

Filed March 18, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of) Case No. 11-O-10888¹
)
MARILYN SUE SCHEER,) OPINION
)
A Member of the State Bar, No. 132544.)
_____)

Respondent Marilyn Sue Scheer seeks review of a hearing judge’s recommendation that she be suspended for a minimum of two years as a result of her misconduct in 32 loan modification cases concerning four clients in California and 28 clients in 12 other states. She argues that she did not engage in the unauthorized practice of law (UPL) in other jurisdictions because she never held herself out as entitled to practice, her services were limited to issues of federal law, and the services she provided can be performed by a non-attorney. Scheer also argues that California’s loan modification laws are unconstitutional. The Office of the Chief Trial Counsel of the State Bar (OCTC) requested a two-year suspension at trial and supports the judge’s decision.

The hearing judge found that Scheer engaged in UPL in another jurisdiction, and that as a result, the fees she collected in the out-of-state loan modification cases were illegal. In the California client matters, the judge found that Scheer violated California’s consumer protection

¹ This is the lead case number, and the other case numbers are: 11-O-11138, 11-O-11997, 11-O-12814, 11-O-13039, 11-O-13064, 11-O-13234, 11-O-13284, 11-O-13308, 11-O-13627, 11-O-13633, 11-O-13644, 11-O-13743, 11-O-13933, 11-O-13988, 11-O-14252, 11-O-14312, 11-O-14594, 11-O-14678, 11-O-14803, 11-O-14881, 11-O-15074, 11-O-15121, 11-O-15554, 11-O-15594, 11-O-15656, 11-O-15730, 11-O-15769, 11-O-15779, 11-O-17803, 11-O-18940, 12-O-10169, 12-O-10267, 12-O-11432.

laws by collecting fees prior to fully performing the loan modification work. After finding three factors in mitigation (lack of prior discipline, cooperation, and good character) and three factors in aggravation (multiple acts, client harm, and lack of insight and remorse), the hearing judge recommended that Scheer be suspended for two years and until she makes restitution and proves her rehabilitation, legal ability and fitness to practice law.

We have independently reviewed the record. (Cal. Rules of Court, rule 9.12.) We agree with the hearing judge's findings of culpability and aggravation in 30 client matters, but find that OCTC did not prove that Scheer engaged in UPL or collected illegal fees in two Colorado client matters. We also assign less weight in mitigation. Given the duration and scope of misconduct and Scheer's ongoing insistence that her actions were entirely proper, we find suspension for a minimum period of two years is warranted and recommend she remain on suspension until she makes restitution to her clients and proves her rehabilitation under standard 1.2(c)(1) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.²

I. FACTS

Scheer and OCTC stipulated to many of the facts relevant to our analysis of this proceeding. Our findings are based on that stipulation as well as the evidence admitted at trial.³ None of the relevant factual findings is in dispute on review, and we adopt and affirm the hearing judge's factual findings, with the exception of one clerical error noted below. (See Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].)

² All further references to standards are to this source and reflect the modifications to the standards effective January 1, 2014. We note the modifications do not make any substantive changes to the standards relevant to this proceeding.

³ We approve the parties' November 7, 2013 joint stipulation clarifying the record as to admitted exhibits and citations to the exhibits.

Scheer was admitted to practice law in California in December 1987 and was previously admitted in Iowa in 1979. She is admitted to practice before federal courts in those two states only. Approximately a decade ago, Scheer focused her practice on real estate law and represented lenders in transactional matters with a large law firm. In June 2009, she was laid off. She then started her own practice, the Marilyn Scheer Law Group PC, in August 2009.

A. Scheer Entered into More Than 30 Fee Agreements for Loan Modification Services

From October 2009 through January 2011, Scheer entered into the fee agreements at issue in this proceeding. The fee agreements were titled “Residential Loan Modification Retainer Agreement” and prominently display the letterhead: “Marilyn Scheer Law Group PC, a California law corporation.” The attorney signature block reads: “Attorney, Marilyn S. Scheer, President, Marilyn Scheer Law Group PC, a California law corporation.”

In each agreement, in exchange for payment of an advance fee, Scheer offered to perform “a set (or combination thereof) of legal services described below, to assist Client in obtaining an agreement to modify a loan or loans involving Client’s residential real property (collectively, the ‘Services’).” “Legal services” are defined as:

Client retains Attorney for the limited purpose of: (a) confirming Client’s eligibility for obtaining a loan modification of the loan secured by the real property described [therein], analyzing and verifying Clients’ financial information; and reviewing lender’s policies and guidelines governing Client’s circumstances; (b) submission of the loan modification package to Client’s lender and confirmation of the acceptability thereof; initiating contact with the lender and engaging in negotiations with the lender for purposes of obtaining a loan modification and providing Client with regular status reports thereof; and (c) finalization of the workout/trial plan modification between the lender and Client (subject to Client’s performance). Client may select any or all of the services described in the foregoing subparagraphs a, b, or c, with each set of services being billed for separately according to the attached schedules.

The agreements also state that “*Attorney will not provide legal services in any area other than loan modification without a separate written agreement with the client.*” (Italics added.)

Twenty-eight of the fee agreements were between Scheer and residents of 12 states other than California and Iowa.⁴ She was not licensed to practice in any state or federal court in the 12 states, and she did not inquire in any of these jurisdictions if she was permitted to represent clients. Nor did she affiliate with any local attorney in the client matters involved in this proceeding. Scheer's fee agreements fail to state that she was not licensed to practice in the client's own state. Although still not specifically disclosing she was not licensed in the client's state, she modified her last nine out-of-state agreements (clients Bogale/Dessalgne, Carman, Clark, Few, Jaremczak, Pica, Robinson, Taraschi and Vasic) to contain the following language:

Jurisdiction and Venue: This Agreement will be governed and construed in accordance with the law of the State of California. Client consents to and acknowledges that Attorney is admitted to practice in the California state and federal courts, and this request is being sought from attorney concerning *issues of federal law*. In accordance with paragraph 8 hereof and the extent required by multijurisdictional provisions (Rule 5.5) of the local jurisdiction, Attorney will hire or otherwise affiliate with an attorney licensed in Client's state of residence who will assist or be primarily responsible for providing services to the client. (Italics added.)

B. Scheer Collected More Than \$120,000 in Fees

Each fee agreement stated that until the client paid the required fee, the agreement would not be effective, and Scheer had no duty to perform the legal services described therein. Each agreement also provided that the fees would be deposited into Scheer's client trust account (CTA) and authorized her to withdraw the funds at various intervals on a percentage basis. As listed in the chart below, Scheer collected more than \$120,000 in flat fees from her clients before fully performing the legal services she contracted to provide. Scheer has not returned any of the collected fees listed here other than a \$550 payment to Walter Clark:

⁴ The hearing judge dismissed two matters for insufficient evidence that charged Scheer with committing UPL in Hawaii. OCTC expressly states that it does not challenge these dismissals. Accordingly, we do not consider the Hawaii counts (counts 25, 26, 42, and 43).

<i>Count</i>	<i>Case No.</i>	<i>Client Name</i>	<i>Retainer Date</i>	<i>Client's Residency</i>	<i>No. of Properties</i>	<i>Fees Collected</i>
1	11-O-10888	Walling	11/16/09	California	2	\$4,000
2, 3	11-O-11138	Wright	2/13/10	Ohio	2	\$5,500
4, 5	11-O-11997	Sadek	1/13/10	Oregon	1	\$3,500
6, 7	11-O-12814	Bogale/ Dessalgne	10/23/10	Virginia	1	\$1,500
8, 9	11-O-13039	Peters	1/22/10	Washington	1	\$3,000
10, 11	11-O-13064	Few	1/30/11	Maryland	1	\$4,500
12, 13	11-O-13234	Nakulski	10/29/09	Illinois	1	\$3,500
14, 15	11-O-13284	Carman	9/22/10	New Jersey	1	\$4,000
16, 17	11-O-13308	Torkelson	1/22/10	Illinois	1	\$3,500
18, 19	11-O-13627	Robinson	6/30/10	Mass.	1	\$3,500
20, 21	11-O-13633	Tarashci	8/4/10	Pennsylvania	1	\$4,500
22, 23	11-O-13644	Jaremczak	9/11/10	New Jersey	1	\$3,500
24	11-O-13743	Neverosky	9/21/10	California	1 ⁵	\$4,500
27, 28	11-O-13988	Morgan	4/21/10	New Jersey	1	\$4,500
29, 30	11-O-14252	Pica	9/30/10	New Jersey	1 ⁶	\$3,500
31, 32	11-O-14312	Hooker	4/7/10	Colorado	1	\$3,500
33, 34	11-O-14594	Montrose	4/12/10	Colorado	1	\$3,500
35, 36	11-O-14678	Oto	4/16/10	Washington	1	\$3,000
37, 38	11-O-14803	Thompson	12/4/09	Virginia	1	\$3,500
39, 40	11-O-14881	Musekiwa	6/11/10	New Hamp.	1	\$3,000
41	11-O-15074	Mammarelli	6/26/10	California	1	\$3,500
44, 45	11-O-15554	Clark	9/27/10	Maryland	1	\$5,550 ⁷
46, 47	11-O-15594	Wyche	11/17/09	Virginia	1	\$2,500
48, 49	11-O-15656	Vides	11/2/09	New York	1	\$2,900
50, 51	11-O-15730	Forney	5/26/10	New Jersey	1	\$6,000
52, 53	11-O-15769	Senfuma	2/5/10	Mass.	1	\$5,000
54, 55	11-O-15779	Gross	6/10/10	New Jersey	1	\$12,000
56, 57	11-O-17803	Vasic	12/4/10	Illinois	1	\$1,500
58, 59	11-O-18940	Fletcher	12/23/09	Virginia	1	\$3,000
60, 61	12-O-10169	Candelaria	2/12/10	New Jersey	1	\$3,500
62	12-O-10267	Arriaza	12/12/09	California	1	\$3,000
63, 64	12-O-11432	Duiganan	3/5/10	New York	1	\$2,000

⁵ The Neverosky property is located in Maryland.

⁶ The Pica property is located in Illinois.

⁷ The hearing judge found that Walter Clark paid Scheer \$5,500 in fees. Based on the Stipulation of Facts, we find that Clark paid \$5,550 in fees.

II. CULPABILITY

We affirm the hearing judge's finding that Scheer is culpable of 26 acts of out-of-state UPL, 26 acts of collecting illegal fees in connection with her UPL, and 4 acts of demanding and collecting fees prior to fully performing loan modification work in California. However, as discussed below, under the rules of professional conduct unique to Colorado, there is insufficient evidence that Scheer committed UPL or charged illegal fees in the two Colorado client matters. In sum, Scheer is culpable of misconduct in 30 client matters.

A. Scheer Committed UPL in 26 Matters in 11 Different States

Rule 1-300(B) of the Rules of Professional Conduct provides that “[a] member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” To analyze whether Scheer has run afoul of this prohibition, we look to the statutes, rules, and case law of the 12 non-California jurisdictions involved in the case. (*In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 257 [analyzing nine states’ professional regulations to determine whether California attorney’s conduct was in violation of rule 1-300(B)].)

1. Nine States Have Adopted ABA Model Rule 5.5(b)

Ohio, Oregon, Virginia, Washington, Maryland, Illinois, Massachusetts, Pennsylvania, and New Hampshire have adopted either an identical or substantially similar rule to rule 5.5(b)(2) of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules), which provides that a “lawyer who is not admitted to practice in this jurisdiction shall not [¶] . . . [¶] hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”⁸ Scheer violated this UPL rule in all nine states.

⁸ Ohio Rules Prof. Conduct, rule 5.5(b)(2); Or. Rules Prof. Conduct, rule 5.5(b)(2); Va. Rules Prof. Conduct, rule 5.5(d)(2)(ii); Wash. Rules Prof. Conduct, rule 5.5(b)(2); Md. Rules Prof. Conduct, rule 5.5(b)(2); Ill. Rules Prof. Conduct, rule 5.5(b)(2); Mass. Rules Prof. Conduct,

Although Scheer is not admitted to practice law in any of these states, she held herself out as entitled to practice law in each of them. Under the auspices of the “Marilyn Scheer Law Group PC, a California law corporation” and in her capacity as an “attorney,” she entered into written fee agreements with residents of these states to provide “legal services” involving property located in the clients’ states. She prominently displayed her law firm’s letterhead at the top of the agreements, and included it in her signature block. Despite identifying herself as a California attorney, she failed to disclose that she was *not* licensed to practice in the specific client’s state. And finally, upon execution of the agreements, Scheer collected fees and provided legal services, cementing the impression she had the right to practice in each state.

Accordingly, we find sufficient evidence that Scheer held herself out as entitled to practice law in these nine states in willful violation of rule 1-300(B) of the Rules of Professional Conduct.⁹ (See *Cleveland Bar Assn. v. Misch* (Ohio 1998) 695 N.E.2d 244, 247 [by silence and by signing documents as “general counsel,” out-of-state attorney “directly and indirectly held himself out as authorized to practice law in Ohio”]; *In re Conduct of Kumley, supra*, 75 P.3d at p. 437 [by listing “attorney” as present occupation on election forms, inactive attorney represented himself as qualified to practice law]; Va. Rules Prof. Conduct, rule 5.5(d)(3) [foreign lawyer shall inform client and interested third parties in writing that lawyer is not admitted to

rule 5.5(b)(2); Pa. Rules Prof. Conduct, rule 5.5(b)(2); N.H. Rules Professional Conduct, rule 5.5(b)(2).

⁹ Each violation also meets the state’s applicable standard of proof for attorney misconduct. (*Disciplinary Counsel v. Willard* (Ohio 2009) 913 N.E.2d 960, 961 [clear and convincing]; *In re Conduct of Kumley* (Or. 2003) 75 P.3d 432, 433 [clear and convincing]; *Livingston v. Virginia State Bar* (Va. 2013) 744 S.E.2d 220, 221 [clear and convincing]; *In re Disciplinary Proceeding Against Shepard* (Wash. 2010) 239 P.3d 1066, 1071 [clear preponderance]; *Attorney Grievance Com’n of Md. v. Ambe* (Md. 2012) 38 A.3d 390, 399 [clear and convincing]; *In re Thomas* (Ill. 2012) 962 N.E.2d 454, 466 [clear and convincing]; *Matter of Ellis* (Mass. 1997) 680 N.E.2d 1154, 1157 [preponderance of the evidence]; *Office of Disciplinary Counsel v. Kiesewetter* (Pa. 2005) 889 A.2d 47, 54, fn. 5 [preponderance of evidence]; *In re Clauson’s Case* (N.H. 2012) 53 A.3d 621, 623 [clear and convincing].)

practice law in Virginia]; Wash. Revised Code, § 2.48.180(2)(a); Wash. Practice of Law Board (Dec. 30, 2009, No. 09-35) [UPL when California lawyer agreed to renegotiate residential mortgage loan for client residing in Washington]; *Attorney Grievance Com'n of Md. v. Ambe, supra*, 38 A.3d at p. 399 [out-of-state attorney held himself out as authorized to practice by failing to indicate that he was not licensed to practice in Maryland]; *In re Thomas, supra*, 962 N.E.2d at p. 470 [attorney has “professional responsibility to make certain that he [or she] is licensed to practice in the jurisdiction before undertaking any professional duties”]; *Lozoff v. Shore Heights, Ltd.* (Ill. App.Ct. 1976) 342 N.E.2d 475, 480 [attorney licensed in Wisconsin was precluded from recovering for legal services rendered in Illinois]; *In re Pius Airewele* (Aug. 6, 2012, No. BD-2012-062) 2012 WL 3990105 [attorney violated Massachusetts’ professional rules of conduct by failing to disclose he was not admitted to practice in Georgia]; *Ginsburg v. Kovrak* (Pa. Com. Pl. 1957) 11 Pa. D. & C.2d 615 [out-of-state attorney licensed in federal courts who used terms “law office” and “attorney at law” on business cards and stationery for his tax consulting business engaged in UPL.]

2. New Jersey and Colorado Have Adopted Modified Versions of ABA Model Rule 5.5

An out-of-state lawyer who is neither admitted *pro hac vice* nor in-house counsel is nevertheless permitted to engage in the practice of law in New Jersey in five limited circumstances, known as the safe harbor provision, none of which are applicable to Scheer. (N.J. Rules Prof. Conduct, rule 5.5(b)(3).) Even under the safe harbor provision, out-of-state attorneys must *first* register with the Clerk of the New Jersey Supreme Court and pay certain assessments before they can practice. (N.J. Rules Prof. Conduct, rule 5.5(c)(3), (6).) Scheer did not prove or argue that she complied with these requirements. (See *In re Opinion No. 49 of the Committee on the Unauthorized Practice of Law*, 210 N.J.L.J. 234 (2012) [“out-of-state lawyers” must meet “all criteria in the pertinent ‘safe harbor’ subparagraph” of rule 5.5(b)(3)].) And, in the same

manner described above, Scheer violated New Jersey's prohibition against holding oneself out as authorized to practice in New Jersey. (N.J. Rules Prof. Conduct, rule 5.5(c)(4).) Accordingly, Scheer violated rule 1-300(B) of the Rules of Professional Conduct by practicing law without authorization in New Jersey.

We disagree, however, with the hearing judge's legal conclusion that Scheer committed UPL in Colorado. While Colorado Rules of Professional Conduct, rule 5.5(a), generally prohibits a lawyer from practicing law in that state without a license, other provisions provide that out-of-state attorneys may practice in some circumstances. Unlike the other states involved in this proceeding, Colorado appears to permit attorneys in good standing in other states to provide transactional services as long as they do not establish domicile or "a place for the regular practice of law in Colorado." (Colo. Rules Civ. Proc., rule 220.)¹⁰ Scheer did not live or establish a place of business in Colorado. Therefore, based on the limited record, we do not find sufficient evidence that Scheer committed UPL in that state. We dismiss with prejudice the two Colorado client matters. (State Bar Case Nos. 11-O-14312 and 11-O-14594.)¹¹

3. New York

In New York, no person may practice law in the state unless currently licensed there. (N.Y. Judiciary Law, § 478.)¹² New York also prohibits holding oneself out as entitled to

¹⁰ "Out-of-state attorney" is defined as one who: "(a) is licensed to practice law and is on active status in another jurisdiction in the United States; [¶] (b) is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice; [¶] (c) has not established domicile in Colorado; and [¶] (d) has not established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients." (Colo. Rules Civ. Proc., rule 220.)

¹¹ Although Scheer's loan modification practice and fee agreement may have violated other state laws, she was not charged with any such violations. (See Col. Revised Stats., § 6-1-1107(1)(a) ["foreclosure consultants" prohibited from collecting upfront fees for loan modification services].)

¹² Limited exceptions to this rule are not applicable here.

practice or representing the authority to practice without a license. (*Ibid.*) As described above, Scheer practiced law and held herself out as an attorney with the authority and knowledge to practice law in New York. (*Carter v. Flaherty* (N.Y. App. Term 2012) 953 N.Y.S.2d 814, 816 [practice of law includes giving legal advice, promising to give legal advice in future, and holding oneself out to public as capable of giving legal advice].) Accordingly, we conclude Scheer committed UPL in violation of New York authorities, and by so doing, she violated rule 1-300(B) of the Rules of Professional Conduct.¹³

4. Scheer’s Practice Is Not Sanctioned by ABA Model Rule 5.5

In addition to contending she did not hold herself as admitted to practice in other states, Scheer contends that her conduct falls within the temporary service and the authorized federal practice exceptions to UPL under ABA Model Rule 5.5. We disagree.¹⁴

First, Scheer was not entitled to practice law in other states on a temporary basis.¹⁵ None of the legal services Scheer provided to her out-of-state clients was reasonably related to her practice in California or involved the application of California law. Instead, the legal services she provided related to her clients’ residential properties, which were not located in California.

¹³ Each violation also meets New York’s applicable standard of proof. (*In re Capoccia* (N.Y. App. Div. 2000) 909 N.Y.S.2d 640, 646 [standard of proof in civil enforcement proceedings charging attorneys with professional misconduct is fair preponderance of evidence].)

¹⁴ The fact that Scheer held herself out as admitted to practice in Ohio, Oregon, Virginia, Washington, Maryland, Illinois, Massachusetts, Pennsylvania, New Hampshire, New Jersey and New York is dispositive. Regardless of whether her practice falls within another subparagraph of ABA Model Rule 5.5, she was not permitted to hold herself out as entitled to practice in those jurisdictions.

¹⁵ ABA Model Rule 5.5(c) provides that a “lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in [a foreign] jurisdiction . . . [¶] . . . [¶] aris[ing] out of or . . . reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”

Moreover, Scheer had not previously represented these clients, and they had no prior contact with California. (*In the Matter of Lenard, supra*, 5 Cal. State Bar Ct. Rptr. at pp. 258-259.)

Likewise, we reject Scheer's claim of a federal practice exception. She asserts that she is not culpable of engaging in UPL because she provided legal advice exclusively involving federal law, and because she is allowed to provide loan modification services under federal programs like the Home Affordable Modification Program (HAMP). Even if her practice was limited to federal law, ABA Model Rule 5.5(d)(2) only reaches services non-admitted lawyers are "authorized by federal or other law or rule to provide in [the] jurisdiction." Scheer is not so authorized. She is not admitted to practice before the federal courts of the applicable states or before any federal agency or federal administrative tribunal. And nothing in HAMP preempts a state's UPL rules or licensing regulations. It governs the relationship between mortgage servicers/lenders on the one hand and borrowers on the other. (See, e.g., 12 U.S.C. § 5219a.) Scheer is neither a lender nor a borrower. And although HAMP may *allow* non-attorneys to provide loan modification services under certain circumstances, it does not *authorize* out-of-state attorneys to provide legal services in states where they are not admitted.¹⁶ Absent federal laws, rules, or regulations authorizing Scheer to practice law in the area of loan modifications, her out-of-state legal practice is not an authorized federal practice under the model rule or as contemplated in the cases she cites.

¹⁶ The Making Home Affordable Program Handbook defines "Authorized Advisors" as advisors duly authorized *by the borrower* (e.g., HUD-approved housing counseling agencies, non-profits, consumer advocacy organizations, legal guardians, powers of attorney and legal counsel) and directs mortgage servicers/lenders to communicate with these advisors. (Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages (Version 3.2 June 1, 2011) section 2.1, p. 50.)

5. Scheer Is Culpable Even if Services Could Be Performed by Layperson

Alternatively, Scheer argues that she is not culpable of UPL since the services she performed could have been provided by a layperson. We reject her attempt to identify herself as a layperson providing non-legal services.

The language of Scheer's fee agreements with out-of-state residents expressly states that she will provide "a set (or combination thereof) of legal services . . . to assist Client in obtaining an agreement to modify a loan." Legal services included reviewing a lender's policies and guidelines, and engaging in negotiations with the lender. Clearly, the clients contracted with "Attorney, Marilyn S. Scheer" and paid fees for legal services performed by an attorney – not a layperson. "Although [loan modification] services might lawfully have been performed by . . . brokers, and other laymen, it does not follow that when they are rendered by an *attorney, or in his office*, they do not involve the practice of law. People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel." (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668, italics added.) By offering to provide legal services and collecting legal fees, Scheer cannot escape culpability for UPL by now claiming she provided non-legal services as a layperson.

We conclude that Scheer improperly held herself out as entitled to practice law and practiced law in Ohio, Oregon, Virginia, Washington, Maryland, Illinois, Massachusetts, Pennsylvania, New Hampshire, New Jersey and New York, thereby committing 26 acts of UPL in willful violation of rule 1-300(B) of the Rules of Professional Conduct.

B. Scheer's Fees Were Illegal

Rule 4-200(A) of the Rules of Professional Conduct provides that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Our conclusion that Scheer is "culpable of UPL compels the further conclusion that the fees [Scheer] charged

and collected” were illegal under rule 4-200(A). (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 904 [attorney not entitled to recover fees for UPL committed in violation of rule 1-300(B) and ordered to refund fees].) As such, there is no room for inquiry into the value of any services she provided. The fees were illegal. Therefore, we find Scheer was not entitled to charge or collect her fees in the 26 out-of-state client matters as the legal services provided in those matters constituted UPL. (*Ibid.*)

C. Scheer Violated California’s Loan Modification Law

In the four California client matters, Scheer conditioned her obligation to perform *any* of the legal services set forth in the fee agreements on the payment of a flat fee. She then deposited those fees in her CTA and withdrew the funds, according to a proscribed schedule on a percentage basis, before completing the loan modification work. Based on this conduct, Scheer is alleged to have “claim[ed], demand[ed], charge[d], collect[ed] [and] receive[d]” compensation before fully performing “each and every service” she contracted to perform or represented she could perform, violating Civil Code section 2944.7,¹⁷ and constituting a cause for discipline pursuant to Business and Professions Code section 6106.3.¹⁸ We agree.

The only published case interpreting Civil Code section 2944.7 for purposes of attorney discipline is our recent decision in *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221. There, we concluded the statute “plainly prohibits *any person* engaging in loan modifications from collecting *any fees* related to such modifications until *each and every* service

¹⁷ In relevant part, Civil Code section 2944.7 provides that “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 . . . [¶] . . . [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.”

¹⁸ Business and Professions Code section 6106.3, subdivision (a), provides that “[i]t 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 . . . 2944.7 of the Civil Code.”

contracted for has been completed. [Citation.]” (*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 four California matters in this proceeding. We are not persuaded by Scheer’s arguments that she is not culpable because the fees were deposited into her CTA (which she withdrew before completing “each and every service” under the contract) or because a third party, not the borrower, paid her fees in one case.

We also reject Scheer’s contention that Civil Code section 2944.7 is unconstitutional because it limits a homeowner from retaining counsel of choice for loan modifications in violation of the homeowner’s and attorney’s right under the First, 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 he represents 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,” and we reject the same argument here. (*Roa v. Lodi Medical Group, Inc., supra*, 37 Cal.3d at p. 925.) Accordingly, we find Scheer committed four violations of Civil Code section 2944.7, and is subject to discipline under Business and Professions Code section 6106.3.

III. MITIGATION AND AGGRAVATION

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Scheer must establish mitigation by clear and convincing evidence (std. 1.6), while OCTC has the same burden to prove aggravating circumstances (std. 1.5). We adopt the hearing judge’s three factors

in mitigation and three in aggravation, ultimately concluding that the aggravation outweighs the mitigation.

A. Three Factors in Mitigation

1. Lack of Prior Discipline Record (Std. 1.6(a))

Standard 1.6(a) provides for mitigation in the absence of discipline over many years and where the present conduct is not deemed serious. However, where the misconduct is serious, a discipline-free practice is most relevant where the misconduct is aberrational and unlikely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.) Here, Scheer committed serious misconduct over a year-and-a-half period. Her practice model violated California statutory provisions and the bar rules of 11 other states. In light of her ongoing position that she did not violate any rules, she poses a high risk of committing future misconduct if permitted to practice. Accordingly, we disagree with the hearing judge that she is entitled to significant weight for her 22 years of discipline-free practice, and assign this factor limited weight.

2. Cooperation (Std. 1.6(e))

Scheer is entitled to some mitigation for providing an extensive stipulation of facts, even though she admitted no culpability. (Std. 1.6(e); *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].)

3. Good Character (Std. 1.6(f))

Standard 1.6(f) provides mitigation where an attorney establishes “extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct.” Scheer presented eight witnesses on her behalf, including two attorneys, but she failed to establish extraordinary good character. The five witnesses whose loans were successfully modified did not demonstrate a full understanding of

her misconduct. The two attorney witnesses had not worked with Scheer in many years, and lacked firsthand knowledge about her loan modification practice. Nevertheless, the witnesses uniformly praised her character, and so we agree Scheer is entitled to some weight in mitigation for good character.

B. Three Factors in Aggravation

1. Multiple Acts of Misconduct (Std. 1.5(b))

For at least a year and a half, Scheer committed multiple acts of misconduct in 30 client matters. Her many acts of wrongdoing substantially aggravate this case. (*In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. at p. 235.)

2. Significant Harm (Std. 1.5(f))

Scheer caused her clients harm by repeatedly charging up-front fees for loan modification services and by failing to refund more than \$120,000 in illegal fees. Since there was no evidence of the financial impact or other harm on any client, we assign some weight in aggravation to this factor. (See *Kelly v. State Bar* (1991) 53 Cal.3d 509, 519-520 ([loss of \$2,000 for six weeks is monetary loss albeit not grievous and \$750 loss for two years is genuine monetary injury although not severe]; std. 1.5(i) [failure to make restitution as aggravating factor].)

3. Indifference/Lack of Remorse (Std. 1.5(g))

Scheer's ongoing insistence that her conduct was justified is troubling because it suggests her conduct may recur. Scheer "was tracking" the California laws through the legislative process and was fully aware when the prohibitions against pre-performance compensation for loan modification work were enacted. Rather than complying, Scheer drafted her agreements in an attempt to circumvent the prohibitions. She then collected compensation from her clients upon execution of the fee agreements. Her persistent claim that her conduct is excused because she believes the law is unconstitutional is less a creative legal theory than a refusal to accept

responsibility for deliberately violating the law. (See *In the Matter of Taylor*, supra, 5 Cal. State Bar Ct. Rptr. at p. 235.) Lack of remorse and failure to acknowledge misconduct are “properly considered as . . . aggravating factor[s] in deciding the appropriate discipline for an attorney. [Citations.]” (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) We assign significant weight to Scheer’s lack of insight.

IV. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.1.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) To seek the fairest discipline, we look to the standards and decisional law. (See *In re Silverton* (2005) 36 Cal.4th 81, 91-92.)

In all 30 client matters, the crux of Sheer’s misconduct was that she charged and collected an illegal fee because either she was not authorized to practice or she failed to comply with consumer protection laws. Several standards apply to her misconduct,¹⁹ but the most relevant is standard 2.3(b), dealing directly with charging and collecting an illegal fee. It provides that appropriate discipline is from reproof to suspension. Given the broad range of discipline, we turn to case precedent for further guidance.

In our recent case, *In the Matter of Taylor*, supra, 5 Cal. State Bar Ct. Rptr. at p. 236, we recommended a minimum six-month actual suspension that would remain in place until the attorney made full restitution for all illegal fees collected. Similar to this case, the attorney in

¹⁹ Although standard 2.6 deals with UPL, it is limited to UPL in California and does not cover Scheer’s out-of-state misconduct. Therefore, the two generic standards that apply include: 2.14 [actual suspension to disbarment for any violation of Bus. & Prof. Code not otherwise specified] and 2.15 [reproof to suspension not to exceed three years for all rule violations not otherwise specified].

Taylor had no prior discipline, was fully aware of the statutory prohibitions against upfront fees for loan modification services, and engaged in serious misconduct causing significant harm to his clients. (*Ibid.*) However, *Taylor* is distinguishable as less serious because the misconduct involved far fewer clients, occurred over a shorter time period, and resulted in the collection of just ten percent of the illegal fees collected in this case. Scheer's misconduct is more extensive than in *Taylor* as it involved 11 other states and affected 30 clients. (See also *In the Matter of Wells, supra*, 4 Cal. State Bar Ct. Rptr. 896 [six-month actual suspension for UPL involving only two clients]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [six-month actual suspension for illegal fee involving single client].)

Scheer's conduct is serious and the harm to her clients is significant. She committed UPL in 11 other jurisdictions and repeatedly violated loan modification statutes designed to protect the consumer. Scheer has also failed to refund the illegal fees. She simply shows no insight into her misconduct.

Guided by standard 2.3(b), the limited case law addressing loan modification cases, and the mitigating and aggravating evidence, we affirm the hearing judge's recommended two-year suspension. In addition, we recommend that Scheer remain suspended until she makes restitution for all the fees she illegally collected and until she proves her rehabilitation, fitness and learning in the law. Our recommendation will allow Scheer the opportunity to gain insight into her misconduct, while at the same time protect the public and the courts and maintain the integrity of the legal profession.

V. RECOMMENDATION

We recommend that Marilyn Sue Scheer be suspended from the practice of law for three years, that execution of that suspension be stayed, and that she be placed on probation for three years on the following conditions:

1. She is suspended from the practice of law for a minimum of the first two years of probation, and will remain suspended until the following requirements are satisfied:
 - (a) She makes restitution to the following payees (or reimburses the Client Security Fund, to the extent of any payment from the fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles:
 - (1) Jamie Walling in the amount of \$4,000 plus 10 percent interest per year from December 16, 2009;
 - (2) Donald and Donna Wright in the amount of \$5,500 plus 10 percent interest per year from February 13, 2010;
 - (3) Hesham Sadek in the amount of \$3,500 plus 10 percent interest per year from January 13, 2010;
 - (4) Girma Bogale and Truwork Dessalgne in the amount of \$1,500 plus 10 percent interest per year from November 24, 2010;
 - (5) Sherry and Richard Few in the amount of \$4,500 plus 10 percent interest per year from January 30, 2011;
 - (6) William Nakulski in the amount of \$3,500 plus 10 percent interest per year from December 30, 2009;
 - (7) James Carman, Sr., and Eleanore Carman in the amount of \$4,000 plus 10 percent interest per year from October 22, 2010;
 - (8) Randy and Mary Torkelson in the amount of \$3,500 plus 10 percent interest per year from February 22, 2010;
 - (9) Darlene and Malcolm Robinson in the amount of \$3,500 plus 10 percent interest per year from August 7, 2010;
 - (10) Rosina Taraschi in the amount of \$4,500 plus 10 percent interest per year from September 3, 2010;

- (11) Stanley Jaremczak in the amount of \$3,500 plus 10 percent interest per year from September 11, 2010;
- (12) Maili and Daniel Neverosky in the amount of \$4,500 plus 10 percent interest per year from October 22, 2010;
- (13) Jorge and Maria Arriaza in the amount of \$3,000 plus 10 percent interest per year from January 14, 2010;
- (14) William Morgan in the amount of \$4,500 plus 10 percent interest per year from July 1, 2010;
- (15) Vincenzo and Vincenza Pica in the amount of \$3,500 plus 10 percent interest per year from August 7, 2010;
- (16) Lainie and Garrett Oto in the amount of \$3,000 plus 10 percent interest per year from April 16, 2010;
- (17) Donald Thompson in the amount of \$3,500 plus 10 percent interest per year from January 4, 2010;
- (18) Lindiwe Musekiwa in the amount of \$3,000 plus 10 percent interest per year from July 11, 2010;
- (19) Christopher Mammarelli in the amount of \$3,500 plus 10 percent interest per year from July 25, 2010;
- (20) Walter Clark in the amount of \$5,000 plus 10 percent interest per year from September 27, 2010;
- (21) Alfonzo and Brenda Wyche in the amount of \$2,500 plus 10 percent interest per year from December 30, 2009;
- (22) Sergio and Ruth Vides in the amount of \$2,900 plus 10 percent interest per year from November 2, 2009;
- (23) Jeffrey Forney in the amount of \$6,000 plus 10 percent interest per year from May 26, 2010;
- (24) Israel Senfuma in the amount of \$5,000 plus 10 percent interest per year from February 10, 2010;
- (25) Donald Gross in the amount of \$12,000 plus 10 percent interest per year from August 13, 2010;
- (26) Radoljub and Nada Vasic in the amount of \$1,500 plus 10 percent interest per year from December 4, 2010;

(27) Barbara and John Fletcher in the amount of \$3,000 plus 10 percent interest per year from December 23, 2009;

(28) Thomas Duignan in the amount of \$2,000 plus 10 percent interest per year from March 5, 2010;

(29) Philip and Cynthia Peters in the amount of \$3,000 plus 10 percent interest per year from March 20, 2010;

(30) Carlos and Olga Candelaria in the amount of \$3,500 plus 10 percent interest per year from March 13, 2010; and

- (b) She provides proof to the State Bar Court of her rehabilitation, fitness to practice, and learning and ability in the general law. (Std. 1.2(c)(1).)
2. She must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation.
 3. Within 30 days after the effective date of the Supreme Court order in this proceeding, she must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with her assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, Scheer must meet with the probation deputy either in-person or by telephone. Thereafter, Scheer must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
 4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, she must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
 5. She 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, she must state whether she 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, she must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to her personally or in writing, relating to whether she is complying or has complied with the conditions contained herein.
 7. Within one year after the effective date of the discipline herein, she 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 she shall not receive MCLE credit for attending Ethics School.

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if she has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

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

We further recommend that Scheer 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.

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

REMKE, P. J.

WE CONCUR:

EPSTEIN, J.

PURCELL, J.