PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

February 7, 2011

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	**No. 08-O-12332**
THINH VAN DOAN	)	**OPINION**
Member No. 152589	)	
A Member of the State Bar.	)	

Respondent Thinh Van Doan requests review of the hearing judge's decision finding him culpable of four counts of misconduct involving misuse of two separate trust accounts. Doan concedes culpability for the misconduct except for one count: he argues that the misappropriation from a client trust account (CTA) did not involve moral turpitude, in violation of Business and Professions Code section 6106.[1] He also contends that the hearing judge should have found more factors in mitigation and less in aggravation, and that the recommended discipline of nine months' actual suspension is excessive. The Office of the Chief Trial Counsel for the State Bar (State Bar) asks that we affirm the hearing judge's culpability findings and recommended discipline.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we uphold the hearing judge's culpability findings, but we assign less weight in aggravation. Based on our

[1]Unless otherwise noted, all further reference to "section(s)" are to the Business and Professions Code.

consideration of the record, as well as the standards[2] and guiding case law, we recommend that Doan's discipline include a 90-day period of actual suspension.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FACTUAL AND PROCEDURAL BACKGROUND

Doan was admitted to practice law in California in June 1991, and focuses on civil litigation, criminal defense, and bankruptcy law. He has no prior discipline. These proceedings commenced on January 30, 2009, when the State Bar filed a Notice of Disciplinary Charges (NDC) arising from multiple trust account violations involving two CTAs. After a one-day trial, the hearing judge filed her decision on February 10, 2010.

In 2005, Doan operated what was then his principal office, and is now his only office, in Westminster, California, where he maintained a trust account at CalNational Bank (Westminster CTA).[3] At that time, he also operated a satellite office in San Gabriel, where he worked about 10 percent of the time and employed no other attorneys. The State Bar offered no evidence regarding the employees' responsibilities at the San Gabriel office, but Doan testified that his staff handled daily operations, including deposits into a separate trust account (San Gabriel CTA). In January 2007, Doan closed the San Gabriel office to regain "better control of what [he was] doing" after he learned about an employee's insurance fraud that was unrelated to his practice. He did not close the San Gabriel CTA until almost a year later on November 30, 2007. Doan did not review or reconcile this trust account on a monthly basis.

[2]Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[3]At trial, the hearing judge granted the State Bar's motion to dismiss count 1 (failing to perform with competence in violation of rule 3-110(A)) and count 5 (misuse of the Westminster CTA in violation of rule 4-100(A)). Accordingly, these counts are not before us on review.

The King Matter

Three counts in this proceeding stem from the San Gabriel staff's handling of one client matter. On February 11, 2005, Sharon King signed a retainer agreement with someone at the San Gabriel office. Doan did not sign this agreement and in fact had no knowledge of it.[4] The agreement stated that Doan would represent King in a personal injury matter for a 20% contingency fee from any resulting recovery. The fee agreement was not Doan's standard form and did not contain his standard fee provisions. On October 13, 2005, a $7,750 settlement check, which had been issued two days earlier, was deposited into the San Gabriel CTA using a stamped endorsement. Doan did not know of the settlement or the deposit because he did not closely review or reconcile his trust account records at that time.

Doan authorized the San Gabriel office manager to use a stamp bearing his signature *only* to deposit client funds *into* the San Gabriel CTA. However, someone at the San Gabriel office forged Doan's signature and issued a check from the San Gabriel CTA to King for $3,000 on November 29, 2005. To the extent that Doan was entitled to $1,550 as attorney fees, he was obligated to maintain $3,200 in the trust account to cover King's medical expenses[5] and her remaining settlement distribution. In April 2006, the San Gabriel CTA balance dipped below $3,200, and fell to $309.42 on October 31, 2006. The balance hovered around $300 until November 30, 2007, when Doan closed the trust account and withdrew the remaining $294.15.

Doan first heard of the King matter sometime in 2007 when King's husband called to complain that his wife had not received her final settlement distribution. Doan explained he did not "know what [King] was talking about" and that he had "to try to locate the [King] file" before he could respond. (The King file had been packed into boxes when Doan closed the San

[4]No proof was offered as to who provided the retainer agreement to King or who deposited the settlement funds into the San Gabriel CTA.

[5]Doan ultimately negotiated a reduction in the medical provider's fees to $750.

Gabriel office.) Dissatisfied with Doan's unwillingness to distribute the remaining settlement proceeds, King sued him in September 2007 in small claims court. On October 30, 2007, King obtained a judgment against Doan for the remaining $3,200 settlement amount, plus $60.00 in costs. Doan filed a motion to vacate the judgment, which was denied, and he appealed, which was dismissed in February 2008 after he failed to appear. In the meantime, Doan negotiated a lien reduction with King's medical provider.

Doan did not satisfy the judgment and the Kings filed a complaint with the State Bar. On May 22, 2008, a State Bar investigator sent Doan a letter asking for a response to the Kings' allegations. In June, 2008, more than two and one-half years after King's settlement funds were deposited in his trust account, Doan sent them a check for $2,510, stating in his accompanying letter that this amount was in satisfaction of the small claims judgment and that he was sending a second check for $750 to the medical provider.

The Commingling Matter

Doan received a $43,000 cashier's check in settlement of his own personal injury lawsuit. In August 2007, he deposited $10,000 into his Westminster CTA and received a newly issued cashier's check for the remaining $33,000. Thereafter, Doan incrementally deposited the $33,000 into the Westminster CTA between September 2007 and May 2008, each time depositing a portion of the funds and receiving a new cashier's check for the balance. On May 23, 2008, he deposited the final cashier's check in the amount of $10,000 into his Westminster CTA. On that same day, Doan issued a check from this CTA for $10,000 to a third person to whom he owed money. Doan also paid King and her medical provider, as well as various independent contractors, from the Westminster CTA. At trial, he acknowledged that this practice violated the Rules of Professional Conduct and conceded his culpability for commingling.

B. CONCLUSIONS OF LAW

Count 2: Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))[6]

Rule 4-100(B)(4) requires an attorney to *promptly* pay upon request funds to which the client is entitled. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10.) Due to his lack of oversight of his San Gabriel CTA, Doan did not learn of his obligation to disburse settlement funds to King or her medical provider until almost two years after the money had been deposited into his trust account. He was "ethically responsible for reasonable oversight of office staff" in handling the entrusted funds. (*In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 479.) Even after King's husband called Doan to demand payment in 2007, he did not pay King until June 10, 2008, and then only after the Kings obtained a small claims judgment against him in February 2008, and filed a complaint with the State Bar. In total, it took over 30 months for King to receive the entire settlement amount owed to her. Such delay clearly violates rule 4-100(B)(4). (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 170 [two-month delay violated rule].)

Count 3: Failure to Maintain Client Funds in CTA (Rule 4-100(A))

Rule 4-100(A) requires that "funds received or held for the benefit of clients" shall be deposited in a CTA. It is well-established that "an attorney has a 'personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.' [Citation.] These duties are non-delegable. [Citation.]" (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.) Under this non-delegable duty, an attorney must maintain client funds in the CTA until outstanding balances are settled. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal State Bar Ct. Rptr. 113, 123.) The fact that the San Gabriel CTA balance repeatedly fell below the amount required to be held in trust for King

[6]Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct.

supports a finding of willful misappropriation in violation of rule 4-100(A). (*Palomo v. State Bar* (1984) 36 Ca1.3d 785, 795-796 [trust account violation may be "wilful" for disciplinary purposes when caused by "serious and inexcusable lapses in office procedure"].)

Count 6: Misappropriation Involving Moral Turpitude (§ 6106)

The NDC charged Doan with moral turpitude for misappropriating King's $3,200 either dishonestly or with gross negligence. Doan contends that the evidence establishes unintentional misappropriation, and that his lack of supervision over an employee who was permitted only to deposit funds into the San Gabriel CTA does not rise to the level of gross negligence. We agree with Doan that no evidence showed that he acted intentionally or dishonestly, but we note that even carelessness leading to trust account violations may involve moral turpitude. (*Giovanazzi v. State Bar* (1980) 28 Ca1.3d 465, 475 ["Gross carelessness and negligence constitute violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involve moral turpitude as they breach the fiduciary relationship owed to clients."].) We find such gross negligence in violation of section 6106 here.

Doan did not regularly reconcile his accounts, and instead delegated his CTA responsibilities to his San Gabriel office staff. He thus bears responsibility for the San Gabriel CTA's frequent dips below $3,200 for over a year and a half before he closed the account. (*In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 712 ["[T]he repeated dipping of respondent's trust account below the required balance constitute[s] a basis for a finding of moral turpitude under section 6106 . . . ."].) In fact, there is "no indication the error would ever have been discovered" without King's effort to enforce her small claims judgment. (*Palomo v. State Bar, supra,* 36 Cal.3d at p. 796, fn. 8.) "Any procedure so lax as to produce that result was grossly negligent." (*Ibid.* [gross negligence found where over four months passed before attorney discovered check he endorsed had been misappropriated].)

Count 4: Commingling Personal Funds in Westminster CTA (Rule 4-100(A))

In addition to requiring client funds to be held in trust, rule 4-100(A) prohibits attorneys from depositing personal funds into CTAs: "No funds belonging to the member or law firm shall be deposited therein or otherwise commingled." Further, "[t]he rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.) Doan improperly deposited $43,000 in personal funds into the Westminster CTA and then issued a $10,000 check to settle a personal debt, in clear violation of rule 4-100(A). (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 426.)

II. MITIGATION AND AGGRAVATION

We determine the appropriate discipline in light of all relevant circumstances, including mitigation and aggravation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Doan must establish mitigation by clear and convincing evidence (std. 1.2(e)), while the State Bar has the same burden to prove aggravation. (Std. 1.2(b).)

A. MITIGATION

The hearing judge found four factors in mitigation to be "compelling." First, we agree under standard 1.2(e)(i) that Doan's 14 years of practice without discipline is a significant factor in mitigation. (*In the Matter of Blum*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 412.)

Second, we adopt the hearing judge's finding that Doan is entitled to additional mitigative weight for his substantial community service and other pro bono activities in the Vietnamese community. (*Rose v. State* Bar (1989) 49 Cal.3d 646, 667.) Doan has taken on pro bono cases, regularly provided free legal advice to a call-in television program for the Vietnamese community, and participated annually in the Vietnamese Bar Association's "Legal Pro Bono Day."

Third, we agree with the hearing judge that Doan displayed candor and cooperation in this discipline proceeding and stipulated to material facts establishing his culpability. (Std. 1.2(e)(v).)

Fourth, the hearing judge found that Doan was experiencing grief and stress at the time of the misconduct due to the deaths of his mother and brother. (Std. 1.2(e)(iv).) However, we assign modest weight in mitigation because he did not establish a nexus between his emotional difficulties and his disregard of his CTA duties. (*In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 59-60.)

B. AGGRAVATION

The hearing judge found four factors in aggravation, but we find only three of the factors are supported by clear and convincing evidence. First, we agree with the hearing judge that Doan committed multiple acts of misconduct in his handling of his trust accounts. His San Gabriel CTA dropped below the required minimum at least 17 times. (Std. 1.2(b)(ii).) Second, we agree that Doan's misconduct significantly harmed King by denying her the use of $3,200 of her settlement funds for more than two and a half years. (Std. 1.2(b)(iv).) Third, and perhaps most troubling, Doan's unwillingness to repay King even after she obtained a judgment in small claims court shows indifference to rectification of his misconduct. (Std. 1.2(b)(v).)

We do not adopt the fourth finding in aggravation under standard 1.2(b)(iii) that Doan failed to account because the State Bar did not introduce supporting evidence that he was asked to provide an accounting or that Doan in fact did not produce an accounting. (Std. 1.2(b).)

III. DISCIPLINE DISCUSSION

The primary purpose of disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) We start with the standards, which serve as guidelines and are accorded great

weight (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580), although no fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

Standard 2.2(a), which applies to willful misappropriations, calls for disbarment unless compelling mitigating circumstances clearly predominate, in which case a minimum one-year actual suspension is warranted. Standard 2.2(b) applies to commingling that doesn't involve willful misappropriation and it suggests at least a three-month actual suspension, irrespective of mitigating circumstances. Standard 2.3, which applies to acts of moral turpitude, calls for actual suspension or disbarment, depending on the extent of harm, the magnitude of the act, and the degree to which it relates to the practice of law. When two or more acts of misconduct are found in a single proceeding and different sanctions are prescribed by the standards, the more severe of the applicable sanctions for these violations should be imposed (std. 1.6(a)), adjusted as appropriate to reflect the balance of aggravating and mitigating circumstances. (Std. 1.6(b).)

Standard 2.2(a) is the most severe sanction, but the Supreme Court has noted that the standard's presumptive discipline of disbarment, or even the imposition of the minimum one-year suspension, is not necessarily faithful to the teachings of its decisions. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 518; *Brockway v. State Bar* (1991) 53 Ca1.3d 51, 66 [one-year minimum period of actual suspension could be "unduly harsh"].) In considering the appropriate discipline here, we note that the term "'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability. "An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State* Bar (1990) 52 Cal.3d 28, 38.) In cases where the misappropriation has been found to be "willful" but where only one client has

been harmed, disbarment has rarely been found to be the appropriate discipline. (*Ibid.*) Furthermore, within the spectrum of willful misappropriation cases, less discipline has been imposed in cases in which the attorney's circumstances indicated the "misconduct was aberrational and hence unlikely to recur," and in cases in which the attorney lacked evil intent. (*Id.* at p. 38.)

The genesis of Doan's misappropriation lies not with dishonesty or intentional misconduct, but rather with his carelessness and grossly negligent reliance on his office staff to the detriment of his client. While Doan's lack of wrongful intent does not excuse his misconduct, it is an important consideration in determining discipline. (*Kelly v. State Bar, supra,* 53 Ca1.3d at pp. 519-520.) Furthermore, Doan has minimized the likelihood of recurrence of his lax office procedures by closing his satellite office, and he has changed his financial procedures so that he no longer commingles personal funds in his CTA. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2 [favorable consideration given for "steps to repair the damage done and to prevent its recurrence"].)

Under these circumstances, we find that it would be "unduly harsh" to impose either disbarment or even the minimum one-year suspension suggested in standard 2.2(a). (See *Brockway v. State Bar, supra,* 53 Cal.3d at p. 66.) Moreover, after reviewing those discipline cases that have considered standard 2.2(a), we find that the discipline recommended by the hearing judge is excessive. The hearing judge relied on *Bates v. State Bar* (1990) 51 Cal.3d 1056, as a benchmark for the level of discipline. In *Bates,* the Supreme Court imposed a six-month suspension for misconduct which the hearing judge found was "similar" to the instant matter. However, the hearing judge further found that Doan's mitigation evidence was weaker than that in the *Bates* case, thereby justifying a nine-month suspension.

We do not agree. The misconduct in *Bates v. State Bar, supra,* 51 Cal.3d 1056, was more serious than in this case. There, the attorney deliberately and personally misappropriated a portion of a $1,229 personal injury settlement from his CTA for his own purposes and then lied to his client's successor attorney about the status of the client's funds. In contrast, Doan did not personally or intentionally misappropriate the funds, nor were they used for his own purposes. Moreover, there is no evidence of dishonesty in this case.

We also disagree with the hearing judge's finding that Doan's evidence of mitigation was "not as compelling as that of *Bates.*" In fact, the Supreme Court did not find "compelling" mitigation in *Bates*; rather, it was underwhelmed by the mitigative evidence, stating: "The only arguably 'mitigating' factor of any significance was petitioner's alcoholism at the time of his misappropriations." (*Bates v. State Bar, supra,* 51 Cal.3d at p. 1061.) The Supreme Court did observe that Bates had practiced for 14 years without reported misconduct and that testimony was provided regarding his reputation for competence and integrity, but it assigned no mitigative weight to these factors. (*Id*. at p. 1062.)

In contrast, the hearing judge found that Doan's evidence *was* compelling, as do we. Doan practiced for 14 years, with the King matter being the only complaint filed against him during that time. As noted above, his revised procedures should greatly minimize the likelihood of any recurrence of both the misconduct at his satellite office and his own mishandling of his CTA by commingling. Doan has made full restitution to King, albeit only after a lawsuit and intercession by the State Bar. He has demonstrated his commitment to utilizing his legal skills on behalf of his community, and has fully cooperated with the State Bar in these proceedings.

Our analysis of other discipline cases that have considered the application of standard 2.2(a) where the misappropriation was due to gross negligence rather than dishonesty leads us to conclude that 90 days' actual suspension is more appropriate upon the conditions set forth below.

(*In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902 [finding six months' actual suspension "excessive" and recommending a 90-day actual suspension for three counts of misconduct in a single client matter, including misappropriating $4,800 in client trust funds, failing to properly pay out client trust funds, and acts of moral turpitude, mitigated by candor and cooperation in discipline proceedings];[7] *In the Matter of Ward*, *supra*, 2 Cal. State Bar Ct. Rptr. 47 [90-day actual suspension for misappropriation of client's $12,000 held in trust due to gross neglect constituting moral turpitude, failure to promptly pay client until after State Bar intervention and failure to communicate to second client, mitigated by attorney's 14 years of discipline-free practice and "impressive" character testimony]; see also *Brockway v. State Bar*, *supra*, 53 Cal.3d 51 [three-month actual suspension for willful misappropriation of $500 due to gross negligence and failure to refund funds to client, plus misconduct in second client matter involving acquisition of adverse interest in client's property, mitigated by 13 years of discipline-free practice and favorable character evidence, but aggravated by questionable candor and indifference].)

IV. RECOMMENDATION

We recommend that THINH VAN DOAN be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 90 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if

[7]The portions of this opinion discussing additional findings in aggravation and mitigation are not published in the California State Bar Court Reporter.

no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar Office of Probation.

4. He 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, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

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

6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Client Trust Accounting School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Client Trust Accounting School.

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that THINH VAN DOAN be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VI. RULE 9.20

We further recommend that THINH VAN DOAN be ordered to comply with the requirements of rule 9.20 of the 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 order in this proceeding. Failure to do so may result in disbarment or suspension.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

REMKE, P. J.

PURCELL, J.