DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
BARRY K. DOWNEY,	:	
	:	
	:	D.C. App. No. 08-BG-1160
Respondent.	:	Board Docket No. 08-BD-014
	:	Bar Docket No. 2008-D338
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 416968)	:	

ORDER OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Respondent pleaded guilty to a single count of engaging in the business of money transmission without a license, in violation of D.C. Code § 26-1002 (2001), a felony which does not require proof of *scienter*. He received a suspended sentence and a $2500 fine. The Court of Appeals decided not to impose an interim suspension and directed the Board to initiate a formal proceeding to determine whether the offense involved moral turpitude, and the nature of the final discipline to be imposed for Respondent's commission of a serious crime. The Board concluded that the strict liability offense did not involve moral turpitude *per se* and referred the matter to Hearing Committee Number Nine. The Hearing Committee addressed three principal issues: whether Respondent was convicted of a "serious crime" within the meaning of D.C. Bar R. XI, §10(b); whether Respondent's offense involved moral turpitude on the facts; and the sanction to be imposed. The Hearing Committee unanimously concluded that the offense was a "serious crime" and that the facts underlying Respondent's conviction did not demonstrate moral turpitude. The Hearing Committee was, however, sharply divided on the appropriate sanction. The majority recommended that Respondent receive an informal admonition. The Chair, dissenting, recommended a three-year suspension. The difference turns primarily on the Hearing Committee's

assessment of Respondent's credibility in asserting that he did not intend to violate the law, that the law was so unsettled that even federal enforcement officials were uncertain whether or how it applied to Respondent's business, and that Respondent relied on advice of counsel that his business did not need to be licensed. The majority credited Respondent's testimony, based not only on Respondent's *ipse dixit* but also on a careful analysis of the context and the surrounding circumstances of the crime. The dissent looked at the same record and reached a different conclusion, finding that Respondent engaged in uncharged dishonesty by misrepresenting his reliance on advice of counsel at the sentencing portion of his criminal case and in connection with subsequent disciplinary proceedings. Bar Counsel[1], who did not originally charge Respondent with any misconduct other than the commission of a "serious crime," now goes beyond even the dissent's position and contends that Respondent should be disbarred because the offense involved moral turpitude on the facts and flagrant dishonesty.

Upon review of the entire record, including the parties' submissions and arguments before us, we adopt the Hearing Committee's unanimous Findings of Fact as well as the Hearing Committee majority's Findings of Fact and credibility findings, which are supported by substantial record evidence. We also affirm, based on a *de novo* review, the Hearing Committee's unanimous Conclusions of Law that the offense constituted a "serious crime" and that the facts surrounding Respondent's conviction did not demonstrate moral turpitude. On the issue of sanction, we have carefully considered the dissent of the Hearing Committee Chair as well as Bar Counsel's exceptions. We affirm the Hearing Committee majority's credibility determinations and fact

[1] Effective December 19, 2015, the D.C. Court of Appeals amended Rule XI of the District of Columbia Rules Governing the Bar by changing the title of Bar Counsel to "Disciplinary Counsel." For ease of reference, this Report and Recommendation refers to the former title of Bar Counsel, under which this case was prosecuted.

findings addressing Respondent's truthfulness, and based on those findings we conclude that Bar Counsel failed to prove dishonesty by clear and convincing evidence. Since the aggravating factor of dishonesty was not established, we adopt the majority's recommendation that Respondent receive an informal admonition.

I. PROCEDURAL HISTORY

Respondent pleaded guilty on July 21, 2008 to a violation of D.C. Code § 26-1002, engaging in the business of money transmission without a license, which is a felony. Respondent promptly self-reported his conviction to the D.C. Bar and the Maryland Bar. On September 17, 2008, Bar Counsel notified the Court of Appeals of the conviction and submitted a proposed order of interim suspension pursuant to D.C. Bar R. XI, § 10(c), because Respondent had pleaded guilty to a felony, which is by definition a "serious crime" under D.C. Bar R. XI, § 10(b). On September 24, 2008, Respondent moved for a stay of the interim suspension. Bar Counsel opposed the motion. On December 4, 2008, the Court granted Respondent's motion to stay the suspension that § 10(c) would otherwise require, without prejudice to Bar Counsel moving to vacate the stay after the Board's report and recommendation had been filed. *In re Downey*, 960 A.2d 1135 (D.C. 2008) (per curiam). On June 24, 2009, after considering Bar Counsel's motion for rehearing or rehearing *en banc*, the Court clarified its procedure for interim suspensions under D.C. Bar R. XI, § 10 (c) but otherwise denied the petition for rehearing. *In re Downey*, 975 A.2d 152 (D.C. 2009) (per curiam).

On July 22, 2009, on motion by Bar Counsel, the Court found that Respondent's offense constituted a "serious crime" as defined by D.C. Bar R. XI, § 10(b)(1), and ordered the Board

> to institute a formal proceeding to determine the nature of the offense, whether it involves moral turpitude within the meaning of D.C. Code § 11-2503(a) (2001),

> and the nature of the final discipline to be imposed for respondent's conviction of a serious crime.

Order, *In re Downey*, No. 08-BG-1160 (D.C. July 22, 2009) (per curiam).

On October 27, 2009, the Board, analyzing the relevant D.C. statute and noting the Court's observation in its December 4, 2008 order that Respondent's offense "involv[ed] no scienter or moral turpitude[,]" concluded that the statute does not involve moral turpitude *per se*. Order, *In re Downey*, Bar Docket No. 338-08 at 3-4 (BPR Oct. 27, 2009). The Board referred the matter to a Hearing Committee to determine: "(1) whether Respondent's conviction involves moral turpitude on the facts, and (2) what final discipline is appropriate in light of Respondent's conviction of this crime." *Id.* at 4. The Board also indicated that Bar Counsel could file a petition charging Respondent with one or more violations of the Rules of Professional Conduct. *Id.* On March 31, 2010, Bar Counsel filed a status report with the Board, stating that based on the information available, Bar Counsel declined to file a Specification of Charges alleging any violation of the Rules of Professional Conduct. Bar Counsel requested that the matter be assigned to a Hearing Committee to determine whether Respondent's offense constituted moral turpitude on the facts and to decide the appropriate sanction for Respondent's conviction of a serious crime. On July 15, 2010, the Board denied Bar Counsel's request and ordered Bar Counsel to initiate a formal proceeding with respect to Respondent's conviction of a serious crime, and also charge Respondent with any violations of the Rules of Professional Conduct that might be approved by a Contact Member. Order, *In re Downey*, Bar Docket No. 338-08 at 7 (BPR July 15, 2010).

Bar Counsel submitted a Specification of Charges to the Board, charging Respondent with commission of a "serious crime" as defined in D.C. Bar R. XI, §10(b), but not with a moral turpitude offense. A Contact Member approved the Specification of Charges on September 29,

2011 and on October 5, 2011, Bar Counsel filed the Specification of Charges and Petition. On January 10, 2012 Hearing Committee Number Nine (the "Hearing Committee") held a pre-hearing conference in which the Chair ordered Bar Counsel to detail its efforts to investigate the evidence of moral turpitude, setting forth all known facts relating to moral turpitude, and explaining Bar Counsel's position regarding the moral turpitude issue. Order, *In re Downey*, Bar Docket No. 338-08 at ¶¶ 7(a)-(e) (H.C. Jan. 10, 2012). The Hearing Committee held a hearing on March 6, 2012, at the conclusion of which the Chair held the record open and ordered Respondent to file copies of "all legal opinions provided to Respondent, e-gold, Ltd. or Gold & Silver Reserve, Inc. regarding compliance with state regulations, including but not limited to D.C. Code § 26-1002." Order, *In re Downey*, Bar Docket No. 338-08 at ¶ 2 (H.C. Mar. 6, 2012). Respondent provided materials as instructed and Bar Counsel sought to reopen the hearing in order to cross-examine Respondent on the newly-disclosed material. The Hearing Committee held an additional hearing day on June 18, 2012, following which the Chair directed Bar Counsel to seek all law firm billing records pertinent to the legal opinions produced by Respondent, and held the record open for that purpose. Following numerous pleadings regarding the confidentiality and sealing of the law firm records, the parties filed their post-hearing submissions, which were completed with Bar Counsel's Reply brief on May 31, 2013.

The Hearing Committee issued its Report and Recommendation, including the dissenting opinion of the Chair, on February 20, 2015. Bar Counsel took exception to the Hearing Committee Report and Recommendation. Following briefing on Bar Counsel's exceptions, the Board heard oral argument on June 25, 2015.

II. SUMMARY OF THE FACTS

Respondent is a member of the District of Columbia Bar, admitted on January 9, 1989. He practices exclusively in the area of employee benefits law, specifically in the application of the Employee Retirement Income Security Act of 1964 (ERISA). UFF 1.[2]

A. E-GOLD

In the mid-1990s Dr. Douglas Jackson, a close friend of Respondent's, developed a method of using digital currency backed by gold bullion to facilitate monetary transactions over the internet. This led to the creation of companies known as Gold & Silver Reserve ("GSR") and E-GOLD (collectively "E-GOLD"), related entities that offered customers a digital currency known as "e-gold" that could be used to buy or sell goods or services online. Customers could transfer e-gold between accounts or exchange e-gold for dollars or other national currencies. The idea to use gold and other precious metals to back digital currency was novel and attracted widespread attention in the press. UFF 2-3.

B. Respondent Obtains Seidl Opinion and Invests in E-GOLD (1995)

Dr. Jackson invited Respondent and his wife to invest in E-GOLD. Before investing, Respondent testified, he sought advice from David Seidl, a corporate lawyer at Miles & Stockbridge whom Respondent had known for years, concerning laws and regulations that might affect E-GOLD. In response to the Hearing Committee Chair's direction to Respondent to produce "any written opinions of outside counsel based on the issue of state license," Respondent provided a letter dated October 3, 1995 (BX 14B) requesting Seidl to review enclosed information about E-GOLD on a variety of legal issues including banking regulation, and an affidavit from Seidl

[2] The Hearing Committee Report and Recommendation will be cited as "HR"; its Unanimous Findings of Fact as "UFF"; the Majority's Findings of Fact as "MFF"; the Dissent as "D"; Bar Counsel's Exhibits as "BX"; Respondent's Exhibits as "RX"; the transcript of the Hearing as "Tr."

(BX 15) confirming in general terms that he had provided a "favorable opinion" on "certain issues" and expressing uncertainty whether that opinion had been oral or had been reflected in a letter. UFF 4-5; MFF 46-48; BX 15.

Respondent ultimately became a co-founder, officer and Director of E-GOLD with a 20% ownership stake in GSR. In those roles, Respondent participated in developing E-GOLD's business model and corporate structure, but was not extensively involved in its day-to-day operations. Throughout the relevant period, Respondent maintained his law practice as a partner at Smith & Downey, the law firm where he continues to work. UFF 6-7.

C. Patriot Act Enacted; Respondent Obtains Drinker, Biddle & Reath Opinion (2001-2003)

The passage of the Patriot Act in late 2001 removed *scienter* requirements from provisions in the Bank Secrecy Act that made it a crime to operate a money transmission business without having registered with the Department of the Treasury or obtaining a state license. Respondent sought legal advice about the applicability of the Patriot Act to E-GOLD from the law firm of Drinker, Biddle & Reath in August or September 2002. Over 6 months later, Drinker Biddle provided a lengthy memorandum setting forth its analysis. BX 14C. The Drinker Biddle memorandum advised that GSR might wish to *consider* whether it needed to register with the Treasury Department and various states as a money service business, but did not explicitly say whether or not such registration was required. Instead, the memorandum suggested that E-GOLD contact the Treasury Department for clarification on federal law requirements, and survey the various state laws to determine whether their licensing requirements might apply to E-GOLD. According to Respondent, the Drinker Biddle memorandum contained several factual inaccuracies that called its conclusions into question. Respondent's communications with Drinker Biddle to

question its bill and to ask whether the memorandum could be corrected and revised continued from the day the memorandum was received at least until December 2003. Respondent expected Drinker Biddle to revise the memorandum and reevaluate its legal analysis in light of the correct facts, but Drinker Biddle never updated the memorandum. Respondent characterized the memorandum as "useless" because of the multiple material errors, but he relied on the memorandum at least to the limited extent that it stated that the E-GOLD entities did not fall within the statutory definition of "financial institution" and therefore were not affected by the Patriot Act. UFF 9-15.

D. Fuerst Opinion; Government Uncertain About E-GOLD's Regulatory Status (2005-2008)

In January 2005, E-GOLD asked Respondent to find another lawyer to advise on the Patriot Act and money transmitter regulation issues. E-GOLD hired Mitchell Fuerst, a recognized expert on the issues, to "advise the company on the application of licensing/registration requirements of federal and state law and dealing with the Treasury Department on those issues." Fuerst met with company officials, reviewed details of the company's operations and transactions and, according to Respondent, advised that the entities comprising E-GOLD were not required to register as money transmitters. Fuerst also recommended that E-GOLD meet with Treasury Department officials to determine whether the government agreed with this position. UFF 16-17.

Fuerst accordingly met with Treasury officials at least twice in 2005. Following one such meeting, an official reportedly directed another government employee to summarize her notes and send them to FinCen (the Financial Crimes Enforcement Network) to ask for a determination whether or not E-GOLD was required to register as a Money Services Business ("MSB"). Another official "emphasized that we want to make an expeditious but also accurate determination of

whether [the E-GOLD entities] are or are not an MSB and if so what [Bank Secrecy Act] requirements should apply to them." UFF 18.

Contemporaneous government publications that Respondent testified he relied on, *e.g.,* Tr. 71-80, document the government's uncertainty about the status of E-GOLD and similar businesses. The 2005 Money Laundering Threat Assessment ("MLTA"), a report by a joint working group of the Departments of Treasury, Justice and Homeland Security, the Federal Reserve and the U.S. Postal Service, explicitly referred to E-GOLD and commented that digital currency systems like E-GOLD "defy conventional business models" and that it was a difficult and fact-intensive analysis to determine whether or not they met the regulatory definition of money transmitter or MSB subject to registration requirements. The 2006 assessment made similar observations. UFF 19; RX 1 at 031-033; RX 2 at 100. *See also* RX 3 (U.S. House of Representatives, Committee on Energy and Commerce, staff report Jan. 2007).

In December 2005, despite the ongoing discussion between E-GOLD and the Treasury Department, GSR became the target of a money laundering civil forfeiture case. Fuerst represented GSR and moved for judgment on the pleadings, arguing that GSR was not a "money transmitting business" nor a "domestic financial institution" for purposes of transaction reporting. Respondent testified that the position taken in the brief was the same as advice that Fuerst had given E-GOLD. UFF 20.

By January 2007, E-GOLD was subject to mounting criticism about its failure to take adequate steps to prevent use of its payment system by criminals, including traffickers in child pornography. A Congressional committee report noted that while E-GOLD had "adopted policies and procedures that prohibit their users from using their account to purchase child pornography," it did "not maintain sufficient records reflecting the activity of e-Gold [sic] accounts . . . or conduct

any due diligence on the merchants that accept e-gold [sic]." While Respondent was aware of some instances when E-GOLD's services were used for illegal activity, he was not charged with or convicted of actively participating in that misconduct, and Bar Counsel neither charged nor presented any substantial evidence of Respondent's involvement in such crimes. Respondent himself testified, without substantial contradiction, that the companies tried to prevent criminal use of the E-GOLD system. UFF 21, RX 3 at 148, and HR at n.2.[3]

E. Criminal Proceedings (2007-2008)

In 2007 E-GOLD, GSR, Respondent, and two other principals were charged in a four-count indictment with conspiracy to commit money laundering (18 U.S.C. § 1956), conspiracy to operate an unlicensed money transmitting business (18 U.S.C. § 371), operation of an unlicensed money transmitting business (18 U.S.C. § 1960), and money transmission without a license (D.C. Code § 26-1002). E-GOLD, Respondent and the other individual defendants moved to dismiss the indictment on grounds that the federal statutes did not apply and E-GOLD was not required to register. The defendants were represented initially by Fuerst, who, Respondent testified, said there was a 100% chance of success. In May 2008 the U.S. District Court for the District of Columbia (Collyer, J.) denied the motion in a lengthy opinion that devoted some 25 pages to defendants' argument and invoked legislative history as well as principles of statutory interpretation to support the adverse ruling. *United States v. E-Gold,* 550 F. Supp. 2d 82 (D.D.C. 2008). It appears the

[3] Bar Counsel now invokes, as evidence of moral turpitude, unproven allegations from charges in the indictment that were dismissed as to Respondent. We find, for reasons discussed in more detail below, that such unproven allegations are not clear and convincing evidence of moral turpitude. According to precedents of this Court, they are not evidence at all. *See infra* section III.B.

decision was a case of first impression. Respondent testified that it was the first determination that E-GOLD was subject to registration requirements. UFF 22-24.

In July 2008, Respondent pleaded guilty to Count 4, a felony under D.C. law that prohibits operation of a money transmitting business without a license. The specific charge in Count 4 alleged a violation from May 14, 2002 through "at least" March 25, 2003, although the period covered by Respondent's Statement of Offense, accompanying his guilty plea (BX 1), is significantly longer, covering the period from October 2001 through December 2005. The Statement of Offense identifies, as examples ("For instance"), seven transactions between May 14, 2002 and March 24, 2003. BX 1 at 52-53. The crime to which Respondent pleaded guilty does not require proof that defendant knew that a license was required; only that he knew he was operating a money transmitting business. At his sentencing in December 2008, Respondent and his counsel stressed that Respondent is an employee benefits lawyer with no expertise in banking law, and that he and E-GOLD had relied on advice from other attorneys that the E-GOLD business was a new business model that did not fall within the scope of existing law and was not required to be licensed or registered. The court (Judge Collyer, who had presided over the civil forfeiture case and written the lengthy opinion denying defendants' motion to dismiss the indictment) stated that she believed that Respondent did not intend to violate the law, that he and E-GOLD were receiving advice of counsel, and that Respondent and E-GOLD were (prior to being indicted) "meeting with the government and presenting their *modus operandi*, and trying to get advice on that." The court sentenced Respondent to 180 days' incarceration, suspended in favor of 36 months' probation, and imposed a $2,500 fine. UFF 26-30.

F. Disciplinary Proceedings

Respondent reported his criminal conviction to disciplinary authorities in the District of Columbia and Maryland, the two jurisdictions where he is admitted to practice. Both the Maryland Attorney Grievance Commission and Bar Counsel in the District sought an immediate interim suspension based on Respondent's guilty plea to a felony. Respondent opposed interim suspension in both jurisdictions. In December 2008 the D.C. Court of Appeals held under D.C. Bar R. XI, §§ 10 (b) and (c) that Respondent had met the burden of showing good cause why the interim suspension should be stayed. The Court, noting that Respondent was not a banking law expert and had "consulted another attorney . . . who confirmed his belief that the companies did not have to be licensed as money transmission businesses," held that a combination of factors established good cause for staying the interim suspension:

> His prior unblemished record as an attorney; his plea of guilty to what amounts to a strict liability offense involving no *scienter* or moral turpitude; and the fact that his violation arose from conduct outside of his normal legal practice all suggest a very low degree of risk that permitting him to practice in the interim will harm the public. For the same reasons, but subject of course to development of a factual record in the disciplinary process, we think that the likelihood that respondent will receive a significant sanction, *i.e.,* a suspension (if at all) of more than brief duration, is very small. Stated differently, there is a reasonable possibility on this record that interim suspension might exceed the sanction that will eventually be imposed on respondent. Considering, finally, the harm to respondent's livelihood and ability to support his family that interim suspension may entail, we conclude that respondent has met his burden to show good cause for why the court should stay its hand.

In re Downey, 960 A.2d 1135, 1136-37 (D.C. 2008). The Maryland Court of Appeals followed suit in March 2010, relying both on Judge Collyer's comments regarding Respondent's lack of criminal intent and on the D.C. Court's ruling. *Attorney Grievance Comm'n v. Downey,* 990 A.2d 1070, 1078 (Md. 2010). Ultimately the Maryland disciplinary process led to a finding by the Attorney Grievance Commission that Respondent, by pleading guilty to a felony, had violated

Maryland Rule of Professional Conduct Rule 8.4(d), engaging in "conduct that is prejudicial to the administration of justice." The Commission, however, declined to impose any disciplinary sanction other than a warning, which "is not discipline" in Maryland. UFF 31-37.

The matter came before the Hearing Committee and the Board in the procedural posture described above.

III. ANALYSIS AND CONCLUSIONS

The Hearing Committee's unanimous findings of fact, summarized above, are well-reasoned and supported by substantial evidence, most of which is helpfully cited and quoted in the findings themselves. As we will explain further, the majority's findings of fact, including credibility determinations, are also well supported by substantial evidence.

The Board owes no deference to the Hearing Committee's proposed conclusions of law, and we review them *de novo*. *In re Bradley*, 70 A.3d 1189, 1194 (D.C. 2013); *In re Anderson*, 778 A.2d 330, 339 n.5 (D.C. 2001). To the extent that we agree with the Hearing Committee's analysis, we will incorporate their analysis as our own.

A. Respondent Was Convicted of a "Serious Crime."

We agree with the Hearing Committee's unanimous conclusion that Respondent was convicted of a "serious crime" within the meaning of D.C. Bar R. XI, § 10(b), which defines the term "serious crime" to encompass "(1) any felony, and (2) any other crime a necessary element of which . . . involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a 'serious crime.'" The Hearing Committee was not directly charged with answering this question. The Board charged the Hearing Committee with addressing the moral turpitude

question and recommending an appropriate sanction for Respondent's conviction of a "serious crime." Nevertheless, faced with Respondent's repeated arguments that the non-*scienter* offense in question does not satisfy the definition of "serious crime," the Hearing Committee made a proposed conclusion on the issue. We agree and adopt their analysis as our own. The Rule is not ambiguous. Respondent committed a "serious crime" within the definition of § 10(b)(1), regardless of *scienter*.

B. Bar Counsel Failed to Prove Moral Turpitude on the Facts[4]

The Hearing Committee unanimously concluded that Bar Counsel failed to prove moral turpitude on the facts by clear and convincing evidence. We agree. While we must defer to the Hearing Committee's factual findings, including credibility determinations, to the extent that they are supported by substantial evidence, the determination of whether or not Respondent's crime involved moral turpitude on the facts is an issue of ultimate fact, which we determine *de novo*. *In re Bradley*, 70 A.3d at 1194; *In re Anderson*, 778 A.2d at 339 n.5.

The Hearing Committee properly applied the standard that

> A crime involves moral turpitude if (a) "the act denounced by statute offends the generally accepted moral code of mankind;" (b) it involves "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man;" or (c) the act is "contrary to justice, honesty, modesty, or good morals."

In re Rehberger, 891 A.2d 249, 251 (D.C. 2006) (disbarring attorney because misdemeanor sexual battery and simple battery against a client constituted moral turpitude on the facts) (quoting *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (en banc)). The Court noted that although certain crimes "may not be denoted crimes of moral turpitude *per se*, they may constitute crimes of moral

[4] The Board determined in its Order dated October 27, 2009, that Respondent's non-*scienter* crime did not constitute moral turpitude *per se.* We incorporate that analysis as our conclusion here.

turpitude under the circumstances of the transgression." *Id*. (citation omitted). "Under the *Colson* and *McBride* analysis of whether a crime or offense is one of moral turpitude, [the Court] examine[s] whether the prohibited conduct is base, vile or depraved, or whether society manifests a revulsion toward such conduct because it offends generally accepted morals." *In re Sims*, 844 A.2d 353, 362 (D.C. 2004).

The Hearing Committee properly rejected Respondent's argument that the moral turpitude analysis should be limited to a narrow assessment of the circumstances under which the E-GOLD entities failed to become licensed as money transmitting businesses. The Hearing Committee understood that its mandate was to consider "evidence as to the circumstances of the crime including [Respondent's] knowledge and intention[.]" *Colson*, 412 A.2d at 1167. A hearing committee is required to broadly examine the circumstances surrounding the commission of a crime, especially evidence probative of the respondent's intent. *See In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (moral turpitude inquiry should include "a broader examination of circumstances surrounding commission of the [crime] which fairly bear on the question of moral turpitude in its actual commission, such as motive or mental condition"); *In re Spiridon*, 755 A.2d 463, 467 (D.C. 2000) (evidence of motive or mental condition "bear[s] on the question of moral turpitude in its actual commission"); *In re Mason*, 736 A.2d 1019, 1021-22 (D.C. 1999) ("evidence of [the respondent's] other fraudulent and dishonest activities" established moral turpitude on the facts, where the respondent had been charged with intentional fraud but pleaded guilty to a lesser-included offense that did not require proof of fraudulent intent).

Bar Counsel initially did not charge moral turpitude at all and stated at the hearing that even after years of diligent investigation it had failed to unearth clear and convincing evidence of any moral turpitude. Tr. 12-14. That position changed only after Respondent produced the legal

opinions and other materials from Seidl, Drinker Biddle and Fuerst. Thereafter, both before the Hearing Committee, and in its exceptions to the Hearing Committee's Report and Recommendation, Bar Counsel's arguments on the moral turpitude issue have fallen into two broad categories.

First, Bar Counsel argues that Respondent dishonestly made false statements about his reliance on outside counsel to the sentencing court, the D.C. Court of Appeals, the Maryland Court of Appeals, and the Hearing Committee. These statements were made in the period between sentencing in 2008 and the hearing in 2012 – between three and ten years after the criminal conduct of which Respondent was convicted. We agree with the Hearing Committee that allegedly false statements made at sentencing and disciplinary proceedings years after the underlying offense carry little or no weight in making a determination on moral turpitude.[5] Respondent's intent when he committed the non-*scienter* offense is relevant to the question of moral turpitude. His honesty when describing his intent years afterward is not.[6] For purposes of assessing moral turpitude we look primarily at the circumstances surrounding the offense itself. HR at 33.

Bar Counsel's second line of argument before the Hearing Committee and in its exceptions is that "Respondent failed to register the E-GOLD companies as money transmitting businesses,

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[5] Allegations of dishonesty in connection with sentencing and the discipline process are addressed in detail below, in connection with our recommendation on the appropriate sanction. Because we agree with the Hearing Committee majority that Respondent did not make dishonest statements in connection with his sentencing and disciplinary proceedings, even if Respondent's statements in 2008-2012 were relevant to the question of moral turpitude in 2001-2005, we would agree with the Hearing Committee's unanimous conclusion that Bar Counsel failed to prove moral turpitude.

[6] As discussed below in the section discussing the appropriate sanction, we have determined that Bar Counsel failed to prove dishonesty by clear and convincing evidence. *See infra* section III.C. Therefore, even if the allegedly false statements made years after the offense were relevant, we would find that they were substantially truthful and do not prove moral turpitude.

knowing that rampant illegal activities were occurring on the E-GOLD service and that his failure to register would allow those illegal activities to continue unabated, including credit card fraud, investment fraud, and distribution of child pornography." Bar Counsel's Brief in Support of Exceptions ("BCE") at 21 (emphasis omitted). Bar Counsel argues that this case is similar to *In re Lee*, 755 A.2d 1034 (D.C. 2000), in which the Court disbarred a respondent who pleaded guilty to money laundering (an offense that did not constitute moral turpitude *per se*) and admitted that he believed the money to be derived from illegal drug activity. The Court held that the "respondent's knowing and willing involvement in [drug trafficking], albeit only in integral financial aspects, evidences moral turpitude." *Id*. at 1036 (citation omitted). Here, unlike in *Lee*, the record does not contain clear and convincing evidence that Respondent intentionally failed to register E-GOLD under applicable D.C. law, knowing that he was violating the law, as part of a "knowing and willing involvement" in criminal activities such as distribution of child pornography and fraud.

Respondent's credibility is central to this analysis. "[T]he Board must accept the Hearing Committee's evidentiary findings, including credibility findings, *if* they are supported by substantial evidence in the record." *In re Bradley*, 70 A.3d at 1193 (quoting *In re Cleaver-Bascombe*, 982 A.2d 396, 401 (D.C. 2006)) (emphasis in original). For purposes of the moral turpitude analysis, as well as for the subsequent discussion of the appropriate sanction, it is essential to understand the full scope and context of Respondent's defense both to the moral turpitude question (on which the Hearing Committee unanimously found in his favor) and on the aggravation of sanction issue (on which the majority found in Respondent's favor while the dissent found uncharged dishonesty).

Respondent consistently testified that he did not intend to violate the law because at all relevant times he had a good faith belief that E-GOLD did not need to be registered as a money

transmitting business. Respondent testified and presented documentary evidence showing that E-GOLD was a new kind of business; that the regulatory climate was uncertain; that even the government enforcers as late as 2005 and perhaps later were uncertain how, if at all, the relevant statutes applied to E-GOLD; that Respondent and E-GOLD sought and (eventually) obtained legal advice that E-GOLD was not a money transmitting business and did not need to register; and that they relied on that advice until the district court, in a case of first impression, ruled against them. The Hearing Committee unanimously found much of this testimony credible, the majority found all of it credible, and we agree that both the unanimous findings and the majority's findings are amply supported by substantial evidence in the record.

First, Respondent presented substantial and largely uncontradicted evidence that the factual context of the offense was one of uncertainty, with rapidly changing laws and regulations addressing new and unprecedented forms of electronic currency. E-GOLD was a new form of digital currency, as was the idea of backing such a digital currency with gold. UFF 2. The D.C. statute that Respondent was convicted of violating was not effective until mid-2000, years after E-GOLD had commenced operations. The dismissed federal charges against Respondent were based on even newer statutes, such as the Patriot Act, which passed in late 2001. UFF 8. Respondent began seeking advice concerning E-GOLD's obligations under these new laws in 2002, less than a year after the Patriot Act was enacted. The first legal opinion, from the firm of Drinker, Biddle & Reath, was late, inaccurate, unreliable and equivocal. UFF 9-15; MFF 51-52. E-GOLD then retained another lawyer, Fuerst, an acknowledged expert in the field, who unequivocally opined that E-GOLD was not a money transmitting business and was not required to register. UFF 16-17; MFF 58. When Fuerst met with Treasury Department officials in 2005, in an effort to determine whether or not the government believed that E-GOLD was required to register, those officials in

their internal memoranda expressed uncertainty as to whether or not E-GOLD was even subject to the laws and regulations in question. UFF 18. Contemporary government publications, including the Money Laundering Threat Assessments of December 2005 and October 2006, explicitly referred to E-GOLD and expressed uncertainty about the extent to which current regulations reached such businesses. UFF 19; RX 1, 2, 3. Respondent and E-GOLD, represented by Fuerst, opposed the 2006 civil forfeiture proceeding on grounds that E-GOLD was not subject to the relevant federal statutes. UFF 20. Once Respondent and E-GOLD were indicted in 2007, they moved to dismiss the indictment on grounds that the relevant statutes and regulations did not apply to E-GOLD. UFF 23. There is no evidence that the oppositions were filed in bad faith, or that Respondent or his counsel did not believe they had merit. In the criminal case Judge Collyer's lengthy opinion, apparently deciding a case of first impression, rejected Respondent's and E-GOLD's position, but did not suggest that the position was frivolous or taken in bad faith. UFF 23-24. Respondent testified that the 2008 decision was the first one to hold that E-GOLD was subject to registration requirements. UFF 24. We find no evidence to the contrary and adopt the Hearing Committee's unanimous findings that Respondent committed his offense at a time when there was widespread uncertainty about the reach of the law and its applicability, if any, to E-GOLD.

Second, Respondent's efforts to obtain legal advice concerning E-GOLD's legal obligations, and his actions in response to the legal advice received, support the Hearing Committee's unanimous and majority findings. Respondent first sought legal advice about E-GOLD in 1995, before deciding to invest. The advice given was oral advice from his friend David Seidl; and while the advice was generally favorable, it could not have referred to the D.C. statute to which Respondent pleaded guilty, since that statute did not exist until five years later. We agree

with the Hearing Committee majority's finding that Seidl's advice was "arguably beside the point" for this reason. We also agree with the majority's finding that no adverse inference should be drawn from the oral nature or timing of Seidl's advice. UFF 4-5; MFF 46-49.[7]

Respondent's second attempt to obtain relevant legal advice was his request to Drinker Biddle for advice concerning the then recently-enacted Patriot Act. The basic facts surrounding the Drinker Biddle memorandum are spelled out in unanimous findings of fact. UFF 9-15. The original request for advice was made in August or September 2002. UFF 9. However, Drinker Biddle did not produce its advice, in the form of a 24-page memorandum, until March 2003. BX 14C. Respondent testified that the memorandum contained numerous factual inaccuracies, which caused him to view the memorandum as "useless" and "did not view it as advice on anything." UFF 12, 14; MFF 51-52. The Hearing Committee Chair's dissenting opinion implies that he did not credit Respondent's testimony about the factual errors in the Drinker Biddle memorandum, BX 14D at 16-17; but the majority credited Respondent's testimony and found that "[t]here is no clear evidence showing that contrary to Respondent's testimony, the memorandum is factually accurate in all material respects." MFF 52. The majority also made specific findings that Respondent's conduct after receiving the Drinker Biddle memorandum corroborates his testimony that he believed it to be inaccurate. Respondent and other officers of E-GOLD participated in a conference call with Drinker Biddle on April 9, 2003, the day they received the memorandum, in

[7] Respondent first informed the Hearing Committee about Seidl's advice as part of his response to the Hearing Committee Chair's broad request for "any written opinions of outside counsel based on the issue of state license." Tr. 189; Order of March 6, 2012. In Respondent Barry K. Downey's Verified Response to March 6, 2012 Order, filed March 20, 2012, Respondent's counsel made clear that the advice from Fuerst, which was oral advice, was the only advice directly responsive to the Chair's request. Respondent provided information about Seidl's opinion as additional materials "in order to be as responsive as possible to the Committee's Order[.]" *Id*. at 2.

which Dr. Jackson detailed the memorandum's inaccuracies. MFF 54. Respondent's e-mail to Drinker Biddle on June 9, 2003 again complained of "incorrect facts and assumptions with respect to" E-GOLD. MFF 53; BX 14D. Respondent sent follow-up e-mails in August and December 2003, each addressing the factual inaccuracies Respondent believed the memorandum contained. MFF 54. There is, therefore, substantial evidence to support the Hearing Committee majority's findings that Respondent believed the Drinker Biddle memorandum to be unreliable.

The Hearing Committee also made findings about the substance of the advice provided in the Drinker Biddle memorandum. We agree with the majority that, on its face, the memorandum "contains little in the way of concrete recommendations." MFF 55; BX 14C. For example, the memorandum says that E-GOLD "may wish to consider whether GSR needs to be registered with the Treasury Department and various states as a money services business" but never states an opinion whether or not such registration is required. BX 14C at 8. The memorandum does not state that E-GOLD was required to report currency transactions; it suggests only that E-GOLD should "consider" the need to do so. BX 14C at 21. Moreover, the memorandum states: "Even if the E-GOLD entities conclude that the BSA and/or USA Patriot Act do not currently apply to E-GOLD and GSR" (the very question on which that E-GOLD had sought advice from Drinker Biddle) the client might want to consider setting up an anti-money laundering or other reporting program." MFF 55; BX 14C at 8, 21. Thus, even if the Drinker Biddle memorandum were not factually inaccurate, we agree with the majority that "the memorandum merely advises the client that it might wish to 'consider' the very issues it was assigned to analyze." MFF 55. We also agree that the statements in the memorandum do not, "either individually or collectively, amount to an opinion that E-GOLD was subject to registration and licensing requirements." MFF 56. This supports the majority's finding crediting Respondent's testimony that he never "receive[d] a

formal opinion of counsel that either of the companies had an obligation to obtain a license for operating a money-transmitting business." MFF 56; Tr. 226.[8] In sum, there is substantial evidence supporting the majority's finding that the Drinker Biddle memorandum, and the facts surrounding its creation and interpretation, are consistent with Respondent's testimony that he did not intend to violate the law.

Moreover, as the Hearing Committee majority found, Respondent did follow one cardinal suggestion in the Drinker Biddle memorandum. He "contact[ed] the Treasury Department for clarification on whether E-Gold and GSR fal[l] within the definition of a money service business or financial institution under BSA." MFF 57; BX 14C at 4.

Respondent also testified that he gave sworn testimony in an IRS deposition on March 9, 2004, with representatives of the IRS and Treasury Department present, that neither E-Gold nor GSR was registered as a money-transmitting business because Respondent believed such registration was not required. Tr. 281-82; Transcript of the March 9, 2004 Examination of Barry Downey before the Internal Revenue Service in the matter titled In re: Gold & Silver Reserve,

[8] Respondent never testified that he relied on the Drinker Biddle memorandum as advice that he need not register E-GOLD as a money transmitter. As noted *supra* n.6, Respondent informed the Hearing Committee about the Drinker Biddle memorandum as part of his response to the Hearing Committee Chair's broad request for "any written opinions of outside counsel based on the issue of state license." Tr. 189; Order of March 6, 2012. In Respondent Barry K. Downey's Verified Response to March 6, 2012 Order, filed March 20, 2012, Respondent's counsel made clear that the advice from Fuerst, which turns out to have been oral advice, was the only advice directly responsive to the Chair's request. Respondent provided information about the Drinker Biddle opinion as additional materials "in order to be as responsive as possible to the Committee's Order." *Id*. at 2.

No. 58-2220023, at 42-43.[9] This uncontroverted testimony, as Respondent points out in his brief opposing Bar Counsel's exceptions, is further contemporaneous evidence of Respondent's state of mind in early 2004 concerning E-GOLD's obligation to register. Respondent told the government in 2004 that E-GOLD was not registered and averred that he believed at that time that registration was not required. The Hearing Committee did not refer to this testimony in its Report and Recommendation, but the testimony further supports the majority's findings that Respondent did not commit his crime with the criminal intent necessary to support a finding of moral turpitude.[10]

In January 2005, Respondent retained Mitchell Fuerst, an acknowledged expert in the relevant areas of law, to represent E-GOLD. Respondent testified that Fuerst concluded that E-GOLD was not required to become licensed or register as money transmitting businesses. UFF 16-17; MFF 58. Nevertheless, on Fuerst's advice (and consistent with the Drinker Biddle suggestion discussed above), Fuerst promptly contacted and met at least twice with responsible Treasury Department officials. UFF 18; MFF 59; RX 4. The government officials themselves were unsure whether or not E-GOLD was required to register. *Id*. The fact that Respondent, through counsel, approached the government and sought clarification of E-GOLD's obligations under the law is consistent with Respondent's testimony that he did not intend to violate the law.

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[9] The IRS transcript was filed in the record before the Hearing Committee on September 17, 2012, as an attachment to Respondent's Status Report, which was submitted to the Hearing Committee in response to its Order of September 6, 2012. The IRS transcript was prospectively admitted in the record without objection (but not given an exhibit number) in the Hearing Committee's Telephonic Hearing on September 6, 2012, Tr. 31-32.

[10] Respondent did not claim in his testimony before the IRS that he had relied on advice of counsel in determining that E-GOLD did not need to be registered. E-GOLD was not registered, Respondent testified, because the "definition of currency has never been inclusive enough to include E-gold [sic]. We talked to the regulators about [registration], but they have not included that in their definition." IRS Transcript at 42. This is consistent with Respondent's testimony before the Hearing Committee eight years later. *See*, *e.g.*, Tr. 73-80.

While Fuerst did not produce a written legal opinion, he did defend E-GOLD in a civil forfeiture action in early 2006, in which he asserted that E-GOLD did not fall within any part of the definition of "money transmitting business" or "financial institution." UFF 20; MFF 61; BX 14A. Respondent testified that the position in the motion corresponded exactly to the advice given by Fuerst, and there was no evidence to the contrary. MFF 61. While the Hearing Committee majority and the dissent differ about the significance of the fact that Fuerst's motion (and, therefore, arguably, his advice) do not expressly address the D.C. statute that Respondent admitted to violating, this does not affect our assessment of moral turpitude. The Hearing Committee's findings that the 2006 motion filed by Fuerst generally reflected his legal advice at the time support the conclusion that Respondent had a good faith belief that registration was not required, and, therefore, did not intend to violate the law.[11]

The opinion of Judge Collyer, who decided on Respondent's suspended sentence, is also relevant to the issue of Respondent's intent and the moral turpitude question. In disciplinary proceedings, Respondent argues, courts in other jurisdictions have deferred to or at least considered the conclusions and opinions reached by the judges who oversaw the underlying proceedings that gave rise to the disciplinary matter. *See, e.g., Matter of Treinen*, 131 P.3d 1282, 1286 (N.M. 2006) (considering sentencing court's remarks); *In re Ferrouillet*, 764 So.2d 948, 951-52 (La. 2000) (per curiam) (relying heavily on sentencing court's reasons for significantly deviating downward from sentencing guidelines); *The Florida Bar v. Arnold*, 767 So.2d 438, 440

[11] Moreover, even assuming, as the dissent found, that Fuerst never offered any opinion on state law issues, there is substantial evidence to support the Hearing Committee majority's additional finding that the application of the D.C. licensing law to businesses like E-GOLD was "anything but clear" at the time of the Drinker Biddle memorandum in 2003, and arguably for years thereafter. MFF 68.

(Fla. 2000) (per curiam) (a mitigating factor was that the sentencing judge felt sympathetic toward the respondent attorney); *Matter of Elias*, 73 A.D.2d 173, 174 (N.Y. App. Div. 1980) (per curiam) (taking into account remarks made by sentencing judge); *Statewide Grievance Comm. v. Bennett*, 1996 WL 526821, *2 (Conn. Super. 1996) (considering sentencing court's reasons for deviating downward from sentencing guidelines). The reason for this is that the sentencing court has the opportunity to hear the comprehensive presentation of the facts and to analyze the fully-developed record and assess the relative culpability, if any, of the party charged.

Judge Collyer, who had presided over Respondent's criminal case from the beginning, and had written the lengthy opinion, probably a case of first impression, holding that E-GOLD was subject to registration and denying Respondent's motion to dismiss the charges, had a great deal of information about Respondent and E-GOLD when she accepted his guilty plea. She imposed a suspended sentence and probation, specifically stating that "I believe [Respondent] when he says that he didn't intend to violate the law." RX 6 at 192 (Sentencing Transcript at 31). While the dissent and Bar Counsel argue that Judge Collyer was misled by Respondent's statements concerning his reliance on advice of counsel, we do not agree.

Respondent and his counsel made several references to Respondent's reliance on advice of counsel in the allocution phase of Respondent's sentencing. Judge Collyer was necessarily familiar not only with Respondent's proposed plea, but with all aspects of the case, including the charges that were being dismissed. Respondent's counsel argued at one point: "[W]hile the lawyers were ardently advising their belief as experts in their field that licensing was not required, the action that Mr. Downey signed on to was that they would present the issue to the bank security [sic] folks at the Department of Treasury and have the regulators make their own determination . . . ." UFF 28; RX 6 at 181-182. This is a reasonably accurate description of what Respondent and E-GOLD

did in 2005 after receiving the inconclusive Drinker Biddle memorandum and, later, Fuerst's advice.[12] There is no indication that Respondent's counsel misled Judge Collyer about the time period in which E-GOLD sought input from Treasury officials. Indeed, the Hearing Committee unanimously made the following finding, which recognizes that Judge Collyer had a good grasp of the sequence of events:

> Judge Collyer appears to have accepted Respondent's representations, as she stated that "I'm sure [Respondent] was [getting that claimed advice of counsel] because his [criminal defense] counsel told me that many times on the record in court." (*Id.* at 175.) She also stated that she "believe[d] him when he says that he didn't intend to violate the law." (BX 10 at 50.) The court also noted the fact that Respondent and E-GOLD "were meeting with the government and presenting their modus operandi and trying to get advice on that." (*Id.* at 59.)

UFF 29. Another quote from the sentencing transcript shows that Judge Collyer understood that Respondent and E-GOLD had not been overly proactive in their compliance efforts.

> But I have to say that Mr. Downey and E-Gold were in some respects were ***in a slow prodding comfortable way*** trying to figure that out. ***It was late. By the time they were trying to figure it out, they were overrun by the criminal elements of society and the world, but they were trying.*** And so I have to recognize that fact. ***They were meeting with the government and presenting their modus operandi and trying to get advice on that.***

RX 6 at 193 (emphasis added). It seems clear that Judge Collyer understood that Respondent did not seek or receive definitive legal advice from Fuerst or anyone else until fairly "late" in the game,

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[12] It is also consistent with Respondent's testimony before the Hearing Committee:

> Q: Did you ever think about getting an opinion from any other lawyers?
> A: Well, that's why we eventually got to Mitchell Fuerst.
> Q: But in the interim.
> A: There was still consideration of resolving that issue. But at that point, because we were before the Treasury, one of the things mentioned in this [Drinker Biddle] memo was you may want to approach Treasury and provide details to them and see what Treasury says. We thought that's what we were doing.

Tr. at 325; *see also* Tr. at 281-83, 329, 334.

and did not begin to try to "figure . . . out" E-GOLD's registration obligations until after they had been "overrun by . . . criminal elements[,]" a development first discussed in the 2007 Congressional staff report. *Id.*; RX 3. Nevertheless, recognizing that Respondent and E-GOLD "were trying" and were cooperating with the government, she credited Respondent's averment that he did not intend to violate the law. We believe Judge Collyer's assessment of Respondent's lack of criminal intent, while not dispositive, deserves deference by the Hearing Committee and the Board, and is relevant to the Court.

Bar Counsel's Exceptions also argue that Respondent has admitted, in pleading guilty to Count IV of the Superseding Indictment (BX 6), to detailed knowledge that, among other things, E-GOLD had at some point become a tool of criminals including sellers of child pornography, operators of Ponzi schemes and fraudulent high-yield investment programs, and any number of other illegal activities. *See* BCE at 4-5. Bar Counsel invited the Hearing Committee, and now invites us, to infer that Respondent, like the respondent in *Lee*, knowingly violated the D.C. statute prohibiting the operation of an unlicensed money transmitting business as part of a "knowing and willing involvement" in enabling the underlying crimes of fraud, distribution of child pornography and so on. We agree with the Hearing Committee's unanimous conclusion that this is not clear and convincing evidence of moral turpitude, for the following reasons.

First, Bar Counsel relies almost exclusively on the unproven, and subsequently dismissed, allegations in the Superseding Indictment. "[T]he law is clear that an indictment is not evidence. It is impermissible for the trier of fact to consider it as evidence of any kind or to draw an inference of guilt from it." *Scott v. United States*, 412 A.2d 364, 371 (D.C. 1980). *See also Johnson v. United States*, 671 A.2d 428, 438 (D.C. 1995) (judge instructed jury that indictment was not evidence); *United States v. Louchart*, 680 F.3d 635, 637-640 (6th Cir. 2012) ("Admission of facts from a

guilty plea is limited to elements of the crime charged or those explicitly admitted to by the defendant"; opinion citing authorities from various jurisdictions to that effect). If Bar Counsel wished to prove that Respondent was tainted by crimes like those alleged in the indictment, Bar Counsel was required to present clear and convincing evidence to support such charges. But Bar Counsel admitted at the hearing that, after years of "extensive efforts to investigate this case . . . over a period of years," Tr. 12:6-7, "[w]e don't have clear and convincing evidence that would be sufficient for us to charge Respondent with moral turpitude." Tr. 13:12-13.[13]

Second, even were we to accord evidentiary value to the unproven allegations in the Superseding Indictment, they prove little more than what Respondent has already admitted. He and the other principals of E-GOLD were aware that criminals were exploiting the E-GOLD payment system. There is also substantial evidence that Respondent and E-GOLD were attempting to prevent the criminal activity. By 2007, a Congressional committee report acknowledged that E-GOLD had adopted policies and procedures to prohibit users from purchasing child pornography, but criticized the company's record-keeping requirements. UFF 21. Respondent testified, without substantial contradiction, that E-GOLD tried to block criminal abuse of its systems, and also explained why Respondent believed that the Congressional report improperly criticized the adequacy of E-GOLD's record keeping. *Id.*; *see*, *e.g.*, Tr. 66-69; 127-28; 134-139. The Justice Department's "*Brady* letter" in the criminal proceeding informing Respondent of potentially exculpatory evidence, details a number of statements by E-GOLD employees, law enforcement officials and others describing steps taken by E-GOLD to prevent or expose criminal

[13] Bar Counsel obtained the Superseding Indictment in 2008. Even with that roadmap for its investigation, Bar Counsel could not develop clear and convincing evidence of moral turpitude by the hearing in 2012.

abuses. RX 4. The Sentencing Memorandum of GSR, placed in evidence by Respondent, devotes a dozen pages to the efforts by E-GOLD to prevent criminal abuse and to cooperate with law enforcement. RX 12 at 13-24. Thus, proof that Respondent knew at some point that criminals were exploiting the E-GOLD system (and that Respondent unsuccessfully attempted to block them) does not transform the non-*scienter* offense into a crime of moral turpitude. Certainly, this record contains no clear or convincing evidence that Respondent or E-GOLD was willfully complicit with child pornographers or other criminals; nor was Respondent or E-GOLD ever charged with such complicity.

If Respondent believed in good faith that registration was not required, his mere knowledge that criminals were exploiting the E-GOLD system did not, by itself, taint the failure to register with moral turpitude. The Hearing Committee unanimously determined that there is not clear and convincing evidence that Respondent intended to operate E-GOLD in violation of the law for the benefit of pornographers and other criminals.[14] HR at 30-33 and n. 7.

For all of the foregoing reasons, we find that the Hearing Committee's unanimous and majority findings concerning Respondent's lack of criminal intent are supported by substantial

[14] The Hearing Committee majority credited Respondent's testimony that he did not intend to violate the law. The dissenting Chair found that Respondent had not relied on advice of counsel, but agreed that Respondent at worst acted negligently or carelessly. HR at 33 and n.7. Even if Respondent acted negligently or carelessly, his violation of the registration statute would not sink to the level of moral turpitude. *See*, *e.g.*, *In re Perrin*, 663 A.2d 517, 519-520 (D.C. 1995) (no moral turpitude where respondent participated in a scheme to obtain money by making misrepresentations and omitting material facts, but where respondent did not intend to defraud anyone and did not know that a fraud was occurring); *In re Wilkins,* 649 A.2d 557, 560 (D.C. 1994) (per curiam) (appended Board Report) (recklessness does not "stand in for the specific intent required to find moral turpitude[.]"); *cf. In re Mason,* 736 A.2d 1019, 1022 (D.C. 1999) (moral turpitude found based on "overwhelming" evidence of fraudulent and dishonest activity). Thus the Hearing Committee's conclusion on the moral turpitude issue was unanimous, although the findings and reasoning of the dissent were somewhat different.

evidence. We owe no deference to the Hearing Committee on the ultimate issue of whether these facts establish moral turpitude, but we agree with the unanimous conclusion of the Hearing Committee that Bar Counsel failed to show moral turpitude by clear and convincing evidence.

C. Uncharged Dishonesty; Recommended Sanction

The Hearing Committee majority recommends that Respondent receive an informal admonition. The dissenting Hearing Committee Chair recommends a three-year suspension. Bar Counsel recommends disbarment. The widely divergent recommendations result from widely differing views on whether Respondent lied about his reliance on legal advice in connection with the offense to which he pleaded guilty.

The issue we must decide is "the nature of the final discipline to be imposed for respondent's conviction of a serious crime." *See* D.C. Bar R. XI, § 10(d). The sanction we recommend must also comply with D.C. Bar R. XI, § 9(h)(1), which provides for the imposition of a sanction that does not "foster a tendency toward inconsistent dispositions for comparable conduct or [is] otherwise unwarranted." *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007*); In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013), the Court of Appeals reiterated that the

> determination of sanctions depends upon a number of factors, such as (1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's disciplinary history, (6) whether the attorney has acknowledged his or her wrongful conduct, and (7) mitigating [or aggravating] circumstances.

As to the first factor, Respondent pleaded guilty to a felony, by definition a "serious crime." The Hearing Committee majority noted that the particular crime is a strict liability offense requiring no proof of criminal intent. Moreover, the majority found that Respondent had no intent to violate the law and repeatedly sought legal advice in an effort to comply with the law. HR at 34.

The dissenting Hearing Committee Chair, who joined the majority in concluding that there was no moral turpitude on the facts, gave more weight to the seriousness of the crime for reasons stated in Judge Collyer's sentencing allocution:

> [T]he failure to register is what leads to the ability of criminals to make use of the E-Gold system for nefarious purposes and abuse the system. . . . Because once you register you have to report things and therefore it's not as anonymous or private. . . . So on the one hand it's just a regulatory compliance issue. On the other hand it's a very serious problem not to have registered.

D at 21, quoting RX 6 at 191-92. The second factor, prejudice to the client, does not come into play, as Respondent's crime did not involve the breach of a duty to any client. Respondent's offense "arose from conduct outside of his normal legal practice." *Downey*, 960 A.2d at 1137. Respondent was not charged with dishonesty, or with violating any other Rules. His disciplinary record was unblemished[15] and he has acknowledged, through his guilty plea and in post-sentencing proceedings, his responsibility for the offense.[16]

The striking difference in the sanction recommendations of the majority, on the one hand, and Bar Counsel and the dissent, on the other hand, centers on factors in aggravation of Respondent's misconduct. Respondent made representations to Judge Collyer in connection with his sentencing, to this Court in connection with his successful request to stay an interim suspension,

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[15] The Maryland Attorney Grievance Commission determined that Respondent, by pleading guilty to a felony, had violated Maryland Rule of Professional Conduct Rule 8.4(d), engaging in "conduct that is prejudicial to the administration of justice." The Commission, however, declined to impose any disciplinary sanction other than a warning, which "is not discipline" in Maryland. UFF 33.

[16] The dissent takes a harsher view of Respondent's attitude toward his crime. D at 22-23. This is because the dissent did not credit Respondent's testimony about advice of counsel. If Respondent misrepresented his reliance on advice of counsel, Respondent would thereby have sought to evade responsibility for his actions by claiming to have relied on nonexistent legal advice. As we affirm the majority's credibility findings and find that Respondent did not misrepresent his reliance on legal advice, we disagree with the dissent's critique of Respondent's attitude towards his crime.

to the Maryland Court of Appeals and the Maryland disciplinary authorities in connection with Maryland discipline proceedings, and to the Hearing Committee in this case. In each of those proceedings, Respondent sought leniency based in part on the claim that he had acted in good faith with respect to E-GOLD's licensing compliance. Respondent's good faith defense was based on all of the circumstances discussed in the preceding section addressing moral turpitude, including, but not limited to, the fact that he had sought and relied on the advice of counsel that E-GOLD was not a money transmitter required to register. Bar Counsel and the dissent concluded that Respondent's statements about advice of counsel were lies. The Hearing Committee majority credited them as true. We have determined, after a careful review, that the majority's findings of fact, including credibility findings, are supported by substantial evidence. The dissent and Bar Counsel's contrary arguments are not. The determination of whether Respondent committed uncharged dishonesty that should aggravate the appropriate sanction is one of ultimate fact, which we consider *de novo.* *See In re Bradley*, 70 A.3d at 1194. We conclude, for reasons detailed below, that Bar Counsel failed to prove by clear and convincing evidence that Respondent committed uncharged dishonesty.

Uncharged dishonesty may be considered in aggravation of sanction. *See*, *e.g.*, *In re Martin*, 67 A.3d at 1050 n.21 (considering uncharged dishonesty in aggravation of sanction); *In re Chapman*, 962 A.2d 922, 925 (D.C. 2009) (per curiam); *In re Lewis*, 689 A.2d 561, 566 (D.C. 1997) (per curiam) (appended Board Report) (same). *Accord*, *In re Yelverton*, 105 A.2d 413, 423 (D.C. 2014). False testimony to the Hearing Committee is a "significant aggravating factor" in determining an appropriate sanction. *In re Cleaver-Bascombe*, 892 A.2d 396, 413 (D.C. 2006); *see also In re Silva*, 27 A.3d 924, 926 (D.C. 2011) (appended Board Report) (adopting Board's recommended sanction of three-year suspension with fitness requirement where Board "view[ed]

respondent's dishonesty and misrepresentations during the disciplinary proceedings as a significant aggravating factor in making its sanction recommendation"); *In re Ukwu*, 926 A.2d 1106, 1118-20 (D.C. 2007). Uncharged misconduct considered in aggravation must be proven by clear and convincing evidence. *In re Cater*, 887 A.2d 1, 25 (D.C. 2005) ("our law requires Bar Counsel to prove the facts that justify the enhancement [of a sanction] with evidence that is clear and convincing."); *In re Boykins*, 999 A.2d 166, 175 (D.C. 2010) (same).

"[T]he Board must accept the Hearing Committee's evidentiary findings, including credibility findings, *if* they are supported by substantial evidence in the record." *In re Bradley*, 70 A.3d at 1193 (emphasis in original) (citation omitted). Although "considerable deference" is accorded the credibility determinations of the Hearing Committee, which had the opportunity to observe the witnesses and assess their demeanor, the Board owes no deference to a credibility determination if that finding has no factual support or is contradicted by the factual record. *Id.*; *see also In re Anderson*, 778 A.2d 330, 341-42 (D.C. 2001). Thus, the Board must determine whether the objective facts in the record support or contradict the majority's findings.

In *Bradley*, the hearing committee found that the respondent "seemed honest" while testifying, and that she simply misremembered certain facts. 70 A.3d at 1193. The Board and the Court gave this finding no deference and instead concluded that the respondent had given intentionally false testimony because the objective facts in the record contradicted her testimony, and "there was no evidence in the record to support a finding that respondent was merely confused and that her detailed testimony was inadvertent and not intentional." *Id.* at 1194; *see also In re Brown*, 112 A.3d 913, 917-18 (D.C. 2015) (per curiam) (a hearing committee must explain the reason for its credibility determination).

This case is not like *Bradley*. The majority carefully assessed Respondent's credibility in light of extensive and substantial evidence, as detailed in their Report and Recommendation and summarized here. However, the dissent's credibility determination also has a basis in the evidence. This presents a somewhat unusual situation, in some ways similar to that in *In re Symkowicz,* 124 A.3d 1078 (D.C. 2015), where the record contained substantial evidence on both sides of the question whether a client had the legal capacity to authorize actions taken by her counsel. The capacity issue was dispositive of a charge of dishonesty against the respondents in that case. While the determination of the client's legal capacity was an issue of law or of ultimate fact, on which the Court owed no deference to the Board or Hearing Committee, the Court in *Symkowicz* held:

> the resolution of that question in the present case turns on the weight to be given to the underlying factual evidence presented by Bar Counsel and the contrary factual evidence presented by respondents. On that indisputably factual issue, we see no basis upon which we could appropriately disregard the conclusions of the Hearing Committee and the Board. *Cf., e.g., In re Nace*, 98 A.3d 967, 974 (D.C. 2014) ("Where there is substantial evidence to support the agency's findings[,] the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the agency.") (brackets and internal quotation marks omitted).

Id. at 1084.

Here the question whether Respondent committed uncharged dishonesty that justifies an aggravation of sanction turns in large part, though not entirely, on Respondent's credibility in testifying about, for example, the oral advice given by Fuerst. We have determined that the Hearing Committee majority's findings on this subject are supported by substantial evidence. Even though the dissent's contrary findings are also supported by some evidence, this would not justify us in substituting our judgment for that of the majority.

The issue of whether Bar Counsel proved by clear and convincing evidence that Respondent committed uncharged dishonesty that merits an aggravation of his sanction is a question of law or of ultimate fact, on which we owe no deference. As the Court held in *Bradley*:

> Moreover, the Board and this court owe no deference to the Hearing Committee's determination of "ultimate facts," which are really conclusions of law and thus are reviewed *de novo. See In re Anderson*, 778 A.2d 330, 339 n. 5 (D.C. 2001). "Ultimate facts" are those that have a clear "legal consequence." *See In re Micheel,* 610 A.2d 231, 235 (D.C.1992). Whether respondent gave sanctionable false testimony before the Hearing Committee is a question of ultimate legal fact that the Board and this court review *de novo*.

70 A.3d at 1193.

Here, as in *Symkowicz*, the ultimate question of Respondent's honesty or dishonesty depends heavily on subsidiary fact findings by the Hearing Committee, including credibility determinations about Respondent's testimony. We believe the majority's findings, including its credibility findings, are supported by substantial evidence. After carefully reviewing the evidence, including the evidence cited by the dissent and Bar Counsel as well as by the majority, we conclude that Bar Counsel failed to prove the aggravating factor of uncharged dishonesty by clear and convincing evidence.

The dissent and Bar Counsel assert that Respondent misrepresented his reliance on legal advice in failing to register E-GOLD as a money transmitting business. The dissent, D at 6-10, details each of the statements by Respondent whose veracity is challenged, and summarizes the essential statements: Respondent "explicitly maintained that he had (1) consulted lawyers who (2) were experts in the field and who (3) specifically told him that E-GOLD need not be registered or licensed." D at 7. Both the dissent and Bar Counsel, in its exceptions, argue that the second and third statements were misrepresentations. We will address the general issues first and then discuss the specific statements that the dissent and Bar Counsel claim were false.

As discussed above, the record contains evidence concerning legal advice that Respondent received from three sources: Seidl, Drinker Biddle, and Fuerst. Respondent never claimed to rely on the oral pre-Patriot Act advice of Seidl (who was unquestionably not an "expert in the field" of money transmitter law, *e.g.* UFF 4-5) or the factually questionable and highly equivocal memorandum from Drinker Biddle, to support his claim that he relied on expert advice stating that E-GOLD was exempt from registration requirements. The truth or falsity of the statements about advice of counsel therefore depends on the advice Respondent received from Fuerst, who, it appears, never provided a formal written opinion.

Respondent testified that Fuerst's legal opinion was that E-GOLD was not a money transmitter and, accordingly, was not required to register under federal or state law. MFF 61; Tr. 283, 304-05. Fuerst provided no written opinion, but his views are reflected in a January 2006 motion for judgment on the pleadings in a civil forfeiture action. *Id.*; BX 14A. The motion asserted that GSR did not fall within any part of the definition of "money transmitting business" in 31 U.S.C. § 5330, or the definition of "financial institution" in 31 U.S.C. § 5312; and therefore GSR was not an unlicensed money transmitting business under 18 U.S.C. § 1960. *Id.* Respondent testified that the statements in the motion were "identical" to the advice Fuerst gave. MFF 61, 65; Tr. 284. Respondent also testified that Fuerst was retained to address both federal and state law requirements, although Respondent was unsure whether Fuerst had been asked to research individual state issues, or whether he did so. MFF 65; Tr. 72, 150, 304-05, 333. As stated in connection with the moral turpitude issue above, the Hearing Committee's unanimous and majority findings about the substance and timing of Fuerst's advice, which include determinations that Respondent testified credibly about the advice received from Fuerst, are supported by substantial evidence and deserve our deference.

Bar Counsel and the dissent level two main attacks on Respondent's testimony about Fuerst's advice. First, they point out, Respondent pleaded guilty to a state law crime, and Fuerst's advice – at least as reflected in Fuerst's 2006 motion for judgment on the pleadings – dealt exclusively with federal law. BX 14A. If Fuerst never rendered an opinion on E-GOLD's need to comply with D.C. registration requirements, the dissent and Bar Counsel argue, then all of Respondent's statements that he relied on advice of counsel in failing to register with D.C. must be lies. D at 19; BCE at 18, 21, 23-24. The Hearing Committee majority, considering Respondent's somewhat uncertain recollection of whether or not Fuerst had opined on state law, evaluated the credibility of Respondent's testimony from a less rigid perspective:

> We cannot agree [that Respondent lied to the Hearing Committee and the sentencing court]. It does not strike us as sensible to draw such a hard and fast line between the question of whether E-GOLD was a money transmitter under federal law and whether it was under D.C. law. Even if Fuerst had not addressed state requirements specifically, it does not seem to us unreasonable for Respondent to have assumed that if E-GOLD were not a money transmitter under federal law it would not have been so under state law.
>
> ***
>
> Concededly, there is an arguable discrepancy between [Respondent's] claims of having relied on counsel in concluding that a D.C. license was not required and his admission that he did not know whether Fuerst had been asked specifically about that issue. Viewing the record as a whole, however, even if Fuerst did not render advice on state law issues, it is plausible that Respondent conflated the issues of federal and state requirements.

MFF 67, 69.[17] Just so. It is far from obvious to a non-expert that the registration requirements of the D.C. statute differ in any material way from the comparable federal statutes. There is no clear evidence in this record that there is any material difference. More to the point, there is no evidence

[17] It would be ironic if Respondent's disciplinary sanction were aggravated because the prosecution allowed him to plead guilty to the less serious state law offense instead of the more serious federal offense about which Fuerst unquestionably provided favorable advice.

that Respondent understood at any relevant time that there was such a difference. When Respondent sought and relied on legal advice from Fuerst (which may or may not have addressed state law issues; Respondent does not specifically recall), it was 2005. Respondent in 2005 was not expecting to be indicted on federal and state charges two years in the future, much less anticipating the details of a 2008 guilty plea limited to one state law count. He was trying to determine whether E-GOLD needed to register as a money services business in 2005. His expert advisor told him it did not. He relied on that advice in good faith. Respondent was telling the truth about his reliance on expert legal advice, even if he as a non-expert failed to grasp the differences, if any, between the registration requirements of D.C. law and its federal counterparts.[18] The Hearing Committee majority credited Respondent's testimony and specifically found that there was not clear and convincing evidence that Respondent dishonestly misrepresented his reliance on expert advice from Fuerst at his later sentencing and disciplinary proceedings. MFF 70. We agree.

The Hearing Committee majority's findings about the nature of Fuerst's advice and Respondent's reliance on that advice incorporate well-explained credibility findings and are supported by substantial evidence. Some aspects of the majority's findings go beyond credibility and address the ultimate fact of whether Respondent made dishonest statements about advice of counsel to the Hearing Committee and elsewhere. On that ultimate issue we determine *de novo* that Bar Counsel failed to prove by clear and convincing evidence that Respondent made any dishonest statements to the Hearing Committee about Fuerst's advice, particularly as Respondent acknowledged uncertainty about whether or not Fuerst had specifically opined on the narrow state

[18] *See*, *e.g.*, MFF 68, which summarizes a portion of the Drinker Biddle memorandum, describing the complexity involved in determining whether registration would be required under newly-promulgated model state laws.

law issue as opposed to the big picture regulatory compliance issues. It was not dishonest for Respondent, a non-expert, to make general statements to the effect that he relied on advice of counsel as part of the support for his good faith belief that E-GOLD did not need to be registered. There is substantial evidence that Fuerst did give such advice and that Respondent relied on it. We will address this issue in further detail below, in connection with the specific statements that the dissent and Bar Counsel claim were dishonest.

The second line of attack by Bar Counsel and the dissent is that Respondent misrepresented the time period during which he relied on Fuerst's advice. Respondent's guilty plea referred to seven instances of money transmission occurring between May 14, 2002 and March 24, 2003. Since Fuerst provided no legal advice to E-GOLD until 2005, the dissent and Bar Counsel reason, Respondent could not have been relying on Fuerst's favorable legal opinion at the time he committed the offense. Therefore, Bar Counsel and the dissent conclude, whenever Respondent argued reliance on advice of counsel at his sentencing or in his bar disciplinary proceedings, he must have been lying because the advice did not exist at the time of the seven specific criminal acts particularized in the guilty plea.

The positions of the dissent and Bar Counsel do not withstand close scrutiny. As the Hearing Committee unanimously found, the Statement of Offense, to which Respondent agreed as part of the plea proceedings, set the timetable of Respondent's offense thus: "Between October 2001 and December 2005, DOWNEY, as an owner and director of the E-GOLD operation, offered a payment processing service to the public in the form of 'e-gold.' The E-GOLD operation was engaged in the business of money transmission under District of Columbia law . . . ." UFF 25; BX 1 at 52. The Statement of Offense also listed seven specific transactions between May 14, 2002 and March 24, 2003; but made it clear that these were merely examples: "***For instance,*** on or about

the dates listed below, the defendant transferred and caused to be transferred the sums indicated to and from banks located in the District of Columbia." BX 1 at 52 (emphasis added). Count Four of the indictment to which Respondent pleaded guilty also sets an open-ended time span for the alleged crime, albeit one slightly different than the Statement of Offense:

> Beginning on or about May 14, 2002, ***through at least*** March 25, 2003, in the District of Columbia, the defendants **DOUGLAS JACKSON, BARRY DOWNEY,** and **REID JACKSON** did, without obtaining a license issued by the Superintendent of the Office of Banking and Financial Institutions of the District of Columbia, engage in the business of money transmission, as that term is defined in D.C. ST. § 26-1001(10) . . .

BX 6 at 118 (emphasis added). The Statement of Offense concluded:

> The defendant operated the E-GOLD operation's money transmitting business without a license in the District of Columbia or any other state. ***Throughout its operation,*** the defendant was aware of the E-GOLD operation's activities and that the business was not licensed as a money transmitting business with the District of Columbia.

BX 1 at 54 (emphasis added). In sum, both the Statement of Offense, which was specifically crafted to reflect Respondent's guilty plea, and the Superseding Indictment, which framed the charges that led to his guilty plea, indicate that Respondent's misconduct continued after the seventh exemplar transaction on March 24, 2003, and at least through December 2005 as specified in the Statement of Offense. The dissent stated: "During the period of his admitted illegal conduct, Respondent did not receive, and thus could not have relied upon, the advice of *any* counsel." D at 7 (emphasis in original). This statement would be correct if (and only if) the "period of [Respondent's] illegal conduct" expired before Fuerst gave his advice in 2005. But Respondent's admitted misconduct, as spelled out in the Statement of Offense, extended at least until December 2005, by which time Respondent had unquestionably sought, received and relied on Fuerst's opinion. The dissent is simply wrong on this point, and so is Bar Counsel.

This does not determine the ultimate issue of Respondent's honesty or dishonesty, however. The evidence shows that Respondent did not receive Fuerst's advice until 2005. If Respondent made statements stating or implying that he received and relied on favorable legal advice at some time prior to 2005, those statements would be false and potentially dishonest. The dissent, echoed in this regard by Bar Counsel, maintained that Respondent's uncharged dishonesty included false statements about reliance on legal advice made to the sentencing court, to this Court, to the Maryland Court of Appeals, and to the Hearing Committee and even the Board. These are serious accusations, and we will therefore address them here in some detail.

The dissent and Bar Counsel's Exceptions identify and quote three statements made to Judge Collyer by Respondent and his counsel that the dissent claims to be false. D at 6-7, BCE at 7-8, referencing RX 6 at 167, 181, 187-188. The dissent points out, for example, that "Judge Collyer was told that experienced lawyers were 'ardently advising [Respondent of] their belief as experts in their field [that] licensing was not required.'" RX 6 at 181 (emphasis added). The dissent also quotes Respondent's allocution: ("I believed we had found the expert that advised us on these issues . . . . I've looked to experts just like when others have looked to me on employee benefits issue [sic].") RX 6 at 188. Given the substantial evidence supporting the majority's findings that Respondent in fact received such advice from Fuerst, the statements criticized by the dissent and Bar Counsel are not inherently false. The statements do not make reference to any specific time period. Of course, it is possible for a statement to be made under circumstances that lead the listener to draw a false conclusion about the time period in question. *See*, *e.g.*, *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (even "technically true" answers can be dishonest if they evince a lack of integrity and straightforwardness). But there is nothing about the sentencing transcript that suggests the discussion was limited to any narrow time frame. For reasons already stated, we do

not believe Respondent sought to mislead, much less succeeded in misleading, Judge Collyer, whose pointed remarks at the sentencing made clear that she knew Respondent and E-GOLD had not been very proactive in seeking legal advice. Judge Collyer expressly based her holding that Respondent acted in good faith on several different circumstances, not just reliance on the advice of outside counsel.

In sum, the statements made to Judge Collyer by Respondent and his counsel, as quoted by the dissent (D at 6) and Bar Counsel (BCE at 7-8) are reasonably accurate descriptions of the advice sought and received from Fuerst. None of these statements misrepresented the time at which Fuerst's advice was sought or given. None of them misrepresented the substance of Fuerst's advice, as found by the Hearing Committee majority in findings supported by substantial evidence. Viewing this as an issue of ultimate fact, we conclude that there is no clear and convincing evidence to support a finding that Respondent made any dishonest statement to Judge Collyer.

The dissent and Bar Counsel also contend that Respondent and his counsel made misrepresentations to the Court in connection with seeking a stay of the immediate, interim suspension that would otherwise have been imposed for his conviction of a serious crime, under D.C. Bar Rule XI, § 10(c). D at 9; BCE at 9. After his sentencing, Respondent promptly reported the conviction to Bar Counsel, and on or about September 22, 2008, filed a Motion Requesting that the Court Not Enter, or that it Immediately Set Aside, Any Order of Suspension, together with a supporting memorandum ("Stay Memorandum"). The Dissent and Bar Counsel refer to two sentence fragments from the 19-page Stay Memorandum, which again recite in general terms that Respondent "sought the advice of outside counsel with particular expertise in these matters," and had "sought expert legal advice with respect to the companies' compliance issues," D at 9,

referencing Stay Memorandum at 9 n. 3. *See* BCE at 9. On their face, there is nothing false about these snippets, which accurately describe the advice from Fuerst.

Context matters, however, and we have examined the entire 19-page Stay Memorandum to determine whether in context there was anything that might have misled the Court about the nature or timing of the legal advice described by Respondent's counsel. Not only is there nothing false about the two brief statements about legal advice; we find that the full context in which Respondent described his good faith negates the dishonesty arguments of the dissent and Bar Counsel. In his Stay Memorandum, Respondent argued, among other things, that his personal and professional character were exemplary, that the law covering money transmitter businesses was unsettled and changing, that the E-GOLD business itself was a legitimate alternative to traditional currency (but, as acknowledged in the guilty plea, was required to register as a money transmitter), that Respondent himself was merely an officer and shareholder of E-GOLD, not deeply involved in its day-to-day operations, and that he had a good faith belief that E-GOLD was not required to register as a money transmitter business. Stay Memorandum at 2-12. In support of the good faith argument, Respondent first explained that the belief "regularly appeared to . . . be corroborated by many different government agencies and representatives," listing and attaching four examples including a 2005 U.S. Money Laundering Threat Assessment (subsequently entered in the record here as RX 1), the 2006 version of that Assessment (subsequently entered into the record here as RX 2) and a 2007 Congressional staff report (subsequently entered into the record here as RX 3). *Id.* at 10-12. Respondent added:

> On the foregoing landscape, there was a substantial, good-faith question whether the businesses which Mr. Downey served as an officer or director required a license. Furthermore, as the Statement of Offense notes, "on e-gold [sic] compliance issues, [Mr. Downey] sought the advice of outside counsel with particular expertise in those matters."

Stay Memorandum at 12. Thus, in addressing this Court, Respondent primarily based his good faith defense on the "landscape" of regulatory uncertainty in 2005-2007 when even the responsible regulatory bodies and Congress did not know whether or how the law applied to companies like E-GOLD. Almost as an afterthought ("Furthermore"), he pointed out, he himself was no expert and had sought and relied on expert advice from outside counsel. The main thrust of Respondent's arguments to this Court was that the legal landscape was unsettled and that Respondent and E-GOLD acted in good faith in that uncertain climate. Taken in this context, the two remarks referring generally to advice of counsel are accurate descriptions of the advice sought and received from Fuerst. There is nothing in the entire Stay Memorandum that would explicitly or implicitly limit the time period during which Respondent sought and obtained legal advice. Most of the "good faith" evidence consists of government documents published between 2005 and 2007, so, if anything, the legal advice in question could be correctly inferred to coincide with those publications.

The Court, in finding that Respondent had shown good cause to stay the interim suspension, recited the substance of the Statement of Offense, including the statement that "[b]ecause his expertise is in employee benefits, he consulted another attorney in this regard, who confirmed his belief that the companies did not have to be licensed as money transmission businesses" and then summarized the reasons why good cause was shown, thus:

> His prior unblemished record as an attorney; his plea of guilty to what amounts to a strict liability offense involving no *scienter* or moral turpitude; and the fact that his violation arose from conduct outside of his normal legal practice all suggest a very low degree of risk that permitting him to practice in the interim will harm the public.

In re Downey, 960 A.2d at 1136-1137. It seems clear that the Court considered all of Respondent's arguments and granted relief for a variety of reasons, among which "advice of counsel" was only

one. Bar Counsel has therefore failed to prove by clear and convincing evidence that Respondent made any dishonest statements to the Court.[19]

The same analysis applies to Respondent's representations to the Maryland Court of Appeals and Maryland disciplinary authorities. While we do not have the full record from Maryland, the opinion of the Maryland court and peer review panel, which closely paraphrase the language of the Statement of Offense, Judge Collyer's sentencing colloquy, and the opinion of the Court staying the interim suspension, suggests that Respondent did no more than repeat the truthful general statement that he, as a non-specialist in an uncertain regulatory landscape, had sought, received and relied on expert advice that E-GOLD was not a money transmitter required to register. D at 8, BCE at 9-10. Bar Counsel therefore has failed to prove by clear and convincing evidence that Respondent made any dishonest statements to the Maryland Court of Appeals or Maryland disciplinary authorities.

We next address Respondent's representations to the Hearing Committee. The dissent and Bar Counsel claim there were deceptive statements in Respondent's Answer to the Specification of Charges. D at 9, BCE at 10-11. Respondent's Answer to the Specification of Charges, and the accompanying Statement of Relevant Facts, filed on or about January 4, 2012 ("Answer"), copied many of the arguments in the Stay Memorandum submitted to the Court in 2008. The Answer also (truthfully) referred to the favorable ruling by the Court and the Maryland Court and disciplinary authorities. The Answer briefly quoted and paraphrased the language in the Statement of Offense concerning advice of counsel, and then devoted over a dozen pages to documenting the climate of

[19] Although the dissent did not mention it, Respondent again cited and quoted the Statement of Offense to the Court in his Reply Memorandum, filed on or about October 9, 2008, at 2-3. The representations and the context were the same. There was nothing dishonest in that filing either.

regulatory uncertainty that existed up to about 2007, and other mitigating factors. Answer at 3-20. Again the primary references to support Respondent's good faith argument were the government documents later entered as RX 1-3. Placed in context, the statement about reliance on advice of counsel was a reasonably accurate description of the advice given by Fuerst. As with the Stay Memorandum submitted to the Court, the Answer did not specify any particular date or time when the legal advice was given. If anything, the context suggests that the legal advice Respondent relied on was contemporaneous with the various government documents expressing regulatory uncertainty between 2005 and 2007. We conclude that Bar Counsel has failed to present clear and convincing evidence that Respondent made any dishonest pre-hearing statements to the Hearing Committee.

Finally, Bar Counsel and the dissent claim that Respondent testified falsely before the Hearing Committee at the hearing. D at 9-10, BCE at 11. The dissent specifies three alleged false statements. First, Respondent's counsel, in his short opening statement, explained that "[t]he peer-review panel in Maryland reviewed and recommended dismissal because Mr. Downey did, it concluded, precisely what any lawyer should do, relied upon someone with more expertise in the particular field to make the determination." Tr. 33:10-14.[20] To begin with, this is not sworn testimony by Respondent but advocacy by his counsel. Nevertheless, Respondent never corrected counsel's statement, so its truthfulness remains relevant to our assessment of possible dishonesty. However, the statement itself is nothing more than an accurate recitation of part of the Maryland peer-review panel's decision. It is a general statement, and does not specify the time when the

[20] The dissent failed to address the portion of the statement showing that Respondent's counsel was describing the actions taken and conclusions made by the Maryland peer-review panel.

peer-review panel believed Respondent had consulted the unspecified "someone with more expertise." It does not even reflect whether the unnamed expert was an attorney or some other kind of expert. Because Respondent did retain Fuerst, and received and relied on his expert advice, there is nothing inaccurate or even potentially deceptive about the general opening remarks of Respondent's counsel.

Second, the dissent gives the following example of supposedly dishonest testimony by Respondent: "When asked how E-GOLD made [*sic*] ensured compliance with regulatory laws, Respondent testified 'it had hired outside counsel to advise . . . on these types of issues.'" D at 10, quoting Tr. 70. The quoted excerpt is accurate with respect to Fuerst's advice. It is also true as to Drinker Biddle, who unquestionably were hired to "advise . . . on these types of issues," even though their opinion turned out to be inaccurate and inconclusive.[21] The excerpt quoted in the dissent is not dishonest. Moreover, when we examined the full Q & A in the transcript, the innocuous and truthful nature of the testimony was even more apparent:

> Q: How did the company address its compliance, ensure that it was in compliance with regulatory laws?
>
> A: Well, it had hired outside counsel to advise it and had hired Ernst & Young to advise it on those types of issues. And when issues came up outside that area, it hired outside counsel to advise it on what it should do.

Tr. 70:12-19. This was an extremely general question posed by Respondent's own counsel in direct examination very early in the hearing, setting the stage for a more searching discussion of Respondent's good faith belief that E-GOLD did not need to be registered. There is nothing misleading about this general statement of E-GOLD's approach to regulatory issues in general,

[21] Respondent never mentioned Drinker Biddle or Seidl in his testimony during the first day of the hearing, when he explained in detail the basis for his good faith belief that E-GOLD was not required to register as a currency transmitter. He did, as discussed in more detail below, testify extensively about the role played by Fuerst.

which implicitly included tax and financial regulatory issues as well as money transfer regulations (hence, the reference to Ernst & Young). Moreover, as the transcript continued, Respondent's testimony covered additional truthful information, which further undermines the arguments by the dissent and Bar Counsel that Respondent testified dishonestly. For example, on the very next page of transcript is the following information about Fuerst:

> Q: There was reference [by the Hearing Committee Chair] earlier today to Mitchell Fuerst. Did the company hire Mitchell Fuerst?
>
> A: They did. If I can just say, I mean, this was an area of -- these are businesses-- that is, E-Gold [sic] was a business that was a pioneer in its field. I mean, it was unique in that operation, and there weren't laws that -- you know, there was no guidance on that. And so the company hired experts to get advice on what rules applied and how to comply. And yes, they did hire Mitchell Fuerst, because he was a representative of the company. He was an expert and had a reputation in the field for being expert in that area.
>
> * * *
>
> Q: How did the company come to hire Mr. Fuerst?
>
> A: Well, he was hired to advise the company on the application of the licensing/registration requirements of federal and state law and dealing with the Treasury Department on those issues.

Tr. 71:5-18; 72:14-19. This is truthful testimony about the retention of Fuerst and the scope of his representation. It does not misrepresent the time period when those events occurred.

The dissent's third example of potentially dishonest testimony is more troubling. Respondent testified, still on direct examination by his own attorney:

> that he never believed the companies were violating the law because "that's what the company was being told from the very beginning. I mean, if a question arose they would hire attorneys or accountants to answer the question and to advise the company on how to be in compliance." Tr. 74; *accord* Tr. 82, 104-105 ("I wasn't the adviser, telling them what compliance they needed to do. I was a part of the, you know, team that was being advised by the attorneys and Ernst & Young and participated in that process").

D at 10. As the dissent and Bar Counsel point out, this comes close to an explicit statement that Respondent and E-GOLD were receiving favorable legal advice "from the very beginning." Such a statement would be untrue, and, if uncorrected, could be evidence of dishonesty. But the statement does not explicitly say that Respondent or E-GOLD was receiving favorable legal advice "from the very beginning." It contains two averments. The first states that ***someone*** was telling Respondent and E-GOLD "from the very beginning" that they were not in violation of the law. The second states that when questions arose, Respondent and E-GOLD would hire "attorneys or accountants" to answer those questions. It is not unreasonable to infer from these two statements that Respondent and E-GOLD were receiving favorable legal advice "from the very beginning." But ambiguity remains in these very general statements, and other interpretations also are possible. In order to evaluate the serious accusations by the dissent and Bar Counsel, we have reviewed the entire portion of the transcript to place the "from the very beginning" comment in context.

> Q: Why was this [that E-GOLD was complying with the law] your belief?
>
> A: Well, that's what the company was being told from the very beginning. I mean, if a question arose, they would hire attorneys or accountants to answer the question and to advise the company on how to be in compliance. Because the internet currencies like this – and E-GOLD was a pioneer, but right behind them came PayPal in 2002 or around 2002, and there were other companies like that starting after E-Gold had started. There were no rulings, and the laws had not caught up with this type of business . . . . And so it hadn't been – those questions had not been answered yet.
>
> Q: Were there other things that you saw or were told that led you to confirm this belief?
>
> A: Yes. I mean, Dr. Jackson was very active in – he testified before Congress on these issues on several occasions. He met with Federal Reserve on these issues. He – but there were also reports being written by these agencies that were saying the same thing we were concluding, that the rules did not apply to E-Gold.

Tr. 73:18 – 75:7. Respondent then testified in detail about his reliance on RX 1, the 2005 Money Laundering Threat Assessment, and RX 2, the 2006 Money Laundering Threat Assessment, and

explained how these government documents, along with the information gathered by Dr. Jackson in his Congressional testimony and meetings with the Federal Reserve, all bolstered Respondent's good faith belief that E-GOLD was not required to register as a money transmitter. In all those pages of testimony Respondent made no reference to reliance on any legal advice. Tr. 75:8-80:3. The next reference to legal advice described work done by Fuerst in early 2005:

> Q: Were you aware of whether Mr. Fuerst was having discussions with FinCEN or BSA examiners about these fact-specific issues?
>
> A: Yes. I mean, the company wanted to be regulated. The company wanted to obtain a license but had been advised that it could not obtain a license because the regulations didn't apply and, therefore, was not subject to those regulations. So Mitchell Fuerst was also hired, and he went to the Bank Secrecy Act division of Treasury and FinCEN in, I think, beginning of January 2005 to lay out the business of the company in front of the regulators and to obtain a ruling and to describe for them how the regulations could be modified slightly to include E-Gold as a money services business that, therefore, could be regulated and licensed. So that was why he was hired, to get the rules changed.

Tr. 80:4-21.

Taken in isolation Respondent's statement about what E-GOLD was "being told from the very beginning" is troubling, and might be evidence of dishonesty. Placed in context however, it is at best ambiguous. Respondent explained at length that his good faith was based on regulatory uncertainty and on government publications like the Money Laundering Threat Assessments, as well as on the favorable legal opinion that Respondent did, in fact, receive from Fuerst in 2005. It is not clear that the information that Respondent testified that E-GOLD "was being told from the very beginning" was legal advice, as opposed to information from government sources or from

Dr. Jackson's investigations. Thus, while the statement in isolation is troubling and confusing, we conclude that it is not by itself clear and convincing evidence of dishonesty.[22]

For all of the foregoing reasons, we conclude that Bar Counsel failed to prove by clear and convincing evidence that Respondent engaged in uncharged dishonesty. Because we have determined that uncharged dishonesty was not shown by clear and convincing evidence, we need not address Bar Counsel's further argument that Respondent committed "flagrant dishonesty."[23] *See* BCE at 23-24.

Given our conclusion that dishonesty was not shown by clear and convincing evidence, we must determine what sanction to recommend for Respondent's commission of a serious crime. As discussed above, we find that no client was prejudiced, that Respondent accepted responsibility for his actions, that Respondent has a clean disciplinary record[24] and an exemplary career, and that no other disciplinary violations were even charged, much less proven. The question, then, comes down to determining what sanction is appropriate for Respondent's conviction of a non-*scienter* crime which is "serious" simply because it is a felony, and where Bar Counsel has failed to prove

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[22] It is also relevant that Respondent was able to correct any misunderstandings about the timing and scope of his reliance on advice of counsel later in the hearing. While the dissent and Bar Counsel invite us to infer that Respondent's later clarification on these issues was disingenuous, we are not convinced, given the general and ambiguous nature of the original statement.

[23] We agree with the dissent that using Respondent's statements, even if false, to establish "flagrant dishonesty" in a case where Respondent was never charged with any Rules violation involving dishonesty, could raise due process concerns. D at 25 and n.10.

[24] The Maryland Attorney Grievance Commission concluded that Respondent, by pleading guilty to a felony, had violated Maryland Rule of Professional Conduct Rule 8.4(d), engaging in "conduct that is prejudicial to the administration of justice." The Commission, however, declined to impose any disciplinary sanction other than a warning, which "is not discipline" in Maryland. UFF 33.

by clear and convincing evidence that Respondent acted with moral turpitude or made dishonest statements to the sentencing court and disciplinary bodies.

Because the offense is a serious crime, the law requires us to recommend some discipline. *See* D.C. Bar R. XI, § 10(d); *In re Lovendusky*, Bar Docket No. 418-84 at 8 (BPR Nov. 4, 1985) (if the respondent is convicted of a serious crime, "some 'final discipline' should be recommended").

Several courts and disciplinary bodies have already considered Respondent's culpability. Judge Collyer, who believed Respondent did not intend to violate the law, imposed a suspended sentence. The Court of Appeals, observing that Respondent was convicted of a non-*scienter* crime that was outside his normal legal practice, said that based on the preliminary information then before it, "the likelihood that respondent will receive a significant sanction, i.e. a suspension (if at all) of more than brief duration, is very small." *In re Downey*, 960 A.2d at 1137.[25] The Maryland authorities, after examining the evidence, imposed no discipline at all, choosing instead to issue only a warning. RX 8. The Hearing Committee held a full evidentiary hearing, and the majority credited Respondent's testimony as well as his honesty. The majority found, and we agree with their findings based on our *de novo* review, that Bar Counsel failed to prove by clear and convincing evidence that Respondent lied to any of the relevant courts and disciplinary bodies. The majority recommended an informal admonition, apparently intending to be as consistent as possible with the disposition of the Maryland proceedings.

[25] In staying the interim suspension, the Court made it clear that the final sanction must be determined on the basis of a full factual record. The Court's observation about the low probability of a suspensory sanction did not affect our analysis of the factual record.

The only case we have identified where the Court imposed discipline for a strict liability crime, without a finding of moral turpitude, is *In re Lovendusky*, No. 84-1672 (D.C. Apr. 4, 1986), where the Court imposed a six-month suspension for the felony offense of attempted carnal knowledge of a minor, where the evidence failed to show that the respondent knew or should have known that the victim was underage. The crime in *Lovendusky* and the nature of the respondent's intent are so fundamentally different from this case that the result is not closely comparable for sanction purposes. [26]

In a search of crimes involving licensing or business law violations, we identified *In re Perrin*, 633 A.2d 517 (D.C. 1995), where a three-year suspension was imposed for a misdemeanor violation of the New York General Business Law. The underlying facts showed that the respondent admitted to participation in a dishonest scheme that resulted in the loss of millions of dollars to innocent investors. There are no such allegations here.

A more general survey of discipline imposed for serious crimes shows that brief suspensions have been imposed for crimes involving the intent to defraud. For example, in *In re Krouner*, 748 A.2d 924 (D.C. 2000), a reciprocal discipline case, the respondent was reprimanded in New York for a conviction of misdemeanor theft of services (a $900 telephone bill) and two instances of forging a client's signature on pleadings filed in probate court. Given the intentional and dishonest nature of the serious crime and the practice-related dishonesty, the Court applied the "substantially different discipline" exception of Bar Rule XI, §11(c)(4), and imposed a thirty-day suspension, which would have been the "very minimum" sanction if the matter had arisen as an

[26] Among other differences, the respondent in *Lovendusky* had already served an interim suspension of a year. Because the interim suspension far exceeded the final discipline imposed, the respondent was immediately reinstated.

original jurisdiction case in the District of Columbia.[27] *Krouner* is not closely comparable to this case, because the theft of services and the forged signatures involved dishonesty and because there were multiple practice-related offenses, whereas here the single offense did not involve dishonesty and was unrelated to the practice of law.

The Court also has imposed brief suspensions or stayed suspensions for a crime involving fraudulent intent, where the sanction was mitigated under *In re Kersey*, 520 A.2d 321 (D.C. 1987) (disbarment stayed in favor of five-year probation with conditions where misappropriation and multiple disciplinary violations had a proven nexus to respondent's alcoholism and there was proof of rehabilitation). *See*, *e.g.*, *In re Soinien*, 783 A.2d 619, 621 (D.C. 2001) (thirty-day suspension stayed in favor of two-year supervised probation where respondent pleaded guilty to misdemeanor theft and unlawful possession of controlled substance); *In re Kent*, 467 A.2d 982 (D.C. 1983) (per curiam) (thirty-day suspension where respondent's shoplifting was caused by mental disturbance and desire to be caught). Respondent's crime is not closely comparable to any of these cases, because it does not involve an intent to steal or defraud, nor is *Kersey* mitigation applicable here.

Also relevant here are cases in which a respondent's violation occurred in a climate of legal uncertainty. The Court has approved informal admonitions in several disciplinary cases where the respondents violated a disciplinary rule in a new area of law based on their good faith misunderstanding of the requirements, and there were no comparable cases for use as a parallel for assessing consistent discipline. *See, e.g., In re Sofaer*, 728 A.2d 625 (D.C. 1999) (appended Board Report) (informal admonition ordered in case of first impression where the respondent violated the

[27] Sanctions imposed as reciprocal discipline under the substantially different discipline standard can serve as precedent in original matters. *See In re Pennington*, 921 A.2d 135, 143 (D.C. 2007).

government lawyer revolving-door Rule 1.11(a), but had no prior disciplinary record, an exemplary 30-year legal career including service as a prosecutor, professor, federal judge, and senior State Department official, and there was no harm to the client); *In re Confidential,* 670 A.2d 1343 (D.C. 1996) (informal admonition ordered in case of first impression where the respondent showed his substantial compliance with new Rule 1.5(e)(2) (writing to client setting forth fee sharing agreement) but failed to include in his retainer agreement information regarding fee splitting with the co-counsel that he had orally communicated to the client); *In re L.R.*, 640 A.2d 697 (D.C. 1994) (informal admonition ordered where Board properly took into account the respondent's good faith misunderstanding of the CJA statute (D.C. Code § 11-2606(a)) when he violated DR 1-102(A)(5) (conduct prejudicial to administration of justice) by agreeing to simultaneously represent a defendant as CJA counsel on appeal and paid counsel in Superior Court). Respondent also invites our attention to *In re Kline*, 113 A.3d 202, 204 (D.C. 2015). *Kline* involved a charge that a prosecutor had violated Rule 3.8(e), which prohibits a prosecutor from failing to disclose to a defendant any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused. The Court observed that there had been conflicting interpretations of Rule 3.8(e) and that the respondent's misinterpretation of the Rule was "wrong but not unreasonable" under the circumstances. *Id.* at 216. The Court acknowledged that there had been some ambiguity as to the interpretation of Rule 3.8(e) at the time of respondent's violation, and imposed no discipline. *Id.*

"[T]he imposition of sanctions in bar discipline cases is not an exact science" and "[w]ithin the limits of the mandate to achieve consistency, each case must be decided on its particular facts." *In re Cater* 887 A.2d at 17 (quoting *In re Austin*, 858 A.2d 969, 975 (D.C. 2004) and *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980)). This case presents the rare, if not unique, situation wherein a

respondent pleaded guilty to a single non-*scienter* felony unrelated to the practice of law, the crime was committed in a climate of legal and regulatory uncertainty, Bar Counsel has failed to prove moral turpitude or dishonesty by clear and convincing evidence, there are no other disciplinary charges, and Respondent's disciplinary record and character are unblemished. We recognize that "[t]he discipline we impose should serve not only to maintain the integrity of the profession and to protect the public and the courts, but also to deter other attorneys from engaging in similar misconduct" and that "[i]n all cases, our purpose in imposing discipline is to serve the public and professional interests we have identified, rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted).

Under those circumstances, we adopt the Hearing Committee's recommendation that Respondent should receive an informal admonition.

D. Respondent's Motion to Dismiss Should Be Denied

Respondent filed a Motion for Order Concluding Proceedings with No Discipline or, In the Alternative, Motion to Strike and for Other Necessary Relief ("MTD"). Respondent argued that after receiving the additional documents produced by Respondent concerning advice of counsel, Bar Counsel added a previously uncharged dishonesty charge, that Respondent, not anticipating this new accusation, was "lulled and trapped into presenting his testimony in a particular fashion," was deprived of the right to respond to the new charge, and was thus "prejudiced beyond repair." MTD at 2-3. Respondent requested that the "matter be concluded with no additional or further discipline imposed." *Id*. at 1. In the alternative, Respondent requested that the Hearing Committee strike "all of Bar Counsel's claims of dishonesty and moral turpitude, and all evidence and testimony received following the close of the hearing." *Id*. Pursuant to Rule 7.16(a), the Hearing Committee Chair denied the motion on March 15, 2013, pending a recommendation to the Board

on how the motion should be resolved. The Hearing Committee now recommends that the Board deny Respondent's motion.

We agree and affirm the Hearing Committee's unanimous recommendation for the reasons stated in HR at 36-38. Respondent had a full and fair opportunity to contest Bar Counsel's arguments and to explain the newly produced documents at the second day of the hearing. Bar Counsel advised Respondent of the substance of his new accusations well in advance of the second hearing day and Respondent had (and took advantage of) a full opportunity to testify on direct, explaining his view of the newly produced material. There is nothing unfair in allowing Bar Counsel the right to cross-examine Respondent or challenge Respondent's credibility and veracity under these circumstances. The motion is denied.

IV. CONCLUSION

For the reasons stated, the Board affirms the Hearing Committee's unanimous fact findings and the majority's fact findings including the majority's credibility determinations, which are supported by substantial evidence. The Board affirms on *de novo* review the Hearing Committee's unanimous conclusions that Respondent committed a "serious crime" within the meaning of D.C. Bar Rule XI, § 10(b), and that Bar Counsel failed to prove moral turpitude by clear and convincing evidence. We have carefully considered the arguments by the dissent and Bar Counsel that Respondent committed uncharged dishonesty by misrepresenting his reliance on advice of counsel, and conclude that Bar Counsel failed to prove dishonesty by clear and convincing evidence. Given these findings and conclusions, and pursuant to D.C. Bar R. XI, § 9(c)[28] and Board Rule 13.8,[29] the Board hereby directs Bar Counsel to issue an informal admonition to Respondent for his conviction of a serious crime.

It is so ORDERED.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /ELY/
Eric L. Yaffe
Chair

Dated: December 28, 2015

This Order was prepared by Mr. Peirce. All members of the Board concur in this Order except Messrs. Bernius and Carter, who are recused.

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[28] D.C. Bar R. XI, § 9(c) provides that, after it hears oral argument, the Board may, *inter alia*, "direct Bar Counsel to issue an informal admonition . . . ."

[29] Board Rule 13.8 provides, in pertinent part: "When the Board determines that the proceeding should be concluded by an informal admonition, . . . the Board shall direct Bar Counsel to informally admonish respondent in writing including a brief statement of the reasons therefor . . . ."