BEFORE THE HEARING BOARD OF THE
ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
JOHN PATRICK MESSINA,	)	
Attorney-Respondent	)	No. 2014-PR-00002
No. 1892622	)	
	)	

RESPONDENT'S MOTION TO DISMISS ALL CHARGES

Respondent, John P. Messina, moves for an order dismissing all charges against him on the following grounds:

(a) the Administrator has abused his discretion by willfully disregarding his duty to investigate the legal and factual issues underlying this disciplinary case; and

(b) the Administrator's attorney has violated R.P.C. 3.1 by controverting Mr. Messina's claims regarding a certain Legal Services and Consulting Agreement ("Consulting Agreement") "without a basis in law and fact for doing so that is not frivolous."

In the alternative, Mr. Messina moves for an order reopening the record to receive evidence and hear argument regarding the Administrator's claim that Mr. Messina is "a recidivist, who has engaged in a pattern of misconduct and has shown no remorse," and that he "poses a risk to both the court system and the public."

In support of this motion Mr. Messina submits his declaration under penalty of perjury dated May 27, 2015 ("*Declaration*"). In further support of this motion he states as follows:

1. This disciplinary case arises out of a referral from the United States Court of Appeals for the Seventh Circuit. Traditionally, that court refers disciplinary matters to the ARDC because the agency has the resources "to investigate charges of misconduct and resolve factual disputes." *In re Cook*, 49 F.3d 263, (7th Cir. 1994).

2. The referral arose out of federal judgments entered against Mr. Messina under the "preponderance of the evidence" standard, which is lower than the "clear and convincing" standard that the Administrator must meet in a disciplinary case. Under *In Re Owens,* 125 Ill. 2d 390, 532 N.E.2d 248 (1988), the Administrator cannot rely solely on the federal judgments underlying this referral in order to meet his burden of proof in this case.

3. In assessing the evidence underlying the referral from the Seventh Circuit, the Administrator had broad discretion "to either close the investigation or

refer the matter to the Inquiry Board." *In re Thomas*, 2012 IL 113035, ¶99 (2012). The Administrator had such discretion because "[t]he volume of complaints received by the Commission requires the Administrator to set priorities and allocate resources. An investigation into allegations of less serious misconduct may be closed so that other, more serious allegations may be pursued." *Id.*

4. In order to make an *informed* exercise of his discretion in this case, the Administrator had a duty to investigate claims advanced by Mr. Messina that were supported by credible, verifiable evidence. One such claim concerned the Legal Services and Consulting Agreement ("Consulting Agreement") that Mr. Messina was required to execute as a condition to settling the Grove Fresh litigation.

5. For 22 years now, Mr. Messina has averred that the Consulting Agreement was an unethical restriction on his right to practice law, and that he had been coerced into executing the Consulting Agreement by certain threatening statements uttered by Judge Zagel. This was corroborated by the expert opinion of Prof. Daniel Coquillette and by admissions that defense lawyers made in 1994, when Mr. Messina first challenged the propriety of the Consulting Agreement. *Declaration* ¶¶9-14.

6. During closing argument the Administrator's attorney freely admitted that she had not bothered to investigate Mr. Messina's claims regarding the Consulting Agreement. Nevertheless, she challenged the credibility of Mr. Messina's sworn testimony on the subject. Here, in full, is the colloquy between the Chair and the Administrator's attorney regarding the Consulting Agreement:

> CHAIRMAN DAVIS: I have a question about that though. Didn't Judge Zagel, in attempting to settle the underlying cases, didn't he ask the Respondent to represent the defendants in the case, the very parties he was suing?
>
> MS. COLEMAN: *That is Mr. Messina's representations.* Mr. Messina entered into it, a consulting agreement. He claims he was forced to enter into this consulting agreement. I don't quite understand how someone can force anyone to sign an agreement that they don't want to sign.
>
> CHAIRMAN DAVIS: Well then, isn't the evidence that Judge Zagel had told the Respondent that he would be guilty of malpractice?
>
> MS. COLEMAN: *I don't think that that's the evidence. That's what Mr. Messina said. Just because Mr. Messina said that doesn't make it true.* And because I wasn't down here trying the '95 contempt order, *I didn't feel it upon me to bring Judge Zagel in to address these allegations or any other attorneys trying to address a 1995 sanction order.*
>
> CHAIRMAN DAVIS: Do you find it strange that a Respondent who is suing defendants would end up after the case was settled representing those very defendants? Do you find that strange at all?

MS. COLEMAN: *I can't weigh in on that at all, Mr. Davis, because I simply don't have enough information about this, those circumstances. I don't have enough information about what went on.* I don't have enough information about what agreements these people entered into. I do know that Mr. Messina was a part of whatever went on down there, despite the fact —

CHAIRMAN DAVIS: Well, is there a dispute that Mr. Messina entered into a consulting arrangement where he represented the defendants?

MS. COLEMAN: Absolutely not. Because he entered —

CHAIRMAN DAVIS: Don't you find that strange?

MS. COLEMAN: *I cannot say if that's strange or not simply because I don't have enough information on it,* Mr. Davis.

(Tr. 597-99)

7. R.P.C. 3.1 provides that "[a] lawyer shall not...controvert an issue...unless there is a basis in law and fact for doing so that is not frivolous." The Administrator's attorney, having conceded that she didn't "have enough information about what went on" with the Consulting Agreement, could not ethically challenge Mr. Messina's testimony on that subject.

8. The Administrator's failure to investigate Mr. Messina's claims is also evident from statements his attorney made during pre-trial discovery. For example, on December 8, 2014, Mr. Messina served the Administrator's lawyer with a request to produce

> "[a]ny and all statements of witnesses with knowledge of the allegations of facts and misconduct alleged in the Administrator's complaint, that are in your possession or under your custody or control or are known to you."

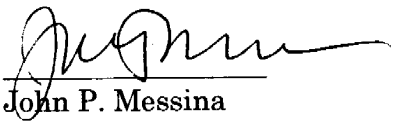
9. The Administrator's attorney did not produce any statements, presumably because she had not bothered to interview any witnesses.

WHEREFORE, for the reasons stated above, Mr. Messina prays for an order as follows:

A. Dismissing all charges with prejudice.

B. In the alternative, reopening the record to receive evidence and hear argument regarding the Administrator's claim that Mr. Messina is "a recidivist, who has engaged in a pattern of misconduct and has shown no remorse," and that he "poses a risk to both the court system and the public."

Dated this 27th day of May, 2015.



John P. Messina

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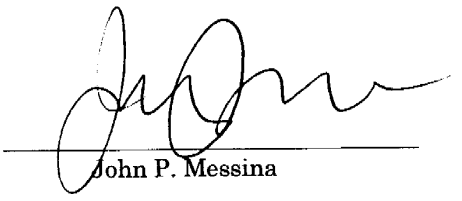
Proof of Service

I, John P. Messina, an attorney, certify that before 5:00 pm on May 27, 2015, I served a copy of **RESPONDENT'S MOTION TO DISMISS ALL CHARGES** by personally delivering a copy to the office of Meriel Coleman, the Administrator's attorney, at One Prudential Plaza, 130 East Randolph Drive, Chicago, Illinois 60601.



John P. Messina