

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	Case No.: 99-C-11161
)	
TAMIR OHEB,)	OPINION ON REVIEW
)	
A Member of the State Bar.)	
_____)	

In this conviction referral proceeding, the State Bar seeks 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 with credit given for the period of respondent's interim suspension and which will continue until respondent establishes his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.¹

Although the State Bar advances multiple claims, we view them as two essential claims. First, the State Bar claims that the hearing judge erred in not recommending respondent's summary disbarment because it asserts that respondent's criminal convictions meet the statutory criteria for disbarment under California's summary disbarment statute in Business and Professions Code section 6102, subdivision (c).² In support of this claim, the State Bar first

¹The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

²Unless otherwise indicated, all further statutory references are to the Business and Professions Code. Section 6102, subdivision (c) states: "After the judgment of conviction of an offense specified in [Section 6102,] subdivision (a) has become final or, irrespective of any

argues that, even if the crimes of which respondent was convicted do not inherently involve moral turpitude, respondent's convictions still meet the statutory criteria for summary disbarment because (1) the crimes are felonies and (2) the facts and circumstances surrounding their commission involve moral turpitude. Alternatively, the State Bar argues that respondent's convictions meet the statutory criteria for summary disbarment because they are for crimes that inherently involve moral turpitude, notwithstanding our holding in an order we filed on August 30, 2001, that respondent's convictions are for crimes for which there is only probable cause to believe they involve moral turpitude.

Second, the State Bar claims that, even if respondent's convictions do not meet the statutory criteria for summary disbarment, the nature and scope of his crimes, the facts and circumstances surrounding their commission, the numerous aggravating circumstances, and the lack of any substantial mitigation meet the criteria for disbarment under standard 3.2, the standard applicable to convictions involving moral turpitude.

Respondent, on the other hand, urges us to reject each of the State Bar's claims. In fact, he admits that “[t]he detailed findings of the Hearing Department are amply supported by the record” and that “[t]he degree of discipline recommended by the Hearing Department is well-supported and should be adopted” by the review department.

Our independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), leads us to reject both of the State Bar's claims, to uphold and adopt many, but not all, of the hearing judge's significant factual findings and legal conclusions, to make additional factual findings and legal conclusions, and to uphold and adopt the hearing judge's recommendation of suspension.

subsequent order under Section 1203.4 of the Penal Code or similar statutory provision, an order granting probation has been made suspending the imposition of sentence, the Supreme Court shall summarily disbar the attorney 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.”

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.³ Once the State Bar 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.⁴ (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,

³Penal 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 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.

⁴Either one of these grounds alone would authorize respondent's interim suspension. (Bus. & Prof. Code, § 6102, subd. (a).)

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.

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 Bar⁵ 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 (§ 6102, subd. (c)), applies to all felonies which involve moral turpitude in their surrounding facts and circumstances and not just to those where the elements of the 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.

⁵All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

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 form of the law quoted *ante*, footnote 2, replaced the 1985 version. It 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 (e), 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 reprovved 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 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.

⁶In 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.

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 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

⁷However, 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.

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 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

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

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 car⁹ 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.

⁹Gottlieb 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.

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.

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. Respondent's and Sklan's assertion appears disingenuous since very soon before or after this, officer Mercer told Sklan of Gottlieb's long

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

history of fraudulent activities and felony convictions. The hearing judge's decision does not discuss the issue 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.

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 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 disregard¹² 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

¹¹We 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.)

¹²In 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.)

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 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

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

¹³It 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* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122; *Breland v. Traylor Eng. etc., 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].)

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.

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.

¹⁴It 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.)

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; *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, 1996, 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 clients 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 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.

¹⁵In 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.)

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).)

B. Mitigating circumstances.

1. Cooperation.

We decline to place significant mitigative weight on respondent's cooperation during these proceedings (std. 1.2(c)(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

¹⁶With 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.

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.

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.” As the hearing judge correctly noted, the Supreme Court has rejected the standard’s mandate that any two-year actual suspension 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.)

Next, we look to decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) We are unaware of any decisional law involving criminal convictions for violating Penal Code section 549. However, the State Bar contends that *In re Petty* (1981) 29 Cal.3d 356, which involved violations of former section 556 of the Insurance Code (now see Pen. Code, § 550 [false or fraudulent claims or statements and prohibited acts]) is instructive and supports disbarment in this proceeding. We disagree.

The criminal convictions and the facts and circumstances surrounding them in *Petty* involved two attorneys who, from 1972 until 1975, with the intent to defraud insurers, staged automobile accidents, falsified medical and property damage reports, made false insurance claims, forged signatures on releases to obtain settlement proceeds, and also employed and paid others for producing personal injury and property damage claims. (*In re Petty, supra*, 29 Cal.3d at pp. 359-360.) The attorneys in *Petty* were disbarred. (*Id.* at p. 362.) Because the level of misconduct established in *Petty* is so much greater—knowing, intentional participation by the accused attorneys in staged accidents to defraud—than the misconduct proved in the present proceeding, we conclude that *Petty* is neither comparable nor instructive.

Because there is no decisional law regarding Penal Code section 549, we look to decisional law regarding discipline imposed in cases involving attorney criminal convictions and misconduct for capping and reckless failure to supervise law office staff.

In re Arnoff (1978) 22 Cal.3d 740 was a disciplinary proceeding based on the attorney's conviction of conspiracy to commit capping. The relationship between Arnoff and a layperson who effectively controlled Arnoff's law office lasted for about two years and involved about 500 personal injury 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. Arnoff had no prior discipline in 20 years of law practice and suffered from heavy emotional pressures during that time. Arnoff presented positive evidence of rehabilitative treatment. The Supreme Court suspended him for two years.

In *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, the improper solicitation of accident victims was committed by Kroff personally over a period of about 18 months. It was accompanied by other serious misconduct including misrepresentations to the prospective clients and failures to account properly for their funds. Kroff had a prior suspension for serious misconduct including commission of acts of moral turpitude. On our recommendation, the Supreme Court imposed a five-year suspension stayed, on conditions including a three-year actual suspension. In *Kroff*, we also discussed *In the Matter of Scapa & Brown, supra*, 2 Cal. State Bar Ct. Rptr. 635, in which an 18-month actual suspension was ordered. We noted that in *Scapa & Brown*, the attorneys hired laypersons to solicit clients, divided legal fees with them and attempted to enforce an unconscionable fee provision for a minimum attorney fee in the case of discharge but that these activities lasted only six months.

Another case involving failure to exercise control over nonlawyers in handling personal injury clients was *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468. Rubens left one practice after about nine months when realizing his lack of control over nonattorney staff and joined another practice for about 18 months, although he had similar suspicions that capping and insurance fraud were occurring. We recommended and the Supreme Court imposed a three-year suspension stayed on conditions of a two-year actual suspension. We noted in aggravation Rubens's prior reproval and in mitigation, his cooperation with the State

Bar. We also found several uncharged factors in aggravation including Rubens's fee splitting with nonlawyers. In *Rubens*, we discussed *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, in which a two-year actual suspension was also ordered. We noted that Jones's failure to supervise his non-attorney staff yielded more serious misconduct than found in *Rubens*, yet Rubens showed less mitigation and greater aggravation than Jones.

Respondent's crimes are particularly troublesome because they were inextricably interwoven with his practice of law and were the result of his recklessness in practicing law. Respondent's unsubstantiated claims of severe financial difficulties do not justify nor mitigate his misconduct.

Looking at prior cases involving reckless failure to supervise non-lawyers resulting in capping and division of fees shows that a two-year actual suspension as recommended in *Arnoff* and *Rubens* is an appropriate recommendation in this case.

As noted *ante*, respondent has made only \$40,000 in restitution for the \$155,000 in monetary harm directly caused by criminal conduct, leaving \$115,000 unreimbursed. "Restitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Accordingly, one's efforts, if any, to make restitution are particularly relevant to the issue of his rehabilitation. (*Hippard, supra*, 49 Cal.3d at p. 1093.) One reason for that is because restitution is an extremely effective method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Hippard, supra*, 49 Cal.3d at p. 1093; *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009; see also *Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10.)

Accordingly, we shall include a probation condition in our discipline recommendation requiring that respondent make restitution of \$115,000 together with interest thereon from September 14, 2000, which is the date respondent signed the plea agreement in his criminal case, until paid. We reject respondent's contention that he made all the restitution that is required of him because he paid the \$40,000. Because an attorney's responsibilities differ for those of a

layman, he or she may “be required to make restitution as a moral obligation even when there is no legal obligation to do so.” (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674, citing *Brookman v. State Bar*, *supra*, 46 Cal.3d at p. 1008.)

We conclude that the appropriate level of discipline is four years’ stayed suspension and four years’ probation with extensive rehabilitative probation conditions, including a two-year period of actual suspension and restitution of \$115,000.

VIII. Discipline recommendation.

We recommend that respondent Tamir Oheb be suspended from the practice of law in the State of California for a period of four years; that execution of the four-year period of suspension be stayed; and that he be placed on probation for a period of four years on the following conditions.

1. Respondent is actually suspended from the practice of law in the State of California during the first two years of this probation and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct with credit to be given for the period of respondent’s interim suspension, which began on October 1, 2001.¹⁷
2. Prior to the expiration of his probation, respondent must, with respect to the Arroyo matter: (1) make restitution to Western United Insurance Company, Progressive Insurance Company and, if it has paid, the Client Security Fund in the amount of \$100,000 plus interest thereon at the rate of 10 percent simple interest per annum from September 14, 2000, until paid; and (2) provide satisfactory proof of such restitution to the State Bar’s Office of Probation in Los Angeles. Within the first 90 days after the effective date of the Supreme Court order in this matter, the Office of Probation must determine, how much of the \$100,000 in restitution together with the interest thereon is due Western United, Progressive Insurance and, if appropriate, the Client Security Fund based on the amount of money each of them paid out as a result of respondent’s misconduct. Respondent must fully cooperate with and assist the Office of Probation in making these determinations, which are subject to de novo review by the State Bar Court on the motion of either respondent or the State Bar.
3. Prior to the expiration of his probation, respondent must, with respect to the Cowart matter: (1) make restitution to 20th Century Insurance Company, Financial Indemnity Company and, if it has paid, the Client Security Fund in the amount of \$15,000 plus

¹⁷Of course, even if respondent will have no prospective period of actual suspension after he is given credit for the period of his interim suspension, he must still make the requisite showings required by standard 1.4(c)(ii). (Cf. *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 453.)

interest thereon at the rate of 10 percent simple interest per annum from September 14, 2000, until paid; and (2) provide satisfactory proof of such restitution to the State Bar's Office of Probation in Los Angeles. Within the first 90 days after the effective date of the Supreme Court order in this matter, the Office of Probation must determine, how much of the \$15,000 restitution together with the interest thereon is due 20th Century, Financial Indemnity and, if appropriate, the Client Security Fund based on the amount of money each of them paid out as a result of respondent's misconduct. Respondent must fully cooperate with and assist the Office of Probation in making these determinations, which are subject to de novo review by the State Bar Court on the motion of either respondent or the State Bar.

4. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.
5. Subject to the assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.
6. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:
 - (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and
 - (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

7. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)(1)). Respondent must notify the Membership Records Office and the Office of Probation of any change in his office address or telephone number or his address used for State Bar purposes when he maintains no office no later than 10 days after the change. In addition, respondent must maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Respondent must notify the Office of Probation of any change in his home address or telephone number no later than 10 days after the change.

Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).)

8. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)
9. Respondent's probation will commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for four years shall be satisfied, and the suspension shall terminate.

IX. Professional responsibility examination, rule 955, and costs.

We further recommend that respondent Oheb be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of his actual suspension or within one year after the effective date of discipline, whichever is later, and to provide satisfactory proof of his passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period. Additionally, we recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Finally, we 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 payable in accordance with Business and Professions Code section 6140.7.

STOVITZ, P. J.

We concur:

WATAI, J.
EPSTEIN, J.

Case No. 99-C-11161

In the Matter of Tamir Oheb

Hearing Judge

Hon. Robert M. Talcott

Counsel for the Parties

For State Bar of California:

Susan Jackson
Alan Gordon
Deputy Trial Counsel
Office of the Chief Trial Counsel
The State Bar of California
1149 S. Hill St.
Los Angeles, CA 90015-2212

For Respondent:

Arthur L. Margolis
Margolis & Margolis, L.L.P.
2000 Riverside Dr.
Los Angeles, CA 90039-3758