PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

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STATE BAR COURT
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STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 13-O-16289
	)	
MICHAEL ANTHONY LOTTA,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 94301.	)	
	)	

This is Michael Anthony Lotta's fourth discipline proceeding. The current matter arises from his representation of an unsophisticated client, Jeanice Smiley, in her lawsuit against her former employer for wrongful termination, employment discrimination, and retaliation. A hearing judge found that Lotta failed to perform competently and to keep Smiley reasonably informed about significant developments in her case. The judge also found four factors in aggravation (prior record of discipline, multiple acts, lack of insight, and significant harm) and two in minimal mitigation (cooperation and good character). The hearing judge recommended discipline that included a two-year actual suspension to continue until Lotta provides proof of his rehabilitation and fitness to practice law.

Both Lotta and the Office of the Chief Trial Counsel of the State Bar (OCTC) appeal. Lotta requests dismissal on grounds that he is not culpable, asserting his professional conduct was justified due to the weakness of Smiley's case. He argues that no additional discipline is warranted, even if we find him culpable as charged, since his most recent prior case was commenced after the misconduct underlying the current matter. He further argues that the 90-day suspension imposed in his most recent discipline proceeding should suffice for his misconduct in both cases. OCTC requests that we find additional culpability, more aggravation,

and less mitigation. It asks that we disbar Lotta, citing to standard 1.8(b),[1] which, in pertinent part, proposes disbarment as the appropriate discipline for respondents with two or more prior records of discipline unless the most compelling mitigation clearly predominates.

We have reviewed the record independently (Cal. Rules of Court, rule 9.12), and find clear and convincing evidence[2] establishing that Lotta failed to act competently and to keep his client informed of important developments in her case. From the very outset of his retention by Smiley, Lotta believed her case was weak. His doubts were confirmed after she was deposed by her former employer, Rite Aid, yet he neither withdrew nor took affirmative steps to protect her interests. Instead, Lotta pursued an unauthorized strategy of inaction, intentionally failing to respond to Rite Aid's discovery requests or to oppose its motions to compel, for summary judgment, and for terminating sanctions. Ostensibly, his objective was to avoid revealing to Rite Aid the weakness of Smiley's case.

Lotta did not effectively communicate his dire assessment of the case or his plan of inaction to Smiley, who continued to believe that her claims had merit and that he would pursue them. Not surprisingly, Lotta's strategy led to the dismissal of Smiley's case and the imposition of sanctions and costs against her. This outcome understandably dismayed and bewildered Smiley, who in her plainspoken testimony below, asked the very questions that are central to this matter: "So, if you ain't got a case, then why did he take the case and send you through all this here . . . ? Why you accept the case? I would have went to another attorney to get me an attorney . . . ."

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[1] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The standards were revised and renumbered effective July 1, 2015. Because the requests for review were submitted for ruling after that date, we apply the revised version of the standards, and all further references to standards are to this source.

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

In assessing the proper discipline for Lotta's misconduct, we consider two of his three prior discipline records, and find that standard 1.8(b) applies. Because his mitigation is not compelling and does not clearly predominate over his misconduct, we recommend that Lotta be disbarred, particularly in light of his lack of insight into the nature and seriousness of his present and prior misconduct, which has resulted in harm in at least 11 client matters.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

Lotta was admitted to the practice of law in California on December 16, 1980.

In March 2011, Lotta met with Smiley about her discrimination claims against Rite Aid. From their first meeting, he did not believe she had a strong claim. Nevertheless, on May 28, 2011, Lotta submitted a Complaint of Discrimination Under the Provisions of the California Fair Employment and Housing Act, alleging, inter alia, age and race discrimination and retaliation for engaging in protected and union activities, and seeking a right-to-sue notice. The Department of Fair Employment and Housing sent Lotta a copy of Smiley's Notice of Case Closure, which constituted her right-to-sue notice, allowing her to pursue her lawsuit against Rite Aid.

On August 27, 2011, Smiley entered into a written contingent fee retainer agreement with Lotta. Still believing her case was "very weak," Lotta filed a lawsuit against Rite Aid in June 2012 on behalf of Smiley and Kelvin Coleman, another former Rite Aid employee. Rite Aid demurred, and Lotta filed first and second amended complaints. On November 19, 2012, Rite Aid answered the second amended complaint and served written discovery requests on Lotta. Two days later, Lotta's office sent the requests to Smiley and asked her to "***completely*** answer" them and return the answers within ten days. (Emphasis in original.) Smiley prepared 30 pages of handwritten responses, which she sent to Lotta on December 12, 2012. Thereafter, at the

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[3] We base the factual background on the parties' Stipulation as to Undisputed Facts and Admission of Documents, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

request of Lotta's office, Smiley met with Lotta to explain her responses. Not satisfied with the information she had given him, Lotta requested, and Rite Aid granted, three extensions, extending the deadline to respond to the discovery requests to January 28, 2013.

In the interim, Lotta's office sent three letters to Smiley, apprising her of the scheduling of the trial and her deposition. None of these letters mentioned that her responses were inadequate or that they were due by January 28, 2013. On February 1, 2013, Lotta's office sent Smiley another letter enclosing "Verification forms" for her to complete and return. The letter stated that "[t]he purpose of the verification is for our office records and to show the opposing counsel that you have answered the discovery requests that we have mailed to you." The letter did not disclose that the deadline for discovery responses had already passed. Smiley completed the verifications and returned them to Lotta with the understanding that he would serve the responses on Rite Aid.

Lotta's office prepared draft responses based on Smiley's handwritten answers to the discovery requests, but never served them on Rite Aid because Lotta continued to believe that her responses were insufficient to support her claims. Rather than reveal the weakness of Smiley's case to Rite Aid, he decided that he would not provide the responses. Lotta testified that he advised Smiley of this decision; Smiley testified that she was unaware that he had not responded to the discovery requests. The hearing judge found that Lotta did not discuss his decision with Smiley.

On February 6, 2013, Rite Aid sent Lotta a letter informing him that all objections to the discovery requests had been waived as a result of Smiley's failure to timely respond. It also requested the discovery responses by February 11, 2013 if Lotta wanted to avoid a motion to compel and for sanctions. Again, Lotta neither responded to Rite Aid nor notified Smiley of the new deadline. On February 19, 2013, Rite Aid filed a motion to compel, which Lotta did not

oppose. He testified that he discussed the motion with Smiley, but did not do so in writing. The hearing judge found that Lotta did not advise his client of the motion to compel or of his decision not to respond to it.

In the meantime, Rite Aid took Smiley's deposition on March 20, 2013. During and after her deposition, Lotta berated Smiley about her testimony, which confirmed his previous opinion that her allegations had no factual basis.[4] Lotta testified that he knew after her deposition that "she had lost her case. The case was over. There was no case, absolutely." However, he did not communicate his assessment to Smiley, nor did he seek to withdraw from the case or advise her to find new counsel.

At the March 21, 2013 hearing on Rite Aid's uncontested motion to compel, an appearance attorney sent by Lotta informed the superior court that the tardy responses were due to a lack of client cooperation. The court ordered Smiley and co-plaintiff Coleman to serve verified, complete responses by April 10, 2013, and imposed $250 in sanctions against each of them, but not against Lotta. Lotta then wrote to Smiley, notifying her "that the Court order [sic] you to pay the sum of $250.00 to the defendant or it's [sic] attorneys Hodel Briggs Winter, LLP. [¶] We need the same in seven (7) days." However, he did not mention the reason for the sanctions or that the court had ordered her to provide discovery responses to Rite Aid by April 10, 2013.

After Smiley received the letter, she called Lotta to ask why she had to pay the $250. He explained that the sanctions resulted from her failure to provide timely responses to the discovery requests. Again, he failed to tell her that her verified discovery answers were due by April 10,

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[4] Smiley testified that, during breaks in the deposition, "[Lotta] would say, like, cursing, 'You're F-ing up, and, you know, you're this and you're that . . . ." She also stated that "[Lotta] would take me out, start yelling at me and cursing, and I'm like, 'What am I doing wrong? You told me to answer yes or no, and that's what I'm doing, answering yes or no.'"

2013. When Smiley asked Lotta to pay the $250, he refused, declaring that he could not invest any more money in her case.

Rite Aid filed a summary judgment motion on May 9, 2013. Lotta sent the motion to Smiley, seeking information from her to respond to Rite Aid's supporting statement of undisputed facts. Smiley provided Lotta with over 20 pages of handwritten responses, indicating which facts she disputed and her reasons for doing so. Smiley still believed Rite Aid had discriminated and retaliated against her and wanted to pursue the matter. However, after reviewing Smiley's responses, Lotta concluded that she simply could not provide additional support for her claims, and therefore he decided not to oppose the summary judgment motion. Instead, he allowed the motion to proceed unopposed, hoping that his strategy of inaction would allow him an opportunity to settle the case before its weakness was revealed.

After mediation on May 24, 2013, Lotta obtained a $10,000 settlement offer from Rite Aid.[5] Although he recommended that Smiley accept it, she elected not to do so, believing that her case was worth more. At that time, she was unaware that she was in violation of the March 21, 2013 court order requiring her verified answers by April 10, 2013. Having received no response to its discovery requests, on June 6, 2013, Rite Aid filed a motion for (1) terminating sanctions or, in the alternative, issue and evidentiary sanctions, and (2) monetary sanctions against Smiley. Rite Aid sought, inter alia, an order dismissing Smiley's case with prejudice and monetary sanctions of not less than $1,350.

Lotta again elected not to oppose Rite Aid's motion. He testified that "it really didn't matter" at that point because he believed he could not defeat Rite Aid's summary judgment motion. The hearing judge found that Lotta did not consult Smiley in making this decision, nor did he inform her of the pendency of the motion for terminating sanctions.

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[5] As the hearing judge noted, it is unclear whether the $10,000 settlement offer was for both Smiley and Coleman or only Smiley.

On July 2, 2013, the superior court granted both Rite Aid's summary judgment motion and its motion for terminating sanctions. The court later entered judgment in favor of Rite Aid, and awarded it costs. On July 23, 2013, Rite Aid filed a memorandum of costs seeking $3,254.25 against Smiley.[6] Faced with imposition of these costs against Smiley, Lotta testified that he obtained her consent to seek a waiver by Rite Aid of its right to costs and fees in exchange for a release of all claims by Smiley. On August 1, 2013, Lotta sent Smiley a letter enclosing a proposed Confidential Settlement Agreement and General Release, but she did not sign the agreement. Instead, she retained new counsel to review her lawsuit against Rite Aid, including Lotta's handling of the case. Smiley subsequently filed a complaint with the State Bar and a malpractice lawsuit against Lotta.

On August 21, 2014, OCTC initiated this proceeding by filing a Notice of Disciplinary Charges (NDC), specifying two counts of misconduct: (1) failure to perform with competence, in violation of rule 3-110(A) of the Rules of Professional Conduct;[7] and (2) failure to inform a client of significant developments, in violation of Business and Professions Code section 6068, subdivision (m).[8] On December 4, 2014, when the trial below commenced, the parties filed a partial stipulation of facts and admission of documents. During trial, Lotta and Smiley both testified, as did one character witness presented by Lotta. On February 17, 2015, the Hearing Department issued its decision.

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[6] In its decision, the Hearing Department incorrectly identified the amount of costs as $3,270.63.

[7] All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

[8] All further references to sections are to the Business and Professions Code unless otherwise noted.

II. LOTTA IS CULPABLE OF TWO COUNTS OF MISCONDUCT

A. Count One: Rule 3-110(A) [Failure to Perform with Competence][9]

OCTC charged Lotta with intentionally, recklessly, or repeatedly failing to perform with competence. Specifically, it alleged that Lotta failed to respond to Rite Aid's discovery requests and motion to compel and to oppose its summary judgment motion and motion for terminating sanctions.

The hearing judge correctly found that Lotta violated rule 3-110(A) by failing to respond to discovery requests. The judge also correctly found that Lotta failed to take any steps to try to reduce the sanctions imposed against his clients or to request that they be assessed more appropriately against himself. However, the hearing judge did not find Lotta culpable of incompetence for failing to oppose Rite Aid's motion to compel or summary judgment motion because Lotta did not have reasonable grounds to oppose those motions. We disagree with this analysis, and find Lotta culpable as charged.

The merits of Rite Aid's motions did not justify Lotta's failed strategy since inaction was not an option. We addressed this very issue in *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 490. There, an attorney accepted representation of a client for an employment discrimination claim. After meeting with the client and reviewing the facts, he did not believe his client had a strong case and concluded that more evidence was needed to prosecute the matter successfully. The client credibly testified that the attorney never told her that she would not prevail with her claim in the absence of additional evidence. Other than preparing a draft claim, the attorney took no action on behalf of his client for 15 months. We concluded that the attorney's inaction violated rule 3-110(A) because in representing his client, "[the attorney] had a choice: proceed diligently in advancing her legitimate claims or give his

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[9] Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

best advice to his client that she had no meritorious claims promptly after so concluding, withdrawing if necessary, on proper notice, if the client insisted on pursuing her claim. [Citation.] He could not simply let excessive time pass, lead his client to believe he would advance her claim and neither do so nor take appropriate action to withdraw so that she might consult other counsel." (*In the Matter of Rodriguez, supra,* 2 Cal. State Bar Ct. Rptr. at p. 490.)

Having agreed to represent Smiley, Lotta failed to satisfy his most basic duty of protecting her interests. Instead, Lotta's inaction resulted in the preclusion of Smiley's evidentiary objections to discovery, the imposition of sanctions and costs against her, but not against himself, and, ultimately, dismissal of her case. It was not Lotta's role to act as judge and jury. "If [counsel] doubted either his client's credibility or the legitimacy of her claim, he should have questioned her closely and, if his doubts persisted, withdrawn from employment. [Citation.]" (*Davis v. State Bar* (1983) 33 Cal.3d 231, 238.) Clearly, he had an "obligation to take timely, substantive action on the client's behalf," and failure to do so violated rule 3-110(A). (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554, citations omitted.)

B. Count Two: Section 6068, Subdivision (m) [Failure to Inform Client of Significant Developments]

We adopt the hearing judge's findings that Lotta is culpable as charged of willfully violating section 6068, subdivision (m)[10] by failing to keep Smiley reasonably informed regarding the following significant developments: (1) that Rite Aid filed a motion to compel on

[10] Section 6068, subdivision (m), provides that it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

February 19, 2013; (2) that the superior court granted Rite Aid's motion to compel on March 21, 2013; and (3) that Rite Aid filed a motion for terminating sanctions on June 6, 2013.[11]

Lotta argues that the hearing judge's findings are erroneous and Count Two should be dismissed. He contends that he informed Smiley of every significant development, and discussed every problem and each of his strategic decisions with her. Lotta also asserts that Smiley was not credible and that her testimony as to whether she was informed of critical developments was false.

However, the hearing judge, who saw and heard Lotta's and Smiley's testimony firsthand, found in favor of Smiley regarding several issues. We give great weight to the hearing judge's resolution of contradictory testimony. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [he or she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"]; Rules Proc. of State Bar, rule 5.155(A).) This principle is particularly applicable here as there is no evidence demonstrating that Lotta notified Smiley in writing of the significant developments in question. (*Gilardi v. State Bar* (1987) 43 Cal.3d 683, 690.) To the contrary, his letters obfuscated important information necessary for her to fully understand the merits of her claims and the status of her case. In this case, "the documentary evidence does not support [Lotta's] version of the facts" (*ibid.*), since his written communications to Smiley did not apprise her of significant developments.

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[11] OCTC also charged Lotta with failing to inform Smiley that Rite Aid filed a motion for summary judgment on May 9, 2013. However, the hearing judge "[did] not find culpability on this allegation, as [Lotta] sent a copy of the motion for summary judgment to Smiley." OCTC does not challenge this finding, and we affirm it as it is also established by Lotta's memorandum to his file.

C. Uncharged Misconduct

On review, OCTC requests that we find additional culpability because Lotta intentionally disobeyed the court's March 21, 2013 order requiring Smiley to serve her verified answers to Rite Aid's discovery requests by April 10, 2013. OCTC argues that his disobedience is a separate failure to perform with competence. In response, Lotta counters that this was neither alleged in the NDC nor argued at trial. We agree with Lotta that this specific misconduct was not charged in the NDC, and, in any event, the facts underlying OCTC's theory of additional misconduct are duplicative of those that form the basis of our culpability findings in Count One for his failure to perform competently. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76-77 [where same misconduct forms basis for two violations, it is inappropriate to discipline respondent for both].)

III. SIGNIFICANT AGGRAVATION OUTWEIGHS MITIGATION[12]

The hearing judge found four factors in aggravation and two in mitigation. We agree, but adjust the weight of certain factors.

A. Aggravation

1. Prior Record of Discipline (Std. 1.5(a))

The hearing judge correctly found that Lotta's prior record of discipline constitutes "a very significant aggravating factor" under standard 1.5(a).

Lotta I.[13] On November 4, 2004, the Supreme Court ordered, inter alia, that Lotta be actually suspended for 60 days and placed on probation for three years. Lotta stipulated to 21 counts of misconduct in at least six client matters, including five counts of failing to perform

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

[13] Supreme Court case no. S127210; State Bar Court case nos. 00-O-15609, 01-O-01548, 01-O-02429, 01-O-04604, 02-O-11288, 02-O-11896, 02-O-12569, 02-O-14384, 02-O-14676.

with competence, as well as numerous additional counts involving failing to: promptly release clients' files; keep clients reasonably informed of significant developments; promptly pay client funds; respond to client inquiries; render accounts of client funds; communicate a settlement offer; deposit client funds in a trust account; and notify a client of the receipt of client funds. This wide-ranging misconduct occurred between April 1998 and November 2002. In aggravation, Lotta caused significant harm and committed multiple acts of misconduct. In mitigation, he had no prior record of discipline, acknowledged wrongdoing, and implemented changes in his office procedures to correct problems that contributed to the misconduct.

Lotta II.[14] On March 23, 2006, a year and a half after its initial disciplinary order, the Supreme Court ordered a six-month stayed suspension and a one-year probation as the result of Lotta stipulating to a single count of failing to promptly pay client funds. In the underlying matter, despite his client's requests, Lotta failed to take any meaningful steps to negotiate reductions with, or pay, his client's medical lienholders for approximately 21 months, even though the settlement funds were in his CTA. In addition, Lotta did not file an interpleader action for the judicial division of his client's settlement funds until after his client complained about him to the State Bar. As a result of his failures, Lotta's client received past due notices regarding one lien, and was warned that another lien was being transferred to the lienholder's legal department for collection. This misconduct occurred between November 2002 and August 2004. In aggravation, Lotta had one prior record of discipline. In mitigation, he displayed candor and cooperation with the State Bar.

Lotta III.[15] On September 4, 2014, the Supreme Court issued its third disciplinary order suspending Lotta for 90 days and until payment of restitution, and placing him on probation for an additional three years. Lotta again committed misconduct in February 2008, less than one

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[14] Supreme Court case no. S140348; State Bar Court case nos. 03-O-03162, 03-O-05037.

[15] Supreme Court case no. S219308; State Bar Court case no. 13-O-11980.

year after completing his *Lotta II* probation, by improperly entering into a business transaction with a client that was not fair and reasonable to the client. Specifically, during the course of a long-term legal representation of a friend, Lotta borrowed $10,000 from the client/friend. The loan agreement was memorialized by only a promissory note. The terms of the loan, which was unsecured, did not specify a due date for repayment. Since the terms also provided that interest was to be assessed only on any sum that was not paid when due, and no due date was designated, no interest accrued to the client. Lotta did not obtain the client's written consent to the transaction, did not inform the client about its inherent unfairness, and did not advise the client in writing that he could seek the advice of independent counsel. Lotta then failed to repay $3,500 of the $10,000 loan. In aggravation, Lotta had two prior records of discipline. In mitigation, he entered into a pretrial stipulation with OCTC, acknowledging his misconduct.

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

Lotta's misconduct involved numerous instances when he consciously chose not to perform actions necessary to preserve his client's cause and did so without advising his client. Given that "multiple acts of misconduct as aggravation are not limited to the counts pleaded [citation]" (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279), we find that Lotta's various acts of misconduct alleged in Counts One and Two constitute multiple acts that significantly aggravate this case under standard 1.5(b).

3. Significant Harm (Std. 1.5(j))

The hearing judge correctly found that Lotta caused significant harm to his client and to Rite Aid. Lotta wrongly subjected Smiley to orders requiring her to pay sanctions and costs, and

concealed the reason for the sanctions from her.[16] Moreover, his inaction foreclosed all options for his client, resulting in a dismissal of her case and depriving her of a trial.

Lotta also adopted a cavalier view of the harm his actions caused Rite Aid, exemplified by his testimony that he was not responsible for Rite Aid continuing to litigate the Smiley case, which he characterized as "[t]hey do what they do." That same attitude is reflected in his rebuttal brief where he stated that "[a]ny harm to Rite Aid is also attributable to Smiley rather than [to himself] . . . ."

4. Indifference and Lack of Insight (Std. 1.5(k))

The hearing judge found that "[Lotta] has demonstrated a persistent lack of insight." We agree, and find that this is the most significant factor in aggravation. Lotta insists that he has done nothing wrong, arguing that he had no duty under the circumstances to respond to Rite Aid's discovery requests or its various motions. He has indicated that he would continue to "generally follow" a policy of inaction and non-responsiveness to discovery in cases where he deemed his clients' information did not support their positions.

Rather than accept responsibility, Lotta repeatedly blames his client. His briefs on appeal are replete with statements such as: "*Smiley is the only one responsible* for losing her case because she never had a case to win"; "it was *Smiley's failures* to supply any evidence in support of her claims that resulted in the sanction award"; and "the fact that 'she lost her case' was *her fault entirely* . . . ." (Italics added.) Finally, and most tellingly, he asserts that "Smiley was not entitled to 'her day in court'" given the weakness of her case.

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[16] It was *Lotta's* decision not to serve the discovery responses; Smiley timely provided him with 30 pages of handwritten responses to Rite Aid's discovery requests. We note, too, that Lotta's appearance attorney misrepresented to the superior court at the hearing on Rite Aid's uncontested motion to compel that the tardy responses were due to a lack of client cooperation, rather than Lotta's conscious decision not to respond. This misrepresentation is attributable to Lotta. (See *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [attorney is responsible for work product of employees performed pursuant to his or her direction and authority].)

B. Mitigation

1. Cooperation (Std. 1.6(e))

Lotta entered into a partial stipulation only as to facts and admission of documents, which warrants modest consideration in mitigation. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [factual stipulation merits some mitigation]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for those who admit culpability].)

2. Character Evidence (Std. 1.6(f))

Standard 1.6(f) authorizes mitigating credit for "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 [attorney's] misconduct." Lotta presented good character evidence from four individuals, including an attorney, a friend, the owner of a local restaurant, and a client.[17] The hearing judge found that these individuals "demonstrated a clear understanding of the present misconduct and praised [Lotta's] integrity and abilities as an attorney." In addition, one witness described Lotta's pro bono work, to which we afford little weight as we do not have clear and convincing evidence of its nature and scope. Also notable was the testimony (via declaration) from attorney John C. Mulvana that "[Lotta] is very conscientious and is a very skilled attorney that puts his clients before himself and does what is best for them." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [character testimony from attorneys is valuable given their "strong interest in maintaining the honest administration of justice"].)

Even with these positive assessments, the hearing judge properly assigned limited mitigation to Lotta's good character evidence because the four witnesses did not constitute a broad range of references from the legal and general communities. We agree. (*In the Matter of*

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[17] Three individuals submitted declarations, while a fourth submitted a declaration and testified at trial.

Myrdall (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients did not constitute broad range of references].)

IV. DISBARMENT IS THE APPROPRIATE DISCIPLINE

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.) OCTC asserts that Lotta should be disbarred, while Lotta urges that the hearing judge's recommendation of a two-year actual suspension and until he shows rehabilitation is "grossly excessive" given the particular facts and circumstances of this case.

In considering the appropriate level of discipline, we begin with the standards as they provide us with the guidelines to determine the discipline to be recommended. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Further, we give the standards great weight to promote consistency (*ibid.*), and, accordingly, we follow them "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11).

Standard 2.7(c) provides for suspension or reproval for a failure to perform services in an individual matter, depending on the extent of the misconduct and the degree of harm to the client. However, we consider standard 1.8(b) as more relevant based on Lotta's disciplinary history and because it asks for the most severe sanction. (Std. 1.7(a) [most severe sanction must be imposed where multiple sanctions apply].) Standard 1.8(b) provides that disbarment is appropriate when a member has two or more prior records of discipline if: (1) an actual suspension was ordered in any prior disciplinary matter; or (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities, unless the misconduct underlying the prior discipline occurred during the same time period as the

current misconduct or the most compelling mitigating circumstances clearly predominate. For purposes of our discipline analysis, we find that Lotta has two prior records of discipline.[18]

OCTC correctly observed in its brief that "Lotta's prior discipline did not impress upon him the importance of his ethical duties." Indeed, he has intermittently committed misconduct over a 15-year period from 1998 through 2013, and, consequently, received a 60-day actual suspension in *Lotta I* and a minimum of a 90-day actual suspension in *Lotta III*. In addition, he was placed on probation for three years in *Lotta I* and an additional year in *Lotta II*. Less than one year after completing the latter probation, he committed the misconduct underlying *Lotta III*, resulting in three more years of probation. The record thus reflects Lotta's inability to conform to ethical responsibilities despite repeated supervised probation.

Moreover, Lotta's current misconduct is virtually identical to some of that which occurred nearly two decades ago in *Lotta I*—e.g., failing to serve discovery responses despite having received written answers from his client, failing to perform legal services competently before his client's case was dismissed, and failing to keep his client reasonably informed of significant developments. (*In the Matter of Gadda*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 443-444 [similarities between prior and current misconduct render previous discipline more serious as they indicate prior discipline did not rehabilitate].)

Of equal concern is Lotta's inability or unwillingness to recognize the serious nature and consequences of his conduct. His testimony below strongly suggests that he would continue to act in the same manner if he found himself in similar circumstances. He fails to comprehend that once he undertook to represent his client, he was duty bound to pursue her interests to the fullest extent possible regardless of the strength or weakness of her case.

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[18] We agree with Lotta's argument that since *Lotta III* was filed after the misconduct involved here, our discipline analysis should consider the instant proceeding "as part of the third prior discipline, and not as the fourth discipline." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

Lotta's limited mitigation evidence for cooperation and good character is not compelling, nor does it predominate over the significant aggravation. And we can find no justification to depart from the disbarment recommendation in standard 1.8(b). (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].)

Finally, the decisional law further guides us, particularly those cases involving similar misconduct where multiple prior disciplines have led to disbarment. (See *Kent v. State Bar* (1987) 43 Cal.3d 729 [attorney disbarred pursuant to former std. 1.7(b) for performing with incompetence accompanied by deception about status of cases and harm to six clients, with three prior disciplines, lack of appreciation of wrongdoing and no compelling mitigation]; *In the Matter of Hunter, supra,* 3 Cal. State Bar Ct. Rptr. 63 [former std. 1.7(b) relied upon for disbarment recommendation for attorney's incompetent representation of several clients in criminal matters with two priors involving misconduct over seven-year period and no mitigating circumstances to counter attorney's multiple acts of misconduct, failure to cooperate, and significant harm to client and administration of justice].)

V. RECOMMENDATION

We recommend that Michael Anthony Lotta be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We also 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.

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

VI. ORDER

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Michael Anthony Lotta is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).)

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.

CERTIFICATE OF SERVICE

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

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 3, 2016, I deposited a true copy of the following document(s):

OPINION AND ORDER FILED MAY 3, 2016

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

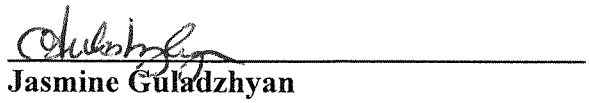
[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

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

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

BRANDON K. TADY, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 3, 2016.



Jasmine Guladzhyan
Case Administrator
State Bar Court