

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No. 08-O-12332-LMA
)	
THINH VAN DOAN,)	DECISION
)	
Member No. 152589,)	
)	
A Member of the State Bar.)	
_____)	

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **Thinh Van Doan** is charged with six counts of professional misconduct involving one client matter and trust accounting violations, including (1) failing to perform competently; (2) failing to pay client funds promptly; (3) failing to maintain client funds in trust account; (4) commingling; and (5) committing an act of moral turpitude.

The court finds, by clear and convincing evidence, that respondent is culpable of four of the six counts. In view of respondent’s misconduct, the evidence in aggravation and mitigation, including respondent’s 14 years of practice without prior discipline, the court recommends, among other things, that respondent be placed on two years’ stayed suspension, two years’ probation and nine months’ actual suspension.

II. PERTINENT PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges (NDC) on January 30, 2009. Respondent filed an answer on March 4, 2009.

The trial was held on October 14, 2009. After post-trial briefs, the court took the matter under submission for decision on November 23, 2009.

The State Bar was represented by Deputy Trial Counsel Larry DeSha. Respondent was represented by Attorney David A. Clare.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the evidence and testimony introduced at this proceeding and on the parties' stipulations.

Respondent was admitted to the practice of law in California on June 6, 1991, and has been a member of the State Bar of California since that time.

A. The King Matter

Between October 2005 and January 2007, respondent had two law offices, located in San Gabriel and Westminster. Respondent's primary office was in Westminster.

Respondent had maintained two client trust accounts. One was at United Commercial Bank in Rosemead for the San Gabriel Office (CTA#1) from October 2005 to November 2007. And the other account was at California National Bank in Westminster for the Westminster Office (CTA#2) from August 2007 to July 2008.

In February 2005, Sharon King retained respondent, through his San Gabriel office, to represent her in a personal injury matter. The retainer agreement provided that respondent's contingency fee would be 20% of any settlement reached before the filing of a lawsuit.

On October 11, 2005, respondent received a settlement check for \$7,750 in the King matter. On October 13, 2005, respondent deposited the check into the CTA#1.

Since respondent was entitled to a contingency fee of 20% of \$7,750 or \$1,550, he was required to maintain the sum of \$6,200 in the CTA#1. But the balance soon fell below that amount.

On October 24, 2005, the CTA#1 balance dipped to \$4,720.92. By November 2, 2005, the CTA #1 balance fell to \$278.

On November 7, 2005, respondent deposited settlement funds into the CTA#1, increasing the balance to \$25,521.

On November 29, 2005, respondent issued a CTA#1 check to Mrs. King in the sum of \$3,000. After the disbursement, he was obligated to maintain \$3,200 in the CTA#1 (\$6,200 - \$3,000). But on December 7, 2005, the balance in the CTA#1 fell to \$2,931.18. On June 20, 2006, the CTA#1 balance dropped further to \$2,462.47 and never rose to \$3,200. Then on November 30, 2007, the balance was zero and respondent closed the CTA#1.

On October 30, 2007, Mrs. King obtained a default judgment for \$3,260 against respondent in a small claims court.

Instead of paying the judgment, respondent filed a motion to vacate it. On January 16, 2008, the motion was denied. Respondent did not appear at the motion hearing.

Respondent then filed an appeal from the small claims judgment. The appeal was dismissed on February 29, 2008. Respondent failed to appear in court for the appeal.

On June 9, 2008, after an inquiry from the State Bar, respondent sent Mrs. King a check in the sum of \$2,510 and also sent Dr. Peter Hang a check in the amount \$750 for his medical treatment of Mrs. King, thereby totaling \$3,260. These two checks were drawn on respondent's CTA#2 and were paid from personal funds of \$5,000.

B. The Commingling Matter

Respondent admitted that he used the CTA#2 for personal expenses. He deposited personal funds in the CTA#2 and paid those funds out to satisfy personal expenses, as follows:

<i>Date</i>	<i>Deposit</i>	<i>Withdrawal</i>
8/21/07	\$43,000	\$33,000
9/25/07	\$33,000	\$25,000
4/4/08	\$25,000	\$18,000
5/9/08	\$18,000	\$13,000
5/23/08	\$10,000	\$10,000

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A))¹

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

The State Bar asked that count 1 be dismissed for lack of evidence. Count 1 is hereby dismissed with prejudice.

Count 2: Failure to Pay Client Funds Promptly (Rules Prof. Conduct, Rule 4-100(B)(4))

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver any funds or properties in the possession of the attorney which the client is entitled to receive.

Respondent asserted that he had no knowledge about the King matter and that he was defrauded by his office manager. He further claimed that he was unaware of the outstanding settlement funds and that the client did not request or demand payment. Thus, he argued, absent actual knowledge, he did not have a duty to pay out the funds.

On the contrary, respondent knew or should have known that he still owed Mrs. King the balance of the settlement funds. Mrs. King had obtained a default judgment for \$3,260 against

¹ References to rules are to the Rules of Professional Conduct, unless otherwise indicated.

respondent in October 2007. Yet, instead of satisfying the judgment, respondent sought to vacate the judgment. It was not until after the State Bar notified him of Mrs. King's complaint, some eight months later, that respondent paid the funds.

An attorney has a “personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.” (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) These duties are nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) “[I]n the handling of client funds, an attorney has a direct professional responsibility to his or her client, and the attorney does not avoid that direct professional responsibility by, even reasonable, reliance on a partner, associate or responsible employee.” (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.)

Therefore, respondent's reliance on his office manager did not relieve him of his obligation to see that those funds were retained in the trust account and to ensure that the client received her share of the settlement. Under a duty to know what was going on, he was responsible for the acts of his office manager even though he claimed that he had no actual knowledge of the acts. (*In the Matter of Blum, supra*, at p. 411.) In fact, regardless of whether he personally possessed these funds, as Mrs. King’s attorney, respondent was ethically responsible for reasonable oversight of his office staff which did possess them. (See *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468.)

By disbursing \$3,260 in settlement funds to Mrs. King and her medical provider in June 2008 – 32 months after he received the check in October 2005 and 8 months after the client had obtained a small claims judgment against him in October 2007, respondent clearly and convincingly failed to promptly pay client funds as requested by his client in willful violation of rule 4-100(B)(4). (See *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91 [Rule requiring prompt payment of entrusted funds on demand requires no special state of mind

to establish violation; mere fact that payment was not made is sufficient to constitute willfulness for purpose of finding willful violation of the rule].)

Count 3: Failing to Maintain Client Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

Respondent admitted that he is culpable of count 3 in that he failed to maintain \$3,200 in the CTA#1 on behalf of Mrs. King in willful violation of rule 4-100(A).

Count 4: Commingling (Rules Prof. Conduct, Rule 4-100(A))

Respondent also admitted that he is culpable of count 4 in that he deposited his personal funds into the CTA#2, thereby commingling his personal funds with client funds, in willful violation of rule 4-100(A).

Count 5: Misuse of Client Trust Account (Rules Prof. Conduct, Rule 4-100(A))

The State Bar asked that count 5 be dismissed due to lack of evidence. Count 5 is hereby dismissed with prejudice.

Count 6: Moral Turpitude (Bus. & Prof. Code, § 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

Respondent argued that that he was merely negligent in managing his trust account and in supervising his San Gabriel office. He further claimed that his failure to handle the King matter was an isolated instance.

It is well settled that the mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a

conclusion of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent. (See *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.)

“[O]nce the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn.” (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) While this may have been one instance of misappropriation, respondent's failure to supervise his employee and the client trust account was not aberrational. In fact, he admitted that he did not regularly reconcile the monthly statements for his client trust account. Therefore, when the balance in the CTA#1 fell below \$3,200 and when respondent closed the account without paying his client the balance of the settlement funds, respondent misappropriated \$3,200 of his client funds with gross negligence, thus committing an act of moral turpitude in willful violation of section 6106.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)²

A. Aggravation

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

Respondent committed multiple acts of wrongdoing by failing to promptly pay client funds, commingling his personal funds with trust funds and misappropriating \$3,200. (Std. 1.2(b)(ii).)

Respondent refused to account to the client regarding the settlement funds. (Std. 1.2(b)(iii).) When his client sued respondent for money owed and obtained a judgment against

²All further references to standards are to this source.

him, respondent had a duty to provide an accounting to his client. Instead, he appealed the judgment.

Respondent's misconduct harmed significantly his client by depriving her of the settlement funds for 32 months. (Std. 1.2(b)(iv).) The client had to go to small claims court and the State Bar for assistance.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Although the client obtained a judgment against him, he did not pay until after the State Bar intervened.

B. Mitigation

Respondent was admitted to the practice of law in 1991 and has no prior record of discipline. Respondent's 14 years of discipline-free practice at the time of his misconduct is a mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

At the time of his misconduct, respondent suffered emotional difficulties following the deaths of his mother in 2005 and his brother in 2008. He was very close to them. (Std. 1.2(e)(iv).)

Respondent has performed substantial pro bono work in the Vietnamese community. He participated in the Vietnamese Legal Bar Association's "Legal Pro Bono Day" in the past five years. Also, he appears regularly on a Vietnamese TV program where Vietnamese-speaking callers call in with legal questions and he provides them with free legal advice. He has also represented numerous clients over the years in pro bono cases. (Std. 1.2(e)(vi).)

Respondent was candid and cooperative to the State Bar during disciplinary investigation and proceedings, including agreeing to certain stipulated facts and culpability. (Std. 1.2(e)(v).)

V. DISCIPLINE DISCUSSION

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

The applicable standards provide a broad range of sanctions ranging from actual suspension to disbarment. (Stds. 1.6, 2.2(a), 2.2(b), and 2.3.)

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

Standard 2.2(a) provides that culpability of willful misappropriation of entrusted funds must result in disbarment, unless the amount is insignificantly small or if the most compelling mitigating circumstances clearly predominate. Then the discipline must not be less than a one-year actual suspension, irrespective of mitigating circumstances.

Standard 2.2(b) provides that the commission of a violation of rule 4-100, including commingling, must result in at least a three-month actual suspension, irrespective of mitigating circumstances. Here, respondent failed to timely pay client funds and maintain client funds in his client trust account.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

The State Bar asked that respondent be actually suspended for one year under standard 2.2(a).

But the standards “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has been long-held that the court “is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) While the standards are entitled to great weight (*In re Silverton* (2005) 36 Cal.4th 81, 92), they do not provide for mandatory disciplinary outcomes. Although the standards were established as guidelines, “ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case.” (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

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

In *Edwards v. State Bar* (1990) 52 Cal.3d 28, the Supreme Court expressly rejected an inflexible interpretation of the language of standard 2.2(a). “This standard correctly recognizes that willful misappropriation is grave misconduct for which disbarment is the usual form of discipline. In requiring that a minimum of one year of actual suspension invariably be imposed, however, the standard is not faithful to the teachings of this court’s decisions. [Citation.] The standard’s one-year minimum should be regarded as a guideline, not an inflexible mandate.” (*Id.* at p. 38.)

In *Howard*, the Supreme Court imposed a six-month actual suspension instead of the one-year actual suspension for the attorney’s misappropriation of \$1,300 based upon her mitigating evidence of lifelong psychological problems leading to drug and alcohol abuse.

Finally, in *Brockway v. State Bar* (1991) 53 Cal.3d 51, the Supreme Court imposed a three-month actual suspension for misappropriation of \$500 of client funds, failure to promptly pay client funds and improper acquisition of an interest adverse to his client. The court determined that “the minimum one-year actual suspension suggested by standard 2.2(a) would be unduly harsh under the circumstances.”

In summary, the “foregoing cases make clear that, where appropriate, the Supreme Court will not hesitate to impose a level of discipline lower than that specified by a standard’s seemingly mandatory language, even when the standard expressly provides for a minimum discipline ‘irrespective of mitigating circumstances.’” (*In the Matter of Van Sickle, supra*, 4 Cal. State Bar Ct. Rptr. at p. 996.)

Similarly, the court’s analysis of respondent’s misconduct and the comparable Supreme Court and Review Department cases demonstrate that the one year’s actual suspension (standard 2.2(a)) is unnecessary here.

At the same time, respondent’s argument that he should not be actually suspended from the practice of law is unconvincing. In support of his argument, he cited *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716 [private reproof], *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17 [private reproof] and *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113 [45 days actual suspension].

These cases involved misconduct that was far less egregious than that of respondent. Both of the attorneys in *Respondent E* and *Respondent F* committed acts of commingling, but no acts of moral turpitude or misappropriation. And the attorney in *Bleecker* technically misappropriated a relatively small amount for a few months, misused his trust account as an operating account and was not intentionally dishonest. His misconduct occurred about five

months and mitigation included no client harm, change of business practices, and no prior or a subsequent record of discipline. The facts in this matter are more serious because respondent's misconduct involved misappropriation and his failure to pay client funds occurred over a long period of time.

In a similar case, *Bates v. State Bar* (1990) 51 Cal.3d 1056 involved the willful misappropriation of \$1,229.75 of client trust funds and misrepresentations to the client's new counsel regarding those funds. This misconduct was aggravated by the attorney's refusal to make restitution of the misappropriated funds until after the State Bar referee issued a decision. In addition to the attorney's 14 years of practice prior to his misconduct and the testimony demonstrating respondent's reputation in the legal community for competence and integrity, the court found the attorney's recovery from alcoholism was a significant factor in mitigation. The Supreme Court approved the recommendation of three years' stayed suspension, probation, and six months' actual suspension. (*Id.* at pp. 1061-1062.)

While this matter is similar to *Bates*, respondent's mitigation is not as compelling as that of *Bates*. In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.)

In view of respondent's misconduct, the case law, the aggravating evidence, and the compelling mitigating factors that he had no prior record of discipline in 14 years of practice, involved in substantial pro bono activities and community work, that he was suffering emotional difficulties at the time of the misconduct, and that he fully cooperated with the State Bar, the court concludes that placing respondent on an actual suspension for nine months would be appropriate to protect the public and to preserve public confidence in the profession.

VI. RECOMMENDATIONS

A. Discipline

The court recommends that respondent **Thinh Van Doan** be suspended from the practice of law in California for two years, that execution of the suspension be stayed, and that he be placed on probation for two years, subject to the following conditions:

1. Respondent must be suspended from the practice of law for the first nine months of probation;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;
4. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;
5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1;
6. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will

not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);

7. Within one year after the effective date of the Supreme Court order in this matter, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2212, and passage of the test given at the end of that session. Arrangements to attend Ethics School Client Trust Accounting School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Trust Accounting School. (Rules Proc. of State Bar, rule 3201);
8. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and
9. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years that is stayed, will be satisfied and that suspension will be terminated.

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within one year after the effective date of this order. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Willful failure to comply with the provisions of rule 9.20 may result in revocation of

probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.³

D. Costs

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

Dated: February ____, 2010

LUCY ARMENDARIZ
Judge of the State Bar Court

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