Public Matter

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of JOHN CHARLES EASTMAN, State Bar No. 193726.	))))))	Case No. SBC-23-O-30029-YDR ORDER RE MOTION FOR ABATEMENT

Background

On August 4, 2023, Respondent John Charles Eastman filed a motion to abate this proceeding based on the August 1, 2023, federal indictment of Donald J. Trump for conspiracy to defraud the United States and other crimes. Respondent maintained that abatement is necessary because although currently unnamed, the potential exists that Respondent may be charged as a co-conspirator and indicted in the criminal case against Donald Trump. Respondent offered various arguments in support of abatement: (1) it is necessary to protect Respondent's Fifth Amendment rights; (2) the Office of Chief Trial Counsel of the State Bar of California (OCTC) will suffer no prejudice; (3) Respondent will be severely burdened if he is required to defend himself in this proceeding simultaneously with a criminal case; (4) it will be more efficient and save judicial resources; and (5) it is in the public's interest that a criminal case receive precedence over this disciplinary proceeding.

On August 10, 2023, OCTC filed a response in opposition to abatement of this case. OCTC argued that Respondent has not been charged with a crime, has not received a target letter and it is speculative as to whether federal criminal charges will be brought against Respondent.

Moreover, OCTC contended that Respondent was aware of his criminal exposure, yet he has chosen to testify as to several issues in this disciplinary proceeding, waiving his Fifth Amendment privilege against self-incrimination as to those issues. Finally, OCTC maintained that Respondent's abatement request is untimely and public protection and the prejudice to OCTC warrants denying abatement of this proceeding.

Prior to this court ruling on the motion to abate, Respondent was indicted in Fulton County, Georgia on August 14, 2023. Thus, on August 15, 2023, OCTC filed a supplement in opposition to Respondent's August 4, 2023 motion to abate asserting that although Respondent has now been indicted, the prejudice to OCTC and public protection strongly weigh in favor of completing the trial. OCTC also reiterates its contention that Respondent has waived his Fifth Amendment right to self-incrimination on certain topics.

On August 16, 2023, Respondent filed a supplemental brief in support of his motion for abatement. Respondent argues that OCTC's principal argument that Respondent's criminal exposure was speculative is no longer applicable as Respondent has now been indicted.

Analysis

Respondent has waived his Fifth Amendment privilege against self-incrimination.

In this disciplinary proceeding, Respondent has already testified[1] regarding certain topics and allegations in the NDC that overlap with the allegations in the Fulton County indictment, without asserting a Fifth Amendment privilege. In a State Bar disciplinary case, an attorney does not hold the equivalent protection against being summoned to testify as a person accused in a criminal trial. The attorney may be "compelled to testify but may refuse to answer questions on the ground that his testimony would 'tend to incriminate him'." (*Black v. State Bar* (1972) 7

[1] Respondent testified pursuant to Evidence Code section 776 (adverse witness) in OCTC's case in chief.

Cal.3d 676, 686.) "If the attorney testifies without objection at a State Bar proceeding he has waived the privilege." (*In re Utz* (1989) 48 Cal.3d 468, 479, citing *Black v. State Bar, supra,* 7 Cal.3d at p. 688.) Here, Respondent has testified for over 8 hours in OCTC's case-in-chief, not once invoking his Fifth Amendment privilege or making any such objection to his testimony thus far. It is firmly established that a witness cannot choose to testify willingly about a topic during a single legal proceeding and then later claim the right to remain silent under self-incrimination privilege when asked about specific subjects. (*Mitchell v. U.S.* (1999) 526 U.S. 314, 321.) The act of testifying results in a forfeiture of the privilege for the subjects discussed, and the extent of this "'waiver is determined by the scope of relevant cross-examination. [Citation.]"' (*Victaulic Co. v. American Home Assurance Co.* (2018) Cal.App.5th 948, 979.) "'The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry.' [Citation.]" (*Mitchell v. U.S., supra,* 526 U.S. at p. 321.) It is of no consequence that Respondent testified pursuant to Evidence Code section 776 since he never plead the Fifth. (Cf. *Crittenden v. Superior Court of San Diego County* (1964) 225 Cal.App.2d 101, 105-106 [improper to require husband, called as an adverse witness, to take stand over objection that his testimony might incriminate him as he did not waive privilege against self-incrimination by filing general denial].)

Respondent was well aware of his possible criminal exposure and of his right to plead the Fifth.

Respondent was fully cognizant of the timing and method to exercise his Fifth Amendment privilege against self-incrimination. On December 9, 2021, Respondent sat for a deposition before the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (January 6 Committee). Besides answering basic questions about his background, Respondent pled the Fifth Amendment over 145 times as he was questioned about his actions surrounding the 2020 election. (State Bar's Supplemental Exhibits To Opposition To

Respondent's Motion For Abatement, Exh. 1.) The following exchange took place during the deposition:

> Mr. Raskin. Could I just follow up on that for a moment? Counsel invoked the bar proceeding which is taking place against Dr. Eastman in California. Is it the bar proceeding that is troubling Dr. Eastman with respect to answering these questions or is it something else, Dr. Eastman?
>
> Mr. Burnham. If I could respond to the question. The bar proceeding is just one of many, many bases that led us to take the -- make the invocation we're making here today.
>
> Mr. Raskin. Okay. But, Dr. Eastman, you understand that a bar proceeding is civil in nature, do you not?
>
> The Witness. Yes.
>
> Mr. Raskin. Okay. So when you're asserting the Fifth Amendment, it is with respect to other potential criminal prosecutions. Is that right?
>
> The Witness. Fifth.

(Id., Exh. 1, pp. 32-33.)

This exchange demonstrates Respondent had concerns about his testimony before the January 6 Committee impacting the State Bar proceedings and was conscious of the possibility of facing other criminal prosecutions. Yet, he knowingly made the choice to testify in this disciplinary proceeding and never asserted the Fifth Amendment here.

Moreover, on March 22, 2022, there was more indicia of Respondent's potential criminal prosecutions for his actions surrounding the 2020 election. The court in *Eastman v. Thompson*, Central District of California case No. 8:22-cv-00099-DOC-DFM, determined "that it is more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021" in violation of 18 U.S.C. § 371. (*Eastman v. Thompson* (C.D. Cal.) case No. 8:22-cv-00099-DOC-DFM, pp. 36, 40.)[2]

[2] Pursuant to Evidence Code section 452, subdivision (a), the court takes judicial notice of *Eastman v. Thompson* (C.D. Cal.) case No. 8:22-cv-00099-DOC-DFM, pp. 36, 40.

In addition to his December 9, 2021 deposition before the January 6 Committee, on August 31, 2022, Respondent appeared before the Fulton County, Georgia grand jury and Respondent was advised by his counsel, Charles Burnham, Esq. and Harvey Silverglate, Esq., "to assert attorney client privilege and the constitutional right to remain silent where appropriate." (State Bar's Supplemental Exhibits to Opposition, Exh. 2.) Moreover, Respondent was referred to the Department of Justice on December 19, 2022,[3] by the January 6 Committee.

Finally, during the February 27, 2023 initial status conference in this case, Respondent contemplated seeking abatement stating, "there may be something that requires abatement" and that he "may need to seek relief from the court" but in the end he indicated he would leave the issue of abatement for another time.

As demonstrated by the timeline of the aforementioned appearances, Respondent was completely aware that he had potential criminal exposure for his actions surrounding the 2020 election, which is also the subject of the NDC. Yet, Respondent gave considerable testimony without ever invoking the Fifth Amendment and did not seek abatement until six days into trial.

The factors outlined in rule 5.50 of the Rules of Procedure of the State Bar[4] do not weigh in Respondent's favor.

Rule 5.50(B) provides some of the relevant factors to consider in connection with fashioning a ruling on a motion to abate.[5] The allegations in the NDC are extremely serious and

[3] Pursuant to Evidence Code section 452, subdivision (c), the court takes judicial notice that the January 6 Committee referred Respondent to the Department of Justice for criminal prosecution for violations of 18 U.S.C. § 1512(c) (corruptly obstruct official government proceeding) and 18 U.S.C. § 371 (conspiracy to defraud the United States). (December 19, 2022 January 6 Select Committee Final Public Hearing Transcript at 59:02 - 1:00:54, available at https://www.rev.com/blog/transcripts/january-6-select-committee-final-public-hearing-transcript.)

[4] All further references to rules are to the Rules of Procedure of the State Bar, unless otherwise indicated.

[5] Rule 5.50(B) provides:

detail the severe consequences of Respondent's alleged actions. The court has made no predeterminations regarding this case, but if Respondent is culpable of the conduct alleged, public protection necessitates that this case be disposed of in a timely matter, particularly as there is an upcoming election in 2024.

Considering the factors laid out in rule 5.50(B), the issues in this proceeding closely resemble those in the Fulton County criminal case. Nevertheless, waiting for the trial and potential subsequent appeals in Fulton County is likely to considerably prolong the disciplinary proceedings. Postponing this proceeding until the conclusion of the Fulton County criminal case would not expedite this proceedng, and as previously mentioned, it is probable that the Fulton County case will face significant delays.

While the evidence from the Fulton County case may assist in determining the outcome of this proceeding, the Respondent and other witnesses have already provided extensive testimony on many subjects relevant to the Fulton County criminal counts against Respondent. If this case is put on hold for an extended period, there is a risk that evidence might become unavailable due to fading memories of witnesses, causing potential harm to both Respondent and OCTC.

> The Court may consider any relevant factor to determine a motion under this rule, including the need to dispose of the proceeding at the earliest time and the extent to which: (1) the issues in the proceeding are substantially the same as in a related proceeding; (2) the proceeding would probably be delayed by waiting for the trial or an appeal in a related proceeding; (3) the proceeding would probably be expedited by waiting for the disposition in a related proceeding; (4) evidence to be adduced in a related proceeding would aid in determining the proceeding; (5) evidence may become unavailable because of any delay; (6) parties, witnesses, or documents are currently unavailable for reasons beyond the parties' control; (7) a party or witness may be prejudiced in a related proceeding by delaying or proceeding with further action; and (8) a Client Security Fund claim would be unnecessarily delayed.

Respondent argues that he will face prejudice since some of his witnesses are now unwilling to testify based on the advice of counsel or concerns about being implicated in a criminal prosecution. However, Respondent has not indicated which witnesses are unwilling to testify, whether or when these witnesses might eventually be prepared to offer their testimony in support of his defense.

In sum, the factors in rule 5.50(B) do not favor abatement.

The two-prong test in *Klein v. Harris* (2d. Cir. 1981) 667 F.2d 274 is not instructive.

Respondent cites the two-prong test in a Second Circuit case—*Klein v. Harris* (2d. Cir. 1981) 667 F.2d 274—to support his argument that Respondent has not waived his Fifth Amendment privilege against self-incrimination.[6] Even though a United States District Court in California has considered the *Klein* case as informative (*Universal Trading & Inv. Co.*, (N.D. Cal. 2006) 2006 WL 3798157 *1), as Respondent acknowledges, it is important to note that the Ninth Circuit has not explicitly embraced the *Klein* test. Moreover, in *Klein*, the appellate court found that a state trial judge erred by allowing a witness to invoke the Fifth Amendment's privilege against self-incrimination when he was recalled to the stand in a criminal case. (*Klein, supra*, 667, F.2d at p. 289.) The court determined that the witness relinquished any potential fifth amendment right he could have claimed to refrain from providing testimony about a murder, as he openly discussed the details of the crime during his initial testimony on the stand. (*Ibid*.)

[6] The Second Circuit in *Klein*, *supra*, 667 F.2d at p. 287, has employed a test for inferring from prior testimony a waiver of the Fifth Amendment privilege: "(1) that the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth; and (2) that the witness had reason to know that his prior statements would be interpreted as a waiver of the fifth amendment's privilege against self-incrimination."

Indeed, when a defendant seeks to assert his Fifth Amendment privilege against self-incrimination subsequent to having previously made certain statements during legal proceedings, the courts within the U.S. District Courts in California typically concentrate on the extent of the defendant's initial declarations. A waiver is found if the defendant has participated extensively in the discovery process, but no waiver is recognized if such involvement has not occurred. (See, e.g., *Multiven, Inc. v. Cisco Sys., Inc.* (N.D. Cal. 2010) 725 F.Supp.2d 887; *Jones v. Conte,* (N.D. Cal. Apr. 19, 2005) 2005 WL 1287017, at *1.)[7] For example, in *Multiven* the court denied the plaintiff/counter-defendant's motion to stay a civil case until parallel criminal proceedings against him were resolved. The court focused on the considerable extent of the counter-defendant's statements provided during civil litigation. This encompassed deposition testimony spanning fourteen hours and the submission of numerous declarations to endorse the cross-motions for summary judgment made by the parties. (*Multiven, supra*, 725 F.Supp.2d at 897.) Although declining to decide whether the counter-defendant's testimony actually effected a waiver of his Fifth Amendment rights, based on the "extensive" nature of that testimony, the court concluded that "continuing the [civil] litigation will only minimally implicate [the counter-defendant's] Fifth Amendment rights[.]" (*Id.*) (citation omitted); see also *FTC v. JK Publications, Inc.*, (C.D. Cal. 2000) 99 F.Supp.2d 1176, 1199 ("Where a defendant already has provided deposition testimony on substantive issues of the civil case, any burden on that defendant's Fifth Amendment privilege is 'negligible.'"; but cf. *Jones, supra*, 2005 WL 1287017 at p. *1 [court granted defendant's request for a stay of civil proceedings pending resolution of

[7] Unpublished federal opinions are " 'citable notwithstanding California Rules of Court, rule [8.1115] which only bars citation of unpublished California opinions.' " (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990, fn. 4.)

related criminal case given the only statements defendant made with respect to the civil matter were public statements, not "deposition testimony or sworn statements in [a] proceeding[.]")

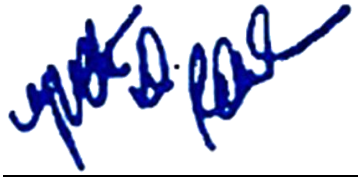
Conclusion

The court is aware of its obligation to provide due process to attorneys subject to discipline, while at the same time affording public protection. Normally a disciplinary proceeding would be abated when an attorney is facing criminal indictment on the same issues. However, this is a unique circumstance where Respondent has already taken the stand for approximately 8 hours and 35 minutes, testifying to many of the issues in this case—and waiving his Fifth Amendment right against self-incrimination. Respondent became aware that his involvement in the 2020 election exposed him to potential criminal charges. Here, he contemplated requesting a pause in these proceedings, but ultimately decided against it. Given his standing as an attorney and constitutional scholar, his prior deposition before the January 6 Committee, and his appearance before the Fulton County grand jury, it is clear that Respondent is acquainted with exercising his Fifth Amendment privilege. Nevertheless, he chose to go ahead with the trial in this instance without utilizing those rights or pursuing a delay in the proceedings.

Finally, the court takes very seriously the mission of the State Bar Court which includes "(a) the protection the public, the courts and the legal profession; (b) maintenance of the highest professional standards; and (c) preservation of the public confidence in the legal profession." (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, std. 1.1.) By denying abatement of this proceeding, California licensed attorneys will acquire a better understanding of their ethical obligations, and the members of the public will be better served and protected by the resolution of this case.

Accordingly, upon review of the pleadings and record in this case, Respondent's motion for abatement of this proceeding is **DENIED,** no good cause appearing. The September 5, 2023, through September 8 and September 12 through September 15 trial dates remain calendared.

IT IS SO ORDERED.



Dated: August 25, 2023

YVETTE D. ROLAND
Judge of the State Bar Court