DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	
Michael D.J. Eisenberg, Esquire,	**Disciplinary Docket Nos.** **2014-D318 (Glaab)** **2016-D399 & 2019-D058 (Swain)** **2017-D057 (Faust)** **2019-D123 (Mitchell)** **2020-D239 (Brisendine)** **2021-D010 (Travis)**
Respondent	
A Member of the Bar of the District of Columbia Court of Appeals **Bar Number: 486251** **Date of Admission: May 10, 2004**	

SPECIFICATION OF CHARGES

The disciplinary proceedings instituted by this petition are based upon conduct that violates the standards governing the practice of law in the District of Columbia as prescribed by Rule X and Rule XI, §2(b) of the District of Columbia Court of Appeals Rules Governing the Bar (D.C. Bar R.). Jurisdiction for this disciplinary proceeding is prescribed by D.C. Bar R. XI.

1. Pursuant to D.C. Bar R. XI, §1(a), Disciplinary Counsel has jurisdiction to prosecute because Respondent is a member of the District of Columbia Bar, admitted on May 10, 2004, and assigned Bar number 486251. Respondent practices

law in the District of Columbia but often represents clients in other states as part of a federal administrative practice.

2. Respondent is not a member of any other state bars, although he is admitted to practice before some federal courts.

3. As a general matter, on Respondent's letterhead and e-mail signature block, he identifies himself as an attorney.

COUNT 1: G. Faye Glaab
2014-D318

4. In 2011, G. Faye Glaab was a statistical clerk employed by the U.S. Census Bureau in Jeffersonville, Indiana. The Census Bureau is an agency of the U.S. Department of Commerce. Ms. Glaab alleged that her employer had impermissibly discriminated against her, then retaliated against her for engaging in protected activities. The claim number assigned by the employer was 11-63-00265. In May 2012, Ms. Glaab filed another formal complaint also alleging impermissible discrimination, which was assigned 63-2012-01866.

5. Ms. Glaab's co-worker Kimberly Cain, also a statistical clerk, was her representative.

Respondent Initiated Representation of Ms. Glaab

6. On **July 15, 2012**, Respondent was already representing Ms. Cain in an employment discrimination matter against the Census Bureau. He had traveled to

Louisville, Kentucky, to depose Ms. Glaab in Ms. Cain's matter. Respondent and Ms. Cain had discussed that Ms. Glaab may also have legal claims against the agency and on about July 15, 2012, Respondent e-mailed Ms. Glaab inviting her to speak with him about representing her too.

7. On **July 15, 2012**, Respondent, Ms. Cain, and Ms. Glaab met at a coffee shop in or near Respondent's hotel to discuss whether Respondent would represent Ms. Glaab in her employment matter against the Census Bureau. Respondent informed Ms. Glaab that he would provide her with a retainer agreement the next day for her signature.

8. Ms. Glaab and Respondent believed Ms. Cain was a potential witness for Ms. Glaab. Respondent had no substantive discussion with Ms. Glaab about any possible conflicts of interest that might arise from the dual representation before he presented her with a retainer agreement.

9. On **July 16, 2012**, the day Respondent deposed Ms. Glaab in Ms. Cain's case, Respondent provided Ms. Glaab a retainer agreement, which Ms. Glaab signed. Respondent did not give her sufficient time to review it and never provided her a copy, although he had promised to do so.

10. Respondent charged Ms. Glaab $4000, which he described as a "non-refundable 'true retainer.'" He also charged Ms. Glaab a 15% "contingency fee" regarding "any award, back ben[e]fits, etc." The agreement also stated that

Respondent would give Ms. Glaab a "statement of accounts" at his hourly rate set forth as $305, to support recovery of any statutory attorney's fees he might attempt to recover from the employer, in the event Ms. Glaab prevailed on the merits or settled. The agreement provided that Ms. Glaab "**will not be personally liable for any fees in excess of the initial 'true retainer'**," and was responsible only for out-of-pocket expenses. (Bold type in original.)

11. Respondent did not explain his billing practices to Ms. Glaab. For example, Respondent never disclosed to Ms. Glaab that he might increase his hourly rate without a new retainer agreement and without discussing it with her first.

12. During the representation, Ms. Glaab paid Respondent the $4000 set forth in the retainer agreement and later, an additional $1000.

Respondent Failed To Appear for the Parties' Settlement Conference

13. On **September 10, 2012**, the administrative judge issued an order scheduling a settlement teleconference two months hence, for November 9, 2012, at 1PM in the **2011** case (#0265).

14. At no time before the teleconference's date did Respondent submit anything in writing informing the administrative judge that he had a scheduling conflict, despite having a prescheduled family vacation on that date. Fewer than 90 minutes before the teleconference, Respondent sent the administrative judge a

facsimile informing him of Respondent's vacation, seeking a week's continuance, and advising that Respondent was unavailable that day.

15. On **November 9, 2012**, the administrative judge, opposing counsel, and the employer were all present as expected.

16. Respondent did not attend the settlement teleconference. He did not send anyone, including his associate, in his stead on Ms. Glaab's behalf.

17. On **November 9**, the administrative judge called Ms. Glaab at work when Respondent did not appear for the settlement teleconference. Ms. Glaab was unaware that the teleconference had convened. Based on a conversation with Respondent days earlier, she believed he had spoken with the administrative judge and obtained a continuance.

18. Ms. Glaab's **2011** case did not settle.

Respondent Did Not Consult and Communicate With Ms. Glaab, and Failed to Make Important Filings In Her Cases

19. Ms. Glaab asked Respondent whether he believed she had claims worth pursuing when she retained him. Respondent assured her that she did.

20. Respondent did not consult with Ms. Glaab or explain to her the purpose, risks, or benefits of (a) incurring substantial financial costs by deposing multiple individuals who had already given affidavits during the EEO investigation

of the **2011** case (#0265), and (b) deposing his own client, especially when the employer planned to do so.

21. Respondent also did not consult with or explain to Ms. Glaab why he did not contact certain witnesses she asserted corroborated her experience of impermissible discrimination.

22. Respondent did not take any steps to familiarize his client with what to expect or otherwise prepare for the deposition he planned to take of Ms. Glaab in her own **2011** case.

23. Respondent did not take any steps to familiarize his client with what to expect or otherwise prepare Ms. Glaab for the deposition the employer planned to take in her **2011** case.

24. Respondent failed to timely submit Ms. Glaab's witness list for the EEOC administrative hearing of her **2011** case. As a consequence, on **January 8, 2013**, the EEOC administrative judge sanctioned Ms. Glaab by preventing her from calling any of the nine witnesses Respondent had deposed, other than Ms. Glaab herself. The judge would only allow Ms. Glaab to call those witnesses whom the employer called at the merits hearing. Respondent did not file any pleading seeking reconsideration of the administrative judge's pre-hearing order.

25. Respondent did not tell Ms. Glaab that he had not timely filed a witness list in her **2011** case. Respondent never told Ms. Glaab that he had not sought to correct his error by seeking the judge's permission to file a witness list out of time.

26. After the judge sanctioned Ms. Glaab by denying her the ability to call her own witnesses, Respondent told Ms. Glaab that Ms. Cain would testify in her **2011** case, knowing that the administrative judge had ruled Respondent could not do so.

27. Because Ms. Cain did not appear on the employer's witness list, the judge did not permit Ms. Cain to testify in Ms. Glaab's case, even though Respondent and Ms. Glaab had planned to call her in the **2011** case.

28. Ms. Glaab did not discover that Ms. Cain would not be a witness for her in the **2011** case until the day of her hearing, on **May 2, 2013**.

29. In the meantime, in Ms. Glaab's **2012** case (-1866), a report of investigation was generated on November 13, 2012. She had the option of requesting a hearing. Respondent did not present Ms. Glaab the option of requesting a hearing.

30. Respondent did not request a hearing on Ms. Glaab's behalf in her **2012** case.

31. In the absence of a hearing, Ms. Glaab had the right to submit a rebuttal argument to the report of the investigation in her **2012** case. Respondent did not

present Ms. Glaab the option of submitting a rebuttal argument to the report of investigation.

32. Respondent did not file a rebuttal argument to the report of investigation on Ms. Glaab's behalf in the **2012** case.

33. Respondent did not explain or consult with Ms. Glaab regarding the advantages and disadvantages of doing nothing once the report of investigation issued, *i.e.,* neither seeking an EEOC hearing nor filing a rebuttal argument before the employer issued a final agency decision.

Ms. Glaab Did Not Prevail at Her Merits Hearing In Her 2011 Case or in Her 2012 Case Decided Without A Hearing

34. On **April 3, 2013**, the employer in Ms. Glaab's **2012** case (--1866) issued its final agency decision without a hearing. It concluded that Ms. Glaab had "offered no specific evidence to rebut any of the Agency's articulated reasons for the alleged discriminatory acts," and that the "substance of [her] allegations concern actions to which she presents absolutely no conclusive evidence that any of the claimed actions were objectively offensive, abusive or hostile, and otherwise taken in order to harass, or discriminate against her . . . or in retaliation for protected activity."

35. On **May 2, 2013**, Ms. Glaab's merits hearing in her **2011** case (--0265) was held.

36. Ms. Glaab was the only person Respondent was permitted to call to testify in her **2011** case.

37. Neither Respondent nor anyone at his law firm prepared Ms. Glaab to testify at her hearing in the **2011** case.

38. The administrative judge ruled against Ms. Glaab at her **2011** case hearing, granting the employer's motion for a directed verdict without hearing from the employer's witnesses.

39. Throughout the representation, Respondent did not consult with Ms. Glaab about her goals for an acceptable outcome or how to achieve them. For example:

A. When the employer prevailed on a motion for a directed verdict in Ms. Glaab's **2011** case, Respondent chose not to appeal that matter. He did not discuss with Ms. Glaab the basis of the decision, her appealable issues (if any), her chances of success, the additional costs and fees Respondent would charge, or why it was advisable to accept the administrative judge's decision.

B. When the employer issued its final agency decision in her **2012** case, Respondent again did not explain the significance of having failed to (i) seek a hearing before the EEOC or (ii) rebut the employer's report of investigation, and the facts in its final order. Respondent simply informed her that he would continue the representation through appeal.

40. Respondent filed a brief appealing the **2012** decision on May 30, 2013.

41. Two months after Respondent informed Ms. Glaab he would represent her in appealing the final agency decision in her **2012** case and before the appeal was decided, he terminated all representations and moved to withdraw from all her cases.

42. The appeal Respondent filed in Ms. Glaab's appeal was unsuccessful.

Conflict of Interest

43. By the time of Ms. Glaab's May 2, 2013 merits hearing in the **2011** case (--0265), Respondent no longer represented Ms. Cain and Respondent and Ms. Cain had an antagonistic relationship. Only a few weeks prior to Ms. Glaab's hearing, on April 17, 2013, Respondent had sued Ms. Cain for money he claimed she owed him. Ms. Glaab had loaned Ms. Cain money to pay Respondent but it was insufficient for Ms. Cain to pay off Respondent's outstanding bill or repay Ms. Glaab before Ms. Glaab's hearing.

44. The tension between Respondent and Ms. Cain put a strain on the relationship between Ms. Cain and Ms. Glaab. Eventually, Ms. Glaab and Ms. Cain stopped speaking. Yet, despite these and other tensions between Ms. Glaab and Ms. Cain, Ms. Glaab believed Ms. Cain was an important witness in her **2011** case whom Respondent would call to testify.

45. At no time before the professional relationship between Respondent and Ms. Cain ended did Respondent explain to Ms. Glaab how the antagonism between him and Ms. Cain could potentially adversely affect Respondent's representation of Ms. Glaab or Ms. Glaab's case. At no time prior to Ms. Glaab's hearing did Respondent notify Ms. Glaab that, in the weeks leading up to the hearing, he had sued Ms. Cain for fees.

46. Respondent did not see any conflict of interest.

Respondent's Civil Suit Against His Client

47. On **July 5, 2013**, Respondent sued Ms. Glaab in D.C. Superior Court alleging breach of contract and *quantum meruit*. He sought "total damages" of $43,602.18, which included attorney's fees, even though the retainer agreement with Ms. Glaab stated that she would owe no fees for legal services beyond the $4000 fee advance. Respondent sought to recover attorney's fees from Ms. Glaab not at the $305 hourly rate reflected in his retainer agreement, but at $531.92 per hour.

48. Trial was ultimately scheduled for September 29 and 30, 2014.

49. Ms. Glaab traveled to the District of Columbia with a friend to defend herself. She could not afford counsel and represented herself *pro se*.

50. The trial lasted two days, after which the presiding judge found in favor of Ms. Glaab.

The Charges in Glaab

51. Respondent violated the following D.C. Rules of Professional Conduct:

A. Rules 1.1(a) and (b), because Respondent failed to provide competent representation to Ms. Glaab, and to serve his client with the skill and care commensurate with that generally afforded client by other lawyers in similar matters;

B. Rule 1.2(a), because Respondent failed to consult with Ms. Glaab about the means to pursue her objectives;

C. Rules 1.3(a) and (c), because Respondent failed to represent Ms. Glaab with diligence and zeal within the bounds of the law, and to act promptly;

D. Rules 1.3(b)(1) and (2), because Respondent intentionally failed to seek Ms. Glaab's lawful objectives through reasonably available means permitted by law and ethics, and prejudiced or damaged her during the course of the professional relationship;

E. Rules 1.4(b), because Respondent failed to explain matters to the extent reasonably necessary to permit Ms. Glaab to make informed decisions about the representation;

F. Rule 1.5(a), because Respondent charged his client an unreasonable fee;

G. Rule 1.7(b)(4), because Respondent represented Ms. Glaab with respect to a matter in which his professional judgment on Ms. Glaab's behalf reasonably may have been adversely affected by his interests in his own financial, business, and/or personal interests in his attempts to obtain money from another client whom Respondent and Ms. Glaab both believed was important to Ms. Glaab's case, and Respondent did so without informed consent;

H. Rule 8.4(c), because Respondent knowingly misled his client about how her case would proceed, for example, what witnesses would testify, and changed the manner and amount he charged Ms. Glaab for his professional fees without disclosing that he had done so until he sued her; and

I. Rule 8.4(d), because Respondent seriously interfered with the administration of justice.

COUNT 2: Shirley Swain
2016-D399 & 2019-D058

The Litigation

49. On **April 5, 2011**, Respondent agreed to represent Shirley Swain in an employment discrimination matter against her employer, the Veteran's Administration Medical Center in Salem, Virginia. Ms. Swain, a laundry machine operator, living in Roanoke, Virginia, alleged her employer allowed her to be

sexually harassed and retaliated against when she complained. Before Respondent represented her, Ms. Swain had help from a non-lawyer union representative to pursue a sexual harassment claim before the Equal Employment Opportunity Commission.

50. When Respondent began to represent Ms. Swain, her administrative EEO claim was pending before an administrative judge, with discovery and dispositive motion deadlines imminent.

51. Respondent provided Ms. Swain a retainer agreement charging a $3000 "non-refundable 'true retainer.'" He also charged Ms. Swain a 20% contingency fee, in addition to any statutory fees he might attempt to recover from the employer, in the event Ms. Swain prevailed. The agreement stated that Ms. Swain "**will not be personally liable for any fees in excess of the initial 'true retainer'**." (Bold type in original.) It did not explain how she would be responsible for a 20% contingency fee on any recovery and not be liable for fees in excess of her "true retainer" of $3000. Under the agreement, Ms. Swain was responsible for out-of-pocket expenses but was not obligated to pay Respondent's hourly fee of $305.

52. Ms. Swain signed Respondent's retainer agreement the day after he sent it, *i.e.,* on **April 6, 2011**. She paid Respondent $1500 in April 2011 and another $700 by February 2012.

53. On **April 18, 2011**, Respondent entered his appearance in her EEO case.

54. Respondent failed to obtain, marshal, and present his client's evidence properly. For example:

A. Respondent did not seek to add claims of reprisal even though Ms. Swain had been targeted by a co-worker after she complained about him to management and after she filed her EEO complaint about him.

B. Respondent did not seek relevant discovery to supplement the union's efforts on Ms. Swain's behalf, including failing to seek all (i) complaints concerning the accused harasser, (ii) records of his prior misconduct, and (iii) his performance evaluations.

C. Respondent chose to depose ten individuals – his client among them – even though most had already made official statements during the employer's internal investigation, a number of which supported Ms. Swain.

D. Respondent's pre-hearing report, *inter alia*, did not identify an amount Ms. Swain sought in pecuniary damages, and did not identify the number of leave hours Ms. Swain sought to recover as part of her damages.

55. The employer conceded before the EEOC that sexual harassment of Ms. Swain on one day had been severe. Nevertheless, the employer moved to dismiss her claims in November 2011.

56. On **December 19, 2011**, Respondent filed an opposition to the motion to dismiss that was deficient, including because he argued that Ms. Swain had suffered retaliation without having amended the complaint to include that claim, which the employer challenged in its reply.

57. On **April 12, 2012**, the parties settled the case for **$83,500**. The employer paid:

A. **$35,000** by check sent to Ms. Swain for her damages.

B. **$48,5000** by check sent to Respondent: **$45,000** for Respondent's attorney's fees, and **$3500** for Ms. Swain's litigation costs.

Failure To Communicate and Consult

58. Throughout the representation, Respondent had few substantive discussions with his client and did not consult with her about his strategy to advance her case. For example, Respondent never consulted with his client or explained to her the purpose, risks, or benefits of (a) expending substantial financial resources by deposing individuals who had already given statements during the investigation; (b) forgoing less expensive paper discovery such as requests for production of documents, interrogatories, and requests for admissions; and (c) deposing his own client.

59. Respondent rarely initiated communication to keep Ms. Swain apprised of her case's status.

60. Respondent did not explain his billing practices to Ms. Swain.

61. Before Ms. Swain agreed to the settlement, Respondent did not explain to her that he expected Ms. Swain to pay him more money. She believed that the funds her employer would pay Respondent were all that he was due.

62. After the settlement, by letter dated **May 8, 2012**, Respondent wrote Ms. Swain about returning her documents, the end of the representation, and a "final bill." His letter stated that he was returning "original documentation that [Ms. Swain] had provided" him. The letter further stated:

> Also, let this serve as your final bill for services. Pursuant to our agreement your outstanding bill for $800 regarding your true retainer (i.e. $3000 - $1500 - $300 - $400 = $800) and $7000 (i.e., 20% of your settlement [$35,000.00] is still due my office. The total is $7,800.

62. Respondent sued Ms. Swain for the remainder of his retainer and his contingency fee. The court did not believe Ms. Swain's claim that Respondent had received nearly $50,000 from her employer, and on September 22, 2015, it ordered her to pay Respondent an additional $7800 in fees.

Respondent's Collections Efforts

63. In April 2016, D. C. Superior Court issued a writ of attachment whereby Respondent was allowed to attach Ms. Swain's paycheck.

64. Over the next several months, Respondent received a total of **$1499** in Ms. Swain's garnished wages.

65. Ms. Swain filed for bankruptcy, and her debt to Respondent was discharged on **October 6, 2016**.

66. On **November 10, 2016**, the D.C. Superior Court ordered that garnishment of Ms. Swain's wages stop.

67. On **November 17, 2016**, the D.C. Superior Court ordered Respondent to return Ms. Swain's garnished wages.

68. Respondent did not refund Ms. Swain's garnished wages after the D.C. Superior Court issued its order.

69. On **January 27, 2017**, Respondent filed a motion to stay the court's order directing him to refund Ms. Swain's garnished wages, which the D.C. Superior Court denied on **February 23, 2017**, stating:

> Plaintiff [Respondent] asserts that he should be permitted to hold in his trust account the money that the Court had ordered to be returned to defendant [Ms. Swain] because [Respondent] believes that he might prevail on a motion to dismiss defendant's bankruptcy. . . . Plaintiff is not entitled to garnishment at this time, and it would be unjust to allow plaintiff to retain defendant's money pending the outcome of defendant's bankruptcy matter. The Court is not in a position to evaluate the merits of plaintiff's motion to dismiss defendant's bankruptcy, and is not inclined to stay the Court's order for the purposes of awaiting resolution of that motion. The Court, therefore, denies plaintiff's motion to stay the order releasing garnishment.

70. For over two years after receiving the court's February 23, 2017 order, Respondent did not refund Ms. Swain's garnished wages. Instead, he kept the funds that had been garnished, and sought to collaterally attack the order that he refund them.

71. On **September 28, 2017**, Respondent filed in bankruptcy court a "Motion to Dismiss Defendant's Fraudulent Bankruptcy Claim." Ms. Swain's bankruptcy case had been closed since October 2016 when her debts were discharged. The bankruptcy court rejected Respondent's motion, directing him to file a motion to reopen, which Respondent failed to do.

72. On **October 30, 2017**, the bankruptcy court denied Respondent's motion to dismiss, stating that it "was not the Court's duty to attempt a guess as to what the movant is trying to accomplish. The Court cannot dismiss a case that is already dismissed . . . ."

73. Eventually, the bankruptcy judge directed Respondent to file a brief in support of his position by **May 21, 2018**. Respondent sought and received multiple extensions before filing his brief.

74. In a **July 5, 2018** opinion, the bankruptcy judge concluded that because "the District of Columbia Superior Court can determine this action without intruding on the exclusive jurisdiction of the Bankruptcy Court," Respondent had

provided insufficient grounds to reopen Ms. Swain's bankruptcy case. The judge also found:

> According to the D.C. Order, Eisenberg was supposed to receive $7,000.00 of the Debtor's settlement, plus an additional $800.00 from a partially paid retainer, and *the Debtor acknowledged that the full settlement proceeds were sent to her* and she deposited them into her bank account. *The reason the settlement funds were sent to the Debtor and not to Eisenberg is unclear*.
>
> (Emphasis added).

75. On **October 14, 2018**, Respondent filed in D.C. Superior Court a "Motion to Reopen."

76. At the **December 3** hearing, the Superior Court directed Respondent to show cause why he should not be held in contempt of court for failing to honor its order to disgorge Ms. Swain's garnished funds years before. It directed Ms. Swain to brief why Respondent was not entitled to the $7800 he claimed she owed him. Both briefs were due by December 24, 2018.

77. By order dated **March 1, 2019**, the Superior Court held Respondent in contempt, vacated the Superior Court's September 2015 judgment awarding Respondent additional attorney's fees from Ms. Swain's settlement, discharged Ms. Swain's $7800 debt to Respondent, directed Respondent to refund Ms. Swain's garnished wages of $1499, and ordered Respondent to pay Ms. Swain $978.22 in damages caused by Respondent's failure to return her wages sooner.

78. On **March 6, 2019**, Respondent filed a motion to stay the Superior Court's order, which the court denied on **March 11**.

79. Pursuant to the Superior Court's March 11, order, Respondent owed Ms. Swain $2,477.22.

80. In **April 2019**, Respondent paid Ms. Swain $1499.

81. Respondent waited from March 2019 until **March 2022** to pay the $978.22 in damages and interest the Superior Court had ordered him to pay Ms. Swain. Although nearly three years had elapsed since the Superior Court's order directing payment, he did not include interest for that time.

The Charges in Swain

82. Respondent violated the following Rules:

A. Rules 1.1(a) and (b), because Respondent failed to provide competent representation to Ms. Swain, and to serve his client with the skill and care commensurate with those generally afforded clients by other lawyers in similar matters;

B. Rule 1.2(a), because Respondent failed to consult with Ms. Swain about the means to pursue her objectives;

C. Rule 1.3(a), because Respondent failed to represent Ms. Swain with diligence and zeal within the bounds of the law;

D. Rules 1.4(a) and (b), because Respondent failed to keep Ms. Swain reasonably informed about the status of the matter, and to explain the matter to the extent reasonably necessary to permit his client to make informed decisions about the representation;

E. Rule 1.5(c), because Respondent's fee agreement did not state the method by which the contingent fee was to be determined, and upon conclusion of the matter, Respondent did not provide Ms. Swain a written statement showing the remittance to her and the method of its determination;

F. Rule 3.4(c), because Respondent knowingly disobeyed a court order without an open refusal based on an assertion that no valid obligation existed; and.

G. Rule 8.4(d), because Respondent seriously interfered with the administration of justice.

COUNT 3: Merlene Faust
2017-D057

The Litigation

83. Merlene Faust, a letter carrier in Houston, Texas, alleged that the United States Postal Service had impermissibly discriminated against her, then retaliated against her for engaging in protected activities. She had claims arising from health problems she had suffered on the job. She had filed complaints with the

Office of Workers' Compensation (OWCP) and EEOC on her own and through prior counsel. Some matters remained pending when she hired Respondent. At least one claim was deemed appropriate for adjudication by the Merit Systems Protection Board (MSPB) after Ms. Faust hired Respondent.

84. Ms. Faust had prevailed before the Department of Labor on a workers' compensation claim. Her employer challenged the award, and the Labor Department rescinded it on September 13, 2011.

85. On **October 18, 2011**, Ms. Faust and Respondent entered into a retainer agreement charging a 25% contingency fee, in addition to any fees Respondent might attempt to recover from the employer if she prevailed. She was responsible for out-of-pocket expenses and was not obligated to pay Respondent's hourly fee. The agreement promised that Ms. Faust would receive statements of account "billed at the rates outlined herein."

86. The next day, on **October 19**, Ms. Faust e-mailed Respondent by that she had mailed him the retainer agreement and a package of documents. She asked what additional documents and other information Respondent needed to begin the representation, but Respondent did not identify any such documents.

87. Respondent did not consult with Ms. Faust about a strategy, including identifying (a) in which matters he was representing her, (b) her goals in the representation, and (c) which matters to pursue to best achieve her stated goals.

88. Respondent failed to obtain, marshal, and present his client's evidence in a timely or proper manner in any forum. For example:

A. On **October 20, 2011**, Ms. Faust reminded Respondent that certain paperwork was due "ASAP" and included with her letter two letters from the employer's EEO office that requested responses. Both responses were due within the next several days, but Respondent did not answer them by the deadline.

B. On **October 25, 2011**, Ms. Faust asked Respondent to inform her employer that he represented her. Respondent did not do so.

C. On **November 1, 2011**, the employer's EEO office canceled Ms. Faust's request for counseling in **EEO matter 4G-770-0288-11**, because Respondent had not submitted information by the deadlines. Respondent was able to get Ms. Faust's counseling request restored but did not use the opportunity to correct and clarify Ms. Faust's claims as the agency directed.

D. Respondent filed an inadequate request for Ms. Faust to return to work.

E. Ms. Faust provided Respondent multiple examples of what she considered reprisals by her employer. Respondent did not follow up on the information or amend any of Ms. Faust's claims to set forth the employer's

alleged retaliatory acts. Respondent also did not allege a hostile work environment claim, which could have extended and revived certain deadlines.

F. In Ms. Faust's **MSPB matter 4G-770-0288-11**, Respondent propounded written discovery but did not ask for important data and documents. The questions Respondent did ask focused on a request for reasonable workplace accommodations, even though the MSPB does not have jurisdiction over such issues.

G. In Ms. Faust's **MSPB matter 4G-770-0288-11**, Respondent did not move to compel responses or otherwise obtain requested information when the employer refused to produce documents and data that Respondent sought in discovery.

H. Respondent missed several deadlines to make substantive pleadings in connection with Ms. Faust's claims before the MSPB.

89. During the representation, Respondent and his associate prepared some substantive pleadings but failed to present valid legal arguments, misapplied the law, and conflated Ms. Faust's MSPB and EEO claims.

90. On **September 23, 2014**, Ms. Faust discharged Respondent by e-mail. She requested a final accounting, as well as a list of the cases in which Respondent had represented her but had not prevailed. Respondent did not comply.

91. During the representation, Ms. Faust paid Respondent more than **$5300** for costs.

Lack of Communication and Consultation

92. Throughout the representation, Respondent had few substantive discussions with his client about what he was doing to advance her interests. For example:

A. As the representation proceeded with multiple setbacks, including sometimes failing to obtain discovery in a timely or complete manner and failure to establish jurisdiction for some claims, Respondent did not explain to Ms. Faust how she could prevail before various agencies in which she had filed claims.

B. Respondent failed to consult with or explain why he chose not to (i) assert claims of reprisal by the employer that Ms. Faust believed had occurred and (ii) allege and pursue a hostile work environment claim.

C. Respondent elected not to pursue more obvious arguments in the EEO process consisting of a failure-to-accommodate claim without consulting with Ms. Faust about the benefits and drawbacks of doing so. Respondent did not consult with Ms. Faust or inform her why he instead chose the MSPB path in which relief was more difficult to obtain.

D. Respondent failed to respond to Ms. Faust's questions seeking guidance about how to proceed at work in a way that would not jeopardize her pending administrative complaints or the best way to proceed with new claims.

93. After Respondent's associate left his firm, Ms. Faust was often unable to reach Respondent for information on the status of her claims.

94. Without consulting with Ms. Faust about the risks and any potential benefits, Respondent incurred substantial costs in taking multiple depositions in Texas, including air fare, hotel rooms, car rentals, and meals for him and his associate, for which he maintained inadequate documentation.

Respondent's Civil Suit Against His Client

95. On **May 25, 2015**, Respondent sued Ms. Faust in D.C. Small Claims Court for **$2,908.76** for unpaid costs. The documentation he submitted failed to substantiate the costs he claimed.

96. Ms. Faust moved *pro se* to dismiss. She filed evidence that she had already paid Respondent more than $5300 but disputed some of his charges. Ms. Faust argued, *inter alia,* that Respondent could not establish that he was entitled to any money beyond what she had already paid him.

97. Respondent opposed Ms. Faust's motion to dismiss, and she was compelled to retain local counsel.

98. On **February 1, 2016**, the magistrate judge denied Ms. Faust's motion to dismiss and set trial for **April 4, 2016**.

99. Ms. Faust could not afford both her attorney and the expenses for the trip to D.C., so on **March 17, 2016**, she agreed her attorney could withdraw.

100. On **March 25, 2016**, Respondent opposed Ms. Faust's effort to represent herself *pro se*. The court did not rule on the motion before trial.

101. Ms. Faust expended significant resources to travel to D.C. to defend herself in small claims court. Her counsel was also present because she had not been released from the case.

102. On **April 4, 2016**, the day of trial, Respondent conceded that he had miscalculated the amount Ms. Faust purportedly owed him and stated that she owed him less than $130.

The Charges in Faust

103. Respondent violated the following Rules:

A. Rules 1.1(a) and (b), because Respondent failed to provide competent representation to Ms. Faust, and to serve his client with the skill and care commensurate with those generally afforded clients by other lawyers in similar matters;

B. Rule 1.2(a), because Respondent failed to consult with Ms. Faust about the means to pursue her objectives;

C. Rules 1.3(a) and (c), because Respondent failed to represent Ms. Faust with diligence and zeal within the bounds of the law, and to act promptly;

D. Rules 1.4(a) and (b), because Respondent failed to keep Ms. Faust reasonably informed about the status of the matter, and to explain the matter to the extent reasonably necessary to permit his client to make informed decisions about the representation;

E. Rule 8.4(d), because Respondent engaged in conduct seriously interfering with administration of justice.

COUNT 4: Tammy Mitchell
2019-D123

The Litigation

104. In **September 2013**, Respondent agreed to represent Tammy Mitchell in employment discrimination matters. Mrs. Mitchell alleged that her employer, the VA Medical Center in Beckley, West Virginia, had impermissibly discriminated against her, then retaliated against her for engaging in activities protected under anti-discrimination and whistleblower statutes. Mrs. Mitchell was a registered nurse with

the Home-Based Primary Care program of the VA and had an attorney handling her **EEO** administrative process when Respondent undertook to represent her.

105. The jurisdictional questions comprising Mrs. Mitchell's claims involved the EEOC, MSPB, the U.S. Office of the Special Counsel, Mrs. Mitchell's rights under a collective bargaining agreement, and the U.S. Department of Labor.

106. Respondent did not discuss with Mrs. Mitchell a strategy to proceed, including identifying (a) in which matters he would represent her (EEO, MSPB, OWCP, OSC, whistleblower complaint, some combination or all), (b) her goals in the representation, and (c) which matters to pursue to best achieve her stated goals.

107. As discussed below, Respondent provided Mrs. Mitchell with three fee agreements. In the first agreement, dated **September 25, 2013,** Respondent said he would represent Mrs. Mitchell in her "Federal Employee [*sic*] Employment issue – EEOC," including before the relevant "Agency," "US Federal Court," the Whistleblower process, the Merit Systems Protection Board, and the Equal Employment Opportunity Commission.

108. On **October 1, 2013,** Mrs. Mitchell signed the retainer agreement and paid Respondent $5000.

EEO Representation

109. When she hired Respondent, Mrs. Mitchell was on medical leave and had a pending request for a hearing in her **EEO matter –-4616**. Mrs. Mitchell

informed Respondent that despite her medical documentation, her employer sent her a letter dated **October 17, 2013**, demanding that she return to work.

110. On **November 18, 2013**, Respondent notified her employer, Beckley VAMC, that he was representing her in the pending EEO matter -4616. Respondent did not, however, enter his appearance before the EEOC.

111. Without consulting with Mrs. Mitchell, Respondent sought extensions of time to submit documents to the EEOC. He failed to pursue Mrs. Mitchell's claims before the EEOC, including EEO matter –4616, and another claim that Mrs. Mitchell filed with the EEOC, EEO claim, -464. Respondent did not discuss with Mrs. Mitchell his decision to abandon her EEOC matters and the possible consequences of his doing so.

112. In **December 2014**, the employer's investigator asked Respondent about another EEOC matter relating to Mrs. Mitchell, **EEO matter –1271**. Mrs. Mitchell has no record that Respondent ever answered the investigator, and no response appears in Respondent's client file.

113. On **March 31, 2015**, the employer issued its final agency decision dismissing Mrs. Mitchell's claims in **EEO matter –1271**. Respondent did not discuss with Mrs. Mitchell the employer's decision. Mrs. Mitchell did not find out about the decision until she sought information about the status of her EEO claims by contacting the agency directly.

114. The March 31 final agency decision notified Mrs. Mitchell of its understanding that **EEO matter –4616** was still pending before the EEOC. Respondent took no substantive steps to advance Mrs. Mitchell's interests in that matter. Respondent did not discuss with Mrs. Mitchell his decision to abandon it.

115. On **November 2, 2015**, Mrs. Mitchell was terminated by her employer on the erroneous basis that her nursing license had lapsed. When she received the termination notice, Mrs. Mitchell immediately called the relevant licensing board and informed it that her license had not lapsed, rather that she had been on inactive status. She directed the licensing board to reactivate her license, which it did that day.

116. Mrs. Mitchell immediately told Respondent about her termination and the reactivation of her nursing license from inactive status. Respondent did not discuss with Mrs. Mitchell whether she could file another **EEO** complaint, a grievance under her collective bargaining agreement, or other ways to challenge her termination.

Workers' Compensation Representation

117. When she hired Respondent, Mrs. Mitchell had already lost a **workers' compensation** matter before the Office of Workers' Compensation Programs **claim -4212**, but she had the right to appeal.

118. Mrs. Mitchell filed a *pro se* request for reconsideration in March 2014, provided a copy to Respondent, and advised the OWCP that Respondent was her counsel.

119. On **June 27, 2014**, the OWCP denied Mrs. Mitchell's request for reconsideration in OWCP matter -4212.

120. On **September 26, 2014**, Respondent presented Mrs. Mitchell with a second fee agreement to represent her in her OWCP matter.

121. Respondent waited until **June 26, 2015**, to file another request for reconsideration. Respondent used the wrong case number and failed to include the required authorization from his client. Respondent did not correct these deficiencies until September 15, 2016.

122. In the meantime, on **December 2, 2015**, the VA denied Mrs. Mitchell's request to reconsider her termination.

123. On **December 13, 2015**, Respondent e-mailed Mrs. Mitchell's former employer setting forth what he considered to be problems with the employer's approach to Mrs. Mitchell's case. He did not make any further substantive filings in Mrs. Mitchell's OWCP case until 2017.

124. On **February 7, 2017**, Respondent filed a mandamus petition in Mrs. Mitchell's workers' compensation matter, with the United States District Court for the District of Columbia suing the Labor Department.

125. Respondent refiled the mandamus petition twice, initially on February 15, 2017, and again on March 18, 2017.

126. Respondent stated he was "seek[ing] for OWCP to fulfill their obligations under [the applicable statute], accept [Mrs. Mitchell's] appeal, and grant her reconsideration of their prior decision." Respondent did not cite any legal authority for the relief he sought, including his claim for attorney's fees and costs.

127. Respondent also claimed, without basis, that Mrs. Mitchell had not been given sufficient opportunity to designate Respondent as her representative before the OWCP.

128. On **May 19, 2017**, OWCP denied Mrs. Mitchell's June 2015 request for reconsideration.

129. On **June 9, 2017**, Respondent erroneously filed a pleading in Mrs. Mitchell's case associated with another client in an unrelated matter.

130. The Labor Department moved to dismiss Mrs. Mitchell's mandamus suit. Respondent failed to file a response, despite the District Court's minute order directing him to do so.

131. Respondent represented to the District Court that the case was "moot" and "will be dismissed," although Respondent filed no pleading reflecting such statements.

132. On **September 6, 2017**, the District Court dismissed the mandamus case without prejudice for failure to prosecute and as moot, based on Respondent's representations.

133. Respondent did not tell Mrs. Mitchell that the court had dismissed the case.

MSPB Representation

134. When Mrs. Mitchell was terminated, she filed a notice of appeal with the **MSPB** and identified Respondent as her attorney.

135. In **January 2016**, Respondent pursued the appeal before the MSPB, even though he knew that Mrs. Mitchell had not exhausted her administrative remedies – a jurisdictional requirement.

136. The MSPB issued an Acknowledgement Order setting a discovery deadline. Respondent, however, did not seek discovery within the deadline.

137. On **January 21, 2016**, the employer moved to dismiss the appeal because Mrs. Mitchell did not qualify as an employee under the MSPB and had failed to exhaust her administrative remedies. Consequently, the MSPB lacked jurisdiction.

138. On **February 1, 2016**, Respondent filed a pleading conceding that his client had not exhausted her administrative remedies and moved to dismiss Mrs. Mitchell's appeal without prejudice.

139. On **February 4, 2016**, the MSPB dismissed Mrs. Mitchell's appeal, stating that Mrs. Mitchell could refile after she pursued her claims with the Office of Special Counsel. It also informed Mrs. Mitchell that if she did not refile by August 4, 2016, the MSPB would automatically refile her appeal on that date.

140. By letter dated **August 18, 2016**, the OSC informed Mrs. Mitchell, care of Respondent, that 240 days had elapsed since she had filed her complaint for wrongful termination. She could agree to extend the deadline for OSC's investigation or terminate the investigation.

141. Respondent did not refile Mrs. Mitchell's appeal by the deadline, so the MSPB did so on her behalf. **On August 24, 2016**, the employer again moved to dismiss Mrs. Mitchell's appeal for lack of jurisdiction.

142. On **September 2, 2016**, Respondent again moved to dismiss without prejudice to permit the OSC to complete its investigation. By letter dated November 4, 2016, the OSC concluded its investigation on the merits, finding no support for Mrs. Mitchell's claims of reprisal.

143. In the meantime, on **September 6, 2016**, the MSPB again dismissed Mrs. Mitchell's appeal without prejudice but warned that its decision would become final unless a petition for review was filed by October 11, 2016.

144. Respondent did not file a petition for review by the October 11 deadline.

145. Instead, in January 2017, Respondent filed a new appeal with the MSPB challenging Mrs. Mitchell's termination on whistleblower grounds, **MSPB claim – 0139-W-3**.

146. The MSPB rejected the appeal. Respondent had named the OSC, rather than the VA, as the defendant, and he failed to accurately identify the nature of Mrs. Mitchell's position as competitive service (rather than excepted service).

147. On **March 2, 2017**, the MSPB gave Respondent instructions on how to prove jurisdiction. Respondent failed to follow them. He included an analysis by the OSC of why Mrs. Mitchell could not prevail before the MSPB, despite there being no reason to present the OSC's analysis.

148. On **July 11, 2017**, Respondent filed a status report in Mrs. Mitchell's whistleblower claim that included a factual narrative and statement of the legal question for someone else's case.

149. On **August 28, 2017**, Respondent filed a motion in MSPB claim -0139-W-3, seeking to compel the employer VAMC to provide certain information, but failed to serve counsel for the VAMC. The MSPB informed Respondent that any such further submissions would be rejected.

150. On **August 31, 2017**, the MSPB denied Respondent's motion to compel for failing to comply with relevant procedures, including failing to file discovery requests before the deadline.

151. On **September 7, 2017**, Respondent filed another motion to compel the employer's response, in which he conceded he had been unaware of the discovery deadlines. The MSPB only allowed Respondent very limited discovery because he had missed the deadlines. Respondent did not inform Mrs. Mitchell that he had missed the deadlines or the consequences of having done so.

152. On **September 20, 2017**, Respondent filed Mrs. Mitchell's prehearing statement. It contained significant text that was lined through (struck) as though it were a draft rather than a final document.

153. On **January 12, 2018**, Respondent filed a motion to enforce a $300,000 settlement agreement in MSPB claim -0139-W-3 and sought sanctions against the employer, notwithstanding that no settlement had been reached.

154. That same day, Respondent moved to recuse the presiding AJ in MSPB claim -0139-W-3 on the ground, *inter alia*, that the judge had "yelled" at Respondent for not settling Mrs. Mitchell's case. Respondent claimed, without basis, that his client had accepted a $300,000 offer but the employer reneged.

155. The case was reassigned to another AJ who denied Respondent's motion to enforce the nonexistent settlement, finding no factual or legal basis for Respondent's position.

156. From **November 2015**, when Respondent challenged Mrs. Mitchell's termination until **February 2018**, Respondent never adduced facts or provided legal authority for the MSPB to exercise jurisdiction over her claims.

157. By order dated **February 5, 2018**, the AJ ordered Respondent to state how the MSPB had jurisdiction over Mrs. Mitchell's claims.

158. Respondent sought and was granted until February 22, 2018, to respond. No evidence exists in Respondent's client file that, in response to the new deadline, he made a filing arguing why the MSPB had jurisdiction over Mrs. Mitchell's claim 0139-W-3, and he did not provide a date-stamped copy of any such filing to his client.

159. Dissatisfied with the quality of Respondent's representation, Mrs. Mitchell discharged Respondent during a conference call with the MSPB on **February 22, 2018**. That same day, Respondent withdrew from representing Mrs. Mitchell in MSPB claim -0139-W-3.

Office of Special Counsel Representation

160. On October 16, 2014, more than a year after Respondent had begun to represent Mrs. Mitchell, he presented her with a third fee agreement for representation before the Office of Special Counsel in a whisteblower matter.

161. Mrs. Mitchell needed to exhaust her administrative remedies before the OSC before pursuing her claims with the MSPB. Respondent, however, failed to pursue her whistleblower claims with the OSC.

162. The OSC eventually closed Mrs. Mitchell's claims in November 2016, finding no substantive basis to continue any inquiry into her claims.

Lack of Communication and Consultation

163. During the representation, Respondent did not consult with Mrs. Mitchell about a strategy to advance her interests, including in what forum or forums she should or could pursue her claims.

164. Respondent also did not explain to Mrs. Mitchell the developments in her matters, including delays or the rejections of motions and claims that he filed on her behalf because he had failed to respond timely, if at all, or because they had no basis or were not brought in the correct forum.

Respondent's Retainer Agreements and Billing Practices

165. Respondent presented Mrs. Mitchell with three separate fee agreements during the representation. The first, dated September 25, 2013, for the "Federal Employee Employment issue – EEOC", required Mrs. Mitchell to pay a $5000 fee and provided that Respondent would charge a 15% contingency fee, in addition to any fees he might attempt to recover from the government if Mrs. Mitchell prevailed.

Mrs. Mitchell paid Respondent $5000 in September; Respondent deposited her payment in October 2013.

166. Respondent's second fee agreement, dated September 26, 2014, was described as a "Federal Employee Employment issue." Respondent charged Mrs. Mitchell an additional $4000 "advance fee," and he said he would charge a 15% contingency fee and referenced recovery under fee-shifting statutes. The agreement further provided that Respondent would send Mrs. Mitchell "regular accountings" describing his time and services. Respondent told Mrs. Mitchell that other than the $4000 fee, she would not have to pay any additional fees but would be responsible for out-of-pocket expenses. Mrs. Mitchell signed the second retainer agreement on October 10, 2014.

167. On or about November 7, 2014, Mrs. Mitchell paid Respondent $4000 for "OWCP #032114212." Respondent violated OWCP regulations by failing to safeguard her funds (by placing them in his operating account rather than his IOLTA) before the relevant agency ruled on the reasonableness of Respondent's fees. Respondent never refunded these fees. Contingency fees are not permitted in OWCP cases.

168. Respondent's third agreement, dated October 16, 2014, was for representation in Mrs. Mitchell's "Whistleblower issue." Respondent said he would charge a 25% contingency fee, but his contingency fee would not limit his ability or

authority to recover his "actual attorney fees from the Agency." In this agreement too, Respondent said he would "provide statements of accounts to the Client billed at" his specified hourly rate and that of his employees. On November 14, 2014, Mrs. Mitchell signed the third retainer agreement.

169. Respondent never explained to Mrs. Mitchell how the three agreements functioned together, if at all, and what additional fees he would charge her if she prevailed in one or more of her claims. Respondent never explained how he was able to charge a contingency fee in her OWCP matters. Respondent never explained to Mrs. Mitchell his authority to deposit the $4000 into his operating account in 2014 that he collected to represent Mrs. Mitchell in her OWCP matters before he had submitted a successful fee petition.

170. Respondent did not send Mrs. Mitchell invoices on a regular basis. The invoices he later produced to Disciplinary Counsel included charges for preparing documents that had no filed-stamped copies in Respondent's client file and that were not sent to Mrs. Mitchell. Some also contained double charges for the same activity. For example:

A. Respondent double-billed Mrs. Mitchell on October 8, 2013, for 13 minutes each at $804.68/hour in an unspecified **EEOC** matter, for preparing a mailing to prior counsel and an e-mail to "MK about appearance," none of which appear as final documents in his client file;

B. Respondent billed $1200 on February 5, 2015, in EEOC matter –1271 to "Prepare and file Hearing Request form for client. Conversation with client," but the filed document does not appear in his client file;

C. Respondent billed twice on March 11, 2015, for five and a half hours each at $ $402.34/hour for travel to West Virginia for mediation (not the mediation itself) in an unspecified EEOC matter, although no notice or resolution for a mediation on that date appears in the client file;

D. Respondent billed $643.74 on November 17, 2016, in the **whistleblower** matter to "Draft and submit reply to OSC," which does not appear in Respondent's client file.

Respondent's Unauthorized Use of Mrs. Mitchell's Funds

171. On **October 4, 2013**, Respondent deposited Mrs. Mitchell's $5000 into his IOLTA. Three days later, on October 7, Respondent transferred all $5000 into his operating account. Respondent had not yet provided $5000 worth of services for Mrs. Mitchell.

172. Respondent did not request, and Mrs. Mitchell did not consent, to his spending her $5000 before performing work in her matters.

173. On or about **October 10, 2014**, Mrs. Mitchell provided Respondent a check for $4000 as an advance fee, as required by the second fee agreement.

174. In **October 2014**, Respondent e-mailed Mrs. Mitchell that he had not received the check.

175. On **November 6, 2014**, Mrs. Mitchell placed a stop-payment on the check.

176. On **November 7, 2014**, Mrs. Mitchell provided Respondent a second check for Respondent's $4000 advance fee, which Respondent deposited in his operating account on November 18, 2014. Doing so violated federal regulations requiring the payment to be held in trust until approved pursuant to 20 Code of Federal Regulations §§ 10.702-10.703.

177. On **March 1, 2018**, after Mrs. Mitchell had discharged him, Respondent cashed Mrs. Mitchell's first check for $4000 dated October 10, 2014.

178. Respondent did not tell Mrs. Mitchell that he was cashing her October 2014 check, and his doing so caused Mrs. Mitchell's checking account to go into overdraft status.

179. After cashing the October 2014 check, Respondent sent Mrs. Mitchell an invoice for $4000 dated March 6, 2018, purportedly for:

> Expense
> Oct. 10, 2014
> Flat fee for Federal Employee Employment Issue

180. Mrs. Mitchell already had paid Respondent the $4000 in November 2014, as Respondent knew, and she did not owe him any additional fees or expenses.

181. At the time Respondent cashed the stale $4000 check, Mrs. Mitchell asked Respondent to explain his March 1, 2018, deposit of check #1069. Respondent did not respond.

182. The following year, on **May 10, 2019**, the Office of Disciplinary Counsel received a complaint from Mrs. Mitchell against Respondent.

183. On **May 17, 2019**, Disciplinary Counsel wrote Respondent, enclosing a copy of Mrs. Mitchell's complaint with an inquiry letter and document subpoena dated May 17, 2019.

184. Also on **May 17**, Mrs. Mitchell received a $4000 check from Respondent dated May 3, 2019, that was drawn on his trust account.

The Charges in Mitchell

185. Respondent violated the following Rules:

A. Rules 1.1(a) and (b), because Respondent failed to provide competent representation to Mrs. Mitchell, and to serve his client with the skill and care commensurate with that generally afforded clients by other lawyers in similar matters;

B. Rules 1.2(a) and (c), because Respondent failed to consult with Mrs. Mitchell about the means to pursue her objectives, and failed to obtain informed consent to limit the representation's objectives;

C. Rules 1.3(a) and (c), because Respondent failed to represent Mrs. Mitchell with diligence and zeal within the bounds of the law, and to act promptly;

D. Rules 1.3(b)(1) and (2), because Respondent intentionally failed to seek Mrs. Mitchell's lawful objectives through reasonably available means permitted by law and ethics, and prejudiced or damaged his client during the course of the professional relationship;

E. Rules 1.4(a) and (b), because Respondent failed to keep Mrs. Mitchell reasonably informed about the status of the matter, and to explain the matter to the extent reasonably necessary to permit her to make informed decisions about the representation;

F. Rule 1.5(a), because Respondent charged a fee prohibited by law when he deposited Mrs. Mitchell's $4000 check for her OWCP representation into his operating account rather than his trust account, and has never refunded her fee or submitted a fee petition to authorize keeping the funds;

G. Rule 1.5(b), because Respondent did not provide his client a writing that accurately identified the scope of his representation;

H. Rule 1.15(a), because Respondent intentionally or recklessly misappropriated $4000 from Mrs. Mitchell by cashing her check after he

claimed to have lost it years earlier and for which he already had been paid with a replacement check;

I. Rule 1.15(e), because Respondent misappropriated Mrs. Mitchell's $5000 by removing it from his IOLTA to his operating account before he had earned the funds;

J. Rule 8.4(c), because Respondent engaged in dishonesty when he transferred a $5000 fee from trust to his operating account as his own before earning it, and cashed Mrs. Mitchell's stale $4000 October 2014 check without advising her in advance that he was doing so; and

K. Rule 8.4(d), because Respondent seriously interfered with the administration of justice.

COUNT 5: Evertte D. Travis
2021-D010

Background

186. The Department of Veterans Affairs administrative appeals process is charged with assisting veterans and is not adversarial. The U.S. Department of Veterans Affairs has a duty to (a) assist and (b) notify the veteran of material information designed to facilitate successful resolution of the veteran's claims. Thus, the VA administrative process is more flexible than adversarial forums and many claims can be handled informally.

187. Everette D. Travis is an Army veteran who was discharged in December 1993. At the time of his discharge, he had not been evaluated for service-connected disability, even though he suffered several injuries during his service. From 1994 to 2006, with the help of a national veterans' service organization, Mr. Travis applied for service-connected disability benefits and received disability ratings between 10-20% due to his diagnosed Post-Traumatic Stress Disorder. Thereafter, he fought to show the VA that his medical conditions were entirely service connected.

188. In 2012, Mr. Travis and the veterans' service organization established that his diagnosed PTSD met the criteria for a 100% disability rating under the VA regulations. Mr. Travis believed he was entitled to disability payments dating back to his date of separation from the military in 1993, because his PTSD was 100% service connected.

189. In 2016, Mr. Travis's efforts to obtain retroactive payments for his PTSD disability caused him to retain Respondent.

The Representation

190. On or about **November 30, 2016**, Respondent agreed to represent Mr. Travis in all matters before the VA. Mr. Travis needed assistance applying for his benefits. He had multiple claims, including to establish a service-connection for (a) his diagnosed PTSD, as of the effective date of his military discharge; (b) his

diagnosed hypertension; and (c) an adverse reaction to the anthrax vaccination that resulted in his hospitalization and that he believed exacerbated other currently diagnosed medical conditions.

191. Mr. Travis informed Respondent that he did not have much money and his financial circumstances were precarious.

192. At the outset of the representation, Respondent assured Mr. Travis that he could represent his interests before the VA. Respondent did not discuss what limitations, if any, he would place on the representation, including that he would not assist Mr. Travis in filing for benefits or pursue his claims for PTSD, hypertension, and adverse reaction to the anthrax vaccine.

193. On **January 7, 2017**, Respondent formally entered his appearance before the VA.

194. Respondent failed to consult with his client about the most efficient and cost-effective options available at that time.

195. From **2016 through 2018**, Respondent made few substantive filings and took few substantive steps to advance the interests Mr. Travis told Respondent he wished to pursue when he retained Respondent. Specifically, Respondent did not seek, obtain, and marshal the records necessary to prove a service-connection for Mr. Travis's claims of PTSD, hypertension, and hospitalization after his anthrax vaccination or explain to Mr. Travis why Respondent felt no basis existed to do so.

196. Throughout the representation, Mr. Travis asked for, but did not receive, specific information from Respondent about his claims. For example, Respondent frequently sought extensions on deadlines without providing Mr. Travis with copies of what, if anything, Respondent eventually submitted. As a result, Mr. Travis asked Respondent for a tally of his open claims and their respective statuses. Respondent never provided that information to his client.

197. Respondent was either unaware of several basic VA law practices and procedures or deliberately withheld important information from his client during the VA appeals process. For example:

A. Mr. Travis wished to consolidate all his issues during a single appeal for a variety of reasons, including managing his costs and stress. Yet, Respondent informed his client that doing so was not an option. Respondent did not explain the circumstances under which it would have been possible to combine some, if not all, of his pending matters and why it was not possible given Mr. Travis's circumstances.

B. When he undertook the representation, Respondent failed to explain to Mr. Travis the circumstances under which his matters could be advanced on the docket. Respondent did not present this option to Mr. Travis until April 2020, years into the representation and after Mr. Travis informed Respondent that his circumstances had significantly worsened.

C. Respondent erroneously told Mr. Travis that one reason his claims were taking so long to be resolved was that his file was unusually large. Mr. Travis's file was not unusually large or materially different from veterans with similar claims.

198. Respondent stated during a Board of Veterans' Appeals hearing on October 25, 2017, that he had not reviewed Mr. Travis's service file. At the hearing, Respondent was also uncertain of the precise issues for Mr. Travis that he had placed before the judge to adjudicate.

199. During the representation, Respondent collected $1780 from a backpay award to Mr. Travis. The award did not relate to the claims most important to Mr. Travis: his PTSD, hypertension, and adverse reaction to the anthrax vaccine.

200. In **August 2018**, Respondent told his client that he did not represent Mr. Travis in all matters he had pending in the VA administrative process. However, nothing in Respondent's retainer agreement stated that the representation was limited in scope.

201. Respondent did not pursue Mr. Travis's claims for PTSD, hypertension, and his adverse reaction to the anthrax vaccine, or meaningfully explain to Mr. Travis the bases for his decision not to do so, despite his client's requests to understand why no progress had been made on those claims.

Termination of the Attorney-Client Relationship

202. By **November 2020**, Mr. Travis had lost confidence in Respondent. He informed Respondent that he wished to discuss his concerns.

203. In **January 2021**, Respondent and Mr. Travis terminated the attorney-client relationship.

The Charges in Travis

204. Respondent violated the following Rules:

A. Rules 1.1(a) and (b), because Respondent failed to provide competent representation to his client; represent Mr. Travis's interests using the required legal knowledge, skill, care, thoroughness, and preparation reasonably necessary for the representation; and serve his client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;

B. Rule 1.2(a), because Respondent failed to consult with his client as to the means by which Mr. Travis's goals were to be pursued;

C. Rules 1.3(a) and (c), because Respondent failed to represent his client with diligence and zeal within the bounds of the law, and to act with reasonable promptness in representing his client;

D. Rules 1.3(b)(1) and (2), because Respondent intentionally failed to seek the lawful objectives of his client through reasonably available means

permitted by law and ethics; and prejudiced or damaged his client during the course of the professional relationship; and,

E. Rules 1.4(a) and (b), because Respondent failed to keep Mr. Travis reasonably informed about the status of his VA matters, promptly comply with reasonable requests for information, and explain matters to the extent reasonably necessary to permit his client to make informed decisions regarding the representation.

COUNT 6: Leonard A. Brisendine
2020-D239

Background

206. Disciplinary Counsel incorporates by reference ¶ 186.

The Representation

207. On **July 17, 2014**, Respondent agreed to represent United States Navy Veteran Leonard Brisendine in all matters before the VA. Mr. Brisendine sought Respondent's counsel following a May 2014 VA Regional Office Rating Decision that denied his claim that his current diagnosis of Post-Traumatic Stress Disorder was connected to his military service.

208. In May 2014, the VA had mailed Mr. Brisendine a notice directing him to appear for a VA exam. However, the VA sent the notice to an old address, even

though Mr. Brisendine had provided his new one. By the time Mr. Brisendine received the notice, it was too late for him to appear for the VA exam.

209. The VA issued its May 2014 Rating Decision denying relief on two grounds: (a) Mr. Brisendine's failure to appear for a VA exam in April 2014, and (b) lack of a current PTSD diagnosis of record related to his military service. Mr. Brisendine had one year to contest the decision.

210. When Respondent undertook to represent Mr. Brisendine, he had two options to proceed on his client's behalf:

A. Respondent could file a Notice of Disagreement with the local Regional Office within one year of the May 2014 Rating Decision, specifying the date of the Rating Decision being challenged and identifying the specific issues challenged. The Regional Office would issue a Statement of the Case, along with a list of evidence considered, applicable laws, and a statement of "Reasons & Bases." If Mr. Brisendine disagreed with the Statement of the Case, he would have been able to file a formal appeal to the Board of Veterans' Appeals.

B. Respondent could file a Notice of Disagreement and request an informal conference and/or a formal in-person or video-hearing with a Decision Review Officer. After that, a *de novo* review would be conducted by a Decision Review Officer, who would then issue a decision.

211. Under either option, Respondent could have submitted new evidence or an explanation of circumstances of which the Regional Office was unaware. For example, because Mr. Brisendine had not submitted to a VA exam, the VA was entitled to summarily deny his claim. Respondent could have requested a rescheduled exam and explained that Mr. Brisendine had missed the deadline because of his move. Respondent did not advise Mr. Brisendine of this or any other option at any time before the Statement of the Case was issued. Nor did Respondent seek this outcome with the VA when he filed Mr. Brisendine's Notice of Disagreement.

212. Mr. Brisendine had informed Respondent that he did not have much money, and consequently was living in Mexico.

213. If Respondent had chosen to work with a Decision Review Officer through an informal conference and/or formal testimony, Respondent could have presented the medical records and other evidence Mr. Brisendine possessed that already connected Mr. Brisendine's current diagnosis of PTSD to his military service. Had Respondent done so, a VA exam may not have been necessary.

214. Respondent failed to present his client with the more efficient and cost-effective options available.

215. Pursuing the more time-consuming path increased the fees Respondent was statutorily entitled to receive.

216. On **September 9, 2014**, Respondent filed a Notice of Disagreement with the Regional Office without seeking an informal conference and/or formal testimony. Respondent stated in the Notice of Disagreement that the "reason for disagreement will be provided as this matter develops." At no time before the Regional Office issued its Statement of the Case did Respondent submit Mr. Brisendine's medical evidence showing that his currently diagnosed PTSD was service-related. This caused additional and unnecessary delay.

217. Respondent did not inform Mr. Brisendine that his private medical records contained evidence very likely to establish that Mr. Brisendine's currently diagnosed PTSD was related to his military service, and, thus, might never require a VA exam. Nor did Respondent explain to Mr. Brisendine why he failed to submit his client's private medical evidence before the Statement of the Case was issued.

218. In **January 2015**, the Regional Office issued a Statement of the Case. It did not disturb the Navy's discharge decision, thus continuing the denial of the relief Mr. Brisendine sought.

219. In **December 2015**, Respondent filed a formal appeal to the Board of Veterans' Appeals on Mr. Brisendine's behalf. In the intervening months, Respondent did not submit any of the evidence that could have proved

Mr. Brisendine's currently diagnosed PTSD was service connected. Respondent still had not requested that a new VA exam date be scheduled for Mr. Brisendine. The Respondent did not consult with or explain to Mr. Brisendine why he made these choices.

220. On the official VA appeal form, Respondent again specified no reasons for Mr. Brisendine's challenge to the May 2014 Rating Decision, writing: "the reason for disagreement will be provided as this matter develops."

221. Also on the official VA appeal form, Respondent advised that Mr. Brisendine would travel from Mexico to Washington, D.C., for an in-person hearing at the Washington, D.C. Central Office. Respondent did not consult with or explain to his client the option of a video conference with a Veterans Law Judge, and why Respondent believed appearing in person was preferable, particularly in light of his client's financial circumstances.

222. The in-person VA Board Hearing at its Central Office in Washington, D.C. was held on **December 6, 2016**.

The Board of Veterans' Appeals Hearing and Its Aftermath

223. At Mr. Brisendine's VA Board hearing, Veterans Law Judge Jonathan Kramer pointed out to Respondent that the record did not contain evidence that his client had a currently diagnosed psychiatric disability. Judge Kramer stated he

would keep Mr. Brisendine's records open for an additional 60 days to allow Respondent to submit that additional evidence.

224. Respondent advised the judge: "That I can get to you tomorrow." Respondent did not submit the material the next day or anytime thereafter.

225. Respondent was either unaware of a number of basic VA law practices and procedures or deliberately withheld important information from his client during the VA appeals process. For example:

A. Because Mr. Brisendine possessed many of the necessary records linking his currently diagnosed disability to his military service and had provided them to Respondent, the hearing afforded Respondent the opportunity to present to Judge Kramer evidence showing all elements necessary to establish service-connection. Respondent did not do so.

B. If Respondent believed he needed records his client did not possess, he could have obtained and submitted them at any time during the appeals process, including with the initial Notice of Disagreement in September 2014, up through the hearing before Judge Kramer in December 2015. Respondent did not do so.

C. Judge Kramer explained to Respondent (and his client) that the VA did not necessarily need to examine Mr. Brisendine, as long as he submitted medical evidence, whether from a VA or private medical provider,

showing that Mr. Brisendine suffered from a currently diagnosed psychiatric disability related to his military service. Respondent was surprised at this.

D. Mr. Brisendine's medal of commendation was an important document to establish recognition for his high level of service in the Navy. Mr. Brisendine had received it for acts of heroism in the face of danger that he asserted had caused his PTSD. The copy Judge Kramer reviewed in Mr. Brisendine's file was illegible. The judge asked for a copy he could read and provided Respondent additional time to submit it. Respondent failed to provide another copy.

226. As Judge Kramer's 60-day extension approached without additional submissions by Respondent, Mr. Brisendine became anxious, angry, and depressed, and the professional relationship deteriorated.

Respondent Terminated the Attorney-Client Relationship

227. By e-mail on January 29, 2017, Respondent terminated the attorney-client relationship. He did not file the documents necessary for Mr. Brisendine to prevail with the VA Board, stating: "I will no longer do any work on your case and I have no longer have [*sic*] any professional reasonability [*sic*] for the matter." Respondent stated that he would ask for a 30-day extension for Mr. Brisendine to submit the necessary documentation to obtain relief.

228. Respondent further informed Mr. Brisendine that he would return "the remaining paper file" to him at a D.C. address, even though Respondent knew Mr. Brisendine lived in Mexico.

229. As of the date he discharged Mr. Brisendine as a client, Respondent had made no substantive filings to show that Mr. Brisendine was entitled to a disability rating. Despite stating at each phase of his client's matter that the "reason for disagreement will be provided as this matter develops," Respondent never made any formal filings. Respondent made no formal filing arguing that Mr. Brisendine's PTSD was connected to his military service, or that the service connection was evident from Mr. Brisendine's current service file. Respondent also did not provide any supplemental documentation he believed necessary to show such a connection.

230. Mr. Brisendine was distraught.

231. Mr. Brisendine ultimately obtained the assistance of a national veterans organization, filed his own Notice of Disagreement, and obtained a disability rating and award for his injury from the VA in **September 2018**.

232. On **March 11, 2021**, Respondent sued Mr. Brisendine for professional fees and prevailed in D.C. Small Claims Court.

The Charges in Brisendine

233. Respondent violated the following Rules:

A. Rules 1.1(a) and (b), because Respondent failed to provide competent representation to his client, because Respondent failed to represent Mr. Brisendine's interests using the required legal knowledge, skill, care, thoroughness, and preparation reasonably necessary for the representation; and because Respondent failed to serve his client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters;

B. Rule 1.2(a), because Respondent failed to consult with his client as to the means by which Mr. Brisendine's goals were to be pursued;

C. Rules 1.3(a) and (c), because Respondent failed to represent his client with diligence and zeal within the bounds of the law, and to act with reasonable promptness in representing his client;

D. Rules 1.3(b)(1) and (2), because Respondent intentionally failed to seek the lawful objectives of his client through reasonably available means permitted by law and ethics; and prejudiced or damaged his client during the course of the professional relationship; and,

E. Rule 1.4(b), because Respondent failed to explain matters to the extent reasonably necessary to permit his client to make informed decisions regarding the representation.

Respectfully submitted,

/s/ Hamilton P. Fox, III
Hamilton P. Fox, III
Disciplinary Counsel

Traci M. Tait
Assistant Disciplinary Counsel

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VERIFICATION & DECLARATION

I declare on December 22, 2023, under penalty of perjury, that I believe the foregoing facts stated in the Specification of Charges are true and correct.

Traci M. Tait
Assistant Disciplinary Counsel

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	:	
	:	
Michael D.J. Eisenberg, Esquire	:	**Disciplinary Docket Nos. 2014-D318 (Glaab)**
	:	**2016-D399 & 2019-D058 (Swain)**
Respondent	:	**2017-D057 (Faust)**
	:	**2019-D123 (Mitchell)**
Bar Registration No. 486251	:	**2020-D239 (Brisendine)**
Date of Admission: May 10, 2004	:	**2021-D010 (Travis)**
	:	

PETITION INSTITUTING FORMAL DISCIPLINARY PROCEEDINGS

A. This Petition (including the attached Specification of Charges which is made part of this Petition) notifies Respondent that disciplinary proceedings are hereby instituted pursuant to Rule XI, § 8(c), of the District of Columbia Court of Appeals' Rules Governing the Bar (D.C. Bar R.).

B. Respondent is an attorney admitted to practice before the District of Columbia Court of Appeals on the date stated in the caption of the Specification of Charges.

C. A lawyer member of a Hearing Committee assigned by the Board on Professional Responsibility (Board) pursuant to D.C. Bar R. XI, § 4(e)(5), has approved the institution of these disciplinary proceedings.

D. ***Procedures***

(1) **Referral to Hearing Committee** - When the Board receives the Petition Instituting Formal Disciplinary Proceedings, the Board shall refer it to a Hearing Committee.

(2) **Filing Answer** - Respondent must respond to the Specification of Charges by filing an answer with the Board and by serving a copy on the Office of Disciplinary Counsel within 20 days of the date of service of this Petition, unless the time is extended by the Chair of the Hearing Committee. Permission to file an answer after the 20-day period may be granted by the Chair of the Hearing Committee if the failure to file an answer was attributable to mistake, inadvertence, surprise, or excusable neglect. If a limiting date occurs on a Saturday, Sunday, or official holiday in the District of Columbia, the time for submission will be extended to the next business day. Any motion to extend the time to file an answer, and/or any other motion filed with the Board or Hearing Committee Chair, must be served on the Office of Disciplinary Counsel at the address shown on the last page of this petition.

(3) **Content of Answer** - The answer may be a denial, a statement in exculpation, or a statement in mitigation of the alleged misconduct. Any charges not

answered by Respondent may be deemed established as provided in Board Rule 7.7.

(4) **Mitigation** - Respondent has the right to present evidence in mitigation to the Hearing Committee regardless of whether the substantive allegations of the Specification of Charges are admitted or denied.

(5) **Process** - Respondent is entitled to fifteen days' notice of the time and place of hearing, to be represented by counsel, to cross-examine witnesses, and to present evidence.

E. In addition to the procedures contained in D.C. Bar R. XI, the Board has promulgated Board Rules relating to procedures and the admission of evidence which are applicable to these procedures. A copy of these rules is being provided to Respondent with a copy of this Petition.

WHEREFORE, the Office of Disciplinary Counsel requests that the Board consider whether the conduct of Respondent violated the District of Columbia Rules of Professional Conduct, and, if so, that it impose/recommend appropriate discipline.

Office of Disciplinary Counsel

/s/

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