DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
BENJAMIN M. SOTO,	)	Bar Docket No. 107-00
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

Background

Respondent is a member of the Bar of the District of Columbia Court of Appeals (the "Court"), having been admitted by motion on January 6, 1997. Respondent is also a member of the Bar of Pennsylvania. Respondent was also admitted to practice before the United States District Court for the District of Maryland on February 3, 1997. On June 7, 2002, the Attorney Grievance Commission of Maryland and Respondent filed a Joint Petition for Reprimand by Consent with the Court of Appeals of Maryland (the "Maryland Court") asking it to issue an order reprimanding Respondent for engaging in the unauthorized practice of law in Maryland, with the provision that the order not be published in the Maryland Reports, Maryland Reporter or the Atlantic Reporter, Second Series. The Joint Petition for Reprimand by Consent was filed on June 7, 2002, in *Attorney Grievance Comm'n of Md. v. Soto*, Misc. Docket AG, No. 69, September Term, 2001.

Respondent is not admitted to practice law in Maryland, but is subject to the disciplinary authority of the Maryland Court pursuant to Rule 8.5(b)[1] of the Maryland Rules of Professional Conduct and Maryland Rule 16-701(a).[2]

On June 13, 2002, the Maryland Court issued an order reprimanding Respondent for engaging in the unauthorized practice of law in Maryland with the provision that it not be published in the Maryland Reports, Maryland Reporter or the Atlantic Reporter, Second Series. Thereafter, the Attorney Grievance Commission of Maryland reported to the Office of Bar Counsel the issuance of the disciplinary order by the Maryland Court. The reprimand is subject to public disclosure and is a formal disciplinary sanction in Maryland. *See* Statement of Bar Counsel, Attachment D (letter dated Oct. 29, 2002, from Maryland Assistant Bar Counsel Raymond A. Hein).

The Board recommends that the Court impose the reciprocal discipline of a public censure upon Respondent.

Disciplinary Proceedings Before the Board on Professional Responsibility

On September 17, 2002, Bar Counsel filed with the Court a certified copy of the order of the Maryland Court. On October 1, 2002, the Court issued an order directing Bar Counsel to inform the Board on Professional Responsibility (the "Board") of her position regarding reciprocal discipline within thirty days of the date of the order. Based

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[1] Rule 8.5(b) of the Maryland Rules of Professional Conduct states: "A lawyer not admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that: (1) involves the practice of law in this State by that lawyer, or (2) involves the lawyer holding himself or herself out as practicing law in this State, or (3) involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control."

[2] Maryland Rule 16-701(a) states, in pertinent part, that for purposes of discipline, the term attorney includes "a person not admitted by the Court of Appeals who engages in the practice of law in this State, or who holds himself or herself out as practicing law in this State."

on the disciplinary order of the Maryland Court and the underlying record, Bar Counsel submitted that the Board should recommend to the Court that equivalent reciprocal discipline be imposed and that Respondent be censured by the Court.

Facts Underlying The Maryland Discipline

On May 1, 1996, Respondent became employed as an associate attorney of the law firm then known as Garza, Papermaster, Regan & Rose, P.C. (the "Garza firm"). The Garza firm maintained its offices in Rockville, Maryland. At the time of his initial employment with the Garza firm, Respondent was a member only of the Bar of Pennsylvania. Subsequently, Respondent was admitted to practice in the District of Columbia by motion on January 6, 1997, and before the United States District Court for the District of Maryland on February 3, 1997. Respondent remained employed with the Garza firm through February 2000.

The primary focus of Respondent's legal work at the Garza firm consisted of probate and civil cases filed in the District of Columbia, and bankruptcy cases filed in Maryland. Respondent also performed non-legal real estate settlement work for a title company owned by John R. Garza, Esquire, one of the partners at the Garza firm. On three occasions in 1999, Respondent signed instruments affecting title to Maryland real property. Accompanying Respondent's signature on each instrument was a statement certifying that the instrument "was prepared by or under the supervision of the undersigned, an attorney duly admitted to practice before the Court of Appeals of Maryland."

In the Joint Petition for Reprimand by Consent, Respondent acknowledged that this conduct constituted the practice of law in the State of Maryland, pursuant to the

Maryland Code, Business Occupations and Professions, § 10-101(h)(2)(ii), which defines the practice of law as including "preparing an instrument that affects title to real estate," and he further acknowledged that he engaged in the unauthorized practice of law in violation of Maryland Rule of Professional Conduct 5.5(a)[3] and Maryland Code, Business Occupations and Professions, § 10-601(a).[4]

Analysis

D.C. Bar R. XI, § 11(f)(2) provides that identical discipline be imposed unless the attorney demonstrates, or the Court finds on the face of the record, by clear and convincing evidence that one of the five exceptions set forth in D.C. Bar R. XI, § 11(c) applies.[5] *See* D.C. Bar R. XI, § 11(c). The rule "creates a rebuttable presumption that the discipline will be the same in the District of Columbia as it was in the original disciplining jurisdiction." *In re Zilberberg*, 612 A.2d 832, 834 (D.C. 1992) (citing *In re Velasquez*, 507 A.2d 145, 146-47 (D.C. 1986) (per curiam)). That presumption may be overcome where one or more of the specifically enumerated exceptions listed in D.C. Bar R. XI, § 11(c) exists.

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[3] Rule 5.5(a) of the Maryland Rules of Professional Conduct, which is identical to Rule 5.5 (a) of the D.C. Rules of Professional Conduct, provides: "A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."

[4] Section 10-601(a) of the Maryland Code, Business Occupations and Professions, states that "[e]xcept as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar."

[5] D.C. Bar R. XI, § 11(c) provides that reciprocal discipline shall be imposed unless the attorney demonstrates by clear and convincing evidence that:
(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.

When a respondent does not contest reciprocal discipline, the role of the Board is more limited. The Court has stated that in such cases, "[t]he most the Board should consider itself obliged to do . . . is 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)). The Court also has recently reiterated that "in such circumstances, the imposition of identical discipline 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).

Bar Counsel has filed a statement with the Board supporting imposition of a censure as reciprocal discipline. In a response to the Court's order to show cause, Respondent agrees with Bar Counsel's recommendation and states that he does not object to the imposition of the identical discipline that he received in Maryland.

Because the imposition of reciprocal discipline is uncontested, we construe our review as limited under *Spann* and the subsequent case law. *See In re Hines*, Bar Docket No. 411-01 (BPR June 26, 2003) (currently pending review by the Court) (analysis under *Spann* where the respondent filed an answer to the Court's order to show cause but did not contest the imposition of reciprocal discipline). Based on our examination of the record, we find that no obvious miscarriage of justice would result from the imposition of reciprocal discipline. Respondent was afforded notice and an opportunity to be heard in Maryland; he was represented by counsel throughout the Maryland proceedings. He freely and voluntarily waived his right to contest the allegations against him when he

submitted the Joint Petition, in which he admitted that the allegations of unauthorized practice of law against him were true. He acknowledged under penalty of perjury and on the basis of personal knowledge his signature on each of the three instruments affecting title to real estate, certifying that the instrument "was prepared by or under the supervision of the undersigned, an attorney duly admitted to practice before the Court of Appeals of Maryland." Also, Respondent's conduct – engaging in the unauthorized practice of law in Maryland – constitutes misconduct in the District of Columbia.

We further find that imposition of a censure would not result in a grave injustice or an obvious miscarriage of justice under *Spann*. Cases in this jurisdiction where suspensions have been imposed involved misconduct more egregious than the misconduct here. *See In re Kennedy*, 605 A.2d 600 (D.C. 1992) (per curiam) (nine-month suspension with fitness imposed for unauthorized practice of law where aggravating factors included repeated and intentional violations, disdain for the disciplinary system, and prior discipline); *see also In re Ray*, 675 A.2d 1381 (D.C. 1996) (six-month suspension with reinstatement conditioned on restitution imposed for negligent misappropriation, collection of illegal fee, lack of competence, as well as unauthorized practice of law); *In re Washington,* 489 A.2d 452 (D.C. 1985) (three-month suspension imposed for neglect, conduct prejudicial to administration of justice, as well as unauthorized practice of law). A public censure was imposed by the Court as substantially different reciprocal discipline under D.C. Bar R. XI, § 11(c)(4) in *In re Daum*, 635 A.2d 933 (D.C. 1994) (per curiam), for the unauthorized practice of law and conduct prejudicial to the administration of justice, where the respondent appeared as counsel of record in about 17 cases in Maryland without being admitted *pro hac vice* or

associating with local counsel. The Court adopted the Board's sanction recommendation and appended the Board report to its opinion in *Daum*, in which the Board distinguished *Daum* from *Kennedy*, stressing the significant aggravating factors present in *Kennedy* and noting that the respondent in *Daum* had no prior disciplinary history and acknowledged his misconduct, as well as the fact that there was no evidence of aggravating factors. In the current matter, like *Daum*, Respondent has no prior disciplinary history, he admitted his misconduct, and there is no evidence in the record of any aggravating factors.

A reprimand was imposed on Respondent by the Maryland Court. The Court has found that a "public censure is functionally equivalent to a public reprimand in another jurisdiction." *In re Bell*, 716 A.2d 205, 206 (D.C. 1998); *see also In re Resnick*, 816 A.2d 792, 793 (D.C. 2003) (per curiam); *In re Maxwell*, 815 A.2d 362, 362 (D.C. 2003) (per curiam); *In re Bridges*, 805 A.2d 233, 234 (D.C. 2002); *In re Greenberg*, 762 A.2d 42, 42 (D.C. 2000) (per curiam). However, while a censure is functionally equivalent to a reprimand, the reprimand imposed on Respondent by the Maryland Court also included the provision that it not be published. D.C. Bar R. XI does not provide for discipline that is not public. *See In re Dunietz*, 687 A.2d 206, 211 (D.C. 1996) (Court refused to impose confidential censure, finding it contrary to the public interest and inconsistent with D.C. Bar R. XI). The Board previously considered a reciprocal matter where the respondent received a reprimand issued by the Maryland Court with the provision that it not be published. *See In re Holdmann*, Bar Docket No. 287-00 (BPR Nov. 7, 2002) (currently pending review by the Court). In *Holdmann*, the Board recommended reciprocal discipline of public censure, expressing concern that adoption of non-public discipline in reciprocal matters could "begin slowly to erode the public nature of our disciplinary

system." *Holdmann*, Bar Docket No. 287-00, Board Report at 6. The Board also noted that there are procedures in this jurisdiction for sealing part or all of a record in a disciplinary matter with a protective order, and that the respondent in *Holdmann* did not avail himself of the procedures provided for under D.C. Bar R. XI, § 17(d) and Board Rule 3.6. In the instant case, Respondent also has not availed himself of those procedures.

We thus recommend imposition of a censure by the Court, the functional equivalent of a reprimand issued by the Maryland Court, but with one difference – that consistent with the requirement of public discipline in this jurisdiction, that the censure be fully public and that it be published in the normal course.

Conclusion and Recommendation

For the reasons discussed above, the Board recommends to the Court that it impose reciprocal discipline on Respondent in the form of a public censure for his unauthorized practice of law in Maryland.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Kay T. Payne

Dated: July 17, 2003

All members of the Board concur in this Report and Recommendation.