



After his fraudulent return scheme was discovered by Target loss prevention personnel, Respondent, on August 4, 2006, pled guilty in Montgomery County, Maryland to the theft of property under \$500, in violation of Section 7-104(a), (b) of Maryland Criminal Law (Theft-Unauthorized Control Over Property).<sup>1</sup> Respondent agreed that had his case gone to trial, the evidence would have shown that on October 29, 2005, Respondent stole a Bose stereo with a value of \$525.00; that on December 24, 2005, Respondent stole a Kodak printer with a value of \$237.00; and that on January 1, 2006, Respondent stole an RCA stereo with a value of \$88.00. On or about August 4, 2006, Respondent was sentenced to (1) two years supervised probation, (2) forty hours of community service and (3) fines and costs totaling \$625.

## **II. Procedural History**

By letter dated August 16, 2006, Bar Counsel, pursuant to D.C. Bar R. XI, §10(a) submitted a certified copy of the docket entry of Respondent's guilty plea in Montgomery County to the Clerk of the District of Columbia Court of Appeals. Bar Counsel also submitted a proposed order pursuant to D.C. Bar R. XI, § 10(c) requesting that Respondent be suspended immediately from the practice of law in the District of Columbia until disciplinary proceedings

---

<sup>1</sup> Maryland Criminal Code states, in relevant part, that:

- (a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
  - (1) intends to deprive the owner of the property;
  - (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
  - (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.
- (b) A person may not obtain control over property by willfully or knowingly using deception, if the person:
  - (1) intends to deprive the owner of the property;
  - (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
  - (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Md. Ann. Code of 1957, art. 27 § 7-104.

resolve his case and that the Board on Professional Responsibility institute a formal proceeding to determine the nature of the final discipline to be imposed.

On September 11, 2006, Respondent moved to have his suspension set aside, although a suspension had not yet been entered technically. Bar Counsel did not oppose the motion.

On October 5, 2006, the Court of Appeals granted Respondent's motion and denied Bar Counsel's petition requesting an order of temporary suspension as moot.

On October 23, 2006, the Court of Appeals entered an order directing the Board on Professional Responsibility to institute a formal proceeding to determine the nature of the final discipline to be imposed and to review the elements of the offense of which Respondent was convicted to determine whether the conviction involves moral turpitude within the meaning of D.C. Code § 11-2503(a). *In re Allen*, No. 06-BG-958 (D.C. Oct. 23, 2006).

By letter dated October 26, 2006, the Board directed the parties to brief whether the crime of which Respondent was convicted involves moral turpitude *per se*.

On November 15, 2006, Bar Counsel filed a brief on the issue of moral turpitude. In his brief, Bar Counsel avers that while Respondent's conviction does not involve moral turpitude *per se*, his actions could involve moral turpitude based on the facts since he committed a serious crime. Bar Counsel also requested that this matter be referred to a hearing committee to determine whether the circumstances involve moral turpitude based on the facts.

On November 22, 2006, Respondent replied to Bar Counsel's November 15, 2006 brief on the issue of moral turpitude *per se*, agreeing that this matter does not involve moral turpitude *per se* and that a hearing committee should determine whether this matter involves moral turpitude based on the facts.

On December 21, 2006, the Board issued an Order referring this matter to a hearing committee to determine: (1) whether Respondent's conviction involves moral turpitude on the

facts in light of any aggravating or mitigating circumstances; and (2) what final discipline is appropriate in light of Respondent's criminal conviction.

On December 28, 2007, Bar Counsel filed a two-count specification of charges and a petition instituting formal disciplinary proceedings against Respondent. Count One of the specification of charges alleges that Respondent engaged in conduct in violation of Rule 8.4(b) (criminal acts that reflected adversely on his honesty, trustworthiness or fitness as a lawyer), and Rule 8.4(c) (dishonesty, fraud, deceit and/or misrepresentation). Count Two of the specification of charges alleges that Respondent has been convicted of a serious crime as defined by D.C. Bar R. XI, § 10(d) and thus, the sole issue to be determined in light of Respondent's conviction is the final discipline to be imposed. On February 6, 2008, after an unopposed motion to extend time was granted, Respondent answered the petition instituting formal disciplinary proceedings. This Hearing Committee set the hearing in this matter for March 28, 2008.

During the March 28<sup>th</sup> hearing, Bar Counsel elected not to call any witnesses but instead submitted Bar Exhibits A through D and Bar Exhibits 1 through 5, which were received into evidence without objection. Bar Counsel also moved Joint Exhibit 1, the Stipulation of Facts, which was received into evidence without objection. Bar Counsel then rested his case-in-chief. In doing so, Bar Counsel elected to reserve for briefing whether Respondent's actions constituted moral turpitude based on the facts.

Respondent also elected not to call any witnesses. His counsel moved Respondent's Exhibits 1 through 5 into evidence, which were received without objection.

Although Respondent rested his case without calling any witness, the Hearing Committee wanted to develop the record by taking testimony on the question of moral turpitude, since the Board referred this matter to the Hearing Committee for a moral turpitude determination. The Hearing Committee was particularly interested in hearing from Respondent and his treating psychiatrist. At the Hearing Committee's urging, Respondent's counsel agreed to make

Respondent and his doctor available to testify without the need for a subpoena. As a result, the March 28<sup>th</sup> hearing was adjourned to April 28, 2008 so Respondent could confer with his counsel regarding his testimony.

On April 28, 2008, the Hearing Committee heard testimony from Respondent and Thomas C. Goldman, M.D. Bar Counsel called Detective David Hill, as a rebuttal witness. Bar Counsel also offered additional exhibits, designated as Bar Exhibits 6 through 8. These exhibits were admitted into evidence over hearsay objections. Respondent also offered six additional exhibits identified as Respondent's Exhibits 1 through 6 for the April 28<sup>th</sup> hearing. Five of those exhibits were admitted into evidence and Exhibit 1 was not admitted. This Hearing Committee also requested that a videotape created by Target Department Store be placed into evidence, and it was admitted. This tape showed Respondent's fraudulent transactions. In addition to hearing testimony and receiving additional evidence, the Hearing Committee heard closing arguments on the parties' respective positions.

### **III. Findings of Fact**

Based on the evidence produced at the hearing, testimony taken, arguments advanced in support thereof and the record as a whole, this Hearing Committee makes the following findings of fact:

#### **A. General Findings of Fact.**

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on July 10, 1992, and assigned Bar number 433601. (Joint Exhibit 1, Joint Stipulation of Facts (" Joint Stipulation") ¶ 1.) Respondent is also a member of the Pennsylvania and Virginia bars. (*Id.*)

2. Respondent is married with four children. (April 28, 2008 Transcript ("Tr. II") at 11:2-4, 13:7.)

3. During the time frame relevant to his actions, Respondent was an assistant to the President of the United States for domestic policy issues. (Tr. II at 7:7-11.) He advised the President on all domestic policy issues including healthcare, education, labor, housing, transportation, environmental, and interior issues, among others. (*Id.* at 7:14-18.) He was one of a few senior people in the White House during Hurricane Katrina and was tasked to lead the White House response to that crisis. (*Id.* at 14:5-15.)

4. On January 2, 2006, Respondent was arrested for theft of property from the Target Corporation at one of its stores in Gaithersburg, Maryland, which is located in Montgomery County. (Tr. II at 11:2-4, 13:7.)

5. Respondent engaged in a fraudulent return scheme to deprive Target of its property on at least three occasions. (Stipulation ¶ 4.)

#### **October 29, 2005 Incident**

6. On October 29, 2005, at approximately 9:56 a.m., Respondent purchased a Bose stereo system from a Target store in Gaithersburg, Maryland, using his credit card. (Hearing Committee Exhibit 1; Tr. II at 24-25.) Respondent left the store with the item and placed it in his car. (*Id.*) When he got to his car with the item, Respondent “immediately realized that this is not good. [His] wife is not going to like this. [He] didn’t need to make this purchase.” (Tr. II at 24:19-25:1.)

7. Respondent left the Bose system that he purchased in his car and then re-entered the Target store shortly thereafter with an empty shopping cart. (Hearing Committee Exhibit 1; Tr. II at 24-25.)

8. Upon re-entering the store, Respondent went to the electronics department and placed an identical Bose stereo system into his empty shopping cart. (*Id.*) Approximately five minutes later, Respondent entered the guest services center at the Target store, presented the receipt he received when he purchased the Bose stereo system that remained in his car and

received a refund to his credit card for the purchase price of that system while returning the Bose system he had just removed from the Target's shelves. (*Id.*) Respondent made a fraudulent return. (Stipulation ¶ 4.)

#### **December 24, 2005 Incident**

9. On December 24, 2005, at approximately 8:30 a.m., Respondent purchased a Kodak printer from a Target store in Montgomery County, Maryland, using his credit card. (Hearing Committee Exhibit 1; Tr. II at 22-23.) Respondent left the store with the item. (*Id.*) At some point in time, Respondent returned to another Target store without the printer but with the receipt for the printer. (Hearing Committee Exhibit 1; Tr. II at 22-23.)

10. Upon entering the other Target store, Respondent removed an identical Kodak printer from the Target shelves and, shortly thereafter, entered the guest services center at the Target store to return the item he removed from the shelf. (*Id.*) In doing so, Respondent presented the receipt he received when he purchased the original printer that he took out of the other Target store early in the day and received a refund to his credit card for the purchase price of that printer while returning the printer he removed from the Target shelf for which he did not pay. (*Id.*) Respondent made another fraudulent return. (Stipulation ¶ 4.)

#### **January 1, 2006 Incident**

11. On January 1, 2006, at approximately 3:30 p.m., Respondent purchased an RCA stereo from a Target store in Rockville, Maryland, using his credit card. (Hearing Committee Exhibit 1; Tr. II at 26.) Respondent left the store with the item and placed it in his car. (*Id.*) Respondent reentered the Target store shortly thereafter empty handed. (Hearing Committee Exhibit 1; Tr. II at 26.)

12. Upon re-entering the store, Respondent removed an identical RCA stereo from the shelves and then proceeded to the guest services center at the Target store. (*Id.*) He presented the receipt he received for the purchase of the original stereo that remained in his car and received a

refund to his credit card for the purchase price of that stereo while returning the stereo he removed from the Target shelf for which he did not pay. (*Id.*) Respondent made another fraudulent return. (Stipulation ¶ 4.)

**B. Findings of Fact as to Count I (Misconduct).**

13. On August 4, 2006, Respondent pled guilty in Montgomery County Circuit Court to theft of property under \$500, in violation of Section 7-104(a), (b) of Maryland Criminal Law (Theft-Unauthorized Control Over Property). (Stipulation ¶ 3.) The charge to which Respondent pled guilty was a misdemeanor offense. (Tr. II at 21:12-16.)

14. At sentencing, Respondent agreed that had his case gone to trial, the evidence would have shown that on October 29, 2005, Respondent stole a Bose stereo with a value of \$525.00; that on December 24, 2005, Respondent stole a Kodak printer with a value of \$237.00; and that on January 1, 2006, Respondent stole an RCA stereo with a value of \$88.00. (Stipulation ¶ 4.)

15. On or about August 4, 2006, Respondent was sentenced to (1) two years supervised probation, (2) forty hours of community service and (3) fines and cost totaling \$625. (*Id.* ¶ 5.)

16. After Bar Counsel reported Respondent's conviction to the District of Columbia Court of Appeals, on October 23, 2006, the District of Columbia Court of Appeals issued an order, noting that Respondent had been convicted of a serious crime and directing the Board on Professional Responsibility ("the Board") to "institute formal proceedings to determine the nature of the final discipline to be imposed, and specifically, to review the elements of the Maryland offense of which Respondent was convicted for the purpose of determining whether any of the crimes involves moral turpitude within the meaning of D.C. Code § 11-2503(a) (2001)." (Bar Counsel Exhibit 4.)

**C. Findings of Fact as to Count II (Serious Crime).**

17. On December 21, 2006, the Board issued an order, concluding that because the crime of which Respondent was convicted was a misdemeanor, it did not involve moral turpitude *per se*. (Bar Counsel Exhibit 5.)

18. This disciplinary matter involves two issues: (1) whether the actions of Respondent involve moral turpitude; and (2) what is the appropriate discipline to be imposed based on Respondent's conviction of a serious crime and his violations of Rules 8.4(b) and 8.4(c).

**D. Findings of Fact as to the Credibility of Witnesses.**

19. Three witnesses were called during the hearing. Bar Counsel rested his case in chief without calling a witness but Respondent, at the urging of the Hearing Committee, called two witnesses during his case in chief — himself and his treating psychiatrist, Dr. Thomas C. Goldman. Bar Counsel called Detective David E. Hill as a rebuttal witness.

20. The Hearing Committee found each of the witnesses to be generally unpersuasive due to inconsistent testimony and a lack of corroboration of their versions of critical events. In certain instances, however, the Hearing Committee credited the witnesses' testimony when there was no pattern of inconsistency or an appearance of lack of candor. The Hearing Committee has generally credited the testimony of each individual that comports with the Joint Stipulation. The Hearing Committee did not credit the witnesses' testimony with respect to the following:

**Respondent**

21. Respondent admits that he engaged in a fraudulent return scheme to deprive Target of its property. Respondent's testimony explaining his basis for engaging in the return scheme contained inconsistencies which undermined the credibility of his testimony to some degree. For example, as an explanation for his criminal conduct, Respondent testified that he would shop regularly after leaving work at night and before arriving at home as a means of

building a buffer between work and home to relieve stress. (Tr. II at 38:20-39:14.) However, the incidents in question occurred during the day or afternoon, which is inconsistent with the testimony that he would go to the stores at night time as a stress reliever and buffer leading to these events.

22. At the hearing, Respondent also testified that he returned the stolen items to the stores from which he took the items once he obtained the illegal refund. (Tr. II at 25:19-26:22.) Yet, Respondent did not tell the Montgomery County Police or prosecutor that he returned the items notwithstanding Respondent may have avoided criminal prosecution with that information or might have mitigated the criminal penalty. Moreover, Respondent's therapist testified that Respondent told him that the Bose sound system that he (Respondent) stole in October was not usable in his apartment, suggesting that Respondent took the stereo home rather than return it within a few minutes as Respondent testified. (Tr. II at 76.)

**Dr. Thomas Goldman**

23. Dr. Goldman was qualified as a forensic psychiatric expert. (Tr. II at 69-70.) His expert report noted that Respondent suffered from kleptomania. (Tr. II at 82:18-89:7.) Yet, at the hearing, Dr. Goldman testified that Respondent suffered from an adjustment disorder rather than kleptomania. (*Id.*) He never mentioned an adjustment disorder in his report. (Respondent Exhibit 2.)

24. Perhaps more importantly, Dr. Goldman testified that if Respondent had returned the stolen property to the stores shortly after he realized what he had done, “[t]hat would be different from what [Dr. Goldman] understood he did.” (Tr. II at 78:12-79:7.) When questioned later by the Hearing Committee about whether Respondent returned the stolen items to the store's shelves, Dr. Goldman testified that he believes he indeed did hear that occurred. (Tr. II at 86:19-87:4.)

25. As pertinent to this case, the DSM-IV from which Dr. Goldman diagnosed Respondent with kleptomania states that the condition involves instances where “the individual may hoard the stolen objects or surreptitiously return them.” (Tr. II at 95:20-96:13.) Dr. Goldman’s expert report, however, does not reflect any statements from Respondent that he returned the stolen items. (Respondent Exhibit 2.) Thus, Dr. Goldman first suggests he did not know Respondent returned the items, then states Respondent told him that Respondent indeed returned the items, but Dr. Goldman fails to mention that fact in his report although it is a key element of Respondent’s alleged condition.

#### **Detective David Hill**

26. The Committee notes that while Detective Hill’s testimony did not exhibit the inconsistencies displayed in the testimony of Respondent and Dr. Goldman, it was based in large part on hearsay. While some documentary evidence and the tapes corroborated the detective’s testimony, significant portions of critical testimony relied on out of court statements by Target agents and other police officers. (*See e.g.*, Tr. II at 149:4-150:9; 153:19-154:11.) Bar Counsel elected not to call these individuals.

#### **E. Findings of Fact in Support of Mitigation.**

27. **Unsettled Private Life.** Respondent and his family moved their family residence approximately five times during an eight month time period in 2005. (Tr. II at 8:9-15.) These frequent moves did not appear to occur for financial reasons. (Tr. II at 8:9-12:19; 49:21-57:11.)

28. **Hurricane Katrina.** As senior domestic policy advisor to President Bush in 2005, Respondent had a leadership position in the White House’s response to the Hurricane Katrina disaster. (Tr. II at 57:9-59:14.) He had a grueling work schedule from 5 a.m. to 10 p.m. during a six to eight week period after the disaster. (Tr. II at 59:15-60:22.) Respondent “identified closely with those who were suffering [in Katrina] and [he] internalized that.” (Tr. II at 62:3-6.) Moreover, some memories of the Katrina disaster affected Respondent greatly; for

example, he remembered “a gentlemen sitting out in front of the Superdome in a chair for days with a sign on him saying, ‘I’ve passed away. Please bury me.’ That didn’t happen, and [he] felt very responsible for much of that, the lack of ability to address that.” (Tr. II at 62:15-22.)

29. **Reciprocal Discipline.** Respondent was disciplined by the bars of Pennsylvania and Virginia. (Tr. I at 11:8-22.) He cooperated fully in those proceedings and completed a 90-day suspension in each jurisdiction. (Tr. I at 11:8-22.) He is now a bar member in good standing in both jurisdictions. (Tr. I at 11:18-22.) Respondent also completed his Maryland sentencing requirements, including paying his fine and completing his community service. (Tr. I at 11:8-22.)

30. **Time to Prosecute and Respondent’s Cooperation.** The Bar of the District of Columbia has been reviewing and prosecuting this matter since August 16, 2006. During this time, Respondent has cooperated fully.

31. **Medical Condition.** While the Hearing Committee has noted inconsistencies with Dr. Goldman’s diagnosis of Respondent’s condition or disorder — whether it be an adjustment disorder or kleptomania — Respondent faced significant pressure from his job given the amount work, and involvement with the Katrina disaster.

32. **Positive Community Work and Remorse.** Respondent has been in public service for almost 12 years and has been an active role model in the community particularly with respect to his involvement with his church. (Respondent’s March 28 Exhibits 1-5.) Respondent has never been arrested or disciplined prior to this matter. He has displayed significant remorse for his actions, including cooperating with the criminal investigation, acknowledging the consequences of his actions and apologizing for the breach of the public’s, his parish’s and his family’s trust.

### **III. Conclusions of Law**

This proceeding must determine whether Respondent’s conviction involves moral turpitude on the facts in light of any aggravating or mitigating circumstances. Bar Counsel

charged Respondent with conduct violating District of Columbia Rules of Professional Conduct Rule 8.4 (b) and (c) because Respondent engaged in criminal acts that reflected adversely on his honesty, trustworthiness or fitness as a lawyer, and with the commission of a serious crime. In addition, the Board directed the Hearing Committee to determine whether Respondent's conviction involved moral turpitude based on the facts. We examine each of these issues below against the backdrop of mitigating circumstances.

**A. Respondent Engaged in Misconduct by Violating Rule 8.4(b) (Criminal Fraud and Theft) and Rule 8.4(c) (Dishonesty and Fraud).**

Rule 8.4(b) states that “[it] is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” The term “dishonesty” encompasses fraudulent, deceitful, or misrepresentative behavior. *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam) (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). D.C. Code § 22-3221 defines criminal fraud in the second degree as “a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.” The D.C. theft statute, D.C. Code § 22-3211(b), provides that a person commits the crime of theft “if that person wrongfully obtains or uses the property of another with the intent 1) to deprive the other of a right to the property or a benefit of the property; or 2) to appropriate the property to his or her own use or to the use of a third person.”

Rule 8.4(c) of the D.C. Rules on Professional Conduct makes it professional misconduct for a lawyer to engage in “conduct involving dishonesty, fraud, deceit or misrepresentation.” The District has held that theft evinces a lack of “honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness.” *In re Shorter*, 570 A.2d at 767-68 (quoting *Tucker v. Lower*, 434 P.2d at 324). “Fraud” is a “generic term which embraces all the multifarious acts . . . resorted to by one individual to gain an advantage over another by suggestions or by suppression

of the truth.” *In re Shorter*, 570 A.2d at 768 (quoting 37 C.J.S. *Fraud* § 1 (1943)). “Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.” *Andolsun v. Berlitz School of Languages*, 196 A.2d 926, 927 (D.C. 1964).

There is no doubt that Respondent engaged in criminal misconduct in violation of Rules 8.4(b) and (c). Respondent pled guilty in Montgomery County, Maryland to the crime of theft of property. Respondent then stipulated that, on at least three occasions, he conducted a fraudulent return scheme to deprive Target of its property.<sup>2</sup> (Stipulation ¶ 4.) At its very essence, Respondent’s “return scheme” was theft by fraud. Both theft and fraud strike at the heart of a lawyer’s role as an advocate and a champion of civil and constitutional rights. These acts turn a blind eye to a lawyer’s sworn ethical obligations and have no place in the legal profession. Respondent’s crime infringes on Rule 8.4’s core values, namely a lawyer must not act in a manner reflecting adversely on his or her honesty, trustworthiness, or fitness particularly conduct involving dishonesty, deceit or misrepresentation.

**B. Respondent’s Conduct is not Moral Turpitude on the Facts**

D.C. Code § 11-2503(a) provides for disbarment of an attorney who is convicted of an offense involving moral turpitude. A felony that includes theft or intent to defraud as an essential element is a crime of moral turpitude *per se*. See, e.g., *In re Caplan*, 691 A.2d 1152 (D.C. 1997) (en banc). Where, however, the conviction is a misdemeanor offense, it does not involve moral turpitude *per se*. *In re McBride*, 602 A.2d 626 (D.C. 1992) (en banc). The Court in *McBride* held that it “no longer sees any justification for believing that a misdemeanor — even one with an ‘intent to defraud’ — can involve moral turpitude *per se*.” *Id.* Instead, a hearing is required to determine whether the misdemeanor involves moral turpitude based on the

---

<sup>2</sup> Bar Counsel and the witnesses suggest that Respondent’s conduct extended past the three incidents at the heart of this matter. This Hearing Committee does not believe the record supports a finding that Respondent participated in more than the three incidents to which the parties stipulated. Moreover, the Hearing Committee notes that Bar Counsel’s charges are limited to only the December 24, 2005 incident involving the Kodak printer.

underlying facts. *Id*; see, e.g., *In re Sneed*, 673 A.2d 591, 594 (D.C. 1996) (moral turpitude found where misdemeanor theft involved the attorney’s participation in a scheme to defraud a government agency of \$15,000); *In re Untanlan*, 619 A.2d 978 (D.C. 1998) (*per curiam*) (moral turpitude found where misdemeanor conviction involved attorney’s facilitation of a felony theft, which was characterized as fraudulent). In other words, this Hearing Committee must determine whether Respondent committed a crime rising to the level of moral turpitude.

Bar Counsel bears the “burden of proving disciplinary charges and factual findings must be supported by clear and convincing evidence.” *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quoting *In re Williams*, 464 A.2d 115, 119 (D.C. 1983)); see also B.P.R. Rule 11.5. “Clear and convincing evidence is most easily defined as the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt”; it “is such evidence as would produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.” *In re Ingersoll Trust*, 950 A.2d 672 (D.C. 2008) (quoting *In re Estate of Walker*, 890 A.2d 216, 223 n.6 (D.C. 2006)). Thus, it is Bar Counsel’s duty to establish by clear and convincing evidence that Respondent’s crime involved moral turpitude based on the facts. Bar Counsel has not met this burden.

**1. The District of Columbia has a High Standard for Acts Constituting Moral Turpitude.**

There is no bright-line test or standard to determine what acts constitute moral turpitude. The idea of moral turpitude incorporates a revulsion of society toward conduct deeply offending the general moral sense of right and wrong. *In re McBride*, 602 A.2d at 632-33. It is an “act of baseness, vileness or depravity.” *In re Sharp*, 674 A.2d 899-901 (D.C. 1996). The Court has explained that a crime constitutes moral turpitude where it “offends the generally accepted moral code of mankind.” *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (en banc).

In *In re Colson*, the Court discussed the scope of the Hearing Committee's inquiry in deciding the moral turpitude question. *Id.* at 1168. Where an attorney stands convicted of a crime which according to the Board's initial determination does not inherently involve moral turpitude, the Hearing Committee should explore the question of moral turpitude by considering "evidence as to the circumstances of the crime including the actor's knowledge and intention." *Id.* at 1165.

## **2. Nature and Circumstances of Respondent's Crime.**

Bar Counsel argues that Respondent employed an ingenious scheme to deprive Target of its property. (Bar Counsel's Brief at 7.) Bar Counsel continues arguing that Respondent's thefts from Target can best be characterized as covert and deceptive. (*Id.*) The Hearing Committee agrees that Respondent's crime was covert and somewhat sophisticated. However, most crimes are covert in nature. Further, the sophistication of this crime may have been exacerbated by apparent holes in Target's own loss prevention and return procedures. There was no evidence presented that Respondent knew when he returned items at Target that the store did not attempt to reconcile the skew numbers on the receipts with the skew numbers on the returned items. If Target had performed simple reconciliations, Respondent's supposed sophisticated scheme would have been stopped in its tracks.

Bar Counsel also argues that Respondent's scheme did not operate in an open fashion. (Bar Counsel's Brief at 8.) As a matter of commonsense, few, including the common snatch and grab criminal, enter large department stores without the knowledge they are under surveillance. Most stores post this information. Regardless, although there was no evidence that Respondent knew or did not know about the surveillance, we assume that Respondent understood that the Target store had cameras and employed people to monitor individuals using those cameras.

Bar Counsel also submits that the "cunning and deceptive nature of Respondent's fraudulent returns is 'contrary to justice, honesty, modesty, or good morals,' and can therefore be

characterized as a crime involving moral turpitude.” (Bar Counsel’s Brief at 8 (citation omitted).) Bar Counsel’s argument runs dangerously close to suggesting that by simply participating in a misdemeanor theft by fraud, a person engages in moral turpitude based on the facts since all fraud by nature is cunning and deceptive and subverts honesty, good morals and justice. This line of reasoning essentially suggests that misdemeanor fraud is moral turpitude *per se*. Such a position would contradict the holding of *McBride* that a misdemeanor involving fraud is not moral turpitude *per se*.

Here, the Hearing Committee finds that Bar Counsel has not provided any evidence that Respondent’s actions were of a vile or depraved nature justifying a finding of moral turpitude based on the facts. Simply committing a fraudulent act that is a misdemeanor does not rise to moral turpitude by itself. Furthermore, while the Hearing Committee agrees with Bar Counsel that Respondent’s actions were not designed to benefit anyone (*see* Bar Counsel Brief at 9), we cannot agree that the actions could be pecuniary in nature. Respondent did not profit from his crime. The stolen items had a nominal value and the evidence shows that Respondent did not need the items for personal use. Therefore, Respondent’s actions, while dishonest, fraudulent and immoral, do not cross over into the realm of moral turpitude.

**C. There are Several Factors Mitigating Respondent’s Behavior.**

When deciding the moral turpitude question in a misdemeanor case, the question of disability mitigation is relevant and material.<sup>3</sup> In *In re Spiridon*, 755 A.2d 463, 467 (D.C. 2000), the Court held that evidence of a mental condition or motive “bear[s] on the question of moral turpitude in its actual commission.” *Id.* Based on the mitigation evidence presented, we find that Respondent did not commit a crime of moral turpitude.

---

<sup>3</sup> Although Respondent failed to file a *Kersey* mitigation notice under Board Rule 7.6, the Hearing Committee can consider his disability mitigation because “the Board is to consider mitigation and aggravating circumstances independently of any *Kersey* disability.” *In re Herbst*, 931 A.2d 1016, 1017 n.1 (D.C. 2007) (*per curiam*).

In *Spiridon*, the respondent was convicted of misdemeanor theft of \$18 while working as a bus driver in Maryland. The Hearing Committee examined the facts and circumstances surrounding the commission of the crime such as the motive and the respondent's mental condition, including the testimony of two doctors who testified that respondent suffered from schizoaffective disorder, alcohol abuse, and adjustment disorder with mixed anxiety and depressed mood, and concluded that respondent's crime did not involve moral turpitude. The Court agreed, concluding that "respondent's actions were not so much motivated by a desire for personal gain as by psychological disturbances more closely akin to those at issue in *Kent*." *Id.* at 469.

In *In re Kent*, 467 A.2d 982 (D.C. 1983), the Court concluded that the respondent was suffering from "severe transient emotional distress" and had a prior history of emotional problems when she was arrested for stealing merchandise in a department store, and that "she was motivated by a 'neurotic desire to be caught rather than a desire for personal gain.'" *Id.* at 984. The Court suspended Ms. Kent for 30 days.

Following *Kent*, the Court in *Spiridon* held that it could not "confidently conclude that respondent took the money for 'personal gain,' as opposed to taking it in whole or in part as a result of 'self-defeating behavior' consistent with this psychological problems." 755 A.2d at 467. Mr. Spiridon was suspended for one year with fitness.

In *In re Soininen*, the respondent was convicted of misdemeanor theft after she attempted to steal flowers and potting soil valued at less than \$200. The Hearing Committee considered disability in determining whether she was convicted of a crime involving moral turpitude, concluding that while the respondent's conduct violated Rules 8.4(b) and (c) of the District of Columbia Rules of Professional Conduct, "she had established by clear and convincing evidence that her conduct was 'substantially affected by her addiction.'" 783 A.2d at 621. Her disability also was considered in mitigation of the sanction after the Hearing Committee found no moral

turpitude. *Id.* at 622. The Court affirmed the Hearing Committee’s recommendation and imposed a 30-day suspension, stayed in favor of a two-year supervised probation with conditions. *Id.* at 619.

Here, Respondent was under significant pressure in responding to a national disaster which involved the loss of hundreds of lives. Respondent’s role in the White House’s Hurricane Katrina response, coupled with his unsettled private life — moving his residence over and over again while trying to keep his word to his family, undoubtedly caused stress that may have manifested itself in one of the conditions identified by Dr. Goldman. This Hearing Committee, like the Court in *Spiridon*, cannot confidently conclude that Respondent acted out of personal gain as opposed to self-defeating behavior consistent with a psychological problem or by a neurotic desire to be caught, like the respondent in *Kent*.

Even putting aside the stress Respondent experienced, there are further mitigating factors. Respondent has been disciplined in other jurisdictions, he has cooperated fully, and has had an exemplary record — never having been previously arrested or faced disciplinary measures by any bar. Against the backdrop of what Respondent has done right in his life and career, what he has done wrong does not rise to the level of moral turpitude. Nevertheless, Respondent’s actions were unquestionably wrong and do not befit a member of the bar of this jurisdiction. Accordingly, a sanction that sanctions Respondent for his misdeeds and deters him and others from engaging in similar conduct in the future is appropriate.

#### **IV. Recommended Sanction**

As the District of Columbia has recognized, “the purpose of bar discipline [is] to protect the public, the courts, and the legal profession from the misconduct of individual attorneys.” *In re Smith*, 403 A.2d 296, 300 (D.C. 1979). Based on the foregoing findings of fact and conclusions of law, and particularly taking into account the Court’s past precedents in analogous

