PUBLIC MATTER - DESIGNATED FOR PUBLICATION

Filed April 27, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No. 99-C-11161
	)	(Supreme Ct. No. S129298)
TAMIR OHEB,	)	
	)	**OPINION ON REVIEW AFTER**
A Member of the State Bar.	)	**REMAND BY SUPREME COURT**
	)	

In this conviction referral proceeding, the State Bar sought our review of a hearing judge's decision recommending that respondent, Tamir Oheb, be placed on four years' stayed suspension and on four years' probation with conditions, including two years' actual suspension. On July 16, 2004, we filed our opinion in this case, concluding that summary disbarment was not authorized under Bus. & Prof. Code, §6102 (c), but finding that the facts and circumstances surrounding the conviction of respondent, Tamir Oheb, of violation of Penal Code, section 549 involved moral turpitude. We accordingly adopted the hearing judge's recommendation that respondent be suspended for four years, that execution be stayed and that respondent be actually suspended for two years, retroactive to October 1, 2001, the start of his interim suspension, and that his actual suspension should continue until he makes an acceptable showing under Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Standards).

The State Bar sought Supreme Court review of our decision, arguing that disbarment is the appropriate discipline to recommend. In the alternative, the Bar sought a remand to us to reconsider the degree of discipline.

By order of June 15, 2005, the Supreme Court remanded the matter to us with directions to vacate our recommendation and reconsider it in light of Standard 3.2. (Cal. Rules of Court, rule 953.5.)[1]

After an opportunity for the parties to brief the issue on remand, we have reconsidered our earlier discipline recommendation and now recommend, for the reasons stated, that respondent be disbarred.

I. PROCEDURAL HISTORY.

In September 2000, after pleading nolo contendere, respondent was convicted in the Los Angeles Superior Court on two felony counts of violating Penal Code section 549 for accepting referrals of personal injury clients with reckless disregard for whether the referring party or the referred clients intended to make false or fraudulent insurance claims.[2] Once the State Bar

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[1]Because of the Supreme Court's remand order, and pending our further order, we depublished our earlier opinion in *In the Matter of Oheb.* (See 4 Cal. State Bar Ct. Rptr. 697.) For ease of reference, we refer to that opinion as our "2004 opinion." We have construed the Supreme Court's order that we vacate our 2004 opinion as to our discussion and recommendation of the degree of discipline. (2004 typed opinion, Sections VII. and VIII., pp. 32-38.) We therefore re-adopt Sections I. through VI., pp. 3 - 32, of our 2004 opinion; and, accordingly, republish our previous statement as to procedural history, discussion of ineligibility of this case for summary disbarment, findings of fact, conclusions of law and discussion of aggravating and mitigating circumstances. In order to restore the portions of our 2004 opinion which we re-adopt, we set them forth anew, utilizing the same heading designations as in the earlier opinion.

[2]Penal Code section 549 provides: "Any firm, corporation, partnership, or association, or any person acting in his or her individual capacity, or in his or her capacity as a public or private employee, who solicits, accepts, or refers any business to or from any individual or entity with the knowledge that, or with reckless disregard for whether, the individual or entity for or from

notified us of respondent's convictions, we filed an order in August 2001 that placed respondent on interim suspension because respondent's convictions were for (1) felony crimes and (2) crimes which there is probable cause to believe involve moral turpitude.[3] (Bus. & Prof. Code, § 6102, subd. (a); Cal. Rules of Court, rule 951(a); Rules Proc. of State Bar, rule 320(a).) In that same August 2001 order, following the customary practice for such crimes, we also referred respondent's convictions to the hearing department for a trial on the issues of whether the facts and circumstances surrounding the commission of the crimes involved moral turpitude (Bus. & Prof. Code, §§ 6101, 6102) or other misconduct warranting discipline (see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494); and, if so, for a recommendation as to the discipline to be imposed. (Cal. Rules of Court, rule 951(a); Rules Proc. of State Bar, rule 320(a).)

After he was placed on interim suspension in California under our August 2001 order, respondent practiced law in Las Vegas until he was suspended in Nevada in February 2002, which was only about two months before the State Bar Court trial. The record does not indicate whether respondent was physically present in Las Vegas or anywhere else in Nevada when he practiced law after his interim suspension in California.

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whom the solicitation or referral is made, or the individual or entity who is solicited or referred, intends to violate Section 550 of this code or Section 1871.4 of the Insurance Code [by making false or fraudulent insurance claims] is guilty of a crime, punishable . . . ." Respondent pleaded nolo contendere only to the "with reckless disregard" portion of section 549 and not to the "with the knowledge" portion. In light of respondent's plea agreement, the People found it unnecessary to take a position on whether respondent had actual knowledge that his clients or the individual who referred the clients to him intended to make false or fraudulent insurance claims. At the hearing on respondent's plea agreement, the People told the court, that it was leaving for the State Bar the issue of whether respondent had such actual knowledge.

[3]Either one of these grounds alone would authorize respondent's interim suspension. (Bus. & Prof. Code, § 6102, subd. (a).)

After a trial of almost five days, the hearing judge found that the circumstances surrounding respondent's crimes involved moral turpitude because respondent accepted personal injury cases with knowledge that they were being purchased and took steps to conceal the fact that he was splitting attorney's fees with a nonattorney. The hearing judge further found that the circumstances surrounding respondent's convictions also involved respondent's (1) willful violation of rule 1-311 of the Rules of Professional Conduct of the State Bar[4] by employing a nonattorney whom respondent knew had previously resigned from the State Bar with disciplinary charges pending without complying with the requirements of rule 1-311, (2) willful violation of rule 1-320 by improperly entering into financial arrangements with nonattorneys to obtain clients, and (3) willful violation of rule 4-100(A) by making certain improper deposits into and payments from his client trust account.

After considering aggravating and mitigating evidence, which we discuss *post*, the hearing judge made his recommendation of four years' stayed suspension, four years' probation, and two years' actual suspension, and this appeal was filed by the State Bar.

II. CURRENT LAW DOES NOT PROVIDE FOR SUMMARY DISBARMENT UNLESS THE ELEMENTS OF THE CONVICTION INHERENTLY INVOLVE MORAL TURPITUDE.

At the outset, we discuss the State Bar's argument that the summary disbarment statute (Bus. & Prof. Code, § 6102, subd. (c)[5]), applies to all felonies which involve moral turpitude in their surrounding facts and circumstances and not just to those where the elements of the

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

[5]All further references to section(s) are to the Business and Professions Code unless otherwise indicated.

conviction involve moral turpitude per se. As we shall discuss, we disagree with the State Bar. In our view, the State Bar's position is contrary to the uniform meaning and interpretation of over 70 years of summary provisions of the State Bar Act flowing from an attorney's conviction of crime.

The State Bar offers several points in support of its argument. However, we have concluded that its points do not offer the support the State Bar claims.

Prior to 1955, the State Bar Act and predecessor laws provided for automatic disbarment upon an attorney's final conviction of a crime involving moral turpitude. (E.g., *In re Smith* (1967) 67 Cal.2d 460, 462; *In re Collins* (1922) 188 Cal.701, 707-708.) It is clear that under the pre-1955 law, automatic disbarment was reserved for only those crimes which inherently involved moral turpitude. The Supreme Court made this point succinctly in *In re Hallinan* (1954) 43 Cal.2d 243, 248: "Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under [the State Bar Act]." Indeed, in those cases not inherently involving moral turpitude, before and after the earlier automatic disbarment law, the Supreme Court uniformly referred them to the State Bar not only for an evidentiary hearing on the question of whether the surrounding facts and circumstances involved moral turpitude or misconduct warranting lawyer discipline, but also for a recommendation as to the degree of discipline to impose depending on what was shown by the surrounding facts and circumstances. (In addition to *In re Hallinan*, *supra*, at pp. 253-254, see *In re Kelley*, *supra*, 52 Cal.3d 487, 492; *In re Strick* (1983) 34 Cal.3d 891, 897; *In re Higbie* (1972) 6 Cal.3d 562, 568-569; *In re Langford* (1966) 64 Cal.2d 489, 490.)

Effective January 1, 1986, a summary disbarment law was enacted in the State Bar Act. Although it is not the text of the law at issue here, its history is instructive to the issue in the 1996 law which is before us. The law between 1986 and 1997 provided for summary disbarment if "an element" of the convicted felony was the "specific intent to deceive, defraud, steal, or make or suborn a false statement." Other required elements not pertinent here were that the crime either occurred in the practice of law or such that the attorney's client was a victim. (See *In re Utz* (1989) 48 Cal.3d 468, 482, fn. 10.)

Although this law was cited by the Supreme Court in four decisions, none of these citations touch the issue under review. (See *In re Ewaniszyk* (1990) 50 Cal.3d 543, 549-550 [retroactive applicability need not be decided as disbarment was warranted irrespective of the summary disbarment law]; *In re Utz*, *supra*, 48 Cal.3d 468, 482-483 [insufficient basis to impose discipline under the 1985 summary disbarment law, as to the requirement that the offense occur in the practice of law]; *In re Basinger* (1988) 45 Cal.3d 1348, 1358, fn. 3 [since, inter alia, the State Bar did not rely on summary disbarment statute below, its applicability need not be decided]; *In re Ford* (1988) 44 Cal.3d 810, 816, fn. 6 [question of retroactive application of § 6102, subd. (c) need not be decided].)

Effective January 1, 1997, the law eliminated the requirement that the crime had to have occurred in the practice of law or such that the attorney's client was a victim and, as pertinent here, provided for summary disbarment "if the offense is a felony under the laws of California, the United States, or any state or territory thereof, and an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude."

The State Bar maintains that whatever the viability of the Supreme Court's earlier requirement limiting summary disbarment to crimes that inherently involve moral turpitude, that limit did not survive the 1996 amendments. We disagree.

The State Bar advances several arguments for its theory that a crime is eligible for summary disbarment even if it does not inherently involve moral turpitude. First it contends that the plain language of the 1996 amendment to section 6102, subdivision (c) demonstrates its applicability to crimes not inherently involving moral turpitude. But its explanation does not provide support for its argument. Indeed, we believe that the plain meaning of this provision, is to read the reference to moral turpitude as relating to "an element of the offense" just as other factors included in the statute relate. That would make the statute fully compatible with the long-standing judicial interpretation.

The State Bar also contends that the legislative history of the 1996 amendment to section 6102, subdivision (c) establishes its broader applicability of the law. According to the State Bar, the original form of this amendment contained the word "element" twice, in this array: "After the judgment of conviction . . . has become final . . . , the Supreme Court shall summarily disbar the attorney if the offense is a felony . . . and an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or an element of the offense involved moral turpitude." The State Bar argues that this original draft of the bill made clear that the moral turpitude element applied only to crimes inherently involving moral turpitude and that when the legislature removed the second reference to "element of the offense" in the bill that that was a legislative intent that the provision relate to crimes not inherently involving moral turpitude. However, the State Bar concedes that there is no discussion by any legislator as to this

subject and in our view, it is an equally reasonable conclusion that the deletion was made simply as a stylistic avoidance of redundancy. (Cf. *Price v. State Bar* (1982) 30 Cal.3d 537, 541 [legislature's failure to remove a provision in section 6131 was deemed an oversight].) Moreover, given the nature of the statutory amendments, the legislature is assumed to be aware of and to have acquiesced in the lengthy, uniform history of the Supreme Court in requiring a crime inherently involving moral turpitude before invoking summary disbarment procedures (see *Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734), and we see no evidence that the legislature intended to alter this judicial construction. Indeed, any discussion that the State Bar does cite us to from the legislative history is merely explanatory and consistent with the long-standing interpretation that the crime must inherently involve moral turpitude as a precondition for summary disbarment. In that connection, we find it significant that, when defining an out-of-state felony which would qualify under section 6102 for either interim suspension or summary disbarment, the legislature expressly referred to the "elements" of the offense. (§ 6102, subd. (d)(2).) Finally, we note that the legislative procedure for imposing final discipline after an attorney's criminal conviction for those offenses ineligible for summary disbarment, continues to recognize either crimes "involving" moral turpitude or, crimes in which the "circumstances" surrounding the commission involve moral turpitude. (§ 6102, subd. (e).) This is to us a strong legislative recognition that the term "involve" or "involving" moral turpitude as used in section 6102 means that the crime inherently involves moral turpitude as a matter of law, just as *In re Hallinan*, *supra*, 43 Cal.2d 243, contemplates.

The State Bar's citation of Supreme Court decisional law to support its position is similarly unavailing, for, if anything, *In re Lesansky* (2001) 25 Cal.4th 11, 16, appears to us to be

guidance that the Supreme Court interprets the 1996 summary disbarment law in the same essential manner as the law prior to 1955, in requiring moral turpitude to be inherent in the criminal conviction as a prerequisite to summary disbarment. In *Lesansky*, the attorney claimed that his conviction of attempted child molestation under Penal Code sections 664 and 288, subdivision (c)(1), was not eligible for summary disbarment as it was not a crime inherently involving moral turpitude. The Supreme Court disagreed, stating that "An offense *necessarily* involves moral turpitude if the conviction would *in every case* evidence bad moral character. [Citing *In re Hallinan, supra*, 43 Cal.2d 243.] This is a question of law to be determined by this court. [Citation.]" (*In re Lesansky, supra*, 25 Cal.4th at p. 16, original italics.) Although Lesansky's crime had been classified as one which involves moral turpitude per se, unlike respondent's conviction of Penal Code section 549, if the Supreme Court determined that the 1996 summary disbarment law's "moral turpitude" element could be triggered by a lesser requirement than by a crime that inherently involved moral turpitude, it presumably would have so indicated instead of following its long-standing approach.

Similarly unavailing to the State Bar's argument is the State Bar's reliance on rule 606 of the Rules of Procedure of the State Bar which allows us to refer a conviction to the hearing judge solely to resolve factual issues regarding whether the criteria are present for summary disbarment. As the history of that rule reveals, it was adopted solely in response to the legislative enactment of criteria that existed until January 1, 1997, that in order to be eligible for summary disbarment, a crime must have occurred in the practice of law or in a way that a client was a victim. Since the presence or absence of those elements were not always obvious from the bare

record of conviction, we were given referral authority to ascertain whether the statutory elements existed. Rule 606 did not, however, change the type of crimes eligible for summary disbarment.

Finally, we cannot agree with the policy arguments the State Bar cites for reading section 6102, subdivision (c) as applicable to crimes not inherently involving the prescribed elements. We simply observe that the policy of limiting crimes eligible for summary disbarment under the 1996 law to those which inherently involve the statutory elements appears the far better policy, for those crimes then depend on a *legal* definition of the crime's elements and are uniformly applied to all such convictions of the same crime, rather than turning on slight variations in facts and circumstances yielding varying moral turpitude outcomes for the same conviction, as can occur in every crime of an attorney not involving per se the prescribed summary disbarment elements. (Among many such crimes which could have a varying outcome, see, e.g., *In re Higbie*, *supra*, 6 Cal.3d 562; *In re Langford*, *supra*, 64 Cal.2d 489.)

We have reviewed our order classifying this offense as one which there is probable cause to believe involves moral turpitude, and we adhere to that classification. In order to warrant classification as a crime inherently involving moral turpitude, the least adjudicated elements of the crime must, as a matter of law, constitute moral turpitude no matter how the crime was committed. (Cf. *People v. Castro* (1985) 38 Cal.3d 301, 317 [classification of moral turpitude crimes for witness impeachment purposes].) Given that either reckless disregard or knowledge of intent of another to commit insurance fraud is an element of the offense -- here respondent pled to the "reckless disregard" element -- we cannot hold that Penal Code section 549 inherently involves moral turpitude.

III. FINDINGS OF FACT.

Turning to the facts and circumstances surrounding respondent's conviction, our independent review causes us to make the following findings of fact, which are established by clear and convincing evidence.

A. Respondent's background.

In 1982, when respondent was 17, his father had a severe stroke. The next year, respondent's family moved from New York to Tarzana, California, where they lived in an apartment near one of respondent's uncles. Respondent testified that, ever since his family moved to California in 1983, he has worked and provided 80 percent of his family's income. While respondent went to law school at night, he worked full-time during the day and all but completely supported his sister when she was in college in the late 1980's and early 1990's, paying for her food and college tuition, buying her a car, and paying for its insurance and related expenses.

Sometime while in law school, respondent moved out of his family's apartment and into a house that he purchased in the Northridge area. Thereafter, his parents purchased and moved into a house in or near Northridge. Respondent testified that, in addition to having to pay his monthly mortgage of about $2,000, he was responsible for his parents' mortgage.

After respondent graduated from law school in May 1992, he took and passed the July 1992 California General Bar Examination, was admitted to the practice of law in California on December 14, 1992, and has been a member of the State Bar since that time. Sometime thereafter, respondent was admitted to practice in Nevada. After his admission to practice, respondent received multiple job offers with salaries ranging from $25,000 to $30,000 a year.

Respondent rejected each of those offers as insufficient to pay his living expenses and the financial assistance he gave his family. Respondent married in May 1995, and his first child was born in August 1996 and his second in July 1999. Respondent's wife did not work.

B. Respondent's law practice.

In early 1993, respondent opened his own law practice, which he limited almost exclusively to plaintiffs' personal injury. Except for the few months when he had a small office in Reseda, California, respondent practiced law out of his house. During that time, respondent had privileges in what is referred to as a "Fegen Suite," a law office suite where attorneys paid for office privileges such as receiving mail, forwarding their telephone calls, and meeting with clients in a conference room. Then, in October 1996, respondent moved into an office in Tarzana, California, which he thereafter maintained as his permanent and principal office. Over the years, respondent also opened "satellite" offices in a number of other cities such as Woodland Hills, California and Las Vegas, Nevada. Respondent testified that almost all of his satellite offices were open only for a short while because they were not profitable.

Respondent personally kept his financial records, maintaining particularly meticulous bank records for each of his accounts, including his client trust account. For each bank account, he kept a file containing a copy of each check written on the account and another file containing a copy of each check deposited into the account. Respondent was the only one who wrote or signed checks on his bank accounts.

When a case settled, respondent personally prepared the "settlement sheet," which set forth the division of the settlement proceeds, i.e., between the client, respondent, medical providers, and any other party entitled to a portion of the proceeds. The client had to approve

division of the settlement proceeds and sign the settlement sheet before respondent would pay out any proceeds.

One morning in October 1997, chiropractor Richard Monoson telephoned respondent. Respondent had met and dealt with both Monoson and Jack Hannah, Monoson's office manager and only employee, some 10 years earlier while respondent was in law school and worked as a law clerk for an attorney who referred clients to Monoson. Over the years, Monoson befriended respondent and, inter alia, employed respondent for three or four months in 1992 while he waited for his bar results at a salary of either $200 or $300 per week and apparently even loaned respondent money. Respondent considered Monoson like a brother; believed that Monoson saved his and his family's lives by employing him; and allegedly relied greatly on Monoson's purported honesty, integrity, and good judgment. From the time he started practicing law in 1993 through mid-December 1998, respondent referred all of his clients to Monoson for treatment.

When Monoson telephoned respondent that morning in October 1997, he asked respondent to come to his chiropractic office in Encino that afternoon to meet Kenneth Gottlieb, whom Monoson described only as a former attorney who could increase respondent's practice. When respondent went to Monoson's office that afternoon, Monoson introduced him to Gottlieb as well as to Keith R. Ohanesian, a chiropractor with whom Monoson did business and who knew Gottlieb, and Tony Folgar, an investigator who worked with Gottlieb.

At the meeting, no one told respondent that Gottlieb resigned with disciplinary charges pending in July 1992 or that Gottlieb had a criminal record. After the introductions were made that afternoon, the men met for about 30 minutes. At that meeting, respondent learned that Monoson just met Gottlieb the day before; that Gottlieb was working with Attorney Ronald

Hettena in Hettena's personal injury practice, but that Gottlieb was looking for another attorney to work with because Hettena was allegedly closing his practice and moving out of state; and that Gottlieb was going to keep and to continue working out of an office in Van Nuys, California that he had shared with Hettena. In addition, respondent was told and believed that Gottlieb had been a very successful "attorney for 25 years plus, that [Gottlieb] was a litigator, [that Gottlieb] had worked for a number of famous attorneys," that Gottlieb had a "huge book of business" that he was willing to refer to respondent, and that he was willing to teach respondent how to litigate.

Respondent soon learned of Gottlieb's resignation when he looked Gottlieb's membership status up on the State Bar's web site. Even though the State Bar's web site indicated that Gottlieb's resignation was with disciplinary charges pending, it did not identify the pending charges, and respondent never requested that information from the State Bar. The State Bar's official public records, although not then available on its web site, disclosed that Gottlieb had been publicly reproved in May 1986 and that the disciplinary charges pending against Gottlieb involved both Gottlieb's September 1991 convictions on two counts of insurance fraud, two counts of grand theft, and two counts of forgery, and Gottlieb's failure to comply with rule 955 of the California Rules of Court as directed in an order we filed in fall 1991 placing Gottlieb on interim suspension.[6]

Respondent not only failed to seek additional information from the State Bar on Gottlieb's resignation, he waited a number of weeks before he even asked Gottlieb for more

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[6]In 1994, Gottlieb was again convicted of insurance fraud involving staged automobile accidents and of grand theft. At that time, he was also convicted of money laundering. Because Gottlieb resigned in 1992, Gottlieb's public records at the State Bar did not disclose his 1994 convictions.

information. Respondent testified that, when asked, Gottlieb explained "that he had some issue with the State Bar over some – a med – a med pay matter or lien of a doctor that took years and years to resolve and he finally just resigned." Respondent also testified that he believed Gottlieb's explanation. While it is true that a number of respondent's witnesses corroborated respondent's testimony as to the basic content of Gottlieb's explanation, they did not corroborate respondent's testimony that he believed the explanation.

As the hearing judge correctly found, the parties agreed at the meeting that Gottlieb would transfer all of the personal injury cases that he had with Attorney Hettena to respondent, that respondent would be substituted in place of Hettena as the attorney of record in those cases, that Gottlieb would find and, when necessary, buy new cases and refer them to respondent to be the attorney of record, that Gottlieb would work for respondent on the cases he referred to respondent, and that the clients would be sent to either Monoson or Ohanesian for treatment. Moreover, as the hearing judge correctly found, respondent and Gottlieb agreed at the meeting to split the attorney's fees on each case Gottlieb referred to respondent: 25 percent to respondent and 75 percent to Gottlieb whenever Gottlieb had to buy the case or otherwise had to pay money to someone in connection with the case, and 50 percent each whenever Gottlieb did not have to buy the case or otherwise have to pay for some expense related to the case or whenever Gottlieb bought the case from a specific individual who did not charge much for cases.

In sum, by the end of this 30-minute meeting, respondent had entered into a business relationship with Gottlieb, whom he had just met, in which Gottlieb would buy and refer cases to respondent, work on those cases with respondent, and teach respondent how to litigate and in which respondent was to pay Gottlieb, under their fee splitting agreement, either 75 or 50 percent

of any attorney's fees recovered in each case Gottlieb brought into respondent's law office. Respondent did this even though he knew that his fee splitting agreement with Gottlieb violated the Rules of Professional Conduct and that he viewed fee splitting agreements with nonattorneys as "not legal." However, respondent did testify that his law practice had slowed down considerably by October 1997, causing him severe financial difficulties, a great deal of anxiety, and to become very scared that he and his parents would lose their homes. Respondent and Gottlieb promptly began working together in mid-October 1997 and stopped working together in mid-December 1998.

Respondent admits that he agreed to permit Gottlieb, for the first couple of months of their business relationship, to operate his office in Van Nuys as an extension of respondent's law office and to work on the cases Gottlieb referred to him in that Van Nuys office without respondent's or another attorney's supervision. In fact, as late as February or March 1998, the name "Law Offices of Tamir Oheb" was still on the front door of Gottlieb's office and on the office building's central directory. About one month after the beginning of their relationship, i.e., about November 1997, and during the time Gottlieb was operating his Van Nuys office as an extension of respondent's law office, three settlement checks for clients Gottlieb referred to respondent were sent to Gottlieb's office. Gottlieb stole those checks, forged respondent's signature on them, and attempted to cash them, but was unable to do so. Respondent became very upset when he learned of Gottlieb's theft and forgery. One Sunday in November 1997, respondent, Gottlieb, Monoson, and Ohanesian met at Monoson's home to discuss the matter. Respondent told Gottlieb " 'That's it. You know, you forged my check[s]. I can't work with you. I mean, you're crazy.' " In addition, respondent told Monoson that he would never speak to

or do business with him again if he kept doing business with Gottlieb. However, Monoson and Gottlieb quickly convinced respondent not to end his and Gottlieb's business relationship.

Respondent testified that Gottlieb pleaded that he was desperate and that he had been pressured into stealing the checks, forging respondent's signature, and trying to cash them. However, neither respondent nor Gottlieb offered any details of this pressure. Respondent further testified that Gottlieb promised to move into respondent's law office, to be in respondent's office everyday from 9:00 a.m. to 5:00 p.m., to have all the files under respondent's nose "all the time," and to let respondent read and sign everything.[7]

Monoson pleaded that he had provided treatments to and obtained x-rays on the clients in many of the cases that Gottlieb referred to respondent and that he, therefore, had a real financial interest in those cases, which would be jeopardized if respondent terminated his relationship with Gottlieb. Moreover, Monoson assured respondent that Gottlieb was " 'a good guy' " and promised to watch Gottlieb and to " 'make sure that everything's good and everybody's treating' [for their injuries]."

Finally, at the meeting at Monoson's home, respondent asked Gottlieb to modify the fee splitting agreement to give respondent more than 25 percent of the recovered attorney's fees because it was respondent's law license. Gottlieb refused and again explained that he could not

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[7]However, Gottlieb had already previously agreed to bring all the client files into respondent's Tarzana office after the first couple of months and to work on them there under respondent's supervision. In any event, throughout his relationship with Gottlieb, respondent periodically permitted Gottlieb to take client files to Gottlieb's Van Nuys office and to work on them there without attorney supervision. Gottlieb did not always return the files as he agreed, and respondent had to instruct him to go to his Van Nuys office and get the files and return them to respondent's office or had to have his secretary telephone Gottlieb and tell him to bring the files back to respondent's office.

agree to give respondent anymore than 25 percent because Gottlieb had to pay for the cases out of his 75 percent share.

In total, Gottlieb referred 50 to 60 automobile accident injury cases involving about 150 plaintiffs to respondent. Virtually all of the Gottlieb referred cases were based on fraudulent insurance claims arising from staged automobile accidents under a sophisticated scheme involving, at least, Monoson, Ohanesian, Gottlieb, and possibly Folgar. In a typical case, Monoson and Ohanesian bought the cars that were involved in the staged accident, which were ordinarily older model cars, and fraudulently obtained and paid for insurance on the cars. The insurance they bought on these older cars very frequently included property damage coverage and, about 85 percent of the time, included medical payment coverage ("med-pay"), which are both additional cost coverage items. Gottlieb and Folgar located the individuals to act as the fraudulent drivers and passengers, and Folgar apparently staged the automobile accidents, which were done by crashing the cars in an empty parking garage without any of the fraudulent drivers and passenger actors being present.

The hearing judge found that respondent's testimony that he did not know about the staged accidents was credible and supported by Gottlieb's and Hannah's testimony, which the hearing judge also found credible, that they did not tell respondent about the staged accidents because they were afraid that he would not participate in filing the insurance claims on the accidents. For reasons we discuss *post*, we adopt this finding.

Gottlieb first met with the fraudulent drivers and passengers, collected their personal information, and had them sign medical records releases and contingent fee agreements retaining respondent as their attorney. When Gottlieb signed these individuals up as respondent's clients,

he virtually always did so outside of respondent's office and without respondent's supervision or even knowledge. Gottlieb told the clients the story of how the fake accident that they were "involved in" occurred and how they were supposed to have been injured in it. He also coached them to make sure that they remembered these necessary details before they met respondent, gave insurance statements, or had depositions taken.

Once Gottlieb signed up a new client and set up the client's file, he took the file into respondent's Tarzana office and put it in the file cabinet drawers reserved for Gottlieb's referrals. Respondent testified that, at some point during his representation of each client, he reviewed the client's file in detail and never discovered anything that led him to believe that fraud might be involved in a case.

More specifically, respondent testified that he reviewed every client file to, inter alia, make sure that it contained all the necessary documentation,[8] determined whether there was a limitations issue, reviewed how the accident happened and determined whether it made "sense," verified that the extent of the client's injuries were consistent with the property damage, determined whether he needed to research policy limits, and "see if everything is signed in the right place, if the dates are where they're supposed to be, if everything is in place." Respondent's testimony is corroborated by the credible testimony of David Loe, an attorney who referred between 10 and 20 personal injury cases to respondent between 1998 through respondent's interim suspension in 2001. Loe testified that respondent personally checked the validity of the cases he referred to respondent to determine whether they involved staged accidents by personally interviewing the prospective clients, reviewing the police reports, and questioning him

[8]Respondent did not specify what documentation he considered to be necessary.

in great detail about cases, seeking such information as to how Loe got the case. Loe also testified that respondent told him that respondent followed these extensive review/investigative procedures every time respondent accepted a case that has been referred to him.

Respondent admitted that he often did not even meet the clients in the Gottlieb referred cases until an insurance company or someone wanted to take the clients' statements. However, respondent also admits that he was not always present when a client's statement was taken. Respondent explained that, whenever it was inconvenient for him to be present when a client's statement was taken, he sent Gottlieb to appear with the client.

Respondent permitted Gottlieb to work on the cases Gottlieb brought into the office with very little supervision or instruction. In addition to having Gottlieb appear with clients when their statements were taken, respondent had Gottlieb negotiate the settlements in the cases he brought in the office. Respondent asserts that he required Gottlieb to get his approval of any settlement offer before Gottlieb accepted it; however, the hearing judge made no finding on this issue. Moreover, as the State Bar points out, respondent testified that, because he thought that Gottlieb was such a good negotiator, he had Gottlieb call the insurance adjustor in one of respondent's own cases and that Gottlieb quickly negotiated a great settlement.

During his 14-month association with Gottlieb, respondent's practice increased substantially. During that time, respondent had somewhere between two and six individuals, excluding Gottlieb, working for him. Even though some of those individuals were independent contractors, others clearly were not.

In total, respondent paid Gottlieb about $148,300 (about $7,500 in 1997; about $127,000 in 1998; and about $13,800 in 1999) as Gottlieb's 75 percent share of the attorney's fees

recovered on the cases that he brought into respondent's office. Respondent paid Gottlieb as an independent contractor, and ordinarily paid him with checks that described the nature of the payment in the memo section of the checks by writing "independent contractor." However, respondent occasionally attempted to conceal the true nature of his payments to Gottlieb by writing in the memo section of the check entries such as reimbursement of travel expenses, advance of wages, or new car. Moreover, respondent admits that, once or twice when he had a case with a particularly large settlement, he attempted to conceal the nature of his payment to Gottlieb by writing an incorrect description of the payment in the memo section with the intent to disguise or hide his fee splitting from the State Bar. Respondent testified that, other than keeping copies of the checks, he did not keep any records with respect to any of his payments to Gottlieb.

On December 8, 1997, respondent, with Attorney Jeffery Sklan appearing with him, was interviewed about his relationship with Gottlieb by Kelly Mercer, a peace officer with the Insurance Fraud Division of the California Department of Insurance. Because respondent and Sklan refused to permit officer Mercer to record the interview, she had to prepare a written report and summary of it shortly after it was over. There is no evidence in the record that indicates whether staged automobile accidents or any of Gottlieb's prior convictions were mentioned or discussed. However, officer Mercer did ask respondent whether he notified the State Bar of his employment of Gottlieb as required by rule 1-311. Respondent admits that he did not.

Moreover, relying on the written report she prepared of her interview with respondent to refresh her recollection, officer Mercer testified that respondent told her at the interview that, in an automobile accident case, he considered it to be a "red flag" of insurance fraud if there were

more than two people in the car[9] and that respondent first told her that he paid Gottlieb by the hour and workload, but that respondent and Sklan went outside and, when they returned, he told her that Gottlieb was paid when the case was settled. When respondent testified he did not contradict Mercer's testimony. Instead, he merely testified that he doubted that he told Mercer that he considered more than two people in a car to be a red flag and that he really didn't recall whether he told her that he paid Gottlieb by the hour and workload. To conclude, we find officer Mercer's uncontradicted and unequivocal testimony to be true.

In mid-December 1998, both Hannah and Gottlieb were arrested. Hannah was apparently released relatively soon, but Gottlieb remained in jail until sometime around February 24, 1999. Respondent quickly learned of the arrests. It was not until after respondent learned that Gottlieb had been arrested in mid-December 1998 that respondent retained Jeffery Sklan as his criminal attorney. At that time, Sklan advised respondent to end his relationship with Gottlieb and to change his office locks, which respondent did after Gottlieb was released from jail.

Even after Hannah and Gottlieb were arrested, and respondent was interviewed by investigator Mercer, respondent neither investigated the disciplinary charges pending when Gottlieb resigned, e.g., by contacting the State Bar, nor investigated the extent and nature of the money laundering charge respondent was told was the basis of Gottlieb's incarceration.

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[9]Gottlieb testified that in 99 percent of the cases he referred to respondent, there were either 3 or 4 people in the car. Hannah's testimony supported Gottlieb's testimony. Respondent contradicted Gottlieb's testimony and testified that the cases were evenly divided between 2, 3, or 4 people in the car. The hearing judge, however, found that there were typically 3 or 4 people in the cars; accordingly, it is clear that he rejected, albeit implicitly, respondent's testimony in favor of Gottlieb's testimony.

In early 1999, the client or clients in the Deleon matter claimed that they had not been paid their share of the settlement proceeds in their case. When respondent pulled the Deleon matter file, there were copies of negotiated drafts in it. Respondent and Sklan met with Gottlieb in respondent's office on February 26, 1999, to confront Gottlieb on this payment problem. Gottlieb wore a "wire" so that officer Mercer could record the meeting.[10] It was at this meeting that Gottlieb first told respondent that all the cases he brought into respondent's office were based on staged accidents.

Within a couple of days after this meeting, respondent's client Maria Arroyo, who was a Gottlieb referral, went to respondent's office and claimed that she had never received the med-pay proceeds in her case. She gave respondent a letter stating that her case was based on a staged accident and that she would tell the authorities about it and other cases respondent handled that she said were based on staged accidents if respondent did not pay her the $35,000 in med-pay benefits she was purportedly entitled to. Respondent asserts that he thought that Arroyo was lying about the staged accidents in order to get him to give her $35,000.

Both respondent and Sklan assert that, even after their February 26, 1999, meeting with Gottlieb and even after the Arroyo incident, they still had no knowledge of fraud in any Gottlieb referred case. To support this assertion, they contend that they did not know whether Gottlieb was telling the truth about staging accidents as they "felt that Gottlieb might be creating this in order to extort" money from respondent. The hearing judge's decision does not discuss the issue

[10]The terms of Gottlieb's criminal probation required him to assist the Department of Insurance in its investigation of respondent.

of when respondent had knowledge of the staged accidents, and we decline to independently address the issue for reasons we discuss *post*.

Even though respondent and Sklan claimed not to know whether cases referred to Gottlieb involved staged accidents, Sklan advised respondent, after the February 26, 1999, meeting "to get rid of any pending cases" referred to respondent by Gottlieb. By the end of March 1999, respondent had "dropped" all such pending cases. However, respondent did not return the client files to clients when he "dropped" them. In fact, as late as June 1999 other attorneys were requesting, from respondent, the client files in cases respondent dropped.

Respondent was arrested on June 29, 1999, and charged with a total of 36 counts of making false insurance claims, conspiracy to commit grand theft, and capping. As noted *ante*, respondent pleaded nolo contendere to two felony counts of violating Penal Code section 549 for accepting referrals of personal injury clients with reckless disregard for whether the referring party or the referred clients intended to make false or fraudulent insurance claims. One count involved respondent's reckless conduct in the Arroyo matter in November 1997, which caused Western United Insurance Company and Progressive Insurance Company to pay a combined total of at least $130,000 to seven individuals on claims that were fraudulent and based on a staged accident. The other count involved respondent's reckless conduct in the Cowart matter in March 1998, which caused 20th Century Insurance Company and Financial Indemnity Company to pay a combined total of at least $25,000 to three people on claims that were fraudulent and based on a staged accident.

Even though respondent was sentenced to 364 days in the county jail, 304 of those days were stayed, so respondent spent only 60 days in jail. Respondent was also put on three years'

formal probation. In addition, his sentence included a $200 fine, 500 hours of community service, and $40,000 in restitution, but did so only to the four insurance companies which paid out on the claims in the Arroyo and Cowart matters. Respondent left it up to the assistant district attorney to determine the amounts and the insurance companies to which he would be required to make restitution under his plea agreement.

Respondent completed all the terms of his sentence, and the superior court granted respondent's motion to reduce his convictions to misdemeanors, but it denied his motion to dismiss the case. In February 2004, the superior court terminated respondent's criminal probation, set aside his plea of guilty and his conviction, and dismissed the criminal proceedings in accordance with Penal Code section 1203.4.

IV. THE RECORD DOES NOT ESTABLISH RESPONDENT KNEW OF STAGED ACCIDENTS.

We reject the State Bar's contention that the hearing judge erred in not finding that respondent knew of the staged accidents when he was representing the clients Gottlieb referred to him. The State Bar contends that, based on the record as a whole, the evidence establishes that it is more likely to find that respondent knew of the staged accidents or intentionally insulated himself from the facts so that he could claim lack of knowledge if the insurance fraud was ever discovered. The State Bar argues that, inter alia, the following facts support its contention: that respondent knew that Gottlieb was buying cases, that Gottlieb resigned with disciplinary charges pending, that Gottlieb stole and forged three settlement checks; that Gottlieb's cases typically involved three or four people in the car, which respondent admitted is either a red flag or an issue of concern in insurance fraud and that respondent permitted Gottlieb to negotiate settlements in

the cases Gottlieb referred to respondent. As the State Bar correctly notes, it may prove an attorney's misconduct with clear and convincing circumstantial evidence. (*In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237). However, we are unable to find such clear and convincing circumstantial evidence in the record to support such a finding.

As we discuss in detail *post*, these facts when viewed collectively and together with the remaining evidence unquestionably establish that respondent was exceedingly reckless in entering into and maintaining his business relationship with Gottlieb and suggest that respondent knew of some impropriety in the Gottlieb referred cases. Nonetheless, we are unable to conclude that the evidence, when taken as a whole, constitutes clear circumstantial evidence that respondent knew that the accidents were staged. First, in our view, the record supports the inference that respondent knew of the staged accidents as equally as it supports the inference that respondent did not know of them. In such a case, we must accept the inference favoring the attorney. (E.g., *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.) Second, the issue was litigated before the hearing judge in a multiple-day trial and was resolved against the State Bar. Because the hearing judge's finding was based on the credibility assessment of the witness, we properly give it great weight.[11] (Rules Proc. of State Bar, rule 305(a); e.g., *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 932.)

V. CONCLUSIONS OF LAW.

Under section 6101, subdivisions (a) and (e), "an attorney's conviction of a crime pursuant to a plea of nolo contendere is 'conclusive evidence of guilt of the crime' for the

[11]We recognize that, at times, the hearing judge rejected respondent's testimony. However, that fact does not compel a reversal of the hearing judge's finding on this issue. (See *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 19.)

purpose of disciplinary proceedings. [Citations.]" (*In re Gross* (1983) 33 Cal.3d 561, 567.) In other words, the criminal conviction "is conclusive proof that the attorney committed all acts necessary to constitute the offense. [Citation.]" (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.) Thus, respondent's convictions on two counts of violating Penal Code section 549, which are based on respondent's recklessness and not his actual knowledge, conclusively establish that he acted in reckless disregard[12] of the unlawful intentions of others such as Gottlieb, Gottlieb referred clients, Monoson, Ohanesian, and Hannah. This is particularly troubling since respondent engaged in this criminally reckless misconduct in the course of his practice of law in November 1997, less than one month after he entered into his improper business relationship with Gottlieb and then again only four months later in March 1998. If respondent had not repeatedly been criminally reckless in his practice, he would have quickly discovered Gottlieb, Monoson, and Ohanesian's fraud or, at least, would have had an opportunity to discover it.

As noted *ante*, because respondent's convictions for violating Penal Code section 549 do not involve moral turpitude per se, we must review the circumstances surrounding respondent's convictions to determine whether they in fact involved moral turpitude or other misconduct warranting discipline. In reviewing the circumstances surrounding respondent's conviction, "we are not restricted to examining the elements of the crime, but rather may look to the whole course

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[12]In this state the phrase "reckless disregard" is to be construed according to the Model Penal Code's definition of the term "recklessness," which is "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." (Model Pen. Code, § 2.02, subd. (2)(c); *In re Steven S.* (1994) 25 Cal.App.4th 598, 615.)

of [respondent's] conduct which reflects upon his fitness to practice law. [Citations.]" (*In re Hurwitz* (1976) 17 Cal.3d 562, 567.) That is because it is the misconduct underlying respondent's conviction, as opposed to the conviction itself, that warrants discipline. (*In re Gross, supra*, 33 Cal.3d at p. 568.)

Although we agree with and adopt the hearing judge's conclusion that the facts and circumstances surrounding respondent's conviction involved moral turpitude, we base our determination on somewhat different grounds in that we reject some of the hearing judge's findings of misconduct and find additional misconduct which the hearing judge did not find.

A. Respondent's involvement in capping and fee splitting involved moral turpitude.

As we noted *ante*, the hearing judge correctly found that respondent knew Gottlieb was buying almost all, if not all, of the cases Gottlieb referred to respondent. It is true that respondent, when testifying in the hearing department, adamantly denied knowing that Gottlieb was buying cases or that Gottlieb was paying for them out of Gottlieb's 75 percent share of the fees. However, Gottlieb unequivocally and credibly testified to the contrary. Thus, because the hearing judge's findings are consistent with Gottlieb's testimony, it is clear that he rejected respondent's testimony implicitly. Furthermore, because the hearing judge's finding resolved issues of credibility of the witnesses, we give it great weight (Rules Proc. of State Bar, rule 305(a)), and we adopt that finding.[13]

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[13]It is particularly appropriate for us to adopt the hearing judge's finding because respondent's testimony, when viewed collectively, demonstrates that he was either unable or unwilling to accurately recollect and communicate the events about which he testified, and at times, his testimony seemed confused. In addition, in a number of instances, respondent failed to corroborate or substantiate his testimony with evidence that one would have expectedly produced. Respondent's unexplained failure to produce such evidence is a strong indication that respondent's testimony is not credible. (Evid. Code, §§ 412, 413; *In the Matter of Bleecker*

We conclude that the facts and circumstances of respondent's misconduct in knowing that Gottlieb was buying cases, in paying Gottlieb for buying the cases, referring the cases to respondent's law office, coming into respondent's office "everyday," and working on the referred cases by splitting any attorney's fees recovered on the referred cases in deliberate violation of rule 1-310, prohibiting fee splitting with nonattorneys, involved moral turpitude. What is more, respondent's misconduct in capping, under the facts of this case, involved moral turpitude. (See *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, 652-653.)

B. Respondent's many demonstrations of recklessness involved moral turpitude.

Respondent was reckless in entering his business relationship with Gottlieb without investigating him and in not seeking additional information on Gottlieb once he learned at the outset that Gottlieb resigned with disciplinary charges pending. At that point, respondent had a direct and easy opportunity to investigate Gottlieb's background and, with the most minimal of effort, to learn of Gottlieb's prior record of discipline and 1991 convictions for forgery, grand theft, and insurance fraud.[14] Respondent's tolerance for Gottlieb should have ended completely when respondent later learned that Gottlieb stole and forged the three settlement checks.

(Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122; *Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426 [when a party fails to introduce evidence that would naturally have been produced, the trier of fact may properly infer that the evidence is adverse to the party].)

[14]It is undisputed that respondent would have promptly obtained this information from the State Bar if he had requested it anytime except from the end of June 1998 through early 1999, when the State Bar had only a skeletal staff because it laid-off most of its employees after the governor vetoed the bar's 1998 fee bill. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 589, 591.)

Respondent knowingly permitted Gottlieb to, inter alia, interview and sign up clients without his knowledge or approval, and knowingly failed to monitor the cases Gottlieb referred to him, e.g., he did not review each Gottlieb referral when Gottlieb first brought it into the office. This conduct establishes "an habitual failure to give reasonable attention to the handling of the affairs of his clients rather than an isolated instance of carelessness followed by a firm determination to make amends." (*Waterman v. State Bar* (1936) 8 Cal.2d 17, 21.) Recklessness and gross carelessness in the practice of law, even if not deliberate or dishonest, violate "the oath of an attorney to discharge faithfully the duties of an attorney to the best of his knowledge and ability and involve moral turpitude, in that they are a breach of the fiduciary relation which binds him to the most conscientious fidelity to his clients' interests. [Citations.]" (*Simmons v. State Bar* (1970) 2 Cal.3d 719, 729; accord, *Doyle v. State Bar* (1976) 15 Cal.3d 973, 978, and cases there cited.) Even repeated acts of mere negligence and omission can involve moral turpitude and "prove as great a lack of fitness to practice law as affirmative violations of duty. [Citations.]" (*Bruns v. State Bar* (1941) 18 Cal.2d 667, 672.)

We hold that respondent's manner and method of practicing law, at least, during his 14-month association with Gottlieb, was reckless and, therefore, involved moral turpitude. Given the several opportunities respondent had to protect himself from Gottlieb early on, his failure to do so can only be seen as recklessness of the most acute nature.

C. Respondent's deceit involved moral turpitude.

We also conclude that respondent's misconduct in falsely recording in his financial and bank records the nature of his payments to Gottlieb with the specific intent to conceal his improper fee splitting with a nonattorney from, inter alia, the State Bar involves moral turpitude.

" 'An attorney's practice of deceit involves moral turpitude.' [Citations.]" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888; see also *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 474-475.)

D. Respondent's repeated failures to competently represent his clients involved moral turpitude.

As noted *ante*, we do not address the issue of when respondent learned that the Gottlieb referred cases were based on staged accidents because respondent should have proceeded as if he had known about the staged accidents no later than February 26, 1999, when Gottlieb told him of the staged accidents. Respondent should have, at a minimum, met with each client referred to him by Gottlieb, whether their case was then pending or had already been settled, and told him or her that respondent had substantial information suggesting, inter alia, that the client knowingly made a false claim based on a staged accident and on fraudulently obtained automobile insurance and then given him or her whatever legal counsel was appropriate, e.g., advising the client to seek advice from a criminal defense attorney. (Cf. *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684-1687 [duty to competently perform requires attorneys to alert clients to all reasonably apparent legal problems even when they fall outside the scope of attorney's retention and to the possible need for other counsel to address those problems]; *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 178-179 ["attorney's duty to the client can extend beyond the closing of the file."]) Respondent, however, did not do so even though it was readily apparent that his clients might have been included in the Department of Insurance fraud investigation involving Gottlieb and prosecuted for client insurance fraud. In sum, respondent's wholesale failure to competently represent these clients by providing them with competent legal advice after the February 26, 1999, meeting also involves moral turpitude.

We reject as meritless the contentions respondent asserted while testifying that, to contact his clients and provide them such advice would have been improper because it would amount to accusing them of committing fraud, which Sklan advised him he could not do; and that, in any event, such advice was unnecessary with respect to the Gottlieb referred cases that were already settled because the clients in those cases would have already signed some insurance company form of affidavit or release, which all contain fraud warning language. That contention reflects a failure to appreciate the duties he owed to his clients.

E. Additional facts and circumstances showing misconduct warranting discipline.

Although the following acts of misconduct did not involve moral turpitude, we consider them in making our discipline recommendation for they show misconduct warranting discipline. Even though respondent employed resigned member Gottlieb within the meaning of rule 1-311(A)(1) and (3), he willfully failed to notify the State Bar of Gottlieb's employment and termination as required under rule 1-311(D) and (F). In addition, respondent willfully violated rule 1-311(B)(3) and (4) because he knowingly permitted and instructed Gottlieb to appear with clients when they had their statements taken and to negotiate settlements for clients.[15] Respondent is simply not excused of these serious acts of misconduct even if his testimony that he did not know about rule 1-311 is true. (E.g., *Abeles v. State Bar* (1973) 9 Cal.3d 603, 610-611; *Millsberg v. State Bar* (1971) 6 Cal.3d 65, 75.) Moreover, respondent's admitted

[15]In light of this conclusion, we need not and do not address the State Bar's contention that respondent aided and abetted Gottlieb in the unauthorized practice of law because, if we concluded that respondent did aid and abet Gottlieb, it would be duplicative. (Cf. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76-77.)

misconduct in not notifying the State Bar is exacerbated by his failure to have done so after officer Mercer expressly told respondent about that rule.

Furthermore, respondent willfully violated rule 4-100(A) when he improperly deposited a $6,672.03 tax refund check of one of his employees into his client trust account. That check was given to respondent in repayment of a personal loan respondent made to the employee's life partner. Accordingly, when respondent deposited it into his trust account he improperly commingled his funds with those of his clients. "Commingling, like misappropriation . . . , is a serious offense involving funds entrusted to an attorney. [Citation.]" (*Grim v. State Bar* (1991) 53 Cal.3d 21, 32.)

VI. AGGRAVATING AND MITIGATING CIRCUMSTANCES.

A. Aggravating circumstances.

1. Multiple acts of wrongdoing.

Respondent's misconduct involved numerous acts of misconduct. (Std. 1.2(b)(ii).)

2. Personal Gain.

The fact that respondent intentionally engaged in the misconduct for personal gain and, in fact, personally profited from it are aggravating circumstances. (*In the Matter of Kreitenberg*, *supra*, 4 Cal. State Bar Ct. Rptr. 469, 475.)

3. Substantial Harm.

Respondent's crimes caused the involved insurance companies to suffer direct and substantial economic harm. (Std. 1.2(b)(iv).)

In addition, respondent harmed his clients, to whom he owed a fiduciary duty (*In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 757, citing *Cox v. Delmas*

(1893) 99 Cal. 104, 123), and a duty as an attorney "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just . . ." (§ 6068, subd. (c)). By his recklessness, he was furthering exposure of his clients to prosecution and other serious legal difficulties. (See *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 475.)

4. Failure to make complete restitution.

Even though respondent made $40,000 in restitution to four insurance companies for the direct monetary harm his crimes caused them, the misconduct underlying his convictions directly caused those four insurance companies to pay out a total of $155,000 in fraudulent claims based on staged accidents ($130,000 in the Arroyo matter, and $25,000 in the Cowart matter). Respondent admits that he has not made restitution of the remaining $115,000 ($155,000 less $40,000).[16] In addition, respondent admits that, other than the $40,000 restitution he paid to the four insurance companies, he has not made any restitution to the other insurance companies which suffered direct economic harm as a result of his misconduct. This is an aggravating circumstance because it demonstrates respondent's indifference to rectification for the consequences of his misconduct. (Std. 1.2(b)(v).)

[16]With respect to the $130,000 involved in Arroyo matter, respondent paid a total of $30,000 as follows: $10,000 to Western United Insurance Company and $20,000 to Progressive Insurance Company. This leaves $100,000 unreimbursed in the Arroyo matter. However, the record does not establish how much of this unreimbursed $100,000 is attributed to Western United or Progressive Insurance losses. With respect to the $25,000 involved in the Cowart matter, respondent paid a total of $10,000 as follows: $5,000 to 20th Century Insurance Company and $5,000 to Financial Indemnity Company. This leaves $15,000 unreimbursed in the Cowart matter. However, the record does not establish how much of this unreimbursed $15,000 is attributed to 20th Century or Financial Indemnity losses.

B. Mitigating circumstances.

1. Cooperation.

We decline to place significant mitigative weight on respondent's cooperation during these proceedings (std. 1.2(e)(v)) as found by the hearing judge, since respondent's admissions of culpability for violating rules 1-320 and 1-311 were easily provable violations.

2. Naivete and trust in others.

We acknowledge that respondent testified and the hearing judge found that respondent is no longer the same person he was when he committed his misconduct, that respondent is contrite and has learned from this experience. However, other than the conclusory assertion that respondent is no longer the same person, the only specifics that respondent testified to support this assertion were generalizations such as "I'm going to be different . . . a little more jaded now or I look at it with a jaundiced eye . . ."; and "maybe a little more standoffish now than I was before, more cautious." Similarly, none of respondent's character witnesses provided any substantial evidence as to how respondent has changed. Their testimony included such generalizations to the effect that respondent is more sophisticated now; that "he would take more care to investigate the background of the people that he was [sic.] doing business with"; and that he is remorseful. However, in explaining how respondent has changed, Attorney Loe testified that respondent is "remorseful for what happened. [But] as I said, I don't believe his character is completely different."

Second, even though respondent is contrite, " '[r]emorse does not demonstrate rehabilitation.' " (*In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 477, quoting *In re Conflenti* (1981) 29 Cal.3d 120, 124.)

What is more, assuming, arguendo, that respondent was naive in business, it would not be a mitigating factor. Naivete had nothing to do with respondent's decision to enter into his business relationship with Gottlieb, involving capping and fee splitting, both of which respondent knew were improper if not criminal. Most importantly, naivete had little if anything to do with the criminal recklessness respondent engaged in his practice of law and for which he was convicted of two felonies. (Cf. *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 479.)

Respondent's reliance on the hearing judge's findings that he "accepted at face value Monoson's assurances that Gottlieb was an all-right person with whom to work" and that he "trusted Monoson implicitly and, by association, Gottlieb" as mitigation is misplaced because, in our view, there is not clear and convincing evidence to support those findings. Respondent knew that Monoson had no prior dealings with Gottlieb and that Monoson met Gottlieb only one day before respondent met him. Accordingly, respondent was well aware that Monoson had no rational basis on which to make his generic assurance that Gottlieb was " 'a good guy.' " Any trust that respondent may have had in Monoson and any reliance that respondent may have placed on Monoson's purported honesty, integrity, and good judgment, could not have plausibly or believably continued after the October 1997 meeting at Monoson's office at which respondent met Gottlieb and at which Monoson encouraged respondent to enter into a business relationship with Gottlieb that involved both capping and fee splitting.

3. Good character evidence.

Respondent presented testimony as to his good character and abilities from five attorneys, one of whom is also a C.P.A., one who is a businessperson, one C.P.A. who is not an attorney,

and an insurance adjustor. While we agree in substance with the hearing judge's summaries of their testimony, we are unable to give the witnesses' testimony as much mitigating weight as did the hearing judge. First, in our view, the witnesses did not establish that they possessed adequate knowledge of respondent's convictions or of the facts and circumstances surrounding them. This reduces mitigating weight we may give to this testimony. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939-940.) At least two witnesses rarely saw or interacted with respondent. At least one attorney all but blamed Gottlieb and Monoson.

VII. DEGREE OF DISCIPLINE DISCUSSION.

Paramount in the Supreme Court's concern in remanding this matter to us is the issue of what is the proper function and role of the Standards, and in Standard 3.2 in particular, in arriving at a recommendation of discipline.

A brief background summary will aid our discussion. The Standards were adopted by the Board of Governors of the State Bar effective January 1, 1986. (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550.) At that time, the State Bar disciplinary system used about 300 volunteers who sat on local panels as referees to hear disciplinary cases. (See generally *In re Rose* (2000) 22 Cal.4th 430, 438.) These volunteers made recommendations to a State Bar Disciplinary Board (Review Department), itself composed of 18 volunteers. Given the large number of volunteers and the decentralized nature of the disciplinary trial system, consistency of recommendation for similar offenses was a major concern. (See Introduction to Standards.) Supreme Court decisions filed in the first few years after the adoption of the standards described their function variously[17]

[17]See, e.g., *Greenbaum v. State Bar*, supra, 43 Cal.3d at p. 550 (the Standards are "simply guidelines"); *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 198, fn.14 (same); *Hawk v. State Bar* (1988) 45 Cal.3d 589, 602 (same); but see *Natali v. State Bar* (1988) 45 Cal.3d 456, 468 (the

but made it clear that they neither were "talismanic" (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222), nor were they binding. (E.g., *Boehme v. State Bar* (1988) 47 Cal.3d 448, 454.) Thus, although the Standards were established as guidelines, ultimately, the proper recommendation of discipline rested on a balanced consideration of the unique factors in each case. (E.g., *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 798.)

Effective July 1, 1989, adjudication of attorney disciplinary matters was altered dramatically in California as a small cadre of appointed professional State Bar Court judges displaced the work of the many volunteers. (E.g., *In re Rose*, *supra*, 22 Cal.4th at p. 438.) After 1989, discipline recommendations were made by a small number of pro tempore judges, and therefore consistency appeared no longer to be as acute an issue. Following the change in the method of adjudicating disciplinary cases, the Supreme Court reduced substantially its issuance of written opinions in attorney disciplinary matters and also, as an exercise of its inherent powers over the regulation of attorneys in the State, made the granting of review discretionary rather than as a matter of course. (Cal. Rules of Court, rule 954; *In re Rose*, *supra*, 22 Cal.4th at pp. 440-441.)

The Supreme Court has issued four opinions in attorney disciplinary cases arising from recommendations of the current appointed State Bar Court. (*In re Silverton* (2005) 36 Cal.4th 81; *In re Rose, supra,* 22 Cal.4th 430; *In re Brown* (1995) 12 Cal.4th 205; and *In re Morse* (1995) 11 Cal.4th 184.) These opinions, which collectively span ten years, demonstrate the significance

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Supreme Court will not reject a recommendation arising from application of the standards unless it has "grave doubts as to the propriety of the recommended discipline").

that the Court continues to place, in general, on the Standards as important and useful guidelines for assessing the appropriate degree of discipline.

In addition to their value in providing consistency, we view the standards as useful today in serving added functions. First, they promote the achievement of fair and informed consensual dispositions by the parties in appropriate cases. (Rules of Proc. of State Bar, rules 133-134.) Indeed, in recent years, about half of the formal charges filed in the State Bar Court have resulted in such consensual dispositions. These dispositions have expedited the resolution of cases noticeably, compared to cases which are tried. Moreover, the Standards provide a valuable educative function for California's sizeable legal profession, courts and public – just as when the Standards were first adopted – as to the appropriate factors for assessing the degree of discipline and how they may lead to an appropriate disciplinary result. However, in 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 (see *In re Nadrich* (1988) 44 Cal.3d 271, 277), or about which "grave doubts" exist as to the recommendation's propriety. (*In re Young* (1989) 49 Cal.3d 257, 268.) Moreover, the weight to be accorded the Standards will depend on the degree to which they are apt to the case at bench. (*In re Brown*, *supra*, 12 Cal.4th at pp. 220-221 [but see discussion at p. 221 in which the Court concluded that although the standards were of limited utility in the particular case, they did suggest that the level of discipline recommended by the review department was inadequate].)

With this background, which makes clear the overall guiding value of the Standards, we re-state the initial points we made in discussing discipline in our 2004 opinion. In determining the appropriate level of discipline, we first look 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.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (See also *Chadwick v. State Bar*, *supra*, 49 Cal.3d 103, 111.) The applicable sanction in this proceeding is found in standard 3.2, which 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."

In our 2004 opinion, we stated and re-state here that the Supreme Court has rejected the standard's mandate that any two-year actual suspension recommended must be prospective to the attorney's interim suspension. (*In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 307, citing *In re Young* (1989) 49 Cal.3d 257, 268.) However, we failed to state the role that standard 3.2 as a whole played in our ultimate recommendation, instead proceeding to review disciplinary decisions in other comparable cases. We now correct our mistake; and, when we do so, we must conclude that our 2004 recommendation was inadequate.

By its language quoted *ante*, Standard 3.2 guides strongly to disbarment for crimes which involve moral turpitude. We already have found moral turpitude surrounding respondent's conviction and those facts show that the acts of moral turpitude were repeated and had the potential to create serious harm. As we found in our 2004 opinion, respondent engaged in

recklessness of the most acute nature. Respondent was recklessly indifferent to the clear potential of danger presented by Gottlieb and respondent's recklessness commenced with his failure to take simple steps available to any citizen to ascertain Gottlieb's criminal history when he should have been on notice to do so. It continued with respondent's intentional decision to act unethically by paying Gottlieb for cases brought to respondent's office and by splitting fees with him, knowing that Gottlieb was no longer a member of the State Bar. When respondent learned early-on in his relationship with Gottlieb that the latter had stolen and forged three settlement drafts, respondent did not cease dealing with Gottlieb. Rather, he was prevailed on to continue his relationship with Gottlieb. Finally, respondent accorded Gottlieb extensive freedom to interview and retain clients for respondent without respondent's knowledge and approval, and respondent did not adequately monitor the cases which Gottlieb brought to the office.

Wholly apart from the recklessness which respondent demonstrated in his 14-month relationship with Gottlieb, we found that respondent engaged in moral turpitude by his illegal activities of furthering capping. Moreover, respondent's repeated failure to represent his clients competently involved moral turpitude, particularly after he learned in late February 1996 that the cases brought to the office by Gottlieb rested on staged accidents.

Finally, respondent's practice of deceit by falsely recording in his records the nature of his payments to Gottlieb, in order to conceal their illegal or unethical purpose, unquestionably involved intentional acts of moral turpitude.

When we review the numerous ways respondent committed moral turpitude, we can only conclude that his conviction for violating Penal Code section 549 was most serious for disciplinary purposes, fully warranting following the guidance of Standard 3.2 for disbarment.

Indeed, ""[D]isbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude. [Citations.]"" (*In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 317.)

Reviewing the balance of mitigating and aggravating circumstances also supports a disbarment recommendation here. We have assigned little weight to respondent's cooperation with the State Bar and to the evidence offered as to his character. Also, respondent's misconduct commenced less than five years after his admission to practice so that his lack of prior discipline was not entitled to mitigating credit. (E.g., *Amante v. State Bar* (1990) 50 Cal.3d 247, 255-256; *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837.) In contrast, the weight of aggravating circumstances decisively predominates. As we found *ante*, respondent engaged in multiple acts of misconduct, he profited from that misconduct, his conduct harmed insurers and he either jeopardized legitimate clients or exposed persons engaged in potential or actual fraudulent conduct to even greater civil or criminal liability. (Compare *In the Matter of Kreitenberg, supra*, 4 Cal. State Bar Ct. Rptr. at p. 475). Moreover, respondent failed to complete restitution of losses resulting from his misdeeds. Thus, the record here does not provide a basis to reject the guidance of disbarment in Standard 3.2.

Although there have been no published decisions of disciplinary cases following an attorney's violation of Penal Code section 549, we have found persuasive opinions which recommend or impose discipline on account of the presence of moral turpitude to a serious degree similar to that found here.

We start by reiterating, as we stated *ante*, that the usual discipline for an attorney's conviction of a crime which involves serious acts of moral turpitude is disbarment. This

principle is well established in this State. (E.g., *In re Crooks* (1990) 51 Cal.3d 1090, 1101; *In re Bogart* (1973) 9 Cal.3d 743, 748; *In re Smith* (1967) 67 Cal.2d 460, 462.) Indeed, had respondent been convicted of a felony which, inter alia, inherently involved moral turpitude, he would have been subjected to summary disbarment. (§ 6102; *In re Paguirigan* (2001) 25 Cal.4th 1, 8.) That respondent's offense did not inherently involve moral turpitude does not immunize him from the appropriate discipline for the serious misconduct surrounding his conviction. No intent to lower professional standards is evident in the procedures allowing for referral to the State Bar Court for hearing of attorney convictions not inherently involving moral turpitude. (E.g., *In re Smith*, *supra*, 67 Cal.2d at p. 462.)

We deem the case of *In the Matter of Kreitenberg*, *supra*, 4 Cal. State Bar Ct. Rptr. 469 to be guiding. That case involved a conviction of conspiring to defraud the Internal Revenue Service (IRS), a crime which has been classified for moral turpitude purposes as one which does not inherently involve moral turpitude. (*Id*. at p. 474, fn. 3.) Nevertheless, we held that the facts and circumstances surrounding Kreitenberg's offense involved several aspects of moral turpitude. His acts, together with those of his cousin, spanned six years, starting just about three years after his admission. He wrote over 680 fraudulent checks totaling over $1.6 million in legal fees which were not reported to the IRS. Much of this money was used to pay cappers to bring more cases to the law office. We noted the positive aspects of Kreitenberg's mitigating evidence, but weighed it less heavily than did the hearing judge. Among the several aggravating circumstances we found were that Kreitenberg's misconduct "touched on virtually every aspect of his law practice" and, in establishing a fraudulent check writing scheme, he jeopardized the names of his clients while seeking to conceal legal fees from the IRS and to conceal that capping

also occurred. (*Id.* at pp. 475-476.) We also noted that Kreitenberg did not withdraw from the conspiracy and did not cooperate until the IRS had started an audit of him. We recommended, and the Supreme Court imposed, disbarment. Although acknowledging that respondent's misconduct occurred over less time and appeared of less seriousness, we find many similarities between *Kreitenberg* and this case. In particular, we note that in both, the attorneys realized from early on that misconduct was being committed; neither acted timely to stop the practices; in both cases, the attorneys' misconduct imbued most of the activities of their practices; and in both, their clients were jeopardized. Although Kreitenberg's misconduct was arguably more serious, that does not demonstrate that disbarment is excessive here.

We have examined *In re Arnoff* (1978) 22 Cal.3d 740, in which the Supreme Court suspended the attorney for two years following his conviction of conspiracy to commit capping. A layperson effectively controlled Arnoff's law office and the relationship between that person and Arnoff lasted two years and involved about 500 cases. Arnoff agreed to split fees with the layperson but there was insufficient evidence that Arnoff knew that the layperson was making kickbacks to doctors for referrals to Arnoff. However, in *Arnoff*, the Supreme Court considered a number of mitigating factors not present in the case before us, including heavy emotional duress and health pressures bearing on Arnoff during the time of his misconduct, favorable character evidence, evidence of rehabilitative treatment and his record of 20 years of practice without discipline.

Similarly, several original proceedings which had been decided over the years[18] resulting in suspension involved either less serious misconduct, more mitigation or both. Nevertheless, the Supreme Court did disbar an attorney found culpable of widespread capping violations over a three-year period. (*Kitsis v. State Bar* (1979) 23 Cal.3d 857.) In *Kitsis*, the attorney misled one of his cappers that her (the capper's) actions were legal. Kitsis had practiced for eight years when this misconduct started but he had been privately reproved earlier for improper payment of client expenses. Kitsis pled guilty to a misdemeanor charge of capping and, in original disciplinary proceedings, had been found culpable of, inter alia, committing acts of moral turpitude. Kitsis presented 19 favorable character reference letters from other attorneys, friends and clients but the Supreme Court noted that the letters did not demonstrate awareness of the extent of Kitsis's misconduct. (*Id.* at p. 867.)

As noted in *In re Young*, *supra*, 49 Cal.3d at p. 268, the Supreme Court has not always imposed the degree of discipline called for in standard 3.2 if it had "grave doubts as to the propriety of the recommended discipline."

In this case, we find no grave or even serious doubts as to the propriety of the recommendation. It was purely fortuitous that more harm did not occur as a result of the facts and circumstances surrounding respondent's criminal offense, given especially that the accident claims pressed in the name of respondent's office appear to have arisen from fraud and that respondent's conduct was both grossly reckless in a number of ways and, by disguising financial entries, intentionally dishonest. As the overriding purposes of lawyer discipline are to protect the

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[18] *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838; *In the Matter of Scapa & Brown, supra*, 2 Cal. State Bar Ct. Rptr. 635; and *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411.

public, maintain high professional standards and preserve the integrity of the legal profession (std. 1.3), disbarment is appropriate based on applying the Standards to this case and also appropriate when measured against decisional law.

VIII. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Tamir Oheb, be disbarred from the practice of law in this State and that his name be stricken from the roll of attorneys licensed to practice in the State. We further recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court, and perform the acts specified within subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend 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 enforceable as provided in Business and Professions Code, section 6140.7 and as a money judgment. As respondent has been suspended continually by interim order following his felony conviction, we do not impose an order of inactive enrollment incident to this recommendation.

STOVITZ, P.J.

We concur:

WATAI, J.

EPSTEIN, J.