

FILED *J.H.*
2/9/2023

**STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES**

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No. SBC-22-O-30655-YDR
)	
JOSEPH LAWRENCE DUNN,)	ORDER GRANTING IN PART AND
)	DENYING IN PART RESPONDENT'S
)	DECEMBER 19, 2022 MOTION TO
State Bar No. 123063.)	DISMISS
_____)	

On December 19, 2022, respondent Joseph Lawrence Dunn (Respondent), by and through counsel, filed a motion to dismiss (Motion) the Notice of Disciplinary Charges (NDC) filed in the instant disciplinary proceeding. Special Deputy Trial Counsel (SDTC) of the State Bar of California (State Bar) filed an opposition to the Motion on December 27, 2022.

On January 5, 2023, over SDTC's objection, the court granted Respondent's request to file additional briefing in support of the Motion. Respondent's supplemental brief was filed on January 17, 2023, and SDTC filed a response on January 24.¹

Discussion

Rule 5.124 provides the grounds for dismissal of a disciplinary proceeding. Citing to this rule, Respondent's Motion seeks dismissal of the NDC based on the following three grounds:

¹ The court rejects SDTC's argument that Respondent's supplemental brief is untimely. The court's January 5, 2023 order granted Respondent five court days to file a supplemental brief. Respondent's brief was filed on January 17, exactly five court days from the January 5 order, plus two court days for service of the order by e-mail. (See Rule 5.28 of the Rules of Procedure of the State Bar.) All further references to rules are to this source unless otherwise specified.

(1) the NDC is barred by the limitations period under rule 5.21; (2) dismissal of the NDC is warranted to further justice due to prosecutorial delay; and (3) dismissal is appropriate as a discovery sanction for SDTC's misuse of the discovery process. SDTC opposes the Motion and asks the court to deny relief because Respondent has failed to meet any of the grounds for dismissal under rule 5.124. The court will address each argument separately.

Proceeding Barred by Statute or Rule (Rule 5.124(F))

Respondent seeks dismissal under rule 5.124(F), which provides in part: "A proceeding may be dismissed if it is barred by any applicable statute or rule." Specifically, Respondent argues that the NDC, filed on July 5, 2022, is barred by the five-year limitations period under rule 5.21(A). This rule provides: "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the initial pleading must be filed within . . . five years from the date the violation occurred." (Rule 5.21(A).) The rule does not limit the authority of the State Bar to file charges based on information obtained from an independent source. (Rule 5.21(G) ["The five-year limit does not apply to disciplinary proceedings that were investigated and initiated by the State Bar based on information received from an independent source other than a complainant".])

At issue is whether the rule of limitations applies to this proceeding, and if so, if the NDC is timely. Respondent bears the burden of showing that this proceeding is time-barred. (*In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728, 735, fn. 7; Evid.Code, §§ 500, 550, subd. (b).) When ruling on a pretrial motion to dismiss, the court deems all the factual allegations in the NDC to be true. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 377-378.) The NDC articulates the nature of the alleged misconduct with sufficient particularity and correlates it to a violation of the Business and Professions Code. Count One of the NDC alleges that in May 2014, Respondent, in his capacity as Executive

Director of the State Bar, recommended that the Board of Trustees of the State Bar (Board) sponsor the California State Assembly Bill (AB) 852 and stated to the Board that “there is no known opposition to the measure,” when Respondent knew that statement was false and misleading. Count Two alleges that in November 2013, Respondent, in his capacity as Executive Director, stated to the Board that no State Bar funds would be used to fund a trip to Mongolia in January 2014, when Respondent knew that statement was false and misleading. Count Three alleges that Respondent breached his fiduciary duties to the Board by engaging in the misconduct alleged in Counts One and Two. Though the NDC alleges that the misconduct occurred more than eight years prior to commencing this proceeding, it does not allege facts that would indicate whether the five-year rule of limitations applies and if it does, whether the NDC is timely.

Respondent argues that this disciplinary proceeding is barred by the five-year rule of limitations because the NDC is based on the same allegations of misconduct previously made by Jayne Kim (Kim) in a July 31, 2014 complaint, which was referred to outside counsel for investigation and closed with no action.² SDTC, in turn, argues that the rule of limitations does not apply to the NDC under rule 5.21(G), because the State Bar initiated this proceeding based on information received from an independent source, namely, Judge Edward A. Infante’s final arbitration award dated March 20, 2017, which resolved the employment arbitration between Respondent and the State Bar.

The record reflects that on July 31, 2014, Kim, then Chief Trial Counsel of the Office of Chief Trial Counsel, authored a 17-page document entitled “Report of Improper Activity.” (Declaration of Charles Berwanger In Support of State Bar Opposition To Respondent’s

² As there are no objections, the court will consider admissible evidence submitted by the parties in their briefs, except that the court declines to make any inferences regarding the content of documents identified in the State Bar’s privilege log produced in the employment arbitration.

Supplement To Motion Two Dismiss, Exh. 1.) The report was sent to Robert A. Hawley, then State Bar Deputy Executive Director/Chief Operating Officer and to the State Bar Office of Human Resources. The report detailed concerns regarding the actions of Respondent and other State Bar executives. Among other things, Kim reported that Supreme Court staff had expressed concerns to Respondent regarding AB 852. Respondent failed to inform the Board about those concerns in a May 2014 meeting, and instead Respondent expressly advocated Board support for AB 852. Kim's report also included allegations that Howard Miller, a non-State Bar employee or representative, who traveled with Tom Layton and Respondent to Mongolia as part of a State Bar delegation, made false statements about the non-use of State Bar funds for travel in an April 2014, Daily Journal article, and that Respondent knew those statements were false when made.³ (Id., p. 2) Kim's report implies that Respondent ghost-wrote the article or had something to do with it. Shortly after, Kim made a request to appoint an outside examiner under rule 2201 based on her July 31 reporting.

On August 29, 2014, Daniel E. Eaton was appointed Special Deputy Trial Counsel to investigate allegations made in Kim's July 31 report.

On September 7, 2014, Eaton prepared a preliminary report. He referred to Kim's July 31, 2014 "memorandum" as the source of the "factual allegations on which the inquiry is based," but noted that the allegations were not attributable to any identified complainant and recommended closing the matter. (Declaration of Mark Geragos In Support of Supplemental Briefing In Support of Motion To Dismiss, Exh. E, p. 3429. After interviewing Kim shortly thereafter, Eaton prepared a supplemental report dated September 19, 2014, wherein Eaton

³ Kim further stated that "[o]n April 4, 2014, the ED [Respondent] signed and submitted an expense report requesting reimbursement for travel costs in connection with his January trip to Mongolia. In that same expense report, the ED [Respondent] indicated the purchase of airfare on a State Bar purchasing card. The ED [Respondent] submitted that expense report to the CFO (Office of Finance) on April 7, 2014." (Id.)

identified Kim as the “complainant,”⁴ and her July 31, 2014 report as the “complaint” underlying the disciplinary investigation. (Id., p. 3437.) Eaton’s supplemental report states that he investigated Kim’s allegations of false statements about the non-use of State Bar funds for travel to Mongolia made in The Daily Journal article and Respondent’s possible role in the writing of the article. After outlining his analysis and the reasons Eaton believed the allegations did not warrant discipline, Eaton recommended closing the investigation. (Id., p. 3440.)

Based on these facts, the court finds that Count One of the NDC is based on the same allegations Kim made against Respondent in 2014 regarding statements to the Board concerning Respondent’s advocacy of AB 852. Though Eaton’s preliminary and supplemental report only address allegations regarding The Daily Journal article, Kim’s 2014 complaint includes allegations of wrongdoing in connection with Respondent’s statements to the Board concerning AB 852, the same allegations included in Count One of the NDC and allegations that Eaton could have investigated. Therefore, Count One of the NDC is subject to the rule of limitations and the State Bar, pursuant to rule 5.21, had five years to bring charges relative to those allegations. Even if the limitations period was tolled under rule 5.21(C)(3) during the pendency of Respondent’s employment arbitration with the State Bar from late 2014 to March 2017, the NDC was filed in July 2022, more than five years after Respondent’s alleged wrongdoing. (Rule 5.21(A).) Accordingly, Count One of the NDC is time-barred and dismissed with prejudice. For the same reason, the allegation regarding AB 852 in Count Three of the NDC is also time-barred and dismissed with prejudice.

The court has considered SDTC’s argument that this matter is not subject to the rule of limitations because it was opened by the State Bar as an “SBI” (State Bar investigation) as a

⁴ Rule 5.4 (15) defines complainant as “a person who alleges misconduct by a State Bar attorney.”

result of information received from an independent source. SDTC produced an intake form which states: “This inquiry was opened as a result of a March 20, 2017 Final Arbitration Award in Joseph L. Dunn (R) v. State Bar of California.” The court agrees that the arbitration award is not a disciplinary complaint against Respondent, nor its author—Judge Infante—a time-barred complainant. It is information from an independent source. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 9 [matter not barred by limitations period because it was initiated by State Bar, not third-party complainant, after superior court entered sanctions order].) However, SDTC’s argument ignores the fact that the NDC is based, at least in part, on allegations of misconduct made prior to the arbitration award and which triggered the running of the rule of limitations. The court is unaware of any legal authority for the proposition that the State Bar can initiate a viable disciplinary proceeding based on information from an independent source when the same allegations were previously made in a prior complaint and are time-barred.

Finally, because the Mongolia trip Count Three allegations of the NDC were not set forth by Kim in 2014—Kim’s allegations regarding the Mongolia trip are limited to statements made in April 2014 in *The Daily Journal*—the court finds that the Count Three Mongolia charges were initiated based on information received from an independent source— Judge Infante’s arbitration award—and therefore not subject to the rule of limitations. (Rule 5.21(G).) However, the Count Three allegations relative to Respondent’s alleged recommendation to the Board regarding AB 852, are dismissed with prejudice, for the reasons stated above.

Dismissal to Further Justice (Rule 5.124(G))

Respondent argues that even if the NDC is not time-barred, it should be dismissed to further justice because of the State Bar’s inordinate delay in bringing charges and because it would be unfair and prejudicial to require Respondent to defend against charges for alleged misconduct which occurred in 2013 and 2014.

A motion to dismiss to further justice under rule 5.124(G)(1) and (2), may only be brought by the party that began the proceeding, i.e., SDTC, or the court, on its own motion, after notice to the parties stating its reasons for dismissal and an order for the parties to show cause why it should not dismiss the proceeding. Respondent has no standing to bring a motion to dismiss under rule 5.124(G)(1), and the court declines to move on its own motion to dismiss the proceedings under rule 5.124(G)(2) because Respondent has not made a showing by clear and convincing evidence of specific, actual prejudice. Although Respondent argues that memories have faded, documents have been lost or destroyed and four critical witnesses are deceased, there is no showing as to the specific prejudice to Respondent resulting from delay in filing charges. (*In Matter of Crane* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 157 [“Absent a showing of specific prejudice, delay in State Bar disciplinary proceedings is not a basis for dismissal of the charges”]; *In Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 396 [“Respondent must establish that the delay denied her a fair trial by demonstrating specific actual prejudice”].)

That said, the court may, if necessary and at the appropriate time, consider whether Respondent is entitled to mitigation for excessive delay in filing the NDC under standard 1.6(i) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 5)

Discovery Sanction (Rule 5.124(I))

Respondent also seeks dismissal of the NDC under rule 5.124(I), which provides that “[d]ismissal may be ordered as a discovery sanction.” The Supreme Court has held that the civil discovery statutes are applicable to disciplinary proceedings. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; see also *In the Matter of Torres* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr.

19, 24 [“Long ago, the policy decision was made to apply the Civil Discovery Act broadly to State Bar disciplinary proceedings”].) Similarly, rule 5.69(C) provides that “[t]he Civil Discovery Act’s provisions about misuse of the discovery process and permissible sanctions (except provisions for monetary sanctions and the arrest of a party) apply in State Bar Court proceedings. The Court may not order dismissal as a discovery sanction without considering the effect on the protection of the public.”

The Discovery Act authorizes many kinds of sanctions, including terminating (dismissal) sanctions, for misuse of the discovery process. (See Code Civ. Proc. § 2023.030.) “The sanction of dismissal . . . is ordinarily a drastic measure which should be employed with caution. [Citation.] However, there is no question that a court is empowered to apply the ultimate sanction [of dismissal] against a litigant who persists in the outright refusal to comply with his discovery obligations. [Citation.]” (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793.) The courts, however, have long recognized that terminating sanctions are to be used sparingly because of the drastic effect of their application. (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604; see also *In the Matter of Torres* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 19, 25 [“[B]ecause of the drastic nature of a terminating sanction, it should only be granted when the party has had an opportunity to comply with a court order”].) There are two requirements that must be met before the imposition of a discovery sanction: (1) there must be a failure to comply with court-ordered discovery; and (2) the failure must be willful. (*In the Matter of Torres, supra*, 5 Cal. State Bar Ct. Rptr. at p. 23.)

Respondent argues that the NDC should be dismissed as a discovery sanction because SDTC has deliberately and blatantly failed to comply with its discovery obligations. Respondent states that few documents have been produced and SDTC refuses to designate a person most knowledgeable for deposition. SDTC has detailed in its opposition several efforts to comply

with Respondent's discovery, including producing all responsive documents in its possession and attempting to seek documents from third-parties who may potentially have responsive documents. The State Bar has restored Outlook mailboxes for State Bar employees and incurred substantial expense processing documents for upload to a Relativity platform. SDTC received the Hueston Hennigan hard drive relating to the underlying employment arbitration, and has retained an outside vendor, Transperfect Legal Systems, to process the contents. Approximately 389,559 possible responsive documents have been identified. SDTC has interviewed a vendor to provide privilege, confidentiality and relevance reviews of such documents, which is estimated to cost the State Bar at least \$483,253. SDTC maintains it has been a major undertaking to respond to Respondent's limitless discovery, and at a substantial cost to the State Bar. Because SDTC believes Respondent's discovery is overbroad and goes beyond the allegations in the NDC, it has served objections and made unsuccessful efforts to meet and confer with Respondent to narrow the scope of the discovery.

The adequacy of SDTC's discovery responses is not before the court at this time. That issue may be raised on a motion to compel. (See rule 5.69 [motions to compel discovery and sanctions].) At issue is whether dismissal sanctions are warranted. Though the court has previously expressed concerns regarding the length of time it is taking to complete discovery and whether SDTC has acted diligently in doing so, on the facts described above there is no showing of SDTC's outright refusal to comply with its discovery obligations or other evidence of discovery abuse, especially in light of SDTC's recent updates describing the time, effort and costs associated with fully responding to Respondent's discovery. Furthermore, there presently is no willful failure on the part of SDTC to comply with court-ordered discovery, which is a prerequisite for the imposition of terminating sanctions. Therefore, Respondent's request for a dismissal sanction is denied.

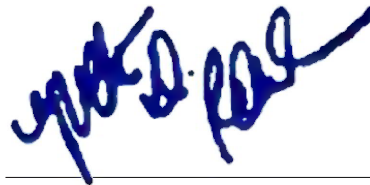
Conclusion

The Motion is **GRANTED** as to Count One of the NDC. The Motion is **DENIED** as to Count Two of the NDC. The Motion is **GRANTED** as to the allegation regarding AB 852 in Count Three of the NDC, but otherwise **DENIED**. (Rule 5.124(F) and 5.21(A).)

Accordingly, Count One, and the allegation regarding AB 852 in Count Three, are **DISMISSED** with prejudice.

IT IS SO ORDERED.

Dated: February 9, 2023



YVETTE D. ROLAND
Judge of the State Bar Court

CERTIFICATE OF ELECTRONIC SERVICE

(Rules Proc. of State Bar, rule 5.27.1.)

I, the undersigned, certify that I am a Court Clerk of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on February 9, 2023, I transmitted a true copy of the following document(s):

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S DECEMBER 19, 2022 MOTION TO DISMISS

by electronic service to MARK J. GERAGOS at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

mark@geragos.com

by electronic service to BENJAMIN J. MEISELAS at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

ben@geragos.com

by electronic service to ELLEN A. PANSKY at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

epansky@panskyarkle.com

by electronic service to CHARLES V. BERWANGER at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

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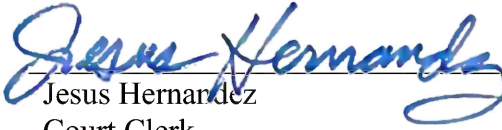
by electronic service to EDWARD J. MCINTYRE at the following electronic service address as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

edmcintyre@ethicsguru.law

The above document(s) was/were served electronically. My electronic service address is ctroomB@statebarcourt.ca.gov and my business address is 845 South Figueroa Street, Los Angeles, CA 90017

I declare, under penalty of perjury under the laws of the State of California, that the information above is true and correct.

Date: February 9, 2023



Jesus Hernandez
Court Clerk
State Bar Court