James Phalen

From: [Alan J. Roth]
Sent: Wednesday, November 9, 2022 12:56 PM
To: DCBoard
Subject: [EXT]Comments on Proposed Board Rule Changes - Administrative Order 2022-1
Attachments: DC Bar Letter 6-4-21.pdf; Fox ODC Letter 06112021.pdf; Reply to Fox ODC 06162021.pdf; DC Bar Disciplinary System Ltr 6-15-22.pdf

Dear Board Members,

Thank you for this opportunity to submit written comments on the Board of Professional Responsibility's (Board) proposed amendments to the Board's Rules, as provided in Administrative Order 2022-1 issued October 28, 2022.

I have been highly critical of the Office of Disciplinary Counsel's (ODC) handling of the numerous complaints filed against DC Bar members alleged to have violated the rules of professional conduct in their work for former President Trump's Administration, his re-election campaign, or his efforts to overturn the results of the 2020 election (collectively, the Trump-related controversies). My criticisms were included in, among other communications, letters to Disciplinary Counsel Phil Fox dated June 4 and 16, 2021, and a further letter to Chief Judge Anna Blackburne-Rigsby, then-Board Chair Matthew Kaiser, and Bar President-Elect Ellen Jakovic dated June 15, 2022. Copies of these letters are attached here to supplement the record.

Comment on Reason for Rule Changes

Achieving a satisfactory solution to a problem is difficult without first gaining agreement on what the problem is. Accordingly, before commenting on the proposed Rule revisions themselves, I want to address the Board's stated "Reason for proposed Rule changes" set forth at the conclusion of "Section A. Docketing and Notification Rules (Rules 2.3-2.8 and 6.1)" in the October 28th Administrative Order. As the Board notes, many members of the Bar are indeed concerned that "Disciplinary Counsel was not investigating public figures by virtue of their status." There are several deficiencies, however, in this cramped explanation of why the Board's Rules need modification.

First, "public figures" are not the only attorneys whose allegedly unethical conduct has been inappropriately ignored by ODC. As my June 15, 2022 letter noted:

> Nor does it appear ODC has singled out only famous people involved in the Trump post-election effort for special treatment. On February 25, 2021 – nearly 16 months ago [now more than 20 months ago] – a 14-page complaint was submitted to ODC [by attorney Patrick A. Malone] outlining in exquisite detail the manner in which three lesser known lawyers – Julie Zsuzsa Haller, Lawrence Joseph, and Brandon Johnson – participated in filing an election-related lawsuit in the federal district court for the Eastern District of Texas. . . . [T]he complaint persuasively alleged that their pleadings were filled with falsehoods, misrepresentations, and even a fake document. . . . These three lawyers were alleged to have engaged, among other things, in frivolous litigation in violation of the rules of professional conduct and disciplinary action was sought against them. A federal judge in Michigan has since imposed sanctions on two of the three for similar frivolous election litigation, including a referral to ODC for disciplinary action.

Under no stretch of the imagination can any of these three lawyers be considered "public figures." The Board should not try papering over ODC's refusal to docket complaints in these Trump-related controversies by suggesting that complainants concerned about the reputation of the legal profession are focused solely on "public figures."

Moreover, at least one complainant was told point blank well before the November 2020 election, "*In general, this Office will not intervene in matters that are currently and publicly being discussed in the national political arena.*" (Letter from Angela Walker, ODC Staff Attorney, to Gershon M. Ratner, Re: Barr/Ratner, Undocketed No. 2020-U592 (Aug. 4, 2020)). More than one year later, ODC advised that it would not docket complaints "based only on public information, such as news reports or court proceedings, where the complainant has no personal knowledge of the matter." (Letter from Angela Walker, ODC Staff Attorney, to Daniel B. Edelman and Others, Re: Clark/Edelman, Undocketed No. 2021-U791 (Oct. 18, 2021)). It is remarkable that at that juncture, after considerable public debate on and media coverage of this subject, *even public records of judicial proceedings* still would not suffice to justify docketing a complaint, a truly bizarre twist on the Bar's and the courts' purported interest in upholding the rule of law. The Board thus unfairly minimizes the concerns of complainants who in good faith submitted well-founded grievances by suggesting that the basis for refusal to docket their complaints was limited to "lack of personal knowledge of the underlying events" or that they had merely been "*given the impression* that Disciplinary Counsel was not investigating public figures by virtue of their status." (Emphasis added.) Reading ODC's letters to complainants in the fullness of the context in which they arose, it is difficult to imagine that ODC had not made a conscious policy decision to exempt from scrutiny any attorney who participated in a controversial matter, regardless of whether that attorney was a so-called "public figure."

Finally, with all due respect, it insults the reader's intelligence for the Board to state that ODC's "policy of disclosing less information to complainants without personal knowledge of the underlying events is only intended to comply with the requirement that all investigations be confidential." These very proposed amendments arise specifically out of ODC's unjustified refusal to *docket* complaints, *not* out of what information ODC discloses to complainants or the public *after* a complaint is docketed. In his June 11, 2021 response to me, Mr. Fox attempted to conflate the three separate issues of docketing, investigation, and confidentiality in an unpersuasive attempt to justify ignoring Board Rules 2.3 and 2.4 (which in turn incorporates section 6(a)(2) of Rule XI). Those Rules constrain ODC's discretion to refuse to docket a complaint. None of those provisions empower Disciplinary Counsel to invent unwritten excuses for *not* docketing complaints such as those that have appeared in ODC's various non-docketing letters or Mr. Fox's letter to me. The Board's Rules provide a process in Chapter 2 for determining *after* docketing whether a complaint should be pursued or dismissed. That process includes investigation, subject to the same confidentiality requirements that would apply in a case initiated and docketed by ODC itself.

In his letter to me, Mr. Fox found it necessary to excuse ODC's *ultra vires* conduct by claiming that "all this is complicated and not easy to explain. In fact, we have revised our 'non-docketing' letter to complainants several times to try to be clear about our policy." More likely, those repeated revisions were necessary because the explanations were unpersuasive and contrary to the Board's Rules. Now that the Board has proposed revising its Rules to ensure that *all* complaints are docketed appropriately, and that public confidence in the disciplinary system will be preserved, it is important that any Rules changes serve those very purposes and do not permit ODC to continue finding excuses to evade its responsibilities.

Comments on Proposed Rules Changes

<u>Proposed Rule 2.4</u> (Preliminary Screening of Complaints)

It is not clear whether the changes proposed in the first paragraph of this Rule are positive. While at first glance deleting the phrase "as appears appropriate" from the first sentence seems helpfully intended to constrain ODC

in making its docketing determinations, the change proposed in the second sentence is unnecessary and simply gives back to Disciplinary Counsel the problematic source of discretion that led to this very proposal in the first place. *There is no reason the current second sentence of this Rule cannot stand as is, even with the change proposed in the first sentence.*

The proposed change in terminology from "preliminary inquiry" to "preliminary screening" also raises an important question. The terms "inquiry" and "preliminary inquiry" appear in Board Rule 1.2 (definition of "Investigation" means a "factual inquiry"; definition of "Respondent" includes an attorney whose conduct has become subject to "inquiry"); Rule 5.1 ("Preliminary Inquiry into Complaints of Misconduct Against Counsel in Criminal Proceedings"); and Rule 13.9 (Respondent objections to "written inquiry" of the Board). Although these terms are themselves not defined in the current Board Rules, they presumably have developed commonly accepted meanings or applications over the years in their respective contexts. By contrast, the term "screening" appears only in the heading of the current Rule but has no definition, meaning, or history beyond that. Standing alone, the heading sheds no particular light on the meaning of the term as used in this one proposed instance.* Assuming the Board intends something short of a full-blown "factual inquiry" – which is contemplated by the Investigation stage of the process rather than the preliminary, pre-docketing stage – it would be appropriate in light of this introduction of new terminology for the Board to make clear that the screening process is limited solely to examining whether a complaint meets the three-part test set forth in Rule 2.3.

The proposed new second paragraph of Rule 2.3 should be expanded in two respects. First, while the proposed language states that "Disciplinary Counsel may rely on its docketing determination regarding [a] previously received complaint" if it receives additional complaints "involving materially identical factual allegations," the proposal should state more clearly what action Disciplinary Counsel may or should take in such a circumstance, i.e., "rely on" to do what?

Second, ODC may receive complaints against an attorney that contain similar or related allegations of misconduct, but that are not "materially identical." Likewise, other complaints may contain allegations that arise out of an identical event or transaction but implicate different potential ethical breaches. The revised Rule should make clear that Disciplinary Counsel must treat these complaints individually, rather than reflexively lumping them in with another complaint that may have already been screened and found wanting.

The final sentence of this proposed Rule revises existing language making Disciplinary Counsel's docketing decisions non-reviewable. While the new language does not materially change the status quo, the Board should reconsider this position in light of what we have learned during the past two years. ODC has clearly abused its unreviewable discretion with respect to docketing decisions by inventing unjustified and improper reasons for refusing to docket otherwise appropriate complaints. The non-reviewability of Disciplinary Counsel's docketing decisions should be limited solely to the grounds that a complaint is unfounded on its face or is not within the Board's jurisdiction. Disciplinary Counsel should no longer be permitted a free pass at this early stage of the process with regard to its determinations on the *merits* of the allegations in an otherwise serious complaint. If a complaint is not docketed because Disciplinary Counsel concludes that the allegations, even if taken as true, would not constitute an ethics violation that would merit discipline, the complainant should be granted at least one level of review. If such review had been available to the many complainants lodging grievances related to the Trump-related controversies that were dismissed or ignored by ODC over the past two years, the problems the Board is now dealing with might well have been averted.

<u>Proposed Rule 2.6</u> (Notification of Docketing Determination to Complainant)

By and large, the notification requirements in this proposed revision of Rule 2.6 are a significant improvement over the status quo. The Board should adopt all of the provisions related to notification to complainants at large.

With respect to instances in which Disciplinary Counsel has determined not to docket a complaint, the "further explanation" referenced in the last sentence of the proposed Rule should not be a purely discretionary act. The word "may" should be changed to "shall." This change would not place an undue burden on ODC and indeed would not even change what appears to be its current practice. As evidenced by ODC's letters to various complainants, explanations have been provided to complainants about why their complaints have not been docketed. These explanations have helped demonstrate why the Board finds it necessary to propose these very revisions. According to its reasons for these Rule changes, the Board seeks increased transparency; the language being proposed in Rule 2.6 would have the perverse effect of reducing the transparency previously provided to complainants and the Board itself.

Proposed Rule 6.1 (Notification of Dismissal)

Again on the theme of transparency – after nearly four decades of practice under existing Rule 6.1, it is not evident why the Board suddenly feels it necessary to truncate into a mere "brief statement" the "statement" provided to a complainant in the event of a dismissal. If a written opinion accompanies a dismissal, it would certainly be sufficient to include a copy of the opinion with any such notification as a means of satisfying the existing requirement. This hardly seems burdensome. In the absence of a written opinion, even a brief statement written by ODC explaining the dismissal would presumably suffice. But since "brevity" is ultimately in the eye of the beholder, adding this subjective term to the Rule appears designed to give ODC permission *in every case* to provide the complainant with the least possible amount of information about why a complaint was dismissed.

Conclusion

Thank you for your consideration of these comments. If you wish to discuss them further or have any questions, please feel free to reach out to me by e-mail or phone me at [redacted].

Sincerely,
Alan J. Roth
Bar No. 318071

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* "[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in the most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this types have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.,* 331 U.S. 519, 528-29 (1947).

Alan J. Roth **[redacted]**
[redacted] **Washington, D.C. 20009** **([redacted]**

June 4, 2021

Robert J. Spagnoletti, Esquire
Chief Executive Officer
District of Columbia Bar
901 4th Street, NW
Washington, DC 20001

Hamilton P. Fox, III
Disciplinary Counsel
Office of Disciplinary Counsel
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Dear Messrs. Spagnoletti and Fox:

Today I deposited in the mail a $320 check in payment for my 2021-2022 DC Bar "Active Membership License Fee." For the first time in the more than 40 years since I was admitted to practice in the District of Columbia, I am paying this fee under protest, and I am writing to explain why.

The Office of Disciplinary Counsel (ODC) in August 2020 declined to docket an ethics complaint filed last July against then-Attorney General William Barr by more than two dozen District lawyers, including four former DC Bar Presidents. This decision came to light only recently, and the rationales underlying it, set forth in ODC's August 4th letter to complainant Gershon Ratner, were weak and legally dubious. Washington, DC is the seat of our national government. Given that (1) the DC Bar therefore naturally counts among its members literally thousands of lawyers "involved in electoral politics and governmental affairs," as the ODC's letter put it, and (2) ODC states it generally "will not intervene in matters that are currently and publicly being discussed in the national political arena," ODC has in effect told DC Bar members who happen to occupy positions of power that they need not concern themselves with the DC Bar's Rules of Professional Conduct.

The suggestion in ODC's letter that this complaint was dismissed because the complainants "lack[ed] personal knowledge of the facts or allegations concerning Mr. Barr" or that "the evidence seem[ed] insufficient" was nothing short of spurious. With regard to the former, DC Bar Rule XI, section 6(a)(2) confers on ODC the power and duty "[t]o investigate *all* matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of Disciplinary Counsel or the Board *from any source whatsoever*, where the *apparent* facts, if true, may warrant discipline." (Emphases added.) With regard to the latter, one must have been asleep throughout Mr.Barr's tenure to assert, without further inquiry, that "the evidence

seemed insufficient to us." Even prosecutors will pursue *criminal* investigations based on credible news reports. But apparently, when it comes to an ethics inquiry, multiple news reports from multiple news outlets based on multiple credible sources are "insufficient" for ODC if the complainants are not either actual participants in the alleged wrongdoing or whistleblowers with first-hand knowledge willing to risk their jobs or careers.

You are no doubt aware that integrated bars are under constitutional assault in several of the 31 jurisdictions where mandatory bar dues are imposed, as they are here in the District. In the wake of *Janus v. AFSCME,* 585 U.S. ___, 138 S. Ct. 2448 (2018), these challenges typically involve First Amendment free speech or association claims. I need not embrace these First Amendment arguments, however, to suggest that ODC and, by extension, the DC Bar are failing the more basic test set out by the Supreme Court in *Keller v. State Bar of California,* 496 U.S. 1 (1990), to justify requiring attorneys to pay mandatory bar dues, namely, "the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 14. The Court expanded on this theme more recently in *Harris v. Quinn,* 573 U.S. 616 (2014), where in striking down mandatory union dues imposed on certain home health care workers, it distinguished the mandatory bar dues upheld in *Keller* as follows:

> Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.

Id. at 655-56. With the ODC's open proclamation that it will not subject powerful, well-connected, or politically active attorneys to its "detailed ethical rules," it is failing appropriately to "regulat[e] the legal profession." In essence, District lawyers are compelled to bear "the expense of ensuring that [most, but not a privileged class of] attorneys adhere to ethical practices." In these circumstances, any justification for maintaining compulsory bar membership in the DC Bar has fallen victim to the rationale underlying *Keller* itself.

In a recent blog post titled "Free Pass for Favored Few?", available at https://lawprofessors.typepad.com/legal_profession/2021/05/i-am-advised-that-the-district-of-columbia-office-of-disciplinary-counsel-notified-host-of-attorneys-including-several-forme.html, Georgetown Law ethics counsel and Professor Michael Frisch was critical not only of ODC's handling of the Barr case but of other matters involving notable political figures. He points out that ODC has showered grace upon a number of highly visible political figures despite professing in its August 4th letter that it avoids "interven[ing] in matters that are currently and publicly being discussed in the national political arena." Apparently, once public attention dies down "in the national political arena" to which the August 4th letter refers, ODC then considers itself free to ignore the grave breaches of public trust and confidence that first gave rise to public attention.

I have spent more than half my professional life working outside the traditional or conventional practice of law, but I have never before hesitated to pay my DC Bar license fee. I have maintained my status as an active member partly for the privilege of being able to call myself a lawyer and partly so that, from time to time, I can assist clients and organizations on a pro bono basis. Apart from that, and a magazine I rarely read, I get precisely nothing for my $320 annual DC Bar membership. If I ceased engaging in pro bono work, I could still call myself a lawyer. I was first admitted in Connecticut, which does not have an integrated bar and to which even as a full, active member I am required to pay the princely sum of $37.50 a year – precisely because I do not practice law as an occupation. I am not aware of any particular problems Connecticut has experienced with attorney discipline or the quality of its legal services. Indeed, the available evidence suggests that states without mandatory bar dues have developed equally or more effective mechanisms for regulating the legal profession. *See* L. Levin, *The End of Mandatory State Bars?,* 109 GEO. L.J. 1, 17-20 (2020), available at https://www.law.georgetown.edu/georgetown-law-journal/glj-online/109-online/the-end-of-mandatory-state-bars/.

If you expect the continued respect of your members, much less their support, you might begin by looking to the phrase engraved above the Supreme Court's portico: "Equal Justice Under Law." Those words apply as much to ODC's administration of the Rules of Professional Conduct as to the courts' administration of justice. Failing that, I predict you will simply be adding further momentum to the already growing movement to abolish integrated bars and mandatory bar dues.

Sincerely,

Alan J. Roth

Alan J. Roth
Bar No. 318071

cc: Gershon M. Ratner, Esquire
Professor Michael Frisch
Lawyers Defending American Democracy

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June 11, 2021

Alan J. Roth, Esquire

Via email only to [redacted]

Dear Mr. Roth:

I am responding to your letter of June 4, 2021, addressed to me and Robert Spagnoletti, the Chief Executive Officer of the D.C. Bar. First, you should understand that Mr. Spagnoletti and the Bar have no involvement whatsoever in the decisions of the Office of Disciplinary Counsel, including whether to docket a matter. In fact, they are not even informed of such decisions; by Court rule these decisions are confidential.

Almost 50 years ago, as a result of court reorganization, the Court of Appeals created the D.C. Bar as a mandatory bar and required it to fund the disciplinary system. But that is the Bar's only role. It neither selects nor supervises Disciplinary Counsel. Rather, this Office is an arm of the Court and is supervised by the Board on Professional Responsibility, whose members are appointed by the Court.

All the complaints we handle, including those made against public officials or political figures are confidential until we file charges (or issue an admonition to a lawyer). This is required by the Court's rules. Accordingly, we neither confirm nor deny that we have received a complaint against a member of the Bar. Nor can we confirm or deny that we have docketed a case for investigation. Confidentiality is not an act of discretion on our part; it is mandated by the Court's rules.

There also is a countervailing consideration. Those same rules require us to inform a complainant whether we are dismissing his or her complaint or whether we are docketing the case for investigation. Further, if we do docket and investigate a complaint and conclude at the end of the investigation not to bring charges, we are required to inform the complainant of that fact. (If we do bring charges, everything becomes public at that point.) This obviously is an exception to our requirement of confidentiality, but in normal cases, it does not result in any public disclosure beyond the disclosure to the complainant.

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Where, however, the lawyer complained against is a public figure, the conflict between these two requirements becomes more troublesome. If we decide to docket and investigate a case, that fact is newsworthy. If we announce that we are not investigating a case, that too may be newsworthy. Thus, if we decline to investigate, supporters of the lawyer will proclaim his or her innocence; if we decide to investigate, his or her opponents will trumpet that fact. Complicating all this even further is the fact that our jurisdiction is limited to enforcing the D.C. Rules of Professional Conduct and that we must prove our cases by a clear-and-convincing-evidence standard. That means that we have no jurisdiction to investigate conduct that some might find offensive unless it could violate one of the written rules. Further, if we cannot meet our standard of proof, we will not bring charges even if we believe we could prove them by a lesser preponderance-of-the-evidence standard. But those nuances can be lost if there is an announcement that we are or are not investigating a particular lawyer.

Therefore, in order to avoid letting our docketing decisions, which are supposed to be secret, have political ramifications, we do not "docket" complaints where the complainant has no personal knowledge of the matter complained about. The complainant is advised that the complaint has not been docketed, but it is important to understand that not docketing a complaint is not the same as not investigating a matter. We are not dependent upon a complaint to initiate an investigation. We can and do investigate matters that come to our attention from any source, including the press. We do not inform anyone, other than the lawyer under investigation, of those investigations that we initiate on our own. We "docket" these cases showing this office as the initiator of the matter. So, it is entirely possible that even though we have not docketed a complaint against a public figure, we are none-the-less investigating that person. I hasten to add, it is also entirely possible that we have looked into the matter based on the public record and have concluded that there is no violation of the Rules that could be sustained in a prosecution, and therefore have decided not to investigate. In short, there is a distinction between a determination not to docket a particular complainant's complaint and a determination whether to investigate the matter about which he or she has complained.

As you can see, all this is complicated and not to easy to explain. In fact, we have revised our "non-docketing" letter to complainants several times to try to be clear about our policy. I hope this explains it.

Very truly yours,

Hamilton P. Fox, III
Hamilton P. Fox, III
Disciplinary Counsel

cc. Robert J. Spagnoletti, Esquire
via email to [redacted] HPF:act

Alan J. Roth **[redacted]**
[redacted] **Washington, D.C. 20009** **([redacted]**

June 16, 2021

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Via email only to [redacted]

Dear Mr. Fox:

Thank you for your June 11, 2021 letter in reply to mine of June 4th. I appreciate the time you took to provide an in-depth response to my concerns. I know your letter was written in good faith, and I have no desire to draw you into an extended "back-and-forth" on these issues. Accordingly, I'm not expecting a further response if your time doesn't permit it. Regrettably, however, your letter only served to reinforce my belief that the most powerful and politically prominent members of the DC Bar are being arbitrarily and inappropriately shielded by the disciplinary process you described.

Fortunately, I have never had any professional or personal encounters with the disciplinary system, and so this discussion has provided a learning experience of sorts for me. But after studying your letter carefully, I was left wondering how the Board on Professional Responsibility has allowed ODC to assume powers and authorities nowhere set forth in or contemplated by the Board's Rules. Inasmuch as the ODC is supervised by the Board, I am respectfully taking the liberty of copying Board Chair Matthew Kaiser on this letter and sharing with him our previous correspondence.

Your letter conflates three separate issues: the confidentiality of a complaint, the grounds for docketing a complaint, and the decision about what course to pursue after docketing. Nowhere in my June 4th letter did I suggest that either Rule XI's or the Board's Rules regarding *confidentiality* were inappropriate. Rather, my focus was on ODC's apparent refusal, made explicit in the instance of the Barr complaint, to carry out its responsibilities pursuant to Rule XI, section 6(a)(2) with respect to the hundreds, perhaps thousands, of DC Bar members who happen to occupy positions of power.

Disciplinary Counsel's discretion to refuse to docket a case is strictly constrained by Board Rules 2.3 and 2.4, which in turn incorporates section 6(a)(2) of Rule XI. None of those provisions empower Disciplinary Counsel to invent unwritten excuses for *not* docketing complaints against lawyers "involved in electoral politics and governmental affairs," or whose alleged professional misconduct happens to be part of "matters that are currently and publicly being discussed in the national political arena" or that might have

"political ramifications" – excuses such as a complainant's lack of personal knowledge, or ODC's conclusory assertion that "the evidence seems insufficient."

The Board's Rules provide a process in Chapter 2 for determining *after* docketing whether a complaint should be dismissed or pursued. That process includes investigation, subject to the same confidentiality requirements applicable to cases you describe as being initiated and docketed "on [y]our own." No provisions in Rule XI or the Board Rules empower Disciplinary Counsel to circumvent these processes simply because the attorney against whom a complaint is filed happens to be a public official, a political figure, or in any other respect a prominent individual. And I do not know what to make of this sentence near the end of your letter: "I hasten to add, it is also entirely possible that we have looked into the matter based on the public record and have concluded that there is no violation of the Rules that could be sustained in a prosecution, and therefore have decided not to investigate." It is difficult to fathom how one could determine a case cannot be proven when a complaint is dismissed at the outset with no investigation.

Of course, subject to the Board's oversight, it is appropriate in reviewing complaints that ODC deploy its resources in a manner deemed most efficient and effective in carrying out the mission for which the disciplinary system was established. However, something has gone seriously awry when that system's leadership lets it be known that lawyers holding the most prominent positions in government need not fear any complaint for alleged violations of their Attorney's Oath or the Rules of Professional Conduct because such complaints will be summarily dismissed regardless of merit, rather than being docketed, potentially investigated, and pursued as the facts and the law may warrant.

It is not surprising that you have "revised [y]our 'non-docketing' letter to complainants several times to try to be clear about [y]our policy." Perhaps these repeated revisions have been necessary because the explanations haven't been persuasive. Rather than applying the rules and processes on the books equally and evenly to all members of the Bar, ODC has carved out its own special rules for special people. Its current approach to handling public complaints against political officials and public figures threatens to undermine the Court of Appeals' approach to funding the disciplinary system, which long predates the Supreme Court's rationales in the *Keller* and *Harris* decisions for allowing for the imposition of mandatory bar dues. I respectfully urge you to rethink what you're doing.

Sincerely,

Alan J. Roth

Alan J. Roth

cc: Matthew G. Kaiser, Esquire (via e-mail)
Robert Spagnoletti, Esquire (via e-mail)
Gershon M. Ratner, Esquire
Professor Michael Frisch
Lawyers Defending American Democracy

Alan J. Roth **[redacted]**
[redacted] **Lewes, DE 19958** **[redacted]**

June 15, 2022

Hon. Anna Blackburne-Rigsby Chief
Judge
District of Columbia Court of Appeals
430 E Street, NW – Room 115
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Matthew G. Kaiser, Esquire
Chair, Board of Professional Responsibility
430 E Street, NW – Room 138
Washington, DC 20001

Ellen Jakovic, Esquire
President-Elect, District of Columbia Bar
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1301 Pennsylvania Avenue, NW
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Via e-mail only to [redacted]

Dear Chief Judge Blackburne-Rigsby, Mr. Kaiser, and Ms. Jakovic:

One year ago this month, I wrote to DC Bar CEO Bob Spagnoletti and Disciplinary Counsel Phil Fox to inform them that for the first time in the more than 40 years since being admitted to practice in the District of Columbia, I was paying my annual "Active Membership License Fee" under protest. My protest was based on the Office of Disciplinary Counsel's (ODC) weak and legally dubious rationale for refusing even to docket, much less investigate, an ethics complaint that had been filed in July 2020 against then-Attorney General William Barr by more than two dozen District lawyers, including four former DC Bar Presidents. That ODC decision, which contravened the plain language of Board of Professional Responsibility (BPR) Rules 2.3 and 2.4, had only become public in the spring of 2021.

To his credit, Mr. Fox responded at some length to my letter. Unfortunately, his response was barely comprehensible and bore no relation to the actual text of the BPR Rules or the related Rule XI of the Rules Governing the DC Bar. In more diplomatic terms, I pointed out these failures to him in a reply on which I copied Mr. Kaiser in the belief that the BPR exercised supervisory authority over ODC. This exchange was the subject of some news media coverage and online commentary at the time, but I never heard further from any BPR representative in response to my concern that ODC's creation of "special rules for special people" threatened to undermine both respect and the constitutional basis for DC's mandatory bar.

I.

To the extent there has been closer BPR scrutiny of ODC's practices since last June, it doesn't appear to have resulted in any significant change. While some may be tempted to point to last week's ODC charges against Rudy Giuliani to suggest otherwise, I am not impressed. Virtually all of the evidence leading to ODC's charges were developed by New York's disciplinary authorities and were laid out in a 33-page opinion of the New York Supreme Court Appellate Division's First Department on May 3, 2021, more than a year ago. The DC Court of Appeals preliminarily suspended Giuliani's license two months later, based not on any material investigative or prosecutorial work by ODC but because the reciprocal discipline provisions of Rule XI, section 11 made it virtually automatic. And in any event, Giuliani's DC bar membership has been inactive since 2002.

Meanwhile, multiple ethics complaints have been filed over the last 18 months against former Assistant Attorney General Jeffrey Clark for his alleged attempts to persuade his superiors, including Bill Barr's successor, to declare the results of the 2020 election fraudulent in several states. As late as October 18, 2021, months after my June correspondence and much as in the Barr case, ODC still refused to docket such a complaint on the ground that "the complainant ha[d] no personal knowledge of the matter" and that it was "based only on public information, such as news reports or court proceedings." Yet 11 days *before* that dismissal, Senate Judiciary Committee Chairman Dick Durbin made his own request for an ODC investigation of Mr. Clark, enclosing a report of his Committee's eight-month investigation into Justice Department operations in the aftermath of the 2020 election. News reports in March 2022 suggested that former Acting Attorney General Jeffrey Rosen and former Acting Deputy Attorney General Richard Donoghue, were cooperating with an ODC investigation of Clark. But 14 months after the first complaint, there still has been no formal action taken with respect to Mr. Clark.

In March 2022, a deeply researched ethics complaint was filed against prominent attorney Cleta Mitchell, alleging she participated in former President Trump's infamous phone call with Georgia Secretary of State Brad Raffensperger and assisted Mr. Trump as he urged Raffensperger to "find" the necessary additional votes to change Georgia's electoral outcome. It is unclear whether ODC is pursuing this case, or whether it has ignored these allegations on the ground that this complainant too "has no personal knowledge of the matter."

Nor does it appear ODC has singled out only famous people involved in the Trump post-election effort for special treatment. On February 25, 2021 – nearly 16 months ago – a 14-page complaint was submitted to ODC outlining in exquisite detail the manner in which three lesser known lawyers – Julie Zsuzsa Haller, Lawrence Joseph, and Brandon Johnson – participated in filing an election-related lawsuit in the federal district court for the Eastern District of Texas. Through screenshots, exhibits, and personal research, the complaint persuasively alleged that their pleadings were filled with falsehoods, misrepresentations, and even a fake document purporting to be a "joint resolution" of the Arizona Legislature. Their Texas lawsuit was dismissed within five days, the Fifth Circuit denied an appeal one day later, and the Supreme Court rejected a petition for review in a one-sentence order five days after that. These three lawyers were alleged to have engaged, among other things, in frivolous litigation in violation of the rules of professional conduct and disciplinary action was sought against them. A federal

judge in Michigan has since imposed sanctions on two of the three for similar frivolous election litigation, including a referral to ODC for disciplinary action. And yet a check of the ODC website suggests that no action has been taken against any of them.

If all this weren't enough, another stinging indictment of DC's disciplinary system came from an ODC staff attorney earlier this year. In the Bar's own *Washington Lawyer* magazine, senior assistant disciplinary counsel Myles Link admitted, "[D]elay is probably the biggest problem in our system. As you know, I chaired the ABA's Standing Committee on Professional Regulation and in that role I got to observe disciplinary systems around the country. *The District of Columbia system probably has more delay built into its process than any other system I have seen.* The only beneficiary of such a system is the bad lawyer who can continue to practice until there's a final decision in their case." (Emphasis added.)

I recently moved from the District to Delaware, but I remain closely connected to Washington by friendships, professional ties, and business relationships after living and working there since 1985. I have not yet reached the stage of my life where I'm prepared to relinquish the right and privilege to practice law if the opportunity or need arises, even on a pro bono basis. (Within the past 18 months, for example, I represented two dozen residents of Adams Morgan in a contested case before a DC government agency, including a 9-hour trial.) Thus, I will renew my active membership in the DC Bar this month. But once again, I am doing so under protest. And rather than writing again to Messrs. Spagnoletti and Fox, I am addressing this letter to the three of you to state just how much more appalled I am with what I've learned since last year. According to the most recent publicly available annual report of the DC Bar, roughly 30% of our mandatory license fees are spent on a disciplinary system of which I am ashamed. *It is broken, dysfunctional, and bad for consumers of legal services. In an obsessive effort to avoid politics, it is now perceived to be making political decisions or delaying decisions for political reasons.* I object to being associated with and compelled to support this farce, which combines the worst of both worlds – blinding itself to the threats posed to our democracy by a small but determined number of Bar members alleged to have participated in a coup attempt, but unable to deliver timely action even when specific, verifiable evidence in the public record is called to its attention by official authorities.

II.

At a special meeting of the Bar in April 2022, four resolutions were scheduled to be presented for the membership's consideration, the last of which pertained to the role of the profession in upholding the rule of law. I spent considerable time preparing an amendment to that resolution to authorize the Board of Governors to make non-partisan public statements and recommendations about "the importance of holding all members of the bar, regardless of governmental position or involvement in political matters, equally accountable under the D.C. Bar's Rules of Professional Conduct." Due to an unfortunate technical glitch in the meeting's online functionality that day, I was unable to offer the amendment, as the Bar's by-laws would have permitted. But this malfunction led me to a deeper conversation with Mr. Spagnoletti and the Bar's General Counsel Erum Mirza about the role of the BPR in relation to ODC's failures.

According to the DC Bar website, "[BPR's] administrative responsibilities include . . . *oversight of* the Board's Office of Executive Attorney and *the Office of Disciplinary Counsel*." (Emphasis added.) Thus, I requested copies of the minutes of all BPR meetings in the last 24 months at which ODC oversight was conducted, a request I thought reasonable in the interest of transparency because I found no rules or regulations prohibiting a bar member from seeing such minutes. Ms. Mirza graciously undertook to look into this and some related BPR questions on my behalf. What I learned as a result of her discussions with Mr. Jim Phelan, Executive Attorney at BPR, has been disappointing to say the least. Apparently there are no such minutes of oversight meetings because there have been no BPR meetings devoted to the topic of ODC oversight. According to Ms. Mirza, Mr. Phelan stated that BPR's supervision and oversight of the Executive Attorney and ODC staff is ongoing and constant. As the former staff director and chief counsel of a congressional committee that conducted oversight of the agencies and subject matters under its jurisdiction, I know what real oversight is. What Mr. Phelan purportedly described is not real oversight.

Nonetheless, I reached out to Mr. Kaiser to inquire whether any progress had been made on a new policy to address situations in which ODC believes complainants lack "personal knowledge" of the facts alleged in their complaints, which a complainant in one of these election-related cases told me Mr. Kaiser informed him last year BPR and ODC were considering. While Mr. Kaiser was kind enough to have an extended phone conversation with me yesterday, I took away from that conversation the conclusions that (1) BPR discussions with ODC on this and related subjects have been ongoing for an extended period with no clear end in sight, and (2) it seems difficult for BPR to separate its duty for handling individual cases from its responsibility to deal generically with ODC's practices in applying BPR's rules to the class of cases described above.

Upon closer study, I now recognize that Rule XI, section 4(e), governing the BPR's powers and duties, makes no explicit reference to "oversight" of ODC. Instead, Rule XI, section 4(e)(2) states that "Disciplinary Counsel shall serve at the pleasure of the Board, *subject to the Court's oversight authority over all disciplinary matters."* (Emphasis added.) Respectfully, Chief Judge Blackburne-Rigsby, it appears to be time for the Court to step in here and inquire just what is going on at ODC. Does the Court of Appeals believe it is appropriate that ODC slow-walk complaints about lawyers admitted to the Bar of our Nation's Capital who are alleged to have engaged in activities designed to undermine our democracy – or worse, for ODC to just sit on its hands, hiding behind incoherent excuses about a complainant's "lack of personal knowledge" when the facts at issue are a matter of broad public knowledge? Does the Court believe such lawyers should go on practicing in the District without fear of being held to account because ODC does not wish to dirty its hands with messy matters of national or potential political import? Does the Court bear responsibility for not timely disposing of disciplinary cases itself?

Bars and courts in other jurisdictions seem to have sturdier spines when it comes to addressing threats to our democracy, not to mention faster and more transparent processes. On May 25, the Texas State Bar charged Texas Attorney General Kenneth Paxton with professional misconduct for filing a Supreme Court action trying to overturn the 2020 election results in four states. The Texas Bar disciplinary authorities have also asked for the imposition of sanctions on Trump lawyer Sidney Powell in connection with her filing of multiple frivolous election

lawsuits. The California Bar has confirmed it is investigating John Eastman, another Trump attorney, for possible ethics violations related to the 2020 election. And as already noted, Rudy Giuliani's law license was suspended indefinitely by a New York court more than a year ago.

The Board of Governors bears some responsibility here too. Mr. Spagnoletti graciously spoke to outgoing President Chad Sarchio regarding my inability to offer my amendment at the April special meeting. I am informed that Mr. Sarchio stated that "the Board of Governors' view is that the member resolution authorizing the Board to make statements concerning the role of the legal profession in upholding the rule of law encompasses concerns about lawyer discipline." But these words are less important than action. The May/June 2022 issue of *Washington Lawyer* carried an article titled "The Rule of Law Under Pressure." Ironically, it focused considerably more attention on threats to democracy abroad than at home, but it did conclude by noting that "[i]ndividual lawyers also have a key role in promoting and preserving rule of law in their professional and personal lives," including through "abiding by ethical obligations to uphold the law" and by "educat[ing] others about the challenging but critical ways that all members of democratic societies can contribute to, and not detract from, the rule of law foundations of our legal and political systems." If the Board of Governors shares the concerns set forth in that article and indeed holds the view Mr. Sarchio expressed, then I call upon Ms. Jakovic to place before the Board for approval a public statement addressed to ODC along the same lines as those I was denied the opportunity to offer as an amendment in April.

III.

Mandatory bars and their dues systems are increasingly coming under constitutional assault, as I noted in my letter to Messrs. Spagnoletti and Fox last June. Three Federal Circuits have recently upheld First Amendment freedom of association claims against such compulsory arrangements, which they held were not entirely foreclosed by *Keller v. State Bar of California,* 496 U.S. 1 (1990) or its precursor, *Lathrop v. Donohue,* 367 U.S. 820 (1961). *Schell v. Chief Justices & Justices of Oklahoma Supreme Court,* 11 F.4th 1178, 1189 (10th Cir. 2021), *cert. denied,* No. 21-779 (Apr. 4, 2022); *McDonald v. Longley,* 4 F.4th 229, 244-45 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth,* No. 21-800, *vide Firth v. McDonald,* No. 21-974 (Apr. 4. 2022); *Crowe v. Oregon State Bar,* 989 F.3d 714, 729 (9th Cir. 2021), *cert. denied,* No. 20-1678, 2021 WL 2260516 (Oct. 4. 2021). Each of these appeals courts, in its own way, also noted that *Keller* is now "vulnerable to reversal by the Supreme Court." *Schell, supra,* at 1190.

My objection is admittedly different from those set forth by the bar members in those cases, but goes more directly to the very rationale of *Keller* itself. The constitutional justification for forcing lawyers into a mandatory bar was the public interest in requiring lawyers to pay for their own self-regulation, with the concomitant benefits to their profession and the public. *See Harris v. Quinn,* 573 U.S. 616, 655-56 (2014); *Keller, supra,* at 13-14. But when a disciplinary system breaks down, fails to carry out its mission expeditiously, and makes a mockery of our ethics rules by not enforcing those rules with an even hand, then it strikes me that the mandatory bar of which that system is a part has invited a challenge. If "the right to eschew association for expressive purposes" means anything at all, *Janus v. American Fed'n of State, County, and Mun. Employees, Council 31,* ___ U.S. ___, 138 S. Ct. 2448, 2463 (2018), then being forced to associate with that dysfunctional system would present a viable constitutional claim.

In the meantime, pending your responses to the primary focus of this letter, I am respectfully placing you on notice that your dues system fails to provide the minimum constitutional safeguards for members set forth in *Keller,* and perhaps the more stringent requirements of *Janus*. *Keller* required mandatory bars to adopt procedures to ensure that members can obtain refunds of any portion of their compulsory dues not used to regulate attorneys or improve the quality of their jurisdictions' legal professions. The DC Bar's by-laws call for the collection of dues, but neither they nor any other binding document provide for the safeguards required by *Keller* or by *Janus,* which may now require at a minimum the safeguards set forth in *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 310 (1986). *See McDonald, supra,* at 254. I look forward to your prompt adoption of such constitutionally required procedural safeguards. Please inform me how and when I can expect their implementation.

Thank you for your consideration.

Sincerely,

Alan J. Roth

Alan J. Roth
Bar No. 318071

cc: Associate Judges of the Court of Appeals (via efilehelp@dcappeals.gov)
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