BEFORE THE REVIEW BOARD OF THE

ILLINOIS ATTORNEY REGISTRATION

AND DISCIPLINARY COMMISSION

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

BRIEF OF RESPONDENT-APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Nature of the Case

Respondent was charged in a one-count *Amended Complaint* with ten acts of misconduct occurring between October 1993 and October 2011. The alleged misconduct included failing to appear in court when allegedly ordered to do so; disclosing information allegedly protected by secrecy orders; and filing three allegedly frivolous appeals. The alleged misconduct occurred in complex commercial litigation in the federal district court that began in February 1989, and after various turns in the district court, the Seventh Circuit, and bankruptcy court, concluded 22 years later, in October 2011.

The case proceeded to a hearing at which Respondent appeared *pro se*. The Administrator, after declaring that he was seeking discipline for only three of the ten acts of alleged misconduct (the three allegedly frivolous appeals) moved into evidence 16 documentary exhibits. He then rested his case without calling any witnesses. Respondent called three witnesses, including two character witnesses. He also presented narrative testimony.

The Hearing Board issued a report and recommendation concluding that one of the three appeals was frivolous and that Respondent had engaged in conduct prejudicial to the administration of justice. The Hearing Board recommended a suspension of sixty days and that, as a condition to being reinstated, Respondent complete the ARDC seminar on Professional Responsibility.

Three questions are raised on the pleadings: whether the Chair erred when he: (a) struck affirmative material from Respondent's answers to numerous paragraphs of the *Amended Complaint*; (b) struck Respondent's requests for declaratory findings, and (c) struck all of Respondent's defenses.

Issues Presented

Whether the Hearing Board's findings are against the manifest weight of the evidence.

Whether the Hearing Board erred as a matter of law in (a) striking Respondent's affirmative defenses and (b) denying Respondent's request for relief under Supreme Court Rule 137.

Jurisdiction

The Panel filed its Report on September 9, 2015. On September 30, 2015, Messina and the Administrator timely filed notices of exceptions.

STATEMENT OF FACTS

A. Background.

John Patrick Messina attended Boston College Law School, graduating *cum laude* in 1975. (R.97-98.) In 1975-76, he served as a Teaching Fellow at the University of Illinois College of Law. In 1976 he was admitted to the bars of New York, Massachusetts,[1] and Illinois. (R.98.)

From 1976-81 he was an associate at Jenner & Block. (R.98, 108.) After that he was an associate (1981-82) and partner (1982-87) at Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz. In the fall of 1987 he established the Law Office of John P. Messina. (R.110-11.)

The origins of this disciplinary case: This disciplinary case grew out of a referral from the United States Court of Appeals for the Seventh Circuit. The referral came in October 2011, at the conclusion of unsuccessful appeals from the final report of a bankruptcy trustee. That report, filed in 2008, came eight years after Messina had filed a Chapter 11 petition to reorganize his law practice, *In re The Law Office of John P. Messina*, No. 99 B 29371. (Adm. Ex. 6, pp.11, 13-14.)

Cecil Troy and Grove Fresh: Messina's Chapter 11 petition was a byproduct of litigation initiated ten years earlier by Grove Fresh Distributors, Inc. ("Grove Fresh"), a small

[1] Messina is no longer an active member of the New York bar or the Massachusetts bar.

business that distributed orange juice and other food products from a warehouse on Chicago's south side. (Adm. Ex. 8, p.9.) Cecil Troy was Grove Fresh's president and principle shareholder. He had founded Grove Fresh in 1961, with $1,000 in capital. Over the next 18 years Grove Fresh grew and prospered, becoming one of the largest black-owned businesses in Chicago. From 1980 through 1988 and later, the firm's revenues declined and profits disappeared. (Adm. Ex. 8, p.9.)

In September 1988 Troy hired Jeffrey Hines, a Maryland lawyer, to investigate whether Grove Fresh was losing business to competitors who cheated by making and selling adulterated orange juice products falsely labeled as 100% pure. Hines had at least 12 years of experience suing orange juice firms that sold misbranded products. (Adm. Ex. 6, p.22.)

Hines's lawsuits: On February 10, 1989, Hines filed five lawsuits against six of Grove Fresh's competitors, alleging that they competed unfairly by making and selling adulterated orange juice products falsely labeled as 100% pure. The complaints alleged claims under the Lanham Act, the common law, and RICO. (*E.g.*, Adm. Ex. 8, pp.9-10; Resp. Ex. 6M ¶¶7, 94-97.)

The practices of four of the firms sued by Hines ("Four OJ Firms") have a bearing on this disciplinary case: American Citrus Products Corp. ("American Citrus"); Flavor Fresh Foods Corp. ("Flavor Fresh"); Everfresh Juice Corp. ("Everfresh"); and Holiday Juice Ltd. ("Holiday Juice"). (Adm. Ex. 8, p.11.) Another key actor is John Labatt Ltd. ("Labatt"), the parent of both Everfresh and Holiday Juice. (Adm. Ex. 6, pp.26-27.)

The evidence against the Four OJ Firms: The evidence against the Four OJ Firms dates back to 1962, when the manufacture and sale of adulterated orange juice products became a federal crime. From 1962 forward, any product labeled and sold as "100% pure orange juice from concentrate" could contain only four ingredients: water, frozen concentrated orange juice,

orange oil, and orange pulp. The addition of any other ingredient was, and is, a felony punishable by up to three years in prison for each offense. (Adm. Ex. 6, pp.16, 18; Adm. Ex. 12, p.3.)

In the years after 1962 the Four OJ Firms' manufacturing practices were targets of investigations by several government agencies, including the Florida Department of Citrus (FDOC); the Michigan Department of Agriculture; the Food and Drug Administration (FDA); the Bureau of Customs; and the Department of Justice (DOJ). (Adm. Ex. 6, pp.22-26, 32; Adm. Ex. 8, p.17.) Three of the OJ Firms (American Citrus, Holiday Juice, and Everfresh) were also targets of civil investigations by Hines, who conducted the investigations for a Maryland competitor of the Four OJ Firms. (Adm. Ex. 6, p.22.) Collectively, the evidence from these investigations showed as follows:

> **The formula for adulterated orange juice:** In 1962 American Citrus, then known as Home Juice Co., hired James Marshall, a food chemist, to create a formula for making a beverage that had the look, taste, and texture of 100% pure orange juice from concentrate, but which included ingredients not permitted by the standard of identity[2] for that product. Over the next 26 or 27 years, Home Juice/American Citrus used this formula to make adulterated orange juice products that were falsely labeled and sold as 100% pure. (Adm. Ex.6, p.16; Adm. Ex.8, pp.11, 12.)
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> **The civil conspiracy:** Marshall gave the formula he created for Home Juice to executives at Home Juice's subsidiaries and affiliates, including Everfresh and Holiday Juice. Over the next 26 or 27 years, Everfresh and Holiday Juice used the Home Juice formula to make adulterated orange juice products that were falsely labeled and sold as 100% pure. (Adm. Ex.8, pp.11-12.)
>
> Marshall left Home Juice in 1974 and formed his own firm, Flavor Fresh. Over the next 17 or so years, Flavor Fresh used the Home Juice formula to make adulterated orange juice products that were falsely labeled and sold as 100% pure. (Adm. Ex.8, pp.11-12.)
>
> **The unsafe additive:** From 1979 to 1988 or 1989, American Citrus, Everfresh, and Flavor Fresh extended the shelf life of their orange juice products by adding Oleum 320/IDEA, a liquid solution that they imported from a vendor in Europe. Flavor Fresh used the additive through 1991. (Adm. Ex. 6, pp.23, 25; Adm. Ex.3, p.12.) The active ingredient in the additive was never identified to a certainty; it was alleged to be either natamycin, an antibiotic, or diethylpyrocarbonate, a carcinogenic. In either event the

[2] A standard of identity is a recipe of mandatory ingredients promulgated by the FDA. (Adm. Ex. 12, p.3.)

additive was unsafe as a matter of law because it was not approved for use in foods. (Adm. Ex. 6, pp.23-24.)

The related criminal case: On February 18, 1993, a federal grand jury in Michigan indicted Marshall, Flavor Fresh, and nine others, charging them with a scheme to sell consumers adulterated orange juice products. The indictment covered products that were distributed under at least 23 different labels in at least 25 states. (Adm. Ex.6, p.25.)

Marshall pleaded guilty to a conspiracy to violate the food purity laws. He was sentenced to 37 months in prison and fined $125,000. His sentence was affirmed on appeal. (Adm. Ex.6, p.26.) During plea negotiations Marshall met with federal prosecutors for 15 hours of interviews. During these interviews he implicated Home Juice/American Citrus, Everfresh, Holiday Juice, and Flavor Fresh in a common scheme to make and sell adulterated orange juice according to the formula Marshall had created in 1962. He identified four Home Juice/American Citrus employees, three Holiday Juice employees, and three Everfresh employees with whom he "talked about adulteration and formulations." (Adm. Ex. 6, pp.24-25; Adm. Ex. 8, p.12.)

Labatt's knowledge of Everfresh's illegal practices: Labatt was a multi-national food and entertainment conglomerate domiciled in Toronto. Between 1983 and 1987 Labatt created a juice business by acquiring five firms in the United States and Canada, including two former Home Juice affiliates—Holiday Juice and Everfresh. (Adm. Ex. 8, p.13.)

The evidence showed that when Labatt acquired Everfresh in 1986, Labatt knew Everfresh was making and selling adulterated orange juice misbranded as 100% pure. The evidence also showed that Labatt allowed Everfresh to continue making such products over the next two years. During that time Everfresh made and sold 3.2 million gallons of adulterated products falsely labeled as 100% pure. (Resp. Ex. 2B, ¶¶6-7.)

Labatt's amnesty from the FDA: On May 5 and June 21, 1989, Labatt officials and their attorneys met with FDA officials seeking amnesty from criminal charges against Labatt and its orange juice subsidiaries. FDA granted the amnesty. The evidence showed that Labatt obtained amnesty after it falsely declared to the FDA that: (a) Labatt had not learned about Everfresh's illegal practices until earlier that year (*i.e.*, 1989) and (b) an Everfresh executive had concealed the illegal practices from Labatt. (Adm. Ex. 8, pp.14-15.)

Hines's conflict of interest: Shortly before Troy hired him, Hines had settled separate lawsuits against Labatt's orange juice subsidiaries and against American Citrus. The settlements included covenants restricting Hines's right to practice law, in violation of R.P.C. 5.6(b), which provides that "[a] lawyer shall not participate in offering or making:…an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.". The covenant protecting American Citrus barred him from suing that firm for acts or omissions occurring prior to July 1988. The covenant protecting Labatt and its orange juice subsidiaries barred him from suing those firms for acts or omissions occurring prior to August 1988. (Adm. Ex. 8, pp.10-15; Resp. Ex.2C, pp.5-6.)

Hines did not disclose these covenants to Troy. Troy learned about the covenants in November 1989. He immediately fired Hines for conflicts of interest. (Adm. Ex. 8, p.10; Resp. Ex.2C, pp.7-8.)

B. Messina's representation of Grove Fresh.

In July 1989 Troy hired Messina as local counsel to assist Hines. When Hines was fired in November 1989, Troy asked Messina to investigate claims that Hines's covenants precluded him from pursuing. Messina agreed. (Adm. Ex. 8, p.10.)

Messina's investigations: During a nine-month investigation Messina obtained information about the defendants' manufacturing practices dating back to 1975. The information

came from public records held by state and federal regulatory agencies; from the federal court files of the lawsuits Hines had litigated against the defendants between 1976 and 1988; and from interviews of expert chemists at the FDOC, the University of Florida, and the University of Illinois. (Adm. Ex. 8, p.17.) He also retained Coopers & Lybrand ("C&L") to prepare a report on damages Grove Fresh may have suffered from unfair competition. C&L's final report opined that Grove Fresh had suffered damages of $2.9 million. (*Id*.)

Based on this investigation Messina drafted the complaint in *Grove Fresh Distributors, Inc. v. John Labatt, Ltd., et al.*, No 90cv5009, a 54-page document supported by 26 exhibits. (Resp. Ex. 6M, 6N.) The complaint included these allegations:

- Beginning no later than May 1975, American Citrus, Everfresh, Holiday Juice, and Flavor Fresh used a common formula to make and sell adulterated orange juice products. (Resp. Ex. 6M ¶¶92-107.)
- Labatt knew about its subsidiaries' illegal practices no later than December 1986. It allowed those practices to continue for at least two more years. (Resp. Ex. 6M ¶¶123-39.)
- In May and June 1989 Labatt officials and their attorneys met with FDA officials seeking to avoid a criminal investigation of Labatt's orange juice business. Labatt falsely declared to the FDA that: (a) Labatt had not learned about Everfresh's illegal practices until earlier that year (*i.e.*, 1989) and (b) an Everfresh executive had concealed the illegal practices from Labatt. (Adm. Ex. 6M, ¶¶10-15.)

The stipulation for a seal: On August 23, 1990, in the course of settlement discussions, Messina informed Everfresh's lawyers that Grove Fresh was planning to file a new lawsuit alleging claims dating back to 1975. The next day, Everfresh's lawyers served an emergency motion seeking to require Grove Fresh to file the new complaint (the 90cv5009 complaint) under seal. The motion argued that the proposed new lawsuit was an improper attempt to amend the complaint in the original case against Everfresh and to escape the discovery plan and order recently entered in that case. (Adm. Ex.8, p.18.)

At the hearing Messina offered to file the complaint under seal "so long as we can have a status on Tuesday [August 28] and then discuss how we would dispose of the seal." (Adm. Ex.8, p.18.) Judge Zagel agreed:

> THE COURT: Right. File it under seal, designate it as a related case and it will come to me, *and then we can sort out whether it should be under seal in the first place*, whether it is a related case, all of that stuff.

(Adm. Ex.8, p.19.) [emphasis added].

Judge Zagel's courtroom deputy informed Messina that filing a complaint under seal required a minute order from Judge Zagel in his capacity as the currently designated Emergency Judge. (Resp. Ex. 6O, p.41.) On August 28, 1990, Judge Zagel issued a minute order stating: "*Plaintiff's* motion to file case under seal granted. The complaint and all subsequent pleadings shall be filed under seal until further order of court." (Resp. Ex. 7B.) [emphasis added]

Judge Zagel never held the hearing he had promised to hold. On August 31, Grove Fresh moved to vacate the seal. Judge Zagel denied the motion without giving any reasons why he was keeping the case sealed. (Adm. Ex.8, p.19.)

Judge Zagel's suppression of the 90cv5009 docket: Rule 79(a) of the Federal Rules of Civil Procedure requires the clerk of court to keep a "book known as 'civil docket." The clerk is required to enter on the docket all papers filed by the litigants and all "orders, judgments, and verdicts" rendered by the court. These docket entries define the scope of the official record in the trial court. (Adm. Ex.8, p.19; Resp. Ex. 2D, p.10.)

Without notice to Grove Fresh, Judge Zagel ordered the Clerk of Court not to docket any of the papers in 90cv5009, in violation of Fed. R. Civ. P. 79(a). The docket remained suppressed for a period of four years, eight months, and 17 days, from August 28, 1990, through May 14, 1995. During that time there was no official record of any of the approximately 380 pleadings, motions, briefs, court orders, and other papers that were filed in the case. (Adm. Ex. 8, p.19.)

In any appeal prosecuted during the four years, eight months, and 17 days that the docket was suppressed, the Federal Rules of Appellate Procedure would bar the Seventh Circuit from considering the contents of any of the undocketed papers. (Adm. Ex.3, p.63.)

The finding regarding the public sources for the 90cv5009 complaint: The 90cv5009 defendants moved to dismiss the complaint on procedural grounds. Their briefs characterized the 90cv5009 complaint as an unauthorized amendment to the complaints that Hines had filed in February 1989. They argued that Grove Fresh did not meet the standards for amending those complaints because the only new allegations were "drawn from public sources" that were available to Grove Fresh as of February 1989, and too much time had lapsed to permit Grove Fresh to now use that information in the 90cv5009 complaint. (Adm. Ex. 6, p.35.)

In March 1991 Judge Zagel denied their motions. His ruling included a finding that the parties "agree that the information used to [draft the 90cv5009 complaint] was obtained from public agencies without help from the defendants or a court order." (Adm. Ex. 6, p.35.)

The Medill School of Journalism's challenge to the secrecy orders: In September 1991 a team of working reporters and journalism students (collectively, "journalists") intervened in the Grove Fresh litigation to challenge the 90cv5009 seal and the administration of the 89cv1113 protective order. The defendants resisted the journalists' claims with misconduct charges ("Misconduct Charges" or "Charges") that impugned Grove Fresh and Messina. They alleged that the secrecy orders were justified because: (a) Grove Fresh and its lawyers had, allegedly, falsely accused the defendants in order to extort an undeserved payment, and (b) the 90cv5009 complaint included confidential information subject to the protective order in 89cv1113, such that the seal was necessary to enforce the 89cv1113 protective order. (Adm. Ex. 6, p.37.)

The defendants did not produce any evidence to support their claims regarding the secrecy orders. (Adm. Ex. 8, p. 22.) Grove Fresh came forward with evidence refuting all of their factual claims. (*Id*. at 23.)

In November 1992 Judge Zagel adjudicated the journalists' claims by making a hypothetical finding of fact—he ruled that the seal was justified because "[t]he complaint in this case contains allegations which would, *if not filed in court and if untrue*, be libelous." (Adm. Ex. 8, p.23) [emphasis added].

The settlement, including the restriction on Messina's right to practice law: In September 1992 Grove Fresh and the defendants agreed to suspend litigation activities and to enter into settlement negotiations. The negotiations stalled for six months over defendants' demand that as a condition of settlement, Messina agree to refrain from representing consumers in class action suits against Labatt and American Citrus (collectively, the "Labatt Judgment Creditors"). (Adm. Ex. 8, p.24.) Messina resisted on the ground that their demand was barred by R.P.C. 5.6(b). (*Id*. at 24-28.)

To disguise the violation, the Labatt Judgment Creditors demanded that Messina execute a Legal Services and Consulting Agreement ("Consulting Agreement") purporting to create an attorney-client relationship between themselves and Messina and paying Messina $200,000 in four installments of $50,000. The rules on conflicts of interest would then bar Messina from representing consumers. (Adm. Ex. 8, p. 27.)

Messina objected to the Consulting Agreement as a sham arrangement that violated R.P.C. 5.6(b). He eventually yielded to the defendants' demands, but only after two events:

(a) Troy, who was 78 years old and in failing health, asked Messina to yield to the Labatt Judgment Creditors' demands so that he (Troy) could put the litigation behind him before he was "pushin' up daisies," as he put it. (Adm. Ex. 8, pp. 27-28.)

(b) Judge Zagel issued this threatening statement—if Grove Fresh lost the opportunity to settle its claims due to Messina's refusal to execute the Consulting Agreement, Judge Zagel had said, Messina would be subject to a $2 million malpractice liability that would not be dischargeable in bankruptcy. (*Id*. at 28.)

The settlement: On April 16, 1993, Grove Fresh settled its claims against Labatt and the Four OJ Firms for the sum of $2,000,000. As a condition to closing the settlement, he executed the Consulting Agreement. Upon receiving the initial $50,000 consulting fee, Messina delivered the funds to his attorney and instructed him to deposit the funds in an escrow account. He created the escrow to preserve his right to rescind the Consulting Agreement. (Adm. Ex. 8, p. 29.)

The finding that the defendants "bought" the right to remove the 90cv5009 records from the courthouse: As of December 14, 1992, the date the journalists filed their notice of appeal, Judge Zagel had the entire 90cv5009 case file in his chambers. The journalists could not perfect the record for their appeal unless Judge Zagel released the court file to the clerk of court. Judge Zagel interfered with the record for the journalists' appeal in two respects. First, he refused to release the 90cv5009 case file to the clerk of court, thereby preventing the clerk from creating a docket manually. (Adm. Ex. 8, pp. 24-25, 26-27.) Second, on April 29, 1993, without prior notice to the journalists, he granted a motion by the defendants to remove from the courthouse all of the 200 or so papers then in the 90cv5009 case file, except for the complaint, the answer, and the stipulated order of dismissal. (*Id*. at 28.29.)

After learning about the order authorizing the removal of records from the courthouse, the journalists moved in the district court for a stay of the removal of the records pending the outcome of their appeal. Judge Zagel denied their motion with the following explanation:

> THE COURT: There is as far as I am concerned no case. *The defendant bought the case from the plaintiff.* And absent some strong reason not to permit that, which nobody has brought to my attention, *there is no case*. And the only decision – in fact, technically it is not, I think, a decision. It simply confirmed what the parties have worked out. *And you are roughly in the same position as you were as if the case had never been filed in the first place*.

(Adm. Ex. 8, p. 29.) On May 12, 1993, the journalists filed an emergency motion asking the Seventh Circuit to stay the removal of the records. The Seventh Circuit granted the stay and set a briefing schedule on the merits of the appeal. For reasons that have never been explained, however, the clerk of the district court did not create a docket when he transmitted the 90cv5009 records to the Seventh Circuit. Consequently, the official record for the journalists' appeal did not include any of the papers Grove Fresh had filed rebutting the Misconduct Charges. (*Id*.)

C. The post-settlement disputes.

Three months after the settlement closed, the Labatt Judgment Creditors filed their brief in opposition to the journalists' appeal from the order denying the journalists' claims for access to the sealed papers. The allegations in the Labatt Judgment Creditors' brief triggered five years of post-settlement disputes.

Reiteration of the Misconduct Charges: The Labatt Judgment Creditors' brief alleged that the 90cv5009 seal was justified because Messina had filed a complaint that included "scandalous allegations" that had "falsely accuse[d]" them in order "to extract a large settlement" from them, (Adm. Ex. 8, p. 30.) These Charges imputed to Messina the crime of intimidation, a class three felony under 70 ILCS 5/12-6. They also imputed to him violations of Rules 1.2(f)(1), 3.1, 3.3(a) (1), 4.4, and 8.4(a)(4) of the Rules of Professional Conduct. (Resp. Ex. 6A, p. 4.)

The Labatt Judgment Creditors placed their brief in the Seventh Circuit's public files and delivered it to reporters committed to publishing reports about the litigation. If the Misconduct Charges were accepted as true by the Seventh Circuit, then, in Messina's estimation, these were the likely consequences: (1) The Misconduct Charges would suffice to affirm the secrecy orders. (2) The Charges would be repeated in news reports and in a judicial opinion published in the West Publishing Co.'s National Reporter System, permanently damaging Messina's reputation.

(Resp. Ex. 6A, pp. 7-8.)

Messina's response to the Misconduct Charges: Upon learning of the Labatt Judgment Creditors' charges Messina rescinded the Consulting Agreement, declaring that he could not have a viable professional relationship with clients who knowingly made such false charges. He also tendered back the consulting fees he had received to date and demanded that they withdraw their charges. (Adm. Ex. 8, p. 30.)

The Labatt Judgment Creditors refused to accept Messina's rescission of the Consulting Agreement even though they had no intention of ever using his services. They also asserted that the secrecy covenants in the Consulting Agreement barred him from responding to the Misconduct Charges in any forum. (Adm. Ex. 8, p. 30.)

ARDC inquiries into Messina's complaint re: Misconduct Charges:[3] On August 5, 1993, Messina complained to the Administrator about the Misconduct Charges alleged in the brief the Labatt Judgment Creditors had filed in the Seventh Circuit on July 14, 1993. (C.710.) In responding to the Administrator's inquiries into Messina's complaint, the defense lawyers tacitly admitted that they had no evidence to support those Charges. The sole bases for the Charges, they acknowledged, were the *subjective* beliefs of the defendants and their lawyers. Subsequently, the defense lawyers abandoned the Misconduct Charges as grounds for resisting the journalists' access claims. (*Id.*)

The defense lawyers' admissions, and the evidence submitted by Messina, did not persuade the Administrator. In a letter dated December 16, 1994, her attorney closed the inquiry into the Misconduct Charges. (C.710.)

[3] Messina's complaints to the ARDC were described in ¶¶79-80, 206-20 of Messina's affirmative defenses, which were stricken on the Administrator's motion. The Administrator's motion "admit[ted] all well-pleaded facts constituting the defense, along with all reasonable inferences which may be drawn therefrom." *In re Estate of Davis*, 225 Ill. App. 3d 998 (2d Dist. 1992).

ARDC inquiries into Messina's complaint re: Consulting Agreement: In the meanwhile, on April 28, 1994, Messina expanded his complaint to the Administrator to include the Consulting Agreement. He alleged that the Consulting Agreement was a sham arrangement designed to evade the strictures of R.P.C. 5.6(b). (C.710.)

In support of this claim Messina submitted the expert opinion of Professor Daniel Coquillette, the former Dean at Boston College Law School (1985-93), former Charles Warren Visiting Professor of American Legal History at Harvard Law School (2011-12), and currently the J. Donald Monan, S.J. University Professor at Boston College (1997 to present). (C.710.)

Prof. Coquillette opined that the Consulting Agreement violated R.P.C. 5.6(b). At the time of this opinion (April 1994) Prof. Coquillette was the Reporter for the Committee on Rules of Practice and Procedure, Judicial Conference of the United States. (C.710.)

The defense lawyers admitted that they had required the Consulting Agreement as a condition of settlement and as a means for restricting Messina's right to practice law. (C.711.) Despite these admissions, the ARDC closed the inquiry into the Consulting Agreement. The Administrator's decision was reported to Messina in a letter dated December 16, 1994. (C.711.)

D. The Proceedings leading to the Contempt Order.

On August 24, 1993, the Labatt Judgment Creditors presented a motion in 90cv5009 seeking relief against Messina and Grove Fresh under FRCP 60(b). The motion sought to enforce the Consulting Agreement or, alternatively, to rescind the $2,000,000 settlement. *The motion alleged that as of August 1993, Messina was one of Grove Fresh's attorneys*. (Adm. Ex. 8, p. 30.)

Messina's FRAP 46(c) Motion: On October 22, 1993, Messina filed in the Seventh Circuit *Motion of John P. Messina for a Hearing Regarding Allegations of Misconduct in Appellees' Brief of July 14, 1993, And for Other Relief* ("*FRAP 46(c) Motion"*). (Resp. Ex. 6A.)

Messina identified himself as one of the attorneys of record for Grove Fresh, but also as a *pro se* petitioner seeking a hearing for himself, *not* for Grove Fresh, pursuant to FRAP 46(c), which provided at the time as follows:

> A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar….

The *FRAP 46(c) Motion* argued that Messina's reputation would be damaged if the Seventh Circuit accepted as true, and repeated in a published opinion, defendants' Misconduct Charges. Publishing such charges in the Federal Reporter would be a form of attorney discipline, Messina argued, for which he had a right to a hearing before the discipline was imposed. (Resp. Ex. 6A, pp. 7-8.)

Between October and early February, the Labatt Judgment Creditors moved against Messina on four fronts, making contradictory statements along the way about his status as a Grove Fresh attorney:

Motion to Strike: On October 25 and 27, the Labatt Judgment Creditors moved to strike Messina's FRAP 46(c) Motion. Contradicting their Rule 60(b) motion in the district court, which alleged that Messina was a Grove Fresh attorney as of August 1993, they alleged that he had no standing in the Seventh Circuit because Grove Fresh had discharged him as its attorney on January 21, 1993. (Adm. Ex. 8, p. 31.)

Judge Kanne denied Messina's request for additional time to respond. He also denied Messina's FRAP 46(c) motion and issued a rule to show cause ("RTSC") why Messina should not be disciplined for filing an allegedly frivolous motion. Messina answered the RTSC on November 22, 1993. A year later, the Seventh Circuit dismissed it. (Adm. Ex. 8, p. 31).

Contempt Petition: In November 1993, the Labatt Judgment Creditors filed a contempt petition, alleging that statements Messina made in his Seventh Circuit papers violated the seal. (Adm. Ex. 8, p. 31.)

Amended Rule (60(b) claim: Also in November the Labatt Judgment Creditors amended their Rule 60(b) claim, dropping the request for enforcement of the settlement and seeking rescission only. They alleged that Messina had fraudulently induced settlement by allegedly misrepresenting his willingness to restrict his practice as a condition of settlement. This amended claim was premised on Messina's being a Grove Fresh attorney as of April 1993, the date of settlement. (Adm. Ex. 8, p. 32.)

Rule 11 claim: In February 1994 the Labatt Judgment Creditors moved for Rule 11 sanctions, alleging that Grove Fresh discharged Messina on January 21, 1993, and so he violated Rule 11 when, in his FRAP 45(c) motion, he described himself as a Grove Fresh attorney. (Adm. Ex. 8, p. 32.)

Messina's response to the Rule 60(b) and contempt claims: Messina responded to the Rule 60(b) and contempt claims on December 9, 1993. He argued: (1) The Consulting Agreement was illegal and unenforceable. (2) The court lacked jurisdiction over the settlement agreement. (3) Alleged disclosures in Messina's FRAP 45(c) papers were "a legitimate and proper response to defendants' libelous attacks." (Resp. Ex. 10A, *passim*; Adm. Ex. 8, p. 32.)

The Seventh Circuit's ruling in the journalists' appeal: On May 12, 1994, the Seventh Circuit ruled on the journalists' access claims. The Court did *not* describe or adjudicate the Labatt Judgment Creditors' statements about Messina's alleged conduct. The Court agreed that Judge Zagel erred when he postponed the Journalists' access to rulings and underlying documents. "[A] necessary corollary to the presumption [of access] is that once found to be

appropriate, access should be immediate and contemporaneous….To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." (Adm. Ex. 8, p. 32.)

However, the Court rejected the argument for a *per se* reversal of the seal order and remanded the case, "ask[ing] only that in reaching its decision in this matter on remand…the district court specify the basis for its conclusions." (Adm. Ex. 8, p. 32.)

Proceedings on remand: On June 20, 1994, the journalists presented their *Motion for Access to Sealed Documents Pursuant to the Ruling of the Seventh Circuit Court of Appeals.* They asked for "immediate access...to each written decision the Seventh Circuit has made in 90 C 5009 and to all of the documents on which the Seventh Circuit relied in making those decisions." The motion also asked for a "list [of] all documents that have ever been included in the Court file." (Adm. Ex. 8, p. 33).

By August 2, the Labatt Judgment Creditors had stipulated to unsealing 181 records, including all of the 90cv5009 orders. Judge Zagel, however, did not make those records public, or let the clerk create a docket, until May 15, 1995, a year and three days after the Seventh Circuit's ruling that the Journalists' access should be "immediate and contemporaneous." (Adm. Ex. 8, p. 33.)

The May 1995 docket included only 248 of the 380 extant records. The rest weren't docketed until 1997, and then only after Messina had incurred $40,000 in attorney fees to oversee re-construction of the record. (Adm. Ex. 8, p. 33.)

Particularized claims for secrecy: At the June 20 hearing Judge Zagel did not explain why he had sealed 90cv5009. Instead, he invited the Labatt Judgment Creditors to identify the

particular records they wished to keep sealed. By August 2, the Labatt Judgment Creditors had identified 56 records they wanted kept sealed. (Adm. Ex. 8, p. 33.)

Messina's September 20th letter to Elson: As of September 20, Judge Zagel had yet to explain why he had sealed 90cv5009 or to rule on the particularized claims for secrecy. Nor had he issued a gag order, or made any of the findings required by *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970), for the issuance of a gag order. (Adm. Ex. 8, p. 33.)

On September 20 Messina sent a letter to the journalists' attorney (John Elson) summarizing: (a) the procedural history of the emergency motion for a seal, (b) the contention in the Labatt Judgment Creditors' motions to dismiss that the 90cv5009 complaint was based on sources in the public domain, and (c) Judge Zagel's March 1991 finding that the parties "agree[d] that the information used to [draft the 90cv5009 complaint] was obtained from public agencies without help from the defendants or a court order." (Adm. Ex. 8, pp. 33-34.)

A few weeks later the journalists incorporated Messina's letter into their *Motion for Public Access to All Documents that Are, and ever Were, in the 90cv5009 File*. (Adm. Ex. 8, p. They argued that the procedural history of the claims made in the emergency motion for a seal showed:

> First, that there was never a plausible rationale for the seal; second, that the reason for the seal, the fact that the new complaint might be dismissed, disappeared when the dismissal motion was denied, and third, the ground Defendants asserted for the dismissal of the complaint—that the new information alleged in the complaint was publicly available—directly undermines any conceivable rationale for sealing the complaint from the public.

(Adm. Ex. 8, p. 34.)

October 27th explanation for the seal: The journalists presented their motion on October 27; Judge Zagel denied it. In the course of the hearing he articulated for the first time his reasons for sealing 90cv5009. The "principal factor" behind his decision was that he disapproved of Messina's advocacy. (Adm. Ex. 8, p. 34.) Messina was not present at the October

27 hearing. After reviewing a transcript, he asked for leave to file a memorandum responding to the court's comments; Judge Zagel denied his request. (Adm. Ex. 8, p. 34.)

Rulings on the access claims: On November 21, Judge Zagel ruled that two categories of papers should remain sealed: (1) all briefs and memorandums that analyzed evidence from discovery, and (2) all post-judgment papers filed by the Labatt Judgment Creditors, Grove Fresh, and Messina after the April 1993 settlement. (Adm. Ex. 8, p. 34.)

Elson's Draft Order: When a case is unsealed, the clerk's office will not create a chronological docket until it receives a written order specifying the records to be unsealed. Elson prepared an agreed draft order listing all of the records that were to be unsealed in accordance with the November 21 ruling. (*Id.*) Judge Zagel accepted the order on February 1, 1993 ("February Draft Order"), but he never sent it to the clerk's office. Everything continued under seal until May 15. (Adm. Ex. 8, pp. 34-35.)

Disposition of the RTSC: In the meanwhile, in June 1994 the Seventh Circuit referred the RTSC to the ARDC, which opened an inquiry into the Labatt Judgment Creditors' allegation that the 90cv5009 complaint "contain[ed] false statements and information derived from confidential discovery material subject to a protective order and was filed to embarrass, harass and falsely accuse the defendants." (Adm. Ex. 8, p. 35.)

ARDC asked Messina to provide it with "any and all information related to this matter including evidence upon which you based the allegations contained in the complaint you filed in the Grove Fresh litigation." Messina responded with a 22-page description of his investigation. He also submitted copies of the exhibits to the complaint and a paragraph-by-paragraph identification of the sources for the complaint's allegations. (Adm. Ex. 8, p. 35.)

The ARDC closed its inquiry in September 1994. On Messina's motion, the Seventh Circuit dismissed the RTSC on November 17, 1994. (Adm. Ex. 8, p. 35.)

Ruling on Messina's status as a Grove Fresh attorney: In November 1994 the Labatt Judgment Creditors moved to compel discovery of communications between Grove Fresh and Messina on and after January 21, 1993. Grove Fresh objected to this motion on the ground that the communications were protected by the attorney-client privilege—*i.e*., that Messina and Grove Fresh had continued as attorney and client after January 21, 1993. (Adm. Ex. 8, p. 35.)

On December 1, 1994, Judge Zagel sustained Grove Fresh's claim of privilege. He based his ruling on an *in camera* review of ten letters and memos that Grove Fresh and Messina had exchanged on and *after* January 21, 1993. (Adm. Ex. 8, p. 35.)

Messina's recusal motion and §1927 motion: In October 1994, American Citrus filed a supplemental petition for contempt, alleging that Messina's September 20th letter to Elson violated the seal. Messina responded in January 1995, arguing that the seal order was not a gag on speech. (Adm. Ex. 8, p. 36.) That same month Messina moved to recuse Judge Zagel pursuant to 28 U.S.C. §455, on the ground that he had already expressed an opinion on a disputed issue in the Rule 60(b) case, namely, the validity of the Consulting Agreement. (*Id*.)

He also moved to dismiss all of the post-settlement proceedings on the ground that the proceedings were vexations and had been instituted for the improper purpose of enforcing an unethical restriction on his right to practice law. (Adm. Ex. 8, p. 36.) Judge Zagel denied both motions. (*Id*.)

Contempt trial: On February 3, 1995, Judge Zagel held a one-day bench trial on the contempt and Rule 11 charges. Messina testified without contradiction that he and Grove Fresh had continued in an attorney-client relationship after January 21, 1993. (Adm. Ex. 8, p. 36.)

Messina's appeal: On March 1, Messina appealed from the orders denying the recusal and §1927 motions. He couldn't perfect his appeal because Judge Zagel would not transmit Elson's Draft Order to the clerk's office, despite written and oral requests by Messina. (Adm. Ex. 8, p. 36.)

On May 2 Messina filed in the Seventh Circuit *Motion for Relief from the District Court Regarding the Record on Appeal* asking for an order (a) directing Judge Zagel to transmit Elson's Draft Order to the Clerk and (b) directing the Clerk to create a complete docket sheet. (Adm. Ex. 8, p. 36.) On May 12, the Seventh Circuit denied without prejudice "those portions of the motion which request relief directed at the District Court record … until they have been determined in the District Court in the first instance." (*Id*.)

Three days later—*i.e.*, on May 15—the seal on 90cv5009 was effectively removed when a clerk began making entries on the electronic docket for 90cv5009. Over a four-day period the clerk docketed 248 of the 380 records in 90cv5009. (Adm. Ex. 8, p. 37.) Records omitted from the May 1995 docket included all of the papers filed in the post-settlement disputes by the Labatt Judgment Creditors, Messina, and Grove Fresh—that is, all of the records underlying Messina's pending appeals. (*Id*.)

Meanwhile, in mid-March, with no notice to Messina, co-counsel at Rivkin Radler & Kremer ("RR&K") stipulated to a settlement dismissing the Rule 60(b) case. Pursuant to that settlement, RR&K joined the Labatt Judgment Creditors in a motion to dismiss Messina's appeal on the ground that he lacked standing because Grove Fresh allegedly had discharged him on January 21, 1993. (Adm. Ex. 8, p. 37.)

RR&K joined this motion even though it had recently prevailed on its claim that Messina and Grove Fresh had *continued* in an attorney client relationship after January 21, 1993. The Seventh Circuit granted the dismissal motion on June 9, 1995. (Adm. Ex. 8, p. 37.)

The Contempt Order: On June 9, 1995, Judge Zagel issued a 60-page *Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law* ("Contempt Order"), which he published in the Federal Supplement as *Grove Fresh Distributors, Inc. v. John Labatt, Ltd.*, 888 F. Supp. 1427 (N.D. Ill. 1995). The Contempt Order opened with this commentary on Messina's character:

> Othello's downfall was the result of his own jealousy, MacBeth fell victim to his blinding ambition, Lear's insecurity prompted his misfortunes, and Hamlet's tragedy was that of a man who could not make up his mind. John Messina fits the mold of the great tragic figure. *His is the tragedy of an attorney who could not keep a confidence*. (emphasis added)

(Adm. Ex. 1, p. 1.) The Contempt Order (and subsequent related orders) included injunctions and financial penalties that Judge Zagel imposed on Messina for the benefit of the Labatt Judgment Creditors, as follows:

> (a) Judge Zagel enjoined Messina from representing consumers in state court class action suits against the Labatt Judgment Creditors, on the ground that Messina was not fit to serve as class counsel. Judge Zagel made this finding and issued this injunction on his own motion, without affording Messina any prior notice or opportunity to be heard.
>
> (b) For a period of five years, Judge Zagel enjoined Messina from discussing with anyone the evidence Messina had gathered from *public sources* against the Labatt Judgment Creditors, without first securing Judge Zagel's permission, upon pain of forfeiting a $50,000 bond.
>
> (c) Judge Zagel cited Messina for contempt of court for disclosing truthful information in the course of defending himself against false misconduct charges published by the Labatt Judgment Creditors.
>
> (d) Judge Zagel ordered Messina to pay the attorneys' fees the Labatt Judgment Creditors had incurred to secure the injunctions and contempt citations, which he fixed at $149,554.45, plus interest from January 1997.

(Adm. Ex. 1, pp. 58-59; Adm. Ex. 6, pp. 47-49.)

E. Appellate counsel's undisclosed conflict of interest.

In August 1995, Jenner & Block ("Jenner") agreed to represent Messina in appealing the Contempt Order to the Seventh Circuit and in defending Messina in a parallel investigation at the ARDC. (Adm. Ex. 8, p. 37.) Jenner had a financial conflict of interest that it didn't disclose until 1998—Jenner would not present any arguments challenging the integrity of the 90cv5009 proceedings because doing so would require disclosures to other clients that would harm business. (*Id.*)

On appeal Jenner argued that the Contempt Order violated the First Amendment and due process. (Adm. Ex. 8, p. 37.) On February 5, 1998, the Seventh Circuit issued a five-page unpublished order affirming the Contempt Order. The Order did not address the merits of Messina's First Amendment or due process arguments. The Court treated the appeal as presenting two different versions of the facts and opted to believe Judge Zagel's because the Court was "certainly in no position to question [Judge Zagel's] first hand impressions of Mr. Messina's conduct." (Adm. Ex. 8, pp. 37-38.)

In July 1998, after the ARDC investigation had escalated into a referral to an Inquiry Panel, Jenner withdrew from representing Messina, citing its conflict. In *pro se* papers, Messina presented the facts and arguments Jenner had been unwilling to present to the Seventh Circuit or to the ARDC because of its conflict. (Adm. Ex. 8, p. 38.) The ARDC closed its investigation without voting a complaint. (*Id.*)

F. The bankruptcy case.

In September 1999 Messina filed a Chapter 11 petition to reorganize his law practice. In December 1999 Labatt and American Citrus filed a complaint alleging that the debt imposed by the Contempt Order was not dischargeable in bankruptcy, contending that the injury for which

they had been awarded the fees was "willful[ly] and malicious[ly]" caused by Messina within the meaning of 11 U.S.C. §523(a)(6). (Adm. Ex. 8, p. 38.)

The Labatt Judgment Creditors' complaint did not identify the injury they allegedly had suffered, nor did they describe what Messina had done to cause the alleged injury. Instead, they "incorporated in full" the 60-page Contempt Order, which they attached to the complaint. (Adm. Ex. 8, p. 38.)

In March 2000 the bankruptcy court granted summary judgment to the Labatt Judgment Creditors, but the ruling did not become final and appealable until 2009. Messina timely appealed, first to the district court and then to the Seventh Circuit. Both courts ruled against him and found that that the appeals were frivolous. The district court ordered Messina to pay sanctions totaling $56,691.46 in fees and costs. The Seventh Circuit ordered him to pay sanctions totaling $96,139.25 in fees and costs. (Adm. Ex. 14.)The Seventh Circuit also entered an order on October 28, 2011, striking Messina's name from the roll of attorneys authorized to practice law in that court and referring the matter to the Commission for further proceedings. (Adm. Ex. 11.)

The Rule 60(b) proceedings: After the summary judgment in 99-A-1573, Messina filed a FRCP 60(b) motion to vacate the Contempt Order. The district court summarily denied that motion. Messina appealed (Adm. Ex. 3), but the Seventh Circuit affirmed. (Adm. Ex. 4.) This is the appeal that the Hearing Board found to be frivolous.

G. Procedural history of this disciplinary case.

This disciplinary case began with a letter of inquiry dated November 3, 2011. Messina responded in letters dated November 21, 2011 (C.963 et seq.), December 7, 2011 (C.966 et seq.), and January 31, 2012 (C.1017 et seq.), and in a brief dated March 12, 2012. (C.1043 et. seq.) In support of these responses he submitted 95 paper exhibits and 43 digital exhibits. (C.1095-1102).

On February 27, 2012, Messina notified the Administrator and the Administrator's attorney, Meriel Coleman, that he was preparing a brief to "sharpen the presentation of the factual and legal issues" raised by the inquiry. He asked for a meeting after the brief was submitted "to answer any questions or concerns you may have." He urged that the matter "be referred to an Inquiry Board panel to sort out who should be held accountable for the 18 years of costly, wasteful, and destructive litigation that followed the breakdown of the Grove Fresh Settlement Contracts…." (C.947.)

Shortly after Messina made the last of his submissions he called Coleman to arrange a meeting, but Coleman refused to meet. She said she had no interest in learning about the merits of any disputes in the Grove Fresh litigation that had taken place before 1993, when she graduated from law school. (C.938.) *See also* R. 669 ("I don't need to call witnesses to talk about what happened [when I was] in college and law school.")

The Amended Complaint: The *Amended Complaint* in this case includes 17 paragraphs that refer to specific events in the Grove Fresh litigation that occurred between 1989 and 1993, when the Administrator's attorney's was attending college and law school. *See Amended Complaint* ¶¶2-19. By her own admission, the Administrator's attorney's refused to investigate the information Messina had provided her regarding the events alleged in ¶¶2-19.

Messina's Answer and Affirmative Defenses: In July 2014 Messina included the following Affirmative Defense in his answer to the *Amended Complaint*:

> (a) Due process requires a neutral judge who makes a good-faith effort to apply the rules of evidence and the rules of procedure to the matters that come before him or her. A biased judge is one who knowingly violates the rules of evidence or the rules of procedure in order to reach a result that would be precluded by a neutral application of those rules.
>
> (b) In the lower federal courts due process requires that trial court judges and appellate court judges adjudicate *all* justiciable claims presented in the course of a case. *See Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821).

(c) The federal court orders and bankruptcy court orders that are the subjects of ¶¶6, 7, 23, 25, 30, 31, 33, 34, 38, 41, and 43 of the Administrator's First Amended Complaint violated due process because the judges issuing those orders knowingly violated the rules of procedure and the rules of evidence in order to reach results that would have been precluded by a neutral application of those rules.

(d) Federal court judges disagree among themselves on whether they are bound by the rule that judicial opinions ought to be candid and accurate. Regardless of that disagreement, federal court opinions that violate the rule on candor and accuracy violate due process and are not binding in attorney disciplinary proceedings conducted under the auspices of the Illinois Supreme Court.

(e) The federal court orders and bankruptcy court orders described in ¶¶6, 7, 23, 25, 30, 31, 33, 34, 38, 41, and 43 of the Administrator's First Amended Complaint are not binding on Messina as collateral estoppel in this case because the proceedings underlying those orders were "so lacking in notice or opportunity to be heard as to constitute a deprivation of due process of law." Sup. Ct. Rule 763(4).

In support of this Affirmative Defense Messina asserted Counterclaims for Declaratory Relief. The Administrator moved to strike the Affirmative Defenses and counterclaims on the ground that the defenses and counterclaims were "narrative denials of the allegations in the Administrator's complaint," and Messina had no right to present such narratives. (C.719.) The Chair granted the motion.

The trial: Administrator's case-in-chief: The Administrator did not call any witnesses. His case-in-chief rested on 16 exhibits, 14 of which were identified and received as Adm. Ex. 1-14. The other two were identified as Resp. Ex. 2A and 2B, but they were received in evidence during the Administrator's case-in-chief pursuant to a stipulation in accordance with Ill. R. Evid. 106, the rule of completeness. (R. 10-12.)

The Administrator's evidence consisted of ten court orders and opinions (Adm. Ex. 1, 2, 4, 5. 7, 9, 10, 11, 13, 14) and six filings by Messina—three briefs (Adm. Ex. 3, 6, 8) a petition. (Adm. Ex. 12), and Statements of Uncontested Facts (Resp. Ex, 2A, 2B) that Messina had submitted to the bankruptcy court in March 2000 in accordance with the local rules on summary judgment proceedings.

ARGUMENT

I. THE ADMINISTRATOR OBSTRUCTED MESSINA'S RIGHTS TO PLEAD A DEFENSE AND TO CROSS-EXAMINE HIS ACCUSERS.

The *Amended Complaint* rests on the narratives of the federal judges who cited Messina for contempt of court and then sanctioned him for making collateral attacks on the fairness of the contempt proceedings. Under the rules of evidence and the rules of procedure that govern disciplinary cases, Messina had a right to challenge the veracity of the federal narratives and to cross-examine his accusers. *See In re Owens*, 125 Ill.2d 390 (1988) ("*Owens I*"); *In re Owens,* 144 Ill.2d 372 (1991) ("*Owens II"*).

The Administrator obstructed these rights to such a degree that Messina was not afforded a fair opportunity to be heard, as due process required. The appropriate remedy at this late stage is a dismissal of all charges with prejudice.

A. The Administrator obstructed Messina's right to plead an alternative narrative.

Owens I, Owens II, and Sup. Ct. Rule 753(c)(5) afforded Messina the right to file affirmative defenses that challenged the fairness and veracity of the federal judgments underlying the *Amended Complaint*. The Administrator obstructed Messina's exercise of this right when he induced the chair of the Hearing Panel to strike Messina's challenges to the federal narratives.

1. A federal judge's findings in a private civil suit, while admissible in evidence, cannot stand as the only evidence of the misconduct charges.

Owens I and *Owens II* involved a dispute between two pairs of brothers— Carroll and Gerald Owens, and Bert and John Beatty. In 1970 they entered into a written partnership agreement for the purpose of acquiring and operating a radio station. The Owenses, who were lawyers, agreed to contribute legal services to the partnership. The Beattys agreed to contribute technical and financial support. 125 Ill. 2d at 395.

In September 1973 the Beattys sued the Owenses for fraud and breach of their fiduciary duties as lawyers. Eight years later, after a jury trial, final judgment was entered for the Beattys. 125 Ill. 2d at 394. Four years after that, the Administrator filed a two-count complaint based on the civil court judgment. The complaint charged each of the Owenses with engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, and other related charges. 125 Ill. 2d at 393.

In 1987 the Administrator filed a motion for summary judgment seeking to rely on the factual findings in the civil case. In support of the motion the Administrator filed certified copies of the jury verdict (which the trial court considered advisory due to the equity nature of the case), the special interrogatories submitted to the jury, the jury's answers, the findings of fact and conclusions by the court, and the judgment. He also filed a memorandum of law arguing that the doctrine of estoppel by verdict precluded the Owenses from relitigating the factual findings in the civil case. After the Hearing Board granted the motion, the Owenses were allowed to present evidence only in extenuation and mitigation. The Hearing Board made findings for the Administrator on almost all of the charges and recommended a two-year suspension. 125 Ill. 2d at 395.

On appeal the Illinois Supreme Court, after noting that it bore the "ultimate responsibility" for determining what conduct is disciplinable, categorically rejected the use of offensive collateral estoppel in a disciplinary case:

> We will not… [give] offensive collateral estoppel effect in a disciplinary proceeding to factual findings in a civil fraud action. The risk of unfairly imposed discipline is too great, and the economy to be gained too minimal, to warrant such an abridgement of the disciplinary process.

125 Ill. 2d at 400-01. The Court remanded for a plenary trial.

On remand the Administrator presented documentary evidence and testimony from witnesses proving the disciplinary charges to the satisfaction of the Hearing Board, which recommended one-year suspensions. The recommendation rested on 24 paragraphs of findings, 18 of which relied on evidence presented at the hearing; the other four paragraphs recounted the civil case. *See In the Matter of Carroll L. Owens, et al*., No. 2129396, p. 2 (Rev. Bd. 1990).

On appeal the Owens brothers argued that the holding in *Owens I* barred the Hearing Board from giving any consideration whatsoever to the civil judgment. Both the Review Board and the Illinois Supreme Court rejected that argument, with the Court explaining:

> We did not…preclude the Hearing Board from taking "judicial notice" of a public record, namely the findings and judgment in the civil fraud case. Although *a civil judgment may not be the only factor of consideration of a Hearing Board*, it nevertheless may be a component in the greater whole of the Board's decision. Even so, the findings of the Hearing Board explicitly state that the civil action was not used as evidence of the conduct alleged. We see no reason to question that finding.

144 Ill. 2d at 378-79 (emphasis added).

Owens I stands for the proposition that when the narrative from a private civil judgment is the source of a disciplinary complaint, the respondent is free to challenge the veracity of that narrative. *Owens II* stands for the proposition that a judge's findings in a civil case, while admissible in disciplinary proceedings, can never be the only evidence of alleged professional misconduct.

2. Sup. Ct. Rule 753(c)(5), *Owens I,* and *Owens II* afforded Messina the right to include in his answer to the *Amended Complaint* affirmative matter that challenged the veracity of the federal narratives.

"The purpose of pleadings is to present, define and narrow the issues and limit the proof needed at trial. Pleadings are not intended to erect barriers to a trial on the merits but instead to remove them and facilitate trial. The object of pleadings is to produce an issue asserted by one

side and denied by the other so that a trial may determine the actual truth." *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 307-08(1981).

In disciplinary cases, the scope of the pleadings that a respondent may file is defined by Sup. Ct. Rule 753(c)(5), which provides that "[p]roceedings before the [Hearing] Board…shall be in accordance with the Code of Civil Procedure and the rules of the supreme court as modified by rules promulgated by the Commission pursuant to Supreme Court Rule 751(a)." The Commission has not modified the following provisions in the Code of Civil Procedure, so they unquestionably apply to disciplinary cases. :

- §2-603(c) which provides that "(p)leadings shall be liberally construed with a view to doing substantial justice between the parties.
- §2-608(a), which provides that any claim of any kind by a defendant against a plaintiff or a co-defendant "shall be referred to as a counterclaim."
- §2-613, which provides that "[t]he facts constituting any affirmative defense…and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleadings, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply."
- §2-701(a), which provides that "[n]o action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby."

In conjunction with Sup. Ct. Rule 753(c)(5), *Owens I* and *Owens II* guaranteed Messina the right to challenge the veracity of the federal narratives, and to do so in the form of counterclaims seeking declaratory relief.

The Administrator obstructed Messina's right to present such a challenge when he induced the chair of the Hearing Panel to strike Messina's Affirmative Defenses and Counterclaims.

B. The Administrator's trial strategy wrongfully deprived Messina of his right to cross-examine the witnesses who are the source of the charges against him.

Messina had a right to a public trial on the charges alleged in the *Amended Complaint*. The right to a public hearing before any tribunal or body includes the right to cross-examine

adverse witnesses. *Braden v. Much*, 403 Ill. 507, 513, 87 N.E.2d 620, 623 (1949); *EE Hauling, Inc. v. County of DuPage*, 77 Ill. App.3d 1017 (2d Dist. 1979); *People ex rel. Klaeren v. Village of Lisle*, 316 Ill. App.3d 770 (2d Dist. 2000). The Administrator obstructed Messina's right to cross-examine his accusers by failing to call his accusers to the witness stand at trial.

II. THE *AMENDED COMPLAINT* MUST BE DISMISSED BECAUSE THE ADMINISTRATOR FAILED TO PROVE A *PRIMA FACIE* CASE REGARDING ANY OF THE TEN ALLEGED ACTS OF PROFESSIONAL MISCONDUCT.

The *Amended Complaint* charged Messina with ten acts of alleged misconduct over an 18-year period (1993-2011). Seven of the allegations concerned acts (sometimes referred to as the "Seven Acts") that Judge Zagel had punished with contempt citations. The other three concerned appeals that collaterally attacked the fairness of the procedures that led to the contempt citations.

Messina denied that any of his actions constituted professional misconduct. *Third Amended Answer* ¶¶15-17, 20-21, 23, 28-30, 32-33 and 36-41. (C.738-45.) His denials required the Administrator to establish a *prima facie* case as to each of the misconduct charges. *Owens I* and *Owens II* precluded the Administrator from resting his prima facie case exclusively on the federal judges' findings. But, that is precisely what the Administrator did here. The only evidence he offered beyond the federal judges' findings were six filings by Messina that were *exculpatory*—they refuted the misconduct charges.

The Administrator's failure to present any independent evidence that Messina engaged in misconduct requires that the charges against him be dismissed.

A. Ignoring *Owens I* and *Owens II*, the Administrator failed to produce any independent evidence that the Seven Acts constituted professional misconduct, and therefore he failed to establish a *prima facie* case that any of the Seven Acts constituted professional misconduct.

Paragraphs 15-17, 20-21, 23, 28-30 of the *Amended Complaint* charged Messina with Seven Acts of alleged professional misconduct that tracked the seven contempt citations issued by Judge Zagel, as follows:

> **First Act:** Messina failed to appear in court on October 21, 1993, when Judge Zagel allegedly had ordered him to appear.
>
> **Second Act:** Messina allegedly misrepresented to the Seventh Circuit his status as a Grove Fresh attorney as of October 22, 1993.
>
> **Third, Fourth, and Fifth Acts:** He allegedly disclosed three pieces of allegedly confidential material in a motion he filed in the Seventh Circuit on October 22, 1993.
>
> **Sixth Act:** In a letter dated September 22, 1994, he disclosed allegedly confidential material to an attorney for an intervenor in the Grove Fresh litigation.
>
> **Seventh Act:** He disclosed allegedly confidential material in papers he filed in bankruptcy court in February 2000.
>
> Messina denied that any of the Seven Acts constituted misconduct. *Third Amended Answer* ¶¶15-17, 20-21, 23, 28-30. (C.738-45.) His denials required the Administrator to establish a *prima facie* case as to each of the Seven Acts. A burdened party establishes a *prima facie* case when he comes forward with at least some evidence on every essential element of an alleged claim. *Kokinis v. Kotrich*, 81 Ill.2d 151, 154-55 (1980). This burden is satisfied by evidence that, viewed in the aspect most favorable to the burdened party, is sufficient to enable the trier of fact reasonably to find the issue for him. *Donoho v. O'Connell's, Inc.,* 13 Ill. 2d 113 (1958).

In a disciplinary case based on a civil judgment, an essential element of every alleged violation is evidence independent of the findings made by the fact-finder in the underlying civil case. With respect to the Seven Acts, and considering the holdings in *Owens I* and *Owens II*, the Hearing Board could not reasonably find for the Administrator unless he produced evidence

independent of the Contempt Order establishing every essential element of the Seven Acts. At Administrator's Attorney minimum, meeting this burden required the Administrator to produce the following witnesses and documents:

- **First Act:** Proving this act required producing a copy of the court order that allegedly required Messina to appear in court on October 21, 1993. It also required a witness to authenticate the court order and to certify that the order had been served on Messina.
- **Second Act:** Proving this act required producing a witness to testify that Grove Fresh had discharged Messina prior to October 22, 1993. It also required producing the document in which Messina allegedly misrepresented his status to the Seventh Circuit.
- **Third, Fourth, and Fifth Acts:** Proving these acts required producing several documents: (a) the motion Messina filed in the Seventh Circuit on October 22, 1993; (b) the umbrella protective orders (discussed below in §III-B-1) authorizing the defendants to designate the disputed information as confidential; (c) the notices designating the disputed information as confidential (*see* §III-C, below). It also required a witness to authenticate the aforementioned documents and to testify to the alleged injury caused by the alleged disclosures.
- **Sixth Act:** Proving this act required producing several documents: (a) the letter dated September 22, 1994: (b) the umbrella protective orders authorizing the defendants to designate the disputed information as confidential; and (c) the notices designating the disputed information as confidential. It also required a witness to authenticate the documents and to testify to the alleged injury caused by the alleged disclosure.
- **Seventh Act:** Proving this act required producing several documents: (a) the papers Messina filed in bankruptcy court in February 2000; (b) the umbrella protective orders authorizing the defendants to designate the disputed information as confidential; and (c) the notices designating the disputed information as confidential. It also required a witness to authenticate the documents and to testify to the alleged injury caused by the alleged disclosure.

The Administrator called no witnesses and failed to produce any of the relevant documents. His failure to produce any independent evidence regarding the Seven Acts requires that the misconduct charges predicated on the Seven Acts be dismissed.

B. Ignoring *Owens I* and *Owens II*, the Administrator failed to produce any independent evidence that Messina filed three frivolous appeals, and therefore he failed to establish a *prima facie* case that any of the appeals was frivolous.

Paragraphs 32-33 and 36-41 of the *Amended Complaint* allege that Messina pursued three allegedly frivolous appeals that included collateral attacks on the Contempt Order, as follows:

- In 2001-02, he pursued an allegedly frivolous appeal from an order denying a Rule 60(b) motion seeking relief from the Contempt Order, and in doing so he "attempt[ed] to repackage his prior appeals."
- In 2009-10, he pursued an allegedly frivolous appeal from a summary judgment ruling by the bankruptcy court.
- In 2010-11, he pursued an allegedly frivolous appeal from the district court to the Seventh Circuit.

(C.41-44). The Administrator alleged that the appeals taken in 2001-02 and 2009-20 violated Rules 3.1 and 8.4(5) of the 1990 version of the Illinois Rules of Professional Conduct, since repealed. The 2010-11 appeal, he alleged, violated Rules 3.1 and 8.4(d) of the 2010 version of the Illinois Rules of Professional Conduct.

Rule 3.1 currently provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis *in law and fact* for doing so that is not frivolous…" (emphasis added). The 1990 version of Rule 3.1 is identical, except that it did not include the phrase "in law and in fact." Rule 8.4(5) (1990) and Rule 8.4(d) (2010) provide in pertinent part that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

For the reasons stated below, the Administrator failed to prove *prima facie* cases that the appeals were frivolous or that Messina had engaged in conduct prejudicial to the administration of justice.

1. The Administrator failed to produce a witness to identify the allegedly frivolous aspects of the appeals.

Rule 3.1 imposes an objective standard of reasonableness for filing or advancing meritorious legal arguments. *See Edwards v. Estate of Harrison*, 235 Ill. App. 3d 213 (1st Dist. 1992) (construing comparable provision in Sup. Ct. Rule 137). Subjective good faith is not sufficient to meet the burden of Rule 3.1. *Cmarko v. Fischer,* 208 Ill. App. 3d 440, 445 (1st Dist. 1990) (construing comparable provision in Sup. Ct. Rule 137).

Proof that Messina's appeals fell short of an objective standard of reasonableness required a witness to identify the standard that applied to Messina's appeals and then to articulate how the appeals allegedly fell short of that standard. The Administrator failed to produce any such witness regarding any of the three appeals.

2. The Administrator failed to produce 11 of the 17 documents essential to proving his claim that the three appeals were frivolous.

Proving that the three appeals were frivolous required the Administrator to produce at least four documents from each appeal, or a total of 12 documents: Messina's opening brief; defendants' answering brief; Messina's reply brief; and the reviewing court's opinion. The Administrator produced only six of these documents. He failed to produce any of the defendants' answering briefs or any of Messina's reply briefs

Moreover, proving the claim that the 2001-02 appeal was frivolous because it "repackage[d] his prior appeals" required proof of at least five additional documents: (1) the opening brief Jenner & Block had filed in the prior appeal, *i.e.*, the 1997 appeal from the Contempt Order; (2) the defendants' answering brief; (3) Messina's reply brief; (4) the reviewing court's opinion; and (5) Messina's petition for rehearing *en banc*. The Administrator failed to produce any of these documents.

C. The Administrator's failure to prove any *prima facie* cases of misconduct requires that the *Amended Complaint* be dismissed as a matter of law.

Failure to satisfy the burden of production requires a decision by the court as a matter of law on the particular issue adverse to the burdened party. *Olinger v. Great Atl. & Pac. Tea Co.*, 21 Ill.2d 469 (1961). *See also* GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §300.4 (10th ed. 2010) ["GRAHAM'S HANDBOOK"].

In *Olinger*, plaintiff sued for personal injuries sustained when he slipped and fell on the floor of defendant's grocery store. As the Hearing Board did in this case (R. 43-53), the trial court in *Olinger* denied a motion for a directed verdict at the close of plaintiff's case. The case was submitted to a jury, which returned a verdict for the plaintiff in the sum of $30,000. The Illinois Appellate Court set aside the verdict, finding that the plaintiff had failed to establish a *prima facie* case of an essential element of a negligence claim. The Illinois Supreme Court affirmed.

Here, the Administrator failed to establish a *prima facie* case respecting any of the ten acts of professional misconduct alleged in the *Amended Complaint*. Accordingly, *Olinger* requires that the Hearing Board's findings be set aside, and that the charges against Messina be dismissed.

III. THE HEARING BOARD'S FINDINGS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assuming *arguendo* that the Administrator established a *prima facie* case that required Messina to present a defense, the Administrator still had the burden of persuasion—the burden of proving each of the ten alleged acts of misconduct with clear and convincing evidence. *In re Winthrop*, 219 Ill. 2d 526, 542 (2006). Clear and convincing evidence constitutes a high level of certainty, which is greater than a preponderance of the evidence but less than proof beyond a reasonable doubt. *People v. Williams*, 143 Ill. 2d 477 (1991).

A Hearing Board's factual findings should be set aside when they are against the manifest weight of the evidence, which occurs when the opposite conclusion is apparent or the fact found appears unreasonable, arbitrary, or not based on the evidence. *In re Witt*, 145 Ill. 2d 380, 390 (1991). Testimony that is not contradicted, impeached, or inherently improbable, by either internal or external circumstances, cannot arbitrarily be disregarded. *People Ex Rel. Brown v. Baker,* 88 Ill. 2d 81, 85 (1981); *Coupon Redemption, Inc. v. Ramadan ,* 164 Ill. App. 3d 749 (1987).

For the reasons stated below the Administrator's findings, in so far as they are adverse to Messina, are against the manifest weight of the evidence.

A. Hearing Board findings that contradict the unchallenged exculpatory evidence in Messina's appellate briefs are arbitrary and unreasonable *per se*.

The Hearing Board Report's "Findings of Fact and Conclusions of Law" encompass 23 pages. (C.1116-39.) Because the Administrator presented no witnesses, "the appellate briefs provide the core evidence in this case." (C.1116.) However, the *only* appellate briefs received in evidence were briefs written by or on behalf of Messina. *See* Adm. Ex. 3, 6, 8 12; Resp. Ex. 2K, 3G.[4] The narratives in these briefs exculpated Messina. *See, e.g.*, Adm. Ex. 3, pp.17-18 (refuting the charge that Messina violated the 89cv1113 protective order prior to entry of the 90cv5009 seal order); Adm. Ex. 6, pp.31-35, 56-57 (refuting Judge Zagel's procedural history of the seal order); Resp. Ex. 3G, pp. 33-40 (refuting contentions that Messina violated the protective orders

[4] Four of these appellate briefs (Adm. Ex. 3, 6, 8, 12) were received in evidence during the Administrator's case-in-chief. Because Messina is a party to this case, the statements in these exhibits are "admissions" within the meaning of Illinois Rule of Evidence 801(d)(2), even though the statements are exculpatory. Because the statements are admissions within the meaning of Illinois Rule of Evidence 801(d)(2), they constitute substantive evidence of the matters described therein. GRAHAM'S HANDBOOK §801.14, p. 814 (prior statement by an adverse party need not be impeaching to be admissible).

in October 1993 and September 1994, or disobeyed an order to appear in court on October 21, 1993, or misrepresented his status as a Grove Fresh attorney.)

Given the Hearing Board's acknowledgement that "the appellate briefs provide the core evidence in this case," any findings adverse to the exculpatory evidence presented in Messina's appellate briefs are inherently arbitrary and unreasonable.

B. The findings regarding Messina's alleged violations of the 89c1113 protective order prior of August 28, 1990, ignore the unimpeached testimony and documentary evidence to the contrary.

The Hearing Board Report includes the following findings regarding Messina's alleged violations of the secrecy orders prior to August 28, 1990:

- On some date prior to August 28, 1990, Messina violated the protective order in 89cv1113. (C.1117.) ("Judge Zagel was concerned that without the seal Respondent would disclose confidential information as he had done in a prior case involving the same parties.")
- Messina's alleged violation of the 89cv1113 protective order was the reason why Judge Zagel, on August 28, 1990, issued an order sealing the 90cv5009 case. (*Id.*)

These findings are against the manifest weight of the evidence in two respects. First, the findings regarding the alleged violation of the 89cv1113 protective order prior to August 28, 1990, ignore Messina's unimpeached testimony and corroborating documentary evidence to the contrary. *See* §§1-4, below.

Second, the finding regarding Judge Zagel's reason for sealing 90cv5009 ignores the transcript of the hearing on August 24, 1990 ((Resp. Ex.7A). That transcript shows beyond a shadow of doubt that Messina *stipulated* to the entry of a temporary seal pending the resolution of an emergency motion that had been served on him earlier that day. *There was never any hearing on the merits of Judge Zagel's reasons for sealing 90cv5009.*

1. The *Grove Fresh* protective orders were umbrella orders, not particularized protective orders.

Federal judges protect the confidentiality of discovery materials by issuing protective orders under the aegis of Fed. R. Civ. P. 26(c). As of 1989-91, when protective orders were issued in the *Grove Fresh* litigation, Rule 26(c) provided as follows:

> Upon motion by a party…and for good cause shown, the court…may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:…(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way…

Rule 26(c) has spawned two types of protective orders. A particularized protective order protects sensitive discovery materials individually, on a document-by-document basis. The burden to prove "good cause" to issue a particularized protective order falls on the party seeking the particularized protection. Litigating a particularized protective order can be costly and time-consuming. *Citizens First National Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3rd 943, 946 (7th Cir. 1999).

An umbrella protective order is a cost-effective alternative to particularized protective orders. *See* Kutz, *Rethinking the "Good Cause" Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P.26(c)*, 42 Val. U. L. Rev. 291, 300-01 (2007). The typical umbrella order: (a) allows a party to designate broad categories of documents as presumptively protected; (b) creates a mechanism for a party to challenge an adversary's claim of confidentiality for a particular document; and (c) authorizes the automatic sealing of papers that attach, or include references to, documents designated as confidential. MANUAL FOR COMPLEX LITIGATION, FOURTH, §11.432 (2004).

At trial Messina testified about the protective orders entered in three of Grove Fresh's cases: the order entered in September 1989 in the 89cv1115 case against New England Apple Corp. (Resp. Ex. 8A); the order entered in May 1990 in the 89cv1113 case against Everfresh

(Resp. Ex. 8C); and the order entered in May 1991in the 90cv5009 case against Labatt, *et al*. (Resp. Ex. 8L). All three orders were of the umbrella-type—that is, in lieu of identifying protected documents on a document-by-document basis, they allowed a party to designate broad categories of documents as presumptively protected, subject to challenge by an adverse party.

The earliest of the protectives order—the one entered in September 1989 in the case against New England Apple—was a typical umbrella order. The protective orders entered after that, in 89cv1113 and 90cv5009, deviated from the typical umbrella order in the respects discussed below in §§2-3.

2. By agreement, the umbrella protective orders in 89cv1113 and 90cv5009 omitted to include a provision that would authorize the automatic sealing of allegedly confidential papers filed with the clerk of court.

Grove Fresh stipulated to the entry of the eight-page umbrella protective order in the 89cv1115 case against New England Apple. (Resp. Ex.8A; R.127-28.) This order included the following language pre-authorizing the clerk of court to seal papers that included references to documents or materials that a party had designated as confidential:

> All transcripts of depositions, exhibits, answers to interrogatories and other documents and materials designated as Confidential Material, *including briefs and affidavits filed with any Court pursuant to or deriving from the Discovery Materials and comprising or containing documents marked as confidential or information taken therefrom*, shall be filed in sealed envelopes or other appropriately sealed containers on which shall be endorsed ... a statement substantially in the following form: "This envelope containing documents filed in this case by (name of party) is not to be opened nor the contents thereof to be displayed or revealed except under direction of the Court." (emphasis added)

(Resp. Ex.8A, ¶5.)

This provision was included in the 89cv1115 protective order in order to comply with General Rule 10 of the local civil rules of the Northern District of Illinois ("G.R. 10"), which governed the sealing of papers filed with the clerk of court. (R. 129-31.) G.R. 10 provided that the clerk of court could not seal documents filed by a party unless the court had previously

entered a protective order authorizing the sealing. The language quoted above satisfied this pre-authorization requirement. (*Id*.)

At Messina's request, this pre-authorization was excluded from the umbrella orders entered in the 89cv1113 case and the 90cv5009 case. *Compare* R.Ex.8A *with* Resp. Ex. 8C and Resp. Ex. 8L. Because of this deliberate omission, the sealing of court papers in those cases had to proceed on a document-by-document basis.

3. By agreement, the umbrella protective orders in 89cv1113 and 90cv5009 excluded deposition transcripts from the categories of documents that could be designated as confidential.

The September 1989 protective order in the 89cv1115 case against New England Apple was an *eight-page umbrella protective order* that included language requiring the sealing of any "*transcripts of depositions*…designated as Confidential Material." (Resp. Ex. 8A, ¶5 [emphasis added]; R. 127-30.)

The following spring Everfresh's lawyers, who were from McDermott Will & Emery, drafted a *two-page umbrella protective order* for entry in the 89cv1113 case against Everfresh. At Messina's request, McDermott Will & Emery's two-page draft omitted any reference to "transcripts of depositions." Judge Zagel accepted McDermott Will & Emery's draft and entered it *nunc pro tunc* to May 25, 1990. (Resp. Ex. 8C.; R. 130-31.

In February 1991 Joe Cancilla, a Schiff Hardin & Waite lawyer representing Labatt, Everfresh's parent, attempted to designate as confidential certain deposition testimony given by a Labatt employee in the 89cv1113 against Everfresh. Cancilla cited the 89cv1113 protective order as authority for the designation. (Resp. Ex. 8H, p. 1.) Messina objected to the designation, pointing out that the 89cv1113 protective order did not apply to deposition testimony. (Resp. Ex. 8I.) In March 1991, after a further exchange of correspondence, Cancilla dropped his claim that

the 89cv1113 protective order applied to deposition testimony. (Resp. Ex. 8-I, 8-J, 8-K; R. 147-48.)

Two months after this concession, Cancilla stipulated to the entry of a protective order in the 90cv5009 case. (Resp. Ex. 8-L.) The operative provisions of this stipulated order were identical to the operative provisions of the 89cv1113 protective order. (R. 148-49.) By executing this stipulation Cancilla and his client tacitly agreed that the 90cv5009 protective order did not cover deposition transcripts.

4. There is no evidence to support the finding that Messina violated the 89cv1113 protective order in July 1990, when he challenged a claim of confidentiality for a category of business records showing violations of the federal food purity laws.

Echoing the Contempt Order (Adm. Ex. 1, p.4n.2), the Hearing Board found that Judge Zagel had sealed 90cv5009 because "Judge Zagel was concerned that without the seal Respondent would disclose confidential information as he had done in a prior case involving the same parties." The only evidence for this finding is the following passage from the Contempt Order, purporting to recite the procedural history of the order sealing 90cv5009:

> On 24 August 1990, Labatt presented an emergency motion to seal the new complaint described in Mr. Messina's letter, arguing that the new complaint was an illegitimate attempt to amend the complaint in case No. 89 C 1113 (then 18 months old and nearing the close of discovery).
>
> On 29 August 1990 [sic] I granted the motion to seal the complaint for case No. 90 C 5009. *A key reason behind this decision was Mr. Messina himself. After presiding for the previous eighteen months over case No. 89 C 1113, I was familiar with certain tactics employed by Mr. Messina which I believed were questionable if not reprehensible. Specifically, I was wary of Mr. Messina's repeated attempts to beat the defendants into submission by disclosing materials previously designated as confidential to generate unfavorable publicity for them*. (emphasis added)

In a footnote, Judge Zagel purported to support this finding by citing to two incidents, one of which couldn't possibly have influenced his decision to seal 90cv5009 because it occurred on October 1, 1990, 33 days *after* he had issued the seal order:

> Especially alarming was Messina's propensity to disregard court orders and include documents designated as confidential as attachments to his pleadings (which would then be put into the public record or forwarded to the press). An emergency motion seeking to restrain Messina from making prohibited disclosures would inevitably follow. See e.g.. Minute Order of 10/3/90 Ordering Messina Not to Publish His 10/1/90 Letter to the Press and Ordering Him to Comply With the Court's Ruling; Minute Order of 7/18/90 Granting Motion to Enforce Protective Order in 89 C 1113.

The facts underlying the "Minute Order of 7/18/90" do not support the Judge Zagel's finding that Messina had a "propensity to disregard court orders." Those facts are as follows:

- In June 1990 Everfresh produced 601 pages of so-called Batch Sheets, which were business records of the recipes Everfresh used in 1987 to make 3,190,000 gallons of adulterated orange juice misbranded as 100% pure.
- Everfresh designated the Batch Sheets as confidential documents under the umbrella protective order that had recently been entered in 89cv1113.
- Under the terms of the umbrella order Grove Fresh had ten days in which to object to the claim of confidentiality for the Batch Sheets. Messina timely served an objection on July 2, 1990. He asserted the objection in a private letter to defense counsel. He did not file any papers with the clerk of court.
- Messina's notice triggered the start of a ten-day period in which Everfresh could ask the court to adjudicate its claim of confidentiality for the Batch Sheets. On July 11, 1990, Everfresh filed a timely motion for such a ruling.
- In the minute order dated July 18, 1990, Judge Zagel sustained the defense's claim of confidentiality.
- *Messina complied with Judge Zagel's order*. He did not disclose the Batch Sheets to anyone.

(Resp. Ex. 6O, pp. 35-36.)

C. The Administrator failed to produce any evidence that the defendants ever designated as confidential any of the disputed information referred to in ¶¶17, 21, 23, and 28 of the *Amended Complaint.*

Paragraphs 17, 21, 23, and 28 of the *Amended Complaint* allege that Messina violated the umbrella protective orders in 89cv1113 and 90cv5009 by disclosing the names of witnesses who invoked the Fifth Amendment privilege against self-incrimination; by disclosing the amount defendants had paid to settle Grove Fresh's claims; and by disclosing "other confidential information [Messina] acquired through discovery." (C.39-41.)

Under the terms of the umbrella protective orders, information would qualify for confidential treatment only if the party claiming protection has "inform[ed] other counsel in writing that certain documents or categories thereof are confidential." (Resp. Ex. 8C, p.1; 8L, p.3.) The Administrator did not produce any evidence that any of the disputed information described in ¶¶17, 21, 23, and 28 of the *Amended Complaint* had ever been designated as confidential. He couldn't produce the evidence because it doesn't exist.

D. Messina never conceded that any of his actions violated any of the secrecy orders.

The Hearing Board made a finding that Messina "acknowledged that his [October 1993] motion [in the Seventh Circuit] recited confidential information, that is, the names of witnesses who had invoked their Fifth Amendment privilege against self-incrimination and the settlement amount…" In support of this finding the Board cited Messina's answer to ¶17 of the *Amended Complaint* (C.666) and his testimony at R. 159-60, 176-77, 195, 200-203. None of these cites supports the finding.

Messina's answer to ¶17 (C.666) admits only that Messina filed a motion in the Seventh Circuit on October 22, 1993, and that the "motion recited: (a) the names of witnesses who had invoked their fifth amendment privilege against self-incrimination, and (b) the fact that the defense had paid $2,000,000 to settle the litigation." The answer did not admit that these recitations violated any protective orders.

As for Messina's testimony, he declared without qualification as follows: "I did not…think that anything that I said in my motion or in my affidavit itself, that anything in there was subject to a Protective Order." (R.159.) He acknowledged that "the defendants *believed*" that he had disclosed confidential information subject to the protective orders (R.202) [emphasis

added], but he never conceded that the disputed information was, in fact, subject to the protective orders.

E. To the extent that there are conflicts in the evidence, the Administrator's failure to call Messina's accusers as witnesses at trial requires that the conflicts be resolved against the Administrator.

Messina's accusers were the defense lawyers in the Grove Fresh litigation, all of whom are members of the Illinois bar. These lawyers had knowledge of relevant, admissible evidence regarding nine of the ten alleged acts of misconduct alleged by the Administrator—all but the allegation regarding Messina's status as a Grove Fresh attorney as of October 22, 1993.

The defense lawyers were under the Administrator's control because, as members of the Illinois bar, R.P.C. 8.1(b) required them to provide the Administrator with all relevant information or else be subject to discipline. They were not equally available to Messina because they were likely to be biased against him. *See United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946); *Tonarelli v. Gibbons*, 121 Ill. App. 3d 1042 (1984). GRAHAM'S HANDBOOK §301.6, p. 122.

Because of this disparity of control over these witnesses, the Administrator's failure to call them as witnesses in the trial of this case created a presumption that their testimony would have been adverse to the Administrator's contentions. *See* Comment to *Illinois Pattern Jury Instruction 5.01* ("The failure of a party to produce testimony or physical evidence within his control creates a presumption that the evidence if produced would have been adverse to him.") This presumption requires that any conflicts in the evidence be resolved against the Administrator

F. The Hearing Board's finding regarding the 2001-02 appeal is barred by *Owens I* and *Owens II*.

The Hearing Board made a finding that Messina's arguments in the 2001-02 appeal were not "legitimate advocacy, as he could not reasonably believe they would result in the Seventh

Circuit vacating an order that it previously upheld." (C.1135.) There is no evidence in the record to support this conclusion other than the findings of the federal judges who sanctioned Messina. For the reasons stated above in §I-A-1, *Owens I* and *Owens II* require that this finding be set aside.

IV. THE HEARING BOARD ERRED RULING THAT MESSINA'S MAY 2015 PAPERS WERE BARRED BY ARDC RULE 284(a).

On May 27 and 29, 2015, Messina filed papers (collectively, "the May 2015 Papers") seeking dismissal of all charges. (C.904-22.) The May 2015 Papers were analogous to a motion for sanctions under Sup. Ct. Rule 137(a). He asked for dismissal as a sanction for the Administrator's breach of his duty to conduct an objectively reasonable inquiry into the relevant facts and law underlying the *Report and Argument Regarding Prior Discipline* (C.889) and the *Amended Complaint*.

The Hearing Board granted the Administrator's motion to strike the May 2015 Papers on the ground that they are "post-trial motions" within the meaning of ARDC Rule 284(a), which bars the Hearing Board from considering such motions. The Board erred. *See Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458 (1990). *See also Gaynor v. Walsh*, 219 Ill. App. 3d 996, 579 N.E.2d 1223 (2nd Dist. 1991) (applying *Marsh* to motions for sanctions filed pursuant to S. Ct. Rule 137).

CONCLUSION

For the reasons set forth above, the Hearing Board findings adverse to Messina should be set aside, and the case should be remanded for a hearing on Messina's requests for relief under Supreme Court Rule 137.

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