UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No: 03-2006 (EGS)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 29

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
GEORGE EDELSTEIN,	)	**Bar Docket No. 012-02**
	)	
Respondent.	)	

REPORT AND RECOMMENDATION
OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

The United States District Court for the Southern District of New York ("U.S. District Court") disbarred Respondent for conduct relating to a series of loans he made to a client while representing him, accepting employment while the client was indebted to him, and engaging in conduct prejudicial to the administration of justice in violation of the New York Lawyer's Code of Professional Responsibility ("New York Code").[1] Respondent was later disbarred reciprocally by the United States Court of Appeals for the Second Circuit and the Appellate Division of the Supreme Court of New York First Judicial Department.

Bar Counsel reported the order of the U.S. District Court to the District of Columbia Court of Appeals (the "Court"). By Order dated February 28, 2002, the Court suspended Respondent pursuant to D.C. Bar R. XI, § 11(d) and directed the Board on Professional Responsibility (the "Board") either to: (1) recommend whether identical, greater, or lesser discipline should be imposed on Respondent; or (2) determine whether the Board should proceed de novo. Respondent has not filed an affidavit under D.C. Bar R. XI, § 14(g), nor has he filed an affidavit

[1] The S.D.N.Y. disbarred Respondent by removing his name from its roll of attorneys. The S.D.N.Y. treats removal from its roll of attorneys as a disbarment. See Attachment C to Statement of Bar Counsel. (S.D.N.Y. Order of Dec. 20, 2001).

pursuant to In re Goldberg, 460 A.2d 982 (D.C. 1983) (per curiam). Bar Counsel recommends that Respondent be disbarred on a reciprocal basis. Respondent failed to file a timely opposition to Bar Counsel's statement. We recommend that Respondent be disbarred.

I – THE NEW YORK PROCEEDINGS

Respondent was admitted to our Bar by examination on January 20, 1967. He is also a member of the New York Bar. In 1995, the Grievance Committee Chairman for the U.S. District Court appointed a Hearing Panel to hear charges of professional misconduct against Respondent.[2]

One aspect of the misconduct arose from Respondent's representation of a criminal defendant who later became a FBI confidential informant ("the informant"). During the course of this representation, Respondent made a series of nine loans to the informant, over a thirteen-month period, totaling more than $20,000. The representation was terminated but later resumed, while the informant's debt to Respondent remained unpaid. Respondent then allegedly requested the government to pay the informant for his cooperation so as to allow the informant to repay his debt to Respondent. Thereafter Respondent ceased to represent the informant, and sued him to recover the loans. Respondent obtained a default judgment.

The Hearing Panel found that the foregoing conduct violated New York Code Disciplinary Rule ("DR") 5-103(B),[3] which prohibits advancing financial assistance to a client,

[2] This summary of pertinent facts comes entirely from the S.D.N.Y. decision dated June 2, 1999.

[3] New York Code DR 5-103(B) states:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
> (1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.
> (2) Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client.

and DR 5-101(A)[4], which prohibits a lawyer from accepting employment if his professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial interests. The Hearing Panel found that the financial relationship between Respondent and his criminal client was likely to affect Respondent's professional judgment. Moreover, Respondent did not allege that he had made the required disclosure to his client as to how Respondent's financial interests might affect his judgment. The Hearing Panel also found that Respondent acted contrary to his client's interests by repeatedly complaining to the FBI handler about the client's indebtedness and dishonesty.

Respondent was also found to have engaged in conduct prejudicial to the administration of justice, in violation of New York Code DR 1-102(A)(5),[5] as a result of Respondent's proposal to disclose to the informant the whereabouts of a client who was a fugitive. This proposal was made contingent upon the informant's ability to convince the government to pay the informant substantial sums of money in exchange for the information. The money was to be paid to Respondent to satisfy the outstanding debt. Respondent maintained that the informant contacted him, at the government's request, to offer Respondent money to disclose the whereabouts of the fugitive client. Respondent further claimed that he had "played along" with the informant to determine how far the government would go to obtain information about the fugitive client and to gain information to support an accusation that the government was engaging in improper conduct. The Hearing Panel declined to make a finding as to who approached whom or who

[4] New York Code DR 5-101(A), as in effect during the relevant time period, reads: "Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." It has since been amended.

[5] New York Code DR 1-102(A)(5) states: "A lawyer or law firm shall not [e]ngage in conduct that is prejudicial to the administration of justice."

proposed the improper sale of the information regarding the fugitive client's whereabouts. The Hearing Panel did find, however, that Respondent's conduct was prejudicial to the administration of justice and violated New York Code DR 1-102(A)(5), when he pursued the "private sting" and failed to report his suspicion of government misconduct to the presiding court or the Department of Justice. According to the Hearing Panel, Respondent's alleged misconduct resulted in the expenditure of enormous amounts of court and Justice Department time and resources – in part due to Respondent's disqualification from representation of the fugitive, which caused a delay in trial. The Hearing Panel noted that as a former lawyer with the Justice Department for some twenty years, Respondent was aware of the potential prejudice to the administration of justice of undertaking a private investigation rather than reporting possible official misconduct.[6]

Based upon the Hearing Panel Report, the U.S. District Court ordered Respondent removed from its roll of attorneys. Subsequent to that order, the Second Circuit took reciprocal action and disbarred Respondent. The Appellate Division of the Supreme Court of the State of New York also disbarred Respondent on a reciprocal basis after conducting its own hearing as to the appropriate discipline to be imposed. The United States Court of Appeals for the District of Columbia Circuit Circuit disbarred Respondent on a reciprocal basis on July 5, 2002.

[6] The Hearing Panel declined to make any finding as to Respondent's alleged violation of New York Code DR 1-102(A)(4) which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation" since, according to the Panel, such conduct is inherent in a "sting" operation and this charge was subsumed in the Panel's finding that the sting was "prejudicial to the administration of justice." The Hearing Panel also declined to find that Respondent violated New York Code DR 4-401 (Preservation of Confidences and Secrets of a Client) and New York Code DR 1-102 (Misconduct) for using a client's confidence to the client's disadvantage and the lawyer's advantage, in relation to the allegation that Respondent tried to obtain money from the FBI in exchange for the whereabouts of his fugitive client. Since the sting was not completed, according to the Hearing Panel the client's confidence was not revealed and it could not be established that Respondent knew, much less intended to divulge, his client's whereabouts.

II – DISCUSSION

D.C. Bar R. XI, § 11(f)(2) establishes a presumption in favor of the imposition of identical reciprocal discipline which is rebuttable if the respondent demonstrates by clear and convincing evidence, or the Court finds on the face of the record by clear and convincing evidence, that one or more of the five exceptions set out in D.C. Bar R. XI, § 11(c) exists.[7] See D.C. Bar R. XI, § 11(c) and (f); In re Zilberberg, 612 A.2d 832, 834 (D.C. 1992). When a respondent does not contest reciprocal discipline, however, the role of the Board is limited: "[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)). In another recent decision, the Court said 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). The Court has explained that "[u]nderlying that principle is a general reluctance by the court to have the disciplinary law of the District of Columbia – concerning both misconduct and sanctions – developed in proceedings that are characterized by deference to another jurisdiction's judgment and also by the absence of 'that clear concreteness provided when a question emerges . . . for a

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[7] 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.

decision from a clash of adversary argument.'" Childress, 811 A.2d at 807 (quoting In re Goldsborough, 654 A.2d 1285, 1287-88 n.5 (D.C. 1995)).

Bar Counsel recommends that identical discipline be imposed. Although, Respondent has neither timely nor properly opposed Bar Counsel's recommendation, we have reviewed each of the exceptions set forth in D.C. Bar R. XI, § 11(c), and find that Respondent has failed to demonstrate by clear and convincing evidence that any of the exceptions applies. Accordingly, reciprocal discipline should be imposed.

The Court's February 28, 2002 order directed Bar Counsel to "inform the Board [] of her position regarding reciprocal discipline within 30 days of the date of [the] order" and directed Respondent to "show cause before the Board [], if cause there be, within 10 days why identical, greater or lesser discipline should not be imposed in the District of Columbia."[8] Bar Counsel's statement was timely filed. Respondent subsequently filed three documents – all many months after his response to Bar Counsel was due. First, he filed a response to Bar Counsel's statement, received on June 25, 2002, with a "Motion for Leave to File Response and Appendix out of Time" explaining that the U.S. District Court record was extensive and that he had been hindered by the other disciplinary litigation.[9] Second, before the motion was ruled upon, on July 31,

[8] See also Rule XI, § 11(d) (stating that "[u]pon receipt of a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been suspended or disbarred by a disciplining court outside the District of Columbia or by another court in the District of Columbia, the Court shall forthwith enter an order suspending the attorney from the practice of law in the District of Columbia pending final disposition of any reciprocal disciplinary proceeding, and directing the attorney to show cause within thirty days from the date of the order why the identical discipline should not be imposed. The attorney's response to the order to show cause shall be filed with the Board, which for good cause shown may extend the time for filing a response for a period not to exceed thirty days"); Bar Rule 8.2 reads in pertinent part: "[r]espondent may file a response to Bar Counsel's statement concerning reciprocal discipline within ten (10) days of service of the statement".

[9] To the letter accompanying his response, Respondent attaches two documents which, he says, are subject to an order of the Southern District of New York sealing them. D.C. Bar R. XI, section 17(d) provides for entry of a protective order upon application and good cause shown. Neither Bar Counsel nor Respondent have filed a motion for protective order. We construe Respondent's letter as a motion for a protective order to seal the documents and grant Respondent's motion.

2002, Respondent sent a letter to the Board stating that he did not oppose Bar Counsel's recommendation. Third, on December 31, 2002, Respondent sent a letter in which he "withdr[ew]" his previous letter. This "withdrawal" states no basis upon which Respondent intended to challenge Bar Counsel's recommendation. In reliance on Respondent's first letter, Bar Counsel did not file a written response to Respondent's earlier opposition. Following Respondent's December 31 letter, Bar Counsel filed a reply on March 14, 2003.

While we could have treated this as a matter in which Bar Counsel's recommendation was not challenged by the Respondent, we did review the D.C. Bar R. XI, § 11(c) exceptions. We find that none are applicable here. Respondent received due process in New York, there is no infirmity of proof and the misconduct plainly constitutes a violation of the District of Columbia Rules of Professional Conduct. Although Respondent's misconduct might not result in the same sanction in the District, we do not find that the imposition of the identical discipline would result in grave injustice.

(1) Respondent Failed To Establish Deprivation Of Due Process Or Infirmity Of Proof In The New York Proceeding

Respondent received due process in the New York proceedings. Due process requires notice and an opportunity to be heard. See, e.g., In re Asher, 772 A.2d 1161, 1165 (D.C. 2001) (citing cases). Respondent was served with a statement of charges and he answered through counsel. He filed a letter purported to be a motion for summary judgment, which was adjudicated by the Hearing Panel. Respondent was also notified of the scheduled hearing date but failed to appear. A reconvened hearing was then scheduled, and Respondent was warned by a hand delivered letter that upon his failure to appear, the Panel "will take your default and proceed to adjudicate both your motion for summary jurisdiction and the issues raised in the

Amended Statement of Charges…" and repeating that "the Panel feels that your testimony is vital to both adjudications." Panel Report at 7. Immediately prior to the hearing, Respondent informed the Panel by facsimile that he "decline[s] to appear to testify." The hearing proceeded in Respondent's absence. The record thus establishes that there was no failure of due process. Moreover, Respondent chose to ignore the New York proceedings. That decision waives any due process claim. See In re Asher, 772 A.2d 1161, 1166 (D.C. 2001) (decision by foreign jurisdiction to deny respondent's request for continuance and to proceed with the disciplinary hearing without Respondent did not violate due process where Respondent had notice of the hearing and was given several opportunities to respond and participate).

We find no infirmity of proof in the New York action. There is no basis whatsoever for this Board to question the evidentiary basis of the U.S. District Court disciplinary proceeding. Having been afforded the opportunity to present evidence, Respondent is not free to relitigate in the District of Columbia adverse findings made by the foreign jurisdiction. See In re Shearin, 764 A.2d 774, 777 (D.C. 2000) ("Under principles of collateral estoppel, in reciprocal discipline cases we generally accept the ruling to the original jurisdiction") quoting In re Klein, 747 A.2d 1179, 1181 (D.C. 1997); see also In re Richardson, 602 A.2d 179, 181 (D.C. 1992) (same); In re Richardson, 692 A.2d 427, 434 (D.C. 1997), cert. denied, 522 U.S. 1118 (1998) (No de novo hearing where attorney elected to forego hearing in original jurisdiction); In re Balsamo, 780 A.2d 255, 259 (D.C. 2001) ("once . . . an evidentiary hearing comporting with due process is held [in the foreign jurisdiction] . . . there need not be another such hearing in the District of Columbia); In re Velasquez, 507 A.2d 145, 147 (D.C. 1986). Finally, it is Respondent's burden to establish an infirmity of proof by clear and convincing evidence. He has not met that burden here. Under

these circumstances, we can find no failure of proof that would militate against the imposition of reciprocal discipline.

(2) Respondent's Misconduct Constitutes A Misconduct In The District

It is also undisputed that Respondent's misconduct violates the counterpart disciplinary rules in the District of Columbia. New York Code DR 5-103(B), prohibiting a lawyer from advancing financial assistance to a client, contains provisions similar to our Rule 1.8(d).[10] Respondent admitted making a series of nine loans to his client, totaling more than twenty thousand dollars. None of the exceptions enumerated in Rule 1.8(d) apply as there is no evidence that the loans were for litigation expenses or were intended to provide financial assistance to enable Respondent's client to maintain litigation. See In re Alongi, 794 A.2d 605, 607 (D.C. 2002) (per curiam) (one-year reciprocal suspension for attorney suspended in New York for misconduct that included improper financial assistance to a client, neglect, deceit and conflict of interest in drafting a will where he was named beneficiary, and engaging in a sexual relationship with his client, without proper disclosure and waiver).

New York Code DR 5-101(A) (conflict of interest) is substantially identical to our Rule 1.7(b)(4).[11] Respondent clearly violated this rule when he represented a client who owed him

[10] D.C. Rule 1.8(d) states:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:
>
> (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses of medical examination, costs of obtaining and presenting evidence; and
>
> (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.

money. Respondent own financial interests could reasonably affect his professional judgment and he did not allege that he had made the required disclosure to his client as to the nature of the possible conflict and the possible adverse consequences of such representation.[12] See In re Hager, 812 A.2d 904, 922 (D.C. 2002) (one-year suspension for attorney found to have violated eight different rules including representing clients in matter where attorney's professional judgment was or reasonably might have been affected by his own interests); In re Williams, 722 A.2d 328, 329 (D.C. 1998) (per curiam) (disbarment as reciprocal discipline for attorney who knowingly and intentionally misappropriated client funds and failed to advise client of actual or potential conflicts of interest where exercise of his professional judgment on the part of his client may have been affected by his own financial and personal interests; violation of former District of Columbia Rule DR 5-101(A) which is substantially the same as Rule 1.7(b)(4)); In re Zelloe, 686 A.2d 1034, 1037 (D.C. 1996) (90-day suspension in reciprocal case for attorney who inter alia violated former District of Columbia Rule DR 5-101(A)).

New York Code DR 1-102(A)(5) (conduct prejudicial to the administration of justice) is similar to our Rule 8.4(d).[13] Respondent violated this rule when he pursued his "private sting" and failed to report the alleged government misconduct, causing his disqualification from representing his client, delays and the expenditure of time and resources. See In re Hopkins, 687 A.2d 938, 938 (D.C. 1996) (per curiam) (public censure for attorney found to engage in conduct

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[11] D.C. Rule 1.7(b) states in pertinent part: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

[12] See D.C. Rule 1.7(c): "A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."

[13] D.C. Rule 8.4(d) states: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct that seriously interferes with the administration of justice."

prejudicial to the administration of justice where she failed to take any action to protect estate assets from her client's looting); In re Lewis, 689 A.2d 561, 565 (D.C. 1997) (per curiam) (30-day suspension for attorney who, among other violations, seriously interfered with the administration of justice by failing to provide accurate address to the court occasioning lengthy delay).

(3) Reciprocal Discipline is Warranted

The sanction of disbarment imposed by the New York disciplinary authorities may be somewhat more severe than the sanction the Court might impose for similar conduct in this jurisdiction. We have found no single case in the District of Columbia that provides guidance on sanction, given the Respondent's conduct considered in the aggregate. In the District, the sanctions for representing a client where the attorney's professional judgment was or reasonably might have been affected by his own interests (Rule 1.7(b)(4)), and for conduct prejudicial to the administration of justice (Rule 8.4(d)), range from public censure to a one-year suspension. See In re Hopkins, 687 A.2d 938, 938 (D.C. 1996) (per curiam) (public censure for violating Rule 8.4(d)); In re Hager, 812 A.2d 904, 922 (D.C. 2002) (one-year suspension for multiple violations including Rule 1.7(b)(4)). We are not aware of any original case in this jurisdiction dealing with advancing financial assistance to a client in violation of Rule 1.8(d). A recent reciprocal case imposed a one-year suspension upon an attorney who violated several disciplinary Rules, including improperly providing financial assistance to his client. See In re Alongi, 794 A.2d 605, 607 (D.C. 2002) (per curiam); see also In re McLain, 671 A.2d 951, 954 (D.C. 1996) (90-day suspension for Rule 1.8(a) violation where clients loaned money to Respondent, which he failed to reimburse, and Respondent never advised clients about a potential conflict of interest).

Although Respondent's misconduct might have elicited a lighter sanction in the District of Columbia if discipline were imposed in the first instance here, considering all the circumstances of this case, the seriousness of Respondent's misconduct, and his cavalier approach to both the New York proceeding and this reciprocal proceeding,[14] we find that no grave injustice would result in subjecting Respondent to the same discipline imposed by the U.S. District Court. Bar Counsel's recommendation in favor of reciprocal discipline, Respondent's failure to inform Bar Counsel of the foreign proceeding, and his failure to respond timely to Bar Counsel's statement, support our conclusion.

CONCLUSION

For the above reasons, we recommend that Respondent be disbarred on a reciprocal basis with reinstatement to run from the date he files the affidavit required by D.C. Bar R. XI, § 14(g). See D.C. Bar R. XI, § 16(c); In re Slosberg, 650 A.2d 1329, 1331 (D.C. 1994). As Respondent has not yet filed such affidavit, we direct his attention to the requirements of that rule and their effect on his eligibility for reinstatement.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Martin R. Baach
Board Member

Dated: June 30, 2003

All members of the Board concur in this Report and Recommendation, except Mr. Knight, who did not participate.

[14] The Hearing Panel found that Respondent willfully defaulted by failing to appear at the hearings and giving frivolous excuses, and failed to cooperate with the Panel by adopting a conscious strategy to delay and impede the Panels' work. See Panel Report at 23.