TY CLEVENGER,	*	IN THE
Petitioner,	*	CIRCUIT COURT
v.	*	FOR
THE ATTORNEY GRIEVANCE COMMISSION, et al	*	ANNE ARUNDEL COUNTY
	*	
Respondents.	*	Case No.: C-02-CV-16-003620

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MOTION TO DISMISS WRIT OF MANDAMUS

Respondent, the Attorney Grievance Commission and Office of Bar Counsel, through undersigned counsel, requests that this Court deny the Petition for Writ of Mandamus filed by Ty Clevenger. The Petition asks this Court to issue the extraordinary prerogative writ of mandamus to compel the Respondents to "comply with Maryland Rule 19-711(b), particularly subsections (2)(A) through (2)(D)." Petition at 5, ¶13. This Court should deny or dismiss Mr. Clevenger's Petition because the Circuit Court for Anne Arundel County does not have the authority to supply the relief requested, the Office of Bar Counsel is not an entity capable of being sued and further, Mr. Clevenger does not have a clear legal right to the relief he seeks.

FACTUAL BACKGROUND

On September 1, 2016, Mr. Clevenger wrote a letter to the Attorney Grievance Commission (the "AGC") filing a misconduct complaint against former Secretary of State, Hillary Rodham Clinton's attorneys, David E. Kendall, Cheryl D. Mills, and Heather Faye Samuelson. Petition, Ex. 2. The complaint involves the controversy over Mrs. Clinton's

work-related emails that were stored on her private email server. *Id.* The factual basis for Mr. Clevenger's complaint appears to have been collected from various publically available sources. *Id.* On September 7, 2016, Mr. Clevenger mailed a second letter to the AGC supplementing his complaint. Petition, Ex. 3. On September 27, 2016, Deputy Bar Counsel, Raymond A. Hein, sent a letter to Mr. Clevenger explaining that the AGC "decline[s] to conduct an investigation of the named attorneys with you designated as the complainant." Petition, Ex. 4.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS UNABLE TO PROVIDE THE RELIEF MR. CLEVENGER SEEKS.

It is well-settled that the Court of Appeals "has original and complete jurisdiction over all attorney disciplinary matters arising from the conduct of a member of the Maryland State Bar." *Attorney Grievance Commission v. Pak*, 400 Md. 567, 599-600 (2007), *cert. denied*, 552 U.S. 1099 (2008) (citing *Attorney Grievance Commission v. Reinhardt*, 391 Md. 209, 202 (2006)(same)). *Attorney Grievance Comm'n of Maryland 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.") Furthermore, Md. Rules 19-702 and 19-703 provide exclusive authority to the AGC through Bar Counsel, subject to the supervision and approval of the Court of Appeals, to investigate alleged violations of the Maryland Lawyers' Rules of Professional Conduct. Additionally, the Rules authorize the AGC, through its Bar Counsel and Assistant Bar Counsel, to dismiss a complaint of

professional misconduct or incapacity. Rules 19-702(h)(9)(B); 19-703(b)(1). Absent express statutory authority permitting judicial review by a circuit court of an AGC decision, no judicial review lies. Md. Rule 7-200, *et seq*.

The Rules establishing the AGC were promulgated by the Court of Appeals, to assist in its Constitutional authority to make rules of practice. Md. Const. art. IV, § 18. The Rules adopted by the Court of Appeals show that it has exclusive control of the AGC in all matters involving attorney discipline.

Rule 19-702 establishes the AGC: "There is an Attorney Grievance Commission which shall consist of 12 members….") The Court of Appeals may remove a member of the Commission at any time. Rule 19-702(f). Subject to the approval by the Court of Appeals, "the Commission shall appoint an attorney as Bar Counsel." Rule 19-703. There is no rule or other authority which provides any circuit court with the authority to discipline attorneys or control any actions of the AGC[1]. Absent this authority, none exists.

Mr. Clevenger brings this action in the Circuit Court seeking what is functionally judicial review of an AGC action. Under the Rules, the Circuit Court has no authority or jurisdiction to review actions of the AGC or issue orders directing the AGC to act because the Court of Appeals has original and complete jurisdiction in all matters pertaining to attorney discipline. Although the Court of Appeals has delegated certain operational tasks to the AGC, the AGC remains under the exclusive control of the Court of Appeals in

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[1] Rule 19-722 which provides that upon the filing of a Petition for Disciplinary or Remedial Action, the Court of Appeals may enter an order designating "a judge of any circuit would to hear the action."

matters of attorney discipline. For these reasons, this Court unable to provide the relief Mr. Clevenger seeks and this action must be dismissed.

II. MR. CLEVENGER HAS NO CLEAR LEGAL RIGHT TO THE RELIEF HE SEEKS.

The purpose of a writ of mandamus is to compel the performance of a non-discretionary duty. *Wilson v. Simms*, 380 Md. 206, 217 (2004). Mandamus is an extraordinary writ used to compel public officials to "perform some ministerial 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." *Wilson,* 380 Md. at 217-18; *Harvey v. Marshall*, 158 Md.App. 355, 381 (2004). *See also Brack v. Bar Ass'n of Baltimore City*, 185 Md. 468, 474 (1946)("The petition for the writ must show both a clear legal right to the petitioner and also an imperative duty on the part of the defendant and unless these rights and duties are clearly established, there is no ground for the issuance of mandamus."); *Forster v. Hargadon*, 398 Md. 298 (2007). *Forster*, 398 Md. at 307; *See also Phillip Morris v. Angeletti*, 358 Md. 689 (2000). The court exercises its power with respect to mandamus "with caution, treading carefully so as to avoid interfering with legislative prerogative and administrative discretion." *Wilson*, 380 Md. at 223.

As is evident from the Rules, Bar Counsel's duties with the AGC are not ministerial and the role of Bar Counsel demands that he have discretion in all aspects of his investigations of complaints of attorney misconduct.

The goal of attorney discipline is protection of the public, rather than the punishment of the erring attorney. *Attorney Grievance Comm'n of Maryland v. Garcia*, 410 Md. 507,

520–21 (2009), reinstatement granted sub nom. *In re Garcia*, 430 Md. 640 (2013); *Attorney Grievance v. Goff*, 399 Md. 1, 30–31 (2007)(same); *Attorney Grievance v. Mba–Jonas*, 397 Md. 690, 702–03 (2007)(same). The Rules creating and guiding the AGC espouse the objective of protecting the public.

In construing a Rule, the court applies principles of construction similar to those used to construe a statute. *Holmes v. State,* 350 Md. 412, 422 (1998). If the language in the Rule is clear and unambiguous, the analysis ends. *Attorney Grievance Comm'n of Maryland v. Fezell*, 361 Md. 234, 248 (2000). Like a statute, interpretation of the language of the Rule requires that it be read in conjunction with the other subsections of the Rule so that the Rule is harmonized with all of its provisions. *Williams v. State*, 329 Md. 1, 15–16 (1992) (Court must discern "legislative intent from the entire statutory scheme, as opposed to scrutinizing parts of a statute in isolation."). And a statute is to be given a reasonable interpretation, not one that is illogical or incompatible with common sense. *State v. Brantner*, 360 Md. 314, 322 (2000). Statutes on the same subject are to be read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or "any portion, meaningless, surplusage, superfluous or nugatory." *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 302–03 (2001)(quoting *GEICO v. Ins. Comm'r*, 332 Md. 124, 132 (1993)).

Rule 19-711 provides that "Bar Counsel shall make an appropriate investigation of every complaint that is not facially frivolous or unfounded." Rule 19-711 (b)(1). The plain language of Rule 19-711 provides that Bar Counsel must make a discretionary determination of which complaints are "facially frivolous or unfounded." Bar Counsel

must also make an "appropriate" investigation. The term "appropriate" indicates that Bar Counsel has discretion to determine the type or depth of investigation based on any given complaint. The plain language of the Rule 19-711 shows that the role of Bar Counsel is imbued with discretion: he must determine which complaints are unfounded and must also determine the type of investigation warranted by the particular facts presented. Thus, for these reasons, mandamus may not be had to compel Bar Counsel to investigate a complaint in a specific manner. Thus, here the term "shall" as it appears in Rule 19-711(b), is qualified with discretionary language, thus, the context of the Rule indicates that it is not mandatory. *Carter v. Harris*, 312 Md. 371, 377 (1988).

Stemming from the basic notion that Bar Counsel has discretion to perform his duties based on the facts of any given complaint, the plain language of the Rules must give way to an interpretation that does not do harm to the purpose of the Rules. Mr. Clevenger's interpretation of the Rules would do just this: it would subject the AGC to the risk of becoming a political tool and would squander scarce resources. Mr. Clevenger argues that because Rule 19-711(b) (2)(A) - (2)(D) states that Bar Counsel "shall make an appropriate investigation of every complaint that is not frivolous or unfounded," that Bar Counsel is required to investigate each and every complaint, regardless of the number of complaints received based on the same set of facts. For instance, when misconduct complaints are raised against very public figures, the AGC could receive multiple complaints based on the same or similar sets of facts. Such investigations would squander limited state resources investigating the same individuals based on the same facts. In these cases, Bar Counsel, in order to best serve the public good, must exercise his discretion and

determine the best use of scarce public funds and how best to protect the public.

Furthermore, the confidentiality rules applicable to all AGC complaints greatly restrains Bar Counsel ability to explain his actions. Bar Counsel is not at liberty to disclose whether there are or are not other pending investigations. The rules provide that "the records of any investigation by Bar Counsel, including the existence and content of any complaint or response until Bar Counsel files a petition for disciplinary or remedial action" are confidential. Rule 19-707(A). Given the level confidentiality applicable to all complaints, Bar Counsel must have discretion because if ever questioned or sued for mandamus relief, Bar Counsel and the AGC are not able to mount any sort of case in defense of their own actions. This would mean that the AGC would perpetually be subject to legal action – without defense – any time a complainant was unhappy with an action of the AGC. This cannot be the meaning of Rule 19-711.

Rule 19-711 should be not construed to force Bar Counsel to investigate and keep potentially hundreds of complainants informed when duplicative complaints are filed. Bar Counsel must have the discretion to decline to investigate certain complaints in order to further the public good. If Bar Counsel did not have such discretion, he could be subject to legal action in which the confidentiality of Bar Counsel's activities would keep Bar Counsel and the AGC from being able to explain or defend their actions. This would not serve to protect the public and this cannot be the law.

In this case, Mr. Clevenger did not possess any personal information related to the complaints he made about Hillary Clinton's attorneys. Bar Counsel responded to Mr. Clevenger's complaint stating that because Mr. Clevenger was not personally aggrieved by

the attorneys who are the subject of the complaint and because Mr. Clevenger does not possess material information about the case, Bar Counsel was declining to investigate Mr. Clevenger's complaint "with [Mr. Clevenger] as the complainant." Petition, Ex. 4. This letter does not say that it is declining to investigate Mr. Clevenger's complaint, it states that it will not be investigating the complaint with Mr. Clevenger as complainant. While Bar Counsel is unable to give information about the existence of other complaints, it is quite possible that there have been hundreds of similar complaints filed which seek to use the attorney grievance process to gain information on political figures for political gain.

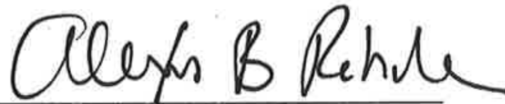
It cannot be that the intent of the Rules that Bar Counsel and the AGC would be forced to investigate every duplicate complaint providing extensive notice to every complainant who has no personal knowledge of an event and then, be subject to a lawsuit which the AGC is unable by rule to defend. The reading of Rule 19-711 advanced by Mr. Clevenger defies common sense. Mr. Clevenger does not a legal right to the relief he seeks: the work of Bar Counsel is not ministerial and cannot be challenged by through this mandamus action.

CONCLUSION

The Petition for Writ of Mandamus should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May 2017, a copy of the foregoing was served by electronic means via the Court's MDEC system on the persons entitled to receive such notice and mailed, via first-class mail, postage prepaid, to the following:

Ty Clevenger
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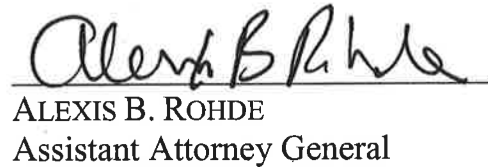
Petitioner Pro Se



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