DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER NINE

In the Matter of:	:	
	:	
BARRY K. DOWNEY,	:	
	:	
Respondent.	:	Board Docket No. 08-BD-014
	:	Bar Docket No. 2008-D338
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 416968)	:	

REPORT AND RECOMMENDATION

INTRODUCTION

Bar Counsel charged Barry K. Downey ("Respondent"), a member of the Bar of the District of Columbia Court of Appeals, with the commission of a "serious crime" within the meaning of D.C. Bar R. XI, § 10(b), based upon Respondent's felony conviction for engaging in the business of money transmission without a license in violation of D.C. Code § 26-1002 (2001). Bar Counsel also contends that Respondent should be disbarred for that same crime under D.C. Code § 11-2503(a), which mandates disbarment for conviction of a crime of moral turpitude. Respondent asserts that he should receive no discipline.

Our assignment at the outset of this matter was straightforward. The Board had concluded that the felony to which Respondent pleaded guilty—a strict liability crime requiring no proof of *scienter*—did not involve moral turpitude *per se*. It referred the question whether the underlying conduct involved moral turpitude on the *facts* to a hearing committee. In essence, our task was to determine whether Respondent had acted with *scienter*, even if proof of that was not required for a conviction. In either case, we were also to recommend a sanction based on Respondent's conviction of a "serious crime."

As set forth below, Bar Counsel's original position was that the facts did not demonstrate moral turpitude. Bar Counsel stated that it had no evidence to support such a finding, and accordingly had none to present. Notwithstanding Bar Counsel's position, our task remained to develop the record so as to make our own determination on the question of moral turpitude, as required by the Board's order of July 15, 2010. *See, e.g.*, *In re Allen*, Bar Docket No. 099-06 at 4-5 (H.C. Rpt. Nov. 19, 2008) (to "develop the record on the question of moral turpitude," the Hearing Committee called witnesses after the parties had rested); *In re Perrin*, Bar Docket No. 296-90 at 12 (H.C. Rpt. Mar. 29, 1994) (Where Bar Counsel did not argue that a respondent's criminal conviction involved moral turpitude, the Hearing Committee independently examined the question, finding that Bar Counsel does not have "the luxury of making his own mind and limiting the ability of the Committee, the Board and the Court of Appeals to make its own assessment of the matter.").

Bar Counsel presented no witnesses at the hearing. Respondent testified on his own behalf, and four other witnesses testified to his good character. Respondent asserted, as he had throughout the criminal matter and a disciplinary proceeding in Maryland, that he had relied on the advice of legal counsel in all matters related to the question whether E-GOLD, the entity for which he was a co-founder and Director, was subject to federal registration and state licensure requirements. According to Respondent, he was advised that such requirements did not apply.

Concerned about the paucity of evidence in the record, the Hearing Committee directed Respondent to produce any documents corroborating his claim that he relied on the advice of counsel. Respondent did so, and an additional hearing day was held to hear testimony on the newly produced materials. At the conclusion of the testimony, the Hearing Committee directed Bar Counsel to obtain additional evidence, namely billing records from the firms that had provided

legal advice to Respondent and E-GOLD. The record was then closed.

Based on our determinations as to credibility and relevance, our weighing of the evidence, the parties' submissions, and our consideration of the burden of proof, the Hearing Committee unanimously concludes that Respondent committed a "serious crime" within the meaning of D.C. Bar R. XI, § 10(b), and that Bar Counsel failed to prove that the facts underlying Respondent's conviction demonstrate moral turpitude. We also agree that Respondent's motion to dismiss should be denied. Thus, the only issue we must determine is the sanction to be imposed for Respondent's conviction of a "serious crime." That decision rests in large part on our assessment of Respondent's credibility in asserting that he relied on the advice of counsel. The Hearing Committee is divided on this crucial question. The majority finds credible Respondent's claim that he relied on the advice of counsel. The Chair disagrees, finding that Respondent repeatedly lied to the Federal District Court, the D.C. Court of Appeals, Maryland disciplinary authorities, and the Hearing Committee when he explained that he relied on the advice of counsel in concluding that the licensing requirement of D.C. Code § 26-1002 did not apply to E-GOLD.

The majority recommends that Respondent be issued an informal admonition for his "serious crime" conviction. The Chair recommends the substantially more severe sanction of a three-year suspension.

UNANIMOUS FINDINGS OF FACT

The Hearing Committee unanimously makes the following findings of fact (FF 1-43), which are supported by clear and convincing evidence:

1. Respondent is a member of the District of Columbia Bar, admitted by motion on January 9, 1989 and assigned Bar Number 416968. (Stip. ¶ 1; BX A.) He practices exclusively in the area of employee benefits law, specifically in the application of the Employee Retirement

Income Security Act of 1964 (ERISA). (Tr. 45.)

2. In the mid-1990s, Dr. Douglas Jackson, a close friend of Respondent's, conceived of a method of using digital currency backed by gold bullion to facilitate monetary transactions on the internet. (Tr. 53-54.) At the time, the use of digital currency in general as a substitute for credit cards for internet transactions was new. Dr. Jackson's idea to use gold and other precious metals to back digital currency was novel, and what ultimately became E-GOLD attracted widespread attention in the press. (Tr. 58.)

3. Gold & Silver Reserve ("GSR") and E-Gold (collectively, "E-GOLD")[1] offered their customers a digital currency known as "e-gold" that could be used by account holders to buy or sell goods or services online. (Stip. ¶ 8.) Customers could transfer e-gold gold between accounts, or exchange e-gold for dollars or other national currencies. (*Id.*)

4. Dr. Jackson invited Respondent and his wife to invest in E-GOLD. (Tr. 59). Before investing, Respondent sought the advice of David Seidl, a corporate lawyer at Miles & Stockbridge whom Respondent had known for many years, on laws and regulations that might affect E-GOLD's business. (Tr. 227, 231; BX 14B.) Respondent sent Seidl several pages of materials describing the E-GOLD system. (BX 14B.) The materials included a "promotional document" that mentioned possible application of banking regulations, characterizing it as a "gray zone." (Tr. BX 14B at 523.) In his letter to Seidl, Respondent stated that "we do not believe there exists much in the way of regulation of the business of GS&R," but asked Seidl for his "reaction to that conclusion." (BX 14B at 518.) Respondent asked specifically whether E-GOLD was subject to regulation under several areas of the law, including specifically banking law. (*Id*.) Respondent testified that after having reviewed the documents, Seidl advised him that "the company as

[1] GSR was established in 1996. E-Gold was spun off as a separate entity in 1999.

described was not doing banking, and was not subject to banking regulations." (Tr. 231-32.)

5. On March 6, 2012, the Hearing Committee directed Respondent to produce any written legal opinions that would substantiate his claim that he relied on the advice of counsel, including Seidl's, in all matters concerning whether E-GOLD was subject to federal registration and state licensure requirements. In response, among other documents, Respondent submitted Seidl's affidavit. Seidl stated that he recalled Respondent's request for advice with respect to any legal issues Seidl considered relevant. (BX 15.) Seidl added that he recalled having "reviewed certain background materials on Gold & Silver Reserve and shared my favorable opinion with [Respondent] on certain issues," based on his background as a corporate lawyer with significant securities law experience. (*Id*.) The affidavit does not provide any further details about Seidl's legal opinion or specify the nature of the issues on which he opined.

6. Respondent ultimately became a co-founder and a Director of E-Gold, Ltd., and a co-founder, Secretary, Vice-President, and Director of Gold & Silver Reserve, Inc. (Stip. ¶ 2.) Respondent had a 20 percent ownership stake in GSR. (Tr. 154.) Dr. Jackson owned 55 percent of GSR; Jackson's brother owned another five percent. (Tr. 51, 62, 154.) The remaining ownership interest was spread among numerous other individuals. (Tr. 155.)

7. Respondent participated in developing E-GOLD's business model and corporate structure. (Stip. ¶ 3.) However, he was not extensively involved in E-GOLD's day-to-day transactions. (Stip. ¶¶ 3-6.) Throughout his involvement with E-GOLD, Respondent maintained his law practice as a partner at Smith & Downey, an employee benefits law firm, where he continues to work. (Tr. 91, 96.)

8. By all accounts, E-GOLD was a success. The passage of the Patriot Act in late 2001 prompted Respondent to revisit the question of whether it was subject to various regulatory

requirements. The Patriot Act removed the *scienter* requirements from provisions in the Bank Secrecy Act that made it a crime to operate a money transmission business without having registered with the Department of the Treasury or having obtained a license required by state law. The statute defines an "unlicensed money transmitting business" as one that:

> (A) is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable; (B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section; or (C) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity.

18 U.S.C. § 1960(a). Previously, the law required proof that a defendant *knowingly* operated a money transmission business without a required state license.

9. In August or September 2002, Respondent sought legal advice about application of the Patriot Act to the E-GOLD entities from the law firm of Drinker Biddle and Reath, which had represented E-GOLD in patent matters. (Tr. 228, 234.) Over six months later, Drinker Biddle sent Respondent a lengthy memorandum setting forth its analysis. (BX 14C.)

10. In the memorandum, Drinker Biddle advised that:

> The E-Gold entities may wish to consider whether GSR needs to be registered with the Treasury Department and various states as a money service business . . . . GSR's location in the United States and the possibility that certain operations of its business may lead it to be categorized as a (a) currency dealer or exchanger; (b) issuer of stored value; (c) redeemer of traveler's checks, money orders or stored value and/or (d) money transmitter vulnerable to a regulatory claim that it is an unregistered money service business.

(*Id*. at 21.)

11. The memorandum added that the "need for E-Gold to register with the Treasury Department may also be an issue because of the common ownership between E-Gold and GSR."

With respect to the registration issue, the memorandum concluded that the entities might wish to consider "contacting the Treasury Department for clarification on whether E-Gold and GSR falls within the definition of a money service business or financial institution." (*Id*.) With respect to state licensure, it stated that E-GOLD "may want to survey the laws of the various states to ensure that GSR is not in violation of any licensing requirements for a MSB." (*Id*. at A-2.)

12. According to Respondent, the memorandum contained several material inaccuracies that called its conclusions, such as they were, into question. (Tr. 229, 238-44.) For example, the memorandum mistakenly describes E-Gold, Ltd., GSR, and the E-Gold Bullion Reserve Special Purpose Trust as related entities, when they are separate. (Tr. 239.) It inaccurately describes a typical transaction. (Tr. 239-40.) And it states incorrectly that GSR accepts "currency." (*Id*.)

13. Respondent, Dr. Jackson, and Dr. Jackson's brother participated in a conference call with Drinker Biddle attorneys the day the memorandum was received. (Tr. 262.) According to Respondent, Dr. Jackson reviewed line by line the errors in the facts and assumptions set forth in the memo. (*Id*.) Respondent expected Drinker Biddle to revise the memorandum and reevaluate its legal analysis in light of the correct facts. (Tr. 263.)

14. Respondent testified that because of the errors, he considered the memorandum to be "useless" and "did not view [the memo] as advice on anything." (Tr. 298, 316.) As a result, he complained repeatedly to Drinker Biddle about its bill. In June 2003, he protested that "neither company has yet seen an accurate product from this work," and advised the firm that he did not intend to recommend payment for "educating the attorneys involved on the content of the patriot act and the application of that learning to incorrect facts and assumptions with respect to G&SR and e-gold . . . ." (BX 14D at 552, 554.) In August 2003, having received no response to his June email, Respondent complained once again to Drinker Biddle about the bill. (*Id*. at 554.) In

December, Respondent emailed the firm a third time, again disputing the firm's fees and asking what "it would take" to split the work product into two memoranda addressing E-GOLD and GSR separately. (*Id*. at 555.) Drinker Biddle never produced any new or revised version of its original memorandum. (Tr. 269.)

15. Respondent testified that he "would not have used that Drinker Biddle document for anything" in its original state. (Tr. 312.) He appears to have relied on the memorandum to a limited extent, however. He drew comfort from a passage suggesting that the E-GOLD entities did not fall within the statutory definition of "financial institutions" and thus were not affected by the Patriot Act. The memorandum states that "[a]lthough, GSR and, to a more limited extent, E-Gold, perform some of the functions associated with certain of the enumerated 'financial institutions,' there is no definition that completely captures the function of any one of the E-Gold Entities or all of them taken together." Respondent, while contending that Drinker Biddle's analysis lacked any certainty, testified that he viewed this as a "very definite statement" that "neither company separately or together met any of those definitions." (Tr. 265.)

16. In January 2005, a little more than a year later, E-GOLD asked Respondent to attempt to locate another lawyer to advise E-GOLD on the Patriot Act and money transmitter regulation issues. E-GOLD was by then involved in an intensifying IRS audit, during which the issue of registration as a money transmitter arose. (Tr. 281.) Respondent "made some inquiries to people [he] knew," which led him to Mitchell Fuerst's law firm in Washington, D.C. (Tr. 73.) Respondent recommended that the company interview Fuerst, who had a reputation as "an expert on these exact issues" of Treasury Department regulation. (Tr. 73.) Following an interview, E-GOLD hired Fuerst to "advise the company on the application of the licensing/registration requirements of federal and state law and dealing with the Treasury Department on those issues."

(Tr. 72.)

17. Fuerst met with company officials, reviewed details of the company's operations on site, and examined transactions. (Tr. 283.) According to Respondent, Fuerst advised that the companies were not required to become licensed or to register as money transmitters. (*Id*.) He recommended, however, that the company sit down with the government to determine whether it agreed. (Tr. 334.)

18. The record reflects that Fuerst met at least twice with Treasury Department officials. (RX 4 at 157.) Evidently, some of these officials were themselves unsure about whether the E-GOLD entities were subject to registration requirements. At one meeting, in May 2005, an official reportedly directed another government employee to "summarize her notes and forward those to FinCen [(the Financial Crimes Enforcement Network)] to ask them to make a determination whether they are an MSB." (*Id.*) Another official "emphasized that we want to make an expeditious but also accurate determination of whether they are or are not an MSB and if so what BSA requirements should apply to them." (*Id*.)

19. Contemporaneous government publications document the government's uncertainty about the status of businesses like E-GOLD. The Money Laundering Threat Assessment ("MLTA"), a report made by a working group consisting of officials from Departments of the Treasury, Justice, and Homeland Security, as well as the Federal Reserve and the United States Postal Service, refer to E-GOLD explicitly. (*See* RX 1 at 031.) The December 2005 MLTA notes that digital currency systems like E-GOLD "defy conventional business models." It concludes that "[w]hether an online payment system or digital currency service meets the definition of a money transmitter pursuant to BSA regulations, though, depends upon its location and the ways in which it participates in or conducts transactions." It adds that "[d]etermining which legal entity

has jurisdiction for regulatory and enforcement purposes can be challenging." (*Id*. at 033.) The October 2006 MLTA reflects a continued lack of clarity: "Whether a particular online payment service, stored value provider, digital precious metals service or other . . . digital currency service meets the definition of an MSB under the regulations is a fact-specific determination." (RX 2 at 100.)

20. In December 2005, despite the ongoing discussions between E-GOLD and the Treasury Department, the Secret Service arrived at the company unannounced and seized company records. By January 2006, GSR was embroiled in a civil forfeiture action regarding funds alleged to be the proceeds of money laundering. Fuerst represented GSR in those proceedings. In its motion for judgment on the pleadings, filed by Fuerst, GSR argues that it is not a covered "money transmitting business" under 18 U.S.C. § 1960, and that it is not a "domestic financial institution" for purposes of transaction reporting requirements. Respondent testified that these positions were consistent with the oral advice Fuerst had given shortly after he was engaged. (Tr. 284.)

21. By January 2007, E-GOLD was subject to mounting criticism about its failure to take adequate steps to thwart use of its payment system by traffickers in child pornography. A Congressional committee report noted that while E-GOLD had "adopted policies and procedures that prohibit their users from using their account to purchase child pornography," it did "not maintain sufficient records reflecting the activity of e-Gold accounts . . . or conduct any due diligence on the merchants that accept e-gold." (RX 3 at 148.)[2]

[2] Although Respondent clearly knew of some instances when E-GOLD's services were used for illegal activity (Tr. 67-69, 136; BX 11 at 456), he was not convicted of actively participating in that misconduct, and Bar Counsel neither charged nor attempted to prove Respondent's direct involvement in it. Respondent testified, without substantial contradiction, that the company tried to forestall criminal use of the E-GOLD systems. (Tr. 127-28.) In its proposed findings of fact, Bar Counsel belatedly refers to hearsay allegations that, *inter alia*, Respondent and others conducted funds transfers on behalf of clients knowing that the funds were the proceeds of

The Criminal Proceedings

22. The Treasury Department never informed Respondent of its determination on the question whether E-GOLD was a money transmitting business subject to registration requirements. (Tr. 304-05.) Evidently the government concluded that it was, because E-Gold, Ltd., GSR, Dr. Jackson, his brother, and Respondent were charged in 2007 with having violated federal and state law in failing to comply with them. Count One of the indictment charged defendants with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956; Count Two charged them with conspiracy to operate an unlicensed money transmitting business in violation of 18 U.S.C. § 371; Count Three alleged operation of an unlicensed money transmitting business in violation of 18 U.S.C. § 1960; and Count Four charged money transmission without a license in violation of D.C. Code § 26-1002. (BX 6.)

23. Initially, Fuerst represented all defendants in the criminal case. According to Respondent, Fuerst told him there was a 100 percent chance of winning a motion to dismiss the indictment. (Tr. 90.) This proved not to be the case. Defendants did move to dismiss the indictment, contending that 18 U.S.C. § 1960 did not apply to E-GOLD's operations, because the transactions do not involve cash or currency. In May 2008, the court denied the motion. In a lengthy opinion, the court addressed what appears to have been an issue of first impression: whether transactions must be in cash to render a company performing a transmitting service a "money transmitting business" under section 1960. *United States v. E-Gold*, 550 F. Supp. 2d 82 (D.D.C. 2008). It considered defendants' argument that because that term is undefined in the

unlawful activity. (BC PFF 16-18.) However, Bar Counsel did not raise those contentions in the Specification of Charges or at the hearing, and offered no evidence to support them. As a consequence, we neither credit, nor rely upon, those hearsay assertions in making our findings and recommendations.

statute, one must look elsewhere in the law—specifically, 31 U.S.C. §§ 5313 and 5330(d)(1)—for its meaning.

24. The court devoted 25 pages to defendants' argument. It analyzed the text of section 1960, relied on principles of statutory interpretation, and referred to legislative history. Ultimately, on May 8, 2008, the court rejected defendants' position that E-GOLD's operations were outside the scope of those laws, and denied the motion to dismiss. According to Respondent, this was the first determination that E-GOLD was subject to registration requirements. (Tr. 90.)

25. In September 2008, Respondent pleaded guilty to Count Four, a felony under D.C. law that prohibits operation of a money transmitting business without a license. The Statement of Offense, to which Respondent agreed as part of the plea proceedings, states that "[b]etween October 2001 and December 2005, DOWNEY, as an owner and Director of the E-GOLD operation, offered a payment processing service to the public in the form of 'e-gold.' The e-gold operation was engaged in the business of money transmission under District of Columbia law . . . ." (BX 1 at 52.) It identifies seven transfers as examples of financial transactions that took place in the District of Columbia. The first of these occurred on May 14, 2002, and the last occurred on March 24, 2003. The latter dates correspond to the allegations in Count Four, the state crime to which Respondent pleaded guilty. It charges that the individual defendants engaged in money transmission without a license "[b]eginning on or about May 14, 2002, through at least March 25, 2003." (BX 6 at 26.) The former dates correspond to the allegations in Count Three, which charges all defendants with having operated an unlicensed money transmitting business in violation of 18 U.S.C. § 1960(b) "[b]eginning on or about October 26, 2001, through at least December 2005." (*Id*. at 25.)

26. The crime to which Responded pleaded guilty does not require proof that the defendant

did so knowing that a license was required. Rather, it is a strict liability, or non-*scienter* crime: It requires only that defendant knew that he was operating a money transmitting business. This distinction was important to Respondent in his decision to plead guilty; he testified that he "wasn't going to plead to anything that involved any type of intent to violate the law." (Tr. 91-92.)

27. Neither does the crime involve, as an element of the offense, improper conduct by an attorney, interference with the administration of justice, false swearing, misrepresentation, willful failure to file income tax returns, fraud, deceit, bribery, extortion, misappropriation, or theft. (Stip. ¶ 13.)

28. Sentencing took place on December 15, 2008. At sentencing, Respondent's counsel asserted that Respondent had "sought the advice of outside counsel with specific expertise" in matters of licensing and registration of E-GOLD's business operations, and that he had been advised that no such licenses were required." (RX 6 at 181.) He explained that:

> Mr. Downey is not, was not, and has never been an expert on issues related to banking, to financial institutions, to currency, to what is required to be licensed or registered as a money transmitting business . . . . He sought advice from attorneys that he . . . sincerely believed had the requisite expertise to offer the kind of advice that was needed. . . . And they advised . . . that this is a new business, it is a new business model. It does not fall within the rubric of prior business models. And it is not required under current law to be licensed or registered.

(*Id.* at 166-67.) Respondent's counsel added that "[W]hile the lawyers were ardently advising their belief as experts in their field that licensing was not required, the action that Mr. Downey signed on to was that they would present the issue to the bank security folks at the Department of Treasury and have the regulators make their own determination . . . ." (*Id*. at 181-82.) Respondent confirmed his counsel's representations. During the sentencing hearing, he testified that as an employee benefits lawyer, he lacked the expertise to form a conclusion as to whether or not E-GOLD was subject to registration and licensing requirements. (*Id.* at 187-88.) Respondent

explained that he had turned to outside counsel for advice on those questions, and that he "believed we had found the expert that advised us on these issues." (*Id*. at 187-88.) Although the government questioned the categorical nature of that assertion, it did not challenge it, because it didn't "have [the] opportunity to go into their attorney-client communications." (*Id.* at 175-76.)

29. Judge Collyer appears to have accepted Respondent's representations, as she stated that "I'm sure [Respondent] was [getting that claimed advice of counsel] because his [criminal defense] counsel told me that many times on the record in court." (*Id.* at 175.) She also stated that she "believe[d] him when he says that he didn't intend to violate the law." (BX 10 at 50.) The court also noted the fact that Respondent and E-GOLD "were meeting with the government and presenting their modus operandi and trying to get advice on that." (*Id*. at 59.)

30. The Court sentenced Respondent to 180 days' incarceration, suspended in favor of 36 months' probation, and imposed a $2,500 fine. (Stip. ¶ 11.)

The Maryland Disciplinary Proceedings

31. In July 2008, Respondent reported his criminal conviction to disciplinary authorities in the District of Columbia and Maryland, the jurisdictions in which he was admitted to practice. (RX 1); *Attorney Grievance Comm'n v. Downey*, 990 A.2d 1070 (Md. 2010). Upon notification of Respondent's guilty plea, the Attorney Grievance Commission of Maryland filed a Petition for Disciplinary or Remedial Action charging Respondent with having violated Rule 8.4 of the Maryland Rules of Professional Conduct. Maryland Bar Counsel sought an interim suspension. The Maryland Court of Appeals dismissed the request on March 12, 2010. *Downey*, 990 A.2d at 1078. In the proceedings in that court, Respondent cited Judge Collyer's comments regarding his lack of criminal intent. Respondent also relied on the District of Columbia Court of Appeals' decision not to impose an interim suspension in the District of Columbia. *Id*. The Maryland Court

of Appeals relied on both in deciding not to enter a suspension order. *Id*. at 1078.

32. On December 28, 2010, a Peer Review Panel of the Maryland State Bar recommended dismissing charges against Respondent, finding that he "did not intend to violate the law," because he "did not serve as counsel . . . in connection with the registration issue," and "engaged counsel who specialized in licensing and regulation to advise the company [who] . . . advised that registration was not required." (RX 7 at 202-03.)[3]

33. On April 11, 2011, the Attorney Grievance Commission of Maryland dismissed the complaint brought against Respondent by Maryland Bar Counsel. (RX 8.) It found that Respondent, by pleading guilty, had violated Maryland Rule of Professional Conduct Rule 8.4(d), which provides that it is misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice." The Commission, however, declined to impose any disciplinary sanction. Instead, it only issued a warning, which "is not discipline" in Maryland. (*Id*.)

The D.C. Disciplinary Proceedings

34. Bar Counsel for the District of Columbia notified the District of Columbia Court of Appeals of Respondent's conviction on September 17, 2008. As noted above, Bar Counsel requested that Respondent be suspended immediately from the practice of law pursuant to D.C. Bar. R. XI, § 10(c), based on his plea of guilty to a "serious crime." (*Id*.)

35. Respondent filed a motion in the Court of Appeals to stay the issuance of a suspension order on September 24, 2008. He argued that he had had a "good faith belief that [he was] acting within the limits of the law" because he had "sought the advice of outside counsel with particular expertise in those matters" and had "sought expert legal advice with respect to the companies'

[3] Respondent's filings with Maryland authorities are not in the record before us. Based on the statements of Maryland disciplinary authorities, we conclude that Respondent made advice-of-counsel claims identical to those he has made in the District of Columbia.

compliance issues." (Memorandum in Support of Motion of Barry K. Downey Requesting that the Court Not Enter, or that It Immediately Set Aside, Any Order of Suspension, at 9 n.3.) Consequently, Respondent asserted that he had "a good faith belief that the companies were not operating in violation of the law." (*Id*. at 3.)

36. The Court of Appeals accepted those representations, finding that Respondent had "consulted another attorney . . . who confirmed his belief that the companies did not have to be licensed as money transmission businesses." The Court accordingly stayed the interim suspension of Respondent, reasoning that:

> His prior unblemished record as an attorney; his plea of guilty to what amounts to a strict liability offense involving no *scienter* or moral turpitude; and the fact that his violation arose from conduct outside of his normal legal practice all suggest a very low degree of risk that permitting him to practice in the interim will harm the public. For the same reasons, but subject of course to development of a factual record in the disciplinary process, we think that the likelihood that respondent will receive a significant sanction, *i.e*., a suspension (if at all) of more than brief duration, is very small. Stated differently, there is a reasonable possibility on this record that interim suspension might exceed the sanction that will eventually be imposed on respondent. Considering, finally, the harm to respondent's livelihood and ability to support his family that interim suspension may entail, we conclude that respondent has met his burden to show good cause for why the court should stay its hand.

In re Downey, 960 A.2d 1135, 1137 (D.C. 2008).

37. On July 22, 2009, the Court of Appeals directed the Board on Professional Responsibility "to institute a formal proceeding to determine the nature of the offense, whether it involves moral turpitude within the meaning of D.C. Code § 11-2503(a) (2001), and the nature of the final discipline to be imposed for respondent's commission of a serious crime." On October 27, 2010, the Board issued an order concluding that the crime does not involve moral turpitude *per se*, because it is a strict liability offense for which proof of knowledge or intent is not required. The Board "refer[red] the matter to a Hearing Committee for a determination as to whether the

crime constitutes moral turpitude on the facts, and the final discipline to be imposed."

38. On July 15, 2011, the Board directed Bar Counsel to "initiate a formal proceeding with respect to Respondent's conviction of a serious crime," and concurrently to "charge Respondent with any violations of the Rules of Professional Conduct that are approved by a Contact Member." The Specification of Charges was filed on October 5, 2011.

39. The Specification of Charges alleged that Respondent had been convicted of engaging in the business of money transmission without a license in violation of D.C. Code § 26-1002, a felony punishable by imprisonment for up to five years and therefore a "serious crime" as defined by D.C. Bar R. XI, § 10(b). (BX B.) Notably, Bar Counsel did not charge Respondent with any violation of the Rules of Professional Conduct, or with the conviction of a crime of moral turpitude under D.C. Code § 11-2503(a). The Specification of Charges (¶ 12) stated that the sole issue to be determined by the Hearing Committee was the nature of the final discipline to be imposed based on Respondent's conviction of a "serious crime."

40. In all material respects, Respondent admitted in his Answer the factual allegations set forth in the Specification of Charges. He disputed, however, the claim that he was convicted of a "serious crime." (BX D.) Specifically, Respondent argued that the term "serious crime," as used in Rule XI, does not apply to non-*scienter* felonies. (*Id*.) We address this contention below.

41. In addition, just as he had in the criminal and Maryland disciplinary proceedings, Respondent asserted in his Answer (in an annexed "Statement of Relevant Facts in Mitigation") that "on compliance issues . . . [he] 'sought the advice of outside counsel with particular expertise in those matters.'" Based on that advice, Respondent claimed that he "genuinely believed – and had good faith reason to believe – that [the E-GOLD businesses were] outside the regulatory scheme governing money transmitting businesses." (BX D at 13.) Respondent explicitly alleged

that he was "advised . . . that [E-GOLD's business model was] not subject to existing statutes and regulations . . . ." (*Id*. at 25-26.) For these reasons, Respondent argued that no discipline should be imposed.

42. In its Pre-Hearing Submission, Bar Counsel expressly disclaimed any allegation that Respondent's crime involved moral turpitude on the facts:

> Bar Counsel has not charged Respondent with committing a crime involving moral turpitude on the facts because we do not have clear and convincing evidence to support making such a charge under oath as required by D.C. Bar R. XI, § 8(c).

The Disciplinary Hearing

43. Bar Counsel confirmed this at the outset of the hearing, stating repeatedly that it did not have evidence to support a finding of moral turpitude. (*See, e.g.*, Tr. 8, 12, 21-22.) Notwithstanding Bar Counsel's position, the Board's October 27, 2009 order referring Respondent's conviction to the Hearing Committee required the Hearing Committee to develop the record on the moral turpitude question. *See Allen*, 27 A.3d at 1187; *Perrin*, 663 A.2d at 519-20. In its case in chief, Bar Counsel presented no witnesses, but did submit several exhibits. These were admitted into evidence. (Tr. 27.) Respondent testified in his defense, as did a number of character witnesses.

THE MAJORITY'S FINDINGS OF FACT

The following are the findings of fact made by a majority of the Hearing Committee.

Respondent's Testimony Regarding Legal Advice

44. Respondent's position at the hearing, as it was throughout the criminal proceedings and the Maryland disciplinary process, was that he had sought and relied on the advice of counsel on issues related to E-GOLD's compliance with registration and licensing requirements. For example, when asked how E-GOLD made sure it was in compliance with regulatory laws,

Respondent testified "it had hired outside counsel to advise it . . . on those types of issues." (Tr. 70.) He testified that he never believed the companies were violating the law because "that's what the company was being told from the very beginning. I mean, if a question arose, they would hire attorneys or accountants to answer the question and to advise the company on how to be in compliance." (Tr. 74; *accord* Tr. 82, 104-05 ("I wasn't the adviser, telling them what compliance they needed to do. I was a part of the, you know, team that was being advised by the attorneys and Ernst & Young and participated in that process.").)

45. Over the relevant time period, Respondent sought and received advice from lawyers at three different law firms. The Chair finds that Respondent could not reasonably have relied on advice from any of the three, at least with respect to whether to obtain a state license. We respectfully disagree, for the following reasons.

David Seidl, Esquire

46. As found in paragraphs 4-5, *supra*, Respondent sought advice from David Seidl of Miles & Stockbridge. Seidl, as Respondent recalls, seemed "pretty confident" that E-GOLD's operations were not subject to Bank Secrecy Act regulations because E-GOLD "was not doing banking, was not subject to banking regulations, and was not doing anything that would be qualified – classified as securities, subject to securities issues." (Tr. 231-32; *see also* BX 14 at ¶ 3.)

47. The Chair dismisses Seidl's advice as "inconsequential" and "off-the-cuff." The Chair emphasizes that Respondent never got an opinion in writing and had "no contemporaneous notes of the professed verbal exchange he claims to have had with Seidl eighteen years earlier." Dissent at 12. He points out that Seidl does not profess to have particular experience in banking regulatory requirements. (*Id.* at 12-13.) He notes that Miles & Stockbridge had no records relating to E-

GOLD or Respondent, and does not appear to have taken either on as a client. The Chair infers from the absence of such documentation that to the extent that Seidl gave any advice, it was trivial, and that Respondent cannot have relied on it to the extent he claims. The Chair even draws an adverse inference from Seidl's failure to appear as a witness.

48. We do not share the Chair's view of Seidl's advice or Respondent's testimony about it. The fact that the advice was not put in writing does not cause us to question its existence or validity. Seidl himself confirmed that he had provided advice in response to a request from Respondent, so we see no reason to doubt that it was sought. Seidl's affidavit, submitted in response to the Hearing Committee's request for documentation of all legal opinions, states that he recalled Respondent sending him materials describing GSR's activities and asking him "to advise him on any legal issues I thought relevant." (BX 15 ¶ 5-6.) While the ultimate opinion may not have been formalized in writing, Respondent's request for it was: Respondent produced a letter that not only asked for legal advice but directed Seidl to bill for it. (BX 14B.) The absence of "contemporaneous notes" of oral legal advice is hardly surprising, and does not cause us to doubt that advice was given, in light of the clear evidence that it was. Finally, we decline to speculate on the reasons for Seidl's failure to appear as a witness, much less to infer from it that Seidl would have contradicted Respondent's testimony.

49. In any event, as the Chair suggests, Seidl's advice is arguably beside the point. It was rendered long before the criminal offense, part of the Patriot Act, was enacted. As a result, we agree that Respondent cannot have relied on Seidl's advice with respect to the issue of compliance with state licensing requirements. But Respondent did not claim to have been relying on Seidl for that purpose; with respect to compliance with the Patriot Act registration requirements and state licensing issues, he relied on Mitchell Fuerst. Seidl's name was only proffered in an

effort to comply fully with the Hearing Committee's order to produce documentary evidence of outside legal advice. In his Verified Response to the Hearing Committee's March 6, 2012 Order, Respondent stated forthrightly that aside from Mitchell Fuerst's (as reflected in a motion in the civil forfeiture case), he was "not aware of other written legal opinions that he, E-Gold, Ltd., or Gold & Silver Reserve, Inc. received from counsel regarding compliance with state regulations." Respondent nonetheless produced a letter he wrote to Seidl prior to his investment in E-GOLD "in order to be as responsive as possible to the Committee's Order." Respondent has never taken the position that he relied on Seidl for advice on state licensing requirements or compliance requirements under the Patriot Act. (Tr. 306.)

Drinker Biddle

50. As described above in paragraphs 9-15, Respondent retained Drinker Biddle to advise it with respect to the application to E-GOLD of the newly passed Patriot Act. There is no dispute that Drinker Biddle provided the requested advice: It is set forth in the 24-page memorandum that is Bar Counsel's Exhibit 14C.

51. Whether the advice was sound is another matter. Respondent testified that he and E-GOLD had serious questions about the firm's analysis because it was premised on numerous factual inaccuracies. (Tr. 229, 238-44.) Overall, Respondent considered the memorandum to be "useless" and "did not view it as advice on anything." (Tr. 298, 316.)

52. Respondent testified that the memorandum contained several material factual inaccuracies. He testified that Drinker Biddle's analysis was based on a misunderstanding of how the E-GOLD companies were related to each other, whether or not E-GOLD dealt in currency, and how E-GOLD conducted transactions. The Chair appears to question the veracity of this testimony; the dissent refers to the memorandum's "supposed factual inaccuracies" and describes

it as "purportedly contain[ing] a factual misunderstanding." Dissent at 17. There is no clear evidence showing that contrary to Respondent's testimony, the memorandum is factually accurate in all material respects.

53. Moreover, the record clearly supports Respondent's testimony that he believed the memorandum to be inaccurate, as he shows that he complained about the errors at the time. To take one example, Respondent's June 9, 2003 email to Drinker Biddle protesting its bill states unequivocally that the firm's analysis is based on "incorrect facts and assumptions with respect to G&SR and e-gold." It states further that "neither company has yet seen an accurate product from this work." (BX 14D.) This contemporaneous email corroborates Respondent's testimony that at least from his standpoint, the memorandum was incorrect in ways that called its conclusions into question. There is no evidence showing that Respondent secretly held the opposite view.

54. Another reason the Chair gives for questioning Respondent's position that the memorandum was unreliable because it was premised on erroneous facts is that Respondent "took no meaningful action to clarify or correct the memorandum's supposed factual inaccuracies." Dissent at 16-17. In our view, the record reflects the opposite. Respondent testified that he, Dr. Jackson, and Doug Jackson participated in a conference call with Drinker Biddle on April 9, 2003, the day they received the memorandum, in which Dr. Jackson went over in detail the inaccuracies it contained. (Tr. 262.) Respondent said that he understood that Drinker Biddle was "going to go back, rewrite it correctly, the factual assumptions and premises . . . apply the correct analysis to the correct facts and produce a product that provided an analysis to companies that did exist." (Tr. 263.) Two months later, as noted above, Respondent complained in writing that that they "had not yet seen an accurate product from this work." (BX 14D.) Respondent sent follow-up emails in August and December, each of which notes that he had received no response to his prior

communications. (*Id*.) In the December email, Respondent suggests one possible way of correcting the analysis would be to provide a separate memorandum for each company. (*Id*.) We find that Respondent took several actions to correct the factual inaccuracies—all to no avail.

55. Moreover, we are inclined to agree with Respondent that the memorandum contains little in the way of concrete recommendations. It says that GSR and E-Gold "*could* be characterized" as money service businesses subject to registration requirements." (BX 14C at 8 (emphasis added).) It says that E-GOLD "*may* wish to *consider* whether GSR needs to be registered with the Treasury Department and various states as a money services business." (*Id.* at 21 (emphasis added).) As we understand it, this is what Drinker Biddle was asked to consider—whether the E-GOLD entities needed to be registered with federal and state authorities. The memorandum does not state that E-GOLD was required to report currency transactions; it suggests only that E-GOLD "should *consider* the need to" do so. (*Id*. (emphasis added).) More generally, the memorandum states that "[e]ven if the E-Gold entities conclude that the BSA and/or USA Patriot Act do not currently apply to E-Gold and GSR" (the very question that was put to Drinker Biddle), "the E-Gold entities may wish to review the operations of the E-Gold entities and consider what actions would be necessary in order to establish an anti-money laundering program or to begin reporting suspicious activities or currency transactions." (*Id*.) Thus, Drinker Biddle not only failed to make concrete recommendations, it did not even answer the principal question whether E-GOLD was subject to BSA and Patriot Act regulations. Even aside from the factual inaccuracies, the memorandum merely advises the client that it might wish to "consider" the very issues it was assigned to analyze.

56. Unlike the Chair, we do not find that these statements, either individually or collectively, amount to an opinion that E-GOLD was subject to registration and licensing

requirements. Nowhere does it say that any E-GOLD entity is a money transmitting business requiring a state license. And nothing causes us to question Respondent's claim that he never "receive[d] a formal opinion of counsel that either of the companies had an obligation to obtain a license for operating a money-transmitting business." (*See* Tr. 226.) The Drinker Biddle memorandum states that based on the statutory language, "there is no clear answer as to whether any E-Gold Entity qualifies as a 'financial institution' under the BSA." (BX 14C at 4.) In our view, the memorandum's "admonition" that GSR nonetheless "could be characterized" as a money transmitter does not contradict Respondent's testimony.

57. Ultimately, having reached no conclusion on the question, Drinker Biddle's suggestion was that the client "may wish to consider . . . contacting the Treasury Department for clarification on whether E-Gold and GSR falls within the definition of a money service business or financial institution under BSA." (*Id.*) This is precisely what E-GOLD proceeded to do, albeit using a different lawyer.

Mitchell Fuerst

58. As noted in paragraphs 16-18, Mitchell Fuerst was retained to analyze the issue and meet with the regulators to get a determination whether E-GOLD was subject to registration and licensing requirements. Respondent testified that Fuerst, having reviewed the details of the companies' operations, concluded that they were not required to become licensed or register as money transmitting businesses. (Tr. 283, 321.) Despite having reached that conclusion—and because the companies *wanted* to be registered and licensed—Fuerst

> went to the Bank Secrecy Act division of Treasury and FinCEN in . . . January 2005 to lay out the business of the company in front of the regulators and to describe for them how the regulations could be modified slightly to include E-Gold as a money services business that, therefore, could be regulated and licensed.

(Tr. 80.)

59. Respondent's Exhibit 4, a letter from the prosecutor to defendants in the criminal case, confirms that Fuerst met with the regulators. (RX 4.) The letter, produced pursuant to the government's obligation to produce potentially exculpatory evidence in a criminal case, discloses the existence of two reports prepared by a BSA examiner, in March and May 2005. As described above in paragraph 18, these reportedly reflect that Fuerst met at least twice with Treasury Department personnel. Even the examiners were uncertain as to E-GOLD's status: one examiner reportedly "emphasized that we want to make an expeditious but also accurate determination of whether they are or are not an MSB and if so what BSA requirements should apply to them. (*Id.* at 4.)

60. Thus, to the extent that Drinker Biddle's suggestion that E-GOLD might wish to consider approaching the government constitutes advice, Respondent and the company followed it. Fuerst met with government officials on E-GOLD's behalf, and even they did not say that E-GOLD was subject to registration and licensing requirements.

61. According to Respondent, Fuerst's legal opinion was that E-GOLD was not a money transmitter, and accordingly was not required to register under federal or state law. (Tr. 283, 304-05). His views were not set forth in a formal written opinion. They are reflected, however, in a January 2006 motion for judgment on the pleadings filed in a civil forfeiture action. (BX 14A.) The motion asserts that GSR does not fall within any part of the definition of "money transmitting business" in 31 U.S.C. § 5330, or the definition of "financial institution" in 31 U.S.C. § 5312. (*Id.* at 4.) As such, the motion argues, GSR is not an unlicensed money transmitting business under 18 U.S.C. § 1960. According to Respondent, these statements correspond exactly to the advice Fuerst gave. We find nothing in the record to contradict this claim.

62. The Chair dismisses Fuerst's advice as irrelevant, for two reasons. First, he notes that

Respondent pleaded guilty to Count Four of the indictment, which charges defendants with having operated a money transmission business without a D.C. license "from at least May 14, 2002 through at least March 25, 2003." (BX 6 at 118.) Because Fuerst was not hired until 2005, the Chair argues that Respondent cannot have been relying on his legal advice when he engaged in the criminal conduct.[4]

63. The record does not reveal why Respondent's plea limits the criminal conduct to that period. We note that the Statement of Offense identifies seven specific transactions, the first and last of which correspond to the dates above. (BX 1 at 52-53.) We also note that elsewhere in the Statement of Offense, it states that Respondent was an owner and director of E-GOLD "between October 2001 and December 2005, and that "[t]hroughout its operation, the defendant was aware of the E-GOLD operation's activities and that the business was not licensed as a money transmitting business with the District of Columbia." (*Id.* at 52, 54.) As far as we know, nothing changed from March 2003 until December 2005; E-GOLD was operating in D.C., and if a license were required for E-GOLD to transact business, it was doing so without one. Regardless of what Respondent pleaded to, the criminal offense was ongoing before Fuerst was hired and continued thereafter.

64. The second reason the Chair gives for dismissing Fuerst's advice is that the motion for judgment on the pleadings did not specifically relate to state licensing requirements, as contrasted with federal registration requirements. The offense to which Respondent pleaded was the failure to obtain a state license; since the motion addressed only federal registration, the Chair finds that Fuerst's advice was limited to that narrow question.

[4] The same argument would apply to Drinker Biddle's advice, since, as the dissent points out, it was received on March 31, 2003, after the time period specified in the Statement of Offense.

65. It is true that Respondent described the motion to be "identical" to the oral advice Fuerst had given, and the motion only speaks to the issue of registration with federal authorities. (Tr. 284.) And at one point Respondent confessed that he did not know either if Fuerst was asked to research individual state issues or whether he did so. (Tr. 333.) On the other hand, he also testified more than once that Fuerst had been retained to address both federal and state requirements. (Tr. 72, 150, 304-05, 333.) For what it may be worth, Dr. Jackson's criminal defense attorney asserted at the sentencing hearing that he "didn't believe that the way OmniPay, GSR and E-Gold operated required a license and he based that on the information that he was receiving from counsel." (BX 10 at 21.)

66. Nonetheless, the Chair finds that Fuerst's advice was limited to the issue of federal registration, and therefore that Respondent cannot have been relying on Fuerst when he failed to obtain a D.C. license for E-GOLD. The Chair accordingly concludes that Respondent lied both to the Hearing Committee and the sentencing court when he said that he was.

67. We cannot agree. It does not strike us as sensible to draw such a hard and fast line between the question of whether E-GOLD was a money transmitter under federal law and whether it was under D.C. law. Even if Fuerst had not addressed state requirements specifically, it does not seem to us unreasonable for Respondent to have assumed that if E-GOLD were not a money transmitter under federal law it would not have been so under state law.

68. Moreover, whatever Fuerst may have said about the question whether E-GOLD's operations implicated state licensing laws, Drinker Biddle's March 2003 memorandum suggests that the answer was anything but clear. It describes the Uniform Money Services Act ("UMSA"), which was drafted and approved in 2000 by the National Conference of Commissioners on Uniform State Laws. According to Drinker Biddle, the UMSA defines "monetary value" to mean

"a medium of exchange, whether or not redeemable in money." (BX 14C at A-2.) The memorandum notes further that the commentary to the model law states that the UMSA expands the term "money service business" to "potentially include" e-money and gold/precious metal transfers. At that time, Vermont was the only state to have adopted the UMSA. Even now, the D.C. Code speaks only in terms of "money": It defines "money transmission" as "the sale or issuance of payment instruments or engaging in the business of receiving money for transmission or transmitting money within the United States, or to locations abroad, by any and all means, including but not limited to payment instrument, wire, facsimile, or electronic transfer." D.C. Code § 26-1001 (2014).

69. For these reasons, we are not prepared to agree with the Chair and Bar Counsel that Respondent's testimony was false—particularly not under the clear and convincing standard that we are bound to apply. Nothing in Respondent's demeanor during his testimony on this (or any other) issue suggested to us that he was being untruthful. Concededly, there is an arguable discrepancy between his claims of having relied on counsel in concluding that a D.C. license was not required and his admission that he did not know whether Fuerst had been asked specifically about that issue. Viewing the record as a whole, however, even if Fuerst did not render advice on state law issues, it is plausible that Respondent conflated the issues of federal and state requirements.[5]

[5] Another reason the Chair gives for discrediting Respondent's claim to have relied on Fuerst's legal advice is that Fuerst never appeared before the Hearing Committee. The Chair states "[t]here was no evident attempt by Respondent to secure his testimony, and Respondent offered no explanation as to why his testimony was not proffered." Dissent at 19. It is not clear that the facts of this case permit an adverse inference to be drawn. We need not decide that issue because, even if we were permitted to draw an adverse inference, we would not do so in light of the manner in which the case was presented to the Hearing Committee, with Bar Counsel initially asserting that Respondent's crime did not involve moral turpitude, and only challenging his reliance on the

70. Thus, we do not find by clear and convincing evidence that Respondent testified falsely when he claimed to have relied on Fuerst's advice in failing to comply with federal registration and state licensing requirements.

CONCLUSIONS OF LAW

A. Respondent was convicted of a "serious crime."

Respondent pleaded guilty to the felony of engaging in the business of money transmission without a license in violation of D.C. Code § 26-1002. Respondent contends that his felony conviction does not constitute a "serious crime" under D.C. Bar R. XI, § 10(b) because the sentencing court determined that the conviction "involved no knowledge of the violation and no intent to commit a crime." (BX D at 16 (Respondent's Answer); Pre-hearing Transcript (1/10/12) at 7-9, BX D at 20.)

D.C. Bar Rule XI, § 10(b), states that the term "serious crime":

> shall include (1) any felony, and (2) any other crime a necessary element of which . . . 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.

On its face, the Rule defines "serious crime" as any felony, regardless of whether its elements include the elements listed in the Rule's second subpart. Respondent argues that subpart (2) of the Rule modifies subpart (1) and narrows its scope. Thus, Respondent argues that to constitute a "serious crime," the offense must both be a felony and have the characteristics described in subpart (2).

This is a misreading of the Rule. Subpart (2) plainly addresses any "other crime," meaning

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advice of counsel after he produced documents in the midst of the hearing. We decline to draw an adverse inference from Respondent's failure to call witnesses whose testimony did not appear necessary at the beginning of the hearing.

any crime "other" than a felony. Under Respondent's view, premeditated murder would not be a "serious crime" under D.C. Bar R. XI, § 10(b), unless it involved improper conduct as an attorney, bribery, or one of the other factors enumerated in (2). This is an absurd result. *See, e.g.*, *In re Carpenter*, 891 A.2d 223, 224 (D.C. 2006) (per curiam) (first-degree murder is a crime of moral turpitude *per se*).[6] We conclude that Respondent committed a "serious crime" under D.C. Bar R. XI, § 10(b).

B. Bar Counsel failed to prove moral turpitude on the facts.

In accordance with the procedures set out in *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (en banc), the Board referred this matter to a hearing committee to determine whether Respondent acted with moral turpitude when he committed his criminal act. A crime of moral turpitude is one that "offends the generally accepted moral code of mankind." *Id*. The notion of moral turpitude reflects 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, 361-62 (D.C. 2004).

Our mandate in this matter is thus to consider "evidence as to the circumstances of the crime including [Respondent's] knowledge and intention." *Colson*, 412 A.2d at 1168. Respondent argues that our "consideration of the moral turpitude issue is limited to the circumstances of . . . the failure of E-Gold, Ltd. and G&SR to become licensed as money transmitting businesses."

[6] In his proposed Findings of Fact, Respondent appears to have abandoned his argument on this point. Resp't PFF at 5 n.3, 87. In any event, we reject it.

(Resp't PFF at 75.) The moral turpitude inquiry is not so narrow. A hearing committee is required to broadly examine the circumstances surrounding the commission of a crime, especially evidence probative of the respondent's intent. *See Allen*, 27 A.3d at 1184 (holding that a 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"); *In re Spiridon*, 755 A.2d 463, 467 (D.C. 2000) (evidence of motive or mental condition "bear[s] on the question of moral turpitude in its actual commission"); *In re Mason*, 736 A.2d 1019, 1021-22 (D.C. 1999) ("evidence of [the respondent's] other fraudulent and dishonest activities" established moral turpitude on the facts, where the respondent had been charged with intentional fraud but pleaded guilty to a lesser-included offense that did not require proof of fraudulent intent).

As set forth above, Bar Counsel initially stated that it had no evidence to support a finding of moral turpitude on the facts. Now, however, Bar Counsel argues that the Respondent's crime did involve moral turpitude on the facts. It claims that Respondent's repeated claims of having relied on the advice of counsel in the commission of the offense "has now been proven false." (Bar Counsel's Reply to Respondent's Proposed Findings of Fact and Conclusions of Law at 3 (May 31, 2013).)

Based on our broad examination of all the circumstances bearing on Respondent's criminal conviction, the Hearing Committee unanimously concludes that Bar Counsel has failed to satisfy its burden to prove moral turpitude by clear and convincing evidence. Bar Counsel belatedly argues that Respondent's conduct involved moral turpitude because he failed to register the E-GOLD companies knowing of E-GOLD's criminal activities and that the failure to register would facilitate them. (BC PFF 16; BC Reply at 10.) But Bar Counsel failed to offer any proof at the

hearing to support this allegation. Thus, there was no evidence that Respondent "intentionally act[ed] dishonestly for personal gain." *See In re McBride*, 642 A.2d 1270, 1273 (D.C. 1994). Respondent never attempted to conceal the fact that E-GOLD and GSR were unlicensed.

Bar Counsel, based on the documents produced in response to the Chair's order and Respondent's testimony concerning them, now asserts that Respondent's professed belief that E-GOLD was not subject to registration and licensing requirements was not objectively reasonable. First, we are not persuaded that the question is whether Respondent's reliance on counsel was objectively reasonable, as Bar Counsel contends. *Cf. In re Soininen*, 853 A.2d 712, 717 (2004) (rejecting claim that respondent relied on advice that "sounded too good to be true"). Bar Counsel cites *Colson* for this proposition, 412 A.2d at 1168. The cited page largely addresses whether a crime inherently involves moral turpitude, meaning it does so *per se*. *Id.* If anything, on the question of moral turpitude on the facts, *Colson* supports Respondent's argument that his subjective belief is what matters. It provides that in a disciplinary hearing convened for the purpose of determining moral turpitude on the facts, the Hearing Committee is to consider the "circumstances of the crime including the actor's knowledge and intention." *Id*. at 1167; *see also In re Hutchinson*, 534 A.2d 919, 923 (D.C. 1987) (en banc) (only proof of a fraudulent intent or state of mind indicates moral turpitude).

We conclude that Bar Counsel has failed to prove that Respondent's reliance on outside counsel was subjectively unreasonable. E-GOLD involved a new form of transmittable value that was not contemplated by the registration and licensing requirements, and it was not obvious that the definitions of money transmitter applied. Moreover, there is no evidence clearly showing that Respondent was advised that the law required E-GOLD to be registered and licensed. We do not agree, for the reasons stated, with Bar Counsel's position that the Drinker Biddle

memorandum advised that registration and licensing requirements applied.

We also disagree that Respondent's purported dishonesty supports a finding of moral turpitude. First, we question whether his allegedly dishonest statements in the sentencing hearing and the disciplinary process should be considered for purposes of making a determination on moral turpitude. The question is whether the circumstances surrounding his commission of offense itself involve moral turpitude. As set forth above, we find credible Respondent's claim that he relied on counsel on issues related to registration and licensing. An argument can be made that Respondent acted negligently in failing to do more to ensure that E-GOLD was not in violation of state licensing requirements. But this does not rise to the level of moral turpitude.[7] Accordingly, we reject Bar Counsel's position, and find that Respondent's crime did not involve moral turpitude on the facts.[8]

C. Recommended sanction

The remaining question before us is "the nature of the final discipline to be imposed for respondent's conviction of a serious crime." *See* D.C. Bar R. XI, § 10(d). In *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013), the Court of Appeals reiterated that the

> determination of sanctions depends upon a number of factors, such as (1) the seriousness of the conduct, (2) prejudice to the client, (3) whether the conduct involved dishonesty, (4) violation of other disciplinary rules, (5) the attorney's

[7] Even assuming that, as the Chair finds, Respondent acted negligently or even carelessly, negligence does not rise to the level of moral turpitude. *In re Hutchinson*, 534 A.2d at 923 (only proof of a fraudulent intent or state of mind indicates moral turpitude). The Chair agrees. Accordingly, the Hearing Committee unanimously concludes that any negligence on Respondent's part does not establish moral turpitude.

[8] Our determination on the issue of moral turpitude would be the same even if we concurred with the Chair's finding that Respondent lied when he claimed to have relied on the advice of counsel. The Chair, notwithstanding his finding that Respondent made repeated misrepresentations, agrees that Bar Counsel failed to prove that Respondent acted with moral turpitude when he committed the criminal offense. Accordingly, the Hearing Committee unanimously finds that the record does not support a finding of moral turpitude.

> disciplinary history, (6) whether the attorney has acknowledged his or her wrongful conduct, and (7) mitigating circumstances.

Respondent's misconduct was serious by definition, as it involved the commission of a serious crime. However, the crime was a strict liability offense for which proof of criminal intent is not required. For the reasons set forth above, we have concluded that Respondent had no intent to violate the law; to the contrary, the evidence reflects that he repeatedly sought legal advice in an effort to comply with the law. His underlying conduct did not prejudice any client, and the commission of the offense did not involve any dishonesty on his part. Respondent was not charged with violating any other Rules and has an unblemished disciplinary history, and he has acknowledged his responsibility in this case.

Bar Counsel alleges, and the Chair would have us find, that Respondent was dishonest before the Hearing Committee as well as the sentencing court. Uncharged dishonesty may be considered in aggravation of sanction. *See In re Chapman*, 962, A.2d 922, 925 (D.C. 2009). And false testimony to the Hearing Committee is a "significant aggravating factor" in determining an appropriate sanction. *In re Cleaver-Bascombe*, 892 A.2d 396, 413 (D.C. 2006); *see also Silva*, 29 A.3d at 926 (adopting Board's recommended sanction of three-year suspension with fitness requirement where Board "view[ed] respondent's dishonesty and misrepresentations during the disciplinary proceedings as a significant aggravating factor in making its sanction recommendation"). Uncharged misconduct considered in aggravation must be proved by clear and convincing evidence. *See Cater*, 887 A.2d at 25 (where proven misconduct does not support a fitness requirement, Bar Counsel may rely on other aggravating facts, which must be proven by clear and convincing evidence); *In re Boykins*, 999 A.2d 166, 175 (D.C. 2010) (same).

As set forth above, we find that Bar Counsel has failed to prove by clear and convincing evidence that Respondent acted with criminal intent when he failed to register E-GOLD and

comply with licensing requirements. Instead, we credit Respondent's claim that he acted in good faith and on the advice of counsel. To be sure, with the benefit of hindsight, one can argue that Respondent should have sought to register and obtain licenses notwithstanding the laws' lack of clarity. But that falls far short of establishing that Respondent lied when he said he relied on counsel. He repeatedly sought legal advice, and the evidence does not clearly show either that he was advised that the regulations applied to E-GOLD or that he ignored such advice. Moreover, unlike the Chair, nothing about Respondent's demeanor while testifying causes us to question his truthfulness. While he may have expressed frustration from time to time with the questioning, his demeanor was largely consistent throughout. For these reasons, we disagree with Bar Counsel and the Chair that dishonesty has been proven by clear and convincing evidence. We also disagree that Respondent's attitude toward the offense is a factor in aggravation.

Having rejected Bar Counsel's allegations of "flagrant dishonesty," the question is what sanction to recommend. Because the offense is a serious crime, the law requires us to recommend some discipline. *See* D.C. Bar R. XI, § 10(d); *In re Lovendusky*, Bar Docket No. 418-84 at 8 (BPR Nov. 4, 1985) (if the respondent is convicted of a serious crime, "some 'final discipline' should be recommended"). The possibilities range from an informal admonition to disbarment. D.C. Bar. R. XI, § 3(a).

We recommend that Respondent be issued an informal admonition. We note that the Maryland authorities imposed no discipline at all, choosing instead to issue only a warning. (RX 8.) We also note that the Court of Appeals, in declining to enter a suspension order, stated that based on the information before it, "the likelihood that respondent will receive a significant sanction, *i.e.* a suspension (if at all) or more than brief duration, is very small." Both the Maryland bar and the Court of Appeals assumed as true that Respondent was advised that the

companies were not subject to registration and licensing requirements.

D. Respondent's motion to dismiss should be denied.

As set forth above, after the initial round of testimony, the Hearing Committee issued an order requiring production of documents reflecting the legal advice Respondent received. Documents marked as BX 14 were produced in response. Bar Counsel moved to reopen the hearing, arguing that they contradicted Respondent's testimony and "raise[] significant questions about Respondent's credibility and honesty, which will have significant bearing on the Committee's recommendation as to sanction." (Bar Counsel's Motion to Reopen Hearing at 2.) The motion was granted, and Respondent testified regarding those documents on June 18, 2012.

In his post-hearing brief, Bar Counsel argued that Respondent was dishonest when he asserted to Judge Collyer, the Maryland Peer Review Panel, the D.C. Court of Appeals, and the Hearing Committee that he relied on the advice of counsel in concluding that E-GOLD did not need to be registered. (*See* BC PFF at 50-61.) In response, on December 3, 2012, Respondent filed a Motion for Order Concluding Proceedings with No Discipline or, In the Alternative, Motion to Strike and for Other Necessary Relief ("Resp't Motion"). Respondent argued that Bar Counsel effectively had added a previously uncharged dishonesty charge, that he was "lulled and trapped into presenting his testimony in a particular fashion," depriving him of the right to respond to the new charge, and was thus "prejudiced beyond repair." (Resp't Motion at 2-3.) Respondent requested that the "matter be concluded with no additional or further discipline imposed." (*Id.* at 1.) In the alternative, Respondent requested that the Hearing Committee strike "all of Bar Counsel's claims of dishonesty and moral turpitude, and all evidence and testimony received following the close of the hearing." (*Id*.)

Pursuant to Rule 7.16(a), the Hearing Committee Chair denied the motion on March 15,

2013, with a view to recommending a proposed disposition of the motion to the Board. The Hearing Committee now recommends that the Board deny Respondent's motion for the reasons set forth below.

Respondent claims that he was denied procedural due process because he was "lulled and entrapped into presenting his defense." A respondent "has a right to procedural due process" in a disciplinary proceeding. *In re Day*, 717 A.2d 883, 886 (D.C. 1998) (citing *In re Ruffalo*, 390 U.S. 544, 550 (1968)). "Due process is afforded when the disciplinary proceeding provides adequate notice and a meaningful opportunity to be heard." *Id.* at 886; *In re Edelstein*, 892 A.2d 1153, 1157 (D.C. 2006) (same); *In re Smith*, 403 A.2d 296, 297, 302 (D.C. 1979) (no due process violation where a new charge was brought based on respondent's testimony during a disciplinary hearing, where he was given notice of the charge and the hearing was continued to allow him to defend it).

The crux of Respondent's due process argument is that had Bar Counsel charged him with dishonesty, he "would have addressed, explained and diffused that charge by addressing it head on" and could have called other witnesses to corroborate his testimony:

> When this matter began, the sole issue posed by the Specification of Charges was Mr. Downey's state of mind, and whether he indeed had a good faith belief that he was not violating the law. That was the sole focus of his testimony. *Now, however, Bar Counsel seeks to turn these proceedings into an issue of Mr. Downey's honesty. Had Mr. Downey been told that from the outset, he would have presented his testimony in a completely different fashion to dispel any such concerns.* Instead, Mr. Downey was lulled and trapped into presenting his testimony in a particular fashion to defend and explain the only charge that was pending against him.

(Resp't Motion at 3 (emphasis added).)

We reject Respondent's argument. Respondent well knew before he testified on the second day of the hearing that Bar Counsel intended to argue that he had been dishonest, and that his dishonesty should be considered in aggravation of sanction. Bar Counsel advised Respondent of the alleged inconsistencies on April 5, 2012, *before* he testified on the second hearing day (June

18, 2012), and Respondent had ample opportunity to address them then.

Indeed, when the hearing reconvened on June 18, 2012, Respondent testified on direct examination by his counsel regarding the documents at issue. He reaffirmed his reliance on the advice of counsel, and he had every opportunity to explain why, contrary to Bar Counsel's claim, the documents did not contradict, undermine, or otherwise affect his earlier statements regarding the advice of counsel. (*See* Tr. 224-85.) Bar Counsel had every right to challenge the veracity of Respondent's testimony. Moreover, credibility or the lack thereof is considered in determining the aggravating factors that should be taken into account in imposing discipline.

CONCLUSION

For the reasons stated, the Hearing Committee finds that Respondent did not commit a crime of moral turpitude within the meaning of D.C. Code § 11-2503(a) and recommends that Respondent be issued an informal admonition as final discipline for his conviction of a "serious crime," within the meaning of D.C. Bar R. XI, § 10(b). In addition, the Hearing Committee recommends that Respondent's motion to dismiss this disciplinary proceeding be denied.

HEARING COMMITTEE NUMBER NINE

/LSS/
Laura S. Shores, Esquire
Attorney Member

/CS/
Carolyn Slenska
Public Member

Dated: February 20, 2015

This Report and Recommendation was prepared by Ms. Shores. Mr. Bernius concurs in the majority report, where indicated, and has prepared a separate dissent.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER NINE

In the Matter of:	:	
	:	
BARRY K. DOWNEY,	:	
	:	
Respondent.	:	Board Docket No. 08-BD-014
	:	Bar Docket No. 2008-D338
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 416968)	:	

DISSENTING OPINION OF ROBERT C. BERNIUS

Introduction

I agree that Respondent committed a "serious crime" within the meaning of D.C. Bar R. XI, § 10(b), and that Bar Counsel failed to prove Respondent acted with moral turpitude. I also concur in the recommendation that Respondent's motion to dismiss be denied.

However, I am convinced that Respondent repeatedly lied to the Federal District Court, to the District of Columbia Court of Appeals, to Maryland disciplinary authorities, and to the Hearing Committee. As a consequence, I disagree with my colleagues' recommendation as to sanction. In my view, Respondent should be suspended from the practice of law for a period of three years. To explain my conclusion, I must revisit the history of this case.

Marshaling of the Evidence

This disciplinary proceeding is premised upon Respondent's felony conviction for engaging in the business of money transmission without a license in violation of D.C. Code § 26-1002.

On July 15, 2010, the Board ordered Bar Counsel to commence a formal disciplinary proceeding, and pointedly noted that the hearing committee assigned to the matter "should be able

to rely on Bar Counsel to *marshal the evidence* and recommend . . . an appropriate sanction." Order, *In re Downey*, Board Docket No. 08-BG-1160 at 5 (BPR July 15, 2010) (emphasis added). The disciplinary hearing began on March 6, 2012.

At the hearing, Bar Counsel explained that his efforts to obtain evidence from federal agencies had largely been unsuccessful, and conceded that moral turpitude could not be proved. Tr. 8, 11-12, 16. In Bar Counsel's view, the only issue for resolution was the appropriate sanction to be imposed based on Respondent's conviction of a serious crime. Tr. 14. Bar Counsel offered documentary evidence and rested his case without calling any witnesses.

In his own case, Respondent claimed that in all respects material to his criminal conviction, he had (1) sought the advice of counsel (2) with subject matter expertise who (3) advised him that state licensing was not required.

Respondent's testimony was not contradicted by other evidence at the hearing, but it was not corroborated, either. As a consequence, and in an effort to comply with the Board's mandate to marshal the evidence, the Hearing Committee ordered Respondent to produce all the legal opinions he had received pertaining to state licensure of E-GOLD. Up to that point, Respondent had refused to disclose those materials, citing attorney-client privilege. Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction ("BC PFF") at 5; Respondent Barry K. Downey's Proposed Findings of Fact, Conclusions of Law and Memorandum in Response to Bar Counsel's Recommendations ("Resp. PFF") at 6-7.

In effect, Respondent was ordered to produce the opinions of counsel upon which he had purportedly relied. Tr. 189, 198-90; Order, *In re Downey*, Board Docket No. 08-D-14 (HC Mar. 6, 2012). The hearing was held open pending receipt of that additional evidence. Tr. 190-92.

On March 20, 2012, Respondent for the first time produced documents relating to the legal advice he had received. In response, Bar Counsel moved to reopen the hearing on the ground that those materials contradicted Respondent's testimony and "raise[d] significant questions about Respondent's credibility and honesty." Bar Counsel's Motion to Reopen Hearing at 2 (HC Apr. 5, 2012). Respondent opposed the motion, arguing that any inconsistency between the documents and his testimony could be addressed in post-hearing briefs. Bar Counsel's motion was granted, and the hearing reconvened on June 18, 2012.

When the hearing reconvened, Respondent was first examined by his counsel, and then cross-examined by Bar Counsel. His testimony focused on the newly-produced evidence. At the end of that testimony, the Hearing Committee ordered Bar Counsel to obtain the billing records and time entries underpinning the legal advice provided to Respondent. Tr. 336. Bar Counsel later reported that one of the two law firms involved, Miles & Stockbridge, had no such records. The other firm, Drinker Biddle & Reath, produced its time and billing records, which the Board placed under partial seal by Order dated December 27, 2012. BX 16.

Respondent's Criminal Conduct

Respondent was a co-founder and a Director of E-gold, Ltd. ("E-Gold"), and a co-founder, Secretary, Vice-President, and Director of Gold and Silver Reserve, Inc. ("GSR") (collectively "E-GOLD"). Stip. ¶ 2. E-GOLD offered customers a digital currency known as "e-gold," allowing account holders to buy or sell goods or services online without using traditional currency. Stip. ¶ 8.

Digital currency in general, and the operations of E-GOLD in particular, were highly controversial. On the one hand, Respondent asserts that e-gold was an innovative alternative to traditional currency. Answer at 13; RX 12 at 27. On the other hand, the federal government contended that, because of its users' ability to manage their accounts anonymously, e-gold was a

mode of payment favored by money launderers, operators of investment scams and sellers of child pornography. BX 6 at 78, 99-100, 118, 178.

Respondent helped develop E-GOLD's business model and corporate structure. Stip. ¶ 3. Although he clearly knew that many of its customers used E-GOLD's services for illegal activity (Tr. 67-69, 136; BX 11 at 456), Respondent did not plead guilty to actively participating in that misconduct, and Bar Counsel neither charged nor attempted to prove Respondent's direct involvement in it. Respondent testified, without substantial contradiction, that the company tried to forestall criminal use of the E-GOLD systems. Tr. 127-28.

Respondent was, however, the only attorney among the E-GOLD founders. He established the E-GOLD protocols for responding to the many subpoenas served upon it. Tr. 125-26. He also undertook responsibility to assure E-GOLD's compliance with state and federal law and regulations. Stip. ¶¶ 3-6; BX 1 at P51; Tr. 55-56, 104-05. To that end, Respondent claims to have "sought the advise [*sic*] of outside counsel" who purportedly had "specific expertise" in compliance matters. BX 1 at 51. Respondent initiated communications with outside counsel, transmitted E-GOLD's legal concerns to outside counsel, met with outside counsel, and received the advice that outside counsel rendered. BX 14B, 14C; BX 16 (08/05/02, 09/13/02, 09/17/02). Respondent was thus primarily responsible for establishing the protocols for E-GOLD's compliance with state licensing requirements. It became apparent, however, that E-GOLD complied neither with state licensing obligations nor with federal criminal laws.

The Criminal Proceedings

On April 3, 2008, a federal grand jury issued a four-count Indictment against Respondent, E-GOLD, and E-GOLD's two other founders (BX 6 at 93):

a. Count One ("Conspiracy to Launder Monetary Instruments") alleged that from 1999 through December 2005, Respondent and his co-defendants conspired to engage in financial transactions with funds known to be the proceeds of child pornography, wire fraud, or access device fraud, with the intent to promote that unlawful activity in violation of 18 U.S.C. § 1956. BX 6 at 101-03;

b. Count Two ("Conspiracy to Operate Unlicensed Money Transmitting Business") alleged that from October 2001 through December 2005, Respondent and his co-defendants conspired to provide unlicensed money transmitting services to the public through the E-GOLD operation, thereby establishing the E-GOLD operation as a viable private currency and enhancing their own personal wealth, in violation of 18 U.S.C. § 1960. BX 6 at 111;

c. Count Three ("Operation of an Unlicensed Money Transmitting Business") alleged that from October 2001 through December 2005, Respondent and his co-defendants knowingly conducted, controlled, managed, supervised, directed, and owned all or part of an unlicensed money transmitting business in violation of 18 U.S.C. § 1960(b)(l). BX 6 at 118; and

d. Count Four ("Money Transmission without a License") alleged that from May 14, 2002 through March 25, 2003, Respondent and his co-defendants engaged in the business of money transmission without obtaining a license, in violation of D.C. Code § 26-1002. BX 6 at 118.

On July 21, 2008, all four defendants pleaded guilty before Judge Collyer in the U.S. District Court for the District of Columbia. BX 1 at 43. The corporate defendants pleaded guilty

to Counts One and Two. Tr. 106-07; BX 8 at 171. Respondent pleaded guilty to Count Four, *i.e.*, engaging in the business of money transmission without a license in violation of D.C. Code § 26-1002. Stip. ¶ 9; BX 1 at 77. In his plea, Respondent admitted that from May 14, 2002 through March 25, 2003, he operated E-GOLD's money transmitting business knowing that it was not licensed as a money transacting business in the District of Columbia. BX 1 at 54; BX 6 at 118.

On December 15, 2008, the Court sentenced Respondent to 180 days' incarceration, suspended in favor of 36 months' probation, and fined him $2,500. Stip. ¶ 11.

Respondent's "Advice of Counsel" Claim

The Court's sentencing decision was materially influenced by Respondent's claim that he had, at all relevant times, acted in good faith with respect to E-GOLD's state licensure. Respondent contended not only that he had "sought the advice of outside counsel," but that counsel – who had "specific expertise" in matters of licensing and registration of E-GOLD's business operations – had told Respondent that E-GOLD did not need to be licensed.

Thus Judge Collyer was told that experienced lawyers were "ardently advising [Respondent of] their belief *as experts in their field [that] licensing was not required*." RX 6 at 181 (emphasis added); BX 1 at 51; RX 6 at 187-88. Respondent's criminal defense counsel explicitly represented that Respondent:

> sought advice from *attorneys* that he . . . sincerely believed *had the requisite expertise* to offer the kind of advice that was needed. . . . And they advised . . . that this is a new business, it is a new business model. It does not fall within the rubric of prior business models. *And it is not required under current law to be licensed or registered*.

RX 6 at 167. Respondent endorsed the representation his lawyer made to Judge Collyer ("I believed we had found the expert that advised us on these issues. . . . I've looked to experts just like when others have looked to me on employee benefits issue [*sic*]"). RX 6 at 188. Although

the government clearly mistrusted Respondent's reliance-on-counsel representations, its opposition was muted because it didn't "have [the] opportunity to go into their attorney-client communications." RX 6 at 176.

The majority seems to overlook the unequivocal, detailed nature of Respondent's representations to the sentencing court. He did not merely say that he consulted with counsel, or that he received advice that was inaccurate, ambiguous, or based on factual errors (*see* FF 12-15). Nor did he claim simply to have been advised that the regulatory environment was uncertain (*see* FF 18-19). Rather, he explicitly maintained that he had (1) consulted lawyers who (2) were experts in the field and who (3) specifically told him that E-GOLD need not be registered or licensed.

For the reasons discussed below, I view the latter two elements of Respondent's advice-of-counsel claim as paramount. But the substantial documentary evidence in the record flatly contradicts them. During the period of his admitted illegal conduct, Respondent did not receive, and thus could not have relied upon, the advice of *any* counsel. He did not receive advice from any lawyer who "specialized in licensing and regulations" under state law. And, he most assuredly was never advised that E-GOLD need not be registered or licensed under D.C. law. The evidence conclusively demonstrates that his repeated claims of reliance on the advice of counsel were misrepresentations, repeatedly and knowingly made in an effort to exonerate himself criminally and to avoid disciplinary charges in the District of Columbia and State of Maryland.

The misrepresentation succeeded. At sentencing, Judge Collyer accepted Respondent's advice-of-counsel claim, stating that "I'm sure [Respondent] was [getting that claimed advice of counsel] because his [criminal defense] counsel told me that many times on the record in court." She consequently sentenced him to probation. RX 6 at 175; Stip. ¶ 12.

Respondent repeated his advice-of-counsel claim throughout the course of the ensuing disciplinary matters, repeatedly invoking Judge Collyer's observations. At every stage, disciplinary authorities accepted his misrepresentations as true.

The Maryland Disciplinary Proceedings

Respondent confronted disciplinary charges in Maryland. On March 12, 2009, the Maryland Court of Appeals denied the petition of the Attorney Grievance Commission of Maryland seeking Respondent's interim suspension, noting an earlier decision of the D.C. Court of Appeals declining a suspension (*infra*, page 9), and observing that "respondent . . . was trying, with the help of counsel hired for the purpose, to comply" with applicable regulations. *Attorney Grievance Comm'n v. Downey*, 990 A.2d 1070, 1078 (Md. 2010).

On December 28, 2010, a Peer Review Panel of the Maryland State Bar recommended dismissing charges against Respondent, finding that he "did not intend to violate the law," because he "did not serve as counsel . . . in connection with the registration issue," and "engaged counsel *who specialized in licensing and regulation* to advise the company[, who] . . . *advised that registration was not required*." RX 7 at 202-03 (emphasis added).[1] On April 11, 2011, the Attorney Grievance Commission of Maryland dismissed the complaint brought against Respondent by Maryland Bar Counsel. RX 8 at 205. Although it found that Respondent violated Maryland Rule of Professional Conduct Rule 8.4(d), it only issued a warning which "is not discipline" in Maryland. *Id.*

[1] Respondent's filings with Maryland authorities are not in the record. Based on the above-quoted statements, it is evident that Respondent made advice-of-counsel claims to Maryland disciplinary authorities that were identical to those he made in the District of Columbia.

The District of Columbia Disciplinary Proceedings

When the instant disciplinary matter was first before the District of Columbia Court of Appeals, Respondent again represented that the conduct leading to his criminal conviction was based on the advice of expert counsel. He argued to the Court that he had had a "good faith belief that [he was] acting within the limits of the law" because he had "sought the advice of outside counsel with particular expertise in those matters" and had "sought expert legal advice with respect to the companies' compliance issues." Memorandum in Support of Motion of Barry K. Downey Requesting that the Court Not Enter, or that It Immediately Set Aside, any Order of Suspension at 9 n.3. As a consequence, he advised the Court, Respondent had "a good faith belief that the companies were not operating in violation of the law." *Id*. at 3. Respondent told the Court of Appeals what he had told Judge Collyer, and the Court relied on his representations, concluding that Respondent had "consulted another attorney . . . who confirmed his belief that the companies did not have to be licensed as money transmission businesses." The Court stayed his interim suspension. BX 2 at 2. *Downey*, 960 A.2d at 1136.

Again, in his answer to the Specification of Charges, Respondent's annexed "Statement of Relevant Facts in Mitigation" asserted that "on compliance issues . . . [he] 'sought the advice of outside counsel with particular expertise in those matters.'" Based on that advice, he claimed, Respondent "genuinely believed – and had good faith reason to believe – that [the E-GOLD businesses were] outside the regulatory scheme governing money transmitting businesses." Answer at 13. Respondent reiterated that he was "advised . . . that [E-GOLD's business model was] *not subject to existing statutes and regulations. . . .*" *Id*. BX D at 25-26 (emphasis added).

Finally, on the first day of the disciplinary hearing Respondent repeated his theme:

a. His attorney claimed that "Mr. Downey did . . . precisely what any lawyer should

do, relied upon someone with more expertise in the particular field to make the determination." Tr. 34.

b. When asked how E-GOLD made ensured compliance with regulatory laws, Respondent testified "it had hired outside counsel to advise . . . on those types of issues." Tr. 70.

c. Respondent, who "was kept up to date by the attorneys" when they were looking at compliance issues (Tr. 71), testified that he never believed the companies were violating the law because "that's what the company was being told from the very beginning. I mean, if a question arose, they would hire attorneys or accountants to answer the question and to advise the company on how to be in compliance." Tr. 74; *accord* Tr. 82, 104-05 ("I wasn't the adviser, telling them what compliance they needed to do. I was a part of the, you know, team that was being advised by the attorneys and Ernst & Young and participated in that process").

The Actual Advice of Counsel

The legal opinion materials produced by Respondent were: (1) a 1995 letter from Respondent to David Seidl, an attorney then affiliated with the law firm Miles & Stockbridge (BX 14B); (2) a 2003 legal memorandum from the law firm Drinker Biddle & Reath, LLP ("Drinker Biddle") addressed to Respondent (BX 14C); and (3) a 2006 motion filed by attorney Mitchell Fuerst on behalf of GSR, seeking dismissal of a forfeiture action brought against it on the ground that it was not a money transmitting business.[2] BX 14A. Those documents directly and unequivocally disproved Respondent's claims. I address each of these materials in turn.

(a) Attorney David Seidl

On October 3, 1995, before E-GOLD was founded (Tr. 103), Respondent wrote to attorney David Seidl of Miles & Stockbridge, a personal friend whom Respondent had known for many

[2] The motion was denied. *United States v. E-Gold, Ltd.*, 550 F. Supp. 2d 82, 101 (D.D.C. 2008).

years. Respondent explained that he did not think E-GOLD would be subject to government regulation and asked for Seidl's "initial reaction to this conclusion." BX 14B; BX 15 ¶¶ 6, 16; Tr. 230. Respondent was unsure whether E-Gold or Gold & Silver Reserve fit the definition of financial institutions within the meaning of the Bank Secrecy Act of 1970. BX 14B at 6.

Respondent did not ask for a formal legal opinion from Seidl, but merely an "initial review" (BX 14B at 518), *i.e.*, "[Seidl's] inputs on [Respondent's] thoughts." Tr. 326. Indeed, the reason for the inquiry was personal: Respondent sought out Seidl because Respondent and his wife were considering investing in E-GOLD, and Respondent wanted Seidl's reaction before he did so. Tr. 229-30.

Respondent never received a written opinion from Seidl or from his firm. Tr. 326; BX 14 at 508. Instead, Respondent subsequently spoke with Seidl. Tr. 231-32. Respondent tentatively recalled at the hearing that when he and Seidl had spoken in 1995, Seidl "seemed pretty confident" that E-GOLD was "outside those [regulatory] requirements." Tr. 326. Respondent further testified that Seidl vaguely advised him that E-GOLD "was not doing banking, was not subject to banking regulations, and was not doing anything that would be qualified – classified as securities, subject to securities issues." Tr. 231-32. E-GOLD began operating about a year later without registering as a money transmitting business. Tr. 232.

Respondent neither listed Seidl as a witness nor called him to testify at the hearing. However, in an affidavit prepared for Bar Counsel (but only after Respondent produced his 1995 letter to Seidl), Seidl most assuredly did *not* confirm that he gave the advice Respondent attributed to him. Seidl acknowledged that in 1995 he "shared [a] favorable opinion with [Respondent]," but

only "on certain issues" which he does not identify. BX 15 at ¶ 8.[3] Seidl described his circumscribed advice as:

> providing an opinion concerning *certain aspects of Gold & Silver Reserve's business based on my background as a corporate lawyer with significant experience dealing with securities*. I was happy to assist a friend by providing my judgment and opinion on his proposed venture *within my area of competency* without requiring compensation due to the minimal effort required (emphasis added).

BX 15 ¶ 15. Seidl professes no expertise in the legal principles at issue in this case, namely the post-Patriot Act, state licensing of money transmitting businesses. His pre-Patriot Act, off-the-cuff advice was, at its most expansive, limited to corporate and securities issues in 1995. It did not extend to the "regulatory requirements" advice claimed by Respondent.

At that, Seidl's advice was inconsequential. He did not provide it in writing (Tr. 288), and at the hearing Respondent produced no contemporaneous notes of the professed verbal exchange he claims to have had with Seidl eighteen years earlier. Miles & Stockbridge could find no records relating to Seidl's advice, or for that matter relating to Respondent or to E-GOLD. It appears that the law firm never took any of them on as a client. BX 15 ¶¶ 11-12. In assessing the matter for Respondent, Seidl put in only "minimal effort" and did not seek the expertise of others in his firm because he did not want to bill Respondent for any work. BX 15 ¶ 15. Respondent did not pay for Seidl's advice. Tr. 291.

In my view, the "opinion" of Seidl was therefore no more than what Respondent requested: an attorney-friend's "initial reactions." BX 14B at 518. Contrary to the view of the majority opinion, it was not legal advice rendered by a subject matter expert upon which Respondent and

[3] Exhibits 15 and 16 were tendered to the Hearing Committee by Bar Counsel subsequent to the hearing in this matter. Both parties have referred to both exhibits in their post-hearing submissions, without objection to their consideration by the Hearing Committee. Accordingly, the Hearing Committee accepts those exhibits into evidence in this matter.

E-GOLD could reasonably have relied for purposes of determining E-GOLD's compliance with state licensing requirements. Indeed, Respondent conceded as much because he later became concerned about passage of the Patriot Act in 2001 and its implications for E-GOLD (Tr. 234-35). It is inconceivable that, when he engaged in the *post*-Patriot Act criminal conduct for which he was convicted (from May 14, 2002 through March 25, 2003), Respondent continued to rely on *pre*-Patriot Act legal advice rendered by his friend Seidl, seven to eight years earlier.

In any event, whatever its scope, Seidl's curbstone advice was necessarily irrelevant to the issues in this case. Both the Patriot Act and the felony statute of which Respondent was criminally convicted were enacted more than five years *after* Respondent's interaction with Seidl.[4] Respondent pleaded guilty to criminal conduct during the period May 2002 through at least March 25, 2003. However competent or prescient Seidl may have been, Respondent could not truthfully have referred to Seidl as the "outside counsel with specific expertise" in matters of licensing and registration who advised him that licensing and registration was not required for E-GOLD's operations. Seidl did not – and could not – have advised Respondent that E-GOLD need not obtain a license pursuant to D.C. Code § 26-1002.[5]

[4] *See* 2000 District of Columbia Laws 13-140 (Act 13–322).

[5] I also believe that if he had been called to testify, Seidl would have contradicted Respondent's testimony in material respects. Seidl's affidavit is replete with vaguely, yet artfully, worded phrases ("shared my favorable opinion . . . on certain issues;" "opinion concerning certain aspects of [E-GOLD's] business;" "within my area of competency") (BX 15 ¶¶ 6, 15) that would have been clarified had he appeared at the hearing. Respondent talked to Seidl during the disciplinary proceedings (BX 15 at ¶ 10) but did not call him as a witness. Under the circumstances, Seidl was peculiarly available to Respondent to testify, and it is appropriate to draw an adverse inference from his non-appearance. *McClanahan v. United States*, 230 F.2d 919, 925-26 (5th Cir. 1956). *Accord, Dent v. United States*, 404 A.2d 165, 170 (D.C. 1979).

(b) Drinker Biddle

Following his exchanges with Seidl, Respondent did not seek further legal advice regarding the laws relating to E-GOLD's operations generally, or the licensing of money transmitting businesses in particular, for seven years. Tr. 227-28. In August 2002, concerned about how the 2001 Patriot Act might affect E-GOLD, Respondent approached the Drinker Biddle firm. Respondent chose Drinker Biddle because its attorneys were familiar with E-GOLD and had the necessary expertise to respond to his concerns. Tr. 234. He engaged the firm to provide a legal memorandum advising whether E-GOLD was subject to government regulation in light of the Patriot Act. Tr. 234-35. To that end, Respondent participated in an initial teleconference with Drinker Biddle attorneys on August 5, 2002, and met with them on September 17, 2002, to discuss the project. BX 16 at 3-4.

On March 31, 2003, Drinker Biddle provided Respondent with a 24-page legal memorandum analyzing the issues confronting E-GOLD, and recommending that Respondent consider registering the E-GOLD companies. Contrary to Respondent's claims, the memo concluded that GSR *was* "vulnerable to a regulatory claim that it is an unregistered money service business." BX 14C at 21. It also advised that due to the common ownership of the E-GOLD entities, E-Gold should consider registering as a money service business with the Treasury Department and "various states." *Id*. Finally, the memo recommended that E-GOLD consider the need to "report currency transactions" and to "establish an anti-money laundering program or to begin reporting suspicious activities or currency transactions." *Id.*

In addition to its general admonitions, the Drinker Biddle memorandum specifically identified the criminal statutes upon which Respondent's (and E-GOLD's) indictment and conviction were based:

(1) The memorandum noted that Title 18 U.S.C. §§ 1956 and 1957, which make it a crime knowingly to engage in a financial transaction with the proceeds from specified crimes, "may be applicable to one or more of the E-Gold businesses." BX 14C at 550. Count One of the Superseding Indictment charged E-GOLD and Respondent with violating 18 U.S.C. § 1956;

(2) The memorandum explicitly stated that "***GSR could be characterized as a . . . money transmitter . . . which would require registration***" (bold and italicized emphasis in original), and noted that "Title 18 U.S.C. § 1960 . . . of the Patriot Act makes it a federal offense to . . . own an unlicensed money transmitting business."[6] Counts Two and Three of the Indictment charged E-GOLD and Respondent with violating 18 U.S.C. § 1960.

(3) Finally, the memorandum directly cautioned Respondent that:

> a handful of states have begun to license and regulate such diverse entities as . . . Internet money transfer systems. . . . Accordingly, *you may want to survey the laws of the various states to ensure that GSR is not in violation of the licensing requirements* for a Money Services Business.

[6] In light of this specific admonition in the Drinker Biddle memorandum, I question the veracity of this categorical testimony by Respondent:

> Q Did you ever receive a formal opinion of counsel that either of the companies had an obligation to obtain a license for operating a money-transmitting business?
> A No, I did not.

Tr. 226. This answer may have been "technically true," but "evince[d] a lack of integrity and straightforwardness." Respondent "knew what information [Bar Counsel] was after, but for his own benefit refrained from supplying that information . . ." *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (per curiam).

Id. at A-2 (emphasis added).[7] Count Four of the Indictment, to which he pleaded guilty, accused Respondent of violating just such a state licensing requirement.

Respondent's response to the Drinker Biddle memorandum was dismissive. He complained via e-mail on June 9, 2003 that the legal bill associated with the research was unreasonable, stating that he did not intend to pay for "educating the attorneys involved on the content of the patriot act and the application of that learning to incorrect facts and assumptions with respect to G&SR and e-gold." BX 14D at 552. Respondent considered the memorandum to be "useless" and "did not view [the memo] as advice on anything." Tr. 298, 316. On August 1, 2003, Respondent again complained that Drinker Biddle continued to bill him for its work. BX 14D at 554. Five months later, Respondent sent another e-mail, again disputing the firm's fees and asking what "it would take" to split the work product into two memoranda addressing E-Gold and GSR separately. BX 14D at 555. Respondent claims that he then gave Drinker Biddle "seven or eight months to provide a corrected memo with a [revised] analysis," but he never followed up and never straightened out the billing dispute. Tr. 328-30. Understandably, no revision was forthcoming from Drinker Biddle.

Thus, despite passage of the Patriot Act and Respondent's professed concern over its application to E-GOLD, despite Drinker Biddle's detailed warnings about compliance with federal criminal law, and despite Drinker Biddle's specific caution about the applicability of state licensing statutes to E-GOLD's operations, Respondent took no meaningful action to clarify or correct the memorandum's supposed factual inaccuracies, made no effort to adhere to its

[7] In his proposed Findings of Fact, Respondent alleges that the Drinker Biddle "memorandum started with the conclusion that e-gold, Ltd. and G&SR 'individually or collectively did not fit within any of the definitions of financial institution' and, therefore, were not subject to the money transmitting licensing requirements." Resp. PFF at 51. That characterization is palpably untrue. The Drinker Biddle memorandum makes no such statement

recommendations, and made no effort to assess the potentially applicable state licensing requirements. Instead, because the Drinker Biddle memorandum purportedly contained a factual misunderstanding it "didn't give [Respondent] any concern at all that we needed to do anything." Tr. 297.

One need not determine whether the Drinker Biddle memorandum was, as Respondent now contends, based on materially inaccurate facts. Respondent acknowledged at the resumed hearing in this matter that his "advice of counsel" defense, at least in this disciplinary proceeding, was not in any relevant sense based on advice from Drinker Biddle. Tr. 308-09. To the contrary, Respondent claimed – and the majority agrees – that the memo was "useless" and was not "advice on anything." FF 14.[8] Drinker Biddle thus could hardly be the attorneys with "special expertise" upon whom Respondent claims to have relied. And, of course, Respondent disregarded that advice and acted utterly contrary to it.

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[8] Respondent, however, claims that he *did* rely on Drinker Biddle memorandum in making his advice-of-counsel claim to Judge Collyer. Doing so, however, was cagey if not disingenuous. When he told Judge Collyer he had relied on the advice of counsel, Respondent admits he was referring to Drinker Biddle advice, but only insofar as it related to patent and trademark matters:

> Q And at sentencing, you told Judge Collyer that when dealing with matters outside your area of expertise you relied on outside experts to advise on those matters. Is that correct?
> A Yes, that's correct.
> Q Did that refer to the advice from Drinker Biddle in any way?
> A Well, I mean, yes. I mean, I relied on them or the company relied on them for patent work. The company relied on them for trademark work. The company relied on them for patent defense work. So, yes. They would have been used as outside counsel to answer questions that I, of course, had no expertise in, yes.

Tr. 309. It is impossible to accept the notion that Respondent believed Judge Collyer to be even remotely interested in the company's reliance on counsel for *patent and trademark* work in the sentencing colloquy. Failing to explain that Drinker Biddle rendered *patent and trademark* advice – but *not* money transmitting advice – constituted yet another material misrepresentation in Respondent's sentencing allocution.

The Drinker Biddle memorandum is irrelevant to the advice-of-counsel defense for yet another reason: temporal irrelevance. Just as Seidl's purported advice was rendered years *prior* to enactment of the criminal statute Respondent violated, the Drinker Biddle memorandum was dated March 31, 2003 – six days *after* the criminal conduct for which Respondent was convicted. BX 7 ("Judgment in Criminal Case . . . Offense Ended . . . March 25, 2003"); RX 8 at 190, 197 (Guilty Plea). Under no strained interpretation of the facts could Respondent truthfully have sought to excuse his criminal conduct by pointing to the advice of counsel rendered *after* that conduct had ended.

For these reasons, Respondent could not truthfully have referred to Drinker Biddle as the "outside counsel with specific expertise" in matters of licensing and registration whose advice he received and relied upon. Respondent's interactions with Drinker Biddle flatly disprove his advice-of-counsel claim.

(c) Mitchell Fuerst

The third, and final, attorney who advised Respondent in E-GOLD affairs was Mitchell Fuerst. Tr. 282, 301.

In January 2005, in response to document requests from the Treasury Department, Respondent retained Fuerst to represent E-GOLD. Tr. 282-83; Respondent Barry K. Downey's Motion for Order Concluding Proceedings, at 17 (Dec. 3, 2012). That retention was twenty-two months *after* the criminal conduct underlying Respondent's conviction had ended. Tr. 282-83; BX 6 at 118; BX 7; RX 8 at 190, 197; Resp. PFF at 61. Whatever its substance, therefore, Fuerst's advice could not have been relied upon by Respondent to justify his criminal activity.

In any event, Respondent initially testified that Fuerst gave him an opinion encompassing state regulations, and that he believed the opinion to be in writing. Tr. 82, 150. He claimed that

Fuerst "was hired to advise the company on the application of the licensing/registration requirements of federal and state law" (Tr. 72), that Fuerst told him that the "rules did not apply" to E-GOLD (Tr. 149), and "the companies were not required to become licensed or register as money-transmitting businesses." Tr. 283, 304-05.

Conceding that Fuerst had not provided a written opinion on these matters (BX 14 at 507), Respondent nevertheless claimed that a motion for summary judgment filed by Fuerst in January 2006 corroborated Fuerst's oral opinion that Respondent and E-GOLD had a "100% likelihood" of success in the criminal matter. Tr. 90; BX 14 at 507-08. Respondent claimed that the memorandum "was identical" to the oral advice Fuerst had provided to him. Tr. 284.

Respondent's descriptions of the advice Fuerst allegedly gave him is incredible and, in my view, knowingly false.

First, Fuerst's advocacy piece had no relationship to the crime of which Respondent was convicted; Fuerst never mentioned licensing requirements under the D.C. Money Transmission Act or any other state licensing regulation. BX 14A.

Second, Fuerst never testified in this matter. There was no evident attempt by Respondent to secure his testimony, and Respondent offered no explanation as to why his testimony was not proffered. This is particularly troubling since the evidence suggests that, in meetings with government agents during the criminal investigation, Fuerst was at best equivocal on the registration issue, telling them "that he [Fuerst] could see it either way. And maybe they'd be required to register, maybe they wouldn't." RX 6 at 175. Once again, these circumstances suggest quite strongly to me that testimony by Fuerst would have contradicted Respondent's claims. Page 14 n.5, *supra*.

In any event, Respondent eventually conceded that he did not know if Fuerst ever was asked to look at the licensing requirements of D.C. or other states. Tr. 333.

I conclude that Fuerst never gave legal advice to Respondent concerning state licensing requirements for E-GOLD. Even if he did, that advice was rendered almost two years after Respondent's criminal conduct had ended. For these reasons, Respondent could not truthfully have defended his criminal activity by referring to Mitchell Fuerst as "outside counsel with specific expertise" in matters of licensing and registration whose advice he allegedly received and relied upon before he committed his crime.

Apart from David Seidl, Drinker Biddle, and Mitchell Fuerst, Respondent did not purport to rely on any other attorneys for his advice-of-counsel defense.

Based on the foregoing documentary evidence and Respondent's testimonial concessions, it is quite clear that, although Respondent occasionally consulted with outside counsel, no attorney ever advised him that E-GOLD did not have to be licensed pursuant to D.C. law. Respondent's testimony and representations to the contrary were knowingly false.

The Appropriate Sanction

In determining an appropriate sanction one must assess: (1) the nature and seriousness of the misconduct; (2) the presence of misrepresentation or dishonesty; (3) the respondent's attitude toward the underlying misconduct; (4) prior disciplinary violations; (5) mitigating or aggravating circumstances; and (6) prejudice to the client. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)); *Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc). The sanction imposed must of course also be consistent with cases involving comparable misconduct. I will assess each of these factors in turn.

(1) Seriousness of the Misconduct

Respondent was convicted of a felony, which the Hearing Committee unanimously finds to have been a serious crime. Although it is a strict liability offense for which proof of criminal intent was not required, Report and Recommendation at 34, I weigh Respondent's misconduct

more heavily than does the majority opinion. In that respect I agree with Judge Collyer's observation:

> [T]he failure to register is what leads to the ability of criminals to make use of the E-Gold system for nefarious purposes and abuse the system. . . . Because once you register you have to report things and therefore it's not as anonymous or private. . . . So on the one hand it's just a regulatory compliance issue. On the other hand it's a very serious problem not to have registered.

RX 6 at 191-92.

(2) Misrepresentation or Dishonesty

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12. The failure to disclose a material fact also constitutes a misrepresentation. *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation.") (citations omitted).

Respondent has not been found to have violated any Rule that proscribes dishonesty or misrepresentation. In that limited sense, then, this matter does not involve dishonesty. However, uncharged dishonesty, even outside of the disciplinary proceedings, may be considered in aggravation of sanction. *See, e.g.*, *Martin*, 67 A.3d at 1050 n.21 (considering uncharged dishonesty in aggravation of sanction); *In re Lewis*, 689 A.2d 561, 566 (D.C. 1997) (per curiam) (appended Board Report) (same). *Accord*, *In re Yelverton*, 105 A.2d 413, 423 (D.C. 2014). Thus, I consider Respondent's false testimony to the Hearing Committee, and his related false statements to Judge Collyer, Maryland disciplinary authorities, and the D.C. Court of Appeals, to be an aggravating factor in making my sanction recommendation. Honesty is "basic to the practice of law, and . . . lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times." *In re Guberman*, 978 A.2d 200, 209 n.10 (D.C. 2009) (internal quotation marks omitted).

(3) Respondent's Attitude Toward the Underlying Misconduct

Based on his guilty plea, Respondent argues that he has taken responsibility for his misconduct. He led his co-defendants to accept plea agreements, and caused the E-GOLD companies to begin the process of registering with the government and applying for state licenses. He also acknowledged to Judge Collyer that he "was wrong." Resp. PFF at 103-05.

All of that, however, seems to reflect Respondent's pragmatic recognition of the likelihood of a serious felony conviction following Judge Collyer's denial of the defendants' dispositive motion, rather than a genuine acceptance of responsibility for his misconduct.

Indeed, in the latter sense, throughout the disciplinary process Respondent has repeatedly urged that he was not responsible for the failure by E-GOLD to obtain licensure, by conjuring up his purported reliance on counsel and, more generally, by denying any personal responsibility for even determining E-GOLD's compliance responsibilities in the first instance. He claimed that he was not "extensively involved" in the day-to-day operation of the business, insisted he was not advising the company, and even de-emphasized his interaction with Drinker Biddle, ultimately contending that he had "exercised good professional judgment." Tr. 70-71, 94, 104-05, 125; *see* Tr. 33 ("Mr. Downey did . . . precisely what any lawyer should do. . . .").[9] The evidence, however, showed that Respondent was the E-GOLD representative principally responsible for determining compliance. *See supra* p. 4; BX 1 at 51 (Statement of Offense); Tr. 70, 104-05. It was Respondent who was clearly the point person with the outside lawyers he claims advised the company on compliance matters. Respondent was far more involved in compliance issues than he is willing to admit. Respondent's failure to acknowledge any responsibility affects my sanction recommendation. *See In re Daniel*, 11 A.3d 291, 301 (D.C. 2011).

[9] He testified that "I [made] the initial contact. Beyond that, I was just monitoring what was going on." Tr. 303.

(4) Respondent's Disciplinary History

Respondent has no history of criminal or disciplinary actions, other than the Maryland disciplinary matter discussed above, which was terminated with no disciplinary finding.

(5) Mitigating and Aggravating Circumstances

At his criminal sentencing, the court indicated that Mr. Downey is "a fine outstanding member of his community, of his family. He is clearly a good lawyer and a good husband and a good father and a good member of his church and his community and has no criminal history." I accept these observations, which were corroborated by the character witnesses at the hearing and the supportive letters from Respondent's friends and family. RX 8.

I reject, however, any mitigating import from the statements by Judge Collyer, Maryland disciplinary authorities, or the Maryland Court of Appeals to the effect that Respondent acted in good faith, for the reasons discussed previously. To the contrary, they were all based on a misunderstanding of the facts, induced by Respondent's misrepresentations, which I consider as an aggravating factor.

In addition, and as previously discussed, I conclude that Respondent repeated those core misrepresentations to the District of Columbia Court of Appeals and his testimony and arguments to the Hearing Committee. Those statements were false, and knowingly so, and would not have been discovered had Respondent not been ordered to produce documents that he had previously withheld from Bar Counsel.

Respondent's false statements are a "significant aggravating factor" in my assessment of the appropriate sanction. *In re Cleaver-Bascombe*, 892 A.2d 396, 413 (D.C. 2006) ("*Cleaver-Bascombe I*"); *see also In re Ukwu*, 926 A.2d 1106, 1118-20 (D.C. 2007); *In re Silva*, 27 A.3d 1109, 1111, 1113 (D.C. 2011) (adopting Board's recommended sanction of three-year suspension with fitness requirement where Board "view[ed] respondent's dishonesty and misrepresentations

during the disciplinary proceedings as a significant aggravating factor in making its sanction recommendation"). Respondent's misrepresentations in the disciplinary process demonstrate that he "clearly does not appreciate the impropriety of his . . . conduct." *Cleaver-Bascombe I*, 892 A.2d at 412 (citing *In re Goffe*, 641 A.2d 458 (D.C. 1994)) (per curiam). Indeed, the seriousness of the misrepresentations is heightened by Respondent's astonishing post-hearing effort to deny that he ever made them: "Mr. Downey, however, has never asserted an 'advice of counsel' defense." Resp. PFF at 77-78.

(6) Prejudice to the Client

This matter did not involve the breach of a duty to any client. As the Court of Appeals observed, Respondent's "violation arose from conduct outside of his normal legal practice." *Downey*, 960 A.2d at 1137.

(7) The Mandate to Achieve Consistency

The Court has made clear that honesty is "basic" to the practice of law, and that lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times. *In re Mason*, 736 A.2d 1019, 1024-25 (D.C. 1999) (citations omitted). "There is nothing more antithetical to the practice of law than dishonesty . . . ." *Daniel*, 11 A.3d at 300 (citing *Hutchinson*, 534 A.2d at 924).

I agree with those observations. In that vein, Bar Counsel seeks disbarment for Respondent's "flagrant dishonesty," a level of misconduct to be determined by a "fact-specific approach." *Guberman*, 978 A.2d at 206 n.5 (quoting Board Report). A "continuing and pervasive indifference to the obligations of honesty in the judicial system" warrants disbarment, while less egregious conduct does not. *Id*. at 210 n.13 (quoting *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008)). I do not, however, believe that Respondent's misrepresentations rise to the flagrant dishonesty level.

In his sanctions recommendation, Bar Counsel relies upon Respondent's false statements to Judge Collyer and to Maryland disciplinary authorities. *See* BC PFF 50-54. However, Bar Counsel did not charge Respondent with dishonesty or misrepresentation in the Specification of Charges. While it is appropriate to consider Respondent's false statements as a general aggravating factor, using them as a basis to find "flagrant dishonesty" warranting disbarment in these circumstances could in my view raise due process concerns.[10] As a consequence, the majority of the cases dealing with "flagrant dishonesty" relied upon by Bar Counsel are inapposite.

The sanctions approved by the Court in matters involving dishonesty vary widely. In *In re Chapman*, 962 A.2d 922, 923-27 (D.C. 2009) (per curiam), the Court imposed a 60-day suspension, with 30 days stayed in favor of a one-year period of probation, with conditions, where respondent neglected a client matter and lied to Bar Counsel and the Hearing Committee to cover up the misconduct. In *Martin*, 67 A.3d at 1053-54, an 18-month suspension was imposed where the respondent charged excessive fees and made false statements to Bar Counsel and the Hearing Committee. In *In re Boykins*, 999 A.2d 166, 167-74 (D.C. 2010), a two-year suspension plus fitness was imposed for negligent misappropriation and misleading and inconsistent explanations to Bar Counsel.

The Court has typically imposed a one-year suspension for intentional dishonesty to

[10] The Court has considered uncharged dishonesty as a basis for finding "flagrant dishonesty," but only where the Specification of Charges includes allegations of dishonest conduct. *See, e.g.*, *In re White*, 11 A.3d 1226, 1278 (D.C. 2011) (per curiam) (appended Hearing Committee report) (terminated employee filed whistleblower complaint and falsely accused employers, presented false and altered documents to D.C. Council and the Hearing Committee, and testified falsely before D.C. Council, "creating an unbroken chain of deceit and misrepresentation that ran all the way through [the Hearing] Committee's proceedings"); *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (per curiam) ("*Cleaver-Bascombe II*") (respondent submitted "patently fraudulent" CJA voucher, lied about it under oath, and testified falsely before the Hearing Committee).

government agencies. *See, e.g.*, *In re Belardi*, 891 A.2d 224, 224-25 (D.C. 2006) (per curiam) (false statements to the FCC); *In re Bowser*, 771 A.2d 1002, 1003-04 (D.C. 2001) (per curiam) (false statements to INS); *In re Cerroni*, 683 A.2d 150, 151 (D.C. 1996) (per curiam) (false statement to HUD).

More to the point, in *Daniel*, 11 A.3d at 291, the respondent concealed personal funds from the IRS in his trust accounts (and thus commingled personal funds with entrusted funds), lied to the IRS, and made materially false statements denying the misconduct in a sworn affidavit submitted to the Hearing Committee. The Court noted that this "misconduct, though serious, d[id] not reach the level of misconduct of attorneys whom [the Court] ha[s] disbarred." *Id*. at 301. The Court looked instead to *In re Moore*, 691 A.2d 1151 (D.C. 1997), where the respondent was suspended for three years based on pleading guilty, as here, to a "serious crime" that did not involve moral turpitude coupled with directing an attorney in his office to lie on his behalf, and testifying falsely in divorce proceedings concerning his income. *Daniel*, 11 A.3d at 301. The Court, as did the Court in *Moore*, imposed a three-year suspension with a fitness requirement. *Id*. at 302. The *Daniel* court also noted the respondent's reluctance to recognize his misconduct, relying on *Goffe*, 641 A.2d at 464-66, and comparing Goffe's "reluctance . . . to this day to indicate contrition or recognition of the seriousness of the offenses," with the conduct of other attorneys, who "quickly came to realize and freely acknowledge the totally unacceptable nature of their misconduct." *Id*. at 301. *Accord, In re Scott*, 19 A.3d 774, 776-79 (D.C. 2011) (imposing a three-year suspension with fitness for misconduct involving false statements and material omissions on a D.C. Bar application regarding four grievances that had been filed against the respondent in North Carolina, combined with false statements to Bar Counsel and the Hearing Committee); *In re Perrin*, 663 A.2d 517, 521 (D.C. 1995) (three-year suspension with

fitness where respondent was convicted of a serious crime that did not involve moral turpitude, coupled with dishonesty).

By comparison, the respondent in *Hutchinson*, 534 A.2d at 919-21, who was convicted of misdemeanor securities fraud and also made false statements to the SEC, was suspended for one year. However, Hutchinson spontaneously recanted his false statements, was genuinely contrite for his actions, and there were other "significant factors in mitigation" that are not present in this case.

In assessing these cases, and recognizing that comparisons are inexact and each case must "turn on its own particular facts," *In re Hines*, 482 A.2d 378, 386 (D.C. 1984), I conclude that this matter most closely resembles *Daniel*, *Moore*, *Scott*, and *Perrin*, and consequently recommend that Respondent be suspended from the practice of law for three years.

Conclusion

The record in this case is profoundly disturbing, but in my view demonstrates conclusively that Respondent has consistently lied in asserting his advice of counsel defense. For that reason, I respectfully dissent from the sanction recommendation of my colleagues. I believe that Respondent should be suspended from the practice of law for three years.

/RCB/
Robert C. Bernius, Esq., Chair

Dated: February 20, 2015