BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
NEJLA KASSANDRA KEYFLI LANE,	§	TX CAUSE NO. 67623
STATE BAR CARD NO. 24095557	§	IL SUP. CT. NO. M.R.31402
	§	IL COMMISSION NO. 2019PR74
ATTORNEY RESPONSE AND OBJECTION	§	FEDERAL COURT NO. 18MC40

ATTORNEY'S RESPONSE AND OBJECTION TO FIRST AMENDED ORDER TO SHOW CAUSE ON PETITION FOR RECIPROCAL DISCIPLINE

In response to the First Amended Order to Show Cause on Petition for Reciprocal Discipline and Hearing Notice ("Notice") from the Commission for Lawyer Discipline ("Petitioner"), pursuant to Texas Disciplinary Rules of Procedure Conduct "TDRPC" Part IX, Attorney Nejla Kassandra Keyfli Lane ("Respondent Lane") *opposes reciprocal discipline of any kind* by the Board of Disciplinary Appeals ("BODA"), identical to that imposed by the Illinois Supreme Court, because not only would it result in grave injustice and unwarranted, but also for the reasons stated below it would be *unconstitutional*, and in support Respondent Lane states as follows:

On May 30, 2023, Respondent Lane voluntarily accepted service of the above-titled documents. This Answer is within the allotted 30-day of service.

A. FACTUAL AND PROCEDURAL BACKGROUND

1. The Illinois ARDC disciplinary matter arose from three (3) email incidents which transpired while Respondent Lane was representing a plaintiff, Barry Epstein, in *Barry Epstein v. Paula Epstein and Jay Frank*, No. 14-cv-8431, in the United States District Court for the Northern District of Illinois ("NDIL"), pursuant to 18 U.S.C. §2520, for alleged multiple violations of the

Federal Wiretap Act ("Wiretap Act"). (Respondent's Ex. or Respondent Exh.) Marked as R[1]-Exh. 5, pp. 776-801. The case involved a highly protracted and contentious divorce (the divorce litigation was pending in state court at the time).

2. Mr. Epstein's federal complaint in the NDIL against his then-wife Ms. Epstein and his wife's then-divorce attorney, Mr. Jay Frank, alleged, *inter alia*, that Ms. Epstein unlawfully intercepted, disclosed, and used Mr. Epstein's emails in violation of the Wiretap Act (as leverage to gain more in settlement in their divorce litigation pending at the time).

3. Initially, on April 20, 2015, Judge Thomas Durkin ("Judge Durkin") dismissed this suit on the pleadings; however, plaintiff filed an appeal in the United States Court of Appeals for the Seventh Circuit, titled *Epstein v. Epstein at. al.*, Case No. 15-2076. The Seventh Circuit reversed the dismissal of the federal action against plaintiff's wife, Ms. Epstein, but affirmed the dismissal of the wife's divorce attorney, Mr. Frank, and remanded the case back to Judge Durkin. See *Epstein v. Epstein et. al.*, 843 F.3d 1147 (7th Cir. 2016)1. Respondent Exhibit, R-Exh. 1.2 EM, at 33- 39. (R166, 299). However, Seventh Circuit Judge Richard Posner wrote a separate concurring opinion—*dicta*[2]—to address *an issue not raised on appeal*, namely "whether the Wiretap Act should be thought applicable" to invasions of privacy as it relates to marital infidelity. Ms. Epstein's federal matter attorney, Mr. Scott Schaefers, adopted Judge Posner's *dictum* and referred to it as the "Posner Defense" thus devising a new "affirmative defense" which Magistrate Judge Sheila Finnegan readily adopted. (R-Exh. 5, at 5, actual DE62 at p. 11-12, *See* also R-Ex. 5, at 119 of 1626). (R133) (R-Ex. 5.15, at 751-7622, 5.16 at 426-27 of 1626) (270-272).

[1] Respondent's Illinois Hearing Exhibits are marked as R-Exh. Or R. Certified records. Not included in this Attorney Response, but available upon request. This Response extracted and marked pages from the Certified files. New Exhibits are marked A-H, 1-3.
[2] Judge Richard Posner's opinion is interchangeably referred to as *dicta* or *dictum.*

4. On remand, on January 6, 2017, over the objection of Respondent Lane, Judge Durkin put the case on an aggressive schedule, emphasizing that settlement discussions should take place under the threat of a trial date, and he averred: "Well, let's set a trial date and work backwards …. If you're going to talk reasonably and settle about this case - - *settle this case, you'll do it under the threat of a trial date*." (*Emphasis added*). And this matter was set for trial on June 5, 2017. R-Ex.14, pp.1-7, see Transcript of Jan. 6, 2017. (R68-69). This truncated discovery schedule was unreasonably short for a colossal complex Wiretap Act violation case. Subsequently, Judge Durkin assigned Judge Finnegan as Magistrate Judge for an expedited settlement conference, but after a failed settlement, this case was again referred to Magistrate Judge Finnegan ("Mag. Judge") for discovery supervision. Thereafter, Judge Finnegan controlled the direction of the discovery, purposefully steering the case consistent with Judge Posner's *dicta*. Judge Posner's *dicta* which slammed Mr. Epstein was treated as binding law and was now referred to as the "Posner Defense." *See* R-Exh. 14, Trans. of certified federal court pp. 1-434. R511-523. (Tr. of proceeding page marked as R).

5. Although a judge is presumed to be impartial, Respondent Lane's perception was that after the botched settlement conference, Magistrate Judge Finnegan demonstrated bias because she was making statements favoring Ms. Epstein and referencing Judge Posner's dicta as if it were binding law. Respondent Lane's first email, on April 18, 2017, to Judge Finnegan, *inter alia*, stated the following to counter such bias: "[t]his is not about 'catching a cheater or infidelity' and Posner's dicta (sic) is not the law, there is no such Posner Defense! This case is not filed for moral rights/wrongs …". (*See* R-Exh. 1-3 at1-3, the three-email thread/communication at 28-29). (**Newly** marked Group **Exh. F**, 3 Emails).

6. The second and third email incidents were on Friday, June 23, 2017, and June 26, 2017, respectively. Respondent Lane's emails were in response to a seven-page order received from Judge Finnegan's law clerk, Ms. Allison Engel, stating: "Counsel, [a]ttached is the Order denying Plaintiff's Motion for Extension of Time to Complete Discovery and Leave to Depose Jay Frank [207]. It will be uploaded to the docket on Monday." (Respondent's Ex. 5, DE221). Notably on June 22, 2017, Judge Finnegan had already entered an Order [Docket 213] denying the motion [DE207]. (*See* Respondent's Exh. 5, at 851, DE 213). Yet, this seven-page order appeared not only unnecessary and redundant, but it also mischaracterized facts and questioned Respondent's character, professionalism, and competency as counsel and Respondent perceived this not only as a personal attack but also as evidence of judicial bias. (*See* R-Ex. 5, at 883-889, DE221). Therefore, Respondent Lane asserts said content of these three (3) private emails cannot be construed as false because, arguably, an opinion cannot be false; hence, any finding of the emails expressing opinions to be false inherently violates Petitioner's First Amendment rights to Freedom of Speech and right to Redress of Grievances. (U. S. Const., First Amendment). (*See* **Exh. F**, 3 Emails).

7. Thereafter, on July 6, 2017, prior to filing a "Motion for Recusal of Judges Thomas M. Durkin and Sheila Finnegan [DE268]" ("recusal motion"), Respondent Lane expressed her concerns about apparent judicial bias in open court directly to Judge Durkin. (*See* **Exh. A,** DE268, R-Ex. 14, TR. July 6, 2017, pp. 9-10). Subsequently, the recusal motion emphasized concerns about extreme wrongful judicial bias. This right to redress grievances is a fundamental aspect of our democratic society, allowing individuals to seek justice, accountability, and resolution for their concerns or grievances, which is closely connected to the principles of free speech, petition, and access to justice. (U.S. Const., First Amendment & Article I§5 of the Illinois Const.). Judge Durkin denied the recusal motion [DE268]; however, due to Petitioner's reported incidents of judicial bias

and partiality, he set the case to be tried by a jury [DE301]. (*See* Exh. A, Bates at 118, DE301 at 16, R-Exh. 14, TR of July 24, 2017). After the recusal motion was denied and a jury trial commenced, the case was settled after the opening statements concluded.

8. On October 31, 2017, Judge Finnegan filed a formal complaint against Respondent Lane with the Executive Committee ("federal district court") for sending three (3) emails containing unprofessional and inappropriate language to Judge Finnegan and her law clerk, Allison Engle ("Ms. Engle"). First email was sent on April 18, 2017, to Judge Finnegan and two (2) emails on June 23 & June 26, 2017, though directed to the Judge's law clerk, Ms. Engel, Judge Finnegan's proposed order mailbox was included to avoid the perception of *ex parte* communication. (*See* **Exh. B**, **Group Exh. Citation**, Atty. Response, Order, Reinstatement).

9. Judge Finnegan stated, inter alia: "I informed Ms. Lane in writing that *the communication was improper* and instructed her not to do this again. Despite this, on June 23, 2017, and again on June 26, 2017, Ms. Lane sent lengthy emails criticizing another ruling. Not only did Ms. Lane violate my April 17 order but the language that she used in the emails was *wholly unprofessional and extremely inappropriate*." (*Emphasis added*). *See* **Group Exh. B**, at 2, R-Ex. 10, at 125-127.

10. On November 14, 2017, the Northern District of Illinois Eastern Division Executive Committee issued a Citation *In re: Nejla K. Lane*, **No. 17D43.** (*See* Exh. A, Citation, at 1-2). According to this Citation it was *for* improper email communication with Judge Finnegan and Respondent Lane was accused of violating the American Bar Association Model Rules of Professional Conduct ("Rule"), Rule 3.5(d), which states "a lawyer shall not engage in conduct *intended to disrupt a tribunal*" and Rule 8.4(d), "it is professional misconduct for a lawyer to engage in conduct that *is prejudicial to the administration of justice*". (*Emphasis added*).

Respondent Lane was instructed to respond, "why the imposition of discipline would be unwarranted and reasons thereof." (*See* **Group Exh. B**, Citation, at 1-2).

11. On December 20, 2017, Respondent Lane responded by apologizing for sending said emails and expressed her sincere regret for not having opted to file a proper motion instead[3]. However, Respondent Lane in her Attorney Response to the Citation stated that Judge Finnegan's complaint against her was for expressing her strong opinion about and visceral reaction to the demonstrated bias and engaging in a personal vendetta for calling her out on following *dicta* rather than the law. (*See* **Exh. B**, Citation, Attorney Response actual at 16 & Exh. B, DE268, Motion for Recusal of Judges).

12. Subsequently, **on *January 22, 2018***, the federal district court issued an Order, with Cause **No. 18MC40**, immediately suspending Respondent Lane from the General Bar for six (6) months, and the Trial Bar for twelve (12) months, for the use of "unprofessional and inappropriate language" in said emails[4]. Subsequently, Respondent Lane was reinstated to both bars, on August 7, 2018, and on June 11, 2019, respectively, and since then she remains in good standing. (*See* Group **Exh. B**, pp. 38-40, Citation, Complaint, Response, Order, and subsequent reinstatements).

13. However, neither Judge Finnegan's complaint nor the NDIL's Citation or suspension Order claimed Respondent Lane violated ***Illinois Rule of Professional Conduct 8.2(a)***, which states "a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity *concerning the qualifications or integrity of a Judge, adjudicatory*

[3] DE268, on July 17, 2017, Respondent filed a "Motion for Recusal of Judges Thomas M. Durkin and Sheila Finnegan" alleging, *inter alia*, bias and prejudice against Respondent Lane's client, Mr. Barry Epstein, the Plaintiff.

[4] It should be noted that Respondent did not engage in any personal attacks on the judge such as calling her name or impugning her character; rather, all Respondent did was criticize the statement of the court based upon logic and the merits of the issues at hand. There is in fact a huge difference between the two. One is permitted and the other is not.

officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." (*Emphasis added*). Accordingly, Respondent Lane's response to the Citation did not include a defense for a Rule 8.2(a) violation. *Id.* at 39. (*See* **Group Exh. B**, NDIL Citation and Order).

B. PROCEEDING BEFORE THE HEARING BOARD OF THE ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION ("ARDC")

14. On August 28, 2019, the Administrator for the ARDC brought a one-count complaint against the Respondent Lane for the same federal district court incident under **No. 2019PR00074**. However, the complaint against Respondent Lane was based on selected words or quotes that were taken out of context and then twisted and contorted to create a new charge of a Rule 8.2(a) violation. Respondent Lane contends that these words and excerpts from the three (3) emails were not only inconsistent with the overall context of the emails, but also distorted the meaning and intent behind her actual communications. Respondent Lane believes when Administrator focused on isolated portions of the emails, the true meaning and intent of her communications were unreasonably distorted, leading to an inaccurate portrayal of her conduct. Such an example is provided in the Administrator's own words, *supporting Respondent's belief of using quotes and words out of context*. (<u>See</u> **the Exh. C**, Resp. Answer to Complaint on page 8, No. 20), which states:

> **<u>No. 20 of the Complaint:</u>** In her [Respondent's] June 26, 2017 *email to* ***Engel***, referred to in paragraph 19, above, Respondent described what she *perceived to be errors in Judge Finnegan's June 23, 2017 order*, characterizing the order as ***"flawed",*** *accused Judge Finnegan* of engaging in *ex parte* communications, and stated, in part, the following: (*Emphasis added*).
> <u>Actual quote in the third paragraph</u>: "*How do you* [Engel] *know* I did not see the SC order???? *Where do you* [Engel] get this information? *Ex Parte* Communication with Defendant's attorney, Scott? Smearing dirt behind my back?" (*Emphasis added*).
> **<u>Answer:</u>** Respondent admits the allegations in Paragraph 20. Respondent further states that the information set forth in Paragraph 20 contains selected quotes which

> are excerpts and only portions of the paragraphs quoted and *is not complete*, and *does not contain other portions of Respondent's e-mail* which *attempted to correct errors and misstatements* contained in the Court's Order. (*Emphasis added*). *Id*. at 8-9.

15. Said complaint accurately stated that Respondent Lane's emails were neither directed to Judge Finnegan nor did she accuse Judge Finnegan of engaging in *ex parte* communications. Respondent's emails were directed to *"Ms. Engel,"* Judge Finnegan's law clerk. The emails inquired about the source of the information contained in the June 23 Order attributed to Ms. Engel. Respondent Lane sought clarification regarding the origin of the information rather than making direct statements or allegations against Judge Finnegan. Furthermore, Respondent Lane asserts these inquiries were phrased as questions, ending with question marks ("??"), which is seeking information rather than making definitive statements against anyone, including Judge Finnegan. Additional evidence that these emails were directed to Ms. Engel, and not Judge Finnegan, is on the fifth paragraph which concludes with an expression to Ms. Engel, stating, "Thank you Allison [Ms. Engel]! Great job!" (*Emphasis added*). *Id.* 9. However, it appears that the Administrator interpreted Respondent Lane's inquiries as to statements or allegations, potentially leading to the charge of new violation under Rule 8.2(a), contrary to Respondent Lane true intent. Administrator's Complaint not only charged Respondent with Illinois Rules of Professional Conduct (IRPC) Rule 3.5(d) and 8.4(a) violations, but also with a new ***Rule 8.2(a) violation***, which pertains to, "*making a false or reckless statement impugning the integrity of a judge*." Respondent Lane contends that if such violation occurred, it would have been addressed and defended against in the federal district court or by the magistrate judge, rather than by the Administrator. (*See* **Exh. C**, Complaint, at 11-12).

C. THE BOARD OF DISCIPLINARY APPEAL ("BODA") AND RESPONDENT LANE'S DEFENSES PURSUANT TO RULE 9.04

16. Respondent Lane asserts that the Illinois Hearing Board's Report and Recommendation ("Report") violated her constitutional rights during the proceedings, specifically her due process rights, equal protection under the law, and freedom of speech under the First Amendment. Pursuant to Texas Disciplinary Rule of Professional Conduct ("TDRPC") and Texas Rule of Disciplinary Procedure ("TRDP"), Respondent Lane assert defense pursuant to TRDP Rule 9.04 to avoid the imposition of discipline identical to that imposed by the Illinois Supreme Court:

17. Rule 9.04(A), Respondent Lane asserts that the procedure followed in the other jurisdiction on the disciplinary matter "was so lacking in notice or opportunity to be heard as to constitute ***a deprivation of due process***" and it also constituted a violation of the Fourteenth Amendment to the U. S. Constitution that provides that "no state shall deprive any person of life, liberty, or property, ***without due process of law***." (*Emphasis added*) U. S. Const. Amend. XIV§1. Respondent Lane asserts that the disciplinary proceedings in the other jurisdiction violated Respondent Lane's due process rights, a Rule that is designed to ensure that attorneys have a meaningful opportunity to be heard and present their defense, *infra*. *Id.*

18. Rule 9.04(B) allows an attorney to challenge the proof of misconduct established in another jurisdiction and assert an infirmity of proof. Respondent Lane asserts that there were significant deficiencies in the evidence or that the conclusion reached by the Illinois Hearing Board's Report and Recommendation, which resulted in her suspension, was against the manifest weight of the evidence. Respondent Lane asserts that there was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the

Board of Disciplinary Appeals, consistent with its duty, ***should not accept as final the conclusion on the evidence reached in the other jurisdiction***.

19. Pursuant to Rule 9.04(C), Respondent Lane asserts that the imposition by the Board of Disciplinary Appeals of discipline identical, to the extent practicable, with that imposed by the other jurisdiction (Illinois) ***would result in grave injustice***, because the Illinois suspension is in violation of her constitutional rights, and the disciplinary actions taken against her in Illinois violated these constitutional protections.

20. This Illinois disciplinary matter proceeded to a hearing on March 16 and 17, 2021. Prior to and during the hearing, Respondent Lane requested several actions that were ultimately denied. These requests included the following:

i. Motion Requesting In-Person Hearing, to Strike Past Remote WebEx Video Deposition Transcripts, and Allow the Use of Audio-Visual Recording Device: Respondent Lane sought an in-person hearing, requested the striking of remote video deposition transcripts, and requested the use of an audio-visual recording device. However, the motion was denied, including a renewed Motion to Reconsider same (C186-238);
ii. Four-day hearing to present evidence: Respondent Lane requested a four-day hearing to present her evidence. This request was also denied. (C183-91, C194-98, C205-209, C304);
iii. Motion for Leave to Add the Character Witness, Officer of the Consulate General of Turkey: Respondent Lane sought to add a character witness, specifically an Officer of the Consulate General of Turkey. However, this motion was also denied. (C240-252);
iv. Admission of Respondent Lane's exhibits: Respondent Lane requested the admission of her exhibits, including public records, certified court reporters' transcripts, email communications, and reports from Lawyers' Assistance Program (LAP) Counselors and Dr. Michael Fields' expert medical reports. This request was also denied. (C302-309, C314-346, C347); and
v. Testimony of Dr. Fields: Respondent Lane's disclosed expert witness, Dr. Fields, was also denied the opportunity to testify in his capacity as an expert and was instead designated only as a character witness. (R337-345).

21. Respondent Lane’s otherwise admissible evidence was denied, by sustaining Administrator’s objections who stated:

> "It's not that you have gone beyond the scope of my cross, the point is, this is not going to come into evidence. It's a transcript. That is a transcript of a deposition, right?" "No, no. It's actually - - it doesn't matter. It's a court proceeding, and it's not coming into evidence." (*Emphasis added*) (See R316, R246-251).

22. The Board's unreasonable exclusion of admissible evidence, *inter alia*, constitutes a violation of due process, which impacted the fundamental fairness of the proceedings. "The fundamental requisite of due process of law is the opportunity to be heard." *Greene v. Lindsay*, 456 U.S. 444, 455 (1982). Procedural due process, guaranteed to all persons by the Fourteenth Amendment to the U.S. Constitution, is triggered where, as here, the government has deprived a person of life, liberty, or property.

23. Similarly, the Board's exclusion of Respondent Lane's evidence was contrary to §120.560 of Illinois Administrative Procedures Act. *In re Melin* (1951), 410 Ill. 332, held that common law rules of evidence apply to disciplinary proceedings. In *In re Heirich* (1956), 10 Ill. 2d 357, 367, however, this court held that technical rules of evidence, including the hearsay rule, *need not be mechanically followed in attorney discipline cases*. Letters and affidavits have been considered in previous attorney discipline cases, apparently without the Administrator's objection. (See, *e.g.*, *In re Wigoda* (1979), 77 Ill. 2d 154; *In re Thomas* (1979), 76 Ill. 2d 185; *In re Steinbrecher* (1973), 53 Ill. 2d 413, 419-20.) Under the circumstances we believe that the hearing panel had the discretion to admit the letters into evidence. They were of minor significance to the Petitioner's case. There were more than a dozen of them, and the cost of bringing the authors to Chicago to testify would have been prohibitive. Moreover, the Administrator did not dispute [***12] any of the information contained in the letters. *In re Silvern*, 92 Ill. 2d 188, 196. (*Emphasis added*).

24. Furthermore, the Report violated Respondent Lane's rights under the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution, because the Equal Protection Clause requires the government to have a compelling state interest, or at a minimum a rational basis, to treat people differently for legal purposes. Laws or government actions that discriminate against certain individuals or groups without a compelling justification may be found unconstitutional. The Equal Protection Clause plays a crucial role in promoting fairness, equality, and non-discrimination in the United States, and it applies to all individuals, including attorneys, ensuring that they are entitled to equal protection under the law.

25. Respondent Lane contends that there is substantial disparity between the discipline recommended and imposed on worse misconduct by other lawyers, and this disparity violates the Equal Protection Clause, as arbitrary and irrational discrimination is considered a violation of the Clause. As the Supreme Court has consistently held, "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83, 100 L. Ed. 2d 62, 108 S. Ct. 1645 (1988). Thus, a law will fail under rational basis review if "'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [legislature's] actions were irrational.'" *Gregory v. Ashcroft*, 501 U.S. 452, 471, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979)); accord *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) [**78] (finding that a government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). *Allen v. Leis*, 154 F. Supp. 2d 1240, 1269. Respondent Lane asserts that attorneys who have engaged in misconduct that is remotely

similar to or worse than her own have received lesser disciplinary actions or were not disciplined at all. This includes being censured, eligible for Rule 108(a) deferral, reprimanded, or granted a Rule 56 diversion program. (*See* Exh. D, Req. for Rule 56 Div. Ltr., R456).

26. According to the ARDC Rule 56 Diversion Eligibility, Respondent Lane was otherwise eligible for the diversion program because the conduct in question did not involve misappropriation of funds; criminal acts; actual loss to a client or other persons; or dishonesty, fraud, deceit, or misrepresentation. Congruently, "[t]he Hearing Board also found that Respondent's misconduct did not arise from a dishonest or improper motive." (***See* Exh. 1**, Hrng Bd. RR at 11, Exh. 2, Review Bd. Report p. 9). (*Emphasis added*). The Administrator's refusal to allow Respondent Lane the Rule 56 diversion program violated Respondent Lane's equal protection rights under the Fourteenth Amendment.

27. Respondent Lane's expression of her opinion in those three (3) emails is factually dissimilar from cases mentioned herein, such as *In re Kelly*, 808 F.2d 549, 549 (7th Cir. 1986), in which an attorney filed a motion to recuse a judge from participating in the appeal of a sex-discrimination suit brought against a Catholic-affiliated university. In *Kelly*, the attorney filed an affidavit, which stated that the judge, a graduate of the university and its law school, was personally opposed to abortion, an issue allegedly raised by the university. The attorney was ordered to substantiate his allegations about the judge. He referenced the judge's membership in a Catholic legal society and his alleged participation in its presentations about the issue of abortion. *Id.* at 551. Thereafter, the attorney was ordered to show cause why he should not be disciplined for violating Fed. R. Civ. P. 11. The court discharged the rule to show cause. Under Fed. R. App. P. 46(c), a lawyer was subject to discipline for unbecoming conduct and Rule 11, although not a part of the appellate rules, helped to define such conduct. Furthermore, lawyers were obligated to be

scrupulous about the accuracy of their sworn statements about fellow lawyers and judges. However, the court *In re Kelly* concluded that discipline was not warranted *because of the possibility that the affidavit was the result of clumsy, rather than dishonest,* drafting. Kelly, 808 F.2d at 552. (*Emphasis added*).

28. Unlike in Respondent Lane's disciplinary matter, other attorneys' whose misconduct was proven by clear and convincing evidence for unprofessional and unethical conduct were spared from any form of discipline. In *In re Bell*, the district court found by clear and convincing evidence that the attorney acted in an unprofessional and unethical manner and violated the Tennessee Rules of Professional Conduct and Tennessee Rule of Professional Responsibility, specifically Tenn. Sup. Ct. R. Prof. Conduct 8, 3.1; 3.3; and 8.4. Throughout the disciplinary process the attorney was honest and truthful. Further, he did not misrepresent the nature of the misconduct nor his actions before a magistrate judge. Rather, he had been forthcoming and repentant. Thus, the district court determined that a *public admonition would suffice*. *In re Bell*, 713 F. Supp. 2d 717, 717. (*Emphasis added*). Likewise, "the Court conclude[d] that based upon Respondent's violations, disbarment and suspension are not warranted. Rather, the Court concludes that the purposes of discipline, correction of the offending attorney, *protection of the public*, protection of the integrity and standards of the court and bar of this district, [**15]and deterrence to other attorneys, (*In re Moncier,* 2008 U.S. Dist. LEXIS 779932, 2008 WL 3981491 *2-3 (E.D. Tenn. Aug. 22, 2008)), *can be achieved by a public admonition*. *Id.* 713 F. Supp. 2d 717, 722.

29. When comparing the above-mentioned cases, including Mr. Kelly's case with Respondent Lane's, it is obvious that Mr. Kelly *made factual and false statements in a motion to recuse a judge,* but Respondent Lane in said emails was only venting to a law clerk, when she expressed her opinion. Mr. Kelly's statements were false, but the veracity of Respondent Lane's

statements is debatable because she was expressing an opinion, which is closely connected to the principles of free speech and thus protected under the First Amendment. However, Mr. Kelly's false statement of fact was under oath about a judge in a motion that is available to the public, but Respondent Lane's emails were neither under oath nor in a motion available to the public view. (*See* **Exh. E**, complete emails), (*See* also R49, R112, R456, R518, R286). (*See* ***also*** **Exh. B**, Citation, pp. 5-11, Exh. 1, Hrng. Bd. RR. R-Ex. 11, Respondent Lane's Response to the Citation).

30. Nevertheless, in *In re Kelly*, the court held that *discipline was not warranted*, the attorney was not even investigated by the state bar. However, Respondent Lane's disciplinary matter commenced in 2017 and it continues after almost five years; *ergo*, she was being treated worse than Mr. Kelly, because the ARDC disciplinary matter continues to-date. Specially, Respondent Lane disciplinary matter does not even involve Rule 11 violation, however, in *Kelly*, the court held, "to punish an attorney for a single violation of Rule 11 of the Federal Rules of Civil Procedure would violate the speech and petition clauses of the First Amendment." *Kelly*, 808 F.2d at 550. (*Emphasis added*). Respondent Lane, *inter alia*, was denied equal protection under law because other attorneys were differently treated for worse misconduct. In another disciplinary matter, though, "it was proven that Respondent made false statements in two motions and acted inappropriately in court," and the Hearing Board stated that they believed that the Respondent had learned his lesson and believed that Respondent is unlikely to engage in similar misconduct in the future and *recommended Respondent be censured*." *In re Benjamin Edward Harrison*, July 12, 2007, Commission No. 06CH36, pp. 8-9. (*Emphasis added*). However, in Respondent Lane's matter, the Hearing Board's recommendations are far more drastic, because there is not only a six-month suspension, but also an additional six (6) months' probation. The terms of the probations

go beyond what is proportionate for the alleged violation, contrary to *In re Kelly* and *In re Harrison, supra.*

31. Therefore, Respondent Lane believes that the Illinois suspension is in violation of her constitutional rights, and the disciplinary actions taken against her in Illinois violated these constitutional protections, and the above demonstrated violations establish strong defenses under Rule 9.04.

32. Furthermore, Respondent Lane asserts that the Report is flawed, because it failed to make any finding at all as to whether Respondent Lane knew that any of the claims that she made in her emails were false, much less that she knew that they were false by clear and convincing evidence. The Administrator did not identify any evidence in the record showing that Respondent Lane made any of these statements with reckless disregard as to their truth or falsity. The Report does not allege intent to make false statements, nor can intent or reckless disregard be inferred from any of the Boards' findings. There is not even an allegation of awareness on the part of Respondent Lane that she knew that there was insufficient evidence to support her claims. See *Cranwill v. Donahue*, 99 Ill.App.3d 968, 426 N.E.2d 337, 55 Ill. Dec. 362 (Ill. App. 1981). Reckless disregard, in regard to derogatory statements, requires proof that the defendant had a "high degree of awareness of their probable falsity." *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 85 S. Ct. 209, 215, 13 L.Ed.2d 125. Accord *Kuwik v. Starmark Star Marketing and Admin.*, Inc., 619 N.E.2d 129, 156 Ill.2d 16, 188 Ill. Dec. 765 (Ill. 1993). The Report provided none.

33. Furthermore, the Administrator failed to identify any evidence in the record which shows Respondent Lane's alleged intent. See *Holder v. Caselton*, 657 N.E.2d 680, 275 Ill.App.3d 950 (Ill. App. 1995) ("Defendants assert that plaintiff raises this issue for the first time on appeal, and plaintiff appears to concede that point in her reply brief by failing to respond or point out

where the record contains any objection she made at the trial level."). Instead, the Administrator invited the Review Board to ignore the plain language of the Rule and the decisions of the U.S. and Illinois Supreme Courts, and substitute in their place another rule altogether: "[a] lawyer who attacks a judge's honesty or integrity must have an objectively reasonable basis for doing so in order to escape liability under Rule 8.2(a)." (Not included herein but will be available upon request a **Group Exh. 4**, Administrator's Response Brief at p. 18, relying upon Review Board decisions, included are Respondent's Brief and Reply Brief). The Report is accordingly flawed, it does not even claim that these decisions are binding upon the Board. But those of the U.S. and Illinois Supreme Court are. Accordingly, the Report is bereft of any basis for concluding that Respondent Lane has violated rule 8.2(a). Inasmuch as the Administrator has failed to identify any evidence in the record showing that Respondent Lane had a high degree of, or any, awareness of the probable falsity of her statements, thus the Report's finding that Respondent Lane violated Rule 8.2(a) was against the manifest weight of the evidence.

34. Though the Report erroneously determined that the Administrator proved that the Respondent Lane had violated Rules 3.5(d), 8.2(a) and 8.4(d) of the Illinois Rules of Professional Conduct, the charged misconduct, by clear and convincing evidence, *it failed to show how the Administrator proved any violations by any legal standard at all,* much less clear and convincing evidence. The Report is against the manifest weight of the evidence. These rules as applied were unconstitutional, specifically, Rule 8.2(a), as applied to private communications between Judges and attorneys, or ones shared with an extremely small group of individuals who are highly unlikely to disseminate it further. The use of these Rules to punish Respondent Lane for the three (3) emails to Magistrate Judge Finnegan and/or her law clerk, violates Respondent Lane's First Amendment right to freedom of speech. (R68, R291, R323). Additionally, it appears that the reason for

imposing six-months' suspension followed by additional six-month probation, is because it is aimed to silence her speech, potentially having a chilling effect on all attorneys' freedom of speech. Its effect is to sanction attorney speech, in violation of the First Amendment, which requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Here, neither the suspension nor the probation do bear such a link. *Ergo*, the Illinois disciplinary action imposed on Respondent Lane is unnecessary or disproportionate to the alleged violation or harm caused.

35. Though Respondent Lane was already punished by the federal district court, *yet* the Administrator sought excessive punishment in form of a six-month suspension coupled with atypical, burdensome probationary terms which are unduly harsh and disproportionate, for the same speech related incident as was in the federal district court. Respondent Lane asserts that attorneys with worse misconduct were treated differently. Other attorneys with worse conduct were either *not* disciplined at all or *only censured*, were eligible for Rule 108(a) deferral, reprimanded, *or were granted a Rule 56 diversion program*. Though Respondent was eligible for all these alternative disciplines, she was treated worse not only by suspension in federal court and the Illinois State Bar, but the Administrator enhanced it with an additional six-months of probation and related costs, which is overly punitive. (*See* **Exh. D**, Req Diversion Letter).

36. Respondent Lane avers that the discipline imposed in other jurisdictions is unconstitutional, because it violated, *inter alia*, her Constitutional Rights.

37. Foremost, on or before ***July 29, 2020***, Respondent Lane inquired and/or discussed the above *federal court suspension* with Chief Disciplinary Counsel of the State Bar of Texas, Seana Willing ("Ms. Willing"). (*See* **Exh. F**, Email in July 2020). During said email

communication, *inter alia*, Ms. Willing responded to Respondent Lane that on ***January 22, 2018,*** the time of the Illinois federal district court suspension order against her, that current rule 8.03 did not require a reporting of a discipline from federal court or agency. Simply put, TDRPC Rule 8.03 ***does not consider a discipline from a federal court*** **or agency**, nor does it require self-reporting for a federal court or federal agency discipline. (*See* **Exh. F & G**, Proposed Rules, p. 2).

38. As a matter of fact, an amendment to Rule 8.03, TDRPC, was not approved by Committee on Disciplinary Rules and Referenda ("CDRR") and the State Bar of Texas Board of Directors ("Board") until the ***end of September 2020***, nearly three-years after the date of Respondent Lane's federal district court suspension. (*See* **Exh. G**, Approval date).

39. Furthermore, also noteworthy, the Amended Rule 8.03 extended the self-reporting and reciprocal-discipline provisions to cover certain discipline by a federal court or federal agency. According to Summary of Proposed Disciplinary Rules Report (p. 2), which stated: "attorneys licensed in Texas should not be able to avoid reporting federal court discipline to the CDC under TDRPC Rule 8.03(f), nor should they be able to avoid reciprocal discipline in Texas, ***when such discipline is warranted to protect the public***." (*Emphasis added*). (*See* **Exh. G**, Summary of Proposed Disciplinary Rule p. 11 of 18). Respondent Lane emphasizes that the federal district court discipline against her "*did not involve any unethical attorney conducts* ***against the public or clients***; misappropriation of funds; criminal acts; actual loss to a client or other persons; dishonesty, fraud, deceit, misrepresentation; ***nor raises any public protection concerns.***" Therefore, Respondent Lane argues that this amended rule would be inapplicable for Respondent Lane's perceived or alleged misconduct. Respondent Lane objects to the imposition of reciprocal discipline, *infra*, because the Illinois disciplinary action is punitive, *inter alia*, the rules as applied are unconstitutional, restricting attorney speech, and in so doing imposing a chilling effect.

40. Now Respondent Lane pleads with BODA not to punish her repeatedly for the same incident from June 2017. She emphasizes that her conduct in question does not warrant a "reciprocal discipline" in this matter, since at the time of this incident, then, TDRPC Rule 8.03 did not require reporting a federal court discipline to the Chief Disciplinary Counsel ("CDC"). Respondent Lane asserts in addition the Ex Post Facto Clause, *infra,* she also asserts the following TDRPC Rule 9.04 (A)-(C) defenses, to avoid the imposition of discipline identical to that imposed by the Illinois Supreme Court. (*See* **Group Exh. F & G**).

D. LAW AND ARGUMENT FOR EX POST FACTO LAW

The *ex post facto* clause is a constitutional provision in the United States that prohibits the enactment of laws that retroactively criminalize conduct *or increase the punishment for an act that was not illegal when it was committed*. It is derived from Article I, Section 9, Clause 3, and Article I, Section 10, Clause 1 of the United States Constitution. (*Emphasis added*).

41. Respondent Lane asserts that the *ex post facto* clause is applicable to attorney discipline proceedings when they are considered *punitive in nature*. This means that if a law or rule is enacted or applied retroactively to impose a more severe punishment or penalty on an attorney for conduct that was not prohibited when it occurred, it could potentially violate the *ex post facto* clause. *Assuming arguendo,* if the BODA were to impose discipline identical to that imposed by the Illinois Supreme Court, this would be indeed considered punitive because punished Respondent for nine (9) months, with the suspension stayed after six (6) months, followed by six (6) months' probation subject to the conditions recommended by the Review Board. The term of this probation is as follows:

> a. Respondent's practice of law shall be supervised by a licensed attorney acceptable to the Administrator. Respondent shall provide the name, address, and telephone number of the supervising attorney to the Administrator. Within the first thirty (30) days of probation, Respondent shall meet with the supervising attorney and meet at

least once a month thereafter. Respondent shall authorize the supervising attorney to provide a report in writing to the Administrator, no less than once every quarter, regarding Respondent's cooperation with the supervising attorney, the nature of Respondent's work, and the supervising attorney's general appraisal of Respondent's practice of law;

b. Respondent shall provide notice to the Administrator of any change in supervising attorney within fourteen (14) days of the change;
c. Prior to the completion of the period of probation, Respondent shall attend and successfully complete the ARDC Professionalism Seminar;
d. Respondent shall comply with the provisions of Article VII of the Illinois Supreme Court Rules on Admission and Discipline of Attorneys and the Illinois Rules of Professional Conduct and shall timely cooperate with the Administrator in providing information regarding any investigations relating to her conduct;
e. Respondent shall attend meetings as scheduled by the Commission probation officer;
f. Respondent shall notify the Administrator within fourteen (14) days of any change of address;
g. Respondent shall reimburse the Commission for the costs of this proceeding as defined in Supreme Court Rule 773, and shall reimburse the Commission for any further costs incurred during the period of probation; and
h. *Probation shall be revoked if Respondent found to have violated any of the terms of probation. The remaining period of suspension shall commence from the date of the determination that any term of probation has been violated*. *Emphasis added*. (*See* **Group Exh. 3**, Mandate dated Jan. 17, 2023, Exh. 2, Report pp. 15-16).

42. Respondent Lane asserts that the conduct in question did not involve misappropriation of funds; criminal acts; actual loss to a client or other persons; or dishonesty, fraud, deceit, or misrepresentation. Similarly, the Hearing Board's Report indicated that "[t]he Hearing Board also found that Respondent's misconduct *did not arise from a dishonest or improper motive*." *See* **Exh. 2**, Review Bd. Report p. 9. (*Emphasis added*). However, to make it overly punitive, Respondent Lane was additionally required to comply with Illinois Rule 764, which states:

> Duties of a Disciplined Attorney and Attorneys Affiliated with Disciplined Attorneys, including but not limited to the followings:
> (a) **Maintenance of Records.** The disciplined attorney shall maintain:
> (1) files, documents, and other records relating to any matter which was the subject of a disciplinary investigation or proceedings;

(2) files, documents, and other records relating to any and all terminated matters in which the disciplined attorney represented a client at any time prior to the imposition of discipline;
(3) files, documents, and other records of pending matters in which the disciplined attorney had some responsibility on the date of, or *represented a client during the year prior to*, the imposition of discipline;
(4) ***all financial records*** *related to the disciplined attorney's* ***practice of law during the seven years preceding the imposition of discipline****,* ***including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports***[5]; and (5) *all records related to compliance with this rule*. (*Emphasis added*). (*See* **Group Exh. 3**).

43. In addition to the above terms of probation, Respondent Lane per Supreme Court Rule 773(c), was ordered to pay $1,500 costs incurred in connection with this the discipline, along with reimbursing the Client Protection Program Trust Fund for any Client Protection payments, if any, arising from her conduct prior to the termination of the period of suspension/probation. (*See* **Group Exh. 3**, Mandate, pp. 1-4). Accumulatively, these additional and increased penalties along with the obligation to pay, are construed as strong evidence of punitive intent. For the foregoing reasons Respondent Lane believes that the *ex post facto* clause is applicable to her discipline proceedings because the foregoing terms are considered punitive in nature. Simply put, this means that if a law or rule is enacted or applied retroactively to impose a more severe punishment or penalty on an attorney for conduct that was not prohibited when the federal suspension occurred on January 22, 2018, it would potentially violate the *ex post facto* clause. *Id.*

44. The court in *Stogner v. California*, held: "*Ex post facto* laws, within the words and the intent of the prohibition include: first, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; second, every law that aggravates a crime, or makes it greater than it was, when committed; third,

[5] Respondent Lane has never, ever, in almost 18-year law career had any client complain about her; why is this term part of the probation, if not to show an overly punitive intent?

every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and fourth, every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive." *Stogner v. California*, 539 U.S. 607, 609.

45. This rule is applicable to the imposition of attorney discipline because in determining whether something "constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause … [w]e must 'ascertain whether the legislature meant the statute to establish "'civil"' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid.* (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980))." *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1146-47 (2003). "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack* v. *Klein*, 385 U.S. 511, 515.' *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226 (1968). Accordingly, the ex post facto clause applies to proceedings to impose attorney disciple which can include disbarment, or, certainly, the similar penalty of suspension.

46. In *Peugh v. United States*, the Supreme Court held that the "*Ex Post Facto* Clause was violated because the 2009 Guidelines called for a greater punishment than the 2000 Guidelines in effect when defendant completed his crimes. Sentencing Commission data indicated that when a Guidelines range moved up or down, sentences moved with it. A retrospective increase created

a sufficient risk of a higher sentence to constitute an *ex post facto* violation. When defendant committed his crime, the recommended sentence was 30 to 37 months. When he was sentenced, it was 70 to 87 months. Such a retrospective increase in the measure of punishment raised clear *ex post facto* concerns. The presence of discretion did not displace the *Ex Post Facto* Clause's protections. Nothing in a rule that retrospective application of a higher Guidelines range violated the *Ex Post Facto* Clause undid the holdings of Sixth Amendment cases, including *Booker*. The amended Guidelines' enhancement of the measure of punishment by altering the substantive "formula" used to calculate defendant's sentencing range created a "significant risk" of a higher sentence, and offended fundamental justice, one of the principal interests the *Ex Post Facto* Clause was designed to serve." *Peugh v. United States*, 569 U.S. 530, 530. The judgment affirming the sentence was reversed, and the case was remanded. *Id.* at 530.

47. Now Respondent Lane humbly pleads with BODA not to punish her repeatedly for the same email incident from June 2017. She emphasized that her conduct in question does not warrant a "reciprocal discipline" in this matter, *inter alia*, the TDRPC Rule 8.03 in place at the time of her federal court suspension did not require her to report the federal court discipline to the Chief Disciplinary Counsel ("CDC"), and there was no provision for imposing discipline identical to that imposed by the other jurisdiction. Therefore, Respondent Lane contends that it would be unjust to impose reciprocal discipline on her based on rules or requirements that were not in effect at the relevant time.

E. CONCLUSION

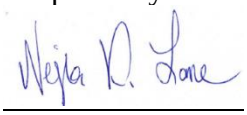
For the foregoing reasons, Respondent Lane contends that the procedure followed by Illinois in the disciplinary matter (as well as the substance) deprived her of due process and equal protection, and also violated Respondent Lane's constitutional rights. Respondent Lane asserts

based on her defenses Pursuant to Rule 9.04(A)-(C), the imposition by the BODA of discipline identical, to the extent practicable, with that imposed by Illinois would result in grave injustice. Therefore, BODA should neither accept as final the *conclusion* on the evidence reached in Illinois nor impose a discipline identical with that imposed by Illinois, because such would result in grave injustice. Respondent Lane emphasizes that the Report and Recommendation from the other jurisdiction are severely flawed, because the Rules 3.5(d), 8.2(a) and 8.4(d) as applied were unconstitutional and against the manifest weight of Evidence.

Furthermore, on June 16, 2023, Respondent Lane filed a Petition for a Writ of Certiorari to the Illinois Supreme Court for violating her constitutional rights. (*See* **Exh. H**, Petition).

WHEREFORE, Respondent Lane respectfully urges BODA, for reasons stated above, to (1) decline the imposition of discipline, identical to that imposed by the Illinois Supreme Court, and (2) grant any such other relief this Board deems just and equitable.

Respectfully submitted,



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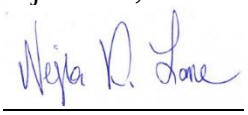
UNSWORN DECLARATION

My name is NEJLA KASSANDRA KEYFLI LANE, my date of birth is February X, 1964, and my address is 8004 Niederwald Strasse, Kyle, Texas 78640 (in Hays County).

Pursuant to §132.001. I declare under penalty of perjury that the foregoing Attorney Response is true and correct. Executed in Hays County, State of Texas, on the 28th day of June 2023.

Nejla Lane, Declarant



Attorney Nejla Lane