DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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

OPINION AND ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

This disciplinary matter arises out of Respondent Darryl A. Feldman's filing of a Motion to Alter or Amend in the Circuit Court for Montgomery County, Maryland ("Maryland family court" or "the court") on behalf of his client, Christopher Libertelli, who sought to reduce his monthly child support obligation. The issue before the Board is whether Respondent's failure to attach all of Mr. Libertelli's urine test results to the motion and a subsequent exhibit, and/or his limited direct examination of Mr. Libertelli during the motion hearing, violated Maryland Attorneys' Rules of Professional Conduct ("Md. Rules") 19-308.4(c) and (d).

The Specification of Charges alleged that Respondent violated Md. Rules 19-303.3(a)(2) (knowingly failing to disclose a material fact to a tribunal when

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

disclosure was necessary to avoid assisting a fraudulent act by the client), 19-303.3(a)(4) (knowingly offering evidence known to be false and/or failing to take reasonable remedial measures after offering materially false evidence), 19-304.1(a)(2) (knowingly failing to disclose a material fact when disclosure was necessary to avoid assisting a fraudulent act of his client), 19-308.4(c) (engaging in conduct involving dishonesty, fraud, deceit, and/or misrepresentation), and 19-308.4(d) (engaging in conduct prejudicial to the administration of justice).[1]

After a four-day hearing and post-hearing briefing, the Hearing Committee determined that Disciplinary Counsel had not proven any of the charges and issued its report recommending dismissal.

Disciplinary Counsel's exception is limited to the issue of whether Respondent's conduct violated Md. Rules 19-308.4(c) and (d) in what it describes were "intentional failures to communicate truthful information." Disciplinary Counsel's Brief ("ODC Br.") at 14, 17 (citing *Att'y Grievance Comm'n v. Stanalonis*, 126 A.3d 6, 16-17 (Md. 2015)). Disciplinary Counsel argues that Respondent intentionally concealed material facts and omitted truthful information. ODC Br. at 16-17. Disciplinary Counsel contends it was not required to establish Respondent's "intent to deceive" and, as a result, the Hearing Committee

[1] Because the underlying conduct arose in connection with a matter before a Maryland tribunal, Disciplinary Counsel charged violations of the Md. Rules. *See* D.C. Rule 8.5(b)(1) ("For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.").

"incorrectly applied a heightened standard." Disciplinary Counsel's Reply Brief ("ODC Reply") at 20.

In response, Respondent argues that where a violation of Md. Rule 19-308.4(c) is based on an alleged *omission* of a material fact (as opposed to the making of an intentionally false statement), Disciplinary Counsel must prove that there was an intent to deceive. *See* Respondent's Brief ("R. Br.") at 41-48. Respondent contends that Disciplinary Counsel's position ignores the Committee's factual and credibility findings, the expert witness' testimony, and the context and circumstances of this case and the cited Maryland cases. R. Br. at 49.

Upon consideration of the evidentiary record, the Committee's factual and credibility findings which no party disputes, and the parties' arguments, we find that Disciplinary Counsel did not prove, by clear and convincing evidence, that Respondent engaged in dishonesty, fraud, deceit, and/or misrepresentation or that he engaged in conduct that was prejudicial to the administration of justice.[2] As discussed below, we agree with Respondent that Maryland case law requires a showing of an intent to deceive before an attorney can be found to have violated Md. Rule 19-308.4(c) and 19-308.4(d) based on his or her omission of a material fact. We dismiss those charges because there is not clear and convincing evidence that Respondent withheld information with an intent to deceive the Maryland family court. We further adopt the Committee's findings and conclusion that Respondent

[2] Mr. Gilbertsen does not join this Opinion and Order and has written a separate dissenting opinion. *See* Appended Dissent ("Dissent").

did not violate Md. Rules 19-303.3(a)(2), 19-303.3(a)(4), and 19-304.1(a)(2).[3] Accordingly, we dismiss all charges.

II. FACTUAL SUMMARY

We adopt the Hearing Committee's factual findings ("FF 1-65") because they are supported by substantial evidence in the record. *See* HC Report; Board Rule 13.7. The Board "must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record." *In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam) (quoting *In re Bradley*, 70 A.3d 1189, 1193 (D.C. 2013) (per curiam)); *see also In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (defining "substantial evidence" as "enough evidence for a reasonable mind to find sufficient to support the conclusion reached").

In contrast to clear and convincing evidence, substantial evidence may be equivocal. *See, e.g.*, *In re Godette*, 919 A.2d 1157, 1163-64 (D.C. 2007); *In re Cater*, 887 A.2d 1, 24 (D.C. 2005). The Board is to "accord considerable deference to credibility findings by a trier of fact who has had the opportunity to observe the

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[3] Disciplinary Counsel does not take exception to the Hearing Committee's conclusion that Disciplinary Counsel did not establish by clear and convincing evidence that Respondent knowingly failed to disclose a material fact when disclosure was necessary to avoid assisting a fraudulent act by his client (in violation of Md. Rules 19-303.3(a)(2) and 19-304.1(a)(2)) or that Respondent knowingly offered evidence that that he knew to be false and/or failed to take reasonable remedial measures after offering materially false evidence (in violation of Md. Rule 19-303(a)(4)). ODC Reply at 25. The Hearing Committee found that there was no evidence in the record to support a finding that a fraudulent act had occurred, *see* HC Report at 61-65, and no evidence that any of the drug test results submitted in support of the Motion to Alter or Amend were "doctored or misleadingly altered in some way," *see id.* at 66-69.

witnesses and assess their demeanor" unless unsupported by substantial evidence. *Bradley*, 70 A.3d at 1193-94.

In January 2018, Respondent entered his first appearance on behalf of Mr. Libertelli, who had been litigating a divorce, child custody, and child support matter against Yuki Noguchi before Judge Harry C. Storm in the Maryland family court since October 2014. FF 6, 10. Sometime during the marriage, Mr. Libertelli became addicted to opiates after a back injury, and, subsequently, he became addicted to cocaine. FF 5.

Beginning in 2016, Judge Storm required Mr. Libertelli to undergo drug testing as a condition for his visits with his two children. FF 7. Prior to Mr. Libertelli's retention of Respondent, Ms. Noguchi's then-attorney, Hope Stafford, Esquire, had filed an emergency motion to modify Mr. Libertelli's access to his and Ms. Noguchi's two children and to alter the drug testing regimen, when it became clear that Mr. Libertelli had falsified drug test results. FF 9. Judge Storm granted Ms. Stafford's motion, suspended Mr. Libertelli's in-person access to the children, and granted Ms. Noguchi sole physical custody. FF 9. Judge Storm reported Mr. Libertelli's falsification of evidence and dishonesty to the Office of Disciplinary Counsel, resulting in an investigation and filing of a Specification of Charges. *See In re Libertelli,* Board Docket No. 20-BD-050, at 7 (BPR Mar. 24, 2023) ("*Libertelli I*").[4]

[4] On June 8, 2023, the D.C. Court of Appeals disbarred Mr. Libertelli in *Libertelli I* for knowingly making false statements and altering drug test results

Accordingly, by the time Respondent began representing him in January 2018, Mr. Libertelli had a history of drug abuse and falsifying drug tests. FF 9-10. Mr. Libertelli's prior counsel had withdrawn, and Judge Storm recalled that he "was glad to see" that Respondent, of whom Judge Storm has a high opinion, had been substituted in as counsel. FF 10; *see also* FF 3 (Judge Storm testifying that Respondent was a "highly effective lawyer" for clients in other cases before him and "adhere[s] to his ethical standards"). Respondent has practiced family law in the Maryland courts for several years and, among colleagues and members of the Montgomery County Bar Association, has a reputation of being "professional and honest and reputable," and is "well thought of" by opposing counsel. FF 3 (testimony of family law practitioner Howard B. Soypher, Esquire, and former President of the Montgomery County Bar Association, Heather Hostetter, Esquire).

Given this history, both Respondent and his then-associate, John Dame, Esquire, were sensitive to the ethical challenges posed in representing Mr. Libertelli.

(conduct that preceded Respondent's representation of Mr. Libertelli). *See In re Libertelli*, 295 A.3d 1101 (D.C. 2023) (per curiam) (adopting Board's recommendation where no exceptions filed). Prior to his disbarment, Disciplinary Counsel filed a second discipline case against Mr. Libertelli, *In re Libertelli*, Disc. Docket No. 2021-D175 ("*Libertelli II*"), which was consolidated with the instant case. On July 3, 2023, the Board granted Respondent's motion to sever his discipline case from *Libertelli II.* Judge Storm testified that he did not make a report or complaint to Disciplinary Counsel for the conduct involved in the instant case, either against Respondent or against Mr. Libertelli in *Libertelli II*. FF 9 n.6.

FF 11.[5] Respondent consulted with outside ethics counsel and the Maryland State Bar Association's ethics hotline, and, in one instance, Respondent affirmatively corrected a misrepresentation that Mr. Libertelli had made to Judge Storm in November 2018. FF 11, 15-17.[6] After advising Mr. Libertelli of his ethical

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[5] Mr. Dame appeared at the hearing as Disciplinary Counsel's witness, but his testimony credited Respondent's conduct and was consistent with Respondent's recollections and testimony at the hearing. *See, e.g.*, FF 11, 18, 23, 27, 29, 32, 34, 35, 37, 40, 41, 42, 43, 59. Mr. Dame worked as an associate at the Feldman Jackson law firm from September 2018 to March 2023. FF 4 (describing Respondent as a good mentor and supervisor, and "a man of integrity and honesty"). Disciplinary Counsel investigated Mr. Dame in conjunction with Respondent but ultimately did not file any charges against Mr. Dame. *Id.*

[6] Prior to the hearing on Ms. Noguchi's motion to modify custody, Mr. Libertelli had taken a hair follicle drug test, which could detect drug use in the preceding weeks to months (a "look back"); the test was taken at Respondent's suggestion because Mr. Libertelli had missed several urine drug test appointments. FF 13. Mr. Libertelli testified during the November 2018 hearing that he had taken the test and that it would confirm that he had not taken illegal drugs in the preceding months. FF 13-14. However, two days after the hearing, the hair follicle test result came back positive for cocaine. FF 15. After seeking advice from outside ethics counsel, Respondent advised Mr. Libertelli that Respondent had "an ethical obligation to disclose the test":

> 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. . . . Because we have an ethical obligation to disclose the test, if you do not give consent to us disclosing it[,] we probably have to file a motion to withdraw.

obligation, Respondent disclosed a positive hair follicle drug test result in a letter to Judge Storm, which was also provided to Ms. Noguchi's counsel. FF 17; *see* Disciplinary Counsel's Exhibit ("DCX") 120 at 8. Judge Storm proceeded to grant Ms. Noguchi's motion to modify custody, and she obtained sole legal custody and primary physical custody of the children, with Respondent limited to supervised visits. FF 18. Because Mr. Libertelli declined to establish a track record of supervised visits or to participate in a residential drug treatment program, Respondent repeatedly rebuffed Mr. Libertelli's requests to have Judge Storm revisit the custody and visitation issue. FF 18-19. Respondent also refused to file a motion to recuse Judge Storm, despite Mr. Libertelli's repeated requests, because Respondent believed Mr. Libertelli's claim of bias was unsupported. FF 19.

Child Support Litigation in 2020 and 2021

On October 2, 2020, Respondent, on Mr. Libertelli's behalf, filed a motion to lower the monthly child support payment of $19,924.98 on the grounds that (1) Mr. Libertelli's annual salary had dropped from $1.4 million to $350,000 annually due to a change in employment, (2) the child support amount was "well in excess of[] the children's demonstrated reasonable needs," and (3) the uneven financial responsibility between both working parents violated Maryland law. FF 20-21. The calculation of $19,924.98 was a significant increase from the prior year, June 2019

FF 16.

through May 2020, during which Mr. Libertelli's monthly child support obligation was $10,541.07. DCX 13 at 3.[7]

At the hearing on the motion, Ms. Noguchi appeared *pro se* and countered Mr. Libertelli's claim regarding his inability to pay with evidence of Mr. Libertelli's payments of over $100,000 to websites of a sexual nature and to individuals who had supplied him with illegal drugs. FF 23. Her "Plaintiff's Summary Exhibit - Mr. Libertelli's Cash Withdrawals and Transfers to Deon Jones and Jimmy Singleton (2020)" was based on records subpoenaed from Mr. Libertelli's banks and other financial providers. *Id.* Respondent did not contest the accuracy of Ms. Noguchi's exhibit but argued that the payments were irrelevant to the legal question of Mr. Libertelli's ability to pay, which under Maryland law was to be determined solely on his income and reasonable living expenses. FF 24.

On March 15, 2021, Judge Storm issued an opinion and order denying Mr. Libertelli's motion to modify child support. FF 25. Judge Storm concluded that "there ha[d] been a material change in [Mr. Libertelli's] circumstances," since Mr. Libertelli was no longer working at Google where he had earned a sizable 2019 income upon which the $19,924.98 obligation was calculated under the Term Sheet. DCX 13 (Judge Storm's March 15, 2021 Memorandum Opinion) at 6; *see also*

[7] We have made supplemental factual findings established by clear and convincing evidence, citing directly to the record. *See* Board Rule 13.7.

FF 25.[8] Judge Storm also acknowledged that "[t]here is no question that at $19,924.98 per month[,] the child support obligation far exceeds the present reasonable needs of the children, who are ages 10 and 11." DCX 13 at 7. Judge Storm, however, denied the motion to modify because Mr. Libertelli and Ms. Noguchi had agreed to the Term Sheet and its support calculations. In the view of Judge Storm, the parties presumably determined that the calculation was in the "best interest" of the children even though it was excessive in amount and unbalanced against Mr. Libertelli:

> While the child support amount for the discreet [sic] June 2020 to May 2021 period may seem grossly unfair to [Mr. Libertelli], the Court cannot find under the evidence presented that the Term Sheet provision in question "does not serve the child[ren]'s best interest" or that the proposed modification does.

DCX 13 at 10 (quoting *Ruppert v. Fish*, 84 Md. App. 665, 676 (1990)). Although not the focus of the opinion, Judge Storm did include a reference to Ms. Noguchi's exhibit, stating that "the evidence showed that [Mr. Libertelli] continues to make large cash withdrawals and payments to individuals previously identified as suppling

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[8] Under the Term Sheet executed on December 1, 2017, a formula for child support required that Mr. Libertelli pay $4,100 a month through June 1, 2018, and thereafter he had to pay 17% of his gross employment income, recalculated annually based on his prior year's income. DCX 13 at 2-3; FF 8. Judge Storm incorporated the Term Sheet into the Judgment of Absolute Divorce that was entered on January 19, 2018. FF 8. Accordingly, for the period of June 2018 through May 2019, Mr. Libertelli's child support obligation was based on the percentage, resulting in a monthly obligation of $9,300.94; for the period of June 2019 through May 2020, it was calculated to be $10,541.07 a month. DCX 13 at 3 n.3.

[sic] him with drugs. In 2020, those cash withdrawals and payments totaled $104.810.78." DCX 13 at 8; FF 25.

Renewed Drug Testing at ARCpoint Lab

After he issued the order granting Ms. Noguchi sole legal and primary physical custody of the children, with supervised visits, in March 2019, Judge Storm stopped requiring Mr. Libertelli to submit to drug testing. Tr. 295 (Noguchi); *see* FF 18. However, as a condition to practice law while *Libertelli I* was pending, Mr. Libertelli was ordered by the Board on Professional Responsibility to undergo bimonthly drug testing beginning in January 2021 with test results sent directly from a lab to the Office of Disciplinary Counsel. FF 26; Order, *Libertelli I*, Board Docket No. 20-BD-050 (Jan. 13. 2021). In anticipation that the Board would be requiring this drug testing and because of his own desire to establish a track record of negative drug tests, Mr. Libertelli voluntarily began taking drug tests in August 2020 at ARCpoint Lab ("ARCpoint"), which Respondent and Mr. Dame had located as a drug testing facility. FF 26-27.[9] In September 2020, Mr. Libertelli took a hair follicle test which was negative for the use of opiates (with a one-year look back). FF 26 n.13; *see also* FF 28. That result was forwarded to Respondent by Mr. Libertelli's discipline case attorney in *Libertelli I*. FF 28.

Mr. Libertelli submitted a urine sample to ARCpoint on August 5, 2020, and that test result, which was sent to Respondent, came back positive for cocaine a few

[9] Mr. Libertelli was served with the Specification of Charges in *Libertelli I* on July 27, 2020. *Libertelli I*, Board Docket No. 20-BD-050, at 3 (HC Rpt. Feb. 2, 2022).

days later. FF 27. Subsequently, ARCpoint sent test results to Mr. Libertelli's discipline case attorney and not Respondent. *See* FF 27; DCX 75; Tr. 714-15, 754 (Respondent). Mr. Libertelli also tested positive for cocaine in a urine test on September 28. FF 27-28. In October 2020, the urine test results were mixed—October 5 and 15 urine tests were negative for cocaine but October 23 and 27 urine tests were positive for cocaine. FF 28. Respondent did not learn about the September 28 and October 23 and 27 positive cocaine test results until sometime during the early months of 2021, after receiving emailed results from either Mr. Libertelli or his discipline case attorney. FF 29; *see also* Tr. 714-15 (Respondent).[10] No urine test was completed in November 2020.

By December 2020, however, Mr. Libertelli began testing consistently negative for cocaine in his urine samples submitted to ARCpoint. FF 28. His December 11, 2020, January 11, January 28, February 10, March 4, March 24, April 19, April 30, May 14, June 2 and June 17 of 2021 urine test results were negative for cocaine and opiates. FF 28. At the time of Judge Storm's March 15, 2021 decision denying the motion to modify the child support, five consecutive urine test results were negative for cocaine and opiates (Dec. 11, 2020, and Jan. 11, Jan. 28, Feb. 10 and Mar. 4, 2021). Mr. Libertelli was upset when he read Judge Storm's opinion denying his motion to modify the child support, and, in particular, was very

[10] In regard to urine test screening for opiates, the same urine tests of August 5, 2020, and October 5, 2020 through June 17, 2021, were negative for opiates. *See* FF 28 Chart. The September 28, 2020 urine test only screened for cocaine use, presumably because that same day Mr. Libertelli submitted a hair sample for opiate use screening. *Id.*

upset by Judge Storm's reference to his spending on drugs. FF 30. Mr. Libertelli criticized Respondent's decision not to provide his "clean" drug tests results to Judge Storm before he issued a decision for the motion to modify. *Id.* Mr. Libertelli wrote to Respondent: "I BEGGED YOU GUYS TO PUT IN MY CLEAN DRUG TESTS and now I have this?" *Id.*; *see also* FF 32. Respondent replied to Mr. Libertelli that negative "drug tests would not have made any difference [for the motion to modify child support] (in my opinion)." FF 30.[11]

The Motion to Alter or Amend

Two weeks later, on March 29, 2021, Respondent filed a Motion to Alter or Amend on Mr. Libertelli's behalf. FF 31; *see* FF 38 n.18. The motion challenged Judge Storm's assumption that because the parties had agreed to a specific child support calculation under the Term Sheet, it was appropriate to find that the calculation was in the children's "best interest." DCX 95 at 2-10. Respondent argued

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[11] 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 while previously he had spent money on drugs, "that now [he was] doing really well and so that's not—that's not going on." FF 32 (emphasis in original). Respondent explained at the hearing that he continued to believe that the drug test results were not "material at all" to the issue of child support under Maryland case law, but he did think that it could have some relevance since Judge Storm had mentioned Mr. Libertelli's drug use in the March 2021 order:

> To 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. . . . [It] was a very narrow point . . . .

FF 32 (quoting Respondent's testimony).

that it was not in the children's best interest for Mr. Libertelli to pay $19,924.98 per month ($239,099 annually) when his annual income was $350,000 before taxes and where such a result was not foreseeable at the time he and Ms. Noguchi agreed to the Term Sheet calculation. *See* DCX 95 at 6 ("This Court's rationale leaves very little room for any modification of any child support agreements . . . . [I]t decreases the likelihood parties may enter into agreements to resolve cases. It also results in essentially making child support pursuant to an agreement non-modifiable which is contrary to the law and policy of this State.").

In the process of shared drafting of the Motion to Alter or Amend, Respondent, Mr. Dame, and Mr. Libertelli decided that they would submit five urine test results from 2021 which had been required by the Board on Professional Responsibility in Mr. Libertelli's discipline case (adding the January 13, 2021 Board order as an **Exhibit B** to the original draft), and not the urine test results taken voluntarily in September, October, and December 2020, which included both positive (September 28, October 23 and 27) and negative (October 5 and 15, December 11) results for cocaine. *See* FF 28, 33, 37, 39. They decided to include the September 2020 hair follicle test that screened only for opiates and fentanyl and had a 12-month lookback (indicating that he had not used opiates from September 2019 to September 2020). FF 39; *see also* FF 28.

The bulk of the final Motion to Alter or Amend focused on the primary argument—that the child support award was not consistent with governing Maryland law concerning the best interests of the child—but it also included a brief section

titled, "Due to Plaintiff's Continued Focus on Allegations of Improper Behavior by Defendant, this Court Should Receive Additional Evidence Concerning Defendant's Progress in his Recovery." FF 39; DCX 95 at 10. A clearly separated **Exhibit A** (September 2020 hair follicle test negative for opiates and fentanyl with notation: "6 [inches] of head hair tested (Approximately 12 months timeframe)," DCX 95 at 15-17) and **Exhibit C** (January to March 2021 urine tests that were negative for amphetamines, cocaine, opiates, and phencyclidine but positive for marijuana, DCX 95 at 22-27) was attached to the motion.[12] FF 39. **Exhibit B** was the January 13, 2021 Board order for bi-monthly testing for opiates, cocaine, and other drugs.

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[12] The Motion to Alter or Amend distinguished the hair follicle and urine drug tests as follows:

> 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.
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> 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[of 2021]. *See* **Exhibit C**.

FF 39 (emphasis in original). Disciplinary Counsel acknowledges that the language in paragraph 32 that Mr. Libertelli voluntarily took drug tests "on more than one occasion over the past year*"* could be read to signal that other drug tests were taken in 2020 that were not included with the motion. *See* FF 39; ODC Reply at 15; R. Br. at 32. Exhibit C included all the Board-ordered 2021 urine test results available at the filing of the motion.

Id. The motion asserted that "[Mr. Libertelli] is pushing forward in recovery and believes that this Court would benefit from knowledge of his current circumstances." *Id.*

Exhibit 1 and Ms. Noguchi's Cross-Examination of Mr. Libertelli

Approximately four months later, just prior to the July 2021 hearing on the motion, Respondent asked Mr. Dame to obtain copies of all of Mr. Libertelli's urine test results *directly* from ARCpoint, including results obtained after the Motion to Alter or Amend had been filed. FF 41. In the process, Mr. Dame asked the ARCpoint employee to sign and complete a boilerplate printed "Certification of Custodian of Records or Other Qualified Individual" ("custodian of records form") that Mr. Dame provided. FF 41; *see* DCX 103 at 16 (completed custodian of record form). ARCpoint emailed all of their urine test results, including those from August to December 2020 at around 8 p.m. on July 8, 2021, but did not send the September 2020 hair follicle test result for opiates until the following day at around noon on July 9, in response to Mr. Dame's email message that it had not been included. FF 41. Mr. Dame gathered the tests that were to be included in Exhibit 1 (a total of 11 urine tests from December 2020 to June 2021 and the September 2020 single hair follicle test that was negative for opiates), and Mr. Dame placed the custodian of records form at the end of the exhibit. FF 42.[13] A legal assistant in their office

[13] 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. FF 42. The Hearing Committee fully credited Respondent's testimony that he was not made aware until January 2022 (when he

prepared the "Defendant's Exhibit List," describing Exhibit 1 as "Defendant's Drug Testing History" for the "Item Description." FF 44; *see* DCX 104 at 1 (Exhibit

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and Mr. Dame were preparing their joint response to Disciplinary Counsel's inquiry letter) that the hair follicle test was provided the following day by email, and not in the group of urine tests with the custodian of records form received on July 8. *See* FF 41 (noting Respondent's demeanor when testifying and the lack of any conflicting record evidence).

Disciplinary Counsel continues to suggest that somehow the custodian of record form was inapplicable to the hair follicle test and should not have been included in Exhibit 1. *See* ODC Br. at 6-7. The Hearing Committee, however, considered the record evidence and found that "[g]iven the email communication history, . . . the lab 'had inadvertently not included the hair follicle test' and therefore . . . the lab's business record certification was intended to cover the hair follicle test results." FF 41. Before the Board, Disciplinary Counsel now argues that the business record form applied only to "the full set" of the tests (and not each test report), such that it was misleading to attach the form to Exhibit 1. ODC Br. at 6-7. However, the form makes no reference to the "full set" of tests. *See* DCX 90 at 20. We are not persuaded that the custodian records form was misleading to the court. Judge Storm stated at the motion hearing that his concern was whether he would be able to determine if the test reports had been falsified by Mr. Libertelli, "[g]iven the prior history." DCX 111 at 23 (transcript from motion hearing). Respondent then gave the exhibit binder to Judge Storm and explained that Mr. Dame had gotten the test results directly from the lab, given "what happened in the past," with a business record certification, *id.* at 23-24.

> MR. FELDMAN: If there is any doubt and you want us to take steps –
> THE COURT: No, There is a business record certification. That at least addresses my one concern.
> MR. FELDMAN: Right.
> THE COURT: And the only other issue is whether I want to receive additional evidence.

Id. at 24. As noted previously, the Hearing Committee found that there was no evidence that any of the drug test results submitted in support of the Motion to Alter or Amend were "doctored or misleadingly altered in some way." HC Report at 66-69.

List).[14] In preparation for the hearing, Respondent, Mr. Dame, and Mr. Libertelli confirmed by email their intent to offer the September 2020 hair follicle test for opiates and the recent urine tests from December 2020 to June 2021. FF 40 (citing email history and Respondent's and Mr. Dame's testimony).

Prior to the hearing, Mr. Dame emailed Mr. Libertelli a draft script of his possible direct examination at the hearing, which included guidance on how to respond to questions about eight hearing exhibits addressing Mr. Libertelli's income and expenses that Respondent hoped to move into evidence, as well as Exhibit 1. FF 43. Respondent and Mr. Dame went over the script with Mr. Libertelli shortly before the hearing; neither Respondent nor Mr. Dame ever suggested that Mr. Libertelli should lie if asked about earlier urine test results or suggest that Exhibit 1 included all of his test results from ARCpoint. FF 43. Mr. Dame reminded Mr. Libertelli of his "continuing obligation to update discovery, particularly your bank statements, which are at the heart of the matter." FF 43 n.21.

Respondent and Ms. Noguchi exchanged exhibits the day before the hearing. FF 44. Unbeknownst to Respondent, Ms. Noguchi obtained the earlier positive urine test results, having learned about the results while viewing Mr. Libertelli's disciplinary hearing in *Libertelli 1* on the publicly available YouTube channel. FF 45. At the hearing, Ms. Noguchi argued that drug test results in Exhibit 1 were

[14] At no time during the motion hearing did Respondent, Mr. Libertelli, Ms. Noguchi, or Judge Storm ever refer to Exhibit 1 as Mr. Libertelli's "Drug Testing History." *See* DCX 111 at 1-104. The trial binder Exhibit 1 itself does not include a title page; the phrase "Drug Testing History" appears in the record only on the Exhibit List. *See* DCX 103 at 1-16; DCX 104 at 1.

not relevant to the issue of child support, but Judge Storm allowed Respondent to put Mr. Libertelli on the stand in order to conditionally move Exhibit 1 into evidence. FF 48-49. During his direct examination, Respondent had Mr. Libertelli identify the drug test results in Exhibit 1; Mr. Libertelli, largely following Mr. Dame's script, testified they were "drug tests that I took at [ARC]point Labs." FF 49. Respondent asked Mr. Libertelli if the test results go to the issue "of any inference that you were doing drugs during the relevant period of time?" and Mr. Libertelli said, "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." FF 50.

During Ms. Noguchi's cross-examination, however, Mr. Libertelli falsely described the period of time covered by the tests when he responded, "These are all of the tests that I took in the timeframe covering the one year." FF 53. Ms. Noguchi then successfully confronted and impeached Mr. Libertelli's statement with copies of his positive for cocaine urine test results of September 28, October 23, and October 27, 2020. FF 53-54. At the end of the cross-examination, Judge Storm commented, in response to Ms. Noguchi's request for judicial notice, that it was apparent from the cross-examination that certain drug test results were not included in Exhibit 1. FF 55. Judge Storm took a recess, and the parties reconvened to address Ms. Noguchi's contempt motion with Mr. Libertelli returning to the stand and addressing the several financial exhibits Respondent also had included in the exhibit binder. FF 55, 57.

Both Ms. Noguchi and Respondent focused their closing arguments on Maryland case law as it relates to the "best interests" of the child and child support calculations and the merits of the contempt motion. *See* DCX 111 at 92-101. Ms. Noguchi argued that the drug test results were irrelevant to the amount of child support Mr. Libertelli should pay but were relevant to his "ongoing lack of credibility." FF 57. Against Respondent's advice, Mr. Libertelli insisted on making a final statement to Judge Storm at the close of the hearing; Mr. Libertelli responded to Ms. Noguchi's statement regarding his ongoing lack of credibility and then falsely claimed that he was not aware of the omission of the earlier urine test results and that Respondent and Mr. Dame "made a mistake in not disclosing them here. I don't think that mistake should be attributed to me." FF 58.

Given the context of Judge Storm's history and familiarity with Mr. Libertelli, the Hearing Committee credited Respondent's account of his contemporaneous state of mind when he decided not to respond to his client's accusation: "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 [closing] statement much credence. *See* FF 59." HC Report at 65. When asked what he thought of Mr. Libertelli's closing remarks, Judge Storm could not recall 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." FF 58. Given Mr. Libertelli's history, Judge Storm testified that he gave little consideration to the drug test results. *Id.* He did not require

Ms. Noguchi to mark the positive urine tests results used for impeachment as an exhibit because she was *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." FF 61 n.26 (quoting Judge Storm).

The following month, Judge Storm issued an opinion and order granting the Motion to Alter or Amend and finding that "the Court is persuaded by Defendant's argument that in light of the material change of circumstance since the Term Sheet was signed (including the substantial reduction in Defendant's income and overall net worth, while Plaintiff's income and net worth have increased), that modification is warranted" pursuant to Maryland case law. DCX 114 at 69 (Judge Storm's August 17, 2021 Memorandum Opinion); *see also* DCX 114 at 70 (relying on *Voishan v. Palma*, 609 A.2d 319 (Md. 1992) and *Bagley v. Bagley*, 632 A.2d 229 (Md. App. Ct. 1993)). Judge Storm concluded that it was not in the best interests of the children to apply the Term Sheet's calculations, which would "impose upon [Mr. Libertelli] the exorbitant child support obligation resulting therefrom at a time when his financial circumstances have deteriorated (notwithstanding that such deterioration are largely of his own making)." *Id.* at 69-70.[15] He lowered the child support to $7,000 a month and ordered Mr. Libertelli to pay $31,406.27 in arrearages. FF 61. Although he granted Mr. Libertelli's request to receive the additional evidence in

[15] In regard to the deteriorated finances, Judge Storm noted that Mr. Libertelli (in addition to his reduced employment income) had significant legal fees from *Libertelli I*, had substantial unpaid tax obligations, and had limited assets from the divorce. DCX 114 at 68 n.3.

Exhibit 1, Judge Storm wrote that "its probative value is minimal and is not a material consideration in the Court's decision herein." FF 61.

III. DISCUSSION

A. Standard of Review

We review *de novo* a hearing committee's legal conclusions and its determinations of ultimate fact. *See Klayman*, 228 A.3d at 717; *Bradley*, 70 A.3d at 1194 (Board owes "no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus are reviewed *de novo*").

The Board, however, is not to set aside credibility findings of a respondent's intent unless they are unsupported by substantial evidence or if the credibility finding itself was made in error of law. *In re Krame*, 284 A.3d 745, 752 (D.C. 2022) (recognizing that "[s]ome factual questions, like whether an individual acted with knowledge or intent, at least resemble legal questions of 'ultimate fact'"). In other words, a hearing committee's "credibility findings must be accepted and can have a foreclosing impact on ultimate facts and legal conclusions, so long as they are supported by substantial evidence and uninfected by legal error." 284 A.3d at 754-55.

B. Credibility Findings

Disciplinary Counsel does not dispute any of the Committee's credibility findings. *See* ODC Br. at 11-12. Disciplinary Counsel acknowledges that the Hearing Committee credited the witnesses' testimony regarding Respondent's "reputation for professionalism and honesty." ODC Br. at 11. In addition,

Disciplinary Counsel notes that the Hearing Committee found Respondent's testimony and prior statements credible concerning:

- Respondent's intent to show Libertelli's "progress in recovery" which would not oblige him to include older test results (FF 34 (quoting Respondent's testimony));
- Respondent not instructing Mr. Libertelli to lie if asked about the older drug test results (FF 43);
- Respondent's reference to Mr. Libertelli's use of "drugs during the relevant period of time," during his direct examination of Mr. Libertelli, was intended to refer to two periods of time—September 2019 through September 2020 (negative for opiates based on the hair follicle test result) and December 11, 2020 through July 21, 2021 (negative for cocaine based on the urine test results) (FF 51); and
- Respondent's stated intent in offering Exhibit 1 to "rebut, in part" Judge Storm's belief that Mr. Libertelli was "continuing to spend large sums of money on drugs" and that he did not include the earlier test results because they did not rebut that idea (FF 52 (quoting DCX 116 at 5)).

ODC Br. at 11-12.

The Hearing Committee also considered Respondent's demeanor and consistency in testimony when explaining how Mr. Dame had not shared the details of how the custodian of records form had been received on a different day than the

hair follicle test, until he and Mr. Dame filed a joint response to Disciplinary Counsel's investigation (*see supra* n.13; FF 41).

The Committee additionally believed Respondent's explanation as to why he did not interfere with Ms. Noguchi's effective cross-examination of Mr. Libertelli. Respondent credibly testified that he would have corrected Mr. Libertelli's statement about which drug tests were included in the relevant time period during redirect had Ms. Noguchi not already impeached his testimony. FF 55-56; HC Report at 64. Andrew D. Levy, Esquire, who was qualified as an expert on the standard of care applicable in Maryland trial litigation, FF 64; *see also* HC Report at 55-58, further explained why under the standard of care, Respondent was not obliged to interrupt the flow of Ms. Noguchi's effective cross-examination ("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."). HC Report at 65 (quoting Levy). The Committee credited Mr. Levy's expert testimony that Respondent was "entitled under the standard of care to await the conclusion of the cross-examination, and then decide whether there was something that needed to be corrected." *Id.*; *see also* HC Report at 64-65 (citing 6 Am. Jur. Trial 201, §30 and noting that "immediately interjecting would have raised a different set of concerns, since it would have unnecessarily interrupted the flow of Ms. Noguchi's cross examination.").

The Hearing Committee also found that Mr. Levy credibly 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)." HC Report at 57. Specifically, Mr. Levy opined that since the urine tests prior to December 2020 did not support the point that Respondent was trying to make 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 standard of care requires an advocate to be selective." FF 65 (quoting Levy). [16]

[16] The dissenting opinion suggests that Disciplinary Counsel is taking exception to the Committee's factual and credibility findings. *See* Dissent at 14 n.4. However, Disciplinary Counsel clearly states in its briefing that it takes exception only to the Committee's legal conclusions. At page 1 of its opening brief, it succinctly states that it "takes exception to the findings that Feldman did not engage in conduct involving dishonesty under Maryland Rule 19-308.4(c) and conduct that was prejudicial to the administration of justice under Maryland Rule 19-308.4(d)." ODC Br. at 1. Disciplinary Counsel notably does not dispute any of the enumerated factual findings ("FF") in its "Statement of Facts," ODC Br. at 2-11, identifies several of the Committee's credibility findings (without arguing they were unsupported by substantial evidence or based on a mistake of law), *see* ODC Br. at 11-12, and nowhere in its briefing makes the argument that any of the Committee's findings are unsupported by substantial evidence. Instead, its exception is based on the Hearing Committee's analysis of Maryland case law, in particular, that Disciplinary Counsel had to prove Respondent's intent to deceive or mislead:

C. Disciplinary Counsel Did Not Establish that Respondent Violated Md. Rule 19-308.4(c).

Disciplinary Counsel alleges that Respondent violated Md. Rule 19-308.4(c) by intentionally withholding truthful, material information when he (1) did not include 2020 urine test results (positive or negative) in the Motion to Alter or Amend filed on March 29, 2021, (2) did not include all of the urine test results in Exhibit 1 for the hearing, and (3) presented Exhibit 1's urine test results during the July 2021 hearing on the motion. We agree with the Hearing Committee that Disciplinary Counsel failed to establish a violation of Md. Rule 19-308.4(c). Neither the Motion to Alter or Amend, Exhibit 1, nor Respondent's conduct at the hearing was false or misleading, and the evidence does not show that Respondent intended to deceive

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> At most, the hearing committee's findings about Feldman's unstated intention could rebut a claim that Feldman had the specific intent to mislead, but that is not required to show a violation of the rule.

ODC Br. at 20 (citing *Att'y Grievance Comm'n v. Dore*, 73 A.3d 161, 174 (Md. 2013)).

> Feldman emphasizes the hearing committee's finding that when he referred to "the relevant period of time," he actually had the two separate periods of recovery in mind, one for opiates and a separate period for cocaine, and notes that Disciplinary Counsel has not challenged that finding. [R.] Br. [at] 25. That is true. It doesn't matter what Feldman silently intended when he asked that question or if Feldman inwardly believed he was referring to two periods of recovery all along when he outwardly gave no indication of that intent. As discussed below, Maryland does not require a showing that an attorney had the "intent to deceive" to find a violation of Maryland Rule 19-308.4(c).

ODC Reply at 20 (citing *Dore*, 73 A.3d at 174).

Judge Storm by limiting his presentation to the post-December 2020 urine test results which supported the point he was trying to make.

1. Intentional conduct is required for a violation of Md. Rule 19-308.4(c).

Under Md. Rule 19-308.4(c), "[i]t is professional misconduct for an attorney to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Md. Rule 19-308.4(c). "[D]eceit can be based not only on overt misrepresentation but on concealment of material facts." *Att'y Grievance Comm'n v. Floyd*, 929 A.2d 61, 70 (Md. 2007). To prove a violation of Md. Rule 19-308.4(c), Disciplinary Counsel must establish something more than negligent misconduct. "It is well settled that this Court will not find a violation of MRPC 8.4(c) when the attorney's misconduct is the product of 'negligent rather than intentional misconduct.'" *Att'y Grievance Comm'n v. DiCicco*, 802 A.2d 1014, 1026 (Md. 2002) (quoting *Att'y Grievance Comm'n v. Awuah*, 697 A.2d 446, 454 (Md. 1997)).

A lawyer may engage in "conduct involving dishonesty, fraud, deceit or misrepresentation" by making a false statement about a material fact that the lawyer knows to be false. Establishing that the lawyer knowingly made the statement and knew the statement was false is sufficient to show that the required intent for violation, without a further showing that the lawyer intended to deceive. *See, e.g.*, *Att'y Grievance Comm'n v. Cassilly*, 262 A.3d 272, 325 (Md. 2021) (attorney "engaged in conduct involving intentional dishonesty" when he made "four statements of fact that he knew to be false to the circuit court"); *Att'y Grievance Comm'n v. Steinhorn*, 198 A.3d 821, 829 (Md. 2018) ("[I]n the context of Rule

8.4(c), so long as an attorney knowingly makes a false statement, he necessarily engages in conduct involving misrepresentation. No intent to deceive is necessary." (quoting *Dore*, 73 A.3d at 174); *Stanalonis*, 126 A.3d at 16; *see also Att'y Grievance Comm'n v. Zhang*, 100 A.3d 1112, 1135-36 (Md. 2014) (highlighting the difference between fraud and deceit, which require an intent to deceive, and dishonesty and misrepresentation, which do not require any specific intent "so long as an attorney knowingly makes a false statement" (citing *Dore*, 73 A.3d at 174)).

2. A violation based on an omission requires a showing that the attorney intended to deceive by the omission.

Here, Disciplinary Counsel concedes that Respondent did not make a false statement, but alleges that the dishonesty was in "intentionally *withholding* truthful information." ODC Reply at 1 (emphasis added).[17] Disciplinary Counsel takes the

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[17] Unlike D.C. discipline case law, Maryland does not have a reckless dishonesty standard. *See In re Tun*, Board Docket No. 19-BD-019 (BPR Feb. 2, 2022), appended Hearing Committee Report at 22 (Apr. 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); *see also* HC Report at 70-71. We apply Maryland case law when evaluating whether a violation of a Maryland Rule has been proven by clear and convincing evidence. *See*, *e.g.*, *In re Chapman*, Board Docket No. 20-BD-034 (BPR Oct. 27, 2021), appended Hearing Committee Report at 26-39 (Aug. 11, 2021) (relying on Maryland case law when finding violations of Md. Rules 19-301.1, 19-301.2(a), 19-301.4(b), and 19-303.1), *recommendation adopted in the absence of exception*, 284 A.3d 395 (D.C. 2022).

The dissenting opinion cites two District of Columbia cases for the proposition that proof of an intent to deceive is not needed for omissions because "[c]oncealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." Dissent at 20 (quoting *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) and *In re Mitchell*, 727 A.2d 308, 315 (D.C. 1999)). Both cases, however, are factually distinguishable from the circumstances here, *see* HC Report at 77; *infra* pp.

position that the mere omission of the earlier urine tests, even absent an intent to deceive, violated Md. Rule 19-308.4(c). *See, e.g.*, ODC Br. at 14. This position is not consistent with Maryland law.

Establishing that an attorney who failed to state a material fact did so dishonestly requires a showing that the lawyer intended to mislead by the omission. *See Stanalonis*, 126 A.3d at 16-17 ("Although it has been suggested on occasion that an attorney might violate MLRPC 8.4(c) by means of a negligent or an 'inadvertent' misrepresentation, this Court has generally required that there be a 'conscious objective or purpose' to the misrepresentation or omission . . . .") (finding no violation when there was no "evidence of an omission or misrepresentation with a 'conscious objective or purpose' to conceal truthful information"); *Att'y Grievance Comm'n v. Zeiger*, 53 A.3d 332, 338 (Md. 2012) (per curiam) (declining to find a violation of Md. Rule 19-308.4(c) when a lawyer failed to disclose the existence of

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34-39, and in both cases, circumstances beyond the mere fact of an omission supported the conclusion that the respondents' omissions violated D.C Rule 8.4(c). In *Mitchell*, the respondent failed to inform a client of his own law firm's bankruptcy which was "an omission of a material fact that respondent was *obligated* to disclose" and the Court of Appeals concluded that "because respondent did not tell [his client] about the bankruptcy for over fourteen months, we hold that the Board's conclusion that respondent violated Rule 8.4(c) is supported by clear and convincing evidence." 727 A.2d at 315 (emphasis added). In *Outlaw*, the omission was similarly egregious and involved a legal obligation. The respondent miscalculated the statute of limitations, failed to promptly inform her client that the statute of limitations barred the tort claim, "deliberately avoided disclosing the true posture of the case," and then failed to take responsibility when confronted by the client, with the D.C. Court of Appeals concluding that "[t]his type of misconduct is undoubtedly sufficient to establish the respondent violated Rules 1.4(a) and (b), as well as Rule 8.4(c)." 917 A.2d at 685-86, 688.

a certain will) ("While it would have been preferable for [the lawyer] to have made some mention of the . . . will on the forms he submitted . . . , there is no clear and convincing evidence in the record that he intentionally chose to mislead anyone."). The mere fact that an attorney did not include a particular fact in a statement does not without more show that the attorney acted dishonestly.[18]

That requirement is unsurprising. An attorney may know that he or she is omitting a fact from a statement without intending to deceive by doing so, while it

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[18] Disciplinary Counsel uses the phrase "intentional failures to communicate truthful information" to suggest an ethical obligation to disclose all known facts regardless of a conscious purpose to deceive, citing to *Stanalonis* in particular. *See* ODC Br. at 17 (citing *Stanalonis*, 126 A.3d at 16-17). Disciplinary Counsel claims that in *Stanalonis*, "the Maryland Supreme Court described several cases in which Rule 19-308.4(c) was violated by 'intentional failures to communicate truthful information.'" *Id.* However, the "several cases" identified in *Stanalonis* all demonstrate an attorney's *conscious intent to deceive, misrepresent, or mislead*:

> [F]acts of those cases might be more aptly described as intentional failures to communicate truthful information, as opposed to negligent falsehoods. *See Attorney Grievance Comm'n v. Nwadike*, 416 Md. 180, 194-95, 6 A.3d 287 (2010) (respondent violated MLRPC 8.4(c) when she acted with a "conscious objective or purpose" to conceal information from her client and Bar Counsel); *Attorney Grievance Comm'n v. Calhoun*, 391 Md 532, 566, 894 A.3d 518 (2006) (respondent violated MLRPC 8.4(c) by "deceitful and misleading" conduct when she received a check for full settlement of client's case, deposited the check into her own bank account, and did not inform her client for more than a year of the receipt of the funds); *Attorney Grievance Comm'n v. Ellison*, 384 Md. 688, 715, 867 A.2d 259 (2005) (respondent violated MLRPC 8.4(c) when he acted with "conscious objective or purpose" in concealing fact of ongoing representation of a client).

Stanalonis, 126 A.3d at 17.

is inherently dishonest for an attorney to make an affirmative statement about a material fact that the attorney knows is false. Not all omissions of fact, even of material fact, constitute "dishonesty, fraud, deceit or misrepresentation" in violation of Md. Rule 19-308.4(c). A rule that an omission made with *no intent* to deceive necessarily constitutes dishonesty, would too broadly require attorneys to include *every* material fact about a matter in their presentations, even if disclosure of those facts was not requested by the opposing party or was not compelled by the ethics or court rules. That is not required in the adversary system. *See* Md. Rule 19-303.3(a)(2) ("An 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) ("In the course of representing a client an attorney shall not knowingly: . . . fail to disclose a material fact *when disclosure is necessary to avoid assisting* a criminal or fraudulent act by a client.") (emphasis added)); Md. Rule 19-304.1, cmt. 1 ("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." (emphasis added)).

The cases relied on by Disciplinary Counsel do not support its argument that *no* intent to deceive is required when an attorney *omits* a material fact from a statement (as opposed to making an intentionally false statement). *See, e.g.*, ODC's Reply at 23 (partially quoting *Dore* and *Ambe*). Disciplinary Counsel's quotations of *Dore* and *Ambe* are incomplete and fail to distinguish that the holdings apply to knowingly making a false statement, not omissions. *See Dore*, 73 A.3d at 174 ("[I]n

the context of Rule 8.4(c), so long as an attorney *knowingly makes a false statement*, he necessarily engages in conduct involving misrepresentation. No intent to deceive is necessary." (emphasis added)); *Att'y Grievance Comm'n v. Ambe*, 218 A.3d 757, 772 (Md. 2019) ("Intent to deceive is not required in finding a Rule 19-308.4(c) violation as 'long as an attorney *knowingly makes a false statement*, [because] he necessarily engages in conduct involving misrepresentation.'" (emphasis added) (citations omitted)).

Disciplinary Counsel's reliance on *Stanalonis* and *Calhoun* are similarly misplaced. *See* ODC Br. at 14, 19. In *Attorney Grievance Commission v. Stanalonis*, the Maryland Supreme Court (previously named the Court of Appeals of Maryland) reiterated "there [must] be a 'conscious objective or purpose' to the misrepresentation or omission," 126 A.3d at 16, and in *Attorney Grievance Commission v. Calhoun*, 894 A.2d 518 (Md. 2006), the Maryland Supreme Court found a violation of Rule 19-308.4(c) when a respondent's "conduct was deceitful and misleading" although it was not "intentionally fraudulent." 894 A.2d at 538, 543-44. The necessary intent for "conduct involving dishonesty, fraud, deceit or misrepresentation" may be shown by an attorney's knowingly making a false affirmative statement or by the attorney's omitting a material fact with the intent to deceive.[19]

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[19] Respondent appears to still contend that the drug tests were not material to Judge Storm's decision regarding the child support. R. Br. at 3. The Hearing Committee concluded that "Mr. Libertelli's drug testing history was sufficiently important at the time in the child support dispute that it is material to our

Disciplinary Counsel does not identify a Maryland case in which an attorney was found to have violated Md. Rule 19-308.4(c) by omitting a material fact when the attorney did not intend to mislead by the omission. Nor has the Board found such a case. Rather, Maryland cases have found a violation of Md. Rule 19-308.4(c) by an attorney's omission when the attorney made the omission with an intent to deceive. *See*, *e.g.*, *Floyd*, 929 A.2d at 70 (Where attorney had her former employer/current husband act as a reference to a potential employer and then had him draft a competing job offer letter, without ever disclosing that the author was her husband, she violated Md. Rule 19-308.4(c) because the omission "was intended to conceal a relationship other than that of an employer and employee" and it "concealed her relationship with her husband in her attempt to secure a higher starting salary . . . than she otherwise would have received."); *see also Att'y Grievance Comm'n v. Framm*, 144 A.3d 827, 851-53 (Md. 2016) (attorney violated Md. Rules 19-303.3 and 19-308.4(c) "not because she did not summarize every exhibit submitted to [a judge], but rather because her summaries were inaccurate and designed to mislead the District Court").

Attorney Grievance Commission v. Steinhorn is not to the contrary. *See Steinhorn*, 198 A.3d at 830. In that case, on a complaint/application form, a respondent combined unpaid assessments sought by the client with agreed-upon

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interpretation of the Rules at issue." HC Report at 59. Having fully considered the Mr. Libertelli's and Ms. Noguchi's pleadings and Judge Storm's ultimate decision, *see supra* pp. 8-10, 13-16, 20-22, we believe the issue of materiality is a close one but do not believe it was wrongly decided and adopt the Committee's analysis. *See* HC Report at 58-59.

attorneys' fees and listed that total on the damages line of the form, leaving the line for attorneys' fees blank. *Id.* at 825. The Maryland Supreme Court found that conduct violated both Md. Rule 19-303.3 and Rule 19-308.4(c) despite the hearing judge's factual conclusion that the lawyer "did not intend to deceive anyone." *Id.* at 829-830. The Maryland Supreme Court apparently considered the attorney's completion of the form to be an affirmative misstatement about the damages and attorneys' fees sought, as well as a concealment of the attorneys' fees sought. *See id.* at 828-830 ("Respondent knowingly submitted false information to the court," and "[b]y grouping his attorney's fees with the damages listed in his complaints, [r]espondent misled the court into believing that he was not collecting any attorney's fees when the facts demonstrate otherwise," and the attorney "concealed the material fact that he was collecting attorney's fees, thereby preventing the court from assessing the reasonableness of those fees"). That case does not support the proposition that any omission of material fact, without an intent to deceive, violates Md. Rule 19-308.4(c).

Here, the Hearing Committee found that Respondent did not intend to mislead Judge Storm or any party by omitting the pre-December 2020 urine test results, which were both negative and positive for cocaine during August, September, and October 2020. The Hearing Committee found the testimony of Respondent and Mr. Dame on that point to be credible. Respondent was aware of the ethical risks implicated in representing Mr. Libertelli in light of his client's earlier conduct, and Respondent took steps to comply with his ethical obligations in the representation.

We agree with the Hearing Committee that neither the Motion to Alter or Amend, Exhibit 1, nor Respondent's conduct during the hearing, was misleading in light of the point Respondent sought to make. The tests that Respondent included in the Motion to Alter or Amend and Exhibit 1 accurately demonstrated Mr. Libertelli's progress in (1) limiting his use of opiates for the period covered by hair follicle test (September 2019 to September 2020),[20] and (2) limiting his use of cocaine, opiates and other drugs for the period covered by the urine tests taken between December 11, 2020, and June 17, 2021.[21] FF 34.

As recognized by Disciplinary Counsel, the Hearing Committee found credible Respondent's testimony that he offered the drug tests not as a complete record of Mr. Libertelli's drug testing but to show his "progress in recovery" and "current situation" when the exhibits were offered. *See* FF 31, 32, 34, 47.

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[20] Respondent's Motion to Alter or Amend specified that 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." DCX 95 at 10-11. Respondent did not make any representation about Mr. Libertelli's cocaine use during the period covered by the hair follicle test (September 2019 to September 2020). In the next paragraph, Respondent's motion stated that pursuant to his discipline case, "[o]n January 13, 2021, . . . Defendant agreed to submit to bi-monthly drug testing for opioids, cocaine, and other drugs," identified the attached Exhibit B (a copy of the Board order including requirement the lab send drug test results directly to the Office of Disciplinary Counsel), and concluded with "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." DCX 95 at 11.

[21] The ARCpoint test results attached to the motion clearly demarcated which types of drugs had been screened and distinguished the method as being a "hair follicle" test or a "urine sample" test. *See* DCX 95 at 16-17, 23-27.

Respondent "made no representation—express or implied—about the relevance of any drug tests, other than those we submitted." FF 52. Respondent and his then-associate Mr. Dame testified that neither attorney told Mr. Libertelli to lie about the exhibits or represent that the tests listed in the exhibit were all the tests Mr. Libertelli had taken. *See* FF 43. The Committee found Respondent's and Mr. Dame's testimony on those points credible, and Disciplinary Counsel appropriately does not challenge that determination. *See* FF 43, 51, 52.

Finally, Respondent's references to "the relevant period of time" in questioning his client during direct examination were intended to refer to "the time periods covered by the tests" included in the relevant exhibits, and not to the time of earlier, omitted tests. FF 51. That evidence, along with the expert testimony suggesting that Respondent had no obligation to disclose the tests under the circumstances (FF 65), supports the Committee's finding that Respondent did not intend to deceive by omitting the earlier tests.[22] Respondent submitted the tests *not* to show that Mr. Libertelli had avoided the use of all illicit drugs in 2020 (which Ms.

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[22] While finding that Respondent's testimony was credible and that he had "a reputation for professionalism and honesty" (FF 3), the Hearing Committee acknowledged in its Conclusions of Law that "Respondent came close to the line at several points" between "zealous advocacy in support of one's own case and intentionally 'misrepresenting the evidence' before the court." HC Report at 73 (quoting *Framm*, 144 A.3d at 850). As discussed above, we agree with the Committee that Disciplinary Counsel failed to show by clear and convincing evidence that Respondent intended to deceive Judge Storm. Respondent's efforts to respond to his client's concerns while complying with his ethical obligations did not constitute an ethical violation. *See* FF 36-38 (describing Mr. Libertelli's role in the preparation of the motion).

Noguchi's earlier summary chart submitted February 25, 2021, made clear was not the case), but rather to show Mr. Libertelli's "progress in recovery" (having not used opiates during September 2019 to September 2020), and "current situation" at the time the motion and exhibit were offered (urine test results from January to March 2021 attached to the motion and urine test results from December 2020 to June 2021 attached to Exhibit 1 available at time of the hearing), including presumably his decreased spending on drugs since the period covered in Ms. Noguchi's summary exhibit of February 5, 2021.[23] *See* FF 23, 31, 32, 34, 39, 42, 47. There was nothing misleading about the documents themselves; the test reports themselves clearly stated when the specimen was collected and analyzed, which type of drugs were screened for, and the results of those screenings. [24]

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[23] Ms. Noguchi's summary exhibit, showing "large cash withdrawals and payments to individuals previously identified as suppling [sic] him with drugs," covered the period January 2020 through December 2020. DCX 12; DCX 13 at 8.

[24] The dissenting opinion relies on two District of Columbia cases in support of its argument that substantial evidence does not support the Committee's finding that Respondent did not intend to deceive the court, when deceiving the court was "a natural consequence" of his conduct. *See* Dissent at 13 (first citing *In re Dory*, 552 A.2d 518, 522-23 (D.C. 1989) (Schwelb, J., concurring); and then citing *Corbin v. United States*, 120 A.3d 588, 591 n.3 (D.C. 2015) (factfinder entitled to infer that defendant "intended the natural and probable consequences of acts knowingly done")).

> Respondent's proffered testimony about his subjective strategic thinking, his demeanor while testifying before the Hearing Committee, his earlier policing of the client's unethical requests, his otherwise good reputation, and the judge's stated indifference about the challenged conduct — none of that provides "substantial evidence" for finding that Respondent did not intend the natural consequences of his challenged

Respondent would have been required to reply truthfully to questions from the Maryland family court about the drug tests, and any knowingly false statement in reply to a question would have been dishonest. *See, e.g.*, Md. Rules 19-303.3 and 19-308.4(c); FF 65 n.30 (Mr. Levy's expert testimony on Respondent's obligations).

> conduct. *Cf.* FF 52 (citing FF 3-4, 35 as support for crediting Respondent's "explanation as 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").

Dissent at 18. We are not persuaded that a hearing committee is required to infer a respondent's intent based on the natural or probable consequences (which will likely be in dispute) of intentional conduct, where other evidence to the contrary is in the record.

In *Corbin*, a criminal case, the jury was permitted to infer that the defendant intended to steal other keys attached to the ignition key, an inference that was permitted and consistent with "the jury's responsibility to weigh evidence [and] make credibility determinations." 120 A.3d at 591 n.3. However, here, the fact-finding Hearing Committee weighed the evidence, made credibility determinations, and concluded that the necessary intent was not proven. In *Dory*, Associate Judge Schwelb's concurrence describes evidence of neglect that was so egregious and uncontradicted that he believed it was intentional, 552 A.3d at 522-23, but, here, we agree with the Hearing Committee that evidence of deceptive conduct by Respondent is not so apparent:

> 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.

HC Report at 76-77.

Here, though, the tests Respondent submitted and introduced accurately showed that (1) Mr. Libertelli did not test positive for cocaine or opiate use in urine tests from December 11, 2020, to June 17, 2021, and (2) did not test positive for opiate use in a September 2020 hair follicle test with a one-year look back to September 2019. That evidence accurately described Mr. Libertelli's "current situation" at the time of the hearing on the motion (FF 34), and it properly supported Respondent's argument that Mr. Libertelli was "pushing forward in recovery" (FF 31).[25]

D. Disciplinary Counsel Did Not Establish that Respondent Violated Md. Rule 19-308.4(d).

Md. Rule 19-308.4(d) provides that it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice." "Generally, a lawyer violates MLRPC 8.4(d) where the lawyer's conduct negatively impacts the public's perception of the legal profession." *Stanalonis*, 126 A.2d at 17 (quoting *Att'y Grievance Comm'n v. Basinger*, 109 A.3d 1165, 1170 (Md. 2015)). In the Maryland discipline system, conduct that violates Md. Rule 19-308.4(c) also violates Md. Rule 19-308.4(d). If an attorney engages in dishonesty in violation of Md. Rule 19-

[25] The Hearing Committee noted that Mr. Libertelli's use or positive drug tests for marijuana were not a concern in the proceedings before Judge Storm, so that references to "drugs," "drug use," and "illegal drugs" in its report did not include marijuana. HC Report at 8 n.5 (question of whether marijuana was legal or not in the District of Columbia at the time). Disciplinary Counsel similarly describes the urine drug tests attached to the Motion to Alter or Amend and in Exhibit 1 as "clean" drug tests even though they showed the presence of marijuana. *See, e.g.*, ODC Br. at 4-5, 7. If marijuana use was a material issue in the Libertelli-Noguchi proceedings, as argued by the dissenting opinion, *see* Dissent at 4 n.3, the repeated disclosure of the positive marijuana test results (in Exhibit C and in Exhibit 1) only supports the finding that Respondent did not intend to deceive the court.

308.4(c), that conduct can "negatively impact[] the public's perception" of the profession in violation of Md. Rule 19-308.4(d). *See Framm*, 144 A.3d at 853 (an attorney's misrepresentations to a court and other ethical violations "erode[] the public's confidence in the legal profession and [are] prejudicial to the administration of justice in violation of MLRPC 8.4(d)").

Before the Board (and previously before the Hearing Committee), Disciplinary Counsel's argument for finding the Md. Rule 19-308.4(d) violation relies on the same conduct that Disciplinary Counsel alleges supports the dishonesty charge. *See* ODC Br. at 22-23. We agree with the Hearing Committee that Respondent did not violate Md. Rule 19-308.4(d), since Respondent did not violate Md. Rule 19-308.4(c) in his presentation of Mr. Libertelli's drug tests.

Disciplinary Counsel mistakenly characterizes the respondent's conduct in *Attorney Grievance Commission v. Hoerauf*, 229 A.3d 802, 823 (Md. 2020), where the 19-308.4(d) violation was based on the 19.308.4(c) violations, as similar to the conduct here. *See* ODC Br. at 22-23. Disciplinary Counsel asserts that "[i]n *Hoerauf*, the court found violations of [Md.] Rule 19-308.4(c) similar to Feldman's—statements intended to conceal material facts from the court—was conduct that 'tends to bring the legal profession into disrepute' and therefore violates [Md.] Rule 19-308.4(d)." *Id.* (quoting *Hoerauf*, 229 A.3d at 823). However, Hoerauf knowingly made intentionally false statements to the court and her client:

> [Hoerauf] violated Rule 8.4(c) in the Brown/Goldenberg matter when she knowingly and intentionally *misrepresented to Ms. Brown via text message that she had mailed the motion* for drug treatment to the court, even though [Hoerauf] never prepared or filed such motion. The

> hearing judge found that [Hoerauf] *made this misstatement to Ms. Brown with the intent to deceive her*. We also agree with the hearing judge that [Hoerauf]'s violation of Rule 19-308.1(a) in the *Brown/Goldenberg* matter constitutes a violation of Rule 19-308.4(c). [Hoerauf] also violated Rule 19-308.4(c) in the Ademiluyi/Solomon matter when she made a *knowing and intentional misrepresentation to the circuit court* in order to conceal the extent of her efforts to dissuade K.J. from cooperating with the prosecution, including facilitating the attorney-client relationship between Ms. Ademiluyi and K.J.

Hoerauf, 229 A.3d at 823 (emphasis added).[26]

Accordingly, we conclude that Disciplinary Counsel has not proven a violation of Md. Rule 19-308.4(d).

V. CONCLUSION

For the foregoing reasons, we find that Disciplinary Counsel did not prove, by clear and convincing evidence, that Respondent engaged in dishonesty, fraud, deceit, and/or misrepresentation in violation of Md. Rule 19-308.4(c) or prejudiced the administration of justice in violation of Md. Rule 19-308.4(d). The Md. Rule 19-303.3(a)(2), 19-304.1(a)(2), and 19-304.1(a)(2) charges were also not proven by

[26] For the same reason, *Attorney Grievance Commission v. Fader*, 66 A.3d 18, 42 (Md. 2013) (violation of Md. Rule 8.4(d) where the respondent "overtly misled" the administrative law judge during his appearance and made the knowingly false statement that he had sought and received treatment at Sinai Hospital "when, in fact he had not") does not apply to the circumstances of the instant case where it is undisputed that Respondent did not make a false statement to the court.

clear and convincing evidence. Accordingly, we dismiss all charges against Respondent in this matter.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Bernadette C. Sargeant

Bernadette C. Sargeant
Chair

This Opinion and Order was prepared by Ms. Spiegel. All members of the Board concur, except Mr. Gilbertsen, who filed a Dissent.

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

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

DISSENT OF THOMAS GILBERTSEN

I respectfully dissent from the Board's Opinion and Order (the "Board Opinion") because the Office of Disciplinary Counsel ("ODC") established by clear and convincing evidence that Respondent engaged in dishonesty under Maryland Rule 19-308.4(c) by intentionally withholding truthful and material information about his client's drug testing history and progress in recovery, and violated Maryland Rule 19-308.4(d) because Respondent's dishonesty prejudiced the administration of justice. I believe that in adopting the Hearing Committee Report's (the "Report") findings and conclusions, the Board Opinion takes an insupportably narrow view of the law and contemporaneous record facts. Clear and convincing evidence compels finding Respondent's intent to deceive, and his *post hoc* rationalizations to the contrary, which the Hearing Committee credited, are not supported by substantial evidence and are therefore subject to *de novo* review under *In re Krame*, 284 A.3d 745, 752-55 (D.C. 2022).

I. Clear and Convincing Evidence Compels Finding Respondent's Intent to Deceive.

Respondent represented Christopher Libertelli ("Libertelli") in a domestic relations dispute pending in the Circuit Court for Montgomery County, Maryland. FF 6.[1] The case was against Yuki Noguchi ("Noguchi"), Libertelli's ex-wife and mother of their two elementary school children. FF 5-6. A recurring issue in that case was Libertelli's substance abuse, which directly impacted his attempts to maintain custody/visitation rights and — through his drug spending habits — his motions to modify child support. *See* FF 9, 12-15, 23, 25. Another recurring issue was Libertelli's falsification of drug test results. FF 9, 12. Indeed, a prior attorney withdrew from the representation in 2018 when Libertelli was caught falsifying drug tests submitted to the court. FF 9-10. Respondent then took over the case, knowing that his client falsified earlier drug test results in the same action. FF 10; Tr. 955-57 (Respondent).

After Respondent took on the case, Libertelli's substance abuse and the accuracy of his drug test reporting continued to be an issue. At a custody hearing in November 2018, Respondent argued that Libertelli should return to unsupervised partial custody and visitation because he had not been using drugs for the previous three months, and Libertelli testified that the results of a recent hair follicle test

[1] "Op." refers to the Board's Opinion and Order. "HC Rpt." refers to the Hearing Committee Report. "FF" refers to the Findings of Fact made by the Hearing Committee in their Report and Recommendation. "Tr." refers to the transcript of the hearing that took place July 11-13 & August 16 of 2023. "DCX" refers to Disciplinary Counsel's exhibits. "ODC Br." refers to Disciplinary Counsel's Opening Brief.

would soon confirm it. FF 14. But after that hearing concluded, the hair follicle test came back positive for cocaine use. FF 15. After advising Libertelli that he would likely withdraw if the positive test result was not disclosed, Respondent disclosed the test result to the court and Noguchi's counsel. FF 17. Four months later in March 2019, the court granted Noguchi primary physical custody of the couple's children, allowing Libertelli only supervised visits. FF 18.

Unhappy with his case's trajectory, Libertelli told Respondent that he wanted to regain custody by establishing a track record of clean drug tests to submit to the court. *Id.* Meanwhile, in mid-2020 Libertelli began taking twice-monthly drug tests.[2] Respondent found a drug testing facility for Libertelli to use: ARCpoint Labs. FF 26-27. In an August 2020 urine drug test, Libertelli tested negative for opiates but positive for cocaine. FF 28. A month later in September 2020, Libertelli tested negative for opiates in a hair follicle test — but he again tested positive for cocaine use in a urine test administered that same day. *Id.* One month thereafter in October 2020, Libertelli had two urine tests that were negative for cocaine and opiates on October 5 and 15, but he had two tests on October 23 and 27 that again tested positive for cocaine use. *Id.* Libertelli did not take any drug tests in November 2020. *Id.* His reported urine drug tests from December 11, 2020 onward were negative for both

[2] Later in January 2021, the Board required Libertelli to submit twice-monthly drug test results as part of an attorney discipline proceeding arising from his submission of falsified drug test results in the Maryland domestic relations matter. FF 18, 26 n.13 (January 2021 Board Order requiring drug testing).

cocaine and opiates, but continued to be positive for marijuana use.[3] *Id.* The only hair follicle test administered by ARCPoint Lab was the one taken to screen for opiates in September 2020. FF 28.

Issues about Libertelli's drug use arose again in February 2021 after the court granted Noguchi's September 2020 motion to hold Libertelli in contempt for failing to pay child support. FF 20; *see* FF 23. Respondent countered by moving to lower Libertelli's child support payments, arguing that his client was unable to pay due to a job change. FF 21. At the February 2021 hearing on that motion, Noguchi introduced evidence showing that Libertelli was still paying people who supplied him with drugs, and she argued that those expenditures undercut his claimed inability to pay child support. FF 23. In a March 2021 ruling, the court denied Respondent's motion to modify child support, citing evidence that Libertelli "continues to make large cash withdrawals and payments to individuals previously identified as supplying him drugs," and noting that his drug payments exceeded $104,000 in 2020. FF 25 (quoting DCX 13 at 8).

[3] Respondent tested positive for marijuana in most of his urine tests; the only times his urine tests were negative for marijuana were on April 14, 2021, May 14, 2021, and June 2 and 17, 2021. *See* DCX 90 at 14, 17, 18-19. The Hearing Committee concluded that Libertelli's admitted marijuana use was not necessarily illegal or a significant concern in the Noguchi-Libertelli proceedings, and noted that "references to "drugs," "drug use," and "illegal drugs" in [the Hearing Committee] report and recommendation do not include marijuana." FF 5 n.5. That conclusion is not supported by the record; the issue before the court was whether and to what extent Respondent's client was spending money on his drug habits (legal or not) and his attempt to establish a better record for regaining unsupervised visits of his minor children.

Upset with that ruling — particularly the court's reference to his drug spending — Libertelli urged Respondent to file a motion for reconsideration of the recent child support ruling, asking the court to admit new evidence of Libertelli's recent drug testing history. FF 30-31; DCX 95. Although initially reluctant to oblige this request, Respondent soon relented. *See* FF 31-32. In a reconsideration motion filed shortly thereafter, Respondent asked the court to "receive additional evidence concerning [Libertelli's] progress in recovery" to rebut Noguchi's evidence that Libertelli continued to spend money on his drug habits. FF 31 (quoting DCX 95 at 10).

By early 2021, Respondent knew that Libertelli had repeatedly tested positive for cocaine (and marijuana) during the Fall of 2020 and thereafter, but the "additional evidence" he submitted with his reconsideration motion were exhibits of drug test results that included *only* a selection of Libertelli's "clean" (or negative) drug tests from that same period: the September 2020 hair follicle test for opiates which was negative, and five urine tests from January to March of 2021 which were negative for opiates and cocaine (but positive for marijuana). FF 29, 33, 39; DCX 95 at 10-11, 16-17, 23-27.

By claiming a one-year "look-back" for Libertelli's September 2020 hair follicle test, the time period which Respondent's own motion put at issue was September 2019 forward. *See* DCX 95 at 10-11. Respondent pulled his client's failed drug tests from this *same* period — not some earlier period. FF 33. He pulled Libertelli's failed cocaine use tests for September and October 2020. *Id.*; *see also*

FF 28. *Compare* DCX 90 at 3-7 *with* DCX 95 at 16, 23-27. Attached to the motion was Exhibit A (the September 2020 hair follicle test result), Exhibit B (the January 2021 Board Order requiring bi-monthly testing) and Exhibit C (urine test results of January 11 & 28, February 10, March 4 & March 24, 2021 which were negative for cocaine and opiates (but positive for marijuana)).

This omission was not the result of oversight nor inadvertence. The record is not disputed that Respondent intentionally pulled the urine drug tests showing cocaine use from the reconsideration motion's Exhibit C because his client adamantly insisted that they not be disclosed to the court. *See* FF 31-37. While Respondent was vetting a draft of the reconsideration motion with his client, Libertelli angrily complained — without substantiation — that his failed cocaine tests from Fall 2020 were "false positives" and that all references to the failed drug tests should therefore be removed from the draft motion materials. FF 36-37 (quoting DCX 40 at 13).

In response to Libertelli's request to remove the failed drug tests, Respondent buckled. Respondent pulled references to the failed cocaine tests from his draft reconsideration motion. FF 37. Before the Hearing Committee, Respondent never claimed to have done so based on his client's unsubstantiated claims that they were "false positives." FF 36 n.16. Respondent filed the reconsideration motion in March 2021 with Exhibits A and C that purported to reflect his client's drug use from September 2019 onward, but without the failed cocaine use tests from this same period. FF 37; *see* DCX 95 (final motion). While later preparing for a hearing on the

reconsideration motion, Respondent and his then-associate, John Dame, confirmed with Libertelli over the phone, in emails, and during rehearsal for the hearing that the strategy was to offer only his "clean drug tests." *See* FF 33-35, 43; DCX 97 at 1 (email from Dame to Libertelli).[4]

Before the hearing on his motion, Respondent directed his associate to obtain copies of Libertelli's full testing history directly from the lab. FF 41. In response to Dame's request, the lab sent a set of Libertelli's urine tests — including the four positive results for cocaine in August to October 2020 along with a certification as to the authenticity of "the attached records." FF 41; DCX 90. In response to a follow-up email the next day, the lab sent Libertelli's hair follicle test from September 2020 and a July 8, 2021 urine test that was negative for cocaine and opiates. FF 41; DCX 94. Respondent directed Dame to compile a selection of only the favorable drug test results into an exhibit for use at the hearing. FF 42. The resulting "Exhibit 1" was titled on the exhibit list exchanged with Ms. Noguchi as "Defendant's Drug Testing History." FF 44; DCX 104. That description was false and misleading. Exhibit 1 did not portray Libertelli's drug testing history, but only a selection of Libertelli's drug tests from the period depicted minus his failed cocaine tests from August to October 2020 and two clean tests in October 2020. There was no

[4] Although the reconsideration motion related only to child support, Respondent and Libertelli both knew that the same judge would also decide any custody issues in the case, Tr. 1011-12 (Respondent), and that Libertelli's drug use was a "central issue" to custody. FF 6. In testimony before the Hearing Committee, the judge confirmed that "as a general rule," drug test results could impact a child custody ruling. FF 61 n.26.

indication in Exhibit 1 that Libertelli took other drug tests which were not reflected in the "Drug Testing History" — Respondent acknowledged that he was responsible for the contents of Exhibit 1. FF 42, 44. The last page of Exhibit 1 includes the lab's certification for "the *attached set* of" Libertelli's urine tests — which referred to all tests the lab had provided, including those which Respondent pulled from Exhibit 1. FF 41; *compare* DCX 105 at 15, *with* DCX 90 at 20. In the certification, the lab director attested under penalty of perjury to the authenticity of "[t]he attached records" as they were maintained by the lab in the ordinary course of business. DCX 90 at 20; FF 41. But Exhibit 1 "Drug Testing History" attached only a subset of the records to which the certificate referred. *Compare* DCX 105, *with* DCX 90. Accordingly and precisely as intended, Exhibit 1 misleadingly portrayed Libertelli's drug testing history.

Respondent reviewed and approved Exhibit 1 before the hearing. FF 42. His associate prepared and emailed a draft script to offer Libertelli guidance about how to testify about Exhibit 1. FF 43; Tr. 1051-52. Shortly before the hearing, Respondent went over the script with Libertelli. *Id*. The script instructs Libertelli to identify Exhibit 1 by saying, "These are my drug tests with Arc Point Labs," without disclosing that Exhibit 1 contains only *some* of his drug tests from that lab, or that Libertelli took other tests at the same lab which the exhibit intentionally omits. DCX 106 at 2; FF 43 n.21.

The court heard Respondent's reconsideration motion on July 15, 2021. FF 40. In his opening statement, Respondent argued that the court should admit

Libertelli's drug test history to rebut Noguchi's prior evidence about Libertelli's spending on drugs. FF 47; DCX 111 at 23. When the court asked how it could be assured that the tests were authentic, Respondent represented that the drug testing lab provided an affidavit "saying *these are the records*, his drug test records." DCX 111 at 23 (emphasis added); FF 49. Respondent then presented Exhibit 1 to the court and again vouched for the tests' authenticity, stating that "it has been our practice to get them directly from the drug testing people now because of what happened in the past." DCX 111 at 23-24; FF 49 n.22. Respondent emphasized that the court should admit the drug test history not just to rebut evidence about Libertelli's spending, but also because it was

> important to Mr. Libertelli that he show the Court what is going on. And that the inferences that Ms. Noguchi wants you to draw aren't appropriate inferences. And he can be cross-examined but the reason why we filed that part of the motion and the reason why we'll have him testify is because we think it is important that you see this as part of your ultimate decision in this case.

DCX 111 at 36-37; *see also* FF 47.

When Respondent examined his client on the stand at the hearing, Libertelli identified Exhibit 1 as "drug tests that I took at FarPoint [sic] Labs," consistent with the prepared script. FF 49 (quoting DCX 111 at 44). Respondent did not ask (and Libertelli did not disclose) that Exhibit 1 contained only a subset of his drug tests during the period represented. To address the court's concern about reliability, Respondent had Libertelli identify the lab's certification on the last page of Exhibit 1— but again failed to disclose that Exhibit 1 omitted the August to October 2020 failed drug test results among the "attached records" referred to by the lab's

certification. FF 49, FF 49, n.22; DCX 111 at 44-45. *Compare* DCX 90 at 1-20 (results from lab), *with* DCX 105 at 1-15 (Exhibit 1).

After the court conditionally admitted Respondent's Exhibit 1 based on the certification (FF 49; DCX 111 at 45), Respondent examined Libertelli about it but did not disclose that failed cocaine test results were excluded from the exhibit. *See* DCX 111 at 45-48. To the contrary, after Libertelli identified Exhibit 1, Respondent asked questions suggesting that the exhibit *was* complete, such as how often Libertelli tested at the lab and whether he "ever" submitted a hair follicle test to the lab. *Id.* at 44. When Respondent asked about the hair follicle test, Libertelli answered, "This is the most comprehensive of the tests that you can get for oxycodone." *Id.* at 46. But he did not mention that he tested positive for cocaine on the same day as the hair-follicle test. Respondent asked, "what time period" was covered by the hair follicle test, leading Libertelli to answer "at least 12 months," referring to the period before the September 28, 2020 test (a look-back to September 28, 2019). *Id.*

When Respondent asked why it was important to have the drug test results admitted as evidence, Libertelli testified that it was his "biggest project" and that he believed it was "necessary to restore custody to me so that I can see my boys." DCX 111 at 47; FF 50. Respondent then asked: "Do you believe it goes to the issue also of any inference that you were *doing drugs during the relevant period of time*?" FF 50 (quoting DCX 111 at 47-48) (emphasis added). Libertelli answered: "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." *Id.*; FF 50, n.23. Throughout the direct examination, Respondent made no distinction between *legal* and *illegal* drugs, and made no reference to the existence of positive cocaine test results during the same period. FF 52.

Respondent's direct examination of his client about Exhibit 1 "Drug Testing History" presented a sworn narrative that Libertelli had clean drug tests covering a period stretching back to September 2019. On cross-examination, Noguchi began asking Libertelli, "did you produce all of the drug tests that were available to you in the timeframe that you —" when Libertelli interrupted: "Yes. There are all of the tests that I took in the timeframe covering the one year." DCX 111 at 54; FF 53. That statement was false. Both Libertelli and Respondent knew Exhibit 1 consciously omitted failed cocaine urine tests from that same "one year" period. FF 53. It was their intentional strategy to present only good opiate and cocaine drug test outcomes from that period. FF 31-32, 34, 39. Consistent with that strategy, Respondent did nothing to correct his client's false testimony. FF 55.

Noguchi then confronted Libertelli with his failed cocaine use tests in the Fall of 2020, which she had obtained from Libertelli's disciplinary hearing. FF 54. Respondent and his client did not expect that. FF 54 n.24. Noguchi testified that Respondent appeared "panicked" — testimony which the Hearing Committee found credible. *Id.* When Libertelli was forced to admit that he tested positive for cocaine use during the period at issue, Respondent asked to see the failed drug test reports and asked how Noguchi "came into possession of that." DCX 111 at 54-55; FF 54.

Respondent did not redirect Libertelli thereafter, nor did he offer any explanation to the court about how or why he pulled Libertelli's failed cocaine tests from the proffered evidence. FF 56-57.

At the hearing's conclusion, Libertelli asked to address the court and cravenly denied his own role in withholding his failed drug tests from the court:

> I want the Court to understand in the DC bar case it was my decision to disclose those tests. I disclosed them all 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.

FF 58 (quoting DCX 111 at 101). Libertelli did not characterize the omitted drug tests as part of a nuanced strategy to show the court his "current situation" or "progress" in recovery. He told the judge that pulling the failed cocaine test results was a "mistake" — a "mistake" made by Respondent — that should not be attributed to him personally.

Significantly, Respondent never mentioned the failed drug tests during the reconsideration motion hearing – he offered no redirect of his client after Noguchi's cross-examination and his closing argument did not respond to Noguchi's argument about his client's lack of credibility. *See* FF 56-57. Nor did Respondent later attempt to correct his client's obviously false denial of any responsibility for withholding failed drug tests from the court. *See* FF 59.

The clear and convincing contemporaneous evidence therefore compels, in my view, a finding that Respondent's willful and knowing conduct intended to

mislead the court about his client's drug testing history, progress in recovery, and current situation during the period reflected in Exhibit 1.

II. Testimony Disavowing Respondent's Intent to Deceive Is Not Supported by Substantial Record Evidence.

In a case where no inadvertence is claimed and none of the facts are disputed, the opportunity for Respondent to deny that he intended the natural consequences of his intentional conduct is necessarily limited. *See, e.g.*, *In re Dory*, 552 A.2d 518, 522-23 (D.C. 1989) (Schwelb, J., concurring) (finding intent based on bedrock common law principle that one "is held to intend the foreseeable consequences of his conduct"); *In re Shillaire*, 549 A.2d 336, 344 (D.C. 1988) (accord). On this bedrock principle alone, ODC met its burden to show by clear and convincing evidence that Respondent's challenged conduct intended to deceive the court about his client's history of drug testing, "progress in recovery," or "current situation" by intentionally pulling and omitting failed cocaine tests from the time period covered by the challenged exhibits and prepared testimony. *See Dory*, 552 A.2d at 522-23; *see also Corbin v. United States*, 120 A.3d 588, 591 n.3 (D.C. 2015) (factfinder entitled to infer that defendant "intended the natural and probable consequences of acts knowingly done").

Yet, the Hearing Committee found that ODC somehow failed to prove that Respondent intended the natural consequences of his acts. The Hearing Committee reached a contrafactual result by crediting testimony from Respondent and others offering ambiguous *post hoc* explanations about Respondent's "thinking" and "strategy" for withholding the failed drug tests. The Hearing Committee believed

Respondent when he simply denied trying to deceive the court. *See, e.g.*, FF 34, 38, 51-52. And when others — including Respondent's associate Dame, other Maryland attorney colleagues, and the presiding Maryland judge — testified that they could not believe Respondent would intend such a thing based on his reputation for integrity, that testimony was also credited. FF 3-4.

I understand that under Court of Appeals precedents, the Board may be bound by the Hearing Committee's credibility assessments and related fact findings unless they are (a) not supported by substantial record evidence, or (b) constitute conclusions of ultimate fact or law, which must be reviewed *de novo*. *Krame*, 284 A.3d at 752-53. As the Court held in *In re Bradley*, 70 A.3d 1189, 1193-94 (D.C. 2013), while reviewing bodies accord considerable deference to credibility findings by a trier of fact, "the Board and this [C]ourt owe no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus reviewed *de novo*." "Ultimate facts are those that have a clear 'legal consequence.'" *Id*. at 1194.

The Board Opinion accepts the Hearing Committee's credibility and ultimate findings on Respondent's intent as if they are unassailable — indeed, uncontested — on this record. Op. at 22-25, 34-39.[5] But the Hearing Committee's cited support

[5] The Board Opinion circumscribes ODC's arguments in this case, claiming that "Disciplinary Counsel does not dispute any of the Committee's credibility findings" and "concedes that Respondent did not make a false statement." Op. at 22-23, 28. I am not convinced ODC concedes either point. The Board Opinion cites ODC's Br. at 11-12, which simply (and accurately) *recites* the Hearing Committee's findings crediting Respondent's various *post hoc* claims about his challenged conduct,

for these credibility and intent findings is illusory. The Hearing Committee's findings do not achieve the level of substantial record evidence support necessary to bind the Board or the Court of Appeals under *Krame*. For example, at various points the Hearing Committee issues rote credibility findings to the general effect that:

> 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.

FF 38; *see also* FF 52 (citing prior findings about Respondent's general reputation). The Hearing Committee credited Respondent's testimony that

> [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.

FF 52 (emphasis added) (quoting DCX 116 at 5). Neither this explanation (nor any other *post hoc* rationale in the record) negates the strong inference that Respondent intended to deceive the court with his affirmative actions. Indeed, in many instances the proffered rationales are *more* consistent with an intent to deceive than not. The Hearing Committee credited testimony from Respondent's associate Dame, who testified that

> [T]he strategy was largely motivated by Mr. Libertelli's desire to

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without endorsing them. It seems clear to me that ODC continues to dispute the Hearing Committee's findings about what Respondent intended and continues to challenge the falsity of Respondent's statements. *See, e.g.*, ODC Br. at 19 ("Feldman intentionally concealed material facts and failed to communicate truthful information to the court.")

> 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.

FF 35 (crediting Dame's testimony as consistent with Respondent's). This vague testimony provides no support for finding that Respondent did not intend to deceive the court about his client's drug testing history or progress in recovery by intentionally withholding Libertelli's failed cocaine tests from the period at issue.

The Hearing Committee also credited testimony from Respondent's local attorney colleagues and Judge Storm, who presided over the proceedings at issue. Testimony about Respondent's general reputation for integrity (FF 3) is not sufficiently probative of what Respondent intended to accomplish by redacting his client's failed cocaine use tests from the evidentiary submission about Libertelli's drug testing history.

In *Krame*, the Court of Appeals held that "credibility findings must be accepted and can have a foreclosing impact on ultimate facts and legal conclusions so long as they are supported by substantial evidence and uninfected by legal error." *Krame*, 284 A.3d at 754-55. Hearing committee factual findings are entitled to deference *only* when supported by substantial evidence, which is "enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (*per curiam*) (quoting *In re*

Thompson, 583 A.2d 1006, 1008 (D.C. 1990)). The Court's *Krame* decision also recognizes that the Board "owes no deference to the Hearing Committee's determination of 'ultimate facts,' which are really conclusions of law and thus reviewed *de novo*." 284 A.3d at 752 (quoting *Bradley*, 70 A.3d at 1194). Indeed, the Court emphasized that "[s]ome factual questions, like whether an individual acted with knowledge or intent, at least resemble legal questions of 'ultimate fact,' so that both the Hearing Committee and the Board have a claim to being the final arbiter of such facts." 284 A.3d at 752.

Reconciling those two principles, the Court observed that while a hearing committee's findings about whether a respondent possessed requisite intent is often an "ultimate fact," the hearing committee's "credibility findings can still constrain the determination of ultimate fact." *Id.* at 752-54 (first citing *In re Micheel*, 610 A.2d 231, 234-35 (D.C. 1992); then citing *In re Temple*, 629 A.2d 1203, 1208-09 (D.C. 1993); and then citing *In re Evans*, 578 A.2d 1141, 1142 (D.C. 1990)). The *Krame* Court emphasized, however, that

> "[I]n some circumstances, a Hearing Committee's finding as to a respondent's credibility 'does not warrant the normal deference.'" . . . *In re Tun* highlighted two such scenarios. The first occurs when the Hearing Committee's findings are not supported by substantial evidence. . . . The second occurs when the Hearing Committee's credibility findings are based upon a mistake of law, as opposed to the witness's demeanor or manner of testifying.

Krame, 284 A.3d at 754 (quoting and citing *In re Tun*, 195 A.3d 65, 73 (D.C. 2018).

I believe the record in this case satisfies *Krame*'s first scenario, and that applying *Krame* to the record in this case demonstrates that the Hearing Committee's credibility and intent findings unfortunately do *not* trigger normal deference because they do not rebut and cannot be reconciled with the Respondent's actual conduct and the contemporaneous factual record in this matter. The Hearing Committee's findings are simply not supported by substantial record evidence.

Libertelli's contemporaneous statement to the court that withholding the failed cocaine tests from Exhibit 1 was a "mistake" effectively shuts the door on *post hoc* explanations that removing the failed tests was part of some benign "strategy" to make a nuanced showing about only the good drug tests while suppressing the failed tests. Respondent's proffered testimony about his subjective strategic thinking, his demeanor while testifying before the Hearing Committee, his earlier policing of the client's unethical requests, his otherwise good reputation, and the judge's stated indifference about the challenged conduct — none of that provides "substantial evidence" for finding that Respondent did not intend the natural consequences of his challenged conduct. *Cf*. FF 52 (citing FF 3-4, 35 as support for crediting Respondent's "explanation as 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"). These findings fail to provide substantial evidentiary support for a conclusion that ODC failed to establish Respondent's intent to deceive by clear and convincing evidence.

More fundamentally, the cited testimonials about Respondent's reputation and

nuanced "strategies" do not actually rebut a finding that Respondent intended to deceive the court. Reputation testimony does not forestall such a finding, nor does Dame's testimony about how Respondent recognized the challenge of handling things "in an ethical manner" after Libertelli demanded that his failed cocaine tests be concealed from the court. FF 35 (quoting Tr. 203 (Dame)). None of the testimony about Respondent's "strategy" rebuts the undisputed record evidence that concealing his client's failed cocaine tests was intentional and a "mistake" — to use Libertelli's contemporaneous, in-court admission.

Respondent also submitted — and the Hearing Committee cited — testimony from an expert Maryland trial attorney about the standard of care applicable to trial lawyers practicing in Maryland. FF 64-65. The Board Opinion also relies on this testimony. Op. at 24-25. Respondent's expert testified that Respondent had no obligation to disclose Mr. Libertelli's failed cocaine test results because they were "not material to the point being made," absent an order from the court or a discovery request from Ms. Noguchi. FF 65. But the "point being made" by Respondent was his client's drug testing history and progress in recovery during the period September 2019 forward, and failed cocaine tests during that same period represented by Exhibit 1 were therefore material — as both the Hearing Committee and Board Opinion concede. Op. at 33 n.19.[6]

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[6] Even if Respondent had no pre-existing duty to make *any* representation or proffer to the court about his client's drug test history, once he chose and set out to do so in his reconsideration motion, he had a duty to do so truthfully. Once Respondent chose to submit to the court a sworn showing (exhibits and testimony) about Libertelli's drug testing history and progress in recovery, Respondent had a duty under the

The Board Opinion also devotes significant treatment to the question of whether and how much an ethical violation based on an *omission* requires finding a specific intent to deceive. *See* Op. at 28-34. The Board Opinion addresses and rejects Disciplinary Counsel's argument and cited authorities holding that no specific showing of intent to deceive is necessary when an attorney consciously omits material facts from a statement to the court. *See* Op. at 31-34. A lengthy analysis of the competing positions is unnecessary because "[c]oncealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (quoting *In re Mitchell*, 727 A.2d 308, 315 (D.C. 1999)); *see also Att'y Grievance Comm'n v. Smith*, 109 A.3d 1184, 1195-96 (Md. 2015).

Respondent's challenged conduct is no mere omission. He affirmatively represented his client's "Drug Testing History" (or "progress in recovery" or "current situation") as encompassing only good drug test results for opiates and cocaine from the time period he designated — while redacting his client's failed cocaine tests during that same period. In the original draft reconsideration motion, Respondent included his client's failed cocaine tests. *See* FF 37. But Libertelli objected, arguing without basis that his failed drug tests were "false positives." So Respondent removed them from later drafts and submitted a motion to the court that was knowingly misleading about his client's drug test history during the period

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applicable ethics rules to do so truthfully, without making false statements, without an intent to deceive.

represented. Before the hearing on his reconsideration motion, he reviewed the prepared Exhibit 1 which covered a period from September 2019 onward, but again excluded his client's failed drug tests from that same period — as his client had insisted. Respondent's Exhibit 1 included a certification from the lab attesting that the "attached records" were "true and correct copies of records" kept in the ordinary course of regularly conducted business. At the hearing, Respondent introduced Exhibit 1 through direct examination of his client, who testified misleadingly that the exhibit set forth his drug tests during the period. When Noguchi impeached Libertelli with the omitted failed drug tests, Respondent "appeared panicked" and asked her "where did you get those." At the end of the hearing, Respondent's client told the court that he was not aware the failed drug tests were omitted from Exhibit 1, and that it was his lawyer's "mistake" not to include them. Respondent remained silent. He never explained to the court that removing the failed cocaine tests from Exhibit 1 was part of a subtle strategy to make a limited showing about Libertelli's "progress in recovery."

In my view, the record forestalls any attempt to portray Respondent's intentional conduct as a simple omission. Respondent could have chosen to make *no* showing about his client's drug tests — that would have relieved him of any duty to disclose the truth about Libertelli's progress in recovery. But by taking on that issue and making an affirmatively misleading showing about his client's "Drug Test History" and progress in recovery during the period he put at issue, Respondent took his conduct outside the parameters of a mere omission.

The record supports a finding that ODC proved Respondent's violation of Maryland Rule 19-308.4(c) by clear and convincing evidence — and no contrary finding has substantial support in the record. The record also supports that Respondent's misconduct prejudiced the administration of justice under Maryland Rule 19-308.4(d). *See Att'y Grievance Comm'n v. Fader*, 66 A.3d 18, 41-42 (Md. 2013) (knowingly misleading administrative law judge violated Maryland Rules 19-308.4(c) and 19.308.4(d)). It must be emphasized that the misconduct at issue played out in the context of child support issues being disputed in domestic relations court. One acknowledged and documented objective of Respondent's "Drug Testing History" exhibit and showing before the court was not only to reduce Libertelli's child support payments, but to start laying the groundwork for unsupervised visits with his minor children. Given the risks and the stakes in a matter involving interwoven child support *and* custody issues, Respondent's misrepresentations about Libertelli's drug test history, his progress in recovery, or his "current circumstances," threatened to and did significantly impact the court's ongoing adjudication of both child support and visitation issues.

III. SANCTION.

Disciplinary Counsel seeks a one-year suspension to sanction Respondent's knowing dishonesty to a tribunal. ODC Br. at 23-27. The Court of Appeals applies D.C. law to determine the appropriate sanction even when "evaluating misconduct under the rules of another jurisdiction." *In re Tun*, 286 A.3d 538, 543 (D.C. 2022). In determining the appropriate sanction, the Court may consider a range of factors,

such as the seriousness of the conduct, whether the conduct involved dishonesty, the attorney's disciplinary history, and whether the attorney has acknowledged his wrongful conduct and taken responsibility. *E.g.*, *In re Dobbie*, 305 A.3d 780, 811 (D.C. 2023). The Court also considers the sanctions imposed in other cases to ensure that the imposed sanction does not "foster a tendency toward inconsistent dispositions for comparable conduct." D.C. Bar R. XI, § 9(h)(1); *see*, *e.g.*, *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000).

I agree with Disciplinary Counsel that Respondent's dishonesty was serious, especially in the context of a child support and custody dispute. While lawyers are not obligated to 'make their opponent's case,' they do have a "greater duty than ordinary citizens to be scrupulously honest *at all times*, for honesty is 'basic' to the practice of law." *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (quoting *In re Mason*, 736 A.2d 1019, 1024-25 (D.C. 1999)). "Every lawyer has a duty to foster respect for the law, and *any* act by a lawyer which shows disrespect for the law tarnishes the entire profession." *Id.* Respondent knew about his client's substance use problems and prior false representations to the same court about his drug test history. Respondent knew that his client had failed drug tests for cocaine during the Fall 2020. He knew that the court had limited Libertelli to supervised visitation as a result of his past impairments and drug use. Yes, Respondent resisted earlier unethical requests by Libertelli. But this time, he buckled. Respondent embarked on a conscious course of conduct to falsely suggest that his client's drug

use history was unblemished since September 2019, and that Libertelli had made materially more progress in recovery than was true.

Although Respondent has no prior disciplinary history and a good reputation for honesty and integrity prior to this matter, he has not acknowledged his wrongful conduct. Respondent's conduct is similar to cases where the Court has imposed sanctions for knowingly falsifying or concealing material information. In cases involving dishonesty about matters unrelated to the substance of the representation, the Court has imposed a short suspension. For example, in *In re Uchendu*, 812 A.2d 933, 942 (D.C. 2002), the respondent was suspended for one month for signing his clients' names to probate documents with their authorization and notarizing his own signatures. In *In re Reback*, 513 A.2d 226, 228 (D.C. 1986) (*en banc*), the Court suspended two lawyers for six months for attempting to cover up their neglect by refiling a verified complaint that the client had previously signed and signing the client's name without the client's knowledge. The Court arrived at a six-month suspension after considering substantial mitigating factors, including that the respondents "admitted their wrongdoing," were "contrite," "cooperated fully," returned their fees to their client, and had "unblemished records of professional conduct during 30 and 15 years of practice, respectively." *Id.* at 233.

The Court has imposed suspensions of a year or more for attorneys who, like Respondent, assisted their client in presenting false information to a court. For example, in *In re Thompson*, 538 A.2d 247, 247-48 (D.C. 1987) (*per curiam*), the respondent was suspended for one year for knowingly assisting his client in making

false statements on an immigration application about the states in which she resided and worked. In *In re Parshall*, the respondent was suspended for 18 months for intentionally filing "a false status report that also attached documents he had fabricated in order to support his fraudulent report." 878 A.2d 1253, 1254-55 (D.C. 2005) (per curiam). But elsewhere, similar conduct of falsifying drug tests in child support and custody cases (by omitting failed tests) has been sanctioned by public censure only. *See In re Wilka*, 638 N.W.2d 245, 246-48 (S.D. 2001) (publicly censuring attorney who apologized to court after submitting improperly redacted drug tests in a child visitation dispute).

Respondent's conduct most resembles the respondent in *Thompson*: he intentionally assisted Libertelli in presenting a false version of his "Drug Test History" or "progress in recovery" to the court, and purposefully hid Libertelli's failed cocaine tests during the period at issue. Respondent directly vouched for the authenticity of his Exhibit 1 "Drug Test History" in open court, and relied on a misleading certification to get that exhibit conditionally admitted. In his examination of Libertelli, Respondent's questions and Libertelli's scripted answers suggested that the set of negative tests was complete and Respondent never hinted otherwise. He then asked Libertelli directly whether the set of records which Respondent purposely compiled to *hide Libertelli's drug use* was relevant to whether he was using drugs, prompting his client to answer that it was. Respondent's subterfuge was foiled only because — unbeknownst to him or his client — Noguchi was prepared with the evidence to disprove it. If the hearing had gone as Respondent planned, the

court would have been left with the false impression that Libertelli had only negative cocaine test results during the period at issue. *See* FF 61 n.26; Tr. 550-551, 553-554 (J. Storm) (explaining how an extended period of negative testing would have generally been helpful to Libertelli). Although Respondent's conduct is mitigated by his lack of prior discipline, unlike the respondents in *Reback* and *Wilka*, he has not acknowledged wrongdoing. I therefore recommend a one-year suspension.

By: Thomas Gilbertsen
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