

ATTORNEY GRIEVANCE
COMMISSION, *et al.*,
Petitioners,

v.

TY CLEVINGER,
Respondent.

* IN THE
* COURT OF APPEALS
* OF MARYLAND
* September Term, 2017
* Petition Docket No. ____

* * * * *

**PETITION FOR WRIT OF CERTIORARI
AND REQUEST FOR EXPEDITED REVIEW
TO BE FILED UNDER SEAL**

Pursuant to Rule 8-302(a), petitioners Attorney Grievance Commission and Bar Counsel¹ (collectively, the “Commission”) respectfully petition this Court for a writ of certiorari before decision in the Court of Special Appeals to review two orders of the Circuit Court for Anne Arundel County dated September 22, 2017: (1) an order granting a writ of mandamus directing the Commission to conduct an investigation of three members of the Maryland Bar (App. 1); and (2) an order vacating a prior order that had sealed the proceedings (App. 2).

This Court’s immediate attention is desirable and in the public interest because the lower court’s orders: (1) usurp the Court of Appeals’ original and exclusive jurisdiction over attorney disciplinary matters arising from the conduct of a member of the Maryland Bar; (2) conflict with Maryland Rule 19-711(b) and divest Bar Counsel of discretion to

¹ In his petition, Mr. Clevenger named the “Office of Bar Counsel” as a Respondent. Where, as here, the “Office of Bar Counsel” is not a discrete legal entity capable of being sued or giving relief, the term “Bar Counsel” is used to identify correctly the Respondent.

decline to investigate a complaint containing “information about an attorney derived from published news reports or third party sources where the complainant appears to have no personal knowledge of the information being submitted,” and (3) implement an interpretation of the confidentiality Rules that violates the rights of attorneys named in complaints prior to any investigation or the filing of formal charges.

PERTINENT PROVISIONS

Maryland Rules 19-702, 19-703, 19-707, 19-711, 19-722.

QUESTIONS PRESENTED

1. Did the circuit court err in issuing a writ of mandamus directing the Attorney Grievance Commission to investigate a complaint against three members of the Maryland Bar where exclusive jurisdiction over attorney disciplinary matters is vested in the Court of Appeals and Bar Counsel has discretion to determine whether an investigation is warranted?

2. Did the circuit court err in vacating its prior order sealing the proceedings where Maryland Rule 19-711 expressly provides that all attorney disciplinary complaints and investigations are confidential unless and until formal charges are brought against an attorney?

STATEMENT OF THE CASE

On September 1, 2016, Mr. Clevenger wrote a letter to the Commission complaining of alleged misconduct by David E. Kendall, Cheryl D. Mills, and Heather Faye Samuelson, attorneys for the former Secretary of State, Hillary Rodham Clinton. (App. 3.) The

complaint involves the controversy over Mrs. Clinton’s work-related emails stored on her private email server. *Id.* The factual basis for Mr. Clevenger’s complaint appears to have been collected from various publicly available sources and from the coverage of this issue by the press. *Id.* On September 7, 2016, Mr. Clevenger mailed a second letter to the Commission supplementing his complaint. (App. 7.) On September 27, 2016, Deputy Bar Counsel Raymond A. Hein sent a letter to Mr. Clevenger advising that “[i]t appears that you have no personal knowledge of the allegations presented in your correspondence, nor are you a personally aggrieved client or party possessing material information that would assist this office in reviewing such allegations. Under these circumstances, we decline to conduct an investigation of the named attorneys with you designated as the complainant.” (App. 9.)

On December 20, 2016, Mr. Clevenger filed a petition for writ of mandamus in the Circuit Court for Anne Arundel County. (App. 10.) On May 25, 2017, the Commission filed a timely motion to dismiss the petition for writ of mandamus and a motion to seal the case. Mr. Clevenger opposed both motions. By order dated June 20, 2017, the court granted the motion to seal. On July 25, 2017, the circuit court denied the motion to dismiss.

The circuit court held a hearing on the merits on September 11, 2017. By written order dated September 22, 2017, the court granted the writ of mandamus directing the Commission to investigate “David E. Kendall, Cheryl D. Mills, and Heather Faye Samuelson.” (App. 1.) On September 22, 2017, the circuit court also vacated its prior order sealing the case. (App. 2.) With this order, the complaint, as well as the names of the attorneys subject to investigation, became part of the public record.

REASONS FOR GRANTING REVIEW

This Court should grant review to resolve an important matter of public concern and to give effect and meaning to the confidentiality provisions and protections contained in the Court's own Rules. Whether a circuit court may exercise jurisdiction over the actions of the Attorney Grievance Commission and Bar Counsel, in connection with its responsibility to investigate and prosecute complaints of attorney misconduct, where this Court retains exclusive original jurisdiction over attorney disciplinary matters, is an issue arising in multiple cases and courts, and is in need of resolution. As this case amply demonstrates, the further failure of the circuit court to comply with the letter and spirit of this Court's confidentiality Rules to protect attorneys from the public disclosure of unsubstantiated complaints of misconduct undermines the public confidence in the legal system and deprives the attorneys of Court-mandated protections.

I. THE COURT OF APPEALS HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ATTORNEY DISCIPLINARY MATTERS, INCLUDING ANY ACTION TO COMPEL BAR COUNSEL TO CONDUCT AN INVESTIGATION UNDER THE MARYLAND RULES.

This Court "has original and complete jurisdiction over all attorney disciplinary matters arising from the conduct of a member of the Maryland State Bar." *Attorney Grievance Comm'n v. Pak*, 400 Md. 567, 599-600 (2007), *cert. denied*, 552 U.S. 1099 (2008) (citing *Attorney Grievance Comm'n v. Reinhardt*, 391 Md. 209, 202 (2006) (same)); *Attorney Grievance Comm'n v. Fader*, 431 Md. 395, 426-27 (2013) (same). *See also In re Kimmer*, 392 Md. 251, 269 (2006) ("[I]t has been clear, since 1898, that the Court of Appeals has exclusive jurisdiction over the regulation of, and admission to, the practice of

law.”) In Maryland, the circuit courts “are courts of original general jurisdiction and . . . may hear and decide all cases at law and in equity other than those which fall within the class of controversies reserved by a particular law for the exclusive jurisdiction of some other forum.” *St. Joseph Med. Ctr., Inc. v. Turnbull*, 432 Md. 259, 274 (2013) (quoting *First Federated Commodity Tr. Corp. v. Comm’r of Sec. for Md.*, 272 Md. 329, 335 (1974) (citations omitted)). Thus, where exclusive original jurisdiction over a subject matter is vested in a particular court, no claim arising out of that subject matter or “class of controversies” may be heard by a circuit court.

Under the Rules, this Court has delegated to Bar Counsel the exclusive responsibility for investigating and prosecuting complaints of attorney misconduct and violations of the Maryland Lawyers Rules of Professional Conduct. Md. Rule 19-703(b)(1) (empowering Bar Counsel to “investigate professional misconduct or incapacity on the part of an attorney”); Md. Rule 19-702(h)(4) (directing the Commission to “supervise the activities of Bar Counsel”); Md. Rule 19-721 (“Upon approval or direction of the Commission, Bar Counsel, on behalf of the Commission, shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals.”). The Rules likewise empower Bar Counsel to “make an appropriate investigation of every complaint that is not facially frivolous, unfounded, or duplicative,” and to decline the complaint if “Bar Counsel concludes that a complaint is without merit, does not allege facts which, if true, would demonstrate either professional misconduct or incapacity, or is duplicative.” Md. Rule 19-711(b)(1), (2).

Certain matters such as high profile prosecutions, and cases receiving significant coverage in the press, often generate the filing of numerous duplicative complaints with the Commission. Thus, Bar Counsel also may decline “a complaint submitted by an individual who provides information about an attorney derived from published news reports or third party sources where the complainant appears to have no personal knowledge of the information being submitted.” Md. Rule 19-711(b) (2).²

Here, the circuit court lacked jurisdiction over Bar Counsel’s discretionary determination to decline to investigate the complaint filed against three members of the Maryland bar. The investigation of a complaint made against an attorney alleging professional misconduct concerns an “attorney disciplinary matter[] arising from the conduct of a member of the Maryland State Bar,” over which this Court has “original and complete jurisdiction.”³ *Pak*, 400 Md. at 599-600. Indeed, Bar Counsel’s investigation is a necessary predicate to any attorney disciplinary proceeding in this Court. Md. Rule 19-721.

Not only did the circuit court exceed its jurisdiction and usurp the authority of this Court in a matter “arising from the conduct of a member of the Maryland State Bar,” the

² Effective August 1, 2017, this Court amended Rule 19-711 to clarify, consistent with Bar Counsel’s long-standing practice, that Bar Counsel may decline to investigate “duplicative” complaints and complaints “derived from public news reports.” Bar Counsel may, of course, initiate her own complaint based on information she receives from any source. Md. Rule 19-711(a).

³ Presently pending in this Court is a petition for writ of mandamus filed directly with the Court. *Ucheomumu v. Attorney Grievance Comm’n*, Misc. No. 39, Sept Term 2016.

court further erred in granting an extraordinary writ to control the exercise of Bar Counsel's discretion. "It is well established that common law mandamus is 'an extraordinary remedy' that 'is generally used to compel inferior tribunals, public officials or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which the party applying for the writ has a clear legal right.'" *Falls Rd. Cmty. Ass'n, Inc. v. Baltimore County*, 437 Md. 115, 139 (2014) (quoting *Goodwich v. Nolan*, 343 Md. 130, 145 (1996)). "The writ ordinarily does not lie where the action to be reviewed is discretionary or depends on personal judgment." *Id.* See also *Brack v. Wells*, 184 Md. 86, 90 (1944) ("Unless [the public official's] discretion is grossly abused or such duty compelled by statute or there is a clear showing that such duty exists, mandamus will not lie."). A circuit court must, therefore, treat a request for mandamus relief "with caution, treading carefully so as to avoid interfering with legislative prerogative and administrative discretion." *Wilson v. Simms*, 380 Md. 206, 223 (2004).

Before August 1, 2017, and at the time these issues were briefed initially in the circuit court, the prior version of Rule 19-711 was in effect. When the circuit court issued its written order on September 22, 2017, however, the current version of Rule 19-711 applied to Mr. Clevenger's complaint and to any discretionary determination made by Bar Counsel. This Court's decisions confirm that a rule, like a statute, is presumed to operate prospectively from its effective date but where the rule effects "a change in procedure only, and not in substantive rights," the rule applies to "all actions whether accrued, pending or future, unless a contrary intention is expressed." *Rawlings v. Rawlings*, 362 Md. 535, 555

(2001) (quoting *Mason v. State*, 309 Md. 215, 219–20 (1987)). See also *Langston v. Riffe*, 359 Md. 396, 410-11 (2000) (holding § 5-1038(a)(2)(i)(2) of the Family Law Article, which allows “a circuit court to set aside or modify a paternity declaration ‘if a blood or genetic test done in accordance with § 5-1029 of this subtitle establishes the exclusion of the individual named as the father in the order,’” applies retrospectively as it was remedial and did not affect any substantive rights) Here, the Rule change modified the screening procedure for Bar Counsel in vetting complaints and conducting investigations; it did not impair any vested rights.⁴ Mr. Clevenger did not have a vested right in having a complaint opened in his name (listing him as the complainant) or in having his particular complaint investigated.

The circuit court erred, therefore, in entertaining and issuing a common law writ of mandamus. The court both lacked jurisdiction over the Bar Counsel’s discretionary decision to decline to conduct an investigation and further failed to apply the correct legal standard and analysis. Where the complaint, on its face, makes clear that Mr. Clevenger had no personal knowledge of the facts alleged, and further, that the factual allegations in the complaint were “derived from published news reports or third party sources where the

⁴ In discussing the difficulty of defining this term, this Court has observed that “‘a vested right, as that term is used in relation to constitutional guarantees, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice.’ Thus ‘vested right means simply a right which under particular circumstances will be protected from legislative interference. Another definition notes that a vested right is an immediate right of present enjoyment or a present fixed right of future enjoyment.’” *Rawlings*, 362 Md. at 557-58 (quoting *Langston*, 359 Md. at 419-20 (citations omitted)).

complainant appears to have no personal knowledge of the information being submitted,” mandamus will not lie to compel Bar Counsel to perform an investigation that lies squarely within Bar Counsel’s discretion. Md. Rule 19-711(b) (2).

II. THIS COURT’S RULES PROHIBIT THE DISCLOSURE OF A COMPLAINT ALLEGING ATTORNEY MISCONDUCT PRIOR TO THE FILING OF FORMAL CHARGES BY BAR COUNSEL.

The Rules governing attorney disciplinary investigations effectuate the important public policy concerns underpinning the confidentiality required in attorney disciplinary proceedings, especially before the filing of formal charges against the attorney. If, as here, Bar Counsel declines to investigate a complaint, the records relating to that complaint are confidential and may not be made public. To the contrary, “the records of an investigation by Bar Counsel, including the existence and content of any complaint or response, [are confidential] until Bar Counsel files a petition for disciplinary or remedial action.” Md. Rule 19-707(b)(A). These records “may not be disclosed by Bar Counsel, the staff and investigators of the Office of Bar Counsel, any member of the Commission, the staff of the Commission, the Peer Review Committee, any attorney involved in the proceeding, or, in any civil action or proceeding, by the complainant or an attorney for the complainant.” Md. Rule 19-707(b).

The confidentiality provisions protect attorneys from damage to their reputations and injury—personal, professional, and economic—that might result from the publication of unexamined and unsubstantiated complaints. Further, such confidentiality maintains the public confidence in the legal system by preventing the premature announcement of groundless claims of misconduct or incompetence, which may be animated by political,

personal or other concerns. *See generally Landmark Commc 'ns, Inc. v. Virginia*, 435 U.S. 829, 835 (1978) (discussing the importance of confidentiality in judicial disciplinary proceedings).

Despite the plain and unambiguous language in Rule 19-707(b), prohibiting the disclosure of a complaint “by the complainant or an attorney for the complainant” in a civil action or proceeding, Mr. Clevenger attached a copy of his complaint of attorney misconduct as an exhibit to his petition for writ of mandamus. Both the petition and the complaint disclose the existence of the complaint and identify by name the attorneys alleged to have engaged in misconduct. To ameliorate Mr. Clevenger’s unauthorized disclosure, the case was sealed. The circuit court’s subsequent order vacating the sealing violates the plain language of Rule 19-707 and renders the protections afforded attorneys by the Rules illusory.

CONCLUSION

The petition for a writ of certiorari should be granted and the orders of the circuit court stayed pending further order of this Court.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/Michele J. McDonald

MICHELE J. MCDONALD
CPF No. 9212160211
Assistant Attorney General

/s/Alexis B. Rohde

ALEXIS B. ROHDE
CPF No. 0412150224
Assistant Attorney General

200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
arohde@oag.state.md.us
mmcdonald@oag.state.md.us
(410) 576-6576 (telephone)
(410) 576-6393 (facsimile)

October 23, 2017

Attorneys for Petitioners

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This document contains 2,551 words, excluding the parts exempted from the word count by Rule 8-503.
2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/Michele J. McDonald

Michele J. McDonald

RULE 20-201 CERTIFICATION

I certify that this document does not contain any publicly available restricted information and is being filed as a confidential document accompanied by a motion to seal.

/s/Michele J. McDonald

Michele J. McDonald

CERTIFICATE OF SERVICE

I certify that on this 23rd day of October 2017, a copy of the foregoing was filed and served electronically through the MDEC system on all persons entitled to service and mailed, via first-class mail, postage prepaid, to the following:

Ty Clevenger
P.O. Box 20753
Brooklyn, New York 11202-0753

Respondent Pro Se

/s/Michele J. McDonald

Michele J. McDonald