FILED MAY 2, 2007

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	**Case No. 06-J-14347-RAH**
	)	
KEVIN F. CHRISTOF,	)	**DECISION**
	)	
Member No. 194684,	)	
	)	
A Member of the State Bar.	)	

I. Introduction

On August 23, 2006, the Arizona Supreme Court imposed discipline on respondent **Kevin F. Christof**, consisting of actual suspension of two years from the practice of law and imposed other terms and conditions of discipline for his misconduct involving three clients. As a result, the State Bar of California initiated this proceeding under Business and Professions Code section 6049.1 and rules 620 through 625 of the Rules of Procedure of the State Bar of California.

Business and Professions Code section 6049.1(a) provides, in pertinent part, that a certified copy of a final order, by any court of record of any state of the United States authorized by law or rule of court to conduct disciplinary proceedings against attorneys, determining that a member of the State Bar committed professional misconduct in another state will be conclusive evidence that the member is culpable of professional misconduct in this state, subject only to the following limitations: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability determined in the proceeding in the other state would not warrant the imposition of discipline in California under the laws or rules applicable in this state at the time of respondent's misconduct; and (3) whether the proceedings of the other state lacked fundamental constitutional protection. (Bus. & Prof. Code, § 6049.1(b).)

Therefore, the issues in the instant proceeding are limited as set forth in Business and

Professions Code section 6049.1 (b), *ante*.

Respondent bears the burden of establishing that the conduct for which he was disciplined in Arizona would not warrant the imposition of discipline in California and/or that the Arizona proceedings lacked fundamental constitutional protection. (Bus. & Prof. Code, § 6049.1(b).) Since respondent defaulted and did not participate in this proceeding, the court focuses on the degree of discipline to be imposed in California.

In view of respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended for two years, that execution of suspension be stayed, and that he be actually suspended for 18 months and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205.)

II. Pertinent Procedural History

On November 30, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and served via certified mail, return receipt requested, a Notice of Disciplinary Charges (NDC) on respondent at his official membership records address (official address). (Rules Proc. of State Bar, rule 60.) On that same date, a courtesy copy of the NDC was sent to respondent at his official address via regular mail. On November 30, 2006, a copy of the NDC was also served via certified mail, return receipt requested, on respondent at the Arizona address listed in his Arizona disciplinary record. A courtesy copy of the NDC was also sent on that same date, via regular mail, to respondent at his Arizona address. The NDC, which was sent to respondent via certified mail at his official address was returned as undeliverable. Both copies of the NDC, which were sent to respondent's Arizona address, were also returned as undeliverable. However, the courtesy copy of the NDC, which was sent via regular mail to respondent's official address, was not returned as undeliverable or for any other reason.

Respondent did not file a response to the NDC. (Rules Proc. of State Bar, rule 103.)

On motion of the State Bar, respondent's default was entered on January 18, 2007.

Respondent was enrolled as an inactive member on January 21, 2007. (Bus. & Prof. Code 6007(e).)[1]

Respondent did not participate in these disciplinary proceedings. Accordingly, the court took this matter under submission on February 5, 2007, following the filing of the State Bar's brief on culpability and discipline.

III. Jurisdiction

Respondent was admitted to the practice of law in California on April 4, 1998, and has since been a member of the State Bar of California.

IV. Findings of Fact

The court admits into evidence the certified copy of the Arizona disciplinary proceeding entitled *In the Matter of a Member of the State Bar of Arizona, Kevin F. Christof*, Bar No. 018276, Supreme Court No. SB-06-0100-D, Judgment and Order filed August 23, 2006; Disciplinary Commission Report filed May 4, 2006; Hearing Officer's Report filed February 7, 2006, which were attached to the NDC as exhibit 1, and the applicable rules of the Supreme Court of Arizona on the regulation of the practice of law, a copy of which was attached to the NDC as exhibit 2.

The record of the Arizona disciplinary proceeding conclusively establishes the following facts:

A. Procedural History Regarding the Arizona Disciplinary Matter

The State Bar of Arizona filed a complaint against respondent on August 1, 2005, and service of the complaint was also accomplished on August 1, 2005. On September 19, 2005, after respondent failed to timely file an answer, the disciplinary clerk filed and mailed a notice of default to respondent's address of record, as well as to the address respondent used on his motion for extension of time to answer. When respondent still failed to file an answer, the disciplinary clerk entered respondent's default on October 14, 2005.

Pursuant to Arizona Supreme Court Rule 57(d), all factual allegations in the complaint are deemed admitted upon respondent's default.

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[1]References to section are to the California Business and Professions Code, unless otherwise noted.

Following entry of respondent's default, the State Bar of Arizona requested an aggravation/mitigation hearing. Respondent did not participate in the hearing, which was held on November 15, 2005.

B. Suspension from the Practice of Law in the State of Arizona

Respondent was admitted to the practice law in the State of Arizona on July 7, 1998.

On August 23, 2006, the Supreme Court of Arizona issued a Judgment and Order in Supreme Court No. SB-06-0100-D, effective 30 days thereafter, suspending respondent from the practice of law for two years in Arizona and placing him on probation for two years with conditions to be determined at the time of his reinstatement. The Supreme Court also ordered, among other things, that respondent pay restitution to three clients in the total amount of $11,090.13 and costs of the disciplinary proceedings.

The Arizona Supreme Court order was based upon the May 4, 2006 Disciplinary Commission Report, which adopted the findings of fact, conclusions of law, and disciplinary recommendation contained in the February 7, 2006 Hearing Officer's Report, as set forth *post*.

C. Misconduct in Arizona

1. Count One – The Schutz Matter

a. Facts Deemed Admitted

On February 27, 2004, Diana Schutz (Schutz) met with respondent in order to retain respondent to file a marriage dissolution proceeding for her.

On March 3, 2004 and March 9, 2004, respondent drafted and sent a total of two letters on Schutz's behalf to opposing counsel, stating that respondent had been retained in the divorce case. However, respondent failed to file a petition for dissolution. Opposing counsel prepared and filed the petition for dissolution in Maricopa County and served Schutz. Respondent did not timely file a Notice of Appearance or an answer to the petition for dissolution on Schutz's behalf.

As a result, a default was entered against Schutz and the matter was set for a default hearing on May 26, 2004. The day before the default hearing, respondent filed an answer on behalf of Schutz and appeared at the hearing with Schutz. However, respondent was not allowed to participate because Schutz was found in default.

Thereafter, Schutz hired another lawyer, Merrill Robbins (Robbins), to set aside the default. Robbins filed a complaint against respondent with the Arizona State Bar, providing details of respondent's conduct in the matter.

On September 7, 2004, Arizona Bar Counsel (bar counsel) wrote to respondent, requesting that respondent answer the charges regarding his conduct by providing a written response, addressing his conduct.

On October 21, 2004, respondent filed a response to bar counsel's September 7, 2004 letter. Respondent indicated that he first met with Schutz at the Family Lawyer Assistance Project (FLAP) at which time he provided her with general information regarding the marital dissolution process and suggested that she consult with private counsel. Respondent also gave Schutz his contact information and told her that he could assist her in obtaining an order of protection, as she was concerned that her husband had threatened to kill her and her daughter.

According to respondent, he and Schutz met again in late February 2004, at respondent's office. Respondent indicated that at that time he informed Schutz that he could not represent her until such time as she signed a retainer agreement and paid the court's filing fee. Respondent claimed to have mailed a proposed retainer agreement to Schutz on March 14, 2004. Shortly thereafter, on March 22, 2004, Schutz was served with a petition for dissolution and forwarded a copy of the petition to respondent. However, Schutz did not return the retainer agreement and did not pay the filing fee.

Respondent further stated in his response to bar counsel, that on April 5, 2004, he sent an e-mail to Schutz, advising her that she needed to return the retainer agreement and pay the filing fee, as he did not advance filing fees. Respondent also reported that he told Schutz that a response to the petition for dissolution of marriage was due on April 12, 2004.

On April 17, 2004, Schutz responded to respondent's April 5, 2004 e-mail indicating that she had the cash to pay for the filing fee and wished to meet with respondent. Respondent received the filing fee from Schutz on April 20, 2004. Schutz signed respondent's retainer agreement on April 27, 2004.

According to Schutz, the first time she saw the retainer agreement was on April 27, 2004,

the date it was signed. It is Schutz's position that respondent told her that he would "front" the money for the filing fee and that she "could pay him later."

In his October 21, 2004 response to bar counsel's letter, respondent wrote that based on his experience, he believed that filing an answer in a marital dissolution matter instead of a motion to set aside default is a recognized and sufficient action in Maricopa County.

On December 1, 2004, Robbins, filed a Motion to Vacate Default Judgment on behalf of Schutz. The motion was denied. The court found that Schutz, while represented by respondent, did not act promptly and found that the circumstances did not constitute excusable neglect.

An Order of Diversion, directing respondent to participate in the Ethics Enhancement Program (EEP) and the Law Office Management Assistance Program (LOMAP) was issued on March 4, 2005. On March 8, 2005, LOMAP sent a copy of the Order of Diversion and an instructional letter to respondent. However, respondent did not contact LOMAP as instructed. LOMAP sent another letter to respondent on March 31, 2005. Thereafter, LOMAP attempted to phone respondent, but the telephone numbers provided by respondent were either out of service or incorrect.

Because respondent failed to respond to the Order of Diversion, the Probable Cause Panelist of the State Bar of Arizona issued an Order Vacating Order of Diversion on May 4, 2005, and a Probable Cause Order directing the Arizona State Bar to file a complaint with the disciplinary clerk, charging respondent with violations of Supreme Court Rule 42 (Arizona Rules of Professional Conduct) including, but not limited to, Ethical Rules 1.2, 1.3, and 1.4[2] and Supreme Court Rule 32 (c)(3).[3]

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[2]The Arizona Rules of Professional Conduct appear as Supreme Court Rule 42, and the individual rules within Supreme Court Rule 42 are referred to as "ERs" (Ethical Rules).

[3]Supreme Court Rule 32(c)(3) states, in pertinent part: "All members shall provide to the state bar office a current street address, telephone number, any other post office address the member may use, and the name and address of the bar of any other jurisdiction to which he may be admitted. Any change of address shall be reported to the state bar within thirty days of its effective date. . . ."

b. Additional Facts Proven at Hearing

Schutz testified that when she received the notice advising her that she had 10 days to respond to the petition for dissolution, she immediately gave it to respondent. When she received a second notice, after respondent had not responded to the first notice, indicating she had 20 days to respond she again called respondent. Respondent informed Schutz that she had 60 days in which to respond. Schutz testified that respondent never told her she was on her own and needed to file an answer to defend herself without him.

Schutz testified that: (1) she paid respondent $260 for the filing fee; and (2) she paid respondent at least $1,000 as a fee.

Schutz paid a total of $7,096.91 in attorney fees and costs to Robbins for services rendered "in the preservation of income, the protection of assets and attempts to overturn [her] Decree of Dissolution."

Count 2 – The Claxton Matter

a. Facts Deemed Admitted

On May 6, 2004, Jan Claxton (Claxton) met with respondent to discuss a petition for modification of child support that had been served on her. At that time, she gave respondent her file, including all original documents. On May 14, 2004, Claxton signed and mailed a retainer agreement and a check for $750 to respondent.

Thereafter, on May 25, 2004, respondent filed a Request for Hearing in Claxton's case. Although respondent had been given all original documents, he failed to discern that Claxton had been served personally with the petition to modify support on May 3, 2004, and was subsequently served an Acceptance of Service, which she executed two days later on May 5, 2004. Because the court calculated the time for the response from the personal service date, not the acceptance of service date, it determined that respondent's Request for Hearing was untimely.

Respondent filed the response on May 25, 2004. He claimed that based upon information he had received, he had no reason to believe that his responsive motion was filed late. He further claimed that the error in calculating the response time was compounded by the fact that the court failed to mail him a copy of the Order for Child Support entered on June 11, 2004, even though he

had filed a Notice of Appearance on May 25, 2004. Respondent also contended that the "double service" (i.e., the personal service of the petition to modify and the Acceptance of Service) was contrary to the Civil Rules. According to respondent, he immediately began to prepare a motion to set aside the June 11, 2004 order regarding child support.

Subsequently, on June 16, 2004, Claxton received a copy of an Order of Assignment, reducing her ex-husband's support payments from $542.10 to $213.12. The order also reduced uninsured medical/dental payments from 60% to 35.7%.

Respondent maintained that he repeatedly explained to Claxton the procedural error committed by her husband, and the remedy respondent proposed. However, according to respondent her voicemail messages to him between July 5 and July 10, 2004, became belligerent in tone and blamed him for the status of the case. Respondent admitted that due to Claxton's tone, he resolved to communicate with her only in writing once the work was done.

According to Claxton, she told respondent that she had received personal service of the petition to modify support on May 3, 2004, and, therefore, respondent could not have been confused about the date of service and should have calculated the response time correctly.

Claxton also asserted that her phone messages were not belligerent, but did express her concern over the entry of the order. Claxton stated that respondent failed to return any of her phone messages and only responded by e-mail on July 12, 2004, after she informed him she had retained other counsel.

When Claxton retained other counsel on July 11, 2004, respondent ceased work on the matter and forwarded Claxton's file to her new lawyer. On August 5, 2004, respondent received a stipulation for substitution of counsel, which he executed and returned on August 10, 2004. Respondent also forwarded Claxton's $750 retainer to successor counsel.

An Order of Diversion directing respondent to participate in EEP and LOMAP issued on March 4, 2005. A copy of the order along with an instructional letter was sent by bar counsel to respondent on March 8, 2005. However, respondent did not contact LOMAP as instructed. LOMAP sent another letter to respondent on March 31, 2005. Thereafter, LOMAP attempted to call respondent, but the telephone numbers provided by respondent were either out of service or

incorrect. Respondent failed to contact LOMAP, EEP, or bar counsel.

Because respondent failed to respond to the Order of Diversion, the Probable Cause Panelist issued an Order Vacating Order of Diversion on May 4, 2005, and a Probable Cause Order directing the Arizona State Bar to file a complaint with the disciplinary clerk, charging respondent with violations of Supreme Court Rule 42 (Arizona Rules of Professional Conduct) including, but not limited to, Ethical Rules 1.2, 1.3, and 1.4 and Supreme Court Rule 32 (c)(3).

b. Additional Facts Proven at Hearing

Claxton testified that because of respondent's representation, her child support payments were in arrears for three months at $328.98 per month for a total of $986.94.

It cost Claxton $1,710.28 in additional attorney fees to correct the problem caused by respondent.

Count 3 – The Balicki Matter

a. Facts Deemed Admitted

In April 2004, Yolanda Balicki (Balicki) met respondent at FLAP, where she asked him to help her with a child support/custody case. Respondent agreed to represent Balicki.

On April 29, 2004, Balicki signed a fee agreement with respondent, whereby she agreed to pay him $150 a month plus court fees to help her obtain child support for her 17 month old son. Balicki paid him an initial $150 fee and $236 for court fees. On May 26, 2004, Balicki paid respondent $150 for the month of June; on June 4, 2004, she paid another $150 for the month of July. Thereafter, Balicki discontinued payments as respondent was no longer returning her phone calls, e-mails, or regular mail.

On August 26, 2004, Balicki sent respondent a final letter terminating his services and requesting a refund. Balicki was able to stop payment on the $236 check for court fees, but "initially" did not receive a refund of the $450 fees.

On October 6, 2004, bar counsel wrote a letter to respondent, requesting that he respond to charges filed regarding ethical rule violations.

On November 21, 2004, respondent filed a response to the State Bar's October 6, 2004 letter. He admitted that on April 12, 2004, Balicki sent an e-mail requesting a consultation regarding

paternity and "expungement matters" and that she retained him in late April 2004. Respondent further stated that his failure to file the initial paternity complaint was due to Balicki's failure to sign the verification that was required to be attached to and filed with the complaint. Respondent claimed that he left voice messages for Balicki during the months of May and June, asking her to make an appointment. On June 12, 2004, when he still had not received a response to his messages, he wrote a letter to Balicki. Respondent asserted that due to the lack of further contact from Balicki and her failure to make additional payments pursuant to their agreement, he closed her file. Respondent denied receiving any payment beyond the initial $150.00.

Bar counsel wrote to Balicki on February 28, 2005 requesting copies of bank records reflecting when and by whom the cashier's checks had been negotiated. In addition, bar counsel wrote to respondent requesting that he submit a copy of the Complaint to Establish Paternity that he had referenced, but had not included with his November 21, 2004 letter. Respondent did not reply. On April 12, 2005, bar counsel again wrote to respondent requesting a copy of the Complaint to Establish Paternity. Respondent failed to respond to the specific request for a copy of the Complaint to Establish Paternity.

According to Balicki, she received no telephone messages or mail from respondent. Responding to a request from bar counsel, Balicki submitted copies of the receipts for the cashier's checks she had sent to respondent in May and June 2004. Balicki subsequently advised that when she checked with her credit union, neither cashier's check had been negotiated.

Bar counsel attempted to contact respondent but found none of the telephone numbers for respondent listed in the Arizona State Bar's membership database to be working. Respondent's number, which was listed with the State Bar of California, belonged to his mother who, when called by bar counsel, advised that respondent had moved his Arizona office and that she did not have his new telephone number.

On May 5, 2005, the Probable Cause Panelist directed the State Bar to file a complaint with the disciplinary clerk charging respondent with violations of Supreme Court Rule 42 (Arizona Rules of Professional Conduct), including, but not limited, to ERs. 1.3, 1.4, 1.5 and 8.1(b), as well as Supreme Court Rules 32(c)(3) and 53(f).

b. Additional Facts Proven at Hearing

Balicki incurred $36 in fees to stop payment on cashier's checks that she drew from her account to pay respondent. The cashier checks had not been cashed by respondent.

V. Conclusions of Law

A. Violations of Arizona Supreme Court Rules

The Arizona Supreme Court found that respondent violated Supreme Court Rule 42 (Arizona Rules of Professional Conduct), Supreme Court Rule 32 (Duty to Update Member Contact Information) and Supreme Court Rule 53 (Grounds for Discipline), based on the findings of fact and recommendations by the Arizona Disciplinary Commission:

1. ER 1.2 Scope of Representation

(Abiding by the client's decision concerning the objectives of representation and consulting with the client as to the means by which they are to be pursued)

Respondent violated ER 1.2 in count 1 by failing to file a marriage dissolution proceeding for Schutz, including failing to file the petition for dissolution, and, thereafter, by failing to consult with her regarding the means by which the dissolution would be obtained.

2. ER 1.3 Diligence

(Acting with reasonable diligence and promptness in representing a client)

Respondent violated ER 1.3 in counts 1, 2, and 3 by failing to timely file a notice of appearance or an answer on Schutz's behalf to the petition for dissolution which had been served upon Schutz, by failing to timely file a response to the petition for modification of child support which had been served on Claxton, and by failing to act diligently and promptly on behalf of Balicki in the child support matter for which Balicki had retained respondent by, among other things, failing to file a paternity complaint in the matter.

3. ER 1.4 Communication

(Keeping a client reasonably informed and promptly comply with reasonable requests for information)

Respondent violated ER 1.4 in counts 1, 2, and 3 by failing to consult with each of his clients about the means by which their respective objectives were to be accomplished, failing to

keep each of his clients reasonably informed about the status of their respective cases, failing to promptly comply with each client's reasonable request for information, and failing to explain matters to each of his clients to the extent reasonably necessary to permit each of them to make informed decisions regarding their respective representation.

4. ER 1.5 Fees

(Reasonable attorney fee and proportional to the services performed by the attorney)

Respondent violated ER 1.5 in count 3 by charging an unreasonable fee, as the services provided were worthless to his client.

5. ER 8.1(b) Disciplinary Matter

(Must not knowingly fail to respond to a lawful demand for information from a disciplinary authority)

Respondent violated ER 8.1 in count 3 by failing to respond to a lawful demand for information from a disciplinary authority in that he failed to provide a copy of the Complaint to Establish Paternity, which was twice requested by bar counsel.

6. ER 8.4 Misconduct Prejudicial to the Administration of Justice

(Professional misconduct for an attorney to violate the Rules of Professional conduct or engage in conduct that is prejudicial to the administration of justice (ER 8.4(d))

Respondent violated ER 8.4 in counts1 and 2 by having failed to comply with the Order of Diversion, which required that he participate in EEP and LOMAP.

7 Supreme Court Rule 32(c)(3) (Member Duties)

(Must maintain a current address, telephone number, and any other post office address the member may use)

Respondent violated Rule 32(c)(3) in counts 1, 2, and 3 by failing to provide the State Bar of Arizona with a current street address, telephone number or any other post office address.

8. Supreme Court Rule 53 Grounds for Discipline

(Rule 53(d) – Evading service or refusal to cooperate with officials of the State Bar, a hearing officer, the commission or a conservator appointed under these rules acting in the course of that person's duties;

(Rule 53(f) – Failure to furnish information. The failure to furnish information to or respond promptly to any inquiry or request from bar counsel, a hearing officer, the board, the commission or this court, made pursuant to these rules for information relevant to complaints, grievances or matters under investigation concerning conduct of a lawyer. . .)

Respondent violated rule 53(f) in count 3 by knowingly failing to provide a copy of the Complaint to Establish Paternity to bar counsel, despite two requests from bar counsel to do so.

Additionally, by failing to respond to the disciplinary complaint filed by the State Bar of Arizona and allowing his default to be entered, and by failing to participate in the aggravation/mitigation hearing, respondent violated rule 53(d) in that his conduct constituted a refusal to cooperate with officials and staff of the State Bar and the hearing officer, all of whom were acting in the course of their duties

B. Legal Conclusions

1. Counts 1 – 3: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))[4]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

In counts 1, 2, and 3, respondent recklessly or repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A), as follows:

a. By failing to file a petition for dissolution on behalf of Schutz, by failing to timely file an answer to the petition for dissolution filed by Robbins on behalf of Schutz's husband, by failing to timely file a notice of appearance, thereby allowing a default to be entered against Schutz, and by failing to file a motion to set aside the default entered against Schutz;

b. By failing to act diligently in representing Claxton in a modification of child

[4]References to rule are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise noted.

support matter, by failing to discern that Claxton had been served personally with the petition to modify support on May 3, 2004, and that she was subsequently served with an Acceptance of Service, which she executed on May 5, 2004, thereby resulting in the untimely filing of Claxton's Request for Hearing and ultimately resulting in a reduction of child support payments from her ex-husband;

c. By failing to act diligently in obtaining child support for Balicki's son, by failing to file the initial complaint to establish paternity, and by failing to provide services of any worth to Balicki.

2. Counts 1 – 3: Failure to Communicate (Bus. & Prof. Code, §6068, Subd., (m))

Section 6068, subdivision (m), provides that it is the duty of any attorney to 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.

In counts 1, 2, and 3, respondent wilfully violated section 6068, subdivision (m) as follows:

a. By failing to inform Schutz that he would not be filing an answer to her ex-husband's petition for dissolution and by failing to inform Schutz that he would not be filing a motion to set aside the default which had been entered against her;

b. By failing to keep Claxton reasonably informed about the correct deadline for filing her response to the petition to modify child support, by failing to inform Claxton that he failed to meet that deadline, by failing to return Claxton's telephone calls or otherwise communicate with her regarding the status of her matter; and

c. By failing to reply to any of Balicki's phone calls, e-mails or regular mail regarding the status of her matter, subsequent to the signing by Balicki of the fee agreement on April 29, 2004.

3. Counts 1 – 3 : Improper Withdrawal From Employment (Rule 3-700(A)(2))

Rule 3-700(A)(2) provides that an attorney must not withdraw from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700 (D), and complying with applicable laws and rules.

In Counts 1, 2, and 3, the court finds no clear and convincing evidence that respondent improperly withdrew from employment, as follows:

a. The State Bar contends that respondent violated rule 3-700(A)(2) by improperly withdrawing from employment in the Schutz matter. Although respondent failed to perform competently when, among other things, he allowed a default to be entered against Schutz and then failed to file a motion to set aside the default, respondent did not withdraw from employment. Rather, he continued to represent Schutz, subsequent to the default being entered against her, by filing an answer to the default and appearing with her at the May 26, 2004 default hearing. Thereafter, Schutz hired another attorney.

b. On July 11, 2004, when Claxton retained counsel to replace respondent, respondent ceased work on the Claxton matter and forwarded Claxton's file to her new lawyer. Thereafter, respondent also forwarded the $750 fee he had received from Claxton to successor counsel.

c. The Hearing Officer's Report found that on August 26, 2004, Balicki sent respondent a letter terminating his services and requesting a refund.

The court also notes that there were no charges or findings in the Arizona proceeding, which addressed improper withdrawal from employment by respondent.

Accordingly, there is no clear and convincing evidence that respondent violated rule 3-700(A)(2) as to Schutz, Claxton, or Balicki.

4. Counts 1 – 3 : Failure to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly

refund unearned fees.

Respondent wilfully violated rule 3-700(D)(2) as follows:

a. In count 1, respondent, who failed to perform the services for which he was retained, failed to return any portion of the $1,000 fee Schutz had paid to him and also failed to repay the $260 filing fee that she had paid him to file a marriage dissolution proceeding for her, thereby failing to return unearned fees in the amount of $1, 260.

However, in Counts 2 and 3 the court finds no clear and convincing evidence that respondent wilfully violated rule 3-700(D)(2) based on the following:

b. In count 2, respondent forwarded to Claxton's successor counsel, the $750 retainer fee which Claxton had paid to respondent.

c. In count 3, Balicki paid respondent an initial $150 fee and $236 for court fees. Thereafter, Balicki sent respondent two $150 cashier's checks. On August 26, 2004, Balicki sent respondent a letter terminating his services and requesting a refund. She placed a stop payment on the $236 check for court fees, but according to the Hearing Officer's Report, Balicki "initially" did not receive a refund of the additional $450 fees (i.e, the three $150 fee payments she had paid respondent).

When contacted by Arizona bar counsel, respondent denied receiving any payment beyond the initial $150 fee. Balicki advised bar counsel that neither of the two cashier's checks had been negotiated. Those cashier checks, totaling $300, were not cashed by respondent.

The Hearing Officer's Report, which states that Balicki "initially" did not receive a refund of the $450 fees, implies that she eventually did receive a refund of the $450. Additionally, the fact that the Arizona Supreme Court ordered respondent to reimburse Balicki $36 for the stop payment check fees, but did not order respondent to reimburse the $450 fees, also indicates that Balicki was reimbursed the $450 fees she had paid to respondent.

VI. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[5]

Respondent's six years of trouble-free practice at the time of his misconduct is not long enough to constitute mitigation. (See, *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837.)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent engaged in multiple acts of wrongdoing, including failing to perform competently, failing to communicate, and failing to return unearned fees. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed his clients. Schutz was unable to have the default, which was caused by respondent's misconduct, set aside. Moreover, Schutz paid $7,096.91 in attorney fees to hire another attorney to try to have the default set aside. Claxton, similarly, incurred $1,710.28 in additional attorney fees to correct the problems caused by respondent's misconduct. Thus, respondent caused his clients significant financial harm. Additionally, respondent engaged in conduct prejudicial to the administration of justice by failing to comply with the March 4, 2005 Order of Diversion, issued by the Arizona State Bar. (Std. 1.2 (b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He has yet to refund any portion of the unearned fees to Schutz.

Respondent's failure to participate in this disciplinary matter prior to the entry of his default is a serious aggravating factor. (Std. 1.2(b)(vi).) Respondent defaulted in the disciplinary proceeding in Arizona and in this proceeding. He also displayed a lack of cooperation to the Arizona State Bar during the disciplinary investigation in that state.

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[5]All further references to standards are to this source.

VII. Discussion

The purpose of disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103,111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016,1025, std.1.3.)

Respondent's misconduct involved three client matters. The standards for respondent's misconduct provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.4(b), and 2.6.)

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept., August 24, 2006, No. 99-O-12923) __Cal. State Bar Ct. Rptr. ___.) It has been long-held that the court "is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be actually suspended for a period of two years. In support of its recommended discipline, the State Bar cited two cases, *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074 and *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220.

In *Bailey*, the attorney was actually suspended for two years and until he paid restitution with a five-year stayed suspension for his improper withdrawal from employment in four client matters, collecting an illegal fee in one client matter, failing to return client papers in one client matter, failing to perform competently in one client matter, and failing to respond to reasonable client inquiries in one client matter. The attorney was also found culpable of failing to maintain a current business address (one count), and failing to cooperate with the State Bar regarding three client complaints. No mitigation was found. In aggravation, the attorney's misconduct harmed one of his clients and the attorney committed multiple acts of wrongdoing. He also failed to participate in the disciplinary proceeding before the entry of his default.

The Supreme Court in *Bledsoe* imposed a two-year actual suspension on an attorney who had

abandoned four clients, failed to return unearned fees, failed to communicate with three clients, made misrepresentations to a client regarding her case status and failed to cooperate with the State Bar. The attorney also defaulted in the disciplinary proceeding.

The court also finds the following cases to be instructive.

In *Lester v. State Bar* (1976) 17 Cal.3d 547, the Supreme Court actually suspended an attorney for six months for misrepresentation and for failing to perform services in four matters, failing to refund any portion of advanced fees, and failing to communicate with clients. Aggravation included his lack of candor before the State Bar and general lack of insight into the wrongfulness of his actions.

In *Farnham v. State Bar* (1976) 17 Cal.3d 605, the attorney abandoned two clients and engaged in the unauthorized practice of law while under actual suspension. The Supreme Court found that the attorney's actions evidenced a serious pattern of misconduct whereby he willfully deceived his clients, avoided their efforts to communicate with him and eventually abandoned their causes. (*Id*. at p. 612.) He also had a prior record of discipline for similar misconduct and showed a lack of insight into the impropriety of his actions. As a result, he was actually suspended for six months with a stayed suspension of two years upon conditions of probation.

Here, respondent's misconduct is not nearly as egregious and /or extensive as that of the attorneys in *Bledsoe*, *Baile*y, *Lester*, or *Farnham*. Unlike the attorneys in *Bledsoe*, *Lester*, and *Farnham*, respondent was not found culpable of engaging in acts of misrepresentation or deception. Respondent failed, however, to perform competently and to communicate in three client matters. He also failed to return unearned fees in one client matter.

"In a proceeding under section 6049.1, the appropriate degree of discipline is not presumed by the other state's discipline, but is open for determination in this state." *In the Matter of Kauffman* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 213, 217.)

In recommending discipline, the "paramount concern is the protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) In this matter, the court finds the State Bar's recommendation of two years actual suspension to be too harsh. Respondent's misconduct warrants a less severe level of discipline than the two year actual

suspension imposed in *Bailey* and *Bledsoe.* Therefore, in view of respondent's misconduct, the standards in conjunction with the case law, and the aggravating evidence, the court determines that placing respondent on actual suspension for eighteen months would be appropriate to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys.

The State Bar also requests that respondent be ordered to make restitution to three clients. "Restitution is fundamental to the goal of rehabilitation." *(Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Id.* at p. 1093.) Here, respondent failed to return unearned fees in the amount of $1,260 to Schutz. However, in the Claxton and Balicki matters, since the court did not find respondent culpable of failure to return unearned fees, it is not recommended that respondent pay restitution to those clients.

Moreover, the Supreme Court does not "approve imposition of restitution as a means of compensating the victim of wrongdoing." (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) In the Schutz matter, $7,096.91 of the restitution being requested by the State Bar was not for unearned fees paid to respondent. Rather, the $7,096.91 was the amount that Schutz paid to the attorney whom she hired to set aside the default that had been entered against her while being represented by respondent, and thus involved tort damages. Similarly, in the Claxton matter, the child support arrearage for the three months that Claxton's child support matter was pending, in the amount of $986.94, and the fees Claxton paid to her subsequent counsel to correct the mistakes made by respondent, in the amount of $1,710.28, involved tort damages. In the Balicki matter, the stop payment fees on cashier's checks, in the amount of $36, also involved tort damages. And the court will not recommend extending restitution to cover tort damages.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Kevin F. Christof** be suspended from the practice of law for two years, that said suspension be stayed, and that respondent be actually suspended from the practice of law for 18 months and until he files and the State Bar Court grants a motion to terminate his actual suspension (Rules Proc. of State Bar, rule 205).

It is also recommended that respondent be ordered to comply with any probation conditions, including restitution, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension. (Rules Proc. of State Bar, rule 205(g).)

It is further recommended that if respondent is actually suspended for two years or more, he will remain actually suspended until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order or during the period of his actual suspension, whichever is longer. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn.8.)

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Wilful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.[6]

VII. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May 2, 2007

RICHARD A. HONN
Judge of the State Bar Court

[6]Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (See, *Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)