IN THE
SUPREME COURT OF ILLINOIS

In the Matter of:	)	
	)	
JOHN PATRICK MESSINA,	)	Supreme Court No. M.R. 28368
	)	
Attorney-Respondent,	)	Commission No. 2014PR00002
	)	
No. 1892622.	)	

ADMINISTRATOR'S ANSWER TO RESPONDENT'S PETITION FOR LEAVE TO FILE EXCEPTIONS

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ORAL ARGUMENT REQUESTED

INTRODUCTION

In this matter, the Review Board affirmed the Hearing Board's findings that Respondent filed a frivolous appeal, in violation of 1990 Illinois Rule of Professional Conduct 3.1, and that Respondent's conduct had been prejudicial to the administration of justice, in violation of 1990 Rule 8.4(a)(5). The Review Board recommended that Respondent be suspended for 60 days and until he completes the ARDC Professionalism Seminar.

In Respondent's petition for leave to file exceptions, he urges this Court to reject the Review Board's finding that he violated 1990 Rule 3.1. Respondent does not argue that the Review Board's finding was against the manifest weight of the evidence. Rather, Respondent argues that the Administrator's investigation and trial of this case violated his right to due process, because the Administrator chose to rely on documentary evidence, rather than witness testimony, to prove the charges against him.

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, hereby asks this Court to deny Respondent's petition for leave to file exceptions. The Administrator has filed his own petition for leave to file exceptions to the Report and Recommendation of the Review Board, asking this Court to enter an order finding that Respondent filed two frivolous appeals in addition to the one frivolous appeal found by the Boards below. The Administrator has also asked this Court to suspend Respondent for six months and until further order of this Court, based on the extent of his misconduct, his utter and complete lack of remorse, and his recidivism. To avoid repeating arguments contained in the Administrator's petition, the Administrator limits this answer to responding to arguments raised in Respondent's petition.

ARGUMENT

I.
RESPONDENT'S RIGHT TO DUE PROCESS WAS NOT VIOLATED AT HIS DISCIPLINARY HEARING, WHERE THE ADMINISTRATOR PRESENTED DOCUMENTARY EVIDENCE ABOUT THE UNDERLYING FACTS, AND RESPONDENT PRESENTED TESTIMONY AND DOCUMENTARY EVIDENCE ABOUT THE UNDERLYING FACTS

Respondent argues in his petition that he had a right to due process or a right to have a disciplinary hearing that comported with fundamental fairness. Resp. Petition at 5. The Administrator agrees that Respondent had a right to due process, which means that Respondent was entitled to fair notice of the charges against him, and that Respondent was afforded an opportunity to be heard. *See, In re Storment*, 203 Ill.2d 378, 786 N.E.2d 963 (2002); *In re Sullivan*, 92 CH 314 (Review Bd. at 8, Feb. 17, 1994), *petition for leave to file exceptions allowed and sanction increased*, M.R. 10124 (May 19, 1994). Respondent received fair notice of the charges against him and does not argue to the contrary. Respondent argues, however, that he did not have a fair opportunity to be heard, despite the fact that he testified at length and filed multiple motions before and after the hearing in this cause, because the Administrator's case in chief relied on the documentary record from the underlying civil appeals at issue. Resp. Petition at 5. Respondent argues that the Administrator's use of documentary evidence amounted to the Administrator's use of offensive collateral estoppel that this Court rejected in *In re Owens*, 144 Ill.2d 372, 581 N.E.2d 372 (1991) (referred to as "*Owens I*"). As shown below, Respondent's argument has no merit.

The Court considered the Owens matter in *Owens I* and in *In re Owens*, 125 Ill.2d 390, 532 N.E.2d 248 (1988) (referred to as "*Owens II*"). In *Owens I* and *Owens II*, this

Court considered the Administrator's charges against brothers Carroll and Gerald Owens. The Owens brothers had been defendants in a civil action in which a trial court had found that they had fraudulently breached their fiduciary duty to former clients and breached a partnership agreement. The Administrator filed a complaint against the Owens brothers, based on the civil judgment against them. At the disciplinary hearing, the Hearing Board considered the civil judgment to be conclusive evidence of the brothers' fraudulent conduct and permitted them to present only extenuating and mitigating evidence. The Hearing Board later issued a report finding misconduct, and the Review Board adopted the Hearing Board's report. The Owens brothers filed exceptions. This Court decided in *Owens I*, 144 Ill.2d at 401, not to allow the offensive use of collateral estoppel in a disciplinary proceeding to findings in a civil action, and that the Owens brothers were entitled to an evidentiary hearing on the underlying facts of the complaint. This Court thus remanded the Owens matter to the Hearing Board for further proceedings. *Owens I*, 144 Ill.2d at 402.

On remand, the Hearing Board considered testimony and documentary evidence about the underlying facts, and the Hearing Board found that the Owens brothers had engaged in misconduct. The documentary evidence included the civil judgment against the Owens brothers. The Review Board considered whether the Hearing Board was prohibited from considering the findings and judgment of the civil trial court. The Review Board found that *Owens I* did not prohibit the Hearing Board from taking judicial notice of the civil court findings and judgment. *In re Owens*, 86 SH 71 (Review Bd. at 4, Aug. 14, 1990). In *Owens II*, 144 Ill.2d at 378-79, this Court affirmed the Review Board's finding:

> We did not, however, 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.

In the present matter, dissimilar to the circumstances in *Owens I*, the Administrator did not attempt to rely on offensive collateral estoppel to prove the charges against Respondent. The Administrator's complaint charged Respondent with filing three frivolous appeals and engaging in conduct that was prejudicial to the administration of justice. C. 36-45. At hearing, the Hearing Board received the Administrator's exhibits into evidence, without objection from Respondent. R. 10. The exhibits included the opinions and orders that Respondent appealed. *See* Adm. Exs. 1-2. The exhibits also included Respondent's appellate briefs, in which Respondent presented his arguments and the reasons behind them. *See* Adm. Exs. 3, 6, 8. Those exhibits allowed the Hearing Board to assess whether, as the reviewing federal courts held, Respondent wasted the time and resources of the judiciary and his opposing counsel by pursuing frivolous appeals. R.B. at 16. Respondent also presented testimony and documentary evidence. H.B. at 3 (C. 1116). Additionally, similar to the circumstances in *Owens II*, the Administrator's exhibits included opinions and orders that Respondent had filed appeals that were frivolous, and the Hearing Board took notice of those findings. *See* Adm. Exs. 4, 7, 9. It was not a violation of Respondent's right to due process that a component of the Hearing Board's decision was opinions and orders that Respondent filed frivolous appeals. Adm. Ex. 9 at 4.

Respondent also argues that his right to due process was violated because the Administrator did not present witness testimony at hearing. Resp. Petition at 6. In his

petition, Respondent does not explain who the Administrator should have been required to present, and he cites no authority for his contention that the Administrator cannot prove a disciplinary charge without witness testimony.

Supreme Court Rule 753(e)(3)(e) requires the arguments in a petition for leave to file exceptions to include "appropriate authorities." In this regard, it is identical to Supreme Court Rule 315(b)(5), which requires arguments in petitions for leave to appeal to include "appropriate authorities," and similar to Supreme Court Rule 341(e)(7), which requires arguments in appellate briefs to include "citation to authorities." Courts have long construed the latter two rules to require cogent legal argument with citation to authorities, with noncompliance resulting in waiver. *See e.g., People v. Lantz*, 186 Ill. 2d 243, 262, 712 N.E.2d 314 (1999) (point summarily raised in petition for leave to appeal was waived for lack of citation to authority); *McCarthy v. Denkovski*, 301 Ill. App. 3d 69, 75, 703 N.E.2d 408 (1st Dist. 1998) ("A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and coherent arguments presented; arguments inadequately presented on appeal are waived."); *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515 (4th Dist. 2001) ("'A reviewing court . . . is not simply a depository into which the appealing party may dump the burden of argument and research.'"), *quoting People v. Hood*, 210 Ill. App. 3d 743, 746, 569 N.E.2d 228 (4th Dist. 1991); *In re Estate of Divine*, 263 Ill. App. 3d 799, 810, 635 N.E.2d 581 (1st Dist. 1994) ("It is an elementary rule of appellate practice that an appellant may not make a point merely by stating it without presenting arguments in support of it."). *See also*, Supreme Court Rule 341(h)(7) (points not argued in an appellate brief are waived). In

the present matter, Respondent's unsupported conclusions about witness testimony in disciplinary proceedings should be deemed waived.

Nevertheless, the Administrator argues that the Hearing Board did not require the testimony of an expert witness to determine whether Respondent's filing of the frivolous appeals was inconsistent with the Illinois Rules of Professional Conduct. The Administrator notes that this Court has disciplined attorneys whose conduct the Hearing Board found in violation of Rule 3.1, notwithstanding the absence of testimony from an expert. *See e.g., In re Dore*, 07 CH 122, M.R. 24566 (Sept. 20, 2011). *See also, In re Masters*, 91 Ill.2d 413, 425, 438 N.E.2d 187 (1982) (standards of ethical conduct pertinent to disciplinary proceedings are not an appropriate subject of expert testimony); *In re Sarelas*, 50 Ill.2d 87, 97, 277 N.E.2d 313 (1971) (attorney's contention that there was no evidence against him was groundless, even though no oral testimony was elicited). Additionally, Respondent was permitted to present witnesses, and he did so. R. 66, 78, 101. Respondent's right to due process was not violated because the Administrator relied on documentary evidence, rather than witness testimony.[1]

II.
RESPONDENT'S MISCONDUCT WARRANTS HIS SUSPENSION FOR SIX MONTHS AND UNTIL FURTHER ORDER OF THIS COURT

Respondent should be suspended for six months and until further order of this Court, in light of aggravating factors, as the Administrator argues in his petition for leave to file exceptions. Adm. Petition at 32-37. One of the aggravating factors is

[1]Respondent states in his petition at page 1 that the Administrator did not take the sworn statement of any witness during the Administrator's investigation or during discovery. To the extent that Respondent asserts that the Administrator did not speak with witnesses, his assertion is baseless.

Respondent's prior suspension for commingling and conversion. H.B. at 27, 29 (C. 1140, 1142); *see also In re Messina*, 96 CH 611, *discipline on consent allowed*, M.R. 14450 (March 23, 1998). Although the nature of Respondent's prior misconduct is dissimilar to his present misconduct, the Hearing Board found that Respondent's prior discipline should have resulted in his heightened awareness of his professional obligations. H.B. at 29 (C. 1142). However, in his petition, Respondent erroneously diminishes his prior misconduct as a technical violation of the 1990 Rules of Professional Conduct.

This Court has declined to label a violation of the rules as a technical violation, unless the record suggests that the violation was a simple oversight. *In re Storment*, 203 Ill.2d 378, 398, 786 N.E.2d 963 (2002). Respondent's prior misconduct, for which he was suspended for 30 days, was not a simple oversight. He and a client had disagreed on the amount of his compensation. During their dispute, Respondent received $23,000 in settlement funds related to the client's matter. The client claimed an interest in $16,975 of the settlement funds. Instead of depositing the disputed amount into a separate, identifiable account, Respondent, who had closed his client trust account, deposited the entire $23,000 into his own business checking account. About five months later, Respondent's business checking account fell to $14,144.34, which was $2,830.66 below the amount of settlement funds in which the client claimed an interest. *Messina* (Hrg. Bd. Transcript at 15). About one week later, Respondent repaid the converted funds to his business checking account. Only then did he put the disputed funds into a trust account. At the very least, Respondent's deposit of disputed funds into his business checking account was not a simple oversight. Respondent had previously maintained a client trust account and knew that he had to segregate funds in which a client or third party claimed

an interest. *Messina* (Hrg. Bd. Transcript at 15). He also had an obligation to maintain those funds until he and the client resolved their dispute. 1990 Illinois Rule of Professional Conduct 1.15(c).

However, in his petition, Respondent refers to his misconduct as nothing more than a technical violation. Resp. Petition at 3.[2] He also links his prior misconduct to events in the Grove Fresh litigation that is the subject of the frivolous appeals at issue in the instant matter, stating that his conversion of client funds was due to his paying a law school professor to render an opinion about a consulting agreement related to the Grove Fresh litigation. Resp. Petition at 3-4. Respondent then describes the law school professor's opinion. Resp. Petition at 3-4. Respondent's discussion of the law school professor's opinion is not relevant, except to continue Respondent's criticism of Judge Zagel and Respondent's opposing counsel in the Grove Fresh litigation. Respondent has repeatedly used these disciplinary proceedings to argue about the Grove Fresh litigation, and he has not restrained himself despite admonitions by the Hearing and Review Boards. H.B. at 3, 29-30, 32-33 (C. 1116, 1142-43, 1145-46); R.B. at 24. As the Administrator argues in his petition, Respondent has not demonstrated that he has learned from his recent misconduct, and his misconduct warrants a suspension of six months and until further order of this Court. Adm. Petition at 32-37.

[2]Respondent also states that, in the petition for discipline on consent in his prior disciplinary matter, he and the Administrator stipulated that he "promptly made full restitution once he discovered his error." Resp. Petition at 4. The petition does not contain such a stipulation. The petition indicates that Respondent repaid his business checking account before receiving the client's complaint to ARDC, and that Respondent later resolved his dispute with the client. *Messina* (Petition at ¶¶9-10).

CONCLUSION

For the foregoing reasons and the reasons in the Administrator's petition for leave to file exceptions in this matter, the Administrator respectfully requests that this Court grant the Administrator's petition for leave to file exceptions, deny Respondent's petition for leave to file exceptions, and enter an order finding that Respondent violated 1990 Rules 3.1 and 8.4(a)(5) in his appeals in his bankruptcy matter, and suspending Respondent for six months and until further order of this Court.

Respectfully submitted,

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