PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION



**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

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| In the Matter of | ) | Case No. 12-O-14896 |
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| DOMINIQUE NGHI THIEU, | ) | OPINION AND ORDER |
| | ) | |
| A Member of the State Bar, No. 236914. | ) | |
| | ) | |

We must decide the appropriate degree of discipline to recommend for Dominique Nghi Thieu's admitted misappropriation of $25,000 of her client's trust funds in February 2012. A State Bar Court hearing judge recommended disbarment, finding that, while there are two significant mitigating circumstances in this case, they are neither compelling, nor do they clearly predominate over aggravating circumstances.

On review, Thieu urges that mitigating circumstances warrant actual suspension rather than disbarment. The Office of the Chief Trial Counsel of the State Bar (OCTC) urges that we adopt the hearing judge's recommendation. As we discuss *post*, on our independent review of the record (Cal. Rules of Ct., rule 9.12), we accord less weight to mitigating circumstances, and we adopt the hearing judge's recommendation as fully warranted and necessary to adequately protect the public and maintain high professional standards.

## I. FACTS AND FINDINGS OF CULPABILITY

Prior to the State Bar Court trial, Thieu and OCTC stipulated to all of the key background facts underlying Thieu's culpability of willful misappropriation of $25,000 of trust funds, of related misuse of her client trust account (CTA), and of failure to cooperate or participate in the

State Bar investigation of her alleged misconduct. During trial and on review, Thieu also admitted that she knowingly used her client's trust funds for other purposes.

Thieu was admitted to practice law in California in 2005, and has no record of prior discipline. In February 2010, Tung Nguyen retained Thieu to represent him against C. Pham in recovering monies Nguyen claimed Pham owed to him. In her retainer agreement, Thieu requested that Nguyen pay a $10,000 advance fee to be applied against her reduced fee rate of $200 per hour, and that $2,000 of the $10,000 be paid up front, with the timing of payment of the remaining $8,000 to be determined. Nguyen paid Thieu $2,000 at the time of the retainer agreement. Thieu filed suit against Pham on behalf of Nguyen.

In July 2011, after mediation, Nguyen agreed to settle his suit against Pham for Pham's payment of $80,000. As an inducement to resolve this case, Nguyen agreed to settle in full for only $50,000 if Pham paid it in two installments: $25,000 by August 15, 2011, and the remaining $25,000 by February 28, 2012. Pham paid the first $25,000 on time. Of this sum, Thieu deducted $5,000 as her claimed fees and promptly paid Nguyen the remaining $20,000.

On January 17, 2012, Pham paid Thieu the remaining $25,000 owed Nguyen to complete the settlement. When Nguyen went to Thieu's office to endorse this check, Thieu told him that she would have to review her file to determine whether Nguyen owed any added sums for her fees and costs. On January 30, 2012, Thieu deposited this $25,000 check into her CTA, creating an account balance of $25,010.

The evidence shows that between February 1, and February 24, 2012, Thieu wrote six separate checks on her CTA totaling $25,000, which she deposited into her personal bank account. These six withdrawals reduced Thieu's CTA balance on January 31, 2012 to $10, plus an added $0.83 in earned interest. Thieu admitted in her testimony that these withdrawn sums

were not used for Nguyen. Rather, the evidence shows that the $25,000 was used for a combination of Thieu's personal and office expenses.[1]

Thieu did not promptly pay Nguyen any part of his $25,000, and she never sent him a statement of what further fees he owed her. He had a need for funds, as he was in his sixties and his employer recently reduced his work hours as a messenger/courier. In March 2012, when Thieu had not promptly paid him his share of the trust funds, Nguyen had to dip into retirement funds and sought information from Thieu as to when he could receive his funds from the Pham matter.

Thieu agreed to meet Nguyen on March 30, 2012, but, the day before the meeting, she rescheduled it, and then further rescheduled it several more times, citing different business and personal commitments. On April 10, 2012, Nguyen sent an email to Thieu that he was planning to come by Thieu's office the next day to pick up a check for his funds. On April 11, 2012, Nguyen went to Thieu's office. She was not present but left a $25,000 check made out to him and written on her general, business account, post-dated April 20, 2012. She attached to the check a note to Nguyen, which told him that she had yet to do a final accounting; was unable to locate her CTA checkbook; and, when she did, she would transfer funds from her CTA to her business account, or issue a new check.[2] She requested Nguyen not to deposit the attached check until April 20.

On May 17, 2012, Nguyen deposited Thieu's $25,000 check, but it was returned unpaid by the bank for lack of sufficient funds. Nguyen then sent Thieu a letter by certified mail, dated

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[1] These expenses included Thieu paying part of a voluntarily assumed obligation to another client, Dang, of $580,000 as recompense to Dang after terminating sanctions were entered by a court against Dang and Thieu failed to respond to discovery requests in the Dang litigation.

[2] Thieu was not charged with misrepresenting to Nguyen her failure to maintain his trust funds inviolate and in a CTA; but, as we discuss *post*, we consider in aggravation, Thieu's statement to Nguyen as a misleading statement that Thieu still held his funds in trust when she had depleted her account of them over six weeks earlier.

May 24, 2012, demanding payment of his trust funds. Thieu received this letter, but did not reply.

Shortly thereafter, Nguyen complained to the State Bar about Thieu's failure to pay his funds. As part of its investigation into Nguyen's complaint, a State Bar investigator sent Thieu a letter on September 25, 2012, requesting her reply by October 9, 2012. Thieu stipulated that she received this letter, but did not reply.

On July 22, 2013, the State Bar issued its formal disciplinary charges in this matter.

On August 20, 2013, almost 18 months after Thieu misappropriated Nguyen's $25,000, and 11 months after learning of the State Bar investigation, she sent Nguyen a cashier's check for $30,000. This covered Nguyen's $25,000 share of trust funds, $3,875 in interest, and an additional $1,125 as a "token of . . . extreme remorse." Thieu wrote that she was extremely embarrassed and sorry for the delay in receiving his funds, that she still had not done an accounting in his case, but she waived any additional fees that might be due her. However, Thieu never explained to Nguyen what had happened to his funds.

Based on Thieu's admissions and the record of testimonial and documentary evidence, the hearing judge found Thieu culpable of the following three charged ethical violations: willful misappropriation of $25,000 of Nguyen's trust funds in February 2012 (Bus. & Prof. Code, § 6106),[3] willful failure to maintain trust funds in a required CTA (Rules. Prof. Conduct, rule 4-100(A)),[4] and failure to participate or cooperate in the State Bar investigation of Nguyen's complaint (§ 6068, subd. (i)).

Neither party disputes these findings, and we adopt them.

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[3] Subsequent references to sections are to this code unless otherwise noted.

[4] Subsequent references to rules are to these rules unless otherwise noted.

The undeniable facts show that Thieu knowingly chose to use Nguyen's $25,000 for non-trust purposes,[5] including to pay part of a self-assumed obligation to another client designed to obviate a malpractice claim. Thieu's wilful misappropriation involved moral turpitude, even if, arguendo, as she testified, she did not intend to *permanently* deny Nguyen his funds. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033; *Jackson v. State* Bar (1975) 15 Cal.3d 372, 382.) Additionally, Thieu's lengthy control over Nguyen's funds amply amounted to moral turpitude regardless of Thieu's hope that she could have restored them earlier than the 18 months which elapsed.

Moreover, Thieu's failure to keep Nguyen's $25,000 inviolate in her CTA is a serious breach of professional standards, in willful violation of rule 4-100(A), designed as a therapeutic standard to guard against precisely what happened here, the actual misappropriation of trust funds. (*Silver v. State Bar* (1974) 13 Cal.3d 134, 144-145.) However, as is customary, we shall accord no added weight to the rule 4-100(A) violation in assessing degree of discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

We agree with the hearing judge's determination not to assign culpability to two charges related to Thieu's misconduct: failure to timely pay Nguyen's trust funds (rule 4-100(B)(4)) and the furnishing of appropriate accounts to Nguyen of his funds (rule 4-100(B)(3)), since in this case they are cumulative or duplicative of the more serious misconduct found. (E.g., *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

Finally, we adopt the hearing judge's finding that Thieu is not culpable of charges that she engaged in an act of moral turpitude by deliberately, or with gross neglect, issuing Nguyen an insufficiently funded check in April 2012. On review, OCTC does not dispute the hearing judge's finding. However, as we discuss *post*, we consider the circumstances of issuing this

[5] On review, Thieu has accepted the finding of misappropriation of the full $25,000, pointing to her trial testimony that she admitted taking that amount from Nguyen.

check as germane to our review of the balance of aggravating and mitigating factors, which we now undertake.

## II. AGGRAVATION AND MITIGATION

In order to appropriately apply the Standards for Attorney Sanctions for Professional Misconduct,[6] we must assess the evidence and weight of aggravating and mitigating factors. OCTC must establish aggravating factors by clear and convincing evidence (std. 1.5), and Thieu must establish mitigating factors by the same burden (std. 1.6).

### A. Aggravating Factors

#### 1. Multiple Acts of Wrongdoing (Std. 1.5(b))

The hearing judge assigned this as an aggravating factor based on the three counts of culpability found. Thieu does not challenge this finding. We agree with the hearing judge. Under revised standard 1.5(b), it is clear, as we have observed before under a former version of this standard, that this aggravating factor is established not merely by the number of culpability counts (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555), but also by the number of times wrongdoing occurred (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 59). Thieu's misappropriations occurred six different times in February 2012.

#### 2. Concealment and Lack of Candor or Cooperation with Victim (Std. 1.5(f), (l))

The hearing judge found that Thieu attempted to conceal her misconduct from Nguyen by repeatedly rescheduling her meetings with him. Thieu points to evidence that she was remorseful to Nguyen when restoring his funds in August 2013. We agree with the hearing

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[6] Effective July 1, 2015, the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, were revised and renumbered. Because this review was submitted for ruling after the July 1, 2015, effective date, we apply the revised version of the standards. All further references to standards are to the revised version of this source.

judge's findings but also find, as OCTC argues, that Thieu's hiding of her misappropriation was more protracted and serious than the hearing judge found and involved repeatedly misleading Nguyen over a two-month period, by a protracted exchange of communications, culminating in her giving Nguyen a post-dated $25,000 check that was dishonored. (Std. 1.5(e).) Moreover, even when restoring Nguyen's funds, Thieu never admitted to him that she had misappropriated them 18 months earlier, instead apologizing only for her delay.

**3. Significant Harm to Nguyen (Std. 1.5(j))**

The hearing judge correctly found that Thieu's misappropriation harmed Nguyen significantly, and we agree with this finding, given the evidence of the financial pressures facing Nguyen at the time. However, the judge gave little weight to this factor since he found that Thieu ameliorated much of the harm by waiving her fees and paying Nguyen a total of $30,000 in restitution. OCTC disagrees with the weight given by the hearing judge to this factor, and so do we. Considering that Thieu's restitution to Nguyen was both delayed and under pressure of these proceedings, we do not find that the ultimate amount of restitution should lower its aggravating weight because Thieu harmed her client she knew was pressed financially, and who had agreed to a substantially lower settlement against Pham in order to receive funds promptly.

**B. Mitigating Factors**

**1. No Prior Record of Discipline (Std. 1.6(a))**

Although the hearing judge correctly found that Thieu has no prior discipline, she had been admitted to practice for less than seven years prior to her misconduct. On this record, we cannot uphold the hearing judge's finding that this is entitled to significant mitigation. Both the current standard and its predecessor require that, to warrant mitigation, the discipline-free practice must have occurred over many years. The hearing judge noted two cases, *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317 and *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.

*Cooper* dealt with an attorney who had 30 years of discipline-free practice, and the court explained that a lack of prior discipline is most relevant to mitigation when the misconduct is aberrational and unlikely to recur. That interpretation is now reflected in standard 1.6(a). *Rodgers* dealt with an attorney with almost 20 years of discipline-free practice. Similarly, most cases Thieu cites involved lengthier periods of practice prior to the misconduct.

In our view, the best that can be said is that Thieu's seven-year lack of prior discipline is worthy of only slight mitigation. (*In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 44 [seven years of discipline-free practice, but much less serious misconduct found than in the present case]; see also *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [eight years of discipline-free practice together with other mitigating factors did not render disbarment excessive].) The combination of Thieu's misappropriation in a series of withdrawals in February 2012, and her extended evasion and deception of Nguyen for several months thereafter, belies that Thieu's misconduct was an aberrational event. Altogether, it spanned about one-fifth of her entire time as a member of the State Bar up to the time of the formal charges.

**2. Good Character (Std. 1.6(f))**

The hearing judge noted Thieu's seven character witnesses for the esteem in which they held Thieu. But the judge did not assign a degree of mitigating weight to Thieu's character witness showing. We find that it merits only limited weight. Five of the seven witnesses were attorneys, but two of them had known Thieu for only about four years. Several of the witnesses had business relationships with Thieu. One of the attorney witnesses who, like Thieu's other character witnesses, was highly supportive of Thieu's moral character, nevertheless would disclose to prospective clients the serious nature of the charges against her when referring Thieu to them.

The hearing judge also found that Thieu's impressive range of pro bono and community activities was strong evidence of her good moral character. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono and community service are mitigating].) We agree that Thieu's showing of her long practice of community, civic, and bar association engagements, starting even prior to attending law school, was impressive and merited significant mitigation. It extended to leadership positions in Vietnamese American bar associations at the regional and national levels. It was accompanied by evidence that Thieu also performed considerable pro bono and reduced-fee legal and clinical services.

**3. Remorse and Recognition of Wrongdoing (Std. 1.6(g))**

The hearing judge gave limited mitigating weight to Thieu's showing of remorse to Nguyen because it did not occur until after the State Bar investigation. We cannot accord any weight to that showing. Standard 1.6(g) defines mitigation regarding remorse as "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." The undisputed facts show that Thieu's efforts were not prompt but marked by evasion, concealment, and deception. Her restitution to Nguyen occurred 18 months after her misuse of his funds and her expression of remorse to Nguyen occurred a long time after she realized that he was deprived of funds which he clearly needed.

**4. Financial difficulties**

Although the standards do not recognize financial pressures as a mitigating factor in misappropriation cases, case law has done so under prescribed conditions. (E.g., *Grim v. State Bar* (1991) 53 Cal.3d 21, 31-32; *Amante v. State Bar* (1990) 50 Cal.3d 247, 254-255.) As the Supreme Court observed, in order for financial pressures to be given significant mitigating weight in misappropriation cases, they must be extreme and result from financial circumstances

not reasonably foreseeable or beyond the attorney's control. (*Grim v. State Bar*, *supra*, 53 Cal.3d at p. 31.)

As the hearing judge noted, and we agree, Thieu's serious financial pressures ultimately caused her to lose ownership of her residence and her law office. But they were due primarily to Thieu creating, on her own, a $580,000 obligation to prevent or resolve a malpractice action with Dang at a time when Thieu did not have the cash flow to support this obligation. This was neither unforeseeable nor beyond Thieu's control, and we cannot, therefore, accord it mitigating weight.

## III. DISBARMENT IS THE APPROPRIATE SANCTION

Having consulted the standards to identify and weigh individual aggravating and mitigating factors, we return to those standards to recommend the appropriate degree of discipline overall. (*In re Silverton* (2005) 36 Cal.4th 81, 91; stds. 1.7 and 2.1.)

Disbarment is the presumed sanction for Thieu's intentional misappropriation of Nguyen's trust funds unless the amount is insignificantly small, or sufficiently compelling mitigation clearly predominates. (Std. 2.1(a).)[7] The amount Thieu misappropriated was not insignificantly small. (*Chang v. State Bar, supra,* 49 Cal.3d at pp. 128-129 [$7,898 held to be significant amount]; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 held to be significant amount].) Moreover, we have found that several serious aggravating factors surrounded Thieu's misconduct. When balanced against her strong, positive mitigation of community and pro bono service, we must conclude that Thieu's mitigation is not compelling.

As noted correctly by the hearing judge, the purposes of State Bar Court proceedings are not to punish Thieu, but to protect the public, preserve confidence in the profession, and maintain

[7] Part B of the standards define the "presumed sanction" as a starting point for the imposition of discipline which can be adjusted down or up depending on application of mitigating and aggravating circumstances and the balancing of these circumstances per standard 1.7.

the highest professional standards for attorneys. (Decision, p. 13; citing *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In that regard, misappropriation of trust funds is grievously improper—a gross breach of professional misconduct that involves moral turpitude. (§ 6106; cf. *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1073 [misappropriation of $29,000 of law firm funds by firm partner].)

For the reasons above, we conclude, as did the hearing judge, that the sanction of disbarment is warranted here and consistent with relevant case law. (See generally *Grim v. State Bar*, *supra*, 53 Cal.3d 21 [disbarment in light of $5,546 misappropriation from one client, prior record for commingling and despite good character and cooperation]; *Gordon v. State Bar* (1982) 31 Cal.3d 748 [disbarred for misappropriating over $27,000, despite 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, remorse, and lack of harm]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarred for misappropriating $40,000, aggravated by client harm and uncharged misconduct, despite 15 years of discipline-free practice, emotional problems, restitution, remorse, good character, community service, cooperation by stipulating to culpability and community service].)

## IV. DISBARMENT RECOMMENDATION

We recommend that Dominique Nghi Thieu be disbarred from the practice of law and that her name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that she must comply with rule 9.20 of the California Rules of Court and 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 matter.

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

## V. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Dominique Nghi Thieu be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective February 21, 2014, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

STOVITZ, J.*

WE CONCUR:

PURCELL, P. J.

McGILL, J.**

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court

** Hearing judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar

## CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on October 7, 2015, I deposited a true copy of the following document(s):

OPINION AND ORDER FILED OCTOBER 7, 2015

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MARISOL OCAMPO
CENTURY LAW GROUP LLP
5200 W CENTURY BLVD #345
LOS ANGELES, CA 90045

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Charles A. Murray, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on October 7, 2015.

Rosalie Ruiz
Case Administrator
State Bar Court