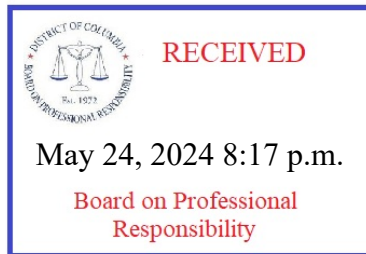


**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY**



In the Matter of Michael D.J. Eisenberg, Esquire, Respondent A Member of the Bar of the District of Columbia Court of Appeals Bar Number: 486251 Date of Admission: May 10, 2004	Disciplinary Docket Nos. 2014-D318 (Glaab) 2016-D399 & 2019-D058 (Swain) 2017-D057 (Faust) 2019-D123 (Mitchell) 2020-D239 (Brisendine) 2021-D010 (Travis)
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RESPONDENT, MICHAEL D.J. EISENBERG’S MOTION TO DISMISS
WITH SUPPORTING EVIDENCE AND CITATIONS
(OPPOSED)

Respondent, Michael D.J. Eisenberg, moves to dismiss the charges based upon principles of fundamental fairness and due process applicable to D.C. bar complaint investigations and ODC disciplinary actions. Bar Counsel has been contacted and opposes this motion.

Mr. Eisenberg has suffered **actual prejudice** from these now more than a decade-long processes with undue delays by Disciplinary Counsel between when bar grievances or inquiries were first reported to respondent and when formal charges were ultimately filed or pursued. In some cases, thirteen (13) years have expired since the occurrences that form the basis for the allegations. Key exculpatory and/or mitigating evidence is no longer available to respondent and the absence of the evidence and testimony as well as other special circumstances **substantially impair**

Mr. Eisenberg's ability to defend the formal disciplinary charges, as further addressed in section "C" below.

Additionally, the prosecutorial stacking ("piling on") of charges with continued inclusion of allegations or factual contentions - already discredited with powerful evidence and/or supporting documents and citations previously forwarded by respondent or his prior counsel to Disciplinary Counsel - evinces a flawed and unreliable pre-charging process that materially departs from concepts of fundamental fairness and due process in disciplinary matters.

A. SUMMARY OF KEY FACTS OR ISSUES SUPPORTING THE MOTION

In support of the motion, respondent offers the affidavit dated May 14, 2024, of Robert Hirshon, former President of the American Bar Association and law/ethics professor at the University of Michigan School of Law [Respondent's Motion Exhibit (hereafter "RMX") 2]; the declaration of Thomas B. Mason, Mr. Eisenberg's prior defense counsel, dated May 21, 2024 (RMX 3); the declaration of David W. Sumner, respondent's current *pro bono* assisting counsel in these matters (RMX 5); and the affidavit and supplemental affidavits of respondent, Michael D.J. Eisenberg, dated May 9, 2024 and May 22, 2024, respectively (RMX 6 and 16).

Also provided are the April 24, 2024, letter from combat veteran, David Miller, on behalf of Mr. Eisenberg (RMX 7) and transcript excerpts from V.A.

proceedings thanking or praising Mr. Eisenberg for his work on behalf of service veterans (RMX 8).

Additionally, a substantial portfolio of laudatory letters in support of Mr. Eisenberg are provided, all previously forwarded to bar counsel over the years in advance of the formal charges (RMX 1). This collection of laudatory letters is representative of the quality of mitigation or character evidence Mr. Eisenberg possesses. The letters certainly corroborate the excellent or successful results Mr. Eisenberg has achieved for numerous clients in very challenging cases. The letters and accolades also vouch for Respondent's prior demonstrated professionalism and tenacity when pursuing matters on behalf military personnel, service veterans and other worthy clients.

Also attached as supporting evidence are letters dated March 17, 2017 (RMX 10) and November 2, 2023 (RMX 9) sent by Mr. Eisenberg's prior counsel, Thomas Mason, to Disciplinary Counsel regarding the *Swain*, *Glaab* and *Mitchell* matters. The November 2 reply is 75 pages and effectively discredits in remarkable detail numerous non-meritorious or incorrect contentions, many of which are still surprisingly included within these unfairly stacked allegations and charges (RMX 3 ¶¶ 5-6).

Mr. Eisenberg also has substantial exculpatory and/or mitigating evidence in response to the *Travis*, *Faust* and *Brisendine* matters, as articulated in his early reply

or response letters to Disciplinary Counsel [RMX 13 and 14] and the V.A. Office of General Counsel [RMX 11].

Mr. Brisendine complained to the Veterans Administration's Office of General Counsel (OGC) regarding the same occurrences, in addition to filing a grievance with the Office of Disciplinary Counsel (ODC). The V.A. OGC conducted a thorough inquiry into the matter and once armed with Mr. Eisenberg's detailed factual input and discussions of the matter, the V.A. OGC took no adverse action and closed the formal inquiry (RMX 12). Mr. Eisenberg remains fully accredited and in good standing with the Veterans Administration and continues to serve veterans, as he has done dedicatedly and effectively for the last approximate 17 years.

The fact that the Veterans Administration OGC did not believe the *Brisendine* facts or occurrences warranted formal adverse action toward Mr. Eisenberg – when the V.A. possessed similar facts as are possessed by Disciplinary Counsel- is quite telling. The reply or response letters [RMX 9, 10, 11, 13 and 14] (all previously in the possession of Disciplinary Counsel) rather emphatically highlight major flaws and inefficiencies in the pre-charging investigation and evaluation processes by the ODC. Material exculpatory and/or mitigating evidence is simply being missed or ignored or otherwise not being adequately considered (RMX 2 ¶ 7; RMX 3 ¶¶ 5-6).

The motion caption alone suggests that these charges are based upon inquiries or conduct that Disciplinary Counsel has been collecting (without any earlier

informal bar or formal board dispositions) for at least a decade. Formal filed charges were received by Respondent on April 9, 2024, as bundled or stacked allegations. Mr. Eisenberg has been managing his practice for 17-18 years and the D.C. Bar website has no published reports of prior informal and/or formal discipline in advance of these current charges (See the D.C. Bar website search features re “Disciplinary Decisions”).

Mr. Eisenberg has not engaged in any reprehensible or immoral or criminal behaviors. He has not taken advantage of any extremely vulnerable or incompetent person or client. He has devoted his practice to helping disabled veterans.¹ Many of the contentions are in the Specification are not meritorious, but to the extent some may have a modicum of underlining merit, those specific allegations are a 10-year compilation of occasional inadvertence or unwitting mistakes that are not uncommonly seen in a very busy low fees/*pro bono* solo practice geared to help potential clients often having pre-existing physical or mental disorders and lacking significant resources to retain alternative legal representation.

¹ Mr. Eisenberg’s commitment to serving veterans is beautifully expressed by combat veteran David Miller (RMX 7). This Vietnam veteran in his April 20, 2024, letter states: “I could continue for the next 10 years just saying good and positive things about Mr. Eisenberg. We were blessed to meet and work with him for the past 10 years. We are thrilled by everything he has done for us. I have nothing negative to say, as all our interactions have been positive, productive, and rewarding. He got us everything we had been hoping for since filing my first claim in 1975...” See also, the transcript excerpts from Veterans Administration proceedings thanking or praising Mr. Eisenberg for his work on behalf of service veterans (RMX 8).

Mr. Eisenberg is not charged with making prior misrepresentations to Disciplinary Counsel during this decade long and extremely oppressive process. He has fully cooperated with the bar investigations. There is no evidence of obstruction. There are no charged acts of fabrication or withholding or spoliation of evidence.

There are no allegations of impairment of respondent due to alcohol or illegal substance abuse. There is no history of DUI's and Mr. Eisenberg has never been convicted of a criminal offense (beyond a speeding ticket) in this jurisdiction or anywhere else.

Further, there have been no dishonored checks from Mr. Eisenberg's trust account and no negative balances or overdrafts in his office operating accounts. No accounts dropped below balances necessary to ensure refunds to clients in the event of earlier than anticipated termination of the attorney-client relationship by Mr. Eisenberg or the client.

Mr. Eisenberg's "hybrid" representation agreement for EEOC matters was deemed fair and enforceable by D. C. Superior Court (Judge Dixon) during Mr. Eisenberg's pursuit of collection for unpaid fees (in *Swain*). His representation agreements in both veteran benefits cases and EEOC claims are in writing, reflecting significantly **lower** than market contingency fees and the clients' duty to reimburse the practice for necessary costs incurred or advanced in pursuing these difficult

claims.² Even though clients are responsible for reimbursing costs as the matter is in progress, Mr. Eisenberg, out of kindness and professional courtesy, frequently continued to provide representation despite the client being in significant breach of the fee agreement regarding payment of costs [RMX 6 ¶ 10].

Mr. Eisenberg has never denied he made some mistakes here, including office accounting and billing errors. However, the true or genuine mistakes or errors committed by Mr. Eisenberg, are not accurately or fairly represented by Disciplinary Counsel's hugely exaggerated charges that include numerous contentions reasonably disproven or discredited during the earlier protracted investigations.³

Several of the allegations charged here occurred in the milieu of Mr. Eisenberg's clients turning on him, following preceding praiseworthy or quite competent or successful representation, to avoid paying fees or costs reimbursements that these former clients were contractually obligated to pay (RMX

² Respondent's representation agreements are specially designed to benefit clients who typically have difficulty finding or affording a lawyer willing to assist them in these very challenging and often protracted matters frequently having low probabilities of ultimate success (RMX 6 ¶ 11). See the fee agreement used in *Travis* (RMX 17), a veteran benefits matter.

³ Bar counsel gratuitously added allegations of dishonesty to Count 4, but this appears consistent with the general theme of overcharging Mr. Eisenberg, as no dishonesty or immoral acts will be demonstrated by objective evaluation of the evidence. Disciplinary Counsel should already know from a mountain of exculpatory and/or mitigating evidence and facts previously forwarded to them that, despite this gratuitously prejudicial "add on" contention of dishonesty, Mr. Eisenberg is neither a dishonest man nor a dishonest lawyer (RMX 1; RMX 2 ¶ 7; RMX 5 ¶ 11; RMX 7). Similar overcharging circumstances existed in *In re Morten*, Bar Docket No. 2011-D363 p. 6-7 (BPR May 7, 2021) ("Disciplinary Counsel has also leveled a shifting array of dishonesty allegations against Respondent... Ultimately, we conclude that none of the dishonesty allegations were proven."). The Board dismissed all the charges *In re Morten* based upon failure of proof and due process violations.

6 ¶ 10; “Specification” Counts 2, 3 and 6). The allegations in Count 6 relate to a former client, Mr. Brisendine, whom Mr. Eisenberg had to take very commendable interventions on behalf of during the representation to help prevent the client from possibly committing suicide, despite the client being in Mexico and separated from Mr. Eisenberg by a continent [RMX 6 ¶ 16(1)(c)]. Mr. Brisendine suffered from ongoing alcohol abuse as well as other disorders (e.g. PTSD) contributing to his bouts of despondency and sporadically erratic and abusive behaviors toward his counsel (respondent) during the period of representation. Mr. Eisenberg was commendably patient with this (former) client’s mercurial and unpredictable moods and behaviors – As the ODC is well aware, Mr. Eisenberg’s sensitivity was even praised gratefully by Mr. Brisendine:

Hey Michael, really sorry that I was disrespectful to you last night and caused you so much concern. I wish I could justify it somehow but it would be an a**hole thing to do so. Believe it or not I am actually rather fond of you and if you will forgive me for my own indiscretion of drinking and clicking send I really would appreciate it if you could continue to represent me. My two friends who reached out to me last night at your bequest said no you need to stick with that guy he's solid gold. And I believe that now. It's pretty early right now, I'm gonna go back to bed soon. You did not deserve the shi* last night, and you comported yourself like a total gentleman and I appreciate that. If you want to drop me I understand. This process is mental torture. Give me a waterboard anyday instead of constantly reliving an event that stuck my amygdala in overdrive with no way to get-to stand down I understand why people take their life into their hands. It is so hard to dig up all these bodies from the graveyard of my mind. I guess the good news right now is that the process is pretty much in the can and it's a waiting game now. I don't have to deal with the details anymore and believe me that's where the devil lives. I want to thank you for your patience your understanding and your empathy. You proved yourself to me to be a very

good man and the only guy that I want to pursue my case. There is one hell of a yelp review in your future.

RMX 18.

There is substantial available information to Disciplinary Counsel indicating that rather than being a threat to clients or the public, Mr. Eisenberg is a valuable, even irreplaceable asset to the legal community (See RMX 1, 7 and 8). For example, Mr. Eiler, a friend and colleague in the practice of Veterans Benefits, provides . . .

Michael often represents clients who other attorneys, myself included, all-too-often shy away from because of concern they could be "difficult" clients. Clients with behavioral issues, financial issues, veterans with significant mental health issues - these are some examples of the countless clients Michael has represented over the years.

RMX 1, p.10. Additionally, Mr. Eisenberg is a guru in modern law office technologies, and he has recently won a prestigious award from a national organization for the quality of his legal blog podcast programming ("The Tech-Savvy Lawyer") [RMX 6 ¶ 1 and RMX 5 ¶¶ 8-9].

In short, there is no morally egregious conduct here, however, there is factually exculpatory and/or exceptionally laudatory information available to Disciplinary Counsel that heretofore has not been adequately considered that warranted earlier and fairer resolution of the matters.

Mr. Eisenberg has provided evidence of an impressive tally of successful results in very challenging cases (RMX 1 and 7). These practice successes, reflecting skill and knowledge, plus the already burgeoning (and still growing) stacks of

laudatory character evidence, bely attempts by Disciplinary Counsel to characterize or portray Mr. Eisenberg as generally incompetent or unfit to practice law or lacking in moral character.

B. SUPPORTING CITATIONS AND AUTHORITY

1. Undue Delays

The ABA Model Rules for Lawyer Disciplinary Enforcement briefly touch on this issue of delays in pursuing formal charges by Disciplinary Counsel. The commentary to Rule 32, in pertinent part states:

An unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or testimony available at an earlier time to meet such a charge.

The general rule applicable to D.C. Bar disciplinary matters is that a respondent must make an affirmative showing of actual prejudice for disciplinary charges to be dismissed based upon due process grounds. See *In re Klayman*, 2022 U.S. App. LEXIS 32079 (D.C. Cir. Sep. 15, 2022) (stating that undue delay must be coupled with actual prejudice to justify dismissal). The length of the delay typically creates no presumption of actual prejudice.⁴ To warrant dismissal, the undue delay must have “substantially impaired” a respondent’s ability to defend

⁴ It should be noted, however, that the seven (7) years delay that existed in *In re Klayman*, *supra*, was less than the length of delays demonstrated here with respect to some of the pending charges (at least 10 years in *Glaab* and approximately 8 years in *Swain*). Significantly, the occurrences that make up some of the charges date back at least thirteen (13) years.

against the charges filed by Disciplinary Counsel. *In re Fay*, 111 A.3d 1025, 1032 (D.C. 2015) (per curiam).

Nevertheless, disciplinary courts in other jurisdictions have, when special or extraordinary facts or circumstances exist, adopted an exception to the general rule that actual prejudice must be affirmatively demonstrated by the respondent before charges can be dismissed on due process grounds. Actual prejudice may still be presumed under special circumstances.

One such example is *In re Deleon*, 902 A.2d 1027, a 2006 decision from the Court of Judicial Discipline of the Commonwealth of Pennsylvania. The court found that a **two and a half years delay** by disciplinary counsel in filing formal charges warranted dismissal of the charges, despite Pennsylvania disciplinary law mandating a finding of actual prejudice for such a dismissal on due process grounds. The disciplinary court stated:

[T]here can come a time in a given case where the **delay** is so lengthy that **prejudice** can be presumed. We do not here specify what that length of time is or may be in any case -- save this case. We hold that in this case the **delay** was such that **prejudice** may be presumed (emphasis in original). 902 A.2d at 1032.

In re Klayman, supra, addressing a seven (7) year delay should not be construed as a clarion call to Disciplinary Counsel in D.C. to produce or exploit unwarranted delays in the disposition of matters before the institution of formal charges. It has been the doctrine in D.C. Bar disciplinary matters consistently for

over thirty- five (35) years that delays, when truly exceptional (and these are), may be considered a significant mitigating factor to reduce appropriate sanctions, sometimes well below levels that may have otherwise been typical for the charged misconduct. See *In re Schneider*, 553 A.2d 206 (D.C. 1989) (undue delay was cited as justification to reduce a six month suspension to just 30 days despite violations with proven **dishonesty** by the respondent in altering receipts to obtain higher business expense reimbursements); *In re Miller*, 553 A.2d 201 (D.C. 1989) (in another case involving proven **dishonesty** by a respondent, the board's recommendation of a one year suspension was reduced to a 30 days suspension as a result of undue delays). In *In re Miller*, the Court of Appeals declared "we think the delay in this case [six years] warrants a less severe sanction than that recommended." *Id.* at 206.

The damaging effects of delay have been previously described in eloquent language by the Florida Supreme Court: "During [an] unduly long period of investigation and prosecution, the accused lawyer is left roaming through the fields of Limbo where dwelt what Dante called 'the praiseless and the blameless dead.'" *The Florida Bar v. Randolph*, 238 So. 2d 635, 638-39 (Fla. 1970).

Robert Hirshon, Professor of Law and former President of the American Bar Association, provided affidavit evidence (RMX 2) as a consulting expert witness on key motion issues, including the undue delays that exist here by Disciplinary

Counsel prior to formal disposition of the charges. Professor Hirshon states rather emphatically:

Although there is typically no statute of limitations per se in disposition of disciplinary matters once initiated, unless imposed by local rule, in my strong opinion the times represented in several matters here appear extraordinarily outside normal expectations for formal disposition of active disciplinary matters, giving appropriate regard to the administrative due process rights of a respondent. I do a substantial amount of reading of ethics opinions and reports in preparation for my ethics and professional responsibility courses that I teach and I have appeared as an expert on ethics matters approximately twelve (12) times in federal and state courts over the last ten (10) years. I personally have not seen or reviewed any prior cases from any state or jurisdiction wherein the delays between the original bar complaint and formal disposition of charges equaled or exceeded the delays that exist here.

(RMX 2 ¶ 5).

2. Flaws in the Pre-charging Processes.

It is axiomatic that when specific factual allegations have been reasonably and specifically disproven during the pre-charging processes by incontestable or unimpeachable sources and evidence, such disproven charges should not be pursued or bundled with contentions or allegations that do have significant evidentiary foundation.

Disciplinary proceedings are “quasi-criminal” and, as a result, attorneys subject to those proceedings are entitled to due process of law. *In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015) (per curiam) (citing *In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983)). “Disciplinary proceedings are adversary, adjudicatory proceedings . .

. [and] as much as they are concerned with property rights of respondent-bar members, due process safeguards must be observed.” *In re Thorup*, 432 A.2d 1221, 1225 (D.C. 1981). See also, *Disciplinary Counsel v. Reinheimer*, No. 2019-1742, 2020 WL 4516060, at *3 (Ohio Aug. 6, 2020) (per curiam) (dismissing charges where “relator’s theory of the case changed after the presentation of the evidence”); *Attorney Grievance Comm’n v. Sanderson*, 213 A.3d 122, 140 (Md. 2019) (setting aside a finding of misappropriation not raised in initial complaint); *Cincinnati Bar Ass’n v. Wiest*, 72 N.E.3d 621, 626 (Ohio 2016) (per curiam) (wherein charges were dismissed because of a failure to allege facts putting the respondent on notice that certain conduct would be at issue).⁵

An administrative agency must follow principles of fundamental fairness. See *State ex rel. White v. Parsons*, 199 W. Va. 1 (W. Va. 1996), wherein the court held that administrative agencies are limited by principles of fair play and due process. The court held the “cardinal test of the presence or absence of due process of law in an administrative proceeding is the presence or absence of the rudiments of fair play long known to law.” 199 W. Va. at 8. See also *State Department of Environmental Protection v. Stavola*, 103 N.J. 425, 511 A.2d 622 (1986).

⁵ In *In re Morten*, Bar Docket No. 2011-D363 (BPR May 7, 2021) the D.C. Board of Professional Responsibility similarly found a due process violation by Disciplinary Counsel improperly offering and arguing evidence and allegations that were never included in the Specification of Charges.

Indeed, by stacking disproven or reasonably discredited allegations with matters that are legitimately in contest or admitted, bar counsel is requiring a respondent to devote considerable time, resources, and costs litigating matters that should not even be at issue in the proceedings. By charging matters that have already been shown to be false or inaccurate or non-meritorious, bar counsel is consuming judicial and party resources away from facts and contentions genuinely in dispute.

Similarly, over-charging and stacking of allegations creates a real danger or risk that subsequent fact finders will be more impacted or influenced by the mere multiplicity or redundancy of charges and the pretense of gravity of the allegations than the intrinsic or actual provable merits of each factual contention.

C. THE EXISTENCE OF ACTUAL PREJUDICE

Mr. Eisenberg has demonstrated actual prejudice.⁶ The undue delays and prosecutorial inefficiencies have “substantially impaired” respondent’s ability to defend against the charges filed by Disciplinary Counsel. A finding of actual prejudice and substantial impairment to the defense of the charges is justified based upon multiple material considerations discussed below, all supported by the record and/or motion submissions:

⁶ Respondent has not had the benefit of complete discovery. Evidence of additional circumstances creating actual prejudice may be demonstrated as these matters progress.

(1) Exculpatory and/or mitigating evidence has been lost to Mr. Eisenberg's defense of these charges as referenced in subsections (a) through (g) below.

(a) Alana Bergner previously worked in Mr. Eisenberg's office during the period respondent was managing the *Travis* matter. Alana has not responded to emails or texts for over a year and a half and her current whereabouts are unknown. Therefore, this key witness is likely unavailable to testify as a live witness before the hearing committee. The materiality of her potential testimony is demonstrated by the offer of proof titled "Declaration Regarding the Anticipated Testimony of Alana Bergner" (RMX 15);

(b) Kim Cain is a material witness regarding the charged *Glaab* allegations as she is implicated in the so-called conflict of interest ["Specification" ¶¶ 7, 8, 43-46 and 51(G)]. Kim Cain purportedly no longer responds to communications from bar counsel and has retracted some earlier representations to the ODC. Kim Cain would have to admit under oath that Mr. Eisenberg allowed her invoices for costs reimbursement to go unpaid for many months as a professional courtesy and that the client's delinquency (in advance of much later legal collection attempts against her) created no actual discord, animosity or rancor between Ms. Cain or Mr. Eisenberg. She would also have to admit (if telling the truth) that she encouraged and was privy to Ms. Glaab seeking Mr. Eisenberg's representation and gave express if not implied consent to the arrangement despite Ms. Glaab being a possible (but nonmaterial)

witness in her separate EEOC matter. She would also concede (if testifying truthfully) that she possessed no information adverse to Ms. Glaab's claim and Ms. Glaab possessed no information adverse to her own claim at the time Mr. Eisenberg began his dual representation of Ms. Cain and Ms. Glaab in separate EEOC matters [RMX 6 ¶ 15(a)].

(c) Meanwhile, Kim Cain's mother would serve as a material witness. However, we believe Kim Cain's mother has now passed away. Mr. Eisenberg represented Kim Cain's mother in an EEOC matter resulting in a very favorable outcome for her. If testifying truthfully, the presumably deceased Mrs. Cain (the mother) would have acknowledged Mr. Eisenberg's professionalism and effectiveness in handling her EEOC claim [RMX 6 ¶ 15 (b)].

(d) Transcripts for some of the hearings at issue were never obtained and/or were not requested years ago (as unnecessary) and cannot be requested now due to the delays that have occurred between the hearings or court appearances and when respondent would have first learned of a grievance related to his conduct at the hearing. The transcripts and more precise docket information is missing from ODC master files produced in these matters. A transcript would likely challenge Disciplinary Counsel's interpretation of events at certain hearings or court appearances. For example, no transcript is available of the D.C. Superior Court breach of contract trial that resulted in summary judgment in favor of Mr. Eisenberg in the *Swain* matter.

We believe, if a transcript were available, the transcript would help explain matters in a more favorable light to respondent. The judge quite reasonably had serious reservations about Ms. Swain's credibility and conduct. She came to court with "unclean hands" and made very prejudicial admissions regarding her prior handling of the settlement funds during testimony. The court's summary judgment ruling cannot replace the import or probative value of a transcript of Ms. Swain's actual trial testimony that included very damaging to her cause in the courtroom admissions [RMX 6 ¶ 16(2)];

(e) The following additional individuals that would have been able to provide glowing character and professionalism testimony or proof of competence testimony on behalf of Mr. Eisenberg, are no longer likely available to testify at the committee hearing [RMX 6 ¶¶ 15(c)-(g)]: **Chantena Kinney, Jason Breedlove, Robert McCumber and Richard Hunt**. We may learn of others who have also become unavailable to testify at the committee hearing as these proceedings and formal discovery progress;

(f) Mr. Eisenberg has exchanged or upgraded his cell phone at least 6 to 8 times since the onset thirteen (13) years ago of occurrences upon which the charges are founded. Some data, such as messages and texts, have likely become irretrievable before specific issues in contest were even brought to Mr. Eisenberg's attention by

Disciplinary Counsel years after the events being investigated occurred (RMX 16 ¶ 4);

(g) Mr. Eisenberg has had accounts with Vonage and AT&T during relevant time periods here. Respondent made phone calls to the administrative judge's office in advance of the alleged missed tele-hearing in *Glaab* and left voice mail messages.

The several year lag time - between when the hearing occurred and when respondent later received bar notice of specific contentions about the hearing from Disciplinary Counsel – resulted in respondent being unable to corroborate the occurrence of all the phone calls with online accessible phone records. Vonage data goes back 18 months only and AT&T for 16 months only [RMX 6 ¶16(1)(a)-(d)]. This is but another example of how undue delays here extinguished Mr. Eisenberg's opportunity to present exculpatory or corroborating information in defense of the allegations, specifically in *Glaab* and *Faust* as well as other charged matters. The Vonage and AT&T records would have also reflected more frequent or consistent liaison or contacts with clients over the multi-year periods of representation than what is being asserted by Disciplinary Counsel in the Specification of Charges;

(2) Mr. Eisenberg has lost the services of his prior defense counsel due to unwarranted prolongation of this process from inefficiencies by Disciplinary Counsel.

Thomas B. Mason, Esq. is a very well-respected D.C. attorney specializing in ethics matters and he previously represented respondent continuously in these bar inquiries

or matters from 2014 to April 8, 2024 (RMX 3 ¶ 3). Mr. Mason's knowledge of the history of these matters since Disciplinary Counsel's involvement over a decade ago; his skill as an ethics specialist; and his formidably detailed command of the case and facts, are irreplaceable assets to the defense, especially at this critical late juncture in a decade long process. No attorney joining the fray at this point moving forward could possibly provide a comparable level of representation as Mr. Mason has consistently provided respondent the last ten (10) plus years in these now formally charged matters. Mr. Mason's online biography outlining his prestigious credentials and experience is provided (RMX 4);

(3) Mr. Eisenberg incurred over \$400,000 in representation costs during the preceding ten (10) year period in these specific charged matters alone and those defense costs were escalated or increased by the unnecessarily inefficient and protracted nature of the prior pre-charging processes (RMX 6 ¶ 17).⁷

The overwhelming expense of defending these prior bar complaints, many of which include dubious or debatable allegations, plus the extraordinary delays and other major flaws in the ODC processes, resulted in an eventual *de facto* disqualification of Thomas Mason as respondent's counsel and gives Disciplinary Counsel an unfair

⁷ The calculation was subject to some estimation as many of the prior defense counsel invoice time entries do not parse out which of multiple matters over the last ten (10) plus years the billable time was specifically charged against. Some of the invoiced charges relate to previously dismissed matters that were also accompanied by extremely lengthy periods of time between the original bar grievance and formal disposition of the matters by Disciplinary Counsel. The *Johnson* matter, for example, not charged here, was dismissed only recently after being evaluated by the ODC for approximately 10 years following the original inquiries to respondent.

competitive advantage that offends principles of fundamental fairness and due process (RMX 5 ¶¶ 12-15 and RMX 6 ¶ 17);

- (4) Disciplinary Counsel has seemingly hoarded charges for years, many including allegations with questionable evidentiary foundation or dubious support, to now inappropriately pile up or stack charges.**

Disciplinary Counsel is essentially masking the fact that many of the contentions do not hold up to a detailed or exacting review or the micro-scrutiny they each vitally deserve. The records in these matters are so voluminous there is a definite danger that first impressions or visceral biases have long ago trumped genuine evidence during this decade long process. The OCD master files alone for the charged matters here total 58,673 PDF pages of documents (RMX 5 ¶ 14). It is exceptionally laborious for anyone to read the record here in conscientious detail. However, that is indeed where the truth is found, but it takes an enormous commitment to fairness and details to uncover the actual truth regarding these occurrences. Unfortunately, that attention to detail has not been consistently exhibited throughout this 10-year prosecutorial onslaught;

- (6) Disciplinary Counsel has often been largely indifferent to incontestably exculpatory or hugely mitigating evidence in these charged matters and has frequently acted with unyielding inflexibility in the face of impressive contrary evidence.**

Mr. Eisenberg has suffered actual prejudice from this prosecutorial intransigence because there are numerous contentions in the Specification of Charges that never should have been included or bundled with others (TMX 3 ¶ 5-6, TMX 5 ¶ 11 and

TMX 6 ¶ 17). There is a real danger that re-litigating already disproven contentions of Disciplinary Counsel takes critical time and massive resources away from litigating those matters that do at least have better evidentiary support. Furthermore, the multiplicity of the charges, many lacking significant substantive merit, creates a prejudicially false impression of gravity or recidivism. As stated by Professor Hirshon:

Mr. Eisenberg has the best mitigation evidence I have seen in my career as to both its quality and breadth. I cannot emphasize this enough. He has supportive letters from former clients, colleagues, former law clerks and practice advisors, retired 2-star generals, wounded combat veterans and other notable references vouching for his competence, his good character and his demonstrated professionalism. This extremely supportive information was likely undervalued or inadequately considered by Disciplinary Counsel during the prior protracted processes. Mr. Eisenberg clearly has very impactful and exemplary exculpatory and mitigation evidence to support his defense of these disciplinary charges.

(RMX 2 ¶ 7);

- (7) **Some of the alleged misconduct (e.g. *Mitchell* and more recent occurrences) may have been avoidable entirely if Disciplinary Counsel had diligently pursued the matters efficiently and in earnest with written proposals to respondent regarding informal disposition, such as diversion or reprimand and other negotiated resolutions including adept utilization of law practice management interventions and mandatory C.L.E.**

This isn't hypothetical. Disciplinary Counsel was aware of Mr. Eisenberg's unique hybrid representation agreement that included a special retainer feature denominated as "nonrefundable" prior to 2014 - see *Glaab* and *Swain*, the oldest charges here. That provision alone should have triggered instructional or cautionary dialogue

between Disciplinary Counsel and respondent well before some of the *Mitchell* events that are now being incorrectly interpreted by bar counsel as constituting non-negligent misappropriation [See “Specification” ¶¶ 185 (H) and (I)]. There were no informal actions of record taken by Disciplinary Counsel to help educate respondent on improving fee agreement terminology to avoid ethical concerns or quandaries.⁸ Also, none of the complainants availed themselves of the Attorney/Client Fee Dispute Arbitration processes despite the phone number for the service being provided by Mr. Eisenberg in the representation agreements signed by the former clients prior to onset of representation (RMX 17 at p. 3).⁹ Mr. Eisenberg’s fee structure is specially designed to give most clients, unable to find another lawyer to take their case or unable to afford another lawyer, an opportunity to have representation through his office.

⁸ Mr. Eisenberg’s fee agreement pertinent to *Glaab, Swain and Mitchell* (the 2013 contract) is rather unique. The initial commitment retainer is not equivalent to the “flat fee” arrangement discussed by the D.C. Court of Appeals in *In re Mance*, nor is it a retainer against unearned future billable time or hours. The fee arrangement confers a considerable benefit to new clients at contract inception. It is a misnomer to characterize it as a “flat fee.” The special circumstances in this case fall into unresolved or gray zone issues not adequately addressed by *In re Mance* or its progeny. The Board has had to grapple previously with ambiguities and uncertainties regarding the parameters of *In re Mance*. See *In re Alexei*, Bar Docket No. 2016-D375 (BPR June 30, 2023). See also, *In re Haar*, Bar Docket Nos. 2012-D392 & 2013-D429 at p. 2 (BPR June 24, 2019) (“Disciplinary Counsel did not prove by clear and convincing evidence that Respondent’s failure to comply with *Mance* resulted from anything other than his good faith mistake of law, and consequently proved only that Respondent acted negligently”).

⁹ None of the charged conduct warranted or prompted complainants to submit claims to the Client Security Fund. Mr. Eisenberg has never been notified that he owes any reimbursements to the Client Protection Fund as no funds to his knowledge have ever been paid out by the Fund on his behalf regarding any of these former clients mentioned in the Specification of Charges or any others.

- (8) A multiplicity of the factual contentions and charges relate to clients purportedly communicating certain facts or instructions to respondent and Mr. Eisenberg’s alleged failure to consult with or communicate specific matters to clients or, alternatively, relate to contested factual contentions that would implicate respondent’s personal recollection and memory of the occurrences in order to effectively respond (See, “Specification” ¶¶ 7, 8, 9, 11, 17, 19, 20, 21, 22, 23, 25, 26, 28, 29, 33, 37, 39, 39(A) and (B), 41, 45, 46, 51(B), 51(D) and (E), 51(G) and (H), 58, 59, 60, 61, 82(B) and (D), 87, 88(A) and (B), 92, (2(A)-(D), 103(B) and (D), 106, 111, 112, 113, 114, 116, 133, 151, 163, 164, 169, 172, 181, 185(B) and (E), 191, 192, 194, 195, 196, 197(A)-(C), 198, 200, 201, 202, 204(B) and (E), 207, 211, 212, 214, 217, 219, 233(B) and (E)).**

Many of these eighty (80) separate paragraphs alleging client discussions or recollection/memory dependent events are not verbal interactions or occurrences preserved in signed documents nor in emails or file memos and would not necessarily be expected to be so preserved. Countless verbal exchanges occur during the usual course of multi-year representations that never get memorialized in the case file. Several of the allegations here by their very nature are the most prejudicially impacted by the huge passage of time, that is, recollections of non-recorded verbal discussions with clients during the progress of multi-year representation. In other words, the charges include countless allegations (here approximately 25% of all the paragraph contentions in the Specification) that implicate recollections and memories which diminish further with each passing month or year. This is yet another reason why the missing Vonage and AT&T phone data would have been vital to Mr. Eisenberg’s defense of these formal charges;

- (9) By delaying or hoarding (without disposition) matters and subsequently stacking formal charges, Disciplinary Counsel has now made it completely unfeasible for Mr. Eisenberg to retain expert witness testimony on all or many key aspects of the underlying substantive merits of the bundled allegations to be contested.**

The records in this case are so prolific - in large part due to delays in earlier disposition of matters and this bundling of overly stale allegations with previously discredited contentions - that an expert witness would require potentially hundreds upon hundreds of billable hours to get through materials in the micro detail these matters warrant.¹⁰ The costs would be prohibitive. Mr. Eisenberg has already lost his prior exceptional attorney, Thomas Mason, due to financial stresses created by these flawed processes and protracted delays. Therefore, clear and obvious prejudice respondent has suffered, substantially impairing his defense, is the current inability to retain, due to prohibitive costs, expert witnesses to confront **all** or even most matters that could be successfully contested through expert witness testimony;

- (10) Mr. Eisenberg's ability to defend these charges has also been substantially impaired by the logistically impossible tasks his new cross-country located *pro bono* co-counsel (appearing initially April 18, 2024) faces to meet fast approaching procedural deadlines; to review materials including 58,673 PDF pages of ODC records (RMX 5 ¶ 11); and to assemble a defense case while also continuing to manage his own solo multi-state litigation practice.**

¹⁰ The hourly rate to retain an expert with suitable experience and credentials to effectively confront these inappropriately stacked and frequently non-meritorious allegations can easily range between \$500 to \$1000 an hour (RMX 5 ¶ 13).

The prejudice created by these currently existing circumstances is obvious and extreme;

(11) Finally, Mr. Eisenberg has been plagued by a decade of frequent ODC bureaucratic errors and inefficiencies.

These include repetitive requests for information previously provided, erroneous or unfounded accusations of untimely production¹¹ and possible careless release of Mr. Eisenberg's private information (his SSN) to at least one complainant (*Mitchell*). Mr. Eisenberg has been very cooperative through years of bureaucratic errors and inefficiencies, but also immensely frustrated by them. The inefficiencies and errors by Disciplinary Counsel during these protracted processes identified repeatedly by Mr. Eisenberg in correspondence to ODC over the last decade or more, resulted in estranged relations between Mr. Eisenberg and Disciplinary Counsel despite his consistent cooperation with these prejudicially prolonged investigations.

As stated by the esteemed Professor Hirshon in his authoritative and well-reasoned affidavit:

Respondent's affidavit provides significant and credible evidence of actual prejudice to his defense of these charges from the undue delays caused by Disciplinary Counsel. It is my personal opinion that the undue delays here did in fact substantially impair Mr. Eisenberg's ability to effectively defend against these formal disciplinary charges.

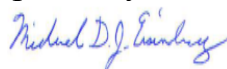
(RMX 2 ¶ 6)

¹¹ Mr. Eisenberg is not charged with any Rule 8.1(a) or Rule 8.4(d) violations related to his response to bar inquiries or requests for information by Disciplinary Counsel and/or his level of cooperation with bar counsel throughout these decade long bar investigations.

D. RELIEF REQUESTED/ CONCLUSION

The embarrassment, oppression, financial costs, substantial damage to his defenses and other hardships respondent has already endured as a result of undue delays and prosecutorial indifference by Disciplinary Counsel to substantial incontestable exculpatory and/or mitigating evidence, quite frankly, shocks the sensibilities. Respondent has suffered actual and irreparable prejudice in his ability to defend these charges. Principles of fundamental fairness, justice and equity support the relief requested. The magnitude of retribution heretofore exacted from respondent, Michael D.J. Eisenberg, by Disciplinary Counsel, as demonstrated by proof of actual prejudice, warrants dismissal of the charges.

Respectfully submitted,



Michael D.J. Eisenberg, Esquire
Co-counsel for Respondent
700 12th Street, NW STE 700
Washington, DC 20005
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F: (202) 403-3430
Michael@Eisenberg-Lawoffice.com

AND FOR:

David W. Sumner, Esquire
Co-counsel for Respondent
333 N. Wilmot Rd., Suite 340
Tucson, Arizona 85711
520-253-5262 (office)

610-220-1475 (cell)
medmal@icloud.com (email)

Date: May 24, 2024

CERTIFICATE OF COMPLIANCE

The above document titled “Respondent, Michael D.J. Eisenberg’s Motion to Dismiss with Supporting Evidence and Citations (Opposed)” complies with the document length and format requirements of Board Rule 19.8(c) because it contains 7,018 words, is double-spaced, with one-inch margins and it is on 8 ½ by 11-inch paper. I am relying on the word count function in Microsoft Word in making this representation.

Respectfully submitted,



Michael D.J. Eisenberg, Esquire
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700 12th Street, NW STE 700
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F: (202) 403-3430
Michael@Eisenberg-Lawoffice.com

Date: May 24, 2024

**DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY**

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

RMX 1- The 15 supporting letter compilation

- MG Harding (former VA client);
- Jason Breedlove (former MEB/PEB client);
- Kent Eiler (VA benefits practice colleague);
- Dominick Schoonmaker (current VA/Military Records Correction client);
- McBride (former VA client);
- Nealy Stapleton (professional office organizer);
- Robert Foreman (current VA client);
- Sharon O'Neal (widow of former VA/FTCA client and later client herself);
- Patrick Withrow (former law clerk);
- Justin Ermels (former VA client);
- Rebecca Kidder (colleague - mother of former MEB/PEB client);
- David Lambdin (VA client);
- Antonio Martin (current MEB/PEB Client);
- Gwendolyn L. Moore (former federal employment issue client);

- Lonnie Keene (VA benefits practice colleague);
- Thomas Fedele (former VA client);
- Kenneth Kuper (former law clerk).

RMX 2- Robert Hirshon affidavit dated May 14, 2024, with exhibit A and B attachments.

RMX 3- Declaration of Thomas Mason dated May 21, 2024.

RMX 4- Thomas Mason online professional biography.

RMX 5- Declaration of David W. Sumner dated May 21, 2024.

RMX 6- Michael D.J. Eisenberg affidavit dated May 9, 2024.

RMX 7- David Miller (disabled combat veteran) letter of April 20, 2024.

RMX 8- VA transcript excerpts.

RMX 9- Thomas Mason letter to ODC dated November 2, 2023 (75 pages).

RMX 10- Thomas Mason letter to ODC dated March 17, 2017 (3 pages).

RMX 11- Reply letter dated January 3, 2022, to VA OGC in Brisendine (23 pages).

RMX 12- Inquiry closed letter from VA OGC dated November 9, 2023 (1 page).

RMX 13- Reply letter to ODC in Travis dated April 9, 2021(7 pages).

RMX 14- Reply letter in Faust dated June 5, 2017 (23 pages).

RMX 15- Declaration Regarding the Anticipated Testimony of Alana Bergner.

RMX 16- Supplemental Affidavit of Michael D.J. Eisenberg dated May 22, 2024.

RMX 17- Travis representation agreement of November 30, 2016.

RMX 18- E-mail from L. Brisendine.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 1

(Supporting Letter Compilation)

September 12, 2022

Office of Disciplinary Counsel
c/o Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC 20005

MG Robert A Harding, US Army (Retired)
7681 Ballestrade Court
McLean, Virginia 22102

RE: Statement in support of Michael D.J. Eisenberg

I am providing this statement in support of Michael D.J. Eisenberg because I am confident that he remains the ideal attorney for disabled veterans like myself.

During most of the year 2006, I was in dispute with the Veterans Affairs (VA) department over my status as a disabled veteran. At the time, I had been retired for five years. Our Country was involved in more than two wars, and the VA was understandably overworked and understaffed. Despite my best communication with the disability office, I was hitting a brick wall. Desk managers changed, correspondence got misplaced, and contact was sporadic.

Out of desperation, I sought help from a friend who had gone through similar challenges but overcame them. He recommended Michael Eisenberg. After the initial consultation, I retained Mr. Eisenberg, and I was so fortunate that I did. VA caseload was increasing, and their funding was putting them at a disadvantage in keeping up technologically. I needed someone who knew the system and knew the players.

Although Michael came highly recommended, I made my own inquiries and found him to be the real deal. His knowledge of the VA landscape was apparent immediately. Unfortunately, my communications with my assigned VA office in Roanoke, Virginia, were simply paper drills with no concrete actions being taken.

I provided Michael a statement of my details, to include personal statements, doctors notes, and details of my ailment. He took it from there.

Mr Eisenberg made both telephonic and personal appointments for me within days. He arranged a meeting with my assigned counselor in Roanoke, Virginia and adjusted his schedule to meet mine. We met outside VA regional office in Roanoke. He shared with me what I should expect and made me feel extremely confident in my position.

During my interview with the VA counselor, Mr Eisenberg spoke up only on one or two technical questions but had put a binder together that answered all of VA's question in meticulous detail. The session took approximately 45 minutes. I was told the Roanoke office would be in touch. Within two weeks after that meeting, I was awarded 50% disability. This, after trying to do it myself for almost a year, was miraculous. I considered Mr Eisenberg the best advocate ever! Not just because we were successful, but because his experience and background helped me navigate a very complicated and overwhelming system.

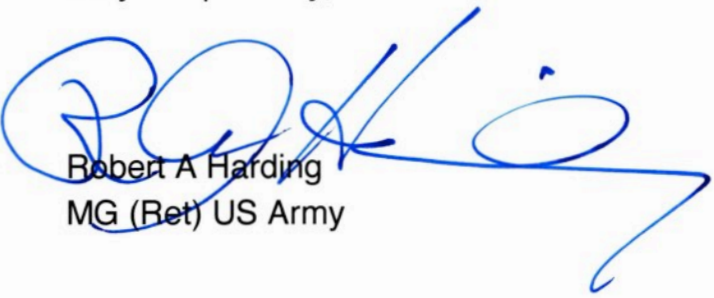
Mr Eisenberg's ability to communicate effectively to me as well as to the VA was impressive. His process was very deliberate and by the book and I think that is what swayed the Roanoke counselor to be proactive.

Michael Eisenberg spent time with me, learning about my disability and objectives. He became someone that I trusted with very personal details. I hope that he is allowed to continue to help soldiers like me. After 33 years in the military and reaching the rank of two star general, I found myself not up to the task of dealing with the Department of Veterans Affairs. I was fortunate to have found Mr Eisenberg and I recommended him to several colleagues. I hope he remains in a position to continue to help Vets like myself.

Thank you for your time.

I can always be reached at (703) 893-1984

Very Respectfully,


Robert A Harding
MG (Ret) US Army

*Veterans need
Michael!
vr Bob H*

To Whom It May Concern,

My name is Jason Breedlove and I am writing this letter on behalf of my attorney Michael Eisenberg. Mr. Eisenberg has been my legal counsel for over 7 years now. He has helped me through a total of 4 Military Medical Board Proceedings, 1 Physical Evaluation Board Proceeding, and 1 Physical Evaluation Board Formal Board Hearing. JB

I am a severely disabled combat veteran and I have a child with Leukemia. My life is chaos. A medical discharge was imminent so I hired Mr. Eisenberg right away. I do not believe I could have made it through those extremely hard times without him by my side protecting my family and me. He has done more for me than I could ever repay him for. He has secured my future after a grueling battle with the military medical system. I now have health benefits for my ill son. There is just so much that he has done for me throughout all of these years. JB

My first case began in late 2006 and ended in early 2009. Mr. Eisenberg spent countless hours working with me and for me, including during his Mini-Honeymoon. There was not one piece of communication that went to the medical board without him being involved. There were several conference calls, emails, written statements, rebuttals, and appeals. The appeals were phenomenal. They were very well written, strong, assertive, and written to the very letter of the law. I was impressed. It was obvious that he had put a lot of thought, planning, and compassion into everything that he wrote. He aggressively asserted my interests. For all of this he only charged me \$1,000. I couldn't believe it; 2 ½ years of hard work for only \$1,000. JB

The military wasn't in the business of handing out disability benefits. My initial rating came back at a mere 50%. This was nowhere near enough for how disabled I am and did not reflect my non-stop chronic pain, PTSD, and anxiety. The medical board was also trying to say JB

my injuries were not combat related. In the end, Mr. Eisenberg got my rating increased to 90% and all of my injuries deemed combat related. He truly felt I deserved more and was willing to take it to the next level for me, but I declined. I could live with 90%. He fought hard for me and the harder we fought, the harder the government fought back. It was not an easy road, but my Mr. Eisenberg put forth 110% every step of the way. He was always available to me. Even on his honeymoon.

JB

In 2013, when I came up for my disability review, the military tried to lower my back rating from 40% to 10% and lower my overall rating to only 70%. This was unacceptable. They also refused to diagnose me with PTSD. Instead, they kept saying I had an anxiety disorder and the disability rating was too low. They kept finding ways to rate me under a different rating code. This time Mr. Eisenberg took my case pro bono. Additionally, we were only allowed one written appeal before requesting a formal hearing. The only thing he charged me for was his travel expenses to represent me at the formal hearing (in the State of Washington), and even then he still didn't charge me for the hotel costs (and I know as a rule of thumb, he does not charge clients for meals). He was very considerate to my financial situation in both cases, and in my opinion he grossly undercharged me for the amount of work he put in.

JB

This TDRL review was critical. It basically decided my military benefits for the rest of my life. Yet again the medical board tried to lowball me. Mr. Eisenberg ended up getting my overall rating increased to 140%! This far surpassed even my initial rating of 90%. He even got them to add 2 new ratable conditions that were not included during my first med board which I didn't even think possible AND he was able to finally get me rated for PTSD which they had to refused to do all these years. Mr. Eisenberg wrote an extremely compelling "statement of disagreement" which the PEB found critical in their decision making. He got them to see several

JB

errors in my case and admit that they were made. Mr. Eisenberg more than exceeded my expectations and he literally secured my future.

JB

Mr. Eisenberg is one of the most competent and compassionate lawyers that I have ever met. He cares about every single soldier that walks through his door and he does this country a great service by protecting them from the government entities that refuse to properly take care of its' veterans. He is a great man; one of kind. He works so very hard for so very little. I am honored to have worked with Mike Eisenberg. He has changed my life forever, during one of my greatest times of need. My family is indebted to him for the countless hours he spent protecting and defending me.

JB

Thank you for your time.

Sincerely,



Jason M. Breedlove

2/25/2014

Kent A. Eiler, Esq.
Carpenter Chartered
P.O. Box 2099
Topeka, KS 66601

May 10, 2024

DC Office of Disciplinary Counsel c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW Ste 700
Washington D.C. 20005

Re: Statement in Support of Michael D.J. Eisenberg

Dear Sir/Madam,

I write this letter on behalf of my friend and good colleague Michael D.J. Eisenberg as I understand your office has received several complaints regarding his conduct. I have had the privilege to know Michael for the past decade as a colleague and fellow member of the bar. I have been a member in good standing of the DC Bar since March 8, 2013. My status, currently, is Inactive. I am also a member of the bar of New York and Iowa (where I presently reside.)

In my law practice I currently serve as a Lieutenant Colonel in the Reserve of the United States Air Force Judge Advocate General's Corps. In my civilian practice I am an attorney with the law firm of Carpenter Chartered located in Topeka, Kansas where my practice consists exclusively of representing claimants before the United States Department of Veterans Affairs, the U.S. Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Federal Circuit. Prior to returning to private practice at the beginning of 2021, I spent five years running the New York City Bar Association's Veterans Assistance Project under its 501(c)(3) component, the City Bar Justice Center.

I met Michael shortly before joining the DC Bar. I had just left Active Duty in the military, was very new to DC, and Michael graciously took me to lunch and helped me connect with the National Organization of Veterans Advocates, an organization he and I belong to still to this day. Michael was incredibly generous of his time and his mentorship. In the decade since, I have known Michael to be a committed advocate for those who would otherwise find it incredibly difficult to find a lawyer.

Michael often represents clients who other attorneys, myself included, all-too-often shy away from because of concern they could be “difficult” clients. Clients with behavioral issues, financial issues, veterans with significant mental health issues- these are some examples of the countless clients Michael has represented over the years. I know Michael has represented clients pro bono in federal court, in the hope that he will be able to obtain legal fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Moreover, that court work has had an impact in the practice of veterans’ law in this country. His work on behalf of Mr. Haselwander in *Haselwander v. McHugh*, 774 F.3d 990 (D.C. Cir.2014) is cited by veterans’ advocates from around the country to this day.

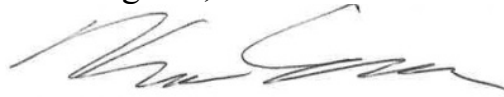
Michael’s low-bono work, which makes up the bulk of his practice, necessarily means he operates a volume practice. Even if you possess complaints from several dozen past, former, or current clients of Michael’s, I suspect that number would amount to fewer than 1% of the total clients Michael has represented during the course of his legal career. Moreover those complaints would not reflect the countless clients for whom Michael has made a life changing difference whether it was his securing veterans compensation from the Department of Veterans Affairs to which they’d previously been denied or helping a federal civil servant salvage their career by avoiding removal. None of us are perfect but I trust you will also consider the totality of Michael’s career when determining an appropriate course of action.

As you may know, in August 2020, Attorney Jerri Dunston from your office contacted me about either serving as an expert witness or whether I might be able to assist your office in locating an expert witness. I had been recommended by my friend, colleague, and fellow judge advocate Jason Wright to Ms. Dunston. When I spoke with Ms. Dunston at that time I did not realize the attorney about which I was being contacted was Michael at first. I explained during our phone conversation that the world of veterans’ advocates was a very small one and there was a possibility I would know the individual under investigation. I recall her asking “Why is it so small?” or words to that effect. I explained it’s a very small group because there has to be a certain dedication to the client base given the relatively small fees involved. She relayed to me it was Michael. As I explained to Ms. Dunston at the time, I most certainly did know Michael, and could not serve as an expert witness because, if the Office of Disciplinary Counsel were to take action against Michael I would likely be in the position I now find myself in, which is writing this letter in support of Michael because of what I know of his work.

From my knowledge of Michael D.J. Eisenberg I think Michael would be the first person to say he does not deserve any special, favorable treatment by or from your office. However, I also hope and trust whatever past conduct is at issue by him, similarly, is examined under that same light. I'm confident the conduct at issue stems from Michael's good faith efforts to deal with difficult situations which, with the benefit of hindsight, may have been handled differently but certainly doesn't stem from any ill-will or malice. Michael's extensive, low-bono advocacy is a credit both to himself and the bar. Our profession would be better off if more attorneys followed Michael's example in that respect. Michael has been, and I hope continues to be, someone who can help those for whom finding a lawyer is never a given.

Please don't hesitate to contact me at the information below to discuss any portion of this letter on Michael's behalf.

Best Regards,

A handwritten signature in dark ink, appearing to read 'Kent A. Eiler', written in a cursive style.

Kent A. Eiler, Esq.
Carpenter Chartered
P.O. Box 2099
Topeka, KS 66601
Ph: 785-357-5251 ext 222
Email: kent@carpenterchartered.com

ODC c/o

Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC 20005

Dominick H. Schoonmaker, SFC (USA Retired)
51 Boyce Rd.
Nassau, NY 12123-3024

RE: Statement in support of Michael D.J. Eisenberg.

This letter is being presented as a testament to the professionalism, integrity, loyalty, honesty, and caring of Michael D.J. Eisenberg.

My name is Dominick H. Schoonmaker, SFC (USA Retired). I am a combat Veteran of the United States Army. I served in Iraq during Operation Iraqi Freedom III, Forward Operating Base Danger, Tikrit Iraq, in 2005. I was deployed as a Soldier of the 42nd Infantry Division, New York Army National Guard out of Troy New York as part of Task Force Liberty.

I sustained an injury to my right shoulder while serving in Tikrit, which after 3 surgeries, would end my military and full time Federal Civilian Technician career. I attempted to file for Veterans benefits via the American Legion and then Veterans of Foreign Wars representatives, over the course of 18 months, with no success. Then, in 2014, I retained the services of Mr. Michael D.J. Eisenberg at the recommendation of a former Veterans Administration employee who was familiar with Mr. Eisenberg. This started a professional relationship which has endured for 8 years and continues to this day.

When one makes inquiries about legal representation there is a tendency to ask if the lawyer is good, gets positive client results, and how much does he/she charge. I have found that Mr. Eisenberg is underpriced for his services and I have told him so many times over the years. The amount of time and effort that he has produced for me, in my opinion, vastly outweighs his fees.

Mr. Eisenberg has called me on Saturday and Sunday mornings, while walking his dog, because he needed to inform me of details pertaining to my cases with the Veterans Administration (VA) and the United States Army. I have informed him several times that nothing in my cases warrants the sacrifice of his personal time on weekends and yet he states he likes to keep his clients informed. To say he is a workaholic is a large understatement. I have learned over the years that this drive comes from an actual caring of his clients beyond the reputational and monetary considerations.

I have a 100% disability rating from the Veterans Administration solely because of the efforts and expertise of Mr. Eisenberg. I could not have accomplished this on my own. I was

thoroughly angered and frustrated with the Army and VA disability systems and felt helpless until I engaged with Mr. Eisenberg.

To anyone that would attempt to convince me that Mr. Eisenberg is anything other than professional, loyal, honest, or caring is doomed to failure. I have a lawyer in my family and have heard the stories of clients unhappy with results of litigation who blame their lawyer for every problem they have ever had. I have found that most complaints are due to a lack of a desired payday that did not occur and then they, in anger, turn their sights to their own representation looking for another payday and revenge.

This unprofessional conduct and pettiness personally anger me, as a former Senior Non-Commissioned Officer, when this client is a former military member. Respect, Honor, and Integrity are some of the Army Values and they do not cease to exist upon discharge.

Sincerely,



Dominick H. Schoonmaker, SFC (USA Retired)

Cell 518-225-0043

dschoon3@gmail.com

OIF3 Veteran

Freedom Is Not Free,

Remember The Fallen

"The only thing necessary for the triumph of evil is for good men to do nothing." -Edmund Burke-

April 21, 2024

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

Glenn McBride
103 Crown Road
Roanoke VA 24018

RE: Statement in support of Michael D.J. Eisenberg.

My name is Glenn McBride. I am a disabled veteran who sought out Mr. Eisenberg's services for possible representation before the Department of Veterans Affairs. Admittedly, I was not happy with my current representation and wanted to find someone new. When I spoke with Michael (he invited me to call him "Michael" or "Mike"), he quickly put me at ease, as getting benefits from the VA is a trying process.

During our discussion, Michael identified the root of my issue—a breakdown in communication with the other firm's staff. His advice to approach one of the partners, backed by his knowledge of the firm's reputation, instilled in me a sense of trust. He assured me that if this approach didn't work, he would be there to talk further.

I followed up on Michael's advice. My attorney was responsive, and we are back on track. I appreciate Michael's honesty, willingness to talk me through the various issues I was having, and consciousness of not trying to, in his words, "poach" a client. I was so appreciative of Michael's integrity and willingness to help despite not getting a new client that I wrote some positive reviews on some websites.

I would have no problem recommending Michael to my friends, and I appreciate his work in helping my fellow Veterans.

Sincerely,

A handwritten signature in blue ink, appearing to read "Glenn McBride", with a stylized flourish at the end.

Glenn McBride

November 2, 2023

ODC c/o
Michael D.J.Eisenberg
Law Office of Michael D.J.Eisenberg
700 12th street, NW
STE 700
Washington DC.20005

Robert Foreman
2830 Shore Drive, unit 208
Virginia Beach, VA, 23451

RE: Statement in support of Michael D.J. Eisenberg.

To whom it may concern:

I am a US Navy veteran who served two tours of duty off the coast of Vietnam in the years 1970 to 1972 being involved in plane guard duty and shore bombardment on different ships during that time period. I left Vietnam via a Coral Sea Helicopter from my destroyer to Da Nang and from Da Nang to Clark Air Force base and then on another plane to the US for my honorable discharge from the Navy.

Years later during a routine physical it was discovered that I had Prostate Cancer, later found to be stage two. I was already receiving some disability payments for PTSD and COPD and this discovery increased my compensation to 100%. Ultimately the cancer went into remission and I rightly lost that 100% compensation rating but still had the service connection which was important in case the cancer returned.

At some point later I was diagnosed with type 2 diabetes and applied for benefits based on presumed exposure to Agent Orange. My claim was denied and my whole situation re-evaluated. I lost my service connection for the prostate cancer in addition to this denial for diabetes and also heart disease. The reason was that I could not prove I was on land in Vietnam. It was obvious I was since I flew out of Da Nang but I was unable to convince the VA.

I then began fighting on my own, writing letters, citing statutes, challenging them to prove me wrong but nothing worked. They continued their denials, never even addressing the most important facts I was making. I felt like I was fighting with a brick wall. Luckily for me I had a friend who had served as a Chaplain and his damages were mental. I explained my frustrations to him and he recommended Mr. Eisenberg whom he had worked with and ultimately was awarded 100% disability. I called Mr. Eisenberg and we worked together seven years on my claim. I thank God as does my wife that we found him.

I have nothing but good to say about my experience working with Michael. We talked as needed about my case but most of our communication was via email. He has an appointment system set up so that if one of us felt a need to talk we could set up a tele appointment. He made it clear to me and also to my wife that if we need him for anything related to our case that we should not hesitate to call him.

We began our business relationship seven years ago. He has always been very direct and straightforward with me. He obviously knows his stuff. I met him personally in DC for our BOV hearing and I liked him as a person. Above and beyond all of that he won my case for me, taking me up to an 80% disability rating as well as getting my service connection for Prostate Cancer reinstated retroactively correcting the errors made by the VA when they severed that connection.

In addition to an increased monthly income Mr. Eisenberg also secured me a significant cash award for that time period when I was incorrectly denied benefits. This was a life changing victory for my wife and I who were living basically month to month financially. Lastly, as bad luck would have it, my cancer did come back and it is unsalvageable but because Michael got that service connection reestablished I am now at a 100% disability rating with a very significant monthly income. I know now that my wife and I can enjoy our life and that when I am gone she will be financially secure.

All we can say is May God Bless Mr. Eisenberg and the good work he does for us veterans. He changed our life 100% for the better.

Respectfully

Robert J Foreman



Robert J Foxman
2830 Shore Drive
UNIT 208
VIRGINIA BEACH
VIRGINIA 23457

RICHMOND VA 230

3 NOV 2023 PM 7 L



GDC c/o

MICHAEL D. J. EISENBERG

LAW OFFICE OF MICHAEL D. J. EISENBERG

700 12th STREET, NW STE 700

WASHINGTON DC, 20005

20005-405275 RMX 1 20/51



4-18-2024

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

Nealey Stapleton
10919 Oakwood Drive
Fairfax, VA 22030

RE: Statement in support of Michael D.J. Eisenberg

To Whom It May Concern,

My name is Nealey Stapleton, and I own On Track Organizing, LLC. I am a professional organizer and have been in business since 2007. I help my clients with decluttering, time management, information management, space planning, and storage solutions.

I was hired by Michael Eisenberg in August of 2022 to help him with cable management, organizing office supplies, paper management and general home office organization. Since then, we generally meet about 2 times per month for 2-3 hours to accomplish these goals and to help him keep his office organized.

More specifically, we have better organized his home office so that Michael can locate things easily and operate his business more efficiently. I think being organized makes for an improved lawyer who is on top of his duties and Michael clearly cares about and does this. In addition to hiring me, Michael keeps a well organized calendar and is very technologically savvy.

In my experience, it is clear that Michael cares deeply about the work he does and the clients he serves. He attends many conferences to further his knowledge, make new connections and improve his business. He has always treated me with respect and kindness. He regularly asks how my family is doing and offers to make me coffee during our morning organizing sessions. We work well together and he is very easy to get along with. He is communicative, responsive and pays me on time.

Overall, I find Michael to be very funny and kind-hearted. If I had a problem, I would feel comfortable going to him for advice. He seems to have a good relationship with his wife, who I have met a few times. He also has 2 dogs that he adores and takes good care of. In my opinion, Michael is a good person and I look forward to continuing working with him.

Healey Stapleton 4-18-24

Sharon O'Neal
41 Scenic View Drive
Martinsville, VA 24112

To Whom It May Concern,

My name is Sharon O'Neal. I am the widow of Jonny O'Neal. I met Mr. Eisenberg through Tammy Mitchell. Tammy had suggested I speak with Mr. Eisenberg about a possible malpractice complaint my husband had against the Department of Veterans Affairs. At no time did Mr. Eisenberg ever solicit his services to me.

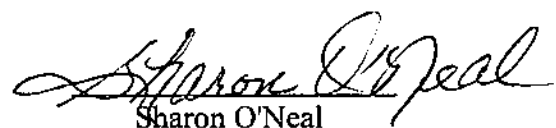
Mr. Eisenberg provided me with a free telephone consultation. I was able to express to him the wrongdoing I felt the VA had committed against my husband. They had not properly contacted my husband in a timely fashion regarding the cancer they found in an earlier screening. Their failure led to my husband's unnecessarily early death.

Mr. Eisenberg expressed that he thought he could help me and my family. He explained thoroughly how the process works, his services, and what to expect if I hired him to take the case. I hired Mr. Eisenberg. He sent me a contract, I signed and returned it, and he then successfully won my case. I have nothing but positive thoughts about Mr. Eisenberg and his services. He was thorough in his explanations and kept me timely informed.

As a side note, my relationship with Tammy and Mickey Mitchell is strained. In addition to unusual communications, they stopped me several times at a Walmart in Crab Orchard, WV. They would routinely speak ill of Mr. Eisenberg before they later fired him. I have severed communications with them because they don't seem to have a grip on reality.

Mr. Eisenberg is a great representative of his profession. I appreciate that Mr. Eisenberg will call me from time to time to see how I am doing. I am grateful for his help.

Sincerely,


Sharon O'Neal

Date

12/15/22

10/17/2022

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

Patrick Withrow
100 Haverford Ct.
Winchester, VA 22602

RE: Statement in support of Michael D.J. Eisenberg.

Hello,

I am Patrick Withrow. I currently work as an Export Compliance Officer with the United States Department of Commerce, Bureau of Industry and Security. However, from January of 2020 to September of 2020 I worked as a law clerk for Michael D.J. Eisenberg.

My work for Mr. Eisenberg of one of many short-term jobs and internships I worked while in law school, but it was unquestionably the best of them. I spent most of my time with him researching and writing legal briefs for cases before administrative law judges and before state and federal judges, including one brief for a writ of certiorari to the United States Supreme Court.

~~Mr. Eisenberg was an ideal mentor for helping to improve my legal research and writing~~
skills. The work he assigned was always significant, never trivial, or minor assignments as I have been assigned in other legal student jobs. He was always very responsive with reviewing of drafts and with providing constructive feedback, but also very patient when dealing with any mistakes or issues in my performance. He was adept at discussing issues with me in a manner that made me feel as though 100% of his attention was focused on me and on what we were

discussing. My legal writing skills improved more under nine months of his tutelage than with three years of legal research and writing classes. I would happily work for Mr. Eisenberg again.

Best Regards,

A handwritten signature in black ink that reads "Patrick Withrow". The signature is written in a cursive, flowing style with some capitalization and a distinct "P" at the start.

Patrick Withrow

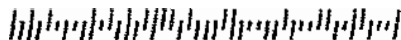
Patrick Withrow
100 Haverford Ct.
Winchester VA 22602

NOVA 220

18 NOV 22 PM 04

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

RMX 129/51
20063-405275



August 6, 2023

ODC c/o

Michael D.J. Eisenberg

Law Office of Michael D.J. Eisenberg

700 12th Street, NW STE 700

Washington, DC. 20005

Chief Warrant Officer 3 Justin M. Ermels

6624 Peckham Street

Johnston, IA

50131

RE: Statement in support of Michael D.J. Eisenberg

To whom it may concern,

My name is Chief Warrant Officer 3 (CWO3) Justin M. Ermels. I have been serving active duty in the United States Marine Corps since September of 2003 until present. Serving my time in the Marine Corps as a motor transportation technician until 2013 when I was accepted into the Warrant Officer Program and retitled as a Motor Transport Maintenance Officer. Overseeing and managing the maintenance programs and marines for each unit I was assigned.

In November of 2020 a medical issue occurred with my back and, after going through all the perquisites of physical therapy, pain management and medications, it was eventually determined that back surgery needed to take place. In April of 2021 I underwent that surgery in an attempt to correct the injury that occurred. While the surgery, for the most part, was successful there was still pain. As I endured the recovery process, the time came for a revaluation in the spring of 2022. While the extreme pain had been relieved the surgery did not completely resolve the pain shooting through my back, groin and leg. Due to this, I was forced to be placed on an Informal Physical Evaluation Board (IPEB) to determine a fit for duty status which would determine my eligibility for continued service. The IPEB would recommend either "medical retirement", which would allow me to receive my pension and benefits at a reduced pension, "medical separation with severance without benefits" or placed into a "presumed fit" status (for those already approved for retirement) in order to complete my time until retirement. I was anticipating the "presumed fit" outcome due to me already being approved for retirement prior to me being placed on a medical board. This was not the case.

In September of 2022 the IPEB came back with a "medical separation with severance without benefits" determination. I was devastated. Just after my 19 years of service in the Marine Corps, I was being told "thank you, but good day" with nothing to show for it. No pension. No benefits for myself or my family. After over 19 years of multiple deployments while we were at war, time away from my family, missing the birth of my youngest daughter, missed funerals, missed weddings, missed growing with my kids and wife. I was being shown the exit.

I declined the informal board's recommendation and requested a formal board to take place. When I requested this in September of 2022 I was assigned a Judge Advocate General (JAG) attorney to represent me. As the JAG and I talked, I brought up my concern asking why I wouldn't have been placed in the "presumed fit" status for having already been approved for retirement. He made the claim that it was because I wasn't already over 20 years of service. This JAG did not provide me with any optimism that he could get it overturned as he believed a service member had to be past 20 years to be placed into the "presumed fit" status. It was at this point, October/November 2022 time period; I sought the services of Mr. Michael Eisenberg.

I retained Mr. Eisenberg due to not having a remotely good feeling that the Department of Defense appointed attorney could provide any assistance with my case. Upon hiring Mr. Eisenberg he collected all my information, historical documents, files, etc., over the last two years. Over the course of the next few months we stayed in constant contact via either e-mail or phone conversation. Typically, I was on three-way calling with my wife to help ensure our questions were being answered and that information was being disseminated. For three months I didn't know if I was about to get kicked out of the service with nothing to show for it but separation time from my wife and kids. All that kept going through my head was "why am I still even doing anything if I am getting kicked out anyway"?

During the time from September 23rd, 2022 when I declined the IFEB's recommendation and December 15th, 2022, the date of my formal board, I was in disarray. Multiple e-mails would be sent to Mr. Eisenberg during this time period as well as phone calls. Whether it was himself or an individual in his office, I would get a response back within a 24 hour period; calming me and my wife's nerves.

On December 15th, as I was awaiting my turn in line for my formal board hearing to take place, I was on the phone with Mr. Eisenberg. It was about 15 minutes prior to my board convening. We spoke and he stated that he was already in touch with the President of the Formal Physical Evaluation Board, a Colonel in the United States Marine Corps. During this discussion he, Mr. Eisenberg, brought up the fact that I was already approved for retirement and under the current orders and directives I should have been placed into a "presumed fit" status to fulfill retirement and complete my 20 years of service. This is something I'm certain the JAG lawyer, a Major at the time, would not have even attempted as he believed that I didn't fall under that directive since I was not at 20 years of service yet. Upon hearing, and being presented, this information the President of the Board informed Mr. Eisenberg that he would be placing me in the "presumed fit" status to fulfill retirement. An anticipated 45 minute to one hour hearing turned into fifteen minutes of formalities. Mr. Eisenberg not only ensured that I could retire with my head on my shoulders, but he also pointed out a flaw in the system and its process for physical evaluation board which completely disregarded the fact that the service member was already approved for retirement. This outcome took the biggest load off of my shoulders. The stress that had been built up due to this situation I was in had been relieved due to the efforts of Mr. Eisenberg. I was now back on track with my career and could conclude my 20 year career in the Marine Corps on a positive note.

Hiring Mr. Eisenberg and his team was by far one of the best investments I have ever made. He and his team were invaluable to me and my family during this enduring time in my career. I

would have rather been deployed to the Middle East again, than go through the stress this situation caused me. I am proud to say that on October 1, 2023; I will be officially retired from active duty in the United States Marine Corps after 20+ years of service due to Mr. Eisenberg and his efforts. I have had multiple marines reach out asking me about my case, and I have been more than willing to recommend Mr. Eisenberg and his services.

I give my fullest support in Mr. Eisenberg and his team in what they constantly strive to do, look out for the service member.

Respectfully,



CWO3 Justin Ermels

December 7, 2022

Office of Disciplinary Counsel c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

RE: Statement in support of Michael D.J. Eisenberg

Dear Counsel:

I am writing this letter in support of Attorney Michael D.J. Eisenberg. I am an attorney licensed to practice law in South Dakota, the United States Eighth Circuit Court of Appeals, the United States Supreme Court, and the United States Federal Court of Claims, amongst other courts. I graduated from Yale Law School in 1997 and am currently an Equity Partner at Peebles Kidder Bergin & Robinson, LLP. For purposes of this letter, more importantly, I am the stepmother of a combat Marine who served in Fallujah, Iraq and Helmand Province, Afghanistan among other duty stations in the 8 years he served his country. In May 2012, nine days home from a tour of duty in Afghanistan, our son was paralyzed in an automobile accident in South Dakota where we live, in a rollover accident in which he was the passenger. To say that his life and our lives were forever changed is an understatement. Michael Eisenberg agreed to represent our son and provided invaluable assistance in untangling the complex system in which an active-duty Marine injured while on leave receives medical care and is discharged from duty with or without benefits.

Michael's acumen and skill in navigating the systems of the Marine Corps, the Navy, and the Veteran's Administration, as well as multiple hospital systems to ensure that our son received the best medical care available at a private facility and then later at Palto Alto VA Polytrauma and Spinal Cord Injury Unit, in ensuring he was determined to be injured in the Line of Duty, and in appealing an initial disability determination that did not accord our son all of benefits he so rightly earned through his service was tremendous. As result of Michael's dedication, perseverance, and tireless efforts on behalf of our son, he received full retirement and disability benefits and special pay. This was no small feat when actors within the system were threatening during the process of appeal that because our son had not yet been discharged from active duty, they would ensure he was transferred back to California in a wheelchair to serve until the discharge and appeal process was completed, and demanding he appear in Maryland for the appeal in person, despite being a new paraplegic who was also managing Traumatic Brain Injury and complex combat PTSD. Michael was responsive,

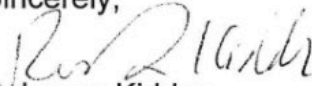
professional, and tireless in his dedication to our son as his client. Today, because of Michael's efforts, our son is living a good life, despite the challenges he faces.

In my lifetime, I have worked with many attorneys, both as a person and as an attorney. Michael was professional, responsive, and timely with pleadings and with communicating with our son and us. His legal advice was on point. Most importantly, he worked tirelessly to advocate for our son's best interests and guided us through the process of obtaining medical care and the military benefits for our son that he was entitled to by law.

Please feel free to contact me if I can provide any additional information about this letter of support or our experience with Mr. Eisenberg.

Thank you for taking the time to review this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Rebecca Kidder", written over the printed name.

Rebecca Kidder
24866 N. Star Dr.
Custer, Sd 57730
rkidder@ndnlaw.com
(605) 484-2761

January 11, 2023

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

David A Lambdin Jr
5160 Ardmore Drive
Orlando, FL 32792

RE: Statement in support of Michael D.J. Eisenberg.

I am writing this document in support of Michael DJ Eisenberg as an excellent Legal Attorney.

Michael D J Eisenberg has represented me as legal counsel with the Veterans Administration for ten years.

The entire time of his representation he has been competent in his statement of my case and actively engaged in pursuit of it's rightful legal rulings and completion.

Micheal has been courteous, caring, punctual, articulate and factual in all of his dealings with me either in person on through long distance means of communication.

Michael has succeeded in obtaining me a 100% disability rating and back pay on my VA appeals case which other representation was unable to achieve after thirty plus years of denials by the lethargic overburdened VA appeals court process.

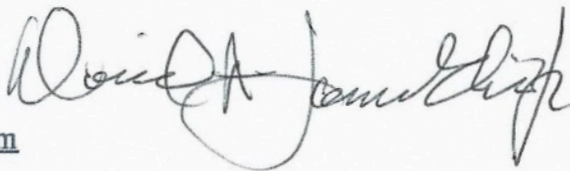
Micheal continues to represent me in other ongoing VA related compensation matters.

I trust Michael DJ Eisenberg to do the best job at representing my VA Disability appeals to the very end.

I am willing to give personal testimony under oath if necessary.

Sincerely

David A Lambdin Jr
(907)738-3106
captaind80@hotmail.com

A handwritten signature in dark ink, appearing to read "David A Lambdin Jr", written over a horizontal line.

25, August 2023.

ODC c/o

Mr. Michael D.J. Eisenberg

Law Office of Michael DJ Eisenberg

700 12th Steet, NW suite 700

Washington, DC 20005

My name is Antonio Joseph Martin.

I am a Retired USArmy Veteran, Active Duty In Iraq, 2009-2010.

I retained Mr. Eisenberg in April 2014, to assist me with my USARMY MEB/PEB.

In 2009 In Iraq, I had a accident and incurred TBI and Several orthopedic injuries while on Combat Mission, from a motor vehicle accident(MVA), which led to disability.

I was MEDEVAC to LAMC and then sent to DDEAMC for MEB. 2010 REFRAD to the Army National Guard.

Due to my injuries, I did Experience difficulty with the MEB process.

In 2014, while serving in the Army National Guard, I was required to to obtain IME/IMR LEGAL and Medical representation at this time for the MEB/PEB BOARD.

MR.EISENBERG Attended my. 2015 MEB/PEB BOARD in SA, Texas, and coordinated the correction of my USARMY Record, before the USAPDA BOARD(USARMY PEB).

As this is a IDES System INTEGRATED USVA, Mr. Eisenberg had to prepare, all the records, from two different Medical -systems, for both USARMY AND USVA/USVBA.

MY USARMY NON-COMPENSABLE RETIREMENT, DUE TO DISABILITY, CAME 19JAN2016, FROM THE ARMY BOARD.

MR.EISENBERG APPEALED TO THE COURTS, USDC, USCA,USCVC, USABCMR, USVBA, USVA, USANG-TAG, USCFC,USBVA, and USCAVC.

Currently, My CASE is Pending, Evaluated and considered to be PDRL-Compensable disability retirement, By the Court, the decision has Not been made final, as of this date.

Through this entire case,for almost Ten Years. I have received calls and correspondance, several times a month, from MR.EISENBERG, And the level of dedication, professionalism, support, and personal attention from this office, has been consistently at 10/10 level, or above.

I have TBI disability deficits from my Military Service, so it not possible for me to Represent myself in this matter.

Mr. Eisenberg has not charged me for his office hours and legal services since 2014, even though he is dedicated several 100's of hours to this case, our appeal and corrections to the record are ongoing, and

djm

we are confident that the resolution of this case will be an improvement of the official U.S. Army status of 2014.

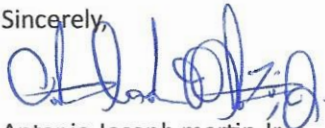
This is not a simple correction of record, this is a complicated case with many unorthodox movements, that requires much legal care and attention to detail, to address the many issues of this case.

If I did not have the representation of Eisenberg Law, and Mr. Eisenberg, I would be irreparably harmed.

There is no "pro-bono" Legal asset for Veterans, and No Lawyers work on a restricted pay structure, as this lawyer does.

Cordially, and

Sincerely,

A handwritten signature in blue ink, appearing to read "Antonio Joseph Martin, Jr.", with a stylized flourish at the end.

Antonio Joseph martin,Jr.

USARMY VETERAN,OIF9.2

..

..

Gwendolyn Layette Moore, RN, BSN, MSA

8458 East G. Ave.

Kalamazoo, MICHIGAN 49048

269-352-8457

1-10-24

I am writing this letter on behalf of Attorney Michael D.J. Eisenberg, 700 12th Street, NW STE 700, Washington, DC. 20005, whom I met in January 2012 after working at the Department of Veteran's Affairs for almost 30 years, as a Nurse Manager of the Post Traumatic Stress Unit (PTSD). At that time, I was blamed for something that I did not do, was not guilty of & the Department of Veteran's Affairs in Battle Creek Michigan was trying to fire me & I would lose my retirement. At the time, I also had over 1500 sick leave hours and, over 500 vacation hours. I never called in & was considered to be a model employee with a number of exceptional qualities.

I enjoyed caring for the veterans & staff. Some other jobs that I have had over the years: ICU/CCU Nurse 6 years, Ventilator/ ICU Nurse Manager 10 years, Nurse Educator 10 Years, help started the computer system at the Department of Veteran's Affairs, developed educational programs, Over the CPR program over training for 500 clinical staff in Cardio-Pulmonary Resuscitation, Nurse Recruiter, Triage Nurse taking emergency & suicide calls, and you name it I have done it and really enjoyed being a nurse and caring for people. I worked 36 years in hospitals, 30 years at the VA & 6 years in a private hospital. My dream was to retire from the Government.

I was Nurse Manager of a 36 bed PTSD unit the Department of Veteran's Affairs in Battle Creek. One day a patient was being disruptive, acting out & abusive to staff and other residents. I was the Nurse in charge of the unit, but the Psychiatrist was over the entire PTSD unit. Doctors are in charge over the entire unit with the highest degree & the highest pay 3-4 times the salary of an RN. Some of the nurses had hide a pair of leather restraints on the unit, which we were not supposed to have in our procession. We were supposed to be a restraint free environment. All staff were informed of removal of restraints & it was written in the minutes &

everyone was aware, the restraints were sent back to the supply department. (SPD). Two staff RNs that worked on the unit hid the restraints & brought them out during the psychiatric emergency or the take down of this resident. I was blamed for the restraints being on the unit which I was not aware they were hidden. They blamed me also saying I should have overruled the Psychiatrist, who is the head of the unit.

I couldn't believe I was being treated this way by the Department of Veteran's Affairs in Battle Creek. The Department of Veteran's Affairs in Battle Creek had a longstanding history of discriminating against African American Nurses. They had lied on & removed several African American Nurses for things they didn't do or was not guilty of,

I could not sleep at night knowing what happened & this was not true, so I heard about Attorney Michael D.J. Eisenberg, I called him & he agreed to represent me. I won the case, he was totally professional. I told everyone what a great attorney he was & was the best. They also brought in a team of nurses from around the country to be a part of this case, again we won & Attorney Eisenberg was very professional, I was really impressed with his expertise. I was able to leave the heart aches behind me & move on as a result of winning this case, which I knew I was in the right all along. Attorney Eisenberg helped numerous people at the Department of Veteran Affairs. I retired officially 8 years ago. After retirement, I got bored and continued to care for the elderly, and teach Cardio-Pulmonary Resuscitation (CPR) in the community. I am forever in debt & grateful to Attorney Eisenberg. When anyone asked about an Attorney, I always refer them to him, Thank you for allowing me this opportunity to speak on his behalf.

Gwendolyn L Moore, RN, BSN, MSA

X Gwendolyn L. Moore (signature)

July 13, 2022

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC 20005

RE: Statement in support of Michael D.J. Eisenberg

I write in support of Michael D.J. Eisenberg. Like Michael, I am an attorney that practices veterans law. I first met Michael through a mutual friend when I was new to the practice of veterans law. At the time, the mutual friend was the Director of the New York City Bar Association's Veterans Assistance Project. I met Michael in approximately 2018 at one of the semi-annual meetings of the National Organization of Veterans' Advocates (NOVA), which we both attend regularly.

Michael has always been exceedingly kind and supportive of my efforts to start a veterans law practice. He's provided me with very helpful advice and is always generous with his time. Michael is particularly knowledgeable about law firm technology. From the time we first met, Michael has graciously offered to be available any time I wanted to contact him with a question or to seek his advice – an offer I have taken him up on. In my experience, Michael is always available and quick to respond to a query.

I am respectful of Michael's experience and expertise in a very complex legal practice. I appreciate the professionalism and courtesy that Michael has always extended towards me. And I consider myself lucky to be able to count on Michael for his advice and counsel.

Sincerely,

A handwritten signature in black ink, appearing to read "Lonnie S. Keene". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lonnie S. Keene, Esq.
53 Hack Green Road
Pound Ridge, NY 10576

Thomas Fedele
2601 Henry Hudson Pkwy
Apt. 10g Bronx NY 10463

ODC c/o

Michael D.J. Eisenberg

Law office of Michael D.J. Eisenberg

700 12th St, NW STE 700

Washington, DC

July7 2022

RE: Statement in support of Michael D.J. Eisenberg

To Whom It may concern,

Please accept this communication in support of Atty. Eisenberg.

I am writing this letter in support of Atty. Eisenberg as I believe he is one of the finest lawyers I have ever had contact with and have nothing but the most professional relations with him in our business dealings.

I am a Supervising Investigator (Lieutenant) Criminal investigator with the NY state Criminal Investigations Division. I have worked here for the past 20 years. Prior to that was employed as a POLICE OFFICER IN The Norwalk Connecticut police department. Most of my career there was as a detective or sergeant in the Investigations Division.

During my 50 years of police work I have had the opportunity to observe and work with many attorneys ranging from those in private practice to District Attorneys and Federal Prosecutors.

I count Atty Eisenberg as one of the best attorneys I have dealt with. I have known him for over 10 years.

He has always shown himself to be forthwith and honest as well as fully prepared to move forward on exactly what we discussed in my case and he came to the hearings well prepared and well versed on all the aspects germane to the case on hand .

I have had the opportunity to observe his presentation in hearings and have found him to be both honest and forth right. He is the type of Attorney that returns your calls and answers your questions in a manner that explains the situation coherently and efficiently.

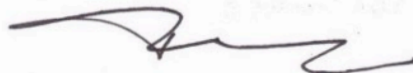
I have retained Atty Eisenberg to represent me at the US Veterans appeal process in Washington and I could not be more pleased with his approach to the case and his professionalism. In both cases he prevailed in my favor and I could not be happier with the outcome. He has also been available for me to discuss other legal issues and questions that have arisen.

I can say that Atty Eisenberg has taken the time out of his schedule on several occasions to answer phone questions that I have had over the course of our relationship and I believe that is a rarity nowadays in terms of people being very busy with other issues. I am heartened by this level of professionalism and would and have recommended him to other veterans.

In closing I find that my professional relationship with Atty Eisenberg has been the type of interaction we always expect from professionals but many times falls short.

Respectfully,

Thomas Fedele

A handwritten signature in dark ink, appearing to be 'Thomas Fedele', with a stylized, flowing script.

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

Kenneth Kuper
124 Brook Circle
Danville, VA 24541

RE: Statement in support of Michael D.J. Eisenberg.

To whom it may concern,

My name is Kenneth Kuper; I am a former Law Clerk for Mr. Eisenberg. I worked with Mr. Eisenberg during the Spring of 2018. I am now an active member of the Virginia State Bar. I recall my time with Mr. Eisenberg fondly. I worked with Mr. Eisenberg on all aspects of his practice, to include meeting over the phone and in person with his clients.

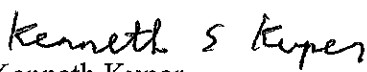
I thoroughly enjoyed my time working with Mr. Eisenberg, learning a great deal about how to juggle the diverse responsibilities of being a solo-practitioner. From my perspective, Mr. Eisenberg was always a zealous, dedicated, and ethical attorney. He would go to great lengths to develop his clients' cases, often working late nights and weekends.

I could tell that Mr. Eisenberg truly cared about the hardships facing his clients. He wanted to obtain the best results for them because he understood how essential their access to employment, disability, and VA benefits were for their livelihoods. Mr. Eisenberg's passion for his clients' hardships drove his hard work and dedication to their cases.

Additionally, I found Mr. Eisenberg to be a responsive, helpful, and attentive supervising attorney. Working with him allowed me to better understand the day to day operations of a law office. I will always be grateful for my time working with Mr. Eisenberg.

If you have any questions or concerns, I can be reached by email at kennkup@mail.regent.edu or phone at 906-360-3905.

Sincerely,


Kenneth Kuper

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 2

(Robert Hirshon affidavit dated May 14, 2024, with
exhibit A and B attachments)

AFFIDAVIT OF ROBERT HIRSHON

**Re: Disciplinary Docket Nos: 2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)**

I, Robert Hirshon, age 76, hereby state under oath that the following facts are true and accurate based upon my current personal knowledge and belief:

1. I have substantial prior knowledge and experience in professional responsibility and legal ethics matters. In addition to having served as President of the American Bar Association from 2001-02, I previously served as President of the Maine State Bar Association. I also recently served a three-year term as a member of the ABA's Standing Committee on Ethics and Professional Responsibility. This committee issues ethics opinions interpreting both the Model Rules of Professional Conduct and the Model Code of Judicial Conduct. I have been teaching introductory and advanced Ethics and Professional Responsibility courses at the University Michigan School of Law for the last fifteen (15) years. More detailed summaries of my background and credentials are attached to this affidavit as Exhibits A (biographical summary) and B (CV).
2. I have had the opportunity to review certain materials relevant to these DC Bar matters, including the relevant DC Rules of professional Conduct, the Specification of Charges, Respondent's affidavit dated May 9, 2024, and submissions provided by Mr. Eisenberg and his prior defense counsel, Thomas B. Mason, to ODC for review and consideration by Disciplinary Counsel prior to formal charges being instituted. I have also had the opportunity to review a collection of letters supportive of Mr. Eisenberg which vouch for his numerous prior practice successes and additionally attest to both his good character and his professionalism;
3. I have been asked to address certain general or preliminary inquiries by respondent's co-counsel, David W. Sumner, Esq., potentially relevant to Mr. Eisenberg's "due process" and other major concerns regarding the conduct of these very lengthy disciplinary investigations;

4. Respondent in his affidavit attests to never being officially offered prior informal dispositions with respect to allegations in any of these captioned matters in advance of formal charges. Several of the disciplinary matters, such as *Swain* and *Glaab*, were in the complaint or official inquiry stage for approximately eight (8) to ten (10) years. Other allegations, such as those in *Faust*, were pending without formal disposition for approximately seven (7) years. The significant delays by Disciplinary Counsel in disposition of these matters is corroborated by the D.C. Bar website, which reflects no reports of prior discipline by Disciplinary Counsel against Mr. Eisenberg during the 17-18 years he has managed his solo practice in advance of the recent formal charges received by Respondent on April 9, 2024;
5. General Inquiry # 1 (by Mr. Sumner), "Was the length of time between initiation of bar inquiries and the filing of formal charges here exceptionally long or in excess of general expectations among ethics specialists or practitioners regarding formal disposition of bar matters after initiation of formal inquiries? Answer: *Although there is typically no statute of limitations per se in disposition of disciplinary matters once initiated, unless imposed by local rule, in my strong opinion the times represented in several matters here appear extraordinarily outside normal expectations for formal disposition of active disciplinary matters, giving appropriate regard to the administrative due process rights of a respondent. I do a substantial amount of reading of ethics opinions and reports in preparation for my ethics and professional responsibility courses that I teach and I have appeared as an expert on ethics matters approximately twelve (12) times in federal and state courts over the last ten (10) years. I personally have not seen or reviewed any prior cases from any state or jurisdiction wherein the delays between the original bar complaint and formal disposition of charges equaled or exceeded the delays that exist here;*
6. General Inquiry # 2, "Do you believe Mr. Eisenberg was prejudiced by the lengthy delays shown here prior to formal charges? Answer: *Respondent's affidavit provides significant and credible evidence of actual prejudice to his defense of these charges from the undue delays caused by Disciplinary Counsel. It is my personal opinion that the undue delays here did in fact*

substantially impair Mr. Eisenberg's ability to effectively defend against these formal disciplinary charges;

7. General Inquiry # 3, "What is your impression of the quality of some of the information respondent or his prior counsel provided to the ODC previously through numerous letters of support from former clients, colleagues and law students previously employed and mentored by Mr. Eisenberg in his solo practice? Answer: *Mr. Eisenberg has the best mitigation evidence I have seen in my career as to both its quality and breadth. I cannot emphasize this enough. He has supportive letters from former clients, colleagues, former law clerks and practice advisors, retired 2-star generals, wounded combat veterans and other notable references vouching for his competence, his good character and his demonstrated professionalism. This extremely supportive information was likely undervalued or inadequately considered by Disciplinary Counsel during the prior protracted processes. Mr. Eisenberg clearly has very impactful and exemplary exculpatory and mitigation evidence to support his defense of these disciplinary charges;*
8. General Inquiry # 4, "What ethical standards or guidelines are generally applicable to bar counsel in the prosecution of disciplinary matters? Answer: *Disciplinary Counsel are not bound by identical ethical obligations applicable to prosecutors in criminal cases (See D.C. Rule 3.8). However, in quasi-criminal matters such as these, disciplinary attorneys are nevertheless ethically bound to adhere to general rules of "fair play" or fundamental fairness that should be extended to all parties in the disciplinary process. It is expected, for example, that bar counsel will be cognizant at all times that lengthy and unwarranted delays in the disposition of disciplinary matters may unduly prejudice respondents' opportunity to fairly confront or challenge the formal charges. "...An unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony available at an earlier time to meet such a charge."* See Rule 32 (commentary), ABA Model Rules for Lawyer Disciplinary Enforcement (2020 Ed.);
9. General Inquiry # 5, "As a general rule, should factual allegations or contentions be included in formal charges if highly credible or unimpeachable or incontestable evidence has been presented to bar counsel in the pre-charging stages indicating that certain allegations are

without substantial merit? Answer: *All the allegations in a formal complaint should be reasonably supported by credible, reliable evidence and probable cause. It would generally depart from interpretation standards applicable to evaluating professional misconduct for bar counsel in disciplinary processes to include in formal charges factual allegations or contentions that have been clearly or powerfully discredited in pre-charging investigations. Facts or contentions demonstrated in the pre-charging stages to be clearly incorrect or unreliable, should not be included in formal disciplinary charges, whether they are the result of inadvertence, possible bureaucratic inefficiencies or failure of bar counsel and staff to conscientiously review or evaluate all the relevant evidence;*

10. General Inquiry # 6, "Is it improper for an attorney to seek collection of attorney fees or costs that are due under a binding contract of representation through use of legal means such as small claims court or as a last resort garnishment, if informal attempts at collection have failed?

Answer: *It is not unethical for an attorney to pursue collection actions for fees and costs that he reasonably believes remain due and owing under an enforceable contract of representation under circumstances where fee arbitration is not mandated specifically by local rules or required by the representation agreement. Solo practitioners, for example, may not have the resources or income to continue to offer valuable services through their practice if they are unable to pursue collection processes for fees and costs where circumstances warrant those interventions. Obviously, reasonable attempts should be made to resolve the matter informally before recourse to legal collection processes.*

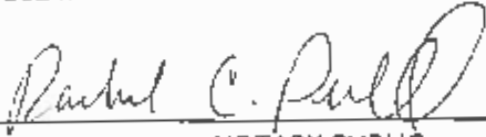


■ ■

COUNTY OF WASHTENAW

STATE OF MICHIGAN

under oath this 14 day of May 2024.



NOTARY PUBLIC

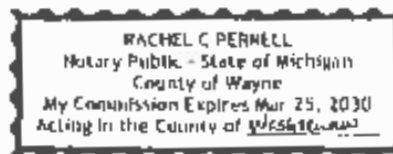


EXHIBIT A

At the University of Michigan Law School, in addition to teaching both basic and advanced courses on ethics and professional responsibility, I was the law school's "Co-Director" of the State Bar of Michigan's Professionalism in Action Program presented at the law school during 2015-2018. Additionally, I have volunteered my time to the Michigan Supreme Court Board of Law Examiners and provided them with comments and suggestions to the proposed ethics and professional responsibility questions and model answers for the Michigan Bar Examination.

My legal experience includes thirty years of practice in the Portland, Maine law firm of Drummond, Woodsum & MacMahon. My management responsibilities at the firm included advising the firm's lawyers on their ethical responsibilities as described in the Maine Code, and, subsequently, the Maine Rules of Professional Responsibility. Also, I served as the CEO of a 75-lawyer law firm and the COO of a 370-lawyer regional law firm, both headquartered in Portland, Oregon.

As a result of my various positions as a practicing lawyer, law firm manager (CEO and COO), law school professor teaching ethics and a law firm consultant, I have substantial familiarity with the administration of the rules of professional conduct.

During the period of time that I was a practicing lawyer, I was the President of the Maine State Bar Association, the Maine Bar Foundation, and the American Bar Association ("ABA"). While serving as President of the ABA, I appointed a committee to revisit Model Rule 1.6 for consideration of possible amendments. The current version of Rule 1.6 is a result of this Committee's recommendations. Prior to serving as President, I was chair of the ABA's Pro Bono Committee. I was the primary author of and floor manager for Model Rule 6.1.

As a former ABA president, I am a life-long member of the ABA's House of Delegates. I have personally participated in the debates which have amended and adopted various Model Rules.

Presently, I am a member of the American Law Institute, which drafts the various restatements including the Restatement of the Law Governing Lawyers. I recently served a three year term as a member of the ABA's Standing Committee on Ethics and Professional Responsibility. This committee issues ethics opinions interpreting both the Model Rules of Professional Conduct and the Model Code of Judicial Conduct. Additionally, the Committee reviews and proposes amendments of the Model Rules to the ABA's House of Delegates. I have prepared, with others, amendments to the Model Rules 1.4 and 5.5

I have participated in numerous CLE panels and delivered many presentations focused on legal ethics and professional responsibility. I received a B.A. from the University of Michigan in 1970 as well as a J.D. in 1973, before returning to my home state of Maine to practice law.

EXHIBIT B

ROBERT E. HIRSHON

1015 Olivia Avenue
Ann Arbor, MI 48104
207-329-9471 (cell)
Email: RHirshon@hotmail.com

Robert E. Hirshon is an internationally known lawyer, writer and speaker. He practiced law for 30 years in the Portland, Maine law firm of Drummond, Woodsum & MacMabon, P.A. Hirshon served on the firm's Board of Directors and was Chair of the firm's Financial Services Practice Group. Hirshon served as President and Chief Executive Officer of the Maine State Bar Association, the Maine Bar Foundation and the American Bar Association. As President of the American Bar Association, Hirshon was the spokesperson for the world's largest professional association and determined how and when the Association should speak on important national and international issues such as the profession's response to the September 11th tragedy and various corporate scandals. Under his leadership, the Association redesigned its annual meeting, automated its presidential appointment process and focused upon the issues surrounding law student debt and the professional ramifications of increasing billable hour requirements. During his three years as an officer of the ABA, he traveled to numerous countries, meeting with judges, members of the bar, and political and corporate leaders.

Hirshon served as the CEO of Tonkon Torp LLP, an Oregon law firm of 70 lawyers, eight senior managers and 90 staff members. At Tonkon, he restructured the firm's administrative departments, oversaw a major technology initiative, facilitated the adoption and implementation of the firm's strategic plan, created a speaker's bureau focusing on professionalism and helped to design and implement a system of partner peer review. Under his leadership, Tonkon Torp launched an ambitious diversity program, embraced a new pro bono policy based upon Model Rule 6.1 and redesigned its budgeting process to provide for greater transparency and accountability. During his tenure, the firm enjoyed record increases in both reserves and per partner profits.

Hirshon also served as the COO of Stoel Rives LLP, a 370 lawyer Western regional law firm with offices in 11 cities and seven states. At Stoel, his responsibilities included supervising the senior administrative directors, providing support to the firm's departments and committees, operational oversight of the firm's offices and participation in the firm's Executive and Retirement and Investment Committees.

Presently, Hirshon is the Frank G. Millard Professor from Practice at the University of Michigan Law School where he teaches courses on professional responsibility and the business of lawyering. He also serves as The University of Michigan's Special Counsel on Developments in the Legal Profession. Additionally, Hirshon is the CEO of The Wein Hirshon Charitable Foundation. The Foundation provides grants to nonprofit organizations pursuant to its charter. Hirshon has complete management responsibility for the foundation and is directly involved in the administration of grants; he oversees the investment strategies of the endowment. Hirshon also serves as a consultant and expert witness to law firms on management and ethical issues.

Hirshon is the recipient of several honorary degrees. He has substantial litigation and legislative experience. He has represented business entities and associations, has testified in countless legislative hearings in both state legislatures and Congress and has worked closely with the members and staff of both major political parties.

U.S. Court of Appeals for the First Circuit
U.S. District Court, District of Maine
State of Maine

EDUCATION:

Law School	University of Michigan Juris Doctor Editor, Michigan Journal of Law Reform
Undergraduate	University of Michigan B.A. with Distinction Major: Political Science

AFFILIATIONS:

American Bar Association
Maine State Bar Association
American Law Institute
Pi Sigma Alpha

EMPLOYMENT:

2009 - Present	University of Michigan Frank G. Millard Professor from Practice and Special Counsel on Developments in the Legal Profession The Wein Hirshon Charitable Foundation, CEO Management and investment responsibilities
2014 - 2019	Haim Striks School of Law, College of Management Academic Studies, Visiting Professor of Law, Israel
2009 - 2018	Verrill Dana LLP, Counsel, regional law firm headquartered in Portland, Maine
2011 - 2017	Peking University School of Transnational Law, Adjunct Professor of Law, China
2007 -2008	Stoel Rives LLP, COO Administrative responsibilities for 630 employees
2003 -2007	Tonkon Torp LLP, CEO Management responsibilities for 166 person law firm
2003 -2004	AFFECT, General Counsel
1973 -2003	Drummond, Woodsum & MacMahon, P.A. Business and insurance litigation, regulatory and legislative advocacy with mediation and arbitration experience. Member of the firm's Board of Directors and helped create and was first Chair of Financial Services Practice Group.
1988 - 1993	Adjunct Professor of Law University of Maine Law School

Courses Taught: Negotiations and Trial Practice

SERVICE TO THE LEGAL PROFESSION:

Current positions within the American Bar Association:

- Member, House of Delegates
- Member, ABA TIPS Committee
- Member, TIPS Committee on Ethics and Professional Responsibility

Other positions:

- Volunteer commentator for Michigan Supreme Court Board of Law Examiners (Ethics and Professional Responsibility)
- Michigan's State Bar's 21st Century Practice Task Force

Previously held positions within the American Bar Association:

- President (2001 - 2002)
- President, ABA Fund for Justice and Education
- Chair, ALI-ABA Committee on Continuing Professional Education
- Ex-Officio Director, American Bar Endowment
- Advisor, Committee on Issues of Concern to the Legal Profession
- Member, Standing Committee on Ethics and Professional Responsibility
- Member, ABA/TIPS Committee, Tort Trial and Insurance Practice Section
- Advisor, Standing Committee on Delivery of Legal Services
- Chair, Steering Committee of ABA Blueprints Project
- Member, Board of Directors, American Bar Foundation
- Ex Officio, Executive Council, National Conference of Bar Presidents
- Chair, Membership Task Force, Section of Legal Educ. & Admissions to the Bar
- Chair, Second Season Commission
- Chair, Standing Committee on Membership
- Chair, Tort & Insurance Practice Section
- Member, Advisory Committee on Law Library of Congress
- Member, Asian Law Advisory Council
- Member, Asian Law Initiative Council
- Member, Special Committee on Electronic Citation Issues
- Member, Standing Committee of Legal Aid and Indigent Defendants
- Member, Commission on the Renaissance of Idealism in the Legal Profession
- Chair, Section Officers Conference Planning Committee
- Nominating Committee, House of Delegates
- Chair, Standing Committee on Lawyers' Public Service Responsibility (Pro Bono Committee)
- Chair, Steering Committee for the Center for Pro Bono
- Vice Chair, Public Regulation of Insurance Law, Tort & Insurance Practice Section
- Chair, Int'l Tort & Insurance Law Practice Committee, Tort & Ins. Practice Section

Previously held positions within the State of Maine:

- President and Director, Maine Bar Foundation
- Chair, Maine Bar Foundation's Bankers' Advisory Committee
- President, Maine State Bar Association
- Member and Chair, Continuing Legal Education Committee, Maine State Bar Association
- Member, Steering Committee to Study Maine Legal Needs

- Member, Maine Legal Needs Study Implementation Committee
- Member, State of Maine Governor's Judicial Selection Committee
- Member, State of Maine's Judicial Committee on Court-Bar Relations

SERVICE TO THE COMMUNITY:

- Member, Maine Jewish Museum Board of Directors
- Member, Board of Visitors, Lewis and Clark Law School
- Member, Campaign Cabinet, United Way of the Columbia-Willamette
- Board of Trustees, Oregon Independent College Foundation, Inc.
- Member, Board of Directors, National Constitution Center
- Member, Dean's Advisory Council, University of Michigan Law School
- Chair, Board of Trustees, Breakwater School
- Member, Vice-Chair, Zoning Board of Appeals, Town of Cape Elizabeth, Maine
- Member, AVVO Advisory Board

HONORS:

2014 A.W. Brian Simpson Memorial Award, Student Funded Fellowships (SFF)
 University of Michigan Law School
 2005 Distinguished Service Award, The National Judicial College
 Muskie Access to Justice Award, The Muskie Fund for Legal Service
 Special Award for Support of Military Reservists, Standing Committee of Legal Aid
 to Military
 Muskie Award for Public Service, American Bar Association
 Honorary Degree, Suffolk University School of Law, Boston, Massachusetts
 Honorary Degree, Willamette College of Law, Salem, Oregon
 Honorary Degree, University of Denver School of Law
 Fellow, Maine Bar Foundation
 Howard Dana Pro Bono Award, Maine Bar Foundation
 Reece Smith Special Service Award, National Association of Pro Bono Coordinators
 Fellow and State Chairperson, American Bar Foundation
 Joint Legislative Resolution honoring contributions made to community and legal
 profession, Maine Senate and Maine House of Representatives
 Award for support of Pro Bono Legal Services, Voluntary Legal Services of Northern
 California
 Award of Honor, Armenian Assembly of America
 Award for promotion of equal access to justice, American Bar Association Fund for
 Justice and Education
 Listed in Who's Who in America
 Listed in Who's Who in American Law

RECENT PRESENTATIONS AND PUBLICATIONS

PRESENTATIONS:

AFL/CIO Lawyers Conference: Moderator - I Should Have Just Stayed at Home - The Unauthorized Practice of Law

Maine State Bar Association Annual Meeting: Speaker - The Disruption of the Legal Profession

College of Management Academic Studies, Israel: Speaker - The Future of the Legal Profession: A Global View

American Bar Association, Delivery of Legal Services Committee Meeting: Speaker - Modalities for the Effective Delivery of Legal Services

University of Michigan Law School: Speaker - The Future of the Legal Profession: Scarier than you Think

National Conference of Bar Presidents: Speaker - The Future of the Legal Profession: A Snapshot (regional program)

National Conference of Bar Presidents: Speaker - The Future of the Legal Profession: Why You Should Be Afraid (annual program)

ABA mid-year meeting: Speaker - Alternative Approaches to the Delivery of Legal Services

The Maryland State Bar Association: Keynote Speaker - The New Reality for Law School Graduates, Law Schools and the Bar

John Waldo Ballou Inn of Court: Keynote Speaker - Law Office Management in the 21st Century: Dealing with a Changing Professional Landscape

University of Maine Law School, Maine Law Review Symposium: Moderator - Connecting Law and Legislature: The Legacy of Senator Edmund Muskie

The David Weiner Center for Lawyer's Ethics and Professional Responsibility: Keynote Speaker - The Future of the Legal Profession

University of Michigan Law School: Speaker - Why a Diamond May Not be a Law Student's Best Friend

Barry University, Dwayne O. Andreas School of Law, Florida: Speaker - Branding in Legal Education

Florida Bar Association: Speaker - Law Careers: The Dynamics of an Evolving Profession

Michigan Bar Association and the University of Michigan Law School: Co-Director - Professionalism in Action Program

ABA House of Delegates: Moderator - Legal Education: The States Get Involved

ABA House of Delegates: Moderator - Future of Legal Education

University of Michigan: Moderator - Richard W. Pogue Law Leaders Panel

Shenzhen All Lawyers Association: Speaker - Where We Are Headed: The Ride Down

University of Michigan: Speaker - Morality and Ethics: Not Necessarily the Same

Voluntary Committee of Lawyers: Panelist - Marijuana and Federalism: Is California a Test Case?

Maine State Bar Association: Speaker - Ethical Dilemmas Confronted

Oregon State Bar: Presenter - Futures Conference

International Association of Defense Counsel: Moderator - Alternative Billing Protocols

Hildebrandt International: Panelist - Building Practice Groups in a Mid-Sized Firm

ABA Law Practice Management Section: Panelist - Law Management at a Mid-Sized Firm

Owen M. Panner American Inn of Court: Keynote Speaker - Executive Power Out of Control

Northwestern School of Law of Lewis and Clark College Professionalism Roundtable: Participant in Panel Presentation - Billing Issues and the Ethical Lawyer

Arlington Club: Keynote Speaker - American Judges: Under Attack

ABA Day in Washington: Participant in a Panel Presentation - Student Loan Forgiveness for Public Interest Attorneys

National Judicial College Jackson Lecture Series: Speech - Under Siege: America's Independent Judiciary

Oregon Independent College Foundation and the University of Portland 2004 Ethics Symposium: Panelist - Best Practices Discussion

Oregon Paralegal Association: Speaker - Ethical Rules and Guidelines

Challenges to the Legal Profession: Participant of the Discussion by Members of the University of the Pacific McGeorge School of Law Managing Partners & Faculty

University of the Pacific McGeorge School of Law Faculty: Keynote Speaker

Campaign for Equal Justice 13th Annual Awards Luncheon: Introduction of Keynote Speaker, Oregon Congressman David Wu

Lake Oswego Rotary Club: Keynote Luncheon Speaker

Arlington Club: Keynote Speaker - Travels of an ABA President

Address to the Memphis Bar Foundation: Keynote Speaker

CPR Fall Meeting, Chicago: Speaker - The Unintended Consequences of the Billable Hour

Spring 2003 ABA National Legal Malpractice Conference: Speaker

2003 Equal Justice Conference: Speaker

University of Virginia School of Law: Keynote Address - Take Back the Future

Greater Dayton Volunteers Lawyers Project: Keynote Address - Exclamation Point or Question Mark: What Are You?

The Alexander F. Morrison Lecture, State Bar of California Annual Meeting: Address - Beyond the Billable Hour

ABA General Practice, Solo and Small Firm Section Meeting: Keynote Address - Renaissance Weekend

15th National Workshop for Lawyer Assistance Program: Keynote Address - Leave No One Behind

1st Annual Creating Equal Justice in Montana Conference: Address - The Role of the Organized Bar in Pursuit of Equal Justice

West Virginia Bar Association 116th Annual Meeting: Address - Role of the Profession in Establishing the Rule of Law

Columbia University: Keynote Address - The Constitution One Year After 9/11

Maine Humanities Council and Portland Public Library: Keynote Address - Law and Terrorism

South African Conference of the International Bar Association: Address - Human Rights - An American Perspective

American Bar Association Silver Gavel Awards Assembly Luncheon: Remarks

American Bar Association's Commission on Mental and Physical Disability Law and National Organization on Disability: Presentation of Hearne Award

American Bar Association Pro Bono Luncheon: Remarks

American Bar Association: Address to House of Delegates

American Bar Association Continuing Legal Ed. Program: Remarks - Terrorism in the Rule of Law

John Marshall Award at Supreme Court of the United States: Remarks

17th Annual Livingston Hall Juvenile Justice Award: Address

Dialogue on Freedom: Participation in Program

Billable Hour Task Force Continuing Legal Education Program: Remarks

American Bar Association's Opening Assembly: Remarks

Central Eastern European Law Initiative Annual Luncheon: Remarks

American Bar Association: Keynote Address - Center on Children and the Law

National Conference of Bar Presidents: Opening Remarks - Loan Repayment Workshop

Ilustre Colegio des Abogados de Madrid: Lecture on Terrorism

New York County Lawyers' Association: Rededication Ceremony

National Association of Unemployment Insurance Appellate Boards: Keynote Address

Conference of Chief Justices and Conference of State Court Administrators: Keynote Address

Chattanooga Rotary Club: Keynote Address - 28th National Conference on Corporate Responsibility

Willamette College of Law Commencement: Commencement Address

University of Colorado School of Law Commencement: Commencement Address

Dallas Bar Association Annual Meeting: Keynote Address

Equal Justice Conference: Keynote Address

22nd Annual Cohen Lecture, George Washington School of Law: Keynote Address

Fisk University, Nashville, Tennessee: Discussion with students and faculty

Memphis Rotary Club: Keynote Address

New England Juvenile Defender Center Meeting: Keynote Address

Maine State Bar Association Annual Meeting Panel: Mobilization of the Bar to Provide Legal Help to Military Personnel/Reservists

Maine State Bar Association Annual Meeting Awards Banquet: Keynote Address

Maine Bar Foundation Awards Luncheon: Keynote Address

University of Denver School of Law: Commencement Address

National League of Cities: Keynote Address - Homeland Defense

ALI-ABA Committee on Professional Education: Keynote Address

ABA Commission on Billable Hours: A Billable Hours Speech to In-House Counsel

U.S. Commission on Ocean Policy: Member, Panel of Ocean, Research, Ed. & Policy Organizations

Seeking Common Ground: A General Counsel Roundtable: Address to Participants
Philadelphia Bar Association Tenth Anniversary Public Interest Section Dinner: Keynote Address
ABA Loan Forgiveness and Repayment Fall Meeting: Keynote Address
Equal Justice Conference: Keynote Address
Dispute Resolution Annual CLE Program: Implications for ADR in the Growth of Interdisciplinary Practice
Alliance of American Insurers: Address - Class Actions: Regulation by Litigation
ABA Insurance Industry Project: Address - Staff Counsel Involvement
Armenian Assembly of America Banquet: Keynote Address
University of Denver Law School: Address to Faculty and Students
American Chiropractic Association: Keynote Address to House of Delegates
National Lawyer Referral Symposium: Keynote Address - Referral Systems in the 21st Century
Penobscot County Bar Association: Luncheon Address - Making the Law Work for Everyone
National Conference on Unbundled Legal Services: Keynote Address - Changing the Face of Legal Practice
State Farm Corporate Law Division Program: Address - Your Bar Assoc. - Making it Work for You
The New Jersey Association of Professional Mediators 7th Annual Conference: The Politics of Mediation: Keynote Address
Volunteer Lawyers Project Annual Reception: Keynote Address
Maine State Bar Association: Keynote Address - Bridging the Gap Program
Western Regional Meeting on Improving Legal Services for the Poor: Keynote Address
University of Michigan Law School Inspiring Paths Speakers Series: Keynote Address
Michigan Legal Aid and Defenders Association 90th Anniversary: Keynote Address
American Association of Law Schools: Address to House of Delegates
Maine State Bar Association Winter Meeting: Keynote Address
Maine Volunteer Lawyers Project Annual Meeting Awards Banquet: Keynote Address
Commercial Law Affiliates / 2001 Annual Meeting: Keynote Address
Massachusetts Legal Assistance Corporation: Keynote Address
New Hampshire Bar Foundation: Keynote Address - Judicial Independence
University of Michigan Law School: Commencement Address
The Muskie Access to Justice Award: Keynote Address
Washburn University School of Law: Commencement Address
Salt Lake Regional Meeting on Improving Legal Services for the Poor: Keynote Address
Florida Bar Access to Justice Retreat and Conference: Keynote Address

PUBLICATIONS:

Op-Ed Pieces

Legalizing Marijuana: An Issue that Just Won't Go Away (April 2010)

Independent Judiciary: Vital to Democracy (May 2005)

Honoring Military Lawyers on Memorial Day (May 2002)

Lawyers Volunteers Enrich Communities All Over the Country (May 2002)

Law Day's Dialogue on Freedom (May 2002)

A Victory for Law School Admissions (April 2002)

Billable Hours - Boon or Bane? (April 2002)

On Balance: In a Media-Centric World, Debate Must Balance Emotion with Objectivity (April 2002)

Justice Must Not Be for Sale (Spring 2002)

The Search for Death Penalty Answers Shouldn't Stop in Illinois (March 2002)

Patient's Bill of Rights May Offer Ineffective Remedies (March 2002)

Judicial Elections Ready for Reform (March 2002)

Military Tribunals (February 2002)

Kentucky Juvenile Executions (February 2002)

Judicial Elections (February 2002)

Bring Terrorists to Trial the American Way (February 2002)

Lawyers Must do More to Help Children (February 2002)

Children Alone: The INS and Unaccompanied Minors (January 2002)

Dialogue on Freedom (January 2002)

ABA Task Force Says Use of Military Commissions Justified: Urges Narrow, Limited Use;
Adherence to Military, International Law (January 2002)

Fighting the War on Drugs: Winning the War on Pain (Submitted with AMA President) (January 2002)

Personal View of Pro Bono (December 2001)

End Unfair Tax Penalties for Military Personnel (November 2001)

A Message to Lawyers: Help Those Who Defend America (November 2001)

Calling on Lawyers to Help Assist Victims Families Post 9/11 (November 2001)

Rule of Law Our Strongest Weapon: Response to Terrorism (October 2001)

Suggestions to Ensure That Charitable Giving (Post 9/11) Is Legitimate and Goes Where You Want
It to Go (October 2001)

Encouraging Corporations to Provide Assistance for Victims of Domestic Violence (October 2001)

Encouraging Lawyers to Help Victims of Domestic Violence (October 2001)

Lawyers Can Help: Domestic Violence Awareness Month (October 2001)

Giving with Confidence (Fall 2001)

Supporting Affirmative Action in Law School Admissions (September 2001)

Supporting Effective Regulation of Oxycontin Prescriptions for Pain (Submitted with American Medical Association President) (September 2001)

Encouraging Lawyers to Offer Pro Bono Assistance To Reservists Being Called To Duty Post 9/11 (September 2001)

Encouraging Lawyers to Help Children (August 2001)

“Pro Bono: Aiding Poor. Minorities.” (February 2000)

Additional Publications

“The Legacy of Senator Edmund Muskie.” 67 Maine L. Rev. 2 (2015)

“The Billable Hour is Dead. Long Live ... ?” GPSolo (January/February 2013)

“America’s Judges Under Siege,” Maine Bar Journal (Summer. 2005)

“Reforming Immigration Proceedings for Children: A Speech by the President of the American Bar Association,” Journal of Law and Border Studies (Volume 2, 2002)

“A Few Thoughts on the Importance of an Independent Judiciary,” The Journal of Appellate Practice and Process (Fall 2002)

“A Dangerous Precedent,” The European Lawyer (September 2002)

“Easing Debt Encourages Public Service Careers,” Wisconsin Lawyer (July 2002)

“Billable Hours and the In-House Counsel - A US Perspective.” The Australian Corporate Lawyer (March/June 2002)

“Providing All Americans with a Key to the Courthouse,” Judges’ Journal (Winter 2001)

“Pro Bono: How to Establish a Solid, Vital Program.” 16 Bar Leader 3 (July-August 1991)

“How and When to Intervene in the Insurance Rate-Setting Process,” 3 The Brief 48 (Spring 1991)

“Multi-Party Toxic Litigation,” 2 Maine Trial Practice 21 (February 1986)

“Release of Defendants in Multi-Party Litigation,” 26 For the Defense 27 (February 1984)

“Pierringer Release: Single Tortfeasor Settlements in Multi-Party Litigation” 16 Maine Bar Bulletin 1 (January 1982)

“Anti-Competitive Covenants,” 12 Maine Bar Bulletin 1 (January 1978)

“The Interrelationship Between Exclusionary Zoning and Exclusionary Subdivision Control,” 5 Journal of Law Reform 2 (1972)

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 3

(Declaration of Thomas Mason dated May 21, 2024)

DECLARATION OF THOMAS B MASON

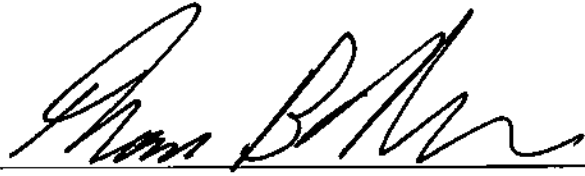
Re: **Disciplinary Docket Nos: 2014-D318 (Glaab)**
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

I, THOMAS B. MASON, hereby state:

1. I have been asked to provide this Declaration by Mr. Eisenberg, though his counsel.
2. I have represented respondents in disciplinary matters in the District of Columbia since the early 1990s.
3. I previously advised and/or represented Michael D.J. Eisenberg from early 2014 through April 8, 2024, regarding multiple DC Bar investigations or inquiries including the *Glaab*, *Swain*, *Faust*, *Mitchell*, and *Brisendine* matters.
4. I do not currently represent Mr. Eisenberg regarding these charged matters. He has indicated to me that he is no longer able to afford our services;
5. I, along with a colleague, submitted a letter to ODC dated November 2, 2023, on behalf of Mr. Eisenberg addressing the Mitchell, Glaab and Swain matters.
6. The current Specification of Charges as to Mitchell, Glaab and Swain does not appear to have meaningfully changed as compared to the draft Specification of Charges which we addressed in our November 2, 2023, letter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May *2*/2024.

A handwritten signature in black ink, appearing to read 'Thomas B. Mason', written over a horizontal line.

Thomas B. Mason

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 4

(Thomas Mason online professional biography)

HWG^{About}[Our
Team](#)[Practices](#)[News &
Insights](#)[Careers](#)[Contact](#)

Partner

Thomas B. Mason

[Home](#) | [Our Team](#) | [Thomas B. Mason](#)

CONTACT

+1 202 730 1302

tmason@hwglaw.com



PRACTICES

Legal Ethics and Malpractice

EDUCATION

Columbia Law School, J.D.

Yale University, B.A., *cum laude*

Thomas B. Mason represents lawyers and law firms on professional responsibility and ethics matters, including malpractice, disqualification, disciplinary investigations and prosecutions, partner admissions and departures, and law firm dissolutions.

CLERKSHIP

Hon. Frank Kaufman, U.S. District Court for the District of Maryland

Tom's disciplinary experience includes matters before the USPTO's Office of Enrollment and Discipline (OED) as well as numerous state bars. He also counsels and advises lawyers and law firms in all of the above areas so as to avoid problems or disputes before they arise. Thomas was named Washington, D.C., Ethics and Professional Responsibility Lawyer of the Year for 2014, 2017, 2019, and Legal Malpractice Law – Defendants Lawyer of the Year for 2018 and 2023 by *Best Lawyers*. He has served as an expert in ethics and related issues on numerous occasions.

- On behalf of a national telecommunications carrier, obtained a dismissal at the pleading stage of a claim for nearly \$10 million in outstanding legal fees purportedly due to the former outside counsel.
- Handled dozens of disciplinary complaints and disqualification controversies, obtaining many outright dismissals and often dissuading opposing counsel from filing motions to disqualify.
- Successfully defeated a motion to disqualify brought by one AmLaw 100 firm against another AmLaw firm.
- Litigated numerous malpractice cases at both the appellate and

trial level. Obtained dismissals of all counts at the motion to dismiss stage on behalf of multiple clients based on ripeness, causation, and damage issues.

- Regularly represents the District of Columbia Public Defender Service, the Legal Aid Society of the District of Columbia, Bread for the City, and other legal service organizations and their lawyers on a pro bono basis.

Prior to private practice, Thomas worked for the Federal Public Defender for the District of Maryland, where he represented clients in a wide variety of cases, including espionage, civil rights, mail and wire fraud, and controlled substance prosecutions. He went on to join the District of Columbia Public Defender Service where he had an intensive criminal trial and appellate practice.

Thomas is a member of the D.C. Bar's Global Legal Practice Committee and a past member of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. Thomas served on the D.C. Bar Legal Ethics Committee from 2006 to 2012, including three terms as Chair from 2009 to 2012. Thomas also served on the D.C. Bar Rules of Professional Conduct Review

Committee from 2002 to 2008 and then again from 2013 to 2020, including terms as Vice-Chair and Chair. During his tenure, the Committee adopted the most extensive revisions to the D.C. Rules of Professional Conduct since the D.C. Bar adopted the Rules in 1991.

Thomas speaks and writes frequently on ethics and malpractice matters. He is a frequent speaker at the D.C. Bar and has also spoken before various sections of the American Bar Association, the Practising Law Institute, the American Law Institute and a number of other bar and industry organizations. He has written on topics such as non-lawyer partners and multiple “of counsel” relationships with different law firms. Thomas has taught ethics and professional responsibility at the Georgetown University School of Law from 2008 to 2016 and has taught various subjects at the National Institute of Trial Advocacy, Columbus School of Law at Catholic University and American University’s Washington College of Law.

— IN THE NEWS

5/3/24 — FIRM NEWS

Fourteen HWG Attorneys Recognized on 2023 Capital Pro Bono Honor Roll

8/17/23 — FIRM NEWS

Best Lawyers Recognizes 19
HWG Lawyers, Names Tom
Mason “Lawyer of the Year”

8/18/22 — FIRM NEWS

Best Lawyers Recognizes 18
HWG Lawyers, Names Tom
Mason “Lawyer of the Year”

2/24/22 — CLE

Getting Admitted to the D.C.
Bar and Avoiding the
Unauthorized Practice of Law

10/22/21 — EVENTS

Using Tech Ethically: A
Lawyers’ Ethical Duties to
Understand Metadata, Digital
Evidence in the Cloud, Secure
Client Data, and More

8/19/21 — FIRM NEWS

Best Lawyers Recognizes 18
HWG Attorneys

1/26/21 — EVENTS

Proposed Outside Counsel
Guidelines

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A Lawyer’s Ethical Duties to
Understand Metadata, Digital
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9/24/20 — EVENTS

Litigation Ethics

8/20/20 — FIRM NEWS

***Best Lawyers 2021* Recognizes
17 HWG Attorneys**

7/14/20 — EVENTS

**Ethics and E-Discovery: How
Much Do You Need to Know?
2020**

6/10/20 — EVENTS

**Leaving Government
Employment: Ethics Issues for
Attorneys**

5/27/20 — EVENTS

**The Ethics of Social Media: A
Summary and Primer**

2/24/20 — EVENTS

**Withdrawing from a Client
Representation**

10/31/19 — EVENTS

**HWG's 2019 Annual CLE Ethics
Program**

10/18/19 — EVENTS

**Ethical Issues in an
Immigration Practice**

8/15/19 — FIRM NEWS

***Best Lawyers* Recognizes
Fourteen HWG Attorneys**

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**ABA Forum on Affordable
Housing and Community
Development Law's Annual
Meeting**

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Legal Ethics and Unauthorized Practice Update 2019

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Leaving Government Employment: Ethics Issues for Lawyers 2019

11/13/18 — EVENTS

Contacts with Represented and Unrepresented Persons: Ethics Issues for D.C. Lawyers

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Engagement Agreements: A Primer

10/23/18 — EVENTS

A Lawyer's Ethical Duties to Understand Metadata, Digital Evidence in the Cloud, Secure Client Data, and More

9/19/18 — EVENTS

Issues for In-House Counsel: Attorney-Client Privilege; Social Media and Enforcement Actions

9/5/18 — EVENTS

Ethical Strategies for Dealing with Challenging or Difficult Clients

8/15/18 — FIRM NEWS

***Best Lawyers* Names Thomas Mason as "Lawyer of the Year" and Recognizes Twelve HWG Attorneys**

6/12/18 — EVENTS

Ethics and the Virtual Practice of Law

5/24/18 — EVENTS

Another Perspective: Views From Outside the Department of Justice

5/10/18 — EVENTS

Complicit? Ethical Challenges in a Connected World

5/8/18 — FIRM NEWS

HWG LLP Receives Top-Tier Rankings in *Chambers USA*

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4/10/18 — EVENTS

Ethical Issues Arising From Lateral Hires, Partner Departures and Law Firm Dissolutions

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The Worst-Case Scenario: How to Handle Ethical Issues that You Hope You Don't Encounter

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Ethical Issues Arising From Lateral Hires, Partner Departures, and Law Firm Dissolutions

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Preparing for the Inevitable: A DQ Motion Boot Camp

10/12/17 — EVENTS

Identifying and Dealing with Ethical Conflicts of Interest

9/28/17 — EVENTS

Ethical Strategies for Dealing with Challenging or Difficult Clients

9/15/17 — EVENTS

Attorney Malpractice Traps in Employment Law

9/14/17 — EVENTS

Breaking Up Is Hard To Do

8/15/17 — FIRM NEWS

***Best Lawyers* Names Thomas Mason as “Lawyer of the Year” and Recognizes Eleven HWG Attorneys**

7/31/17 — EVENTS

Ethical Issues in Law Firm Dissolutions

6/28/17 — EVENTS

Legal Ethics and Tech in the Corporate Governance Sphere

6/14/17 — EVENTS

Ethical Issues Arising from Lateral Hires, Partner Withdrawals, and Law Firm Dissolutions

6/12/17 — EVENTS

For Lawyers Who Lobby (and Their Firms): Legal Ethics and Unauthorized Practice Update

5/11/17 — EVENTS

Confidentiality Obligations Under the D.C. Rules of Professional Conduct

5/10/17 — EVENTS

50 Shades of Grey: Exploring IoT Ethical Issues

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Twenty-Four HWG LLP Attorneys Receive *Super Lawyers* Recognition

HWG

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Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 5

(Declaration of David W. Sumner dated May 21, 2024)

DECLARATION OF DAVID W. SUMNER

Re: Disciplinary Docket Nos: 2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

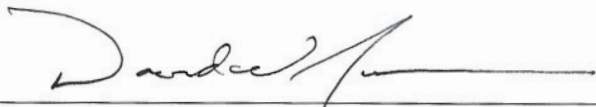
I, David W. Sumner, hereby state:

1. I am a litigation attorney in active practice and currently licensed in seven (7) states: Maryland, Arizona, Ohio, Pennsylvania, South Carolina, Georgia and Arkansas. I am also admitted before the U.S. Supreme Court;
2. I was previously on active duty in the U.S. Army as a JAG officer. I worked in Washington, D.C. at the Pentagon while with Army litigation and also served as Special Counsel, Tort Branch, Civil Division, U.S. Department of Justice;
3. While on active duty, I also served overseas as Chief Trial Counsel (senior prosecutor) for the Office of the Staff Judge Advocate, Camp Casey (2d Infantry Division) in South Korea;
4. I do not hold myself out as D.C. Bar or ethics specialist;
5. I am a solo practitioner with a multi-state medical negligence practice based out of Tucson, Arizona;
6. I first formally "appeared" as co-counsel for Respondent in these D.C. Bar matters on April 18, 2024;
7. I am not biologically related to Michael D.J. Eisenberg, but I do have the privilege of being his stepfather. I have known Michael since 1980, when Michael was then 9 or 10 years old;
8. Since obtaining his undergraduate, Masters and J.D. degrees and later entering private practice (after a judicial clerkship with the Navy/Marine Court of Criminal Appeals), Michael has helped me in my law practice innumerable times over the years, particularly on computer or office technology matters;
9. Michael is known in the legal community as an expert in law office tech setups and upgrades and he possesses impressive knowledge regarding computers, office software and accessory devices and equipment or services to assist lawyers in staying current in this new, fast-moving digital and internet world;

10. I will be assisting Michael in defending the recently filed charges on an entirely volunteer basis without fees or compensation, while also attempting to maintain my own multi-state solo law practice during the progress of these disciplinary proceedings;
11. Michael is a fine man and an honest lawyer. I am troubled by numerous aspects of these over a decade long ODC processes which improvidently include allegations of dishonesty against Michael;
12. I am aware of the financial and emotional impact that this extremely long grievance or disciplinary process has had on Michael and his wife, Mindy. Unfortunately, Michael no longer has the financial means to retain Thomas Mason or Mr. Mason's firm to continue their prior decade long representation of him regarding these D.C. Bar matters;
13. Preliminary investigations and inquiries regarding retention of expert witnesses have indicated that consultation fees for an expert with suitable credentials and gravitas to effectively assist in challenging these disciplinary matters would be billed at an hourly rate in the range of \$500 to \$1000 per hour;
14. The ODC "master files" regarding these specifically charged client matters, *Glaab, Swain, Faust, Mitchell, Brisendine* and *Travis*, previously or recently provided to Respondent, cumulatively consist of approximately 58,673 PDF pages of documents. The rest of the *Mitchell* master file PDF uploads were received on May 16, 2024. The entirety of the *Mitchell* master file from ODC (minus their redacted work product or privileged matters) consists of 11,546 bates stamped pages;
15. My late entry into this matter as counsel - due to Michael's current financial stresses and his loss of prior counsel - plus the overwhelming volume of records that must be reviewed in conscientious detail by me for development of defense evidence and strategies, put Michael at a clear prejudicial disadvantage moving forward in these formal proceedings particularly at this late juncture in what has already been a decade long process for Disciplinary Counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 21, 2024.



David W. Sumner

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 6

(Michael D.J. Eisenberg affidavit dated May 9, 2024)

AFFIDAVIT OF MICHAEL D.J. EISENBERG

Re: Disciplinary Docket Nos: 2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

I, Michael D.J. Eisenberg, age 53, hereby state under oath that the following facts are true and accurate based on my current personal knowledge and belief:

1. I am a solo practitioner and respondent/co-counsel in this matter. I am currently assisted in my practice by several part-time law students from George Mason University Law School (GMU), whom I hire and mentor. In recent years, GMU has allowed students to do paid externships for credit. I am grateful to have worked with so many young, aspiring future lawyers. For over a decade, I have volunteered as a moot court judge for GMU's ASLS Moot Court and Upper-Class Competition, among others. I am also the blog master of an internet blog site titled "The Tech Savvy Lawyer" and host its component podcast. This programming series was recently recognized nationally by the American Legal Tech Awards in 2022 for excellence and its positive contributions to the legal profession;
2. I focus primarily on representing military personnel, veterans, and their families in numerous matters related to military service, such as fitness for service, medical disability determinations, and modification of service or personnel records. Most of my work is representation before the Department of Veterans Affairs. I help Veterans through a complex and often lengthy process trying to get service connections, proper effective dates, and accurate ratings for their service-connected disabilities. I handle social security claims. I also represent federal employees in work discrimination or unlawful termination claims or actions. It is my honor to be able to assist military personnel and service veterans. Several of my immediate family members honorably served in the United States military, including tours in the Korean War and the Vietnam War. My wife, Mindy, has been with the Environmental Protection Agency (EPA) for 27 years. We are a Washington, D.C., civil service family so federal employee issues hit close to home;
3. My federal practice presents numerous and unique challenges to practitioners. Many lawyers will flee from or avoid this type of practice due to the extraordinary delays and frustrations encountered in overcoming federal agency or department inefficiencies or are chased away by the relatively small chance of success when pursuing certain federal claims or determinations, or they become disenchanted having to wait many months or even multiple years before receipt of compensation for clients or attorney fees and costs reimbursement even after successful conclusion of cases;



4. Indeed, those unique challenges result in many potential claimants or petitioners being underserved by the legal community. These daunting challenges have not prevented me from trying to help military personnel, service veterans, civil servants, or other clients when possible. I am proud of the numerous successes we have achieved in the practice of handling these uniquely challenging claims over the last 17-18 years. Unfortunately, the extraordinary time that has passed in most of these bar matters (as examples, ten (10) years in *Glaab* and eight (8) years in *Swain*) from when the inquiries were first reported to me by the ODC has likely prejudiced me in contesting the charges. Such extreme delays in the disposition of these complaints make it more difficult for me to locate or offer supportive or impeaching evidence. Memories fade, witnesses become unavailable, and certain evidentiary leads will now result in dead ends due to the extreme passage of time;
5. The undue delays that exist here from the time disciplinary counsel first received a client complaint to this point of recent formal charging can be fairly characterized as unconscionable. Most, or potentially all, of the stipulated to or otherwise genuinely provable errors are infractions having no substantial or actual long-term detrimental impact on the outcome of the matters. In fact, there are provable material facts demonstrating my persistence for clients in the face of remarkable stonewalling by agencies and resilience in overcoming special case (not lawyer-caused) adversities. Some of these clients received unexpectedly good or reasonable resolutions with my participations in the matters meaningfully contributing to those ultimately favorable outcomes. The full extent of the prejudice the delays by Disciplinary Counsel in pursuing these charged matters have caused my defense of the charges will not be known until I obtain discovery of additional information and documents not previously available to me for years preceding these formal charges;
6. Many of my prior and current clients naturally become disillusioned and impatient with the unavoidable and extremely long delays we see in pursuing their federal claims. Results never come quickly or easily. These cases often require dealing with federal agencies or departments notorious for inefficiencies in handling or processing these claims or in reaching final determinations. It is not unusual for some of the federal claims, even if seemingly quite meritorious, to take 3, 7, or even ten or more years before final determinations or claim success or compensation for the client can be achieved;
7. When I first started my VA practice nearly 17 years ago, I remember during my first National Organization for Veterans Advocates conference (a conference I take on average of at least every three of four conferences held every two years), I recall Ken Carpenter, an esteemed member of the private Veterans Benefits bar, telling a room of possibly 400 attorneys new to field of practice that the process can take about two to ten years before a case is finished. During this time, as regulated by the then-new Veterans' Benefits Improvement Act, attorneys could not charge fees. The law mandates that in almost all cases the fee is contingency fee. I noticed after the first break that well over half of the audience had left the conference;

8. Some of the matters I manage, like federal employment actions, even when factually compelling and justified, more frequently than not, result in no success for claimants, irrespective of the diligence or expertise of counsel applied in pursuit of the matters. They are just extremely difficult cases to win. My law practice is not glamorous or lucrative compared to other practice specialties, but it can be very rewarding in other respects (helping veterans and other worthy clients). I attend CLE courses and national organizational meetings every year to stay current in fields of federal practice. Veterans law remains the primary focus of my solo law practice;
9. Many clients with pre-existing disabilities come to me already hopelessly antagonistic or embittered by the quagmire of federal processes or earlier adverse decisions when proceeding *pro se*. They understandably have little additional tolerance for the inevitable additional bureaucratic delays or typical setbacks encountered while further pursuing their claims or requests after an attorney is formally hired;
10. I am unable to maintain my practice if I do not receive reimbursement for reasonable or necessary costs advanced in these cases. Unfortunately, costs and attorney fee collection efforts are necessary at times in my practice. One mistake in retrospect here was in aggressively trying to recoup costs or fees and seek to have clients honor my fee agreement (that courts, agencies, or defendants had determined previously to be fair, reasonable and enforceable) for these uniquely challenging cases. I have learned that harsh lesson. Nevertheless, I have historically often deferred payment of some of or all of the low special retainer or costs reimbursements to assist the clients having some financial stress. However, as all lawyers sending invoices know or learn, clients can engage in novel and evasive behaviors to avoid reimbursing you for case costs and fees, even in circumstances where no billing error or other anomaly exists to justify them not paying;
11. These cases often require substantial cost expenditures for depositions, transcripts, expert witnesses, cross-country travel for hearings or depositions, and other case management expenses. Unfortunately, the predicted percentage chance of success at inception of many of these claims or cases is not very high. The existence of fee-shifting statutes or the use of a pure (but much higher) contingency fee representation agreement is not adequate incentive to encourage many lawyers (including myself) to accept these very challenging claims for many of the reasons already mentioned above. A hybrid representation agreement, that is, an initial retainer with a concomitant contingency fee (lower than normal) is common and necessary to economically prosecute these cases. Very few of my clients can afford to pursue these protracted claims or cases on a pure billable hour basis. A hybrid agreement, such as the one I typically use, is fair to both the practice and the client, certainly with the risks and incredible challenges associated with these claims. The arrangement gives them access to the hearing room or courthouse, so to speak, in matters, many reasonable attorneys would likely decline if the case were handled on a pure contingency fee basis. My agreement gives them access to an attorney when most lawyers doing this work would be too expensive for the clients to hire on a pure billable hour basis;

12. I have previously admitted to accounting/billing errors and other well-intentioned mistakes related to these bar discipline matters. There are some facts or contentions the disciplinary counsel may have correct, however, there are also numerous specific facts or allegations that are inaccurate or exaggerated or unfair under the circumstances or otherwise reasonably subject to good faith evidentiary and/or legal challenges;
13. I believe the evidence supports that many of the errors were innocent glitches or mistakes not uncommonly seen with a busy and uniquely challenging solo practice. Nothing occurred in any of these matters that constitute fraud, corruption, misrepresentation, fabrication, graft, obstruction, spoliation, criminality, or other conduct upon more detailed scrutiny that impugns my character or integrity;
14. It is overwhelming for a respondent to have these types of bar matters pending against them for any length of time. This is certainly true for well-intentioned lawyers valuing their livelihood, their reputation, and their family. It becomes devastatingly unbearable when these matters go on with no disposition for 3, 4, 7, 8 or 10 years after the bar inquiry has already been initiated by Disciplinary Counsel. I understand that bar counsel cannot predict when a client complaint may be first presented but disciplinary counsel does largely control how efficiently the matters are handled once received. These matters cannot fairly be allowed to hang over respondents for extraordinary lengths of time. There is a danger of real prejudice to the defense of the allegations when these matters are not formally charged until many years (here as long as 8 to 10 years in some cases) after a bar complaint was first received;
15. I already fear that several witnesses are likely unavailable to me currently that would have been available with earlier disposition of these charges;
 - a. Kim Cain. She is a material witness regarding the charges related to Faye Glaab particularly on the alleged conflict contentions. She has proved uncooperative and unreliable with the ODC and will likely be unavailable for defense to obtain key cross-examination admissions. Ms. Cain knows I was gracious for many months regarding her non-payment of costs reimbursements and that no rancor or animosity existed between us when I accepted her friend and colleague as a new client in a separate matter. She would confirm, if being honest, that she encouraged me to also represent Ms. Glaab, was privy to the pre-representation discussions with Ms. Glaab and knew that there were no apparent adverse issues between her claim and Ms. Glaab's future claim, when the dual representation began;
 - b. Kim Cain's Mother. I believe she has now passed away. She would have testified to the quality of work I provided her in her own federal employee matter. This was resolved before her daughter became a client of mine. She would have confirmed my management of her claim was professional in all respects and that I obtained a successful result for her;
 - c. Alana Bergner. She is a former clerk of mine whom I have been unable to reach for over a year and half now. She would testify in detail about the difficulty we were having with Mr. Travis. He also withheld material information from us that was detrimental to his claims. For example, he was discharged for misconduct due

to assaulting/abusing a woman. We learned this only after receipt of his OMPF (Official Military Personnel File), which requires considerable time to obtain after it is first requested;

- d. Chantena Kinney. She was a nurse with the Department of Veterans Affairs. Ms. Kinney passed away within the last year. It was always a joy speaking with Ms. Kinney because I knew every time she was down about work issues, I could make her laugh and feel better. Just as important, I helped her with several work-related matters in her federal employment. I was able to successfully navigate her through two different disciplinary matters. Unfortunately, on the third matter, we were not successful. But I know she was always pleased with my work and the professionalism I provided her;
 - e. Jason Breedlove. Mr. Breedlove is a Veteran of the US military. He was medically retired. I have not been able to get in touch with him. I fear he may have passed away. The injuries he sustained both affected his body and mind. He would have testified to the outstanding work I did to get his proposed discharge from 10% (which would give him only military medical separation benefits) to a 90% rating for military retirement benefits. This gave him and his family important access to Tricare, the military provided medical insurance. He needed this in order to provide chemotherapy to his young son who was suffering from cancer. For a nominal fee, I took his case forward that lasted nearly a decade to achieve important life-saving benefits for his family;
 - f. Robert McCumber. I believe Mr. McCumber, a Veteran of the US Military, passed away a couple of years ago. He was someone I helped several years ago who sent me the following message (before he passed): *It's been some time since you won my appeal and got my 100%. This is just a note to let you know how grateful I am for what you did for me. My cancer of the lungs has Pretty much went on a tear, so I now have a very short time to live, hospice has taken over (sic.) my care so I'm looking at the end game. So, I just wanted to say THANK YOU!* (Note that I corrected most of the misspellings;)
 - g. Richard Hunt: I have lost contact with Mr. Hunt. He was living in Germany when we last communicated, and I believe unresponsive since I tried to contact him last. I had represented him for nearly 14 years before the VA. In one of his e-mails to me, he provided the following: *As far as attorneys go, you were one of the best. Picking me up at the airport and driving me over 100s of miles to my hearings when I couldn't do it. Always knew my case. And you never once didn't reply to my worries or fears. It took a long time, but you never quit on me, and for that I will be always grateful.* (Note that I corrected most of the misspellings;)
16. Actual prejudice from undue delays by Disciplinary Counsel is also evident because the charges include allegations of failing to communicate more frequently or effectively with clients. Client communications can be in writing or through verbal interactions. Not every introductory or substantive conversation gets documented nor is required to be. Recollections on details of conversations and occurrences further disappear with the continuing passage of time, as has occurred here for me and potential witnesses. Furthermore, important data that would be key to defending certain contentions by

Disciplinary Counsel are now irretrievably lost or inaccessible to me;

- 1) Loss of phone logs from Vonage and AT&T. Given the delays or lack of timeliness of the charges, I am unable to get and was unable to preserve call logs. The data would have been unavailable to me years ago also, because of the lengthy lag time between when I first learned from bar counsel that certain facts are in issue and when the events originally occurred, often exceeded two or three years or more.
 - a) Faust: Ms. Faust has not shared that she was calling my office on a near daily basis to "discuss" the ongoing issues at the post office. We were sympathetic to the ongoing daily concerns. We would advise her that she could file a new claim or add it to her existing claims as an ongoing pattern of harassment. However, she continued to incessantly call and monopolize our time away from other time sensitive work. After my associate left the office (for career advancement), Ms. Faust was embittered because I was unable to give her the same amount of personal time due to practice demands, making her even more challenging to work with;
 - b) Glaab: I believe the phone logs would reflect my attempts to contact Judge Momah before the hearing date in question. Without those logs, my defense is prejudiced. The administrative judge would not have likely preserved voice mails I left him;
 - c) Brisendine: I believe the phone logs would reflect our consistent communication that included discussions about his case. This included the nearly three-hour period on a Sunday evening when I was researching and attempting to call various authorities and consulates in order to find him help after receiving an e-mail expressing eminent suicidal ideation. He was in Mexico across the continent from me;
 - d) Swain: I believe the phone logs would reflect our consistent communication as it relates to case appraisal, particularly as we approached settlement discussions;
- 2) Transcripts: There are various transcripts that may no longer be available given the passage of time.
 - a) Swain: I did not order a transcript from the breach of contract trial before Judge Dixon in Washington D.C. Superior Court. I prevailed and did not expect a bar complaint years later;
 - b) Glaab/Mitchell/Faust/Travis/Brisendine: I do not know what transcripts were preserved from proceedings after I was no longer representing these clients. I believe transcripts of subsequent proceedings would likely contain some exculpatory and/or mitigating evidence in my defense;
17. The whole disciplinary process has obviously been a tremendous and constant financial and emotional strain for years. I admit to making some mistakes that resulted in bar inquiries and the need for defense representation. However, the extraordinary elongation of time here between receipt of the bar complaints to formal disposition of the matters did materially add to my defense costs over the intervening years. I can no longer afford the services of my prior counsel, Thomas Mason, a well-respected D.C. based ethics

attorney, or his firm to represent me in these charged matters. Just for representation in the charged matters for necessary or prudent interactions with bar counsel to explain or defend or mitigate the charged misconduct, I have over the last ten (10) years incurred more than **\$400,000** in estimated legal fees and costs;

18. My former counsel frequently highlighted or provided incontestable evidence discrediting numerous factual contentions or allegations asserted by bar counsel and there was unfortunately a lack of suitable interest by bar counsel in seriously considering additional salient facts or exculpatory evidence and this pattern was observed or experienced for years. The voluminous records make it laborious for anyone to find key information, and some key information can be hidden within stacks of data, but that does not excuse bar counsel of ignoring exculpatory evidence when specifically referenced in correspondence and corroborated by records. Many of the factual contentions by bar counsel, alternatively, even if supported by some evidence, appeared appropriate for informal disposition such as diversion or admonitions or reprimands somewhere along the way;
19. This decade long process has been predominantly oppressive, over-arching and punitive in nature with little interest shown by Disciplinary Counsel in genuinely helping me address whatever office practice management issues could be addressed or readily improved through more constructive, rehabilitative, or meaningful interactions or interventions. Over the years, I have always maintained efforts to improve myself as a lawyer and my practice - seeking counseling from the bar both for stress and office management, attending CLEs (although not a requirement of the bar), and even self-assessment with a career coach and a professional office assistant as we all came out of COVID. These are just some of the ongoing corrective actions I have taken to make myself a better lawyer. I have been humbled by having to ask for and receive so many letters of support from current and former clients and professional colleagues;
20. The DC Bar should be a beacon of light for championing concepts of fair play and due process. It is my hope that, going forward, those aspirational goals can truly be achieved.

Michael D.J. Eisenberg

Michael D.J. Eisenberg

COUNTY OF Parker

Texas
STATE OF ~~VIRGINIA~~ ^{PS}

The above individual appeared before me, signed and subscribed to this affidavit under oath this 9th day of May 2024

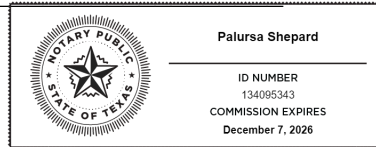
Palursa Shepard

NOTARY PUBLIC

Palursa Shepard

134095343

Notary Public, State of Texas



Electronically signed and notarized online using the Proof platform.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 7

(David Miller [disabled combat veteran] letter of
April 20, 2024)

ODC c/o
Michael D.J. Eisenberg
Law Office of Michael D.J. Eisenberg
700 12th Street, NW STE 700
Washington, DC. 20005

April 20, 2024

David and Barbara Miller
1589 E. Brenda Drive
Casa Grande, AZ 85122

To Whom it May Concern:

My name is David Miller, I am a 100% Disabled Combat Veteran, who served in Vietnam during the Vietnam War. I was attached to the USS Duluth LPD 6, an Amphibious Assault Ship operating within the Intercoastal Waterways of North, South Vietnam, and Cambodia. We carried about 1,200 Marine Soldiers on the ship which we took on Landing Craft during Special Operations (approximately 9 or 10, separate operations), We dropped these Marines on the beach, and returned to the ship, with the dead, injured and anything that needed to be taken back to the Ship.

Having been exposed many times, on a regular basis to Agent Orange containing Dioxin, a known Carcinogen. We were lied to by our Command Staff, that Agent Orange was not harmful to humans. That was a lie, and a cover up that lasted until 1982, when the lie was uncovered by the American Cancer Society. The Conditions I have, including many (approximately 21) of the conditions that are now conditions I deal with daily. I was at a loss as to what I was doing wrong, as to not being able to have my conditions rated.

I searched long and hard for an attorney that could help me to get these conditions rated. I came across Michael Eisenberg and read reviews and made the decision to call and talk to him about my current situation with the VA. I was given a free interview with Mr. Eisenberg, who reviewed my case, and later he agreed to take my case for a very reasonable 20% fee. On any arrearage collected. He also explained the costs that I would be responsible for during the process.

Both my wife and I so appreciate his involvement, in ways most people couldn't understand. The VA required that I go to a 3rd. party disinterested doctor for a thorough exam, to offer their opinion on my existing conditions. All my conditions turned out to be worse, and in some cases, they were much worse than my VA doctors had reported in my medical file. Mr. Eisenberg has always been respectful, honest, caring, concerned, and very well informed. He took the time to explain in detail what would happen in front of the judge.

For ten (10) years our Attorney, Client relationship has been nothing other than completely professional, I have worked with several Attorney's in my 78 years of life. Mr. Eisenberg has proven to be the most important part of the many Appeal prosses we have been through, on so many different occasions. I don't know what all of the Veterans go through with their appeals. If it matters, this Veteran has been through so many ups and downs, excitement, and depression,

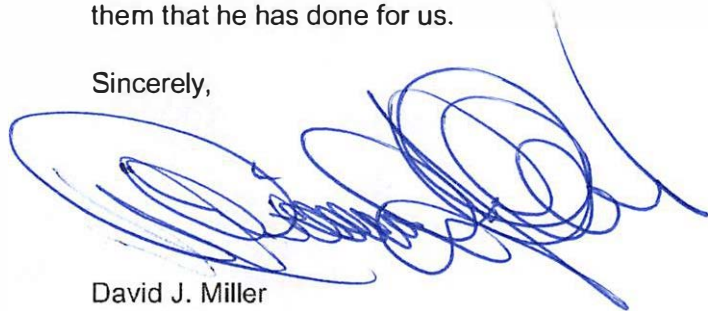
disappointments, and the victory's Mr. Eisenberg and his staff has worked their butt's off to make sure that everything was done the VA way.

Doing anything the VA way is challenging to say the least. Nothing is simple, from the submission of the correct forms to all of the time periods that must be met. I have about 20 different diseases, and conditions. I take so many different medications, it takes 3-4 people to make sure that I'm taking the correct medication at the correct time, as well as getting refills when they are needed.

I take a narcotic three times every day just to take the edge off the pain. I have ten (10) different doctors that take care of my daily issues, and deal with my treatments. This entire process which is going on each day is so difficult. Mr. Eisenberg was there all the way. Doing everything required of him, he was never late or absent from any of the hearings before a judge. The most important point is that Mr. Eisenberg was and is dependable, trustworthy, and very honest.

I could continue for the next 10 years just saying good and positive things about Mr. Eisenberg. We were blessed to meet and work with him for the past 10 years. We are thrilled by everything he has done for us. I have nothing negative to say, as all our interactions have been positive, productive, and rewarding. He got us everything we had been hoping for since filing my first claim in 1975. I have referred many other Veterans to him, because I know that he would do for them that he has done for us.

Sincerely,



David J. Miller
1589 E Brenda Dr.
Casa Grande, AZ 85122

dmiller559@aol.com
1 (760) 777 5008

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit

(VA transcript excerpts)

JUDGE: Of course. Okay. Thank you so much. And, and first to you Mr. Eisenberg, thank you so much for your presentation and preparation for today. I appreciate that. Made for a fruitful hearing.

2023.03.08, Hearing for xxxxxx286S, pg22

JUDGE: All right. Well, very good. Thank you to both of you. Mr. Eisenberg, I want to thank you first for your representation of [REDACTED] here this morning, that was very helpful. And

2023.03.23, Hearing for xxxxxx21c, pg 26

So, once again, I thank you. I thank you, Mr. Eisenberg, for some really helpful thoughts and comments and also for switching because that really did make it a lot easier and allowed us to go forward. So, thank you, both. And if there's nothing further, the hearing will be closed.

2023.01.04, Hearing for xxxxx578C, pg20

JUDGE: -- Mr. Eisenberg, I appreciate what you're doing for our Veterans every day. It's very nice of you.

2023.05.09, Hearing for xxxxx300, pg 16

Thank you for your testimony. It's always helpful to meet Veterans. It's always useful to hear your side of the story so that we can understand the claim a little bit better. So, I thank you for that, and thank you, Mr. Eisenberg, for your representation today.

2023.09.26 Hearing for xxxxxx736S, pg 21

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 9

(Thomas Mason letter to ODC dated
November 2, 2023)

Via Electronic Mail

Julia L. Porter, Esquire
Deputy Disciplinary Counsel
Traci M. Tait, Esquire
Assistant Disciplinary Counsel
District of Columbia Office of Disciplinary Counsel
515 5th Street, N.W.
Building A, Room 117
Washington, D.C. 20001

November 2, 2023

Re: Disciplinary Docket Nos. 2019-D123 (Mitchell); 2014-D318 (Glaab); and 2016-D399/2019-D058 (Swain)

Dear Ms. Tait:

This letter provides Mr. Eisenberg's position with respect to the draft Specification of Charges ("draft SOC" or "SOC") in the above matters.

I. Introduction and Summary of Our Position

After our conversation with your Office on September 20, 2023, we returned to our review of the extensive investigative files in these matters with a view to working with you collaboratively to enable us to advise our client on whether and how to proceed on a possible petition for negotiated discipline under Disciplinary Rule 12.1. D.C. Bar R. XI § 12.1. Unfortunately, although we have not yet had time to conduct a complete review of all the investigative files, at this point it is clear to us that the SOC as drafted cannot form the basis for such a petition.

By rule, a petition for negotiated discipline must contain "[a] stipulation of facts and charges, including citation to the Rules of Professional Conduct that the attorney has violated." *Id.* § 12.1(b)(1)(ii). An attorney petitioning for negotiated discipline must "acknowledge[] the truth of the material facts" underlying the disciplinary charges—to which the attorney must also agree. *Id.* § 12.1(b)(2)(iii). Given the results of our review so far, we cannot responsibly advise Mr. Eisenberg to agree to the factual allegations of the SOC because there are fundamental inconsistencies between those allegations and the *material* facts as we understand them from the record documents. We emphasize "material" because we are not nitpicking the SOC as incorrect with respect to debatable details. We believe the documents contain numerous grave misstatements of material facts that are concretely verifiable on the existing record and not subject to reasonable dispute.

Among the three matters that we have been able to review to date in some depth, the allegations in Mitchell present the starkest contrast with the facts on the record. To take just one example, the SOC's overall factual narrative and the related charges in connection with Ms. Mitchell's workers' compensation ("OWCP") case are—again, we believe, verifiably and beyond reasonable dispute—incorrect in material respects. The SOC essentially maintains that “the OWCP denied Mrs. Mitchell’s second request for reconsideration” on December 2, 2015, SOC ¶ 121, and that Mr. Eisenberg then did virtually nothing until February 2017, when—for reasons unexplained in the draft SOC—he filed a petition for mandamus that was ultimately dismissed because Mr. Eisenberg disregarded a district court order to prosecute it. SOC ¶¶ 122-23. The record is inconsistent with those allegations.

The record reveals that Mr. Eisenberg filed a timely and well-reasoned Request for Reconsideration—what the SOC calls the “second request for reconsideration,” SOC ¶ 121, because Ms. Mitchell had filed a previous one—in the workers' compensation matter on June 26, 2015. Mitchell 4702-10. But we could find no support for the SOC's claim that “the OWCP denied [this] . . . request for reconsideration” on December 2, 2015. SOC ¶ 121. The lone document we located in the record from that date is a decision from the Department of Veterans Affairs (“VA”) Healthcare Network that is entirely unrelated to Ms. Mitchell's workers' compensation case. Mitchell 5668.

The record further shows that, through early 2016, Mr. Eisenberg and Ms. Mitchell had no reason to believe that there was any issue or problem with her Request for Reconsideration. In May 2016, Mr. Eisenberg's office reached out to OWCP for a status update. Mitchell 10011-12. Beginning at that time, OWCP repeatedly engaged in obfuscation and misdirection, ultimately taking the position that Ms. Mitchell's Request for Reconsideration would not be considered on the merits because Mr. Eisenberg had not provided a “notice of representation” until the agency requested it *after* the time for reconsideration had run. *See* Mitchell 10013-50.

Rather than give up, Mr. Eisenberg then filed a Petition for Mandamus in D.C. District Court asking the court to order consideration of his Request for Reconsideration. Mitchell 9002-10. Directly contrary to the allegations of the SOC, *that Petition for Mandamus was successful*. After many months of stonewalling by the agency, about two months after Mr. Eisenberg filed his Petition, *OWCP confessed error* through its actions. It assigned the Request for Reconsideration to a new Senior Claims Examiner for merits review. Mitchell 8979-80. On May 19, 2017, the OWCP issued a new decision on the merits finding that the Request “lacked sufficient probative value to modify the [prior] decision.” Mitchell 8981-84.

There are stark disparities between these record facts and the allegations of the SOC. But one allegation in the SOC that *is* accurate is that Mr. Eisenberg then informed the district court that the Petition for Mandamus was moot. Mitchell 9146. Contrary to implication of the SOC, however, that was not in disregard of a court order to prosecute the case. Rather, Mr. Eisenberg correctly told the court that the Petition was moot because he and his client had *received the relief requested by the petition*. As a result, the district court litigation indisputably *was* moot.

In short, the record indicates that, in an impressive display of persistence and resilience, Mr. Eisenberg cut through a mountain of bureaucratic red tape in Ms. Mitchell's OWCP matter,

prosecuted a difficult mandamus action, and *obtained* for Ms. Mitchell exactly the relief to which was entitled to—merits review of the second Request for Reconsideration. On that hard-earned merits review, she did not prevail, but through absolutely no fault of Mr. Eisenberg.

This is already a long introduction, which is clearly not the place to present our position in detail. But this example from Mitchell is by no means isolated—as set forth in greater detail below, the SOC’s allegations are incorrect with respect to an array of facts and circumstances that are unquestionably “material” within the meaning of Disciplinary Rule 12.1.

Again, we do not claim that *we* have, at this point, a fully evolved and error-free view of the investigative files that you supplied. Law firms often suggest a pace of a bit under a minute per page as a rough guide for document review. At that pace, it would require about 200 hours to review your investigative files in Mitchell alone. We doubt we have invested that much time into *all* of the work presented in this document—which, again, addresses Mitchell, Glaab, and Swain—including record review, legal research, drafting of detailed factual backgrounds, and written application of the law to the facts as we understand them. We have done our best in the time we have had, but you sternly instructed us not to wait until December to respond, so we have been obliged to move more quickly than would ordinarily be advisable. Given what we have found so far, however, our professional responsibility dictates a careful study of the remaining three matters in the SOC, which we have so far reviewed only for triage purposes. We simply cannot conduct that such a review in the timeframe you have imposed. And, in light of our findings to date, we also cannot responsibly advise our client to affirm the “truth of the material facts” as presented by the SOC in matters we have not yet reviewed. D.C. Bar R. XI § 12.1(b)(2)(iii).

We understand that you have indicated that you plan to press forward with the draft SOC as it stands in December. But we would be less than candid if we did not state unambiguously that we think that ill-advised. Again, as set forth herein, the draft SOC’s allegations regarding the three matters we have reviewed contain serious errors subject to straightforward—albeit labor-intensive, given the extensive files here—factual verification. Such factual corrections would make clear beyond reasonable dispute that a number of charges are misplaced. And it seems likely to us that there are may be similar errors in other portions of the SOC. We simply cannot know at this time.

In sum, we would like, as was our goal after speaking with you in September, to find a way to move forward together toward a petition for negotiated discipline. We are profoundly disappointed to find ourselves in a position where we do not think that possible on the basis of the SOC as drafted. We have no choice but to defer to you regarding next steps, but the SOC would require substantial revision before it could form the basis for proceedings under Rule 12.1.

II. General Background and Testimonials

As you know, Mr. Eisenberg has dedicated his career to representing veterans, military servicemen and women, and civil servants, seeking increased medical benefits for former soldiers with service-related conditions and fair compensation for individuals who have faced discrimination in government service. As we expect you are also aware, this is an area in which

few lawyers are willing to practice due to a variety of factors, including the limited means of the client base, the difficulty and complexity of cases, and the relatively low likelihood of success in any given case.

Mr. Eisenberg's business model lets him take on a substantial number of clients while charging them very little. He frequently charges only a small upfront payment and takes a reasonable contingency, from 15-25% in most cases, as well as the possibility of fees under the Equal Access to Justice Act ("EAJA") in some cases. Of course, this model also requires that clients pay the actual out-of-pocket costs of their cases—otherwise, Mr. Eisenberg would soon run out of money and would be unable to continue to provide representation to anyone.

Consistent with his model, Mr. Eisenberg must necessarily take on a considerable number of clients at the same time—the likelihood of breaking even in any given case is small, to say nothing of making a living. This does sometimes lead to errors in his representations. At the same time, however, it has also led to many successes, cases in which Mr. Eisenberg has been able to help people who otherwise likely would not have found a lawyer at all. Our sense is that these successes and the testimonials we have presented have not, to date, factored into your overall assessment of Mr. Eisenberg's work. We would again ask that you give serious consideration to the heartfelt gratitude that many of Mr. Eisenberg's clients have expressed for his work in helping them to procure a measure of justice.

We provided some testimonials about Mr. Eisenberg's successes to you last year and have received many more since. Specifically, in our September 22, 2022 submission regarding the Swain matter, we highlighted eleven letters supporting Mr. Eisenberg's personal character and professional conduct. These letters demonstrated how Mr. Eisenberg is a dedicated advocate for people often underserved by other lawyers. Lieutenant Colonel Kent Eiler, Air Force Reserve member and a fellow attorney in VA matters—and apparently a person you have considered to serve as a possible expert witness against Mr. Eisenberg—explained that Mr. Eisenberg "often represents clients who other attorneys, myself included, all-too-often shy away from because of concern they could be 'difficult'" due to perceived "behavioral issues, financial issues, [or because they involve] veterans with significant mental health issues." Attach. 1 at 2 (Letter from Kent A. Eiler, Esq. to D.C. Office of Disciplinary Counsel c/o Michael D.J. Eisenberg (July 3, 2022)). A retired Air Force Master Sergeant Tina Neville, who experienced "[s]exual harassment and sexual discrimination" during her thirty years in service, stated that Mr. Eisenberg "was the only lawyer I found" that would "tak[e] on the federal government" for her. Ms. Neville felt that "Michael Eisenberg is paving the way for justice to be attained" not just for her but for "so many women . . . experiencing the same treatment in our military." Attach. 2 at 1 (Letter from Tina A. Neville to ODC c/o Michael D.J. Eisenberg1 (July 2, 2022)). Retired Air Force Officer Alan Schmidt described how "Most lawyers I contacted were not immediately available to discuss my case. Michael immediately made the time to hear my issues with the VA and develop a plan of action." Mr. Schmidt was subsequently awarded back-pay "after 6 years of waiting...thanks to the knowledge and effort of Michael." Attach. 3 at 1 (Letter from Alan Schmidt to ODC c/o Michael D.J. Eisenberg (Sept. 15, 2022)).

Last year's letters also emphasized Mr. Eisenberg's earnest compassion, active communication, and prudent professionalism. Veterans' attorney Lonnie Keene portrayed Mr.

Eisenberg as “exceedingly kind and supportive” and praised his “experience and expertise.” Attach. 4 at 1 (Letter from Lonnie S. Keene to ODC c/o Michael D.J. Eisenberg (July 13, 2022)). VA nurse Chantena Kinney recounted how Mr. Eisenberg “fought and fought [for me] along with being a counselor to me through all th[e] stress” of “being discriminated against.” Attach. 5 at 1 (Letter from Chantena Kinney to ODC c/o Michael D.J. Eisenberg (n.d.)). New York State Lieutenant Criminal Investigator Thomas Fedeles described Mr. Eisenberg as “the type of Attorney that returns your calls and answers your questions in a manner that explains the situation coherently and efficiently,” and stressed that “[d]uring my 50 years of police work I have had the opportunity to observe and work with many attorneys ranging from those in private practice to District Attorneys and Federal Prosecutors. I count Atty Eisenberg as one of the best attorneys I have dealt with.” Attach. 6 at 1 (Letter from Thomas Fedeles to ODC c/o Michael D.J. Eisenberg (July 7, 2022)). Army veteran Dominick Schoonmaker related the times that “Mr. Eisenberg has called me on Saturday and Sunday mornings, while walking his dog, because he needed to inform me of details pertaining to my cases with the Veterans Administration (VA) and the United States Army. . . . I have learned over the years that this drive comes from an actual caring of his clients beyond the reputational and monetary considerations.” Attach. 7 at 1 (Letter from Dominick H. Schoonmaker to ODC c/o Michael D.J. Eisenberg (n.d.)). Retired two-star general Robert Harding “considered Mr[.] Eisenberg the best advocate ever! Not just because we were successful [in his VA appeal], but because his experience and background helped me navigate a very complicated and overwhelming system.” Attach. 8 at 2 (Letter from Robert A. Harding to Office of Disciplinary Counsel c/o Michael D.J. Eisenberg (Sept. 12, 2022)).

A striking aspect from the previously featured letters is the number of supporters who, in a testament to Mr. Eisenberg’s genuine concern for those he represents, count Mr. Eisenberg as both a client and a friend. Cindy Davis, former bookstore manager at Mr. Eisenberg’s law school, stated that “Michael Eisenberg and I have maintained our friendship for the past 20 plus years. . . . I admire the work Michael has done on behalf of the veterans he has helped, including myself and my daughters” and further noted that Mr. Eisenberg helped her sister with an EEOC matter. Attach. 9 at 1 (Letter from Cindy L. Davis (Sept. 19, 2022)). Judy Graham “got to know Michael Eisenberg when I found myself in need of an EEOC attorney nine years ago. He won the case for me, and we became friends. During the ordeal of many interviews, depositions, and phone calls, Michael was very considerate and kind.” Attach. 10 at 1 (Letter from Judy A. Graham (Sept. 9, 2022)). Similarly, retired Air Force Lieutenant Colonel Lawrence Krauser wrote that during his case he “developed a personal respect and friendship with Michael” such that he “informed him near the end of the case that, win or lose, I hoped to continue as his friend. I found Michael to be a very ethical man, knowledgeable in the law, and a decent human being. That honesty and mutual respect led to a friendship I hope to continue for some time.” Attach. 11 at 2 (Letter from Lawrence Mark Krauser to Office of Disciplinary Counsel c/o Michael D.J. Eisenberg (July 5, 2022)).

Since last year’s submission, we have received further material supporting Mr. Eisenberg’s impact on the communities he serves. Mr. Eisenberg’s work was featured in Dwight Mears’ *The Medal of Honor*, a book chronicling the history of military awards. Attach. 12 (Dwight S. Mears, *The Medal of Honor: The Evolution of America’s Highest Military Decoration* 181-93 (2018)). The book discusses the 2014 *Haselwander v. McHugh* case in

which Mr. Eisenberg represented the appellant, Kenneth Haselwander. *See Haselwander v. McHugh*, 774 F.3d 990 (D.C. Cir. 2014). Mr. Haselwander was a veterinary specialist in the Army who seemed to meet all the requirements for a Purple Heart Medal after being wounded by enemy fire in the Vietnam War, yet he had not received an award for his service. Before taking his claim to the courts, Mr. Haselwander made his case through the traditional channel—the Army Board for Correction of Military Records (“BCMR”)—multiple times, but the BCMR determined in each instance that there was insufficient evidence to grant a Purple Heart. Mr. Haselwander turned to the D.C. District Court, but it deferred to the BCMR ruling, as the precedent at that time was (in the District Court’s words) for military boards for correction to be “entitled to even greater deference than civilian administrative agencies.” *Id.* at 187. However, with Mr. Eisenberg’s assistance, Mr. Haselwander then took his case to the D.C. Circuit Court of Appeals, which ruled that the BCMR’s decision was “utterly illogical,” “patently unfair,” and “unworthy of any deference.” *Id.* The D.C. Circuit Court remanded the case back to the BCMR, which finally awarded Mr. Haselwander his Purple Heart in 2015. *Id.* at 187-88. Mears cites *Haselwander* as a landmark case that initiated a trend of “[f]ederal courts’ traditional deference to military corrections boards. . . evolving in response to the perception that many BCMRs are failing to author decisions that satisfy the arbitrary or capricious standard of review.” *Id.* at 186-87. In a 2023 email to Mr. Eisenberg, Mr. Mears noted that there have been at least two recent instances of BCMR decisions being reconsidered in favor of the veteran in light of the *Haselwander* precedent. *See* Attach. 13 (Email from Dwight Mears to Michael D.J. Eisenberg (Oct. 27, 2023)). In other words, beyond the direct impact he has on his clients, Mr. Eisenberg’s advocacy has positive and far-reaching ripple effects, enabling other veterans to achieve the justice and recognition they deserve.

Clients and colleagues have also continued to write letters of support over the past year, characterizing Mr. Eisenberg as a skillful attorney, a diligent communicator, and an empathetic advocate. Karen Momber, a VA nurse falsely accused of malpractice, recounts how Mr. Eisenberg flew out to Michigan to aid in her VA hearing and “provided me with support, not only by his presence, but with legal advice regarding my responses to questions. . . . The end result was that the accusations that had been brought against me were found to be without merit and I was restored to my previous nursing position.” Attach. 14 at 1 (Letter from Karen M. Momber to ODC c/o Michael D.J. Eisenberg (Sept. 9, 2023)). Retired Air Force technician Rhodora Colombini states that Mr. Eisenberg is “cordial, patient, and shares with me any updates of any internal movements. . . . I am pleased and am confident [that] Michael D.J. Eisenberg is representing my experience truthfully and to the best of his abilities.” Attach. 15 at 1 (Letter from Rhodora D. Colombini to ODC c/o Michael D.J. Eisenberg (Aug. 9, 2023)). Fellow Air Force Veteran Pamela Young expresses how she felt that Mr. Eisenberg “was responsive and caring about doing a good job. He stood up for me when I could not help myself.” Attach. 16 at 1 (Letter from Pamela Young to ODC c/o Michael D.J. Eisenberg (Jan. 13, 2023)). Chief Warrant Officer Justin Ermels, whose dismissal from the Marines without benefits was overturned with Mr. Eisenberg’s help, describes how he was always reassured that, whenever he had a question or concern, he “would get a response back within a 24 hour period; calming me and my wife’s nerves.” Attach. 17 at 2 (Letter from Justin M. Ermels to ODC c/o Michael D.J. Eisenberg (Aug. 6, 2023)).

Many of Mr. Eisenberg's clients have worked with him over the course of many years—an indication of his success as a lawyer and efforts as a personal ally. Antonio Joseph Martin, an Army veteran for whom Mr. Eisenberg has worked since 2014, attests that over the past decade he has “received calls and correspond[ence], several times a month, from Mr. Eisenberg. And the level of dedication, professionalism, support, and personal attention from this office, has been consistently at 10/10 level, or above.” Attach. 18 at 1 (Letter from Antonio Joseph Martin to ODC c/o Mr. Michael D.J. Eisenberg (Aug. 25, 2023)). David Lambdin Jr., a client of ten years, writes how Mr. Eisenberg “has been courteous, caring, punctual, articulate and factual in all of his dealings with me either in person o[r] through long distance means of communication.” Attach. 19 at 1 (Letter from David A. Lambdin Jr. to ODC c/o Michael D.J. Eisenberg (Jan. 11, 2023)). Burton Landman, another veteran with service-connected disabilities, has been represented by Mr. Eisenberg since 2008. Ever since, Mr. Eisenberg “has been and continues to be the consummate professional . . . and has always made me feel like I mattered [and] like my rights mattered.” Mr. Eisenberg successfully appealed Mr. Landman's service-connected disability rating, a result that Mr. Landman described as “a life-changing event for me. I cannot begin to explain or relate how grateful I am for this attorney's zealous and steadfast representation.” Attach. 20 at 1 (Letter from Burton K. Landman to ODC c/o Michael D.J. Eisenberg (Feb. 9, 2023)).

Further evidence of Mr. Eisenberg's abilities can be seen in the numerous clients who were recommended his services by others and had similarly exceptional experiences. A fellow veteran referred Lea Thompson to Mr. Eisenberg, and Ms. Thompson writes that “[E]very time I would get depressed . . . Michael would reassure me and tell me he was going to fight all the way with me. He would not leave my side until I received all that I was owed to aide in my injuries and illnesses.” Mr. Eisenberg eventually helped Ms. Thompson get from 0% to 100% service-connected benefits. Attach. 21 at 1 (Letter from Lea Thompson to ODC c/o Michael D.J. Eisenberg (Jan. 19, 2023)). Sharon O'Neal, a VA nurse who received a recommendation for Mr. Eisenberg, has “nothing but positive thoughts about Mr. Eisenberg and his services. He was thorough in his explanations and kept me timely informed....I appreciate that Mr. Eisenberg will call me from time to time to see how I [am] doing. I am grateful for his help.” Attach. 22 at 1 (Letter from Sharon O'Neal (Dec. 5, 2022)).

Mr. Eisenberg has received additional letters from other attorneys, showing how he is not only valued by his clients but respected by his peers. Amy B. Kretkowski, veterans law attorney, adjunct law professor, and member of the Board of Directors for the National Organization of Veterans' Advocates, regularly refers veterans to Mr. Eisenberg for matters she does not handle: “He is one of the only veterans' advocates I feel comfortable recommending for representation in this complex area of law. . . . He is known in the veterans' advocacy community as a reliable and trustworthy resource.” Attach. 23 at 1 (Letter from Amy B. Kretkowski to ODC c/o Michael D.J. Eisenberg (Dec. 9, 2022)). Rebecca Kidder, managing partner at Peebles Kidder LLP, sought Mr. Eisenberg's help obtaining benefits for her son who was paralyzed in combat. Ms. Kidder writes that “In my lifetime, I have worked with many attorneys . . . Michael was professional, responsive, and timely with pleadings and with communicating with our son and us. His legal advice was on point.” Attach. 24 at 1 (Letter from Rebecca Kidder to Office of Disciplinary Counsel c/o Michael D.J. Eisenberg (Dec. 7, 2022)). Patrick Withrow, now a Compliance Officer at the United States Department of Commerce, was a clerk for Mr.

Eisenberg while in law school. Mr. Withrow remembers Mr. Eisenberg as an “ideal mentor” and notes that “My legal writing skills improved more under nine months of his tutelage [than] with three years of legal research and writing classes. I would happily work for Mr. Eisenberg again.” Attach. 25 at 1-2 (Letter from Patrick Withrow to ODC c/o Michael D.J. Eisenberg (Oct. 17, 2022)).

Evident in all the letters from this year and last is the profound gratitude and respect Mr. Eisenberg’s clients and colleagues feel toward him. However, these sentiments are perhaps best exemplified in an email Mr. Eisenberg received in August 2021. A former client, lying in hospice care with “a very short time to live,” made sure to thank his “friend” Mr. Eisenberg for his efforts years ago in winning a VA appeal to obtain 100% benefits. Attach. 26 (Email to Michael D.J. Eisenberg (Aug. 6, 2021)).

In sum, then, while we recognize that Mr. Eisenberg has made mistakes in his practice, we think it important to recognize that he has also done enormous good. Already underserved areas of the law would become even more so without his commitment and compassion.

III. Summary of Matters Addressed Below

Again, in this document we address Mitchell, Glaab, and Swain, in that order. We recognize that this is a lengthy document—necessarily so, given that even just these three matters represent tens of thousands of pages of investigative files. We therefore offer these summary thoughts up front to aid your review.

1. *Mitchell*: We begin with Mitchell. Without getting into the details yet, the Mitchell portion of the draft SOC essentially alleges that Mr. Eisenberg 1) failed to pursue Ms. Mitchell’s EEO matters, SOC ¶¶ 110-15; 2) failed to properly pursue or perfect the Request for Reconsideration that he filed in Ms. Mitchell’s workers’ compensation case, SOC ¶¶ 120-31; and 3) failed to exhaust administrative remedies, improperly provided the Office of Special Counsel’s (“OSC”) analysis to the Merit Systems Protection Board (“MSPB”), and otherwise erred in pursuing Ms. Mitchell’s “Individual Right of Action” (“IRA”) appeal at the MSPB, SOC ¶¶ 133-56.

Our review of the investigative files, in contrast, indicates that Mr. Eisenberg pursued Ms. Mitchell’s matters diligently and substantially successfully—until the second administrative law judge (“ALJ”) assigned made the erroneous suggestion that Mr. Eisenberg had filed Ms. Mitchell’s challenge to her termination in the wrong forum, Mitchell 10071-75, which greatly upset Ms. Mitchell and led to the end of her professional relationship with Mr. Eisenberg. See Mitchell 7014, 10060-64.

The ALJ was wrong, and so are many of the SOC’s allegations regarding the most important of Ms. Mitchell’s matters, her whistleblowing case. In fact, the relevant statutory regime and the MSPB’s regulations make clear that it has jurisdiction over claims of retaliation for whistleblowing once review by the OSC has been exhausted. Here, Mr. Eisenberg properly sought and obtained OSC exhaustion; properly perfected Ms. Mitchell’s MSPB appeal; engaged in independent investigation bringing to light disparities in treatment between Ms. Mitchell and

similarly situated VA nurses that allowed her to successfully make out her *prima facie* case; and forced the Agency to the bargaining table to discuss a six-figure settlement. The case did not settle, and the ALJ's erroneous statement gravely undermined the relationship between Mr. Eisenberg and Ms. Mitchell—leading to his withdrawal—but Mr. Eisenberg diligently and effectively pursued the case *for years without compensation* before that unfortunate conclusion.

As briefly set forth above, the gap between the allegations of the SOC and the reality of the workers' compensation representation is even greater. The SOC maintains that “the OWCP denied Mrs. Mitchell's second request for reconsideration” on December 2, 2015, SOC ¶ 121, and that Mr. Eisenberg then waited until February 2017 to file a petition for mandamus that was ultimately dismissed because Mr. Eisenberg disregarded a district court order. SOC ¶¶ 123-28. All of that is incorrect.

In fact, Mr. Eisenberg filed a timely and well-reasoned Request for Reconsideration—what the SOC calls the “second request for reconsideration,” SOC ¶ 121, because Ms. Mitchell had filed a previous one—in the workers' compensation matter on June 26, 2015. Mitchell 9204-12. We found no support in the record for the SOC's claim that “the OWCP denied [this] . . . request for reconsideration” on December 2, 2015. SOC ¶ 121. The only document we located from that date is a decision from the VA Healthcare Network that is entirely unrelated to Ms. Mitchell's workers' compensation case. Mitchell 5668.

Again, through early 2016, Mr. Eisenberg and Ms. Mitchell had no reason to believe that there was any issue or problem with her request for reconsideration. In May 2016, Mr. Eisenberg reached out to OWCP for a status update. Mitchell 10011-12. Unfortunately, the agency then engaged in various obfuscations, and ultimately claimed that Ms. Mitchell's request for reconsideration would not be considered on the merits because Mr. Eisenberg had not provided a “notice of representation” until the agency requested it after the time for reconsideration had run. *See* Mitchell 10013-50.

Mr. Eisenberg then filed a Petition for Mandamus in D.C. District Court asking the court to order merits consideration of his Request for Reconsideration. Mitchell 9002-10. Directly contrary to the allegations of the SOC, *that petition for mandamus was successful*. After literally years of misdirection by the agency, just two months after Mr. Eisenberg filed his petition for mandamus, *OWCP confessed error*. It assigned the Request for Reconsideration to a new Senior Claims Examiner for merits review. Mitchell 8979-80. On May 19, 2017, the OWCP issued a new decision on the merits finding that the Request “lacked sufficient probative value to modify the [prior] decision.” Mitchell 8981-84.

Mr. Eisenberg then told the district court that the Petition for Mandamus was moot. Mitchell 9146. But that was not in disregard of a court order to prosecute the case, as the SOC alleges. Rather, Mr. Eisenberg correctly told the court that the petition was moot because he and his client had *already received the relief requested*. The district court litigation indisputably *was* moot. In short, in an impressive display of persistence and resilience, Mr. Eisenberg cut through a mountain of bureaucratic red tape, prosecuted a difficult mandamus action, and *obtained* for Ms. Mitchell exactly what she was entitled to—merits review of his well-written Request for Reconsideration.

With respect to the EEO matters, the SOC essentially alleges that Mr. Eisenberg agreed to represent Ms. Mitchell on these matters, but soon after unilaterally “decide[d] to abandon them,” without ever even “enter[ing] an appearance.” SOC ¶¶ 110-111. This is a significant misunderstanding of the record.

When Mr. Eisenberg was retained by Ms. Mitchell, her former counsel had requested a hearing before an ALJ. As in the case of the workers’ compensation claim, Mr. Eisenberg and a colleague both repeatedly contacted the EEOC offices in both D.C. and in Philadelphia to ensure that the request for a hearing remained on track. *See* Mitchell 5610-12. As of June 19, 2014, they were unambiguously told that the “case files are with the Philadelphia District Office Hearings Unit,” Mitchell 5609, and that “the subject matter is still pending.” *Id.*

The SOC claims that the next event in the EEO -4616 proceeding was a decision by “the employer” on March 31, 2015 “dismissing all Mrs. Mitchell’s EEOC claims.” SOC ¶ 113. That is again incorrect. The decision on that date addressed a *different* EEO claim filed by Ms. Mitchell herself, the EEO -1271 proceeding, while unambiguously indicating that “Complainant’s harassment claim under EEO Case . . . 4616, is currently pending hearing.” Mitchell 5656 n.3. The March 31, 2015 decision thus did not resolve or even address -4616 other than to note that it was still on track for a hearing.

The SOC appears to fault Mr. Eisenberg for not “fil[ing]”—“discuss[ing] with Mrs. Mitchell whether she could file”—another EEO complaint relating to her termination in 2015. SOC ¶¶ 114-15. But the record reflects that Ms. Mitchell—with Mr. Eisenberg’s advice and assistance—*added her termination to her whistleblower retaliation suit*. *See* Mitchell 9977 (email from Ms. Mitchell requesting Mr. Eisenberg to file her whistleblower claim with the OSC). That was the proper forum for her retaliation claim—as discussed below, claims of retaliation (including via termination) fall under the jurisdiction of the MSPB.

The record does not reveal, so far as we could determine, what ultimately became of Ms. Mitchell’s EEO claim. But what is clear is that Ms. Mitchell—and thus Mr. Eisenberg—substantially shifted focus toward the end of 2014 to her potentially-much-more-valuable claim that she was the subject of retaliation for whistleblowing. As noted above, however, while primarily focusing on *that* claim, all parties—including Mr. Eisenberg, the VA lawyer (Mr. Kelly), and Ms. Mitchell—understood that Ms. Mitchell’s *employment* claims were also part of mediation and settlement discussions right up until Mr. Eisenberg’s withdrawal.

We further address the specific charges of the draft SOC in Mitchell below. For now, however, the point is that the SOC’s core thrust that Mr. Eisenberg agreed to represent Ms. Mitchell and then essentially did nothing could hardly be more wrong. In fact, Mr. Eisenberg represented Ms. Mitchell for at least many scores, likely hundreds, of hours over more than four years. And, in total, he was compensated \$9000 for that work. Contrary to Ms. Mitchell’s latter-day representations, *after* she was misled by the ALJ, this was hardly a “scam”—it was a diligent representation with many substantial successes that did not lead to a successful settlement because Ms. Mitchell’s settlement value was wholly unrealistic.

2. *Glaab*: As in Mitchell, it appears to us that a number of the charges in Swain are based on a misunderstanding of the record. This is perhaps most notable in connection with the Rule 1.5(a) allegation that that Mr. Eisenberg “charged his client an unreasonable fee.” SOC ¶ 48(F). We cannot tell from the draft SOC what constituted the purportedly unreasonable charge—but it is clear from the record that none occurred.

Under the engagement agreement between Mr. Eisenberg and Ms. Glaab, she paid \$4000 for an array of services that included him taking nine depositions, responding to discovery requests, engaging in settlement negotiations, and then flying out to represent Ms. Glaab at an EEO hearing. The draft SOC does not explain how it could be unreasonable to pay \$4000 for this array of services, and it plainly was not.

We surmise that the draft SOC may intend to take issue not with the fee *actually* charged, but with larger figures that Mr. Eisenberg advanced as part of his settlement efforts and lawsuit against Ms. Glaab for failing to pay the out-of-pocket costs of her case. (So far as we understand, it is not disputed that she did not pay those costs, nor that the engagement agreement made clear that she was responsible for them.) In the SOC’s view, the problem—again, so far as we can tell—appears to be that Mr. Eisenberg advanced two alternative theories of recovery against Ms. Glaab in trying to recover those costs from her. The first, his own view, was that the contract was valid and that she owed only the remaining unpaid costs that he had covered. *See* Glaab 458. The second, based on what he understood to be Ms. Glaab’s position, was that *if* there was no valid contract as she maintained, then Ms. Glaab should have to pay him “[t]he reasonable value of the unpaid legal fees.” Glaab 462.

In the end, of course, the Superior Court rejected *both* of those legal theories. But Mr. Eisenberg’s (unsuccessful) legal argument that a client should *either* have to honor her contractual bargain or else pay the reasonable market value of the services received is self-evidently *not* charging an unreasonable fee under Rule 1.5(a). The claim represents two alternative legal grounds for a *reasonable* fee—which the court found was not owing in any event.

Many of the SOC’s other allegations regarding the Glaab representation appear to be about Mr. Eisenberg’s failure to attend a settlement conference or submit a witness list for the hearing he attended with Ms. Glaab. Those concerns strike us as misplaced. First, Mr. Eisenberg’s associate was available for the settlement call—and was well-versed in the case—although the judge inexplicably did not let her participate in Mr. Eisenberg’s place. But, perhaps more importantly, the conference took place at a time when it was clear that the parties were not remotely aligned on settlement. And there were six months before the hearing on the merits—during which the case certainly *could* have settled had the agency been willing to entertain monetary compensation. The agency was not, and so the case didn’t settle. But that had nothing to do with Mr. Eisenberg missing a meeting months before.

There was similarly zero impact at all from Mr. Eisenberg’s failure to submit his own witness list. As noted above, after hearing from *only* Ms. Glaab, Judge Momah made up his mind to dismiss her case. He was not willing to hear from any other witnesses. As explained above, the judge found that Ms. Glaab could not prevail in her case before him because she

lacked credibility as a witness. In short, no matter how many witnesses Mr. Eisenberg might have identified, they would not have been allowed to testify. There was thus neither actual nor potential prejudice to Ms. Glaab—her own testimony, without regard to Mr. Eisenberg’s conduct, led to the dismissal of her case.

We also do not understand exactly what the claimed Rule 1.7 conflict was here. The draft SOC alleges that Mr. Eisenberg had a conflict under Rule 1.7(b)(4)—i.e., that his representation of Ms. Glaab “reasonably [could be] adversely affected by . . . his own financial . . . interests.” SOC¶ 48(G). The specific concern appears to be that Mr. Eisenberg’s interest in recovering costs that he had paid on behalf of Ms. Cain in pursuing her unsuccessful EEO claim could somehow have interfered with her being a witness in Ms. Glaab’s case. *Id.*

But we do not see how the fact that Ms. Cain owed Mr. Eisenberg money could divide his loyalties as to Ms. Glaab. Certainly, her debt to Mr. Eisenberg could conceivably have generated negative feelings toward Mr. Eisenberg *by Ms. Cain*. For that matter, Ms. Cain’s debt to Ms. Glaab could presumably have generated negative feelings *by Ms. Cain* toward Ms. Glaab. But it is of course common for witnesses to feel antipathy toward lawyers and parties who call them to testify—yet those feelings do not create a legal *conflict* between the lawyer and his own client. Indeed, we were not able to find *any* case in *any* jurisdiction finding a conflict based on antipathy between a lawyer and a witness whom the lawyer might wish to call in his client’s case. And even if there were some potential for indirect conflict, the record here reflects an effective waiver. According to Ms. Glaab herself, she “waived any conflict of interest . . . issues that may have arisen because of [Mr. Eisenberg’s] dual representation.” Glaab 1187.

There are other charges in Glaab but, again, these appear to be the core issues: 1) that Mr. Eisenberg missed a meeting (for which his associate was available) and did not submit a list of witnesses who would not have been allowed to testify; and 2) that Mr. Eisenberg advanced an unsuccessful theory of *quantum meruit* against Ms. Glaab in litigation. We unearthed no precedent for finding these to be rule violations.

3. *Swain*: The charges in Swain may be the most puzzling of the draft SOC. Perhaps most fundamentally, as we stated on our most recent call, they do not appear to respond in any significant way to our earlier advocacy. The real gravamen of Swain still seems to be a charge of incompetence under Rule 1.1. But as we said in our previous submissions, Rule 1.1 is fundamentally misplaced in a case where Mr. Eisenberg *prevailed* on behalf of Ms. Swain. Indeed, he not only prevailed, but obtained for her a very substantial settlement, which she described as a “blessing” for her and her family, Swain 3120, and that was literally dozens of times greater than the best offer her union representatives had obtained for her. If that is “incompetence” within the meaning of Rule 1.1, we do not how attorneys going forward can have reasonable notice of the term’s scope.

We also think that the draft SOC in Swain fundamentally misconstrues Rule 1.2—which is true of Glaab as well. Rule 1.2 accords certain big-picture authority to the client, including the right to determine the “objectives of representation” and the right to be consulted as to the means to pursue those objectives. *See* D.C. Rules r. 1.2(a) (“Rule 1.2”). But the Rule also

reserves authority over tactics and strategy to the lawyer. Mr. Eisenberg’s representation of both Ms. Swain and Ms. Glaab respected this division of authority.

For your convenience, we have combined the substance of our two earlier written responses in our Swain discussion below, while also addressing the new Rule 8.4(d) charge. But our basic position in Swain is: 1) it doesn’t make sense to charge a lawyer with incompetence for conducting a very successful representation; and 2) there are specific factual errors in the draft SOC that need to be corrected.

IV. Mitigating Factors

Before turning to our detailed discussion, we think it important to emphasize that while Mr. Eisenberg made mistakes in these representations, his mistakes have been simply that—at no time has Mr. Eisenberg been motivated by any “dishonest or selfish motive.” Standards for Imposing Lawyer Sanctions (“ABA Standards”) § 9.32(b). That and other mitigating factors under the ABA Standards should be taken into account in connection with the draft SOC as a whole.

We also think it important to reemphasize that Mr. Eisenberg’s record—confirmed by the myriad testimonials summarized above—of helping clients who might struggle (and in many cases actually have struggled) to find representation is relevant here. Mr. Eisenberg is not a big-firm partner practicing perfect law. He is a lawyer in an underserved area who has had substantial successes on behalf of individuals who cannot afford to hire big-firm lawyers. His entire fee in many cases that last months or even years represents only several hours of work for such lawyers. Against that backdrop, we find the SOC’s repeated allegations that Mr. Eisenberg’s fees are unreasonable difficult to fathom.

It is also relevant that Mr. Eisenberg does not have “a prior disciplinary record.” *Id.* § 9.32(a). And he has repeatedly accepted responsibility and expressed remorse for the errors he has made, as discussed further in connection with individual matters below. *See Id.* § 9.32(l).

Section 9.32(j) of the ABA Standards—identifying “delay in disciplinary proceedings” as a mitigating factor—is also relevant here. *See also In re Williams*, 513 A.2d 793, 797 (D.C. 1986) (“A delay [in a disciplinary proceeding] coupled with actual prejudice could result in a due process violation.”). The conduct at issue in the draft SOC dates back more than a dozen years; that delay presents challenges in researching and presenting a thoughtful defense.

In the Glaab matter, for example, the draft SOC raises questions such as whether “Respondent . . . explain[ed] his billing practices to Ms. Glaab,” and whether he “explain[ed] to Ms. Glaab how the antagonism between him and Ms. Cain could potentially adversely affect Respondent’s representation of Ms. Glaab.” SOC ¶¶ 10, 42. Again, the underlying events occurred over a dozen years ago, from approximately July of 2012 to May of 2013. *Id.* ¶¶ 5-37. Your office initiated its investigation in 2015, when the events were relatively recent and recollections fresh. Your investigation has thus been ongoing for more than eight years, during which there have been long and unexplained periods of apparent inactivity. As a result, we must now conduct our own investigation on a cold trail. And much of the conduct at issue in the

Swain matter is even older, dating back to April of 2011, *Id.* ¶ 49, with Mr. Eisenberg’s successful resolution of Ms. Swain’s case occurring in April of 2012. *Id.* ¶ 57. In short, both matters reach back ten years or more.

We are uncertain why it has taken so long to get to this point. We have timely responded to inquiries from your Office. At this time, we do not have enough information to assess the extent to which Mr. Eisenberg’s rights have been prejudiced by the delay. We cannot yet, for example, subpoena documents and so we do not know if the passage of time has rendered it more difficult or even impossible for Mr. Eisenberg to obtain information—such as relevant emails, for example—that could help to address the allegations of the draft SOC. There is no question, though, that the intervening years will render that process unusually challenging, and your Office should take that into account in any proceedings involving Mr. Eisenberg. At a minimum, the unexplained delays in these matters far exceed those involved in D.C. cases noting delay as a potential mitigating factor. *See, e.g., Williams*, 513 A.2d at 798 (treating an eighteen-month “lapse” in case as a possible mitigating factor); *In re Schneider*, 553 A.2d 206, 212 (D.C.1989) (the fact that the matter had “dragged on into its sixth year” was among the “significant mitigating factors”).

V. Mitchell

A. Background: During Ms. Mitchell’s employment as a registered nurse with the VA Medical Center (VAMC) in Beckley, West Virginia, she believed that her employer subjected her to a hostile work environment, and also retaliated against her—including terminating her employment—for engaging in protected whistleblowing regarding misconduct by staff members at the VAMC.

Ms. Mitchell sought relief on her claims in several different fora. Given the complexity of the matters involved, we do not attempt to trace every procedural thread. But we do think it important to describe in some detail what occurred in these representations because, again, there are fundamental inconsistencies between the factual record and the allegations of the draft SOC.

1. The EEO Matters: On October 26, 2012, Ms. Mitchell filed an EEO complaint, matter -4616, making a hostile work environment claim. Mitchell 2221-38. She maintained that she was subjected to a hostile work environment when her superiors failed to support her in attempting—in her role as Program Director of Home Based Primary Care at the Medical Center—to discipline certain employees at the VAMC. Mitchell 1847-58. She claimed that her supervisors’ lack of support put her “in a mental state/condition as to where [she had] no concentration, skills, living in constant fear, paranoia, and suffering from PTSD.” Mitchell 1847. On January 17, 2013, the EEO officer assigned indicated that her claim -4616 met the requirements for further investigation by the VA. Mitchell 2246-49.

Ms. Mitchell was initially represented by Timothy Lupardus, including at her interview by the EEO investigator on April 12, 2013. Mitchell 2270-2309. That initial investigation led to a revised “partial acceptance,” meaning that claim -4616 was modified and assigned for further investigation on April 30, 2013. Mitchell 2324-27. That investigation resulted in a full Investigative Report being assembled and submitted by the investigator on June 17, 2013.

Mitchell 3818. Ms. Mitchell then requested a hearing before an ALJ, Mitchell 5593, which resulted in referral of the investigative file to the EEOC office in Philadelphia on August 29, 2013. Mitchell 5557-58.

Shortly after, on October 1, 2013—as further discussed below in connection with the specifics of the engagement agreements—Ms. Mitchell engaged Mr. Eisenberg to represent her in matter -4616. Mitchell 10081-84. On November 18, 2013, Mr. Eisenberg contacted the Agency via fax to let it know that he had been retained in the -4616 matter and that further communications should go through his office. Mitchell 5622.

There was then a period of several months when Mr. Eisenberg received no word about the hearing that Ms. Mitchell had requested. Accordingly, on May 23, 2014, Mr. Eisenberg's associate, DeAnna Schabacker, reached out to the D.C. EEOC office to try to determine the status of the claim. Mitchell 5612. The D.C. office incorrectly stated that the case had been dismissed, so Ms. Schabacker contacted Sharon Dove, EEO case manager at the VA's Office of Resolution Management, to try to determine whether a hearing was upcoming. Mitchell 5610-12. After numerous emails and phone calls, Ms. Schabacker was eventually able—on June 19, 2014—to obtain confirmation that the “case files are with the Philadelphia District Office Hearing Unit,” Mitchell 5609, and that “the subject matter is still pending.” *Id.*

After again hearing nothing for several months, on September 24, 2014, Mr. Eisenberg himself contacted Ms. Dove to follow up about the status of the case. Ms. Dove then reached out to a number of government employees to try to get information about the matter. She noted in her email that “it appears that there is a hearing number,” Mitchell 9203, and she sought “any information regarding the subject case” to enable her to respond to Mr. Eisenberg's inquiry. *Id.*

The Agency staff attorney assigned to case -4616 was also puzzled regarding its status. That attorney, Matthew Kelly, contacted the EEOC office's Chief Administrative Judge on December 8, 2014, referencing matter -4616; echoing Mr. Eisenberg's understanding that a “request for a hearing before an Administrative Judge” in the matter was pending; and requesting an update. Mitchell 5625. Mr. Kelly copied Mr. Eisenberg and Ms. Mitchell on his request and acknowledged that Mr. Eisenberg “has advised me that he is now representing Complainant in this matter.” *Id.*

To pause for a moment in the chronology, these facts—which are clear from the record—bear little resemblance to the allegations of the draft SOC. It claims, for example, that Mr. Eisenberg “failed to pursue Mrs. Mitchell's claims before the EEOC, including in matter -4616,” and that he did not even “enter his appearance.” SOC ¶¶ 110-11. In fact, Mr. Eisenberg and his employee vigorously pursued Ms. Mitchell's EEO matter -4616 throughout 2014, and the record reflects that the Agency, multiple EEOC offices, and opposing counsel were keenly aware that Mr. Eisenberg and his associate were representing Ms. Mitchell.

The draft SOC states that the next event in the -4616 history was a decision by “the employer” on March 31, 2015 “dismissing all Mrs. Mitchell's EEOC claims.” SOC ¶ 113. The SOC provides no citation. That statement is incorrect. While there *was* a decision issued by the VA on March 31, 2015, as the “SUBJECT” line of that decision indicates, it addressed a *different*

EEO claim by Ms. Mitchell, -1271, which the draft SOC hardly mentions. *See* SOC ¶ 112, 168(B). The March 31, 2015, decision—at Mitchell 5656-61—resolved *only* claim -1271.

Ms. Mitchell’s EEO claim -1271 was entirely distinct from -4616. Matter -1271 began in December 2014, when Ms. Mitchell initiated contact with a counselor about it. *See* Mitchell 5642-53. Mr. Eisenberg filed a formal complaint in -1271 on Ms. Mitchell’s behalf on February 6, 2015. Mitchell 5654. Although this matter, like claim -4616, alleged a hostile work environment, it reflected an entirely different workplace concern. While -4616 was about Ms. Mitchell’s supervisors’ failure to support her in her work, -1271 alleged that “the Agency hired Complainant’s Mental Health Counselor . . . in an effort to undermine Complainant’s treatment.” Mitchell 5656.

Regarding -1271, the SOC states only that Ms. Mitchell has “no record that Respondent ever answered” an investigator’s inquiry about this matter, without providing specifics. SOC ¶ 112. In fact, however, the VA’s March 31, 2015, decision in -1271 noted, *that in response to an inquiry by the Office of Resolution Management*, Mr. Eisenberg had clarified that Ms. Mitchell wished to *either* file -1271 as a new complaint *or* add her new concern to the existing -4616 matter. Mitchell 5656 n.3. The reviewing Field Manager indicated that -1271 was accordingly being processed as a new complaint. *Id.*

The Field Officer then rejected the -1271 complaint, however, finding that Ms. Mitchell’s allegation that the VA hired her counselor to undermine her treatment failed to meet the “severe or pervasive” harassment threshold required to advance a complaint for “further processing.” Mitchell 5657. The decision advised Ms. Mitchell of her right to file an appeal in -1271, *id.*, but she does not appear to have pursued one. Given the weakness of the claim and the decision’s sound reasoning, that was a judicious choice.

Significantly, the March 31, 2015, decision *also* very briefly addressed -4616 in a footnote, but *not on the merits*. Instead, the decision again reinforced the understanding of all parties—including Mr. Eisenberg and his client, as well as the Agency attorney assigned to the matter—that “Complainant’s harassment claim under EEO Case . . . 4616 is currently pending hearing.” Mitchell 5656 n.3. The March 31, 2015, decision thus did not resolve or even address -4616 other than to note that *it remained on track for a hearing*. Indeed, even years later, as Mr. Eisenberg and Mr. Kelly negotiated on a possible settlement in 2017, *both* appear to have understood -4616 to remain pending. *See* Mitchell 10057.

The SOC states that Ms. Mitchell later “f[ound] out” more about -4616 when she “sought information about the status of her EEO claims by contacting the agency directly.” SOC ¶ 113. The SOC does not indicate *what* she found out, although perhaps the implication is that she was told the matter was closed. If that is the case—and, again, we could not tell from the record—it was an error on the part of the agency, directly conflicting with *all* parties’ understanding that the matter had been set for a hearing.

Finally, however, it bears emphasis that by March of 2015, both Ms. Mitchell—with Mr. Eisenberg’s ongoing assistance for several years—and the Agency—represented by Mr. Kelly—were focused on her whistleblower claims rather than the still-pending EEO matter -4616.

Again, however, the EEO matter *does* appear to have been part of long-term efforts—lasting into 2018—by Mr. Eisenberg to obtain a “global” settlement on Ms. Mitchell’s behalf, i.e., a settlement of her whistleblower *and* employment concerns. See Mitchell 10057, 10065-66.

2. The Worker’s Compensation Matter: Before hiring Mr. Eisenberg, Ms. Mitchell filed a claim for workers’ compensation on October 25, 2012. This claim related closely to Ms. Mitchell’s initial EEOC claim. She maintained that “a lack of support from [her] supervisor(s)/management in helping [her] discipline . . . employees” entitled her to compensation. Mitchell 9279. On May 16, 2013, the OWCP issued a decision disagreeing on the ground that Ms. Mitchell’s emotional conditions were not sustained “within the performance of duty as that legal concept is defined under the Federal Employees Compensation Act” (“FECA”). *Id.* The OWCP further found that “the majority of [Ms. Mitchell’s] complaints related to problems with [her] supervisors” and that “[a]n employee’s complaints concerning the manner in which a supervisor performs his duties” generally “fall . . . outside the scope” of workers’ compensation. Mitchell 9280.

Following that initial decision, Ms. Mitchell provided some additional evidence, and on June 27, 2014, the OWCP issued a second decision upholding its earlier determination. Mitchell 9278-86. This second decision found that the new “evidence is not sufficient to modify the decision dated 5/16/13 as the [new] evidence received . . . is in essence **cumulative** with respect to the issues and allegations raised and considered in the decision appealed from.” Mitchell 9283. The decision advised Ms. Mitchell that any further request for reconsideration would need to be “received by OWCP within 1 calendar year of the date of [this] decision.” Mitchell 9286.

Ms. Mitchell engaged Mr. Eisenberg to represent her on an appeal or reconsideration in this matter on October 10, 2014. Mitchell 10085-90. On June 26, 2015—within the deadline imposed by the challenged decision—Mr. Eisenberg submitted a well-reasoned, nine-page-single-spaced Request for Reconsideration. Mitchell 4702-10. The first sentence of the filing identifies both Ms. Mitchell and the June 27, 2014, decision being challenged.¹ Mitchell 4702. The first paragraph succinctly identifies the key holding of the prior decisions, i.e., that Ms. Mitchell’s complaints primarily “related to problems with [her] supervisors and management” and therefore were not covered. *Id.* Mr. Eisenberg’s letter then explained, however, that while *complaints* about supervisors are not within the scope of the FECA, emotional *injuries* resulting from an employee’s performance of her duties *are* within the Act’s scope. Mitchell 4703. Mr. Eisenberg also identified portions of Ms. Mitchell’s diagnoses indicating that her emotional condition *was*, in fact, the result of work stresses. Mitchell 4703-04. He argued that she was not objecting to her supervisors’ performance of their duties, but to the emotional harm that those supervisors’ flawed performance of their duties caused her, which is cognizable under the Act. Mitchell 4705-09.

¹ The draft SOC notes that Mr. Eisenberg’s original Request for Reconsideration contained the wrong case number on the front cover and that he “did not correct these deficiencies until September 15, 2016.” SOC ¶ 120. While Mr. Eisenberg did indeed include the wrong case number on that Request, he corrected the clerical error *sua sponte* on July 13, 2015, less than a month after the request was filed. Mitchell 8972.

When the OWCP failed to act on his Request for Reconsideration, Ms. Mitchell asked Mr. Eisenberg to reach out in May of 2016 to inquire about its status. Mitchell 10008. Mr. Eisenberg's office was referred to the Philadelphia office of OWCP, where they made further repeated but unsuccessful attempts to obtain status information about the claim. *See* Mitchell 10011-17. On July 26, 2016, Ms. Mitchell reached OWCP directly and was told her claim had been "closed." Mitchell 10021. Mr. Eisenberg again repeatedly attempted to contact OWCP for further information, and was finally told in September of 2016 that OWCP could not communicate with him about the case because he did not have a notice of representation on file. Mitchell 10049-50.

Mr. Eisenberg's colleague, Ashley Caldwell, also had repeated contacts with OWCP. In an October 21, 2016 email summarizing those contacts for Mr. Eisenberg, Mitchell 8989, she wrote:

[After we fixed the case number in July 2015,] I called on . . . July 26, and August 23. Each time I spoke with Elizabeth, who never mentioned there was an issue regarding a notice of representation. Each time I left a voicemail with Daniel Bogdon, the case manager, who never called back.

On September 15, 2016 I call again and this time spoke to Carla. Carla would not speak to me until a notice of rep. was provided. Tammy [Mitchell] signed the notice and it was provided to OWCP that same day. On September 20, 2016, [Carla provided] . . . a letter from OWCP to Tammy's Congressman, dated December 2015, stating that the appeal from her attorney[] was denied because no designation of rep. was received by OWCP . . . OWCP has not provided an explanation for why this was sent to our office but NOT sent to Tammy.

On October 21, 2016, I tried to contact OWCP in D.C., without success. On October 21, 2016, I contacted Myra Conway with OIG. She said she had no status update and it was "out of her hands."

Mr. Eisenberg refused to let the matter drop; in February of 2017, he filed a nine-page Petition for Mandamus in the U.S. District Court for the District of Columbia seeking to require OWCP to address his Request for Reconsideration on Ms. Mitchell's behalf. Attach. 27 (District Court Petition for Mandamus); Mitchell 9002-10. Mr. Eisenberg's petition provided a summary of the procedural posture of Ms. Mitchell's claim and argued that the Agency had a non-discretionary duty to address a timely appeal—as his request for reconsideration unquestionably had been—on the merits. Attach. 27 at 5-7. The Petition sought expedited merits consideration of the request.

OWCP realized that Mr. Eisenberg was likely to prevail on the Petition for Mandamus. On April 19, 2017, the agency formally acknowledged Ms. Mitchell's Request for Reconsideration and stated that it would—precisely as requested in the Petition for Mandamus—be reviewed on the merits by a new Senior Claims Examiner who had not previously been involved with the claim. Attach. 28 at 1 (April 19, 2017, letter from OWCP to Ms. Mitchell); Mitchell 8979. On May 19, 2017, OWCP issued a new decision stating that the case had, in fact,

been reviewed on the merits of the Request for Reconsideration, but that it did not meet the legal standard for relief, i.e., the Request lacked “sufficient probative value to modify the [prior] decision.” Attach. 29 at 3 (May 19, 2017, letter from OWCP to Ms. Mitchell); Mitchell 8981-84.

On May 26, 2017—*after* providing the requested relief—the Agency moved to dismiss Mr. Eisenberg’s action seeking mandamus. Mitchell 9030-43. The Agency correctly pointed out that OWCP *had* accepted the request for reconsideration on the merits, and *had* reconsidered Ms. Mitchell’s claim, but had also *denied* it on May 19, 2017. Mitchell 9035. Accordingly, there was no continued basis for the court’s jurisdiction. Mr. Eisenberg did “represent[] to the court”—as the draft SOC states—that the case before the district court was “moot” and would “be dismissed.” See Mitchell 9146. The draft SOC does not appear to recognize, however, that Mr. Eisenberg’s representation to the court was the *only* acceptable response to the Agency’s Motion to Dismiss. Again, at that point, Mr. Eisenberg’s dogged pursuit of Ms. Mitchell’s case in district court had obtained the relief sought—that the OWCP would address Mr. Eisenberg’s Request for Reconsideration *on the merits*. Having obtained that relief, the district court litigation *was* indisputably moot. In sum, then, Mr. Eisenberg’s well-argued Request for Reconsideration did not *prevail* when it was considered by OWCP—but the OWCP’s merits decision rejecting the request was not even *reviewable* in district court, let alone actually under review. See Mitchell 9042 (May 26, 2017 Memorandum in Support of Defendant’s Motion to Dismiss, arguing that “[t]his denial of federal workers’ compensation benefits falls squarely within FECA’s explicit preclusion of judicial review, 5 U.S.C. 8128(b)”); see also *Practice and Procedure Before the U.S. Department of Labor Employees’ Compensation Appeals Board*, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/ecab/resources/procedures> (stating that “Board decisions are binding upon OWCP and not subject to court review.”).

3. The Whistleblower Matter: Before engaging Mr. Eisenberg to represent her on these issues, Ms. Mitchell contacted Congressman Rahall and Senator Manchin on September 5, 2014, with whistleblowing allegations. Mitchell 5916-32. Those allegations included a variety of wrongdoing toward patients by employees at the Beckley VAMC, including withholding certain medications, over-medication of patients, falsification of records, delays in treatment, and other irregularities. *Id.* Perhaps more significant here, however, Ms. Mitchell also alleged “Intimidation/Reprisals/Reprimands/Death Threats” *toward her* in response to her whistleblowing activities while at the VAMC. Mitchell 5916. Her whistleblowing claims thus included 1) claims about treatment of patients; and 2) claims of reprisals *toward her* due to her whistleblowing.

Ms. Mitchell’s allegations of mistreatment of patients at the VAMC were taken very seriously. Both Senator Manchin (Mitchell 5914) and Congressman Rahall (Mitchell 6316) forwarded Ms. Mitchell’s concerns to the VA Office of Inspector General almost immediately for further investigation in September of 2014. The VA’s investigation into those allegations appears to have concluded on or around April 22, 2015. On that date, the U.S. Office of Special Counsel forwarded to the President the VA’s report, “substantiat[ing] the whistleblower’s concerns” and concluding that Beckley VAMC had restricted the use of certain expensive medications on the basis of “budgetary rather than clinical concerns,” which contravenes VA policy. Mitchell 5852. And Ms. Mitchell’s “additional allegations concerning ongoing wrongdoing [toward patients] at this facility” also led to a second VA report on June 11, 2015. That report substantiated a number

of her additional allegations and also set forth “disciplinary actions” taken in response to the violations found. *Id.* The repercussions of those actions included the resignation of the Chief of Pharmacy at Beckley VAMC in September 2015. Mitchell 5855.

Initial Meetings and Correspondence Involving Mr. Eisenberg: Again, however, Ms. Mitchell was also concerned *with her own treatment by the VAMC* as a result of her whistleblowing, i.e., reprisals and other alleged mistreatment. Mr. Eisenberg was centrally involved in representing Ms. Mitchell on these issues from the outset. Ms. Mitchell indicated, for example, that she and her lawyer, “Michael Eisenberg from Washington, DC” had met with OIG in December of 2014 to provide “an extreme amount of evidence.” Mitchell 9553-54. Ms. Mitchell and Mr. Eisenberg then also “met with Karin McGraw, Director of BVAMC and the BVAMC attorney in March of 2015.” *Id.*

OIG not only did little to address Ms. Mitchell’s concerns about her treatment, but also failed for some time to explain why not. By October 2015, she was very frustrated—by then, again, there had been *two* VA OIG reports finding wrongdoing at the VAMC, but Ms. Mitchell felt that her allegations about her own treatment had gone unaddressed. In a letter to her elected representatives, she noted that she “has tried and tried to contact the VA OIG to complete the rest of my complaint with the OIG but all he ever gets is a run around.” Mitchell 9554.

On November 2, 2015, the Beckley VAMC terminated Ms. Mitchell from her employment there. The stated reason was that her Registered Nurse (“RN”) licensure had “expired on October 31, 2015.” Mitchell 6470. In a November 16, 2015, email to the VAMC, Mr. Eisenberg pointed out that Ms. Mitchell’s license had not “expired,” but rather had been placed “in an inactive status in order to reduce unnecessary costs.” Mitchell 6465. Mr. Eisenberg included a copy of Ms. Mitchell’s license information from the West Virginia Board of Examiners for RNs confirming that fact. Mitchell 6473. Ms. Mitchell immediately suspected “[t]his is just more retaliation” for her whistleblowing. Mitchell 9748.

Exhaustion of OSC Review: From the record, it appears that Mr. Eisenberg and Ms. Mitchell both knew that they would need to go to OSC in the first instance with a claim that Ms. Mitchell’s termination and other alleged mistreatment constituted reprisal for whistleblowing. On December 1, 2015, just a month after the termination, Ms. Mitchell reached out in frustration to the office of her state senator. She asked that Senator Capito’s office forward her letter challenging her termination “to the OSC” to address “where [the VA is] trying to terminate me unjustly.” She noted that Mr. Eisenberg “ha[d] been working diligently trying to help [her] but they [OSC] are ignoring him, too.” Mitchell 9739. On December 10, 2015, Ms. Mitchell asked Mr. Eisenberg to file a formal complaint with OSC, Mitchell 9977, which he did immediately. *See* Mitchell 9975-76 (confirming OSC’s receipt of the complaint).

Subsequently, on January 5, 2016, Mr. Eisenberg *also* filed an IRA appeal on Ms. Mitchell’s behalf to the MSPB “alleging retaliation against [Ms. Mitchell] for protected whistleblower disclosures when [the VA] terminated her employment at the VA Medical Center, Beckley, West Virginia.” Mitchell 6201. As the MSPB’s website explains, an individual “may file what is known as an individual right of action (IRA) appeal if [she] believe[s] that an agency has taken, threatened to take, or failed to take a personnel action against [her] because

you ‘blew the whistle,’ i.e., disclosed information that you reasonably believed evidences a violation of law, rule, or regulation” See U.S. Merit Systems Protection Board, *Prohibited Personnel Practices* (5 USC § 2302 (b)), MSPB.GOV, <https://www.mspb.gov/ppp/ppp.htm> (last visited Oct. 25, 2023).

After filing with the MSPB, Mr. Eisenberg voluntarily sought dismissal of that action to provide time to exhaust Ms. Mitchell’s OSC remedies. Mitchell 6166. This procedure not only got an IRA appeal on file, but also ensured that the MSPB would *automatically refile* Ms. Mitchell’s IRA appeal in six months if she had not received a decision from OSC by then. Automatic refiling by the MSPB is a common practice; indeed, the Board’s Judge’s Handbook *mandates* that “the appeal will be automatically refiled by a date specified by the AJ” *any* time “a dismissal without prejudice is issued over the objection of the appellant.” U.S. Merit Systems Protection Board, JUDGES’ HANDBOOK, at 27, mspb.gov (last updated Oct. 2019). And the Board otherwise provides ALJ’s broad discretion to provide for automatic refiling in any case, thus relieving individual appellants of the burden of doing so. *Id.* at 27. (“An AJ should determine whether the appeal must be refiled by the appellant or whether it will be refiled automatically by a specified date.”)

On February 4, 2016, the request for voluntary dismissal was granted. Mitchell 6166. ALJ Gregory Smith explained that, to show jurisdiction at MSPB following exhaustion at the OSC, appellant now “need[ed] only submit a statement indicating she is refiling her appeal with the OSC closure letter [i.e., the OSC final decision] attached”—but, again, “if the appellant has not refiled by August 4, 2016, the Board will automatically refile the appeal for her.” Mitchell 6116. The Board *did* automatically refile on August 4, 2016. Mitchell 6166. But Mr. Eisenberg then correctly pointed out, on September 2, 2016, that a second voluntarily dismissal was appropriate because “as of August 16, 2016, the Office of Special Counsel notified Appellant that it had not yet concluded Appellant’s OSC complaint investigation.” Mitchell 5936. Mr. Eisenberg asked that the Board again *refile* the case on March 2, 2017, if Petitioner had not done so by that date, Mitchell 5937, and the ALJ agreed to do so. Mitchell 6202.

On November 4, 2016, OSC issued proposed factual and legal determinations. Mitchell 6306-09. Mr. Eisenberg critiqued those findings in an email sent on Ms. Mitchell’s behalf on November 17, 2016, but OSC adopted its original determinations on November 18, 2016, and issued its final closure letter. Mitchell 6312. OSC’s decision, Mitchell 6306-09, found that Ms. Mitchell’s complaints about misconduct at VAMC *to her superiors* were *not* protected whistleblowing, and accordingly would be properly addressed through the EEO Complaint process. Mitchell 6307. As discussed above, at that time those complaints appear to have been pending in the EEO process. OSC further found, however, that Ms. Mitchell’s complaints *outside* the organization to Senator Manchin and Congressman Rahall *did* constitute protected whistleblowing. Mitchell 6307-08.

Still, OSC rejected that whistleblowing claim on the merits, finding that her termination was not “in reprisal for those protected activities,” but rather was a result of her “inactive” status as a registered nurse. Mitchell 6308. OSC found that—regardless of whether her license expired or merely went inactive—any period where she did not have “full and unrestricted licensure” rendered her termination non-discretionary under 38 U.S.C. § 7402. Mitchell 6308. OSC

indicated, however, that Ms. Mitchell could now “seek corrective action from the Merit Systems Protection Board.” Mitchell 6313.

Proceedings at MSPB After Exhaustion of OSC Remedies: On January 24, 2017, Mr. Eisenberg again refiled Ms. Mitchell’s IRA appeal, this time with the necessary proof that OSC review had been exhausted. Mitchell 6264. Entirely understandably, given the fact the MSPB required OSC exhaustion, Mr. Eisenberg misidentified OSC rather than the VA as the “agency whose action [he was] challenging.” *Id.* Mr. Eisenberg accordingly refiled the IRA appeal again with the correct respondent on February 6, 2017. Mitchell 6277. On February 13, 2017, ALJ Smith issued an Order on Jurisdiction explaining that additional jurisdictional requirements—in addition, that is, to having shown that OSC review was complete—would now need to be met. Mitchell 6278. Mr. Eisenberg sought and received an extension to respond to the order by March 6, 2017, with the agency response due March 13, 2017. Mitchell 6294.

“Both parties filed responses addressing jurisdictional issues,” Mitchell 10071, but ALJ Smith does not appear to have addressed jurisdiction at that time. Instead, on June 12, 2017, ALJ Smith issued an order scheduling a hearing and prehearing conference, and also set a deadline for prehearing submissions. *Id.* These actions strongly suggest that the ALJ believed—correctly, as we explain in our Analysis—that jurisdiction was now satisfied, since it obviously would have been an enormous waste of both the Board’s and the parties’ time to proceed to the merits if the Board lacked jurisdiction.

ALJ Smith issued a further scheduling order on August 14, 2017. Mitchell 7960-64. It called for prehearing submissions by September 20, 2017, and also ordered that “unless otherwise specified, all discovery efforts will terminate on” September 21, 2017,” the date of the telephonic prehearing conference. Mitchell 7961-63. The hearing itself was scheduled for October 5, 2017. Mitchell 7960.

On September 20, 2017, both Mr. Eisenberg on Ms. Mitchell’s behalf, *see* Mitchell 6691-94, and the agency, Mitchell 6657-62, filed prehearing submissions. ALJ Smith then held a prehearing conference on September 21, 2017, in which he identified both the merits issues to be addressed and the legal standards to be applied at the hearing. Mitchell 6811-13.

Mr. Eisenberg’s Representation of Ms. Mitchell in Mediation and Settlement Negotiations: In April 2017, the lawyer representing the VA, Mr. Kelly, expressed to Mr. Eisenberg that the Agency was interested in pursuing a “global settlement of the pending cases of Ms. Mitchell.” Mitchell 10057. Both sides understood this to include both the whistleblower matter before the Board and “Federal Employee Employment issues.” Mitchell 10057.

On May 9, 2017, the Board issued a Notice of Mediation Schedule in Ms. Mitchell’s IRA appeal, indicating that the parties had agreed to explore alternative dispute resolution (“ADR”) on all claims, as Mr. Kelly suggested. The Notice stated that the “parties have . . . a mutual interest in mediation,” and therefore declared that “[a]ll time limits relating to the . . . petition for appeal are now suspended” pending mediation. Mitchell 6382 (emphasis added). The mediation occurred on May 25, 2017, where Ms. Mitchell “appear[ed] . . . with her attorney, Michael D.J. Eisenberg, Esq.” Mitchell 6382-83, 6391. During the course of the mediation itself and

“[a]dditional discussions . . . following the mediation”—in which Mr. Eisenberg of course continued to represent Ms. Mitchell—“a settlement could not be reached.” Mitchell 6391.

Settlement was not reached because Ms. Mitchell and the Agency were extremely far apart on the value of the case. In August of 2017, the Agency pointed out to the Board that “[w]hile the Appellant has reduced [her] initial \$7 million dollar demand to \$5 million dollars, she is still outside the bounds of reasonableness.” Mitchell 6570. That position was based on the Agency’s view that Ms. Mitchell’s termination had nothing to do with whistleblowing, but rather was *mandatory* under federal law because her RN license had entered “inactive” status. Ms. Mitchell, however, took the position that such lapses had occurred in the past and *not* resulted in termination, so she was being singled out due to her whistleblowing. Against that backdrop, the Agency indicated that it would be “more inclined to settle” if a comparator—a specific example of an individual with a lapsed license who was *not* terminated—were “brought forth.” Mitchell 7523.

In August 2017, Mr. Eisenberg did just that. He had “learned through his own independent investigation of a comparator” undermining “the Agency’s claim that medical professionals who allow their licenses to lapse would be immediately fired.” Mitchell 7522. As a result, on September 12, 2017, ALJ Smith issued the Agency a stern “Order to Produce Records” of all RNs “from January 1, 2012 to present” who “had a lapse in state licensing” and the “action taken” by the Agency. Mitchell 6629. On September 19, 2017, the Agency responded with a spreadsheet showing five nurses with lapses in licensing (including Ms. Mitchell), resulting in four terminations *but also one admonishment*, Mitchell 6631, thus undermining the Agency’s position by confirming a comparator who was not terminated. In addition, on September 29, 2017, Mr. Kelly emailed ALJ Smith that information had been “brought to our attention that another Beckley VAMC Registered Nurse may have had a brief . . . lapse in licensure.” Mitchell 6914.

As a result of these revelations, Mr. Eisenberg contacted ALJ Smith on October 2, 2017, to suggest postponing the hearing—again, scheduled to occur just three days later on October 5—to “give the Agency an opportunity to reconsider its [settlement] position from where it left off in mediation and possibly allow the parties to reach an agreement.” Mitchell 6434. Mr. Kelly, who was cc’d on that email, contacted Mr. Eisenberg immediately, also by email, to say that the Agency would be willing to resume settlement talks on “this MSPB case” if “Appellant’s demand” was not “above \$300,000.” Mitchell 6433-34. Mr. Eisenberg indicated he would “take your position back to my client and get back to you.” Mitchell 6433. The Agency filed a Joint Motion to Postpone Hearing, and the ALJ granted a 30-day suspension in the case beginning on October 12, 2017, so that the parties could pursue settlement. Mitchell 6924.

Mr. Eisenberg and Ms. Mitchell interpreted Mr. Kelly’s email as having already offered to settle for \$300,000. After consulting with Ms. Mitchell, Mr. Eisenberg sought to accept that offer. Mitchell 6410. The Agency, however, responded that it had not intended to make an offer of settlement for \$300,000. *Id.* Accordingly, no settlement had occurred when, on November 13, 2017, ALJ Smith held a telephonic status conference. Mitchell 6402.

Unfortunately, before the conference began, ALJ Smith appears to have been under the misimpression that there *was* “a settlement between the parties.” Mitchell 7620; *see also* Mitchell 6402. We found no transcript and relatively little other information about that conference in the record, but when the ALJ realized that there had in fact *not* been a settlement, he appears to have been frustrated with both sides. He told the Agency that “it cannot offer to settle a matter within a particular range then complain because the offered party accepted at the higher end of the range.” *Id.* But he also indicated his view “that Appellant did not have a case, and that Appellant would be lucky to get a five-figure settlement.” Mitchell 7569. According to Ms. Mitchell, the ALJ “clearly stated to all of us that he didn’t think I have a case WORTH six-figures or even five-figures” and “basically told [the Agency] to take their \$300,000 offer back because . . . it was a ridiculous amount.” Mitchell 7602. The Agency did so, advancing an offer to settle for just \$30,500. Mitchell 6414.

On January 12, 2018, Mr. Eisenberg filed an eight-page motion asking the Board to enforce a settlement at \$300,000. Mitchell 6956-64. Because Ms. Mitchell did not want the same ALJ whom she believed had “already made his mind up . . . to “rul[e] in the VA’s favor” to rule on that motion, on that same day Mr. Eisenberg also filed a seven-page motion to recuse ALJ Smith. Mitchell 6940-46. The motion to recuse appears to have been successful, as the case was assigned to a new ALJ, Craig Berg, on January 18, 2018. Mitchell 6978. However, ALJ Berg ruled on the motion for enforcement on January 25, 2018, in the Agency’s favor, finding that Mr. Kelly’s email was only an offer to “enter back into mediation,” not an offer to actually settle for \$300,000. Mitchell 6125-26.

ALJ Berg also presided at a further status conference on January 24, 2018. Mitchell 7009. Again, there is relatively little information in the record regarding this conference, but from context it appears that ALJ Berg indicated at that time that Mr. Eisenberg should have filed Ms. Mitchell’s retaliation challenge to her termination with the Disciplinary Appeals Board (“DAB”) rather than the Merit Systems Protection Board. *See* Mitchell 10060-66. As we explain further in our Analysis below, if that was the ALJ’s view, it appears to have been incorrect. Subject to exhaustion at the OSC, which Mr. Eisenberg diligently obtained in this case, Ms. Mitchell’s claim that she was fired *in retaliation for whistleblowing* was under the jurisdiction of the MSPB. The DAB, in contrast, has jurisdiction over “major adverse action[s]” against federal medical personnel stemming *not* from whistleblowing but rather from issues of “professional conduct” such as failure to provide appropriate medical care. *See* 38 U.S.C. § 7462(a)(1). Presumably based on his view that the MSPB lacked jurisdiction, ALJ Berg ordered on February 5, 2018, that the parties “file supplemental argument on the jurisdictional issue in this matter.” Mitchell 6140; *see also* 10071-74.

Following the status conference with ALJ Berg—and his ruling denying the motion to enforce—Mr. Eisenberg reached back out to Ms. Mitchell regarding next steps. He advised her that the ALJ’s ruling confirmed that the Agency *had* at least offered to resume mediation, and “suggest[ed] that [Ms. Mitchell] mediate only the mspb [case] under \$300,000” as the Agency had offered, keeping the EEO claim separate. Mitchell 6420.

In response, Ms. Mitchell stated that “[t]hey have abused me for almost 6 years and I’m through playing games. I will research and find everything I need to find to beat them in court.”

Mitchell 6419. She further indicated that the “amount . . . is now **5 million** for a GLOBAL” settlement—that is, a settlement including the EEO claim—but if this is “just about my Whistleblower Claims of wrongdoing . . . we are asking for **4 million**.” Mitchell 10059. In response to Mr. Eisenberg’s pleas that “I need to be able to talk with you” and that “E-mails and Instant Messages are not always constructive for conversations,” Mitchell 10065-66, Ms. Mitchell stated, “There’s really no point to call me Mike [as Mr. Mitchell and I] have made up our minds.” Mitchell 10059.

From the record it appears that ALJ Berg’s mistaken view that Mr. Eisenberg should have taken Ms. Mitchell’s whistleblowing case to the DAB rather than the MSPB deeply upset her. On January 31, 2018, she wrote Mr. Eisenberg five emails between 9:47 and 11:32 a.m., *see* Mitchell 10060-64, primarily raising issues about this purported jurisdictional mistake. Indeed, by that point the relationship had deteriorated to the point where Mr. Eisenberg no longer believed that he could effectively represent Ms. Mitchell. He sought to withdraw from the representation, and during a conference with ALJ Berg on February 22, 2018, Ms. Mitchell agreed that she no longer wanted Mr. Eisenberg to represent her. Mr. Eisenberg therefore formally withdrew from the representation on February 22, 2018. Mitchell 7014.

4. The Engagement Agreements: In 2013 and 2014, Ms. Mitchell entered three engagement agreements with Mr. Eisenberg. The first, dated September 25, 2013, and signed by Ms. Mitchell on October 1, 2013, was “for services regarding [her] Federal Employee Employment issue – EEOC.” Mitchell 10081-84 (“EEO Engagement Agreement”). That agreement further specified that it covered representation by Mr. Eisenberg up through “final Agency action,” as well as for an “appeal to US Federal Court” if “Client and Attorney both agree that an appeal . . . is appropriate.” Mitchell 10082.

The September 2013 agreement further specified that Ms. Mitchell would pay an initial “true retainer” of \$5000 that would be “considered earned upon receipt.” Mitchell 10081. Ms. Mitchell would not “be personally liable for any fees in excess of the initial ‘true retainer.’” Mitchell 10082. Mr. Eisenberg would also receive “15% of any award, settlement, etc.” Mitchell 10081. Mr. Eisenberg also indicated that he would keep track of his fees for the purpose of potentially later seeking “to recover its actual attorney’s fees, costs, and expenses” from the government under the Equal Access to Justice Act. Mitchell 10082. The agreement also provided that “COSTS are in addition[] to our FEE and are not included in the FEE,” and that if costs were not paid “within 30 days upon receipt of [an] invoice,” then costs would be “assessed when incurred.” *Id.*

The second engagement agreement—dated September 26, 2014, and signed Ms. Mitchell on October 10, 2014—was for “representation by attorney of client during client’s OWCP reconsideration issue.” Mitchell 10085-90 (“OWCP Engagement Agreement”). The agreement further stated that Mr. Eisenberg would represent Ms. Mitchell “until receipt of final Agency action,” but “both Client and Attorney have to agree to move forward” on any “appeal to a federal court.” Mitchell 10087.

In the OWCP Engagement Agreement, Ms. Mitchell agreed to an “advance fee” of \$4000. Mitchell 10085. The Agreement explained in detail that this advance fee would

ordinarily be placed in a trust account, but that Mr. Eisenberg could place it into his operating account with Ms. Mitchell's informed consent. The Agreement noted that giving consent had real consequences, because in Mr. Eisenberg's operating account the funds would—unlike in a trust account—“be subject to my creditors.” *Id.* The Agreement noted, however, that Mr. Eisenberg still needed to “perform the work described in this agreement in order to earn the advance fee.” *Id.* Mr. Eisenberg agreed to “refund to [Ms. Mitchell] any amount of the advance fee which is not earned.” Mitchell 10085-86.

On November 14, 2014, Ms. Mitchell signed a third engagement agreement (dated October 16, 2014) for Mr. Eisenberg to represent her “regarding [her] Whistleblower issue” in proceedings “against the United States Government.” Mitchell 10091-95 (“OSC Engagement Agreement”). The Agreement provided that it would cover “the Agency proceeding until receipt of final Agency action” in the “Whistleblower, OIG, OSC, etc. process.” Mitchell 10092. The OSC Agreement did not provide for any additional up-front payment by Ms. Mitchell, but instead indicated that Mr. Eisenberg would “be paid 25% of any award” obtained in the case. Mitchell 10091. Again, the Agreement also entitled him to pursue an EAJA recovery as well. *Id.*

5. Work Performed by Mr. Eisenberg, Payments Received, and Error Regarding Original \$4000 Check from Ms. Mitchell: The draft SOC contains almost no information about the work performed by Mr. Eisenberg in the matters discussed above. The record clearly demonstrates, however, that Mr. Eisenberg performed an enormous amount of work on Ms. Mitchell's behalf *over a period of more than four years.*

To give just a cursory sense of that work, it included (but was not limited to):

- Repeated efforts by both Mr. Eisenberg and his associate to determine the status of EEO matter -4616;
- Timely filing a detailed request for reconsideration in Ms. Mitchell's workers' compensation matter;
- Filing a complaint and petition for mandamus in a district court action that also included a number of additional filings, and that resulted in obtaining merits review of Ms. Mitchell's request for reconsideration in her workers' compensation matter;
- Representing Ms. Mitchell in initial meetings with OIG and the VAMC regarding Ms. Mitchell's concerns of retaliation directed at her due to her whistleblowing;
- Following up with OIG and OSC about those concerns;
- Filing an original OSC action seeking relief as to that retaliation claim;
- Filing an MSPB appeal regarding the retaliation claim and a number of subsequent filings in that appeal while awaiting OSC exhaustion;
- Responding to OSC's proposed findings and then transmitting its final decision to MSPB to initiate merits proceedings on the IRA appeal before the MSPB;
- Representing Ms. Mitchell in hearings before the MSPB;
- Engaging in discovery in the MSPB case and making an array of discovery-related and other pre-hearing filings;
- Conducting an independent investigation that led to the Board's order that the Agency disclose “comparators,” resulting in a resumption of settlement negotiations and ultimate proof of Ms. Mitchell's *prima facie* case.

- Representing Ms. Mitchell in mediation, as well as settlement negotiations;
- Making detailed filings with the Board seeking enforcement (unsuccessfully) of the \$300,000 settlement offer and recusal (successfully) of the ALJ whom Ms. Mitchell did not think would treat her fairly.

For all of this work, which would appear conservatively to represent well over 100 hours of Mr. Eisenberg's time, he was—under the engagement agreements discussed above—paid a total of \$9000. That included \$5000 in 2013 and \$4000 in 2014. The agreements do not call for Ms. Mitchell to have paid for any work after that, and she does not appear to have done so.

After Mr. Eisenberg's representation of Ms. Mitchell terminated in February of 2018, a dispute arose regarding her \$4000 payment to him under the 2014 OWCP Engagement Agreement. Shortly after entering into that engagement, Mr. Eisenberg contacted Ms. Mitchell on October 28, 2014, to indicate that he did not think he had received her check for retainer. Mitchell 4; *see also* Mitchell 19-21. Ms. Mitchell informed him that *she had cancelled the original check, #1069*, and also provided a new check, #1070. Mr. Eisenberg cashed that replacement check on November 18, 2014. Mitchell 4; *see also* Mitchell 22-23.

After the engagement ended in February 2018, the original check, #1069, was deposited to Mr. Eisenberg's account on March 1, 2018. Mitchell 5. We could find no evidence in the record that Ms. Mitchell contacted Mr. Eisenberg about this error. Instead, Ms. Mitchell appears to have contacted the West Virginia state police with a fraud complaint. Mitchell 28-31. That complaint claimed that Mr. Eisenberg "had not properly or timely filed any of the cases she had hired him for." Mitchell 31. Although the West Virginia State Police closed that investigation because the "venue of offenses was outside of West Virginia," *id.*, the matter appears to have been referred to the D.C. police. *See* Mitchell 5, 31.

On April 29, 2019, the D.C. police contacted Mr. Eisenberg about Ms. Mitchell's complaint. Mr. Eisenberg indicated that he would need to investigate, and then met with his bookkeeper to investigate Ms. Mitchell's complaint. Attach. 30 (5/1/2019 Email from M. Eisenberg to Detective Milochik). They discovered that Mr. Eisenberg's previous outside accounting firm had made an error on Ms. Mitchell's account. Attach. 31 (5/2/2019 Email from M. Eisenberg to Detective Milochik). Mr. Eisenberg immediately refunded the \$4000, and Ms. Mitchell confirmed on May 17, 2019, that she had received the money. Attach. 32 (5/17/19 Email from Detective Milochik to M. Eisenberg).

B. Analysis: The SOC alleges sixteen rule violations by Mr. Eisenberg in connection with Ms. Mitchell. Those violations include Rules 1.1(a) and (b); Rules 1.2(a) and (c); Rules 1.3(a) and (c); Rules 1.3(b)(1) and (2); Rules 1.4(a) and (b); Rules 1.5(a) and (b); and Rules 1.15(a) and (e); and Rules 8.4(c) and (d). As further set forth below, many of these charges appear to be based on misunderstandings of the facts.

Rules 1.1(a) & (b): The draft SOC alleges that "Respondent violated . . . 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 to clients by other lawyers in similar matters." SOC ¶ 183(A). The draft SOC does not specify the

conduct on which this charge is based, but the implication of the narrative appears to be that Mr. Eisenberg purportedly 1) failed to pursue Mitchell's EEO matters, SOC ¶¶ 110-15; 2) failed to properly pursue or perfect the Request for Reconsideration that he filed in Ms. Mitchell's workers' compensation case, SOC ¶¶ 120; and 3) failed to exhaust administrative remedies, improperly provided OSC's analysis to the MSPB, and otherwise erred in pursuing Ms. Mitchell's IRA appeal at the MSPB, SOC ¶¶ 133-156.

Our review, in contrast, indicates that Mr. Eisenberg pursued these matters diligently and substantially successfully—up until the time when ALJ Berg's erroneous suggestion that Mr. Eisenberg should have filed Ms. Mitchell's challenge to her termination before the DAB rather than the MSPB greatly unsettled Ms. Mitchell and definitively soured the attorney/client relationship.

The MSPB Case: We begin by addressing the MSPB representation because it was by far the most substantial and complex of Ms. Mitchell's matters. The SOC appears to allege that Mr. Eisenberg improperly appealed to the MSPB without pursuing exhaustion at the OSC, SOC ¶ 133; that he failed to obtain discovery, SOC ¶ 134; that it was improper to supply OSC's analysis to the MSPB, SOC ¶ 144; and that Mr. Eisenberg never properly perfected Ms. Mitchell's MSPB appeal, SOC ¶¶ 137-144.

Each of these allegations is incorrect. To see why, it is helpful to first review the complex scheme of whistleblower protections. As applicable here, 5 U.S.C. § 1221(a) provides that an employee or former employee of a federal agency may "seek corrective action from the Merit Systems Protection Board" in response to any "prohibited personnel practice described in section 2302(b)(8)." Section 2302(b)(8)—the "whistleblower protections"—in turn bars federal employers from taking certain actions in retaliation for employee disclosures about wrongdoing within the agency. *See* 5 U.S.C. § 2302(b)(8). A claim by an individual employee seeking MSPB review in whistleblower cases is called an "individual right of action" ("IRA") appeal.

MSPB regulations indicate that an IRA appeal may not go forward until an appellant "seek[s] corrective action from the [Office of] Special Counsel," or "OSC." *See* 5 C.F.R. § 1209.2(b)(1) (2013). Section 1209.2(c) further specifies that when an IRA retaliatory termination claim reaches the MSPB, the *only* "merits issues before the Board are . . . whether the appellant has demonstrated that whistleblowing" contributed to the challenged action(s) "and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the . . . action(s) in the absence of the whistleblowing." *See id.* § 1209.2(c). Under 5 U.S.C. § 1214(a)(6)(iii), an employee has three years from the adverse employee action to file a complaint with the OSC.

At the MSPB, it is the appellant's burden to show that she exhausted her claims before the OSC. The MSPB's jurisdiction in an IRA appeal is limited to the specific issues the appellant raised before OSC. *See, e.g., Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1377 (Fed. Cir. 2001); *Ellison v. Merit Systems Prot. Bd.*, 7 F.3d 1031, 1036 (Fed. Cir. 1993). The Board may only consider the actual claims the appellant made to OSC and not the employee's later characterization of those claims before the Board. *Covarrubias v. Social Sec. Admin.*, 113 M.S.P.R. 583, ¶ 13 (M.S.P.B. 2010), *rev'd on other grounds*,

Colbert v. Dep't of Veterans Affs., No. DA-1221-13-0382-W-1, 2014 WL 5285715 (M.S.P.B. Oct. 16, 2014); *see also Whistleblower Q&A*, U.S. MERIT SYSTEMS PROTECTION BOARD, www.mspb.gov/appeals/whistleblower.htm.

Against this backdrop, there was nothing irregular about Mr. Eisenberg's exhaustion of Ms. Mitchell's OSC remedies and perfection of her appeal at the MSPB. Again, the record indicates that both Ms. Mitchell and Mr. Eisenberg were aware that they had to go to the OSC before an IRA appeal would be permitted to proceed. Ms. Mitchell was terminated on November 2, 2015, and Mr. Eisenberg filed her reprisal claim with OSC about a month later—as instructed by Ms. Mitchell—on December 10, 2015. *See Mitchell* 9975-76.

Mr. Eisenberg then properly alerted the MSPB that Ms. Mitchell would be bringing an IRA appeal, but he also sought voluntary dismissal pending OSC review. The ALJ correctly understood that this was a routine protective filing and provided—as expressly envisioned by the MSPB Judge's Handbook, *see supra* at 20—for “automatic[] refil[ing] by a date specified by the AJ.”

In the meantime, Ms. Mitchell's OSC complaint proceeded, equally routinely, through the process of exhaustion. To start, after that complaint was filed, Mr. Eisenberg waited an appropriate period and then followed up to check on its status. He was told—on August 16, 2016—that “the Office of Special Counsel . . . had not yet concluded Appellant's OSC complaint investigation.” *Mitchell* 5936.

The SOC states that the MSPB “dismissed Mrs. Mitchell's appeal” on September 6, 2016, and “warned that its decision would become final unless a petition for review was filed by October 11, 2016.” SOC ¶ 141. That is incorrect; we do not know what this part of the SOC intends to refer to in the record. Again, as described above, the Board had indicated that it would, as it routinely does, refile Ms. Mitchell's IRA appeal for her if a OSC had not reached a decision by August 4, 2016. No such decision was reached, so the Board *did* refile Ms. Mitchell's IRA appeal on August 4. *Mitchell* 6166. When Mr. Eisenberg then indicated that OSC review was still incomplete, the Board stated that it would again dismiss without prejudice and refile again if necessary—i.e., if there had been no OSC decision—on March 6, 2017. *Mitchell* 6202.

The SOC also suggests that Mr. Eisenberg improperly “filed a new appeal with the MSPB” in January 2017, “**MSBP claim –0139-W-3**,” instead of following up on the pending docket. SOC ¶ 143. While we do not think there would be anything improper about that if it had occurred, it did not occur. At the MSPB, each time an appeal is *re*-filed—which, again, often happens *many* times—the final digit in the claim updates for administrative purposes, until the number reaches “9.” *See, e.g., Jackson v. Dep't of Justice*, No. DE-0754-22-0272-I-2, 2023 WL 3686885 (M.S.P.B. May 25, 2023) (“When the appeal is automatically re-filed, the new case number will be DE-0754-22-0272-I-3 (with the final digit indicating the third iteration of the same appeal).”). Indeed, re-filings are so common that the final digit does sometimes exceed “9”—at which point a new docket number is assigned even though the case remains the same, because the system apparently will not support the final digit updating to “10.” *See, e.g., Lentz v. Dep't of the Interior*, Nos. SF-0752-15-0363-R-1, *et seq.*, 2022 WL 2387534 (M.S.P.B. June 30,

2022) (“When the appeal was refiled a ninth time, due to technical limitations of the Board’s software, it was assigned a new docket number.”).

Accordingly, when the MSPB automatically refiled Ms. Mitchell’s claim in August 2016, the case number went from ending in “1” to ending in “2,” such that the entire case number was “PH-1221-16-0139-W-2.” Mitchell 6148. When Mr. Eisenberg refiled the claim again with proof of exhaustion in February 2017, the ALJ issued an Acknowledgment Order in which the entire case number became “PH-1221-16-0139-W-3.” The ALJ also explained at that time that all documents submitted in the “prior Board record in this matter, MSPB Docket No. PH-1221-16-0139-W-2, may be referred to during the adjudication of this appeal.” Mitchell 7737. This is because, as far as the agency record was concerned, the new filing was just a continuation of “the original appeal.” *Id*; see also Mitchell 6148 (noting similarly that “the prior Board record in this matter [MSPB claim –0139-W-1] may be referred to during the adjudication of this appeal” which was evidently a continuation of “the original appeal”). Again, then, there was nothing remotely irregular about Mr. Eisenberg’s February 7, 2017, filing. It is exactly what the MSPB had anticipated—again, multiple re-filings are routine in IRA appeals.

The SOC also suggests that there was something improper about Mr. Eisenberg providing the OSC’s reasoning to the MSPB, and that there was “no reason” for it. SOC ¶ 145. That is incorrect on two levels. First, as a general matter, a substantial part of the *purpose* of administrative exhaustion is to provide the later reviewer the benefit of the reasoning of the initial review. But second, there was a much more specific reason here for providing the OSC’s determination to MSPB. As noted above, the appellant in IRA appeals has the burden to demonstrate not just the fact of exhaustion before the OSC, but also *specifically what issues the OSC addressed*. See, e.g., *Briley*, 236 F.3d at 1377; *Ellison*, 7 F.3d at 1036. The most straightforward way to do that is to provide the OSC decision, as Mr. Eisenberg did here.

The SOC also suggests that Mr. Eisenberg failed to obtain adequate discovery in the MSPB matter. SOC ¶¶ 147-49. The record does reflect confusion about whether the discovery schedule that ALJ Smith set in February 2017 remained operative many months later after multiple continuances to accommodate the mediation and settlement efforts. Our view is that, under the MSPB’s regulations and Judge’s Handbook, that discovery schedule *should have been pushed back*, as Mr. Eisenberg argued, to take account of the time periods when the parties’ focus was on mediation and possible settlement rather than on discovery—indeed, as noted above, ALJ Smith had specifically ordered, in his May 9, 2017 Notice of Mediation Schedule, that “[a]ll time limits relating to the . . . petition for appeal are now suspended” pending mediation. Mitchell 6382 (emphasis added). It thus frankly appears highly questionable that the Board stuck to the *original* discovery schedule.

In any event, that ruling by the Board was soon overtaken by events. Mr. Eisenberg’s diligence in investigating and prosecuting the case resulted in the Board *ordering* precisely the discovery needed to advance Ms. Mitchell’s IRA appeal. See Mitchell 6629. As noted above, by regulation, the critical issue in an IRA action is “whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the whistleblowing or other protected activity.” See 5 C.F.R. § 1209.2(c). Here, the Agency itself recognized that this issue turned on whether *non-whistleblowers* were, as the Agency

claimed, automatically fired when their credentials lapsed, or whether Ms. Mitchell had been treated more harshly than others in that position. That is why the Agency indicated that it would be “more inclined to settle” if a comparator—of an individual with a lapsed license who was *not* terminated—were “brought forth.” Mitchell 7523.

As set forth above, Mr. Eisenberg’s investigation brought one such individual to light, and he so informed ALJ Smith. Mitchell 7522-23. The ALJ then ordered the Agency to disclose *any* lapses in state licensing that had *not* resulted in termination. Mitchell 6629. The Agency was obliged to acknowledge at least two such situations. Mitchell 6631, Mitchell 6914. That, in turn, is why the Agency was willing, immediately after its second disclosure, to return to the negotiating table as long as “Appellant’s demand” was not “above \$300,000.” Mitchell 6433-34.

To this point, then, Mr. Eisenberg’s pursuit of Ms. Mitchell’s IRA appeal was extremely effective *over a period of years*. The purported missteps identified by the SOC generally were *not* missteps at all—and Mr. Eisenberg successfully brought the Agency to the table to discuss settlement up to \$300,000. Ultimately, the case did not settle—but that is hardly surprising given that Ms. Mitchell indicated that she and her husband required “**5 million** for a GLOBAL” settlement and that if this was “just about my Whistleblower Claims of wrongdoing . . . we are asking for **4 Million**.” Mitchell 10059. Realistically, \$4.7 million is a settlement gap (a difference of over 1000%) that no amount of effective lawyering is likely to close.

Finally, we cannot discern whether the SOC endorses the second ALJ’s apparent initial view that the MSPB lacked jurisdiction over Ms. Mitchell’s whistleblower challenge to her termination. We say “apparent” because, without a transcript of the relevant hearing, it is not certain whether that even was the ALJ’s view during the January hearing. What does seem clear is that Ms. Mitchell *understood* the judge to be saying that the matter should have been filed with the DAB, and that she had the strong—and deeply unsettling—impression that Mr. Eisenberg had erred in not doing so. *See* Mitchell 10060-66.

As set forth above, that impression was wrong—again, our understanding of the law is that the MSPB has jurisdiction (following exhaustion at the OSC) over claims that an employee was fired in retaliation for *whistleblowing*. ALJ Berg may initially have been confused because challenges to terminations of medical personnel *based on job performance* do fall within the jurisdiction of the DAB, not the MSPB. But, as the Federal Circuit ruled in *Harding v. Department of Veterans Affairs*, 448 F.3d 1373, 1375 (Fed. Cir. 2006), the DAB’s jurisdiction over terminations involving “a question of professional conduct or competence,” *see* 38 U.S.C. § 7462(a)(1)(A), does not alter the fact “that 5 U.S.C. § 2105(f) represents express authorization by Congress for the inclusion of DVA medical personnel in the class of ‘employees’ protected by 5 U.S.C. § 1221.” *Harding*, 448 F.3d at 1375. Again, that means the MSPB unquestionably has jurisdiction over such whistleblower claims. And, of course, ALJ Berg himself came around to that view after further time to reflect. His final decision in Ms. Mitchell’s case correctly found that Ms. Mitchell’s disclosures to her elected officials were within the MSPB’s jurisdiction under 5 U.S.C. § 2302(b)(8), although he rejected her claim on the merits. *See* Attach. 33 (July 22, 2019, Initial Decision in *Mitchell v. VA*, MSPB Case No. Ph-1221-16-0139-W-5) (“ALJ Berg Final Decision”).

In sum, Mr. Eisenberg did an impressive job to get the Agency to the negotiating table to talk about a settlement up to \$300,000 in a case that—as noted above—ALJ Smith made clear he did not think was even worth “five figures.” See Mitchell 7569. ALJ Berg’s incorrect initial assumption about the MSPB’s jurisdiction—or lack thereof—appears to have greatly damaged the relationship between Mr. Eisenberg and Ms. Mitchell, undermining his ability to represent her effectively. Indeed, in the aftermath of that conference with ALJ Berg, Ms. Mitchell refused even to speak to Mr. Eisenberg—see Mitchell 10066 (email from Mr. Eisenberg to Ms. Mitchell indicating that Ms. Mitchell refused to talk verbally with Mr. Eisenberg, forcing them to engage in “near hour long conversation[s] via IM”); see also Mitchell 6419-23 (IM exchange between Mr. Eisenberg and Ms. Mitchell, in which Mr. Eisenberg asks Ms. Mitchell if she is “free to talk for a few minutes,” and Ms. Mitchell responds that she “really do[esn’t] see a point in talking”)—notwithstanding efforts on his part documented on the record. In such circumstances, it is not surprising that he sought and received permission to withdraw from the representation. Mitchell 7014.

Still, Mr. Eisenberg had done enough so that, even proceeding *pro se* after his withdrawal, Ms. Mitchell was able to prove her *prima facie* case of whistleblower retaliation. Attach. 33 at 8. The evidence that Mr. Eisenberg uncovered that non-whistleblowers were not necessarily fired for a lapse in credentials carried that issue. But Ms. Mitchell did not prevail because ALJ Berg found—even in the face of these inconsistent comparators unearthed by Mr. Eisenberg—that the agency had shown by clear and convincing evidence that it *would* still have “terminated the appellant even in the absence of her protected activity” as a result of her lapsed license. *Id.* at 12. Essentially, ALJ Berg found the non-terminated comparators to be outliers.

The Workers’ Compensation Case: Turning to Ms. Mitchell’s workers’ compensation matter, as discussed in summary fashion above, the allegations of the SOC are even more directly at odds with the record than in the MSPB case. The SOC maintains that “the OWCP denied Mrs. Mitchell’s second request for reconsideration” on December 2, 2015, SOC ¶ 121, and that Mr. Eisenberg then waited until February 2017 to file a petition for mandamus that was ultimately dismissed because Mr. Eisenberg disregarded a district court order. SOC ¶ 123-28. These allegations are inconsistent with the record.

As set forth above, Mr. Eisenberg filed a timely and well-reasoned Request for Reconsideration—what the SOC calls the “second request for reconsideration,” SOC ¶ 121, because Ms. Mitchell had filed a previous one—in the workers’ compensation matter on June 26, 2015. Mitchell 4702-10. The SOC maintains that “the OWCP denied [this] . . . request for reconsideration” on December 2, 2015. SOC ¶ 121. We could find no support for that claim in the record, and the SOC cites none. Again, the only document we could find in the record dated December 2, 2015, is a letter from the VA Healthcare Network to Ms. Mitchell, in which the Acting Director of the VA Capitol Health Care Network—an entirely different entity having no connection at all to the OWCP—upheld Ms. Mitchell’s termination from work on the grounds that she had not maintained an “unrestricted Nurse License.” Mitchell 5668. That decision is unrelated to Ms. Mitchell’s workers’ compensation case.

In fact, through early 2016, Mr. Eisenberg and Ms. Mitchell had no reason to believe that there was any issue or problem with her request for reconsideration. In May 2016, Mr.

Eisenberg's office reached out to OWCP for a status update. Mitchell 10011-12. Unfortunately, at that point, to get any information at all he and his colleague were obliged—as set forth in our statement of facts—to persist through a remarkable series of obfuscations and misdirections by OWCP, only to ultimately be told that Ms. Mitchell's request for reconsideration would not be considered on the merits because Mr. Eisenberg had not provided a “notice of representation” until the agency requested it after the time for reconsideration had run. *See* Mitchell 10013-50. Mr. Eisenberg and his colleague still continued, however, to try to obtain reconsideration by OWCP through October of 2016. *See* discussion *supra* at 17.

When that failed, as also discussed above, Mr. Eisenberg refused to let the matter drop and instead filed a petition for mandamus in D.C. District Court asking the court to order merits consideration of his Request for Reconsideration. Mitchell 9002-10. Directly contrary to the allegations of the SOC, *that petition for mandamus was entirely successful*. After literally years of obfuscation by the agency, just two months after Mr. Eisenberg filed his petition for mandamus, *OWCP confessed error*. On April 19, 2017, OWCP formally acknowledged Ms. Mitchell's Request for Reconsideration and stated that it would—precisely as requested in the petition—be reviewed on the merits by a new Senior Claims Examiner who had not previously been involved with the claim. Attach. 28 at 1; Mitchell 8979. OWCP then did just that—on May 19, 2017, it issued a merits decision stating that the case had been reviewed on the merits of the Request for Reconsideration, but that the Request lacked “sufficient probative value to modify the [prior] decision.” Attach. 29 at 3; Mitchell 8981-84.

When the Agency *then* moved to discuss Mr. Eisenberg's mandamus action—on June 26, 2017—it had thus *already* provided the relief he had asked the court to order. So Mr. Eisenberg did indeed “represent[] to the court”—here the draft SOC is correct—that the case before the district court was “moot” and would “be dismissed.” *See* Mitchell 9146. But he did so not in disregard of a court order to prosecute the case. Rather, Mr. Eisenberg correctly told the court that the petition was moot because he and his client had already received the relief requested. Having obtained that relief from OWCP—the *only relief the court could provide Ms. Mitchell*—the district court litigation *was* indisputably moot.

In sum, then, Mr. Eisenberg overcame difficult circumstances to obtain information from the agency, and then prosecuted a difficult mandamus action and *obtained* for Ms. Mitchell exactly what she was entitled to—merits review of his well-written Request for Reconsideration. He ultimately failed to persuade the OWCP that the emotional harm claimed by Ms. Mitchell entitled her to compensation under the Act. While we are not workers' compensation experts, that decision seems correct to us—but, in any event, the core point here is that Mr. Eisenberg's aggressive lawyering did obtain for Ms. Mitchell the decision *on the merits* of her second Request for Reconsideration *to which she was entitled*.

The EEO Matters: The SOC essentially alleges that Mr. Eisenberg agreed to represent Ms. Mitchell on her EEO matters, but soon after unilaterally “deci[ded] to abandon them,” SOC ¶ 111, without ever even “enter[ing] an appearance.” SOC ¶ 110. This is also a misunderstanding of the record.

When Mr. Eisenberg was retained by Ms. Mitchell, her former counsel had requested a hearing before an ALJ, Mitchell 5593, which resulted in referral of the investigative file to the EEOC office in Philadelphia on August 29, 2013. Mitchell 5557-58. The record is clear that Mr. Eisenberg then contacted the Agency via fax to let it know that he had been retained in the -4616 matter and further communications should go through his office, Mitchell 5622, *and* that the agency was aware of the representation. The staff attorney assigned to the case consistently cc'd Mr. Eisenberg on emails and negotiated with him for years on a *global* settlement of Ms. Mitchell's matters that included her employment claims as well as her whistleblower claims. *See* discussion *supra* at 14-16.

As in the case of the workers' compensation claim, Mr. Eisenberg and a colleague repeatedly contacted the EEOC offices in both D.C. and in Philadelphia to ensure that the request for a hearing remained on track. *See* Mitchell 5610-12. As of June 19, 2015, Mr. Eisenberg's office was unambiguously told that the "case files are with the Philadelphia District Office Hearing Unit," Mitchell 5609, and that "the subject matter is still pending." *Id.* But still they did not just trust to fate. After still hearing nothing for months, on September 24, 2014, Mr. Eisenberg again followed up, as did the Agency staff attorney assigned to case. *See* Mitchell 9203.

As noted above, the SOC claims that the next event in the -4616 history was a decision by "the employer" on March 31, 2015 "dismissing all Mrs. Mitchell's EEOC claims." SOC ¶ 113. That is incorrect. The decision on that date addressed a *different* EEO claim filed by Ms. Mitchell herself, -1271, while again unambiguously indicated that "Complainant's harassment claim under EEO Case . . . 4616 is currently pending hearing." Mitchell 5656 n.3. The March 31, 2015, decision thus did not resolve or even address -4616 other than to note that it was still on track for a hearing.

As also noted above, Ms. Mitchell—and thus Mr. Eisenberg—substantially shifted focus at the end of 2014 to her potentially-much-more-valuable claim that she was the subject of retaliation for whistleblowing. As noted above, however, while primarily focusing on *that* claim, all parties—including Mr. Eisenberg, the VA lawyer (Mr. Kelly), and Ms. Mitchell—understood that Ms. Mitchell's *employment* claims were also part of mediation and settlement discussions. *See* Mitchell 10057, 10065-66.

The SOC appears to fault Mr. Eisenberg for not "fil[ing]"—or "discuss[ing]" with Mrs. Mitchell whether she could file"—another EEO complaint relating to her termination in 2015. SOC ¶¶ 114-15. But the record reflects that Ms. Mitchell—with Mr. Eisenberg's advice and assistance—*added her termination to her whistleblower retaliation suit.* *See* Mitchell 9977 (email from Ms. Mitchell requesting Mr. Eisenberg to file her whistleblower claim with the OSC). That appears to have been the only appropriate outlet for her retaliation claim—as discussed above, claims of retaliation (including via termination) for whistleblower fall under the jurisdiction of the MSPB.

In sum, Ms. Mitchell's EEO case may ultimately have been mishandled or misplaced by *the agency*. We could find nothing in the record specifically addressing that case's ultimate disposition. But in focusing on the whistleblower matter, Mr. Eisenberg was by no means acting

unilaterally or improperly. He was doing exactly what Ms. Mitchell wanted him to do at the time, and what the scheme for administrative review of whistleblower claims of retaliation appears to require.

Rules 1.2(a) & (c): The draft SOC alleges that “Respondent violated . . . Rules 1.1(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.” SOC ¶183(B). The SOC provides no specifics, so it is difficult to discern what these allegations refer to. But, against the backdrop of the facts and law discussed above, we do not think they merit substantial additional discussion.

As set forth above, after being paid \$9000 to represent Ms. Mitchell on matters *she had initiated* before the EEOC and the OWCP, Mr. Eisenberg spent *four years* representing Ms. Mitchell not only on those matters, but on a complicated whistleblower appeal before the OSC and the MSPB. The notion that he did this without “consulting her about the means to pursue her objectives” makes no sense. *She* selected the means in every matter. *She* filed with the EEOC and the OWCP, and *she* specifically told him to file with OSC. And Mr. Eisenberg perfected the IRA appeal that she initiated at the OSC by diligently pursuing it at the MSPB. Again, all of this took years.

Mr. Eisenberg thus did not “limit the representation’s objectives” in any meaningful sense of that phrase. To the contrary, the objectives expanded over the years to home in on Ms. Mitchell overall goal of a “global” cash settlement on all her claims. Again, the fact that Mr. Eisenberg did not *achieve* that goal appears due to some unfortunate (and mistaken) comments by ALJ Berg, as well as the Mitchells’ own excessive valuation of their case. But it certainly was not due to a failure to consult.

Rules 1.3(a) & (c): The draft SOC alleges that “Respondent violated . . . 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.” SOC ¶ 183(C).

Again, there is no need to repeat here everything we have said above. But Mr. Eisenberg performed years of work on complicated cases here at extremely low cost. To take just two examples, he obtained by petitioning for mandamus the very relief that the OWCP had repeatedly denied. And by unearthing “comparators” the VA had sought to conceal, Mr. Eisenberg also gave Ms. Mitchell a real opportunity to reach a six-figure settlement in a case that ALJ Smith found extremely underwhelming. While the representations here were not perfect, the facts reflected by the record—as opposed to allegations of the SOC—demonstrate diligence and zeal in abundance over a period of multiple years.

Rules 1.4(a) & (b): The draft SOC alleges that Mr. Eisenberg violated 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.” These allegations are again difficult to respond to because it is unclear what they refer to.

The evidence on the record is that Mr. Eisenberg and Ms. Mitchell worked closely together on her core whistleblower claims beginning in December of 2014, when Mr. Eisenberg began accompanying Ms. Mitchell to meetings with government officials, *see, e.g.*, Mitchell 9553-54 (describing meetings with OIG and the VAMC), all the way up through January 2018, when some uninformed comments by ALJ Berg appear to have thoroughly undermined their relationship, which was already fraught with frustration due years of errors and obfuscation by agency decisionmakers. It is also clear from the record that it was Ms. Mitchell who initially filed her EEO, OWCP, and her initial whistleblower matter, and also that it was she who directed Mr. Eisenberg to add her termination claim to her whistleblower case by filing it with OSC. And it is clear that Ms. Mitchell was fully informed throughout the OWCP case—including the fact that the agency *capitulated* on its untimeliness claim as a result of the mandamus action in district court, and then issued a new decision on the merits.

What is *not* clear from the record is why or when the EEO case 1) ceased to be on track for a hearing, as Mr. Eisenberg was repeatedly told both orally and in writing at least up through mid-2015; or 2) what the ultimate disposition of that case and the reasoning underlying any such disposition were. But neither side had much incentive to press for a hearing on that matter as long as it was part of “global” settlement talks that also included the far more substantial whistleblower claim, and those talks were ongoing right up through Mr. Eisenberg’s withdrawal from the case in early 2018.

In short, we would be happy to further address specific allegations that Mr. Eisenberg failed to keep Ms. Mitchell informed of developments in her case. But other than the fact that the Philadelphia EEO office may have lost or mistakenly closed Ms. Mitchell’s file—which *nobody* knew, including not only Mr. Eisenberg and Ms. Mitchell, but the Agency’s own lawyer in these matters, Mr. Kelly—we simply do not know what the developments the SOC alludes to here. From the record, it appears that Ms. Mitchell was closely involved at every stage of every matter.

Rule 1.5(a): Paragraph 183(F) of the draft SOC alleges that Respondent violated 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.” We are uncertain what this charge intends to encompass in “prohibited by law” because no law other than Rule 1.5(a) is specified. But Mr. Eisenberg’s arrangement with Ms. Mitchell to represent her in her OWCP matter did not violate Rule 1.5(a).

Rule 1.5(a) requires that lawyers must charge a “reasonable” fee. *See* D.C. Rules r. 1.5(a). The rule identifies many factors to consider in determining “reasonableness,” but the most fundamental is the “time and labor” required by the engagement. *Id.* 1.5(a)(1). Comment [4] further provides that “[a] lawyer may require advance payment of a fee, but is obliged to return any unearned portion.” *Id.* 1.5[4].

As discussed above, the OWCP Engagement Agreement between Mr. Eisenberg and Ms. Mitchell called for Ms. Mitchell to pay an “advance fee” of \$4000 for him to represent her on her

“OWCP reconsideration issue.” Mitchell 10085. The agreement further indicated that Mr. Eisenberg would represent Ms. Mitchell “until receipt of final Agency action.” Mitchell 10087.

As also set forth above, the Agreement explained in detail that the advance fee of \$4000 would ordinarily be placed in a trust account, but that Mr. Eisenberg could place it into his operating account with Ms. Mitchell’s informed consent. The Agreement explained the consequences of such consent—the funds would, unlike in a trust account, “be subject to [Mr. Eisenberg’s] creditors.” Mitchell 13. The Agreement also indicated that Mr. Eisenberg would “refund to [Ms. Mitchell] any amount of the advance fee which is not earned.” Mitchell 13-14. Ms. Mitchell consented to these terms.

We are unsure what is alleged to be inconsistent with Rule 1.5(a) here. Rule 1.15(e) appears potentially more relevant, because it requires “[a]dvances of unearned fees . . . [to] be treated as property of the client”—but subject to an exception when “the client gives informed consent to a different arrangement.” D.C. Rules r. 1.15(e). Again, Ms. Mitchell did, in fact, give informed consent to a different arrangement here.

Perhaps the issue is whether Mr. Eisenberg actually *earned* the \$4000, as Rule 1.5(a) of course also requires. But he plainly did. Again, in the engagement agreement, he indicated that he would represent Ms. Mitchell on her “OWCP reconsideration issue,” Mitchell 14, up through “receipt of final Agency action.” Mitchell 10087. And he then went to great lengths to ensure that she actually received the “final agency action” on reconsideration to which she was entitled. That started with filing a detailed, nine-page-single-spaced Request for Reconsideration. Mitchell 4702-10. He and his colleague then spent hours trying to ascertain why OWCP never ruled on the request. When they were ultimately told that OWCP believed there was a fatal procedural flaw, Mr. Eisenberg filed a complaint and mandamus petition in district court, representing dozens more hours of work. And he continued to pursue that petition until OWCP capitulated and provided the merits review to which Ms. Mitchell was entitled. *See discussion supra* at 16-18.

Ms. Mitchell was extremely fortunate to be represented on a flat-fee basis (plus a contingency that never eventuated) in her OWCP appeal. At a conservative estimate, Mr. Eisenberg devoted dozens of hours to this matter—such that his hourly fee was likely under \$100, which is, at the very least eminently “reasonable” under Rule 1.5(a).

Rule 1.5(b): The draft SOC alleges that Respondent violated Rule 1.5(b), “because Respondent did not provide his client a writing that accurately represented the scope of his representation.” SOC ¶ 183(G). Once again, we are unsure what this charge is about, but from its context surrounded by other charges involving the OWCP matter, we surmise that it concerns the OWCP matter.

If so, the charge is incorrect. As set forth above, the second engagement agreement between Mr. Eisenberg and Ms. Mitchell provided that he would represent Ms. Mitchell on her “OWCP reconsideration issue,” Mitchell 14, up through “receipt of final Agency action.” Mitchell 10087. And that is exactly what he did, persevering through agency misdirection, pursuing a difficult district court action, and obtaining the merits consideration to which Ms.

Mitchell was entitled. Mr. Eisenberg’s “writing” thus said exactly what he was going to do, and then he did it, notwithstanding that it took far more effort (and time) than anyone could have envisioned at the outset of the representation. There was never any issue regarding the scope of Mr. Eisenberg’s representation of Ms. Mitchell in her OWCP matter—the agreement simply came to its natural end when Ms. Mitchell received her final, albeit unfavorable, agency action.

Rule 1.15(a): The draft SOC alleges that Respondent violated 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.” SOC ¶ 183(H). As set forth below, the record here does not reflect intentional or reckless misappropriation.

As explained above, there was some confusion surrounding Ms. Mitchell’s initial \$4000 payment to Mr. Eisenberg under the 2014 OWCP Representation Agreement. Shortly after entering into that engagement, on October 28, 2014, Mr. Eisenberg contacted Ms. Mitchell to indicate that he did not think he had received her check for retainer. Mitchell 4; *see also* Mitchell 19-21. Ms. Mitchell informed him that she had cancelled the original check, #1069, and also provided a new check, #1070. Mr. Eisenberg cashed that check on November 18, 2014. Mitchell 4; *see also* Mitchell 22-23.

Years later, after the engagement ended in February 2018, the original check, #1069, was deposited to Mr. Eisenberg’s account on March 1, 2018. Mitchell 5. This was due to an outside accountant’s error in connection with Ms. Mitchell’s account, which did not show the initial payment for \$4000. Attach. 31. As a result, Mr. Eisenberg issued a *new* bill for that matter. It is unclear from the record exactly how or why the *old* check was deposited—but certainly there is no evidence that Mr. Eisenberg “intentionally” or “recklessly” sought to double bill.

Unfortunately, Ms. Mitchell does not appear to have gone to Mr. Eisenberg about this error, but rather contacted the West Virginia state police. Mitchell 28-31. Because Mr. Eisenberg was not within their jurisdiction, they appear to have referred the matter to the D.C. police. *See* Mitchell 5, Mitchell 31. At the request of a D.C. detective, Mr. Eisenberg investigated, found the error, and immediately refunded the \$4000. *See* Attachs. 30-32.

The issue here thus appears to have been a simple mistake—and by Mr. Eisenberg’s accountant rather than by him. We could find no evidence in the record of intentional or reckless misappropriation.

Rule 1.15(e): The draft SOC alleges a Rule 1.15(e) violation “because Respondent misappropriated Mrs. Mitchell’s \$5000 by removing it from his IOLTA to his operating account before he had earned the funds.” SOC ¶ 183(I). The narrative further specifies that this occurred only three days after Mr. Eisenberg initially deposited the funds to his IOLTA account. *Id.* ¶ 169.

We could not find documents in the record to verify these claims but would certainly appreciate the opportunity to review any such evidence. If the timetable set forth in the SOC is correct, it may be correct that the \$5000 was not fully earned at the time of transfer to the

operating account. We look forward to working with you to learn further specifics of what occurred, and when. In short, whether there was a Rule 1.15(e) violation depends on factual issues that we have not yet been able to pin down in the investigative files.

We do think it again bears emphasis, however, that this is a situation where Mr. Eisenberg unquestionably performed tens of thousands of dollars of legal services over a period of several years for which he was not compensated in any way. That does not, of course, excuse premature transfers of funds from an IOLTA to an operating account, but it is flatly inconsistent with Ms. Mitchell's repeated claims on the record that Mr. Eisenberg was not a "real" attorney and was merely "running a scam." *See, e.g.,* Mitchell 4-8, Mitchell 46-49. Representing Ms. Mitchell on several complex matters and performing at least scores, probably hundreds, of hours of work to investigate and prosecute matters in which any prospect of reasonable compensation depended on *Ms. Mitchell* accepting a settlement certainly was not a "scam" on *her*.

Rule 8.4(c): The draft SOC alleges a Rule 8.4(c) violation "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." SOC ¶ 183(J).

As set forth above, we found no indication on the record that cashing the \$4000 check reflected any intentional or reckless conduct on Mr. Eisenberg's part and thus no evidence of dishonesty. The evidence that does appear, including that Mr. Eisenberg immediately refunded the money when contacted about it, weighs in the opposite direction. Again, however, we would be interested to review any record materials that you believe support the SOC's claims of dishonesty.

With respect to the \$5000 payment, as set forth above, the engagement agreement specified that it would be "considered earned upon receipt." Mitchell 10081. Accordingly, putting aside whether that agreement was *permitted* by Rule 1.15(e), it certainly was not *dishonest*. Mr. Eisenberg and Ms. Mitchell specifically *agreed* that the money was his upon payment. Accordingly, we simply cannot see how the transfer could support a charge of dishonesty. We would appreciate any guidance if you are aware of relevant record materials that we have missed, since we certainly cannot be sure to have seen everything in the limited time we had for review of the extensive investigate files.

Rule 8.4(d): This is another of the counts where we simply cannot discern what is being alleged. As discussed further in connection with Glaab and Swain below, the Court of Appeals has characterized Rule 8.4(d) as addressing "derelictions of attorney conduct considered reprehensible to the practice of law." *In re Hopkins*, 677 A.2d 55, 59 (D.C. 1996) (quoting *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985)). Such cases "generally involve misleading the court or misusing or obstructing proceedings . . . or interfering with Bar Counsel's efforts to investigate attorney misconduct." *In re Yelverton*, 105 A.3d 413, 426 (D.C. 2014).

We do not think such conduct has even been alleged here. But we certainly would welcome any opportunity to learn what, exactly, the concerns here are under Rule 8.4(d).

VI. Glaab

A. Background: In 2011, Ms. Glaab was a statistical clerk in the U.S. Census Bureau. She believed that her employer had discriminated against her and therefore filed two Equal Employment Opportunity Complaints—Complaint No. 11-63-00265 (Ms. Glaab’s “first EEO case”) and Complaint No. 63-2012-01866 (her “second EEO case”). She sought a lawyer to assist her in those proceedings.

Ms. Glaab ultimately engaged Mr. Eisenberg. She met him because he had been representing Ms. Glaab’s friend and colleague, Ms. Cain, in an unrelated EEO proceeding since 2010. Ms. Glaab and Mr. Eisenberg entered an engagement agreement on July 16, 2012. *See* Glaab 471-73. At that time, Mr. Eisenberg still also represented Ms. Cain. Mr. Eisenberg deposed Ms. Glaab as a witness in Ms. Cain’s case on the same day that Ms. Glaab hired him for her case. By that time, Ms. Cain had fallen behind in her payments to Mr. Eisenberg. Ms. Glaab was aware of Ms. Cain’s debt to Mr. Eisenberg. In fact, Ms. Glaab had loaned money to Ms. Cain—including money to pay Mr. Eisenberg—and had not been paid back. Glaab 176.

At the time that Mr. Eisenberg was engaged by Ms. Glaab, they both expected that Ms. Cain might be a witness in Ms. Glaab’s EEO cases. SOC ¶ 7. Ms. Glaab thus chose to engage Mr. Eisenberg even though she knew that Ms. Cain might be a witness in her case, that Ms. Cain was behind on her payments to Mr. Eisenberg, and that Ms. Cain owed Ms. Glaab herself money.

The engagement letter entered on July 16, 2012 by Ms. Glaab and Mr. Eisenberg provided for a non-refundable “true retainer” of \$4,000. The agreement also indicated that Ms. Glaab would not be liable for any attorney’s “fees in excess of the initial ‘true retainer.’” Glaab 471. The letter stated that for purposes of later attempting to recover attorney’s fees from the government, Mr. Eisenberg would track time spent on Ms. Glaab’s case at the then-current “*Laffey*”-matrix rate, which was \$305 for an attorney of his seniority. That rate would be “subject to change” over time based on the Bureau of Labor’s Consumer Price Index (“CPI”) data. *Id.* (The *Laffey* matrix is a widely used tool for setting appropriate fees in fee-shifting cases, *see* Laffey Matrix, www.laffeymatrix.com/see.html (last visited Oct. 24, 2023), and is commonly adjusted using CPI data. *Id.*) The engagement letter further provided for a 15% contingency fee “of any award, back benefits, etc.” *Id.* Perhaps most important here, the agreement also indicated that the agreement as to *attorney’s fees* “does not include any out-of-pocket costs that may be incurred, such as court filing fees, sheriff’s fees, deposition costs, photocopying, etc. As explained these COSTS are in additional to our FEE and are not included in the FEE.” Glaab 472.

After being engaged by Ms. Glaab, Mr. Eisenberg conducted robust discovery efforts on her behalf from September to December of 2012 in her first EEO case. That work included exchanging discovery requests and responses, and taking nine depositions. Glaab 127 (“Mr. Eisenberg deposed eight witnesses in addition to Mrs. Glaab.”). The record does not reveal any dispute about the fact that Mr. Eisenberg paid the costs of court reporters needed for the depositions, as well as the costs of his own travel.

The Administrative Law Judge to whom Ms. Glaab's first EEO case was assigned, Judge Davidson Momah, scheduled a settlement conference with the parties during the discovery period, to be held on November 9, 2012. Several days before the conference, Mr. Eisenberg called the judge and left a voicemail with an unopposed request that the settlement conference be postponed because Mr. Eisenberg thought the parties were nearing a settlement. *See* Glaab 745-61. The judge did not respond. Unfortunately, by the day of the conference, the agency had rejected Ms. Glaab's settlement offer, and it was clear to Mr. Eisenberg that "there would be no settlement." Glaab 535. Mr. Eisenberg assumed that the settlement conference would be cancelled and—after again attempting to confirm cancellation of the settlement conference—left on a preplanned family trip. *Id.* He accordingly missed the settlement call, although his associate, Ms. Schabacker "offered to take the call in [his] place," but the judge "said no." Glaab 743. The same day, Mr. Eisenberg emailed the judge to apologize for "misinterpret[ing] the situation"—he had interpreted the judge's silence as agreement that the conference should be postponed. Glaab 535.

At the end of the discovery period, on December 28, 2012, Ms. Glaab's employer moved for summary judgment. Glaab 5299. Mr. Eisenberg's office appears to have prepared an opposition, Glaab 1442, and the motion was denied on January 18, 2013. Glaab 6411. On January 8, 2013, Judge Momah held a pre-hearing conference, which Mr. Eisenberg attended. On May 2, 2013, Mr. Eisenberg represented Ms. Glaab at the hearing in Louisville, Kentucky before Judge Momah. After hearing *only* from Ms. Glaab, Judge Momah orally denied her claims and dismissed her case. Judge Momah explained: "I don't know whether she's telling me the truth or whether she's making things up as she goes along. When confronted with . . . several of her testimonies . . . she denies it, then the deposition that was taken of her contradicts her testimony." Glaab 991. The judge concluded that "there were so many incidents [in Ms. Glaab's testimony] that lack[] credibility here that I can't . . . you know, continue with the case—to have the Agency incur additional expense." Glaab 992.

Notably, at the time Ms. Glaab's first EEO case was dismissed, it does not appear that Ms. Cain was even aware that Mr. Eisenberg intended to seek to recover costs that she had not paid by suing her. That suit was filed in Superior Court on April 17, 2013. *See Eisenberg v. Cain*, Opinion & Order, at 1 (Civ. No. 2013 CA 2689 B, April 4, 2014). The Superior Court's rules provide for 60 days for service of process. *See* D.C. Super. Ct. Rule 4(m)(1). Mr. Eisenberg provided an Affidavit of Service to the court on May 13, 2013. Default judgment was entered on Mr. Eisenberg's behalf on December 17, 2013, and Ms. Cain's Motion to Vacate that judgment was denied on April 4, 2014. *Cain*, Opinion & Order, at 2-3.

In Ms. Glaab's second EEO case, Mr. Eisenberg entered a notice of appearance on August 22, 2012, soon after his engagement. Glaab 6833. Ms. Glaab received a Report of Investigation ("ROI") in that case on November 13, 2012. The ROI set forth a statement of Ms. Glaab's three complaints accepted for investigation and the steps that had been taken to investigate them. Ms. Glaab's claims, alleging age and sex discrimination as well as retaliation for her "prior EEO activity," Glaab 7050, involved: 1) a supervisor's comment to a roomful of approximately 40 or 50 people, including Ms. Glaab, indicating that the supervisor wouldn't "want to be [working]" at the Census Bureau when she reached some of their ages; 2) Ms. Glaab's reassignment to an area of the workplace near a co-worker with whom she did not get

along; and 3) a supervisor being “less than civil” in counseling Ms. Glaab on her workplace performance and also denying her request for a transfer to a different division. Glaab 7055-58. The ROI indicated that an investigator had taken extensive testimony from Ms. Glaab and the two supervisors involved, Glaab 7052, and had reviewed and incorporated into the record documents submitted by Ms. Glaab, one of the supervisors, and an EEO specialist who had also investigated Ms. Glaab’s claims. Glaab 7053.

Although Ms. Glaab was entitled to seek a hearing to further supplement the record reflected by the ROI that she had already helped to build, neither she nor Mr. Eisenberg sought to do so. On April 3, 2013, an ALJ therefore addressed her claims on that record. Glaab 6945-88. The decision rejected Ms. Glaab’s first claim—regarding the supervisor’s comment—because it had no “materially adverse” consequences for her. Glaab 6972. The ALJ further found that Ms. Glaab had not borne her burden to establish a *prima facie* case that the second and third incidents had involved disparate treatment based on age or sex. Glaab 6973-74. With respect to retaliation, the ALJ found a *prima facie* case but ruled that the agency had met its burden to show that its actions were taken for legitimate reasons. Glaab 6979-84. On May 30, 2013, Mr. Eisenberg filed a 10-page, single-spaced brief appealing the ALJ’s determinations. Glaab 7030-40. Soon after—by June 3, 2013—the attorney-client relationship between Mr. Eisenberg and Ms. Glaab ended. Glaab 441.

About a month later, on July 5, 2013, Mr. Eisenberg filed a complaint against Ms. Glaab in Superior Court for breach of contract, claiming that she had failed to fulfill her financial commitments to him under their engagement agreement. More specifically, the Complaint alleged that Ms. Glaab had contracted in the engagement agreement “to pay all costs associated with the prosecution of her” EEO cases, and that she had not done so. Glaab 458. The Complaint further alleged that unpaid costs in her first EEO case—primarily for fees paid to court reporters and travel expenses, *see* Glaab 477-80—totalled \$5,870.63. Glaab 458.

The Complaint advanced two primary theories of recovery, in the alternative. The first was that the retainer agreement was a valid contract. If that were the case, then the \$4000 retainer was earned upon receipt, and Ms. Glaab would owe no further attorney’s fees—but she would still owe Mr. Eisenberg for the actual expenses of the case that he had paid and for which she had not reimbursed him. On this theory, Mr. Eisenberg sought an award of \$5,870.63 in unreimbursed costs. Glaab 459-61.

Mr. Eisenberg’s second theory of recovery was that if there had been no valid contract—which he understood to be Ms. Glaab’s position—then Ms. Glaab should have to pay him the “reasonable value of the unpaid legal fees” on a theory of *quantum meruit*. Glaab 462-63. Mr. Eisenberg calculated that value based on the *Laffey* rate at the time that his representation of Ms. Glaab ended, Glaab 289—as opposed to the *Laffey* rate in the engagement letter. His “understanding [was] that, at least in the federal government, they accept the Laffey Fee rate of what is current when the matter settles or concludes.” *Id.* In Mr. Eisenberg’s view, the *Laffey* rate multiplied by the hours worked would fairly reflect the market value of the services that he and his associate had provided to Ms. Glaab. Using that calculation, Mr. Eisenberg arrived at a fair market value of \$42,731.55 for that work. Glaab 458. Of course, in the absence of a contract, the total of \$5000 that he believed Ms. Glaab had paid him—the \$4000 retainer plus

\$1000 toward his expenses—had to be credited to her, leaving a total outstanding value of \$37,731.55. *Id.* But Mr. Eisenberg’s costs—the \$5870.63 of unpaid expenses outstanding—were also still owing, such that the total—again, in the absence of any enforceable contract—would be \$43,602.18. *Id.*

Mr. Eisenberg’s summary judgment motion, filed on November 1, 2013, Glaab 450, made clear that these arguments were presented in the alternative. Part I of that filing argued that “The Parties Entered a Valid and Enforceable Contract,” Glaab 492, under which Mr. Eisenberg sought only unreimbursed “actual costs he fronted during the prosecution of [Ms. Glaab’s] case.” Glaab 497-98. Part II of the filing argued that, “**IN THE ALTERNATIVE**,” “[i]n the event the contract is deemed invalid or unenforceable, Plaintiff is entitled to recover under the theory of quantum meruit” per the *Laffey* calculation as set forth above.² Glaab 498-99.

On February 4, 2014, Judge Laura Cordero of the Superior Court denied Mr. Eisenberg’s Motion for Summary Judgment. She found that there was “a genuine issue of material fact” relevant to Mr. Eisenberg’s breach-of-contract claim because it was unclear whether he “performed his own obligations under the agreement.” Glaab 519. The court found that a “material breach” by Mr. Eisenberg “would excuse Defendant from her obligation to pay the requested costs.” Glaab 521. The court also found that Ms. Glaab had sufficiently raised the possibility of such a breach by claiming that Mr. Eisenberg had “missed crucial deadlines” and failed to “present any witnesses” in her case, amounting to what she believed was “malpractice.” Glaab 520. Judge Cordero accordingly denied the Motion for Summary Judgment.

Mr. Eisenberg’s case against Ms. Glaab went to trial on September 29, 2014, before Judge Cordero. Mr. Eisenberg argued that there was a valid contract, that Ms. Glaab had received the benefit of the bargain, and that she was obliged to pay costs as the representation agreement contemplated. *See* Glaab 124-25. He admitted that he made mistakes during the representation, including that he “missed a meeting” and that the ALJ had asked for a witness list that he had “not handed in” on time. Glaab 269. But Mr. Eisenberg also pointed out that “Judge Momah didn’t dismiss [Ms. Glaab’s] case because of something I did or something I didn’t do. He . . . stopped the case because of Mrs. Glaab’s lies” after hearing only her testimony. Glaab 308-09.

Ms. Glaab argued that she was not liable to Mr. Eisenberg under their contract because his performance amounted to malpractice and breach of fiduciary duty—material breaches of the contract on his part. She testified, for example, regarding the missed meeting and the failure to timely submit a witness list. *See, e.g.,* Glaab 25, 26, 32. She also argued that Mr. Eisenberg erred in deposing her in her EEO case because that only “g[ave] the defense opportunities to trip [her] up.” Glaab 91.

² Notably, the net amount is slightly higher in Mr. Eisenberg’s Motion for Summary Judgment than in his Complaint because he understood Ms. Glaab to have indicated by then that she had paid only \$500 in addition to the retainer, not \$1000 as Mr. Eisenberg had initially believed. Glaab 499 n.7.

At the close of trial, Judge Cordero ruled for Ms. Glaab. In her findings of fact, the judge recognized that Mr. Eisenberg had discussed the terms of the engagement agreement with Ms. Glaab, including “the fact that she would be responsible for costs separate from the four thousand retainer.” Glaab 102. The judge found, however, that that Mr. Eisenberg had “fully admitted that he neglected to appear” at a scheduled hearing and that he had also “admitted that he never produced a witness list on behalf of the plaintiff.” Glaab 105.

After making her factual findings, Judge Cordero concluded that Mr. Eisenberg had failed to comply with Rules of Professional Conduct 1.3 (diligence and zeal), 1.4(a) and (b) (keeping the client reasonably informed), and 1.7 (conflict of interest). Accordingly, Ms. Glaab had “met her burden” to show a breach by Mr. Eisenberg on grounds of “both legal malpractice based on the failure to comply with minimum standards as reflected in the Rules of Professional Conduct” and “breach of fiduciary duty . . . based on the failure to comply with the standards of professional conduct.” Glaab 106-15. Judge Cordero entered a judgment in favor of Ms. Glaab. Glaab 115.

On February 24, 2015, your Office contacted Mr. Eisenberg because the trial transcript of the proceedings before Judge Cordero “raise[d] questions” about his conduct. Glaab 2. You sought information regarding Mr. Eisenberg’s representation of Ms. Glaab, including matters in which he represented her, relevant documents, and information regarding his civil action against her. Glaab 3-4. On May 12, 2015, Mr. Eisenberg responded with the information requested. Glaab 441-445. The charges in the current SOC thus appear to represent the culmination of an investigation spanning more than eight years.

B. Analysis: The SOC alleges twelve rule violations by Mr. Eisenberg in connection with Ms. Glaab. Those violations include Rules 1.1(a) and (b); Rule 1.2(a); Rules 1.3(a) and (c); Rules 1.3(b)(1) and (2); Rule 1.4(b); Rule 1.5(a); and Rule 1.7(b)(4).

Rules 1.1(a) & (b): The draft SOC alleges that “Respondent violated . . . 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 [to] client[s] by other lawyers in similar matters.” SOC ¶ 48(A). The draft SOC does not specify the conduct on which this charge is based, but the implication of the narrative appears to be that it relates primarily to missing the settlement conference, *id.* ¶¶ 12-17, and failing to submit a witness list in Ms. Glaab’s first EEO case. *Id.* ¶¶ 23-27.

The Court of Appeals has explained, however, that it “f[inds] Rule 1.1 violations worthy of sanction only when they involve conduct that is truly incompetent, fraudulent, or negligent *and* that prejudices or could have prejudiced the client.” *Yelverton*, 105 A.3d at 422 (emphasis added). “Merely careless conduct . . . is insufficient to support a Rule 1.1 violation.” *In re Bailey*, 283 A.3d 1199, 1205 (D.C. 2022) (citing *In re Ford*, 797 A.2d 1231, 1231 (D.C. 2002)). Here, Mr. Eisenberg’s conduct was not “truly incompetent, fraudulent, or negligent” and plainly did not prejudice Ms. Glaab in any way.

Mr. Eisenberg affirmatively engaged the agency in settlement negotiations leading up to the settlement conference scheduled for November 9, 2013. Glaab 169-70. For example, on

October 30, 2012, Mr. Eisenberg reached out to the agency's lawyer, Mr. DiTomaso, to ask whether the agency was "will[ing] to . . . negotiate" on a settlement. Glaab 757. Mr. DiTomaso invited an offer. Glaab 756. On November 5, 2012, Mr. Eisenberg indicated that he "[s]poke with [his] client," and she was willing to settle for \$3000 in compensatory damages, \$75,000 in non-compensatory damages, a return to her position, and an apology from the agency, plus attorney's fees. Glaab 749. Mr. Eisenberg also indicated that he had contacted Judge Momah's chambers to seek to push back the November 9, 2013 conference. *Id.* Mr. DiTomaso shut down that offer rather tersely, responding that the agency was willing to explore only "non-monetary settlement." Glaab 747.

Mr. Eisenberg therefore thought it "clear" by November 9 that "there would be no settlement." Glaab 476. Mr. Eisenberg accordingly contacted Judge Momah's chambers that day to again seek cancellation or postponement of the telephonic settlement conference, Glaab 745, but left on his preplanned vacation without hearing back. His associate, Ms. Schabacker—who was well-informed about the case, having worked on the opposition to summary judgment and having been involved in settlement exchanges with the agency—did attend the call, but Judge Momah would not let her "take the call in [Mr. Eisenberg's] place" because Mr. Eisenberg was "not available for the hearing w/o his approval first." Glaab 743.

In short, Mr. Eisenberg and his associate actively pursued settlement on Ms. Glaab's behalf, but the parties were far apart. Negotiations therefore failed. Mr. Eisenberg then made an error of judgment in assuming that the judge would cancel or delay the conference—but that error had no impact on Ms. Glaab's case. Again, Ms. Glaab was represented on the call with the judge and opposition counsel—by Mr. Eisenberg's colleague, Ms. Schabacker—but the judge inexplicably refused to allow her to participate. Further, there were more than six months between the settlement conference that Mr. Eisenberg missed on November 9, 2012 and the merits hearing on May 16, 2013. Had the agency been willing to entertain *monetary* compensation—which, as Mr. Eisenberg knew, was what Ms. Glaab sought—there was ample time to reach agreement. Because monetary compensation was not on the table, however, the parties never came close to a settlement. Mr. Eisenberg's absence from the hearing—for which, again, his colleague was available—thus plainly was not the reason the case didn't settle. Moreover, it bears emphasis that Ms. Glaab did not contemporaneously raise any concerns about Mr. Eisenberg's representation of her—indeed, he went on to represent her *for nearly five more years*.

There was similarly no impact at all from Mr. Eisenberg's failure to submit his own witness list. As noted above, after hearing from *only* Ms. Glaab, Judge Momah decided to dismiss her case. He was not willing to hear from any other witnesses. As explained above, the judge found that Ms. Glaab could not prevail in her case before him because she lacked credibility as a witness. In short, no matter how many witnesses Mr. Eisenberg might have identified, they would not have been allowed to testify. There was thus neither actual nor potential prejudice to Ms. Glaab—her own testimony, without regard to Mr. Eisenberg's conduct, led to the dismissal of her case.

It also bears emphasis that the cases in which the Court of Appeals *has* found violations of Rule 1.1 involve conduct of a wholly different magnitude than Mr. Eisenberg's mistakes here.

The Court’s recent decision in *In re Johnson*, 298 A.3d 294 (D.C. 2023) provides an illustrative contrast. There, the respondent took on a police misconduct case *without any familiarity with such matters*. She then

. . . allowed the statute of limitations to run on the adult [plaintiffs’] claims and . . . conceded that the children’s claims should be dismissed too. What’s more, she failed to correct her error after being made aware of it. . . . In [another] matter, Ms. Johnson arranged to participate in the hearing by telephone but then could not be reached, and she failed to file her motion to withdraw, which revealed client confidences, *in camera* or *ex parte*, because she did not know she could. [On another matter], Ms. Johnson did not know how to value a medical malpractice claim and had no idea where the \$5 million valuation . . . came from

Id. at 311. Mr. Eisenberg, in contrast, has represented many clients in suits similar to Ms. Glaab’s against government agencies. His settlement offer, while unsuccessful, was entirely reasonable in magnitude and based on Ms. Glaab’s own desire for monetary compensation. And the errors of 1) relying on his associate to attend the telephonic settlement conference after settlement negotiations failed rather than attending in person; and 2) failing to submit a list of witnesses (*who would not have been allowed to testify*) do not rise anywhere close to the level of the widespread—and ultimately case-dispositive—errors on which the *Johnson* court relied.

Rule 1.2: The draft SOC alleges a violation of Rule 1.2 because Mr. Eisenberg purportedly “failed to consult with Ms. Glaab about the means to pursue her objectives.” SOC ¶ 48(B). This charge appears to relate back to the SOC’s claims that Mr. Eisenberg “did not consult with Ms. Glaab” about matters such as the “purpose, risks, or benefits” of Mr. Eisenberg’s approach to discovery. *Id.* ¶¶ 19-20. The draft SOC also suggests that Mr. Eisenberg erred in deposing Ms. Glaab and did not adequately prepare her for her deposition. *Id.* ¶¶ 19, 21-22.

This charge misapplies Rule 1.2. The rule accords big-picture authority over the representation to the client, including the right to determine the “objectives of representation” and the right to be consulted as to the means to pursue those objectives. *See* D.C. Rules r. 1.2(a) (“Rule 1.2”). But the rule also reserves authority over tactics and strategy to the lawyer. Mr. Eisenberg’s representation of Ms. Glaab respected this division of authority. There is no question that Mr. Eisenberg understood Ms. Glaab’s objective—a monetary recovery from the Census Bureau for the discrimination that she believed she had experienced. And he pursued that objective via *her* chosen means of a hearing before the ALJ, a process *she* had invoked before even retaining Mr. Eisenberg.

But under the Court of Appeals’ case law, tactical trial decisions like those identified in the draft SOC—including, for example, how many witnesses to depose—fall within the lawyer’s expertise. Indeed, we could not find a single Court of Appeals case involving a Rule 1.2 violation based on a lawyer’s strategic choices, such as who to depose or how to prepare witnesses. That is because, as the Court of Appeals has explained, “the lawyer has—and must have—full authority to manage the conduct of the trial.” *Kuhn v. United States*, 900 A.2d 691, 700 (D.C. 2006) (internal quotation and citation omitted); *see also In re Karr*, 722 A.2d 16, 19

(D.C. 1998) (Courts will not “second guess” the tactical decisions of counsel in the disciplinary context. (citations omitted)). Contrary to the draft SOC then, the rules—including Rule 1.2—leave strategic choices about things such as the “purpose, risks, or benefits” of Mr. Eisenberg’s approach to discovery to the lawyer. *See In re Stanton*, 532 A.2d 95, 101 (D.C. 1987) (Mack, J., concurring) (“[I]n both criminal and civil matters, the lawyer is the master of procedural and tactical aspects of litigation. This inherent authority is derived from the lawyer’s expertise in legal strategy and procedure.” (quoting *ABA/BNA Lawyer’s Manual on Professional Conduct* § 31:304 (1984))).

In short, Mr. Eisenberg fully understood Ms. Glaab’s objectives and vigorously pursued them, consistent with Rule 1.2. He simply did not succeed because the ALJ found Ms. Glaab’s testimony unpersuasive. But we have found no indication in the case law that Rule 1.2 requires a client’s involvement in tactical decisions concerning how best to achieve her objectives in litigation. At a minimum, we believe that your Office must come forward with *some* evidence—whether from precedent, expert testimony, or other sources—to demonstrate that the standard of care under Rule 1.2 requires consultation with clients about tactical decisions. The SOC appears to make bald allegations to that effect, but we have seen no basis for that position and thus cannot at this time advise our client to agree to a Rule 1.2 violation in this matter.

Rules 1.3(a) & (c): The draft SOC restates Rule 1.3(a) and (c), which respectively require that “a lawyer shall represent a client zealously and diligently within the bounds of the law” (Rule 1.3(a)) and “shall act with reasonable promptness in representing a client” (Rule 1.3(c)). Although it is not clear what conduct these charges are based on, they appear misplaced.

The Comments to D.C.’s Rule 1.3 give examples of failures to fulfill the duty imposed by the rule, such as by procrastination, long-term neglect of a client matter, or failure to carry a matter through to conclusion. *See, e.g.*, Rule 1.3 cmts. [7]-[9]. But this case does not involve any such conduct. As set forth above, Mr. Eisenberg aggressively pursued Ms. Glaab’s first EEO case, initiating settlement negotiations, participating in extensive discovery, and representing her right up to the moment of dismissal by Judge Momah at the hearing.

Nor did Mr. Eisenberg neglect Ms. Glaab’s second EEO case. While he did not seek to supplement the record reflected in the ROI, that record was extensive. It included lengthy statements from Ms. Glaab herself, as well as the documentation that Ms. Glaab submitted. Glaab 7052-53. And we found no indication in the investigative files—nor any description in the SOC—of any additional information that should have been included in the record or could have been presented at a hearing. As set forth above, the ALJ dismissed Ms. Glaab’s first count in this matter—based on her supervisor’s comment about wanting to leave the agency sooner rather than later—because that comment had no “materially adverse” consequences for Ms. Glaab. Glaab 6972. It does not appear from the investigative files that Ms. Glaab has herself ever maintained that there were materially adverse consequences. As her attorney, Mr. Eisenberg presumably knew that and accordingly saw no need for further evidence on this point. Similarly, we found nothing to suggest that Ms. Glaab could have advanced any additional evidence at a hearing that her reassignment or the denial of her request for transfer—underlying her second and third counts—resulted from discrimination rather than legitimate factors. *See* Glaab 6979-6984. From

this record, then, the decision not to seek a hearing in Ms. Glaab’s second EEO case appears not only reasonable but entirely correct.

Moreover, even though relations between Ms. Glaab and Mr. Eisenberg were frayed when it came time—at the end of May 2013—to appeal the ALJ’s decision on Ms. Glaab’s second EEO claim, Mr. Eisenberg filed a detailed brief challenging that decision. Glaab 7030-40. And we found no suggestion in the record that there was anything more he could or should have done *after* filing the appeal.

Once again, Mr. Eisenberg’s representation of Ms. Glaab contrasts sharply with the kinds of conduct that *have* been found to constitute violations of Rule 1.3. In *In re Murdter*, for example, the respondent was appointed as CJA counsel in five cases to appeal the criminal convictions of indigent clients. But “[r]espondent failed to brief any of the cases, despite multiple briefing orders of the Court” and “pleaded guilty to contempt for the failure to file briefs in two of the matters,” for which he was “sentenced to four months incarceration, with execution of the sentence suspended.” 131 A.3d 355, 359 (D.C. 2016). In *In re Wright*, “[r]espondent failed to respond to the discovery requests of his client’s adversaries, their motion to compel, or to the court order to show cause why the case should not be dismissed,” resulting in dismissal of the case. 702 A.2d 1251, 1255 (D.C. 1997). Mr. Eisenberg’s representation of Ms. Glaab in both of her cases—in which he represented her until all actions he should have taken were complete—is not remotely comparable. He did miss a hearing and fail to submit a witness list—but neither appears to have affected Ms. Glaab’s case in any way, in contrast to the cited cases in which the prejudice was obvious, indisputable, and, indeed, dispositive.

Rules 1.3(b)(1) & (2): The draft SOC restates Rule 1.3(b)(a) and (2), claiming that Mr. Eisenberg “failed to seek Ms. Glaab’s lawful objectives through reasonably available means” and also “prejudiced or damaged her during the course of the professional relationship.” SOC ¶ 48(D). These charges are unfounded and merit little additional discussion.

As noted above, there is no question that Mr. Eisenberg understood and sought to achieve Ms. Glaab’s goal of a monetary award from the agency in her first EEO case. The fact that he failed to achieve that goal had nothing to do with any failure to pursue “reasonably available means.” In her first case, Mr. Eisenberg pursued settlement discussions. He represented Ms. Glaab at the hearing that she had initiated. But the agency rejected their settlement offer, and Mr. Eisenberg and his client did not prevail at the hearing. Mr. Eisenberg thus *sought* Ms. Glaab’s lawful objectives—he simply failed to achieve them.

Moreover, as already discussed in connection with Rule 1.1 above, we found no evidence on this record that Mr. Eisenberg’s conduct prejudiced Ms. Glaab in any way. Again, *he* missed a settlement conference, but *his associate* was up to speed and available; the parties at the time were far apart on settlement; and there were then six more months following that mistake during which the case could have settled but did not because the parties were not in agreement. And, again, there was no impact at all from Mr. Eisenberg’s failure to submit a witness list. Judge

Momah dismissed the case based on Ms. Glaab's testimony, so other witnesses would not have been allowed to testify whether they were identified or not.³

Rule 1.4(b): The draft SOC alleges that Mr. Eisenberg "failed to explain matters to the extent reasonably necessary to permit Ms. Glaab to make informed decisions about the representation." *Id.* ¶ 48(E). From the narrative, it appears that this charge may relate to Mr. Eisenberg's alleged 1) failure to discuss the number of individuals to be deposed with Ms. Glaab, *id.* ¶ 19; 2) failure to discuss with Ms. Glaab why he did not contact certain witnesses; 3) failure to consult with Ms. Glaab as to whether to seek a hearing or file a rebuttal after the ROI issued in her second EEO case; and/or 4) failure to discuss his financial dispute with Ms. Cain with Ms. Glaab, *id.* ¶ 42. We leave this fourth allegation to our discussion of a potential conflict of interest, below. The other allegations merit little additional discussion. As noted in our analysis of Rule 1.2 above, courts generally recognize that it is not merely permissible but *preferable* for the lawyer to make tactical decisions. Issues such as which witnesses to depose, who to contact or call as witnesses, and what evidence to introduce are precisely such tactical decisions. *See, e.g., State v. Davis*, 506 A.2d 86 (Conn. 1986) (Witness selection is a tactical decision for the lawyer.); *Darden v. Wainwright*, 477 U.S. 168 (1986) (Lawyers in a capital case could properly decide not to introduce mitigating evidence at sentencing.).

The draft SOC appears to misunderstand the function of a ROI. A ROI does not make "arguments" to be "rebutt[ed]." SOC ¶ 31. As EEOC Directive MD-110 explains, an EEO investigation "is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence." *See* U.S. Equal Employment Opportunity Commission, *Chapter 6 DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS*, <https://www.eeoc.gov/federal-sector/management-directive/chapter-6-development-impartial-and-appropriate-factual-records> (last visited Oct. 25, 2023). The ROI summarizes the information gathered in that investigation, providing a factual record on which the fact-finder may draw conclusions as to whether an agency committed legal violations. A proper investigation, as certainly appears to have occurred here, thus gathers testimony and documentary evidence from both sides. *See* Glaab 7052-54. It is then not at all unusual for the matter to proceed directly from investigation to a decision without further information being submitted by the complainant or her lawyer, and without any need for a hearing. Indeed, the federal government's flowchart of the EEO process suggests that proceeding directly to a decision by the agency is the primary approach, although a complainant "may request an EEOC hearing." *See, e.g., Flowchart of the EEO Complaint Process* (illustration), Federal Trade Commission, <https://www.ftc.gov/sites/default/files/attachments/filing-complaint-discrimination-federal-trade-commission/eeocomplaint-flowchart.pdf>.

Here, Ms. Glaab was clearly aware that she was *entitled* to a hearing because her first EEO matter—in which she was also represented by Mr. Eisenberg—was already scheduled for one. There was no need for Mr. Eisenberg to explain that again in order for her to make an

³ In addition, had Ms. Glaab's case proceeded after her testimony, Mr. Eisenberg was of course entitled to call witnesses on the government's list and to introduce testimony from the depositions that he had conducted.

informed decision about whether to seek a second hearing. But it is entirely reasonable that she and Mr. Eisenberg both thought that the record—which, again, contained extensive testimony from Ms. Glaab herself—was sufficiently developed to proceed to a decision without a hearing.

Rule 1.5(a): The draft SOC alleges a violation of Rule 1.5(a) on the ground that Mr. Eisenberg “charged his client an unreasonable fee.” SOC ¶ 48(F). It is difficult to discern from the draft SOC what constituted the purportedly unreasonable charge—but this charge appears to reflect a misunderstanding of the facts.

As the draft SOC acknowledges, Mr. Eisenberg charged Ms. Glaab \$4000, Glaab 471, to take on her cases. The agreement also indicated that Ms. Glaab would not be liable for any attorney’s “fees in excess of the initial ‘true retainer,’” *id.*, and the SOC does not allege that Ms. Glaab ever paid any other *attorney’s fees*. It does allege that Ms. Glaab also paid an “additional \$1000.” SOC ¶ 11. It is not entirely clear from the record whether that additional amount that Ms. Glaab paid toward costs was \$500 or \$1000, *see supra* at n.1, but the difference is not material here. We will use the \$1000 figure, for a total expenditure by Ms. Glaab of \$5000 here.

The engagement agreement placed responsibility for out-of-pocket costs of pursuing claims on Ms. Glaab. Glaab 472 (engagement letter stating that the retainer “does not include any out-of-pocket costs that may be incurred, such as court filing fees, sheriff’s fees, deposition costs, photocopying, etc. As explained these COSTS are in addition to our FEE and are not included in the FEE.”). The record also clearly reflects that Mr. Eisenberg paid over \$1000 in travel expenses out-of-pocket to attend the hearing in the first EEO case, as well as over \$4000 for court reporters for depositions in that case. Glaab 479-80.

It thus appears that Ms. Glaab paid less than 1/5 of Mr. Eisenberg’s out-of-pocket expenses for the hearing and \$4000 for his (and his associate’s) time. The investigative files do not appear to contain an hour-by-hour breakdown of those services, but they clearly included taking nine depositions, responding to discovery requests, engaging in settlement negotiations, and traveling to and attending the hearing on Ms. Glaab’s behalf. *See supra* at 40-41. The draft SOC does not explain how it could be unreasonable to pay \$4000 for this array of services. Our best guess is that the \$4000 flat fee is not the basis for the SOC’s allegation of a Rule 1.5(a) violation.

Instead, we surmise that the draft SOC may intend to take exception to the larger figures that Mr. Eisenberg advanced as part of his settlement efforts and lawsuit against Ms. Glaab for failing to pay his costs. But those fees plainly were never “charged” within the meaning of Rule 1.5. As set forth above, Mr. Eisenberg advanced two primary, alternative theories of recovery against Ms. Glaab. The first—his own view—was that the contract was valid and that she owed only the remaining unpaid costs that he had covered. *See* Glaab 458. The second—based on what he understood to be Ms. Glaab’s position—was that *if* there was no valid contract, then Ms. Glaab should have to pay him “[t]he reasonable value of the unpaid legal fees.” Glaab 462. Mr. Eisenberg believed that value should be based on the *Laffey* rate used in fee award cases. *See* Glaab 289.

But Mr. Eisenberg’s unsuccessful theories of recovery have nothing to do with whether he charged an unreasonable fee under Rule 1.5(a). His fee, \$4000, was entirely reasonable. When Ms. Glaab failed to honor her agreement to also pay his *costs*, Mr. Eisenberg believed she should either: (1) get the benefit of her bargain for low *fees*, but also pay the *costs* she owed; or 2) be required to pay *fees* for his services based on their market value if there had, as she claimed, been no valid contract. In the end, the Superior Court rejected *both* of those legal theories. But Mr. Eisenberg’s legal claim that a client should *either* have to honor her contractual bargain or else pay the reasonable market value of the services received is self-evidently not charging an unreasonable fee under Rule 1.5(a). The claim represents two alternative arguments for a *reasonable* fee—which, again, the court here found was not owing in any event.

Rule 1.7(b)(4): The draft SOC alleges that Mr. Eisenberg had a conflict under Rule 1.7(b)(4)—i.e., that his representation of Ms. Glaab “reasonably [could] have been adversely affected by . . . his own financial . . . interests.” SOC ¶ 48(G). The specific concern appears to be that Mr. Eisenberg’s interest in recovering costs that he had paid on behalf of Ms. Cain in pursuing her unsuccessful EEO claim could somehow have interfered with her being a witness in Ms. Glaab’s case. *Id.* The SOC also claims that Mr. Eisenberg failed to obtain “informed consent” to this purported conflict. *Id.*

As the Court of Appeals has explained, “Rule 1.7 is founded upon the principle that a client is entitled to undivided loyalty and zealous legal representation.” *In re Evans*, 902 A.2d 56, 65 (D.C. 2006). Representing clients with adverse *legal positions* obviously risks dividing a lawyer’s loyalties and is therefore forbidden by the rule. *See* Rule 1.7(a). But there are, of course, other situations that can create a conflict of interest, including the “lawyer’s own financial . . . interests.” Rule 1.7(b)(4). So the lawyer may not, for example, “refer[] clients to an enterprise in which the lawyer has an undisclosed financial interest.” Rule 1.7 cmt. [11]. Again, that could divide the lawyer’s loyalty—the lawyer’s financial interest in the enterprise might lead to an unnecessary referral, for example.

Here, however, we cannot see how the fact that Ms. Cain owed Mr. Eisenberg money could divide his loyalties to Ms. Glaab. Certainly, Ms. Cain’s debt to Mr. Eisenberg could conceivably generate negative feelings toward Mr. Eisenberg by Ms. Cain. Ms. Cain might also have felt antipathy toward Ms. Glaab herself, to whom Ms. Cain owed money. But it is commonplace for witnesses to feel antipathy toward lawyers and parties who call on them to testify—and that obviously does not create a *conflict* between the lawyer and his *own* client. Indeed, we were not able to find any case in any jurisdiction finding a conflict based on antipathy between a lawyer and a witness whom the lawyer might wish to call in his client’s case. Again, as noted above, conflicts involve situations dividing the lawyer’s loyalty. The Massachusetts Supreme Court has explained, for example, that “an actual conflict exists ‘where . . . an attorney has business reasons for preferring a verdict unfavorable to the [client].’” *Commonwealth v. Mosher*, 455 Mass. 811, 820 (2012). Here, in contrast, Mr. Eisenberg’s financial interests and those of Ms. Glaab were fully aligned—whether or not he recovered his costs from Ms. Cain, Mr. Eisenberg had a contingent interest *in a positive outcome in Ms. Glaab’s EEO case*.

In any event, even if there was some potential for indirect conflict, the record reflects an effective waiver. Mr. Eisenberg testified that Ms. Glaab was aware both of Mr. Eisenberg's representation of Ms. Cain and of her debt to him at the time Ms. Glaab entered her engagement agreement with Mr. Eisenberg. Glaab 293-94. While Judge Cordero appeared skeptical of that awareness, the exchange between Mr. Eisenberg and Ms. Glaab at her deposition several months after she engaged him confirms it. That deposition took place in early December of 2012, about five months before Mr. Eisenberg sued Ms. Cain for costs. At that deposition, Mr. Eisenberg asked: "Now, for the record, correct me if I'm wrong, but I'm both your attorney and Ms. Cain's attorney regarding her EEO cases: is that correct?" Ms. Glaab indicated that this was correct and that she had "waived any conflict of interest . . . issues that may have arisen because of [Mr. Eisenberg's] dual representation." Glaab 1187. Ms. Glaab also later confirmed that fact during the Superior Court trial. Mr. Eisenberg asked: "Now when you and I first started off you knew that Mrs. Cain was a client of mine at the time?" Glaab 174. Ms. Glaab indicated that she had and agreed that "at that time [she] weighed any conflict of interest." *Id.* Judge Cordero was dismissive of these statements, but it is not clear to us why.

Rule 8.4(c): The draft SOC alleges that "Respondent knowingly misled his client about how her case would proceed," specifically as to "what witnesses would testify" and by "chang[ing] the amount he charged Ms. Glaab for his professional fees without disclosing that he had done so[.]" SOC ¶ 48(H).

We addressed the second allegation in connection with Rule 1.5(a) and so do not repeat that discussion here. In brief, however, it is not accurate on this record to say that Mr. Eisenberg "changed the amount he charged Ms. Glaab for his professional fees[.]" *Id.* Ms. Glaab did not pay the *costs* she owed under the terms of the engagement letter. Mr. Eisenberg took the position in settlement and litigation that she could either honor the contract, getting the benefit of her bargain for low *fees* but also owing for out-of-pocket *costs*, or else she should have to pay the fair market value for his services—which he believed to be much higher than the contracted-for amount—in the *absence* of a valid contract. Mr. Eisenberg's position did not prevail in settlement talks or in litigation, and Mr. Eisenberg certainly never "charged" those fees—he merely advanced them as an (unsuccessful) legal theory. We could not find any precedent even remotely suggesting that this was dishonest within the meaning of Rule 8.4(c).

Rule 8.4(c) is not a "catch-all" applicable to any attorney conduct potentially subject to disapproval. As the Court of Appeals explained in *In re Hutchinson*, the heart of a Rule 8.4(c) violation is "affirmative proof of a fraudulent intent or state of mind." 534 A.2d 919, 923 (D.C. 1987). The record here wholly belies any such intent. Mr. Eisenberg believed that Ms. Glaab had taken advantage of one part of their bargain (for low fees) while violating another (to pay costs). He accordingly sought his costs, arguing that Ms. Glaab needed to take both halves of the bargain or neither. There was nothing dishonest about that position.

Nor does Mr. Eisenberg's conduct here resemble anything previously found by the Court of Appeals to be "dishonest" under Rule 8.4(c) or its predecessor rule. *See also* D.C. Code of Pro. Responsibility DR 1-102(A)(4) (prohibiting lawyers from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation"). One category of cases finding Rule 8.4(c) violations involves purposeful false statements and falsification of documents. *See, e.g.,*

In re Ukwu, 926 A.2d 1106, 1139 (Respondent falsely testified he never received payment from a client.); *In re Jones-Terrell*, 712 A.2d 496, 498-99 (D.C. 1998) (Respondent falsely stated she had power of attorney, and the Board found it “difficult to credit” respondent’s assertion this was not intentional.); *In re Reback*, 487 A.2d 235, 237 (D.C. 1985) (Respondent signed client’s name to a complaint, had it notarized, and filed it without telling the client—all to conceal a dismissal for inattention.); *In re Schneider*, 553 A.2d 206, 207 (D.C. 1989) (Respondent deliberately falsified expense reports.). Mr. Eisenberg’s settlement position in this case is not remotely comparable.

The second primary category of Rule 8.4(c) cases finding violations involves deliberate concealment of information. *See, e.g., In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990) (Respondent’s answers to IRS questions were “technically true” but had the effect of concealing assets in which respondent knew the IRS to be interested.); *In re Mitchell*, 727 A.2d 308, 311 (D.C. 1999) (Respondent concealed his firm’s bankruptcy from a client seeking the return of a \$10,000 retainer.); *In re Slattery*, 767 A.2d 203, 206, 213 (D.C. 2001) (Respondent made an unauthorized withdrawal of over \$10,000 from an account that was not his, did not tell the account owner, and attempted to conceal the withdrawal.); *In re Carlson*, 745 A.2d 257, 257-58 (D.C. 2000) (Respondent withdrew funds from an escrow account intended for his client’s settlement of a lien with an insurer and did not tell the client.). Again, there was no comparable concealment here.

In short, we found absolutely no evidence in this record to demonstrate a “dishonest or fraudulent state of mind within the meaning of *Hutchinson*.” *In re Stiller*, 725 A.2d 533, 538 (D.C. 1999). Mr. Eisenberg’s settlement position may have been ill-founded, but it was not dishonest.

Rule 8.4(d): The draft SOC alleges that Mr. Eisenberg “seriously interfered with the administration of justice,” but does not specify how. SOC ¶ 48(I). Mr. Eisenberg’s conduct here does not come close to satisfying the Court of Appeals’ standard for Rule 8.4(d) violations.

Specifically, the Court has characterized Rule 8.4(d) as addressing “derelictions of attorney conduct considered reprehensible to the practice of law.” *In re Hopkins*, 677 A.2d at 59 (quoting *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985)). As under Rule 8.4(c), the Court of Appeals has not attempted to identify all such improper conduct, but instead considers whether the conduct alleged is analogous to previous violations. *In re Hallmark*, 831 A.2d 366, 375 (D.C. 2003) illustrates this approach. There, the respondent had filed an untimely and inaccurate CJA voucher, which led the Board to find multiple rule violations. *Id.* at 368-69. But comparing the allegations to prior Rule 8.4(d)—and predecessor rule DR 1-102(A)(5)—cases, the Court of Appeals found that such violations require “a showing of more egregious conduct.” *Id.* at 375. In particular, the Court noted that its earlier cases involved an “*intentional disregard* for the effect that an action may have on judicial proceedings or the client’s cause, [while] what we have here is . . . the result of negligence.” *Id.* at 375 (emphasis added).

More recently, the Court of Appeals canvassed its Rule 8.4(d) cases in *Yelverton*, 105 A.3d at 426-28, which involved “patently frivolous” motions for a mistrial and multiple filings “accusing [the judge] of bias . . . and . . . asking for his recusal.” The Court found that its Rule

8.4(d) cases had “generally involve[d] misleading the court or misusing or obstructing proceedings . . . or interfering with Bar Counsel’s efforts to investigate attorney misconduct.” *Id.* at 426. But the *Yelverton* Court found that even well-intentioned filings may obstruct proceedings in violation of the Rule when they are “numerous,” “meritless,” “repetitive,” and “vexatious.” *See id.* at 428. The Court distinguished *Hallmark*—which, again, had not found a Rule 8.4(d) violation—because the attorney there had only “filed one unsubstantiated voucher and then abandoned it.” *Id.* at 427.

Applying these standards here, Mr. Eisenberg did not demonstrate “intentional disregard” for the effect of his conduct in Ms. Glaab’s EEO case. *Hallmark*, 831 A.2d at 375. He did miss a hearing—but he repeatedly reached out to the judge both before and after, including sending a detailed note of “sincerest apologies” the same day, *see* Glaab 336, and there is no evidence that his absence from the hearing affected the case in any way. A lawyer from his firm was there to handle the matter, but the judge denied her permission to participate. Similarly, as discussed above, Mr. Eisenberg’s failure to submit a witness list does not appear to have had any effect at all on the hearing. And certainly, this conduct cannot fairly be characterized as “egregious” or “vexatious.” *Yelverton*, 105 A.3d at 428. As we said at the outset, Mr. Eisenberg made mistakes, but they were simply mistakes.

Judge Cordero’s Decision: Because our analysis above differs from Judge Cordero’s oral opinion in Mr. Eisenberg’s suit against Ms. Glaab, we address that divergence here. Specifically, Judge Cordero found violations of Rule 1.3 (diligence and zeal), 1.4(a) (keeping the client reasonably informed), and 1.7 (conflict of interest). As to Rule 1.3, Judge Cordero appears to have believed that missing the settlement conference and failure to file a witness list violated Rule 1.3. Glaab 106-08. She then found that because “Mr. Eisenberg never told [Ms. Glaab] that he had failed to submit a witness list on her behalf” and “represented . . . that Miss Cain was going to be called,” he violated Rule 1.4. Glaab 108. Finally, she found that there was a “conflict of interests as soon as Miss Cain had failed to make payments on her legal bills to Mr. Eisenberg” because “Miss Cain was going to be Miss Glaab’s witness,” and there was no waiver because there was only “general and brief discussion” where Mr. Eisenberg “assumed that Miss Glaab was aware of this conflict of interests.” Glaab 111.

For the reasons set forth above, we respectfully disagree with Judge Cordero. But neither we, nor anyone else, ever had any opportunity to attempt to dissuade her. We will not repeat our entire argument here, but, first, missing a settlement conference for which an associate was available and failing to file a witness list—where neither event had any negative impact on the client’s case—do not constitute the kind of pervasive and long-term neglect of a client matter that violates Rule 1.3, particularly in the absence of prejudice. *See, e.g.*, Rule 1.3 cmts. [7]-[9]; *Murder*, 131 A.3d at 356-58; *Wright*, 702 A.2d at 1256. Second, failing to tell Ms. Glaab that she could not call witnesses beyond those identified by the government also had no effect whatsoever on Ms. Glaab’s case. And, finally, we could find no precedent for the notion that possible tensions between a lawyer and a witness he might wish to call in a client’s case constitute a conflict of interest between the lawyer and the client. Creating such a rule would be ill-conceived and difficult to apply in the run of cases. And we found no evidence in any way suggesting that Mr. Eisenberg failed to do anything that he should have done on behalf of Ms. Glaab because of his relationship with Ms. Cain.

Moreover, Judge Cordero's determinations on these issues are not binding in your Office's proceeding against Mr. Eisenberg. It is well-settled in this jurisdiction that issue preclusion applies only when, in a previous case, an issue was (1) actually litigated, (2) decided in a valid and final disposition on the merits, (3) "after a full and fair opportunity for litigation by the same parties or their privies," and (4) essential to the judgment. *Colvin v. Howard Univ.*, 257 A.3d 474, 482-83 (D.C. 2021) (quoting *Smith v. Jenkins*, 562 A.2d 610, 617 (D.C. 1989)).

The issue before Judge Cordero was Mr. Eisenberg's claim for costs against Ms. Glaab, based on the parties' contract or *quantum meruit*. And, again, Mr. Eisenberg certainly did not have a full and fair opportunity to address whether he violated any Rules of Professional Conduct—the issue was not briefed or argued by Ms. Glaab at any stage of the proceedings, so as to put Mr. Eisenberg on notice that he needed to address it, nor did the judge provide any opportunity to do so. Indeed, Judge Cordero invoked the Rules only at the end of the proceeding in making her oral ruling. Glaab 101. Mr. Eisenberg had *no* opportunity to address the claimed violations, either affirmatively or on rebuttal.

Finally, the "preponderance of the evidence" standard applicable in civil cases is, of course, lower than the "clear and convincing" standard applicable here. That is why it is well-established that D.C. does not give "preclusive effect" in disciplinary matters "to factual findings made in . . . non-disciplinary proceeding[s]." *In re Maxwell*, 798 A.2d 525, 529 (D.C. 2002) (citing *Att'y Grievance Comm'n of Md. v. Bear*, 763 A.2d 175, 181 (Md. 2000) (Issues decided "under a preponderance of the evidence standard" could not be given "preclusive effect. . . in a subsequent attorney discipline proceeding.")).

VII. Swain

As you are aware, we responded in writing to a previous SOC regarding Mr. Eisenberg's representation of Ms. Swain on September 30, 2022. After our call to discuss Swain and the Johnson Matter on October 7, 2022, we provided a second letter on November 9, 2022 to address questions that you raised on that call.

In our recent call on Monday, September 11, you indicated that you had revised the SOC as to Swain based on that exchange. Our review of the new draft SOC indicates that you have removed the Rule 1.5(a) charge that Mr. Eisenberg's \$3000 fee and 20% contingency represented an unreasonable fee, as well as the Rule 8.4(c) charge that was apparently based on Judge Pan's mistaken view that Mr. Eisenberg had failed to inform the court that he maintained certain funds ultimately returned to Ms. Swain in a trust account for a period of time. The new draft SOC, however, adds a Rule 8.4(d) charge that Mr. Eisenberg "seriously interfered with the administration of justice," although it does not explain how.

We frankly do not understand this response to our advocacy in Swain, although we would certainly like to understand better. As we made clear in our conversation last year, we find many of the charges in Swain extremely perplexing. As we said then, the real fulcrum of the charges in Swain appears to be Rule 1.1—that Mr. Eisenberg failed to provide competent representation to Ms. Swain. But Rule 1.1 is fundamentally misplaced in a case where Mr. Eisenberg *prevailed*

on behalf of Ms. Swain, obtaining for her a very substantial settlement—which she described as a “blessing” for her and her family, Swain 3120—that was literally dozens of times greater than the best offer her union representatives obtained.

As we also said then, there appear to us to be clear factual errors in the draft SOC regarding Swain. To take just one example, we pointed out that the factual record clearly establishes the *opposite* of the allegation that Mr. Eisenberg “did not seek to add claims of reprisal.” SOC ¶ 54(A). Initially, *Ms. Swain* told the Veterans Administration (“VA”) investigator that “she wanted this basis removed from her complaint,” Swain 2293 n.1, and the VA thus focused first on the sexual harassment claim. *Id.* But after Ms. Swain engaged Mr. Eisenberg, *he did pursue the reprisal issue*. We provided extensive citations on this point, but you have not, so we simply do not understand your position.

We also think the draft SOC fundamentally misconstrues Rule 1.2. As noted above in connection with the Glaab matter, this rule accords certain big-picture authority to the client, including the right to determine the “objectives of representation” and the right to be consulted as to the means to pursue those objectives. *See* D.C. Rules r. 1.2(a) (“Rule 1.2”). But the rule also reserves authority over tactics and strategy to the lawyer. Mr. Eisenberg’s representation of Ms. Swain, as with Ms. Glaab, respected this division of authority.

For your convenience, we have combined the substance of our two earlier written responses below, while removing the Rule 1.5(a) and Rule 8.4(c) discussions and addressing the new Rule 8.4(d) charge. *But we want to make clear up front that we fear that we may be talking past each other here*—our basic position on the Swain matter is: 1) it doesn’t make sense to charge a lawyer with *incompetence* for conducting an overwhelmingly successful representation; and 2) there are factual errors in the SOC that need to be corrected. We don’t think the revised SOC takes account of either point in any significant way, and we are particularly troubled if there is to be a rule that *successful* representations may—although we cannot determine under what conditions from the SOC—violate this jurisdiction’s Rule 1.1.

A. Background:

1. The Harassment Incident and Ms. Swain’s Initial Complaint: Shirley Swain worked at the Veterans Administration Medical Center in Roanoke, Virginia. On April 21, 2010, a co-worker, Alton Akin, made an offensive comment to Ms. Swain to the effect that he “knew [she was] a man” and to “drop your pants, let me see if you are or not.” Swain 2503. Mr. Akin said he would pay Ms. Swain to do so, “about a million.” *Id.*

Ms. Swain filed an informal complaint. She initially retracted it, Swain 2504, but then retracted her retraction to pursue a complaint against the VA. During May and June 2010, Ms. Swain was represented by non-attorney officials from her union, but they were unable to resolve her complaint. Swain 2224-25, 2232-33. Ms. Swain accordingly filed a complaint with the Office of Resolution Management on July 6, 2020. Swain 2250. Her complaint asked that Ms. Swain be reassigned to avoid contact with Mr. Akin and for \$300,000 in compensatory damages. Swain 2254.

Ms. Swain's complaint initially contained two claims: 1) "Sexual Harassment;" and 2) "Retaliation for Report of Sexual Harassment" or reprisal. *Id.* With respect to the second claim, however, Ms. Swain told the VA investigator that "she wanted this basis removed from her complaint." Swain 2293 n.1. The VA accordingly accepted for investigation one claim: "Whether on the basis of sex (Female), the complainant was subjected to Sexual Harassment when on April 21, 2010" Mr. Akin made his comment. Swain 2293.

2. Representation of Ms. Swain by Union Officials Results in Low-Ball Offer and No Settlement: The VA Office of Resolution Management began its investigation on October 1, 2010. Swain 2271. Mr. Joseph DiBisceglie handled the investigation, which concluded with a Report of Investigation dated November 24, 2010. Swain 2192-203.

As was her right following the ROI, Ms. Swain, still represented by union officials, sought a hearing before an EEO Administrative Law Judge ("ALJ"). Swain 2803. The ALJ issued an Acknowledgment and Order on February 28, 2011. Swain 898-901. The ALJ required that "a party must initiate discovery within twenty (20) calendar days of receipt of this Order." Swain 900. The timeframe of that order was several weeks before Mr. Eisenberg was retained.

In early 2011, the parties held settlement discussions. There was a job opening for a telephone operator, and Ms. Swain wanted that job. The agency's initial settlement offer was merely to "hold open" the position to allow Ms. Swain "to make [a] merit promotion application in exchange for a release of all claims." Swain 2883. Ms. Swain rejected that offer. She asked that the VA agree to move her to the telephone operator position at a GS 4 level; restore annual leave that she took because of anxiety and harassment; pay her medical expenses for mental health therapy; and pay \$25,000 in compensatory damages. Swain 2841. In response, the VA improved its offer only slightly to: 1) restoring twenty hours of annual leave; 2) paying \$1,000 in compensatory damages; and 3) reassigning Mr. Akin. Swain 2842. This still-paltry offer caused Ms. Swain to seek an attorney to replace her union representation. Swain 2843. She contacted Mr. Eisenberg by phone the same day to discuss her case. Swain 2722.

3. Aggressive Litigation of Ms. Swain's Claim by Mr. Eisenberg Results in a Far Higher Offer and a Successful Settlement: On April 6, 2011, Ms. Swain signed a four-page engagement letter with Mr. Eisenberg. Swain 2722-25. The agreement required Ms. Swain to pay a retainer of \$3,000, but provided that the rest of Mr. Eisenberg's compensation would be under the EAJA and a specified contingency. The engagement letter stated that "Client and Attorney agree that the Attorney is to be paid 20% of any award, settlement, etc., including but not limited to Client's award for damages, compensation, back pay, etc." Swain 2722. The agreement further provided that the "Client will not be personally liable for any fees in excess" of the \$3,000 retainer. Swain 2723. Ms. Swain signed the engagement letter and initialed every page. Swain 2722-25.

Notably, Mr. Eisenberg had an associate, DeAnna Schabacker, who participated in the case, taking a number of depositions. Mr. Eisenberg had to pay Ms. Schabacker her salary regardless of whether he was being paid by Ms. Swain. But Ms. Swain never paid the entire \$3,000 retainer—she paid only \$2,200. Swain 116. She acknowledged that she owed money to

Mr. Eisenberg both pre- and post-settlement. *See, e.g.*, Swain 873 (writing in a note to Eisenberg on April 22, 2011: “I’m a little low on cash but will be sending you another payment.”); Swain 885 (writing in a note to Mr. Eisenberg on “January 26, 2011 [sic, should be 2012] waitin [sic] on my tax return thought it was coming 25th. . . . I had plans to send you a large payment. Didn’t happen yet but I will send it when it comes. Thank you. I want you [to] continue to represent me. Yall the best!”).

Mr. Eisenberg continued to litigate Ms. Swain’s case despite the underpayment, maintaining frequent contact with Ms. Swain. Ms. Swain sent long notes explaining the facts of the case. *See* Swain 874-84. She spoke or met with Mr. Eisenberg and/or his colleagues on April 15 and 26, and October 23, 2011, as well as January 16, and February 10 and 11, 2012. Swain 260-64. Mr. Eisenberg and his associate also corresponded with Ms. Swain on April 18 and 30, May 11 and 28, and December 26, 2011, as well as January 10, 19, and 22, 2012. Swain 909-16; Swain 260. When Mr. Eisenberg provided Ms. Swain discovery requests, she annotated them with her answers and provided an additional eight pages of notes. Swain 2850-2871. Ms. Swain also sent a journal she had kept to Mr. Eisenberg, and he copied and returned it. Swain 919.

A month before the hearing, Mr. Eisenberg wrote a reminder to Ms. Swain that she had a substantial balance left to pay on her \$3,000 retainer. She had paid \$1,500 in April 2011, \$300 in January 2012, and then paid an additional \$400 in early February 2012—just a week before the hearing. Swain 3033-34. Thereafter, she did not make any more payments towards the retainer. *See id.* Mr. Eisenberg did not seek to withdraw, however, and ultimately represented Ms. Swain by himself, with no associate or paralegal assistance, at a two-day hearing in Roanoke in February 2012.

To prepare for that hearing, Mr. Eisenberg and his colleague, Ms. Schabacker, deposed the following individuals in Salem during a single trip in October 2011:

Deponent	Date	Notes
Cheryl Renee Harris	October 24, 2011	Swain 531-52
Carl Luck	October 24, 2011	Swain 627-58
Stephen Oliver	October 24, 2011	Swain 659-86
Norma B. Saunders	October 24, 2011	Swain 687-722
Willie Mae Artis	October 25, 2011	Swain 378-441
Jesse Gearheart	October 25, 2011	Swain 442-530
Margie L. Loudermilk	October 25, 2011	Swain 584-626
Alton Glen Akin	October 26, 2011	Swain 314-77
William Dale Hendley	October 26, 2011	Swain 553-83
Shirley Ann Swain	October 26, 2011	Swain 723-871

These depositions adduced testimony regarding not only the April 21, 2010, incident, but also Mr. Akin’s previous pattern of inappropriate behavior and Ms. Swain’s allegations of subsequent retaliation.

On November 21, 2011, about a month after the depositions, the VA filed a Motion to Dismiss Without a Hearing. Swain 1710-17. Although the VA did not dispute the statement that Mr. Akin made to Ms. Swain on April 21, 2010, the VA wrote that “[c]omplainant has no credible evidence to demonstrate that any of Akin’s actions . . . were taken as a result of her being a female.” Swain 1711-12. The VA further argued that Ms. Swain had not “present[ed] a *prima facie* case” because she “does not allege or demonstrate that the Agency did not take immediate corrective action as soon as the Complainant made the event known to her supervisors.” Swain 1714.

Mr. Eisenberg opposed the VA’s motion and cross-moved for summary judgment on December 27, 2011. Swain 1726; Swain 2949-67. Mr. Eisenberg cited the depositions that he and Ms. Schabacker had taken—including the evidence of continued harassment by Mr. Akin adduced there—to refute the proposition that the VA had taken “prompt remedial action.” *Id.* For example, page 13 alone of Mr. Eisenberg’s Opposition to Defendant’s Motion to Dismiss contained approximately twenty specific citations to deposition testimony that he and his colleague had obtained supporting Ms. Swain’s claims of reprisal by Mr. Akin. Swain 2961.

Mr. Eisenberg also submitted a Pre-Hearing Report on January 9, 2012. Swain 3014-23. The report devoted about two single-spaced pages to addressing Mr. Akin’s continued harassment of Ms. Swain after April 21, 2010. Swain 3015-17. The report cited Ms. Swain’s deposition testimony frequently in support of this discussion. *Id.* Ms. Swain’s deposition was also submitted as a trial exhibit, *see* Swain 3021, along with Ms. Swain’s annotated calendar that recounted the various instances of harassment by Mr. Akin. Swain 2673-721, 3021. The VA investigator’s report—which, again, contained discussion of prior incidents involving inappropriate conduct by Mr. Akin—was also admitted as a trial exhibit. Swain 1727 (order admitting report); Swain 2192-203 (investigative report itself).

The ALJ held telephonic prehearing conferences on January 23 and 27, 2012. Swain 1726. After the conferences, the ALJ denied both the VA’s motion to dismiss and Ms. Swain’s cross-motion for summary judgment in an order dated January 30, 2012. *Id.* That prehearing conference memorandum and order also set out two issues for the hearing: (a) whether “the Agency subject[ed Ms. Swain] to a hostile work environment based on sex” based on Mr. Alton’s statements and actions on April 21, 2010; and (b) whether Mr. Alton thereafter retaliated against Ms. Swain (“reprisal”) by telling her that “he was ‘going to take her down;’ following her around; and taking notes.” *Id.*

The hearing took place on February 13 and 14, 2012. The ALJ made clear that Ms. Swain was likely to prevail and recommended to the VA that it settle. The parties entered a settlement agreement in early April 2012 that was far more favorable to Ms. Swain than the VA’s best offer before Mr. Eisenberg became involved. Swain 8-11. As noted above, the VA in 2011 had offered to restore twenty hours of annual leave, pay \$1,000 in compensatory damages, and reassign Mr. Akin. Swain 2842. In the post-hearing settlement, the VA agreed to pay \$35,000 in damages to Ms. Swain instead of \$1,000 and also restore sixty-four hours of leave with an economic value of approximately \$964.⁴ Swain 9-10. The total was considerably higher

⁴ Ms. Swain’s hourly pay was \$15.06 in 2013. Swain 3085.

than Ms. Swain's own settlement demand—again, \$25,000 plus medical expenses and restoration of annual leave—before she engaged Mr. Eisenberg. Swain 2841. In addition, the VA agreed to pay Mr. Eisenberg \$45,000 in attorney's fees and \$3,500 toward expenses. Swain 9. Finally, the VA agreed to address the harassment and retaliation that Ms. Swain experienced *after* she complained about Mr. Akin's April 21, 2010 statement via a mandatory training program: "All Supervisors in Complainant's chain of command as of April 2010 shall be provided training specifically designed toward the prevention of sexual harassment *with emphasis placed on appropriate actions to take once harassment has been reported to management.*" Swain 10 (emphasis added).

The VA agreed to the \$45,000 in attorney's fees after review of time entries. The time entries showed 114 hours had been "billed" to Ms. Swain's matter, amounting to over \$52,000 in time. Another 25.4 hours were written off. Mr. Eisenberg attended the hearing by himself, without a paralegal or another lawyer. No time was billed after the hearing. Mr. Eisenberg did not charge for negotiating the settlement or handling the settlement agreement. In all, the \$52,000 in "billed" time actually reflected only about eighty percent of the time spent on the case (including unbilled travel time), even without including the negotiation and finalizing of the settlement. *See* Swain 260-64.

The settlement agreement was fully executed, including by Ms. Swain, on April 9, 2012. Swain 11. Payment was due within 45 days. Swain 10. Ms. Swain never paid the \$800 remaining on the retainer set forth in the engagement letter. Ms. Swain also did not honor the terms of her contingency agreement with Mr. Eisenberg, and instead kept and quickly spent nearly \$8,000 of the money that she owed him.

4. Mr. Eisenberg's Successful Suit to Enforce the Representation Agreement and for Garnishment: When it became clear that Ms. Swain would not honor the representation agreement, Mr. Eisenberg brought an action in August 2012 against Ms. Swain in the Superior Court. Ms. Swain represented herself in the case. She was served on September 12, 2012. Swain 3089. She did not respond to the complaint for months, even when was ordered by the court to do, Swain 3079, but she did appear by phone at a hearing on January 18, 2013. Swain 3089 n. 1. She then failed to appear in person on March 15, 2013. Swain 3089. On that date, a default judgment was initially entered against Ms. Swain as requested by Mr. Eisenberg. Swain 3089-90. Ms. Swain then filed an answer and sought to vacate the default judgment but acknowledged the debt that she owed Mr. Eisenberg: "I can't not [sic] pay \$7,800 all at once I can pay [sic] small amount once a month until its [sic] paid." Swain 3087. The court vacated the default judgment on May 15, 2015. Swain 3092-94.

Mr. Eisenberg moved for summary judgment in July 2013, and Ms. Swain responded on July 26, 2013. Swain 3111-21. She stated that the \$35,000 that she had received was gone—specifically, that she had given it to family members, including her children, mother, sister, nieces, and uncle. Swain 3120-21. The money was a "blessing to share" with her family. Swain 3120. She requested that any new court date not be until October 2013. Swain 3121.

On August 5, 2013, Ms. Swain sought and received a stay of Mr. Eisenberg's suit based on her filing a Chapter 13 bankruptcy in the Western District of Virginia. *See* Chapter 13 Voluntary Petition, *In re Swain*, No. 13-71271 (Bankr. W.D. Va. Aug. 5, 2013). Upon learning

of that filing, Mr. Eisenberg notified the Superior Court; but for him, the court would not have been informed of Ms. Swain's bankruptcy filing. On August 15, 2013, Mr. Eisenberg filed a "*Plaintiff's* Motion to Stay Matter Pending Defendant's Final Adjudication of Her Bankruptcy Matter." Swain 3122 (emphasis added). On September 6, 2013, the Superior Court stayed the case because of the bankruptcy filing. Swain 3048. The matter remained stayed until the Chapter 13 bankruptcy action was dismissed because Ms. Swain did not make the required payments to the bankruptcy trustee. Trustee's Motion to Dismiss and Notice of Hearing, *In re Swain*, No. 13-71271 (Bankr. W.D. Va. Mar. 20, 2015); Swain 3130 (4/20/15 Order of Dismissal). Mr. Eisenberg informed the Superior Court of the dismissal at the next status hearing. Ms. Swain never appeared and never informed the Superior Court of her bankruptcy case or its dismissal. Swain 3052.

When the Chapter 13 bankruptcy action was dismissed, the Superior Court lifted the stay. *Id.* Three months later, the court entered summary judgment for Mr. Eisenberg, holding that Ms. Swain owed him \$7,800 for his legal services under the terms of their agreement. The court explained:

[Ms. Swain] should understand that she entered into an agreement with [Mr. Eisenberg] and enjoyed the fruits of [his] efforts, namely, the negotiation and execution of a favorable settlement agreement and the undisclosed amount she received in non-compensatory damages. As such, both law and equity will require [Ms. Swain] to fulfill her part of the parties' bargain and pay [Mr. Eisenberg] \$7,800 for legal services provided.

Swain 120. Ms. Swain refused to pay the \$7,800, however. Mr. Eisenberg therefore filed for a writ of garnishment, which the Superior Court granted, permitting him to garnish Ms. Swain's wages to recover the fees owed to him under the court's summary judgment ruling.

5. Ms. Swain's Second Bankruptcy Filing and the Dispute over Garnished Funds: In July 2016, Ms. Swain filed for bankruptcy again—this time through Chapter 7—but failed to notify Mr. Eisenberg of her bankruptcy petition, as she was required to do. In a memorandum opinion resulting from that filing, the Bankruptcy Court observed: "Debtor did not list or schedule Eisenberg in her Chapter 7 list of creditors . . . or as a garnishee" even though "Eisenberg was well known to the debtor." Memorandum Opinion at 6, *In re Swain*, No. 16-70898 (Bankr. W.D. Va. July 5, 2018). Moreover, the "only notice provided to Eisenberg in connection with this case was a letter" mailed *after* the Debtor obtained her discharge asking him to dismiss the pending garnishment. *Id.* at 6-7. Mr. Eisenberg thus never had the opportunity to challenge whether Ms. Swain's debt to him was subject to discharge. But despite his concerns about the fairness—and legality—of addressing Ms. Swain's debt to him in a bankruptcy process of which he had received no notice, Mr. Eisenberg again promptly filed a motion in the Superior Court before Judge Dixon to stop the garnishment. *See* Swain 3136-39. The Motion was handled by the Chambers Judge, Judge Irving, who did stop further garnishment in response to Mr. Eisenberg's request in an Order dated November 10, 2016. Swain 3140.

Judge Irving's Order did not, however, require Mr. Eisenberg to repay monies already received from the garnishment—prior to the date of his Order—that had gone toward satisfaction of the summary judgment ruling that Mr. Eisenberg had obtained against Ms. Swain. *See id.*

The Order simply granted Mr. Eisenberg's Motion, stated that the Writ of Attachment was vacated, and ordered that "the Court's Garnishment with Defendant's Employer, the United States Government, be stopped." *Id.* The Clerk of the Court then issued a "Certificate" to the "Garnishee," i.e., to the VA, directing that "YOU, the Garnishee, are to release all funds now being held back to the defendant" and that "the Court's Garnishment . . . be stopped." Swain 3141. Thus, neither the Order nor the Certificate purported to impose *any* duty or obligation on Mr. Eisenberg. Mr. Eisenberg moved the monies received from Ms. Swain to his trust account soon after.

On January 27, 2017, however, Mr. Eisenberg filed a Motion to Stay the court's order because he incorrectly interpreted the certificate as *directed at him* and as requiring release *by him* of garnished funds that he had received. *See* Swain 3142-49. At the same time, however, Mr. Eisenberg informed the Superior Court that he thought that a discharge, or even a stay of payment, to be invalid and that he intended to "Move the Bankruptcy Court to Dismiss Ms. Swain's bankruptcy thus requiring Ms. Swain to resume payments to Mr. Eisenberg." Swain 3142.

The Superior Court denied Mr. Eisenberg's request for a stay on February 23, 2017. Swain 3150. The court's order was not a model of clarity. It appeared to assume, as Mr. Eisenberg had assumed, that the earlier order *had* required Mr. Eisenberg to do something. As explained above, no such requirement can be found in the text of the order stopping the garnishment. Nonetheless, the court's February order found—without explanation or citation to a court rule, case, or other legal authority—that "it would be unjust to allow plaintiff to retain defendant's money pending the outcome of defendant's bankruptcy matter." *Id.*

This statement that "it would be unjust to allow plaintiff to retain defendant's money pending the outcome of defendant's bankruptcy matter" is hard to square with the undisputed facts here. As explained above, the Superior Court had entered summary judgment for \$7,800 in favor of Mr. Eisenberg because, among other things: 1) Ms. Swain had not, according to the Superior Court, honored the terms of her agreement with Mr. Eisenberg, and both law and equity required her to do so; and 2) Ms. Swain had *admitted* that she owed Mr. Eisenberg the money. Notably, the Superior Court at that time also expressly addressed Ms. Swain's financial circumstances, finding that "defendant's contention that she . . . cannot afford to pay the defendant" was "irrelevant to whether or not the defendant is indebted to the plaintiff as a matter of law." Swain 119. Significantly, however, even after the Court entered summary judgment, Ms. Swain defied the court's order and refused to pay, leading the Court to authorize garnishment.

Up until the time that Mr. Eisenberg returned to the Superior Court to ask that it *stop* the garnishment, then, any monies that he received were being paid to him *under a Superior Court garnishment order toward satisfaction of a Superior Court summary judgment order that Ms. Swain owed Mr. Eisenberg \$7,800*. It is thus simply incorrect to claim that it would be "unjust" for Mr. Eisenberg to retain funds received before Ms. Swain's bankruptcy filing. Swain 3150. That filing was, of course, prospective—it did not undo the fact that Mr. Eisenberg was entitled, under the Superior Court's summary judgment ruling, to collect \$7,800 from Ms. Swain *until that debt was extinguished in bankruptcy*.

And, again, as explained above, the Superior Court's November 2016 order stopping the garnishment and requiring issuance of a Certificate to that effect to the VA did nothing to change anything about that state of affairs. Moreover, the February 2017 order was limited to "den[ying] plaintiff's motion to stay the order releasing garnishment." Swain 3150. Accordingly, it too did nothing to change the fact that Mr. Eisenberg had a valid judgment against Ms. Swain, and the court had ordered monies transferred to him via garnishment of her wages toward satisfying that judgment. Moreover, notwithstanding the garnishment that had occurred, it is undisputed that as of the time of the February order, Mr. Eisenberg's judgment against Ms. Swain remained mostly unpaid.

It also bears emphasis that at the time of the February 2017 order, it was common ground that 1) the Bankruptcy Court had not yet addressed Mr. Eisenberg's claim that Ms. Swain's debt to him remained valid; and 2) the Bankruptcy Court, not the Superior Court, would need to rule on that issue in the first instance. The February order specifically stated: "The [Superior] 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 [November 10, 2016] Order [stopping the garnishment] for the purposes of awaiting resolution of that motion." *Id.*

Shortly after the Superior Court's February order, Mr. Eisenberg did go to the Bankruptcy Court to contest the discharge of Ms. Swain's debt to him, just as he had told the Superior Court he would do. *See* Attach. 34 at Ex. 9 (Letter from Thomas B. Mason & Rachel F. Cotton to Jerri U. Dunston (Apr. 30, 2019)). In response, the Bankruptcy Court *agreed* with Mr. Eisenberg that Ms. Swain had improperly failed to list Mr. Eisenberg as a creditor and that she did not give Mr. Eisenberg proper notice of her bankruptcy petition. *See* Swain 3229 ("[T]here is no question that Eisenberg was a known creditor with no actual notice of the case, and he was not given notice of the case in time to file a non-dischargeability action. Notwithstanding the D.C. Order [granting Mr. Eisenberg summary judgment on his claim], the Debtor adamantly objects to Eisenberg's entitlement to the fees he claims. She has no persuasive explanation for why he was not listed as a creditor in the case."). The Bankruptcy Court, however, declined to rule on the prospective validity of Ms. Swain's debt to Mr. Eisenberg. Instead, it held—contrary to the earlier understanding of both Mr. Eisenberg and the Superior Court—that the Superior Court had concurrent jurisdiction to "determine the dischargeability of" Mr. Eisenberg's claim "without intruding on the exclusive jurisdiction of the Bankruptcy Court." Swain 3231. The Bankruptcy Court added that "[n]othing contained in the Court Opinion or Order shall prevent Eisenberg from proceeding in the District of Columbia Superior Court to seek a determination of the dischargeability of the debt owed to him by the Debtor, Shirley Ann Swain, and evidenced by the judgment of that court." Swain 3222.

Consistent with the Bankruptcy Court's Order, Mr. Eisenberg therefore returned to the Superior Court on October 14, 2018, asking the Court to rule on whether Ms. Swain's debt to him had been properly dischargeable in bankruptcy. *See* Attach. 34 at Ex. 14. In that motion, Mr. Eisenberg informed the Court that the garnished "funds are currently being held in Mr. Eisenberg's trust account" because the issue of the dischargeability of Ms. Swain's debt had first been presented to the Bankruptcy Court and now, based on the Bankruptcy Court's ruling, was being "returned here." *Id.* at Ex. 14 at 6 n.8.

Judge Pan set Mr. Eisenberg's motion to reopen for a hearing on December 3, 2018. Initially, Judge Pan was "inclined to say that this [debt] is not discharged, Ms. Swain, because Mr. Eisenberg didn't have notice in advance of the bankruptcy resolution that his debt was part of your petition." *Id.* at Ex. 15 at 22:2-6 (12/03/2018 Hearing Tr.). Ms. Swain then raised the issue of the \$1,499 in garnished funds. Judge Pan stated: "I think I specifically ordered you not to keep it in your trust account and to give it to Ms. Swain." *Id.* at Ex. 15 at 23:24-24:1; *see also id.* at Ex. 15 at 33:8-9 ("I ordered you to return the money."). Mr. Eisenberg explained that he had believed the Superior Court had lacked "jurisdiction over the bankruptcy matter," so he kept the money in a trust account while he returned to the Bankruptcy Court. *Id.* at Ex. 15 at 33:2-3. He also explained that he did *not* understand the Superior Court's original order stopping the garnishment as "sa[y]ing that I had to return the garnishment funds." *Id.* at Ex. 15 at 25:10-16.

6. The Order to Show Cause: After the December 3 hearing, the Superior Court issued an order to Mr. Eisenberg to show cause "as to why he should not be held in contempt of court for his admitted failure to comply with the Court's February 23, 2017, order, denying [his] Motion to Stay the Release of Garnishment Funds[.]" Swain 3323 ("12/04/18 Order"). At the same time, the court *also* ordered briefing on the underlying question about whether the fact that "Mr. Eisenberg did not receive notice of the bankruptcy proceeding" should render Ms. Swain's "otherwise dischargeable" debt to him invalid and also invited Ms. Swain to "raise any other issues that she identifies as bearing upon her legal obligation to pay the debt." *Id.*

Notably, the Court's 12/04/18 Order treated these issues as essentially unrelated, calling for simultaneous initial briefs by *Mr. Eisenberg* on the contempt-of-court issue and by *Ms. Swain* on the discharge-of-debt issue, and then for oppositions and replies. But the issues *do* appear linked—again, as set forth above, putting aside the bankruptcy proceeding, Mr. Eisenberg unquestionably had a valid judgment against Ms. Swain for \$7,800. And before she even sought discharge in bankruptcy, Mr. Eisenberg received some amount toward that debt from the court-ordered garnishment of Ms. Swain's wages. But if the bankruptcy proceeding had no effect on Mr. Eisenberg's judgment against Ms. Swain—as Mr. Eisenberg believed and as to which no court had decided at the time of the 12/04/18 Order—it is hard to see how it could be contempt of court for Mr. Eisenberg to keep monies that the court itself had ordered paid to him through garnishment. But Ms. Swain had no claim to these funds in any event—if the bankruptcy extinguished Mr. Eisenberg's claim to them, it extinguished Ms. Swain's as well, so the funds should have gone to the bankruptcy trustee if anyone.

7. The Contempt of Court Ruling and Appeal: In an order issued March 1, 2019, Judge Pan addressed both issues. *See Swain* 3440-50. With respect to contempt, she wrote that Mr. Eisenberg had violated her February order:

Plaintiff filed a motion to extinguish the garnishment on November 3, 2016, upon learning about defendant's bankruptcy petition. The Court (Irving, J.) granted plaintiff's motion to extinguish the garnishment on November 10, 2016. On November 17, 2016, the Clerk of the Court issued a certificate requiring plaintiff to release all funds held pursuant to the vacated writ of attachment. On January 27, 2017, plaintiff filed a motion to stay release of garnishment funds. On February

23, 2017, this Court denied plaintiff's motion, thereby ordering plaintiff to release the garnished funds to defendant. *See generally* Order, dated February 23, 2017.

Swain 3441.

As indicated by the facts set forth above, however, these statements are inaccurate in two important respects. First, as noted above, the court's November 17, 2016 Certificate *was directed to the VA*, not Mr. Eisenberg, and it simply did not address "funds held" by Mr. Eisenberg "pursuant to the vacated writ of attachment." *Id.* Second, the court's denial of Mr. Eisenberg's motion to *stay* the court's earlier action did not "order[]" Mr. Eisenberg "to release the garnished funds" that had been already paid to him by Ms. Swain—rather, it ordered the VA, the garnishee, "to release the garnished funds." *Id.* As discussed above, it did observe in passing that it would be "unjust to allow plaintiff to retain defendant's money pending the outcome of defendant's bankruptcy matter," but it did not explain why or provide any legal basis for disgorgement of the funds lawfully received by Mr. Eisenberg under the order of garnishment—and, indeed, there was nothing "unjust" about that. Swain 3150. In any event, the *ordering clause* in the court's denial of the stay was limited to denying Mr. Eisenberg's request for a stay. *Id.* The text of the February 2017 stay-denial order thus does not appear to impose any express obligations beyond those in the underlying November 2016 order resulting in issuance of the Certificate.

But Judge Pan nonetheless held Mr. Eisenberg in contempt of court, ordering him to repay the garnished funds to Ms. Swain and to pay her an additional \$978.22, as compensatory damages, which included \$500 in damages "for the inconvenience and stress" on Ms. Swain, plus back interest of 6%.⁵ Swain 3445-46.

The Court then turned to the issue of the continuing validity of the underlying debt. The court first stated that "the Bankruptcy Court held that defendant's debt to plaintiff had not been discharged through her Chapter 7 bankruptcy proceeding, because defendant did not provide plaintiff notice of her bankruptcy petition and an opportunity to challenge the dischargeability of the debt." Swain 3446. But Judge Pan went on to find that there was no fraud or misrepresentation made by Ms. Swain *at the time of settlement* that would make the debt non-dischargeable. Specifically, Judge Pan found that "there was a settlement payment to defendant, who failed to use that money (which belonged to her) to pay a debt owed. [But b]ecause defendant did not intend to deceive or defraud plaintiff, and did not steal money from plaintiff, her debt to plaintiff in the amount of \$7,800 is subject to the Bankruptcy Court's discharge order." Swain 3448.

This analysis of the dischargeability of Ms. Swain's debt appears to miss a fundamental issue. The Bankruptcy Court had found that there was no impediment to discharging Ms. Swain's debt from anything that happened *at the time of settlement*. But as Judge Pan herself acknowledged, "[Ms. Swain] did not provide notice of her bankruptcy petition and an opportunity to challenge the dischargeability of the debt." Swain 3446. Mr. Eisenberg believed

⁵ The court cited no statute or other authority for the interest rate that it imposed. Essentially, the court created a loan or debt owed by Mr. Eisenberg to Ms. Swain and added interest to it.

that failure rendered the debt nondischargeable. *See* Attach. 34 at Ex. 15 at 34:25-35:4 (The Court and Mr. Eisenberg “weren’t aware of all the facts. In other words, the underlying deceit of Ms. Swain and her attorney in executing their Chapter 7.”); *id.* at Ex. 14 at 6. (“[T]he Bankruptcy Court for the Western District of Virginia decided that Ms. Swain’s failure to list Mr. Eisenberg as a creditor in her bankruptcy petition gave Mr. Eisenberg ‘the ability to reopen [Ms. Swain’s bankruptcy cases] and maintain an action objecting to the discharge of the debt owed to him.’” (second alteration in original) (citation omitted)). However, Judge Pan’s decision did not even address Mr. Eisenberg’s argument that this fraud by Ms. Swain *in the bankruptcy proceedings* rendered her debt to him nondischargeable. *Id.* at Ex. 14 at 8-9.

Mr. Eisenberg appealed Judge Pan’s order to the D.C. Court of Appeals but also sent a check for the garnished funds—although not the additional damages ordered by Judge Pan—to Ms. Swain.⁶ Before the Court of Appeals, Mr. Eisenberg again argued that the discharge itself was fraudulent because Ms. Swain knew about her debt to him but failed to provide him the required notice. *See* Amend. Opening Br. for Appellant, Michael D.J. Eisenberg at 5-8, *Eisenberg v. Swain*, No. 19-CV-189 (D.C. Oct. 25, 2019). Like the Superior Court, the Court of Appeals did not address that argument, but instead held that “Ms. Swain’s mere knowledge of her obligation” to Mr. Eisenberg—at the time of the April 2012 settlement—“does not meet the higher scienter of actual fraud.” *Eisenberg v. Swain*, 233 A.3d 13, 21 (D.C. 2020). The Court of Appeals then also upheld the court’s contempt ruling. *Id.* at 22-25. The Court of Appeals reasoned that “[d]espite twice receiving clear instruction from the court to return” the garnished funds to Ms. Swain, he did not do so for more than two years. *Id.* at 21. According to the decision, those “clear instruction[s]” were contained in the Superior Court’s “November 17, 2016” order and in the order denying the motion to stay “on February 23, 2017.” *Id.* Again, however, the Clerk’s November 17 Certificate was directed to the VA and did not contain “clear instructions” to Mr. Eisenberg. And while the Superior Court’s statement that it would be “unjust,” Swain 3150, for Mr. Eisenberg to keep the garnished funds could certainly be read to *imply* that those funds should be returned, there certainly was no “clear instruction”—nor, indeed, *any* express instruction—to do so.

B. Analysis

The SOC alleges violations of D.C. Rules of Professional Conduct 1.1(a) and (b); 1.2(a); 1.3(a); 1.4(a) and (b); 1.5(c); 3.4(c), and 8.4(d). As set forth below, these allegations are not borne out by the facts.

Rule 1.1(a) & (b): The SOC alleges that “Respondent violated . . . 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 that generally afforded to clients by other lawyers in similar matters.” SOC ¶ 82(A). This charge—which, again, appears unchanged

⁶ Mr. Eisenberg sought and obtained a stay of the additional damages that Judge Pan had ordered that he pay pending appeal. Order at 4, *Eisenberg v. Swain*, No. 2012 CA 006509 B (D.C. Super. Ct. Apr. 17, 2019) (staying order to pay \$978.22 in compensatory damages upon posting of a bond); Bond Filed, *Eisenberg v. Swain*, No. 2012 CA 006509 B (D.C. Super. Ct. May 3, 2019). He later paid those additional damages in March 2022.

from the prior draft SOC—appears to be primarily based on the allegation that Mr. Eisenberg “failed to obtain, marshal, and present his client’s evidence properly.” *Id.* ¶ 54. More specifically, subparagraphs 54(A)-(D) allege that Mr. Eisenberg: 1) failed to pursue a claim of reprisal against the VA on Ms. Swain’s behalf; 2) failed to seek “relevant discovery;” 3) chose to conduct depositions of individuals even though “most had already made official statements;” and 4) filed an “untimely” pre-hearing report that also failed to “identify an amount Ms. Swain sought in pecuniary damages, and did not identify the number of leave hours Ms. Swain sought to recover[.]” *Id.* 54(A)-(D).

These allegations fall far short of a Rule 1.1 violation both factually and legally. Before turning to the factual details, however, our big-picture point here—again—is that Mr. Eisenberg *prevailed* here on behalf of Ms. Swain, obtaining for her a substantial settlement that she described as a “blessing” for her and her family, Swain 3120—after her union representatives failed to achieve any positive outcome. The SOC’s allegations under Rule 1.1 therefore miss both the forest and the trees. The Court of Appeals has explained that it “[f]inds] Rule 1.1 violations” only when there has been “conduct that is truly incompetent, fraudulent, or negligent *and* that prejudices or could have prejudiced the client.” *Yelverton*, 105 A.3d at 422 (emphasis added). Here, both elements of a Rule 1.1 violation are missing. Mr. Eisenberg’s representation of Ms. Swain before the ALJ was far from “truly incompetent” and did not prejudice Ms. Swain, but instead substantially benefitted her.

Yelverton is illustrative here, although the facts were very different. The *Yelverton* court addressed a situation where a lawyer representing a witness in a criminal trial sought a mistrial after the defendant was acquitted, even though the lawyer “should have known that . . . once the defendant had been acquitted,” the motion “had absolutely no chance of success.” *Id.* But the court found that while “respondent’s filings were ill-advised, meritless, and unprofessional,” they did *not* constitute a “serious deficiency in the representation” sufficient to trigger Rule 1.1. *Id.* at 423. The court explained that there was no “reason to stretch” Rule 1.1 “to sanction a lawyer’s actions taken for the purpose of protecting the client that caused no actual harm and were unlikely to cause harm to the client.” *Id.* Mr. Eisenberg’s filings and in-person advocacy *here* were, unlike in *Yelverton*, diligent and strategically sound—again, to the point where he convinced the ALJ of Ms. Swain’s position, leading to settlement. He did not pursue a strategy with “absolutely no chance of success,” but rather actually succeeded in obtaining a favorable settlement approved by Ms. Swain. Rule 1.1 thus does not apply here because there was no “serious deficiency in the representation.” In fact, we have found *no* case from any jurisdiction applying Rule 1.1 to a successful representation, and we are deeply skeptical that any such case exists.

Turning to the SOC’s factual claims, the record clearly shows the *opposite* of the allegation that Mr. Eisenberg “did not seek to add claims of reprisal.” SOC ¶ 54(A). Initially, Ms. Swain told the VA investigator that “she wanted this basis removed from her complaint,” Swain 2293, and the VA thus focused first on the sexual harassment claim. *Id.* But after Ms. Swain engaged Mr. Eisenberg, *he did pursue the reprisal issue*. During the depositions in October 2011, Mr. Eisenberg and his colleague adduced extensive testimony regarding Mr. Akin’s pattern of reprisal against Ms. Swain. And both Mr. Eisenberg’s Opposition to the VA’s Motion to Dismiss Without a Hearing and his Pre-Hearing Report relied extensively on that

testimony. As noted above, *a single page* of the Opposition contained approximately twenty specific citations to deposition testimony that Mr. Eisenberg and his colleague had obtained supporting Ms. Swain's claims of retaliation. Swain 2961. And, again, the pre-hearing report devoted about two single-spaced pages to Mr. Akin's continued harassment of Ms. Swain after April 21, 2010. Swain 3015-17. The ALJ got this message loud and clear—in denying the VA's motion for summary judgment, the ALJ set out *two* issues for the hearing, *both* sexual harassment *and* retaliation/reprisal, notwithstanding that Ms. Swain had, before retaining Mr. Eisenberg, asked for the latter claim to be dropped. Swain 1726. Inclusion of this issue for the hearing therefore appears entirely due to Mr. Eisenberg's vigorous representation. The current draft SOC does not appear to grapple with these indisputable facts.

With respect to discovery, the draft SOC oddly asserts that Mr. Eisenberg sought both too little and too much. He sought too little because he allegedly “fail[ed] to seek” certain records, SOC ¶ 54(B), but he sought too much because he conducted too many depositions. *Id.* ¶ 54(C). Neither allegation comes close to a rule violation. As noted above, the VA investigator's report—which discussed the prior incidents involving inappropriate conduct by Mr. Akin—was admitted as a trial exhibit. Swain 1727 (order admitting report); Swain 2192-203 (investigative report itself). Mr. Eisenberg also received the underlying reports concerning these other incidents. Swain 2731 (November 2008); Swain 2732 (January 2006); Swain 2758-59 (December 2008); Swain 2760-61 (December 2008). Moreover, Mr. Eisenberg reasonably decided to obtain deposition testimony rather than rely solely on earlier transcribed “affidavits” done by the VA investigator. And, as also discussed above, he then relied extensively on the deposition testimony in his submissions, which in fact did convince the ALJ of Ms. Swain's position. Finally, by the time that Mr. Eisenberg had been retained, the time for propounding new discovery requests had passed, absent leave from the ALJ. The ALJ also limited interrogatories to one set and Ms. Swain's earlier representatives had already filed interrogatories. Swain 889-90, 900.

The SOC also alleges that Mr. Eisenberg's pre-hearing report was “untimely,” did not “identify an amount Ms. Swain sought in pecuniary damages,” and did not identify the hours that Ms. Swain sought to recover as part of her damages. SOC ¶ 54(D). But the pre-hearing report was filed before the workday even began on the day after it was due, and the ALJ plainly considered it, for example, indicating that “[d]ocumentary evidence” at the hearing would include “attachment[s] to the pre-hearing statement.” Swain 1727. The pre-hearing report also expressly repeated Ms. Swain's claim for \$300,000 in monetary damages from her complaint, Swain 3022, so the allegation that Mr. Eisenberg failed to identify the amount that she sought in damages is simply incorrect. Finally, while the pre-hearing report did not identify a specific number of hours that Ms. Swain was forced to use as a result of the hostile work environment, it did state that she would seek to establish and recover all of the “annual leave” hours she used “from December 10, 2010, to January 3, 2011.” *Id.* As a result, as noted above, Ms. Swain *did* recover, as part of her settlement, *sixty-four hours of annual leave*, which was *more than three times the VA's best offer before Mr. Eisenberg took on her case*.

The SOC claims that Mr. Eisenberg “failed to obtain, marshal, and present his client's evidence properly.” SOC ¶ 54. Yet, the SOC contains not a word about the hearing itself, which consumed two days and resulted in a clear message from the presiding officer that Ms. Swain

would prevail, and the VA should settle the case. There is no hearing transcript, so it is hard to understand how your Office could meet its burden to support this charge, particularly in light of the ultimate result. In short, the accusations in the SOC regarding Mr. Eisenberg's alleged lack of competence are either directly contradicted by the evidence or find no support in the record. The facts demonstrate that Mr. Eisenberg transformed a case in which Ms. Swain's union representatives had failed to generate a settlement offer above \$1,000 and twenty hours of restored leave into a settlement of \$35,000 and 64 hours of restored leave, as well as the moral vindication that Ms. Swain had been long seeking. There is simply nothing in Rule 1.1 or the case law interpreting it to suggest that such representation qualifies as incompetent.

Rules 1.2(a), 1.4(a), and 1.4(b): Paragraphs 82(B) and (D) allege violations of these rules because Mr. Eisenberg purportedly "failed to consult with Ms. Swain about the means to pursue her objectives" and "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[.]" *Id.* ¶ 82(B) & (D). Although it is somewhat unclear from the SOC, these charges appear to relate to allegations that Mr. Eisenberg "had few substantive discussions with his client and did not consult with her about his strategy," *id.* ¶ 58, including an alleged lack of consultation regarding the "purpose, risks, or benefits" of Mr. Eisenberg's approach to discovery. *Id.* The SOC also alleges that Mr. Eisenberg "rarely initiated communication to keep Ms. Swain apprised of her case's status." *Id.* ¶ 59. This allegation is unsupported by the record. *E.g.* Swain 263 (1/16/12 entries: "Return call to client. House line not working. LVM [left voicemail message]." "Conversation with client.").

And these are the type of vague allegations that are harder to respond to ten years after the fact. They are also belied by the record. We are aware of no contemporaneous complaints by Ms. Swain about Mr. Eisenberg. As the hearing neared, instead of complaints, Ms. Swain wanted to be sure that Mr. Eisenberg remained her lawyer. She acknowledged that she had not paid the full \$3,000, due long before the hearing. She did not try to evade that obligation by raising issues with any aspect of Mr. Eisenberg's representation, including concerning his communications with her. Instead, she was worried that her non-payment would cause Mr. Eisenberg to seek to withdraw (which he did not). *See, e.g.,* Swain 873 (writing in a note to Eisenberg on April 22, 2011: "I'm a little low on cash but will be sending you another payment"); Swain 885 (writing in a note to Mr. Eisenberg on "January 26, 2011 [sic, should be 2012] waitin [sic] on my tax return thought it was coming 25th. . . . I had plans to send you a large payment. Didn't happen yet but I will send it when it comes. Thank you. I want you [to] continue to represent me. Yall the best!").

More broadly, the SOC fundamentally misconstrues Rule 1.2. As noted above in connection with the Glaab matter, this rule accords certain big-picture authority to the client, including the right to determine the "objectives of representation" and the right to be consulted as to the means to pursue those objectives. *See* D.C. Rules r. 1.2(a) ("Rule 1.2"). But the rule also reserves authority over tactics and strategy to the lawyer. Mr. Eisenberg's representation of Ms. Swain respected this division of authority. There is no question that Mr. Eisenberg understood Ms. Swain's objective here, i.e., recovering money from the VA in compensation for the hostile work environment she experienced, and that he consulted with her about pursuing that objective via *her* chosen means of a hearing before the ALJ. At the same time, however, Mr.

Eisenberg properly made tactical decisions of the sort that require professional experience, such as how many witnesses to depose. And, again, the Court of Appeals has expressly endorsed this division of authority—“the lawyer has—and must have—full authority to manage the conduct of the trial.” *Kuhn*, 900 A.2d at 700 (internal quotation and citation omitted). “This inherent authority is derived from the lawyer’s expertise in legal strategy and procedure.” *In re Stanton*, 532 A.2d at 101 (quoting *ABA/BNA Lawyer’s Manual On Professional Conduct* § 31:304 (1984)). Moreover, the Court of Appeals has also found that even where a lawyer’s failure to share information *does* rise to the level of a Rule 1.4 violation—which was not the case here, as discussed directly below—that does *not* necessarily show a failure to “abide by his ‘client’s decisions concerning the objectives of representation”” or a failure to ““consult with [his] client as to the means by which they are to be pursued.”” See *In re Karr*, 722 A.2d at 21 (alteration in original) (citing Rule 1.2(a)) (finding that a failure to share a brief with the client prior to filing violated Rule 1.4, but not Rule 1.2). In short, Mr. Eisenberg fully understood Ms. Swain’s objectives, consulted with her about the means to achieve them, and, most importantly, *actually did achieve them*.

The SOC alleges that Mr. Eisenberg violated Rules 1.4(a) and (b) by purportedly failing to keep Ms. Swain reasonably informed about the matter or failing to explain it sufficiently to permit her to make informed decisions. But this is not a case in which the lawyer left a client in the dark about developments in her case. As noted above, Mr. Eisenberg and his associate were receptive to input from Ms. Swain, *see, e.g.*, Swain 874-84, 2897-910, and spoke and otherwise corresponded with Ms. Swain approximately fifteen times during the five busiest months of her case. Swain 260-64, 909-16. And the record certainly does not suggest that they ignored efforts by Ms. Swain to contact them—they listened to and returned voicemails and included her in deposition preparation, for example, and there is no record that Ms. Swain sought greater involvement or communication but was denied.

The Court of Appeals’ analysis in *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001), shows that the communication here was more than reasonable. The Court there wrote:

Brice admits that she and Schoeneman spoke monthly, that he traveled to Baltimore to meet her, and that she traveled to Virginia to meet him. . . . Given the [long-term] nature of the matter . . . monthly conversations are not *prima facie* unreasonable. Nothing in the record points to any events or circumstances that would have required Schoeneman to communicate [more] with Brice [and] Brice’s complaint [thus] does not allege misconduct in violation of Rule 1.4(a).

Id. As set forth above, Mr. Eisenberg and his colleague communicated with Ms. Swain much more than “monthly” during busy periods in her case. They also included her in their preparations for the hearing, and, as noted above, there is no indication that she sought *greater* participation in the matter before the ALJ.

Finally, the allegation that Mr. Eisenberg did not “explain his billing practices to Ms. Swain,” SOC ¶ 60, is flatly contradicted by the engagement letter. She was to pay \$3,000 plus twenty percent of any award. That is stated in the engagement letter, and Ms. Swain understood this financial obligation. The alleged failure to explain to Ms. Swain that she owed more money

than the \$2,200 that she had paid prior to the settlement therefore is simply not credible. Ms. Swain's own requests for a payment plan or more time also do not express either surprise or any lack of understanding of the fee agreement. Ms. Swain knew in February 2012—before there was any settlement—that she still owed Mr. Eisenberg payment towards the \$3,000 retainer specified in the engagement letter. That is why she paid \$400 that month and promised to pay more. There is, in short, simply no evidence of a Rule 1.4 violation here.

Rule 1.3: The SOC restates Rule 1.3(a), which requires that “a lawyer shall represent a client zealously and diligently within the bounds of the law.” D.C. Rules r. 1.3 (“Rule 1.3”); *see id.* ¶ 82(C) (claiming that Mr. Eisenberg “failed to represent Ms. Swain with diligence and zeal within the bounds of the law”). Although it is not clear what conduct this charge is based on, it appears misplaced.

The Comments to D.C. Rule 1.3 give examples of failures to fulfill the duty imposed by the rule, such as procrastination, neglect of a client matter, or failure to carry a matter through to conclusion. *See, e.g.,* D.C. Rules r. 1.3 cmts. [7]-[9]. But this case does not involve any such conduct. *As repeatedly set forth above, Mr. Eisenberg litigated Ms. Swain's case aggressively, resulting in a settlement—approved by Ms. Swain—for an amount approximately thirty-five times higher than what the VA had offered her before she hired Mr. Eisenberg.* Just as we were unable to find any case in which Rule 1.1 has been applied to the successful settlement of a case (again, expressly approved and signed by the client), we also were not able to find such a case applying Rule 1.3 to a representation that produced a result commensurate with that obtained by Mr. Eisenberg for Ms. Swain.

Rule 1.5(c): As noted above, the new draft SOC removes the Rule 1.5(a) charge, but reiterates the Rule 1.5(c) count. SOC ¶ 82(E). As you are aware, we addressed that count in our letter on November 9, 2022, responding to concerns you raised during the preceding call. As we set forth there, D.C.'s Rule 1.5(c) provides in its entirety:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination.

D.C. Rules r. 1.5(c). Rule 1.5(c) thus contains two core requirements applicable here: 1) a written contingency agreement including the percentage going to the lawyer, which must also note any expenses to be deducted from the client's recovery; and 2) written notice to the client of the “outcome of the matter.” *Id.* The final phrase of the rule, regarding notice of “remittance to

the client,” is not applicable here because the government of course paid the settlement amount directly to Ms. Swain, and accordingly, there was nothing for Mr. Eisenberg to “remit.” *Id.*

There is no dispute that the parties had a *written* contingency agreement in this case. Ms. Swain’s engagement letter with Mr. Eisenberg stated that “Client and Attorney agree that the Attorney is to be paid 20% of any award, settlement, etc., including but not limited to Client’s award for damages, compensation, back pay, etc.” Swain 2722. The letter also made clear that Ms. Swain was not liable for any expenses, but that Mr. Eisenberg could seek them from the government as permitted by law. Swain 2722-23. This agreement was, of course, the subject of the summary judgment in Mr. Eisenberg’s favor in the Superior Court. The court found:

[Ms. Swain] should understand that she entered into an agreement with [Mr. Eisenberg] and enjoyed the fruits of [his] efforts, namely, the negotiation and execution of a favorable settlement agreement and the undisclosed amount she received in non-compensatory damages. As such, both law and equity will require [Ms. Swain] to fulfill her part of the parties’ bargain and pay [Mr. Eisenberg] \$7,800 for legal services provided.

Swain 120. Chief Judge Dixon (retired) did not find the agreement between the parties unconscionable, unfair, or unreasonable.

The remaining issue under Rule 1.5(c) is whether Mr. Eisenberg provided *written notice* to Ms. Swain regarding the “outcome of the matter.” As we noted on our first call together, there is strong circumstantial evidence that he did provide such written notice in the form of the settlement agreement itself. Ms. Swain signed that agreement, and it is our understanding that *she* also provided it to your Office, as well as to the Bankruptcy Court. *See* Attach. 35 at Attach. B (Letter from Thomas B. Mason & Timothy J. Simeone to Julia Porter & Traci M. Tait (Nov. 9, 2022)) (3/27/18 filing and attached settlement agreement). We have not been able to definitively ascertain whether Ms. Swain initially received that agreement in person, by email, by mail, or via other means—which is perhaps not surprising given the passage of more than ten years since the agreement concluded—but, again, there can be no real doubt that she did receive it. Again, we believe that she provided it *to you*, and you have not informed us to the contrary. Correspondingly, we also were not able to find any record of Ms. Swain ever *not* having a copy of the settlement agreement—she does not appear to have asked for it, or for that matter, for any other information that would suggest any lack of knowledge or confusion regarding the outcome of her case. And, of course, there is no dispute that she received and spent the settlement money, including the portion due to Mr. Eisenberg under their agreement. In these circumstances, we do not think that it can be demonstrated by clear and convincing evidence that Mr. Eisenberg failed to provide Ms. Swain with notice of the outcome of her matter in violation of Rule 1.5(c).

Rule 3.4(c): Mr. Eisenberg 1) did not “[k]nowingly disobey[] a court order,” SOC ¶ 82(F); and 2) also falls within Rule 3.4(c)’s safe harbor for an “open refusal based on an assertion that no valid obligation exists.” D.C. Rules r. 3.4(c) (“Rule 3.4”). As set forth below, there simply was no “obligation” imposed *on Mr. Eisenberg* by the Superior Court’s orders *to the “garnishee.”* Moreover, with respect to the safe harbor, Mr. Eisenberg’s refusal to return the

funds was entirely open and notorious, based on his view that the question of the dischargeability of Ms. Swain's debt was for the Bankruptcy Court to decide.

The content of the Superior Court's orders is set forth in detail above. To summarize, however, the November 10, 2016 order by the Chambers Judge, Judge Irving, did not require Mr. Eisenberg to return any funds to Ms. Swain. It simply granted *Mr. Eisenberg's* motion to stop the garnishment and vacated the writ of attachment on her wages. Swain 3140. More specifically, that Order mandated that "the Court's Garnishment with Defendant's Employer, the United States Government, be stopped." *Id.* The Clerk of the Court then also issued a "Certificate" to the "Garnishee," i.e., *to the VA*, directing that "YOU, the Garnishee, are to release all funds now being held back to the defendant." Swain 3141.

Until that point, we do not think it even fairly debatable that the Superior Court did not instruct *Mr. Eisenberg* to do anything whatsoever with funds that *he* had already received via the garnishment enforcing his judgment against Ms. Swain. Neither Judge Irving's order nor the Clerk's certificate addressed Mr. Eisenberg in any way.

Unfortunately, Mr. Eisenberg appears to have incorrectly interpreted the certificate as directed at him—likely because the term "garnishee" can be confusing—and as requiring release *by him* of garnished funds that he had received. *See* Swain 3142-49. Again, under the plain language of the documents, that simply was not so. The "garnishee" is, by definition, the entity doing the garnishing, not the creditor in whose favor it is done. It is factually indisputable that the certificate did not address Mr. Eisenberg.

In any event, however, Mr. Eisenberg moved for a stay and also informed the Superior Court that he believed that the dischargeability of Ms. Swain's debt to him was the exclusive province of the Bankruptcy Court—and at the time the Superior Court concurred. Mr. Eisenberg further indicated that he therefore intended to "Move the Bankruptcy Court to Dismiss Ms. Swain's bankruptcy thus requiring Ms. Swain to resume payments to Mr. Eisenberg." Swain 3142. The Superior Court, now Judge Pan, denied Mr. Eisenberg's request for a stay on February 23, 2017. *See* Swain 3150.

As we have previously stated, that order was not a model of clarity—it *ordered* only that plaintiff's motion to stay be denied, but it *also* contained the statement that "it would be unjust to allow plaintiff to retain defendant's money pending the outcome of defendant's bankruptcy matter." *Id.* Read in context, we do not think that this statement clearly and convincingly imposed a *new* obligation on Mr. Eisenberg to return monies that he had received via garnishment before Ms. Swain's second bankruptcy filing. As noted above, given the legal rulings to that point, the garnished money Mr. Eisenberg had received simply was not the "defendant's money." It had been ordered turned over *to him* because it was indisputably due *to him* under the engagement agreement.

Turning to the question of "open refusal," in September 2017, Mr. Eisenberg went to the Bankruptcy Court to contest the discharge of Ms. Swain's debt to him. He had told the Superior Court that he would do that, and Judge Pan had indicated that it would be appropriate. *See id.* Mr. Eisenberg therefore filed a motion to dismiss Ms. Swain's bankruptcy filing. *See* Attach. 34

at Ex. 9. Ms. Swain’s responsive filing in Bankruptcy Court claimed that he had been “ordered” by the Superior Court to return that money, but that he still had it. *Id.* at Ex. 12 at 2. The fact that Mr. Eisenberg was holding those funds was then discussed at the hearing before the Bankruptcy Court. Indeed, Ms. Swain testified there that “I said hey, he could have [the money held in trust]. I don’t want no more parts of this case. I want him to leave me alone.” *Id.* at Ex. 17 at 12:6-8 (4/16/2019 Hearing Tr. in bankruptcy case). Both sides then also referenced the fact that the money remained in Mr. Eisenberg’s trust account in their post-hearing filings. *See* Attach. 36 at 7 n. 2 (May 30, 2018 Filing by Mr. Eisenberg) (“[T]he only accounting Mr. Eisenberg has is about \$917.57. . . . Petitioner reminds this Court that once he learned of the bankruptcy, he moved the garnished money into his trust account.”); Attach. 37 at 1 (June 4, 2018 Letter from Ms. Swain) (“He knew [that] he [had] taken money from my job as . . . a garnishment. [A]nd never returned my money [as] order[ed] by the court.”); Attach. 38 (June 9, 2018 Letter from Ms. Swain) at 6 (“\$1,316.67 . . . was taken from my wages[;] he was ordered to return it but he didn’t”); Attach. 39 at 4 (June 10, 2018 Letter from Ms. Swain) (“I arranged to have the money [garnishment] come out of my wages.”). Mr. Eisenberg—and Ms. Swain—thus told the Bankruptcy Court from the very beginning, and repeatedly, that he still had the garnished funds.

In Superior Court, Judge Pan’s referral letter to your Office stated that this fact came to the Superior Court’s attention only when “the *pro se* defendant . . . informed the Court one year and ten months after the issuance of the order” that she claims Mr. Eisenberg violated. Attach. 34 at Ex. 18 (3/1/19 Letter from Florence Y. Pan to Disciplinary Counsel). We mean no disrespect to Judge Pan, but that is simply an error. It is incorrect. Upon referral of his non-dischargeability argument from the Bankruptcy Court back to Superior Court, Mr. Eisenberg’s initial filing in the Superior Court stated in plain English and in no uncertain terms that he still had the garnished funds and why. Specifically, as we explained in our earlier letter, Mr. Eisenberg indicated that those “funds are currently being held in Mr. Eisenberg’s trust account” because the issue of the dischargeability of Ms. Swain’s debt had needed—again, under Judge Pan’s own ruling—to first be presented to the Bankruptcy Court and now, based on the Bankruptcy Court’s ruling, was being “returned here.” *Id.* at Ex. 14 at 6 n.8.

In short, there is absolutely *no* evidence on this record that Mr. Eisenberg ever attempted to conceal the fact the garnished funds were in his trust account all along. To the contrary, he repeatedly underscored that fact to both the Bankruptcy Court and the Superior Court, both before and after Judge Pan’s February 23, 2017 order. And he also repeatedly said *why* he still had the funds: He believed the judgment that the Superior Court had entered in his favor against Ms. Swain remained valid, and he wanted a court with jurisdiction over that issue to so rule. Both Mr. Eisenberg and the Superior Court thought that the only court with jurisdiction was the Bankruptcy Court, so that is where he went. The Bankruptcy Court then *agreed* that Ms. Swain failed to give him proper notice, *see* Swain 3229, but *disagreed* that the Superior Court lacked jurisdiction. Swain 3231. Mr. Eisenberg therefore did not get a ruling on his non-dischargeability argument until the Superior Court rejected it in the *same* order holding Mr. Eisenberg in contempt. That is precisely the result foreclosed by Rule 3.4(c)’s “open refusal” safe harbor—imposing a sanction on the basis that an openly held legal position *not previously ruled upon* was incorrect.

The Court of Appeals’ affirmance of the Superior Court’s contempt decision against Mr. Eisenberg does not alter this straightforward textual application of Rule 3.4(c). Like the Superior Court, the Court of Appeals also found that the Superior Court orders contained “clear instruction[s]” to Mr. Eisenberg to return the garnished funds without pointing to *any* instructions at all, clear or otherwise. *Swain*, 233 A.3d at 21. We believe that finding was simply incorrect, and, as discussed above, it is well-established that D.C. does not give “preclusive effect” in disciplinary matters “to factual findings made in a non-disciplinary proceeding” *In re Maxwell*, 798 A.2d at 529 (“[I]ssues decided in a civil case under a preponderance of the evidence standard’ could not be given ‘preclusive effect . . . in a subsequent attorney discipline proceeding.’”) (citing *Att’y Grievance Comm’n of MD.*, 763 A.2d at 181).

Finally, and equally important, because Rule 3.4 was not before the Court of Appeals, it of course made no findings as to whether Mr. Eisenberg’s disobedience of an obligation imposed by a court, if any, constituted an “open refusal” under the rule’s safe harbor. As set forth above, it did—the Superior Court not only *knew* that Mr. Eisenberg intended to return to the Bankruptcy Court to address the dischargeability of Ms. Swain’s debt to him, but actually indicated that he *should* do so.

Rule 8.4(d): As noted above, the draft SOC newly alleges that Mr. Eisenberg “seriously interfered with the administration of justice,” but again does not specify how. SOC ¶ 82(G). We frankly find it impossible even to speculate.

As set forth above, however, the Court of Appeals has described Rule 8.4(d) as addressing “derelictions of attorney conduct considered reprehensible to the practice of law.” *In re Hopkins*, 677 A.2d at 59 (quoting *In re Alexander*, 496 A.2d 244, 255 (D.C. 1985)). As also noted above, in *In re Yelverton*, the Court found that its Rule 8.4(d) cases had “generally involve[d] misleading the court or misusing or obstructing proceedings . . . or interfering with Bar Counsel’s efforts to investigate attorney misconduct.” *Yelverton*, 105 A.3d. at 426. There is no such conduct involved here.

Dated: November 2, 2023

Sincerely,



Thomas B. Mason
HWG LLP



Timothy J. Simeone
HWG LLP

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 10

(Thomas Mason letter to ODC dated March 17, 2017)



HARRIS, WILTSHIRE
& GRANNIS LLP

Thomas B. Mason
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(202) 730-1302

March 17, 2017

Via Federal Express

Traci M. Tait, Esquire
Assistant Disciplinary Counsel
Office of Disciplinary Counsel
515 5th Street, N.W.
Building A, Room 117
Washington, D.C. 20001

Re: Eisenberg/Swain, Bar Docket 2016-D399

Dear Ms. Tait,

We write to respond to Ms. Swain's February 13, 2017, letter to your office. Although we are sympathetic to Ms. Swain's challenges in life, she continues to refuse to acknowledge the agreement that she made with Mr. Eisenberg at the outset of the representation. That agreement resulted in a reasonable fee for Mr. Eisenberg.

In engaging Mr. Eisenberg as her counsel to represent her in pursuing an EEOC complaint against the Department of Veterans Affairs (the "agency"), Ms. Swain agreed that, in return for Mr. Eisenberg's legal services, she would pay him \$3,000 and a contingent fee of 20% of any award or settlement that she received. See Engagement Letter (Eisenberg_Swain_00006-Eisenberg_Swain_00009). The engagement letter also expressly provided that Mr. Eisenberg would be entitled to any attorney's fees that he could recover from the agency. *Id.* Ms. Swain agreed to assign any attorney's fees and expenses awarded to Mr. Eisenberg and, if such fees were paid directly to her, she agreed to remit them to Mr. Eisenberg. *Id.* Ms. Swain signed that agreement, and initialed every page of it to indicate her assent.

This was a fair deal. If Mr. Eisenberg was unsuccessful in prosecuting Ms. Swain's case, he would earn only \$3,000. If he was successful, he stood to obtain a relatively modest percentage of the recovery and statutory fees.

In the litigation, the agency vehemently contested Ms. Swain's case, arguing that Ms. Swain was subjected to one harassing comment by a coworker and other minor incidents, which was insufficiently pervasive to constitute a hostile work environment, and that there was no basis to impute liability to the agency because it had promptly disciplined the offending coworker. Two weeks after the harassing comment (and well before Mr. Eisenberg became involved), Ms. Swain wrote to her superiors that "I, Shirley Swain, want to withdraw my statement on [her coworker]. We have talked on forgiveness and I strongly agree! This is my decision. . . . This is something we can put behind us and move on. Together we stand divided to fall." Of course, Ms. Swain later changed her view and her statement became one of the many obstacles that Mr. Eisenberg

had to overcome to prevail. Despite the challenges, Mr. Eisenberg was successful in settling Ms. Swain's case for a substantial sum after a hard-fought hearing.

Mr. Eisenberg worked on Ms. Swain's case with one associate (and four hours of help from a law clerk to prepare documents for the hearing). The associate devoted about 72 hours to the case; Mr. Eisenberg devoted about 64 hours. Between the two of them, they engaged in significant discovery, including ten depositions, document discovery and interrogatories; successfully overcame the government's motion to dismiss the matter without a hearing; filed a pre-hearing report; and prepared for and participated in a hearing before an administrative law judge. Whereas other contingency fee lawyers might have tried to settle the case early, rather than go through the time, effort, and expense of preparing for a hearing, Mr. Eisenberg and his associate did not back off the case. In the end, the hearing was so successful that, at its conclusion, the administrative law judge recommended to the agency that it settle the case. The agency complied and Mr. Eisenberg was able to obtain a significant cash payment for Ms. Swain, as well as the restoration of a substantial amount of sick leave.

Now, after Mr. Eisenberg successfully prosecuted her case, Ms. Swain wants to renegotiate her deal with Mr. Eisenberg through a bar complaint. This is an abuse of the disciplinary system. A court has already ruled that Ms. Swain should be held to her bargain. *See Order Granting Plaintiff's Motion for Summary Judgment at 3* ("[Ms. Swain] should understand that she entered into an agreement with [Mr. Eisenberg] and enjoyed the fruits of [his] efforts, namely, the negotiation and execution of a favorable settlement agreement and the undisclosed amount she received in non-compensatory damages. As such, both law and equity will require [Ms. Swain] to fulfill her part of the parties' bargain and pay [Mr. Eisenberg] \$7,800 for legal services provided.").

Moreover, Mr. Eisenberg's earned fee is thoroughly reasonable. Using rates based on the adjusted *Laffey* matrix, Mr. Eisenberg and his staff billed \$52,734.77 in time on Ms. Swain's case. *See Eisenberg_Swain_0014*.¹ Under the terms of the settlement agreement, Mr. Eisenberg received \$45,000 in attorney's fees from the Department of Veterans Affairs. He is also entitled to 20% of Ms. Swain's recovery, per the terms of their agreement. Given that Mr. Eisenberg took Ms. Swain's case with the risk that he would recover nothing at all aside from the modest \$3,000 fee, the agreement to entitle Mr. Eisenberg to 20% of Ms. Swain's recovery (if any) was reasonable and equitable to both parties. Indeed, a 20% contingency fee is on the low end of contingency fees typically charged by attorneys.

Adding together the components of Mr. Eisenberg's fee (\$3,000 + \$45,000 + \$7,000), Mr. Eisenberg earned a \$55,000 fee for his successful prosecution of Ms. Swain's case. That number is very close to the amount that he billed to the case on an hourly basis—and yet, given the risk that Mr. Eisenberg accepted by taking the case, it would have been entirely reasonable for Mr. Eisenberg to earn more than that amount.²

¹ This amount includes billing at only half-rate for travel time.

² Mr. Eisenberg has not actually received that amount, however. Instead, Ms. Swain still owes him \$800 of the \$3,000, and refused to remit to him the \$7,000 contingent fee amount.

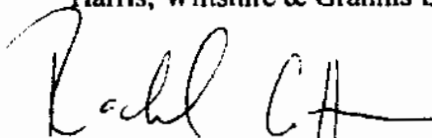
Where the parties agreed in writing to increase the upside potential for counsel by assigning him the right to awarded fees as well as a contingent portion of the client's recovery, and the client receives her agreed-upon percentage of the recovery, there is no reason for a disciplinary authority to disregard the deal struck by the client and her attorney. *Accord Venegas v. Mitchell*, 495 U.S. 82, 87-89 (1990) (noting that plaintiffs can agree to pay their attorneys both statutory fees and a percentage of any money judgment that may be awarded); *Campbell Harrison & Dagley, L.L.P. v. Hill*, 782 F.3d 240, 245 (5th Cir. 2015) ("There is nothing about a relatively high hourly rate schedule, uncertain to time of payment, and/or a relatively low contingent percentage, when the prospect of recovery is plenty uncertain, that should be offensive to a competent lawyer, a reasonable client, or an overall traditional public policy of fairness."). This is particularly true where, as here, the total fee due to Mr. Eisenberg is nearly equivalent to the amount that he would have received had he been paid hourly using adjusted *Laffey* rates.

As a final point, in her letter, Ms. Swain suggests that Mr. Eisenberg originally agreed to \$25,000 in fees and "went up at the last minute to \$50,000." Swain Letter at 1. It is unclear what she is referring to, but Mr. Eisenberg's negotiation of his attorney fee award was based on Mr. Eisenberg's submissions to the agency about the number of hours that he and his firm had devoted to the case and reasonable rates calculated according to the *Laffey* index.³ There was nothing unreasonable or coercive about that negotiation, and Ms. Swain agreed to the settlement.

Sincerely,



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³ Ms. Swain also complains about the garnishment from her wages. To the extent that Mr. Eisenberg has garnished Ms. Swain's wages, it was pursuant to a lawful process.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 11

(Reply letter dated January 3, 2022, to VA OGC in
Brisendine)

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January 3, 2022

TRANSMITTED E-MAIL TO (w Encl.)

Nathan J. Kroes

Accreditation Discipline & Fees (022D) Office of the General Counsel

810 Vermont Avenue, NW

Washington, DC 20420

RE: Eisenberg/Brisendine
OGC Docket No. 022D-98852

Dear Mr. Kroes,

This letter responds to correspondence from the OGC dated October 26, 2021, regarding Mr. Leonard Brisendine's complaint against this office. I appreciate the extensions to file this response until January 3, 2022. My response is provided below. I have attempted to address Mr. Brisendine's communication as best as possible. But, if there are any unanswered questions or need for clarification, please contact me: I am more than willing to cooperate, and I take seriously any complaint filed against me.

I. Background

1) Mr. Brisendine

Mr. Brisendine is a veteran of the United States Navy who suffers from PTSD because of a tragic 1975 fire on a Navy ship where his heroism saved lives but scarred him for life. In 2014, almost four decades after leaving the Navy, Mr. Brisendine applied for disability benefits with the Department of Veterans Affairs (VA). His claim was denied, and thereafter he retained my office to pursue his appeal before the Board of Veterans Appeals (BVA). As a result of the appeal, Mr. Brisendine was able to supplement the record with additional materials supporting his claim. As the deadline for these materials approached, Mr. Brisendine became more and more stressed and anxious. He lashed out at me and terminated me just before the deadline for the materials – that our office had helped him assemble – in a series of communications that were out of character for Mr. Brisendine. As a result, my representation was terminated before the process concluded. Nevertheless, based on my work with Mr. Brisendine, the BVA remanded the matter back to the VA Regional Office (VARO) that had first denied Mr. Brisendine's claim.

When Mr. Brisendine terminated my representation, I asked the VA to extend the deadline for his submission. After that, I did not represent him in the remand to the VARO. The

Eisenberg/Brisendine
OGC Docket No. 022D-98852

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VARO awarded Mr. Brisendine a 30% disability with back benefits of approximately \$21,000 and going-forward payments of about \$440 a month, tax-free. My fee agreement was contingent only, with a 20% fee of back-benefits but no share of future payments. That made my fee for this matter some \$4,200, which I have yet to receive.

I am sympathetic to Mr. Brisendine's plight, and in my view, he does suffer from PTSD. If he had not terminated my services, I believe that I could have helped Mr. Brisendine receive a higher disability payment. As I will discuss below, Mr. Brisendine's allegations about my handling of his case are without merit and this matter should be dismissed.

2) *Mr. Brisendine's Honorable Service in the Military.*

Mr. Brisendine's complaint arises from this office's handling of his VA matter before the BVA. Mr. Brisendine is a veteran of the United States Navy, receiving an honorable discharge from the service in 1976. Attachment O at 71. He suffers from Post-Traumatic Stress Disorder (PTSD).^{1, 2} Mr. Brisendine has, in the past, self-medicated with alcohol.³ Mr. Brisendine is a service-connected veteran entitled to benefits from the VA. This office successfully represented him before the VA at the BVA.

Mr. Brisendine served in the Navy from March 1974 to July 1976 as a medic or corpsman. On the evening of November 22, 1975, his ship (the USS Pharris, FF-1094) was part of a task force conducting night flying training exercises in the Mediterranean Sea. Two other ships, the USS Belknap (CG-26) and the USS John F. Kennedy (CV-67), collided. The Kennedy was an aircraft carrier and much larger than the Belknap, a cruiser. The collision cut fuel lines on the Kennedy, with highly flammable aviation gas spilling on the Belknap and igniting severe fires throughout the ship. The Belknap's superstructure, made of aluminum, melted in the fire.⁴ Two of the ship's crew died, and 46 were injured or suffered from smoke inhalation.

1 Attachment AJ at 1.

2 Mr. Brisendine's mental health condition was the issue this office assisted him with on appeal with the VA/BVA. That condition also made it a challenge to deal with him during the course of our representation. All will be discussed further in the brief.

3. Of course, alcoholism is a disease, and it is not Mr. Brisendine's fault that he suffers from it. It is common among those who have PTSD. It is a condition he will suffer from for the rest of his life whether he is in a status of sobriety or not. See "Is Alcoholism a Curable Disease?" by the American Addiction Centers, <https://www.alcohol.org/alcoholism/can-it-be-cured/> (last viewed December 25, 2020). Unfortunately, as discussed further, Mr. Brisendine was not always in a status of sobriety during the course of our relationship.

⁴ The damage to the Belknap, which took four years to repair, was one of the reasons the Navy stopped building ships with aluminum superstructures and went to back to steel.

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Mr. Brisendine's ship (the Pharris) came alongside the Belknap to help fight the fires. Mr. Brisendine boarded the Belknap to treat the dying and injured sailors. Mr. Brisendine, "with complete disregard for his own personal safety, boarded the fiercely burning Belknap. Before essential medical supplies became available, he flawlessly rendered needed emergency first aid and comfort to numerous Belknap crewman. . . . [H]is quick reaction and use of mouth-to-mouth resuscitation and subsequent treatment saved the life of one victim . . . Hospitalman Brisendine's prompt actions, professional expertise and selfless devotion to duty in the face of great personal risk" prompted the Navy to award him the Navy and Marine Corps Medal, *the highest non-combat decoration that exists* for Navy and Marine Corps members. Attachment AN; see also <https://valor.militarytimes.com/hero/34746> (Mr. Brisendine's citation).

3) *Mr. Brisendine's Post Service.*

Mr. Brisendine had a difficult life thereafter. He married and had two children but divorced. He had lifelong issues with anxiety and depression and drinking. Attachment BK and Attachments AO-AZ. Mr. Brisendine was born in 1954. He was 20 when he joined the Navy and was 22 at the time of the Belknap fire. He is now over 67 years old. Nevertheless, Mr. Brisendine worked hard to conquer his disorder. In the mid-90s, in his 40s, he went back to school and received both a bachelor's and master's degrees, which enabled him to have a career as a licensed professional counselor in the D.C. metropolitan area.

In February 2014, he filed a disability claim asserting PTSD arising from his experience on the Belknap on the night of the collision and fire in 1975. The VA's Roanoke Regional Office denied his claim in May 2014. Attachment K at 4. The VA found multiple reasons to deny the claim: Mr. Brisendine had not presented evidence of "a confirmed diagnosis of post-traumatic stress disorder" and that there was no connection between Mr. Brisendine's Navy service and his claimed condition. Mr. Brisendine had failed to provide the necessary information to enable the VA to schedule an examination at a VA medical facility, so the VA canceled the exam. I later learned that it appeared Mr. Brisendine had failed to appear for his C&P exam.

II. Summary of My Representation of Mr. Brisendine

1) *Prehearing*

Mr. Brisendine retained my office to appeal the denial of the disability by the VA in July 2014. Attachment BQ. The terms of the engagement called for Mr. Brisendine to compensate me only on a contingent basis, with my fee set at 20% of only past-due benefits. I have collected no fees to date.

We filed a Notice of Disagreement and an Appeal on September 14, 2014, with the VA. Attachment C. In response, the VA issued a Statement of the Case dated January 12, 2015. Attachment K. That document made it clear what the matter concerned and what the issues were: Whether Mr. Brisendine, in fact, suffered from PTSD and whether that condition was linked to

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his experiences on the night of the Belknap fire. There was no issue he was on the Belknap that night about what he did or that he had a traumatic experience on the Belknap. The issue was whether he had a current disorder and whether that disorder could be linked to the events on the Belknap. His service file confirmed that Mr. Brisendine's "exposure to stressor event(s) is established."

Mr. Brisendine had various options to pursue his appeal. He could waive a hearing, have a hearing in person at the Roanoke Regional Office (where his case was based), have a video hearing from the VA Roanoke Regional Office (with myself and the Administrative Judge [AJ] here in D.C.), or finally, an in-person hearing before the BVA in Washington, DC. I recommended the last option for various reasons.

Mr. Brisendine was then living in Mexico, and to my knowledge, video hearings were not conducted in Mexico. At that time, video hearings were, to my knowledge, only done from VAROs which had the equipment to connect with the VA BVA Judges in Washington, DC.⁵ Since Mr. Brisendine was then living in Mexico and I was not aware of any way for him to have a video hearing from Mexico, he would have to travel to a VARO to conduct a video hearing. My judgment was that Mr. Brisendine should appear in person before a BVA AJ to have the best chance of success.

Telling his story in person was, in my experience, more compelling and persuasive, and this was particularly so in Mr. Brisendine's case. The Citation for his Navy and Marine Corps Medal was compelling evidence of the trauma he suffered. He could read that to the Judge and talk about his experience with little chance he would be seen as embellishing, much less fabricating the event. The trip to Washington was well worth it, in my judgment. Mr. Brisendine followed my advice on this issue. In any event, for any video conference, Mr. Brisendine would have had to have traveled from Mexico to the U.S. His case was being conducted through the Roanoke VARO. He would have to travel from Mexico to Roanoke, VA. If we were to ask his case to be transferred from Roanoke to a VARO closer to Mexico, it would have invited more delay; something, neither of us wanted. So again, my judgment was that if he had to travel, he should appear in person before the BVA.

The VA was backlogged everywhere, and it took some time to get a hearing before the BVA. On September 15, 2016, the VA Roanoke Office certified and transferred the matter to the BVA. Attachment V. On November 8, 2016, the Board set Mr. Brisendine's hearing for December 6, 2016. Attachment X.

⁵ All BVA AJs work out of Washington, DC, and at the time, I believe I had only one other veteran client who was living overseas. However, he was former Air Force. He would always tie his hearings with visiting family and as a benefit being former Air Force he could hitch a ride on certain Air Force planes if there was room.

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2) *Hearing*

Mr. Brisendine claims I mishandled the hearing and was criticized by the Judge and references the transcript. The transcript, attached as Attachment Tr, does not support such a conclusion.⁶ Right from the start, the Judge focused on the key issue because I had previewed it at the prehearing conference. Attachment Tr at 2 (Judge: . . . We discussed at the prehearing conference the issue on appeal, entitlement to service connection for psychiatric disability to include post-traumatic stress disorder, otherwise known as PTSD. Do I have the issue correct? Mr. Eisenberg: Yes, sir.”). Based on the papers, I then identified the reason for the denial – that Mr. Brisendine missed a medical appointment scheduled with the VA related to his application. Attachment Tr at 2-3. Then I and Mr. Brisendine explained the circumstances that led to the missed appointment. Mr. Brisendine had moved and did not receive notice of the appointment until the day of the appointment. Attachment Tr 2-3. The transcript reflects exactly the type of dialogue I had hoped for. I spoke for Mr. Brisendine but Mr. Brisendine also spoke for himself, establishing credibility and a connection with the Judge. Attachment Tr at 2-8.

The Judge viewed Mr. Brisendine with sympathy and compassion and helped guide him on how to be successful on remand. For example, he told Mr. Brisendine to get his own independent opinion from his own doctors for the remand: “You can get an opinion. You know, go to your psychiatrist and get an opinion linking your psychiatric disability to the events of service. That way – because the thing is – I could – maybe, there’s enough evidence to get you another examination [at the VA], but, if I ask for an opinion, you may not get the answer you want from the VA Examiner.” Attachment Tr at 9. The Judge continued: “I’m giving you the opportunity to go to your- deal with your doctors. The doctor – the psychiatric professionals that know you best.” *Id.* An opinion from them “might be enough right there to grant you the benefit you seek, so I want to give you that opportunity. So I’ll leave the record open 60 days until February 6th, 201[7]⁷.” *Id.*

The Judge showing how he had been moved by Mr. Brisendine, added “get the best – you know, get a good opinion.” *Id.* The Judge told Mr. Brisendine that the missed appointment was not dispositive: “There’s nothing that says VA has to get one [a medical examination]. It only gets one if it needs more evidence to make a decision.” Attachment Tr at 12.

In short, the hearing went about as well as it could go. The Judge even said “I don’t think, you know, under the circumstances that a denial would be possible because we did schedule this examination, and. . . they [the VA] probably should’ve done more effort.” Attachment Tr 20; see also Attachment Tr 22 (“I don’t see how, under the circumstances I can deny, but, and I

⁶ I only recently came into possession of the transcript by way of Mr. Brisendine. Attachment Tr.

⁷ The transcript has 2016. This is not logical. The hearing was December 2016; thus, the correction to February 2017.

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won't rule anything out, but it's not looking likely that I can just outright deny it at this point."). A key point was that Mr. Brisendine tried to call the VA when he belatedly received notice of the appointment: "I'm going to believe you that you tried to call." Attachment Tr 20.

The Judge held the record open for 60 days but added; "[i]f you need more time, you let me know. . . . You can always extend it." Attachment Tr 23. At the end of the hearing, the Judge remarked "you guys seem motivated" to which Mr. Brisendine responded: "Well, I came here from Mexico. I'm currently living in Mexico because I can't afford to live in the United States on Social Security." The Judge responded: . . . *"I want to thank you, though, for making the trip here."* Attachment Tr 23 (emphasis added); see also Attachment Tr 28 (*"again, I'll thank you for coming in and helping us with your appeal."*)(emphasis added).

In my experience, a video hearing would have much less likely to produce such a reaction from the Judge. The Judge's later opinion, by Mr. Brisendine's own account was a very positive and advocative opinion from the Judge, an "incredible result," an "extremely favorable opinion." Mr. Brisendine was his own best witness and made a strong impression on the Judge. As his attorney, I could see the Judge's reaction and therefore let my client and the Judge continue their dialogue. It would have been counterproductive for me to try to quiet my client and handle the entire proceeding, with simply nods or "yes" or "no" comments from my client. I have more than enough experience to understand the dynamics of a courtroom and that a lawyer's role at a hearing can vary depending on the circumstances.

Mr. Brisendine's claim I mishandled the hearing and was admonished by the Judge could not be further from the actual facts and truth. The transcript demonstrates that, beyond doubt. The Judge's strong and positive reaction to Mr. Brisendine was exactly what I was hoping for when I recommended that Mr. Brisendine choose an in-person hearing in Washington. As for the opinion, I can only cite Mr. Brisendine's positive characterization of it, as I also do not have a copy of the opinion. It was issued after I was discharged and is similarly not now available to me.

Mr. Brisendine also faults me for not being more specific in the Notice of Disagreement. I did not have enough specific evidence *at that point* to point to particular instances of the effect of PTSD on Mr. Brisendine's life, nor was there sufficient specific evidence that would support the degree of disability. The Judge gave Mr. Brisendine an opportunity to submit whatever he wanted by reopening the record and that allowed Mr. Brisendine to tell his story in full.

Mr. Brisendine had a difficult life, but he had attended and graduated from college, had gotten married, had two children, and held down a number of jobs over the years; this included running his own practice. My judgment was that a claim of 100% disability was not yet justified by the evidence I had or my interactions with Mr. Brisendine. I was concerned that such a claim might be seen as overreaching by the Judge.

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3) *Post Hearing*

After the hearing, Mr. Brisendine was a bit manic. We walked together in D.C. from the BVA toward the George Washington University. He was excited that the hearing went well. But he wanted assurances from me we “won” the case. Of course, I could not and did not offer such a guarantee. I advised him I thought we did very well and that we had some homework to do. And that I would assist him in accomplishing these tasks.

I assisted Mr. Brisendine in getting evidence to support a diagnosis of PTSD. Attachments Y, AV, AX, AZ, and BL. I also assisted Mr. Brisendine in coordinating additional statements in support from family, friends, and colleagues. Attachments Y & AO - AZ. But he terminated my services in January 2017 as he became more and more anxious as the deadline for submitting additional evidence approached. Mr. Brisendine was under stress and concerned about what the Judge might rule and his case in general. He experienced several episodes in which he was critical and abusive of me, as reflected in e-mail correspondence between us, detailed below.⁸

His actions created a conflict of interest that required me to remove myself as counsel in January 2017. I promptly moved to extend the submission deadline and provided him with a copy of his file. I do not know what Mr. Brisendine, in fact, submitted on remand, as those materials were and remain unavailable to me. I do know that we have prepared a wealth of evidence from friends, ex-wives, medical professionals to submit as of the date of my termination.

On or about October 30, 2018, the Regional Office awarded Mr. Brisendine a 30% disability with \$ 21,850.10 in back benefits. The award entitles him to a tax-free monthly payment from the government at the 30% rating – today, which is about \$441.35/month. Recall, Mr. Brisendine terminated our relationship before the actual proceeding that determined his disability rating took place. My office was only made aware that the Judge issued a decision when the VA issued an attorney fee payment; this was learned indirectly as I was denied direct payment of my fees. Attachment AJ. (This, as the VA noted, now created a private matter for me to collect my fees from Mr. Brisendine). Had I remained as his counsel, I may have been able to secure a higher rating. In any event, a 30% disability rating means that Mr. Brisendine will receive (in 2021) \$441.35 per month, tax-free (\$5,296.20 per year). “2021 Veteran’s disability compensation rates”, <https://www.va.gov/disability/compensation-rates/veteran-rates/> (last viewed on January 3, 2021). These payments increase to \$467.39 per month in 2022. <https://www.va.gov/disability/compensation-rates/veteran-rates/> (last viewed on December 25, 2021). Under my engagement agreement, I receive no portion of these continuing payments.

⁸ See §§4), *infra*.

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Based on both the VA attorney-fee award and my engagement letter with Mr. Brisendine, I have sought compensation for \$4,370.02, i.e., 20% of \$ 21,850.10 in back benefits for my representation of Mr. Brisendine. My understanding is that the VA has no timely appeal regarding the VA attorney-fee award or any timely dispute of our attorney-fee agreement. The only issue before the VA is whether they must pay my fee directly (from his back benefits) or if I must address this matter privately with Mr. Brisendine in court.

III. Detailed Facts and Analysis

1) *Prehearing*

As noted above, on or about July 12, 2014, Mr. Brisendine retained my office to assist with his VA benefits appeal before the VA/BVA.⁹ On or about March 30, 2014, Mr. Brisendine was denied service connection for PTSD. Attachment AJ at 1. Based on our interview, it was clear that Mr. Brisendine's history in service and treatment throughout (or lack-there-of) during service and after service entitled him to service-connected benefits from the VA.

Mr. Brisendine's statement that my office had minimal communications with him is without merit. Please see the attachment communications my office had with Mr. Brisendine. Attachments *generally* and E - sets 2016 & 2017. They reflect an ongoing communication with Mr. Brisendine. Sometimes, I would need some additional time to address his questions when we spoke: Either he would ask a question I had not prepared for or I did not have the answer apparent to me at the time or ask me irrelevant questions. But, we did speak when appropriate and he was including on most if not all of our e-mails/faxes with the VA.

On or about September 4/5, 2014, my office prepared and filed a Notice of Appeal/Notice of Disagreement (NOD) letter of the May 21, 2014, Decision, our Engagement Letter, an Appointment of Individual as Claimant's Representative form (VA Form 21-22a), a Request for and Consent to Release of information from Individual's Records (VA Form 3288)¹⁰, and an ACH Vender/Miscellaneous Payment Enrollment Form (SF 3881). Attachment C & D, F & G, see also Attachment B. The regulation at the time only requires a simple notice that a veteran disagrees with the decision in question. At the time, no "form" was required. Nor were specifics of the disagreement required. Mr. Brisendine did not have his c-file when he first engaged me. The tactic was simple: It would be premature to sandbox Mr. Brisendine's issues on appeal when I had not had an opportunity to review his claim file (referred to as his "c-file").¹¹ I did not receive that file until March 2015. Providing a detailed NOD upon submitting the NOD may preclude him from arguing various avenues of obtaining benefits and could preclude him from

⁹ Attachment A.

¹⁰ A VA claims folder for a veteran is routinely referred to as a veterans "c-file" by the VA. This vernacular will be used by the writer throughout the rest of this document.

¹¹ See fn 10, *supra*.

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asking for benefits he may not know are related to *his* basis for appeal. Meanwhile, waiting to file his appeal pending the arrival of his c-file delays his appeal processing. It is very possible if not likely that the c-file would be delivered after the statute of limitations. Thus, filing the appeal over waiting for the c-file to do so takes in my professional judgment precedence.

Mr. Brisendine's legal conclusions about the lack of specifics in the Notice of Disagreement (NOD) are speculative at best: "A proper professionally executed NOD would have resulted in being scheduled for a C and P exam as I desired, and could have reduced to the reduced the waiting time by over a year." Complaint at 2. Mr. Brisendine's statement is speculative and has no foundation based in facts or law to support his conclusion. Also, as the Judge noted, Mr. Brisendine "may not [have gotten] the answer you want from the VA Examiner." Attachment Tr 9. The Judge was urging Mr. Brisendine to put in his own evidence from his own doctors and reopened the record (which had already been closed) to allow him to do so.

(The "random sample" that Mr. Brisendine refers to was, admittedly, an administrative error on my part. Upon recognition of the error, I contacted Mr. Brisendine. He assured me he would delete the document. Also note it is not untypical that a veteran would not have their c-file when contacting my office. Presuming they pass a certain threshold to establish a case, my office would offer to accept the veteran as a client, sign them up if they were interested, get the paperwork ready and send out an NOD along with a request for the veteran's c-file. This would get the case moving through the government process and preserve his/her appellate rights.)

In addition to the strategy discussed above, the aim was to take the matter out of the local VARO hands that made the error, provide a higher level of review (a BVA AJ with a law degree), and ideally a remand with the authority of the BVA ordering the VARO to act accordingly. It has been my experience and the experience of my colleagues¹² that veterans like Mr. Brisendine would have to wait even longer for the VARO act, still, issue a wrong "Statement of the Case" (SOC), and then appeal to the BVA after wasting time waiting even longer before the VARO.¹³

On or about January 12, 2015, the VA sent us an SOC. Attachment K. An SOC informs the veteran of the issue on appeal, the Agency's position on it, and gives options for how he/she may want to proceed. The SOC made it very clear that the VA understood what the issues were: "[E]ntitlement to service connection for [PTSD]" stemming from heroic actions from the Belknap fire event. See Rating Decision, May 19, 2014 (attaching materials submitted by Mr.

¹² I have been a member of the National Organization of Veterans Advocates for nearly 15 years.

¹³ Note the laws were recently changed (well after my representation of Mr. Brisendine) allowing a veteran to appeal directly to the BVA instead of through the VA/VARO.

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Brisendine, including news articles and excerpts from a study by the Naval Health Research Center about the Belknap collision). The SOC made it clear that what was lacking was a current diagnosis that Mr. Brisendine in fact suffered from PTSD and that disorder could be linked to the Belknap fire.¹⁴

The SOC then provides several options for the veteran: He/she can choose (i) an in-person hearing in Washington, DC, (ii) a Video-Hearing (with the veteran at his local VARO where his case was based [most residents of Washington, DC, where Mr. Brisendine's case originated, are typically handled in Baltimore or Roanoke] and the judge and myself in Washington, DC), (iii) a traveling board hearing where the judge and I travel to the veteran's local VARO, meet with the veteran, and conduct the hearing there, or (iv) he/she may simply waive any hearing. Attachment K and VA9 form in Attachment I. The VA requires the veteran to file a VA-9 Form to inform the VA of his hearing election.

On or about February 14, 2015, after consultation with Mr. Brisendine, my office submitted the required VA-9 Form. Attachments I, J, L – N. Based on my advice, Mr. Brisendine chose to have an in-person hearing before an AJ in Washington, DC. Mr. Brisendine's inference that he was not informed that the in-person was not of his choosing lacks merit. He was carbon copied on the transmission, his e-mails reflect his understanding, and the subsequent form notes his signature on it (even though it is not necessary if the representative signs the form). See Attachment I.

The VA is horribly backlogged. The VA has too many cases and not enough staff.¹⁵ Once the case is sent to the BVA, the BVA then has to work it up, i.e., have the judge and his clerk(s) review the case themselves in order to become familiar with the case. At both the VARO and BVA levels, the cases are typically heard in the order they are submitted; you start at the end of the line¹⁶ and have to wait your turn. Meanwhile, I would communicate with Mr. Brisendine and

¹⁴ Unfortunately, Mr. Brisendine, represented by the Disabled American Veterans, did "not provide the requested information for an examination scheduled at VMAC Washington on 4-25-14" and the exam was cancelled. Attachment CA. This is, of course, because he did not receive timely notice of the exam as discussed at the hearing.

¹⁵ Attachment E, 2016 17-18, 21. "Inspector general finds VA claims backlog greater than reported", Stars and Stripes, <https://www.stripes.com/news/inspector-general-finds-va-claims-backlog-greater-than-reported-1.546926>, (last viewed on January 2, 2021)

¹⁶ Except for severe financial problems (bankruptcy petition or home foreclosure notice); serious illness (physicians statement documenting serious illness, preferably with clinical findings); or advanced age of 75 years or more. Attachment W.

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make sure he was working on his "buddy letters," documentation of a diagnosis of PTSD, and any additional documentation, etc.,¹⁷ see discussion *infra*. Attachments E, 2016 & 2017

On or about September 18, 2014, we both¹⁸ received an option to conduct a Decision Review Office ("DRO") Hearing. Attachment H. My office's standard of procedure would be to discuss the option.¹⁹ Mr. Brisendine elected not to have a DRO Hearing.

On or about January 12, 2015, we both received an SOC. Attachments K and N. The notice provided Mr. Brisendine four options for a hearing: He could waive having a hearing, have a hearing in person at the Roanoke VARO, have a video-hearing from the Roanoke VARO (with myself and the AJ here in D.C.), or finally an in-person hearing before the BVA in Washington, DC.

Pre-COVID, I would recommend to any veteran that given the option (and if they could afford it and physically/psychologically endure the trip) to have an in-person hearing in Washington, DC, over a video hearing (with the judge and I in DC). I believe nothing better helps a veteran's case than to have him/her physically sitting in front of the judge to tell her or his story. As stated above, Mr. Brisendine had a compelling story to tell. Further, when not having an episode of PTSD, Mr. Brisendine was charming. Mr. Brisendine elected to have an in-person hearing before the BVA AJ in Washington, DC. On or about February 14, 2015, a VA-9 was

17 Mr. Brisendine seems to have forgotten all of the work we did together: "[The BVA] opinion was the result of the case that the veteran put together through my narratives, letters from many friends and family, former employers, medical records, pictures, news articles, research studies, etc. I am proud to say I put together a very compelling case." Complaint pg. 4. Mr. Brisendine seems to have forgotten that he did not do this work alone; he did it with my help. Unfortunately, the VA is well aware that veterans will sometimes discharge their attorney after the hearing, in a misguided effort not to have to pay their attorneys. But as the work has already been done, these attempts often prove futile.

18 Mr. Brisendine was directly mailed the correspondence by the VA. I received a carbon copy. My normal operating procedures would be to scan, OCR and e-mail him a copy.

19 A DRO hearing is the opportunity for a veteran to meet with the DRO officer at their local VARO. This would have required Mr. Brisendine to come back to Roanoke, VA, for the hearing. Alternatively, if he wanted to relocate his case to a VARO closer to Mexico, it would have not only likely delayed the processing of his case (as the file would have to be transferred from Roanoke, VA to the new VARO) but he would have had to pay his travel costs and mine (fees and costs are separate and Mr. Brisendine agreed to cover all costs regardless of outcome). This is clearly articulated in the engagement letter. Attachment A and C at 2 – 5. Second, the judge is likely to be tired from travel and we want him/her fresh and unencumbered by the stress of travel for the hearing. Veterans will opt out of the DRO option as it keeps the case at the same local VARO where they made the same mistake as before.

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submitted to the VA with his forum election. Attachment L and N. The hearing transcript bears out my judgment. See Attachment Tr.

Mr. Brisendine was living in Mexico at the time the hearing was scheduled. I am unaware of a VARO in Mexico that could do a video conference with the BVA.²⁰ I am also unaware of an embassy or consulate in Mexico that could do a video hearing with the BVA.²¹ He would have to travel to the United States, regardless.²²

(This is why I was surprised by VA AJ Kramer's comment about Mr. Brisendine could have video conferenced the hearing since the VA has no regional office in Mexico.²³ By this time, I had been practicing VA benefits matters for nearly ten (10) years, and I had not heard of this "option." Neither AJ Kramer nor Mr. Brisendine provided any evidence that the hearing could have been conducted as Mr. Brisendine or as the AJ suggested.²⁴)

20 Note this is pre-COVID, before the BVA had rolled out a new option of a virtual hearing with the Veteran using her/his smart device with video to attend BVA hearings, but this was not an option at the time.

21 They would have to be using the same video conferencing system.

22 Mr. Brisendine gave me no indication that he objected to my recommendation. Moreover, he did agree to travel to Washington, DC. I also was aware that he had maintained his professional presence in Washington, DC. Attachment BO. He also maintains a post office box in Washington, DC. Attachment E, 2017 at 16. Additionally, he had routinely traveled to DC in the past for *inter alia* medical treatment. Attachment E, 2016 at 22. During the time of our representation, Mr. Brisendine informed me that he purchased a classic car for \$2,500.00. Attachment E at 39, 41 & 43. Regardless, I stand by my advice that an in-person hearing was the best strategy and the transcript confirms my judgment.

23 Mr. Brisendine may have been able to have his video hearing conducted at a VARO in a state closer to Mexico. But, this would require his case management be transferred from Roanoke, VA, to the other VARO; this likely would have caused additional undue delay. Regardless, this still would have required him to spend funds to travel to the United States and his hearing would have likely been delayed as the VAROs would have to transfer his case from Roanoke, VA, to the other state. Unless, of course, he would have had the hearing in Roanoke, VA – this would have proven even more costly for him travel-wise and for the reasons discussed earlier, not recommended. The VA now (2020) allows virtual hearing through its system (well after Mr. Brisendine's hearing) where a veteran can use his/her smart device or computer with a video camera and microphone to call into his/her hearing from anywhere. Likewise, the AJ and representative can do the same. A "Skype" call as Mr. Brisendine infers in his communications has never been an option of which I am aware. Attachment E, 2018 at 10, 14 & 16.

²⁴ See fn 5, *supra*.

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On or about March 10, 2015, my office received his c-file. Attachment O. Given the time frame of the claim (2014), a paper copy was likely received. My office's standard of procedure would be to run the file through a scanner, run the electronic copy through an Optical Character Recognition ("OCR") Program,²⁵ and the original paper file and the CD copy would be mailed to the veteran for his records. See Attachment Z. This would give us the ability for us to talk from the same materials. On or about March 21, 2015, my office mailed²⁶ him the physical file and a CD. Attachment P.

On or about September 15, 2016, we²⁷ were informed that Mr. Brisendine's file had been moved from his VARO to the BVA in DC. Attachment V. This is an important step in a VA case. Once the file has been moved from the VARO to the BVA, the BVA can start working the case up for a hearing.

On or about November 8, 2016, we²⁸ were informed that Mr. Brisendine's hearing was scheduled for December 6, 2016. Attachment X.

In response to Mr. Brisendine's comments about the lack of a Compensation and Pension ("C&P") Exam²⁹ by the VA, typically, when the VA fails to provide a C&P exam, it may be because it does not believe the veteran has a current medical condition or does not believe he has a stressor, e.g., an event while in service that caused his current condition. This can occur even if they have the necessary evidence on file. This is what occurred when his claim was first denied. His VA exam was cancelled because he did not provide the requested information as discussed above. Rating Decision at 2.

During the appeal process, he was not eligible for a C&P but could have requested a C&P on remand.³⁰ In any event, leading up to the hearing, I advised Mr. Brisendine what information he would need to help bolster his case. Attachment E, 2016 at 1. This includes obtaining statements from friends and family about his conditions related to his time in service or about his current condition today. Attachments AO – AZ. Mr. Brisendine wanted to produce a statement supporting his claim. Attachment BJ. But based on my experience, I believe his oral, in-person

25 A file that has been OCR'd allows you to word search the electronic file on your computer and I burned a copy to CD and sent it to the Veteran.

26 Mr. Brisendine requested the file be mailed to his DC address.

27 See fn 18, supra.

28 See fn 18, supra.

29 I have no idea of the genesis Mr. Brisendine's comment that a lack of VA provided C&P exam "...is extremely unusual, almost unheard of." Complaint at 2. I have been practicing VA law for nearly 15 years. It is not uncommon that the VA failed to provide a veteran his/her C&P exam. Moreover, Mr. Brisendine failed to provide the VA what it needed to schedule a C&P.

³⁰ Mr. Brisendine may well have had a post-remand C&P exam after I was terminated.

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testimony was key in obtaining a favorable decision from the BVA. We worked together to obtain any supporting documents possible. Attachments AM and AN & AV – AZ, B – BH, BL, Q-U.³¹

2) *Hearing.*

On or about December 6, 2016, Mr. Brisendine had a hearing before an AJ for the BVA. Mr. Brisendine and I talked before the hearing. We also talked the day of the hearing just prior before we were to begin the hearing. As discussed herein, Mr. Brisendine's insistence that the denial of a C&P was unheard of was not the needed focus of the hearing. I needed to keep him focused on the events that occurred while in service, how they have been affecting him since then, and his conditions today such there would be no doubt that a C&P was needed. I respect that veterans have some very relevant and pertinent stories to tell. But, it is important for representatives to focus through the client's story to find those key elements necessary to help veterans obtain the benefits they deserve.

I believe Mr. Brisendine may be confusing my focus (and trying to keep him focused) with disinterest. While a client may feel one aspect of their case is the most important aspect, it is the attorney's responsibility to use his professional judgment to keep the client focused on the necessary points to win his case. My goal has always been helping him achieve the service-connection and disability rating he is entitled to from the VA.

(As I expressed above, it would be premature for an attorney to sandbox the issue[s] without first seeing the c-file. By using a generic basis for an appeal to ensure every issue is covered, any issue can be easily raised before and at the BVA hearing itself. If Mr. Brisendine's BVA AJ had a problem with it, he would be one of the few, if any, BVA AJs, who have over my past 15 years of practice before the VA had an issue with such an NOD.)

Based on my experience, the key for success was for Mr. Brisendine to tell his story at the hearing without sounding rehearsed – I acknowledge that no one knows the facts about Mr. Brisendine better than Mr. Brisendine – this is why I believe in teamwork at these hearings. I had advised him not to stress out about the hearing: Think about the events in chronological order, answer only the question asked, don't elaborate (if we need more information, either the judge or

³¹ Mr. Brisendine's statement "Mr. Eisenberg should have directed this veteran to *stop* trying to reach the VA by phone, but instead, to go in person and wait as long as it takes to get a C and P examination. He should have directed me to do that while I was in DC, so that I would not have to make another unnecessary flight from Mexico" does not make sense to the respondent. The VA is well aware that a veteran cannot just show up at the VA and demand an instant C&P examination.

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I will ask for more), keep his answers short, tell the truth, and if he doesn't know, he does not know the answer – no guessing.

I do remember the Judge stating something before the hearing to the effect of Mr. Brisendine could have had a video hearing.³² In general, the Judge is correct; Mr. Brisendine could have had a video hearing. But, as I described earlier, that is not the best option. Further, I was surprised about the possibility of a hearing being conducted with Mr. Brisendine in Mexico. Additional concerns are where the hearing could have been conducted in Mexico. I am unaware of any VAROs located in Mexico. Presuming Mr. Brisendine could use an embassy or other U.S. federal agency in Mexico, I would be concerned whether the alleged location's systems could communicate with the BVA's videoconference system (the government does not have consistent video systems throughout their different agencies). Any glitch in the arrangements for a video conference at an embassy or some other location in Mexico would have led to the hearing being postponed, likely for months or longer.

The one event that does stand out from the hearing happened after the hearing. I recall walking with Mr. Brisendine after the hearing. The hearing was at the VA office at 425 I Street, NW, Washington, DC, and I believe we were walking toward Foggy Bottom. While walking with him, we did discuss what had occurred at the hearing. Mr. Brisendine was very animated. He was excited about the hearing and wanted me to "guarantee" that he had won his case. To me, he appeared to believe that he had established a personal connection with the Judge during his testimony. I thought so as well; recall, this was the purpose of having him fly from Mexico to the U.S. But I told him I could not "guarantee" a favorable result. I explained that the decision was in the Judge's hands, the Judge will hopefully find in his favor. But that does not mean they may find something else to deny it or simply make a mistake. I explained to him that even the very best case could fail for reasons unknown and not necessarily the "correct" reason. This conversation sticks out to me because it is one of two times I had to temper a client's demand I provide a "guaranteed" result right after a hearing. However, at the time Mr. Brisendine did not complain about my representation.

3) *Post Hearing*

The VA, as discussed above, was behind in its work and not meeting its statutory deadlines. This was clearly causing Mr. Brisendine additional stress. It became a problem several times.

32 I do not recall the BVA AJ "rolling his eyes"; I also do not recall any BVA AJ ever rolling their eyes. In any event, the Attorney Fee Award was Granted despite Mr. Brisendine's unsubstantiated comment.

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He would profess suicidal ideation.³³ On or about January 11, 2017, Mr. Brisendine proffered imminent suicidal ideation. Although this was a Sunday evening, I was very concerned about the communications I was receiving from him. Attachment E, 2017 at 51. I immediately acted. I spent several hours through various means trying to reach him. When first contacts with him failed, I tried contacting the local Mexican police, the U.S. Embassy in Mexico, and U.S. Consulate in Mexico. It was difficult to reach government bodies as this was a Sunday evening. I did remember that not only is Mr. Brisendine a Licensed Professional Counselor, but some of his friends were trained in mental health treatment too.

I reached out to Mr. Brisendine's friend Peter Chirinos, MA LPC NCC DCC. Attachments E, 2017 at 45. Mr. Chirinos provided a "buddy letter" for Mr. Brisendine's case. I explained the situation to Mr. Chirinos. Mr. Chirinos was able to make contact with Mr. Brisendine. Mr. Chirinos assured me that Mr. Brisendine was in no imminent danger. He advised that he was "puffing" the situation more severely than before; Mr. Brisendine simply wanted the general public's attention.³⁴

Mr. Brisendine contacted me later. He apologized for his behavior.³⁵ Mr. Brisendine informed me his friends thought Mr. Brisendine needed "to stick with [my representation] [I'm]

33 "If I'm not dead I'll be happy to take your call." Attachment E, 2017, 121. "I have to tell you I've been seriously thinking about hanging myself so I may not be into the phone." Id. at 112. "Please help me." Id. at 98. *Inter alia*.

³⁴ It is not a violation of the confidentiality rules to take reasonable measures in the face of threats of suicide by a client. *See, e.g.,* S. Lever, A Client Threatens Suicide – What Can You Do (Lawyers Mutual Risk Management Center, May 29, 2019)(<https://www.lawyersmutualinc.com/risk-management-resources/articles/a-client-threatens-suicide-what-can-you-do>)

³⁵ "Hey Michael, really sorry that I was disrespectful to you last night and caused you so much concern. I wish I could justify it somehow but it would be an asshole thing to do so. Believe it or not I am actually rather fond of you and if you will forgive me for my own indiscretion of drinking and clicking send I really would appreciate it if you could continue to represent me. My two friends who reached out to me last night at your bequest said no you need to stick with that guy he's solid gold. And I believe that now. It's pretty early right now, I'm gonna go back to bed soon. You did not deserve the shit last night, and you comported yourself like a total gentleman and I appreciate that. If you want to drop me I understand. This process is mental torture. Give me a waterboard anyday instead of constantly reliving an event that stuck my amygdala in overdrive with no way to get-to stand down I understand why people take their life into their hands. It is so hard to dig up all these bodies from the graveyard of my mind. I guess the good news right now is that the process is pretty much in the can and it's a waiting game now. I don't have to deal with the details anymore and believe me that's where the devil lives. I want to thank you for your patience your understanding and your empathy. You proved yourself to me to be a

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solid gold.” Id. I confirmed to him that everything is OK between us. Attachment E, 2017 at 53-54. Unfortunately, Mr. Brisendine resumed his intemperate communications with me.

4) *Mr. Brisendine's claim he fired me for "good cause" lacks merit.*

On or about January 19, 2017, Mr. Brisendine asked “How do I go about firing you and getting a competent attorney to represent me?” The next day, he wrote “Sorry for all the nasty emails. I am a crazy fuck, and I am sorry” and “Michael, I think I have come back to my senses. I am very sorry I was rude to you. God, I wish I didn't have this problem of being horrible to people who try to help me. I am really sorry I was nasty to you. I am crying a lott now so it is hard to type. Are you willing to still work with me?” Attachment E, 2017 73-74

Then Mr. Brisendine asked if I could still represent him if he filed complaints with the newspapers, the Department of Veterans Affairs, and the D.C. Office of Disciplinary Counsel. I advised him that would create a conflict of interest between the two of us. The bar rules would then prohibit me from representing him further.

On or about January 28, 2017, Mr. Brisendine sent information indicating that he filed complaints with newspapers and I also believe with the Department of Veterans Affairs, and the Office of Disciplinary Counsel (“ODC”) for the Washington, DC Bar Association. Thus, as I had warned Mr. Brisendine earlier, his actions terminated our attorney-client relationship. I advised him and moved to withdraw as counsel. Attachment E, 2017 at 16. As I had learned, this type of behavior from him should not have been surprising. As noted by his friend, a professional counselor: “I think Lenny knew he was in trouble and resigned rather than get fired. I was sorry, but not really surprised, because it just seemed like a long time coming. I was glad to hear that Lenny had worked really hard and had a nice private practice in DC. Lenny told me that was how all three of his previous jobs had ended. He had to quit each job in order to avoid being fired.” Attachment AV.

Mr. Brisendine's following statement is misplaced: "In the two months after the hearing, and before being fired, Mr. Eisenberg never filed any of the evidence documents that I provided to him for the VA's C-File, nor did he provide any further details or reasons to the court regarding the essentially meaningless and NOD as he promised." Complaint pg. 3. First, we strategized what documentation was necessary. Then as the original deadline approached, we had not finalized obtaining all of the documentation yet. Some of the documentation he provided me were photocopies (versus scanned) of documents that were not legible. Attachment E, 2017 at 239 and Attachment Y, *inter alia*. We worked together on getting better copies and complete copies. But due to Mr. Brisendine's actions, our attorney-client relationship ended. In my motion to withdraw, I asked that Mr. Brisendine be afforded an extra 30 days to provide additional

very good man and the only guy that I want to pursue my case. There is one hell of a yelp review in your future.” Attachment E, 2017, 54, 58.

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information (i.e., the information that we had been working on) or have a new representative appear (if he so desired). Attachment E, 2017 at 12-13.

5) *Paperwork*

On or about January 30, 2017, I moved to withdraw myself as Mr. Brisendine's representative. Note: The VA will not always grant a Motion to withdraw at the BVA hearing stage as they want to make sure the veteran is competently represented. Attachment AC. It was done in writing, with the veteran's name and claim number, and noting Mr. Brisendine and I no longer had an attorney-client relationship. I determined that Rule 608 of the Board's Rules of Practice, 38 C.F.R. § 20.608, was already met given I advised the VA there was no longer an attorney-client relationship between us; thus inherently *circumstances have arisen that it would be in violation of my bar's ethics to continue representation of the veteran*.

On or about April 10, 2017³⁶, I was informed that the Motion to Withdraw was not (yet) granted. Attachment AC. No specific reason was given. It noted that “[a] motion to withdraw representation must be in writing, and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, the VA file number, and the reason why withdrawal of representation should be granted.” Id.

On or about August 10, 2017, I moved to withdraw again [which I still thought was redundant and already accomplished] noting the veteran's name, claim number and basis for withdrawing – that we no longer had an attorney client relationship. Attachment E, 2017 at 2. This has not been a problem in the past when I have had to withdraw from a case, which hasn't happened often.³⁷

On or about December 4, 2017, the VA informed me the notice of withdraw was denied for the same reason as before. Attachment AE. On or about January 16, 2018, I sent the VA notice with the additional language *Circumstances have arisen that it would be in violation of my bar's ethics to continue representation of the veteran. Note that the attorney-client relationship has been severed*. Attachment AF. On or about March 7, 2018, the VA Granted my motion to withdraw. Attachment AG. The process took just under 14 months – not 18 as Mr. Brisendine stated in his letter.

³⁶ Mr. Brisendine's February 2017, date seems to be inaccurate.

³⁷ In the past, the language informing the VA that the attorney-client relationship was over between the representative and the veteran had to the best of my knowledge always been sufficient notice for the VA to sever representation between representative and veteran.

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VA regulations provide Mr. Brisendine the right to hire or fire any attorney he so chooses.³⁸ The VA regulations allow a veteran to replace his "appointed representative" simply by filing a new VA Form 21-22a, "designation of representation" form. This would automatically replace me as the designated representative at any time; every VA-approved veteran's representative would know this information.³⁹ Mr. Brisendine was never prevented from doing this. Mr. Brisendine's statement that "[t]his prevented me from designating another representative, which was probably intentional on his part. Mr. Eisenberg finally officially withdrew from my case after I threatened to sue him for malpractice, and he probably could tell I was very serious, because I was" has no basis. As I had mentioned, the necessary work had been performed, we were waiting for a decision, and presuming we succeeded, my fee would then be earned. There was no delay tactic in the removal of my representation. Regardless of any new representative Mr. Brisendine wanted to bring aboard, my work (and any fee associated with it) had been done. I wanted nothing more than to be done with Mr. Brisendine, given his behavior, especially post-hearing.

6) *Attorney fee award.*⁴⁰

On or about October 2, 2018, I was informed that the VA would not withhold my fee from Mr. Brisendine's retroactive payment award and not directly pay me my fee.⁴¹ Attachment AH. I later learned the issue was that the VA did not receive the signed engagement letter within 30 days of its execution. I believe the issue was due to the delay the USPS has with Mexico – about three weeks. See "How long does it take to mail a letter from Mexico to us?" <https://www.sidmartinbio.org/how-long-does-it-take-to-mail-a-letter-from-mexico-to-us/> (last viewed January 03, 2022). (Although the mail may have been delayed to my office, my focus was getting Mr. Brisendine the benefits and help he was both entitled to and needed.) On or about October 17, 2020, I made a timely appeal regarding the direct payment of my fees. Attachment AI.

38 Note VA regulations require approval by the BVA for an attorney to cease representation while the matter is before the BVA. See generally Attachments AC & AE.

39 The VA requires a representative to be either an agent who has passed their required test or a lawyer having the necessary CLEs. See generally 38 CFR § 14.629.

40 Since Mr. Brisendine and I ended our attorney-client relationship before the BVA remand and presumable subsequent VARO decision granted his 30% award were issued, I do not have a copy of either. Thus, I cannot comment on the BVA AJ's "advocation" or why the VARO ruled as it did. It would be speculative on my part.

41 Note there is a difference between an attorney fee award (contingency-fee based) and the government's direct payment from the veterans back benefit award (which if not done through them, then needs to be done privately through the veteran).

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On or about October 30, 2018, I learned that an attorney-fee award was made for \$4,370.02. This is based on a \$21,850.10 back pay award. Attachment AJ. Mr. Brisendine was awarded back pay at the 30% disability rating. Thus, if the appeal were hyper-focused on a 100% disability rating as Mr. Brisendine suggests, he would have been denied this award or any award other than 100%.⁴² My office did not receive the AJ's decision or the VARO subsequent award. So, I cannot articulate why the VARO granted him an award of 30% or if it should have been different. Clear factors against Mr. Brisendine receiving a higher rating included his ability to travel on his own, his ability to appear and participate at a hearing, his being articulate in both writing and vocabulary, and his ability to maintain proper dress and hygiene. If Mr. Brisendine was dissatisfied with his disability rating decision, he had every right to appeal the VARO decision. The decision would have informed him of his rights.

Sometime between October 30, 2018, and November 9, 2018, I contacted Mr. Brisendine. Attachment E, 2018 at 1 & 2. I wanted to warn him that the \$4,370.02 in attorney's fees may have been paid to him directly. My options were either my appealing the direct payment award (which, if granted, would then cause the VA to recoup my money directly from Mr. Brisendine by withholding future benefit payments) or if he remained uncooperative cause my office to file a collections action.⁴³ Communications to this affect is what I believe Mr. Brisendine is referring to regarding to allegations of harassment and intimidation before the BVA hearings question. I was hoping to work this out with him. Mr. Brisendine was not responsive. Mr. Brisendine is also

⁴² Mr. Brisendine asserts that he should have been classified as 100% disabled because of his post-traumatic stress disorder. The criteria for total 100% disability are: "Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name." 38 CFR Book C, Subpart B, section 4.130. Mr. Brisendine no doubt suffered a disability as a result of his service and most particularly the tragic events on the Belknap in November 1975. However, Mr. Brisendine served another 8 months after that collision and fire on the Belknap, albeit during a time before PTSD was a recognized disorder. I observed Mr. Brisendine's ability to care for himself, travel on his own and articulate himself (see also Personal Statement attached as Attachment XX); thus I feared by hyper focusing on 100% would have been seen as overreaching by the AJ.

⁴³ The appeal through the VA would be the easier route. However, as the statute of limitations is coming close, litigation may be necessary. I run a low-bono practice – I only charge a 20% contingency fee. This is the accepted rate if you want the VA to withhold and directly pay your attorney's fee. Other practitioners do charge more. And if approved by the VA, the attorney would then have to obtain their fee directly from the veteran. Since I have a low-bono practice, any loss, regardless of the amount, is not something my practice can easily sustain.

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incorrect in his correspondence. I was not denied payment by the VA, i.e., my attorney fee was warranted, but given the status of the direct VA payment issue, payment of the fee was a private matter between Mr. Brisendine and myself, i.e., that he needed to pay me directly.

I then contacted Mr. Chirinos. He was Mr. Brisendine's friend who was instrumental during Mr. Brisendine's suicidal ideation episode. There was no confidential information exchanged in my communications with Mr. Chirinos. I wanted to give Mr. Brisendine a fair warning, so he did not find himself in arrears. I have no idea if Mr. Chirinos blocked my number; I never spoke with him. As I have had no communications from Mr. (or Mrs.) Chirinos, I have no idea if Mr. Brisendine's statements re Chirinos are accurate. This includes whether Mr. and Mrs. Chirinos are still communicating with Mr. Brisendine.⁴⁴

On or about November 9, 2018, I received a statement from Mr. Brisendine contesting my fees. Attachment AK. Note, it was not addressed to anyone. He offered a settlement of \$1,500. It was rejected. Mr. Brisendine took a unilateral approach attempting to force me to take his "settlement" (he seemed mentally unbalanced based on his approach). Attachment E, 2018 at 4, 9, 11, 13, 14, 17 & 18. His actions were rejected.

On December 8, 2020, I spoke with VA central office and confirmed that the only issue on appeal for the hearing is the direct payment of the attorney fee. It is also my understanding this is the only timely appeal on record. Typically, a veteran has one year from a VA decision to appeal the decision. 38 U.S.C. § 7105. A veteran has 120 days from the decision, i.e., the original decision, not the appeal decision, to file an appeal with VA Office of General Counsel regarding the fee from the fee agreement. 38 CFR § 14.636. In my communications with the VA, I understand there is no timely appeal regarding my attorney fee award, only the direct fee payment issue.

On or about October 22, 2021, a hearing was to have occurred regarding whether the VA has a legal obligation to withhold and pay my attorney fee award directly or if I had to collect my fee from Mr. Brisendine instead. Attachment BO. Mr. Brisendine appeared at the hearing yet asserted that he did not get notice of the hearing. The AJ postponed the hearing. A hearing is rescheduled for January 13, 2022.

⁴⁴ Recall from above "As noted by his friend, a professional counselor: 'I think Lenny knew he was in trouble and resigned rather than get fired. I was sorry, but not really surprised, because it just seemed like a long time coming. I was glad to hear that Lenny had worked really hard and had a nice private practice in DC. Lenny told me that was how all three of his previous jobs had ended. He had to quit each job in order to avoid being fired.'" Attachment AV.

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Mr. Brisendine's motive has been to reduce his fee due to me. The language⁴⁵ he provided in his complaint is similar⁴⁶ (if not identical) to prior communications he previously made with me regarding alleged communication with the Washington, DC Bar's Office of Disciplinary Counsel, the District of Columbia Superior Court, and newspapers.⁴⁷ He appears to be gaslighting me to garner sympathy for himself as altruistic.⁴⁸ The “corrective” action needed is simply for Mr. Brisendine to pay his bill for fees based on our agreement for the successful work my office performed for him.

I am seeking the fees I earned assisting him with his case.⁴⁹ Any resulting detriment to Mr. Brisendine is of his own doing⁵⁰; I sympathize with Mr. Brisendine, the battles he must endure on a daily basis inhibiting are him from doing what he knows in his heart is right. But allowing Mr. Brisendine not to pay his bill based on such flawed reasoning defeats the Veterans Choice Act, 38 U.S. Code § 5904. It signals other veterans to seek out private representation, just not pay them, then threat to or actually file a complaint with OGC in an effort to discourage the representative from seeking his/her fee.

Conclusion.

Mr. Brisendine may be dissatisfied with my legal services. He may not like my approach. But, with my assistance, he was successful before the BVA and VARO. Whether further appellate action by him was necessary (not necessarily an uncommon problem for the VA) is unknown. I do not have the decision and scant future activity (what I have was provided by Mr.

45 “If Mr. Eisenberg accepts the payment of \$1500, I ask that the VA caution Mr. Eisenberg to stand down from any further attempts to collect or garnish my protected sources of retirement income. To do so would be the punishment of a vulnerable person by causing a negative impact on my credit rating and reputation.” Attachment AL at 9.

46 Attachment AL.

47 He apparently did communicate with the ODC and the Superior Court. It is unknown if he did communicate with any press. Note the ODC documents are confidential/not public pursuant to the Bar's rules and actions.

48 “I feel empathy for this man. Mr. Eisenberg appears to be a reasonably decent person who is obviously overworked and simply has gotten in way over his head with too many cases. If so, then he two (sic.) has suffered, and I sincerely hope he will take some sort of corrective actions so that he can be a happy and fully functioning person who enjoys his life and his work.” Attachment AL at 9.

49 Mr. Brisendine’s arguments here also appear non-sensical – telling of his mental health issues. In one portion, he proclaims “In spite of the fact we agreed to have no further contact long ago.” Then several sentences states “after over three years since he last refused to have any further communication with me.” Mr. Brisendine does not have a cohesive grasp on the facts.

50 I do not know all of the sources of income, savings, assets, etc. of Mr. Brisendine. I do know that Mr. Brisendine has been at times disrespectful, belligerent, and not accurate in his retelling of the facts.

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Brisendine). But nothing prevented Mr. Brisendine from having a new representative file a VA 21-22a Form, Designation of Representative, that would have either automatically replaced me or designated that person as his representative. Additionally, nothing prevented Mr. Brisendine from informing the VA he no longer wanted me as his representative.

Mr. Brisendine does have every *right* to file a complaint. I believe the mental health issues that entitle him to benefits from the VA and have made him a challenging client have been clouding his judgment related to my office's work for him. Nevertheless, I wish him well and bear no ill-will towards him. He has PTSD and cannot always conduct himself as I know he would like to do in his heart.

I have had the privilege and honor of representing veterans before the Department of Veterans Affairs for nearly 15 years. The process is long, can be confusing, and not always financially equivalent for the amount of hard work my office performs to achieve success. I am happy we were able to assist Mr. Brisendine, a veteran of the United States Military, and obtain the VA benefits to which he was entitled. But as his complaint does not rise to the level of discipline under the OGC's rules and regulations, I ask that the OGC dismiss his complaint.⁵¹

Please contact me with any questions.

Thank you.

Respectfully Submitted,

/s/ Michael D.J. Eisenberg
Michael D.J. Eisenberg

⁵¹ From Mr. Brisendine, “[Because you are seeking money] . . . I wrongly assumed that you would be satisfied with simply not being reported to the DC Office of Disciplinary Counsel, but maybe not.” Attachment E, 2018 at 10.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 12

(Inquiry closed letter from VA OGC dated November 9,
2023)

VA



U.S. Department
of Veterans Affairs

Accreditation, Discipline, & Fees (022D)
Benefits Law Group
Office of General Counsel

810 Vermont Avenue, NW
Washington, DC 20420
ogcaccréditationmailbox@va.gov

In Reply Refer To:
022D-98852

November 9, 2023

Michael D.J. Eisenberg
700 12th Street, NW
Suite 700
Washington, DC 20005

Dear Michael D.J. Eisenberg:

The Office of General Counsel (OGC) of the Department of Veterans Affairs (VA) wrote to you on October 26, 2021, to advise you that we had received a complaint that you may have engaged in conduct that could affect your qualifications for VA accreditation as an attorney. You responded to the allegations against you on January 3, 2022 and then again on June 20, 2022. Having reviewed your responses to the allegations, our office is declining to pursue a formal inquiry at this time. See 38 C.F.R. § 14.633(e)(1). We urge you, however, to please accept this letter as a reminder of the quality of representation owed to your clients when preparing, presenting, and prosecuting VA benefit claims, as well as your obligation to abide by the standards of conduct for VA-accredited practitioners set forth in 38 C.F.R. § 14.632. 38 C.F.R. §§ 14.626, 14.632.

If you have any questions, please email ogcaccréditationmailbox@va.gov and reference 022D-98852.

Sincerely yours,

NATHAN
KROES

2023.11.06
13:47:28 -05'00'

Nathan Kroes
Staff Attorney

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
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Respondent's Motion to Dismiss
Exhibit 13

(Reply letter to ODC in Travis dated April 9, 2021)

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April 9, 21

Sent Via Fax and E-mail to
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Washington, DC 20001
E-mail: taitt@dcodc.org
Fax: 1 (202) 638-0862

RE: Eisenberg/Travis
Disciplinary Docket No. 2021-D010

Dear Ms. Tait,

Please find following my response to your March 23, 2021, correspondence:

Item I – Timeline:

On or about **November 27, 2016**, Everett Travis contacted Michael Eisenberg seeking representation. On or about **November 30, 2016**, Mr. Eisenberg sent an engagement letter to Mr. Travis. Soon after, the parties entered into an attorney-client relationship.

During representation, Mr. Travis became threatening if not abusive in his communications with Mr. Eisenberg's office. Mr. Travis would attempt to order how, where, and when Mr. Eisenberg's office did its work. Mr. Eisenberg had to advise Mr. Travis numerous times not to speak to him and his staff poorly.

Early in the relationship, Mr. Travis had requested in-person meetings to discuss his case. While Mr. Eisenberg is always happy to discuss a client's case, the office does not meet in person. His practice is nationwide. All communications, e.g., meetings, are done by phone. Later on, given COVID, in-person meetings were no longer an option.

From 2016 – early 2020, the case progressed slowly. The VA/BVA has a large backlog that it has been working on for years. Notably, in early 2020, the BVA was rolling out a virtual hearing program that allowed Veterans, their representatives, and the administrative judges to meet by video from the comfort of their own home or office. This program was accelerated given

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COVID. But Mr. Travis insisted on an in-person hearing at the BVA. This was his right still, but in-person hearings were slower to be scheduled and risked cancelation given the COVID outbreak. Mr. Travis was not happy about the situation. At one point, Mr. Eisenberg advised Mr. Travis that the BVA in-person hearing may be postponed because of a government closure due to COVID. Mr. Travis informed Mr. Eisenberg that he would have the hearing regardless. Mr. Eisenberg had to remind Mr. Travis that if he showed up while the government was closed, he might be arrested for trespassing.

Mr. Travis repeatedly expressed his desire to have all issues on appeal addressed at a single hearing. A request that Mr. Eisenberg repeatedly explained is not an option. There were different issues on different appeal streams. The Agency could not combine streams as they were each being worked on by the government in different stages.

September 6, 2019—In an email exchange with Mr. Eisenberg's clerk Hyun-Jung Oh, Ms. Oh explained to Mr. Travis that despite having accidentally told him that a deadline was missed to file a VA-9 form, this was not the case. No VA-9 form submission deadline was ever missed during Mr. Eisenberg's representation of Mr. Travis.

November 15, 2019—Mr. Travis sent Mr. Eisenberg an email, stating, "I want us to review 'all claims and appeals' on file and have all the medical evidence/documentation supporting my claims for benefits readily available. I do not want to have to ask for an extension, period. I want a judgement (sic) based on the information presented...I want to waive my rights and ask the judge to make a decision." Mr. Eisenberg responded, explaining to Mr. Travis that waiving his rights and requesting that the judge make a decision at the hearing is not how the process works.

February 20, 2020—Mr. Travis sent Mr. Eisenberg an email with an attachment, which was a claim submitted by his prior representation, the Disabled American Veterans. Mr. Travis states in his email, "Being that service connection is established and is not in question. You must submit the request for an earlier effective date as date of discharge from service request on all conditions, all conditions are direct service-connected and not secondary. If the Judge(s) do their job they will at least go back to the original filing date of claim(s). If the Judge denies, then ["Clear and Unmistakable Error"] can be filed. Let this be your guide to getting earlier effective dates for all direct service-connected conditions and claim/appeal(s)."

*Note—Not only was Mr. Travis incorrect in stating that all conditions are connected directly and not secondarily, but he was also demanding a process which was later identified by Clerk Alana Nielson to be neither supported by material fact or law/statute. Mr. Travis believed, despite both Mr. Eisenberg and Ms. Nielson explaining to him that the DAV claim was simply a claim filed on his behalf and had not yet been decided, that every claim made by the DAV was to be backdated to 1993. Mr. Travis was notified on January 23, 2018, by the VA that only one claim from the DAV filing received an earlier effective date, which was 2011, not 1993. His record does not support an earlier effective date of the date of discharge for his PTSD claim, as

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the first claim for his PTSD was not made until 2005, his psychological evaluation upon discharge was normal, and he never mentioned the beheading incident to his medical providers until over a decade after his discharge.

May 20, 2020—Mr. Eisenberg was successful for one of Mr. Travis' appeal streams. Mr. Eisenberg emailed Mr. Travis to let him know to expect a back pay award of \$8,900, of which \$7,120 would be deposited into Mr. Travis' account (the remaining \$1,780 represents Mr. Eisenberg's 20% fee). Mr. Travis responded on the same day, saying, "This can't be correct. You sure you're not missing some zero's or is this for one issue? This is totally not what I was expecting for my injuries incurred during my military service and my current health conditions I and my suffer...I am totally disappointed I how the VA/BVA has totally FUCKED me over time and time again." It had to be explained to him that the "total" he believed he was entitled to was actually offset from prior awards, the award-at-issue only provided so much, and there were other matters on appeal that may fill in the gap. Simply put, he could not receive money again for money already paid to him.¹

September 21, 2020—Mr. Travis emailed Mr. Eisenberg with a document attachment from Dr. Ayers, a document that has been in his client file and had previously been presented to and considered by the BVA in his PTSD appeal stream.

September 24-25, 2020—Clerk Alana Nielson emailed Mr. Travis requesting discharge documents, as these materials were not contained in his client file nor any other documents in possession of Mr. Eisenberg's office. Mr. Travis responded, saying that he would have his wife look for the documents. Clerk Nielson informed Mr. Travis that the documents would likely be necessary for a possible PTSD Clear and Unmistakable Error claim.

October 2, 2020—Mr. Travis sent an email to the office, in part stating that "Just to be clear with you, I understand from DAV that the VA owes me and my family from the date of discharge (12-22-1993 thru 11-1-2005) at 100% permanent and total disability for all of my direct service-connected disabilities...and all that was incorrect and missing in-between the time period of 2005- 2012." The record is VOID of any documentation from the DAV supporting his claim that DAV stated an effective date of 1993 was guaranteed; as discussed below, it was discovered that there were no facts or laws, to support Mr. Travis' contention.

¹ VA disability benefits are not cumulative. For example, if a Veteran received benefits for one condition at 50% and another at 50%; he would not receive 100%. He would receive a total disability rating of 70%. Further, if the first condition had already been granted and paid to him and the Veteran, on appeal, received the second condition, he would only receive the payment of the differential from what he had already received. I.e., the payment rate at 70% minus the 50% payment rate he had already received.

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October 6, 2020—Clerk Nielson responded to Mr. Travis's October 2 email, explaining that the DAV form that he believes shows he is entitled to 100% P&T backdated to 1993 is, in fact, simply a claim that the DAV filed. Clerk Nielson stated that "There is/was no guarantee of entitlement to 100% P&T from the date of discharge."

October 6, 2020—Mr. Travis responded to Ms. Nielson's October 6 email, stating, "...make no mistake about it, I want all the benefits I'm entitled to from me serving the United States of America during the Gulf War Era!"

October 8, 2020—Mr. Travis dropped his Official Military Personnel File at the office. Prior to this date, the office was unaware of its specific contents.

October 14, 2020—Mr. Travis' OMPF was scanned into the office's system.

October 16, 2020—Clerk Nielson reviewed the OMPF and discovered that Mr. Travis had been discharged from the Army for misconduct; specifically, Mr. Travis was found guilty of assaulting a civilian female (Mr. Travis grabbed a woman, threw her to the ground, spit on her, slapped her in the face, and threw her against a wall), while stationed in Germany (among other offenses) and using "disrespectful in language" toward a non-commissioned officer (he had stated, "I don't have to listen to no damn fucking NCO."

*Note: This is the first we learned of this information and other fundamental facts Mr. Travis had not shared with my office previously.

October 20, 2020—Clerk Nielson discovered that Mr. Travis' previous representation through the DAV had been terminated by the DAV for "abusive and threatening actions."

November 3, 2020—Mr. Eisenberg informed Mr. Travis that the office could not pursue a PTSD Clear and Unmistakable Error claim. The reasons were spelled out clearly, and the relevant law was provided, showing Mr. Travis that his claim was not supported by fact or law.

November 3, 2020—Mr. Travis responded, stating that he had "concerns about [the office's] research and deliberation(s)" and again requested clarification about the letter from Dr. Ayers.

November 3, 2020—Mr. Eisenberg responded, informing Mr. Travis that the letter in question provided no supporting evidence for a PTSD CUE.

December 20, 2020—Travis emailed Eisenberg stating that all evidence should be brought to the upcoming January 6, 2021, hearing and that "no extensions will be requested, under no circumstances."

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December 21, 2020—Mr. Eisenberg responded, stating that Mr. Travis's direction on extensions was inappropriate **and that if Mr. Travis did not follow the advice given by Mr. Eisenberg, it could potentially be a basis for discharge.**

December 28, 2020—Mr. Travis responded, saying that he was discharging Mr. Eisenberg after the January 6, 2021, hearing and that he felt like he was "getting screwed all over again by the US Army, DoD, VA, and the BVA..."

January 2, 2021— Mr. Travis emailed Mr. Eisenberg stating, "I would like for you to explain to me what my MEB/PEB review stated upon my exit out (sic) the US Army....Please send us a copy."

*Note—This "review" did not exist: Mr. Travis did not undergo a MEB/PEB upon exiting the Army, as he was discharged from the service for misconduct. The PTSD event occurred after he had been ordered to be discharged; thus, an MEB/PEB would not be ordered after the fact. Recall he assaulted a female civilian in the face while on active duty.

January 4, 2021— As the tenor of Mr. Travis' communications were dubious again, Mr. Eisenberg reminded Mr. Travis that communication between client and attorney should remain respectful (as Mr. Travis had been asked to have respectful communications with this office and not bark orders) and that he had an identical copy of documents we had and thus already had them. (This request was also suspect in that the documentation he requested simply did not exist.)

January 4, 2021— Mr. Travis responded, "What do you mean? I asked you a simple question and you called it disrespectful because you have failed to properly represent me? Michael, you may dismiss yourself from representing me and my family when you are ready. No matter what I'll be dismissing you after the January 06, 2021 hearing for a lack of representation. I will also be filing a complaint against you with the DC Bar/American Bar Association. Have a wonderful day, and stay safe!"

The parties terminated their attorney-client relationship. A copy of his electronic file, albeit duplicative, was sent to him along with any hard copies of his documentation still in our possession.

Please note that in preparing this response, Mr. Eisenberg just learned that his clerk, Alana Nielson, was "unavailable" to attend his hearings in the past because she was scared of him.²

² Please note the clerk I refer to is a 6-Year Navy Veteran who was Honorably discharged from the military. She is not someone easily intimidated.

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Item II – Copy of Client File

Provided in March 1, 2021, mailing.

Item III – Court Memberships

I am licensed in Washington, DC.

I am admitted to the following Courts:

US DC for the District of Columbia

US District Court for the Western District TX (*pro hac vice*)

US DC for Maryland

US DC for the Western District of Michigan

US Court of Federal Claims

US Court of Appeals for the Fourth Circuit

US Court of Appeals for the Sixth Circuit

US Court of Appeals for the Seventh Circuit

US Court of Appeals for the District of Columbia

US Court of Appeals for the Federal Circuit

US Court of Appeals for the 10th Circuit

US Air Force Court of Criminal Appeals

US Army Court of Criminal Appeals

US Navy-Marine Corps Court of Criminal Appeals

US Court of Appeals for the Armed Forces

US Court of Appeals for Veterans Claims

US Supreme Court

Item IV – Change of Address?

N/A – my home and office address has not changed in about 15 years.

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Very truly yours,

/s/ Michael D.J. Eisenberg

Michael D.J. Eisenberg
Attorney & Counselor at Law

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 14

(Reply letter in Faust dated June 5, 2017)

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June 5, 2017

SENT VIA E-MAIL and FACSIMILE

Office of Disciplinary Counsel

ATTN: Traci Tait

515 5th Street NW

Building A, Room 117

Washington, DC 20001

E-Mail: taitt@dcodc.org

FAX: (202) 638-0862

RE: Eisenberg/Faust

Disciplinary Docket No. 2017-D057

Dear Ms. Tait,

Thank you for the opportunity to respond to your May 25, 2017, correspondence.

Please note that I was not downtown for the rest of the week shortly after a hearing I had on Tuesday, May 30, 2017. So, I had not received that day's mail (or from the prior weekend holiday).¹ I did not get the two copies until the evening of Friday, June 2, 2017 (please note that my home address has not changed in nearly ten years). Thus, I have not had significant time to go through the complete file provided by ODC; but I did pull out some documents from your package that I attached with this correspondence to support my position. The remaining facts are based upon my current recollection.

In response to your letter, Ms. Faust's complaint and the ODC's subpoena, I provide the following:

1. Ms. Faust was sued because she was discharged as a client for refusing to pay her bills. Furthermore, she had been providing comments via e-mail and verbally that she was planning on not paying her future bills. See Attachment F.² Contrary to her statement, the engagement letter clearly states that she is responsible for all costs. Attachment A³ at 2. Her bill for costs, let alone continuing costs as litigation typically endures, was becoming a concern to her. She simply wanted to settle the matter when the Government had no interest in doing so. (Ms. Faust had been warned that unfortunately in most

¹ USPS Tracking reflects that it was delivered on Wednesday, May 31, 2017. See Attachment C.

² Please note that this attachment was provided to the ODC by Ms. Faust and then, subsequently, to me. Given the late nature I received the ODC's correspondence, I have not had a chance to go through my closed files.

³ See Footnote 2.

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Federal Employee Employment actions, e.g., Equal Employment Opportunity Commission (“EEOC”) and Merit System Protection Board (“MSPB”), the cases tend to last many years. I typically advise my clients to be prepared for a *marathon* not a *sprint*.) Simply put, she proved she was not ready for the marathon as frustrations with the process and continued fear of her work environment increased over time. This caused her to lash out.

Ms. Faust was also let go because she was becoming combative and abused communications with my office. I was well aware that her work life was uncomfortable and that she had a medical condition that affected her at her workplace. I was sympathetic and generous by taking her case at a reduced rate including a lower contingency fee and no true retainer. See Attachment A.⁴ But, she must cover her costs as do all my clients. I became worried when she had asked *me what happens if she fails to pay her bill*. See Attachment F.⁵ I am a small solo practitioner who helps those, like Veterans, Military Members and Federal Employees, who typically cannot afford the higher priced attorneys and larger law firms.

I was sympathetic to her difficult situation and my staff and I spent a lot of time talking with her, working with and for her, and traveling on her behalf. But, this did not give her license to contact my office routinely because her employer was continuously subjecting her to an ongoing pattern of harassment. Her calls and e-mails were returned in a timely and professional manner. Ms. Faust also became unreasonably upset when my former associate, Ms. Schabacker, moved on. Ms. Faust was overly and unreasonably suspicious about her departure. Ms. Faust was informed that Ms. Schabacker simply left for a better job with the government – based in part on the experience she gained through working with me and by my recommendation that I had provided for her. See Attachment E.⁶ Her full-time position was never intended to be long-term employment. I have not hired a full-time employee since her departure; my staff are all contractors.

The public record shows that the collection’s matter had been mutually settled by the parties on April 4, 2016. See Attachment D at 1. Prior to having to file suit, I had asked Ms. Faust to show me where she felt any prior invoicing was incorrect. She did not *substantively* respond. I even asked my then-accountant to review the matter; he had advised me that she owed the outstanding invoice. At trial, I discovered my former accountant erred and I provided a *mea culpa* of a reduced bill in open court. But, Ms. Faust still had an outstanding bill. The parties came to a settlement agreement where Ms. Faust agreed to make restitution on her remaining bill. Attachment D. Afterwards,

⁴ See Footnote 2.

⁵ See Footnote 2.

⁶ See Footnote 2.

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having recognized the error made by my accountant and in an effort of good faith, I waived the remaining bill.

I am uncertain how Ms. Faust is complaining about the small claims court action. She was represented by counsel. I presume said counsel advised her competently through the process. (Granted, her Motion to Dismiss for Lack of Jurisdiction failed.) She further cannot state that she had to suddenly make plans for an appearance for a hearing. She had been granted three separate extensions (she had ample time to make arrangements) and the court provided her with ample notice. If she has some displeasure with the results of that action then she needs to look to her attorney, not myself.

2. Before I go digging through old files to comply with the rest of your subpoena, I request that this matter be dismissed. I am unaware of any bar ethic requirements regarding an accounting error made by an attorney's accountant that the parties mutually resolved or prohibiting me from collecting a past due bill from a former client. If the ODC feels the need to pursue this matter, I request a four-week extension to get the requested documents together (as I am in a busy month with many pleadings due and as stated before, I am only a solo practitioner). Feel free to call me; I am more than happy to discuss this matter with you further.

3.

Court of Appeals for the District of Columbia
US District Court for the District of Columbia
US District Court for the District of Maryland
US District Court for the Western District of Michigan
US District Court for the Western District of Texas (*pro hac vice*)
US Court of Federal Claims
US Court of Appeals for the Fourth Circuit
US Court of Appeals for the Sixth Circuit
US Court of Appeals for the Seventh Circuit
US Court of Appeals for the Tenth Circuit
US Court of Appeals for the District of Columbia
US Court of Appeals for the Federal Circuit
US Air Force Court of Criminal Appeals
US Army Court of Criminal Appeals
US Navy-Marine Corps Court of Criminal Appeals
US Court of Appeals for the Armed Forces
US Court of Appeals for Veterans Claims
US Supreme Court

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4. There has not been any changes in my work or home address. My work address has remained the same for over eleven years and my home address has been the same for over ten years.

Sincerely,

Michael Eisenberg

Michael D.J. Eisenberg

Encl.

Attachments A, C-F

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October 14, 2011

Merline Faust
16726 Village Trace Drive
Houston, TX 77053

RE: Engagement letter for services regarding your EEOC/MSPB issue.

Dear Ms. Faust,

This letter will confirm our discussion from this past last week. It was a pleasure talking with you during our telephone conference. As I had explained to you, it is my opinion that you definitely need the assistance of a lawyer, whether it be our firm or another lawyer. In my opinion, the matter is too complex for you to represent yourself.

As I had explained to you, if you wish my office to represent you against the United States Government, our fee will be, as outlined below:

Attorney's Fees:

CONTINGENCY FEES: Client and Attorney agree that the Attorney is to be paid 25% of any award, settlement, etc., including but not limited to Client's award for damages, compensation, back pay, etc. This clause shall not be read as a limitation on the Attorney's ability or authority to recover its actual attorney fees from the Agency, either through the EEOC or the MSPB or any other forum, as permitted under any statute, law, regulation or rule, including but not limited to the Back-Pay Act and/or the Equal Access to Justice Act (EAJA). The Statements of Account provided to the Client will be used to support any attempt by the Firm to recover its actual attorneys' fees, costs, and expenses, to the maximum extent permitted by law. Client agrees to assign and all attorney's fees and expenses awarded by the Court in Client's federal court action under EAJA, etc. to Mr. Eisenberg. If said fees are paid by the government directly to you, the client, you agree to remit said funds to Mr. Eisenberg within three (3) days. Where necessary, confidential client information will be redacted, consistent with Washington, DC Bar ethics opinions.

HOURLY RATE: The Attorney and the Client agree that the Client will not be personally liable for any fees in excess of the contingency fee. The Attorney will provide statements of accounts to the Client billed at the rates outlined herein. The Statements of Account provided to the Client will be used to support any attempt by the Attorney to recover its actual attorneys' fees, costs, and expenses, to the maximum extent

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permitted by law. If said fees are paid by the government directly to you, the client, you agree to remit said funds to Mr. Eisenberg within three (3) days.

Scope of Work: Attorney's services include representation by attorney of client against Defendant in his action. A copy of the signed contract, returned to my office will trigger these services.

Possible Conflicts of Interest. If the Attorney determines that he represents another client whose interests conflict, or are likely to conflict, with Client's interests, Attorney reserves the right to terminate this Agreement, while protecting the confidentiality of any privileged information that Client has provided to Attorney.

COSTS. The above does not include any out-of-pocket costs that may be incurred, such as court filing fees, sheriff's fees, deposition costs, photocopying, etc. As explained, these COSTS are in addition to our FEE and are not included in the FEE.

This schedule is acceptable to us, so long as you understand that if you terminate payments, we may terminate our services and withdraw from the case.

You are also agreeing to cooperate and participate in the conduct of your case and to truthfully and immediately notify us as to anything that may occur that could affect the case. You understand that we are relying on the facts as given to us by you.

Obviously, depending upon the facts as they are developed, our opinion could change and you could be awarded more or less, or even lose. You also understand that getting a judgment is not the same as getting cash and that you may have to expend additional costs and fees to collect the judgment.

You asked me if spending money on legal fees in this case is throwing good money after bad, and I told you that at this point, I couldn't give you an answer, and that you should understand that there are no guarantees of winning or collecting.

It is my opinion, however, that whether you use our firm or other lawyers, you should proceed with your case. Please do not delay. If you delay the commencement of your legal issue, you may at some point be barred from bringing it.

If the above properly sets forth our agreement, please sign and return the enclosed copy of this letter along with payment for the "true retainer". Note: Trust account funds, if applicable, are deposited to our Trust Account in accordance with the rules governing lawyers in our state including IOLTA (Interest On Lawyer Trust Accounts) rules as well as our fiduciary duty to you as a client.

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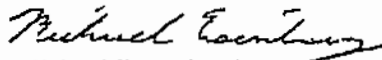
By signing below, you agree that any fee dispute that you may have that cannot be resolved between ourselves will be submitted to the DC Bar Attorney-Client Fee Arbitration Board (ACAB). A copy of the ACAB's rules are available through the ACAB staff. Their number is 202-737-4700, ext. 216. I want to encourage you to contact the ACAB for counseling and information prior to deciding whether to sign this agreement.

D.C. Bar Legal Ethics rules require me to keep client files for a minimum of five years, unless the client requests that he or she take possession of the file. By signing below, you, the client, agree that I am permitted to destroy or discard your file after five years unless you request it before the expiration of this time. All valuables must be returned to the client or other proper party before the file can be destroyed or discarded. In any event, you, the client, agree to pay for the shipping of these materials.

If we do not receive a signed copy of this letter within thirty (30) days along with full payment, I shall assume that you have obtained other counsel or have decided not to pursue this matter, and shall mark my file "closed" and do nothing further.

If any of the above is not clear, or if you have any questions, please do not hesitate to call me.

Very truly yours,


Michael D.J. Eisenberg

The above is understood and agreed to.

Dated: _____

Client Name: _____

Merline Faust

Track Another Package +

Remove X

Tracking Number: 9414726699042060245549



Product & Tracking Information

See Available Actions

Postal Product:
First-Class Mail®

Features:
Certified Mail™
Return Receipt

DATE & TIME	STATUS OF ITEM	LOCATION
May 31, 2017, 1:32 pm	Delivered, Left with Individual	WASHINGTON, DC 20005
Your item was delivered to an individual at the address at 1:32 pm on May 31, 2017 in WASHINGTON, DC 20005.		
May 30, 2017, 7:34 pm	Business Closed	WASHINGTON, DC 20005
May 30, 2017, 9:42 am	In Transit to Destination	
May 29, 2017, 8:07 am	Departed USPS Facility	WASHINGTON, DC 20066

See More V

Available Actions

Text Updates	V
Email Updates	V

See Less ^

Can't find what you're looking for?

Go to our FAQs section to find answers to your tracking questions.

FAQs (http://faq.usps.com/?articleId=220900)

Attachment C 1/2

There's an easier way to track your packages.

Why jump from page to page to track packages being sent to you? With My USPS™, you can easily track all your packages in one place. Sign up to:

- Set up automatic email and text alerts, so you'll never have to manually track a package again
- Provide delivery instructions, so your carrier knows where to leave packages

Sign Up

(https://reg.usps.com/entreg/RegistrationAction_input?)

(https://www.usps.com/) app=UspsTools&appURL=https%3A%2F%2Ftools.usps.com%2Fgo%2FTrackConfirmAction%21input'

HELPFUL LINKS	ON ABOUT.USPS.COM	OTHER USPS SITES	LEGAL INFORMATION
Contact Us (https://www.usps.com/help/welcome.htm)	About USPS Home (http://about.usps.com/)	Business Customer Gateway (https://gateway.usps.com/)	Privacy Policy (http://about.usps.com/who-we-are/privacy-policy/privacy-policy-highlights.htm)
Site Index (https://www.usps.com/globals/site/index.htm)	Newsroom (http://about.usps.com/news/welcome.htm)	Postal Inspectors (https://postalinspectors.uspis.gov/)	Terms of Use (http://about.usps.com/termsfuse.htm)
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2015 SC3 002136: EISENBERG, MICHAEL Vs. FAUST, MERLINE	
Case Type: Sml Clms >\$2,500 <=\$5,000	File Date: 05/26/2015
Status: Closed	Status Date: 05/26/2015
Disposition: Dismissed-Without Prejudice	Disposition Date: 04/04/2016

Party Name	Party Alias(es)	Party Type	Attorney(s)
EISENBERG, MICHAEL	THE LAW OFFICE OF MICHAEL D.J. EISENBERG	PLAINTIFF	EISENBERG, MICHAEL DJ
FAUST, MERLINE		Defendant	ROYAL, Ms STEPHANIE L

Docket Date	Description	Messages
04/08/2016	Praeipce Filed:	Praeipce to Dismiss Matter with Prejudice Filed MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff)
04/04/2016	Event Resulted:	Event Resulted: The following event: Trial scheduled for 04/04/2016 at 11:00 am has been resulted as follows: Result: TrialSettled and Dismissed in open court. Non Jury trial held with Plaintiff present and Defendant present with Counsel. Trial held with finding and Settlement entered by Parties for the amount of \$126.01. Parties signed a Settlement agreement at Trial praecipce in open court and the Court Dismisses this matter without Prejudice for Plaintiff to refile if check does not clear or Settlement is breached. Judge: BESHOURI, JOSEPH E Location: Small Claims Courtroom B-119 MICHAEL EISENBERG (Plaintiff); MERLINE FAUST (Defendant); ; Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff); Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
04/04/2016	Event Resulted:	Event Resulted: The following event: Motion Hearing scheduled for 04/04/2016 at 9:00 am has been resulted as follows: Result: Motion Hearing Held with Plaintiff and Defendant present with Counsel. Plaintiff's Motion to Strike Defendant's Motion to Withdraw Counsel is DENIED as MOOT. Judge: BESHOURI, JOSEPH E Location: Small Claims Courtroom B-119 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff) Participant(s): Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
04/04/2016	Settled at Trial	Settlement Agreement at Trial MERLINE FAUST (Defendant); ; Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff)
04/04/2016	Defendant's Exhibits Submitted	Defendant's Exhibits Submitted 1-4 MERLINE FAUST (Defendant); ; Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant)
04/04/2016	Plaintiff's Exhibits Submitted	Plaintiff's Exhibits Submitted 1 MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff)
04/04/2016	Event Scheduled:	Event Scheduled: Event: Mediation Session Date: 04/04/2016 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Mediation Room 123-8
04/04/2016	Order Granting Motion to Withdraw Counsel Entered on Docket	Order Withdrawing the Defendant's Motion to Withdraw Counsel and Denying as Moot, the Plaintiff's Motion to Strike Defendant's Motion to Withdraw as Counsel Entered on Docket and has been signed by Magistrate Judge Joseph Beshouri, with copies to be mailed out to all parties on April 4th, 2016.
04/04/2016	Event Resulted:	Event Resulted: The following event: Motion Hrg to Withdraw as Counsel scheduled for 04/04/2016 at 9:00 am has been resulted as follows: Result: Motion Hearing Held with Plaintiff and Defendant Attorney present. Defendant's Motion to Withdraw as Counsel is WITHDRAWN in open court.

		Judge: BESHOURI, JOSEPH E Location: Small Claims Courtroom B-119 Participant(s): Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
04/04/2016	Consent to Having a Magistrate Judge Handle all Proceedings	Consent to Having a Magistrate Judge Handle all Proceedings Consent to Having a Magistrate Judge Handle all Pr Sent on: 04/04/2016 09:48:50.67
03/25/2016	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Withdraw as Counsel Date: 04/04/2016 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
03/25/2016	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 03/25/2016 15:57:08.76
03/25/2016	Opposition to Motion to Withdraw as Counsel Filed	Opposition to Defendant's Motion to Withdraw as Counsel Filed MICHAEL EISENBERG (Plaintiff); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff)
03/25/2016	Motion to Withdraw as Counsel Filed	Motion to Strike Defendant's Motion to Withdraw as Counsel Filed MICHAEL EISENBERG (Plaintiff); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff) Receipt: 107262 Date: 03/25/2016
03/17/2016	Certification Filed	Certificationof Notice to Client from withdrawing attorney Filed Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant)
03/17/2016	Event Scheduled:	Event Scheduled: Event: Motion Hearing Date: 04/04/2016 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
03/17/2016	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 03/17/2016 11:35:37.51
03/17/2016	Motion to Withdraw as Counsel Filed	Motion to Withdraw as Counsel Filed Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant) Receipt: 107051 Date: 03/17/2016
02/01/2016	Order Granting Motion to Dismiss Entered on Docket	Order Denying Motion to Dismiss Entered on Docket signed by Magistrate Judge Beshouri and copies mailed to parties on 2/1/2016 Participant(s): Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
02/01/2016	Event Scheduled:	Event Scheduled: Event: Trial Date: 04/04/2016 Time: 11:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
02/01/2016	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 02/01/2016 17:04:28.35
02/01/2016	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 02/01/2016 at 3:30 pm has been resulted as follows: Result: Motion Hearing Held -- Both parties present via telephone. Defendant's motion to dismiss is DENIED. Case proceeds to trial on 04/04/2016. Judge: BESHOURI, JOSEPH E Location: Courtroom 206 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff) Participant(s): Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
02/01/2016	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 02/01/2016 Time: 3:30 pm Judge: BESHOURI, JOSEPH E Location: Courtroom 206
02/01/2016	Event Scheduled in Error	ENTERED IN ERROR -- WRONG JUDGE Event Scheduled in Error The following event: Motion Hrg to Dismiss scheduled for 02/01/2016 at 3:30 pm has been resulted as follows: Result: Event Scheduled in Error Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
02/01/2016	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 02/01/2016 Time: 3:30 pm Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
01/30/2016	Miscellaneous Docket	Plaintiff's Errata Memorandum in support of personal jurisdiction MICHAEL EISENBERG (Plaintiff); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff)
01/30/2016	Miscellaneous Docket	Defendant'sMemorandum Support of personal Jurisdiction MICHAEL EISENBERG (Plaintiff); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff)
01/26/2016	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 01/26/2016 at 4:30 pm has been resulted as follows: Result: Case Continued by Court Judge: BESHOURI, JOSEPH E Location: Courtroom 206
01/26/2016	Event Scheduled in Error	Event Scheduled in Error The following event: Motion Hrg to Dismiss scheduled for 01/26/2016 at 4:30 pm has been resulted as follows: Result: Event Scheduled in Error Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
01/26/2016	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 01/26/2016 Time: 4:30 pm Judge: BESHOURI, JOSEPH E Location: Courtroom 206
01/25/2016	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 01/26/2016 Time: 4:30 pm Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
01/08/2016	Event Resulted:	Event Resulted:

		The following event: Continued Initial Hearing scheduled for 01/08/2016 at 10:00 am has been resulted as follows: Result: Continued Initial Hearing Cont'd with Plaintiff and Defendant Attorney present. The Court continues Defendant's Motion to Dismiss to be heard before Judge Beshouri in his courtroom via telephone on 1/26/2016 at 4:30pm via telephone. Parties present Presiding Judge Beshouri with their contact information in open court. Case to be resulted and will be handled further through Judge Beshouri Law Clerks. Judge: BESHOURI, JOSEPH E Location: Small Claims Courtroom B-119 MICHAEL EISENBERG (Plaintiff); MERLINE FAUST (Defendant); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff); Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
01/08/2016	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 01/08/2016 at 10:00 am has been resulted as follows: Result: Motion Hearing Continued with Plaintiff and Defendant Attorney present. The Court continues Defendant's Motion to Dismiss to be heard before Judge Beshouri in his courtroom via telephone on 1/26/2016 at 4:30pm via telephone. Parties present Presiding Judge Beshouri with their contact information in open court. Case to be resulted and will be handled further through Judge Beshouri Law Clerks. Judge: BESHOURI, JOSEPH E Location: Small Claims Courtroom B-119 MICHAEL EISENBERG (Plaintiff); ; Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff); Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
01/08/2016	Order Denying Motion Entered on Docket	Order Denying Plaintiff's Motion Corrected Errata Motion to Strike Defendant's Response to Plaintiff's Reply to Defendant's Motion to Dismiss With Prejudice Entered on Docket signed by Magistrate Judge Joseph Beshouri and mailed to parties on 1/8/2016 Participant(s): Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
01/08/2016	Event Resulted:	Event Resulted: The following event: Motion Hearing scheduled for 01/08/2016 at 10:00 am has been resulted as follows: Result: Motion Hearing Held with Plaintiff and Defendant Attorney present only. Plaintiff's Corrected Errata Motion to Strike Defendant's Response to Plaintiff's Reply to Defendant's Motion to Dismiss With Prejudice is DENIED. Judge: BESHOURI, JOSEPH E Location: Small Claims Courtroom B-119 MICHAEL EISENBERG (Plaintiff); ; Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff); Judge JOSEPH E BESHOURI on behalf of Judge DIANE M BRENNEMAN
12/28/2015	Event Scheduled:	Event Scheduled: Event: Motion Hearing Date: 01/08/2016 Time: 10:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
12/28/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 12/28/2015 12:09:49.83
12/28/2015	Event Resulted:	Event Resulted: The following event: Motion Hearing scheduled for 12/28/2015 at 10:00 am has been resulted as follows: Result: Motion Hearing Continued -- Plaintiff's Atty present. Defendant's Atty present. Case is continued by the Court to 01/08/2016 at 10:00 am. Judge: NOOTER, WILLIAM Location: Small Claims Courtroom B-119 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff) Participant(s): Judge WILLIAM NOOTER on behalf of Judge DIANE M BRENNEMAN
12/28/2015	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 01/08/2016 Time: 10:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
12/28/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 12/28/2015 12:07:58.09
12/28/2015	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 12/28/2015 at 10:00 am has been resulted as follows: Result: Motion Hearing Continued -- Plaintiff's Atty present. Defendant's Atty present. Case is continued by the Court to 01/08/2016 at 10:00 am. Judge: NOOTER, WILLIAM Location: Small Claims Courtroom B-119 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff) Participant(s): Judge WILLIAM NOOTER on behalf of Judge DIANE M BRENNEMAN
12/28/2015	Continued Initial Hearing	Continued Initial Hearing Event: Continued Initial Hearing Date: 01/08/2016 Time: 10:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
12/28/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Continuing Hearing [SC] Sent on: 12/28/2015 12:06:10.18
12/28/2015	Event Resulted:	Event Resulted: The following event: Continued Initial Hearing scheduled for 12/28/2015 at 10:00 am has been resulted as follows: Result: Continued Initial Hearing Cont'd -- Plaintiff's Atty present. Defendant's Atty present. Case is continued by the Court to 01/08/2016 at 10:00 am. Judge: NOOTER, WILLIAM Location: Small Claims Courtroom B-119 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (Plaintiff) Participant(s): Judge WILLIAM NOOTER on behalf of Judge DIANE M BRENNEMAN
11/09/2015	Response to:	Reply to Plaintiff's Motion to Strike Defendant's Response to Plaintiff's Rely to Defendant's Motion to Dismiss With Prejudice: Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant)
11/06/2015	Continued Initial Hearing	Continued Initial Hearing Event: Continued Initial Hearing Date: 12/28/2015 Time: 10:00 am

		Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119	
11/06/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Continuing Hearing [SC] Sent on: 11/06/2015 11:46:02.74	
11/06/2015	Event Resulted:	Event Resulted: The following event: Continued Initial Hearing scheduled for 12/04/2015 at 9:00 am has been resulted as follows: Result: Case Continued by Court ---_Case continued by the Court due to a Judicial Training. Parties were contacted and at the Plaintiff's request this matter is continued to 12/28/2015 at 10:00 am. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Participant(s): Judge DIANE M BRENNEMAN	
11/06/2015	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 12/28/2015 Time: 10:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119	
11/06/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 11/06/2015 11:44:54.13	
11/06/2015	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 12/04/2015 at 9:00 am has been resulted as follows: Result: Motion Hearing Continued by the Court----- Case continued by the Court due to a Judicial Training. Parties were contacted and at the Plaintiff's request this matter is continued to 12/28/2015 at 10:00 am. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Participant(s): Judge DIANE M BRENNEMAN	
11/06/2015	Event Scheduled:	Event Scheduled: Event: Motion Hearing Date: 12/28/2015 Time: 10:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119	
11/06/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 11/06/2015 11:43:24.00	
11/06/2015	Event Resulted:	Event Resulted: The following event: Motion Hearing scheduled for 12/04/2015 at 9:00 am has been resulted as follows: Result: Case Continued by Court ---Case continued by the Court due to a Judicial Training. Parties were contacted and at the Plaintiff's request this matter is continued to 12/28/2015 at 10:00 am. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Participant(s): Judge DIANE M BRENNEMAN	
10/30/2015	Event Scheduled:	Event Scheduled: Event: Motion Hearing Date: 12/04/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119	
10/30/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 10/30/2015 15:09:39.18	
10/30/2015	Motion Filed:	Corrected Errata Motion to Strike Defendant's Response to Plaintiff's Reply to Defendant's Motion to Dismiss With PrejudiceFiled: MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Receipt: 103485 Date: 10/30/2015	
10/13/2015	Continued Initial Hearing	Continued Initial Hearing Event: Continued Initial Hearing Date: 12/04/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119	
10/13/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Continuing Hearing [SC] Sent on: 10/13/2015 10:31:34.08	
10/13/2015	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 12/04/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119	
10/13/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 10/13/2015 10:30:30.62	
10/13/2015	Event Resulted:	Event Resulted: The following event: Continued Initial Hearing scheduled for 10/13/2015 at 9:00 am has been resulted as follows: Result: Continued Initial Hearing Cont'd with Plaintiff Attorney and Defendant Attorney present. Plaintiff's oral request to continue is GRANTED to 12/4/2015. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Participant(s): Judge DIANE M BRENNEMAN	
10/13/2015	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 10/13/2015 at 9:00 am has been resulted as follows: Result: Motion Hearing Continued with Plaintiff and Defendant Attorney present. Plaintiff's oral request to continue is GRANTED to 12/4/2015. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant); MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Participant(s): Judge DIANE M BRENNEMAN	
10/07/2015	Praeipe Entering Atty Appearance Filed	Praeipe Entering Atty Appearance Filed Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant) RMX 14 17/23	Attachment D 4/6
10/07/2015	Response to:	Response to :Plaintiff's Reply to defendants 's Motion to dismiss with Prejudice	

		Ms STEPHANIE L ROYAL (Attorney) on behalf of MERLINE FAUST (Defendant)
08/27/2015	Response to:	Reply to Defendants Motion to Dismiss with Prejudice MICHAEL EISENBERG (PLAINTIFF); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF)
08/13/2015	Order Granting Motion for Continuance Entered on Docket	Order Granting Defendants Motion for Continuance with No Further Continuances for the Defendant Entered on Docket signed by Judge Brenneman and mailed to all parties on August 13, 2015.
08/13/2015	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 10/13/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
08/13/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 08/13/2015 09:58:16.97
08/13/2015	Event Resulted:	Event Resulted: The following event: Motion Hrg to Dismiss scheduled for 08/13/2015 at 9:00 am has been resulted as follows: Result: Motion Hearing Continued -Plaintiff present only. Defendant's request for continuance is GRANTED to 10/13/2015. Per Judge Brenneman, there would be no further continuances for the Defendant. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
08/13/2015	Continued Initial Hearing	Continued Initial Hearing Event: Continued Initial Hearing Date: 10/13/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Result: Continued Initial Hearing Cont'd
08/13/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Continuing Hearing [SC] Sent on: 08/13/2015 09:50:20.03
08/13/2015	Event Resulted:	Event Resulted: The following event: Continued Initial Hearing scheduled for 08/13/2015 at 9:00 am has been resulted as follows: Result: Continued Initial Hearing Held -Plaintiff presently only. Defendant's request for continuance is GRANTED until October 13, 2015. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Participant(s): Judge DIANE M BRENNEMAN
08/11/2015	Telephone Request for Continuance	Telephone Request for Continuance Request for Continuance by Telephone Sent on: 08/11/2015 12:15:16.27 MERLINE FAUST (Defendant);
07/17/2015	Telephone Request for Continuance	Telephone Request for Continuance Request for Continuance by Telephone Sent on: 07/17/2015 16:15:46.02 MERLINE FAUST (Defendant);
07/17/2015	Event Scheduled:	Event Scheduled: Event: Motion Hrg to Dismiss Date: 08/13/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
07/17/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Scheduling Hearing [SC] Sent on: 07/17/2015 11:31:25.81
07/17/2015	Continued Initial Hearing	Continued Initial Hearing Event: Continued Initial Hearing Date: 08/13/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Result: Continued Initial Hearing Held
07/17/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) Notice Continuing Hearing [SC] Sent on: 07/17/2015 11:30:28.35
07/17/2015	Event Resulted:	Event Resulted: The following event: Continued Initial Hearing scheduled for 07/17/2015 at 9:00 am has been resulted as follows: Result: Continued Initial Hearing Not Held -no appearance by either side. Plaintiff's request to continuance is GRANTED to 08/13/2015. Please reschedule the motion to dismiss for 08/13/2015 as well. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Participant(s): Judge DIANE M BRENNEMAN
07/17/2015	Telephone Request for Continuance	Telephone Request for Continuance Request for Continuance by Telephone Sent on: 07/17/2015 08:34:54.54 MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF)
07/16/2015	Miscellaneous Docket	Miscellaneous Docket (Motion to Dismiss With Prejudice) MERLINE FAUST (Defendant);
06/30/2015	Attempted Service on Statement of Claim Filed	Attempted Service on Statement of Claim Filed return to sender, unclaimed and unable to foward. MERLINE FAUST (Defendant);
06/22/2015	Continued Initial Hearing	Continued Initial Hearing Event: Continued Initial Hearing Date: 07/17/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Result: Continued Initial Hearing Not Held
06/22/2015	Notice Mailed to Party (ies)	Notice Mailed to Party (ies) RMX 14 18/23

		Notice Continuing Hearing [SC] Sent on: 06/22/2015 12:21:16.59
06/22/2015	Event Resulted:	Event Resulted: The following event: Initial Hearing scheduled for 06/22/2015 at 9:00 am has been resulted as follows: Result: Continued Initial Hearing Held -Plaintiff present only. Defendant's request for continunace is GRANTED 07/17/2015. Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 MERLINE FAUST (Defendant); ; MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF)
06/22/2015	Statement of Claim/Special Process Server's Affidavit of Service Filed	Statement of Claim/Special Process Server's Affidavit of Service Filed-Defendant was served personally on 6/12/2015 at 6:12pm MERLINE FAUST (Defendant);
06/22/2015	Event Scheduled:	Event Scheduled: Event: Initial Hearing Date: 06/22/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119 Result: Continued Initial Hearing Held
06/16/2015	Event Resulted:	Event Resulted: No Service The following event: Initial Hearing scheduled for 06/22/2015 at 9:00 am has been resulted as follows: Result: Initial Hrg Not Held Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
06/15/2015	Telephone Request for Continuance	Telephone Request for Continuance Request for Continuance by Telephone Sent on: 06/15/2015 11:16:29.46 MERLINE FAUST (Defendant);
05/26/2015	Event Scheduled:	Event Scheduled: Event: Initial Hearing Date: 06/22/2015 Time: 9:00 am Judge: BRENNEMAN, DIANE M Location: Small Claims Courtroom B-119
05/26/2015	Restricted Mail	Restricted Mail MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Receipt: 98615 Date: 05/26/2015
05/26/2015	Service of Statement of Claim by Certified Mail Issued	Service of Statement of Claim by Certified Mail Issued MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Receipt: 98615 Date: 05/26/2015
05/26/2015	Complaint for Contract Filed	Complaint for Contract Filed MICHAEL DJ EISENBERG (Attorney) on behalf of MICHAEL EISENBERG (PLAINTIFF) Receipt: 98615 Date: 05/26/2015

Receipt #	Date	From	Payments	Fee	Amount Paid
107262	03/25/2016	EISENBERG, MICHAEL DJ	Cash \$10.00	Cost \$10.00	\$10.00
107051	03/17/2016	EISENBERG, MICHAEL DJ	Cc \$10.00	Cost \$10.00	\$10.00
103485	10/30/2015	EISENBERG, MICHAEL DJ	Check \$10.00	Cost \$10.00	\$10.00
98615	05/26/2015	EISENBERG, MICHAEL	Check \$56.54	Cost \$56.54	\$56.54

https://us-mg4.mail.yahoo.com/neo/launch?partner=sbc&.rand=flpt0...

Subject: Re: Faust vs USPS
From: Law Office (Michael@Eisenberg-Lawoffice.com)
To: msfaust4383@att.net;
Date: Tuesday, July 1, 2014 7:09 PM

Hi Merline,

I did return your call last week and left you a voice message. I know we have been playing telephone tag for a bit. I also e-mailed you regarding your "urgent" messages. You told me that Glenn was up to his usual tricks in trying to get you removed, i.e., that he was threatening to fire you and the issue with the four day leave. While I grant you it is upsetting, there is nothing that can be done about it immediately. (BTW: I noticed my name is spelled wrong in your e-mail to me [from the 30th]. I never received it.)

DeAnna got a new job! I am happy for her. Its a move up. We parted on very good terms. I gave her a great recommendation. She had sent out a mass e-mail to everyone noting her departure and wishing all well. So, yes, I am trying to re-juggle everything with her departure and will do my best to stay on top of things (FYI: We just started a new law clerk).

You are still our client. That hasn't changed. We'd have a long talk before something like that happens.

I just returned from out of town work trip. What is your general availability to speak on Thursday afternoon, so we can set up a time to talk and circle the proverbial wagons.

Best,

Sincerely,

Michael Eisenberg

Law Office of Michael D.J. Eisenberg
Attorney and Counselor at Law
700 12th Street, NW
Suite 700
Washington, DC 20005
michael@eisenberg-lawoffice.com
www.eisenberg-lawoffice.com
O: (202) 558-6371
F: (202) 403-3430

CONFIDENTIALITY NOTICE: This message is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply and destroy all copies of the original message. If you are the intended recipient but do not wish to receive communications through this medium, please advise the sender immediately.

Attachment E 1/1

Subject: Re: Invoice - Faust v. MSPS, et al.
From: msfaust (msfaust4383@att.net)
To: Michael@Eisenberg-Lawoffice.com;
Date: Monday, March 24, 2014 11:40 AM

Mike Don't be nervous I like to be informed and don't want to be placed in a bind. Saw there is a 30 day period...will make the 600 payment soon.

Sent from my Verizon Wireless 4G LTE smartphone

Mike Don't be nervous I like to be informed and don't want to be placed in a bind. Saw there is a 30 day period...will make the 600 payment soon.

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----
From: Law Office <Michael@Eisenberg-Lawoffice.com>
Date: 03/24/2014 8:16 AM (GMT-06:00)
To: Merline Faust <msfaust4383@att.net>
Subject: Re: Invoice - Faust v. MSPS, et al.
Hi Merline,

Correct, there was no link for payment. As I had expressed in my prior e-mail, I sent you the invoice my office paid for your US CAFC case against the Post Office and the MSPB. (The invoice from lex group explained that it was for paper printing requirements [which you had been advised was necessary in this court [before we began here] and that we have several briefs and a joint appendix [which in of itself was nearly 500 pages] My accountant has not entered it into our system yet. Thus, there would be no link. A check or authorization to us a credit card would be required at this point.

It is important to remember that you have several cases ongoing. We did a round of depositions in one EEO matter and you were advised that another round for a separate EEO matter as anticipated in the not so distant future.

We try to give you heads up as bills are anticipated. You do have the right to know what your bills are about.

Likewise, we have the right (and you have the responsibility) to pay us promptly. (Asking me what happens if you fail to pay your bills puts me on uneasy grounds.)

In anticipation of your prompt payment.

We look forward to working with you on your cases.

Sincerely,

Michael Eisenberg

Law Office of Michael D.J. Eisenberg
Attorney and Counselor at Law
700 12th Street, NW
Suite 700
Washington, DC 20005
michael@eisenberg-lawoffice.com
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O: (202) 558-6371
F: (202) 403-3430

Attachment F 1/1

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

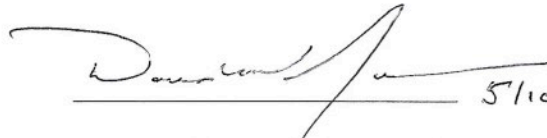
Respondent's Motion to Dismiss
Exhibit 15

(Declaration Regarding the Anticipated Testimony of
Alana Bergner)

DECLARATION REGARDING THE ANTICIPATED TESTIMONY OF ALANA BERGNER

Based upon information currently available to the undersigned co-counsel for Michael D.J. Eisenberg, counsel represents in the form of an offer of proof that if Alana Bergner were available and able to testify live before the Committee, she would testify consistent with the following:

Mr. Travis is an Army veteran who obtained Mr. Eisenberg's services to assist with his VA disability claim appeals. Mr. Travis had multiple appeals streams at the time he sought our representation. In the years that Mr. Eisenberg represented Mr. Travis, he had received many favorable decisions for his appeals, with many more that were still in progress. Mr. Travis' communications with the office tended to be demanding and curt. He would send emails with incomplete attachments and screenshots from the VA disability website demanding detailed explanations about decisions or ratings that were updated in the system and not yet necessarily communicated to the office. Mr. Travis had a few open appeals that the office was actively working on, including appeals for earlier effective dates for his GERD diagnosis, for pes planus, and for plantar fasciitis. The office informed Mr. Travis that it would not be pursuing any further appeals for his PTSD claim, as the record did not support a sound legal argument for such an appeal. Mr. Travis was provided with a detailed explanation of this decision; however, he was unhappy with the decision to decline continuation of his claim for an earlier effective date for PTSD. His unhappiness grew over the month of December, and his communication with the office became more demanding and less professional with each email. Mr. Travis then terminated the office shortly before two BVA hearings for which the office was already prepared to attend. Many of Mr. Travis' appeals were still open due to the work of this office. Mr. Eisenberg was professional in his dealings with Mr. Travis despite the client's often unreasonable, abusive and/or over-demanding behaviors towards him.

 5/10/2024
DAVID W. SUMNER, ESQ.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 16

(Supplemental Affidavit of Michael D.J. Eisenberg dated
May 22, 2024)

SUPPLEMENTAL AFFIDAVIT OF MICHAEL D.J. EISENBERG

Re: **Disciplinary Docket Nos: 2014-D318 (Glaab)**
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

I, Michael D.J. Eisenberg, age 53, hereby state under oath that the following facts are true and accurate based on my current personal knowledge and belief:

1. Since completing my earlier affidavit of May 9, 2024, I did receive an email reply from combat veteran, Jason Breedlove. He is alive but not well. He just underwent brain surgery (per email report), and it still appears very likely that he will be unavailable to testify as a live witness in this matter;
2. Also, the dates when I was initially advised by the ODC of the original bar grievance or inquiries in these charged matters, are on or about February 24, 2014, in *Glaab*, on or about December 22, 2016, in *Swain*, on or about May 25, 2017, in *Faust*, on or about May 22, 2019, in *Mitchell*, on or about December 2, 2020, in *Brisendine*, and on or about February 12, 2022 in *Travis*;
3. The negotiated settlement in *Swain*, in addition to the \$35,000 in cash to the client, also included a grant of sixty-four (64) days in paid sick leave. This equates to close to \$8,000 in value to the settlement above the \$35,000 cash payout (using the former client's pay data for the time periods at issue);
4. The occurrences mentioned in the Specification of Charges date back to 2011 or approximately thirteen (13) years. Between 2011 and the present, I have replaced my cellphone approximately 6 to 8 times. I am confident that certain data, like messages or texts, was lost in transitioning to the new phones. I would use my cell for communications with administrative judges, their staff, or opposing counsel. On a very limited basis, I would communicate with clients (usually if I am traveling for that client) on my cell phone.
5. Since about October 2023, I have been volunteering as a new member for the ABA Law Practice Division.

I have been appointed to the following committees:

- Law Practice Today Editorial Board
- Legal Technology Resource Center



- Professional Development

I have written or contributed to the following ABA articles and podcast episodes:

- Law Technology Today, *Roundtable: AI Programs*, April 17, 2024, https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2024/roundtable-ai-programs/
- Law Practice Today, *The Don'ts of Using AI in Legal Work*, March 15, 2024, https://www.americanbar.org/groups/law_practice/resources/law-practice-today/2024/march-2024/the-donts-of-using-ai-in-legal-work/
- Law Practice Today, *LTRC Roundtable: Email Inbox Prioritization*, March 6, 2024, https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2024/roundtable-email-inbox-prioritization/
- Law Practice Today, *2023 Cloud Computing TechReport*, January 29, 2024, https://www.americanbar.org/groups/law_practice/resources/tech-report/2023/2023-cloud-computing-techreport/
- The Law Practice Podcast, *AI for Solo and Small Firms*, April 4, 2024, https://www.americanbar.org/groups/law_practice/resources/podcast/ai-for-solo-and-small-firms/

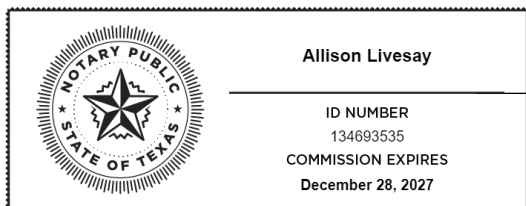
Michael D.J. Eisenberg

Michael D.J. Eisenberg

COUNTY OF Bexar

STATE OF Texas

The above individual appeared before me, signed and subscribed to this affidavit under oath this 22nd day of May 2024



Allison Livesay

NOTARY PUBLIC

Electronically signed and notarized online using the Proof platform.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 17

(Travis representation agreement of November 30, 2016)

Law Office of Michael D.J. Eisenberg

Attorney and Counselor at Law

One Metro Center • 700 12th Street, NW, Suite 700 • Washington, DC 20005

(202) 558-6371 • Fax: (202) 403-3430 • michael@eisenberg-lawoffice.com • www.eisenberg-lawoffice.com

November 30, 2016

Everette Travis
3605 Hansberry Court, NE
Washington DC 20018

RE: Engagement letter for services regarding Everette Travis's Veterans Affairs issue,
VA File number – [REDACTED] DOB: [REDACTED]

Dear Mr. Travis,

This letter will confirm our recent discussions. It was a pleasure talking with you earlier during our telephone conference. As I had explained to you, it is my opinion that you definitely need the assistance of a lawyer, whether it be our firm or another lawyer. In my opinion, the matter is too complex for you to represent yourself.

As I had explained to you, if you wish my office to represent you before the U.S. Department of Veterans' Affairs (DVA) and (if need be) the Court of Appeals for Veterans' Claims (CAVC), Court of Appeals for the Federal Circuit (CAFC), or the Supreme Court of the United States (SCOTUS) our fee will be, as outlined below:

CONTINGENCY FEE: Client agrees to pay a fee equal to twenty (20) percent of the total amount of any past-due benefits awarded on the basis of the Client's claim with DVA. It is understood that this Contingency Fee is to be paid by the DVA directly to the Attorney from any past-due benefits awarded on the basis of the Client's claim.

Work will be deemed completed upon ruling by DVA unless Client and Attorney both agree that an appeal to CAVC is appropriate. Then work will be deemed completed upon ruling CAVC and any subsequent action, if appropriate, by the DVA.

EAJA FEES AND ASSIGNMENT OF EAJA FEES: If this case is appealed to CAVC or CAFC or SCOTUS and Equal Access to Justice Act (EAJA) fees are appropriate, both parties agree that, if appropriate, any EAJA fee awarded will be deemed earned and paid to Mr. Eisenberg. Further, by signing below, you agree to assign these moneys so that the government can pay the attorney directly. If said fees are paid by the government directly to you, you agree to remit said funds to Mr. Eisenberg within three (3) days. EAJA attorney fees sought and recovered shall be applied to Client's contingency fee owed to Attorney.

Law Office of Michael D.J. Eisenberg, Attorney and Counselor at Law

CLIENT AGREES TO PAY COSTS. The above does not include any out-of-pocket costs that may be incurred, such as court filing fees, sheriff's fees, deposition costs, photocopying, etc. As explained, these COSTS are in addition to our FEE and are not included in the FEE. Client agrees to pay said costs within 7 (seven) days upon receipt of invoice from Attorney for said COSTS. If the aforementioned costs or fees are not paid to attorney within the time prescribed above, reasonable attorneys' fees and costs will be assessed when incurred by the Law Office of Michael D.J. Eisenberg, Attorney and Counselor in Law, in collection of this Invoice. A 1.5% monthly finance charge (which is an annual percentage of 18%) will be applied to all balances outstanding 30 days or longer. Parties agree that any dispute regarding the failure to pay said fees or costs will be litigated in and parties be bound by the jurisdiction of Washington, DC, see Breach of Contract Jurisdiction, *infra*. Client understands that costs must be paid regardless of the case's outcome.

This schedule is acceptable to us, so long as you understand that if you terminate payments, we may terminate our services and withdraw from the case.

BREACH OF CONTRACT JURISDICTION: If the aforementioned Costs or fees are not paid to attorney within the time prescribed above, parties agree that any dispute regarding the failure to pay said fees or Costs will be litigated in and parties be bound by the jurisdiction of Washington, DC. Furthermore, Client agrees to Waive a Jury Trial.

CLIENT COOPERATION: You are also agreeing to cooperate and participate in the conduct of your case and to truthfully and immediately notify us as to anything that may occur that could affect the case. You understand that we are relying on the facts as given to us by you.

It is your duty to respond to our inquiries and communications promptly and to provide promptly all information known or available that may be relevant to our engagement, to provide us with factual information and materials required in order to perform the foregoing services, and to keep us informed of your mailing address and other contact information. If, at any time during the course of this representation, your address becomes unknown or we are otherwise unable to contact you, we shall be permitted to withdraw from this representation by sending you a certified letter to your last known address.

DISCLAIMER OF GUARANTY: Obviously, depending upon the facts as they are developed, our opinion could change and you could be awarded more or less, or even lose. You also understand that getting a judgment is not the same as getting cash and that you may have to expend additional Costs and Fees to collect the judgment.

You asked me if spending money on legal fees in this case is throwing good money after bad, and I told you that at this point, I couldn't give you an answer, and that you should understand that there are no guarantees of winning or collecting.

It is my opinion, however, that whether you use our firm or other lawyers, you should proceed with your case. Please do not delay. If you delay the commencement of your legal issue, you may at some point be barred from bringing it.

Law Office of Michael D.J. Eisenberg, Attorney and Counselor at Law

ARBITRATION OF FEE DISPUTE. By signing below, you agree that any fee dispute that you may have that cannot be resolved between us will be submitted to the DC Bar Attorney-Client Fee Arbitration Board (ACAB). A copy of the ACAB's rules are available through the ACAB staff. Their number is 202-737-4700, ext. 216. **I want to encourage you to contact the ACAB for counseling and information prior to deciding whether to sign this agreement.**

RETURN OF CLIENT FILES: Client acknowledges that Attorney runs a "paperless" office. Most documents provided to Attorney will be returned to Client. Attorney will first scan the documents and provide an electronic copy either by e-mail or CD. However, there are exceptions where some original documents may be maintained by Attorney. Note: D.C. Bar Legal Ethics rules require me to keep client files for a minimum of five years, unless the client requests that he or she take possession of the file. Upon completion of this matter, Attorney will forward any hard copies to the last known address of the client. All valuables must be returned to the client or other proper party before the file can be destroyed or discarded. By signing below, you, the client, agree that I am permitted to destroy or discard your file after five years unless you request it before the expiration of this time. In any event, you, the client, agree to pay for the shipping of these materials.

REPRESENTATION OF ADVERSE INTERESTS. Client is informed that the Rules of Professional Conduct require the Client's informed written consent before an Attorney may begin or continue to represent the Client when the attorney has or had a relationship with another party interested in the subject matter of the Attorney's proposed representation of the client. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for Client under this agreement. As long as Attorney's services for Client continue under this agreement, Attorney will not agree to provide legal services for any such party without Client's prior written consent.

SETTLEMENT/CONCLUSION. Attorney will not settle Client's claim without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney. Upon conclusion of this matter, as required by Rule 1.5(c) of the D.C. Rules of Professional Conduct, Attorney will provide Client with a written statement of the outcome, and in the event of a recovery, shall set out its distribution.

ATTORNEY'S LIEN. By signing below, parties agree Attorney will have a lien for Attorney's fees and costs advanced on all claims and causes of action that are the subject of his representation of Client under this agreement and on all proceeds of any recovery obtained (whether by settlement, arbitration award, or court judgment).

DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Attorney. Notwithstanding the discharge, Client will be obligated to pay Attorney out of the recovery a reasonable attorney's fee for all services provided and to reimburse Attorney out of the recovery

Law Office of Michael D.J. Eisenberg, Attorney and Counselor at Law

for all costs advanced. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for Fees, Attorney will bear the loss.

WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) The client consents, and (b) the client's conduct renders it unreasonably difficult for the attorney to carry out the employment effectively. Notwithstanding Attorney's withdrawal, Client will be obligated to pay Attorney out of the recovery a reasonable attorney's fee for all services provided, and to reimburse Attorney out of the recovery for all costs advanced, before the withdrawal. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for Fees, Attorney will bear the loss.

ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

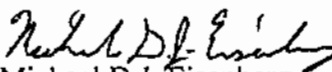
ATTORNEY'S FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney's fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

EXPIRATION OF ENGAGEMENT LETTER: If we do not receive a signed copy of this letter within thirty (30) days, I shall assume that you have obtained other counsel or have decided not to pursue this matter, and shall mark my file "closed" and do nothing further.

QUESTIONS: If any of the above is not clear, or if you have any questions, please do not hesitate to call me.

Law Office of Michael D.J. Eisenberg, Attorney and Counselor at Law

Very truly yours,


Michael D.J. Eisenberg

The above is understood and agreed to:

Dated: December 14, 2016

Client Name: Everette Travis
Everette Travis

Encl.

Re: Disciplinary Docket Nos:
2014-D318 (Glaab)
2016-D399 & 2019-D058 (Swain)
2017-D057 (Faust)
2019-D123 (Mitchell)
2020-D239 (Brisendine)
2021-D010 (Travis)

Respondent's Motion to Dismiss
Exhibit 18

(E-mail from L. Brisendine)

RMX 18 2/2