DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
JESUS R. ROMO VEJAR,	:	
	:	
Respondent.	:	D.C. App. No. 06-BG-10
	:	Bar Docket No. 016-05
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 416922)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This is a reciprocal discipline matter based on a public censure with terms issued to Respondent by the Supreme Court of Arizona (the "Arizona Court") on November 18, 2004. The Board recommends that the Court impose substantially different reciprocal discipline of a six-month suspension to run, for purposes of reinstatement, from the date he files an affidavit that fully complies with the requirements of D.C. Bar R. XI, § 14(g).

I. BACKGROUND

Respondent is a member of the Bar of the District of Columbia, having become a member on December 30, 1988. Respondent is also a member of the Arizona Bar.

On November 18, 2004, the Arizona Court publicly censured Respondent and placed him on probation for one year with terms.[1] Respondent did not report the Arizona discipline to Bar Counsel as required by D.C. Bar R. XI, § 11(b). At Bar Counsel's request, the Arizona Court provided Bar Counsel with a certified copy of its Judgment

[1] The probation terms required Respondent to submit trust account records of his office for audit and refrain from violating the Arizona Rules during the one-year probation period.

and Order of public censure, and Bar Counsel filed it with the District of Columbia Court of Appeals (the "Court") on January 10, 2006.

On January 27, 2006, the Court issued an Order directing the Board either to: (i) recommend whether identical, greater, or lesser discipline should be imposed as reciprocal discipline, or (ii) determine whether the Board should proceed *de novo*. *In re Vejar*, D.C. App. No. 06-BG-0642 (D.C. Jan. 27, 2006). On February 27, 2006, Bar Counsel filed a statement with the Board recommending the imposition of substantially different reciprocal discipline of a six-month suspension. On March 15, 2006, Respondent filed a brief asking the Board to recommend the imposition of identical reciprocal discipline of a public censure and opposing the six-month suspension recommended by Bar Counsel.

A. The Arizona Misconduct

The Arizona discipline stemmed from Respondent's representation of a client in a personal injury case and his handling of the settlement proceeds. Specifically, Respondent received $50,000 in settlement funds in November 2001, and on or about November 21, 2001, deposited the funds in his attorney trust account. Respondent disbursed his client's share of the settlement and took his legal fee. There was a workers' compensation lien in the amount of $15,806.75 on the settlement proceeds. Respondent maintained $15,000 in his trust account to satisfy the lien, promising his client that he would attempt to negotiate a settlement of the lien amount with the insurance company. According to the Arizona Court's Hearing Officer's Report, "Respondent made a few phone calls to the workers' compensation insurance office, and eventually to the

insurance attorney regarding the lien" and "did not thereafter diligently pursue the payment of the worker's compensation lien on behalf" of his client.[2]

On various occasions during the time that the lien funds should have been held in the trust account, Respondent transferred portions of the funds to his operating account and used a portion of the funds to pay another client. Despite receiving several written requests from the insurance company's attorney regarding the status of the lien funds, Respondent did not respond. Thereupon the insurance company filed a complaint with the Arizona Bar, and upon receiving notice of the complaint, Respondent paid the lien in full.

Respondent stipulated to the misconduct in a Tender of Admissions and Agreement for Discipline by Consent, but asserted that the trust account violations resulted from negligence and not intentional wrongdoing, an assertion that was not disputed by Arizona Bar Counsel. Based on the agreement, the Hearing Officer found that Respondent engaged in neglect, negligent misappropriation, commingling and trust account violations in contravention of Arizona Rules of Supreme Court Rule 42 (through violating the Arizona Rules of Professional Conduct ("Arizona Rules") ER 1.3 and ER 1.15), Rule 43 and Rule 44.[3] This misconduct would be misconduct in the District of

[2] Hearing Officer's Report at 2.

[3] Arizona Rule 1.3 (diligence and promptness) prohibits the same conduct as Rule 1.3(a)(diligence) and Rule 1.3(c)(promptness). Arizona Rule 1.15(safekeeping property) is comparable to Rule 1.15(safekeeping property), although the rules have differing specific requirements for trust accounts. The text of the Arizona Rules is set forth at Appendix C of Bar Counsel's statement on reciprocal discipline filed with the Board.

Columbia, as most of the Arizona Rules that Respondent violated have counterparts here.[4]

II. RECIPROCAL DISCIPLINE

Under D.C. Bar R. XI, § 11(f), there is a rebuttable presumption in favor of the imposition of identical reciprocal discipline unless the respondent demonstrates, or the Court finds on the face of the record by clear and convincing evidence, that one or more of the five exceptions set forth in D.C. Bar R. XI, § 11(c) applies. *See In re Zdravkovich*, 831 A.2d 964, 968 (D.C. 2003) (citing *In re Gardner*, 650 A.2d 693, 695 (D.C. 1994); *In re Zilberberg*, 612 A.2d 832, 834-835 (D.C. 1992)).[5]

Bar Counsel contends that Respondent's commingling and negligent misappropriation would warrant substantially different discipline of a six-month suspension in the District of Columbia. Respondent argues that the identical reciprocal discipline of a public censure should be imposed in light of the mitigating factors considered in Arizona, including the absence of a prior disciplinary record, his timely good-faith effort to make restitution, his remorse and cooperation with Arizona Bar Counsel, and his good character and practice in the area of civil rights.

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[4]With respect to Respondent's misconduct occurring after November 1, 1996, Bar Counsel argues that we do not need to consider whether it constituted misconduct in the District of Columbia because, had this matter come to us under original jurisdiction, our choice of law rule (Rule 8.5) would instruct us to apply the Arizona Rules. For the reasons stated by the Board in *In re Gansler*, Bar Docket No. 405-03 (BPR July 9, 2004), the Board disagrees with Bar Counsel's application of a choice of law analysis in reciprocal cases. Because the misconduct in *Gansler* was misconduct in the District of Columbia, the Court did not reach Bar Counsel's choice of law argument. *In re Gansler*, 889 A.2d 285, 290 n. 5 (D.C. 2005).

[5] 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."

In determining whether to apply the "substantially different discipline" exception, there is a two-step analysis. First, it is necessary to determine if the misconduct in question would not have resulted in the same punishment here as it did in the disciplining jurisdiction. Second, where the discipline imposed in this jurisdiction would be different from that of the disciplining court, it must be determined whether the difference is substantial. *See In re DeMaio,* 893 A.2d 583, 587 (D.C. 2006) (citing *In re Garner*, 576 A.2d 1356, 1357 (D.C. 1990) (per curiam)).

In this jurisdiction, the usual sanction for negligent misappropriation, even with related violations, is a six-month suspension. *See, e.g., In re Edwards,* 870 A.2d 90, 94 (D.C. 2005); *In re Anderson,* 778 A.2d 330 (D.C. 2001). The Court has imposed a six-month suspension, even where the respondent presented the same type of strong mitigating factors present in this case. *See In re Davenport,* 794 A.2d 602, 604 (D.C. 2002); *In re Chang*, 694 A.2d 877 (D.C. 1997) (per curiam). Because the difference between a public censure and a six-month suspension is substantial, we find that an exception to the imposition of identical reciprocal discipline exists and that substantially different discipline of a six-month suspension is instead warranted. *See In re Mahoney*, 602 A.2d 128, 130 (D.C. 1992).

We also have considered the remaining exceptions to D.C. Bar R. XI, §11(c) and find that none apply. As previously noted, Respondent's misconduct would be misconduct in this jurisdiction. D.C. Bar R. XI, §11(c)(5). Respondent received due process in Arizona, and there is no infirmity of proof; since he received notice of and participated in the Arizona proceedings and entered into an agreed disposition of the matter. D.C. Bar R. XI, § 11(c)(1) & (2).

III. CONCLUSION

Accordingly, the Board recommends a six-month suspension as substantially different reciprocal discipline. Respondent has not filed the affidavit required by D.C. Bar R. XI, § 14(g). The Board thus recommends that the period of suspension commence, for purposes of reinstatement, from the date that Respondent files a compliant D.C. Bar R. XI, § 14(g) affidavit.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Charles J. Willoughby

Dated: JUL 31 2006

All members of the Board concur in this Report and Recommendation, except Ms. Coghill-Howard and Ms. Kapp, who did not participate.

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DISSENTING STATEMENT OF MEMBER JAMES P. MERCURIO

Two disciplining courts have concluded that a sanction no greater than a public censure and a year on probation is warranted in this matter. The Disciplinary Commission of the Supreme Court of Arizona, the state in which Respondent practices, unanimously recommended that sanction, on the same record that we have before us. Its recommendation was based upon the conclusion of the Arizona Hearing Officer that public censure with a year of probation "will serve to protect the public, instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of the bar." Hearing Officer's Report, in *In re Romo Vejar*, No. 03-0642 (Ariz. Disc. Comm., Sept. 2, 2004), appended to Statement of Bar Counsel, Tab B at 9. The Supreme Court of Arizona declined to exercise discretionary review and entered the recommended sanction. Judgment and Order entered on November 18, 2004, in *In re Romo Vejar,* Ariz. Sup. Ct. No. SB-04-0145-D, appended to Statement of Bar Counsel, Tab E.

In a Colorado reciprocal proceeding, the State Supreme Court, acting through its Office of the Presiding Disciplinary Judge, rejected a sanction of a "six-month suspension, stayed upon the successful completion of one year of probation," which was

proposed by the Colorado Office of Attorney Regulation Counsel. The Office of the Presiding Disciplinary Judge found "a public censure is the appropriate sanction in this case" on the following reasoning:

> One of the primary goals of our disciplinary system is to protect the public from lawyers, who pose a danger to them. The People did not meet their burden of showing Respondent's misconduct warrants a substantially different form of discipline in the State of Colorado. The established facts reveal Respondent's conduct involved negligence, involved only one client, and caused only potential harm to that client. The Hearing Board also considered the fact that Respondent has not practiced in the State of Colorado since before 1992, has no intention of practicing here, and remains administratively suspended (for non-payment of Bar dues) at this time.

Report, Decision and Order Imposing Sanctions Pursuant to C.R.C.P 251.21(d), entered March 31, 2006, at 5, appended to Respondent's Motion for Leave to File Copy of the Supreme Court for the State of Colorado's Report, Decision, and Order Imposing Sanctions, filed herein on April 7, 2006.[1]

Despite the conclusions of these two disciplining courts, the majority recommends that Respondent be suspended for six months from the practice of law in the District of Columbia, a jurisdiction in which he became a member of the Bar almost 18 years ago, but in which he has not been shown ever to have practiced. That result stems from the fact, with which I have no disagreement, that if Respondent's violation had originated in the District of Columbia disciplinary system, instead of the Arizona system, a suspension, probably of six-month duration, would have been imposed. Consequently, under a number of decisions of the Court, the exception provided in D.C. Bar R. XI,

[1] The Supreme Court of the State of Colorado did not impose probation, as the Arizona Court had done, because the Record shows that, at the time of the Colorado order, Respondent had already successfully completed his one-year probation in Arizona.

§ 11(c)(4) is deemed to apply, and the reciprocal sanction imposed in this jurisdiction need not be identical to the sanction imposed by the disciplining court in Arizona.

Another provision in our Reciprocal Discipline Rule, D.C. Bar R. XI, § 11(f), however, expressly permits the Court to enter, and thus the Board to recommend, "such order as it deems appropriate," when the exception in § 11(c)(4), or any of the other four exceptions in D.C. Bar R. XI, § 11(c), applies. Section 11(f), by its plain words, thus provides that, when the exception in § 11(c)(4) is held applicable so that a sanction that is identical to the sanction imposed in the originating jurisdiction is not required, the Court's discretion to choose an appropriate sanction is broad. What is more, nothing in the Rule bars the Court from examining the pertinent circumstances of the case and determining that the appropriate sanction is a sanction that is similar to that imposed by the disciplining court, or even identical to that sanction.

This seemingly paradoxical conclusion stems from the difference in the way the exception in § 11(c)(4) is construed and the broad discretion the Court has under § 11(f). On the one hand, the exception in § 11(c)(4) is construed to apply if, as a hypothetical matter, the District of Columbia would have imposed a substantially different sanction for the same misconduct in a case originating here. *See, e.g., In re Zelloe*, 686 A.2d 1034, 1036 (D.C. 1996). On the other hand, the sanction that the Court chooses to impose under § 11(f) is not limited by what would be imposed in a hypothetical case originating in the District of Columbia, but may take into account, among other facts and circumstances, the sanction imposed by the originating jurisdiction, which has considerably more knowledge of the Respondent, his standing in the Bar and the nature of his practice.

The Record we now have before us demonstrates that Respondent was admitted to the Bar of the District of Columbia by motion almost 18 years ago. His registration statement, dated December 28, 1988, shows that his home address and office address at that time were in Tucson, Arizona. Similarly, the address currently on file for Respondent with the District of Columbia (as revealed on the Bar's Web-site) is in Tucson, and the internet Web-site for "Find Law Lawyers' Directory" lists the same Tucson address for Respondent and no other address. Respondent's 19-year law practice in Arizona, during which he had "no prior discipline with the State Bar" (Hearing Officer's Report, in *In re Romo Vejar*, No. 03-0642 (Ariz. Disc. Comm., Sept. 2, 2004), appended to Statement of Bar Counsel, Tab B at 6), is described in his response to Bar Counsel's statement in this matter as follows:

> From the inception he has represented the undocumented in cases dealing either with government agents, or civilian vigilantes; his cases include the defense of Sanctuary Workers that included priests, pastors and nuns; the largest awarded case for rape by a United States Border Patrolman of an undocumented worker; several cases dealing with wrongful death of undocumented persons by Border Patrolmen; several cases against vigilantes at the Southern Arizona border for abuse of civilian Mexican citizens, and undocumented workers.

Respondent's Response to Bar Counsel at 4.

In sum, the record in this case provides every reason to believe that Respondent is an exemplary lawyer who, for many years has rendered much needed services for the underprivileged and poor in his community. Moreover, the record provides no reason to believe that he has ever practiced law in the District of Columbia or represented any District residents, and the nature of his practice over the past two decades in Arizona makes it unlikely he ever will.

The majority, in this reciprocal matter, takes no account of those considerations and recommends discipline that will harm Respondent's reputation in a way that two other courts have not thought necessary. Since Respondent, in all likelihood, will never practice his profession anywhere near the District of Columbia, there is no evidence – or even any reason to believe – that a sanction identical to that imposed by the disciplinary authorities in his own state and a neighboring state might in any way be inadequate to accomplish the remedial goals of our disciplinary system. Accordingly, I respectfully dissent from the recommendation made by the majority and would recommend that the Court follow the courts in Arizona and Colorado, and impose a public censure for the misconduct established in this matter.

Respectfully submitted,

By: _____
James P. Mercurio

Dated: JUL 31 2006