DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of:	:	
	:	
DARRELL N. FULLER,	:	
	:	Board Docket No. 16-ND-008
Respondent.	:	Bar Docket No. 2013-D235
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Membership No. 499204)	:	

REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE
APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. Procedural History

This matter came before the Ad Hoc Hearing Committee on March 2, 2017, for a limited hearing on a Petition for Negotiated Discipline (the "Petition"). The members of the Hearing Committee are Kathleen Wach, Sally Blumenthal, and Elizabeth Denise Curtis. The Office of Disciplinary Counsel was represented by Assistant Disciplinary Counsel Joseph Perry. Respondent, Darrell Fuller, appeared *pro se*.

The Hearing Committee has carefully considered the Petition for Negotiated Discipline signed by Disciplinary Counsel and Respondent, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent and Disciplinary Counsel. The Hearing

Committee also has fully considered its *in camera* review of Disciplinary Counsel's files and records and *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a two-year suspension, fully stayed in favor of two years of unsupervised probation with conditions, is justified and recommend that it be imposed by the Court.

II. Findings Pursuant to D.C. Bar R. XI, § 12.1(c) and Board Rule 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete, and in proper order.

2. Respondent is aware that there is currently pending against him an investigation into allegations of misconduct. Tr. 21; Affidavit ¶ 2.

3. The allegation that was brought to the attention of Disciplinary Counsel is that Respondent violated Rule 8.4(c), in that Respondent engaged in deceitful conduct. Petition at 5.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. 21-22; Affidavit ¶¶ 4, 6. Specifically, Respondent acknowledges that:

> a) Starting around May 2009, Respondent was employed as in-house counsel for intellectual property issues at a company in Texas.
>
> b) During the summer of 2012, Respondent used his work-issued phone on various occasions to take prurient photos and videos of clothed, non-consenting, and unaware individuals, both at his workplace and at public venues.

c) Respondent stored and edited some of the photos and videos on his workplace computer. They were discovered during routine IT maintenance, resulting in his arrest in September of 2012, for Improper Photography or Visual Recording (5 Tex. Penal Code § 21.15).

d) During the nine-month period from the time of his arrest to the time he pleaded guilty, Respondent attended over 180 meetings for people suffering from addiction to pornography and sex; including 105 Sex Addicts Anonymous (SAA) meetings, 50 therapist-led SAA-type meetings, and 33 SAA-type meetings operated by his church. In reaching this total, Respondent attended 90 meetings in 90 days.

e) On June 4, 2013, Respondent pleaded guilty in the District Court of Harris County, Texas, to one count of improper Photography or Visual Recording. The presiding court deferred any adjudication of guilt. Under the Court's order, Respondent was placed on community supervision for a period of five years (subject to various conditions), ordered to serve 30 days in jail and pay a $250 fine.

f) Respondent promptly notified Disciplinary Counsel of his guilty plea. He also promptly notified the USPTO.

g) On August 13, 2013, the Court of Appeals ordered the Board to "institute a formal proceeding to determine the nature of [Respondent's] offenses and whether they involve moral turpitude within the meaning of D.C. Code § 11-2503(a)(2001)."

h) On August 13, 2013, the Court of Appeals suspended Respondent on an interim basis pursuant to D.C. Bar R. XI, § 10(c).

i) Both Respondent and Disciplinary Counsel took the position that Respondent's violation of the Texas statute did not involve moral turpitude *per se*.

j) On November 1, 2013, Respondent filed an affidavit compliant with D.C. Bar R. XI, § 14(g).

k) On November 13, 2013, the Board ordered simultaneous supplemental briefing addressing whether the order of deferred adjudication entered against Respondent constituted a "final judgment of conviction" under D.C. Code § 11-2503(a) such that the matter was

ripe for a moral turpitude determination. Both Respondent and Disciplinary Counsel agreed that Respondent's order of deferred adjudication did not constitute a final judgment of conviction.

l) The Board then recommended to the Court of Appeals that it vacate Respondent's interim suspension and refer the matter to Disciplinary Counsel under D.C. Bar R. XI, § 8 (governing investigations that do not involve criminal conduct). Disciplinary Counsel took exception to that recommendation, arguing that, Respondent's interim suspension should remain in place and that the case should continue under the auspices of D.C. Bar R. XI, § 10.

m) Ultimately, Respondent, the Board, and Disciplinary Counsel all filed briefs before the Court of Appeals addressing the issue. Throughout this process, Respondent continued to acknowledge the wrongfulness of his misconduct.

n) On September 17, 2014, after Disciplinary Counsel and the Board had filed briefs before the Court of Appeals, and shortly before Respondent filed his brief, the Court of Criminal Appeals of Texas (the criminal court of last resort in Texas) held that the subsection of the statute under which Respondent was charged was unconstitutional.

o) On November 10, 2014, upon the request of Respondent to vacate his §10(c) suspension, and joint motion of Disciplinary Counsel and the Board on Professional Responsibility to refer the matter to Disciplinary Counsel under § 8, the D.C. Court of Appeals vacated Respondent's suspension and referred the matter to Disciplinary Counsel pursuant to D.C. Bar R. XI, § 8(a).

p) On March 12, 2014, the Director of the USPTO approved a settlement agreement wherein Respondent agreed to 24-month suspension before the Patent and Trademark Office.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Tr. 20; Affidavit ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit ¶ 7. Here, Disciplinary Counsel has promised not to pursue any additional charges or any other sanction arising out of the conduct described in the Petition. Petition at 5. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. 24.

7. Respondent has is aware of his right to confer with counsel and is proceeding *pro se*. Tr. 15-16; Affidavit ¶ 1.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and has agreed to the sanction set forth therein. Tr. 24; Affidavit ¶¶ 4, 6.

9. Respondent is not being subjected to coercion or duress. Tr. 15; Affidavit ¶ 6.

10. Respondent is competent and was not under the influence of any substance or medication at the limited hearing. Tr. 16-17.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

a) he has the right to assistance of counsel if Respondent is unable to afford counsel;

b) he will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;

c) he will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

d) he will waive his right to file exceptions to reports and recommendations filed with the Board and with the Court;

e) the negotiated disposition, if approved, may affect his present and future ability to practice law;

f) the negotiated disposition, if approved, may affect his bar memberships in other jurisdictions; and

g) any sworn statement by Respondent in his affidavit or any statements made by Respondent during the proceeding may be used to impeach his testimony if there is a subsequent hearing on the merits.

Tr. 16, 19-20, 28-29; Affidavit ¶¶ 9-10, 12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a two-year suspension, fully stayed in favor of two years of unsupervised probation, with the requirements that Respondent (1) self-certify to Disciplinary Counsel each month that he is complying with the treatment directions of his psychiatrist and any other provider(s), (2) self-certify to Disciplinary Counsel each month that he attended at least one Sexual Addicts Anonymous meeting, (3) immediately seek counseling from a Certified Sex Addiction Therapist should his treatment regimen appear insufficient, (4) waive privilege to the extent necessary for Disciplinary Counsel to verify his compliance with the terms of probation, and (5) not be found to have engaged in any misconduct in this or any jurisdiction. Petition at 6; Tr. 22-23.

a) Respondent further understands that, in the event he is suspended as a result of a violation of the terms of his probation, he must file with the Court an affidavit pursuant to D.C. Bar R. XI, § 14(g) in order for his suspension to be deemed effective for purposes of reinstatement;

b) Respondent understands that, in the event a fitness requirement is imposed as a result of a violation of the terms of his probation, he will be required to prove his fitness to practice law in accord with D.C. Bar R. XI, § 16 and Board Rule 9.8 prior to being allowed to resume the practice of law; and

c) Respondent understands that the reinstatement process may delay Respondent's readmission to the Bar. Tr. 32-35.

13. In mitigation, Respondent and Disciplinary Counsel stipulate that Respondent has been diagnosed with Voyeuristic Disorder (in remission), Depressive Disorder and Anxiety Disorder. He voluntarily consented to an independent medical examination. The treating psychologist found he was:

- A reliable reporter;
- receiving appropriate treatment for all conditions;
- capable of functioning with normal to high levels of stress; and
- at low risk for recidivism for the conduct described.

Petition ¶ 17; Tr. 24-25. Moreover, the parties stipulated that (1) Respondent promptly reported his guilty plea and acknowledged his misconduct from the outset of Disciplinary Counsel's investigation; (2) Respondent has already served just over one year of suspension; (3) Respondent sought out treatment immediately upon his arrest and has agreed to continue doing so as appropriate; (4) Respondent has cooperated with Disciplinary Counsel; (5) Respondent has expressed and demonstrated remorse through all the actions discussed; and (6) Respondent has no prior discipline in this or any other jurisdiction. Tr. 25-26.

III. Discussion

The Hearing Committee shall approve an agreed negotiated discipline if it finds:

> a) that the attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein;
>
> b) that the facts set forth in the Petition or as shown during the limited hearing support the attorney's admission of misconduct and the agreed upon sanction; and
>
> c) that the agreed sanction is justified.

D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition, and agreed to the sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that he is under duress or has been coerced into entering into this disposition. Tr. 15. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. 16, 19-20, 28-29.

Respondent has acknowledged that any and all promises that have been made to him by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to him. Tr. 24; Affidavit ¶ 7.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing, and we conclude that they support the admission of misconduct and the agreed upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because he believes that he could not successfully defend against the misconduct described in the Petition. Tr. 20; Affidavit ¶ 5.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 8.4(c) (deceit). Respondent admits that he violated Rule 8.4(c) through deceitful conduct. Tr. 22. The evidence supports Respondent's admission that he violated Rule 8.4(c) through deceitful conduct in that the stipulated facts provide that Respondent took prurient photos of unaware individuals at his workplace and at public venues.

C. The Agreed-Upon Sanction Is Justified.

The third and most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, § 12.1(c); Board Rule 17.5(a)(iii). Based on the record as a whole, including the stipulated circumstances in mitigation, the Hearing Committee Chair's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and our review of relevant precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient, for the reasons set out below.

Respondent engaged in deceitful conduct, and that conduct required some preparatory steps (placing the mobile phone camera in a position to record private images without the subject's consent) rather than a single impulsive action, and it occurred on more than one occasion. We find that the imposition of discipline is justified.

The stipulated record also reveals several factors that weigh in the Respondent's favor. Respondent initiated efforts – seeking a diagnosis and treatment for his mental health disorder and attending regular meetings of Sexual Addicts Anonymous – immediately following his arrest, and occurring for nine months before his guilty plea. These actions demonstrate acceptance of responsibility. In the same vein, Respondent promptly notified Disciplinary Counsel of the guilty plea and has cooperated fully with the investigation and proceedings in this jurisdiction. Furthermore, the parties' stipulation concerning Respondent's intent is well-supported by the record, which includes a statement by his treating psychiatrist. Respondent also submitted to an independent medical examination at Disciplinary Counsel's request, and the examining psychologist found him to be a credible reporter with a low risk of recidivism, who acknowledges the harm he caused to others.

The parties' agreed-upon sanction in this case is appropriate, when evaluated against the relatively limited precedent in this area of disciplinary law. In *In re Harkins*, 899 A.2d 755, 758, 761-62 (D.C. 2006), the Court imposed a 30-day suspension, for conduct involving misdemeanor sexual abuse in which the

respondent made inappropriate physical contact with and sexual advances toward a stranger on a Metro train. Two other cases involving sexual criminal behavior were found to be crimes of moral turpitude,[1] requiring disbarment. In *In re Wolff*, 490 A.2d 1118, 1120 (D.C. 1985), *reaffirmed*, 511 A.2d 1047 (D.C. 1986) (en banc), the Court disbarred the attorney, finding moral turpitude on the facts, for conduct involving the felony distribution of photographs depicting child pornography as well as engaging in prostitution. A very recent moral turpitude case involved somewhat more similar facts. In *In re Cross*, D.C. App. No. 10-BG-200 (D.C. Mar. 16, 2017), the Court disbarred an attorney who was convicted of misdemeanor video voyeurism after he took steps to surreptitiously photograph a man who was undressing in a gym locker room, and then assaulted and tried to bribe the victim in an attempt to further conceal his wrongdoing. *Id.* at 20.

The instant case is distinguishable from *Wolff*, which involved more serious criminal activity that endangered the safety of minors. *See Wolff*, 490 A.2d at 1120 (stressing the state's compelling interest in protecting children from physically or psychologically injurious conduct as well as the fact that Respondent endangered those children in exchange for money and engaged in prostitution); *see also In re Bewig*, 791 A.2d 908, 909 (D.C. 2002) (per curiam) (finding that misdemeanor sexual contact involving a minor was a crime of moral turpitude). It is also

[1] D.C. Code § 11-2503(a) provides that when a member of the Bar is convicted of an offense involving moral turpitude, the attorney must be disbarred. A crime of moral turpitude is one that "offends the generally accepted moral code of mankind." *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (en banc). Moral turpitude is a concept reflecting society's revulsion toward conduct which deeply offends the general moral sense of right and wrong. *See In re McBride*, 602 A.2d 626, 632- 33 (D.C. 1992) (en banc).

distinguishable from *Cross*, which involved voyeurism, assault, *and* attempted bribery, and was followed by the respondent's extensive false testimony during the disciplinary hearing. *See Cross*, Board Docket No. 12-BD-086, at 10-15 (BPR July 29, 2016), *recommendation adopted*, D.C. App. No. 10-BG-200, slip op. at 1. In contrast, Respondent here has displayed an immediate and complete acceptance of responsibility, and during the long course of these proceedings, has maintained a regime of mental health treatment, which offers reassurance to this Hearing Committee. As explained in *Cross*, however, the fact that Respondent engaged in voyeurism, which inherently involves premeditated acts that violated victims' reasonable expectation of privacy, makes his misconduct more serious than that at issue in *Harkins*. *See id.*, slip op. at 19-20.

In sum, we find that Respondent's misconduct did not involve moral turpitude, and because it was not as serious as the misconduct at issue in *Wolff* and *Cross*, a moderate suspension falls within the range of sanctions that might be imposed in a contested case. The extensive mitigating factors described above also make it appropriate to stay the suspension in favor of probation with conditions designed to ensure Respondent's continued treatment. Given the extensive stipulated mitigation evidence, there is not clear and convincing evidence of a serious doubt as to Respondent's fitness to practice. *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). Such a doubt would exist if Respondent fails to adhere to the terms of probation, and thus, the agreed-upon sanction requires Respondent to prove his fitness to practice if he fails to comply with the probation terms. *See In re Fox*,

Board Docket No. 2010-D529 at 21 (BPR May 8, 2012), *recommendation adopted*, 66 A.3d 548, 550-51 (D.C. 2013) (imposing a conditional fitness requirement where the violation of probation would demonstrate that the respondent was "unable or unwilling to correct his ways"). Accordingly, the parties' agreed-upon sanction is not unduly lenient.

IV. Conclusion and Recommendation

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a two-year suspension, fully stayed in favor of two years of unsupervised probation, with the requirements that Respondent:

(1) self-certify to Disciplinary Counsel each month that he is complying the treatment directions of his psychiatrist and any other provider(s):

(2) self-certify to Disciplinary Counsel each month that he attended at least one Sexual Addicts Anonymous meeting in that month period:

(3) immediately seek counseling from a Certified Sex Addiction Therapist should his treatment regimen appear insufficient;

(4) waive privilege to the extent necessary for Disciplinary Counsel to verify his compliance with the terms of probation; and

(5) not be found to have engaged in any misconduct in this or any jurisdiction.

If Disciplinary Counsel has probable cause to believe that Respondent has violated the terms of his probation, it may seek to revoke Respondent's probation pursuant to D.C. Bar R. XI, § 3 and Board Rule 18.3 and request that Respondent be required to serve the suspension previously stayed herein, consecutively to any other discipline or suspension that may be imposed, and that his reinstatement to the practice of law will be conditioned upon a showing of fitness.

AD HOC HEARING COMMITTEE

/KW/
Kathleen Wach
Chair

/SB/
Sally Blumenthal
Public Member

/EDC/
Elizabeth Denise Curtis
Attorney Member

Dated: May 11, 2017