

**BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION**

In the Matter of:

JOHN PATRICK MESSINA,

Respondent-Appellant,

No. 1892622.

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Commission No. 2014PR00002

**SUR-REPLY BRIEF OF ADMINISTRATOR-APPELLEE,
CROSS RELIEF REQUESTED**

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ORAL ARGUMENT REQUESTED

FILED

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**ATTY REG & DISC COMM
CHICAGO**

ARGUMENT

I. A Review of the Record in this Disciplinary Proceeding Demonstrates that Respondent Filed Three Frivolous Appeals as the Administrator Charged in the Amended Complaint

As to Respondent's appeals related to his contempt proceedings, the Administrator's amended complaint charged Respondent with engaging in professional misconduct beginning in 2001, when he filed his first frivolous appeal. C. 44-45. The frivolous appeals concerned Judge Zagel's rulings about Respondent's conduct in *Grove Fresh*¹ v. *Labatt*, and, contrary to Respondent's arguments in this disciplinary matter (Resp. Reply Brief at 1, 3-4), Respondent's arguments in *Grove Fresh* are not exculpatory.

Judge Zagel found Respondent in contempt of court and in violation of Federal Rule of Civil Procedure 11, after Respondent repeatedly violated the seal and protective orders in *Grove Fresh v. Labatt*, failed to appear in court as ordered, and made false or misleading representations to the Seventh Circuit. Adm. Ex. 1. Judge Zagel ordered Respondent to pay \$149,554.45 to the Labatt defendants. Adm. Ex. 2 at 4. Respondent appealed Judge Zagel's rulings, and, on February 5, 1998, the United States Court of Appeals for the Seventh Circuit entered an order about the contempt proceeding. Adm. Ex. 2 at 1-2. The Seventh Circuit found that the seal and protective orders were valid and constitutional. Adm. Ex. 2 at 3. The Seventh Circuit also found that Respondent violated the orders of confidentiality in an effort to leak information to the public. Adm. Ex. 2 to at 3. The Seventh Circuit also affirmed Judge Zagel's ruling that Respondent willfully chose to ignore Judge Zagel's order to appear in court. Adm. Ex. 2 at 4. The Seventh Circuit further found that Judge Zagel correctly held that Respondent made a claim that was not well grounded in fact, that Respondent incorrectly certified that he

¹In the Appellee Brief, the Administrator referred to Respondent's former client as "Grow Fresh," consistent with the Report of Proceedings. The Administrator believes that the client's correct name is Grove Fresh and will use the correct name in this brief and any subsequent proceedings.

filed a pleading with a proper purpose, and that Respondent filed a brief that was not warranted by existing law. Adm. Ex. 2 at 4. The Seventh Circuit also found that Judge Zagel had the authority to sanction Respondent, and that Judge Zagel did not abuse his authority in doing so. Adm. Ex. 2 at 4. After the Seventh Circuit issued its order and denied Respondent's request for a rehearing, Respondent unsuccessfully appealed the contempt proceeding to the Supreme Court of the United States. R. 88, 374; Adm. Ex. 2 at 1. The Seventh Circuit's order of February 5, 1998, became the final decision on Judge Zagel's rulings, even though Respondent considered the final decision to be incorrect, unfair and unsatisfactory.

Nevertheless, in 2001, Respondent filed a frivolous appeal with the Seventh Circuit.² In 2009, Respondent filed an appeal with the United States District Court for the Northern District of Illinois, after Judge Squires found that Respondent's debt to the Labatt defendants was non-dischargeable because, among other reasons, bankruptcy precedent showed that Respondent's violation of court orders in *Grove Fresh v. Labatt* was willful and malicious conduct. Adm. Exs. 5 at 15-18, and 6. In Respondent's appeal to the District Court, Respondent principally complained about the orders of confidentiality in *Grove Fresh v. Labatt*, the fairness of the contempt proceeding, Jenner & Block's alleged conflict of interest, the completeness of the record on appeal, and Judge Zagel's conduct. Adm. Ex. 6 at 51-58. Significantly, Respondent's summary of his argument focused on his dissatisfaction with the underlying Grove Fresh litigation and asserted that Judge Zagel deserved "a withering critique." Adm. Ex. 6 at 53. Respondent's summary of his argument encouraged Judge Gettleman to "do...justice" by finding

²Since this sur-reply brief is limited to argument on the Administrator's exceptions, the Administrator will not argue in this brief about the 2001 appeal. The record demonstrates, however, that the Seventh Circuit concluded that the 2001 appeal, in which Respondent focused on the contempt proceeding, was frivolous, because the appellate court in a final decision had already found Judge Zagel's rulings to be sound and reasonable and found the record on appeal to be complete. Adm. Ex. 4 at 8. The Seventh Circuit also found that Respondent's 2001 appeal simply repackaged his prior appeals, such that the result was obvious. Adm. Ex. 4 at 10. The record also demonstrates that the Seventh Circuit was aware from the 2001 appeal that Respondent had accused Jenner & Block of engaging in a conflict of interest. Adm. Ex. 4 at 8.

that Respondent did not cause a willful and malicious injury to the Labatt defendants, although Judge Zagel had already found that Respondent had acted willfully, and Judge Zagel's decisions had already been affirmed by the Seventh Circuit, with the U.S. Supreme Court denying Respondent's petition for *certiorari*. R. 88, 374; Adm. Exs. 1, 2, and 6 at 53. Unlike Respondent, Judge Gettleman accepted the final decision in the contempt proceeding and affirmed Judge Squires' rulings that Respondent's debt to the Labatt defendants was non-dischargeable. Adm. Ex. 7 at 7-10, 15.

In 2010, Respondent appealed Judge Gettleman's decision to the Seventh Circuit. Adm. Ex. 8. In that appeal, Respondent was to address whether he caused a willful and malicious injury to the Labatt defendants. Adm. Ex. 8 at 1 (Jurisdictional Statement). Instead, Respondent argued that the defendants and Judge Zagel engaged in improper conduct, that the underlying *Grove Fresh* litigation was unfair, and that the docket in *Grove Fresh* was suppressed. Adm. Ex. 8 at 41-52. In light of the Seventh Circuit's previous and final decision that the seal and protective orders were valid and constitutional, that Respondent clearly violated the seal and protective orders, that Judge Zagel's decisions in the contempt proceeding were sound and reasonable, and that the appellate court had considered Respondent's initial appeal on a complete record, Respondent's 2010 appeal to the Seventh Circuit was a frivolous repackaging of his prior appeals in an effort to relitigate the contempt proceeding. Adm. Exs. 2, 4. The Seventh Circuit thus properly found that Respondent's refusal to accept its prior holdings had wasted the time and resources of his opposing counsel and the courts. Adm. Ex. 9 at 3. In light of the Seventh Circuit's prior holdings, the appellate court also properly found that Respondent could not have believed in good faith that his arguments would be successful. Adm. Ex. 9 at 4.

Respondent's own arguments in his bankruptcy proceeding are not exculpatory and demonstrate that he attempted to use legal procedure to relitigate the contempt proceeding, despite a final decision in the contempt proceeding. The Administrator also reiterates that the Hearing Board had no basis to suggest that Judge Gettleman was distracted by Respondent's extensive description of the Grove Fresh litigation. Adm. Appellee Brief at 26. Both Judge Gettleman and the Seventh Circuit demonstrated in their opinions that they understood the issues. Adm. Exs. 7 at 1, and 9 at 2.

Accordingly, this Board should find that Respondent filed frivolous appeals in 2009 and 2010 in violation of 1990 and 2010 Rules of Professional Conduct 3.1, and that Respondent's conduct was prejudicial to the administration of justice in violation of 1990 and 2010 Rule 8.4(d). This Board should also recommend that Respondent be suspended for six months and until further order of the Court, as the Administrator argues in his Appellee Brief at pages 27-33.

II. Respondent's Unproven Assumptions about the Administrator's Inquiry into His Conduct Do Not Warrant this Board Denying Cross-Relief to the Administrator

Respondent argues that this Board should deny any cross-relief to the Administrator, because Respondent believes that the Administrator did not conduct an objectively reasonable investigation. Resp. Reply Brief at 1. Respondent argues that the Administrator did not interview or depose any witness other than Respondent, and that the Administrator chose not to order a transcript of Respondent's deposition. Resp. Reply Brief at 1-2. Respondent's basis for his assumption that the Administrator spoke to only one witness is the common law record in this matter at pages 832 and 851. Resp. Reply Brief at 1. Those pages do not support Respondent's assumption.

Page 832 is the Administrator's notice to Respondent to appear at his deposition. Page 851 is the first page of the Administrator's response to Respondent's notice to produce. Page 851 shows that, as to Respondent's request to produce any and all statements of witnesses, the Administrator responded:

The Administrator objects to the request as overly broad and burdensome. The Administrator further states that Respondent was afforded the opportunity to review the unprivileged portion of the Administrator's file and request copies of any document that he wanted. Any documents requested by Respondent have been provided to him.

The Administrator's response does not demonstrate that the Administrator spoke to only one witness, or that, for example, the Administrator's litigation counsel had no oral communications with persons other than Respondent.

As to whether or not the Administrator ordered a transcript of Respondent's deposition, Respondent does not support his assertion with a citation to the record in this matter. Regardless, the Administrator is not required to order a transcript of Respondent's deposition. The Administrator also notes that Respondent testified "at great length" at his disciplinary hearing, and that the Hearing Board found much of his testimony to be "extraneous" to the charges properly before the Hearing Board. C. 1116. Apparently, Respondent focused on facts that did not address the issues before the Hearing Board.

Respondent is entitled to voice dissatisfaction with his situation. However, his unproven assumptions about the Administrator's inquiry into his conduct do not warrant this Board denying cross-relief to the Administrator.

III. *Owens I* and *Owens II* Do Not Preclude Consideration of the Judicial Opinions and Orders Related to Respondent's Conduct

Respondent argues that the Administrator's summary of the underlying facts shows that the Administrator did not meet a burden of proof imposed by *Owens I* and *Owens II*. Resp.

Reply Brief at 3-4. The Administrator's summary of the underlying facts states that Respondent's 2009 appeal in his bankruptcy proceeding focused on the fairness of the Grove Fresh litigation, and that his 2010 appeal again attacked the contempt proceedings in *Grove Fresh v. Labatt*. Adm. Appellee Brief at 9-10. Nevertheless, neither *Owens I* nor *Owens II* precludes the Administrator's use and the Hearing and Review Board's consideration of the factual findings and court orders relevant to this disciplinary proceeding. Further, the court opinions of Judges Gettleman, Bauer, Coffey and Ripple as to Respondent's arguments in their courts is relevant, considering that this disciplinary proceeding concerns Respondent's conduct in their courts. As stated in Section I, *supra*, any indication that Judge Gettleman and the Seventh Circuit could not objectively evaluate Respondent's arguments due to their repeatedly reviewing his extensive and mostly extraneous discussion about Grove Fresh is unwarranted, especially as to Judge Gettleman, who only heard one of the three appeals. The Administrator also notes that Judge Squires, who heard the initial bankruptcy proceeding, also found that Respondent sought to relitigate Judge Zagel's rulings in the bankruptcy court. Adm. Ex. 5 at 11-12. Pursuant to *Owens I* and *Owens II*, this Board may consider evidence that purportedly contradicts the judicial opinions in the underlying matters, but this Board is not prohibited from providing some deference to those courts about Respondent's conduct in those courts.

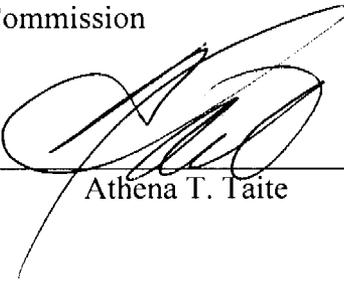
CONCLUSION

For the foregoing reasons and the reasons in the Administrator's Appellee Brief, the Administrator respectfully requests that this Board find that Respondent has engaged in the misconduct alleged in the Administrator's complaint and recommend that Respondent be suspended for six months and until further order of the Court.

Respectfully submitted,

Jerome Larkin, Administrator
Attorney Registration and
Disciplinary Commission

By: _____



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