PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **Christopher James O'Keefe,** **Member No. 165197,** A Member of the State Bar.	**Case No. 04-O-14389-JMR** **Decision**

I. INTRODUCTION

In this disciplinary matter, which proceeded by default, Deputy Trial Counsel Eric H. Hsu appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). After initially participating in two telephone status conferences in this proceeding, respondent Christopher James O'Keefe[1] stopped participating. Thereafter, his default was entered because he never filed a response to the notice of disciplinary charges (NDC).

In the NDC, the State Bar charges respondent with violating rule 3-110(A) of the Rules of Professional Conduct of the State Bar[2] (failure to competently perform legal services), Business and Professions Code section 6106[3] (acts of moral turpitude), rule 3-700(D)(1) (failure to release client file), rule 3-700(D)(2) (failure to refund unearned fees), rule 3-700(A)(2) (improper withdraw from employment), and section 6068, subdivision (i) (failure to cooperate in

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[1]Respondent was admitted to the practice of law in California on June 18, 1993, and has been a member of the State Bar since that time. He has one prior record of discipline.

[2]Unless noted otherwise, all further references to rules are to these rules.

[3]Unless otherwise noted, all further statutory references are to this code.

disciplinary investigation).

The State Bar argues that the appropriate level of discipline is three years' stayed suspension and one year's actual suspension continuing until respondent makes restitution of $5,000 in unearned fees and until he files and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension.[4] For the reasons stated *post*, the court concludes that respondent is culpable on only three of the foregoing six counts of charged misconduct and that the appropriate level of discipline is two years' stayed suspension and six months' actual suspension continuing until respondent makes restitution of a $5,000 unearned fee, accounts for and makes restitution of the unearned portion of a $6,000 fee, and until he makes and the State Bar Court grants a motion to terminate the actual suspension.

II. RELEVANT PROCEDURAL HISTORY

On February 10, 2005, the State Bar filed the NDC in this proceeding and, in accordance with section 6002.1, subdivision (c), properly served a copy of it on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar (official address). That service was deemed complete when mailed. (Section 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.) Accordingly, respondent was required to file a response to the NDC no later than March 7, 2005 (Rules Proc. of State Bar, rule 103(a)), but he did not do so.

However, respondent personally appeared and participated in the first two telephonic status conferences in this proceeding. At the first telephonic status conference, which was held

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[4]The State Bar suggests that any *stayed suspension* recommended in this proceeding should run (or be) concurrent to the *probation* that was imposed on respondent in his prior record of discipline, which is the Supreme Court's June 10, 2005, order in S132495 (State Bar Court case numbers 03-O-04419, 04-O-14313-JMR (consolidated) (*O'Keefe* I). The court rejects the State Bar's suggestion because a stayed suspension cannot be concurrent or consecutive to anything; by its nature, a stayed suspension is stayed it does not "run." The State Bar also suggests that any actual suspension recommended in this proceeding should run consecutively with the 60-day actual suspension imposed on respondent in *O'Keefe* I. However, the court also rejects this suggestion because it is moot since the 60-day actual uspension imposed on respondent in *O'Keefe* I will terminate before the present case will even be transmitted to the Supreme Court.

on March 7, 2005, this court ordered respondent to file his response to the NDC no later than March 14, 2005. However, he did not do so. Thereafter, at the second telephonic status conference, which was held on March 28, 2005, the court ordered respondent to file his response to the NDC immediately. Respondent, however, still did not file a response to the NDC.

On April 21, 2005, this court granted the State Bar's motion for entry of default and filed an order entering respondent's default and placing him on involuntary inactive enrollment. The clerk properly served a copy of that order on respondent.

On May 11, 2005, the State Bar filed a brief on culpability and discipline.[5] The court took the matter under submission for decision without hearing on that same day.

III. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

A. The Atcherley Matter (Counts 1 through 5)

1. Findings of Fact

In January 2002, Linda Atcherley and Paul Vincent, wife and husband, (hereafter sometimes collectively referred to as the Atcherleys) employed respondent to file a chapter 7 bankruptcy proceeding for them and to negotiate resolutions of tax liens that the Internal Revenue Service (IRS) and the California Franchise Tax Board (FTB) filed against them for unpaid back taxes. Initially, respondent told the Atcherleys that his fee to perform the foregoing work would be $6,000. The Atcherleys paid respondent $6,000 as follows: $2,000 in January 2002, $2,000 in February 2002, $1,500 in May 2002, and $500 in August 2002. However, in November 2003, respondent charged the Atcherleys an additional $5,000 in attorney fees to complete his negotiations with the IRS and the FTB. The Atcherleys paid respondent an additional $5,000 that same month.

In April 2002, respondent filed a chapter 7 bankruptcy petition for the Atcherleys in the United States Bankruptcy Court for the Southern District of California. In that petition, respondent listed the Atcherleys' tax debts to the IRS and FTB for the tax years 1998, 1999, and

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[5]Exhibit 1 to this pleading is admitted into evidence. (Rules Proc. of State Bar, rule 202(c).)

2000. Thereafter, in July 2002, the bankruptcy court discharged all of the Atcherleys' dischargeable debts.

In August 2002, respondent informed the Atcherleys that he was actively working with Lynn Davis at the FTB regarding the state's tax liens. And, in December 2002, respondent sent the Atcherleys a letter in which he stated, "Please be advised that your taxes, penalties, and interest up to and including 1998 have been discharged in your Chapter 7." Respondent further stated, in his letter, that he would ask Lynn Davis to handle their 1999, 2000, and 2001 taxes at the local level. Also, in December 2002, respondent asked the Atcherleys for and the Atcherleys provided respondent with certain information and documents that he said he needed to prepare offers in compromise or payment plans or both to present to the IRS and the FTB on their behalf.

Between December 2002 and November 2003, respondent repeatedly told the Atcherleys that he was working with the IRS and with Lynn Davis at the FTB to negotiate the payment of their back taxes. Nevertheless, in January 2004, the FTB levied on two of the Atcherleys' bank accounts and, thereby, collected $8,000 of their 1998 taxes. Atcherley immediately contacted respondent. Respondent told Atcherley that he was working on it. Later in January 2004, Atcherley learned through her own research that her and Vincent's 1998 taxes were not discharged in their bankruptcy proceeding as respondent had stated in his December 2002 letter. Also, in January 2004, the Atcherleys learned that, if the bankruptcy court had discharged their debts in October 2002, instead of July 2002, their 1998 taxes would have been discharged in bankruptcy.

Between January 2004 and June 2004, the Atcherleys made an unspecified number of attempts to contact respondent about the status of the levies and tax liens, but were unsuccessful in obtaining any substantive response from him. When the Atcherleys were actually able to speak with respondent (the number of times is not specified), he merely told them that he was working on it.

In late June 2004, the Atcherleys were notified that the FTB had served one of their banks with an order to withhold $6,135.43 from their account. Linda Atcherley immediately attempted to contact respondent, but she was only able to leave a message for him.

In early July 2004, the Atcherleys employed a tax professional to assist them with their back taxes. In just five days, that tax professional obtained stays of execution on the tax liens and worked out payment plans for the Atcherleys with the FTB.

On July 7, 2004, the Atcherleys mailed respondent a letter at his official address – the address that respondent had previously given to them. In that letter, the Atcherleys notified respondent that they were terminating his services because they had hired a tax professional to handle their matters. In that letter the Atcherleys also asked respondent for their client file and to return the $5,000 in fees that they paid him in November 2003. Even though respondent received the Atcherleys' letter (Evid. Code, § 641), he did not respond to it. Thus, the Atcherleys sent respondent a second letter on July 19, 2004, and a third letter on July 20, 2004. In each of those letters, the Atcherleys again asked respondent to give them their file and to refund the unearned fees to them. Even though respondent received both the July 19 letter and the July 20 letter (Evid. Code, § 641), he never responded to them. Nor did he otherwise give the Atcherleys their client file or refund any unearned fee to them.

In July 2004, the Atcherleys' learned from the tax professional they hired that respondent never dealt with anyone at the FTB regarding their tax liens and back taxes. In fact, respondent never provided any services to the Atcherleys with respect to negotiating and resolving their tax liens or back taxes. Accordingly, respondent could not have earned and did not earn all of the $6,000 fee that the Atcherleys paid him in 2002. Likewise, respondent could not have earned and did not earn any portion of the $5,000 fee that they paid in him 2003.

2. Conclusions of Law

In count 2, the State Bar charges that respondent committed acts involving moral turpitude, dishonesty, or corruption or some combination thereof in wilful violation of section 6106 when he (1) misrepresented to the Atcherleys that he was actively working with Lynn Davis at the FTB and (2) misrepresented to the Atcherleys that their 1998 taxes had been discharged in bankruptcy. The record clearly establishes that respondent intentionally engaged in acts involving moral turpitude and dishonesty in wilful violation of section 6106 when he deliberately misrepresented to the Atcherleys, once in August 2002 and on multiple occasions between

December 2002 and November 2003, that he was actively working with Lynn Davis at the FTB regarding their state's tax liens and negotiating the payment of their back state taxes.[6] (*In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73, 78, 79 [attorney's repeated acts of deceit to client that he had filed suit when had not done so violated section 6106]; accord *In the Matter of Kizer* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 87, 93.)

However, the record fails to clearly establish that respondent wilfully violated section 6106 when he advised the Atcherleys in his December 2002 letter that their 1998 taxes had been discharged in bankruptcy. There is nothing in the record to suggest that respondent knew that this statement was false when he made it or that he made the statement with the intent to mislead. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 353.) At best, the record establishes that respondent was negligent in making that statement because the NDC alleges that he "knew or *should have known* that the 1998 taxes were not appropriate for discharge in the July 2002 discharge, but would have to have been discharged in October 2002."[7] (Italics added.) However, negligence in making a misrepresentation does not constitute a violation of section 6106. (*Ibid.*) Furthermore, there is no evidence suggesting, much less establishing, that the bankruptcy court would have delayed the Atcherleys' discharge from July 2002 until October 2002 so that their 1998 taxes would qualify for discharge.

In count 5, the State Bar charges respondent with violating rule 3-700(A)(2) by

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[6]Even though the record also establishes that respondent wilfully violated section 6106 by deliberately misrepresenting to the Atcherleys that he was working with the IRS to negotiate the payment of their back taxes, by charging and obtaining the additional $5,000 fee from the Atcherleys in November 2003 under false pretenses, and by misappropriating, at least, the $5,000 additional fee he charged and collected from the Atcherleys in November 2003, the court cannot find respondent culpable of those violations because they were not charged. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 465, fn. 9; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217-218; accord, *In re Silverton* (2005) 36 Cal.4th 81, 93, fn.4.) What is more, because this is a default proceeding, this court cannot even consider those acts of proved but uncharged misconduct as aggravation. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 316, fn. 32.)

[7]Because this allegation contains the conjunction "or" it cannot and does not establish that respondent had actual knowledge of the alleged fact. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.) It establishes only that he should have known of it.

improperly withdrawing from employment in the matter. However, while there is no direct evidence that respondent intended to withdraw from his representation of the Atcherleys, depending on the circumstances an attorney's cessation of services can amount to an effective withdrawal. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 641.)

As noted above, even though respondent filed the Atcherleys' chapter 7 bankruptcy petition in April 2002, he did not perform any services for the Atcherleys with respect to resolving their tax liens or negotiating the payment of their back taxes. Accordingly, the record establishes that respondent stopped providing services to the Atcherleys by July 2002, when the bankruptcy court entered the Atcherleys' discharge.

Moreover, even though respondent continued to communicate with the Atcherleys after July 2002, he deliberately mislead them into believing that he had not stopped performing services for them by telling them that he was working on their tax liens and back taxes in almost all of his communications with them after July 2002. If an attorney's gross negligence in failing to communicate with a client may be construed as client abandonment (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680), an attorney's deliberate misrepresentations to a client that he or she is working on the client's case may also be construed as client abandonment particularly when, as in the present case, it effectively denies the client of the opportunity to obtain legal representation from other counsel.

What is more, it is clear that respondent did not take any reasonable steps to protect their interests before he stopped performing services for them because the FTB levied on two of the Atcherleys' bank accounts in January 2004 and served an order to withhold on one of the Atcherleys' banks in June 2004.

The court concludes that, when the foregoing facts are viewed together, it is clear that respondent effectively, if not intentionally, withdrew from representation and abandoned the Atcherleys. And, because respondent failed to take any steps to protect his clients' interests before he withdrew from representation and abandoned the Atcherleys (e.g., he did not give the due notice, allowing time for them to employ other counsel; he did not comply with rule 3-700(D)(1) by giving the Atcherleys their client their file; and he did not comply with rule

3-700(D)(2) by refunding the unearned fees to them), it is clear that respondent is culpable of wilfully violating rule 3-700(A)(2). (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 535-536; *In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at p. 641; *In the Matter of Hindin, supra*, 3 Cal. State Bar Ct. Rptr. at p. 680.)

In counts 3 and 4, respectively, the State Bar charges respondent with wilfully violating rule 3-700(D)(1) by not complying with the Atcherleys' requests for their file and with wilfully violating rule 3-700(D)(2) by failing to comply with the Atcherleys' requests to refund the unearned fees. However, as discussed above, the court has relied on respondent's failure to give the Atcherleys their file and to return the unearned fees to them to support its finding of a rule 3-700(A)(2) violation. Therefore, the court declines to rely on those failures to again find separate violations of rule 3-700(D)(1) and (2). (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280-281.) Accordingly, counts 3 and 4 are dismissed with prejudice.

Further, the court declines to find that respondent is culpable of failing to competently perform legal services in violation of rule 3-110(A) as charged in count 1. First, the only evidence that suggests that any of the work respondent actually performed for the Atcherleys was not performed competently was that he "*should have known* that the 1998 taxes were not appropriate for discharge in the July 2002 discharge, but would have to have been discharged in October 2002." However, as noted *ante*, this establishes only negligence. The review department has "repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation. [Citation.]" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.) Second, to the extent that respondent's complete cassation of work for the Atcherleys July 2002 may be considered as the intentional, reckless, or repeated failure to competently perform legal services, the court relies on respondent's cessation of work to establish respondent's culpability for violating rule 3-700(A)(2). To again rely on that cessation of work to establish a separate violation of rule 3-110(A) would be duplicative and inappropriate. (*Id.* at p. 148.) That is because "the appropriate level of discipline for an act of misconduct does not depend upon how many rules of

professional conduct or statutes proscribe the misconduct. [Citation.]" (*Ibid.*)

Morever, respondent's improper withdraw and client abandonment in wilful violation of rule 3-700(A)(2) more appropriately addresses respondent's misconduct. In addition, at least in a single client matter, a violation of rule 3-700(A)(2) (improper withdraw and client abandonment) supports a greater level of discipline than does a violation of rule 3-110(A) (failure to competently perform). In short, count 1 is dismissed with prejudice.

B. Failure to Cooperate With State Bar Disciplinary Investigations (Count 6)

1. Findings of Fact

In July 2004, the State Bar opened a disciplinary investigation with respect to complaints that the Atcherleys filed against respondent. On October 25, 2004, and again on November 16, 2004, a State Bar investigator properly sent respondent a letter asking respondent to respond, in writing, to specific allegations that the Atcherleys made against him. Even though respondent received both of those letters (Evid. Code, § 641), respondent did not respond to them. Nor did he otherwise communicate with the State Bar investigator about the Atcherleys' complaints.

2. Conclusions of Law

The record clearly establishes that, as charged in count 6, respondent wilfully violated his duty under, section 6068, subdivision (i), to cooperate and participate in State Bar disciplinary investigations by failing to respond to the State Bar investigator's letters with respect to the Atcherleys client matter and by failing to otherwise communicate with the investigator.

IV. LEVEL OF DISCIPLINE

A. Factors in Mitigation

There is no evidence of any mitigating circumstance.

B. Factors in Aggravation

1. Prior Record of Discipline

Respondent has one prior record of discipline, which is an aggravating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(i).)

Respondent's prior record of discipline is the Supreme Court's June 10, 2005, order in

O'Keefe I. In that order, the Supreme Court placed respondent on one year's stayed suspension and one year's probation on conditions, which include a 60-day period of actual suspension. That discipline was imposed on respondent in accordance with a stipulation regarding facts, conclusions of law, and disposition that the parties filed and that this court approved on February 1, 2005, in State Bar Court case numbers 03-O-04419, 04-O-14313-JMR (consolidated).

The misconduct in *O'Keefe* I was committed March 2003; December 2003 through February 2004; May 2004, June 2004, and September 2004 through October 2004.

In March 2003, respondent engaged in acts of moral turpitude in violation of section 6106 by issuing a $2,490 check, an $80 check, and a $200 check drawn on his client trust account when he knew or should have known that there were insufficient funds on deposit to cover them. In March 2003, respondent also violated rule 4-100(B)(3) by failing to maintain a ledger, journal, and reconciliation for his client trust account. From December 2003 through February 2004, respondent violated section 6068, subdivision (i) by failing to participate in State Bar disciplinary investigations regarding the foregoing misconduct.

In May 2004, respondent again engaged in an act of moral turpitude in violation of section 6106 by authorizing a $39.95 electronic check to be drawn on his client trust account when he knew or in the absence of gross negligence should have known that there were insufficient funds on deposit to cover it. In June 2004, respondent violated rule 4-100(A) by commingling his personal funds with client trust funds in his client trust account. Finally, from September 2004 through October 2004, respondent again violated section 6068, subdivision (i) by failing to participate in State Bar disciplinary investigations regarding the foregoing May and June 2004 trust account violations.

2. Multiple Acts of Misconduct

Respondent's misconduct involves multiple acts of misconduct. (Std. 1.2(b).)

3. Significant Harm

Respondent's misconduct caused significant harm to his clients the Atcherleys. (Std. 1.2(b)(iv).) Not only did respondent fail to notify the Atcherleys that he had withdrawn and abandoned their representation after July 2002, he deliberately misled them into believing

otherwise, thereby depriving them of the opportunity of hiring replacement counsel. In addition, respondent wrongfully deprived the Atcherleys of the use of, at least, $5,000 by failing to refund the unearned fees.

4. Failure to File a Response to the NDC

Respondent's failure to file a response to the NDC, which allowed his default to be entered in this proceeding, is an aggravating circumstance. (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 805.) First, his failure to file a response indicates that he fails to appreciate the seriousness of the charges against him. (*Ibid.*) And, second, it indicates "that he does not comprehend the duty as an officer of the court to participate in disciplinary proceedings. [Citation.]" (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 109, citing *Conroy v. State Bar* (1992) 53 Cal.3d 495, 507-508.)

C. Discussion

The primary purpose of disciplinary proceedings conducted by the State Bar is to protect the public, the courts and the legal profession, the maintenance of high professional standards and the preservation of public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025.) When determining the appropriate level of discipline, the court first looks to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) However, the standards are not to be applied in a talismanic fashion. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7(a) provides that, when an attorney has one prior record of discipline, the discipline imposed in the current proceeding shall be greater than that imposed in the prior. However, that standard is not strictly applied when, as in the present proceeding, the misconduct in the current proceeding occurred during the same time period as the misconduct in the prior

proceeding.[8] (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619.) Instead, the correct analysis is to "consider the totality of the findings in the two cases to determine what the discipline would have been had all the charged misconduct . . . been brought as one case." (*Id.* at p. 619.)

In the present proceeding, the most severe sanction for Respondent 's misconduct is found in standard 2.3, which provides that an attorney's commission of an act involving moral turpitude "shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

Considering the present misconduct with that found in *O'Keefe* I, the court notes that respondent has been found culpable of violating section 6106 in both proceedings. However, the section 6106 violations in *O'Keefe* I, which resulted in 60 days' actual suspension, were based on acts found to involve gross negligence as opposed to deliberate wrongdoing, while the section 6106 violations found in the present proceeding are based on repeated deliberate acts of client deceit. The Supreme Court has made clear that misconduct involving deceit "is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567; see also *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 ["deceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain"].) Such misconduct also demonstrates a lack in basic honesty on the part of respondent. Moreover, the Supreme Court considers "abandonment of clients and retention of unearned fees [alone] as serious misconduct warranting periods of actual suspension, and in cases of habitual misconduct, disbarment." (*Matthew v. State Bar* (1989) 49 Cal.3d 784, 791.)

The State Bar cites *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr.

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[8]Respondent committed much of the misconduct found in this present proceeding (August 2002 through July 2004) during the same time period in which he committed the misconduct found in *O'Keefe* I (March 2003 through June 2004).

131 to support its discipline recommendation (i.e., three years' stayed suspension and one year's actual suspension). In *Miller*, the attorney was placed on three years' stayed suspension, three years' probation, and one year's actual suspension. Respondent's misconduct is substantially similar to that of the attorney in *Miller*. However, in *Miller* the attorney had *two* prior records of discipline. Even though one of those two prior records was not serious and did not involve clients, this is still a substantial distinguishing factor. Accordingly, in light of the discipline imposed in *Miller*, the court concludes that had the misconduct found in *O'Keefe* I and the misconduct found in the present proceeding been charged in the same proceeding, the appropriate level of discipline would have been three years' stayed suspension and eight months' actual suspension. Accordingly, in light of the fact that respondent was placed on one year's stayed suspension and 60 days' actual suspension in *O'Keefe* I, the court will recommend, in the present proceeding, that respondent be placed on two years' stayed suspension and six months' actual suspension continuing until respondent (1) makes restitution with interest of the additional $5,000 fee that he charged and collected from the Atcherleys in November 2003, (2) accounts to the Atcherleys for the $6,000 fee they paid him in 2002 and makes restitution with interest to them for the unearned portion of that fee, and (3) makes and the State Bar Court grants a motion to terminate his actual suspension.[9]

V. DISCIPLINE RECOMMENDATION

The court recommends that respondent Christopher James O'Keefe be suspended from the practice of law in the State of California for a period of two years, that execution of the two-year suspension be stayed, and that he be actually suspended from the practice of law for six months and until:

(1) he makes restitution to Linda Atcherley and Paul Vincent, or to the Client Security Fund if it has paid, in the total sum of $5,000 plus interest thereon at the rate of 10 percent per annum from September 5, 2004, until paid,

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[9]As noted *post*, the court recommends that respondent be ordered to pay interest on all unearned fees beginning on September 5, 2004, which is 60 days after July 7, 2004, the date on which the Atcherleys first asked respondent to return the unearned fees.

and he provides satisfactory proof of that restitution to the State Bar's Office of Probation in Los Angeles;

(2) he accounts to Linda Atcherley and Paul Vincent for the fee of $6,000 that they paid him in 2002, he makes restitution to Atcherley and Vincent, or the Client Security Fund if it has paid, for the unearned portion of that $6,000 fee plus interest on that unearned portion at the rate of 10 percent per annum from September 5, 2004, until paid, and he provides satisfactory proof of that accounting and restitution to the State Bar's Office of Probation in Los Angeles; and

(3) he files and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension.

If respondent remains actually suspended for two or more years, the court also recommends that he remain suspended until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

Further, in accordance with rule 205 of the Rules of Procedure of the State Bar, the court recommends that, if the State Bar Court grants a motion to terminate respondent's actual suspension, it be authorized to place him on probation for a specified period of time and to impose on him such probation conditions as it deems necessary or appropriate in light of the misconduct found in this proceeding. Furthermore, the court recommends that respondent be ordered to comply with any such probation conditions imposed on him by the State Bar Court.

The court does not recommend that respondent be order to take and pass a professional responsibility examination because he was order to do so in the Supreme Court's June 10, 2005, order in *O'Keefe* I.

VI. RULE 955 AND COSTS

The court further recommends that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule

within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[10]

Finally, the court recommends that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

Dated: August 8, 2005.

JOANN M. REMKE
Judge of the State Bar Court

[10]Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being a crime, an attorney's failure to comply with rule 955 is also grounds for disbarment or suspension and for revocation of any pending probation. (Cal. Rules of Court, rule 955(d).)

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. 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 San Francisco, on August 8, 2005, I deposited a true copy of the following document(s):

DECISION, filed August 8, 2005

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 San Francisco, California, addressed as follows:

CHRISTOPHER J. O'KEEFE
4810 SUSSEX DR
SAN DIEGO CA 92116

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

ERIC HSU, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **August 8, 2005**.

Laine Silber

Laine Silber
Case Administrator
State Bar Court