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 PERMIT DISCOVERY

NOW COMES Ty Clevenger, the Respondent, and moves the Court to permit discovery for the reasons set forth below:

Facts

The Respondent has attached his July 13, 2015 letter to the Committee in response to the allegations of Complainant Patrick J. Kearney, as well as its attachments. *See* Appendix, Exhibit 2 (hereinafter "Appx. Exh. 2," etc.). 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 by reference his simultaneously-filed Motion to Dismiss and Motion to Transfer, as well as their respective exhibits and attachments (all three motions use the same appendix).

Argument

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 *United States v. Armstrong*, 517 U.S. 456, 468-469 (1996). In his Motion to Dismiss, the Respondent met and

exceeded that standard, therefore he moves the Court to permit discovery in support of his selective prosecution defense. The Respondent also seeks broader discovery because he intends to challenge all of the sanctions orders cited by the Committee in the Charge. Those orders are not a basis for collateral estoppel or res judicata:

> A resolution of a motion for sanctions is not a final judgment on the merits because it "does not signify a district court's assessment of the legal merits of the complaint," and therefore it cannot collaterally estop other claims from proceeding. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396–97, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). It would be unfair to preclude an issue based on the resolution of a motion for sanctions because sanctions hearings are procedurally dissimilar to trials. *See Faigin v. Kelly*, 184 F.3d 67, 78–79 (1st Cir.1999); *Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162, 1164–65 (9th Cir.1991). A motion for sanctions does not provide parties an opportunity to litigate fully—conduct discovery, present and cross-examine witnesses—as required for application of collateral estoppel. *See Amwest Mortgage*, 925 F.2d at 1164–65. Because sanctions "inquiries are severely restricted, [ ] it seems odd to extrapolate from them to the subsequent litigation of issues on the merits." *Faigin*, 184 F.3d at 78–79 (internal citations omitted). Moreover, "[p]reclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Otherson v. INS*, 711 F.2d 267, 273 (D.C.Cir.1983).

Klayman v. Barmak, 602 F.Supp.2d 110, 117-118 (D.D.C. 2009). Accordingly, the Committee must independently prove the allegations made by Judges Huvelle, Lamberth, and Teel. *Id.* The Respondent must be allowed to "litigate fully" those allegations, and that necessarily involves the right to "conduct discovery, present and cross-examine witnesses..." *Id.*

All of the sanctions orders issued by Judge Huvelle, Judge Lamberth, and Judge Teel are premised on the underlying judgment in *Robertson I.* In his Motion to Dismiss, the Respondent presented evidence that the *Robertson I* judgment was obtained by extrinsic fraud. Specifically, officers of the Court suborned perjury, forged a signature, knowingly filed false discovery responses, and tampered with evidence. "[A] prior judgment operates as res judicata only in the absence of fraud or collusion." *Interdonato v. Interdonato*, 521 A.2d 1124, 1132 (D.C. 1987), citing *Riehle v. Margolies*, 279 U.S. 218, 225 (1929); *see also Allen v. McCurry*, 449 U.S. 90, 95,

101 S. Ct. 411, 415, 66 L. Ed. 2d 308 (1980)("collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case"); *see also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 250, 64 S. Ct. 997, 1003, 88 L. Ed. 1250 (1944)(plaintiff's fraud on the court "calls for nothing less than a complete denial of relief"), reversed on other grounds by *Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976); Fed. R. Civ. P. 60(d)(3). If *Robertson I* is void because of extrinsic fraud, then the basis for the sanctions issued by Judge Huvelle, Judge Lamberth, and Judge Teel evaporates. Accordingly, the Respondent should be permitted to conduct discovery regarding that fraud.

Interdonato also includes a second prong, *i.e.*, "collusion." Judge Huvelle was communicating ex parte with Mr. Kearney and/or his colleagues around the same time that she was covering up their fraud on the court, which was also around the same time that she sanctioned the Respondent. Furthermore, the Respondent has produced evidence that Judge Huvelle may have communicated ex parte with a witness and learned about William C. Cartinhour, Jr.'s schizophrenia, yet failed to disclose that information and the related fraud. Regardless, this much is certain: after being presented with unequivocal evidence of fraud against their respective courts, and after being presented with case law establishing a duty to investigate the fraud, Judge Huvelle, Judge Lambert, and Judge Teel have nonetheless turned a blind eye for more than a year. If a judge covers up or participates in a fraud on his or her Court, that judge's sanctions order cannot be given preclusive effect in a grievance proceeding. *Interdonato*, 521 A.2d at 1132; *Riehle*, 279 U.S. at 225; *Allen*, 449 U.S. at 95; and *Hazel-Atlas Glass Co.*, 322 U.S. at 250. Moreover, purely as a matter of credibility, evidence of judicial collusion would discredit the accusations against the Respondent.

Given the strong preliminary evidence of fraud and collusion, the Respondent should be permitted to pursue further evidence of that fraud and collusion. The Respondent must determine, for example, whether the taint of Judge Huvelle's ex parte communications with Mr. Kearney, et al. was passed along to Judges Lamberth and Teel. Granted, the rules permit judges to freely communicate among one another, but the Respondent contends that any such communications would be improper – and the resulting orders would be void – if they were infected by Judge Huvelle's ex parte communications with attorneys or witnesses.

The Respondent would note that the Court provided the Committee with discovery and subpoena powers in its rules, *see* LCvR 83.16(d)(3) and (d)(5), but it has not afforded discovery or subpoena powers to the Respondent. According to the Supreme Court, that double standard is impermissible under the Due Process Clause. *See Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) ("[I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street... It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.). For that reason alone, the Respondent should be permitted to conduct discovery.

The Respondent seeks discovery and testimony from Mr. Kearney, Mr. Kendall and the other Committee members, former Committee clerk Shannon McClellan, and Stanley Slater, M.D. (the witness with whom Judge Huvelle may have communicated ex parte). The Respondent asks the Court to order the Clerk to produce the following:

> (1) Email correspondence between Mr. Kearney or any of his colleagues and Judge Huvelle or any of her clerks or staff.
>
> (2) Email correspondence among Judge Huvelle, Judge Lamberth, Judge Teel, the Committee Clerk, or the Committee members regarding the Respondent, his client (Wade Robertson), William C. Cartinhour, Jr., Patrick Kearney, Michael Bramnick, or the

litigation wherein the Respondent represented Mr. Robertson.

The Respondent may also seek evidence from Mr. Kearney's colleagues, Judge Huvelle, Judge Lamberth, and Judge Teel regarding communications with Judge Huvelle. In addition to exploring the ex parte communications, the Respondent wishes to investigate why he is being treated so differently from Mr. Kearney, his colleagues, and perhaps other similarly-situated attorneys. Accordingly, the Respondent requests 120 days to conduct discovery and depositions, further requesting at least 30 days between the end of the discovery period and any hearing on the merits.

CONCLUSION

For the reasons set forth above, the Court should permit discovery (1) for the purpose of establishing the Respondent's selective prosecution defense, and (2) so the Respondent can prepare his collateral attack on the orders of Judge Huvelle, Judge Lamberth, and Judge Teel. Alternatively, the Court should dismiss the Charge in its entirety.

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