THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of:	:	
	:	
KEVIN J. MCCANTS	:	
	:	
Respondent.	:	Board Docket No. 24-BD-033
	:	Disc. Docket No. 2023-D186
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 493979)	:	

REPORT AND RECOMMENDATION OF THE
AD HOC HEARING COMMITTEE

Respondent, Kevin McCants, is charged with violating Rule 8.4(c) (dishonesty) of the District of Columbia Rules of Professional Conduct (the "Rules"), arising from his alleged attempt to bring his client documents containing a synthetic cannabinoid, while going through security at the D.C. Central Detention Facility. Respondent contends that Disciplinary Counsel did not meet its burden on this charge and that the charge should thus be dismissed.

As set forth below, the Hearing Committee finds that Disciplinary Counsel has not proven its Rule 8.4(c) dishonesty charge and recommends that the charge be dismissed. The Hearing Committee's disposition of this matter turns on Disciplinary Counsel's failure to meet its burden of proof with regard to Respondent's state of knowledge concerning the materials he brought into the Detention Facility. It is undisputed that the pages of the documents that he brought into the Detention

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

Facility had been contaminated with a synthetic cannabinoid. But it was Disciplinary Counsel's burden to prove by clear and convincing evidence that Respondent either knew that this was so or acted recklessly. Disciplinary Counsel failed to adduce evidence sufficient to meet that burden. For that reason, the Hearing Committee finds in favor of Respondent.

I. PROCEDURAL HISTORY

On May 31, 2024, Disciplinary Counsel served Respondent with a Specification of Charges ("Specification"). Respondent lodged an Answer on June 27, 2024, which was accepted for filing, along with his Unopposed Motion for Leave to File Out of Time, which was granted.

A hearing was held on December 9, 2024, before this Ad Hoc Hearing Committee. Disciplinary Counsel was represented at the hearing by Traci M. Tait, Esquire. Respondent was present during the hearing and appeared *pro se*. Before hearing opening statements, the Committee addressed two of Respondent's motions. The Committee first denied Respondent's motion to continue the hearing. Tr. 5-6. The Committee next addressed Respondent's motion for leave to late-file his witness list, and allowed Respondent to call his witnesses if they were properly subpoenaed or were otherwise appearing in compliance with the Board Rules. Tr. 6-16.

During the hearing, Disciplinary Counsel called as witnesses Andrew Mazzuchelli, Esquire, Corporal Adama Fofana, Sergeant Nathaniel Robinson, and Respondent. Respondent did not put on a defense case, nor did he call any witnesses.

Also during the hearing, Disciplinary Counsel submitted DCX 1-8.[1] All of Disciplinary Counsel's exhibits were admitted into evidence without objection. Tr. 77-79. Respondent did not submit any exhibits.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had not proven its charge by clear and convincing evidence. Tr. 373; *see* Board Rule 11.11.

Disciplinary Counsel submitted its Post-Hearing Brief ("ODC Br.") on January 13, 2025, and Respondent filed his Post-Hearing Brief ("R. Br.") on January 23, 2025. Disciplinary Counsel filed its Reply on January 31, 2025 ("ODC Reply").

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and these findings of fact are established by clear and convincing evidence. *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the fact sought to be established" (quoting *In re Dortch*, 820 A.2d 346, 358 (D.C. 2004))).

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on September 9, 2005, and assigned Bar number 493979. DCX 1.

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[1] "DCX" refers to Disciplinary Counsel's exhibits. "Tr." refers to the transcript of the hearing held on December 9, 2024.

2. For at least 19 years, Respondent has represented criminal defendants housed in the District of Columbia Department of Corrections' Central Detention Facility (sometimes called the "D.C. Jail" below) and has frequently visited his clients there. DCX 6 at 30.

3. The D.C. Department of Corrections has a manual and related forms on its website setting forth its policies and procedures for attorneys visiting its facilities. Tr. 41, 129-130 (Mazzuchelli). But there was no evidence that, apart from posting them on its website, the Department of Corrections provided those materials to attorneys visiting clients, required attorneys to review them, made them available to visiting attorneys in any other way, or in any way brought them to the attention of visiting attorneys prior to the incident at issue in this matter. Tr. 129-130. And, as Disciplinary Counsel candidly conceded during oral argument, there was no evidence that Respondent had notice of any such policies. Tr. 356-57.[2] Nor was there language in the policy about bringing something into the D.C. Jail from a third party. Tr. 131 (Mr. Mazzuchelli: "I don't believe [bringing something in from third parties] was ever explicitly in the policy. . . . I don't believe there was anything specifically in the policy about third parties"); *see also* Tr. 321-22 (Respondent: "I know that's something that they told me that day that they wanted to be a policy. I

[2] It is the Hearing Committee's understanding that the Department has subsequently taken steps to make attorneys in the criminal bar more aware of its policies. Tr. 129-130. Whether those steps will prove to be sufficient to give notice in any future case is not before us and we offer no opinion on the matter.

never heard it before, never saw it in writing, nothing like that. . . . I was never aware or told that until today's hearing, the first time in my life I ever heard that.").

4. Attorneys are permitted to bring legal papers into the D.C. Jail. Tr. 158 (Fofana), 266 (Robinson).

5. On October 5, 2023, Respondent went to the D.C. Jail for legal visits with two inmates. DCX 5 at 6, DCX 6 at 12-13; Tr. 67-68 (Mazzuchelli).

6. When he entered the facility, security personnel[3] observed that Respondent possessed a package that looked as though he had "spill[ed] something inside [his] book-bag." DCX 6 at 29. Respondent told security that the papers were legal research from his client's family (*Id.*; *see also* DCX 7 at 2), and testified that he told security that the papers were legal paperwork provided by his client's brother. Tr. 172:9-10. We use the broader term "client's family" that has been proven by clear and convincing evidence.[4]

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[3] This Report uses the terms "security personnel," "Detention Center personnel," and the like interchangeably.

[4] Though these statements were made by Respondent, there were disputes between the parties over precisely what was said and occurred during this incident. For these disputes, the Hearing Committee's ability to discern the truth has been complicated by Disciplinary Counsel's failure to obtain from the Detention Center and offer into evidence the video recording of the event that admittedly exists. Disciplinary Counsel asserted that it did not subpoena the surveillance video "on the theory it was not close enough to Respondent's package to reveal that the papers were wet – the only fact Respondent had challenged." ODC Br. at 15. But, of course, Respondent has also challenged—successfully—Disciplinary Counsel's assertion that he acted either knowingly or recklessly. And, in any event, it was Disciplinary Counsel's obligation both to prove that element of its case and to check as best it reasonably could that such evidence as could reasonably be obtained was consistent with its

7. Security personnel took the paperwork from Respondent because its stained appearance led them to conclude that it required investigation. DCX 6 at 6, 14-15, 29.

8. The package contained 47 pages that were variously described by Detention Center personnel as discolored, wet, and oily. *See* Tr. 167-68, 171, 213-14 (Fofana), 269-270, 272-74 (Robinson).

9. Before he brought the papers to the jail, Respondent had observed that the paperwork may have looked "oily," "suspect"[5] (DCX 4 at 2-3), "weird," (Tr. 330-32, 337, 366-68), and "like it had stains or something . . ." (Tr. 31).

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mens rea allegations before making them. In this connection, it is certainly possible that a contemporaneous video record of Respondent's interactions with DC Jail personnel might have revealed something about Respondent's mental state.

Respondent has requested that the Hearing Committee draw adverse inferences against Disciplinary Counsel due to the failure to obtain and offer this evidence. Disciplinary Counsel notes that Respondent could equally have subpoenaed the video evidence, and thus it argues that no adverse inference is warranted. Because we are ruling in Respondent's favor without drawing such inferences, we need not reach the issue and therefore do not. We note, however, that Disciplinary Counsel's failure to obtain, review, and make available to the Hearing Committee this contemporaneous video evidence of the events left the Hearing Committee with an incomplete record.

In future cases like this one, where the details of what actually happened might make all the difference and where video evidence is available that could help to resolve disagreements between eyewitnesses—without taint from potential bias, distortion caused by failures of perception, or just the natural erosion caused by the passage of time—Disciplinary Counsel should, where practicable, obtain and review such evidence during its investigation. Such evidence may be inculpatory, exculpatory, or neutral. But here, it is an unknown.

[5] Respondent's description that the paperwork was "suspect" comes from his Answer, where he also observed that the paperwork may have looked "oily." When

10. Corporal Adama Fofana, a Department of Corrections security officer decorated for his ability to locate and detect contraband (Tr. 149, 151-54, 157-58 (Fofana)), was summoned to examine the paperwork. Tr. 169-171 (Fofana); *see also* Tr. 268-69 (Robinson)).

11. Corporal Fofana received the package of stained papers from one of the security personnel (Sergeant John Rosser) responsible for checking individuals who enter the D.C. Jail. DCX 6 at 10-11, 14-21; Tr. 169-173, 243-45, 248 (Fofana).

12. Sergeant Robinson is a retired Army military police officer and special operations sergeant who had also worked for the U.S. Department of State providing diplomatic security for former Secretaries of State Madeleine Albright and General Colin Powell. Tr. 262-64 (Robinson). Sergeant Robinson has worked at the Department of Corrections for more than 17 years and currently heads the 12-person Security Operations Group. Tr. 264-65, 268 (Robinson). He testified that the

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asked about this description at the hearing, Respondent clarified that "[i]t wasn't oily like this could be contraband. I never knew that." Tr. 332. We credit Respondent's explanation that he did not know, and was not reasonably alerted, to the fact that the stains could represent cannabinoid-infused papers. *See infra* FF 23 (the Department of Corrections had not, as of the time of the incident, taken steps to inform members of the bar visiting the facility about the problem of cannabinoid-infused papers). This is also consistent with Respondent's testimony repeatedly denying that the documents looked suspect, by which we understood him to mean "indicative of the presence of narcotics" as opposed to meriting reasonable scrutiny. Tr. 330-31; *see also infra* FF 25-26. As noted *infra*, we credit Respondent's testimony that he had inspected the document for such forms of contraband *as he was aware of* and found none. *See* FF 25.

envelope containing the papers had wet spots where Respondent's papers were "bleeding through." Tr. 274, 278 (Robinson); *see also* Tr. 191 (Fofana).

13. Respondent stated to both Corporal Fofana and Sergeant Robinson that he had received the papers from a client's family. Tr. 172, 203-04, 218, 244 (Fofana), 325 (Respondent); *see* Tr. 276, 280-84, 287-88, 290-94 (Robinson), 365-66 (Respondent).

14. Corporal Fofana took the package to another location to process it for drug testing. Tr. 173-74, 242-44 (Fofana), 269-270 (Robinson). Sergeant Robinson observed him. Tr. 174, 179-180 (Fofana), 268-270, 304 (Robinson).

15. Corporal Fofana removed the papers from a manila envelope, separated 47 individual pages, photographed them laid out on the floor, and placed them in an evidence bag. Tr. 173-76, 182 (Fofana), 303 (Robinson); *see* DCX 6 at 26-27. He filled out relevant information on the bag then locked it in a contraband safe. Tr. 174-182, 192, 207, 211, 242-45 (Fofana), 270 (Robinson); DCX 6 at 21-27. Corporal Fofana prepared a chain of custody report. DCX 6 at 24; Tr. 70 (Mazzuchelli), 174, 178-79, 244-45 (Fofana). He also prepared an Extraordinary Occurrence Report where he wrote the papers "appeared to be soak[ed] in an unknown liquid substance." DCX 6 at 21-23; Tr. 69 (Mazzuchelli), 173-76, 244-245 (Fofana).

16. Other contemporaneous reports prepared by eyewitnesses on October 5, 2023, described the papers variously as "wet and darker than normal" (DCX 6 at 10-11), and "oily." DCX 6 at 14; *see* Tr. 65-69 (Mazzuchelli).

17. Paper that is wet or discolored is suspected by Corrections personnel of containing illegal drugs. Tr. 166-67, 170-71, 176-78 (Fofana), 267 (Robinson); *see also* DCX 6 at 11, 14-23.

18. A substantial number of the papers processed by Corporal Fofana were discolored. DCX 6 at 26; Tr. 182-192 (Fofana).

19. The papers were tested and found to contain a synthetic cannabinoid. DCX 6 at 8-9; Tr. 48-49, 63-65, 75 (Mazzuchelli). Respondent has never contested the accuracy of the test results. Tr. 124 (Respondent: "I'm accepting the results as correct. I'm not challenging that.").

20. After the papers were determined to be contraband, Respondent was formally barred from entering all Department of Corrections facilities. DCX 5 at 6; Tr. 54-55, 62, 75-77 (Mazzuchelli); *see* DCX 6 at 29-30. The ban remained in effect at the time of the disciplinary hearing in this case. Tr. 84-85 (Mazzuchelli).

21. Department of Corrections General Counsel Andrew Mazzuchelli notified the presiding judge of the Superior Court of the District of Columbia's criminal division that Respondent had been barred from entering the jail and the reasons for the ban. DCX 5 at 4; Tr. 55, 76, 79-80 (Mazzuchelli). Both the presiding judge and Mr. Mazzuchelli filed disciplinary complaints against Respondent. DCX 5, DCX 6.

22. The Department of Corrections considered Respondent's near-introduction of drug-infused papers into the D.C. Jail to be very serious. Tr. 85-87 (Mazzuchelli). Inmates' use of illicit drugs can be fatal. Tr. 160 (Fofana).

23. Despite this, Mr. Mazzuchelli acknowledged that the Department of Corrections had not, as of the time of the incident, taken steps to inform members of the bar visiting the facility about the problem of cannabinoid-infused papers. *See* Tr. 129-130, 356-57.

24. Although Respondent maintains that the papers infused with drugs were not wet, the Department of Corrections ("DOC") witnesses testified that the papers Respondent attempted to bring into the D.C. Jail were wet. *Compare* DCX 4, DCX 7 at 2, DCX 8 at 3, *and* Tr. 24, 31, 33, 321, 326 (Respondent's testimony to the Hearing Committee), *with* Tr. 222, 250-51, 259-260 (Fofana), 278 (Robinson: affirmatively responding to Respondent's question whether "soaked" meant "wet"). *See also* Tr. 272-75, 277-280, 302-05 (Robinson). The DOC witnesses' testimony was to some extent corroborated by their contemporaneous reports about the incident, as well as others'. DCX 6 at 10-11, 14, 21. But the contemporaneous paperwork was not entirely consistent in its description of the documents.[6] Thus, we find that Disciplinary Counsel has proven by clear and convincing evidence only that the DOC personnel—with the benefit of specialized knowledge and experience that Respondent lacked (*see infra* FF 25-26)—had reason to suspect that the papers in question might be drug-infused.

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[6] *Compare* DCX 6 at 6 ("The papers in question were wet, stained, and not consistent with the texture or appearance of normal paper."), *with id.* at 10-11 (the pages "*appeared* wet and darker than normal" (emphasis added)), 14 ("papers that looked oily"), 16 (same), 18-19 (papers were "oily and looked suspicious"), *and* 21-23 (papers "that appeared to be soak[ed] in an unknown liquid substance").

25. But, on the key issue of whether *he* knew or suspected that the papers he had been given were infused with synthetic cannabinoids, Respondent's denials were credible. Tr. 24, 29-31 (explaining during his opening statement that the paper "looked like old treati[s]es," "[i]t was nothing obvious," "[n]othing was wet," and that he thought he was bringing "legal research"), 330-31 ("I'm not going to say they looked suspect. It was never in my mind until it all came to a discussion."), 347-48, 367-68 (during closing, explaining it never crossed his mind). Respondent testified that he was unaware that "soaked" papers were a vehicle for smuggling cannabinoids into the Detention Center[7]—and Disciplinary Counsel candidly admitted that no contrary evidence had been adduced. Tr. 356-57. Respondent further credibly testified that he checked the package to ensure that no pills, razor blades, or other things that he recognized as contraband were included and found none. *See* Tr. 321, 324, 332.

26. While Department of Corrections staff were undoubtedly highly aware of and sensitized to the issue of drug-infused paper, which they regularly dealt with, someone not familiar with the issue—and we again emphasize that there was no evidence that Respondent was—would have no reason to conclude or suspect that

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[7] *See* Tr. 332 ("[W]hy didn't they just tell the lawyers that guys were bringing [synthetic contraband through papers] in? I never heard that before. It never entered my mind, I tell you that. It wasn't oily like this could be contraband. I never knew that."); Tr. 348 ("I never knew about a policy, never knew that drugs could be dipped or sprayed on paperwork. . . .There was no training . . . . I know that afterwards they sent the letter out . . . saying don't take anything from anybody, any research or whatever it is.").

the documents in question themselves constituted or contained contraband. The papers, based on our review of contemporaneous photographs, while far from the pristine products of a lawyer's office, were not so badly stained as to be outside the limits of what might reasonably be provided by a client's family. *See* DCX 6 at 26.

27. No evidence of motive on Respondent's part was introduced.

III. CONCLUSIONS OF LAW

A. Summary of the parties' contentions.

Disciplinary Counsel argues that Respondent violated Rule 8.4(c) (dishonesty) because he was aware, or ignored obvious signs, that the papers he attempted to bring his client contained synthetic contraband. Disciplinary Counsel notes several circumstances in support, including that he knew or should have known that lawyers are not allowed to bring in paperwork other than legal papers he had prepared or originated in his office, that his experience and privileged status as a criminal defense attorney should have given him pause to deliver third-party paperwork to inmates, that the paperwork itself was "wet" and looked "weird," "suspect," "stained," and "oily," and that no adverse inference should be taken against Disciplinary Counsel for any failure to produce video footage. ODC Br. at 8-18; *see also* ODC Reply at 4-8.

Respondent argues that the papers were not "wet"—and instead showed properties of only being "worn"—and more generally that he did not have reason to believe that the papers contained synthetic contraband. R. Br. at 2, 8, 11. He also asks the Committee to make an adverse inference against Disciplinary Counsel for

not producing video evidence that would allegedly show the guard giving the paperwork back to Respondent and warning him that his backpack may be leaking. R. Br. at 3, 5-6, 12-13.

We find that Disciplinary Counsel did not prove that Respondent violated Rule 8.4(c) by the requisite clear and convincing evidence. *See In re Romansky*, 938 A.2d 733, 741-42 (D.C. 2007).

B. Disciplinary Counsel did not prove that Respondent violated Rule 8.4(c) (dishonesty) by knowingly or recklessly attempting to bring his client documents containing a synthetic cannabinoid while going through security at the D.C. Central Detention Facility.

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Dishonesty is the most general of these categories. It includes "not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (per curiam) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (per curiam)). The Court holds lawyers to a "high standard of honesty, no matter what role the lawyer is filling," *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc) (quoting *In re Reback*, 513 A.2d 226, 231 (D.C. 1986)).

If the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation."

In re Romansky, 825 A.2d 311, 315 (D.C. 2003). Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.*; *see also In re Uchendu*, 812 A.2d 933, 939 (D.C. 2002) ("[S]ome evidence of a dishonest state of mind is necessary to prove an 8.4(c) violation."). Dishonest intent can be established by proof of recklessness. *See Romansky*, 825 A.2d at 316-17. To prove recklessness, Disciplinary Counsel must establish by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Id.*; *see, e.g.*, *In re Boykins*, 999 A.2d 166, 171-72 (D.C. 2010) (finding reckless dishonesty where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers). The entire context of the respondent's actions, including their credibility at the hearing, is relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam).

As discussed above, the Hearing Committee concludes that Disciplinary Counsel did not adduce clear and convincing evidence that Respondent either knowingly or recklessly attempted to introduce documents infused with synthetic cannabinoids into the Detention Facility. Rather, he appears to have done so unwittingly and after the exercise of sufficient care to come well short of any display of recklessness.

With respect to the allegation that Respondent acted knowingly, Respondent's denials that he knew that the papers in question were contaminated were credible and Disciplinary Counsel introduced no evidence showing (a) that Respondent was even aware that such contaminated paperwork was used to smuggle drugs into the facility or (b) that Respondent had any motive to act as a witting drug mule. Accordingly, we conclude that Disciplinary Counsel did not prove by clear and convincing evidence that Respondent intentionally or knowingly smuggled drugs into the facility.

With respect to our conclusion that Disciplinary Counsel did not prove that Respondent acted recklessly, we note the following. First, the evidence did not show that Respondent in particular was (or a reasonable attorney in general would have been) aware of the risk that drug-infused papers could serve as a vehicle for dangerous contraband. To the contrary, the evidence was to the effect that the facility had not prior to this incident advised attorneys of this danger. Second, the facility did not provide its policies to attorneys (apart from posting them online) nor require attorneys to review them before visiting clients. As a result, there was no evidence that Respondent knew or should have known that bringing legal papers provided by a client's family was problematic. And, finally, Respondent credibly testified that he inspected the papers in question for such potential contraband as he—lacking knowledge of the problem of cannabinoid-infused papers—was aware of and detected none. Accordingly, Disciplinary Counsel did not show by clear and

convincing evidence that Respondent "consciously disregarded" a known risk or otherwise acted recklessly.

IV. CONCLUSION

For the foregoing reasons, the Committee finds that Respondent did not violate Rule 8.4(c) (dishonesty) and thus recommends that the charge be dismissed.

AD HOC HEARING COMMITTEE

Jonathan Shaw, Chair

Sally Winthrop, Public Member

Johanna Reeves, Attorney Member