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:	:	
	:	
DARRYL A. FELDMAN	:	
	:	
Respondent.	:	Board Docket No. 22-BD-083
	:	Disc. Docket No. 2021-D229
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 446093)	:	

REPORT AND RECOMMENDATION OF THE AD HOC HEARING COMMITTEE

Respondent, Darryl A. Feldman, is charged with dishonest conduct in violation of the Maryland Attorneys' Rules of Professional Conduct ("MD Rules" or "Maryland Rules") arising from his representation of his then-client, Christopher Libertelli in child support proceedings before the Circuit Court for Montgomery County, Maryland. Disciplinary Counsel contends that Respondent committed all the charged violations and that his license to practice law should be suspended for one year as a sanction for his misconduct. Respondent contends Disciplinary Counsel has not proven any of the charges by clear and convincing evidence; in the alternative, if a Rule violation is found, Respondent contends that a reprimand would be an appropriate sanction in light of the record as a whole in this case and mitigating circumstances.

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

As set forth below, while this case presented several close questions, the Ad Hoc Hearing Committee ("the Hearing Committee") finds that Disciplinary Counsel has not proven any of the charged Rule violations by clear and convincing evidence and recommends dismissal.

I. PROCEDURAL HISTORY

On November 29, 2022, Disciplinary Counsel served Respondent through his counsel with a Specification of Charges ("Specification"). The Specification alleges that Respondent violated the following rules:

- MD Rule 19-303.3(a)(2), by knowingly failing to "disclose a material fact to a tribunal when disclosure was necessary to avoid assisting a fraudulent act by the client";
- MD Rule 19-303.3(a)(4), by knowingly offering evidence "that they knew to be false" and/or failing to take reasonable remedial measures after offering materially false evidence;
- MD Rule 19-304.1(a)(2), by knowingly failing to "disclose a material fact when disclosure was necessary to avoid assisting the fraudulent act of his client";
- MD Rule 19-308.4(c), by engaging in conduct involving dishonesty, fraud, deceit, and/or misrepresentation; and

- MD Rule 19-308.4(d), by engaging in conduct that was prejudicial to the administration of justice.

See Specification at 9-11 ¶ 41 (b)-(d), (g), and (i).[1]

Respondent filed an Answer on January 6, 2023. Initially, this case (Disciplinary Docket No. 2021-D229) was joined with a case against Mr. Libertelli, who at the time was a member of the D.C. Bar himself (Disciplinary Docket No. 2021-D175) ("*Libertelli II*"). On June 8, 2023, the D.C. Court of Appeals disbarred Mr. Libertelli for flagrant dishonesty in an earlier discipline case (Disciplinary Docket No. 2019-D072). *See In re Libertelli*, 295 A.3d 1101 (D.C. 2023) (per curiam) ("*Libertelli I*"). Following that disbarment, the Board granted Respondent's renewed motion to sever the previously joined cases in July 2023. *See* Board Order, July 3, 2023.[2]

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[1] Because the charges against Respondent relate to the proceedings in the Circuit Court for Montgomery County, Maryland, the Maryland Attorneys' Rules of Professional Conduct apply to the charged conduct pursuant to D.C. Rule 8.5(b) (Choice of Law). *See* Specification at 9 ¶ 41. Respondent does not contest Disciplinary Counsel's decision to apply the Maryland Rules.

[2] While it is within Disciplinary Counsel's discretion to seek dismissal of *Libertelli II* considering Mr. Libertelli's disbarment in *Libertelli I*, Disciplinary Counsel has not yet done so, and *Libertelli II* remains pending. *See, e.g.*, *In re Marshall*, Bar Docket No. 274-96 (BPR Sept. 29, 2003), appended Hearing Committee Report at 5 ("dismissal of a complaint, without prejudice" is permitted "when . . . the Court already has entered an order in an unrelated matter directing a respondent's . . . disbarment"); *see also* Board Order, July 3, 2023, p. 5 (requesting Disciplinary Counsel's proposed disposition of *Libertelli II*).

Prior to the hearing, both parties filed evidentiary motions. Respondent moved to exclude the testimony of Mr. Libertelli's ex-wife, Yuki Noguchi; the Chair of the Hearing Committee denied that motion. *See* Hearing Committee Order, July 7, 2023. Disciplinary Counsel moved to exclude the testimony of Respondent's expert witness, Andrew D. Levy, Esquire; that motion was also denied without prejudice to being renewed at the hearing. *See* Hearing Committee Order, July 3, 2023.

The hearing was held on July 11-13 & August 16, 2023. Disciplinary Counsel was represented at the hearing by Deputy Disciplinary Counsel Julia Porter, Esquire, and Assistant Disciplinary Counsel Sean O'Brien, Esquire. Respondent was present during the hearing and was represented at the hearing by Stanley J. Reed, Esquire, and W. Hunter Daley, Esquire. One of Disciplinary Counsel's witnesses, Respondent's former associate, John Dame, Esquire, was represented by Sarah Fink, Esquire.

During the hearing, Disciplinary Counsel submitted DCX[3] 1 through 131. All of Disciplinary Counsel's exhibits were admitted into evidence, including DCX 122 over Respondent's objection. Tr. 952-54, 1222. Disciplinary Counsel called as its witnesses: Mr. Dame; Mr. Libertelli; Ms. Noguchi; and Respondent.

Respondent submitted DFX 1 through 47. All of Respondent's exhibits were admitted into evidence without objection. Tr. 953. Respondent testified on his own behalf and called as witnesses: Judge Harry C. Storm, who presided over the

[3] "DCX" refers to Disciplinary Counsel's exhibits. "DFX" refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing.

Libertelli-Noguchi divorce, custody, and child support proceedings; Mr. Levy, an experienced trial lawyer who was proffered as an expert on the standard of care applicable in Maryland trial litigation; and Howard B. Soypher, Esquire, and Heather Hostetter, Esquire, family law practitioners in Montgomery County who testified as character witnesses.

Upon conclusion of the hearing, the Hearing Committee made a preliminary non-binding determination that Disciplinary Counsel had proven "that a line was crossed" as to at least one of the ethical violations set forth in the Specification. Tr. 1259; *see* Board Rule 11.11. By agreement of the parties, any additional mitigating or aggravating evidence (as to sanction) was to be presented by written briefing. Tr. 1261-62. The Chair noted that Respondent had already introduced testimony of character witnesses who had described Respondent's overall standing and reputation in the bar. Tr. 1262.

Disciplinary Counsel submitted its Proposed Findings of Fact, Conclusions of Law, and Sanction Recommendation ("ODC Br.") on September 13, 2023, and Respondent filed his Proposed Findings of Fact, Conclusions of Law, and Sanction Recommendation ("Resp. Br.") on October 3, 2023. Disciplinary Counsel filed its Reply Brief ("Reply Br.") on October 16, 2023.

II. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing, and the Committee finds they are supported 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 facts sought to be established").

A. Background

1. Respondent was admitted to the Bar of the District of Columbia Court of Appeals on February 7, 1997, and assigned Bar number 446093. DCX 2 at 1. Respondent also has been a member of the Maryland Bar since 1994. Tr. 648 (Respondent).

2. Respondent has practiced family law in the Maryland courts for over twenty years; he became a partner at Ain & Bank in approximately 2010, and then with another partner from that firm, formed their own law firm, Feldman Jackson, in 2018. *See* Tr. 649-50 (Respondent). Currently, the firm has six attorneys including Respondent. Tr. 650-51 (Respondent).

3. Judge Harry C. Storm, who presided over the divorce and related proceedings at the heart of this case, described Respondent as having a reputation for professionalism and honesty in the Montgomery County, Maryland courts:

> Based on my experiences with Mr. Feldman, I have always found him to be a highly effective lawyer. I believe that he adhered to his ethical standards. There was nothing I ever—I had no experience and no reason to believe otherwise based on my experience with him in other cases. . . . to my knowledge, Mr. Feldman is, you know, well respected here in Montgomery County as a—he's well regarded as a family law practitioner here, and he has a fairly low-key style in terms of his approach. He has been effective for his clients in other cases that he's appeared before me on.

Tr. 540 (Judge Storm). Howard B. Soypher, another family law practitioner who has been opposing counsel against Respondent in six significant trials and knows him professionally, described Respondent as someone possessing a character of honesty and integrity, "someone that I can certainly take him at his word and trust it." Tr. 578-81 (Soypher). Mr. Soypher also noted that Respondent "is well thought of as a practitioner among [his] colleagues." Tr. 582 (Soypher). Similarly, Heather Hostetter, a former Bar President of the Montgomery County Bar Association who has litigated against Respondent in over twenty cases, testified that Respondent is "known to be an excellent trial attorney who is professional and honest and reputable." Tr. 590-93, 595 (Hostetter); *see also* Tr. 594-97 (Hostetter) (testifying to her trust for Respondent and his reputation for professionalism). Given the demeanor of these witnesses at the hearing, the significant interactions each have had with Respondent, and their evident familiarity with his reputation among colleagues in the Montgomery County, Maryland Bar Association, we credit their testimony as to his personal character and reputation.

4. John Dame worked as an associate at Feldman Jackson from September 2018 until March 2023. Tr. 54 (Dame). During his time at Feldman Jackson, he worked with Respondent on the Libertelli-Noguchi child custody and child support matters. Tr. 55-56 (Dame); *see also* Tr. 57 (Dame) (describing how he assisted Respondent in preparing for hearings, depositions, and other matters in discovery, and in communicating with Mr. Libertelli). Disciplinary Counsel investigated both Mr. Dame and Respondent for their involvement in the Libertelli-Noguchi matter

but ultimately did not file any charges against Mr. Dame. Tr. 176 (Dame).[4] Mr. Dame testified that Respondent was a good mentor and supervisor to him and "a man of integrity and honesty." Tr. 182-83 (Dame). We credit this testimony as we do the other positive testimony about Respondent's character and reputation.

B. The Libertelli-Noguchi Divorce and Custody Proceedings

5. Christopher Libertelli and Yuki Noguchi were married in 2008. Tr. 278 (Noguchi). They have two children together, born in 2009 and 2010. *Id*.; DCX 10 at 1. Following a surgery, Mr. Libertelli became addicted to opiates/opioids; subsequently he became addicted to cocaine. Tr. 280-81 (Noguchi), Tr. 680-81 (Respondent).[5]

6. Since October 2014, Ms. Noguchi and Mr. Libertelli have been parties to a divorce and child custody matter before Judge Storm in the Circuit Court for Montgomery County, Maryland. DFX 1 at 1, 13. Mr. Libertelli's drug use was a

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[4] Disciplinary Counsel asked both Respondent and Mr. Dame to respond to its initial inquiry letter and to provide information and documents. *See* Tr. 170-72. Through his counsel, Mr. Dame submitted a five-page declaration that was verified by Respondent as accurate, and Disciplinary Counsel declined to file charges against Mr. Dame. Tr. 174, 176 (Dame). He left Respondent's law firm on amicable terms in March 2023. *See* Tr. 54, 183 (Dame). Beginning in April 2023, Mr. Dame started working as in-house counsel for Rothschild Capital Partners. Tr. 54 (Dame).

[5] Mr. Libertelli also used and tested positive for marijuana, but that does not appear to have been a significant concern in any of the divorce proceedings. *See* Tr. 680 (Respondent: "I think there was a debate at the time . . . [as to] whether [marijuana was] legal or not legal in the District of Columbia."). Accordingly, references to "drugs," "drug use," and "illegal drugs" in this report and recommendation do not include marijuana.

central issue in that litigation, most notably because his drug use was a factor in deciding the issue of child custody. Tr. 425-26 (Libertelli).

7. Beginning sometime in 2016, Judge Storm required Mr. Libertelli to undergo drug testing as a condition for visits with his children. Tr. 281-83 (Noguchi); Tr. 426 (Libertelli). Mr. Libertelli was allowed more time with his children after he provided negative drug test results; by the end of 2017, he had physical custody of the children for forty percent of the time. Tr. 283, 286 (Noguchi).

8. The other terms of Ms. Noguchi's and Mr. Libertelli's divorce were governed by a Term Sheet they executed on December 1, 2017. DCX 8; Tr. 285-86 (Noguchi). The Term Sheet provided a formula for child support under which Mr. Libertelli was required to pay a fixed amount through June 1, 2019, and thereafter to pay a percentage of his annual gross employment income, recalculated annually based on his prior year's income. DCX 8 at 1-2. Judge Storm incorporated the Term Sheet into the Judgment of Absolute Divorce that was entered on January 19, 2018. DCX 10 at 1.

9. Shortly before a January 11, 2018 hearing to finalize the terms of Mr. Libertelli's and Ms. Noguchi's divorce, Ms. Noguchi's then-attorney, Hope Stafford, Esquire, determined that Mr. Libertelli had falsified drug test results when she noticed that a test result he submitted "was essentially identical to a test from another year"; she then compared additional test results and discovered that he had been "Photoshopping or doctoring them." Tr. 287 (Noguchi). Upon learning this information, Ms. Stafford immediately filed an emergency motion to modify Mr.

Libertelli's access to the children and to alter the drug testing regimen so that his test results would be submitted directly to Judge Storm. Tr. 287-89, 377-78 (Noguchi); DFX 1 at 57-58. Following these revelations and Mr. Libertelli's failure to appear at the scheduled January 11 hearing, Judge Storm suspended Mr. Libertelli's in-person access to the children and issued an emergency order granting Ms. Noguchi sole physical custody. Tr. 289 (Noguchi); Tr. 514 (Storm); DFX 1 at 58. A further status hearing was scheduled for February 13, 2018. DFX 1 at 61-62.[6]

C. Mr. Libertelli Retains Respondent as Substitute Counsel in January 2018.

10. A week after the January 11 hearing at which Mr. Libertelli failed to appear, his then-counsel, Scott Strickler, Esquire, withdrew by filing a Motion to Strike the Appearance as Counsel for the Defendant. DFX 1 at 58 (Docket entry); Tr. 290 (Noguchi); Tr. 427-28 (Libertelli) (acknowledging that Mr. Strickler and Geoff Platnick, Esquire, "claim[ed] that they had secured an opinion that required them to withdraw" and that they "stopped representing" him without filing a formal motion to withdraw). Several days later, on January 22, 2018, Respondent entered his appearance. Tr. 955-56 (Respondent); DFX 1 at 60; *see also* Tr. 540-41 (Judge

[6] Based on Mr. Libertelli's alteration of his drug test results, Judge Storm filed a complaint with the District of Columbia Bar, Tr. 522-23 (Storm), triggering an investigation by the Office of Disciplinary Counsel that resulted in *Libertelli I* (Disciplinary Docket No. 2019-D072) and ultimately to Mr. Libertelli's disbarment. Tr. 538 (Storm); *In re Libertelli*, 295 A.3d 1101 (D.C. 2023). Judge Storm did not, however, file a complaint against Mr. Libertelli or Respondent related to the present disciplinary proceeding. Tr. 538 (Storm).

Storm: "I was glad to see that [Respondent] was representing Mr. Libertelli, honestly.").

11. From the time Mr. Libertelli retained Respondent and his firm, it is evident that both Respondent and Mr. Dame were aware of and sensitive to the ethical challenges posed by their client's drug use. Tr. 884-87 (Respondent) (noting consultation with outside ethics counsel and other efforts to fulfill ethical obligations); Tr. 987 (Respondent) (describing efforts to obtain ethics advice from Stanley Reed, Esquire, and the Maryland State Bar Association's ethics hotline); Tr. 1143 (Respondent) (referring to email he sent to Mr. Libertelli referencing the ethics advice Respondent had received); Tr. 183-84 (Dame) (agreeing that Mr. Libertelli was a "difficult client" requiring that he and Respondent be "very sensitive" to ethical issues). The record reflects at least one instance where they concluded it was necessary to seek ethics advice and affirmatively correct a misrepresentation that Mr. Libertelli had made to the court. *See infra* FF 15-17.[7] Respondent attempted to manage these challenges while continuing to represent Mr. Libertelli. *See, e.g.*, Tr. 990-91, 1090-92 (Respondent).

D. Additional 2018 Custody Proceedings

12. Ahead of the February 2018 status hearing to address the revelations about Mr. Libertelli's altered drug tests, Ms. Stafford obtained copies of his test results directly from the lab he was using, by subpoena. Tr. 287-88, 291 (Noguchi);

[7] "FF" refers to the numbered Findings of Fact in this Report and Recommendation.

Tr. 957-58 (Respondent). Based on this evidence, it became clear that Mr. Libertelli had falsified most of the test results he had submitted, changing positive results to negative, changing creatinine levels (indicating that samples were diluted), and fabricating other results. Tr. 288-89, 291 (Noguchi); DCX 96 at 4; Tr. 957-58 (Respondent); Tr. 447-48 (Libertelli). On Ms. Noguchi's behalf, Ms. Stafford filed a supplement to her emergency motion to modify access and drug testing regimen and a motion to modify custody. DFX 1 at 61-62. The motion to modify access and drug testing regimen was granted at the status hearing on February 13, 2018—as a result, Mr. Libertelli was only allowed supervised visits pending an evidentiary hearing on the supplemental motion to modify custody, which was scheduled for November 2018. *See* DFX 1 at 62, 75; Tr. 957-60, 966-67 (Respondent); Tr. 289-95 (Noguchi); *see infra* FF 13-14.

13. As they began preparing for the November 2018 custody hearing, Respondent was concerned about Mr. Libertelli's history of missing his periodic urine drug test appointments. Tr. 881-82, 912-13, 965, 967-971 (Respondent). Because of this history of missed tests, Respondent advised Mr. Libertelli that he should voluntarily get a hair follicle test, which had a much longer "lookback" period—i.e. the test would be able to detect drug use in the preceding weeks to months corresponding to some of the missed urine tests; if negative, it could be presented at the hearing to support Mr. Libertelli's claim that he had not used drugs during that time. DFX 45 at 1-6; Tr. 881-83, 968-70 (Respondent). Mr. Libertelli agreed but did not provide the lab with a hair sample until November 20, 2018, six

days before the hearing, meaning that the result was not ready in time for the hearing. DFX 45 at 6-7; DCX 120 at 9; *see* DFX 1 at 75.

14. At the November 2018 hearing, Mr. Libertelli's position, which Respondent articulated, was that he had abstained from drug use since August 2018 and should therefore return to having unsupervised partial custody and visitation rights with his children. Tr. 971-74 (Respondent); *see* Tr. 64-65 (Dame); Tr. 293-95 (Noguchi). During the hearing, Mr. Libertelli disclosed that he had taken a hair follicle test and represented that it would confirm that he had not taken illegal drugs in the preceding months. *See* DCX 130 at 2; Tr. 884, 974 (Respondent); Tr. 64-65 (Dame); Tr. 294-95, 343-44 (Noguchi); Tr. 494 (Libertelli).

15. Within two days after the hearing concluded, however, Respondent received the hair follicle test results, which were positive for cocaine. DCX 121 at 1; DCX 124; DCX 125; Tr. 883, 977-78, 980-81 (Respondent). Over the next several weeks, Respondent and Mr. Dame exchanged emails with Mr. Libertelli about the results and what they would mean for the custody case. *See, e.g.*, DFX 29; DFX 31; DFX 33. Mr. Libertelli remained adamant that he had not made any false statements and at several points leveled personal attacks against his lawyers. *See, e.g.*, DFX 31 at 3 ("I'm disgusted that you would think this test results suggested I lied."); DFX 33 at 2.

16. Eventually, Respondent sought advice from Stanley Reed, who at the time also represented Mr. Libertelli in his first discipline case, *Libertelli I*. DCX 126; Tr. 884, 980-83, 985-86 (Respondent). Based on Mr. Reed's advice, Respondent

wrote Mr. Libertelli an email on December 13, 2018, explaining that he was obligated under governing ethics rules to disclose the hair follicle test results to the court and that if Mr. Libertelli did not agree, Respondent would have to withdraw:

> As you know, you tested positive for cocaine. I believe you when you tell me that you have not done cocaine since August 3, and the urine tests support this. And, both could be true, as the hair follicle test looks back 3+ months, you could have tested positive for cocaine and not have taken cocaine since August. That all being said, you testified that you took the hair follicle test and now we have the results. We have done some research and consulted with an ethics person and under our rules we need to inform the court of the test result but we cannot do that without your consent. The decision as to whether you consent to this is up to you, but if it is not disclosed and it later comes out it will look like we are hiding it and that will not sit well with Judge Storm especially given the history of this case. Because we have an ethical obligation to disclose the test, if you do not give consent to us disclosing it we will probably have to file a motion to withdraw. I really do not want to do that because I do think highly of you and have great affection for you, but I would be obligated to. This is a serious issue so please think about this and let us know your thoughts.

DFX 33 at 2; *see* Tr. 885, 986-87 (Respondent). Mr. Libertelli agreed to the disclosure. DFX 33 at 2.

17. Respondent disclosed the results of the hair follicle test in a letter sent to Judge Storm on December 18, 2018. DCX 120 at 8. The letter stated that the hair follicle test results were being provided "[i]n the interest of full transparency." DCX 120 at 8-9; *see* DFX 34 at 1-2; DFX 35 at 1-2.[8]

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[8] An earlier draft of the letter also stated that "[~~t~~]~~he results of the [November 20 hair follicle] test will provide the Court with all available information as it prepares to make its ruling~~." DCX 130 at 2 (strikethrough in original); Tr. 989-990

18. In March 2019, Judge Storm granted Ms. Noguchi sole legal custody and primary physical custody of the children and allowed Mr. Libertelli only supervised visits. Tr. 295 (Noguchi); Tr. 703, 991 (Respondent); DFX 1 at 82. Mr. Libertelli was unhappy with this result, and subsequently expressed his eagerness to establish a "track record" of negative drug tests that could be used to support a request to modify the child custody order. Tr. 433-34, 458 (Libertelli); Tr. 677, 685, 715-18, 995-97 (Respondent); *see also* Tr. 74-75, 189-192 (Dame). As Mr. Dame put it (when explaining Mr. Libertelli's decision to voluntarily resume drug testing in the summer of 2020), Mr. Libertelli

> was eager to regain custody of his children, and a lot—you know our advice to Mr. Libertelli had been twofold. One, he needed to establish a record of clean drug testing for an extended period of time, and two, he needed to exercise supervised visitation with his children on a more regular basis.

Tr. 74-75 (Dame). Notwithstanding his desire to regain custody of his children, Mr. Libertelli resisted participating in visits with them due to the requirement that they be supervised, against Respondent's advice. *See* DFX 31 at 1-2.

19. With Mr. Libertelli not having established a "track record" of supervised visits or participated in a residential drug treatment program, Respondent believed that there were no grounds to revisit the custody and visitation issue with

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(Respondent). This representation was deleted when Mr. Libertelli tested positive for cocaine in a urine test administered December 6, meaning that it would not have been accurate. *See* DCX 129 at 3; Tr. 988-990 (Respondent).

Judge Storm and rebuffed Mr. Libertelli's subsequent requests to do so. Tr. 673-680 (Respondent). Despite Mr. Libertelli's requests, Respondent also refused to file a motion to recuse Judge Storm, based on Mr. Libertelli's unsupported claim of bias. Tr. 678 (Respondent). We find Respondent's testimony as to these facts credible and consistent with the overall record in this case.

E. Renewed Litigation Over Child Support

20. At some point following the entry of the Judgment of Absolute Divorce, Mr. Libertelli stopped paying the child support agreed to in the parties' Term Sheet, Tr. 297 (Noguchi); *see* DCX 8 at 1-2, prompting Ms. Noguchi to commence renewed litigation starting around November 2019, seeking enforcement of Mr. Libertelli's child support obligations and asking Judge Storm to hold him in contempt. *See, e.g.*, DFX 1 at 90-94; Tr. 297 (Noguchi).[9] On September 30, 2020, Judge Storm entered a written order granting Ms. Noguchi's motion in part, ordering Mr. Libertelli to pay $84,657.16 in child support arrearages and approximately $20,000 in other child-related expenses, and increasing his monthly child support payment to $19,924.98 based on the parties' Term Sheet. DCX 9.

21. Shortly after Judge Storm's ruling, on October 2, 2020, Respondent, on Mr. Libertelli's behalf, moved to lower Mr. Libertelli's monthly child support

[9] Respondent testified that "over the course of the litigation, numerous judgments were entered against Mr. Libertelli . . . related to child support arrearages," and he told Mr. Libertelli: "these are judgments, you have to pay these judgments," but Mr. Libertelli "would push us off. He just wouldn't—he just wouldn't pay them." Tr. 700-01 (Respondent).

payment on the grounds that he was unable to pay due to changed financial circumstances—namely that his annual income had dropped from approximately $1.4 million to $350,000 due to a change in jobs. DCX 10; DFX 1 at 95; Tr. 706-08, 1002-03 (Respondent); Tr. 187, 407 (Dame); Tr. 544 (Storm); DCX 114 at 4. The motion also argued that the payment obligation ordered by Judge Storm "depart[ed] considerably from, and [was] well in excess of, the children's demonstrated reasonable needs," DCX 10 at 3; and that the distribution of financial responsibility for the children between Mr. Libertelli and Ms. Noguchi was unfair and in violation of Maryland law. Tr. 709-713 (Respondent); DCX 10 at 5; DCX 114 at 4; *see* DFX 1 at 95.

22. Ms. Noguchi, opposed the motion, noting that under the parties' Term Sheet, the child support payment was based on Mr. Libertelli's prior year's income (more than $1.4 million) and that the payment would reset automatically on June 1, 2021, which would take account for any change in Mr. Libertelli's income. DCX 11; Tr. 302 (Noguchi); *see also* Tr. 1001-02 (Respondent).

23. Judge Storm scheduled a hearing on the motion for February 25, 2021. DFX 1 at 98. Ms. Noguchi appeared *pro se*.[10] DFX 1 at 97-98; Tr. 303 (Noguchi).

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[10] Ms. Noguchi decided to proceed *pro se* because she could not continue paying for counsel at the rate she had been paying, in part due to Mr. Libertelli's failure to honor his child support obligations or pay the judgments entered against him, and because she "felt like I could represent myself, and I just didn't want to spend any more money on paying lawyers to fight what seemed like an interminable case." Tr. 304; *see* Tr. 303, 390, 394-95 (Noguchi); *see also* Tr. 700-02 (Respondent).

At the hearing, both parties' presentations focused on finances and expenses. *See, e.g.*, DFX 2 at 31-38, 43-73, 77-90; Tr. 84 (Dame); Tr. 302-03 (Noguchi). Mr. Libertelli testified about his income and expenses, such as his mortgage, legal fees, and car payments, which Respondent argued were relevant to his ability to pay. DFX 2 at 31-34, 37-38, 182, 205-206; Tr. 1006-08 (Respondent); *see also* Tr. 544-45 (Storm). In response, Ms. Noguchi provided evidence that Mr. Libertelli was spending money on other purchases. *See, e.g.*, DFX 2 at 43-54. Specifically, she introduced a "Plaintiff's Summary Exhibit - Mr. Libertelli's Cash Withdrawals and Transfers to Deon Jones and Jimmy Singleton (2020)" (DCX 12), which she had compiled based on records subpoenaed from Mr. Libertelli's banks and other financial providers.[11] The cash withdrawals corresponded to payments Mr. Libertelli made to people who supplied him with illegal drugs, along with other payments to "questionable websites" of a sexual nature. DCX 13 at 8; *see* DCX 12; DFX 2 at 43-54, 63-73; Tr. 545-49 (Storm). These expenditures totaled over $100,000. DCX 12; DCX 13 at 8. Ms. Noguchi argued that in light of these expenditures, Mr. Libertelli could not credibly contend that he was unable to pay his monthly child support. DFX 2 at 184, 193-195; DCX 114 at 4.

24. Respondent did not contest the accuracy of Ms. Noguchi's evidence. Tr. 724, 726, 1009 (Respondent); Tr. 302-03 (Noguchi). Instead, he argued that the

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[11] According to Ms. Noguchi, the subpoena was necessary because Mr. Libertelli's own production of financial records was incomplete. DCX 12 at 1; Tr. 302-03, 307 (Noguchi). Disciplinary Counsel does not allege that Respondent committed any violation in connection to this production.

cash withdrawals and payments were irrelevant to Mr. Libertelli's ability to pay child support, which under Maryland law was required to be determined based solely on his income and regular living expenses. Tr. 724-25, 746, 1007-10 (Respondent); DFX 2 at 45-47; *see* Tr. 374-75 (Noguchi). As Respondent explained in this disciplinary proceeding:

> Even if you spent money on those things . . . it wasn't relevant to the three arguments, that his income couldn't pay the child support amount, that the expenses—that the child support amount well exceeded the expenses of the children, that even if he was spending this amount, it didn't mean that Ms. Noguchi shouldn't also contribute towards the children's expenses.

Tr. 725 (Respondent). We credit Respondent's explanation of his reasoning based on his demeanor at the hearing and the consistency of his explanation with other evidence in the record.

25. On March 15, 2021,[12] Judge Storm issued an opinion and order denying the motion to modify child support, noting in his opinion that "while [Mr. Libertelli] claims difficulty in meeting his obligations, the evidence showed that he continues to make large cash withdrawals and payments to individuals previously identified as supplying him drugs. In 2020, those cash withdrawals and payments totaled $104,810.78." DCX 13 at 8; *see* DCX 13 at 10; DCX 114 at 4; DFX 1 at 98. Even though Judge Storm also concluded "there has been a material change in [Mr.

[12] While the Order was dated and distributed to the parties on March 15, it was not entered onto the docket until March 18, 2021. *Compare* DFX 1 at 98, *with* DCX 13 at 10-11, *and* DCX 14 at 3.

Libertelli's] circumstances," DCX 13 at 6, he found that the evidence was not "sufficiently compelling" to change Mr. Libertelli's support obligations under the Term Sheet. DCX 13 at 10.

F. Mr. Libertelli's Drug Testing History in 2020 and 2021

26. Coinciding with the renewed litigation over child support discussed above, Mr. Libertelli began taking regular drug tests again, starting in mid-2020. Tr. 991-92, 994, 1115 (Respondent); *see* DFX 47. Apart from his own desire to establish a track record of negative drug tests, *see* FF 18, Mr. Libertelli was also required to undergo bimonthly testing as a condition to practice law while *Libertelli I* remained pending in the disciplinary system. DCX 95 at 19-20 (Order, *In re Libertelli*, Board Docket No. 20-BD-050 (BPR Jan. 13, 2021)); *see also supra* p. 3; DCX 95 at 11; DCX 66 (Dec. 11, 2020, email from Mr. Libertelli: "You should also see new drug tests come through pursuant to the Board's protocol").[13]

27. Respondent and Mr. Dame located a drug testing facility, ARCpoint Labs ("ARCpoint"), in July 2020. *See* Tr. 74 (Dame); DCX 62. On August 5, 2020, Mr. Libertelli provided a urine sample to ARCpoint to test for opiates, cocaine, and

[13] Mr. Libertelli started voluntarily drug testing in advance of the disciplinary "protocol" around August 2020, although the Board on Professional Responsibility did not issue its order confirming the specific drug testing requirement until January 13, 2021. Tr. 1115 (Respondent); DCX 95 at 19-20; DCX 66 (Dec. 11, 2020, email from Mr. Libertelli attaching September 28, 2020 hair follicle test result which was negative for opiates and attaching October 5 and 15, 2020 urine tests that were negative for cocaine); *see also* Tr. 714-15 (Respondent).

other drugs. *See* DCX 63 at 2. Respondent and Mr. Dame received the results two days later directly from the lab. DCX 63; DCX 64; Tr. 994, 998-99, 1027-28 (Respondent). The sample came back negative for opiates but positive for cocaine. DCX 63 at 2. The August 5 test result was the last test Mr. Dame and Mr. Feldman received directly from ARCpoint until July 2021 (when Mr. Feldman asked Mr. Dame to obtain all of the test results directly from ARCpoint in preparation for the July hearing, *see infra* FF 41). Tr. 79 (Dame). However, Mr. Libertelli continued his drug testing, and in February 2021, Mr. Libertelli forwarded one additional urine test result to Respondent that was positive (September 28, 2020). Tr. 80-82 (Dame) (identifying email sent to Respondent by Mr. Libertelli with attached drug test result); DCX 68-69. Some point later, Respondent and Mr. Dame learned about two positive urine tests for cocaine for October 23 & 27, 2020. Tr. 83 (Dame).

28. Mr. Libertelli did not start testing negative for both opiates and cocaine consistently until December 2020. DCX 105 at 1-12; DCX 114 at 6; DCX 116 at 4. A September 28, 2020, hair follicle test with a one-year lookback was negative for opiates. DCX 93 at 2-3; Tr. 82 (Dame identifying September 28, 2020 hair follicle test that Mr. Reed emailed to Respondent). But four urine test results between August and October 2020 were positive for cocaine (two other urine tests during that same time period were negative for cocaine). Tr. 451-53 (Libertelli); Tr. 752, 1013-14, 1020-21 (Respondent); DCX 90 at 2-3 (August 4 & September 28, 2020 urine test positive for cocaine); DCX 90 at 6-7 (October 23 & 27, 2020 urine test positive for cocaine). Mr. Libertelli's full drug testing history between August 2020 and June

2021—which Respondent obtained from ARCpoint in July 2021—is summarized below:[14]

Date	Type	Result
August 5, 2020	Urine—Cocaine and Opiates	Positive for Cocaine; Negative for Opiates
September 28, 2020	Urine—Cocaine Only	Positive
September 28, 2020	**Hair Follicle**—Opiates Only	Negative
October 5, 2020	Urine—Cocaine and Opiates	Negative
October 15, 2020	Urine—Cocaine and Opiates	Negative
October 23, 2020	Urine—Cocaine and Opiates	Positive for Cocaine; Negative for Opiates
October 27, 2020	Urine—Cocaine and Opiates	Positive for Cocaine; Negative for Opiates
December 11, 2020	Urine—Cocaine and Opiates	Negative
January 11, 2021	Urine—Cocaine and Opiates	Negative
January 28, 2021	Urine—Cocaine and Opiates	Negative
February 10, 2021	Urine—Cocaine and Opiates	Negative
March 4, 2021	Urine—Cocaine and Opiates	Negative
March 24, 2021	Urine—Cocaine and Opiates	Negative
April 19, 2021	Urine—Cocaine and Opiates	Negative
April 30, 2021	Urine—Cocaine and Opiates	Negative
May 14, 2021	Urine—Cocaine and Opiates	Negative
June 2, 2021	Urine—Cocaine and Opiates	Negative
June 17, 2021	Urine—Cocaine and Opiates	Negative

DCX 90 at 2-19; DCX 93 at 2-3.

29. At least by early February 2021, both Mr. Dame and Respondent were aware that Mr. Libertelli had tested positive for cocaine on August 5, 2020 and September 28, 2020, based on the ARCpoint urine test results provided by the

[14] These test results were provided by ARCpoint directly to Mr. Dame upon his request in July 2021, *see infra* FF 41.

laboratory or Mr. Libertelli. DCX 63-64 (August 5, 2020 results from ARCpoint sent to Mr. Dame and then forwarded to Respondent); DCX 68 (September 28, 2020 results from Mr. Libertelli sent to Respondent); Tr. 79-83, 107-08 (Dame); Tr. 751-55, 999 (Respondent). The record is unclear when Respondent received copies of the positive urine test results of October 23 & 27, 2020, but he testified that he believed it was in the early months of 2021. Tr. 714 (Respondent); DCX 66 (only October 5, 2020 and October 15, 2020 results from Mr. Libertelli sent to Respondent).

G. Motion to Alter or Amend the March 2021 Child Support Decision

30. Mr. Libertelli was extremely upset with the March 2021 child support decision denying his motion to modify, especially the reference to his spending on drugs. *See* FF 25; DCX 13 at 8; Tr. 450-51 (Libertelli); Tr. 200 (Dame). He focused in particular on his lawyers' decision in the child support proceedings not to provide the court with his "clean" drug test results. DCX 14 at 2; DCX 15-17; DCX 114 at 4; Tr. 200-01, 203 (Dame); Tr. 740-41, 745-46, 1011 (Respondent). In an email on March 15, 2021, shortly after he received the court's order denying his motion to modify, he wrote to Respondent: "I BEGGED YOU GUYS TO PUT IN MY CLEAN DRUG TESTS and now I have this?" DCX 14 at 2. Respondent replied by email that based on Judge Storm's opinion, Mr. Libertelli's "drug tests would not have made any difference (in my opinion)." DCX 14 at 1.

31. At Mr. Libertelli's behest, Respondent agreed to file a motion to alter or amend ("the motion"), asking Judge Storm to reconsider its ruling on child

support and to admit new evidence. DCX 15; DCX 17; Tr. 103-06 (Dame). The motion primarily focused once again on Mr. Libertelli's changed financial circumstances and the need to take those circumstances into account under Maryland law. DCX 95. But notwithstanding Respondent's belief that it would not have made any difference, the motion also addressed Mr. Libertelli's recent drug testing history. DCX 95 at 10-12. The motion argued that because Judge Storm had admitted Ms. Noguchi's summary exhibit documenting Mr. Libertelli's alleged spending on drugs, "Defendant insists that this Court receive additional evidence concerning his progress in recovery to aid this Court in determining whether to alter or amend. . . ." DCX 95 at 10; *see also* DCX 95 at 11 ("Despite Plaintiff's continued allegation against him, Defendant is pushing forward in recovery and believes that this Court would benefit from knowledge of his current circumstances.").

32. Mr. Libertelli was "very adamant and insistent" that Respondent and Mr. Dame "provide evidence . . . of his *progress* in recovery, and his clean drug tests" to show Judge Storm that if he had previously spent "money on people, you know, in that exhibit . . . that now [he was] doing really well, and so that's not—that's not going on." Tr. 745-46 (Respondent) (emphasis added). Respondent himself continued to think Mr. Libertelli's drug testing history was not "material at all" to the issue of child support, but he "did think it had some relevance, because [his history of drug use] was mentioned in [Judge Storm's] order" and

> [t]o the extent this is even a thought in [Judge Storm's] mind still, it shouldn't be . . . because the circumstances are different. [Mr. Libertelli]'s doing much better now . . . as opposed to in the fall, where

> Ms. Noguchi presented all this evidence about this other exhibit. . . . [I]t was a very narrow point . . . .

Tr. 768-69 (Respondent).

33. The "additional evidence" Mr. Libertelli wished Judge Storm to consider consisted of a subset of his "clean" drug tests—the favorable September 28, 2020, hair follicle test for opiates and the favorable urine test results for cocaine from December 2020 on. DCX 95 at 10-11, 16-17, 23-27; *see* DCX 7 at 6, 8 (¶¶ 16, 19, 23-24); DCX 114 at 4-6; DCX 116 at 4; DCX 118 at 1-3; Tr. 93-96, 98-99, 115-16, 141-47, 152, 154, 201-02, 413-16 (Dame); Tr. 1013-14, 1019-1021, 1029, 1043-44, 1046, 1086 (Respondent). The urine test results from August through October 2020 (both favorable and unfavorable) were neither included nor otherwise disclosed. DCX 7 at 6 (¶ 16); *see* DCX 95; DCX 90 at 2-3, 6-7; DCX 114 at 4-6; Tr. 142-43, 211-12 (Dame); Tr. 752-54, 1029-1035, 1053-54 (Respondent).

34. Respondent did not believe he had any obligation to disclose information about the August through October 2020 urine tests to Ms. Noguchi or Judge Storm. Tr. 808-812, 1053-54 (Respondent). According to Respondent, "The strategy was we had a point to make to Judge Storm. We wanted to show [Mr. Libertelli]'s current situation, his *progress in recovery currently* . . . ." Tr. 810-11 (emphasis added).[15] Based on Respondent's demeanor during his testimony,

[15] As Respondent later elaborated, Mr. Libertelli's position was that "in almost every single contested action, or back and forth, [his] addiction was brought up. . . . And at every single hearing he was getting dinged for it. . . . Going to his progress in

corroborating evidence in the record (including the testimony of Mr. Dame and Mr. Libertelli, as well as Respondent's consistent representations to Disciplinary Counsel during their investigation), and his reputation for professionalism and honesty among his peers, the Hearing Committee finds this explanation—of what Respondent was trying to prove and what he believed he needed to disclose—credible. Tr. 419-421 (Dame); Tr. 457-59, 465, 498-500 (Libertelli); DCX 114 at 4-9; DCX 116 at 4-7; *see also, e.g.*, Tr. 95-96, 115-16, 142-43, 154-55, 201-02, 413-16 (Dame); Tr. 455-56, 462-64 (Libertelli); Tr. 523, 538 (Storm); FF 3-4.

35. The motion to alter or amend was drafted by both Respondent and Mr. Dame, although Respondent had the final say on its contents, for which he was ultimately responsible. Tr. 96, 116, 142-43 (Dame); Tr. 1021-22 (Respondent); DCX 20-22; DCX 117 at 3. Mr. Dame's account of the strategic thinking underlying inclusion of Mr. Libertelli's more recent "clean" test results was similar to Respondent's. *See, e.g.*, Tr. 95-96, 115-16, 141-43, 152, 154, 201-02, 413-16, 419 (Dame). According to Mr. Dame:

> [T]he strategy was largely motivated by Mr. Libertelli's desire to introduce clean drug tests [and] trying to manage that request in an ethical manner. . . . [T]he reasoning for introducing them was to partially rebut Ms. Noguchi's exhibit, summary exhibit, having to do with the cash withdrawals and Judge Storm's response thereto in his opinion.

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recovery, judge, don't hold this against him this time. He's making progress, don't hold it against him . . . ." Tr. 813-15 (Respondent).

Tr. 203 (Dame). We credit Mr. Dame's testimony, which, as noted, is consistent with that of Respondent. *See infra* FF 52.

36. Mr. Libertelli was involved in the drafting of the motion, proposing revisions, asking questions, and making extensive comments and suggestions. *See* DCX 24-25; DCX 27; DCX 35; DCX 40-41; DCX 43; DCX 48-49; Tr. 1021-22 (Respondent). On March 23, 2021, Respondent sent him a draft. DCX 22; *see* Tr. 1021 (Respondent). While the motion was supposed to mention only the recent clean test results, Tr. 95, 115-16 (Dame), the initial drafts cited the "September, October, and December 2020" urine tests and hair follicle test together as a single exhibit. *Compare* DCX 20 at 8-9 (Mr. Dame's first draft) *with* DCX 21 at 10 (Respondent's edits to the first draft); *see also* DCX 22 at 12; DCX 31 at 12; DCX 40 at 13-26 (showing Mr. Libertelli's edits to the relevant paragraph). The initial drafts incorrectly said that these tests all "found no evidence of either opiate or cocaine use." DCX 22 at 12 (¶ 29); DCX 31 at 12 (¶ 29); *see infra* FF 37. In response, Mr. Libertelli asked in a written comment, "Why are we putting these in. – there are false positive [sic] in this testing!" DCX 40 at 13 (referring to the September through October 2020 urine tests).[16]

37. In response, Respondent and Mr. Dame removed all references to both the positive and negative cocaine urine tests from August to October 2020, but left

[16] Respondent never adopted or accepted Mr. Libertelli's unsupported claim that some of the four positive cocaine urine test results during August to October 2020 were "false" positives. Tr. 776-77, 1111 (Respondent).

in the reference to the September 2020 hair follicle test that was negative for opiates. DCX 46 at 13-14 (showing edits); *see* DCX 59 at 16-17; DCX 95 at 10-11, 15-17; Tr. 210-12 (Dame); Tr. 908-09, 1113 (Respondent). The hair follicle test for opiates was attached as Exhibit A, and five negative urine test results for cocaine were attached as Exhibit C (urine specimens collected on January 11, 2021, January 28, 2021, February 10, 2021, March 4, 2021, March 24, 2021). DCX 95 at 15-17, 22-27.[17] Respondent and Mr. Dame edited the final text of the motion as follows:

> Despite being under no obligation to do so, Defendant submitted to drug tests on more than one occasion over the past year. ~~in September, October, and December 2020. *See* **Exhibit B**.~~ Of particular significance, on September 30 [sic], 2020, Defendant submitted himself for a hair follicle test with a twelve (12) month look-back. This test found no evidence of Defendant's use of fentanyl or numerous other opiates. *See* **Exhibit A**. ~~The other tests mentioned herein, which were urine based, found no evidence of either opiate or cocaine use.~~ Defendant has not used opiates since January 7, 2019.

Compare DCX 22 at 12 (¶ 29) *with* DCX 95 at 10-11 (¶ 32) (additions underlined; deletions in strikethrough) (bold emphasis in original); *see also* DCX 46 at 13-14; DCX 59 at 16-17. Mr. Libertelli had suggested extensive additional edits to this portion of the motion, including a representation that the hair follicle test actually had an "18 month lookback" and was consistent with "Defendant's position that he stopped using opiates on January 7th, 2019 at 7:37 p.m." DCX 40 at 13. Respondent

[17] Mr. Libertelli's December 11, 2020 negative urine test was not included in Exhibit C, but ARCpoint provided that test result to Mr. Dame in July 2021, and it was introduced into evidence at the hearing (along with additional urine test results collected after the motion was filed) as part of Exhibit 1. *See infra* FF 41.

and Mr. Dame rejected virtually all of these other changes. *Compare* DCX 40 at 13 *with* DCX 46 at 13-14 *and* DCX 95 at 10-11 (final version of the motion).

38. Respondent, however, did ultimately accept Mr. Libertelli's suggested statement that he had "not used opiates since January 7, 2019." DCX 95 at 11; *see* DCX 49 at 1; DCX 55. Respondent initially advised Mr. Libertelli against including the statement because there was no test to support it (notwithstanding Mr. Libertelli's claim that the September 2020 hair follicle test had a longer lookback). DCX 36; DCX 53 at 1 (email from Respondent to Mr. Libertelli: "We want to provide Judge Storm with information that he will view as credible. . . . the important thing is to provide Judge Storm clear, uncontroverted evidence . . . ."). However, Mr. Libertelli refused to authorize the filing of the motion without it, risking that the motion would not be filed by the March 29, 2021 deadline—and so Respondent acquiesced.[18] DCX 22 at 1; DCX 55-57; DCX 95 at 11; Tr. 134-35, 214-15 (Dame); Tr. 790-93, 1022-23 (Respondent). As he explained at this disciplinary hearing:

> I didn't think Judge Storm would find it credible. But I didn't think in any way putting that sentence in there was unethical. It wasn't even a question of ethics. It was a question of Judge Storm is not going to believe this, because we don't have an exhibit to show this.

Tr. 793-94 (Respondent); *see also* DCX 58 at 1 (email from Respondent to Mr. Libertelli: "Hi Chris, We will put it in but it is against our advice for the reasons

[18] Respondent himself drove to the courthouse in Rockville with the final motion, which he filed on March 29, 2021, just minutes before the 5:00 p.m. filing deadline. Tr. 216 (Dame); *see* DCX 95 at 1; DFX 1 at 98-99.

stated. The consequences of not filing this on time are significant, regardless of whether that is in there."). Once again, based on Respondent's demeanor at the hearing, the consistency of his testimony with other evidence in the record, and his reputation for honesty and professionalism among his peers, we find this statement as to his thinking credible. *See, e.g.*, FF 3-4.

39. The bulk of the motion focuses on Respondent's primary argument, which was that Judge Storm's child support award was not consistent with governing Maryland law concerning the best interests of the children. *See* DCX 95 at 2-10 (¶¶ 6-29). Paragraphs 31 to 35 state the following in regard to Respondent's argument that Judge Storm "Should Receive Additional Evidence Concerning Defendant's Progress in his Recovery":

> 31. Due to this Court's admission of the summary exhibits over Defendant's objections, and the statements in this Court's opinion, Defendant insists that this Court receive additional evidence concerning his progress in recovery to aid this Court in determining whether to alter or amend its Opinion [] and Order [] pursuant to Maryland Rule 2-534.
>
> 32. Despite being under no obligation to do so, Defendant submitted to drug tests on more than one occasion over the past year. Of particular significance, on September 30, 2020, Defendant submitted himself for a hair follicle test with a twelve (12) month look-back. This test found no evidence of Defendant's use of fentanyl or numerous other opiates. *See* **Exhibit A**, Defendant has not used opiates since January 7, 2019.
>
> 33. On January 13, 2021, as part of his case involving the District of Columbia Board on Professional Responsibility, Defendant agreed to submit to bi-monthly drug testing for opioids, cocaine, and other drugs. *See* **Exhibit B**. Defendant has since tested negative for opiates, cocaine, and all other illegal drugs on the panel on January 28, February 10, March 4, and March 24. See **Exhibit C**.

> 34. As this Court is aware, Defendant's proceedings before the District of Columbia Board on Professional Responsibility involve serious allegations against him and pose a significant threat to his license to practice law and his ability to earn income.
>
> 35. Defendant requests that this Court receive **Exhibits A, B, and C** into evidence as part of its reconsideration of Defendant's Verified Motion to Modify Child Support []. Despite Plaintiff's continued allegations against him, Defendant is pushing forward in recovery and believes that this Court would benefit from knowledge of his current circumstances.

DCX 95 at 10-11 (footnote omitted).[19]

Exhibit A to the motion was the single hair follicle test provided by Mr. Reed, counsel for Mr. Libertelli in *Libertelli I*:

Date	Type	Result
September 28, 2020	**Hair Follicle**—Opiates Only	Negative

[19] The motion also accuses Ms. Noguchi of using Mr. Libertelli's "substance use disorder as a cudgel" and a "weapon." DCX 95 at 11(¶ 36). It argues that her "new allegations regarding [Mr. Libertelli's] cash withdrawals or supposedly illicit behavior" were based on her "sense of superiority, virtue-signaling, and desire to shame" him and claims that Mr. Libertelli "has repeatedly acknowledged his past errors and is currently addressing the consequences of his actions" with the Board on Professional Responsibility. *Id.* at 11-12. It goes on to request attorneys' fees and costs for the work associated with bringing the motion to alter or amend. *Id.* at 13 (¶ 42). Ms. Noguchi opposed the motion to alter or amend, including Respondent's request for Judge Storm to receive additional evidence, given the unreliability of the drug test results, and the request for attorney's fees. DCX 96 at 3-5; Tr. 310 (Noguchi). In her opposition, she argued the test results submitted were unreliable because they were not given randomly. DCX 96 at 4. She also filed a motion for contempt or enforcement of the child support previously ordered by Judge Storm. Tr. 311 (Noguchi); DFX 1 at 99.

Exhibit C was the following five urine tests from 2021:

Date	Type	Result
January 11, 2021	Urine—Cocaine and Opiates	Negative
January 28, 2021	Urine—Cocaine and Opiates	Negative
February 10, 2021	Urine—Cocaine and Opiates	Negative
March 4, 2021	Urine—Cocaine and Opiates	Negative
March 24, 2021	Urine—Cocaine and Opiates	Negative

DCX 95 at 15-17 (Exhibit A), 22-27 (Exhibit C).

H. The July 15, 2021 Hearing

40. The court scheduled a hearing on the motion to alter or amend and a contempt motion filed by Ms. Noguchi for July 15, 2021 ("the hearing"). DFX 1 at 100-01. In preparation for the hearing, Respondent and Mr. Dame confirmed with Mr. Libertelli their intent to offer his September 2020 hair follicle test and his recent "clean drug tests" from December 2020 onward into evidence. DCX 97 at 1; DCX 102 at 1-2; *see* Tr. 151-52, 403-04 (Dame); Tr. 832-33 (Respondent). They confirmed this strategy for the hearing over the phone, in emails, and when they rehearsed Mr. Libertelli's testimony shortly before the hearing. DCX 99; DCX 102; DCX 106; DCX 108; DFX 18; Tr. 148-49 (Dame); Tr. 833-36, 1046-48 (Respondent); *see also* DCX 7 at 6-8 (¶¶ 19, 23).

41. Ahead of the hearing, Respondent asked Mr. Dame to obtain copies of Mr. Libertelli's updated and full testing history *directly* from ARCpoint. Tr. 1031 (Respondent). On July 8, 2021 at 7:52 p.m., the Director of Laboratory Operations, Dimitrina Barzachka, emailed Mr. Dame 17 urine tests from specimens taken from August 5, 2020 to June 17, 2021 (which included the previously mentioned 4

positive tests for cocaine during August to October 2020). *Id*.; DCX 90 at 1-19 (email from Ms. Barzachka to Mr. Dame with ShareFile attachments). Mr. Dame had requested that the lab fill out a form that he provided as an attachment titled "Certification of Custodian of Records or Other Qualified Individual"), and Ms. Barzachka included the completed and signed form in the emailed test results. *See* Tr. 145 (Dame); DCX 89 at 1, 4; DCX 90 at 20. Because Mr. Libertelli's hair follicle test from September 2020 was not included, the next day at 12:35 p.m, Mr. Dame wrote an email to Ms. Barzachka that noted the omission and asked that she send that result as well; Ms. Barzachka sent the hair follicle test result a few minutes later at 12:44 p.m. on July 9. Tr. 147-48 (Dame); DCX 92 at 1, DCX 93 at 1. Given the email communication history, Mr. Dame believed that the lab "had inadvertently not included the hair follicle test" and therefore that the lab's business record certification was intended to cover the hair follicle test results. *See* DCX 7 at 7; *see also* Tr. 234 (Dame); Tr. 843 (Respondent). Respondent did not actually learn from Mr. Dame until January 2022, when they were preparing their joint response to Disciplinary Counsel's discipline inquiry, that the September 2020 hair follicle test had been provided by the lab one day after the urine test results were sent. DCX 111 at 23 (Respondent recounting his "understanding" that all the drug tests that were ultimately offered as evidence "were reviewed and received by someone at the drug testing agency and they provided a signed affidavit to us saying that these are the records"). Based on Respondent's demeanor at the hearing and the lack of any conflicting record evidence, we find this representation to be credible.

42. After obtaining all of the test results from ARCpoint Lab, Mr. Dame, at Respondent's direction, compiled a selection (from December 2020 on) of the results as "Exhibit 1" for the hearing. Exhibit 1 included the September 2020 hair follicle test result provided in Exhibit A to the motion, *see* DCX 105 at 13-14, and a collection of negative urine tests from December 2020 on, including the test results that were part of Exhibit C to the motion and additional results that were obtained after the motion had been filed, *see* DCX 105 at 1-12 (test results for urine specimens collected on December 11, 2020; January 11, 2021, January 28, 2021, February 10, 2021, March 4, 2021, March 24, 2021, April 19, 2021; April 30, 2021, May 14, 2021, June 2, 2021, June 17, 2021). *See also* Tr. 1031-35 (Respondent); Tr. 154-55 (Dame); FF 39. Once again, urine tests from before December 2020—both positive and negative—were omitted. *See* DCX 90 at 2-7; DCX 114 at 7. The tests included in Exhibit 1 are listed below:

Date	Type	Result
September 28, 2020	**Hair Follicle**—Opiates Only	Negative
December 11, 2020	Urine—Cocaine and Opiates	Negative
January 11, 2021	Urine—Cocaine and Opiates	Negative
January 28, 2021	Urine—Cocaine and Opiates	Negative
February 10, 2021	Urine—Cocaine and Opiates	Negative
March 4, 2021	Urine—Cocaine and Opiates	Negative
March 24, 2021	Urine—Cocaine and Opiates	Negative
April 19, 2021	Urine—Cocaine and Opiates	Negative
April 30, 2021	Urine—Cocaine and Opiates	Negative
May 14, 2021	Urine—Cocaine and Opiates	Negative
June 2, 2021	Urine—Cocaine and Opiates	Negative
June 17, 2021	Urine—Cocaine and Opiates	Negative

DCX 105 at 1-14. At the end of the exhibit, Mr. Dame attached the signed certification as the last page of the exhibit. *Id*. at 15; Tr. 404-06 (Dame); Tr. 1033-35, 1061-62 (Respondent). Respondent acknowledged that he was ultimately responsible for the contents of Exhibit 1, which he reviewed and approved before Mr. Dame sent it and the other hearing exhibits to Mr. Libertelli. DCX 118 at 3; Tr. 154-55, 406 (Dame); Tr. 1046 (Respondent); *see* DCX 103; DCX 106; DCX 117 at 3.[20]

43. On July 14, 2021, Mr. Dame emailed Mr. Libertelli a draft script for the hearing on the motion to alter or amend, which included guidance about how to describe the test results in Exhibit 1, as well as how to respond if questioned about the other hearing exhibits concerning Mr. Libertelli's income and expenses. DCX 106 at 1-7; DFX 24; Tr. 158, 416 (Dame); Tr. 1046-47 (Respondent); *supra* note 20. Respondent and Mr. Dame went over the script and strategy with Mr. Libertelli shortly before the hearing, including how they would present the December 2020 and later drug test results comprising Exhibit 1. Tr. 833-36 (Respondent). While there was no disclosure of the earlier positive and negative urine test results from August to October 2020, neither Respondent nor Mr. Dame told Mr. Libertelli that if he was asked questions about his positive drug tests that he

[20] Exhibit 1 was one of ten exhibits offered at the hearing. DCX 104 at 1. (The other exhibits concerned visitation fees, attorneys' fees, expert fees, Mr. Libertelli's financial documents, and IRS Notice to Mr. Libertelli, Ms. Noguchi's Discovery Responses, and Mr. Libertelli's Response to Request for Admissions).

should lie or otherwise represent that the tests in Exhibit 1 were "all the drug tests he had taken from September of 2020 on." Tr. 227-28 (Dame).[21] Given the consistency between their testimony and their respective demeanors at this hearing, we credit both Respondent's and Mr. Dame's accounts of their preparation of Mr. Libertelli for the July 15 hearing credible.

44. The day before the July 15 hearing, Respondent exchanged exhibits with Ms. Noguchi. Tr. 153-54 (Dame); Tr. 315 (Noguchi); DCX 100 at 2-3; *see* DCX 109. On the exhibit list, which was created by a legal assistant in Respondent's office, Tr. 156, 221-22 (Dame); Tr. 851 (Respondent), Exhibit 1 is labeled "Defendant's Drug Testing History," without a notation specifying that the urine tests which were from December 11, 2020 to June 17, 2021 or that the hair follicle opiate test had been taken in September 2020. DCX 104; *see* Tr. 318 (Noguchi).

45. Ms. Noguchi, in fact, had in her possession the earlier, pre-December 2020 urine drug test results from ARCpoint, which she did not disclose to Respondent or Mr. Dame. Ms. Noguchi had watched Mr. Libertelli's disciplinary hearing in his separate disciplinary matter, *Libertelli I,* which was available to the

[21] The script instructs Mr. Libertelli to identify the exhibit as "my drug tests with Arc Point Labs [sic]." DCX 106 at 2. There is no qualifier to indicate the existence of other tests not included in the exhibit because Respondent concluded he had no duty to disclose the omitted tests. *Id*.; DCX 7 at 8 (¶ 24); DCX 116 at 5; Tr. 808-09, 1062, 1071 (Respondent). On July 12, 2021, Mr. Dame also reminded Mr. Libertelli of their "continuing obligation to update discovery, particularly your bank statements, which are at the heart of the matter." DFX 20 at 1.

public for viewing on the Board on Professional Responsibility YouTube hearing channel. Tr. 321-22 (Noguchi); *see supra* note 6. Ms. Stafford, who testified at the *Libertelli I* hearing, obtained copies of the September and October 2020 positive urine tests for cocaine and provided them to Ms. Noguchi. Tr. 323, 333, 355-56, 365-67 (Noguchi).

46. The July 15, 2021 hearing on the motion to alter or amend began with Respondent's arguments regarding Mr. Libertelli's "material change in circumstances"—i.e. that his salary had decreased from over a million dollars to $350,000 per year. DCX 111 at 8; Tr. 544 (Storm). In arguing why this justified a modification of child support notwithstanding the Term Sheet, Respondent directed the court to relevant case law and reminded Judge Storm of his earlier acknowledgement that $20,000 a month in child support appeared to be greater than the reasonable needs of the children. DCX 111 at 9-21. As Judge Storm explained to the Hearing Committee:

> [M]y recollection was that one of the issues in terms of [Mr. Libertelli's] ability to or inability to pay was in part tied to the way that he was receiving stock options or some kind of benefit that was being reflected I think on a W-2 but wasn't money that he was actually receiving.

Tr. 544-45 (Storm).

47. Toward the end of his opening argument, Respondent addressed Ms. Noguchi's prior summary chart related to Mr. Libertelli's spending on drugs, *see* FF 23, and said "this is part of the reason why we want to introduce a drug test" to the extent "there is any reliance whatsoever Your Honor that he was spending his

money on illicit drugs." DCX 111 at 22-23; *see also id*. at 24, 37 (arguing that the additional drug tests should be admitted to rebut inferences Ms. Noguchi had asked the court to draw and should be considered as part of the "ultimate decision in this case").

48. During her opening argument, Ms. Noguchi urged Judge Storm to reaffirm his prior child support order, arguing that the child support award was appropriate given Mr. Libertelli's income for the preceding five years and the provisions of the Term Sheet. DCX 111 at 38-39. She went on to agree with Respondent that the child support award was not dependent on whether or not Mr. Libertelli was using drugs. *See* DCX 111 at 39-41; Tr. 319-320, 336-37 (Noguchi). Her argument was that Judge Storm should consider Mr. Libertelli's spending on *all* discretionary expenses, and therefore that the drug tests were irrelevant:

> The Court did not make child support contingent on whether he is actively an addict or not. . . He identified $17,000 spent on third party payment websites over a four month period [sic] is primarily payment for guitar lessons. This Court's decision did not hinge on the question of whether he is or is not still using drugs. Instead, the Court relied on the fact that he chose to spend considerable resources on other things instead of child support. . . . While I believe the drug tests introduced [Exhibit 1] are irrelevant to child support, I will note the veracity of his representations [regarding his drug use] to this Court has been an issue from the very start of this case.

DCX 111 at 39-40. She then focused her arguments on her contempt motion and Mr. Libertelli's failure to pay the previously ordered child support amounts. *See id*. at 41-42.

49. Following Ms. Noguchi's opening, Respondent moved to admit his exhibits. In order to move in Exhibit 1, Respondent agreed to put Mr. Libertelli on the stand to allow Ms. Noguchi to cross-examine him. DCX 111 at 36-37. During his direct examination of Mr. Libertelli, Respondent had him review and identify the drug test results contained in Exhibit 1. DCX 111 at 44. Mr. Libertelli identified the documents as "drug tests that I took at FarPoint [sic] Labs." *Id*. Judge Storm said he would not admit the results without a certification, which Respondent then had Mr. Libertelli identify as the last page of the exhibit. *Id*. at 44-45.[22] Based on these representations, Judge Storm conditionally admitted the exhibit. *Id*. at 45.

50. Respondent continued asking Mr. Libertelli questions mostly from their script, starting with identifying and describing the hair follicle test taken on September 28, 2020, and then moving to the urine test in April 2021 that tested for a larger panel of drugs. *Compare* DCX 111 at 46-47, *with* DCX 106 at 2, *and* DCX 105 at 8. Respondent asked Mr. Libertelli why it was important to him to have the recent results admitted as evidence. Mr. Libertelli responded it was his "biggest project" and that he "believe[d] that it is necessary to restore custody to me so I can see my boys." DCX 111 at 47. Because Mr. Libertelli's response deviated from the previously-agreed upon script, Respondent redirected him with a leading question:

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[22] When presenting Judge Storm with the exhibit binder, Respondent represented that it was their practice to get the results directly from the drug testing center because of "what happened in the past." DCX 111 at 23-24. Judge Storm replied that the certification addressed "my one concern" regarding reliability but the other issue "is whether I want to receive additional evidence." *Id*. at 24.

"Do you believe it goes to the issue also of any inference that you were doing drugs during the relevant period of time?" Mr. Libertelli then responded: "Yes. I have worked very hard for these tests and I feel the Court should consider them in the context of the allegations that I was spending money on drugs. Sorry." DCX 111 at 47-48; *see* FF 35-38, 43.[23]

51. In response to Disciplinary Counsel's inquiry letter during its investigation, Respondent represented that his reference to "the relevant period of time" in questioning Mr. Libertelli "was meant to refer the witness to Exhibit 1, and the time periods covered by the tests therein." DCX 116 at 5 (February 4, 2022 letter from Respondent to the Office of Disciplinary Counsel). In other words, it was meant to refer to the time period in which Mr. Libertelli had demonstrably not used opiates (September 2019 through September 2020) and the period in which he had demonstrably not used cocaine (December 11, 2020, through the date of the hearing, July 21, 2021). *See id*.; *see also* FF 31-33. The fact that "the relevant time period" actually refers to two separate time periods is admittedly confusing, but there is no evidence in the record suggesting that Respondent meant something else by this phrase or other reason for us to doubt Respondent's candor to Disciplinary Counsel. Based on this lack of conflicting evidence, Respondent's overall demeanor at the hearing, and his reputation for honesty and professionalism among his peers, we

[23] The word "Sorry" appears to have been Mr. Libertelli's apology to Respondent for referencing the child custody dispute, which was not the subject of the hearing. Tr. 855-56 (Respondent).

credit Respondent's explanation of what he meant by this reference. *See, e.g.*, FF 3-4.

52. In presenting the drug test results and questioning Mr. Libertelli about them, Respondent made no reference to the existence of positive cocaine test results in September and October 2020. Tr. 1062, 1071 (Respondent); Tr. 318, 330 (Noguchi); *see* DCX 111 at 22-37, 43-52. As Respondent later put it to Disciplinary Counsel:

> [B]y introducing the tests in Exhibit 1, our intent was to rebut, in part, Judge Storm's finding suggesting that he believed Mr. Libertelli was continuing to spend large sums of money on drugs. To the extent that [other] drug tests did not rebut that finding, we did not introduce them. We made no representation—express or implied—about the relevance of any drug tests, other than those we submitted.

DCX 116 at 5; *see also* DCX 7 at 7 (¶¶ 20-21); Tr. 1043-44 (Respondent). We again credit Respondent's explanation as to the intent of his presentation based on his demeanor, the overall consistency of his testimony and other representations, and his general reputation for honesty and professionalism. *See, e.g.*, FF 3-4, 35.

53. When it came time for Ms. Noguchi to cross-examine Mr. Libertelli at the July 15 hearing, she asked him whether he had "produce[d] all of the drug tests that were available to you in the timeframe that you --" at which point Mr. Libertelli interrupted before she could finish and answered: "*Yes. These are all of the tests that I took in the timeframe covering the one year*." DCX 111 at 54 (emphasis added). This statement was false. Tr. 1119 (Respondent). Mr. Libertelli knew that the exhibit omitted four positive urine test results, from before December 2020 (as evidenced

by his editing of the draft motion). Tr. 874, 1064, 1069-70, 1084 (Respondent); Tr. 163-64, 167 (Dame); DCX 118 at 4-5; *see also* FF 36, 43. Upon hearing Mr. Libertelli's incorrect statement, Respondent understood that he might need to address the issue during his redirect of Mr. Libertelli, but did not think he was obligated to interrupt Ms. Noguchi's cross-examination: "[A]t that point in time, I needed to see what happened with the rest of the cross-examination. And so that would be—the decision[-]making point at the end of the cross-examination, whether I had to do any redirect to clear that up." Tr. 1120 (Respondent). Again, based on Respondent's demeanor at the hearing, the lack of any conflicting evidence in the record, and his overall reputation for honesty and professionalism, we credit Respondent's testimony regarding his state of mind at that particular moment. *See, e.g.*, FF 3-4.

54. Ms. Noguchi, in fact, did confront Mr. Libertelli with the positive urine tests he took on September 28, 2020, October 23, 2020, and October 27, 2020, which she had obtained via the disciplinary hearing in *Libertelli I* (Disciplinary Docket No. 2019-D072). DCX 111 at 54-56; Tr. 326, 328 (Noguchi).[24] Respondent requested to see the tests and later asked where she had obtained them, DCX 111 at 54-55; Tr. 328

[24] At the hearing in this disciplinary matter, Ms. Noguchi testified that Respondent "appeared panicked" when she confronted Mr. Libertelli with his positive test results. Tr. 326 (Noguchi). We have no reason to question that this was her honest recollection, and it does appear that the substance of her cross-examination and Mr. Libertelli's false statement were unexpected. *See* Tr. 164 (Dame) (noting that he and Respondent had not expected Ms. Noguchi to produce these earlier test results).

(Noguchi), but made no objection to their use. *See* DCX 111 at 57. Ms. Noguchi asked Mr. Libertelli if the September and October 2020 drug test results showing positive results for cocaine were included in his motion to alter or amend. *Id*. at 56. Mr. Libertelli responded that he had "been testing for eight years. There are many tests that are not included in this docket." *Id*. He added: "The tests that were in the September/October period are not included in the motion to alter or amend because [Exhibit 1] was those tests were *after* I stopped using drugs." *Id*. (emphasis added). Mr. Libertelli also attempted to distinguish tests he submitted in his attorney discipline case with tests submitted for the child support case; "In the DC Bar case [Disciplinary Docket No. 2019-D072], we took the tests from September 2020 to the present and put them all in the docket. That's how you obtained access to them." DCX 111 at 57.

55. Ms. Noguchi then concluded her cross examination:

> Ms. NOGUCHI: Your Honor, I would l[ike] to just submit. Request that the Court take judicial notice that these [September and October 2020 drug tests] were not submitted as part of the motion to alter or amend.
>
> THE COURT: All right. I think that's –
>
> MS. NOGUCHI: And they were omitted from there.
>
> THE COURT: I think that is apparent from the question.

Id. Respondent did not ask any further questions of Mr. Libertelli on the motion to alter or amend, and Judge Storm took a recess before reconvening to address Ms. Noguchi's contempt motion.

56. Respondent believed no redirect examination of Mr. Libertelli was necessary after Ms. Noguchi's cross-examination because

> through Ms. Noguchi's questions and Mr. Libertelli's answers, I believe that it was cleared up. . . . it was clear, I think, to the Court, and it was clear to me that not all of the drug tests he referred to here comprised Exhibit 1. And he clarified . . . that certain tests were included and certain tests were tests were not included, and he gave the reason why.
>
> Q. What obligation did you have to do anything more at that point, as you understood it?
>
> A. As I understood, at that point, because of his testimony, and in my mind, because of Judge Storm's comments at the end that he understood what was going on, I didn't feel I had any obligation to clear anything up, because the evidence was in and it was already clear. And I believe the judge understood what had happened, the nature of the testimony, the point Ms. Noguchi was making and what Mr. Libertelli said and how he answered his questions.

Tr. 1120-21 (Respondent); *see also* DCX 118 at 4 (¶ 16). We credit this explanation as to Respondent's contemporaneous thinking.

57. Upon reconvening to address the contempt motion, Mr. Libertelli returned to the stand and Ms. Noguchi examined him using the nine additional exhibits that Respondent had included in the exhibit binder. *See* DCX 111 at 59-64. In her closing, Ms. Noguchi again argued that the drug test results were irrelevant to the amount of child support Mr. Libertelli should pay but they were relevant to his "ongoing lack of credibility." DCX 111 at 91. Ms. Noguchi argued that his omission of the earlier positive tests in September and October 2020 "deepen[ed] his extraordinary history of deception." *Id*. at 91-92. Respondent's closing focused

entirely on other issues; he did not respond to Ms. Noguchi's assertions about his client's credibility, nor did Judge Storm ask Respondent to do so. *See id*. at 92-101.

58. At the end of the hearing, Mr. Libertelli told Respondent he wanted to address the court. Tr. 869-70 (Respondent); *see* Tr. 166 (Dame); DCX 111 at 101. Respondent advised him not to say anything more, Tr. 869-870 (Respondent), but after Mr. Libertelli insisted, Respondent asked the court to "indulge" Mr. Libertelli. DCX 111 at 101. Mr. Libertelli then proceeded to make the following statement:

> Ms. Noguchi suggested that (unintelligible) disclose a few positive drug tests were indication of my lack of transparency or honesty. And I want the Court to understand in the DC [attorney discipline] bar case it was my decision to disclose those tests. I disclosed them all [in the disciplinary proceeding] so that the board would have the benefit of those tests. I love my lawyers. They made a mistake in not disclosing them here. I don't think that mistake should be attributed to me.

Id. When Judge Storm asked Ms. Noguchi if she had anything further, she responded: "I mean I don't know if you're suggesting that his attorneys are suborning perjury," to which Respondent replied in open court: "So he testified to what this test represented" and later "I don't believe he [sic] suborned." *Id*. at 102. Judge Storm responded: "I understand the testimony was what it was" and the hearing concluded. *Id*. In his testimony to the Hearing Committee, Judge Storm could not remember if he had a contemporaneous impression of Mr. Libertelli's statement, which he attributed to the fact that "the issue of the drug test just was not a major concern of mine." Tr. 565 (Storm). Judge Storm had decided to give little weight to drug testing due to Mr. Libertelli's record of falsification. *See, e.g*., FF 9, 12; *see infra* FF 61 (Judge Storm explaining that the probative value of the drug tests

was "minimal" and "not a material consideration" in the court's decision on the motion to alter or amend).

59. Respondent testified that while he did not think Mr. Libertelli's statement about his attorneys making "a mistake" that should not be "attributed to" him was accurate, he thought it was intended to convey Mr. Libertelli's opinion: "I thought [Mr. Libertelli] was expressing to the Court that he really disagreed with our strategy, that we should have picked a different strategy." Tr. 1084 (Respondent).[25] When asked why he did not contradict this representation in open court, Respondent explained to the Hearing Committee:

> I did think that it was [Mr. Libertelli's] opinion of things. I didn't think it was a well-informed opinion, but it put me in the position to argue with my client in front of Judge Storm relating to attorney-client privileged information. And I also thought, in sitting there, that Judge Storm, given the history of this case, given Chris [Libertelli]'s actions in this case, took it for what it was, just Chris [Libertelli] sort of going off on a rant about something that wasn't having anything to do with what actually happened during the trial. And I didn't do anything. I didn't argue with my client in front of [Judge Storm]. I didn't say I have to take a moment to figure out my attorney-client privileged responsibilities. I used my judgment, and what I thought Judge Storm was interpreting it as, and just said this is Chris [Libertelli]'s opinion, I'm not going to do anything. That's what I did at the time, in the moment.

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[25] Mr. Dame likewise testified that at the time of the proceeding, he was not "100 percent sure" that Mr. Libertelli's statement—that the decision not to include the September and October 2020 urine tests "should not be attributed to me" –was false, although once Mr. Dame reviewed the record, including Mr. Libertelli's heavy editing of the motion to reconsider, Mr. Dame realized the statement was false. Tr. 167-68, 228-232 (Dame).

Tr. 872. When asked at the hearing if he believed at the time that he had an ethical obligation to address Mr. Libertelli's statement, Respondent answered:

> I don't think so. I mean the evidence was the evidence. He testified in direct, he testified in cross, all the evidence was in. It was apparent to me that Judge Storm understood the evidence. I didn't know at the time he didn't think it was material. I didn't think that part was material to the ultimate issue. It was concerning to me, of course, that he stood up and said that, and I didn't think it was accurate. But I don't think I had any ethical obligation at the time to stand up and tell Judge Strom all of the behind-the-scenes stuff as to what happened and what I think his knowledge was, or even say, Judge Storm, that's inaccurate you heard him testify. I didn't think it was appropriate. I wasn't ethically required to almost cross-examine my own client right there at the time to prove what he had said, which was just off – and I think Judge Storm understood that.

Tr. 872-73 (Respondent); *see also* Tr. 1087 (Respondent: "I chose to not argue with my client in front of the judge."). Respondent testified consistently during direct and cross-examination on this point, and the Hearing Committee finds his testimony credible as to what he believed his ethical obligations were and what he was thinking at the time.

60. Respondent was nevertheless "upset" by Mr. Libertelli's comment to Judge Storm because "he intentionally or not intentionally threw me and John [Dame] under the bus," and after the hearing he told Mr. Libertelli that what he had said was "entirely inappropriate" and "not true." Tr. 874 (Respondent). Respondent continued to think that Mr. Libertelli's real issue was that he was upset that the "strategy" he and his lawyers had agreed on (to present his consistently negative urine test results starting from December 2020 to the court) did not work out and reflected poorly on him, so he was belatedly trying to disavow it. Tr. 1085-87

(Respondent). When asked if he considered going back to Judge Storm after the hearing and after he had time to reflect, Respondent answered:

> Well, I don't know what you mean ["]time to reflect["], but Ms. Noguchi put before the Court positive drug test results. We did not go back and say, oh, by the way, here are the *negative* ones [from August and October 2020] she didn't show you, Your Honor. She only showed you the positive ones . . . .[I]t wouldn't make sense to do that. . . . We did not explain to the Court how we, you know, went about selecting. You know, we didn't explain to the Court our thought process. . . We came with our exhibits. There is no explanation to the Court of kind of the work product or your thought process of putting together.

Tr. 1088-90 (emphasis added). Respondent's testimony relating to his thought process and decision-making is credible, again based on his demeanor and the overall consistency of his testimony with the rest of the record.

61. On August 13, 2021, Judge Storm granted Mr. Libertelli's motion to alter or amend the court's ruling on child support, lowering the amount of monthly support from approximately $20,000 a month to $7,000 a month, but also requiring him to pay arrearages of $31,406.27. DCX 112 at 1 to 2. Judge Storm also granted Mr. Libertelli's request to receive the additional evidence of his negative drug tests (Exhibit 1), but he also declared that "its probative value is minimal and is not a material consideration in the Court's decision herein." DCX 112 at 7 n.4.[26]

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[26] On cross-examination by Disciplinary Counsel, when asked if negative or positive drug tests might have an impact on modifying custody or visitation, Judge Storm acknowledged that they might "as a general rule." Tr. 551-54 (Storm). Judge Storm added that he did not require Ms. Noguchi to mark the October and September 2020 positive drug tests as an exhibit during her impeachment of Mr. Libertelli, partly

I. Respondent's Continued Representation of Mr. Libertelli

62. After the July 2021 hearing, Respondent continued to represent Mr. Libertelli, including filing a notice for in banc[27] review of Judge Storm's reduced child support award (which Mr. Libertelli believed was still too high) and failure to award attorney's fees,[28] and in ongoing litigation with Ms. Noguchi over her efforts to collect unpaid child support. DFX 1 at 102; Tr. 331-32, 391 (Noguchi); Tr. 1090-91, 1093 (Respondent).

63. At some point after filing the in banc notice, Respondent and Mr. Libertelli mutually agreed to part ways. Mr. Libertelli claimed to the Hearing Committee that he "fired" Respondent because "he wasn't being aggressive enough" and "was pushing back more than I thought appropriate." Tr. 498-99 (Libertelli). According to Respondent, while the statement that he was fired may have been "technically" true, by that point "it was clear that I didn't want to go forward with

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because she was acting *pro se* and "coupled with the fact that all this drug—none of this was—I just didn't view it as being terribly material to the ultimate decision I was going to make." Tr. 560-61 (Storm).

[27] Maryland courts allow for a "mini[]appeal" process known as in banc review of decisions made by a trial court by a three-judge panel of circuit court judges other than the trial judge. Tr. 736-37 (Respondent); *see* DFX 1 at 102.

[28] When there is a modification of child support, the party seeking the modification can ask for attorney's fees by statute. Tr. 731 (Respondent); *see also* Tr. 734 (Respondent: "[T]he financial picture of that amount of child support was just so unreasonable that we had to go to court to change it—[Mr. Libertelli] was justified in his action [in filing the motion to alter or amend] . . . and Ms. Noguchi could afford to pay attorney fees. So it was a totally legitimate ask under applicable law, and under the statute, to ask for attorney fees in this situation for Mr. Libertelli.").

this type of relationship with him . . . . It was mutual." Tr. 874-76 (Respondent). As Respondent recalled, he and Mr. Dame objected to the way Mr. Libertelli treated them and Mr. Libertelli, in turn, was unhappy with them because they would not agree to file a motion to recuse Judge Storm or a motion for Mr. Libertelli to obtain custody. Tr. 875 (Respondent). Because of the breakdown in the relationship, Respondent withdrew from the representation. Tr. 877 (Respondent).[29]

J. Expert Testimony of Mr. Levy

64. Mr. Levy, an experienced Maryland trial attorney was qualified as an expert on the standard of care for trial lawyers practicing in Maryland. Tr. 1157-64, 1168-69, 1176-77 (Levy).

65. At the hearing in this matter, Mr. Levy testified that Respondent had no obligation to disclose Mr. Libertelli's positive drug test results that were "not material to the point being made," absent an order from the court or a discovery request from Ms. Noguchi. Tr. 1183-85 (Levy). Since Mr. Libertelli's positive cocaine tests prior to December 2020 did not support the point Respondent was making and were not covered by a court order or discovery request, the standard of care did not require them to be disclosed, because "the general rule [is] that you have no obligation to disclose bad facts. And not only are you allowed to be selective, the

[29] Respondent and Mr. Dame filed their motion to withdraw on the same day that Disciplinary Counsel emailed Respondent a letter of inquiry in this matter, *see* DFX 1 at 103; DCX 114 at 3, but there is no evidence in the record contradicting Respondent's testimony regarding his reasons for withdrawing, Tr. 875-77, and it appears to have been a coincidence that these events happened on the same day.

standard of care requires an advocate to be selective." Tr. 1204 (Levy). Mr. Levy also testified that Respondent had no obligation to disclose details of trial strategy, which would constitute work product. Tr. 1188 (Levy).[30]

III. CONCLUSIONS OF LAW

Disciplinary Counsel bears the burden of showing that Respondent committed misconduct in violation of the charged rules by "clear and convincing evidence." *In re Mitchell*, 727 A.2d 308, 313 (D.C. 1999); Board Rule 11.6. Here, Disciplinary Counsel has charged violations of five different provisions of the Maryland Rules arising out of Respondent's conduct in preparing the March 2021 motion to alter or amend Judge Storm's child support order and the July 2021 hearing on that motion. The instances of dishonestly alleged by Disciplinary Counsel are as follows:

March 2021 motion: Disciplinary Counsel argues that Respondent violated the charged Rules when he submitted the March 2021 motion to alter or amend Judge Storm's prior child support order along with the attached **Exhibit A** (September 2020 hair follicle test that was negative for opiates) and **Exhibit C** (urine specimens collected on January 11, 2021, January 28, 2021, February 10, 2021, March 4, 2021, March 24, 2021 that were negative for cocaine). ODC Br. at 35-37. Specifically, Disciplinary Counsel argues that it was "misleading" for the supplement exhibits to

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[30] Mr. Levy noted that additional disclosures might have been required in response to a direct question from the court—for instance, if the court had directly asked Respondent if urine drug test results pre-dating December 2020 were included in Exhibit 1 or if he had included all available test results. Tr. 1204-07 (Levy).

include the September 2020 negative hair follicle test for opiates "without disclosing that there were several positive cocaine tests during the same period." ODC Br. at 36; *see also* FF 39. Although Disciplinary Counsel acknowledges that the motion made no affirmative misrepresentations to Judge Storm, Disciplinary Counsel argues that Respondent "cherry-pick[ed]" favorable evidence in a manner that was inconsistent with his "duty of candor." ODC Br. at 37.[31]

July 15, 2021 hearing: Disciplinary Counsel also finds fault with Respondent's conduct at the July 15, 2021 hearing. ODC Br. at 37-41. First, it reiterates the charge of cherry-picking, arguing that it was dishonest to present an exhibit at the hearing (labeled "Drug Testing History") that included the negative September 2020 hair follicle test but did not include Mr. Libertelli's contemporaneous positive cocaine urine tests. ODC Br. at 37-38. Disciplinary Counsel argues that the selective presentation of test results, labeling of the exhibit, and Respondent's statements in his examination of Mr. Libertelli at the hearing, all served to create a false impression that the exhibit contained all of Mr. Libertelli's test results from the relevant periods. ODC Br. at 39; *see also* FF 49-52. Disciplinary

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[31] Disciplinary Counsel also takes issue with the motion's aggressive criticism of Ms. Noguchi's decision to raise Mr. Libertelli's drug use, *see supra* note 19, which it labels "disingenuous[]" given that Respondent knew Mr. Libertelli "was continuing to use and spend money on cocaine throughout 2020." ODC Br. at 37. Respondent does not directly address this specific allegation in his briefing. We express no view on the validity or fairness of the motion's rhetorical criticisms of Ms. Noguchi's litigation strategy. The criticisms are, however, broadly consistent with the position Respondent took that Mr. Libertelli's drug use was irrelevant to the issue of child support. *See* FF 24, 32, 46, 61.

Counsel also faults Respondent for remaining silent when Ms. Noguchi confronted Mr. Libertelli with some of his positive test results on cross-examination, arguing that Respondent should have disclosed his own "involvement" in the decision to omit the earlier September and October 2020 positive tests at that point. ODC Br. at 40; *see also* FF 55-57. When Mr. Libertelli himself attributed the omission of the positive tests to his lawyers at the end of the hearing and called it a "mistake," Disciplinary Counsel again contends Respondent should have spoken up "to disclose that the omission was intentional" and part of a strategy devised by Mr. Libertelli and his lawyers. ODC Br. at 40; *see also* FF 58. Finally, it faults Respondent for doing nothing to "correct the record" after the hearing, which it asserts somehow misled both Judge Storm and the in banc court that reviewed Judge Storm's modification of the child support award. ODC Br. at 41; *see also* FF 60-62.

Respondent has a very different interpretation of his conduct in preparing the March 2021 motion to alter or amend and at the July 2021 hearing. He places significant weight on the marginal relevance of Mr. Libertelli's drug testing history to the issue of child support, suggesting that Disciplinary Counsel has failed to prove that he committed any act of dishonesty pertaining to a "material" fact and that "[i]f materiality is not proven, all [] charges *must* be dismissed." Resp. Br. 46-47 (emphasis in original). In any event, Respondent argues (relying significantly on the testimony of his expert Mr. Levy) that his conduct met the applicable standard of care. *Id*. at 56-57. He contends that it was appropriate to introduce Mr. Libertelli's negative urine test results for cocaine and the hair follicle opioid test that was

negative for opiates to show his "significant progress" in overcoming his addictions and that he did not intentionally make any false or misleading statements in the motion or at the hearing. *Id*. at 57-59; *see also* FF 34-35, 37. He further argues that he had no obligation to correct or elaborate on Mr. Libertelli's false statement during cross-examination ("*These are all of the tests that I took in the timeframe covering the one year*.") given that Mr. Libertelli was impeached by Ms. Noguchi; and no obligation to address Judge Storm when Mr. Libertelli "threw [him] and Mr. Dame" under the bus in his remarks at the end of the hearing. Resp. Br. at 6-7, 54-55, 62, 65-66; FF 59-60.

Disciplinary Counsel devotes much of its reply brief to rebutting Respondent's contention that the drug tests were not relevant to any "material" fact. Reply Br. at 5-7. It also renews its objections to the admission of Mr. Levy's testimony as to the applicable standard of care, which we discuss immediately below. *Id*. at 12-14. Finally, Disciplinary Counsel reiterates its core contention that Respondent's presentations in the March 2021 motion and July 2021 hearing impermissibly "obscured" the existence of relevant evidence. *Id*. at 15-17.

A. Mr. Levy's Expert Testimony is Admissible

As a preliminary matter, we address the admissibility of Mr. Levy's testimony. Expert testimony is admissible in disciplinary proceedings to help determine issues of fact, including to help shed light on the applicable "standard of care" at issue, or to help a hearing committee understand a particular type of practice or the usual procedure for handling a certain type of case. *See, e.g.*, *In re Speights*,

173 A.3d 96, 101-02 (2017) (per curiam) (expert testimony admitted to address standard of care in personal injury cases); *In re Outlaw*, 917 A.2d 684, 686 (D.C. 2007) (per curiam) (expert testimony admitted to address standard practices in personal injury litigation in D.C. and Virginia); *In re Fair*, 780 A.2d 1106, 1111-12 (D.C. 2001) (expert testimony admitted in the field of probate law). The ultimate question is "whether the special knowledge or experience of the expert would aid the [trier of fact] in determining the questions in issue." *Wilkes v. United States*, 631 A.2d 880, 883 n.7 (D.C. 1993).

The admissibility of expert testimony is within the discretion of a hearing committee. *Speights*, 173 A.3d at 102. And, as with all evidence admitted in a disciplinary proceeding, it is within the discretion of a hearing committee to determine the weight and significance of expert testimony. *See id*.; Board Rule 11.3.

Mr. Levy is an experienced trial lawyer who has practiced law in the Maryland courts for over forty years, has taught at the University of Maryland School of Law for over thirty years, and has regularly made presentations to Maryland trial and appellate judges for the Maryland Judicial Institute. Tr. 1157-1160 (Levy). Respondent offered him as an "expert in Maryland trial practice" who was "qualified to provide an expert opinion [on] the standard of care for Maryland trial lawyers." Tr. 1164. We did not allow Mr. Levy to offer opinion testimony on whether a Rule was violated. *See Steele v. D.C. Tiger Mart*, 854 A.2d 175, 184 (D.C. 2004) (no abuse of discretion where trial court precluded expert from "interpreting and applying the governing law").

Disciplinary Counsel nevertheless argues that we should disregard Mr. Levy's testimony because the "only standard [he] offered . . . was his own opinion." Reply Br. at 12 (quoting *Varner v. District of Columbia*, 891 A.2d 260, 269 (D.C. 2006)). In particular, Disciplinary Counsel faults Mr. Levy for failing to cite a "rule, regulation, or guideline [that] establishes a standard of care in the substantive area of law," or otherwise articulate the standard of care he believed applied in this matter with sufficient precision. *Id*. (alteration in original) (quoting *In re Bailey*, Board Docket No. 18-BD-054, at 20 (BPR July 9, 2021), *recommendation adopted in relevant part*, 283 A.3d 1199 (D.C. 2022)). Disciplinary Counsel also suggests that Mr. Levy's review of the record was inadequate because he only focused on the March 29, 2021 motion to alter or amend and the July 15, 2021 hearing transcript and was supposedly not aware of certain pertinent facts, such as that Respondent had "*intentionally* withheld Libertelli's positive drug tests." Reply Br. at 14-15 (emphasis in original).

We conclude that Mr. Levy's testimony is admissible. Disciplinary Counsel does not dispute that he has the requisite "special[ized] knowledge or experience" based on his many years as a Maryland practitioner and professor, as well as instructor to the Maryland trial and appellate judges. *See Wilkes*, 631 A.2d at 883 n.7. It is true, as Disciplinary Counsel argues, that even a qualified expert may not simply present conclusory assertions about the standard of care without any explanation or analysis beyond his or her personal opinion. *See, e.g.*, *Bailey*, 283 A.3d at 1206; *Varner*, 891 A.2d at 270. However, Mr. Levy "was not merely offering

personal opinions," rather, he "was applying his knowledge of the standard of care . . . gained from his extensive experience" as a practitioner and instructor. *Speights*, 173 A.3d at 101; *see* Tr. 1172-76 (Levy); FF 64-65. Mr. Levy described in general terms the obligations of Maryland trial lawyers, including the obligation to understand and adhere to the Rules, which function as a "field manual" for lawyer conduct in litigation, Tr. 1166 (Levy); identified the "critical[ly] important[]" duties of candor and zealous advocacy, Tr. 1165, 1171-72 (Levy); and explained scenarios in which a Maryland trial lawyer would be obliged to provide a tribunal with facts that were unhelpful or even harmful to his or her client according to the norms of practice. Tr. 1179-82 (Levy). This is not comparable to the cursory presentations that have been rejected in other cases.

As for Disciplinary Counsel's assertion that Mr. Levy's review of the record was inadequate and/or biased, these objections seem to amount mostly to a complaint that Mr. Levy did not adopt Disciplinary Counsel's theory of this case. For example, contrary to Disciplinary Counsel's assertion, Mr. Levy was aware that the omission of Mr. Libertelli's positive drug tests from Respondent's evidentiary presentation was a conscious choice inasmuch as Respondent was aware the tests existed. *See* Tr. 1211-12 (Levy). In questioning whether the omission was "intentional," Mr. Levy appears to have been observing that Respondent never made an affirmative decision to withhold them because Respondent simply assumed they were irrelevant. Tr. 1183-85, 1211-12 (Levy). Disciplinary Counsel may disagree with this interpretation, but we do not think it suggests Mr. Levy's review of the

record was inadequate. *Cf. In re Alexei*, Board Docket No. 20-BD-018, at 15-16, 18-19, 23-24 (HC Rpt. Mar. 7, 2023) (discounting weight of expert opinion where expert witness had factually incorrect knowledge of the record), *recommendation adopted and matter dismissed*, Board Docket No. 20-BD-018 (BPR June 30, 2023), *recommendation adopted in relevant part*, 319 A.3d 404, 406 (D.C. 2024).

Ultimately, the admissibility of expert testimony does not depend on the expert having done an exhaustive review of the entire record. *See Motorola Inc. v. Murray*, 147 A.3d 751, 756 (D.C. 2016) (en banc) (adopting Fed. R. Evid. 702, which requires expert opinions be "based on *sufficient* facts or data" (emphasis added)); *Wilson Sporting Goods Co. v. Hickox*, 59 A.3d 1267, 1271-72 (D.C. 2013) (finding an expert opinion was properly admitted where it was based on "*adequate* data," and that deficiencies in expert testimony "go to weight rather than admissibility" (emphasis added)). Here, we have relied on Mr. Levy's testimony primarily to illuminate the governing standard of care for trial lawyers in Maryland; our evaluation of Respondent's conduct is based on our own independent examination of the record in light of the Rule violations Disciplinary Counsel has charged. We are satisfied that Mr. Levy conducted an adequate review of the record sufficient to offer an informed opinion on the points for which we relied on his testimony.

B. Mr. Libertelli's Drug Testing History Was Material

We next address Respondent's contention that Disciplinary Counsel has not proven that any fact allegedly concealed by Respondent was material. To the extent

Respondent means to suggest that Mr. Libertelli's overall drug testing history was entirely immaterial to the child support litigation and that this should be the end of any inquiry, we do not agree.

The Maryland Supreme Court (previously titled the Court of Appeals of Maryland) has explained that "a fact is material if its existence or nonexistence is a matter to which a reasonable [person]"—in this case, the trier of fact—"would attach importance" in determining a course of action. *Att'y Grievance Comm'n v. Floyd*, 929 A.2d 61, 66 (Md. 2007) (quoting *Brodsky v. Hull*, 77 A.2d 156, 159 (Md. 1950)). A fact can be important in litigation even if it is not ultimately outcome-determinative. Here, Respondent testified that he thought Mr. Libertelli's drug testing history was not "material at all" to the issue of child support, but also that it had "some relevance" because Mr. Libertelli's history of drug use had been mentioned in Judge Storm's order. FF 32. Judge Storm himself also did not ultimately think the testing history was "terribly material," but it was still important enough for him to mention in his initial order. FF 61; *see also supra* note 26. Based on these facts, it is clear to us that Mr. Libertelli's drug testing history was sufficiently important at the time in the child support dispute that it is material to our interpretation of the Rules at issue.

The determinative issue, as explained below, is that Disciplinary Counsel has not shown that Respondent engaged in dishonest conduct in violation of any of the charged rules.

C. Disciplinary Counsel Has Not Shown Respondent Knowingly Failed to Disclose a Material Fact Necessary to Avoid Assisting a Criminal or Fraudulent Act by Mr. Libertelli (MD Rules 19-303.3(a)(2) or 19-304.1(a)(2))

MD Rules 19-303.3(a)(2) and 19-304.1(a)(2) address similar conduct. MD Rule 19-303.3(a)(2) provides that "[a]n attorney shall not knowingly . . . fail to disclose a material fact to a tribunal *when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client*." (emphasis added). MD Rule 19-304.1(a)(2) provides that "[i]n the course of representing a client an attorney shall not knowingly . . . fail to disclose a material fact [to a third person] *when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client*." (emphasis added). [32] "Knowingly" in this context "denotes actual knowledge of the fact in question," although "knowledge may be inferred from circumstances." MD Rule 19-301.0(h). A "fraudulent" act means one that is done with a conscious "purpose to deceive." *Att'y Grievance Comm'n v. Dore*, 73 A.3d 161, 168 (Md. 2013).[33]

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[32] The language of MD Rule 19-304.1(a)(2) is very similar to D.C. Rule 4.1(b). However, we are unaware of any case where a violation of D.C. Rule 4.1(b) has been discussed or established. The D.C. Rules do not have an equivalent to MD Rule 19-303.3(a)(2).

[33] In *Dore*, the Court of Appeals of Maryland explained: "Fraud is statutorily defined as 'conduct that is fraudulent under the substantive or procedural law of [Maryland] *and has a purpose to deceive*.' Md. R. Prof'l Responsibility 1.0(e) (emphasis added). 'This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.' *Id*. cmt. 5." *Dore*, 73 A.3d at 168. The Court went on to explain that the respondent's negligence and careless behavior

MD Rules 19-303.3(a)(2) and 19-304.1(a)(2)—like the other Maryland rules Disciplinary Counsel alleges Respondent violated—apply a corollary to the general principle in Maryland (as in most U.S. jurisdictions) that litigants in a proceeding are not obligated to present favorable evidence for the opposing side. *E.g.*, *Winkler Constr. Co. v. Jerome*, 734 A.2d 212, 220-21 (Md. 1999); *see also* Tr. 1188 (Levy) ("[T]he adversary system is premised on the idea that each side is going to sort of make the best case for their client [that] they can."). As Comment [1] to Rule 19-304.1 notes: "An attorney is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." Comment [2] to MD Rule 19-303.3 similarly observes that "an attorney in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause . . . [but] must not allow the tribunal to be misled by false statements of law or fact or evidence that the attorney knows to be false."

Disciplinary Counsel has not identified the "criminal or fraudulent act" committed by Mr. Libertelli that Respondent purportedly assisted. *See, e.g.*, ODC Br. at 35-43. The Specification of Charges also does not charge Mr. Libertelli with committing a criminal or fraudulent act in connection with the motion to alter or amend or the hearing on that motion; it only charges a violation of D.C. Rule 8.4(b)

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could not amount to fraud because "there is nothing in the record to suggest his actions were motivated by a 'purpose to deceive.'" *Id*.

(criminal act) related to an August 9, 2021 sworn declaration that Mr. Libertelli submitted in *Libertelli I*, in which another attorney represented Mr. Libertelli. *See* Specification ¶ 39.

In contrast, in the two cases cited by Disciplinary Counsel involving violations of MD Rules 19-303.3(a)(2) and 19-304.1(a)(2), the client's fraudulent acts—and their attorney's role in assisting them—were both clear. In *Attorney Grievance Commission v. Pak*, the respondent, who represented her parents in proceedings before a federal district court, intentionally concealed the source of funds they had used to fraudulently purchase a property by creating shell entities. 929 A.2d 546, 551 (Md. 2007). The entities were created for the sole purpose of shielding her parents' assets from a complainant; as a result, the respondent assisted the fraud and was also charged as a co-conspirator in defrauding the complainant. *Id*. at 553-54, 558-60, 570. The Court of Appeals of Maryland found that her purposeful deception of the federal court regarding "the true labyrinthine course of transactions involving her parents[']property" violated MD Rule 19-303.3(a)(2) and that her repeated failures to disclose to opposing counsel the true nature and extent of the property sale transactions violated Rule 304.1(a)(2). *Id*. at 558-59, 566-68.

Similarly, in *Attorney Grievance Commission v. Rohrback*, the respondent actively helped his client use a false name in interactions with a probation officer, including in a pre-interview call where the respondent "misrepresented that his client was [the false identity]." 591 A.2d 488, 497-98 (Md. 1991). The Court of Appeals of Maryland found that this conduct violated MD Rule 19-304.1(a)(2). *Id*. at 498.

Tellingly, the court declined to find a Rule violation arising out of an earlier bail hearing where the respondent had merely witnessed his client using a false identity because there was no evidence that that he had assisted in the criminal deception. *Id*. at 495-96.

Taking Disciplinary Counsel's allegations as a whole, the acts of fraud in which Respondent might be said to have assisted could include Mr. Libertelli's misrepresentation of his drug testing history, his express misstatements in response to his cross-examination by Ms. Noguchi at the July 2021 hearing, and his misleading statements at the end of that hearing regarding the decision he and his lawyers made to only offer negative test results. *See* FF 44, 53, 58; ODC Br. at 35-41. However, none of these circumstances are analogous to the conduct that gave rise to the violations of MD Rules 19-303.3(a)(2) and 19-304.1(a)(2) in the cases cited by Disciplinary Counsel.

We are not persuaded that Disciplinary Counsel has established that the submission of only certain negative test results as part of the motion to alter or amend and at the hearing was itself fraudulent. We have credited Respondent's and Mr. Dame's testimony that the intention in offering the negative hair follicle test result from September 2020 and negative cocaine urine test results since December 2020 in connection to the motion and at the hearing was to show the court that Mr. Libertelli was making "progress in recovery." FF 34-35, 37-39. As discussed below, we do not endorse some of Respondent's choices in making this presentation, *see infra* pp. 78-79, but to the extent Disciplinary Counsel is suggesting that Respondent

intended to aid some sort of broader fraud on the court by Mr. Libertelli, there simply is not any evidence that Respondent had this intent. It is true that part of the reason *Mr. Libertelli* sought to introduce his negative test results appears to have been his desire to establish a "track record" that would allow him to revisit the court's March 2019 custody determination. *See* FF 18. But Respondent consistently rebuffed Mr. Libertelli's requests to revisit the child custody issue, recognizing that his client had not amassed an actual track record of abstinence or visitation with his children sufficient to offer any hope of success. FF 19; *see* FF 52. The record is thus insufficient to show that Respondent actively or intentionally assisted Mr. Libertelli in perpetrating a fraud in this regard.

We also disagree with any suggestion by Disciplinary Counsel that Respondent's conduct during Ms. Noguchi's cross-examination of Mr. Libertelli assisted a criminal or fraudulent act when Respondent failed to interrupt Ms. Noguchi's questioning of Mr. Libertelli. Respondent credibly testified that he would have corrected the misstatement during his redirect of Mr. Libertelli had Ms. Noguchi not impeached Mr. Libertelli with his positive test results. *See* FF 55-56. Respondent was not required to immediately leap up and interrupt her, before she had finished her cross examination, as Disciplinary Counsel implies. *See* ODC Br. at 40-41; *see also* Reply Br. at 18-20. Indeed, immediately interjecting would have raised a different set of concerns, since it would have unnecessarily interrupted the flow of Ms. Noguchi's cross-examination. *See* 6 Am. Jur. Trials 201, § 30 (noting

effectiveness of cross-examination often depends on uninterrupted flow). Doing so was, in the very least, not obligatory. As noted by Mr. Levy:

> [T]his is on cross. If this statement [by Mr. Libertelli] had been made during direct, Mr. Feldman probably could have corrected it immediately. But of course, it was not his floor. He didn't have the floor at that point. This was Ms. Noguchi's opportunity to ask questions and she honed right in on it. . . . [S]he impeaches his testimony and gets him to admit that his previous answer was inaccurate. I mean, she doesn't have a law degree, but she has got a great future as a cross-examiner, I got to say. I mean, you know, it was instant.

Tr. 1192 (Levy); *see also* Tr. 1190 (Levy) (Respondent "was entitled under the standard of care to await the conclusion of cross-examination, and then decide whether there was something that needed to be corrected.").

Finally, we are unpersuaded that Respondent's failures to correct Mr. Libertelli's statements at the end of the hearing abetted a fraud. Judge Storm's long history with Mr. Libertelli and familiarity with his behavior are especially salient on this point. We credited Respondent's account of his contemporaneous state of mind, that he was wary of "argu[ing]" with or essentially "cross-examin[ing]" his own client in front of the court, and that he ultimately believed Judge Storm's history with the case would lead him to not give Mr. Libertelli's statement much credence. *See* FF 59. We cannot say these decisions clearly violated any Rule.

Pak and Rohrback—two rare instances where MD Rule 19-303.3(a)(2) or 19-304.1(a)(2) violations have been found—involved situations where disclosures were necessary to avoid assisting clearly fraudulent and/or criminal acts that the

respondents did not merely witness but in which they actively participated. This case is not analogous.

Accordingly, Disciplinary Counsel has not met its burden of proving by clear and convincing evidence that Respondent violated MD Rules 19-303.3(a)(2) or 19-304.1(a)(2*)*.

D. Disciplinary Counsel Has Not Shown Respondent Knowingly Offered Evidence He Knew to Be False (MD Rule 19-303.3(a)(4))

MD Rule 19-303.3(a)(4) provides that "[a]n attorney shall not knowingly . . . offer evidence that the attorney knows to be false. If an attorney has offered material evidence and comes to know of its falsity, the attorney shall take reasonable remedial measures." This charge appears directed at Respondent's alleged "cherry picking" of test results—i.e. his submission of the September 28, 2020 hair follicle test that was negative for opiates without disclosing that there were positive cocaine urine tests for the same period. ODC Br. at 36. Most of the cases Disciplinary Counsel relies on in support of this charge involve violations of MD Rule 19-303.3(a)(1), which Respondent was not charged with violating. *See, e.g.*, ODC Br. at 36-37 (citing *Att'y Grievance Comm'n v. Framm,* 144 A.3d 827, 850-51 (Md. 2016)); ODC Br. at 33 (first citing *Dore*, 73 A.3d at 171 and then citing *Att'y Grievance Comm'n v. Steinhorn*, 198 A.3d 821, 827-30 (Md. 2018)).[34] A number of these cases also

[34] MD Rule 19-303.3(a)(1) prohibits an attorney from knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the attorney." Disciplinary

address MD Rule 19-308.4(c), which Disciplinary Counsel did charge Respondent with violating, so we discuss their application below. *See infra* p. 70.

Disciplinary Counsel only has cited two cases that involved a subdivision (a)(4) charge. In *Attorney Grievance Commission v. Gordon*, a reciprocal case, the respondent knowingly offered false evidence in a summary judgment hearing when he submitted a document purporting to be the original signature page for a contract signed in 2000 that was, in reality, a replacement that his client had signed the night before the hearing, which occurred in 2005. 991 A.2d 51, 58 (Md. 2010). Because "[t]he existence of the signature was a material issue in the litigation," the Maryland Court of Appeals concluded that the respondent violated MD Rule 19-303.3(a)(4) in failing to "inform the court that the signature page had been signed five years after the fact and during litigation involving the contract," and by "fil[ing] pleadings falsely suggesting that the page represented the original." *Id*.

Disciplinary Counsel also cites *Attorney Grievance Commission v. Tanko*, which includes a reference to subdivision (a)(4). *See* 969 A.2d 1010, 1022 (Md. 2009). In *Tanko*, the respondent submitted two expungement petitions to a Maryland district court for clients who he knew were ineligible because of the required three-year waiting period since their convictions had not passed. *Id*. On each petition, the Respondent "drew lines" through the part of the petitions referencing the time period

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Counsel charged only Mr. Libertelli with violation of this Rule, in relation to his statements at the end of the July 2021 hearing. *See* Specification at 9-10 ¶ 41(a) ("Respondent Libertelli knowingly made a false statement of fact to the tribunal and/or failed to correct a false statement of material fact.").

since conviction, apparently hoping that the resulting confusion would allow "these ineligible petitions [to] 'slip though' and avoid detection by the District Court." *Id*. The court concluded that he violated MD Rule 19-303.3(a), although it did not specify which subsection. *Id*. at 1022-23.

Both cases cited by Disciplinary Counsel in which MD Rule 19-303.3(a)(4) was at issue involved evidence or other submissions that were doctored or misleadingly altered in some way—a doctored contract in one instance and misleadingly filled out forms in the other. We find it difficult to characterize the otherwise accurate drug test results Respondent submitted as analogous. We are aware of no case in which the Maryland Supreme Court has found a violation of MD Rule 19-303.3(a)(4) based on selective presentation of true evidence.

Disciplinary Counsel also raises the issue of how ARCpoint Lab's business record certification was presented—attached as the last page of Exhibit 1 with the hair follicle test preceding it, despite that the certification may only have applied to the cocaine urine tests. ODC Br. at 38. But even if we found it was improper to offer the ARCpoint certification at the end of these exhibits,[35] the record does not support

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[35] Mr. Dame was tasked with getting the "full testing history" from ARCpoint lab; when he received the seventeen urine test results with the attached certification, he immediately noticed that the hair follicle test was missing. FF 41. Mr. Dame made a follow-up request for the hair follicle test result, which the lab emailed to him the next day. FF 41. We credited Mr. Dame's testimony that he believed it was appropriate to include the hair follicle test as being included in the ARCpoint certification. Both Mr. Dame and Respondent's understanding was that all the tests, including the hair follicle test, had been certified by ARCpoint. FF 41. Disciplinary

a finding that Respondent knowingly offered evidence that he knew to be false. We credited both Respondent and Mr. Dame's testimony that they sincerely thought the business record certification applied to all the tests sent by ARCpoint, FF 41; in any event, it is undisputed that Respondent did not learn from Mr. Dame until January 2022, when they were preparing their joint response to Disciplinary Counsel's discipline inquiry, that the hair follicle test had not been included in the original email from ARCpoint that also included the certification. FF 41. Thus, there is no basis for us to find that there was any "knowing" submission of false evidence in connection to the certification. *See Att'y Grievance Comm'n v. Neverdon*, 251 A.3d 1157, 1194 (Md. 2021) (no MD Rule 3.3 violation where attorney did not learn that signature on document was forged until after it was submitted).

Accordingly, Disciplinary Counsel has not proven, by clear and convincing evidence, that Respondent violated MD Rule 19-303.3(a)(4).

E. Disciplinary Counsel Has Not Shown Respondent Engaged in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation (MD 19-308.4(c))

We turn next to the alleged violations of MD Rule 19-308.4(c). This Rule provides that "[i]t is professional misconduct for an attorney to . . . engage in

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Counsel has stipulated that hair follicle test in Exhibit 1 was a "legitimate test." Tr. 194 (Porter). No evidence in the record suggests that ARCpoint did not intend for the certification to apply to the hair follicle test.

conduct involving dishonesty, fraud, deceit or misrepresentation."[36] Dishonesty includes any "conduct evincing a lack of honesty, probity or integrity of principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Att'y Grievance Comm'n v. Thomas*, 103 A.3d 629, 648 (Md. 2014) (alteration in original) (quoting *Att'y Grievance Comm'n v. McDonald*, 85 A.3d 117, 140 (Md. 2014)). The dishonesty in question "can be based on concealment of material facts as well as on overt misrepresentations." *Att'y Grievance Comm'n v. Floyd*, 929 A.2d 61, 66 (Md. 2007) (citing *Levin v. Singer*, 175 A.2d 423, 432 (Md. 1961)).

Although MD Rule 19-308.4(c)'s reach is comparatively broad, "[n]ot all attorney statements that turn out to be untrue" will amount to a violation. *Att'y Grievance Comm'n v. Stanalonis*, 126 A.3d 6, 16 (Md. 2015). Maryland courts have generally held that violations of the rule "must be the result of *intentional* misconduct." *Att'y Grievance Comm'n v. Moore*, 152 A.3d 639, 657 (Md. 2017) (citing *Att'y Grievance Comm'n v. Mungin*, 96 A.3d 122, 133 (Md. 2014)). In other words, there can be no violation based on a "mistake, misunderstanding, or inadvertency," no matter how unjustified. *Att'y Grievance Comm'n v. Rheinstein*, 223 A.3d 505, 546 (Md. 2020) (quoting *Dore*, 73 A.3d at 168); *see also In re Tun*,

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[36] While the language of MD Rule 19-308.4(c) mirrors the language of D.C. Rule 8.4(c), the Maryland courts have imposed a higher level of intent for a violation. *See infra* pp. 70-72.

Board Docket No. 19-BD-019 (BPR Feb. 2, 2022), appended Hearing Committee Report at 22 (April 15, 2021) (recognizing that MD Rule 19-308.4(c) "does not have a reckless dishonesty standard, only intentional . . . dishonesty"), *recommendation adopted*, 286 A.3d 538 (D.C. 2022). As the court in *Stanalonis* observed:

> Although it has been suggested on occasion that an attorney might violate MLRPC 8.4(c) by means of a negligent or "inadvertent" misrepresentation, this Court has generally required that there be a "conscious objective or purpose" to the misrepresentation or omission and the facts of those cases might be more aptly described as *intentional* failures to communicate truthful information, as opposed to negligent falsehoods.

126 A.3d at 16-17 (emphasis added) (first citing *Att'y Grievance Comm'n v. Nwadike*, 6 A.3d 287, 295 (Md. 2010); then citing *Att'y Grievance Comm'n v. Calhoun*, 894 A.2d 518, 538 (Md. 2006); and then citing *Att'y Grievance Comm'n v. Ellison*, 867 A.2d 259, 274-75 (Md. 2005)).

To be sure, a specific intent to deceive is not required to show a violation of MD Rule 19-308.4(c). *See Steinhorn*, 198 A.3d at 829; *Dore*, 73 A.3d at 174. At a minimum, however, a violation of Rule 19-308.4(c) in Maryland requires some evidence that an attorney *knew* the representation they were making was false. *Stanalonis*, 126 A.3d at 16-17; *see, e.g.*, *Framm*, 144 A.3d at 849-50 (respondent made affirmative misrepresentations about the substance of the evidence she had

omitted—and her omissions "in tandem" with these affirmative misrepresentations violated MLRPC 8.4(c)).[37]

Disciplinary Counsel devotes very little attention to MD Rule 19-308.4(c) in its briefing, but it appears that Disciplinary Counsel's contention is that Respondent's alleged "cherry-picking" of Mr. Libertelli's test results in both the motion to reconsider and the July 2021 hearing, and various other omissions at the hearing, all violate the Rule. *See* ODC Br. at 37, 43-44. Of the facts Disciplinary Counsel highlights, Respondent's submission of Mr. Libertelli's negative hair follicle test for opiates while omitting contemporaneous positive urine tests for cocaine—together with his accompanying statements when presenting this evidence at the July hearing—present the closest question.

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[37] At the hearing and in its proposed findings of fact, for instance, Disciplinary Counsel placed some emphasis on Respondent's decision to accede to Mr. Libertelli's demand to include the statement that Mr. Libertelli had "not used opiates since January [7,] 2019" in the motion to alter or amend. ODC PFF 41; Tr. 15 (opening statement), 134-36 (Dame), 1021-23 (Respondent); *see* Reply Br. at 10. We have included the relevant facts in our findings to provide the Board with a complete record, but it is clear that this decision could not have amounted to a Rule violation: while Respondent admits that he did not know whether this statement was true, there is no evidence in the record to suggest that he knew it was false. *See* FF 37-38, 41; *see also* Tr. 217-18 (Dame), 794-96 (Respondent). Thus, it cannot give rise to a violation of Rule 8.4(c) (or any other charged Rule). *See also, e.g.*, *Att'y Grievance Comm'n v. Smith*, 109 A.3d 1184, 1196-97 (Md. 2015) (finding no MD Rule 3.3 or 8.4(c) violation after respondent credibly testified that did not know information was false when he provided it); *Moore*, 152 A.3d at 657; *Steinhorn*, 198 A.3d at 827-830, 829 n.13; *Neverdon*, 251 A.3d at 1194.

Disciplinary Counsel is correct that "cherry-picking" information in a deceptive manner can violate MD Rule 19-308.4(c). It analogizes Respondent's conduct here to that of the respondent in *Framm*. The *Framm* respondent was involved in a fee dispute with a former client in which the client's mental capacity to enter into a retainer agreement was at issue. 144 A.3d at 840. She selectively presented evidence that her former client had sufficient capacity to enter into the agreement while suppressing a substantial amount of contrary evidence showing he lacked sufficient capacity. *Id*. at 849-850. She also made affirmative misrepresentations about the substance of the evidence she had omitted—and her omissions "in tandem" with these affirmative misrepresentations violated Rule 8.4(c). *Id*. at 849-850, 852. As the court put it: "[O]nce the Respondent presented the issue of [her client's] mental competency to the District Court, her obligation . . . was to refrain from misleading the court about the issue or mispresenting the evidence. Respondent altogether ignored this obligation . . . ." *Id*. at 850.

As previously noted, attorneys in Maryland are not generally required to present evidence favorable to the opposing side. *Winkler Constr.*, 734 A.2d at 246; Tr. 1179-80, 1182, 1188 (Levy). But the line between zealous advocacy in support of one's own case and intentionally "misrepresenting the evidence" before the court, *Framm*, 144 A.3d at 850, can sometimes be murky. We think Respondent came close to the line at several points discussed below, but that ultimately Disciplinary Counsel has not shown by clear and convincing evidence that he "intentional[ly] fail[ed] to

communicate truthful information" in a manner that would violate MD Rule 19-308.4(c). *Stanalonis*, 126 A.3d at 17.

To be sure, it is clear from the record—and largely undisputed by the parties—that there was a conscious strategy formulated by Respondent and his client to only submit Mr. Libertelli's September 2020 negative hair follicle test for opiates and his negative urine tests for cocaine from December 2020 to June 2021 to the court, thereby not including the four positive and two negative tests for cocaine in August, September and October 2020. *See* FF 37, 39, 47. We credited Respondent's explanation that his intent in introducing the negative drug tests in the motion for reconsideration and at the July 2021 hearing was to show Mr. Libertelli's "progress in recovery," in direct response to Ms. Noguchi having raised the issue of Mr. Libertelli's spending on drugs to support her argument against modifying child support. *See* FF 34-35.[38]

To show Mr. Libertelli's "progress in recovery," it was clearly reasonable to introduce his consistently negative cocaine tests starting on December 11, 2020. *See* FF 31-33. The earlier negative hair follicle test for opiates was also relevant on this point, as evidence of Mr. Libertelli's not having used opiates. Since that time period covered by the hair follicle test coincided with a period when Mr. Libertelli was still

[38] As previously noted, while we recognize that Mr. Libertelli wanted to present his negative test results to build a "track record" that would help him regain custody of his children, Respondent refused to actively assist in this effort, and in fact refused to help Mr. Libertelli revisit the custody issue. *See supra* p. 64; FF 19.

testing positive for cocaine, however, its inclusion without a clear explanation could have confused some observers. *See* FF 31, 33, 35, 39. We are further concerned by the exchange Respondent had with Mr. Libertelli on direct examination at the hearing, in which Respondent asked Mr. Libertelli whether his negative tests (not distinguishing between the hair follicle and the urine test) had bearing on "the issue . . . of *any inference that you were doing drugs during the relevant period of time*"—to which Mr. Libertelli responded "Yes . . . I feel the Court should consider them in the context of the allegation that I was spending money on drugs." FF 50 (emphasis added). Mr. Libertelli *was* still testing positive for cocaine during the period covered by the hair follicle test. *See* FF 51.[39] Respondent's question could be read as inviting him to claim the opposite.

Nevertheless, while one might read this exchange, coupled with the presentation of only negative test results, to imply that Mr. Libertelli was not using illegal drugs at all during the time periods covered by the various tests that were submitted, neither Respondent's question nor Mr. Libertelli's response actually go that far. Elsewhere, moreover, Respondent was careful *not* to make such a

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[39] It also gives us pause that Exhibit 1 submitted at the hearing was labeled "Defendant's Drug Testing History," again with no qualifier or explanation. *See* FF 44. We accept that Respondent did not prepare the exhibit list, but he was ultimately responsible for the entire presentation to the court. *See* FF 42, 44, 49; *Att'y Grievance Comm'n v. Johnson*, 976 A.2d 245, 266 (Md. 2009) ("[A]n attorney may not escape responsibility . . . by blithely saying that any shortcomings are solely the fault of his employee." (quoting *Att'y Grievance Comm'n v. Goldberg*, 441 A.2d 338, 341 (Md. 1982))).

misrepresentation, including in the motion to alter or amend. Earlier drafts of the motion show that Respondent or Mr. Dame affirmatively excised a statement Mr. Libertelli added—essentially claiming he had abstained from all illegal drugs during the relevant time periods—along with a number of other potentially misleading statements that Mr. Libertelli had suggested. *See* FF 36-39. Moreover, the parties' focus at the hearing was not on whether Mr. Libertelli was actually "doing drugs"—both sides agreed that question was irrelevant to the issue of child support, *see, e.g.*, FF 48 (Ms. Noguchi's opening statement)—but on whether he was *spending money* on drugs. *See* FF 35, 47, 50, 52. To the extent Mr. Libertelli's response to Respondent's question implied that he was not in fact spending money on drugs during the relevant time, there is no conclusive evidence in the record showing that Respondent knew such a representation was false (or even that it was false, since Mr. Libertelli could have been testing positive for drugs that he purchased earlier). There also is no evidence (including in the testimony from Disciplinary Counsel's own witness, Mr. Dame) reflecting the existence of any sort of broader scheme or plot to mislead the court.

Nor can we discern what the motive for such an effort would have been. Issues related to Mr. Libertelli's spending on drugs were relevant to the proceedings because Judge Storm had mentioned this spending in his prior child support order, but they were not the main focus of the motion to reconsider or the hearing. Respondent's primary (and ultimately successful) argument was that even if Mr. Libertelli was spending money on and using drugs, those facts were irrelevant to the

child support calculation under governing Maryland law. FF 39, 46-47. Given Judge Storm's long history with the Noguchi-Libertelli divorce proceeding, any broader claim that Mr. Libertelli had given up, or was spending no money on, illegal drugs would not have been likely to succeed. *See, e.g.*, FF 9, 23-25, 38, 61.

This context would not matter for purposes of finding a violation of MD Rule 19-308.4(c) if the record contained evidence of a clear, affirmative misrepresentation by Respondent, or a blatant omission—like withholding evidence there was an obligation to produce or responding evasively to a direct question from the court. *See* Tr. 1186 (Levy) (noting positive drug tests were not responsive to any order from the court or discovery request from Ms. Noguchi); Tr. 1204 (Levy) (noting Maryland trial attorneys are required to disclose unfavorable facts in response to direct questions from the court). But such facts are not present here.

We are aware of no case in which the Maryland Supreme Court has found a violation of MD Rule 19-308.4(c) based on this sparse of a record. In every case we have reviewed involving an omission of material evidence that gave rise to a violation of MD Rule 19-308.4(c), the omission in question occurred as part of a larger pattern of deception that also included *clear* affirmative misstatements or involved concealment of information that no reasonable attorney would have believed it was permissible to withhold. *Framm* is a case in point. The respondent's omissions in that case were made "in tandem" with affirmative misrepresentations, 144 A.3d at 850, and the evidence of her dishonesty was specific and obviously intentional, as explained in a subsequent case:

> [I]n *Framm*, the attorney made material misrepresentations to the court about her client's mental capacity in a fee-related suit, even when those misrepresentations were "directly contrary to the position she advanced before the court in the [client's] divorce and guardianship cases." [*Framm*,]144 A.3d at 849. Among the many instances of misconduct in *Framm*, we noted that the attorney's most egregious act was that she "lied to and deceived the court to the detriment of her former client for her own monetary gain." [*Framm*], 144 A.3d at 855.

Att'y Grievance Comm'n v. Powers, 164 A.3d 138, 156-57 (Md. 2017) (second alteration in original); *see also Att'y Grievance Comm'n v. Cassilly*, 262 A.3d 272, 325-26 (Md. 2021) (former prosecutor's concealment of material evidence coupled with affirmative mischaracterizations of the evidence and other false statements violated MD Rule 19-308.4(c)); *Floyd*, 929 A.2d at 70 (concealment of fact that prospective employer who wrote competing offer letter allowing the respondent to obtain a higher salary from a federal agency was also respondent's spouse violated MD Rule 19-308.4(c)); *Att'y Grievance Comm'n v. Harris*, 939 A.2d 732, 739 (Md. 2008) (concealment of fact that Respondent was divorced from his ex-wife in order to transfer joint mutual fund account they co-owned violated MD Rule 19-308.4(c)); *Nwadike*, 6 A.3d at 295-96 (concealment of identity of incriminating witness from Bar Counsel investigation violated MD Rule 19-308.4(c)).

Respondent's inclusion of the September 2020 hair follicle test result in the selection of test results to present to the court and the confusing, ambiguous exchange with Mr. Libertelli at the July 2021 hearing were unfortunate, but they are not analogous to the facts in these other cases. While it would have been better for him to provide clearer information, that is not enough to establish that he violated

MD Rule 19-308.4(c). *See Att'y Grievance Comm'n v. Zeiger*, 53 A.3d 332, 337-38 (Md. 2012) (no Rule 8.4(c) violation for the failure to disclose the existence of a will even though "it would have been preferable" to mention). We do not endorse all of Respondent's choices, but Disciplinary Counsel has not shown by clear and convincing evidence that this conduct violated MD Rule 19-308.4(c).

That leaves Respondent's failures to correct Mr. Libertelli's other misstatements at the hearing or generally disclose details about the decision to submit only Mr. Libertelli's negative test results into evidence. We have no difficulty concluding that Respondent's decisions to refrain from correcting his own client and reluctance to volunteer details regarding privileged communications do not violate MD Rule 19-308.4(c). As Mr. Levy, opined: "I would think that disclosure of strategy . . . I would call that work product. And there is a privilege for work product for that very reason, in which I would say borders on malpractice to disclose your strategy to the other side." Tr. 1188 (Levy); *see also In re White*, 181 A.3d 750 (Md. 2018) ("An attorney's strategies, theories, and mental impressions are attorney work product" subject to privilege protection (quoting *Storetrax.com, Inc. v. Gurland*, 895 A.2d 355, 380 (Md. 2006), *aff'd*, 915 A.2d 991 (Md. 2007)) (internal quotations omitted)); *Harris v. Baltimore Sun Co.*, 625 A.2d 941, 947 (Md. 1993) (finding a lawyer may violate Rule 1.6, which prohibits "reveal[ing] information relating to representation of a client," when "there is a risk or potential for harm to the client's interests[, which] turns on the facts and circumstances of the particular case"); *Att'y Grievance Comm'n v Powers*, 164 A.3d 138, 146-47 (Md. 2017).

Here too, we are mindful of the history of the Libertelli-Noguchi divorce proceedings, and particularly of Judge Storm's years-long experience with the case. It was reasonable, as Respondent put it, to assume that "Judge Storm, given the history of this case, given [Mr. Libertelli's] actions in this case" would not take many of Mr. Libertelli's statements at face value. FF 59. Whether or not we agree with how Respondent balanced the competing pressures on him in every instance, we cannot say his failure to correct Mr. Libertelli or provide more details constituted a clear misrepresentation for purposes of MD Rule 19-308.4(c). Accordingly, Disciplinary Counsel has not shown by clear and convincing evidence that any of Respondent's conduct violated this rule.

F. Disciplinary Counsel Has Not Shown Respondent Engaged in Conduct Prejudicial to the Administration of Justice (MD Rule 19-308.4(d))

MD Rule 19-308.4(d) provides that "[i]t is professional misconduct for an attorney to . . . engage in conduct that is prejudicial to the administration of justice." The Rule has been violated when "conduct impacts negatively the public's perception or efficacy of the courts or legal profession." *Att'y Grievance Comm'n v. Barnett*, 102 A.3d 310, 318 (Md. 2014) (citation and internal quotations omitted). Conduct that violates Maryland rules requiring candor or against dishonesty may also violate MD Rule 19-308.4(d). *See Steinhorn*, 198 A.3d at 830 ("[D]epriving the court of knowledge and, in turn, the ability to act upon that knowledge is a violation of . . . 8.4(d)."); *Att'y Grievance Comm'n v. Worsham*, 105 A.3d 515, 529-30 (Md. 2014) (finding the failure to file tax returns violated MD Rule 19-308.4(c) and MD Rule 19-308.4(d)).

Disciplinary Counsel's position that it has proven a MD Rule 19-308.4(d) violation here is predicated entirely on its contention that it has proven Respondent violated MD Rules 19-303.3(a)(2) & (a)(4). ODC Br. at 44-45. Because we find that Disciplinary Counsel has not shown by clear and convincing evidence that Respondent violated any provision of MD Rules 19-303.3(a)(2) & (a)(4), we also conclude that it has not demonstrated a violation of MD Rule 19-308.4(d).

IV. CONCLUSION

For the foregoing reasons, the Committee recommends that the charges be dismissed for failure of proof.

AD HOC HEARING COMMITTEE

Daniel I. Weiner, Chair

David Bernstein, Public Member

Jason S. Rubinstein, Attorney Member