

ahead by one day the reply brief that was due in that sequence of briefing and filed it yesterday with the DCCA.¹

2. *Lodging*. Given our position that the abeyance posture of this matter continues—of necessity—while that issue is pending before the DCCA—and indeed must also continue under the divestiture of jurisdiction as well—Respondent is only lodging, not filing, his Status Report today.
3. *Divestiture of Jurisdiction*. The Hearing Committee Chair is no doubt aware of our long-running position that while a case is pending at the DCCA in an appellate filing that ODC has voluntarily docketed, jurisdiction is divested here in this adjunct forum below. The pending case in the DCCA was filed by ODC on October 26, 2022. *See* Exhibit 1 (DCCA Docket Sheet). If ordered to do so, we would lodge a brief reiterating that position once more. But for purposes of the June 16, 2023, Order, we are assuming the Chair would agree that this would be a wasteful exercise. Moreover, on September 15, 2022, the DCCA issued an order mooted most of Respondent’s objections to how the case was proceeding below. *See* Exhibit 2. That order did not explicitly state anything about Respondent’s divestiture-of-jurisdiction points and indeed rendered

¹ Indeed, in light of the manner in which the Office of Disciplinary Counsel (“ODC”) proceeded, such as by interjecting demonstrably incorrect and irrelevant merits arguments in response to our recent DCCA motion, we filed an over-length reply brief in support of that motion. As a result, we had to and did file an accompanying motion. *See Motion to Exceed Length Limitations for Respondent’s Reply to in Support of Motion to Continue Abeyance of Proceedings Before This Court and/or Defer Proceedings Below*, noting that ODC did not consent to the motion. And briefing on that accompanying procedural motion has certainly not even been completed—another factor making the Hearing Committee’s June 16, 2023, Order here premature.

those points moot by dismissing No. 22-BG-059. Obviously, when a particular dispute is dismissed at the higher level of the DCCA, its jurisdiction over a pending dispute can no longer divest the adjunct bodies below of jurisdiction.

4. *Appeal as of Right of the U.S. District Court for the District of Columbia's Remand Order.* The Chair may not be aware, but Mr. Clark possesses an appeal as of right with respect to the June 8, 2023, remand order issued by the U.S. District Court, as it concerns a removal premised on the federal-officer removal statute (28 U.S.C. § 1442). *See* 28 U.S.C. § 1447(d). *See* Exhibit 3 (Notice of Appeal). The District Court's June 8, 2023, Order is thus not immediately effective to dispose of the controversy over removal jurisdiction (a major issue of contention pending before the DCCA in the motions practice referenced above and in footnote 1). Indeed, the District Court has not even yet issued a Rule 58 separate judgment.² Nor has ODC sought the issuance of such a judgment, further rendering the Committee Chair's June 16, 2023, Order premature.

The DCCA's stay order—as well as the stay posture most relevant here of lodging all materials filed below the DCCA level instituted by the Board consistent with the

² Though, of course, the District Court could not withhold such a document forever and thereby attempt to defeat Respondent's appellate rights. *See* Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order."). More importantly, if such a separate judgment never issues, Federal Rule of Appellate Procedure 4(a)(2), (7) operate together to fix the relevant appellate timing rules affecting when Rule 58 separate judgment orders are not entered.

DCCA's January 17, 2023, stay order—was set up by the DCCA to continue until the removal jurisdiction dispute has been resolved. And that dispute, as noted, has not been resolved. Completion of the appeal (and all follow-on opportunities to challenge an appellate panel decision) must first be truly final and not subject to any higher-level appellate review before the proceedings of Hearing Committee Twelve may be reactivated.

5. *Potential Rescheduling of the Hearing Before This Committee.* As is implicit from the foregoing, Respondent's position is that it would be premature to reschedule the hearing at this time. Respondent cannot presently foresee when it would be ripe to set such a hearing date. This is true especially because Respondent will want to litigate to the Chair via motions practice numerous threshold matters, even were there to be a ruling final up through the DCCA level that the Board and Committee possess jurisdiction over this matter, despite the fact that the District of Columbia is not a "State" within the meaning of 28 U.S.C. § 530B (and relatedly that the U.S. Department of Justice regulation issued under this statute is *ultra vires* for exceeding the terms of Section 530B's authorization) and despite certain other of the Respondent's defenses including those asserting that an exercise of D.C. Bar jurisdiction here would also violate the separation of powers. *See Answer (Third, Fourth, Fifth, Eighth, Eighteenth, Nineteenth, Twentieth, Twenty-Second, and Twenty-Third Defenses).*

6. *Intention to File a Mandamus Petition to the DCCA, If Needed.* Respondent recognizes that there have been rulings south of the DCCA in this matter that Respondent cannot obtain a resolution of the threshold question of whether jurisdiction exists here, despite the limitations of Section 530B, until he first proceeds through a hearing, preserving jurisdictional objections for review by the DCCA. With due respect, and as the Chair is aware, we believe that such an approach violates *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (threshold jurisdictional questions must be resolved before the merits); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (requirement to establish subject matter jurisdiction as a threshold matter is “inflexible and without exception” and, for that reason, the Supreme Court rejected the doctrine of “hypothetical jurisdiction”).³ *Cf. Coinbase, Inc. v. Bielski*, Case No. 22-105, slip op. June 22 2023⁴ (whether case belongs in arbitration or district court involves the entire case, therefore district court proceedings stayed pending interlocutory appeal of arbitrability, here analogous to removability; by long-standing practice, when Congress wants to authorize an interlocutory appeal and automatic stay pending appeal, it need not say anything about a stay).

³ This is also the rule in ordinary judicial proceedings in District of Columbia Courts. *See UMC Dev. LLC v. District of Columbia*, 120 A.2d. 37, 42 (D.C. 2015) (standing is a matter posing “a threshold jurisdictional question which must be addressed prior to and independently of the merits of a party’s claim.”).

⁴ Available at https://www.supremecourt.gov/opinions/22pdf/22-105_5536.pdf (last visited Jun. 23, 2023).

As a result, were Respondent to be faced with a future ruling holding against removal jurisdiction that can no longer be challenged because *certiorari* has been denied or because the U.S. Supreme Court rules against Mr. Clark, Respondent would still file a petition for mandamus to the DCCA arguing that no hearing can proceed before there is a final threshold resolution of the disputed issue of subject matter jurisdiction and thus that any general rule that the DCCA has created to the contrary is void as applied here. Relatedly, Respondent would take the position, at the very least, that it would be imprudent to hold a hearing before such a mandamus petition is finally resolved—and such a petition would also potentially involve U.S. Supreme Court review.

7. ***Issues That May Need to Be Addressed.*** Respondent cannot fully say at this premature juncture what the full range of other threshold matters that must or may need to be resolved by the Chair before a hearing could begin. After the October 2022 status conference that the Chair held was complete and the DCCA's September 15, 2022, order had issued, it became clear to us that we would need to remove this case to the Article III courts. Without clarity as to which procedural rules would govern this matter (i.e., the Federal Rules of Criminal Procedure, the Federal Rules of Civil procedure, or a hybrid of the two if removal jurisdiction were found to exist, versus the procedural rules governing the DCCA, Board, and Hearing Committee processes,

if removal jurisdiction is not held to exist), it is impossible to identify or formulate all necessary motions in advance.

8. *Five Threshold Motions Respondent Anticipates Would Need to Be Resolved Before It Would Be Prudent or Even Possible to Set a Hearing Date, Even If, Counterfactually, Both (a) the Removal Jurisdiction Dispute Were Final, and (b) the Jurisdictional Mandamus Petition Were Also Final.* At this time, we can alert the Chair to five threshold motions we would consider drawing up and filing if and when the removal issues and the mandamus-able issues are finally resolved:

- i. *Presidential Appointments Clause Prerogatives.* The Charges threaten to interfere with the exclusive Appointments Clause power of the President of the United States. *See Answer (Sixth Defense).*
- ii. *The Charges Present Non-Justiciable Political Questions in the Context of an Interbranch Dispute (Partly Mooted by the Dawn of the Current Congress).* Senator Durbin is the genesis of this matter. His complaint never should have been docketed because he had *no first-hand knowledge* of Mr. Clark's conduct, legal advice, and/or positions taken inside Executive Branch disputes. Numerous Democrats have objected to presidential elections, including far away from the floors of the two Houses of Congress. There is no basis for turning such a political dispute into a matter for bar discipline, despite the fact

that, as is common knowledge, many members of Congress are lawyers. *See* Answer (Ninth, Thirty-Sixth, Thirty-Seventh Defenses).

iii. ***Respondent's Conduct Is Entitled to Official Immunity or Qualified Immunity.***

And, as the Chair is no doubt aware, the presence and applicability of an immunity to a particular matter means that Respondent could not be subjected to a hearing before the immunity was finally found not to exist. *See* Answer (Twenty-Fourth Defense).

iv. ***The Charges Do Not State a Violation of the Rules of Professional Conduct and Respondent Certainly Had No Fair Notice of the Heretofore Unknown Offense of Persisting in Advancing a Legal Argument After Other Lawyers Disagreed But the President Had Not Yet Resolved the Dispute.***

At the October 2022 status conference, you, as Chair, seemed to recognize that, after Mr. Fox's concession that he would not have brought this case merely for drafting a letter to be sent to state officials, a serious issue existed as to how such persistent conduct could possibly violate the Rules. *See* Answer (Twenty-Fifth and Twenty-Sixth Defenses).

v. ***ODC Has Engaged in at Least Two Forms of Misconduct That Fatally Taint This Action: (1) ODC Improperly Threatened Respondent to Agree to Its Invalid Informational Demands or Discipline Would Be Heightened, Which Violates***

Due Process; and (2) ODC Has Improperly Attempted to Try Its Case in the Press. See Answer (Forty-Fourth, Forty-Sixth, and Forty-Seventh Defenses.

Finally, as an overarching caveat, by setting out these five exemplar threshold motions, Respondent and his counsel do not intend to waive any of Respondent's other defenses or concede that those are not threshold matters as well. In this document, we are simply trying to be as transparent as we can at this time, in our lodged response to the June 16, 2023, Order.

9. *Intermediate Dates.* For the reasons listed above (and others), that we cannot hazard a guess at this point as to when it would be possible or prudent to set any intermediate dates. Respondent and undersigned counsel, however, put this Committee and ODC on notice of two points: (i) even once the removal jurisdiction and mandamus threshold issues are finally resolved, we will need a general transition period of at least two weeks and possibly as long as one month in which to assess where the case stands in light of any intervening judicial cases and formulate defenses based thereon; and (ii) each of the five exemplar motion should, in terms of a briefing schedule, be set over a sequential period of 3-4 weeks each after the general transition period ends. Each of the above-described motions will be complex and Respondent should not be denied adequate time to lay out any such defenses.
10. *Aid with Obtaining Documents from DOJ and Beyond.* Using its resource advantages as well as being able to use the period in which this matter was confidential and/or

under seal to its advantage, ODC has had the luxury of having been able to interview witnesses it believes support the Charges and look at documents that were released by the House Oversight Committee and the Senate Judiciary Committee in 2021, by the House January 6 Select Committee in 2022, and by the U.S. Justice Department (in violation of its *Touhy* regulations, we believe). Mr. Clark has not been afforded these luxuries and had hoped that Charges would never be filed in light of the extensive defenses he informed ODC of via late January 2022 letters. Moreover, the January 6 Committee has released only a small fraction of the evidence it collected; some of the unreleased evidence may be exculpatory as to Mr. Clark, especially considering the show-trial nature of those proceedings. In light of these issues, the Chair would need to assist Respondent by calling for the full span of documents to be released to the parties. Or, failing that, for Mr. Clark to approach the relevant bodies to see if they will share *all necessary information*. Finally, if that will not occur for one reason or another, we are putting the Committee and ODC on notice that we will argue that Mr. Clark's due process rights would be violated if a hearing goes forward nonetheless, since both the Biden Justice Department and the Biden National Archives and Records Administration (as the keeper of the now-defunct January 6 Committee records), have obvious incentives not to want to assist Mr. Clark to assemble the full span of his own records inside the Justice Department from 2020-early 2021 or to assemble documents provided by third parties to other governmental bodies. *See Answer (Forty-Eighth &*

Forty-Ninth Defenses). Resort to FOIA requests and FOIA litigation may become necessary. In addition, securing the testimony of current or former DOJ employees may become entangled in disputes or litigation over the application of the *Touhy* regulations.

11. *Witnesses.* The June 16, 2023 Order did not ask us to do so, but we want to put the Committee and ODC on full notice that we cannot possibly be expected to try to line up witnesses for Mr. Clark at this time because there is insufficient clarity as to scheduling and thus it would be unfair to the witnesses (and to Mr. Clark, who would then be potentially blamed for trying the patience of third parties), if scheduling guesses are made that may not hold up.

12. *Information on Other Prosecutions.* Much like we anticipate that President Trump, in defending the Mar-a-Lago documents prosecution brought against him on grounds that he is being selectively prosecuted, would want to see documents concerning DOJ investigations and prosecutorial decision memoranda as to other Presidents, Vice Presidents, and Senators, etc., with alleged document-retention problems, we will want a period of discovery into whether ODC has ever brought or even considered bringing a bar disciplinary case remotely like this one ever before. This is because Mr. Clark's due process (equal protection component) rights would be violated by selective D.C. Bar prosecution. *See* Answer (Thirty-Eighth and Thirty-Ninth Defenses). For instance, during election controversies in 2000, 2004, and 2016 were any Democrat

lawyers taking positions on those presidential elections ever even investigated for their positions?

13. *Ex Parte Contacts.* We anticipate that, at the appropriate time, we will file a motion requiring all *ex parte* contacts concerning *non-ministerial* matters (with ministerial matters being things such as extensions, page-enlargements, status phone calls, etc.) between the Board, this Hearing Committee, and ODC. Also, we have previously sought discovery of third-party contacts and coordination between ODC with (a) any members or agents of Congress, (b) DOJ or the Biden Administration, and (c) the media. We have been rebuffed there. That cannot be allowed to continue.

14. *Renewed Deferral Motion.* As the Chair is no doubt aware, this matter is just one piece in a mosaic of matters or potential matters that involve scrutiny of the actions of President Trump's lawyers or perceived allies of President Trump in late 2020 to early 2021. Under standard principles animating the DCCA, Board, and Hearing Committee approach to granting deferrals, Respondent thus may opt to file a renewed deferral motion on an appropriate future date.

15. *Prehearing Conference.* Given the intense complexity of this novel matter as well as the fact that the matter may take unexpected twists and turns, Respondent can easily anticipate that yes, a prehearing conference of considerable length would be required before this matter could be set for a hearing, if and after all prior hurdles to doing so

are surmounted, but it would be premature and inefficient to conduct such a conference now.

Respectfully submitted this 23rd day of June 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have on June 23, 2023, served counsel for the opposing party and the executive attorney by email addressed to:

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Case Information: 22-BG-0891

Short Caption:	IN RE JEFFREY B. CLARK, BAR REGISTRATION NO. 455315, BOARD DOCKET NO. 22-BD-39	Classification:	Bar Governance - Bar - Disciplinary
Superior Court or Agency Case Number:	DDN: 2021-D193	Filed Date:	10/26/2022
Opening Event Date:	10/26/2022	Case Status:	Pending
Record Completed:		Post-Decision Matter Pending:	
Briefs Completed:			
Argued/Submitted:			
Disposition:		Next Scheduled Action:	Review Filings/Statements/Pleadings
Mandate Issued:			

Party Information

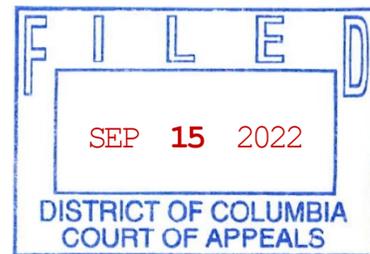
Appellate Role	Party Name	IFP	Attorney(s)	Arguing Attorney	E-Filer
Petitioner	Bar Counsel	N	Hamilton P. Fox	N	Y
			Jason Horrell	N	Y
			Theodore (Jack) Metzler	N	Y
Petitioner	Board on Professional Responsibility		James T. Phalen	N	Y
Respondent	Jeffrey B. Clark	N	Charles Burnham	N	Y

Events

Event Date	Status	Description	Result	PDF
10/26/2022	Filed	Bar Counsel's Motion To Enforce Subpoena		
11/04/2022	Filed	Reply to Disciplinary Counsel's Motion to Enforce Subpoena. (Respondent)		
11/07/2022	Filed	Disciplinary Counsel's Reply to Respondent's Response to Motion to Enforce (Petitioner Bar Counsel)		
11/26/2022	Filed	Notification of Second Removal to Federal Court (Respondent)		
01/17/2023	Filed	ORDER holding subpoena in abeyance pending outcome of removal matter in US District Court.		
06/09/2023	Filed	Disciplinary Counsel's Notice of Order Granting Remand (Petitioner Bar Counsel)		

06/12/2023	Filed	Motion to continue abeyance of proceedings before this court and/or defer proceedings below. (Respondent)
06/16/2023	Filed	Appearance by Theodore (Jack) Metzler (Petitioner Bar Counsel)
06/20/2023	Lodged	Opposition to Motion to Continue Abeyance (Petitioner Bar Counsel)
06/21/2023	Filed	Motion For Leave to Exceed Length Limitations for Reply in Support of Motion to Continue Abeyance of Proceedings Before this Court and/or Defer Proceedings Below (Respondent)
06/22/2023	Lodged	Reply in Support of Motion to Continue Abeyance of Proceedings Before This Court and/or Defer Proceedings Below (Respondent)

**District of Columbia
Court of Appeals**



No. 22-BG-059

IN RE JEFFREY B. CLARK

A Member of the Bar of the
District of Columbia Court of Appeals
Bar Registration No. 445315

DDN2021-D193
Board Docket No.: 22-BD-39

BEFORE: Glickman and Howard, Associate Judges, and Steadman, Senior Judge.

ORDER

(FILED— September 15, 2022)

This matter began as a sealed motion to enforce a subpoena duces tecum to assist in the investigation of a potential disciplinary violation, respondent then filed motions for leave to file his lodged opposition that exceeded the page limits and a motion to quash that was opposed by Disciplinary Counsel to which respondent filed a reply; Disciplinary Counsel filed a motion to supplement the record, respondent filed a response and Disciplinary Counsel filed a reply; Disciplinary Counsel then filed a motion to unseal the case stating that it had filed a petition and specification of charges that has been sent to a Hearing Committee (2022 BDN 39) but still seeks enforcement of the subpoena duces tecum to assist in presenting its case, respondent opposes and filed a motion to stay the proceedings before the Hearing Committee pending resolution of this matter that is opposed by Disciplinary Counsel and respondent filed a reply, and finally respondent has filed a D.C. App. R. 28(k) letter, it is

ORDERED that respondent's motions for leave to file his opposition are granted. It is

FURTHER ORDERED that Disciplinary Counsel's motion to supplement the motion is granted. It is

No. 22-BG-59

FURTHER ORDERED that the motion to unseal is granted and the case number and caption are changed as reflected in this order. Because Disciplinary Counsel has now filed a petition and specification of charges pursuant to D.C. Bar R. XI, § 8(c), D.C. Bar R. XI, § 17(a) no longer applies. Any request for a protective order must be made to the Hearing Committee pursuant to D.C. Bar R. XI, § 17(d). It is

FURTHER ORDERED that respondent's motion to stay the disciplinary proceedings is denied. It is

FURTHER ORDERED that respondent's motion to quash the subpoena is denied. D.C. Bar R. XI, § 18(c) requires that all motions to quash a subpoena must be heard and decided by a Hearing Committee designated by the Executive Attorney. It is

FURTHER ORDERED that because disciplinary proceedings have been initiated the pending subpoena issued pursuant to D.C. Bar R. XI, § 18(b) no longer applies. D.C. Bar R. XI, § 18(a) provides that once formal disciplinary proceedings are initiated the subpoena to compel attendance and production of documents may be issued by either Disciplinary Counsel or a member of the Hearing Committee. By reaching this resolution we express no opinion on whether the subpoenas was properly served. Therefore, the motion to compel is denied as moot.

PER CURIAM

Copies e-served to:

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Disciplinary Counsel

No. 22-BG-59

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Lucy Pittman, Esquire
Chair - BPR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: JEFFREY B. CLARK,

A member of the Bar of the
District of Columbia Court of
Appeals (Bar No. 455315)

Case Nos. 22-mc-00096, 22-mc-00117,
and 23-mc-00007 (consolidated)

NOTICE OF APPEAL

Plaintiff/Charge Respondent Jeffrey B. Clark hereby files this notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order of the United States District Court for the District of Columbia, entered June 8, 2023, granting motions to remand filed by Defendant/Charging Party Disciplinary Counsel Hamilton P. (“Phil”) Fox. Appeals of right lie from remand orders arising from federal officer removal cases pursuant to 28 U.S.C. § 1447(d).

Respectfully submitted this 11th day of June 2023.

/s/ Charles Burnham

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served counsel for the opposing party with a copy of this **Notice of Appeal** by filing with the Court's electronic filing system and by email addressed to:

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This 11th day of June 2023.

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