

Filed April 30, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 11-O-12821(11-O-14028)
)	
JON MICHAEL ALEXANDER,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 129207.)	
_____)	

This is Jon Michael Alexander’s fourth disciplinary matter. The hearing judge below recommended his disbarment after finding that he committed serious misconduct while serving as the District Attorney of Del Norte County. Specifically, the judge found that Alexander violated rule 2-100(A) of the Rules of Professional Conduct of the State Bar¹ by engaging in an ex parte meeting with a defendant who was represented by counsel in a pending criminal matter. The judge further found that Alexander committed acts of moral turpitude in violation of Business and Professions Code section 6106² because he told no one about his meeting and denied it had occurred when questioned about it by his deputy district attorney. Several weeks later, when confronted with a surreptitious recording of his communication with the defendant, he finally admitted to the meeting, but claimed he had forgotten about it.

Alexander appeals, arguing that he has committed no disciplinable offense and instead is the victim of selective prosecution by the Office of the Chief Trial Counsel of the State Bar

¹ Rule 2-100(A) prohibits communications with a represented party. All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

² Section 6106 prohibits any act involving moral turpitude, dishonesty, or corruption. All further references to sections are to the Business and Professions Code unless otherwise noted.

(OCTC) and of bias by the hearing judge. OCTC has not appealed and asks us to affirm the disbarment recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we reject Alexander's arguments and adopt the hearing judge's findings and discipline recommendation. The judge found that Alexander's significant mitigation evidence did not clearly outweigh the seriousness of his misconduct and the strong evidence in aggravation. Underscoring the judge's disbarment recommendation was her conclusion that Alexander's conduct had compromised "a compelling societal interest in preserving the integrity of the office of the district attorney." Indeed, the high standard of conduct expected of prosecutors, who act as the gatekeepers to the fair administration of justice, was lacking in this case. Accordingly, in light of Alexander's extensive prior discipline record, we conclude that a disbarment recommendation is necessary to protect the public, the courts, and the legal profession.

I. CLAIMS OF SELECTIVE PROSECUTION AND JUDICIAL BIAS

Alexander challenges the fundamental fairness of these proceedings. He contends he is the victim of selective prosecution by OCTC and the trial judge was biased. We find his arguments are without merit.

A. Alexander Did Not Establish Selective Prosecution

Alexander claims OCTC "deliberately and intentionally targeted him for disparate treatment," in violation of his equal protection rights under the Fourteenth Amendment to the United States Constitution and Civil Code section 51.³ In making this argument, he relies on a statement by an OCTC deputy trial attorney in an internal memorandum. The attorney, who was

³ Civil Code section 51, known as the Unruh Civil Rights Act, is modeled upon traditional "public accommodations" legislation. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 731.) It is directed at practices by business enterprises intended to exclude "individuals from places of public accommodation or other business enterprises . . . on the basis of class or group affiliation. . . ." (*Id.* at p. 740.)

not assigned to prosecute this case, opined that she “did not believe for a second that Alexander should be D.A. I think his mental abilities continue to be adversely affected by his long-time Meth use, even though he appears to be sober now.”

We previously considered the same evidence and legal argument on interlocutory review and found that Alexander failed to prove that OCTC has a policy of selectively prosecuting rehabilitated addicts or that non-addicts are not prosecuted. He has offered no new evidence to show that he has been deliberately singled out on the basis of some invidious criterion. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 833 [invidious purpose for prosecution is one that is arbitrary and unjustified because it bears no rational relationship to legitimate law enforcement interests].) In fact, an attorney’s substance abuse is a legitimate factor to be considered in determining whether to pursue disciplinary or other regulatory proceedings against an attorney. (See, e.g., § 6007, subd. (b)(3) [attorney may be involuntarily enrolled inactive if habitual use of intoxicants or drugs affects ability to practice law].) Alexander failed to establish he is the subject of selective prosecution.

B. Alexander Did Not Prove Judicial Bias

Alexander also previously sought interlocutory review of his judicial bias claim as the result of the hearing judge’s refusal to grant a continuance of his disciplinary trial so that he could prosecute a significant criminal matter in Del Norte County. We denied his petition, finding no abuse of discretion or error of law in the judge’s ruling. The Supreme Court has long been of the view that “[c]ontinuances of disciplinary hearings are disfavored” (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 791.) Alexander offers no new evidence or legal authority that would cause us to reverse our earlier denial of this claim. And we note that the hearing judge granted Alexander’s subsequent motion for a trial continuance on August 13, 2012. Therefore, his renewed claim of judicial bias lacks merit.

II. BACKGROUND AND PROCEDURAL HISTORY

Alexander stipulated to certain facts and the admission of several documents, and conceded additional facts in his answer to the Notice of Disciplinary Charges (NDC). As to his trial testimony, the hearing judge found it generally to be “tenuous.” She concluded he lacked candor and truthfulness in his dealings with the superior court and opposing counsel. These findings are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge’s factual findings entitled to great weight on review].) We summarize the stipulated facts, together with those facts adduced from the trial evidence.

Alexander was admitted to the practice of law in California on July 2, 1987. In the early 1990s, he worked as a deputy for the Orange County District Attorney and subsequently for the Orange County Public Defender. He then went into private practice as a criminal defense attorney in Orange County. Alexander’s legal career took a severe downturn in 1996 when his use of cocaine and methamphetamine became a full-blown addiction. Ultimately, he lost his law practice and most of his personal possessions, including his home. He sought help and completed the Salvation Army’s 12-step substance abuse program. In early 2005, he successfully applied for a position as a prosecutor with the Del Norte County District Attorney. Alexander was elected and sworn in as the District Attorney for Del Norte County on January 3, 2011.

OCTC filed an NDC on May 15, 2012, alleging seven counts of misconduct in three matters. As summarized below, the hearing judge dismissed the first two matters due to a lack of clear and convincing evidence⁴ of culpability, but found serious misconduct in the third matter.

⁴ Clear and convincing evidence must leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

In the first matter, the NDC alleged that Alexander violated rule 5-300(A)⁵ in July 2009 by lending \$14,000 to Linda Sanford, the Assistant Chief Probation Officer for Del Norte County (the Sanford case). In addition, it charged that he committed acts involving moral turpitude, dishonesty, or corruption in violation of section 6106 by failing to disclose this loan to the courts or to opposing counsel in various criminal proceedings. The hearing judge dismissed the Sanford case after trial, concluding that Alexander's long-standing friendship with Sanford brought the loan within the exception provided by rule 5-300(A) when "the personal or family relationship between the member and the . . . official . . . is such that gifts are customarily given and exchanged." The judge also found that Alexander's failure to divulge the loan to the court or to opposing counsel in several cases where Sanford was involved as a probation officer did not violate section 6106, since the evidence did not prove that he "made the loan with the intent to obtain some advantage from Sanford."

In the second matter, Alexander was charged with acts of moral turpitude arising from his failure to recuse himself or to inform the superior court in a criminal proceeding that George Mavris, a defendant's attorney, was concurrently representing Alexander in a pending disciplinary matter and had previously loaned him \$6,000 (the Mavris case). In a criminal proceeding, Alexander joined with Mavris in moving to dismiss the criminal charges against the defendant. The hearing judge dismissed the Mavris matter, finding that "[a]rguably, respondent should have disqualified himself . . . to avoid the appearance of a conflict of interest with respect to his official duties. But there is no clear and convincing evidence that his failure to do so affected his ability to impartially perform the discretionary functions of his office."

⁵ Rule 5-300(A) prohibits giving or lending anything of value to an official of a tribunal.

In the third matter, Alexander was charged and found culpable of multiple acts of misconduct arising from his ex parte communication with a represented defendant, Michelle Taylor (the Taylor case).

Alexander is appealing the culpability findings in the Taylor matter, but asks us to adopt the hearing judge's dismissals of the Sanford and Mavris cases. OCTC did not seek review of the dismissals of these two matters, which we adopt.⁶ Accordingly, we discuss only the Taylor matter.

III. ALEXANDER IS CULPABLE OF MISCONDUCT IN THE TAYLOR MATTER

A. Findings of Fact

In March 2011, Michelle Taylor was a passenger in a pickup truck driven by Damien VanParks. During a traffic stop, an officer searched Taylor and discovered packets of methamphetamine in her pants. She told the officer the drugs belonged to VanParks and that he asked her to hide them. Taylor and VanParks were arrested and charged with felony drug violations involving possession, possession for sale, and transportation of methamphetamine. Donald McElfresh was appointed as Taylor's attorney and William Cater was appointed as VanParks' attorney.

On Friday afternoon, July 8, 2011, Taylor made an unexpected visit to Alexander. According to Alexander, Taylor "barged" into his office unannounced and "immediately launched" into a confession that the drugs belonged to her, not to VanParks. Alexander testified he was surprised to see her, although he recognized her from a previous encounter when she had

⁶ We are concerned that OCTC raised a challenge to the Sanford and Mavris dismissals only in its responsive brief, as it limits Alexander's opportunity to respond. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 526, fn. 3 [if appellee wishes to address issues not raised by appellant, appellee should request review]; see also § 6086.65, subd. (c) [decision or order issued by hearing judge reviewable only upon timely request of party and not on Review Department's own motion].) Given our affirmance of the hearing judge's culpability findings in the Taylor case and our adoption of her disbarment recommendation, we decline to consider the dismissals of the Sanford and Mavris cases.

been the victim of an assault. He further testified that “halfway into the conversation,” Taylor told him that McElfresh was her attorney. Nevertheless, he continued the conversation because “I did not think I had a duty to cut things off.”

At this point in the conversation, Alexander recalled that he and McElfresh had agreed that Alexander could discuss rehabilitation options with Taylor, but he “would not take advantage of [her].” Yet, he asked Taylor “to identify her drug dealer” and suggested she return later in the day with McElfresh if she wanted to discuss rehabilitation possibilities.

Alexander described his participation in the conversation as passive: “I was just sitting there listening, pretty much” and “[a]t no time did I try to elicit any incriminating or [sic] evidence from that girl.” But, according to a recording of that July 8th meeting,⁷ his involvement in the conversation was far more proactive. Taylor initiated the conversation by saying: “I need to talk to you about something – something I was involved in.” Alexander then prompted: “So what happened?” and she responded: “I was with somebody that got pulled over and . . . they found something on me.” Alexander asked: “They found, what, meth?” and then followed up with another question: “How much?” Taylor told him she was unsure of the amount but described the drugs as being in separate packets. Alexander clarified: “Like for sales?” Taylor answered in the affirmative.

Alexander then asked if she had an attorney and Taylor replied that it was McElfresh. At that point, Alexander did not stop the conversation, but instead assured Taylor that McElfresh was a “good guy.” Taylor responded: “But I tried to put the blame off onto somebody else, but it wasn’t theirs . . . It was mine” and she identified that it was “Damien” whom she wrongfully blamed. Alexander clarified that she was referring to Damien VanParks, whom he knew from previous drug-related investigations, and continued the conversation by asking: “Who sold it to

⁷ Taylor surreptitiously taped her conversation with Alexander. As we discuss *post*, we do not agree with Alexander that the recording of the conversation is inadmissible.

you?” When Taylor hesitated, he said: “You can think about it,” but he warned her that she faced “two, three or four years in state prison. And I am definitely willing to be consulted (unintelligible) so if you want to think about it.” Taylor then left Alexander’s office.

Alexander told no one about the ex parte meeting. The following Monday, July 11, 2011, he and McElfresh encountered one another in the courthouse and discussed Taylor’s case, but Alexander did not disclose his meeting with Taylor or her confession. During their conversation, Taylor approached them and, according to McElfresh, he gave Alexander permission to speak to Taylor at that time and only in his presence about a rehabilitation program.⁸

On the same day, VanParks’ defense attorney, Cater, advised Assistant District Attorney, Katherine Micks, that he heard that Taylor had confessed to Alexander that the drugs were hers. Deputy Micks in turn asked McElfresh about the supposed confession, but McElfresh did not believe it was true since he had heard nothing about it from his client. Micks made an entry in her file: “Did Michelle come in and tell Jon [Alexander] the dope is hers?” Seeking to confirm the incident, Micks asked Alexander on Monday afternoon if Taylor had gone to his office and admitted the dope was hers. Alexander told her he never spoke with Taylor — just three days after his conversation with her.

On July 19, 2011, the court conducted a preliminary hearing in the Taylor/VanParks case. Alexander was present but did not inform the court or the attorneys for Taylor and VanParks about his ex parte communication with Taylor or her statements exculpating VanParks.

⁸ Alexander testified that as early as June 2011, he and McElfresh “had many discussions about getting Ms. Taylor into rehabilitation and my ability to speak with her about that.” He described his understanding with McElfresh as “permission given for me to discuss rehabilitation with her.” McElfresh strongly disputed Alexander’s “understanding.” He maintained that he gave Alexander permission to speak to Taylor only at the time of their July 11th courthouse meeting when Taylor was in their presence. The hearing judge found Alexander’s testimony that he had McElfresh’s unrestricted permission to speak to Taylor not credible. We give great deference to this credibility finding, and adopt it.

VanParks appeared late at the preliminary hearing and, as a consequence, he was taken into custody. Still, Alexander remained silent about the exculpatory statements.

On July 21, 2011, Leroy Davies substituted in as VanParks' attorney. VanParks told Davies that Taylor had confessed to Alexander that the drugs belonged to her, not him. Davies did not believe him until August 10, 2011, when VanParks produced a recording of the conversation between Alexander and Taylor. The next day, Davies delivered a copy of the recording to deputy Micks, who listened to it and in turn gave it to Alexander. Micks and Alexander then listened to the recording together. According to Micks, when they finished, Alexander "told me that it was clearly him on the tape, that it was clearly a conversation with Michelle Taylor, and that he had no recollection of having that conversation with her."

Alexander noted in his file that same day that he intended to dismiss the case against VanParks, and he did so about a week later.

The day after Alexander received the recording on August 12, 2011, he delivered a copy of it to McElfresh, with a note stating: "Honestly do NOT recall Michelle Taylor in my office, but must have cause she taped me telling me that Van Parks was innocent and the meth was hers." (Emphasis in the original note.) After receiving the tape, McElfresh asked Alexander for assurances that any admissions on the tape would not be used against Taylor. Thereafter, Alexander gave McElfresh a declaration under penalty of perjury that stated in part: "[T]he content of any such conversations, although entirely voluntary on Ms. Taylor's part, are deemed confidential and pursuant to the *Massiah* decision⁹ will never be used against Ms. Taylor in any case(s) presently pending against her."

⁹ *Massiah v. United States* (1964) 377 U.S. 201 [84 S.Ct. 119, 12 L.Ed.2d 246] prohibits the government from eliciting incriminating statements from a defendant after the right to counsel attaches under the Sixth Amendment to the United States Constitution.

On December 15, 2011, Taylor's case was transferred to the Attorney General's Office, which assumed the prosecution due to Alexander's ex parte communication with Taylor, who was ultimately convicted.

B. Conclusions of Law

1. The Transcript of the Ex Parte Communication Was Properly Admitted

Alexander argues that the hearing judge improperly admitted the tape and transcript of his conversation with Taylor under Penal Code section 632, subdivision (d), which provides that "no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." We find that Alexander waived his right to the evidentiary protection provided by this section by the following actions:

(1) delivering the recording to Taylor's attorney, McElfresh, with a note confirming that it revealed Taylor "telling me that VanParks was innocent and the meth was hers," with no limitation on its use and without disputing its authenticity and accuracy; and

(2) providing a transcript of the tape to his expert witness in this disciplinary proceeding, who relied on it, in part, to render his opinion that the encounter did not rise to the level of an ethical violation. (*Frio v. Superior Court* (1980) 203 Cal.App.3d 1480, 1493, fn. 5 [by "seeking to introduce evidence obtained as a result of a violation of section 632, the tape recorded party thereby waives its protection"]; Evid. Code, § 801, subd. (b) [expert opinion admitted only if based on matter "that reasonably may be relied upon by an expert in forming an opinion"].)

Additionally, the tape and transcript are admissible to impeach Alexander's testimony that "[a]t no time did I try to elicit any incriminating or [sic] evidence from that girl." The recording evidences that he did just that, even after he knew Taylor was represented by counsel. "[T]he party asserting [the evidentiary sanction of Penal Code section 632] should not be

permitted to use it as a shield for perjury. The repugnance of an opportunity for a witness who was recorded to lie in this situation is akin to the circumstance of a criminal defendant who testifies at variance with an earlier statement ruled inadmissible because of a violation of *Miranda*.” (*Frio v. Superior Court, supra*, 203 Cal.App.3d at p. 1497; *People v. Crow* (1994) 28 Cal.App.4th 440, 452 [evidence in violation of Pen. Code, § 632 can be used to impeach inconsistent testimony].)

Alexander’s other challenges to the admissibility of the recording and transcript based on their authenticity and accuracy are similarly without merit since he admitted in his answer to the NDC that the recording “is the best evidence” of his conversation with Taylor.¹⁰ We conclude the hearing judge properly admitted the recording and the transcript of the ex parte meeting.

2. Alexander Violated Rule 2-100(A) [communication with a represented party]

Rule 2-100(A) provides that an attorney who is representing a client “shall not communicate directly or indirectly about the subject of the representation with a party the [attorney] knows to be represented by another lawyer in the matter, unless the [attorney] has the consent of the other lawyer.” The hearing judge found that Alexander violated rule 2-100(A) on July 8th by speaking to Taylor at an ex parte meeting “about her pending criminal matter without consent of her defense attorney when he knew she was represented by McElfresh.” We agree. (*In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 673-675 [rule 2-100 violated where criminal defendant initiated contact with attorney about coordinating plea bargain, and attorney continued communication with defendant knowing defendant was represented by counsel who did not authorize communication].)

¹⁰ Alexander authorized a Del Norte County superior court reporter to prepare the transcript of the recorded conversation. He provided this transcript to the State Bar during discovery and also to his expert witness, who relied on it while testifying at trial.

The record contains clear and convincing evidence of Alexander's misconduct, including his own testimony based on his independent recollection of the communication. (*Frio v. Superior Court, supra*, 203 Cal.App.3d 1480, 1498 [independent recollection of participant in illegally recorded conversation not barred by Penal Code § 632].) Micks also testified about the ex parte meeting, having discussed it with Alexander at the time they listened to the tape.

In addition to this testimonial evidence, written evidence corroborates the essential facts underlying Alexander's culpability: (1) the note he wrote to McElfresh confirming he met with Taylor, who told him that "Van Parks was innocent and the meth was hers;" and (2) the declaration under penalty of perjury he provided to McElfresh admitting to the conversation with Taylor. The recording and transcript of the conversation are merely cumulative evidence, providing a contextual picture of the interaction between Taylor and Alexander.

Alexander has repeatedly asserted that Taylor waived her rights under rule 2-100 because she initiated the meeting. He is incorrect. "[I]t would be a mistake to speak in terms of a party 'waiving' her 'rights' under Rule 2-100. The rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties." (*United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1462.) Nor was Alexander's duty under rule 2-100 somehow trumped, as his expert testified, by his obligation to investigate VanParks' involvement in the crime. "[A] district attorney may not communicate with a criminal defendant he knows to be represented by counsel, even if that communication is limited to an inquiry into conduct for which the defendant has not been charged." (*People v. Sharp* (1983) 150 Cal.App.3d 13, 18.) Moreover, Alexander admitted the purpose of his communication with Taylor was not to investigate a crime.

Alexander also incorrectly argues that his communication was not "willful." In order to establish a willful breach of the Rules of Professional Conduct, it is only necessary to prove the

person acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it. (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) Alexander's actions were clearly willful.

3. Alexander Violated Section 6106 [moral turpitude]

The hearing judge found Alexander engaged in multiple acts of moral turpitude in violation of section 6106 by: (1) speaking to Taylor whom he knew was represented by counsel; (2) failing to immediately inform defense attorney McElfresh that he had spoken with Taylor until he learned that the conversation was tape-recorded; (3) failing to inform defense attorney Cater that Taylor had provided statements favorable to VanParks; (4) falsely declaring under penalty of perjury that he "immediately" brought his prior meeting with Taylor to defense attorney McElfresh's attention when in fact he did not tell him until more than a month later and only after discovering that there was a tape of the conversation; (5) failing to disclose to the court the exculpatory evidence favorable to VanParks at the July 19 preliminary hearing; and (6) denying his conversation with Taylor to Assistant District Attorney Micks. We agree. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124 [intentionally making false statements involves moral turpitude]; *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [concealment of material fact misleads as effectively as false statement].)

4. Violation of Rule 5-220 [suppressing evidence]

Rule 5-220 provides that an attorney "shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce." Since Taylor's confession impeached her prior statements and exonerated VanParks, Alexander had a legal duty to disclose it for use at the preliminary hearing scheduled for July 19, 2011. (*Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, 1087 [when prosecution possesses exculpatory or impeachment evidence which could reasonably alter court's probable cause determination regarding any

charge or allegation, defendant’s right to due process requires prosecution to disclose such evidence].) However, the facts underlying the rule 5-220 violation are duplicative of those establishing his culpability under section 6106. We therefore do not give additional weight to our discipline analysis based on this rule violation. (See *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 182, fn. 11 [failure to timely disclose defendant’s statement evidenced violation of rule 5-220 but was dismissed as duplicative].)¹¹

IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.¹² Alexander has the same burden to prove mitigation. (Std. 1.6.) The hearing judge found in aggravation that Alexander has an extensive prior disciplinary record, committed multiple acts of misconduct, harmed the administration of justice, and lacked remorse. The judge also found that Alexander had strong character evidence and established extensive community service as compelling mitigating factors. We adopt these findings, as modified below.

A. Four Aggravating Circumstances

1. Prior Record of Discipline (Std. 1.8(a))

Alexander has three prior records of discipline (1996, 2003, and 2011), which we consider as significant aggravation, particularly since he committed the present misconduct while still on disciplinary probation for similar wrongdoing — engaging in ex parte communication.

¹¹ The hearing judge dismissed the charge of incompetence in violation of rule 3-110(A) because the gravamen of that charge was duplicative of other violations. We agree, and adopt the dismissal with prejudice.

¹² Effective January 1, 2014, the standards were revised and renumbered. Since this matter was submitted for ruling in 2014, the new standards apply. However, they do not conflict with the former standards applicable to this case. All further references to standards are to the new versions and to this source.

Alexander argues his priors should not be given great weight because they were remote in time. We do not agree. Standard 1.8(b) makes no distinction between remote and recent prior disciplines. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 607 [attorney's initial discipline in 1962 not remote from additional disciplines, with final discipline in 1988].)

Alexander I (March 1996 – private reproof)

In June 1994, Alexander entered into an the Agreement in Lieu of Discipline (ALD) as a result of a 1991 misdemeanor conviction for driving without a driver's license and a 1992 misdemeanor conviction for driving with a suspended license. Subsequently, the State Bar Court privately reproofed Alexander in March 1996 for failing to comply with the conditions of his ALD, including failure to timely complete the professional responsibility examination, submit several quarterly reports, and provide a statement of compliance with his criminal probation. There were no aggravating factors, and his absence of a prior record, demonstrated good character, and pro bono work were considered as mitigation.

Alexander II (November 2003 – six-month suspension)

Due to his non-appearance, Alexander's default was taken in this consolidated proceeding. In the first matter, the hearing judge found he was culpable of failing to return a \$4,500 unearned fee in 2002, cooperate with OCTC's investigation, or maintain his current phone number. In the second matter, Alexander engaged in the unauthorized practice of law (UPL) in 2002 when he made a court appearance on behalf of two criminal defendants while on administrative suspension for nonpayment of Bar dues. He also did not inform the court or opposing counsel of his suspension and accordingly, the hearing judge found he committed an act involving moral turpitude. His prior discipline, multiple acts of misconduct, harm to a client and the administration of justice, and indifference were considered as aggravation. There were no mitigating factors. The Supreme Court ordered that Alexander be actually suspended for six

months to continue until he made restitution and the State Bar Court granted his motion to terminate his actual suspension.

Alexander III (April 2011 – 60-day suspension)

This consolidated disciplinary proceeding involved four separate matters. In the first case, Alexander stipulated that he engaged in UPL between September 2002 and January 2003, as well as failed to perform with competence, communicate with a client, return the client's file, and refund unearned fees. In the second matter, Alexander again engaged in UPL in February 2003. In the third case, Alexander participated in an improper ex parte communication with a judge in June 2003, and in the fourth matter, he failed to adequately communicate with a client in January 2006.

Alexander's misconduct was aggravated by his prior disciplinary record, multiple acts of misconduct, client harm, and his untimely filing of a California Rules of Court, rule 9.20 affidavit. In mitigation, Alexander cooperated with OCTC, paid restitution, and suffered from emotional, physical, and financial problems. He also received mitigation for his participation in the State Bar Lawyer Assistance Program (LAP) to assist him with his substance abuse issues. He successfully completed the State Bar Court's Alternative Discipline Program. In April 2011, the Supreme Court ordered that Alexander be suspended from the practice of law for two years, stayed, and placed on probation for three years on the condition that he be actually suspended for 60 days.

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

Alexander's numerous acts of moral turpitude, combined with his rule violation, establish multiple acts of misconduct. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered aggravating as multiple acts of misconduct].)

3. Harm to Administration of Justice (Std. 1.5(f))

The record establishes that Alexander's conduct in the Taylor case interfered with the proper administration of justice and burdened the State Attorney General's office, which had to assume responsibility for prosecuting Taylor. Furthermore, Alexander's misconduct constituted an abuse of his prosecutorial power that tarnished the reputation of the District Attorney's Office, thus undermining the public's trust in the fair administration of justice. (*In the Matter of Field, supra*, 5 Cal. State Bar Ct. Rptr. 171, 184 [attorney's misconduct harmed administration of justice by causing unnecessary litigation, compromising criminal cases, and negatively impacting public trust in judicial system].) We assign significant weight to this aggravating factor.¹³

4. Indifference (Std. 1.5(g))

Alexander has shown no insight into the seriousness of his wrongdoing and instead views his misconduct as a "momentary error of judgment." He is wrong. Our Supreme Court has long regarded rule 2-100 as a bedrock of the fair administration of justice. "This rule [the predecessor to rule 2-100] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice and was designed to prevent acts such as those engaged in here by petitioner. It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided." (*Mitton v. State Bar* (1969) 71 Cal.2d 525, 534.) Alexander consciously ignored these fundamental protections to the attorney-client relationship provided by rule 2-100.

Alexander also dismisses his overt lie to his subordinate, Micks, as conduct that "cannot remotely reach the levels of wrong doing that meet the requirements of moral turpitude." And he

¹³ The hearing judge found harm to the administration of justice based on Alexander's failure to disclose his conflicts of interest in the Sanford and Mavris cases. We do not consider these acts as aggravating since those matters have been dismissed with prejudice.

continues to assert he had McElfresh's ongoing authorization to speak with Taylor despite clear and convincing evidence to the contrary. Lastly, Alexander contends his political enemies are responsible for repeatedly filing spurious complaints about him with the State Bar, and repeatedly argues that his conduct did not harm Taylor or VanParks. His indifference to his own wrongdoing is a compelling factor in aggravation. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [when attorney fails to accept responsibility for her actions but instead seeks to shift responsibility to others, such conduct demonstrates indifference and lack of remorse].)

B. Two Mitigating Circumstances

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

We agree with the hearing judge that Alexander presented an extensive cadre of impressive character witnesses. Over 30 people testified on his behalf, and more than 180 people signed statements attesting to his integrity and good character and expressing their hope that he will be able to continue his service as their district attorney. These declarants included the Humboldt County District Attorney, the Pelican Bay Prison warden, and the Superintendent of the Del Norte County Unified School District. Among the witnesses who testified were a Court of Appeal justice, two trial judges, Crescent City officials (mayor, city attorney, and police chief), a former member of the State Assembly, a member of the California Coastal Commission, two former members of the County Board of Supervisors, the District Attorney for Imperial County, the deputy chief for the California Bureau of Automotive Repairs, two defense attorneys, a Court of Appeal staff attorney, law enforcement personnel, business owners, teachers, counselors, and a surgeon. These witnesses reviewed the NDC, and uniformly described Alexander as ethical and honest.

The majority of these witnesses echoed the testimony of the mayor of Crescent City who pronounced Alexander an incredible role model for the community who is generous to a fault. A superior court judge described him as the first elected county official to make a point of treating the Yurok tribe with respect. Attorneys defined Alexander as someone with great judgment in determining whether or not someone deserved a break, and asserted that the profession needs more lawyers with Alexander's level of compassion. Other witnesses stated that Alexander was instrumental in making positive changes in Del Norte County and in stemming the spread of the methamphetamine epidemic. For these reasons, many witnesses believe Alexander's work as District Attorney has been an indispensable community asset and that it would be a terrible loss if he were unable to practice law. Many testified that they would not be willing to put their reputations on the line to vouch for someone unless they had Alexander's level of integrity. We afford very significant mitigating weight to Alexander's extraordinary showing of good character. (See *In the Matter of Field, supra*, 5 Cal. State Bar Ct. Rptr. at p. 185 [attorney presented extraordinary demonstration of good character with testimony of 36 witnesses consisting of judges, attorneys, public officials, law enforcement personnel, community leaders, crime victims, and friends].)

2. Community Service

Alexander and several character witnesses attested to his extensive community involvement, including his service on the Boards of the Marine Mammal Center and the Jordan Recovery Center. He volunteers with the Democratic Central Committee, and has participated in the Relay for Life fundraising event.

Alexander has also dedicated himself to programs that focus on at-risk youth by sponsoring Little League, soccer, and softball teams, and by creating the first 12-step program in Del Norte County for juveniles. He started a 12-step recovery program for adult males and has

frequently paid for rooms at local motels for recovering addicts. We conclude that Alexander established extensive community service in mitigation. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service is mitigating factor].)

V. DISBARMENT IS WARRANTED

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to maintain high standards for attorneys, and to preserve public confidence in the profession. (Std. 1.1.) There is no fixed formula to determine the appropriate discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) In order “[t]o impose discipline consistent with the goal of protecting the public, we ‘balance all relevant factors including [aggravating and] mitigating circumstances on a case-to-case basis.’ [Citation.]” (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 618.) We begin our discipline analysis with the standards.

Although several standards apply to Alexander’s misconduct,¹⁴ we consider standard 1.8(b) most apt due to his extensive record of prior discipline involving actual suspensions. Under this standard, disbarment is the presumptive discipline unless the most compelling mitigating circumstances clearly predominate. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [under prior standard for recidivism, disbarment imposed where no compelling mitigation found].) Alexander’s good character and community service, although compelling, do not clearly predominate over his serious misconduct and multiple aggravating factors, including his extensive prior record of discipline.

Alexander has been involved with the disciplinary system since 1994, yet he continues to commit misconduct, even while on probation and while serving as the chief law enforcement

¹⁴ These standards include 2.7, which states disbarment or actual suspension is appropriate for an act of moral turpitude and 2.15, which provides for reproof or suspension up to three years for rules violations not otherwise specified in the standards.

officer for Del Norte County. Recognizing the important and unique role that prosecutors play in the fair administration of justice, OCTC urges disbarment, arguing that Alexander represents an unmitigated danger to the public, that he does not believe that the rules of ethics apply to him, and he assumes that anyone who objects to his misconduct is motivated by malice and is in league with his adversaries. In support of its recommended level of discipline, OCTC cites, among other cases, *In the Matter of Field, supra*, 5 Cal. State Bar Ct. Rptr. 171 (four years' actual suspension for prosecutorial misconduct in four criminal matters over a ten-year period); and *Price v. State Bar* (1982) 30 Cal.3d 537 (two years' actual suspension for altering evidence at murder trial in order to obtain conviction).

In *Price*, a prosecutor altered evidence in a criminal trial and attempted to evade discovery by discussing the alteration with the judge in the absence of opposing counsel and by communicating to the defendant — after conviction but before sentencing — an offer to seek favorable sentencing in exchange for defendant's agreement not to appeal the conviction. The Supreme Court found that the mitigating evidence militated against disbarment because the attorney had no prior record of discipline in 11 years of practice, had been under mental and emotional stress, was cooperative and remorseful throughout the proceedings, and presented witnesses who testified to his good reputation as a lawyer and his active involvement in civic affairs. The attorney was suspended for five years, stayed, placed on probation for five years, and actually suspended for two years.

In *Field*, an overzealous deputy district attorney abused his prosecutorial power, concealed evidence, and violated the constitutional rights of defendants in favor of winning cases. Because of his compelling mitigation, including no prior record of discipline, Field was actually suspended for four years with five years' probation and five years' stayed suspension.

While Alexander's misconduct was not as egregious or extensive as in *Price* and *Field*, the attorneys in those cases had no prior disciplinary records and were remorseful for their misconduct. Such is not the case here. To the contrary, Alexander's three prior records of discipline and his denial of any wrongdoing weigh heavily in favor of disbarment. For nearly two decades, Alexander repeatedly failed to conform his behavior to the ethical standards demanded of all attorneys. Moreover, he compromised his position of public trust. "[B]ecause the prosecutor enjoys such broad discretion . . . the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266-267, superseded by statute on other grounds; *Stark v. Supreme Court* (2011) 52 Cal.4th 368, 416.) The Supreme Court has instructed that prosecutors are held to a heightened standard of professional conduct "to assure that the power committed to [their] care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

Since Alexander committed the present misconduct just months after being placed on disciplinary probation, we conclude that further probation and suspension are inadequate to prevent future misconduct. Disbarment is both necessary and appropriate, as provided under standard 1.8(b) and the relevant decisional law, to protect the public, the courts, and the legal profession. (See *Barnum v. State Bar, supra*, 52 Cal.3d at p. 113 [disbarment imposed where attorney had three priors and no compelling mitigation]; *Arden v. State Bar* (1987) 43 Cal.3d 713, 728 [disbarment imposed on attorney with three priors that indicated unwillingness to conform conduct to ethical strictures]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [disbarment imposed where attorney posed risk of future misconduct due to indifference and lack of candor]; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80

[disbarment recommended where attorney had two priors and was unable to conform conduct to ethical norms].)

VI. RECOMMENDATION

We recommend that Jon Michael Alexander be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he must comply with rule 9.20 of the California Rules of Court and 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 matter

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

VII. ORDER

The order that Jon Michael Alexander be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective April 7, 2013, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.