No. 16-0A-43

COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA

Ty Clevenger,
Petitioner

v.

Wallace E. Shipp, Jr., Disciplinary Counsel of the District of Columbia, and the District of Columbia Board on Professional Responsibility,
Respondents

PETITION FOR DIVISION REHEARING and
PETITION FOR REHEARING EN BANC

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INTRODUCTION

In his Petition for Mandamus, the Petitioner alleged that the Office of Disciplinary Counsel and the Board of Professional Responsibility refused to perform duties imposed by law. The Court denied that petition on December 30, 2016, and the Petitioner now requests a rehearing pursuant to D.C. R. App. P. 40. The Petitioner further requests *en banc* review pursuant to D.C. R. App. P. 35 because this proceeding involves a question of exceptional importance. The Petitioner presented compelling evidence that members of the bar committed serious crimes against the administration of justice, yet the Board and Disciplinary Counsel refused even to investigate, apparently because of the political prominence of the attorneys involved. Such a double standard undermines the rule of law. Furthermore, given the widespread media coverage of the attorneys' misconduct, that double standard erodes public confidence in disciplinary authorities and the legal profession.

ARGUMENT

In its December 30, 2016 Order, the Court cited Board of Professional Responsibility Rule 2.4 for the premise that "the decision of Disciplinary Counsel to not docket a complaint is not subject to review." The Petitioner respectfully submits that the Court's reliance on Rule 2.4 is misplaced. As a preliminary matter, Rule 2.4 does not purport to limit the jurisdiction of this Court. Read in context,

Rule 2.4 only limits the jurisdiction of the *Board* over the docketing decisions of Disciplinary Counsel, *i.e.*, the rule does not purport to limit this Court's supervisory jurisdiction over the Board or Disciplinary Counsel. And that leads to the next issue, which is far more important: the Board could not limit the supervisory or mandamus jurisdiction of this Court even if it wanted to do so.

The Board is a subsidiary arm of this Court and its members are appointed by this Court, *see* Bar Rule XI, Section 4(b), therefore it could not possibly presume to limit the inherent authority of this Court, whether by rule or by any other means. *See, generally, Matter of D. M. R.*, 373 A.2d 235, 238 (D.C. 1977) (discussing inherent authority of the Court of Appeals). Under the present holding, however, any administrative body or Court committee could simply declare that its decisions or the decisions of those under its authority are non-reviewable. Suppose, for example, the Superior Court adopted a rule stating that the decisions of its special masters were not subject to review. Would this Court then consider itself restrained by such a presumptuous rule?

Even if the Board could somehow limit this Court's right of *appellate* review, Maryland courts have found that such circumstances militate in favor of mandamus relief:

> This Court has stated that judicial review is properly sought through a writ of mandamus "where there [is] no statutory provision for hearing or review and where public officials [are] alleged to have abused the discretionary powers reposed in them." *State Department of Health v. Walker*, 238 Md.

> 512, 522–23, 209 A.2d 555, 561 (1965) (emphasis added). *See also State Department of Assessments and Taxation v. Clark*, 281 Md. 385, 399, 380 A.2d 28, 36–37 (1977); *Gould, supra*, 273 Md. at 502, 331 A.2d at 65; *State Insurance Commissioner v. National Bureau of Casualty Underwriters*, 248 Md. 292, 300, 236 A.2d 282, 286 (1967); *Heaps v. Cobb*, 185 Md. 372, 380, 45 A.2d 73, 76 (1945). Thus, prior to granting a writ of mandamus to review discretionary acts, there must be both a lack of an available procedure for obtaining review and an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable.

Goodwich v. Nolan, 343 Md. 130, 146, 680 A.2d 1040, 1048 (1996). In this case, there is "both a lack of an available procedure for obtaining review and an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable." The Petitioner presented uncontested evidence that attorneys David Kendall, Cheryl Mills, and Heather Samuelson willfully destroyed evidence while representing Presidential candidate Hillary Rodham Clinton. Lesser persons go to federal prison for such misconduct, yet the Board and Disciplinary Counsel refused even to *investigate* such misconduct. That creates a strong appearance of political favoritism, and that too weighs in favor of mandamus relief. "[T]he courts, possessing inherent power to prevent violations of public trust, may grant mandamus requiring public officers to perform their duties without committing unlawful acts or abuses of discretion." *Mahoney v. Bd. of Sup'rs of Elections of Queen Anne's County*, 205 Md. 325, 335, 108 A.2d 143, 147 (1954)(internal citations omitted). At the moment, the Board and Disciplinary Counsel seem willing to turn a blind eye to serious criminal activity by members of the bar so

long as those attorneys have the right political connections. If that is not a violation of the public trust and an abuse of discretion, it is hard to imagine what would be.

In this instance, however, there was no abuse of discretion, but only because the Board and Disciplinary Counsel had no discretion. According to Board Rule 2.3, "a complaint shall be docketed if it: (1) is not unfounded on its face; (2) contains allegations which, if true, would constitute a violation of the Attorney's Oath of Office or the rules of professional conduct that would merit discipline; and (3) is within the jurisdiction of the Board." (Emphasis added). That imposes a ministerial duty, and violation of a ministerial duty is always grounds for mandamus relief. *See D.C. v. Fitzgerald*, 953 A.2d 288, 297 (D.C. 2008), *opinion amended on denial of reh'g*, 964 A.2d 1281 (D.C. 2009).

Finally, the Court's December 30, 2016 Order focuses entirely on one of the Respondents and ignores the other, namely the Board. Under Section 4(e)(1) of Bar Rule XI, a duty is imposed on the Board "[t]o consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of this rule." That duty is imposed *directly* on the Board, independent of any duties imposed on Disciplinary Counsel. While Board Rule 2.4 states that Disciplinary Counsel's docketing decisions are not reviewable, it says nothing about the Board itself. In other words, even if

Board Rule 2.4 somehow limits the Court's supervisory authority over Disciplinary Counsel, it does not purport to limit this Court's supervisory authority over the Board (and, for the reasons set forth above, the Board could not limit this Court's supervisory authority even if it wanted to do so). Accordingly, this Court has an independent ground for granting mandamus relief against the Board, namely because the Board refused to perform its duties under Section 4(e)(1) of Bar Rule XI.

CONCLUSION

The Court should grant the Petitioner's request, ordering the Respondents to fully comply with their duties to investigate the misconduct of Mr. Kendall, Ms. Sims, and Ms. Samuelson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Petition for Writ of Mandamus and its exhibits were sent to the individuals below via first-class mail on January 12, 2017:

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