DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	)	
	)	
MATTHEW S. BEWIG,	)	Bar Docket No. 16-99
	)	
Respondent.	)	

REPORT, RECOMMENDATION AND ORDER

Hearing Committee Number Eight recommends that the District of Columbia Court of Appeals disbar Respondent for committing a misdemeanor that involves moral turpitude, considering the facts and circumstances of the crime. This matter is before us on Respondent's exception to the Hearing Committee's Report and Recommendation. For the reasons stated below, the Board also recommends that Respondent be disbarred.

Procedural Background

The disciplinary charges stem from Respondent's December 14, 1998, misdemeanor conviction in the Superior Court of the District of Columbia (the "Superior Court"), for sexual contact in violation of D.C. Code § 22-4106. The Court concluded that the misdemeanor did not constitute a "serious crime" as defined by D.C. App. R. XI, § 10(b), and referred the matter to the Board on Professional Responsibility (the "Board") for further proceedings consistent with D.C. App. R. XI, § 8. Bar Counsel filed a petition charging Respondent with commission of a crime involving moral turpitude and violation of Rule 8.4(b) (criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness) of the D.C. Rules of Professional Conduct. Respondent denied that his conduct constituted moral turpitude or violated the ethical rule. He also interposed a timely notice of his intention to raise

disability in mitigation of any sanction that might be imposed should a violation requiring discipline be found. See In re Kersey, 520 A.2d 321 (D.C. 1987).

While this case was pending before the Hearing Committee, Respondent filed a motion for protective order pursuant to D.C. App. R. XI, § 17(d), to: (i) prohibit the disclosure of the Petition and Specification of Charges, and (ii) direct that proceedings in this matter be conducted to maintain confidentiality. Respondent argued that a protective order was necessary because publication of the identity of the victim of Respondent's sexual abuse would be detrimental to the victim's therapy and recovery. Included with the motion was a signed statement from the victim's therapist stating that public attention to this matter could be detrimental to the victim's emotional growth and development. On September 15, 1999, the Board entered an Order that deferred publication of the Petition and Specification of Charges and reserved ruling on whether a limited protective order should be entered protecting from public dissemination the identity of the victim. The Board inquired in the September 15, 1999 Order whether the identity of the victim was already a matter of public record in the criminal case. The Board requested briefing on the feasibility and appropriateness of a limited protective order within ten days of receipt of a transcript of the sentencing hearing in the criminal matter.

Before receipt of the sentencing transcript, the Board entered a Protective Order, on November 24, 1999, which provisionally addressed the limited confidentiality issue reserved in the September 15, 1999 Order in order to permit a hearing in this matter to go forward on December 1, 1999. The Board ordered that evidence that identified the victim of Respondent's sexual abuse or that would make the victim's identity readily discernible be taken, but kept under seal. The Board's Order left it to the Hearing Committee Chair, in the first instance, to rule whether specific testimony and

exhibits should be withheld from the public record. The Board specifically noted that it did "not intend by this Order that the entire hearing be closed or that all exhibits be kept under seal." (Nov. 24 Order at 2.) The Board's Order was without prejudice to any party's further motion to the Board to lift or modify the Order.

A one-day hearing was held on December 1, 1999. Substantial portions of the hearing were conducted in a confidential manner in order to avoid disclosure of the victim's identity. The Hearing Committee Chair designated some portions of the transcript as public, but sealed most of the testimony because reference to the victim was frequent. The Hearing Committee directed Bar Counsel to prepare and file a redacted set of exhibits to protect the victim's identity. Bar Counsel filed the redacted exhibits on January 10, 2000. That same date, Bar Counsel proposed to the Hearing Committee that it accept as public portions of the hearing transcript identified in writing by the Office of Bar Counsel.

While the Hearing Committee had the case under advisement, important developments on the issue of confidentiality took place in the Superior Court. On December 12, 1999, an order was entered by the Superior Court in the criminal misdemeanor docket in which Respondent was convicted, granting a motion to seal the identity of the victim. United States v. Bewig, Crim. No. M-17737-98. The order required that certain enumerated documents be placed under seal, including documents entered into evidence in this proceeding as Bar Exhibits 2 (Information filed by AUSA Mary McCord, December 10, 1998), 3 (Plea Proffer), 5 (Judgment and Probation Order of January 27, 1999), 10 (Transcript of the plea proceeding on December 14, 1998) and 11 (Transcript of the sentencing hearing on January 27, 1999).

On May 1, 2000, the Hearing Committee entered an Order requiring that no brief refer to the victim by name or otherwise reveal the identity of the victim of Respondent's sexual abuse and that all transcripts and exhibits be maintained under seal until further order of the Hearing Committee, the Board, or the Court of Appeals. The Hearing Committee's Order further directed that the parties' briefs not use any pronouns or other indicia that might reveal the victim's identity and that quotations from the transcript refer to the victim as "underage victim." Briefs complying with the Order were to be publicly available.

In a letter dated May 16, 2000, Bar Counsel sought clarification of the Hearing Committee's May 1, 2000 Order, to determine whether the Hearing Committee intended to maintain the Petition and Specification of Charges, the entire hearing transcript, and all exhibits under seal. On May 25, 2000, the Hearing Committee modified its May 1, 2000 Order, in part. The Hearing Committee ordered, apparently to facilitate reporting of Respondent's status to the Maryland Bar, that "the Board Office and Bar Counsel shall be free to make a written report, upon written inquiry from any person that 'Respondent is presently the subject of disciplinary proceedings in this jurisdiction arising out of his 1998 conviction, in this jurisdiction, for misdemeanor sexual abuse.'" (May 25 Order at 1-2.) The Order further provided that any requests and responsive reports be copied to counsel for Respondent.

On August 8, 2000, Bar Counsel filed with the Board a motion to modify protective order, accompanied by extensive material from the record. Bar Counsel maintained that the May 25, 2000 Order of the Hearing Committee, which effectively sealed the entire record of this proceeding, was overly broad. She urged that the Board enter a more limited protective order directing that portions of

the record, which do not identify the victim of Respondent's sexual abuse, be made part of the public record. Respondent opposed Bar Counsel's motion to modify protective order, on grounds that the public had adequate notice of the existence and nature of this matter. Respondent further asserted that there is a danger that the identity of the victim could be discerned, even absent a direct reference by name in the record, and that the potential serious harm to the victim outweighs Bar Counsel's or the public's interest in keeping the record public. Respondent further contended that Bar Exhibits sealed by order of the Superior Court may not be released unless the court modifies its order. Respondent urged that, should the record of this matter be unsealed, additional redactions from the record, which he specified, would be necessary to protect the identity of the victim.

On October 23, 2000, the Hearing Committee issued its Report and Recommendation recommending Respondent's disbarment. In a Confidential Companion Order appended to its Report, the Hearing Committee considered arguments of the parties that related specifically to the identity of the victim. The Hearing Committee further recommended that all sealed records remain under seal while the Board considers the Hearing Committee's Report and during any period of suspension or disbarment.

By Order dated November 8, 2000, the Board Chair reiterated the principle that maintaining the identity of the victim in confidence is appropriate under D.C. App. R. XI, § 17(d). The Board Chair also ruled that the disciplinary system should abide by a confidentiality order entered by the Superior Court, unless and until that order is modified by that Court or the Court of Appeals. A court order, the Board Chair held, is "good cause," under D.C. App. R. XI, § 17(d), for entry of a limited protective order prohibiting disclosure of documents covered by the order. Pending full consideration

of the Board of the merits of this matter, the November 8, 2000 Order released the Hearing Committee's Report and Recommendation. The Confidential Companion Order to the Hearing Committee's Report was ordered to remain under seal. The Board Chair then outlined specific redactions to the record that she informed the parties she was inclined to recommend to the full Board, and invited the parties to address in their briefs on the merits any protective order issues. The issue of what portion of the record should remain under seal, and what portion should be available to the public, accordingly is before the Board for resolution.

Findings of Fact

In large part, the Findings of Fact below are drawn from those of the Hearing Committee. It "credit[ed] the testimony of all witnesses before [it], including Respondent." (H.C. Report. 5.)[1] We reconfigure the Hearing Committee's discussion to include in the Findings of Fact the findings on Respondent's Kersey issue, which the Hearing Committee discussed separately in its Report. The Board also files separately, under seal, a Confidential Companion Report, incorporating findings of fact, also based on those made by the Hearing Committee, that involve actual or potential identification of the minor victim.

1. Respondent has been a member of the Bar of the District of Columbia since February 6, 1995. He was originally licensed in Maryland in 1992. (BX A.)

2. On December 14, 1998, Respondent pleaded guilty in the Superior Court to misdemeanor sexual contact in violation of D.C. Code, § 22-4106. On January 27, 1999, he was

[1] The Report and Recommendation of the Hearing Committee is cited as "H.C. Report." "BX" refers to Bar Counsel's exhibits; the transcript of the hearing held on December 1, 1999, is cited as "Tr."

sentenced to 180 days in jail, with all time suspended on condition that he complete 30 months of supervised probation with monitored mental health counseling. (BX 5) (under seal).

3. The sex crime on which Respondent's conviction is based involved repeated acts of sexual contact with a six-year old male victim who was then in Respondent's care.[2]

4. Respondent's conduct came to light on September 9, 1998, only after the underage victim reported to his mother a recent pattern of sexual abuse. The mother then confronted Respondent, who initially denied the allegation but then confessed to the mother.

5. A short time after confession to the underage victim's mother, Respondent reported himself to the Metropolitan Police (the mother would have reported Respondent, absent his voluntary surrender).

6. Misdemeanor prosecution of Respondent followed upon information based primarily on facts that Respondent revealed to law enforcement. In his plea agreement, Respondent admitted to several instances, over a three to four month period, of genital fondling of the underage victim for personal gratification.

7. Certain details regarding the scope and severity of abuse were not known to law enforcement at the time Respondent entered his guilty plea, but came to light during the course of Respondent's post-conviction mental health counseling. The Hearing Committee became privy to those

[2] Bar Counsel also put on evidence at the hearing that Respondent had been the focus of two separate reports involving allegations that he had inappropriately touched female children entrusted to his care in a babysitting cooperative. The Hearing Committee concluded that Bar Counsel did not meet the required evidentiary burden regarding these allegations: "the record does not support a conclusion that Respondent's conduct vis-a-vis the complaining children was wrongful, or somehow indicative of a habit or pattern-and-practice of child sexual abuse." (H.C. Report at 2.) The Board agrees, and focuses only on the conduct underlying the guilty pleas and that was uncontested at the hearing.

unfortunate details through the testimony of Respondent, his therapist Thomas Berg, and the underage victim's mother. These undisputed facts included:

a. Sexual abuse of the underage victim began when the victim was three years old, during a period when the victim was also in Respondent's care. The sexual abuse involved repeated instances, over a period of several months, of touching the victim's penis for Respondent's personal gratification. That pattern of abuse went undetected and is known to the disciplinary process today only because of Respondent's admission. Although Respondent continued to interact with the victim after age three, the abuse stopped because of Respondent's exercise of self-control. (Tr. at 189-90) (under seal).

b. Sexual abuse resumed when the victim was six years old, again during a period when the victim was in Respondent's care. Over a period of three to four months, the pattern of sexual abuse included:

- causing the victim to touch Respondent's penis;
- digital penetration of the victim's anus; and
- oral stimulation of the victim's penis.

Respondent instructed the six-year-old not to tell anyone about their sexual interactions.

8. Respondent performed these acts with the intent to arouse or gratify his own sexual desires.[3] He understood that his victim was legally incapable of consenting to the conduct and emotionally incapable of fending for himself. Respondent understood that his behavior violated societal norms. There also is no dispute that Respondent was mentally competent and capable of understanding what he was doing during the periods of sexual abuse. Indeed, Respondent testified that he attempted to

avoid being alone with the victim and struggled to try to stop himself from having sexual contact. (Tr. at 195-96.)

9. At the time of the sexual abuse, Respondent's law practice involved government contracts work with a prominent Washington law firm. The record is undisputed that Respondent served his clients well, including during the periods of sexual abuse. Two partners in his law office, fully aware of Respondent's criminal conviction, testified that they believed Respondent posed no threat to clients or co-workers. (Tr. at 51, 58, 66.) They also commended Respondent's work and were willing to have him continue in law practice after they knew of the criminal conviction. (Tr. 52-53, 67.)

10. Respondent entered the care of Mr. Berg within two weeks after surrendering himself to law enforcement. Mr. Berg continued to be Respondent's treating therapist post-conviction.

11. Mr. Berg regularly testifies in Superior Court as an expert on childhood sexual abuse. (Tr. at 113 (Berg).) Mr. Berg's court appearances have included testimony against his patient when he believes the patient is at risk of offending again. (Tr. at 142 (Berg).) He has been working in the field for approximately 20 years. (Tr. at 107-13 (Berg).) During this time, he has assisted law enforcement efforts to investigate sex offenses; he has worked with over 500 patients. (Tr. at 110, 142, 167 (Berg).) The Hearing Committee accepted Mr. Berg as an expert in the diagnosis, evaluation, and treatment of sexual offenders and credited his testimony within his field of expertise. (H.C. Report at 4.)

12. Mr. Berg diagnosed Respondent as a "regressed offender," as compared to a "fixated offender." (Tr. at 125 (Berg).) Fixated sex offenders are sexually attracted to children; as a result, they are likely to be serial abusers of children. (Tr. at 119-22 (Berg).) A regressed offender is

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[3] Respondent also admitted that he occasionally used his office computer to download child pornography from the internet.

not attracted to children in general, but during times of stress "reaches out to a child to meet basically what are adult needs, emotional and sometimes sexual needs." (Tr. at 122-24 (Berg).) A regressed offender usually has a "high level of emotional deprivation in [his] childhood [including] some type of sexual abuse." (Tr. at 123 (Berg).) Regressed offenders tend to see their conduct as not hurtful to the child. (Tr. at 124 (Berg).) Because regressed offenders are not attracted to children, their treatment prospects are good with success rates ranging from 75-95%. (BX 6) (under seal).

13. Respondent fits the profile of a regressed offender. He reported that he lived in an orphanage for the first two years of his life. Respondent also reported that his adoptive parents were physically violent and manipulative. (Tr. at 127-28 (Berg).) Respondent reported to his therapist that he was sexually molested at age thirteen. (Tr. at 129 (Berg).) Mr. Berg testified, however, that Respondent did not, as a result, have less than full responsibility for his actions. (Tr. at 129 (Berg).) Mr. Berg described the "spontaneous" and "impulsive" nature of Respondent's initial sexual contact with the victim. (Tr. at 138-39 (Berg).) Respondent was able to control that impulse for some time, but when the child was six years old, the pressure had built up again for Respondent and he "impulsive[ly]" and "compulsive[ly]" approached the child sexually again "because there was again this very compelling need to feel assured, reassured, to feel affection, to feel love, to feel in control of his life." (Tr. at 140 (Berg).)

14. Mr. Berg characterized Respondent's conduct as an illness, complete with warning signs, and capable of treatment. (Tr. at 154-55 (Berg).) The Hearing Committee concluded that "Respondent suffers from an illness." (H.C. Report at 8.) As part of that illness, Respondent's

competency notwithstanding, Mr. Berg believes Respondent did not fully comprehend that the conduct was harmful to the underage victim. (Tr. at 126, 168-69 (Berg).)

15. Respondent's treatment had advanced by the hearing to the point where Respondent understood the illness and posed no risk to the underage victim, or children in general. Mr. Berg describes Respondent's therapy as one of the more "successful" treatments he has worked with in a long time. (Tr. at 143 (Berg).) The Hearing Committee accepted that Respondent "is on the road to full recovery and – clinically – presents no current threat to his victim or any other child." (H.C. Report at 9.)

16. Mr. Berg also believes Respondent's treatment will progress faster and more effectively if Respondent is permitted to retain his Bar license. The stress associated with disbarment, and corresponding impact on his ability to support his family, may add "many months of [additional] clinical work" to Respondent's treatment. (Tr. at 147, 166 (Berg).)

17. Respondent has informed the Board of developments in his situation since the hearing, with no objection from Bar Counsel. The Board includes them for the Court's information. On October 19, 2000, the Superior Court modified Respondent's sentence, nunc pro tunc to the original date of sentencing of January 27, 1999, to 30 months of unsupervised probation, with a requirement of monthly written reports to probation updating his employment, describing any rearrest, and providing information on his therapy. The Superior Court also required registration as a sex offender in any out-of-state jurisdiction. United States v. Bewig, No. M17737-98 (D.C. Super. Ct. Oct. 19, 2000). Since late October 2000, Respondent has resided in Tampa, Florida. He has continued sex offender therapy

with Dr. Leo P. Cotton, a psychotherapist, attending all required sessions and making "progress as expected." (Attachment 2 to Appeal Brief of Respondent.)

Analysis

A. The crime of sexual contact in the District of Columbia, D.C. Code §22-4106, is a misdemeanor. It covers a wide range of unwanted sexual contact, including contact between adults. Because a § 22-4106 violation is a misdemeanor, whether the conduct underlying the conviction involves moral turpitude, and thus leads to disbarment pursuant to D.C. Code § 11-2503(a), must be considered on the facts. In re McBride, 602 A.2d 626, 632 (D.C. 1992) (en banc). A crime involving moral turpitude is one that "offends the generally accepted moral code of mankind." In re Colson, 412 A.2d 1160, 1168 (D.C. 1979)(en banc). Moral turpitude involves "[a]n act of baseness, vileness or depravity in the private and social duties which man owes to his fellow men or to society in general" or "[c]onduct contrary to justice, honesty, modesty, or good morals." Colson, 412 A.2d at 1168 (quoting 2 Bouv. Law Dictionary 2247 (Rawle's Third Revision), Black's Law Dictionary 1160 (4th ed. 1951)).

Respondent objects to the Hearing Committee's conclusions that his conduct involved moral turpitude and violated Rule 8.4(b). He contends that the Hearing Committee did not sufficiently analyze whether his conduct involved moral turpitude. Instead, the Hearing Committee cited "Justice Douglas' [sic – Justice Potter Stewart's] definition of pornography" and claimed that it could "recognize moral turpitude when we see it." (H.C. Report 6.) The Hearing Committee found moral turpitude "painfully obvious on this record," (id.) and concluded that the nature and extent of Respondent's sexual abuse established moral turpitude. The Hearing Committee recognized that Respondent suffered from an illness, that he was the victim of childhood sexual molestation, and that he was on the road to

full recovery. (H.C. Report at 8-9.) The offending conduct did not involve the practice of law. There was no indication that it impaired his ability to provide high quality legal services to clients. (Id.) Respondent has no other disciplinary record. (Id.) None of these factors, in the Hearing Committee's view, was sufficient to outweigh the "absolutely horrific nature of Respondent's actual conduct." (H.C. Report at 7.)

Respondent points to the fact that he did not fully appreciate and understand the harm to the victim, because of his illness. Findings of Fact, ¶ 14. He also stresses that he attempted to stop himself from sexual contact with the child but was unable to do so. The core of Respondent's argument is that the Hearing Committee arrived at its conclusion of moral turpitude before considering these or other facts pertinent to the Kersey analysis. The Hearing Committee did not cite Kersey at all, or explore how the disciplinary process should respond where proof of odious acts is accompanied by proof that an illness, from which Respondent is substantially rehabilitated, contributed to the misconduct.

B. The Court's decision in In re Spiridon, 755 A.2d 463 (D.C. 2000), charted an analytical course for how the disciplinary system should assess the misdemeanor criminal conduct of an attorney who is also to some degree impaired. We consider Spiridon in some depth because it is closely analogous to the issue here.

Spiridon was convicted of misdemeanor theft in Maryland, Md. Code Ann., Crimes & Punishment § 27-342 (1995), for taking $18 in bus fares while working as a night bus driver in Ocean City. Because the crime was a misdemeanor, it did not involve moral turpitude per se; the matter was referred to a hearing committee. The Hearing Committee and Board both concluded that the crime did not involve moral turpitude within the meaning of D.C. Code § 11-2503(a). Factors supporting the

absence of moral turpitude included the small amount of money involved, the lack of evidence of a more extensive pattern of criminal activity, and the lack of any relationship between the conduct and legal practice. 755 A.2d at 465. The evidence also showed that Spiridon was suffering from extreme stress, depression, and alcohol abuse when the theft took place. Bar Counsel's expert concluded that the respondent was a "significantly disturbed individual" suffering from schizoaffective disorder, alcohol abuse, and adjustment disorder with mixed anxiety and depressed mood. Id. The Board had concluded that the respondent's conduct did not involve moral turpitude under § 11-2503(a), finding similarities to In re Kent, 467 A.2d 982, 984 (D.C. 1983) (per curiam), in which a mentally ill attorney shoplifted out of a desire to be caught rather than a desire for personal gain. The Board concluded, however, that the respondent's conduct did violate Rule 8.4(b), because he committed "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Spiridon, 755 A.2d at 465.

The Court in Spiridon rejected Bar Counsel's position that when a misdemeanor involves an element that would render the offense moral turpitude per se if a felony, moral turpitude must be found regardless of the totality of the facts, including mitigating factors. 755 A.2d at 466. Following McBride, the Court in Spiridon instructed that the Board first should look beyond the elements of the misdemeanor offense to determine if the crime is one of moral turpitude. 755 A.2d at 466-67. The Court considered which "circumstances of the transgression," 755 A.2d at 466, quoting McBride, 602 A.2d at 635, are appropriate for consideration by the Board. The Court concluded that circumstances beyond the events relating to the crime itself may be appropriate as part of the moral turpitude inquiry, including:

> "circumstances surrounding commission of the misdemeanor which fairly bear on the question of moral turpitude in its actual commission, such as motive or mental condition. To use the homely example, a theft of a loaf of bread to feed one's starving children may be moral turpitude per se if society has deemed it an unexcused felony offense, but if society has deemed it only a misdemeanor, then for McBride purposes the motive can be taken into account."

755 A.2d at 467. "McBride leads . . . to the inescapable conclusion that some 'mitigating factors' may be considered in making the determination in the first instance whether moral turpitude existed on the facts of a particular case." 755 A.2d at 467. In other words, there is no "trip wire" in the misdemeanor moral turpitude inquiry that, once we pass it, we truncate or eliminate consideration of other factors. On the other hand, the Court made clear in Spiridon that not every factor a respondent might want to prove is relevant to the moral turpitude inquiry. So, for example, absence of a prior disciplinary record or remorse, while in other contexts relevant to sanction, are not circumstances that bear on the inquiry whether a particular crime involves moral turpitude on its facts. 755 A.2d at 467-68.

We reiterate this teaching in detail because it is not clear that the Hearing Committee's inquiry in this case took full account of all of the facts and circumstances of the crime, including Respondent's motive and mental condition. The Hearing Committee was so struck by the offensiveness of the conduct that it did not make clear how it factored in Respondent's illness and recovery, and the unrelatedness of the conduct and legal practice. The Board accordingly has fully reviewed the record with the goal of undertaking consideration of all of the relevant circumstances.

C. We begin with the facts that Bar Counsel urges on us most strongly. The misconduct is odious. It violated fundamental societal taboos and victimized a very young child. The sexual abuse on

this record was not an isolated lapse. It was repeated over a period of time when the child was six, and was a second series of episodes of abuse, the first inflicted when the child was three. Respondent engaged in this conduct for his own sexual gratification. Respondent attempted to hide his conduct by urging the child's silence and approaching the child sexually under circumstances when detection was unlikely. [4] The abuse stopped because Respondent was caught. In cases in the felony context, the Court has ordered disbarment for crimes of child sexual abuse where the elements of the offense established that the attorney had permanent or temporary care, custody or responsibility for the supervision of the child, thus demonstrating the attorney's knowledge that the child was below the age of legal consent. See In re Wortzel, 698 A.2d 429 (D.C. 1997) (per curiam); In re Sharp, 674 A.2d 899 (D.C. 1996). For an attorney convicted of a misdemeanor involving such facts, it will be a rare case in which the absence of moral turpitude can be shown. See Spiridon, 755 A.2d at 468.

Respondent seems to argue in response that once the facts are established that satisfy the mitigation standard in Kersey – that the respondent suffers from an addiction or illness that contributed to the misconduct, and is substantially rehabilitated [5] – some sanction short of disbarment should follow, even if the actual conduct involved in the misdemeanor satisfies the Colson standard for moral turpitude. The Board disagrees. This argument is the opposite extreme from Bar Counsel's argument rejected by the Court in Spiridon. Respondent seems to say that, once the Kersey facts are shown, a wire is

[4] These circumstances are detailed more fully in the Confidential Companion Report accompanying this Report and Recommendation.

[5] Mr. Berg's unrefuted testimony supports the conclusion that Respondent suffers from an illness, that the illness contributed to the misconduct, and that Respondent has made excellent progress in therapy and is well on the road to rehabilitation. At Bar Counsel's request, Respondent was examined by a therapist chosen by Bar Counsel, who Bar Counsel then declined to call to testify. Respondent asks the Board to conclude that Bar Counsel's therapist would have supported Mr. Berg's diagnosis. We decline to do so because such a conclusion would be speculative. Instead, we treat Mr. Berg's testimony as unrefuted.

tripped and moral turpitude should not be found. That argument seems to the Board as inconsistent with Spiridon as the Bar Counsel argument rejected therein.

It also is far from clear on this record that Respondent's illness would qualify for Kersey mitigation in a case that does not involve a criminal conviction but that calls for the Kersey analysis for possible mitigation of sanction. The Court has not considered whether the illness involved in the "regressed offender" disorder qualifies for Kersey consideration, even outside of the context of a criminal conviction case. Not every illness, addiction or disorder that contributes to an attorney's misconduct will mitigate the offense. E.g., In re Marshall, 762 A.2d 530 (D.C. 2000) (at least in a misappropriation case, addiction to cocaine attributable to illegal use of that drug does not warrant imposition of a sanction less than disbarment).

As counseled in Spiridon, we look at the record to understand the illness or addiction, and all of the surrounding facts and circumstances, for purposes of determining if Respondent's conduct involved moral turpitude. A very serious illness or addiction could be highly material to that inquiry. For example, in Kersey, the Court observed that there is an element of alcoholism that is involuntary. While "[n]ot all drinking alcoholics are totally unable to control their behavior . . . alcoholism can result in uncontrollable behavior and severe psychological and physiological changes." 520 A.2d at 325. While Kersey's misconduct was severe and protracted, the evidence showed that his "alcohol abuse affected his thoughts and judgment." 520 A.2d at 326. His thinking had been "delusional," "irrational and nonsensical" at various relevant times. Id. at 326-27. Accord, In re Appler, 669 A.2d 731, 739 (D.C. 1995) (bipolar disorder takes away some degree of control; in the right circumstances it could be cause

for mitigation). In such a case, the illness may be so severe, and its relationship with the misconduct so close, that it affects the determination of whether the crime involves moral turpitude.

The record here convinces the Board that the illness impaired Respondent's understanding of what he was doing only to a limited degree. The Hearing Committee found, consistent with Mr. Berg's unrefuted testimony, that Respondent understood the wrongfulness of his behavior and "that his victim was legally incapable of consenting to the conduct and emotionally incapable of fending for himself." Findings of Fact, ¶8. "Respondent was mentally competent and capable of understanding what he was doing during the periods of sexual abuse." Id. Respondent abused his victim only in circumstances in which he could avoid detection. Respondent urged the victim to remain silent. He actually refrained from abusing his victim for several years. Respondent engaged in the conduct for sexual pleasure and gratification. [6]

The one area in which Respondent's understanding was impaired was in his lack of full comprehension that his conduct was harmful to his victim. Findings of Fact, ¶ 14. The Board concludes that this one area of lack of comprehension by Respondent is a far cry from the level of illness found in Kersey and its progeny. The Board recognizes that Respondent suffered, as part of his illness, from an urge to reach out to a child in times of stress to satisfy his emotional and sexual needs. Findings of Fact, ¶12. The history of emotional mistreatment of Respondent when he was a child and sexual abuse when he was a teenager weighs heavily on this record. This obviously creates a more sympathetic situation than if a hypothetical respondent, after having sexual contact with a six-year-old, were to testify that he did it simply for pleasure. The core of moral wrongdoing here, however, is not

significantly mitigated by Respondent's illness. Respondent understood the wrongfulness of his behavior, knew what he was doing, and knew that his victim could not consent. His efforts to cover up his behavior show his understanding that it was offensive and betray his defense that his conduct was solely the result of his illness. His conduct violated the generally accepted moral code of mankind whether or not he fully understood the harm he was causing to his victim. He had been able to avoid the urge to have such sexual contact for about three years. When the urge to do so again became overwhelming, he should have sought help. He was a capable, functioning attorney who knew what he was doing was wrong. His behavior was in marked contrast to others whose judgment and ability to function were fundamentally undermined by their illness. See Spiridon, 755 A.2d at 465; Kersey, 520 A.2d at 324; In re Kent, 467 A.2d at 983. [7]

The Board is aware of the impact of its decision that Respondent's crime involved moral turpitude. Despite the reprehensible nature of Respondent's acts, there are aspects of this case that have made it difficult for the Board to recommend the inevitable sanction: Once confronted with his conduct, Respondent sought professional help. Mr. Berg characterized Respondent's recovery as one of the most successful he has seen. (Tr. at 143 (Berg).) Respondent testified fully and frankly to the Hearing Committee about his acts, and cooperated in the disciplinary process. At the Board, Respondent represented himself. The Board can scarcely imagine how difficult it must be for a member

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[6] The Dissenting Opinion of Elizabeth Taylor cites Respondent's therapist describing Respondent's behavior as conduct over which he had no control. Dissenting Opinion at 4. We cannot square that characterization with the substantial control and choice that Respondent exercised or the totality of Mr. Berg's testimony.

[7] We disagree with the Dissenting Opinion that we should engage in the analysis set forth in Kersey and then refrain, apparently in any misdemeanor criminal conviction case, from recommending disbarment if all three prongs of the Kersey test are found. The Hearing Committee heard all of the evidence that Respondent offered concerning his mental health. The Board has taken that evidence fully into account, as Spiridon counsels. When the Board weighs all of the facts and circumstances, including the evidence of illness as well as the nature of the acts and

of the Bar to appear before a panel of peers and members of the public to discuss such conduct. Respondent could not have handled the situation with greater decency and dignity. His sincere understanding of the harm he has caused – to the victim, to his own future, and to persons who care about him – is very clear to the Board. What happened here is tragic for all concerned. It is a tragedy for which Respondent has taken responsibility, but for which, the Board believes, he must face the sanction of disbarment. [8]/

One might well ask of what benefit it has been to Respondent to seek treatment, work at his therapy, tell the truth, and face the consequences if he is disbarred anyway. Is Respondent really treated any differently in the disciplinary system than the hypothetical respondent who is unrepentant and just finds sexual abuse of minors pleasurable? The Board believes that there should be a difference, and that it will manifest itself when Respondent seeks reinstatement. His successful therapy (assuming that Respondent completes its course), remorse, candor and cooperation should weigh heavily in favor of a petition for reinstatement, as will his lack of any other discipline and the unrelatedness of this conduct to the practice of law.

D. The Hearing Committee also found that Respondent's conduct violated Rule 8.4(b), and recommended, for that violation alone, an 18-month suspension with a requirement that Respondent

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the circumstances in which Respondent committed them, the Board concludes that moral turpitude is apparent on the facts.

[8] The Board recognizes that Respondent's therapist recommended against disbarment on grounds that it would set back Respondent's therapy. Tr. 145, 147, 166. The goals of a therapist tend to be assisted by having minimum disruption in the life of a respondent who is trying to resolve mental health issues. Those goals are not the same as those of the disciplinary system. By statute, the District of Columbia requires disbarment of attorneys who commit crimes involving moral turpitude. The integrity of the profession and confidence of the public are promoted by the sanction here; the deterrent effect on others who need help to avoid acting on their sexual attraction to children is obvious. This case is like many others in which the respondent has learned the painful lessons of his misconduct by the time the case reaches us, and we have some level of confidence that the respondent does not present an immediate danger to the public. Nonetheless, we cannot rely on remorse or rehabilitation to take a set of very abhorrent facts out of the category of "moral turpitude." See Spiridon, 755 A.2d at 467-68.

show fitness before reinstatement. Respondent has not briefed any objection to the finding of a Rule 8.4(b) violation. The Board agrees that this conduct reflects adversely on Respondent's fitness to practice law. While the sexual abuse was unrelated to legal practice, the inherent lack of trustworthiness in Respondent's conduct is very troublesome, given the duty of care that he owed the child. His efforts to persuade the child to maintain secrecy and his persistent conduct despite the knowledge of its wrongfulness call into question the moral compass that should be possessed by a practicing lawyer.

E. The final issue that remains in this proceeding concerns whether portions of the record should remain under seal to protect the identity of the victim. The Board Chair ruled on an interim basis during the course of the proceeding that protecting the identity of the victim was sufficient "good cause" under D.C. App. R. XI, § 17(d), to create an exception to the usual rule that disciplinary proceedings are open to the public from the point of filing the Petition. The full Board now adopts that ruling. Respondent's original Motion for Protective Order was accompanied by a signed statement from the victim's treating therapist affirming that public disclosure of the victim's identity could impair his progress in therapy. It would be a travesty for this disciplinary proceeding, occasioned by Respondent's harm to the victim, to cause the victim any more suffering. The job of the disciplinary system is to help the public; no member of the public can be more important in this regard than the victim of Respondent's criminal conduct. The Board concludes that the portions of the record identifying or potentially identifying the victim should remain under seal. It hereby so orders, pending any different resolution of this issue by the Court of Appeals. Appendix A and B list the materials that will be redacted or omitted from the public record and filed under seal.

The Board does not understand Bar Counsel to disagree with the basic principle that the victim's identify should be protected. Bar Counsel has submitted to the Board, however, a Confidential Position on Confidentiality that urges that Bar Exhibits 2, 3, 5, 10 and 11 be put in the public record, with information potentially identifying the victim redacted.[9] These are the exhibits that have been sealed by order of the Superior Court. Bar Counsel argues that the Board should make them public nonetheless, because no Bar disciplinary parties were involved in the motions proceedings in the Superior Court and it is unknown whether the Superior Court was aware of or considered the consequences of the sealing for the disciplinary process.

The Board finds these arguments completely unpersuasive. There is no authority known to the Board that would permit the Board to make public documents that the Superior Court has sealed. The parties, Hearing Committee and Board have had full access to the documents, as will the Court. Any interested member of the public can learn from the material in the public record what Respondent did. The Board declines to second-guess the conclusions of the Superior Court in a proceeding in which it was not a participant.

Bar Counsel's real concern about the confidentiality appears to be that virtually the entire record in this matter was kept under seal from May 1, 2000 until the Board Chair's November 8, 2000 order releasing the Hearing Committee Report and Recommendation. Bar Counsel characterizes this as a proceeding "conducted in secrecy."

The Board has a different view. The Hearing Committee faced a serious dilemma in handling this proceeding. It resolved to protect the identity of the victim, which the Board's November

[9] Bar Counsel also urged three minor changes to the appendices listing the redactions. The Board has made the suggested changes and also added a redaction: Proposed Findings of Fact by Mr. Bewig, p. 8, lines 3-5.

24, 1999 Order obligated it to do. Yet the Hearing Committee also was obligated to make a complete record, in the interest of bringing the proceeding to a prompt and orderly decision. It needed to hear fully and candidly from Respondent, Mr. Berg, and other witnesses who knew the identity of the victim and who were likely to mention it at any time. The Hearing Committee opted to get the testimony out on the record as efficiently as it could, which it accomplished in a one-day hearing. It did so by designating extensive passages of the testimony as non-public.[10] The option was for the Hearing Committee Chair to designate questions and answers individually for the sealed and public record as the hearing proceeded. Such a process would have been cumbersome and time-consuming, and would have interrupted the flow of the testimony and the ability of all participants to focus on its content.

The Board does not fault the Hearing Committee for the procedure it used here. Disciplinary proceedings are public proceedings, yet the victim's identity was legitimately protected from public disclosure. Because the victim's identity was discussed so frequently, it was appropriate for the Board to address after the creation of the record which portions would be made public and which portions should remain under seal. The Board would expect it to be a very rare hearing in which confidential material is discussed so pervasively that large portions of the record remain sealed until the confidential material can be sorted from public information. Where such a process must occur, the efforts of the Hearing Committee and the Board are aided by the preparation by the parties of a specific list of the material proposed to be released or sealed.

CONCLUSION

[10] There apparently were no members of the public in attendance at the hearing, so this process did not cause anyone to be excluded from the hearing itself.

For all of the foregoing reasons, the Board concludes that, under all of the facts and circumstances, Respondent's misdemeanor conviction involves moral turpitude on the facts. The underlying conduct also violates Rule 8.4(b). The Board recommends that Respondent be disbarred. The Board orders that the material from the record identified in Appendix A and B be maintained in the Board Office and filed with the Court of Appeals under seal, unless and until the Court of Appeals considers the confidentiality of information in the record and rules otherwise.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____
Patricia A. Brannan
Chair

DATED: June 19, 2001

All members of the Board concur in this Report and Recommendation except Ms. Taylor, who has filed a dissent.