DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
MARK A. KEY,	:	Bar Docket No. 169-04
	:	
Respondent.	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This is a reciprocal matter from the State of North Carolina. Respondent is a member of the Bar of the District of Columbia, having been admitted on June 5, 1998. Respondent is also a member of the North Carolina State Bar.

On May 21, 2003, Respondent was suspended from the practice of law for two years, which suspension was stayed for three years conditioned upon Respondent's compliance with specified conditions. Respondent's suspension was the result of a Consent Order on Discipline.[1] We recommend that the District of Columbia Court of Appeals ("Court") impose identical reciprocal discipline.

I. BACKGROUND

On or about May 29, 2002, Respondent was convicted of assault on a female, a misdemeanor, in violation of North Carolina General Statute § 14-33(c)(2). On July 26, 2002, he was sentenced to 45 days in jail, suspended on condition of supervised probation for 24 months and a fine of $500.00.

[1] Neither Bar Counsel nor Respondent raised any issue of our jurisdiction over Respondent under D.C. Bar R. XI, § 11(a). *See In re Greenspan*, Bar Docket No. 279-01 (BPR July 30, 2004). We note, however, that under North Carolina law, the North Carolina State Bar has concurrent jurisdiction with its judiciary over the discipline of attorneys. This authority includes the power to order suspensions or disbarment. N.C. Gen. Stat. § 84-28; NCSB Rule § .0100 *et seq*.

On December 19, 2002, the North Carolina State Bar ("NCSB") initiated disciplinary action against Respondent before the Disciplinary Hearing Commission of the NCSB. Respondent received notice of the North Carolina disciplinary proceedings and answered the NCSB complaint with the assistance of counsel. In his answer, Respondent admitted to his conviction of assault on a female, but nonetheless contended that the sexual conduct was consensual. Respondent admitted that the victim of the assault sought his legal advice concerning a land/property dispute, but denied that she ever became a client.

In his answer, Respondent also admitted that his conduct constituted a violation of Rules 8.4(b) and 1.18 of the North Carolina Rules of Professional Conduct.

Rule 8.4(b) of said Rules states:

> It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Rule 1.18 of the North Carolina Rules states, *inter alia*, that:

> (a) A lawyer shall not have sexual relations with a current client of the lawyer.
>
> . . . .
>
> (d) For purposes of this rule "sexual relations" means:
>
> > . . . .
> >
> > (2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

According to the comments to North Carolina Rule 1.18, it was adopted to clarify the longer-standing recognition that sexual relationships with clients are a prohibited conflict of interest under Rule 1.7, North Carolina's general rule on conflicts of interest.

> [1] The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that a sexual relationship with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest, which cannot be ameliorated by the consent of the client.
>
> [2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to the lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

After filing his answer and with the assistance of counsel, Respondent entered into a consent order, under which he stipulated to the existence of an attorney/client relationship with the assault victim and that on February 27 and 28, 2002, he "made sexual advances toward" the victim and "kissed and otherwise engaged in physical contact with [her] for the purpose of arousing the sexual desire of the parties." Consent Order of Discipline at 2. Respondent stipulated that his conduct violated Rules 8.4(b) and 1.18 of the North Carolina Rules of Professional Conduct and "freely, voluntarily, and with the advice of counsel consents to the order of discipline, waives a formal hearing in the above referenced matter, and waives all right to appeal this consent order or challenge in any way the sufficiency of the findings, conclusions, or discipline imposed." *Id*. at 1.

II. RECIPROCAL DISCIPLINE

Under D.C. Bar R. XI, § 11(f)(2), there is a rebuttable presumption in favor of the imposition of identical 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). The five exceptions under D.C. Bar R. XI, § 11(c) are:

> (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.

Respondent opposes the imposition of any discipline in the District of Columbia and has proffered three arguments in support. We discuss each below in some depth, not only to address Respondent's exceptions to reciprocal discipline, but given the dearth of original authority to guide the Board's analysis, to explain our reasoning. As set forth below, we have concluded that none of Respondent's exceptions suffice to rebut the presumption in favor of the imposition of identical reciprocal discipline. .

A. First, Respondent contends that his discipline in North Carolina was "primarily" based upon his violation of North Carolina Rule 1.18. Because D.C. does not have an identical rule, Respondent asserts that his "actions in North Carolina [do] . . . not constitute misconduct" in this jurisdiction. Bar Counsel has treated this argument as raising an exception by Respondent under D.C. Bar R. XI, § 11(c)(5).

Respondent's discipline in North Carolina was based upon his violation of both Rules 1.18 and 8.4(b) of the North Carolina Rules of Professional Conduct. Respondent

is correct that his violation of both of those rules arose from the same overall set of circumstances. The North Carolina disciplinary rules, however, are focused on different aspects of those overall circumstances. A violation of Rule 8.4(b) is triggered by a criminal act. North Carolina's Rule 8.4(b) is identical to Rule 8.4(b) of the D.C. Rules of Professional Conduct. A criminal act is not a prerequisite to a finding that a respondent violated North Carolina Rule 1.18 – its focus is on sexual activity with a client, whether criminal or not. Thus, at the outset, Respondent's reliance on the fact that D.C. does not have an exact counterpart to North Carolina Rule 1.18 does not establish, clearly or convincingly, that his actions do not constitute misconduct in this jurisdiction. *Cf. In re Youmans*, 588 A.2d 718, 719 (D.C. 1991) (per curiam).

Bar Counsel submitted a certified copy of Respondent's conviction by a North Carolina court of North Carolina General Statute § 14-33(c)(2), which is a Class A1 misdemeanor offense. *E.g.*, D.C. Bar R. XI, § 10(f) ("A certified copy of a court record or docket entry of a finding that an attorney is guilty of a crime . . . shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based thereon."). Respondent stipulated to the fact of his conviction and cannot attack it in a disciplinary proceeding.

Thus, the only issue with regard to the application of Rule 8.4(b) is whether Respondent's crime is of the type that "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." The NCSB specifically found that Respondent's misconduct reflected adversely on his honesty, trustworthiness and fitness, and Respondent stipulated and agreed to the "findings of fact and conclusions of law recited" in the consent order. Consent Order of Discipline at 1, 3. "Reciprocal discipline

proceedings are not a forum to reargue the foreign discipline." *Zdravkovich*, 831 A.2d at 969.

In D.C., a criminal act reflects adversely on a lawyer's fitness if it is a crime of violence or breach of personal trust. Rule 8.4(b), Comment [1]. Assault on a client, whether sexual or not, falls within this standard. As discussed more fully below, sexual assault of a client, whether upon a man or a woman, raises serious concerns about an abuse of a lawyer's dominant position in the lawyer-client relationship. As the NCSB found, Respondent's actions were committed with a "selfish motive." Consent Order of Discipline at 4.

Respondent's reliance on D.C. Bar R. XI, § 11(c)(5) fails because his crime is, in fact, disciplinary misconduct under Rule 8.4(b) of both the D.C. and North Carolina Rules. And, as noted, this misconduct, standing alone, is sufficient grounds upon which to impose reciprocal discipline. Nonetheless, Respondent's assertion that D.C. has no counterpart to North Carolina Rule 1.18 is erroneous.

As set forth above, North Carolina Rule 1.18 is a conflict of interest rule, which was derived from its general rule, Rule 1.7, governing conflicts of interest. Under North Carolina Rule 1.7(b) "[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests" without first obtaining the informed consent of his/her client.

North Carolina deemed it necessary to clarify that sexual relations with a client are prohibited through the adoption of a separate, more direct disciplinary prohibition. Aside from its specificity, the only substantive difference between the two North Carolina conflicts rules is that a lawyer cannot avoid the prohibitions of Rule 1.18 by

obtaining consent after the lawyer/client relationship arises – client consent is not a cure under North Carolina Rule 1.18.

Under D.C. Rules, a sexual relationship with a client violates Rule 1.7(b)(4), which provides that, absent client consent:

> [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 . . . personal interests.

The only practical difference between D.C. Rule 1.7(b)(4) and North Carolina Rule 1.18 is that a sexual relationship with a client will not run afoul of the D.C. Rule if the lawyer obtains the client's informed consent. In all other respects, the two rules are parallel. *See e.g.*, *In re Zilberberg*, 612 A.2d 832 n.1 (D.C. 1992); *In re Hudock*, 544 A.2d 707, 709 (D.C. 1988) (per curiam) (appended Board Report).

Application of D.C. Rule 1.7(b)(4) to a nonconsensual sexual relationship with a client is supported by D.C. case law. *In re Asher*, 772 A.2d 1161 (D.C. 2001). That such a relationship is a conflict of interest is abundantly clear. When a lawyer takes advantage of a client's trust or dependency solely for the lawyer's own personal gratification, there is a conflict of interest. This is an abuse of one of the core attributes of the attorney/client relationship. Moreover, the vagaries of sexual interaction can have a direct impact on a lawyer's objective and independent professional judgment in the pursuit of a client's legal interests or the zeal with which the lawyer pursues the representation. This is an issue of professionalism, not morality.

Respondent's conviction of assault on a female precludes any finding that the sexual relationship, which Respondent admits to, was consensual and that, thus, D.C. Rule 1.7(b)(4) does not apply. *See* Rule 1.7(c). In North Carolina, assault is defined as

"an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Roberts*, 155 S.E.2d 303, 305 (N.C. 1967). Even if we could assume that any person of "reasonable firmness" could consent to such "an overt act" or attempt "to do some immediate physical injury," Respondent has not met his burden under D.C. Bar R. XI, §11(c) (2).[2]

B. Second, Respondent asserts that his physical relationship with the victim was consensual and, as a result, his criminal conviction was unjustified. Thus, Respondent contends that the imposition of reciprocal discipline would be a "grave injustice." Bar Counsel has treated this argument as raising an exception by Respondent under D.C. Bar R. XI, § 11(c)(3).

As noted above, our receipt of a certified copy of a court document evidencing a respondent's conviction of a crime is "conclusive evidence." *See* D.C. Bar R. XI, § 10(f). No matter how strongly Respondent may believe that he was the true victim of the events leading up to his conviction, we are not free to ignore that a judge decided otherwise. *Cf. In re Bridges*, 805 A.2d 233, 235 (D.C. 2002) (infirmity of proof "exception is not an invitation . . . to relitigate in the District of Columbia the adverse findings of another court in a procedurally fair setting"). Respondent acknowledged that the North Carolina judge had before him Respondent's evidence of consent.

[2] Bar Counsel also asserts that under D.C. Rule 8.5(b)(2)(ii), we should evaluate Respondent's misconduct under the North Carolina Rules of Professional Conduct. Given that we find that Respondent's misconduct violates the substantially identical provisions of our own Rules of Professional Conduct, there is no reason for us to reconsider our decision in *In re Gansler*, Bar Docket No. 405-03 (BPR July 9, 2004) (rejecting application of Rule 8.5(b)(2)(ii) in reciprocal discipline cases).

While the case law provides little in the way of examples of "grave injustice" under D.C. Bar R. XI, § 11(c)(3), we are comfortable concluding that Respondent has provided nothing that clearly and convincingly demonstrates that any such injustice would occur through the imposition of reciprocal discipline. Respondent was represented by counsel throughout the North Carolina proceedings. He voluntarily waived his right to a hearing and freely stipulated to the conclusions of fact and law underlying the NCSB disciplinary order. He has not remotely suggested that either the North Carolina criminal or disciplinary proceedings were tainted in any manner, that his representation was inadequate, or that any newly discovered evidence exists.

Indeed, given that his suspension here will, like that in North Carolina, be stayed pending his satisfactory completion of certain "probationary" conditions, it is difficult to give Respondent's assertion of "grave injustice" much credence. He holds the keys to whether any period of actual suspension will ever occur – either in North Carolina or here – in his own hands.

C. Third, Respondent asserts that his conviction was based upon a misdemeanor offense, which does not constitute a "serious crime" under D.C. Bar R. XI, §10(b).[3] Based upon this Rule, Respondent asserts that his misconduct warrants substantially different discipline or no discipline.

Bar Counsel has treated this argument as raising an exception by Respondent under D.C. Bar R. XI, § 11(c)(4). Under § 11(c)(4), as noted, a respondent can avoid reciprocal discipline by a clear and convincing demonstration that "[t]he misconduct

[3] Bar Counsel reported Respondent's conviction to the court as a non serious crime under D.C. Bar R. XI, § 10(e). On July 19, 2004, the Court directed Bar Counsel to investigate the matter and proceed as appropriate under D.C. Bar R. XI, § 8. Bar Counsel apparently has chosen to prosecute this matter under the reciprocal discipline provisions of D.C. Bar R. XI, § 11 only.

warrants substantially different discipline in the District of Columbia." This exception is directed at the appropriateness of the foreign sanction rather than the determination of a violation of any disciplinary rule.

Respondent's reliance on D.C. Bar R. XI, §10(b) is misplaced. That section defines "serious crimes" for purposes of setting the procedures to be followed when an attorney is convicted of either a "serious" or "other" crime. *See also* D.C. Bar R. XI, § 8. All of the procedures addressed in the Rule relate to proceedings initiated because of a criminal conviction, not to reciprocal proceedings under D.C. Bar R. XI, § 11.

Moreover, nothing in D.C. Bar R. XI, § 10 limits discipline to "serious" crimes. *See* D.C. Rule XI, § 10(e); *In re Sims,* 844 A.2d 353, 362-63 (D.C. 2004) (disbarment for crime of moral turpitude for conviction of non serious crime). The existence of these procedures does not presuppose what discipline or sanction will ultimately be imposed on any respondent implicated in the commission of any crime. Further, there is no requirement that a respondent actually be convicted of a criminal offense to impose discipline under Rule 8.4(b) of the D.C. Rules of Professional Conduct. *See e.g., In re Slattery*, 767 A.2d 203 (D.C. 2001) (finding violation of Rule 8.4(b) where there was no underlying convicion); *cf. In re Reynolds,* 649 A.2d 818, 819 (D.C. 1994) (per curiam) (Ferrell, J. and Terry, J., concurring) (discussing deletion of 'moral turpitude' qualification from Rule 8.4(b); noting that Rule focus is on any crime that "indicate[s] lack of those characteristics relevant to law practice").

Moving to the issue of whether substantially different discipline would be warranted in D.C., we note, at the outset, that Bar Counsel has not objected to the NCSB's decision regarding a probationary stay of Respondent's suspension. The

NCSB's three-year probationary stay includes conditions designed to address the NCSB's concerns about Respondent's fitness to practice law. Bar Counsel also does not ask that the Board adopt any concurrent or additional probationary conditions in D.C. to be monitored or evaluated by the Board. Under such circumstances, we believe it appropriate to defer to the NCSB decision to stay Respondent's suspension. *Cf.* D.C. Bar R. XI, § 11(h). While we defer to the stay, it remains relevant to our analysis, given its importance to the nature of the foreign sanction. The stay issued by the NCSB allows Respondent to avoid any actual suspension from practice both in North Carolina and here by satisfying the probationary conditions. Thus, the only issue here is whether a *potential* two-year suspension is within the range of sanctions imposed in the District of Columbia on attorneys who engage in roughly similar conduct.

Bar Counsel places primary reliance for its recommendation on *In re Saboorian*, 770 A.2d 78 (D.C. 2001) (per curiam) and *In re Goldsborough*, 654 A.2d 1285 (D.C. 1995). Both of these cases involved the imposition of reciprocal discipline. Only original jurisdiction cases provide applicable authority on sanction in a reciprocal matter, not other reciprocal cases. *In re Sheridan*, 798 A.2d 516, 522 (D.C. 2002).

The only original case in D.C. involving sexual misconduct, not involving moral turpitude, is *In re Lovendusky*, No. 84-1672 (D.C. Apr. 4, 1986) (memorandum opinion). That case involved a misdemeanor conviction of attempted carnal knowledge of a fourteen year old. The respondent was suspended for six months. Even as the only D.C. precedent arising from an original disciplinary proceeding, it would not control on the issue of sanction because the misconduct was not practice related. Moreover, attempted

carnal knowledge (*i.e.*, statutory rape) is not a crime the conviction of which involves any element of violence.

Sanctions for violations of Rule 8.4(b) have ranged from suspension for 30 days to disbarment. *See e.g., In re Soininen*, 783 A.2d 619 (D.C. 2004) (30 days); *Slattery*, 767 A.2d at 203 (disbarment); *In re Spiridon*, 755 A.2d 463 (D.C. 2000) (one year, with fitness requirement); *In re Phillips*, 705 A.2d 690 (D.C. 1998) (60 days); *In re Cerroni*, 683 A.2d 150 (D.C. 1996) (per curiam) (one year); *In re Perrin*, 663 A.2d 517 (D.C. 1995) (three years); *In re Hutchinson*, 534 A.2d 919 (D.C. 1987) (en banc) (one year); *In re Kent*, 467 A.2d 982 (D.C. 1983) (30 days). Sanctions for conflicts of interest have ranged from suspension for 30 days to disbarment. *In re Austin*, No. 02-BG-786 (D.C. Sept. 2, 2004) (disbarment); *In re Butterfield*, 851 A.2d 513 (D.C. 2004) (per curiam) (30 days); *In re Cohen*, 847 A.2d 1162 (D.C. 2004) (30 days); *In re Hager*, 812 A.2d 904 (D.C. 2002) (one year); *In re Jones-Terrell*, 712 A.2d 496 (D.C. 1998) (60 days).

Misconduct that occurs during the course of an attorney/client relationship is deserving of a greater sanction than misconduct that arises in the context of an attorney's private affairs. *In re Kennedy*, 542 A.2d 1225, 1230 (D.C. 1988). While private misconduct is subject to discipline, "clients in general and the administration of justice are the primary focus of protection." *Id.* at 1231. "Because 'the role of a lawyer is to represent and advise clients in a fiduciary capacity and to carry out the administration of justice,' practice-related violations of disciplinary rules have more 'impact on the representation of clients and the practice of law in general.'" *Slattery*, 767 A.2d at 215 (quoting *Kennedy*, 542 A.2d at 1230-31). Misconduct that occurs during the course of a professional relationship also casts more serious doubt on an attorney's fitness and is

more likely to adversely impact the public's perception of the profession in general. "[T]he principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general." *In re Addams*, 579 A.2d 190, 194 (D.C. 1990).

In addition, misconduct that enhances the attorney's self-interest at the expense of the client also warrants a greater sanction. *See e.g., Austin*, *supra*; *Slattery*, 767 A.2d at 218; *In re Sneed*, 673 A.2d 591 (D.C. 1996); *In re McBride*, 602 A.2d 626 (D.C. 1992) (en banc). That the advantage being taken by the attorney is sexual rather than financial is not, in our view, a distinction worthy of any substantive difference. Respondent's misconduct, as noted, was found to be motivated by selfishness. Indeed, taking sexual advantage may very well have long term impacts on a client that cannot be rectified by any form of restitution or disgorgement.

Finally, while violations of Rule 8.4(b) are often coupled with acts of intentional or reckless misrepresentation, or other dishonesty, the absence of any indication in the record that such factors exist here are adequately counter-balanced by the fact that Respondent was convicted of a crime of violence.

There is a two-step inquiry in determining whether imposition of a different sanction is warranted under the substantially different discipline exception of D.C. Bar R. XI, 11(c)(4): "(1) whether the 'misconduct in question would not have resulted in the same punishment here as it did in the disciplining jurisdiction', and (2) where discipline in this jurisdiction would be different, 'whether the difference is substantial.'" *Sheridan*, 798 A.2d at 522 (quoting *In re Krouner*, 748 A.2d 924, 928 (D.C. 2000); *In re Garner*, 576 A.2d 1356, 1357 (D.C. 1990) (per curiam)). In light of *Lovendusky* and the

substantial plus factors leaning toward a greater sanction for Respondent in this case, we cannot conclude that the imposition of a two-year suspension "would not have resulted here" if this case had been decided in an original proceeding. Moreover, even assuming the potential for a "difference," given the range of sanctions that have been imposed for violations of Rule 8.4(b) and conflict of interest rules and the fact that Respondent – under the terms of the North Carolina order – may avoid any period of actual suspension here, that difference is not substantial at least in terms of any disadvantage to Respondent.

III. CONCLUSION

For the foregoing reasons, the Board recommends that the Court impose identical reciprocal discipline of a two-year suspension, stayed for three years and conditioned on Respondent's not being held by the NCSB to be in violation of the terms of the NCSB disciplinary order. The Board notes that should the probation be revoked and the underlying two-year suspension imposed, Respondent should not receive credit for the time he was suspended on an interim basis pursuant to D.C. Bar R. XI, § 11(d) (from May 18, 2004 to July 19, 2004), because he did not file the affidavit required by D.C. Bar R. XI, § 14(g). *See In re Slosberg*, 650 A.2d 1329, 1331 (D.C. 1994).

BOARD ON PROFESSIONAL RESPONSIBILITY

By:_____
Lee Ellen Helfrich

Dated: November 12, 2004

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