IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:	**: MISC. NO. 1:11-MC-06**
DON BAILEY, ESQUIRE	**: Chief Judge Kane**

RESPONSE TO RULE TO SHOW CAUSE AND REQUEST FOR HEARING

AND NOW comes Respondent, and, in response to the February 8, 2012 Rule to Show Cause issued by this Court, *en banc* (Judge Mariani abstaining), avers as follows:

1. The proceedings in this matter are governed by Middle District LR 83.24, and its 4 subsections, which are plain. Of course, as set forth in the King's Bench Petition filed by the Respondent in the Pennsylvania Supreme Court, attached hereto (without exhibits), lawyer disciplinary proceedings are subject to rigorous due process requirements.[1] Accordingly, Rule 83.24.4 provides for hearings to determine any and all disputed facts raised by the investigative recommendation and response, and also requires a hearing "if the respondent-attorney wishes to be heard in mitigation." Respondent hereby demands his hearings under both provisos.

Further, because these proceedings were initiated on the January 3, 2011

[1] Lawyer disciplinary proceedings must meet "the most exacting demands of due process of law." Law Students Civil Rights Research Council v. Wadmond, 410 U.S. 154, 174 (1971). Goldstein v. Comm'n on Practice, 995 P.2d 923 (2000). The object of disciplinary proceedings is to punish an alleged wrongdoer, which, of course, implicates property and liberty interests and triggers due process protections. See In re Ruffalo, 390 U.S. 544 (1968). It is basic that a state cannot exclude a person from the practice of law in any manner which violates due process. Schware v. Board of Bar Examiners of NM, 353 U.S. 232 (1957).

Order and complaint of this Court, the hearing must be scheduled to be held before a panel of three other judges of this Court, and the appointment must be made by the Third Circuit President Judge. Respondent believes that the reasons are self-evident as to why Judges Kane, Conner, and Jones should not be on any such hearing panel, each having recused themselves from all of respondent's cases. None of the other judges, have been part of any sanctions in the past against respondent, and none would be objectionable to have on a hearing panel, though the matter of their institution being under question by respondent, and whether they can maintain objectivity as such, should be a matter for their own consciences.

2. Preliminarily, at pages 23 and 24 of his July 29, 2011 report and recommendation, investigative counsel notes respondent's request that this matter be unsealed, and he "left it to the court's discretion as to whether this case should remain sealed", with the clear impression that there did not appear to be any reason that the matter remain sealed, noting that some matters had already leaked into the public in any event. Respondent again demands that this docket be opened to the public in its entirety. There is not now, nor has there ever been, any reason to seal this matter, other than to prevent the disclosure of this process, both procedurally and substantively, which can only embarrass this court.

3. While this Court's (Judge Kane's) January 3, 2011 Order was apparently precipitated by an earlier, 2010 correspondence of attorney Devon

Jacob, the January 3, 2011 Order further directed an investigative inquiry into allegations concerning respondent's "fitness to practice law". This is a catchall provision devoid of any definable due process boundaries. It more or less mirrors the "conduct unbecoming" standard, utilized by law enforcement managers to prevent the disclosure of public corruption. This is the task to which the reports and recommendations, dated July 29, 2011, and November 30, 2011 of Mr. Gilroy relate.[2] Mr. Gilroy purports to have accomplished this task, though, and despite respondent's expressed desire to contribute, he was never afforded any input into the reports.[3] This is all-the-more reason to schedule a hearing in this matter. Additionally, respondent is entitled to fair notice from this Court as to what the precise nature of the charges are against him, so that he can prepare a defense, and the report and recommendation does not comport with this basic due process requirement.

4. It appears at the outset that the November 30, 2011 report and recommendation defers to the findings of the July 29, 2011 report and

[2] Objections to Hubert X. Gilroy's continuation as investigator in this matter in light of demonstrable conflicts that he has, including his service on the panel to appoint Magistrate Judge Martin C. Carlson are set forth in the January 25 and, 2011 correspondence that respondent sent to Judge Kane, a copy of which is attached hereto and incorporated by reference. Respondent notes that, to the extent that this Court is proceeding with discipline over the matter of calling Devon Jacob an "asshole" the attached correspondence specifically places facts at issue in these regards as to which respondent intends to offer evidence to address, and demands an opportunity for a hearing at which to do so.

[3] Respondent at all times remained ready, willing, and able to meet and cooperate with Mr. Gilroy in the performance of his investigative task. Respondent was at one point contacted by Mr. Gilroy, then had attorney Sam Stretton take over this matter for him. Respondent is not sure why ultimately he was not permitted any input into the investigator's effort, but stresses that he wanted to provide input. Respondent was never made aware of the so-called RMR of July 29, 2011 until this so-called "supplemental" R&R was filed.

recommendation, and concludes that certain vaguely-defined additional matters, including the Devon Jacob matter, should not be pursued at this time. The investigation thus abandons its purported initial justification, dismissing same out of hand, and then, without any notice to Mr. Bailey, moves on to undisclosed grounds. This fact alone compels the dismissal of this action on due process, *Rooker-Feldman* and *Younger* grounds since the state court proceedings were, and are, underway.

Further, Mr. Gilroy and Judge Kane are fully aware that the state proceedings purportedly generated by Mr. Paul Killian (or certain Middle District and Third Circuit Judges, depending upon who is being truthful) were originated and have been moving along prior to and during the time that Judge Kane initiated this collateral proceeding. It is worthy of note that Mr. Killian is not only a personal confidant and longtime friend of Mr. Carlson's, but that he served as a hastily appointed member of Mr. Carlson's selection panel, all at the request of Judge Kane. It is believed that the relationship between Mr. Carlson, Mr. Killian, and Judge Kane are well known to most members of this Court. This purports to include certain matters that were the subject of past sanctions issues that respondent has gone through with some judges of this Court.

The purpose of the November 30, 2011 report and recommendation was to not only defer making further specific recommendations to add to those made in

the July 29, 2011 report, but to suggest that there was some expedience to moving the July 29, 2011 matter forward premised upon an assertion that the state proceedings were somehow unreasonably delayed by the respondent. Not only is this expressly disclosed purpose, albeit one in violation of Mr. Bailey's due process rights, unsupportable by any facts, this proposition is inherently flawed. Mr. Bailey had, among others, subpoenaed Judges Kane, Jones, and Conner for his disciplinary hearings. This was based upon the uncontested fact that ODC attorney, Robert Fulton, and ODC Chief Counsel, Paul Killian, had both indicated that Judge Conner had complained about Mr. Bailey to the Disciplinary Board.

Even further, Mr. Fulton had expressly indicated in a personal meeting to Mr. Bailey, and his attorney, that Judges Jones, Conner and Judge Anthony Scirica of the Third Circuit had made "complaints" and "complained" about Don Bailey to the disciplinary board. Prior to Bailey's disciplinary hearings initially scheduled for June of 2011, the ODC called Judges Kane, Jones, Conner and Scirica to ask them to come in and testify. Only Jones, and Conner, ever showed up. This they eventually did while successfully fighting Mr. Bailey's subpoena to have them answer his questions.

Regardless, within a day or two of being asked and getting their voluntary agreement to help prosecute Mr. Bailey, Judges Kane, Jones Conner and Scirica, all recused themselves from all of Don Bailey's cases, except one. The exception

was Judge Kane in this one case. How does Judge Kane recuse herself in all of Don Bailey's cases because of a conflict and yet persist with this process? At Don Bailey's disciplinary hearing, either Judges Jones or Conner perjured themselves by testifying that they had never complained about Don Bailey to the D.O. or ODC. Someone is lying. Fulton, or Killian lied and are carrying on a selective and vindictive prosecution of sorts, or at the very least, Conner lied, which, quite frankly, appears to be the case. This group cannot have it both ways.

Oddly, however, the Pennsylvania Supreme Court has issued orders disposing of the motions filed by respondent in that court, and directed post-hearing submissions by the Office of Disciplinary Counsel that largely coincide with these proceedings – the state findings of fact and conclusions of law are due March 29, 2012, a mere six days after this filing, despite the fact that this matter has “sat”, so-to-speak, for long periods of time. Any overview reveals the obvious i.e., an unacceptable degree of collusion to serve only one purpose, namely to prevent Mr. Bailey's exercise of free speech and the disclosure of official misconduct. This offends principles of comity and federalism as well. Regardless, the July 29, 2011 report and recommendation appears to provide the entirety of the matters at issue in these proceedings.

5. Respondent objects to, and/or asks for further guidance concerning the exact contours of, the July 29, 2011 report and recommendation. Due process

demands that respondent be given fair notice of the charges against him, and, although the report is simple enough to read and understand in terms of general subject matter, it is less-than clear in its findings of the facts as to the exact conduct of the respondent that is alleged to violate the subject rules, RPC 8.2(a) and 8.4(c) & (d). The cited rules, namely 8.2, and 8.4(c) & (d) could be described as First Amendment deficient and deprived. Indeed they are objected to as unconstitutional both as written and as applied here. The opportunity to brief the issue separately, and in detail is requested here. Further, a complete and full factual hearing is demanded because Mr. Bailey is accused of saying in a pro se pleading that certain judges were "misbehaving". Mr. Bailey asserts he can and will prove that. 8.4(c) & (d) are similarly deficient and the misconduct alleged is nowhere sufficiently described and nowhere in any of this process are even rudimentary procedural due process standards met.

Respondent suspects that the accusations against him can be roughly summarized as involving the following:

a) Ten allegations made in 10 paragraphs of the Motion for Rehearing en banc filed by respondent in the Third Circuit in *Lewis v. Smith*, No. 08-3800;

b) Three allegations made by respondent in objections to an April 1, 2010 report and recommendation of Magistrate Judge Carlson in *Lease v. Fishel*, Middle District No. 07-0003;

c) Two statements respondent made under oath and on the witness stand in the Third Circuit hearing in the *Lewis* matter;

d) Four comments respondent made in a series of videos on the internet called “The Don Bailey Story”, and found on his website at www.donbaileylaw.com;

e) Two comments in an answer to the petition for discipline arising from the matters set forth in item "a" *supra*);

f) Two comments in the deposition in *Kovala v. Steele,* Middle District No. 09-801 (not the “asshole” comments);

g) Five comments in connection with an investigation by the Supreme Court of Pennsylvania Office of Disciplinary Counsel that does not appear to be a public investigation; what is particularly troublesome is that the investigator, Mr. Gilroy, clearly demonstrates the actual admitted purposes of the Supplemental R&R and the investigation initiated by Judge Kane on page 7 of the "Supplemental Report and Recommendation." "In counsel's view, LR 83.24.3 allows a relatively quick and direct procedure for this court to initiate and adjudicate disciplinary proceedings against Mr. Bailey, which may be resolved more expeditiously than matters pending before the Pennsylvania Disciplinary Board". To accomplish this goal Mr. Gilroy must of necessity have colluded with ODC in violation of Mr. Bailey's rights and state law. Mr. Bailey has been denied access to his own ODC

and DB files. Why are they made available to Mr. Gilroy and Judge Kane?

h) Six comments in the response to investigative inquiry made in "a", *supra*;

i) There is also a general expression of concern that respondent may have in some way contributed to impeachment websites for Judges Jane, Conner, and Jones.

6. At the outset, items a), c), e), and h), *supra,* all relate to the matter currently proceeding before the state disciplinary authorities, and, as a matter of comity and procedural due process should be deferred until the state authorities act in these regards. Doing so would be consistent with the structure of the Middle District disciplinary process rules as well. LR 83.21 governs reciprocal disciplinary procedures for matters under review by the state courts, and the rules under which the present matter is proceeding, specifically, LR 83.24.2 suggests deferral of proceedings to the extent under investigation by another disciplinary body. It is a consistent principle of federal jurisprudence, as reflected in the *Rooker-Feldman* doctrine, along with *Younger* and its progeny, and through other abstention doctrines, that a federal court should not act on a matter currently being litigated through the state courts, and further these principles, additionally militate in favor of deferring any action on items a), c), e), and h), above. *See Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 US 423 (1982).*

Even further, to subject a respondent in a disciplinary proceeding for statements he made in a compelled response during the investigations of these matters, items "e" and "h", *supra,* seriously offend 1st, 5th, and 14th Amendment rights, and are otherwise fairly subsumed by the disciplinary proceedings underway in the Pennsylvania courts.

7. With respect to item "g", *supra,* this appears to be a matter that somehow came into the possession of the investigator in violation of law. While there is presumed to be a certain amount of authority inherent to the appointment of an investigator that may give him or her access to federal court dockets and records, and things of that nature, there is nothing in the law or rules that would allow this federal investigator, or a federal judge, or magistrate judge, access to state court proceedings and papers that are not accessible to the general public, or even attorneys or judges at any level. The matters at issue in item "g", *supra,* were never sent to the formal charge stage (being deficient) and, under Pennsylvania Rules, remain confidential. These matters should not be known to Mr. Gilroy, and inquiry should be had into how they are known.

In that regard, circumstances like this are one of the reasons that Mr. Gilroy is alleged to have a conflict. He was on the panel to appoint Martin Carlson to Magistrate Judge along with Paul Killion, who is the Pennsylvania's Disciplinary Board's Chief Disciplinary Counsel. Under what authority was Mr. Gilroy given

access to Mr. Bailey's disciplinary files? These files won't even be released. Mr. Bailey was asked to see them. Consequently, extremely serious due process questions under both state and federal constitutions, along with complicit violations of both civil and criminal law, arise in this matter. The lack of rules, lack of predictability as to the rules, lack of adherence to due process principles, the arbitrary and capricious actions of officials including judges and their appointees, turns the entire disciplinary process into a nightmarish star chamber process having its roots in both federal and state prosecutorial and investigatory functions combined with growing evidence of unlawful actions by court clerks from both the Middle District and the Third Circuit level.

8. Item "b", *supra,* relates to matters voiced by respondent in response to an order finding him to have engaged in sanctionable conduct and awarding $10,000 in sanctions against him simply because he chose as was his right, not to respond to a scurrilous attack upon him by MJ Carlson, who then penned a totally dishonest, vindictive, *ad hominem* attack on Mr. Bailey in a rambling memorandum in the Lease case. Gilroy bootstraps this vicious attack, attempting to legitimize it. Please see Mr. Bailey's response. Proceeding with that charge offends principles of witness immunity, etc.. Bailey's personal interest was at stake, and he was placed at issue by the judges upon whom he has otherwise commented on as reflected herein. It offends due process to penalize him for these

comments under the circumstances. Indeed, he had a right to respond, perhaps even a duty.

9. Item "d", *supra*, specifically seeks to charge respondent for statements he made in a wholly private capacity through a private medium, and released over the internet, and the comments of respondent as referenced in item "f", *supra*, are of the same character, being gratuitous comments made in response to Mr. Jacobs' frivolous threats of having respondent sanctioned.

10. Plaintiff believes that many of the foregoing comments cannot be considered constitutionally for the reasons stated, but that, regardless of those comments as to which this Court ultimately proceeds against respondent, the gravamen of the charges is not that they were made, but, as set forth in Rules 8.2 and 8.4, that they were made falsely or recklessly, or, as stated in Rule 8.4(d) qualified as "conduct that is prejudicial to the administration of justice." Analytically, respondent submits that truth or lack of recklessness to the comments he may have variously made implicating certain identified judges in misconduct is the *sine qua non* of their not being prejudicial to the administration of justice, but in the furtherance thereof, until or unless an opportunity for discovery and disclosure is allowed.

The key point, for present purposes, is that respondent has a right to a hearing to contest that he had the requisite state of mind and/or knowledge to

mitigate what is clearly a very strong reaction to these matters on the face of what was said about him, and done to him. There is no rule of professional conduct and no constitutional privilege that defends an errant judge, or closes the mouth of an attorney and his clients, in justifiable situations, within common sense limitations. Mr. Bailey is being attacked not because of what he did, but because of what he said in reaction to abuses heaped upon him and his clients. The idea being is that in our federal system, attorneys do not have the same First Amendment rights that other American citizens have, given our double standard applications of the First Amendment in a judicial context.

11. Respondent has said things about specific judges, engaging in errant behavior in a context where he was denied the right to call witnesses and the right to offer testimony, all to protect misconduct and abuse by certain judges, such as Judge Jones in the Lewis case where sanctions were imposed on Mr. Bailey and his client belatedly and he was denied an opportunity to even respond and then later to offer testimony and bring witnesses. This is directly contrary to the Supreme Court of the United States repeatedly holding due process in attorney disciplinary proceedings of the utmost importance. The reasons are obvious. Not a single one of the actions against Mr. Bailey to date in either the federal or state system has he or his clients but afforded due process.

12. All of the allegations of misconduct against respondent are denied, as there is no proof that anything has been done wrong. To the extent this Court deems that there is, respondent is entitled to fair notice and an opportunity to respond in proceedings attendant with all due process protections. There are numerous innocent American citizens who have rights, including the right of access to the courts, at issue, to whom this Court owes a duty of protection. These things cannot simply be swept under the rug with the hope that they go away. They will not. The allegations of misconduct against respondent must be proven, and proof is demanded. A hearing and all due process protections are demanded.

WHEREFORE, Respondent, Don Bailey, respectfully requests that this Court enter an appropriate Order directing that the captioned docket be unsealed and the matter be dismissed or at the very least stayed pending completion of the disciplinary proceedings against Mr. Bailey are completed.

Respectfully submitted,

s/Don Bailey
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