NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TY CLEVENGER, Plaintiff-Appellant, v. GREGORY P. DRESSER; et al., Defendants-Appellees.	No. 17-17136 D.C. No. 3:17-cv-02798-WHA MEMORANDUM* (Filed Dec. 26, 2018)

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Submitted December 19, 2018**
San Francisco, California

Before: BOGGS,*** PAEZ, and OWENS, Circuit Judges.

Ty Clevenger, an inactive member of the State Bar of California ("State Bar"), appeals from the district court's orders dismissing his case based on *Younger* abstention, denying preliminary injunctive relief, and

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

sanctioning the State Bar's counsel. Clevenger asserts First Amendment retaliation and selective prosecution claims, alleging the State Bar sought his disbarment because of his blogging that was critical of the bar. We review the district court's decision to abstain de novo. *See Kenneally v. Lungren*, 967 F.2d 329, 331 (9th Cir. 1992). We review for abuse of discretion both the decision to deny a preliminary injunction, *see Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016), and the imposition of sanctions, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court properly dismissed the case after concluding that each element of *Younger* abstention was satisfied. For a federal court to abstain, it must conclude that state proceedings are (1) ongoing, (2) implicate an important state interest, and (3) offer the plaintiff an adequate opportunity to raise constitutional claims. *See ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014). Clevenger contests both whether state proceedings were ongoing and whether they offered him a sufficient forum to litigate his claims.

First, state proceedings were ongoing even though Clevenger filed his lawsuit in federal court before the State Bar filed formal charges against him. *See M&A Gabaee v. Cmty. Redevelopment Agency of L.A.*, 419 F.3d 1036, 1039 (9th Cir. 2005) ("[I]t is not the filing date of the federal action that matters, but the date when substantive proceedings begin."). Here, the

district court had not yet held "any proceedings of substance on the merits" before the State Bar filed formal disciplinary charges against Clevenger. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *see also Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 728-29 (9th Cir. 2017) (explaining the proper inquiry is "fact-specific"). Even in denying Clevenger's request for a preliminary injunction, for instance, the district court did not evaluate the case's merits. With federal litigation only in its "embryonic stage," abstaining to allow Clevenger's claims to be heard in state proceedings was proper. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984) (citation omitted).

Second, the State Bar's disciplinary proceedings offer an adequate forum for Clevenger to litigate his claims. This court has previously addressed Clevenger's argument, and each time held that this *Younger* element is met because the litigant can seek review by the California Supreme Court. *See, e.g.*, *Canatella v. California*, 404 F.3d 1106, 1111 (9th Cir. 2005) ("Although judicial review is wholly discretionary, its mere availability provides the requisite opportunity to litigate."); *Hirsh v. Justices of Sup. Ct. of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (per curiam).

Finally, *Younger*'s bad-faith exception does not apply here. *See Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982). Neither Clevenger's allegations nor any evidence in the record suggests that the State Bar acted in bad faith in seeking his disbarment. The State Bar acted only after Clevenger notified it that another jurisdiction had

disciplined him. Thus, the State Bar did not begin disciplinary proceedings "without a reasonable expectation of obtaining a valid [disbarment]," *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975), or to retaliate against the exercise of a constitutional right, *see Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965). The district court, therefore, properly held that the bad-faith exception does not preclude abstention here.

2. Clevenger's appeal from the denial of a preliminary injunction is moot. *See SEC v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982) (holding that an entry of final judgment moots an appeal from an order denying a preliminary injunction). This rule applies even when a district court dismisses a case on non-merits grounds. *See Nationwide Biweekly*, 873 F.3d at 730-31 ("If the cases had been properly dismissed on *Younger* grounds, there would be no need to reach the merits of the preliminary injunctions."). As such, we do not address this issue on appeal.

3. The district court did not abuse its discretion in sanctioning the State Bar's counsel for "misrepresentations" made in court by granting Clevenger the opportunity to take a single two-hour deposition of a defendant. Clevenger argues that the sanction was insufficient. But, the district court had significant discretion in "fashion[ing] an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TY CLEVENGER,

Plaintiff,

v.

GREGORY P. DRESSER, STACIA L. JOHNS, KIMBERLY G. KASRELIOVICH, and THE STATE BAR OF CALIFORNIA,

Defendants. /

No. C 17-02798 WHA

ORDER GRANTING MOTION TO DISMISS

(Filed Oct. 19, 2017)

In the opening salvo of this attorney-discipline action for injunctive relief, plaintiff Ty Clevenger, facing discipline by the State Bar of California, moved for a temporary restraining order and preliminary injunction while defendants — the State Bar and affiliated individuals — moved to dismiss (Dkt. Nos. 3, 18). A prior order denied plaintiff's motion based on certain representations made by defense counsel at the hearing on that motion (Dkt. No. 22). Defendants subsequently moved to clarify the record because counsel's representations turned out to be less than accurate (Dkt. No. 24). Another order held defendants' motions in abeyance and granted in part plaintiff's motion for discovery, allowing him to depose defendant Gregory Dresser for two hours as a result of defense counsel's misrepresentations (Dkt. No. 40).

Plaintiff used only one hour and 24 minutes of his two hours and asked numerous unreasonable questions. Having reviewed the transcript, the Court finds nothing inappropriate about the deponent's responses (*see* Dkt. No. 44-1). With the deposition completed, defendants' motion to clarify the record is **GRANTED**. This order now turns to the fully-briefed motion to dismiss, and specifically to its *Younger* abstention argument (Dkt. No. 18 at 7-9).

Younger v. Harris, 401 U.S. 37 (1971), requires federal courts to abstain from exercising jurisdiction where "(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1091-92 (9th Cir. 2008) (citations omitted). An exception exists if there is a "showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate." *Id.* at 1092 (quoting *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982)).

In California, attorney-discipline proceedings "commence" with a notice of disciplinary charges. *Canatella v. Cal.*, 404 F.3d 1106, 1110 (9th Cir. 2005) (citation omitted); *Hirsh v. Justices of Supreme Court of State of Cal.*, 67 F.3d 708, 711 (9th Cir. 1995). Here, plaintiff filed this action after receiving only a notice of *intent*

to file notice of disciplinary charges (*see* Dkt. Nos. 3-11; 18 at 10). But even if the proceeding against him had not yet "commenced" back then, it certainly appears to be "ongoing" now and headed to trial (*see* Dkt. No. 48). "*Younger* abstention applies even when the state action is not filed until after the federal action, as long as it is filed before proceedings of substance on the merits occur in federal court." *M&A Gabaee v. Cmty. Redev. Agency of City of Los Angeles*, 419 F.3d 1036, 1041 (9th Cir. 2005). The closest thing to a proceeding of substance on the merits in this action occurred early on with the denial of plaintiff's motion for a temporary restraining order and preliminary injunction after a short hearing (*see* Dkt. Nos. 22-23). Neither that proceeding, nor any since, sufficed to defeat *Younger* abstention here. *See Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987). Plaintiff's authorities to the contrary are inapposite (*see* Dkt. No. 28 at 4). *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984) ("A federal court action in which a preliminary injunction is granted has proceeded well beyond the 'embryonic stage.'"); *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1350-51 (9th Cir. 1985) (an "extended evidentiary hearing on the question of a preliminary injunction constituted a substantive proceeding on the merits"). The first requirement for *Younger* abstention is met here.

Our court of appeals has held that California's attorney-discipline proceedings implicate important state interests and provide an adequate opportunity to litigate federal constitutional claims because of the

availability of discretionary judicial review. *See Hirsh*, 67 F.3d at 712-13. Plaintiff nevertheless insists "abstention is improper" because he "will have no opportunity to present his claims," again citing inapposite decisions (*see* Dkt. No. 28 at 4). *See Dubinka v. Judges of Superior Court of State of Cal. for Cty. of Los Angeles*, 23 F.3d 218, 224-25 (9th Cir. 1994) (the appellants were not procedurally barred from raising constitutional arguments in state courts even if state courts had already rejected those arguments); *Meredith v. Oregon*, 321 F.3d 807, 818-20 (9th Cir. 2003) (Oregon law did not provide options for "timely" adjudication of the plaintiff's federal claims). Under binding precedent, plaintiff is wrong. The second and third requirements for *Younger* abstention are also met here. Since plaintiff brought this action for the sole purpose of enjoining the disciplinary proceeding against him, the fourth and final requirement for *Younger* abstention is met as well (*see* Dkt. No. ¶¶ 23-26).

Plaintiff also cites *Privitera v. California Board of Medical Quality Assurance*, 926 F.2d 890 (9th Cir. 1991), and *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir. 1981), for the proposition that *Younger* abstention does not apply to "injunctive relief for First Amendment retaliation and selective prosecution" (Dkt. No. 28 at 4). Neither decision supports plaintiff's position here.

In *Privitera*, which challenged a medical license revocation proceeding against the plaintiff physician, the district court declined to dismiss the action based on *Younger* abstention because the plaintiff had "made a sufficient showing of bad faith or harassment to

invoke the exception" to *Younger* but nevertheless denied a preliminary injunction, dismissed pendent claims, and stayed the federal action pending resolution of the state claims. 926 F.2d at 892, 894. Our court of appeals, reviewing only the stay order and the denial of a preliminary injunction, had no occasion to examine the application of *Younger* abstention to First Amendment retaliation and selective prosecution claims, much less endorse the sweeping proposition plaintiff asserts here. *See id.* at 896, 898.

In *Fitzgerald*, a non-binding decision, the district court found that a state prosecution against the plaintiffs had been "brought for the purposes of harassment and retaliation and would not have been brought but for the improper influence exerted on the prosecutor by certain [county] judges to seek the indictments" after the plaintiffs exercised their First Amendment rights by criticizing certain county officials. 636 F.2d at 944-45. The Fifth Circuit concluded this finding was not clearly erroneous and consequently affirmed the district court's injunction of the state prosecution. *Ibid.* Like *Privitera, Fitzgerald* merely applied the general principle that a "showing of bad faith, harassment, or some other extraordinary circumstance" would make *Younger* abstention inappropriate. *See City of San Jose*, 546 F.3d at 1092 (quotation and citation omitted). It does not support plaintiff's theory that allegations of First Amendment retaliation or selective prosecution have some talismanic immunity against *Younger* abstention.

This order finds that plaintiff has not shown "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate" based on the evidentiary record here. *See ibid.* Even when given an extra opportunity to make that showing by taking a deposition of his choosing (*see* Dkt. No. 41 at 8:6-8), plaintiff squandered that opportunity and failed to improve the evidentiary record in his favor. It is time for him to return to state court, where this controversy concerning the disciplinary proceeding against him belongs. *See Gilbertson v. Albright*, 381 F.3d 965, 981 (9th Cir. 2004) ("When an injunction is sought and *Younger* applies . . . dismissal (and only dismissal) is appropriate."). This Court expresses no opinion on the merits of that disciplinary proceeding. Counsel shall not argue otherwise based on anything in this order or in the history of this action.

For the foregoing reasons, this action is **DISMISSED**. Plaintiff's pending requests to file an updated motion for a temporary restraining order or preliminary injunction (Dkt. No. 46) and to file a motion to amend the complaint (Dkt. No. 49) are **DENIED AS MOOT**. The Clerk shall please **CLOSE THE FILE**.

IT IS SO ORDERED.

Dated: October 19, 2017. /s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TY CLEVENGER,

Plaintiff,

v.

GREGORY P. DRESSER, *et al.*,

Defendants.

/

No. C 17-02798 WHA

ORDER SETTING HEARING ON MOTION TO CLARIFY RECORD, CROSS-MOTION FOR DISCOVERY, AND MOTION TO DISMISS

(Filed Jun. 19, 2017)

At the hearing on June 1 on plaintiff Ty Clevenger's motion for a temporary restraining order and preliminary injunction, Attorney Suzanne Grandt for defendant State Bar of California had this exchange with the undersigned judge (Dkt. No. 23 at 18:16-20:17):

> Ms. Grandt: Any argument [plaintiff] is making [here] he can make in state bar court . . .
>
> The Court: Can he subpoena witnesses at the state bar?
>
> Ms. Grandt: Can he subpoena witnesses? Yes. He can do that. He can bring all these arguments in state bar court. There is no reason to be in federal court —
>
> The Court: He could subpoena in the state bar court all these people and find out if the blog post had anything to do with it?
>
> Ms. Grandt: Yes. And he can do that in state bar court if he wants to. . . .

> The Court: Wait. I want to make — Ms. Grandt, I want to make it very clear.
>
> Ms. Grandt: Yes.
>
> The Court: You're telling me that in the state bar court, he will be allowed to subpoena Mr. Dresser and all the other people that he wants to try to show that the whole thing is cooked up in retaliation for the First Amendment blog posts?
>
> Ms. Grandt: Correct. And there is case law that says his a — all his arguments are — he can bring up in state bar court. . . .
>
> The Court: He can make those arguments, and some judge is going to rule on it?
>
> Ms. Grandt: Correct.

In short, the undersigned judge asked very specifically about Attorney Grandt's representation "that plaintiff will be able to take all the discovery necessary or that he wishes [and] will have a fair opportunity in the state bar court to subpoena appropriate people to show that he's being retaliated against" (*id.* at 22:12-22:17), and relied on that representation as the main basis for denying plaintiff's motion at the time.

A week later on June 8, Attorney Robert Retana for the State Bar wrote a letter to plaintiff taking the position that "Ms. Grandt's statements regarding [his] ability to raise [his] claims in State Bar Court and take discovery are accurate" (Dkt. No. 25-4 at 1). That letter, however, admitted that, under Section 6049.1 of the

California Business and Professions Code, the proceedings against plaintiff would be "limited to certain specified issues," and moreover, that he would have "a full and fair opportunity" only to "present [his] arguments for why [he is] entitled to discovery before the State Bar Court" (*id.* at 2). The letter concluded, "The California Supreme Court presents an adequate forum for consideration of your constitutional law claims should they be rejected by the State Bar Court" (*id.* at 3).

The next day, defendants filed a motion "to clarify the record regarding State Bar rules and procedures" because Attorney Grandt "was not sufficiently clear in her representations" to the undersigned judge (Dkt. No. 24 at 1). That motion "clarified" that, "if Plaintiff believes he is entitled to discovery, he must request it from State Bar Court. If State Bar Court denies his request, he must appeal to the California Supreme Court" (*id.* at 3).

The Court is troubled by the inaccuracies in Attorney Grandt's statements at the last hearing in this action, and by the apparently limiting effect of Section 6049.1 on plaintiff's ability to litigate the First Amendment issues he claims are inherent in the proceedings currently underway against him. The Court wants to call counsel back for further hearing on these and other pending matters.

Accordingly, this order treats plaintiff's pending motion for discovery (Dkt. No. 25) as a cross-motion and response to defendants' motion to clarify the record, and **VACATES** the briefing schedule for the former.

Defendants may submit a reply brief supporting their motion to clarify the record and addressing plaintiffs cross-motion for discovery by **JUNE 23 AT NOON**. Plaintiff may submit a sur-reply by **JUNE 30 AT NOON**. A hearing on both the motion and the cross-motion is set for **JULY 20 AT 8:00 A.M.** The hearing on defendants' pending motion to dismiss this action is also advanced from July 27 to **JULY 20 AT 8:00 A.M.**

The Court is aware of plaintiff's request that defendants or defense counsel pay his travel expenses to attend the hearing on his cross-motion (Dkt. No. 25 at 6 n.3) and **DEFERS** ruling on this request until after the hearing, at which time reimbursement for such expenses may be considered as a possible sanction for Ms. Grandt having made inaccurate statements before the undersigned judge in the first place.

Finally, the undersigned judge also notes that Attorney Gregory Dresser, who is named as a defendant in this action, practiced with the undersigned judge at Morrison & Foerster in the 1990s. If either side wishes to move to disqualify the undersigned judge on this basis, such motion must be filed prior to the upcoming hearing date on July 20.

Except to the extent stated herein, plaintiff's motion to shorten time (Dkt. No. 26) is **DENIED**. To better manage the crossfire of motions and miscellaneous filings in this action, no further substantive motions may be filed herein without the Court's advance permission. Any party that wants to file a motion shall submit a précis not to exceed **THREE PAGES** in length (12-point

font, double-spaced, with no footnotes or attachments) summarizing the key arguments from and relief sought by the proposed motion. The opposing side will then have **48 HOURS** to submit a response also not to exceed **THREE PAGES** in length (12-point font, double-spaced, with no footnotes or attachments). The Court will then decide whether or not to grant permission to file the proposed motion.

IT IS SO ORDERED.

Dated: June 19, 2017. /s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TY CLEVENGER,

Plaintiff,

v.

GREGORY P. DRESSER, *et al.*,

Defendants.
/

No. C 17-02798 WHA

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTION FOR DISCOVERY

(Filed Jul. 24, 2017)

For the reasons stated on the record at the hearing on July 20, plaintiff Ty Clevenger's cross-motion for discovery (Dkt. No. 25) is **GRANTED IN PART**. Plaintiff shall have two hours of airtime, with no breaks counted against that time, to take the deposition of Gregory Dresser. Otherwise, the cross-motion for discovery is **DENIED**.

Defendants' pending motion to dismiss (Dkt. No. 18) and motion to clarify the record (Dkt. No. 24) are **HELD IN ABEYANCE** until the deposition is completed.

IT IS SO ORDERED.

Dated: July 24, 2017. /s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

STATE BAR COURT OF CALIFORNIA HEARING DEPARTMENT 845 S. Figueroa St., Los Angeles, CA 90017	For Clerk's Use Only:
In the Matter of: **TY ODELL CLEVENGER** **Member No. 216094** A Member of the State Bar.	Case No(s). 16-J-17320-CV **STATUS CONFERENCE ORDER** (Filed Nov. 27, 2017) Date: **November 27, 2017** Time: **10:00 a.m.**

APPEARANCES:

Office of Trials by:
KIMBERLY G. KASRELIOVICH
STACIA L. JOHNS
- ☒ In Person
- ☐ Telephone
- ☐ No Appearance

Named Party by:
TY O. CLEVENGER
- ☐ In Person
- ☒ Telephone
- ☐ No Appearance

Named Party's Counsel by:
- ☐ In Person
- ☐ Telephone
- ☐ No Appearance

TRIAL:

☐ This matter is set for date(s) certain for trial on;
Culpability/Discipline: _____
_____

PRETRIAL:

☐ Further Status Conference: ☐ In person
☐ Telephonic _____ ☐ Calendar
☐ Pretrial Conference: ☐ In person
☐ Telephonic _____ ☐ Calendar

Pretrial Statement/Proposed Exhibits Due _____ days before Pretrial Conference pursuant to Rule 1223 and 1224, Rules of Practice of The State Bar Court. The State Bar must use numbers to designate its exhibits beginning with 001; and Respondent/ Applicant/Petitioner must use numbers beginning with 1001.

OTHER ORDERS:

The present matter was abated pending the resolution of a federal action for injunctive relief filed by Mr. Clevenger (Respondent). Respondent's federal action was recently dismissed by the United States District Court for the Northern District of California; however, that order is now on appeal before the United States Court of Appeals for the Ninth Circuit.

On October 25, 2017, the Office of Chief Trial Counsel (OCTC) filed a motion to unabate the case. Respondent opposed the motion on November 7, 2017.

Abatement issues are covered by rule 5.50 of the Rules of Procedure. Rule 5.50(B) is broad and permits the court to "consider any relevant factor" in determining whether or not to abate. Abatement is generally contrary to public protection.

However, here, on balance, the factors weigh in favor of continuing abatement of the case pending the outcome in the Ninth Circuit.

First, this is a "J" case, so Respondent has already been disciplined for the misconduct in two separate jurisdictions.

Second, public protection concerns are mitigated by the fact that Mr. Clevenger is inactive, and has been inactive in California for nearly a decade.

Third, it appears that the delay will not be excessive. The Ninth Circuit has issued a briefing schedule concluding on Feb. 26, 2018. And, it appears that the proceedings will be expedited.

For all of these reasons, the court finds that there is good cause to keep the matter abated at this time. Consequently, the OCTC's Motion to Unabate is **DENIED**.

The court orders the parties to appear at a status conference on **April 16, 2018, at 10:00 a.m.** to update the court on the proceedings in the Ninth Circuit.

☐ Service of this order is waived.

IT IS SO ORDERED.

Dated: November 27, 2017 /s/ Cynthia Valenzuela
CYNTHIA VALENZUELA
Judge of the State Bar Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TY CLEVENGER, Plaintiff-Appellant, v. GREGORY P. DRESSER; et al., Defendants-Appellees.	No. 17-17136 D.C. No. 3:17-cv-02798-WHA Northern District of California, San Francisco ORDER (Filed Feb. 21, 2019)

Before: BOGGS,* PAEZ, and OWENS, Circuit Judges. The panel has voted to deny Appellant's petition for panel rehearing. Judges Paez and Owens have voted to deny Appellant's petition for rehearing en banc, and Judge Boggs has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petitions for panel rehearing and for rehearing en banc are DENIED.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

NINTH CIRCUIT GENERAL ORDER

6.5 Screening Calendars

a. Selection and Criteria of Cases for Screening Calendars

Cases that are eligible for submission without oral argument under FRAP 34(a) may be assigned to screening calendars by the Clerk's Office. Additionally, they should meet all of the following criteria: *(Rev. 9/17/14)*

(1) The result is clear.

(2) The applicable law is established in the Ninth Circuit based on circuit or Supreme Court precedent.

After the Clerk assigns a case to the screening calendar, the Clerk's Office forwards the case materials to the staff attorneys. The staff attorneys then place each screening case on either an oral screening calendar or a written screening calendar. *(Rev. 7/1/02; 7/1/03)*

b. Oral Screening Panel Presentations

1. Disposition of Cases

The staff attorneys shall prepare proposed memorandum dispositions for the cases that they place on the oral screening calendars. An authoring judge will be designated for each case presented to the oral screening panel, and the writing assignment will rotate among the 3 panel members.

The staff attorneys shall orally present the proposed dispositions to the screening panels at periodically scheduled sessions. After the staff attorneys have presented each case, the panel members discuss the proposed disposition and make any necessary revisions. If the 3 panel members unanimously agree with the disposition, the designated authoring judge shall direct the presenting attorney to certify the proposed disposition for filing pursuant to G.O. 6.9. *(Rev. 1/1/00)*

Disposition of cases and/or motions presented at the oral screening panel ordinarily will be by unpublished memorandum or order. If, in the judgment of a panel, a decision warrants publication, the resulting order or opinion shall be included in the daily pre-publication report and specifically flagged as a decision arising from an oral screening panel. *(Rev. 7/1/02; 1/1/07; 9/17/14)*

2. Rejection of Cases

All 3 judges must agree that the case is suitable for the screening program before a case is disposed of by a screening panel. Any one judge may reject a case from screening. Judges normally shall reject any case that does not meet the screening criteria, as outlined above in G.O. 6.5.a. *(Rev. 12/13/10)*

If a case is rejected from screening, it shall be scheduled on the next available argument calendar. The proposed disposition and the rejecting judge's reasons for rejecting the case shall be sent to the Calendar

Unit for forwarding to the oral argument panel assigned to the case. *(Rev. 12/13/10)*

3. Petitions for Rehearing

The Clerk shall forward each petition for rehearing in any case disposed of by an oral screening panel to the appropriate staff attorney. If a petition for rehearing en banc is filed in any case disposed of at an oral screening panel, the relevant procedures set forth in Chapter V shall apply. *(Rev. 3/24/04; 9/17/14)*

c. Written Screening Panels

When a written screening panel indicates that it is ready for case assignments, staff shall send the requested number of cases taken from the cases designated as those eligible for screening pursuant to G.O. 6.5(a). The authoring judge is responsible for forwarding the written disposition to the Clerk's Office for filing. *(Rev. 7/1/03; 9/17/14)*

1. Rejection by Judges

Any one judge may reject a case from the written screening calendar. Judges shall reject any case that does not meet the screening criteria, as outlined above in G.O. 6.5.a. If a case is rejected, a replacement case will be sent by staff. If a case is rejected from the written screening calendar, it shall be scheduled on the next available argument calendar. The draft disposition, and the rejecting judge's reasons for rejecting the

case, along with any bench memorandum, shall be sent to the Calendar Unit for forwarding to the oral argument panel assigned to the case. *(Rev. 7/1/03)*

2. Dispositions

Dispositions ordinarily will be by memorandum. If the panel has not issued a separate order submitting the case, a footnote should be included in the disposition indicating that the panel unanimously agrees that the case should be submitted on the briefs pursuant to FRAP 34(a). *(Rev. 7/1/02; 7/1/03; 9/17/14)*

d. Written Screening Calendars *(Abrogated 3/24/04)*

6.6. Recalcitrant Witness Appeals

Upon receipt of a notice of appeal in which review is sought under 28 U.S.C. § 1826, the Clerk shall docket the appeal and immediately deliver the notice of appeal to the motions unit. A motions attorney shall immediately review the notice of appeal to ascertain whether the appeal properly falls within the purview of 28 U.S.C. § 1826.

If the appeal is within the purview of section 1826, the motions attorney shall immediately notify the presiding judge on the motions panel that is scheduled to sit on the thirtieth day after the notice of appeal was filed. The presiding judge, with the assistance of the motions attorney, shall establish a briefing schedule

that will assure that the appeal can be decided within 30 days of the filing of the notice of appeal. That panel shall hear and decide the appeal regardless of whether a motion for extension of time beyond the 30-day period is granted. *(Rev. 9/17/14)*

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. . . .

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief

shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Constitution, Art. III, § 3.5

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

California Penal Code §135

A person who, knowing that any book, paper, record, instrument in writing, digital image, video recording owned by another, or other matter or thing, is about to be produced in evidence upon a trial, inquiry, or investigation, authorized by law, willfully destroys, erases, or

conceals the same, with the intent to prevent it or its content from being produced, is guilty of a misdemeanor.

California Business & Professions Code §6128

Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

(b) Willfully delays his client's suit with a view to his own gain.

(c) Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for.

Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

California State Bar Rule 5.111(D)(1)

If the [State Bar] Court recommends disbarment, it must also order the member placed on inactive enrollment under Business and Professions Code § 6007(c)(4). Unless the [State Bar] Court orders otherwise, the order takes effect upon personal service or three days after service by mail, whichever is earlier.

California State Bar Rule of Procedure 2201(a)

(a) The Chief Trial Counsel or designee shall recuse herself or himself when:

(1) Any inquiry or complaint is about:

i. The Chief Trial Counsel or designee;

ii. A member employed by the State Bar of California; . . .

California State Bar Rule of Procedure 2201(c)(1)

In the event of the Chief Trial Counsel's recusal, the inquiry or complaint shall be referred to the Special Deputy Trial Counsel Administrator or delegee ("Administrator").

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

TY CLEVENGER,

Plaintiff,

vs.

GREGORY P. DRESSER, STACIA L. JOHNS, KIMBERLY G. KASRELIOVICH and THE STATE BAR OF CALIFORNIA

Defendants

Case No. 3:17-cv-2798-WHA

Joint Status Report

DEPT: Courtroom 8
JUDGE: Judge William Alsup

(Filed Aug. 29, 2017)

The Plaintiff deposed Defendant Gregory Dresser on July 28, 2017, and a copy of the transcript and its exhibits are attached to this status report as Exhibit 1.

PLAINTIFF'S POSITION

(1) Introduction.

In his deposition, Mr. Dresser went a step beyond playing dumb, and his attorneys proved yet again that they are acting in bad faith. Not only did Mr. Dresser testify repeatedly that he did not know the answers to straightforward questions, on a couple of occasions he went a step tut-the] by claiming that he did not know who else might have the answers. *See* July 28, 2017 Deposition Transcript 17:17 – 17:23 and 18:23 – 19:3

(Exhibit 1) (hereinafter "R.R. 17:17 – 17:23 and 18:23 19:3," and so forth). Worse, many of the unanswered questions had been sent to Mr. Dresser's attorneys in advance of the deposition. *See* July 26, 2017 Email from Ty Clevenger to Robert Retana and Vanessa Holton (Exhibit 2). The July 26, 2017 email included a warning to Defendants' Counsel: "If Mr. Dresser is unable to answer [the questions], I plan to cite that to Judge Alsup as grounds for additional discovery." *Id.* Despite the warning, Mr. Dresser's attorneys did not even share those questions with Mr. Dresser. R.R. 10:10 – 10:13. Mr. Dresser nonetheless admitted that he had seen the questions while reading the filings in this case, R.R. 14:25 – 15:13, yet he still did not have answers to *any* of the questions. Not a single one. It thus appears that Mr. Dresser and his attorneys did not act in good faith.

It is worth noting that the Defendants objected when the Plaintiff indicated that he would attach the entire deposition transcript to this report rather than selected excerpts. *See* August 25, 2017 Email exchange between Ty Clevenger and Marc Shapp (Exhibit 3). That objection is telling. The Defendants apparently did not want the Court to see just how many unnecessary (and even frivolous) objections were asserted by Defendants' Counsel.[1] Rather than take a break and permit Mr. Dresser to review all exhibits before testifying, Defendants' Counsel insisted that Mr. Dresser

[1] The court reporter repeatedly transcribed "running objection" as "relevant objection." This can be verified by listening to the video recording of the deposition.

be permitted to review all documents "on the clock," knowing full well that the Plaintiff had only two hours to depose Mr. Dresser (the videotape version of the deposition reveals how long those delays were). R.R. 22:25 – 25:1. Even so, the deposition took little more than an hour because Mr. Dresser claimed to know so little about the things that happened on his watch.[2]

(2) <u>Background.</u>

The Court will recall that an Alabama attorney, Jason Yearout, submitted a declaration in 2016 indicating that California Bar prosecutor Cydney Batchelor withheld exculpatory evidence while prosecuting Wade Robertson, a friend and former client of the Plaintiffs. *See* Declaration of Jason Yearout, (Exhibit 1, Internal Exhibit 1-B). Mr. Yearout's declaration also implicated bar prosecutor Robert Henderson. *Id.* After learning of the declaration, the Plaintiff filed misconduct complaints against Ms. Batchelor and Mr. Henderson with the Office of Chief Trial Counsel ("OCTC"), see Complaint Against Cydney Batchelor (Exhibit 1, Internal Exhibit 2) and Complaint Against Robert Henderson (Exhibit 1, Internal Exhibit 3), and he

---

[2] In this very document, there is evidence of an attempt to mislead the Court, albeit on a minor point. The Defendants congratulate themselves for producing Mr. Dresser for deposition: "only two days after Mr. Clevenger sent a Notice of Intent to Depose [Mr. Dresser] on July 26 . . . the State Bar produced Mr. Dresser, on July 28." They fail to mention that *they* proposed the July 28 date in an email sent the preceding week, and the Plaintiff immediately agreed to that date. *See* July 21, 2017 Email exchange between Ty Clevenger and Robert Retana (Exhibit 4).

blogged about those complaints from May 9, 2017 to June 14, 2016. *See* "State bar prosecutor who investigated prosecutorial misconduct is accused of prosecutorial misconduct," May 9, 2016 (http://lawflog.com/?p=1185) and "California Bar blocks investigation of internal misconduct," June 14, 2016 (http://lawflog.com/?p=1228). Mr. Dresser's top deputy at the OCTC, Donald Steedman, dismissed the complaints without an investigation, *id.*, even though (1) the Plaintiff requested that OCTC recuse itself because of its conflict of interest, *see* May 9, 2016 Letter from Ty Clevenger to California Bar Trustees (Exhibit 1, Internal Exhibit 1) and (2) even though state law *obligated* the OCTC to recuse and appoint a special counsel. *See* Rule 2201, State Bar of California Rules of Procedure. Some time after the Plaintiff filed the complaints and began blogging, the Defendants opened disciplinary cases against the Plaintiff. *Compare* "LawFlog.com posts above *with* R.R. 10:14 – 11:4.

(3) <u>Revelations (and non-revelations) during the deposition.</u>

Mr. Dresser admitted receiving the Plaintiffs emails containing links to the blog posts about Ms. Batchelor, but he claimed that he did not click on the links or read the blog posts. R.R. 39:4 – 41:13. On the other hand, Mr. Dresser admitted that he read the Plaintiffs letters about Ms. Batchelor's misconduct, *see, e.g.*, R.R. 30:2 – 32:13, and he also admitted that he received a call from an assistant district attorney regarding the Plaintiffs criminal complaints against

disciplinary prosecutors Ms. Batchelor and Mr. Henderson. R.R. 42:2 – 44:18. Despite the letters and the call from a criminal prosecutor, however, Mr. Dresser claimed to know nothing about how Mr. Steedman, his chief deputy at the time, handled the allegations against Ms. Batchelor and Mr. Henderson. R.R. 34:11 – 37:6. Similarly, Mr. Dresser claimed that he had never even looked at the ease file in the underlying State Bar Court case against the Plaintiff, *see* R.R. 22:7 – 22:12, even though (1) he has read the pleadings in this case, *see* R.R. 56:21 – 57:2, and (2) his codefendants called him about this case immediately after it was filed. R.R. 13:9 – 13:19.

Mr. Dresser testified that he did not know who was responsible for opening the disciplinary cases against the Plaintiff, R.R. 11:8-11, even though that information could presumably be obtained from the computer system in his office. When the Plaintiff asked whether Ms. Batchelor or Mr. Henderson could have been responsible for opening the disciplinary cases against the Plaintiff, Mr. Dresser first testified that he had "much doubt" that Ms. Batchelor could have initiated the charges against the Plaintiff, but he was finally forced to admit that he did not know. R.R. 61:24 – 64:5. When the Plaintiff asked whether Mr. Dresser expected his office to take disciplinary action against Suzanne Grandt because of her role in misleading this Court, Mr. Dresser refused to answer the question. R.R. 47:14 – 47:21. When the Plaintiff pointed out that the answer is relevant because he is asserting a

selective prosecution claim, Mr. Dresser still refused to answer the question. R.R. 47:22 – 48:2.

Mr. Dresser claimed that he did not know when his office opened State Bar Court Case No. 16-J-17320, R.R. 10:6 – 10:9, even though that question had been submitted to his attorneys in advance, *see* July 26, 2017 Email from Ty Clevenger to Robert Retana and Suzanne Grandt (Exhibit 2)[3], and even though the answer was readily ascertainable by Mr. Dresser. R.R. 10:19 10:23. In fact, the Plaintiff had previously emailed Mr. Dresser's attorneys on July 20, 2017 explaining (1) why the answer was critical and (2) that only the Defendants had access to the information. *See* July 20, 2017 Email from Ty Clevenger to Robert Retana and Suzanne Grandt (Exhibit 5). Mr. Dresser's attorneys not only refused to answer the question themselves, they refused to share the question with their client in advance of the deposition. R.R. 10:10 – 10:13. Notwithstanding this attempt to "hide the ball," Mr. Dresser was forced to disclose a little bit of useful information. He admitted that, based on the case numbers, Case No. 164-17320 was probably filed late in 2016, while Case No. 17-J-289 was probably filed in early 2017. R.R. 10:14 – 11:4. That revelation is critically important. The Plaintiff provided Mr. Dresser with a February 11, 2013 letter from Bill Stephens, a

[3] As witnessed by his electronic signature on this document, the Plaintiff declares under penalty of perjury under the laws of the United States that Exhibit 2, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6 and Exhibit 7 are true and correct copies of the documents that he represents them to be. The Plaintiff declares likewise of Internal Exhibit 11 to Exhibit 1.

former employee of the California Bar, and that letter cites Case No. 13-O-10168. *See* February 11, 2013 Letter from Bill Stephens to Ty Clevenger (Exhibit 1, Internal Exhibit 11). The 2013 case is based on the *exact same* underlying Texas disciplinary case as Case No. 16-J-17320. After the Texas case was resolved, the Plaintiff notified the California Bar by faxed letter, *see* September 16, 2014 Letter from Ty Clevenger to Bill Stephens (Exhibit 6), and the California Bar took no further action against the Plaintiff. It thus appears that Case No. Case No. [sic] 13-O-10168 was closed. Yet two years later – and within months of the Plaintiff filing complaints and blogging about Ms. Batchelor – the Defendants suddenly decided to re-open *the exact same case* under a new number. That cannot be a coincidence.

It is also worth noting the two occasions that Mr. Dresser not only failed to answer questions, but claimed that he did not know who else would have the answer to the questions. Mr. Dresser first testified that he did not know whether another inactive member of the California Bar had ever been charged (like the Plaintiff) under Cal. Bus. & Prof. Code § 6049.1, and he did not know who would have the answer to that question. R.R. 17:17-17:23. He then testified that he did not know if an inactive member had ever been subjected to harsher discipline in California than what had been imposed by another jurisdiction, and he did not know who would have the answer to that question. R.R. 18:23-19:3. It's hard to prove a claim of selective prosecution (or any other claim, for that matter) when

the defendants pretend not to know anything about the information that is exclusively under their control.

Meanwhile, Mr. Dresser testified that his "understanding" was that the Plaintiffs complaint against Ms. Batchelor "was handled in the ordinary course as the rules provide." R.R. 31:7 – 31:24. But it was not. As noted above, Rule 2201 obligated Mr. Dresser to appoint a special counsel. Instead, he allowed his second-in-command to dismiss the case without an investigation. That suggests selective prosecution. On one end of the spectrum, bar employees like Cydney Batchelor and Suzanne Grandt can violate the rules with impunity. On the other, an outsider like the Plaintiff faces disbarment because he dared to expose the bar's corruption and favoritism.

Given the evasions and bad faith demonstrated above, the Plaintiff moves the Court to permit standard pre-trial discovery in this case. The Plaintiff would also direct the Court's attention to a recent report that the California Bar promoted Suzanne Grandt and gave her a substantial raise shortly after this Court announced that it was considering whether to sanction her for false statements. *See* Lyle Moran, "State Bar promoted attorney accused of misleading federal judge," *Los Angeles Daily Journal*, August 7, 2017 (Exhibit 7). The Plaintiff asks the Court to compel Mr. Dresser to answer the question that he refused to answer, *i.e.*, whether he expects disciplinary action against Ms. Grandt. That is acutely relevant to the question of selective prosecution, namely whether favored lawyers can act with impunity (or get promoted

despite misconduct) while politically inconvenient lawyers like the Plaintiff are threatened with disbarment for criticizing the double standard.

DEFENDANTS' POSITION

On July 20, 2017, as a sanction against the State Bar, the Court allowed Mr. Clevenger a limited two-hour deposition of Mr. Dresser, but refused his requests for broader discovery. (July 20, 2017, Hearing Tr. at 8:22-9:2; 9:15-16 ("But I think you get, as a sanction, you get to depose Mr. Dresser for two hours, and that's going to be it.").) Eight days later—and only two days after Mr. Clevenger sent a Notice of Intent to Depose [Mr. Dresser] on July 26—the State Bar produced Mr. Dresser, on July 28.

A certified shorthand reporter and a videographer recorded the deposition. The State Bar agreed to Mr. Clevenger's request that he be permitted to participate in the deposition by telephone. Mr. Clevenger had the opportunity to ask Mr. Dresser all of the questions he wanted, as demonstrated by the fact he concluded the deposition after approximately one hour and 15 minutes—45 minutes short of the amount of time granted by this Court.

Mr. Clevenger has taken the opportunity of this Court's request for a status report to argue his case and request further discovery after the Court granted him only a two-hour deposition of Mr. Dresser. The transcript that Mr. Clevenger attaches to this report shows that the State Bar has not acted in bad faith and

that Mr. Dresser answered Mr. Clevenger's questions directly, in good faith, and without evasion.[4] More generally, the State Bar does not agree with or concede any of the arguments, characterizarions [sic], or positions of Mr. Clevenger herein.

Finally, it is important to note that Mr. Dresser was not designated as a 30(b)(6) witness and therefore could only testify as to those matters within his personal knowledge. If Mr. Clevenger had wanted to take a deposititon [sic] of an organization, he should have asked for one. Moreover, Mr. Clevenger's attached Exhibit 2, including his list of questions, which expanded discovery beyond what the Court allowed, was sent less than forty-eight hours before the deposition took place. This would have made it difficult for even a 30(b)(6) witness to adequately inform himself of the multiple areas of questioning within that time frame.

Mr. Dresser's deposition is now completed, and Defendants therefore respectfully request this Court to consider, and grant, the pending motion to dismiss.

Dated: August 29, 2017

Respectfully submitted,

/s/ Ty Clevenger
TY CLEVENGER
Texas Bar No. 24034380
P.O. Box 20753

[4] Most of the exhibits to Mr. Dresser's deposition are already part of the record in this case, were not authenticated, or were not even introduced during Mr. Dresser's deposition.

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Plaintiff Pro Se

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

TY CLEVENGER, Plaintiff, vs. **GREGORY P. DRESSER, STACIA L. JOHNS, KIMBERLY G. KASRELIOVICH and THE STATE BAR OF CALIFORNIA** Defendants	**Case No. 3:17-cv-2798-WHA** **Précis** DEPT: Courtroom 8 JUDGE: Judge William Alsup (Filed Aug. 6, 2017)

NOW COMES the Plaintiff, moving the Court to grant him permission to file an updated motion for a temporary restraining order/preliminary injunction:

As reflected in the parties' Joint Status Report (Doc. No. 44), Defendant Gregory P. Dresser conceded that State Bar Case No. 16-J-17320 was likely filed in

the latter part of 2016. As further noted in that report, Case No. 16-J-17320 is *identical* to a case that was opened in 2013 and apparently closed in 2014, namely State Bar Case No. 13-O-10168. In other words, it appears that the Defendants reopened a *closed case* within six months of the time that the Plaintiff (1) blogged about corruption in the California Bar and (2) filed disciplinary and criminal complaints against California Bar employees.

The Plaintiff contends that he has established a prima facie case of First Amendment retaliation:

> There are three elements to a First Amendment retaliation claim, as we explained in *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755 (9th Cir.2006):
>
> > [A] plaintiff must show that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.
>
> *Id.* at 770 (citing *Mendocino Envt'l Cntr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir.1999)). Once a plaintiff has made such a showing, the burden shifts to the government to show that it "would have taken the same action even in the absence of the protected conduct." *Id.* at 770 (internal citation and quotation marks omitted); *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)

> (establishing this framework in the public employee speech context).

O'Brien v. Welty, 818 F.3d 920, 932 (9th Cir. 2016). The Ninth Circuit has observed that retaliatory intent can rarely be proven directly, but it may be inferred from the chronology of events following activities that are protected by the First Amendment. *See Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) and *Ho-Chuan Chen v. Dougherty*, 225 F. App'x 665, 667 (9th Cir. 2007). In this case, the Defendants initiated adverse actions within six months of the Plaintiffs protected activities, and the Ninth Circuit held in *Ho-Chuan. Chen* that a delay of six months was not too long to infer retaliatory intent. *Id.* at 667.

That chronology of events was noted by the Plaintiff in the Joint Status Report, yet the Defendants made no attempt to argue that they "would have taken the same action even in the absence of the protected conduct." Obviously, the Defendants cannot meet their burden, namely because they cannot conjure up with a non-retaliatory explanation for their decision to reopen a case that had been closed two years earlier. Meanwhile, Ninth Circuit case law not only *permits* a federal court to exercise jurisdiction in order to prevent bad-faith or retaliatory prosecution, it *requires* the court to exercise jurisdiction under those circumstances:

> It should be noted that under certain circumstances, abstention from intervention in state criminal proceedings is itself inappropriate.

> *Younger*, 401 U.S. at 53–54, 91 S.Ct. at 754–55. These circumstances obtain where the prosecution is brought in bad faith, *id.* at 47–49, 91 S.Ct. at 752–53; where a statute is "flagrantly and patently violative of express constitutional prohibitions . . . ," *id.* at 53–54, 91 S.Ct. at 754–55 (quoting *Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941)); and where the state forum is biased, *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973).

Miofsky v. Superior Court of State of Cal., In & For Sacramento County, 703 F.2d 332, 337 n. 7 (9th Cir. 1983).

The State Bar Court established a November 8, 2017 trial date yesterday for *In the Matter of Ty Clevenger*, Case Nos. 16-J-17320 and 17-J-00289. While the State Bar Court has been very accommodating thus far, the Plaintiff respectfully seeks this Court's permission to file a motion for interim relief, specifically to postpone the State Bar Court prosecution until such time as this Court can reach the merits.

Respectfully submitted,

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Attorneys for Defendants Gregory P. Dresser, Stacia L. Johns, Kimberly G. Kasreliovich, The State Bar of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TY CLEVENGER Plaintiff, v. GREGORY P. DRESSER, et al., Defendants.	Case No. 3:17-cv-02798-WHA **STATEMENT OF NONOPPOSITION** (Filed Sep. 15, 2017)

Pursuant to Rule 7-3(b) of the Local Rules of Practice in Civil Proceedings before the United States

District Court for the Northern District of California, Defendants the State Bar of California, Gregory Dresser, Kimberly Kasreliovich, and Stacia Johns ("Defendants") hereby provide notice of nonopposition to Plaintiff Ty Clevenger's request for "permission to file an updated motion for a temporary restraining order/preliminary injunction," Dkt. No. 46.

Defendants disagree with the legal analyses, characterizations of facts, and applications of law to facts Plaintiff presents on the merits of a potential motion for injunctive relief. Defendants intend to set forth the bases for such disagreements in their opposition to any such motion, if and when Plaintiff files one.

Dated: September 15, 2017

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
THE STATE BAR OF CALIFORNIA

By: /s/ Marc A. Shapp
MARC A. SHAPP
Attorneys for Defendants
Gregory P. Dresser,
Stacia L. Johns,
Kimberly G. Kasreliovich,
The State Bar of California

Pages 1 - 22

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

TY CLEVENGER, Plaintiff, VS. GREGORY P. DRESSER, ET AL., Defendants.	)	**NO. CV 17-02798-WHA**

San Francisco, California
Thursday, June 1, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

TY CLEVENGER
P.O. Box 20753
Brooklyn, NY 11202
BY: TY CLEVENGER, IN PRO SE

For Defendants:

OFFICE OF GENERAL COUNSEL
THE STATE BAR OF CALIFORNIA
180 Howard Street
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BY: SUZANNE C. GRANDT, ESQUIRE

* * *

[22] My point, Your Honor – and this goes to the First Amendment retaliation. California has known about this for years and did nothing until I started blogging about Cydney Batchelor. That's the difference.

And they can try to say that – you know, concoct all these explanations, and they are truly making things up on the fly, but those are the facts in the record.

They did nothing until I started blogging about Cydney Batchelor.

THE COURT: All right. Here's the answer. I'm ruling from the bench.

Motion for Preliminary Injunction denied. And the main reason I'm denying it is because Ms. Grandt has represented to me that plaintiff will be able to take all the discovery necessary or that he wishes. He will have a fair opportunity in the state bar court to subpoena appropriate people to show that he's being retaliated against.

And if that turns out not to be true, you may come back and see me and maybe we will give a preliminary injunction at that point.

So motion denied. Thank you. Here are your documents back.

(Proceedings adjourned at 8:40 a.m.)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

TY CLEVENGER, Plaintiff, VS. GREGORY P. DRESSER, ET AL., Defendants.	NO. C 17-02798-WHA

San Francisco, California
Thursday, July 20, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

BY: TY CLEVENGER
PRO SE

For Defendant:

STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105-1617
BY: ROBERT G. RETANA
SUZANNE C. GRANDT

* * *

[2] **Thursday – July 20, 2017** **8:41 a.m.**

PROCEEDINGS

- - - 000 - - -

THE COURT: We'll go to the State Bar case, Clevenger, 17-2798.

MR. RETANA: Good morning, Your Honor. Robert Retana and Suzanne Grandt for the State Bar of California.

THE COURT: Thank you.

MR. CLEVENGER: Good morning, Your Honor. Ty Clevenger, pro se.

THE COURT: Thank you. All right. Whose motion is this?

MR. RETANA: Well, Your Honor, there's two matters on. There's a motion to dismiss, and Ms. Grandt – we've prepared it as follows. Ms. Grandt is prepared to argue the motion to dismiss, and I'm prepared to argue the motion to correct the record, and there was a cross-motion for discovery, so I am prepared to argue that part of it.

THE COURT: Well, all right. I want – I want you all – I'm very familiar with what happened here. And I was misled on purpose last time we were here, because it was important for me to know – it could be that Mr. Clevenger is some kind of shyster and deserves to be disbarred. I don't know. I know nothing about him. But he brought this lawsuit trying to stop

what he said was a First Amendment violation [3] that you, the State Bar, were punishing him because he wrote unflattering things about the State Bar. I haven't read any of them. I don't know if it's unflattering or not.

It was important to me at the last hearing, and I think you were the one who was here, I said: *Will he be able to take discovery in the State Bar court and raise all these issues in the State Bar court?* And you told me flat out "yes" at least three times. Then about two weeks later we get a letter from your side saying that was false, untrue, and you wanted to correct it. Well, fine. I'm letting you correct it. But maybe the punishment for that is he's going to get a chance to take some depositions in this Court that he could use because your court won't allow it.

Now, you can now respond. Go ahead.

MR. RETANA: Okay. Thank you, Your Honor.

So first of all, first and foremost, you know, we apologize to the Court for any misunderstanding.

THE COURT: Any? There was – I don't know if it was false on purpose, but it was reckless –

MR. RETANA: Well –

THE COURT: – what you told me.

MR. RETANA: Your Honor, I could assure you that Ms. Grandt – it was not her intention to make any false statements.

But can I just – there's a few things I just want to say.

[4] **THE COURT:** Get the State Bar to look into *her* conduct. Maybe my committee here in this Court, the committee that we have here for admitting to practice in this Court ought to look into Ms. Grandt's conduct. Maybe we'll have two investigations going at once.

MR. RETANA: Well, Your Honor, the point I would like to make is that there's a couple of different issues here. First of all, the misstatements that were made, or inaccurate statements, deal with the extent to which discovery is available in the State Bar court.

And Ms. Grandt was remiss in not stating to the Court that there are rules of procedure that require a showing of good cause before Mr. Clevenger would be allowed to take the discovery that he wishes.

There's a separate issue that arises because the – there was a letter that was sent to the General Counsel Vanessa Holton by Mr. Clevenger, and in the letter he says he is concerned about statements made by Ms. Grandt at the hearing that he would be able to fully litigate his federal claims in State Bar court, and I respond to that letter saying that the statements were accurate. And what I was responding to was that specific issue.

The issue of whether or not he can fully litigate his claims in State Bar court is our good faith legal position, and we maintain that position for purposes of

today's hearing. So [5] the idea of whether or not he could fully litigate those claims was responded to in the letter with citations to our legal authority for that proposition.

The statements that were inaccurate amount to statements that the failure to note that there's a requirement of good cause before the discovery can take place. But there are in fact State Bar discovery rules that permit the type of discovery that were – that was mentioned in deposition, subpoenas, and so forth. But there is a requirement that the Court find good cause.

And I think if you even look at the transcript, Ms. Grandt says several times that, you know, he can make those arguments to the Court. And in the Court's order the exchange that's quoted on the first and second page, it concludes by saying, "he can make those arguments, and some judge is going to rule on it," and Ms. Grandt says "that's correct." So I think it was her understanding that, you know, there was – implicit understanding that, you know, she can't – she's not a judge, she can't authorize him to take any discovery or not take any discovery; it has to be subject to a finding by the State Bar court. And she should have clarified that.

But there was no intention on Ms. Grandt's part to mislead the Court, and she's apologized in her declaration. I apologize again. But, you know, sometimes these are hard lessons to learn. It's better to say, "I'm not sure, I need to [6] check," than to give an answer to the Court when you're not a hundred percent certain.

So we don't believe that it rises to the level of any sort of misconduct or bad faith or recklessness. We feel it was an error in not clarifying to the Court that there is a requirement that the Court find good faith for discovery.

And I'd also like to point out that Mr. Clevenger has in fact filed a motion for discovery in the State Bar court, and he's raised the federal issues in his answer to the State Bar court, so these issues –

THE COURT: Well, has that discovery been allowed?

MR. RETANA: Well, it's subject to a ruling by the Court, so it hasn't been allowed. So if the discovery is not allowed, his remedy is to appeal to the California Supreme Court, not to conduct parallel proceedings in this Court. It would violate the principles of comity. And the exclusive jurisdiction for governing the conduct of attorneys is with the California Supreme Court.

The California Supreme Court is fully competent to entertain his arguments, entertain federal constitutional questions, decide whether or not discovery is allowed. So the fact that he has to go through that procedure doesn't violate his due process rights.

And, you know, the fact that he's requested this discovery and pointed out the issue in the State Bar court almost moots [7] the arguments that he's making here, because they are in fact – they are in fact being considered by the Court.

MR. CLEVENGER: Your Honor, may I respond?

THE COURT: No, not yet.

MR. CLEVENGER: Okay.

THE COURT: Why did you interrupt?

MR. CLEVENGER: Sorry, Your Honor.

THE COURT: Have you finished?

MR. RETANA: Those are the main points.

I'm happy to answer any questions the Court has. But I want to emphasize that we understand that we're the State Bar of California, and we have to be beyond reproach in everything that we do.

And I just want to say Ms. Grandt is a very hard-working attorney. She prepares very hard for these hearings, and I think her declaration shows that it was not – there was nothing intentional. She's apologized to the Court. I apologized to the Court. We can have Ms. Grandt apologize again.

THE COURT: No, I don't need anymore apologies.

MR. RETANA: But I don't think it rises to the level of –

THE COURT: I've got a lot of hearings.

All right. Your turn.

MR. CLEVENGER: Your Honor, there's been a new [8] development. On Friday – he referenced the fact that I filed a motion to permit discovery, and that's true.

On Friday of last week, the defendants in that case filed an opposition across the board to my request for discovery. So I think it's a bit disingenuous –

THE COURT: Who do you want to depose? Give me the most important person you think you should be able to depose.

MR. CLEVENGER: The Chief Trial Counsel.

THE COURT: Who is that?

MR. CLEVENGER: Well, he's no longer there, Greg Dresser, so the parties have changed somewhat. And also the prosecuting attorneys, your Honor.

THE COURT: Why would you get the prosecuting attorneys?

MR. CLEVENGER: Because they're the ones in the best position to know who is calling the shots on the case.

Also what happened on Monday of this week is a trial date in the State Bar court was set for September 6th and 7th, which means I've got about six weeks. I don't even know yet if I'm going to be permitted discovery in that case, so I'm getting whipsawed –

THE COURT: All right. I'm going to give you one two-hour deposition of Mr. Dresser –

MR. CLEVENGER: Yes, Your Honor.

THE COURT: – out of this Court. It's a sanction for [9] what Ms. Grandt did to the Court. I ordinarily would be inclined to grant this, the *Younger* abstention.

MR. CLEVENGER: Your Honor –

THE COURT: No, no, I'm not done. This is – it's almost unheard of to do what Mr. Clevenger wants here, and I would normally throw this case into oblivion, except Ms. Grandt misrepresented things to me and made an important difference in the ruling.

I don't believe you'll get a fair hearing in the State Bar court. I think the way this thing has been presented to me, that they're going to shortchange you. You left out the fact that you're opposing that discovery.

MR. RETANA: Your Honor –

THE COURT: Just a minute.

But I think you get, as a sanction, you get to depose Mr. Dresser for two hours, and that's going to be it.

I'm sorry I can't solve every problem in life of Mr. Clevenger. But you – there are procedures. You can take appeals. You can do all – maybe I'll let you take the one deposition for two hours, and then because I

have a feeling you're going to get zero out of the State Bar court.

Yes? What do you want to say?

MR. RETANA: Just about the issue of the opposition. We're not opposing it on the basis that he's not able to take discovery in State Bar court. It's based on the fact that he [10] has not established good cause, because the allegations are –

THE COURT: Well, he did blogs; right?

MR. RETANA: But he's made this very same –

THE COURT: He's come before the State Bar, and then here just conveniently right after that you start to prosecute him. All right. So, I'm sorry, but there's enough of a theory here that its –

MR. RETANA: But he's made these very same allegations when he was under disciplinary proceedings in the D.C. court, and the D.C. court's disciplinary order was finalized a few months before proceedings were initiated here. So I don't think the record as stated by Mr. Clevenger is accurate.

THE COURT: Yeah, but you didn't have – it just happens to be that you elected to do reciprocal discovery – reciprocal punishment, disbarment, after he wrote things that are critical of the State Bar.

Now, I didn't just fall off a turnip truck. I've seen enough retaliation claims and know that the first thing that an employee does, whenever they're about to be

fired, is they do something that would get retaliated, so they can say retaliation.

So maybe what Mr. Clevenger is doing here is just a gimmick, and he's pulling the wool over my eyes. Maybe. I'm not saying I even believe any of this. I'm just telling you this. I didn't like what Ms. Grandt did. She misled me, and [11] led me to believe that he would get to take those depositions of the State Bar court. So I'm going to give him the deposition of Dresser. You do the subpoena, get him, two hours air time, no interruptions. If there are interruptions, then there's going to be more time. That's the only discovery that I'm allowing. Then he can use that in the State Bar court.

MS. GRANDT: Your Honor, if I may just add something.

You know, once again, I apologize for misrepresentations, and if you want to sanction the State Bar and me personally, you have the authority to do that. But the relief that you're giving him would be unprecedented and would allow any person to –

THE COURT: Well, then take it to the courts of appeal.

MS. GRANDT: Was is it?

THE COURT: Take a writ to the courts of appeal if you think that it's unprecedented. I'm trying to do the fair thing here.

MS. GRANDT: It would just open the door to allowing any attorney who is being prosecuted in the

State Bar to run into federal court and then state that they were being discriminated against.

THE COURT: Well, then next time you will know, because then I'm going to say, oh, no, it's different, because last time Ms. Grandt misrepresented things to me, that's why I [12] did it.

MS. GRANDT: But, Your Honor, it's our position in our papers that this Court doesn't have jurisdiction over this case.

THE COURT: Well, then take a writ. I'm sorry. I believe I've got enough jurisdiction to impose the sanction that I am imposing, which is that he gets to take a two-hour deposition. And next time the State Bar will be a little bit more honest with the poor federal judge.

I've got so many cases to run here. I wish I didn't have this case either, you know. But I do have the case, and I've got to do the best I can in the limited time that I've got. And if you don't like my answer, that's okay with me if you take a writ to the court of appeals. God bless you. They're smarter than I am. They will fix it if I made a mistake.

MS. GRANDT: And just to clarify the record, he blogged about a year before the charges were brought, and about four months before the charges were brought, that's when the disciplinary order was initiated in D.C. in November. So he blogged about six months prior to the final order of discipline in D.C. And

then four months after that D.C. order came, the State Bar brought charges.

THE COURT: Listen, I want to make it real clear that if Mr. Clevenger ever represents to the contrary, I am in no way saying that there was a First Amendment violation. I am in [13] no way saying that Mr. Clevenger is an honorable guy. I am in no way saying that he doesn't deserve to be thrown out of the State Bar. I am not doing any of that. This is strictly because you – I'm making this order because Ms. Grandt told me something that wasn't true, and I relied on it. And the relief that plaintiff is going to get is very limited relief that he gets a two-hour deposition to make up for what you told me. This is – I'm doing what I think is the fair thing to do.

MR. RETANA: So –

THE COURT: So there. That's what the ruling is.

MR. RETANA: Yes, Your Honor. So procedurally, where does that leave us in terms of the motion to dismiss?

THE COURT: I'm going to hold all of that in abeyance. I'm not going to dismiss anything until this deposition is taken. Maybe then I will just abstain. Abstain, not dismiss, abstain. Do you know the difference?

MR. RETANA: Yes, I do, Your Honor.

THE COURT: Okay. Well, maybe I will abstain. That's why it's called a *Younger* abstention.

MR. RETANA: Yes, sir.

THE COURT: I'll wait and see how it develops over there. Maybe it develops in a fair way. Maybe it develops in an unfair way.

MR. RETANA: After the deposition has been completed, how do we bring this back to the Court's attention?

[14] **THE COURT:** You know, after the deposition, you can revisit it, so can he. If it turns out they deny him all discovery, maybe he can ask for two or three more depositions over here. Maybe not.

MR. CLEVENGER: Your Honor, may I ask a quick question?

THE COURT: Yes, please.

MR. CLEVENGER: I listed some potential interrogatories.

THE COURT: No. We're not going to do that. You've got a two-hour deposition, and that's it.

MR. CLEVENGER: Understood.

THE COURT: Life is too short.

MR. CLEVENGER: Understood.

THE COURT: Life is too short. That's it, two-hour deposition of Mr. Dresser. And it's your

responsibility to subpoena him, track him down, get him into the room in time, and all of that stuff.

MR. CLEVENGER: Understood.

THE COURT: All right. End of hearing. Thank you.

MR. RETANA: Thank you, Your Honor.

MR. CLEVENGER: Thank you.

(Proceedings adjourned at 8:55 a.m.)

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US judge sanctions State Bar

By James Getz
Daily Journal Staff Writer

Saying that a State Bar counsel misled him in a previous hearing about an attorney's ability to get discovery in State Bar Court to defend against allegations there, U.S. District Judge William Alsup sanctioned the agency Thursday.

Against the bar's objections that the move was unprecedented, Alsup punished the agency by allowing the defendant lawyer to depose its former interim chief trial counsel.

Ty Clevenger is trying to prove in San Francisco federal court that the State Bar initiated disciplinary proceedings against him only after he posted blogs critical of another State Bar case, thereby trampling on his First Amendment rights through retaliation and selective prosecution.

He named the former trial counsel, Gregory Dresser, and two other State Bar attorneys and the State Bar itself as defendants. Clevenger v. Dresser et al., 17-CV02798 (N.D. Cal., filed May 15, 2017).

State Bar attorneys say the disciplinary action against Clevenger is a routine one: reciprocal punishment for being sanctioned earlier in Texas and the District of Columbia. That "extensive history of misconduct," the bar wrote in court papers, "constitutes ample grounds

for the State Bar's initiation of disciplinary proceedings."

They also argue that a federal court should not even hear Clevenger's complaint because if he is dissatisfied with the extent of discovery that the State Bar Court permits, he can appeal to the California Supreme Court. Thursday's hearing was on three motions: Clevenger's motion to permit discovery in federal court, and the State Bar's motions to dismiss the case and to clarify the record about State Bar Assistant General Counsel Suzanne Grandt's misstatements to Alsup.

At a June 1 hearing on Clevenger's motion for a preliminary injunction against the State Bar, Grandt repeatedly affirmed that Clevenger could subpoena Dresser and anyone else to prove, in State Bar Court, his allegations of retaliation.

In reality, State Bar Court discovery rules are limited, and an attorney must ask that court to allow discovery. Grandt's statements about the scope of discovery were important because Alsup relied on them in denying Clevenger's injunction motion.

The bar filed its charges soon after that ruling. Clevenger had sought an injunction to prevent the bar from filing until its attorneys could prove they would have prosecuted him regardless of his blogging.

After Robert Retana, deputy general counsel for the State Bar, apologized to Alsup and reiterated that Grandt had not intended to misstate the rules, the

judge said he would grant the motion to clarify the record.

But Alsup stated, "I was misled on purpose." He then allowed Clevenger to take the two-hour deposition of Dresser as punishment.

"I would like to throw this case into oblivion," Alsup told Clevenger, except, "I have a feeling you'll get zero from the State Bar Court."

As soon as Alsup imposed punishment by allowing the deposition, Grandt invited Alsup to punish her or the State Bar differently because, "The relief you're allowing is unprecedented." It would, she said, allow any attorney facing State Bar discipline to run to the federal courthouse.

"Then take a writ to the court of appeals," Alsup replied.

Alsup in essence denied the bar's motion to dismiss by saying he saw "enough of a case here," but added he would abstain from acting until after the Dresser deposition and possibly until after events unfold in State Bar Court. He denied Clevenger any additional discovery for now.

After Thursday's hearing, Clevenger expressed muted satisfaction. "I was hoping for a little more than that," he said, "but it's a step in the right direction. Right now, the State Bar is making my case better than I can."

Clevenger, who is based in New York, was admitted to the California bar in 2001 but has been an inactive

member since 2008. He said his State Bar trial is in September.

In his federal complaint, Clevenger said the Bar notified him in an April letter that it intended to seek disbarment, even though he was inactive and neither Texas nor the District of Columbia had sought to disbar him.

Retana said the State Bar cannot comment on pending litigation.

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