DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
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LESLIE D. SILVERMAN,	:	
	:	
Respondent.	:	DCCA No. 04-BG-73
	:	Bar Docket Nos. 504-02 & 045-04
A Member of the Bar	:	
of the District of Columbia Court of Appeals	:	
(Bar Registration No. 448188)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL RESPONSIBILITY

These are two consolidated matters, one an original jurisdiction proceeding arising from Respondent's failure to respond to Bar Counsel, and the other a reciprocal proceeding arising out of a reprimand issued by the Maryland Attorney Grievance Commission ("the Commission"). The original matter is quite straightforward; it involves a charge of failure to respond to a Bar Counsel investigation in this jurisdiction, and there is no serious doubt as to the proper disposition of that matter. The reciprocal case, however, is more involved, for it requires the Board on Professional Responsibility ("the Board") to determine whether the Maryland Attorney Grievance Commission is a "disciplining court" within the meaning of D.C. Bar R. XI, § 11(a), such that a reprimand from the Commission may be given reciprocal effect in this jurisdiction (including the possibility that this jurisdiction might impose a *greater* sanction than a reprimand under D.C. Bar R. XI, § 11(c), without holding a *de novo* hearing here). In *In re Greenspan*, Bar Docket No. 279-01 (July 30, 2004), a majority of the Board concluded that the Massachusetts Board of Bar Overseers — which, like the Commission, does not itself have the authority to disbar or suspend attorneys — is a "disciplining court." *Greenspan* is currently pending before the D.C. Court of Appeals ("Court"), and while the Board's recommendation in that case is

pending before the Court, the Board will follow its decision in *Greenspan* for entities that are functionally similar to the Massachusetts Board. The Maryland Attorney Grievance Commission, however, is significantly different from the Massachusetts Board. Thus, the Board concludes that, even if the Court of Appeals upholds this Board's decision in *Greenspan*, the Maryland Attorney Grievance Commission should not be deemed to be a "disciplining court."

I. The Original Matter: No. 504-02

This specification of charges in the original matter comes to the Board from Hearing Committee Number Ten (the "Committee"), which concluded that Respondent violated Rule 8.1 (knowing failure to respond to a lawful demand for information from a disciplinary authority), Rule 8.4(d) (engaging in conduct that seriously interferes with the administration of justice), and D.C. Bar R. XI, § 2(b)(3) (failure to comply with an order of the Board). The Committee recommended that Respondent be publicly censured. Neither Respondent nor Bar Counsel took exception to that recommendation.

A. Procedural History

On July 14, 2003, Bar Counsel filed with the Board a Specification of Charges and a Petition Instituting Formal Disciplinary Proceedings in this matter alleging that Respondent violated the following Rules of Professional Conduct: Rule 8.1(b) in that Respondent, in connection with a disciplinary matter, failed to respond reasonably to a lawful demand for information from a disciplinary authority; Rule 8.4(d) in that Respondent engaged in and continues to engage in conduct that seriously interferes with the administration of justice; and D.C. Bar R. XI, § 2(b)(3), which provides that failure to comply with any order of the Court or

the Board "shall be grounds for discipline." BX B.[1] Respondent acknowledged that she received Bar Counsel's request for information and failed to respond to the requests. Tr. at 14, 20, 21. She further testified that some time after receiving Bar Counsel's initial request, she contacted her former law firm in an attempt to retrieve the file related to the underlying compliant, which was in their possession. Tr. at 15. When she was unable to acquire the file from her former law firm, she ordered the file from the court. Tr. at 21, 23, 29, 30, 31, 37. Respondent also cited the illness of her mother and lack of staffing as a solo practitioner. Tr. at 17-18, 26-28, 38, 47. Respondent's written answer comports with her testimony. BX 3; BX D; Tr. at 25, 37.

This matter was heard by the Committee on September 10, 2003. Bar Counsel's Exhibits BX A-D and 1-3 were received in evidence without objection. Tr. at 7. Bar Counsel called Respondent as her only witness. Respondent testified but provided no exhibits, called no witnesses, and was not represented by counsel. At the conclusion of the hearing, the Committee announced its preliminary, non-binding determination that Bar Counsel had presented evidence sufficient to permit a finding of a violation of at least one of the alleged charges. Tr. at 50-51. Bar Counsel offered no evidence of prior discipline in aggravation of the charges. Tr. at 51. Respondent offered no evidence in mitigation apart from her sworn testimony.

Following the hearing, the Committee Chair requested post-hearing briefs filed according to the briefing schedule prescribed by Board Rule 12.1. Tr. at 55. The transcript in this matter was submitted on September 25, 2003. Bar Counsel filed her Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on October 6, 2003. Respondent did

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[1] Bar Counsel's exhibits will be referred to as "BX." Respondent's exhibits will be referred to as "RX." The stipulation of the parties will be referred to as "Stip." The transcript of the hearing will be referred to as "Tr."

not timely file a post-hearing brief by the due date. Respondent filed her Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction on November 4, 2003, without requesting leave of the Committee to do so. Due to the untimeliness of the filing, Respondent's proposed findings were not accepted for filing and were returned with a notation that a motion for leave to file late was necessary. Respondent did not make that request.

The Committee issued its Report and Recommendation ("HC Rpt.") on November 17, 2003, finding that Respondent violated Rules D.C. Bar R. XI, § 2(b)(3), and Rules 8.1(b) and 8.4(d) of the Rules of Professional Conduct and recommending that Respondent be publicly censured. Bar Counsel filed a letter in support of that recommendation on November 19, 2003. Respondent filed no exception, nor was an oral argument held before the Board.

B. Findings of Fact in No. 504-02

The Board adopts the Findings of Fact of the Committee set forth below, as modified for clarification.

1. Respondent was admitted to the District of Columbia Bar on October 2, 1995, and assigned Bar No. 448188. BX A; BX 3; Tr. at 9; HC Rpt. at 3.

2. A disciplinary complaint alleging ethical misconduct by Respondent was docketed on or about November 20, 2002, and mailed to Respondent on or about November 22, 2002, at Respondent's address listed with the D.C. Bar. Bar Counsel requested that Respondent provide a written response to the complaint by December 4, 2002. Respondent failed to respond, and the letter was not returned. BX 3; HC Rpt. at 3. Respondent acknowledged that she received the complaint. Tr. at 14; HC Rpt. at 3.

3. On December 17, 2002, Bar Counsel sent Respondent a second letter directing her to submit a written response to the complaint by December 30, 2002. Tr. at 20; HC Rpt. at 3. The letter was not returned and again the Respondent failed to respond. BX 3. Respondent acknowledged that she received the second letter as well. Tr. at 20-21; HC Rpt. at 3.

4. Bar Counsel sent a third letter together with a copy of the previous letters and the complaint on January 9, 2003. Respondent was requested to respond by January 27, 2003. This letter also was not returned. BX 3; HC Rpt. at 4. Still again, Respondent admitted to receiving it. Tr. at 21-22; HC Rpt. at 4.

5. On January 24, 2003, Respondent was personally served with the three letters with enclosures. BX 1 (Attachment F); BX 3; Tr. at 22-23; HC Rpt. at 4. Respondent acknowledged personal service. Tr. at 22; HC Rpt. at 4.

6. Bar Counsel filed and mailed a motion to compel Respondent's response to the ethical complaint on March 10, 2003. BX 1; HC Rpt. at 4. The motion included copies of previous correspondence as well as another copy of the complaint. The motion was not returned and Respondent still did not respond. She acknowledged its receipt as well. HC Rpt. at 4.

7. On March 27, 2003, the Board issued an order directing Respondent to respond to the complaint within 10 days. BX 2; HC Rpt. at 4. It also was not returned, Respondent again failed to respond, (BX 3; Tr. at 24-25) and she again acknowledged receipt. Tr. at 24, 28; HC Rpt. at 4.

8. On or about July 21, 2003, Respondent was personally served with the Specification of Charges and Petition instituting Formal Disciplinary

Proceedings. BX C; HC Rpt. at 4. On or about August 12, 2003, Respondent filed with the Board and served on Bar Counsel an answer to the Petition which includes a substantive response to the underlying disciplinary complaint. BX 3; BX D; Tr. at 25, 37; HC Rpt. at 5.

C. Analysis

1. Rule 8.1(b)

Bar Counsel charged that Respondent violated Rule 8.1(b) of the Rules of Professional Conduct by failing to respond reasonably to a lawful demand for information from a disciplinary authority in connection with a disciplinary matter. Rule 8.1(b) provides in pertinent part: "A lawyer . . . in connection with a disciplinary matter shall not . . . knowingly fail to respond reasonably to a lawful demand for information from . . . [a] disciplinary authority . . . ."

This case is similar to several others in which an attorney initially failed to respond to numerous initial inquiries from Bar Counsel requesting a response to an ethical complaint but then eventually did so, once served with papers instituting formal proceedings. *See, e.g., In re Beller*, 802 A.2d 340 (D.C. 2002) (per curiam); *In re Steinberg*, 761 A.2d 279 (D.C. 2000) (per curiam). In such cases, the Board has not hesitated to find a Rule 8.1(b) violation, although the attorney's ultimate cooperation with the disciplinary system may be taken into account in determining the appropriate sanction. In this case, the Committee found Respondent to be a credible witness and expressed sensitivity to the challenges faced by solo practitioners and empathy to the difficulties Respondent encountered but did not find that those challenges and difficulties negated her obligation to respond to legitimate inquiries from Bar Counsel. The Board agrees. By her own admission, Respondent received the inquiries by mail between November 20, 2002 and January 12, 2003, and failed to respond even though she personally

received a copy of the complaint and Bar Counsel's inquiries on January 24, 2003. She also ignored a Board order directing her to respond. She finally responded on August 12, 2003, about ten months after the initial request. The Board agrees with the Committee that such conduct, established by clear and convincing evidence by Bar Counsel, violates Rule 8.1(b).

2. Rule 8.4(d)

Bar Counsel charged that Respondent violated Rule 8.4(d) of the Rules of Professional Conduct by engaging in conduct that seriously interfered with the administration of justice. Rule 8.4(d) states: "It is professional misconduct for a lawyer to engage in conduct that seriously interferes with the administration of justice."

The Board and the Court have frequently held that a lawyer's failure to respond to a Bar Counsel's request for information in response to an ethical complaint, combined with the lawyer's failure to comply with a Board order directing the attorney to respond to Bar Counsel's request for information, violates Rule 8.4(d). Comment (3) to the Rule warns that "(a) lawyer's failure to respond to Bar Counsel's inquiries . . . may constitute misconduct." *See, e.g., Beller*, 802 A.2d at 340; *In re Beaman*, 775 A.2d 1063 (D.C. 2001) (per curiam); *In re Giles*, 741 A.2d 1062 (D.C. 1999) (per curiam); *In re Wright*, 702 A.2d 1251, 1255-56 (D.C. 1997) (per curiam) (appended Board Report); *In re Delaney*, 697 A.2d 1212, 1213-14 (D.C. 1997); *In re Lilly*, 699 A.2d 1135 (D.C. 1997) (per curiam). A violation of Rule 8.4(d) has also been found based on an attorney's unjustified delay in responding, even when the attorney ultimately did respond. *See In re Nielsen*, 768 A.2d 41 (D.C. 2001) (per curiam); *Beller*, 802 A.2d at 340.

Respondent was extremely dilatory in responding to Bar Counsel's requests. Like the respondents in *Nielsen*, and *In re Taylor*, Bar Docket No. 504-98 (BPR Apr. 26, 2001), she did not respond to the requests until after the filing of formal disciplinary charges. Respondent's

conduct did in fact prevent an expeditious resolution of the allegations against her. The Board thus concludes that such conduct, established by clear and convincing evidence by Bar Counsel, violates Rule 8.4(d).

3. D.C. Bar R. XI, § 2(b)

Bar Counsel charged that Respondent violated D.C. Bar R. XI § 2(b) by failing to respond to an order of the Board. D.C. Bar R. XI, § 2(b) provides:

> Acts or omissions by an attorney . . . which violate . . . the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline. . . . Any of the following shall also be grounds for discipline: . . . Failure to comply with any order of the Court or the Board issued pursuant to this rule.

It is well established that failure to comply with the Board's orders constitutes misconduct under this Rule. *See, e.g., Beaman*, 775 A.2d at 1063; *Giles*, 741 A.2d at 1062; *Delaney*, 697 A.2d at 1213-14; *In re Smith*, 649 A.2d 299 (D.C. 1994) (per curiam). As the Committee stated in its report, the record in this matter demonstrates that Respondent received copies of the Board's order, that she was aware of the order, and that she failed to comply with the order. HC Rpt. at 11. Accordingly, the Board concludes that a disciplinary violation has been established.

II. The Reciprocal Matter: No. 045-04

The reciprocal matter arises out of a reprimand issued by the Maryland Attorney Grievance Commission. That reprimand, in turn, resulted from Respondent's failure to respond to three separate requests from Maryland Bar Counsel for information concerning ethical complaints. Respondent and Maryland Bar Counsel agreed that Respondent's conduct violated Maryland's Rule 8.1(b), and proposed to the Commission that it issue a reprimand. The Commission agreed, and by letter dated December 22, 2003, directed that Maryland Bar Counsel issue a reprimand.

Bar Counsel plausibly argues that, if the multiple violations underlying the reciprocal matter had been prosecuted here as an original matter, they might well have yielded a short suspensory sanction rather than a reprimand — especially when considered in combination with the similar violation established in the original matter in this case. *See, e.g., Steinberg*, 761 A.2d at 279. Bar Counsel urges, therefore, that this Board should recommend a period of suspension rather than a reprimand, although Bar Counsel does not oppose a stay of that suspension on the condition that Respondent demonstrate successful compliance with terms of a conditional diversion agreement reached by Respondent and Maryland Bar Counsel and ordered by the Commission.[2] Bar Counsel's position raises the question whether a reprimand issued by the Maryland Attorney Grievance Commission can be the basis for reciprocal discipline under D.C. Bar R. XI, § 11, which authorizes reciprocal discipline in the District of Columbia upon an attorney who has been the subject of a disciplinary order from a "disciplining court."

An abbreviated reciprocal disciplinary proceeding in the Board, as opposed to a full original disciplinary proceeding instituted in a Hearing Committee, is provided in D.C. Bar R. XI, § 11 if the attorney has been disciplined by a "disciplining court" elsewhere. No provision of D.C. Bar R. XI allows the Board to recommend or impose discipline in a reciprocal discipline proceeding if the foreign discipline has issued from a body that is not a "disciplining court." D.C. Bar R. XI, § 11(c) provides that, unless the respondent demonstrates by clear and convincing evidence to the contrary, "a final determination by a disciplining court outside the

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[2] In addition to the reprimand, Respondent entered into a conditional diversion agreement pursuant to Maryland Rule 16-736, which requires Respondent to take a continuing legal education course, to retain a practice monitor for one year, and to render 50 hours of *pro bono* legal services within one year. In response to a query from the Board, Bar Counsel took the position, based on Maryland Rule 16-736(h)(1), that these additional requirements under the conditional diversion agreement do not constitute an "order of discipline," within the meaning of D.C. Bar R. XI, § 11(b), and therefore may not form the basis of reciprocal discipline in this jurisdiction. The Board agrees. Accordingly, any reciprocal discipline, if at all, must rest on the reprimand issued by the Commission.

District of Columbia or by another court in the District of Columbia that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this Court." Only when foreign discipline has been imposed by a "disciplining court" does the burden shift to the respondent to show why discipline should not also be imposed here. This provision of D.C. Bar R. XI is an exception to the general rule that disciplinary violations must be proven by Bar Counsel upon clear and convincing evidence, a rule that implements the guarantee of due process that are of interest to attorneys who have a license to practice law. *See In re Ruffalo*, 390 U.S. 544 (1968).

D.C. Bar R. XI, § 11(a) defines "disciplining court" to mean

> [1] any court of the United States as defined in Title 28 Section 451 of the United States Code, [2] the highest court of any state, territory, or possession of the United States, and [3] any other agency or tribunal with authority to disbar or suspend an attorney from the practice of law in any state, territory, or possession of the United States.

(Bracketed numerals added)

This Board recently had occasion to review the "disciplining court" issued in *Greenspan*, Bar Docket No. 279-01, a case that involved the Massachusetts Bar Board of Overseers. Much like this Board, the Massachusetts Board functions, in effect, as an intermediate appellate body exercising authority delegated by the highest court of the state, with authority to review findings of fact, conclusions of law, and recommendations made by a hearing committee (or in some cases a special hearing officer). The Massachusetts Board, like this Board, may dismiss a matter and may issue a reprimand without referring the matter to the Massachusetts Supreme Judicial Court. The Massachusetts Board may not, however, suspend or disbar an attorney; that authority is reserved to the Supreme Judicial Court, by reference from the Massachusetts Board, just as that authority in our system is reserved to the Court of Appeals. *See Greenspan* at 7-12. And

like this Board, the Massachusetts Board makes recommendations with respect to disbarment and suspensions to the Supreme Judicial Court, which recommendations are accorded considerable deference by that court. *See id.* at 10 (noting that Supreme Judicial Court will uphold Massachusetts Board's recommendations if supported by substantial evidence). The Massachusetts Board does not, however, supervise the prosecution of disciplinary cases in the Massachusetts state court system (just as this Board does not exercise any such authority in the District of Columbia court system).

The Board concluded in *Greenspan*, with three members dissenting, that "a public reprimand ordered by the [Massachusetts] Board of Overseers provides an appropriate basis upon which to impose reciprocal discipline" under D.C. Bar R. XI, § 11. *See id*. at 24. In order "to develop a consistent methodology" deciding "disciplinary court" issues, the Board adopted a "three-part test to be conducted as a prerequisite for imposing reciprocal discipline whenever a low administrative body imposes discipline in a foreign jurisdiction." *Id*. at 26. That test was stated as follows:

> The Board will examine the disciplinary scheme in the original jurisdiction to determine that: 1) the administrative body imposing discipline is a part of an attorney disciplinary system; 2) the administrative body is exercising disciplinary authority pursuant to rules or regulations promulgated by a court which itself has authority to disbar or suspend attorneys in the jurisdiction; and 3) the administrative body's imposition of discipline is consistent with that delegated authority.

Id. at 26-27.

Some statements in the *Greenspan* report might suggest that the orders of any agency that satisfy the foregoing three-part test are to be deemed, without more, orders of a "disciplining court" under D.C. Bar. R. XI, § 11, but several aspects of the report caution against any such broad reading of the Board's report. First, the Board in *Greenspan* identifies the test as "a

prerequisite for imposing reciprocal discipline whenever a lower administrative body imposes discipline in a foreign jurisdiction." *Id.* at 26 (emphasis added). That statement implies that other tests may be necessary even for bodies that satisfy the *Greenspan* test. Second, the Board's adoption of the test comes in the report after the Board has stated and fully explained its decision regarding orders of the Massachusetts Board of Bar Overseers, the only administrative body at issue in *Greenspan*. And although the report goes on to "determine" that the Massachusetts Board satisfies all three prongs of the test (*Id.* at 27), the Board adopts the test for its usefulness "to *develop* a consistent methodology for determining what constitutes a 'disciplinary court.'" *Id*. at 26 (emphasis added). The Board thus did not hold out its adoption of the test as establishing a consistent methodology or explicitly conclude that any administrative body that satisfies the test should be deemed equivalent to a "disciplinary court" under D.C. Bar R. XI, § 11. In fact, the report itself implicitly disclaims any such intention when it denies that a foreign administrative body similar to District of Columbia Office of Bar Counsel — an authority that would indisputably satisfy all three parts of the test — could issue orders on which reciprocal discipline could be based. That disclaimer appears at *Greenspan* at 11 n.14, in which the Board responds to an argument made in the dissenting statement. The *Greenspan* dissenters, on the assumption that any agency that satisfies the Board's "three-part test" would be deemed a "disciplinary court" for D.C. Bar R. XI, § 11, contended that "informal admonitions" of the kind Bar Counsel issues under authority delegated by the Court might be held adequate for imposing reciprocal discipline if issued by a similar agency in another jurisdiction. *Greenspan*, Dissenting Statement of Member Paul R.Q. Wolfson at 3-5. The Board rejected this contention, however, by observing that "this jurisdiction has never imposed reciprocal discipline based on a Bar

Counsel admonition issued in another jurisdiction" and explaining that "*we are not endorsing such a practice*." *Greenspan* at 11 n.14 (emphasis added).

We therefore conclude that the three-part *Greenspan* test was not adopted as a comprehensive statement of the methodology for determining whether "disciplinary court" status should be accorded a foreign administrative body that exercises authority delegated by the highest court in the jurisdiction but which has no "authority to disbar or suspend an attorney from the practice of law in any state, territory, or possession of the United States." D.C. Bar R. XI, § 11(a). On the contrary, as the Board explained, the test is intended to operate as a "prerequisite" to exclude those bodies that do not satisfy its requirements. "Disciplinary court" status thus should be accorded only to administrative bodies that, like the Massachusetts Board of Bar Overseers, satisfy the prerequisite three prongs of the *Greenspan* test, but also have the powers, duties and regular functions to justify the presumption its orders would have under D.C. Bar R. XI, § 11(c).

The Maryland Attorney Grievance Commission functions in a manner that is quite different from the Massachusetts Board. In many respects it functions more like a prosecutor's office or a grand jury than an intermediate appellate body under the direct supervision of the highest court. The Commission supervises the prosecutorial activities of Maryland Bar Counsel more directly than is the case in this jurisdiction. Upon completion of an investigation, Bar Counsel recommends to the Commission one of various actions, which the Commission may approve or disapprove, or files with the Commission a Statement of Charges with an election for peer review. Peer review panels may hold informal meetings with Bar Counsel, the complainant, and the attorney, and recommend action to the Commission, which the Commission may approve or disapprove. The actions which Bar Counsel or the peer review panels may

recommend to the Commission include dismissal or termination of a complaint (with or without a warning) in accordance with Md. Rule 16-735; a Conditional Diversion Agreement in accordance with Md. Rule 16-736; a reprimand in accordance with Md. Rule 16-737; or the immediate filing of a Petition for Disciplinary or Remedial Action in the Maryland Court of Appeals, in accordance with Md. Rules 16-771, 16-773 or 16-774. It is noteworthy, however, that the Commission may issue a reprimand (or, more accurately, direct Maryland Bar Counsel to administer a reprimand) only if the respondent and Bar Counsel agree. Should the respondent's attorney resist issuance of a reprimand, then Bar Counsel or the Grievance Commission may pursue the matter only by petitioning the Court of Appeals for disciplinary or remedial action.

Quite unlike the case in our system (or Massachusetts' system), once the Grievance Commission petitions the Maryland Court of Appeals for disciplinary or remedial action, the Commission ceases to operate like an adjudicator. Rather, in Maryland, disciplinary matters are tried in the Circuit Courts before a state judge. The Grievance Commission stands as the petitioner in such cases, with the actual prosecution usually conducted by Bar Counsel; the Grievance Commission therefore becomes the adversary of the respondent, not the neutral adjudicator. After the trial, the circuit judge usually makes findings of fact and conclusions of law, subject to review in the Maryland Court of Appeals.

In a large number of cases, the Grievance Commission represents the prosecutorial, rather than the adjudicatory, arm of the disciplinary system. Moreover, the only occasion on which the Grievance Commission may itself order that discipline be imposed, in the form of a reprimand, is where the respondent agrees. Proceedings before the Grievance Commission may be significantly more informal than proceedings before the Massachusetts Board of Overseers.

Indeed, because the Grievance Commission may not issue disciplinary orders without the attorney's consent, the Commission does not appear to be obligated to observe the full constitutional requirements of procedural due process that must be observed by adjudicatory bodies such as this Board and the Massachusetts Board of Overseers. The attorney's right to due process, rather, is secured by his right to a full trial on the merits before a state judge in the Maryland courts.

The Board's decision in *Greenspan* was not intended to reach orders issued by prosecutors, rather than adjudicators, in the disciplinary system. Of course, given the very diverse array of disciplinary systems in this country, the Board may well encounter bodies in the future that fall somewhere in between the Massachusetts Board of Overseers and the Maryland Grievance Commission. The Maryland Grievance Commission, however, falls at one pole and its orders cannot be the basis for reciprocal discipline under D.C. Bar R. XI, § 11. Accordingly, the Board orders that the reciprocal matter, No. 045-04, be dismissed.[3]

III. Sanction Recommendation in No. 504-02

Because the Board finds a disciplinary violation only in the original matter, the Board's sanction recommendation is limited to the record in that matter. The Hearing Committee recommended that Respondent be publicly censured, comparing Respondent's actions to *Nielsen*, 768 A.2d at 41. The Board agrees with the Hearing Committee that this case is much like *Nielsen*. As the Board stated in that case, "[a] public censure is the appropriate sanction for Respondent's dilatory response to Bar [C]ounsel and to the Board order compelling a response. It sends an appropriate message to the Bar that the use of dilatory tactics in responding to Bar

[3] Bar Counsel, of course, remains free to institute an original proceeding should she deem it warranted.

complaints will not be tolerated and, at the same time recognizes Respondent's eventual cooperation with the disciplinary process and [her] lack of a prior disciplinary record." *Nielsen*, Bar Docket No. 482-98 (BPR Nov. 7, 2000).

In determining the appropriate sanction, the Court has considered the seriousness of the misconduct and sanctions for similar misconduct,[4] prior discipline, prejudice to the client, violation of other disciplinary rules, whether the conduct involved dishonesty, the respondent's attitude, and circumstances in aggravation and/or mitigation. *See In re Slattery*, 767 A.2d 203, 214-15 (D.C. 2001); *In re McLain*, 671 A.2d 951, 954 (D.C. 1996); *In re Jackson*, 650 A.2d 675, 678 (D.C. 1994) (per curiam) (appended Board Report); *In re Hill*, 619 A.2d 936, 939 (D.C. 1993) (per curiam) (appended Board Report); *see also In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). We treat these factors below.

There is no evidence of prior discipline, prejudice to a client, dishonest conduct, or violations of other rules beyond those two based on Respondent's failure to respond. The seriousness of Respondent's misconduct is not great; she did eventually respond to the complaint before the hearing in this matter, and she participated in the hearing. Respondent cited the illness of her mother, the moving of her law firm, and the attendant problems with making her office operational as additional factors affecting her response to Bar Counsel and the Board. Tr. at 17-18, 26-28, 38, 47. While expressing sympathy with Respondent's problems, the Committee found that those challenges did not negate her duty to respond or appreciably mitigate her violation. The Board agrees with the Committee as discussed above that the appropriate sanction in this instance is a public censure, which is consistent with the sanctions imposed by the Court

[4] The Board has a duty not to recommend dispositions which would foster a tendency towards inconsistent dispositions for comparable conduct. D.C. Bar R. XI, § 9(g)(1).

in similar matters, as exemplified by *Nielsen*, 768 A.2d at 41. Like *Nielsen*, where a public censure was imposed, the instant matter involves a single matter. Respondent's response to the complaint was several months overdue and thus untimely, and it was made only after formal charges were filed. Further, like *Nielsen*, Respondent participated in the proceedings before the Hearing Committee and she had no record of prior discipline. Theoretically it might have been possible for Respondent to establish sufficient mitigating factors to make the appropriate sanction a Board reprimand rather than a censure. *See Taylor, supra*. However, Respondent's various procedural defaults in this case (*see* Findings of Fact ¶¶ 1-8, *supra*) impeded her from making any such showing with sufficient clarity that would give the Board the confidence to impose a reprimand on its own rather than recommend a censure by the Court.

IV. Conclusion

Based upon the foregoing, the Board determines that reciprocal discipline based on the Attorney Grievance Commission of Maryland reprimand and Conditional Diversion Agreement under D.C. Bar R. XI, § 11(c) is not appropriate. With regard to the original jurisdiction matters, the Board adopts in substance the findings of the Hearing Committee, and concurs with its conclusion of law that Bar Counsel has proven by clear and convincing evidence that

Respondent violated Rules 8.1(b), 8.4(d), and D.C. Bar R. XI, § 2(b)(3). The Board recommends a sanction in the original proceeding of a public censure.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Paul R.Q. Wolfson
Vice Chair

Dated: December 17, 2004

All members of the Board concur in this Report and Recommendation except Mr. Willoughby, who is recused, and Mr. Baach, who has filed a separate concurring and dissenting statement joined by Dr. Payne.

Opinion of Martin R. Baach concurring in part and dissenting in part.

I concur in all respects with the portion of the Report that concerns the original matter, BDN 504-02. I respectfully dissent with regard to the Report's treatment of the "disciplining court" issue and thus its conclusion in the reciprocal matter, BDN 045-04.

With the two other matters decided today, *In re Robert Silverman*, BDN 145-02, and *In re Becket*, BDN 174-02, and the earlier decided *In re Greenspan*, BDN 279-01 (BPR July 30, 2004), the Court now has before it four "disciplining court" cases to aid in its resolution of the proper interpretation of Rule XI, § 11 (a). Unfortunately, we are unable to present the Court with a consistent view of our own on this issue, as the majority and dissenting opinions reflect.

I would utilize the three-part *Greenspan* test in this case and every reciprocal discipline case that comes before us. Application of that test would lead to the conclusion that: (i) the Maryland Attorney Grievance Commission ("Commission") is a "disciplining court," (ii) our Board should afford deference to the Commission's decision in the instant case; and (iii) reciprocal discipline should issue in BDN 045-04.

The Respondent admits violating Maryland Rule 8.1(b). Respondent did not contest the reprimand that the Commission issued. Had Respondent contested either liability or sanction, the charges against her would have been heard by a circuit court judge and finally adjudicated before the Maryland Court of Appeals – the state's highest court. Once that court ruled, we would then have afforded deference to the Maryland disciplinary decision. But Respondent elected not to contest either liability or the resulting sanction the Commission imposed. The majority decision thus creates a conundrum: because Respondent was adjudicated by consent rather than in a contested proceeding, Bar Counsel must now commit the resources necessary to bring an original

matter against her or Respondent will not be subject to any sanction in the District of Columbia. This cannot be what Rule XI intended.

All members of the Board concur in this Order. Mr. Wolfson has filed a separate Concurring statement joined by Mr. Klein, Mr. Williams, Ms. Helfrich and Mr. Mercurio. Affording reciprocal treatment to the discipline that was issued by the Maryland system, the majority concludes, "would stretch the meaning of 'disciplining court' too far." Majority Op. at 13. This is because the majority concludes that the Commission assumes a prosecutorial function, which the agencies in *Greenspan* (the Massachusetts Board of Bar Overseers), in *Robert Silverman* (the Hearing Department of California State Bar Court), and in *Beckett* (the Connecticut Statewide Grievance Committee) purportedly do not. Accordingly, while claiming adherence to our *Greenspan* precedent, the majority declines to apply its three-part test in the instant case, a test that indisputably would find that reciprocal discipline is proper here.

I would apply the *Greenspan* test and support reciprocal discipline in all four cases. I come to this view for a number of reasons.

First, absent compelling grounds to reverse our decision in *Greenspan*, which surely have not arisen in the four months since that case was decided, I believe the Board is bound as a matter of *stare decisis* to follow the three-part test we announced in that case.

Second, *Greenspan* – which is in accord with the decision of the Board in *In re Dixon*, Bar Docket Nos. 480-95 & 178-96 (BPR July 23, 1996) – is the right result as a straight matter of statutory construction. Just a few days ago the United States Supreme Court was faced with a vexing statutory construction question arising out of the Truth in Lending Act. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. ___, 2004 WL 2707418

(Nov. 30, 2004). The number of opinions written in *Koons Buick* is a testament to the challenges that can be presented by statutory construction. Justice Ginsburg's opinion for a plurality of the Court contrasted the uncertain meaning of the statutory language in question with the clear purpose of Congress.

In my view while the majority here, and the dissent in *Greenspan*, parse each word of Rule XI, Sec. 11(a) in search of support for their conclusion that it has a narrow scope, their reading both strains the text and ignores the obvious function of reciprocal discipline. That function is to afford full faith and credit to the legitimate and duly constituted disciplinary systems of the fifty states, the territories, and possessions and to impose reciprocal discipline, via expedited procedures, upon those members of the D.C. Bar who are properly disciplined there. *See In re Zdravakovich*, 831 A.2d 964, 969 (D.C. 2003) ("underlying our strict standard in reciprocal bar discipline cases is not only the notion that another jurisdiction has already afforded the attorney a full disciplinary proceeding, but also the idea that there is merit in according deference, for its own sake, to the actions of other jurisdictions with respect to the attorneys over whom we share supervisory authority.") The majority's reading of the definition of "disciplining court" would frustrate that objective.

The proper answer to the majority's restrained reading of the definition of "disciplining court" is to apply common sense. The *Koons Buick* majority quoted Justice Oliver Wendell Holmes' decision in *Roschen v. Ward*, 279 U.S. 337, 339 (1929): "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Koons Buick*, majority slip op. at 12. In his concurrence, Justice Stevens put it like this: "If an unambiguous text describing a plausible policy decision were a sufficient basis for determining the meaning of a statute, we would have to

affirm." *Id., concurring slip op*. at 1 (Stevens, J., concurring). But the Court did not affirm because common sense prevailed and the clear objective of the Act lighted the way to the right interpretation of the TILA. "Common sense is often more reliable than rote repetition of causes of statutory construction." *Id.* at 2.

As the lone *Koons Buick* dissenter, Justice Scalia – like the majority here who refuse to accept the common sense of *Greenspan* – prefers to burden the drafter of the definition with the task of clarifying the wording:

> If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.

Id., dissenting slip op. at 7 (Scalia, J., dissenting) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004)). In my view, this is not what our Board should do. The Board should use common sense, not burden the Court of Appeals with an unnecessary demand that it rewrite the statute.

Common sense suggests that the Court fully intended that authorized delegates of a state's highest court charged with conducting disciplinary proceedings for that court and subject to the court's supervision and review should be considered as part of that court for purposes of the "disciplining court" definition. Such a construction would not render the remainder of the definition – "any other agency or tribunal with authority to disbar or suspend an attorney from the practice of law" – superfluous. There may well be such agencies or tribunals in other states that are not creatures of the state's highest court and not subject to its review but that have the ultimate power of disbarment or suspension that fit within this phrase. There may be others still, such as courts of limited jurisdiction, that only have the lesser power of reprimand or admonition not subject to

high court review that would be excluded from the definition. The point is that it is possible to use common sense to construe the rule as we did in *Greenspan* without doing violence to any of its provisions and fully achieve its objectives.

Third, the plain fact is that the majority's opinion does not actually rest on a construction that confines the language of the rule, "the highest court of any state," only to such courts themselves. The majority says it is only distinguishing, not reversing, *Greenspan* when it concludes that the Massachusetts Board in that case qualifies for reciprocity:

> Because the Massachusetts Board routinely exercises what may fairly be characterized as adjudicatory, or quasi-judicial, authority delegated from (and subject to the direct supervision of) the Supreme Judicial Court, it is reasonable to conclude that the Massachusetts Board functions, in effect, as part of the highest court of the Commonwealth of Massachusetts when hearing disciplinary cases.

Majority Op. at 11. Yet the language of the rule contains no such qualifications. This is simply a gloss on the rule that the majority is prepared to accept and not the product of strict construction.

At its core, the majority opinion reaches its result not as a matter of construction of the definition of "disciplining court" but due to a more fundamental concern, that inclusion of the Maryland Commission (but not the Massachusetts Board in *Greenspan*) within the ambit of Rule XI would violate due process. This is surely a legitimate concern, but I believe it is misplaced. The majority's assessment of the Maryland disciplinary system, and the Commission's role in it, is simply incorrect. The majority

expresses concerns about the Committee's role as a "prosecutorial arm" of the Maryland system, that the Committee "may be significantly more informal" than the Massachusetts Board considered in *Greenspan*, and that the Commission "does not appear to be obligated to observe the full constitutional requirements of due process." Majority Op. at 15. With respect, I disagree with this assessment.

The Maryland Court of Appeals has established its disciplinary system much like our Court of Appeals, through Court Rules. Chapter 700 of these court rules concerns discipline. Rule 16-711 creates the Attorney Grievance Commission and defines its authority. The Maryland Court of Appeals appoints all members of the Commission, consisting of nine lawyers and three non-lawyers. All are volunteers. Subject to approval by the Court of Appeals, the Commission appoints Maryland's Bar Counsel. *See* Rule 16-711(h)(3). The Commission also supervises the activities of Bar Counsel, authorizes Bar Counsel to hire staff, and has budgetary authority for the Maryland disciplinary system. Rule 16-711 (h)(4),(5) and (15). In my judgment, this authority is the same as this Board's authority over Bar Counsel. *See* D.C. Bar R. XI, §§ 4(e)(2), 6(a)(1).

In Maryland, after investigation, the Bar Counsel recommends to the Commission various actions which Rule 16-711 (h)(9) enumerates: dismissal of the complaint; termination of the complaint; diversion; issuance of a reprimand; or filing of a petition for disciplinary action. In our system, the Board serves the same role as the Maryland Attorney Grievance Commission, either through the Board's appointment of a contact member of a Hearing Committee or by the Board directly. *See* D.C. Bar R. XI, §§ 4(d), 5(d). If a petition for disciplinary action is filed in Maryland, it follows a different route from the route – Hearing Committee to Board to Court – we use in the District of

Columbia, but the Maryland system is no less protective of a respondent's due process rights than our system. When a matter is contested, fact-finding and legal determinations are made after hearings by circuit court judges appointed by the Court of Appeals. Rules 16-710; 16-752; 16-757. When the lesser sanction of reprimand is not contested, the Commission imposes it without further judicial involvement. Both types of proceedings guarantee due process. Absent some form of coercion, which is not suggested here, a respondent's knowing and voluntary consent to reprimand cannot constitute denial of due process.

In short, in many respects the Maryland Commission functions just like our Board. From my reading of the Maryland Rules, the Maryland system protects due process as zealously as we do. The majority certainly recites no basis even to suspect the contrary. So what we have here is a reciprocal case in which the Respondent agreed with the Commission at the outset that she violated a disciplinary rule and agreed as to the sanction to be imposed in Maryland. With all the opportunities the Respondent had to have a judicial hearing in Maryland, and the full panoply of due process rights afforded to her in Maryland, she elected to end the matter quickly and simply. There is no due process reason to decline to afford the matter reciprocal consideration under our Rule XI.

Fourth, and finally, reciprocal cases are consuming more and more resources in our disciplinary system. The Board should, it seems to me, find solutions that, while fully compliant with the demands of due process, are expeditious and not overly burdensome. That is the purpose of reciprocal discipline. That policy objective counseled the *Greenspan* result, and it counsels the same result here.

By:_____

Martin R. Baach

Chair

Dated: December 17, 2004