IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re: Anthony J. Zappin, a member of The West Virginia State Bar

Bar No.: 11453

Supreme Court No.: 18-0250

I.D. No.: 18-03-098

REPORT OF THE HEARING PANEL SUBCOMMITTEE

I. PROCEDURAL HISTORY

On or about March 21, 2018, the Office of Lawyer Disciplinary Counsel filed a "Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure." On or about April 18, 2018, Respondent filed a request for a formal hearing in the matter. On or about April 25, 2018, S. Benjamin Bryant, Esquire, filed a Notice of Appearance on behalf of Respondent. Chief Lawyer Disciplinary Counsel filed her discovery on or about December 10, 2018. On that same date, Respondent filed "Respondent Anthony J. Zappin's Motion to Dismiss the Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Infirm Evidence" and "Respondent Anthony J. Zappin's Motion to Dismiss Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Due Process." On December 11, 2018, Respondent filed "Respondent's Motion to Withdraw 'Respondent Anthony J. Zappin's Motion to Dismiss the Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Infirm Evidence.'" Respondent filed his discovery on or about January 16, 2019, as well as "Respondent Anthony J. Zappin's Amended Motion to Dismiss Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Infirm Evidence." On or about February 7, 2019, Chief Lawyer Disciplinary Counsel filed a "Motion to Extend Time Frame to File a Response to

Respondent Anthony J. Zappin's Amended Motion to Dismiss the Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Infirm Evidence and Respondent Anthony J. Zappin's Motion to Dismiss Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Due Process."

On or about February 25, 2019, Respondent filed "Respondent Anthony J. Zappin's Second Amended Motion to Dismiss Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Infirm Evidence" and "Respondent's Second Discovery Production to ODC." On or about February 28, 2019, Chief Lawyer Disciplinary Counsel filed "Responses to Respondent Anthony J. Zappin's Amended Motion to Dismiss the Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Infirm Evidence" and "Respondent Anthony J. Zappin's Motion to Dismiss Notice of Reciprocal Disciplinary Action and Proceedings Thereon: Due Process." On or about March 4, 2019, Respondent filed "Anthony J. Zappin's Discovery Requests to the ODC."

This matter proceeded to a hearing on March 25-26, 2019. The Hearing Panel Subcommittee, comprised of Anne Werum Lambright, Esquire, Chairperson, Gail T. Henderson Staples, Esquire, and Dr. K. Edward Grose, Layperson, presided over this matter. The Panel heard testimony from Respondent and ODC Exhibits 1-11 were admitted, as well as Respondent's Exhibits 1-27 were admitted into evidence.

Based upon the evidence and the record, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board submits the following Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

II. FINDINGS OF FACT

1. Anthony J. Zappin (hereinafter "Respondent") is a lawyer who was admitted to the West Virginia State Bar on November 23, 2010. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer

Disciplinary Board. Respondent was admitted to the practice of law in the State of New York by the First Judicial Department on September 19, 2011.

2. Respondent and Claire Comfort were married in 2013 and have a child together. Since the birth of the child, the parties have engaged in litigation initially in the courts of the District of Columbia and then later, in New York. On or about November 20, 2013, in the Superior Court of the District of Columbia the parties entered into a "Consent Order" wherein Respondent agreed to have no contact with Comfort and to have supervised visitation as a condition for access to his child. In February 2014, Respondent filed for divorce and for custody of their child in the Supreme Court, New York County. Respondent's divorce case was initially before Justice Deborah Kaplan but was later transferred to Justice Matthew Cooper.

3. On or about April 30, 2015, Respondent filed suit against the State of New York in the Court of Claims and alleged that during an April 24, 2015 conference in his custody case, Justice Kaplan directed Officer Katz to assault him and to falsely arrest/imprison him which constituted a civil conspiracy. (Zappin v. New York, Court of Claims, CLAIM NO. E15-0277)

4. Proceedings before Justice Cooper resulted in a September 18, 2015 sanctions decision. In that decision, Justice Cooper imposed financial sanctions on Respondent after finding he had "done everything in his power to undermine the legal process and use his law license as a tool to threaten, bully, and intimidate," behavior that "call[ed] into question his fitness to practice law." Justice Cooper likewise found that Respondent's "tactics, and the language he employ[ed] in his motion papers, ha[d] grown [ever more] extreme and out of step with what is appropriate and permissible advocacy by an attorney, even one who is representing himself." The 2015 Sanctions Decision also criticized Respondent's conduct towards other judges and opposing counsel. (Id. at 4, 8-9). The Court noted that "this divorce case, unfortunately, presents a situation where an attorney has used his pro se status to inflict harm on his wife, their child and the court, and in so doing has caused significant harm to himself." Zappin v. Comfort, 49 Misc. 3d 1201(A), 26 N.Y.S.3d 217 (N.Y. Sup. Ct. 2015), aff'd, 146 A.D.3d 575, 49 N.Y.S.3d 6 (N.Y. App. Div. 2017).

5. On or about October 14, 2015, by and through counsel, Respondent filed a notice of appeal of Justice Cooper's September 2015 sanctions decision. [ODC Exhibit 1, Bates stamped 000055-000056]

6. On or about November 6, 2015, Justice Cooper held a pre-trial conference during which the parties and attorneys reviewed certain documents. At one point while the court went off-the-record, Respondent attempted to pick up and review a folder of documents that had been placed on counsel's table for the parties' review, resulting in an incident between Respondent and counsel for the child. Justice Cooper was not in the room but was alerted to it by court personnel in the courtroom and directed counsel to come back during staggered periods of time to review the documents individually.

7. On November 10, 2015, Justice Cooper held an evidentiary hearing concerning the November 6, 2015 incident. Justice Cooper took the testimony of three court employee witnesses, all of which testified that they saw no contact by the attorney. He allowed all sides to have an opportunity to cross examine the witnesses. Respondent took the stand and gave his version of events, testifying that the other attorney grabbed the documents out of his hands and shoved him and claimed his elbow made contact with his back, which was quite tender from surgery the day prior. He testified that he fell to the ground because of the pain and asked the court officer to intervene and arrest the other lawyer. The other attorney did not testify. [Respondent's Exhibits, Bates stamped 000390AZ-000447AZ]

8. Following the completion of testimony, Justice Cooper made the following findings:

> [I]n a case that is already bizarre, this gets more bizarre ... according to [Plaintiff's] testimony ... somehow Mr. Kurland a 69 year old attorney brutally assaulted [Plaintiff], caused him to fall to the ground as a result of contact that [Plaintiff] says was sufficient to make him fall to the ground.
>
> The credible testimony of three non-interested witnesses court employees is that there was no contact. If there was it was the most minimal contact possible, and the fact that [Plaintiff] would rise and then be shouting things to the extent [of] arrest this man for assault, that he would be saying I'm going to sue you ... the idea this would happen is mind-boggling.
>
> [Plaintiff's] behavior, at the very least, in this incident is bizarre and reflective of a person whose actions are out of control. At worst, it borders on totally improper, perhaps criminal. His actions disrupted the work of this Court[.]

* * *

> This fanciful, I don't think there is any other word for it, conspiracy theory by [Plaintiff] ... calls to question the Plaintiff's ability to tell the difference between true and false, fact and fiction, appropriate and inappropriate. Those are my findings.
>
> (Hearing Tr. 42:18-44:9).

9. At the conclusion of the proceeding, Respondent said to Justice Cooper, "You destroyed my career. You did it intentionally. You published your [Sanctions] [D]ecision to destroy me." (Hearing Tr. 50:10-26). Justice Cooper responded that "if anybody destroyed your career, sir, it was you and you alone[.]" (Id. at 51:2-5).

10. The custody trial began November 12, 2015, and concluded December 11, 2015, and it is noted that there was one day of testimony from September 15, 2014, and the transcript of the hearing held November 10, 2015, were all made part of the record. Respondent called ten witnesses, Comfort called four witnesses, and the court appointed forensic evaluator also testified. Respondent introduced 161 exhibits, Comfort introduced 68 exhibits and the evaluator introduced 4 exhibits, and there were 9 court exhibits, including the forensic report and psychological evaluations of the parties. [Respondent Exhibit 1, page 3].

11. On or about February 5, 2016, the Court of Claims case against Justice Kaplan and her court officer was dismissed with prejudice by a joint stipulation discontinuing the action.

12. Justice Cooper issued an opinion and order regarding the custody trial on or about February 29, 2016. Cooper's decision and order granted Respondent's wife sole custody of the couple's child and found that Respondent had repeatedly perpetrated acts of domestic violence against his wife. The Court further found that Respondent had testified falsely at trial; had knowingly introduced falsified evidence during the proceedings in the form of altered text messages; and had presented misleading testimony through his expert witnesses. The Order goes on to say that going back to April 2014 Respondent engaged in acts that repeatedly demonstrated disrespect for the court and counsel, including ignoring the directives of three judicial officers, setting 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, and baselessly filing a disciplinary complaint against the psychiatric expert witness. Additionally, the Supreme Court found that

Respondent had sent text messages to his wife, also an attorney, threatening her with loss of her license to practice law and professional ruin. Justice Cooper also found that Respondent made grossly offensive remarks during cell phone conversations with his then three-month-old son in which he baselessly accused his father-in-law of being a child sexual abuser who could harm the child. [Respondent Exhibit 1]

13. On April 21, 2016, NY Disciplinary Counsel filed a petition seeking an Order finding Respondent guilty of professional misconduct based upon the Cooper Court's decisions issued February 29, 2016, and Cooper's Sanction Decision issued September 18, 2015. [Respondent's Exhibit 2, page 3]. NYDC argued that the application of collateral estoppel was appropriate because the two requirements: 1. Identity of issue; and 2. full and fair opportunity to litigate were satisfied. [Respondent Exhibit 2, page 34]. NYDC requested the Court to conclude that Respondent violated Rule 8.4(b), Rule 8.4(c), Rule 8.4(d), Rule 8.4(h). Rule 3.1, Rule 3.3(a)(1), and Rule 3.3(a)(3) and refer the matter to the committee for the purposes of a sanction hearing. [Respondent Exhibit 2]. Notice was served upon Respondent on or about April 22, 2016. [Respondent Exhibit 3].

14. On or about June 11, 2016, Respondent, by and through counsel, filed an Affirmation in Opposition to Petition for Collateral Estoppel. [Bates No. 42] The arguments advanced alleged that the application of collateral estoppel was improper as disciplinary counsel failed to satisfy the burden of identify the issue and that Respondent lacked a full and fair opportunity to litigate the issues.

15. On or about July 27, 2016, Respondent filed a *pro se* lawsuit against Justice Cooper, the New York County Supreme Court Justice, seeking compensatory and punitive damages for allegedly disseminating and publishing the September 2015 sanctions decision. Zappin v. Cooper, No. 16-CV-5985 (S.D.N.Y).

16. By unpublished order of October 17, 2016, the Appellate Division of the Supreme Court in the First Judicial Department in New York granted the motion of the NYDC finding Respondent guilty of professional misconduct and referring the matter to a referee solely to consider evidence in mitigation or aggravation and to recommend an appropriate sanction. The Court issued an order pursuant to the doctrine of collateral estoppel based upon the orders and decisions issued in the divorce and custody action. [Respondent Exhibit 4].

17. On or about November 2, 2016, Respondent filed a criminal complaint against Justice Cooper alleging that Justice Cooper approached him on a New York street and spit at him. [ODC Exhibit 4, Bates stamped 2220-2222].

18. On or about November 10, 2016, Respondent filed a complaint against Daily News, LP and Justice Cooper. Respondent alleged that Justice Cooper disseminated the 2015 Sanctions Decision to several news outlets, including a reporter at Daily News. Respondent further alleged defamation for publication of an article about the November 10 evidentiary hearing in his domestic proceedings entitled, "Lawyer fined $10,000 for misusing legal license 'feigned an assault' in courtroom, judge says." Zappin v. Daily News, LP, 16-CV-7417 (S.D.N.Y.).

19. On or about November 14, 2016, Respondent filed suit against Judge Cooper, Julia Marsh, a reporter, and NYP Holdings and alleged that a November 13, 2015 Post article recounting the November 12, 2015 proceeding, entitled " 'Hostile' mega-lawyer accused of abusing pregnant wife," was defamatory. et. Zappin v. NYP Holdings, Inc.et al, 16-CV-8838 (S.D.N.Y).

20. On December 19, 2016, a disciplinary sanctions hearing was held before a Referee. As mitigation evidence, Respondent introduced a limited portion of his deposition testimony in the underlying disciplinary investigation in which he made reference to the fact that he was in counseling during his senior year in college and again sporadically while in law school, that he took antidepressants while in college, and in high school, he volunteered with the homeless. He also introduced a letter from his therapist, in which she stated that she had sporadically treated Respondent over the course of two years but starting in April 2016 he consistently attended therapy on a biweekly basis. He also introduced four letters from character witnesses and maintained that any misconduct on his part occurred solely in the context of his custody dispute. Respondent declined to testify or present other witnesses. [Bates No. 0169-219]

21. On or about February 28, 2017, NYDC filed its Staff's Memorandum on Sanctions. [Bates No. 221-286] In its brief on sanctions, NYDC argued that "Respondent's misconduct calls for his disbarment. The duration, ferocity and maliciousness of this volatile attorney's misconduct make manifest his present unfitness to practice law." [Bates No. 285].

22. On or about March 28, 2017, Respondent was charged in the Criminal Court of the City of New York County of New York for the misdemeanor offense of Falsely Reporting an Incident in the Third Degree based upon his November 2, 2016, report to the New York Police regarding the allegations that Justice Cooper spit on him. [ODC Exhibit 4, Bates No. 2223-2224]. On or about September 19, 2017, Respondent, by and through counsel, plead guilty to one count of Disorderly Conduct, Penal Law Section 240.20, Subdivision One. [ODC Exhibit 4, Bates No. 2225-2234] Respondent agreed to the permanent waiver of sealing the file, three days of community service in West Virginia, and an order of protection was issued for Justice Cooper. [ODC Exhibit 4, Bates No. 2239].

23. On or about April 11, 2017, Respondent, by and through counsel filed its submission in opposition to NYDC's brief on sanctions. [ODC Exhibit 1, Bates No. 287-398]. NYDC filed its reply brief on or about April 25, 2017. [ODC Exhibit 1, Bates No. 399-429].

24. On or about August 3, 2017, the Referee issued its *Referee Report and Recommendation.* The Referee rejected Respondent's mitigation evidence, finding Respondent's accusations of domestic violence by his then-former wife not credible and noted the Washington, D.C. police and courts in the District of Columbia and New York all found the same to be lacking in credibility. The Referee further found that Respondent's deposition testimony as to the sporadic counseling he received in law school and his occasionally taking antidepressants while in college did not constitute mitigation. The Referee found that his charitable work was insignificant, and that his therapist's letter and the similarly worded letters of four (4) character witnesses provided no basis for mitigation. The Referee opined that while Respondent's good conduct during the sanction hearing supported his contention that his disruptive courtroom behavior was confined to the custody litigation, nonetheless, such good behavior is required of lawyers at all times and, thus, did not mitigate his prior misconduct. As to his ultimate conclusion, the Referee opined:

> [Respondent's] numerous instances of misbehavior may have all occurred in the same litigation, but it was extensive and unbridled. He accused and abused three judges in two states, lied continuously, condoned others' perjury, altered documents, physically abused his wife, and more, during years of litigation. There are no significant mitigating circumstances, but [respondent's] lack of remorse and evident lack of respect for the judicial process are serious aggravating factors. The record demonstrates [Respondent's]

unfitness for the practice of law, from which the public should be protected by ordering his disbarment.

[ODC Exhibit 1, Bates 436-442].

25. On or about August 9, 2017, the District Court dismissed the case filed by Respondent against Daily News alleging defamation holding that "the Article qualifies as "the publication of a fair and true report of a judicial proceeding" that is entitled to protection under § 74's privilege and, consequently, Plaintiff's "civil action [for defamation] cannot be maintained against" Defendant. Zappin v. Daily News, L.P., No. 16 CIV. 8762 (KPF), 2017 WL 3425765, at 14 (S.D.N.Y. Aug. 9, 2017).

26. On or about August 30, 2017, NYDC moved the Appellate Division of the Supreme Court in the First Judicial Department in New York to affirm the Referee's report and recommendation of disbarment. On or October 25, 2017, Respondent filed a motion in opposition to NYDC and Respondent argued that it would be fundamentally unfair to discipline him pursuant to the doctrine of collateral estoppel and that this matter should be remanded to the Committee for investigation and the filing of formal charges. He further maintained that he was not given notice and a full and fair opportunity to be heard in the custody litigation. Respondent also argued that Supreme Court's findings were biased and that the underlying proceedings were constitutionally tainted.

27. However, the Court rejected all of Respondent's arguments, upheld the referee report's recommendation of disbarment and stated:

> This record in this case is replete with numerous egregious and outrageous acts of misconduct perpetrated by respondent over the course of a four-year period, including his repeated acts of domestic violence toward his wife; his false testimony at the custody trial; his introduction of falsified evidence in the form of altered text messages; his presentation of misleading testimony through his expert witnesses; his flouting the directives of three judges; his setting up of a fake website about the attorney for the child in the custody action and posting derogatory messages about her on it; his baseless filing of a disciplinary complaint against a court-appointed psychiatric expert; his threatening

text messages directed to his wife; his cell phone calls to his then three-month-old son baselessly accusing his father-in-law of being a child sexual abuser who could harm him; his engagement in frivolous litigation against his wife, her parents, and her attorneys; his attempted defamation of the attorney for the child; and his filing of a police report falsely accusing his wife of committing acts of domestic violence. Notwithstanding the repeated acts of egregious misconduct respondent has committed over the course of several years, he has neither demonstrated any remorse nor any acceptance of responsibility for his intolerable actions. This long list of aggravating factors, and the lack of mitigating factors weighing in respondent's favor, fully support the Referee's recommendation that respondent be disbarred.

Matter of Zappin, 160 A.D.3d 1, 8, 73 N.Y.S.3d 182 (N.Y. App. Div.), appeal dismissed, 32 N.Y.3d 946, 108 N.E.3d 1027 (2018), and leave to appeal denied, No. 2018-964, 2019 WL 637913 (N.Y. Feb. 14, 2019).

28. On or about November 14, 2017, Respondent filed suit against Defendants Kevin Doyle, Esq., a staff attorney of the Attorney Grievance Committee of the Appellate Division, First Department; Ernest Collazo, Esq., Attorney Grievance Committee chairman; Justices Deborah A. Kaplan and Matthew F. Cooper of Supreme Court, New York County; Presiding Justice Rolando T. Acosta and Justice Peter H. Moulton of the First Department; Chief Administrative Judge Lawrence K. Marks; the Justices of the First Department; Robert Tembeckjian, Administrator and Counsel of the State Commission on Judicial Conduct, and Cyrus Vance and Lauren Liebhauser. Zappin v. Collazo, 17-CV-8837 (S.D.N.Y.) Respondent brought the action to "seek redress and put an end to a nearly four (4) year campaign of state-sponsored harassment, retaliation and bad faith litigation levied against him by Appellees." *See* 18-CV-1420, Document 26.

29. On February 2, 2018, the District Court issued an opinion and order granting the judge's motion to dismiss the 2016 case filed by Respondent against Justice Cooper. Zappin v. Cooper, No. 16 Civ. 5985 (KPF), 2018 WL 708369 (S.D.N.Y. Feb. 2, 2018). The District Court held that Respondent's claims were barred by the doctrine of collateral estoppel. Respondent's claims relied on allegations that Justice Cooper made misstatements in the written decision. However, the District Court reasoned that the state appellate courts have repeatedly considered and rejected

nearly identical arguments by him and concluded that the Judge's findings are supported by the record.

30. On February 20, 2018, Respondent filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) and for reconsideration. On April 10, 2018, Respondent requested the Court hold his motion for reconsideration in abeyance to permit him the opportunity to file a motion for recusal. The Court granted the request, but Respondent never filed the motion. The Court denied the reconsideration request on or about May 18, 2018. Zappin v. Cooper, No. 16 CIV. 5985 (KPF), 2018 WL 2305562, at 1 (S.D.N.Y. May 18, 2018) Zappin v. Cooper. No. 16 CIV. 5985 (KPF), 2018 WL 708369, at 1 (S.D.N.Y. Feb. 2, 2018), reconsideration denied, No. 16 CIV. 5985 (KPF), 2018 WL 2305562 (S.D.N.Y. May 18, 2018). Respondent filed a notice of appeal of that decision on or about May 21, 2018.

31. On or about March 21, 2018, the West Virginia Office of Disciplinary Counsel received a letter from Respondent advising of discipline imposed upon him in New York. Respondent included a Per Curiam Opinion issued and an Order entered by the Appellate Division of the Supreme Court for the First Judicial Department, which disbarred Respondent on March 8, 2018.

32. On or about March 26, 2018, the District Court dismissed the defamation suit against NYP Holdings and Julia Marsh on the basis that the article was absolutely privileged as a fair and true report of a judicial proceeding. Zappin v. NYP Holdings, Inc., No. 16 CIV. 8838 (KPF), 2018 WL 1474414, at 1 (S.D.N.Y. Mar. 26, 2018).

33. By Order entered April 10, 2018, the United States District Court for the Southern District of New York dismissed Zappin v. Collazo, 17-CV-8837 (S.D.N.Y.) with prejudice because Respondent missed numerous court-ordered deadlines to file his second amended complaint. Respondent filed a notice of appeal of that decision on or about May 11, 2018, and that matter remained pending before the US Court of Appeals for the Second Circuit. *See* Zappin v. Doyle, No. 18-1420 (2d Cir.).

34. By Order entered June 7, 2018, the Court of Appeals dismissed the appeal of Respondent's domestic matter finding that no substantial constitutional question was directly involved. Zappin v. Comfort, 31 N.Y.3d 1077, 102 N.E.3d 1056 (2018).

35. By Order entered September 6, 2018, the Court of Appeals dismissed the appeal of Respondent's disciplinary case finding no substantial constitutional question was directly involved.

36. By Order entered January 9, 2019, the District of Columbia Court of Appeals entered an Order which issued an interim suspension of Respondent's license to practice law in DC. [ODC Exhibit 11]

37. By Order entered February 14, 2019, the Court of Appeals denied Respondent's motion for leave to appeal the disciplinary decision. Matter of Zappin, No. 2018-964, 2019 WL 637913, (N.Y. Feb. 14, 2019).

38. On or about February 29, 2019, Disciplinary Counsel for the District of Columbia filed a petition seeking reciprocal discipline against Respondent[1][ODC Exhibit 11 at 2498-2499]

39. In response to the Court's order to show cause why reciprocal discipline should not be imposed, Respondent's motions and memorandum's arguments essentially mirror the unsuccessful arguments made in New York (and in West Virginia) and argued he was denied due process in New York, there was an infirmity of proof, and that his conduct wouldn't constitute misconduct in DC.

40. By Order entered March 21, 2019, based upon the March 18, 2018 New York Opinion which disbarred Respondent in the State of New York, the District of Columbia Court of Appeals disbarred Respondent from the practice of law in the District of Columbia, *nunc pro tunc* to February 4, 2019. [ODC Exhibit 11 at 2498-2499]

41. On or about April 5, 2019, Respondent filed a petition for rehearing and rehearing *en banc* of the District of Columbia's decision to disbar him. This petition remains pending at the DC Court of Appeals.

42. On or about April 24, 2019, the District Court dismissed Respondent's lawsuit against the newspaper and its reporter for defamation alleging that newspaper published an article about a day of court proceedings in his divorce and child-custody case that falsely accused him of

[1] Respondent failed to self-report the New York disbarment decision to the District of Columbia.

abusing his ex-wife. Zappin v. NYP Holdings Inc., No. 18-647, 2019 WL 1782635 (2d Cir. Apr. 24, 2019).

43. By Summary Order entered May 15, 2019, the United State Court of Appeals for the Second Circuit issued an Order that affirmed the judgment of the District Court that dismissed Respondent's lawsuit that alleged Justice Cooper wrongfully disseminated the sanctions decision. Zappin v. Cooper, No. 18-1545 (2nd Cir.) [Attachment A]

III. DISCUSSION

A. Reciprocal Disciplinary Proceedings

Article IV, section 1 of the United States Constitution requires that each state give "full faith and credit" to the "public acts, records, and judicial proceedings" of every other state. In the instant matter, The New York courts disbarring Respondent had proper jurisdiction and the judgment is final [2]and on the merits thus requiring West Virginia to recognize the New York proceedings. Such practice best serves the protection of the public and the interests of justice as it advances public confidence in the legal system by producing consistent judgments across the various jurisdictions.

Rule 3.20(e) of the West Virginia Rules of Lawyer Disciplinary Procedure provides that the Hearing Panel Subcommittee shall refer the matter to the Supreme Court of Appeals with the recommendation that the same discipline be imposed as imposed by the foreign jurisdiction unless it is determined by the Hearing Panel Subcommittee that (1) the procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law; (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court of Appeals cannot, consistent with it duty, accept as final the determination of the foreign jurisdiction; (3) the imposition by the Supreme Court of Appeals of the same

[2] At the time of the initial assignment of the matter, Respondent was still pursuing appeals. The Hearing Panel Subcommittee delayed the requested hearing until after the appeals were exhausted.

discipline imposed in the foreign jurisdiction would result in grave injustice; or (4) the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals.

B. The Procedure followed in New York comported with the Requirements of Due Process of Law.

West Virginia has "conclude[d] that in lawyer disciplinary proceedings, a lawyer is entitled to due process of law. Generally, due process requires that a lawyer be given fair notice of the misconduct alleged against him or her, and an opportunity to respond and be heard. However, a determination of the particular process that is due depends on the particular circumstances of the case." Lawyer Disciplinary Bd. v. Stanton, 233 W. Va. 639, 651, 760 S.E.2d 453, 465 (2014).

1. Respondent had Notice and an Opportunity to be Heard.

The Preamble of the Model Rules of Professional Conduct state "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." ABA Model Rules.

Respondent Zappin asserted before the Hearing Panel Subcommittee that "[i]n the custody case, Mr. Zappin was not provided any notice that he stood accused of violations of the Rules of Professional Conduct, or that he needed to defend himself from such charges, within the custody case." [Motion at 6].

In general, as an attorney, Respondent is under a professional obligation to adhere to the Rules of Professional Conduct, but as it relates to his conduct in the custody case, the record reflects that he was given repeated warnings and thus fair notice of the same.

The record was replete with examples of fair notice to Respondent. Justice Kaplan during the December 18, 2014 hearing stated "I again caution you about the representations that you make and the things that you say as an attorney admitted to the bar. So, I don't know how many more times I can caution you." [Transcript 12/18/14 at 43] (emphasis added) On or about July 22, 2015, after the case had been transferred to Justice Cooper, the Court again advised Respondent on the record "of his ethical obligations under the New York Lawyer's Code of Professional Responsibility and his obligation to desist and refrain from violating disciplinary rules.... where although he is representing himself as a client and he is required to treat with courtesy and consideration all persons involved in the legal process." [Transcript 7/22/15 at 18]

Two months before trial on custody, Justice Cooper issued the September 2015 order imposing sanctions on Plaintiff in the amount of ten thousand ($10,000) dollars based on the court's finding that Plaintiff had "use[d] his law license as a tool to threaten, bully, and intimidate," thereby "call[ing] into question his fitness to practice law." In the sanctions decision, Justice Cooper noted that "when plaintiff is before this court representing himself in his own divorce action, he is as bound by the Rules of Professional Conduct and is required to conform his behavior to its dictates as much as when he is before a federal court representing a party in a patent infringement case." Zappin v. Comfort, 49 Misc. 3d 1201(A), 26 N.Y.S.3d 217 (N.Y. Sup. Ct. 2015), aff'd, 146 A.D.3d 575, 49 N.Y.S.3d 6 (N.Y. App. Div. 2017). Justice Cooper advised Respondent "..[h]aven't you learned that when you are in front of me, I get to see your reactions and if you slam your hand down like that because you don't like something I say, that doesn't speak really highly of your self-control..." [Transcript 10/2/15 at 49] Justice Cooper said to Respondent Zappin "what [you] do in the courtroom is evidence that I can rely on and make my determination as to your character, your way of behaving—" [Transcript at 11/23/2015 at 1080]

Respondent agreed during his testimony before the Hearing Panel Subcommittee that Justice Cooper reminded him nearly every time he appeared before him that he was an attorney. [Transcript at 230] Out the outset of the custody trial, in discussing the Sanctions decision, Justice Cooper stated "..it was a decision that dealt with attorney misconduct in such an extreme

case that I had to impose sanctions, something I have never done before. But what the decision was not about a decision about this case. It was about Mr. Zappin's conduct as a lawyer." [Transcript 11/6/15 at 23] Almost a month later, Justice Cooper stated "... Mr. Zappin is acting as a lawyer here. He's representing himself. This is—so what he does in this case is something—where his professional conduct does come into play." [Transcript 12/4/15 at 2040]. The attorney for the child even inquired if he believed that his conduct throughout the matrimonial proceedings was in conformance with the rules of professional conduct, to which Respondent replied "yes" with the exception of the things he said to Justice Kaplan, but explained she still had it coming because of what she said about his mother. [Transcript 12/3/15 at 1934]

The New York Court of Appeals affirming opinion of the 2015 sanctions opinion from Respondent's custody case noted that "[w]e have considered each of the husband's procedural arguments, including that he was entitled to a hearing because he did not have fair notice that sanctions were being considered against him, and find them unavailing. The husband had fair notice that sanctions were being considered, as the AFC requested sanctions in both her moving affirmation[3] and again in her reply papers on the motion, but the husband did not address the AFC's request either in opposition or in surreply. The husband was also warned repeatedly throughout the proceedings that he must adhere to the Rules of Professional Conduct." Respondent appealed that decision as well and the Court of Appeals denied his appeal finding no substantial constitutional question was directly involved. See Zappin v. Comfort, 146 A.D.3d 575, 575–76, 49 N.Y.S.3d 6, 7 (N.Y. App. Div. 2017), appeal dismissed, 31 N.Y.3d 1077, 102 N.E.3d 1056 (2018).

[3] The September 2015 decision states:

> As required by CPLR 2219(a), the following is a recitation of the papers considered in the review of Motion Sequence 19: (1) Attorney for the Child's Order to Show Cause, Affirmation, Exhibits; (2) Plaintiff's Affidavit in Opposition, Exhibits; (3) Attorney for the Child's Reply Affirmation, Exhibits; (4) Plaintiff's Sur-Reply Affidavit, Exhibits. As required by CPLR 2219(a), the following is a recitation of the papers considered in the review of Motion Sequence 21: : (1) Attorney for the Child's Order to Show Cause, Affirmation, Exhibits; (2) Plaintiff's Notice of Cross-Motion, Affidavit, Exhibits; (3) Plaintiff's Affidavit in Opposition, Exhibits; (4) Plaintiff's Supplemental Affidavit; (5) Attorney for the Child's Reply Affirmation; (6) Plaintiff's Sur-Reply Affidavit, Exhibits.
> [September 2015 decision Exhibit]

C. The Proof upon which the New York courts based its decision of misconduct requiring disbarment was not infirm.

1. Preponderance of the Evidence Standard is constitutional in disciplinary proceedings.

Reciprocal discipline is not required if the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court of Appeals cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction.

A disciplinary determination in another jurisdiction based on less than a clear and convincing standard of proof does not constitute infirm evidence so as to disallow West Virginia from imposing reciprocal discipline. The Rules of Lawyer Disciplinary Procedure require that disciplinary charges brought by ODC be proved by clear and convincing evidence. Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. But, as the higher standard of proof in West Virginia is not mandated by the Constitution, this distinction alone provides no basis to avoid reciprocal discipline in this case. New York courts have routinely held that reliance on a "fair preponderance" standard in attorney disciplinary proceedings does not run afoul of the Due Process Clause of the Constitution. The majority of other jurisdictions apply the clear and convincing standard of proof in attorney discipline matters; however, thirteen states, one quarter of the jurisdictions, utilize a standard lower than clear and convincing evidence.[4]

Courts in other jurisdictions have considered this issue and have determined that reciprocal discipline is appropriate even where burdens of proof differ. The District of Columbia, Maryland and North Dakota have all held that they may rely on the disciplinary rulings of other jurisdictions to reciprocally discipline an attorney in their jurisdiction, even when the disciplinary rulings from other jurisdictions are based on a lower standard of proof. The Court of Appeals of the District of Columbia addressed a due process challenge from a lawyer who had

[4] There are multiple states requiring ethics violations to be established by preponderance of the evidence or similar burden of proof including Arkansas, Kentucky, Iowa, Maine, Massachusetts, Michigan, Missouri, New Mexico (partial), New York, Tennessee, Texas, Utah and Washington. (citations omitted)

been disciplined in New York and was facing reciprocal discipline in the District of Columbia. In re Benjamin, 698 A.2d 434, 439 (D.C. Ct. App. 1997). The District of Columbia requires proof of a disciplinary violation by "clear and convincing" evidence, while New York requires proof by a "preponderance of the evidence." The District of Columbia Court of Appeals rejected the lawyer's due process challenge and noted that "... the difference in evidentiary standards between New York and the District of Columbia in disciplinary cases does not, on its face establish an infirmity of proof." In re Benjamin, 698 A.2d at 439. The Court noted that the District of Columbia's decision to use a clear and convincing standard is not constitutionally prescribed, the potential loss of livelihood through disbarment is a property right not a loss of liberty; thus, the District of Columbia may accept a lower standard of evidentiary proof in reciprocal discipline matters, and finally, a rule which automatically established an "infirmity of proof of misconduct in another jurisdiction" with a lower standard of proof would "unfairly insulate attorneys admitted in those jurisdictions from reciprocal discipline." Id. at 439-440.

Likewise, the Maryland Court of Appeals held that it could rely on a disciplinary decision out of New York, even though New York's standard of proof was lower than Maryland's standard of proof. Attorney Grievance Comm'n of Maryland v. Sabghir, 710 A.2d 926 (Ct. App. Md. 1997). In addition to citing and approving the arguments advanced in In re Benjamin, the Maryland Court of Appeals noted that no evidence had been produced that New York treats attorney discipline matters less seriously than Maryland or that the procedures in New York disciplinary matters are inconsistent with Maryland's procedures. 710 A.2d at 934.

Similarly, the Supreme Court of North Dakota rejected a due process challenge in a reciprocal discipline matter in North Dakota arising out of a disciplinary ruling from Minnesota. In In re Disciplinary Action Against Dvorak, 580 N.W.2d 586 (N.D. 1998), the Supreme Court of North Dakota denied that the Minnesota Supreme Court's use of a "clearly erroneous" standard of review, rather than a "de novo" standard of review of the decision of a hearing body deprived the Respondent of due process in a North Dakota reciprocal discipline matter. 580 N.W.2d at 591.

Rule 3.20 of the Rules of Lawyer Disciplinary Procedure suggests that the Court is aware that other jurisdictions may use a lesser burden of proof than West Virginia and that there may be instances where the facts developed in the other jurisdiction will not satisfy the proof

necessary to allow our Court to accept the reciprocal discipline. However, in this matter, the New York custody proceedings establish a clear pattern of egregious behavior that warrants disbarment.

2. The New York custody proceedings establish a pattern of egregious behavior.

The facts developed in the New York custody proceedings establish that Respondent engaged in numerous egregious and outrageous acts of misconduct involving dishonesty, fraud, deceit, or misrepresentation, and engaged in abusive litigation tactics. The record demonstrates many examples of frivolous filings and litigation tactics apparently designed to terrorize Ms. Comfort and her witnesses, her attorney, the attorney for the child, and the Court. The Cooper Court determined that Respondent had done "everything he could to thwart this case going forward." [Transcript 7/22/15 at 24] It is noted that Respondent did not appear at oral summations, until contacted by the Court by telephone. [Transcript 12/21/215]. The facts establish that Respondent repeatedly engaged in court room behavior that was disruptive and not befitting that of an attorney. Counsel for the West Virginia Office of Disciplinary Counsel found the following the most outrageous example of Respondent's behavior not befitting a member of the Bar. In a hearing in March of 2015, Justice Kaplan, shortly after her February 27, 2015 lengthy order was issued, ruled on some additional issues, and at the conclusion she inquired of Petitioner:

The Court: Is there anything else, Mr. Zappin?

Mr. Zappin: Yeah, your Honor. I am tired of these lies coming from you on the record. The motion about Dr. Ravitz's was not fully briefed and you know that. And you put it in your order. You put in your order that I withdraw the 78 proceeding after the attorney general had filed responsive papers. That's not true. He filed it after I filed a notice of discontinuos.

It's lie after lie after lie that comes out of your mouth. And I am tired of it. Then you have the audacity to attack my mother from order of Friday and point over and over again she's been convicted of a felony. That's pretty cold from a woman whose father was convicted multiple

times of organized crime. I mean, that's pretty cold to put over and over and over knowing that order is going to the Appellate Division to attack my mother unnecessary. That's pretty cold. She deserves her privacy just like we do.

The Court: I think we only referenced what you said to the Court in the proceedings and your papers.

Mr. Zappin: That's not true at all. At least my mother is sitting there serving her time, you know, with dignity and respect. She didn't coward out and turn states evidence. So, I am tired of this. I am tired of lie after lie coming out of this record. We'll be in the Appellate Division tomorrow seeking a stay because you cannot hold trial on four days' notice.

That's all I have to say.

Oh, and on the point of counsel fees, it's, when you make $230,000 and let's say $6,000 of net income is going to supervised visitation that you have ordered without a hearing, without a finding of fact, without any shred of evidence, I think that would a person indigent.

So, I don't have a big pile of mob money sitting around. My dad was a pharmacist. So, I can't really afford $6300 a month on supervised visitation. So that makes me indigent. I would love to hire counsel. Peter Stembleck would love to take this case, but he can't because there's no money left.

I can't communicate to you. Every letter goes to you goes out the window. Then we have Mr. Wallack who's been implicated here by the Manhattan District Attorney's Office for witness tampering[5]. And Ms. Comfort. The individual that they put to make false testimony has been arrested, she's set for trial on March 26th and the Manhattan district attorney's office is investigating both of them. And this shouldn't come as a surprise because we have a 2012 letter from your Honor to Mr. Wallack where Mr. Wrubel was opposing counsel and he was issuing false order from this court to financial institutions of the opposing parties saying there that you had issued a stayed and you reprimanded him for it. So, he's not any stranger to dirty conduct.

[5] In response to a motion filed by Petitioner, Mr. Wallack denied being contacted by the District Attorney's office about being investigated for witness tampering. The allegations involve Mr. Wallack's contact with a witness AS that Mr. Wallack denied. [November 6, 2015 Transcript 49-50]

And I will provide you copy where your client sued you for malpractice and it's attached to the complaint. I just want to make it known on the record that I am tired of the lies coming from the court and tainting of the record, knowing full well this is going to go to the Appellate Division. And we're gonna be in the Appellate Division tomorrow, getting a stay, and then we'll go back down to D.C. on Friday, and were going to open up Ms. Comfort's domestic violence petition, and we're gonna have hearing down there in from of Judge Blant, because that's who she lied to, saying that she filed the motion and we'll have him make a finding of domestic violence.

The Court: Are you finished?

Mr. Zappin: Oh, I'm finished, your Honor.

The Court: All right. If you go to the Appellate Division tomorrow and they issue a ruling I will be guided by the wisdom of the justices in the Appellate Division. The record and the papers that are filed in this case speak for themselves. Thank you.

....

[March 3, 2015 Transcript pages 21-24].

Within approximately a month, Respondent filed the claim in the New York Court of Claims alleging that Justice Kaplan ordered her court officer to assault him and that Justice Kaplan also contacted the West Virginia Parole Board and requested that Respondent's mother be denied parole. There was no evidence presented by Respondent to verify any of these claims.

In his court of claims filing, Respondent characterized his volatile diatribe above as "[a]t a hearing on March 3, 2015, Claimant informed Justice Kaplan that he was deeply hurt by these attacks on his mother and noted that the attacks were particularly inexplicable and insensitive given the criminal history of her own father." The Court of Claims case was closed by Stipulation of Discontinuance on February 5, 2016.

Respondent continues to maintain or suggest that Justice Kaplan was demoted as a result of his case and his claims [Transcript 271-273] However, Justice Kaplan, who was employed as an acting justice of the New York Supreme Court from 2007 until she was elected in 2011, was appointed as Statewide Coordinating Judge for Family Violence Cases by Chief Judge Lippman.

The Office of the Statewide Coordinating Judge for Family Violence Cases works collaboratively with the state's administrative judges and judges and staff who handle domestic violence and integrated domestic violence matters statewide. In addition to this statewide position, Justice Kaplan currently is the Chair of the NYS Courts Orders of Protection Task Force; the Co-Chair of the New York Hague Convention and Domestic Violence Bench Guide Consulting Committee; Co-Chair of the NYSBA Family Law Section, Domestic Violence Committee; Member of NYS Courts Advisory Committee on Disability Access; Subcommittee Chair of the NYSBA & Women's Bar Association of the State of New York Joint Domestic Violence Initiative Education and Training Subcommittee; Committee Co-Chair of the New York City Task Force on Domestic Violence; Member of the New York City DV/IDV Interagency Working Group; Member of the NYS Courts Family Violence Task Force; Vice-President, Supreme Court Justices Association of the City of New York; Chair of the New York State Judicial Committee on Elder Justice; and a Member of the NYS Courts Anti-Bias Committee.[6] There was no credible evidence to dispute that Justice Kaplan continues to serve as a jurist in New York with distinction.

The New York record reflects Respondent's frequent abuse of the mother of his child, Ms. Comfort, which might be excused by the nature of child custody proceedings. However, the majority of Respondent's professional abuse during the pendency of the custody matter was heaped upon the attorney for Respondent's child. Ms. Cohen was appointed to be the attorney for the child (AFC) by orders issued by Justice Heitler, on August 11, 2014, and by Justice Kaplan on October 27, 2014. "Soon after her appointment, Ms. Cohen took the position, exercising substituted judgment for a non-verbal infant, that visitation should continue to be supervised as a result of concerns raised about plaintiff's emotional state. From that point on, plaintiff has dedicated himself to having her removed from her role." [September 15, 2015 Cooper Decision]

Respondent filed multiple motions requesting she be removed as attorney for the child alleging misconduct, none of which were found to have merit. Justice Cooper's September 2015 decision noted:

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[6] Justice Debra Kaplan's biography is at https://iapps.courts.state.ny.us/judicialdirectory/Bio?JUDGE_ID=cHA4B6mvtJn0X9L4m8obAQ%3D%3D.

> Plaintiff's efforts to rid himself of the AFC have not been limited to the multiple motions for disqualification that he has made to both Justice Kaplan and me — including part of his cross-motion here — but rather, those efforts have extended to tactics designed to extort, bully, and intimidate. The first was to intentionally violate Justice Kaplan's order that he share the cost of Ms. Cohen's services equally with defendant. He did so by refusing to pay even one dollar of the fees incurred by Ms. Cohen for her services, even as his onslaught of motions directed at her clearly caused her to expend substantial time and effort to oppose them. The idea, it appears, was to inflict financial hardship on the AFC, so that she would be unable to discharge her duty to represent the child's interests.

And, startling to the Hearing Panel Subcommittee, Zappin Enterprises, a company which lists Respondent and his father as its owners, bought and registered the internet domain name www.harrietnewmancohen.com. a website that throughout the custody matter was designed to "swiftly and publicly[7]" retaliate against Ms. Cohen and her law firm for her advocacy of his child.[8] Respondent's mistreatment of the then eighty-two year old attorney for his child did not stop after the issuance of the September 2015 sanctions decision. During his direct testimony by his own counsel, when the AFC was having difficulty hearing his answers and requested the Court to ask him to speak louder, Respondent exclaimed "she can't hear. She's 82 years old and she's in here representing the child. She can't hear." [Transcript 11/30/15 at 1312] During cross examination by Ms. Cohen, she asked "Mr. Zappin, you are very, very, angry that we played the video yesterday that showed your mother and you were particularly angry at me. Correct?" to which Mr. Zappin replied:

> A. I think what you did was one of the worst and most despicable things anybody could do to another person. I think you should be in an orange jumpsuit shackled.

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[7] When the Attorney for the Child demanded payment, Respondent answered by letter dated February 12, 2015, saying, in part:

> I want to be clear, this letter is the first instance in which I am telling you that I will not pay your invoices. And, it is for the very justifiable reason that supervised visitation – which you have advocated for without any record in the case-has made me indigent. More importantly, at each appearance, you have inappropriately threatened me with "judgments." Putting aside the lack of respect and cordiality you have displayed to a fellow member off the bar, you are more than welcome to seek judgments against me if you feel it is appropriate. However, you should be aware that any such attempt will be swiftly and publicly met with claims against you and your firm for fraud, tortious interference with parental rights, legal malpractice and disgorgement, among others.

[8] Respondent told the HPS that his father did this.

Q. Because when you get angry like that a switch goes off in your mind? Makes you very, very, angry? Right?

Schorr: Objection.

The Court: Overruled.

A. No. You played a video of one of the most traumatic events of my life my mother in an orange jumpsuit in shackles and you don't think that would elicit a reaction? I didn't physically attack you. I didn't do anything. I said what you did was deplorable, it was wrong and personally I want to see you in an orange jumpsuit and shackles. I think that's where you belong. I think that's where you should spend some time.

[Transcript 12/4/15 at 2161-2162].

As the AFC continued her questioning of him on behalf of his child, she inquired about whether text messages he sent back and forth to his then pregnant wife from the early evening until the early morning hours was considered "brow beating" and he concluded his answer with "So, if you want to characterize me as browbeating you got something wrong, honey." To which the Court admonished Petitioner for referring to her as "honey" and directed him to apologize, which he did do, as the Court noted, in a sarcastic tone. [Transcript 12/4/15 at 2173].

Respondent admitted to saying during his examination in the custody proceedings that he wanted to see Harriet Cohen, the attorney for his child, in shackles and in an orange jumpsuit. [Transcript at 232-233] However, during the disciplinary case, when Chief Counsel asked if Respondent accused Justice Cooper of abusing his wife, his answer was "no"—twice. [Transcript at 232]. The transcript reflects that in the June 27, 2016 New York hearing, the following exchange took place:

The Court: -- the evidence is beyond a reasonable doubt. You beat her up. You beat your wife.

Mr. Zappin: Just like you did to you wife in 1992. That's all I have to say.

The Court: What?

Mr. Zappin: To sit there and say in open court with the media in the courtroom, to sit there and say—

The Court: You just said what you did to your—you just to me what I did to my wife in 1992. What does that mean, sir?

Mr. Zappin: I have nothing—

The Court: You just—

Mr. Zappin: I want to finish.

The Court: No. No, I want to know that means because, sir, this is a serious matter. Are you accusing me –

Mr. Zappin: I'm not accusing you.

The Court: I am going to have it read back.

The Court: Back on the record. I just had a read back. What the court reporter has told me was said, which I heard and it has been confirmed, Mr. Zappin said, just what you did, you being me, the Court, did to your wife in 1992. That's all I have to say. So, I am going to ask you, Mr. Zappin, you have just made an accusation to me as a judge that I committed domestic violence, that I beat up my wife. What is this based on? That is an incredibly serious charge. What is that based on?

Mr. Zappin: I apologize, your Honor. I misspoke.

The Court: That's not good enough. What is that based on? You cannot make a statement like that. That is totally out of bound to make an accusation like that without one shred of evidence. What did you base that on?

[Transcript 6/27/2016 at 142-144].

There is no dispute that Respondent tendered unredacted copies of exhibits with his child's name and likeness to Law 360. [Hearing Transcript 12/19/15 at 805-806] The AFC later pleaded with him in Court to remove the postings from the internet and the Court warned that he

could consider these actions in the fact findings because Respondent caused the posting that included a likeness of the child [Transcript 12/7/15 at 2430-2431]. The post remained online throughout the custody hearing. Respondent also acknowledged to this HPS that during a Facetime call with his son he accused his father-in-law of being a child sexual abuser—a "pedo". [Transcript at 173] Respondent admitted that during this court ordered visitation with his infant child that he told his son via Facetime that he had a "bad mommy;" that "mommy was going to jail tomorrow;" and that he was going to "put a hurtin' on his momma." [Transcript at 236-237]

In addition, to the Zappin's website on the AFC, Zappin Enterprises also purchased a website in the name of Respondent's wife's counsel www.robertwallack.com and of the case style wherein public postings were made about the custody case www.ZappinvComfort.com. When the Court questioned him, Respondent claimed that he gave the pleadings and transcripts to his father who posted some of the documents online at the website. [Transcript 11/19/15 at 811-813 and 11/23/15 at 982-984] On November 23, 2015, Respondent testified that he got "control" of www.ZappinvComfort.com a few days before. [Transcript 11/23/15 at 998]

During the June 2016 financial trial wherein Ms. Comfort's lawyer accused Respondent of violating the protective order by speaking to Ms. Comfort directly during the Court's recess, it was revealed that a disparaging website devoted to Ms. Comfort's father www.briancomfort.com was purchased by the Zappin family. This time Respondent alleged his mother was operating the website. [Transcript 6/27/2016 at 156]

During the West Virginia disciplinary hearing, Respondent admitted and acknowledged that he presently owned and operated a website that disparages and attacks a woman[9]. [Transcript at 294-297] This woman was apparently on the witness list for the custody hearing for Ms. Comfort to testify regarding an incident that resulted in Respondent being arrested and charged with assault and battery. [10] The criminal case was ultimately dismissed without

[9] www.amysteadman.net.

[10] When the Chair asked Respondent if he had ever had any "run-ins with the law" Respondent replied in the affirmative, later explaining that he was referring to the domestic violence protective order concerning his wife and the kidnapping charges concerning his son, both of which were later expunged from his record. [Transcript at 287-94] He did not tell the HPS that he was arrested and charged with assault and battery on Amy Steadman in Worchester Massachusetts in September 2014.

prejudice. She, like another woman previously involved with Respondent[11], ultimately refused to appear to testify at the custody hearing.

The Court in the custody matter saw both parties testify over the course of several days spanning over a month in a custody matter than spanned more than two (2) years in three (3) jurisdictions. There was extensive support in the record for the Court's determinations. Text messages[12] with admissions from Respondent regarding the abuse and photographs of Ms. Comfort's injuries taken shortly after the incidents of abuse, as well as her witnesses[13] corroborated her account. Moreover, Respondent's conduct and outbursts throughout the trial reinforced the Court's conclusions that Respondent was unable to control his emotions, despite several admonishments regarding his behavior.

The facts developed in the New York custody proceedings establish that Respondent engaged in numerous egregious and outrageous acts of misconduct involving dishonesty, fraud, deceit, or misrepresentation, and engaged in abusive litigation tactics. Although all this occurred in an emotionally charged custody battle and the HPS recognizes the difficulties inherent in this situation, the majority finds that Respondent's misconduct rises to the level of disbarment, as found by the New York courts.

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[11] This woman was on the witness list allegedly to testify about allegations of violence which led to the end of her relationship with Respondent. In response, Respondent sent an email to this woman's attorney, threatening that he had nude photographs of the woman and intended to introduce them into evidence if she testified at the hearing. [Transcript 11/23/15 at 994-5] Judge Cooper had a hearing and the woman's counsel appeared on her behalf, indicating that she did not want to testify but would if the Court compelled her and her counsel further argued that Respondent's email concerning the release of photographs was a threat to intimidate a witness. [Transcript 11/2/15 at 6, 9-10]

[12] Respondent claimed that the text messages had been doctored; the Court directed a neutral expert to make this determination, providing it to the Court by expert testimony. The mother of Respondent's child provided her device but Respondent repeatedly refused to tender his devices so the expert was not able to make expert findings.

[13] Mr. Comfort testified about observing signs of physical abuse on his daughter after the baby was born and that his daughter admitted same to her parents during the November 2013 visit. [Transcript 12/1/2015 at 1545-6] Cathleen Doyle, Ms. Comfort's college roommate testified to observing bruises on her leg and forehead. [Transcript12/3/2015 at 1771] A lactation consultant with no prior relationship to the parties testified that when she met with Ms. Comfort on October 15, 2013, she saw visible shaking and bruising on Ms. Comfort's arms and over her eye and made appropriate concurrent notes. [Transcript 2/11/2015 at 2792-2813]

3. Application of Collateral Estoppel in Disciplinary Proceedings is Not Unconstitutional.

Collateral estoppel is an efficiency rule that is meant to save judicial resources by avoiding the re-litigation of issues of fact that have already been litigated. "The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." "Collateral estoppel applies if the issue sought to be precluded is identical to an issue that was raised, necessarily decided, and material in the prior action, and the party opposing preclusion had a full and fair opportunity to contest the issue in the earlier action." See Karakash v. Trakas, 163 A.D.3d 788, 789, 82 N.Y.S.3d 435, 437–38 (N.Y. App. Div. 2018). (Internal citations omitted).

Respondent contended that "several courts have held that attorney discipline cannot be achieved through the application of collateral estoppel, based on findings from a civil court." [Motion at 8]. However, other courts' uses of collateral estoppel were not persuasive to the Hearing Panel Subcommittee as the use of collateral estoppel is permissible in New York. Dating back to 1983, the doctrine of collateral estoppel has been used by grievance committees in New York to establish disciplinary liability. See, e.g., Matter of Slater, 156 A.D.2d 89 (1st Dept. 1990); Matter of Ryan, 189 A.D.2d 96 (1st Dept. 1993); Matter of MacKenzie, 32 A.D.3d 189 (2d Dept. 2006); Matter of Klarer, 66 A.D.3d 247 (2d Dept. 2009); Matter of Capoccia, 272 A.D.2d 838 (3d Dept. 2000).

In 2015, the New York Court of Appeals endorsed and limited the application of the doctrine of collateral estoppel in attorney disciplinary matters. The Dunn Court reversed a lower court's decision that utilized the doctrine of collateral estoppel and held that collateral estoppel did not apply in attorney's disciplinary proceeding to preclude her from challenging findings of United States Magistrate Judge on a sanctions motion in federal action. The Dunn Court determined that the underlying sanctions determination was made without cross-examination or an opportunity to call witnesses. The New York Court of Appeals held that the doctrine of collateral estoppel has

been applied to disciplinary proceedings "in the past and can continue to be applied where the necessary prerequisites have been met—i.e., where the attorney has had a full and fair opportunity to litigate in the prior proceeding." In re Dunn, 24 N.Y.3d 699, 705, 27 N.E.3d 465, 468 (2015).

The New York Court made a finding in October 2016 that collateral estoppel was appropriate in Respondent's case. The Court noted in its March 8, 2018 disbarment decision that "in disciplinary matters such as this, we may, in the exercise of our discretion, grant collateral estoppel effect to findings made in earlier actions, which need not be criminal in nature (see e.g. Matter of Taylor, 113 A.D.2d 56, 57–58 [1st Dept. 2013]; Matter of Yao, 231 A.D.2d 346, 661 N.Y.S.2d 199 [1st Dept. 1997]). Here, our ruling is amply justified by respondent's having had a full and fair opportunity to litigate the findings made in the custody trial, as well as his history of employing abusive litigation tactics and the likelihood that he would have done so again, in an effort to delay both the appeal of Supreme Court's custody decision and the instant disciplinary proceeding, had this Court not entered its order." Matter of Zappin, 160 A.D.3d 1, 9, 73 N.Y.S.3d 182, 188 (N.Y. App. Div.), appeal dismissed, 32 N.Y.3d 946, 108 N.E.3d 1027 (2018), and leave to appeal denied, 32 N.Y.3d 915 (2019)

West Virginia is not the proper venue to review New York's interpretation of New York law. Reciprocal proceedings are not an opportunity for the West Virginia court to sit in appellate review of a foreign jurisdiction's proceedings. In re Morrissey, 648 A.2d 185, 190 (D.C. 1994) Respondent raised the issue of the application of collateral estoppel to his disciplinary proceedings and due process with the New York courts in the appeal of the disciplinary decision and they were soundly rejected by the appellate Court with the appropriate jurisdiction. Matter of Zappin, 160 A.D.3d 1, 9, 73 N.Y.S.3d 182, 187–88 (N.Y. App. Div.), appeal dismissed, 32 N.Y.3d 946, 108 N.E.3d 1027 (2018), and leave to appeal denied, No. 2018-964, 2019 WL 637913 (N.Y. Feb. 14, 2019).

4. The New York disbarment proceedings were constitutional.

Respondent acknowledged to the Hearing Panel Subcommittee that he had notice of the disciplinary charges [Transcript 215-217] and an opportunity to litigate, albeit unsuccessfully, the application of collateral estoppel. [Transcript at 221] 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 that he was given the opportunity to testify on his own behalf. [Transcript 222-223] Respondent testified that he had the opportunity to and, his counsel did, file briefs post-hearing. [Transcript at 224] Respondent testified that after the referee's opinion recommending disbarment was issued, he had the opportunity to, and his counsel did, file a motion in opposition of the referee's recommendation. [Transcript at 227] Respondent was also permitted to fully exhaust his appellate rights. New York procedures as applied to this matter comport with the requirements of due process of law.

The New York disciplinary counsel argued to the disbarment Court that "Respondent's misconduct in terms of its scope, duration, ferocity, and maliciousness, coupled with his failure to admit any wrongdoing whatsoever, even in the face of this Court's prior finding of guilt, demonstrates that he is presently unfit to practice law." Matter of Zappin, 160 A.D.3d 1, 5, 73 N.Y.S.3d 182, 185 (N.Y. App. Div.), appeal dismissed, 32 N.Y.3d 946, 108 N.E.3d 1027 (2018), and leave to appeal denied, 32 N.Y.3d 915 (2019). As he did in this West Virginia case, Respondent argued "it would be fundamentally unfair to discipline him pursuant to the doctrine of collateral estoppel and that this matter should be remanded to the Committee for investigation and the filing of formal charges, if warranted. He further maintains that he was not given notice and a full and fair opportunity to be heard in the custody litigation.... Respondent next contends that Supreme Court's findings were biased and that the underlying proceedings were constitutionally tainted." Zappin, at 185-186.

The New York Court with the appropriate jurisdiction soundly and correctly rejected these argument and held "[h]aving reviewed the aggravating and mitigating circumstances presented in the record and applicable case law and precedent, we conclude that disbarment is the appropriate sanction "to protect the public, maintain the honor and integrity of the profession, or deter others

from committing similar misconduct" (22 NYCRR 1240.8[b][2]). Therefore, we agree with and adopt the Referee's recommendation that respondent be disbarred." Zappin at 187-188.

D. Imposition of the same sanction as imposed by New York on Respondent would not result in grave injustice.

E. The misconduct proven in the New York disbarment does not warrant a substantially different type of discipline to be imposed by the West Virginia Supreme Court of Appeals.

Respondent failed to offer credible evidence that imposition of disbarment as imposed by New York by the West Virginia Supreme Court of Appeals would result in a grave injustice or that a substantially different type of discipline would be imposed in West Virginia for the proven misconduct.

F. West Virginia Cases on Reciprocal Discipline demonstrate the Court's propensity to honor other state's decisions on lawyer discipline.

Respondent's professional misconduct in New York has already been conclusively proven as "a final adjudication of professional misconduct in another jurisdiction conclusively establishes the fact of such misconduct for purposes of reciprocal disciplinary proceedings in this state." Syl. Point 1, Lawyer Disciplinary Bd. v. Post, 219 W.Va. 82, 631 S.E.2d 921 (2006). The provisions of Rule 3.20 governing reciprocal discipline of lawyers require the imposition of the identical sanction imposed by the foreign jurisdiction unless one of the four grounds provided for challenging the discipline imposed by a foreign jurisdiction is both asserted and established. *See* Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. This is clearly a heavy burden to overcome and the presumption is evident by the Court's decisions in reciprocal discipline. *See* Lawyer Disciplinary Board v. Donald G. Ferrell, Supreme Court No. 22752 (3/13/95)[Court

upheld Virginia's decision annulling Respondent's law license]; Lawyer Disciplinary Board v. John Lawler Hash, Supreme Court No. 24673 (3/30/98)[Court upheld North Carolina's decision annulling Respondent's law license]; Lawyer Disciplinary Board v. Richard M. Brasher, Supreme Court No. 25410 (9/7/00)[Court annulled Respondent's law license after he resigned his license for a period of three years in Florida after entering into a Guilty Plea for Consent Judgment. Court enhanced sanction after Respondent failed to notify WV of his suspension and practiced law in Bluefield, WV]; Lawyer Disciplinary Board v. Daniel J. Post, 219 W.Va. 82, 631 S.E.2d 921 (2006)[Court upheld Colorado's decision annulling Respondent's law license]; Lawyer Disciplinary Board v. Rodney S. Justice, No. 33181 (2/28/17)[Court upheld Kentucky's decision suspending Respondent's law license for 30 days]; Lawyer Disciplinary Board v. Candace K. Calhoun, 221 W.Va. 571, 655 S.E.2d 787 (2007) [Court upheld Maryland's decision indefinitely suspending Respondent's law license]; Lawyer Disciplinary Board v. Richard L. Poling, Supreme Court No. 33356 (10/11/07)[Court upheld North Carolina's decision annulling Respondent's license]; Lawyer Disciplinary Board v. Lester W. Firstenberger, No. 33518 (5/22/08)[Court upheld Massachusetts' decision to suspend Respondent's license for six months and one day]; Lawyer Disciplinary Board v. Rodney S. Justice, No. 33747 (WV 9/4/08)[Court upheld Kentucky's decision suspending Respondent's license for 60 days]; Lawyer Disciplinary Board v. Stephen Michel Bailey, Supreme Court No. 33517 (9/4/08)[Court upheld Colorado's decision suspending Respondent's license for six months]; Lawyer Disciplinary Board v. Rodney S. Toth, No. 33852 (WV 11/5/08)[Court upheld Florida's decision suspending Respondent's license for 91 days, which enhanced the discipline imposed by North Carolina by one day]; Lawyer Disciplinary Board v. Joseph L. Anderson, No. 34425 (WV 9/3/09)[Court upheld Kentucky's decision reprimanding Respondent, but did not issue the probative 30 days suspension issued by that state]; Lawyer Disciplinary Board v. Nathan H. Wasser, 226 W.Va. 348, 700 S.E.2d 800 (2010) [Court upheld Maryland's decision annulling Respondent's license]; Lawyer Disciplinary Board v. Stanley K. Foshee, No. 35121 (WV 11/22/10)[Court upheld Virginia and D.C.'s decisions suspending Respondent's license for three years]; Lawyer Disciplinary Board v. James M. Kernan, No. 35669 (5/12/11)[Court upheld New York's decision suspending Respondent's license for five years]; Lawyer Disciplinary Board v. Arthur L. Bloom, No. 35123 (WV 1/13/11)[Court upheld Pennsylvania's decision annulling Respondent's license]; Lawyer Disciplinary Board v. Randy K. Miller, No. 34813 (WV 1/13/11)[Court dismissed case

because Respondent's temporary suspension by Tennessee "did not amount to 'public discipline or surrender of a license'"];Lawyer Disciplinary Board v. Rodney S. Justice, No. 35502 (WV 2/24/11)[Court upheld Kentucky's decision suspending Respondent for 30 days]; Lawyer Disciplinary Board v. Randy K. Miller, No. 11-0274 (WV 11/22/11)[Court admonished Respondent to correspond with his public censure issued with Tennessee]; Lawyer Disciplinary Board v. Richard G. Solomon No. 35706 (10/6/11)[Court upheld Maryland's decision annulling Respondent's license]; Lawyer Disciplinary Board v. James R. Henry No. 11-0186 (11/22/11)[Court upheld Ohio's decision annulling Respondent's license]; Lawyer Disciplinary Board v. Scott M. Dolin, No. 11-0510 (05/23/12)[Court upheld Texas' decision suspending Respondent's license for 36 months]; Lawyer Disciplinary Board v. Norman L. Folwell, No. 11-1279 (WV 06/07/12)[Court upheld Ohio's decision suspending Respondent's license for two years, with the second year stayed if certain conditions were met]; Lawyer Disciplinary Board v. Joseph Tauber, No. 13-0481 (6/10/14)[Court upheld the decision of Maryland suspending Respondent's license for 30 days with the enhancement of the requirement that Respondent be required to petition for reinstatement]; Lawyer Disciplinary Board v. David A. Downes, 239 W.Va. 671, 805 S.E.2d 432 [Court enhanced Virginia's sanction of reprimand and suspended Respondent's license for 30 days]; Lawyer Disciplinary Board v. James P. Carbone, No. 17-0277 (WV4/4/18)[Court upheld Pennsylvania's decision annulling Respondent's license]; Lawyer Disciplinary Board v. David E. Furrer, No. 18-0306 (WV 4/11/19)[Court upheld Maryland's decision indefinitely suspending Respondent's license]; and Lawyer Disciplinary Board v. Seth A. Robbins, Supreme Court No. 18-1073, (2019) [Court upheld the decision of the District of Columbia suspending Respondent's license for 60 days].

IV. Recommended Sanction

This Hearing Panel Subcommittee has reviewed and re-reviewed the evidence in this reciprocal disciplinary proceeding and is not able to come to a unanimous decision. The entire panel is sympathetic to Respondent's difficulties concerning access to, custody of and visitation

with his son but the majority of the HPS determined that, since New York concluded that Respondent's disbarment was the appropriate sanction to protect the public, maintain the honor and integrity of the profession, or deter others from committing similar misconduct and because this New York determination did not meet any of the four exceptions of Rule 3.20(e) of the West Virginia Rules of Lawyer Disciplinary Procedure, it must refer the matter to the Supreme Court of Appeals with the recommendation that the same sanction of disbarment taken against Respondent by the New York court system be imposed.

RESPECTFULLY SUBMITTED,

HEARING PANEL SUBCOMMITTEE OF THE LAWYER DISCIPLINARY BOARD

Anne Werum Lambright, Esquire
Hearing Panel Subcommittee, Chair

7/2/2020
Date

Gail Henderson Staples, Esquire
Hearing Panel Subcommittee

Date

Dr. K. Edward Grose
Hearing Panel Subcommittee, Layperson

Date

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RESPECTFULLY SUBMITTED,

HEARING PANEL SUBCOMMITTEE OF THE LAWYER DISCIPLINARY BOARD

Anne Werum Lambright, Esquire
Hearing Panel Subcommittee, Chair

Date

Gail Henderson Staples

7/7/2020

Gail Henderson Staples, Esquire
Hearing Panel Subcommittee

Date

Dr. K. Edward Grose
Hearing Panel Subcommittee, Layperson

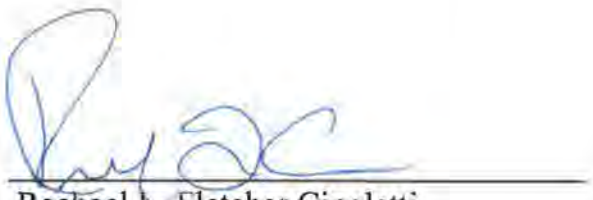
Date

CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 15th day of July, 2020, served a true copy of the foregoing **"REPORT OF THE HEARING PANEL SUBCOMMITTEE"** upon S. Benjamin Bryant, Counsel for Respondent, by mailing the same via United States Mail, with sufficient postage, to the following address:

S. Benjamin Bryant, Esquire
Post Office Box 913
Charleston, West Virginia 25323

Notice to Respondent: for the purpose of filing a consent or objection hereto, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, either party shall have thirty (30) days from today's date to file the same.



Rachael L. Fletcher Cipoletti