DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
KELLY A. CROSS,	:	
	:	
Respondent.	:	Board Docket No. 12-BD-086
	:	Bar Docket No. 2009-D476
An Administratively Suspended Member	:	
of the Bar of the District of Columbia	:	
Court of Appeals	:	
(Bar Registration No. 500189)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

Respondent Kelly A. Cross was convicted in 2009 of misdemeanor video voyeurism, in violation of D.C. Code § 22-3531(c), after surreptitiously taping another patron undressing in the locker room of a local gym. The Hearing Committee found that the facts underlying the crime did not constitute moral turpitude, but that the conduct violated Rules 8.4(b) (criminal acts reflecting adversely on honesty, fitness, or trustworthiness) and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The Hearing Committee recommended that Respondent be suspended for three years and be required to demonstrate his fitness to practice as a condition of reinstatement. Neither Disciplinary Counsel nor Respondent filed exceptions to the Hearing Committee's Report and Recommendation.

The Board considers this to be a difficult case because of its novel facts and the absence of direct precedent and has concluded, contrary to the recommendation of the Hearing Committee, that Respondent's crime involved moral turpitude on the facts. We thus recommend that Respondent be disbarred pursuant to the mandatory disbarment provision of D.C. Code § 11-2503(a). We agree with the Hearing Committee's determination that Respondent violated Rules

8.4(b) and 8.4(c), and in the event the Court disagrees with the Board's moral turpitude finding, recommend that he be suspended for one year, with a requirement to prove fitness as a condition of reinstatement for these violations, as recommended by the Hearing Committee.

I. PROCEDURAL HISTORY

On December 3, 2012, Disciplinary Counsel filed a Petition Instituting Formal Disciplinary Proceedings and a Specification of Charges alleging commission of a crime of moral turpitude pursuant to D.C. Code § 11-2503(a), as well as violations of Rules 3.4(a) (obstructing a party's access to evidence), 8.4(b) (criminal acts reflecting adversely on honesty, fitness or trustworthiness), 8.4(c) (dishonesty, fraud, deceit or misrepresentation), and 8.4(d) (serious interference with the administration of justice). Respondent failed to timely respond to the Specification of Charges.

A pre-hearing conference was held on March 13, 2013. At that time, Respondent appeared through counsel, Matthew Peed, Esquire. A hearing was scheduled for May 17 and 20, 2013. On March 13, 2013, Disciplinary Counsel filed an Amended Specification of Charges, which corrected typographical errors in the original. Respondent answered the Amended Specification of Charges on March 22, 2013.[1]

On April 24, 2013, the Board granted Disciplinary Counsel's motion for a protective order, pursuant to D.C. Bar R. XI, § 17(d) and Board Rule 11.1, prohibiting public disclosure of the

[1] By order dated March 28, 2013, the Hearing Committee accepted Respondent's late-filed Answer.

videotape Respondent took of Complainant[2] changing his clothes in a gym locker room. *See* DX L.[3]

On May 2, 2013, Respondent filed an unopposed motion to continue the hearing until sometime after August 20, 2013, because he was suffering financial difficulties, which impeded his ability to retain counsel. On May 10, 2013, the Hearing Committee granted Respondent's motion for a continuance, and during a pre-hearing conference on May 17, 2013, the hearing was continued until September 9, 2013. On August 22, 2013, the Hearing Committee disclosed that attorney member Marcie Ziegler, Esquire, previously worked at a firm with Respondent's counsel, Mr. Peed. Neither party objected to Ms. Ziegler's participation.

On April 24, 2013, Disciplinary Counsel filed its exhibits, including exhibits DX A through DX N. Pursuant to the Board's April 24 order, DX L (the videotape), was filed under seal. Disciplinary Counsel filed its witness list on May 2, 2013. Subsequently, Respondent filed his witness list, which identified Dr. David McCall, Ph.D., Respondent's counselor, as an expert qualified to testify concerning "the culture of consensual sexual encounters in Washington D.C. sports clubs and his treatment of Respondent." H.C. Rpt. at 4. Respondent also filed a motion, pursuant to Board Rule 3.2, for the issuance of a subpoena to the United States Attorney's Office for the District of Columbia ("USAO") and the Washington, D.C. Metropolitan Police Department ("MPD"), in order to obtain evidence within the possession of those entities.

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[2] Complainant's name was disclosed during these proceedings, and is included in the record. Because Complainant's identity is not material to the disposition of this case, and given the sensitive nature of this matter, this report refers to him as the "Complainant."

[3] Disciplinary Counsel's exhibits are referred to as "DX __."

Disciplinary Counsel filed a motion *in limine* to preclude or limit Dr. McCall's testimony, arguing that the testimony was not relevant and that, as required by Board Rule 7.6(a), Respondent did not provide adequate notice that he intended to raise disability or addiction in mitigation of sanction. Respondent subsequently clarified that he did not seek to introduce Dr. McCall's testimony to support a claim of disability. By order dated September 6, 2013, the Hearing Committee denied Disciplinary Counsel's motion *in limine*, without prejudice to renewal at the hearing. The Hearing Committee granted Respondent's motion to issue subpoenas to the USAO and MPD.

The hearing took place on October 24 and 25, 2013. Respondent was represented by his attorney, Mr. Peed, and Disciplinary Counsel appeared through Assistant Disciplinary Counsel Joseph N. Bowman, Esquire. Disciplinary Counsel called one witness, Complainant in the criminal matter, and introduced exhibits A through N, P, and Q. The Hearing Committee Chair sustained Respondent's objection to DX H and I, the memoranda in aid of sentencing filed by the prosecutor and Respondent in the underlying criminal action, on the grounds that the exhibits were unduly prejudicial. Disciplinary Counsel's other exhibits were admitted.

Respondent testified on his own behalf and also called Dr. McCall. Although Dr. McCall was Respondent's counselor, Respondent did not offer Dr. McCall as an expert witness to testify to a disability in mitigation of sanction; he called him only as "an expert witness . . . regarding 'the culture of consensual sexual encounters at Washington, D.C. sports clubs and his treatment of Respondent.'" H.C. Rpt. at 4; FF 51.[4] Over Disciplinary Counsel's objection, the Hearing

[4] The Hearing Committee's findings of fact are designated "FF."

Committee Chair permitted Dr. McCall to testify as an "expert in sex counseling and therapy, subject to review of the Rules of the Board prior to our preparation of [a] final report and recommendation." Tr. 194.

Dr. McCall was not a witness to the events of August 19, 2009, the day Respondent illegally filmed Complainant, but presented hearsay testimony, relating what Respondent told him about the events. During the hearing, the Hearing Committee asked Dr. McCall to produce his notes of Respondent's treatment, because Dr. McCall referred to these notes during his testimony. FF 54-55. Respondent's counsel then moved to strike Dr. McCall's testimony, to the extent it related to his "communications and treatment with [Respondent] because . . . the question [before the Hearing Committee] is just what happened on August 19." Tr. 229. Disciplinary Counsel consented to this motion, and the Hearing Committee granted it, but asked Dr. McCall to produce his notes for its review. Thus, only Dr. McCall's expert testimony remained in evidence.

In rebuttal, Disciplinary Counsel called John Marsh, an investigator with the USAO, and Charles Anderson, Senior Investigator with the Office of Disciplinary Counsel. At the conclusion of the hearing, Respondent's counsel argued that the MPD still had not completed its search for evidence in response to Respondent's subpoena. Thus, the Hearing Committee left the record open to receive Dr. McCall's treatment notes, and any evidence produced by the MPD. The hearing was adjourned until February 19, 2014.[5]

On February 10, 2014, the Hearing Committee issued a *sua sponte* order, reversing its prior ruling striking Dr. McCall's testimony concerning Respondent's treatment. The Hearing

[5] On January 16, 2014, the Hearing Committee issued an order notifying the parties that Hearing Committee Chair Thomas R. Bundy, III, had been appointed to the Board and giving them the opportunity to object to his continued participation. Neither party voiced an objection.

Committee directed that Dr. McCall's *complete* testimony be included in the record, as it was relevant to Respondent's knowledge and intent. The Hearing Committee also ordered Disciplinary Counsel to subpoena Dr. McCall to appear at the February 19, 2014, hearing and to bring any portion of his notes that memorialized Respondent's account of the August 19, 2009, incident.

When the hearing resumed on February 19, Respondent's counsel produced redacted copies of Dr. McCall's notes, which were admitted in evidence as DX R. The Chair recalled Dr. McCall, and he testified that his prior testimony as to what Respondent told him about the August 19, 2009, incident at the gym was not based on his 2009 notes of his conversations with Respondent but on what Respondent had told him immediately prior to Dr. McCall's testimony.

After closing arguments, the Hearing Committee made a preliminary, non-binding determination that Respondent had committed a violation of the disciplinary rules (*see* Board Rule 11.11), and the parties agreed to continue the hearing to permit Respondent, who did not attend the February 19 hearing, to testify in mitigation of sanction.

Another hearing date was scheduled for March 18, 2014. However, on March 11, 2014, the parties filed a joint motion to cancel that hearing and the record was closed. On April 14, 2014, Disciplinary Counsel timely filed its proposed findings of fact and conclusions of law.

On April 24, 2014, Respondent's counsel filed a motion to withdraw as counsel for Respondent. Respondent consented to the motion, but the Hearing Committee denied it for lack of good cause. The Hearing Committee ordered Respondent to file a post-hearing brief by June 11, 2014. On July 2, 2014, Respondent's counsel moved for reconsideration of the motion to withdraw, asserting that circumstances beyond his control had prevented him from filing a post-hearing brief or exploring a "different course of conduct" in accordance with Respondent's directions. *See* Counsel's Motion for Reconsideration of Motion to Withdraw (July 2, 2014).

On July 8, 2014, the Hearing Committee reconsidered its prior order and allowed Respondent's counsel to withdraw from his representation of Respondent. The Hearing Committee granted Respondent until August 5, 2014, to file a post-hearing brief, but Respondent never did so.

The Hearing Committee issued its Report and Recommendation on May 28, 2015. Neither Respondent nor Disciplinary Counsel has filed an exception.

II. FINDINGS OF FACT

Respondent was admitted to the Bar of the District of Columbia Court of Appeals on September 15, 2006. FF 1. In July 2009, Respondent moved to Washington, D.C., with his partner, after completing a two-year work assignment in Dusseldorf, Germany. FF 3-4. Respondent and his partner were living in temporary housing offered by his employer, and were looking for an apartment to rent. FF 4. Respondent hoped that he would be offered a permanent position with his firm, but was also seeking alternative employment. *Id*. Respondent's partner, a Polish citizen, was attempting to obtain an H1-B visa. *Id*.

A. Respondent's Illegal Filming of Complainant

Respondent and his partner planned to participate in a civil union ceremony, scheduled for August 21, 2009. FF 3. Because he was "stressed" by the pending civil union ceremony, Respondent decided to seek sexual partners at a local sports club, a practice Respondent referred to as "cruising." FF 5. Thus, on August 19, 2009, Respondent went to the Washington Sports Club, a gym located at 738 7th Street, N.W., Washington, D.C. ("WSC"). FF 6.

Many of the essential facts concerning Respondent's conduct are not in dispute. Respondent brought a video camera to the gym, which was concealed in a toiletry bag. FF 19.

Respondent cut a small hole in the side of the toiletry bag, and the camera was fixed within the bag so that the camera lens lined up with the hole. FF 19.

In the WSC locker room, Respondent encountered Complainant, another gym patron, who was changing from street clothes into workout clothes. FF 19; Tr. 37. Respondent positioned himself behind Complainant and used his video camera to record a 20-second video of Complainant undressing, including photographing Complainant's buttocks and genitals. FF 6, 19, 45. Because Respondent's camera was concealed within his bag, Complainant was not aware that he had been filmed. FF 19.

B. Respondent's Altercation with Complainant

After Complainant finished dressing, he walked to the toilet area of the locker room, entered a middle toilet stall, and sat on the toilet. FF 20. The latch on that stall was defective, and the door did not close properly. *Id*. Respondent followed Complainant into the toilet area, and entered the neighboring stall. FF 21. Respondent slammed the door of his stall and placed the toiletry bag containing his camera on the floor between the two stalls, although the camera was not recording. *Id.* Respondent kept his hand on the toiletry bag, and slowly moved it toward Complainant. *Id*. Complainant noticed that a hole had been cut in the side of the bag and could see a camera lens pointing outward through the hole. *Id*. Complainant grabbed the toiletry bag, opened it, moved the toiletries in the bag, and discovered the camera. FF 22.

Crediting Complainant's testimony, the Hearing Committee found that after Complainant grabbed the toiletry bag, Respondent went into Complainant's toilet stall and demanded the bag back. FF 23. Complainant, still seated on the toilet, held on to the bag "like a football." *Id*. Although Complainant perceived Respondent to be a smaller man, Complainant felt fearful because he believed Respondent was upset and "crazy or something." *Id*. Complainant stood up

to pull up his pants, still holding on to the bag, and Respondent "lunged" at him. FF 24. Complainant forced Respondent out of the stall, and toward the sink area. *Id*. Complainant held Respondent against the sinks and told another gym patron to call the police. FF 26. At some point during the scuffle, Complainant suffered a bruise to his right forearm. FF 25.

Complainant testified that Respondent then begged him not to call the police and offered Complainant $1,000 if he would give the bag back. FF 26, 33. When the police arrived, Complainant gave them the toiletry bag and its contents. The responding police officer retrieved the camera and reviewed the recording. The officer told Complainant there was no recording of him in the toilet stall, as Complainant had believed, but showed Complainant the video of him changing clothes. FF 45.

C. Respondent's Arrest and Guilty Plea

Respondent was not arrested at that time. FF 45. Six days later, on August 25, 2009, police visited Respondent's law firm in order to execute a warrant for his arrest. FF 47. However, Respondent was moving apartments that day and was not in the office. *Id*. Respondent turned himself in the following morning, and was charged with video voyeurism and assault. *Id*.

On September 16, 2009, Respondent pleaded guilty in the Superior Court of the District of Columbia to one misdemeanor count of video voyeurism, in violation of D.C. Code § 22-3531(c). FF 48. Pursuant to a plea agreement, Respondent was sentenced to 180 days of incarceration, with the sentence stayed in favor of three years of probation, during which time Respondent was to be supervised by the sex offender unit of the Court Services and Offender Supervision Agency. FF 49. During the period of his probation, Respondent was prohibited from joining a gym, owning a camera or camcorder, or utilizing any social networking sites (such as Craigslist). *Id*. He was also ordered to stay away from Complainant. *Id*.

D. The Hearing Committee's Credibility Findings

The Hearing Committee found that Respondent testified falsely in several instances. *See* FF 6-17; FF 27-34; FF 35-44. The Hearing Committee's credibility determinations were based on its assessment of Respondent's demeanor at the hearing, and on the fact that his testimony was largely unsupported or was contradicted by other evidence. The Hearing Committee credited Complainant's testimony in full, based on its assessment of Complainant's sincere demeanor and the fact that Complainant's testimony was consistent with the testimony of other witnesses.

The Board adopts most of the Hearing Committee's credibility findings about Respondent, as supported by substantial evidence in the record, but does not adopt others, as explained below.

1. The Hearing Committee's Finding that Respondent Testified Falsely about the Basis for His Actions

Respondent testified that on the morning of August 19, 2009, before going to WSC, he accessed Craigslist on his computer in order to locate other men who would be at WSC and who might be interested in engaging in sexual activity. Tr. 78. One of the men with whom he allegedly corresponded was a man who described himself as a "bear," and who posted a photo of himself with his body visible but his face blurred. FF 8-9. Respondent testified that he could see that the man was a white male with a build similar to Complainant, who had a shaved head and beard like Complainant's. FF 9. Respondent said he told the man he would be in the sauna with a black toiletry bag. *Id*.

Respondent testified that he arrived at WSC around noon, but did not find the expected Craigslist correspondent. FF 10. Respondent stayed at WSC for approximately two hours, during which time he had "a few encounters" with other men, some of whom had previously exchanged messages with Respondent. *Id*. Respondent produced the camera during these encounters, and no one objected. *Id*. Several hours after he arrived, Respondent saw Complainant. Respondent said

he thought Complainant might be the self-described "bear" with whom he had corresponded, and thus focused on Complainant in an attempt to determine whether Complainant was interested in having sex with him. FF 11. Respondent testified that he decided to film Complainant for his own interest and possibly to show Complainant, if Complainant was interested. FF 13. It is undisputed that Complainant did not indicate in any way that he was interested in having sex with Respondent.

Respondent offered the testimony of Dr. David McCall, Ph.D., in support of his account. Respondent sought treatment from Dr. McCall, a counselor, after he was arrested. FF 51. After consulting his treatment notes, Dr. McCall testified that Respondent had told him that he filmed Complainant because he believed that Complainant was an individual Respondent had met on Craigslist and agreed to meet at WSC that afternoon for the purpose of engaging in sexual activity. FF 53. However, Dr. McCall's notes did not contain anything to corroborate his testimony about the Craigslist contact. FF 57. When questioned by the Hearing Committee, Dr. McCall testified that he did not independently recall Respondent telling him about the Craigslist contact during their treatment sessions. He conceded that he had talked to Respondent before the hearing, and Respondent may have said something about the Craigslist contact at that time. FF 58. Based on the foregoing, the Hearing Committee found that Dr. McCall's testimony was not reliable. FF 59.

The Hearing Committee found that Respondent's testimony about his purported Craigslist correspondent and other encounters at WSC was false, and intended to justify and minimize his actions with respect to Complainant. FF 17. In support of its conclusion, the Hearing Committee relied on its assessment of Respondent's demeanor and the fact that Respondent "had not previously shared [the story] with anyone, not the police, not the sentencing judge, not even [psychiatrist] Dr. McCall during treatment." H.C. Rpt. at 10.

We agree with the Hearing Committee's assessment that Respondent's testimony lacked credibility. The Hearing Committee was uniquely positioned to assess Respondent's demeanor while testifying, and appropriately found that Respondent testified dishonestly based on his failure to discuss the Craigslist story with his counselor, Dr. McCall, in the aftermath of the incident. Based on the foregoing, the Board finds that there is substantial evidence in the record to support the Hearing Committee's finding that Respondent testified falsely about his purported correspondence with individuals he found on Craigslist, prior to arriving at WSC on August 19, 2009. [6]

2. The Hearing Committee's Finding that Respondent Testified Falsely about the Camera-Bag Arrangement

Respondent's toiletry bag and camera were not introduced in evidence. FF 35. Respondent testified that he happened to bring a digital camera with him to WSC because he had been apartment hunting with his partner. FF 10. Having brought the camera, Respondent testified that he only intended to record consensual encounters, but concealed his camera in the toiletry bag

[6] Although we agree with the Hearing Committee's ultimate credibility finding, we disagree with some of the bases for its determination. We find that the Hearing Committee erroneously considered Respondent's failure to mention the Craigslist correspondence to the police or in court during his plea and sentencing hearings. First, there is no evidence that the police asked Respondent to explain his actions on the date of the incident. Even had they done so, Respondent had the right under the Fifth Amendment to remain silent. Thus, Respondent's failure to offer his explanation about the Craigslist contacts cannot be held against him. Second, at the plea and sentencing hearings, the court and prosecutor focused on Respondent's violation of the video voyeurism statute, and not on the Craigslist correspondence. DX G; DX J. Thus, during the plea colloquy, the prosecutor provided a brief recitation of the facts. The court then asked Respondent to confirm the accuracy of the proffer. Respondent agreed with the facts but added, "Generally, that's half the story." DX G at 10. The court did not question Respondent further. Indeed, what Respondent did or did not say during these hearings may have been on the advice of counsel, and Respondent might have jeopardized his plea agreement with the government by introducing new facts. In addition, the Hearing Committee improperly relied in part on sentencing memoranda filed with the court in the criminal case, exhibits that had been excluded from evidence by the Hearing Committee as unduly prejudicial. *See* FF 14.

because he felt the camera was too conspicuous to hold openly in the sauna. FF 9-10. Respondent asserted that he secured the camera in the bag by using an "Elmer's glue stick" he borrowed from the gym management office located "right off of the locker room" and that he cut a hole in the side of the bag using his keys. FF 42; Tr. 85.

Respondent's testimony was contradicted by both Complainant and John Marsh, an investigator with the USAO. Complainant testified that the camera was "affixed to the side of the bag where [he] could see that [the bag] was cut open where the hole was and [the camera] was fastened on there, either by tape or some sort of Velcro." FF 36. Complainant described the adhesive as "actual Velcro tape that you can buy at Home Depot . . . [or] black electrical tape," and said he "could see it running along the side of the camera which was affixed on the side of the bag." FF 37. Complainant further testified that the hole in the bag looked "pretty circular" and "clean cut." *Id*.

Complainant's testimony was corroborated by the USAO Investigator Marsh, who processed the evidence in Respondent's criminal case. Mr. Marsh testified that the camera was "pretty permanently affixed" inside the bag by "a heavy two-sided tape . . . there was a very heavy tape material that held the camera permanently against the inside of the bag so the lens would stay in there." FF 39. Mr. Marsh stated that the hole in the side of the bag appeared as though it was made by "a razor blade or something hot," and that he "doubt[ed] that you would get that good of a cut with a key." *Id*.

Based on the foregoing, the Hearing Committee found that Respondent testified falsely about the camera-bag arrangement. It concluded that Respondent had secured the camera in the bag before arriving at WSC. FF 44. The Hearing Committee's finding is supported by substantial evidence in the record.

3. The Hearing Committee's Finding that Respondent Testified Falsely about the Altercation with Complainant

The Hearing Committee found that Respondent testified falsely about his altercation with Complainant in the toilet area, because his testimony "ignore[d] common sense," was internally inconsistent, and was contradicted by Complainant's more credible testimony. H.C. Rpt. at 18-21. We concur with the Hearing Committee's finding.

Respondent and Complainant agree on the sequence of events, but they disagree as to who was the aggressor. As explained above, Complainant testified that after he picked up Respondent's toiletry bag and camera from the floor of the toilet stall, Respondent rushed out of his own stall, forced open the door to Complainant's stall, and shut the door behind him, so that Complainant was trapped. FF 23. Respondent then lunged for the bag. Complainant testified that he was fearful of Respondent because he was extremely agitated. *Id*. Complainant was able to resist Respondent's attempts to get the bag and pushed Respondent out of the toilet stall. FF 24. Complainant retained control of the bag and continued to struggle with Respondent. FF 25. Complainant asked a bystander to call the police and held Respondent against the sinks until help arrived. FF 26. Complainant testified that, during this time, Respondent begged him not to call the police and offered him $1,000 if he refrained from doing so. *Id*.

Respondent's testimony described a very different scenario. He stated that after Complainant picked up the toiletry bag and discovered the camera, Respondent could tell that Complainant "was getting really upset." FF 29. Respondent then exited his stall and attempted to calm Complainant by talking to him through the crack in the door of Complainant's stall. *Id*. Respondent conceded that the door to Complainant's stall opened, but denied pushing it open or entering Complainant's stall. *Id*. Instead, Respondent claimed he had merely leaned on the door, which caused the faulty latch to give way. *Id*. After the stall door opened, Respondent said

Complainant told him to "get the fuck out." FF 30. Respondent testified that after their initial exchange of words, Complainant remained in the stall for "maybe two minutes," and Respondent waited by the sinks because he was not sure whether Complainant was dismayed by the camera, but was nonetheless interested in a sexual encounter. FF 31.

The Hearing Committee properly credited Complainant's testimony, and discredited Respondent's testimony to the extent it was contradicted by Complainant. First, Respondent's account was internally inconsistent. He denied entering Complainant's toilet stall, but testified that Complainant told him to "get the fuck out" (of some unspecified place). Notwithstanding the ambiguity of Complainant's statement, the Hearing Committee found that Respondent's testimony only made sense if Respondent had entered Complainant's stall. FF 30. As the Hearing Committee found, Respondent's testimony that Complainant then waited in the stall for two minutes before exiting and confronting Respondent also does not make sense, given that Respondent also testified that Complainant was "really upset" and had just demanded that Complainant get away from him. FF 31.

Respondent generally cast Complainant as the aggressor, denying that he lunged at Complainant to retrieve the toiletry bag, and testifying that he believed Complainant was "trying to gin up this brouhaha in the locker room" by telling others that Respondent had been filming him. FF 33. Respondent also denied offering Complainant money if he would not call the police. *Id*. The Hearing Committee did not credit Respondent's statements, because they found Complainant's testimony more credible.

For the foregoing reasons, we find that there is substantial evidence in the record to support the Hearing Committee's credibility findings with respect to the post-filming altercation between Respondent and Complainant.

4. The Hearing Committee's Finding that Respondent Previously Engaged in Similar Misconduct

The Hearing Committee found, as an aggravating factor, that Respondent had previously recorded undressed men without their consent. H.C. Rpt. at 2, 17, 42. However, Respondent was never directly asked, either by Disciplinary Counsel or the Hearing Committee, whether he had surreptitiously photographed undressed men prior to August 19, 2009, and there was no clear and convincing evidence that he ever did so.

For example, Complainant testified that after their altercation, he asked Respondent, "How do I know you haven't done this before to me?" FF 26. Respondent replied that it was his first time "doing it here." *Id*. Respondent testified that he meant that it was his first time taping anyone that day without their consent, and denied taping anyone anywhere prior to that day. *Id*. However, the Hearing Committee found that Respondent's testimony was contradicted by statements made during his sentencing hearing, when Respondent said, "I knew I had a problem. I knew that my behavior had been escalating. *It* was the sort of problem I was always ashamed to try to go get help for. I didn't know where to go. You know, what sort of . . . I was embarrassed to admit *it*. And this incident sort of just brought this out into the most public lights. So I'm sorry. You know, I can only say that *it* won't happen again. *It* has ceased." *Id*. (emphases added). The Hearing Committee interpreted these statements as admissions by Respondent that he had engaged in video voyeurism previously. *Id*. Based on the foregoing, the Hearing Committee found that Respondent testified falsely that he had not previously taped anyone without their consent. *Id.*

We disagree with the Hearing Committee's finding, and conclude that Respondent's testimony that he "had a problem" and engaged in escalating behavior does not constitute clear and convincing evidence that Respondent previously taped other men without their consent. *See In re Cater*, 887 A.2d 1, 25 (D.C. 2005) (facts in aggravation of sanction must be proved by clear

and convincing evidence). Although the Hearing Committee questioned Respondent, it never clarified whether Respondent's "problem" was referring to "cruising" gyms, seeking to have sex with strangers, or engaging in the consensual filming of others – or video voyeurism. The vague references to some unspecified circumstances or act as "it" does not support the Hearing Committee's finding. Thus, we do not consider Respondent's alleged recidivism as an aggravating factor.

III. CONCLUSIONS OF LAW

The Board finds that Respondent's crime involved moral turpitude on the facts, that Respondent violated Rules 8.4(b) and 8.4(c), and that Disciplinary Counsel has not demonstrated by clear and convincing evidence that Respondent violated Rules 3.4(a) and 8.4(d).

A. Respondent's Crime Involved Moral Turpitude on the Facts and Violated Rule 8.4(b).

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). "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).

In the few moral turpitude cases involving sex-based offenses, the Court has held that a crime involves moral turpitude where "[t]he participant's desire for . . . gratification [exceeded] his ability to demonstrate a public respect and appreciation of existing societal morals and values."

In re Wolff, 511 A.2d 1047 (D.C. 1986) (en banc) (adopting the opinion of *In re Wolff*, 490 A.2d 1118 (D.C. 1985) (citation omitted)). Thus, in *Wolff*, the Court found that the respondent's conviction of distribution of child pornography involved moral turpitude, because the respondent sought out sexual gratification and attempted to profit by selling materials that exploit children. *Id*. at 1119-20. Similarly, in *In re Bewig*, 791 A.2d 908 (D.C. 2002) (per curiam), the Court found that the respondent's conviction of misdemeanor sexual contact with a minor was a crime of moral turpitude on the facts. In *In re Rehberger*, 891 A.2d 249 (D.C. 2006), the Court found moral turpitude on the facts where a respondent was convicted of misdemeanor sexual battery and simple battery after he detained and physically abused a female client who had sought respondent's advice in a divorce case. The Court explained that "misdemeanor sexual convictions" may involve moral turpitude where the victim is placed in a vulnerable position by being "subjected to [the respondent's] forceful, unwelcome, sordid sexual conduct." *Id*. at 252.

Thus, in cases where the Court has determined that a sex-based offense involves moral turpitude, it has found that the respondent knowingly exploited, intruded upon, or invaded the privacy of another person in the interest of his own sexual gratification. By contrast, the Court found no moral turpitude on the facts where a respondent was convicted of carnal knowledge, where there was not clear and convincing evidence that the respondent knew or should have known that the victim was not of the age of consent. *In re Lovendusky*, No. 84-1672 (D.C. April 4, 1986).

The crime of misdemeanor video voyeurism, in violation of D.C. Code § 22-3531(c)(1), provides that it is unlawful "for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is (A) Using a bathroom or rest room; (B) Totally or partially undressed or changing clothes; or (C) Engaging in sexual activity." The Hearing Committee found no moral turpitude on the facts, noting that the only cases in which the

Court has found that a sex-based crime constituted moral turpitude "involved misconduct that included forced sexual touching" of victims who were "arguably more vulnerable than Complainant." H.C. Rpt. at 35 (citing *Bewig*, 791 A.2d 908; *Rehberger*, 891 A.2d 249). The Hearing Committee further concluded that Respondent's offense did not rise to the level of moral turpitude because of the common expectation in today's society that digital cameras and recording devices are everywhere. FF 36.

The Board has independently examined the moral turpitude question, as required by the Court's order referring this matter to the Board, and notwithstanding that Disciplinary Counsel did not object to the Hearing Committee's finding of no moral turpitude. While we believe the question to be close, the Board has determined that the facts underlying Respondent's crime support a finding of moral turpitude, requiring his disbarment under D.C. Code § 11-2503(a).

First, Respondent's surreptitious filming was premeditated; he did not merely take out his camera on the spur of the moment. Rather, before arriving at the gym, he securely affixed the camera to the inside of the bag using heavy duty tape and used a sharp blade to neatly cut a hole in the bag for the lens so that he could film without being detected.

Second, Respondent brought the bag and video camera into the locker room, in contravention of club policy and a clearly visible sign that prohibited video recording. We disagree with the Hearing Committee's observation that the sign reflects a societal recognition that "a camera can be expected to be everywhere," thus making the filming less culpable. H.C. Rpt. at 36. To the contrary, the sign put Respondent on notice of the club's prohibition on filming, and provided gym patrons some level of assurance that they would not be filmed while using the locker room. Tr. at 244-45.

Third, Respondent filmed Complainant from behind, with the camera concealed, so there was virtually no way Complainant could have known there was a camera in his changing area.

Fourth, the seriousness of Respondent's crime is aggravated by his subsequent actions. Respondent followed Complainant into the toilet area, entered the stall next to him, and started pushing his toiletry bag into Complainant's stall.[7] After Complainant discovered the camera, Respondent assaulted Complainant in an attempt to avoid the consequences of his actions. Respondent pushed into Complainant's bathroom stall, effectively cornering Complainant in a vulnerable position, in an attempt to retrieve the bag. During the scuffle, Complainant suffered a bruise on his arm. Then, after the scuffle, Respondent offered Complainant $1,000, in an attempt to buy his silence.

The Board recognizes that this was a fast-moving situation and that Respondent may have offered the $1,000 in a state of panic. However, Respondent's attempt to induce Complainant to remain silent – even if in the heat of the moment – was a fundamental violation of Respondent's obligations as an attorney, a factor we have considered in our moral turpitude finding. *Cf. Lovendusky*, No. 84-1672 at 2 (the respondent's attempt to persuade statutory rape victim to lie to police about the nature of their relationship, several months after the fact, was done in a state of panic, was not discussed in the moral turpitude analysis, and was not found to be an aggravating factor on sanction).

[7] It is undisputed that the camera was turned off at this time and that Respondent did not record Complainant in the toilet. Respondent testified that he pushed the bag with the camera into Complainant's stall in an attempt to signal that he wanted to engage in sexual activity with Complainant. Tr. 90-92; FF 27.

In short, Respondent filmed Complainant and essentially stalked him through the locker room and the bathroom in pursuit of his own sexual desires, despite the fact that he knew there was a good chance Complainant was simply there to use the gym. While *Rehberger* and *Bewig* involved sexual assaults, and this case did not, here Respondent violated the Complainant's reasonable expectation of privacy by surreptitiously filming him changing clothes. As in *Wolff*, *Rehberger*, and *Bewig*, Respondent sought out sexual gratification at the expense of Complainant's legitimate and reasonable privacy interest. Respondent compounded the seriousness of his intrusion upon Complainant by assaulting him in an attempt to get the toiletry bag back and then offering Complainant money in order to avoid police involvement. Based on the foregoing, and the criteria set forth by the Court in other cases involving sex-based offenses, the Board finds that Respondent's crime involves moral turpitude within the meaning of D.C. Code § 11-2503(a).

B. Respondent Violated Rule 8.4(b).

Rule 8.4(b) provides that a lawyer shall not "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The Hearing Committee found that Respondent violated Rule 8.4(b) because he committed the crimes of video voyeurism and assault. H.C. Rpt. at 36-37.

In *In re Harkins*, 899 A.2d 755 (D.C. 2006), the Court found that a sexual assault violated Rule 8.4(b). In that case, the respondent was convicted of misdemeanor sexual abuse after he groped a woman's leg and buttocks on a Metro train. After the woman objected and attempted to move away from the respondent, he followed her through the car, attempted to resume conversation with her, and ultimately dropped his business card in her newspaper and urged her to "[g]ive me a call sometime, baby." *Id*. at 758. The Court found that the respondent violated Rule 8.4(b) by "harass[ing]" the victim, and touching her in a "sexually inappropriate manner." *Id*. at

760. The Court explained: "[d]espite not directly implicating honesty or trustworthiness, sexually abusive contact, because of its inherently violent nature, calls into question one's fitness as a lawyer and thus falls within the ambit of Rule 8.4(b)." *Id*.

The Board recognizes that there was no sexual contact here, and thus Respondent's crime was not inherently violent, but Respondent's violation of Complainant's privacy and physical space was invasive, sexually inappropriate, and threatening, and thus comparable in scope and nature to the misconduct at issue in *Harkins*. The Board agrees with the Hearing Committee that Respondent's crime of video voyeurism constitutes a violation of Rule 8.4(b).

The Board also agrees with the Hearing Committee that Respondent violated Rule 8.4(b) by committing both attempted battery assault and assault with intent to frighten Complainant, in violation of D.C. Code § 22-404, although Respondent was not convicted of assault. The absence of a criminal conviction does not preclude a finding that Respondent violated Rule 8.4(b). *In re Slattery*, 767 A.2d 203 (D.C. 2001).

Pursuant to the Criminal Jury Instructions, the crime of attempted-battery assault requires proof of the following elements:

> (1) [The defendant], with force or violence, injured [or attempted or tried to injure] another person; (2) S/he intended to use force against another person; and (3) At the time, [the defendant] had the apparent ability to injure [the other person].

The crime of assault with intent to frighten requires proof of the following elements:

> (1) [The defendant] committed a threatening act that reasonably would create in another person a fear of immediate injury; (2) That the defendant intended to cause injury or create fear in another person; and (3)At the time, [the defendant] had the apparent ability to injure [another] person.

Criminal Jury Instruction 4.100.

Crediting Complainant's testimony concerning the altercation with Respondent, the Hearing Committee properly found that Respondent committed attempted battery and assault with

intent to frighten when he entered Complainant's toilet stall and lunged at him in order to retrieve his bag by force, resulting in a bruise to Complainant's arm during the altercation. We agree with the Hearing Committee that a violent offense, such as assault, reflects adversely on an attorney's fitness, and constitutes a violation of Rule 8.4(b). *In re Jacoby*, 945 A.2d 1183, 1200 (D.C. 2008) (finding that the crime of domestic violence violates Rule 8.4(b)).

C. Respondent Violated Rule 8.4(c).

Rule 8.4(c) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead. . ." *In re Shorter*, 570 A.2d 760, 767 n.12 (D.C. 1990). To establish deceit, Disciplinary Counsel must show that the respondent had knowledge of the falsity of his words or actions, but it is not necessary to show that the respondent intended to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989). The Hearing Committee found that Respondent engaged in deceit by bringing a concealed camera into the locker room, which "conveyed a false sense of privacy to anyone undressing in the locker room," and by surreptitiously filming Complainant. H.C. Rpt. at 39.

We agree. As the Hearing Committee explained, Respondent's concealment of the video camera in his toiletry bag deceived Complainant into believing that he could change clothes without being filmed. Regardless of whether Respondent intended to deceive Complainant, or intended only to use the video as part of a contemplated sexual encounter with Complainant, Respondent deliberately used the toiletry bag to hide the fact that he was filming in the locker room. Thus, Respondent violated Rule 8.4(c).

D. Disciplinary Counsel Did Not Establish Violations of Rules 3.4(a) and 8.4(d).

The Board agrees with the Hearing Committee that Disciplinary Counsel failed to establish by clear and convincing evidence that Respondent violated Rules 3.4(a) and 8.4(d), but for reasons different than those set forth by the Hearing Committee.

Rule 3.4(a) provides that "a lawyer shall not obstruct another party's access to evidence or alter, destroy, or conceal evidence . . . if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding." Comment [3] to the Rule 3.4(a) explains that the "test is whether destruction of [the] document is directed at concrete litigation that is either pending or almost certain to be filed."

Rule 8.4(d) prohibits an attorney from "engag[ing] in conduct that seriously interferes with the administration of justice." In order to prove a violation of Rule 8.4(d), Disciplinary Counsel must establish that the respondent (1) engaged in improper conduct; (2) which bore directly upon the judicial process with respect to an identifiable case or tribunal; and (3) the conduct tainted the judicial process in more than a *de minimis* way. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996).

Before the Hearing Committee, Disciplinary Counsel argued that Respondent violated these rules when he attempted to retrieve the toiletry bag and camera from Complainant, and when he offered Complainant $1,000 to not call the police. The Hearing Committee found that because Respondent never retrieved the toiletry bag from Complainant, he did not interfere with the police investigation or restrict access to the evidence. The Hearing Committee explained that there was no evidence as to what Respondent would have done with the bag and camera if he had retrieved them, and concluded that Respondent did not violate Rule 3.4(a) or 8.4(d). *See* H.C. Rpt. at 33.

Although we agree with the Hearing Committee's conclusions, we disagree with its reasoning. Immediately after Respondent unsuccessfully attempted to grab the camera and bag

from Complainant, Respondent offered Complainant $1,000 and begged him not to call the police. FF 26. Respondent's offer to pay Complainant in order to avoid police involvement constitutes evidence that Respondent wanted the bag back in order to secrete it from the police.

However, Disciplinary Counsel failed to prove that at the time Respondent grabbed for the bag, he knew or should have known that the bag would be evidence in an "imminent proceeding," as required to establish a violation of Rule 3.4(a). Although Respondent may have feared apprehension by the police, there is no clear and convincing evidence that criminal charges were "almost certain to be filed," (*see* Comment [3] to Rule 3.4(a)). Indeed, even after the police arrived at WSC and reviewed the video, they did not interrogate Respondent or place him under arrest. FF 45.

For the same reason, Disciplinary Counsel did not prove that Respondent violated Rule 8.4(d), which requires that the Respondent's improper conduct bear directly upon the judicial process with respect to an identifiable case or tribunal. *Hopkins*, 677 A.2d at 61. No identifiable case or tribunal existed at the time Respondent was involved in the altercation with Complainant. Furthermore, we agree with the Hearing Committee that Respondent's conduct did not taint any judicial process in more than a *de minimis* way, an additional requirement for proving a violation of Rule 8.4(d). *See id.* at 60-61. Respondent never retrieved the bag from Complainant, the evidence was promptly turned over to the police at the scene, and Respondent was convicted of the video voyeurism offense.

Thus, we agree with the Hearing Committee that Disciplinary Counsel has failed to prove by clear and convincing evidence that Respondent violated Rules 3.4(a) and 8.4(d).

IV. RECOMMENDED SANCTION

Under D.C. Code § 11-2503(a), disbarment is the mandated sanction for an attorney who commits a crime of moral turpitude. We thus recommend that Respondent be disbarred.

In the event the Court disagrees with the Board's conclusion on moral turpitude, the Board recommends that Respondent be suspended for one year with a fitness requirement for his violation of Rules 8.4(b) and 8.4(c), as explained below.

The standard for imposing a disciplinary sanction is set forth in D.C. Bar R. XI, § 9(h)(1), which provides for the imposition of discipline that does not "foster a tendency toward inconsistent dispositions for comparable conduct or [is not] otherwise [] unwarranted." In determining an appropriate sanction, the Court takes into account a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty and/or misrepresentation; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct; and (7) circumstances in aggravation and mitigation of the misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

In *Harkins*, the respondent was suspended for 30 days for a violation of Rule 8.4(b). 899 A.2d 755. In *Jacoby*, the respondent was suspended for 60 days for a violation of Rule 8.4(b), in a reciprocal discipline case based on a conviction for aggravated assault after he hit and choked his wife, threw her into a wall and dislocated her shoulder. 945 A.2d at 1193, 1195. The Court rejected the imposition of identical reciprocal discipline of a public censure, finding that Jacoby's misconduct "warrant[ed] substantially different discipline" because a public censure was below the range of sanctions imposed in the District of Columbia for a violation of Rule 8.4(b). The

Court explained that Jacoby's conduct was intentional and serious, as Jacoby's wife sustained extensive injuries which required months of physical therapy. *Id*.

The Court imposed a six-month suspension in *Lovendusky*, where the respondent violated the predecessor to Rule 8.4(b), and committed a "serious crime" under D.C. Bar R. XI, § 10(b), based on a conviction of carnal knowledge where the respondent was unaware that the victim was underage.[8]

Thus, the sanction for cases involving comparable sex-based offenses or assaults range between 30-day and six-month suspensions. Here, however, Respondent compounded his misconduct by his repeated false testimony to the Hearing Committee in an attempt to avoid responsibility. *See In re Silva*, 29 A.3d 924, 926 (D.C. 2011). Based on the seriousness of Respondent's misconduct, and Respondent's false testimony at the hearing, if the Court finds no moral turpitude on the facts, we recommend that Respondent be suspended for one year.

For the reasons set forth by the Hearing Committee, we also find that there is clear and convincing evidence of a serious doubt regarding Respondent's fitness to practice. *See Cater*, 887 A.2d at 6; H.C. Rpt. at 44-46. We thus recommend that a fitness requirement should be imposed.

[8] The respondent in *Lovendusky* actually served an interim suspension of one year before the Court imposed final discipline. *Lovendusky*, No. 84-1672 at 2.

V. CONCLUSION

For the reasons set forth above, the Board recommends that the Court disbar Respondent pursuant to D.C. Code § 11-2503(a) based on his conviction of a crime that involves moral turpitude on the facts. If the Court disagrees and finds that the crime did not involve moral turpitude, the Board recommends that the Court suspend Respondent for one year, with a requirement that he demonstrate fitness as a condition of reinstatement, for his violations of Rules 8.4(b) and 8.4(c).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /MLS/
Mary Lou Soller

Dated: July 29, 2016

All members of the Board join in this Report and Recommendation, except Mr. Bundy and Mr. Carter, who are recused.