DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
TOAN Q. THAI,	:	
	:	
Respondent.	:	Bar Docket No. 154-03
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 439343)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBLITY

Hearing Committee Number Eleven ("the Committee") held Respondent responsible for six violations of the District of Columbia Rules of Professional Conduct ("Rules") and recommended that he be suspended for 60 days, but that the suspension be stayed *in toto* in favor of probation for one year on the conditions that he (1) take Continuing Legal Education (CLE) courses "on legal ethics and law office management" and (2) pay restitution to his client, Nang Duc Vu, in the amount of the legal fees paid ($4,500 plus interest at the usual legal rate). Neither Bar Counsel nor Respondent took exception from the Committee's findings and recommendations.[1]

Since the findings of the Committee are supported by the substantial evidence in the record as a whole, we adopt virtually all those findings without substantial amendment, but add

[1] *See* Record Index 37 (Letter from Bar Counsel dated December 18, 2007). Respondent, on December 17, 2007, sent a message to the Office of the Executive Attorney by fax in which he "objected both to the findings and the recommendation of the Hearing Committee" and asked that the time for him to submit a brief be extended until February 14, 2007. The Office of the Executive Attorney rejected that fax and advised Respondent that "[a] notice of exception to the Hearing Committee Report should be filed with the Board with [his] original signature and a motion for leave to file out of time." Record Index No. 38. Respondent then on January 2, 2008 filed a hard copy of the letter he previously had sent by fax, but filed no motion for leave to file out of time, as the Office of the Executive Attorney had advised. The Office of the Executive Attorney rejected that filing as untimely filed. Record Index No. 39. Respondent has not made any further effort to assert any objection to the Committee's report.

some additional findings of facts that we deem established by clear and convincing evidence.[2] We agree with the Committee that the evidence establishes violations of District of Columbia 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) and 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).[3] With respect to the sanction, we recommend that Respondent be suspended for 60 days, but that the suspension be stayed after the first 30 days in favor of probation for one year on the conditions that he (1) take CLE courses and (2) pay restitution to his client, Nang Duc Vu, in the amount of $4,500 plus interest at the usual legal rate.

I. FINDINGS OF FACT

The Committee's findings of fact, which we adopt without material amendment and supplement with several findings of the Board, are as follows:

1. Respondent is a member of the District of Columbia Bar, admitted on October 4, 1993. Comm. Finding ¶ 1.[4]

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. Bar Counsel Exhibit 1 at 5-6.[5] Respondent charged Mr. Vu $4,500 as compensation for

[2] In the "Findings" section of this report, we include a citation to Committee findings that we adopt without substantial amendment. Findings made by the Board in the first instance are supported by citations to our basis for the finding.

[3] The Committee also found that Respondent violated Rule 1.16 (a lawyer must take timely steps to the extent reasonably practicable to protect a client's interest). In our view, the evidence does not establish a violation of that rule.

[4] Citations in the form "Comm. Finding ¶ ___" are to the numbered paragraphs in the Hearing Committee Report.

[5] Citations to Bar Counsel's exhibits shall be cited as "BX."

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. Comm. Finding ¶¶ 2-3. Shortly before he retained Respondent, Mr. Vu had received a notice to appear for a "Master hearing before the Immigration Court" on February 25, 2000. BX 16 at 164. At that hearing, the court scheduled a removal hearing for July 26, 2001. BX 16 at 162. The notice scheduling the July hearing contained the following statement:

> Failure to appear for this hearing other than because of exceptional circumstances beyond your control will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act . . . for a period of ten (10) years after the date of entry of the final order of removal.

BX 16 at 163.[6]

3. Respondent represented Mr. Vu in an appearance before the Immigration Court on July 26, 2001. Hearing Transcript 24:11-25:10, May 22, 2008.[7] One or two days before the hearing, Respondent faxed a set of questions related to the hearing to Mr. Vu for him to review. 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 "when [Mr. Vu] sat in [Respondent's] car, while he is driving, and we went over the questions." Comm. Finding ¶ 4; Tr. at 31:17-19, 33:6-33:19. Respondent did nothing else to prepare Mr. Vu for the July 2001 hearing. Tr. at 33:6-33:19.

4. At that hearing, 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 159-160; BX 18; Comm. Finding ¶ 5. 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; Comm. Finding ¶ 6.

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[6] The term "exceptional circumstances" is defined in the notice as referring to "circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances." BX 16 at 163.

[7] The Hearing Transcript, May 22, 2008, shall be cited as "Tr."

5. Respondent represented Mr. Vu in Immigration Court for the hearing on January 28, 2002. BX 16 at 33; Tr. at 27:20-28:9; Comm. Finding ¶ 7. In the car on the way to the January 28, 2002 hearing, Respondent again went over most of the questions that he sent to Mr. Vu before the July 26, 2001 hearing and did nothing more to prepare him for the January 2002 hearing. Tr. at 31:10-33:14; Comm. Finding ¶ 8. At that hearing, the Immigration Judge orally told Respondent and Mr. Vu that the hearing would be continued until February 24, 2003 and 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; BX 18 (tape recording of hearings before the Immigration Court); Comm. Finding ¶¶ 9-10.

6. Mr. Vu did not receive the written order that the hearing would be continued until February 24, 2003, or any copy thereof, because Respondent took the written order handed to him by the court and did not give it or a copy of it to Mr. Vu. Tr. at 37:8-18; 163:12-166:2; Comm. Finding ¶¶ 11, 14. Mr. Vu believed that the Immigration Judge scheduled the next hearing date for March 24, 2003. Tr. at 38:14 -39:9; Comm. Finding ¶ 12. Respondent also believed that the Immigration Judge scheduled the next hearing date for March 24, 2003. Tr. at 157:12-158:1; Comm. Finding ¶ 13. Respondent did not recall what he did with the written notice from the Immigration Judge that indicated that the next hearing date was February 24, 2003. Tr. at 158:15-18; Tr. at 159:4-8; Comm. Finding ¶ 15.

7. 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." Tr. at 38:10-13; Comm. Finding ¶ 16. 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 response to

her question. Tr. at 40:10-41:11; Comm. Finding ¶¶ 16-17. In 2003, the Chinese New Year was celebrated on February 1. *See* Year 2003 of Chinese Black Sheep Year, http://www.chinesefortunecalendar.com/2003.htm (last visited July 18, 2008); About.com: Chinese Culture, http://chineseculture.about.com/library/extra/calendar/bl_newyear.htm (last visited July 18, 2008).

8. Mr. Vu's hearing took place on February 24, 2003, and because Mr. Vu did not appear, he was ordered deported. BX 16 at 99-101; Comm. Finding ¶ 18. Respondent and Mr. Vu were both mailed a copy of the written deportation order. BX 16 at 99-100; Tr. at 41:15-20; Comm. Finding ¶¶ 19-20.

9. In response to the order of deportation, Mr. Vu prepared a draft letter to the Immigration Court, stating "I thought the court date is on March, and I also put in that I was assumed [sic] that [Respondent] is supposed to let me know a couple days before the court date as he did before that," and showed the draft to Respondent when Respondent was preparing a motion to reopen the removal proceeding. Tr. at 45:3-8; Comm. Finding ¶ 22. Respondent drafted an affidavit for Mr. Vu that omitted any reference to his assumption that Respondent was to advise him of the hearing a few days before the scheduled date. BX 16 at 92. The entire statement in the affidavit Mr. Vu signed, which was filed with the court in support of a motion to reopen Mr. Vu's case, read as follows:

> At my last appearance before Judge GEMBACZ, on January 28, 2002, I heard the Judge mentioned [sic] 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.

10. On March 24, 2003, Respondent filed a motion to reopen Mr. Vu's case. BX 16

at 90-91; Comm. Finding ¶ 23. 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.'" BX 16 at 90 (quoting *Matter of Haim*, 19 I. & N. Dec. 641 (BIA 1998)); Comm. Finding ¶ 24. Respondent did not attempt to show "exceptional circumstances beyond [Respondent's] control," the only ground stated in the notice of hearing for avoiding a sanction for failure to appear at the hearing. BX 16 at 90-91; *see supra* Findings of Fact ¶ 2. Attached to the motion was an affidavit signed by Mr. Vu referred to in paragraph 9 above. The draft letter prepared by Mr. Vu was not filed with the court, and neither the affidavit nor the motion itself mentioned that Mr. Vu had relied on Respondent to inform him of the correct date. Comm. Finding ¶ 25. Respondent argued in the motion that the Immigration Judge had orally informed Respondent and Mr. Vu that the next hearing date was February 24, 2003 at 1:00 p.m., not March 24. BX 16 at 90; Comm. Finding ¶ 24.

11. 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" and that "the Court also provided Respondent with a written notice indicating that the hearing was scheduled for February 24, 2003." BX 16 at 84-85; Comm. Finding ¶ 27. In its order, the court noted 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; Comm. Finding ¶ 28.[8]

12. Mr. Vu received the order denying the motion approximately two to three days

[8] Paragraphs 30 and 31 in the Committee's report state that "Respondent concedes that he did not use the correct standard in his Motion to Reopen Removal Proceedings" and that "Respondent acknowledges . . . that his use of the incorrect standard 'most likely' resulted in the Immigration Court's denial of the Motion to Reopen" (citing Tr. at 167:5-169:21, 170:2-12). The Committee's finding that the wrong standard was used is supported by the Immigration Judge's order and the testimony of Bar Counsel's expert witness. BX 16 at 84-85; Tr. at 127:17-.20. Recitation of Respondent's testimony on the point, therefore, is unnecessary.

after it was issued. Tr. at 50:7-10; Comm. Finding ¶ 29. He immediately retained another attorney, Mr. Andrew Vazquez. Tr. at 48:16-49:4; Comm. Finding ¶ 32. Mr. Vasquez instructed Mr. Vu that he would need to see Mr. Vu's file from Respondent. Tr. at 49:5-11; Comm. Finding ¶ 33. Mr. Vu attempted to get his file from Respondent two days after he hired Mr. Vasquez. Tr. at 50:20-51:1; Comm. Finding ¶ 34. Respondent, however, refused to turn Mr. Vu's file over to him. Tr. at 50:5-52:6; Comm. Finding ¶ 35. When Mr. Vu went to obtain his file, the encounter apparently became heated, and Respondent called the police. Tr. 51:19-52:6; Comm. Finding ¶ 36.

13. Mr. Vazquez also requested Mr. Vu's file from Respondent. BX 9 at 4; Comm. Finding ¶ 37. He called Respondent and asked for the file and did not receive it. Tr. 85:20-86:10; Comm. Finding ¶ 38.

14. Mr. Vu went to Respondent's office a second time and received the file. Tr. at 52:13-21; Comm. Finding ¶ 39. Mr. Vazquez finally received Mr. Vu's file on April 28, 2003. Tr. at 91:19-21; Comm. Finding ¶ 40. He decided to file a motion to reconsider the Court's denial of the motion to reopen. Comm. Finding ¶ 41.

15. Mr. Vazquez had 30 days from April 16 to file a motion to reconsider. Tr. 86:11-16; Comm. Finding ¶ 42. Respondent offered to prepare the motion to reconsider, without charge, and to "remedy [his] 'oversight,'" but Mr. Vu declined that offer. BX 9 at 2; Tr. 91:1-18; Comm. Finding ¶ 43. Mr. Vazquez filed the motion on May 1, 2003. BX 16 at 16-30.

16. 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." Tr. 101:10-12; Comm. Finding ¶ 46. Mr. Vazquez

17. Ms. Denyse Sabagh, Esquire, was qualified as an expert in the area of immigration law and practice. Tr. at 125:21-126:7; Comm. Finding ¶ 47. Ms. Sabagh has been practicing law for almost thirty years and specializes in immigration law. Tr. 125:9-20. She is a former national president and former general counsel of the American Immigration Lawyers Association, and advisor to President Clinton's transition team for immigration. *Id.* She speaks and writes 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. *Id.*; Comm. Finding ¶48.

18. Ms. Sabagh opined that Respondent did not "serve[] Mr. Vu with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Tr. at 126:9-14; Comm. Finding ¶ 49. In her opinion, Respondent's failure to serve Mr. Vu with the requisite skill and care was established by his failure to "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." Tr. at 127:17-128:6; Comm. Finding ¶ 50.

19. According to Ms. Sabagh, Respondent used a "reasonable cause" standard in his motion to reopen when the appropriate standard is "exceptional circumstance." Tr. at 137:18-139:1; Comm. Finding ¶ 52. She also testified that Respondent did not adequately prepare his client for his 2002 merit hearing. Tr. at 130:16-132:14; Comm. Finding ¶ 53. 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 and to have called other witnesses at the merits hearing. Tr. 130:16-132:16; Comm. Finding ¶¶ 53-54.[9]

20. Respondent based his motion to reopen on an allegation that the Immigration Judge gave the wrong date orally at the hearing. Ms. Sabagh testified that with respect to that allegation, Respondent had an obligation to listen to the tape of the hearing to make sure that his argument was accurate. Tr. at 139:2-139:11; Comm. Finding ¶ 56. On the tape of the hearing, the Immigration Court judge states that the hearing will be held on February 24, 2003. BX 18; Comm. Finding ¶ 58.

21. A deportation order is a very serious consequence. Tr. 137:5-13.

II. ANALYSIS

1. Respondent's Violations of Disciplinary Rules Mandating Competent Representation with Skill, Care, Zeal and Diligence

The first ethical obligation prescribed in the District of Columbia Rules of Professional Conduct is that a lawyer must provide "competent representation" when he undertakes to represent a client. Rule 1.1(a). The rule goes on to define competent representation as "requir[ing] the legal knowledge, skill, thoroughness and preparation *reasonably necessary* for the representation." *Id.* (emphasis added). Rule 1.1(b) elaborates on that definition with its specific mandate that a lawyer must "serve a client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Rule 1.3 adds that legal representations must be carried out "zealously and diligently within the bounds of the law" and "with reasonable promptness." Rule 1.3(a) and (c).

These rules "are not mere aspirations. They set standards that the legal profession is

[9] We have omitted paragraph 51 from the Committee's findings as it merely states what the witness opined would have been "good practice."

obliged to meet because lawyers often are entrusted with responsibility for some of the most important matters in their clients' lives." *In re Ukwu*, 926 A.2d 1106, 1135 (D.C. 2007). This matter illustrates the kind of heavy responsibility a lawyer can be asked to bear. Respondent's client, Nang Duc Vu, is an electrician who lives with his wife and two children in California. He is not a citizen of the United States, but he was admitted to this country almost 25 years ago, on November 8, 1983. The Immigration and Naturalization Service ("INS"), in December 1999, initiated a removal proceeding in which it sought Mr. Vu's deportation to Vietnam based upon a conviction for the offense of burglary in the Municipal Court of Orange County, California in March 1988, more than twenty years ago.[10] The Immigration Court proceeding for which Mr. Vu retained Respondent was plainly a matter of great personal importance.

The Committee's findings, supported by the substantial evidence in the record as a whole, warrant the following conclusions of law:

- Respondent, in violation of Rule 1.1(a) and (b), failed to prepare his client for the merits hearings he anticipated with the thoroughness reasonably necessary for the representation he had undertaken on behalf of Mr. Vu and he did not exercise care commensurate with that generally afforded to clients by other lawyers in Immigration Court removal proceedings. The only preparation that the record shows Respondent undertook was a discussion of a list of possible questions while Respondent was driving Mr. Vu to the Immigration Court hearings

[10] The INS notice to appear commencing a removal proceeding against Mr. Vu is dated December 8, 1999. BX 16 at 165. The merits hearing originally was scheduled to take place on July 26, 2001. As the findings in this matter relate, however, the hearing was twice postponed by the Immigration Court, *sua sponte*, and was ultimately scheduled for February 24, 2003. *See supra* Findings of Fact ¶¶ 4-5. At the time of the disciplinary hearing in this matter, on May 22, 2007, Mr. Vu was still under a deportation order, and his case was pending in the United States District Court for the Ninth Circuit. Tr. at 53:5-13.

scheduled for July 26, 2001 and January 28, 2002. *See supra* Findings of Fact ¶¶ 3, 5.

- Respondent, in violation of Rules 1.1(b), failed to calendar the hearing scheduled for February 24, 2003, for the date on the written notice he was provided by the Immigration Court. As a consequence, he failed to advise Mr. Vu of the correct date for this hearing and thus did not serve his client with the care commensurate with that generally afforded to clients by other lawyers in Immigration Court removal proceedings. The evidence supporting this violation is the testimony of Bar Counsel's expert witness, Denyse Sabagh, Esquire, that, based upon her review of Bar Counsel's file, Respondent "didn't calendar his case so that he didn't give notice to his client to remind his client about the hearing." Tr. 127:2-19; 134:18-135:22. Respondent did not contradict Ms. Sabagh's testimony. Tr. 159:4-8.[11]

- Respondent violated Rules 1.1(a) and (b) and 1.3(a) in connection with the motion to reopen the removal proceeding that he prepared and filed with the Immigration Court after Mr. Vu had been ordered deported because he missed the February 24, 2003 hearing. Respondent argued in that motion that Mr. Vu had "reasonable cause for his absence from the proceedings" and made no attempt to demonstrate "exceptional circumstances beyond [Mr. Vu's] control," the standard that (1) was stated in the notice of hearing and (2) has been established in the immigration law as the standard that must be met for relief from a failure to appear at a merits

[11] The Committee chair asked Respondent what he did with the notice he "got with respect to Mr. Vu's case in the February 24?" Tr. 159:4-6. Respondent's answer was that "[m]aybe I stuck it somewhere in the file, a file that thick." Tr. 159:7-8.

hearing. *See* BX 16 at 163; Tr. 137:14-139:1, 139:12-140:4. Respondent, moreover, failed to advance the fact that Mr. Vu had missed the hearing because he was relying upon Respondent to notify him of the hearing date, even though that point was stated in a draft letter to the Immigration Court that Mr. Vu had prepared and given to Respondent before the motion was prepared. *See supra* Findings of Fact ¶ 10. Instead, Respondent acknowledged no responsibility on his part for Mr. Vu's failure to appear, but relied on an assertion that the immigration judge had orally stated "March 24, 2003," not "February 24, 2003," when he scheduled the merits hearing during a previous hearing on January 28, 2002. Respondent, however, could not prove that assertion because it was contradicted by both the written scheduling order that Respondent had obtained from the judge and by the tape recording of the January hearing kept by the court.[12] Respondent's conduct summarized in this paragraph violated Rule 1.3(a)'s mandate that he carry out his legal representations "zealously and diligently," as well as the "care" and "skill" obligations mandated in Rule 1.1(b).

The Committee also faulted Respondent for not arguing in the Immigration Court that "Mr. Vu's conviction was not grounds for deportation." HC Report at 11. Support for that conclusion can be found in the testimony of Andrew Vazquez, Esquire, a lawyer whom Mr. Vu retained to represent him after the Immigration Court denied the motion to reopen the removal proceeding and Mr. Vu terminated Respondent's representation. The removal proceeding against Mr. Vu was premised on Section 237(a)(2)(A)(i) of the Immigration and Nationality Act,

[12] The Committee regarded Respondent's insistence during the hearing that the immigration judge had orally announced the wrong date, despite the tape recording and written order, as "puzzling." Hearing Committee Report ("HC Report") at 12. In his explanation of that insistence, Respondent advanced an argument that the Committee

as amended, 8 U.S.C. § 1227, which, as stated in the notice to appear in Mr. Vu's case, made him "subject to removal" because he had "been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or lon[g]er may be imposed." BX 16 at 165. The conviction alleged in the notice was a conviction in Orange County, California Municipal Court for burglary "in violation of Section 459 of the California Penal Code." *Id.* Mr. Vasquez testified that, when he reviewed Mr. Vu's case, he found that "the documents . . . with regard to [Mr. Vu's] criminal conviction . . . specifically state it was a misdemeanor, and therefore . . . was a sentence of one year or less in the county jail [that] could be imposed." Tr. 102:16-20. He suggested that a criminal offense punishable with a sentence of "one year or less" would not subject the offender to removal under Section 237(a)(2)(A)(i) of the Immigration Act because that federal statute specifies a "crime . . . for which a sentence of one year or longer may be imposed" as grounds for removal. Tr. 102:15-21; 8 U.S.C. § 1227.

The merit in that suggestion, however, is far from apparent. The wording of Section 237(a)(2)(A)(i) of the Immigration Act, which refers to a "crime for which a sentence of one year or longer may be imposed," could well be read to include a crime, like Mr. Vu's crime, for which a sentence of one year or less may be imposed. Respondent appears to have made exactly that point during his cross examination of Mr. Vazquez. Respondent asked Mr. Vazquez if he could show the Committee a "copy of the section of the California Criminal Code that describes that the burglary, under the burglary law, had a conviction of six months as you allege." Tr. 111:22-112:3. In his answer, Mr. Vazquez testified that "under 459, under the section [of the California Code], he [Mr. Vu] was convicted of, says that the maximum sentence that he could bear was a sentence of one year or less in the county jail." Tr. 112:14-17. After

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took as "seem[ing] to argue that the tape might have been altered." *Id.*; *see also id.* at 12-13. Respondent, however, proffered no evidence that would support any such argument.

two further questions and answers on this point, Respondent summed up the colloquy with the following comment:

> [I]f the maximum is one year, you have got to follow, because now, since you said a sentence of one year may be imposed, that is it, you know, Mr. Vu is hooked, you know, the government is right.

Tr. 113:11-14.

Mr. Vazquez did not respond to Respondent's summary, and the testimony of Bar Counsel's expert witness, Denyse Sabagh, Esquire, did not support the argument advanced by Mr. Vazquez concerning Respondent's deportability under Section 237(a)(2)(A)(i) of the Immigration Act. On that subject, her testimony was limited to the observation that, "in terms of the allegation 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." Tr. 128:2-6.

The record does not, in our view, support a conclusion that Respondent failed in his obligation of "competent representation" when he did not deny the allegation in Mr. Vu's notice to appear. The allegation avers, in essence, that Mr. Vu was convicted in a California court "for the offense of Burglary . . . in violation of Section 459 of the California Penal Code." BX 16 at 165. No reason for Respondent to challenge that allegation in Mr. Vu's case appears in the record.[13]

[13] Respondent himself introduced the fact that Mr. Vu's conviction had been "expunged in 1992" in support of an assertion that his disciplinary case "should be moot quite a while ago." Tr. 7:22-8:2. Both Mr. Vazquez and Ms. Sabagh testified, however, that "[e]xpungement of a crime involving moral turpitude . . . is not considered for immigration purposes." *Id.* at 119:12-13; 143:21-144:4; *see also id.* at 114:9-17 (Vazquez saying that expungement "is completely irrelevant to the immigration proceeding."). In answer to a question from one of the Committee members, Ms. Sabagh speculated that if the allegation of a criminal conviction were denied in an immigration proceeding, "then maybe the government couldn't make their burden of proof because they wouldn't be able to come in with the documents to prove there was a conviction . . . then the government wouldn't have met its burden of proof." *Id.* at 144:6-15. Nothing in the record, however, suggests that the INS would not have been able to prove the conviction alleged in Mr. Vu's case.

Accordingly, we do not adopt the Committee's conclusion that Respondent violated any disciplinary rule by not putting the government to its proof with regard to Mr. Vu's conviction.

2. Respondent's Violation of His Obligation to Keep His Client Reasonably Informed about the Status of the Matter

The Committee concluded that Respondent violated Rule 1.4(a), which provides that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

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 Respondent when that next date would be. Tr. 40:10-41:11. Respondent did not provide any information. *Id*. As a result, Mr. Vu was under the mistaken view that the hearing was scheduled for March 24, 2003, until he received a notice that he had been ordered deported *in abstentia* for not appearing for a hearing on February 24, 2003. Respondent asserts that he too believed the hearing was in March 2003, but that erroneous belief provides him with no legitimate excuse.

"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); *see also In re Hallmark*, 831 A.2d 366, 374 (D.C. 2003). Respondent was aware, or at least should have been aware, of the serious adverse consequence that would result if Mr. Vu did not appear for his hearing. Moreover, he knew, or at least should have known, that the Immigration Court adhered to a stringent standard for granting relief from deportation orders entered in removal proceedings against a resident alien who misses a merits hearing. Under these circumstances, Respondent informing Mr. Vu (as well as himself) of the actual date of the scheduled hearing was crucial. His failure to advise Mr. Vu of the date and time on the written order that Respondent appears to have had in his

possession falls well short of the "client's reasonable expectations for information" about his case. *See supra* note 9; *Schoenenman* at 264.[14] Respondent's conduct thus violated his obligation, under Rule 1.4(a), to keep Mr. Vu reasonably informed about the status of his matter.

3. Respondent's Violations of His Obligation to Take Timely Steps to Protect His Client's Interests

The Committee concluded that Respondent ran afoul of Rule 1.16 in connection with his transfer of the records needed by successor counsel to represent Mr. Vu in his Immigration Court proceeding. The pertinent provisions in Rule 1.16(d) require lawyers, "[i]n connection with any termination of representation," to take "timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ."

Respondent did not return Mr. Vu's file to him immediately after he was requested to do so. 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 the 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. Vu first visited his new lawyer on April 22, 2003. Tr. at 85:15-16. Mr. Vazquez informed Mr. Vu that he needed to get his files from Respondent. Mr. Vu went to Respondent's office to get the file, but Respondent did not turn over the file. Tr. at 50:20- 52:6. Mr. Vazquez called Respondent and asked for the file and did not receive it. 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. Tr. at 52:13-53:4. Mr. Vazquez received the full file on April 28th (although he received some papers in the interim). Tr. at 90:11-19, 91:19-21.

[14] The evidence is fairly clear that Respondent did not calendar the hearing for the date on the Immigration Court's

In all, there were approximately five days from the time that Mr. Vu first requested his file to the time that he received it. The Committee deemed this delay a violation of Rule 1.16, observing that "the timing was especially critical in this case" because "Mr. Vazquez had a short time fuse – 30 days from April 16 – to file a motion to reconsider." HC Report at 20. What is more, the Committee was troubled by evidence that, in the Committee's view, suggested that Respondent "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." *Id.*

Decisions of the Court under the Code of Professional Responsibility, in force in the District of Columbia before the adoption of the Rules of Professional Conduct, currently in effect, give some support to the Committee's conclusion. The opinion in *In re Russell*, 424 A.2d 1087 (D.C. 1980), expressed a strict view of the lawyer's obligation to surrender papers and records to which the client is entitled upon termination of the lawyer-client relationship. The Court accepted the Committee's view in that case to the effect that "no matter how meager, complainant was entitled to the immediate return of her file upon request." *Id*. at 1088. That formulation of the lawyer's obligation to give the client papers to which he is entitled was cited six years later in *In re Landesberg*, 518 A.2d 96, 102 (D.C. 1986) (citing to *Russell*, in support of its agreement with the Board that there was clear and convincing evidence respondent violated DR 9-103(B)(4), which prohibited refusing to return a case file to a client on demand). But recent decisions, handed down after the adoption of the Rules of Professional Conduct in 1991, have expressed the violation as a failure "to return the files promptly, pursuant to [a] client's request." *See In re Karr*, 722 A.2d 16, 20 (D.C. 1998).

In determining the "promptness" of the Respondent's surrender of the record — approximately 5 days — we look to the rule's requirement that the lawyer take "*timely* steps . . .

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order. *See supra* note 9.

to protect the client's interests." Rule 1.16(d) (emphasis added).[15] Although, as the Committee found, Mr. Vu's successor counsel had only "30 days from April 16 to file a motion to reconsider," the motion was, in fact, filed on May 1, 2003, a full fifteen days before the deadline. *See supra* Findings of Fact ¶ 16; BX 16 at 16-30. Moreover, the evidence does not suggest that successor counsel, for any reason, did not have all the time he needed to prepare the motion.[16] Under these circumstances, we conclude that, while the evidence suggests that Respondent did not act with commendable responsiveness and may even have held Mr. Vu's records for a day or two after he offered to prepare the motion to reconsider, the evidence of the record as a whole does not support the Committee's finding that Respondent violated Rule 1.16 by failing to take timely steps to protect his client's interest.

4. Recommended Sanction

The Committee recommended that Respondent be ordered suspended for sixty (60) days, with execution of the suspension stayed *in toto* for one year, during which Respondent would be on unsupervised probation. As conditions for termination of the probation, the Committee recommends that Respondent attend six hours of CLE and pay restitution of $4,500 with interest at the usual legal rate. Bar Counsel takes no exception to that recommendation.[17] We agree that a 60-day suspension and a year of probation are appropriate and that the Committee's conditions should be imposed, but we recommend that only the last 30 days of the suspension be stayed in

[15] By contrast, the previous rule provided that "[a] lawyer shall . . . *[p]romptly* pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive." DR 9-102(B)(4), Code of Professional Responsibility (emphasis added).

[16] If, for example, the evidence had shown that successor counsel had previous commitments that forced him to file the motion earlier than he would have ordinarily done so, the "timeliness" of Respondent's surrender of the documents might be subject to serious question.

[17] The Committee's recommendation, in fact, exceeds the sanction urged by Bar Counsel during the hearing in that the Committee would impose a stayed suspension of 60 days, whereas Bar Counsel urged a stayed suspension of only 30 days.

favor of the one-year suspension.

Respondent failed to advise Mr. Vu of the correct day for his merits hearing in the Immigration Court, even though he was given the written order setting forth the date of the hearing, and he probably had the order in his possession when Mr. Vu's wife inquired of the hearing day a few weeks before the date in the order. Respondent knew, or should have known, that a deportation order would follow Mr. Vu's failure to appear on the day in the order and that the Immigration Court would rescind the order only in very narrowly defined circumstances. Whether the Immigration Court would have granted relief from the order had Respondent's own responsibility been urged as a basis for such relief is beside the point. Respondent did not present that ground to the Immigration Court, ostensibly to keep his own culpability out of the record and thus protect his own self-interest. We think that negligence, and the severity of the consequence suffered by Mr. Vu as a result of it, calls for a period of actual suspension. *See In re Fitzgerald*, Bar Docket No. 376-07 at 8 (BPR July 24, 2008). A lesser sanction fails to recognize the seriousness of Respondent's misconduct and therefore would not adequately protect the public, the courts and the legal profession.

III. CONCLUSION

The Board recommends that the Court enter an Order suspending Respondent Toan Q. Thai from the practice of law in the District of Columbia for a period of sixty (60) days, with execution of the last 30 days of the suspension stayed in favor of unsupervised probation for one year.

As conditions of his probation, Respondent should be required to do the following:

(1) file with the Board on Professional Responsibility and Bar Counsel a certification that he has attended six hours of CLE courses in legal ethics and law office management as approved by Bar Counsel, and

(2) pay his former client, Nang Duc Vu, full restitution of the fees paid Respondent in the amount of $4,500, with interest computed at the usual legal rate.

For purposes of reinstatement, the suspension should be deemed to run from the date Respondent files an affidavit in compliance with D.C. Bar. R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

Respondent should not be required to notify clients of his probationary status.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
James P. Mercurio

Dated: JUL 31 2008

All members of the Board concur in this Report and Recommendation, except Mr. Bolze who is recused.