



By order of the California Court filed August 22, 2001, as amended by an order filed July 18, 2003, Respondent was suspended from the practice of law for one year, with the suspension stayed subject to a two-year probation and specified conditions.<sup>1</sup> Respondent failed to report the California discipline to Bar Counsel as required by D.C. Bar R. XI, § 11(b). Bar Counsel instead received notice of the California order of discipline from the American Bar Association's National Lawyer Regulatory Data Bank.

Upon receiving notice of the California discipline from Bar Counsel, the Court directed the Board to recommend whether identical, greater or lesser discipline should be imposed as reciprocal discipline or whether the Board instead elects to proceed *de novo*. Order, *In re Fuchs*, No. 04-BG-882 (D.C. Aug. 3, 2004). Because the California Court stayed Respondent's entire suspension, Bar Counsel did not request, and the Court did not order, an interim suspension.

#### THE CALIFORNIA PROCEEDINGS AND MISCONDUCT

The Statement of Bar Counsel provides a description of Respondent's California disciplinary proceedings and the misconduct which formed the basis for such proceedings and resulted in the issuance of a disciplinary order. Bar Counsel's description is fully supported by the record. The Board therefore accepts the description of these matters set forth in the Statement of Bar Counsel.

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<sup>1</sup> The suspension was based on a violation of California Business and Professions Code Section 6068(c) which provides in relevant part that an attorney will only pursue such actions "as appear to him or her legal or just." Respondent's violation of this provision arose out of filing a civil claim against a former client after signing a settlement and release agreement releasing the former client from claims which formed the basis for the suit.

## RECIPROCAL DISCIPLINE

There is a presumption in favor of imposing identical reciprocal discipline that may be rebutted by clear and convincing evidence that one or more of the five exceptions set out in D.C. Bar R. XI, § 11(c) exists. D.C. Bar R. XI, § 11(f); *In re Zilberberg*, 612 A.2d 832, 834 (D.C. 1992).<sup>2</sup> When a respondent does not contest reciprocal discipline, however, the Board's role is limited to reviewing the foreign proceeding "sufficiently to satisfy itself that no obvious miscarriage of justice would result in the imposition of identical discipline." *In re Childress*, 811 A.2d 805, 807 (D.C. 2002) (quoting *In re Spann*, 711 A.2d 1262, 1265 (D.C. 1998)). The imposition of identical discipline when the respondent fails to object "should be close to automatic, with minimum review by both the Board and this court." *In re Cole*, 809 A.2d 1226, 1227 n.3 (D.C. 2002) (per curiam).

In accordance with our limited role, we have examined the record and find nothing that rises to the level of an obvious miscarriage of justice. Respondent received due process in California. He entered a nolo contendere plea to the charged violation of California Business and Professions Code Section 6068(c)<sup>3</sup>. The restriction on maintaining an unjust action imposed

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<sup>2</sup> The five exceptions under D.C Bar R. XI, § 11(c) 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.

<sup>3</sup> Under the terms of California Business and Professions Code Section 6085.5(c) "a plea of nolo contendere shall be considered the same as an admission of culpability."

by that provision is analogous to District of Columbia Rule 3.1.<sup>4</sup> *See In re Reiner*, 561 A.2d 479, 482 (D.C. 1989) (per curiam) (imposing reciprocal discipline “despite slight variations in wording” between District of Columbia disciplinary rules and rules of another jurisdiction, so long as the rules have “the same substantive effect.”) Therefore Respondent’s action in pursuing a suit against his former client would also constitute misconduct in the District of Columbia.<sup>5</sup>

### CONCLUSION

The Board recommends that identical reciprocal discipline should be imposed in this case and therefore the Court should order a one-year suspension, stayed in favor of two years of unsupervised probation subject to the conditions of probation imposed in California, and a requirement that Respondent provide proof that he has complied with the probation conditions imposed in California. *See, e.g., In re Chadwick*, 585 A.2d 798 (D.C. 1991) (per curiam).

### BOARD ON PROFESSIONAL RESPONSIBILITY

By: \_\_\_\_\_  
Roger A. Klein

Dated: April 27, 2005

All members of the Board concur in this Report and Recommendation except Dr. Payne and Ms. Coghill-Howard.

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<sup>4</sup> Rule 3.1 reads in relevant part: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.”

<sup>5</sup> Bar Counsel argues that, under our Rule of Professional Conduct 8.5(b), where (as in this case) the misconduct takes place entirely in the originating jurisdiction, this Board should not independently consider whether the facts would constitute misconduct in the District of Columbia, but rather, under a choice of law analysis, should accept the foreign jurisdiction’s determination that misconduct has occurred. The Board has previously rejected this argument by Bar Counsel. *See, e.g., In re Gansler*, Bar Docket No. 405-03, at 12-19 (BPR July 9, 2004) (pending appeal).