No. ___

Supreme Court of the United States

STEVEN R. DONZIGER,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMITTEE FOR THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT,

Respondent.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 4, 2022

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTION PRESENTED

Did New York deny Mr. Donziger due process of law by disbarring him on the basis of Judge Kaplan's bribery finding without allowing him opportunity to challenge it?

LIST OF PARTIES

Steven Robert Donziger, Petitioner.

Attorney Grievance Committee for the Supreme Court of the State of New York Appellate Division: First Judicial Department, Respondent.

LIST OF PROCEEDINGS

Matter of Donziger, 163 A.D.3d 123, 80 N.Y.S.3d 269, 2018 N.Y. Slip Op. 05128 (July 10, 2018)

Supreme Court of the State of New York Appellate Division: First Judicial Department Report and Recommendation (Feb. 24, 2020)

Matter of Donziger, 186 A.D.3d 27, 128 N.Y.S.3d 212, 2020 N.Y. Slip Op. 04523 (Aug. 13, 2020)

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PETITION

Steven Donziger respectfully petitions for a writ of certiorari to review the judgment of the Appellate Division of the New York Supreme Court, First Judicial Department disbarring him from the practice of law without allowing him an opportunity to contest the bribery allegation against him.

OPINIONS BELOW

The opinion and order of the Appellate Division of the New York Supreme Court, First Judicial Department ("First Department") dated August 13, 2020 may be found at Appendix 72. The New York Court of Appeals' denial of Mr. Donziger's motion for leave to appeal dated May 6, 2021 may be found at Appendix 79, and the New York Court of Appeals' denial of Mr. Donziger's motion for reargument of motion for leave to appeal dated September 9, 2021 may be found at Appendix 80.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a):

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under

the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

I. Introduction

This disbarment case is part of decades-long litigation pitting Chevron Corporation against Petitioner Steven Donziger, defending himself frequently pro se, sometimes with pro bono or marginally financed assistance, and always without the means to marshal a full-fledged defense, let alone one comparable to his adversary's offense. The genesis of the litigation which gave rise to Mr. Donziger's disbarment is an Ecuadorian judgment he won against Chevron on behalf of indigenous Ecuadorians for the company's environmental degradation of the Amazon. Rather than pay the judgment, Chevron counter-sued Mr. Donziger in the United States District Court for the Southern District of New York (S.D.N.Y.) using the Civil provision of the RICO Act (18 U.S.C. § 1964). Judge Lewis Kaplan presided at the RICO trial[1] without a jury and ruled

[1] At his bench trial on criminal contempt charges, Mr. Donziger showed, through documentary evidence and testimony on cross-examination, how Chevron was able to use the rotating assignment schedule of S.D.N.Y.'s Part 1 to ensure its RICO action could be presided over by Judge Kaplan instead of Judge Jed Rakoff. Judge Rakoff had presided over the S.D.N.Y. suit Mr. Donziger brought in 1993 on behalf of indigenous Ecuadorians, which, after it was dismissed *on forum non conveniens* grounds, was filed in Ecuador and led to the judgment issued against

Chevron. S.D.N.Y.'s Part 1 was "established for hearing and determining certain emergency and miscellaneous matters in civil and criminal cases." S.D.N.Y. Local Rule 3, *available at* 2021-09-29 SDNY Rules for the Division of Business.pdf (uscourts.gov). Judges take turns presiding over Part 1, and a schedule of which judge will sit when is announced to the public ahead of time. *See generally* S.D.N.Y. Website, Part 1 Assignments, *available at* District Judges Part 1 Assignments | U.S District Court (uscourts.gov). At his trial, Mr. Donziger showed that prior to the filing of the RICO action, Chevron went to Part 1 while Judge Kaplan was presiding and requested the issuance of foreign discovery subpoenas (pursuant to 28 U.S.C. § 1782) to aid in the Ecuador litigation, which Judge Kaplan issued. Later, when filing the RICO action against Mr. Donziger, Chevron claimed the suit was related to the § 1782 subpoenas but omitted to mention the suit's direct connection to the 1993 action presided over by Judge Rakoff (after transfer from Judge Broderick). *United States v. Donziger*, 19-CR-561 (S.D.N.Y.), Trial Transcript at 745–57. As articulated in Mr. Donziger's petition to this Court following affirmance of the RICO action on appeal, Judge Rakoff had taken the position, in judicial decisions and legal scholarship, that non-preliminary equitable relief could not be granted to private RICO plaintiffs without their accusations of racketeering activity first having been proven to a jury. *See Donziger v. Chevron Corporation*, 2017 WL 1192140 (U.S.), 28 (Mr. Donziger's petition for a writ of certiorari) ("[E]ven assuming that a district court has inherent power to order equitable remedies ancillary to a RICO judgment, the court's authority to enter such relief must depend on the existence of a cause of action over which the court has jurisdiction - namely, RICO's private right of action for damages. . . . Judge Rakoff's injunction in *Uzan* depended on the existence of those damages claims. 202 F. Supp. 2d 239, 244 (holding that § 1964(c) provides 'a private right of action for damages'). Indeed, Judge Rakoff has elsewhere repudiated the view that RICO authorizes injunctive relief in the absence of a damages claim. As his RICO treatise explains: 'Civil RICO claims are only available where monetary relief is sought . . . . Thus, if the suit is in essence a claim . . . for injunctive relief, RICO will not be a suitable vehicle.'" (quoting Jed S. Rakoff, *RICO: Civil and Criminal Law and Strategy* § 7.02[2] (2014)).

that Mr. Donziger had won the Ecuadorian judgment by a pattern of racketeering fraud headlined by a finding that he had bribed Judge Zambrano to win the judgment. Judge Kaplan enjoined Mr. Donziger from profiting from the Ecuadorian judgment and subsequently ordered him to pay Chevron over $800,000 in trial costs.[2]

Chevron's original RICO complaint contained claims for money damages, indisputably entitling Mr. Donziger to a jury trial under the Seventh Amendment. On the eve of trial, Chevron waived its claim for damages and proceeded only for injunctive relief. The result was a bench trial in which Judge Kaplan himself, without a jury,[3] determined whether

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[2] *See Chevron Corp. v. Donziger*, 2018 WL 1137118, at *1 (S.D.N.Y. Feb. 28, 2018), *opinion corrected and superseded*, 2018 WL 1137119 (S.D.N.Y. Mar. 1, 2018), *aff'd*, 990 F.3d 191 (2d Cir. 2021).

[3] At the time of Mr. Donziger's trial, no federal appellate court had held that a private plaintiff could prosecute a defendant to a judge sitting without a jury for having committed a "pattern of racketeering activity" consisting of enumerated felonies. The Second Circuit had not ruled on the issue. The Ninth Circuit had held that private RICO plaintiffs had no right to injunctive relief. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986). The Seventh Circuit had held equitable relief could be granted to private plaintiffs under RICO, but the case had come up to the circuit court following a jury's determination that the requisite RICO predicate offenses had been committed. *See Nat'l Org. For Women, Inc. v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001), *rev'd,* 537 U.S. 393 (2003) (reviewing a decision in which, "[a]fter the jury returned its verdict, the district court . . . entered a permanent, nationwide injunction"). In this respect, Mr. Donziger's case before the Second Circuit made new, unprecedented law authorizing private litigants (here, a corporation with nearly unlimited resources) to accuse a litigation opponent of crimes

Chevron's allegations that Mr. Donziger had obtained the Ecuador judgment through a "pattern of racketeering activity" had been proven. On appeal before the Second Circuit, Mr. Donziger challenged the legal framework that permitted Judge Kaplan to promulgate false findings–namely, the unique nature of RICO Act predicates–and repeatedly challenged the truth of the bribery finding in his statement of facts. Due to the inability to individually appeal the RICO predicates–including the keystone bribery finding later deemed *not necessary*–Judge Kaplan's bribery finding has never been reviewed on its merits.

Following affirmance of the RICO judgment by the Second Circuit, the S.D.N.Y. Grievance Committee, all colleagues of Judge Kaplan, requested that New York discipline Mr. Donziger–not on the basis of the civil RICO judgment against him–but on the predicate offenses underlying the judgment.[4] In

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and have a single judge determine "guilt" by a preponderance. The legality of a corporation using the RICO Act to accuse opposing counsel of being a felonious racketeer and then have those accusations tested by a single judge–without the protections of criminal due process–has not been decided by this Court. *See RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 354 (2016) ("This Court has never decided whether equitable relief is available to private RICO plaintiffs . . . and we express no opinion on the issue today."). Mr. Donziger's petition for a writ of certiorari following the Second Circuit's opinion affirming the use of juryless civil RICO against him had asked the Court to make such a determination. *Donziger v. Chevron Corporation*, 2017 WL 1192140 (U.S.) ("Does the Racketeer Influenced and Corrupt Organizations Act (RICO) authorize federal courts to issue injunctive relief to private parties?"). This Court denied certiorari, leaving intact a split among the Circuit Courts which persists today.

[4] *See* Appendix 1–2 (Letter from P. Kevin Castel, United States District Judge to Jorge Dopico, dated December 2, 2016).

its letter, the S.D.N.Y. Grievance Committee further requested that New York do so by collateral estoppel.[5] The Appellate Division of the New York Supreme Court, First Judicial Department ("First Department") acceded to both requests. It accepted Judge Kaplan's findings as conclusive, incontestable proof of professional misconduct and suspended Mr. Donziger, asserting there was "uncontroverted evidence of serious professional misconduct which immediately threatens the public interest."[6] The court then appointed John Horan, a former Assistant United States Attorney and distinguished member of the New York Bar, as Referee to recommend appropriate sanctions. When Referee Horan indicated in a pre-hearing procedural memo that he would allow Mr. Donziger to challenge the bribery finding, the First Department countermanded him, ordering "that the Referee may not reexamine this court's determination, based on collateral estoppel, that the respondent committed professional misconduct . . ."[7] In compliance, Referee Horan thus limited his sanctions hearing to evidence of character in mitigation:

> Respondent's conduct in this unique matter, all arising from one unusually lengthy and difficult environmental pollution case conducted in Ecuador against the most vigorous and oppressive defense money can buy, leads inexorably to a severe sanction but

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[5] *Id.* at 4.

[6] Appendix 8 (*Matter of Donziger*, 163 A.D.3d 123, 80 N.Y.S.3d 269, 2018 N.Y. Slip Op. 05128).

[7] *See* Appendix 75 (*Matter of Donziger*, 186 A.D.3d 27, 128 N.Y.S.3d 212, 2020 N.Y. Slip Op. 04523).

> should be judged in its entire context; the Kaplan decision is entitled to considerable weight but not necessarily, in these unique circumstances, decisive weight. . . . Assessment of character is not an exact science, but we can all agree that the essential components are honesty, integrity, and credibility. It is far from clear that Respondent is lacking in those qualities as the Committee argues.[8]

Referee Horan recommended to the First Department that Mr. Donziger be reinstated and not disbarred.[9] The court flatly rejected his recommendation. Instead, the First Department reasserted collateral estoppel as the sole evidentiary basis for its action and disbarred Mr. Donziger.[10] With one dissent, the New York Court of Appeals denied Mr. Donziger leave to appeal on May 6, 2021[11] and denied reargument on his motion for leave to appeal on September 9, 2021.[12]

This petition focuses on the New York courts' use of the most devastating of Judge Kaplan's predicate factual findings in the RICO action–that

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[8] Appendix 63 (Supreme Court of the State of New York Appellate Division: First Judicial Department Report and Recommendation).

[9] *Id.* at 63–64.

[10] Appendix 76–77 (*Matter of Donziger*, 186 A.D.3d 27, 128 N.Y.S.3d 212, 2020 N.Y. Slip Op. 04523).

[11] Appendix 79 (*Matter of Donziger*, 36 N.Y.3d 913, 168 N.E.3d 1152, 145 N.Y.S.3d 14 (Table), 2021 WL 1805246 (N.Y.), 2021 N.Y. Slip Op. 65681).

[12] Appendix 80 (*Matter of Donziger*, 37 N.Y.3d 1001, 174 N.E.3d 696, 152 N.Y.S.3d 671 (Mem), 2021 N.Y. Slip Op. 71204).

Mr. Donziger bribed presiding Ecuadorian Judge Zambrano–a finding Judge Kaplan himself has refused to stand behind. In the shadow of this finding, Mr. Donziger has been afflicted with court costs, attorney fees and fines totaling millions of dollars, held in pretrial home confinement for over two years pending prosecution by Judge Kaplan's special prosecutor, and imprisoned at MCI Danbury for criminal contempt,[13] all without benefit of jury trial or many of the other constitutional protections owed to a criminal defendant. Most important, the bribery finding has aided Chevron in entirely dodging responsibility for its depredation of the Amazon.

ARGUMENT

I. New York denied Mr. Donziger due process of law by disbarring him on the basis of Judge Kaplan's bribery finding without allowing him opportunity to challenge it.

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550 (1968) (citing *Ex parte*

[13] In a related but distinct proceeding instigated by Chevron, Mr. Donziger was found to have committed six counts of criminal contempt. After the S.D.N.Y. U.S. Attorney turned down prosecution of the case, Mr. Donziger was prosecuted by a partner at a law firm which counted Chevron among its clients as recently as 2018. Mr. Donziger's private prosecutor was selected by Judge Kaplan. Because the presiding district court judge (who was also selected by Judge Kaplan, rather than by random assignment) was ultimately willing to forego the ability to sentence Mr. Donziger to more than 6 months in jail post-conviction, his criminal contempt charges were deemed "petty" and he was therefore tried without a jury by the judge whom Judge Kaplan selected. After spending 20 months in pretrial home confinement awaiting his criminal contempt trial, Mr. Donziger was sentenced to the maximum of 6 months in jail.

Garland, 71 U.S. 333, 380 (1866) and *Spevack v. Klein*, 385 U.S. 511, 515 (1967). Lawyers facing disbarment proceedings are "accordingly entitled to procedural due process[,]" *In re Ruffalo*, 390 U.S. at 550, as "[t]hese are adversary proceedings of a quasi-criminal nature." *Id.* at 551 (citations omitted). "[W]ithin the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (citations and quotation marks omitted). "[W]hen proceedings for disbarment are 'not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defen[s]e.'" *In re Ruffalo*, 390 U.S. at 550 (1968) (quoting *Randall v. Brigham*, 74 U.S. 523, 526 (1868)).

A. The First Department misapplied collateral estoppel, as properly articulated by its neutral Referee.

Application of the doctrine of collateral estoppel to deny Mr. Donziger all opportunity to contest Judge Kaplan's criminal bribery finding against him was a violation of due process. The burden of proof rests with the Attorney Grievance Committee in a disbarment proceeding, and the unconstitutional use of collateral estoppel in this case to avoid that burden violated due process.

The doctrine of collateral estoppel is a form of proof by hearsay exception. Evidence admitted through collateral estoppel is justified as an exception to the usual rules of proof on the assumption that the reliability of a judicial finding may be assumed.

Preclusive collateral estoppel, unlike ordinary hearsay exceptions, completely precludes challenge to the truth of the matter asserted. Such a radical form of preclusion is seen to promote judicial efficiency, but it is warranted only when there is an identity of issue, when the party against whom the estoppel operates had a full and fair opportunity to contest the facts in another court proceeding, and when there has been no subsequent impeachment of the finding to be imported. *Cf. Schwartz v. Public Administrator of the County of Bronx*, 24 N.Y.2d 65, 71 (1969) ("There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.").

Not one of these three conditions was met in Mr. Donziger's case. Referee Horan confronted the First Department with exactly such an objection: "To argue that respondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer is to overlook the substantial differences in the proceedings."[14]

Referee Horan articulated the differences:

> In particular, in the U.S. District Court, respondent was faced with an equity case without a jury to invalidate a foreign judgment brought against him and others in which the

[14] Appendix 11 (Supreme Court of the State of New York Appellate Division: First Judicial Department Decision on Procedure for the Post-Suspension Hearing Under 22 NYCRR 1240.9(c)).

> District Judge, in so many words, but in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron. . . .[15]
>
> Other material differences can be noted, such as the lack of notice to respondent that his status as a lawyer was in jeopardy before Judge Kaplan, or for that matter, notice that he was, in substance, facing potential criminal charges regarding the judgment at issue. . . .[16]
>
> Finally, it is open to question, at least initially in this Post-Suspension hearing, whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence.[17]

As a means of addressing these differences in process, Referee Horan intended to provide Mr. Donziger with an opportunity to be heard on the findings against him being imported over from the RICO judgment:

> The intention is to have an actual "hearing" pursuant to 22 NYCRR 1240.9(c), where respondent can address the Charges against him as he sees fit, even to the point of disagreeing with, or providing context to the

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[15] *Id.*

[16] *Id.* at 12.

[17] *Id.*

> facts in the first instance found by the District Court, and affirmed as found by the Second Circuit, on the ground that a strict application of the collateral estoppel doctrine, in the circumstances before me, may place respondent in an unfair position, and one he likely could not have foreseen as he set out in the Southern District Court to defend the judgment he obtained in Ecuador.[18]

Mr. Donziger did not get "to have an actual 'hearing'" because the First Department rejected its Referee's decision on procedure. In sum, the application of collateral estoppel to summarily disbar Mr. Donziger without affording him an opportunity to challenge the bribery allegation—a finding of asserted criminality made in a civil proceeding, between grossly asymmetric litigants, without benefit of a jury trial, by a preponderance of the evidence—was a complete and utter denial of due process.

B. Judge Kaplan's bribery finding should not have been given preclusive downstream effect because he specifically declared it to be not essential to his judgment.

Judge Kaplan's bribery finding, as he conceded in his cost order, was "critically"[19] based on the testimony of Alberto Guerra, whom Judge Kaplan

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[18] *Id.* at 13.

[19] *Chevron Corp. v. Donziger*, 2018 WL 1137118, at *5 (S.D.N.Y. Feb. 28, 2018), *opinion corrected and superseded*, 2018 WL 1137119 (S.D.N.Y. Mar. 1, 2018), *aff'd*, 990 F.3d 191 (2d Cir. 2021) ("[The court] did so without necessary regard to whether Donziger and the LAPs bribed former Judge Zambrano, the only point on which Guerra's testimony was critical.").

knew to be a witness of seriously doubtful credibility.[20] In his RICO judgment and opinion, Judge Kaplan specifically and repeatedly stated that this particular finding was independent of his other predicate findings and *not necessary* to his ultimate racketeering judgment. He devoted two sections of his mammoth RICO decision to making this point: sections XIII(B)(ii)(c)(1) and (2):[21]

> The LAPs' Ghostwriting of All or Part of the Judgment and Zambrano's Adoption of Their Product Was Fraud Warranting Equitable Relief *Even Absent Bribery.* (emphasis added).
>
> The Deception of the Lago Agrio Court By The Misrepresentations that Cabrera Was Independent and Impartial and By the Passing Off of the Ghostwritten Report as His Work Was Fraud Warranting Equitable Relief *Even Absent Bribery.* (emphasis added).

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[20] "[Guerra's] professional history includes multiple instances in which he has accepted bribes, lied, and facilitated illegal relationships between parties and judges. . . . Guerra's willingness to accept and solicit bribes, and his lie to Chevron about the supposed offer by the LAPs of $300,000, and other considerations, put his credibility in serious doubt, particularly in light of the benefits he has obtained from Chevron. Indeed, Guerra admitted that he came forward because he believed he would be 'rewarded handsomely.' In addition, there are some inconsistencies in his story." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 519 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016).

[21] The text excerpts quoted here are the titles of the sections Judge Kaplan dedicated to explaining the independence of his RICO injunction from his bribery finding. *See Chevron Corp. v. Donziger,* 974 F. Supp. 2d at 561.

In sum, Judge Kaplan insulated his bribery finding from direct challenge on appeal by stating that his finding Mr. Donziger had bribed Judge Zambrano was not necessary to support the RICO injunction. The non-necessary nature of Judge Kaplan's bribery finding, in tandem with the unfairness of the asymmetric proceedings pitting a multinational corporation against a human rights lawyer, makes application of collateral estoppel to it inappropriate under traditional principles of collateral estoppel doctrine and under explicit New York law. *See Schwartz v. Public Administrator of the County of Bronx*, 24 N.Y.2d at 71 (1969) ("There must be an identity of issue which has *necessarily been decided* in the prior action and is decisive of the present action, and, second, there must have been a *full and fair opportunity to contest the decision now said to be controlling.*") (emphasis added).

C. When confronted with post-trial evidence of Alberto Guerra's perjury, Judge Kaplan was himself not willing to stand behind the bribery finding, which he conceded was "critically" based on Guerra's testimony.

Prior to having costs imposed on him after his RICO trial, Mr. Donziger discovered new post-trial evidence of Alberto Guerra's perjury and brought it to Judge Kaplan's attention. In his February 28, 2018 order imposing costs, Judge Kaplan expressly refused to consider the evidence, stating that Guerra's testimony was "critical" only to the bribery finding, and that the bribery finding was not necessary to the RICO judgment:

> [T]he Court held that this fraudulent behavior warranted equitable relief with respect to the Ecuadorian judgment. It did so without necessary regard to whether Donziger and the LAPs bribed former Judge Zambrano, the only point on which Guerra's testimony was critical. . . . As the Court's opinion makes clear, this Court would have reached precisely the same result in this case even without the testimony of Alberto Guerra.[22]

When Judge Kaplan himself refused to stand behind the allegation of bribery, all justification for applying collateral estoppel to his bribery finding evaporated. Nevertheless, the First Department continued to give it preclusive effect. While the First Department may have intended to efficiently import a reliable finding from another court, the effect of using collateral estoppel here was to predicate disbarment on a dubious and disavowed finding without providing an opportunity to challenge the finding's veracity. By giving the bribery finding undue downstream effect, the First Department denied Mr. Donziger due process of law.

REASONS FOR GRANTING THE WRIT

Mr. Donziger's disbarment, based on an un-reviewed and since-abandoned factual finding created in S.D.N.Y., has itself passed through New York's highest courts without meaningful review. If this Court also allows the First Department's decision to stand without review, the effects will reach beyond

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[22] *See Chevron Corp. v. Donziger*, 2018 WL 1137118, at *5 (S.D.N.Y. Feb. 28, 2018), *opinion corrected and superseded*, 2018 WL 1137119 (S.D.N.Y. Mar. 1, 2018), *aff'd*, 990 F.3d 191 (2d Cir. 2021).

the harm already done to Mr. Donziger and his clients. Law students and young lawyers are mindful of this case, in which a human rights lawyer has been prosecuted by a corporation and thereafter disbarred without first being given an opportunity to defend himself. Indeed, the First Department's decision has already created—and, unless reviewed by this Court, will continue to create—a chilling effect on those who would dare try to hold a corporation accountable in court. *Faced with the prospect of a racketeering suit prosecuted by a litigant with nearly unlimited resources followed by the consequent automatic loss of the right to practice law, who will risk their livelihood to represent those harmed?*

CONCLUSION

This Court should grant certiorari to ensure Mr. Donziger will receive an opportunity to be heard on the charges against him—an opportunity which the only jurist to actually consider the issue found due process required.

Respectfully submitted,

/s/ Charles R. Nesson
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Dated: February 4, 2022

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE

December 2, 2016

Jorge Dopico, Esq.
Chief Attorney
Attorney Grievance Committee,
Appellate Division, First Department
61 Broadway
New York, NY 10006

Dear Mr. ~~Dopico~~ Jorge:

I write in my capacity as Chair of the Southern District of New York Grievance Committee (the "S.D.N.Y. Committee") to refer Stephen Donziger to the Attorney Grievance Committee for the Appellate Division, First Department (the "First Department Committee"). The decision to refer Mr. Donziger was made unanimously by vote of the S.D.N.Y. Committee at its last bi-monthly meeting on November 3, 2016.[1] The S.D.N.Y. Committee consists of

[1] The S.D.N.Y. Committee consist of Chief Judge Colleen McMahon, the undersigned, Chair, District Judge Katherine B. Forrest, District Judge Katherine Polk Failla, District Judge Kenneth M. Karas, Senior District Judge Louis L. Stanton,

Mr. Donziger is a member of the bar of the State of New York with an office in the First Department. On March 4, 2014, following a bench trial in *Chevron Corp. v. Donziger,* 11-cv-00691, Hon. Lewis A. Kaplan, U.S.D.J., found that Mr. Donziger orchestrated a massive fraud that resulted in the Ecuadorian courts awarding a $8.646 billion judgment against Chevron Corp. in favor of Mr. Donziger's clients ("the *Chevron* Opinion"). The Court of Appeals for the Second Circuit recently affirmed Judge Kaplan's decision. *See Chevron Corp. v. Donziger,* 14-0826(L) (Aug. 8, 2016).

Briefly, Mr. Donziger, according to the *Chevron* Opinion, led a group of American and Ecuadorian lawyers who brought an action in Ecuador claiming that Chevron was responsible for extensive environmental damage caused by oil activities of Texaco, Inc., whose stock was later acquired by Chevron. Judge Kaplan found that Mr. Donziger and the Ecuadorian lawyers he led corrupted the case. Donziger and others submitted fraudulent evidence. Donziger and others coerced a judge to appoint an individual who was paid as a plaintiff's damages expert to make a supposedly impartial overall damages assessment. Donziger and others then paid a Colorado consulting firm secretly to ghostwrite the expert's report and then made misrepresentations to U.S. Courts to cover their tracks. Donziger and others also wrote the Judgment themselves and bribed the Ecuadorian judge to sign it.

District Judge Richard J. Sullivan, Magistrate Judge James C. Francis and Magistrate Judge Judith C. McCarthy.

The reason we believe that the First Department Committee rather than the SDNY Committee ought to pursue Mr. Donziger's misconduct is twofold. First, the Committees jurisdiction over violations of the New York Rules of Professional Conduct is limited to events that occur in connection with activities occurring in this Court. *See* Local Civil Rule 1.5(b)(5) In this case, the Committee's jurisdiction extends to only a small subset of the acts which Judge Kaplan found to be wrongful. As described by Judge Kaplan,

> [t]he events at issue in this case took place in law offices in New York, Philadelphia, and elsewhere in the United States, a consulting firm in Colorado, a public relations firm in Washington, the Orienté [region of Ecuador], courthouses in Ecuador and all over the United States, the offices of a New York documentary film maker, news media throughout the world, and government offices in Ecuador and the United States, and other places. But despite the case's complex history, reach and its large cast of players, the events ultimately center on one man - Steven Donziger - and his team of Ecuadorian lawyers and U.S. and European backers.

Chevron Opinion at 5. If the First Department Committee declines to investigate Mr. Donziger, the majority of his misconduct will likely go unpunished by any disciplinary authority.

Second, the doctrine of collateral estoppel is likely available to the First Department Committee. Mr. Donziger's misconduct was the primary focus of a seven-week trial at which the evidence included live testimony from more than 30 witnesses; deposition testimony of 22 witnesses; and more than 4,000 documents. The witnesses were subject to cross-examination and any subsequent questioning after redirect. In an opinion that spans 485 pages, Judge Kaplan made detailed factual findings as to the wrongful acts undertaken by Mr. Donziger to procure the Judgment. On appeal, Mr. Donziger did not dispute any of Judge Kaplan's findings.

It is the S.D.N.Y. Committee's sincere hope is that the First Department Committee will pursue the matter. In making this recommendation, the S.D.N.Y. Committee reserves the right to pursue the small subset of Mr. Donziger's actions that did occur in conjunction with activities in the Southern District of New York.

Within the limitations of the two systems in which we operate, the First Department Committee and the S.D.N.Y. Committee have enjoyed a strong history of appropriate, respectful cooperation in better service of the public. It is the hope of the S.D.N.Y. Committee that the First Department Committee will pursue this important matter.

Very truly yours,

/s/ R. Kevin Castel
R. Kevin Castel

APPENDIX B

163 A.D.3d 123, 80 N.Y.S.3d 269, 2018 N.Y. Slip Op. 05128

**1 In the Matter of Steven R. Donziger (Admitted as Steven Robert Donziger), an Attorney, Respondent.
Attorney Grievance Committee for the First Judicial Department, Petitioner.

Supreme Court, Appellate Division, First Department, New York
M-5635
July 10, 2018

CITE TITLE AS: Matter of Donziger

SUMMARY

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on November 24, 1997, at a term of the Appellate Division of the Supreme Court in the First Judicial Department as Steven Robert Donziger.

HEADNOTE

Attorney and Client
Disciplinary Proceedings
Suspension

Respondent attorney was immediately suspended from the practice of law until further order of the Appellate Division pursuant to 22 NYCRR 1240.9 (a)

(5) based upon the collateral estoppel effect given to a decision of the United States District Court finding that respondent had engaged in coercion, fraud and bribery in connection with an $8.6 billion judgment he obtained, which constituted uncontroverted evidence of serious professional misconduct that immediately threatened the public interest.

APPEARANCES OF COUNSEL

Jorge Dopico, *Chief Attorney*, *Attorney Grievance Committee*, New York City (*Naomi F. Goldstein* of counsel; *George A. Davidson*, pro bono special counsel), for petitioner.

***124** *Steven R. Donziger*, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Steven R. Donziger was admitted to the practice of law in the State of New York by the First Judicial Department on November 24, 1997. At all times relevant herein, respondent has maintained an office for the practice of law within the First Department.

The Attorney Grievance Committee (AGC) seeks an order, pursuant to ****2** Judiciary Law § 90 (2), Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.8, and the doctrine of collateral estoppel, finding respondent guilty of professional misconduct in violation of former Code of Professional Responsibility DR 1-102 (a) (4), (5) and (7) (22 NYCRR

1200.3 [a] [4], [5], [7]), DR 7-102 (a) (6) (22 NYCRR 1200.33 [a] [6]), DR 7-105 (22 NYCRR 1200.36), DR 7-110 (a) and (b) (22 NYCRR 1200.41 [a], [b]), and Rules of Professional Conduct (22 NYCRR 1200.0) rules 3.4 (a) (5), 3.5 (a) (1), and 8.4 (c) and (d), and immediately suspending him from the practice of law pursuant to 22 NYCRR 1240.9 (a). Respondent, appearing pro so, opposes the motion.

The assertion of collateral estoppel is premised on a 322-page decision issued on March 4, 2014, by Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York in *Chevron Corp. v Donziger* (974 F Supp 2d 362 [SD NY 2014], *affd* 833 F3d 74 [2d Cir 2016], *cert denied* 582 US —, 137 S Ct 2268 [2017]), in which respondent was found to have engaged in, inter alia, coercion, fraud and bribery in connection with an $8.6 billion judgment obtained in Ecuador.

In order to invoke collateral estoppel, it must be shown that (1) the issues raised and resolved in the prior proceeding are identical to those decisive in the present proceeding; and (2) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issues now said to be controlling (*see Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65 [1969]).

There is an "identity of issue" insofar as both the prior proceeding before Judge Kaplan and the instant disciplinary matter center on respondent's judicial coercion, corruption of a court expert and ghostwriting of his report, misrepresentations concerning the expert's independence, obstruction of

justice, witness tampering, improperly threatening criminal prosecution,*125 and judicial bribery (*see Ross v Medical Liab. Mut. Ins. Co.*, 75 NY2d 825 [1990]).

Further, respondent was afforded a full and fair opportunity to litigate, as evinced by the voluminous record on which Judge Kaplan's findings were based. Judge Kaplan conducted a seven-week trial, heard 31 live witnesses (including respondent), and considered sworn testimony of three dozen others, as well as thousands of documents. Respondent appealed Judge Kaplan's decision, yet chose not to challenge the underlying factual findings. Thus, his argument that he was denied meaningful appellate review fails.

Because Judge Kaplan's findings constitute uncontroverted evidence of serious professional misconduct which immediately threatens the public interest, respondent should be immediately suspended, pursuant to 22 NYCRR 1240.9 (a) (5) (*see e.g. Matter of Truong*, 2 AD3d 27 [1st Dept 2003]).

Accordingly, the AGC's motion should be granted, and respondent suspended from the practice of law, effective immediately, and until further order of this Court.

Sweeny, Jr., J.P., Renwick, Richter, Manzanet-Daniels and Kahn, JJ., concur.

Respondent suspended from the practice of law in the State of New York, effective the date hereof, and until further order of this Court; referee to hold hearing on sanction for disciplinary rule violations.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

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In the Matter of Steven R. Donziger,
(admitted as Steven Robert Donziger),
an attorney and counselor-at-law:

Attorney Grievance Committee
For the First Judicial Department,
Petitioner,

Steven R. Donziger, Esq.,
(OCA Atty. Reg. No. 2856052),

Respondent.

----------X

DECISION ON PROCEDURE FOR
THE POST-SUSPENSION HEARING
UNDER 22 NYCRR 1240.9(c)

In its August 16, 2018 order granting respondent's request for a Post-Suspension hearing, but reaffirming its Order of July 10, 2018, suspending respondent upon a finding that there was "uncontroverted evidence that respondent engaged in serious professional misconduct immediately threatening the public interest," the court appointed the undersigned to hold "the (22 NYCRR) 1240.9 hearing and to report his finding to the Committee."

With the consent of the Attorney Grievance Committee (AGC) and the Referee, the parties have

proposed procedures with respect to the Post-Suspension Hearing allowed by 22 NYCRR 1240.9 (c), and requested by respondent.

> Respondent Donziger has, by one of his counsel, Martin Garbus, made a proposal in two parts: first he requests the opportunity" ... to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings." If respondent is " ... successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the ... Committee would present evidence against him, and he would have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own."

As an "alternative" respondent argues that due process allow him the "... opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him." See letter dated October 19, 2018, submitted by Martin Garbus, and made a part of the record, Exhibit A.

The AGC has presented a proposal which argues that in this case the doctrine of collateral estoppel should preclude any hearing at which the findings of Judge Kaplan, as affirmed by the Second Circuit, are contested. It argues that in this case the Post-Suspension Hearing becomes merged with the Sanctions hearing as the Appellate Division has already found that suspension is warranted pending a sanctions hearing, and a separate Post-Suspension Hearing is not required to serve due process,

respondent having already had due process before Judge Kaplan. See letter dated October 22, 2018, by George A. Davidson, Pro Bono Special Counsel, and Naomi F. Goldstein, Of Counsel to the Attorney Grievance Committee, also made a part of the record. The AGC also submitted a memorandum of law as to what evidence is admissible at a Section 1240.9(c) hearing, both documents are attached as Exhibit B.

Having reviewed the record in this case, the decision of District Judge Kaplan, the affirmance of the Second Circuit, the per curiam decision of the Appellate Division, and the submissions of the parties and their citations of law, it is not clear to me that there is an easy answer to the position of respondent. However, as Referee, it is my responsibility to rule on the application of collateral estoppel, and on any other procedural or evidentiary matter before me. *In re Abady,* 22 A.D3d 71. To argue that respondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer, is to overlook the substantial differences in the proceedings. There is an obvious asymmetry in the case before Judge Kaplan and the case now underway to sanction respondent notwithstanding similarity or even identity of factual issues.

In particular, in the U.S. District Court, respondent was faced with an equity case without a jury to invalidate a foreign judgment brought against him and others in which the District Judge, in so many words, but in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron. It is doubtful that if an indictment in the

same terms had been brought by the United States Attorney, respondent would have elected to have a trial by a single judge and would have waived his right to a trial by jury. Furthermore, in the case before Judge Kaplan the standard of "beyond a reasonable doubt" was not applied to the facts presented. Judge Kaplan applied the civil standard of a preponderance of the evidence as the law requires. Other material differences can be noted, such as the lack of notice to respondent that his status as a lawyer was in jeopardy before Judge Kaplan, or for that matter, notice that he was, in substance, facing potential criminal charges regarding the judgment at issue. For reasons not readily apparent, on appeal to the Second Circuit respondent did not appear to contest the sufficiency of the evidence supporting any of the factual findings of the District Court. Instead, respondent raised jurisdictional defenses to no avail.

Finally, it is open to question, at least initially in this Post-Suspension hearing whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence.

However, I am inclined to allow respondent latitude in his defense to the Charges against him in this proceeding, and to reserve my decision as to whether collateral estoppel should be applied in these circumstances. This leads me to accept both the second part of respondent's First Proposal, *i.e.,* that part stated as "Alternatively, due process requires ..." (Garbus letter, page 3) and the Second Proposal, as stated in the Garbus letter. It is not my intention to allow respondent to re-try the case against him before Judge Kaplan, but rather to allow him a hearing to address some or all of those findings

in a way that is reasonably fair and practical. Counsel states that he needs two days for this, "approximately." There can be no discernible harm to the "public interest" by this approach. The time to be allowed will be flexible and not restrictive, but not expandable without good cause.

The intention is to have an actual "hearing" pursuant to 22 NYCRR 1240.9(c), where respondent can address the Charges against him as he sees fit, even to the point of disagreeing with, or providing context to the facts in the first instance found by the District Court, and affirmed as found by the Second Circuit, on the ground that a strict application of the collateral estoppel doctrine, in the circumstances before me, may place respondent in an unfair position, and one he likely could not have foreseen as he set out in the Southern District Court to defend the judgment he obtained in Ecuador.

All parties will meet as re-scheduled on December 4; the DDC will be assumed to continue its position that no further hearing is required post-suspension, in this case. The respondent will be prepared to proceed with his evidence, following the guidelines of this decision. As agreed, the hearing will continue to December 5, and future hearings including the Sanction hearing will be scheduled at the convenience of the parties.

Dated: New York, New York
November 8, 2018

/s/ John R. Horan, Referee
John R. Horan, Referee

EXHIBIT A

Offit Kurman
Attorneys At Law

Martin Garbus
Principal
(347) 589-8513
mgarbus@offitkurman.com

October 19, 2018

Referee John R. Horan, Esq.
Fox Horan & Camerini
825 Third Avenue, New York, New York

Re: *Matter of Donziger*
(Index No.: 003839/2014)
Proposal for Hearing Procedure

Dear Referee Horan:

As discussed at the last hearing, here is Respondent's proposed procedure for the two hearings to be held in this matter.

Post-Suspension Hearing

As you know, Respondent received as ***interim*** suspension of his law license, from the First Department, without a hearing, pursuant to 22 NYCRR 1240.9(a). The suspension is "on a interim basis during the pendency of an investigation or proceeding…" *Id.* Under 22 NYCRR 1240.9(c) he is entitled to a post-suspension hearing before his suspension becomes final.

This right to a post-suspension hearing is apparently to accord due process and allow the Respondent to point out errors in the procedure resulting in the determination that he "engaged in conduct immediately threating the public interest." *Id.* This is in accord with federal due process cases.

The U.S. Supreme Court has held that bar disciplinary proceedings are quasi-criminal in nature, entitling the attorney to due process protection. *In re Ruffalo*, 390 U.S. 544, 550 (1968). "[S]ome form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

"Because an attorney disciplinary proceeding is quasi-criminal in nature, the Due Process Clause entitles the charged attorney to, *inter alia*, adequate advance notice of the charges, and the opportunity to effectively respond the charged and ***confront and cross-examine witnesses***." *In re Peters*, 642 F.3d 381, 385 (2nd Cir. 2011)(emphasis added). As the Court said in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970):

> [W]here credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. . .
>
> In almost any setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Mr. Donziger should be allowed to confront and cross-examine the witnesses against him. But based upon exchanges in the last hearing, Mr. Donziger understands that at this point the Referee believes that the First Department's reliance on collateral estoppel in its ***pre***-suspension decision, means Mr. Donziger may not contest Judge Kaplan's findings in the ***post***-suspension hearings. This is an issue to be decided, in the first instance, by the Referee. *See Matter of Abady*, 22 A.D.3d 71, 82 (2005). And it has not yet been decided.

Matter of Abady, supra, confirms that referees are given broad powers to "decide motions, issue findings of facts and conclusions of law and make '[d]eterminations' as to whether charges should be sustained and actions imposed." 22 A.D.3d at 82. This includes the power to make rulings as to the appropriateness of collateral estoppel. *Id.* Thus, in the first instance, it is the Referee's job to determine whether collateral estoppel is appropriate in the post-suspension hearings. No other tribunal has ruled on that yet.

Accordingly, Mr. Donziger's first proposal is that he be allowed to present evidence and argument as to why collateral estoppel is not appropriate in this post-suspension context. If allowed to do so, he believes he will prevail, and a subsequent hearing will be necessary to address what evidence exists to justify any discipline against him.

If he is not given the right to demonstrate why collateral estoppel is inappropriate in the post-suspension hearing, Mr. Donziger should at least be

given the opportunity to point out not only "the risk of an erroneous deprivation . . . through the procedures used"[1] by the First Department, but also the actual mistakes made by the First Department. If a post-suspension hearing does not give the right to point out mistakes made in the original suspension, then what is the point of a post-suspension hearing? Such an approach is consistent with *Matter of Jacobs*, 44 F.3d 84 (2nd Cir. 1994).

Jacobs presented a mirror image of the issue presented here. The question was whether the federal courts could rely upon a bar suspension imposed by the New York Appellate Division in suspending attorney Jacobs from practicing before the federal courts. Before deciding that it could rely upon the Appellate Division decision, "The district court had to examine the state proceeding for consistency with the requirements of due process, adequacy of proof and the absence of any indication that imposing discipline would result in grave injustice." *Id.* at 88 (citing *Selling v. Radford*, 243 U.S. 46, 51 (1917). A similar inquiry is warranted here.

The private interests here at stake are serious—Mr. Donizger's property interest in his law license and livelihood, and his liberty interest in his reputation. *See Arnett v. Kennedy*, 416 U.S. 134, 156 (1974)(When government action may wrongfully injure a citizen's reputation, one function of granting a hearing after that action is to allow the person "an opportunity to clear his name.") The post-suspension hearing must give Mr. Donziger the opportunity to clear his name.

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[1] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

In addition to adequate notice of the charges, procedural due process also guarantees an attorney the right to a decisionmaker who is neutral and detached. *See Ward v. City of Monroeville,* 409 U.S. 57, 61-62 (1972). Instead of doing its own fact-finding, the First Department is relying upon the findings of Judge Kaplan. Donziger must be permitted an opportunity to prove that that decision-maker, Judge Kaplan, was not neutral and detached.

Proposals for Post-Suspension Hearing

First Proposal:

Mr. Donziger requests the opportunity to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings. If he is successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the Grievance Committee would present the evidence against him, and he would have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own.

Alternatively, due process requires that Donziger at least has the opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him. This could be done in approximately two days.

Second Proposal:

If the Referee denies Donziger the opportunity to defend against the findings of Judge Kaplan, then Donziger would propose that in the post-suspension hearing he would present:

1. Evidence and argument regarding mistakes made by First Department in its decision applying collateral estoppel in this matter;

2. Evidence and argument regarding the "risks of erroneous deprivation" caused by the First Department's approach;

3. Evidence and argument addressing whether Judge Kaplan's findings are consistent "with the requirements of due process, [the] adequacy of proof [for his findings] and whether there is an indication that imposing discipline [based on those findings] would result in grave injustice." *Jacobs, supra*. at 88; and

4. An offer of proof, making a record of the evidence Donziger would present to refute Judge Kaplan's findings, were he permitted to do so.

If this second proposal is adopted, Donziger expects the hearing could be concluded in one day or less. If this proposal is adopted, Donziger asks that the hearing be held on November 8th. If the First

Department has not ruled on his counsels' *pro hac vice* applications and his motion to open these hearings to the public by November 2nd, Donziger will ask for a brief continuance of the hearing until those rulings are received.

Sanctions Hearing

Assuming the first hearing does not convince the Referee to recommend a change in the Grievance Committee's position, the second hearing—the sanctions hearing—should be straightforward, addressing issues such as:

1. With respect to each finding of Judge Kaplan cited by the Grievance Committee: does it justify discipline?

2. Are there mitigating factors?

3. Are there aggravating factors?

Donziger expects this hearing will take approximately two days.

Donziger asks that this letter be made a part of the official record of these proceedings.

Sincerely,
/s/ *Martin Garbus*
Martin Garbus

cc: Naomi F. Goldstein, Esq.
Richard Supple, Esq.
Richard Herz, Esq.
John R. Horan, Esq.

EXHIBIT B

ATTORNEY GRIEVANCE COMMITTEE

JORGE DOPICO
CHIEF ATTORNEY

October 22, 2018

PERSONAL AND CONFIDENTIAL

John R. Horan, Esq.
Fox Horan & Camerini
825 Third Avenue
New York, NY 10022-7519

Re: Matter of Steven R. Donziger

Dear Mr. Horan:

We write to respond to Respondent's proposal for the procedures to be followed in a post-suspension hearing. Essentially, Respondent proposes that the Referee challenge the Court's imposition of collateral estoppel. Citing to *In re Abady*, AD3d 71 (2005), respondent asserts "[I]t is the Referee's job to determine whether collateral estoppel is appropriate in the post-suspension hearings." Not surprisingly, Abady does not support any such notion. Abady involved a respondent charged with 28 counts of misconduct. He protested the Referee's application of collateral estoppel to find him guilty of some of the charges based on civil court findings and decisions, claiming that Referee exceeded her authority because the order appointing her only authorized her to "hear and report." The Court found no merit to the respondent's argument and went on to point out that

since "every finding, ruling and determination by the Referee is subject to review by…this Court, which has the sole authority to impose discipline," there was "no danger" that the "Referee, rather than the Court, will finally determine an issue." Id. at 83.

Respondent also relies on *In re Jacobs*, 44 F.3d 84, but that case undermines, rather than supports, his position. Jacobs was reciprocally suspended in the Eastern District of New York on the basis of his suspension by the Second Department. On appeal, the Second Circuit dismissed as meritless Jacob's claim that due process required that he receive a separate evidentiary hearing, noting that Jacobs had ample opportunity in the state proceeding to present evidence, and in fact did so. Indeed, the Second Circuit found that the Eastern District had a clear interest in denying an evidentiary hearing which would "require the grievance committee to expend valuable resources of time and effort on a proceeding which….would do no more than…give Jacobs an unwarranted second opportunity to try the issues all over again." Id. at 90. Respondent here, of course, had ample notice and significant opportunity to be heard and he was.

The fallacy in Respondent's argument that the availability of a 1240.9(c) hearing opens up the First Department's collateral estoppel ruling is demonstrated by the following hypothetical. Suppose the Court had granted the Committee's collateral estoppel motion but denied the motion for interim suspension. There is no question that the Referee would be obligated to recommend a sanction based on the Court's findings of misconduct on the basis of

collateral estoppel. The situation here is no different; the Referee is to recommend a sanction based on the Court's findings. It is absurd to suggest that the Court's granting of additional relief in the form of an interim suspension undermines the principal ruling that Respondent is bound by collateral estoppel. Whatever Respondent may choose to do at a post-suspension hearing by way of mitigation evidence, the collateral estoppel ruling is not subject to reexamination.

Clearly, Respondent's goal is to defeat collateral estoppel. Put another way, he wants to appeal the Court's order. He can try in the Court of Appeals, not in a post-suspension hearing.

Finally, with respect to the sanction hearing, and contrary to Respondent's proposed point one, the Referee, as always, is tasked with recommending the appropriate sanction given the misconduct taken as a whole.

Very truly yours,

/s/ GEORGE A. DAVIDSON
GEORGE A. DAVIDSON
Pro Bono Special Counsel

/s/ NAOMI F. GOLDSTEIN
NAOMI F. GOLDSTEIN
Of Counsel

MEMORANDUM OF LAW OF THE GRIEVANCE COMMITTEE RE: ADMISSIBLE EVIDENCE AT A SECTION 1240.9(c) HEARING

Overview

This memorandum conveys the view of the Attorney Grievance Committee as to what evidence may be submitted by Mr. Donziger at the 1240.9(c) hearing and the sanction hearing. Although the Court ordered the sanction hearing and separately granted Mr. Donziger's request for a post suspension hearing, the Committee respectfully submits that the post suspension hearing should be consolidated with the sanction hearing because admissible evidence in both would be identical.

The History of Post-Interim Suspension Hearings

Section 1240.9(c) of the Rules for Attorney Disciplinary Matters authorizes the interim suspension of a lawyer pending a disciplinary proceeding. For example, a lawyer who defaults in responding to a petition or a subpoena to appear for an examination under oath may be subject to an interim suspension.

In a pair of cases decided together, the Court of Appeals upheld the constitutionality of interim suspensions ordered without a hearing, *Matter of Padilla* and *Matter of Gray*, 67 N.Y.2d 440 (1986). Several years later, in the course of reversing the Second Department for ordering an interim suspension without stating its reasons for doing so, the Court of Appeals in *Matter of Russakoff*, 79 N.Y.

2d 520 (1992) criticized the Appellate Division for having no rule requiring a prompt post-suspension hearing: "[I]t is worthwhile to note that neither the Appellate Division rules…nor the specific order in this case provided for a prompt post suspension hearing. Some action to correct this seems warranted," citing the United States Supreme Court's decision in *Barry v. Burchi*, 443 U.S. 55, 66-68 (1979). Subsequent to the Court of Appeal's admonition in *Russakoff*, the First Department enacted its own rule [former 22 NYCRR 603.4(c)(2)], now superseded by the statewide rule at Section 1240.9(c).

As this history reflects, the purpose of Section 1240.9(c) is to provide the respondent with a due process opportunity to respond to the allegations against him or her. The situation here, of course, is different. Mr. Donziger has already had that opportunity in the seven week trial before Judge Kaplan where he testified and offered countless documents into evidence. Nor do we have mere allegations. The First Department has found that the misconduct established by Judge Kaplan constitutes professional misconduct, in violation of former Disciplinary Rules 1-102 (A)(4), 1-102 (A)(5), 1-102 (A)(7), 7-102 (A)(6), 7-105, 7-110(A), 7-110(B) and the New York Rules of Professional Conduct 3.4 (a)(5), 3.5(a)(1), 8.4 (c), and 8.4 (d). Nevertheless, the Court was constrained to offer Mr. Donziger a post suspension hearing to comply with Section 1240.9(c)[1].

[1] The Court also set forth its basis for the suspension, in full compliance with 1240.9.

Respondent May Not Contradict Findings Given Collateral Estoppel Effect

It is well established that collateral estoppel bars a respondent from relitigating the Court's findings at a subsequent hearing. *In re Abady*, 22 AD3d 71 (1st Dept 2005)(Referee properly invoked collateral estoppel to preclude respondent from relitigating civil decision and order); *In re Osborne*, 1 AD3d 31 (1st Dept. 2003)(respondent's stubborn attempts at the sanction hearing to relitigate the collateral estoppel findings of the Court deemed an aggravating factor); *In re Morrissey*, 217 AD2d 74 (1st Dept 1995)(respondent's attempts to reargue the collateral estoppel findings of professional misconduct misplaced, the only remaining issue to be determined being sanction).

In *Matter of Kramer*, 235 AD2d 87 (1st Dept 1977), our Court interimly suspended the respondent on the basis of misconduct findings by Judge Cote in the Southern District of New York, including among other things making false statements concerning discovery, and remanded to the Departmental Disciplinary Committee for a sanctions hearing. In a subsequent opinion accepting the Committee's recommendation of disbarment, the First Department affirmed the findings of fact and conclusions of law of the Hearing Panel and disbarred the respondent:

> "The panel refused to rely on a polygraph test purporting to contravene the Southern District's finding that he had liked about certain discovery issues in the Selby matter, as this court had

> already ruled that respondent was collaterally estopped from challenging the District Court's finding."

Matter of Kramer, 247 A.D. 2d 81, 83 (1998), citing 238 A.D. 2d at 89.

Except as a technique to compel cooperation from a respondent who has failed to comply with lawful demands of the Court or the Committee, as a practical matter, the First Department does not impose interim suspensions unless the conduct charged is of a nature that the final sanction would be substantial suspension or disbarment. This is as it should be, as there would be no reason for an interim suspension of a respondent who would be facing only a public censure.

Precluded from relitigating the collateral estoppel findings, the only evidence that respondent could submit it in a post suspension hearing is evidence in mitigation, and since an interim suspension in practice constitutes an early start on a final suspension or disbarment, effective mitigation evidence would be directed to whether a final suspension or disbarment would be appropriate. But that is all that may be done in a sanction hearing. So the two hearings are effectively identical. It would make no sense to have two separate hearings and to have two different submissions to the Appellate Division, particularly where, as here, the only "interim" period is the period required to do the sanction hearing.

Of course, Mr. Donziger's burden of persuading the Court that he should not be disbarred, or even given a lengthy suspension, is significant, as the First Department routinely has disbarred respondents in cases involving obstruction of justice or deliberate falsehoods in Court or other government proceedings. See, e.g., *Matter of Zappin*, 160 A.D. 3d 1 (2018); *Matter of Troung*, 22 AD 3d 62 (2005); *Matter of Dougherty*, 7 A.D. 2d 163 (1999); *Matter of Patel*, 209 A.D. 2d 100 (1995); *Matter of Padilla*, 109 AD2d 247 (1st Dept 1985); *Matter of Friedman*, 196 A.D. 2d 152 (1965); *Matter of Lemkin*, 17 A.D. 2d 163 (1963).

The practice of the Court has been to make final orders or suspension or disbarment retroactive to the date of the interim suspension. This has great significance to respondents, since every day that an interim suspension is in place brings closer the day that the respondent would become eligible to apply for reinstatement, i.e. the last day of the suspension, or seven years from disbarment. For this reason, hearings to challenge interim suspensions under Section 1240.9(c) or its predecessor, had been rare.

Conclusion

For the foregoing reasons, a single hearing should be held at which respondent may present evidence in mitigation.

Dated: New York, New York
October 19, 2018

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

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In the Matter of Stephen R. Donziger,
(admitted as Stephen Robert Donziger),
a suspended attorney: RP No. 2018.7008

Attorney Grievance Committee Before: Referee
For the First Judicial Department, John R. Horan

Petitioner,

Stephen R. Donziger,
(OCA Atty. Reg. No. 2856052),

Respondent.

----------X

REPORT AND RECOMMENDATION

Preliminary Statement

By order of the Supreme Court of the State of New York, Appellate Division, First Department, the undersigned was appointed Referee on August 9, 2018, to hold a hearing on the appropriate sanction for Respondent. The same Court had entered an Order of Suspension on July 10, 2018, finding Respondent guilty of professional misconduct in violation of former Disciplinary Rules 1-102 (A)(4), 1-102 (A)(5), 1-102 (A)(7), 7-102 (A)(6), 7-105, 7-110 (A),

and 7-110 (B), and the New York Rules of Professional Conduct 3.4(a) (5), 3.5 (a) (1), 8.4 (c), and 8.4 (d). The Order of Suspension is based upon his actions as found in *Chevron Corp. v. Donziger, et al.*, 974 F. Supp. 2d 362 (S.D.N.Y. 2015), aff'd, 833 F.3d 74 (2d Cir. 2016), cert. denied, 137 S. Ct. 2268 (2017). The District Court's decision is referred to hereinafter as the "Kaplan Decision."

On August 16, 2018, the Court entered a further order supporting its previous Order of Suspension, citing 22 NYCRR Section 1240.9 (a) "upon a finding there was uncontroverted evidence that Respondent engaged in serious professional misconduct immediately threatening the public interest," noting that Respondent had filed a written request for a post-suspension hearing pursuant to Section 1290.9 (c), and granting Respondent's application for a post-suspension hearing. The undersigned was appointed to hear this matter and to report his findings to the Attorney Grievance Committee (hereinafter referred to as the "Committee").

Thereafter, Respondent moved for an order permitting the hearings to be public and to lift the confidentiality normally covering these proceedings. The court granted Respondent's motion by Order of November 29, 2018.

The ordered hearings under Section 1240.9 had been convened under the usual confidentiality, on September 26, 2018, at the Committee's Hearing Room, 61 Broadway, New York, N.Y. At this hearing Naomi Goldstein, of Counsel to the Committee, and

George A. Davidson, as Special Pro Bono Counsel to the Committee appeared for the Committee; and Richard Friedman and Aaron Page, admitted *pro hac vice*, and Martin Garbus, a member of the New York bar, appeared for Respondent, who also appeared pro se.

At this opening session, there developed a discussion of the appropriate limits of proof for the parties, under the applicable doctrine of collateral estoppel. The court, in referring the matter for sanction hearings – both on the order of temporary suspension and for ultimate sanction – had applied that doctrine to the factual basis for sanctions.

On October 30, 2018, as Referee, I proposed a procedure for hearing the matter of the interim sanction pursuant to 22 NYCRR 1240.9 (a) and (c), and ultimate sanction, by allowing some latitude in the proof available to Respondent with respect to findings to which collateral estoppel would be applied, and scheduled a resumption of the hearing on December 4 and 5, 2018. Attached as Appendix A to this report is a copy of the proposal made to counsel (without exhibits). Counsel for the Committee objected to the proposal, and moved to stay proceedings and appealed to the Court to rule on the limits of proof as to evidentiary matters barred under collateral estoppel. The proceeding scheduled for December 4 and 5 was stayed pending the Court's decision.

On January 17, 2019, the Court ruled that "…the Referee may not reexamine this Court's determination, based on the doctrine of collateral estoppel, that Respondent committed professional

misconduct (M-5635), and the post-suspension hearing is limited to whether the professional misconduct Respondent committed warranted his interim suspension pursuant to 22 NYCRR 1240.9 (a)."

The requested hearing under Section 1240.9 (c) reconvened on September 16, 2019, and continued on September 17, and 18; it further reconvened, by consent of the parties, on October 18, and it concluded on that date. The parties requested until December 11, 2019, to submit final briefs. On October 18, 2019, I again noted on the record that I had ruled the two sanction hearings were to be consolidated, as the mitigation proof to be offered by Respondent in opposition to interim suspension, and aggravation evidence, if any, in respect of any final sanction determination, were conceded, after discussion, to be the same. R. 626 and preceding pages. Accordingly, it is unnecessary to make a separate report and recommendation for a separate post-suspension hearing as earlier requested by Respondent under Section 1240.9 (c). I note in this connection that Respondent continues to insist there is not an "uncontested" factual basis for the interim suspension, nor a threat to the public interest and argued that there should be a separate sanction hearing. The premise of Respondent's continued argument that he is due a full and separate hearing on the interim suspension is that he could show facts to dispute Judge Kaplan's findings and that therefore there are not uncontested facts as a basis for interim suspension. But this argument runs into the doctrine of collateral estoppel, held by the Court to apply in this case. The doctrine, in effect, means there are not

any contested facts present and that a hearing under 1290.9 (a) would not be meaningful; furthermore, that proof of any threat to the public interest would be the same in either case. For that reason I ruled that the two hearings were to be merged into one final sanction hearing.

HEARING AS TO SANCTION

We begin with the well understood view of New York's statutes concerning the sanctioning of attorneys who have been found to have violated the Rules of Professional Conduct ("RPC"), and pre-2009, the Code of Professional Conduct, that the point of enforcement is not punishment but rather bringing accountability for unprofessional conduct to the attention of the Court, and the consideration of whether a Respondent, under the circumstances of each case, is in any sense a threat to the public interest, or to actual or potential clients of Respondent. *Matter of Levy*, 37 N.Y.2d 279, 372 N.Y.S.2d 41 (1975).

In considering what sanction to propose in this decidedly unusual case, which is unprecedented (findings criminal in nature in a civil RICO case) and bears none of the characteristics of a typical attorney grievance matter (although the Committee raises questions about Respondent's professional accounting practices), some background to the charges brought by the Committee is useful and instructive. The original litigation upon which the Kaplan Decision is constructed began in October 2003, in Ecuador, after several years of efforts to bring the case in the United States. Chevron had agreed, finally, to litigate the

case in Ecuador if it were sent there by our own United States District Court in New York. It became known as "the Aguinda" litigation; there was Aguinda I and Aguinda II, and resulted in the Lago Agrio judgment issued in Ecuador. We are concerned with the second case and its aftermath beginning in 2003.

In Ecuador, the Respondent showed himself a master of publicity and dramatization in his ability to engage journalists in a world- wide condemnation of the practices of major oil companies like Texaco, and its successor, Chevron. He befriended Amazon Watch and likened the devastated Lago Agrio site in the Amazon basin where the litigation was centered as similar to the catastrophic aftermath of the nuclear explosion at Chernobyl. At the same time, Respondent respected the local nature of the problem and promoted an Ecuadorian lawyer, Pablo Fajardo, as the plaintiffs' lead attorney in court and, generally, in public. But, it appears from Judge Kaplan's detailed findings that Respondent hardly ever let go of the principal levers of the case whether with the judges assigned to hear it, or with the attendant public relations, press, and other sources of publicity.

In 1999, the Ecuador legislature had passed the Environmental Management Act; this statute authorized citizen action for reparations for environmental damages. For the first time the Ecuadorian judiciary could entertain actions for social benefits by private parties. A rough comparison would be to the Superfund legislation of the United States and the class action litigation that followed.

There were several years of litigation in Ecuador on behalf of the plaintiffs who were, initially, indigenous Americans of Ecuador whose land apparently had been despoiled by Texaco, and not remediated by Chevron (who had purchased Texaco), and perhaps also despoiled by the Ecuadorian State petroleum company itself. Plaintiffs, guided in part by Respondent Donziger, but aided by several American firms and Ecuadorian lawyers, obtained a judgment in favor of the Lago Agrio plaintiffs in the amount of $8.646 billion in compensatory damages and $8.646 billion in punitive damages against Chevron Corp. (to be assessed unless Chevron issued an apology, which it did not), for a total of $ 17,292 billion. This has been referred to generally as the "Lago Agrio Judgment". On appeal, to the Ecuador Courts of Appeal, the punitive damages were struck down, and a final judgment against Chevron in the amount of $8,646 billion was entered in 2011. Throughout this hard fought litigation Respondent, always fronted by Ecuadorian counsel, was active in Ecuador as strategist and fundraiser for prosecuting the action. All appearances in the action were made by Ecuadorian counsel. Respondent himself has a contingent fee in the proceeds of the Lago Agrio judgment, although under an agreement of retainer dated in 2017 he has received in the interim substantial fees from funders and donors as well.

Chevron had made charges that the judgment was obtained corruptly in Ecuador as part of the appeal process. But none of their charges were upheld, and no court in Ecuador has found the judgment corrupt. However, well before the Lago Agrio judgment in Ecuador finally issued, in early

2011, Chevron began litigation in the United States and attacked Respondent personally, bringing a civil injunctive action for obtaining a corrupt judgment and other alleged wrongs, and seeking money damages against the Respondent, in the United States District Court for the Southern District of New York. Judge Lewis Kaplan was assigned to the case. Also, before the final judgment in Ecuador Chevron brought several separate discovery actions under 28 U.S.C. Sec. 1782, purportedly in aid of the Lago Agrio litigation. Chevron requested a world-wide injunction of the Ecuadorian judgment; Judge Kaplan granted this remedy, and was quickly reversed by the Second Circuit, and a preliminary injunction limited to the United States was allowed. See *Chevron v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), cert. denied, 133 S. Ct. 423.

Upon remand to the District Court, Chevron revised its attack on Donziger and abruptly waived its claims for damages, turning the case into an equity case for equitable relief on the ground that Donziger had procured a corrupt judgment in Ecuador, among other alleged wrongs. The result was a trial alleging what would have been serious felonies in any jurisdiction to be tried before Judge Kaplan as a civil RICO case, without a jury. Judge Kaplan apparently suggested that the case warranted a RICO civil proceeding and a trial before him without a jury. At the time Judge Kaplan did not hide his regard for Chevron and its predicament as a judgment debtor. On the public record he stated: "We are dealing here with a company of considerable importance to our economy, that employs thousands all over the world, that supplies a group of commodities – gasoline, heating oil, other fuels, and lubricants – on which

every one of us depends every single day." These comments by Judge Kaplan are quoted from the official transcript by Bloomberg Business Week senior writer, Paul M. Barrett, in *Law of the Jungle*, p. 205, First Paperback edition, Broadway Books, 2014.

The result of this civil equity trial was the Kaplan Decision, as affirmed, which is the foundation of the charges against Respondent. The decision is three hundred and forty three (343) pages in the Federal Supplement, 2d series, and exhaustively recounts the facts as found by the judge. Upon petitioning the Appellate Division of the Supreme Court of the State of New York, First Department, to suspend Respondent pending a hearing to determine a final sanction, the Committee invoked the doctrine of collateral estoppel, which purports to effectively deny Respondent the ability to dispute any of the underlying facts constituting violations of the Rules of Professional Conduct found by Judge Kaplan. The Committee's motion to suspend Respondent was made nearly two years after the Second Circuit's affirmance, and after the United States Attorney's Office had declined Chevron's effort to persuade that Office to prosecute the case against Respondent as a criminal matter. The chronology of this matter and the disinclination of the United States Attorney's Office to pursue Respondent are facts that in the view of some observers mitigate the finding that Respondent is a threat to the public interest. Apparently, the Appellate Division in ordering his interim suspension did not agree.

EVIDENCE IN MITIGATION

Respondent's Denial of the Charges

Both the District Judge and the Second Circuit Judges in their decisions asserted that Respondents (there were other named defendants in addition to Respondent Donziger) had not contested the underlying facts. However, Respondent and his counsel at the hearing testified that these statements were not accurate and that the Respondents had not, in any way, allowed the facts presented by Chevron to be treated as uncontested. The testimony of Respondents' highly qualified and experienced appellate counsel, Deepak Gupta, disputed the assertion of both Courts that the facts were not contested. R. 359. He was very clear that the appellate brief to the Second Circuit did contest every material finding of Judge Kaplan. He explained that to undertake a review of the facts of such length (over 500 pages of factual findings) on the only available ground on appeal that they were "clearly erroneous" would have diverted necessary pages and analysis from (in their view) the strong legal objections to the District Court's decision. R. 360-362. However, he agreed to represent Respondent on his appeal from the Kaplan decision because "I felt like a great injustice was being done." R. 357. "I have never seen a judge whose disdain for one side of the case was as palpable on the bench in ways that I think may not have always come through in the paper record. But it was fairly obvious that Judge Kaplan had great personal animosity for Steven Donziger." R. 357.

At the conclusion of Mr. Gupta's testimony, I made it clear that his testimony had been allowed, against the Committee's objection, for the purpose of exploring how Respondent's denial before me should be interpreted, and not to contest the findings of the District Court as affirmed by the Second Circuit. R. 364, 365. Mr. Gupta also expressed his opinion about Respondent's honesty, integrity and whether he posed a threat to the public interest. He said: "To the extent that I understand what the phrase means, I can't imagine how anyone would think that Mr. Donziger poses a threat to the public interest. This is not someone who is taking the money of clients… This is someone who has pursued a single matter for decades. …I can't imagine how anyone could say that he poses some kind of ongoing threat to the public interest. It's absurd." R. 370, 371.

Respondent himself testified, in answer to detailed questions of his counsel, that he had not done any of the corrupt acts with which he has been charged by the Committee. In view of this testimony, and of an appellate strategy that has had unintended consequences, I allowed Respondent to make his denials of the Charges, in the face of collateral estoppel, to allow him to explain why he has not shown any remorse in the circumstances of this case.

As noted above, there is nothing usual or customary about this case, and it is without precedent. However, it is not my place to challenge Judge Kaplan's findings per se; but it is my place to allow Respondent facing the most serious sanction of disbarment to explain himself as fully as he can without encroaching unduly on the boundary of

collateral estoppel. I do not believe a fair hearing can be held otherwise. Only then can a sufficient assessment of his character and fitness be made. In his testimony before me, Respondent was candid and clear and showed no sign of dissembling or evasiveness. He responded directly to his counsel's questions, to counsel for the Committee, and to myself as referee. His direct testimony is discussed further below.

RESPONDENT'S CHARACTER AND REPUTATION

Several witnesses, all distinguished in their respective fields, testified as character witnesses. Domingo Peas (Uyunkar Domingo Peas Nampichkai), an indigenous leader of the Achuar, an ethnic group within the Amazona people, spoke eloquently of Respondent's value to his community, and of the work he had done on their behalf. There was no question in his mind of Respondent's reputation for integrity. He regards Respondent as "counselor of my lawyers in Ecuador." R. 299. Furthermore, "…He is not a danger to the people…he is a man of respect, and he has earned the respect of my people. For me there is no danger. He has been the connection with my lawyers to be able to defend my people." R. 299. "He is super honest and this is the way that I know him. Otherwise I would never have come." R. 304.

Mr. Paz y Mino, an Associate Director of Amazon Watch, testified to the high degree of confidence he and others associated in advocating for the environment and human rights in that area, have for Respondent and credit his tenacity with keeping

the case alive in the face of Chevron's aggression. R. 236. He believes Respondent has the highest integrity and he would not associate with him if he thought otherwise. Amazon Watch was not a party to the litigation. In his opinion the Chevron case is "…famous for being the largest oil-related disaster in history, and not only that, caused deliberately." R. 229. He noted also that Chevron has attacked Amazon Watch, and he characterized Chevron's attack as "…demonizing Donziger … and going after the people waging the case." R. 234. He also testified at length about his knowledge of Chevron's tactics of intimidation in environmental matters. R. 232-250.

George Roger Waters, a professional musician, and leader of the group called "Pink Floyd," testified that he had become a supporter of Respondent in about 2016, and has made several donations to him, and once to his wife, but was not an investor in the litigation arising from the Ecuadorian judgment. R. 258-262. He attested to Respondent's reputation world-wide for "great humanity" and described him as "a man of integrity … who has devoted his entire career since he left Harvard Law School to pursuing human rights issues, to defending people who are largely powerless…" Furthermore, "he is a huge help to the public interest, and presents something of a threat to corporate America which is why he is being demonized and vilified…" R. 257. He was clear that, although he does not keep careful financial records, Mr. Waters is not an investor in Respondent's causes, including the Ecuadorian judgment; he is only a donor to the cause. R. 263, 265.

Rex Weyler, a resident of Manson's Landing, British Columbia, Canada, a widely published journalist and environmental scientist, author of, among many books, *Blood of the Land*, and co-founder of the Greenpeace Environmental organization, testified about his knowledge of Respondent and his work. Beginning his investigation in 2016 into the story of the litigation in the Ecuadorian Amazon, he was introduced to Respondent. He testified that "…the first thing I came upon, because Chevron and their lawyers appear to have been very thorough at getting the story out about Mr. Donziger that he somehow corrupted this process in Ecuador…stories about Mr. Donziger that were not very flattering. I had to take these stories seriously." R. 274. He thereafter concluded that the stories were not true, and had been "fabricated." As he continued his journalistic work he found Respondent to be "extremely honest", "straightforward" and a hard working lawyer. Also, that Respondent has never "…told me anything that did not turn out to be true in my estimation and my research, and he has never led me astray." R. 275. And further, he testified that "Every shred of evidence that I came across told me that Mr. Donziger was an honest man telling the truth." R. 277. Mr. Weyler received "modest" payments for his expenses and his research in Ecuador. He concluded by stating that "Mr. Donziger is a hero in Ecuador. He's a hero in my home."

Zoe Littlepage, one of the lawyers who defended Respondent before Judge Kaplan in the U. S. District Court, testified to Respondent's essential honesty and integrity, R. 311. She admitted that his conduct was not always exemplary, and that initially

she had reservations about the allegations against him. She satisfied herself that he was innocent of the charges before signing on to defend him. R. 310-314. She stated further that her assignment was to deal with the critical witness against Respondent, Alberto Guera, on the issue of judicial bribery. She came to believe that Respondent would not and did not participate in the bribery of a judge. I note this not for the truth of her belief, but for her sincerity and willingness to continue to defend Respondent and to vouch for his character in this proceeding. I declined to admit as evidence before me various records of the trial, both factual and legal, pertaining to the judicial bribery and in which she was involved before Judge Kaplan. R. 315-317, 323 et seq.

Counsel for the Committee opened up the subject of Ms. Littlepage's closing before Judge Kaplan by summarizing her comments about Respondent's personality, as that of a "jerk or abusive to those around him or had disorganized finances but could not find that he was responsible for the acts with which he was charged." R. 328. In answering his question to confirm what she said, she responded: "It sounds like me… I thought that there were emails that put Steven in a bad light. Made Steven look very energized, very much like an activist and not a lawyer, like a jerk saying things in emails, like we all do, that may have been off the cuff. But there was no credible evidence to support that Steven had bribed the judge." R. 329. On re-direct, she went on to elaborate other points she had made to Judge Kaplan. R. 330. I noted that I allowed such testimony, again, to support testimony of others and that of Respondent himself that his denials of the Kaplan findings is

based on his belief, and the expressed belief of others, in his own innocence.

Respondent called his former trial attorney in the case before Judge Kaplan, John Watkins Keker of the San Francisco firm Keker, Van Nest & Peters. Mr. Keker, a Marine veteran and a widely admired trial lawyer with national experience, agreed to represent Respondent in February, 2011. His representation lasted until May of that year. When asked why he had moved to withdraw as trial counsel to Respondent Mr. Keker replied: "the handwriting was on the wall that this was a (indiscernible word) by Chevron. Judge Kaplan made it clear that he was determined to see Mr. Donziger, I think, convicted of the charges Chevron was making. Chevron was, through scorched earth tactics, running up huge bills. They had 160 lawyers working on the case from Gibson Dunn. They had 60 law firms working on the case that filed for summary judgment motions. It was simply economically impossible for us to keep up… It was not going to end well…I filed a motion in which I stated why we were withdrawing." R. 341. He called the trial proceedings a "farce." R. 341. In later testimony he expanded on his view of Judge Kaplan's "unfair" procedural rulings, such as consistently and unfairly (in his view) limiting Respondent's time and ability to be heard or to examine documents. R. 348, 349. Mr. Keker offered his opinion of Respondent's character and his truthfulness: "With me, Steven was straightforward and truthful." R. 342. When asked by Respondent's counsel whether in his opinion Respondent is a threat to the public interest, he responded: "Quite to the contrary, it's ridiculous." R. 347. Further to that point he stated that during the

period he has known Respondent and known of his reputation, he has not been a threat to the public interest. R. 347.

Jennifer Wynn, an Associate Professor (tenured) of Criminal Justice at John Jay College, testified that she has known Respondent for twenty years. She is the author of a well-regarded book: "Inside Riker's, Stories from the World's Largest Penal Colony" (St. Martin's Press, 2001). She met Respondent while writing that book and, at the time, Respondent was working on legislation to improve attention to mental health in the New York State jails and prisons. R. 390-395.[1]

According to Ms. Wynn: "Steven is an honest person; he has integrity, he's brave. I'm baffled that he has an ankle bracelet on, baffled… his integrity is unquestionable…a person who is honest and doesn't lie…somebody who has a strong moral compass, who knows the difference between right and wrong…" R. 395. In the professional world she lives in (the university and prison/jail system) there has never been a question about Respondent's integrity and honesty…aside from Judge Kaplan…" When asked if she considered Respondent to be a threat to the public

[1] At this point in the hearing I noted for the record that during the period of Ms. Wynn's work about Rikers Island I was Acting Chair of the New York City Board of Correction, and that I was familiar with her work at the time, and that although I had heard of Respondent in connection with mental health issues, I had not had any personal or professional contact with him. R. 399.

interest she stated: "It was almost hilarious, no, no, he's a Harvard trained lawyer, he's a man who has been dedicated to righting wrongs… It is so outrageous to me that Chevron Corporation which is a massive polluter and this man is on trial, I mean fighting for his freedom… and it's depressing frankly that I even have to be here." R. 396-397.

William ("Bill") Twist was called to testify. He has a business degree from Northwestern University and has worked in financial services and banking. He has been working in Ecuador for the last twenty-five years and has known Respondent for over twenty years in connection with his work in Ecuador. R. 403. Mr. Twist assisted in setting up with John Perkins the "Pachamama Alliance", a non-profit with headquarters in San Francisco "…committed to preserve the Amazon and support indigenous people in that task." R. 404, 405. When he first met Respondent, over twenty years ago, he had already been working in the Amazon for five years. He saw him every year thereafter in Ecuador and is fully familiar with the Aguinda case and its procedural history. He regards Respondent as a man "… of great integrity, and honor, and skill, commitment, I respect him totally." R. 409. He does not believe Respondent is a threat to the public interest. R. 412.

Mr. Twist posted a bond for Respondent in the contempt case now pending in the United States District Court. "I have absolute trust in his integrity and his honor and his commitment to serve the rule of law and whatever he needs to do to clear his name." R. 412. Mr. Twist is not an investor in the judgment, and has no personal stake or interest in the case, and

wants to use his resources to "… right the wrong to bring justice to this case." R 413. He addressed the question of whether Respondent is a threat to the public interest by stating: "… I want to say I'd like to bring a bigger perspective to this whole thing because I think this is a tragedy. I think the threat to the public interest is from the way he is being punished…that he has to wear an ankle bracelet, that he's confined to his home for no reason at all other than punishment. R. 414- 416. He went on to say that "… Steven is the kind of person we are going to need in the future to resolve the kind of issues that we are going to be facing from an environmental standpoint, from a social justice standpoint." R. 416.

Mr. Twist was followed by John Perkins. Mr. Perkins has served as chief economist for a major consulting firm in Boston whose clients include The World Bank, the United Nations, and the IMF; his work was on loans for the development of infra-structure, including infra-structure benefiting major oil companies. R. 426. He is also one of the founders of Pachamamas Foundation. His view of Respondent is that "he appears to be sacrificing his life… and not to be acting for personal gain… and is certainly not a threat to the public interest." R. 436. Mr. Perkins also said that he does not believe the claims made by Chevron that he bribed a judge: "… from knowing Steve he is incredibly honest and would not do anything like that whatsoever." Although Mr. Perkins admitted that he had not read the Kaplan decision in full, but only in summaries. R 437. Mr. Perkins does not believe in the claims against Respondent because "…he is so committed to the cause of helping the people of Ecuador that he would

never do anything that might in any way jeopardize that cause." R. 438.

Simon Taylor was the last of the several credible and accomplished witnesses to attest to Respondent's character and reputation for integrity. Mr. Taylor runs an international investigative agency that investigates, among many subjects, illegal trafficking in the animal kingdom; e.g., trade in rhino horns, whales, ivory, and the like. He is the co-founder of Global Witness, which won a Nobel Peace Prize in 2003 for exposing the business of "blood diamonds." R. 446.

Mr. Taylor has concluded, after twenty years of investigations "… in many parts of the world, the operations of this sector (referring to the extractive industries), writ large, are corrupt…based on predatory deals that are illicitly obtained under the table through payments to people in a myriad of different maneuvers." R. 448-450. As a consequence he has established an initiative that requires companies to publish what is actually paid for their operations, aimed especially at these industries. As to Respondent, Mr. Taylor stated: "I have met a lot of people over the last twenty five years involved in what I would consider to be an accountability struggle…and I would describe Steven Donziger as right up there as a first among equals of the kind of people in really tough places… I have enormous respect for what he has done… He is an honest person without any hesitation or doubt." He does not believe Respondent capable of bribing a judge, or of being a threat to the public interest. R. 455. He has read all of the Kaplan Decision and holds to his opinion of Respondent.

The final witness of the hearing was Respondent himself. He addressed each Charge in responding to his counsel. Again, in each instance he denied the Charge, and showed no remorse in doing so. The Charges are, in each instance, as serious as any Charges by the Committee can be. As already noted they are, in substance, criminal in nature under the laws of the State of New York. In the words of the Committee's counsel the Charges are: 1) coercion of a judge in Ecuador; 2) corruption of an expert in Ecuador; 3) ghostwriting an expert's report in Ecuador; 4) misrepresenting an expert's independence in Ecuador; 5) obstruction of justice (in the United States); 6) witness tampering (in the United States); 7) threatening criminal prosecution to influence a civil proceeding (in Ecuador); and 8) bribing a judge (Judge Zambrano in Ecuador). See the Committee's Notice of Motion to Grant Collateral Estoppel and to Suspend Respondent Immediately, dated October 30, 2017, which formed the basis for the First Department's Order of Interim Suspension dated July 10, 2018.

As is repeatedly made clear on the record, I allowed Respondent to testify in summary denial about the Charges, over the continuing objection of the Committee's counsel, in order to understand the basis for Respondent's consistent assertion that at no point did he, or his counsel, fail to deny these Charges before Judge Kaplan, or on appeal to the Second Circuit. This assertion is supported by the testimony of his appellate counsel, Deepak Gupta, and by Respondent's Exhibit X in this hearing which I

admitted over objection. His Exhibit X is styled: "Final Direct Testimony of Steven Donziger" and is his statement of direct testimony before Judge Kaplan which Judge Kaplan took in written form in place of oral testimony on direct. Exhibit X became part of the record on appeal from the Kaplan Decision and undermines the comment in the opinion affirming Judge Kaplan that appellant did not contest the findings of fact by the trial judge. See, for example, Exhibit X, pp 38, 39, in reference to Judge Zambrano.

Respondent testified about his education (Harvard Law School, class of '91), after a few years as an international journalist; his early years of practice with the Public Defender of Washington D.C.; his move to New York City; and becoming a member of the bar in 1997, admitted by the First Department. From 1993 to 1995 he served as executive director of the National Criminal Justice Commission, editing a book published in 1996 called *The Real War on Crime*. Thereafter he was associated with the New York firm Kostelanetz & Fink, and after two years with that firm he became associated with Gerald Lefcourt, a well-known criminal defense lawyer in New York City. Beginning in 1999 he started a solo practice in New York City, aiming to concentrate on representing indigenous and other local communities in Ecuador. His office has been during the last few years in his residence at 245 West 104th Street, New York, New York. Respondent speaks Spanish and was first exposed to Ecuador and its Amazon population in 1993. R. 470. He thereafter joined a fact-finding mission to investigate the region affected by pollution and was an assistant to

Christobal Bonifaz, an Ecuadorian citizen who had decided to bring an action against Chevron.

The first action was filed in the United States District Court in the Southern District of New York in 1993. For approximately the next eight years until 2001, the action against Chevron proceeded in pre-trial status with appeals to the Second Circuit and back to the District Court until Chevron finally agreed to submit to the jurisdiction of Ecuador. R. 473. Respondent decided to join forces with a plaintiff's law firm in Philadelphia, Kohn Swift & Graf, and then to be present in Ecuador to assist local counsel in formulating the needed litigation.

This new phase of the case began in 2003. Respondent acted primarily as an administrator, and using his competence in Spanish, serving as an intermediary between the indigenous nationalities and the Ecuadorian lawyers bringing the action. The trial itself was held in the town of Lago Agrio; at the time it had a population of about ten thousand. The courthouse was housed in rented space in a shopping center. Plaintiffs in the class of affected people were both indigenous Amazon people and immigrants from other parts of Ecuador. R. 485, 486. He described the "waste pits" at the drilling site and the effects on streams and water sources. R. 488.

Respondent testified briefly about the ruling by Judge Kaplan in the RICO case that he had waived any privilege he could assert as counsel by failing to produce a privilege log in response to a Chevron subpoena. Respondent's waiver was followed by nineteen days of deposition. R. 495. He continued

with his experience in the RICO case by detailing Chevron's surveillance seven days a week, their use of the Kroll investigation firm, and their continued intimidation group presence at this hearing. R. 500.

Respondent, when asked why he continues his practice as he does, stated that to him the Lagro Agrio case was about cleaning up pollution that is harming people and the environment, and about "corporate accountability." As for the financing of the case Respondent described it as "…traditional plaintiff's side funding model where clients in Ecuador made available a certain percentage of their claim for payment of legal fees, out of pocket expenses and that from 1993 to 2007 the costs of the case were funded by the Kohn firm; in about 2009, Mr. Kohn decided his firm could no longer continue with the case. R. 508. Thereafter, to finance the continuation of the case Respondent brought in "investors" who received a right to receive a certain percentage of the recovery. R. 508.

Respondent's testimony about where the funds of investors went and how they were accounted for was general, somewhat vague, and on the whole not satisfactory as evidence of compliance with the Rules of Professional Responsibility. R. 508, 510. See Rule 1.15. Respondent's casual use of his personal account and his failure to set up a proper attorney trust account are noted, and not denied by him. However, there was no evidence before me that any investor had questioned or complained about the accounting for their investment or that any of the named plaintiffs or their representatives have complained. There were forty-seven individual plaintiffs in the Lago Agrio

case, indigenous to the Amazon region. Apparently there is also a non-profit entity called "FDA" through which Respondent has been paid fees and other costs of the litigation, although he has also referred to his fees as a "cost" of the litigation. R. 738-742.

Respondent testified that after the Kohn firm dropped the case, he took on the responsibility of funding the case. R. 512. The Kohn firm had been running the financial side of the case for several years, but Respondent and Kohn, a very experienced class action plaintiffs' lawyer, disagreed about settlement strategy and about the continuing cost of the case. At that point Kohn unhitched himself from the case. Respondent since then has not kept the kind of accounting records he should have. Respondent apparently rests upon an Agreement dated November 11, 2017, which he claims supersedes his original retainer agreement. Rule 1.5 (b) provides that the financial terms of a retainer should set form the terms in detail. The present agreement does not specify detailed terms such as monthly retainer payments to which Respondent has maintained he is entitled. Respondent's testimony on this subject raises questions about his accountability to his clients for funds raised, fees taken, and costs incurred. Respondent confidently brushed these questions off, and perhaps he is correct, but better accounting procedures should be instituted. R. 685, 686, 738 et seq.

As to his role in the litigation in Ecuador, Respondent said that Pablo Fajardo became the lead trial lawyer, working with two other lawyers "full time for the most part." R. 515. More specifically,

Respondent said: "…day to day I wasn't very involved. All the pleadings were written by local counsel… I did on occasion review pleadings or discuss them with local counsel when they wanted my opinion." R. 515. Respondent offered some context around various facts found by the District Court: "I was, frankly, shocked at some of the activities I watched Chevron's lawyers engage in. Without being hyperbolic… I perceived it to be akin to cheating… trying everything they could to minimize evidence of the harm that they had caused. I saw Chevron's lawyers threatening to put judges in jail if they did not rule in favor of the company." R. 522. Also, " … when I first saw or became aware that there were ex parte meetings with judges, I was very surprised. I was even a little bit affronted. I didn't understand that this was permissible in Ecuador but I saw Chevron's lawyers doing it on a regular basis." R. 522. He also cited an instance of Chevron planting a false media release (in 2009) about a "scandal" with a judge that never happened but which led to an article in The New York Times. R. 523. "We were up against something very dark, and as a lawyer I had never seen that before… I felt fundamentally their strategy was since they could not win on the evidence they had to win through other ways." R. 523. Respondent offered this viewpoint not to suggest that he and his local counsel had to adopt similar tactics, but to color his attitude about the case and why he feels so passionately in the right.

The last judge assigned to the trial, after a succession of several judges, was Judge Zambrano. I allowed counsel to ask if Respondent had bribed any judges in Ecuador, over counsel for the Committee's objection. R. 526. Counsel argued that "A direct denial

of Judge Kaplan's findings is contrary to the collateral estoppel rule with which this tribunal is bound." R. 527. I disagreed with counsel and stated on the record that a fair application of the collateral estoppel rule, in these unique circumstances, would allow Respondent at least to continue a denial also asserted before the District Court to maintain his innocence in the face of what are tantamount to criminal charges. R. 527. I also took note that the record before the District Court and the Second Circuit appears to show (according to his appellate counsel and Exhibit X) that Respondent did contest the findings of fact, however unsuccessfully. Respondent went on to again deny that neither he, nor any of the lawyers associated with him "… in any way" were involved in bribing judges, or in "ghost writing" the ultimate judgment. R. 527.

THE COURTS OF ECUADOR

Of equal importance in consideration of the appropriate sanction for Respondent are the records of appeals taken by Chevron in Ecuador from the judgment of the trial court. R. 532-534, Exhibits L and O. These show (Exhibit L, R. 533) that Chevron claims of corruption in obtaining the judgment, were considered on appeal at the first level. R. 533, 534. The Court stated: "In relation to the seventh request (by Chevron) for clarification regarding whether or not the defendant's accusations with respect to irregularities in the preparation of the trial court judgment had been considered, it is clarified that, yes, such allegations have been considered but no reliable evidence of any crime have been found. The division concluded that the evidence provided by Chevron

Corporation does not lead anywhere without a good dose of imaginative representation. Therefore, it has not been given any merit." R. 535.

Later, in the Ecuadorian highest court for civil appeals, the Court noted (Exhibit O, R. 535): "There is no legal ground or basis to annul the case as Appellant has requested time and again. It is sufficient to point out that the company never demonstrated fraud which it has been claiming without any legal support…the Appellant's incessant harping in this regard departs from procedural good faith." R. 539. According to Respondent the Ecuadorian courts had access to the full evidentiary record "…and rejected the same Chevron complaints that were brought before Judge Kaplan." R. 542.

A total of fifteen to seventeen judges reviewed the Chevron charges of fraud and concluded "…contrary to Judge Kaplan." R. 543. Respondent also testified that lost, to his prejudice in Judge Kaplan's control of the procedures of the RICO case, were counterclaims that he was not allowed to present. R. 543.

OTHER CHARGES

Concerning other charges against him for cancelling inspections and ex parte meetings, Respondent did what he observed was permissible in Ecuador and what his local counsel advised. R. 545. Inspections were played as a game for delays, and were taking place within the trial. His goal was to move the trial forward, not to delay, and he commented that it was fairly common to threaten to

report a judge for inaction. R. 550. In response to Charges 37 to 40 he admitted that "…based on advice of local counsel both what Chevron was doing and what we were doing, was generally paying experts directly and not through the court." R. 557. But he denied that the expert Cabrera (on "global damages") was ever "…paid under the table." R. 558.

Again, this testimony was taken over objection of counsel for the Committee. In the end, I ruled that I should hear why Respondent showed no remorse and that counsel's objections although dictated by his view of collateral estoppel, constituted a restraint on my task of evaluating Respondent's character. R. 559-560.

As to other charges against Respondent, Charge 45 and 46, witness tampering (in another litigation), and calling for criminal charges against Chevron, these are hard to evaluate without going into the detail of Judge Kaplan's decision. Accepting his findings on these charges, in considering a sanction overall, I have subsumed them into the more serious charges of bribery, coercion, and ghostwriting fraud, rather than deal with them separately. The same could be said about his accounting practices with other people's money. During his cross-examination he was shown to be in apparent violation of the professional rules for holding clients' funds and those on which he may have a claim for his services. R. 738 et seq. His failure to file tax returns may be the result of his distracted life recently; however, it is hard to understand why three years of not filing is excusable with someone so able. But that question should be left to the Internal Revenue Service which

is better equipped to judge such matters than the Committee. However, some supervision by the Committee is recommended below even though no complaints have been filed against him by his clients or investors. The Committee is empowered to do this in any event. Of course, his practice is highly specialized and he does not maintain an ordinary practice with a roster of clients; but he should nonetheless follow the Rules in accounting for his professional practice.

RECOMMENDED SANCTION

Counsel for Respondent in his post-hearing submission "Proposed Findings, Conclusions and Recommendations of Referee," made an effort, much appreciated, to treat each charge separately and suggest the appropriate sanction for each, summarizing the evidence from Respondent's viewpoint about each charge. Normally, I would do the same in reporting and recommending to the Court. The Committee also addressed the several violations of the Rules of Professional Conduct in great detail and with persuasive force, suggesting sanctions for each. Nonetheless, I would view the issue of sanction in these unprecedented circumstances, and addressing the several Charges collectively, as needing to answer one broad question: taking in all the evidence before me, both in mitigation and aggravation, and bound by the findings of the District Court, and conceding that the interim suspension was warranted under 22 NYCRR 1290 (a) on the Committee's presentation at the time, should Respondent's suspension be ended and should he be allowed to continue to practice law in the State

of New York? My recommendation is that his interim suspension should be ended, and that he should be allowed to resume the practice of law.

After hearing the evidence in mitigation and aggravation, the sanction of disbarment, while clearly and well-argued by the Committee, impresses me as too extreme. Nor do I think there are precedents which control. There appears to be no case like this. While Respondent is often his own worst enemy and has made numerous misjudgments due to self-confidence that may border on arrogance, and perhaps too much zeal for his cause, his field of practice is not the usual one. Lawyers with his endurance for the difficult case, one which is constantly financially risky and usually opposed by the best paid national firm lawyers available, are not available often. The extent of his pursuit by Chevron is so extravagant, and at this point so unnecessary and punitive, while not a factor in my recommendation, is nonetheless background to it. He has lost the Lago Agrio Judgment, his fee as well, and is besieged with litigation by Chevron and faces severe financial burdens.

Sanctions for an attorney's misconduct are not imposed for punishment but when the Court believes it necessary to "protect the public, maintain the honor and integrity of the profession, or to deter others from committing similar misconduct." 22 NYCRR 1240.8 (b)(2). Respondent's conduct in this unique matter, all arising from one unusually lengthy and difficult environmental pollution case conducted in Ecuador against the most vigorous and oppressive defense money can buy, leads inexorably to a severe sanction

but should be judged in its entire context; the Kaplan decision is entitled to considerable weight but not necessarily, in these unique circumstances, decisive weight.

My recommendation is that Respondent's suspension be continued until the Court reviews this report and accepts it, and if the Court does accept this recommendation, that Respondent's suspension immediately be ended and that he be restored to the bar of this State; but I also recommend that Respondent be subject to an accounting to the Committee for his treatment of client funds, donations, costs of litigation, and personal funds.

Assessment of character is not an exact science, but we can all agree that the essential components are honesty, integrity, and credibility. It is far from clear that Respondent is lacking in those qualities as the Committee argues. We are here engaged in a prediction that despite his flaws noted herein, Respondent has such character and is essentially working for the public interest and not against it, his desire to make a large fee notwithstanding. None of those who testified for these qualities of Respondent are the sort who would carelessly toss off an opinion about character or misrepresent his reputation in the world community. They are inherently credible as witnesses, in my opinion. If his interest in earning a large fee makes his character suspect, the entire bar is suspect.

There is now no real question about whether Respondent is a threat to the public interest, and he does not appear to be a threat to his own clients not

withstanding his deficient accounting practices. He does not need to be deterred from repeating the offending conduct and neither do the lawyers at the bar generally; all of us know that such conduct cannot be condoned. The Committee argues that he should be disbarred but I cannot recommend this sanction in view of the totality of the evidence presented at the hearing, and particularly in mitigation; in my view, it would not be just in these circumstances.

Dated: February 24, 2020
New York, New York

/s/ John R. Horan
John R. Horan, Referee

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Appendix A

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

----------X

In the Matter of Steven R. Donziger, (admitted as Steven Robert Donziger), an attorney and counselor-at-law:

Attorney Grievance Committee For the First Judicial Department, Petitioner,

Steven R. Donziger, Esq., (OCA Atty. Reg. No. 2856052),

Respondent.

----------X

DECISION ON PROCEDURE FOR THE POST-SUSPENSION HEARING UNDER 22 NYCRR 1240.9(c)

In its August 16, 2018 order granting respondent's request for a Post-Suspension hearing, but reaffirming its Order of July 10, 2018, suspending respondent upon a finding that there was "uncontroverted evidence that respondent engaged in serious professional misconduct immediately threatening the public interest," the court appointed the undersigned to hold "the (22 NYCRR) 1240.9 hearing and to report his finding to the Committee."

With the consent of the Attorney Grievance Committee (AGC) and the Referee, the parties have proposed procedures with respect to the Post-

Suspension Hearing allowed by 22 NYCRR 1240.9 (c), and requested by respondent.

> Respondent Donziger has, by one of his counsel, Martin Garbus, made a proposal in two parts: first he requests the opportunity" ... to present evidence and argument as to why collateral estoppel is inappropriate in the post-suspension hearings." If respondent is " ... successful in convincing the Referee that collateral estoppel is inappropriate, there would be a second hearing at which the ... Committee would present evidence against him, and he would have the opportunity to confront and cross-examine the witnesses against him and present evidence of his own."

As an "alternative" respondent argues that due process allow him the "... opportunity to contest the factual findings made by Judge Kaplan that form the basis of the allegations against him here. This would include the right to present evidence refuting those findings and cross-examining any witnesses against him." See letter dated October 19, 2018, submitted by Martin Garbus, and made a part of the record, Exhibit A.

The AGC has presented a proposal which argues that in this case the doctrine of collateral estoppel should preclude any hearing at which the findings of Judge Kaplan, as affirmed by the Second Circuit, are contested. It argues that in this case the Post-Suspension Hearing becomes merged with the Sanctions hearing as the Appellate Division has already found that suspension is warranted pending a sanctions hearing, and a separate Post-Suspension Hearing is not required to serve due process, respondent having already had due process before

Judge Kaplan. See letter dated October 22, 2018, by George A. Davidson, Pro Bono Special Counsel, and Naomi F. Goldstein, Of Counsel to the Attorney Grievance Committee, also made a part of the record. The AGC also submitted a memorandum of law as to what evidence is admissible at a Section 1240.9(c) hearing, both documents are attached as Exhibit B.

Having reviewed the record in this case, the decision of District Judge Kaplan, the affirmance of the Second Circuit, the per curiam decision of the Appellate Division, and the submissions of the parties and their citations of law, it is not clear to me that there is an easy answer to the position of respondent. However, as Referee, it is my responsibility to rule on the application of collateral estoppel, and on any other procedural or evidentiary matter before me. *In re Abady,* 22 A.D3d 71. To argue that respondent has already had his due process in the trial before Judge Kaplan and is entitled to nothing more in this proceeding to sanction him as a lawyer, is to overlook the substantial differences in the proceedings. There is an obvious asymmetry in the case before Judge Kaplan and the case now underway to sanction respondent notwithstanding similarity or even identity of factual issues.

In particular, in the U.S. District Court, respondent was faced with an equity case without a jury to invalidate a foreign judgment brought against him and others in which the District Judge, in so many words, but in the guise of Civil RICO charges, created a criminal indictment against respondent and found the facts to support it by a preponderance of the evidence in reaching his equity judgment in favor of Chevron. It is doubtful that if an indictment in the same terms had been brought by the United States

Attorney, respondent would have elected to have a trial by a single judge and would have waived his right to a trial by jury. Furthermore, in the case before Judge Kaplan the standard of "beyond a reasonable doubt" was not applied to the facts presented. Judge Kaplan applied the civil standard of a preponderance of the evidence as the law requires. Other material differences can be noted, such as the lack of notice to respondent that his status as a lawyer was in jeopardy before Judge Kaplan, or for that matter, notice that he was, in substance, facing potential criminal charges regarding the judgment at issue. For reasons not readily apparent, on appeal to the Second Circuit respondent did not appear to contest the sufficiency of the evidence supporting any of the factual findings of the District Court. Instead, respondent raised jurisdictional defenses to no avail.

Finally, it is open to question, at least initially in this Post-Suspension hearing whether respondent did receive a full and fair hearing before Judge Kaplan, notwithstanding the length of the proceeding and the volume of evidence.

However, I am inclined to allow respondent latitude in his defense to the Charges against him in this proceeding, and to reserve my decision as to whether collateral estoppel should be applied in these circumstances. This leads me to accept both the second part of respondent's First Proposal, *i.e.,* that part stated as "Alternatively, due process requires ..." (Garbus letter, page 3) and the Second Proposal, as stated in the Garbus letter. It is not my intention to allow respondent to re-try the case against him before Judge Kaplan, but rather to allow him a hearing to address some or all of those findings in a way that is reasonably fair and practical.

Counsel states that he needs two days for this, "approximately." There can be no discernible harm to the "public interest" by this approach. The time to be allowed will be flexible and not restrictive, but not expandable without good cause.

The intention is to have an actual "hearing" pursuant to 22 NYCRR 1240.9(c), where respondent can address the Charges against him as he sees fit, even to the point of disagreeing with, or providing context to the facts in the first instance found by the District Court, and affirmed as found by the Second Circuit, on the ground that a strict application of the collateral estoppel doctrine, in the circumstances before me, may place respondent in an unfair position, and one he likely could not have foreseen as he set out in the Southern District Court to defend the judgment he obtained in Ecuador.

All parties will meet as re-scheduled on December 4; the DDC will be assumed to continue its position that no further hearing is required post-suspension, in this case. The respondent will be prepared to proceed with his evidence, following the guidelines of this decision. As agreed, the hearing will continue to December 5, and future hearings including the Sanction hearing will be scheduled at the convenience of the parties.

Dated: New York, New York
November 8, 2018

/s/ John R. Horan, Referee
John R. Horan, Referee

APPENDIX E

186 A.D.3d 27, 128 N.Y.S.3d 212, 2020 N.Y. Slip Op. 04523

**1 In the Matter of Steven R. Donziger (Admitted as Steven Robert Donziger), a Suspended Attorney. Attorney Grievance Committee for the First Judicial Department, Petitioner.

Supreme Court, Appellate Division, First Department, New York
CM-1660, M-1271
August 13, 2020

CITE TITLE AS: Matter of Donziger

SUMMARY

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on November 24, 1997, at a term of the Appellate Division of the Supreme Court in the First Judicial Department as Steven Robert Donziger.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Disbarment

Respondent attorney, who had been immediately suspended from the practice of law until further order of the Appellate Division based upon the collateral

estoppel effect given to a United States District Court decision finding that respondent engaged in egregious professional misconduct, namely, corruption of a court expert and ghostwriting his report, obstruction of justice, witness tampering, and judicial coercion and bribery, for which he steadfastly refused to acknowledge and showed no remorse, was disbarred retroactive to the date of his suspension. The Referee at the sanction/post-suspension hearings, in recommending an end to respondent's interim suspension and reinstatement, was too dismissive of the severity of the misconduct (and arguably exceeded his authority in permitting respondent to offer protestations of innocence notwithstanding prior court orders). Not only did the Referee understate the magnitude of respondent's egregious misdeeds, he also failed to recognize (nor even discuss) the relevant precedent in which the sanction of disbarment had been imposed for comparable misconduct. The Attorney Grievance Committee's evidence in aggravation, particularly the District Court's civil contempt findings (which the Referee failed to address in his report), added to the case for disbarment.

APPEARANCES OF COUNSEL

Jorge Dopico, *Chief Attorney*, *Attorney Grievance Committee*, New York City (*Naomi F. Goldstein* of counsel), for petitioner.

Richard H. Friedman for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Steven R. Donziger was admitted to the practice of law in the State of New York by the First Judicial Department on November 24, 1997, under the name Steven Robert Donziger. At all times relevant herein, respondent has maintained an office for the practice of law within the First Department.

On July 10, 2018, pursuant to the doctrine of collateral estoppel, this Court found respondent guilty of professional misconduct, immediately suspended him from the practice of law, and referred the matter for a sanction hearing based upon his actions in *Chevron Corp. v. Donziger* (974 F Supp 2d 362 [SD NY 2014], *affd* 833 F3d 74 [2d Cir 2016], *cert denied* 582 US —, 137 S Ct 2268 [2017]), in which he, inter alia, was found to have engaged in corruption of a court expert and ghostwriting the expert's report, obstruction of justice, witness tampering, judicial coercion and bribery in connection with an $8.6 billion judgment obtained in Ecuador against Chevron (*Matter of Donziger*, 163 AD3d 123 [1st Dept 2018]).

By order entered August 9, 2018, this matter was referred to a referee for a sanction hearing. Thereafter, by order entered August 16, 2018 (2018 NY Slip Op 80657[U]), this Court granted respondent's request for a post-suspension hearing pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.9 (c) and directed the referee to hear and report on this issue as well as the sanction hearing related to the collateral estoppel proceeding.

By order entered November 29, 2018 (2018 NY Slip Op 89633[U]), this Court granted respondent's request for an unsealing order pursuant to Judiciary Law § 90 (10) and ***29** opened the sanction/post-suspension hearings to the public pursuant to 22 NYCRR 1240.18 (d). Notwithstanding this Court's prior order directing that collateral estoppel attached to Judge Lewis A. Kaplan's findings against respondent, the Referee issued a November 8, 2018 ruling that respondent could challenge those findings at the sanction/post-suspension hearings. The Attorney Grievance Committee (AGC) filed a motion challenging the Referee's ruling. By order entered January 17, 2019, this Court directed "that the Referee may not reexamine this Court's determination, based on the doctrine of collateral estoppel, that respondent committed professional misconduct . . . and that the post-suspension hearing is limited to whether the professional misconduct respondent committed warranted his interim suspension pursuant to 22 NYCRR 1240.9(a)" (2019 NY Slip Op 60992[U]).

Witness testimony before the Referee commenced in September 2019. Respondent testified on his own behalf, called 15 character witnesses, and introduced documentary evidence. The AGC did not call any witnesses but introduced documentary evidence.

In post-hearing memoranda, the AGC argued that respondent should be disbarred; respondent continued to dispute this Court's prior misconduct findings, but argued that if there was any misconduct on his part, it was limited to suggesting that inaccurate language be included in an expert

witness's declaration "which Judge Kaplan found he knew was false" for which sanction should be limited to a private reprimand.

By report dated February 24, 2020, the Referee recommended that the Court end respondent's interim suspension and reinstate him to the practice of law but that he be subject to an accounting by the AGC for the manner in which he has handled client funds and other monies.

By motion dated February 27, 2020, respondent requests that the Referee's report and recommendation be affirmed in full and that he be immediately reinstated to the practice of law.

By notice of cross motion dated May 11, 2020, the AGC opposes respondent's motion and requests that this Court disaffirm the Referee's report and disbar respondent.

The Referee's recommendation that respondent's interim suspension be lifted and he be reinstated to the practice of law should be disaffirmed and respondent should be disbarred retroactive*30 to July 10, 2018, the date of his suspension. Respondent has been found guilty of egregious professional misconduct, namely, corruption of a court expert and ghostwriting his report, obstruction of justice, witness tampering, and judicial coercion and bribery which he steadfastly refuses to acknowledge and shows no remorse for. In recommending an end to respondent's interim suspension and his reinstatement, the Referee was too dismissive of the severity of the misconduct at issue (and he arguably exceeded his

authority in permitting respondent to continually offer protestations of innocence notwithstanding this Court's prior orders).

Not only did the Referee understate the magnitude of respondent's egregious misdeeds, he also failed to recognize (nor even discuss) the relevant precedent in which the sanction of disbarment has been imposed for comparable misconduct (*see e.g. Matter of Zappin*, 160 AD3d 1 [1st Dept 2018], *appeal dismissed* 32 NY3d 946 [2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Fagan*, 58 AD3d 260 [1st Dept 2008], *appeals dismissed* 12 NY3d 813 [2009]).

The AGC's evidence in aggravation, particularly Judge Kaplan's civil contempt findings (which the Referee failed to address in his report [*see Matter of Savitt*, 170 AD3d 24, 28 (1st Dept 2019), *appeal dismissed* 33 NY3d 1118 (2019) (Court opined that referee erroneously failed to recognize civil contempt finding and failure to purge as aggravation)]), only add to the case for disbarment.

Accordingly, respondent's motion to confirm the Referee's report and recommendation should be denied. The Committee's cross motion to disaffirm the Referee's report and recommendation should be granted, and respondent disbarred from the practice of law retroactive to the date of his July 10, 2018 suspension, and his name stricken from the roll of attorneys and counselors-at-law in the State of New York.

Acosta, P.J., Friedman, Renwick, Manzanet-Daniels and Gische, JJ., concur.

Respondent's motion to confirm the Referee's report and recommendation is denied. The Committee's cross motion to disaffirm the Referee's report and recommendation is granted, and respondent is disbarred, retroactive to the date of his July 10, 2018 suspension, and his name is stricken from the roll of attorneys and counselors-at-law in the State of New York.

APPENDIX F

Unpublished Disposition
36 N.Y.3d 913, 168 N.E.3d 1152, 145 N.Y.S.3d 14 (Table), 2021 WL 1805246 (N.Y.), 2021 N.Y. Slip Op. 65681

Donziger, Matter of

Court of Appeals of New York
2020-676
May 6, 2021

CITE TITLE AS: Matter of Donziger

1st Dept: 186 AD3d 27
MOTIONS FOR LEAVE TO APPEAL GRANTED OR DENIED
denied

APPENDIX G

37 N.Y.3d 1001, 174 N.E.3d 696, 152 N.Y.S.3d 671 (Mem), 2021 N.Y. Slip Op. 71204

In the Matter of Steven R. Donziger (Admitted as Steven Robert Donziger), a Suspended Attorney, Appellant.
Attorney Grievance Committee for the First Judicial Department, Respondent.

Court of Appeals of New York
2021-554
Submitted July 6, 2021
Decided September 9, 2021

CITE TITLE AS: Matter of Donziger

Reported below, 186 AD3d 27.

Motion for reargument of motion for leave to appeal denied [*see* 36 NY3d 913 (2021)].

Judges Singas and Cannataro took no part.