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	)	
	)	

DECLARATION OF JOHN P. MESSINA

I, John P. Messina, hereby declare under penalty of perjury that the following statements are true and correct:

1. I am submitting this declaration in support of *Respondent's Motion to Dismiss All Charges* and Respondent's *Response to the Administrator's Report and Argument Regarding Prior Discipline.*

2. Attached hereto is a list of exhibits that are cited in this declaration. All of these exhibits were previously served on the Administrator during the inquiry phase of this case. Because of uncertainties about the confidentiality of many of the exhibits, I am deferring to file these exhibits with the Clerk of the Commission until after the Hearing Panel rules on a motion I will be filing regarding the secrecy issues.

Prior Discipline.

3. In June 1993 I became embroiled in a fee dispute with Marcus Corwin, a member of the Maryland bar. We resolved the dispute in early 1997.

4. The dispute concerned $23,000 in settlements I had collected for Corwin and his business firm, That's Entertainment, Inc. ("TEI"). Under the contingent fee agreement between Corwin and me, $16,975 was the maximum amount of settlement funds that would be due him.

5. Early in the dispute I made two mistakes that led to my being suspended from the practice of law for 30 days:

- I failed to deposit the disputed funds into a separate, identifiable trust account. Instead, I deposited them into my business checking account.
- For a period of six days (December 24-30, 1993), I inadvertently let the balance in my business checking account fall to $14,144.34, an amount that was $2,830.66 less than Corwin's claimed share of the settlement funds.

6. On December 30, 1993, I deposited additional funds into the checking account that brought the balance above the amount Corwin claimed was owed him. A few days later I transferred the disputed funds to a separate, identifiable trust account, where they remained until 1997, when Corwin and I resolved our dispute.

7. In 1997 the Administrator and I filed a joint *Petition to Impose Discipline on Consent Pursuant to Supreme Court Rule 762(b).* In this petition the Administrator stipulated to the following facts:

- That I had admitted all material allegations against me, that I had cooperated in the Administrator's investigation of those allegations, and that I had expressed remorse for that conduct.
- That I had made full restitution to Corwin.
- That I had demonstrated that at the time of the conversion I had substantial assets available to me in another account.
- That I had not previously been disciplined by the Court or by a Board of the Commission.

8. The Administrator also stipulated that attorneys who were familiar with my reputation for truthfulness and veracity would testify that my reputation for those attributes was excellent. Those attorneys included a federal district court judge, an Assistant United States Attorney, a Deputy Corporation Counsel for the City of Chicago, and a professor of constitutional law at Boston College Law School.

The $5,000 retainer to Prof. Coquillette that caused the shortfall in my business checking account.

9. In mid-December 1993 I paid a $5,000 retainer to Professor Daniel Coquillette. The disbursement of this retainer caused the balance in my business checking account to fall to an amount that was $2,830.66 less than Corwin's claimed share of the settlement funds.

10. Professor Coquillette is the Charles Warren Visiting Professor of American Legal History at Harvard Law School. He teaches and writes in the areas of legal history and professional responsibility. I retained him in 1993 to render an opinion on the Legal Services and Consulting Agreement ("Consulting Agreement") I had been required to sign as a condition of settlement in the Grove Fresh litigation.

11. The experience and expertise that qualified Professor Coquillette to render an opinion on the ethics of the Consulting Agreement included the following:

- He served as law clerk to Justice Robert Braucher of the Supreme Judicial Court of Massachusetts and Chief Justice Warren E. Burger of the Supreme Court of the United States.
- He was a partner for six years at the Boston law firm of Palmer & Dodge, where he specialized in complex litigation.

- He taught legal ethics at Boston University Law School, Cornell Law School and Harvard Law School.
- He served as Dean of Boston College Law School from 1985-1993.
- He served as Advisor to the American Law Institute's Restatement on Law Governing the Legal Profession,
- He served as Reporter to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States.
- He served as Chairman of the Massachusetts Bar Association Committee on Professional Ethics.
- He served on the American Bar Association Committee on Ethics and Professional Responsibility, the Massachusetts Task Force on Model Rules of Professional Conduct, and the Massachusetts Task Force on Professionalism.
- He was a Member of the Special Committee on Model Rules of Attorney Conduct of the Supreme Judicial Court of Massachusetts.

12. Prof. Coquillette's opinion (Ex. J) was based on facts I had provided in a letter dated March 31, 1994, a copy of which is Appendix A to his opinion letter. Based on those facts he concluded that the Consulting Agreement violated R.P.C. 5.6(b):

> The "Consulting" Agreement violates both the Illinois Rules of Professional Conduct (Rule 5.6(b)) and the Rules of Professional Conduct for the United States District Court, Northern District of Illinois (Rule 5.6(b)), which are identical to each other and to the American Bar Association Model Rules of Professional Conduct, Rule 5.6(b). In particular, the "Consulting" Agreement is "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties" in violation of all of these rules.

13. On April 28, 1994, I filed a complaint against the defense lawyers who had required me to execute the Consulting Agreement.[1] I alleged that they had violated R.P.C. 5.6(b) when they demanded that I execute it as a condition of settlement.

14. Using euphemisms, the defense lawyers conceded that they had required the Consulting Agreement as a condition of settlement and as an instrument for restricting my practice:

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[1] I have not been able to locate a copy of the letter I sent to the Administrator initiating the inquiry into the Consulting Agreement. However, the factual basis for my complaint is set forth in Appendix A to Prof. Coquillette's opinion letter. If and when I locate a copy of the complaint I will submit it to the Hearing Panel.

a. One set of defense lawyers admitted that the Consulting Agreement was intended to "address [their] clients' concern that Mr. Messina would immediately turn around and sue them again." (Ex. K, p. 2.)

b. Another defense lawyer admitted that the Consulting Agreement was intended to resolve his clients' concern that a "resolution of [Grove Fresh's claims] would in fact bring peace." (Ex. L, p. 12.)

The economics of my solo practice: 1988-1998.

15. From 1976-82 I was an associate lawyer at two commercial law firms: Jenner & Block (1976-81) and Goldberg, Kohn (1981-82). From1982-87 I was a partner at Goldberg, Kohn. During these years my practice was concentrated in complex civil and criminal litigation.

16. In January 1988 I established the Law Office of John P. Messina with offices at 135 South LaSalle, Chicago, Illinois. That same month I opened a business checking account and an IOLTA account at Harris Bank. I maintained these accounts until June 1993, when I wound up my solo practice.

17. In 1988, my first full year as a sole practitioner, my net business income (the amount reported on line 12 of Schedule C of my federal income tax return) ["Business Income"] was $105,118. Adjusted for inflation to 2012 dollars, my 1988 Business Income was $200,878.

18. In 1989 and 1990 I spent a substantial amount of time working on the Grove Fresh litigation—work for which, with one exception, I did not concurrently receive any fees.[2] Nevertheless, my Business Income increased substantially in both years:

- In 1989 my Business Income increased by $18,194 over 1988—to $123,312 ($224,853 in 2012 dollars).
- In 1990 my Business Income increased by $47,830 over 1989—to $171,142 ($296,081 in 2012 dollars).

19. During my first three full years of solo practice my Business Income totaled $399,572 ($691,271 in 2012 dollars). On average, my annual Business Income was $133,101 ($230,615 in 2012 dollars).

20. In 1991 the defendants in the Grove Fresh litigation launched the attack on my character and fitness to practice law that is one of the subjects of this disciplinary case. The first phase of that attack lasted eight years. During those eight years I spent considerable time and money defending against those attacks in three different forums—the district court, the Seventh Circuit, and the ARDC. During those eight years I was also enjoined from representing clients in an area of

[2] The one exception was the settlement in *Grove Fresh Distributors, Inc. v. Flavor Fresh Foods Corp.*, 89c1114, which closed in April 1990. I received a $28,000 contingent fee from that settlement.

the law in which I was uniquely qualified—litigation against orange juice firms that made and sold adulterated products.

21. During the years 1991-98 I devoted considerable time and resources to defending myself against the attacks on my character and fitness to practice law and to challenging the restriction on my right to practice law. These diversions from the actual practice of law had a devastating impact on my Business Income, as the following chart shows:

Year	Business Income
1991	-16,285
1992	10,083
1993	394,512
1994	-39,257
1995	-40,572
1996	-2,851
1997	3,695
1998	160
TOTAL	309,485

22. Whereas my average annual Business Income in the three years preceding the attack (1988-90) was $133,101, my average annual Business Income during the first phase of the attack (1991-98) was $38,686.

23. In terms of my annual Business Income during the period from 1991-98, the year 1993 was an outlier; that is the year Grove Fresh paid me a $400,000 contingent fee. My net Business Income that year was $394,512. My next best year was 1992, when my net Business Income was $10,083—a difference of $384,429.

24. If one excludes 1993 as an outlier, my total Business Income for the other seven years was a negative amount: -$85,027. My average annual loss during those seven years was -$12,147.

25. From 1994 through 1998 I reported cumulative net operating losses of -$78,825. My average annual loss was -$15,765.

The inquiries by the prior Administrator.

26. The prior Administrator conducted inquiries into the Grove Fresh litigation on four separate occasions. These prior inquiries are described below in ¶¶27-32.

27. <u>The 1993-94 inquiry into the Misconduct Charges:</u> On August 5, 1993, I complained to the Administrator about the contents of a brief that the 90cv5009 defendants had filed in the Seventh Circuit Court of Appeals on July 14, 1993. The brief opposed journalists who were seeking access to sealed materials. The defendants sought to justify the seal by accusing my client and me of misconduct, alleging that we had "abused judicial mechanisms" in an attempt to extort the settlement of groundless claims. In support of these charges ("the Misconduct

Charges") they made statements about me that, if accepted as true, would have resulted in my being disbarred or suspended from the practice of law. (Ex. B, pp. 22-23.)

28. In their responses to the ARDC's inquiries, defense counsel tacitly admitted that they had no evidence to support the Misconduct Charges. *See* Ex. C, ¶¶67-68, 75-76. The sole bases for the Charges, they acknowledged, were the *subjective* beliefs of the defendants and their lawyers. *See* Ex. C, ¶¶70-72,.

29. Despite the defense lawyers' admissions that the Misconduct Charges were groundless, the Administrator closed the inquiries on the ground that "the evidence does not warrant further action by this office." (Ex. C, ¶101.)

30. The 1994 inquiry into the Consulting Agreement: This inquiry is discussed above in ¶¶9-14 and in Ex. C, ¶¶5-14, 30-33, 90-101.

31. The 1994 inquiry into the sources for the 90cv5009 complaint: This inquiry is discussed in Ex. M-O.

32. The 1995-98 inquiry into the Contempt Order: This inquiry is discussed in Ex D, ¶¶34-37.

The Administrator's inquiry in this case

33. This disciplinary case arises out of a Seventh Circuit order ("Order") striking my name from the roll of attorneys. The Seventh Circuit issued the Order on October 31, 2011, at the conclusion of an unsuccessful *pro se* appeal from a bankruptcy case.

34. Neither the Order striking my name from the roll of attorneys nor the Rule to Show Cause that preceded it specified any Rule of Professional Conduct that I allegedly had violated. Neither did the letter from the Administrator initiating the inquiry.

35. In preparing my response to the Administrator's inquiry I construed this lack of specificity as implying that, in the Seventh Circuit's view, and in the view of the Administrator, my conduct in the litigation underlying the bankruptcy appeal showed a lack of the requisite character and fitness to practice law.

36. In defense of my conduct over the course of that litigation, which endured for 22 years, I submitted four narratives totaling 128 pages, as follows:

- A three-page letter to Ms. Coleman, dated November 21, 2011. This letter outlined the procedural history of the matters underlying the referral from the Seventh Circuit. (Ex. A.)
- A 51-page letter to Ms. Coleman, dated December 7, 2011 ("December 7th Response"). This letter presented facts and arguments bearing on the merits of the litigation in the district court, the Seventh Circuit, and the bankruptcy court. (I submitted a corrected and revised version of this narrative on January 18, 2012.) (Ex. B.)

- A 22-page letter to Ms. Coleman, dated January 31, 2012 ("January 31st Response"). This letter described related proceedings at the ARDC in 1993-94. (Ex. C.)
- A 52-page brief dated March 21, 2012 ("March 21st Brief"). This brief blended the facts and arguments presented in the prior submissions. (Ex. D.)

In support of these narratives I submitted 95 paper exhibits, which are described in Ex. E, and 43 digital exhibits, which are described in Ex. F.

37. A few days after I submitted the last of the narratives I called Meriel Coleman, the ARDC attorney assigned to the inquiry. I asked if we might meet to discuss an appropriate disposition of the inquiry. She refused to meet with me, saying that the only circumstance in which she would be willing to discuss the case with me was with a court reporter present taking my sworn testimony.

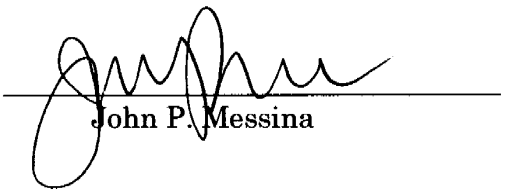
I declare under penalty of perjury that the foregoing statements are true and correct.

Dated this 27th day of May, 2015.

John P. Messina

Proof of Service

I, John P. Messina, an attorney, certify that before 5:00 pm on May 27, 2015, he served a copy of the **DECLARATION OF JOHN P. MESSINA** by 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

APPENDIX

Ex. A	Letter to Ms. Coleman, dated November 21, 2011
Ex. B	Letter to Ms. Coleman, dated December 7, 2011
Ex. C	Letter to Ms. Coleman, dated January 31, 2012
Ex. D	Brief dated March 21, 2012
Ex. E	Third Revised Exhibit List (March 12, 2012)
Ex. F	Table of Digital Exhibits
Ex. G	Petition for Rehearing, With Suggestion for Rehearing *En Banc* (June 7, 2011)
Ex. H	Motion to Vacate Order on Sanctions, and For Other Relief (November 14, 2011)
Ex. I	Declaration Under Penalty of Perjury (November 14, 2011)
Ex. J	Prof. Coquillette's opinion letter (April 22, 1994)
Ex. K	Rutkoff letter to ARDC (October 18, 1994)
Ex. L	Kowal letter to ARDC (October 26, 1994)
Ex. M	ARDC letter of inquiry (July 5, 1994)
Ex. N	Response to inquiry (August 16, 1994)
Ex. O	ARDC letter closing the inquiry (September 30, 1994)
Ex. P	Respondent's First Motion to Dismiss (November 13, 1998)
Ex. Q	Respondent's Second Motion to Dismiss All Charges (November 13, 1998)
Ex. R	Respondent's Memorandum in Support of Motions to Dismiss All Charges (November 13, 1998)
Ex. S	Letter to Thomas Sukowicz dated October 28, 1994.