DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER ELEVEN

In the Matter of:	:	
TOAN Q. THAI, Respondent. A Member of the Bar of the District of Columbia Court of Appeals D.C. BAR NUMBER 439343	:	Bar Docket No. 154-03

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE NUMBER ELEVEN

I. INTRODUCTION

Bar Counsel has charged Respondent with multiple violations of the D.C. Rules of Professional Conduct based on (1) the alleged failure of Respondent to adequately prepare his client for immigration hearings; (2) the failure of Respondent and his client to appear at an Immigration Court hearing (Respondent had oral and written notice of the date of the hearing and as a result of the failure to appear, the Immigration Court ordered Respondent's client deported); (3) the use of an incorrect legal standard in a motion to reopen proceedings; and (4) the alleged failure of Respondent to return promptly his client's files after his client hired a new attorney. As detailed below, the Committee finds that Bar Counsel has proved all of the alleged Rules violations by clear and convincing evidence.

Having found that Bar Counsel has proved multiple violations of the Rules, the Committee recommends a sanction of a 60-day stayed suspension and one year of unsupervised probation. Upon satisfactory completion of the probation, the suspension order would expire of its own force. The Committee also recommends that Respondent

be ordered to attend six hours of continuing legal education courses in legal ethics and law office management as approved by Bar Counsel within the first six months of his probation and pay restitution in the amount of $4,500 with interest at the legal rate to Mr. Vu as conditions of probation.

II. PROCEDURAL HISTORY

On December 13, 2006, Bar Counsel filed a Specification of Charges against Toan Q. Thai ("Respondent"). Bar Counsel alleged that Respondent violated Rules 1.1(a) (a lawyer must provide competent representation), 1.1(b) (a lawyer must serve a client with skill and care), Rule 1.3(a) (a lawyer must represent a client zealously and diligently within the bounds of the law), 1.3(c) (a lawyer must act with reasonable promptness in representing a client, 1.4(a) (a lawyer must keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, 1.16(a)(2) (a lawyer must withdraw from representation if . . . the lawyer's physical or mental condition materially impairs the lawyers ability to represent the client [.][1], and 1.16(d) (a lawyer must surrender papers and property to which the client is entitled, and refund any advance payment or fee that has not been earned). Respondent filed his Answer to the Specification of Charges on March 26, 2007.

A pre-hearing conference in this matter was held on April 10, 2007. At the pre-hearing conference, Mr. Thai informed the Chair that he would seek pro bono counsel for the hearing in this matter. April 10, 2007 Hearing Transcript at pp 10:15-13:7. He failed to do so. Hearing Committee Number Eleven held an evidentiary hearing on May 22, 2007. The Hearing Committee consisted of Patricia G. Butler, Esquire, Chair; Ms. Lula Ivey, Public Member; and Joan Strand, Esquire. At the hearing, Bar Counsel, represented

[1] In its post-hearing brief Bar Counsel stated that it would not pursue a violation of Rule 1.16(a) (2). The Hearing Committee is required to make findings on all violations alleged in the specification of charges. *See In re Drew*, 693 A.2d 1127 ((D.C 1997) (per curiam). We find that Bar Counsel has failed to prove the alleged violation of Rule 1.16(a)(2) by clear and convincing evidence.

by Traci M. Trait, Assistant Bar Counsel, called three witness: Nang Duc Vu; Andrew J; Vasquez, Esquire; and Denyse Sabagh, Esquire, who was qualified as an expert in immigration law and practice. May 22, 2007 Tr. at 126:6-7. Bar Counsel's exhibits ("BX") A through D and 1 through 18 were admitted into evidence. Bar Counsel has pointed out in her brief that the transcript of the hearing does not show that the Chair admitted Bar Counsel's exhibits into evidence. Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanctions ("Bar Counsel's Proposed Findings of Fact) at 2. The Chair recalls doing so, but to remove any ambiguity, the Chair admits them at this time.

Respondent appeared *pro se* and testified on his own behalf. He relied on Exhibits ("RX") 1 through 39, which were admitted at the hearing over no objection. May 22, 2007 Tr. at 185:5-22. Respondent presented no other witnesses.

At the end of the evidentiary portion of the hearing, the Hearing Committee made a preliminary finding that Bar Counsel had proved at least one of the enumerated violations.

III. FINDINGS OF FACT

1. Respondent is a member of the D.C. Bar, admitted on October 4, 1993, Bar Number 439343. BX A.

2. On or about February 12, 2000, Nang Duc Vu, a Vietnamese national living in California, retained Respondent to represent him in removal proceedings before the Immigration Court. BX 1 at 5-6.

3. Respondent charged Mr. Vu $4,500 as compensation for his services; $2,500 as an initial non-refundable retainer fee and $200 each month, beginning in April 2000, until the balance was paid in full.

4. Respondent represented Mr. Vu in an appearance before the Immigration Court on July 26, 2001. BX 16 at 159; May 22, 2007 Tr. at 24: 11 - 25:10.

Before the hearing on July 26, 2001, Respondent faxed a set of questions related to the hearing to Mr. Vu for him to review. May 22, 2007 Tr. at 28:20 - 31:12; BX 8 at 89-91; BX 9 at 67-71. Respondent and Mr. Vu reviewed the questions on the way to court. May 22, 2007 Tr. at 33:6 – 34:18.

5. At that appearance, the Immigration Judge orally told Respondent and Mr. Vu that the hearing would be continued until January 28, 2002 at 1:00 p.m. BX 16 at 159; BX 18.

6. The Immigration Judge also issued a written notice that the hearing was continued until January 28, 2002 at 1:00 p.m. BX 16 at 159.

7. Respondent represented Mr. Vu in Immigration Court for the hearing on January 28, 2002. BX 16 at 33. May 22, 2007 Tr. at 27:20 – 28:9.

8. In the car on the way to the January 28, 2002 hearing, Respondent went over most of the questions that he sent to Mr. Vu before the July 26, 2001 hearing. May 22, 2007 Tr. at 31:10 - 31:21.

9. At that appearance, the Immigration Judge orally told Respondent and Mr. Vu that the hearing would be continued until February 24, 2003. BX 18 (tape recording of January 28, 2002 hearing).

10. At that appearance, the Immigration Judge also issued a written order with notice that the hearing would be continued until February 24, 2003 at 1:00 p.m. BX 16 at 102.

11. Mr. Vu did not receive the written order that the hearing would be continued until February 24, 2003, because Mr. Thai took the written order and did not give the order to Mr. Vu. May 22, 2007 Tr. at 37:8-18; 163:12 - 166:2.

12. Mr. Vu believed that the Immigration Judge scheduled the next hearing date for March 24, 2003. May 22, 2007 Tr. at 38: 14 - -39: 9.

13. Respondent believed that the Immigration Judge scheduled the next hearing date for March 24, 2003. May 22, 2007 Tr. at 157:12 - 158:1.

14. Respondent admits that he received the written notice from the Immigration Judge that indicated that the next hearing date was February 24, 2003. May 22, 2007 Tr. at 158:15-18.

15. Respondent did not recall what he did with the notice at the time that he received it. May 22, 2007 Tr. at 159:4-8.

16. After a few weeks, Mr. Vu contacted Respondent to ask whether "we need anything for the next year trial and [Respondent] said no just wait to the next year trial and we go." May 22, 2007 Tr. at 38:10-13.

17. At the time of the Chinese New Year in February, 2003, Mr. Vu's wife attempted to obtain some information regarding the next hearing date, specifically asking when that next date would be. Respondent did not provide any information. May 27, 2007 Tr. at 40:10 - 41:11.

18. Mr. Vu's trial took place on February 24, 2003, and because Mr. Vu did not appear, he was ordered deported. BX 16 at 99-101.

19. Respondent was mailed a copy of the written notice of deportation. BX 16 at 99. He does not dispute that he received a copy of the written notice of deportation.

20. Mr. Vu was mailed and received a copy of the written notice of deportation. BX 16 at 100; May 22, 2007 Tr. at 41:15-20.

21. Mr. Vu went to Mr. Thai's office when he learned that he had been ordered to be deported. May 22, 2007 Tr. at 41:21 - 42:3.

22. In response to the order of deportation, Mr. Vu prepared a letter to the Immigration Court. In the letter Mr. Vu stated "I thought the court date is on March, and I also put in that I was assumed that Mr. Thai is supposed to let me know couple days before the court date as he did before that." May 22, 2007 Tr. at 45:3-8.

23. On March 24, 2003, Respondent filed a motion to reopen Mr. Vu's case. BX 16 at 90-92.

24. In his motion to reopen, Respondent argued that the proper standard for granting a motion to reopen was whether Mr. Vu had "'reasonable cause for his absence from the proceedings.'"

25. Attached to the motion was an affidavit by Mr. Vu, based on his letter, in which he stated that he "heard the Judge mention [] that my next court appearance is scheduled for March 24, 2003. However, the correct Court date is February 24, 2003 (as shown on the Notice of Hearing in the Removal Proceedings). This is the reason why I failed to appear in Court on February 24, 2003." BX 16 at 92. The affidavit did not mention that Mr. Vu had relied on Respondent to inform him of the correct date.

26. Respondent argued in the motion that the Immigration Judge had orally informed Respondent and Mr. Vu that the next hearing date was March 24, 2003 at 1:00 p.m. BX 16 at 90.

27. On April 16, 2003, the Immigration Court issued an order denying the motion to reopen. (BX 16 at 83. The motion was denied based on the grounds that the "Court stated twice on the record that Respondent's next hearing was scheduled for February 24, 2003. The Court also provided Respondent with a written notice indicating that the hearing was scheduled for February 24, 2003." BX 16 at 84-85.

28. The Immigration Court cited that the proper standard for granting the motion to reopen was whether the "failure to appear was due to exceptional circumstances." BX 16 at 84.

29. Mr. Vu received the order denying the motion approximately two to three days after it was issued. May 22, 2007 Tr. at 50:7-10.

30. Respondent concedes that he did not use the correct standard in his Motion to Reopen Removal Proceedings. May 22, 2007 Tr. at 167:5 – 169:21.

31. Respondent acknowledges, however, that his use of the incorrect standard "most likely" resulted in the Immigration Court's denial of the Motion to Reopen. May 22, 2007 Tr. at 170:2-12.

32. Mr. Vu hired another attorney, Andrew Vazquez, Esquire, shortly after he received the order denying the motion to reopen. May 22, 2007 Tr. at 48:16 - 49:4.

33. Mr. Vasquez instructed Mr. Vu that he would need to see Mr. Vu's file from Mr. Thai. May 22, 2007 Tr. at 49:5-11.

34. Mr. Vu attempted to get his file from Respondent two days after he hired Mr. Vasquez. May 22, 2007 Tr. at 50:20 - 51:1.

35. Respondent refused to turn Mr. Vu's file over to him. May 22, 2007 Tr. at 50:5 - 52:6.

36. When Mr. Vu went to obtain his file, the encounter apparently became heated and Respondent called the police. May 22, 2007 Tr. at 51:19 – 52:6

37. Mr. Vazquez also requested Mr. Vu's file from Respondent. BX 9 at 4.

38. Mr. Vazquez called Respondent and asked for the file and did not receive it. May 22, 2007 Tr. at 85:20 - 86:10.

39. Mr. Vu went to Respondent's office a second time and received the file. May 22, 2007 Tr. at 52:13-21.

40. Mr. Vazquez finally received Mr. Vu's file on April 28, 2003. May 22, 2007 Tr. at 91:19-21.

41. Mr. Vazquez decided to file a Motion to Reconsider the Court's denial of the Motion to Reopen.

42. Mr. Vazquez had a short time frame – 30 days from April 16 -- to file a motion to reconsider. May 22, 2007 Tr. at 86:11-16.

43. Mr. Thai offered to prepare the Motion to Reconsider, without charge, and to "remedy [his] 'oversight,'" but Mr. Vu declined that offer. BX 9 at 2; May 22, 2007 Tr. at 91:1-18.

44. Mr. Vazquez raised several new arguments in his Motion to Reconsider. He argued that he "was trying to show to the Immigration court that Mr. Vu was not even

deportable (because the crime he had been convicted of was a misdemeanor) so he should not have been in proceedings in the first place." May 22, 2007 at 101:10-12.

45. Mr. Vazquez also argued that Mr. Vu was eligible for lawful permanent residence through a visa petition approved by his wife, who is a United States citizen. May 22, 2007 at 103:1 - 104:1.

46. Mr. Thai did not argue either of these points during his representation of Mr. Vu.

47. Denyse Sabath, Esquire, was qualified as an expert in the area of immigration law and practice. May 22, 2007 Tr. at 125:21 - 126:7.

48. Ms. Denyse Sabath, Esquire has been practicing law for almost thirty years and specializes in immigration law. She is "a former national president of American Immigration Lawyers Association; former general counsel of the American Immigration Lawyers Association, and advisor to the Clinton transition team or [sic] immigration; speak[s] and write[s] regularly on immigration issues before bar associations, community organizations business organizations [and] has been interviewed as an expert in immigration by national and international media." May 22. 2007 Tr. at 125:9–20.

49. In Ms. Sabath's opinion, Mr. Thai did not "serve[] Mr. Vu with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." May 22, 2007 at 126:9-14.

50. According to Ms. Sabath, Mr. Thai did not

> calendar his case so that he didn't give notice to his client to remind his client about the hearing; he cited the wrong standard in his Motion to Reopen, he didn't prepare his witness, his client for court for the February 23rd 2003 – February 24th 2003 court hearing. And in terms of the allegations which are denying allegations of deportability, usually if you have a criminal case you would usually put the government to its burden of proof and have the government prove the grounds of deportability.

May 22, 2007 Tr. at 127:17 - 128:6.

51. Ms. Sabath also opined that it would have been good practice for Respondent to check the notice and calendar the date.

> A. When you walk out of the courtroom you get the Scheduling Notice from the court and usually it is you know, kind of chaotic. So you go back, usually what you do is go back to your office, you know, make a copy of the Scheduling Notice, send a letter to the client with the Scheduling Notice saying this is what happened in court today, and your next hearing is scheduling for such-and-such a day, such-and such a time had [sic] such-and-such a place and that you need to be there, and that we will be in touch to follow up with regard to trial reparation or whether or not any other documentation was needed.
>
> Q. Based on the documentary records that you reviewed as well as the testimony that you heard here today is there any evidence that occurred?
>
> A. I didn't see anything in the file that I reviewed.
>
> Q. And did you hear anything like that in the testimony?
>
> A. I didn't hear anything in the testimony.
>
> Q. And in your opinion that falls below the standard of care
>
> A. Yes.

May 22. 2007 Tr. at 134:21-135:22.

52. According to Ms. Sabath, Mr. Thai used a "reasonable cause" standard in his Motion to Reopen when the appropriate standard is "exceptional circumstance." May 22, 2007 Tr. at 137:18 – 139:1.

53. Ms. Sabath testified that Respondent did not adequately prepare his client for his 2002 merits hearing. She would have expected Respondent to undertake a more detailed preparation than only going over the prepared questions in the car on the way to the hearing. May 22, 2007 Tr. at 130:16 – 132:14.

54. Ms. Sabath also testified that she would have expected that other witnesses would have been called at the merits hearing. May 22, 2007 Tr. at 132:15 - 134:16.

55. Ms. Sabath described the deportation order as a "very serious consequence." May 22, 2007 Tr. at 137: 5-13.

56. Mr. Thai based his Motion to Reopen on an allegation that the Immigration Judge gave the wrong date orally at the hearing. Ms. Sabath testified that with respect to that allegation, Mr. Thai had an obligation to listen to the tape of the hearing to make sure that his argument was accurate. May 22, 2007 Tr. at 139:2 – 139: 11.

57. Mr. Thai maintained at the hearing that he did not make an error in the hearing date. May 22, 2007 Tr. at 160:10-14.

58. On the tape of the hearing, the Immigration Court judge states that the hearing will be held on February 24, 2003. BX 18.

IV. CONCLUSIONS OF LAW

Bar Counsel has alleged violations of Rules 1.1(a) (a lawyer must provide competent representation), 1.1(b) (a lawyer must serve a client with skill and care), Rule 1.3(a) (a lawyer must represent a client zealously and diligently within the bounds of the law), 1.3(c) (a lawyer must act with reasonable promptness in representing a client, 1.4(a) (a lawyer must keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, 1.16(a)(2) (a lawyer must withdraw from representation if . . . the lawyer's physical or mental condition materially impairs the lawyers ability to represent the client [.], and 1.16(d) (a lawyer must surrender papers and property to which the clients is entitled, and refunding any advance payment of fee that has not been earned. Respondent disputes that he has violated any ethical rules. The Hearing Committee finds Bar Counsel proved all the alleged violations, with the exception of Rule 1.16(a)(2) which it did not pursue. [2]

A. Rule 1.1 Competence

Rule 1.1 provides:

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[2] See Note 1, *supra*, at page 2.

> (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

Bar Counsel argues that Respondent violated Rule 1.1(a) and Rule 1.1(b) because (1) he did not argue that Mr. Vu's prior conviction did not support deportation; (2) he did not properly prepare for the trial on the merits; (3) he did not calendar the proper date for the trial on the merits and failed to verify the proper date; and (4) he used the wrong legal standard and an argument that could not be supported (that the trial judge gave the wrong trial date) in the Motion to Reopen. Bar Counsel's Proposed Findings of Fact at 9-10. In effect, Bar Counsel argues that Respondent mishandled Mr. Vu's entire deportation proceedings.

Respondent does not concede any of these arguments. It must be pointed out that Respondent's testimony and Respondent's Answer to Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation As To Sanction ("Respondent's Answer") were both often rambling and difficult to follow.[3] It was difficult at times for the Committee to discern the point of Respondent's arguments, but certain points seem relatively clear.

Respondent argues that he did not err in not arguing that Mr. Vu's conviction did not support deportation. He maintains his position that Mr. Vu should have conceded deportation. Respondent's Answer at 8.

Respondent also does not concede that he did not properly prepare Mr. Vu for his trial on the merits. Mr. Vu disputes that the only time that he went over the questions for

[3] Moreover, Respondent filed his brief with a Motion for Leave to File Brief Out of Time approximately two and one-half months after the filing of Bar Counsel's Proposed Findings of Facts. Bar Counsel did not oppose the Motion for Leave. Respondent apparently suffers from diabetes, suffered a diabetic attack and has had difficulty finding the necessary time to complete his brief. Considering the circumstances and Bar Counsel's lack of opposition, the Chair grants Respondents Motion for Leave and will consider the brief.

the hearing with Mr. Vu was in the car before the hearings on July 26, 2001, and January 28, 2002. He states that:

> Mr. Vu's allegations according to which this Respondent only reviewed the questions with him while driving (Respondent was the driver each time at each Court appearance) are **totally incorrect**. It should be noted that Mr. Vu never uttered any complaint or suggested that he preferred to be "drilled in Counsel's office for such an important matter to him. Besides, how can Respondent discuss the questions with Mr. Vu if Mr. Vu and himself had not had a work session shortly before that in Respondent's office. **How can Respondent read the questions to Mr. Vu while he was driving!**

Respondent's Answer at 3 (emphasis in original). The Committee finds Mr. Vu's testimony more credible in this regard and finds that Respondent's preparation was done in the car on the way over to the July, 26, 2001, and the January 28, 2002 hearings by going over some prepared questions regarding his background, family relationships and activities in the United States. The Committee does not find credible Respondent's statement that he "also spent several hours with Mr. Vu to 'drill' him about the questions respondent will ask him (and how to answer to them) at the Merit Hearing." Respondent's Answer at 8.

Respondent still maintains that the Immigration Judge orally said that Mr. Vu's trial on the merits would be held on March 24, 2003. That continued assertion is puzzling. At Respondent's disciplinary hearing, the Committee listened to the tape of the immigration hearing and the Immigration Judge orally stated that Mr. Vu's next hearing would be on February 24, 2003. The hearing notice says that Mr. Vu's hearing would be on February 24, 2003. BX 16 at 102. Respondent, however, almost seems to argue that the tape might have been altered. Respondent states:

> With all due respect to the Office of the Bar Counsel of the District of Columbia, it is respectfully submitted to the Chairperson and the Committee members that Bar Counsel's afore-mentioned finding "hinged his motion on the inaccurate assertion that the Immigration Judge scheduled the next hearing for March 24, 2003 without making the effort to listen to the tape of the hearing, which clearly revealed that the judge

> stated that the hearing would occur on Monday, February 24, 2003" is only **remotely correct**. In fact, Mr. Vu and respondent both heard that the Judge stated that the Hearing would occur on March 24, 2003. **The reason Respondent did not want to listen to the tape of the Hearing** after Mr. Vu and himself failed to appear for the February 24, 2003 Hearing is **that the Immigration Court staff would have certainly reviewed the tape** following Mr. Vu's and Respondent's failure to show up in Court on that date. It is respectfully submitted to the Chair and Committee Members that a little over ten (10) years ago both the former U.S. Immigration and Nationality Service (INS) and the Immigration Court are entities within the U.S. Department of Justice were very tightly organized "units" similar to that of small-town-sheriff-offices or "all boys clubs" often governed by despotism and favoritism, where discriminatory practices were not uncommon.

Respondent's Answer at 4-5 (emphasis in original). The Committee finds that on the tape the judge clearly states that the next hearing for Mr. Vu would be on February 24, 2003. In any event, Respondent also had a written notice with the date of the hearing.

Respondent concedes that he did not use the correct standard in his Motion to Reopen Removal Proceedings. May 22, 2007 Tr. at 167:5 – 169:21. He maintains, however, that he was entitled to use a lower standard because of his position that the judge orally stated the wrong date for the February 24, 2003 hearing. In other words, Respondent argues that because it was a mistake of the court, he could use a lower standard. Respondent acknowledges, however, that his use of the incorrect standard "most likely" resulted in the Immigration Court's denial of the Motion to Reopen. May 22, 2007 Tr. at 170:2-12.

Rule 1.1(a) requires that a lawyer represent his client with "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1(a). Rule 1.1(a) requires a certain level of diligence in staying up to speed on the legal and procedural developments in the case being handled. As Bar Counsel points out:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate and continuing attention to the needs of the representation to assure that there is no neglect of such needs.

Bar Counsel's Proposed Findings of Fact at 11 (citing *In re Drew*, 693 A.2d 1127, 1132 (D.C. 1997)) (appending and incorporating Board Report citing to Comment 5 to Rule 1.1(a)).

The Committee finds that Respondent did not meet the standard of care required under Rule 1.1(a). Respondent's failure was three-fold. First, it appears that he did not stay current with or take steps to learn the relevant area of immigration law. Thus, he failed to argue that Mr. Vu's conviction was not grounds for deportation. Second, he failed to keep track of Mr. Vu's next hearing date with the result that the hearing date was missed and he was ordered deported *in absentia*. Third, he used the incorrect standard in his Motion to Reopen.

Bar Counsel points out that there is no requirement to prove that Respondent intentionally violated Rule 1.1(a) (Bar Counsel's Proposed Findings of Fact at 10) and the Committee finds that Respondent's violations were not intentional. Respondent truly appears to be a good hearted and well meaning individual. That he failed to meet the standard of care under Rule 1.1(a) was not done maliciously or intentionally. Respondent, however, failed to provide Mr. Vu with the requisite level of representation for the matter that he agreed to handle. He did not maintain the proper recordkeeping or docket system, was not knowledgeable about the law, and did not use the proper standard of the law in moving to reopen Mr. Vu's case.

Bar Counsel has proved by clear and convincing evidence that Respondent violated Rule 1.1(a).

Rule 1.1(b) requires that a lawyer "serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar circumstances." Bar Counsel presented a credible expert witness who was able to provide the Committee with guidance on the standard of care for Respondent's representation of Mr. Vu. Denyse Sabath, Esquire, has been practicing law for almost thirty years and specializes in immigration law. She is "a former national president of

American Immigration Lawyers Association; former general counsel of the American Immigration Lawyers Association, and advisor to the Clinton transition team or [sic] immigration; speak[s] and write[s] regularly on immigration issues before bar associations, community organizations business organizations [and] has been interviewed as an expert in immigration by national and international media." May 22. 2007 Tr. at 125:9–20.

Ms. Sabath testified that Respondent did not meet the standard of care with respect to his preparation for the hearings (May 22, 2007 Tr. at 130:16 – 132:14), his calendaring of the hearing (May 22, 2007 Tr. at 127:17 - 128:6), and because of his use of the inappropriate standard for the motion to reopen (May 22, 2007 Tr. at 137:18 – 139:1). Her testimony was not rebutted. In summary, Ms. Sabath testified that Mr. Thai did not "serve[] Mr. Vu with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." May 22, 2007 at 126:9-14.

More specifically, according to Ms. Sabath, Mr. Thai did not

> calendar his case so that he didn't give notice to his client to remind his client about the hearing; he cited the wrong standard in his Motion to Reopen, he didn't prepare his witness, his client for court for the February 23rd 2003 – February 24th 2003 court hearing. An in terms of the allegations which are denying allegations of deportability, usually if you have a criminal case you would usually put the government to its burden of proof and have the government prove the grounds of deportability.

May 22, 2007 Tr. at 127:17 - 128:6.

Moreover, Mr. Thai based his Motion to Reopen on an allegation that the Immigration Judge gave the wrong date orally at the hearing. Ms. Sabath testified that with respect to that allegation, Mr. Thai had an obligation to listen to the tape of the hearing to make sure that his argument was accurate. May 22, 2007 Tr. at 139:2 – 139:11.

It should also be pointed out that Mr. Vazquez raised new arguments in his Motion to Reconsider. He argued that he "was trying to show to the Immigration court

that Mr. Vu was not even deportable (because the crime he had been convicted of was a misdemeanor) so he should not have been in proceedings in the first place." May 22, 2007 at 101:10-12. Mr. Vazquez also argued that Mr. Vu was eligible for lawful permanent residence through a visa petition approved by his wife, who is a United States citizen. May 22, 2007 at 103:1 - 104:1. Mr. Thai did not argue either of these points during his representation of Mr. Vu.

The Committee is convinced that Respondent's representation of Mr. Vu fell below the requisite standard of care and Bar Counsel has proved by clear and convincing evidence that Respondent violated Rule 1.1(b).

B. Rule 1.3 Diligence and Zeal

Bar Counsel alleges that Respondent violated Rules 1.3(a) and (c). Rules 1.3 (a) and (c) provide

> (a) A lawyer shall represent a client zealously and diligently within the bounds of the law.
>
> (c) A lawyer shall act with reasonable promptness in representing a client.

Violations of Rules 1.3(a) and 1.3(c) arise when a lawyer "fail[s] to take action for a significant time to further a client's cause regardless of whether prejudice to the client results." *In re Starnes* 829 A.2d 488, 503 (D.C. 2003) (citation omitted) (from appended Board report).

The Committee finds that Respondent violated Rules 1.3(a) and 1.3(c) in two respects. First, he failed to prepare his client properly for his merits hearing. It is true that Mr. Vu never went through a merits hearing and this fact does give the Committee some pause in determining if there was a violation of Rule 1.3. There is no requirement, however, that prejudice results from the lawyer's violation. Although Mr. Vu never went through the merits hearing, if it had been necessary for him to go through the hearing,

there is a serious question as to whether he would have been adequately prepared with the preparation that he received.

Bar Counsel's expert testified that she would have expected Respondent to undertake a more detailed preparation than only going over the prepared questions in the car on the way to the hearing. May 22, 2007 Tr. at 131:21 - 132:14. She also testified that she would have expected that other witnesses would have been called at the merits hearing. May 22, 2007 Tr. at 132:15 - 134:16. Respondent's testimony that he prepared Mr. Vu at other times and that he prepared his family members to testify was simply not credible. Respondent failed to "zealously and diligently" represent Mr. Vu. If he had zealously and diligently represented him, he would have undertaken a more thorough preparation of Mr. Vu for his merits hearing and would have also been prepared to call additional witnesses on Mr. Vu's behalf.

Second, Respondent failed to maintain a proper tracking or monitoring system so that he would be aware of the correct date for Mr. Vu's merits hearing. As a result, Mr. Vu missed his hearing on February 24, 2003. Bar Counsel's expert testified that it would have been good practice for Respondent to check the notice and calendar the date.

> A. When you walk out of the courtroom you get the Scheduling Notice from the court, and usually it is you know, kind of chaotic. So you go back, usually what you do is go back to your office, you know, make a copy of the Scheduling Notice, send a letter to the client with the Scheduling Notice saying this is what happened in court today, and your next hearing is scheduled for such-and-such a day, such-and–such a time had [sic] such-and-such a place and that you need to be there, and that we will be in touch to follow up with regard to trial preparation, or whether or not any other documentation was needed.
>
> Q. Based on the documentary records that you reviewed as well as the testimony that you heard here today is there any evidence that occurred?
>
> A. I didn't see anything in the file that I reviewed.
>
> Q. And did you hear anything like that in the testimony?
>
> A. I didn't hear anything in the testimony.

Q. And in your opinion that falls below the standard of care?

A. Yes.

May 22, 2007 Tr. at 134:21- 135:22.

The Committee finds that Bar Counsel has proved violations of Rules 1.3(a) and (c) by clear and convincing evidence.

C. Rule 1.4 Communications

Bar Counsel alleges that Respondent violated Rule 1.4(a), which provides:

Rule 1.4 – Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

The plain language of this Rule requires that a lawyer keep the client updated and informed. The more credible evidence in the record is that Respondent did neither. Mr. Vu credibly testified that either he or a relative attempted to find out what the next steps would be in his immigration proceedings. He called Respondent "a few weeks" after the January 28, 2002 hearing and was told that nothing was needed to be done. May 27, 2007 Tr. at 38:6-13. At the time of the Chinese New Year in February, 2003, Mr. Vu's wife attempted to obtain some information regarding the next hearing date, specifically asking when that next date would be. Respondent did not provide any information. May 27, 2007 Tr. at 40:10 - 41:11. This course of action proceeded until Mr. Vu received a notice that he had been ordered deported *in abstentia*. Respondent acknowledged that he believed the hearing was in March, 2003. It makes sense that Respondent could not have been in touch with Mr. Vu with respect to any February hearing -- he believed one did not exist:

> The guiding principle for evaluating conduct under Rule 1.4(a) "is whether the lawyer fulfilled the client's 'reasonable . . . expectations for information.'" *In re Schoenenman*, 777 A.2d 259, 264 (D.C. 2001) (citations omitted). To meet that expectation, a lawyer not only must respond to client inquiries but also must initiate communications to provide information when needed. *See* Rule 1.4(a) cmt 1.

In re Hallmark, 831 A.2d 366, 374 (D.C. 2003).

As a result of his not calendaring the hearing date for Mr. Vu's next hearing, Respondent was not in a position to keep his client updated on the status of his case. He also failed to respond to either Mr. Vu's or his wife's request for information regarding the status of Mr. Vu's case. Both of these actions violated Rule 1.4(a).

D. Rule 1.16 Declining or Terminating Representation

Bar Counsel alleges that Respondent violated Rule 1.16, which provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

Respondent did not promptly return Mr. Vu's file to him. Both Mr. Vu and Andrew Vazquez (Mr. Vu's new attorney) credibly testified about the sequence of events. From the testimony and evidence, it appears that Mr. Vu first attempted to get his file back from Respondent shortly after he received the April 16th order from the Immigration Court that denied Respondent's motion to reopen. Approximately four to five days after the order was issued, Mr. Vu hired Mr. Vazquez as his new attorney. Mr. Vazquez testified that Mr. Vu first visited him on April 22, 2003. May 22, 2007 Tr. at 85:15-16. Mr. Vazquez informed Mr. Vu that he needed to get his file from Respondent. Mr. Vu went to Respondent's office to get the file, but Respondent did not turn over the file. May 22, 2007 Tr. at 50:20- 52:6. When Mr. Vu went to obtain his file on the first occasion, the encounter apparently became heated and Respondent called the police. May 22, 2007 Tr. at 51:19 – 52:6 -- a situation that would not have occurred if Respondent had simply returned the file.

Mr. Vazquez called Respondent and asked for the file and did not receive it. May 22, 2007 Tr. at 85:20 - 86:10. Mr. Vazquez then instructed Mr. Vu to again go to

Respondent's office for the file. On Mr. Vu's second visit to Respondent's office he received the file, which he then turned over to Mr. Vazquez. May 22, 2007 Tr. at 52:13 – 53:4. Mr. Vazquez credibly testified that he received the full file on April 28th (although he received some papers in the interim). May 22, 2007 Tr. at 91:19-21.

In total, there were approximately five days from the time that Mr. Vu first requested his file to the time that he received it. At first glance, this does not seem like an extraordinary amount of time. Other cases have found violations of this Rule based on delays of "one year and one-half and repeated efforts by new counsel – and ultimately Bar Counsel – to obtain full release of client documents and the remaining PIP funds." *See, e.g., In re Arneja*, 790 A.2d 552, 558. What makes the timing especially critical in this case however, is that Mr. Vazquez had a short time frame – 30 days from April 16 -- to file a motion to reconsider. May 22, 2007 Tr. at 86:11-16. What also makes Respondent's actions troubling is that he did not immediately accede to Mr. Vu's request, but instead intended to hold on to the file and continue to work on the case, despite being told by Mr. Vu that he had hired another attorney. Instead, Mr. Thai offered to prepare the Motion to Reconsider, without charge, and to "remedy [his] 'oversight,'" but Mr. Vu declined that offer. BX 9 at 2; May 22, 2007 Tr. at 91:1-18.

In short, Respondent should have given Mr. Vu his file immediately upon his request. *See In re Landesberg*, 518 A.2d 96, 102 (D.C. 1986) (quoting *In re Russell* 424 A.2d 1087, 1088 (D.C. 1980)). A client should not have to ask twice for his file. *In re Landesberg*, 518 A.2d at 102.

Given the extraordinary circumstances of Mr. Vu's need for the file, within a short amount of time, and Respondent's obligation to give the file back immediately upon request, the Committee finds that Mr. Vu violated Rule 1.16 by not giving Mr. Vu his file back immediately when he asked for it.

V. RECOMMENDED SANCTION

A. Factors considered

The factors considered by the Court when considering the appropriate sanction after a finding of misconduct include: the seriousness of the violation, prejudice to the client, any mitigating and aggravating factors, the need to protect the public, the courts and the legal profession, and the moral fitness of the attorney. *See In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *see also In re Slattery*, 767 A.2d 203, 214-5 (D.C. 2001). Other factors to consider include the presence of misrepresentation or dishonesty, Respondent's attitude toward the underlying misconduct, prior disciplinary violations and violations of other code provisions. *In re Wright*, 702 A.2d 1251, 1256 (D.C. 1997); *In re Waller*, 573 A.2d 780, 784-785 (D.C. 1990). The Committee looks at four violations of Respondent: (1) the failure to adequately prepare his client for an immigration hearing on the merits; (2) the failure of Respondent to appear with his client at an immigration hearing on the merits; (3) the failure of Respondent to use the correct legal standard in his motion to reopen; and (4) the failure of Respondent to promptly return his client's files. Considering these violations and all of the relevant factors, the Committee recommends a sanction of a 60-day suspension stayed and one year unsupervised probation. Upon satisfactory completion of the probation, the suspension order would expire of its own force. The Committee also recommends that Respondent be ordered to attend six hours of continuing legal education courses in legal ethics and law office management as approved by Bar Counsel and pay restitution to Mr. Vu in the amount of $4,500 with interest at the legal rate as conditions of probation. The Committee recommends this sanction based upon Respondent's attitude toward the underlying misconduct, the prejudice to the client, the need to protect the public, the courts and the legal profession and the violation of multiple code provisions. All of these factors support the imposition of what may appear to be a somewhat severe sanction (in excess of the sanction requested by Bar Counsel), but the totality of Respondent's conduct supports this recommendation.

The Committee recognizes that this is the exception rather than the rule. In *In re Cleaver-Bascombe*, the Court stated:

> Our disciplinary system is adversarial – Bar Counsel prosecutes and Respondent's attorney defends – and although the court is not precluded from imposing a more severe sanction that that proposed by the prosecuting authority, that is and surely should be the exception, not the norm, in a jurisdiction, like ours, in which Bar Counsel conscientiously and vigorously enforces the Rules of Professional Conduct.

892 A.2d 396, 415 n.14 (D.C. 2006). Based on the gravity of Respondent's conduct, and the factors considered in determining what sanction to recommend, the Committee feels that such an exception is warranted.

B. Respondent's Attitude Toward the Underlying Misconduct

Quite simply, Respondent does not recognize the seriousness of his misconduct. Throughout the hearing, Respondent made numerous excuses for why he did not make the hearing and continued to say that the judge gave the wrong date for the hearing (March 24, 2003), despite the tape in which the Committee heard the judge say that the hearing would be on February 24, 2003. He also stood by his position that the preparation that he had undertaken with Mr. Vu for his merits hearing was adequate. Furthermore, Respondent had great difficultly acknowledging that he used the wrong standard for Mr. Vu's Motion to Reopen. Even then, he appeared to argue that he was entitled to use the incorrect standard because of an error by the judge. Finally, Respondent also did not see that he caused inexcusable delay in returning Mr. Vu's files to him, despite the clock ticking on the time for Mr. Vu to file his motion to reconsider. All of these positions by Respondent show that he did not consider his conduct deficient and still believes that there were valid and justifiable reasons for it.

C. The Prejudice to the Client

The prejudice to the client from Respondent was and is severe. Mr. Vu faces deportation from this country and possible separation from his family. Bar Counsel's expert described the deportation order as a "very serious consequence." May 22, 2007 Tr. at 137: 5-13. His situation is a direct consequence of the actions or failures to act of Respondent. This prejudice strikes the Committee as extreme and warrants a more severe sanction than that recommended by Bar Counsel.

D. The Need to Protect the Public, the Courts and the Legal Profession

It is clear that Respondent needs to implement some safeguards in his practice of the law in order to ensure that he can practice law in a conscientious and responsible manner. Until that is done, the Committee sees a clear need to protect the public, the courts, and the legal profession from Respondent's haphazard and unorganized methods of the practice of law and his serious failure to keep up to date with current legal standards in the area of immigration law. It is this need that underlies the recommendation that Respondent take a course on legal ethics and law office management. The Committee hopes that such a course will provide Respondent with much needed guidance in how to manage his practice.

E. The Violation of Multiple Code Provisions

Respondent violated multiple provisions of the Rules. The violations stem from four basic acts of misconduct: the failure to prepare his client properly; the failure to attend a hearing date; the use of the wrong legal standard in the motion to reopen; and the failure to promptly return Mr. Vu's files. The Committee has found that these actions support a violation of six Rules (including the subparts). While many of the violations are connected, Respondent had times when he could have avoided some of the violations, and he did not. The volume of these violations supports the recommended sanction.

F. Recommended Sanction

As indicated *supra*, the Committee recommends a sanction of a 60-day suspension stayed and one year unsupervised probation. The Committee also recommends that Respondent be ordered to attend six hours of continuing legal education courses in legal ethics and law office management as approved by Bar Counsel and pay restitution to Mr. Vu in the amount of $4,500 with interest at the legal rate as conditions of probation.

This sanction exceeds what Bar Counsel recommends. Bar Counsel refers to cases in which a 30-day stayed suspension was deemed adequate. *See In re Long*, 902 A.2d 1168, 1172 (D.C. 2006); *In re Boykins*, 748 A.2d 413 (D.C. 2000). In both *In re Long* and *In re Boykins*, the respondents appeared to have at least acknowledged their violations of the Rules. *See In re Long*, 902 A.2d at 1170; *In re Boykins*, 748 A.2d at 414. Respondent committed multiple violations and does not acknowledge any of them. Nor has he indicated that he intends to change any aspects of his practice. Respondent's demeanor during the hearing and his filings all point to the fact that Respondent does not see any problems in his method of practice and, instead, looks to blame others for Mr. Vu's predicament. Moreover, the prejudice to Mr. Vu in the instant case is far more severe than the prejudice in *Boykins* or *Long*. Mr. Vu faces possible deportation. The Committee believes that the totality of the circumstances require a more lengthy suspension than recommended by Bar Counsel in this circumstance.

Respondent's case may be analogized to *In re Outlaw*, 917 A.2d 684 (D.C. 2007). In *Outlaw*, the respondent missed the statute of limitations and concealed that information from her client. The respondent was suspended for 60 days. While it is true that *Outlaw* contained the element of dishonesty, which this case does not, the cases may be viewed as comparable when the severe prejudice to Mr. Vu and Respondent's failure to acknowledge his error are taken into consideration. The Committee might be more inclined to agree with Bar Counsel's recommendation of a 30-day stayed suspension if it

felt that Respondent realized the seriousness of and accepted his errors and was determined to alter his practice to avoid a repetition of those errors.

Because Respondent acknowledges no problems with his method of practice, probation also is recommended. "The Board reasons that probation has been employed not only in cases of attorney disability, but also where the neglect at issue resulted from 'some systemic problem in a respondent's practice which could effectively be addressed by conditions requiring remedial measures.'" *In re Mance*, 869 A.2d 339, 341-342 (D.C. 2005). This argues in favor of a probation period where Respondent is required to take six hours of continuing legal education courses in legal ethics and law office management approved by Bar Counsel.

Finally, restitution of the legal fee is required because, although Respondent did undertake some actions on behalf of Mr. Vu, he did not undertake the minimum required to adequately represent Mr. Vu in his immigration proceedings. Mr. Vu faces the serious possible consequences from Respondent's failures – deportation. Respondent should not be permitted to benefit from this representation.

VI. CONCLUSION

In conclusion, the Committee recommends a sanction of a 60-day stayed suspension and one year of unsupervised probation. Upon satisfactory completion of the probation, the suspension order would expire of its own force. The Committee also recommends that Respondent be ordered to attend six hours of continuing legal education courses in legal ethics and law office management as approved by Bar Counsel within the first six months of his probation and pay restitution in the amount of $4,500 with interest at the legal rate to Mr. Vu as conditions of probation. The Committee only hopes that the

sanction recommended, if imposed will result in Respondent realizing that his actions had serious consequences and that he should take steps to remedy the circumstances of his practice that contributed to the violations.

HEARING COMMITTEE NUMBER ELEVEN

By: Patricia G. Butler
Patricia G. Butler
Chair

Lula Ivey /pgb
Lula Ivey

Joan Strand /pgb
Joan Strand

Dated: DEC - 7 2007