DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
VINCENT M. AMBERLY,	:	
	:	
Respondent.	:	D.C. App. No. 08-BG-29
	:	Bar Docket No. 445-07
An Inactive Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 365590)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This reciprocal discipline matter is before the Board on Professional Responsibility (the "Board") based on a January 3, 2008 order of Admonition With Terms issued by the Virginia State Bar Disciplinary Board (the "Virginia Board") against Vincent M. Amberly ("Respondent"). The Board recommends that the District of Columbia Court of Appeals (the "Court") impose substantially different discipline of a 30-day suspension.

I. BACKGROUND

Respondent is a member of the District of Columbia and Virginia Bars.[1] Bar Counsel learned of Respondent's Virginia discipline from the Virginia Bar and, on January 24, 2008, filed a certified copy of the Virginia Board's order with the Court. On February 11, 2008, the Court referred the matter to the Board for its recommendation on reciprocal discipline, directed Bar Counsel to inform the Board of its position, and directed Respondent thereafter to show cause before the Board why identical, greater or lesser discipline should not be imposed. Order, *In re Amberly*, No. 08-BG-29 (D.C. Feb. 11, 2008). Bar Counsel filed its Statement ("BC

[1] Respondent was administratively suspended on September 30, 2003, from the D.C. Bar for failure to pay dues, and became an inactive member in good standing on November 20, 2007.

Statement") on reciprocal discipline on April 10, 2008, followed by Respondent's Statement ("R Statement") on April 23, 2008, and a Reply by Bar Counsel ("BC Reply") on May 1, 2008.

II. THE VIRGINIA PROCEEDING

On January 3, 2008, the Virginia Board found Respondent to have violated four Rules of Professional Conduct: Rule 3.3 (making a false statement to a tribunal); Rule 4.1 (making a false statement while representing a client); Rule 8.1 (making a false statement in a disciplinary matter), and Rule 8.4 (engaging in acts of dishonesty reflecting adversely on a lawyer's fitness to practice law). The Virginia Board imposed discipline in the form of an Admonition with Terms: Respondent must complete three hours of Continuing Legal Education on Virginia procedure, and an additional three hours on legal ethics – both to be completed within one year of November 16, 2007 (the date on which a panel of the Virginia Board heard evidence and announced its sanction). *See* BC Statement, Attachment B (Amended Order of Admonition with Terms of the Virginia Board, Jan. 3, 2008) (the "Virginia Order").

As stated in the Virginia Order, Respondent's sanction grew out of his representation of the Trent Group. Martin Katz, a former independent contractor for the Trent Group and the complainant in the Virginia disciplinary action, filed two lawsuits against his former employer in the Fairfax County General District Court. Mr. Katz, *pro se*, and Respondent, representing the Trent Group, appeared in court on September 19, 2005, the return date on one of Mr. Katz's lawsuits. Respondent presented argument on a motion to consolidate, a copy of which he had handed to Mr. Katz, and also informed the court that he would be filing a counterclaim. That same day he filed his counterclaim with the clerk, but with no certificate of service and without having provided a copy to Mr. Katz. In a telephone call later that same day, Mr. Katz requested a copy of the counterclaim. In an e-mail sent the next day, Respondent stated to Mr. Katz that he

would be forwarding a copy of the counterclaim to him and that it had already been filed. Virginia Order at 1-2. By September 26, Mr. Katz had still not received the counterclaim, and he sent an e-mail to Respondent to that effect. On September 30, 2005, Respondent sent an e-mail to Mr. Katz, attaching a copy of the counterclaim, and he also mailed a copy to Mr. Katz containing the following certificate of service, signed by Respondent:

> I HEREBY CERTIFY that on the 19th day of September, 2005, a true and correct copy of the foregoing Counterclaim, was attempted delivery by hand to Martin B. Katz at the Courthouse, but he refused delivery, on the 30th of September, 2005, a true and correct copy of the foregoing Counterclaim, was delivered to Martin B. Katz, 9822 Hill Street, Kensington, MD 20895, and via electronic transmission or e-mail to the Plaintiff Martin Katz.

Respondent knew that these factual representations concerning attempted service of the counterclaim on September 19, 2005 were false when he made them. Virginia Order at 3 ¶ 9. In open court on October 6, 2005, Respondent repeated this false representation in response to Mr. Katz's motion to dismiss the counterclaim. *Id*. at 3 ¶ 8.

Respondent made an additional false statement in a December 19, 2005 letter to Virginia Bar Counsel, *i.e.*, that he had "handed" the counterclaim to Mr. Katz "at the September 19th hearing," and was unaware until September 30 that Mr. Katz claimed he had never received it. As the Virginia Board concluded, "Respondent's representations to Bar Counsel . . . were misleading in that they were calculated to induce Bar Counsel to conclude a) that Respondent had in fact furnished the [Complainant] with a copy of the Counterclaim on September 19, 2005, and b) that Respondent first learned from the Complainant on September 30, 2005, that Complainant did not have a copy of the Counterclaim." Virginia Order at 3 ¶ 11. In imposing its sanction of admonition with terms, the Virginia Board recognized Respondent's "absence of a prior disciplinary record." *Id*. at 5.

III. RECIPROCAL DISCIPLINE

There is a presumption in favor of imposing identical reciprocal discipline that may be rebutted by the establishment, through clear and convincing evidence, of one or more of the five exceptions set forth in D.C. Bar R. XI, § 11(c).[2] *See also* D.C. Bar R. XI, § 11(f); *In re Zilberberg*, 612 A.2d 832, 834 (D.C. 1992). Bar Counsel contends that the discipline imposed in Virginia, admonishment with terms, is outside the range and substantially different from the discipline that would be imposed in this jurisdiction. Therefore, according to Bar Counsel, under D.C. Bar R. XI, § 11(c)(4), identical reciprocal discipline is inappropriate and Respondent should be "suspended for sixty days." BC Statement at 6.

The Board finds no evidence that Respondent was denied due process or that there was an infirmity of proof in the Virginia proceedings. As reflected in the Virginia Order, Respondent appeared personally and was also represented by counsel. He presented testimony and documentary exhibits and was present for Bar Counsel's presentation of evidence. Virginia Order at 1, 4. The Virginia Board found "clear and convincing evidence" of four separate rule violations. *Id*. at 4. Respondent's conduct in Virginia would have constituted misconduct here. As noted by Bar Counsel, the pertinent provisions of Virginia Rules 3.3(a), 4.1(a), 8.1(a), and 8.4(c) are virtually identical to the corresponding D.C. Rules. However, Bar Counsel contends that Respondent's misconduct would warrant substantially different discipline in an original District of Columbia proceeding. BC Statement at 7.

[2] 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.

Determining whether the "substantially different discipline" exception of D.C. Bar R. XI, § 11(c)(4) warrants greater or lesser discipline is decided by a two-step inquiry. *In re Patel*, 926 A.2d 124 (D.C. 2007) (per curiam); *In re Jacoby*, No. 05-BG-1080, 2008 D.C. App. LEXIS 119, at *16 (D.C. Apr. 3, 2008) (quoting *In re Garner*, 576 A.2d 1356, 1357 (D.C. 1990)). First, the Board must determine "if the misconduct in question would not have resulted in the same punishment here as it did in the disciplining jurisdiction." *Jacoby*, at *16. In deciding this first step, the Board must consider whether the sanction imposed in the foreign jurisdiction is within the range of sanctions that would be imposed for the same misconduct in this jurisdiction. *Id.* Second, where the discipline in this jurisdiction would be different, the Board must determine whether the difference is "substantial." *Id.*, at *17.

A review of the Virginia record and the case law in our jurisdiction relative to Respondent's misconduct of giving intentionally false and misleading facts to a court and to disciplinary authorities reveals that suspension is the norm. A leading case in our jurisdiction in this area is *In re Reback*, 513 A.2d 226 (D.C. 1986) (en banc), where two attorneys in the same law firm who neglected a divorce case were each suspended for (1) re-filing their client's complaint with a false verification after the first had been dismissed for failure to prosecute, and (2) obtaining a false notarization of the verified and re-filed complaint. Both attorneys willingly withdrew as counsel when their client learned of their mistakes and returned all her fees. Both testified at their disciplinary hearing and were found to be remorseful. Both had clean disciplinary records. In light of the dishonesty shown to the court, opposing counsel, and to their client, each attorney was suspended for six months. "Honesty is basic to the practice of law . . . A lawyer's representation to the court must be as reliable as a statement under oath. The reliability of a lawyer's pleadings is guaranteed by the lawyer's membership in the bar . . . .

Filing a pleading or other paper subscribed by a signature is a representation that the signature is genuine." *Id*. at 231.

Other cases dealing with an attorney's misrepresentations to a judicial body that resulted in a suspension include *In re Rosen*, 481 A.2d 451 (D.C. 1984) (attorney with prior discipline who provided less than truthful statements in support of two separate motions for continuances and in a third paper opposing a motion was suspended for 30 days); *In re Waller*, 573 A.2d 780 (D.C. 1990) (per curiam) (While representing a patient in a suit against a hospital, the attorney told the mediator he also represented the doctor, who had not been named as a co-defendant. When the mediator suggested that he had a conflict, the attorney thereafter told the court he did not represent the doctor. When investigated by Bar Counsel, the attorney provided a third version of the representation. A 60-day suspension was imposed, and the court noted that the Respondent had two prior sanctions.); *In re Phillips*, 705 A.2d 690 (D.C. 1998) (per curiam) (attorney who filed a false and misleading petition in federal court in a drug money forfeiture dispute involving a former client was suspended for 60 days); *In re Owens*, 806 A.2d 1230 (D.C. 2002) (per curiam) (attorney who gave false statements to an administrative law judge in order to cover fact that she had attempted to eavesdrop on testimony in violation of court's sequestration order was suspended for 30 days); *In re Uchendu*, 812 A.2d 933 (D.C. 2002) (attorney with clean disciplinary record who represented guardians and personal representatives and often signed and notarized papers for them for filing in probate court, without showing his initials, was suspended for 30 days and required to take legal courses).

Bar Counsel cites additional precedent where an attorney made dishonest statements that did not involve court proceedings: *In re Hawn*, 917 A.2d 693 (D.C. 2007) (per curiam) (attorney who falsified his resume and altered his law school transcript before giving it to a prospective

employer was suspended for 30 days); *In re Scanio*, 919 A.2d 1137 (D.C. 2007) (associate in law firm with no prior discipline was suspended for 30 days after he represented himself against GEICO over an auto accident and lied to GEICO about his earnings at the firm and lied to his firm about what he had told GEICO). "[A]lthough respondent may not have been representing a client, he did hold himself out as a lawyer when dealing with GEICO, and his conduct reflects poorly on the legal profession. Keeping in mind that 'the principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general' . . . we conclude that a public censure is not sufficient to convey our disapproval of respondent's conduct." *Id.* at 1145.

Respondent argues that we should recommend the same penalty as imposed in Virginia. *See* R Statement at 1. He argues that his representation of his client was made difficult by the "emotional and litigious *pro se* plaintiff, Martin B. Katz." *Id*. at 3. The Board does not think the character of the opposing party can excuse in any way an attorney's false statements to the court or anyone else. Respondent also argues that none of the case authority cited by Bar Counsel in support of a suspension is sufficiently comparable to the facts at issue here to overcome the rebuttable presumption of identical reciprocal discipline. *Id*. at 4-5. The Board believes it has accurately summarized the relevant authority in this jurisdiction concerning Respondent's misconduct, taking into account his unblemished record prior to the 2005 incident, and has properly concluded that an admonition with terms is outside the range of discipline in the District of Columbia for such misconduct. Although the six-month suspension in *Reback* is premised on conduct more severe than here, and which included serious neglect, the conduct underlying the suspensions in *Owens* (30 days, no prior disciplinary record), *Uchendu* (30 days, no prior disciplinary record), *Hawn* (30 days, no prior disciplinary record) and *Scanio* (30 days, no prior

disciplinary record) are premised on factual records no more egregious than the repeated false statement to the court and opposing party herein. As to whether the difference between an admonition and a 30-day suspension is substantial, we have no difficulty concluding that a suspension is decidedly more substantial than an admonition, which does not involve removal from practice. *See In re Mahoney*, 602 A.2d 128 (D.C. 1992). Even with an unblemished record, the false signing of papers filed in court and the repetition of this falsehood orally to the court and thereafter in papers filed with Bar Counsel, "formed a dishonest course of conduct that is plainly intolerable." *Reback*, 513 A.2d at 231.

IV. CONCLUSION

For the reasons set forth herein, the Board concludes that identical reciprocal discipline is not appropriate and recommends that the Court enter an order imposing substantially different reciprocal discipline of a 30-day suspension. For purposes of reinstatement, Respondent's suspension should be deemed to run from the date he files an affidavit in compliance with D.C. Bar R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331-33 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Ray S. Bolze
Ray S. Bolze

Dated: JUN 13 2008

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