

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN THE MATTER OF:) **S. Ct. Civ. No. 2022-0005**
)
JEFFREY B.C. MOORHEAD, ESQ.)
Respondent.)
_____)

Considered and Filed: November 28, 2022

Cite as: 2022 VI 20

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

Joel H. Holt, Esq.
Law Offices of Joel H. Holt P.C.
St. Croix, U.S.V.I.
Attorney for Respondent.

Tanisha Bailey-Roka, Esq.
Chief Disciplinary Counsel
St. Croix, U.S.V.I.
Attorney for the Office of Disciplinary Counsel.

Simone R.D. Francis, Esq.
Ogletree Deakins
St. Thomas, U.S.V.I.
Attorney for the Board on Professional Responsibility.

OPINION OF THE COURT

PER CURIAM.

¶ 1 This matter is before the Court pursuant to a notice filed by the Office of Disciplinary Counsel, advising this Court that the United States District Court of the Virgin Islands has issued an order suspending Jeffrey B.C. Moorhead, Esq. from the practice of law for two years, as well as responses thereto filed by Attorney Moorhead and the Board on Professional Responsibility.

For the reasons that follow, we decline to impose reciprocal discipline.

I. BACKGROUND

¶ 2 Attorney Moorhead is a member in good standing of the Virgin Islands Bar. He is also admitted to practice law before the United States District Court of the Virgin Islands (“District Court”). While established by section 21(a) of the Revised Organic Act as a court of record in the Virgin Islands under Article IV of the United States Constitution, the District Court is institutionally separate from the Judicial Branch of the Virgin Islands and maintains its own bar—the District Court Bar—separate and apart from the Virgin Islands Bar. *See In re Alvis*, 54 V.I. 408, 413 (V.I. 2010).

¶ 3 On July 30, 2021, the mother of a client represented by Attorney Moorhead in a criminal proceeding in the District Court sent a letter to a District Court judge, which alleged that Attorney Moorhead had engaged in certain misconduct. The judge referred the complaint to the Chief Judge of the District Court, who immediately recused himself because he is related to Attorney Moorhead and referred the matter to the Chief Judge of the United States Court of Appeals for the Third Circuit. The Third Circuit Chief Judge designated himself as a temporary judge of the District Court, *see* 48 U.S.C. § 1614(a), docketed the complaint as a miscellaneous case in the District Court, and entered an order in that miscellaneous case appointing a magistrate judge ordinarily assigned to the United States District Court for the Western District of Pennsylvania to investigate the complaint and prepare a report and recommendation.

¶ 4 The magistrate judge issued a report and recommendation on December 3, 2021. Before doing so, the magistrate judge did not hold an evidentiary hearing and did not interview Attorney Moorhead, his client, or the client’s mother who wrote the letter which initiated the investigation. In the report, the magistrate judge stated that she had “directed the Clerk of the District Court of

the Virgin Islands to provide a list of matters in which the District Court of the Virgin Islands has imposed discipline upon Attorney Moorhead within the past five years” and that “[i]n addition, [she] independently conducted a search and located several additional matters, in District Court and other courts, in which discipline was imposed.” The magistrate judge provided a list of eight such matters, in which Attorney Moorhead had been fined by various courts or been removed from court-appointed representation and provided a factual summary of each. The report also disclosed that the magistrate judge had interviewed, on an *ex parte* basis, six individuals in conjunction with the investigation, but did not name them and only summarized their collective testimony, indicating that “Attorney Moorhead has long had problems with meeting court deadlines, making timely court appearances, successfully e-filing documents, communicating adequately with clients, and the like,” that he “may be suffering from an impairment of some kind, possibly due to substance abuse,” and that his “law practice has become increasingly disorganized and haphazard, questioning whether he still maintains a law office at all.” The magistrate judge concluded the report by recommending that Attorney Moorhead be suspended from the District Court Bar for two years and “that significant conditions should be imposed upon his readmission,” including “[a] comprehensive physical and mental health examination” and appointment of “[a] professional mentor” who would “supervise [his] practice of law.”

¶ 5 Attorney Moorhead filed an objection to the report and recommendation on December 17, 2021. In his objection, Attorney Moorhead asserted that the procedure employed by the magistrate judge denied his due process rights on multiple grounds, including denying him the right to be heard, considering other matters without providing notice, making findings based on *ex parte* interviews with unnamed individuals, and failing to identify any specific ethical rules that he had violated.

¶ 6 On January 25, 2022, the District Court—consisting of 13 judges of the United States Court of Appeals for the Third Circuit, also sitting by temporary designation as judges of the District Court—issued an order overruling Attorney Moorhead’s objections and approving and adopting the magistrate judge’s December 3, 2021 report and recommendation. *See In re Moorhead*, No. 1:21-mc-0035, 2022 WL 214515 (D.V.I. Jan. 25, 2022) (unpublished). The District Court concluded that the magistrate judge provided Attorney Moorhead with the right to be heard “on the papers in the form of his objections to the Report and Recommendations prior to its submission to the Court.” *Id.* at *6. The District Court further stated that “[b]y virtue of the Report and Recommendation, Attorney Moorhead was given full notice of the scope of the investigation and the allegations underlying the proposed discipline.” *Id.* The District Court further determined that the July 30, 2021 complaint did not limit the scope of the investigation, and held that it was not necessary to allow Attorney Moorhead to interview or examine any witnesses because “the proposed discipline is based upon Attorney Moorhead’s behavior as reflected in public court records that are available to him,” *id.*, and further noted that “there are serious confidentiality concerns presented by Attorney Moorhead’s request to cross-examine these witnesses” because “[t]he Virgin Islands is a small, close-knit legal community, and Attorney Moorhead himself is related to the Chief Judge of the District Court.” The District Court also determined that “the rules of evidence do not apply to this disciplinary proceeding” and that “[n]othing in [the disciplinary rules] excludes hearsay or guarantees a right to cross-examination.” *Id.* at *8. Finally, the District Court concluded that it was not necessary for the magistrate judge to identify any specific ethical rules because “attorneys admitted to practice before the District Court of the Virgin Islands must comply with the Model Rules of Professional Conduct, as adopted by the American Bar Association” and “Attorney Moorhead is expected, as an attorney admitted to the bar of this Court

since 1988, to be thoroughly familiar with these standards.” *Id.* The District Court concluded that Attorney Moorhead had violated Rules 1.1, 1.3, 1.4, 3.5, and 8.4 of the Model Rules, and imposed the two-year suspension and reinstatement conditions that had been recommended by the magistrate judge.

¶ 7 On January 25, 2022, the Virgin Islands Office of Disciplinary Counsel filed a certified copy of the District Court’s January 22, 2022 order with this Court. *See* V.I.S.Ct.R. 207.18. This Court, in a February 1, 2022 order, directed Attorney Moorhead to show cause, in writing, as to why this Court should not impose identical discipline in accordance with Supreme Court Rule 207.18, and permitted the Board on Professional Responsibility to file a response.

¶ 8 Attorney Moorhead timely filed his response on March 3, 2022, which he subsequently supplemented on March 4, 2022, and March 11, 2022. In his filings, he contends that this Court should not impose reciprocal discipline because the procedure employed by the District Court “was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process” and “the imposition of the same discipline by the Court would result in a grave injustice.” V.I.S.Ct.R. 207.18(d)(1), (3).

¶ 9 In addition to reasserting the claims first made in his December 17, 2021 objection to the magistrate judge’s report and recommendation, Attorney Moorhead outlined additional claimed due process violations that occurred after the District Court issued its January 25, 2022 order. Specifically, Attorney Moorhead points to the fact that he filed a notice of appeal with the Clerk of the District Court on January 27, 2022, seeking to appeal the January 25, 2022 order to the United States Court of Appeals for the Third Circuit, but that the Chief Judge—sitting by designation as a judge of the District Court—entered an order on January 31, 2022, directing the Clerk to not process the appeal.

¶ 10 On February 7, 2022, Attorney Moorhead filed with the District Court a motion for reconsideration of the January 31, 2022 order, and concurrently filed a petition for writ of mandamus with the Third Circuit requesting that it direct the Clerk of the District Court to process the notice of appeal in accordance with Rule 4 of the Federal Rules of Appellate Procedure. The District Court denied the reconsideration motion in a February 22, 2022 order on the grounds that all of its prior orders were “administrative” in nature and were unappealable. Attorney Moorhead filed a notice of appeal of the February 22, 2022 order to the Third Circuit, but again the Clerk of the District Court did not process it.

¶ 11 On March 4, 2022, a three-judge panel of the Third Circuit issued an order denying Attorney Moorhead’s petition for writ of mandamus, on grounds that Moorhead failed to demonstrate a clear error of law or an indisputable abuse of discretion. On March 11, 2022, Moorhead filed a petition for panel rehearing of that decision.

¶ 12 The Board on Professional Responsibility submitted its response to Attorney Moorhead’s filings on March 17, 2022. In its response, the Board recommended that this Court defer a decision to impose identical discipline, citing Attorney Moorhead’s continued attempts to obtain appellate review of the January 25, 2022 order. This Court granted the Board’s request to hold this matter in abeyance pending the outcome of those proceedings.

¶ 13 The Third Circuit denied the petition for panel rehearing on March 23, 2022. Shortly thereafter, on April 8, 2022, Attorney Moorhead filed a petition for writ of certiorari with the Supreme Court of the United States. Ultimately, the United States Supreme Court denied the petition on June 21, 2022, and on August 22, 2022, further denied a petition for rehearing that Attorney Moorhead had filed from the denial of certiorari on July 14, 2022.

¶ 14 This Court lifted the abeyance, and after granting multiple extensions of time, the Board filed its recommendation on September 19, 2022. In its filing, the Board noted that the question of what constitutes sufficient due process for purposes of imposition of reciprocal discipline under Supreme Court Rule 207.18 is a matter of first impression but noted that in the context of ordinary attorney disciplinary proceedings this Court has held that “attorneys subject to disciplinary action are afforded the full measure of procedural due process required under the constitution so that we do not unjustly deprive them of their reputation and livelihood.” *In re Maynard*, 60 V.I. 444, 449 (V.I. 2014) (quoting *Statewide Grievance Comm. v. Botwick*, 627 A.2d 901, 906 (Conn. 1993)). The Board emphasizes that the Supreme Court of the United States has instructed that this, at a minimum, requires notice and some opportunity to respond. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985). The Board, however, does not take a position as to whether or not the District Court proceedings satisfied this standard; rather, it “respectfully requests that this Court in its decision in this matter incorporate guidance as to the meaning of ‘due process’ . . . in order to guide the Board, the Office of Disciplinary Counsel, and members of the Virgin Islands Bar Association in future matters.” (Resp. 7-8.)

II. DISCUSSION

¶ 15 This Court, as the highest court of the Virgin Islands vested with the supreme judicial power of the territory, possesses constitutional, statutory, and inherent authority to exercise the exclusive jurisdiction to regulate the practice of law in the Virgin Islands. *See In re Rogers*, 57 V.I. 553, 558 (V.I. 2012) (citing 4 V.I.C. § 32(e)). To assist us with this function, this Court established the Office of Disciplinary Counsel to investigate and prosecute allegations that an attorney has violated the Virgin Islands Rules of Professional Conduct, as well as the Board on Professional Responsibility to adjudicate such allegations, while retaining ultimate authority over

the disciplinary system. *See* V.I.S.Ct.R. 203(c); 207.1; 207.2; *see generally In re Burns*, 73 V.I. 600 (V.I. 2020).

¶ 16 Like many jurisdictions, this Court has adopted a summary process for imposing discipline on an attorney who has already been disciplined or transferred to disability inactive status in another jurisdiction. *See* V.I.S.Ct.R. 207.18. Under this abbreviated process, we presume that “a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in the territory,” V.I.S.Ct.R. 207.18(e), and this Court will presumptively impose identical discipline without the need for an investigation or prosecution by Disciplinary Counsel or a hearing before the Board.¹ We do this as a matter of comity to the judgments of these other jurisdictions but also for reasons of practicality, in that the administration of justice is not served by permitting the lawyer to relitigate the same claims before the Board when the lawyer has either had an evidentiary hearing or had the right to have one in the other jurisdiction.² *Accord, In re Zdravkovich*, 831 A.2d 964, 969 (D.C. 2003).

¹ In its March 17, 2022 filing, the Board, relying on a decision of the Supreme Court of Georgia in *In re Stubbs*, 681 S.E.2d 113 (Ga. 2009), asserts that discipline imposed by a federal court, such as the District Court, should not qualify as discipline “in another jurisdiction” within the meaning of Rule 207.18. While this Court previously imposed reciprocal discipline by consent on an attorney for misconduct found by the United States Court of Appeals for the Third Circuit, *see In re McIntosh*, S. Ct. Civ. Nos. 2012-0013, 0025, 2013 WL 991250 (V.I. Mar. 14, 2013) (unpublished), this Court has never had an opportunity to consider this issue as part of an adversarial proceeding. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (“[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.”). Nevertheless, we decline to resolve this issue of first impression in this case, given our ultimate conclusion that reciprocal discipline is not warranted pursuant to Supreme Court Rule 207.18(d)(1).

² In its response, the Board notes that the individual whose letter resulted in the initiation of the District Court disciplinary proceedings has filed a complaint with the Office of Disciplinary Counsel, and that this Court may wish to consider “holding in abeyance any determination of the

¶ 17 Nevertheless, the lawyer facing such identical discipline may rebut this presumption by establishing that

- (1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- (2) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject;
- (3) the imposition of the same discipline by the Court would result in a grave injustice;
- (4) the misconduct established warrants substantially different discipline or no discipline in this Territory; or
- (5) the reason for the original transfer to disability inactive status no longer exists.

V.I.S.Ct.R. 207.18(d). As a result, “[a]n attorney seeking to avoid reciprocal discipline carries a heavy burden” which will rarely be met. *Committee on Grievances v. Feinman*, 239 F.3d 498, 504 (2d Cir. 2001).

¶ 18 This Court has previously recognized that due process is a flexible concept that calls “for such procedural protections as the particular situation demands.” *Estate of Luddington v. Jaber*, 54 V.I. 678, 684 (V.I. 2011) (internal quotation marks and citations omitted); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Because “attorney discipline proceedings, while nominally civil, are quasi-criminal in nature,” a lawyer accused of ethical misconduct is entitled to considerable due process protections. *See, e.g., In re Motylinski*, 60 V.I. 621, 639 (V.I. 2014) (applying the rule of lenity to a disciplinary proceeding); *In re Maynard*, 60 V.I. 444, 451 (V.I. 2014) (noting that the existence of “an obvious, unquestionable conflict of interest in an attorney discipline case” may be a structural error not amenable to harmless error review). Thus, while “the due process rights of an attorney in a disciplinary proceeding do not extend so far as to

appropriate discipline until these other proceedings are completed.” (Resp. 9.) Because we conclude that reciprocal discipline is not warranted, we in effect reach that result.

guarantee the full panoply of rights afforded to an accused in a criminal case,” the attorney must, at an absolute minimum, receive “notice and an opportunity to be heard.” *In re Cordova-Gonzalez*, 996 F.2d 1334, 1336 (1st Cir. 1993) (internal quotation marks omitted) (collecting cases). The Supreme Court of the United States has also determined that in an attorney disciplinary proceeding, the respondent lawyer must receive notice of the charges at the outset of the proceeding as well as an opportunity to explain himself and present a defense. *In re Ruffalo*, 390 U.S. 544, 550 (1968) (collecting cases).

¶ 19 Attorney Moorhead contends that the District Court denied him due process by failing to provide him with an opportunity to be heard as provided for in its local rules. Rule 83.2(b) of the District Court Local Rules of Civil Procedure, titled “Disciplinary Proceedings,” pursuant to which Attorney Moorhead was disciplined, provides that

When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted or permitted to practice before this Court, shall come to the attention of a judicial officer of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the judicial officer shall inform the Chief Judge. Thereafter, the Chief Judge or the Chief Judge’s designee shall refer the matter to a Magistrate Judge or a committee designated by the Chief Judge (Disciplinary Committee) for investigation and a report and recommendation. The Magistrate Judge or the Disciplinary Committee shall afford the attorney the opportunity to be heard. The attorney may submit objections to the report and recommendation. Any objections are to be filed with the Court within 14 days from the date of filing of the report and recommendation. The matter will then be submitted to the Court for final determination.

(Emphasis added). District Court Rule 83.2(b), by its own terms, provides a respondent attorney with the opportunity to be heard at two separate stages of the proceeding. First, the attorney is entitled to a right to be heard during the investigative stage before the magistrate judge or disciplinary committee that is charged with preparing the report and recommendation. Next, the attorney also has a separate right to elect to submit objections to the District Court before it

considers whether to adopt, reject, or modify those recommendations. The procedure set forth in Local Rule 83.2 represents a simplified form of Rule 5 of the American Bar Association Model Federal Rules of Disciplinary Enforcement, and clearly implements the United States Supreme Court's precedents requiring that attorneys in disciplinary proceedings receive notice of the charges and a right to be heard before the investigator and the ultimate adjudicator. *Ruffalo*, 390 U.S. at 551.

¶ 20 Here, the record reflects that the magistrate judge did not provide Attorney Moorhead with an opportunity to be heard, as is expressly required by Local Rule 83.2(b). While the District Court excused this failure by noting that Attorney Moorhead possessed a right to submit a written objection to the magistrate judge's report and recommendation, the plain text of Local Rule 83.2(b) provides Attorney Moorhead with a right to be heard before the magistrate judge and a right, at his option, to file a written objection to the magistrate judge's report and recommendation. As such, the procedure employed by the District Court in this case did not provide Attorney Moorhead with the required opportunity to be heard, and thus reciprocal discipline is not warranted pursuant to Supreme Court Rule 207.18(d)(1).

¶ 21 For these reasons, we conclude that Attorney Moorhead did not receive the due process protections guaranteed to him by District Court Local Rule 83.2(b), and that imposition of reciprocal discipline under Rule 207.18 based on the January 25, 2022 order is not warranted. We emphasize that our decision not to impose reciprocal discipline does not mean that Attorney Moorhead is immune from discipline by this Court for the alleged misconduct identified in the District Court's January 25, 2022 order. In its response, the Board notes that the individual whose letter resulted in the initiation of the District Court disciplinary proceedings filed a complaint with the Office of Disciplinary Counsel based on largely the same conduct. As noted above, reciprocal

discipline is a tool of comity and convenience, creating a separate summary process for imposing discipline for misconduct found by another bar admissions authority after a proceeding that provided the lawyer with due process. When, as here, this Court concludes that reciprocal discipline may not be warranted, it simply means that this summary process shall not be invoked. The Office of Disciplinary Counsel must promptly conduct its own independent investigation of the ethical misconduct alleged in the January 25, 2022 order and the similar complaint filed with it and, if appropriate, prosecute Attorney Moorhead in a proceeding before the Board.

III. CONCLUSION

¶ 24 The January 25, 2022 suspension order entered by the United States District Court of the Virgin Islands did not provide Attorney Moorhead the requisite notice or opportunity to be heard. Accordingly, we will not impose reciprocal discipline. To the extent any discipline is warranted for the misconduct alleged by the District Court and in the complaint filed with the Office of Disciplinary Counsel, it shall be imposed after an independent investigation and, if necessary, prosecution and adjudication pursuant to Supreme Court Rule 207.

Dated this 28th day of November, 2022.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Kobe Potter
Deputy Clerk

Dated: November 28, 2022