FILED MAY 14, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **JOSEPH GERARD CAVALLO**, **Member No. 108210,** A Member of the State Bar.	)	Case No. **05-C-04453-RAP** **DECISION**

I. Introduction

This contested conviction referral proceeding is based upon the conviction of respondent **JOSEPH GERARD CAVALLO** of three felony counts of conspiracy to commit the crime of attorney capping and attorney recommendation by bail licensee and the actual crime of attorney recommendation by a bail licensee. Respondent was sentenced to six months of house arrest and three years of probation and paid more than $18,000 in fines.

After having thoroughly reviewed the record, the court finds that the facts and circumstances surrounding respondent's conviction involved moral turpitude warranting discipline, and recommends that respondent be suspended from the practice of law for five years, that execution of suspension be stayed, and that he be placed on probation for five years with conditions, including a minimum actual suspension of three years from the practice of law in California. He will remain suspended until he complies with certain conditions. Credit toward the period of actual suspension should be given for the period of interim suspension which commenced on December 17, 2007.

II. Procedural History

On October 12, 2007, in the Orange County Superior Court, respondent pleaded guilty to and was convicted of (1) one felony count of conspiracy to commit a crime (Pen. Code, §182, subd. (a)(1)), of attorney capping in violation of Business and Professions Code section 6152, subdivision (a); (2) one felony count of conspiracy to commit a crime (Pen. Code, §182, subd. (a)(1)) of attorney recommendation by a bail licensee in violation of Insurance Code section 1814, and California Code of Regulations, title 10, section 2071; and (3) one felony count of attorney recommendation by a bail licensee in violation of Insurance Code section 1814 and California Code of Regulations, title 10, section 2071.

On December 17, 2007, after his felony conviction, respondent was placed on interim suspension from the practice of law pending final disposition of the conviction proceeding or further order of the Review Department. (Bus. & Prof. Code, § 6102, subd. (a); Rules Proc. of State Bar, rule 601.)

On May 8, 2008, the Review Department of the State Bar Court issued an order, referring this matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed if the Hearing Department finds that the facts and circumstances surrounding respondent's criminal violations involved moral turpitude or other misconduct warranting discipline.

On May 29, 2008, the State Bar Court issued and properly served a Notice of Hearing on Conviction on respondent. Respondent filed a response on June 2, 2008. (Rules Proc. of State Bar, rule 601.)

Trial was held on January 6 and 7, 2009. Respondent was represented by Attorney Arthur L. Margolis. Deputy Trial Counsel Larry DeSha represented the Office of the Chief Trial Counsel of the State Bar of California (State Bar).

This matter was submitted for decision on February 18, 2009, following the filing of the parties' closing briefs.

III. Findings of Fact and Conclusions of Law

A. Conviction Referral Proceedings

Respondent is conclusively presumed, by the record of his conviction in this proceeding, to have committed all of the elements of the crime of which he was convicted. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; and *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.) However, "[w]hether those acts amount to professional misconduct . . . is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction." (*In the Matter of Respondent O, supra,* 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6.)

If the court concludes that the facts and circumstances surrounding an attorney's conviction involved moral turpitude or other misconduct, this court is to recommend an appropriate level of discipline "according to the gravity of the crime and the circumstances of the case. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.) In fact, this court's discipline recommendation in conviction referral proceedings is often based "on a wide scope of evidence not directly connected to the crimes themselves. [Citations.]" (*In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688-689.)

B. Credibility Determinations

After carefully considering, inter alia, each witness's demeanor while testifying; the manner in which each witness testified; the character of each witness's testimony; each witness's interest in the outcome in this proceeding, if any; and each witness's capacity to perceive,

recollect, and communicate the matters on which he or she testified, the court finds that the testimony of all the witnesses to be credible.

C. Jurisdiction

Respondent was admitted to the practice of law in California on June 3, 1983, and has been a member of the State Bar at all times since.

D. Stipulation as to Facts

The parties filed the following stipulation as to facts on November 13, 2008.

On September 5, 2005, the Orange County Grand Jury handed down an indictment charging respondent and two bail bondsmen, Jorge Andres Castro and Alejandro de Jesus Cruz, with conspiring to commit the crime of attorney capping (Pen. Code, § 182, subd. (a)(1); Bus. & Prof. Code, § 6125, subd. (a)); conspiring to commit the crime of attorney recommendation by a bail licensee (Pen. Code, § 182, subd. (a)(1); Ins. Code, § 1814; Cal. Code Regs., tit. 10, § 2071); and the actual crime of attorney recommendation by a bail licensee (Ins. Code, § 1814; Cal. Code Regs., tit. 10, § 2071).

In March 2004, after receiving complaints concerning illegal bail bond activity in the Orange County Jail, the Orange County District Attorney's Office (D.A.'s Office) performed a random check through the Orange County Superior Court system to see how many criminal cases from 2001 to 2004 had listed respondent as the attorney of record for arrestees bailed out by companies with which respondent had reportedly done business, namely Creative Bail Bonds, Liberty Bail Bonds, and Xtreme Bail Bonds. Respondent's co-defendants had been employees of Creative Bail Bonds who had subsequently started their own bail bonds company, Xtreme Bail Bonds (Xtreme). The D.A.'s Office determined that the number of arrestees who had retained respondent was higher than would have been expected by chance alone. For example, from July 2003 through February 2004, Xtreme had bailed out 41 inmates who had retained

private attorneys. Of these 41 inmates, eight listed respondent or an associate in his office as attorney of record. For the period between January and September 2004, of 46 inmates bailed out by Xtreme, 14 had either respondent or one of his associates listed as "retained attorney."

Between approximately June 1, 2003, and August 1, 2005, respondent had his business cards on display in the office of Xtreme, allowed his co-defendants, who were owners of Xtreme, to refer clients to him, for which he paid a fee, and had offered discounts to clients referred to him by Xtreme, while his co-defendants rewarded jail inmates for referring clients to them. Respondent admitted that he was guilty of the charges to which he pled guilty and that he "should never have agreed" to do what he had done. Respondent stated that there were approximately 30 cases over a two-year period, and the clients were interviewed by his staff, for the most part, as he was "completely consumed" in the two trials of Greg Haidl.[1] Respondent admitted to paying for approximately 10-20 referrals, between $300 and $500 per case, depending on what his co-defendants had requested him to pay.

The indictment listed the following overt acts:[2]

Overt Act 1: In or about and between June 2003 and August 2005, defendants Cruz and Castro kept defendant Cavallo's business cards at Xtreme Bail Bonds' office.

Over Act 2: In or about and between June 2003 and April 2005, defendant Castro took Sara Chavez to defendant Cavallo's law office and introduced her to defendant Cavallo as a new employee of Xtreme.

Overt Act 3: In or about and between June 2003 and April 2005, defendant Castro instructed Sara Chavez to refer Xtreme's clients to defendant Cavallo.

[1] In 2003, respondent began representing Greg Haidl, son of former Orange County Assistant Sheriff, Don Haidl. The case ultimately became a high profile case. Prior to the Haidl case, respondent had never tried a high profile case, and was virtually an unknown.

[2] All the overt acts took place in Orange County, California.

Overt Act 4: In or about and between August 2004 and August 2005, defendant Castro took Pedro Tarifa to defendant Cavallo's law office and introduced Pedro Tarifa to defendant Cavallo as a new employee of Xtreme.

Overt Act 5: In or about and between August 2004 and August 2005, defendant Castro reminded Pedro Tarifa to refer Xtreme's clients to defendant Cavallo.

Overt Act 6: In or about and between August 2004 and August 2005, defendant Castro told Pedro Tarifa that he would give him a bonus for Xtreme's clients he referred to defendant Cavallo.

Overt Act 7: In or about and between August 2004 and August 2005, defendant Castro told Pedro Tarifa to tell Xtreme's clients that they would get a discount from defendant Cavallo because they were referred to him for legal services by Xtreme.

Overt Act 8: In or about August 2004, defendant Cavallo loaned $50,000 to defendant Castro.[3]

Overt Act 9: In or about and between June 2003 and August 2003, defendant Cruz recommended that Martha Marquez hire defendant Cavallo to represent her boyfriend, Christian Vera.

Overt Act 10: In or about and between June 2003 and August 2003, defendant Cruz told Martha Marquez that defendant Cavallo was his friend and would give her boyfriend, Christian Vera, a reduced attorney retainer fee.

[3] During his deposition, Cavallo testified that he required Castro to sign a promissory note and to give him a deed of trust as security for the $50,000 loan. Prior to his indictment, Cavallo received $25,000 as partial repayment of the loan. To date, he has not been repaid the remaining $25,000 balance.

Overt Act 11: In or about and between June 2003 and August 2003, defendant Cruz made an appointment for Martha Marquez and her boyfriend, Christian Vera, with defendant Cavallo.

Overt Act 12: In or about and between June 2003 and August 2003, defendant Castro recommended that Enrique Cortez hire defendant Cavallo as his criminal defense attorney.

Overt Act 13: In or about and between June 2003 and August 2003, defendant Castro drove his car to defendant Cavallo's law office after directing Enrique Cortez to follow him.

Overt Act 14: In or about and between September 2003 and November 2003, defendant Cruz recommended that Miguel Silva hire defendant Cavallo to represent his son, Aaron Silva.

Overt Act 15: In or about and between September 2003 and November 2003, defendant Cruz told Miguel Silva that defendant Cavallo would charge him $5,000 to represent his son, Aaron Silva.

Overt Act 16: In or about and between September 2003 and November 2003, defendant Cruz drove a car to defendant Cavallo's law office after directing Miguel and Aaron Silva to follow him to defendant Cavallo's office.

Overt Act 17: In or about and between October 2003 and November 2003, defendant Cruz recommended that Trinidad Cessna hire defendant Cavallo to represent her husband, Robert Cessna.

Overt Act 18: In or about and between October 2003 and November 2003, defendant Cruz told Robert Cessna that he should go see defendant Cavallo regarding Robert Cessna's criminal case.

Overt Act 19: In or about and between October 2003 and November 2003, defendant Cruz told Robert Cessna that Xtreme refers its customers to defendant Cavallo.

Overt Act 20: In or about and between October 2003 and November 2003, defendant Cruz gave Robert Cessna defendant Cavallo's business card.

Overt Act 21: In or about and between December 2003 and January 2004, defendant Castro told Christopher Desimone that if he hired defendant Cavallo as his criminal defense lawyer, Christopher Desimone would not have to spend any time in jail and probably just get probation.

Overt Act 22: In or about and between December 2003 and January 2004, defendant Castro gave defendant Cavallo's business card to Christopher Desimone.

Overt Act 23: In or about December 2003 and January 2004, defendant Castro told Christopher Desimone that defendant Cavallo will give him a reduced fee.

Overt Act 24: In or about and between March 2004 and May 2004, defendant Castro recommended that Pedro Duque Aguilar hire defendant Cavallo as his criminal defense attorney.

Overt Act 25: In or about and between April 2004 and June 2004, defendant Castro told Gerardo Enriquez that he had a lawyer for him and recommended defendant Cavallo.

Overt Act 26: In or about and between April 2004 and June 2004, defendant Cavallo told Gerardo Enriquez that he was giving him a discount.

Overt Act 27: In or about and between April 2004 and June 2004, defendant Cruz recommended defendant Cavallo to Cirilo Zambrano.

Overt Act 28: In or about and between April 2004 and June 2004, defendants Cruz and Castro took Cirilo Zambrano to defendant Cavallo's office by driving a car and directing Cirilo Zambrano to follow them.

Overt Act 29: In or about and between April 2004 and June 2004, defendant Cavallo told Cirilo Zambrano that he will represent him and that he usually charges $5,000 but because he was referred to him by Xtreme, he would only charge him $3,500.

Overt Act 30: In or about and between May 2004 and July 2004, defendant Cruz gave defendant Cavallo's business card to Javier Martinez.

Overt Act 31: In or about and between August 2004 and September 2004, defendant Castro recommended that Hilario Demetrio hire defendant Cavallo as his criminal defense attorney.

Overt Act 32: In or about and between August 2004 and January 2005, defendant Cavallo told Hilario Demetrio that he will give him a discount since he was referred to him by Xtreme.

Overt Act 33: In or about and between September 2004 and November 2004, defendant Castro gave Anna Borihane defendant Cavallo's business card and recommended his services.

Overt Act 34: In or about and between September 2004 and November 2004, defendant Castro instructed Anna Borihane to tell defendant Cavallo that she was referred to him by defendant Castro from Xtreme.

Over Act 35: In or about and between October 2004 and November 2004, defendant Castro recommended that Mario Chico hire defendant Cavallo as his criminal defense attorney.

Overt Act 36: In or about and between October 2004 and December 2004, defendant Castro recommended defendant Cavallo to Julio Gonzalez.

Overt Act 37: In or about and between October 2004 and December 2004, defendant Castro told Julio Gonzalez that if he hired defendant Cavallo as his criminal defense attorney, defendant Cavallo would give him a discounted rate.

Overt Act 38: In or about and between October 2004 and December 2004, defendant Castro offered to go with Julio Gonzalez to defendant Cavallo's office.

Overt Act 39: In or about and between October 2004 and December 2004, defendant Castro set up an appointment for Julio Gonzalez with defendant Cavallo.

After pleading guilty to conspiracy to commit capping, conspiracy to commit the crime of attorney recommendation by a bail licensee, and the crime of attorney recommendation by a bail licensee, the court sentenced respondent to six months of house arrest, three years of probation, and required respondent to pay $18,336.63 in fines, which respondent has paid in full.

E. Conclusions of Law

Consequently, respondent was convicted of conspiring to commit the crime (Pen. Code, § 182, subd. (a)(1)) of attorney capping in violation of Business and Professions Code section 6152, subd. (a);[4] conspiring to commit the crime of attorney recommendation by a bail licensee (Pen. Code, § 182, subd. (a)(1); Ins. Code, § 1814; and Cal. Code Regs., tit. 10, § 2071); and the actual crime of attorney recommendation by a bail licensee (Ins. Code, § 1814; and Cal. Code Regs., tit. 10, § 2071).

In light of the foregoing facts, the issue before the court is whether the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline.

The term moral turpitude is defined broadly. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 49 Cal.3d 804, 815, fn. 3.) An act of moral turpitude is any "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Citation.]" (*In re Craig* (1938) 12 Cal.2d 93, 97.) "Although an evil intent is not necessary for moral turpitude [citations], some level of guilty knowledge or [moral culpability] is required. [Citation.]" (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384.)

[4] Business and Professions Code section 6152 prohibits any person to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails or other places of detention of persons.

The reason behind the long-standing prohibition in the rules of professional conduct or state law, against capping and improper partnership and fee division activities between lawyers and non-lawyers, is the potential these activities have to adversely affect the independent professional judgment of the lawyer. (*In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178.)

Where an attorney's involvement in capping was pervasive and his law practice was entirely built on illegal payments to third parties for cases, the attorney's conduct clearly involved corruption and moral turpitude. (*In the Matter of Nelson, supra,* 1 Cal. State Bar Ct. Rptr. 178 [capping activities for six months].)

In *Kitsis v. State Bar* (1979) 23 Cal.3d 857, the attorney was involved in capping and soliciting more than 200 clients over a three year period. The Supreme Court held that the deliberate and knowing violation of an attorney's solicitation of clients involved moral turpitude. "[A]n act 'contrary to honesty and good morals is conduct involving moral turpitude.' [Citations.]" (*Id.* at p. 865.)

Here, respondent's capping took place for more than two years, which was clearly pervasive, and involved 30 cases and referrals of at least 10-20 clients. Respondent stipulated that he allowed the owners of Xtreme Bail Bonds to refer clients to him, paid them a referral fee between $300 and $500 for each case and offered discounts to clients referred to him by Xtreme.[5] Respondent further admitted that he should not have agreed to do what he had done.

Respondent argues that his crimes did not involve moral turpitude per se or moral turpitude. While his crimes did not involve moral turpitude per se, the facts and circumstances surrounding his crimes clearly involved moral turpitude and corruption, as in *Nelson*. The law

[5] Contrary to this stipulated fact, respondent testified at trial that he never gave discounts to clients because they were referred by a bail bondsman but gave discounts to all clients, based on their ability to pay. The court rejects this testimony as not credible.

prohibits an attorney from engaging in solicitation of clients. Yet, respondent knowingly violated the law. He was so worried about the financial health of his practice that he allowed his business concerns to take priority over his ethical and professional duties, even in the face of criminal violations. Therefore, despite his arguments at trial trying to justify why he committed the crimes, respondent committed those criminal acts, which are acts "contrary to honesty and good morals" involving moral turpitude.

Based on clear and convincing evidence, the court concludes that the facts and circumstances surrounding respondent's capping conviction involved moral turpitude.

IV. Aggravating and Mitigating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)[6]

A. Aggravation

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

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) On May 17, 1997, the State Bar Court privately reproved respondent for engaging in false, misleading or deceptive advertisements (Bus. & Prof. Code, § 6157.1) and in advertisements containing impersonations and dramatizations without proper disclosure (Bus. & Prof. Code, § 6157.2, subd. (c)(2) and (3)).

Respondent's criminal conviction evidences multiple acts of misconduct by displaying his business cards in Xtreme's office, by offering discounts to clients referred to by Xtreme and by paying fees for Xtreme's multiple referrals over a 26 month period. (Std. 1.2(b)(ii).)

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

Moreover, the fact that respondent intentionally engaged in the misconduct for personal gain and personally profited from his misconduct are aggravating circumstances. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 938.)

In its closing brief, the State Bar alleged that respondent violated rule 1-320(A) and (B) of the Rules of Professional Conduct (financial agreements with non-lawyers). But the State Bar did not provide any substantive arguments, other than stating that the purpose of the Rules of Professional Conduct is "to protect the public and to promote respect and confidence in the legal profession." Because respondent has already been convicted of capping in violation of Business and Professions Code section 6152, finding that respondent also violated rule 1-320(A) of the Rules of Professional Conduct (compensation for referrals of legal clients) would be duplicative and unnecessary. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicative allegations of misconduct].) Furthermore, there is no clear and convincing evidence that respondent shared legal fees with any of the bondsmen in violation of rule 1-320(B) of the Rules of Professional Conduct. Therefore, these alleged, uncharged violations are rejected. (Std. 1.2(b)(iii).)

Although there was no harm to a client, respondent's misconduct caused harm to the administration of justice. (Std. 1.2(b)(iv); *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 69.)

B. Mitigation

Because there was harm to the administration of justice, the lack of harm to the client is not a mitigating factor. (Std. 1.2(e)(iii).)

Respondent argues that he was suffering from financial, physical and emotional difficulties at the time of his criminal acts. (Std. 1.2(e)(iv).) Respondent testified extensively concerning his childhood – being raised in a family with minimal finances, growing up on

welfare, and living in the projects – and how his family background affected him. Through sheer determination and work, respondent was able to complete high school, college and law school. Due to respondent being raised in a family with little or no money, respondent has always feared of being poor. This fear of being poor existed even when respondent's practice was successful and he was making money.

Sometime in 2002, respondent started to have financial concerns regarding his law practice, primarily due to the effect of Proposition 213 on his personal injury practice. As respondent was experiencing a decline in his personal injury practice, he became the attorney for Greg Haidl in a high profile criminal case. During the two trials in the Haidl matter, respondent's law practice suffered financially and he sacrificed his relationship with his children and former wife. At the time of his testimony in this matter, respondent is still troubled by the events that occurred in his Haidl representation and the effects on his personal and professional life.

During this time, respondent sought medical treatment, was taking anti-depression medication, and suffered from heart problems which required numerous surgeries.

While the lack of expert testimony may impact the weight of the evidence, it does not mean that respondent's testimony or this factor must be rejected in mitigation. (*In re Brown* (1995) 12 Cal.4th 205, 222 [some mitigation to effects of attorney's illness despite lack of expert testimony].) The Supreme Court has often considered lay testimony of emotional problems as mitigation. (*Lawhorn v. State* Bar (1987) 43 Cal.3d 1357, 1364.) Thus, some mitigating weight is given to respondent's physical and emotional health difficulties.

Financial difficulties may be a mitigating factor in attorney discipline proceedings, but only if they "are extreme and result from circumstances that are not reasonably foreseeable or that are beyond the attorney's control." (*In re Brown, supra,* 12 Cal.4th 205, 222.) In this case,

there is no clear and convincing evidence that respondent's financial concerns were unforeseeable or beyond his control. In fact, he was afraid of being poor even when his practice was financially successful. Thus, his financial difficulties do not manifest a mitigating factor.

Respondent's stipulation as to facts displays candor and cooperation with the State Bar during the disciplinary proceeding. (Std. 1.2(e)(v).)

Respondent presented the testimony of eight impressive witnesses and three declarants who testified to his good character. (Std. 1.2(e)(vi).) Six of the witnesses are attorneys and their testimony is given great weight because "[t]hese witnesses have a strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) Respondent served as a judge pro tem for over 20 years in Westminster Court, South Coast Court and North County Court in Orange County. Respondent has also provided pro bono services since becoming an attorney. Such civil service deserves recognition as a mitigating circumstance. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.)

Respondent has shown some remorse and willingness to accept responsibility for his acts of misconduct. (Std. 1.2(e)(vii).) Respondent testified that he (1) never gave discounts to clients because they were referred by a bail bondsman but gave discounts to all clients, based on their ability to pay; (2) never authorized a bail bondsman to quote fees to a client; and (3) never guaranteed results on cases to a client nor was he aware that anyone was doing so on his behalf. According to respondent, he had stopped taking referrals when he learned that his co-defendants in the criminal case had rewarded inmates for steering business his way. Respondent hired a retired police official, Thomas Davis, to educate his co-defendants on how to run their business honestly and legally.

However, such testimony is somewhat discounted because, as stated previously,

respondent's conviction is conclusive proof that he had committed all acts necessary to constitute the offense of which he was convicted. It is irrelevant at this juncture for respondent to deny that he ever gave discounts to certain clients referred to by Xtreme or that he authorized the bondsmen to quote fees to clients. This is contrary to his stipulation. In fact, respondent stated, "I was prosecuted and pled guilty because I am guilty of the crimes charged." Therefore, respondent's remorse is only of some weight in mitigation.

Respondent also urges the court to find as mitigation the negative publicity respondent received throughout the course of his criminal proceeding. The court does not agree. Respondent's negative publicity is foreseeable in such a criminal proceeding. Respondent did not demonstrate by clear and convincing evidence how it had a devastating impact on his ability to practice law. (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 29 [the extraordinary harsh effects of the disciplinary proceeding on the attorney and her ability to earn a living – closing her law office to protect the firm and filing bankruptcy].)

V. Discipline Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

The applicable standards provide a broad range of sanctions ranging from actual suspension to disbarment. (Stds. 1.6, 2.3 and 3.2.)

Standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

Standard 2.3 provides that culpability of an act of moral turpitude would result in suspension or disbarment depending on the extent of the attorney's misconduct, on the extent to which the victim of the misconduct is harmed or misled and on the magnitude of misconduct and the degree to which it relates to the attorney's acts within the practice of law.

Standard 3.2 provides: "Final conviction of a member of a crime which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two-year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances."

Here, respondent's misconduct involved three felony convictions of capping. Respondent provided compelling mitigating evidence, including good character as attested to by many witnesses, community services, physical and emotional difficulties, cooperation with the State Bar and remorse.

The State Bar urges that respondent be either disbarred under standard 3.2 or at a minimum, be actually suspended for three to four years.

Respondent argues that his actual suspension should not exceed one year because he never abdicated control of his law practice or his cases to cappers, there was no deceit of clients or third parties and there was no harm to clients. However, the cases relied on by respondent are distinguishable because the misconduct involved there was far less serious than that of respondent. For example, *In the Matter of Duxbury, supra,* 4 Cal. State Bar Ct. Rptr. 61 involved a misdemeanor conviction of an attorney's solicitation of two clients. And, *In the Matter of Nelson, supra,* 1 Cal. State Bar Ct. Rptr. 178 involved an attorney's capping for six months but no criminal conviction.

Nevertheless, it is well settled that the standards "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) 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.) While the standards are entitled to great weight (*In re Silverton* (2005) 36 Cal.4th 81, 92), they do not provide for mandatory disciplinary outcomes. Although the standards were established as guidelines, "ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case." (*In the Matter of Oheb, supra,* 4 Cal. State Bar Ct. Rptr. 920, 940.)

The Supreme Court and the Review Department of the State Bar Court have declined to rigidly apply the standards as mandatory sanctions.

In *In re Young* (1989) 49 Cal.3d 257, 268, the Supreme Court stated: "The Standards for Attorney Sanctions are instructive, but they are simply guidelines for the State Bar and we are not compelled to follow them… We do not apply rigid disciplinary standards, but rather resolve each case on its own facts."

The court recognizes that "disbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude." (*In re Crooks* (1990) 51 Cal.3d 1090, 1101.) But the court has grave doubts as to the propriety of the recommended discipline of disbarment in this matter. In fact, the State Bar's "reliance on standard 3.2 results in an inappropriate recommendation in light of … [respondent's] compelling mitigating factors." (*In re Young, supra,* 49 Cal.3d 257, 268.)

"[I]n the final analysis, as the Supreme Court has made clear, our consideration of the Standards cannot yield a recommendation which, on the record, is arbitrary or rigid [citation], or

about which 'grave doubts' exist as to the recommendation's propriety. [Citation.] Moreover, the weight to be accorded the Standards will depend on the degree to which they are apt to the case at bench." (*In the Matter of Oheb, supra,* 4 Cal. State Bar Ct. Rptr. 920, 940.)

The degree of discipline in cases involving solicitation or capping activities ranges from a minimum of six months actual suspension for isolated acts of solicitation via cappers to disbarment. (*Kitsis v. State Bar, supra,* 23 Cal.3d [disbarment]; *In re Gross* (1983) 33 Cal.3d 561 [three-year actual suspension, false medical reports involved]; *In re Arnoff* (1978) 22 Cal.3d 740 [two-year actual suspension; false medical reports also involved]; *Goldman v. State Bar* (1977) 20 Cal.3d 130 [one-year actual suspension]; *In the Matter of Nelson, supra,* 1 Cal. State Bar Ct. Rptr. 178 [six months' actual suspension].)

As previously discussed in *Nelson*, an attorney who engaged in capping for a six-month period was actually suspended for six months in light of his strong mitigation (remorse, restitution, rehabilitation and cooperation). Unlike *Nelson*, respondent's capping lasted much longer than six months, and he was criminally convicted for his felonious conduct.

In *In the Matter of Duxbury, supra,* 4 Cal. State Bar Ct. Rptr. 61, the attorney was actually suspended for six months for a misdemeanor conviction on a single count of violating Insurance Code section 750, subdivision (a) (prohibiting attorneys from offering compensation for the referral of clients). The attorney's capping involved two cases of solicitation. The court found that the circumstances surrounding the attorney's conviction involved moral turpitude.

In *Goldman,* two attorneys were found culpable of capping as to six clients. They were found to have full knowledge that their employees solicited individuals involved in accidents to employ the Goldman office and signed clients to retainer agreements. The attorneys were actually suspended for one year. Respondent's misconduct was clearly more serious than that of *Goldman, Duxbury* or *Nelson*.

In *Kitsis*, as discussed above, the attorney was disbarred for capping and solicitation of more than 200 clients. Respondent's capping involved about 30 clients and thus was not as egregious as that of the attorney in *Kitsis*.

The court finds *Gross* and *Arnoff* to be of guidance, both of which involved capping in violation of Business and Professions Code section 6152. In *Gross*, the attorney was convicted on a misdemeanor violation for capping and presenting false claims. The Supreme Court imposed a three-year actual suspension. The attorney had no mitigation and had a prior record of discipline. The Supreme Court found that "the misconduct violates the very essence of professional ethics and morality expected of attorneys and endangers the public's confidence in the legal profession." (*In re Gross, supra*, 33 Cal.3d 561, 569.) Here, although respondent has substantial mitigation, he also has a prior record of discipline and he was found guilty of three felony counts on capping.

In *Arnoff*, the attorney was found guilty of violating Penal Code section 182, subdivision 1 (conspiracy to commit capping in violation of Bus. & Prof. Code, § 6152). He split his fees with a layman, participated in a scheme using cappers and runners and made extensive use of fraudulent medical reports. His capping activities took place for about two years and involved 500 personal injury claims. He had substantial mitigating evidence, such as no prior record of discipline in 20 years of practice, had domestic and health difficulties, and was candid, cooperative and remorseful. The Supreme Court found that the facts and circumstances surrounding his criminal violation involved moral turpitude and actually suspended the attorney for two years. Here, respondent's misconduct was similar to that of *Arnoff*; but, unlike *Arnoff*, respondent has a prior record of discipline.

In light of the standards and case law and after balancing all relevant factors, including the underlying misconduct and the aggravating and mitigating circumstances, the court has

determined that a three-year actual suspension would commensurate with the gravity of respondent's act and would be adequate for the protection of the public, the courts and the legal profession.

VI. Recommendations

A. Discipline

The court recommends that respondent **JOSEPH GERARD CAVALLO** be suspended from the practice of law in California for five years, that execution of the suspension be stayed, and that he be placed on probation for five years, subject to the following conditions:

1. Respondent must be suspended from the practice of law for a minimum of the first three years of probation, and he will remain suspended until he provides proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).) Credit toward the period of actual suspension should be given for the period of interim suspension which commenced on December 17, 2007;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent 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, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter

date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

4. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;

5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1;

6. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);

7. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for five years that is stayed, will be satisfied and that suspension will be terminated.

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, during the period of his actual suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 951(b), and Rules Proc. of State Bar, rule 3201(a)(1) and (3).)

C. California Rules of Court, Rule 9.20

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, 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. Willful 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.[7]

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

D. Costs

The court further recommends 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 13, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court