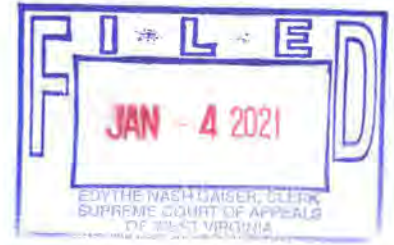


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**IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

No. 18-0250

ANTHONY J. ZAPPIN,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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A. Untimely evidentiary hearing

Much of Respondent's reply brief is a regurgitation of the same recitation of facts and failed arguments he has made throughout the disbarment and custody proceedings in New York. However, in his reply brief, Respondent represented to this Honorable Court that his case was "plagued by repeated delays and stalling by both" ODC and the HPS; however, that representation to this Court is inaccurate. On or about April 18, 2018, Respondent filed a request for a formal hearing in the matter. In that April 2018 request, Respondent advised ODC that he had filed an appeal of the disbarment decision and an appeal of the underlying domestic matter. On or about April 25, 2018, S. Benjamin Bryant, Esquire, filed a Notice of Appearance on behalf of Respondent. Counsel. By email dated May 15, 2018, Respondent's counsel advised that Respondent's appeal of his disciplinary case was presently before the New York Court of Appeals on briefing for jurisdiction. Because of Respondent and his counsel's assertions that the disciplinary matter was pending appeal and arguably not final, a hearing was not scheduled on the reciprocal matter. By email dated September 11, 2018, ODC sent the HPS and Respondent the dismissal Order of Respondent's appeal in the Supreme Court of Appeals of New York. The appeal was denied on September 6, 2018. After the New Court dismissed the appeal of the disciplinary case, ODC scheduled a telephonic status/scheduling conference to move forward with the reciprocal case. At the September 20, 2018, the HPS concluded the New York matter to be a final judgment and determined the reciprocal matter to proceed to hearing. All relevant dates for discovery and motions were set, including a hearing scheduled for January 16-17, 2019. By email dated September 25, 2018, Mr. Bryant advised of a conflict with the hearing dates because Respondent was scheduled for a domestic hearing on his child custody in the District of Columbia. An Order

was entered by the HPS on October 11, 2018, which reflected a change in the hearing date to January 30-31, 2019.¹

There was a telephonic status conference held on January 2, 2019, wherein the January 2019 hearing date was continued. Respondent agreed to provide an affidavit on or before January 9, 2019, waiving any time limitations to have a hearing and further agreed he would not practice law during the pendency of the reciprocal proceedings. An Order was entered January 4, 2019, setting the hearing date for March 25-26, 2019. The above referenced executed notarized affidavit was provided by Respondent's counsel on January 9, 2019. By email dated January 8, 2019, Mr. Bryant requested the hearing dates be moved to accommodate a scheduling conflict with Respondent's parents with a pre-planned vacation. Mr. Bryant advised that they were going to be called as witnesses in the hearing. Respondent filed a motion on January 28, 2019, but later orally withdrew that motion and the matter proceeded to hearing March 25-26, 2019.

Importantly, Rule 3.20 of the Rules of Lawyer Disciplinary Procedure does not set forth any requirement to conduct a hearing within sixty days to be held or a recommendation to be sent to the Court. Regardless, all requests for continuances were made by Respondent's counsel to accommodate Respondent's needs and were properly considered and ruled upon by the HPS.

B. Respondent failed to meet the burden to compel this Court to ignore a foreign judgment, on the merits entitled to full faith and credit.

Article IV, section 1 of the 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, New York court had proper jurisdiction, the judgment is final, on the merits and there are no valid defenses to require West Virginia to not recognize the New York proceedings. Such practice best serves the protection of the public, and the interests of justice as it advances public

¹The Order entered October 11, 2018, erroneously reflects the hearing is set for January of 2018.

confidence in the legal system by producing consistent judgments across the various jurisdictions. 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. 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. Courts in other jurisdictions have considered this issue and have determined that reciprocal discipline is appropriate even where burdens of proof differ. 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. A plain reading of Rule 3.20 suggests that the Court is aware that other jurisdictions may use a lesser burden of proof than West Virginia. 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. Not here.

Additionally, Respondent’s repeated claims that neither ODC, nor the HPS majority refute his testimony² that the evidence on which New York based its decision is infirm clearly misstates Chief Counsel and the members of the HPS’ obligations in a reciprocal disciplinary matter. ODC is under no obligation to prove or dispute anything as 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 imposition of the identical sanction imposed by the foreign jurisdiction unless one of the four grounds provided for challenging the

² Respondent was the only witness that testified in the reciprocal hearing in West Virginia.

discipline imposed by a foreign jurisdiction is both asserted and clearly established by the disciplined lawyer. *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 consistent decisions to uphold reciprocal discipline. The HPS majority properly determined that Respondent failed to meet this burden and that determination is supported by review of the record and the law.

C. Conclusion

At this stage in the proceedings, this Court has held that “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board.” Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). This Court gives respectful consideration to the HPS's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 290, 452 S.E.2d 377, 381 (1994). It is also well settled that “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law.” Syllabus Point 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984),” Syllabus Point 1, Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003). Again, Respondent has fallen short of meeting the burden as the HPS majority decision is well grounded in the record and well supported by the law.

Despite Respondent's histrionics, this case is not novel and no exceptions to reciprocal discipline apply. This reciprocal disciplinary proceeding is not another opportunity for Respondent to litigate his custody case or his disciplinary case. The procedures followed by New

York complied with due process requirements and the proof relied upon by the New York Court is firm. The judgment is final and on the merits. Respondent has not succeeded in his attempt to challenge the New York disciplinary action on due process grounds, the same sanction of disbarment taken against Respondent by the New York court system is mandated by the rules. Respondent must be disbarred. The conduct that is the subject of the proceedings occurred in New York. Following disciplinary proceedings in that court, at which Respondent received notice and had the opportunity to, and did, participate, the Supreme Court of New York, Appellate Division, disbarred Respondent and, thereafter, the New York Court of Appeals denied Respondent's appeal and motion for leave to appeal. Consequently, pursuant to Rule 3.20 and case law, this Court must impose reciprocal discipline.

Respectfully submitted,

The Lawyer Disciplinary Board
By Counsel



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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 4th day of January, 2021, served a true copy of the foregoing "**Reply Brief of the Lawyer Disciplinary Board**" upon Respondent Anthony J. Zappin, Esquire, by mailing the same via United States Mail with sufficient postage, to the address listed on file with the West Virginia State Bar:

Anthony J. Zappin
28 Big Oak Pl
Pawleys Island, South Carolina 29585

And to the address Respondent listed on his brief:

Anthony J. Zappin
1827 Washington Blvd
Huntington, West Virginia 25701



Rachael L. Fletcher Cipoletti