

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GEORGE TIMOTHY SMITHWICK

A Member of the State Bar

[No. 11-O-11334]

Filed May 16, 2014

SUMMARY

The Office of the Chief Trial Counsel (OCTC) requested review of a hearing judge's decision recommending a 60-day actual suspension after respondent stipulated to: 1) splitting fees with a non-lawyer entity; 2) failing to perform legal services with competence; 3) failing to refund unearned fees; and 4) failing to provide the State Bar with notice that he employed a resigned attorney. (Hon. Pat E. McElroy, Hearing Judge.)

The review department upheld the 60-day actual suspension recommended by the hearing judge and added the requirement that respondent remain suspended until he completed restitution.

COUNSEL FOR PARTIES

For OCTC: Cydney T. Batchelor

For Respondent: Douglas L. Rappaport
Joanna P. Sheridan**HEADNOTES**

- [1a-d] 119 **Other Pretrial Matters**
 151 **Evidentiary Effect of Stipulations**
 199 **Other Miscellaneous General Issues**

Where respondent and State Bar stipulated to facts, legal conclusions on culpability, and discipline, but Supreme Court remanded matter for reconsideration of discipline in light of Standards, parties remained bound by stipulation with regard to facts and culpability. State Bar Court permitted parties to present additional evidence on aggravation and mitigation, and reconsidered degree of discipline. However, State Bar was bound by original stipulation that respondent's misconduct was not serious.

- [2] **582.39 Aggravation—Harm to client—Found but Discounted—Other reason**
Although attorney stipulated to causing significant client harm, minimal weight assigned to harm as aggravating factor where foreclosure of client’s home and misrepresentations made by company representatives occurred before respondent accepted client’s case.
- [3a,b] **710.10 Mitigation—Long practice with no prior discipline record—Found**
Where attorney had practiced for over 30 years without prior discipline, and State Bar stipulated that present misconduct was not serious, attorney’s lack of prior record was entitled to significant weight in mitigation. Even if present misconduct had been serious, lack of prior record still would have established that respondent’s misconduct was not likely to recur, where misconduct occurred during single, relatively short period of aberrant behavior, respondent voluntarily ceased committing misconduct before authorities or State Bar became involved, and respondent was remorseful and accepted responsibility for misconduct.
- [4] **735.10 Mitigation—Candor and Cooperation with OCTC—Found**
Significant mitigating weight given for candor and cooperation with OCTC where attorney stipulated to material facts, culpability and discipline because it greatly conserved resources.
- [5] **740.31 Mitigation—Good Character References—Found but Discounted or not
relied on—Insufficient number of references**
Modest mitigation credit for good character where attorney presented four witnesses from varied backgrounds that included an attorney.
- [6] **616.53 Aggravation—Failure to make restitution—Declined to find—Inability to
make full restitution**
**616.59 Aggravation—Failure to make restitution—Declined to find—Other
reason**
Where respondent’s clients could not be located despite State Bar’s efforts to find them, Review Department declined to consider respondent’s delay in paying restitution as aggravating factor.
- [7] **715.50 Mitigation—Good faith—Declined to find**
Where respondent was unaware of duty to report to State Bar that respondent had engaged services of resigned attorney, Review Department reversed hearing judge’s consideration of this fact in mitigation as good faith, because attorneys are not rewarded for ignorance of their ethical responsibilities.

- [8a,b] **802.61 Application of Standards—Standard 1.7(a)—Most severe applicable sanction to be used**
- 844.13 Application of Standards—Performance, communication, or withdrawal—Multiple matters but no habitual disregard (interim Standard 2.5(b))—Applied-actual suspension—Coupled with other misconduct**
- 901.90 Application of Standards—Violations Not Specified Above (interim Standard 2.15)—Applied-Suspension—Other reason**

Where respondent's most serious ethical violations resulted from his affiliation and fee-sharing with a non-lawyer entity, Review Department applied discipline standard most applicable to that misconduct, rather than standard applicable to respondent's failure to perform legal services in multiple matters. Case law in matters involving similar misconduct was inapplicable in light of respondent's compelling mitigation, including long practice without a prior record, candor and cooperation, good character, pro bono work and community service, and remorse and recognition of wrongdoing. Given that respondent's misconduct was not likely to recur, totality of circumstances warranted imposing actual suspension for 60 days and until respondent completed restitution.

ADDITIONAL ANALYSIS

Culpability

Found

- 252.31 Sharing fee with non-lawyer (RPC 1-320(A); 1975 RPC 3-102(A))
- 252.61 Employment of lawyer not eligible to practice (RPC 1-311)
- 270.31 Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))
- 277.61 Failure to refund unearned fees (RPC 3-700(D)(2); 1975 RPC 2-111(A)(3))

Aggravation

Found

- 521 Multiple acts of misconduct (1.5(b) 1986 Standard 1.2(b)(ii))

Declined to find

- 584.50 Harm to public
- 586.50 To administration of justice

Mitigation

Found

- 745.10 Remorse/restitution/atonement (1.6(g) Standard 1.2(e)(vii))

Found but discounted or not relied on

- 765.31 Substantial pro bono work—Insufficient evidence

Discipline

- 1013.06 Stayed suspension—One year
- 1015.02 Actual suspension—two months

Probation Conditions

- 1021 Restitution
- 1024 Ethics exam/ethics school
- 1030 Standard 1.2(c)(1) Rehabilitation Requirement (1986 Standard 1.4(c)(ii))

OPINION

REMKE, P. J.

George Timothy Smithwick practiced law for over 30 years without discipline until he agreed to accept contingency fee cases from a company specializing in lender liability lawsuits, which he later learned was disreputable. His relationship with the company ended within a year and before the involvement of the authorities. Following contact from the Office of the Chief Trial Counsel of the State Bar (OCTC), Smithwick fully cooperated in the investigation and stipulated to his culpability to resolve the matter before disciplinary charges were filed. In particular, he stipulated to: (1) splitting fees with a non-lawyer entity; (2) failing to perform legal services with competence; (3) failing to refund unearned fees totaling \$15,740; and (4) failing to provide the State Bar of California with notice that he employed a resigned attorney. The hearing judge recommended a 60-day actual suspension due to Smithwick's extreme remorse, years of practice without discipline, and attempts to make amends.

OCTC appeals and seeks at least a six-month suspension. It concedes Smithwick had an unblemished record for a lengthy period, but stresses that he abdicated his professional duties owed to at least 12 clients and caused significant harm. Smithwick asks that we affirm the recommended discipline due to a lack of malevolent intent and his compelling mitigation. We agree with Smithwick and affirm the hearing judge's 60-day recommendation, but add a condition that Smithwick remain suspended until he submits full restitution as specified below.

I. SIGNIFICANT PROCEDURAL HISTORY

[1a] This case has an unusual procedural history. Over two years ago, Smithwick and OCTC entered into a stipulation as to facts, conclusions of law, and disposition (Stipulation), which recommended a one-year *stayed* suspension. The Stipulation was then approved by the hearing department. In June 2012, our Supreme Court issued an order returning

the Stipulation “for further consideration of the recommended discipline in light of the applicable attorney discipline standards. (*In re Silverton* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)” (*Smithwick on Discipline* (June 12, 2012, S199709).)

[1b] Following the return, OCTC asserted that it was entitled to reopen the investigation, add charges of misconduct, conduct discovery, and present supplemental evidence on culpability and aggravation — without moving to withdraw from or modify the Stipulation. After the hearing judge rejected OCTC's argument, it petitioned for interlocutory review. We denied the petition and concluded that the parties were bound to the stipulated facts and conclusions of law “unless a motion to withdraw or modify is granted,” but not bound to the level of discipline.

OCTC then filed a motion to modify the Stipulation. It did not seek to modify the *facts* in the Stipulation — only the legal conclusions based on the limited stipulated facts. Alternatively, OCTC asked to withdraw from the Stipulation. The hearing judge denied the motion but permitted the parties to provide evidence to expand on the agreed-upon aggravating and mitigating factors in the Stipulation. Neither party sought interlocutory review of the order.

[1c] The hearing judge held a two-day trial in February 2013. She again instructed the parties that they were bound by the conclusions of law in the Stipulation, but were “permitted to add evidence supporting aggravation and mitigation.” Neither party objected. Thus, pursuant to the Supreme Court's return order, the primary issue is “the recommended discipline in light of the applicable attorney discipline standards.”

II. FACTS AND CULPABILITY

The trial evidence is limited, providing few facts beyond those set forth in the Stipulation. We adopt and summarize the hearing judge's findings, adding relevant facts from the record. (Rules Proc. of State Bar, rule 5.155(A) [judge's findings entitled to great weight].)

A. Factual Background

US Loan Auditors, LLC, US Loan Auditors, Inc., US Legal Advisors, and My US Legal Services (collectively My US Legal) were companies partially owned by non-attorneys. Distressed homeowners hired My US Legal to file predatory lender lawsuits and paid the company advance attorney fees in monthly installments. My US Legal would then hire contract attorneys to represent the homeowners. The company paid the contract attorneys \$250 per month as attorney fees for each client, using funds from the homeowner's monthly installments to My US Legal.

Smithwick was admitted to the Bar in 1979. Thirty years later, in 2009, his former law school classmate, Dan Whaley, suggested he work as a My US Legal contract attorney. In late July 2009, Smithwick agreed to take referral cases from My US Legal. He believed in the validity of some predatory lender lawsuits, but did not have the means as a sole practitioner to litigate cases against banks. My US Legal agreed to provide the necessary staffing and support to help him on the cases he accepted. Smithwick took them on a contingency fee basis, but understood that if the client paid My US Legal advance costs, the company would disburse those funds to him.

Smithwick stipulated that as a contract attorney for My US Legal, he hired Whaley to work in his law office. He was aware that Whaley had resigned from the State Bar, but believed he was petitioning for reinstatement. Smithwick failed to serve the State Bar with written notice that he employed Whaley. At trial, Smithwick testified that he actually considered Whaley an employee of My US Legal since he himself did not pay Whaley, but admitted he "use[d] him to help on the cases."

At first, My US Legal did not disburse any funds to Smithwick. But then in December 2009, Whaley told him that the contract attorneys would

begin receiving \$250 per month for each client for costs. Smithwick did not expect these payments when he first became affiliated with My US Legal, and was unaware that the source of the money was the homeowners' monthly installment payments to the company for legal services.

Smithwick represented at least 12 homeowners who were under contract with My US Legal. He stipulated that he did not perform any work of value on the homeowners' behalf, but My US Legal paid him a total of \$15,740. His acceptance of those unearned advance fees constituted impermissible fee splitting with a non-lawyer. Smithwick testified that he decided to end his relationship with My US Legal after about six to eight months because he was not receiving the necessary support for his cases. He found attorneys to handle his existing cases and substituted out of all but one case, which he continued to work on. He concluded his relationship with My US Legal no later than June 2010. In October 2010, the Attorney General of California filed a complaint against the company. Subsequently, My US Legal filed a bankruptcy petition whereby a trustee became responsible for distributing funds to the homeowners, including any victims of Smithwick's misconduct.

Smithwick initially agreed to refund the \$15,740 from My US Legal to the trustee handling the company's bankruptcy. He was unaware of the total amount each client had paid to My US Legal since he did not know about the clients' installment payments. Upon learning that the trustee could use the money to pay creditors other than the homeowners Smithwick represented, Smithwick gave the funds to his disciplinary attorney for deposit into the attorney's trust account until Smithwick could determine the amount of each of his clients' refunds. Smithwick notified his clients by certified and regular mail that he would reimburse them and asked how much they had paid My US Legal. His efforts were unsuccessful. Although he stipulated to representing 12 clients through My US Legal, at the conclusion of his disciplinary trial, Smithwick agreed to reimburse a total of 19 individuals.¹

1. OCTC obtained My US Legal invoices bearing Smithwick's name in 19 cases, totaling \$13,730. The invoices were not offered in evidence. Instead, the parties created a summary, listing 19 last names and the amounts owed but no other identifying facts (e.g., first names, addresses, case numbers, or

payment dates). The parties also stipulated that Smithwick would have one year to locate and pay the individuals. Any funds not disbursed would be paid to the State Bar Client Security Fund (CSF).

Smithwick stated he is “embarrassed.” He feels “bad and ashamed” that he was affiliated with a company that gave “false hope” and “mised” people who were trying to keep or recover their homes.

B. Culpability

Smithwick stipulated to violating four of the Rules of Professional Conduct as a result of his association with My US Legal: (1) rule 1-320(A) by splitting legal fees with My US Legal, a non-attorney entity; (2) rule 3-110(A) by failing to perform any work of value on his clients’ behalf; (3) rule 3-700(D)(2) by failing to refund unearned fees totaling \$15,740; and (4) rule 1-311 by failing to notify the State Bar in writing that he employed Whaley, a resigned attorney. These legal conclusions are not in dispute, and we adopt them.

III. MITIGATION OUTWEIGHS 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.) Smithwick must establish mitigation by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.6),² while OCTC has the same burden to prove aggravating circumstances. (Std. 1.5.)

A. Two Aggravating Factors

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

For approximately eight months, Smithwick committed multiple acts of misconduct in at least 12 client matters by splitting fees with My US Legal, a non-lawyer entity. This wrongdoing, coupled with his three other stipulated ethical violations, aggravates

this case. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

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

The parties stipulated that Smithwick’s misconduct caused significant client harm,³ but failed to provide any specific facts to support this aggravating factor. To prove the extent of harm at trial, OCTC called only one of Smithwick’s former clients, Jerdie Harris, to testify. Harris is the one client that Smithwick continued to represent after he ended his affiliation with My US Legal. She is a retired postal worker who refinanced her home by taking out a second mortgage in 2006, and ultimately fell behind on the payments as a result of unscrupulous actions by her mortgage broker. In March 2009, Harris’s neighbor suggested she contact My US Legal. Harris paid My US Legal \$3,500 to perform a forensic audit of her second mortgage.

Harris testified that she met with Whaley after the audit and was led to believe that she could get “rich” due to her “bad loan.” She believed My US Legal would “save” her home and agreed to pay the company \$1,000 per month. Harris paid My US Legal \$1,800 in June 2009, but made no other payments. That same June, Harris’s home was sold pursuant to foreclosure. A month later, My US Legal assigned Smithwick to her case. Harris did not meet him until the first mediation in her predatory lending lawsuit. Smithwick represented her until 2012 when she received \$36,000 from a settlement Smithwick negotiated with her mortgage broker’s insurance company.

[2] It is clear that Harris was significantly harmed by My US Legal. She was a homeowner in a desperate situation who was given false promises about saving or reacquiring her home. She paid a considerable amount of money, did not receive what

2. All further references to standards are to this source, and reflect the modifications to the standards effective January 1, 2014.

3. The hearing judge found Smithwick’s misconduct caused significant harm to clients, the public, and the administration of justice. With no facts in the record to prove harm to the public or the administration of justice, we only afford aggravating weight for client harm.

she paid for, and then lost her home two months after she hired the company. But we cannot attribute Harris's loss of her home or the misrepresentations made by My US Legal representatives to Smithwick. Both occurred before he accepted her case. (See, e.g., *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, 420 [refusing to hold attorney "separately responsible for each item of harm which occurred without proof of his actual knowledge".]) Without any other supporting facts, we assign minimal weight in aggravation to client harm.

B. Five Mitigating Factors

1. No Prior Record of Discipline (Std. 1.6(a))

[3a] Standard 1.6(a) provides for mitigation in the absence of discipline over many years coupled with present misconduct that is not serious. At the time of his misconduct, Smithwick had practiced law for over 30 years without discipline. The hearing judge gave this factor significant weight. [1d] Although OCTC stipulated that Smithwick's misconduct was *not* serious, it now argues that the Stipulation should be ignored, the misconduct be deemed serious, and any weight given to this factor be diminished. We reject OCTC's attempt to circumvent the Stipulation to support its position on discipline.⁴

[3b] Moreover, even when misconduct is serious, our Supreme Court explained in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, that a prior record of discipline-free practice is most relevant for mitigation if it occurred during a "single period of aberrant behavior" and is unlikely to recur. (*Ibid.*) That is the case here. Smithwick voluntarily severed his relationship with My US Legal before the authorities or OCTC became involved, he has accepted responsibility for his misconduct, and he is truly remorseful. He did not knowingly split fees with My US Legal, and his misconduct lasted for a relatively short period. These facts establish that his misconduct is not likely to recur. Accordingly, we agree with the hearing judge and give Smithwick's 30-year discipline-free practice significant weight in mitigation.

2. Candor and Cooperation (Std. 1.6(e))

[4] Smithwick displayed candor to and cooperation with OCTC during these proceedings. Before OCTC filed disciplinary charges, he stipulated to the material facts, culpability, and discipline as a result of his association with My US Legal. This greatly conserved resources and we afford it significant weight. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who . . . willingly admit their culpability as well as the facts".])

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

Under standard 1.6(f), a mitigating circumstance is "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." Smithwick presented testimony from a former client, a friend who was a teacher and school administrator, a paralegal who was a former employee, and an attorney. Two of the witnesses had reviewed the Stipulation, and all of them knew about his misconduct to varying degrees. Collectively, they described Smithwick as honest, caring, and a man with unquestionable integrity. They also testified that he has great compassion for his clients and frequently reduces the bills of those with limited means. All but the former client had maintained continual contact with Smithwick for nearly two decades. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591-592 [significant weight given to testimony of two attorneys and fire chief who had long-standing familiarity with attorney and broad knowledge of his good character, work habits, and professional skills].)

[5] While four witnesses may not always meet the standard's requirements, Smithwick's character evidence is entitled to mitigation credit for two reasons. First, the witnesses were from varied backgrounds. (See *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from attorneys, judges, employer, and

4. Although there have been only minor modifications to the record during the lengthy pendency of this case, OCTC stipulated to a one-year stayed suspension in 2011, argued for

a two-year actual suspension after trial in 2013, and now seeks six months.

psychologist constitutes sufficient cross-section of witnesses to provide picture of present character].) Second, we give serious consideration to the testimony of the attorney witness, who corroborated Smithwick's character for honesty and his dedication to clients. (*In the Matter of Brown, supra*, 2 Cal. State Bar Ct. at p. 319 [attorney testimony entitled to serious consideration due to "strong interest in maintaining the honest administration of justice"].) Accordingly, modest mitigation credit is given for the character evidence provided by the four witnesses.

4. *Pro Bono Work and Community Service*

Pro bono work and community service mitigate an attorney's misconduct. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The school administrator character witness testified that Smithwick was very involved at his children's school, he provided pro bono legal services, he led a father's group who donated their time for field trips, and he assisted with establishing an education foundation. We give modest weight to this factor because we know little about the extent of his involvement, and the record contains no other evidence about his pro bono or community service activities. (See *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287 [little mitigation for minimal testimony regarding pro bono activities].)

5. *Remorse and Recognition of Wrongdoing (Std. 1.6(g))*

Smithwick repeatedly expressed remorse for his involvement with My US Legal while accepting responsibility for his misconduct. He ended his relationship with the company within eight months upon the realization that he lacked the ability to fulfill his ethical responsibilities to his clients. Smithwick also deposited over \$15,000 into his disciplinary attorney's trust account to repay the clients he represented through My US Legal.

[6] We reject OCTC's contention that Smithwick's ongoing failure to make restitution directly to the clients should be considered in aggravation. The original stipulation required Smithwick to pay \$15,740 to the trustee in the company's bankruptcy

proceeding within 22 months of the effective date of discipline. Then at trial, OCTC agreed that payment should go to the clients instead of the trustee, if possible, within one year of the effective date of discipline. However, the clients cannot be located. As stated by the deputy trial counsel, My US Legal is "defunct. The Attorney General shut them down. OCTC did make effort to locate additional clients and was unable to do so." Under these circumstances, we decline to penalize Smithwick for the delay in making restitution.

6. *No Mitigation for Good Faith (Std. 1.6(b))*

[7] The hearing judge gave Smithwick mitigation for good faith because he was unaware that he was required to give the State Bar written notice that he had engaged the services of Whaley, who had resigned from the Bar. We decline to do the same because we do not reward attorneys for ignorance of their ethical responsibilities. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 937 [attorney culpable of misconduct even if unaware of ethical obligation to notify Bar that he employed resigned attorney].)

IV. APPROPRIATE DISCIPLINE IS 60-DAY SUSPENSION

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.) Ultimately, we balance all relevant factors 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 determine the proper discipline, the Supreme Court instructs us to follow the standards "whenever possible." (*Id.* at p. 267, fn. 11.)

[8a] Under standard 2.5(b), actual suspension is appropriate for failing to perform legal services in multiple client matters. However, Smithwick's most serious ethical violations result from his affiliation and fee sharing with My US Legal, a non-lawyer entity. (Std. 1.7(a); see *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628

[applying standard most relevant to gravest aspect of attorney's misconduct.] This misconduct falls under standard 2.15, which provides that "[s]uspension not to exceed three years or reproof is appropriate for a violation of a provision of the Rules of Professional Conduct not specified in these Standards."

Given the broad range of discipline (reproof to three years), we also seek guidance from case law. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) Although no case is exactly equivalent to Smithwick's circumstances, we focus on the three most similar fee splitting cases, which range in suspensions from six months to two years.⁵ But we do not apply them because, as discussed below, the misconduct in those cases is far more serious than Smithwick's

In *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, the attorney formed a law partnership with a non-lawyer, who was deemed an "administrator." The two agreed to share legal fees, and the administrator was used as a runner and capper. The administrator also was allowed to obtain clients without Nelson's review and to settle claims with insurers, and was a signatory on Nelson's trust account. After six months of paying for cases, Nelson ended the partnership. He turned his law practice over to an attorney he was unfamiliar with and who had only practiced law for a short time. The attorney subsequently misappropriated settlement proceeds from at least three clients. We determined that Nelson's "entire law practice . . . was derived from paying non-lawyers for referral of cases" — a practice involving corruption in violation of Business and Professions Code section 6106. (*Id.* at pp. 187, 189.) Nelson was culpable of other ethical violations, including abandoning his clients without avoiding foreseeable prejudice to them. There were no circumstances that aggravated Nelson's misconduct, and the mitigating circumstances included voluntary withdrawal from illegal conduct, remorse and regret, and rehabilitation. Nelson was suspended for six months.

In *Gassman v. State Bar* (1976) 18 Cal.3d

125, the attorney employed an individual who served as secretary, bookkeeper, and paralegal assistant for almost three years. Gassman split fees with the employee and his failure to supervise allowed the employee to cash checks from his account without authorization. His lack of supervision led to the deposit of his client's \$15,000 settlement check into his commercial bank account where it was used to pay personal expenses. He also made false representations to a number of clients and failed to provide promised legal services over a four-year period. His gross neglect and abandonment of his clients constituted moral turpitude. The Supreme Court did not discuss any mitigating or aggravating factors, but suspended Gassman for one year.

Finally, in *In the Matter of Jones, supra*, 2 Cal. State Bar Ct. Rptr. 411, an inexperienced attorney abdicated his professional duties for over two years. He permitted "a nonlawyer to operate a large scale personal injury practice involving capping, forgery and other illegal and fraudulent practices." (*Id.* at p. 415.) Jones was unaware that his office administrator practiced law in Jones's name, handled millions of dollars, collected over \$600,000 in attorney fees without providing legal services, and misused \$60,000 withheld from clients for medical provider payments. Jones's breach of his fiduciary duties constituted moral turpitude. In aggravation, he committed multiple acts of misconduct and caused considerable harm to medical providers. His misconduct was mitigated by reporting the office administrator to the police and cooperating with the authorities, good character and community activities and paying nearly \$57,000 of his own money to medical providers. Jones was suspended for two years and until he proved his rehabilitation and fitness to practice.

As noted, Smithwick's case is far less egregious than *Nelson*, *Gassman*, and *Jones*. Moral turpitude did not surround his misconduct, and it did not involve capping, forgery, misappropriation, forming a partnership with a non-lawyer or a total lack of supervision over his practice. Nor did Smithwick

5. In recommending a 60-day actual suspension, the hearing judge relied on two cases where the attorneys' many years of discipline-free practice significantly mitigated their misconduct, but the misconduct was not similar to Smithwick's. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735; *Layton v. State Bar* (1990) 50 Cal.3d 889.) While

a discipline-free practice is a relevant factor, we consider "the level of discipline imposed in previous cases where the misconduct was most similar to that which occurred [in the instant matter]." (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 917.)

abdicate his professional duties to Whaley. Although Whaley assisted on his cases, Smithwick maintained control over them and his client files. He had no agreement to share fees with My US Legal, agreed to take clients on a contingency fee basis, and was unaware that the clients paid advance attorney fees to the company. Smithwick believed the payments he received from Whaley were for costs. Moreover, his fee sharing involved a smaller volume of cases, considerably less money, and a shorter period of time.⁶

This is not to suggest that Smithwick's conduct is excusable. He clearly should have done a more thorough investigation into Whaley's and My US Legal's backgrounds before accepting cases from the company. Under the circumstances, Smithwick's failure to investigate may have been unreasonable, but it was not reckless. And although the deceitful practices of Whaley and My US Legal were reprehensible and undoubtedly harmed vulnerable homeowners, we cannot impute the malicious conduct of others to Smithwick.

[8b] Smithwick's compelling mitigation (lack of a prior discipline record, candor and cooperation, good character, pro bono work and community service, remorse and recognition of wrongdoing) clearly outweighs the aggravating factors (multiple acts and minimal client harm). In particular, comparing the short duration of his misconduct to his 30 years of discipline-free practice, it is unlikely that misconduct will recur. The totality of the circumstances warrants affirming the 60-day suspension recommended by the hearing judge with the added requirement that Smithwick remain suspended until he finalizes restitution.

V. RECOMMENDATION

For the foregoing reasons, we recommend that George Timothy Smithwick be suspended from the practice of law for one year, that execution of that

suspension be stayed, and that he be placed on probation for one year on the following conditions:

1. He is suspended from the practice of law for a minimum of the first 60 days of probation, and will remain suspended until the following requirements are satisfied:

(a) He makes restitution to Jerdie Harris in the amount of \$1,800 plus 10 percent interest per year from June 30, 2009 (or reimburses the Client Security Fund to the extent of any payment from the Fund to the payee, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles (Office of Probation);

(b) He pays \$13,940 to the Client Security Fund and furnishes proof to the Office of Probation;⁷ and

(c) If he remains suspended for two years or more for not satisfying the preceding conditions, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before the suspension will be terminated. (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 the Supreme Court order in this proceeding, 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. Thereafter, he 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 informa-

6. In addition to *Jones*, OCTC asserts that *In the Matter of Oheb*, *supra*, 4 Cal. State Bar Ct. Rptr. 920, supports its recommended discipline. That case is not helpful because it involved an attorney who was disbarred following his felony conviction for accepting referrals of fraudulent personal injury claims (Pen. Code, § 549), misconduct involving moral turpitude. As the facts demonstrate and OCTC concedes, the misconduct in *Oheb* is far more egregious than here.

7. Due to limited information and prior unsuccessful efforts to locate clients, we find the restitution provision recommended by the hearing judge is impractical (i.e., use due diligence for one year to pay clients and then pay remainder to CSF). The funds to CSF will be credited against any CSF payments to Smithwick's My US Legal clients.

tion 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.

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

If Smithwick remains suspended for 90 days or more for not satisfying the preceding restitution condition, we further recommend that he 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 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

We also recommend that Smithwick 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 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).)

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

WE CONCUR:

EPSTEIN, J.
PURCELL, J.