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

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

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE NUMBER FOUR

This matter involves the actions of Kelly A. Cross, Esquire ("Respondent"), who is an administratively suspended member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on September 15, 2006 and assigned Bar number 500189. Respondent is charged with conduct that violates the standards governing the practice of law in the District of Columbia as prescribed by the District of Columbia Rules of Professional Conduct ("Rules") and D.C. Bar R. XI, § 2(b).

I. INTRODUCTION

On August 19, 2009, Respondent used a video camera that he had hidden in his toiletry bag to surreptitiously record a patron at a local gym while that individual undressed in the gym's locker room. Respondent was discovered, subsequently arrested and eventually pleaded guilty to misdemeanor voyeurism in violation of D.C. Code § 22-3531(c). Bar Counsel charged that: (1) Respondent violated Rules 3.4(a) (obstructing another party's access to evidence), 8.4(b) (criminal acts reflecting adversely on honesty, fitness, or trustworthiness), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (serious interference with the

administration of justice); and (2) Respondent was convicted of a crime involving moral turpitude within the meaning of D.C. Code § 11-2503(a). Bar Counsel contends that Respondent's crime requires disbarment under the statute. Respondent contended at the hearing that his actions, although criminal, were in essence based on a misunderstanding.[1]

The Hearing Committee finds by clear and convincing evidence that Respondent violated Rules 8.4(b) and 8.4(c), but that the evidence is insufficient to find that he violated Rules 3.4(a) and 8.4(d) or that he committed a crime of moral turpitude within the meaning of D.C. Code § 11-2503(a). The Hearing Committee further finds that Respondent engaged in this type of misconduct before, and that Respondent's explanation for his misconduct to the Hearing Committee was false based on his demeanor, key contradictions in his testimony and the basic implausibility of his story. The Hearing Committee recommends, therefore, that Respondent be suspended from the practice of law for a period of three years with a fitness requirement as a condition of reinstatement.

II. PROCEDURAL HISTORY

The procedural history of this matter is lengthy but uncomplicated. The relevant procedural history follows:

1. On December 3, 2012, the Office of Bar Counsel filed a Petition Instituting Formal Disciplinary Proceedings and an accompanying Specification of Charges against Respondent. Respondent did not answer within the allowed time.

2. On March 13, 2013, a pre-hearing was held, during which time Matthew Peed, Esquire, entered an appearance for Respondent, and noted that Respondent would move for leave

[1] Respondent did not file a post-hearing brief.

to file an out-of-time Answer to the Specification of Charges. At that same hearing, Bar Counsel noted that he intended to file an Amended Specification of Charges, and to move for a protective order limiting access to and the use of the videotape at the heart of this matter. The videotape was later submitted as Bar Counsel exhibit L.[2] The hearing was set for May 17 and 20, 2013.

3. On March 13, 2013, Bar Counsel filed an Amended Specification of Charges, correcting typographical errors in the previous Specification.

4. Respondent filed his Answer on March 22, 2013.

5. By order dated April 24, 2013, the Board granted Bar Counsel's motion for protective order to seal the videotape and, in doing so, instructed the Board's Office of the Executive Attorney to maintain custody of that exhibit. The order was amended on May 8, 2013, to make it clear that Bar Counsel intended to introduce the videotape in evidence at the hearing.

6. On May 10, 2013, the Hearing Committee granted Respondent's unopposed motion for a continuance of the hearing until after August 20, 2013, because Respondent was having financial difficulties that impacted his ability to retain counsel.

7. A second pre-hearing conference was held on May 17, 2013, and the hearing date was rescheduled for September 9, 2013.

8. On August 21, 2013, the Hearing Committee issued a disclosure, notifying the parties that Hearing Committee member Marcie Ziegler, Esquire, had previously worked at a firm with Respondent's counsel, Mr. Peed. Neither party challenged Ms. Ziegler's participation in this matter.

[2] Bar Counsel's exhibits will be referred to as "BX _."

9. On August 24, 2013, Bar Counsel filed its exhibits A through N and its witness list.[3]

10. On August 26, 2013, Respondent filed his witness list, identifying David McCall, Ph.D., as an expert witness to testify regarding "the culture of consensual sexual encounters in Washington, D.C. sports clubs and his treatment of Respondent."

11. On August 30, 2013, Respondent moved pursuant to Board Rule 3.2 for the issuance of a subpoena to the United States Attorney's Office for the District of Columbia ("USAO") and to the Washington, D.C. Metropolitan Police Department ("MPD"). The purpose of the subpoena was to obtain alleged evidence still within the possession, custody or control of these entities.

12. On September 3, 2013, Bar Counsel moved *in limine* to preclude or limit Dr. McCall's testimony on relevancy grounds, and because Respondent had not provided adequate notice pursuant to Board Rule 7.6(a) that he intended to raise disability or addiction in mitigation of sanction.

13. On September 6, 2013, the Hearing Committee convened at a telephonic pre-hearing conference to address the numerous evidentiary issues raised by the parties. During that conference, Respondent's counsel asserted that he was *not* seeking to introduce evidence of disability or addiction pursuant to Board Rule 7.6. (*See* Sept. 6, 2014 Tr. at 69-70.)

14. By order issued September 6, 2013, the Hearing Committee denied Bar Counsel's motion *in limine* regarding Dr. McCall's testimony, subject to renewal during the hearing, and the Hearing Committee granted Respondent's motion to subpoena the USAO for evidence

[3] The transcript will be referred to as "Tr. __." BX L was filed under seal, pursuant to the May 8 Board order.

obtained during its investigation. The Hearing Committee also allowed Respondent to subpoena the MPD for "all evidence collected in the prosecution of Respondent."[4]

15. On September 9, 2013, a fourth pre-hearing conference was held, rescheduling the hearing until October 24, 2013, to allow time for Respondent to obtain the evidence he sought via subpoena. The Chair also reserved October 25, 2013 as an additional day for testimony if needed.

16. The hearing was held on October 24, 2013. Throughout the hearing, Respondent was represented by counsel, Mr. Peed, and Bar Counsel appeared through Assistant Bar Counsel, Joseph N. Bowman, Esquire.

17. At the hearing, Bar Counsel presented Complainant[5] as its only witness. (Tr. 35-64, 246-60.) Bar Counsel moved exhibits A-N, P and Q into evidence. Bar Counsel did not move Exhibit O into evidence. Respondent objected to the admission of BX H and I, which was sustained on prejudice grounds. The Chair admitted all of Bar Counsel's exhibits except O, H and I. (Tr. 64-72.) Bar Counsel rested its case. Respondent then testified on his own behalf. (Tr. 72-151, 233-46.)

18. The hearing was continued to October 25 because Dr. McCall had a scheduling conflict preventing his attendance on October 24. Respondent attended the entire hearing on October 24, but he attended only the afternoon session of October 25.

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[4] Ultimately, neither the USAO nor the MPD was able to locate or account for the toiletry bag containing the camera, which was the subject of Respondent's subpoena. (Tr. 320.) The USAO stated, however, that Respondent's digital camera and media card were returned to Respondent on December 8, 2009. *See* Bar Counsel's Response to Respondent's Motion for Subpoena (Sept. 4, 2013).

[5] Complainant's name was disclosed during these proceedings, and thus, is contained in the case record. However, due to the sensitive nature of this matter and because Complainant's identity is not material to the disposition of the case, we refer to him as "Complainant."

19. Respondent called Dr. McCall on October 25, 2013, and offered him as an expert regarding the "culture of consensual sexual activity within Washington, D.C. gyms." (Tr. 189.) Over Bar Counsel's objection (Tr. 190-93), the Chair allowed Dr. McCall to testify as an "expert in sex counseling and therapy, subject to review of the Rules of the Board prior to our preparation of final report and recommendation." (Tr. 194.) After the Hearing Committee asked Dr. McCall to provide his treatment notes (Tr. 214, 216), Respondent's counsel moved to strike Dr. McCall's testimony as it related to his "communications and treatment with [Respondent] because . . . the question [before the Hearing Committee] is just what happened on August 19 [(the day that Respondent was arrested)]." (Tr. 229.) Bar Counsel consented to the motion to strike, and the Hearing Committee granted the consent motion to strike portions of Dr. McCall's testimony. Respondent called no other witnesses.

20. In rebuttal, Bar Counsel called John Marsh, an Investigator with the USAO (Tr. 260-280), and Charles Anderson, Senior Investigator with the Office of Bar Counsel. (Tr. 280-83.) At the conclusion of Bar Counsel's rebuttal, Respondent's counsel argued that the MPD still had not completed its search for evidence in this matter. The Hearing Committee adjourned the hearing, but kept the record open to address the production of Dr. McCall's treatment notes and to allow the MPD to complete its search for alleged evidence in response to Respondent's subpoena. (Tr. 284, 294.) Because of evidentiary issues arising from Dr. McCall's October 25 testimony and intervening scheduling conflicts, the Hearing Committee continued the hearing to February 19, 2014.[6]

[6] On January 16, 2014, the Hearing Committee issued an order notifying the parties that Hearing Committee Chair Thomas R. Bundy, III, had been appointed to the Board. Neither party objected to his continued participation in this matter.

21. On February 10, 2014, the Hearing Committee issued an Order *sua sponte* reversing its ruling that struck Dr. McCall's testimony based on the consent motion and ordered the entirety of Dr. McCall's testimony to be included in the record, on the grounds that it was relevant to Respondent's knowledge and intent. The Hearing Committee also ordered Bar Counsel to subpoena Dr. McCall to appear on the next hearing date (February 19, 2014) with those portions of his notes reflecting Respondent's statements about the August 19, 2009 incident, but allowing Dr. McCall to redact information pertaining to Respondent's treatment. The Hearing Committee took these actions because notes reflecting Respondent's statements regarding the underlying events are relevant to our determination of his credibility.

22. On February 11, 2014, Respondent moved to continue the February 19, 2014 hearing date, but the Hearing Committee denied that motion for lack of good cause. *See* Board Rule 7.10.

23. When the hearing resumed on February 19, Respondent's counsel provided copies of Dr. McCall's redacted notes (Tr. 322), which were admitted into evidence as BX R (Tr. 324). The Chair re-called Dr. McCall to provide further testimony. (Tr. 323-361.) After summations, the Hearing Committee met in executive session and made a preliminary, non-binding determination that Respondent had committed a Rule violation. (Tr. 405-06; *see* Board Rule 11.11.) Counsel for Respondent represented that he intended to have Respondent (who did not attend the February 19 hearing because he allegedly had to work) testify in mitigation of sanction. The parties agreed to continue the hearing to present evidence in mitigation and potentially aggravation, as Bar Counsel contended that Respondent lied during his testimony. The Hearing Committee set a hearing date for March 18, 2014.

24. On March 11, 2014, the parties filed a joint motion to cancel the March 18, 2014 hearing date because they agreed that neither had any additional evidence to offer.

25. In a March 14, 2014 Order, the Hearing Committee granted the motion to cancel the hearing date and set a post-hearing briefing schedule.

26. On April 4, 2014, Bar Counsel timely filed its post-hearing brief with proposed findings of fact and conclusions of law.

27. On April 24, 2014, before Respondent's post-hearing brief was due, counsel for Respondent moved to withdraw his representation. Respondent consented to his counsel's motion to withdraw, but the Hearing Committed denied the motion for lack of good cause on May 22, 2014. The Hearing Committee ordered Respondent to file his post-hearing brief by June 11, 2014.

28. On July 2, 2014, Respondent's counsel moved for reconsideration of his motion to withdraw, reiterating that Respondent had consented to counsel's withdrawal and asserting that circumstances beyond counsel's control prevented him filing a post-hearing brief or exploring an unspecified "different course of conduct" that Respondent directed him to pursue. Counsel represented that it was impossible to continue to represent Respondent under these circumstances.

29. On July 8, 2014, the Hearing Committee granted the motion for reconsideration, allowed counsel to withdraw, and provided Respondent until August 5, 2014 to file his post-hearing brief. As of the date of this Report, Respondent has not filed a brief.

III. FINDINGS OF FACT

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

1. Respondent is an administratively suspended member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on September 15, 2006. (BX A.)

A. Background

2. Respondent attended law school at the University of Virginia and graduated in 2005. (Tr. 72, 111.)

3. On August 19, 2009, when this case arose, Respondent worked at Freshfields, Bruckhaus, Deringer, a global law firm, and had just returned from a two-year assignment in Dusseldorf, Germany. (*Id.* at 73, 111.) He was two days away from a civil union ceremony in New Jersey with his partner, who was a Polish citizen, when Respondent committed the crime that is the subject of this disciplinary hearing. (*Id.* at 73-74, 76.)

4. The overseas posting had permitted Respondent and his partner to live together, but the expiration of Respondent's German work authorization necessitated their return to the United States. (*Id.* at 73, 77.) After living temporarily in his firm's housing near DuPont Circle, Respondent was looking for an apartment to rent, seeking an H1-B visa for his partner, and hoping for a permanent U.S. posting from the firm or for alternative employment. (*Id.* at 73-74, 77.)

5. Respondent testified that the pending civil union ceremony made him feel "stressed, I was happy, but I sort of knew it was going to be the end of my single life." (*Id.* at 77.) Because of the pending ceremony, Respondent testified that he decided to take one more opportunity to seek sexual partners by "cruising" in local sports clubs. (*Id.* at 78-79.) Cruising is a practice that Respondent claims was popular among gay men at the time, and was facilitated by internet postings and Craigslist invitations to meet at varying locations. (*Id.*) Respondent

testified that he previously "met people through Craigslist in gyms" for sexual encounters, because it was less dangerous than using outdoor cruising areas. (*Id.* at 79.)

B. Respondent Lacks Credibility and Testified Falsely about the Basis for His Actions

6. There is no dispute that on August 19, 2009, Respondent went to the Washington Sports Club, located at 738 7th Street, N.W., Washington, D.C. ("WSC"). (Tr. 25, 37, 77, 104-05.) There is also no dispute that Respondent brought along a video camera to the gym on that day and recorded Complainant in various states of undress without his knowledge or consent. (Tr. 39, 84, 87.) For the reasons set forth below, we do not credit the balance of Respondent's testimony explaining his actions because it is unsupported by any record evidence, including his own prior statements regarding the underlying events. Indeed, his testimony is contradicted by record evidence, including Respondent's own statements and testimony regarding the underlying events.

7. While Respondent's tone and tenor at the hearing were calm and polished — as one might expect based on his academic accomplishments, obvious intellect and legal training — his testimony appeared to evolve, as he produced new, previously unknown explanations for his conduct. For example, as discussed below, Respondent provided an elaborate story about a Craigslist encounter, which he had not previously shared with anyone, not the police, not the sentencing judge, not even Dr. McCall during treatment. Simply put, we find that Respondent was not credible, and his description of many of the underlying events was a fabrication.

8. Specifically, Respondent testified that he used Craigslist to identify WSC as a gym where like-minded gay men might congregate and engage in sexual activities. (Tr. 78, 115.) Respondent maintains that he had responded to several people on Craigslist the day of the incident, including one who advertised himself as "a well-endowed bear who was interested in

showing off in the SSS" (which, according to Respondent, was code for "showers, saunas and stalls"). (Tr. 78, 81.) Respondent testified that he agreed to meet this person at WSC around noon on the day of the subject incident with Complainant. (*Id.*)

9. Respondent testified that the person referring to himself as a bear posted a photo on Craigslist but blurred his face in that photo. (Tr. 78.) Respondent maintains that he could still tell from the blurred picture that that person was a white male who had a build similar to Complainant, and who had a shaved head and beard like Complainant. (Tr. 82.) Respondent testified that he replied to the posting, stating that he planned to be at the WSC with "a black [toiletry] bag and would most likely be in the sauna." (Tr. 81-82.) Respondent testified that he chose the black toiletry bag as an identifier because he would not be wearing clothes and believed the bag would be inconspicuous in the sauna, but still a way to identify Respondent among other black males in the gym locker room on that day. (Tr. 82.)

10. According to Respondent, when he arrived at the gym "around noon," he did not see the expected Craigslist correspondent. (Tr. 83.) Respondent brought along a video camera that he claims to have used apartment-hunting with his partner because Respondent believed that this trip to WSC would be his "last fling here at the gym and wouldn't it be nice to record some of [it]." (*Id.*) Respondent maintains that, over the next two hours, he had "a few encounters" with people who had exchanged messages with him or simply were "looking for sex." (Tr. 83-84.) None of these individuals objected to the camera when Respondent produced it, although the gym had posted signs prohibiting cameras in the locker room. (Tr. 78-95, 244-245 (Respondent).) None of these people were mentioned in any police report or named by Respondent as a witness, and there was no evidence (other than Respondent's testimony) that these additional encounters took place. While Respondent asserts that the video camera at issue

was never returned to him by the MPD, (Tr. 147) he made no effort to elicit testimony from any police officer, WSC personnel or even Complainant — each of whom viewed Respondent's tape — about whether additional, consensual encounters at WSC that day were recorded.[7]

11. According to Respondent, Complainant arrived at WSC as Respondent was getting ready to leave the gym. (Tr. 86 (Respondent).) Although it was later than the noon time that Respondent claims he was supposed to meet the individual from Craigslist, Respondent testified that he still thought "maybe this is him" when Complainant arrived because Complainant "had a shaved head and looked sort of like a bear." (*Id.*) Respondent and Complainant made eye contact (Tr. 87 (Respondent); 59 (Complainant)), but Respondent testified he "didn't really get a reaction" from Complainant, who went straight to a locker and began changing. (Tr. 88 (Respondent).)

12. As Complainant changed into workout clothes, unbeknownst to him, Respondent began videotaping Complainant from behind, recording his private parts with the camera that Respondent had concealed in his toiletry bag. Respondent was able to take pictures through a hole that he had made in the bag. (BX D, ¶ 2 (Respondent's Answer admitting allegations); BX E (Affidavit in Support of an Arrest Warrant); Tr. 37-50, 246-260 (Complainant).)

13. Respondent testified that he remained unsure whether Complainant was the person with whom he had corresponded through Craigslist, but Respondent took the video because he wanted "to do something that seemed a little different than the other videos I had

[7] As discussed in note 4, *supra*, the USAO stated that Respondent's digital camera and media card were returned to him in 2009. Respondent contends that the MPD returned a camera other than the subject video camera. (Respondent's Motion for Subpoena at 1-2.) Respondent made this assertion for the first time just weeks before the September 2013 hearing date. (*Id.*) Respondent claims that the allegedly missing video camera and its memory card contain video supporting his testimony. (*Id.*)

taken that day," and "thought it would be nice to get a shot of this big penis in the locker room . . . an interesting shot that [he] hadn't taken." (Tr. 148.) This reason differed from Respondent's other stated reason for filming Complainant, namely that he took the video because he thought it would be fun to show Complainant later. (Tr. 109-10.) Both of these reasons conflict with yet another reason Respondent offered during his hearing testimony: "I was more interested in taping my sex, taping sort of sexual escapades. There was lots of people who used that gym. I could stand around all day and videotape people in the gym, but it just wasn't my thing." (Tr. at 144.)

14. Respondent never told the MPD about his Craigslist communications or planned rendezvous with a person resembling Complainant. He never mentioned it to the judge during his guilty plea or during his subsequent sentencing hearing. (Tr. 116-17; BX G at 10 (at his plea hearing, Respondent described the government's version of the facts as "half the story," but did not elaborate); BX J (Respondent did not mention Craigslist at sentencing).) Respondent's memorandum in aid of sentencing in the criminal case asserted that Respondent "believed that there had been mutual flirtation between himself and [Complainant]." (BX I at 2.)[8] The sentencing memorandum does not mention Craigslist. Respondent also did not mention the Craigslist story to Bar Counsel when Bar Counsel interviewed Respondent during its investigation. (Tr. 131-32.) And, there was no mention of the Craigslist story in the treatment notes provided by Respondent's counselor, Dr. McCall, notwithstanding that the patient sessions with Respondent (1) occurred shortly after the incident, (2) continued for more than a year

[8] Respondent testified here that he and Complainant made eye contact, but that he "didn't really get a reaction" from Complainant (Tr. 87-88). Thus, Respondent's own testimony cannot be described as a "mutual flirtation."

thereafter, and (3) occurred allegedly to help Respondent remedy the behavior leading to his arrest. (*See* Respondent's Additional Exhibit – Dr.'s Notes.)

15. Respondent provided no evidence corroborating any part of his Craigslist story other than his own testimony. When asked for evidence, Respondent testified that he deleted all email communications evidencing his Craigslist activities, as a matter of practice to prevent his fiancée from discovering them. Respondent also testified that he did not know the name of any of the individuals whom he met at the gym and with whom he allegedly engaged in sexual activities. (*See* Tr. 138 (Q: "The gentleman that you were speaking with on Craigslist, did you guys exchange names?" A: "No."). And, Respondent did not produce any other posting from Craigslist confirming the practice of "cruising" or demonstrating that men meet in the showers, sauna and stall areas under the acronym ("SSS").

16. Critical aspects of Respondent's story were simply contradicted by other testimony and record evidence. As discussed more fully below, Respondent's version of the incident with Complainant varies greatly from the testimony of others in terms of the size of camera used by Respondent, how the camera was affixed in the bag, when the concealed camera hole was made, his interaction with Complainant and even statements made by the parties during the incident.

17. Accordingly, we find that Respondent is not credible and testified falsely about arranging to meet individuals from Craigslist at WSC and the specifics of why and how he committed the crime of voyeurism.

C. Complainant Provided Believable Testimony about Respondent's Criminal Actions

18. We found Complainant's testimony about the crime to be very sincere and consistent with testimony offered by other witnesses. Complainant testified that on the afternoon

of August 19, 2009, Complainant went to exercise at WSC. He was a member of the club, but had never previously met or communicated with Respondent. (Tr. 37; BX G at 8.) Respondent also was at the gym.

19. As Complainant began changing into workout clothes, Respondent began videotaping Complainant from behind, recording his private parts with the camera that he had hidden in his toiletry bag. Respondent was able to take pictures through a hole that he had made in the bag. (BX D, ¶ 2 (Respondent's Answer admitting allegations); BX E (Affidavit in Support of an Arrest Warrant); Tr. 37-50, 246-260 (Complainant).) "Complainant did not know Respondent and was unaware of Respondent or his behavior at the time." (Respondent's Answer ¶ 3 (admitting allegations).)

20. Complainant finished changing, still unaware that Respondent had recorded him, and went to the toilet area where he entered a vacant middle toilet stall, closed and latched the stall door, and sat on the toilet to "do [his] business." (Tr. 38.) Both men testified the latch on that stall was defective and did not close or secure properly. (Tr. 38 (Complainant); 93 (Respondent).)

21. Respondent followed Complainant into the toilet area, entered the stall next to Complainant's, slammed the door shut and put the toiletry bag on the floor between his stall and Complainant's. (Tr. 38 (Complainant); 90 (Respondent).) Complainant noticed the bag and thought it was strange that someone would place it on the floor. (Tr. 38 (Complainant).) When he thought he saw the bag move, he looked back at it several times "as it was inching toward me more," (Tr. 38 (Complainant)), and saw "it was kind of creeping closer and closer." (Tr. 54 (Complainant); 90-91 (Respondent).) As the bag turned, Complainant saw that a hole had been

cut in the bag, and Complainant could see a camera lens inside it, pointing up at him. (Tr. 38-39, 247 (Complainant).)

22. Complainant grabbed the bag, opened it, and after pushing aside ordinary toiletries, he discovered the camera, "affixed" to the side of the bag so its lens aligned with the hole. (Tr. 37-50, 246-260 (Complainant); BX D, ¶ 3 (Respondent's Answer admitting allegations).)

D. The Altercation after the Voyeurism Incident

23. As soon as Complainant discovered the camera hidden in the toiletry bag, he testified that Respondent "entered [the] stall. The door just flew open." (Tr. 39 (Complainant).) Complainant testified that Respondent shut the door behind him, and "was demanding to get his bag back." (*Id.*) He testified that Respondent said "give me my bag back, it's not what it seems, be quiet, I'll give you money." (*Id.* 44.) Surprised by the encounter, but still seated on the toilet with his pants down, Complainant clutched the bag under his right arm "like a football." (*Id.* 39-40.) He "perceived [Respondent] to be smaller than [himself]" but said he was still fearful because Respondent was ". . . obviously animated, he was pretty hyped up, his eyes were wide, he wanted his bag back. I thought the guy was crazy or something." (*Id.* 40.)

24. As Complainant tried to stand and pull up his pants, Complainant testified that Respondent "made a motion to try to get the bag back. He actually lunged at me . . . to reach for the bag." (*Id.*) Complainant turned to deflect Respondent, grabbed him by the shirt and opened the stall door with a foot to push him into the public area. (*Id.* 41.)

25. At some point during the struggle, Complainant suffered a bruise to his right forearm. (*Id.* 44-45, BX P (color photographs of Complainant's right forearm, showing bruise).) Complainant testified that he was not sure whether the bruise happened when Respondent lunged

for the bag and grabbed him, when he pressed the camera bag against his arm, or otherwise "during the scuffle." (Tr. 62 (Complainant).) He was certain, however, that "[Respondent] coming in [to the stall] caused the bruise definitively." (*Id.*)

26. Once Complainant pushed Respondent outside of the stall and into a public area in the men's locker room, Complainant told a bystander to call the police and held Respondent against the sinks. (*Id.* 41.) During this time, Respondent tried to convince Complainant to give Respondent the bag by offering money, and he begged Complainant not to call the police. (*Id*.) Within about a minute, the gym staff came in, and Complainant let go of Respondent. (*Id.* 41-42 (Complainant)). Respondent continued to plead for the bag. (*Id.*) Complainant told him it was too late to avoid calling police. (*Id.*) Complainant testified that he asked "how do I know you haven't done this before to me?" Respondent replied that it was his first time "doing it here." (Tr. 44 (Complainant).) Respondent admitted that he made the statement, but claims he meant that it was the first time taping anybody that day without their consent, and he had never taped anyone anywhere else before. (Tr. 134-35.) This testimony, however, is belied by Respondent's testimony during his sentencing hearing when the court asked Respondent whether he had anything to say about his actions. Respondent admitted "that what [Complainant] just said really, really affected me. I mean, I was very sorry for what I did the day it happened. ***I knew I had a problem. I knew that my behavior had been escalating. It was the sort of problem that I was always ashamed to try to go get help for.*** I didn't know where to go. You know, what sort of – I was embarrassed to admit it. And this incident sort of just brought this out into the most public lights . . . So I'm sorry. You know, I can only say that it won't happen again. It has ***ceased*** . . . ." (BX J at 18 (emphasis added).) Noticeably absent from Respondent's statement is that he had never engaged in this behavior before. Rather, he described his behavior as

escalating for which he needed help. Moreover, Respondent's counselor, Dr. McCall, testified that he had videotaped people before. (FF 55, *infra*.) Accordingly, we find the subject incident was not the first time Respondent engaged in this type of behavior, despite the fact that no other specific incident was established.

E. Respondent Testified Falsely about the Altercation

27. Respondent testified to an entirely different version of events pertaining to the altercation. Continuing to push his Craigslist story, Respondent testified that after following Complainant into an adjacent bathroom stall, he placed the bag between the stalls hoping Complainant would notice it, and that "maybe he'd get turned on by [seeing a bag], but in any event, he'd at least know it was me, that I would know it was the right guy." (Tr. 92.) He testified that his hand was plainly visible to Complainant as he moved the bag "back and forth." (Tr. 91.) Respondent chose this alleged method of communicating rather than simply asking Complainant (while seated in the adjacent stall) if he was indeed the Craigslist correspondent. Respondent's story that he still thought Complainant was the Craigslist correspondent makes little sense, given that Complainant was not acting like somebody heading to the sauna to find a man with a black bag or otherwise looking for a sexual encounter.

28. Respondent acknowledged that he knew "something was wrong" when Complainant grabbed the bag. (Tr. 92 (Respondent).) Respondent testified that Complainant "kicked [his] hand" when grabbing the bag and asked if the camera was recording, to which Respondent replied it was not. (*Id.*)

29. Respondent testified that he "remember[ed Complainant] sort of looking down, and I could see just from the shadows in his stall that he was looking down, crouching over to kind of see – I thought to kind of see what was going on." (Tr. 91 (Respondent).) In other

words, Respondent testified that he could tell what Complainant was doing in an adjacent stall by watching whatever small portion of Complainant's shadow on the bathroom floor that could be seen. Respondent testified that he "just tried to calm [Complainant] down" but Respondent could tell Complainant "was getting really upset." (*Id.*) As a result, Respondent said that he left his own stall to talk with Complainant "through the gap" between the stall door and stall frame in front of the stall in which Complainant remained seated and that, at that point, "the door to the [Complainant's] stall flew open. It didn't fly open, but it just opened up." (*Id.*) After describing the broken latch, he denied pushing open the door, but conceded that "I think I was leaning on" it so that it opened. (*Id.* 93 (Respondent).)

30. Respondent also falsely denied entering Complainant's stall or closing the door behind him after entering the stall. (*Id.*) Instead, Respondent claimed that he just stood outside the stall as Complainant "got up and slammed the door shut again." (*Id.*) But Respondent's testimony that he never entered the stall is undermined by his own testimony that Complainant said to Respondent "what the fuck are you doing in ***here***, get the fuck out, get the fuck out," after the stall door opened. (*Id.* (emphasis added).) Certainly, under these circumstances, one would anticipate a response of "close the door" if indeed Respondent only caused the door to open and did not enter.

31. While Complainant testified that he had to physically remove Respondent from the stall and restrain him until help arrived, Respondent contends that Complainant remained in the stall for "maybe two minutes" but he left the stall and "waited at the sink area . . . because I thought maybe [Complainant] was interested and didn't want to be filmed . . . ." (*Id.* 93.) We find this statement — that Respondent waited to see if Complainant was still interested — to be undermined and contradicted and unbelievable based on Respondent's previous testimony that

by this time Complaint allegedly had kicked Respondent and told him to "get the fuck out, get the fuck out" of the stall.

32. Respondent claims that he apologized when Complainant left the stall, trying to explain that it was not what it appeared, but Complainant "started pushing and shoving" him and using profanities. (Tr. 94 (Respondent).)

33. Respondent "vaguely remembered [Complainant] pinning [him] against the sink and then [Respondent] went out to the locker room area because [he] wanted some more people around." (Tr. 95 (Respondent).) Respondent added that when they were "in the locker room area, . . . there were some other people around and some other guys who had been cruising" and Complainant again pinned him against one of the lockers. (Tr. 97.) According to Respondent, other gym members "held [Complainant] back" until Complainant left to get gym management. (*Id.*) Respondent denied lunging at Complainant to retrieve the bag, claiming that at that point he was scared of Complainant's size (Tr. 96, 142 (Respondent)), but later became angry about Complainant "trying to gin up this brouhaha in the locker room" by telling others that Respondent was filming them in the locker room and by yelling a gay slur a few times. (Tr. 94, 96, 149 (Respondent)). At this point, Respondent acknowledged that he was "flailing" and "trying to get [Complainant's] hands off me" during the confrontation. (*Id.*) When asked whether Respondent offered to pay Complainant money to get the camera back, Respondent said "No I did not. I believe I said I'll do whatever you want, what do you want? I may have offered. I know I didn't say I'll give you $1,000 because I definitely didn't have $1,000 to give." (Tr. 145 (Respondent).)

34. Again, the Hearing Committee does not credit Respondent's version of events relating to the post-taping altercation. Indeed, we find that Respondent testified falsely about the

altercation for several reasons. First, Complainant's testimony is largely the same as the statement he provided to the police, which was memorialized in a police affidavit the day after the incident in 2009. Second, Respondent's statements, while shaded heavily against Complainant and making him look like the aggressor, largely confirm Complainant's recollection of events.[9] Finally, Respondent's story encourages the Hearing Committee to ignore common sense by giving credit to such testimony that Respondent possesses the special ability to discern head shadows from leg shadows on a bathroom floor to such a degree that he can tell which way and when a person is looking while seated in an adjacent bathroom stall. Based on the foregoing and our assessment of Respondent's credibility, we find that Respondent testified falsely to the Hearing Committee about the altercation, in addition to falsely testifying about the voyeurism incident.

F. Respondent also Testified Falsely about the Camera-Bag Arrangement

35. The bag and camera themselves were not introduced into evidence. Neither the USAO nor the MPD was able to locate or account for the toiletry bag. (Tr. 320.) However, the USAO stated that Respondent's digital camera and media card were returned to Respondent on December 8, 2009. (*See* Bar Counsel's Response to Respondent's Motion for Subpoena (Sept. 4, 2013; nn.4, 7, *supra*.) Shortly before the hearing, Respondent asserted for the first time that the camera returned to him was not the camera used to videotape Complainant but rather a different

[9] In short, Complainant's recollection was that Respondent came into the stalls loudly, moved the bag closer and turned it slightly until the lens pointed towards Complainant, and then tilted the bag in his hand underneath the stall partition. At this point, Complainant snatched the bag and asked if the camera was recording. Respondent went into Complainant's stall, and Complainant told him to get out. A physical confrontation of some kind ensued. Complainant pinned Respondent against the sink. Respondent apologized profusely. Respondent commented this is the first time he had done this (Tr. 134-35), and Respondent offered to pay money to get the bag and camera back. (Tr. 149.)

camera seized by the MPD during a search of Respondent's home. (*See* Sept. 6, 2013 Prehearing Tr. 81-82.)

36. Complainant testified that the bag was a "run of the mill toiletry kind of bag" about the size of "a Kleenex box," made of a dark colored material. (Tr. 60-61.) He said that the bag was not light or heavy and appeared to have a rubber liner. (Tr. 61.) Inside, he saw a digital camera, "no bigger than an iPhone" (Tr. 251 (Complainant)), "affixed to side of the bag where [he] could see that [the bag] was cut open where the hole was and [the camera] was fastened on there, either by tape or some sort of Velcro." (Tr. 39, 248, 252 (Complainant).)

37. Complainant testified that the adhesive "definitely wasn't masking tape," but was dark-colored, likely either "that actual Velcro tape that you can buy at Home Depot . . . [or] black electrical tape," and he "could see it running along the side of the camera which was affixed on the side of the bag." (Tr. 252-53 (Complainant).) He testified that the hole was "pretty circular," looked "clean cut" and was either the size of the camera's lens or smaller. (Tr. 250-53 (Complainant).) "It did not look like a rough cut like someone would have made this even from a key chain or something or key to cut the hole." (*Id.*)

38. USAO Investigator, John Marsh, processed the evidence in Respondent's criminal case and examined both camera and bag before viewing the recordings made by the camera. (Tr. 268, 273 (Marsh).) The toiletry bag, he said, was "about maybe 6 by 6 as long as 10 inches[,] . . . a small to mid-sized bag," made from "a nylon taffeta material, which is a tight weaved nylon that had a hole cut out and [a camera] . . . affixed to the inside of the bag." (Tr. 269 (Marsh).)

39. As to the camera, Investigator Marsh testified that it was "probably hand-sized or possibly smaller" with a single integrated lens that remained flush with the camera body "like

your travel camera." (Tr. 270-71, 279.) Marsh described the camera as "pretty permanently affixed" by "a heavy two-sided tape . . . there was a very heavy tape material that held the camera permanently against the inside of the bag so the lens would stay in there." (Tr. 269, 276 (Marsh).) The heavy tape "stuck very well . . . making a good contact," such that if he were to hold up the bag "the camera would just stay hanging in there, it wouldn't even fall off." (Tr. 276 (Marsh).) Marsh testified that "this was a homemade cut as if maybe . . . [made by a] a razor blade or something not hot . . . ." (Tr. 277.) The investigator "doubt[ed] that you would get that good of a cut with a key." (Tr. 277-78 (Marsh).) In other words, the hidden camera arrangement was not prepared at the gym in the spur of the moment.

40. At Respondent's sentencing hearing, the bag was described as having "a tiny hole cut and it is precisely the size and then precisely the location of the lens of the camera." (BX J at 9.) When the Hearing Committee viewed the video, which was submitted as Bar Counsel Exhibit L, the recording was not obstructed by the contour of the bag; rather, it was clean, and the video did not shake as much as one might anticipate with a camera in a bag that was not secured tightly. (*See* Tr. 85 (Respondent noting that before he affixed the camera, it moved around the bag).)

41. The Hearing Committee's observations of the video, the statements at the sentencing hearing and, most importantly, Investigator Marsh's testimony largely corroborated Complainant's description of the camera and the bag with some minor discrepancies (*e.g.* dime-sized hole (Tr. 61 (Complainant)) or nickel-sized hole (Tr. 270 (Marsh))), which suggested only small differences in their spatial perceptions. In all material respects, these more detailed inspections confirmed Complainant's quick assessment of the bag and camera.

42. Respondent's testimony conflicted with the testimony given by Investigator Marsh, Complainant and statements in Bar Counsel's exhibits. Respondent testified that he made a spontaneous decision to record activities at the gym. (*See, e.g.*, Tr. 109 (Respondent testified that he did not plan before that day to record in the gym).) Thus, the hidden camera set up, according to Respondent's version, was prepared on the spot. The camera, he said, "was actually a fairly large camera[,] . . . [not] a cell phone camera and it wasn't a very modern camera, it was an older digital camera that . . . was just bulky and had this bright red blinking light when it was on . . . ." (Tr. 84 (Respondent).) He said he "didn't like having this big bulky camera out when [he] was in the sauna" and wanted to "be discreet" about recording sex in the sauna, so he decided to conceal it in the bag. (Tr. 84-86 (Respondent).) Respondent testified that:

> . . . I took a set of keys and cut a hole in the bag and put the camera inside and then before another encounter, the camera just kept moving around, so there's a small management office right off of the locker room and I got a small Elmer's glue stick and I put some of the glue on the bag, on the camera and stuck it in the bag.

Tr. 85 (Respondent).[10] Under questioning from the Hearing Committee, Respondent elaborated on his story:

> I used, I believe there was some Elmer's glue stick, the kind that you would use in elementary school. There was a glue stick and some staplers sitting on one of the gym management office desks . . . . So I put some of that in the front of [the camera]. It was a nonpermanent glue. It didn't really hold it. To say it was

[10] Noticeably absent from Respondent's testimony is: (1) that he viewed the video of his alleged previous encounters and determined the camera was moving; (2) that the bag was not stationary in the sauna during his alleged sexual activity; or (3) that he held the bag in his hand (which presumably means he held the camera inside in place). In other words, he provided no basis for concluding that he knew the camera was moving inside the bag before he allegedly went to get the glue. It makes little sense that a "big bulky camera," as Respondent described it, moved so freely inside of a toiletry bag, which are universally small.

> affixed isn't really appropriate. It wasn't permanently attached to anything. It just sort of held it in place so it didn't move completely around.

Tr. 234 (Respondent).

43. When asked about the weight of the camera, Respondent testified: "Probably about weight of maybe a full bottle of the Diet Coke, I'm not sure . . . four pounds, three pounds." (Tr. 241 (Respondent).) The government argued in its sentencing memorandum that Respondent's crime was premeditated "as demonstrated by the elaborate set-up of [Respondent's] camera and bag. The camera was permanently glued to the black bag [which] had a whole exactly the size and location of the camera lens." (BX J at 6-7.) Respondent did not dispute this characterization in his sentencing memorandum. Instead, he argued that his crime was not premeditated because his "use of the bag was not entirely surreptitious" and the bag was in plain view of Complainant. (BX I at 4.) Indeed, he did not assert that the bag/camera arrangement was made on the spot in the locker room using a key and glue stick. We would have expected that, if his testimony during the hearing were the actual facts, he would have included them in his sentencing memorandum in arguing that his crime was not premeditated.

44. We credit the consistent testimony of Complainant and Investigator Marsh concerning the camera over Respondent's testimony. The construction of the bag is important because the more precise and sturdy construction, as the evidence supports, indicates that the hidden camera contraption was created before Respondent arrived at the gym, which contradicts Respondent's story and testimony. Respondent's testimony about getting a glue stick from a nearby management office was also contradicted by Charles Anderson, Office of Bar Counsel Manager of Forensic Investigations, who testified that there was no office in the men's locker room, as described by Respondent. (Tr. 282 (Anderson).) We find that Respondent testified falsely about the bag and camera and the spontaneous attempt to glue the camera to the bag.

G. The Police Investigation and Aftermath

45. When the police arrived, they did not arrest Respondent or charge him immediately. (Tr. 97-98 (Respondent); 52-53 (Complainant).) Complainant handed over the bag and its contents. (Tr. 46 (Complainant).) Officer Powell then reviewed the recording in the camera and told Complainant there was no recording of him in the stall; instead, Powell played the recording of Complainant changing beforehand. (Tr. 47 (Complainant).) Complainant described seeing the recording:

> It showed me taking off my boxer shorts, dropping my pants basically and getting undressed and you could see the view from the camera come up really close behind me, like behind my buttocks and kind of between my genitals . . . . I saw that and I was shocked and I told Powell, I said, that's me.

(Tr. 48 (Complainant).)[11]

46. Respondent did not mention anything, to Complainant or the police, about mistaking Complainant for a Craigslist contact. (Tr. 63 (Complainant).)

47. Police subsequently obtained a warrant for Respondent's arrest and visited Respondent's law firm on August 25. (Tr. 105, 124.) He was moving apartments that day but turned himself in the following morning and was charged with voyeurism and assault. (Tr. 106-07 (Respondent); BX E.)

48. On September 16, 2009, Respondent pleaded guilty in the Superior Court of the District of Columbia to one misdemeanor count of voyeurism, in violation of D.C. Code § 22-3531(c), making it unlawful "for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is (A) using a bathroom or

[11] Noticeably absent from the police report is any mention of the other sexual encounters on the tape.

restroom; [or] (B) totally or partially undressed or changing clothes . . . ." (BX G; BX Q ("[Complainant] did not consent to being recorded by [Respondent]. [Respondent had] no legal justification for his conduct"); Tr. 107, 113-14 (Respondent); *see also* BX K (Judgment in a Criminal Case); BX M (Plea Agreement and Waiver of Trial); BX N (D.C. Code § 22-3531); BX G (transcript of Respondent's guilty plea); BX Q (Proffer of Facts).)

49. Pursuant to a plea agreement between the United States and Respondent, the Superior Court imposed a sentence of 180 days of incarceration, stayed, provided that Respondent successfully complete three years of probation, during which he would be supervised by the sex offender unit of the Court Services and Offender Supervision Agency. (BX J at 19-20.) The Court also prohibited Respondent from joining any gym; owning a camera, camcorder, or any other type of recording device, or utilizing any social networking web sites (such as Craigslist). It also ordered Respondent to stay away from Complainant, the victim of his crime. (*Id.*; BX G at 6.)

50. When asked at the hearing whether he considered his actions "wrong," Respondent said he did, but he did not think it reflected adversely on his trustworthiness as a lawyer because he did not intend to harm anyone with the recordings: "I just thought it was kind of hot to take some videos of what I was doing. I didn't really have any long-term plans to do anything with them." (Tr. 144-45 (Respondent).) Respondent also did not believe he acted deceitfully when he recorded Complainant without his permission with a concealed camera because he did not try to leave with the recording and thus "didn't intend to have [Complainant] deceived." (Tr. 145 (Respondent).) Instead, he testified that "it would have been deceitful if I had known full-well that someone wasn't interested . . . ." (Tr. 146.) We find that Respondent does not fully appreciate or understand the wrongfulness of his actions.

H. Testimony of David McCall, Ph.D.

51. Respondent testified that after he was arrested he "used the opportunity to basically seek some professional help, someone who had expertise in sexual disorders among gay men and [he] asked around for some recommendations and did some internet research and found [David McCall, Ph.D.]." (Tr. 100-01 (Respondent).) Dr. McCall received a Ph.D. in counseling from Catholic University in 1993. (Tr. 184.) Respondent met with Dr. McCall on ten occasions, (BX R), and called him as a witness, seeking to have him qualified as an expert witness to testify about the "culture of consensual sexual encounters in Washington, D.C. sports clubs and his treatment of Respondent." (*See* Respondent's List of Witnesses filed August 26, 2013; Tr. 189, 206.)

52. On October 25, 2013, Dr. McCall testified on direct examination that his expertise relating to sports clubs was based on: his experience as member of the YMCA and several health clubs; his son was a personal trainer and manager of health clubs; and he and his son share knowledge about sex at health clubs. (Tr. 185-87 (McCall).) On *voir dire*, Dr. McCall admitted that he had done no clinical research or published any articles pertaining to his proposed expertise. (Tr. 190-93 (McCall).) The Hearing Committee initially allowed Dr. McCall to testify as an "expert in sex counseling and therapy" only. (Tr. 194.)

53. Moreover, while Dr. McCall was not a witness to the locker room incident, he testified about what Respondent had told him concerning the events at issue. Some of Dr. McCall's testimony was similar to Respondent's testimony at the disciplinary hearing. For example, he testified that Respondent told him about finding someone on a website who wanted to have sex in the gym's locker room. (Tr. 208 (McCall).) Glancing down to his notes, Dr. McCall summarized Respondent's claims about encountering Complainant:

> [W]hat I recall is that in *looking at the notes*, [Respondent] thought that he had made contact with somebody that he was going to meet in the gym and the person looked a certain way. He thought that this was the person and he had described himself. In his mind, the person was acting as though he was the person he had connected with. So when he went into a bathroom stall and [Respondent's] next assumption was, oh, he's inviting me into the stall next to him. He thought it was a sanctioning behavior, he thought it was a mutually agreed upon thing that they were doing.

(Tr. 212-13 (McCall) (emphasis added).) But, Dr. McCall later backed away from his testimony that Respondent told him about meeting somebody from a website during his counseling session.

54. More aspects of Dr. McCall's testimony varied from Respondent's testimony, including such details as "he was using a small video camera . . ."; "I believe [Respondent] had" recorded people in gyms at times prior to the instant matter; and Respondent "said, I told the person [from Craigslist] that I would be carrying a black nylon bag ***with a camera***." (Tr. 213-14 (McCall) (emphasis added).) Dr. McCall also stated that Respondent "thought he had made one of these connections with somebody who was mutually responsive . . . ." (*Id.*) And Dr. McCall testified that Respondent's conduct was a result of a "compulsion" or "habit," which contradicts any suggestion by Respondent that he had not done this type of activity before. (Tr. 206-07 (McCall).) Dr. McCall testified, moreover, that it had been years since he discussed the incident with Respondent, but he had "notes that are pretty extensive," and he referred to those notes during his testimony. (Tr. 212 (McCall).)

55. The Hearing Committee asked Dr. McCall for copies of his notes and asked Respondent whether he would assert any privilege, which the Hearing Committee thought was waived given Dr. McCall's testimony. (Tr. 216-17.) Counsel for Respondent said that he was concerned about the notes containing information from sessions that had nothing to do with this case, but could be prejudicial. (*See* Tr. 215.) After an adjournment to allow counsel to review the notes, Respondent moved to strike Dr. McCall's testimony relating to his treatment of

Respondent, and Bar Counsel consented. (Tr. 228-29.) The Hearing Committee granted the consent motion but still noted that it intended to subpoena those portions of Dr. McCall's notes that related to Respondent's statements regarding the incident. (*See* Tr. 285-86.) The hearing adjourned until February 19, 2014, because Respondent wanted additional time to have the MPD search for the bag and camera.

56. On February 10, 2014, the Hearing Committee *sua sponte* issued an order requesting that Bar Counsel subpoena Dr. McCall's notes, vacating the motion to strike Dr. McCall's testimony and instructing Dr. McCall to appear for the next hearing date. (*Order*, Bar Docket No. 2009-D476 (HC Feb. 10, 2014).)

57. Dr. McCall testified again on February 19, 2014. Pursuant to a subpoena, he produced his notes to the Hearing Committee, which were admitted as an exhibit, in a redacted form to show only the notes relating to the underlying events. (BX R; Tr. 324.) The notes were heavily redacted and what little remains un-redacted does not contain anything corroborating Dr. McCall's testimony regarding Respondent's prior description of the events in question. (*See* BX R.)

58. When the Hearing Committee questioned Dr. McCall about his notes and earlier testimony, he testified that his notes did *not* refresh his recollection about his communications with Respondent. (Tr. 329 (McCall).) When asked about whether he had an independent recollection of Respondent mentioning correspondence with someone on a website, Dr. McCall testified he did not. (Tr. 330.) When pressed about his prior testimony about Respondent soliciting somebody on the website, Dr. McCall said he may recall something about Craigslist or another website being used to make contacts. (Tr. 348-50.) However, Dr. McCall also conceded

that "[n]ow Mr. Cross and I had some conversations prior to this [hearing], and he could have even said something at that time, but, no, it was not in my notes, and so I didn't." (Tr. 333.)

59. The Hearing Committee does not find Dr. McCall's testimony to be reliable except to the extent that his testimony indicates that Respondent had engaged in this type of behavior before, which was memorialized in his notes contemporaneously with the 2009 interview session. Considering the entirety of Dr. McCall's testimony, we conclude that Respondent told Dr. McCall about the Craigslist story in anticipation of his October 2013 testimony.

I. Evidence in Mitigation and Aggravation

60. There was no evidence introduced in mitigation or aggravation of sanction. While Respondent's counsel filed exhibits 1 through 5 on October 1, 2013, he never moved them into evidence. At the February 19, 2014 hearing, moreover, counsel for Respondent informed the Hearing Committee that he wanted to offer testimony in mitigation by Respondent himself, but Respondent was not present that day, so the hearing was continued to allow for mitigation (and potentially aggravation) evidence. The parties later moved to cancel the hearing because neither had additional evidence to offer, and the Hearing Committee granted the motion.

IV. CONCLUSIONS OF LAW

Based on the hearing testimony, the exhibits offered into evidence, the argument of counsel and taking into consideration applicable law, the Hearing Committee concludes that: (A) Bar Counsel failed to establish violations of Rules 3.4(a) and 8.4(d); (B) Respondent's video voyeurism conviction is not a crime of moral turpitude on the facts; and (C) Bar Counsel established by clear and convincing evidence that Respondent's misconduct violated Rules 8.4(b) and 8.4(c). We discuss each of these conclusions below.

A. Bar Counsel Did Not Establish Violations of Rules 3.4(a) (obstructing access to evidence) and 8.4(d) (serious interference with the administration of justice)

Rule 3.4(a) provides that a lawyer shall not "obstruct another party's access to evidence or alter, destroy, or conceal evidence . . . if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding." Rule 8.4(d) similarly provides that it is professional misconduct for a lawyer to "engage in conduct that seriously interferes with the administration of justice." In *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996), the Court explained that to establish a violation of Rule 8.4(d), Bar Counsel must show by clear and convincing evidence that: (1) the lawyer's conduct was improper; (2) the conduct bore directly on the judicial process in an identifiable case; and (3) the conduct "taint[ed] the judicial process in more than a *de minimis* way," namely that it must "potentially impact upon the process to a serious and adverse degree."

Bar Counsel argues that Respondent violated Rules 3.4(a) and 8.4(d) when:

> he attempted to obstruct [Complainant]'s access to the camera, toiletry bag, and video-recording – the evidence of Respondent's criminal conduct. In an effort to retrieve the bag and camera, Respondent forced his way into [Complainant]'s toilet stall. He demanded return of the bag and camera, and "lunged" at [Complainant] in an effort to retrieve them. Respondent and [Complainant] struggled and stumbled out of the stall as [Complainant] shouted for help. When Respondent realized he would not be able to wrest the bag from [Complainant], he begged him not to call the police and offered to pay $1,000 for the evidence.

(B.C. Brief at 28.) Bar Counsel contends that Respondent's pleas for Complainant not to call the police indicate that Respondent knew he was in imminent danger of arrest and criminal prosecution and that the bag and camera were evidence of his criminal conduct. (*Id.* (citing D.C. Code § 22-722(a)(2)(B)(3)(B) ("A person commits the offense of obstruction of justice if that person . . . [k]nowingly uses intimidating or physical force, [or] threatens or corruptly persuades another person . . . to withhold truthful testimony or a record, document, or other object from an

official proceeding; [or] [h]arrases another person with the intent to hinder, delay, prevent, or dissuade the person from . . . [r]eporting to a law enforcement officer the commission of, or any information concerning, a criminal offense . . . .").)

The Hearing Committee disagrees with Bar Counsel that Respondent's attempt to take the toiletry bag and camera back from Complainant interfered seriously with the administration of justice. Respondent never recovered the toiletry bag or its contents from Complainant, and thus, he did not actually restrict anyone's access to evidence or ability to use such evidence. At best, any interference with the judicial process was *de minimis*. We can only speculate what Respondent wanted to do with the materials had he recovered them. Yes, Respondent could have destroyed them or kept them from Complainant or the police, but it is possible Respondent might have preserved them. Thus, even if Bar Counsel had charged these violations as an attempted Rule violation (which it did not), there is simply not enough evidence to find by clear and convincing standard that Respondent sought to take the items from Complainant in an attempt to obstruct justice. Therefore, we find that Bar Counsel has not proven by clear and convincing evidence that Respondent violated Rules 3.4(a) or 8.4(d).

B. Bar Counsel Failed to Establish that Respondent's Crime Involved Moral Turpitude on the Facts

D.C. Code § 11-2503(a) provides that any attorney convicted of a crime involving moral turpitude shall be disbarred. The Court has defined moral turpitude as an "act denounced by the statute [that] offends the generally accepted moral code of mankind[,]" an act involving "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man" or an act "contrary to justice, honesty, modesty, or good morals." *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (en banc). Thus, in determining whether a given

crime is one of moral turpitude, the finder of fact must "examine 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, 361-362 (D.C. 2004). Ultimately, the question is "whether [R]espondent's conduct 'offends the generally accepted moral code.'" *In re Spiridon*, 755 A.2d 463, 468 (D.C. 2000) (quoting *Colson*, 412 A.2d at 1168). Bar Counsel bears the burden of proving the existence of moral turpitude by clear and convincing evidence. *See In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011). Under this standard, Bar Counsel must show that Respondent's conduct "[rose] to such a level that the legislature would have intended as a consequence the automatic disbarment of the attorney in question." *Id*. at 1185 (quoting *Spiridon*, 755 A.2d at 468).

Although misdemeanor cases "may not be denoted crimes of moral turpitude *per se*, they may constitute crimes of moral turpitude under 'the circumstances of the transgression,'" *i.e*., on the facts. *In re Rehberger*, 891 A.2d 249, 252 (D.C. 2006) (quoting *Sims*, 844 A.2d at 360 (citing *In re McBride*, 602 A.2d 626, 635 (D.C. 1992) (en banc))). In accordance with the procedures set forth in *Colson*, 412 A.2d at 1168, the Hearing Committee must determine whether Respondent acted with moral turpitude when he committed the criminal act of misdemeanor video voyeurism. We must consider "evidence as to the circumstances of the crime including [Respondent's] knowledge and intention." *Colson*, 412 A.2d at 1168; *see also 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"); *Spiridon*, 755 A.2d at 467 (evidence of motive or mental condition "bear[s] on the question of moral turpitude in its actual commission").

Bar Counsel identifies a few cases in which misdemeanor crimes of a sexual nature were found to constitute moral turpitude on the facts. (B.C. Brief at 30 (citing *In re Bewig*, 791 A.2d 908 (D.C. 2002) (respondent convicted of misdemeanor sexual contact with a minor was disbarred because his criminal conduct involved moral turpitude on the facts)); *In re Rehberger*, 891 A.2d 249 (D.C. 2006) (misdemeanor convictions of sexual battery and simple battery, which involved "sordid sexual contact with and abuse of a female client," constituted moral turpitude on the facts). These cases are distinguishable from the instant matter. Both *Bewig* and *Rehberger* involved misconduct that included forced sexual touching, which did not occur here. And the victims in each of those cases were different from and arguably more vulnerable than Complainant, *e.g.*, in *Bewig*, a child, and in *Rehberger*, a client, as opposed to Complainant, who was an adult unaware of the crime at the time it was perpetrated and was not physically touched.[12]

Examining the record as a whole, the Hearing Committee does not believe that Respondent's conduct rises to the level of moral turpitude on the facts, even taking into consideration that Respondent's own witness testified his conduct was a "habit," not an

[12] Bar Counsel also argues that Respondent's alleged attempt to obstruct justice through taking the camera by force, pleading with Complainant not to call the police and offering Complainant money to ignore the matter should be considered in the moral turpitude analysis. (B.C. Brief at 32 (citing *In re Johnson, supra*, 48 A.2d at 173 ("purposely destroying or concealing evidence, or even attempting to do so, is 'contrary to justice' and a grave threat to due process of law" and "the crime of witness and evidence tampering . . . is a crime of moral turpitude *per se* and provides an independent basis for [respondent's] disbarment")).) Bar Counsel did not charge Respondent with attempting to obstruct justice and has not established by clear and convincing evidence that Respondent obstructed justice. Thus, we reject Bar Counsel's argument that we should find moral turpitude on this ground.

aberration, (Tr. 206-207 (McCall)) and that Respondent lied to the Hearing Committee about the incident. Unquestionably, Respondent's conduct is repugnant and had a significant adverse impact on Complainant, (Tr. 49-50) (noting that he could not sleep, it affected his relationship with his wife and he was scared). The Hearing Committee, however, does not believe this incident of video voyeurism rises to the level of offensiveness necessary to support a finding of moral turpitude on the facts.

Indeed, in today's world, a camera can be expected to be everywhere, including gyms like WSC, which are forced to post signs stating that video cameras are prohibited in the locker room. While this technological reality does not excuse Respondent's conduct, it properly frames the question whether such conduct rises to the level of baseness, vileness or depravity to support a finding of moral turpitude. Looking to D.C. law for guidance, the legislature has distinguished video voyeurism, which is a misdemeanor, from similar crimes such as possessing child pornography, which is a felony, because children are more vulnerable members of our society. *Compare* D.C. Code § 22-3531 (voyeurism), *with* D.C. Code § 22-3103 (child pornography possession). It stands to reason in this case, therefore, that Respondent's conduct, while criminal and objectionable, is not so depraved as to involve moral turpitude. As a consequence, we do not believe Respondent's conduct reaches the level of moral turpitude on the facts.

C. Bar Counsel Established by Clear and Convincing Evidence that Respondent's Misconduct Violated Rules 8.4(b) for the Criminal Acts of Voyeurism and Assault and 8.4(c) for Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation

Rule 8.4(b) provides that a lawyer shall not "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Bar Counsel charges that Respondent violated Rule 8.4(b) because he committed the crimes of voyeurism in

violation of D.C. Code § 22-3531(c) and "assault," specifically either "attempted battery" or "intent-to-frighten" assault.[13]

There is no question that Respondent committed the crime of voyeurism in violation of D.C. Code § 22-3531(c), as he pleaded guilty and was convicted under that statute. We find that this criminal conduct bears on his honesty and trustworthiness because his surreptitious, non-consensual taping was deceitful in nature. Deceit is the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead . . . ." *In re Shorter*, 570 A.2d 760, 767 n.12 (D.C. 1990) (per curiam) (citation omitted). Clearly, Respondent should not have been recording in the locker-room but at a minimum should have disclosed his taping activities to Complainant.

Although Respondent was not convicted of assault, the absence of a criminal conviction does not preclude a Rule 8.4(b) violation. *See, e.g.*, *In re Slattery*, 767 A.2d 203 (D.C. 2001). Thus, the Hearing Committee must determine whether Respondent committed assault, and if so, whether that conduct bears on his honesty, trustworthiness or fitness as a lawyer in other respects. Bar Counsel argues that Respondent committed either "assault with intent to frighten" or "attempted battery," each of which has distinct elements. The Criminal Jury Instructions for the District of Columbia set forth the elements of each type of assault in Instruction 4.100:

[13] Paragraph 6 of the Specification of Charges alleges that Respondent violated Rule 8.4(b) by committing the criminal acts of voyeurism and assault, but it does not identify the specific statutory section allegedly violated. However, as ¶ 4 alleges that Respondent pled guilty to one count of voyeurism under D.C. Code § 22-3531, there is no ambiguity as to the statutory section at issue. With respect to assault, Bar Counsel argued in its post-hearing brief, at 25-27, that Respondent's conduct constituted "attempted battery" or "intent-to-frighten assault." This notice, which included the pattern jury instructions explaining the elements of each variant of "assault," is sufficient to satisfy due process. *See In re Austin*, 858 A.2d 969, 976 (D.C. 2004) ("[T]he specification of charges and post-hearing filings fairly put respondent on notice of the fraud charges against him.").

> **Assault with Intent to Frighten:** (1) that [the defendant] committed a threatening act that reasonably would create in another person a fear of immediate injury; (2) that the defendant intended to cause injury or create fear in another person; and (3) that, at the time, the defendant had the apparent ability to injure the other person.
>
> **Attempted-Battery:** (1) that [the defendant] with force or violence, injured [or attempted or tried to injure] another person; (2) S/he intended to use force against another person; and (3) At the time [the defendant] had the apparent ability to injure [the other person].

The Hearing Committee finds that Respondent committed attempted battery because he injured Complainant (bruising his arm) in the struggle in the bathroom stall, he intended to use force to recover the toiletry bag, and he had the apparent ability to injure Complainant. We also find that Respondent committed assault with intent to frighten because there is clear and convincing evidence that Respondent intended to cause injury or create fear when he entered Complainant's bathroom stall. In fact, Complainant testified that he was frightened when Respondent entered the bathroom stall, and Complainant had nightmares after this incident. (Tr. 49-50.) We find that Respondent's conduct not only meets the technical elements of assault when he used force in attempting to grab the toiletry bag from Complainant, but also bears on Respondent's fitness as a lawyer in other respects. While the facts of this matter do not reach the level of violence found in the cases cited by Bar Counsel, one cannot reasonably find a lawyer fit who has physically confronted the victim of a crime. *See In re Jacoby*, 945 A.2d 1183, 1200 (D.C. 2008) (offenses involving violence violate Rule 8.4(b)). Accordingly, we find that Respondent's crimes of voyeurism and assault violated Rule 8.4(b).

We reach the same conclusion with respect to Rule 8.4(c). Rule 8.4(c) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." As noted above, deceit is the "suppression of a fact by one who is bound to disclose it, or who

gives information of other facts which are likely to mislead . . . ." *Shorter*, 570 A.2d at 767 (citation omitted). To establish deceit, the respondent must have knowledge of the falsity of his words or actions, but it is not necessary that the respondent have intent to deceive or defraud. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989) (finding deceit where attorney submitted false travel expense forms but did not intend to deceive the client or law firm, and there was no personal gain).

Bar Counsel alleges that Respondent committed "deceit" when he tricked Complainant into thinking the locker room was a private space, that it would be safe to undress and by cutting a hole in his toiletry bag to hide his camera. Regardless of whether Respondent viewed Complainant as a willing participant in sexual activity, Respondent was aware of the fact that his toiletry bag, containing a hidden camera, conveyed a false sense of privacy to anyone undressing in the locker room. Respondent's explanation that he did not engage in deceit because he did not attempt to leave the gym with the recording is inapposite. *See* FF 40, *supra*. We have no way of knowing what would have become of the recording if Respondent had not been caught. By using the hidden camera to record Complainant in such a manner as to not be discovered, Respondent acted deceitfully in violation of Rule 8.4(c).

V. RECOMMENDED SANCTION

The appropriate sanction is one that is necessary to protect the public and the courts, maintain the integrity of the profession, and deter other attorneys from engaging in similar misconduct. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005); *Reback*, 513 A.2d at 231. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback*, 513 A.2d at 231 (citations omitted). The sanction imposed must also be consistent with

cases involving comparable misconduct. *See* D.C. Bar R. XI, § 9(h)(1); *In re Elgin*, 918 A.2d 362, 373 (D.C. 2007); *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

The determination of a disciplinary sanction takes into account a number of factors including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty and/or misrepresentation; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney had a previous disciplinary history; (6) whether or not the attorney acknowledged his or her wrongful conduct and (7) circumstances in aggravation and mitigation of the misconduct. *In re Cole*, 967 A.2d 1264, 1267 (D.C. 2009); *see also Martin*, 67 A.3d at 1053 (citing *Elgin*, 918 A.2d at 376); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

A. Respondent's Misconduct was Serious

Undoubtedly, Respondent's conduct is very serious since it warranted criminal prosecution. His conduct was also deceitful given that he surreptitiously recorded an individual in an environment in which that individual had a reasonable expectation of privacy. Indeed, Respondent misrepresented himself as a gym patron when he was really seeking to commit a crime, and he did this on more than one occasion. Troublingly, Respondent did not appreciate the seriousness of his actions, testifying that he thought his actions were neither deceitful nor dishonest. Additionally, Respondent lied to the Hearing Committee concerning the circumstances of his actions, which is a serious aggravating circumstance. *See In re Cleaver-Bascombe*, 892 A.2d 396, 413 (D.C. 2006) ("*Cleaver-Bascombe I*") (false testimony to Hearing Committee "is a significant aggravating factor").

B. Scant Analogous Guidance on Acts of Misdemeanor Video Voyeurism

Misdemeanor video voyeurism in the context of an attorney disciplinary proceeding is a case of first impression in this jurisdiction, and only a few courts have considered the issue nationwide. In *In re Kaye*, 2014 WL 1324546 (Cal. Bar Ct. Apr. 1, 2014), California disciplined an attorney practicing for 17 years who surreptitiously photographed women on eight occasions in various states of undress at a tanning salon. The attorney pleaded guilty to four misdemeanor violations — two counts of secretly filming a person and two counts of peeking through a private area. Although the court found that the respondent's offenses were acts of moral turpitude under California law, it determined that a three-year suspension was warranted given that California no longer requires disbarment for misdemeanor crimes of moral turpitude. The *Kaye* court reasoned that given the mitigating and aggravating circumstances, including the respondent's inability to fully appreciate his wrongdoing, the three-year suspension was the appropriate sanction. *Id.* ("It is not our role to punish Kaye for his convictions — the superior court has taken care of that by imposing a criminal sentence.").

In *In re Holloway*, 469 S.E.2d 167 (Ga. 1996), the Georgia Supreme Court suspended an attorney for two years after he entered a plea of guilty to the felony offense of unlawful invasion of privacy for surreptitiously videotaping his secretary while she used the bathroom. The respondent in this case had set-up an elaborate scheme to lure the victim into a bathroom in which he lay in wait to record her. His crime was discovered when she later found the video with her initials marked on it. The *Holloway* court noted the existence of several mitigating circumstances before determining that a two-year suspension was appropriate.

C. Aggravating Circumstances Exist in this Matter

Respondent's conduct is similar to that of the respondent in *Holloway* because he has one established incident of video voyeurism. While there are similarities with *Holloway*, there are also several distinguishing factors making Respondent's actions here more egregious. First, unlike in *Holloway*, Respondent does not appreciate his wrongdoing. Second, there is evidence that Respondent engaged in this type of conduct before. Finally, Respondent lied to the Hearing Committee concerning key issues relating to his crime.

We believe that Respondent's conduct, while dishonest, does not rise to the level of flagrant dishonesty, notwithstanding that his dishonest conduct involves criminal activity. *See Pelkey*, 962 A.2d at 280-82; *In re Goffe*, 641 A.2d 458, 465 (D.C. 1994) (per curiam) (dishonesty "was part of a plan to commit fraud intended to benefit himself"); *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). We find that Respondent's dishonesty did not involve fraud and arose from his desire to excuse his conduct, distinguishing it from cases of flagrant dishonesty, where disbarment was imposed for dishonest conduct that was "morally reprehensible" or quasi-criminal in nature. *See In re White*, 11 A.3d 1226, 1278 (D.C. 2011) (per curiam) (terminated employee filed whistleblower complaint and falsely accused employers, presented false and altered documents to D.C. Council and 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 Kanu*, 5 A.3d 1, 3-6, 15 (D.C. 2010) (attorney who had promised to refund money to clients if their visa applications were denied did not tell the clients that their applications had been denied, evaded their inquiries, lied to the

clients and Bar Counsel about refunding the clients' money, and encouraged clients to falsify applications).

D. Recommended Sanction

D.C. Bar R. XI, § 9(h)(1) provides for the imposition of discipline that does not "foster a tendency toward inconsistent dispositions for comparable conduct or [is not] otherwise [] unwarranted." However, we are unaware of any prior disciplinary cases with analogous facts. As discussed above, the misconduct in *Bewig* and *Rehberger*, where the respondents were disbarred, was far more egregious. In *In re Harkins*, 899 A.2d 755 (D.C. 2006), the closest case we have been able to identify, the Court imposed a 30-day suspension based on a misdemeanor sexual battery conviction for the touching of a passenger on a Metro train, where the respondent left the victim his business card, with the suggestion that she contact him. *Harkins*, 899 A.2d at 758. Respondent's deceitful and dishonest conduct in taping the Complainant and subsequent dishonesty to the Hearing Committee is far more serious than the misconduct at issue in *Harkins.* Thus, in recommending a sanction, we focus on the deception underlying Respondent's misconduct and his subsequent attempt to cover it up in his false testimony to the Hearing Committee, not simply the act of voyeurism.

Respondent was able to record Complainant because he did so surreptitiously. He did not walk around the locker room with his camera out, warning others that he was taping, or recording only those who gave permission. Instead, he hid his camera in his toiletry bag so that he might record Complainant without his knowledge or consent. He knowingly exploited the common, accepted understanding that patrons are not recorded in locker rooms and thwarted the WSC's prohibition on cameras in the locker room. We have no doubt that Complainant would

not have undressed in front of Respondent had Respondent been openly taping in the locker room.

Respondent's taping of Complainant was a serious invasion of Complainant's privacy. It was surreptitious and deceptive. Although the analogy is far from perfect, Respondent's deception was not unlike other deceitful attempts to avoid responsibility for misconduct, where the Court has imposed significant suspensions. *See In re Slaughter*, 929 A.2d 433 (D.C. 2007) (three-year suspension with fitness for the creation of a false contingency fee agreement to mislead the respondent's firm regarding the client's billing arrangement and for the creation of fabricated documents to cover up the earlier misrepresentation); *In re Daniel*, 11 A.3d 291 (D.C. 2011) (three-year suspension with fitness for use of lawyer trust accounts to hide personal and business funds from the IRS); *see also In re Silva*, 29 A.3d 924, 926 (D.C. 2011) (three-year suspension with fitness where the respondent's dishonesty and misrepresentations during the disciplinary proceedings were significant aggravating factors). Coupled with Respondent's false testimony to the Hearing Committee, which we consider a significant aggravating factor, we conclude that Respondent should be suspended for three years. *See Cleaver-Bascombe I*, 892 A.2d at 413.

E. Respondent Should Be Required to Prove Fitness Before Resuming Practice of Law

The Court established the standard for the imposition of a fitness requirement in *In re Cater*, 887 A.2d 1 (D.C. 2005). The Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id.* at 6. Proof of a "serious doubt" under *Cater* involves "more than 'no confidence that a Respondent will not engage in similar conduct in the future.'" *In re*

Guberman, 978 A.2d 200, 213 (D.C. 2009). It connotes instead "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

In articulating this standard, the Court observed that the reason for conditioning reinstatement on proof of fitness was "conceptually different" from the basis for imposing a suspension. As the Court explained:

> [t]he fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run . . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . .

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. They include:

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

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

Our consideration of Respondent's misconduct, as measured against the *Roundtree* factors, convinces us that Bar Counsel has sustained its burden to prove, by clear and convincing

evidence, that there is a serious doubt regarding Respondent's continuing fitness to practice, as explained below.

First, we recognize that the nature and circumstances of Respondent's misconduct were serious. He surreptitiously recorded a stranger in a locker room and then assaulted his victim in an effort to recover his hidden camera. As to the second factor, Respondent does not recognize the seriousness of his conduct, as he does not believe that his conduct was deceitful or dishonest.

With respect to the third *Roundtree* factor (Respondent's conduct since the misconduct at issue), no evidence was offered relevant to Respondent's conduct since the misconduct, other than Dr. McCall's testimony regarding his treatment. This factor is neutral in our fitness analysis.

With respect to the fourth *Roundtree* factor (Respondent's present character), we have found that he testified dishonestly to this Hearing Committee, continuing the pattern of dishonesty and deception that includes the surreptitious taping that gave rise to these proceedings. As to the fifth *Roundtree* factor (Respondent's present qualifications to practice law), Bar Counsel presented no evidence regarding deficiencies in Respondent's present qualifications to practice law, apart from the misconduct in this case.

Given the above, Respondent's failure to recognize the seriousness of the misconduct and his pattern of dishonest and deceitful conduct, including his misrepresentations to the Hearing Committee, we find that Bar Counsel has provided clear and convincing evidence that casts a serious doubt upon Respondent's continuing fitness to practice law, necessary to support the substantial condition of a fitness requirement. *See Cater*, 887 A.2d at 23-24. The Hearing Committee thus recommends the imposition of a fitness requirement as a condition of reinstatement.

VI. CONCLUSION

For the reasons stated, the Hearing Committee finds that Respondent violated Rules 8.4(b) and 8.4(c) and recommends that Respondent be suspended from the practice of law for three years and required to prove his fitness to practice as a condition of reinstatement.

HEARING COMMITTEE NUMBER FOUR

/TRB/
Thomas R. Bundy, III, Chair

/RF/
Ms. Ria Fletcher

/MRZ/
Marcie R. Ziegler

Dated: May 28, 2015