

DISTRICT OF COLUMBIA COURT OF APPEALS  
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
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DARRELL N. FULLER,	:	D.C. App. No. 13-BG-757
	:	Board Docket No. 13-BD-064
Respondent.	:	Bar Docket No. 2013-D235
	:	
A Suspended Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 499204)	:	

REPORT AND RECOMMENDATION OF THE  
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter is before the Board on Professional Responsibility (the “Board”) pursuant to an order of the District of Columbia Court of Appeals (the “Court”) temporarily suspending Respondent pursuant to D.C. Bar R. XI, § 10(c) based on his guilty plea to a “serious crime” and referring the matter to the Board for a moral turpitude determination under D.C. Code § 11-2503(a) (2001). Respondent’s guilty plea was entered pursuant to a deferred adjudication procedure under Texas law, which does not entail a guilty plea to a “serious crime” as defined under D.C. Bar R. XI, § 10, or a conviction under the mandatory disbarment provision of D.C. Code § 11-2503(a). The Board thus recommends that the Court vacate its order of temporary suspension and its referral to the Board for a moral turpitude determination, and that the Court refer Respondent’s crime to Bar Counsel to proceed as appropriate under D.C. Bar R. XI, § 8.

BACKGROUND

Respondent was admitted to the Bar of the District of Columbia Court of Appeals on July 7, 2006. On June 4, 2013, Respondent pleaded guilty in the District Court of Harris County, Texas, to one count of Improper Photography or Visual Recording in violation of Tex. Penal Code § 21.15. The plea was entered pursuant to Tex. Code Crim. Proc. Art. 42.12,

§ 5(a), which provides that in appropriate cases, a court may “defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.” If the defendant successfully completes the period of community supervision, the charges against him will be dismissed and there will be no record of conviction. Tex. Code Crim. Proc. Art. 42.12, § 5(c). The order of deferred adjudication entered against Respondent provided that he serve 30 days in prison, and then be placed on community supervision for a period of five years.

On July 17, 2013, Bar Counsel filed copies of the Texas court’s order of deferred adjudication with the Court. On August 13, 2013, the Court suspended Respondent pursuant to D.C. Bar R. XI, § 10(c), which provides for an immediate, temporary suspension upon entry of a guilty plea to a “serious crime,” and directed the Board to determine whether the crime involves moral turpitude within the meaning of D.C. Code § 11-2503(a). Order, *In re Fuller*, No. 13-BG-757 (D.C. Aug. 13, 2013). On August 21, 2013, the Board directed the parties to brief whether a violation of Tex. Penal Code § 21.15 inherently involves moral turpitude or whether the crime should be referred for a hearing to determine moral turpitude on the facts.

In their responsive briefs, Bar Counsel and Respondent concurred that a violation of Tex. Penal Code § 21.15(b)(1) does not inherently involve moral turpitude and that a hearing is necessary to determine moral turpitude on the facts.<sup>1</sup> Respondent further asserted that the Texas order of deferred adjudication is not a conviction and thus is not the proper subject of a moral turpitude inquiry under D.C. Code § 11-2503(a). Thereafter, on November 13, 2013, the

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<sup>1</sup> Bar Counsel asserted that the crime does not involve moral turpitude *per se*, because a violation of the statute does not require proof that the victim was a minor. Respondent agreed, arguing that the statute punishes conduct that is less serious than the conduct prohibited by the child pornography statute at issue in *In re Wolff*, 490 A.2d 1118 (D.C. 1985), *aff’d on reh’g*, 511 A.2d 1047 (D.C. 1986) (en banc), which was found not to involve moral turpitude *per se*, and that the Texas statute is unconstitutionally broad and vague.

Board directed the parties to brief “whether the June 4, 2013 ‘order of deferred adjudication’ entered against Respondent pursuant to Tex. Code Crim. Proc. [Art.] 42.12 § 5, constitutes a ‘final judgment of conviction’ under D.C. Code § 11-2503(a) such that this matter is ripe for a moral turpitude determination.” Order, *In re Fuller*, Board Docket No. 13-BD-064 at 2 (BPR Nov. 13, 2013). The parties were asked to “specifically address Tex. Code Crim. Proc. [Art.] 42.12 § 5(c), which provides that a ‘dismissal and discharge . . . may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense.’” *Id.*

In his response to the Board’s briefing order, Respondent reiterated that a deferred adjudication is not a conviction within the meaning of D.C. Code § 11-2503(a), citing previous Board orders. *See* Respondent’s Statement on the Issue of Deferred Adjudication at 2-3 (citing *In re Tatelbaum*, Bar Docket No. 128-06 (BPR Oct. 13, 2006) and *In re Ezer*, Bar Docket No. 339-00 & 001-01 (BPR June 18, 2001)). In its response, Bar Counsel conceded that “even if the Board were to find [that Respondent’s] offense involved moral turpitude, this matter will not be ripe for a recommendation of disbarment until Respondent has been convicted.” *See* Supplemental Brief of Bar Counsel on the Issue of Moral Turpitude at 2. Bar Counsel nonetheless urged the Board to proceed with the moral turpitude inquiry now, on the grounds that under D.C. Bar R. XI, § 10(d), a hearing would be necessary to decide the question of the final discipline to be imposed in light of Respondent’s guilty plea to a “serious crime.”<sup>2</sup> *Id.* at 2-3; *see* D.C. Bar R. XI, § 10(d). According to Bar Counsel, it would not be in the interest of

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<sup>2</sup> Under D.C. Bar R. XI, § 10(d), where a respondent is convicted of a “serious crime,” Bar Counsel is to “initiate a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed.”

judicial economy to have a second hearing on the moral turpitude question, if Respondent is ever convicted.

As explained below, Respondent's guilty plea under the Texas deferred adjudication procedure is neither a guilty plea to a "serious crime" within the meaning of D.C. Bar R. XI, § 10, nor a conviction for purposes of the mandatory disbarment provision of D.C. Code § 11-2503(a). Thus, there is no basis to refer the matter for a hearing.

### ANALYSIS

#### I. Procedures for the Treatment of Criminal Convictions Under D.C. Bar R. XI, § 10 and Respondent's Guilty Plea

##### A. Rule XI Procedures for the Treatment of Criminal Convictions

D.C. Bar R. XI, § 10 sets forth the procedure for treating criminal convictions and implements the mandatory disbarment provision of D.C. Code § 11-2503(a). *See In re Colson*, 412 A.2d 1160, 1165-66 (D.C. 1979) (en banc). Subsection 10(a) requires Bar Counsel to file with the Court a certified copy of a guilty finding or plea "[i]f an attorney is found guilty of a crime or pleads guilty or *nolo contendere* to a criminal charge in a District of Columbia court," or a "court outside the District of Columbia or in any federal court[.]" Subsection 10(b) defines the term "serious crime," which includes "any felony" or other crime involving theft or fraud, among other things. Under subsection 10(f), a certified copy of the docket entry or finding of guilt is "conclusive evidence of the commission of that crime[.]"

Where the Court makes a summary determination that the crime fits the definition of "serious crime," subsection 10(c) provides for the imposition of an immediate order of temporary suspension. *See In re Downey*, 960 A.2d 1135, 1136 (D.C. 2008) (per curiam). This temporary suspension is to remain in effect pending final determination of an appeal from the conviction, and may be set aside upon a showing of good cause "when it appears in the

interests of justice to do so.”<sup>3</sup> *Id.*; D.C. Bar R. XI, § 10(c). Subsection 10(d) provides for the institution of a formal disciplinary proceeding based on a “serious crime” conviction, “in which the sole issue to be determined is the final discipline to be imposed.”<sup>4</sup>

After entry of an order of suspension under subsection 10(c), the Court refers the matter to the Board to determine the final discipline to be imposed for conviction of a “serious crime,” *In re Hutchinson*, 474 A.2d 842, 844 (D.C. 1984), and to determine whether the crime involves moral turpitude within the meaning of D.C. Code § 11-2503(a).

The procedure for deciding the moral turpitude question under D.C. Code § 11-2503(a) was established in *Colson*. It provides that when the Court refers a criminal conviction to the Board, the Board must first review the elements of the attorney’s offense to determine whether the crime involves moral turpitude *per se*. See *Colson*, 412 A.2d at 1164-67; *In re Shorter*, 570 A.2d 760, 765 (D.C. 1990) (per curiam). Where the Board concludes that the offense does not involve moral turpitude *per se*, the matter is referred to a hearing committee to determine whether the facts underlying the conviction involve moral turpitude. *Id.*

#### B. Respondent’s Guilty Plea

Tex. Crim. Proc. Art. 42.12, § 5(a), pursuant to which Respondent pleaded guilty, is intended to relieve a defendant from an adjudication of guilt and a record of conviction. See *Pye v. State*, No. 03-06-00306-CR, 2009 Tex. App. LEXIS 1412, at \*42 (Tex. Ct. App. Feb. 27, 2009) (mem. op., not designated for publication) (The “essence” of this deferred adjudication procedure “is that the defendant is placed on community supervision without a finding of guilt

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<sup>3</sup> If Respondent’s conviction is upheld on appeal, the suspension remains in effect until the final disposition of the disciplinary proceeding. See D.C. Bar R. XI, § 10(c).

<sup>4</sup> Where the Court makes a determination that the crime is not a “serious crime,” the Court refers the matter to Bar Counsel for investigation and proceedings as appropriate under D.C. Bar R. XI, § 8.

and without being convicted of any offense.”) If the defendant successfully completes the period of community supervision, “the judge shall dismiss the proceedings against the defendant and discharge him.” Tex. Crim. Proc. Art. 42.12, § 5(c); *see also Webb v. City of Dallas*, 211 S.W.3d 808, 816-17 (Tex. Ct. App. 2006) (dismissal of deferred adjudication after successful completion of community supervision is equivalent to dismissal of charges without conviction). Such a dismissal “may not be deemed a conviction for the purposes of qualifications or disabilities imposed by law for conviction of an offense.” Tex. Crim Proc. Art. 42.12 § 5(a). If the defendant violates a term of his community supervision, he is entitled to a limited hearing, after which the court will determine whether to proceed with an adjudication of guilt on the original charge. *Id.*, § 5(b). If the defendant is adjudicated guilty, the criminal proceedings will continue as if not deferred. *Id.*

Thus, although Respondent pleaded guilty, there has been no adjudication of guilt or order of conviction entered against him, nor will there be, unless he violates the terms of his community supervision. If Respondent successfully completes his community supervision, the charges against him will be dismissed, and he will have no record of conviction.

II. Respondent’s Guilty Plea Is Not Subject to the “Serious Crime” Provision of D.C. Bar R. XI, § 10.

Respondent’s guilty plea under the Texas deferred adjudication procedure is not a guilty plea under the “serious crime” provision of D.C. Bar R. XI, § 10. Section 10 requires Bar Counsel to notify the Court “[i]f an attorney is found guilty of a crime or pleads guilty or *nolo contendere* to a criminal charge . . .” and to “initiate a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed.” The rule plainly applies to guilty or *nolo contendere* pleas that will result in convictions, since it *requires* the imposition of a disciplinary sanction.

To the extent the rule may be considered ambiguous, the drafting history of section 10 supports exempting guilty pleas entered pursuant to a deferred adjudication procedure from its scope. The predecessor to D.C. Bar R. XI, § 10(a) originally provided that formal disciplinary proceedings based on a serious crime could be initiated only upon entry of a final judgment of conviction. *See* D.C. Bar R. XI, § 15(4) (1972). The rule was amended in 1985, and again in 1989, to begin the process earlier. The obvious purpose of the amendments was to advance the commencement of disciplinary proceedings and provide for an immediate, temporary suspension upon entry of a plea or finding of guilt, where, absent reversal, conviction was almost certain to follow. The legislative history of the Model Rules of Disciplinary Enforcement, upon which D.C. Bar R. XI, § 10 is based, supports this interpretation. The Model Rules originally provided for the entry of an order of temporary suspension and the initiation of disciplinary proceedings upon conviction of a serious crime; in 1999, they were amended to provide for entry of an order of temporary suspension and the initiation of disciplinary proceedings upon entry of a plea or finding of guilt. The legislative history makes clear that the drafters of the Model Rule amendments intended the rule to apply to a plea or guilty finding that would result in a conviction. *See* Commentary to ABA Model Rule 19 (“The issue to be determined in a disciplinary proceeding predicated upon the finding of guilt of a lawyer for a crime is whether the conduct established by the determination of guilt and *subsequent conviction* warrants discipline, and, if so, the extent of the discipline to be imposed.”) (emphasis added)).

Respondent’s plea of guilty under Tex. Code Crim. Proc. Art. 42.12, § 5(a) is plainly not a “guilty plea” to a “serious crime” within the meaning of D.C. Bar R. XI, § 10. As such, there is no basis to support Respondent’s temporary suspension under D.C. Bar R. XI, § 10(c)

or to conduct a hearing under D.C. Bar R. XI, § 10(d) to determine “the nature of the final discipline to be imposed” based on a plea of guilty or *nolo contendere* to a “serious crime.”

III. Respondent’s Guilty Plea Is Not the Proper Subject of a Moral Turpitude Inquiry Under D.C. Code § 11-2503(a).

Respondent’s plea of guilty is also not subject to the mandatory disbarment provision of D.C. Code § 11-2503(a), which applies only where an attorney “is *convicted* of an offense involving moral turpitude, and a certified copy of the conviction is presented to the court[.]” D.C. Code § 11-2503(a) (emphasis added); *see Tatelbaum*, Bar Docket No. 128-06 at 3, *recommendation adopted*, 915 A.2d 350, 351 (D.C. 2006) (per curiam); *Ezer*, Bar Docket Nos. 339-00 & 001-01 at 2, *recommendation adopted*, 790 A.2d 550, 551 (D.C. 2002) (per curiam).

Bar Counsel concedes that a deferred adjudication under Texas law does not constitute a conviction, but nonetheless seeks a hearing on moral turpitude, on the chance that Respondent may violate the terms of his community supervision and eventually be convicted. Bar Counsel’s rationale, that it is in the interest of judicial economy to conduct such a hearing now, is based on a mistaken premise – that, in light of Respondent’s guilty plea to a “serious crime,” a hearing is necessary to determine the final discipline to be imposed under D.C. Bar R. XI, § 10(d), regardless of whether the plea results in a conviction. But as explained above, D.C. Bar R. XI, § 10 does not contemplate a hearing where the charges are eventually dismissed, as provided under the Texas statute. Thus, contrary to promoting efficiency, a hearing on the moral turpitude question at this juncture could be a waste of disciplinary resources. In addition, it would be unfair to Respondent, who should not have to defend against application of the mandatory disbarment provision of D.C. Code § 11-2503(a) when he has not yet been convicted and may well never be.



## CONCLUSION

For the reasons set forth above, the Board recommends that Respondent's plea of guilty entered pursuant to the order of deferred adjudication under Tex. Code Crim. Proc. Art. 42.12 § 5 should not be treated as a guilty plea within the meaning of D.C. Bar R. XI, § 10(a) or a conviction under D.C. Code § 11-2503(a). The Board thus recommends that the Court vacate its August 13, 2013 order suspending Respondent pursuant to D.C. Bar R. XI, § 10(c) and referring the matter to the Board for a determination of moral turpitude. Instead, the Court should refer Respondent's guilty plea to Bar Counsel pursuant to D.C. Bar R. XI, § 8(a) for whatever action Bar Counsel deems appropriate.

## BOARD ON PROFESSIONAL RESPONSIBILITY

By: /TDF/  
Theodore D. Frank  
Chair

Dated: April 25, 2014

This report was prepared with the assistance of Ms. Smith. All members of the Board concur in this Report and Recommendation.