UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TY CLEVENGER, Respondent Member of the Bar of the District Court for the District of Columbia	Attorney Grievance Docket No. 15-19

MOTION TO DISMISS

NOW COMES Ty Clevenger, the Respondent, and moves the Court to dismiss this case for the reasons set forth below or, alternatively, permit discovery:

Introduction

In a 2010 grievance, the Respondent presented the Committee with evidence that members of the Court's bar had fabricated an affidavit and forged a signature in *Wade A. Robertson v. William C. Cartinhour, Jr.*, Case No. 1:09-cv-1642 (D.D.C. 2009)("*Robertson I*"). Appendix, Exhibit 3 (hereinafter "Appx., Exh. 3," and so forth). The Committee refused to investigate. Appx., Exh. 4. In a January 24, 2015 grievance, the Respondent presented the Committee with newly-obtained evidence that some of those same attorneys had tampered with medical evidence in *Robertson I* in order to conceal the fact that their client, William C. Cartinhour, Jr., is a paranoid schizophrenic. Appx., Exh. 5. That evidence was significant because those attorneys obtained a $7 million verdict based almost exclusively on the testimony of Mr. Cartinhour. *Id.* Furthermore, the evidence indicated that Mr. Cartinhour was most likely psychotic *during his videotaped trial testimony*, and that his attorneys actively misrepresented his condition as a heart ailment. *Id.* Finally, the Respondent presented the Committee with evidence that one or more of those attorneys were communicating *ex parte* with Judge Ellen S. Huvelle

while she was presiding over *Robertson I*, and while she was simultaneously refusing to investigate the evidence of the fraud against her own court. *Id.* Notwithstanding the irrefutable evidence, the Committee has once again refused to investigate the crimes of the foregoing attorneys. Instead, the Committee seeks to disbar the attorney who dared to report their crimes. In other words, the Committee is retaliating against a whistleblower.

Facts

The Respondent has attached his July 13, 2015 letter to the Committee in response to the allegations of Complainant Patrick J. Kearney. Appx., Exh. 2. The Respondent has also attached his January 24, 2015 complaint of misconduct against Mr. Kearney and some of his colleagues. Appx., Exh. 5. The Respondent incorporates both letters and their attachments and exhibits by reference as if fully set forth herein. The Respondent further incorporates his Motion to Permit Discovery and his Motion to Transfer by reference, as well as their exhibits and attachments, as if fully set forth herein (all three motions use the same appendix).

Argument

"A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463, 116 S. Ct. 1480, 1486, 134 L. Ed. 2D 687 (1996).

> A selective prosecution claim asks the Court to exercise judicial power over a core Executive function—the enforcement of criminal laws. A prosecutor's discretion is, however, subject to constitutional limits such as the equal protection component of the Fifth Amendment's Due Process Clause, which prohibits a prosecutor from making decisions based on race, religion, or other arbitrary classifications. *United States v. Armstrong,* 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.' " *Armstrong,* 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (quoting *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926)). The defendant must show both

> (1) that he was singled out for prosecution from others similarly situated and (2) that his prosecution was motivated by a discriminatory purpose. *United States v. Palfrey,* 499 F.Supp.2d 34, 39 (D.D.C.2007). "[T]he standard is a demanding one." *Armstrong,* 517 U.S. at 463, 116 S.Ct. 1480. To obtain discovery, the defendant must put forth "some evidence tending to show the existence of the essential elements" of a selective prosecution claim. *Id.* at 468–69, 116 S.Ct. 1480; *see also Attorney General v. Irish People, Inc.,* 684 F.2d 928, 932 (D.C.Cir.1982) (holding that defendant must make a colorable showing as to both selectivity and improper motivation).

United States v. Khanu, 664 F. Supp. 2d 28, 31 (D.D.C. 2009).

"[T]o establish selective prosecution, a defendant must show that the prosecution was predicated on a constitutionally impermissible motive, such as on the basis of race or religion, or in retaliation for her exercise of constitutional rights." *United States v. Ndiaye*, 434 F.3d 1270, 1288 (11th Cir. 2006). This includes retaliation based on the exercise of First Amendment rights. *See United States v. Christopher*, 700 F.2d 1253, 1258 (9th Cir. 1983); *State v. Wesco, Inc.*, 2006 VT 93, ¶ 12, 180 Vt. 345, 351, 911 A.2d 281, 286 (2006); and *In re Basani*, 149 N.H. 259, 263, 817 A.2d 957, 961 (2003). Some courts seem to have concluded that selective prosecution is available as a defense in attorney disciplinary proceedings, *see, e.g.*, *In Matter of Convisser*, 148 N.M. 732, 738, 242 P.3d 299, 305 (N.M. 2010) and *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. James*, 267 Neb. 186, 197, 673 N.W.2d 214, 225 (Neb. 2004), but the Respondent has not found any cases elaborating on that conclusion. On the other hand, courts have held that First Amendment retaliation is an independent affirmative defense to a disciplinary proceeding. *See In re Complaint as to Conduct of Paulson*, 341 Or. 542, 145 P.3d 171 (2006) and *Cariglia v. Bar Counsel*, 442 Mass. 372, 813 N.E.2d 498 (2004); *see also Westin v. McDaniel*, 760 F. Supp. 1563 (M.D. Ga.) *aff'd*, 949 F.2d 1163 (11th Cir. 1991) (district attorney enjoined from bringing charges against criminal defense attorney in retaliation for First Amendment activities).

The State Bar of Texas dismissed all charges against the Respondent that resulted from

the orders of Judge Huvelle after the Respondent produced evidence that she had been communicating ex parte with Mr. Kearney and/or his colleagues. *See* Declaration of Ty Clevenger, Appx., Exh. 1 and *compare* Appx., Exh. 6 *with* Appx., Exh. 7. The Respondent has not been sanctioned by any court since January 31, 2013, when he was sanctioned by the D.C. Circuit. *See* Declaration of Ty Clevenger, Appx., Exh. 1. The D.C. Circuit referred that sanction to its disciplinary committee, and the Respondent was ultimately reprimanded. Appx., Exh. 8. Now, almost three years later after that sanction, the Committee has suddenly decided that it wants to *disbar* the Respondent. Why seek such draconian punishment? And why now? The only plausible explanation is retaliation. On September 9, 2014, the Respondent published DirtyRottenJudges.com, a fact noted in Mr. Kearney's December 29, 2014 complaint. That website presented evidence of widespread misconduct in this Court.[1] Appx., Exh. 11. On October 26, 2015, the Respondent published evidence of the Committee's bias and dereliction on his blog. Appx., Exh. 12. Six weeks later, the Committee filed charges seeking to *disbar* the Respondent. It is also worth noting that the charges were signed by Committee chairman David Kendall, who happens to be Judge Huvelle's former law partner. *See* Declaration of Ty Clevenger, Appx., Exh. 1.

Since Judge Huvelle was willing to communicate ex parte with the Respondent's opposing counsel (and possibly with a witness), it is not hard to believe that she would communicate directly with Mr. Kendall or the Committee. In fact, there is evidence that she communicated with the Committee back in 2010, *see* Declaration of Wade Robertson, Appx., Exh. 13, when both she and the Committee refused to investigate the evidence against Mr.

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1 DirtyRottenJudges.com has been cited by several media outlets, including *Texas Lawyer* and the legal blog of the *Wall Street Journal*. *See* Appx., Exh. 9 and Exh. 10. Likewise, media organizations worldwide have picked up stories from the Respondent's blog, LawFlog.com. *See* Declaration of Ty Clevenger, Appx., Exh. 1.

Kearney and his colleagues (Mr. Kendall was also serving on the Committee at that time). *See* Declaration of Ty Clevenger, Appx., Exh. 1. Regardless, the fact remains that the Committee seeks to disbar an attorney for alleged offenses which, even if true, pale in comparison to the crimes committed by Mr. Kearney and his colleagues. At the same time, the Committee refuses to investigate the overwhelming evidence against those attorneys, much less file charges against them. If that is not selective prosecution, then there is no such thing.

As further evidence of the Committee's animus and bad faith, consider the bottom paragraph on page 5 of the Charge filed by the Committee. Yes, Judge Lamberth wrote some outrageous statements about the Respondent, but his November 25, 2014 anti-filing injunction was directed at the Respondent's clients, not the Respondent. The Committee, however, lifted a sentence from that opinion and inserted "Respondent" in brackets, even though the Respondent was not named in that sentence. What could that be other than deliberate deception? Worse, the Committee never gave the Respondent any notice that it was considering Judge Lamberth's order. In its June 5, 2015 letter directing the Respondent to address Mr. Kearney's complaint, the Committee listed five issues that it wanted the Respondent to address. Appx., Exh. 14. The November 25, 2015 order was nowhere on that list, *id.*, thus the Respondent never had a chance to address that issue. Yet the Committee cited it as a basis for the Charge. Apparently the Committee was too busy retaliating against the Respondent to concern itself with little things like due process, *i.e.*, notice and an opportunity to respond. *See Williston Basin Interstate Pipeline Co. v. F.E.R.C.*, 165 F.3d 54, 63 (D.C. Cir. 1999), quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (A "party is entitled ... to know the issues on which decision will turn and to be apprised of the factual material on which the [decision maker] relies for decision so that he may rebut it"); *see also In re*

Ruffalo, 390 U.S. 544, 550 (1968)(An attorney is entitled to procedural due process in a disciplinary proceeding). Similarly, the Committee faults the Respondent because he did not disclose his attorney-client relationship with Wade Robertson in 2010 when he first filed misconduct complaints against Mr. Kearney, et al. The Committee never told the Respondent to address that issue in its June 5, 2015 letter. The attorney-client relationship was a matter of public record in the D.C. Circuit, the Respondent never sought to hide it, and, in any event, the Respondent did not violate any rule or professional obligation, so why bring it up? Because the Committee is engaged in malicious fault-finding.

It is noteworthy that Mr. Kearney filed an identical complaint against the Respondent in the U.S. Court of Appeals for the D.C. Circuit. Appx., Exh. 15. The D.C. Circuit dismissed its case, Appx., Exh. 16, but the District Committee has taken a much more vindictive approach by seeking the Respondent's disbarment. What exactly does that achieve when the Respondent has neither the intention nor the desire to practice law again in the D.C. District? *See* October 7, 2015 Letter from Ty Clevenger to Committee, Appx., Exh. 17 (explaining that circuit case had been dismissed and the Respondent wished to resign from the District Court, but he could not do so while a disciplinary case was pending). The Committee's request for disbarment cannot be the result of any desire to protect the public, because the Respondent's primary licensing authority – *i.e.*, the State Bar of Texas – considered most of the issues raised by Mr. Kearney and rejected them (after the Respondent obtained proof of Judge Huvelle's judicial misconduct). *See* Declaration of Ty Clevenger, Appx. 1 and *compare* Appx., Exh. 6 *with* Appx., Exh. 7.

Unlike Mr. Kearney and his colleagues, the Respondent has never lied, cheated, or stolen from anyone, nor has the Respondent ever been accused of such a thing, yet the Committee seeks the most draconian punishment available. The only plausible motive for that is retaliation. By

convincing the Court to disbar the Respondent, the Committee hopes that the State Bar of Texas will impose reciprocal discipline, end the Respondent's legal career, and thus discredit him. In other words, it appears that Mr. Kendall is trying to protect his former law partner (*i.e.*, Judge Huvelle) by disbarring and discrediting the Respondent. After all, if the Committee were to investigate Mr. Kearney, et al., it would inevitably have to explore the evidence of Judge Huvelle's misconduct.

The Respondent has been a member of the State Bar of Texas for almost fifteen years, practicing mostly in Texas state courts, and never once has he been sanctioned or accused of misconduct by any of those courts. *See* Declaration of Ty Clevenger, Appx., Exh. 1. The only sanction imposed on the Respondent by a court outside the D.C. Circuit was imposed in 2011 in the Western District of Texas by Judge Walter S. Smith, Jr., who was recently reprimanded by the Fifth Circuit and may soon face impeachment because of a judicial misconduct complaint filed by the Respondent. *Id.* and Appx., Exh. 18. The Respondent is not a danger to his clients, the legal profession, or the courts, although corrupt judges and corrupt lawyers may certainly perceive him as a threat. *See* Angela Morris, "Lawyer-Muckracker Targets Public Officials," *Texas Lawyer*, January 20, 2016, Appx., Exh. 9. By attempting to end the Respondent's legal career, even as it turns a blind eye to the criminal misconduct of Mr. Kearney, et al., the Committee is retaliating against a whistleblower. There is no other plausible explanation.

The Respondent moves the Court to dismiss the Charge outright. Alternatively, if the Court concludes that there is not yet sufficient evidence to prove selective prosecution, then the Respondent moves the Court to permit discovery. The Court has previously held that defendants "must put forth 'some evidence tending to show the existence of the essential elements' of a selective prosecution claim" in order to obtain discovery. *United States v. Khanu*, 664 F. Supp.

2d 28, 31 (D.D.C. 2009), citing *Armstrong,* 517 U.S. at 468-469. The Respondent has met and exceeded that standard. The Respondent therefore should be permitted to subpoena documents and/or depose witnesses in order to strengthen his selective prosecution defense. Among other things, the Respondent should be permitted to investigate ex parte communications among Committee members, Judge Huvelle, and Mr. Kearney and his colleagues. The Respondent also should be permitted to examine the Committee's treatment of other similarly-situated attorneys. The Respondent therefore requests 120 days for written discovery and depositions.

CONCLUSION

The Court should dismiss the Charge in its entirety. Alternatively, the Court should permit discovery for the purpose of establishing selective prosecution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 5, 2016 a copy of the foregoing document was provided to the Committee on Grievances of the U.S. District Court for the District of Columbia via email attachment to the individual and address below:

Brigett N. Tenor, Clerk
Committee on Grievances
U.S. District Court for the District of Columbia
Brigette_Tenor@dcd.uscourts.gov

Ty Clevenger