

Filed February 5, 2015

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of ) Case Nos. 12-O-10290 (12-O-10291); 12-O-11524  
 ) (12-O-11735; 12-O-11736; 12-O-12235; 12-O-12428);  
MARK EUGENE HUBER, ) 12-O-14409; 12-O-15611; 12-O-17770 (Cons.)  
 )  
A Member of the State Bar, No. 179183. ) OPINION  
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**I. SUMMARY**

Mark Eugene Huber moved to Utah from California in August 2011 without telling several clients who had given him payment in full for his services. His failure to inform his clients of the move had serious effects on these unsophisticated and financially vulnerable individuals. The bankruptcy cases and personal injury matters the clients had retained him for were not completed, and he stopped communicating with them. In addition, he failed to disclose a conflict of interest with respect to one client, and in another matter, he disobeyed court orders.<sup>1</sup>

The Office of the Chief Trial Counsel of the State Bar (OCTC) filed five Notices of Disciplinary Charges (NDC) and, at trial, sought disbarment. Huber requested no more than a 90-day suspension. The hearing judge found Huber culpable of 29 counts of misconduct<sup>2</sup> and serious aggravation, including a recent prior discipline involving similar misconduct.

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<sup>1</sup> With respect to one client, OCTC failed to prove the underlying charges, which were dismissed, and culpability was found only on Huber’s failure to cooperate with the State Bar. (Bus. & Prof. Code, § 6068, subd. (i) [requires all attorneys to “cooperate and participate” in any disciplinary proceeding].) All further references to section(s) are to the Business and Professions Code, and all references to rule(s) are to the State Bar Rules of Professional Conduct, unless otherwise noted.

<sup>2</sup> At trial on January 29, 2013, the hearing judge dismissed the Lewis matter (Case no. 12-O-11736) with prejudice on OCTC’s motion.

In deciding the appropriate discipline, the hearing judge considered OCTC's argument that Huber's misconduct represented a pattern warranting disbarment. In a well-reasoned decision, the judge concluded that disbarment was not appropriate because the misconduct was neither prolonged nor did it constitute a pattern. As such, the judge found that the appropriate level of discipline was three years' stayed suspension and four years of probation with conditions, including two years of actual suspension continuing until the balance of Huber's restitution was paid, and until he establishes his rehabilitation, fitness to practice, and learning in the general law.

Huber appeals. While conceding that some discipline was appropriate, he urges this court to reduce the actual suspension to 90 days. OCTC did not appeal, and submits that a multi-year suspension coupled with a requirement that respondent demonstrate rehabilitation is appropriate discipline under the facts of this case.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge's findings and discipline recommendation and adopt them, with one minor modification.<sup>3</sup>

## **II. CREDIBILITY FINDINGS**

The hearing judge found all of the complaining witnesses who testified to be credible, but found Huber not credible. The judge stated in her decision, "after reflecting on the record as a whole, the court finds that almost all of respondent's testimony on disputed fact issues lacks credibility, if not candor. In numerous instances, respondent's testimony is inconsistent with reliable documentary evidence, contrived, insincere, and implausible. [¶] In stark contrast to respondent's incredible testimony, is the very credible testimony of each of the complaining witnesses." Huber argues he testified credibly but fails to cite to any support in the record for his

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<sup>3</sup> Where the hearing judge found culpability in Count 2A in the Coates matter (Case no. 12-O-11735), we dismiss that count, finding no clear and convincing evidence.

argument. We defer to the hearing judge’s findings, since “determinations of testimonial credibility must receive great weight because the hearing judge heard and saw the witnesses and observed their demeanor. [Citations.]” (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315; see *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055 [great weight to hearing panel’s factual finding]; Rules Proc. of State Bar, rule 5.155(A) [findings of fact by hearing judge entitled to great weight].)

### III. FACTS

#### A. Lehwalder (Case no. 12-O-10290)

Between April 2009 and June 2010, Huber accepted \$1,600 from Andrew Lehwalder for the purpose of preparing and filing a Chapter 7 bankruptcy petition. Yet Huber performed no legal services for Lehwalder. He led Lehwalder to believe he had done everything necessary for the petition to go forward and that he was preparing and filing the petition. In addition, Lehwalder’s numerous calls to Huber went unreturned, and he was contacted by collection agencies. Huber failed to inform Lehwalder that no action had been taken on his behalf nor did he disclose that he had relocated to Utah in August 2011. Huber acknowledges he could have communicated better.

Huber further failed to promptly refund the fees he received. After he was notified about the State Bar complaint in February 2012, he refunded the \$1,600.

#### **Huber is culpable on all counts — one charge dismissed**

The hearing judge found that Huber failed to act competently when he did not file a Chapter 7 bankruptcy petition (rule 3-110(A)),<sup>4</sup> promptly respond to reasonable status inquiries

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<sup>4</sup> Rule 3-110(A) provides: “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” “An attorney who continues to represent a client has the obligation to take timely, substantive action on the client’s behalf.” (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554 [attorney who filed complaint but took no substantive action thereafter despite client inquiries violated rule 3-110(A)].)

by not returning Lehwalder's phone calls (§ 6068, subd. (m)),<sup>5</sup> and promptly refund the \$1,600 in unearned fees (rule 3-700(D)(2)).<sup>6</sup> The hearing judge found Lehwalder did not request his client file, resulting in insufficient evidence of a rule 3-700(D)(1)<sup>7</sup> violation. As such, the hearing judge dismissed that charged rule 3-700(D)(1) violation with prejudice.

We find that the hearing judge's factual findings are supported by clear and convincing evidence and agree with the hearing judge's conclusions as to culpability.<sup>8</sup>

**B. Ochoa (Case no. 12-O-10291)**

Between February and September of 2011, Huber accepted \$900 from Katia and Francisco Ochoa for the purpose of preparing and filing a Chapter 7 bankruptcy petition on their behalf. The Ochoas provided all paperwork requested by Huber. However, Huber performed no legal services for them. During this time period, he received three letters from the Ochoas' creditor, Wells Fargo, requesting confirmation that he was their lawyer. He did not contact Wells Fargo or tell the Ochoas about the letters. Creditors continued to harass the Ochoas. Huber also failed to return Katia Ochoa's multiple telephone calls. In August 2011, Huber moved to Utah without telling the Ochoas, effectively ending their attorney client relationship. After OCTC notified Huber in February, 2012, about the Ochoas' October 2011 State Bar complaint, he refunded the \$900.

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<sup>5</sup> Section 6068, subdivision (m), requires attorneys "[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."

<sup>6</sup> Rule 3-700(D)(2) requires attorneys to refund promptly any part of a fee paid in advance that has not been earned.

<sup>7</sup> Rule 3-700(D)(1) requires an attorney to return the client file promptly upon the client's request.

<sup>8</sup> 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.) While denying culpability, Huber has agreed to pay \$258.60 in interest.

**Huber is culpable on all counts**

We agree with the hearing judge that Huber is culpable of all of the charged misconduct involving the Ochoas. By not filing their Chapter 7 bankruptcy petition, Huber willfully failed to perform legal services with competence, in violation of rule 3-110(A). He also violated section 6068, subdivision (m), by both failing to return Katia Ochoa's telephone calls and by failing to advise the Ochoas of his move to Utah. Huber failed to promptly refund the Ochoas' fees by waiting six months after his effective termination to return the money, and thus willfully violated rule 3-700(D)(2)<sup>9</sup>

**C. Matutis (Case no. 12-O-11524)**

Huber accepted \$1,800 (payment in full) from Elvis and Lilia Matutis on April 26, 2011, to prepare and file a Chapter 7 bankruptcy petition on their behalf. The Matutises provided all the paperwork requested by Huber and attended credit counseling at Huber's office.

Huber did not tell the couple about his August 2011 move to Utah and did not respond to their numerous telephone and other inquiries between September 2011 and February 2012. Finally, the Matutises sent Huber an email on February 28, 2012, to which he did not respond until April 2012. Creditors were harassing Lilia Matutis, often leaving her derogatory messages. She testified: "He didn't even tell us that he moved to Utah, and that's why I'm so scared."

The Matutises filed a complaint with the State Bar on February 3, 2012. Huber admits he failed to respond to the inquiry letters OCTC sent him. After OCTC filed an NDC in the matter, about 16 months after his retention, Huber finally filed the Chapter 7 petition.

**Huber is culpable on three of the four counts**

Huber failed to file a Chapter 7 bankruptcy petition for the Matutises for more than 16 months after he was retained. He failed to promptly return telephone calls between September

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<sup>9</sup> While denying culpability, Huber agreed to pay \$39.21 in interest.

2011 and February 2012, and failed to promptly respond to the Matutises' February 28, 2012 email. Despite receiving inquiry letters from the State Bar, Huber failed to respond.

We agree with the hearing judge that Huber is culpable of willfully violating rule 3-110(A); section 6068, subdivision (m); and section 6068, subdivision (i).<sup>10</sup> We also agree that the alleged violation of rule 3-700(D)(2) should be dismissed with prejudice since Huber eventually filed the Matutises' Chapter 7 bankruptcy petition and therefore earned his fee.<sup>11</sup>

**D. Coates (Case no. 12-O-11735)**

Coates hired Huber to represent him in a personal injury matter, and Huber filed a complaint. After Huber relocated to Utah, he associated with Sacramento-area attorney Kevin Hall on the case. On October 21, 2011, the case was settled with Coates' consent. Defense counsel sent a release to Hall. Hall, however, did not have Coates' contact information or the client file so he forwarded the release to Huber during the fall of 2011. Coates did not appear at trial in the disciplinary matter. Hall testified at trial that he did not know why Coates did not sign the release or whether Huber attempted to have Coates sign it. Huber testified that he had trouble contacting Coates, who had a general delivery address, and that Coates was unsure whether he wanted to agree to the settlement.

Coates filed a complaint with the State Bar on February 9, 2012. The State Bar gave Hall's contact information to Coates. Coates contacted Hall, the settlement release was executed in March 2012, and Coates received his portion of the settlement in September 2012.

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<sup>10</sup> Section 6068, subdivision (i), requires an attorney to cooperate and participate in any investigation of the member by the State Bar.

<sup>11</sup> In its brief, the OCTC acknowledged that it did not request additional findings of culpability for Huber's failure to return this fee.

**Huber is culpable of one of the two counts**

OCTC has failed to prove by clear and convincing evidence that the delay in executing the settlement agreement was attributable to Huber. We disagree with the hearing judge that Huber violated rule 3-110(A) and dismiss this count with prejudice. Huber admitted he violated section 6068, subdivision (i), by failing to respond in writing to OCTC's inquiry letter. The hearing judge found that Huber's admission established his culpability, and we agree.

**E. Pietrafritta (Case no. 12-O-12235)**

In September 2010, Nikol Pietrafritta hired Huber to represent her concerning a car accident. Huber made a \$12,500 settlement demand to Farmers Insurance; it countered with an offer of \$2,513. Following advice of counsel, Ms. Pietrafritta rejected the offer. Farmers made three subsequent offers between April and July 2011, including the highest offer of \$3,200. Huber rejected those three offers without communicating them to Pietrafritta. The last time Pietrafritta spoke to Huber was around August 2011. When he advised her that she should file a lawsuit, she consented and believed he would do so on her behalf. Thereafter, Huber moved to Utah, and Pietrafritta did not speak with him again. Huber did not file a lawsuit, and Pietrafritta never received a settlement.

Around August or September 2011, while representing Pietrafritta, Huber began employment discussions with Farmers Insurance. He started working for Farmers in November 2011. He never informed Pietrafritta about the conflict, and he never withdrew from representing her. At trial, on OCTC's motion, a count alleging a violation of rule 3-310(B) was added to conform to proof.<sup>12</sup>

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<sup>12</sup> Rule 3-310(B) provides that an attorney must not accept or continue representation of a client without providing written disclosure to the client of the attorney's business, legal, professional, financial, or personal relationship with a party or witness in the same matter or with a person or entity that has an interest in the outcome of the matter.

The hearing judge found Huber culpable of failing to act with competence (rule 3-110(A)); failing to communicate the settlement offer (rule 3-510);<sup>13</sup> and failing to avoid representing adverse interests (rule 3-110(B)). She dismissed Count Four (C) for failure to communicate by not returning his client's telephone calls (§ 6068, subd. (m)). Finally, the hearing judge found Huber culpable of accepting or continuing representation of a client without providing the required written disclosure of his relationship. (Rule 3-310(B).)

**Huber is culpable on all counts — one charge dismissed**

We affirm all of the hearing judge's findings. Huber failed to act competently when he did not file the lawsuit despite his client's consent to do so. Huber also failed to communicate the settlement offers to his client. Most serious was Huber's complete disregard of his ethical responsibilities when he negotiated and then accepted employment by Farmers Insurance while representing Pietrafritta in a case seeking funds from Farmers' policy in violation of rule 3-310(B).<sup>14</sup>

We also agree with the hearing judge's dismissal of the charge for violating section 6068, subdivision (m) (failure to return Pietrafritta's telephone calls). While Huber was charged with failing to respond promptly by not returning Pietrafritta's calls, the evidence was not clear and convincing that there was a violation. As such, the alleged violation of section 6068, subdivision (m) is dismissed with prejudice.<sup>15</sup>

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<sup>13</sup> Rule 3-510 requires an attorney to promptly communicate to the client all amounts, terms, and conditions of any written offer of settlement in a civil matter.

<sup>14</sup> The hearing judge incorrectly found that Huber began working for Farmers Insurance in September 2011. While he was involved in discussions with Farmers at the time, he did not actually begin working for the company until November 2011. Nevertheless, this discrepancy does not affect Huber's culpability for violation of rule 3-310(B).

<sup>15</sup> OCTC expressly stated it did not seek additional culpability findings in the Pietrafritta matter.



**F. Scribner (Case no. 12-O-12428)**

James Scribner hired Huber to represent him in a Chapter 7 bankruptcy matter in June 2009, and paid advance fees. He subsequently filed a State Bar complaint in March 2012. Huber admits he did not respond to the April 10, 2012 inquiry letter about the complaint. Scribner did not testify in the State Bar proceeding.

**Huber is culpable of failing to cooperate with the State Bar, but the other counts are dismissed for lack of proof.**

The hearing judge dismissed three key charges for lack of evidence. OCTC “agrees with this determination” as Scribner did not testify. Since he did not, OCTC was unable to present clear and convincing evidence of Huber’s failure to act with competence (rule 3-110(A)), his failure to communicate (§ 6068, subd. (m)), or his failure to return unearned fees (rule 3-700(D)(2).) As such, these counts are dismissed with prejudice. However, Huber failed to cooperate with the State Bar when he received, but did not respond to, the inquiry letter. Therefore, we agree with the hearing judge that Huber is culpable of violating section 6068, subdivision (i).

**G. Orlando (Case no. 12-O-14409)**

Carole Orlando hired Huber in March 2009 to file a bankruptcy petition on her behalf, and paid him at least \$1,600 between March 2009 and June 2010. Huber failed to take any steps to represent Orlando in the bankruptcy. He then moved to Utah without telling her, and she lost touch with him. She did not have enough money to hire new counsel to pursue the bankruptcy. Finally, in April of 2012, she filed a State Bar complaint because “she did not know what else to do.” At that point, it appears Orlando and Huber re-established communication. The record, however, shows that no fees have been returned to Orlando nor has Huber filed a bankruptcy petition for her.

Huber received, but did not respond to State Bar inquiry letters.

**Huber is culpable on three of four counts.**

Huber did not file the bankruptcy petition for which Orlando retained him. After he abandoned Orlando by moving to Utah without proper notice, he failed to return any unearned fees. Huber also did not respond to the State Bar's inquiry letters, despite having received them. As found by the hearing judge, Huber is culpable of failure to perform with competence in violation of rule 3-110(A),<sup>16</sup> failure to refund unearned fees in violation of rule 3-700(D)(2), and failure to cooperate, in violation of section 6068, subdivision (i). We also agree with the hearing judge that the evidence was insufficient to prove Huber's failure to release Orlando's file (rule 3-700(D)(1), and therefore, we dismiss that count with prejudice.

The record is unclear as to the amount of restitution due. While Orlando proved payments of at least \$1,600 in fees, her testimony was that, as far as she knew, she had paid him the complete fee of \$2,200. However, she concedes that she does not have any documents to show payment of the additional \$800. The hearing judge found Orlando paid \$2,200 in advance fees, but expressly invited Huber to present supplemental evidence. He did not do so. Huber also failed to challenge the amount in his briefing (Rules Proc. of State Bar. rule 5.152(C) [any factual error not raised on review is waived].)<sup>17</sup> Accordingly, we find that Huber is obligated to repay \$2,200 with interest thereon until paid.

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<sup>16</sup> There was no clear and convincing evidence of Huber's failure to defend Orlando against a suit filed against her business. Therefore, our finding of culpability is based only on Huber's failure to file the bankruptcy petition.

<sup>17</sup> Huber stated in his opening brief that he wanted to update the Court regarding the Orlando matter. OCTC stated it would not oppose a motion to augment because it understood fees had been refunded. However, no motion to augment was filed.

**H. Donley (Case no. 12-O-15611)**

Michelle Donley (now Michelle Donley Bonomolo) hired Huber in June 2011 to file a bankruptcy petition on her behalf and paid him in full (\$1,195). Huber concedes he failed to take any steps to represent Donley in the bankruptcy.

Despite numerous efforts, Donley was unable to reach Huber, who moved to Utah without telling her. She hired new counsel to handle the bankruptcy. Counsel recommended that she file a State Bar complaint to obtain a fee refund. In July 2012, Donley filed a complaint.

Huber did not respond to OCTC's inquiry letters, despite having received them.

Huber claims that he repaid the principal portion of the restitution, but had not yet paid the interest. However, he presented no evidence supporting this contention.

**Huber is culpable of all counts.**

We agree with the hearing judge's culpability findings. Huber did not file Donley's bankruptcy petition for which he was retained. He abandoned her by not responding to her multiple inquiries and by failing to return his unearned fees. Finally, he failed to respond to the State Bar's inquiry letters. As such, Huber is culpable of violating rule 3-110(A) (failure to perform with competence), section 6068, subdivision (m) (failure to communicate), rule 3-700(D)(2) (failure to refund unearned fees), and section 6068, subdivision (j) (failure to cooperate with the State Bar).

**I. Lee (Case no. 12-O-17770)**

In June 2007, Michael Lee hired Huber to represent him in a personal injury matter. Huber filed a complaint on Lee's behalf in May 2009, but never informed Lee that he had done so. In January 2010, the superior court served a notice of case management conference and order to appear, requiring the parties to file a case management statement. Huber received the order and was aware of its contents but failed to file the required statement. Huber also failed to

appear at the order to show cause (OSC) hearing, which had to be rescheduled several times with a new OSC issued each time. Huber failed to obey three similar subsequent orders and also failed to pay the sanctions imposed as a result of his failure to appear and to comply with orders. He received all of these court orders to appear and the sanctions order.

An OSC regarding dismissal of the case was set for October 7, 2010. Huber received this order, but he did not appear, file the attorney compliance statement, or pay the sanctions required by the order. Throughout his representation of Lee, Huber failed to return many of Lee's telephone calls. Due to Huber's failure to comply with the court orders, Lee's case was dismissed without prejudice in October 2010.

On April 6, 2011, Huber filed a motion to set aside the dismissal, which was granted by the superior court. However, he did not take any further steps to pursue the case. Huber admits he "dropped the ball" on this matter. Huber also did not inform Lee about the dismissal or the motion to set aside.

Lee filed a State Bar complaint in November 2012. In early 2013, OCTC sent Huber two inquiry letters. He received these letters, but did not timely respond to either.

### **Huber is culpable on all counts**

We agree with the hearing judge's culpability findings on all counts. Huber failed to comply with at least four superior court orders, which resulted in a dismissal of Lee's case. He lost contact with the court, and abandoned his client by failing to return Lee's telephone calls and by failing to inform Lee that his case had been dismissed and was later reinstated. Finally, he failed to timely respond to OCTC's inquiry letters. As such, Huber is culpable of failure to perform with competence in violation of rule 3-110(A), failure to obey a court order in violation of section 6103, failure to respond to client inquiries in violation of section 6068, subdivision (m), failure to inform his client of a significant development, in violation of section 6068,

subdivision (m), and failure to cooperate with the State Bar, in violation of section 6068, subdivision (i).

#### **IV. AGGRAVATION OUTWEIGHS MITIGATION<sup>18</sup>**

##### **A. Aggravation**

###### **1. Prior Record (Std. 1.5(a))**

Huber has one record of discipline. On August 31, 2011, he stipulated to four counts of misconduct in two client matters. First, in 2007, Huber was retained in a personal injury matter and filed an action on his client's behalf. Thereafter, he failed to accomplish timely service of process, or comply with the case management program. His inaction resulted in the dismissal of the case in March 2010. (Rule 3-110(A) (failure to perform with competence).)

Second, in September 2010, Huber was retained in a bankruptcy matter and was paid \$1,400 in fees. Huber took no steps to effectuate the bankruptcy. (Rule 3-110(A).) He also failed to communicate with his client. (§ 6068, subd. (m).)

Finally, Huber failed to refund fees until after his client complained and OCTC contacted him in March 2011. (Rule 3-700(D)(2).) No aggravating circumstances were involved. He received mitigation for no priors, candor and cooperation, and because he "was suffering from a debilitating physical ailment at the time of the misconduct." For this misconduct, Huber received a private reproof.

We assign substantial weight in aggravation to Huber's prior misconduct because it strongly resembles the current misconduct. Huber accepted fees to prepare and file bankruptcy petitions, provided no legal services, failed to communicate, and then failed to refund the fees. Since Huber's present misconduct began before the stipulation in the prior discipline, we

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<sup>18</sup> The Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence (hereafter standards). Standard 1.6 requires Huber to meet the same burden to prove mitigation.

somewhat reduce the aggravating weight of his prior discipline. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619 [aggravating force of prior generally diminished if misconduct underlying it occurred during period of present misconduct].) Nevertheless, we find that Huber was clearly on notice of the ethically questionable nature of his conduct so the prior discipline still warrants substantial weight in aggravation. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564.)

## **2. Multiple Acts of Wrongdoing (Std. 1.5(b)) / Pattern (Std. 1.5(c))**

We agree with the hearing judge that Huber's misconduct involves multiple acts of wrongdoing, which is a serious aggravating circumstance. We also agree with the hearing judge that Huber's misconduct is not sufficiently prolonged to constitute a pattern. (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217 [single occurrence of abandonment not pattern even if multiple clients affected since pattern of misconduct limited to serious instances of repeated misconduct over prolonged period]; *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [only most serious instances of repeated misconduct over prolonged period of time constituted pattern]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959 [pattern must involve serious misconduct spanning an extended period of time].)

Providing guidance on the issue of pattern in this case is the analysis in *Young v. State Bar, supra*, 50 Cal.3d 1204. The Supreme Court found that the attorney in *Young* had committed misconduct involving nine clients during late 1985 through February 1986. In early 1986, *Young* moved to Florida from California and, like Huber, abandoned his clients. The State Bar argued that his abandonment of multiple clients represented a pattern justifying disbarment. The Supreme Court disagreed:

The finding that petitioner's acts demonstrated a "pattern of misconduct" is based on his actions from November 1985 through February 1986. But petitioner's move to Florida in early 1986, while resulting in the abandonment of several clients, did not evidence a 'pattern of misconduct.' *Such a finding cannot be*

*based on one occurrence of abandonment, even though its consequences affected several persons over a period of a few months.*

(*Id.* at pp. 1216-1217, italics added.) The Supreme Court ordered Young actually suspended for two years.

In the present case, the misconduct in the eight client matters occurred between mid-2009 through mid-2012.<sup>19</sup> While Huber has paid a portion of the restitution in the present matter, some amounts remain to be paid. As such, most acts of misconduct at issue occurred during an approximate three-year period. Under either the *Valinoti* or the *Brockway* analysis discussed below, we do not consider this to be an “extended period of time.”

### **3. Significant Harm (Std. 1.5(f))**

Huber’s inaction on the bankruptcy petitions caused his clients financial and emotional stress and his incompetence in the personal injury cases prevented one client from obtaining a settlement and caused another client’s case to be dismissed. We agree with the hearing judge that Huber’s actions resulted in significant harm to his clients.

### **4. Indifference (Std. 1.5(g))**

The hearing judge found significant aggravation for Huber’s indifference in failing to timely refund \$2,200 of unearned fees in the Orlando matter and \$1,195 in unearned fees in the Donley matter. We agree.

## **B. Mitigation**

### **1. Extreme Difficulties (Std. 1.6(d))**

We agree with the hearing judge that Huber is only entitled to limited mitigation for emotional, financial, and physical difficulties, including the separation from his wife, his

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<sup>19</sup> While Huber was retained in June 2007 in one client matter in his prior discipline, the record is unclear as to when the misconduct occurred prior to the judge’s dismissal of the case in March 2010.

daughter getting married at a young age, and his battles with Crohn's disease. He has failed to establish that his numerous issues no longer pose a risk, as required by the standard.

## **2. Good Character (Std. 1.6(f))**

We also agree with the hearing judge that only limited mitigation should be given for Huber's good character evidence. Four witnesses testified on Huber's behalf. These witnesses were not aware of the full extent of Huber's misconduct and did not constitute a wide range of the general and legal communities. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [character evidence entitled to limited weight since it was not from wide range of references].)

## **3. Restitution (Std. 1.6(j))**

Huber's restitution is not a mitigating circumstance. We agree with the hearing judge that Huber is not entitled to credit for his untimely, last-minute partial payment of restitution. (See *Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 708-709 [restitution under threat or force of disciplinary proceedings is not properly considered to have any mitigating effect].)

## **V. TWO YEARS' ACTUAL SUSPENSION IS APPROPRIATE**

We begin our analysis by looking to the disciplinary standards. As discussed below, we have found no pattern in Huber's misconduct, so standard 2.5(a) does not apply.<sup>20</sup> But standards 2.8(a) [disbarment or actual suspension appropriate for violation of court order] and 2.5(b) [actual suspension appropriate for failing to perform legal services or properly communicate in multiple client matters, not demonstrating a pattern of misconduct] do apply to this matter.

The hearing judge recommended discipline of two years' actual suspension, continuing until Huber fully pays restitution (including interest) to Carole Orlando and Michelle Donley,

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<sup>20</sup> Standard 2.5(a) provides "Disbarment is appropriate for failing to perform legal services with clients, demonstrating a pattern of misconduct."



and until he proves rehabilitation pursuant to standard 1.2(c)(1). OCTC does not appeal this recommendation, and we agree with the hearing judge that this is the appropriate discipline.

We have viewed the record as a whole regarding the nature and extent of the misconduct and harm in determining whether it has established a pattern or a habitual disregard by Huber of his clients' interests that justifies disbarment. Huber's misconduct in the present case involves incompetence in seven client matters, beginning in 2009 and continuing through 2012.<sup>21</sup> His prior proceeding shows he committed similar misconduct that began in 2007 — an aggravating factor. His lack of insight and his indifference, as well as the harm caused to vulnerable clients, also aggravate his misconduct.

Our recommendation for a lengthy suspension and probation is consistent with prior case law. In *In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. 498, we found the attorney culpable of misconduct in 18 counts involving nine client matters, all spanning two and one-half years. But we found that this period of time was not sufficient to constitute a "pattern," since it did not represent an "extended period of time" as required in *Levin v. State Bar, supra*, 47 Cal.3d 1140. As such, we rejected the OCTC argument for disbarment in favor of a two-year actual suspension.

Also, in *In the Matter of Brockway, supra*, 4 Cal. State Bar Ct. Rptr. 944, we found that 14 counts of misconduct in four client matters spanning approximately two years did not constitute a "pattern." We noted "[t]he State Bar argues this amounted to a pattern of client abandonment. We disagree. Only the most serious instances of repeated misconduct over a prolonged period of time have been considered as evidence of a 'pattern of misconduct.' [Citations.]" Finding no pattern, we recommended that Brockway serve a two-year suspension.

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<sup>21</sup> In two other client matters (Coates and Scribner), the found misconduct only involved failing to cooperate with the State Bar, and so is not included in the analysis of whether a pattern existed.

Finally, as the court stated in *Young v. State Bar*, *supra*, 50 Cal.3d at p. 1221:

While habitual disregard by an attorney of the interests of his clients, combined with the failure to communicate with them, may justify disbarment [citation], an examination of the decisions that have resulted in disbarment for such misconduct demonstrates more egregious acts by the attorney or a record of many prior instances of discipline . . . . [Citations.]

Huber has one prior discipline for which he received only a private reproof; he has not previously been suspended from the practice of law or been subject to probation. Guided by the analysis in the cases cited above, we do not find that Huber's misconduct and his prior discipline justify disbarment.

In making this determination, we are not persuaded by the cases Huber cited that call for significantly less discipline. They are distinguishable in that they involve fewer acts of misconduct, include different types of misconduct, and involve no priors. For example, several differences distinguish *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91. First, Riley had no priors while Huber does — an August 2011 stipulation to similar misconduct involving two client matters (a bankruptcy and a personal injury matter). Despite stipulating to that misconduct, Huber continued in this matter to engage in similar misconduct in both the personal injury and bankruptcy matters. Second, *Riley* involved breach of duties toward a *non-client*. Huber's misconduct directly harmed his financially vulnerable clients. Third, in the Lee client matter, Huber failed to obey four court orders which resulted in the dismissal of his client's case without prejudice. In the Pietrafritta matter, he accepted employment from Farmers Insurance while he was still representing his client in settlement negotiations with Farmers. This misconduct is not present in *Riley*.

In sum, while Huber's misconduct is serious, we see no reason to disregard the hearing judge's recommendation. We agree with OCTC that Huber's misconduct was sufficiently close to constituting a pattern as to justify a two-year suspension. Importantly, Huber will have to

prove his rehabilitation and fitness to practice law before he is reinstated at a formal hearing before the State Bar Court — a heavy burden given his misconduct.

## **VI. RECOMMENDATION**

For the foregoing reasons, we recommend that Mark Eugene Huber be suspended from the practice of law for three years, that execution of that suspension be stayed, and that he be placed on probation for four years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of his probation, and remain suspended until the following conditions are satisfied:
  - a. He makes restitution to Carole Orlando in the amount of \$2,200 plus 10 percent interest per annum from June 21, 2010, (or reimburses the Client Security Fund to the extent of any payment from the Fund to Carole Orlando, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles;
  - b. He makes restitution to Michelle Donley Bonomolo in the amount of \$1,195 plus 10 percent interest per annum from June 21, 2011, (or reimburses the Client Security Fund to the extent of any payment from the Fund to Michelle Donley Bonomolo, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles; and,
  - c. He provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
2. Within the first two years of probation, Huber must pay restitution to Andrew Lehwalder in the amount of \$258.60 and furnish satisfactory proof thereof to the State Bar's Office of Probation.
3. Within the first two years of probation, Huber must pay restitution to Katia and Francisco Ochoa in the amount of \$39.21 and furnish satisfactory proof thereof to the State Bar's Office of Probation.
4. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
5. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such

change in writing to the Membership Records Office and the State Bar Office of Probation.

6. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request
7. 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.
8. 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.
9. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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

## **VII. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Mark Eugene Huber be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension, 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).)

### **VIII. RULE 9.20 COMPLIANCE**

We further recommend that Mark Eugene Huber be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

### **IX. COSTS**

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

HONN, J.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.