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

In the Matter of:	:	
	:	
Toan Q. Thai,	:	
	:	Board Docket No. 14-BD-026
Respondent.	:	Bar Docket No. 2009-D316, 2009-
	:	D357, 2012-D256, 2013-D132, &
A Suspended Member of the Bar of the	:	2013-D167
District of Columbia Court of Appeals	:	
(Bar Registration No. 439343)	:	

Report and Recommendation

Bar Counsel charges Respondent Toan Q. Thai with many serious violations of the District of Columbia Rules of Professional Conduct arising from his representation of clients in immigration matters. Bar Counsel describes an attorney completely unmoored from his professional responsibility, who took clients' money but failed to keep it safe; who neglected the clients' cases, avoided their calls, and kept them from information they needed to know; who refused to return the clients' files or fees he did not earn; who continued to practice law and take on clients after his license to practice law was suspended; who lied to his clients and the courts; and who failed to cooperate with Bar Counsel's investigation. Bar Counsel charges that Respondent's neglect lasted for years, a delay that in one case resulted in prejudice to his client. Bar Counsel alleges this conduct violated Rules 1.1(a) and (b); 1.2(a); 1.3(a), (b)(1), and (c); 1.4(a) and (b); 1.5(b); 1.15(a); 1.16(d); 1.19(a); 3.3(a); 5.5(a); 8.1(b); and 8.4(b), (c), and (d). Bar Counsel recommends that Respondent be disbarred for his misconduct. Respondent has not participated in these proceedings.

The matter is before Hearing Committee Number Nine, consisting of Theodore (Jack) Metzler, Esq., Chair; Thomas DiLeonardo, Esq., Attorney Member; and Mr. Joel Kavet, Public Member. As described below, the Hearing Committee finds by clear and convincing evidence that Respondent committed nearly all of the violations in the Specification of Charges. The Hearing Committee recommends that Respondent be disbarred.

I. Procedural History

On March 19, 2014, Bar Counsel personally served Respondent with a Petition Instituting Formal Disciplinary Proceedings and the Specification of Charges. BX D.[1] Respondent did not answer the Specification within the time required by Board Rule 7.5. A pre-hearing conference was held on June 11, 2014. Bar Counsel was represented by Assistant Bar Counsel Traci M. Tait, Esq. Although Respondent received notice of the pre-hearing conference, he did not appear, nor did counsel appear on his behalf.

The Chair noted for the record that Respondent had the right to proceed pro se or to be represented by counsel, and that Board Rule 19.5 provides for the appointment of counsel if Respondent is indigent. The Chair also recited the consequences provided in the Board Rules for failing to answer the Specification, and permitted Respondent until June 23, 2014 to file his answer, accompanied by a motion to late-file. After further discussion, the Chair extended Respondent's time to answer until 20 days after Bar Counsel filed an amended Specification of Charges. On July 2, 2014, the Hearing Committee Chair issued an order memorializing the pre-hearing conference, and directing service of the transcript upon Respondent at his address of record with the Bar.

[1] BX refers to Bar Counsel's exhibits. "Tr." refers to the transcript of the hearing.

On July 8, 2014, Bar Counsel filed an Amended Specification of Charges to (i) correct a scrivener's error in Count One to refer to Rule 8.1(b), rather than 8.1(a); and (ii) specify dishonesty as the basis for the alleged violation of Rule 8.4(c) charged in Counts One, Three, and Four of the Specification of Charges. Respondent did not answer the Specification.

A two-day hearing was held on September 9 and 10, 2014. Respondent did not appear, either in person or through counsel. At the outset of the hearing, the Chair noted that both the order memorializing the pre-hearing conference and a transcript were mailed to Respondent, that neither document was returned in the mail, and that Respondent thus had notice of the hearing. Tr. 4. The Chair also informed Bar Counsel that one member of the Hearing Committee would be unable to attend the second day of the hearing. Tr. 10-11. Bar Counsel consented to proceed on the second day with a quorum of the Hearing Committee present and the third member reading the transcript and participating in the decision. *See* Board R. 7.2; Tr. 95, 151.

Bar Counsel called six witnesses (Heesoek Lee, Hue Lan T. Nguyen, Nhung Le, Bich Thi Ngoc Huynh, Dobrina M. Dobreva, Esq., and Brandon Meyer, Esq.), four of whom (Lee, Nguyen, Le, and Huynh) testified through interpreters. Bar Counsel introduced Bar Exhibits A, B, D, E, 1, 1a-1f, 2, 2a-2i, 3, 3a-3c, 4, and 4a-4f,[2] which were admitted into evidence. Tr. 136, 212-13.

The Hearing Committee ordered post-hearing briefs. Bar Counsel timely filed its brief on November 4, 2014. Respondent did not file a brief.

[2] The prehearing order specified that proposed exhibits should be "in consecutive numerical order." This isn't exactly what we had in mind.

II. Findings of Fact

The Hearing Committee finds the facts below by clear and convincing evidence, unless otherwise noted. *See* Board R. 11.5.

A. Background

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on October 4, 1993, and assigned Bar No. 439343. BX A. He was admitted to practice law in Pennsylvania on December 20, 1991. *Id.*

2. On December 24, 2009, the District of Columbia Court of Appeals (the "Court") suspended Respondent for 60 days, stayed after the first 30 days in favor of one year's probation, for violations of Rules 1.1(a) (competent representation), 1.1(b) (skill and care), 1.3(a) (diligence and zeal), 1.3(c) (reasonable promptness), 1.4(a) (keeping client reasonably informed), and 1.16(d) (failure to promptly return client's file). *In re Thai*, 987 A.2d 428 (D.C. 2009); BX 4 at 3. On August 20, 2010, the Supreme Court of Pennsylvania suspended Respondent for 60 days as reciprocal discipline. Order, *In re Thai*, No. 08-BG-868 (Pa. Aug. 20, 2010); BX 4a at 11.1.

3. Respondent practices primarily in immigration matters. By order dated January 27, 2010, the Board of Immigration Appeals (BIA) suspended Respondent from practice before the BIA, immigration courts, and the Department of Homeland Security, pending an investigation based on the Court's December 24, 2009 order of suspension. BX 4; BX 4b at 12. On August 1, 2012, the Supreme Court of Pennsylvania suspended Respondent indefinitely as reciprocal discipline with the immigration courts.[3]

[3] The Disciplinary Board of the Supreme Court of Pennsylvania reports public information about Pennsylvania attorneys on its website, www.padisciplinaryboard.org. The public record of Respondent's suspension is suitable for judicial notice. *See Poulnot v. District of Columbia*, 608 A.2d 134, 141 (D.C. 1992).

4. As of August 4, 2014, Respondent had not been reinstated to practice by the BIA. BX 4c at 43.[4]

5. Respondent's law office was in California when he represented each of the clients in the cases at issue in these proceedings. *See* BX 1d (Nguyen and Le); BX 2 at 7 (Tang and Dang); BX 3 at 14 (Huynh); BX 4b at 15-23 (Do and Trinh); BX 4e at 74-80 (Lee).

B. Count I: Hue Lan T. Nguyen and Nhung Van Le (2009-D316)

6. On September 28, 2007, Hue Lan T. Nguyen, a naturalized citizen of the United States, and her husband Nhung Van Le retained Respondent to seek an adjustment of status (*i.e.* a "green card") for Le. Tr. 45 (Nguyen); BX 1 at 3. The adjustment of status was to be based on Nguyen's marriage to Le.

7. When they first went to his office, Nguyen and Le saw Respondent only briefly, meeting instead with Respondent's wife, who assists Respondent, and who became Nguyen and Le's primary contact with Respondent's office. Tr. 46-48 (Nguyen); BX 1e at 20.[5] Respondent's wife walked Nguyen and Le through paperwork that would be required to adjust Le's status. Tr. 46-48 (Nguyen). Nguyen and Le paid Respondent $1,500 at this initial meeting. BX 1 at 3, 18, 32. Respondent did not give Nguyen and Le

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[4] BX 4b is a list of disciplined attorneys from the Executive Office of Immigration Review website. A recent check of that page confirms that Respondent still has not been reinstated. *See* http://www.justice.gov/eoir/discipline.htm (July 27, 2015).

[5] Although Bar Counsel's exhibits 1 and 1a-1f are marked separately, Bar Counsel has added continuous page numbering that spans the entire set. *See* Tr. 140-141. Exhibit 1e, for example, begins on page 17. References in the text are to those page numbers. The page numbering restarts at 1 with exhibits 2, 3, and 4, continuing in each case through the subsequent exhibits that begin with the same number (2a-2i, 3a-3c, etc.).

a retention letter setting out the basis of his fee, the scope of the representation, or the expenses they would be responsible for. Tr. 92 (Nguyen); 116 (Le).

8. Respondent's wife directed Nguyen and Le to collect documents to support their petition, including a marriage certificate and an affidavit of a joint sponsor, who would pledge to financially support Le. Tr. 46, 83-84 (Nguyen); *see also* BX 1e at 88-106. Respondent's wife told Nguyen and Le that they needed a joint sponsor because Nguyen's income was insufficient on its own to support Le. Tr. 83-34 (Nguyen). Nguyen and Le obtained a marriage certificate showing that they were married October 9, 2007. BX 1e at 43; Tr. 82 (Nguyen). They also obtained an affidavit of support from Tong Nguyen, a friend of Le's. Tr. 83 (Nguyen). Tong Nguyen provided his certificate of naturalization, an employment verification letter dated May 17, 2007, and copies of his 2006 tax returns. BX 1e at 88-106.

9. Nguyen and Le returned to Respondent's office in November 2007, meeting again with Respondent's wife. Tr. 56. By the time the second meeting concluded, Respondent's office had prepared an application package to be filed with the immigration authorities. Tr. 48, 56 (Nguyen); BX 1e at 20, 27-106. Nguyen and Le signed various documents in the application package and paid Respondent an additional $1,705 (for a total of $3,205). Tr. 74-75 (Nguyen); BX 1 at 3, 18, 20, 32, BX 1e at 33, 44-48. Respondent's wife gave them a copy of the application package and told them they would soon receive a receipt showing that the application had been submitted. Tr. 55-56 (Nguyen). Respondent's wife also told them that Le would get his green card within two years. Tr. 58 (Nguyen), 106-110 (Le).

10. Respondent never submitted the application. BX 1e at 20.

11. In the ensuing weeks, Nguyen and Le did not receive any receipt from the immigration authorities. Tr. 56 (Nguyen). When they tried to find out the status of their case, they were permitted to speak only with Respondent's wife, who told them that their petition was being processed and that they would have to wait two years. Tr. 56-58 (Nguyen), 106-109 (Le); BX 1 at 4. Nguyen and Le attempted to learn the status of their case through dozens of telephone calls and several visits to Respondent's office. Tr. 57-58 (Nguyen), 109 (Le). In June 2009, Nguyen and Le visited Respondent's office and spoke with him personally, asking for their money back so that they could hire another attorney. BX 1 at 4; Tr. 66 (Nguyen). Respondent sent them out of his office, slammed the door, and told them they could sue him for their money back. Tr. 66, 86-87 (Nguyen).

12. Neither Respondent nor his wife ever informed Nguyen and Le that their application was never filed. Tr. 59 (Nguyen), 106-108, 110 (Le). Nguyen suspected as much because she never received a receipt from the immigration authorities. Tr. 57 (Nguyen); BX 1f at 107. In July 2009, Nguyen and Le went to the Santa Ana office of the U.S. Citizenship and Information Service (USCIS) to inquire about the status of their case. Tr. 60 (Nguyen); BX 1f at 107. They learned that there was no record of their case ever having been filed. Tr. 60-61 (Nguyen); BX 1 at 4; 1f at 107.

13. Nguyen then sued Respondent in small claims court. Tr. 61 (Nguyen); *see also Nguyen v. Thai*, No. 30-2009-291938 (Sup. Ct. Orange Co., Sm. Claims) (filed Aug. 11, 2009).[6] Although Nguyen received a judgment against Respondent, he did not pay her at first. Tr. 61, 64 (Nguyen); *Nguyen v. Thai*, Docket entry for Nov. 13, 2009 ("Case

[6] Although not included in Bar Counsel's exhibits, the docket for Nguyen's small claims suit is a public record suitable for judicial notice. *See Poulnot*, 608 A.2d at 141.

disposed of with disposition of judgment uncontested on 11/13/2009"). Nguyen informed the court that Respondent had not complied with its judgment, and scheduled a second court appearance. Tr. 63-64 (Nguyen); *Nguyen v. Thai*, Docket entry for Jan. 26, 2010. On their second court date, Respondent brought Nguyen to his office and refunded her $3,205. Tr. 64-65.

14. Nguyen and Le subsequently applied, successfully, to adjust Le's status without the assistance of an attorney. Tr. 67 (Nguyen), 110 (Le).

15. Nguyen and Le also filed a complaint with Bar Counsel. BX 1; Tr. 79 (Nguyen). On August 13, 2009, Bar Counsel wrote to Respondent, seeking his response to the complaint by August 24, 2009. BX 1a at 5-6. Respondent did not answer by the deadline. Bar Counsel sent a second letter to Respondent, by certified mail, on September 2, 2009, together with a subpoena for his case file with a return date of September 7, 2009. BX 1b at 7-10. Respondent's office received the letter September 8, 2009. BX 1c.

16. A month later, Respondent faxed Bar Counsel, expressing thanks for "your patience." BX 1d at 13. Respondent stated that he was unable to comply with Bar Counsel's requests[7] earlier due to his health, but expected that he could respond by October 10, 2009. *Id.* Respondent included two doctor's notes with the fax. The first, from Nhan X. Nguyen, M.D., stated that Respondent was seen on Sept. 27, 2009 and should be released from work for three days. BX 1d at 14. The second reported that from January 31 to March 10, 2009—five months before Bar Counsel's initial letter—Respondent had

[7] Bar Counsel was awaiting responses in both the Nguyen/Le matter and the Tang matter; the latter is discussed *infra*, pp. 12-17.

been in the care of Dr. Daniel D. Lee, a licensed clinical psychologist, for anxiety. BX 1d at 15.

17. Respondent submitted a written response to Nguyen's complaint, which was received by Bar Counsel on October 21, 2009 (11 days after Respondent's self-imposed deadline). BX 1e at 17-31. Respondent included copies of the application package his office had prepared and receipts for payments received from Nguyen and Le. BX 1e at 18-106.

18. Respondent asserted that Nguyen and Le's application was not submitted to immigration authorities because (i) relief is not guaranteed; (ii) Nguyen and Le would face more administrative hurdles if they applied within two years of their marriage than if they applied after two years had passed; and (iii) the person who provided the affidavit of support (Tong Nguyen, Mr. Le's friend) was unable to provide a verification of employment dated after October, 2007, and had become seriously ill and unemployed. BX 1e at 19-20. Respondent claimed that he explained these circumstances and the timing of the application to Nguyen, and blamed his failure to file the application on Nguyen's "indecisiveness and tacit consent." *Id.*

19. Nguyen and Le disputed Respondent's account. BX 1f. They refuted his specific assertions about Tong Nguyen by attaching an employment verification letter from 2009 and W2 forms showing that Nguyen had been employed by the same company since 1997. *Id.* at 109-112.

20. On April 26, 2013, Bar Counsel sent a fax requesting additional information about Respondent's representation of Nguyen/Le (and others). BX 2f at 28. Bar Counsel specifically requested that Respondent identify the bank accounts into which he

deposited funds received from Nguyen/Le and two other client matters,[8] including the deposit dates and copies of any supporting checks and bank statements. *Id.* at 28-29. Respondent did not reply. BX E at 4-5.

21. The Hearing Committee does not find the unsworn factual assertions in Respondent's description of the Nguyen/Le matter credible. His assertion that Tong Nguyen became unemployed is incorrect; to the contrary, the W2 forms and verification of employment provided to Bar Counsel show that Tong Nguyen was employed by the same company from 1997 to 2009. BX 1f at 109-112. Nor can the Hearing Committee credit Respondent's unsworn claim that he advised Nguyen and Le to submit their petition only after they had been married for two years. If Respondent had intended to submit the petition in 2009 (two years after the marriage), there would have been no reason to prepare the application and have Nguyen and Le sign it in 2007.[9] *See* BX 1e at 33-40. Moreover, it would have made little sense to ask Nguyen and Le to pay Respondent in 2007 for an application that would not be filed until 2009.

22. Respondent's claims also conflict with one another: If Respondent intended to file the petition in 2009, the lack of an employment verification from Tong Nguyen in October 2007 would not have been a problem; the question would have been whether he would be able to verify his employment in 2009. (As it happened, Tong Nguyen *did* provide a new employment verification in 2009. BX 1f at 109.) In addition, the Hearing

[8] The other two matters were Tang/Dang and Huynh, the subjects of Count II and III, respectively.

[9] It is not clear that the immigration authorities would even accept an application that was signed two years before it was filed, given that the applicants are asked for "present" information and whether they "ever" did certain things. *See* BX 1e at 37, 38.

Committee credits the testimony of Nguyen and Le, which is consistent with the record, that Respondent agreed to file their application in 2007.

23. Moreover, the Hearing Committee credits the testimony of Brandon Meyer, Esq., an immigration attorney who has handled about a hundred applications for adjustment of status based on marriage to a U.S. citizen, and is familiar with the standard of care in such cases.[10] Tr. 173-174, 195-196 (Meyer). Meyer agreed that there are some additional administrative hurdles when a green card application is made within two years of a marriage, but he also testified that he would "absolutely not" advise a client to wait two years before submitting an application. *Id.* at 196-197. Meyer testified that waiting would be justified only in "exceedingly rare circumstances," such as where the marriage occurred within 45 days of the immigrant entering the country on a student or tourist visa, because in that circumstance immigration officials would conclude there was "preconceived intent." *Id.* at 197. Meyer also testified that he could not think of any benefit of waiting two years after a marriage to apply for a green card, unless the immigrant had an independent authorization to work in the United States. *Id.* at 198.

24. Those circumstances did not apply to Le and Nguyen. The application package Respondent prepared shows that Le entered the country six years before his marriage, on a tourist visa that expired a year later. BX 1e at 34. It does not appear that he had any independent authorization to work. *See* BX 1e at 36 (describing Le's then-current USCIS Status as "OUT-OF-STATUS").

[10] Meyer was called by Bar Counsel in connection with another of Respondent's clients, Bich Thi Ngoc Huynh, as discussed *infra* pp. 16-20.

25. In light of the above, the Hearing Committee does not credit Respondent's claim that he advised Nguyen and Le to wait two years before applying for Le's green card. We also find that an ordinarily skilled practitioner would not have advised Nguyen and Le to wait two years before applying for Le's green card.

C. Count II: Cuong Bao Tang and Long Dang (2009-D357)

26. Bar Counsel asks the Hearing Committee to do some heavy lifting in its findings with regard to Count II. Bar Counsel did not present any witnesses in support of this count. *See* Tr. 214. The complaint's narrative is also skeletal, stating (in its entirety): "Mr. Toan from Pacific Immigration has agreed & promises us (Cuong Tang & Long Dang) to return the money in the amount of $6,000.00 if the immigration process does not go through as he has been promised." BX 2 at 1-2. The complaint attached receipts received from Respondent's office and several handwritten agreements (parts of which are written in Vietnamese), apparently between Respondent and Dang. The only narrative that attempts to explain these documents (outside Bar Counsel's filings in this matter) appears in a letter from Respondent to Bar Counsel. BX 2d at 19-20.

27. We pause to note that Bar Counsel must prove the charges by clear and convincing evidence. *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001). Clear and convincing evidence is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (quoting *Anderson*, 778 A.2d at 335). However, Hearing Committee members are "not precluded from using their common sense in evaluating the record." *In re Godette*, 919 A.2d 1157, 1165-1166 (D.C. 2007). Nor must they "shut their minds to that which all others can see or understand." *Id.* at 1166 n.10 (quoting *Poulnot v. District of Columbia*,

608 A.2d 134, 141 (D.C. 1992)). Accordingly, given the spare record, the Hearing Committee applies common sense and reasonable inferences to find the facts below by clear and convincing evidence.

28. On September 24, 2008, Respondent's office received $1,000 in cash from Cuong Tang, which the receipt indicates was a deposit on a $3,000 fee to apply for a student visa. BX 2 at 7; BX 2d at 22. We infer from the receipt that Respondent agreed to apply for a student visa on behalf of someone; however, the record does not permit a finding on the identity of the student or the student's relationship to Tang.

29. Respondent's office received an additional $4,450 in cash from Tang on October 25, 2008, which the receipt indicates was a tuition deposit to be paid to Santa Ana College. *Id.*; *see also* BX 2d at 19.

30. Respondent says that the deposit was for an unidentified Vietnamese student studying in New Zealand, who intended to transfer to Santa Ana. BX 2d at 19. The record does not permit any finding on these details by clear and convincing evidence; however, we infer that the tuition deposit was given to Respondent in connection with the student visa application he agreed to file.

31. It is clear that Respondent was supposed to make a $4,450 tuition deposit but failed to do so. BX 2d at 19. In his response to Bar Counsel, he claims that in late October 2008, he brought the money, in cash, to the college, but that it was lost when he left his briefcase unattended in a bathroom for ten minutes. *Id.* Respondent claims that soon thereafter he promised to "return the sum [Tang and Dang] entrusted to me in its entirety." *Id.*

32. Respondent's story is insufficient for the Hearing Committee to form a firm belief or conviction as to what really happened to the tuition deposit. We are convinced, however, that whatever else might have happened to the funds, Respondent did not deposit them into a trust account. Had he done so, he would have brought a check to the college, and it would have been unnecessary to concoct a story about losing the money in a bathroom. Even if Respondent's story is true, it would be an admission that he failed to deposit the funds in a trust account.

33. Respondent thereafter entered into a series of agreements with Long Dang[11] to repay various amounts by various deadlines. BX 2 at 3-6. In the first agreement, Respondent promised to refund $4,450 "in cash" and $1,000 "in legal fee," by March 15, 2009. BX 2 at 3; BX 2d at 19. The bottom half of the agreement contains what may be the same agreement in Vietnamese.

34. The second agreement is dated a month after the first due date, and is also written in Vietnamese. BX 2 at 4. In the second agreement, the amount owed is $5,000 (expressed as the sum of 3,500 + 1,500), and the due date is July 20, 2009. *Id.* at 4. When that date came around, Respondent entered into a third agreement, which is in both English and Vietnamese. *Id.* at 5-6. In the English version, Respondent says, "I, Toan Q. Thai, Esq. certify that I owe Mr. Long a sum of $4,500 and agree to pay the later the sum of $5,000 on 7/15/2009. Because I have financial difficulties Mr. Long agrees to let me pay him the sum of $6,000 (six thousand dollars) on August 15, 2009 (8/15/2009)." *Id.* at 6. The agreements are summarized in the following table:

[11] Respondent's letter to Bar Counsel refers to Dang as "Long Pham." BX 2d at 19.

Agreement Date	Amount(s)		Total	Deadline	Record reference
3/2/2009	4,450	1,000	5,450	3/15/2009	BX 2 at 3
4/21/2009	3,500	1,500	5,000	7/20/2009	BX 2 at 4
7/20/2009	6,000		6,000	8/15/2009	BX 2 at 5-6

35. Respondent describes these agreements as a deal to "pay $5,500 in the spring of 2009," and later "the amount was raised to 6,000 on or before August 15, 2009." Bx 2d at 19.

36. The agreements contain several discrepancies which are not explained by the Tang/Dang complaint or by Respondent's summary. It is clear that Respondent initially agreed to repay the tuition deposit "in cash," but we are not sure what to make of the promise to refund $1,000 "in legal fee." It could be that the parties wanted to identify the two payments that Respondent received, and he intended to repay both of them "in cash." It's also possible that "in legal fee" meant that Respondent would earn the fee by applying for the student visa as originally contemplated. The latter interpretation is consistent with Tang/Dang's complaint that Respondent would pay "if the immigration process does not go through." BX 2 at 2. The record does not contain sufficient evidence to pick one of these possibilities over the other.

37. In addition, the amount due decreased from $5,450 in the first agreement to $5,000 in the second. But the overall pattern (and Respondent's summary) suggests that the amount of the repayment went up as the due date was pushed back. Because the second agreement was made more than a month after the first due date and extended the deadline three months further, we infer that Respondent must have owed even less than $5,000 when the second agreement was made.

38. The third agreement bears this out. The English version begins with a description of the second agreement: Respondent certifies that "I owe Mr. Long" $4,500,

and "I agree to pay . . . $5,000 on 7/15/2009." BX 2 at 6. Although the statements are in present tense, we infer that they are describing events that were then in the past; specifically, that Respondent owed $4,500 at the time of the second agreement and that he agreed to pay an extra $500, ($5,000 total) in exchange for additional time in which to pay.[12]

39. Given the above, we find that Tang and Dang received something they valued at around $950 between the first agreement and the second, which reduced the amount payable from $5,450 to $4,500. However, the record does not contain evidence sufficient to determine what that something was.

40. It is clear that Respondent did not make the payment described in the last agreement. BX 2 at 2-3; 2d at 19.

41. Bar Counsel received Tang and Dang's complaint on August 24, 2009. BX 2. Bar Counsel wrote to Respondent on September 2, 2009, seeking his substantive response to the complaint, together with a subpoena for his client file. BX 2a. The following month, Respondent sent the fax described in paragraph 16 above, attaching doctors' notes and seeking more time to respond. BX 2c.

42. On October 16, 2009, Respondent provided his response to the complaint. BX 2d. He acknowledged receiving $5,450 from Tang, as well as the series of agreements with Dang. *Id.* He provided a copy of the same receipts as were attached to the complaint,

[12] Respondent used the present tense similarly in his correspondence with Bar Counsel. *E.g.*, BX 2d at 19 ("I initially owe $5,450"; "I make a deal that I will pay Mr. Tang . . ."). The Hearing Committee is also convinced this is the correct interpretation despite the incorrect recitation of the due date as 7/15/2009, rather than 7/20/2009, which was the actual due date in the second agreement. *See* BX 2 at 4-6.

and stated that he had offered to increase the repayment amount yet again, this time to $7,000.[13] *Id.*

43. Bar Counsel sought information from Respondent on December 10, 2009, April 26, 2013, and May 21, 2013. BX 2e, 2f, 2i. Among other things, Bar Counsel sought to learn information that would have filled in some of the gaps above, such as who the client was, what relief they sought, and why Tang and Dang were paying the bills. *See id.* Respondent failed to provide any substantive response. BX E at 5. On May 13 and 20, 2013, he faxed Bar Counsel requests for additional time, citing medical issues and work limitations. BX 2g, 2h. In support of the latter request, he attached a letter from a doctor's office welcoming him as a new patient and confirming the time of his initial appointment. BX 2h at 32. Bar Counsel did not receive any further responses from Respondent. BX E at 5.

D. Count Three: Bich Thi Ngoc Huynh (2012-D256)

44. Bich Thi Ngoc Huynh was born in Vietnam and came to the United States in 2005. Tr. 121 (Huynh). She married a U.S. citizen the following year, and began the process to adjust her immigration status. Tr. 122-123 (Huynh); BX 3b at 231. But the marriage was not successful. Tr. 123 (Huynh). The two were separated, and Huynh's husband thereafter refused to cooperate further in her immigration petition. *Id.* They were divorced in June, 2009. Tr. 122 (Huynh); 178 (Meyer).

45. On June 13, 2009, Huynh retained Respondent to seek an adjustment of her immigration status as a battered spouse of a U.S. citizen, as permitted by the

[13] Respondent also claimed he had an "unexpected good fortune" and included a notice purporting to inform him that he had won more than $3.2 million from the "Prize Information Bureau." BX 2d at 21.

Violence Against Women Act. Tr. 123-126 (Huynh); BX 3 at 14-15. Huynh signed a retainer agreement with Respondent and paid him $2,000 cash in installments of $1,000 each. Tr. 127-128 (Huynh); BX 3 at 14-17. The second installment was made on September 26, 2009. BX 3 at 17. The retainer agreement and receipts are signed by Respondent and filled out in his handwriting. BX 3 at 14-17. Respondent told Huynh that it would take several years to finalize her adjustment of status. Tr. 125 (Huynh).

46. Respondent prepared a petition to adjust Huynh's status, which Huynh signed in about September 2009. Tr. 145-146 (Huynh); BX 3b at 198-245. In support of the petition, Huynh gave Respondent numerous documents, prepared a personal statement, and also visited a clinical psychologist who gave Respondent a report. Tr. 143-145 (Huynh); BX 3b at 202-245.

47. Respondent never submitted the petition. Tr. 148-149 (Huynh); 175-176 (Meyer). When Huynh signed the application, Respondent told her he would submit it to USCIS, and his office later told her that the application had been submitted. Tr. 148-149 (Huynh). In fact, Huynh's subsequent attorney learned through a Freedom of Information Act (FOIA) request in 2011 that no battered spouse petition was ever filed on Huynh's behalf. Tr. 175-176 (Meyer).

48. Huynh did not hear from Respondent for six months after she signed the petition. Tr. 129-130 (Huynh). She began calling his office to learn the status of her case, but Respondent's wife did not permit Huynh to speak with Respondent, telling her each time that Respondent was busy and that Huynh should continue to wait. *Id.* When Huynh asked for her case number, she was told that there was no number for her case. Tr. 150 (Huynh). Huynh called two or three times a month for nearly two years—until

about August or September 2011—but was never able to speak with Respondent or learn the status of her application. Tr. 130-131 (Huynh). She then visited Respondent's office but was again rebuffed by Respondent's wife. *Id.*

49. Huynh concluded that Respondent had cheated her and that she would have to find another attorney. Tr. 132 (Huynh). She spoke with Brandon Meyer, Esq., who asked her to obtain her file from Respondent, and also submitted a FOIA request to USCIS regarding the status of Huynh's case. Tr. 132-133 (Huynh); 174-175 (Meyer). Huynh went to Respondent's office several times to retrieve her file, but Respondent's wife refused each time to give her a copy. *Id.* After several months, Huynh brought an English-speaking friend with her and threatened to sue if Respondent did not give her a copy of the file. *Id.* Respondent's office then gave Huynh a copy of her file. *Id.*

50. Huynh obtained her file in about April 2012 and hired Meyer the next month.[14] Tr. 133-134 (Huynh); BX 3 at 18-20. Meyer immediately saw that more than two years had elapsed since Huynh's divorce. Tr. 177-178 (Meyer). That fact was significant because to take advantage of the Violence Against Women Act, a petition must be filed within two years of the divorce. *Id.* Accordingly, Huynh could adjust her status only under the humanitarian discretion of USCIS. *Id.* In addition, because her first application to adjust her status was not completed, Huynh could have been placed in deportation proceedings at any time. Tr. 181-182 (Meyer).

51. Meyer determined that Respondent had provided ineffective assistance to Huynh and assisted her in preparing a bar complaint against him. Tr. 181-183 (Meyer).

[14] Meyer's office submitted the FOIA request on Huynh's behalf before she officially retained him. Tr. 174 (Meyer).

In the course of preparing the compliant, Meyer sent Respondent three letters detailing his misconduct in Huynh's case, each of which also requested a refund. Tr. 191-192 (Meyer); BX 3c at 260-263. The final letter was delivered to Respondent personally by Meyer's employee, who testified at the hearing. Tr. 164-166 (Dobreva); 191-192 (Meyer). BX 3c at 260-263.

52. Respondent did not refund any part of the fee. Tr. 134-135 (Huynh).

53. In addition, Respondent did not tell Huynh at any time that his license to practice in D.C. was suspended in December 2009, that he was suspended from practice before the immigration authorities in January 2010, or that his license in Pennsylvania was suspended in August 2010. Tr. 133-134 (Huynh).

54. Meyer submitted a battered spouse petition for Huynh, but it was denied. Tr. 193 (Meyer). Although USCIS found that Huynh met the standard for a battered spouse, the agency elected not to exercise its humanitarian discretion because the application was filed outside the two-year window. *Id.*

55. Huynh later remarried to a U.S. citizen. Tr. 194 (Meyer). At the time of the hearing, Meyer was preparing to submit an application to adjust her immigration status based on that marriage. *Id.*

56. Bar Counsel sent Respondent a copy of Huynh's complaint on July 30, 2012 by regular mail, requesting a chronology of the representation, a copy of his file, and a listing of the jurisdictions where he was authorized to practice law. BX 3a at 189-190. Bar Counsel requested the response by August 9, 2012, ten calendar days after the date of the letter. *Id.*

57. On August 20, 2012, Bar Counsel received a set of documents related to the Huynh matter from Respondent, but without any cover letter or explanation of the documents. BX E at 5.

58. Five months later, Bar Counsel sent Respondent, by fax and regular mail, another request that he provide a written response to the Huynh complaint, and asking that he identify the documents he had already sent. BX 3c at 247-50. Bar Counsel did not receive any further response from Respondent. BX E at 6.

E. Count Four: Unauthorized Practice of Law (2013-D132 & 2013-D167)

59. As described above, Respondent's license to practice law in D.C. was suspended in December 2009; he was suspended from practice before the immigration authorities in January 2010; and he was suspended in Pennsylvania on August 20, 2010 and August 1, 2012. BX 4, 4a, 4b; *supra* ¶¶ 2-3.

60. Respondent's suspension in D.C. was for 60 days, with 30 days stayed in favor of probation. BX 4 at 6-7. The Court attached several conditions to the probation, including that Respondent file an affidavit accepting the conditions within 30 days of its order. *Id.* Respondent did not file the affidavit. BX 4a at 9. On July 18, 2011, the Court ordered Respondent to show cause why his probation should not be revoked. *Id.* at 10. Respondent failed to respond to that order, and the Court revoked his probation. *Id.* at 11. The Court ordered Respondent suspended for 60 days, which, for purposes of reinstatement, does not begin to run until he files an affidavit that complies with D.C. Bar Rule XI § 14(g). *Id.*

61. Respondent has not filed the affidavit, and has not been reinstated in D.C., Pennsylvania, or before the immigration authorities.

62. Despite his suspensions, Respondent continued to practice law before the immigration authorities.

63. On April 16, 2010, Respondent entered his appearance in the Los Angeles immigration court as counsel for Hanh My Thi Do. BX 4b at 16-17. Respondent falsely represented—under penalty of perjury—that he was a "member in good standing" of the D.C. Bar, and that he was not "subject to any order of any court or administrative agency" suspending him from practice. *Id.* Respondent also appeared personally that day before an immigration judge in the same case. *Id.* at 18.

64. The Executive Office of Immigration Review (EOIR) discovered Respondent's appearance and, in a letter dated April 19, 2010, told him to "cease and desist from further practice" unless and until he was reinstated. BX 4b at 15.

65. Respondent still continued to represent clients in immigration matters. In August 2010, Respondent's client Hung Quoc Trinh appeared without counsel before an immigration judge. BX 4b at 22, 26. Trinh testified that Respondent notified him of the suspension on the very day he was to appear. *Id.* at 27. Respondent then appeared on Trinh's behalf on October 21, 2010. *Id.* at 30. When the immigration judge asked if he had been reinstated, Respondent lied that he had. *Id.* at 31.

66. EOIR again discovered the appearance, and its Disciplinary Counsel sought a response from Respondent on October 28, 2010.[15] BX 4D at 47.

[15] EOIR also charged that Respondent had appeared in another matter, representing Thanh Truc Truong at a hearing on October 15, 2010. *See* BX 4d at 47-48. Bar Counsel likewise charges Respondent with unauthorized practice with respect to Truong; however, we do not find clear and convincing evidence that Respondent was the attorney in that case. The transcript lists the attorney as "Twan Que Ti," not "Toan Q. Thai." *Id.* at 47. The transcript indicates this is a phonetic spelling (*id.* at 37), but that is insufficient to infer that it refers to Respondent. There is no signed appearance form as there was in the Do case (BX 1d at 50-51), nor is there discussion on the record that indicates Respondent is the attorney, as there

67. Respondent still did not stop practicing law. In August, 2011, Respondent agreed to represent another client, Heesook Lee, in applying for authorization as a special immigrant religious worker. Tr. 18-20 (Lee); BX 4e at 77-79. Respondent signed a retention letter and accepted $3,000 in cash from Lee. Tr. 19-20 (Lee); BX 4e at 77-79. Respondent did not tell Lee that he was not authorized to practice law before the immigration authorities. Tr. 27 (Lee).

68. Respondent submitted an application on Lee's behalf, but failed to inform him when Respondent received correspondence from immigration authorities. Tr. 23-24, 31 (Lee); *see* BX 4e at 74-76. Lee called Respondent numerous times and visited his office, but was unable to learn the status of his case. Tr. 22-24 (Lee). In April, 2012, Respondent sent Lee a notice from USCIS requesting additional documents for his application. Tr. 29-30. With the help of a new lawyer, Lee responded to the notice and ultimately received his green card. *Id.*

69. Bar Counsel opened an investigation and wrote Respondent on April 3, April 26, and May 7, 2013, seeking his response to the unauthorized practice claims. Respondent never replied.

III. Conclusions of Law

The Hearing Committee concludes that Respondent committed numerous violations of the Rules of Professional Conduct.

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was in the Trinh hearing (BX 1d at 60-61). Accordingly there is nothing to exclude the possibility that a different attorney with a similar-sounding name represented Mr. Truong at the hearing.

A. Competence, Diligence, and Communication—Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(c), 1.4(a), and 1.4(b) (Counts I, III)

In the Nguyen/Le and Huynh matters, Respondent gathered information from his clients and prepared petitions to be filed with the immigration authorities, but he never filed them. At the same time, he falsely led his clients to believe their petitions had been filed, and then refused to take their calls, meet with them, or give them any update on the status of their cases. Had he told them the truth, Nguyen/Le and Huynh could have sought assistance elsewhere. As it happened, they learned that their immigration petitions were never filed only after consulting outside sources. In Huynh's case, if she had known the truth sooner she might well have obtained an adjustment of status during the two-year eligibility period provided in the Violence Against Women Act. Instead, that period expired while Respondent did nothing.

Respondent's conduct fell so far short of a lawyer's basic duty to his clients that it is no surprise it violated numerous Rules of Professional Conduct. These rules "are not mere aspirations." *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007). "They set standards that the legal profession is obliged to meet because lawyers often are entrusted with responsibility for some of the most important matters in their clients' lives." *Id.* Bar Counsel's charges include violations under seven Rules common to both the Nguyen/Le and Huynh matters. We conclude that Respondent violated all of them.

Competence. An attorney must represent clients with competence; specifically, the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1(a). Competent representation requires both the "skill and care" that other attorneys generally provide in similar matters, (Rule 1.1(b)), and "continuing attention" to the matter (Rule 1.1 cmt. 5).

At a minimum, Respondent's duty of thoroughness, skill, and care required him to file his clients' immigration petitions as he had agreed he would. *See*, *e.g.*, *In re Douglass*, 859 A.2d 1069, 1079 (D.C. 2004) ("[A]n attorney adhering to the proper standard of care will take reasonably expeditious steps to pursue his client's case."). Instead, Respondent let Nguyen/Le's and Huynh's petitions stagnate, unfiled, while he ignored their requests for information. Accordingly, we conclude that Respondent violated Rules 1.1(a) and 1.1(b).

Diligence. An attorney must represent clients with "diligence and zeal," and may not intentionally fail to seek their lawful objectives (Rule 1.3(a) & 1.3(b)(1)). Diligence requires acting with "reasonable promptness" (Rule 1.3(c)), and avoiding unreasonable delay and neglect of a client matter—particularly when statutes of limitations or other deadlines are present. *See* Rule. 1.3 cmt. 8. When a lawyer "fails to communicate with the client and fails to take the necessary steps to preserve the client's interests," the lawyer violates the duty of zeal and diligence. *In re Bernstein*, 707 A.2d 371, 376 (D.C. 1998).

We conclude that Respondent's prolonged neglect of the Nguyen/Le and Huynh matters, together with his failure to communicate with the clients, violated the duty of diligence, zeal, and reasonable promptness embodied in of Rules 1.3(a) and 1.3(c). We also conclude that Respondent intentionally failed to pursue Nguyen/Le's and Huynh's lawful objectives, in violation of Rule 1.3(b)(1). Neglect of a client matter "ripens into an intentional violation when the lawyer is aware of his neglect of the client matter, or the neglect is so pervasive that the lawyer must be aware of it." *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997). "Knowing abandonment of a client is the classic case of a Rule 1.3(b)(1)

violation." *Id.* Further, "evidence that a lawyer fabricated excuses for his neglect may also support a finding that his neglect was conscious and intentional." *In re Reback*, 487 A.2d 235, 241, *adopted in relevant part*, 513 A.2d 226 (D.C. 1986) (en banc).

Respondent was aware of Nguyen/Le's and Huynh's objectives. In each case, he agreed to file a petition seeking a green card. *See* BX 1e at 17-20 (Respondent letter regarding Nguyen/Le); BX 3 at 14-16 (representation letter and receipt in Respondent's handwriting). Accordingly, he knew he had a responsibility to file their petitions, and yet he did not do so. For two years, Respondent did not contact Nguyen/Le or Huynh to update them on their cases; when they tried to contact him, he was nearly impossible to reach. Respondent's lack of communication extended to other clients (*see* Tr. 22-23 (Lee)) and so was persistent and prolonged that the Hearing Committee can only conclude that it must have been intentional. *Cf. In re Haupt,* 444 A.2d 317, 322 (D.C. 1982). Moreover, we infer that Respondent was aware of his neglect from his fabricated excuses for failing to file Nguyen/Le's petition and his angry response when they finally confronted him in person. *See supra* ¶¶ 11, 18-20.

Communication. An attorney must keep clients "reasonably informed" about the status their matters, promptly complying "with reasonable requests for information" (Rule 1.4(a)), and must explain matters well enough "to permit the client to make informed decisions" (Rule 1.4(b)).

Respondent's extended failure to communicate was unreasonable and prevented Nguyen/Le and Huynh from making informed decisions about their cases. Had they known that Respondent failed to file their petitions, they could have sought assistance from another attorney. If Huynh had done so, she might well have obtained an

adjustment of status during the two-year period provided in the Violence Against Women Act, which Respondent allowed to expire without filing her petition. Accordingly, we conclude that Respondent violated Rule 1.4(a) and (b) in both cases.

B. Abiding By Client Decisions—Rule 1.2(a) (Count I)

Bar Counsel argues that the facts supporting Respondent's other violations in the Nguyen/Le matter also show that he violated Rule 1.2(a), which requires an attorney to "abide by a client's decisions concerning the objectives of the representation" and "consult with the client as to the means by which they are to be pursued." BC Br. 26-27. We agree. Respondent's intentional failure to file Nguyen/Le's immigration petition was also a failure to abide by Nguyen/Le's decisions concerning the objectives of the representation; namely that Respondent would file an immigration petition on their behalf. That the Rule 1.2(a) violation overlaps with other rule violations is irrelevant for purposes of finding that there was such a violation. *Bernstein*, 707 A.2d at 376.

C. Representation Letter—Rule 1.5(b) (Counts I-III)

In the Specification of Charges, Bar Counsel charged that Respondent failed to give Nguyen/Le, Tang/Dang, or Huynh representation letters, as required by Rule 1.5(b). Because Respondent failed to provide a representation letter to Nguyen and Le, the Hearing Committee concludes that he violated Rule 1.5(b) in that representation. *See supra* ¶ 7.

Bar Counsel concedes the evidence does not support the charges that Respondent violated Rule 1.5(b) in the Tang/Dang and Huynh matters. BC Br. 22 n.6. Accordingly, we conclude that those charges were not proved.

D. Misuse of Client Funds and Safekeeping of Property—Rules 1.15(a), 1.16(d), former 1.19(a), and 8.4(d) (Counts I-III)

Bar Counsel charges Respondent with several violations related to his handling of client funds and property. Specifically, Bar Counsel alleges that: (i) Respondent failed to segregate the funds he received from Tang/Dang or maintain them in a proper trust account, in violation of Rule 1.15(a) and former Rule 1.19(a)[16]; (ii) Respondent recklessly or intentionally misappropriated funds he received from Huynh, in violation of Rule 1.15(a); and (iii) Respondent refused to return unearned fees to Nguyen/Lee, Tang/Dang, and Huynh, and refused to return Huynh's client file, in violation of Rule 1.16(d). Bar Counsel further alleges that Respondent committed grand theft under California law—a crime that reflects adversely on his honesty and fitness as a lawyer—by failing to give Huynh a refund, thereby violating Rule 8.4(d).

Commingling and Deposit Into Trust Fund. Under Rule 1.15(a), an attorney must "hold property of others with the care required of a professional fiduciary." *See* Rule 1.15(a) & cmt. 1. "One of the most basic rules of fiduciary conduct is that the fiduciary must not commingle his own property with that held by him belonging to another. In particular, fiduciary funds must be kept separate and deposited in a special account." *In re Hessler*, 549 A.2d 700, 702 (D.C. 1988). The requirement to deposit funds in a special account is reflected in former Rule 1.19(a), now incorporated in Rule 1.15(b).

We conclude that Respondent violated Rule 1.15(a) and former 1.19(a) in the Tang/Dang matter by failing to segregate the funds entrusted to him in an appropriate trust account. *See supra*, ¶ 32.

[16] Rule 1.19(a)'s requirement to deposit funds into a proper trust account was incorporated into Rule 1.15 on August 1, 2010. Bar Counsel charged Respondent under the former Rule because the events related to Tang/Dang occurred before the rule revision.

Misappropriation. One of the most serious ethical violations that a lawyer can be charged with is taking a client's money without authorization. *See In re Uscinski*, 2 A.3d 154, 160 (D.C. 2009). Misappropriation "includes any unauthorized use of a client's funds entrusted to his or her lawyer, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he or she derives any personal gain or benefit." *In re Edwards*, 990 A.2d 501 (D.C. 2010).

Bar Counsel bears the burden of proving misappropriation by clear and convincing evidence, but in many cases "the proof requirement is not a demanding one," because when the balance in the lawyer's escrow account "falls below the amount due the client," misappropriation "is essentially a *per se* offense." *In re Carlson*, 802 A.2d 341, 348 (D.C. 2002); *Anderson*, 778 A.2d at 335. This case is not so simple.

Bar Counsel charges that Respondent misappropriated $2,000 that Huynh paid him as an advance payment for filing an immigration petition on her behalf. Under Rule 1.15(e) (formerly Rule 1.15(d)), these funds belonged to Huynh until earned, and as such, the only authorized use was to hold them in trust until they were earned.[17] But unlike cases in which a Hearing Committee can look to the attorney's escrow account, Respondent did not provide Bar Counsel with any record of what happened to Huynh's deposit, though Bar Counsel asked, *supra* ¶ 20, and even though he was required to maintain such records and supply them to Bar Counsel. *See* Rule 1.15(a); D.C. Bar R. XI, §§ 8(a) & 19(f). Indeed, the reason a lawyer must account for his use of funds is

[17] Soon after Respondent received the first half of Huynh's deposit, the Court held "that when an attorney receives payment of a flat fee, the payment is an 'advance[] of unearned fees' and 'shall be treated as property of the client . . . until earned unless the client consents to a different arrangement.'" *In re Mance*, 980 A.2d 1196, 1202 (D.C. 2009), quoting Rule 1.15(d) (currently Rule 1.15(e)). Respondent received the second half two days after *Mance*.

precisely "so that the documentary record itself tells the full story of how the attorney handled client or third-party funds." *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003). We lack that documentary record here because Respondent failed to cooperate with Bar Counsel.

Although we have been unable to locate a case in which the Court has found an unauthorized use without evidence that the balance in the attorney's account fell below the amount held in trust, we nevertheless find by clear and convincing evidence that an unauthorized use occurred here:

First, the evidence shows that Respondent received the funds from Huynh to file an immigration petition, *supra* ¶ 45, and as discussed, he was required to keep them in trust until he earned them. *Mance*, 980 A.2d 1196, 1202.

Second, we find that Respondent never earned the funds. "[A]n attorney earns fees only by conferring a benefit on or performing a legal service for the client." *Id.* at 1202, quoting *In re Sather*, 3 P.3d 403, 410 (Colo. 2000). Respondent did not perform the service he was hired for (filing an immigration petition), and though he had prepared the petition, that did not confer any benefit on Huynh because he let the statutory filing period expire. *See supra* ¶¶ 46-50; *Richardson v. Green*, 528 A.2d 429, 438 n.12 (D.C. 1987) (attorney may not recover partial fee where "his acts were worthless" and the client "received no value").

Third, we find by logical inference and common sense that Respondent did something with the funds other than the only thing he was allowed to do; namely, keep them in escrow on Huynh's behalf. It has been six years since Huynh gave $2,000 to Respondent. In the intervening time, Respondent let the filing period (during which he

could have earned the money) expire; Huynh asked him three times (through her subsequent attorney) to refund the money (he failed to do so); Bar Counsel asked Respondent to account for his handling of the money (he failed to do that either); and Bar Counsel formally charged Respondent with misappropriating the money. In light of those circumstances, we find the probability that Respondent promptly deposited Huynh's deposit in an escrow account, where it has remained ever since, to be vanishingly small. Accordingly, Respondent must have done something else with the funds. Whatever that was, it was unauthorized.

We further find that the misappropriation was intentional, because at some point it was clear that Respondent would *never* file an immigration petition for Huynh. When two years had passed after Huynh's divorce, for example, Respondent should have known that the window to obtain relief through a battered spouse petition had closed, and there was no longer any prospect that he could earn a fee from Huynh's deposit.[18] *See supra* ¶ 50. Keeping the money after that—in the face of Huynh's refund requests—warrants a finding of intentional, or at the very least, reckless misappropriation. Respondent's continued (and continuing) failure to refund Huynh's fees in the face of Bar Counsel's investigation and these proceedings further evinces that his misappropriation become and has remained intentional. *See In re Gregory*, 790 A.2d 573, 579 (D.C. 2002) (appended Board Report) ("Respondent's continued inattention to the doctors' requests for payment and to his own records would warrant a finding of recklessness and, ultimately, intent.").

[18] We do not suggest that this is the earliest point that Respondent's unauthorized use could have ripened into an intentional or reckless misappropriation. Respondent was suspended from practice before the immigration authorities in early 2010, and he kept Huynh's funds for two years during which he did nothing to advance her case despite numerous attempts to contact him for updates.

"Intentional misappropriation is such a serious offense because it compromises the integrity at the heart of the client-attorney relationship." *Uscinski*, 2 A.3d at 160. Thus, misappropriation that shows "an unacceptable level of disregard for the safety and welfare of entrusted funds—in short, that is reckless—will warrant disbarment." *Id.* at 338 (D.C. 2001). Misappropriation that is "merely negligent," on the other hand, does not warrant a presumption of disbarment. *Id.* Nothing Respondent did "suggests the unauthorized use was inadvertent or the result of simple negligence." *Anderson*, 579 A.2d at 339. To the contrary, Respondent's failure to offer Huynh a refund evinces "either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds." *Id.*

Refund Of Advance Payments And Failure To Return Client File. Rule 1.16(d) requires an attorney to take timely steps to protect clients' interests when the client relationship is terminated. Those steps include returning the client's file and refunding any advance payment that has not been earned. We conclude that Respondent violated Rule 1.16(d) in the Nguyen/Le, Tang/Dang, and Huynh matters.

Nguyen/Le: Although Respondent eventually returned the fees that Nguyen and Le paid him, he only did so after Nguyen accepted his challenge to sue him for a refund. *Supra* ¶ 13. Even then, Respondent did not pay the judgment and had to be haled into court a second time before he paid. *Id.* We conclude that Nguyen and Le were entitled to a refund and that Respondent violated Rule 1.16(d) by unreasonably withholding payment. *See In re Martin*, 67 A.3d 1032, 1049-1050 (D.C. 2013) (finding violation of Rule 1.16(d) for unreasonably withholding award entered by the Attorney-Client Arbitration Board).

Huynh: As described above, Respondent failed to provide the legal services he promised to Huynh but nevertheless refused to refund the fees she paid. We conclude that Respondent's failure to refund Huynh's fees violated Rule 1.16(d). He also violated Rule 1.16(d) in his representation of Huynh by refusing to return her file when she terminated the attorney-client relationship. *Supra* ¶¶ 49-50. As the Court of Appeals noted in Respondent's prior disciplinary matter, "'A client should not have to ask twice' for his file." *In re Thai*, 987 A.2d 428, 430 (D.C. 2009), quoting *In re Landesberg*, 518 A.2d 96, 102 (D.C. 1986) (per curiam) (appended Board Report). "[T]he client is owed an 'immediate return' of his file 'no matter how meager.'" *Id.*, quoting *In re Russell*, 424 A.2d 1087, 1088 (D.C. 1980) (per curiam). Accordingly, we conclude that Respondent's failure to return Huynh's file violated Rule 1.16(d).

Tang/Dang: We also conclude the Respondent violated Rule 1.16(d) by failing to return at least $4,500 that Tang and Dang entrusted to him. *See supra* ¶¶ 28-40. Rule 1.16(d) applies to "any property to which the client is entitled." Rule 1.16 cmt 11 (internal quotation marks omitted). Respondent agreed in writing that Tang and Dang were entitled to $4,500, but he failed to pay them. *See supra* ¶¶ 28-40. For purposes of Rule 1.16, it is irrelevant which part of that amount is attributable to unearned fees and which part is attributable to the tuition deposit.[19]

Criminal Conduct. Bar Counsel charges that Respondent's misappropriation of Huynh's deposit amounted to grand theft under California law, and therefore violated

[19] The evidence does not permit a finding by clear and convincing evidence that Respondent failed to return the remaining $950 he received in the Tang/Dang matter. *See supra* ¶¶ 36-39.

Rule 8.4(b) as a "criminal act that reflects adversely on [Respondent's] honesty, trustworthiness, or fitness." We agree.

In California, theft by embezzlement is defined as "the fraudulent appropriation of property by the person to whom it has been intrusted." Cal. Penal Code § 503; *see also id.* § 484(a) ("Every person . . . who shall fraudulently appropriate property which has been entrusted to him or her . . . is guilty of theft."). Theft involving more than $950 is grand theft. Cal. Penal Code § 487.

"The gist of [embezzlement] is the appropriation to one's own use of property held by him or her for devotion to a specified purpose other than his or her own enjoyment of it." *California v. Nazary*, 191 Cal. App. 4th 727, 729 (2010). "An intent to deprive the rightful owner of possession even temporarily is sufficient and it is no defense that the perpetrator intended to restore the property nor that the property was never applied to the embezzler's personal use or benefit." *Id.* at 154 (internal quotation marks omitted). We conclude that Respondent's refusal to return the funds Huynh paid him, particularly after letters requesting a refund were delivered to him personally, amounted to grand theft—embezzlement—under California law.[20] Theft is an offense that reflects adversely

[20] We do not agree with Bar Counsel that Respondent's conduct was also theft by false pretenses, which "requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation." *California v. Wooten*, 44 Cal. App. 4th 1834, 1842 (1996). Bar Counsel argues that Respondent received money from Huynh by falsely representing himself as lawyer when he knew he was likely to be suspended in his earlier disciplinary matter. BC Br. at 40. But at the time, Respondent was authorized to practice law in D.C., Pennsylvania, and before the immigration authorities. His disciplinary matter was before the Court of Appeals on the Board's recommendation for a partially stayed suspension, but final discipline had not been imposed, and the Hearing Committee had recommended that the suspension be stayed in its entirety. *See* BX 4 at 3-4. Although Respondent's suspension has turned out to be continuous since December 2009, and (with related conduct) has resulted in suspensions in Pennsylvania and before the BIA, we see no basis to charge Respondent with falsely representing himself

on a lawyer's honesty, trustworthiness, or fitness, and we therefore conclude that Respondent violated Rule 8.4(b). *See, e.g.*, *In re Gil*, 656 A.2d 303 (D.C. 1995).

E. Candor—Rule 3.3(a) (Count IV)

All attorneys owe a duty of candor to the tribunals where they appear. In D.C., that duty is defined in Rule 3.3. *See* Rule 3.3 cmt. 1. Although some circumstances require careful line drawing to define the duty of candor (*see id.* cmt. 3-11), the same cannot be said of lying in open court and in court filings. Further, the failure to make a disclosure can be the equivalent of an affirmative misrepresentation. *Id.* cmt. 2.

We conclude that Respondent violated Rule 3.3(a) (knowingly making "a false statement of fact" to a tribunal) when he filed a notice of appearance in the Do matter claiming he was a member in good standing of the D.C. Bar and that he was not subject to any disciplinary order (BX 4d at 16-17); and when he bald-facedly lied in open court about being reinstated in the Trinh matter (BX 4d at 31). We conclude that Respondent's misrepresentations were made knowingly: Respondent participated in the D.C. disciplinary proceeding that resulted in his suspension, and therefore knew he was suspended when he filed his notice of appearance for Do. *See* BX 4 at 3-4. Respondent knew he was suspended from practice before immigration authorities when he represented Trinh (as he told Trinh before sending him to his hearing alone, BX 4b at 27), and *a fortiori* that he had not been reinstated when he told the court he had. BX 4b at 31.

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as a lawyer *before* he was suspended. Moreover, that Respondent prepared Huynh's petition suggests that at least initially he intended to file it and did not have the intent to defraud required for theft by false pretenses.

We also conclude that Respondent's appearance in open court in the Do matter—without revealing his bar status—was the equivalent of an affirmative misrepresentation to the court that he was authorized to appear, when in truth he was not.[21] *See* BX 4d at 18.

F. Unauthorized Practice of Law—Rule 5.5(a) (Counts III and IV)

Rule 5.5(a) prohibits an attorney from practicing law "in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction."

We conclude that Respondent violated Rule 5.5(a) when, after being suspended from practice before the immigration authorities, he: (i) filed an appearance in the Do matter (*supra* ¶ 63; BX 4d at 16-18); (ii) appeared in open court in the Do matter (*id.*); (iii) continued an attorney-client relationship with Trinh (*see supra* ¶ 65); (iv) appeared in open court in the Trinh matter (*supra* ¶ 65; BX 4d at 30); (v) agreed to represent Lee in an immigration petition (*supra* ¶ 67; BX 4e at 17-20); and (vi) filed an immigration petition on Lee's behalf (*supra* ¶ 68; BX 4e at 74). Respondent also violated this Court's unauthorized practice rule in the Do matter by holding himself out as authorized to practice law in the District of Columbia when he was suspended.[22] *See* D.C. Ct. App. R. 49(b).

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[21] We do not find that Respondent violated his duty of candor in his representation of Heesook Lee. Respondent filed an immigration petition on Lee's behalf when he was suspended from practice before the immigration authorities, *see* BX 4e at 74, but unlike the other matters, the record does not contain evidence of an affirmative false statement of fact (like Respondent's notice of appearance in the Do matter, BX 4d at 16-17), or omission (as when he appeared in open court in the Do matter), sufficient to show a Rule 3.3 violation by clear and convincing evidence.

[22] As discussed above, we find that Bar Counsel's charge that Respondent represented Truong while suspended was not proved by clear and convincing evidence. *See supra*, n.15.

Bar Counsel also alleges, and we conclude, that Respondent engaged in the unauthorized practice of law when he failed to notify his client Huynh that he was suspended from practice. Although the Court has not yet addressed it, we agree with other courts that a suspended lawyer's "failure to notify his client of the suspension serves as a ground for a violation of Rule 5.5(a)." *Atty. Griev. Comm'n v. Maignan*, 31 A.3d 467, 474 (Md. 2011); *In re Stensland*, 764 N.W.2d 438, 444 (N.D. 2009) (failure to notify client of suspension violated prohibition on unauthorized practice).

Under the Court's Rule 49, the practice of law depends on the existence of "a client relationship of trust or reliance." D.C. Ct. App. R. 49(b)(2). Respondent entered into a client relationship with Huynh in June 2009 that lasted until approximately late 2011. *See supra* ¶¶ 45-48. By the middle of that period he had become suspended everywhere he had been authorized at its start. By August 2010, he was not authorized to practice anywhere. Although Respondent does not appear to have been doing anything to pursue Huynh's case, he knew—through her repeated attempts to contact him—that she believed he was representing her. In these circumstances, Respondent's failure to inform Huynh of his suspensions was the equivalent of an affirmative representation that he was still authorized to practice law. *See Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1131 (D.C. 2015) ("A false representation may be either 'an affirmative misrepresentation or a failure to disclose a material fact when a duty to disclose that fact has arisen.'"), quoting *Rothenberg v. Aero Mayflower Transit Co.*, 495 F. Supp. 399, 406 (D.D.C. 1980); *In re Soininen*, 853 A.2d 712, 715 (D.C. 2004). Respondent was no more permitted to continue an attorney-client relationship while suspended than he was permitted to take on new clients. *See, e.g.*, *Maignan*, 31 A.3d at 474; *In re Castro*, 737 So. 2d 701, 703 (La.

June 18, 1999) (suspended attorney engaged in unauthorized practice by failing to inform clients of suspension and accepting new clients); *Colorado v. Zimmermann*, 960 P.2d 85, 86-87 (Colo. 1998) (suspended attorney engaged in the unauthorized practice of law, in part due to his failure to inform his client of his suspension).

G. Responding to Bar Counsel, Dishonesty And Interference With The Administration Of Justice—Rules 8.1(b), 8.4(c), and 8.4(d) (Counts I-IV)

Under the Rules of Professional Responsibility, attorneys owe duties not only to clients and the courts, but also to the profession as a whole. Thus, because the disciplinary system is vital to maintaining that integrity of the legal profession, a lawyer may not "fail to respond reasonably" to a request for information from a disciplinary authority under Rule 8.1(b). Failure to respond to Bar Counsel may be "conduct that seriously interferes with the administration of justice" under Rule 8.4(d). In addition, under Rule 8.4(c), attorneys may not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Bar Counsel charges that Respondent violated Rule 8.1(b) by failing to respond to its inquiries in each of the representations at issue, and that this conduct seriously interfered with the administration of justice (Rule 8.4(d)) with respect to Huynh. Bar Counsel also argues that Respondent's misrepresentations to immigration authorities and his unauthorized practice interfered seriously with the administration of justice, in violation of Rule 8.4(d). And Bar Counsel charges that respondent engaged in dishonesty, violating Rule 8.4(c), by: failing to inform Nguyen/Le, Huynh, or Lee about the status of their cases; failing to provide refunds to Nguyen/Le and Huynh; and lying to immigration authorities.

Responding to Bar Counsel. We have no trouble concluding that Respondent violated Rule 8.1(b) by failing to respond to Bar Counsel's inquiries in each of the four counts in the Specification. Although he did initially provide substantive responses and documents in two of the matters (Nguyen/Le and Tang/Dang, BX 1e, 2d), he provided only an unidentified set of documents in the third (Huynh, BX 3d), and nothing at all in the fourth (unauthorized practice). *See supra* ¶¶ 10, 42, 57, 69. Further, Respondent failed to respond to reasonable follow-up questions about the Nguyen/Le, Tang/Dang, and Huynh matters, and provided none of the financial records Bar Counsel required to investigate his handling of client funds.[23] *Id.*; BX 3c; BX E at 5.

Dishonesty. We likewise conclude that Respondent engaged in dishonesty, violating Rule 8.4(c), in the Nguyen/Le, Huynh, and unauthorized practice counts in the Specification. Dishonesty is the "most general term" for the conduct proscribed by Rule 8.1(c), and "encompasses fraudulent, deceitful, or misrepresentative behavior." *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990). However, "what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty" if it shows a lack of honesty, probity, or integrity in principle. *Id.*

Here, the record is rife with examples of Respondent's dishonesty. Respondent was dishonest when he failed to inform Nguyen/Le and Huynh that he did not file their petitions. *Supra* ¶¶ 12, 48. He was dishonest when he told them that their petitions had been filed and that they were progressing through the immigration system. *Id.* He was

[23] Because Respondent failed to answer Bar Counsel's further inquiries regarding the Nguyen/Le and Tang/Dang matters (*see supra* ¶¶ 20, 43), we do not rely on the delays in which Respondent asked for more time to respond to the complaints or Bar Counsel's questions. Accordingly, we make no conclusions regarding the health problems on which Respondent blamed those delays. *See* BX 1d; 2c; 2g, 2h.

dishonest when he failed to respond to their requests for information. *Id.* And Respondent was dishonest when he failed to refund the fees Nguyen/Le and Huynh paid after they discovered that he hadn't filed their petitions. *Supra* ¶¶ 12, 13, 52.

Respondent was likewise dishonest when he failed to inform Huynh that he had been suspended from the practice of law, and when he agreed to represent Lee when he was not authorized to practice. *Supra* ¶¶ 53, 67. He was dishonest when he filed Lee's immigration petition while not authorized to practice before the immigration authorities; when he lied on his notice of appearance; and when he appeared in immigration court for Do without disclosing his suspension. *Supra* ¶¶ 63, 65, 68. And Respondent was especially dishonest in the Trinh matter when he lied to the immigration court about being reinstated to practice. *Supra* ¶ 65.

Serious interference with the administration of justice. We conclude that Respondent's handling of Huynh's immigration petition seriously interfered with the administration of justice, in violation of Rule 8.4(d).

A lawyer violates Rule 8.4(d) where his conduct (i) was improper, *i.e.*, he either acted or failed to act when he should have; (ii) bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have potentially had an impact upon the process to a serious and adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

Respondent's misrepresentation that he was authorized to practice law in the Do, Trinh, and Lee matters violated each prong of the *Hopkins* test—misrepresenting that he was licensed to practice law was improper, bore on the judicial process, and might have put his clients' cases in danger of dismissal.

The record also supports the conclusion that Respondent seriously interfered with the administration of justice by failing to respond to Bar Counsel in the Huynh and unauthorized practice counts of the Specification. As the Rule's commentary explains, interference with the administration of justice includes the "failure to respond to Bar Counsel's inquiries or subpoenas." Rule 8.4 cmt. 2; *see also*, *e.g.*, *In re Edwards*, 990 A.2d 501, 524 (D.C. 2010). The failure to answer Bar Counsel meets the first two prongs of *Hopkins* because attorneys should respond to disciplinary authorities, and their failure to do so bears "directly on the attorney disciplinary process concerning an identifiable matter." *Id.* at 524-525. A failure to answer may be *de minimis* if the Respondent did not receive Bar Counsel's correspondence. *Id.* But where the Respondent's failure to reply necessitates repeated attempts to communicate with him (and there is no evidence of misdirected mail), the conduct goes beyond the *de minimis* threshold. *Id.*

Here, Respondent's repeated failures to respond to Bar Counsel tainted the attorney discipline process in more than a *de minimis* way and thus seriously interfered with the administration of justice. Indeed, this case demonstrates the need for such a rule: In each instance, Respondent's failure to respond caused delay and hampered Bar Counsel's investigation.

IV. Recommended Sanction

In weighing the severity of an attorney's misconduct, the Court considers "the entire mosaic of the attorney's practice as reflected in the record." *In re Ukwu*, 926 A.2d 1106, 1117 & n.20 (D.C. 2007). Here, Respondent's conduct shows an utter disregard—if not contempt—for his clients, their cases, the courts, the rules of the profession, and the disciplinary process. We recommend that he be disbarred.

Though Respondent's misconduct is extensive, two of his violations—intentional misappropriation and theft—merit disbarment all on their own. Disbarment is "[t]he presumptive sanction for intentional misappropriation, absent a showing of extraordinary circumstances." *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). No such circumstances warrant a lesser sanction here. *Cf. In re Clarke*, 684 A.2d 1276, 1281 (D.C. 1996) (Lack of prior disciplinary history, financial distress, and cooperation with Bar Counsel do not justify departing from sanction of disbarment). To the contrary, Respondent's misappropriation is aggravated by his many other violations and his prior discipline—which involved some of the same misconduct. Disbarment is likewise the appropriate sanction for theft. *In re Mitrano*, 952 A.2d 901, 928 (D.C. 2008) (Appended Board Report). Respondent's other misconduct confirms that disbarment is the appropriate sanction.

Bar Counsel argues that Respondent should also be ordered to pay restitution to Nguyen/Le, Tang/Dang, Huynh, and Lee. We agree that Respondent should repay his clients, and the Court may order a disbarred attorney to pay restitution as a condition of reinstatement. D.C. Bar R. XI § 3(b). Given the severity of Respondent's misconduct and his disregard for this disciplinary proceeding, we question whether he will ever be able to show he is fit to practice law, as required for reinstatement. *In re Johnson*, 103 A.3d 194 (D.C. 2014). Nevertheless, should that ever come to pass we recommend that restitution should be a condition of Respondent's reinstatement.[24]

[24] We recommend restitution be ordered for Tang/Dang and Huynh because (as discussed in our analysis of Rule 1.16(d)), Respondent failed to return funds owed to them, but Respondent later repaid Nguyen and Le, so we do not recommend further restitution to them. *See supra* ¶ 13. We also recommend restitution be ordered for Lee, who paid Respondent $3,000 when was not authorized to practice law at all, s*ee supra* ¶ 67, and thus not entitled to earn a fee for legal services. *See In re Ray*, 675 A.2d 1381 (D.C. 1996).

Conclusion

For the foregoing reasons, the Hearing Committee Recommends that Respondent be disbarred.

HEARING COMMITTEE NUMBER NINE

/TM/
Theodore (Jack) Metzler, Esquire
Chair

/JK/
Joel Kavet
Public Member

/TD/
Thomas DiLeonardo, Esquire
Attorney Member

Dated: September 17, 2015