DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER TWELVE

In the Matter of:	:	
	:	
JEFFREY B. CLARK	:	
	:	Board Docket No. 22-BD-039
Respondent.	:	Disciplinary Docket No. 2021-D193
	:	
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

ORDER

Pending before the Hearing Committee are Respondent's Motion in Limine regarding Admissibility of Evidence Regarding the 2020 Election Coming to Light After January 3, 2021 and Motion Opposing Adverse Inference in Response to Valid Invocation of the Constitutional Right to Remain Silent. Disciplinary Counsel opposes each of these motions.[1] We address each below.

A. Motion in Limine regarding Admissibility of Evidence Regarding the 2020 Election Coming to Light After January 3, 2021

Mr. Clark moves this Hearing Committee to permit the introduction of evidence "regarding the results of investigations into the 2020 election conducted after January 3, 2021 to support the reasonableness of the positions he took in the draft letter of December 28, 2020 based on the belief, expressed in the draft letter of that date and in discussions with others, that there were "significant concerns that may have impacted the outcome of the election in multiple States, including in the

[1] The Hearing Committee heard argument concerning both motions during the December 18, 2023 video pre-hearing conference.

State of Georgia." Motion at 1. Relying on Federal Rule of Evidence 401[2], Respondent contends that this evidence is relevant to the reasonableness of Mr. Clark's beliefs, and whether they were honestly held, when he drafted the letter at issue. Motion at 8. Mr. Clark contends that, in charging that he attempted to engage in conduct involving dishonesty in violation of Rules 8.4(a) and (c), Disciplinary Counsel must prove that he acted, at a minimum, recklessly. According to Mr. Clark, the proffered evidence bears on that question.

Disciplinary Counsel responds that the reasonableness of Mr. Clark's beliefs – whether honestly held or otherwise - in drafting the letter is not relevant to any fact of consequence in this matter. It points to the limited allegations in the Specification of Charges, namely that Mr. Clark drafted a letter containing multiple false statements, pressed to send the letter despite being told by other officials that it contained false statements, and continued to do so until January 3, 2021, when it became clear that he would not be appointed as Acting Attorney General. Opposition at 2. Disciplinary Counsel argues that post-January 3, 2021 evidence is not relevant to these allegations or the charged Rule violations. Disciplinary Counsel also cites Fed. R. Evid. 403[3] and argues that the probative value of any such evidence would be substantially outweighed by the risk of confusion of the issues, or considerations of undue delay, waste of time or needless presentation of cumulative evidence, involved in a dispute over the Georgia election and whether alleged irregularities affected the outcome. *Id.*

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[2] Under Federal Rule of Evidence 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

[3] Rule 403 provides, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Mr. Clark is correct that a Rule 8.4(c) violation would require, at the very least, that Disciplinary Counsel prove that he acted recklessly, *see In re Romansky*, 825 A.2d 311, 317 (D.C. 2003) (remanding to the Board for a determination as to the respondent's actual state of mind and determining that if he acted knowingly, or recklessly -, *i.e.,* consciously disregarding the risk that his actions posed - then his conduct was dishonest in violation of Rule 8.4(c)).

But Mr. Clark has not explained how the evidence at issue - information not available to him until after the alleged misconduct had occurred - is relevant to this inquiry or to any defense that he may have to the charged Rule violations. Mr. Clark cites (at 5-6) cases finding some types of evidence concerning events after a representation was made could be relevant to some allegations concerning the representation. For example, proof that a prediction about the market turned out to be accurate might be relevant to assess whether it was reckless to make the prediction, even though other evidence of subsequent events would not be. *See, e.g.*, *Patrick v. Patrick*, 2010 WL 569740 at *3 (W.D. Pa. Feb. 12, 2010). However, Disciplinary Counsel does not allege that Mr. Clark violated the Rules of Professional Conduct by making a prediction, and Mr. Clark does not show how the evidence he wishes to offer relates to the allegations Disciplinary Counsel does make or his defenses to them.

I also agree with Disciplinary Counsel that any probative value of the evidence Mr. Clark seeks to offer is substantially outweighed by undue delay and waste of time involved the dispute. Accordingly, Mr. Clark's Motion in Limine regarding Admissibility of Evidence Regarding the 2020 Election Coming to Light After January 3, 2021 is denied.

B. Motion Opposing Adverse Inference in Response to Valid Invocation of the Constitutional Right to Remain Silent

Mr. Clark has reserved the right to invoke the Fifth Amendment if called to testify in these proceedings. During the prehearing conference, his counsel predicted that, if called, Mr. Clark

would essentially testify only to basic biographical information and would invoke the Fifth Amendment as to any further questions. Tr. 223-24. Mr. Clark seeks a ruling that this Hearing Committee will not draw an adverse inference should he do so. He points to the impermissibility of such adverse inferences in criminal proceedings based on a defendant's invocation of the Fifth Amendment, *see* 81 Am. Jur. 2d Witnesses § 118 ("In a criminal case, the jury may not properly draw any inference from a person's exercise of his or her Fifth Amendment right against self-incrimination."). He contends that the same should apply in these quasi-criminal proceedings. *See In re Artis*, 883 A.2d 85, 101 (D.C. 2005) (recognizing that disciplinary proceedings are quasi-criminal in nature). And he cautions that an adverse inference in this context may visit an unconstitutional penalty upon Mr. Clark for exercising his Fifth Amendment right. Motion at 3.

Disciplinary Counsel notes that, while Mr. Clark is correct in the context of criminal matters, such inferences are not prohibited in civil matters. It previews that its witnesses will testify that the statements contained in Mr. Clark's letter were false and insists that, if Mr. Clark chooses to invoke the Fifth Amendment, the Hearing Committee may infer that he does not have evidence to contradict those witnesses. Opposition at 5. It contends that, since the inference will not automatically result in discipline, Mr. Clark would not be penalized for his invocation. It further states that the Hearing Committee should be able to consider independent evidence supporting the inference, and should assign the appropriate evidentiary weight to it.

In analyzing this issue, it is important to distinguish between a determination that a point has been unrebutted from an adverse inference. As the parties agreed during the hearing and I discussed in my previous recommendation on Mr. Clark's motion to defer, the decision to invoke the Fifth Amendment can (and frequently does) involve a difficult choice. Whether in a criminal proceeding, a civil proceeding, or this disciplinary proceeding, a party who decides not to testify

runs the risk that there, therefore, be no evidence to rebut adverse allegations. *See, e.g.*, *Attorney Grievance Comn. of Maryland v. Unnamed Attorney*, 467 A.2d 517, 522 (Md. 1983). A party is not entitled to a *favorable* inference from silence: that, if only they had testified, that testimony would have demonstrated innocence or a lack of liability.

The issue here, however, is different. Disciplinary Counsel argues that we are entitled to draw an *adverse* inference from a decision Mr. Clark may make not to testify. This issue presents a novel issue in the discipline system. On the one hand, we are aware of no authority that would prohibit this Hearing Committee from drawing an adverse inference should Mr. Clark invoke the Fifth Amendment during the hearing. On the other hand, given counsel's representation as to the anticipated breadth of Respondent's invocation, we find that this Hearing Committee would be unable to draw an adverse inference regarding any particular material fact from the anticipated blanket assertion of the Fifth Amendment. Relying on counsel's representation as to the breadth of Mr. Clark's invocation of the Fifth Amendment, Respondent's Motion Opposing Adverse Inference in Response to Valid Invocation of the Constitutional Right to Remain Silent is granted, without prejudice to reconsideration in the event that Mr. Clark's actual invocation of the Fifth Amendment varies from counsel's prediction.

There is a preliminary hearing in this case scheduled for January 16, 2024 at 10:15 am. In advance of that hearing, the parties are directed to consider and be prepared to address the extent, if any, to which these rulings make affect the scheduling, evidence or preparation for the hearing.

It is so Ordered.

HEARING COMMITTEE NUMBER TWELVE

By: Merril Hirsh
Merril Hirsh
Chair

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