

**IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY, MARYLAND**

TY CLEVINGER,

Petitioner,

vs.

**ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND and
OFFICE OF BAR COUNSEL,**

Respondents

Case No. C-02-CV-16-003620

RESPONSE IN OPPOSITION TO MOTION TO DISMISS WRIT OF MANDAMUS

NOW COMES Ty Clevenger, the Petitioner, responding in opposition to the Respondents' MOTION TO DISMISS WRIT OF MANDAMUS:

Factual Background

The Petitioner incorporates by reference his PETITION FOR WRIT OF MANDAMUS and its evidentiary attachments.

Argument

1. The Circuit Court has jurisdiction to provide mandamus relief.

The Respondents' motion confuses apples with oranges, citing numerous *disciplinary* cases to argue that this Court lacks jurisdiction to grant mandamus relief. This, however, is not a disciplinary case. As the Respondents' themselves acknowledge, no disciplinary case was ever opened against David Kendall, Cheryl Mills, or Heather Samuelson. Accordingly, the relevant issue is not whether the Respondents somehow mishandled a disciplinary case. Instead, the real

issue before the Court is whether the Respondents have the discretion to refuse to *investigate* when Maryland law *compels* them to investigate. The Petitioner has found no reported cases on that subject, and the various rules cited by the Respondents only apply to disciplinary proceedings.

2. The Respondents do not have discretion to flout Maryland statutes or rules.

The Respondents make a compelling *policy* argument for prosecutorial discretion, and indeed many states grant such discretion to bar prosecutors. The Respondents' argument should be directed to legislators, however, because current Maryland statutes do not afford such broad discretion to the Respondents. As the Respondents themselves note, "Bar Counsel *shall* make an appropriate investigation of every complaint that is not facially frivolous or unfounded." MOTION, 5, quoting Maryland Rule 19-711(b)(1)(emphasis added). The Respondents suggest that (1) maybe there was some sort of cursory investigation of the Petitioner's complaint and (2) they should have discretion to decide what is an "appropriate" investigation, but the October 24, 2016 letter from Raymond Hein plainly indicates that no investigation was conducted at all (ergo it could not have been "appropriate"). See PETITION FOR MANDAMUS, Exhibit 6. The Respondents further suggest that the Petitioner's complaint may have been dismissed without an investigation because it was frivolous or unfounded, but as a factual matter that claim is refuted by the October 24, 2016 letter, which says nothing of the sort. *Id.* Instead, the letter indicates that Bar Counsel refused to investigate because the Petitioner (1) had no personal knowledge and (2) was not personally aggrieved. *Id.* Those grounds for dismissal are not permitted by Maryland Rule 19-711(b)(1). On the contrary, Maryland Rule 19-711(a) expressly permits *any* person to file a bar grievance, not just personally aggrieved clients or parties, or individuals with "personal

knowledge of the allegations.” Finally, this Court can determine for itself as a matter of law that the Petitioner's complaint was neither frivolous nor unfounded, hence the Respondents were obligated to investigate.

3. If the Respondents had any discretion, they abused it.

The Motion to Dismiss conspicuously ignores two case law excerpts in the Petition for Mandamus, namely quotes from *Falls Rd. Cmty. Ass'n, Inc. v. Baltimore County*, 437 Md. 115, 139–40, 85 A.3d 185, 199–200 (2014) and *Goodwich v. Nolan*, 343 Md. 130, 146, 680 A.2d 1040, 1048 (1996). See PETITION FOR MANDAMUS, 4 ¶12. The Respondents' motion focuses exclusively on whether or not they had a ministerial duty, but *Falls Road* and *Goodwich* indicate that there is more than one way to establish grounds for mandamus relief. Both cases explain that a court may review a discretionary act of a public official when 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.” *Id.* That scenario is squarely before this Court.

Politically powerful attorneys are being shielded from an investigation in this instance despite overwhelming evidence of criminal misconduct. That, in turn, creates a strong appearance of political favoritism and impropriety. If a storefront divorce lawyer in Western Maryland had systematically destroyed evidence and a concerned third party had filed a bar grievance against him or her, is there any doubt that the Respondents would pursue that case vigorously? Certainly not. Thus the Respondents' refusal to investigate Mr. Kendall, Ms. Mills, and Ms. Samuelson is arbitrary, capricious, and unreasonable. It is also illegal to the extent that it violates the equal protection rights of less prominent attorneys who are accused of misconduct. Regardless of whether Mr. Kendall, Ms. Mills, and Ms. Samuelson represented Hillary Clinton,

Donald Trump, or a non-citizen personal injury plaintiff, they should not get a free pass when there is compelling evidence of a criminal activity.

4. The Respondents are actually requesting summary judgment, and that request is premature.

As noted above, mandamus relief may be granted where “the action complained of is illegal, arbitrary, capricious or unreasonable.” The Respondents implicitly ask the Court to weigh the evidence with respect to the latter three issues, even though the Petitioner has not yet been afforded any discovery. In other words, the Respondents' motion is at least in part a motion for summary judgment. Before any motion for summary judgment is decided, the Petitioner should be afforded an opportunity to conduct discovery about complaints against similarly-situated lawyers, *i.e.*, lawyers who were accused of widespread evidence tampering. If less prominent lawyers were investigated and prosecuted for such offenses, that will provide additional evidence that the dismissal of the Petitioner's complaint was “arbitrary, capricious or unreasonable.”

Conclusion

The Court has jurisdiction and the Respondents have not identified any defects that are facially evident from the Petition, therefore their motion should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on Asst. Attorney General Alexis Rodhe, counsel for the Respondents, at arohde@oag.state.md.us on June 9, 2017.



Ty Clevenger