DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
WAYNE R. ROHDE,	:	D.C App. No. 05-BG-1141
	:	Board Docket No. D347-05
Respondent.	:	Bar Docket No. 2005-D347
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 421213)	:	

REPORT AND RECOMMENDATION OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This matter concerns the scope of the moral turpitude inquiry under D.C. Code § 11-2503(a) and the related case law, and the application of *Kersey* mitigation to both the moral turpitude question and the imposition of final discipline for Respondent's conviction of a serious crime, as defined by D.C. Bar R. XI, § 10(b). On January 16, 2015, Hearing Committee Number Three issued its Report and Recommendation and found that Bar Counsel had failed to establish that Respondent committed a crime of moral turpitude within the meaning of the statute when he fled the scene following his head-on collision with another vehicle and thereafter pleaded guilty to felony hit and run, in violation of Code of Virginia § 46.2-894. The Hearing Committee instead determined that Bar Counsel had established that Respondent violated Rule 8.4(b) and that he was convicted of a "serious crime" within the meaning of D.C. Bar R. XI, § 10(b). The Hearing Committee recommended that Respondent be suspended for two years, with a fitness requirement, but stayed the suspension pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987), and recommended that Respondent be placed on probation for three years, with conditions.

Bar Counsel excepted to the Hearing Committee's Report and Recommendation, including its conclusion that Respondent's conduct did not constitute moral turpitude on the facts. Bar

Counsel further contended that even if Respondent's conduct did not constitute moral turpitude, the Hearing Committee improperly applied *Kersey* to mitigate the sanction to include a period of probation. Upon our review of the entire record, and our consideration of the parties' oral arguments on Bar Counsel's exceptions, we adopt the Hearing Committee's Findings of Fact as supported by substantial record evidence and its Conclusions of Law, which are well-grounded in precedent and the facts. We also adopt the Hearing Committee's recommendation as to the sanction, including the conditions of probation.

SUMMARY OF THE FACTS

Respondent was admitted to the District of Columbia Bar on November 15, 1989. That same year, he began working as an associate for the law firm Dow, Lohnes & Albertson, PLLC ("DLA"). In 1991, Respondent joined a new firm, Sher & Blackwell LLP, that his supervisors at DLA had formed. He continued to practice at Sher & Blackwell (now Cozen O'Connor P.C.) through July 2013. As of October 20, 2004, the firm's office was located at 1850 M Street, N.W. in the District of Columbia. FF 1-5.[1]

A. The Events of October 20, 2004

After leaving work on the evening of October 20, 2004, Respondent joined two friends at Rumors, a bar located on the corner of 19th and M Streets, N.W., across the street from Respondent's office. While at Rumors, Respondent consumed a large quantity of alcohol, including beer and shots of liquor. FF 7-8. At 7:37 p.m., after having been at Rumors for approximately one to two hours, Respondent paid a $34.27 bar tab using his American Express

[1] Hearing Committee Number Three's Report and Recommendation will be cited as HR at --; the Findings of Fact as FF --; Bar Counsel's Exhibits as BX --; Respondent's Exhibits as RX --; the transcript of the hearings on December 11 and 12, 2007 as TR I at --; and the transcript of the hearing on January 15, 2008 as TR II at --.

card, adding a $10 tip and correctly calculating the total of $44.27. FF 9; RX 6. Respondent remained at Rumors until approximately 11:30 p.m. FF 10.

Upon leaving Rumors, Respondent walked to the parking garage under his office, using his key card to gain access to the garage. He located his Jeep Cherokee, drove to the parking garage's exit, and used his key card again to leave the garage. FF 11. He began to head to his home in Arlington, Virginia, taking his usual route which included driving through D.C., passing over the Teddy Roosevelt Bridge, merging onto Interstate 66, and then taking Exit 73 for Lee Highway and continuing west on Lee Highway in Arlington, Virginia. FF 12. Respondent had traveled this route from his office to his home nearly every day for twelve years, including hundreds of times after he had been drinking for several hours. FF 14.

As he headed home that evening, and was near the intersection of Lee Highway and N. Taylor Street in Arlington, Respondent collided head-on with a car driven by Elvira Banks. Ms. Banks' car was totaled in the collision, and Respondent's car suffered significant front-end damage. After the collision, Respondent backed his car away from the scene, and then drove to his home, which was approximately four to five blocks away. FF 15-18. Respondent did not attempt to render assistance to Ms. Banks, and did not report his name, address, driver's license number, or vehicle registration number to law enforcement authorities or to Ms. Banks prior to leaving the scene. FF 22.

Instead, Respondent drove home with a flat front right tire and the rim exposed. Sparks were flying from his tire rim. FF 19. Upon arriving home, Respondent parked his car in the driveway of his house. FF 21.

Police officers found Respondent's license plate at the scene of the accident, and after determining that the license plate belonged to a Jeep Cherokee registered to Respondent, went to

Respondent's home. FF 23-24. They saw Respondent's heavily damaged vehicle in the driveway. Thereafter, they banged on Respondent's front door for 20-30 minutes in an attempt to contact him, but Respondent did not answer. FF 24-25. Police officers then towed and impounded Respondent's damaged vehicle from his driveway. At that time, they observed that the airbag had deployed and that it was stained with blood. FF 27. Respondent's neighbor, Joshua Horowitz, telephoned Respondent sometime later that night, but Respondent did not answer Mr. Horowitz either. FF 25.

B. Respondent's Guilty Plea and Sentencing

Mr. Horowitz went to Respondent's home the next day, October 21, 2004. FF 61. On Mr. Horowitz's recommendation, Respondent retained an attorney. The attorney contacted Arlington police that day and subsequently made arrangements for Respondent to turn himself in. FF 29. On April 18, 2005, a grand jury returned an indictment charging Respondent with felony hit and run, in violation of Code of Virginia § 46.2-894, a Class 5 felony under Virginia law. FF 31. On August 10, 2005, Respondent pleaded guilty to the felony hit and run charge. FF 34.

During the plea colloquy, Respondent testified, *inter alia*, that he understood the nature of the charge against him and the particular elements of the crime with which he was charged. Respondent's attorney characterized the collision as "an unknowing hit and run." FF 35; BX 3 at 5, 17.

The Assistant Commonwealth's Attorney made a proffer of facts and stated, among other things, that Respondent had stipulated that the collision with Ms. Banks was alcohol-related. The Assistant Commonwealth's Attorney also informed the court that at the time of the collision, Respondent was intoxicated "to the point that he didn't know what happened." FF 36;

BX 3 at 9-11, 14. On August 24, 2005, the Circuit Court of Arlington County entered an order convicting Respondent of felony hit and run. FF 37; BX 1 at 3.

The Court conducted a sentencing hearing on November 18, 2005. At the hearing, Respondent's attorney represented that Respondent "really was in a blackout" and that he "did not know what happened [until] he was awakened by a neighbor in this matter." FF 38; BX 5 at 7. Respondent's counsel also represented at the hearing that Respondent was a weekend drinker for whom "[a]lcohol had never really been an issue." FF 39 n.16; BX 5 at 6. In his presentence statement, however, Respondent explained that he was undergoing treatment for alcoholism and described his drinking habits in detail. FF 39 n.16; RX 9 at 8. This statement was included in the Presentence Investigation Report submitted to the court by the Virginia Department of Corrections prior to Respondent's sentencing hearing.[2] *Id.* The court sentenced Respondent to two years' incarceration, then suspended the sentence, placed Respondent on supervised probation, and ordered him to pay costs of $405.00. FF 39; BX 1 at 1-2.

C. Respondent's History of Alcohol Abuse

The evidence established that Respondent's drinking problem had started many years before the hit and run incident. By the age of 15 he was drinking alcohol weekly. He became intoxicated regularly during college, and in law school he continued to drink in excess two to three times per week. He also used marijuana and cocaine occasionally while in college and law school. By the late 1980's, after he had begun his professional career, Respondent drank in bars almost

[2] In particular, the presentence report states: "Subject began drinking as a teenager and he notes that his drinking increased as he completed college and then law school. At the time of the instant offense he was drinking at least a bottle of wine a day and drinking at bars on the weekend. He started alcohol treatment immediately after the accident in October 2004. He has been attending an outpatient program at Arlington Hospital advising that at first he attended sessions three times a week . . . ." RX 9 at 8.

every day. By 2000, Respondent typically consumed one or two bottles of wine every night. FF 40-44; BX 15 at 6-7; RX 9 at 8.

Prior to October 20, 2004, Respondent had experienced alcoholic blackouts on several occasions. He had suffered his first blackout during his freshman year in college. The frequency of his blackouts increased from the late 1990's through the time of the collision. FF 45; BX 15 at 7. On four previous occasions, Respondent was involved in alcohol-related single vehicle accidents. In two of those instances, Respondent's vehicle sustained damages, but he did not recall what had happened. FF 47; BX 15 at 8.

D. The Testimony

The Hearing Committee carefully considered the testimony of key witnesses, including Respondent, Mr. Horowitz, and the experts for Respondent and Bar Counsel. The Hearing Committee found Respondent's, Mr. Horowitz's, and Respondent's expert's testimony to be credible, as described more fully below. HR at 28-31. We defer to those findings. *See In re Mba-Jonas*, No. 14-BG-607, at 3 (D.C. July 2, 2015) (citations and internal quotation marks omitted) (deferring to Hearing Committee's findings of fact because it is "the only decision-maker which had the opportunity to observe the witnesses and assess their demeanor").

Respondent testified that at some point during the evening of October 20, 2004, he entered into an alcoholic blackout state, and thus has no memory of his collision with Ms. Banks or much of the night as a whole. FF 48. He did not recall using his credit card to pay his bar tab, what time he left Rumors, using his key card to access the parking garage under his office building, or driving his car out of his garage. Nor did he recall colliding with Ms. Banks's car, backing away from the scene of the accident, or driving home in his heavily damaged car. He also testified that he never heard the police knocking on his door or his phone ringing that night. He did not hear the police

tow his car from the driveway of his home. FF 49-53. When he awoke the next morning, he was still wearing his clothes from the previous day, with only one contact lens in place. He had "no memory of the events the night before." FF 54. He first learned of his collision with Ms. Banks during a conversation with his neighbor, Joshua Horowitz. He was shocked, "scared," and "not sure of what had happened." FF 57.

The Hearing Committee found Respondent's testimony to be credible. They based their finding on Respondent's demeanor, his candor, and the sincerity of his expressions of remorse. They further found his testimony to be consistent with the testimony of Mr. Horowitz, both experts, and the forensic evidence of the collision. Finally, they found that Respondent did not deny or dispute evidence that might be considered damaging to his case. FF 58.

Around midnight on October 21, 2004, Joshua Horowitz, Respondent's neighbor, noticed police outside of Respondent's house. Mr. Horowitz saw that Respondent's car was in the driveway in a beat-up condition with the front end smashed and the airbag deployed. FF 59. The police informed Mr. Horowitz that there had been a car accident, that someone was injured, and that Respondent might be involved. The police towed Respondent's car from the driveway. Mr. Horowitz called Respondent on the telephone, but Respondent did not answer. FF 59-60.

The next morning, Mr. Horowitz went by Respondent's house. Respondent was on the telephone and appeared to be relaxed, but when Respondent got off the phone, and Mr. Horowitz told Respondent that Respondent had been in a car crash, and that the driver of the other car had been injured, Respondent's demeanor changed and he began pacing and "looked very agitated." FF 61-62. Mr. Horowitz testified that, based on his observations, Respondent "clearly had no idea . . . about the injury" to Ms. Banks. Nothing in his many interactions with Respondent subsequent to October 21, 2005, led Mr. Horowitz to believe that Respondent had any recollection of the

collision with Ms. Banks. FF 63. The Hearing Committee found Mr. Horowitz's testimony to be credible. He was clear and consistent in his testimony, and did not appear to be biased towards Respondent. FF 64.

Ultimately, the Hearing Committee's findings turned largely on the testimony of the experts for Respondent and Bar Counsel. Respondent's expert, Dr. Charles L. Whitfield, was qualified as an expert on alcoholism, alcohol recovery, and memory. FF 65. Dr. Whitfield is a psychotherapist and addiction medicine physician who treats alcoholics and drug addicts in his private practice in Atlanta, Georgia. He received his M.D. from the University of North Carolina Medical School in 1965. FF 66. At the hearing, he estimated that he had treated and evaluated over 1,000 alcoholics during the course of his career. FF 67. Since the 1970's, Dr. Whitfield has performed research and published many articles in peer reviewed literature, including a number of articles on the effects of alcoholism on memory. He has also authored a book entitled Memory and Abuse: Remembering and Healing the Effects of Trauma. FF 68.

As part of his evaluation, Dr. Whitfield had Respondent complete two diagnostic questionnaires concerning his drinking history. FF 69. Dr. Whitfield also interviewed Respondent for approximately five to six hours concerning: 1) Respondent's drinking history and other factors that would assist him in assessing whether Respondent was an alcoholic; and 2) Respondent's subsequent efforts at rehabilitation. FF 70. Neither Bar Counsel nor its expert challenged the reliability of Dr. Whitfield's evaluation protocol. FF 69 n.17.

Dr. Whitfield concluded that Respondent was an alcoholic, and that at the time of the collision he was in an alcoholic blackout state. Dr. Whitfield did not prepare a formal report, but rather prepared seven exhibits concerning alcoholism and memory loss, all of which were admitted into evidence. FF 71. Dr. Whitfield testified that there are three main types of memory: short

term, long term, and working or active memory. Short term memory consists of current information held for three to 30 seconds. In working or active memory, the brain transfers or encodes information from short-term memory into long-term memory. Through this process, data stored in long-term memory is connected with current inputs from short-term memory, and a person is able to arrive at an "appropriate judgment." FF 73-74.

Dr. Whitfield testified that, during an alcoholic blackout, working memory, constructive thinking ability, and judgment are lost, because alcohol stops memory formation and adversely affects the hippocampus, a brain structure that carries out memory formation and storage. FF 75. In essence, an alcoholic blackout prevents a person from processing new sensory inputs and forming working or active memories, rendering the drinker unable to "react and decide in a rational and appropriate way to ordinary or extraordinary events." FF 76. In Dr. Whitfield's opinion, Respondent was only able to retain an awareness of his collision with Ms. Banks for seconds after it occurred. As a result of his intoxication and blackout, Respondent could not convert the new sensory input (the collision) into his long-term memory, or access the part of his long-term memory that would have informed a proper response to the collision. FF 77. Dr. Whitfield testified that if Respondent had not been suffering from an alcoholic blackout at the time of the collision, he would have been able to conform his conduct to the requirements of the law and would not have left the scene. FF 78.

Dr. Whitfield distinguished "procedural memory" from memory loss that would occur from an alcoholic blackout. According to Dr. Whitfield, Respondent was able to retrieve his car and drive to the scene of the collision and then home because he had performed those functions many times over the course of twelve years. Those functions were stored in Respondent's procedural memory. Dr. Whitfield said that other patients he had treated over the years were also

able to use their pre-blackout long-term memory to complete routine tasks despite suffering an alcoholic blackout. FF 79-80.

Bar Counsel's expert witness, Dr. Neil Blumberg, was offered to rebut Dr. Whitfield's testimony. Dr. Blumberg was qualified as an expert in forensic psychiatry. He earned his M.D. from the George Washington University School of Medicine in 1977. He specializes in forensic psychiatry, which is a subspecialty of psychiatry concerning the evaluation of an individual's mental state in legal proceedings. He is board certified in psychiatry and forensic psychiatry. Dr. Blumberg has maintained a private practice in general and forensic psychiatry since 1981. Between 1996 and 2003, Dr. Blumberg served as a forensic psychiatric consultant for the Circuit and District Courts of Baltimore County and Baltimore City. From 1996 to 1999, Dr. Blumberg also acted as the Director of Forensic Evaluation at Spring Grove Hospital Center. In both positions, he was required to evaluate defendants to determine competence to stand trial and level of criminal responsibility. FF 81-84. At the time of the hearing, Dr. Blumberg had performed approximately 5,000 forensic evaluations, and he testified that alcoholism has been an issue in many of those cases. FF 85.

Dr. Blumberg interviewed Respondent for approximately three and a half hours and administered a battery of psychiatric tests to Respondent for an additional two and a half hours. He also reviewed written materials concerning this matter. FF 86. At the conclusion of his evaluation, he prepared a written report, which was admitted into evidence. FF 86; BX 15.

Dr. Blumberg agreed with Dr. Whitfield that Respondent was an alcoholic, that he suffered an alcoholic blackout at the time of the collision, and that alcohol interferes with memory formation and with the transfer of information from short term to long term memory. FF 88-89. Dr. Blumberg also agreed that the judgment of a person suffering an alcoholic blackout is impeded

and that the ability of the alcoholic to access his long term memory is significantly impaired. FF 91.

However, Dr. Blumberg disagreed with Dr. Whitfield concerning the effects of an alcoholic blackout. In his opinion, a person suffering an alcoholic blackout can still access his long term memory and is able to distinguish right from wrong; the person still knows when his or her behavior is illegal or unethical. FF 90. Applying these principles to this case, Dr. Blumberg testified that at the time of the collision, Respondent was aware of the collision and understood that it was wrong to leave the scene, even if he later did not remember having such knowledge or awareness. FF 92. Dr. Blumberg opined that Respondent did not lose the ability to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law and that he retained the ability to form the specific intent to stop and render aid to Ms. Banks. Although Respondent's judgment was impaired, he did not lose the capacity to choose the proper course of action. FF 93.

In support of his opinion, Dr. Blumberg observed that Respondent was able to perform a number of other tasks during his alcoholic blackout, including paying his bar tab, with a tip, retrieving his car from the parking garage, and driving to the scene of the collision and then home after colliding with Ms. Banks. FF 94. Respondent's ability to drive home suggested an awareness that he was involved in an accident and that he was choosing to leave the scene. FF 95. Dr. Blumberg agreed with Dr. Whitfield that, but for Respondent's intoxication, he would not have left the scene of his collision with Ms. Banks. FF 96.

The determination of the credibility of the experts was central to the Hearing Committee's findings. The Hearing Committee found that it was a "close question," FF 105, but ultimately credited Dr. Whitfield's testimony in its entirety, and credited those aspects of Dr. Blumberg's

expert opinion that were consistent with Dr. Whitfield's. FF 98. The primary divergence between the testimony of the two experts was in the effect that Respondent's alcoholic blackout had on his ability to conform his actions to the requirements of the law. Dr. Whitfield opined that a person suffering from an alcoholic blackout is too impaired to connect his current observations with his underlying knowledge of right and wrong and to transfer his immediate observations to his long term memory. Accordingly, Respondent was unable to act appropriately. FF 101. Dr. Blumberg, however, opined that, although Respondent's judgment was impaired, he understood right from wrong and knew he should not leave the scene. FF 102. In support of his position, Dr. Blumberg identified the numerous other tasks that Respondent was able to perform that evening despite his impaired condition, while Dr. Whitfield countered that those were procedural tasks that a person can perform even when in an alcoholic blackout state. FF 103-04.

The Hearing Committee credited Dr. Whitfield's opinion on the effect of Respondent's alcoholic blackout in part due to Dr. Whitfield's highly specialized training and practice in the area of alcoholism compared to Dr. Blumberg's more generalized knowledge of alcoholism. Moreover, the Hearing Committee found that Respondent's aberrant behavior following the collision, including leaving his front bumper and license plate on the scene and parking his car in his driveway in plain view, was consistent with Dr. Whitfield's opinion that Respondent was not consciously aware of the collision and did not thereafter try to conceal his involvement. FF 105. Finally, the Hearing Committee found that Dr. Whitfield's testimony was independently corroborated by the testimony of Mr. Horowitz concerning Respondent's sudden change in demeanor when informed of the collision and by Respondent's own credible testimony. FF 106.

E. Respondent's Rehabilitation

Both Dr. Whitfield and Dr. Blumberg agreed that as of the date of the hearing, Respondent was taking his rehabilitation seriously and had an excellent prognosis for continued sobriety. FF 114. The experts proved to be correct. As of July 2013, Respondent's Alcoholics Anonymous ("AA") acquaintances, family members, and friends observed that Respondent has remained committed since October 2004 to his sobriety and recovery from alcoholism. FF 115.

In particular, the day after the collision with Ms. Banks, Respondent contacted the Lawyers' Assistance Program of the District of Columbia Bar ("LAP"). He met with a LAP counselor, contacted an attorney volunteer, and began attending AA meetings once a week. FF 108. In May 2005, he obtained an AA sponsor and began attending at least three AA meetings per week. Respondent became active in his AA chapter, served as the chapter's treasurer, and sought to assist other members. FF 110-12. Respondent also completed a Virginia Hospital Center outpatient treatment program in October 2005. FF 110. He successfully completed his probation obligations on November 18, 2007. FF 113.

As of July 2013, when Respondent submitted the most recent evidence of his rehabilitation from alcoholism, Respondent continued to attend an average of four AA meetings per week and to meet with his AA sponsor once per week. He also sponsored three other men in AA. FF 116. Also as of July 2013, Respondent continued to meet with a counselor from the LAP once a month. He had been volunteering for the LAP, meeting with other attorneys with alcohol problems, and speaking at local law schools.[3] FF 117-18. He had been serving on the Board of the Arlington

[3] On July 19, 2013, Respondent submitted a document to the Hearing Committee entitled "Respondent's Rehabilitation Submission." Exhibit 2 to that submission includes a letter from the LAP stating that Respondent "demonstrates a strong commitment to sobriety. Based on reports

Hospital Addiction Treatment Alumni Association. FF 119. Respondent has expressed sincere remorse for his conduct and the resulting injuries to Ms. Banks. FF 120.

F. Respondent's Post-Hearing Conduct

On November 16, 2010, Respondent filed an Application to Qualify as a Foreign Attorney Under Local Civil Rule 83.1(D) and Local Criminal Rule 57.4 in the United States District Court for the Eastern District of Virginia for a matter in which his firm acted as counsel for the plaintiff. Respondent signed the Virginia *pro hac vice* application, in which he represented "I have not been reprimanded in any court nor has there been any action in any court pertaining to my conduct or fitness as a member of the bar." FF 121. At the time, the hearing in this matter had concluded, but the Hearing Committee had not yet issued its report.

On December 15, 2010, David Y. Loh, a partner at Cozen O'Connor, filed on Respondent's behalf a Motion to Admit Counsel *pro hac vice* in the United States District Court for the Southern District of New York in a matter related to the Virginia case. Mr. Loh represented that "[t]here are no pending disciplinary proceeding[s] against [Respondent] in any State or Federal court." Respondent did not sign the New York *pro hac vice* application. FF 122.

---

and observations, Mr. Rohde continues to meet the criteria for Alcohol Dependence in Full Sustained Remission (DSM-IV 303.90)." Exhibit 3 includes an Affidavit from Assistant United States Attorney Patricia A. Riley, a founding member of the Lawyers Group of Alcoholics Anonymous, who had seen Respondent almost every week since October 2004 when he first arrived at the Lawyers Group. She stated: "Wayne Rohde's rehabilitation is precisely what we hoped to achieve when we worked to convince the bar to fund a program to assist alcoholic lawyers rehabilitate themselves and the Court of Appeals to give those who did so successfully the opportunity to continue to practice law. Based on all that I have learned in my 33+ years in AA and what I have seen of Wayne Rohde, allowing him to continue to practice his profession is in the best interests of the public, the bar, and Wayne himself."

CONCLUSIONS OF LAW

Bar Counsel requests that we find that Respondent's conviction of the Virginia hit and run offense constitutes moral turpitude *per se* or, if we do not so find, that the conviction constitutes moral turpitude on the facts. The Board has already determined that felony hit and run, in violation of Code of Virginia § 46.2-894, does not inherently involve moral turpitude, and we adhere to that ruling. We also agree with the Hearing Committee that Bar Counsel failed to establish moral turpitude on the facts but that it did prove that Respondent violated Rule 8.4(b) and committed a "serious crime" within the meaning of D.C. Bar R. XI, §10 (b).

A. Moral Turpitude

D.C. Code § 11-2503(a) provides that when a member of the bar is convicted of an offense involving moral turpitude, the individual 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 deeply offending 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). There are two types of moral turpitude inquiry that may be undertaken in our disciplinary system, depending upon the particular crime. The first is whether, in the case of a felony conviction, the conviction involves

moral turpitude *per se*.[4] The second is whether the conviction, regardless of whether it is a misdemeanor or a felony, involves moral turpitude on the facts. *See Colson*, 412 A.2d at 1165.

1. Moral Turpitude *Per Se*

Bar Counsel contends that Respondent's felony hit and run conviction constitutes moral turpitude *per se*. Such a finding is contingent on whether the elements of the statute under which Respondent was convicted involve moral turpitude on their face. Where a respondent is convicted of a crime of moral turpitude *per se*, our inquiry ends and the respondent must be disbarred; evidence in mitigation is not admissible on the question of moral turpitude. *See In re Hopmayer*, 625 A.2d 290, 291-92 (D.C. 1993); *see also In re Spiridon*, 755 A.2d 463, 466 (D.C. 2000); *Colson*, 412 A.2d at 1165. The Virginia Code provision at issue, § 46.2-894, states, in relevant part:

> The driver of any vehicle involved in an accident in which a person is killed or injured or in which an attended vehicle or other attended property is damaged shall immediately stop as close to the scene of the accident as possible without obstructing traffic, as provided § 46.2-888, and report his name, address, driver's license number, and vehicle registration number forthwith to the State Police or local law enforcement agency, to the person struck and injured if such person appears to be capable of understanding and retaining the information, or to the driver or some other occupant of the vehicle collided with or to the custodian of other damaged property. The driver shall also render reasonable assistance to any person injured in such accident, including taking such injured person to a physician, surgeon, or hospital if it is apparent that medical treatment is necessary or is requested by the injured person.

In ruling that Respondent's offense did not constitute moral turpitude *per se*, the Board found that it could envision crimes under the statute that would not involve moral turpitude. *See* Order, *In re Rohde*, Bar Docket No. 2005-D347 (BPR July 27, 2006). When the least culpable offender under a statute would not have engaged in conduct that society considers vile or depraved,

[4] Misdemeanor convictions are never considered to constitute moral turpitude *per se*. *See McBride*, 602 A.2d at 629.

the offense is not deemed to involve moral turpitude. *In re Shorter*, 570 A.2d 760, 766-67 n.11 (D.C. 1990) (per curiam). Here, not only is there no reason to second-guess the previous finding of the Board, we agree with our prior finding. The least culpable offender under the Virginia hit and run statute might, as the result of an emergency, not immediately stop upon getting into an accident in which someone may have been injured. This might occur, for example, where a man is rushing his pregnant wife to the emergency room, and while doing so collides with another vehicle and then, rather than stopping, continues to the hospital. *See In re Tidwell*, 831 A.2d 953, 959 (D.C. 2003) (citing *Tate v. State Bar*, 920 S.W.2d 727 (Tex. Ct. App. 1996)). We do not believe society would view leaving the scene of an accident in such circumstances as an act of moral turpitude. Accordingly, a violation of Code of Virginia § 46.2-894 does not involve moral turpitude *per se*, and it was appropriate for the matter to be sent to a Hearing Committee for a determination of moral turpitude on the facts.

2. Moral Turpitude on the Facts

With respect to the underlying facts, many are not in dispute. It is undisputed that Respondent drank heavily for several years and suffered from occasional alcoholic blackouts, including on the evening in question. It is also undisputed that on the evening in question, Respondent drank heavily, paid for at least some of his drinks, retrieved his car, and followed his usual route home before colliding with Ms. Banks. It is also undisputed that Respondent thereafter drove home, without assisting Ms. Banks, and parked his car in his driveway. When the police banged on his door later that evening, and his neighbor Mr. Horowitz, attempted to reach him by phone, he failed to respond.

The dispute centers on Respondent's level of intent when he left the scene and the testimony of Respondent and the experts. Bar Counsel contends that Respondent left the scene of

the collision knowing he should have remained and assisted Ms. Banks. Bar Counsel refers to the specific, purposeful actions taken by Respondent that evening, as well as the testimony of Dr. Blumberg, to support its position. Respondent asserts that he suffered from an alcoholic blackout that evening that rendered him incapable of conforming his conduct to the requirements of the law. He relies on his own testimony as well as that of his expert, Dr. Whitfield, who testified that Respondent did not remember the collision seconds after it happened, and that his subsequent conduct was consistent with an alcoholic blackout and his inability to remember the earlier events of the day. Both Dr. Whitfield and Bar Counsel's expert, Dr. Blumberg, agreed that Respondent had suffered that day from an alcoholic blackout and that, absent the blackout, Respondent would have conformed his conduct to the requirements of the law and would have remained on the scene.

The Hearing Committee credited the testimony of Respondent and Dr. Whitfield, and supported its credibility findings with specific, logical reasons. The Hearing Committee also noted that the testimony of Mr. Horowitz corroborated Respondent's version of events.

In cases in which the question is whether a crime constitutes moral turpitude on the facts, "the determination becomes intensely specific to the particular facts and circumstances." *Spiridon*, 755 A.2d at 468. Mitigating circumstances, including a respondent's mental condition, may be taken into consideration in the determination of whether a crime constitutes moral turpitude.[5] *See*

[5] Bar Counsel argues that in examining the facts and circumstances of Respondent's felony crime to determine whether it involves moral turpitude, it was improper for the Hearing Committee to consider evidence of Respondent's alcoholism or alcoholic blackout. Bar Counsel's position is contrary to *Colson*, 412 A.2d at 1167, where the en banc Court directed that "evidence as to the circumstances of the crime including the actor's knowledge and intention [must] be admitted" when determining moral turpitude on the facts. It is also unsupported by *Spiridon*, on which Bar Counsel relies, where the Court simply held that mitigating factors bearing on the moral turpitude question, including a respondent's mental state and alcohol abuse, may be considered in determining whether there is moral turpitude in the actual commission of a misdemeanor offense.

In re Allen, 27 A.3d 1178, 1187 (D.C. 2011) (moral turpitude inquiry should include "a broader examination of circumstances surrounding commission of the [crime] which fairly bear on the question of moral turpitude in its actual commission, such as motive or mental condition") (quoting *Spiridon*, 755 A.2d at 467). We will not disturb the credibility findings of the Hearing Committee where they are supported by substantial evidence in the record. D.C. Bar R. XI, §9(h); *see In re Micheel*, 610 A.2d 231, 234 (D.C. 1992). Here, the Hearing Committee's credibility findings – as well as its overall findings on the issue of moral turpitude – are well-supported in the record.

Bar Counsel asks the Board to substitute its judgment for the Hearing Committee's determination that Respondent testified credibly and its decision to credit the expert testimony of Dr. Whitfield. That we will not do. The Hearing Committee had the unique opportunity to observe Respondent, assess his demeanor, and evaluate the experts' testimony, and we defer to its determinations. *See Mba-Jonas*, No. 14-BG-607, at 3.

Nor can we find, as Bar Counsel requests, that Respondent's plea of guilty requires a finding that he engaged in conduct that constitutes moral turpitude. We agree with the Hearing Committee that under the Virginia statute, Respondent's plea of guilty was merely an admission that at the time he left the scene, he knew he had collided with another vehicle, and that he knew

---

755 A.2d at 466-67. The rationale of *Spiridon* applies equally to felonies referred for a hearing on the question of moral turpitude on the facts. Evidence of a respondent's mental state and alcohol abuse are clearly probative on the questions of knowledge and intent, the central questions in any moral turpitude inquiry. *Colson*, 412 A.2d at 1167. *Hopmayer*, 625 A.2d at 290, is not to the contrary. *Hopmayer* merely "precludes consideration of mitigating circumstances *after* a determination of moral turpitude has been made." *Spiridon*, 755 A.2d at 467 (emphasis added). It does not foreclose the consideration of material evidence on the question of moral turpitude, in the first instance, for a felony referred to a hearing committee to examine the underlying facts.

or should have known that someone had been injured. HR at 40.[6] No more was needed for the Court to accept his plea. Moreover, at the time of the plea and then sentencing, the prosecutor and Respondent made the court aware that Respondent was so drunk that he experienced an alcoholic blackout and that he had no recollection of what had happened that evening. Nothing that occurred during the plea colloquy or at sentencing is inconsistent with the plea itself or with Respondent's position in this disciplinary proceeding. We thus disagree with Bar Counsel that Respondent's plea amounts to an admission of moral turpitude on the facts. *Cf. Tidwell*, 931 A.2d at 959-960 (finding moral turpitude on the facts, based in part on the respondent's admissions at plea hearing that were inconsistent with his proffered evidence of alcoholic blackout).

We also cannot agree with Bar Counsel that Respondent's conduct before the collision establishes that Respondent committed a crime of moral turpitude. Bar Counsel failed to present any evidence to support its contention that Respondent's decision to go to Rumors was a conscious and sober choice to "drive drunk," and that he "knowingly drank himself into a blackout state." Bar Counsel's Brief at 26-27. Further, according to Dr. Whitfield, Respondent's ability to pay the tab at Rumors, leave the parking lot, and drive home on his accustomed route were routine, procedural actions entirely consistent with someone in an alcoholic blackout state, who is unable to conform his conduct to the requirements of the law. For us to independently determine that Respondent's ability to engage in these actions establishes that he acted with wrongful intent would be to substitute our judgment for that of the expert, and would disturb the Hearing Committee's decision to credit Dr. Whitfield's expert opinion and Respondent's consistent

[6] Under Virginia case law, a defendant who flees the scene of an accident need only possess actual knowledge of the occurrence of the accident and possible injury at some point in time in order to be convicted of the offense of felony hit and run. *See Neel v. Commonwealth*, 641 S.E.2d 775, 778 (Va. Ct. App. 2007); *Kil v. Commonwealth*, 407 S.E.2d 674, 679 (Va. Ct. App. 1991).

testimony. Moreover, while it is true that Respondent chose to drink that night, it is uncontroverted that he had a serious alcohol problem, which at the time he was unable to control. *See, e.g., In re Soininen*, 783 A.2d 619, 621 (D.C. 2001) (no moral turpitude where the respondent's conduct was substantially affected by her addiction to alcohol and prescription drugs); *Spiridon*, 755 A.2d at 468-69 (no moral turpitude where the respondent suffered from alcoholism and psychological problems). We agree with Bar Counsel that the "totality of the circumstances" should be considered in assessing moral turpitude. In doing so, and taking into account Respondent's alcoholism and the testimony adduced at the hearing, we conclude that Respondent's crime did not involve moral turpitude on the facts.[7]

B. Respondent Violated Rule 8.4(b).

The Hearing Committee found that Respondent violated Rule 8.4(b) based on his conviction of felony hit and run. Rule 8.4(b) states that "[i]t is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects[.]" Although Respondent does not challenge the Hearing Committee's finding on this issue, Respondent's Brief at 31, we nevertheless must determine whether Bar Counsel has proved the rule violation by clear and convincing evidence.

[7] Bar Counsel contends that the Hearing Committee erred when it excluded Dr. Blumberg's testimony about Respondent's mental state preceding his "decision to drive drunk." *See, e.g.*, Bar Counsel's Reply Brief at 3. The Hearing Committee declined to admit the testimony on the basis that it was both irrelevant and cumulative, since evidence concerning Respondent's activities leading up to the collision had already been admitted into evidence. TR II at 55-56. We do not find that the Hearing Committee erred in its decision to exclude the evidence but, even if the decision was in error, such error was harmless since there was ample testimony concerning Respondent's mental state both before and after the collision, and the views of the experts on this issue were clear.

We have little difficulty finding that Bar Counsel has proved that Respondent violated Rule 8.4(b). The Rule is intended to "sanction . . . those criminal acts that implicate and call into question the fundamental characteristics we wish attorneys to possess." *In re Harkins*, 899 A.2d 755, 759 (D.C. 2006). We must decide "whether the offense 'indicate[s] [a] lack of those characteristics relevant to law practice,' and '[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.'" *In re Reynolds*, 649 A.2d 818, 819 (D.C. 1994) (per curiam) (Farell, J., concurring) (quoting Rule 8.4, cmt. [1]).

In pleading guilty to felony hit and run, Respondent admitted to the elements of a violation of Code of Virginia § 46.2-894 – that he was aware of the collision the instant it occurred and that a reasonable person would have known that someone had been injured. He also conceded that the collision was the result of his intoxication. Respondent admitted that he had abused alcohol for several years, and had been involved in at least four single-car accidents while under the influence of alcohol. Given his indifference to his legal obligations, over a period of several years, and his felony hit and run conviction, we find that Respondent violated Rule 8.4(b). *See In re Reynolds*, 763 A.2d 713, 714 (D.C. 2000) (per curiam); *In re Small*, 760 A. 2d 612, 613-14 (D.C. 2000) (per curiam).

C. Respondent Was Convicted of a "Serious Crime" Within the Meaning of D.C. Bar R. XI, § 10(b).

The Hearing Committee determined that Respondent's crime constitutes a "serious crime" under D.C. Bar R. XI, § 10(b). Subsection 10(b) defines a "serious crime" as:

> (1) any felony, and (2) any other crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit,

> bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

D.C. Bar R. XI, § 10(b).

Where a respondent is convicted of a "serious crime," Bar Counsel is required to initiate a formal proceeding to determine the nature of the final discipline to be imposed. D.C. Bar R. XI, § 10(d). A "serious crime" is a basis in and of itself for the imposition of discipline, without being tethered to a particular rule violation. The sanction to be imposed is based upon the nature and circumstances of the offense. *See Allen*, 27 A.3d at 1188-89.

Respondent did not take exception to the Hearing Committee's finding that he committed a "serious crime" within the meaning of D.C. Bar R. XI, § 10(b). Indeed, we have little difficulty finding that the offense constitutes a "serious crime." Subsection 10(b) clearly defines a "serious crime" as including "any felony." Respondent's crime of hit and run in violation of Code of Virginia § 46.2-894 falls within this definition, because it is a felony punishable by up to ten years' imprisonment.[8] As a general rule, any conviction of a crime which is punishable beyond the misdemeanor range of one year will be considered a felony and thus a "serious crime." *See In re Brown*, Bar Docket No. 88-97, at 17 (BPR Dec. 10, 2003), *recommendation adopted*, 851 A.2d 1278, 1279 (D.C. 2004) (per curiam).

SANCTION

In determining the appropriate sanction for Respondent's violation of Rule 8.4(b) and his commission of a "serious crime" pursuant to D.C. Bar R. XI, § 10(b), we consider "what is necessary to protect the public and the courts, to maintain the integrity of the profession, and to

[8] *See* Va. Code. Ann. § 46.2-894 (hit and run is a Class 5 felony if the accident results in injury or death to any person, or if there was more than $1000 in property damage); Va. Code Ann. § 18.2-10(e) (Class 5 felonies punishable by a term of imprisonment of not less than one year, and not more than 10 years).

deter other attorneys from engaging in similar misconduct." *In re Evans*, 902 A.2d 56, 74 (D.C. 2006) (per curiam) (appended Board Report) (quoting *In re Uchendu*, 812 A.2d 933, 941 (D.C. 2002)). In making this assessment, we consider the nature and seriousness of the misconduct, prior discipline, prejudice to the client (if any), the respondent's attitude, and circumstances in aggravation and mitigation. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). The sanction imposed must be consistent with cases involving comparable misconduct and not otherwise unwarranted. D.C. Bar R. XI, § 9(h)(1); *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

Respondent's crime was undoubtedly serious. His wrongful conduct resulted in serious injury to Ms. Banks, and he left the scene of the collision without assisting her or otherwise seeking help. Respondent, however, has no prior discipline. No clients were prejudiced, as his conduct did not relate to legal representations or advice, but rather to matters occurring outside of the workplace. As to his attitude, the testimony at the hearing established that Respondent was remorseful, had accepted responsibility for his conduct, and had gone to great lengths to seek treatment for his alcoholism. Bar Counsel's expert opined at the hearing that Respondent had "displayed to me, legitimate remorse for his conduct, . . . ultimately . . . reaching a settlement with the woman who was injured." TR II at 72. The lawyer for Mr. and Ms. Banks represented at Respondent's 2005 sentencing hearing that Respondent had worked hard to make matters right for the Banks, that they were impressed with the steps Respondent had taken to "straighten himself out," and that they "would have no objection if probation was granted" to Respondent in his criminal case. BX 5 at 12. In the circumstances present here, the two-year suspension imposed by the Hearing Committee is appropriate.

The Hearing Committee found *In re Hoare*, 727 A.2d 316 (D.C. 1999) (per curiam), to be the most comparable case. In *Hoare*, the respondent was intoxicated when he collided with another car, killing its driver, but he did not leave the scene of the accident and had no history of alcohol abuse or prior disciplinary violations. The Court found that the respondent committed a "serious crime," but not a crime of moral turpitude or a violation of Rule 8.4(b), and imposed a two-year suspension. *Id.* at 317. We agree that *Hoare* is the most comparable case. Respondent's conduct in leaving the scene was the result of his alcoholism – both experts opined that but for his alcoholism, he would not have left the scene. Respondent injured but did not kill the driver with whom he collided, and he has sought substantial treatment for his alcoholism and has accepted responsibility for his conduct.

Bar Counsel equates this case with *Tidwell* and thus seeks to have Respondent disbarred. In *Tidwell*, however, the respondent admitted that he consciously decided to leave the scene of an accident in which he killed a bicyclist. 831 A.2d at 960-61. Thereafter, he attempted to conceal his involvement in the accident by hiding his car in his garage. *Id.* at 956; *In re Tidwell*, Bar Docket No. 403-99, at 8-10 (BPR July 5, 2002). Unlike Tidwell, Respondent did not consciously decide to leave the scene of the accident and did not attempt to conceal his involvement. Accordingly, *Tidwell* is plainly distinguishable from the instant case.

A. Fitness Requirement

We agree with the Hearing Committee's conclusion that a fitness requirement is necessary in this case. In determining whether to impose a fitness condition, the question is whether the record contains clear and convincing evidence that casts a serious doubt on the attorney's continuing fitness to practice law. *In re Cater*, 887 A.2d 1, 6 (D.C. 2005). In applying the *Cater*

standard, the Court considers the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985). They are:

> (1) the nature and circumstances of the misconduct for which the attorney was disciplined;
>
> (2) whether the attorney recognizes the seriousness of the misconduct;
>
> (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;
>
> (4) the attorney's present character; and
>
> (5) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

While the nature of the misconduct was serious, the incident occurred eleven years ago. Respondent has recognized the seriousness of his misconduct, and has taken significant steps to remedy his wrongs and prevent future ones. He compensated Ms. Banks, entered into alcoholic treatment programs, sought and received counseling, and has become involved in helping others with similar problems. No questions have been raised about his present character or qualifications to practice law, and he has not been subject to discipline since the time of the incident.

On the other hand, we recognize that Respondent's conduct occurred as the result of an alcohol problem that he has struggled with for most of his adult life. In the circumstances, it is important to focus particularly on the first of the *Roundtree* factors. *See In re Bradley*, 70 A.3d 1189, 1196 (D.C. 2013) (per curiam) ("In most cases, it is the attorney's misconduct . . . that casts the requisite serious doubt on the attorney's fitness.") (quoting *Cater*, 887 A.2d at 24-25). Given the nature of the offense, and Respondent's pre-offense conduct and historical struggle with alcoholism, a fitness requirement is necessary to protect the public. A fitness requirement will ensure that if Respondent violates the terms of his probation and is suspended from the practice of

law, he will not be reinstated until an assessment is made of his moral qualifications, character, and competence to practice law.

B. *Kersey* Mitigation

Respondent asserts that his sanction should be mitigated under *Kersey* based on his chronic alcoholism.[9] The Hearing Committee found that Respondent established his eligibility for *Kersey* mitigation, and that as a result, his suspension should be stayed, and he should be placed on probation, with conditions.

To be eligible for *Kersey* mitigation, a respondent must establish the following:

(1) By clear and convincing evidence that he had a disability;

(2) By a preponderance of the evidence that the disability substantially affected his misconduct; and

(3) By clear and convincing evidence that he has been substantially rehabilitated.

See Board Rule 11.13; *In re Stanback*, 681 A.2d 1109, 1114-15 (D.C. 1996).

Respondent has established the first prong of *Kersey*. Alcoholism is a disability under *Kersey*. *See, e.g., Kersey*, 520 A.2d at 327. There is no question that Respondent proved that he was an alcoholic and therefore was disabled at the time of the offense. His own testimony, the

[9] It is an open question whether *Kersey* may be applied to mitigate the sanction for a felony crime that is not a crime of moral turpitude. *See In re Soininen*, 783 A.2d at 622, n.6. We believe *Kersey* mitigation should be available in felony cases. First, the Court has applied *Kersey* mitigation in cases where the respondent was not convicted of a crime but engaged in felony-type activity. *See, e.g, In re Temple*, 596 A.2d 585, 586-87 (D.C. 1991), *remanded to* 629 A.2d 1203 (D.C. 1993). Second, the rationale for applying *Kersey* mitigation to a misdemeanor applies equally to a felony offense. As the Court noted in *Soininen, Kersey* mitigation has been applied even when the misconduct includes intentional or reckless misappropriation, a violation for which the presumptive sanction is disbarment. *Soininen*, 783 A.2d at 622. Given that *Kersey* mitigation has been applied even in this most serious category of disciplinary cases, we see no reason why it should not be applied here.

submissions by the LAP and Attorney Riley, and the testimony of both experts showed that he was a chronic alcoholic for years leading up to the time of his collision with Ms. Banks.

Respondent's and Bar Counsel's experts agreed that, but for Respondent's alcoholism, he would have stopped and assisted Ms. Banks and would not have fled the scene of the collision. Bar Counsel contends that Respondent failed to establish the causal connection between his alcoholism and the crime, for the same reasons it maintains that Respondent's crime involved moral turpitude – that alcoholism may have caused Respondent to drink excessively the night of the collision, but it was Respondent's "poor judgment while sober" that resulted in his decision "to drive in a blackout state." Bar Counsel's Brief at 34. We reject Bar Counsel's argument, for the same reasons we have found that his crime did not involve moral turpitude on the facts – the lack of any evidence to show that Respondent made a conscious and sober choice to drive drunk. *See supra* at 20-21. Rather, the clear and convincing evidence shows that Respondent's alcoholism substantially affected Respondent's misconduct. We thus find that Respondent satisfied the second *Kersey* prong.

Finally, the third prong of *Kersey* is satisfied by a showing, by clear and convincing evidence, that the respondent has been substantially rehabilitated. Importantly, the Court has made clear that a respondent who has engaged in misconduct as a result of a disability, but who no longer poses a threat to the public, should not be punished "for punishment's sake," but that if the threat can be managed by a period of probation, "then disbarment or a period of actual suspension may be unnecessary." *In re Appler*, 669 A.2d 731, 740 (D.C. 1995).

At the hearing, Respondent presented clear and convincing evidence of his substantial rehabilitation from alcoholism. Both experts agreed that Respondent was rehabilitated and that his prognosis for continued sobriety was excellent. FF 114. It also was uncontroverted that

Respondent had been treated for his alcoholism for several years, was a long-time participant in AA, had continued his law practice without incident, and had not had a drink for many years. Several witnesses attested to his rehabilitation. FF 115-17.

Notwithstanding Respondent's continued sobriety, Bar Counsel maintains that he is not substantially rehabilitated based on evidence submitted in response to the Hearing Committee's June 27, 2013 order directing the parties to provide "updated information on Respondent's treatment and current state of rehabilitation." That information includes two *pro hac vice* applications filed in 2010 with two federal courts, which Bar Counsel contends include misrepresentations regarding the pending disciplinary proceeding, show a "pattern of denial and dishonesty to courts," and were motivated by personal gain. Bar Counsel's Brief at 35-36. According to Bar Counsel, this evidence "shows that Respondent's underlying character flaws played a critical role in his misconduct and have not been resolved or rehabilitated by his sobriety." *Id*. at 34. Bar Counsel contends that the Hearing Committee erred in denying its motion for a hearing to fully develop the record on this issue. We disagree.

First, the rehabilitation inquiry under *Kersey* centers on a respondent's rehabilitation from the condition that was a causal factor in the misconduct. *Kersey*, 520 A.2d at 327 ("[W]hen alcoholism has been a causal factor leading to professional misconduct, rehabilitation from that condition will be considered a significant factor in imposing discipline."). It does not include an inquiry into a respondent's "unresolved character flaws" that neither qualify for *Kersey* mitigation nor were established as contributing to the misconduct. Here, there is no doubt that Respondent is substantially rehabilitated from alcoholism, and Bar Counsel does not contend otherwise. The materials submitted in response to the Hearing Committee's June 27, 2013 order only confirm his continued abstinence from alcohol and show that since 2005, Respondent has remained sober,

actively participated in AA, attended regular monitoring appointments with the LAP, and served as a mentor for other attorneys through the LAP.

Second, even if an inquiry into moral character was appropriate on the question of Respondent's rehabilitation, Bar Counsel failed to establish a basis to refer the matter for a hearing. We agree that Respondent mischaracterized his disciplinary status in the *pro hac vice* applications, but the issue Bar Counsel would explore, the claim that Respondent was motivated by personal gain, is wholly unsubstantiated.

With respect to the application filed on November 16, 2010, in the United States District Court for the Eastern District of Virginia, Respondent stated that "I have not been reprimanded in any court nor has there been any action in any court pertaining to my conduct or fitness as a member of the bar." FF 121. At the time, this matter was pending before the Hearing Committee. In addition, before 2010, there had been at least two "actions" by the Court of Appeals "pertaining to [Respondent's] conduct or fitness as a member of the bar." First, on December 5, 2005, the Court granted Respondent's motion to set aside his temporary suspension. Second, on March 16, 2006, the Court referred this case to the Board "to institute a formal proceeding to determine the nature of the final discipline to be imposed and to review the elements of the statute of which respondent was convicted to determine whether his conviction involved moral turpitude *per se* or on its facts." Order, *In re Rohde*, No. 05-BG-1141 (D.C. Mar. 16, 2006). The application filed on December 15, 2010, by a member of Respondent's firm in the United States District Court for the Southern District of New York in a related matter similarly stated that "[t]here are no pending disciplinary proceedings against Wayne Rohde in any State or Federal court." FF 122. Again, at the time of the New York application, this matter was pending before the Hearing Committee.

Although the Board is not a "court," the Board and its Hearing Committees act as an arm of the Court of Appeals in adjudicating disciplinary cases. *See* D.C. Bar R. XI, § 1(a); Order, *On Petition to Amend Rule 1 of the Rules Governing the Bar*, 431 A.2d 521, 523 (D.C. 1981) (Harris, J. concurring); *see also Simons v. Bellinger*, 643 F.2d 774, 775, 780 (D.C. Cir. 1980). Respondent's overly literal interpretation that the Board is not a "court," and Hearing Committee members are not "judges," resulted in answers in the Virginia and New York applications that, while "technically true," were nonetheless misleading. *See* Declaration of Marc J. Fink, attached to Respondent's Memorandum in Opposition to Bar Counsel's Motion for a Hearing and in Reply to Bar Counsel's Rehabilitation Submission at ¶ 8 (Sept. 10, 2013) ("Fink Decl."); *see also Shorter*, 570 A.2d at 768. Respondent's additional statement in the Virginia application, that there had not "been any action in any court pertaining to my conduct or fitness as a member of the bar" was plainly false, since the Court had taken actions in this case.

At the same time, Bar Counsel offered only speculation that Respondent intended to deceive his firm and acted dishonestly for personal gain. Thus, before the Hearing Committee, Bar Counsel claimed that Respondent "had large financial stakes" in maintaining his status at his law firm and that he could "potentially lose a client and disappoint his new [firm]." Bar Counsel's Submission Regarding Respondent's Rehabilitation at 6 (July 31, 2013). That speculation was directly rebutted by Respondent in the sworn Declaration of Marc Fink, a partner at Respondent's firm. Mr. Fink attested, *inter alia*, that Respondent's firm was aware of the pending disciplinary proceeding and that Respondent "did not respond on his own" to the question in the Virginia *pro hac vice* form, but came to him for guidance. He further averred that there was no reason for Respondent to submit the *pro hac vice* applications to appease the firm or retain a client he would have otherwise lost, because the firm was already aware of this disciplinary proceeding at the time

the applications were filed, Respondent was not the originating attorney for the client at issue, and other attorneys from Respondent's firm were capable of representing the client before the federal courts in Virginia and New York. Fink Decl. at ¶¶ 4-7.

The record thus shows that Bar Counsel's unsubstantiated claim that Respondent intended to deceive his firm and acted dishonestly for personal gain is directly rebutted by sworn proof from a partner in the firm itself, showing that he did not. Under these circumstances, there is no basis to refer the matter for further fact-finding on Respondent's moral character, particularly given its lack of relevance to the question of Respondent's rehabilitation from alcoholism and the uncontroverted evidence of Respondent's continued and long-standing sobriety. That evidence satisfies the third *Kersey* prong.

C. Probation

The Hearing Committee recommended a two-year suspension with a fitness requirement, and that the suspension be stayed in favor of a three-year period of supervised probation, subject to certain conditions. Those conditions include that Respondent shall: a) not commit any other disciplinary rule violations; b) maintain his sobriety; c) be subject to sobriety monitoring; d) meet as frequently as necessary to maintain his sobriety with a representative of the D.C. Bar Lawyer Assistance Program; and e) attend Alcoholics Anonymous meetings as often as he, his LAP representative, and other involved experts deem necessary.

We agree with the Hearing Committee that this is the appropriate sanction. Respondent has worked hard and has successfully rehabilitated himself. By all accounts he has practiced law competently for several years since the accident without further incident. A suspension at this time would serve primarily to punish the Respondent rather than protect the public. We are satisfied that the Hearing Committee's recommended sanction ensures that the public is adequately protected currently and will be adequately protected in the future.

CONCLUSION

For the foregoing reasons, we recommend that Respondent be suspended for two years with a requirement to prove his fitness to practice as a condition of reinstatement, and that the suspension be stayed in favor of a three-year period of supervised probation, subject to the conditions set forth by Hearing Committee Number Three in its Report and Recommendation. We further recommend that Respondent not be required to provide his clients notice of the probation under D.C. Bar R. XI, § 3(a)(7).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /ELY/
Eric L. Yaffe
Chair

Dated: August 3, 2015

All members of the Board concur in this Report and Recommendation, except Mr. Carter, who is recused.