DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
STEVEN E. MIRSKY,	)	Bar Docket No. 342-02
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This matter comes before the Board on referral from the District of Columbia Court of Appeals (hereinafter the "Court") for consideration of reciprocal discipline. The only issue presented is what would constitute appropriate reciprocal discipline. In Maryland, the Respondent received a ninety-day suspension. In this jurisdiction, the usual discipline on the record presented would be a six-month suspension. The rebuttable presumption applied in instances of reciprocal discipline is that of identical discipline, i.e., in this instance a ninety-day suspension. Bar Counsel has objected to the imposition of identical reciprocal discipline and has recommended disbarment. For the reasons explained in detail below, the Board finds that on the record as it is constituted it is appropriate to impose substantially different discipline of a six-month suspension.

1. District of Columbia Proceedings

Respondent was admitted to the D.C. Bar on March 28, 1978. He was also a member of the Maryland Bar during the relevant period of misconduct.

The Court of Appeals of Maryland (hereinafter the "Maryland Court") suspended Respondent by consent for a period of ninety days, effective July 15, 2002. Bar Counsel filed a certified copy of the Maryland Court's Order, dated June 18, 2002, with the Court

on April 15, 2003.

The Court then suspended Respondent on an interim basis pursuant to D.C. Bar R. XI, § 11(d), by Order dated April 28, 2003. The Court also ordered Respondent to show cause why identical discipline should not be imposed. It directed the Board either to recommend whether identical, greater, or lesser discipline should be imposed as reciprocal discipline, or whether the Board should proceed on a *de novo* basis. *In re Mirsky*, No. 03-BG-374 (D.C. Apr. 28, 2003).

Bar Counsel filed a statement with the Board recommending the imposition of the substantially different discipline of disbarment. Respondent did not respond to the Court's Order to show cause or to Bar Counsel's statement on reciprocal discipline.

2. The Maryland Proceedings

Because this matter was resolved pursuant to a consent disposition, the record of the underlying conduct is ambiguous. The Maryland Petition for Disciplinary or Remedial Action (the "Petition"), filed on or about March 13, 2002, alleged that Respondent was retained by Mane-Line Utilities, Inc. and Utilities Services, Inc. (hereinafter "Mane-Line") on December 4, 2000, and was paid a retainer of $2,500. Petition, ¶ 2 at 1. Respondent "deposited the unearned retainer in his operating account and spent the entire amount within two weeks." *Id.*, ¶ 3 at 1. After the clients discharged Respondent and demanded that he return the unearned portion of the retainer, he drew a check on his escrow account to refund the retainer. "The check was initially dishonored due to non-sufficient funds in the account," and "Respondent then transferred personal funds and funds belonging to another client in his escrow account to cover the check." *Id.*, ¶ 6 at 2. According to the Petition, Respondent also failed to maintain in his escrow

account funds belonging to another client, apparently not related to Mane-Line, identified as "Mr. Meija." *Id.*

In his Answer to the Petition, filed May 9, 2002, Respondent admitted that he had deposited an unearned retainer for $2,500 from Mane-Line into his operating account rather than his escrow account. Furthermore, he spent that entire amount within two weeks. Respondent admitted that when Mane-Line terminated his services, he drew a check on his escrow account to refund the retainer, which was dishonored for insufficient funds. Respondent also admitted that at that time, he had a negative balance in his escrow account, and that he used another client's funds to cover the amount of the refund check to Mane-Line. Of particular importance, he stated, "Because he was gravely concerned that a check drawn on his Trust Account [payable to Mane-Line] may not clear the bank, he used all available funds in his possession, which also included funds on his person, some of which had just been given to him by another client. He has replenished those funds, recognizes that he made a serious error, and is highly remorseful with regard to this unfortunate occurrence." Answer to Petition for Disciplinary or Remedial Action (hereinafter "Answer"), ¶ 3 at 1-2. Elsewhere, he indicated that the other client was the same Mr. Meija. *Id.*, ¶ 6 at 2.

On June 10, 2002, Maryland Bar Counsel and Respondent filed a Joint Petition for Suspension of Respondent by Consent for Ninety Days ("Joint Petition"). In the Joint Petition, they stated "Respondent is alleged to have neglected a client's case, failed to keep his unearned retainer in his escrow account, and when he refunded the fee after discharge, the check was initially dishonored by the bank for non-sufficient funds. Respondent then used funds belonging to another client to cover the refund check." *Id.*,

¶ 3 at 1-2. Respondent "acknowledge[d] that if a hearing were held, sufficient evidence could be produced to sustain the allegation of misconduct." *Id.*, ¶ 6 at 2.

The Order of the Maryland Court, dated June 18, 2002, consisted of a single page, without elaboration on the Joint Petition. It does not contain any specific fact findings or legal conclusions. The Court granted the Joint Petition, and Respondent was suspended by consent from the practice of law in that jurisdiction for a period of ninety days, effective July 15, 2002. (On November 1, 2002, Respondent was reinstated to the practice of law in Maryland.)

From the Joint Petition and the Maryland Order, it is unclear as to whom Respondent was found to have committed violations of the Maryland ethical rules: Mane-Line, Mr. Meija, or both clients. While the Petition alleged violations of numerous ethical rules,[1] it did not indicate which rules were violated as to Mane-Line, and which rules were violated as to Mr. Meija. It is possible to infer intent or recklessness on the part of an attorney who has engaged in misappropriation, but it is not possible to do so in this instance. There is neither an explicit finding of intentional or reckless misappropriation, nor an implicit finding that may be inferred reasonably from the record as constituted. There is no finding even that the use of Mr. Meija's funds was unauthorized.

The best that could be said (from Bar Counsel's perspective), or the worst that could be said (from Respondent's perspective) is that the clearest statement identifying the violation of the ethical rules is vague. The clearest statement is the following: In

[1] The Petition alleged violations of the following Maryland Ethical and Business Operating Rules: Rule 1.3, Diligence; Rule 1.4, Communication; Rule 1.15, Safekeeping Property; Rule 1.16, Declining or Terminating Representation; Rule 8.4, Misconduct; Rule 16-604, Trust Account Required Deposits; Rule 16-607, Commingling of Funds; Rule 16-609, Prohibited Transactions, and § 10-3067, Misuse of Trust Money. Each of the alleged Maryland violations has a counter-part in the D.C. Rules of Professional Conduct, which are Rules 1.3; 1.4, 1.15; 1.16; 8.4; and 1.17.

Respondent's Answer, he states, "Because he was gravely concerned that a check drawn on his Trust Account [payable to Mane-Line] may not clear the bank, he used all available funds in his possession, which also included funds on his person, some of which had just been given to him by another client. He has replenished those funds, recognizes that he made a serious error, and is highly remorseful with regard to this unfortunate occurrence." Answer, ¶ 3 at 1-2.

This statement is vague, because it could be read as acknowledging Respondent's conduct as to Mane-Line was "a serious error" and "unfortunate occurrence." Or it could be read as acknowledging Respondent's conduct as to Mr. Meija was "a serious error" and "unfortunate occurrence." Or it could be read as referring to Respondent's behavior toward both clients and the entire sequence of events, taken together, as "a serious error" and "unfortunate occurrence." There is nothing else in the record that would provide a means of selecting among these plausible interpretations. Bar Counsel recognizes as much, stating, "The Maryland Court did not state the grounds for the suspension." Statement of Bar Counsel at 2. Bar Counsel does not advance any theory of intentional or reckless misappropriation as to Mane-Lane, but only as to Mr. Meija.

The Joint Petition and the Maryland Order, in sum, are both imprecise as to the exact violation (or violations) that occurred, the facts that were established, and especially the crucial issue of Respondent's state of mind as to the use of Mr. Meija's funds.

3. Analysis

The standard of review in matters of reciprocal discipline is well-established. Under D.C. Bar R. XI, § 11(f)(2), there is a rebuttable presumption in favor of the

imposition of identical discipline, unless the Respondent demonstrates or the Court finds on the face of the record by clear and convincing evidence that one or more of the five exceptions set forth in D.C. Bar R. XI, § 11(c) applies. Those exceptions are as follows:

> (1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or
>
> (3) The imposition of the same discipline by the Court would result in grave injustice; or
>
> (4) The misconduct established warrants substantially different discipline in the District of Columbia; or
>
> (5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

See In re Zdravkovich, 831 A.2d 964, 967 (D.C. 2003) (citing *In re Gardner*, 650 A.2d 693, 695 (D.C. 1994); *In re Zilberberg*, 612 A.2d 832, 834 (D.C. 1992)).

The Board may consider independently whether any of the exceptions are applicable, according to the plain language of D.C. Bar R. XI, § 11(f)(2). *See In re Maxwell*, 798 A.2d 525, 529 (D.C. 2002) (reiterating that the Board has independent authority to review the record for applicability of any exception in reciprocal discipline matters); *In re Bielec*, 755 A.2d 1018, 1022 n.3 (D.C. 2000) (per curiam) (same). If the Respondent does not participate, however, the Court has indicated that only rarely should an exception be applied. *See Zdravkovich*, 831 A.2d 969. "[I]n such circumstances, the imposition of identical reciprocal discipline should be close to automatic, with minimum review by both the Board and [the] Court." *In re Cole*, 809 A.2d 1226, 1227 n.3 (D.C. 2002) (per curiam). The Board has a limited role, at most being "obliged . . . to review the foreign proceeding sufficiently to satisfy itself that no obvious miscarriage of justice

would result in the imposition of identical discipline – a situation that we anticipate would rarely, if ever, present itself." *In re Childress*, 811 A.2d 805, 807 (D.C. 2002) (quoting *In re Spann*, 711 A.2d 1262, 1265 (D.C. 1998)).

If Bar Counsel believes an exception applies, she may object as well, recommending a different sanction. *See Zdravkovich*, 831 A.2d at 968-69. The case law also requires that the record affirmatively show the requisite level of culpability to support the substantially different discipline of disbarment as reciprocal discipline. *Zilberberg*, 612 A.2d at 835. I.e., the Maryland record must show that Respondent misappropriated client funds intentionally or recklessly. If the contention of Bar Counsel is that the misappropriation of client funds was intentional or reckless, then Bar Counsel must carry this burden with an affirmative showing of Respondent's intent based on the Maryland record or a *de novo* proceeding. Absent such a showing, it is inappropriate for the Board to recommend disbarment.

4. Bar Counsel's Argument for Disbarment

Bar Counsel has presented an argument for disbarment. Bar Counsel argues that the Maryland record establishes intentional or reckless misappropriation, which would require disbarment under *In re Addams*, 579 A.2d 190 (D.C. 1990) (en banc). In analyzing Bar Counsel's argument, it is important at the outset to note that Bar Counsel had an option. If Bar Counsel wished to do so, it could recommend (or on its own initiate) proceedings against Respondent – or any other individual similarly situated – *de novo*. If it chose to do so, it could develop a record that included direct evidence beyond the record in the reciprocal matter. For example, if it had done so here, it could have attempted to show intentional or reckless misappropriation as it would if it had proceeded

against Respondent without any action by the Maryland Court. Because it did not do so, the Board is limited to the facts as developed in the reciprocal matter.

Essentially, Bar Counsel invites the Board to conclude that Respondent committed intentional misappropriation in Maryland.[2] For that violation, the appropriate discipline would be disbarment in D.C. However, the Maryland Court did not come to such a conclusion. Therefore, the Board would be in the position of piecing together from various documents of a conclusory nature a new finding of intentionality or recklessness.

This the Board declines to do. If the record in the Maryland proceeding in fact established on its face intentional or reckless misappropriation, then the fourth factor of D.C. Bar R. XI, § 11(c), that "the misconduct established warrants substantially different discipline in the District of Columbia," would apply and disbarment would be appropriate.

Yet the record is simply unclear in this respect. Without affirmative evidence of Respondent's state of mind with respect to the entrusted funds (not present here), the record establishes no more than negligent misappropriation. The requisite affirmative evidence is not present. Therefore, the substantially different discipline of disbarment would be outside the range of sanctions imposed in this jurisdiction for Respondent's conduct.

The Board is further precluded from recommending disbarment at this juncture by the line of cases in which the Court declined to impose the greater sanction of disbarment where the records in reciprocal cases did not contain the requisite affirmative evidence of intentional or reckless misappropriation. The present case cannot be meaningfully

[2] Bar Counsel asserts that the misappropriation by Respondent was intentional in nature, although the requisite level of *mens rea* necessary to trigger to presumption of disbarment is intentionality or recklessness in D.C. *See In re Anderson,* 778 A.2d 330, 338-39 (D.C. 2001).

distinguished from those earlier decisions. *See In re Zelloe*, 686 A.2d 1034 (D.C. 1996); *In re Otchere*, 677 A.2d 1040 (D.C. 1996) (per curiam); *In re Powell*, 686 A.2d 247 (D.C. 1996) (per curiam); *In re Moorcones*, 619 A.2d 983 (D.C. 1993) (per curiam); *In re Diday*, 631 A.2d 901 (D.C. 1993) (per curiam); *Zilberberg*, 612 A.2d 832.

5. Precedent Supporting a Six-Month Suspension

There is an alternative, however, which is appropriate. The Court noted in *Zdravkovich*, 831 A.2d 964, that where Bar Counsel objects to the imposition of identical discipline but the respondent has not participated, the Board can engage in an analysis under D.C. Bar R. XI, § 11(c)(4). Under this sub-section, the Board is allowed to depart from the presumption of an identical sanction upon clear and convincing evidence that "the misconduct established warrants substantially different discipline in the District of Columbia." *Id.* at 967.

A two-step inquiry is required in determining whether imposition of a different sanction is warranted under the substantially different discipline exception of D.C. Bar R. XI, § 11(c)(4). First, the Board must determine whether the "misconduct in question would not have resulted in the same punishment here as it did in the disciplining jurisdiction." *In re Sheridan*, 798 A.2d 516, 522 (D.C. 2002) (quoting *In re Krouner*, 748 A.2d 924, 928 (D.C. 2000) and *In re Garner*, 576 A.2d 1356, 1357 (D.C. 1990)). Second, the Board must determine "whether the difference is substantial." *Id.*

It is clear that the misconduct in question would not have resulted in the same punishment here. While the Board does not believe it can infer that Respondent committed misappropriation of an intentional or reckless nature, it need do nothing more than accept the record in the Maryland proceeding to conclude that Respondent

committed misappropriation that was negligent at least. The sanction here for negligent misappropriation is typically a six-month suspension. *In re Davenport*, 794 A.2d 602, 603-04 (D.C. 2002); *Anderson*, 778 A.2d at 342. A ninety-day suspension and a six-month suspension are substantially different.

There is precedent which also provides guidance. Two cases, both of which arose in the context of reciprocal proceedings based on Maryland discipline, are instructive: *In re Berkowitz*, 702 A.2d 683 (D.C. 1997) *and In re McClain*, Bar Docket No. 66-03 (BPR, Dec. 31, 2003).

In *Berkowitz*, 702 A.2d 683, the Respondent committed in Maryland what would amount to negligent misappropriation in D.C., warranting a sanction of a six-month suspension. In Maryland, he was given an indefinite suspension with a right to apply for readmission within ninety days. *Id.* at 684. In the District of Columbia, he was suspended for a period of six months. *Id.* The Board recommended a six-month suspension and it was imposed by the Court.

In *McClain*, Bar Docket No. 66-03, similarly, the Maryland Court concluded that the Respondent therein had failed to keep safe the property of a third party and failed to maintain a properly designated attorney trust account. On that basis, it suspended him for thirty days. In the reciprocal proceedings in D.C., the Board recommended the usual sanction in this jurisdiction for misappropriation that is neither intentional nor reckless, namely a six-month suspension. *Id.* at 11.

This case is similar to both *Berkowitz* and *McClain.* Here, as in both those cases, the Board is presented with no more than negligent misappropriation. In both those cases, the Board imposed what would be customary on the same record in D.C., a six-month

suspension. The Board did so despite both the Maryland Court's imposition of a lesser sanction and Bar Counsel's request of a greater sanction. As in those cases, so too here. This case is on all fours with *McClain*. There, as here, no issue was presented as to the matter of misappropriation. There, as here, an issue was presented as to whether said misappropriation was intentional or reckless on the one hand, or negligent on the other hand. In *McClain*, the Board declined to follow Bar Counsel's suggestion that it infer the misappropriation was intentional or reckless, rather than negligent. The Board noted that there had been no such findings by the Maryland Court, and there was not a sufficient basis from which an inference could be made. *Id.* at 10-11. The Board takes the same approach here.

Conclusion

The Board recommends the imposition of reciprocal discipline in the form of a six-month suspension. The period of suspension should run from the time Respondent files the affidavit required by D.C. Bar R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Frank H. Wu

Dated: March 15, 2004.