

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case No.: 12-PM-12885-RAH (S196641)
	)	
<b>KIM TRONG NGUYEN,</b>	)	<b>ORDER GRANTING MOTION TO</b>
	)	<b>REVOKE PROBATION AND FOR</b>
<b>Member No. 162783,</b>	)	<b>INVOLUNTARY INACTIVE</b>
	)	<b>ENROLLMENT</b>
<u>A Member of the State Bar.</u>	)	

**Introduction**<sup>1</sup>

In this probation revocation proceeding, respondent Kim Trong Nguyen is charged with violating his probation conditions imposed by the California Supreme Court. The Office of Probation of the State Bar of California (Office of Probation) seeks to revoke respondent’s probation, to impose upon him the entire period of suspension previously stayed, and to involuntarily enroll respondent as an inactive member of the State Bar.

The court finds, by preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion. Therefore, the court orders that respondent be involuntarily enrolled as an inactive member of the State Bar. The court also recommends, among other things, that respondent's probation be revoked, that the previously stayed, three-year suspension be lifted, and that he be actually suspended for three years and must remain suspended until he makes restitution as specified, *infra*, and provides proof to the State Bar Court

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.4(c)(ii).)

### **Significant Procedural History**

On April 13, 2012, the Office of Probation filed and properly served a motion to revoke probation on respondent. The motion was sent by certified mail to respondent's official membership records address. A courtesy copy of the motion was also sent by regular mail to respondent at his official membership records address. Respondent did not file a response within 20 days of the service of the motion.

On May 9, 2012, after the time for respondent to file a response to the State Bar's motion to revoke his probation had expired, the court took this matter under submission.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 14, 1992, and has been a member of the State Bar of California at all times since that date.

#### **Facts**

On November 30, 2011, in Supreme Court case No. S196641, the California Supreme Court ordered, among other things, that:

1. Respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that he be placed on probation for three years on condition that he be suspended from the practice of law for a minimum of the first two years of probation and remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii); and
2. Respondent comply with the probation conditions, recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed August

11, 2007 (State Bar Court case Nos. 09-O-19074 (10-O-07064; 10-O-08649); 10-O-03281 (10-O-05114) Cons.), including, but not limited to the following:

- A. Within 30 days from the effective date of discipline (i.e., by January 29, 2012), respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the probation conditions;
- B. Within 30 days from the effective date of discipline (i.e., by January 29, 2012), respondent must join the Law Practice Management and Technology Section of the State Bar of California;
- C. No later than 60 days after the effective date of discipline (i.e., by February 28, 2012), respondent must make restitution, which includes the principal amount, plus interest of 10% per annum, to the payees listed below and furnish satisfactory proof thereof to the State Bar's Office of Probation (or reimburse the Client Security Fund (CSF) to the extent of all or any portion of the principal amount listed below that was paid by the CSF to the payees, plus applicable interest and costs);

<b>Payee</b>	<b>Principal Amount</b>	<b>Interest Accrues From</b>
Brian Nicholson	\$2,700	January 13, 2011
Hugo Villatoro	\$7,750	October 26, 2009

- D. Within the first 90 days of the probation period (i.e., by March 29, 2012), respondent must develop a law office management/organization plan and have it approved by the Office of Probation; and
- E. During the period of probation, respondent must submit a written report to the Office of Probation on January 10, April 10, July 10 and October 10 of each year, or part thereof, during which the probation is in effect, stating

under penalty of perjury that he has complied with provisions of the State Bar Act and Rules of Professional Conduct during said period (quarterly report).

The Supreme Court order became effective on December 30, 2011, 30 days after it was entered. (Cal. Rules of Court, rule 9.18(a).) It was properly served on respondent.<sup>2</sup>

On December 12, 2011, the Office of Probation wrote a letter to respondent, which was properly sent to him at his official membership records address, reminding him of certain terms and conditions of his suspension and the probation imposed pursuant to the Supreme Court's order. Enclosed with the letter, among other things, were copies of the Supreme Court's order, the probation conditions portion of the stipulation, and instruction sheets or forms to be used in submitting quarterly reports.

On February 9, 2012, the Office of Probation wrote another letter to respondent, noting that he had failed to contact the Office of Probation to schedule a meeting with the probation deputy that was assigned to his case and had failed to provide proof of enrollment in the Law Practice Management and Technology Section. The letter warned respondent that he could be referred for his noncompliance, if he did not file a motion and obtain an order modifying his deadlines. A copy of the Office of Probation's December 12, 2011 letter and its enclosures were included with the February 9, 2012 letter.

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<sup>2</sup> Although no proof was offered that the Clerk of the Supreme Court served the Supreme Court's order upon respondent, California Rules of Court, rule 8.532(a) requires clerks of reviewing courts to immediately transmit a copy of all decisions of those courts to the parties upon filing. It is presumed pursuant to Evidence Code section 664 that official duties have been regularly performed. (*In re Linda D.* (1970) 3 Cal.App.3d 567, 571.) Therefore, in the absence of evidence to the contrary, this court finds that the Clerk of the Supreme Court performed his duty and transmitted a copy of the Supreme Court's order to respondent immediately after its filing.

On February 27, 2012, the State Bar received an email from respondent, which provided confirmation of respondent's enrollment on that same date in the Law Practice Management Section. Additionally, on February 27, 2012, respondent and the probation deputy assigned to his case exchanged phone calls. Among other things, they scheduled a meeting to discuss the terms and conditions of respondent's discipline.

The scheduled telephonic meeting took place on February 28, 2012. All conditions and deadlines were reviewed. The probation deputy advised respondent that if he was unable to timely complete conditions, he should file a motion with the State Bar Court. Respondent was also advised that any failure to meet his compliance deadlines would result in a referral to the State Bar Court.

On March 12, 2012, the Office of Probation received an e-mail from respondent stating that he has not been able to make restitution.

On March 28, 2012, the Office of Probation received respondent's law office management/organization plan. In a facsimile transmission that was sent to respondent on March 28, 2012, the Office of Probation notified respondent that his law office management plan was rejected and set forth the deficiencies on which that rejection was based. As of April 13, 2012, the date on which the Office of Probation's motion to revoke probation was filed, respondent had not submitted an amended law office management plan to the Office of Probation for its approval.

On April 10, 2012, the quarterly report due on that same date was received by the Office of Probation, but not filed. The Office of Probation found the report defective, as it failed to include the period of time covered by that report. On April 10, 2012, the probation deputy assigned to respondent's case placed a telephone call to respondent's official membership telephone number to notify him that his quarterly report could not be filed. The probation

deputy, however, was unable to leave a message at that number, because the outgoing message stated that the person at that number was not accepting calls at that time.

None of the letters sent to respondent by the Office of Probation were returned as undeliverable or for any other reason.

As of April 13, 2012, the Office of Probation had not received proof from respondent of his having made any restitution and had not received an amended law office management plan.

### **Conclusions**

Section 6093, subdivision (b), provides that violation of a probation condition constitutes cause for revocation of any probation then pending and may constitute cause for discipline. Section 6093, subdivision (c), provides that the standard of proof is the preponderance of the evidence. Bad faith is not a requirement for a finding of culpability in a probation violation matter. Instead, a general purpose or willingness to commit an act or permit an omission is sufficient. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Respondent did not timely contact the Office of Probation and schedule a meeting with his assigned probation deputy by January 29, 2012. As set forth above, respondent did not schedule his meeting with his assigned probation deputy until February 27, 2012.

Nor did respondent timely provide proof of enrollment in the Law Practice Management and Technology Section by January 29, 2012. He did not provide confirmation of his enrollment in the Law Practice Management and Technology Section until February 27, 2012.

Respondent failed to make restitution to Brian Nicholson and Hugo Villatoro by February 8, 2012 as required by his probation. Respondent confirmed in his March 12, 2012 email to the Office of Probation that as of that date, he still had not made restitution.

Respondent also failed to develop a law office management/organization plan and have it approved by the Office of Probation by March 29, 2012. On March 28, 2012, the Office of

Probation notified respondent that his plan was rejected and informed respondent of the deficiencies in that plan that needed to be remedied. As of April 13, 2012, the date on which the Office of Probation's motion to revoke respondent's probation was filed, respondent had not submitted an amended law office management plan to the Office of Probation for its approval.

Respondent's quarterly report that was due on April 10, 2012, could not be filed, because the report he submitted was deficient in that it did not specify the period of time being covered by the report.

The Office of Probation has shown by a preponderance of the evidence that respondent did not comply with probation as ordered by the Supreme Court in S196641 in that: (1) he did not timely schedule his meeting with his assigned probation deputy; (2) he did not timely join the Law Practice Management and Technology Section; (3) he did not make restitution to Brian Nicholson or Hugo Villatoro; (4) he failed to develop a law office management plan and have it approved by the Office of Probation; and (5) he failed to timely file the quarterly report, which had a filing deadline of April 10, 2012, due to a defect in the report he submitted.

As a result, the revocation of respondent's probation in California Supreme Court order No. S196641 is warranted.

### **Aggravation<sup>3</sup>**

#### **Prior Record of Discipline (Std. 1.2(b)(i).)**

Respondent has two prior records of discipline.

In his first prior record of discipline, respondent was found culpable for failing to obey a court order and failing to communicate. He was publicly reprimanded. (State Bar Court case No. 02-O-10917; effective August 29, 2002.)

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<sup>3</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

In his second prior record of discipline, the underlying matter, respondent stipulated to culpability in five client matters for failing to communicate, engaging in acts of moral turpitude, including misappropriation, failing to provide appropriate accountings of client funds, failing to return unearned fees, failing to obey court orders, failing to cooperate with State Bar investigations, and failing to maintain client funds in a client trust account. He was ordered suspended for three years, stayed, placed on probation for three years, subject to conditions, including, among other things, that he remain suspended for a minimum of the first two years of probation and remain suspended until he provides proof of his rehabilitation, fitness to practice, and learning and ability in the general law. (Supreme Court case No. S196641, effective December 30, 2011; State Bar Court case Nos. 09-O-19074 et al.)

**Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)**

Respondent committed multiple acts of misconduct, including failing to timely schedule a meeting with his assigned probation deputy to discuss the terms and conditions of his probation; failing to timely join the Law Practice Management and Technology Section of the State Bar of California, failing to make restitution, failing to develop a law office management plan and have it approved by the Office of Probation, and failing to file a quarterly report.

**Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)**

An attorney's continued failure to comply with his probation conditions after being notified of that noncompliance is properly considered a substantial aggravating circumstance. It demonstrates indifference toward rectification of or atonement for the consequences of one's misconduct. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.) Although the motion to revoke his probation was filed in April 2012, which put respondent on notice that his probation status was in jeopardy, respondent still failed to make any restitution payments, failed to file an amended law office management plan, and failed to file a



revised/amended April 2012 quarterly report in an attempt to fix the deficiency in the April report he had submitted.

**Lack of Candor/Cooperation to Victims/State Bar (Std. 1.2(b)(vi).)**

Respondent's failure to participate in this proceeding is also an aggravating factor.

**Mitigation**

Since respondent did not file a response to the probation revocation motion, no evidence in mitigation was presented and none is apparent from the record. (Std. 1.2(e).)

**Discussion**

Section 6093 authorizes the revocation of probation for a violation of a probation condition, and standard 1.7 requires that the court recommend a greater discipline in this matter than that imposed in the underlying disciplinary proceeding, but any actual suspension cannot exceed the period of stayed suspension imposed in the underlying proceeding. (Rules Proc. of State Bar, rule 5.312.) The extent of the discipline to recommend is dependent, in part, on the seriousness of the probation violation and respondent's recognition of his misconduct and his efforts to comply with the conditions. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

Although respondent participated in his past two disciplinary matters, the court has no information about the underlying cause of his probation violations or of any mitigating circumstances surrounding his misconduct due to his lack of participation in this proceeding.

The Office of Probation requested that respondent be actually suspended for the full amount of stayed suspension. The court agrees.

**Recommendations**

The court recommends that the probation of respondent Kim Trong Nguyen, member No. 162783, imposed in Supreme Court case matter S196641 (State Bar Court case Nos. 09-O-19074

(10-O-07064; 10-O-08649); 10-O-03281 (10-O-05114) Cons.) be revoked; that the previous stay of execution of the suspension be lifted; and that respondent be actually suspended from the practice of law for a minimum of three years and will remain suspended until the following requirements are satisfied:

1. He makes restitution to Brian Nicholson in the amount of \$2,700 plus 10 percent interest per year from January 13, 2011 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Brian Nicholson, in accordance with Business and Professions Code section 6140.5) and furnishes proof thereof to the State Bar's Office of Probation in Los Angeles;
2. He makes restitution to Hugo Villatoro in the amount of \$7,750 plus 10 percent interest per year from October 26, 2009, (or reimburses the Client Security Fund, to the extent of any payment from the fund to Hugo Villatoro, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles; and
3. He must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

### **Multistate Professional Responsibility Examination**

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) because he was previously ordered to do so in Supreme Court case matter S196641.

**California Rules of Court, Rule 9.20**

It is recommended that respondent 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.<sup>4</sup>

**Costs**

It is also recommended 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.

**Order of Involuntary Inactive Enrollment**

Section 6007, subdivision (d)(1), provides for an attorney's involuntary inactive enrollment for violating probation if: (A) the attorney is under a suspension order any portion of which has been stayed during a period of probation, (B) the court finds that probation has been violated, and (C) the court recommends that the attorney receive an actual suspension due to the probation violation or other disciplinary matter. The requirements of section 6007, subdivision (d)(1) have been met.

Respondent is ordered to be involuntarily enrolled inactive under section 6007, subdivision (d)(1).<sup>5</sup> This inactive enrollment order will be effective three calendar days after the date upon which this order is served.

Dated: June \_\_\_\_\_, 2012

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RICHARD A. HONN  
Judge of the State Bar Court

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<sup>4</sup> 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.)

<sup>5</sup> The court recommends that any period of involuntary inactive enrollment be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)

