DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
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TIMOTHY D. NAEGELE,	:	D.C. App. No. 14-BG-1468
	:	Board Docket No. 14-BD-109
Respondent.	:	Bar Docket No. 2014-D271
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 161448)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

The Court referred this matter to the Board to recommend whether reciprocal discipline should be imposed on Respondent following his disbarment in California. Disciplinary Counsel argues that reciprocal discipline should be imposed and that Respondent should be disbarred. Respondent argues against the imposition of reciprocal discipline and argues that no discipline is warranted. The Board has reviewed Respondent's Response to the Court's Order to Show Cause why reciprocal discipline should not be imposed and Disciplinary Counsel's Statement Regarding Reciprocal Discipline ("ODC's Statement"). None of Respondent's arguments are well-taken, and reciprocal discipline should be imposed.

However, the Board finds on the face of the record that the misconduct established in California warrants substantially different discipline in the District of Columbia. *See* D.C. Bar R. XI, § 11(e). As discussed below, Respondent was disbarred in California pursuant to a procedural rule that requires disbarment when

a respondent is in default, and the facts deemed admitted pursuant to California's default procedures show that he engaged in some misconduct, but not misconduct that would be sufficient to warrant disbarment in the District of Columbia. Thus, the Board recommends that the Court not impose identical reciprocal discipline, but instead should order Disciplinary Counsel to issue an informal admonition to Respondent.

I. Standard of Review

In reciprocal discipline matters, D.C. Bar R. XI, § 11(e) provides that identical discipline will be imposed unless the attorney demonstrates by clear and convincing evidence, or "the court finds '*on the face of the record*, that one or more of the grounds set forth in'" D.C. Bar R. XI, § 11(c) applies. *In re Goffer*, 121 A.3d 1252, 1255 (D.C. 2015) (emphasis in original) (quoting D.C. Bar R. XI, § 11(e)); *see also In re Spann*, 711 A.2d 1262, 1263 (D.C. 1998) ("[T]he Board can recommend a different sanction where it believes an exception applies."). The exceptions to the imposition of identical reciprocal discipline are:

> (1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (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
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> (3) The imposition of the same discipline by the Court would result in grave injustice; or
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> (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.

D.C. Bar R. XI, § 11(c). These exceptions are narrowly interpreted. *In re Chaganti*, 144 A.3d 20, 23 (D.C. 2016) (per curiam). Rule XI, § 11 "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). As the Court has previously stated, "reciprocal discipline proceedings are not a forum to reargue the foreign discipline." *In re Zdravkovich*, 831 A.2d 964, 969 (D.C. 2003).

II. The California Disciplinary Proceedings

Respondent was disbarred by the Supreme Court of California on September 23, 2015. Order, *In re Naegele*, S227353 (Cal. Sept. 23, 2015) (en banc) (Attachment A to ODC's Statement) ("September 23, 2015 Order"). The disciplinary proceeding against Respondent arose out of his representation of plaintiffs in a federal civil action. When Respondent did not respond to a Notice of Disciplinary Charges that had been filed against him, the disciplinary prosecutor, the Office of the Chief Trial Counsel of the State Bar of California (the "State Bar"), filed a Motion for Default on September 27, 2014. Respondent did not respond to the State Bar's motion, and on October 1, 2014, default was entered by the Hearing Department of the State Bar Court of California, the trial level in California disciplinary proceedings. *See* Order, *In re Naegele*, Case No. 13-O-12380-LMA (Cal. St. Bar Ct. Oct. 1, 2014) (Attachment D to ODC's Statement) ("October 1, 2014 Order"); *see also* Decision and Order, *In re Naegele*, Case No. 13-O-12380-

LMA, at 4 (Cal. St. Bar Ct. Apr. 21, 2015) (Attachment B to ODC's Statement) ("April 21, 2015 Order").

The October 1, 2014 default order warned Respondent in bold letters that "[**i**]**f you fail to timely move to set aside your default, this Court will enter an order recommending your disbarment without further hearing or proceeding.**" *See* Rule 5.83(C)(1) of Rules of Procedure of the State Bar of California ("Cal. Rule Proc.") (allowing a respondent ninety days to move to set aside a default). Instead of moving to set aside the default, on December 2, 2014, Respondent filed a Petition for Review with the California Supreme Court. That petition was denied on January 14, 2015. *See* April 21, 2015 Order at 3.

On March 9, 2015, the State Bar filed a Petition for Disbarment with the Hearing Department. *Id.* Pursuant to Cal. Rule Proc. 5.85(E), Respondent could have filed a motion to set aside or vacate the default within twenty days of the Petition. He did not do so. Instead, on March 30, 2015, Respondent filed a "Special Appearance" "for the sole purpose of challenging the jurisdiction of [the State Bar] Court to rule on the State Bar's Petition for Disbarment."[1] *See* Special Appearance (attached to Respondent's Response to Order to Show Cause).

On April 21, 2015, the Hearing Department recommended that Respondent be disbarred. *See* April 21, 2015 Order. The Hearing Department found that the factual allegations in the Notice of Disciplinary Charges were deemed admitted upon

[1] The State Bar Court did not consider this a proper response to the State Bar's petition. *See* April 21, 2015 Order at 4.

entry of Respondent's default, and no further proof was required to establish such facts. *Id.* at 4 (citing Cal. Rule Proc. 5.82(2) ("If the Court enters a member's default . . . the facts alleged in the notice of disciplinary charges will be deemed admitted")). The Hearing Department found that, based on the facts it deemed admitted, Respondent charged an unconscionable fee of $735,481.25 in the underlying client matter (in violation of California Rule of Professional Conduct 4-200(A)) and willfully violated Business and Professions Code § 6068, subdivision j, by failing to notify the State Bar of a change in his address. *See* April 21, 2015 Order at 4-5. The Hearing Department found that the State Bar had not proven a violation of Rule 3-700(D)(2) (failure to return unearned fees) because the record was insufficient to determine what portion of the fees had been earned. *Id.* at 5 & n.5.[2]

The Hearing Department then recommended that Respondent be disbarred pursuant to Cal. Rule Proc. 5.85(F), which provides that

> (1) If the member fails to file a response or the Court denies a motion to set aside or vacate the default and all other relief from default, the Court must recommend the member's disbarment if the evidence shows:

[2] Respondent asserts that the allegation that he overcharged his clients is based on the findings of a Los Angeles County Bar Association Dispute Resolution Services arbitration panel that he charged his clients $735,000 and that the proper fees should have been $8,500. Response to Order to Show Cause at 2, 5 n.3. This is consistent with the allegation that he charged $735,481.25 and overcharged his clients $726,981.25, a difference of $8,500. *See* Notice of Disciplinary Charges at ¶¶ 2-3. Respondent asserts that he did not participate in the arbitration hearing on the advice of his counsel. He also challenged the jurisdiction of the arbitration panel to hear a fee dispute, arguing that his fee agreement with his clients provided that "a court of the District of Columbia and/or in the United States District Court for the District of Columbia" has "exclusive jurisdiction" to resolve any dispute between Respondent and his clients. Response to Order to Show Cause at 7 n.3.

(a) The notice of disciplinary charges was served on the member properly;

(b) The member had actual notice or reasonable diligence was used to notify the member of the proceedings prior to the entry of default;

(c) The default was properly entered; and

(d) The factual allegations deemed admitted in the notice of disciplinary charges or pursuant to the notice of hearing on conviction support a finding that the member violated a statute, rule or court order that would warrant the imposition of discipline.

The Hearing Department found that the notice of disciplinary charges was served on Respondent, that reasonable diligence was used to notify Respondent of the proceedings prior to entry of default, that the default was properly entered, and that the factual allegations in the notice of disciplinary charges "deemed admitted by the entry of the default support a finding that respondent violated a statute, rule, or court order that would warrant the imposition of discipline." April 21, 2015 Order at 6. The Supreme Court of California disbarred Respondent on September 23, 2015. *See* September 23, 2015 Order.

On February 2, 2016, Disciplinary Counsel notified the D.C. Court of Appeals that Respondent had been disbarred in California. Respondent did not self-report his California discipline as required by D.C. Bar R. XI, § 11(b). On February 17, 2016, the Court ordered Respondent to show cause why identical reciprocal discipline of disbarment should not be imposed. Respondent filed his Response on March 14, 2016. Disciplinary Counsel filed its Statement Regarding Reciprocal

Discipline on March 28, 2016. On November 2, 2016, the Court referred the matter to the Board for its recommendation.

III. Discussion

Respondent argues that reciprocal discipline should not be imposed because (1) the California proceedings were so lacking in the opportunity to be heard as to constitute a deprivation of due process; (2) there was an infirmity of proof in the California proceedings; and (3) the imposition of reciprocal discipline would result in a grave injustice. Disciplinary Counsel argues that reciprocal discipline should be imposed and Respondent should be disbarred because none of the exceptions in D.C. Bar R. XI, § 11(c) apply here. We find that Respondent's arguments lack merit; but we recommend that the Court not impose identical reciprocal discipline because the face of the record shows that the misconduct established in California (charging an unreasonable fee and failure to maintain an updated address with the Bar) would not result in the sanction of disbarment in the District of Columbia, and would instead result in an informal admonition. As an informal admonition is substantially different discipline than the disbarment ordered in California, the exception found in D.C. Bar R. XI, § 11(c)(4) applies here.

We begin by addressing Respondent's arguments.

A. Respondent Received Due Process in the California Proceedings.

Respondent argues that he was denied due process as an exception under D.C. Bar R. XI, § 11(c)(1) because "[t]here is reason to believe" that the California Bar

Court and California Supreme Court did not consider documents he filed. He cites no evidence to support this speculation.

Disciplinary Counsel argues that Respondent received due process in the California proceeding. The Board agrees with Disciplinary Counsel.

The Court reviews due process claims in reciprocal discipline cases not as an appellate court for "foreign disciplinary proceedings," but only to see if "'any serious defects were present in the foreign proceedings . . . such that it would be wrong to impose reciprocal discipline here.'" *Chaganti*, 144 A.3d at 24 (alteration in original) (quoting *In re Morrissey*, 648 A.2d 185, 190 (D.C. 1994) (per curiam) (appended Board Report)). Respondent did not argue, and thus has not shown, that he was denied notice and an opportunity to be heard in the California proceeding. *See In re Peters*, 149 A.3d 253, 257 (D.C. 2016) (per curiam) (a respondent who receives notice and has an opportunity to be heard has not been deprived of due process); *In re Edelstein*, 892 A.2d 1153, 1157 (D.C. 2006) ("'Due process is afforded when the disciplinary proceeding provides adequate notice and a meaningful opportunity to be heard.'" (quoting *In re Day*, 717 A.2d 883, 886 (D.C. 2000))). Indeed, the record shows that Respondent knew of the disciplinary proceedings, but he deliberately did not respond to the Notice of Disciplinary Charges, and then never sought to avoid disbarment by moving to set aside the default. Instead, he decided to challenge the State Bar Court's jurisdiction. Moreover, before recommending Respondent's disbarment, the Hearing Department examined the record and concluded that Respondent had adequate notice of the

disciplinary proceeding and an opportunity to respond. *See* April 12, 2015 Order at 6. As such, the due process exception does not apply. *See In re Shieh*, 738 A.2d 814, 816-17 (D.C. 1999) (rejecting due process argument where the respondent knew that he had been defaulted, but tried to remove the California disciplinary proceeding to federal court rather than responding to the default notice).

B. There Was No Infirmity of Proof in the California Proceedings.

Respondent raises a number of arguments under the "infirmity of proof" § 11(c)(2) exception umbrella: (1) the clients' claims were discharged in bankruptcy; (2) the statute of limitations has expired on an arbitration award in the clients' favor; (3) expert witnesses opined that Respondent did not engage in wrongdoing; (4) the arbitrators lacked jurisdiction to hear the clients' complaint against Respondent because his fee agreement with the clients contained a forum selection clause that required disputes to be resolved in a court in the District of Columbia; (5) the California State Bar is an illegal entity under *North Carolina State Board of Dental Examiners v. Federal Trade Comm'n*, 135 S. Ct. 1101 (2015); and, (6) the State Bar owes Respondent approximately $7,000. Disciplinary Counsel asserts that none of these arguments establish an infirmity of proof in the California proceedings. The Board agrees.

The only argument Respondent makes that even remotely approaches an "infirmity of proof" argument is that experts have opined that he did not engage in wrongdoing. However, Respondent did not submit any expert reports or otherwise explain how these expert opinions result in an infirmity of proof in the California

proceedings. Viewed in the light most favorable to Respondent, the Board assumes that had he litigated the matter in California, he would have been able to offer evidence that supported the conclusion that he did not engage in misconduct. But, the fact that Respondent could have offered evidence that supported his position does not mean that a contrary finding suffers from an infirmity of proof. Thus, he has failed to carry his burden of showing an infirmity of proof in the California proceedings by clear and convincing evidence. *See In re Ditton*, 954 A.2d 986, 994 (D.C. 2008) ("The burden of proof on an attorney who would seek to establish the 'infirmity of proof' exception by the requisite clear and convincing evidence is a heavy one." (quoting *In re Bridges*, 805 A.2d 233, 235 (D.C. 2002))).

We recognize that the underlying facts here were not decided in California in a contested evidentiary hearing, where the proof offered could have been challenged. Rather, the facts were deemed admitted because Respondent did not participate, was in default, and never moved to have the default set aside. The difference is immaterial to the question of whether reciprocal discipline should be imposed. In *Shieh*, the Court considered the California default process at issue here, and found that the application of the default process did not result in an infirmity of proof. 738 A.2d at 817.

Moreover, the facts deemed admitted support the finding that Respondent charged an unconscionable fee:[3]

> (1) the amount of the fee was not in proportion to the value of the services performed; (2) the clients were not sophisticated and relied on respondent's expertise to guide them in the failed litigation he pursued on their behalf; (3) the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly did not warrant the amount of the fees charged and collected by respondent; (4) the amount involved as potential damages did not support the amount of fees charged and collected by respondent; (5) the nature and length of the professional relationship with the clients did not warrant the amount of attorney fees charged and collected by respondent; (6) the time and labor involved did not warrant the amount of attorney fees respondent charged and collected from the clients; and (7) respondent did not properly inform the clients of the prospects for recovery in the

[3] California Rule of Professional Conduct 4-200 provides that:

> (A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.
> (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:
>
> > (1) The amount of the fee in proportion to the value of the services performed.
> > (2) The relative sophistication of the member and the client.
> > (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
> > (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
> > (5) The amount involved and the results obtained.
> > (6) The time limitations imposed by the client or by the circumstances.
> > (7) The nature and length of the professional relationship with the client.
> > (8) The experience, reputation, and ability of the member or members performing the services.
> > (9) Whether the fee is fixed or contingent.
> > (10) The time and labor required.
> > (11) The informed consent of the client to the fee.

> litigation or recoupment of the attorney fees he collected from the clients.

April 21, 2015 Order at 4-5. These findings would support the conclusion in the District of Columbia that Respondent charged an unreasonable fee in violation of Rule 1.5(a). *See* D.C. Rule of Professional Conduct 1.5(a) (identifying the factors considered in determining the reasonableness of a fee, including the time and labor required, the novelty and difficulty of the questions, the skill requisite to properly perform the legal service, the nature and length of the professional relationship, and the amount involved, among other factors).

Although we rely on the Court's decision in *Shieh* in considering facts that were "deemed admitted" pursuant to the California default process, we recognize that in *Shieh,* the Court noted that the California court also relied on documentary evidence presented by the State Bar, not just "deemed admitted" allegations: "'[T]he State Bar Court based its decision on both the facts deemed to have been admitted by Respondent's default *and* on the additional documentary evidence submitted by the State Bar—65 binders of documentary evidence.'" *Shieh*, 738 A.2d at 817 (quoting Board Report) (emphasis in original). Nonetheless, we do not understand *Shieh* to require that a default entered in another jurisdiction must be supported by some documentary evidence, in addition to facts alleged and then deemed admitted,

before that default will have effect here.[4] This is especially so where, as here, Respondent had two opportunities to set aside the default, and chose not to do so.

The State Bar Court's October 1, 2014 default order prominently warned Respondent that if "**you fail to timely move to set aside [the] default, this Court will enter an order recommending your disbarment without further hearing or proceeding**." October 1, 2014 Order (bold in original). Despite this warning, Respondent did not move to set aside the default, but instead filed a Petition for Review with the California Supreme Court, which was later dismissed. After the State Bar filed a Petition for Disbarment on March 9, 2015, Respondent still did not seek to have the default vacated or set aside. Instead he challenged only the jurisdiction of the State Bar Court. After ignoring two opportunities to undue the default and contest the allegations on the merits, Respondent should not be allowed to relitigate the matters here simply because the California procedures allow findings based on facts "deemed admitted" when a Respondent is defaulted.

Finally, it is clear that the State Bar Court carefully considered the evidence against Respondent, and did not simply recommend his disbarment because he failed

[4] We also recognize that the default procedure in the D.C. disciplinary system differs significantly from the California procedure. Most notably, the D.C. procedure does not provide that facts are deemed admitted when a respondent is held in default. Instead, Disciplinary Counsel is required to submit ex parte proof "sufficient to prove the allegations by clear and convincing evidence, based upon documentary evidence, sworn affidavits, and/or testimony." D.C. Bar R. XI, § 8(f). The practical effect of the requirements of § 8(f) is that Disciplinary Counsel must devote resources to proving facts that the respondent has not chosen to contest. Given the other burdens placed on Disciplinary Counsel in our disciplinary system, it may be appropriate to consider whether to permit matters to be decided based on facts deemed admitted (without other evidence), where the respondent has failed to answer the charges.

to participate in the disciplinary proceeding. After reviewing the facts alleged and finding that the facts deemed admitted established that Respondent charged an unconscionable fee, the State Bar Court found that those facts did *not* establish that Respondent failed to refund an unearned fee because the facts did not prove the amount of any unearned fee. April 21, 2015 Order at 5. Given the State Bar Court's careful consideration of the evidence, we do not find an infirmity of proof.

C. Respondent Did Not Establish that the Imposition of Reciprocal Discipline Would Result in a Grave Injustice.

Respondent argues that reciprocal discipline would result in a grave injustice under the D.C. Bar R. XI, § 11(c)(3) exception because (1) he has enjoyed a long and distinguished career without prior discipline; (2) he worked tirelessly for his clients and received only a fraction of the fees paid; and, (3) discipline would impair his ability to earn a living.

Disciplinary Counsel argues that none of these arguments constitutes a "grave injustice." We agree. Discipline is imposed on lawyers who violate the Rules of Professional Conduct, even those who have enjoyed long and distinguished careers without discipline and who have worked tirelessly for their clients. Moreover, by their very nature, disciplinary sanctions routinely impair the ability of lawyers to earn a living, and this is not a reason to refuse to impose them on respondents. Thus, there is no merit to any of Respondent's "grave injustice" arguments.

D. On the Face of the Record, It Appears that Respondent's Misconduct Would Have Resulted in Substantially Different Discipline in the District of Columbia.

Although none of Respondent's arguments have any merit, that does not end the Board's inquiry because D.C. Bar R. XI, § 11(e) provides that identical discipline should not be imposed if one of the grounds set forth in § 11(c) appears "on the face of the record." *See Spann*, 711 A.2d at 1263 (citing *In re Gardner*, 650 A.2d 693, 696 (D.C. 1994)); *see also In re Maxwell*, 798 A.2d 525, 529 (D.C. 2002) (reiterating the independent authority of the Board to review the record for applicability of exception to reciprocal discipline); *In re Bielec*, 755 A.2d 1018, 1022 n.3 (D.C. 2000) (per curiam) (same). As discussed below, we find that it is clear on the face of the record that Respondent's misconduct (charging an unreasonable fee) would not have resulted in disbarment here, and therefore were recommend that identical reciprocal discipline not be imposed, and that Respondent instead receive an informal admonition.

Analysis of the substantially different discipline exception under § 11(c)(4) requires a two-step inquiry. *In re Jacoby*, 945 A.2d 1193, 1199-1200 (D.C. 2008); *In re Garner*, 576 A.2d 1356, 1357 (D.C. 1990) (per curiam). First, we determine whether the conduct in question would not have resulted in the same sanction in the District of Columbia as it did in the disciplining jurisdiction. *In re Fitzgerald*, 982 A.2d 743, 748 (D.C. 2009) (citations omitted). Second, if the discipline imposed here would be different from that of the disciplining court, we must decide whether the difference between the two is substantial.

Respondent was disbarred pursuant to Cal. Rule Proc. 5.85(F), which mandates disbarment where, *inter alia*, a respondent has been defaulted and "[t]he factual allegations deemed admitted in the notice of disciplinary charges . . . support a finding that the member violated a statute, rule or court order that would warrant the imposition of discipline." Thus, disbarment is imposed under Rule 5.85(F) because Respondent engaged in some misconduct, not necessarily conduct that, standing alone, would have resulted in disbarment.

There is no such default procedure or rule in the District of Columbia. Disciplinary Counsel may seek a respondent's default if the respondent fails to answer a petition. *See* D.C. Bar R. XI, § 8(f); Board Rule 7.9. However, unlike the procedure in California, a respondent who has been defaulted is not disbarred for engaging in any misconduct if the sanction for that misconduct is not disbarment. Instead, a defaulted respondent who has engaged in misconduct receives a sanction that is consistent with that imposed for comparable misconduct. *See In re Hargrove*, Bar Docket No. 2013-D127, at 23 (BPR Apr. 26, 2016) (citing D.C. Bar R. XI, § 9(h) and recommending that defaulted respondent be suspended for sixty days with fitness for violating Rules 1.1(a), 1.1(b), 1.3(c), 1.16(d), and 8.4(d)), *recommendation adopted*, No. 16-BG-385 (D.C. Mar. 9, 2017) (adopting the Board's sanction because it did not "foster a tendency toward inconsistent dispositions for comparable conduct" and was not "otherwise . . . unwarranted" (quoting D.C. Bar R. XI, § 9(h)(1))).

Because the District of Columbia does not impose automatic disbarment for a default in a disciplinary proceeding, we next look to see whether the misconduct found in California would have resulted in respondent's disbarment here. We conclude that it would not. Respondent was found to have charged an unconscionable fee and failed to keep his address updated.[5] In *In re Martin*, the Court noted that "sanctions for charging an unreasonable fee range 'from informal admonition to suspension,' and suspension is usually imposed only in combination with violation of other rules." 67 A.3d 1032, 1053 (D.C. 2013) (quoting *In re Shaw*, 775 A.2d 1123, 1125 n.5 (D.C. 2001) (per curiam)); *see also In re Waller*, 524 A.2d 748, 749 (D.C. 1987) (thirty-day suspension for clearly excessive fee and two other Rule violations); *In re Landesberg*, 518 A.2d 96, 97 (D.C. 1986) (per curiam) (sixty-day suspension for failure to return unearned fee and three other Rule violations).

Disciplinary Counsel relies on *Martin* in arguing that in the District of Columbia, Respondent would receive at least a lengthy suspension with reinstatement conditioned on disgorgement of the unpaid arbitration award. However, in *Martin*, the Court found that the respondent's failure to pay an ACAB award, and his repeated efforts in court to avoid the ACAB award, violated Rule 1.16(d) because he failed to promptly return an unearned fee. 67 A.3d at 1047. *Martin* is inapposite because the California State Bar Court clearly found that the

[5] D.C. Bar R. II, § 2(1) provides that all D.C. Bar members must provide the Secretary of the Bar with his or her current residence and office addresses, email address, and telephone number. We have been unable to locate any cases in which a respondent was disciplined for failure to maintain a current address with the Bar. Disciplinary Counsel did not cite any such cases in its Statement Regarding Reciprocal Discipline.

State Bar had *not* proven by clear and convincing evidence that Respondent failed to return an unearned fee because it could not determine the amount of the unearned fee. Pursuant to D.C. Bar R. XI, § 11(e), we are bound to accept the facts found in California. Because the foreign discipline was not based on a failure to refund unearned fees, we are reluctant to recommend a sanction based on the failure to refund unearned fees.[6]

Instead, we recommend a sanction based on the fact that Respondent charged an unconscionable fee. As discussed above, *Martin* noted that an informal admonition is the typical sanction for charging an unreasonable fee unaccompanied by other Rule violations. We do not think that the failure to maintain a current address with the California Bar (the other California violation) is sufficient to aggravate the sanction above an informal admonition. We do not lightly find an exception to the rebuttable presumption that an identical reciprocal sanction should be imposed, but are constrained by the current parameters of the consequences for defaulting in a disciplinary proceeding in the District of Columbia. Disbarment imposed in California because of Respondent's procedural default is substantially different than an informal admonition.

[6] Similarly, we reject Disciplinary Counsel's argument that the facts found in California would support a finding here that Respondent's unreasonable delay in refunding an unearned fee would ripen into intentional misappropriation, for which Respondent would be disbarred, citing *In re Utley*, 698 A.2d 446, 449 (D.C. 1997) and *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc). Disciplinary Counsel cites to no cases in which the failure to return an unearned fee has "ripened" into misappropriation. Failure to return an unearned fee is prosecuted as a Rule 1.16(d) violation, not a misappropriation. *See, e.g.*, *In re Martin*, 67 A.3d 1032 (D.C. 2013) (when ACAB issues an award in favor of the client in a fee dispute, "the attorney is required to give this sum to the client under Rule 1.16(d)").

IV. Conclusion

For the foregoing reasons, we recommend that the Court impose substantially different reciprocal discipline and order Disciplinary Counsel to issue an informal admonition to Respondent.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /PGB/
Patricia G. Butler

Dated: April 26, 2017

All members of the Board concur in this report and recommendation.