STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT B. SCAPA AND
MICHAEL S. BROWN

Members of the State Bar

Nos. 88-O-12498 and 88-O-12499 (consolidated)

Filed October 27, 1993; as modified, November 3, 1993,
and as modified on denial of reconsideration, January 28, 1994

SUMMARY

Respondents, partners in a plaintiff personal injury practice, set up a branch office in which non-lawyer independent contractors, acting without attorney supervision, were responsible for signing up clients and were paid in cash for this service based on the value of the client's case. Respondents' form fee agreement provided that if their clients discharged them, they would be entitled to their full contingent fee, or at least to a minimum of three hours paid at a high hourly rate, regardless of the amount of work actually performed. In several cases, after their clients hired new counsel, respondents improperly claimed liens on their clients' recoveries and threatened to sue for punitive damages if the liens were not honored.

Respondents were found culpable of employing their non-lawyer agents to engage in prohibited in-person solicitation of clients; conspiring to violate the solicitation rules; dividing legal fees with their non-lawyer agents, and attempting to charge unconscionable legal fees. The hearing judge concluded that respondents' actions violated several Rules of Professional Conduct and constituted moral turpitude, and recommended that each respondent receive a 30-month stayed suspension, 4 years probation, and 15 months actual suspension. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondents sought review, raising several procedural contentions, contesting the hearing judge's findings, and asserting that the recommended suspension was excessive. The review department rejected respondents' procedural claims and concluded that the findings were supported by clear and convincing evidence and decisional law. Guided by comparable case law, the review department concluded that an even greater actual suspension was appropriate in view of respondents' overreaching practices, particularly in regard to their unethical fee practices. Accordingly, the review department modified the hearing judge's discipline recommendation to include an 18-month actual suspension. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Donald R. Steedman

For Respondents: Daniel Drapiewski

HEADNOTES

[1 a-d] **106.20 Procedure—Pleadings—Notice of Charges**
113 Procedure—Discovery
119 Procedure—Other Pretrial Matters
192 Due Process/Procedural Rights
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)
Where notice to show cause charging client solicitation did not identify clients allegedly solicited, but did name persons who were alleged to have performed such solicitations and fixed the period of charged misconduct, and where respondents were informed of identities of allegedly solicited clients well before most pre-trial discovery was completed, and at least six months before trial, respondents' motion to dismiss notice to show cause based on alleged vagueness, which was not made until first day of trial, was properly denied.

[2] **106.40 Procedure—Pleadings—Amendment**
106.90 Procedure—Pleadings—Other Issues
135 Procedure—Rules of Procedure
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)
The purpose of the notice to show cause in a disciplinary proceeding is to serve as a determination that probable cause exists to warrant formal charges. (Trans. Rules Proc. of State Bar, rule 510.) Accordingly, statements of probable cause, which identified clients allegedly involved in solicitation charged in notice to show cause, served as equivalent of amendments to notice to show cause.

[3] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
135 Procedure—Rules of Procedure
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)
A State Bar disciplinary matter does not deal with civil responsibility where a party might be under a duty to mitigate harm or damages. The State Bar is entitled to investigate whatever information it acquires about misconduct without notifying the attorney involved contemporaneously, and it did not act improperly by failing to notify attorneys promptly when it learned of solicitation of clients by attorneys' agents. State Bar rules require only that attorneys be given an opportunity to explain or deny matters under investigation prior to issuance of notice to show cause. (Trans. Rules Proc. of State Bar, rule 509(b).)

[4] **204.90 Culpability—General Substantive Issues**
Attorneys have a personal duty to obey the State Bar Act and Rules of Professional Conduct and to reasonably supervise their agents and employees to that end.

[5] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)
Where respondents' non-lawyer agents solicited a client who, unknown to them, was a State Bar attorney, and invited that attorney to respondents' office, that attorney did not improperly search respondents' law office by reading papers spread out on table in front of him by respondents' staff, without touching papers or opening any cabinets, drawers, or files. Such conduct would not have been improper if committed by a police agency in collecting evidence in a criminal case.

[6] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
148 Evidence—Witnesses
162.20 Proof—Respondent's Burden
191 Effect/Relationship of Other Proceedings
State Bar prosecutors have statutory authority to apply to superior court to grant immunity from criminal prosecution to a witness in an attorney disciplinary proceeding. Where such procedures were properly invoked, and respondents showed no prejudice to themselves on account of the procedures followed in seeking such immunity, respondents were not entitled to relief based on asserted error in such procedures.

[7] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
Where State Bar demonstrated that Board of Governors policy had been properly observed with regard to State Bar investigators' interviews of respondents' current clients who had not made complaints against them, respondents were not entitled to relief based on occurrence of such interviews.

[8 a, b] **135 Procedure—Rules of Procedure**
142 Evidence—Hearsay
194 Statutes Outside State Bar Act
In State Bar disciplinary proceedings, the formal rules of evidence apply as in civil cases, with the proviso that no error in admitting or excluding evidence invalidates a finding or decision unless the error deprived the party of a fair hearing. (Trans. Rules Proc. of State Bar, rule 556.) Accordingly, hearsay evidence is not admissible unless the opposing party agrees to its admission or otherwise waives any hearsay objections, or the evidence is subject to an exception to the hearsay rule. Where facts needed to establish past recollection recorded exception were shown, hearsay statements in witness's notebooks were properly admitted, and admission of notebooks themselves, even if error, did not prejudice opposing parties.

[9] **120 Procedure—Conduct of Trial**
148 Evidence—Witnesses
159 Evidence—Miscellaneous
Testimony of expert witness who did not know facts of specific case but could only give opinion as to respondents' practices was proper expert testimony. Where hearing judge limited expert's testimony to proper opinion testimony on subjects of his qualifications, fair hearing was ensured.

[10] **162.19 Proof—State Bar's Burden—Other/General**
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues
253.00 Rule 1-400(C) [former 2-101(B)]
Culpability can be established in attorney disciplinary proceedings either by direct or circumstantial evidence, and circumstantial evidence has been considered on a regular basis in cases involving improper client solicitation by an attorney's agents. Culpability findings regarding charge of improper client solicitation were proper where, in addition to circumstantial evidence, there was inculpatory direct evidence in the record, and hearing judge properly evaluated and weighed witness testimony.

[11 a-e] **162.11 Proof—State Bar's Burden—Clear and Convincing**
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)
Where respondents set up distant branch office with intent to be present only one day per week; authorized non-lawyer independent contractors to explain complex and unusual fee agreements to prospective clients; did not review cases or speak with clients until after clients had signed fee agreements; paid contractors in cash based on viability of cases, and implausibly characterized contractors as investigators; ignored indications of excessive non-lawyer control of cases; chose to disbelieve clients' reports that contractors had solicited them, and did not present convincing explanation about how they believed clients had come to retain them, hearing judge's findings that respondents knew of contractors' solicitation of clients were supported by clear and convincing evidence.

[12 a, b] **193 Constitutional Issues**
253.00 Rule 1-400(C) [former 2-101(B)]
253.20 Former rule 2-101(C) (no current rule)
Solicitation of clients may be constitutionally protected under the First Amendment depending on the occupation or profession involved and certain other circumstances. Free speech guarantees have been held not to prevent enforcement of California's rules governing in-person solicitation, and solicitation of clients for lawyers has long been illegal in California. Where accident victims were tempted by persuasiveness of respondents' non-lawyer agents who had superior access to police reports, and in one instance a victim was solicited minutes after returning from the hospital, such facts showed constitutional justification for prohibition of such in-person solicitation.

[13 a, b] **221.00 State Bar Act—Section 6106**
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)
Where respondents made a shared decision to operate a distant branch office using non-lawyer independent contractors paid in cash to sign up clients, respondents committed acts of moral turpitude by violating the client solicitation rules and conspiring to violate such rules; their involvement in repeated client solicitation constituted "corruption" within the meaning of the moral turpitude statute.

[14 a, b] **253.10 Rule 1-400(D) [former 2-101(A)]**
253.20 Former rule 2-101(C) (no current rule)
290.00 Rule 4-200 [former 2-107]

582.10 Aggravation—Harm to Client—Found
871 Standards—Unconscionable Fee—6 Months Minimum
1093 Substantive Issues re Discipline—Inadequacy

Where respondents seriously disregarded their fiduciary duty to clients, including leaving it to non-lawyer contractors to explain complex retainer agreement without allowing clients to review it over time or discuss it with respondents, and where such retainer agreement, though purporting to be for contingent fees, contained unconscionable provision for minimum fee upon discharge, and where respondents' acts in seeking to enforce such provision damaged clients, respondents' conduct warranted greater actual suspension than 15 months recommended by hearing judge. Respondents' involvement in client solicitation alone warranted one-year actual suspension; their remaining offenses deserved an additional six months.

ADDITIONAL ANALYSIS

Culpability

Found

221.19 Section 6106—Other Factual Basis
252.31 Rule 1-320(A) [former 3-102(A)]
252.41 Rule 1-320(B) [former 3-102(B)]
253.01 Rule 1-400(C) [former 2-101(B)]
253.11 Rule 1-400(D) [former 2-101(A)]
253.21 Former rule 2-101(C) (no current rule)
290.01 Rule 4-200 (former 2-107)

Not Found

221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
430.05 Breach of Fiduciary Duty

Aggravation

Found

521 Multiple Acts
551 Overreaching
586.11 Harm to Administration of Justice
691 Other

Mitigation

Found but Discounted

710.35 No Prior Record
740.32 Good Character
740.33 Good Character
750.32 Rehabilitation

Declined to Find

710.53 No Prior Record

Standards

833.90 Moral Turpitude—Suspension
901.30 Miscellaneous Violations—Suspension

Discipline

1013.08 Stayed Suspension—2 Years
1015.07 Actual Suspension—18 Months
1017.10 Probation—4 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

STOVITZ, J.:

Respondents Scapa and Brown request review of a decision of a State Bar Court hearing judge recommending that they each be suspended from the practice of law for 30 months, that the suspension be stayed and that they be placed on a 4-year probation on various conditions including 15 months actual suspension.

The hearing judge's recommendation is based on a 77-page decision after 23 days of trial. The judge found that between February and September 1988 respondents committed acts of moral turpitude and wilfully violated rules of professional conduct by using others to engage in prohibited in-person solicitation, conspiring to violate the solicitation rules, dividing legal fees with non-lawyers and attempting to charge unconscionable legal fees.

In urging us to overturn the hearing judge's decision, respondents press several procedural attacks, claim that the findings do not support the decision and some are contrary to law and assert that the recommended suspension is excessive discipline. At most, respondents contend that they are culpable of inadequate supervision of their non-lawyer independent contractors. Opposing all of respondents' claims, the Office of the Chief Trial Counsel (OCTC) has submitted a most thorough brief contending that even greater discipline would be warranted for respondents.

Upon our independent review of this voluminous record, we have concluded that respondents' procedural claims are without merit and the hearing judge's findings and conclusions are supported by clear and convincing evidence and guiding decisional law. The record shows that respondents set up a branch law office in which they knew that their independent contractors, acting on their own, and without any attorney supervision, would be responsible for explaining to accident victims respondents' sophisticated attorney-client retainer agreement and seek to have clients sign those agreements. The evidence clearly shows that respondents paid these contractors in cash for viable cases brought to respondents' office by unlawful, in-person solicitation. Moreover, the solicitations here were patently corrupt for they involved bribes by respondents' independent contractors to police officers for the favorable channeling of police accident reports to the contractors although there is no clear evidence that respondents were aware of this police corruption. They were also unaware that their contractors were getting kickbacks for referral of clients to the same medical clinic. The record also shows that when several of respondents' clients who were solicited by their independent contractors changed counsel, respondents threatened their new counsel with assertions of liens and threatened relevant insurers with punitive damage actions if liens were not honored in circumstances where the record shows that the agreements were known by respondents to be unenforceable and, in any event, provided for an unconscionable minimum fee if respondents were discharged in light of the fact that respondents' office staff did only the most perfunctory work for the clients in opening a file and in sending initial form letters.

Guided by decisions in comparable cases, we conclude that an even greater actual suspension than recommended by the hearing judge is appropriate in view of not only the solicitation of prospective clients but respondents' overreaching particularly by their assertion of unethical fee practices. Accordingly, we shall recommend an 18-month actual suspension on the same conditions as the hearing judge.

I. FACTS, FINDINGS AND CONCLUSIONS.

A. Introduction.

Although respondents dispute that they are culpable of illegal solicitation and other serious charged misconduct, the essential facts which occurred are not disputed including that several agents of respondents solicited professional employment for respondents from numerous prospective clients in the period from February to September 1988.

Following is a summary of the evidence. Respondent Scapa was admitted to practice law in California in 1977 and respondent Brown was admitted in 1982.

Their practice was largely plaintiff personal injury and was in Southern California. To get a larger client base, in late 1987 respondents opened a Northern California office in San Bruno. They staffed it with secretaries and paralegals. Except for one of the respondents visiting the San Bruno office about one day a week, there were no attorneys in that office working for respondents. Respondents decided to engage the services of several people to "sign up" clients. These independent contractors also worked for other attorneys. Although respondents might have engaged as many as four or five independent contractors to "sign up" clients, most clients in the proceeding we review were solicited by two of these contractors: Robert Buchanan and Joseph Gumban.

Buchanan had been a salesperson and was the principal in a sign and ladder business. Gumban was a retired police officer whose wife was a nurse. Respondents thought that Gumban and Buchanan would each be able to refer a number of clients to the San Bruno office and sign up clients referred. Respondents took the position in this proceeding that they were not only unaware that Gumban and Buchanan were soliciting prospective clients but counseled Gumban and Buchanan not to do so. OCTC presented clear evidence that Gumban and Buchanan solicited over 30 prospective clients for respondents' San Bruno practice between about February and September 1988. Twelve clients testified below as to their solicitation by respondents' agents. Respondents do not dispute that these clients were solicited but dispute that they are culpable of professional misconduct in connection therewith. We deem it unnecessary to repeat the details of each client's solicitation experience recounted in the hearing judge's lengthy decision. Rather, we shall focus on the facts in the record and findings common to several or all of the solicitations.

B. Illegal source of solicitation targets.

The solicitation activities of Gumban and Buchanan followed a pattern as did their obtaining prospective clients' signatures on respondents' retainer agreements.[1] Gumban and Buchanan made an illegal arrangement with two employees of the San Francisco Police Department record bureau to pay for police accident reports pre-screened for personal injury case value. Gumban and Buchanan would generally pay a flat sum, such as $500 to $1,000, for a week's worth of reports. With the personal information from the reports they would then call the victims to recommend respondents' services. If the victims were interested in retaining respondents, Gumban or Buchanan would meet the victim at the victim's home or a nearby restaurant and present the client with respondents' retainer agreement for signature. There is no clear evidence to show that respondents knew of the illegal police report arrangement.

No clients were solicited at an accident scene or hospital and most were called several days or a week or more after their accidents. However, one prospective client, Michelle Behrman Fiorsi, was called by another independent contractor of respondent at her home minutes after returning from treatment at a hospital emergency room while still groggy from pain medication.

C. Delegation by respondents to non-lawyers of signing of complex attorney-client retainer contract.

The evidence below was clear and convincing that respondents knew that their non-attorney independent contractors were explaining respondents' fee agreements to prospective clients and getting their signatures on those agreements without any member of the State Bar being involved. The record shows that the agreements and accompanying papers were not routine nor internally consistent. Respondents' fee agreement was a legal-sized page of 11 paragraphs. Although acknowledging that the client understood that contingent fees were negotiable by law, it provided for attorney fees of 33 and one-third percent of all amounts recovered if the case was settled before filing of suit or claim and 40 percent of

1. Gumban and Buchanan did not work for respondents at all the same times in 1988. Gumban started working for respondents in early 1988, and trained Buchanan and Buchanan worked for respondents during the spring and summer of 1988.

all sums recovered if the case was settled after suit or claim and start of discovery.[2] Respondents' agreement also provided for their entitlement to the full contingent fee on all parts of the client's recovery, including medical pay and uninsured motorist coverage, even if the client discharged respondents against their wishes (except for their misconduct or incapacity) in violation of the agreement. If the full contingent fee did not apply in case of wrongful discharge, the agreement provided for a minimum of three hours of respondents' time as compensation. Most of the agreements introduced in evidence had the hourly rate of $200 filled in. Thus in the latter cases, the clients had committed themselves to at least $600 of fees if they discharged respondents against respondents' wishes. There was never any dispute below that respondents knew at all times that if they were discharged by their client for any reason, they would be limited to an attorney fee recovery based on the reasonable value of their services up to the time of discharge under *Fracasse* v. *Brent* (1972) 6 Cal.3d 784, 792. Moreover, since 1939, the State Bar Act has rendered void any fee contract procured by runners or cappers such as Gumban and Buchanan. (Bus. & Prof. Code, § 6154.)

OCTC produced the testimony of Arne Werchick, Esq., a past president of the California Trial Lawyers Association and an expert in plaintiff personal injury cases. Werchick was critical about several aspects of respondents' retainer agreement, including the provision which gave them a share of all parts of the client's recovery including that based on medical pay insurance coverage when most attorneys would incur no time or expense to acquire that item of recovery for the client. Werchick was also critical of the minimum figure of a $600 fee owed on discharge of respondents. He termed such a minimum fee "unconscionable" and testified that the $200 per hour figure on which it was based was an excessive charge for respondents' practice. Respondents offered no contrary expert evidence.

Also presented to the clients for signature by respondents' agents was the usual authorization form for seeking medical report data and one additional document which, according to Werchick, was most unusual. It was a declaration under penalty of perjury in which the prospective client stated that his or her decision to retain respondents was not the result of any promises, offer or solicitation. Werchick saw no legitimate use in a personal injury practice for asking a client to sign such a statement. He testified that he could not see any purpose other than to "paper" a file when the lawyer might have a suspicion that the client was in fact solicited.

D. Respondents' cash payments to non-lawyers for signing up clients.

The evidence is undisputed that respondents paid Gumban and Buchanan almost entirely in cash for their work. Buchanan testified that respondents' cash payments for cases brought to the law office ranged from zero to $1,000 depending on the settlement or recovery value of the case. Similarly, Buchanan testified that if he did some work on a case but the prospective client was without insurance or respondents rejected it for some other reason, he was not paid. Buchanan had little recollection of the number of cases he brought to respondents but OCTC produced a record book Buchanan maintained which showed that respondents paid Buchanan in about 75 cases and these payments were often in two stages per case, shortly after Buchanan brought the case to respondents and at a later time. Respondent Brown testified that Gumban and Buchanan performed a number of investigative tasks on their cases but conceded that they were not licensed private investigators.[3] In any event, respondents kept no records of the cash payments to Gumban and Buchanan.

Respondents personally reviewed the cases in which their agents signed up clients and testified that they reserved the right to accept or decline represen-

2. Because of the internal inconsistency of respondents' fee agreement provisions, it was not clear whether a case which settled after filing suit but before discovery would earn respondents a 33 and one-third percent fee or a 40 percent fee.

3. As pertinent to this case, Business and Professions Code section 7522 provides that to be exempt from private investigative licensure, persons performing investigative duties working for another must be doing so in an "employer-employee relationship." As noted, Gumban and Buchanan were independent contractors.

tation. Respondents frequently spoke with the clients personally once they decided to accept the case.

E. Referrals by Gumban and Buchanan of clients to the same medical clinic which gave kickbacks to them.

The evidence shows that if a client did not have a treating doctor, Gumban and Buchanan would recommend a specific medical clinic which would "kick back" $250 to Gumban or Buchanan. Although there is no evidence to show that respondents were aware of Gumban and Buchanan receiving kickbacks, respondents' office files reflected the great number of clients evaluated and treated by the same medical provider. This was another practice highly criticized by OCTC's expert witness, Werchick. He testified that an insurer would likely become suspicious of referrals of many different clients to the same medical provider and that that practice would not be in the best client interest.

The testimony of Alex Lavita is pertinent here. Lavita was in an auto accident in San Francisco on March 11, 1988. He was "a little bit shaken up" but was not sure at the time if he was injured. About two or three days later, he was solicited for respondents by Buchanan, whom he had never met before. Buchanan referred Lavita to the favored medical clinic for treatment. Shortly thereafter, he met with respondent Scapa who suggested that Lavita's recovery might depend on the number of weeks he treated at the clinic. After about 11 clinic visits over 2 weeks, involving a series of physiotherapy treatments, Lavita stopped going to the referred clinic. Scapa called Lavita a few days later and asked him why he stopped treatment. He told Scapa that he was not injured. Scapa told Lavita that he might be injured and that if he did not take a certain number of clinic treatments, Lavita would not have as big of a case and respondents would not be able to represent him. Scapa's talk with Lavita did not change his mind about further treatment. Respondents then terminated their representation of Lavita and Lavita dealt directly with the insurer of the person whose vehicle struck his, telling the insurer that he had not been injured and had only lost one day of employment.

F. When some clients sought new counsel, respondents asserted liens on their future recoveries, including against their own insurers, although respondents performed only perfunctory work in those cases.

Several clients testified below that they were induced to sign respondents' retainer agreements by Gumban or Buchanan telling them that they could cancel their contract with respondents at any time or on short notice. Some found that when they discharged respondents and hired new counsel, respondents asserted attorney-fee liens on their future recoveries including against their own insurers. Some of these liens were for far more than the value of services performed.

In June 1988 Robert J. Seronio, who had been solicited as a client of respondents by an independent contractor other than Gumban or Buchanan, decided to hire a new attorney. Seronio's main concern was property damage to his vehicle. After Seronio discharged respondents, respondent Brown sent Seronio's new attorney and the opposing party's insurer letters insisting that they preserve respondents' equitable liens for attorney fees and advanced costs. Brown insisted that respondents' firm be named on all settlement drafts. To the insurer, Brown threatened legal action if his firm was not named on every settlement draft. In that instance, wrote Brown, he would deem it appropriate to seek punitive damages.

Seronio's new attorney wrote back to Brown, requesting Seronio's file and an itemization of time spent and costs advanced. Brown did not provide this information. Seronio's new counsel concluded that the only work respondents had performed was the opening of a file and certain initial "form" correspondence signed by respondents' secretary. Seronio settled his own property damage claim with the other driver's insurer and Seronio's new attorney recovered a small settlement for either medical pay or personal injuries.

In April 1988 Fiorsi, who had been solicited for respondents as soon as she returned home from emergency medical treatment, decided to change lawyers and hire an attorney who had been recom-

mended by a friend. A few days later, she contacted respondents' office to report that she had chosen another lawyer to represent her. In June 1988 Fiorsi's new attorney wrote respondents of this change. Respondent Brown sent Fiorsi's new attorney and Fiorsi's and the opposing party's insurer letters insisting that they preserve the equitable liens for attorney fees and advanced costs and threatened both insurers with a punitive damage legal action if respondents' firm was not named on every settlement draft. Fiorsi's new attorney attempted unsuccessfully for several months to obtain from respondents the amount of their claimed lien for attorney fees and supporting documentation. Meanwhile, because of respondents' lien, Fiorsi could not get her damaged car repaired.

In October 1988 respondents' staff sent Fiorsi's new attorney the requested information. It listed services respondents performed valued at $1,425.02.[4] The first $900 of billed services were claimed for the first five days of respondents' representation in April 1988 for an initial interview, file review, creation of three standard letters to insurers, preparation of an "SR-1" form and four phone calls. The remaining $525.02 of billed services were incurred after Fiorsi's new attorney had told respondent of the change of counsel. These charges were attributed to review of the file, the preparation of the letters insisting that respondents' lien be honored and the preparation of other correspondence regarding the substitution of counsel. Fiorsi's new attorney objected to the excessive fee claimed by respondents and testified at the State Bar Court hearing that, to his knowledge, the dispute over respondents' lien had still not been resolved. Fiorsi testified that after a number of phone calls to respondents' office and insurers, she was able to get her car fixed.

In February 1988 Kenneth Tashiro was in an auto accident. Gumban and Buchanan together solicited him for respondents' practice and they recommended he see a particular chiropractor. Tashiro signed respondents' retainer agreement but declined to visit the recommended chiropractor and declined to make an appointment to visit with either respondent. Instead, about one or two weeks after he signed respondents' retainer agreement, Tashiro hired a lawyer of his choice, Illson New. New wrote to respondent Scapa on March 21 to advise that he (New) was now representing Tashiro and that Tashiro was uncertain whether respondents were his lawyers. In mid-May 1988 respondent Brown sent similar letters to New and the insurer as he had sent in the Seronio and Fiorsi cases asserting a lien. In June 1988, after Brown discussed the matter further with respondent Scapa, respondents chose not to pursue a lien in Tashiro's case.

Donald and Barbara Tate were injured in an auto accident in March 1988. They originally retained respondents to represent them but in May 1988, selected another attorney. In June 1988 respondent Brown wrote the Tates' new counsel that he would cooperate in turning over the file. However, in August 1988, Brown wrote both to the Tates' new counsel and an insurer the same type of letters he had written to counsel and insurers in the three cases discussed *ante* asserting his lien. The outcome of this asserted lien is unclear.

G. In 1988 respondents learned from clients or successor attorneys that non-attorneys were soliciting business for respondents.

The record shows that from three different sources during 1988, respondents received information that their clients had been solicited by their non-attorney independent contractors. In one case, involving client Tashiro, his later counsel, New, had two conversations with respondents' staff in March 1988 about the solicitation of Tashiro. The first conversation was with respondents' secretary Arlene Gamit. Gamit checked into New's information and called him back later to explain that his concern could not be valid since office records showed that Tashiro initiated contact with respondents' office. Not satisfied with that answer in view of Tashiro's specific information as to how he was approached by Gumban and Buchanan, New spoke directly with

4. Respondents' invoice understated the total itemized services as $1,145.02.

respondent Scapa to repeat his concern over the solicitation of his client. New testified that Scapa seemed quite interested in how aggressive Gumban and Buchanan had been with Tashiro. New's testimony supports the hearing judge's finding that Scapa seemed more concerned with mollifying New. According to Scapa, he questioned Gumban and Buchanan about New's claim. When they insisted that Tashiro was a "legitimate referral," he took no further action.

On April 20, 1988, a few days after Fiorsi was solicited to sign respondents' retainer agreement, she wrote to respondents: "I would like you to know that I got my own attorney. Thank you for your consideration anyway." Rather than taking this as evidence that Fiorsi had not voluntarily chosen respondents to represent her initially, respondent Brown took it as a sign of a client unappreciative of the efforts of his office. In September 1988, while attempting to resolve respondents' lien claim, Fiorsi's successor attorney wrote to respondent Brown detailing the information Fiorsi gave him about how an investigator had solicited her case for respondents in April.

Janice Sandles was involved in an auto accident in April 1988. About seven or ten days later, Buchanan solicited her by phone for respondents. She signed respondents' retainer agreement. In a meeting with respondent Brown about a month later, Sandles told him how Buchanan had approached her to hire respondents. She testified that Brown described Buchanan as his "agent" and told Sandles that she and Buchanan would be working very closely together.

Respondent Brown testified that in about June 1988, he had an inkling that Gumban and Buchanan might have solicited cases for respondents. However, after Scapa voluntarily looked into the matter and questioned Gumban and Buchanan, Brown was no longer concerned. Brown testified also that no client had ever told him of being solicited by Gumban and Buchanan.

H. Events leading to the end of the solicitation acts.

Several prospective clients were upset that when they were solicited by respondents' agents, those agents had copies of the relevant police accident reports even before the subjects could get them themselves from the police records bureau. One person's complaint to police department management led to an internal affairs investigation of the police officers who were selling reports to Gumban and Buchanan. The senior police officer involved was convicted of a crime and, in about September 1988, this source of accident victims stopped.

At the same time, the State Bar had begun an investigation based on several complaints it had received about some of respondents' practices discussed *ante*.[5]

Respondent Brown testified that he terminated the relationship with Buchanan in summer 1988 when Buchanan was unable to explain satisfactorily to Brown how a police report which appeared to be an "original" and not a copy found its way into respondents' files.

I. Hearing judge's findings and conclusions.

The hearing judge made findings as to the conduct outlined above and concluded that respondents were culpable of professional misconduct of several different types. As to count 1 which charged respondents with accepting representation of clients who had been solicited in an intrusive manner, the judge

5. Coincidentally, in March 1988 Buchanan solicited Alan Cohen, a senior trial counsel employed by the State Bar, who had been in a four-car auto accident a few days earlier and whose name was on a police report Buchanan had purchased through his arrangement with police officers. Unaware of Cohen's job, Buchanan persuaded Cohen to sign respondents' retainer agreement. Cohen played along and met Buchanan at respondents' Bay Area office. He brought along a State Bar investigator he introduced as his wife. While at respondents' law offices, Cohen met only with Buchanan. No attorney appeared to be in the office at the time. Cohen asked to take the blank retainer agreement package home to study but Buchanan refused the request. When Buchanan left the room for a while, Cohen studied the names of other accident victims on police reports which were spread "open-faced" on the table in front of him and made notes of the names of the victims.

concluded there was no question that clients were solicited for respondents' law practice between February and September 1988. Based on the judge's findings as to the nature and weight of testimony of a number of witnesses, including respondents, the judge's assessment of witness credibility and consideration of documentary evidence, he concluded that respondents knew that Gumban and Buchanan were soliciting employment for respondent from prospective clients.[6] Consequently, the hearing judge concluded that respondents wilfully violated rule 2-101 of the Rules of Professional Conduct,[7] wilfully violated rule 3-102(B) by compensating lay persons for recommending respondents' employment to prospective clients and engaged in moral turpitude or corruption proscribed by section 6106 of the Business and Professions Code.[8]

Finding that respondents shared legal fees with Gumban and Buchanan by paying them on a per-case basis with no fixed rate for certain services, the hearing judge concluded that respondents violated rule 3-102(A). He also concluded that since the division of fees was part of an illegal scheme, respondents violated section 6106. Recognizing that he had already so concluded as to the solicitation aspect of the case, he treated this violation of section 6106 as duplicative for purposes of assessing discipline. The hearing judge found no culpability on a count that respondents were grossly negligent in supervising their lay employees within the meaning of section 6106 and rules 6-101(A) and 6-101(B). He did so on the ground that these charges were made as an alternative to the charges of involvement in unlawful solicitation. The hearing judge noted that, had he not found respondents culpable of improper solicitation activities, he would have found them culpable of gross carelessness in supervision of office staff.

The hearing judge concluded that respondents violated section 6106 by conspiring to violate rules 2-101 and 3-102(B) and that this was a more serious act than the moral turpitude found incident to the solicitation charge. Finally, the hearing judge found that since respondents sought in their fee contracts to bind clients to fixed minimum fees if they changed counsel without respondents' consent and thereafter, when the clients did change counsel, threatened punitive damage actions to assert lien claims for fees they were unlikely to be entitled to receive, they sought to charge an unconscionable fee as proscribed by rule 2-107 and its successor, rule 4-200.

In weighing the degree of discipline, the hearing judge gave some mitigating weight to respondents' lack of prior discipline in 10 and 5 years of practice, respectively, prior to the acts of misconduct. Also considered mitigating was impressive character testimony from other clients who were completely satisfied with respondents' services and very favorable testimony from other attorneys, business people, doctors and a retired superior court judge. The hearing judge discussed this evidence in detail including its being tempered by several factors: one witness not being aware of the findings against respondents and testifying that those findings did not show honorable conduct; another testifying that the use of cash to pay investigators was "sloppy"; and two others testifying, respectively, that solicitation was a "victimless crime" or one which did not impugn honesty or trust. Additionally, the hearing judge noted the testimony of two rebuttal witness presented by the deputy trial counsel, each a newly-admitted lawyer, who testified as to the poor reputation of respondents and the unsatisfactory practices in which one witness believed respondents' office engaged.

The hearing judge found that one of the rebuttal witnesses had had limited sources of information on which to base her opinion. The hearing judge also gave some mitigating weight to respondents' testimony as to steps that had been taken in their relocated

6. The hearing judge devoted 20 pages of his decision to his assessment of the evidence bearing on the charge of solicitation.

7. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

8. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

Northern California office to prevent client solicitation and to serve clients better. These steps include revision of the attorney-client retainer agreement, discontinuance of the form asking clients to declare that they have not been solicited, ceasing of cash payments to investigators, and tightened control over investigators and intake of cases to ensure that an attorney spoke directly with the client before respondents accepted the case. The hearing judge tempered the mitigation he accorded this evidence of changed practices because of respondents' lack of recognition at trial that they had committed misconduct of more than a minimal nature.

The hearing judge considered as an aggravating factor respondents' multiple acts of misconduct in paying persons to solicit numerous cases over an eight-month period. While giving respondents the benefit of the doubt as to whether or not they were aware of police bribery and medical clinic kickbacks, the hearing judge concluded that respondents' misconduct resulted in harm to the administration of justice, invasion of privacy of accident victims, overreaching of clients and encouragement of unnecessary litigation.

After comparing this record with those in other solicitation cases considered by the Supreme Court or this court, the hearing judge recommended that each respondent be suspended for 30 months, stayed, on conditions of a 4-year probation and 15 months of actual suspension.

II. DISCUSSION.

A. Procedural contentions.

Before discussing the merits of the charges and issues bearing on discipline, we review respondents' several procedural contentions.

1. Adequacy of the notice to show cause.

[1a] Respondents have attacked broadly the notice to show cause ("notice"), claiming it lacks adequate specificity. Our review of the record shows that even though the original notice lacked the identity of specific clients allegedly solicited, respondents were given such information by OCTC well before trial and well before most pre-trial discovery was completed. Respondents have made no case for any relief based on their claim.

[1b] The notice was filed in November 1989. The charges of count 1 of the notice named Gumban and Buchanan, identified their relationship to respondents and fixed the period of charged misconduct as between about February through September 1988. The notice charged that Gumban and Buchanan bought police reports and telephoned "numerous persons" whose names appeared on the reports. It alleged that respondents accepted clients solicited by Gumban and Buchanan and that respondents paid money to these two and knew they and others were soliciting clients for them. Specific additional counts incorporated by reference the charges in count 1 and alleged additional specific statutory or rule violations.

In respondents' December 1989 answer to the notice, they claimed insufficient notice of the charges. At a February 1990 State Bar Court status conference, trial was set for May 29, 1990, but it was later continued to October 1, 1990, except for the taking of Gumban's testimony in May 1990. In March 1990, when the State Bar sought certain discovery as to agents other than Gumban and Buchanan, the hearing judge prohibited it unless OCTC first filed a statement of probable cause to believe that these other persons were respondents' employees or were involved in soliciting clients for respondents. Also in March 1990, the hearing judge prohibited the State Bar from using any information obtained from respondents as to their clients to prove the charges of failure to adequately supervise without identifying those clients by name. The judge prohibited use of information gleaned from respondents to prove the charge of attempting to collect an unconscionable fee without OCTC first filing a statement of probable cause that respondents had committed the alleged violation against named clients.

On March 23, 1990, nearly two months before the initial trial date, the deputy trial counsel filed statements of probable cause identifying clients Seronio, Tashiro, Tate and Fiorsi. **[2]** Since the purpose of the notice to show cause itself is to serve as a determination that probable cause exists to

warrant formal charges (Trans. Rules Proc. of State Bar, rule 510), the March 1990 statements of probable cause served as the equivalent of amendments to the notice. Moreover, on April 9, 1990, OCTC filed its pretrial statement listing witnesses it planned to call, separately classified as to twenty-one named clients alleged to have been illegally solicited by respondents, five named attorneys representing respondents' former clients in matters in which respondents demanded fees without legal basis, nine named agents or employees of respondents and other named witnesses.

The record shows that between May and July 1990 the parties engaged in extensive discovery including propounding interrogatories, taking depositions, and seeking production of documents. **[1c]** On the first day of trial, October 1, 1990, respondents made an oral motion to dismiss because of the alleged vagueness of the notice. The hearing judge found it unpersuasive, noting especially that counsel were aware that any such issue was to be raised earlier. Respondents' reiteration of the same argument on review is similarly unpersuasive.

Respondents rely on our decision in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. However, that case does not support their claim for relief. In *Glasser*, the notice to show cause failed to afford the accused attorney notice as to which of potentially hundreds of financial transactions over a seven-year period, involving twelve different trusts, were at issue. When Glasser sought a more definite notice than the less-than-two-page pleading, OCTC declined to amend and the hearing judge granted Glasser's timely motion to dismiss before trial, without prejudice. In the case now before us, we have a very different situation. **[1d]** The original notice fixed the eight-month time period involved and identified Gumban and Buchanan as agents involved with respondents in unethical activity. OCTC provided statements of probable cause to identify additional agents and several clients. About six months before trial respondents knew the identity of all the persons OCTC would produce to support the charges. Respondents had an abundant opportunity to conduct discovery with that knowledge, they had a timely opportunity to challenge the notice if they thought it was improperly vague and they have shown no prejudice as a result of the procedures followed.

2. Alleged misconduct by OCTC.

On review, respondents urge five different grounds of misconduct by OCTC or its agents. We have reviewed them and find them to be without merit. **[3]** First, respondents claim that OCTC failed to notify respondents promptly of the solicitation of State Bar attorney Cohen and therefore failed to take steps to prevent later solicitations. Their contention, unaccompanied by any citation of legal authority, is frivolous. In this proceeding we do not deal with civil responsibility where a party might be under a duty to mitigate harm or damages. Rather, this is an attorney disciplinary matter and the State Bar was entitled to investigate whatever information it acquired about alleged professional misconduct without notifying respondents contemporaneously. All that was required was that prior to issuance of the notice, respondents be given an opportunity to explain or deny the matters under investigation. (Trans. Rules Proc. of State Bar, rule 509(b).) Respondents have not shown that OCTC failed to comply with this rule.

[4] Respondents' complaint in their brief that the State Bar failed to "deactivate" Gumban and Buchanan promptly after learning in 1988 that they were engaged in improper solicitation efforts completely misunderstands that respondents had a personal duty to obey the State Bar Act and Rules of Professional Conduct and to reasonably supervise their agents and employees to that end. As the record shows, when respondents learned from their clients or their new counsel that respondents' agents had originally solicited them, respondents chose to believe Gumban and Buchanan rather than the clients or attorneys who told them of the capping activities.

[5] A more serious charge urged by respondents, but one unaccompanied by any citation of authority, is that OCTC attorney Cohen improperly searched respondents' law office when invited there upon being solicited to become respondents' client. We see no evidence in the record to support this charge. All that this record shows Cohen did to gather information was to read the names of persons on police reports which Buchanan or another of respondents'

agents had already spread on the table in front of Cohen. Cohen opened no cabinets, drawers, files or folders nor did he touch any other paper not given him by Buchanan. If the challenged conduct had been committed by a police agency, in collecting evidence in a criminal case, it would not have been an improper search. (See 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Exclusion of Illegally Obtained Evidence, § 2379, pp. 2809-2812.)

[6] Respondents also contend that OCTC failed to comply with proper procedures for the grants of immunity from criminal prosecution extended to Gumban and Buchanan. Since 1987, the State Bar Act has specifically authorized OCTC to apply to a superior court to grant immunity from criminal prosecution to a witness in an attorney disciplinary proceeding. (§ 6094 (b).) These procedures were properly invoked here and respondents had the opportunity to litigate before trial the propriety of the specific procedures used or representations made. While they made similar objections at trial, they have not shown any legal cause for relief and very significantly have shown no prejudice to *themselves* on account of the immunity procedures followed by OCTC as to witnesses Gumban and Buchanan. Accordingly, respondents' claim must fail. (See, e.g., *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 778; *Goldstein* v. *State Bar* (1989) 47 Cal.3d 937, 949-950 [need for showing of prejudice or denial of a fair hearing before relief will be granted on claim of procedural error].)

[7] Respondents next claim error because OCTC investigators interviewed respondents' current clients who had not made complaints against them. Respondents suggest that such conduct was contrary to policy adopted by the Board of Governors of the State Bar. Both parties have cited the appropriate authority but OCTC demonstrated to the hearing judge in a timely manner that the Board of Governors policy was properly complied with.

Finally, respondents have inflated a speculative claim that OCTC improperly spread information about the charges into a Fourth Amendment violation. Respondents' claim lacks any support in the record or even in their own brief to show that any impropriety occurred.

3. Objections to admissibility of evidence.

Respondents claim that the hearing judge erred in admitting certain evidence. They claim first that two notebooks kept by Buchanan reflecting payments to him by respondents for clients he signed up were not admissible. The hearing judge admitted Buchanan's statements in these two notebooks under the "past recollection recorded" exception to the hearsay rule. (Evid. Code, § 1237.) While acknowledging the foregoing statutory exception to the hearsay rule, respondents fail to show that the elements required for the exception were not met. Instead, by broad brush strokes of doubt, respondents seek to raise enough questions about the hearing judge's ruling to have us reverse it. We see no basis for doing so.

[8a] The rules governing this proceeding apply generally the formal rules of evidence as in civil cases, with the important proviso that no error in admitting or excluding evidence shall invalidate a finding or decision unless the error deprived the party of a fair hearing. (Trans. Rules Proc. of State Bar, rule 556.) Accordingly, under the general rule, hearsay evidence was not admissible in this proceeding unless respondents agreed to its admission (see *In re Ford* (1988) 44 Cal.3d 810, 818) or otherwise waived any hearsay objections (see *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 793) or the evidence was subject to an exception to the hearsay rule. (See *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 108 [adoptive admission].)

[8b] As pertinent here, for the past recollection recorded exception to the hearsay rule to apply, the statements made by Buchanan recorded in his notebooks must have been admissible if made while testifying, Buchanan must have lacked adequate recollection at trial about the matters to make the statement and the notebook entries must have been made contemporaneous to the fact recorded or at a time while fresh in Buchanan's mind, and must have been made by him and offered after Buchanan testified that the entries were true statements of such fact. (Evid. Code, § 1237; see *In re Berman* (1989) 48 Cal.3d 517, 525, fn. 5; *Frio* v. *Superior Court* (1988) 203 Cal.App.3d 1480, 1492.) Buchanan was subject to lengthy direct and cross examination on the facts

bearing on this exception to the hearsay rule as well as to his conduct generally in his dealings with respondents and the judge ruled correctly that the statements in the notebooks were admissible under this exception. As an indication of the hearing judge's fairness in making this ruling, he indicated that the weight of the evidence was greater as to those notebook entries Buchanan recalled. Moreover, we agree with the deputy trial counsel that the physical admission of the Buchanan notebooks themselves (as opposed to the statements contained therein), even if error under Evidence Code section 1237, subdivision (b), has not prejudiced respondents. (See *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 844-845.) Finally, although the notebooks tended to show the magnitude of the scheme and amounts of payments respondents made to Buchanan, abundant other evidence not subject to any hearsay objection was offered to prove the charges.

[9] Citing no legal authorities, respondents contend that testimony of OCTC's expert witness, Werchick, was improperly received. We disagree. Respondents appear to criticize Werchick's testimony because he knew of no facts about the solicitations and could offer only his opinion as to respondent's practices. According to the authorities on point, that is precisely the proper subject for expert testimony. (See Evid. Code, § 801; 1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 474, pp. 445-446.) The hearing judge ensured a fair hearing by limiting Werchick's opinion testimony to the subjects of his qualifications and taking care that the questions put to him by the parties sought to elicit proper opinion testimony. Although Evidence Code section 805 allows an expert to opine on matters embracing the ultimate issue to be decided by the hearing judge, the judge did not allow Werchick to opine on whether respondents' conduct violated the charged rules.

We have reviewed the other contentions made by respondents that testimony of Gumban and Buchanan was inadmissible and that evidence of solicitations of Fiorsi and Seronio was inadmissible. These contentions, unsupported by any legal authorities, are without merit. Respondents' attempts to charge OCTC with having "poisoned" the record are similarly without merit. OCTC was entitled to present all relevant, admissible evidence, and make appropriate offers of proof. The rules of evidence and proper standards of ethical conduct appear to have been followed in presenting the evidence, and, in any event, respondents' concern about OCTC's trial presentation was completely resolved by the hearing judge's demonstrated fairness in ruling on motions and evidentiary objections during the lengthy, sharply contested pretrial and trial proceedings.

B. Record support for the findings and conclusions.

Before us, respondents offer several arguments that the record does not support the hearing judge's findings and conclusions by the requisite standard of clear and convincing evidence. (See, e.g., *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725.) After an independent review of this lengthy record, we cannot agree with respondents' claims.

[10] Respondents center their attack on the culpability findings concerning the charge of improper solicitation. Their attack is simple: the only direct evidence showed that respondents were not participants in solicitation and the hearing judge disregarded this evidence to concentrate on a number of circumstances which led him to conclude that respondents were culpable. Respondents' argument is flawed in several aspects. First, it ignores the inculpatory direct evidence in the record. Second, it ignores the proper role of the hearing judge in evaluating the demeanor of witnesses and character of their testimony and in assigning weight to testimony based on that assessment. (See *Arden* v. *State Bar*, *supra*, 43 Cal.3d at p. 725.) Finally, it disregards the well-established principle that culpability can be established in these proceedings either by direct or circumstantial evidence and the fact that circumstantial evidence has been considered on a regular basis in cases involving the type of conduct before us. (See *Geffen* v. *State Bar* (1975) 14 Cal.3d 843, 853, and cases cited therein.)

[11a] The evidence shows without dispute that respondents, Southern California practitioners, set up their Northern California office to expand their client base but with the intent that one of them would be present only about one day a week. They deliber-

ately authorized non-lawyer independent contractors to have office space and access to respondents' attorney-client retainer agreements, and to explain the complex details of respondents' fee agreements and accompanying documents to prospective clients. As OCTC's expert witness, Werchick, testified, several of these details were unusual provisions in plaintiff personal injury fee agreements such as the provision for a minimum hourly fee upon the client's unauthorized discharge of respondents and the recital which clients were asked to sign stating that they had not been solicited. Werchick also testified that in his opinion an attorney, not a non-lawyer, should decide whether or not to accept responsibility for a case, particularly when the attorney has yet to inspect a police accident report. Yet, by their own practice respondents did not review the cases until after their agents had signed up the clients and the testimony of several clients who were solicited showed that when they asked to study the retainer agreement before signing or to first speak with respondents, the agents declined to let them do so.

[11b] There is also no dispute that respondents paid their contractors, notably Gumban and Buchanan, almost entirely in cash and respondents produced no records to substantiate the purpose of the payments.[9] Buchanan testified that he thought respondent Brown knew of his obtaining clients by solicitation through the use of purchased police reports for he reported one conversation with Brown in which Brown told Buchanan that their relationship would end if Buchanan continued the practices of which he assumed Brown was aware. Buchanan also testified that respondents only paid him if he brought them cases with viable recovery prospects. Gumban testified that he was only paid for cases he referred to respondents and that they would pay him a bonus at year end based on the number of cases referred to respondents which remained active in the office.

[11c] When respondents were told by some clients and their newly-chosen lawyers about how they had come to be signed up as clients of respondents, respondents chose to prefer the explanation of their agents. Respondents' own attention to their files would have shown that a large number of clients were referred to the same medical clinic, a practice also questioned by the State Bar's expert witness as not in the clients' best interest given the variety of injuries and the clients' different home addresses. Although this latter circumstance does not directly establish that respondents knew of solicitation, it should have placed respondents on notice of excessive non-lawyer control of cases within their office. One of respondents' own witnesses characterized respondents' multiple referrals to the same clinic as a poor practice.

[11d] The hearing judge properly considered additional inculpatory circumstances. These included the highly unlikely theory that respondents, relying on remote independent contractors, would not be aware of the source of clients coming to their firm and that respondents' explanation that they advertised for cases in certain communities was not a convincing defense in light of any support in the record for how that explanation could have accounted for the clients coming to respondents' practice. Moreover, neither Gumban nor Buchanan had a background in personal injury or accident investigation and there was evidence that no investigation had been done in many cases beyond obtaining the police report. Thus, the argument that they were being employed as investigators rather than cappers is implausible at best.

[11e] We conclude that the hearing judge's findings are supported by clear and convincing evidence and we adopt them except we find no mitigation in respondent Brown's short period of prior practice and under the circumstances very little mitigation in respondent Scapa's period of prior practice. We now turn to the judge's conclusions.

[12a] Without citation of authority, respondents state that solicitation is "not per se wrong." They argue that their conduct was protected under the First Amendment to the United States Constitution. We agree with respondents' argument only insofar as

9. Although the amounts of the payments were disputed, they were not insignificant. Respondents estimated that they paid Gumban and Buchanan a total of $5,000 to $10,000. Buchanan testified that respondents paid him $25,000 to $35,000.

solicitation may be constitutionally protected depending on the occupation or profession involved and certain other circumstances. Last term, the United States Supreme Court affirmed a federal district court's ban on enforcing Florida's rules against in-person solicitation of business by certified public accountants. (*Edenfield* v. *Fane* (1993) __ U.S.__ [113 S.Ct. 1792, 123 L.Ed.2d 543].) The Court distinguished the state interest in prohibiting solicitation by lawyers trained to persuade prospective clients who might be vulnerable with the more objective environment in which solicitation by accountants might occur by "cold calls" to business executives and concluded that Florida's ban on accountant solicitation had none of the same dangers as in-person solicitation by lawyers in cases in which the Court had upheld state regulation. The Court stated in part that "The typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik* [v. *Ohio State Bar Assn.* (1978) 436 U.S. 447]." (*Edenfield* v. *Fane*, *supra*, __ U.S. at p. __ [113 S.Ct. at p. 1803].)

[12b] The California Supreme Court has held that free speech guarantees do not prevent enforcement of California's rules prohibiting in-person solicitation. (See *Kitsis* v. *State Bar* (1979) 23 Cal.3d 857, 863-864.) Also, solicitation of clients for lawyers has long been illegal in California. (See *Goldman* v. *State Bar* (1977) 20 Cal.3d 130, 134, fn. 4, 141, fn. 8.) The facts of this case showed that many accident victims were tempted by the persuasiveness of respondents' agents, armed with police accident reports the victims wanted and often could not obtain themselves as quickly from the police department, and that one of the victims, Fiorsi, was solicited minutes after returning from the hospital, while still under medication. These facts show the constitutional justification for California's rules prohibiting in-person solicitation of the type proven here.

[13a] This record also supports the hearing judge's conclusion that respondents committed acts of moral turpitude in the manner in which they violated the solicitation rules and conspired to surreptitiously violate the rules against improper client solicitation. Respondents made a shared decision to operate their Northern California branch office with independent contractors such as Gumban and Buchanan having free rein as to client sign-ups and paid in cash for that activity.

In *Younger* v. *State Bar* (1974) 12 Cal.3d 274, 288, the Supreme Court rejected a disciplinary board finding that there was a "common plan, scheme, and modus operandi" for that attorney's agents to solicit clients for the attorney. The Court noted that the hearing referees found untrue charges of some individual solicitations which would support the challenged finding, and that the disciplinary board did not make findings on those three counts and the Court was unwilling to make a contrary finding solely on the basis of the printed record. We do not have a comparable situation here as the hearing judge who saw and heard all testimony made abundant factual findings supporting his conclusion of the conspiracy, which factual findings we adopt.

[13b] In *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 187, we observed that that attorney's conduct of involvement in repeated solicitation violated section 6106 if for no other reason than that it constituted an act of corruption. The same could be said for respondents' conduct. We agree with the deputy trial counsel that respondents' reliance on *Rose* v. *State Bar* (1989) 49 Cal.3d 646 to claim that moral turpitude was not involved is not persuasive in view of Rose's far more minimal conduct in just one transaction involving solicitation.

We also adopt the hearing judge's conclusions that respondents wilfully violated the rules of professional conduct prohibiting attempts to charge an unconscionable fee and improper division of fees with and improper payments to non-attorneys. As we observed earlier this year in another case involving serious delegation of an attorney's duties of professional responsibility to a non-attorney, *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, the ethical ban against improper fee division between lawyer and non-lawyer was "directed at the risk posed by the possibility of control of legal matters by the non-lawyer, interested more in personal profit than the client's welfare." (*Id.* at p. 420, citing *In re Arnoff* (1978) 22 Cal.3d 740, 748, fn. 4; *Gassman* v. *State Bar* (1976) 18 Cal.3d 125, 132.) There is abundant evidence that the harm envisioned

by the cited cases occurred here, particularly with regard to bribery, kickbacks and client overreaching.

C. Recommended discipline.

The hearing judge observed correctly the wide range of discipline choices under the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) for respondents' misconduct. As we observed in *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 421, acts of moral turpitude could warrant recommendation of either disbarment or suspension depending on the magnitude of the violation and the degree to which it related to respondents' law practice. (Std. 2.3.) In contrast, with one exception, respondents' wilful violations of the Rules of Professional Conduct could warrant reproval or suspension depending on the gravity of the offense or degree of harm to victims. (Std. 2.10.) Standard 2.7 provides for a minimum six-month actual suspension for an attorney's charging or collecting of an unconscionable fee.

We look first at the misconduct of solicitation of prospective clients. In the past 20 years, the Supreme Court has written a number of opinions disciplining attorneys for such improper conduct. We reviewed those opinions in *In the Matter of Nelson*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 190, noting that the discipline ranged from six months actual suspension for isolated acts of solicitation using lay agents to a two-year actual suspension or disbarment for the most aggravated cases of widespread solicitation with additional aggravated misconduct. In arriving at his recommendation, the hearing judge reviewed almost all of those decisions as well as our *Nelson* decision.

Our *Nelson* decision involved an attorney who set up a law partnership with a non-lawyer and divided fees with that person and whose entire law practice over a six-month period came from improper solicitation acts of the non-lawyer. We found extensive mitigation in *Nelson* not only from the attorney's decisive withdrawal from the illegal conduct, but his regret and remorse over it as well as the long passage of time since his acts (five years) accompanied by strong evidence of undisputed, complete rehabilitation. We recommended a two-year suspension, stayed, on conditions of a two-year probation and a six-month actual suspension. The Supreme Court adopted our recommendation. (*In re Nelson*, order filed April 1, 1991 (S019296).)

The hearing judge considered this case closely analogous to *Goldman* v. *State Bar*, *supra*, 20 Cal.3d 130, although the judge noted differences from *Goldman* as well. In *Goldman*, the two attorneys opened a branch office about 100 miles from their principal law office with one of the attorneys taking turns staffing the office one day per week. The attorneys had a full-time and several part-time investigators in the branch office. The Supreme Court found that the attorneys culpable of misconduct involving six specific clients known to have been solicited over a period of several months and of a general count of pursuing a course of conduct to solicit prospective clients who were auto accident victims. It appears that respondents were also found culpable of conduct involving moral turpitude, dishonesty or corruption in violation of section 6106 as a result of their solicitation activities. As did respondents, Goldman and his partner claimed no knowledge of improper solicitation activities. The Supreme Court did not discuss any evidence of mitigating circumstances but found the State Bar disciplinary board recommendation of a one-year actual suspension warranted, noting that the hearing committee had recommended a stayed suspension with only six months actual suspension. We agree with the hearing judge's analysis here that, although the mitigation appeared greater than in *Goldman*, respondents' solicitation activities lasted longer and their misconduct extended into unconscionable fee practices.

At the same time, we deem this case to warrant somewhat less actual suspension than we recommended in *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. 411, where an attorney's abdication of professional duties spanned several years, commencing with his establishment of a "moonlight" practice without any adequate supervision of a non-lawyer partner. The attorney, through recklessness or gross negligence, permitted that partner to act on his own to operate a large-scale personal injury practice in the attorney's name including capping, forgery and other illegal and fraudulent practices involving millions of

dollars. To his credit, shortly after Jones discovered the extensive criminal conduct of his partner, he turned his partner in to the police and himself in to the State Bar. Nevertheless, due to lack of sufficient evidence of rehabilitation, we increased the recommended discipline to a three-year stayed suspension on conditions including actual suspension for two years and until the attorney established his rehabilitation, fitness and legal learning.

We also agree with the hearing judge that this case warrants less severe discipline than the more massive instances of illegal and even more intrusive misconduct found in *Kitsis* v. *State Bar, supra*, 23 Cal.3d 857 and *In re Arnoff, supra*, 22 Cal.3d 740.

On review, OCTC urges that respondent Brown's actions warrant greater discipline than those of respondent Scapa. The hearing judge viewed the respective culpability of each respondent as warranting the same degree of discipline and we agree with the hearing judge, concluding that OCTC has not shown sufficient differences between the respondents' respective conduct to warrant a difference.

[14a] Nevertheless, we conclude that respondents' misconduct warrants somewhat greater actual suspension than recommended by the hearing judge because of the seriousness of respondents' broad practices of disregard of fiduciary duties to their clients. From the very time their clients were solicited, respondents left it to non-lawyer contractors to explain their complex retainer agreement. These "gatekeeper" agents would not even allow prospective clients to study the agreement for a day or two before signing it nor would they allow prospective clients to speak to respondents about the contract until the clients bound themselves to it. Instead, they told clients that they could cancel the contract at any time. But the contract itself, although purporting to be a contingent fee agreement, committed most clients to a minimum of $600 of legal fees if they discharged respondents involuntarily and regardless of whether any work was done to justify this minimum fee. Respondents were always aware that, on discharge, they were limited to a recovery of the reasonable value of services rendered. When respondents' clients changed counsel, some very soon after signing respondents' contract, respondents sought to hold clients and the affected insurers to liens, threatening insurers with punitive damage actions if the liens were not honored. Although the clients' new counsel showed willingness to honor respondents' liens up to the reasonable value of their services, despite their being void due to their being the product of solicitation, respondents delayed inordinately in supporting their lien claims or did so by charging exorbitant amounts for perfunctory services performed almost entirely by support staff. These delays prevented some clients from settling simple accident cases or from just getting their own damaged car repaired promptly. Even though respondents did not know of medical clinic kickbacks to their agents, they knew or should have known that their many clients were disserved by referral to the same medical clinic for identical types of repeated, serial physiotherapy treatments.

In viewing the entire manner in which many of respondents' clients were overreached by respondents' practices, their current claim that what they did in bringing accessible counsel to victims of small accident cases was justified by the First Amendment, is a most hollow claim indeed. This record reveals just why the public continues to press attorneys to be subject to the same specific consumer protection duties as those who operate an ordinary business.

Our Supreme Court has condemned the conduct of attorneys who overreached clients because of unethical fee practices. In *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, the Court observed that the legal profession is "more than a mere 'money-getting trade.'" (*Id.* at p. 449, quoting canon 12, former ABA Canons of Ethics.) Twice over 40 years, the Court has observed that "the right to practice law 'is not a license to mulct the unfortunate.'" (*Bushman* v. *State Bar* (1974) 11 Cal.3d 558, 564, quoting *Recht* v. *State Bar* (1933) 218 Cal. 352, 355.)

[14b] Viewing the solicitation aspect of this case as generally comparable to *Goldman* v. *State Bar, supra*, so as to warrant a one-year actual suspension for that aspect alone, we conclude that the remainder of respondents' offenses which showed their manifest disregard of client interest deserve an additional six months actual suspension. As we noted, the standards would provide for a minimum six-

month actual suspension for respondents' unconscionable fee offense, standing alone.

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondents each be suspended from the practice of law in the State of California for a period of thirty (30) months, that execution of such suspension be stayed and that respondents be placed on probation for a period of four (4) years on the condition that they each be actually suspended from the practice of law for a period of eighteen (18) months and that they comply with conditions 2 through 11 contained in the hearing judge's decision.

We further recommend that prior to the expiration of the period of actual suspension, each respondent be required to pass the California Professional Responsibility Examination administered by the Committee of Bar Examiners.

We also recommend that each respondent be required to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order.

Finally, we recommend that costs be awarded the State Bar pursuant to the provisions of Business and Professions Code section 6086.10.

I concur:

NORIAN, J.

PEARLMAN, P.J., concurring:

I fully concur with the opinion of the court, but wish to address specifically respondents' argument that solicitation should no longer be a crime and that their misconduct is essentially only malum prohibitum in a constitutionally questionable area of the law—the product of "innovative practitioners who market their legal skills creatively and aggressively and by doing so provide those services to a group of clients whose cases would otherwise be neglected." To the contrary, even on their own version of the facts, respondents engaged in egregious misconduct.

As pointed out in this court's opinion, the very recent decision of the United States Supreme Court in *Edenfield* v. *Fane* (1993) __ U.S. __ [113 S.Ct. 1792, 123 L.Ed.2d 543] emphasized the dangers of fraud and overreaching by overly aggressive lawyers in distinguishing regulations prohibiting solicitation of accident victims from the Florida Board of Accountancy's rule prohibiting certified public accountants (CPAs) from engaging in "direct, in-person, uninvited solicitation" to obtain new clients. The latter was struck down as violative of the First Amendment because of the CPAs' right to engage in commercial speech.

Here, in contrast to the situation in *Edenfield*, we are not confronted with a simple "cold call" by professionals on sophisticated potential clientele. Rather, it is undisputed that respondents entirely abdicated to independent "investigators" the establishment of the attorney-client relationship; that they paid these "investigators" in unrecorded cash transactions for obtaining the signatures of numerous accident victims they had never met; and that for this purpose they drafted standardized fee agreements with illegal provisions attempting to benefit respondents at their clients' expense.

Contrary to respondents' altruistic claim, respondents did not show that the persons so solicited would have been unable to find adequate counsel but for respondents' opening a branch office with no attorneys on site several hundred miles from their principal office. Nor did respondents on their visits to the office even purport to interview potential clients themselves or through supervised employees to ensure that there was no actual overreaching.

As the decision below and the opinion of the court herein have found, two of the cappers (Gumban and Buchanan) engaged in extensive criminal activity involving kickbacks and illegally obtained police reports to get clients in respondents' door. Respondents were not found to have actual knowledge of any of the kickbacks or the practice of obtaining police reports illegally, although there was ample

evidence that they should have been on notice of at least some incidents of these illegal practices of Gumban and Buchanan.

Had respondents been actively involved in every facet of the criminal activities engaged in by Gumban and Buchanan, the State Bar would in all likelihood be asking for their disbarment. But respondents cannot be sanguine about their more limited role because it was in and of itself very serious. Respondents unquestionably knew that *any* business procured for them by Gumban or Buchanan as their agents was a void solicitation by a "runner" or "capper" under Business and Professions Code sections 6151 and 6154 regardless of their personal belief that solicitation should not be prohibited.

It is not possible to credit even for the sake of argument respondents' alleged good intentions, because they did not take any steps whatsoever to ensure that potential clients understood the terms of the attorney-client fee agreement, or understood that the terms were truly negotiable as required by Business and Professions Code section 6147 (a)(4) as opposed to a mere recitation of negotiability in a contract expected to be presented on a take-it-or-leave-it basis.[1]

Obviously, if respondents were willing to pay a portion of the fee to illegal cappers, the same services rendered by respondents should theoretically have been available for less cost to the clients either from respondents directly (eliminating the middleman) or other attorneys who did not make illegal payments for receipt of the clients' business. Also, according to the State Bar's expert witness, who was a former president of the California Trial Lawyers Association, most attorneys would incur no time or expense to recover medical pay insurance coverage and thus could be expected not to bargain for a share of such proceeds in the contingent fee agreement. No opportunity was given respondents' clients to negotiate this provision out of the agreement.

Most despicably, in derogation of their professional responsibilities, respondents put in each agreement two other unusual and highly repugnant provisions: (1) language purporting to entitle respondents to their full contingent fee if the client discharged the respondents without cause and against respondents' wishes and (2) a liquidated damage provision purporting to prevent clients from withdrawing from the agreement, in any event, unless they paid a minimum fee equivalent to three hours' legal services at an hourly rate.[2] This was unquestionably unconscionable as found by the court. Clients have the power and the right at any time to discharge their attorney with or without cause and the attorney is limited to recovery of the reasonable value of services actually rendered to the time of discharge. (*Fracasse* v. *Brent* (1972) 6 Cal.3d 784, 792.) Thus, a client who changed his or her mind the next day, before any work was undertaken, should have no liability for services not yet rendered.

Respondents' attempt to obtain a minimum fee from every case when clients subjected to potentially high-pressure tactics of unsupervised agents might be anticipated to change their minds[3] was patently the result not of misjudgment in a few instances, but of systematic overreaching. Indeed, most despicable of all was the highly unusual separate form on which respondents had their cappers obtain clients' signatures—a declaration under penalty of perjury that the prospective client was not solicited. Such tactics might have left unsuspecting clients open to charges of perjury if they subsequently wished to repudiate the fee agreement on the basis that it was in fact a void solicitation.

When the fee agreements were later challenged by new lawyers for various clients, respondents

1. As the opinion of the court points out, clients were not given the opportunity to talk to respondents before signing the fee agreement or to hold the agreement overnight before signing it.

2. The minimum fee was generally $600 based on a stated fee of $200 per hour. In a few instances, the minimum fee was set at $150 per hour for a total of $450.

3. For this very reason, consumer legislation protects individuals from a wide range of door-to-door salespeople by allowing rescission without penalty for three days following home solicitation. (Civ. Code, § 1689.6.) That statute is expressly inapplicable to services of attorneys, who, as discussed herein, are barred by other provisions of the law from similar uninvited solicitation of new business from members of the public.

compounded their overreaching by asserting invalid liens against some of the clients, adding insult to injury by threatening suit against at least one insurer for punitive damages if respondents were not named on all settlement drafts. Moreover, when told that Gumban and Buchanan had used improper tactics to get the clients to sign the agreements, respondents ignored the warning signals and proceeded for several months thereafter with reckless indifference toward the rights of clients who charged that they had been illegally solicited.

Thus, the inability of the State Bar to prove respondents' actual knowledge of the scope and sorry details of Gumban and Buchanan's kickback scheme does not absolve respondents from complicity in the improper solicitation of clients and from unconscionable fee agreements systematically resulting therefrom. Contrary to respondents' counsel's argument, respondents' misconduct does warrant zealous condemnation. Indeed, their lack of recognition of the seriousness thereof and their attempt to characterize themselves as merely technical transgressors who were taken advantage of by unscrupulous independent contractors is itself cause for grave concern. Respondents engaged in despicable "marketing" practices that members of the public dread—generation of "gotcha" agreements designed as traps for the unwary. These agreements were foisted on unsuspecting accident victims through unsupervised tactics of cappers. Respondents' legalistic attempt to shield themselves with deniability by use of forms disseminated by the very same unsupervised cappers is the type of slick conduct that gives attorneys a bad name. If this is how they treat clients, what kind of conduct can they be expected to engage in with adversaries and the court?

Respondents' conduct is all the more pernicious because it is sanctimoniously characterized as intended to benefit persons who otherwise might not receive proper legal representation. The truth is that unsophisticated persons were in fact improperly pressured into using respondents' services and systematically intimidated from withdrawing from the fee agreements by unenforceable documentation purporting to penalize them for exercising their right to discharge an unwanted attorney. Some benefit! This left the clients in the position of needing another attorney to help the clients discover their true rights to terminate respondents' void attorneys' fee contract without penalty.

Respondents' misconduct appears motivated solely by greed. Under the standards and case law, 18 months suspension of both respondents is amply justified on the facts established in this proceeding.