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:	:	
	:	
PABLO M. ZYLBERGLAIT,	:	
	:	Board Docket No. 21-ND-005
Respondent.	:	Disc. Docket No. 2019-D244
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 453710)	:	

REPORT AND RECOMMENDATION
OF AD HOC HEARING COMMITTEE
APPROVING PETITION FOR NEGOTIATED DISCIPLINE

I. PROCEDURAL HISTORY

This matter came before an Ad Hoc Hearing Committee on June 9, 2021, for a limited hearing on a Petition for Negotiated Discipline (the "Petition"). The members of the Hearing Committee are Jeffrey Dill, Esquire, Chair; Ria Fletcher, Public Member; and, Dawn Murphy-Johnson, Esquire, Attorney Member. The Office of Disciplinary Counsel was represented by William R. Ross, Esquire, Assistant Disciplinary Counsel. Respondent was represented by Paul L. Knight, Esquire and was present throughout the limited hearing.

The Hearing Committee has carefully considered the Petition, which has been signed by Disciplinary Counsel, Respondent and Respondent's Counsel, the supporting affidavit submitted by Respondent (the "Affidavit"), and the representations during the limited hearing made by Respondent, Respondent's

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

Counsel and Disciplinary Counsel taken pursuant to Board Rule 17.4. The Hearing Committee also fully considered its *in camera* review of Disciplinary Counsel's files and records, and *ex parte* communications with Disciplinary Counsel. For the reasons set forth below, we approve the Petition, find the negotiated discipline of a six-month suspension, stayed, and six months of unsupervised probation during which Respondent must continue complying with the recommendations of his therapist and ensure that his therapist provides monthly reports to Disciplinary Counsel regarding Respondent's compliance, is justified and recommend that it be imposed by the Court.

II. FINDINGS PURSUANT TO D.C. BAR R. XI, § 12.1(c) AND BOARD RULE 17.5

The Hearing Committee, after full and careful consideration, finds that:

1. The Petition and Affidavit are full, complete and in proper order.

2. Respondent is aware that there is currently pending against him a proceeding involving allegations of misconduct. Tr. at 12; Affidavit at ¶ 2.

3. The allegations that were brought to the attention of Disciplinary Counsel are that Respondent violated Rule 8.4(b) of the District of Columbia Rules of Professional Conduct, in that Respondent committed a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer in other respects. Petition at II.5.

4. Respondent has freely and voluntarily acknowledged that the material facts and misconduct reflected in the Petition are true. Tr. at 12-13; Affidavit at ¶ 4. Specifically, Respondent acknowledges that:

A. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by motion on January 6, 1997, and assigned Bar number 453710.

B. On June 5, 2019, Respondent stood behind a woman on the escalator at the L'Enfant Plaza Metro station. Respondent placed his cell phone on top of his duffel bag and attempted to record images under the woman's skirt. Respondent did not have the woman's consent to take images under her skirt. Respondent's actions were recorded on Metro security cameras.

C. A witness who knew the victim confronted Respondent on the escalator and alerted the victim of Respondent's actions. After exiting the escalator, the victim confronted Respondent, asked to view the photos on his phone, and saw blurry photos or video that appeared to have been taken that day.

D. After his arrest, Respondent cooperated with the government. On September 24, 2019, Respondent pled guilty to attempted voyeurism. He was sentenced to 60 days incarceration, with execution of sentence suspended, and placed on three months unsupervised probation. Respondent has successfully completed the terms of his probation.

E. Respondent violated Rule 8.4(b) of the District of Columbia Rules of Professional Conduct, in that Respondent committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects.

5. Respondent is agreeing to the disposition because Respondent believes that he cannot successfully defend against discipline based on the stipulated misconduct. Affidavit at ¶ 5.

6. Disciplinary Counsel has made no promises to Respondent other than what is contained in the Petition for Negotiated Discipline. Affidavit at ¶ 7. Those promises and inducements are that in connection with the Petition for Negotiated Discipline, Disciplinary Counsel agrees not to pursue any charges arising out of the

conduct described in the Petition, other than those set forth therein, or any sanction for that misconduct other than as set forth therein. Petition at III. Respondent confirmed during the limited hearing that there have been no other promises or inducements other than those set forth in the Petition. Tr. at 15.

7. Respondent has conferred with his counsel. Tr. at 9; Affidavit at ¶ 1.

8. Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction set forth therein. Tr. at 9-10; Affidavit at ¶¶ 4-5.

9. Respondent is not being subjected to coercion or duress. Tr. at 15; Affidavit at ¶ 6.

10. Respondent is competent and was not under the influence of any substance or medication at the limited hearing. Tr. at 9-10.

11. Respondent is fully aware of the implications of the disposition being entered into, including, but not limited to, the following:

A. He has the right to assistance of counsel if Respondent is unable to afford counsel;

B. He will waive his right to cross-examine adverse witnesses and to compel witnesses to appear on his behalf;

C. He will waive his right to have Disciplinary Counsel prove each and every charge by clear and convincing evidence;

D. He will waive his right to file exceptions to reports and recommendations with the Board and with the Court;

E. The negotiated disposition, if approved, may affect his present and future ability to practice law;

F. The negotiated disposition, if approved, may affect his bar memberships in other jurisdictions; and

G. Any sworn statement by Respondent in his affidavit or any statements made by Respondent during the proceeding may be used to impeach his testimony if there is a subsequent hearing on the merits.

Tr. at 17-20; Affidavit at ¶¶ 1, 9-12.

12. Respondent and Disciplinary Counsel have agreed that the sanction in this matter should be a six-month suspension, stayed, and six months of unsupervised probation during which Respondent must continue complying with the recommendations of his therapist and provide to Disciplinary Counsel the therapist's monthly reports regarding his compliance. Petition at V; Tr. at 14, 20. Respondent's therapist will send the monthly reports directly to Disciplinary Counsel. Tr. at 14, 20.

13. Respondent and Disciplinary Counsel have stipulated to the following circumstances in mitigation:

> Respondent cooperated with the criminal and disciplinary investigations. He promptly began regular counseling and therapy sessions and continues to see a licensed psychotherapist at least monthly. Disciplinary Counsel has no information suggesting Respondent has engaged in any further misconduct.

Petition at 5-6; Tr. at 16.

14. There are no circumstances in aggravation. Tr. at 17.

15. There were no complainants to notify of the limited hearing. Tr. at 6-7.

III. DISCUSSION

The Hearing Committee shall recommend approval of an agreed-upon petition for negotiated discipline if it finds:

A. That the attorney has knowingly and voluntarily acknowledged the facts and misconduct reflected in the petition and agreed to the sanction therein;

B. That the facts set forth in the petition or as shown during the limited hearing support the attorney's admission of misconduct and the agreed upon sanction; and

C. That the agreed sanction is justified.

D.C. Bar R. XI, § 12.1(c); Board Rule 17.5 (a)(i)-(iii).

A. Respondent Has Knowingly and Voluntarily Acknowledged the Facts and Misconduct and Agreed to the Stipulated Sanction.

The Hearing Committee finds that Respondent has knowingly and voluntarily acknowledged the facts and misconduct reflected in the Petition and agreed to the sanction therein. Respondent, after being placed under oath, admitted the stipulated facts and charges set forth in the Petition, and denied that he was under duress or has been coerced into entering into this disposition. Tr. at 9-17. Respondent understands the implications and consequences of entering into this negotiated discipline. Tr. at 17-20.

Respondent has acknowledged that any promises that have been made to him by Disciplinary Counsel as part of this negotiated discipline are set forth in writing in the Petition and that there are no other promises or inducements that have been made to him. Tr. at 14-15; Affidavit at ¶ 7.

B. The Stipulated Facts Support the Admissions of Misconduct and the Agreed-Upon Sanction.

The Hearing Committee has carefully reviewed the facts set forth in the Petition and established during the hearing and we conclude that they support the admission of misconduct and the agreed-upon sanction. Moreover, Respondent is agreeing to this negotiated discipline because he believes that he could not successfully defend against the misconduct described in the Petition. Affidavit at ¶ 5.

With regard to the second factor, the Petition states that Respondent violated Rule of Professional Conduct 8.4(b). The evidence supports Respondent's admission that he violated Rule 8.4(b) in that the stipulated facts describe how he committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects.

C. Respondent's Conduct Does Not Qualify as Moral Turpitude.

We must determine whether Respondent's criminal conduct involved moral turpitude. If we conclude that it does, we would be required to reject the petition as unduly lenient because disbarment is required for an offense that involves moral turpitude. *See* D.C. Code § 11-2503(a). In *In re Rigas*, 9 A.3d 494 (D.C. 2010), the Court approved the imposition of negotiated discipline for criminal convictions referred to the Board for a moral turpitude determination where "the absence of moral turpitude is clear." *Id.* at 498 (internal quotations omitted). *Rigas* also set forth guidelines to assist in this determination. They require that Disciplinary Counsel certify in the petition for negotiated discipline that (1) that the crime does

not involve moral turpitude per se; (2) that Disciplinary Counsel has exhausted all reasonable means of inquiry to find proof in support of moral turpitude, and explaining those efforts; (3) that Disciplinary Counsel does not believe that there is sufficient evidence to prove moral turpitude on the facts; (4) that all of the facts relevant to the determination of moral turpitude are set forth in the petition; and (5) that any cases regarding the same or similar offenses have been cited in the petition. *Id.* at 497. The petition also must articulate with particularity "the facts relating to moral turpitude and the basis for [Disciplinary] Counsel's view that no probable cause exists to charge moral turpitude." *Id.* (internal quotations omitted). The Petition contains the certifications required by *Rigas*. Petition at IV.

Rigas instructs that we must "evaluate independently [Disciplinary] Counsel's decision that a particular criminal conviction does not involve moral turpitude on the facts or that the proof is insufficient." *Id.* at 498 (quoting Board Report). We must be "satisfied, after independent consideration of the record, that all reasonable avenues of investigation have been pursued and that the evidence of moral turpitude is clearly insufficient." *Id.* at 497 (quoting Board Order). Our *in camera* review of Disciplinary Counsel's file and *ex parte* communication with Disciplinary Counsel confirm that Disciplinary Counsel has pursued all reasonable avenues of investigation, and all of the facts relevant to the moral turpitude determination are set forth in the Petition. We next consider whether the record supports Disciplinary Counsel's determination that Respondent's conduct did not involve moral turpitude on the facts.

A crime of moral turpitude is one that involves "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." *In re Colson*, 412 A.2d 1160, 1167-68 (D.C. 1979) (en banc) (quoting 2 Bouv. Law Dictionary 2247 (Rawle's 3d. Rev.)). In *In re Cross*, the Board examined the application of moral turpitude to misdemeanor sex offenses:

> In the few moral turpitude cases involving sex-based offenses, the Court has held that a crime involves moral turpitude where "[t]he participant's desire for . . . gratification [exceeded] his ability to demonstrate a public respect and appreciation of existing societal morals and values." *In re Wolff*, 511 A.2d 1047 (D.C. 1986) (en banc) (adopting the opinion of *In re Wolff*, 490 A.2d 1118 (D.C. 1985) (citation omitted)). Thus, in *Wolff*, the Court found that the respondent's conviction of distribution of child pornography involved moral turpitude, because the respondent sought out sexual gratification and attempted to profit by selling materials that exploit children. *Id.* at 1119-20. Similarly, in *In re Bewig*, 791 A.2d 908 (D.C. 2002) (per curiam), the Court found that the respondent's conviction of misdemeanor sexual contact with a minor was a crime of moral turpitude on the facts. In *In re Rehberger*, 891 A.2d 249 (D.C. 2006), the Court found moral turpitude on the facts where a respondent was convicted of misdemeanor sexual battery and simple battery after he detained and physically abused a female client who had sought respondent's advice in a divorce case. The Court explained that "misdemeanor sexual convictions" may involve moral turpitude where the victim is placed in a vulnerable position by being "subjected to [the respondent's] forceful, unwelcome, sordid sexual conduct." *Id*. at 252.
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> Thus, in cases where the Court has determined that a sex-based offense involves moral turpitude, it has found that the respondent knowingly exploited, intruded upon, or invaded the privacy of another person in the interest of his own sexual gratification.

In re Cross, Board Docket No. 12-BD-086, at 17-18 (BPR July 29, 2016) (alterations in original), *recommendation approved where no exceptions filed*, 155 A.3d 835

(D.C. 2017) (per curiam). The Petition identifies the two most analogous disciplinary cases on the moral turpitude issue, both of which involved surreptitious video recording for sexual gratification: *In re Cross*, *supra*, and *In re Fuller*, Board Docket No. 16-ND-008 (HC Rpt. May 11, 2017), *recommendation approved*, 172 A.3d 886 (D.C. 2017) (per curiam).

Cross was found to have engaged in a crime of moral turpitude because he surreptitiously filmed another patron in a gym locker room, assaulted the victim in an attempt to recover the camera, and offered a bribe. *Cross*, Board Docket No. 12-BD-086, at 7-9. The Board noted in its report that the respondent's surreptitious filming was premeditated, as he had altered a shaving kit to secret his camera. *Id.* at 19. It also noted that the respondent sought out sexual gratification at the expense of the complainant's legitimate and reasonable privacy interest. *Id.* at 21. That said, it is not apparent from the Board Report that the surreptitious recording, by itself, would have constituted moral turpitude.

Fuller was a negotiated discipline, where the Court accepted a Hearing Committee's recommendation that the respondent had not engaged in moral turpitude when he "used his work-issued phone on various occasions to take prurient photos and videos of clothed, non-consenting, and unaware individuals, both at his workplace and at public venues." *Fuller*, Board Docket No. 16-ND-008, at 2; *see Fuller*, 172 A.3d at 887. Certainly, like Cross, Fuller's conduct was premeditated, and he sought out sexual gratification at the expense of his victims' legitimate and reasonable privacy interest, yet his conduct did not constitute moral turpitude, thus

also suggesting that the recording alone did not constitute moral turpitude. We recognize that *Fuller* would not be precedential in a contested case (because it is a negotiated discipline case (*see* D.C. Bar R. XI, § 12.1(d))); however, we conclude that if the Court determined that Fuller's prolonged voyeuristic video recording was a crime of moral turpitude (thus warranting disbarment), it would have rejected the *Fuller* negotiated discipline as unduly lenient.

Here, Respondent engaged in a single episode of surreptitious recording. His conduct, while intolerable, did not involve the physical assault or attempted bribery present in *Cross* and was not prolonged, as in *Fuller*. Thus, we recommend that the Court conclude that Respondent's conduct did not involve moral turpitude on the facts.

D. The Agreed-Upon Sanction is Justified.

The most complicated factor the Hearing Committee must consider is whether the sanction agreed upon is justified. *See* D.C. Bar R. XI, §12.1(c); Board Rule 17.5 (a) (iii). Based on the record as a whole, including the stipulated circumstances in mitigation, the Hearing Committee's *in camera* review of Disciplinary Counsel's investigative file and *ex parte* discussion with Disciplinary Counsel, and our review of relevant precedent, we conclude that the agreed-upon sanction is justified and not unduly lenient in light of the relevant precedent (*Cross* and *Fuller*, *supra*), for the following reasons:

We understand that we are to determine whether the proposed negotiated sanction is justified under the circumstances of this matter, not whether it is as

consistent as possible with sanctions imposed in contested matters involving comparable misconduct. Nevertheless, we think it is useful for purposes of assessing the negotiated sanction to utilize as a framework for our analysis the seven factors that the Court of Appeals has prescribed for sanction determinations in contested matters. *See In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013) (providing that the factors to consider in determining the appropriate sanction in a contested matter include (1) the seriousness of the misconduct, (2) the presence of misrepresentation or dishonesty, (3) Respondent's attitude toward the underlying conduct, (4) prior disciplinary violations, (5) aggravating and mitigating circumstances, (6) whether additional provisions of the Rules of Professional Conduct were violated and (7) prejudice to the client).

The first factor in that analysis – the seriousness of the misconduct – raises significant concerns for all three Hearing Committee members and is the only factor that gives the Hearing Committee hesitation regarding the negotiated sanction. All of us find the act at the heart of this matter to be highly offensive to say the least.

The other six factors do not create issues in terms of supporting the negotiated sanction. Based on the record before us, Respondent does not appear to have been dishonest regarding the incident, he seems to have been contrite throughout the matter, there is no indication of prior violations, he has been cooperative throughout, no other Rules of Professional Conduct other than those presented in the Petition seem to be at issue, and no client has been prejudiced.

In addition, the Hearing Committee had the opportunity to observe Respondent and to hear from him during the course of the limited hearing. We conclude that he recognizes the wrongfulness of his actions and is remorseful. Importantly, Respondent continues to undergo therapy and reports from the therapist will be submitted to Disciplinary Counsel.

Respondent's misconduct, which although intolerable, did not involve physical contact with the victim, as was the case in *In re Harkins*, where the respondent was suspended for thirty days following his conviction for misdemeanor sexual abuse, arising out of an unwanted touching on a Metro train. 899 A.2d 755, 759-760, 762 (D.C. 2006). As discussed above, the misconduct here is nowhere near as serious as that in *Cross*. Respondent's conduct is most similar to, although far less serious than the prolonged surreptitious recording in *Fuller*, where the respondent received a stayed two-year suspension in a negotiated discipline case. 172 A.3d at 887-88. Although D.C. Bar R. XI, § 12.1(d) would preclude our consideration of *Fuller* in recommending a sanction in a contested case, (*see In re Wilson*, 241 A.3d 309, 313 (D.C. 2020) (per curiam)), we believe that it is a helpful data point in determining that the sanction imposed here is not unduly lenient.

Having carefully reviewed the agreed-upon facts in this matter, having heard from and questioned Respondent during the hearing, and taking into account the pertinent sanctions case law cited above and in the Petition (at 4-5), we conclude the negotiated sanction is justified.

IV. CONCLUSION AND RECOMMENDATION

It is the conclusion of the Hearing Committee that the discipline negotiated in this matter is appropriate.

For the reasons stated above, it is the recommendation of this Hearing Committee that the negotiated discipline be approved and that the Court impose a six-month suspension, stayed, and six months of unsupervised probation during which Respondent must continue complying with the recommendations of his therapist and ensure that his therapist provides monthly reports to Disciplinary Counsel regarding Respondent's compliance.

AD HOC HEARING COMMITTEE

By: Jeffrey Dill
Jeffrey Dill, Chair

Ria Fletcher, Public Member

Dawn Murphy-Johnson, Attorney Member