IN THE
SUPREME COURT OF ILLINOIS

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

RESPONDENT'S PETITION FOR LEAVE TO FILE EXCEPTIONS

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ORAL ARGUMENT REQUESTED

REQUEST FOR LEAVE TO FILE EXCEPTIONS

John P. Messina, Respondent, pursuant to Supreme Court Rule 753(e)(1), petitions this Court for leave to file exceptions to the Report and Recommendation of the Review Board, which affirmed a Hearing Board recommendation that Respondent be suspended from the practice of law for six months and until he completes the ARDC's Professionalism seminar.

Respondent was charged in a one-count, 45-paragraph *Amended Complaint* that described private civil litigation ("the *Grove Fresh* Litigation") spanning 22 years, from 1989 to 2011. The Administrator sought to discipline Respondent for three allegedly frivolous appeals that Respondent had filed, and lost, between 2001 and 2011; those appeals are described in ¶¶26-45 of the *Amended Complaint*. The litigation that led to those appeals took place between 1989 and 1998; it is described in ¶¶2-25 of the *Amended Complaint*.

The narrative in the *Amended Complaint* rests exclusively on the findings in 19 court orders issued by four different federal courts over the course of 22 years. The Administrator's narrative was not informed by any evidence from live witnesses—he did not take a sworn statement from a single witness before he filed the *Amended Complaint*. Nor was his presentation at trial informed by any evidence from live witnesses: He did not depose any witnesses regarding the merits of any of the allegations in the *Amended Complaint*, not even Respondent.

At trial, the Administrator rested his case without calling a single witness. His evidence consisted of 461 pages of documentary exhibits: 138 pages of court orders, and 323 pages of briefs and petitions filed by Respondent in the allegedly frivolous appeals. The Administrator did not move into evidence any of the pleadings, motions or briefs filed by Respondent's adversaries.

Respondent argues that the Administrator failed to meet his burden of proof under *In re Owens*, 125 Ill.2d 390, 401 (1988) ["*Owens I*"], and *In re Owens,* 144 Ill.2d 372 (1991) ("*Owens II"*). Those cases hold that when disciplinary charges are based on findings made by a judge in private civil litigation, the Administrator cannot rely on offensive collateral estoppel to meet his burden of proof because 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 401. Rather, this Court held, a respondent who is charged on the basis of findings made in private civil litigation is "entitled to an evidentiary hearing on the underlying facts of the complaint." *Id.*

REPORTS OF THE HEARING AND REVIEW BOARDS

The Hearing Board filed its report and recommendation on September 9, 2015. (C. 1114). Both Respondent and the Administrator filed exceptions to the Hearing Board's report and recommendation. The Review Board filed its report and recommendation on September 23, 2016.

POINTS RELIED UPON FOR REJECTION OF THE REPORT AND RECOMMENDATION OFTHE REVIEW BOARD

The Administrator failed to present any evidence corroborating any of the contested allegations in the *Amended Complaint*, in derogation of his burden of proof under the *Owens* cases.

STATEMENT OF FACTS

Respondent 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.)

Prior Discipline

In 1998 Respondent was suspended for a technical violation of the rules on segregating client funds. *In Re Messina*, M.R. 14450, 96 CH 611 (1998). The technical violation occurred over a six-day period in December 1993 and involved $2,830.66 in disputed funds. As soon as Respondent discovered the violation he corrected it. (C. 910-11.)

The transaction that created the technical violation was a $5,000 retainer that Respondent paid to Professor Daniel Coquillette, the former Dean at Boston College Law School (1985-93). Currently, Prof. Coquillette is the Charles Warren Visiting Professor of American Legal History at Harvard Law School (2011-12, 2015-present). He is also the J. Donald Monan University Professor of Law at Boston College (1997-present). (C.782)

Respondent retained Prof. Coquillette to render an opinion on the ethics of the Legal Services and Consulting Agreement ("Consulting Agreement") that is referred to in ¶9 of the *Amended Complaint*. Respondent had been required to execute the Consulting Agreement as a condition to settling his client's unfair competition claims. (Resp. Ex. 10-A, pp.17-18n.5.) He signed the Consulting agreement only after the presiding judge threatened that Respondent would be subject to a $2 million malpractice claim if Respondent's client lost the opportunity to settle his claims because of Respondent's objections to the Consulting Agreement. (Adm. Ex. 6, p.40; Adm. Ex. 8, p.28; Resp. Ex. 6B, p.8.) Prof. Coquillette opined that the defendants' demand

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

that Respondent execute the Consulting Agreement, and the judge's endorsement of that demand, violated Rule of Professional Conduct 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 client controversy." (C.1037.)

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

- Respondent had cooperated in the Administrator's investigation, expressed remorse, and had promptly made full restitution once he discovered his error
- Respondent had demonstrated that at the time of the conversion he had substantial assets available to him in another account.
- Respondent had not previously been disciplined by the Court or by a Board of the Commission.
- Attorneys who were familiar with Respondent's reputation for truthfulness and veracity would testify that his reputation for those attributes was excellent.

(C.911.)

The contested allegations

On January 8, 2014, the Administrator filed the original *Complaint* in this case. (C. 12.) He filed an *Amended Complaint* on February 28, 2014, to correct scrivener's errors. (C.34.) The *Amended Complaint* cites findings made in 19 federal court orders and judgments issued over a 21-year period, from May 1990 to October 2011. (*Amended Complaint* ¶¶3, 4, 5, 6, 7, 8, 14, 16, 17, 18, 23, 25, 30, 31, 33, 34, 35, 38, 41, 43.)

Respondent's answer to the *Amended Complaint* denied the material allegations in ¶¶8, 14, 33, 37, 38, 44, and 45. He challenged the accuracy and completeness of the allegations in ¶¶5, 6, 7, 9, 10, 11-12, 16, 18, 20, 25, 29, 42, 43. (C.663-712.)

At trial, the Administrator did not call any witnesses to support the allegations disputed by Respondent's answer. (R.42-43.) Respondent moved for a directed finding at the close of the Administrator's case. (R.43-52.) The Hearing Board denied the motion. (R.53.)

ARGUMENT

The investigation and trial of this case violated due process.

Attorney disciplinary proceedings are quasi-criminal in nature. As such they are subject to the Due Process Clause. *In re Ruffalo*, 390 U.S. 544, 551 (1968). That Clause guarantees a defendant the right to a trial that comports with "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981).[2]

Defining "fundamental fairness" in a particular situation is an "uncertain enterprise." *Lassiter*, 452 U.S. at 24. Because it cannot be precisely defined, courts must discover the meaning of "fundamental fairness" by first considering any relevant precedents and then assessing the interests at stake. *Id.* at 24-25.

In Illinois, when charges against an attorney are based on findings made by a judge in private civil litigation, the relevant precedents are the *Owens* decisions. In those cases the Administrator's charges rested on the factual findings in a civil fraud action. The Administrator sought to truncate the evidentiary hearing by invoking the doctrine of offensive collateral estoppel to bar the respondent from challenging those findings.

This Court rejected the Administrator's arguments for permitting offensive collateral estoppel in such cases, finding that 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 401. Consequently, this Court held, a respondent charged on the basis of findings made in private civil litigation is "entitled to an evidentiary hearing on the underlying facts of the complaint." *Id.*

[2] "Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 651 (1974) (Douglas, J., dissenting).

Here, the Administrator failed to present any witnesses to meet his burden of proving the disputed allegations in the *Amended Complaint*. His failure to do so violated due process.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court grant Respondent's petition for leave to file exceptions. Respondent requests that this Court reject the Review Board's finding that Respondent violated Rule 3.1 when he filed the appeal described in ¶¶32-33 of the *Amended Complaint*.

/s/ John P. Messina

DATED: October 28, 2016

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