

DISTRICT OF COLUMBIA COURT OF APPEALS
 BOARD ON PROFESSIONAL RESPONSIBILITY
 HEARING COMMITTEE NUMBER TWELVE



FILED

Feb 16 2024 11:41am

In the Matter of:	:	
	:	
JEFFREY B. CLARK,	:	
	:	
	:	Board on Professional Responsibility
Respondent.	:	Board Docket No. 22-BD-039
	:	Disciplinary Docket No. 2021-D193
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

ORDER

The parties disagree as to the scope and import of the Hearing Committee’s January 11, 2024 Order denying Mr. Clark’s Motion In Limine Regarding Admissibility of Evidence Regarding the 2020 Election Coming to Light After January 3, 2021. Disciplinary Counsel argues that the order precludes Mr. Clark from offering testimony or exhibits that reflect information that came to light after January 3, 2021. Thus, Disciplinary Counsel has filed a motion to compel Mr. Clark to file witness and exhibit lists that do not include witnesses who will testify to post-January 3 information or exhibits reflecting post-January 3 information. Mr. Clark opposes Disciplinary Counsel’s motion, arguing that that the January 11, 2024 order did not exclude any evidence, and simply rejected Mr. Clark’s argument that post-January 3 information should be admitted because it was relevant to the reasonableness of Mr. Clark’s beliefs before January 3. Mr. Clark suggests that such

evidence may still be admissible for “any other permitted purpose,” and that the Order “did not exclude any specific witnesses or exhibits.”

Resolution of this dispute requires that we revisit Mr. Clark’s motion in limine and the January 11 Order. In his motion in limine, Mr. Clark sought an advance ruling “that he be allowed to introduce evidence of subsequent investigations into the 2020 election.” Motion in Limine at 9. He wanted to admit this evidence

to support the reasonableness of the positions he took in the draft letter of December 28, 2020 based on the belief, expressed in the draft letter of that date and in discussions with others, that there were “significant concerns that may have impacted the outcome of the election in multiple States, including in the State of Georgia.

Motion in Limine at 1. That motion was denied in the January 11 Order because Mr. Clark failed to show that the post-January 3 evidence relates to Disciplinary Counsel’s charges or his defenses to them.

Mr. Clark is correct that the January 11 Order did not exclude specific evidence or witnesses; however, Disciplinary Counsel is correct that the January 11 Order concluded that evidence regarding post January 3 information would not be admitted. Mr. Clark claims that the evidence may be offered for “other permitted purposes,” but he did not identify those other purposes in his original motion in limine or in his opposition to Disciplinary Counsel’s motion to compel.

We recognize that by their very nature, rulings on motions in limine are made without prejudice to reconsideration as a case develops. Thus, Mr. Clark may try to argue for the admission of the excluded evidence, if circumstances warrant.

However, the possibility that excluded evidence may become admissible in the future, does not justify providing exhibit and witness lists that do not reflect the limitations resulting from the January 11 Order.

At the January 16, 2024 preliminary hearing in this matter, counsel for Mr. Clark asked permission to submit a separate written proffer concerning the post-January 3 evidence so that my ruling could be reviewed on appeal. Tr. at 286-89. In response, I requested Mr. Clark's counsel to meet and confer, to submit separate lists, one of witnesses and exhibits who would testify to pre-January 3, 2024 events and a proffer of post-January 3 evidence that Mr. Clark could reference on appeal and advise the Committee on whether this affected the length of the hearing. *See id.* at 289 ("what I would like you to do, and I would really like you to talk with Mr. Fox about it, too, is to figure out where you are, get a new exhibit list and a separate list for the proffer part of it so that we can focus on, you know, what's for the hearing and what's for the proffer, and perhaps work on whether this affects the number of days that the hearing is going to require also."). Mr. Clark has not filed the anticipated proffer, but Disciplinary Counsel does not seek to compel him to do so. *See* ODC Motion at 5 ("It does not matter to Disciplinary Counsel when (or if) Mr. Clark makes his proffer about excluded evidence; that is for the purposes of his appeal, so a later deadline does not prejudice the parties.").

Upon consideration of the foregoing, it is hereby

ORDERED that Disciplinary Counsel's motion to compel is granted in part, and it is further

ORDERED that within 14 days Mr. Clark shall file with the Office of the Executive Attorney and serve Disciplinary Counsel with (a) a witness list that does not include witnesses who will testify solely regarding post-January 3 information; and (b) an exhibit list that does not include exhibits that reflect only post-January 3 information; and it is further

ORDERED that no later than 7 business days thereafter, the parties will meet and confer and advise the Committee on how long they would now expect the hearing to take with post-January 3 information and evidence excluded: and it is further

ORDERED that, pursuant to Board Rule 7.16(a) either party will be allowed to submit a written proffer regarding any evidence excluded as privileged, cumulative, or irrelevant; and it is further

ORDERED that Mr. Clark shall not be required to formally move for the admission of post-January 3 testimony or exhibits during the hearing in order to include such evidence in his proffer; and it is further

ORDERED that the deadline for any proffer shall be determined at a later date after consultation with the parties; and it is further

ORDERED that Disciplinary Counsel's motion to compel is otherwise denied.

HEARING COMMITTEE NUMBER TWELVE

By: Merril Hirsh
Merril Hirsh
Chair

cc:

Jeffrey Clark, Esquire
c/o Charles Burnham, Esquire
Robert A. Destro, Esquire
Harry W. MacDougald, Esquire
charles@burnhamgorokhov.com
robert.destro@protonmail.com
hmacdougald@ccedlaw.com

Hamilton P. Fox, III, Esquire
Jason R. Horrell, Esquire
Office of Disciplinary Counsel
foxp@dcodc.org
horrellj@dcodc.org