

Filed February 12, 2015

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	<b>Case Nos. 11-O-17398 (11-O-18576; 12-O-10964;</b>
	)	<b>12-O-11488; 12-O-12239; 12-O-12703);</b>
<b>ROBERT G. SCURRAH, JR.,</b>	)	<b>12-O-14401 (12-O-14602; 12-O-17028)</b>
	)	<b>(Cons.)</b>
A Member of the State Bar, No. 82766.	)	<b>OPINION</b>
_____	)	

Robert G. Scurrah, Jr. is charged with violating Business and Professions Code section 6106.3 in nine loan modification matters.<sup>1</sup> Two Notices of Disciplinary Charges alleged that from 2010 to 2012, he collected legal fees before completing each loan modification service outlined in a single retainer agreement. A loan modification law enacted in 2009 prohibits collecting *any* fees until each and every loan modification service contracted for has been performed; it is designed to protect the borrower. The hearing judge found Scurrah culpable and recommended discipline including a 90-day actual suspension, continuing until he makes restitution of illegal fees charged to seven clients, totaling more than \$25,000.

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<sup>1</sup> Business and Professions Code section 6106.3, subdivision (a), 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.”

Civil Code Section 2944.7, subdivision (a)(1), provides: “Notwithstanding any other 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.” All further references to sections are to the Civil Code unless otherwise noted.

Both Scurrah and the Office of the Chief Trial Counsel of the State Bar (OCTC) appeal. Scurrah makes several challenges to culpability, including that he acted in good faith after being misled by the State Bar about application of the new law. If culpability stands, he seeks a private reproof, arguing that his mitigation, including 30 years of discipline-free practice, outweighs the aggravation. OCTC contends that Scurrah is a continuing danger to the public because he fails to recognize his wrongdoing; therefore, a one-year suspension is warranted.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability findings and recommended discipline. The record reveals that Scurrah received conflicting information about "unbundling" his legal services from knowledgeable professionals in the industry, including attorneys, and from State Bar representatives. Even so, much of his misconduct occurred while the State Bar was investigating him about collecting fees for the unbundled services. Scurrah's reliance on the advice of other attorneys is not a defense to his wrongdoing, but it does warrant mitigation. After assigning appropriate weight to his mitigation, including good faith, we find that the hearing judge's recommended discipline is fully supported by the applicable standards<sup>2</sup> and comparable case law.

## **I. BACKGROUND AND OVERVIEW<sup>3</sup>**

### **A. Loan Modification Legislation**

On October 11, 2009, California Senate Bill number 94 (SB 94) became effective.<sup>4</sup> The Legislature enacted the law to regulate attorneys' performance of loan modification services. One of the new safeguards prohibits the collection of fees until all loan modification services are

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<sup>2</sup> All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

<sup>3</sup> A detailed chronology of events is necessary to provide a full factual background.

<sup>4</sup> SB 94 added sections 2944.6 and 2944.7 to the Civil Code and section 6106.3 to the Business and Professions Code (Stats. 2009, Ch. 630, § 10).

completed. (§ 2944.7.) The intent was 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 (2009–2010 Reg. Sess.) as amended Mar. 23, 2009, pp. 5-6.) A violation of section 2944.7, subdivision (a), is a misdemeanor (§ 2944.7, subd. (b)) and a basis for imposing attorney discipline (Bus & Prof. Code, § 6106.3, subd. (a)).

#### **B. Impact of the New Law on Scurrah’s Loan Modification Practice**

Scurrah was admitted to practice law in 1978. In March 2009, he and attorney John McGrath became owners of a large loan modification practice called CDA (Consumer Debt Advocate) Law Center. Scurrah claims to have handled 4,000 loan modifications with a high success rate. When he learned about SB 94, he tracked it through the legislation process to ascertain the bill’s meaning and impact on CDA.

Immediately after SB 94 passed in October 2009 (hereafter section 2944.7), Scurrah sought advice about unbundling services and charging in phases for those services he completed. He began by calling the State Bar Ethics Hotline, but was told to seek legal counsel about handling payment for loan modification services. Shortly thereafter, Martin Andelman, a non-attorney loan modification expert and advocate, told Scurrah that the Legislature did not intend to prohibit attorneys from unbundling services and receiving payments after a phase of the loan modification service was completed. Scurrah then spoke with loan modification attorney Steve Feldman, who told him a State Bar representative stated that loan modification services could be broken up into phases. Finally, Scurrah talked to attorney Julie Greenfield, a seasoned attorney with a strong background in real estate lending, regulation, and compliance. She was a former vice-chair of the State Bar’s Consumer Financial Services Committee, and had been retained by

the State Bar as an expert witness in litigation regarding mortgage loan modifications and the federal Truth-In-Lending Act. Greenfield told Scurrah that she believed attorneys could be paid after completing each specific discrete service.

Around the same time (November 2009), Scurrah read the State Bar's website posting entitled: "Senate Bill No. 94: Prohibition of Advance Fees; and Required Notices, FAQs" (FAQ). It stated that section 2944.7 makes it unlawful 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." The website warned that the "State Bar's Office of the Chief Trial Counsel will enforce the statutory language consistent with this interpretation." The posting did not mention unbundling.

After considering all this information, Scurrah changed his fee agreements. He developed a business model that segregated modification services into phases within a single retainer agreement.<sup>5</sup> The clients preauthorized payments for phased services, permitting CDA to withdraw funds from their bank accounts once services in a single phase had been completed. The CDA loan processing manager testified that CDA collected fees in phases and prior to completing the full loan modification packet in at least 1,300 cases.

### **C. Scurrah Received Additional Information about Unbundling Services**

On January 15, 2011, Scurrah attended an Orange County Bar Association Continuing Legal Education program which addressed loan modifications. Andelman and Greenfield were presenters. The program provided a general primer for those interested in representing parties in loan modifications. The written materials recited the new law's prohibition against collecting

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<sup>5</sup> Scurrah separated his services for loan modifications into three or four phases, charging separately, in the range of \$100 to \$1,850, for each phase. The \$100 charge was for the final phase, which covered submitting the loan proposal, communicating with the lender and client, and negotiating the modification. The more expensive phases covered preparatory services such as collecting and analyzing documents, auditing and updating the client file, collecting missing documents, and preparing the restructured loan proposal.

any compensation until every service has been performed. The materials listed limitations on attorneys, but did not reference unbundling services within a single agreement. Instead, it stated: “California attorneys have divided Modification services into separate Retainer Agreements and receive payment after specified services have been performed.”

The following month, on February 8, 2011, Scurrah received a State Bar investigation letter prompted by a client who complained that Scurrah collected fees before all his loan modification services had been performed. On March 8, 2011, Scurrah responded, claiming that the assertion “that a modification must be completed before any payments are made is simply incorrect.” He cited Andelman and the statute’s legislative history as support for his position.

In June 2011, Scurrah received two other similar complaint letters. The same month, he received an email from Greenfield opining that section 2944.7 did not prohibit attorneys from unbundling services.

Scurrah hired attorney Jon Dieringer to represent him with respect to the State Bar investigations. In August 2011, Dieringer discussed the three complaints with State Bar Investigator Hom. Hom stated that Scurrah’s business practice violated section 2944.7. However, on September 19, 2011, Hom sent Dieringer a letter dismissing without prejudice the investigation in the first complaint because the matter did not warrant further action.<sup>6</sup>

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<sup>6</sup> Two days earlier, on September 17, 2011, Scurrah attended the State Bar Annual Meeting where a State Bar supervising attorney for the loan modification fraud team presented a seminar entitled “Ethics and Loan Modifications.” The materials provided specified that “charging for work in stages” violated section 2944.7. Scurrah did not believe this was the official policy of the State Bar because the program cover sheet included a standard disclaimer statement.

Around the same time, Scurrah read the pleadings and learned of a ruling in the United States District Court for the Northern District of California (*Duenas v. Brown, et al.* (N.D.Cal. Aug. 10, 2011, No. 10-CV-05884). Duenas claimed the State Bar was expansively interpreting SB 94 in a manner that prevented the public from retaining counsel for mortgage-related services, and sought to enjoin enforcement of section 2944.7, subdivision (a). Scurrah interpreted the State Bar pleadings as recognizing the propriety of unbundling. On August 10, 2011, the federal court dismissed the action with leave to amend.

On October 24, 2011, Dieringer called Hom to discuss the two remaining complaints. Dieringer credibly testified Hom told him the State Bar did not find anything wrong with Scurrah's phased payments. Dieringer followed up with an October 27, 2011 letter to Hom confirming: "You mentioned that the State Bar finds no impropriety in the phased payments received for the services rendered." In November 2011, the State Bar closed the investigation on the two remaining complaints without prejudice. Hom did not testify.

In April 2012, the State Bar investigated McGrath, Scurrah's partner at CDA. McGrath told Scurrah that State Bar attorney Tim Byer suggested CDA create a separate agreement for each phase of service. Attorney Feldman told Scurrah he had received the same advice from Byer. By April 2012, Scurrah changed his agreements to comport with the State Bar's suggestion and he separated his phased services into four different retainer agreements.

In May 2012, the Better Business Bureau (BBB) contacted Scurrah about another client complaint. The BBB notice referred Scurrah to the State Bar's website that contained an updated FAQ regarding section 2944.7. The notice reiterated the language of section 2944.7 and posed the following question: "May an attorney who provides a borrower loan modification . . . services agree with the borrower that the services requested will be broken down into component parts and that a fee for each component part will be earned and collected as each part is completed?" The answer was "no." The document clarified that if an attorney is employed to assist the borrower in obtaining a loan modification, "[i]t is a violation of SB 94 to attempt to obtain a payment for any portion of the services contracted for in pursuit of the modification . . . prior to the completion of all the services required by the employment contract."

On September 2, 2012, Greenfield sent an email to David Carr, Scurrah's counsel in the investigation of the instant disciplinary proceeding. She stated that attorneys may collect fees for phased or unbundled services in loan modification cases "pursuant to one or more Retainer

Agreements.” On September 26 and December 18, 2012, OCTC filed the Notices of Disciplinary Charges alleging Scurrah violated section 2944.7 in nine client matters.

In November 2012, Scurrah reviewed this court’s published opinion in *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221 (*Taylor*), where we analyzed the new loan modification statute. In that case, Taylor argued the new law was ambiguous and should be interpreted to permit unbundling fees for services as they were completed. We disagreed and found: “The language of Civil Code section 2944.7, subdivision (a), plainly prohibits *any person* engaging in loan modification from collecting *any fees* related to such modifications until *each and every* service contracted for has been completed. [Citation.]” (*Id.* at p. 232, original italics.) Scurrah testified he does not agree with this interpretation of section 2944.7. No evidence establishes that after publication of *Taylor*, Scurrah continued to charge for unbundled services pursuant to a single retainer agreement.<sup>7</sup>

## II. UNDISPUTED FACTS — INDIVIDUAL CLIENT MATTERS

Limited evidence about individual client matters was presented at trial. Most of the facts are set forth in the parties’ Stipulation as to Facts and Documents. OCTC and Scurrah agreed that each client hired Scurrah through CDA to obtain a mortgage loan modification. All clients signed authorizations permitting Scurrah to withdraw money from their accounts for legal services and other fees. We adopt and summarize the hearing judge’s factual findings taken from the stipulated facts and those proven at trial. Notably, in six of the nine client matters,

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<sup>7</sup> The month before *Taylor*’s publication, Scurrah filed a Declaratory Relief Action with the superior court seeking a determination of the correct interpretation of section 2944.7 with respect to unbundled services. The judge denied the application because the State Bar’s jurisdiction to determine *application* of the statute was “off-limits” for the superior court. In its ruling, the court noted that Scurrah “correctly posits that § 2944.7 requires the lawyer to either (1) present a client with dozens of separate retainer agreements for discrete acts or (2) forgo formal ‘modification’ efforts and run instead directly to the courthouse steps to litigate freely.” The court also stated: “On its face [section 2944.7] merely prohibits collection of fees prior to completing services [to which] the attorney agreed.”

Scurrah collected fees after the State Bar began investigating him (February 2011) and before the first investigation was dismissed (September 2011).

**A. Napoles Matter (11-O-17398)**

Maria Napoles hired Scurrah on August 28, 2011. In September 2011, CDA made two withdrawals totaling \$2,245 from her bank account. On September 14, 2011, Napoles terminated Scurrah's employment and requested a refund of the fees. On February 6, 2012, Scurrah paid Napoles \$2,345, which was \$100 more than the amount Scurrah collected.

**B. Von Goetz Matter (11-O-18576)**

Mary von Goetz hired Scurrah on June 9, 2011. During that month and on July 5, 2011, CDA made three withdrawals totaling \$3,467 from von Goetz's bank account. On June 27, 2011, CDA sent a loan modification proposal and supporting documents to von Goetz's mortgage servicer. In July 2011, the mortgage servicer denied von Goetz's loan modification request for lack of sufficient income.

**C. Thompson Matter (12-O-11488)**

Aron Thompson hired Scurrah on December 10, 2011. On December 30, CDA withdrew \$1,450 from Mr. Thompson's bank account. By February 2012, Thompson had not provided Scurrah with requested financial information, and no loan modification request was submitted to Thompson's lender. Thompson asked CDA to return his \$1,450. CDA complied and refunded Thompson's money on February 12, 2012.

**D. Orcini Matter (12-O-10964)**

Teresa Orcini first hired Scurrah on November 30, 2010. Between December 2010 and March 21, 2011, CDA withdrew \$4,295 in three payments from Orcini's bank account. A trustee's sale for her property was scheduled for March 21, 2011, so Scurrah sent Orcini's mortgage servicer a loan modification request on March 14, 2011. The servicer denied the



request because Orcini's rental income had decreased. Orcini hired Scurrah to obtain a loan modification for a second property on June 29, 2011. When CDA attempted to withdraw funds in July 2011, the bank rejected the payment for insufficient funds.

**E. Giordano Matter (12-O-12239)**

Anthony Giordano hired Scurrah on March 31, 2011. From April 2011 until June 23, 2011, CDA withdrew a total of \$2,995 in five payments from Giordano's bank account. On January 10 and January 18, 2012, CDA submitted a loan modification proposal to Giordano's loan servicer. The servicer denied the proposal in February 2012 because Giordano's loan debt-to-income ratio was too high.

**F. Fallah Matter (12-O-12703)**

Hassan Fallah hired Scurrah on July 19, 2011. By September 16, 2011, CDA made three withdrawals totaling \$3,495 from Fallah's bank account. On September 20, 2011, CDA submitted a loan modification financial package to Fallah's lender, which denied it in February 2012.

**G. Frias Matter (12-O-14401)**

Jose Frias hired Scurrah on June 30, 2011. From July through September 20, 2011, CDA made three withdrawals totaling \$3,795 from Frias's bank account. CDA submitted a loan modification application to Frias's lender in September 2011, which it denied. Later, the lender indicated that the application had not yet been rejected. Even though CDA resubmitted Frias's application in November 2011, Frias requested a refund. No evidence indicated that CDA complied with Frias's refund request. Ultimately, the lender approved Frias's loan modification in June 2012.

#### **H. Garza-Rosel Matter (12-O-14602)**

Judy Garza-Rosel hired Scurrah on September 25, 2011. From October 4, 2011 to November 9, 2011, CDA made three withdrawals totaling \$3,495 from Garza-Rosel's bank account. CDA submitted two loan modification packages to Garza-Rosel's lender — one in November 2011 and the second in February 2012. The lender approved a trial loan modification, but Garza-Rosel's home was sold in foreclosure proceedings on June 4, 2012.

#### **I. Bringman Matter (12-O-17028)**

Hal Bringman hired Scurrah on September 23, 2011, to obtain a loan modification for his rental property. In October and December 2011, CDA made two withdrawals totaling \$2,900 from Bringman's bank account. CDA submitted a loan modification package to Bringman's lender, which denied it on June 25, 2012. Bringman hired Scurrah a second time in November 2011, seeking a loan modification for his residence. In November 2011 and on January 13, 2012, CDA made two withdrawals totaling \$2,500 from Bringman's bank account. CDA submitted a financial package to Bringman's lender on January 30, 2012. The record does not indicate the outcome of the modification request.

### **III. SCURRAH IS CULPABLE OF NINE COUNTS OF MISCONDUCT**

OCTC charged Scurrah with nine counts of willfully violating Business and Professions Code section 6106.3 by charging and collecting fees for loan modifications before performing all contracted services, as prohibited by section 2944.7. The hearing judge found him culpable and subject to discipline. We agree.

The only published case interpreting section 2944.7 for purposes of attorney discipline is our recent decision in *In the Matter of Taylor*, *supra*, 5 Cal. State Bar Ct. Rptr. 221. There, we concluded the statute clearly prohibited collecting any fees in advance of completing all loan modification services. (*Id.* at p. 232.) Furthermore, we found that the *Taylor* loan modification

agreements, which “unbundle[ed] services within loan modifications and charge[d] separately for them,” ran afoul of the statutory provisions. (*Ibid.*) Our analysis in *Taylor* applies equally to the nine client matters in this proceeding. Scurrah stipulated that each of the complaining witnesses employed him to attempt to obtain a mortgage loan modification. He also stipulated to facts establishing that he collected fees in each client matter before he submitted the financial package to the lenders. His admitted conduct violated section 2944.7, and we find him culpable as charged.

#### **IV. SCURRAH’S DEFENSES TO CULPABILITY ARE WITHOUT MERIT<sup>8</sup>**

##### **A. Willfulness**

We are unpersuaded by Scurrah’s arguments that he is not culpable because he did not act willfully. Willfulness in the attorney discipline context requires that members charged with committing a disciplinable wrong acted or omitted to act purposely, and intended either to commit the act or to abstain from committing it. (See *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 [no intent to violate law, to injure another, or to acquire advantage required]; see also *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186 [willfulness does not require bad faith or knowledge of provision violated].) At the time Scurrah collected his fees for unbundled loan modification services pursuant to a single retainer agreement, he had read the statute and knew that professionals in the field were in disagreement as to whether the new law prohibited such unbundling. Yet he proceeded to collect fees knowing there was a risk that his collection practices violated section 2944.7. We conclude his conduct was willful.

##### **B. Good Faith**

We also reject Scurrah’s argument that his good faith in consulting with others before he collected fees in phases negates his willfulness. Scurrah cannot rely on another attorney’s

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<sup>8</sup> Those defenses not specifically addressed herein have been considered as lacking in factual and/or legal support.

opinion as a defense to violating rules governing attorney ethics. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of “fellow attorney” no defense to wrongdoing].) Further, his claimed good faith is irrelevant to culpability because the applicable definition of willful does not require proof of bad faith or intent to violate the law. Nor is Scurrah’s reliance on *Call v. State Bar* (1955) 45 Cal.2d 104 appropriate here. *Call* provides: “[M]ere ignorance of the law in conducting the affairs of a client in good faith is not cause for discipline. [Citations.]” (*Id.* at pp. 110-111.) Scurrah did not act in ignorance of the law but instead chose to adopt his own interpretation of the language of section 2944.7 in concluding that unbundling was permitted.<sup>9</sup> In fact, in six of the nine client matters at issue, Scurrah collected fees for unbundled services while being investigated by the State Bar (February to September 2011).

### **C. Estoppel**

Scurrah incorrectly posits that OCTC is estopped from prosecuting him because its current interpretation of section 2944.7 differs from that offered in federal court pleadings in an unrelated case. (*Duenas v. Brown, supra*, Defendant James Towery’s Reply in Support of Motion to Dismiss.) OCTC consistently maintained in *Duenas v. Brown* that section 2944.7, subdivision (a), prohibits payments to any person for negotiating, arranging, or performing a loan modification until all such services are complete. A thorough reading of the *Duenas v. Brown* pleadings establishes that the State Bar did not offer a contrary position.

### **D. Constitutional Issues**

We also reject Scurrah’s contention that Civil Code section 2944.7 is unconstitutional because it “prevents him from engaging in one aspect — his chosen aspect — of his profession by making it economically impossible to continue representing struggling homeowners seeking

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<sup>9</sup> In *Taylor, supra*, 5 Cal. State Bar Ct. Rptr. at p. 232, we found that the language of the statute “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. [Citation.] We find nothing ambiguous about the statute’s language. . . .” (Italics in original.)

loan modifications,” in violation of the Fifth and Fourteenth Amendments. We take guidance from *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, in which the California Supreme Court upheld the constitutionality of a section of the State Bar Act (Bus. & Prof. Code, § 6146) that places limits on the amount of fees an attorney may obtain in a medical malpractice action when representing a party on a contingency fee basis. The Supreme Court rejected the argument that the statute “impermissibly infringes on the right of medical malpractice victims to retain counsel in malpractice actions” (*id.* at p. 925), and we reject the same argument here.

#### **E. Application of Section 2944.7 to Evaluation Services**

Finally, Scurrah argues that the plain language of section 2944.7 regulates only the negotiation and arranging of loan modifications, not the *evaluation* of them. (§ 2944.7, subd. (a), [“unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification”].) He contends that his retainer agreements are outside the reach of the statute since all phases outlined in the agreements, except the final one, deal with evaluating loan modifications. We disagree.

Scurrah stipulated that each client hired him for loan modification services. He testified that “the whole point of a loan modification is to negotiate with the bank,” and “gathering client information is absolutely required before you begin negotiations with the bank.” Therefore, Scurrah’s evaluation phases fall under section 2944.7 because they are, by his own concession, necessary to arrange or otherwise perform a loan modification.

### **V. AGGRAVATION AND MITIGATION**

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Scurrah to meet the same burden to prove mitigation.

## A. Aggravation

The hearing judge found three factors in aggravation: (1) multiple acts; (2) significant harm; and (3) indifference. We agree with the first two.

Scurrah committed multiple acts of misconduct (std. 1.5(b)), although there is no pattern because such a finding is limited to “ ‘the most serious instances of repeated misconduct over a prolonged period of time. . . .’ [Citation.]” (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217.)

Scurrah significantly harmed his clients (std. 1.5(f)). He exploited their financial desperation and his fiduciary position by charging advance fees that section 2944.7 prohibits. Like the hearing judge, we assign limited weight to this aggravating factor; OCTC did not present evidence of specific financial impact or harm. We also note that Scurrah refunded fees to two clients upon their demand, but did not return fees to clients who failed to request them.<sup>10</sup>

We do not find that Scurrah has demonstrated indifference, although the hearing judge found to the contrary. (Std. 1.5(g).) Scurrah stopped using a retainer that provided for payment in phases when the State Bar suggested using multiple retainer agreements for separate services. No clear and convincing evidence establishes that Scurrah continued to use a single retainer agreement to collect fees for unbundled services after the *Taylor* decision.<sup>11</sup> Given these circumstances, the fact that Scurrah disagrees with this court’s interpretation of section 2944.7 in *Taylor* does not demonstrate indifference warranting aggravation.

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<sup>10</sup> One exception is Frias, who requested a refund that Scurrah never returned. However, Frias’s loan modification was granted.

<sup>11</sup> Although Scurrah followed with the State Bar’s pre-*Taylor* advice to use separate retainer agreements, OCTC argues that *Taylor* now prohibits this practice. We do not decide the issue of whether the use of multiple retainer agreements violates section 2944.7 because this case concerns only the propriety of collecting separate fees pursuant to a *single* agreement.

## **B. Mitigation**

The hearing judge correctly found three mitigating factors: (1) a lengthy discipline-free practice; (2) good faith; and (3) good character. We find two additional factors: cooperation and community service.

Scurrah practiced law for 30 years without discipline, a substantial mitigating factor. (Std. 1.6(a).) Since his misconduct in nine client matters involved a single issue — his interpretation of section 2944.7 — we find his lengthy discipline-free record relevant mitigating evidence. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious, long discipline-free practice is most relevant where misconduct is aberrational].)

We assign mitigating credit for Scurrah's good faith. (Std. 1.6(b); see *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [finding of good faith requires belief that is honestly held and reasonable].) He actively sought advice about the new statute from authoritative sources, although he received conflicting opinions from industry professionals. He revised his fee agreements upon the State Bar's recommendation, and issued refunds to two clients. He was misled by the State Bar's own actions and statements when it dismissed three matters which specifically arose from his fee agreements and when Hom advised Dieringer there was no impropriety in Scurrah's agreements.<sup>12</sup> Although most of Scurrah's misconduct occurred while being investigated by the State Bar, the hearing judge nonetheless found he was entitled to mitigation for his overall good faith, as described above. We agree.

Scurrah is entitled to some mitigation credit for good character (std. 1.6(f)). He presented two attorney witnesses who were aware of the charges and the misconduct. But the three character witness declarations he submitted did not contain any facts establishing that those

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<sup>12</sup> On review, OCTC concedes that Scurrah could have reasonably believed his phased fee agreements were permissible when the initial complaints in 2011 against him were dismissed. This concession is relevant to our finding of good faith as a mitigating factor.

witnesses knew anything about the disciplinary proceeding or the charges. (See *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]; but see *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to testimony of attorneys due to their “strong interest in maintaining the honest administration of justice”].)

As an additional mitigating factor, we assign limited credit for cooperation because Scurrah stipulated to relevant facts. (Std. 1.6(e).); see *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts].) As a second additional mitigating factor, we credit Scurrah with having performed commendable community service. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service is mitigating factor].) He actively supports the U.S.O. in San Diego and is dedicated to the San Diego State University Aztec Athletic Foundation where he volunteers and fundraises for scholarships. He also volunteers for a non-profit agency that focuses on rescuing abused children.

## **VI. 90-DAY SUSPENSION IS APPROPRIATE DISCIPLINE<sup>13</sup>**

Standard 2.14 instructs that disbarment or actual suspension is appropriate discipline for a violation of section 6106.3. The guiding case addressing violations of the 2009 loan modification laws is *In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. 221. Taylor was culpable of charging pre-performance loan modification fees in eight matters and one count of failing to provide the required loan modification disclosures. His misconduct was aggravated by multiple acts of misconduct, significant client harm, and lack of remorse; his single mitigating

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<sup>13</sup> The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession, to preserve public confidence in the profession, and to maintain high professional standards for attorneys. (Std. 1.1.)



factor was good character. He failed to provide full refunds to his clients upon their request. Throughout the disciplinary proceedings, Taylor maintained that section 2944.7 permitted him to charge for unbundled services. He was suspended for six months and ordered to pay restitution.

Scurrah committed misconduct similar to Taylor's, but proved five mitigating factors and paid refunds to two of nine clients. These circumstances call for a lesser discipline than in *Taylor*, particularly since Scurrah was misled by the State Bar as to the proper interpretation of section 2944.7. Further, Scurrah has a long record of discipline-free practice; Taylor had only four years of practice. Ultimately, however, Scurrah collected illegal fees in nine client matters. Accordingly, a 90-day suspension, continuing until he pays restitution, and probation are warranted to protect the public, the courts, and the legal profession. Without question, this discipline is significant for Scurrah, given his 30 years of discipline-free practice, and is in line with the applicable standard and our decision in *Taylor*.

## VII. RECOMMENDATION

For the foregoing reasons, we recommend that Robert G. Scurrah, Jr., be suspended for one year, that execution of that suspension be stayed, and that he be placed on probation for two years with the following conditions:

1. He must be suspended from the practice of law for a minimum of the first 90 days of his probation, and remain suspended until the following conditions 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:
    - (i) Mary von Goetz in the amount of \$3,467 plus 10 percent interest per year from July 5, 2011;
    - (ii) Teresa Orcini in the amount of \$4,295 plus 10 percent interest per year from March 21, 2011;
    - (iii) Anthony Giordano in the amount of \$2,995 plus 10 percent interest per year from June 23, 2011;

- (iv) Hassan Fallah in the amount of \$3,495 plus 10 percent interest per year from September 16, 2011;
  - (v) Jose Frias in the amount of \$3,795 plus 10 percent interest per year from September 20, 2011;
  - (vi) Judy Garza-Rosel in the amount of \$3,495 plus 10 percent interest per year from November 9, 2011;
  - (vii) Hal Bringman in the amount of \$5,400 plus 10 percent interest per year from January 13, 2012;
- b. If he remains suspended for two years or more as a result of not satisfying the preceding requirement, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
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 discipline, he must contact the Office of Probation 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, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
  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. (Rules Proc. of State Bar, rule 3201.)

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 Scurrah has complied with all conditions of probation, the stayed suspension will be satisfied and that suspension will be terminated.

### **VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Scurrah be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this case or during the period of his actual suspension, whichever is longer, 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).)

### **IX. RULE 9.20**

We further recommend that Scurrah 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.

## **X. COSTS**

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

PURCELL, P. J.

WE CONCUR:

EPSTEIN, J.

McELROY, J.\*

\*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar of California.