SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISON : FIRST JUDICIAL DEPARTMENT

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In the Matter of Steven R. Donziger,
(admitted as Steven Robert Donziger),
an attorney and counselor-at-law:

Attorney Grievance Committee
For the First Judicial Department,

Petitioner,

Steven R. Donziger, Esq.,
(OCA Atty. Reg. No. 2856052),

Respondent.

----------X

DECISION ON
PROCEDURE FOR
THE POST-SUSPENSION
HEARING UNDER
22 NYCRR 1240.9(c)

In its August 16, 2018 order granting respondent's request for a Post-Suspension hearing, but reaffirming its Order of July 10, 2018, suspending respondent upon a finding that there was "uncontroverted evidence that respondent engaged in serious professional misconduct immediately threatening the public interest," the court appointed the undersigned to hold "the (22 NYCRR) 1240.9 hearing and to report his finding to the Committee."

With the consent of the Attorney Grievance Committee (AGC) and the Referee, the parties have proposed procedures with respect to the Post-Suspension Hearing allowed by 22 NYCRR 1240.9 (c), and requested by respondent.

Respondent Donziger has, by one of his counsel, Martin Garbus, made a proposal in two parts: first he requests the opportunity "… to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings." If respondent is "…successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the … Committee would present evidence against him, and he would

have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own."

As an "alternative" respondent argues that due process allow him the "... opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him." See letter dated October 19, 2018, submitted by Martin Garbus, and made a part of the record, Exhibit A.

The AGC has presented a proposal which argues that in this case the doctrine of collateral estoppel should preclude any hearing at which the findings of Judge Kaplan, as affirmed by the Second Circuit, are contested. It argues that in this case the Post-Suspension Hearing becomes merged with the Sanctions hearing as the Appellate Division has already found that suspension is warranted pending a sanctions hearing, and a separate Post-Suspension Hearing is not required to serve due process, respondent having already had due process before Judge Kaplan. See letter dated October 22, 2018, by George A. Davidson, Pro Bono Special Counsel, and Naomi F. Goldstein, Of Counsel to the Attorney Grievance Committee, also made a part of the record. The AGC also submitted a memorandum of law as to what evidence is admissible at a Section 1240.9(c) hearing, both documents are attached as Exhibit B.

Having reviewed the record in this case, the decision of District Judge Kaplan, the affirmance of the Second Circuit, the per curiam decision of the Appellate Division, and the submissions of the parties and their citations of law, it is not clear to me that there is an easy answer to the position of respondent. However, as Referee, it is my responsibility to rule on the application of collateral estoppel, and on any other procedural or evidentiary matter before me.

In re Abady, 22 A.D3d 71. To argue that respondent 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. There is an obvious asymmetry in the case before Judge Kaplan and the case now underway to sanction respondent notwithstanding similarity or even identity of factual issues.

In particular, in the U.S. District Court, respondent was faced with an equity case without a jury to invalidate a foreign judgment brought against him and others in which the District Judge, in so many words, but in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron. It is doubtful that if an indictment in the same terms had been brought by the United States Attorney, respondent would have elected to have a trial by a single judge and would have waived his right to a trial by jury. Furthermore, in the case before Judge Kaplan the standard of "beyond a reasonable doubt" was not applied to the facts presented. Judge Kaplan applied the civil standard of a preponderance of the evidence as the law requires. Other material differences can be noted, such as the lack of notice to respondent that his status as a lawyer was in jeopardy before Judge Kaplan, or for that matter, notice that he was, in substance, facing potential criminal charges regarding the judgment at issue. For reasons not readily apparent, on appeal to the Second Circuit respondent did not appear to contest the sufficiency of the evidence supporting any of the factual findings of the District Court. Instead, respondent raised jurisdictional defenses to no avail.

Finally, it is open to question, at least initially in this Post-Suspension hearing whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence.

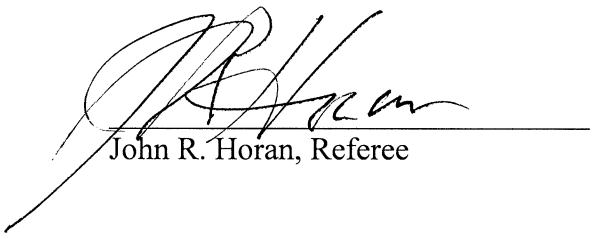
However, I am inclined to allow respondent latitude in his defense to the Charges against him in this proceeding, and to reserve my decision as to whether collateral estoppel should be applied in these circumstances. This leads me to accept both the second part of respondent's First Proposal, *i.e.*, that part stated as "Alternatively, due process requires..." (Garbus letter, page 3) and the Second Proposal, as stated in the Garbus letter. It is not my intention to allow respondent to re-try the case against him before Judge Kaplan, but rather to allow him a hearing to address some or all of those findings in a way that is reasonably fair and practical. Counsel states that he needs two days for this, "approximately." There can be no discernible harm to the "public interest" by this approach. The time to be allowed will be flexible and not restrictive, but not expandable without good cause.

The intention is to have an actual "hearing" pursuant to 22 NYCRR 1240.9(c), where respondent can address the Charges against him as he sees fit, even to the point of disagreeing with, or providing context to the facts in the first instance found by the District Court, and affirmed as found by the Second Circuit, on the ground that a strict application of the collateral estoppel doctrine, in the circumstances before me, may place respondent in an unfair position, and one he likely could not have foreseen as he set out in the Southern District Court to defend the judgment he obtained in Ecuador.

All parties will meet as re-scheduled on December 4; the DDC will be assumed to continue its position that no further hearing is required post-suspension, in this case. The respondent will be prepared to proceed with his evidence, following the guidelines of this

decision. As agreed, the hearing will continue to December 5, and future hearings including the Sanction hearing will be scheduled at the convenience of the parties.

Dated: New York, New York
November 8, 2018



John R. Horan, Referee

Exhibit A

Offit | Kurman®
Attorneys At Law

MARYLAND
PENNSYLVANIA
VIRGINIA
NEW JERSEY
NEW YORK
DELAWARE
WASHINGTON, DC

Martin Garbus
Principal
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mgarbus@offitkurman.com

October 19, 2018

Referee John R. Horan, Esq.
Fox Horan & Camerini
825 Third Avenue, New York, New York

Re: *Matter of Donziger* (Index No.: 003839/2014)
Proposal for Hearing Procedure

Dear Referee Horan:

As discussed at the last hearing, here is Respondent's proposed procedure for the two hearings to be held in this matter.

Post-Suspension Hearing

As you know, Respondent received an ***interim*** suspension of his law license, from the First Department, without a hearing, pursuant to 22 NYCRR 1240.9(a). The suspension is "on an interim basis during the pendency of an investigation or proceeding..." *Id.* Under 22 NYCRR 1240.9(c) he is entitled to a post-suspension hearing before his suspension becomes final.

This right to a post-suspension hearing is apparently to accord due process and allow the Respondent to point out errors in the procedure resulting in the determination that he "engaged in conduct immediately threatening the public interest." *Id.* This is in accord with federal due process cases.

The U.S. Supreme Court has held that bar disciplinary proceedings are quasi-criminal in nature, entitling the attorney to due process protection. *In re Ruffalo,* 390 U.S. 544, 550 (1968). "[S]ome form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

"Because an attorney disciplinary proceeding is quasi-criminal in nature, the Due Process Clause entitles the charged attorney to, *inter alia,* adequate advance notice of the charges, and the opportunity to effectively respond to the charges and ***confront and cross-examine witnesses***." *In re Peters*, 642 F.3d 381, 385 (2nd Cir. 2011)(emphasis added). As the Court said in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970):

> [W]here credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision...
>
> In almost any setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Mr. Donziger should be allowed to confront and cross-examine the witnesses against him. But based upon exchanges in the last hearing, Mr. Donziger understands that at this point the Referee believes that the First Department's reliance on collateral estoppel in its ***pre***-suspension decision, means Mr. Donziger may not contest Judge Kaplan's findings in the ***post***-suspension hearings. This is an issue to be decided, in the first instance, by the Referee. *See Matter of Abady,* 22 A.D.3d 71, 82 (2005). And it has not yet been decided.

Matter of Abady, supra. confirms that referees are given broad powers to "decide motions, issue findings of facts and conclusions of law and make '[d]eterminations' as to whether charges should be sustained and actions imposed." 22 A.D.3d at 82. This includes the power to make rulings as to the appropriateness of collateral estoppel. *Id.* Thus, in the first instance, it is the Referee's job to determine whether collateral estoppel is appropriate in the post-suspension hearings. No other tribunal has ruled on that yet.

Accordingly, Mr. Donziger's first proposal is that he be allowed to present evidence and argument as to why collateral estoppel is not appropriate in this post-suspension context. If allowed to do so, he believes he will prevail, and a subsequent hearing will be necessary to address what evidence exists to justify any discipline against him.

If he is not given the right to demonstrate why collateral estoppel is inappropriate in the post-suspension hearing, Mr. Donziger should at least be given the opportunity to point out not only "the risk of an erroneous deprivation . . . through the procedures used"[1] by the First Department, but also the actual mistakes made by the First Department. If a post-suspension hearing does not give the right to point out mistakes made in the original suspension, then what is the point of a post-suspension hearing? Such an approach is consistent with *Matter of Jacobs,* 44 F.3d 84 (2nd Cir. 1994).

Jacobs presented a mirror image of the issue presented here. The question was whether the federal courts could rely upon a bar suspension imposed by the New York Appellate Division in suspending attorney Jacobs from practicing before the federal courts. Before deciding that it could rely upon the Appellate Division decision, "The district court had to examine the state proceeding for consistency with the requirements of due process, adequacy of proof and the

[1] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

absence of any indication that imposing discipline would result in grave injustice." *Id.* at 88 (citing *Selling v. Radford*, 243 U.S. 46, 51 (1917). A similar inquiry is warranted here.

The private interests here at stake are serious—Mr. Donziger's property interest in his law license and livelihood, and his liberty interest in his reputation. *See Arnett v. Kennedy,* 416 U.S. 134, 156 (1974)(When government action may wrongfully injure a citizen's reputation, one function of granting a hearing after that action is to allow the person "an opportunity to clear his name.") The post-suspension hearing must give Mr. Donziger the opportunity to clear his name.

In addition to adequate notice of the charges, procedural due process also guarantees an attorney the right to a decisionmaker who is neutral and detached. *See Ward v. City of Monroeville,* 409 U.S. 57, 61-62 (1972). Instead of doing its own fact-finding, the First Department is relying upon the findings of Judge Kaplan. Donziger must be permitted an opportunity to prove that that decision-maker, Judge Kaplan, was not neutral and detached.

Proposals for Post-Suspension Hearing

First Proposal:

Mr. Donziger requests the opportunity to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings. If he is successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the Grievance Committee would present the evidence against him, and he would have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own.

Alternatively, due process requires that Donziger at least has the opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him. This could be done in approximately two days.

Second Proposal:

If the Referee denies Donziger the opportunity to defend against the findings of Judge Kaplan, then Donziger would propose that in the post-suspension hearing he would present:

1. Evidence and argument regarding mistakes made by First Department in its decision applying collateral estoppel in this matter;

2. Evidence and argument regarding the "risks of erroneous deprivation" caused by the First Department's approach;

3. Evidence and argument addressing whether Judge Kaplan's findings are consistent "with the requirements of due process, [the] adequacy of proof [for his findings] and

whether there is an indication that imposing discipline [based on those findings] would result in grave injustice." *Jacobs, supra.* at 88; and

4. An offer of proof, making a record of the evidence Donziger would present to refute Judge Kaplan's findings, were he permitted to do so.

If this second proposal is adopted, Donziger expects the hearing could be concluded in one day or less. If this proposal is adopted, Donziger asks that the hearing be held on November 8th. If the First Department has not ruled on his counsels' *pro hac vice* applications and his motion to open these hearings to the public by November 2nd, Donziger will ask for a brief continuance of the hearing until those rulings are received.

Sanctions Hearing

Assuming the first hearing does not convince the Referee to recommend a change in the Grievance Committee's position, the second hearing—the sanctions hearing—should be straightforward, addressing issues such as:

1. With respect to each finding of Judge Kaplan cited by the Grievance Committee: does it justify discipline?

2. Are there mitigating factors?

3. Are there aggravating factors?

Donziger expects this hearing will take approximately two days.

Donziger asks that this letter be made a part of the official record of these proceedings

Sincerely,

Martin Garbus

Martin Garbus

cc: Naomi F. Goldstein, Esq.
Richard Supple, Esq.
Richard Herz, Esq.
John R. Horan, Esq.

Exhibit B

ATTORNEY GRIEVANCE COMMITTEE
STATE OF NEW YORK
SUPREME COURT APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT
61 BROADWAY - 2ND FLOOR
NEW YORK, NEW YORK 10006

(212) 401-0800
FAX: (212) 287-1045 (NOT FOR SERVICE OF PAPERS)

October 22, 2018

PERSONAL AND CONFIDENTIAL

John R. Horan, Esq.
Fox Horan & Camerini
825 Third Avenue
New York, NY 10022-7519

Re: Matter of Steven R. Donziger

Dear Mr. Horan:

We write to respond to Respondent's proposal for the procedures to be followed in a post-suspension hearing. Essentially, Respondent proposes that the Referee challenge the Court's imposition of collateral estoppel. Citing to *In re Abady*, AD3d 71 (2005), respondent asserts "[I]t is the Referee's job to determine whether collateral estoppel is appropriate in the post-suspension hearings." Not surprisingly, Abady does not support any such notion. Abady involved a respondent charged with 28 counts of misconduct. He protested the Referee's application of collateral estoppel to find him guilty of some of the charges based on civil court findings and decisions, claiming the Referee exceeded her authority because the order appointing her only authorized her to "hear and report." The Court found no merit to the respondent's argument and went on to point out that since "every finding, ruling and determination by the Referee is subject to review by…this Court, which has the sole authority to impose discipline," there was "no danger" that the "Referee, rather than the Court, will finally determine an issue." Id. at 83.

Respondent also relies on *In re Jacobs*, 44 F.3d 84, but that case undermines, rather than supports, his position. Jacobs was reciprocally suspended in the Eastern District of New York on the basis of his suspension by the Second Department. On appeal, the Second Circuit dismissed as meritless Jacob's claim that due process required that he receive a separate evidentiary hearing, noting that Jacobs had ample opportunity in the state proceeding to present evidence, and in fact did so. Indeed, the Second Circuit found that the Eastern District had a clear interest in denying an evidentiary hearing

which would " require the grievance committee to expend valuable resources of time and effort on a proceeding which….would do no more than …give Jacobs an unwarranted second opportunity to try the issues all over again." Id. at 90. Respondent here, of course, had ample notice and significant opportunity to be heard and he was.

The fallacy in Respondent's argument that the availability of a 1240.9(c) hearing opens up the First Department's collateral estoppel ruling is demonstrated by the following hypothetical. Suppose the Court had granted the Committee's collateral estoppel motion but denied the motion for interim suspension. There is no question that the Referee would be obligated to recommend a sanction based on the Court's findings of misconduct on the basis of collateral estoppel. The situation here is no different; the Referee is to recommend a sanction based on the Court's findings. It is absurd to suggest that the Court's granting of additional relief in the form of an interim suspension undermines the principal ruling that Respondent is bound by collateral estoppel. Whatever Respondent may choose to do at a post-suspension hearing by way of mitigation evidence, the collateral estoppel ruling is not subject to reexamination.

Clearly, Respondent's goal is to defeat collateral estoppel. Put another way, he wants to appeal the Court's order. He can try in the Court of Appeals, not in a post-suspension hearing.

Finally, with respect to the sanction hearing, and contrary to Respondent's proposed point one, the Referee, as always, is tasked with recommending the appropriate sanction given the misconduct taken as a whole.

Very truly yours,

George A. Davidson

GEORGE A. DAVIDSON
Pro Bono Special Counsel

Naomi F. Goldstein

NAOMI F. GOLDSTEIN
Of Counsel

MEMORANDUM OF LAW OF THE GRIEVANCE COMMITTEE
RE: ADMISSIBLE EVIDENCE AT A SECTION 1240.9(C) HEARING

Overview

This memorandum conveys the view of the Attorney Grievance Committee as to what evidence may be submitted by Mr. Donziger at the 1240.9(c) hearing and the sanction hearing. Although the Court ordered the sanction hearing and separately granted Mr. Donziger's request for a post suspension hearing, the Committee respectfully submits that the post suspension hearing should be consolidated with the sanction hearing because admissible evidence in both would be identical.

The History of Post-Interim Suspension Hearings

Section 1240.9(c) of the Rules for Attorney Disciplinary Matters authorizes the interim suspension of a lawyer pending a disciplinary proceeding. For example, a lawyer who defaults in responding to a petition or a subpoena to appear for an examination under oath may be subject to an interim suspension.

In a pair of cases decided together, the Court of Appeals upheld the constitutionality of interim suspensions ordered without a hearing, *Matter of Padilla* and *Matter of Gray*, 67 N.Y.2d 440(1986). Several years later, in the course of reversing the Second Department for ordering an interim suspension

without stating its reasons for doing so, the Court of Appeals in *Matter of Russakoff*, 79 N.Y. 2d 520 (1992) criticized the Appellate Division for having no rule requiring a prompt post-suspension hearing: "[I]t is worthwhile to note that neither the Appellate Division rules...nor the specific order in this case provided for a prompt post suspension hearing. Some action to correct this seems warranted," citing the United States Supreme Court's decision in *Barry v. Burchi*, 443 U.S. 55, 66-68 (1979). Subsequent to the Court of Appeal's admonition in *Russakoff*, the First Department enacted its own rule [former 22 NYCRR 603.4(e)(2)], now superseded by the statewide rule at Section 1240.9(c).

As this history reflects, the purpose of Section 1240.9(c) is to provide the respondent with a due process opportunity to respond to the allegations against him or her. The situation here, of course, is different. Mr. Donziger has already had that opportunity in the seven week trial before Judge Kaplan where he testified and offered countless documents into evidence. Nor do we have mere allegations. The First Department has found that the misconduct established by Judge Kaplan constitutes professional misconduct, in violation of former Disciplinary Rules 1-102 (A)(4), 1-102 (A)(5), 1-102 (A)

(7), 7-102 (A) (6), 7-105, 7-110(A), 7-110(B) and the New York Rules of Professional Conduct 3.4 (a) (5), 3.5(a) (1), 8.4 (c), and 8.4 (d). Nevertheless, the Court was constrained to offer Mr. Donziger a post suspension hearing to comply with Section1240.9(c)[1].

Respondent May Not Contradict Findings Given Collateral Estoppel Effect

It is well established that collateral estoppel bars a respondent from relitigating the Court's findings at a subsequent hearing. *In re Abady*, 22 AD3d 71 (1st Dept 2005)(Referee properly invoked collateral estoppel to preclude respondent from relitigating civil decision and order); *In re Osborne*, 1 AD3d 31 (1st Dept 2003) (respondent's stubborn attempts at the sanction hearing to relitigate the collateral estoppel findings of the Court deemed an aggravating factor); *In re Morrissey*, 217 AD2d 74 (1st Dept 1995)(respondent's attempts to reargue the collateral estoppel findings of professional misconduct misplaced, the only remaining issue to be determined being sanction).

In *Matter of Kramer*, 235 AD2d 87 (1st Dept 1977), our Court interimly suspended the respondent on the basis of misconduct findings by Judge Cote in

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[1] The Court also set forth its basis for the suspension, in full compliance with 1240.9.

the Southern District of the New York, including among other things making false statements concerning discovery, and remanded to the Departmental Disciplinary Committee for a sanctions hearing. In a subsequent opinion accepting the Committee's recommendation of disbarment, the First Department affirmed the findings of fact and conclusions of law of the Hearing Panel and disbarred the respondent:

> "The panel refused to rely on a polygraph test purporting to contravene the Southern District's finding that he had lied about certain discovery issues in the Selby matter, as this court had already ruled that respondent was collaterally estopped from challenging the District Court's finding."

Matter of Kramer, 247 A.D. 2d 81,83 (1998), citing 238 A.D. 2d at 89.

Except as a technique to compel cooperation from a respondent who has failed to comply with lawful demands of the Court or the Committee, as a practical matter, the First Department does not impose interim suspensions unless the conduct charged is of a nature that the final sanction would be substantial suspension or disbarment. This is as it should be, as there would be no reason for an interim suspension of a respondent who would be facing only a public censure.

Precluded from relitigating the collateral estoppel findings, the only evidence that respondent could submit in a post suspension hearing is evidence in mitigation, and since an interim suspension in practice constitutes an early start on a final suspension or disbarment, effective mitigation evidence would be directed to whether a final suspension or disbarment would be appropriate. But that is all that may be done in a sanction hearing. So the two hearings are effectively identical. It would make no sense to have two separate hearings and to have two different submissions to the Appellate Division, particularly where, as here, the only "interim" period is the period required to do the sanction hearing.

Of course, Mr. Donziger's burden of persuading the Court that he should not be disbarred, or even given a lengthy suspension, is significant, as the First Department routinely has disbarred respondents in cases involving obstruction of justice or deliberate falsehoods in Court or other government proceedings. See, e.g. *Matter of Zappin*, 160 A.D. 3d 1 (2018); *Matter of Troung*, 22 AD 3d 62 (2005); *Matter of Dougherty*, 7A.D. 2d 163 (1999); *Matter of Patel*, 209 A.D. 2d 100 (1995); *Matter of Padilla*, 109 AD2d 247 (1st Dept 1985); *Matter of Friedman*, 196 A.D. 2d 152 (1965); *Matter of Lemkin*, 17

A.D. 2d 163 (1963).

The practice of the Court has been to make final orders of suspension or disbarment retroactive to the date of the interim suspension. This has great significance to respondents, since every day that an interim suspension is in place brings closer the day that the respondent would become eligible to apply for reinstatement, i.e. the last day of the suspension, or seven years from disbarment. For this reason, hearings to challenge interim suspensions under Section 1240.9(c) or its predecessor, have been rare.

Conclusion

For the foregoing reasons, a single hearing should be held at which respondent may present evidence in mitigation.

Dated: New York, New York
October 19, 2018