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# Recent Developments: Att'y Grievance Comm'n of Md. v. Midlen: Maryland Attorneys Run the Risk of Having to Serve a Consecutive, Rather Than Concurrent Suspension, When They Fail to Promptly Notify Bar Counsel That They Have Been Suspended in Another Jurisdiction

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## RECENT DEVELOPMENT

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### **ATT'Y GRIEVANCE COMM'N OF MD. V. MIDLEN: MARYLAND ATTORNEYS RUN THE RISK OF HAVING TO SERVE A CONSECUTIVE, RATHER THAN CONCURRENT SUSPENSION, WHEN THEY FAIL TO PROMPTLY NOTIFY BAR COUNSEL THAT THEY HAVE BEEN SUSPENDED IN ANOTHER JURISDICTION.**

**By: Daniel Wechsler**

The Court of Appeals of Maryland held that Maryland attorneys run the risk of having to serve a consecutive, rather than concurrent suspension, when they fail to promptly notify Bar Counsel that they have been suspended in another jurisdiction. *Att'y Grievance Comm'n of Md. v. Midlen*, 395 Md. 628, 911 A.2d 852 (2006). In cases such as this where it is unclear whether an attorney stopped practicing in Maryland after being sanctioned in the District of Columbia, the attorney will likely face a partly consecutive, rather than completely concurrent, sanction in Maryland. *Id.*

Respondent, John H. Midlen, Jr. ("Midlen") was suspended from practicing law in the District of Columbia ("D.C.") for 18 months, after violating several D.C. Rules of Professional Conduct. The Maryland Bar Counsel learned of Midlen's suspension in D.C. approximately five months later.

Pursuant to Maryland Rule 16-773(b), the Maryland Bar Counsel filed a petition seeking reciprocal discipline in Maryland. Reciprocal discipline allows for a disciplinary action to be instituted against an attorney in Maryland who is found to have been disciplined in another jurisdiction.

In response to the petition, the Court of Appeals of Maryland requested that each party show cause as to why reciprocal discipline should or should not be imposed. Midlen argued that his due process rights were violated in the D.C. Court of Appeals, and that an 18 month suspension was too severe under Maryland law. After reviewing Midlen's contentions, the Court sided with the Maryland Bar Counsel and ordered an 18 month suspension.

In an issue of first impression, the Court determined how to implement the suspension as either consecutive or concurrent through the analysis of three different options. *Midlen*, 395 Md. at 647, 911 A.2d at 864. The first option would be to begin the suspension on the date it is ordered and let it run its natural course for 18 months. *Id.* at 648, 911 A.2d at 864. This option would cause Midlen to remain suspended in Maryland for over a year after the D.C. suspension is terminated. *Id.*

The second option would be to apply the suspension retroactively so that it would run simultaneously with the D.C. suspension. *Id.* This option would be viable only if it were certain that Midlen did not practice in Maryland after being suspended in D.C. *Id.* at 648, 911 A.2d at 864-65. If Midlen practiced in Maryland after his D.C. suspension was ordered, a retroactive application of the Maryland suspension would have the effect of turning what was once lawful conduct into unlawful conduct. *Id.* The Court deemed this effect to be “impermissible.” *Id.*

A third approach would be to start the suspension upon issuance of the order and end the suspension when the D.C. suspension concludes. *Id.* at 648, 911 A.2d at 865. This option, while providing Midlen with a suspension lasting for a duration of 18 months, would be considered an 18 month suspension in D.C. and only a few months suspension in Maryland. *Id.* This might have the ill effect of encouraging attorneys not to report suspensions or attempt to use delay tactics in order to evade or minimize a suspension in Maryland. *Id.* at 648-49, 911 A.2d at 865. Since the attorney would know that the Court would end the suspension upon termination of the other jurisdiction’s suspension, there would be little incentive to report misconduct in other jurisdictions. *Id.*

In selecting the appropriate option, the Court examined various legal sources for insight regarding reciprocal discipline. *Id.* at 649, 911 A.2d at 865. The Court first noted that the Maryland Rules and the ABA Model Rules of Professional Conduct were silent as to whether to apply a reciprocal suspension concurrently or consecutively. *Id.* However, case law, particularly *Matter of Goldberg*, 460 A.2d 982 (D.C. 1983), has analyzed the issue. *Midlen*, 395 Md. at 649, 911 A.2d at 865. In *Goldberg*, the D.C. Court of Appeals ruled that concurrent suspensions were preferable to consecutive suspensions in order to prevent the punishment from being harsher than intended. *Midlen*, 395 Md. at 649, 911 A.2d at 865.

In agreeing with the D.C. Court of Appeals' decision in *Goldberg*, the Court of Appeals of Maryland noted that concurrency would encourage attorneys to notify the Maryland Bar Counsel if they are suspended in another jurisdiction. *Midlen*, 395 Md. at 651, 911 A.2d at 866. Moreover, the central goal of reciprocal discipline is to protect the citizens of Maryland. *Id.* at 652, 911 A.2d at 867. Through prompt reporting of suspensions, a more immediate protection for Marylanders can be realized. *Id.*

However, the Court made clear that despite the advantages of concurrent disciplinary sanctions, each case may have special circumstances that warrant different results. *Id.* at 651, 911 A.2d at 866. The Court commented that reciprocal discipline should "ordinarily" be concurrent, but that the Court retains discretion in its determination of how to implement a suspension. *Id.*

Using its discretionary powers, the Court determined that beginning the suspension on the date of issuance and letting it continue for 18 months was the appropriate option in this case. *Id.* at 653, 911 A.2d at 868. Although this has the negative effect of extending the disciplinary sanction over a year past the D.C. suspension, the Court could not apply the suspension retroactively since the Court did not know whether *Midlen* practiced in Maryland after being suspended in D.C. *Id.* Thus, *Midlen's* Maryland suspension will have a consecutive portion to be completed when the D.C. suspension has run its course.

The Court provides sound and thorough reasoning for its decision. However, suspending an attorney for an act committed in another jurisdiction for an extended period of time after the original suspension is over appears somewhat harsh. Perhaps a more creative solution should be sought which would seek to penalize the attorney without causing any undue hardship. For example, the Court might consider combining different types of sanctions so that all suspensions would finish at the conclusion of the original suspension. Then, a public reprimand or other type of less severe sanction would follow. Unless a more versatile solution is reached, Maryland attorneys must act cautiously and always report cross-jurisdictional sanctions.