THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER TWELVE

In the Matter of:	:	
	:	
CHRISTOPHER D. LIBERTELLI	:	
	:	
Respondent.	:	Board Docket No. 20-BD-050
	:	Disc. Docket No. 2019-D072
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 451341)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER TWELVE

Respondent, Christopher Libertelli, is charged with violating Rules 3.3(a)(1), 3.3(a)(4), 3.4(a), 3.4(b), 8.4(b), 8.4(c), and 8.4(d) of the District of Columbia and/or the equivalent Maryland Rules of Professional Conduct (Rules 19-303.3(a)(1), 19-303.3(a)(4), 19-303.4(a), 19-303.4(b), 19-308.4(b), 19-308.4(c), and 19-308.4(d)), arising from Mr. Libertelli's conduct in divorce and custody proceedings in Maryland, both as a party and *pro se* litigant, between December 2015 and March 2019. There is no dispute that, during this period, Mr. Libertelli lied on scores of occasions. He lied under oath during testimony. He lied in representations made to the Court that were not under oath. He fabricated or materially altered scores of drug tests to conceal his continued use of drugs, and scores of entries in financial records, in almost all (but not all) instances to conceal payment for drugs.

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

Disciplinary Counsel contends that Mr. Libertelli committed all of the charged violations and should be disbarred as a sanction for his misconduct. Mr. Libertelli does not currently deny that he violated any of the charged Rule violations and agrees that he should be sanctioned.[1] However, he argues that he is entitled to disability mitigation under *In re Kersey*, 520 A.2d 321 (D.C. 1987), and that based on the *Kersey* and additional factors relevant to sanction he should not be disbarred. "Aside from that," Mr. Libertelli "leave[s] the task of fashioning an appropriate sanction to the learned discretion of the . . . Hearing Committee." Lib. Br. at 2-3.

As set forth below, we conclude that the Maryland Rules apply to the violations and find that Disciplinary Counsel has proven all of the alleged violations by clear and convincing evidence. These extreme violations warrant disbarment.

In considering Mr. Libertelli's mitigation arguments, we are sensitive to the horrible effects of addiction and agree that he has provided some evidence towards

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[1] In his Answer, Mr. Libertelli admitted all of the alleged violations, with the exception of Maryland Rule 19-308.4(b). Disciplinary Counsel's Exhibit ("DCX ") 4 ¶ 22. In his Opening Brief, he states that he

> initially preserved his right to contest the charge that he violated Rule 19-308.4(b) based on a legal question of whether his actions constituted a "criminal act" that reflected his honesty, trustworthiness, or fitness as an attorney in other respects. His initial reservation of this issue is not a denial of his actions that he was dishonest with the court, opposing counsel, and his ex-wife.

Respondent's Response to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Sanction Recommendation, and Respondent's Opening Brief ("Lib. Br.") at 93. (Mr. Libertelli's Opening Brief is not paginated. Our page references to it refer to page X of 96 in the PDF version.) However, Mr. Libertelli's brief does not argue the legal question. We conclude that, as Mr. Libertelli lied under oath, Rule 8.4(b) applies to his conduct.

the elements of *Kersey* mitigation and meets the first element of proving by clear and convincing evidence that he suffered from an addiction. If the other evidence were stronger, the case would turn on the resolution of some significant undecided issues of law. However, on the existing evidence, we conclude that Mr. Libertelli did not prove by a preponderance of evidence that the addiction was a substantial cause of his wrongdoing; and, although he has made some progress, he did not prove (by the required clear and convincing evidence, or even a preponderance) that he is already substantially rehabilitated as *Kersey* requires. Accordingly, he should be disbarred.

I. PROCEDURAL HISTORY

On July 27, 2020, Disciplinary Counsel served Mr. Libertelli with a Specification of Charges ("Specification"). A hearing was held on June 21-25, 2021. Mr. Libertelli was present and was represented by counsel.[2] The parties waived the requirement of a bifurcated hearing, which is normally required under Board Rule 11.11, because Mr. Libertelli had disclosed his *Kersey* defense and admitted most of the alleged Rule violations, and because several witnesses would be testifying both with respect to the allegations of misconduct and with respect to mitigation.

[2] Prior to the fourth day of the hearing, the Attorney Member of this Hearing Committee experienced a family emergency that rendered him unable to attend the final two days of the hearing. The hearing proceeded with a quorum of two members, and the parties consented to the Attorney Member participating in the decision after reviewing a recording of the hearing. Tr. 1038-40; *see* Board Rule 7.12.

The following exhibits were received into evidence at the outset of the hearing: DCX 1-64 and RX 1-14.[3] During the hearing, Disciplinary Counsel offered DCX 65 into evidence, which was admitted over Mr. Libertelli's objection, as well as DCX 66 and 67, which were admitted without objection. Mr. Libertelli offered RX 15 and 16 into evidence during the hearing, which were admitted without objection, and withdrew RX 11 and 12. During the hearing, Disciplinary Counsel called as witnesses Mr. Libertelli, Michael Labbe, LPC, Niki Irish, LICSW, Hope Stafford and Dr. Ryan Shugarman. Respondent called as witnesses Dr. Anjula Agrawal, Markham Erickson, Dr. Richard Ratner, Jacqueline Libertelli, Aparna Sridhar, Dr. Nicholas Kirsch, and Blair Levin.

II. FACTUAL SUMMARY

The charges against Mr. Libertelli involve what he now admits are scores of intentional misrepresentations he made in divorce and custody proceedings over a period of almost three years (from December 2015 to November 2018) – misrepresentations made overwhelmingly, but not entirely, to conceal his use and

[3] As noted in n.1, above, "DCX " refers to Disciplinary Counsel's exhibits. "RX " refers to Respondent's exhibits. "Tr." refers to the transcript of the hearing held in this matter on June 21-25, 2021. Where the exhibits are themselves transcripts of other proceedings, the transcript pages are referenced as "DCX Tr." or "RX Tr." The parties filed four post-hearing briefs: Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law, and Sanction Recommendations ("ODC Br."); Mr. Libertelli's Opening Brief ("Lib. Br."); Disciplinary Counsel's Response to Respondent's Opening Brief (which, for clarity, we refer to as "ODC Reply"); and Mr. Libertelli's Reply to Disciplinary Counsel's Response to Respondent's Opening Brief ("Lib. Reply").

purchases of drugs (primarily opioids,[4] cocaine and marijuana), which was a major issue in the case. Mr. Libertelli lied under oath as a witness in the divorce proceeding; he made non-sworn false statements both directly to the Court (for example, in the course of acting *pro se*) and indirectly when his counsel conveyed his false information; he falsified numerous drug test results and fabricated financial records that he produced to his wife's counsel and, in many instances, offered or caused or allowed these fabricated documents to be entered into evidence without informing the Court that they were fabricated. Respondent was diagnosed with Opioid Use Disorder in 2016 (as well as a Cocaine Use Disorder) and has since sought treatment and counseling. Though he stopped taking non-prescription opioids in 2018, Respondent continued to use cocaine until at least late 2020. He also continues to use marijuana and received a medical marijuana card in April 2021.

III. FINDINGS OF FACT

The following findings of fact are based on the testimony and documentary evidence admitted at the hearing. To the extent these findings relate to proof of Disciplinary Counsel's allegations of violations or to disability or rehabilitation elements of Mr. Libertelli's *Kersey* mitigation defense, these findings of facts are established by clear and convincing evidence (under *Kersey*, the element of causation is to be determined by a preponderance of the evidence). *See* Board Rule

[4] The term "opioids" includes and usually refers to synthetic drugs, such as Oxycontin and Percocet, that are painkillers with the same or similar effects as "opiates" (natural poppy derivatives, such as heroin and morphine). Tr. 370-71, 930-31, 1240-41.

11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is "more than a preponderance of the evidence," it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established"' (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004))).

1. Mr. Libertelli is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on June 3, 1996, and assigned Bar number 451341. DCX 1.

2. From September 1996 to 1999 or 2000, Mr. Libertelli worked as an associate at Dow Lohnes & Albertson. RX 5 at 62; RX 6 at 68; Tr. 62-63. From January 2001 through early 2005, Mr. Libertelli worked for the Federal Communications Commission. RX 5 at 62; Tr. 63-64. From March 2005 to December 2011, Mr. Libertelli worked at Skype as Senior Director of Government Affairs for the Americas. RX 5 at 61-62; Tr. 64. Between December 2011 and June 2017, he worked for Netflix as Vice-President of Global Public Policy. RX 5 at 60-61. Since then, Mr. Libertelli has worked at various times on his own as a consultant and at other times in-house at other firms. *See* Tr. 65-68. Since November 2020, he has been General Counsel of Carrier Exchange d/b/a CarrierX. Tr. 60-61.

3. In July 2008, while he was working at Skype, Mr. Libertelli married Yuki Noguchi[5]; they had two boys born in September 2009 and December 2010. Tr. 63-64, 69-70, 1057-58.

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[5] During their marriage, Ms. Noguchi used the married name Yuki Libertelli. For convenience, we will refer to her as Ms. Noguchi throughout.

4. Mr. Libertelli and Ms. Noguchi were divorced as part of divorce and custody proceedings that respectively began in the Circuit Court for Montgomery County, Maryland in 2014 and 2015, and were subsequently consolidated. DCX 5. The case was still active on the Court's docket at the time of our June 2021 hearing. *Id.* Most of the proceedings in the case were before Circuit Court Judge Harry C. Storm. *Id.*

The Separation and Interim Agreement

5. As explained in greater detail below, during the course of his marriage, Mr. Libertelli used a number of drugs, including opioids that he initially received on prescription for back pain, but subsequently bought off the street, cocaine and other stimulants, and marijuana. In September 2013, Ms. Noguchi staged what usually has been referred to as an "intervention" that she asserted was due to his drug use.[6] From that point, onward, Mr. Libertelli and Ms. Noguchi no longer lived together. DCX 6 Tr. at 96; Tr. 395-96.

6. In April 2014, Mr. Libertelli and Ms. Noguchi entered into an interim agreement that addressed custody and visitation. Tr. 76-77, 835-36; DCX 6 Tr. at 108, 128; DCX 8 Tr. at 13-14. The agreement contemplated that Ms. Noguchi

[6] Mr. Libertelli does not agree that the term "intervention" properly characterizes this event or its motives. *See* Tr. 70; DCX 7 Tr. at 69-71. Although the fact of this event is important in the timeline, the views about what motivated it and exactly what took place are not critical to our proceeding. As we have limited evidence on the point, we cannot and do not say that "intervention" accurately describes the event. However, because the term "intervention" is used frequently throughout many of the hearings, and is the term Mr. Libertelli uses in his Brief, *see* Lib. Br. Proposed Findings of Fact ("PFF") 80-82, we will continue to use it here solely for convenience.

would retain custody; Mr. Libertelli would have supervised visitation on particular days. DCX 6 Tr. at 108-09; DCX 8 Tr. at 13-14. Mr. Libertelli also agreed to be evaluated by Dr. Paul Berman and (subject to some travel accommodations) to be drug tested twice a week. DCX 8 at 14. *See* DCX 6 Tr. at 109-10, 158-59; Tr. 835-37. If Mr. Libertelli missed or failed three consecutive tests, Ms. Noguchi could insist on a paid supervisor. DCX 8 Tr. at 14. The agreement was to continue in effect until the parties agreed or the Court ordered otherwise. *Id.* *See generally* Tr. 837-41.

7. During the period between April and November 2014, Ms. Noguchi's counsel received drug test results from Mr. Libertelli's counsel. Tr. 839-41. Mr. Libertelli tested positive for drugs more than 20 times during the course of Dr. Berman's evaluation. DCX 8 Tr. at 14. There were gaps in the testing, and some results indicated that the sample was diluted. DCX 6 Tr. at 162-63; *see also* Tr. 841-42. Nonetheless, Dr. Berman issued a report in September 2014, that recommended some additional visitation. DCX 6 Tr. at 109, 157; Tr. 845-46. Mr. Libertelli hired a malpractice lawyer, Chris Hogue, to investigate Dr. Berman and filed a complaint against him with the medical board. Tr. 78, 848.

The Divorce Proceedings

8. In October 2014, Ms. Noguchi filed a complaint against Mr. Libertelli for divorce in the Circuit Court for Montgomery County, Maryland. When the complaint was filed, Ms. Noguchi lived in Montgomery County, Maryland, and

Mr. Libertelli lived in the District of Columbia. The divorce complaint was subsequently consolidated with a custody complaint. *See* Tr. 843-50.

9. Mr. Libertelli's drug use was "the issue for years in this divorce and custody case." Tr. 81. There was never any doubt that he had used drugs – he was already being drug tested before the litigation began – or that he had not stopped using (his tests were coming back positive). DCX 8 Tr. at 14. As explained in more detail below, at various times, he acknowledged to the Court that he had a drug problem. Tr. 555-56. *See generally* Tr. 567 ("[T]he case was about the existent addiction.").

10. Mr. Libertelli had at least four sets of counsel in his divorce proceeding. His initial counsel was Barbara Burke, who practices collaborative law. Tr. 295-96, 403-04, 834; DCX 6 Tr. at 108. Later he was represented by Lisa Fishberg, Scott Strickler and Geoffrey Platnick. *See* DCX 6 Tr. at 3; Tr. 76, 834-35. During a hearing in March 2017, Mr. Libertelli represented himself. *See* DCX 10. At a hearing in January 2018, Mr. Strickler and Mr. Platnick again represented him. *See* DCX 14. At subsequent hearings in 2018, he was represented by Darryl Feldman and his firm. *See* DCX 16, 18, 19; Tr. 460-61 (discussing four sets of lawyers).

The December 2015 Hearing on Access and Drug Protocols

11. On December 14, 2015, Montgomery County Circuit Judge Terrence McGann conducted a hearing on Mr. Libertelli's request for additional access to the children (to permit overnight visits), the drug testing protocol and the appointment of a treatment monitor. DCX 6. At the hearing there was "no dispute" that

"Mr. Libertelli ha[d] a history of drug use." DCX 6 Tr. at 11, 109. He acknowledged that he used cocaine at least as recently as July 2015 and (although he disputed the result) that he had a positive test from September 2015. *Id.* at 12. However, his counsel urged that Mr. Libertelli had not used opioids since April 2015 and that "everyone in this room familiar with this case, will have to concede that Mr. Libertelli's use [of cocaine] is significantly decreased from that which it was when [the divorce proceeding] began." *Id.* Mr. Libertelli admitted in the disciplinary hearing that his divorce counsel's statement that he had not used opioids since Spring 2015 was untrue and that he did not correct the misstatement to Court, even though he knew that his counsel's statement was incorrect. Tr. 118-19.

12. At this December 2015 hearing, Mr. Libertelli testified that he had spinal stenosis, a degenerative condition. DCX 6 Tr. at 129. According to that testimony, he was injured playing squash in 2010, but the pain did not immediately present itself because the initial effect was to lose feeling in his fingers. The pain and the use of painkillers started in 2011 or 2012. *Id.*

13. Mr. Libertelli further admitted at this December 2015 hearing that, between approximately 2011 and April 2015, he obtained more painkillers than he was prescribed: he said that he had obtained them by ordering them online or using painkillers that Ms. Noguchi's doctors prescribed for her and not through any other means. DCX 6 Tr. at 129-31. Mr. Libertelli testified that he did not drive an automobile when he used drugs. DCX 6 Tr. at 107. He also testified at the

December 2015 hearing that he had used drugs in 2015 but only on "[a] handful of occasions," and never while with his children. *Id.* at 120-21.

14. Although the testimony about not using drugs while with the children appears to have been true, the testimony about the extent of his drug use was not. Ms. Noguchi's lawyers confronted Mr. Libertelli with numerous ATM cash withdrawals in the hundreds of dollars, each going back to 2013 from locations far away from where he lived (either in Bethesda, or Military Road in Northwest D.C.), such as 4400 Benning Road, N.E., 125 45th Street, N.E. and 3917 Minnesota Avenue, N.E. *Id.* at 171-72. Mr. Libertelli sought to explain these by saying that someone who worked on his team lived "on the corner of 8th Street and Benning Road," and he would occasionally take him home and that he paid some people in cash – including the supervisor for visits and his girlfriend Sophy Chen. *Id.* at 172-73. These answers, however, did not explain why he made withdrawals at *4400* Benning Road, N.E. (almost four miles to the east of 8th Street in the opposite direction from where Mr. Libertelli lived), why the withdrawals were at various times of day, or why he made withdrawals on consecutive days or what would bring him to the neighborhood on some of the days of the week involved. *Id.* at 173-88.

15. He also professed not to know a District of Columbia telephone number that his telephone records reflected that he called over 1,500 times and texted nearly 9,000 times, sometimes at odd hours. Tr. 866-68; DCX 6 Tr. at 188-213. That number was eventually linked to Mr. Libertelli's drug dealer, Deon Jones. DCX 8

Tr. at 15. Mr. Libertelli lied when he professed not to know to whom he made these communications. Tr. 127-29.

16. He said that he would not continue to use drugs and was willing to continue drug testing. DCX 6 Tr. at 121. At one point during the December 2015 hearing, he said that at the time of the interim agreement, he thought he "had developed a dependency on painkillers," *id.* at 109, but at another he denied having a "chemical dependency," and said instead that he had "a problem" in that he "couldn't be pain free without them," and needed them "to be okay." *Id.* at 127-28.

17. Before the December 2015 hearing concluded, the parties entered into a consent agreement and *pendente lite* order approved by Judge McGann that superseded the interim agreement under which the parties had previously operated. DCX 8 Tr. at 15. The order continued to require that visitation be supervised but expanded the list of supervisors to include Mr. Libertelli's parents and Ms. Chen, increased the visitation and reduced the frequency of drug tests. *Id.* at 15-17; *see also* DCX 7 Tr. at 99-100. The drug testing results went to Mr. Libertelli who was to send them to Ms. Noguchi's counsel either through counsel, or, when he was *pro se*, directly. DCX 7 Tr. at 102-03.

The 2016 Hearings and November 2016 Custody Order

18. Eleven days after the Court entered its order, Ms. Noguchi filed an emergency motion to modify the order because Mr. Libertelli continued to have failed drug test results. DCX 8 Tr. at 17. Judge Storm denied the emergency motion

(finding no emergency), then conducted a three-day hearing in March and May 2016, after which he declined to modify his previous order denying the motion. *Id.*

19. In July 2016, Judge Storm conducted another five-day hearing to address how custody should proceed. At this hearing, Mr. Libertelli admitted that he had relapsed. He testified that he had adhered to the drug testing protocol, DCX 7 Tr. at 103, but that he still misused drugs: he had a positive test for opioids two weeks before. He testified that he needed to take opioids to avoid withdrawal symptoms. *Id.* at 133-36, 184-86. He said that he obtained opioids through Mr. Jones and could not say whether that occurred more than 150 times. *Id.* at 180-83.

20. Mr. Libertelli also testified that he believed it was necessary for him to continue drug testing to demonstrate his sobriety. *Id.* at 104-05. He said that it was reasonable for the Court to be concerned because his recovery was "ongoing," *id.* at 111, and that it was in the best interest of the children to order that he not drive with them until he could demonstrate that he had three months of clean drug tests. *Id.* at 131-32. He added that he intended to continue treatment and looked forward to it. *Id.* at 109-10.

21. Again, while this part of the testimony was true, other parts were not. At the July 2016 hearing, Mr. Libertelli testified that he started out in 2009 taking 5 milligrams of opioids two or three times a day and that by that July 2016, he needed 10 milligrams of opioids once or twice a day to avoid withdrawal symptoms: "so I don't feel like I have the flu" (*i.e.*, start to suffer withdrawal). DCX 7 Tr. at 133-36,

184-86. But, as explained below, from his testimony in the disciplinary proceeding, his actual usage was much greater – at some point around this period growing to 400 milligrams a day, which Mr. Libertelli called "an insane amount." Tr. 387.

22. Mr. Libertelli testified at the July 2016 hearing that he had not used marijuana in over a year, that he said he had also been offered and taken cocaine only twice in the preceding six months, DCX 7 Tr. at 109, 174-76, and had not used cocaine for months since, *id.* at 108-09. This was not true. Tr. 135-37.

23. When asked at the July 2016 hearing about some drug tests that reflected dilution, Mr. Libertelli agreed that he did not have a medical condition, like diabetes or a kidney disease that would lead to drinking water for medical reasons, but denied taking steps to dilute his urine. DCX 7 Tr. at 141. Being as how he had no basis for why the tests indicated dilution, this testimony is not correct.

24. When asked to identify the people from whom he bought illegal opioids, he said that there were many people from whom he got drugs and one, in particular from whom he received drugs fewer than five times in the last year, but he did not know anybody's name. *Id.* at 166-73. He testified that he still could not identify that Deon Jones's telephone number was the one he had called and texted so many times. *Id.* at 176-77. In fact, the numerous contacts reflected that he purchased drugs much more frequently, and if he did not know Mr. Jones's phone number it was only in the technical sense that he could not recite it – he must have known who it was he had contacted so many times.

25. As explained below, in April 2016, Mr. Libertelli had begun taking medically-prescribed Suboxone. Tr. 92-93, 407-08, 463; DCX 18 Tr. at 167-68. Although classified as an opioid itself, Suboxone is oral treatment for opioid addiction that combines two medications – buprenorphine and naloxone. Tr. 625. The buprenorphine operates as a "partial antagonist" against opioid receptors – a cup-shaped receptor – that (unlike "full antagonists" like morphine and heroin) partially blocks the brain's receptors for physical and emotional pain. Tr. 625-26; *see also* Tr. 809-11, 816-17, 1223. Because the medication partially blocks the receptors, other full antagonists cannot get to the receptors and do not produce an effect. Tr. 626-27, 944-45; *see also* Tr. 93. Suboxone is accordingly used to allow addicts to taper off their addiction without going through full withdrawal, in the hope that, one day, the patient will taper off Suboxone itself. Tr. 627.

26. At the July 2016 hearing, Mr. Libertelli testified that it had been "extraordinarily hard" to get Suboxone, and there were four of five times he did not have any prescription. DCX 7 Tr. at 96-97, 183-84. But he said that the problem had been resolved and he was taking the drug "without interruption." *Id.* at 96-97.

27. Since then, Mr. Libertelli has said that this testimony about being able to obtain Suboxone was untrue. At a November 26, 2018 hearing in a divorce case, Mr. Libertelli testified that, in fact, "[m]y access to Suboxone during this [2016] period was always difficult." DCX 19 Tr. at 24. During the disciplinary hearing, he testified there were always difficulties obtaining Suboxone because of the controls that applied to its sale and that he had lied during his 2016 testimony so as not to

suggest to the Court that there was a problem with his recovery. Tr. 93-96, 145-48, 408-10, 463-64. Mr. Libertelli testified during the disciplinary case that he was going through withdrawal as he was attempting to obtain the medication; and added that Ms. Chen spent time helping him try to obtain Suboxone pills and would be "a great person" to speak with about the difficulty he encountered. Tr. 463-64; *see also id.* at 147, 409-10.

28. Mr. Libertelli testified during the disciplinary hearing that "I said a lot of things to keep my kids intact with me. I would say anything to Judge Storm to keep my kids around." Tr. 121-22; *see also, e.g.*, Tr.123, 132-34, 143-44, 185, 463-64, 465-67, 487, 559-60.

29. On November 1, 2016, the Court issued an oral opinion finding that Mr. Libertelli had been untruthful about his drug use, the source of his drugs, his water loading before urine tests, and his claimed inability to obtain Suboxone, which he was using to treat his opioid addiction. DCX 8 Tr. at 17-20. As the Court put it: "Contrary to Mr. Libertelli's testimony in December of 2015, the evidence showed that he in fact continued to use drugs and that he continued to have contact with Mr. Jones and to make large cash withdrawals. Indeed, the evidence showed that during his first week of overnight access [to his children] December 19th and 20th [2015], he withdrew $1,900 in cash and had 24 contacts with Mr. Jones." *Id.* at 17-18.

30. Judge Storm nevertheless believed, based on Mr. Libertelli's representations, that he had made progress in getting his addictions under control.

Citing expert testimony, he concluded that Mr. Libertelli was among the "minority" of addicts, "who function and are relatively stable," and "are able to maintain good jobs," and "able to be good parents." DCX 8 Tr. at 21. He concluded that "[t]here was no evidence that [Mr. Libertelli] has ever driven impaired," and that even Ms. Noguchi's private investigator could not find any evidence of impairment in his dealings with the children. *Id.* at 22. Judge Storm also agreed with the expert that "Mr. Libertelli has the ability to make reasonable and rational decisions about the children." *Id.* at 23.

31. Judge Storm concluded that legal custody should be shared jointly – meaning that both parents were responsible for decisions about the children, DCX 8 Tr. at 29 – and that Mr. Libertelli's physical access to the children should continue without requiring paid supervision (as opposed to Mr. Libertelli's parents or Ms. Chen or the children's nanny, Ara Guzman). *Id* at 31-32. Judge Storm noted that he had "also weighed" Mr. Libertelli's "lack of credibility," and his decision "should not be interpreted as in any way rewarding his behavior," but expressed his "belief that the boys should not be punished by having [Mr. Libertelli's] access restricted any more than necessary under the circumstances." *Id.*

32. In the November 9, 2016, custody order, the Court granted Mr. Libertelli joint legal custody of the two children but granted primary physical custody to Ms. Noguchi. DCX 9. The Court further ruled that Mr. Libertelli's access to his children would be monitored and supervised until he had four consecutive months of clean urine tests. During this initial four-month phase (phase

one), Mr. Libertelli had to undergo random urine testing once a week, with the tests to occur within 24 hours of notification to Mr. Libertelli. Mr. Libertelli was required to provide the test results to his wife's counsel within 48 hours of their receipt. *Id.* If Mr. Libertelli failed a urine test during the four-month period, then phase one would continue until such time as he completed four consecutive months of clean urine tests.[7] *Id.* After successfully completing phase one, Mr. Libertelli could have unmonitored access to his children and an additional overnight stay with them during the week. *Id.*; *see also* DCX 8 Tr. at 31-33.

33. The Court closed the oral order by telling Mr. Libertelli that "you have an incentive to stay clean . . . . [U]nsupervised time with the boys if everything goes as expected will occur by the end of February [2017] in four months . . . so the prospect of resuming a normal relationship with them I think it is on the horizon and don't mess it up." DCX 8 Tr. at 49.

34. During his testimony in the disciplinary hearing, Mr. Libertelli disparaged Judge Storm for approaching addiction as something that can be addressed by creating incentives to be clean and particularly for leaving Mr. Libertelli's lawyers, and later (when he became *pro se*) Mr. Libertelli, in charge of forwarding the drug test results. Tr. 220-21 ("[Y]ou should never put a drug addict in charge of his other drug tests. Like that is crazy. This is nobody in the

[7] Under the Order, a urine test could be considered failed if (l) there was water loading or other tampering of the tests, (2) Respondent missed a test, or (3) he failed to report for testing within 24 hours after notification.

recovery community that will say that is the legitimate thing to do. That is the position my lawyers put me in. I don't mean to say that that shifts responsibility at all. Like I did this. This is my problem. This is my making. But it was in the context.").

The Falsified Drug Test Results

35. In fact, as of the time of this November 2016 decision, Mr. Libertelli was already falsifying drug tests. Mr. Libertelli began fabricating drug tests in connection with a scheduled vacation with the kids in July 2016; he received a positive drug test and believed that, if disclosed, the test would prevent him from taking them on the vacation. Tr. 410-11.

36. Between August 2016 and November 2017, Mr. Libertelli falsified at least 62 of his drug tests and five times presented drug test "results" as if he had taken a test that he did not take. Tr. 181-84; DCX 19 Tr. at 38-45 & DCX 20, 21. The actual records showed that he tested positive for and concealed use of oxycodone (Percocet); hydrocodone (Vicodin); oxymorphone (Opana), hydromorphone (Dilaudid), morphine, cocaine, marijuana and on one occasion methamphetamine. DCX 49 at 10, 23; *see* Tr. 1249-50.

37. Mr. Libertelli altered the drug tests to eliminate the results reflecting that on 47 occasions he tested positive for cocaine. DCX 19 Tr. at 45-47 & DCX 20, 21. He also altered the drug test results by switching results for oxycodone in 36 tests and oxymorphone in 42 tests from positive to negative. DCX 19 Tr. at 46-47

& DCX 20, 21. He described the process of making the changes as being as "simple" as "'save as,'" "'cut,'" "'paste.'" Tr. 182.

38. Mr. Libertelli knew he was falsifying drug tests and knew that it was "absolutely dishonest," and a "wrong thing to do to lie to a court." Tr. 465-66. He said that, at the time, he thought of it as "choosing my role as a father over my role as a lawyer," and in what he called his "addled state" perceived the benefit of "preserving consistent access to my boys," as outweighing the cost. Tr. 465-67. He said that "looking and sitting here . . . there were so many things wrong with that decision as well as the things that led to it." Tr. 467.

39. During that August 2016 to November 2017 period, he also intentionally invalidated some test results by drinking large amounts of water to dilute the sample, DCX 18 Tr. at 249-52, and altered the relevant date in the report to make it appear that the sample had not been diluted.

40. Between November 28, 2017 and January 18, 2018, Mr. Libertelli did not undergo any testing. Yet, during this time, Mr. Libertelli submitted what purported to be test results by changing the dates on other test results, including for those he had altered to remove positive results. DCX 13; DCX 14 Tr. at 34; DCX 15 at 2; DCX 20 at 76-81.

The March 2017 Merits Trial

41. On March 20 and 22, 2017, the Court held a merits trial for the divorce in which Mr. Libertelli represented himself. DCX 5 at 38 (Dkt. Nos. 285, 286); DCX 10, DCX 19 Tr. at 29. During the trial, Mr. Libertelli told the Court that he

had been hitting his marks and would be able to demonstrate that at trial; introduced purportedly clean drug tests into evidence; offered a summary chart of falsified exhibits; and testified that his drug tests demonstrate that he had moved from Phase one to Phase two in the custody order – entitling him to unsupervised access to the children. DCX 10 Tr. at 184-85 (Mr. Libertelli stating under oath, "[t]he other exhibit of significance is Exhibit 30, which is a description of the test results, as well as the testing calendar, which demonstrates that we've moved to phase one to phase two under" the custody order); *id.* at 207 (the calendar (DCX 11) "gives the Court confidence that I'm hitting my marks on the phase one part of the order, as well as the back-up"); DCX 19 Tr. at 29-31.

42. These statements, testimony and evidence were all false: as Mr. Libertelli put it during the disciplinary hearing "[t]here was no recovery happening while I was in the middle of this custody case." Tr. 137-38; *see also* Tr. 897-98 (Stafford).

43. At this March 2017 divorce hearing, Mr. Libertelli admitted that the telephone number that appeared so frequently on his phone was that of Mr. Jones. DCX 10 Tr. at 240. But he still relied on evidence created by falsifying drug tests to mislead the Court and lied under oath and in argument about what the tests really showed. Tr. 141-44. *See also* DCX 12 Tr. at 25 ("I have done everything in my power to meet the requirements [of the Court's drug testing custody order]. I have prioritized my recovery and drug testing over my job and other obligations that [have] arise[n] throughout this case.").

44. One of the issues that arose at this March 2017 divorce hearing and in later divorce proceedings was whether Mr. Libertelli had dissipated marital assets by spending them on drug purchases – an issue that affected how the assets would be divided between the parties in the divorce decree. DCX 10 Tr. at 20. Mr. Libertelli asserted at this hearing that Ms. Noguchi did not have a cognizable claim that Mr. Libertelli had dissipated marital assets by spending them on drug purchases because under Maryland law, "[d]issipation is a doctrine that's applied where one spouse has the intent to hide or transfer away from the marital estate assets that would avoid this Court's equitable distribution power." *Id.*

45. In addition to arguing this legal point, however, Mr. Libertelli also provided conflicting testimony concerning significant payments he said he made to his girlfriend Sophy Chen. *See* Tr. 864-66. As the Court would later put it, Mr. Libertelli testified that "[s]he gave him money. She loaned him money. There was no promissory note. There is a promissory note. She gave him money to buy the house that went into the bank account. It didn't go into the bank account." RX 9 Tr. at 19.

46. At least some of this testimony had to be false. Unlike almost all of the other false testimony and evidence Mr. Libertelli provided concerning his drug use, this false testimony did not concern his drug use or money he used for drugs or his fitness for custody and visitation. There was no dispute that Mr. Libertelli paid money to Ms. Chen and no allegation that money given to Ms. Chen was used for drugs. *See* Tr. 124. The effect of lying about the purpose for which this money was

paid was to obscure or conceal whether there was a dissipation of assets that should affect the property disposition between Mr. Libertelli and Ms. Noguchi.

The Fabrication of Financial Records

47. Subsequently, Mr. Libertelli both concealed and falsified records concerning how much he had spent on drugs. In April 2017, Mr. Libertelli learned he was losing his job at Netflix. DCX 19 Tr. at 36-37. He sought to reopen the evidence to report the change, arguing that it affected the financial situation upon which the Court could rely. *See id.* at 36-38.

48. When Ms. Noguchi served a second set of subpoenas to obtain financial information, Mr. Libertelli moved to quash, ultimately reaching an agreement to provide documents himself, rather than have Ms. Noguchi obtain the financial institutions' copies. Tr. 180-81, 188-89 ("Q: So you were trying to prevent Ms. Noguchi and her lawyer from seeing the actual financial records from the banks? A: 100%."); DCX 5 at 42-43 (Dkt. Nos. 318-324); *see* DCX 19 Tr. at 37 (Representation by Ms. Stafford); Tr. 858-62.

49. Mr. Libertelli then produced financial documents in September 2017, in which Mr. Libertelli had photoshopped bank, investment account and credit card records by cutting and pasting entries, largely to conceal his withdrawal of funds to buy drugs and his purchases from a marijuana delivery service. Tr. 173-74, 175-78, 187-91, 199-201, 207-20; DCX 19 Tr. at 59-76 & DCX 22 through 32. *See generally* Tr. 164-66 (describing the issue); 178-80 (describing how Mr. Libertelli

made the alterations before providing documents either to his lawyers or Ms. Noguchi's lawyers).

50. For example, Mr. Libertelli altered the monthly statements for a Citibank account by changing many of the ATM cash withdrawals for hundreds of dollars each, to debit card purchases to vendors for much smaller amounts. Tr. 190-91. In one statement alone, he replaced 23 ATM withdrawals and one teller withdrawal totaling almost $14,200 with purchases ranging from $7.92 to $29.95 from Apple iTunes, CVS, Rite Aid, Rodman's and other vendors. *Compare* DCX 26 at 2-5 *with* DCX 27 at 2-5. He changed a $75.45 debit card purchase from Redeye Delivery (a marijuana delivery service) into a $7.92 purchase from a bagel shop. *Compare* DCX 26 at 2 *with* DCX 27 at 2; Tr. 191. He changed the record of an ATM withdrawal of $803.50 made on July 20 at 9:53 pm (DCX 27 at 40) into an online transfer of $800 on July 20 (DCX 26 at 39). In order to conceal that he had made some ATM withdrawals on one of his E*Trade accounts he altered not only the ATM entries, but also entries reflecting a refund of ATM fees to appear as interest or interest rate changes. *Compare* DCX 28 at 1 *with* DCX 29 at 1; Tr. 215-16. In other instances, when he was charged ATM fees, he altered them to be balance inquiry or parking meter fees. *Compare* DCX 30 at 13-16 *with* DCX 31 at 13-16.

51. Thus, while Ms. Noguchi and the Court knew by this point that he had used money to buy drugs, Mr. Libertelli concealed how much money he had spent. A summary exhibit later admitted during a November 2018 hearing in the divorce proceeding (after the fabrications had come to light) reflected that, between February

1 and December 31, 2017 alone, Mr. Libertelli made almost 400 cash withdrawals from his accounts (almost all in amounts ranging from $200 to approximately $800), totaling over $184,000. DCX 19 Tr. at 76-78 & DCX 32. Often, he made cash withdrawals many times in a month, and while he asserted that he paid people for non-drug-related services in cash, some of those people were "also" paid by check. Tr. 862-64.[8]

52. In at least one instance, Mr. Libertelli concealed more than just a drug purchase. Judge Storm had put a freeze on one of Mr. Libertelli's accounts – E*Trade Account No. 1386. Tr. 164-65 (Libertelli) 868-69, 901-02 (Stafford). The February 2017 statement from this account reflects that there had been two "withdrawals" from the account, totaling $9,200 (one $8,000 and another $1,200) and that with other adjustments the balance in the account had gone down from $48,574.57 to $39,272.88. DCX 23 at 6-7. Mr. Libertelli, however, had photoshopped an altered version of the statement that deleted the two "withdrawals." DCX 22 at 6-7; Tr. 166-68, 171-72.

53. Mr. Libertelli maintains that these were not really "withdrawals," but rather transfers that show up in another account, and he personally believed that there was nothing improper in transferring money from a frozen account without court approval so long as the money was not spent. Tr. 165, 169-70, 172-73, 195. The

[8] Eventually, Mr. Libertelli also argued that not all of the cash he took out of ATM machines was used to buy drugs. Tr. 124-27, 138-40, 192-93, 216-17, 308-09. But he never provided an accounting for what was and was not drug money.

Court, however, found him in contempt twice for these transfers. Tr. 195-96; 868-69; DCX 19 Tr. at 57-58. Mr. Libertelli acknowledges that the Court found the payments out of the account to be "improper," but asserts that Judge Storm had "strict liability" in his mind and that it was "absurd" to think he "would do this for $8,000," which is "not even a single-digit percentage" of all of the assets. Tr. 173-74; *see also* Tr. 193-96 (expressing "astonish[ment]" that he was held in contempt).

54. In the divorce proceeding, however, Mr. Libertelli went beyond arguing that the transfers should be viewed as proper; he concealed the evidence that the transfers had occurred.

55. As with the testimony concerning why Mr. Libertelli made payments to Ms. Chen, this falsification did not conceal a drug purchase. It changed the facts that bore on his compliance with financial requirements. Indeed, these falsified records became the basis of a financial settlement the parties reached in late 2017. Tr. 206-07, 905-07; DCX 19 Tr. at 37-38, 69-76 & DCX 26-31. Eventually, Ms. Noguchi's lawyers obtained the accurate financial statements, with numbers from the banks and other financial institutions, DCX 23, 25, 27, 29, 31, but Mr. Libertelli never disclosed to them that he had falsified the documents. Tr. 221-22, 902-04, 908-09.

Discovery of Altered Drug Tests and the January 11, 2018 Hearing

56. On January 5, 2018, Mr. Libertelli had produced results for a drug test that was ostensibly performed on December 29, 2017, even though Mr. Libertelli's appearance for the test had not been requested until January 5, 2018. DCX 13 at 3.

When Ms. Noguchi's attorneys examined Mr. Libertelli's drug test results, they noted other evidence of fabrication. Tr. 878-81 (Stafford). For example, reports contained identical requisition, accession and specimen IDs numbers, in samples with the same dates and time, save that the reports appeared to be exactly one year apart; or reported on an assessment of dilution that would not have been done based on other data that seemed to be in the report. DCX 13 at 3-4; RX 9 Tr. at 35-38.

57. On January 11, 2018, the morning of a scheduled appearing in which the Court was to render the divorce decree, Ms. Noguchi's counsel filed an "emergency" motion "To Modify Access & Drug Testing Regimen," based on the discrepancies they had found to that point. DCX 13; Tr. 881-82.

58. The January 11, 2018, hearing began with the divorce decree. The parties had already stipulated to several matters, including child support and the division of real and personal property, leaving only the division of certain accounts and Ms. Noguchi's claim for dissipation and attorney's fees for the Court to decide. RX 9 Tr. at 5-6. The Court said that it was treating Mr. Libertelli's opioid addiction "as an illness," and was not "punish[ing] Mr. Libertelli for his addiction." *Id.* at 15. However, based on a comparison of cash withdrawals after the parties' separation to those before the separation, *id.* at 16, it ruled that Mr. Libertelli had dissipated almost $320,000 based on unexplained cash withdrawals. *Id.* at 16-19. The Court also found Mr. Libertelli's "conflicting explanations" of why he gave money to Sophy Chen to be "unconvincing," and ruled that the money purportedly paid to Ms. Chen dissipated $114,230 from the marital estate. *Id.* at 19-20.

59. The Court also ordered Mr. Libertelli to pay $100,000 out of the over $300,000 that Ms. Noguchi incurred in attorneys' fees. RX 9 Tr. at 29. The Court ruled that Mr. Libertelli's "drug use and the need to trace cash" increased the costs. The Court found that some fees were appropriate, as Mr. Libertelli had been in contempt for failing to comply with the Court's order, but "on the other hand, there were times when I felt that [Ms. Noguchi] was taking unreasonable positions and pushing things more than things needed to be pushed." *Id.*

60. Counsel then discussed the emergency motion, RX 9 Tr. at 30-41, and at a follow-up hearing that afternoon, Mr. Libertelli's counsel stated that Mr. Libertelli was "agreeable" to going back to the beginning of phase one (supervised visitation for four months) and will "agree to authorize the test facility to release the test results directly to" Ms. Noguchi's counsel. *Id.* at 79.

61. The Court, however, ruled that "I've given Mr. Libertelli every single benefit of the doubt, throughout the course of this proceeding, over the last two years. I'm going to suspend all of his access [to the children], and we're going to set a hearing date in a couple of weeks." *Id.* at 80.

62. Mr. Libertelli was represented by counsel at the afternoon hearing but did not personally attend. RX 9 Tr. at 80. He testified that he went to see one of his treating physicians, Dr. Bogrov, and that he considered suicide. Tr. 425-28. He credits Sophy Chen with being "able to save me" from doing that. Tr. 427, 468.

63. Even after Ms. Noguchi's lawyers and the Court had learned that Mr. Libertelli had altered at least some testing results, however, Mr. Libertelli

neither provided them with the accurate documents, nor ensured that his lawyers would provide them. Mr. Libertelli testified in the disciplinary hearing that he told his then attorneys to be "maximally transparent," about providing this information, Tr. 226-30. According to his testimony during the disciplinary hearing, these lawyers said that there was an ethics opinion that required them to withdraw from the case, and they did eventually withdraw, over his objection. Tr. 226-27, 229-31.

64. But the withdrawal of counsel does not explain Mr. Libertelli's continued failure to provide the accurate information. To begin with, he was without counsel for only a brief period. His then counsel moved to withdraw on January 17, 2018, and new counsel entered an appearance on January 22, 2018, DCX 5 at 47-49, and represented him at the February 13, 2018 hearing the Court scheduled. DCX 16. And in any event, there is nothing that prevented him, or his subsequent counsel, from providing all of the accurate drug test results and financial records immediately. Instead, he promised to, but never did, sign a release making the tests available, and opposing counsel obtained accurate drug tests by subpoenaing the testing company, Quest Diagnostics. Tr. 883-84 (Stafford), Tr. 226-27 (Libertelli), DCX 15 (¶¶ 10-11). The accurate tests showed that Mr. Libertelli had not had a negative drug test since September 30, 2016, and had falsified 67 of the 72 reports he provided. DCX 15 (¶ 11).

65. Ms. Noguchi's counsel did not obtain accurate financial statements until sometime later (it appears to be months) and did so subpoenaing the financial

institutions. *See* DCX 16 Tr. at 5-7 (noting that some of the earlier motions to quash were moot); Tr. 903-04 (Stafford).

66. Thus, regardless of whether Mr. Libertelli told his lawyers to be "maximally transparent," the fact is, he was not.

The February 13, 2018 Hearing

67. On February 13, 2018, the Court conducted a follow-up hearing. During that hearing, the parties discussed some of the motions to quash financial institution subpoenas having been rendered "moot." DCX 16 Tr. at 5-6. But there was no discussion suggesting that either Ms. Noguchi's lawyers or the Court had been made aware that Mr. Libertelli had been fabricating financial records as well as drug tests.

68. Instead, the discussion focused on the falsified drug tests, about which Ms. Noguchi's divorce attorneys now had the proof. *Id.* at 7-15. Mr. Libertelli's counsel stated that "[t]he why of why Mr. Libertelli did what he did is complex. But breaking it down to its simplest form, his fear for losing his kids outweighed his fear for being caught. I know this is backwards thinking . . . and while I have not known Mr. Libertelli for that long, I'm hopeful that he realizes that now." *Id.* at 15.

69. Mr. Libertelli also directly addressed the Court, saying that

> I wanted you to know that the decision I made . . . to alter these test results, was an appalling one, and I am deeply sorry to you and to everybody who's been affected by this case. I've prolonged these proceedings and I've taken the focus away from my boys, where it should properly be. I recognize that I have to earn this trust back incrementally, in a steady way. After losing my marriage and my job, I just couldn't bear the idea that I would lose my kids. I hope you can

> understand this as a choice to be a consistent father. As silly as it is and reckless as it is, it was a decision to be a consistent force in their life. And I recognize that that's not sober thinking, but I've made enormous strides in the last 30 days, and I hope you can allow me to earn this Court and your trust back.

DCX 16 Tr. at 16-17. He did not mention altering financial statements.

70. Mr. Libertelli's counsel also discussed a recovery program. He said that Mr. Libertelli would continue with Tiffany Movari at Assistance in Recovery, Inc. (AIR) in a program that coordinates with all of Mr. Libertelli's doctors and have drug testing done including an on-demand saliva test performed through an app on his phone. DCX 16 Tr. at 18-19. He reported that Mr. Libertelli was "working with a new doctor" to have an implant so that he would not worry about whether he was taking pills. *Id.* at 19. He would also continue to receive individual counseling at Lamppost Wellness and to attend AA classes at Cleveland Park Unitarian Church. *Id.* at 20. He also reported that Mr. Libertelli had "signed releases for Ms. Noguchi's counsel to be in direct contact with AIR," and to receive directly "every drug test, whether that's a urine test or a saliva test." *Id.*

71. Judge Storm apologized to Ms. Noguchi and her counsel for not insisting that Mr. Libertelli's drug test results go directly to them and instead permitting him to submit the results. DCX 16 Tr. at 44-45. He then said to Mr. Libertelli, "all along you appear to have been deceiving me, deceiving your family, and most, and worst of all, I guess, deceiving your children. . . . [T]he level of deception is staggering and it's a testament to the level of your addiction that you

could be as brazen as you were, while apparently believing that none of this was going to come to light, and that you weren't going to get caught." *Id.* at 45.

72. However, even then, Judge Storm also expressed "sympathy" for Mr. Libertelli: "I went back and looked at some of what Dr. Teeter . . . had to say, and what he said about addiction, that it hijacks normal thoughts, and that appears to have been what happened here, the hijacking of a good person, someone who worked hard and became phenomenally successful, both professionally and financially, who fathered two beautiful children, but whose normal thoughts and normal thinking was hijacked. Of course, Dr. Teeter also testified that the addiction does not cure itself, and his testimony was that the addict either gets into treatment or he dies. So Mr. Libertelli, I continue to have sympathy for you. You are part of the millions of Americans who have fallen prey to this insidious epidemic. But for as long as the addiction controls you, it really is difficult to have any trust in what you say." DCX 16 Tr. at 46.

73. Although Judge Storm stated that there would now need to be paid supervision for Mr. Libertelli's visits, DCX 16 Tr. at 33, he did not enter an order at the hearing. Instead, he said he would take under advisement how to revise the custody and visitation and encouraged the parties to work out an interim arrangement. *Id.* at 47-48. Our record does not contain the actual order. But the Court appears to have granted a temporary care and custody order on March 14, 2018, *see* DCX 5 at 51 (Dkt. No. 396), and, as described below, there was subsequently discovery and a full hearing on a permanent order. Mr. Libertelli

continued to have supervised visitation with his children until October 2019. Tr. 255-56.

74. At the February 2018 divorce hearing, Mr. Libertelli's counsel also told the Court that Mr. Libertelli had retained additional counsel, Stanley Reed, to advise him on bar issues, because there may be some "self-reporting requirements." DCX 16 Tr. at 17, 26-27. On inquiry from the Court, counsel said that he could not confirm what action Mr. Libertelli and Mr. Reed were taking, as he was not party to those discussions, but he assumed that Mr. Libertelli was relying on Mr. Reed's advice. *Id.* at 51-52. At the disciplinary hearing, Mr. Libertelli stated that Mr. Reed advised him that there was no reporting obligation, Tr. 239, and it does not appear from the timing of the proceeding that Mr. Libertelli self-reported his conduct to ODC before Judge Storm reported the conduct a year later, on February 26, 2019. DCX 42.

75. At the end of the February 2018 divorce hearing, Mr. Libertelli fainted and required medical attention. DCX 16 Tr. at 49-53. In response to an interrogatory, he stated that he was diagnosed with syncope and released from the hospital later that day. DCX 17 at 5-6 (Resp. No. 13).

Changes After January 7, 2018

76. As discussed below, *see* ¶ 165, there is no evidence that Mr. Libertelli continued to use illegal opioids or that he physically altered drug test results or financial records after January 7, 2018, Tr. 99, 419-20, 483-87, and in the weeks

after the February 2018 divorce hearing, Mr. Libertelli obtained the Suboxone implant discussed at the February 13, 2018 hearing. Tr. 410.

77. However, he continued to use cocaine and marijuana after February 2018. Tr. 421-22, 487. He tested positive for cocaine in every month between February and August 2018. Tr. 262; DCX 19 Tr. at 88-92. Mr. Libertelli also missed other drug tests in, March and April 2018, DCX 19 Tr. at 90-91, and seven more between June 14 and November 5, 2018. *Id.* at 95-98. And in 2018, he had three other tests that were reported as diluted – although he denied that he water-loaded before taking the test. *Id.* at 98-100.

October 4, 2018 Interrogatory Responses

78. On October 4, 2018, Mr. Libertelli gave sworn responses to interrogatories sent primarily in connection with the custody issue. DCX 17. The responses objected solely on relevance grounds to much information sought about Mr. Libertelli's obtaining and using drugs and the occasion and manner in which he used drugs. DCX 17 at 4-5 (¶¶ 5-11).

79. When he responded to a request that he "Identify all documents that you altered before submitting them to the Court, Plaintiff, and/or Plaintiff's counsel since November 9, 2016," he attested that "Defendant altered the Quest Diagnostic drug reports from approximately August 2016 through November/December 2017." DCX 17 at6 (¶ 15). He still did not admit to having altered financial documents. *See* DCX 19 Tr. at 64-67.

80. At the disciplinary hearing, Mr. Libertelli called this response "incomplete," but said that it was not true to say that he made no disclosure of the altered financial records because Ms. Noguchi's "lawyers at this time would have known that I was altering financial records." Tr. 266-67.

81. There is no evidence that Mr. Libertelli ever supplemented this incomplete interrogatory response. Although Mr. Libertelli believed that at some point, his lawyers did submit or file some document disclosing that he had fabricated financial records, he could not identify what it was, Tr. 267-72, and none appears in evidence in the disciplinary hearing. Mr. Libertelli stated that he "rel[ies] on my lawyers to disclose things to the other side and the court. I review those things." Tr. 271.

82. Mr. Libertelli also responded to a request that he "Identify all accounts with any Financial Institutions on which you have or had withdrawal or signature authority at any time since November 9, 2016, whether individually or with another, and for each, state the name and address of the Financial Institution," by objecting in part that certain financial accounts, such as retirement accounts, are clearly not relevant to the issues before the Court, and asserting that

> Plaintiff has information regarding all such accounts through January of 2017 at which time this Court rendered its opinion/ruling on the financial merits part of the case and such accounts (of both parties) are delineated in the judgment of absolute divorce. Additionally, Plaintiff has subpoenaed many financial accounts of the Defendant. Defendant has the following non-retirement accounts: [listing four accounts].

DCX 17 at 7 (¶ 17).

83. Although this answer is not literally false or non-responsive, it also does not explain that some of the "information" Ms. Noguchi had about these accounts was false and that the falsity (the fabrication of many records) was relevant not only to the "financial merits" part of the case, but also to the issue of Mr. Libertelli's drug use (and therefore the pending January 2018 "emergency" motion concerning drug testing and custody).

October 15, 2018 Deposition

84. At a deposition in the divorce case on October 15, 2018, Mr. Libertelli testified that he believed that he should be able to have unsupervised visits with the children, including one week a month of continuous visitation, DCX 18 Tr. at 9-14, and that this should happen "starting now," in light of his three months of continuous negative tests. *Id.* at 14-15. He said that there was an October 4, 2018 test that would be coming back negative, and that he "thought" there was one after that. *Id.* at 15-16. He testified that he did not like to think about what circumstances would necessitate a return to supervised visitation, as he tried to keep in mind a "healthy fear of relapse," and that (beyond the short term – *i.e.*, three more months) he thought it was very important that the accountability come from him, rather than from continued testing. *Id.* at 17-19.

85. He also testified that both his "last positive test" for cocaine and the last time he used that drug was "May or June, I think." *Id.* at 40. In fact, he had tested positive for cocaine on July 17 and August 3, 2018. DCX 19 Tr. at 100-01. At the disciplinary hearing, he testified that he did not know whether his testimony about

cocaine use was inaccurate: "[t]here are periods were I'm doing well and then, because of the external things that are happening in my life and because I am not the strongest person as I should be, I make mistakes. But I don't know that in this case . . . that that was not true." Tr. 273-74. In a briefing, he conceded that his testimony was false. *See* Lib. Br. at 18 (Response to Proposed Finding of Fact ("PFF") 106).

86. At the deposition, Mr. Libertelli also testified Deon Jones sold him all the drugs he obtained since November 9, 2016 (whether directly or through his cousin, Jimmy Singleton). DCX 18 Tr. at 281-82; *Id.* at 63. He always received drugs from Mr. Jones in person at various places in the city, and, with a couple of exceptions (in which he paid by bank transfer), he paid for the drugs with cash. *Id.* at 44-47. Mr. Libertelli also testified that his last conversation with Mr. Jones was around May or June 2018, and, during that conversation, he told Mr. Jones "to back off" and not to contact him, *id.* at 43-44; DCX 19 Tr. at 200, although Mr. Libertelli's phone records do not seem to reflect the call. *See* DCX 19 at 132-33. Mr. Libertelli testified that his last conversation with Mr. Singleton was in 2017, but that he spoke with Mr. Jones throughout 2017, when he was buying opioids. DCX 18 Tr. at 63-65.

The November 2018 Hearing

87. On November 26, 27 and 28, 2018, Judge Storm conducted an evidentiary hearing on what styled "Emergency Motion" that Ms. Noguchi had filed "to Modify Access and Drug Testing Regimen, Motion to Modify Custody, and Motion to Enforce Agreement Regarding Payment of Private School Tuition."

DCX 19, 36; *see also* DCX 39 at 1. One of the issues in the hearing was whether Mr. Libertelli's current use of drugs put his children at risk (thereby making it in the best interest of the children to modify the access, drug testing and custody arrangements).

88. At the November 2018 hearing, Mr. Libertelli admitted to falsifying both the pre-January 2018 drug tests and the financial records and that he understood that what he did was wrong. DCX 19 Tr. at 160-61. He said that he "wrongly" chose deception instead of telling the truth because "the truth was going to take my kids away from me and that was a very difficult thing for me to accept." *Id.* at 160. As he put it, "it was not a decision to continue to use drugs," but "was a decision to try to protect the kids from the source of my addiction." *Id.*; *see also id.* at 162 (saying he was "rocked" emotionally by learning that Ms. Noguchi had told the children that he was an addict).

89. Mr. Libertelli also testified in November 2018 that, if given the chance to do it again, he would not falsify drug tests or financial records. *Id.* at 161. When his divorce counsel asked why, given what he had done in the past, the Court had any reason to trust his testimony, Mr. Libertelli testified, "I completely understand the Court's skepticism around my behavior and the inferences it would draw. . . . But I am also asking the Court to look at the objective evidence of my sobriety and these tests." *Id.* Having now been confronted with the evidence that he had tested positive for cocaine on July 17 and August 3, 2018, *id.*. at 100-01, he testified that his last positive cocaine test was in the beginning of August 2018. *Id.* at 168.

90. Mr. Libertelli also offered reasons for some of the missed tests, DCX 19 Tr. at 95-98, 183-87. But some of his reasons did not turn out to be true. For example, he claimed to be unable to take a saliva test on April 24 or 25, because he was with his children, but he was not with his children those days. *Id*.. at 91-92.

91. Mr. Libertelli also testified in the November 2018 hearing that he approached the D.C. Bar Lawyer Assistance Program (LAP), went for three interviews there and was "honest with the person at the D.C. Bar" about his drug use, what transpired in the divorce case, especially in January and February 2018, and the fact that he falsified records. DCX 19 Tr. at 201, 220-21. As discussed below, *see* Finding of Fact (FF) 166-170, this testimony was not true.

92. At his October 15, 2018 Deposition, Mr. Libertelli also testified that he altered "some" of his bank statements to conceal cash withdrawals. DCX 18 Tr. at 143-44. He testified that he submitted them just to Ms. Noguchi's lawyers, not to the Court, and that the alterations were "roughly [coterminous] with the testing." *Id.* at 144. Before Ms. Noguchi's lawyers discovered he was altering financial documents, Mr. Libertelli did not tell anyone he had been altering them. *Id.* at 147.

93. Resuming his testimony on the last day of the November 2018 hearing, Mr. Libertelli testified again that his efforts to control cocaine over the previous three months had been "successful," because his use of the anti-depressant and anti-anxiety medication Lexapro had "helped [him] move forward" and that he had not had any cravings for cocaine. DCX 36 Tr. at 87. When asked, "[h]ave you used cocaine in the last three-and-a-half months?," he answered "No." *Id.*

94. In fact, Mr. Libertelli had tested positive for cocaine based on a specimen taken on November 20, 2018 – one week before the hearing – and had received notice of the positive result on the morning of the last day of the hearing. DCX 40 at 9.

95. During the November 2018 hearing, Mr. Libertelli also testified that, prior to 2015, he had purchased a device called a "Whizzinator" – a prosthetic body part that can carry either synthetic or someone else's urine so as to defeat an observed urine test. DCX 19 Tr. at 119. We do not have evidence that Mr. Libertelli used this device. Mr. Libertelli testified that he never used it and never brought it with him when he left his house. *Id.* at 181-82. And, as noted above, he did have positive drug tests during this period. However, this testimony is notable because Mr. Libertelli also testified that his then attorneys, Mr. Strickler and Mr. Platnick, "suggested" that he purchase it, *id.* at 181 – suggesting that his lawyers attempted to subvert the legal process.

96. During that same hearing, Mr. Libertelli also testified that "if there's one person that's really helped me get through to a better place," it is his then psychotherapist Michael Labbe. DCX 19 Tr. at 169-70. He added that although he had been falsifying documents while he was seeing Mr. Labbe, what has changed was that he had been honest with Mr. Labbe about all the things he had done. *Id.* at 169. As explained below, *see* FF 164, this too was not true.

97. He also said that his November 2018 behavior was different from his "2016 or 2017 self" because "[o]ne of the hardest things to learn about this is you

have to cop to things that are deeply embarrassing and shameful." DCX 19 Tr. at 173.

98. After the hearing, he also did not show up for drug tests on November 29 and December 11, 2018, and tested positive for cocaine on December 6, 2018. DCX 39 at 2 (¶ 5) & DCX 39 Ex. D (DCX 39 at 5-12).

99. In February 2019, the Court issued an oral opinion in which it found that Mr. Libertelli had "lied, manipulated, and deceived" the Court, his former wife and her counsel. DCX 41 Tr. at 14.

100. On February 26, 2019, after issuing an order further restricting Mr. Libertelli's access to his children, Judge Storm referred Mr. Libertelli's conduct to Disciplinary Counsel. DCX 42; Tr. 893-94. His cover letter explained that his February 5, 2019 oral opinion "summarizes the history of the case, and sadly identifies conduct on the part of Mr. Libertelli that I felt compelled to bring to your attention." DCX 42 at 1.

Mr. Libertelli's History of Drug Use

101. Although there is no dispute that, at some point, Mr. Libertelli became addicted to opioids and cocaine, when and how this occurred is less clear.

Opioid Use and Addiction

102. Mr. Libertelli first received opioids at age 13 or 14 in connection with oral surgery and believes he took them for about two weeks and received additional brief courses of opioids over the ensuing year. DCX 49 at 16. Although he did not

become addicted to opioids at that point, he recalls enjoying the experience and thought that it enabled him to make creative paintings. *Id.*

103. At some point, Mr. Libertelli experienced severe back pain associated with spinal stenosis aggravated by a sports injury. *Id.*; Tr. 507-08 (Agrawal). In his testimony before us, he said in response to a question asking whether he started using opioids because of a back pain, that "[d]irectly before I was married," which happened in 2008, "I was seeking treatment for a very, very painful lower back and upper back condition." Tr. 83; *see also* Tr. 376-77 (placing the sports injury in 2007). The Court in the divorce proceeding concluded based on Mr. Libertelli's July 2016 testimony there, that "the drug use appears to have been ongoing since at least 2009." DCX 8 Tr. at 11. And, as discussed below, in 2008 or 2009, Dr. Anjula Agrawal (Mr. Libertelli's general physician) prescribed one course of opioids to deal with the pain. Tr. 507-09, 520-22 (Agrawal); DCX 7 Tr. at 72-73, 77-79.

104. It is not clear whether and to what extent Mr. Libertelli obtained opioids prescribed for him after this initial course ran out. In the divorce proceeding, Mr. Libertelli testified that, perhaps around 2010, he went to Dr. Kliman, a pain management doctor. DCX 7 Tr. at 82. He testified that Dr. Kliman initially prescribed opioids, but later used other methods, including ice packs, physical therapy and yoga, *Id.* at 79, and he believes that Dr. Agrawal also recommended cortisone shots. *Id.* He testified that then he received Lyrica, but the disease got worse. *Id.* at 83-84.

105. What is clear is that at some point, Mr. Libertelli started obtaining opioids that were not prescribed for him. In his testimony here and elsewhere, he said that 2011 "sounds about right," for the first time he acquired opioids off prescription. Tr. 83, 87, 454-56; *see also* DCX 6 Tr. at 130 (December 2015 Testimony from Mr. Libertelli stating that he obtained painkillers over and above what was prescribed to him from "approximately 2011 to April of 2015," although as discussed above, in fact, he was continuing to obtain opioids in December 2015 and afterwards); ODC Br. PFF 5 & Lib. Br. Response (admitting that "[b]y 2013, Respondent was purchasing and using illegal drugs – primarily marijuana, cocaine, and opioids").

106. However, some of the testimony is confusing because Mr. Libertelli linked events to the timing of the intervention, which he initially placed in 2010 (instead of 2013), Tr. 392, and linked the start of his taking non-prescription opioids to his first surgery, which, during much of his testimony, he said happened in 2011. *See, e.g.*, Tr. 379, 449, 454-55. During this testimony, he talked about taking non-prescription opioids occurring in the context of other events taking place around 2011 – including his marital relationship and the pressures of caring for young children – that predated the surgery. Tr. 384-85; *see also, e.g.*, Tr. 374-75 (saying that a surgeon, who wrote pre- and post-operative prescriptions was, with Dr. Agarwal, one of the first two doctors in Mr. Libertelli's adult life to write him an opioid prescription); Tr. 449-50 (saying that Dr. Agarwal's prescription, which appears to have occurred in 2008 or 2009, was "like a year" before his first surgery).

107. On questioning from the Hearing Committee and from other evidence, it became clear that the first surgery (on his neck) was actually in March 2014 after he had already moved out of the house. Tr. 481-82; DCX 49 at 19. (This date comes from his intake notes at Aquila Recovery Clinic on April 11, 2016 and seem likely to be the most accurate; testimony during the divorce proceeding placed the first surgery later – in late 2014, DCX 7 Tr. at 87). The first surgery appears to have addressed Mr. Libertelli's chronic pain. Mr. Libertelli testified that his pain "was gone" immediately after the first surgery, but that he was prescribed opioids in connection with the surgery and took them. DCX 7 Tr. at 87.

108. After this first surgery, Mr. Libertelli ruptured his L4 vertebra lifting one of the children up to the top bunk. DCX 7 Tr. at 87-88. This led to a second surgery (on his back) on April 15, 2015. *Id.* at 89. He received opioid medication prescriptions both immediately before and after the second surgery. DCX 7 Tr. at 88. After the second surgery, he no longer experienced significant back pain. *Id.* He took an opioid for pain one more time, he says, when he tweaked his lower back shoveling snow in early 2016. *Id.* at 88-89. He obtained that opioid on the street. Tr. 129. Putting aside the Suboxone pills and the implant he later received as a therapy, the opioid prescription Mr. Libertelli received in connection with his April 15, 2015 second surgery was the last time reflected in the evidence that he obtained opioids from a prescription issued to him. DCX 7 Tr. at 88, 91; DCX 6 at 106.

109. The confusion about timing of the intervention and first surgery means that, when Mr. Libertelli began using non-prescription opioids by 2011, it was

approximately three years before he may have received opioids prescribed in connection with his first surgery. Thus, it was not the opioids he received in connection with surgery that led to the non-prescription use. Indeed, by the time he received opioids in connection with surgery, doctors already viewed him as medication "seeking." DCX 49 at 16-18.

110. That said, the only evidence on the point indicates that his use of opioids began with a lawful prescription, but that legal prescriptions were not a major source of his supply. In addition to the one week's worth of medication Dr. Agrawal prescribed in 2008 or 2009, Tr. 507-09, 520-22, there was possibly another in 2013 or 2014. Tr. 530-31. It is possible he received another course from Dr. Kliman and eventually from the surgeon, Dr. Jacobson. Tr. 387-88, 449-53. He may, as he and Dr. Ratner suggest, Tr. 384-85 (Libertelli); 935-39 (Ratner), have been predisposed to addiction and, in any event, found the medication effective in dealing with pain (both physical and in personal, in connection with his deteriorating marriage, the pressures of having young children and his demanding work schedule). Tr. 384-85.

111. By 2011, Mr. Libertelli went off-prescription to continue to obtain opioids (mostly Oxycontin pills diverted from prescriptions). *See* Tr. 384-88. In the beginning, he used the pills once or twice a month. Tr. 387. Then, over a period of months it became more regular and more milligrams, and eventually grew to 400 milligrams a day, which Mr. Libertelli called "an insane amount." *Id.* Gradually, over time, he became more dependent on opioids, and, at least once he had recovered

from his first surgery in 2014, he was taking opioids regardless of whether he was in pain. *See* Tr. 384-85.

112. Mr. Libertelli acquired the non-prescription drugs in a variety of ways. In his July 2016 testimony, Mr. Libertelli said that "early on" he purchased opioids online on the dark web. DCX 7 Tr. at 86. In the disciplinary hearing, however, he said that this only occurred once or twice. Tr. 84.

113. In 2016, Mr. Libertelli testified that, after the condition worsened, he started "to self-medicate" by getting a prescription from Ms. Noguchi's obstetrician for the opioid oxycodone. DCX 7 Tr. at 84-85. Then, Mr. Libertelli said there was "one part of me," that thought that the doctor was giving him the drugs to "call him off" instigating a malpractice action arising from Ms. Noguchi's difficult childbirth. *Id.* at 85. In a heavily-redacted transcript of a voluntarily recorded 2020 police interview, however, Mr. Libertelli said that seven years before (presumably 2013), he obtained six months of opioid prescriptions for free from a doctor (outside the normal prescription process) by "screaming about suing the doctor." DCX 63 Tr. at 20-22, 28; *see also* DCX 49 at 17-18. At the disciplinary hearing, Mr. Libertelli testified that the prescription did not last for that long a period, Tr. 311-12, and denied that he threatened the doctor. Tr. at 312-13. However, the United States Attorney's Office considered the statement sufficiently clear to refer what it called his "admi[ssion] to having used the threat of litigation to obtain prescription medication from a medical professional at no cost," to Disciplinary Counsel. DCX 63 at 1.

114. However, the most common way he purchased opioids and other illegal drugs was through a dealer – Deon Jones. Tr. 85, 87-88, 386; DCX 18 Tr. at 281-82. Sometimes, Mr. Libertelli made payments to Mr. Jones or Mr. Singleton. Tr. 88; DCX 18 Tr. at 63.

115. It is difficult to declare an exact moment when someone began to have a substance abuse disorder or began to be addicted to a substance. A substance abuse disorder involves meeting a set of criteria the major component of which is "essentially continuing to use despite negative consequences." Tr. 801-02. The term "addiction" usually connotes physical withdrawal, craving, a focus on obtaining the drug that leads to forgetting other aspects of life, doctor shopping or other "seeking behavior," and developing a tolerance that leads to increased dosage. Tr. 802-09, 931-34. The time it takes for use to result in addiction varies from person to person and has a strong genetic component – some people can get addicted to opioids in less than two months; others may never get addicted. Tr. 811-12.

116. Mr. Libertelli testified that he was never addicted to opioids before he began taking opioids by prescription to deal with pain in 2007 or 2008. Tr. 375-77. However, he provided different testimony about the timing afterwards.

117. At one point, he testified that the pain that initially led to him taking the opioids was occurring at the same time as he was "getting married," again 2008, "and so the addiction and the marriage are really coterminous." Tr. 378. He testified that "at some point the use of opioids is not only masking pain but masking you

know, sort of the disappointment with my marriage." *Id.* He placed this transition early in the marriage. He explained that

> I'm the only couple that I know that went to a marriage counselor before we were married. So it was already a bit challenged, but, you know, the kids arrived [which occurred in 2009 and 2010] and that was great on one level and challenging on another. That stresses the marriage. And I think at the same time that this is happening, I think it would be sort of the demands of young fatherhood and all the work that I was doing, I was trying to remain active while managing this pain. I think [Ms. Noguchi] experienced me as moody, because I was. I was in incredible pain. And the opiates that I used then were like I said a prescription and very frequent. But as I moved forward in my addiction and as the marriage deteriorated, those two things went together and in a way it was the use of opiates not only addressed the pain but also some of the emotional issues I was having in the marriage.

Tr. 378-79; *see also* Tr. 389-91 (to similar effect and also noting use of opioids to deal with sadness associated with long travel and "self delusions" that it made him a better parent).

118. Some of his testimony seems to place the addiction sometime later, but before the intervention. *See* Tr. 391-93 (discussing a moment before the intervention when he said to himself that he needed the opioids – although placing the intervention in 2010 instead of 2013).

119. In the July 2016 testimony in the divorce proceeding, Mr. Libertelli seems to place these same events later – saying that the September 2013 intervention "was at a time when my back pain was acute, and I was in active addiction." DCX 7 Tr. at 72. However, he also testified in the disciplinary hearing that he was able to stop using opioids for a short time after the intervention, noting "I can stop. . . . [L]ater, it would become continuous use." Tr. 396.

120. At other points in the disciplinary hearing, Mr. Libertelli testified that, although there was not "a moment in time when I feel like I glossed over into the addiction category," he does not think he would have gone into withdrawal after the post-operative prescription from his first surgery (which he was placing at the time in 2011, but which actually occurred in 2014). Tr. 452-53. He testified that it was after the second surgery in 2015 that "I [was] *becoming* an active addict." Tr. 92 (emphasis added); *see also* Tr. 384-85 ("And that's where reliance on the drug is, you know, a predisposition to addiction, and it becomes an active addiction over time. So if you were to chart it, it would begin right after the surgery and it would grow.").

121. Mr. Libertelli elsewhere suggested that the continuous use did not occur until "nine months to a year" after his second surgery, which he placed in 2015. Tr. 396-401. He attributes his use to conflating the pain-relieving effects of the surgery with the effects of the opioids. Tr. 401. "If I haven't taken opiates continuously in say . . . during my travels in the 2015 period, I would have gone through withdrawal. And so that's one way to think about whether you're addicted or not, do you go through a significant physical withdrawal, and I definitely would have." Tr. 402.

122. Finally, Mr. Libertelli said that the group therapy at Aquila (which began in April 2016), was probably the "sudden realization" he had that he was an addict. Tr. 440-41.

123. To some extent, at least, these discrepancies can be attributed to addiction being both a process that does not necessarily follow a straight course and a term whose medical application depends on the observation of some, but not necessarily all of a group of signs. As Mr. Libertelli noted, his "abuse of opioids escalated over time," and one can use similar words to refer to different events in the course of addiction – *e.g.*, taking opioids to deal with pain, needing to take more because of developing a tolerance, taking opioids after "it was no longer about treating pain," and taking opioids specifically to avoid withdrawal. Tr. 92; *see also* Tr. 939-41 (Ratner).

124. Ms. Noguchi did not testify in the disciplinary hearing and none of her prior testimony from the divorce was included in exhibits. However, two of the Court's orders summarize Ms. Noguchi's testimony. In his November 1, 2016 Order, Judge Storm references Ms. Noguchi's testimony from a July 25-29, 2016 hearing. There, the Court says that Ms. Noguchi believed the intervention was "necessary at the time after coming to the conclusion that her husband had a drug problem." DCX 8 Tr. at 3, 8-9. But this opinion suggests that Ms. Noguchi was unaware of other drug use until the month before the intervention:

> Prior to her scheduling the intervention, Ms. [Noguchi] had not discussed her concerns about the drug use with her husband. She testified that it was shortly before the intervention that she came to realize that her husband was using drugs other than marijuana. Until a family trip to Maine in August of 2013 [one month before the intervention], she testified she was unaware of his drug use notwithstanding that the drug use appears to have been ongoing since at least 2009. Mr. Libertelli testified that the drug use had started when he was prescribed medication following a sports injury. During all of

> that time, 2009 through '13 the evidence showed that Mr. Libertelli was high functioning despite the drug use.

Id. at 10-11.

125. Even this summary, however, suggests some additional history: "[w]hile Ms. [Noguchi] never saw her husband use drugs in the children's presence[,] several months prior to the intervention she fished an orange pill – she described as a muscle relaxant – out of [one of the children's] mouth," and there was "also an incident later on when she found a loose Percocet in the bed in which Mr. Libertelli had been playing with the children," DCX 8 Tr. at 9 – an incident Ms. Noguchi called "an example of his carelessness and his bad judgment." *Id.* at 10.

126. The Court's January 11, 2018 decision granting the divorce suggests a longer history. It says that

> [a]ccording to [Ms. Noguchi], by late 2011, early 2012, Mr. Libertelli was exhibiting increased incidents of moodiness with periods of anger that were disproportionate to the offense. She testified to incidents of darkness with him being unable to articulate the issue. Although she testified that he later admitted to her that it was from an inability to get drugs . . . and from drug withdrawal.

RX 9 Tr. at 9; *see also* Tr. 379 (Libertelli) ("I think [Ms. Noguchi] experienced me as moody, because I was. I was in incredible pain. And the opiates that I used then were like a prescription and very frequent."); RX 9 Tr. at 16-17 (noting for purposes of calculating the extent of dissipation that "we know that during some, if not most of [the time between January 2010 and September 30, 2013], Mr. Libertelli was using drugs").

127. The 2018 decision continued,

> [i]t was 2013 when the issue of Mr. Libertelli's drug use came into clear focus. [Ms. Noguchi] first found eight small baggies of cocaine, which defendant claims he was holding for a friend. In August of that year, while in Maine, she discovered drug paraphernalia. Upon their return from Maine, she discovered Percocet and other controlled substances in his desk. She started tracking things, went to Al-Anon, and then planned an intervention for September 14th of 2013.

Id.[9]

Cocaine and Other Stimulants

128. Mr. Libertelli first used cocaine at age 17 or 18. DCX 7 Tr. at 73; RX 14 at 373; Tr. at 81; *see also* ODC Br. PFF 8 & Lib. Br. Response (admitting to one use of cocaine at age 18). Exactly when he next used cocaine is unclear. Dr. Shugarman's notes of a January 7, 2021 interview with Mr. Libertelli, RX 14 at 373, and the portion of his report apparently based on those notes indicate that Mr. Libertelli told him that after first using cocaine at age 17 (in or around 1986), Mr. Libertelli used cocaine again in 2004, and then continued to use cocaine with a friend two or three times a year. *Id.* at 378; *see also* DCX 49 at 11-12. At the disciplinary hearing, Mr. Libertelli testified that after the first use at age 18, he never used cocaine again until after he was married in 2008. Tr. 81-82.

[9] ODC's expert Dr. Shugarman reports that in a 2021 interview with Ms. Noguchi, she said she staged the intervention after she repeatedly found Mr. Libertelli with opioids, laxatives, muscle relaxers and powder residue among his belongings. She reported that he was taking between 10-15 Vicodin or oxycodone tablets a day from zip lock bags – not prescription bottles. DCX 49 at 5, 17.

129. The evidence is also unclear about the timing of Mr. Libertelli's continued use of cocaine. At a July 2016 hearing in the divorce, Mr. Libertelli testified that his use of cocaine "roughly tracks my opioid use of 2009," DCX 7 Tr. at 89, and Judge Storm's January 11, 2018 oral opinion says that Ms. Noguchi found eight baggies with cocaine in 2013 – although Mr. Libertelli said that it was for a friend. RX 9 Tr. at 9.

130. At the disciplinary hearing, however, Mr. Libertelli testified that his addiction to opioids started gradually after 2011, and that "at this point I'm not using cocaine. I'm just using opiates. That would come later." Tr. 384-85. And in other testimony, he placed the use of cocaine as beginning gradually after the September 2013 intervention. Tr. 459-60.

131. There are also some differences in the way Mr. Libertelli characterizes the relationship between opioids and cocaine. In the July 2016 divorce proceeding, Mr. Libertelli testified that "[o]pioids made me tired, and I have a demanding job, and it was part of my polysubstance abuse to use both so I could, you know, stay up and work." DCX 7 Tr. at 89.

132. At another hearing in November 2018, Mr. Libertelli testified that in 2016 and 2017, he took cocaine, at least in part, because of the pressures from his job at Netflix as a way of dealing with jetlag from international travel. DCX 19 Tr. at 173-74. He also testified that "[t]here are lots of reasons why I was making bad decisions, not just alienation from the kids and the job and the loss of my marriage." *Id*. at 176.

133. At the disciplinary hearing, however, Mr. Libertelli attributed the cocaine use more directly to his opioid use. He testified that his drug use "began as opiates and then later, to counteract the sedative effects of the opiates, I was using cocaine." Tr. at 72, 412-13, 565; *see also* Tr. 385 (stating that he was not using cocaine at the beginning of his developing addiction to opioids because "that would come later"); Tr. 422-24 (suggesting that Opioid Use Disorder has been by far his central problem, that "other drugs have not captured me the same way" and that he could choose to stop using cocaine but could not choose to stop using opioids).

134. There was, however, no testimony on why the stimulant Mr. Libertelli used to counteract the sedative effects of opioids needed to be cocaine. Mr. Libertelli did not suggest he sought to obtain a prescription for lawful stimulants or to use stimulants available over the counter or offer evidence that they were or would have been ineffective.

135. Mr. Labbe testified that cocaine "entered the picture" (in the sense that Mr. Libertelli first raised it to him in his therapy sessions) in early February 2018 when Mr. Libertelli "returned from a two-month absence from treatment." Tr. 630.

136. In addition to cocaine, Mr. Libertelli was also using Adderall "which is a stimulant medication used for people with attention deficit disorder and certain other conditions. It is similar . . . in some ways to cocaine having an upper kind of an effect." Tr. 963. Although Adderall can be prescribed, Mr. Libertelli appears to have obtained it on the street. *See* Lib. Br. PFF 74 (citing without contradiction Dr. Ratner's understanding on this point).

137. As we discuss in connection with the expert testimony below, in addition to being unclear how Mr. Libertelli's opioids and cocaine and other stimulant use relate to each other, it is also unclear how each or both related to his fabrication of evidence and testimony.

138. Mr. Libertelli's cocaine use was, however, significant enough to his life that he continued to take cocaine regularly (and to lie about it) even after the January and February 2018 hearings that restricted him to professionally supervised visitation based on his prior fabrication of drug test results, in part, to conceal his cocaine use. Tr. 419-22, 425-26.

139. Mr. Libertelli continued to buy cocaine from Mr. Jones – until at least September 2020 (over 2-1/2 years after he stopped using non-therapeutic opioids), Tr. 109; DCX 49 at 13, and appears to have made a cash payment to Mr. Singleton, at least as late as December 14, 2020. DCX 49 at 58-59.

140. In June 2020, Mr. Libertelli was arrested for cocaine possession with an intent to distribute. Tr. 101. Mr. Libertelli testified that, although he possessed cocaine, it was a small amount, and he was never a dealer. Tr. 101, 432-35. However, Ms. Chen called two false tips into the police. First, she broke into his computer and phones where she could see his attorney-client information and called in a false tip to the police hotline that he had "'lots of money and drugs in the house.'" Tr. 430-31. The police came and searched the house and left after they found nothing. Tr. 431. Later she called in a second tip that he was dealing drugs. Tr. 432. When the police found a "small amount" of cocaine in his car, they initially

charged him with possession with intent to distribute, but later reduced the charge to possession and he pled guilty to that in April 2021 with a deferred sentencing agreement that can lead to expungement if he meets certain conditions. Tr. 101; 433-35.

141. A transcript reflects that Mr. Libertelli told the police during a 2020 voluntary interview that approximately seven years before (2013), he obtained drugs for free for six months from Ms. Noguchi's obstetrician by threatening to sue the doctor for malpractice. DCX 63 Tr. at 20-22, 28; *see also* Lib. Br. Response to PFF 126 (not disputing ODC's PFF 126 asserting that he made that statement). At the disciplinary hearing, Mr. Libertelli denied threatening the obstetrician, and asserted that the period was not six months. Tr. 311-12.

142. Although it appears that Mr. Libertelli's then lawyers may have discussed the arrest with ODC, it is not clear whether Mr. Libertelli separately reported the plea to ODC. Tr. 105-06. Mr. Libertelli asserts that he told both his lawyers at the time, and his current lawyers to be "maximally transparent" about what was happening, and argues that given "the fact that my ex-girlfriend had lied to the police" about him being a dealer, keeping the information that he pled to a lesser charge was "the last thing," he would have wanted to keep from ODC. Tr. 104-05. *See generally* Tr. 101-07, 306.

Marijuana

143. Except for the years he attended law school, Mr. Libertelli has used marijuana continuously (apart from during law school) since he was 16 (in or around

1985), Tr. 72, 107, 367, 460, and still uses it. Tr. 321-22, 420-21; *see* ODC Br. PFF 7 & Lib. Br. Response (so admitting). At times his use has been sporadic, at other times, regular. Tr. 107, 368.

144. During their marriage, Mr. Libertelli smoked marijuana two or three times a week. DCX 7 Tr. at 74. He continued to use marijuana afterwards, into 2021. Tr. 107-08. For example, he tested positive for marijuana four times in October 2020, once in December 2020, and twice in January and March 2021 and once in April 2021, RX 4 at 40-43, 46, 53-58, but tested negative in June 2021. RX 16.

145. Dr. Shugarman concludes that Mr. Libertelli does not meet the DSM-5 criteria for Cannabis Use Disorder. However, he notes that Mr. Libertelli smoked marijuana hours before meeting with Dr. Shugarman even though Mr. Libertelli asserts that he cannot concentrate properly on work when under the influence of marijuana. Tr. 1248-49; DCX 49 at 57; *see also* Tr. 698-99, FF 190 (noting that DSM-5 stems from the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition).

146. In April 2021, Dr. Agrawal recommended that Mr. Libertelli apply for a D.C. medical marijuana card to assist him obtaining marijuana for treatment of his depression and anxiety. Tr. 524-25, 546.

147. Mr. Libertelli received his medical marijuana card by letter April 27, 2021. DCX 51.

Treatment History

148. Dr. Agrawal is an internist, Tr. 499-500, who has (with a brief interruption) been seeing Mr. Libertelli as his primary physician since 2004. Tr. 506-07. She generally saw Mr. Libertelli every six months but has seen him five or six times between June 2020 and June 2021. Tr. 527-28.

149. However, Dr. Agrawal's knowledge of Mr. Libertelli's drug problems was limited. Dr. Agrawal testified that at some point "maybe 2017, [2016] maybe," she saw that something was "off," with him. Tr. 509-11, 532-33. "A lot of his results were off, more so than in the past that I had records previous to that. He had gained a bit of weight. He had dark circles under his eyes." Tr. 510. However, she was not certain about the timing, and did not at the time know the cause. She asked Mr. Libertelli about what was going on and she doesn't "think he shared much at that time." Tr. 510-11. Also, she "would say" in 2017, Mr. Libertelli was missing appointments "[q]uite a bit." Tr. 511.

150. Mr. Libertelli did not share with Dr. Agrawal that he had a drug problem until February or March 2019, after he had already stopped using opioids. Tr. 512-13, 529-30. By that time, "he [seemed] younger, more positive, just healthier, in general." Tr. 514. He also did not tell Dr. Agrawal that he used cocaine or had been using marijuana on his own before she recommended that he obtain a medical marijuana card in April 2021. Tr. 536.

151. According to the Court's 2018 summary of Ms. Noguchi's testimony "[a]t the intervention, according to [Ms. Noguchi], [Mr. Libertelli] acknowledged

his problem [and] said he would go to rehab." RX 9 Tr. at 9. Mr. Libertelli testified in July 2016 that, sometime after the September 2013 intervention, he saw Dr. Ron Smith, a psychologist in Georgetown, for two or three months. DCX 7 Tr. at 90; Tr. 302.

152. In approximately 2015, Mr. Libertelli began going to Tiffany Morvari at AIR, for drug testing and discussions about potential avenues for recovery. DCX 18 Tr. at 180-83.

153. On or around April 11, 2016, Mr. Libertelli began six to nine months of intensive outpatient therapy at Aquila Recovery Clinic, Washington, D.C. DCX 7 Tr. at 93; DCX 49 at 14; DCX 18 Tr. at 171-73. The program is not a 12-step program, but rather cognitive behavioral therapy that mixes group and individual therapy and medical treatment. DCX 10 Tr. at 214-15. Dr. Moira Bogrov, Aquila's Medical Director, diagnosed Mr. Libertelli upon his admission in April 2016 as having "Opioid Use Disorder, Moderate." DCX 49 at 23.

154. Dr. Bogrov prescribed Suboxone, which Mr. Libertelli began taking in April 2016. Tr. 93, 407-08, 463; DCX 18 Tr. at 168.

155. As noted above, *see* FF 26-28, above, Mr. Libertelli has testified different ways about whether he experienced difficulty obtaining oral Suboxone in 2016. At a July 2016 hearing in the divorce proceeding, Mr. Libertelli testified that, although, it had been previously "extraordinar[il]y hard" to get to get the drug, the problem had been resolved and he was taking the drug "without interruption." DCX 7 Tr. at 96-97. In November 26, 2018 testimony in the divorce proceeding,

DCX 19 Tr. at 24-25, and at the disciplinary hearing, Tr. 93-97, 145-48, 408-10, 463-64, Mr. Libertelli testified that, as Ms. Chen could verify, there were always difficulties obtaining oral Suboxone (including particular problems getting the right DEA codes so the CVS would fill the prescription) and that he had lied during his 2016 testimony so as not to suggest to the Court that there was a problem with his recovery.

156. Also, as noted above, in the November 2016 decision Judge Storm reached based on the July 2016 hearing, the Court stated that, among other things, Mr. Libertelli had "not been truthful about his claimed inability to obtain Suboxone. It was not until the spring of this year that Mr. Libertelli got into the program at Aquila following several failed attempts at other programs." DCX 8 Tr. at 20. However, we do not have the complete record upon which that statement was based, and from the context (which is a passage discussing his false testimony in earlier proceedings), and the second sentence about not getting into the Aquila program until Spring 2016, it does not appear that the Court was saying that his July 2016 statement was untrue. Rather, it appears that the Court was stating that in earlier testimony (either from December 2015 or March 2016), Mr. Libertelli, had professed to be unable to obtain Suboxone when, in fact, he did not meaningfully attempt to do so until he began the Aquila program in Spring 2016.

157. In the disciplinary hearing, two of ODC's witnesses suggest that really Mr. Libertelli was not having difficulties obtaining Suboxone (and that therefore, his original testimony in July 2016 was correct, and it is his later testimony recanting

that that statement that is incorrect). Mr. Labbe, who began seeing Mr. Libertelli in November 2016, testified that Mr. Libertelli never complained to him that he had experienced difficulty obtaining Suboxone and Mr. Labbe considers it to be a "fairly available" medication. Tr. 628.

158. ODC's expert witness, Dr. Ryan Shugarman, does not believe that Mr. Libertelli had significant difficulties obtaining Suboxone. Tr. 1244-47. He asserts that the accurate version of the drug test results from September 16, 2016 to January 18, 2018 (which, as explained above, Mr. Libertelli falsified), reflect that, while there are a number of occasions on which he tested positive for Suboxone metabolite and negative for other opioids, *see, e.g.*, DCX 21 at 15-16, 19-27, 36-39, there are only five occasions in which Mr. Libertelli tested positive only for the illegal opioids and negative for the Suboxone metabolite, *see, e.g.*, DCX 21 at 32, and 35 occasions in which Mr. Libertelli tested positive for *both* oral Suboxone *and* the other opioids the Suboxone was intended to block. DCX 49 at 21; *see, e.g.*, DCX 21 at 11-14, 17-18, 28-29. He stresses the occasions on which Mr. Libertelli tested positive for both illegal opioids and Suboxone, to argue that Mr. Libertelli was "very frequently using illegal opioids during periods of time when he *did in fact* have access to and was taking his prescribed" Suboxone and to imply that Mr. Libertelli just was not making sufficient effort to coordinate his Suboxone prescriptions with the pharmacies. DCX 49 at 21.

159. How it would have happened that Mr. Libertelli took both illegal opioids and Suboxone is not entirely clear. As Mr. Labbe noted, it "wouldn't make

any sense" to take opioids while taking Suboxone because Suboxone blocks the effects of the other opioids. Tr. 629-30. There was no evidence about how long Suboxone might remain in Mr. Libertelli's system and Mr. Libertelli suggested that his prior use would trigger a positive test even though there was an interruption in his obtaining the pills. *See* Tr. 97 (a positive test would "indicate that at some point in the past you took Suboxone"); Tr. 974 (Dr. Ratner) ("[I]f [Mr. Libertelli] was receiving [Suboxone] only intermittently it's possible that it would show up and yet not be having the effect at that particular time that [it] is supposed to have."). In briefing, Mr. Libertelli argues that the evidence that he continued to search out and obtain opioids on the street even after he was taking Suboxone is testament to the virulence of his addiction. *See, e.g.*, Lib. Br. PFFs 101-04.

160. It is also difficult to understand why Mr. Libertelli would have initially testified truthfully, but then "lie" in order to say that his own previous testimony was false.

161. The conflict in this evidence, however, may be more apparent than real. Mr. Libertelli testified about having had problems obtaining Suboxone in July 2016. The drug tests Dr. Shugarman cites did not start until September 2016, and Mr. Labbe did not meet Mr. Libertelli for the first time under November 2016. So neither particularly speaks to what problems Mr. Libertelli might previously have had obtaining Suboxone. Mr. Labbe also testified about Suboxone being generally fairly available, not about whether Mr. Libertelli had problems with the DEA Codes.

162. Also, even putting aside the question of how long Suboxone might remain in Mr. Libertelli's system, Dr. Shugarman's analysis of the drug tests still showed that there were five occasions after September 2016 in which Mr. Libertelli tested negative for Suboxone. And, while he says that he was unable to "verify" whether Mr. Libertelli had difficulty obtaining Suboxone, the actual point on which he says the drug tests differ from Mr. Libertelli's account is whether Mr. Libertelli took unprescribed opioids *only* at the time when he was unable to obtain Suboxone or *also* took them even at some times when he was able to obtain Suboxone. Tr. 1331-32. And on cross-examination, Mr. Labbe also testified that his notes reflect at least one period of time in early 2018 when Mr. Libertelli *was* off Suboxone. Tr. 686-87. So, both of their views are consistent with at least the possibility that he continued to have at least some problems obtaining Suboxone afterwards.

163. In any event, whether and when Mr. Libertelli had difficulty obtaining the oral drug, Suboxone is not critical to our decision. The drug testing information is consistent with a drug recovery program that sometimes worked but often did not: Mr. Libertelli testified in the disciplinary hearing that, although there were weeks during this September 2016 to January 2018 period when he would "go by and be successful," he "could never keep it together and refrain from using opiates for an extended period of time." Tr. 136-37. There were times during this period were he "gave up and didn't try"; he "wasn't succeeding in [his] recovery" and "was despondent about it." *Id.*

164. In November 2016, Aquila began to transition Mr. Libertelli's treatment to Michael Labbe of Lampost Wellness Center in Bethesda, a psychotherapist in Aquila's network. Tr. 145, 622-24; DCX 10 Tr. at 214; DCX 18 Tr. at 173. Mr. Libertelli saw Mr. Labbe for approximately 47 individual and 25 group sessions between November 2016 and 2018. Tr. 633-34. Mr. Labbe testified that, although the two discussed many things about Mr. Libertelli's family history, the divorce and drug use, Mr. Libertelli never told him that he had falsified drug tests or financial records or gave false testimony in the divorce proceeding. Tr. 649-50.

165. Somewhere between February and April 2018, Dr. Minassian installed an implant in Mr. Libertelli's arm that secretes a metabolite of buprenorphine, an active ingredient of Suboxone. Tr. 98-99, 410; DCX 17 at 7 (Resp. No. 16); DCX 18 Tr. at 165-66; DCX 19 Tr. at 123, 163-64, 171, 218-19. In December 2018, Mr. Libertelli testified that he had the implant as a means of providing the Court a "level of assurance" that his opioid use was "off the table." DCX 19 Tr. at 164. The implants last six to nine months, and block the receptor for painkillers, thereby making opioid painkillers ineffective. Tr. 99-100; DCX 19 Tr. at 163-64. But after the first period, Mr. Libertelli said he was doing well enough that he did not get another implant. Tr. 100. There is no evidence that Mr. Libertelli took illegal opioids after January 7, 2018. *See* Tr. 99, 419-20, 562; DCX 49 at 22.

166. Mr. Libertelli's lawyers told him, as part of his recovery program, to speak to the D.C. Bar Lawyer Assistance Program. The Program referred him to Niki Irish, an independent clinical social worker, who at the time was a senior

counselor with the Program. Tr. 771-73. LAP provides assessment, referral, short-term counseling, consultation and monitoring on mental health and substance abuse issues. Tr. 771.

167. Mr. Libertelli told Ms. Irish that this was a "proactive" visit to LAP "in case anything was brought to the attention of ODC regarding his divorce and custody case and issues related to his recovery." Tr. 777; DCX 48 at 16. Mr. Libertelli met with Ms. Irish twice in April 2018 and once in June 2018. Tr. 239-40; DCX 48 at 15-16, 17-18, 26-27. Under program rules, the conversations he had with Ms. Irish were to be confidential, Tr. 241-42; DCX 48 at 1; DCX 19 Tr. at 235 (although Mr. Libertelli subsequently waived that confidentiality). Tr. 245-46, 303-04, 772-73).

168. In addition to discussing what services Mr. Libertelli may need, *see* Tr. 253-54, Mr. Libertelli also discussed some aspects of his divorce proceedings with Ms. Irish. Tr. 786-87. Mr. Libertelli complained about Judge Storm punishing him for being addicted and sought a referral to father's rights organization that could help with an amicus brief. *Id.*; Tr. 247-48, DCX 48 at 19-23.

169. On his intake form, Mr. Libertelli reported to LAP that he was "currently in recovery from a painkiller addiction," DCX 48 at 3, and that he has "past oxycontin use w/back pain." *Id.* He also said that he was currently using, or had used, cocaine and marijuana. *Id.*; Tr. 799. In meeting with Ms. Irish, he denied currently engaging in substance abuse. Tr. 780-81.

170. Although he indicated that these "proactive" visits in case matters were brought to ODC's attention, he did not provide further information about what matters those might be. Tr. 781. He did not disclose to Ms. Irish that he had falsified drug testing or financial records. Tr. 782-83, 785-86, 791-92; DCX 48; Tr. 248-53 (Libertelli – not recalling having made those disclosures).

171. In 2018, Mr. Labbe referred Mr. Libertelli to Lorraine Carleo, a psychiatric nurse practitioner with a specialty in addiction therapy. DCX 18 Tr. at 184-85; Tr. 674-75. She prescribed the antidepressant and anti-anxiety mediation Lexapro, DCX 18 Tr. at 185; DCX 49 at 38, a drug that Mr. Libertelli continued to receive through Dr. Agrawal until September 2020. Tr. 522-24, 543-45; DCX 49 at 38; *see also* Tr. 945-46; DCX 18 Tr. at 185.

172. Mr. Libertelli stopped seeing Mr. Labbe in November 2018 without providing a reason. Tr. 648-49.

173. Mr. Libertelli and Ms. Chen began seeing Dr. Nicholas Kirsch as a couple between March 2018 and May 2019. Tr. 1138-40; DCX 18 at Tr. 188-89; DCX 19 Tr. at 171-72; DCX 49 at 4. Somewhere around the end of 2020, Mr. Libertelli began seeing Dr. Kirsch for individual therapy. Tr. 1155, 1181. Dr. Kirsch has a PhD and license in clinical psychology and has been practicing for about 30 years. Tr. 1126-31.

Effects of the Drug Addiction on Other Aspects of Mr. Libertelli's Life

174. There is conflicting evidence and interpretation about the extent to which Mr. Libertelli's drug addiction or use affected other aspects of his life. During

his testimony in the divorce proceeding, he testified that his drug use did not impair his work. *See* Tr. 122; *see also* DCX 6 Tr. at 14 (counsel for Mr. Libertelli arguing in December 2015 that "[h]e has never had an issue with drugs and work"); *id.* at 97 (as of the 2013 intervention drug use "was not impacting my work"). And some of Mr. Libertelli's witnesses who know him from his work all praised Mr. Libertelli's competence. *See, e.g.*, Tr. 588-93 (Erickson); Tr. 1088-92 (Sridhar); Tr. 1428-30, 1436-39, 1446-48 (Levin).

175. However, Mr. Libertelli testified that his own prior testimony about no work-related problems was something else he lied about in an effort to keep his visitation with his kids and that, in fact, his drug use "absolutely" had an effect on his job. Tr. 122; *see also* Tr. 417 ("[T]he role of addiction in my life is to change my judgment across various different contexts: kids, work, Yuki."). He also testified that he was "asked . . . to leave" Netflix. Tr. 66.

176. Mr. Labbe testified that Mr. Libertelli shared work problems at Netflix with him during his session. Tr. 640-41. Dr. Shugarman reported that during his interviews, Mr. Libertelli acknowledged "the adverse impact that his substance use had upon his productivity at work", DCX 49 at 12, and that Mr. Libertelli "reportedly shared [with Dr. Barbara Wood, discussed below] that 'the need to acquire [opioids] has at times dominated his thinking and degraded his performance at work.'" *Id.* at 26; *see also id.* (Mr. Libertelli told Dr. Shugarman that he would "have to say" that opioid use had "adverse occupational effects" that would "affect [him] cognitively"); *Id.* at 7 (Ms. Noguchi maintaining that Mr. Libertelli had '"lost

jobs pretty frequently"' and that one of his positions '"end[ed] catastrophically"'); Tr. 1277, 1324-25 & RX 14 at 370.

177. Here again, the conflict in the evidence, and its significance, may be more apparent than real. To begin with, as noted above, there is no dispute that Mr. Libertelli had a severe opioid addiction and, at least, a serious cocaine addiction. The witnesses who praised his general competence did not generally work in his office, did not see him all the time and cannot speak to whether he was *ever* impaired by what we now know to be his addiction. To the contrary, they generally testified that there was something "wrong," with Mr. Libertelli, but attributed the problem to the divorce proceedings. *See, e.g.*, Tr. 1096-1100 (Sridhar); *see also* Tr. 1435 (Mr. Levin noting that while Mr. Libertelli was at YouTube, "the divorce was very much in the top of his mind"), Tr. 596-97 (Mr. Erickson explaining how work was probably a "refuge" for Mr. Libertelli, as the divorce was a "painful experience"). Indeed, as Dr. Shugarman acknowledges, there is evidence that (at least from Ms. Noguchi) suggests that his drug use "could have been a factor in problems that he may have had" at Netflix. Tr. 1277.

178. Although Dr. Shugarman states that he is unable to verify this evidence, Tr. 1277, he does not dispute it. Instead, Dr. Shugarman asserts that "[w]hat I do know is that he held positions . . . [that] were fairly prestigious, [and] was very well compensated and many of those positions he held for years. So I don't have any

evidence that he was incapacitated occupationally or was unable to perform his functions to a high level at least the vast majority of the time." *Id.*[10]

179. Moreover, as Dr. Shugarman notes, although it is often, it is not always, true that drug addiction affects all aspects of someone's life, Tr. 1276, or certainly all aspects in the same way. As noted above, in November 2016, Judge Storm ruled (albeit based in part upon suspect testimony from Mr. Libertelli) that Mr. Libertelli was among the "minority" of addicts, "who function and are relatively stable," and "are able to maintain good jobs," and "able to be good parents." DCX 8 Tr. at 21.

180. Taking all the evidence together, we find that Mr. Libertelli's undeniably serious addiction problems had at least some effect on his work but did not entirely prevent him performing it with significant success. But this statement neither proves nor disproves whether the addiction was a "but for" cause of the lies and falsifications that are at issue in this proceeding.

Diagnoses and Expert Testimony

181. **Opioid Use Disorder.** Every medical or psychiatric professional who testified on the subject in the disciplinary hearing or whose testimony from the

[10] As explained below, part of the difficulty of applying Dr. Shugarman's conclusions on this point is that we believe they are based an incorrect legal assumption. He assumes that respondents cannot be "disabled" for purposes of *Kersey* and its progeny unless they would be found to be "disabled" for some other purpose like receiving benefits under the Social Security Disability Insurance or Supplemental Security Income programs or receiving protection under the Americans with Disabilities Act. Because we disagree with this assumption, we do not agree that his ability to function most of the time determines disability for *Kersey* purposes.

divorce proceeding on the subject is referenced agrees that Mr. Libertelli has a severe Opioid Use Disorder and some form of Cocaine Use Disorder.

182. Dr. Ryan Shugarman was ODC's expert witness. He is a licensed physician in Virginia, Maryland and the District of Columbia and is certified by the American Board of Psychiatry and Neurology as a general and forensic psychiatrist. Tr. 1203, 1205-08; DCX 50. In addition to treating patients (currently just under 200), he spends about two days a week doing forensic psychiatric evaluations, mostly for civil litigations and has testified in approximately 60 matters. Tr. 1209-13.

183. Dr. Shugarman concluded that Mr. Libertelli met 10 of the 11 DSM-5 diagnostic criteria for Opioid Use Disorder, DCX 49 at 60-61, and that he met the criteria for this diagnosis by the early 2010s, and continued to meet the full criteria for this condition through at least early 2018. *Id.* at 57, 61; *see* Tr. 1266, 1346-47.

184. Medically, Opioid Use Disorder is considered to be both a disease and a disability, Tr. 506, defined by various criteria in DSM-5. Tr. 501-02, 506, 808. It can have physical manifestations (such as liver toxicity, blood pressure, weight gain or loss, and poor nutrition), Tr. 503, and has psychological symptoms including sedation, drug seeking behavior and "[p]robably not being honest with the issue of the addiction," Tr. 502-03, as well as mood changes. RX 1 at 5.

185. Mr. Libertelli exhibited some of the symptoms associated with Opioid Use Disorder. He gained a lot of weight, did not look healthy, and had circles under his eyes. Tr. 510, 531-32; Tr. 1062. He also developed a tolerance for opioids,

increasing his dose to the point that he was using 400 milligrams of Oxycontin a day. Tr. 385-87. He also suffered from withdrawal symptoms when he did not take opioids. Tr. 406.

186. Dr. Shugarman's report also references the report from Barbara L. Wood, Ph.D., MAC, APA-CPP – a forensic psychologist who evaluated Mr. Libertelli in connection with the custody proceedings. DCX 49 at 5, 44. As explained below, we have no direct evidence from Dr. Wood. Her report, testimony, and the information she relied upon were not offered into evidence. However, Dr. Shugarman reports that Dr. Wood also diagnosed Mr. Libertelli with "Opioid Use Disorder, Severe (on maintenance therapy) (304.00)." *Id.* at 13. According to Dr. Shugarman, Dr. Wood concluded that Mr. Libertelli met six DSM-5 criteria for Opioid Use Disorder: (1) unsuccessful efforts to cut down or control use; (2) cravings; (3) continued use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of opioids; (4) recurrent opioid use in situations in which it is physically hazardous; (5) tolerance; and (6) withdrawal. *See* DCX 49 at 23-24.

187. Mr. Labbe also diagnosed Mr. Libertelli with an Opioid Use Disorder. *See* DCX 47 at 4.

188. Mr. Libertelli's expert, Dr. Richard Ratner, is a psychiatrist and a forensic psychiatrist with close to 50 years of experience. Tr. 924; RX 2. He was not "specifically" asked "to provide a psychiatric diagnosis for Mr. Libertelli," but

accepts Mr. Labbe's diagnosis that Mr. Libertelli suffered from Opioid Use Disorder." RX 1 at 7-8.

189. Dr. Agrawal testified that opioid use is associated with an impaired judgment that would occur "[w]hile they're on the opioids, not necessarily when they're not on it." Tr. 503. There is "almost no patient" that is forthcoming about their addiction. Tr. 504.

190. According to Dr. Agrawal, addiction may not affect all addicts or aspects of a particular addict's life in the same way. For some, addiction "really does affect employment and some not so much. And it depends on the type of employment, on the patient themselves and their education and their ability to sustain just their knowledge base and presence." Tr. 505, 547-48.

191. **Cocaine Use Disorder.** The evidence also established that Mr. Libertelli has a Cocaine Use Disorder. Dr. Shugarman also concludes that Mr. Libertelli meets the DSM-5 criteria for Stimulant Use Disorder, Both Cocaine and Amphetamine-Type Substance, Severe (F14.10 and 15.10, respectively). Tr. 1266; DCX 49 at 57, 62.

192. Dr. Shugarman states that Dr. Wood also diagnosed Mr. Libertelli with Cocaine Use Disorder, Moderate. According to Dr. Shugarman, Dr. Wood relied on four DSM-5 criteria: (1) unsuccessful efforts to cut down or control use; (2) cravings; (3) continued use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of cocaine; and (4) continued use despite knowledge that it was causing or exacerbating a persistent

physical or psychological problem. DCX 49 at 30-31; *see also id.* at 31-33 (discussing cocaine's adverse effect on Mr. Libertelli); Tr. 1348-49.

193. Mr. Labbe also diagnosed Mr. Libertelli with a Cocaine Use Disorder. *See* DCX 47 at 4.

194. As with the Opioid Use Disorder, Dr. Ratner accepts Mr. Labbe's conclusion that Mr. Libertelli also had a Cocaine Use Disorder. *See* RX 1 at 7-8. He testified that Mr. Libertelli was psychologically addicted to cocaine. Tr. 997-98.

195. The expert testimony, however, did not clearly establish the extent to which the cocaine disorder can be attributed to Mr. Libertelli's opioid use. Dr. Ratner testified that opioid and cocaine use do not "always occur together . . . [b]ut it's easy to see how a person using one might end up using the other," Tr. 941, and noted that Mr. Libertelli told him that he used cocaine to counter the sedating effects of the opioids. Tr. 942.

196. But when asked specifically whether Mr. Libertelli's opioid use led to his cocaine addiction (or whether it is possible to know), Dr. Ratner spoke instead about how people, regardless of opioid use, might be drawn to and become dependent upon cocaine when they are in high-power jobs like Mr. Libertelli's. Dr. Ratner testified that "[g]enerally cocaine addiction . . . is more psychological" and "not quite physical in the same way." Tr. 942-43. He said that cocaine "still has a potent addictive quality," but "what happens is that it has its own benefits . . . in terms of making you sharper . . . more alert, able to maybe get more stuff done in the course of a day, and it is widely used . . . and often for those purposes often by

people in relatively high-flying professions where they have to accomplish a lot, they have to perform. And so the appeal of that, particularly if you're in the kind of job that demands a lot from you, I think is pretty clear." Tr. 943. He added that marijuana could also be psychologically addictive and used as a way of obtaining anxiety control. Tr. 943-44.

197. This testimony does not actually say there was a connection between Mr. Libertelli's opioid and cocaine (or marijuana) use. At best, it suggests that while (given the fact that he had a high-powered job and some type of predisposition to drug use) it is not surprising that Mr. Libertelli might use cocaine regardless, it is especially unsurprising, given that he was addicted to sedating opioids.

198. **Mood Disorders.** Dr. Shugarman concludes that Mr. Libertelli appears to have a history of a DSM-5 diagnosis of Other Specified Trauma- and Stressor-Related Disorder (F43.8) between November 2016 and mid-2020, with possible periods of time when this was in remission. Tr. 1265-66; DCX 49 at 57, 63-64. Dr. Kirsch opined that Mr. Libertelli has had periodic depression, anxiety, anger and trauma issues. Tr. 1141-46.

199. Dr. Shugarman agrees with Dr. Kirsch's diagnosis, but also believes that Mr. Libertelli's substance use and conditions "played a substantial role in his mood-related symptoms, at least during the periods of time when he was definitely still using illicit forms of opioids." DCX 49 at 57-58. As he put it, "[i]n the context of all known sources of information, it appears that Mr. Libertelli developed clinically significant depressive symptoms in late 2016 in the context of struggling

with his addiction, the loss of his marriage, and a bitter custody battle at the time," and "[t]here is no indication that Mr. Libertelli has experienced any further symptoms of this condition since mid-2020, and [a]s such, this condition appears to have been resolved since that time." *Id.* at 64.

200. Dr. Shugarman's report also supports the conclusion that Mr. Libertelli's mood swings and irresponsible conduct developed in connection with his opioid use. He reports that Ms. Noguchi said she has no awareness of any mental health or behavioral problems before they were married (in July 2008) and apart from mood lability (changeability), anger and sleep-related problems first observed when she became aware of substance-abuse problems in 2013, she denied ever seeing him depressed or having non-substance/non-personality related mental health conditions. DCX 49 at 38-39.

201. **Personality Disorder.** As noted above, Mr. Labbe also diagnosed Mr. Libertelli with an Opioid Use Disorder, Severe and Cocaine Use Disorder, Moderate. *See* DCX 47 at 4. But Mr. Labbe believes that Mr. Libertelli also has a Narcissistic Personality Disorder. *Id.*; Tr. 636. He asserts that Mr. Libertelli had a sense that he was "special and unique," required "excessive admiration," had a "sense of entitlement," a "general lack of empathy, and was somewhat haughty at times." Tr. 636-67. He suggests that Mr. Libertelli may have used drugs as a secondary condition to mitigate the rage his Narcissistic Personality Disorder caused when he felt violated in some way. Tr. 643-44.

202. To the extent that the issue of whether Mr. Libertelli has a Personality Disorder is relevant, professionals called by both sides expressly disagree with the diagnosis, *see* DCX 49 at 43, 58; Tr. 1345-46 (Dr. Shugarman – concluding that such a disorder would have manifested itself much sooner if it existed); Tr. 1146-50 (Dr. Kirsch – urging that Mr. Libertelli displays a capacity for empathy that is inconsistent with the diagnosis), and the evidence as a whole does not support a finding that he has a Narcissistic Personality Disorder.[11] However, one event associated with Mr. Labbe's opinion is significant to the question of Mr. Libertelli's rehabilitation. Mr. Labbe originally provided his report attributing Mr. Libertelli's conduct to a primary Narcissistic Personality Disorder in response to a December 2, 2020 request from Mr. Libertelli's then counsel in the disciplinary proceeding, Stanley Reid. Tr. 650-51, 668-69.

203. On December 28, 2020, after receiving Mr. Labbe's letter, Mr. Libertelli sent Mr. Labbe an email that read:

> I say this in the most professional sense of the words: fuck you. This will end my career and law license. Just wanted you to know. And yes, I do not believe it was my behavior and choices that will end my law career. I believe it will be pathologizing exhibits like this.

DCX 65 at 1; *see also* Tr. 665.

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[11] Disciplinary Counsel does not seem to say that Mr. Libertelli has a Personality Disorder *per se*, but suggests, that Mr. Libertelli's "anger, erratic moods, and his treatment of others," is due to narcissistic tendencies that Mr. Libertelli "had and has." ODC Reply at 13 n.4. The weight of the evidence, however, contradicts this suggestion. As Dr. Shugarman notes, the evidence is that he exhibited this anger and erratic moods *after* he became an addict, DCX 49 at 43, which undermines the premise that the anger and moods were innate to his personality.

Relationship between Mr. Libertelli's
Substance Abuse Disorders and His Conduct

204. There are two points of agreement on the effect of Mr. Libertelli's drug addiction on his conduct. First, Mr. Libertelli himself and all of the experts who testified on the point agree that, when Mr. Libertelli falsified documents and lied to the Court, he was not acting from intoxication or unaware of what he was doing: he was both capable of knowing and, in fact knew, that what he was doing was wrong. *See, e.g.*, DCX 19 Tr. at 160-61; Tr. 184-85 (Libertelli); RX 1 at 8 (Ratner); Tr. 1275-76 (Shugarman).

205. Second, Mr. Libertelli continued to lie after he stopped using non-therapeutic opioids in January 2018 – in his October 4, 2018 interrogatory answers, his October 15, 2018 deposition and testimony during the November 26-28, 2018 hearing. Mr. Libertelli does not believe the medication in his implant affected his judgment in the way that the illegal opioids had. Tr. 276-78. Neither Mr. Libertelli nor any of his witnesses meaningfully explained how these lies were connected to his prior drug use.

206. As noted above, Mr. Labbe questions whether the underlying problem is the substance abuse or what he believes is a Narcissistic Personality Disorder. He concludes that "[w]hile it is true that addictions will lead individuals to deceive and manipulate, there remains a significant question about Mr. Libertelli's mental health. In other words, who would he be without the substance addictions?" DCX 47 at 4. The diagnosis, in addition to being obviously significant for Mr. Libertelli's mental health, is also significant to his recovery. As Mr. Labbe notes, a personality disorder

of any kind is "more often manageable than it is treatable." Tr. 647. The management involves getting patients to appreciate consequences of their actions. Tr. 647-48.

207. As Mr. Labbe put it, Mr. Libertelli's Narcissistic Personality Disorder, in combination with the opioid or other drug use might possibly "impair his ability to make judgments," but the Narcissistic Personality Disorder "is strong enough that someone might continue the same behaviors without the substance abuse." Tr. 704.

208. Dr. Shugarman, who disagrees with the Narcissistic Personality Disorder diagnosis, nonetheless asserts, that although Mr. Libertelli has an Opioid Use Disorder and a Cocaine Use Disorder, these do not fully explain his conduct. Dr. Shugarman concludes that

> Mr. Libertelli's problematic conduct cannot be attributed solely to the direct intoxicant effects of substances or periods of withdrawal from such. As the majority of his problematic behavior appears to have centered around his drug use, however, it is unclear to me the extent to which he would continue to experience interpersonal difficulties and problems with deceptiveness were he to fully embrace sobriety and refrain from utilizing illicit substances.

DCX 49 at 58.

209. He asserts that Mr. Libertelli

> has exhibited a persistent pattern over the last decade-plus (which coincides with his substance-related problems) of blaming others for his conduct and adverse consequences that he has experienced from such, exhibiting entitled behavior, engaging in deceptive behavior concerning his substance use, and engaging with certain individuals (*e.g.*, Ms. Chen and his former court supervisor, Ms. McGrath) in a

> manner causing them to fear retaliation from him were they to speak to me.

DCX 49 at 58; Tr. 1217-18, 1220-21.

210. Dr. Ratner testified that he perceives Mr. Libertelli's conduct to be "an issue of judgment and did the medication or the medication in combination with each other and also with his preexisting personality cause him to have the kind of bad judgment that would not have occurred had he not been involved with the substances." Tr. 950. Assessed in that way, he concludes that just as someone using cocaine might "fly into a rage," Mr. Libertelli's drug use caused him to have a "distorted view of the utility of doing some of these things, of even the propriety of them or of the overall usefulness . . . whether is this a bad thing, am I only doing this to achieve a certain positive end." Tr. 951. The drugs cause people "to sort of maybe jump to conclusions and not think about all of the negative reasons why some of these conclusions ought not to be jumped to or actions might not be taken." *Id.*

211. Dr. Ratner also suggests that before Mr. Libertelli stopped using non-prescription opioids in January 2018, it is "possible" that the opioids "might actually act as something of a [brake] on the use of the cocaine," but

> [o]nce he got into a position where he did not have the benefits of the [opioids], such that they are, then in a sense I think maybe the cocaine kind of ruled the roost . . . and caused him to be more inclined to find these really bad solutions to things and somehow think that he could do it and could get away with it and make it happen.

Tr. 953-54.

212. In his report, Dr. Ratner also frames his opinion about judgment as a question of whether Mr. Libertelli would expect to get caught:

> [m]ost sensible people, especially a lawyer, would very likely reject [Mr. Libertelli's] course of action out of hand in the correct belief that it would inevitably fail. Yet Mr. Libertelli, despite his intelligence and education, did not do so. This clearly demonstrated a serious error of judgment on his part at the time.

RX 1 at 8. He concluded:

> [p]art of this faulty thinking was due to the long[-]term effects of the opiates on him. In addition, part of it, I think, was due to the desperation that he repeated to me time and again that had his actual status come out, he would be farther away than ever from seeing his kids.

Id.; *see also* Tr. 989-90.

213. Although Dr. Shugarman agrees that Mr. Libertelli meets the DSM definitions for both a severe Opioid Use Disorder and a Severe Stimulant Use Disorder, Both Cocaine and Amphetamine-Type Substance, DCX 49 at 60-63, he disagrees with Dr. Ratner on several scores.

214. Dr. Shugarman begins by concluding that Mr. Libertelli does not have a recognizable disability. On this point, he notes that "[t]he term 'disabled,' or the associated term 'disability,' has different meanings and definitions in different contexts." DCX 49 at 65. But he does not analyze any definition of disability he attributes to the *Kersey* evaluation. Instead, Dr. Shugarman opines about the definitions of disability in two other contexts – the Americans with Disabilities Act (ADA), and two benefits programs, Social Security Disability Income (SSDI) and Supplemental Security Income (SSI). DCX 49 at 65-67.

215. He concludes that Mr. Libertelli's Opioid Use Disorder does not meet the definition of disability under the ADA because Opioid Use Disorder would be

"disqualified as constituting a disability under ADA law when an individual is continuing to actively use illicit opioids which, Mr. Libertelli indeed was doing through at least January 2018." DCX 49 at 65. "Furthermore," he asserts, if Mr. Libertelli

> has in fact been honest in his consistent representation that he has maintained full sobriety from the use of illicit opioids since January 2018, then there is nothing related to this diagnosis that could have in any way contributed to his deceitful representation to the Court in November 2018 that he was not continuing to utilize illicit substances, when he was in fact continuing to use cocaine.

Id. at 65-66.

216. He also concludes that Mr. Libertelli's Opioid Use Disorder does not meet the standard of disability that would be applied to benefit applicants under SSDI and SSI because

> while his Opioid Use Disorder may have contributed to his termination from one or more of these positions (the extent to which it did or did not do so is not entirely known), he was not impaired enough . . . so as to be incapable of gaining employment or holding positions that necessitated a high level of productivity for extended periods of time.

DCX 49 at 65-66.

217. Similarly, Dr. Shugarman finds that Mr. Libertelli's Stimulant Use Disorder, which he says, began in the early 2010s and have continued to be present in full form through at least September 2020, and which very likely remain present in full form to date (*e.g.*, rather than being in partial or full remission) are "also disqualified as constituting disabilities under ADA law when an individual is continuing to actively use illicit cocaine or other stimulants, which Mr. Libertelli

was indeed so doing through at least September 2020." DCX 49 at 66. Because of Mr. Libertelli's ability to work, Dr. Shugarman also rejects the conclusion that his Stimulant Use Disorder would constitute a disability for purposes of the SSDI or SSI programs. *Id.*

218. With respect to both Disorders, Dr. Shugarman concludes that "[a]s such, while Mr. Libertelli undoubtedly experienced numerous adverse effects as a product of his" disorders, "by no definition does he ever appear to have been disabled due to" these conditions. DCX 49 at 66; Tr. 1351.

219. On causation, Dr. Shugarman concludes that because "I have asserted that Mr. Libertelli does not have a disability, and was not disabled, during the period of the misconduct involving the submission of falsified medical and financial records from August 2016 through January 2018, there was no disability that could have substantially caused Mr. Libertelli's misconduct in this regard." DCX 49 at 67.

220. "That said," however, Dr. Shugarman adds:

> consideration could be given to the fact that his judgment during the period of misconduct was more likely than not partially compromised during that time period due to his ongoing opioid use and stimulant use disorders, specifically concerning the domains discussed in the preceding paragraph regarding his ongoing use of substances. Additionally, his addictions at that time caused him to experience strong desires to continue to utilize illicit substances (both opioids and cocaine), which, coupled with the desire to avoid experiencing withdrawal symptoms, contributed to his decision to continue utilizing these substances in spite of the known consequences of doing so. Furthermore, he has repeatedly asserted that his desire to maintain regular visitation with his children, as well as to gain greater visitation and custody-related privileges, coupled with his desire to continue

> utilizing illicit drugs and fear of experiencing withdrawal symptoms, culminated in his decision to falsify data in his custody proceedings.

DCX 49 at 67; Tr. 1352.

221. Much as Dr. Ratner does, Dr. Shugarman reaches two conclusions from these circumstances. First, he concludes that "[t]hese assertions," including that Mr. Libertelli's judgment "was more likely than not partially compromised" "are logical and appear to be genuine rationales for his actions." *Id.* Second, he concludes that Mr. Libertelli knew what he was doing was "improper, unethical, and could potentially result in his disbarment." *Id.*

222. Dr. Shugarman also concludes that Mr. Libertelli has not been rehabilitated from the effects of his addiction. He does not believe that it is clear that Mr. Libertelli is not using cocaine or will not use it; believes that Mr. Libertelli should be working with a substance abuse professional; cites the fact that Mr. Libertelli is not attending Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings, has had, what he calls "very limited drug screening results from 2019," and concludes that "[e]ven if his opioid condition[] is in remission, he's still at risk for relapse and he's not receiving adequate services to either detect a relapse or to help prevent . . . a relapse." Tr. 1288-93; DCX 49 at 68-70.

Evaluation of the Expert Testimony

223. All of the expert testimony had strengths and weaknesses. We found the testimony of Mr. Libertelli's expert, Dr. Ratner, to be fair and evenhanded. Dr. Shugarman does not dispute Dr. Ratner's basic conclusion – that some part of

the drug use affected Mr. Libertelli's judgment and made him at least less cognizant of his likelihood of getting away with it. In fact, Dr. Shugarman says that the conclusion seems reasonable. DCX 49 at 67; Tr. 1352. This conclusion is also apparently supported by the conclusion Dr. Shugarman quoted to us from Dr. Wood, who testified in the divorce proceeding. *See* DCX 49 at 44 (citing Dr. Wood's report as saying that Mr. Libertelli '"exhibits defects of insight, self-awareness, self-control and judg[]ment commonly seen in individuals with a history of chronic, heavy use of psychoactive substances,"' and "displays a diminished capacity to appreciate important risks associated with his use of opioids and cocaine and a lack of insight into the effects of his use and his repeated attempts to conceal it on his interpersonal relationships"). And it is echoed in Judge Storm's conclusion from other expert testimony about addiction "hijack[ing] normal thoughts." DCX 16 Tr. at 46.

224. However, as explained below, we do not believe that Mr. Ratner's conclusion (if accepted) establishes a *Kersey* defense and find his testimony on some critical points, vague, equivocal and surprisingly uninformed. He appears to have received very limited information: he received a copy of the charges, the Answer, some brief from Mr. Libertelli's counsel, and a small collection of reports, and had five interviews with Mr. Libertelli and a brief conversation with Dr. Kirsch. Tr. 928-29, 961.

225. As Dr. Ratner put it, "there's a lot that I seem not to know." Tr. 961. He did not know whether Mr. Libertelli's addiction affected his work. *Id.* He thought Mr. Libertelli "was using opi[ods] probably even up to and around the time

of his marriage," in 2008, Tr. 962-63, which is not true by any version of testimony. He thought that Mr. Libertelli was not using cocaine then, Tr. 963, when it appears that he was, at least doing so recreationally. He did not know whether Mr. Libertelli was using marijuana at the time, *id.*, when he clearly was. He was very unclear on when Mr. Libertelli was prescribed opioids and understood that Mr. Libertelli had legally received prescribed opioids during the whole period from 2008 to 2014, Tr. 965-66, which is clearly untrue. He never learned that Mr. Libertelli had bought opioids on the street from 2011 to 2015. Tr. 966-67. He was unclear on how much cocaine Mr. Libertelli was using from 2015 through 2020, Tr. 968, and how much marijuana. Tr. 968.

226. Dr. Ratner was also unfamiliar with the conduct that he was attributing to the drug use. He did not systematically go over Mr. Libertelli's drug tests, Tr. 970-71. He did not know whether Mr. Libertelli had "somehow managed to change numbers" on the drug tests, or how many drug tests were fabricated over what period of time. Tr. 971-72; *see also* Tr. 988 ("I . . . have no clue as to what he did to alter the tests and at what stage he altered it."). He did not know whether Mr. Libertelli altered financial records. Tr. 977.

227. Dr. Ratner also did not know whether after Mr. Libertelli stopped taking opioids, he continued to lie under oath (or continued to take cocaine). Tr. 980-81, 985-86.

228. With all of these limitations on his knowledge, Dr. Ratner's opinion is very limited. He did not say when Mr. Libertelli became an addict to what

substance. He did not say when or how what drug use affected what decisions. He did not say what decisions there were to be affected. As Dr. Ratner put it (in the context of speculating on what it would mean if his drug use affected his work), his overall testimony was "that maybe his functioning kind of fell down as a result of this constant substance use." Tr. 990.

229. Indeed, at some point, Dr. Ratner's opinion becomes almost tautological. He suggests that because any lawyer would be expected to "know[] better" than to engage in Mr. Libertelli's "deviant behavior," it must be that the drugs left him unable to know better. *See* Tr. 1001-02.

230. As Dr. Ratner noted, to decide whether Mr. Libertelli's lying resulted from an Opioid Use Disorder, Dr. Ratner would "have to know a fair amount more about the circumstances and the conditions." Tr. 995; *see also* Tr. 996-97 (noting that he cannot point specifically to the opioid use or the cocaine use, and "[o]f the two I'd say the cocaine use might relate more to the inclination to do this kind of behavior"). When the Hearing Committee asked whether Mr. Libertelli would have responded to the circumstances of his divorce and custody dispute by multiple lies and fabrications if he had not been abusing drugs, Dr. Ratner said that "it's probably a hypothetical basically but I would like to think that the answer to that is yes." Tr. 999; *see also* Tr. 999-1000 (to similar effect).

231. Although Dr. Ratner's report states that he is "persuaded that" Mr. Libertelli "has turned this part of his life around and could no longer consider choices such as these," RX 1 at 8, in questioning from the Hearing Committee, he

acknowledged that Mr. Libertelli "is probably still an addict and that he would have to re[m]ain vigilant, hopefully through treatment, to the possibility that something like that relapse could occur." Tr. 1002.

232. Dr. Kirsch's testimony was thoughtful and balanced and based in much more experience with Mr. Libertelli than Dr. Ratner had. But the testimony also had limitations. Dr. Kirsch is not an addiction specialist. Tr. 1128, 1173, 1192-94. The focus of his work with Mr. Libertelli has been in assisting him to grow emotionally, Tr. 1133, 1193, and not on pinning down facts about Mr. Libertelli's substance abuse. Tr. 1159-60. Thus, for example, Dr. Kirsch knew that Mr. Libertelli became addicted to opioids and "there's been cocaine use," but did not know the specifics of either, Tr. 1150-51, 1177-81, and does not know much about Mr. Libertelli's cocaine use. Tr. 1166. He knew generally that Mr. Libertelli lied about drug use and "covered up a drug test or falsified it," but did not know the details or full extent of the conduct, Tr. 1151-52, and thinks he may have learned about falsifying "just one" test. Tr. 1185-86. He was also not entirely familiar with (or did not recall) what other treatment Mr. Libertelli was receiving. Tr. 1173-75. Accordingly, while his testimony was very generally credible on the points it addresses, it did not address all the *Kersey* elements.

233. By contrast, we found the testimony and report of ODC's expert, Dr. Shugarman, to be extremely thorough and informed by a great number of interviews and review of documents. DCX 49; Tr. 1216-25. But on a number of

points, Dr. Shugarman went beyond providing expertise in psychology to make arguments about fact and law.

234. On the facts, much of Dr. Shugarman's report is directed to summarizing his interviews of witnesses (some of whom did not testify in the disciplinary hearing) and review of documents and transcripts (many of which were not offered in the disciplinary hearing) and expressing views on the evidence. *See, e.g.*, DCX 49 at 5-48; Tr. 1254-55, 1258-59 (expressing opinions about what he knows or does not know to be true or what the sources of evidence are based on his interviews or reviews of the record).

235. Some of his views of evidence rest on multiple-level hearsay. To use one example, Dr. Shugarman relies heavily on testimony and a report (neither of which was offered in the disciplinary hearing) from another expert, Dr. Barbara Wood, who testified in at least one of the hearings in the divorce proceeding. *See* references on DCX 49 at 5, 7-13, 16-35, 37, 40, 42-44, 50-52, 58; Tr. 1338-42. Among other things, he cites Dr. Wood's report to state that Mr. Libertelli undertook "'numerous, extreme and illegal measures to deceive Ms. Noguchi and her attorneys, various evaluators and the Court as to the nature and extent of his use of psychoactive substances,' with such efforts present from ***2008*** and persisting through the time of her evaluation." DCX 49 at 44 (emphasis added). In providing his summary, Dr. Shugarman is presenting his understanding of an opinion by Dr. Wood (whose testimony we have had no opportunity to observe), that was, in turn based on what she understood (from other interviews or evidence we have not seen).

236. These multiple levels of interpretation and description can make the evidence extremely unreliable. In our case, for example, Disciplinary Counsel has not charged Mr. Libertelli with (and we have not received any evidence showing) any "extreme or illegal" measures predating 2016. Indeed, Mr. Libertelli could not have been deceiving Ms. Noguchi's attorneys as far back as 2008. That was some six years before the divorce proceeding began.

237. We are particularly reluctant to rely on these summaries because experts are not neutrals. They are paid by one party and there is a natural human tendency to favor versions of facts that support one's own side. For example, Dr. Shugarman discounts very clear statements in interviews from both Mr. Libertelli and Ms. Noguchi that Mr. Libertelli's addiction affected his work, on the theory that he was unable independently to verify them – for example, by asking to see the personnel evaluations that Ms. Noguchi referenced. Tr. 1277, 1288. This conclusion that the effect is "unproven" tends to favor ODC's theory that the addiction cannot be said to be the cause of Mr. Libertelli's conduct.

238. But when Dr. Shugarman receives conflicting statements – one from Mr. Libertelli saying that Ms. Chen owed him money and another from Dr. Kirsch that "Mr. Libertelli actually owed Ms. Chen a substantial amount of money," he does not suggest any need to verify the facts. He credits Dr. Kirsch's third-hand understanding of a situation he never observed as being what is true "in fact," and concludes that, therefore, Mr. Libertelli's version is wrong. Tr. 1262. The version

Dr. Shugarman adopts tends to support ODC's theory that Mr. Libertelli lies and cannot be trusted.

239. Similarly, Dr. Shugarman asserts that positive drug testing for cocaine from October 2020 makes "patently false" Mr. Libertelli's statement in his interviews months later that Mr. Libertelli had stopped using other substances in September 2020. Tr. 1283-84. He does not mention the possibility that Mr. Libertelli could have misremembered the month. But Dr. Shugarman discounts several negative drug tests for opioid use, by saying that the tests merely "increase[] the likelihood that, at those times, he actually wasn't using," and asserts that "there isn't substantial corroborating evidence of his non-utilization of opioids." Tr. 1291-92. This is not a balanced assessment of the evidence. It is advocacy. *See also, e.g.*, Tr. 1298-1303 & RX 15 (notes of talking points that Dr. Shugarman consulted during his testimony); Tr. 1134-35 (Dr. Kirsch expressing a similar concern about Dr. Shugarman based on the way in which Dr. Shugarman interviewed him); ODC Br. PFF10 (citing Dr. Shugarman's testimony, Tr. 1242, 1285, as if it were proof that Mr. Libertelli "falsely represented" when he began to purchase opioids).

240. This does not mean that everything Dr. Shugarman states about the facts is incorrect. (For example, as we noted above, we credit Judge Storm's conclusion that Mr. Libertelli made many conflicting statements about the supposed debt between himself and Ms. Chen.) But it does mean that Dr. Shugarman's findings by themselves cannot fairly be used to establish what the facts are. To the extent he relates statements Mr. Libertelli made to him, those are statements of a

party opponent and would be admissible even in a court proceeding. We also view Mr. Libertelli's failure to offer evidence contradicting the serious assertion that he intimidated Ms. Chen and Mr. McGrath as an admission by silence. To the extent Dr. Shugarman relies on the fact that Dr. Wood reached similar conclusions, we have considered that as corroborative of his psychiatric opinion. But we do not find credible as affirmative evidence Dr. Shugarman's summary of facts that we have otherwise been unable to verify through evidence presented to us.

241. We also cannot accept some of Dr. Shugarman's conclusions because they are based not on his expertise in psychology, but on his perception of law. Dr. Shugarman's assumes that the only possible definitions of "disability" are ones used for purposes of receiving SSDI or SSI benefits or ADA protection and that, if Mr. Libertelli's disability does not meet the definition used for those programs there is "no definition" by which he could "ever appear to have been disabled due to" his conditions. DCX 49 at 66. Those are not psychiatric opinions. They are legal conclusions. And as statements of law, they are not correct.

242. As Dr. Shugarman notes, *id.*, "disability" has different definitions in different contexts. This is true because the inquiries have different purposes. The definitions of "disability" under the ADA as opposed to the two benefits statutes (SSDI and SSI) reflect purposes so different that in some sense, they refer to opposite situations. The ADA is a civil rights law that identifies situations in which individuals face unlawful discrimination because of what could be said to be a "disability." One of the ADA's main purposes is to protect people who *can* work

and are denied employment unfairly because a "disability" should *not* prevent them from working. Accordingly, in the ADA, "disability" is a legal (not a medical) term that refers to someone who has a physical or mental impairment that substantially limits one or more major life activities – regardless of whether disability played a role in some improper conduct.[12]

243. The two benefits statutes (SSDI and SSI) use the term "disability" to define (and significantly limit) eligibility. As the name reflects, SSDI is a disability insurance program. It addresses a situation not covered by the pension portion of Social Security by providing additional benefits to people who have worked in the past (and made FICA payments into the social security system), but now cannot work because they have become "disabled." SSI is a public assistance program created to provide payments to individuals who are unable to support themselves. It applies *only* to people whose limited resources prevent them meeting needs and whose disability leaves them unable otherwise to earn that money.

244. Because under both SSDI and SSI, eligible applicants must be "disabled" in the sense of unable otherwise to earn real income, the law defines disability (for those who are not blind) as the "*inability* to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be

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[12] *See* https://adata.org/faq/what-definition-disability-under-ada#:~:text=It%20is%20important%20to%20remember,rather%20than%20a%20medical%20one.&text=The%20ADA%20defines%20a%20person,or%20more%20major%20life%20activity.

expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 416(i), 426(a); 20 C.F.R. §§ 416.905, 404.1505 (emphasis added). Thus, people who would be able to demonstrate an ability to perform employment for purposes of an ADA employment claim would *not* be disabled for purposes of these benefit programs.

245. As explained below in greater detail, the purposes of analyzing whether someone is "disabled" for *Kersey* purposes, is different from either of these purposes. The issue for *Kersey* is not whether someone is a victim of discrimination or can earn money at some job. It is whether someone's condition justifies mitigating the sanction that would otherwise apply to a Rule violation.

246. This error of law in Dr. Shugarman's analysis of disability also affects to some extent his conclusion on causation. Dr. Shugarman concludes that, because Mr. Libertelli was not (in his view), disabled under ADA or SSDI/SSI standards, that disability could not be the cause of his wrongdoing. DCX 49 at 67. And as we do not agree with his premise that *Kersey* defines disability in the same way as these statutes, we cannot agree that an inability to meet the standards those statutes impose means that there is no disability that could have caused Mr. Libertelli's misconduct.

247. As we also discuss below, this does not make all of Dr. Shugarman's analysis irrelevant to our conclusions. His point that some of Mr. Libertelli's conduct post-dated his use of non-therapeutic opioids, is relevant to that analysis,

and we also consider his independent analysis of causation and rehabilitation to be within his expertise.[13]

248. But Dr. Shugarman's opinion of what the legal requirements for asserting an ADA claim or receiving SSDI or SSI benefits is not relevant to any portion of that analysis. And the fact that he relies on misperceptions about the law as a substantial basis for his conclusions, leaves us in some respects without a clear opinion from him on the analysis that is relevant to *Kersey*.

Mr. Libertelli's Current Status

249. The evidence on the state of Mr. Libertelli's recovery is also mixed. As noted above, we do not have any reason to believe Mr. Libertelli has taken non-therapeutic opioids since January 7, 2018. Mr. Libertelli is currently being drug tested and test results referring to a sample taken on June 17, 2021 are negative for a series of drugs including amphetamines, cocaine, marijuana, opiates, and oxycodone. RX 16.

250. However, Mr. Libertelli is the one who schedules the dates on which the tests are to take place, Tr. 471-74, and it is not clear how reliable these tests are. Tr. 1228-32.

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[13] In another proceeding, *In re Rich*, Disciplinary Counsel urged to the Board that it is not an expert's role to reach a conclusion on whether the disability caused the conduct because having an expert testify on whether a *Kersey* element is met constitutes an improper opinion about an ultimate conclusion. *See https://www.youtube.com/watch?v=J15fO4dIfPU* beginning at 54:54. The Board did not address this argument; if it had accepted it, it would have prevented us from relying on Dr. Shugarman's conclusions on these points as well. *See In re Rich*, Board Docket No. 18-BD-042 (BPR Dec. 8, 2021), recommendation adopted after no exceptions filed, No. 21-BG-854 (D.C. Jan. 27, 2022) (per curiam).

251. Although we do not know that Mr. Libertelli has used cocaine since the end of 2020, it is also not clear that he has stopped or that he never intends to use it again. At some points, he testified that his use "decreased to zero beginning in September of [2020]," Tr. 282, 420-21, and that he would "go to [his] grave not understanding" how he had a positive test in October 2020. Tr. 282-83. But he seems to have bought cocaine as late as December 2020, DCX 53 at 68; *see also* Tr. 1286, and at other points he testified in the disciplinary hearing he is "on a slow-down," that continues "until the present day." Tr. 121, 321 ("tends towards zero over time"); *see* DCX 49 at 16.

252. Dr. Agrawal reports that in 2019, he was forthcoming with her about his prior drug use, Tr. 512-14. She also notes his health improved. "[H]e was much slimmer, he was younger, more positive, just heathier, in general." Tr. 514; *see also* Tr. 525-26.

253. Dr. Kirsch believes that in his current therapy, since approximately December 2020, Mr. Libertelli is no longer lying and is currently being "very open" and "trying to be transparent" about his drug use. Tr. 1154. He believes that, while "no client is fully transparent and some clients are better at disguising things," Mr. Libertelli is "working hard on his recovery" and "doing a good job" with being open. Tr. 1156-57. He is less stubborn and more able to see his mistakes. Tr. 1169, 1170-71.

254. Dr. Kirsch understands from Mr. Libertelli that Mr. Libertelli had a relationship with an informal sponsor (although not a formal one, Tr. 1175), and

went to some AA or NA meetings, but they were at least largely suspended during the pandemic. Tr. 1157-58, 1175, 1187-88. There are a lot of things that can trigger a craving for opioids, including depression and anxiety, feelings of isolation or anger. Tr. 1160-61. Dr. Kirsch's therapy works with Mr. Libertelli to recognize and diminish these triggers. Tr. 1161-62. To this point, Dr. Kirsch is "inspired" by how Mr. Libertelli is managing, Tr. 1163, 1171-72, and reports that he has taken more ownership of the harm he has done to himself and others and is able to contain some of the sadness and have less rage about it. Tr. 1169-70.

255. But Dr. Kirsch also notes that this is "not to say he won't slip." Tr. 1163. He "hope[s]" that Mr. Libertelli would contact his informal sponsor before he slipped. Tr. 1164-65.

256. Dr. Kirsch also believes that Mr. Libertelli could use more support. It is not clear to him that a formal sponsor would work better than an informal sponsor. Tr. 1194-95. But Dr. Kirsch would like Mr. Libertelli to have an addiction specialist with whom he could check in from time to time. Tr. 1193-94, 1198.

257. Mr. Libertelli's conduct also seems to be at times uneven. The December 2020 email to Mr. Labbe discussed above, *see* ¶ 203, strongly suggests that he continues to have significant anger management issues that impair his judgment.

258. There are also issues surrounding his visitation with his children. As noted above, Mr. Libertelli repeatedly emphasizes that his (admittedly "addled") thinking about why he lied and falsified documents was based in his desire to

maintain visitation with his children. And, apart from a temporary suspension after the Court learned of his drug test fabrication on January 11, 2018, Court orders have continued to provide Mr. Libertelli rights to visit with his children – after February 2018 with paid supervised access. Tr. 289-91.

259. In October 2019, however, Mr. Libertelli ceased to have regular visits. Tr. 256, 258. According to Mr. Libertelli, this occurred because "my ex-wife and my ex-girlfriend and the supervisor engaged in a plan to cancel my visitation," without involving the Court. Tr. 256-58. At first, he said there had been only two visits with the children since then – one in December 2020 for 45 minutes and one visit on June 20, 2021; then he said there was a third. Tr. 256-58. At first, he said he was unable to obtain even FaceTime access the Court had ordered. Tr. 257. Then he said that the FaceTime access was "a decreasing amount." Tr. 258.

260. When asked whether he filed anything with the Court seeking to enforce his visitation rights, Mr. Libertelli said that "I begged my lawyers to file that. Their view was, [t]his judge hates you; why bother?" Tr. 259, 261-62, 291.

261. On further questioning, Mr. Libertelli explained that Maeve McGrath had been paid to supervise his visits since February 2018 and supervised his December 2020 visit. Tr. 259-60. However, she thereafter refused to continue to supervise visits after December 2020 because Mr. Libertelli had told her to get a lawyer and reported her to the FBI about possible violations of the Consumer Fraud Abuse Act or FISA. Tr. 260-61.

262. Ms. Stafford (Ms. Noguchi's lawyer) testified that Ms. McGrath told her that Ms. Chen had called to tell her that Mr. Libertelli was using a lot of drugs including some new form of drug and that, as a result, Ms. McGrath had required Mr. Libertelli to agree to have her inspect the house for drugs and drug paraphernalia, but Mr. Libertelli had refused. Tr. 893. ODC's expert, Dr. Shugarman, reported that both Ms. McGrath and Ms. Chen refused his requests for an interview, expressing concern about possible retaliation from Mr. Libertelli, DCX 49 at 7, 48; Tr. 1217-18, 1220-21 (Shugarman).

263. In his brief, Mr. Libertelli says that he "has no knowledge of Ms. McGrath's" or Ms. Chen's "state of mind and no knowledge of her conversation with Dr. Shugarman," but "disputes any accusation or implication that he would retaliate against Ms. McGrath in any way for cooperating in this manner." Lib. Br. Response PFFs 117, 118. However, at the disciplinary hearing, he offered no testimony or other evidence to support the assertion that he would not so retaliate and conceded that he told Ms. McGrath to get a lawyer and "referred this case to the FBI," and "met with senior officials at the FBI and the DOJ because of the systematic and ongoing violations of federal law that led to" Ms. Chen, Ms. Noguchi and Ms. McGrath "cancelling my visits." Tr. 260-61.

264. Moreover, although he testified in the disciplinary hearing that the reason he was not seeing his children was that "my ex-wife and my ex-girlfriend and the supervisor engaged in a plan to cancel my visitation," without involving the Court, Tr. 256-58, and that he "begged" his lawyers to no avail to enforce his

visitation rights (Tr. 259), in the briefing he does not dispute that, in fact, he had refused to allow Ms. McGrath to check his house before the children's visit. *See* ODC Br. PFF 116, 119 & Lib. Br. Responses.

Overall Findings on the Effect and Status of Mr. Libertelli's Addiction

265. As we discuss further in our conclusions, we are concerned that, while Mr. Libertelli appears to have displayed some level of progress in dealing with his serious (and horrible) addiction, this and other aspects of his testimony before us (including the continued perception that Judge Storm was biased against him, the assertion that almost all of his many lawyers committed at least ethically questionable or even illegal conduct and his inconsistent assertions about the roles of others) lead us to believe that he is not fully recovered.

266. Based on all of the factual and expert evidence, we find as relevant here that:

a. In addition to suffering from Other Specified Trauma- and Stressor-Related Disorder (F43.8) (which is not alleged to be a cause of his wrongdoing), there is clear and convincing evidence that, at the time of the wrongdoing that forms the basis of this proceeding began, in December 2015, Mr. Libertelli was suffering from three addiction disorders recognized by the DSM-5: an Opioid Use Disorder (F11.10) Severe, and a Stimulant Use Disorder, Both Cocaine and Amphetamine-Type Substance, Severe (F14.10 and F15.10, respectively) (which for convenience, we refer to as a Cocaine Use Disorder).

b. There is clear and convincing evidence that Mr. Libertelli would not have developed the Opioid Use Disorder had he not received legal prescriptions for opioids. However, equally clear evidence establishes that the vast majority of opioids Mr. Libertelli took, both before the period of wrongdoing and afterwards, were obtained without lawful prescription.

c. Although there is some reason to believe that Mr. Libertelli developed the Cocaine Use Disorder as a result of having taken opioids, Mr. Libertelli did not establish by a preponderance of the evidence that the opioid addiction was a but-for cause of his cocaine dependance. All of the cocaine and other stimulants were obtained illegally.

d. Mr. Libertelli established by a preponderance of the evidence that his addictions impaired him in some way, and it is logical to think that addiction affected his judgment. The evidence, however, does not provide a way to determine the extent to which that impairment was due to opioids, cocaine, other stimulants or the combination of all of them.

e. The evidence is also insufficient to establish by a preponderance that his opioid use (whether singly or in combination with other drugs) caused either any particular or every instance of falsification of evidence or testimony. It might have. But it was not proven and there are significant reasons to doubt it.

f. What is clear is that neither Mr. Libertelli's opioid addiction nor his stimulant/cocaine addiction prevented him from understanding that his conduct was wrong. Also, his decisions both generally, and in particular cases, to falsify evidence

and testimony was not the result of drug intoxication at the time he made the falsifications. To the contrary, they were calculated.

g. Also, whatever the initial relationship was between his addiction and active use of opioids and the onset of his falsification of documents and testimony, Mr. Libertelli's misconduct continued after he ceased to use non-therapeutic opioids, although at a time when he continued to use cocaine. Although it is conceivable that whatever effects caused by his history of active opioid addiction might continue in some way after he stopped using non-therapeutic opioids, the evidence was insufficient to establish this fact. Although he did continue to use cocaine after January 2018, the evidence does not establish that his cocaine use was caused by his Opioid Use Disorder, or that it was the cocaine that caused those lies. Therefore, we cannot say that his Opioid Use Disorder was a "but-for" cause of his continued false statements after January 2018.

h. To the extent Mr. Libertelli's addiction is a but-for cause of his misconduct, the evidence does not establish (by a preponderance, and thus certainly not clearly and convincingly) that he is substantially rehabilitated from those effects of his addiction (whether to opioids or cocaine).

IV. CONCLUSIONS OF LAW

Disciplinary Counsel charged Mr. Libertelli with violating Rules 3.3(a)(1), 3.3(a)(4), 3.4(a), 3.4(b), 8.4(b), 8.4(c), and 8.4(d) of the District of Columbia and/or Maryland Rules of Professional Conduct (Rules 19-303.3(a)(1), 19-303.3(a)(4), 19-303.4(a), 19-303.4(b), 19-308.4(b), 19-308.4(c), and 19-308.4(d)), arising from

Mr. Libertelli's conduct in divorce and custody proceedings in Maryland, both as a party and *pro se* litigant, between December 2015 and March 2019. In brief, Disciplinary Counsel urged that there is no difference in Rules under issue in this proceeding, but that under D.C. Rule 8.5(b)(1), Maryland law applies to the determination of violation. ODC Br. at 56 n.7. D.C. Rule 8.5(b)(1) specifies that "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." As Mr. Libertelli does not actually dispute any of the violations at this point, Mr. Libertelli also does not dispute the choice of law. Accordingly, we presume that Maryland law applies to the alleged Rule violations.

Although Maryland law applies to determining the violation, in deciding what sanction to apply to a District of Columbia lawyer and the application of mitigation defenses, we apply District of Columbia law. *See, e.g.*, D.C. Bar Rule XI, § 11(c)(4); *In re Ponds*, 888 A.2d 234, 235, 245-47 (D.C. 2005) (looking to D.C. caselaw in determining the appropriate sanction, despite applying the Maryland Attorneys' Rules of Professional Conduct for the misconduct); *In re Zakroff*, 934 A.2d 409, 424 (D.C. 2007) (noting, in a reciprocal discipline case, that D.C.'s *Kersey* standard may lead to a different result than one reached in Maryland). Disciplinary Counsel maintains that the violations justify disbarment, and that Respondent has not met his burden for *Kersey* mitigation. Mr. Libertelli maintains that the violations, while serious, should involve some lesser sanction, and that he has met his burden under *Kersey*.

A. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-303.3(a)(1) by Knowingly Making a False Statement to a Tribunal.

Maryland Rule 19-303.3(a)(1) provides that:

> An attorney shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the attorney.

Maryland applies Rule 19.303 to lawyers even if they are not representing a client because "candor by a lawyer, in any capacity, is one of the most important character traits of a member of the Bar." *Attorney Grievance Comm'n v. White*, 731 A.2d 447, 457 (Md. 1999) (false deposition testimony by lawyer representing party in lawsuit violated Rule). The Rule applies not only to proceedings before judges, but also "ancillary proceeding[s] conducted pursuant to the tribunal's adjudicative authority, such as a deposition." Rule 19-303 Comment [1].

There is no dispute that Mr. Libertelli knowingly made scores of false statements of fact in the divorce proceedings and failed to correct numerous false statements of fact previously made to the tribunal. Accordingly, we find that Disciplinary Counsel has proved a violation of this Rule by clear and convincing evidence.

B. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-303.3(a)(4) by Knowingly Offering False Evidence.

Maryland Rule 19-303(a)(4) provides:

> An attorney shall not knowingly . . . offer evidence that the attorney knows to be false. If an attorney has offered material evidence and comes to know of its falsity, the attorney shall take reasonable remedial measures.

Again, there is no dispute that Mr. Libertelli knowingly offered false drug tests, false summaries of drug tests, false financial documents and his own false testimony into evidence and never took reasonable remedial measures to correct this. Accordingly, we find that Disciplinary Counsel has proved a violation of this Rule by clear and convincing evidence.

C. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-303.4(a) by Unlawfully Altering Material Having Potential Evidentiary Value.

Maryland Rule 19-303.4(a) provides:

> An attorney shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. An attorney shall not counsel or assist another person to do any such act.

To be unlawful, there needs to be some sort of legal requirement. *Attorney Grievance Comm'n v. Bellamy*, 162 A.3d 848, 862 (Md. 2017) (finding that a failure to turn over evidence to opposing counsel was exceedingly unprofessional but not "unlawful" because there was no formal discovery request). But an attorney's action need not be criminal; it merely must violate a court order or other legal requirement. 2 G. Hazard, Jr., W. Hodes & P. Jarvis, THE LAW OF LAWYERING, § 33.03 (4th ed. 2014).

There is no dispute that Mr. Libertelli was under court orders to provide drug tests to opposing counsel that he then altered. Accordingly, we find that Disciplinary Counsel has proved a violation of this Rule by clear and convincing evidence.

D. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-303.4(b) by Falsifying Evidence.

Maryland Rule 19-303.4(b) provides that "[a]n attorney shall not . . . [f]alsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." As noted above, there is no dispute that Mr. Libertelli falsified evidence. Accordingly, we find that Disciplinary Counsel has proved a violation of this Rule by clear and convincing evidence.

E. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-308.4(b) by Committing Perjury.

Maryland Rule 19-308.4(b) provides that "[i]t is professional misconduct for an attorney to . . . commit a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney in other respects."

There is no requirement that an attorney be charged or convicted of a crime to violate the Rule. Rather, it is sufficient that there be clear and convincing evidence to support the elements of a criminal offense that reflects adversely on the lawyer's honesty, trustworthiness, or fitness. *Attorney Grievance Comm'n v. Garland*, 692 A.2d 465, 471 (Md. 1997); *see also Attorney Grievance Comm'n v. Ndi*, 184 A.3d 25, 36 (Md. 2018).

Disciplinary Counsel argues that Mr. Libertelli engaged in perjury in violation of Maryland Code, Criminal Law § 9-101(a)(1), which provides that "[a] person may not willfully and falsely make an oath or affirmation as to a material fact . . . if the false swearing is perjury at common law." In order to meet the elements of perjury under Section 9-101(a)(1), Disciplinary Counsel needs to show, by clear and

convincing evidence that (1) while under oath in a judicial proceeding, (2) Mr. Libertelli willfully made a statement that (3) he knew to be false and (4) the matter is material to the issue or point in question. *Smith v. Maryland*, 443 A.2d 985, 991 (Md. 1982); *see also Maryland v. McGagh*, 244 A.3d 1117, 1127 (Md. 2021).

Disciplinary Counsel has met this burden. In the two most recent incidents, Mr. Libertelli does not dispute that in his October 2018 deposition and at the November 2018 hearing, he testified under oath.

Mr. Libertelli does not dispute that, at his deposition, he testified that he last used cocaine in May or June 2018, DCX 18 Tr. at 40, which he knew was a lie. (He tested positive for cocaine twice in July and once in August 2018, which he knew having received the drug reports reflecting the positive tests, DCX 21 at 187-93). *See* ODC Br. PFF 106 & Lib. Br. Response 106. Although he denies lying in this proceeding, he does not now dispute that he knew he was lying when he testified at the November 2018 hearing that he had not used cocaine since August 2018, claiming he had no more cravings for it and inviting the Court to look at the objective evidence of his "sobriety." DCX 19 Tr. at 161, 168, 219; DCX 36 Tr. at 87; *see* ODC Br. PFF 111 & Lib. Br. Response 111. He also does not now dispute violating the rule. *See* Libertelli Br. at 93; Lib. Reply at 26, 28.

The Maryland Court of Appeals has defined "willful" as "deliberate and not the result of surprise, confusion or bona fide mistake." *State v. Devers*, 272 A.2d 794, 800 (Md. 1971), *overruled on other grounds*, *In re Petition for Writ of*

Prohibition, 539 A.2d 664 (Md. 1988). There is no dispute that this conduct meets this standard.

There is also no dispute that Mr. Libertelli's drug use, including his cocaine use, was material to the custody and visitation questions at issue when he was testifying.

It is also beyond dispute that this perjury "reflects adversely on the lawyer's honesty, trustworthiness, or fitness."

Accordingly, Disciplinary Counsel has met its burden of proving a violation of Rule 19-308.4(b).

F. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-308.4(c) by Engaging in Conduct Involving Dishonesty, Fraud, Deceit, and Misrepresentation.

Maryland Rule 19-308.4(c) provides that "[i]t is professional misconduct for an attorney to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Maryland Rule requires proof that the false statement or omission was "knowing," whereas dishonest intent can be established by proof of recklessness in the District of Columbia. *Compare Attorney Grievance Comm'n v. Stanalonis*, 126 A.3d 6, 16-17 (Md. 2015), *with In re Romansky*, 825 A.2d 311, 315, 317 (D.C. 2003). "Knowing" dishonesty may be established by proof of a "conscious objective or purpose." *Stanalonis*, 126 A.3d at 16-17.

Here, there is no dispute that Mr. Libertelli engaged in dishonesty with a conscious purpose. *See, e.g.*, Tr. 121-22 ("I would say anything to Judge Storm to keep my kids around."); *see also, e.g.*, Tr. at 123, 132, 133-34, 143-44, 185, 463,

465-67, 487, 559. Accordingly, Disciplinary Counsel has met its burden of proving a violation of Rule 19-308.4(c).

G. Disciplinary Counsel Proved that Mr. Libertelli Violated Maryland Rule 19-308.4(d) by Engaging in Conduct that was Prejudicial to the Administration of Justice.

Maryland Rule 19-308.4(d) prohibits conduct that is "prejudicial to the administration of justice." The Maryland Court of Appeals has held that "conduct prejudicial to the administration of justice is that which reflects negatively on the legal profession and sets a bad example for the public at large." *Attorney Grievance Comm'n v. Brady*, 30 A.3d 902, 913 (Md. 2011) (citations and internal quotation marks omitted). Mr. Libertelli's dishonesty and the attending days upon days of hearings resulting from it obviously meets this definition. *See Attorney Grievance Comm'n v. Pak*, 929 A.2d 546 (Md. 2007) ("An attorney who fails to respond truthfully brings the legal profession into disrepute and is therefore acting in a manner prejudicial to the administration of justice."). Accordingly, Disciplinary Counsel has met its burden of proving a violation of Rule 19-308.4(d).

V. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend the sanction of disbarment. Mr. Libertelli has requested that the Hearing Committee determine an appropriate sanction but urged that he should not be disbarred. For the reasons described below, we recommend that Mr. Libertelli be disbarred.

A. Standard

In the District of Columbia, the sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g.*, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam).

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the

courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

It is difficult to put in words how serious Mr. Libertelli's misconduct was. The Court of Appeals has repeatedly noted that "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law. . . . 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." *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (emphases removed) (quoting *In re Mason*, 736 A.2d 1019, 1024-25 (D.C. 1999)); *Hutchinson*, 534 A.2d at 924.

We agree with Disciplinary Counsel's principal argument (*see* ODC Br. at 62-64) that, in essence, there is no getting around what Judge Storm called Mr. Libertelli's "staggering" level of deception. DCX 16 Tr. at 45. He lied in testimony from December 2015, July 2016, March 2017, October 2018 (by deposition) and November 2018 and was, at best, significantly misleading in sworn Interrogatory responses in October 2018. He completely fabricated or altered dozens of drug tests and scores of entries in financial documents that he sent to Ms. Noguchi's counsel, and in many instances either personally presented them as if they were evidence to the Court, or permitted his attorneys to offer and rely on

them without correction. As we discuss further below in Section V.C, conduct that we would consider to be significantly less serious has resulted in disbarment.

Mr. Libertelli's Arguments. Mr. Libertelli "fully accepts and acknowledges the seriousness of the misconduct at issue," Lib. Br. at 88, and states that "[w]e make no attempt to minimize the seriousness of this conduct, nor does Mr. Libertelli." *Id*. at 90. But his effort to suggest that this conduct does not warrant disbarment inevitably does just that. He agrees with Disciplinary Counsel's point that "a lawyer need not actually be convicted of a crime of moral turpitude in order to be disbarred on the basis the underlying conduct," Lib. Br. at 88 (*citing In re Corizzi*, 803 A.2d 438, 442 (D.C. 2002), and urges that, absent a conviction, "it is . . . not mandatory that a lawyer be disbarred for conduct involving perjury." Lib. Br. at 88-89 (citing *Corizzi*, 803 A.2d at 442; *In re Silva*, 29 A.3d 924, 928 (D.C. 2011); *In re Tun*, 195 A.3d 65 (D.C. 2018); *In re Speights*, 173 A.3d 96, 140-41 (D.C. 2017); *In re Hutchinson*, 534 A.2d 919, 926 (D.C. 1987); *In re Kent*, 467 A.2d 982, 985 (D.C. 1983)). But *Corizzi* did disbar an attorney who suborned perjury by advising two of his clients to lie at their depositions about a reciprocal referral arrangement the lawyer had with a chiropractor, and as we discuss in Part V.C, below, cases involving a sanction short of disbarment for perjury involve conduct that is not even close to as serious as Mr. Libertelli's.

ODC's Arguments. Because we consider Mr. Libertelli's alleged and proven conduct to be serious enough on its own to warrant disbarment, we do not need to rely on ODC's additional one-sentence argument that Mr. Libertelli's conduct is

more serious because it was "more widespread" than those "found by Judge Storm and alleged in the Specification of Charges." ODC Br. at 64. However, because the Board or the Court might find a fuller statement of our views to be useful, we address the points ODC makes.

ODC first argues that Mr. Libertelli's wrongdoing is more serious because he "lied about other matters," that ODC did not charge, "including his disclosures to Irish/LAP." *Id.* (citing PFF 99). However, we cannot sanction Mr. Libertelli based on unspecified matters, and in order to consider a specified matter as the basis for aggravation, there must be proof. As noted, above, FFs 91, 166-67, 170, we agree with Disciplinary Counsel that, at the November 2018 hearing before Judge Storm, Mr. Libertelli stated he shared information about his wrongdoing with Ms. Irish, when, in fact, he had not. But although there is clear and convincing evidence that other lies he made were intentional, we did not observe this testimony and the paper record contains no evidence about his intent in offering this testimony (or whether, for example, he remembered what he said to Ms. Irish months before). And if we are being asked to assume that, because Mr. Libertelli intentionally lied about other matters, he must have remembered and intentionally lied about what he said to Ms. Irish, this would be merely a reflection of the seriousness of the primary conduct for which we have found him responsible, not an independent reason to increase the sanction.

Second, ODC argues that Mr. Libertelli "made misleading statements and knowing misrepresentations in his answer to the charges and gave knowing false

testimony at the hearing." ODC Br. at 64 (citing ODC PFF 67, 81, 86-89, 105, 129-34, 136-37). The Proposed Findings of Fact that ODC cites to support this argument involve a mixture of assertions, some more compelling than others and all also subject to some doubt about intent.

PFF 67. In citing ODC PFF 67 for this argument, ODC asserts that Mr. Libertelli gave "knowing[ly] false" testimony about whether or not he "refused to cooperate" with discovery Ms. Noguchi sought in 2017 of financial information including his severance agreement from Netflix, "claimed that he provided severance information and documents; blamed his lawyer for failing to provide [them] to Ms. Noguchi's counsel," and "contended that" Ms. Noguchi's lawyers went to Netflix as a "business development trip." ODC Br. PFF 67; ODC Br. at 64. The testimony, however, was not as clear as ODC describes it. Ms. Stafford, whose testimony ODC relies upon, did not say that he "refused to cooperate." Ms. Stafford said that Mr. Libertelli at *an earlier hearing* did not tell the truth about "the timing of . . . when he executed a severance package or when he got the money. We were in front of the court." Tr. 861. That is a very serious act of wrongdoing, but it is not one Mr. Libertelli was asked about in his testimony.

On the discovery, Ms. Stafford testified that she *did not remember* "whether we also got" true information on the timing "eventually from Mr. Libertelli," but she did not "think" she got the information from Mr. Libertelli because she pursued the inconvenience and expense of having a California subpoena issued on Netflix.

Tr. 861-62. She was not asked specifically about whether these efforts required a physical trip to California or the expense that occasioned it.

Mr. Libertelli testified that he did not know what materials were sent when because he "had an issue with my lawyers where they weren't providing it to the other side." *See* Tr. 154. He also testified that Ms. Noguchi's lawyers insisted on meetings with Netflix that ended up costing $100,000, this was "not at all about" Mr. Libertelli not providing a copy of the severance agreement, and that Netflix's lawyers told him it was a "business development trip" for Ms. Noguchi's lawyers. Tr. 150-51; *see also* Tr. 154-55 ("The severance agreement wasn't the focus of the reason to go out to California."). Mr. Libertelli asserted that this was "one of the most ridiculous parts of the proceeding." Tr. 150.

We have no reason to doubt Ms. Stafford's honesty. And it seems clear that the production of the severance agreement was at least delayed, and we are skeptical when Mr. Libertelli says that the problem was with his attorneys. But Ms. Stafford's testimony does not actually contradict his. And beyond ODC's assertion that Mr. Libertelli's testimony was "false," there is no evidence saying these statements are false. And his perception that the trip to San Francisco was expensive and unnecessary cannot easily be called "true" or "false."

PFF 81. In reference to this proposed finding, Disciplinary Counsel asserts that Mr. Libertelli "testified falsely that he 'absolutely' told Mr. Labbe he was unable to get suboxone," ODC Br. PFF 81, because Mr. Labbe testified that when Mr. Libertelli came to him in November 2016, he did not tell him "that he was

having difficulty filling his prescription or getting access to Suboxone," that his notes would reflect this problem if Mr. Libertelli had raised it, and that "it's a fairly available medication." Tr. 627-28. However, on cross-examination, Mr. Labbe agreed that his notes reflect that Mr. Libertelli did discuss being '"[v]ery irritable regarding Suboxone . . . treatment and therapy,"' and that Mr. Libertelli was "back on" Suboxone in February of 2018, which he acknowledged indicated that he had been off of the drug. Tr. 686-87.

PFF 86-89. These proposed findings all declare that Mr. Libertelli testified "falsely" in various ways that, after the January 11, 2018 hearing, he had made disclosures, had advised his lawyers to disclose information or had signed a release permitting the disclosure of information to Ms. Noguchi's counsel. Disciplinary Counsel maintains this is false because the evidence (both from Ms. Stafford and exhibits) shows that Ms. Noguchi either did not receive this information at all, or did not receive it immediately, and obtained information by subpoenaing third parties.

As we discuss below, we too have difficulty believing that Mr. Libertelli's testimony is correct and give the circumstances weight in assessing whether Mr. Libertelli has made his burden of proving by clear and convincing evidence that he is substantially rehabilitated. But the fact that Mr. Libertelli did not meet his burden of proof on that issue does not mean that Disciplinary Counsel has met its burden of proving by clear and convincing evidence that Mr. Libertelli lied in his testimony before us.

Mr. Libertelli testified that he had difficulty getting his counsel to forward materials to Ms. Noguchi's counsel. Disciplinary Counsel offered no contrary evidence on this point. To the contrary, as Disciplinary Counsel notes, Mr. Libertelli's counsel withdrew on January 17, 2018. *See* ODC Br. PFF 87. As we discuss below, this does not absolve him of responsibility for ensuring that his lies were corrected, but it makes it more likely that his testimony that he asked them to forward information that they did not forward is true.

Moreover, there is a difference between declaring testimony to be "false," as Disciplinary Counsel does in PFF 86-89, which might simply mean that he was not credible, and presuming that Mr. Libertelli was *intentionally* lying, which is what Disciplinary Counsel urges at its Brief at 64. As we explain below, Mr. Libertelli has a number of perceptions about things that we believe do not accord with reality. He reported his ex-wife, his girlfriend and his visit supervisor to the FBI on the theory that they were interfering with his visitation, and thus violated the Consumer Fraud Abuse Act or FISA. Tr. 259-61. It is true that he was not, in fact, transparent. But the evidence is not clear or convincing that he does not perceive himself to be transparent.

PFF 105. During Mr. Libertelli's June 2021 testimony in this proceeding, Disciplinary Counsel showed Mr. Libertelli an excerpt from his October 15, 2018 deposition in which he said that the last time he had used cocaine was "May or June," DCX 18 Tr. at 40, and asked Mr. Libertelli to admit that this prior testimony was false. Tr. 273. In response, Mr. Libertelli said that "I don't think it was a false

statement," because "[t]here are periods where I'm doing well and" others in which "I make mistakes. But I don't know that in this case that you pushed here -- what you're telling me here that that was not true." Tr. 273-74. He added "[i]f there were drug tests that proved it to be true, obviously, but I guess I don't remember what was going on January 7th, 2018." Tr. 274.

In the context of testimony in which Mr. Libertelli admitted numerous times to having made scores of false statements in prior testimony about his drug use, there is no reason to believe (and no clear and convincing evidence to support the conclusion) that he was lying at our hearing about what he recalled on the particular point.

PFF 129-34, 136-37. These proposed findings assert that Mr. Libertelli should be sanctioned more severely because there are false statements in his Answer to the Specification of Charges. As explained below, the specific merits of these assertions of "falsity" vary. But even when we agree with Disciplinary Counsel, we are reluctant to place reliance on ODC's assertion that Mr. Libertelli made knowing misrepresentations in his Answer as an independent basis for our conclusion.

Disciplinary Counsel does not cite authority supporting the premise that any time a respondent asserts anything in an answer that turns out not to be accepted after the hearing, it constitutes an aggravating factor, justifying a more severe sanction. For many reasons, this should not be the law. Declaring that a respondent cannot dispute facts without facing greater sanction comes dangerously close to saying that parties should not put Disciplinary Counsel to its obligation of proving

violations by clear and convincing evidence. Moreover, whenever one party makes any complaint, and the other denies the truth of an allegation, they cannot both be right. Thus, if any assertion of fact that turns out to be mistaken is the basis for sanction, the same rule would logically apply to Disciplinary Counsel when we ultimately disagree with its assertions.

To add to that, an answer is not testimony. Mr. Libertelli's Answer was not made under oath. He did not even sign it. And he did not swear during his testimony to the truth of all the statements in his Answer – instead testifying that he reviewed the answer and relied on his lawyers to ensure its accuracy. Tr. 293-94.

Although Mr. Libertelli can be held responsible for the acts of his lawyers, it is often difficult if not impossible to determine whether the error was an intentional misrepresentation by Mr. Libertelli, a misstatement or misrecollection (by someone who was asked to recall things that occurred when he was an active drug addict), a confusion of communication between him and his counsel, a typographical error, a misstatement by counsel of something he actually communicated clearly, sloppy phrasing or a misguided effort by counsel to argue for an inference the evidence ultimately did not support. Yes, Mr. Libertelli should read everything his lawyers file carefully, but that does not mean that every type of error in an answer presents grounds for disbarment.

The situation is further complicated because pleadings are to some extent advocacy pieces. They contain characterizations whose exact meaning is subject to disagreement. They are also expected to emphasize favorable facts and to minimize

unfavorable ones with the line between "emphasis" and "misleading" frequently depending on the eye of the beholder.

Here, it is particularly difficult to conclude that falsities in Mr. Libertelli's Answer compel greater sanction, because every statement that Disciplinary Counsel cites in these proposed findings comes from an Answer that admits the basic facts of his violations and every legal theory of violation with the exception of Maryland Rule 19-308.4(b). Even if statements in the Answer are incorrect, it is very difficult to call such an Answer obstructive, and even more so to declare by clear and convincing evidence that it was intended to be so or reflected a failure to appreciate the importance of truth.

Our concern here is greater because, although some of the assertions of false statements are well-taken, others are not, and still others are debatable and could depend on who bears the burden of proof. Disciplinary Counsel's assertions begin with Mr. Libertelli's statement that the "conduct giving rise to the court's referral [to ODC] was during a 'bitter divorce case'" claim that "his 'repeated efforts' to resolve issues with his ex-wife in a 'collaborative fashion' were met 'head-on by her ever more contentious litigation tactics.'" ODC PFF 129. ODC agrees that "it was a contentious divorce," Tr. 20, but argues that he lied when he said in his Answer that he worked in a "collaborative fashion." ODC PFF 129; ODC Br. at 64.

In one sense, of course, viewed from the standpoint of the entire litigation, it is absurd to say that he was being "collaborative" when he lied under oath, and

fabricated evidence. And stressing these points, Ms. Stafford does not agree with Mr. Libertelli's characterization. Tr. 852-54.

But Mr. Libertelli's assertion was not directed to the entire litigation. He testified that, at the outset of the litigation, he hired Barbara Burke, the chair of the Collaborative Divorce Project in D.C., to try to resolve the case "out of court." Tr. 295-96, 403-04. He also says that he was met with "despicable behavior," including process servers sent to his house at 9:00 pm to wake up his children while they were sleeping. Tr. 295-97, 404-06, 461-62. He claims that the case did not start out as contentious but became so. Tr. 295-97, 404-05.

We have no basis upon which to say that those assertions are false. Disciplinary Counsel does not allege that Mr. Libertelli was dishonest in connection with the divorce until testimony he gave in December 2015, after the fact that he had a drug problem was already known. DCX 2 ¶¶ 4-5. Ms. Stafford confirms that Ms. Burke had been Mr. Libertelli's counsel. Tr. 834. And for all the acrimony in the case, Mr. Libertelli and Ms. Noguchi did collaborate in some ways. For example (again as Ms. Stafford confirms) in April 2014, the parties were able to agree on a private custody evaluation, a testing protocol for drug use and a plan for visitation. *See* Tr. 835-37, DCX 8 Tr. at 13-14. As the Court noted, even as late as January 2018, the divorce decree itself was largely agreed upon. *See* RX 9 Tr. at 5-7. Mr. Stafford confirms this also. Tr. 870-71; *see also* ODC Br. PFF 85.

To add to that, while we do not have a full record of which side took what action when, there is evidence that, like most hotly-contested litigation, there is at

least some blame to go around. Judge Storm expressly recognized this in his January 11, 2018, divorce decree when he awarded only $100,000 of the over $300,000 Ms. Noguchi incurred in attorneys' fees and costs and noted that "there were times when I felt that [Ms. Noguchi] was taking unreasonable positions and pushing things more than things needed to be pushed." RX 9 at 29.

Even if we could determine that Mr. Libertelli's assertion that he at some point sought to be "collaborative" and was met with "ever more contentious litigation tactics" was false, we have no reason to believe that it is a "knowing falsehood." Characterizations like "collaborative" and "contentious" are matters of perception. As we discuss elsewhere, we believe that Mr. Libertelli is extremely mistaken about many things and, certainly taken as a whole, we agree with Ms. Stafford about Mr. Libertelli's responsibility for multiplying the litigation. But we cannot conclude that he actually thinks he set out to make the divorce as expensive, painful and contentious as possible, and lied when he said he views the litigation differently. He did not make up this perception for purposes of this hearing. At the time of the divorce, Mr. Libertelli discussed with friends how contentious he thought Ms. Noguchi was being. *See, e.g.*, Tr. 595-601 (Markham); Tr. 1099-1100 (Sridhar); Tr. 1443-44 (Levin).

PFF 130 alleges that Mr. Libertelli lied in his Answer because he "claimed that, in January 2018, when confronted with his misrepresentations, he readily acknowledged to the court that he had provided false information to the court, [Ms.] Noguchi, and opposing counsel[,] DCX 4 at 11," when in fact he acknowledged

having provided false information at the next hearing, in February, and did not reveal any misconduct until after they had been discovered. It is true that the statement did not reveal all of the facts adverse to his case. But it is not a lie warranting a more severe sanction.

PFF 133 argues that Mr. Libertelli (apparently *correctly*) noted that Judge Storm did not refer him for criminal prosecution, DCX 4 at 13, but points to Mr. Libertelli having recalled differently at the hearing.

Even when we agree that Disciplinary Counsel is right about the fact or characterization and Mr. Libertelli's Answer is wrong, almost none of the errors is at a level of seriousness, clarity and proven intentionality to warrant a disbarment that otherwise would not be warranted. PFF 131 states that Mr. Libertelli lied when he said that he "has been abstinent from opiates since November 2017," (DCX 4 at 12) when in fact it was January 2018. Disciplinary Counsel also disputes Mr. Libertelli's characterization of his use of cocaine during the period as "limited," based on him having paid at least $102,027 to Jones and Singleton for something (presumably including cocaine) during a March 2019 to December 2020 period that, in part, post-dated his September 2020 Answer. *See also* ODC Br. PFF 122. We too would not describe that as "limited." But it might well be limited in relation to what his use had been. *See* Lib. Br. Response to PFF 131 (discussing decline in use during 2018).

PFF 132 points to a statement that Mr. Libertelli "initially met with Niki Irish, with whom he shared all the details of his substance abuse issues, as well as the

issues before Judge Storm." DCX 4 at 12. As we have noted, it is clear that he did not share what we would call "all the details" or "all the issues." It is not quite as clear that he did not share what he would call "all the details" or "all the issues." And it is not at all clear that he remembered what exactly he shared with Ms. Irish some 2-1/2 years before the Answer was written.

PFF 134 argues that Mr. Libertelli lied by describing his addiction as one to "*prescription* opioids," DCX 4 Response No. 4 (emphasis added), and stating that he was continuing to use "*prescription* opioids" while he fought to overcome addiction. *Id.* Response No. 5 (emphasis added). We too would not refer opioids prescribed to others that Mr. Libertelli obtained on the street as "prescription opioids." But that is a phraseology that Mr. Libertelli tends to use even when he is explaining that he bought the opioids from Mr. Jones. *See* Tr. 297-98.

PFF 136 is closer. It argues that Mr. Libertelli lied to the extent that he responded to an allegation that he "produced as evidence credit card statements that he had altered to conceal his purchase and receipt of marijuana," by admitting that "he altered credit card statements on two occasions solely to conceal the purchase of marijuana for a friend who was getting married." DCX 4 Response No. 15. We agree that (in the convention of an answer) this statement denies that he purchased and received marijuana for any other purpose and, if so, the statement is "false" as it is clear that he also altered the financial records to conceal his own marijuana purchases. *See* ODC Br. PFF 71. But Mr. Libertelli is correct, Lib. Br. Response to

PFF 136, that this statement could be literally true (two times the purchases were solely for a friend) and on that point there is no evidence otherwise.

PFF 137 is the only statement Disciplinary Counsel cites that is sufficiently clear on its own, and sufficiently serious potentially to warrant additional sanction. PFF 137 says that Mr. Libertelli "lie[d]" when his Answer stated that his November 2018 testimony that he last used cocaine in August 2018 "was true to the best of his knowledge." DCX 4 Response No. 19. As Mr. Libertelli now concedes, this statement in his Answer not true: in fact, he knew in November 2018 that he had used cocaine more recently than in August 2018. Lib. Br. Resp. PFF 137.

In short, Mr. Libertelli committed about as serious a form of wrongdoing as a lawyer could commit when he lied repeatedly in his divorce proceeding, especially under oath. That seriousness is not mitigated in any respect by Mr. Libertelli's arguments. But it is not materially aggravated by Disciplinary Counsel's additional references to statements in the disciplinary hearing.

2. Prejudice to the Client

Mr. Libertelli argues, Lib. Br. at 90, and ODC acknowledges, ODC Br. at 64, that Mr. Libertelli's misconduct did not prejudice a client, and certainly in a literal sense, Mr. Libertelli did not represent any client besides, at times, himself, in his divorce proceeding.

However, as noted above, we agree with ODC that Mr. Libertelli's dishonesty and falsifying evidence during court proceedings '"lies at the heart of what lawyers do,"' ODC Br. at 64 (quoting *Goffe*, 641 A.2d at 465), and Ms. Noguchi, her counsel,

and the Court were victims of this misconduct. Indeed, the integrity of our legal system is a victim if we condone it.

Mr. Libertelli also suggests that his conduct is less serious by identifying other facts that occurred in other cases that, he asserts, do not exist here. All of these arguments suffer from a common problem: no one engages in all possible misconduct. The fact that there are other acts or types of misconduct Mr. Libertelli did not commit does not minimize the seriousness of the acts he did commit. Nor do the examples Mr. Libertelli cites prove his point.

Mr. Libertelli argues first that Mr. Libertelli's lies were "not intended for financial gain but rather to cover his drug use," and refers to *In re Uchendu*, 812 A.2d 933, 941-42 (D.C. 2002), as citing "multiple examples of suspending but not disbarring attorneys for submitting false documents but not for personal gain." Lib. Br. at 90; Lib. Reply at 28. We discuss the facts of *Uchendu* and the cases it cites in Part V.C, below, but as we have noted, when Mr. Libertelli lied about the circumstances under which he gave money to Ms. Chen, and doctored financial records to conceal money he had transferred out of an account the Court had frozen to another account, he was not concealing drug purchases. He was concealing information relevant to arguments Ms. Noguchi was making on dissipation and to negotiations with her over the property division.

Moreover, even if none of his lies inured to his potential financial benefit, he still lied to benefit himself. He lied to improve his legal rights (custody and visitation). And, much as he may have believed at the time that his lies protected

his children, his children were actually the primary victim of his lies. His lies worked to prevent the Court from making a full independent assessment of what steps were necessary to protect the children from the risks posed by Mr. Libertelli's drug use. That makes his lies especially serious.

In any event, although sometimes decisions refer to a lawyer's desire for personal benefit among other facts, *see, e.g.*, *Goffe*, 641 A.2d at 465-66, we cannot accept the legal proposition that no matter how many times a lawyer lies, in how many settings, suspension and not disbarment is the appropriate remedy, so long as the lies were not for personal gain. To the contrary, what a respondent's "precise motives were or whether he benefitted financially is not determinative." *Corizzi*, 803 A.2d at 442-43 (concluding that solicitation of perjury from clients is "egregious" and "reprehensible" no matter the respondent's motivation) (citing *In re Carlson*, 802 A.2d 341, 347 (D.C. 2002) ("misappropriation applies 'whether or not [the attorney] derives any personal gain or benefit therefrom'" (alteration in original)). Indeed, *Uchendu* cited *Lopes* for the proposition that '"[s]anctions for dishonesty range generally from 30 days suspension to disbarment."' *Uchendu*, 812 A.2d at 941 (quoting *In re Lopes*, 770 A.2d 561 570 (D.C. 2001)). *Cf. In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (per curiam) (finding the mitigating effect of the absence of prior discipline and the lack of harm to the client, were "massively outweighed by the aggravating factor – testifying falsely under oath in the disciplinary proceeding that the voucher was indeed accurate").

Mr. Libertelli next argues that "[h]is misconduct was isolated to his own divorce and custody battle and was not pervasive in other parts of his life." Lib. Br. at 90. But no matter how many times someone lied, it is always possible to say they could have lied in more settings. Mr. Libertelli cites neither logic nor case law for the premise that for dishonesty to merit disbarment it is not enough that the lawyer engage in pervasive lies before a court and under oath and Disciplinary Counsel must also investigate and prove lies that occurred in other settings less closely related to his role as a lawyer.

In *Cleaver-Bascombe*, for example, the Court found the Board's recommendation for a two-year suspension (with fitness) insufficient and disbarment to be appropriate when a Criminal Justice Act lawyer lied on a single voucher claiming that she went to the jail to visit a client and then lied at the disciplinary hearing in testifying that the voucher was correct. There was no suggestion that there was or needed to be evidence that she lied in any other aspect of her life.

Then, Mr. Libertelli urges that his lies "also did not involve misappropriation of funds." Lib. Br. at 90 (citing *Cleaver-Bascombe*, 986 A.2d at 1200). However, it is not clear fabricating financial records in a way that obscures an improper movement of funds is so different from a "misappropriation." And, in any event, the fact that the Court of Appeals considers misappropriation to be a particularly egregious form of misconduct does not make it the only misconduct warranting disbarment. The Court of Appeals has recognized '"two types of dishonesty cases,"'

that involve "the most extreme attorney misconduct," warranting disbarment: "'(1) intentional or reckless misappropriation where the presumptive sanction is disbarment, and (2) dishonesty of the flagrant kind.'" *In re Howes*, 52 A.3d 1, 15 (D.C. 2012) (quoting *In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008) (quotations omitted)).

Finally, Mr. Libertelli urges that his misconduct does not "involve the kind of adverse effect on the administration of justice that was evident in *Goffe*, who gave false testimony and documentary evidence as a prosecutor." Lib. Br. at 90. This statement seems to refer to the wrong case. *Goffe* did not involve a prosecutor. Mr. Libertelli may have meant to cite the original disbarment decision in *In re Howes* (the one reported at 52 A.3d 1 (D.C. 2012)).[14] *Howes* did involve a prosecutor who arranged to issue improper vouchers to pay large amounts to friends and relatives of government witnesses and then failed to disclose this potentially exculpatory information. And it is true that one of the aggravating factors in the case was that "[t]he determination of an appropriate disciplinary sanction has heightened significance in the context of a prosecutor's fitness to practice law, because the prosecutor's violation of ethical rules is compounded by his additional duty to the public." 52 A.3d at 21.

[14] Although Mr. Libertelli goes on to cite *Howes*, and to quote from this 2012 decision disbarring Mr. Howes, the decision he cites is the brief 2017 decision granting Mr. Howes' unopposed petition for reinstatement. 160 A.3d 509 (D.C. 2017) (per curiam).

Howes, however, does not suggest that, therefore it is *only* a prosecutor that can be disbarred for acting dishonestly. In *Goffe*, a lawyer was disbarred for fabricating documents in two private contexts. One of these did not involve representing a client: Mr. Goffe fabricated documentation concerning the validity of an agreement and altered documentation to make it appear that his counterparty agreed to changes he did not. In the other, Mr. Goffe represented his fiancée before the Internal Revenue Service and presented forged documents to support her claim for a deduction. In separate matters, he repeatedly falsified evidence, forged signatures and notarizations on legal documents, and lied under oath to cover up his misconduct. *See Goffe*, 641 A.2d at 461-65.

The Court, quoting the Hearing Committee, noted that Mr. Goffe would have been automatically disbarred if he had been convicted of tendering fabricated documents, that his conduct showed a pattern of dishonesty and fabrication of evidence over a number of years, that his dishonesty "was part of a plan to commit fraud intended to benefit himself," and that his "entrenched dishonesty" was his "principal means of dealing with the legal system." *Id.* at 465-66. The fact that Mr. Goffe was disbarred belies the assertion that false statements to a court need to be in connection with a criminal prosecution in order to have a sufficiently adverse effect on the administration to justify that sanction.

3. Dishonesty

There is no disputing (or dispute) that Mr. Libertelli engaged in egregious dishonesty. *See* Lib. Br. at 91.

4. Violations of Other Disciplinary Rules

Mr. Libertelli violated numerous Disciplinary Rules, and not only lied, but interfered with the administration of justice.

5. Previous Disciplinary History

Mr. Libertelli has no previous disciplinary history.

6. Acknowledgement of Wrongful Conduct

As we discuss in greater detail in connection with this *Kersey* mitigation argument, Mr. Libertelli's acknowledgement of his conduct is a complex story. On numerous occasions he acknowledges the wrongdoing and states his responsibility for it. At this point, he does not contest the violations, and argues only that disbarment should not be the sanction. And this is significant. However, as we explain below, at times he does not seem able to have come to grips with what happened.

7. *Kersey* Mitigation

Mr. Libertelli urges the Committee to find that he is entitled to mitigation of sanction based on his addiction to prescription opioids pursuant to *In re Kersey*, 520 A.2d 321 (D.C. 1987) and Board Rule 7.6. *See* Notice of Intent to Raise Disability in Mitigation (Sept. 10, 2020), *and* updated Notice (Nov. 6, 2020).

To prove he is entitled to *Kersey* mitigation, Mr. Libertelli must "demonstrate '(1) by clear and convincing evidence that he had a disability; (2) by a preponderance of the evidence that the disability substantially affected his misconduct; and (3) by clear and convincing evidence that he has been substantially rehabilitated.'" *In re*

Schuman, 251 A.3d 1044, 1055 (D.C. 2021) (quoting *In re Lopes*, 770 A.2d 561, 567 (D.C. 2001)).

As the Court emphasized in *Lopes*, "it was incumbent upon [respondent] to show that his illnesses, however labeled, deprived him of the meaningful ability to comport himself in his professional conduct in accordance with the basic norms of professional responsibility." 770 A.2d at 567 (internal quotations and citation omitted). Here, although Mr. Libertelli has presented some evidence on each point, and on some points, the evidence is close, we conclude that he has met his burden only with respect to the evidence of Opioid Use Disorder on the first factor and has not met his burden on the second (causation) or, in particular, the third (rehabilitation) requirement.

a. The evidence clearly and convincingly establishes that Mr. Libertelli had an Opioid Use Disorder that has its origin in lawful drug use, but does not clearly and convincingly establish the origin of his Cocaine Use Disorder.

To satisfy the first *Kersey* factor, Mr. Libertelli must prove that he was impaired by a disability or addiction at the time of the misconduct. *See, e.g.*, *In re Stanback*, 681 A.2d 1109, 1114-15 & n.6 (D.C. 1996) (requiring the respondent to show that "he suffered from an alcoholism-induced impairment" at the time of the misconduct and noting that the concept had been applied to addiction to prescription drugs). "[A]ddiction to prescription drugs lawfully obtained, like alcoholism, can be treated as a mitigating factor in sanctioning an attorney for misconduct." *In re Temple*, 596 A.2d 585, 586 (D.C. 1991); *see, e.g.*, *In re Soininen*, 783 A.2d 619,

621-22 (D.C. 2001) (successful *Kersey* mitigation based on addiction to anti-anxiety medication she had been prescribed). In *In re Marshall*, the Court clarified that addiction to illegal drugs—there, cocaine—is not a basis for *Kersey* mitigation. 762 A.2d 530, 538 (D.C. 2000) ("We agree with Bar Counsel that '[t]o permit mitigation on grounds of illegal drug use effectively would reward the attorney for illegal conduct occurring after he assumes his professional responsibilities." (alteration in original) (citation omitted)).

Disability or Addiction. We believe that this framework does clearly answer one of the issues on which the parties differ. There is no dispute that at the time of his wrongdoing in this case, Mr. Libertelli suffered from Opioid Use Disorder – an addiction to what at least can be a lawfully prescribed medication. There is, however, a dispute over whether the addiction is a condition that can form the basis of a potential *Kersey* defense. As noted above, Dr. Shugarman suggests that Mr. Libertelli's Opioid Use Disorder cannot form the basis of a *Kersey* defense because is not a "disability" for purposes of the ADA or the SSDI or SSI programs.

ODC does not discuss the ADA, or the two benefit statutes, or offer any justification for Dr. Shugarman's reliance on these statutes. But ODC relies, in part, on the related conclusion that Mr. Libertelli "was always able to function as a highly performing professional," ODC Reply at 2, *see also id.* at 12-14, to suggest in a different way that this conclusion defeats Mr. Libertelli's *Kersey* defense. ODC urges that the Board Report in *In re Schuman* stands for the proposition that "a diagnosis alone is not enough to satisfy the first prong of *Kersey*. The lawyer must

show by clear and convincing evidence that 'he was suffering the ill-effects of the disability at the time of the misconduct.'" ODC Reply at 9 (quoting *In re Schuman*, Board Docket No. 18-BD-020, at 25 (BPR July 19, 2019)); *see also id.* at 24-25 (implying that "suffering the ill-effects of the disability" requires showing ill-effects not only of the addiction but of the drugs). And ODC cites the recent Court of Appeals decision in *In re Schuman*, 251 A.3d 1044 (D.C. 2021), and says that it "adopted [the Board's] recommendation of disbarment but did not reach [the] issue of whether Schuman failed to prove the first prong of *Kersey*." ODC Reply at 9.

We disagree with both ODC's argument and Dr. Shugarman's view. To begin with, we agree with Mr. Libertelli that the standard in both the case law and the regulation is disjunctive. Board Rule 11.13 repeatedly refers to the obligation to submit evidence of a "disability ***or*** addiction." (emphasis added). As we noted above, *Temple*, "h[e]ld" that "***addiction*** to prescription drugs lawfully obtained, like alcoholism, can be treated as a mitigating factor in sanctioning an attorney for misconduct." 596 A.2d at 586 (emphasis added). *Temple* does not suggest that only those addictions that also meet an unspecified definition of "disability" can be considered for mitigation. *See Zakroff*, 934 A.2d at 423 (citing *Temple*, 596 A.2d at 590).

Nor does *Schuman* address the circumstance at issue here. *Schuman* did not involve an addiction. Mr. Schuman sought to argue that his lifelong depression mitigated his misappropriation of funds. As the Board noted, the fact that someone has been diagnosed with lifelong depression does not mean that they are suffering

from its ill-effects during a particular period. *In re Schuman*, No. 18-BD-020, at 24-26 (BPR July 19, 2019).[15] Mr. Schuman's condition had actually substantially improved at the time he misappropriated funds. *See* 251 A.3d at 1057-58. Here, there is no dispute that Mr. Libertelli was not only addicted but actively taking drugs at his wrongdoing.[16]

Nor even if we were to apply *Schuman* in this way, would we agree that in order for an addict to assert a *Kersey* defense, the addict must show that at the time of the wrongdoing (s)he was suffering from the ill-effects not only of the *addiction*, but of the *drugs*. ODC Reply at 9. The effects of the drugs themselves are not by any stretch the only harm associated with addiction. Nothing in *Schuman* suggests that, for example, a respondent would be unable to assert a *Kersey* defense if the conduct were shown to be substantially caused by a respondent suffering from withdrawal symptoms, or an inability to focus because of the distraction of needing to fuel a habit.

Imposing a requirement of proving that an active addiction causes the respondent to be disabled in some other sense would distort the *Kersey* burden of

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[15] Available at https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=JonathanRSchuman18BD020.pdf

[16] *In re Stanback*, 681 A.2d 1109 (D.C. 1996), is similarly distinguishable. There, the Court agreed that a *Kersey* defense was unsuccessful where the respondent had not proven that he suffered from alcoholism or depression until after he misappropriated funds. 681 A.2d at 1111, 1116. As the Court noted in referencing the hearing committee decision, "[h]ad the misappropriation occurred [during the later period for which Mr. Stanback had provided this proof], a *Kersey* defense might be sustainable if the other conditions are met." 681 A.2d at 1112.

proof. As the Court explained in *Stanback*, "[e]ach step of [the *Kersey*] test is separate and distinct, and can be fairly kept so." 681 A.2d at 1116. Respondents bear the burden of proof of disability or addiction and rehabilitation by clear and convincing evidence because they also have the benefit of knowledge on those points: "We think it self-evident that it is the attorney who has the greatest access to the evidence, and who can best identify medical and lay witnesses necessary to show both impairment and rehabilitation." *Id.* at 1115.

But for practical reasons, *Kersey* placed a much lower burden on proving causation. *Kersey* recognized that, "it is an impossible burden to prove that Kersey's alcoholism caused each and every disciplinary violation," 520 A.2d at 326, and accordingly, reduced the burden in several respects – finding no need for individualized proof, and allowing for "but for" causation *and also* by allowing the causation element to be proved by a preponderance of the evidence. *Id.* at 327; *see Stanback*, 681 A.2d at 1115.

Disciplinary Counsel's additional argument of proving that the addiction is a disability would defeat this preponderance standard. It would mean that a respondent who could prove the existence of an addiction and rehabilitation by clear and convincing evidence, and prove by a preponderance of the evidence that this addiction was a but-for (or for that matter even sole) cause of the misconduct would not be entitled to mitigation unless the respondent could also prove by clear and convincing evidence that the addiction caused not just the wrongdoing, but a

disability. This additional step of proving the disability does not appear to serve any of *Kersey's* purposes of aligning our discipline with its goals.[17]

Nor is it apparent what the definition of this additional "disability" requirement would be. As we noted in discussing Dr. Shugarman's testimony, we cannot see any legal basis for presuming that the standard that would apply to deciding whether someone was disabled for ADA or the two benefit programs would apply to *Kersey*. In fact, the ADA standard for disability is at odds (if not mutually inconsistent) with that for the benefit programs, as part of the purpose of the ADA is to protect people who *can* work from being discriminated against, while a major purpose of the SSI and SSDI is ensure that people's disability makes them unable to work, making them in need of benefits.

Kersey, by contrast was based on the conclusion that ignoring the effects of alcoholism from which the respondent is now substantially rehabilitated does not serve the purposes of our disciplinary system (protecting clients, protecting the integrity of the profession and deterrence of unethical conduct). There is no logical reason why a respondent must not only show that addiction, causation, and

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[17] Because we conclude that the Board's decision in *Schuman* does not apply to this case, we do not reach the issue of whether the Board's decision on its facts survives the Court of Appeals' decision in *Schuman*. As ODC notes, ODC Reply at 9, the Court of Appeals did not address whether Mr. Schuman failed to prove a disability by clear and convincing evidence under the first *Kersey* prong, and instead concluded that he had not proven causation by a preponderance of evidence under the second prong. *See* 251 A.3d at 1048, 1058. Arguably, under ODC's reasoning, the Court should not have reached the second prong and instead resolved the case under the prong under which Mr. Schuman bore the greater burden.

rehabilitation, but must, in addition, show that (s)he is unable to do any substantial gainful employment.

Illegal Use of Drugs. However, *Kersey* and its progeny are less clear about how to treat Mr. Libertelli's use of opioids he purchased off the street or of cocaine (which of course was already illegal). Mr. Libertelli argues that he should be able to assert a *Kersey* defense even if the drugs he used were illegal and cites a number of cases from other jurisdictions allowing cocaine use to be considered in mitigation. Lib. Br. at 77-78.

If we were deciding the matter for ourselves, we might view addiction differently than the Court did 22 years ago in *Marshall*: as a disease that attorneys do not choose to have. We might conclude that attorneys suffering from this disease who otherwise prove causation and meet the heavy burden of demonstrating rehabilitation are not really being "rewarded" for the illegal conduct that fueled their disease. Thinking of such a defense as a "reward" for illegal conduct (or, "special grace," 762 A.2d at 538), also seems inconsistent with the fundamental principle that our discipline is not a "punishment" but a protection for clients and the integrity of the profession.

Having this rule also seems inconsistent with our current criminal practice. In criminal court (where the proceeding *is* intended in some measure to punish violators), the District of Columbia operates a Drug Court designed to offer the possibility of treatment premised on the view that addiction is a disease. *See* https://www.dccourts.gov/superior-court/criminal-division/drug-branch. In fact,

when Mr. Libertelli was arrested and pled guilty to possession of cocaine he received a deferred sentence with the possibility of expungement based on a promise to engage in community service. DCX 60-62; Tr. 101, 435.

Treating a consideration of drug addiction as a "reward" or "special grace" also seems inconsistent with the principle behind the LAP. The idea of the program is to treat addiction as a disease.[18]

Indeed, the "reward" or "special grace" logic even seems inconsistent with Disciplinary Counsel's prosecution of this claim. As Disciplinary Counsel notes, even though there was never the slightest doubt that Mr. Libertelli used opioids he bought off the street, cocaine and marijuana long before he obtained his medical marijuana card, Disciplinary Counsel "did not file charges against Respondent because he used illegal drugs." ODC Reply at 38; Tr. 18. If this massive drug use is not something worth making the subject of a disciplinary proceeding, it seems odd to treat it as disqualifying us from considering facts that we would otherwise evaluate in mitigation.[19]

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[18] *See In re Rohde*, 191 A.3d 1124, 1136 (D.C. 2018) (quoting a transcription of an interview with then-Disciplinary Counsel Wallace E. "Gene" Shipp, Jr. in which he rebuffed '"the notion that alcoholism is the result of some sort of moral failing,' and acknowledged that the 'scientific research makes [it] clear . . . [that alcoholism is] a disease and it should be treated as a disease'" in the context of a respondent who committed the crimes of drunk driving and leaving the scene of an accident (alterations in original)).

[19] Also, as Mr. Libertelli notes, Lib. Reply Br. at 7, in *Marshall* it was easier to think of mitigation as being a "special grace" because the case involved a lawyer who had misappropriated client funds and used them to buy cocaine. *See Marshall*, 762 A.2d at 535. This created a particularly compelling reason to protect his clients because "from the standpoint of the victimized client, it makes no difference whether the culpable attorney is addicted to cocaine or not." *Id.* at 534; *see also id.* at 538. Although we do not believe that *Marshall*'s rule is limited to these facts

All of that said, however, *Marshall* is the law. We are obliged to follow it until and unless the Court of Appeals changes it.

Recognizing that *Marshall* is the law, however, does not completely decide how *Marshall* applies to these facts. On this point, we analyze Mr. Libertelli's opioid and cocaine use separately.

Opioid Use Disorder. The parties' views about how *Marshall* applies to these facts involve more inference from the facts the parties stress than discussion of the law. Mr. Libertelli emphasizes that Mr. Libertelli's opioid use began with lawful treatment of physical pain. He maintains that if lawfully obtained opioids were a "but for" cause of his addiction, it no longer matters whether he fueled the addiction through lawfully or unlawfully obtained opioids.[20]

Disciplinary Counsel urges that all the drugs Mr. Libertelli was taking at the time of his wrongdoing were illegally obtained, *see, e.g.*, ODC Reply at 3 (heading), and contends that Mr. Libertelli did not become addicted to drugs based on the legal prescriptions. *Id.* at 3-4. The emphasis on these factual points implies that, unless the actual drugs a respondent was taking at the time of the wrongdoing were legally obtained, or, at least, the addiction was established at the time the drugs were legally

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(and its language is clearly broader), that fact made the Court's perspective easier to see than it might have been under other facts.

[20] During closing argument, Mr. Libertelli also suggested that *Marshall* applies only to drugs, like cocaine, that it is criminal to possess, and that possessing opioids without a prescription (while prohibited as a matter of regulation) is not actually a crime. Tr. 1511-12. As Mr. Libertelli did not argue this point in the briefing we have no occasion to consider it.

obtained, it does not matter whether the use began with lawful treatment for physical pain.

But apart from discussing the general rule of *Marshall*, neither party meaningfully analyzes how the law does or should draw the line in a situation where lawful prescription drug use is a but-for cause of an addiction that is substantially fueled by purchases off the street or purchases of an illegal drug.[21]

In reviewing *Marshall*, we see some support for aspects of both side's views. On the one hand, as Disciplinary Counsel notes, one theme in *Marshall* is that commission of a crime should not be a defense, especially for a lawyer. *See, e.g.*, *Marshall*, 762 A.2d at 537 ("We begin with the obvious. 'There are valid and rational differences between addiction to [cocaine] and alcohol. . . . Alcohol is legal, although regulated, while [cocaine] is prohibited.'") (alterations in original) (citation omitted); *id.* ("'Each time [Marshall] used cocaine during [a period of several years], he engaged in [criminal conduct punishable by] . . . imprisonment and a . . . fine.") (alterations in original) (citation omitted); *id.* at 538 ("An informed public would find it intolerable that such a lawyer be granted special grace." (citation omitted)).

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[21] In a different Section of its Reply, Disciplinary Counsel states that the effects of opioids are "beside the point," because Mr. Libertelli obtained all of his drugs at the time of his misconduct through what Disciplinary Counsel calls "illicit, criminal channels." ODC Reply at 37. However, the only support Disciplinary Counsel cites for this conclusion is an assertion that ***if*** Mr. Libertelli had been "***convicted*** of possession ***with the intent to distribute cocaine*** **–** the crime with which he was ***charged*** in June 2020 – his disbarment would be automatic." *Id.* (emphasis added) (citations omitted). But those charges were dropped and we have no evidence that Mr. Libertelli even intended to distribute cocaine. Thus, this assertion does not assist us in determining how *Kersey* applies to the issues of Mr. Libertelli's use rather than sale.

In addition, the cases that expanded *Kersey* to apply to prescription drugs were careful to limit their discussion to legal as opposed criminal uses. *See Temple*, 596 A.2d at 589 n.4 (declining in extending *Kersey* to apply to prescription drugs to address whether the extension would apply to acts involving criminality because that involves "numerous" considerations); *In re Soininen*, 783 A.2d 619, 622 (D.C. 2001) (noting "that the Klonipin, which Soininen abused, was legally prescribed and that she did not use any of the Vicodin she was convicted of unlawfully possessing").

On the other hand, *Marshall* also stresses that Mr. Marshall's *initial* decision to use cocaine was a *voluntary* decision to commit a crime. *See, e.g.*, *Marshall*, 762 A.2d at 537 ("notwithstanding cocaine's often all-but-irresistible attraction ***for those who have allowed themselves to become involved with it***, the ***intentional*** possession of the drug is unlawful.") (emphasis added, citations omitted). *Id.* ("Marshall now asks us to mitigate the sanction, for conduct otherwise warranting disbarment, on the basis of a condition ***which was brought about, at least initially, by his own intentional violation of the law***.") (emphasis added). Indeed, the distinction *Marshall* drew between alcoholism and cocaine use was expressly based on the fact that "[a]lcohol is legal, although regulated," *id.*, and *Marshall* emphasizes the extent of the lawyer's criminal conduct. *Id.* (Marshall's addiction "stem[med] from his unlawful possession, use, and abuse of cocaine over a period of several years").

At least so far as opioids are concerned, this case does not involve a voluntary decision to start using. There is no dispute that Mr. Libertelli began with lawfully

prescribed use of a highly addictive drug. And opioids, like alcohol, can be said to be "legal, although regulated," in a way that cocaine is not.

It also does not serve the goals of *Marshall* to treat people who come to be addicted to opioids after receiving prescriptions as if they voluntarily decided to take cocaine and became addicted. It is very difficult to think that an "informed public" would consider it to be "special grace," 762 A.2d at 538, to consider the circumstances of a lawyer who became addicted after being prescribed opioids for severe back pain and ended up buying from dealers on the street.

Moreover, there is a difference between an addiction like Mr. Marshall's that *was caused by* an initial decision to engage in criminal behavior (which does not qualify for *Kersey* mitigation) and an addiction that causes illegal conduct. Mr. Kersey himself engaged in a misappropriation of funds, that was arguably illegal. In *Rohde*, the Court ruled that it is proper to consider a *Kersey* defense "in cases involving a felony conviction but not reflecting moral turpitude," 191 A.3d at 1127, there involving leaving the scene of an accident and failing to render assistance. Disciplinary Counsel does not suggest that drug use is a crime of moral turpitude and it seems inconsistent to say that addiction allows for a mitigation of the sanction for a crime *unless* at the time of misconduct you are committing the crime of illegally buying the drugs to which you were addicted.

Given these points, what should be necessary in order to comply with *Marshall* and its sprit is that the respondent prove by clear and convincing evidence that the use was not voluntary – that the addiction was the result of a lawful

prescription and was not continued for recreation and that the respondent was addicted at the time of misconduct.

If that is met, however, we do not believe that the law additionally requires the respondent to show that the addiction also occurred before resorting to buying the drug on the street. To begin with, as a practical matter it is often not possible to discern (even at the time, much less in retrospect) the moment when drug use became an addiction (or what facet of addiction would be the relevant marker for such a determination). As medical professionals are not supposed to prescribe medicine to satisfy drug-seeking, virtually any addiction to a prescription medication could eventually lead to some form of unlawful acquisition. *Stanback* recognized that the reason for requiring the respondent prove the existence of a disability or addiction by clear and convincing evidence is that all of the information sufficient to prove such a disability or addiction should be relatively easily in the respondent's control. *See Stanback*, 681 A.2d at 1116. Imposing an impossible burden of proof seems inconsistent with that premise.

But even if there were no proof problems, so long as the drug use began lawfully and the drugs were not purchased for recreation afterwards and the lawyer was addicted at the time of the misconduct, application of *Kersey* should not turn on how much earlier experts would say the lawyer became addicted. Imagine there are two addicts, both of whom can prove that they became addicted after lawful drug use, that they eventually purchased drugs illegally, that the drug addiction caused their (identical) misconduct, and that they are substantially rehabilitated so that there

is no expectation that the misconduct will recur. The only difference is that one can prove that they began to buy drugs on the street after they met a definition of addiction, while the other can prove only that they began to buy drugs on the street to deal with the pain, but did not actually become addicted until later (sometime before the misconduct). There is no reason to distinguish those two cases. The goal of *Kersey* and *Marshall* is not to punish one of the lawyers for previously buying drugs illegally to deal with pain rather than because of addiction.

We believe that, with respect to opioids, Mr. Libertelli met this burden of proof. He would not have become addicted to opioids had he not received them therapeutically. Although the exact timing of his addiction is unclear, there is no dispute that he was addicted by December 2015 when his misconduct began. Nor is there any reason to believe that he purchased these drugs for recreation (as opposed to dealing with pain before his 2014 surgery and avoiding withdrawal, perhaps before, but certainly afterwards). Accordingly, we consider him to have suffered from a relevant Opioid Use Disorder, for *Kersey* purposes.

Cocaine Use/Cocaine Use Disorder. We do not, however, believe that the same result would apply to the extent Mr. Libertelli's conduct was attributed to his cocaine use. Not only is cocaine the exact drug at issue in *Marshall*, the connection between Mr. Libertelli's lawful prescriptions for opioids and his cocaine use is much more attenuated. At best, Mr. Libertelli showed that a purpose served by his cocaine use was to counteract the sedative effects of using opioids. He did not establish by

clear and convincing evidence that he would not have used cocaine unless he had been addicted to opioids. (In fact, he had used cocaine before using opioids).

More importantly, even if we accepted that his opioid use was a but-for reason for why he was taking a stimulant, the evidence did not establish why that stimulant had to be illegal cocaine, as opposed to medication he could buy over the counter or obtain by legal prescription. Not every opioid addict is also a cocaine addict. And the proof why Mr. Libertelli became one is lacking.

b. Mr. Libertelli did not prove by a preponderance of the evidence that his disability caused his lies.

To satisfy the second *Kersey* factor, the respondent must prove that his or her misconduct was '"substantially caused"' by the qualifying disability or addiction. *In re Zakroff*, 934 A.2d 409, 418 (D.C. 2007) (citations omitted). "Substantial cause" requires the respondent to show that, "[b]ut for [the disabling condition], his misconduct would not have occurred." *Kersey*, 520 A.2d at 327. "[T]he 'but for' test does not require [Mr. Libertelli to prove that his] disability was the 'sole cause' of the attorney's misconduct," or that it caused "each and every violation"; but it does require that he establish a '"sufficient nexus"' between his misconduct and the disability or addiction. *See Zakroff*, 934 A.2d at 423 (citations omitted).

What a sufficient nexus is, however, is somewhat vague. The Court of Appeals has concluded that, in cases where a respondent has committed temporally distinct violations, the respondent must prove that each instance of misconduct was substantially caused by the disabling condition. *See In re Verra*, 932 A.2d 503, 505 (D.C. 2007) (per curiam) ("while [respondent] had demonstrated a causal

relationship between her disorders and her misconduct arising from her representation of [her client], she had not shown it to affect her misconduct in cooperating with [Disciplinary] Counsel's investigation"). Moreover, while the connection between drug addiction and physiological reactions may be fairly clear, the relation to lying may not be. *See Lopes*, 770 A.2d at 569 (upholding *Kersey* defense on the theory that reaction to depression medication mitigated neglect, but concluding that there was no evidence reaction caused dishonesty).

Here there are several problems with Mr. Libertelli's proof on causation. Some possible theories of causation clearly do not fit the facts. Mr. Libertelli's lies were not "drug induced" in the sense of occurring only during periods of actual intoxication. He lied far too often and in far too many settings to suggest that it was "drugs talking" at the time, and there is no evidence connecting each or any lie with either taking or being in withdrawal from drugs.

The drugs did not prevent him from appreciating that what he was doing was wrong. He knew that what he was doing was wrong. *Cf. Rohde*, 191 A.3d at 1133-34 (relying on a Hearing Committee finding that Mr. Rohde's alcoholic blackout affected his ability to know what he was doing leading to a conclusion that he did not engage in moral turpitude).

Mr. Libertelli's lies cannot be understood as reflecting personal denial of the fact of his addiction. It is easy to appreciate that addicts tend to lie about the fact of their addiction. But this case does not involve someone saying "I can give it up anytime I want to. I just don't want to." Mr. Libertelli admitted he was an addict

and Ms. Noguchi and the Court knew he was an addict. He lied and doctored evidence largely to conceal his continued use of drugs to which he had already admitted being addicted.

To add to that, although the lies "largely" involved concealing his drug use and purchases, they did not entirely involve this. He also lied to conceal why he paid money to Ms. Chen and that he had transferred funds out of an account the Court had frozen. That means this was not just a case of lying about addiction or the use.[22]

Ultimately, given these limitations, Mr. Libertelli's theory for causation is the general assertion that his undeniably serious opioid addiction "has to matter" and must have affected his judgment – which Mr. Libertelli amplifies by references to opioid use being a national epidemic. *See* Lib. Reply at 1-2, 28-30. There is some evidence to suggest that there might be a link between his addiction's effect on his judgment and his lies. Dr. Shugarman acknowledges that Mr. Libertelli's "judgment during the period of misconduct was more likely than not partially compromised during that time period due to his ongoing opioid use and stimulant use disorders, specifically concerning the domains discussed in the preceding paragraph regarding his ongoing use of substances." DCX 49-67; Tr. 1352.

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[22] Mr. Libertelli argues that his $60,000 withdrawals were "but a small fraction compared to the over $700,000 in his one trading account, not to mention $2.7 million in assets in the divorce settlement and over $19,000 per month in child support that his wife received." Lib. Reply at 16. This misses the point. Mr. Libertelli was ordered not to take any money from the account. And he altered the financial records to conceal that he violated the order. This lie is very serious regardless of how big a withdrawal (or transfer) his alteration concealed.

Although we agree with Disciplinary Counsel that Dr. Ratner's logic (in essence that it must have been the drugs that caused Mr. Libertelli's bad judgment because no lawyer would be expected to choose lying if they were exercising good judgment) is circular, there is no reason to believe that Mr. Libertelli began generally to lie (about anything we know of in the evidence, but even specifically about his drug use) until after he was addicted to opioids. The evidence is not entirely clear on this point. The timing of his addiction is unclear and there were some gaps in his early testing and some results indicated that the sample was diluted. DCX 6 Tr. at 162-63; *see also* Tr. 840-41. But there is no evidence that Mr. Libertelli fabricated documents before July 2016. Before then, he produced some 20 reports that showed him testing positive. DCX 8 Tr. at 14. This provides some reason to think that something had to be involved in Mr. Libertelli shifting into a mode in which he made scores of lies over a period of time.

We also take seriously Judge Storm's belief that Mr. Libertelli's addiction "hijacked" his normal thoughts. DCX 16 Tr. at 46. This conclusion was one he reached after hearing Mr. Libertelli (and other witnesses we have not) testify at many hearings and comes from the jurist who had to cope with his lies.

There are still, however, several problems with this theory. First, some evidence is not the same as a preponderance of the evidence – to say that something is "logical" does not mean it is proven. Mr. Libertelli lied for a lot a reasons (including the stress of his divorce proceeding, his perceptions of the judge and his desire to improve his argument on visitation), and it is not clear what role the drug

addiction played. As Dr. Ratner noted, to decide whether Mr. Libertelli's lying resulted from an Opioid Use Disorder, Dr. Ratner would "have to know a fair amount more about the circumstances and the conditions." Tr. 995.

Second, the theory that the drug addiction clouded his judgment thereby causing the lying is at least somewhat in tension with the nature of the lies and with Mr. Libertelli's success in other fields. Mr. Libertelli described himself as acting from an "addled" brain that made poor decisions. But the poor decisions were not made on the spur of the moment. He meticulously altered documents for months.

Similarly, although we do not agree with Disciplinary Counsel that the evidence shows that Mr. Libertelli's drug use had no effect on Mr. Libertelli's work, the evidence does give us some pause. On the one hand, even accounting for the possibility, as Judge Storm noted, that some addicts can compartmentalize and succeed in some areas of their lives despite their addiction, the evidence is that Mr. Libertelli likely had some negative effect at work from his undisputed multiple drug addictions. We also note that there were other negative events occurring in Mr. Libertelli's life (*e.g.*, he was essentially fired from Netflix; his relationship with Ms. Chen collapsed; he went through four sets of legal counsel and threatened many participants in the process with litigation and professional complaints. *See also* Tr. 1154). On the other hand, it is difficult to conclude that his addiction '"deprived him of the meaningful ability to comport himself in his professional conduct in accordance with"' *only* '"the basic norms of professional responsibility."' *See Lopes*, 770 A.2d at 567 (quoting Disciplinary Counsel's brief) (concluding that a disability

substantially caused the respondent's neglect and related violations, but not dishonesty to a tribunal).

Third, to the extent there is a link between Mr. Libertelli's addiction and the lies, it is not clear whether what caused the lies was the Opioid Use Disorder (whose consideration we have concluded is consistent with *Marshall*) or the Cocaine Use Disorder (which is not eligible for *Kersey* mitigation under *Marshall*), or some combination of them. Indeed, if anything, Dr. Ratner attributes Mr. Libertelli's actions even more to the cocaine use and speculated that the opioids might even have been a check on the cocaine use. Tr. 996-97; FF 210, 211.

Fourth, while it is undeniable that opioid use is a national epidemic with horrific consequences, the fact that it is widespread, or that drug companies have entered into large settlements, Lib. Reply at 28-30, does not establish whether it caused Mr. Libertelli's lies. Nor do we have evidence upon which to conclude that every opioid addict who has had reason to testify under oath has lied.

But most of all, Mr. Libertelli does not have a good explanation for why the lies continued after January 7, 2018, when Mr. Libertelli stopped using non-therapeutic opioids. No one directly addressed the point during the testimony. In briefing, Mr. Libertelli argues that his "false testimony at the end of 2018 is directly linked to his opioid use," because "[h]e had not broken free of his addiction to cocaine" which, Mr. Libertelli argues "developed as a result of his" Opioid Use Disorder. Lib. Reply at 20-21. But the only evidence Mr. Libertelli cites to support this conclusion is Dr. Ratner's speculation that "maybe" when Mr. Libertelli did not

have the '"benefits of the opioids, such that they are,"' in mitigating the effects of cocaine, "the cocaine kind of ruled the roost at that point and caused him to be more inclined to find these really bad solutions to things." *Id.* (quoting Tr. 953-54).

As we note above, the evidence did not prove that Mr. Libertelli's Opioid Use Disorder forced him to use cocaine as a stimulant. And the speculation – that up until January 2018, it was the opioids causing the lies and that, once he stopped using the opioids, they ceased to counterbalance cocaine and so now the cocaine caused the lies – is unproven and attenuated. The lies he made under oath in answering interrogatories, in deposition and in testimony in fall of 2018, are, by themselves, perhaps serious enough to justify his disbarment. The fact that those lies continued after his active opioid addiction, shows that either (1) it was not his active opioid addiction that caused the lying; or (2) the lying, even if caused initially by his active addiction, took on a life of its own that outlived the active addiction.

In short, the law places the burden of proof on Mr. Libertelli to connect his truly extraordinary wrongdoings not merely to his desire to maintain access to his children, his contentious divorce proceedings or his pressures at work, but substantially to his relevant addiction. And the evidence in this case does not meet this burden.

c. In any event, although Mr. Libertelli did demonstrate some improvement, he has not shown that he is substantially rehabilitated as *Kersey* requires.

Even if, however, we were to accept that Mr. Libertelli had proved causation by a preponderance of the evidence, we are compelled to find based on the evidence

that he has not proved by clear and convincing evidence that he is "substantially rehabilitated." A respondent is substantially rehabilitated when (s)he "no longer poses a threat to the public welfare" or where "that threat is manageable and may be controlled by a period of probation." *In re Appler*, 669 A.2d 731, 740 (D.C. 1995); *see also In re Robinson*, 736 A.2d 983, 989-90 (D.C. 1999) (respondent failed to show substantial rehabilitation "because her conduct continued to call into question her ability to ethically represent her clients. . . . *Kersey* mitigation is not appropriate in this case because it will not guarantee the protection of the public, and of public and private rights" (citation and internal quotations omitted)). Thus, the substantial rehabilitation prong of *Kersey* "imposes a sort of fitness requirement on an attorney who seeks mitigation of sanctions under this doctrine." *Robinson*, 736 A.2d at 989.

Mr. Libertelli has presented some evidence that his condition is improved. It is a huge step for him that he has not taken non-prescription opioids for 3-1/2 years. Tr. 441-42, 483. He has had negative tests for cocaine, and reports some positive results through counseling and connections, Tr. 442-47; Lib. Br. at 86, and is healthier, more outgoing and more candid about his life. Tr. 446, 1070-73.

However, as Mr. Libertelli notes, he still thinks he has "a lot of work to do." Tr. 442. Even by his own testimony he bought cocaine as recently as September 2020, and he paid his drug dealer for something as recently as December 2020. Tr. 282, 319-20, 420-21. There has not been enough time to determine that he has given up cocaine for good.

Dr. Ratner's knowledge about Mr. Libertelli was too limited and his testimony too equivocal to demonstrate Mr. Libertelli's rehabilitation. Dr. Kirsch "hope[s]" that Mr. Libertelli would contact his informal sponsor before he slipped. Tr. 1164-65. The evidence does not demonstrate clearly or convincingly that Mr. Libertelli's judgment and conduct are now such that he "no longer poses a threat to the public welfare" or that the "threat is manageable and may be controlled by a period of probation." *Appler*, 669 A.2d at 740.

Indeed, even as Judge Storm's comments lend some support to Mr. Libertelli's arguments on disability and causation, they also show that Mr. Libertelli had not been rehabilitated as of February 2019 – over a year after he stopped taking opioids. Judge Storm said at the February 5, 2019 hearing that "while" Mr. Libertelli's addiction "may be at the root of all this," "his fitness as a parent ***is*** impacted negatively." DCX 42 Tr. at 20 (emphasis added). He concluded that it was "unrealistic" to keep the prior visitation order in place, *id.*, and that Ms. Noguchi "should now have sole legal custody," of the children because Mr. Libertelli "cannot be trusted at this time to make sound decisions on behalf of [the] children, given the poor decisions that [he had] made in [his] life," even recognizing that those decisions "result from [his] drug dependency." *Id.* at 23; *see also id.* at 24 ("Mr. Libertelli . . . your judgment can simply not be trusted. As I indicated, the risk [to the children] can no longer be managed in a way that proved ineffective under the 2016 order."); DCX 16 Tr. at 45 (February 13, 2018 hearing "all along you appear to have been deceiving me, deceiving your family, and most,

and worst of all, I guess, deceiving your children. And the level of deception is staggering").

Although Mr. Libertelli undoubtedly has a better understanding of himself than he did when his was engaging in that deception, he has not yet restored that trust. When his counsel asked Mr. Libertelli why he continued to lie after he stopped taking opioids, Mr. Libertelli never really answered: rather he gave a lengthy answer explaining various aspects of how his use of opioids affected him *while he was taking the opioids* including the need to obtain "the next score." Tr. 417-19. When the Hearing Committee followed up, his answer was that the opioid addiction affected his judgment and "you're lying because you're trying to hide a shameful thing." Tr. 490-91. When his counsel asked again how his pre-January 2018 opioid use affected his later conduct, he responded that, after January 2018, he did not really have an occasion to discuss with the Court the extent of his improvement. Tr. 566-68. During his testimony, he offered no explanation for why he lied in his November 2018 testimony about having recently used cocaine. Tr. 569-70. It is only in his briefing that he presents a theory.

Similarly, when the Hearing Committee asked how we know, given his past willingness to lie and the importance of being a lawyer to him, *see* Tr. 435-38, that he is not lying in our proceeding, Mr. Libertelli responded, "I think you know that I'[m] not lying to this hearing committee because the things that I am saying are backed up with documentary evidence," and "because I'm being honest with you about my subjective beliefs at the time." Tr. 561. But as our factual discussion

illustrates, much of his testimony is not supported by documentary evidence, and some of the facts – such as the development of his addiction, the premise that all of his falsehoods were directed towards keeping access to the children, and his current perceptions on many events – are contradictory or clearly incorrect.

Nor do the events since January 7, 2018, when Mr. Libertelli last took illegal opioids and our observations at the hearing support the conclusion that, as of now, his judgment as a lawyer can be trusted. To begin with, even accepting that his opioid addiction caused the cocaine use (which as we note is not clear), it is clear that the cocaine use outlived the opioid use. Nor is there clear or convincing evidence that it has stopped for good. He used cocaine occasionally before he was addicted to opioids, and Mr. Libertelli was arrested originally for possession of cocaine with intent to distribute on June 29, 2020, DCX 49 at 32-33, and used cocaine at least as recently as September 2020. DCX 49 at 29-30. And he made a cash payment to Mr. Singleton, as late as December 14, 2020, DCX 49 at 58-59, which he still does not explain.

Although he is being periodically tested for drugs, his tests are not totally independent. He is the one who schedules them. As he himself noted in criticizing his lawyers for setting up such a system, "you should never put a drug addict in charge of his other drug tests. Like that is crazy. This is nobody in the recovery community that will say that is the legitimate thing to do." Tr. 220-21.

We cannot be confident about the extent of Mr. Libertelli's rehabilitation and the adequacy of the medical and psychiatric support he is receiving because

Mr. Libertelli has never been fully forthcoming with his doctors and therapists about his drug use. Even after ceasing to take illegal opioids, and, in some respects to this day, he has not been fully forthcoming with his treating physician, Dr. Agrawal, about his cocaine or prior marijuana use. Tr. 536. He provided very little information to Ms. Irish. *See* Tr. 777-86, 791-92, 825; DCX 48. Although Mr. Libertelli saw Mr. Labbe for approximately 47 individual and 25 group sessions between November 2016 and 2018, Tr. 633-34, Mr. Libertelli never told him that he had falsified drug tests or financial records or gave false testimony in the divorce proceeding. Tr. 649-50. Dr. Kirsch knew that Mr. Libertelli became addicted to opioids and "there's been cocaine use," but did not know the specifics of either, Tr. 1150-51, 1177-81, or much about Mr. Libertelli's cocaine use, Tr. 1166, or the full extent of his falsification, Tr. 1151-52, 1185-86, and what other treatment Mr. Libertelli was receiving. Tr. 1173-75.

We do not suggest that Mr. Libertelli was required in these settings to make a full disclosure of his wrongdoing. In fact, we agree with his point, for example, that he was not required to make such a disclosure to Ms. Irish. Lib. Br. Response to ODC PFF 95. But when even his current therapist, Dr. Kirsch, has limited knowledge of some important facts, we cannot conclude that the evidence is "clear and convincing" that he has the ongoing support he needs to avoid a relapse.

There are also disquieting aspects of Mr. Libertelli's story that are unexplained. Having relied repeatedly and heavily on the testimony that he lied because he wanted to see and be a part of his children's lives, there is no good

explanation for why he stopped seeing his children for the better part of 18 months. He blamed a combination of his wife, his girlfriend, the supervisor (Ms. McGrath) and his lawyers for not being able to see his children for some 18 months. But what really prevented him from seeing his children was his unwillingness to agree to have the supervisor search for drugs before visits and his concomitant threats to Ms. McGrath.

Mr. Libertelli's testimony about Sophy Chen is difficult to reconcile. Ms. Chen is someone Mr. Libertelli has known since law school, who became his girlfriend after his separation from Ms. Noguchi. Tr. 117. She appeared as a witness on his behalf in a December 2015 hearing in the divorce proceeding. Tr. 117, 468. Mr. Libertelli testified that she spent time helping him try to obtain Suboxone pills and would be "a great person" to speak with about the difficulty he encountered, Tr. 463-64, *see also id.* at 409-10, and that he considers her to have "saved" him when he was considering suicide on January 11, 2018, Tr. 427, 468.

But Mr. Libertelli also testified that she "lied" twice to the police about him being a drug dealer, Tr. 101, 430-32, 468-70, and, that in 2019, she engaged in a plan with Ms. Noguchi and Ms. McGrath to prevent him from seeing his children, Tr. 256-58, that led Mr. Libertelli to report all three of them to the FBI. Tr. 260-61.

After hearing Mr. Shugarman testify that both Ms. Chen and Ms. McGrath refused to be interviewed because they were afraid that Mr. Libertelli would retaliate, Tr. 1217-18, 1220-21, Mr. Libertelli did not seek to offer evidence to explain this situation. *See also* DCX 49 at 47 (Mr. Shugarman reporting that

Mr. Libertelli told him that, like Ms. Noguchi, Ms. Chen has taken steps to "undermine [him] and [his] career" (alteration in original)).

A transcript reflects that Mr. Libertelli told the police in 2020 that in approximately 2013, he obtained drugs for free from Ms. Noguchi's obstetrician by threatening to sue the doctor for malpractice. DCX 63 at 20-22, 28. Given his history of anger issues and threats, complaints and legal actions against third-parties (including Dr. Berman, Ms. McGrath, Ms. Chen and, as recently as December 2020, Mr. Labbe), it is entirely believable that they took his action as threatening. And Mr. Libertelli's denial in testimony before us that he was threatening suggests that he does not appreciate the significance of his actions.

It is also disquieting that, in a number of instances, believing Mr. Libertelli's version of the facts requires us to believe that his lawyers engaged in unethical conduct. In November 2018 (ten months after he last took illegal opioids), he testified that, in 2015, his then lawyers recommended that he purchase a Whizzinator device designed to evade drug tests. DCX 19 Tr. at 181. Advising a client to create false evidence is certainly unethical. *Cf.* Maryland Rule 19-308.4(d).

In the disciplinary hearing, Mr. Libertelli testified that:

(1) his (different) lawyers in 2017 failed to forward to Ms. Noguchi's lawyers the Netflix severance agreement he gave them to produce, Tr. 154;

(2) after the January 11, 2018 hearing, when Ms. Noguchi's lawyers knew that he had altered as least some tests, these same lawyers and the ones who came into the case both apparently failed to provide her with all other genuine drug tests or

report on the fabricated financial records even though he had instructed the lawyers to be "maximally transparent" about what happened, Tr. 226-30[23];

(3) he signed "multiple" releases to facilitate Ms. Noguchi's access to financial information that his lawyers failed to forward to her counsel, Tr. 226;

(4) even though this latest set of lawyers knew he had also falsified financial records, they drafted an "incomplete" interrogatory answer for him to sign that failed to disclose this information, DCX 17 at 6 (No. 15); Tr. 266;

(5) in 2019 or 2020, he "begged" his lawyers to file a motion enforcing an order requiring that he be afforded access to his children, only to have them say that a judge who had never cut off his access to his children, "hates [him]; why bother?", Tr. 259, and refuse to carry out his lawful request. *Cf.* Maryland Rules 19.301.2(a), 19-301.3; and

(6) factual errors in his answer and notice of disability in this proceeding are his then lawyer's responsibility, who continued to make errors even after he corrected them. Tr. 294-95, 297-303.

We do not know the full facts of these circumstances, and cannot say that Mr. Libertelli does not believe that the events all took place in the way he describes. But it is difficult to believe that all of these lawyers would commit what seem to be significant ethical (and even legal) improprieties or that, as a lawyer himself,

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[23] Mr. Libertelli testifies that these lawyers said that there was an ethics opinion that required them to withdraw from the case. Tr. 226-27, 229-30. This, however, would not explain why they or at least he did not become transparent about his other document fabrications.

Mr. Libertelli permitted his own lawyers to violate their professional responsibilities.

Although there are many occasions in his testimony where Mr. Libertelli says that this was his fault, there are also many other times when he seems not fully to appreciate the responsibility he bears for what he did. His email to Mr. Labbe specifically denies responsibility; it says "[a]nd yes, I do not believe it was my behavior and choices that will end my law career. I believe it will be pathologizing exhibits like this." DCX 65 at 1; Tr. 665.

Even if we discounted that email as a reaction in anger, other statements reflect that part of him continues to believe that he is the victim of circumstances that he bore overwhelming responsibility for creating. For example, as noted above, we do not agree that he lied when he said that Ms. Noguchi bore some responsibility for the cost of the litigation, or even that the statement is entirely false. But it lacks a sense of proportion. Aggressive and uncooperative litigation tactics are often counterproductive and certainly increase costs. But the ill of those tactics pale in comparison to Mr. Libertelli necessitating numerous hearings by fabricating or doctoring at least 65 drug tests and 100 pages of financial records, aggressively opposing discovery that would get at the truth and repeatedly denying the truth under oath.

The notion that all of the lying served to preserve his contact with his kids is not only objectively false, it does not even explain all of the facts. Whereas Mr. Libertelli "denies having falsified any financial documents for any other

purpose," besides concealing the purchase of illegal drugs, Lib. Br. Resp. PFF 56-58, in fact, he altered financial records to conceal the transfer of money to another account in violation of a court order, and gave conflicting testimony, some of which had to be false, about the purposes for which he gave money to Ms. Chen. *See* FFs 45, 52.

Although he may well believe that, at least after the January 11, 2018 hearing, he was trying to be "fully transparent," the fact is, he was nowhere close to that. Indeed, although there are a number of occasions in which he apologized to the Court for earlier lies that had come to light, we are not aware of any instance in which he sought to correct a lie before it was brought to Judge Storm's attention. *See* Lib. Br. Response to PFF 130 ("It is correct that Mr. Libertelli did not acknowledge his dishonesty until opposing counsel in the divorce action brought it to Judge Storm's attention.").

Mr. Libertelli's perception of Judge Storm's reaction also seems far from reality in a way that is telling. He calls Judge Storm "hostile" and "biased," Tr. 560, Tr. 492-93, and says the Judge is unable to give Mr. Libertelli a "fair shake." Tr. 414. We can understand that anyone may have problems with a judge who makes unfavorable rulings. We can also understand that Mr. Libertelli perceived that Judge Storm was not taking an approach likely to succeed with his addiction – *e.g.*, that creating incentives to be "clean," assumes that the addict can will himself out of the addiction. Tr. 494-95.

But the fact is that Judge Storm exhibited almost superhuman patience with (and even sympathy for) what he aptly described as "staggering" deception. DCX 16 Tr. at 45. Although Mr. Libertelli acts as if he had to choose between honestly describing his drug use and being able to see his kids, Judge Strom never put him to the choice. Apart from a brief period after the January 11 hearing, while Judge Storm determined what order to enter, the Court *never* took away Mr. Libertelli's access to the children even though Mr. Libertelli lied to the Court repeatedly at hearings and filings across some three years.

If the issue were what Mr. Libertelli deserved, no one could fault a judge for ruling against someone who pursued parental access through such "staggering" deception. But Judge Storm recognized that the issue was not what Mr. Libertelli deserved. It was the best interest of his children, and "the boys should not be punished by having [Mr. Libertelli's] access restricted any more than necessary under the circumstances." DCX 8 Tr. at 31. That Mr. Libertelli cannot recognize this as much more than a "fair shake," strongly suggests he has not yet processed the gravity of the wrong he committed.

Here, as in the divorce, what Mr. Libertelli "deserves" is not the issue. We agree with Mr. Libertelli that "[d]isciplinary sanctions are not imposed as punishment, but as a means of assuring the attorney's fitness to practice and for protecting the public from misconduct by attorneys which may cause harm." *In re Zakroff*, 934 A.2d 409, 426 (D.C. 2007) (alteration in original). Accordingly, our focus is what is necessary to provide that protection.

We appreciate Mr. Libertelli's statement that he is "more than willing to submit to additional conditions that will assure this Hearing Committee that he will remain sober." Lib. Br. at 88. But his suggestion that he requires those conditions without identifying any, is effectively an admission that he is not already substantially rehabilitated.

This request that the Committee determine what will work for him is also a cop-out. Apart from a very limited reference to suggestions he attributes to Dr. Kirsch about having an official sponsor and monitoring from an addiction specialist, *id.*, he does not suggest how he would demonstrate his substantial rehabilitation. The Hearing Committee members are not doctors, psychologists, addiction experts or therapists. We know Mr. Libertelli only from the limited window that the evidence in a few-day hearing permits us. We can determine as best we can, whether the evidence shows Mr. Libertelli's substantial rehabilitation. But we cannot determine the path to his recovery. Until Mr. Libertelli works with those who do have expertise to chart a path that he can demonstrate provides confidence in his substantial recovery, he cannot fairly claim to have fully owned it.

C. Sanctions Imposed for Comparable Misconduct

The appropriate sanction for flagrant dishonesty is disbarment. *See In re Pelkey*, 962 A.2d 268, 281 (D.C. 2008). Flagrant dishonesty '"reflect[s] a continuing and pervasive indifference to the obligations of honesty in the judicial system." *In re Pennington*, 921 A.2d 135, 141 (D.C. 2007) (quoting *In re Corizzi*, 803 A.2d 438, 443 (D.C. 2002)). In determining whether a respondent's conduct involved "flagrant

dishonesty," the Court has endorsed a "fact-specific approach [which] requir[es] [consideration of a] [r]espondent's particular misconduct, and not simply the rules that he violated." *In re Guberman*, 978 A.2d 200, 206 n.5 (D.C. 2009) (some alterations in original) (quoting Board Report).

The Court has recognized several categories of misconduct as involving flagrant dishonesty. For example, flagrant dishonesty has been found where the respondent's dishonest conduct involves criminal activity or fraud (dishonesty for personal gain). *See, e.g.*, *In re Cleaver-Bascombe*, 986 A.2d 1191, 1200 (D.C. 2010) (per curiam) (respondent submitted '"patently fraudulent"' CJA voucher, lied about it under oath, and testified falsely before the Hearing Committee (citation omitted)). The Court has found flagrant dishonesty where the respondent's dishonest conduct was "morally reprehensible" and/or quasi-criminal in nature – particularly where the dishonesty was intended to cover up prior misconduct. *See Pennington*, 921 A.2d at 141-42 (describing flagrant dishonesty as conduct that involves "patterns of morally reprehensible behavior"); *In re White*, 11 A.3d 1226, 1278 (D.C. 2011) (per curiam) (appended Hearing Committee Report) (terminated employee filed whistleblower complaint and falsely accused employers, presented false and altered documents to D.C. Council and Hearing Committee, and testified falsely before D.C. Council, "creating an unbroken chain of deceit and misrepresentation that ran all the way through [the Hearing] Committee's proceedings").

The Court found flagrant dishonesty where the respondent engaged in a pattern of dishonesty spanning five years, in which he repeatedly lied to his three

clients and the Probate Court about the status of a related case and to one client about his efforts to contact a life insurance company, followed by false testimony to Disciplinary Counsel and the hearing committee. *See In re Bynum*, Board Docket No. 16-BD-029 (BPR Apr. 4, 2018), *recommendation adopted where no exceptions filed*, 197 A.3d 1072 (D.C. 2018) (per curiam). Whereas the Hearing Committee recommended a three-year suspension with a fitness requirement, the Board found flagrant dishonesty, noting that proof of financial gain is not required and emphasizing the respondent's lack of remorse and tendency to blame others. *Id.* at 14-18.

The facts of this case do not precisely fit any of these authorities. Disciplinary Counsel cites a number of cases for the proposition that a *conviction* for perjury requires disbarment. *See* ODC Br. at 62 (*citing In re Mesinere*, 471 A.2d 269, 270 (D.C. 1984); *In re Gormley*, 793 A.2d 469, 470 (D.C. 2002); *In re Daum*, 69 A.3d 400, 401 (D.C. 2013)). Although this is true, it does not answer the question of what constitutes flagrant dishonesty in the absence of a conviction.

As Mr. Libertelli notes, this case does not involve some of the features found to be aggravating in other cases. Mr. Libertelli did not defraud the CJA system as in *Cleaver-Bascombe*, or abuse a role as prosecutor to commit fraud, as in *Howes*. He did not lie to conceal his own misconduct to clients as in *Bynum* or *Corizzi*.

Also, Mr. Libertelli's addiction, while not satisfying the requirements of *Kersey*, could conceivably still be mitigating to some extent – inasmuch as the addiction reduces the extent to which he can be held completely responsible for his

actions (diminished capacity) or, perhaps, diminishes the usefulness of particular sanctions in serving the purposes of the disciplinary system.[24]

However the cases Mr. Libertelli relies upon are even further removed from this one. As we noted in Section V.B.2, above, Mr. Libertelli refers to *In re Uchendu*, 812 A.2d 933, 941-42, as citing "multiple examples of suspending but not disbarring attorneys for submitting false documents but not for personal gain." Lib. Br. at 90. Thus, the cases *Uchendu* cited in the passage involve situations in which a lawyer falsely submitted a small number of documents in a misguided attempt to *improve the client's* legal position. Mr. Uchendu himself, for example, was suspended for 30 days and required to complete six hours of continuing legal education in connection with at least 16 documents filed in probate matters in which he signed his clients' names, and in some instances, notarized his own signatures. 812 A.2d at 934, 942. The cases *Uchendu* cited on the point were *Lopes*, 770 A.2d at 570 (a sanction for several violations in different matters, with the dishonesty violation also involving a lawyer signing a client's name to an otherwise truthful

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[24] *See, e.g.*, *In re Herbst*, 931 A.2d 1016, 1017 & n.1 (D.C. 2007) (per curiam) (noting that the evidence of the respondent's stress and ADHD diagnosis were "mitigating factors that had to be considered," irrespective of *Kersey*); *In re Douglass*, 745 A.2d 307, (D.C. 2000) (per curiam) (imposing a public censure after considering the deaths of the respondent's mother and son and his own medical problems at the time of the underlying misconduct in mitigation of sanction); *In re Weiss*, Bar Docket No. 263-97, at 6, 13-15 (BPR Apr. 27, 2000) (finding that the respondent's evidence of "a psychological need for security borne of his father's depression-era fear of poverty" carried "little value as mitigation" in reducing the duration of suspension, but that the respondent's self-awareness weighed against imposing a fitness requirement), *recommendation adopted*, 839 A.2d 670, 671 (D.C. 2003) (imposing three-year suspension with one year suspended in favor of two years' probation).

affidavit); *In re Zeiger*, 692 A.2d 1351 (D.C. 1997) (per curiam) (appended Order and Board Report) (sixty-day suspension for falsifying medical records intended to benefit a client); and *In re Sandground*, 542 A.2d 1242, 1248 (D.C. 1988) (per curiam) (three-month suspension for assisting client to conceal assets in a divorce); *In re McBride*, 642 A.2d 1270, 1273 (D.C. 1994) (per curiam) (appended Board Report) (one-year suspension for assisting a *pro bono* client obtain a passport by using a false identification).

Another case involved falsity without an intent to defraud. In *In re Schneider*, 553 A.2d 206, 207, 212 (D.C. 1989), imposed a thirty-day suspension for falsifying travel expense reports used to obtain recovery for the firm for legitimate expenses.

The only case cited in the passage that involved an intent to defraud for the benefit of the lawyer was not entirely for the lawyer's benefit. In *In re Brown*, 672 A.2d 577, 579 (D.C. 1996) (per curiam) (appended Board Report), the lawyer received a sixty-day suspension for misrepresentations on three certificates of service in connection with an effort to alter or amend a judgment of dismissal entered against his clients as a result of his failure to meet discovery deadlines.

In re Pennington involved a reciprocal matter from Maryland in which a lawyer filed a complaint on behalf of clients only to learn after the statute of limitations had passed that a clerk's office error caused the claim not to be treated as filed. The lawyer then agreed to dismiss the case (without client consent) and, rather than tell the clients the case had been dismissed, told them the case had been settled for $10,000 that the lawyer then paid herself. Although Maryland disbarred

Ms. Pennington, the District of Columbia did not. The Court ruled that, unlike Maryland, the District of Columbia applies a presumption of disbarment only in cases of misappropriation of funds, and while *Goffe* and *Corizzi* are examples of cases where dishonesty has warranted disbarment, Ms. Pennington's conduct was different: "However Pennington's actions of deceiving her clients and falsifying a supposed settlement of claims may be characterized, they are far removed from the unexampled patterns of morally reprehensible behavior that caused both [Goffe] and [Corizzi] to be disbarred." 921 A.2d at 141-42.

Although the facts are not identical, the extent of dishonesty in this case so exceeds that found warranting disbarment in *Goffe* and *Corizzi* that it outweighs any other differences or mitigating factors. Mr. Goffe fabricated a relative handful of documents in two discrete contexts. *Corizzi* got two clients to lie about his reciprocal referral arrangements with a chiropractor. Other cases, involving discipline short of disbarment generally involved less serious or even more isolated instances of dishonesty.[25]

[25] *See, e.g., In re Silva*, 29 A.3d 924, 928 (D.C. 2011) (three-year suspension with requirement to show fitness for attorney who forged counterparty signatures and notarization to an agreement he had failed to get signed hoping to substitute an actual agreement before anyone realized it); *In re Tun*, 195 A.3d 65 (D.C. 2018) (one-year suspension for attorney who falsely stated in a recusal motion that the judge had previously reported the attorney for an alleged disciplinary violation (which the judge had not) and that the disciplinary investigation had been dismissed (which it had not been)); *In re Speights*, 173 A.3d 96, 140-41 (D.C. 2017) (per curiam) (appended Hearing Committee Report) (six month suspension for a pattern of neglecting a client matter and giving evasive and dishonest testimony at hearing); *In re Hutchinson*, 534 A.2d 919, 919-21, 926 (D.C. 1987) (en banc) (one-year suspension for attorney who lied in deposition before the SEC about the source insider trading information and then recanted); *In re Kent*, 467 A.2d 982,

Mr. Libertelli did not fabricate one or two documents. He fabricated or altered scores of drug tests and financial documents over a 17-month period until he was caught. He did not merely suborn two acts of perjury. He personally lied dozens of times under oath in hearings spanning some three years. At least two of the lies (the testimony about why he gave money to Ms. Chen and the concealment of transfers found to be contrary to court order) went beyond the ostensible purpose of concealing drug use or purchases and really concealed only the fact that Mr. Libertelli had taken money out of an account in violation of a court order. It was not accidental. It was calculated and calculated repeatedly. And these lies were made either directly to, or with ultimate result of, deceiving a court and forcing scores of hours of hearings and evading court orders.

No one should do that. And lawyers simply cannot. This conduct meets any normal definition of "flagrant" and warrants disbarment.

VI. CONCLUSION

For the foregoing reasons, the Committee finds that Mr. Libertelli violated Rules 19-303.3(a)(1), 19-303.3(a)(4), 19-303.4(a), 19-303.4(b), 19.308.4(b), 19-308.4(c), and 19-308.4(d) of the Maryland Rules of Professional Conduct, and should receive the sanction of disbarment. We further recommend that

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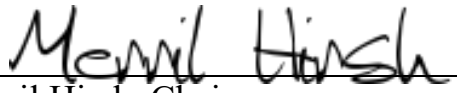
984-85 (D.C. 1983) (per curiam) (30-day suspension for attorney who shoplifted out of a neurotic desire to be caught).

Mr. Libertelli's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

HEARING COMMITTEE NUMBER TWELVE



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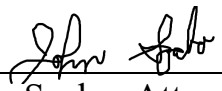

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