Fulton County Superior Court
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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, v. JEFFREY B. CLARK, ET AL., Defendants	Case No. 23SC188947

MOTION TO EXTEND DISCOVERY AND MOTION DEADLINES

Comes Now Jeffrey Bossert Clark, Defendant in the above-entitled matter, and respectfully moves the Court to extend the current deadlines for Defendant's discovery and Defendant's motions, which are currently set for December 4, 2023, and January 8, 2024, respectively. In support of this Motion, Mr. Clark shows the following:

The District of Columbia Office of Disciplinary Counsel filed disciplinary charges against Mr. Clark on July 19, 2022. *See In Re: Jeffrey B. Clark, Esq.*, D.C. Board of Professional Responsibility, Disciplinary Docket No. 2021-D193. The charges are based on the ***same conduct*** for which Mr. Clark is charged in this case and rely on the identical theory—that he committed "attempted dishonesty" in the same draft letter that the District Attorney contends was an attempted false writing in Count 22 of the Indictment. The D.C. Bar and the District Attorney propound identical theories of falsity—that the

letter proposed that the Department of Justice take a position that was different than its then-existing position with respect to the 2020 election.[1]

Mr. Clark sought dismissal of the disciplinary charges in the highest court in the District of Columbia (the D.C. Court of Appeals, an Article I court) on various jurisdictional grounds, but the court declined to rule on those arguments. *See In Re: Jeffrey B. Clark, Esq.*, Board Docket No.: 22-BD-39, Sep. 15, 2022. He also sought dismissal at the Hearing Committee level in the D.C. Bar disciplinary process. That motion was denied on the ground that under the D.C. Bar's rules, the Hearing Committee lacked authority to rule on threshold jurisdictional or legal issues, but would instead conduct an evidentiary hearing and make a recommendation on legal and jurisdictional defenses for later decision by the Board of Professional Responsibility and thereafter the D.C. Court of Appeals. This, despite the U.S. Supreme Court emphatically and repeatedly ruling that threshold jurisdictional issues must be decided first. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (personal and subject matter jurisdictional questions must be resolved before the merits); *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94-95 (1998) (requirement to establish subject matter and personal jurisdiction at the threshold is "inflexible and without exception" because "jurisdiction is the power to declare law," and, "[w]ithout jurisdiction the court cannot proceed at all in any cause") (cleaned up).

[1] Mr. Clark contends both in this case and in the D.C. Bar proceedings that this theory of attempted dishonesty or attempted false writing is logically and legally senseless because it presents no colorable legal basis for asserting that any rule of professional conduct or any criminal statute was broken.

Mr. Clark also sought what the D.C. Bar, under its rules, calls "deferral" of the evidentiary hearing based on the pendency of this criminal case. The Chairman of the Hearing Committee recommended against deferral on October 25, 2023 (*See* Exhibit 1), and the Chair of the Board of Professional Responsibility adopted that recommendation and denied the request for deferral on November 3, 2023 (*See* Exhibit 2).

Mr. Clark also moved for continuance of the evidentiary hearing based on the pendency of this criminal case. On November 7, 2023, the Chair of the Hearing Committee denied the motion for continuance and set the evidentiary hearing to begin on January 9, with trial days running as follows: January 9-10, January 16-17, and January 24-25, 2024. (*See* Exhibit 3).

The Committee Chair's Order also set multiple intermediate deadlines for exchanging witness and exhibit lists, as well as for motions, expert disclosures, etc., several of which are immediately upon us and will prove very time-consuming to meet.

In addition, as the Court will recall, Mr. Clark removed this case to federal court. The federal court ordered remand back to this Court. Mr. Clark has appealed that ruling to the Eleventh Circuit. We also moved for stay pending appeal in the trial court, but the trial court has not ruled. Accordingly, we moved for a stay in the Eleventh Circuit. Our reply brief on that motion is due next Monday, November 13th, and our opening merits brief is due the Monday after that, November 20, 2023.

Mr. Clark also removed the bar discipline case to the District Court for the District of Columbia in October 2022. After eight months, the District Court there remanded on June 8, 2023 (approximately two months before the Indictment here was handed down). Mr. Clark then appealed that ruling to the D.C. Circuit. Mr. Clark sought two stays pending that appeal in both the trial court and the D.C. Circuit (one of which was filed pre-Indictment on July 11, 2023 and the other of which was filed post-Indictment on August 17, 2023, (and which pointed to the Indictment as a basis for stay)) and both motions were denied.

Additionally, after the Indictment in this case was issued, Mr. Clark filed a motion in the Article I D.C. Court of Appeals to hold the disciplinary proceedings in abeyance pending resolution of the removal proceedings in federal court in Washington D.C., and these criminal proceedings. The D.C. Court of Appeals has not ruled, despite Mr. Clark having filed multiple requests that the court do so, given the overlapping schedules of the bar, removal, and criminal proceedings.

In short, we have diligently and energetically pursued postponement—through all available avenues—of the D.C. Bar proceedings in favor of this proceeding. But to no avail. Our view is that these proceedings in Fulton County (whether removed or not to federal court) should take precedence and that their resolution holds the prospect of simplifying the bar proceedings. Bar authorities typically do not seek to adjudicate ethics matters before related criminal proceedings are completed. We thus cannot help but think

that the strange insistence of the D.C. Bar to go first is explainable by politics and not by the application of neutral principles, including principles of efficiency.

And, as noted, just yesterday, on November 7, 2023, the Chair of the Hearing Committee presiding over Mr. Clark's bar disciplinary proceedings, issued an aggressive scheduling order setting the evidentiary hearing to begin on January 9, 2024, and setting numerous other pre-trial deadlines leading up to that hearing.

At present, between this case, the Eleventh Circuit removal appeal, the D.C. Circuit removal appeal (both of which removal appeals Mr. Clark possesses as of right as a federal officer under 28 U.S.C. § 1447(d)), and the D.C. Bar evidentiary hearing, Mr. Clark has the following plethora of deadlines over the next two months (interspersed both before and after the seasonal holidays):

Date	Event	Tribunal
11/9/23	Deadline to Request Additional Hearing Days	DC Bar
11/13/23	Clark's Reply in Support of Stay	11th Circuit
11/13/23	Deadline to Request Zoom Hearing	DC Bar
11/13/23	Deadline to Meet and Confer on Any Prehearing Motions	DC Bar
11/15/23	Exchange Witness Lists	DC Bar
11/20/23	Clark's Appellant's Brief	11th Circuit
11/20/23	Clark's Reply in Support of Personal Jurisdiction Motion (estimated, relates to forthcoming motion to set written responses)	Fulton County Superior Court
11/21/23	Objections to Witness Lists	DC Bar
11/21/23	Prehearing Motions	DC Bar
11/23/23	Thanksgiving	

11/28/23	Responses to Prehearing Motions	DC Bar
12/4/23	Our Discovery Due to District Attorney	Fulton County Superior Court
12/5/23	Designate Expert Witnesses	DC Bar
12/6/23	Clark's Appellant's Brief	DC Circuit
12/12/23	Objections to Expert Witnesses	DC Bar
12/12/23	Preliminary Exhibit List	DC Bar
12/19/23	Objections to Authenticity of Exhibits	DC Bar
12/20/23	District Attorney's Appellee Brief	11th Circuit
12/21/23	Stipulations of Fact	DC Bar
12/22/23	Rebuttal Expert Designation	DC Bar
12/25/23	Christmas	N/A
1/1/24	New Year's Day	N/A
1/2/24	Deadline for Motion to Continue Hearing	DC Bar
1/5/24	D.C. Bar's Appellee's Brief	DC Circuit
1/8/24	Pretrial Motions	Fulton County Superior Court
1/9/24	First Hearing Day	DC Bar
1/10/24	Clark's Reply Brief	11th Circuit
1/10/24	Hearing Day	DC Bar
1/16/24	Hearing Day	DC Bar
1/17/24	Hearing Day	DC Bar
1/24/24	Hearing Day	DC Bar
1/25/24	Hearing Day	DC Bar
1/26/24	Clark's Reply Brief	DC Circuit
2/1/24	Tentative Day to Exchange Signed Exhibits List	DC Bar
2/2/24	Deferred Appendix	DC Circuit
2/16/24	Final Briefs	DC Circuit

It is a sign of a world gone mad that all of this is over a confidential draft of a letter that was never even sent and over which, on elementary constitutional, statutory, and

regulatory grounds, neither a single county prosecutor in Georgia nor the D.C. Bar has any legitimate claim of jurisdiction to challenge.[2]

Laying that to one side, our main point in this Motion is that this is a very difficult and congested calendar. Meeting these deadlines and preparing for the evidentiary hearing in the Bar discipline case in Washington will overburden Mr. Clark and his counsel and compromise the quality of the representation here on which his reputation, livelihood, and liberty depend. Mr. Clark's participation is indispensable to the preparation of his defense in all of these matters, and there is only so much that he and his lawyers can do at one time. Mr. Clark asserted very strong arguments in four different forums in an effort to forestall this dilemma but was not successful in any of them. Now that the D.C. Bar is bound and determined to go forward, Mr. Clark is compelled to seek relief from this Court in the form of a postponement of his deadlines in this Court for 3

[2] Our argument that the D.C. Bar lacks jurisdiction is based on 28 U.S.C. § 530B only granting disciplinary authority over federal lawyers to "States," whereas the District of Columbia is not a "State" and is not defined as a "State" anywhere in Chapter 31 of Part II of Title 28 of the U.S. Code. Additionally, even if the District of Columbia were a State, it would still have to show that it is exercising authority over a federal lawyer "to the same extent and in the same manner as other attorneys in that State," which the D.C. Bar cannot do because it can point to no prior case where a non-federal attorney was charged with ethical violations for attempted dishonesty as to a letter never sent. The regulation promulgated by the Department of Justice likewise extends disciplinary authority over federal attorneys to local bar disciplinarians only "to the same extent and in the same manner as other attorneys in that State." 28 C.F.R. § 77.2(j)(2). Mr. Clark is a class of one—there is no bar discipline case anywhere arising from a draft letter never sent. Finally, the DOJ regulation on which the D.C. Bar relies purports to extend disciplinary authority over federal attorneys to the D.C. Bar exceeds the grant of authority in the statute, and thereby fails at Step 1 of *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The Chair of the Hearing Committee insists that he has no authority to address jurisdictional defenses before holding a hearing on the facts—a ruling that we regard as directly contrary to the Supreme Court's directives in *Ruhrgas* and *Steel Company*, as we note above.

months (after the D.C. Bar hearing is completed), so that his discovery to the State would be due on March 4, 2024 and his motions on April 8, 2023.

We are not seeking delay for the sake of delay—we have already filed one substantial special plea as to lack of personal jurisdiction and will file other motions and pleas as we are able given the multiple litigation demands being stacked upon us. Extending Mr. Clark's discovery and motion deadlines will prevent prejudice to his defense caused by scheduling conflicts as well as promote judicial efficiency as to resolution of the same charges being litigated in a variety of fora.

CONCLUSION

For the reasons given above, Mr. Clark respectfully requests a three-month extension of the current discovery and motion deadlines to March 4, 2024 and April 8, 2024, respectively.

Respectfully submitted, this 8 day of November, 2023.

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076
Two Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 843-1956
hmacdougald@ccedlaw.com

BERNARD & JOHNSON, LLC

/s/ Catherine S. Bernard
Catherine S. Bernard
Ga. Bar No. 505124
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Direct phone: 404.432.8410
catherine@justice.law

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of November, 2023, I electronically lodged the within and foregoing ***Motion to Extend Discovery and Motion Deadlines*** with the Clerk of Court using the Odyssey e-file system which will provide automatic notification to counsel of record for the State of Georgia:

Fani Willis, Esq.
Nathan J. Wade, Esq.
Fulton County District Attorney's Office
136 Pryor Street SW
3rd Floor
Atlanta GA 30303

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076

Two Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 843-1956
hmacdougald@ccedlaw.com

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

FILED
Oct 25 2023 3:29pm
Board on Professional Responsibility

In the Matter of:	:	
	:	
JEFFREY B. CLARK,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-039
	:	Disciplinary Docket No. 2021-D193
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

REPORT AND RECOMMENDATION

Pending before the Hearing Committee Chair are Mr. Clark's Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1), and Disciplinary Counsel's Opposition, Mr. Clark's Reply, Mr. Clark's Post-Oral Argument Supplemental Brief on Deferral, Disciplinary Counsel's Response to October 20, 2023 Filing, and Mr. Clark's Reply in Support of Post-Oral Argument Request for Discovery. For the reasons set forth below, I recommend that the Board Chair deny Mr. Clark's motion for deferral.

I. BACKGROUND AND PROCEDURAL HISTORY

Disciplinary Counsel filed the Specification of Charges in this matter on July 19, 2022. Mr. Clark filed his Answer on September 1, 2022.

On August 29, 2022, prior to filing his Answer, Mr. Clark sought to defer this matter on various grounds, including the existence of federal and state criminal investigations into the same conduct alleged in the Specification of Charges, the

pendency of a subpoena enforcement action before the District of Columbia Court of Appeals and a contention (then asserted both before the District of Columbia Court of Appeals and here) that 28 U.S.C. § 530B exempts District of Columbia Bar Members who are also Department of Justice lawyers from the requirements of the District of Columbia Rules of Professional Conduct. On September 12, 2022, I recommended that the motion be denied. The Board Chair agreed in a September 27, 2022 Order.

A pre-hearing conference was held on October 6, 2022, and this matter was set for a hearing to begin on January 9, 2023. On October 17, 2022, Respondent filed a notice of removal of this matter to the United States District Court for the District of Columbia. Disciplinary Counsel filed a motion to remand on October 21, 2022. On June 9, 2023, Disciplinary Counsel notified the Hearing Committee that the District Court had granted Disciplinary Counsel's motion to remand on June 8, 2023. *See* Order, *In re Clark*, Case Nos.: 22-mc-0096, 22-mc-0117, 23-mc-0007 (D.D.C. June 8, 2023) ("this matter shall be REMANDED for further proceedings") (emphasis in original); *see also* Memorandum Op., *In re Clark*, Case Nos.: 22-mc-0096, 22-mc-0117, 23-mc-0007 (D.D.C. June 8, 2023) (setting forth basis for remand order). Mr. Clark asked the Federal District Court to stay the remand order pending his appeal to the D.C. Circuit. The Federal District Court denied Mr. Clark's motion to stay on August 25, 2023. Mr. Clark has asked the D.C. Circuit to stay the remand order. Mr. Clark's stay request remains pending.

On October 5, 2023, Disciplinary Counsel filed a Supplement to Notice of Remand, attaching the docket sheet in *In re Clark*, D.C. App. No 22-BG-0891, which notified the Hearing Committee that a certified copy of the remand order has been sent by the District Court Clerk, and received by the Court of Appeals Clerk. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.").

On October 6, 2023, the Hearing Committee set a pre-hearing conference to schedule the hearing in this matter. On October 11, 2023, Mr. Clark filed his Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1) ("Request"). On October 12, 2023, Mr. Clark supplemented an earlier motion in the Court of Appeals, asking it to exercise its supervisory authority and stay these proceedings, among other relief. The Court has not ruled on Mr. Clark's October 12 supplement. Disciplinary Counsel filed its Response to Mr. Clark's Request on October 18, 2023 ("Response"). Mr. Clark filed a Reply in Support of his Request shortly before the hearing on October 19, 2023 ("Reply"). I heard oral argument from the parties on Mr. Clark's request during the previously-scheduled October 19, 2023 pre-hearing conference.

Then, on October 20, 2023, Mr. Clark filed a Post-Oral Argument Supplemental Brief on Deferral in the same pleading with a "Related Motion for Discovery," and "Alternative Motion for Continuance." On October 23, 2023,

Disciplinary Counsel filed a response that addressed the discovery request and Mr. Clark filed a Reply to that response on October 24, 2023.

II. SUMMARY

Mr. Clark's Renewed Request is "based mainly on the opening of a criminal case against Respondent involving the same subject matter at issue here." Request at 1. Disciplinary Counsel opposes deferral.

This matter is governed by Board Rule 4.2:

> After a petition has been filed, either Disciplinary Counsel or respondent may request deferral of a disciplinary case based upon the pendency of either a related ongoing criminal investigation or related pending criminal or civil litigation. Such a request shall be filed with the Office of the Executive Attorney and shall be served on the opposing party by the party making the request. A party may file an opposition to such a request within five days of the filing of the request with the Office of the Executive Attorney. The Executive Attorney shall submit the request and any opposition thereto to the Chair of the Hearing Committee to which the case is assigned. The Chair of the Hearing Committee shall transmit the request for deferral, with any opposition thereto, to the Chair of the Board with a recommendation as to the action the Chair of the Hearing Committee considers appropriate within five days of receipt of any opposition to an application for deferral or five days after the date such opposition was due. The Board Chair shall rule on the motion after evaluating the pleadings and recommendation under the standards in Rule 4.1.

Board Rule 4.1 provides that

> Before a petition has been filed, a Contact Member may approve a request by Disciplinary Counsel for deferral based upon the pendency of a related ongoing criminal or disciplinary investigation or upon related pending criminal or civil litigation when there is a substantial likelihood that the resolution of the related investigation or litigation will help to resolve material issues involved in the pending disciplinary matter.

Reading Rules 4.1 and 4.2 together, the question presented by Mr. Clark's deferral request is whether there is a "substantial likelihood that the resolution of" the criminal case against Mr. Clark "will help to resolve material issues" in this disciplinary proceeding.

After careful consideration of all of the briefing and the parties' arguments during an October 19, 2023 pre-hearing conference, the Hearing Committee Chair recommends that the Chair of the Board on Professional Responsibility deny Mr. Clark's Request.[1]

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[1] Although Mr. Clark's Post-Oral Argument Supplemental Brief on Deferral is in the same pleading with a "Related Motion for Discovery," and "Alternative Motion for Continuance," the Board Rules direct these additional motions to a different decisionmaker. Rule 4.2 specifies that Deferral Motions are to be decided by the Board Chair after receiving a recommendation from the Hearing Committee Chair. The discovery and continuance rules require disputes to be decided by Hearing Committee Chair. *See* Board Rules 3.1 and 7.10. I will address these issues on the merits in a separate order.

However, one aspect of Mr. Clark's Related Motion for Discovery needs to be addressed here. Mr. Clark not only seeks discovery into how disciplinary counsel has handled other matters, but also requests that I delay issuing any recommendation concerning his Renewed Request until Disciplinary Counsel complies with his discovery request. Mr. Clark contends that "the requested information will assist the Hearing Committee Chairman and the Board Chairman in their interpretation and application of Board Rules 4.1 and 4.2 by providing relevant context regarding the pattern and practice of *de facto* self-issued deferrals during the investigative stage, and deferrals for pending criminal prosecutions in the post-petition stage." Reply in Support of Post-Oral Argument Request for Discovery at 1. This delay, however, is not authorized by the Rules. Board Rule 4.2 requires that the Hearing Committee Chair transmit a recommendation concerning the disposition of a deferral request within five days of receipt of the opposition to that request. Nor is the discovery that Mr. Clark seeks relevant to the question before me. The issue before me is whether

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III. DISCUSSION

A. Mr. Clark's Arguments

Mr. Clark argues that "[t]he primary reason to defer this case is to await the outcome of *State of Georgia v. Donald J. Trump et al.*, in which Mr. Clark is named as a co-defendant." Request at 1. While maintaining that he is innocent of the criminal charges in the Georgia indictment, Mr. Clark asserts that a criminal conviction in Georgia would streamline this case considerably.

He also argues that deferring this matter pending completion of the Georgia prosecution may provide him with more evidence to use here or with legal rulings on some of his defenses. He states that he shortly expects to receive access to several terabytes of information expected to be produced in discovery in the Georgia prosecution, and which, Mr. Clark argues, may contain exculpatory information. He also asserts that he expects to urge in Georgia that he cannot be prosecuted for allegations that are also involved in this proceeding and may obtain rulings on those issues.

Mr. Clark also seeks deferral based on another criminal proceeding. He asserts that he is Unindicted Coconspirator #4 in the indictment filed by the Special Counsel against former President Trump. *United States v. Trump, et al.*, 1:23-cr-00257 (D.D.C.). He argues that this leaves him "in the unenviable potential position

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there is a substantial likelihood that the resolution of the related investigation or litigation *Mr. Clark is facing* will help to resolve material issues in *this* proceeding, not how Disciplinary Counsel handled other cases. For these reasons, I see no basis to delay transmission of this recommendation to the Board Chair.

of having to simultaneously defend a criminal case in an unfamiliar state, avoid potential indictment in federal court, and litigate in this forum to save his family's livelihood." Request at 11.

Mr. Clark argues that deferring this case pending the resolution of "his criminal matter(s)" would "help to resolve this case by potentially mooting Fifth Amendment problems that would prevent a fair trial in the bar disciplinary process here." Request at 12. Mr. Clark asserts that he "simply cannot allow him to testify here on the same subject matter of the pending criminal charges," thus Mr. Clark "may well be unable to counter the ODC's allegations against him" especially those relating to his intent because "Mr. Clark is the only individual who can address the substance of ODC's case and no third-party witness can substitute for his testimony." Request at 12-13. He argues that without his testimony, "the disciplinary hearing will not be a true adversarial process and the search for truth will be greatly impeded." Request at 13.

Mr. Clark argues that holding a hearing while a criminal case is pending against him would be a break from prior precedent—"sanctions for criminal conduct nearly always follow (not precede) a conviction in the related criminal case" (Request at 15)—and would "raise serious questions in the public's perception of whether high profile attorneys with political affiliations out of step with the prevailing political affiliations and views in D.C. can hope to receive even-handed treatment from the Board." Request at 20.

Mr. Clark asserts that, at this point, he is involved in proceedings before several tribunals and deferring this case will save him the expense of also facing this proceeding.

Finally, Mr. Clark argues that deferral would permit the resolution of his argument, now pending in the District of Columbia Circuit, that the United States District Court for the District of Columbia erred in granting Disciplinary Counsel's motion to remand this case or denying Mr. Clark a stay of that remand pending appeal.

B. Disciplinary Counsel's Responses

Disciplinary Counsel opposes deferral. It argues that "there is no prospect that the criminal case will resolve any material factual issues in the disciplinary case. That is because the facts of Respondent's conduct are a matter of public record." Response at 2. It also argues that the Georgia prosecution will not resolve issues here because the Georgia indictment charges Mr. Clark with violating the Georgia criminal code, not the D.C. Rules of Professional Conduct, which are charged here. It further argues that Mr. Clark is speculating when he argues that evidence of impropriety in the 2020 election will suddenly appear four years after the fact, and that this evidence will somehow justify Respondent's conduct in 2021.

Regarding Mr. Clark's Fifth Amendment arguments, Disciplinary Counsel argues that neither Rule 4.1 nor 4.2 permits deferral to prevent a respondent from offering testimony that might be used against him in a criminal prosecution, and more broadly that a defendant is not entitled to a stay in civil or administrative

proceedings to avoid waiving his right against self-incrimination in a pending criminal case.

As to the "typical" interplay between criminal prosecutions and disciplinary cases, Disciplinary Counsel argues that nearly all of the cases Mr. Clark cites involve conduct (e.g., theft, sexual abuse, securities fraud, assault, vehicular homicide) that does not directly involve the practice of law and of which Disciplinary Counsel would be unaware were it not for the criminal case. Disciplinary Counsel acknowledges that it sometimes becomes aware of a criminal investigation before a conviction, but asserts that "it often makes sense for the criminal investigation to proceed because the facts of the underlying conduct are in question and the criminal process has a greater ability to develop those facts (such as by means of search warrants and the grand jury) than is available in a disciplinary investigation, which is limited to subpoena authority for documents only." Response at 6. Disciplinary Counsel notes that if the criminal case results in a conviction Disciplinary Counsel can proceed under the streamlined procedures of Rule XI, § 10.

Finally, Disciplinary Counsel argues that Mr. Clark seeks an indefinite delay of these proceedings, citing the fact that there is no trial date in the Georgia prosecution, and no charges against Mr. Clark in the Special Counsel investigation.

IV. ANALYSIS

A. The Georgia Prosecution and the Special Counsel Investigation

As quoted above, Rule 4.2 permits deferral when there is a "substantial likelihood that the resolution" of an "ongoing criminal investigation or related

pending criminal . . . litigation" "will help to resolve material issues involved in the pending disciplinary matter." This language limits the inquiry in two respects.

First, the only grounds the Rule provides is whether the "***resolution***" of another matter "will help to ***resolve*** material issues involved ***in the pending disciplinary matter***." (Emphasis added). The Rule does not authorize deferral based on many of the grounds Mr. Clark urges. The Rule requires assessment of whether the "resolution" of that action will help to "resolve" material issues in this proceeding – not whether other proceedings might bring produce useful evidence in this proceeding or whether legal rulings in the case might be useful as precedent. The Rule does not contemplate that disciplinary proceedings will be deferred because a respondent also needs to prepare for other proceedings. The Rule does not authorize deferral because it is more common to have disciplinary charges follow a criminal conviction or because a respondent believes that Disciplinary Counsel's decision-making concerning deferral of matters prior to charges being filed (under Rule 4.1) is improper or inconsistent. Nor does it authorize deferral because a disciplinary hearing may require a respondent to decide whether to assert a Fifth Amendment privilege against self-incrimination. Accordingly, the Rule provides no basis for deferral on these grounds.

Case law has also rejected Mr. Clark's contention that the Constitution affords a respondent in a disciplinary case to avoid having to choose between testifying in the disciplinary case and asserting his Fifth Amendment rights. *See, e.g., De Vita v. Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970); *Bachman v. Statewide Grievance Comm.*,

No. CV126028403S, 2012 WL 4040367, at *8 (Conn. Super. Ct. Aug. 22, 2012); *People v. Jobi*, 37 Misc. 3d 954, 960, 953 N.Y.S.2d 471, 476 (Sup. Ct. 2012); *Arthurs v. Stern*, 560 F.2d 477, 478–79 (1st Cir. 1977); *Sternberg v. State Bar of Mich.*, 384 Mich. 588, 591, 185 N.W.2d 395, 397 (1971). In *De Vita,* for example, the Third Circuit rejected the argument advanced by Mr. Clark here: that "the Fifth Amendment should be so construed that one is not faced with the compulsion to add his own possibly affirmative good impression to weight of evidence in the disciplinary hearing before the criminal trial." We agree with *De Vita* that

> [t]his argument proves too much, for it applies with equal force to every situation where civil and criminal proceedings may arise out of the same factual pattern. If, for example, the charge against an attorney was embezzlement of a client's funds, acceptance of plaintiff's position would require that the wronged client await the completion of a criminal trial before he sought a civil recovery, because of the possible compulsion of the risk of a judgment. The same would be true of every defendant in a wrongful death action; of many taxpayers; of most antitrust defendants.

De Vita v. Sills, 422 F.2d at 1178.

Mr. Clark does not cite or distinguish the large body of case law directly on point. Rather he cites the more general "unconstitutional conditions" doctrine. Request at 13. That doctrine "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). This doctrine protects Mr. Clark in some ways. For example, he is entitled at hearing to invoke the Fifth

Amendment in response to specific questions. *See In re Barber*, 128 A.3d 637, 640 (D.C. 2015) (and cases cited). He cannot be sanctioned solely *for* invoking the Fifth Amendment. *See Spevack v. Klein*, 385 U.S. 511, 517–518, (1967). But as cases on point recognize "[n]ot every adverse consequence of invoking the self-incrimination privilege constitutes compulsion." *Attorney Grievance Comm'n of Maryland v. Unnamed Attorney*, 467 A.2d 517, 520 (Md. 1983). A respondent does not have a "constitutional right to be relieved of the burden of choosing whether to exercise his right to remain silent." *Id.* at 522.

Just as every criminal defendant is faced with the potentially difficult choice whether to testify (and waive the privilege) or remain silent and risk leaving proof unrebutted or insufficiently rebutted,

> Manifestly, difficult choices confront an individual who is the subject of simultaneous criminal and civil or administrative proceedings. It is well accepted that such an individual has no constitutional right to be relieved of the choice whether or not to testify, and civil proceedings will not be enjoined pending the disposition of the criminal charges.

Attorney Grievance Comm'n of Maryland, 467 A.2d at 522 (citations omitted). And this same analysis "has been applied to attorneys in the conduct of disciplinary proceedings." *Id.*[2]

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[2] Mr. Clark also suggests that he has a constitutional right to deferral because if "Mr. Clark were to receive a bar sanction and later obtain exculpatory evidence through the criminal case calling one or more factual presuppositions of the sanction into question, he would then be able to mount a due process challenge or otherwise present grounds for reconsideration of any prior disciplinary resolution." Request at

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Second*,** Rule 4.1/4.2 requires that not just that there be a possibility, but a "substantial likelihood*** that the resolution" of an "ongoing criminal investigation or related pending criminal . . . litigation" "will help to resolve material issues involved in the pending disciplinary matter. Rule 4.1 (emphasis added).

There is not, however, a "substantial likelihood" that material issues in this case will be resolved by a resolution of the Georgia prosecution or the Special Counsel's investigation. The resolution of the Special Counsel's investigation may result in no charges against Mr. Clark, an indictment being filed, or the parties reaching a plea agreement. The resolution of the Georgia prosecution might include the dismissal of the charges (before or after trial), an acquittal, or a conviction. It may also lead to an undifferentiated verdict that does not reflect whether, for example, an acquittal was based upon particular requirements of the Georgia statute under which Mr. Clark was charged that may or may not apply in this proceeding.[3]

8-9. This scenario involves many layers of speculation (for example, that the criminal proceeding will, in fact, produce exculpatory evidence that Mr. Clark did not already have relevant to this proceeding; that it will produce the evidence after it is possible to use it in this proceeding, that this proceeding will go to decision first; that it will be decided in a way that evidence to be obtained in the future might rebut; that this proceeding will be so much faster than the criminal proceeding that there will be no opportunity to move to supplement the record and that the inability to present this evidence at the time the proceeding was conducted would rise to a due process violation). But even putting that aside, the possibility that Mr. Clark might want at some point to mount a due process challenge should various circumstances attain does not make it a denial of due process to proceed based on the rules.

[3] In his Post-Oral Argument Supplemental Brief at 5 n.1, Mr. Clark urges that it is not "necessarily so," that the verdict would be undifferentiated because there is a scenario in which there could be a special verdict. *If* the Eleventh Circuit reverses a

Footnote continued on next page

There is not a "substantial likelihood" that material issues in this case will be resolved by a resolution of the Georgia prosecution or the Special Counsel's investigation that do not result in Mr. Clark's conviction because it seems unlikely that Disciplinary Counsel would be precluded from prosecuting the charged disciplinary rule violations in those circumstances. In *In re Wilde*, the respondent argued that the D.C. discipline system "should have given preclusive effect to the Maryland court's conclusion that she did not commit theft or forgery." *In re Wilde*, 299 A.3d 592, 602 (D.C. 2023). The Court rejected that argument, concluding that it would have been inappropriate to give preclusive effect to the Maryland decision because Disciplinary Counsel was not in privity with the Maryland disciplinary prosecutor. *Id*. at 603.

The resolution of the Georgia prosecution or the Special Counsel investigation would help to resolve material issues here, if the resolution of either matter were that Mr. Clark was convicted of a felony or "any other crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of

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decision by the federal district court remanding Mr. Clark's criminal matter to Georgia state court, and *if* the case went to trial in federal court, and *if* Mr. Clark decided to ask the federal district judge to have the jury use a special verdict that addressed material issues in this case, and if the judge granted the request, the jury could express a view (based on the evidence it received and the law it was instructed to follow) that was directed to a matter at issue in this proceeding. Given these many layers of speculation, we cannot say this scenario is "substantially likely," and even if it were, it would still not mean that the verdict would govern this proceeding or bind Disciplinary Counsel.

justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a 'serious crime.'" *See* D.C. Bar R. XI, § 10(b). In such case, this matter would proceed under D.C. Bar R. XI, § 10(d), which requires Disciplinary Counsel to "initiate a formal proceeding in which the sole issue to be determined shall be the nature of the final discipline to be imposed." Disciplinary Counsel describes this as the "streamlined" procedures available under D.C. Bar R. XI, § 10.

Disciplinary Counsel argues that the Rules do not provide for deferral on this basis, because a proceeding under D.C. Bar R. XI, § 10 would not resolve material issues in "the pending disciplinary matter." Rule 4.1. According to Disciplinary Counsel, the "pending" matter is a proceeding under Rule 8.4(a), (c) and (d) of the District of Columbia Rules of Professional Conduct which do not require conviction of a crime, and D.C. Bar R. XI, § 10 would be a different proceeding. However, Rule 4.1 does not require that the resolution of another proceeding literally resolve the allegations made to date. It requires that there be a "substantial likelihood" that it will "help to resolve" this proceeding. And if it were "substantially likely" that the resolution of the criminal proceeding would lead to the proceeding being transformed into a streamlined process that would "help to resolve" it.

However, we cannot determine that there is a substantial likelihood that Mr. Clark will be convicted of a serious crime following the resolution of the Georgia prosecution, or the Special Counsel's investigation. At this point, there are simply

too many variables, and no evidence has been presented in this case from which to assess that likelihood.

In addition, this is not a situation in which the criminal proceedings can be expected to resolve quickly. Although Mr. Clark had a heading that argues in his (Pre-Argument) Reply that he "does not seek an indefinite stay," Reply at 9, none of the argument that follows suggests any definite limit to the deferral he seeks. To the contrary, he has urged that he is pursuing an appeal of his (to this point) unsuccessful attempt to remove the Georgia prosecution to federal court (the timing of which is uncertain), plans to pursue motion practice before that court (again on no identified schedule or limitation to issues that overlap with proceeding), and, in the event of an adverse verdict, would want to continue defer this case pending an appeal (again without any time limit). There is also no indication when, if ever, he would be indicted in the District of Columbia proceeding, much less the timeline that prosecution could be expected to take. This makes it less likely that the resolution of these other proceedings will help to resolve material issues in this case.[4]

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[4] Mr. Clark urges that we should that we should read Rule 4.1/4.2 more leniently, because, as a practical matter, it is rare that a respondent would ever be able to meet the terms of these rules and because, in practice, these rules would otherwise operate as a one-way ratchet – affording Disciplinary Counsel significant discretion to defer cases (either by inaction or request to the Contact Member under Rule 4.1) when it suits the prosecution of disciplinary claims, while preventing respondents from availing themselves of deferral. Although we are sensitive to this concern, and agree that a rule might be constructed differently, as Mr. Clark also notes, "the four corners of Rules 4.1/4.2 control; they are unique creatures of D.C. law." *Id.* at 7. The Rules do not say (as Mr. Clark) urges that we should defer matters whenever the related matter "will help to resolve material issues," *id.* at 5, or contemplate the near-

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As such, we conclude that the pendency of the Georgia prosecution or the Special Counsel investigation do not support a deferral under Rule 4.2.

B. Deferral for Rulings by the District of Columbia Court of Appeals or the District of Columbia Circuit.

In addition to his "main" argument concerning the Georgia state and potential District of Columbia federal prosecution, Mr. Clark also urges that we should defer the case because of arguments he has made before two other courts. First, Mr. Clark urges that we should defer this case because there is a now a second subpoena enforcement matter before the District of Columbia Court of Appeals and because, in the course of that matter, he has asked that Court to stay this matter or to rule (under 28 U.S.C. §540B) that District of Columbia disciplinary rules do not apply to District of Columbia bar members when they serve as lawyers in the United States Department of Justice.

However, Mr. Clark asserted these arguments before the District of Columbia Court of Appeals as part of an earlier opposition to a subpoena enforcement and

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automatic deferral that would call for disciplinary proceedings to be put on hold whenever there are "factual or legal rulings" that "could prove helpful to how [the] disciplinary case is litigated and adjudicated." *Id.* The words of the Rules ("substantial likelihood," "resolution" (not litigation) of the matter, will help to "resolve," "material") are much more limiting. And if they are too limiting, the solution is to amend the Rule. Our obligation is to follow it. In any event, the sheer number of variables involved in assessing the likelihood of Mr. Clark's criminal prosecution (over what could be many years) actually succeeding in helping to resolve this matter, make the case for finding the "substantial likelihood" necessary to justify deferral much weaker than it could be in circumstances where the criminal prosecution's contours and timing are relatively clear.

request that the District of Columbia Court of Appeal stay this matter; and the District of Columbia Court of Appeals denied the stay and ruled that the subpoena should be considered in the first instance by this hearing committee. *In re Clark*, No. 22-BG-059 (D.C. Sept. 15, 2022). The Board Chair then rejected his argument in adopting the earlier recommendation to deny Mr. Clark's original request for deferral. And since then, the United States District Court for the District of Columbia has rejected Mr. Clark's position that 28 U.S.C. § 540B operated to exempt him from complying with District of Columbia Code of Professional Responsibility. *In re Clark*, 2023 U.S. Dist. LEXIS 100128, *29-*37 (D.D.C. June 8, 2023) (calling it "unmistakable clear" that the statute instead *requires* District of Columbia lawyers who work for the Justice Department to follow their bar rules and "absurd" to read the statute to make officials subject to jurisdictional rules of professional conduct everywhere except where they work). Accordingly, these arguments should be rejected.

Second, Mr. Clark argues that we should either refrain from acting or defer the case because the case has not been properly remanded to us. As explained above, the United States District Court for the District of Columbia has remanded this matter to us. It has also denied a stay of the remand; and ordered the Clerk of that Court to send a certified copy of the ruling to the District of Columbia Court of Appeals, which the Clerk has done. Mr. Clark, however, urges that we should view the Court's order as invalid because under Mr. Clark's reading of the Supreme Court's decision in *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 741 (2023) (ruling that

parties had a right to a stay pending appeal of orders denying a motion to compel arbitration), he had a right to an automatic stay pending his appeal of the Federal District Court's remand order. *See* Request at 22.

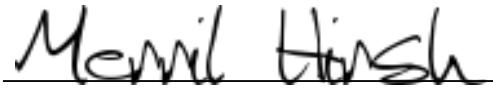
The Board, however, is not a proper forum to obtain collateral review of the Federal District Court's decision (either to remand or to deny the stay). As Mr. Clark notes, his D.C. Circuit appeal "has been on file for about three months already." *Id.* And if the Federal District Court order is to be stayed, it is that court that is empowered to so rule. In the meantime, our obligation is to follow an order that has not been stayed.

In any event, the possibility that Mr. Clark might succeed in an argument that he is entitled to an automatic stay, *regardless* of the merits, pending appeal of the order to remand does not make his appeal "substantially likely" to succeed *on* the merits. The Federal District Court issued a thorough opinion in the case rejecting Mr. Clark's arguments for removal in many instances in strong terms and then ruled that his appeal did not have sufficient merit to justify a stay. Accordingly, the appeal does not meet the standard for deferral.

V. CONCLUSION

For the reasons discussed above, the undersigned Chair recommends that Mr. Clark's Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1) be denied.

HEARING COMMITTEE NUMBER TWELVE

By: 
Merril Hirsh
Chair

cc:

Jeffrey Clark, Esquire
c/o Charles Burnham, Esquire
Robert A. Destro, Esquire
Harry W. MacDougald, Esquire
charles@burnhamgorokhov.com
robert.destro@protonmail.com
hmacdougald@ccedlaw.com

Hamilton P. Fox, III, Esquire
Jason R. Horrell, Esquire
Office of Disciplinary Counsel
foxp@dcodc.org
horrellj@dcodc.org

ISSUED
Nov 3 2023 2:52pm
Board on Professional Responsibility

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:	:	
	:	
JEFFREY B. CLARK,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-039
	:	Disciplinary Docket No. 2021-D193
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

ORDER

Pending before the Board are Respondent's Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1), Disciplinary Counsel's Opposition, Respondent's Reply, Respondent's Post-Oral Argument Supplemental Brief on Deferral, Disciplinary Counsel's Response to October 20, 2023 Filing, Respondent's Reply in Support of Post-Oral Argument Request for Discovery, and the recommendation of the Chair of Hearing Committee Number Twelve that Respondent's motion for deferral be denied.

The Chair of the Board is authorized to defer disciplinary proceedings "when there is a substantial likelihood" that the resolution of a related ongoing criminal investigation or related pending criminal or civil litigation "will help to resolve material issues involved in the pending disciplinary matter." Board Rules 4.1 and 4.2. As is discussed in the Hearing Committee Chair's comprehensive Report and

Recommendation, which carefully examined the parties' arguments, Respondent argues that the case should be deferred for the following reasons:

(1) "to await the outcome of *State of Georgia v. Donald J. Trump et al.*, in which Mr. Clark is named as a co-defendant";

(2) to permit him to gather evidence in the Georgia prosecution, or obtain a legal ruling that might help with his defenses here;

(3) to avoid having to simultaneously defend himself here to save his family's livelihood, and in the Georgia prosecution, while also avoiding a potential indictment by the Special Counsel (he is Unindicted Coconspirator #4 in the indictment filed against former President Trump (*United States v. Trump, et al.*, 1:23-cr-00257 (D.D.C.));

(4) to permit him to testify in this proceeding without fear that his testimony could be used against him in the Georgia prosecution or the Special Counsel investigation;

(5) to avoid a break from prior precedent where disciplinary proceedings against members of the D.C. Bar charged with a crime follow the resolution of the criminal prosecution;

(6) to save the cost of defending against Disciplinary Counsel's charges, while also defending himself before other tribunals; and,

(7) to permit the resolution of his argument to the D.C. Court of Appeals that this matter should be stayed, and his argument to the District of Columbia Circuit, that the United States District Court for the District of Columbia erred in granting Disciplinary Counsel's motion to remand this case or denying Respondent a stay of that remand pending appeal.

Disciplinary Counsel opposes the motion, arguing that these are not appropriate grounds for deferral. The Hearing Committee Chair agreed with Disciplinary Counsel and has recommended that the motion to defer be denied.

Substantially for the reasons set forth in the recommendation of the Chair of Hearing Committee Number Twelve, which is adopted and incorporated by reference herein, the Board, acting through its Chair pursuant to Board Rules 4.1 and 4.2, concludes that Respondent has not met the standard for deferral.

Upon consideration of the foregoing, it is hereby

ORDERED that Respondent's Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1) is denied.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Bernadette C. Sargeant
Bernadette C. Sargeant
Chair

cc:

Jeffrey Clark, Esquire
c/o Charles Burnham, Esquire
Robert A. Destro, Esquire
Harry W. MacDougald, Esquire
charles@burnhamgorokhov.com
robert.destro@protonmail.com
hmacdougald@ccedlaw.com

Hamilton P. Fox, III, Esquire
Jason R. Horrell, Esquire
Office of Disciplinary Counsel
foxp@dcodc.org
horrellj@dcodc.org

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

FILED
Nov 7 2023 10:12am
Board on Professional Responsibility

In the Matter of:	:	
	:	
JEFFREY B. CLARK	:	
	:	Board Docket No. 22-BD-039
Respondent.	:	Disciplinary Docket No. 2021-D193
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

ORDER

A pre-hearing conference was held by Zoom video conference on October 19, 2023, at 10:00 a.m. before the Chair and Public Member, Ms. Patricia Mathews, of this Hearing Committee. Disciplinary Counsel Hamilton P. Fox, III, Esquire, Senior Assistant Disciplinary Counsel Theodore Metzler, Esquire, and Assistant Disciplinary Counsel Jason R. Horrell, Esquire, appeared for the Office of Disciplinary Counsel. Charles Burnham, Esquire, Robert A. Destro, Esquire, and Harry W. MacDougald, Esquire, appeared on behalf of Respondent Jeffrey B. Clark.

On October 20, 2023, Mr. Clark filed a Post-Oral Argument Supplemental Brief on Deferral in the same pleading with a "Related Motion for Discovery," and "Alternative Motion for Continuance." ("Post-Hearing Motion"). On October 23, 2023, Disciplinary Counsel filed a response that addressed the discovery request ("Discovery Response") and Mr. Clark filed a Reply to that response on October 24, 2023.

On October 25, 2023, I made a Report and Recommendation to the Board Chair on Mr. Clark's Renewed Motion for Deferral. This Report and Recommendation addressed the portion of Mr. Clark's Post-Oral Argument Supplemental Brief that discusses the Renewed Motion for Deferral and denied his request that I delay my Report and Recommendation in order to permit

him to conduct discovery about Disciplinary Counsel's handling of other cases. *See* Report and Recommendation at 5-6 n.1.[1]

As I indicated there, I am now ruling on the Request for Discovery, itself, and Mr. Clark's Alternative Motion for Continuance.

Request for Discovery

Mr. Clark asks that I order Disciplinary Counsel to produce:

> (1) A list of cases where a D.C. disciplinary hearing was held ***prior to*** related civil or criminal investigations or litigation elsewhere being concluded;
>
> (2) The number and identity of the cases in (1) that went forward where a Rule 4.2 motion was denied; and
>
> (3) A list of cases where Disciplinary Counsel sought a Rule 4.1 deferral and how many of those cases saw deferral granted versus denied.

Post-Hearing Motion at 9.

Mr. Clark contends that "the requested information will assist the Hearing Committee Chairman and the Board Chairman in their interpretation and application of Board Rules 4.1 and 4.2 by providing relevant context regarding the pattern and practice of de facto self-issued deferrals during the investigative stage, and deferrals for pending criminal prosecutions in the post-petition stage." Reply in Support of Post-Oral Argument Request for Discovery at 1. Mr. Clark also asserts that the information is relevant to his "merits defense" that he cannot face discipline on the facts of this case because the disciplinary action is politically motivated in that no one has previously faced discipline on these facts. Post-Hearing Motion at 10.

The Office of Disciplinary Counsel opposes the request. It asserts that the Board Rules (specifically Rule 3.1) do not authorize this discovery. Disciplinary Counsel has no way of

[1] In a November 3, 2023 Order, the Board Chair decided based upon my Recommendation to deny Respondent's Renewed Motion for Deferral.

locating the requested information short of individually reviewing potentially thousands of files. Discovery Response at 1-2.

In Reply, Mr. Clark does not discuss the Rule. However, he argues that the discovery is pertinent because, 28 U.S.C. §540B, if it applies, subjects Justice Department attorneys to the same discipline as would apply to other lawyers and therefore, makes material whether disciplinary decisions can be said to be the same. He also asserts that whatever burden the discovery imposes is outweighed by the harm to Mr. Clark of facing the sanctions that Disciplinary Counsel seeks.

Analysis

Respondents in disciplinary matters are entitled only to "reasonable discovery" as provided by the Board Rules. *See In re Herndon*, 596 A.2d 592 (D.C. 1991) (addressing the limited discovery available in disciplinary proceedings). Mr. Clark's request seeks discovery that the Rules do not provide. Rules 3.1 and 3.2 provide:

> **3.1 Discovery Entitlement and Access.** During the course of an investigation of a complaint and following the filing of a petition, respondent shall have access to all material in the files of Disciplinary Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Disciplinary Counsel. Respondent may, upon two days' notice, orally request access to such files. Any dispute arising under this chapter shall be resolved, after the filing of a petition, by the Hearing Committee Chair upon written application by respondent.
>
> **3.2 Discovery from Non-Parties.** The Chair of the Hearing Committee before which a case is pending (or the Chair of the Board on Professional Responsibility, if the matter is not before a Hearing Committee) may, upon request of respondent, authorize discovery from non-parties by deposition or by production and inspection of documents. Such requests must be made by written motion. Such motions shall be granted only if respondent demonstrates that respondent has a compelling need for the additional discovery in the preparation of respondent's defense and that such discovery will not be an undue burden on the complainant or other persons. Disciplinary Counsel shall make available to respondent subpoenas to compel attendance of such witnesses and the production of such books, papers, and documents as may be necessary to implement discovery authorized under this Rule. Service of such subpoenas shall be arranged by respondent.

Disciplinary Counsel urges that Rule 3.1 is the only provision that applies to discovery from Disciplinary Counsel, and limits that discovery to non-privileged and non-work product "material in the files of Disciplinary Counsel pertaining to the pending charges," and therefore would not permit discovery into other Disciplinary Counsel files. Although this is a reasonable reading of these rules there are potentially contrary arguments. The Rule refers to "***all*** material in the files ***pertaining*** to the pending charges" (emphasis added), and, arguably pertaining is in the eye of the beholder. And arguably, Rule 3.1 does not prevent discovery under Rule 3.2 – although even under Board Rule 3.2, discovery is available only upon a showing that the respondent has a compelling need for it in the preparation of his defense *and* that such discovery will not constitute an undue burden.

However, even if we were to reject Disciplinary Counsel's reading, Mr. Clark's request is not for documents that Disciplinary Counsel has available. They are interrogatories, seeking information and statistics. The Board Rules clearly do not provide for interrogatories. In *In Re Artis*, 883 A.2d 85 (D.C. 2005), the Court of Appeals ruled that "[g]iven the nature of the proceeding and the competing interests, we agree that interrogatories, as provided for under civil court rules, should not be incorporated into the disciplinary process without promulgation of rules governing their use." 883 A.2d at 101. Although the case involved an instance in which Disciplinary Counsel was effectively seeking responses to interrogatories from the claimant, we can see no basis for adding an interrogatory process the Rules do not contemplate for a respondent. Indeed, if anything, the conclusion that Disciplinary Counsel could not promulgate interrogatories makes it even clearer than a respondent cannot. As the Court noted, subject to constitutional limitations, "attorneys under investigation" do have an obligation (that Bar Counsel does not) to respond to Bar Counsel's inquiries under Rule XI, § 8(a). *Id.*

At hearing, Mr. Clark is already entitled to hold Disciplinary Counsel to its obligation to demonstrate not only that the accusations, but the facts proved by clear and convincing evidence, violate the Disciplinary Rules. *See In re Klayman*, 228 A.3d 713, 717 (D.C. 2020) (per curiam); *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001); *In re Thompson*, 579 A.2d 218, 221 (D.C. 1990). If Mr. Clark is correct, the charges will be unsupported, regardless of how other matters have been handled.

Request for Continuance

As an alternative to Mr. Clark's deferral request, he seeks a continuance of the hearing until March 10, 2024 under Rule 7.10. During the hearing that preceding this filing, I heard from both parties about the schedule. Disciplinary Counsel argued that the case should go to hearing in December because it was basically simple, involved conduct over a short period of time, and Disciplinary Counsel's case in chief should take only about two days. *See* October 19, 2023 Tr. at 163-166. At the hearing, Mr. Clark argued for a March date noting that he had a motions deadline in the Georgia case on January 8, 2024, Tr. at 181-82.

After hearing the arguments, I concluded that, while December was too early to work, and we need not begin the hearing on the day of Mr. Clark's motion deadline (January 8) and would accommodate specific conflicts we should begin the hearing during the week of January 9, 2024. We went on to discuss the lead time and preliminary deadlines that counsel would need in order to begin the hearing on that schedule. *See* October 19, 2023 Tr. at 182. As I explained during the hearing and in my Recommendation that the Board Chair deny Mr. Clark's Renewed Motion for deferral, there were several reasons mitigating against pushing the hearing back:

- At the first pretrial in this matter on October 6, 2022, counsel informed me that they could begin the hearing on January 9, 2023.

- Although Mr. Clark was free to seek the removal of the case if he believed it was warranted by law, nothing prevented him from using the intervening year to prepare his case – for example, by sending *Touhey* request he had said were needed to arrange for current or former Justice Department witnesses to be permitted to testify.

- I am concerned that there seems to be a serial delay – in which at each stage, after one or another unsuccessful motion has delayed the proceeding, Mr. Clark asserts a new argument (or repeats an old one) as a basis for seeking additional delay.

- Parties are not entitled to presumptions that their motions will be successful.

- At this point, many of Mr. Clark's arguments for why we should not proceed have been rejected in strong terms by the United States District Court for the District of Columbia both in remanding the case, and in denying his motion to stay the remand pending the D.C. Circuit's consideration of Mr. Clark's appeal.

- There is no stay of either the remand or this proceeding unless and unless an authority grants it.

See Tr. 170-188.

Accordingly, this motion is, in effect, a request for reconsideration. And while I do believe that Board Rule 7.10 is the appropriate rule under which to consider it, I do not believe that Mr. Clark raises any new or compelling reasons for granting the continuance.

Under Board Rule 7.10, "[a] continuance of the hearing date may be granted only for good cause shown." He contends that there is "good cause" for the continuance for three reasons:

> First, it will allow undersigned counsel and Mr. Clark (who is not a deep pocket) to focus in the near term on the more serious criminal charges against him in Fulton County, Georgia, which has a motions deadline of January 8, 2024, without being distracted to the extent that motions practice, witness interactions, and trial preparation here to gear up for a proposed trial date beginning as early as January 9, 2024.
>
> Second, we propose that on January 10, 2024 and February 10, 2024, Mr. Clark be directed to file a status update about the proceedings in Georgia with the Board for distribution to Hearing Committee #12.
>
> Third, a continuance until March 10 will put further time on the clock for the D.C. Circuit and/or the DCCA to rule on Mr. Clark's pending stay motions. This is a solution to approaching scheduling issues that is more consistent with the serious *Coinbase* [*Inc. v. Bielski*, 599 U.S. 736, 741 (2023),] and *BP* [*P.L.C. v. Mayor &*

> *City Council of Baltimore*, 141 S. Ct. 1532 (2021),] issues that the Chair is well aware of and referenced at today's oral argument.

Post-Hearing Motion at 11.

However, the second of these grounds (offering to provide an update on the Georgia case) is a helpful suggestion if there were a continuance granted, not really grounds for granting a continuance in the first place. And the other two grounds do not in the context of this case justify the continuance.

On Mr. Clark's first grounds, I am sensitive to the costs and difficulties of litigation. But delaying the hearing is not likely to make it cheaper. Usually delay means more expense. To this point, a lot of the expense in the litigation has been the result of motion practice that has delayed it. That an effect of Mr. Clark's attempt to remove the action has been to delay the hearing to a point at which it might be less convenient for Mr. Clark is not grounds to delay it further.

On Mr. Clark's third grounds, *Coinbase* and *BP* do not justify continuing the hearing. As I discussed in previous orders, *Coinbase* and *BP* do not address the merits of the federal district court's decision that this matter should be remanded to the Board. At best, Mr. Clark's argument is that these cases create a possibility that he is entitled to an automatic stay (regardless of the merits) pending appeal of the order to remand. Mr. Clark's contention that he is entitled to an automatic stay is undermined to some extent by the fact the DC Circuit has not so ruled, even though his appeal has been pending for some three months. But even if his argument were not undermined, there is no reason to believe that the DC Circuit would be unable to clarify his right to a stay in the next two months before January 9, 2024, and able to so only sometime between January 9 and March 10, 2024. In the meantime, my obligation is to follow the federal district court order under a federal statute that remanded the case "forthwith." 28 U.S.C. § 1447(c).

Schedule

The deadlines specified herein shall apply in this matter.

a. The hearing will be held from **January 9–10, 16-17, and 24-25, 2024**, beginning at **9:30 a.m.** each day. The parties shall appear promptly at that time. If, in the exercise of professional judgment, either party believes that additional hearing dates are necessary beyond those set forth above, or is aware of any conflict with the schedule provided for in this order, that party shall confer with opposing counsel concerning the same and, on or before **November 9, 2023**, file a statement addressing the parties' positions. If necessary, I will schedule a brief additional pre-hearing conference to address any concerns and determine any adjustments to the schedule.

b. Unless Respondent files a notice requesting that the hearing be held over Zoom by **November 13, 2023**, the hearing will be held in Courtroom II of the Historic Courthouse of the District of Columbia Court of Appeals located at 430 E Street, N.W., Washington D.C.

c. On or before **November 15, 2023**, the parties shall exchange lists of witnesses who will testify in their respective direct cases and file them with the Office of the Executive Attorney. The witness lists shall include a brief description of the anticipated testimony of each proposed witness. Witnesses not identified on these witness lists will not be allowed to testify in the parties' direct cases, absent good cause shown. Any objections to witnesses, and the grounds therefor, shall be filed with the Office of the Executive Attorney and served on opposing counsel on or before **November 21, 2023**.

d. On or before **December 5, 2023**, the parties shall designate any expert witness who will testify in their respective direct cases and file the designation with the Office of the Executive Attorney. Such designation shall be accompanied by an expert report which conforms to the

standards set forth in D.C. Superior Court Rule 26(a). Any objections to expert witnesses, and the grounds therefor, shall be filed with the Office of the Executive Attorney and served on opposing counsel on or before **December 12, 2023**. Any rebuttal expert designation and report, conforming to the standard set forth above, may be filed on or before **December 22, 2023**.

e. On or before **November 13, 2023**, the parties shall meet and confer concerning any prehearing motions, including motions *in limine*, that either party intends to file. Any such motion shall be filed on or before **November 21, 2023** and any response thereto may be filed by **November 28, 2023.**

f. On or before **December 12, 2023**, the parties shall file a preliminary exhibit list and exchange proposed exhibits[2] with a PDF formatted copy of proposed exhibits, with bookmarks for the exhibit numbers. For ease of future reference, all exhibits must be separately paginated, identified by an exhibit number (not an exhibit letter), and should not contain letter prefixes or suffixes. (*i.e.*, C-1, C-2, C-3, or 1A, 1B, 1C). Proposed exhibits shall be accompanied by a List of Exhibits Form (provided by the Office of the Executive Attorney and available at https://www.dcbar.org/attorney-discipline/board-on-professional-responsibility/forms-and-documents). The heading, case information, exhibit numbers, and descriptions shall be typewritten (pursuant to Board Rule 19.8) on the List of Exhibits Form, with the three remaining columns and signatures to be completed at the conclusion of the hearing. **All exhibits must comply with Board**

[2] Please note that, as of January 19, 2023, parties will no longer be required to file exhibits with the Office of the Executive Attorney in advance of the hearing, unless otherwise ordered by the Hearing Committee. Rather, pursuant to Board Rule 7.17, the parties will exchange exhibits at least 10 days before the hearing, offer individual exhibits into evidence during the hearing, and file complete sets of admitted exhibits, along with updated exhibit lists, immediately following the hearing. The new Rules are available on the Board's website: https://www.dcbar.org/Attorney-Discipline/Board-on-Professional-Responsibility/Rules-of-the-Board-on-Professional-Responsibility.

Rule 19.8(f), which requires the redaction of certain information. Any objection to the authenticity of proposed exhibits and the grounds therefor, shall be filed with the Office of the Executive Attorney and served on opposing counsel on or before **December 19, 2023.** The written objection to proposed exhibits shall include a copy of the relevant exhibit(s). To the extent either party intends to object to an exhibit on authenticity grounds, the parties are directed to meet and confer in a good faith effort to resolve the issue without Committee involvement. Prior to the conclusion of the hearing in this matter, the parties shall meet and confer regarding the disposition of any exhibits offered into evidence, and shall raise any disagreements with the Hearing Committee so that any dispute regarding the disposition of any proffered exhibit can be resolved before the hearing concludes. **Within seven days following the conclusion of the hearing, each party shall file (1) a completed, signed exhibit form showing which exhibits moved, excluded, and not offered into evidence, and (2) provide the Office of the Executive Attorney with a PDF formatted copy of their admitted exhibits and a PDF formatted copy of their excluded exhibits.** Any exhibits filed under seal shall be accompanied by a redacted version for inclusion in the public record, and any such sealed exhibit shall be clearly designated on the parties' exhibit lists.

g. On or before **December 21, 2023**, the parties shall confer and file any stipulations of fact to which they have agreed. The parties are strongly encouraged to tailor their respective direct cases at the hearing with those stipulations in mind so as to avoid as much as possible the repetition of stipulated facts.

h. If Respondent has filed notice under Board Rule 7.6(a) of intent to offer evidence of disability in mitigation of sanction pursuant to Board Rule 11.13, Respondent shall, no later than the date set by the Hearing Committee for the filing of witness and exhibit lists, serve on

Disciplinary Counsel a list identifying any witnesses Respondent intends to call in support of the disability mitigation claim (with summaries of their testimony) and copies of any exhibits that Respondent intends to offer in support of the disability mitigation claim. Respondent shall not be required to file this witness list or exhibits with the Hearing Committee at that time, unless Respondent has decided to disclose to the Hearing Committee the intent to raise an alleged disability in mitigation of sanction. *See* Board Rule 7.6(b). Disciplinary Counsel's disability-related witness list and exhibits shall be filed after Respondent completes the presentation of disability-related evidence, or at such other time as the Hearing Committee may direct.

i. The parties are directed to avoid scheduling conflicting matters and shall inform any court/administrative agency of the prior commitment to the disciplinary system. Any motion to continue the hearing shall be made in writing and filed with the Board Office for transmission to the Hearing Committee Chair **at least seven (7) days** before the hearing date, and will be granted only for good cause shown. *See* Board Rule 7.10. The Hearing Committee shall not consider any oral request for a continuance absent the most unusual emergency circumstances. *See* Board Rule 7.10.

It is so Ordered.

HEARING COMMITTEE NUMBER TWELVE

By: Merril Hirsh
Merril Hirsh
Chair

cc:

Jeffrey Clark, Esquire
c/o Charles Burnham, Esquire
Robert A. Destro, Esquire
Harry W. MacDougald, Esquire
charles@burnhamgorokhov.com
robert.destro@protonmail.com
hmacdougald@ccedlaw.com

Hamilton P. Fox, III, Esquire
Theodore Metzler, Esquire
Jason R. Horrell, Esquire
Office of Disciplinary Counsel
foxp@dcodc.org
metzlerj@dcodc.org
horrellj@dcodc.org