DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of Steven R. Donziger A Suspended Member of the Bar of the District of Columbia Court of Appeals Bar Reg. No. 431577	No. 18–BG–967 DDN: 288-16

RESPONSE TO ORDER TO SHOW CAUSE

Introduction

Reciprocal discipline is imposed as a matter of course in an ordinary case. As this response will demonstrate, there is nothing ordinary about this case. To impose reciprocal discipline on this record against Steven Donziger, a human rights and climate justice lawyer, would be a grave injustice. Steven Donziger must be allowed a hearing where he can present facts prior to any decision with respect to the use of reciprocal discipline.

The facts in this case are extraordinary and suggest significant violations of due process rights in the New York proceeding that make it an inappropriate basis

from which to impose reciprocal discipline. First, Mr. Donziger was denied a fact hearing in New York where he could challenge the findings from a 2013 non-jury civil fraud case in which significant evidence emerged post-trial that the lead witness against Mr. Donziger was coached for over 50 days by Chevron lawyers prior to his testimony and lied repeatedly on the stand.[1] Second, the only fact-finder to have specifically considered the application of charged ethics violations to Mr. Donziger's conduct in New York (based on the presentation of character evidence from several prominent attorneys and civil society leaders who know Mr. Donziger and have worked with him) recommended *against* disbarment. That fact-finder, former Assistant U.S. Attorney John Horan, founder of the New York-based law firm Fox Horan Camerini LLP, presided over an adversarial three-day hearing and rendered findings in support of Mr. Donziger's honesty, integrity, and credibility, and ultimately recommended not only against disbarment, but that Respondent's "[then] interim suspension should be ended, and that he should be

[1] *See*, *e.g.*, Attachment 5 - *Brief for Amici Curiae Amazon Watch and Rainforest Action Network In Support of Petitioners*, *Chevron v. Donziger*, No. 16-1178 (U.S. May 1, 2017), https://chevroninecuador.org/assets/docs/2017-05-01-aw-ran-amicus-brief.pdf. This brief is a comprehensive summary with cites to the record showing Chevron's key witness against Mr. Donziger (Alberto Guerra) admitted lying under oath on several critical issues and that the district court as a result erred in findings used as a basis for attorney discipline in the New York proceedings. Pages 17–20 of the brief summarize the lies of the Chevron witness. Pages 5–20 provide a factual overview of Chevron's unethical acts before the district court and the Ecuador trial court.

allowed to resume the practice of law" without further sanction or delay. Attachment 4 at 33. Those detailed, evidence-based findings were rejected by the Appellate Division of the New York Supreme Court - First Department in a cursory decision with no hearing or explanation other than to broadly characterize Mr. Horan, whom the First Department had appointed, as being "too dismissive" of the severity of the charges and exceeding the narrow bounds of inquiry the appeals court had previously set.

This court's review is the final opportunity for a measure of justice to be accorded to Respondent, whose career and freedom have been the target of a litigation opponent with unlimited resources motivated by the desire to avoid the consequences of the pollution judgment Mr. Donziger had helped secure against it on behalf of Indigenous peoples in the Amazon.[2] Beyond the impact on Respondent personally, the use of court and disciplinary proceedings to demonize and silence a champion of environmental justice would be a cautionary tale to future members of the legal profession who speak truth to power. In fact, to disbar Mr. Donziger based on the mechanical application of reciprocal discipline will serve the agenda of his

[2] *See, e.g.*, Paul Barrett, LAW OF THE JUNGLE (2014), at 24–29 (reviewing company memos concerning environmental practices); Joan Kruckewitt, *Oil and Cancer in Ecuador*, S.F. Gate, Dec. 11. 2005, https://www.sfgate.com/green/article/OIL-AND-CANCER-IN-ECUADOR-Ecuadoran-villagers-2557444.php.

opponent by turning a man of great integrity into an object lesson of intimidation designed to silence those who might challenge the fossil fuel industry.

Argument

A core principle of attorney discipline that this court has recognized since its inception is that sanction may only be imposed after a respondent is afforded (1) a full and fair opportunity to respond to allegations of misconduct, (2) satisfactory proof of charges, and (3) consideration of mitigating evidence. *See In re Williams*, 464 A.2d 115 (D.C. 1983) (discipline may not be imposed by default; Bar Counsel must present clear and convincing evidence of misconduct and cannot rely upon attorney's failure to participate); *In re Pearson*, 628 A.2d 94 (D.C. 1992) (reciprocal discipline not imposed as matter of due process when misconduct findings are premised on procedural default).

In reciprocal discipline matters, a final order of discipline from another jurisdiction carries a strong *but rebuttable presumption* that the sanction imposed was the product of a fair process. D.C. Bar R. XI, § 11; *see also In re Velasquez*, 507 A.2d 145 (D.C. 1986). If a respondent has had notice of charges and a full opportunity to respond, default in such circumstances does not create an infirmity of proof or result in a grave injustice in a reciprocal matter. *In re Day*, 717 A.2d 94 (D.C. 1998). But that is not what happened to Mr. Donziger in the New York proceedings.

The history of the proceedings and the various due process shortcomings that led to Respondent's New York disbarment are set forth fully and with record citations in the petition for certiorari submitted in *Steven R. Donziger v. Attorney Grievance Committee for the Supreme Court of the State of New York Appellate Division: First Judicial Department,* which is appended to this Response as Attachment 1.

Respondent is an internationally recognized environmental rights advocate whose entire law practice for almost three decades did not result in even a single grievance complaint. His only encounter with allegations of misconduct arose from his successful litigation against Chevron Corporation in Ecuador. When Mr. Donziger and other lawyers attempted to have the underlying environmental matter heard in the Southern District of New York, Chevron requested that it be dismissed on *forum non conveniens* grounds so that it could he heard in Ecuador's courts. As a condition of the dismissal, Chevron accepted jurisdiction in Ecuador and promised to pay any adverse judgement. Mr. Donziger then helped Amazon communities win the matter in Ecuador, where the courts ultimately issued a judgment against Chevron for $9.5 billion based largely on voluminous scientific evidence including 64,000 chemical sampling results taken from Chevron's former well sites that were submitted by experts for both parties. Chevron has never persuaded any court in Ecuador of its allegations of bribery and ghost-writing of the judgment which are

based largely on false testimony from the Chevron-paid witness who admitted lying repeatedly in the very proceeding whose findings were used to disbar Mr. Donziger in New York without a hearing.[3] Indeed, Chevron's allegations against Mr. Donziger were considered and rejected by Ecuador's highest courts.

After the judgment against Chevron was won in Ecuador, Chevron sought the aid of courts in the United States and found a United States District Court judge amenable to its strategy to try to destroy the foreign judgment by targeting the lead attorney who had helped Indigenous persons prevail against the oil company. The strategy used was to target Mr. Donziger with spectacular allegations of fraud or other wrongdoing to drive him off the case, leaving the actual plaintiffs without counsel and defenseless. In other words, a strategy to win by might what cannot be won on merit.[4]

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[3] *See* Attachment 5 - *Brief for Amici Curiae Amazon Watch and Rainforest Action Network, supra* note 1, at 17–20.

[4] For news articles examining the scope of Chevron's campaign against Mr. Donziger, see Alexander Zaitchik, *Sludge Match: Inside Chevron's $9 Billion Legal Battle With Ecuadorean Villagers*, ROLLING STONE, Aug. 28, 2014, http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828, and Rex Weyler, *This lawyer took on Chevron and won the largest human rights and environmental court judgment in history*, NATIONAL OBSERVER (Can.), Jul. 31, 2020, https://www.nationalobserver.com/2020/07/31/opinion/lawyer-took-chevron-and-won-largest-human-rights-and-environmental-court-judgment.

The story is told in the only disciplinary venue ever accorded to the Respondent, proceedings before Mr. Horan, the referee appointed by the New York Supreme Court Appellate Division for the First Judicial Department ("First Department"). In 2018, Referee Horan noted that the procedural posture of the disciplinary matter had not afforded Mr. Donziger either the opportunity to contest the allegations or the opportunity to present mitigating evidence: "To argue that [R]espondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer, is to overlook the substantial differences in the proceedings." Attachment 3 at 3. In 2020, after the First Department forbade him from providing Donziger with "an actual 'hearing'" "where [R]espondent can address the Charges against him as he sees fit", *Id.* at 4, Referee Horan further found that Respondent has the present character, fitness and integrity to practice law in an honorable manner. Attachment 4 at 8, 30–31 (e.g., "Assessment of character is not an exact science, but we can all agree that the essential components are honesty, integrity, and credibility. It is far from clear that Respondent is lacking in those qualities as the Committee argues.").

Unfortunately, the First Department refused to consider any aspect of Referee Horan's exonerating report and positive assessment of Mr. Donziger's present character and fitness. The reasons for the First Department's refusal underscore Mr. Donziger's contention before this court that he was deprived of fundamental due

process in the New York proceeding and that the imposition of summary reciprocal discipline would result in a grave injustice. D.C. Bar R. XI, § 11(c).

New York employs a preponderance of the evidence standard of proof in bar discipline matters. In *In re Benjamin*, 698 A.2d 434 (D.C. 1996), the court concluded that the lesser standard of proof employed in New York, standing alone, does not create an infirmity of proof in a reciprocal context. But here, the deprivation of notice and the opportunity to be heard is not based on the lesser standard of proof alone but on much more. Rather, Mr. Donziger was the subject of a civil RICO proceeding in the United States District Court for the Southern District of New York ("Southern District") brought by a litigation opponent (Chevron) with unlimited resources that used more than 100 lawyers to target Mr. Donziger, who appeared pro se during much of the proceeding during which he was also deprived of the right to trial by jury.[5] The adverse predicate felony findings of the single judge presiding over the non-jury RICO trial (to our knowledge, the first civil RICO proceeding in U.S. history where an individual defendant was denied a jury) form the basis of this action.

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[5] Chevron submitted a privilege log in the RICO matter that listed more than 60 law firms and more than 2,000 lawyers and legal personnel who had worked in some capacity on the Ecuador pollution litigation and its progeny. More than 100 lawyers were listed from the Gibson, Dunn & Crutcher firm working on the RICO matter targeting Mr. Donziger, according to a count carried out at the time by Mr. Donziger's counsel.

The civil RICO findings in that matter were made under the preponderance of the evidence standard without notice of potential disciplinary consequences and are most assuredly not the product of any disciplinary proceedings with attendant due process safeguards and an opportunity to present counter-factual and mitigating evidence. *See* Attachment 4 at 5 ("this decidedly unusual case, which is unprecedented (findings criminal in nature in a civil RICO case) and bears none of the characteristics of a typical attorney grievance matter . . ."). To reiterate, key findings were based on the testimony of the paid Chevron witness who later admitted perjuring himself on several critical issues after he had been extensively coached by company lawyers prior to taking the stand.[6]

Compounding the many problems in using the findings in that proceeding as a basis for any form of bar discipline is that several of the district court judge's colleagues wrote a referral letter to the Attorney Grievance Committee for the First Department providing a roadmap to impose sanctions on Mr. Donziger without a hearing. This extraordinary letter to the First Department's Grievance Committee makes plain that this is no ordinary case. The sender wrote over the Chief Disciplinary Counsel's formal name to address him as "Jorge." Attachment 2 at 1. More shockingly, the referral letter offers a roadmap to an easy, proof-free

[6] *See* Attachment 5 - *Brief for Amici Curiae Amazon Watch and Rainforest Action Network, supra* note 1.

disbarment by suggesting the use of offensive collateral estoppel. *Id.* at 2. The Grievance Committee and First Department then employed the suggested strategy to deny Mr. Donziger a hearing where he could present ample factual evidence on fact issues that formed the basis for his discipline — including, for example, that the key witness in the RICO trial later admitted under oath that he had lied repeatedly in that proceeding.

Moreover, the ubiquitous participation of private counsel from prominent corporate law firms that represent Chevron or other major players in the oil & gas industry is a unique and disturbing feature that infects every aspect of these proceedings. Referee Horan characterized the conduct of Respondent's litigation opponent as "so extravagant, and at this point so unnecessary and punitive, while not a factor in my recommendation, is nonetheless background to it." Attachment 4 at 34. Moreover, when the findings of Judge Kaplan, who "did not hide his regard for Chevron and its predicament as a judgment debtor", *Id.* at 9, were referred to New York disciplinary authorities, an attorney from a large corporate law firm was appointed as "Pro Bono Special Counsel" to "assist" the Attorney Grievance Commi in pressing the contention that Respondent should be foreclosed from any opportunity to either defend or explain himself. These unsettling arrangements raise the specter that this entire affair is the product of the "parochial or self-interested concerns of the bar" rather than protection of the public from an unfit attorney. *See*

Model Rules of Prof'l Conduct, Preamble at cmt. [12]; Attachment 4 at 35–36 ("There is now no real question about whether Respondent is a threat to the public interest . . . The Committee argues that he should be disbarred but I cannot recommend this sanction in view of the totality of the evidence presented at the hearing, and particularly the mitigation; in my view, it would not be just in these circumstances.").

Thus, the record establishes that the preponderant evidence findings in the civil RICO judgment were then treated as conclusive in the disciplinary proceeding based on the use of offensive collateral estoppel to prevent Respondent from having any opportunity to present any evidence with respect to the allegations or sanction. The First Department's indifference to the denial of Mr. Donziger's right to present factual evidence and its refusal to consider the well-reasoned conclusions of Referee Horan recommending against disbarment underscores this unfairness.

This court has not opined extensively on the use of offensive collateral estoppel in bar discipline proceedings, but there is precedent for rejecting the imposition of discipline based on the use of offensive collateral estoppel when a fact hearing was not allowed. In *In re Kennedy*, 605 A.2d 600 (D.C. 1992), then Bar Counsel sought to use offensive collateral estoppel based on findings in a Maryland civil proceeding. The Board remanded the matter to a hearing committee to establish the alleged misconduct with clear and convincing evidence rather than by conclusive

presumptions. *Id.* at 601. Notably, in *Attorney Grievance Commission v. Bear*, 362 Md. 123, 763 A.2d 175 (2000), the Maryland Court of Appeals explicitly rejected the use of offensive collateral estoppel in bar discipline based on civil findings. Finally, in *Dunn v. Committee on Professional Standards*, 2015 N.Y. Slip. Op. 01556 (Feb. 24, 2015), the New York Court of Appeals ruled in a manner inconsistent with the First Department's disposition of this matter on the subject (collateral estoppel not applied to federal magistrate's sanction findings where attorney did not have full and fair opportunity to litigate issue of misconduct). In sum, there is no precedent in this court for imposing reciprocal discipline in any remotely comparable circumstances. *See* Attachment 4 at 5.

Prior to its 2008 revisions to D.C. Bar R. XI, § 11, all reciprocal matters were referred by the court to the Board on Professional Responsibility for a report and recommendation. A significant part of the court's disciplinary caseload involved adjudicating disputes between (then) Bar Counsel and the Board over the application of the "substantially different" discipline exception. *See, e.g.*, *In re Shieh*, 738 A.2d 814 (D.C. 1999); *In re Berger & Awuah*, 737 A.2d 1033 (D.C. 1999); *In re Spann*, 711 A.2d 1262 (D.C. 1998).

The court's salutary change to a Show Cause regime has substantially reduced the reciprocal discipline caseload. However, to counsel's knowledge, no clear standard has emerged for the court's determination to refer a particular reciprocal

matter to the Board for its input. For example, in *In re Goffer*, No. 14-BG-5 (D.C.) (referral order Mar. 28, 2014) the court referred the matter on the theory that the court "will benefit" from the Board's views. In *In re Naegele*, 14-BG-1468 (D.C.) (referral order Nov. 2, 2014), the court referred the reciprocal matter to the Board because "a response from the Board will aid the court in its resolution" of the California reciprocal matter then being decided. Surely referral to the Board in this extraordinary case "will benefit" "the court in its resolution" of this matter.

The dangers of the political use of attorney discipline have long been recognized. *See In re Primus*, 436 U.S. 412 (1978) (no discipline imposed on ACLU attorney who had solicited as clients victims of forced sterilization); *see generally* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASHINGTON. U. L.Q. 725 (2005). If this case has an historical precedent, it is perhaps found in the bar discipline proceedings against Bernard Ades. *In re Ades*, 6 F. Supp. 467 (D. Md. 1934).

Ades sought to defend a client (an "elderly colored man, accustomed to farm work, but of an unusually high degree of intelligence for a person of the class") accused of multiple murders on the Eastern Shore of Maryland. *Id.* at 470. For his efforts to vigorously defend his client's rights, Ades was threatened with death, beaten by a mob, and subjected to disbarment proceedings. Defended by Charles

Hamilton Houston and Thurgood Marshall, he persuaded the Maryland District Court that no sanction was appropriate.

Here, the court cannot be expected to study this complex record in the first instance to address whether due process has been accorded to Respondent or whether the use of the preponderance of the evidence standard times two combined with the application of offensive collateral estoppel to entirely silence him amounted to a grave injustice. The court should call upon the Board for its valuable input on these questions.

If the court is persuaded on the strength of this Response that a grave injustice has been perpetrated, it has the power to dismiss the matter outright and allow for any disciplinary proceedings (should they be brought) to take their normal course. *See* D.C. Bar R. XI, § 9(j). If not, this matter should be referred to the Board for an examination of the record to determine whether the exceptions of D.C. Bar R. XI, §§ 11(c)(1–3) apply in these unique circumstances. If the Board concludes that due process has not been accorded to Respondent, it should either (1) recommend to the court that this matter be dismissed or (2) refer the matter to Disciplinary Counsel for an investigation pursuant to D.C. Bar R. XI, § 9.

Respondent must be afforded the opportunity to present factual evidence and to otherwise contest the allegations against him before a professional death sentence is imposed.

Dated: May 5, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2022, I filed the foregoing with the Clerk of Court using the EFS system, which will then send a notification of such filing to the counsel of record in this case.

/s/ *Michael S. Frisch*
Michael S. Frisch