IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Petitioner,

v. **Case No. 18-0250**

ANTHONY J. ZAPPIN,

Respondent.

BRIEF OF RESPONDENT ANTHONY J. ZAPPIN

Dated: December 8, 2020

Anthony Zappin
1827 Washington Blvd.
Huntington, WV 25701
(304) 730-4463 (tel.)
anthony.zappin@gmail.com
Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. STATEMENT OF THE CASE

A. Posture of this Reciprocal Disciplinary Proceeding

Respondent was disbarred by the New York Supreme Court, Appellate Division First Department on March 8, 2018 in a drumhead "collateral estoppel attorney disciplinary proceeding," which was based on findings rendered by Justice Matthew F. Cooper in Respondent's personal divorce matter, *Zappin v. Comfort* (hereinafter, referred to as the "New York Disciplinary Decision"). Respondent maintains that he was deprived fair notice and a meaningful opportunity to defend himself both in the underlying *Zappin v. Comfort* matrimonial action and the subsequent collateral estoppel disciplinary proceeding in New York. More importantly, Respondent has presented clear, convincing and overwhelming evidence of the infirmity of the New York findings, which Disciplinary Counsel has not and does not refute.

Respondent informed Disciplinary Counsel of the New York Disciplinary as required by the W.Va. Rules for Lawyer Disciplinary Procedure. On the same day it was received, Disciplinary Counsel filed a "Notice of Reciprocal Disciplinary Action" on March 21, 2018. Consistent with an apparent agenda, Chief Lawyer Disciplinary Counsel, Rachael L. Fletcher Cipoletti, has personally handled all aspects of this matter.

This matter has been plagued by repeated delays and stalling by both Disciplinary Counsel and the Hearing Panel Subcommittee. Indeed, Respondent was entitled to received a hearing sixty (60) days after Disciplinary Counsel's March 21, 2018 Notice. Yet, a hearing was not held by the Hearing Panel Subcommittee for over a year. Likewise, the Hearing Panel Subcommittee took well over fourteen (14) months from the close of the hearing to issue a recommendation, which was only signed by the two (2) attorney members. (*See* June 7, 2020 HPS Recommendation.) More importantly, the Hearing Panel Majority's Recommendation does not address the issues

Respondent raised and essentially recommends that reciprocal discipline be imposed on Respondent for uncharged, unlitigated and baseless assertions of misconduct. Indeed, both the Hearing Panel Majority and Disciplinary Counsel have effectively conceded that the New York findings are infirm and that Respondent was denied fair notice and a meaningful opportunity to defend himself in both the underlying *Zappin v. Comfort* matrimonial action and the subsequent collateral estoppel disciplinary proceeding.

B. Respondent's Educational and Professional Background

Respondent currently resides in Huntington, WV. He earned his law degree from Columbia University Law School in 2010. Respondent was admitted to the bar in West Virginia in 2010, the bar in New York in 2011 and the District of Columbia (via waiver) in 2012.

Respondent was employed at large and prominent law firms in the District of Columbia and New York working primary on patent infringement litigation from 2011-2015. His personnel records and performance reviews revealed that Respondent thrived as an associate attorney in private practice. Respondent's legal troubles began when he sought child custody and subsequently a divorce from his ex-wife Claire Comfort ("Ms. Comfort") in late 2013 and early 2014, respectively. Apartment from the March 8, 2018 disciplinary decision and order issued by the New York County Supreme Court, Appellate Division First Department, upon which this reciprocal disciplinary proceeding is based, Respondent has had no disciplinary history and has had no disciplinary complaints filed against him.

In accordance with an agreement with Disciplinary Counsel, Respondent has not practiced law in West Virginia during the pendency of this proceeding. Respondent is currently a licensed contractor in West Virginia as well as a graduate student maintaining a 4.0 GPA. He is currently

applying to Ph.D. programs and has received glowing recommendations from members of the faculty at his university as well as from his prior employers.

C. The *Zappin v. Comfort* Matrimonial and Child Custody Action

This reciprocal disciplinary action has its origins in Respondent's personal divorce and child custody matter filed against his ex-wife Claire Comfort ("Ms. Comfort"), which was captioned *Anthony Zappin v. Claire Comfort*, Index No. 301568-2014 formerly pending in New York County Supreme Court.

i. Initial Proceeding before the Superior Court for the District of Columbia

Plaintiff and Ms. Comfort had a short relationship that began in late 2012. (*See* Zappin Decl. at Ex. 1, DC Petition and Emergency Motion dated Nov. 13, 2013.) They were married in May 2013 shortly after Plaintiff learned that Ms. Comfort had unexpectedly (at least to Plaintiff) become pregnant. (*See id.*) Their only child, a boy, was born on October 6, 2013. (*See id.*)

On November 10, 2013, just weeks after the child was born, Ms. Comfort and her father, Brian Comfort,[1] abducted Respondent's child. (*See* Zappin Decl. at Ex. 1, DC Petition and Emergency Motion dated Nov. 13, 2013.) The one (1) month old child was flown over 3,000 miles to Tacoma, WA without Respondent's consent where the child was effectively hidden from Respondent by Ms. Comfort and her father. (*See id.*) At the time, Ms. Comfort was suffering from post-partem depression, which is documented in medical records, and refused to seek medical treatment. (*See id.*) Indeed, Ms. Comfort described herself as "unstable" and in need of "getting help" in text messages to Plaintiff during the abduction of the child. (*See* Zappin Decl. at Ex. 1, DC Petition and Emergency Motion dated Nov. 13, 2013.)

[1] Brian Comfort is an attorney purportedly admitted to practice law in the State of Washington. It appears that at least part of Brian Comfort's law practice involves matrimonial and family court litigation.

Plaintiff, through counsel, filed a petition for custody and a motion for the emergency return of the child on November 13, 2013 in the Superior Court for the District of Columbia ("DC Superior Court"). (*See* Zappin Decl. at Ex. 1, DC Petition and Emergency Motion dated Nov. 13, 2013.) Notably, included in Plaintiff's filing were allegations of domestic violence that Plaintiff claimed in detail were committed against him by Ms. Comfort, including leaving permanent scaring on his face. (*See id*; *see also* Zappin Decl. at Ex. 2, Photograph of A. Zappin's Injuries.) It should be further noted that Ms. Comfort subsequently admitted in a sworn document to committing some of the acts of domestic violence Respondent alleged in his November 13, 2013 filings in the DC Superior Court, which were wholly ignored by the New York matrimonial court. (*See* Zappin Decl. at Ex. 3, Comfort Nov. 15, 2013 Declaration.)

Upon learning of the filing of Respondent's child custody petition in DC Superior Court, Ms. Comfort (aided and assisted by her father Brian Comfort) began an erratic cascade of filings in multiple courts. In this filing, Ms. Comfort, for the first time ever, began accusing Respondent of domestically abusing her beginning less than a week before the birth of the child (and never during the prior year of their relationship) as a defense to her abduction of the child and in response. However, in the span of just one (1) week, Ms. Comfort filed three (3) separate sworn statements with courts in Washington State and the District of Columbia with wildly different accounts of her allegations of domestic abuse (*e.g.*, different dates of alleged incidents, different supposed injuries, different numbers of alleged incidents). (*See* Zappin Decl. at Ex. 4, Comfort WA State TPO Petition dated Nov. 13, 2013; Zappin Decl. at Ex. 3, Comfort DC Declaration dated Nov. 15, 2013; Zappin Decl. at Ex. 5, Comfort DC TPO Petition dated Nov. 20, 2013.)

A *pendente lite* hearing on child custody and visitation was scheduled before Judge Jennifer DiTorro in the Domestic Relations Branch of the DC Superior Court for November 20, 2013. The

hearing was thwarted, however, by Ms. Comfort filing for a second *ex parte* temporary order of protection in the Domestic Violence Branch of the DC Superior Court three (3) hours before the start of the *pendente lite* hearing before Judge DiTorro.[2] In her Domestic Violence Branch petition, Ms. Comfort radically altered her allegations of domestic violence from what she alleged in her two (2) prior sworn statements. (*See* Zappin Decl. at Ex. 5, Comfort DC TPO Petition dated Nov. 20, 2013). As a result, Judge DiTorro adjourned the *pendente lite* hearing to March 2014 so as to allow Respondent to gather evidence and prepare a defense.

In the interim, however, Ms. Comfort once again moved the child without Respondent's consent and without authorization from the DC Superior Court from Tacoma, Washington to New York City in February 2014. This thwarted the DC Superior Court's jurisdiction over the child custody proceeding. As a result, Respondent filed for divorce in New York County Supreme Court in February 2014 after the DC Superior Court deemed itself an inconvenient forum to determine the issue of child custody and visitation.

ii. The New York Divorce Proceeding before Justice Deborah Kaplan

Respondent's divorce suit filed in New York County Supreme Court was assigned to Justice Deborah Kaplan. At this time, Respondent was represented by the firm *Aronson, Mayefsky & Sloan LLP* ("AMS"). However, the case was marred by bizarre conduct by Justice Kaplan, most notably Justice Kaplan's imposition of supervised visitation on Respondent without affording him a *pendente lite* hearing required by New York law, previously agreed to by Respondent and Ms. Comfort in DC Superior Court and requested by Respondent incessantly at hearings before Justice Kaplan. *See Carlin v. Carlin*, 52 A.D.3d 559, 560 (N.Y. 2008) ("[I]t is an error as a matter of law

[2] As mentioned above, Ms. Comfort obtained an *ex parte* temporary order of protection in Pierce County Superior Court in Washington State on November 13, 2013 after learning of Respondent's custody petition and emergency motion filed in DC Superior Court.

to make an order respecting custody, even in a *pendente lite* context, based on controverted allegations without having the benefit of a full hearing.").

Between April 2014 and July 2014, AMS requested a *pendente lite* hearing to determine temporary custody and to remove Justice Kaplan's unlawful imposition of supervised visitation on four (4) separate occasions. (*See Zappin v. Comfort* Mot. Seq. 1.) At each of these proceedings, Justice Kaplan refused to go on the record so as to allow Respondent to document and potentially appeal Justice Kaplan's orders denying his requests. (*See id.*) At this time, Respondent was paying approximately $10,000 a month in costs associated with supervised visitation – well exceeding his salary as a junior associate attorney. (*See* Zappin Decl. at Ex. 6, CFS Supervised Visitation Bills.) This was in addition to incurring substantial counsel fees from AMS.

As a result, in July 2014, Respondent had to make the impossible financial choice of whether to continue to see the child or continue being represented by AMS and incurring legal fees. Respondent made the difficult decision to represent himself *pro se* so that he could continue to see his child. As seen throughout the *Zappin v. Comfort* record, Plaintiff's decision to represent himself *pro se* – so that he could continue to see his child – was attacked at every turn by Justice Kaplan and subsequently Justice Matthew Cooper.

After Respondent fired AMS, Justice Kaplan immediately appointed Harriet Newman Cohen as the "Attorney for the Child" at an unconscionably rate of $600 per hour. (*See Zappin v. Comfort*, August 13, 2014 AFC Order.) Justice Kaplan did so without notice, consultation or an opportunity to be heard by the parties as required by statute and court rules. (*See id.*) It was later discovered that at the time of her appointment, Ms. Cohen was not qualified by the First Department to be appointed as an Attorney for the Child in contested custody matters. Even more disconcerting, it was revealed that Ms. Cohen and her firm were substantial campaign donors to

Justice Kaplan's election campaign. And, perhaps worst of all, Respondent recently learned of recorded conversations involving David Evan Schorr in which members of Ms. Cohen's law firm told him that Justice Kaplan appointed Ms. Cohen to "take [Respondent] Zappin out."[3]

Approximately one (1) month after Ms. Cohen's appointment, Justice Kaplan indefinitely "stayed" the case after Plaintiff filed a motion to recuse her as Attorney for the Child. Plaintiff's motion was based on several disconcerting and largely unrefuted actions by Ms. Cohen.[4] This notably included: (i) Ms. Cohen serving unnoticed secret subpoenas on Plaintiff's medical providers without court authorization and then harassing those medical providers; (ii) Ms. Cohen's bias in failing to serve subpoenas on Ms. Comfort's medical providers, which would have had information relevant to her allegations of domestic violence as well as Ms. Comfort's history of drug and alcohol abuse; (iii) Ms. Cohen making blatantly false, fabricated and incendiary allegations that Plaintiff had abused the child with a thermometer, allegations that were refuted by supervisors and later affirmatively abandoned by Ms. Cohen; (iv) Ms. Cohen repeatedly violating and disregarding court orders, including with respect to the confidentiality of the forensic custody evaluation report; (iv) Ms. Cohen admittedly failing to conduct any investigation into the facts of the case, which was further reflected by her billing statements, as required by the guidelines for

---

[3] These facts are currently being litigated in the *Zappin v. Comfort et al.*, Case No. 1:18-cv-1693 (S.D.N.Y.)

[4] In addition to egregious misconduct within the context of *Zappin v. Comfort*, Ms. Cohen had also made patently sexist, discriminatory and bigoted public remarks concerning men. *See* "Divorce Lawyers Criticized by Consumer Affairs Chief," *available at* https://www.nytimes.com/1992/03/13/nyregion/divorce-lawyers-criticized-by-consumer-affairs-chief.html; *see also* "Trouble in Splitsville," *available at* http://nymag.com/nymetro/news/crimelaw/features/1670/ (characterizing Ms. Cohen as a "vocal feminist who is disdained by many of her colleagues at the bar" and quoting Ms. Cohen as demanding women receive "very, very substantial child support, the nannies that she needs, her traveling, her clothing ... a townhouse and a chauffeur-driven car" in divorce proceedings). Ms. Cohen's bigoted public statements and her vocal third-wave feminist anti-male diatribes fundamentally called into question her ability to act in the best interests of the child as an Attorney for the Child.

Attorneys for the Child in the Appellate Division First Department; and (v) Ms. Cohen making numerous knowing and verifiable misstatements and misrepresentations to the New York court about Plaintiff and the child. (*See* Mot. Seq. 31, Motion to Disqualify Cohen.)

iii. Respondent's New York Court of Claims Action

On April 24, 2015, a conference was held before Justice Kaplan in *Zappin v. Comfort*. At the conclusion of the hearing, Respondent was grabbed from the gallery by Justice Kaplan's assigned court officer, Jeffrey Katz ("Officer Katz"). (*See* Zappin. Decl. at Ex. 7, Court of Claims Complaint.) Respondent was then hauled to a side hallway by Justice Kaplan's courtroom, violently shoved against a wall and confined for several minutes without explanation by Officer Katz. (*See id.*) As a result of the incident, Respondent suffered several injuries and was treated at a New York Hospital. (*See id.*)

On April 30, 2015 Respondent filed an action in the New York Court of Claims against Officer Katz and Justice Kaplan relating to the incident on April 24, 2015. (*See* Zappin. Decl. at Ex. 7, Court of Claims Complaint.) It was served by certified mail on the New York Attorney General's Office on May 5, 2017. Just over two (2) weeks later, Justice Kaplan was not only removed from *Zappin v. Comfort*, but she was stripped of over ninety-percent (90%) of her caseload and reassigned to an administrative position in the New York Unified Court System with the title "Statewide Coordinating Judge for Family Violence." (*See* Zappin Decl. at Ex. 8, FOIL Spreadsheet of Justice Kaplan's Reassigned Cases.)

After Justice Kaplan was transferred to an administration position in May 2015, *Zappin v. Comfort* was transferred to Justice Matthew F. Cooper on May 22, 2015 (with the first appearance being July 22, 2017) under highly irregular circumstances. (*See* Zappin Decl. at Ex. 8, FOIL Spreadsheet of Justice Kaplan's Reassigned Cases.) *Zappin v. Comfort* was one of the first, if not

the first case transferred from Justice Kaplan's docket. (*See id.*) Even more astonishing, out of approximately 150 cases transferred from Justice Kaplan's docket, *Zappin v. Comfort* was the only case transferred to Justice Cooper. (*See id.*)

iv. The New York Divorce Proceeding before Justice Cooper

Justice Cooper began formally presiding over *Zappin v. Comfort* on July 22, 2015. At the outset, it is important to note that Justice Cooper is notorious for having a penchant of publicly embarrassing and deriding litigants. In the months before being assigned to *Zappin v. Comfort*, Justice Cooper was responsible for numerous headlines in The New York Post and The New York Daily News ridiculing and shaming litigants. These included, but were not limited to:

- "Divorce Judge Slams 'Bed-Pooping, Cokehead' Banker, Alcoholic Wife" by Julia Marsh, published in The New York Post, *available at* https://nypost.com/2015/01/08/judge-blasts-banker-wife-for-horrible-fiasco-of-a-divorce/[5];

- "Judge Calls Carnegie Deli Manager 'The Shyster of Smoked Meat'" by Julia Marsh, published in The New York Post, *available at* https://nypost.com/2015/08/05/judge-calls-carnegie-deli-manager-the-shyster-of-smoked-meat/;

- "Judge Slam Paul George For Being a Deadbeat Dad," by Julia Marsh, published in The New York Post, *available at* https://nypost.com/2014/09/23/judge-slams-nba-star-for-being-a-deadbeat-dad/; and

- "Judge Rips 'Broke' Deadbeat Dad Who Skied in Alps," by Julia Marsh, published in The New York Post, *available at* https://nypost.com/2015/05/14/deadbeat-dad-claimed-poverty-while-taking-european-ski-trips/.

And, to make matters worse, Justice Cooper had just months prior given testimony before the New York Assembly in which he stated that he "shamed" matrimonial litigants into outcomes he

[5] Notably, the father in this custody dispute lost his job as a result of the article instigated by Justice Cooper and published in The New York Post.

believed were just, even when those outcomes did not comport with the law. (*See* Zappin Decl. at Ex. 9, Cooper Testimony.)

Justice Cooper began formally presiding over *Zappin v. Comfort* on July 22, 2015. Without Respondent even opening his mouth in his courtroom, Justice Cooper sanctioned Respondent on September 18, 2015 (the "Sanctions Decision") based on a request from the Attorney from the Child buried in a "WHEREFORE" clause in reply papers. The Sanctions Decision contained several misstatements and misrepresentations of fact concerning Respondent's conduct. (*See* Zappin Decl. at Ex. 10, Recusal Motion and Chart of Misstatements in Sanctions Decision.) Justice Cooper's misstatements and misrepresentations were verifiably inaccurate based on the *Zappin v. Comfort* record. (*See id.*) More importantly, the Sanctions Decision makes apparent based on Justice Cooper's continued references to Justice Kaplan that the sanction was imposed in retaliation for Respondent's Court of Claims lawsuit. As a result of the statutorily sealed Sanctions Decision being admittedly publicly disseminated to the tabloid press by Justice Cooper himself, Respondent lost his job at a large law firm and was unable to hire counsel for the child custody trial, which was then set to commence in less than two (2) months.

The child custody trial in *Zappin v. Comfort* concluded on December 21, 2015 after thirteen (13) days of trial. On February 29, 2016, Justice Cooper issued his Decision and Order After Custody Trial ("Custody Decision"). (*See Zappin v. Comfort* Child Custody Decision.) Yet again, the Custody Decision, much like the Sanctions Decision, was marred by Justice Cooper's misconduct and contrived findings, which are set forth more fully below.

Justice Cooper's Custody Decision gave Ms. Comfort full custody of the child. (*See Zappin v. Comfort* Custody Decision.) Although Justice Cooper denied Ms. Comfort and the

Attorney for the Child's unfounded request that Respondent be denied access to the child,[6] Justice Cooper directed that Respondent continue to have supervised visitation with the child for at least a period of eighteen (18) more months at a cost of approximately $5,300 a month.[7] (*See id.*) Justice Cooper credited Ms. Comfort's allegations of domestic violence and, in an apparent attempt to further inflame the situation, entered a five (5) year order of protection against Respondent, which she did not even request. (*See id.*)

Respondent subsequently appealed Justice Cooper's Custody Decision to the First Department. This was the same First Department that also heard the attorney disciplinary brought against Respondent by the New York Attorney Grievance Committee for the First Judicial Department ("NYAGC").

D. The New York Collateral Estoppel Disciplinary Proceeding

On April 22, 2016, the NYAGC filed its petition in the First Department requesting that Respondent be found guilty of attorney misconduct based solely on the findings in Justice Cooper's Child Custody Decision via the application of collateral estoppel. (*See* April 22, 2016 Collateral Estoppel Petition.) More specifically, the NYAGC requested in its petition that the First Department "enter an order finding respondent Anthony Jacob Zappin, Esq. ... guilty of professional misconduct by virtue of the adverse judicial findings of Justice Matthew F. Cooper ... and referring the matter back to a referee appointed by [the First Department] for a hearing

[6] Throughout the proceeding, there was no allegation that Respondent had ever harmed or attempted to harm the child. Rather, Respondent had two (2) years of spotless supervisor reports that characterized him as a loving, caring and attentive father. Moreover, five (5) supervisors testified at trial who all confirmed that they had never seen any behavior from Respondent that they believed was inappropriate or a danger to the child.

[7] Respondent was never afforded his *pendente lite* hearing required by New York law. Rather, he was prejudicially ordered to undergo two (2) years of supervised visitation before the *Zappin v. Comfort* custody trial.

solely to consider evidence in mitigation or aggravation, if any, and to recommend the appropriate sanction to be imposed." (*Id.* at 2.)

Respondent was not granted a hearing to respond to allegations of misconduct or present evidence in his defense as required by the New York Rules for Attorney Disciplinary Procedure. *See* 22 NYCRR § 1240 *et seq.* Rather, Respondent was limited to opposing the NYAGC's collateral estoppel petition on paper. Notably, Respondent's opposition was limited to legal arguments as to the issue of why collateral estoppel should not apply. Nevertheless, Respondent contended that he was denied a full and fair opportunity to litigate Justice Cooper's findings at-issue during the child custody trial in *Zappin v. Comfort.* (*See id.*) Most importantly, however, Respondent requested that the proceeding be stayed until such time Respondent could appeal Justice Cooper's Child Custody Decision.

On October 17, 2016, the First Department issued effectively a one (1) sentence order granting the NYAGC's collateral estoppel petition. (*See* Zappin Decl. at Ex. 11, October 17, 2016 Order.) The First Department failed to explain in any way why the application of collateral estoppel was appropriate. (*See id.*) In fact, the order provided no recitation of facts, discussion, legal analysis or specific findings of any kind. Rather, it simply lists the Rules of Professional Conduct that it found Plaintiff guilty of violating. It further granted the NYAGC's petition without first allowing Respondent the opportunity to appeal Justice Cooper's Custody Decision, which prejudiced Respondent's appeal of the underlying Custody Decision and essentially predetermined that appeal without the full record. The October 17, 2016 order was further deficient in that it found Respondent guilty of seven (7) violations of the Rules of Professional Conduct without specifying which factual findings it relied on in finding Respondent guilty of the violations.[8]

[8] In the April 22, 2016 Collateral Estoppel Petition, the NYAGC asserted that multiple findings violated a single Rule of Professional Conduct. For example, the NYAGC asserted that Respondent's

A sanction hearing was held before Referee Martin Gold in December 2016. Respondent introduced a handful of character letters as well as a letter from his treating therapist. (*See* New York Sanction Hearing Transcript.) However, Respondent did not testify at the hearing. On advice of counsel, Respondent stayed silent because his appeal of Justice Cooper's Child Custody Decision was pending before the First Department in which he directly contested the findings relied upon by the NYAGC. In other words, the pendency of Respondent's appeal of the underlying Custody Decision effectively precluded him from have a full and fair sanction hearing. On August 3, 2016, Referee Gold issued a report recommending adopting the NYAGC's position that Respondent be disbarred. (*See* August 3, 2016 Referee Report and Recommendation.)

On March 8, 2018, the First Department issued a decision and order confirming Referee Gold's report. (*See* March 8, 2018 Decision and Order.) In the *per curium* decision, the First Department disbarred Respondent explicitly based on Justice Cooper's February 29, 2016 Custody Decision in *Zappin v. Comfort* through the application of collateral estoppel. It also cited as a basis for imposing discipline numerous assertions of misconduct that were not contained in the NYAGC's April 22, 2016 Collateral Estoppel Petition and which Respondent was never afforded notice of or an opportunity to contest.

II. SUMMARY OF ARGUMENT

First, Respondent contends that the findings relied upon in imposing discipline in New York are fundamentally and constitutionally infirm. Specifically, Respondent presented clear, convincing and overwhelming evidence as to the infirmity of the New York findings before the

---

alleged "Use of Litigation to Mete Out Suffering" violated Rules of Professional Conduct 8.4(h). It also asserted that Respondent's alleged "Threats Toward and Statements About Comfort and her Father" violated Rule of Professional Conduct 8.4(h). The First Department's October 17, 2016 order failed to specify what conduct or finding violated the rule rendering the order unconstitutionally vague.

Hearing Panel. Disciplinary Counsel did not dispute, contest or rebut any of the evidence or Respondent's infirmity assertions. More importantly, the Hearing Panel Majority completely failed to address Respondent's contentions or evidence on this issue.

Second, Respondent maintains he was denied Due Process in the New York disciplinary proceeding. More precisely, Respondent maintains that both in the underlying *Zappin v. Comfort* matrimonial action and the subsequent collateral estoppel disciplinary proceeding that he was denied fair notice and a meaningful opportunity to defend himself. Disciplinary Counsel does not refute Respondent's evidence on these points. Instead, Disciplinary Counsel has misrepresented the proceedings before the New York disciplinary authority both to the Hearing Panel and this Court in her opening brief.

Third, Respondent contends that imposing discipline on Respondent based on findings made by a matrimonial judge under a "preponderance of the evidence" standard is unconstitutional under West Virginia law.

III. STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for January 27, 2021 in this proceeding. Due to the complexity of this case, Respondent maintains that oral argument is necessary.

IV. STANDARD OF REVIEW

"A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment." *Comm. on Legal Ethics of the W.Va. State Bar v. McCorkle*, 192 W.Va. 286, (1994).

V. ARGUMENT

A. The Findings Underlying the New York Disciplinary Decision Are Plainly Infirm

Pursuant to the Rule 3.20(e)(2) of the W.Va. Rules of Lawyer Discipline Procedure, this Court may impose reciprocal discipline unless "the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the [Court] cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction." As shown below, neither Disciplinary Counsel nor the Hearing Panel Majority refute Respondent's contentions and overwhelming evidence on the issue of the infirmity of the New York findings. As a result, it would be unlawful and unconstitutional to impose reciprocal discipline on Respondent.

i. Disciplinary Counsel Does Not Contest, Refute or Rebut Respondent's Contentions and Evidence that the Findings Underlying the New York Disciplinary Decision Are Infirm

Prior to the hearing before the Hearing Panel, Respondent submitted a pre-hearing motion to dismiss requesting that the Hearing Panel rule that the findings underlying the New York Disciplinary Decision are infirm. In support of this motion, Respondent filed a 51-page memorandum that attached twenty-six (26) separate exhibits. (*See* Zappin Decl. at Ex. 12, Zappin Infirmity Motion to Dismiss.) In the memorandum, Respondent addressed in excruciating detail each of Justice Cooper's findings underlying the New York Disciplinary Decision and attached trial exhibits, transcript excerpts and other portions of the record that conclusively proved the findings were not only infirm, but that they were largely fabricated out of thin air. (*See id.*) In her response papers, Disciplinary Counsel failed to address even a single one of Respondent's contentions concerning the infirmity of Justice Cooper's findings. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief.) More clearly, Disciplinary Counsel did not contest, refute

or rebut any of Respondent's overwhelming and convincing evidence on the issue of infirmity of the New York findings.

Likewise, Respondent essentially spent two (2) days before the Hearing Panel testifying and presenting evidence regarding the infirmity of the New York findings. (*See generally* Tr. of HPS Hearing[9].) Once again, the evidence was overwhelming and conclusive. (*See id.*) When Disciplinary Counsel had a chance to cross-examine Respondent at the hearing, she failed to ask a single question to Respondent concerning the issue of the infirmity of the New York findings. (*See* Tr. of HPS Hearing.) Moreover, she failed to introduce a single exhibit, transcript excerpt of portion of the record that would refute any of Respondent's overwhelming and convincing evidence on the subject. (*See id.*) Indeed, Respondent and his then counsel left the hearing with the apparent impression that Disciplinary Counsel was simply not contesting this issue. This was later confirmed by Disciplinary Counsel's proposed findings of fact.

The record in this proceeding plainly demonstrates that Respondent has presented clear and convincing evidence that the findings rendered by Justice Cooper and underlying the New York Disciplinary Decision are infirm. Disciplinary Counsel does not dispute, contest, refute or rebut this evidence. The Hearing Panel Majority plainly erred in failing to address this issue in its June 7, 2020 Recommendation. Regardless, based on the evidence set forth in the record discussed further below in Section A.iii, this Court is compelled as a matter of law to dismiss this reciprocal disciplinary proceeding.

ii. <u>The Hearing Panel Majority Erred by Failing to Address Respondent's Evidence as to the Infirmity of the New York Findings in Its Recommendation</u>

[9] Respondent's reference to "Tr. of HPS Hearing" refers to the transcript of the hearing before the Hearing Panel Subcommittee that took place in this matter.

As discussed above, Respondent submitted a 51-page memorandum, twenty-six (26) narrowly tailored exhibits and two (2) days of testimony on the issue of the infirmity of the New York findings. Again, the evidence was overwhelming and convincing so much so that it went entirely uncontested and unrebutted by Disciplinary Counsel in both her responsive papers at the hearing before the Hearing Panel. In its June 7, 2020 Recommendation, however, the Hearing Panel Majority failed to even spare one drop of ink on the issue, much less did it address Respondent's contentions and evidence. The Hearing Panel Majority totally dodged the issue. As such, this Court should reject the Hearing Panel Majority's Recommendation on its face. The Recommendation is not representative of the case and the issues that were before the Hearing Panel.

iii. The Evidence Is Overwhelming that the New York Findings Are Infirm

Both in his pre-hearing motion to dismiss and at the hearing before the Hearing Panel, Respondent presented overwhelming evidence that the New York Findings, rendered by matrimonial judge Justice Matthew Cooper, were infirm. More specifically, Respondent convincingly showed and proved that in terms of virtually every assertion of attorney misconduct, Justice Cooper rendered findings that lacked any evidentiary basis in the record at the child custody trial, that in most cases directly contradicted the record or were entirely fabricated by Justice Cooper for the purpose of pursuing disciplinary action against Respondent.

Falsification of Text Messages: In the New York Disciplinary Decision, the First Department disbarred Respondent based on Justice Cooper's finding that Respondent fabricated test messages at the child custody trial and entered them into evidence. (*See* April 22, 2016 New York Collateral Estoppel Petition; *see also* March 8, 2018 New York Disciplinary Decision.)

Specifically, Justice Cooper made the following finding in his child custody decision, which the NYAGC relied on:

> The text messages that plaintiff [Zappin] fabricated and introduced into evidence include, but are not limited to, those purportedly having defendant [Comfort] using racist, anti-Semitic and other derogatory and unacceptable language, as well as those that supposedly have her apologizing for assaulting plaintiff or otherwise harming him. Plaintiff [Zappin] also altered his own text messages to defendant [Comfort] by removing admissions of having assaulted her and having committed to her that he would attend a batterer's program. (*Zappin v. Comfort* Child Custody Decision at 37.)

Both in his pre-hearing motion to dismiss and at the hearing before the Hearing Panel, Respondent gave testimony and presented evidence (in the form of the trial exhibit lists) that the text messages spelled out by Justice Cooper above were never entered into evidence at the child custody trial and, with one exception, do not even exist. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 14-15; *see also* Tr. of HPS Hearing.) This evidence and testimony was not contested by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 14, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

Falsification of the November 9, 2013 Text Message: A November 9, 2013 text message exchanged between Respondent and Ms. Comfort was in dispute at the child custody trial. Justice Cooper made findings that Respondent falsified this text message without any technical evidence to support his conclusion. (*See* April 22, 2016 New York Collateral Estoppel Petition; *see also* March 8, 2018 New York Disciplinary Decision.) During the proceedings before the Hearing Panel, Respondent presented evidence that Ms. Comfort had apparently inadvertently presented to the New York court two different versions of the November 9, 2013, supposed printouts from her phone, with different text that confirmed she falsified her version. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 15-21; *see also* Tr. of HPS Hearing.) Meanwhile, Respondent's version of the November 9, 2013 text message was presented on his actual iPad whose file system

was encrypted precluding the ability for him to alter the text message on his device. (*See id.*) Additionally, Respondent presented excerpts of the trial transcript to the Hearing Panel that showed Justice Cooper had seemingly deliberately misrepresented the record and Respondent's statements during the trial in an effort to support his finding that Respondent falsified the text message. (*See id.*) Consequently, the evidence presented by Respondent made it apparent and convincing that it was Ms. Comfort, not Respondent, who had falsified her versions of the November 9, 2013 text message. This evidence was not contested or refuted by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

False Testimony: In the New York Disciplinary Decision, the First Department disciplined Respondent based on Justice Cooper's finding that asserted Respondent gave false testimony during the child custody trial, the supposed instances of which Justice Cooper enumerated in his decision. (*See* April 22, 2016 New York Collateral Estoppel Petition; *see also* March 8, 2018 New York Disciplinary Decision.) During the proceedings before the Hearing Panel, Respondent presented testimony and evidence that the instances of "false testimony" Justice Cooper enumerated in his child custody decision, and relied upon by the NYAGC, were found nowhere in the transcripts of the child custody proceedings. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 21-25; *see also* Tr. of HPS Hearing.) In other words, Justice Cooper unethically and falsely attributed testimony to Respondent in his child custody decision and then went on to find that this falsely attributed testimony was false. (*See id.*) The evidence and testimony Respondent presented to the Hearing Panel was not contested or refuted by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

Inducing Dr. Manion to Give False Testimony: In the New York Disciplinary Decision, the First Department asserted that Respondent induced Dr. William Manion, an expert that he had retained, to give false testimony at the child custody trial. (*See* April 22, 2016 New York Collateral Estoppel Petition; *see also* March 8, 2018 New York Disciplinary Decision.) This assertion was based on Justice Cooper's finding in his child custody decision:

> Not only were Dr. Manion's information and his resultant conclusions spoon-fed to him by plaintiff, but Dr. Manion acknowledged in his testimony that plaintiff went so far as to draft the affidavit that served as his report. (*Zappin v. Comfort* Custody Decision at 43 (emphasis added).)

During the proceedings before the Hearing Panel, Respondent presented evidence that: (i) there was no evidence that Respondent ever "spoon-fed" any conclusions to Dr. Manion; (ii) Respondent was never given notice or an opportunity to defend any such allegation during the child custody trial; and (iii) most importantly, Dr. Manion never testified that Respondent wrote his report – in fact, he testified the opposite:

MS. COHEN:	Dr. Manion, you submitted an affidavit in this action; is that correct?
DR. MANION:	Yes, that's correct.
MS. COHEN:	That was written by Mr. Zappin; is that correct?
DR. MANION:	No. It was written by me.

(*Zappin v. Comfort* Trial Tr. At 489-90 (emphasis added); *see also* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 25-28; *see also* Tr. of HPS Hearing.) This evidence and testimony showing the infirmity of Justice Cooper's finding was not contested or rebutted by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

Flouting Court Orders and Directives: In the New York Disciplinary Decision, the First Department asserted that Respondent "flouted" directives and orders issued in New York and the

District of Columbia during the *Zappin v. Comfort* child custody proceedings. (*See* March 8, 2018 New York Disciplinary Decision.[10]) During the proceedings before the Hearing Panel, Respondent presented testimony and evidence that he was never found to have "flouted" or violated a court order during the child custody proceedings and that during the New York disciplinary proceedings he was never placed on notice as to what orders he "flouted" or violated and how he "flouted" or violated such orders warranting discipline. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 28-29; *see also* Tr. of HPS Hearing.)

Defaming the Attorney for the Child through a "Fake" Website: In the New York Disciplinary Decision, the First Department asserted that Respondent "defamed" the Attorney for the Child. (*See* March 8, 2018 New York Disciplinary Decision.[11]) Respondent presented evidence and testimony that he never "defamed" the Attorney for the Child, which included a sworn contemporaneously (*i.e.*, 2015) signed affidavit from Respondent's father that he (and attorney David Evan Schorr) were responsible for putting up a website about the Attorney for the Child and that Respondent had nothing to do with it. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 29-32, 34-36; *see also* Tr. of HPS Hearing.) Respondent further testified before the Hearing Panel that he had never been found to have "defamed" the Attorney for the Child and that he had never been placed on notice as to what possible statement he purportedly made might be considered defamatory during any proceeding. (*See id.*) This evidence and testimony was not

[10] This allegation of misconduct was not contained in the April 22, 2016 Collateral Estoppel Petition, nor was it raised at any subsequent point by the NYAGC. Instead, it appeared for the first time in the First Department's March 8, 2018 Disciplinary Decision. Obviously, as discussed herein, Respondent was not only unconstitutionally denied formal charges with respect to this allegation, but he was denied fair notice and an opportunity to defend himself violating Due Process.

[11] Again, this allegation of misconduct was not contained in the April 22, 2016 Collateral Estoppel Petition, nor was it raised at any subsequent point by the NYAGC. Instead, it appeared for the first time in the First Department's March 8, 2018 Disciplinary Decision.

disputed or rebutted by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

Filing a "Baseless" Disciplinary Report against Dr. Aaron Metrikin: In the New York Disciplinary Decision, the First Department accused Respondent of filing a "baseless" disciplinary complaint against Dr. Aaron Metrikin, the Attorney for the Child's export. (*See* March 8, 2018 New York Disciplinary Decision.[12]) Respondent presented evidence and testimony that Justice Cooper had made inaccurate and untruthful statements concerning his complaint to the New York Office of Professional Medical Conduct against Dr. Metrikin, which the First Department was apparently relying on its decision. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 32-34; *see also* Tr. of HPS Hearing.) Additionally, Respondent presented evidence and testimony that he was never given notice during the New York disciplinary proceeding that he was subject to discipline for his complaint against Dr. Metrikin. (*See id.*) This evidence and testimony presented by Respondent was likewise uncontested and unrefuted by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

Filing a False Police Report against Ms. Comfort: In the New York Disciplinary order, the First Department accused Respondent of filing a false police report against Ms. Comfort. (*See* March 8, 2018 New York Disciplinary Decision.[13]) Respondent presented evidence and testimony to the hearing panel that during the New York disciplinary proceeding: (i) Respondent was never provided a copy of the so-called "false police report" filed against Ms. Comfort; (ii) the so-called

[12] Yet again, this allegation of misconduct was not contained in the April 22, 2016 Collateral Estoppel Petition, nor was it raised at any subsequent point by the NYAGC. Instead, it appeared for the first time in the First Department's March 8, 2018 Disciplinary Decision.

[13] This allegation of misconduct was likewise not contained in the April 22, 2016 Collateral Estoppel Petition, nor was it raised at any subsequent point by the NYAGC. Instead, it appeared for the first time in the First Department's March 8, 2018 Disciplinary Decision.

"false police report" was never entered into the record or into evidence either in the child custody proceedings or during the New York disciplinary proceedings; (iii) no court had ever made a finding that Respondent made a false police report against Ms. Comfort; and (iv) Respondent was never placed on notice as to what statements he made that constituted a false police report and that he was never given an opportunity to defend the allegation in the New York disciplinary proceeding. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 38-39; *see also* Tr. of HPS Hearing.) This evidence and testimony presented by Respondent was not rebutted or contested by Disciplinary Counsel. (*See* Zappin Decl. at Ex. 13, Disciplinary Counsel Response Brief; *see generally*, Tr. of HPS Hearing.)

Thus, it is virtually indisputable – as evidenced by Disciplinary Counsel's inability to contest Respondent's evidence and the Hearing Panel Majority's dodging the issue completely – that the findings upon which Respondent was disciplined in New York are fundamentally and constitutionally infirm. More specifically, as shown above, the findings, which were rendered by Justice Cooper, lack any evidentiary basis in the record at the child custody trial and in most cases directly contradict the record or were entirely fabricated by Justice Cooper for the purpose of retaliating against and initiating disciplinary action against Respondent.

iv. Disciplinary Counsel Unethically Argues that Respondent Should Be Disciplined for Uncharged Allegations of Misconduct and Actions that Are Constitutionally Protected

Rather than contest or refute Respondent's evidence concerning the infirmity of the New York findings, Disciplinary Counsel has throughout this proceeding unethically attempted to distract the Hearing Panel and now this Court with uncharged, unlitigated and baseless assertions of misconduct. It goes without saying that this matter should be confined to the four-corners of the New York Disciplinary Decision. This is not the forum to raise new allegations of attorney

misconduct. Disciplinary Counsel is free to charge Respondent in an original proceeding for any alleged conduct she believes violates the Rules of Professional Responsibility. Instead, when pressed with overwhelming and convincing evidence as to the infirmity of the New York findings used to discipline Respondent in New York, Disciplinary Counsel throws new, baseless and largely false allegations of misconduct against the wall in this proceeding in an attempt to shirk the rules and smear Respondent without affording him proper notice or an opportunity to be heard. Disciplinary Counsel's conduct has been prejudicial and unethical. *See, e.g., U.S. v. Wilson*, 135 F.3d 291, 302 (4th Cir. 1998) (finding prejudice where prosecutor referred to uncharged and unproven crimes by defendant); *U.S. v. Miller*, 508 F.3d 444, 448-49 (7th Cir. 1974) (holding that it is generally improper and unethical for prosecutor to imply defendant's guilt in uncharged crimes). Respondent will more thoroughly address this issue in a separate filing.

B. Respondent Was Habitually and Egregiously Denied Due Process in the New York Disciplinary Proceeding

Attorneys are entitled to Due Process in attorney discipline proceedings. "Because of the effect of the disciplinary sanction on the attorney involved [in a disciplinary proceeding], the attorney is entitled to procedural due process." *In re Reback*, 513 A.2d 225, 231 fn.3 (D.C. 1986). Procedural due process in an attorney disciplinary proceeding "includes fair notice of the charges against him." *In re Bielec*, 775 A.2d 1018, 1024 (D.C. 2000) (*citing In re Ruffalo*, 390 U.S. 544, 550-51 (U.S. 1968)). Indeed, "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (U.S. 1973).

In this proceeding, the facts patently demonstrate that Respondent was denied his Due Process right to fair notice and a meaningful opportunity to be heard both with respect to Justice Cooper's findings and during the New York collateral estoppel disciplinary proceeding. What's troubling, however, is that the facts show that this refusal to afford Respondent notice and a

meaningful opportunity to be heard in the New York proceedings was deliberate. As demonstrated below, the New York proceedings did not afford Respondent Due Process and reciprocal discipline therefore cannot be imposed.

i. Respondent Was Denied Formal and Fair Notice of Charges against Him

In the New York proceedings, Respondent was denied formal and fair notice of charged against him. The United States Supreme Court has held that since attorney disciplinary proceedings are of a "quasi-criminal nature ... [t]he charge must be known before the proceedings commence" against the attorney. *Ruffalo*, 390. U.S. at 551. In the underlying child custody matter, Respondent was never provided any notice that he stood accused of violations of the Rules of Professional Conduct prior to or during the child custody trial. Nor was Respondent placed on notice that he needed to defend himself against any charge of attorney misconduct within the child custody case. Disciplinary Counsel does not dispute these facts.

In the context of this collateral estoppel disciplinary proceeding, without fair notice to Respondent during that child custody trial that Respondent may be subject to findings of attorney misconduct and Respondent being afforded a meaningful opportunity to defend himself, Respondent was denied Due Process. This is particularly so given that the NYAGC used findings from the child custody trial that Respondent was plainly never given notice he was subject to or an opportunity to defend to request that the First Department find Respondent guilty of professional misconduct via collateral estoppel. Put another way, the NYAGC's assertions of attorney misconduct in the New York collateral estoppel disciplinary matter were manufactured and culled from Justice Cooper's Child Custody Decision *post-hoc*. Where Respondent was not afforded notice that he was subject to such finding or a meaningful opportunity to defend himself in the child custody trial as to the findings relied upon by the NYAGC, Respondent was effectively

subjected to an unconstitutional "trap" with the collateral estoppel disciplinary proceeding lodged by the NYAGC. *See, e.g., Ruffalo*, 390 U.S. at 551 ("The charge must be know before the proceedings commence. They become a trap, when after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.")

More importantly, the New York collateral estoppel disciplinary proceeding denied Respondent his constitutional right to formal charges under the New York attorney discipline rules as required by *Ruffalo*. *See* 22 NYCRR § 1240.8. Here, it is undisputed that Respondent was never served with formal charges under the New York attorney discipline rules. Instead, the NYAGC chose to file a declaratory judgment petition seeking an order that Respondent was guilty of attorney misconduct based on Justice Cooper's findings. (*See* April 22, 2016 Collateral Estoppel Petition.) The NYAGC specifically chose to proceed this way, despite the fact that it has brought formal charges against attorneys in other collateral estoppel matters, in order to avoid triggering the discovery, disclosure and hearing rules set forth in 22 NYCRR § 124 *et seq*. In other words, the bringing of formal charges triggers the rules set forth in 22 NYCRR § 124 *et seq*. By purposely failing to bring formal charges against Respondent, the NYAGC deliberately and unconstitutionally circumvented its own rules and purposely denied Respondent his right and protections afforded in those rules.

The due process safeguards set out in *Ruffalo* have been interpreted by several state supreme courts to require that an attorney be served with formal charges. Specifically, the District of Columbia Court of Appeals has held that based on the Supreme Court's holding in *Ruffalo*, "an attorney can be sanctioned only for those disciplinary violations enumerated in formal charges." *In re Smith*, 403 A.2d 296, 300 (D.C. 1979). Other courts have come to the same conclusion. *See*

In re Disciplinary Action Against Graham, 453 N.W.2d 313, 316 (Minn. 1990) ("As a matter of due process, [an attorney] cannot be found to have violated disciplinary rules by certain actions which were not the subject of formal charges."); *In re Arledge*, 42 So.3d 969, 971 (La. 2010) ("out of an abundance of caution, the board rejected the committee's conclusion that Mr. Arlege also violated Rules 3.1, 3.3, 3.4, 4.1 and 8.4(d) of the Rules of Professional Conduct. The board explained that those rule violations were not set forth in the formal charges and that Mr. Arlege was not given fair and adequate notice of the alleged misconduct.")

In sum, Respondent was denied Due Process where: (i) he was denied fair notice that he may be subject to findings of attorney misconduct in the underlying child custody matter and a meaningful opportunity to defend himself; and (ii) he was denied formal charges in accordance with state law by the NYAGC. As a result, this Court should not impose reciprocal discipline on Respondent based on these egregious violations of Respondent's right to Due Process.

ii. Respondent Was Denied Due Process by the First Department Where It Make Findings of Attorney Misconduct Based on Uncharged and Unlitigated Allegations and Assertions

The lack of formal charges depriving Respondent of his right to due process is particularly egregious with respect to the First Department's March 8, 2018 decision and order. Specifically, in the March 8, 2018 decision and order, the First Department based its decision to disbar Respondent of assertions of misconduct that are not found in the NYAGC's April 22, 2016 Collateral Estoppel Petition and which Respondent was never afforded notice of or an opportunity to contest within the collateral estoppel disciplinary proceeding. These (baseless) assertions of misconduct include:

- That Respondent "beginning in April 2014, engaged in acts that repeatedly demonstrated disrespect for the court and counsel, by, *inter alia*, flouting the judicial directives of three judges (a judge of the District of Columbia Superior Court, the

original matrimonial judge and the matrimonial judge who made these findings)" (Ex. March 8, 2018 Decision and Order at 2, 7);

- That Respondent "set[] up a fake website about the attorney for the child by registering her name as a domain name and posting derogatory messages about her on it" (*id.* at 2, 6);
- That Respondent "baselessly fil[ed] a disciplinary complaint against a court-appointed psychiatric expert witness" (*id.* at 2, 7);
- That Respondent "had attempted to publicly defame the attorney for the child" (*id.* at 2, 7);
- That Respondent "fil[ed] ... a police report falsely accusing his wife of committing acts of domestic violence" (*id.* at 3, 7);
- That Respondent admitted to "engaging in threatening behavior toward the matrimonial judge" (*id.* at 5); and
- That Respondent "accused the matrimonial judge of assaulting his wife and then denied making the accusation" (*id.* at 5).

As the record in the New York proceeding conclusively illustrates, these assertions of misconduct either appeared out-of-the-blue from the First Department in the New York Disciplinary Decision or were raised in reply papers by the NYAGC depriving Respondent of the ability to defend himself. These facts are unrefuted by Disciplinary Counsel

Put simply, the allegations and assertions of misconduct bullet-pointed above were not the subject of constitutionally required formal charges as set forth in *Ruffalo*. In other words, Respondent was denied his right to fair notice of these allegations and a meaningful opportunity to defend himself. Given that the First Department relied on these assertions of misconduct to impose discipline of Respondent, it is apparent that Respondent was denied his right to Due Process precluding the imposition of reciprocal discipline. More importantly, though, the fact that the First Department would spring multiple assertions of misconduct on Respondent, which it knew he did not have notice of or an opportunity to defend, only underscores the fundamental

unfairness of the New York proceeding and undermines the constitutional legitimacy of the March 8, 2018 New York Disciplinary Decision.

iii. Respondent Was Denied His Constitutional Right to a Hearing On the Merits before the New York Disciplinary Authority

The second fundamental element of due process is the right to a fair hearing before an impartial tribunal. Procedural due process in an attorney disciplinary proceeding requires that an attorney be afforded "adequate notice and a meaningful opportunity to be heard." *Bielec*, 755 A.2d at 1022 (D.C. 2000). In this case, the record from the New York collateral estoppel disciplinary is clear that Respondent was not provided with an evidentiary hearing on the merits before the New York disciplinary authority as to the NYAGC's assertions of misconduct against Respondent. Rather, the use of collateral estoppel was specifically used by the NYAGC to unconstitutionally deny Respondent that right. Importantly, Respondent was denied his right to present evidence in his defense, to testify, to cross-examine adverse witnesses, to produce evidence, to call witnesses and to present arguments after learning of the assertions of attorney misconduct by the NYAGC. This is particularly troubling in light of the fact that the record makes apparent that Respondent was never provided any notice that he stood accused of violations of the Rules of Professional Conduct prior to or during the child custody trial.

Both the Hearing Panel Majority and Disciplinary Counsel appear to refute this clear fact. In the Hearing Panel Majority's Recommendation, it states in a passage cribbed from Disciplinary Counsel's proposed findings of fact that:

> Respondent acknowledged to the Hearing Panel Subcommittee that he had notice of the disciplinary charges and an opportunity to litigant, albeit unsuccessfully, the application of collateral estoppel. Respondent acknowledged in his own testimony that he appeared with counsel at the New York disciplinary proceeding, that he was able to present evidence, that his counsel had the opportunity to cross examine and elicit direct testimony from witnesses, and the he was given the opportunity to testify on his own behalf. Respondent testified that he had the opportunity to and,

> his counsel did, file briefs post-hearing ... New York procedures as applied to this matter comported with the requirements of due process of law.

(Hearing Panel Majority Recommendation at 30 (citations omitted).) The Hearing Panel Majority's and Disciplinary Counsel's representations in the above paragraph are deliberately misleading and prejudicial.

First, Respondent has repeatedly consistently maintained in this action and in the New York action that he was not afforded fair notice of the NYAGC disciplinary charges or a meaningful opportunity to litigate them. The Hearing Panel Majority and Disciplinary Counsel point to Respondent's testimony that does not support their conclusion.

Second, contrary to the Hearing Panel Majority's and Disciplinary Counsel's insinuation, Respondent never received a hearing on the merits before the New York disciplinary authority as required by the rules. Respondent was adjudged guilty of attorney misconduct by order of the First Department in October 2016 based on Justice Cooper's matrimonial findings. (*See* October 18, 2016 Order.) The mitigation/aggravation hearing referenced by the Hearing Panel Majority and Disciplinary Counsel did not take place until several months later in December 2016. In other words, applying the reasoning of the Hearing Panel Majority and Disciplinary Counsel, a criminal defendant will have received a fair trial when he is summarily adjudged guilty without a hearing, but is given an opportunity to testify, call witnesses and present evidence at his sentencing hearing. This bizarre logic does not even come close to passing constitutional muster. Moreover, the Hearing Panel Majority's and Disciplinary Counsel's representations concerning Respondent receiving a hearing are eviscerated by the fact that the NYAGC conceded in a hearing in the Southern District of New York that Respondent was not afforded a hearing on the merits in the collateral estoppel disciplinary proceeding. (*See* Zappin Decl. at Ex. 14, Tr. of Initial Conference

in *Zappin v. Dopico et al.*) Consequently, Respondent was denied his Due Process and statutory right to a hearing before the disciplinary authority in New York.

Moreover, with respect to the proceedings in New York filed against Respondent, not only was he denied an evidentiary hearing to contest the assertions of attorney misconduct levied against him, but he was denied his right to an actual fact-finder. In the case *In re Wilde*, 68 A.3d 749 (D.C. 2013), which many cases deciding the issue of collateral estoppel in attorney disciplinary proceedings have cited favorable, Massachusetts left it to the fact-finder (*e.g.*, a referee) – not the Appellate Court – to determine whether collateral estoppel should be applied in attorney discipline cases. *Id.* at 762. Based on this reasoning, this Court left it to the Hearing Board to determine whether collateral estoppel should apply to a criminal conviction in a foreign county. *Id.* at 765. As the record from the New York proceeding illustrates, the First Department unconstitutionally usurped the role of the fact-finder and found Respondent guilty of attorney misconduct without affording him an opportunity to present a complete defense. It therefore cannot be said that the New York proceeding that Respondent was subjected to comported with due process sufficient to impose reciprocal discipline in the District of Columbia.

iv. The NYAGC Failed to Follow Its Only Rules Evidencing an Unconstitutional Proceeding

As mentioned above, the NYAGC deliberately and intentionally failed to follow its own rules in prosecuting Respondent in New York. Specifically, it is undisputed that the NYAGC circumvented its own rules in at least the following way:

- The NYAGC failed to serve Respondent with formal charges as required by 22 NYCRR § 1240.8(a)(1);
- The NYAGC failed to produce disclosure Respondent was entitled to under 22 NYCRR § 1240.8(a)(3);

- The NYAGC refused to allow Respondent discovery that he was entitled to under 22 NYCRR § 1240.8(a)(4);
- Respondent was denied a hearing on the merits before a referee set forth in 22 NYCRR § 1240.8(b)(1); and
- Respondent's aggravation/mitigation hearing was unconstitutionally thwarted where it took place while Respondent was appealing the underlying child custody case before Justice Cooper and his factual findings at issue in the disciplinary matter;[14] and
- The First Department, as detailed above, based its discipline decision on less than seven (7) assertions of misconduct that were never charged, litigated or noticed to Respondent during the proceeding.

Just as a function of basic fairness, it is unclear how this Court can give any weight, credibility or deference to a drumhead disciplinary proceeding in New York where the NYAGC by its own admission deliberately disregarded its own rules.

v. Justice Matthew Cooper Was Not an Impartial Arbiter

Reciprocal discipline is inappropriate in this matter where it is apparent that Respondent was denied an impartial arbiter with respect to Justice Cooper. Indeed, Justice Cooper showed himself through the *Zappin v. Comfort* proceeding as someone who had an axe to grind towards

[14] Under New York law, a stay should have been issued. By granting the NYAGC's Collateral Estoppel Petition and conducting the sanction hearing before Respondent's appeal of the Justice Cooper's child custody decision was heard, the First Department effectively deprived Respondent of the right to introduce evidence of remorse, particularly where it was aware findings relied on by the NYAGC were being challenged in a pending appeal. As a result, Respondent remained silent at the hearing, which the First Department – and now the Hearing Panel Majority – have unconstitutionally found to have exhibit a "lack of remorse." *See U.S. v. Ramirez*, 707 F.Supp.3d 621, 629 (W.D.N.C. 2010) ("[T]he Fifth Amendment limits proof of lack of remorse to 'affirmative words or conduct' expressed by the defendant ... [T]his Court will offer an instruction to the jury that the defendant's mere silence may never be considered as proof of lack of remorse."); *U.S. v. Montgomery*, 10 F.Supp.3d 801, 804 (W.D.Tenn. 2014) ("[T]he Court will instruct the jury that Defendant's mere silence cannot be considered as proof of the lack-of-remorse factor.").

Respondent and engaged in behavior that is unthinkable for a judge. Some of this behavior, includes, but is not limited to:

- Justice Cooper repeatedly and deliberately misrepresented the record and fabricated findings adverse to Respondent. As shown above, this took place not only in his Child Custody Decision, but also in his September 18, 2015 Sanctions Decision;
- Justice Cooper admittedly personally disseminated the statutorily sealed September 18, 2015 Sanctions Decision to the press, including *The New York Law Journal*, *The New York Post* and *The New York Daily News*. He did so with the intent to inflict personal and professional harm on Respondent and to deprive him of the financial ability to hire counsel in the child custody trial. Justice Cooper was found to have engaged in extrajudicial conduct by the Southern District Court New York. *See Zappin v. Cooper*, Case No. 16-cv-5985 at Dkt. No. 57 ("Opinion & Order");
- Justice Cooper repeatedly berated Respondent with derogatory, inappropriate and childish remarks (*see* Tr. of HPS Hearing at 158-160.);
- Justice Cooper physically threatened Respondent during the child custody trial asking Respondent if he wanted to go outside and "rumble" (*see id.* at 161.)
- Justice Cooper systematically excluded virtually every piece of material and relevant evidence favorable to Respondent at the child custody trial. As explained below, this was particular so with respect to Ms. Comfort's allegations of domestic violence.

The record of Justice Cooper's conduct is appalling. This is particularly so where a judge would engage in clear extrajudicial conduct by admittedly personally reaching out to the press in a confidential and sealed matrimonial action in an effort to incite negative press about a litigant. The fact that Justice Cooper repeatedly misrepresented the records and demonstrably fabricated

findings only serves to confirm that he was not a neutral arbiter. Simply put, the record from *Zappin v. Comfort* makes certain that Respondent was denied an impartial arbiter with Justice Cooper and consequently Respondent was denied Due Process.

vi. Respondent Was Denied a Full and Fair Opportunity to Defend Himself with Respect to Ms. Comfort's Allegations of Domestic Violence

With respect to the allegations of domestic violence in *Zappin v. Comfort*, Respondent was plainly denied his Due Process right to meaningfully contest the allegations of domestic violence made against him. As mentioned above, Justice Cooper systematically excluded virtually every piece of evidence favorable to Respondent without any legal justification during the child custody trial. This particularly included critical and necessary evidence to Respondent's defense of Ms. Comfort's allegations of domestic violence.

The law is clear that a party is denied Due Process where he is unable to present crucial evidence and witnesses in his defense. "A party has not had the requisite full and fair opportunity [to comply with Due Process] if he or she was unable to present critical evidence in the initial hearing." *Snider v. Consolidated Coal Co.*, 873 F.2d 555, 559 (7th Cir. 2000). "The full and fair opportunity requirement will not be met if [a] party ... was unable to present critical evidence in the prior proceeding." *In re Pizante*, 186 B.R. 484, 488 (9th Cir. 1995). "In *Blonder-Tongue*, the Supreme Court indicated that the 'full and fair' opportunity inquiry includes the question of 'whether without fault of his own [a party] was deprived of crucial evidence or witnesses in the first litigation." *Charter Oak Fire Ins. Co. v. Electrolux Home Prods., Inc.*, 882 F.Supp.3d 396, 401 (E.D.NY. 2012).

Justice Cooper excluded the following critical evidence necessary to Respondent's defense of Ms. Comfort's allegations of domestic violence without legal justification and in violation of Respondent's Due Process right to a full and fair opportunity to be heard:

- Justice Cooper refused to allow Respondent or his expert access to the digital copies of Ms. Comfort's purported domestic violence photographs in violation of New York law. The digital copies of the photographs were critical and necessary to assess and show that the photographs had been digitally altered, as confirmed by the metadata provided by Justice Cooper's chambers. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 40.);
- Justice Cooper excluded from evidence the metadata corresponding to Ms. Comfort's purported domestic violence photographs. The metadata showed that the photographs had been digitally altered. Additionally, the metadata contained timestamps showing that Ms. Comfort's photographs were taken weeks after the alleged incidents of abuse contradicting her sworn pretrial statements. (*See id.* at 40.)
- Justice Cooper made extensive findings in his child custody decision concerning an April 25, 2015 domestic violence incident at the Time Warner Center between Respondent and Ms. Comfort based solely on their conflicting testimony. Respondent alleged that he was accosted and abused by Ms. Comfort while picking up the child for a visitation. Respondent subpoenaed the security footage from the Time Warner Center, which was returned directly to the trial court with a business certification affidavit (the management company of the Time Warner Center was also willing to testify to authenticate the video). Justice Cooper excluded the security footage – the most objective piece of evidence – without any justification. (*See id.* at 41.)
- Justice Cooper unlawfully excluded Ms. Comfort's medical records prior to her conception of the child. Almost immediately prior to her conception of the child, Respondent proffered evidence that Ms. Comfort had sought treatment for substance

abuse and had been in mental health counseling. These records were directly relevant to her fitness to parent the child under New York law. (*See id.* at 41.)

- Justice Cooper excluded the testimony of Respondent's mother, Leigh Anne Zappin, who was an eye-witness to acts of domestic violence committed by Ms. Comfort against Respondent. (*See id.* at 41.)
- Justice Cooper refused to allow Respondent to call Ms. Comfort's mother, Wendy Comfort, who submitted photographs into evidence at the child custody trial that she had taken during the time Ms. Comfort alleged that she was abused that directly refuted Ms. Comfort's allegations of domestic violence and Ms. Comfort's photographs entered into evidence at trial. (*See id.* at 41-46.) Moreover, Wendy Comfort was present with Ms. Comfort when Ms. Comfort alleged that she had injuries, which Wendy Comfort would have refuted. (*See id.* at 46.)
- Justice Cooper excluded the testimony of the parties' real estate agent, Ellen Klein. Ms. Klein had dinner with Ms. Comfort during a period in which Ms. Comfort claimed in sworn documents that she had "visible" injuries to her face. Ms. Klein had sent contemporaneous text messages to Respondent after the dinner stating that Ms. Comfort "looked great" refuting Ms. Comfort's allegations of domestic violence. Notably, Justice Cooper also excluded Ms. Klein's text message from evidence, despite the authenticity of the text message not being in dispute. (*See id.* at 47.)

As demonstrated above, Respondent was repeatedly denied critical and material evidence with respect to Ms. Comfort's allegations of domestic violence. This included eye-witness testimony, digital files, video footage, medical records and expert opinion, which were all necessary to prosecute and defend Respondent's case at the child custody trial. *See Ritz v.*

O'Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977) (holding that the right to a full and fair hearing includes the right to cross examine witnesses and the right to present evidence); *Scott v. U.S.*, 975 A.2d 831, 839 (D.C. 2009) (finding constitutional error where trial court erroneously precluded defendant from introducing cell phone records corroborating a defense witness's alibi testimony that defendant was on telephone with her at time crime occurred); *In re D.E.*, 991 A.3d 1205, 1212 (D.C. 2010) (finding constitutional violation in exclusion of one defense witness to charged assault even though second defense eyewitness testified); *McDonald v. U.S.*, 904 A.3d 377, 381 (D.C. 2006) (holding that trial court's preclusion of defendant from testifying about his injuries during his arrest held unconstitutional; "for [an] opportunity [to present a defense] to be meaningful, it must be full and fair, not arbitrary and significantly curtailed.").

Just the exclusion of one of the items above should raise a substantial constitutional question as to whether Respondent was afforded a meaningful opportunity to be heard at the child custody trial in *Zappin v. Comfort*. However, the sheer volume of critical and necessary evidence excluded by Justice Cooper without legal justification that was favorable to Respondent plainly shows that Respondent's Due Process right to a full and fair child custody trial was necessary infringed. As a result, this Court should not impose reciprocal discipline.

C. Imposing Reciprocal Discipline on Respondent Is Unconstitutional under West Virginia Law

Disciplinary Counsel insists on arguing that reciprocal discipline may be imposed in cases where the foreign jurisdiction's standard of proof in the attorney disciplinary proceeding where the findings were rendered was the mere "preponderance of the evidence" standard. Respondent does not dispute that. Disciplinary Counsel either fundamentally does not understand Respondent's position or is attempting to mislead the Court as she did with the Hearing Panel Majority.

In this case, the findings upon which Respondent was disciplined in New York were solely rendered in the context of a child custody proceeding in Respondent's personal divorce proceeding. In that proceeding, the guiding standard is the "best interests of the child." *See In re J.J.*, 984 N.Y.S.2d 831, 844 (N.Y. Fam. Ct. 2014) ("[I]n proceedings involving children, the bests interest of the child is a prevalent theme."). Such findings fundamentally do not meet the standard of proof and evidentiary burden necessary to impose reciprocal discipline on Respondent in West Virginia. In fact, imposing reciprocal discipline on Respondent based on findings rendered by a matrimonial judge in a child custody matter is unconstitutional in West Virginia.

The only reason that New York was able to bring a collateral estoppel disciplinary proceeding against Respondent is because New York uses the lower "preponderance of the evidence" standard in attorney discipline cases. *See Matter of Friedman*, 609 N.Y.S.2d 578, 586 (N.Y. 1st Dept. 1994) (The New York Court of Appeals "has conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence."). West Virginia maintains a higher standard of proof in attorney discipline cases. *See* W.Va. Rules of Lawyer Disciplinary Procedure, Rule 3.7 ("In order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proved by clear and convincing evidence.") Consequently, in West Virginia Disciplinary Counsel could only bring a collateral estoppel disciplinary action against an attorney who has had findings rendered against him under the "clear and convincing evidence" standard.

Thus, had Disciplinary Counsel sought to bring an initial action against Respondent asserting collateral estoppel based on Justice Cooper's findings, it would be unlawful and unconstitutional under West Virginia law. *See State v. Bayer.*, 223 W.Va. 146, 155 (2008) (discussing that "clear and convincing evidence" is a "higher standard" than "preponderance of

the evidence"). Disciplinary Counsel should not now be entitled to a windfall merely because this is a reciprocal disciplinary proceeding and use findings rendered by a matrimonial judge using the "preponderance of the evidence" standard to seek the imposition of discipline on Respondent. Disciplinary Counsel's sole remedy is to bring original charges against Respondent.

Disciplinary Counsel cites several cases where jurisdictions using the "clear and convincing evidence" standard have imposed reciprocal discipline based on findings in foreign jurisdictions using the "preponderance of the evidence" standard. The instant matter is fundamentally and critically distinguishable from every case cited by Disciplinary Counsel. Indeed, in those cases, the findings rendered in the context of an attorney disciplinary proceeding. More specifically, those findings carried all the procedural Due Process safeguards of a quasi-criminal proceeding.

In the instant matter, the findings used to impose discipline on Respondent were rendered by a matrimonial judge in a contested child custody case. Matrimonial fact-findings in New York have fundamentally different purposes, goals, procedures and safeguards than attorney disciplinary fact-findings. Indeed, litigants in matrimonial actions are afforded substantially less Due Process safeguards than what the rules require in attorney disciplinary matters. *See* 22 NYCRR § 1240 *et seq*. By way of example, in matrimonial cases in New York:

- Litigants are not entitled to pretrial disclosure *See S.R.E.B. v. E.K.E.B.*, 20 N.Y.S.3d 294 (N.Y. Sup. Ct. 2015) ("[I]t had been the long established policy in the First and Second Judicial Department that generally, pretrial discovery [in child custody matters] is not allowed ...."); *contra* 22 NYCRR § 1240.8(a)(2).
- The Rules of Evidence are extremely relaxed and allow for the introduction of hearsay through Attorneys for the Child and forensic custody evaluators. *See Crocker C. v.*

Anne R., 26 N.Y.S.3d 724 (N.Y. Sup. Ct. 2015); *Balbert v. Balbert*, 74 N.Y.S.3d 131 (N.Y. Sup. Ct. 1947); *Young v. Young*, 628 N.Y.S.2d 957 (N.Y. 2nd Dept. 1995).

- Unlike disciplinary cases, child custody matters are invaded by court-appointed acts such as the Attorney for the Child and the forensic custody evaluator who dictate substantial portions of the litigation and who may introduce hearsay to the court.
- Matrimonial child custody decisions are always modifiable. *See In re Moore*, 21 N.Y.S.2d 292, 294 (N.Y. 2nd Dept. 2015) ("To modify an existing custody order, the parent seeking modification must establish a substantial change in circumstances since the initial custody determination such that the modification is necessary to protect the best interests of the child.") Disciplinary matters, on the other hand, are final and virtually unmodifiable. Moreover, they carry with them extreme and life-long reputational stigma and consequences. *See Karlin v. Culkin*, 248 N.Y. 465, 478 (N.Y. 1928) (noting that professional reputation "once lost, is not easily restored.").

The difference between matrimonial proceedings and attorney disciplinary proceedings is beyond vast. (*See* Zappin Decl. at Ex. 12, Infirmity Motion to Dismiss at 1-11.) The safeguards present in a quasi-criminal attorney disciplinary proceeding are simply not present in a contested matrimonial and child custody proceeding.

As such, it would be manifestly unjust and unconstitutional under West Virginia law to impose discipline on Respondent based on findings rendered in a contested matrimonial and child custody proceeding.

VI. CONCLUSION

For the reasons set forth above, Respondent requests that this Court decline to impose reciprocal discipline. Disciplinary Counsel remains free to bring an original proceeding.

Dated: December 8, 2020
Huntington, West Virginia

Respectfully submitted,

ANTHONY ZAPPIN
1827 Washington Blvd.
Huntington, WV 25701
(304) 730-4463 (tel.)
anthony.zappin@gmail.com
Respondent

CERTIFICATE OF SERVICE

I, Anthony Zappin, hereby certify that on this 8th day of December 2020, I served a true and correct copy of the foregoing "Brief of Respondent Anthony J. Zappin" upon the Office of Lawyer Disciplinary Counsel, by mailing the same via USPS pre-paid mail to the following address:

Rachel L. Fletcher Cipoletti
Office of Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, WV 25304

ANTHONY ZAPPIN