BEFORE THE HEARING BOARD OF THE
ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

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

AMENDED ANSWER, COUNTERCLAIMS AND AFFIRMATIVE DEFENSE TO THE FIRST AMENDED COMPLAINT

Respondent, John Patrick Messina ("Mr. Messina"), for his Answer to the First Amended Complaint, states as follows:

Answer to the First Amended Complaint

Complaint ¶1. At all times alleged in this complaint, Respondent owned and operated a sole proprietorship known as "The Law Office of John P. Messina," which was located at 541 North Cuyler Avenue in Oak Park.

Answer: Admitted, except that Mr. Messina affirmatively states that:

- From 1988 through mid-1993, his office was located at 135 South LaSalle Street, Chicago.
- From mid-1993 through 1996 his office was located at 70 West Madison Street, Chicago.
- Since about 1996, his office has been located at 541 North Cuyler Avenue, Oak Park.

Complaint ¶2. Beginning in July of 1989, Respondent agreed to serve as local counsel for Grove Fresh Distributors ("Grove Fresh"), a citrus distribution company, in its dispute with several competitors. During the period of time that Respondent represented Grove Fresh, at least two lawsuits were filed and pending on its behalf in the United States District Court, Northern District of Illinois.

Answer: Admitted, except that Mr. Messina denies that Grove Fresh was merely a "citrus distribution company;" Grove Fresh distributed a wide range of food products.

Complaint ¶3. A lawsuit that had been filed February 10, 1989, alleged unfair competition, and was captioned as *Grove Fresh Distributors, Inc. v. Everfresh Juice Company, et al.*, docket number 89 CV 01113. On August 24, 1990, the Honorable James B. Zagel entered a protective order in case number 89 CV 01113 that limited Grove Fresh's ability to disclose

information obtained from the defendants through the discovery process that the defendants classified as confidential.

Answer: Admitted, except that Mr. Messina denies that the 89 CV 1113 protective order was entered on August 24, 1990; it was entered in June 1990, *nunc pro tunc* to May 25, 1990.

Complaint ¶4. A second lawsuit, filed on or around August 24, 1990, alleged a conspiracy to sell adulterated juice and to violate RICO by selling mislabeled products. That matter was captioned as *Grove Fresh Distributors, Inc. v. John Labatt Limited, et al.*, docket number 90 CV 5009. Pursuant to an order entered by the Honorable James B. Zagel, case number 90 CV 5009 was filed under seal.

Answer: Admitted, except that Mr. Messina affirmatively states that the 90 CV 5009 case was filed on August 28, 1990, not August 24, 1990.

Complaint ¶5. On May 1, 1991, Judge Zagel signed a stipulated protective order in case number 90 CV 5009 to protect against disclosure of confidential or proprietary information and to facilitate discovery between the parties. By agreeing to the protective order, Respondent agreed that confidential information would be used for only the preparation of trial in case number 90 CV 5009, and for no other purpose, except as required by the law or court process.

Answer: Admitted. Mr. Messina affirmatively states that the 90 CV 5009 protective order was not a gag order, nor did it automatically authorize or require the sealing of court papers that referred to the contents of allegedly confidential documents.

Complaint ¶6. On October 9, 1991, journalists seeking to have the seal order lifted in case number 90 CV 5009 filed a motion to vacate the seal. Shortly thereafter, Judge Zagel denied the request to lift the seal.

Answer: Mr. Messina admits that journalists moved to intervene in 90 CV 5009 and asked Judge Zagel to vacate the seal order, and that Judge Zagel granted them leave to intervene. Mr. Messina denies that Judge Zagel issued his ruling "[s]hortly thereafter"—he issued it fourteen months later, on November 22, 1992.

Mr. Messina affirmatively states that the 1992 order denying the journalists' claims omitted to disclose the grounds for sealing 90 CV 5009 that Judge Zagel would disclose three years later when he issued the contempt order, thereby depriving Mr. Messina of a timely opportunity to appeal those grounds.

Complaint ¶7. On February 21, 1992, case number 89 CV 01113 was dismissed on the defendants' motion for summary judgment.

Answer: Admitted. Mr. Messina affirmatively states that Judge Zagel rested his ruling on a ground that had not been litigated by the parties, thereby depriving Grove Fresh of notice and a timely opportunity to be heard on the purported reason for the adverse ruling. *See* Ex. 14 ¶¶37-45.

Complaint ¶8. On January 21, 1993, Grove Fresh terminated Respondent's involvement in their legal matters.

Answer: Denied.

Complaint ¶9. On April 29, 1993, case number 90 CV 5009 was dismissed after the parties entered into a confidential settlement agreement. As a condition of the settlement, Respondent signed a consulting agreement that prohibited Respondent from disclosing information or documents related to the defendants' business.

Answer: Admitted. Mr. Messina affirmatively states that the consulting agreement's secrecy covenant was void and unenforceable because it was a compounding agreement that violated Illinois public policy. *See In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988) (disciplining lawyer for making a compounding agreement protecting another lawyer).

Complaint ¶10. On June 1, 1993, the journalists renewed their motion to vacate the seal in case number 90 CV 5009. After Judge Zagel denied the motion to vacate the seal, the journalist filed an appeal before the United States Court of Appeals, for the Seventh Circuit ("Court of Appeals").

Answer: Admitted, but Mr. Messina affirmatively states that the Administrator has omitted from his complaint the material fact that the journalists filed their *initial* notice of appeal on December 14, 1992, and then filed their initial brief on the merits of their appeal on January 4, 1993.

The Administrator has also omitted from his complaint any mention of the complex procedural history that unfolded between January 4 and June 1, 1993, during which time Judge Zagel interfered with the clerk of court's duty to create an official record for the appeal.

Complaint ¶11. On July 14, 1993, attorneys for the defendants in the Grove Fresh litigation filed a brief in opposition of the appeal, referred to in paragraph ten, above.

Answer: Admitted. Mr. Messina affirmatively states that the defendants' brief falsely and recklessly charged Grove Fresh and Mr. Messina with misconduct, imputing to Mr. Messina the crime of intimidation, a class three felony, and 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.

Complaint ¶12. On August 5, 1993, Respondent sent letters to the defendants in the Grove Fresh litigation and their attorneys rescinding the consulting agreement, referred to in paragraph nine, above.

Answer: Admitted. Mr. Messina affirmatively states that one of the letters that he sent to the defendants on August 5, 1993, was a copy of his letter to the ARDC complaining about the false Misconduct Charges alleged in the Seventh Circuit brief referred to above in paragraph 11 of the complaint. (*See* Ex. 6.)

Complaint ¶13. On or around August 20, 1993, the defendants in case number 90 CV 5009 filed a motion to enforce the settlement agreement or relief from judgment, referred to in paragraph nine, above.

Answer: Admitted.

Complaint ¶14. Shortly thereafter, Judge Zagel scheduled the motion referred to in paragraph 13, above, to be heard on September 1, 1993, and ordered Respondent, or Respondent's legal representative to appear before him at that time. Respondent learned of the order requiring him or his legal representative to appear shortly after it had been entered. At the request of Respondent's attorney, the September 1, 1993 court date was vacated and was to be rescheduled at a later date.

Answer: Denied. Mr. Messina affirmatively states that:

(a) The defendants presented their Rule 60(b) Motion on August 24, 1993, whereupon Judge Zagel orally scheduled a hearing for noon on September 1, 1993.

(b) Judge Zagel never issued a written scheduling order.

(c) Due to a scheduling conflict Mr. Messina's attorney called chambers to reschedule the September 1st hearing. The judge's secretary stated that no hearing had been scheduled. She agreed to call Mr. Messina's attorney if an order ever issued, but she never called, and neither Mr. Messina nor his attorney ever received any order to appear in court on any particular day.

Complaint ¶15. On October 12, 1993, the attorneys for the defendants re-noticed the motion referred to in paragraph 13, above, to be heard on October 21, 1993. Respondent received a copy of the notice shortly after it had been filed.

Answer: Admitted.

Complaint ¶16. On October 21, 1993, Respondent did not appear before Judge Zagel. As a result of Respondent's failure to appear, Judge Zagel issued a rule to show cause why Respondent should not be held in contempt.

Answer: Admitted. Mr. Messina affirmatively states that the Rule to Show Cause, which was drafted by defense counsel, falsely stated that "the parties appeared before the Court on…September 1, 1993" and that the court on that date "ordered that John P. Messina be present in court at the next hearing." In fact, there was no hearing on September 1, and no order issued on that date or on any other date prior to October 21.

Complaint ¶17. On October 22, 1993, Respondent filed a motion before the Court of Appeals seeking to respond to allegations of misconduct made against him in the brief referred to in paragraph 11, above. In the motion, Respondent revealed information that had been subject to the seal and protective orders, including the confidential amount paid in the settlement, names of individuals involved who had invoked the Fifth Amendment during questioning, and other confidential information that he acquired through discovery. Respondent also held himself out to be the attorney for Grove Fresh, despite the fact that he had been terminated on January 21, 1993.

Answer: Mr. Messina admits that:

- On October 22, 1993, he filed a motion in the Seventh Circuit styled as *Motion Of John P. Messina For A Hearing Regarding Allegations Of Misconduct In Appellees' Brief Of July 14, 1993, And For Other Relief ("Fed. R. App. P. 46(c) Motion")*, a copy of which is attached as Ex. 17.
- 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.

Except as expressly admitted, Mr. Messina denies the allegations of paragraph 17 and each of them. Mr. Messina affirmatively states that R.P.C. 1.6(3) authorized him to disclose any allegedly confidential information tending to rebut the defendants' false and reckless charges.

Complaint ¶18. On November 9, 1993, the Court of Appeals issued an order striking Respondent's motion, referred to in paragraph 17, above, and ordered that Respondent show cause why he should not be sanctioned for filing a frivolous motion. The court dismissed the rule to show cause at a later date.

Answer: Admitted. Mr. Messina affirmatively states that his *Fed. R. App. P. 46(c) Motion* was meritorious because he ultimately received all of the relief sought by that motion.

Complaint ¶19. On November 9, 1993, attorneys representing the defendants in case number 90 CV 5009 petitioned the district court for a finding of contempt and sanctions, alleging that Respondent violated the court's seal order by revealing protected information in his motion filed before the Court of Appeals, referred to in paragraph, 17, above.

Answer: Admitted.

Complaint ¶20. On September 20, 1994, Respondent sent a letter to John Elson, an attorney who was assisting the journalists with efforts to lift the seal orders in the Grove Fresh litigation, regarding the pending litigation.

Answer: Admitted. Mr. Messina affirmatively states that the letter to Mr. Elson was authorized by R.P.C. 1.2(d) as a good faith effort to determine the validity and scope of the seal order.

Complaint ¶21. In October, 1994, attorneys representing the defendants filed a supplemental petition in case number 90 CV 5009, requesting that Respondent be held in contempt, alleging that Respondent's letter, referred to in paragraph 20, above, violated the seal order.

Answer: Admitted.

Complaint ¶22. On February 3, 1995, Judge Zagel held a hearing and Respondent had an opportunity to respond the charges of misconduct, including allegations that he had made disclosures that violated the protective order and seal order of [sic] in case number 90 CV 5009, held himself out to be Grove Fresh's attorney after he had been terminated, and failed to comply with a court order to appear in court to address a motion filed on behalf of the defendants.

Answer: Mr. Messina admits that on February 3, 1995, Judge Zagel held a hearing on the contempt petitions. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 22 and each of them.

Complaint ¶23. On June 9, 1995, Judge Zagel held Respondent in contempt of court in case number 90 CV 5009 for willfully and knowingly violating protective orders by disclosing confidential information, including the information referred to in paragraph 17, above, and for refusing to appear in court, as ordered. Judge Zagel also sanctioned Respondent for holding himself out as counsel for Grove Fresh after he had been discharged; filing a

brief even though he was not a party to the action, did not represent a party to the action and lacked an adverse judgment to appeal. Judge Zagel ordered Respondent to pay attorneys' fees and costs totaling $149,554.45 and to post a $50,000 bond to protect against what the judge considered to be the "significant risk of repetition of future disclosures."

Answer: Mr. Messina admits that on June 9, 1995, Judge Zagel issued an order citing him for civil and criminal contempt of court, ordering him to pay the defendants' attorneys' fees and costs, and requiring him to post a $50,000 cash bond. He also admits that Judge Zagel awarded the defendants $149,554.45 as attorneys' fees and costs, but that the award was made on February 7, 1997, not on June 9, 1995. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 23 and each of them.

Mr. Messina affirmatively states that in or about August 1995, Judge Zagel vacated the criminal contempt findings.

Complaint ¶24. In or around July, 1995, Respondent appealed Judge Zagel's ruling in case number 90 CV 5009, referred to in paragraph 23, above, to the Court of Appeals.

Answer: Mr. Messina admits that he filed a protective notice of appeal in July 1995, but he affirmatively states that the Seventh Circuit stayed that appeal pending the entry of a final judgment, on February 7, 1997. Mr. Messina filed a notice of appeal from that final judgment on February 26, 1997.

Complaint ¶25. On February 5, 1998, the Court of Appeals, in an unpublished opinion, affirmed Judge Zagel's ruling, described to in paragraph 23, above.

Answer: Admitted. Mr. Messina affirmatively states that his representation on appeal was materially tainted by a conflict of interest that went undisclosed until after the appeal had been lost.

Complaint ¶26. On September 22, 1999, Respondent, through attorney Stuart D. Cohen, caused to be filed in the United States Bankruptcy Court, Northern District of Illinois, a petition for Chapter 11 bankruptcy protection on behalf of the Law Office of John P. Messina seeking to discharge debt that included the contempt judgment referred to in paragraph 23, above. The matter was captioned as *In re The Law Office of John P. Messina*, case number 99-29371.

Answer: Admitted.

Complaint ¶27. On December 23, 1999, attorneys for John Labatt, Ltd. and American Citrus Products Corp, defendants in the Grove Fresh litigation, filed an adversary proceeding against Respondent in bankruptcy case number 99-29371, seeking a declaration that the contempt judgment, referred to in paragraph 23, above, was not dischargeable. The adversary proceeding was captioned as *American Citrus Products Corporation et al v. John Messina*, case number 99 A 1573.

Answer: Admitted.

Complaint ¶28. Shortly thereafter, Respondent filed an affidavit in bankruptcy adversary proceeding case number 99 A 1573 disclosing, in violation of the protective order, the name of a witness who had asserted the Fifth Amendment in case number 90 CV 5009.

Answer: Mr. Messina admits that in or about February 2000, he filed an affidavit in bankruptcy court in which he disclosed that a witness had invoked his fifth amendment privilege against self-incrimination. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 28 and each of them.

Complaint ¶29. On May 16, 2000, attorneys for the John Labatt, LTD. and American Citrus Products Corp., defendants in 90 CV 5009, filed a petition in the United States District Court, Northern District of Illinois, in case number 90 CV 5009 asking that Respondent again be held in contempt for disclosure of the witness, as described in paragraph 28, above.

Answer: Admitted. Mr. Messina affirmatively states that the disclosure was not barred by any protective order or by the seal order.

Complaint ¶30. On June 8, 2000, Judge Zagel issued a second contempt order against Respondent in case number 90 CV 5009 for disclosing confidential information and fined him $7,500.

Answer: Mr. Messina admits that paragraph 30 describes an order issued by Judge Zagel on June 8, 2000. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 30 and each of them.

Complaint ¶31. In June, 2000, Respondent filed a motion to vacate the June 9, 1995 contempt order, referred to in paragraph 23, above. Respondent also moved for the recusal of Judge Zagel, alleging bias on the part of Judge Zagel. Shortly thereafter, the district court entered an order denying both motions.

Answer: Mr. Messina admits the allegations in the first and second sentences of paragraph 31 and admits that Judge Zagel denied the motions in or about November 2000.

Complaint ¶32. On or around July 9, 2001, Respondent filed an appeal before the Court of Appeals challenging the orders referred to in paragraph 31, above. The matter was captioned as *Grove Fresh Distributors, Inc., v. John Labatt, Ltd. And American Citrus Products., Appeal of John Messina,* case numbers 01-2799 and 01-3024.

Answer: Admitted.

Complaint ¶33. On August 5, 2002, the Court of Appeals entered an order affirming the district court's rulings, referred to in paragraph 31, above. The Court of Appeals also sanctioned Respondent for filing a frivolous appeal and ordered him to pay $1,500, finding that:

> We agree with appellees that this appeal is simply Messina's attempt to repackage his prior appeals. Given that Messina's claims have been unsuccessfully litigated numerous times in both this Court and in the district court, Messina could not have believed in good faith that he might be successful this time around.
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> ***
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> In his previous appeal, we warned that any future abuse of the legal system would result in sanctions. Messina failed to heed this warning. Because we have previously affirmed Judge Zagel's rulings against Messina, his latest attempt to manipulate the legal system can only be characterized as frivolous.

Answer: Mr. Messina admits the allegations in the first sentence of paragraph 33. He also admits that: (a) the Court of Appeals sanctioned him and ordered him to pay the defendants $1500, and (b) the Administrator has accurately quoted from the Court of Appeals' opinion. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 33 and each of them.

Complaint ¶34. On March 27, 2000, Judge Squires entered an order in bankruptcy adversary case number 99 A 1583, finding that the contempt judgment referred to in paragraph 23, above, could not be discharged through bankruptcy.

Answer: Admitted.

Complaint ¶35. Between March 27, 2000 and December 18, 2008, bankruptcy case number 99-29371 was pending in court. On December 18,

2008, the trustee filed his final report in bankruptcy case number 99-29371. On January 26, 2009, Judge Squires entered an order approving the trustee's final report.

Answer: Admitted.

Complaint ¶36. On January 26, 2009, Respondent appealed Judge Squires' rulings relating to bankruptcy case number 99-29371, including the decision that the contempt judgment was not dischargeable, and the order approving the trustee's final report to the United States District Court, for the Northern District of Illinois, Eastern District. The matter was captioned as *John P. Messina, d/b/a The Law Offices of John P. Messina*, case number 09 C 1739.

Answer: Admitted, except that Mr. Messina affirmatively states that he filed his notice of appeal on February 6, 2009, and not on January 26, 2009.

Complaint ¶37. On September 17, 2009, attorneys for the defendants in the Grove Fresh litigation filed a motion for sanctions and for an order to prevent future misconduct by Respondent, alleging that he continued to abuse the litigation process by filing a frivolous appeal of the bankruptcy court's decision that the contempt judgment was not dischargeable.

Answer: Mr. Messina admits that paragraph 37 describes a motion filed on September 17, 2009, by the attorneys for the defendants in the Grove Fresh litigation. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 37 and each of them.

Complaint ¶38. On August 20, 2010, the Honorable Robert W. Gettleman issued a memorandum opinion and order affirming Judge Squires' rulings in case number 99-29371. At that time, Judge Gettleman also granted the motion referred to in paragraph 37, above, finding that Respondent violated Rule 11 of the Federal Rules of Civil Procedure by presenting to the court pleadings for the improper purpose of attempting to re-litigate issues not before the court, causing unnecessary delay, needlessly increasing the cost of litigation, and filing pleadings containing frivolous arguments, and violated 28 U.S.C. section 1927, by unnecessarily protracting litigation. Judge Gettleman ordered Respondent to pay the defendant's attorney's fees and costs incurred in connection with the appeal.

Answer: Mr. Messina admits that paragraph 38 summarizes rulings the Honorable Robert W. Gettleman issued on August 20, 2010. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 38 and each of them.

Complaint ¶39. On September 24, 2010, Respondent appealed Judge Gettleman's order, described to in paragraph 38, above to the Court of Appeals. The matter was captioned as *In re John P. Messina, doing business as The Law Office of John P. Messina*, case number 10-3240.

Answer: Admitted.

Complaint ¶40. On December 22, 2010, Respondent filed his brief in case number 10-3240. In his brief, Respondent attacked the contempt orders that had been entered against him in case number 90 CV 5009 by making arguments that included accusations that opposing counsel falsely accused him unethical and criminal conduct. Respondent also contested the validity of the original protective order in the Grove Fresh litigation.

Answer: Mr. Messina admits that on December 22, 2010, he filed his brief in case number 10-3240, and that the contents of the brief speak for themselves. Except as expressly admitted, Mr. Messina denies the allegations of paragraph 40 and each of them.

Complaint ¶41. On May 24, 2011, the Court of Appeals, entered an opinion affirming the decision referred to in paragraph 38, above and also finding that Respondent's appeal was frivolous. The Court of Appeals issued a rule to show cause to Respondent, stating:

> Like the redundant appeal before it, this appeal is patently frivolous. We rejected all of Messina's arguments at least once before, and he could not have believed in good faith that his arguments would be successful this time around. We order Messina to show cause why he should not pay double attorneys' fees and costs associated with this appeal, pursuant to Rule 38 of the Federal Rules of Appellate Procedure. We also order Messina to show cause why he should not be suspended or disbarred pursuant to Rule 46(b) of the Federal Rules of Appellate Procedure. Finally, given Messina's blatant disregard of this court's or the district court's warnings, contempt findings, and sanctions, we caution Messina that another frivolous appeal will warrant an injunction against future litigation between these parties. Messina's litigation crusade must end; whether it ends voluntarily or by order of court is entirely within his control.

Answer: Mr. Messina admits that on May 24, 2011, the Court of Appeals, entered an opinion affirming the decision referred to in paragraph 38, above and also finding that Mr. Messina's appeal was frivolous. Mr. Messina also admits that the Administrator has accurately quoted a portion of the rule to show cause. Except as expressly admitted, Mr. Messina denies the allegations in paragraph 41 and each of them.

Complaint ¶42. Pursuant to the court opinion referred to in paragraph 41, above, Respondent's response to the rule to show cause was due by June 24, 2011. At Respondent's request, the court extended Respondent's time to respond to the rule to show cause to July 8, 2011.

Answer: Admitted. Mr. Messina affirmatively states that on June 7, 2011, he filed a petition for rehearing, which remained pending for 146 days before the Seventh Circuit denied it on October 31, 2011. Mr. Messina had a good-faith belief that his response to the rule to show cause was stayed pending a resolution of his petition for rehearing. *See* Ex. 13, ¶¶3-8.

Complaint ¶43. As of October 28, 2011, Respondent had not responded to the rule to show cause. On October 28, 2011, the Court of Appeals in case number 10-3240 ordered that Respondent pay double attorneys' fees associated with the appeal referred to in paragraph 39, above. The court further ordered Respondent's name stricken from the roll of attorneys admitted to practice before it.

Answer: Admitted. Mr. Messina affirmatively states that on November 14, 2011, he filed a motion to vacate the sanctions order (Ex. 13), supported by a 62-page Declaration Under Penalty of Perjury (Ex. 14).

Complaint ¶44. By reason of the conduct described above that occurred before January 1, 2010 Respondent has engaged in the following misconduct:

a. filing appeals on July 9, 2001 and September 17, 2009 in federal court without a basis in law or fact, and therefore, frivolous, in violation of Rule 3.1 of the Illinois Rules of Professional Conduct (1990); and

b. engaging in conduct that is prejudicial to the administration of justice by virtue of his violation of the seal and protective orders and his filing of frivolous appeals, in violation of Rule 8.4(5) of the Illinois Rules of Professional Conduct (1990)

Answer: Denied.

Complaint ¶45. By reason of the conduct described above that occurred after January 1, 2010 Respondent has engaged in the following misconduct:

a. filing an appeal on September 24, 2010 in federal court without a basis in law or fact, and therefore frivolous, in violation of Rule 3.1 of the Illinois Rules of Professional Conduct (2010); and

b. engaging in conduct that is prejudicial to the administration of justice, in violation of Rule 8.4(d) of the Illinois Rules of Professional Conduct (2010)

Answer: Denied.

AFFIRMATIVE DEFENSE

Mr. Messina, for his Affirmative Defense to the First Amended Complaint, states as follows:

(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 Mr. 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).

The facts that support this Affirmative Defense are the subject of Mr. Messina's Counterclaims for Declaratory Judgments, which follow.

COUNTERCLAIMS FOR DECLARATORY JUDGMENTS

Mr. Messina, for his Counterclaims for Declaratory Judgments, states as follows:

A. Introduction.

Exhibits

1. On or about April 16, 2014, Mr. Messina filed his original answer and affirmative defenses, along with an appendix of 17 exhibits. That appendix of exhibits is hereby incorporated by reference into these counterclaims for declaratory judgments.

Mr. Messina's antagonists

2. Mr. Messina's antagonists in the litigation underlying this disciplinary case included four orange juice firms owned or controlled John Labatt Ltd. ("Labatt") and American Citrus Products Corp. ("American Citrus"). Labatt and American Citrus are sometimes referred to collectively as the "Labatt Judgment Creditors."

The Contempt Order

3. The key judicial event in this disciplinary case is a 60-page *Memorandum Opinion and Order Including Findings of Fact and Conclusions of Law* dated June 9, 1995 ("Contempt Order"), issued by Hon. James B. Zagel and 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 acerbic commentary on Mr. 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)

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

> (a) Judge Zagel enjoined Mr. Messina from representing consumers in state court class action suits against the Labatt Judgment Creditors, on the ground that Mr. Messina was not fit to serve as class counsel. Judge Zagel made this finding and issued this injunction on his own motion, without affording Mr. Messina any prior notice or opportunity to be heard.
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> (b) For a period of five years, Judge Zagel enjoined Mr. Messina from discussing with anyone the evidence Mr. 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 Mr. 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 Mr. 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.

The 1998 Investigation by an ARDC Inquiry Panel

5. If accepted as true, the Contempt Order's 60-pages of findings cast doubt on Mr. Messina's character and fitness to practice law. In 1998 an ARDC Inquiry Panel examined those findings. After a six-month investigation the Panel voted not to issue a complaint, accepting Mr. Messina's argument that the proceedings underlying the Contempt Order, and his appeal therefrom, were so lacking in notice and opportunities to be heard as to constitute a deprivation of due process.

The federal court decisions and sanctions post-1998

6. In the federal court and bankruptcy court proceedings referred to in ¶¶23, 25, 31, 33, 34, 38, 41, and 43 of the Administrator's First Amended Complaint, Mr. Messina presented the due process arguments that he had presented to the 1998 Inquiry Panel. All of those courts refused to consider the merits of these arguments.

7. The orders referred to in ¶¶30, 33, 38, 41, and 43 of the Administrator's First Amended Complaint sanctioned Mr. Messina for presenting in those federal forums the due process arguments Mr. Messina had presented to the ARDC's 1998 Inquiry Panel.

The Analytics Underlying the Affirmative Defense

8. The analytics for Mr. Messina's affirmative defense come from four sources:

(a) Benjamin Cardozo, "Law and Literature" in *Selected Writings* 338-428 (1947) ["*Law and Literature*"]. Cardozo served on the New York Court of Appeals from 1914-32 and on the United States Supreme Court from 1932-38.

(b) Richard A. Posner, *Cardozo: A Study in Reputation*, chs. 3, 6 (1990) ["*Cardozo*"]. Posner is also a co-author of *The Behavior of Federal Judges* (see below). He has served as a judge on the United States Court of Appeals for the Seventh Circuit since 1981. He is also a senior lecturer at the University of Chicago and the author of at least 29 books and hundreds of law review articles, essays, and book reviews.

(c) Lee Epstein, William M. Landes, & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational*

Choice (Harvard Univ. Press 2013) ["*The Behavior of Federal Judges*"]. Epstein is Provost Professor of Law and Political Science and Rader Family Trustee Chair in Law at the University of Southern California. Landes is the Clifton R. Musser Professor Emeritus of Law and Economics at the University of Chicago Law School.

(d) James B. Zagel & and Adam Winkler, *The Independence of Judges*, 46 Mercer L. Rev. 795, 818 (1995) ["*Zagel*, 46 Mercer L. Rev. at ___"] Zagel is the federal trial court judge who issued the Contempt Order. At the time of publication Winkler was a law clerk. Currently, he is a professor at UCLA Law School.

9. The prevailing view among federal judges is that "there is no recognized duty of candor in judicial opinion writing." *The Behavior of Federal Judges* 58. *See also Law and Literature* 341 (defending the right of judges to deliberately misstate facts); *compare Zagel*, 46 Mercer L. Rev. at 818 (acknowledging "the rule that judicial opinions ought to be candid and accurate" but arguing that "the judges we most admire" often ignore the rule).

10. The candor (or lack of candor) in a judicial opinion can be ascertained by comparing the contents of an opinion with the briefs, trial transcripts, precedents, and other materials on which the judge purported to base his opinion. *The Behavior of Federal Judges* 52; *Cardozo* 132, 144 ("We need more studies that compare judges' opinions with the lawyers' briefs in their cases.")

Judge Zagel's creative adjudications

11. Judge Zagel believes that "the judges we most admire" achieve greatness by periodically breaking "the rule that judicial opinions ought to be candid and accurate." *Zagel*, 46 Mercer L. Rev. at 818. The great judges, in Zagel's view, "challenge…established doctrine" and create new law "by misrepresenting it as old law or law that is only a little bit new." *Id. See also The Behavior of Federal Judges* 58 ("The motive for concealment deserves particular emphasis. Judges have political reasons to represent creativity as continuity and innovation as constraint.")

12. In the Contempt Order Judge Zagel created new law in the following respects:

- He imposed a prior restraint on a trial lawyer's speech without holding a hearing or making the findings required by *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970), the controlling precedent on gagging lawyers.
- For more than ten years he barred the press from timely access to judicial records that marshalled information highly relevant to the public health and welfare, even though the marshalled information had been culled entirely from public sources.
- He enjoined a lawyer from representing clients in a state court action over which the federal courts had no jurisdiction, and without

affording the lawyer or his clients prior notice or an opportunity to be heard.

13. Judge Zagel was able to misrepresent these novel results as the application of "old law or law that is only a little bit new" by concealing from his readers the following material facts about the Labatt Judgment Creditors, the beneficiaries of his innovative rulings. Disclosing these facts to the readers of the Contempt Order would have discredited the social utility of Judge Zagel's innovative adjudications:

- For nearly thirty years the Labatt Judgment Creditors engaged in food manufacturing practices that violated civil and criminal laws.
- For at least ten years, their unlawful practices included the use of an unsafe additive for economic reasons—the additive extended the shelf life of their adulterated products.
- In 1989 and again in 1992-93, lawyers representing the Labatt Judgment Creditors made materially false statements to federal prosecutors in order to shield their clients from criminal prosecutions.

Note regarding Judges Zagel and Bauer

14. The key figures in this disciplinary case are two federal judges who have been friends for more than 40 years—Judge Zagel, the author of the Contempt Order, and Judge William Bauer, the chair of the Seventh Circuit panel that, at every step along the way, has unflinchingly approved of Judge Zagel's conduct in the Grove Fresh litigation.

15. In addition to their personal friendship Judge Bauer and Judge Zagel have been business partners since at least 1986, when they became co-authors of best-selling legal textbooks. With others, they have published 16 iterations (four editions and 12 supplements) of the popular law school casebook currently known as HADDAD, MARSH, ZAGEL, MEYER, STARKMAN AND BAUER'S CASES AND COMMENTS ON CRIMINAL PROCEDURE (Foundation Press). They are also co-authors, with others, of CRIMINAL PROCEDURE, 1996 CASES AND COMMENTS ON ALTERNATIVE EDUCATION (Foundation Press 1996).

16. The due process arguments that Mr. Messina presented to the 1998 Inquiry Panel, and then re-presented to the bankruptcy court (Judge Squires), the district court (Judge Gettleman), and the Seventh Circuit (Judge Bauer presiding) described with particularity actions by Judge Zagel that, Mr. Messina alleged, violated federal statutes and the Code of Judicial Conduct. *See* Ex. 8-12.

17. Judge Squires, Judge Gettleman, and Judge Bauer ride the same private elevator at the Dirksen Federal Building as does Judge Zagel. In the federal judiciary, sharing an elevator with colleagues is a constraint on the independence of federal judges. *See Zagel*, 46 Mercer L. Rev. at 817-18 (noting that it is "common for a judge to feel constrained by a more immediate group of judges, such as those

within her circuit or, better yet, within her building. Not even judges want to be frowned upon when they get into the judges' elevator at lunch time.")

18. If Judge Squires, Judge Gettleman, and Judge Bauer were to give due consideration to Mr. Messina's due process arguments, their adjudicating orders would have had to summarize the actions by Judge Zagel that, Mr. Messina had alleged, constituted misconduct, and then they would have had to explain why those actions were or were not misconduct.

19. The adjudicative orders issued by Judge Squires, Judge Gettleman, and Judge Bauer did not describe, much less adjudicate, the particulars of judicial misconduct alleged in Mr. Messina's due process arguments.

B. Procedural History.

20. The Administrator has charged Mr. Messina with engaging in conduct that is prejudicial to the administration of justice, in violation of Rule 8.4(d) of the Illinois Rules of Professional Conduct (2010). The charges arise out of a bankruptcy case Mr. Messina filed to reorganize his law practice. *In re The Law Office of John P. Messina*, No. 99-B-29371 (Bkrtcy. Ct. N.D. Ill.)

21. Mr. Messina filed the bankruptcy case in September 1999, after the Seventh Circuit Court of Appeals, in an unpublished order dated February 5, 1998, affirmed the Contempt Order (and subsequent related orders) that impaired Mr. Messina's ability to earn a living.

22. Mr. Messina's appeal from the Contempt Order raised a number of First Amendment issues of first impression. Nevertheless, the Seventh Circuit, in derogation of its own operating procedures, which require that issues of first impression be adjudicated in published opinions, affirmed the Contempt Order in an unpublished order without affording Mr. Messina the opportunity to present oral argument.

23. In the meanwhile, in June 1995 the Administrator had opened an inquiry into the Contempt Order, but at the request of Mr. Messina's appellate counsel (Jenner & Block), she had suspended the inquiry pending the outcome of the appeal.

24. The Administrator reopened her investigation in May 1998, after the Seventh Circuit had affirmed the Contempt Order. In July 1998, the Administrator referred the investigation to an Inquiry Panel.

25. In the meanwhile, in June 1998 Jenner & Block had disclosed to Mr. Messina a conflict of interests that had existed from the outset of the firm's representation of Mr. Messina. That conflict, Jenner & Block acknowledged, had limited the arguments the firm had been willing to present to the Seventh Circuit. The firm asked Mr. Messina to consent to the conflict retroactive to August 1995, when Mr. Messina had first hired the firm. The firm also advised that it would not present to the ARDC the arguments that its conflict of interests had precluded it from presenting to the Seventh Circuit.

26. Mr. Messina declined to consent to the firm's conflict of interests, whereupon the firm withdrew its appearance for Mr. Messina at the ARDC.

27. Thereafter, Mr. Messina represented himself *pro se*. Citing Sup. Ct. Rule 763(4), he argued that the Contempt Order's findings should not be binding on him as collateral estoppel because the proceedings underlying the Contempt Order, and his appeal therefrom, were "so lacking in notice or opportunity to be heard as to constitute a deprivation of due process of law."

28. In support of this defense Mr. Messina appeared before the Inquiry Panel, without counsel, and submitted to several hours of interrogation. He also submitted two detailed motions to close the inquiry without a complaint (Ex. 7 and Ex. 8) along with a Memorandum in Support (Ex. 9). His papers presented to the ARDC the arguments that Jenner & Block had omitted to present to the Seventh Circuit due to its conflict of interests.

29. In December 1998 the Inquiry Panel, which was obliged by ARDC Rule 102 to "determine whether there is sufficient evidence to file a complaint," closed its investigation into the Contempt Order without voting a complaint. Implicit in the Panel's decision was a finding that the federal court proceedings had deprived Mr. Messina of due process.

30. In December 1999 the Labatt Judgment Creditors filed an adversary complaint in Mr. Messina's bankruptcy case, seeking to except from discharge their judgment for $149,554.45 in attorney's fees. *John Labatt Ltd., et al., v. John Messina, 99-A-1573.* Invoking 11 U.S.C. §523(a)(6),[1] they alleged that the injury for which they had been awarded attorney's fees was "willful[ly] and malicious[ly]" caused by Mr. Messina, but they did not describe the injury they allegedly had suffered. Instead, they cited to the Contempt Order, attached a copy as an exhibit, and declared that the Contempt Order was "hereby incorporated in full."

31. The Labatt Judgment Creditors moved for summary judgment, arguing that under the collateral estoppel doctrine, the Contempt Order's findings of fact were binding on Mr. Messina on the issue of whether his conduct towards them was "willful and malicious."

32. Mr. Messina filed an answer, a counterclaim, and an affirmative defense. His affirmative defense tracked the defense he had presented to the ARDC Inquiry Panel, namely, that the Contempt Order's findings should not be treated as collateral estoppel because "the proceedings underlying the Contempt Order were so lacking in fundamental fairness that the Contempt Order should not be accorded preclusive effect herein."

33. The bankruptcy court and the district court refused to consider the merits of Mr. Messina's affirmative defense, claiming that they lacked jurisdiction

[1] Section 523(a)(6) provides that "[a] discharge under [the Bankruptcy Code] does not discharge an individual debtor from any debt…for willful and malicious injury by the debtor to another entity or to the property of another entity ."

to do so. The Seventh Circuit, which refused Mr. Messina's request for oral argument and disposed of the appeal in an unpublished order, also refused to consider the merits of Mr. Messina's collateral attack on the ground that it was merely a "recycled" version of his prior appeals.

34. Neither the bankruptcy court nor the district court nor the Seventh Circuit would adjudicate the merits of the arguments Mr. Messina presented, which were based on the arguments the ARDC had found persuasive.

35. The sanctions referred to in ¶¶30, 33, 38, 41, and 43 of the Administrator's first amended complaint were imposed by the federal courts for presenting in those forums the arguments that, in 1998, the ARDC Inquiry Panel had found persuasive.

C. Factual Background.

36. From July 1989 through April 1993, Mr. Messina represented a small Chicago firm (Grove Fresh Distributors, Inc. ["Grove Fresh"]) in unfair competition lawsuits against a number of orange juice firms, alleging that they had been making and selling adulterated products falsely labeled as 100% pure.

37. The defendants included Labatt, a Canadian food and beverage conglomerate, and four related orange juice firms (collectively, "Four Firms"):

(a) Two of the firms (Everfresh Inc. ["Everfresh"] and Holiday Juice Ltd. ["Holiday Juice"]) were wholly-owned by Labatt.

(b) Another of the firms (American Citrus) was privately owned; it was also the former parent of Everfresh and Holiday Juice.

(c) The fourth firm (Flavor Fresh Foods Corp. ["Flavor Fresh"]) was owned and operated by James Marshall, a food chemist who was formerly vice president for research and development at American Citrus.[2]

38. The Grove Fresh litigation had commenced on February 10, 1989, when Jeffrey Hines, a Maryland lawyer, filed five lawsuits for Grove Fresh, as follows:

- *Grove Fresh Distributors, Inc. v. Everfresh Juice Co., et al.*, 89 CV 1113 ["89 CV 1113"]. "Everfresh Juice Co." was a fictional name for two corporations, wholly-owned by Labatt, doing business as a single entity.
- *Grove Fresh Distributors, Inc. v. Flavor Fresh Foods Corp., et al.,* No. 89 CV 1114 ["89 CV 1114"]. Flavor Fresh was a closely-held Chicago firm whose principals included James Marshall.

[2] During Marshall's tenure at American Citrus, the firm's corporate name was Home Juice Co.

- *Grove Fresh Distributors, Inc. v. New England Apple Products Co., et al.*, No. 89 CV 1115. New England Apple Products Co. is a Massachusetts corporation that markets its products under the "Veryfine" label.
- *Grove Fresh Distributors, Inc. v. American Citrus Products Corp.*, *d/b/a Home Juice Co.*, et al., No. 89 CV 1117 ["89 CV 1117"]. American Citrus was a closely-held firm headquartered in Melrose Park, Illinois.
- *Grove Fresh Distributors, Inc. v. Olympic Gold Juice Co.*, *et al.*, No. 89 CV 1118.

39. On November 30, 1989, Troy fired Hines for conflicts of interest. The conflicts arose out of previously undisclosed covenants that Hines had executed to facilitate the resolution of prior lawsuits for another client. These covenants barred him from suing American Citrus or Labatt and its orange juice subsidiaries for acts or omissions occurring prior to July 1988 and August 1988, respectively. These covenants violated R.P.C. 5.6(b), which provides as follows:

> "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."

40. Hines's covenants came to light when Labatt's lawyers invoked them to justify a nuisance-value settlement offer of $35,000. Mr. Messina, who had been hired as local counsel in July 1989, subsequently learned that Hines had sued Everfresh and American Citrus multiple times between 1975 and 1988 on behalf of a client unrelated to Grove Fresh. Hines's files in those prior lawsuits included evidence of adulteration by Everfresh and American Citrus during those years. Due to the covenants restricting his right to practice law, Hines had not shared that evidence with Mr. Troy.

41. On November 30, 1989, Mr. Troy asked Mr. Messina to investigate the claims that Hines's conflicts had barred him from pursuing. To induce Mr. Messina to assume the larger responsibilities of lead counsel, Mr. Troy offered, and Mr. Messina accepted, a contingent fee contract whereby Mr. Messina would receive 40% of any recovery from the claims he was investigating as well as from the claims already on file.

42. Early in the investigation Mr. Messina recognized that as a sole practitioner he did not have adequate resources to litigate effectively the claims his investigation was uncovering. He recruited Dorothy Zimbrakos, Warren Radler, Dale Crider, and the firm of Rivkin Radler Kremer ("RR&K") to join him as co-counsel, offering to split his 40% contingent fee 50-50.

43. In May 1990 RR&K accepted Mr. Messina's offer and executed a contingent fee contract whereby it would represent Grove Fresh in consideration for 20% of any recovery. At the same time Mr. Messina amended his contract with Grove Fresh to reduce his contingent fee to 20% of any recovery.

44. In the nine months after Hines was fired, Mr. Messina investigated the claims that Hines's unethical covenants had barred him from litigating. The sources for his investigation included Mr. Troy, Troy's friends in the industry, and 16 government agencies in the United States and Canada.

45. Between July 1989 and February 1994 Mr. Messina, relying largely on public sources outside formal discovery procedures, found evidence of the following crimes and torts by Labatt and the Four Firms:

(a) Using a common formula, the Four Firms had been making adulterated products for nearly 30 years. They had sold those products in at least 25 states, the District of Columbia, and throughout Canada. (The manufacture or sale of adulterated products is a felony under 21 U.S.C. §333(a)(2).)

(b) For at least ten years the Four Firms had used an unsafe additive (a separate felony) to extend the shelf life of their adulterated products. They disposed of their inventory of the unsafe additive before Grove Fresh could have it tested, but circumstantial evidence suggested that the ingredients included a carcinogenic agent.

(c) The Four Firms had purchased the unsafe additive from a European vendor and then had imported the additive into the United States by making false statements to the Bureau of Customs. (Making false statements to a government agent is a felony under 18 U.S.C. §1001).

(d) In 1989 Labatt secured an amnesty from criminal charges for itself and its orange juice subsidiaries by making false statements to senior administrators at the Food and Drug Administration ("FDA"), also in violation of 18 U.S.C. §1001.

(e) In 1992-93, during a criminal investigation into Flavor Fresh's use of the unsafe additive, Labatt acknowledged to the Department of Justice ("DOJ") that Everfresh had also used the unsafe additive starting in about 1979, but Labatt falsely represented to DOJ that Everfresh had ceased using the unsafe additive in December 1986, when Labatt acquired the firm. In fact, Everfresh had continued purchasing, importing, and using the unsafe additive in 1987-88, making at least six purchases during those years for which it paid more than $250,000.

46. On August 28, 1990, Mr. Messina filed a pleading for Grove Fresh that incorporated what he had learned to that date about the Four Firms' use of the common formula and about Labatt's false statements to the FDA. The pleading was the complaint in *Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 90 CV 5009 (N.D. Ill.) ["90 CV 5009"].

47. Prior to August 28, 1990, Grove Fresh had served discovery requests in 89 CV 1113, 89 CV 1114, and 89 CV 1117 which, if answered truthfully, would have disclosed that the Four Firms had all used the unsafe additive. As of August 28,

1990, the Four Firms had suppressed all evidence of the unsafe additive, so Grove Fresh did not yet know about the unsafe additive, and the 90 CV 5009 complaint made no mention of it. Grove Fresh first learned about the unsafe additive in October 1990 from documents it received in response to a Freedom of Information Act ("FOIA") request to the FDA.

48. Pursuant to an oral stipulation he had made four days earlier, Mr. Messina filed the 90 CV 5009 complaint under seal. He stipulated to a *temporary* seal of the complaint in order to facilitate resolution of *Everfresh Inc.'s Emergency Motion to Require Plaintiff to File its Proposed New Complaint Under Seal to Judge Zagel* ("*Emergency Motion*") [Ex. 1]. The *Emergency Motion* challenged Grove Fresh's right to file the new lawsuit, alleging that the 90 CV 5009 complaint was an improper attempt to amend the 89 CV 1113 complaint and to escape a discovery plan and order recently entered in that case.

49. In a March 1991 ruling, Grove Fresh prevailed on the procedural claim alleged in *Emergency Motion* for a seal. The ruling included a finding that the parties "agree that the information used to [draft the 90 CV 5009 complaint] *was obtained from public agencies without help from the defendants or a court order."* [emphasis added] Under *Seattle Times v. Rhinehart*, 467 U.S. 20, 34 (1984), this finding precluded the court from:

- Restraining Grove Fresh or its lawyers from disclosing to the public the information in the 90 CV 5009 complaint.
- Denying the public or the press access to the information in the 90 CV 5009 complaint.

Nevertheless, Judge Zagel kept the seal in place without articulating any reason for it.

<u>Journalists' interests in the secrecy orders in the Grove Fresh litigation</u>

50. In April 1991 Mr. Messina filed motions in 89 CV 1113 and 89 CV 1114 reporting to those courts the information Grove Fresh had learned through FOIA requests regarding Everfresh's and Flavor Fresh's use of the unsafe additive. The motions sought evidentiary and financial sanctions, alleging that the defendants had deliberately and wrongfully suppressed all evidence relating to the unsafe additive.

51. The motions regarding the unsafe additive were not filed under seal, as there were no orders in 89 CV 1113 or 89 CV 1114 that authorized or required the filing of pleadings under seal.

52. In the meanwhile, in late 1990 or early 1991 the Medill School of Journalism at Northwestern University organized a team of working reporters and journalism students (collectively, "journalists") to scour Chicago courts for secrecy orders. One of the project's goals was to publish reports on secrecy orders that impaired the press' ability to report on matters affecting the public interest. A

provisional goal of the project was to identify and challenge any secrecy order that prevented reporting on pernicious threats to public health or welfare.

53. One of the Medill students (Elisabeth Leamy) learned about the Grove Fresh litigation from a friend of her family who was a member of the Chicago legal community, but who did not represent any of the parties to the Grove Fresh litigation.

54. Ms. Leamy's reports on the unsafe additive led the journalists to challenge the secrecy orders in two of the Grove Fresh cases—the protective order in 89 CV 1113 and the order sealing 90 CV 5009. If the challenge had succeeded, the journalists would have gained access to records that would have:

- Alerted consumers in at least 25 states and the District of Columbia that they had class action claims against the Four Firms.
- Revealed to the public the details of Everfresh's and Flavor Fresh's use of the unsafe additive.[3]
- Revealed to the government and the general public the false statements Labatt had made in 1989 to induce the FDA to grant Labatt, Everfresh, and Holiday Juice an amnesty from criminal proceedings.

55. The journalists' claims for access to the 90 CV 5009 papers were orthodox claims that should have been resolved by reference to orthodox legal materials, as follows:

(a) The order sealing 90 CV 5009 had been entered pursuant to a stipulation, not after a contested hearing. Mr. Messina had offered the stipulation to facilitate resolution of the *Emergency Motion* challenging Grove Fresh's right to file a new lawsuit. He agreed to file the 90 CV 5009 complaint under seal pending resolution of the claims alleged in the *Emergency Motion*.

(b) In the briefing on the *Emergency Motion*, Grove Fresh and the defendants agreed, and Judge Zagel found, that all of the information in the 90 CV 5009 complaint "was drawn from public sources of information [and] were obtained voluntarily and not through service of process."

(c) Under *Seattle Times v. Rhinehart*, 467 U.S. 20, 34 (1984), the finding about the public sources for the 90 CV 5009 complaint barred the court from restraining in any fashion dissemination of the information in the 90 CV 5009 complaint.

56. The facts described in the previous paragraph were well known to Judge Zagel and warranted his granting the journalists' motion for access to the records in 90 CV 5009. Instead, Judge Zagel concealed those facts from the

[3] As of 1991, when the journalists intervened, Grove Fresh did not yet have evidence of American Citrus's and Holiday Juice's use of the unsafe additive.

journalists and invited the Labatt Judgment Creditors to articulate a fresh reason for keeping the seal in place.

57. The Labatt Judgment Creditors' fresh reason for the seal was a set of false and reckless claims that impugned Grove Fresh and Mr. Messina:

(a) They alleged that Grove Fresh and its lawyers had falsely accused the Labatt Judgment Creditors in order to extort an undeserved payment.

(b) They alleged that the 90 CV 5009 complaint included confidential information subject to the protective order in 89 CV 1113, such that the seal was necessary to enforce the 89 CV 1113 protective order.

58. The Labatt Judgment Creditors' newly-minted reasons for the seal should have been adjudicated in accordance with orthodox legal principles, including the rules of evidence, the rule on judicial admissions, and the doctrine of collateral estoppel:

(a) Under the rules of evidence the Labatt Judgment Creditors had the burden of coming forward with evidence to support their factual claims. They produced no such evidence, however. Moreover, Grove Fresh came forward with evidence refuting all of their factual claims.

(b) Under the rule on judicial admissions, they were bound by their prior claim that the 90 CV 5009 complaint came from public sources.

(c) Under the doctrine of collateral estoppel, they were bound by Judge Zagel's prior finding that all of the information in the 90 CV 5009 complaint "was drawn from public sources of information [and] were obtained voluntarily and not through service of process."

59. For reasons that are not explained by anything in the record, Judge Zagel did not want to grant the journalists access to the records in 90 CV 5009, so he ignored orthodox legal principles when he adjudicated their claims. Instead, he adjudicated the journalists' claims by making an unorthodox, 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."

60. When Judge Zagel made this hypothetical finding, he knew that the 90 CV 5009 complaint was well-grounded in fact. He knew this from his prior adjudication of Grove Fresh's motion to compel the defendants to provide discovery of their manufacturing practices during the 17 years preceding the date of the complaint. Judge Zagel had granted that motion after Grove Fresh had presented him with a detailed description of the evidence supporting the 90 CV 5009 allegations.

61. Judge Zagel' rejection of the journalists' access claims was also based on another finding of fact that he knew was false—his finding that the 90 CV 5009 seal "serve[d] to effectuate the purposes of the protective order entered in

[89c1113]," implying that the 90 CV 5009 complaint contained information subject to that order. In fact, Judge Zagel knew from the defendants' prior admissions, and from his own finding of fact, that all of the information in the 90 CV 5009 complaint "was drawn from public sources of information [and] were obtained voluntarily and not through service of process."

The coerced restriction on Mr. Messina's right to practice law

62. Grove Fresh settled and compromised its claims in April 1993, in exchange for a $2 million payment from the Labatt Judgment Creditors. As a condition of settlement the Labatt Judgment Creditors, with crucial support from Judge Zagel, required Mr. Messina to forever refrain from representing consumers in class action claims against the Labatt Judgment Creditors.

63. The Labatt Judgment Creditors imposed this restriction on Mr. Messina's practice under the guise of a Legal Services and Consulting Agreement ("Consulting Agreement") purporting to create an attorney-client relationship between themselves and Mr. Messina. The rules on conflicts of interest would then bar Mr. Messina from representing consumers.

64. Mr. Messina had objected to the Consulting Agreement as a sham arrangement that violated R.P.C. 5.6(b), which prohibits settlements conditioned on restricting a lawyer's right to practice law. He had also objected to his being required to enter into an attorney-client relationship with the Labatt Judgment Creditors.

65. Mr. Messina eventually executed the Consulting Agreement, but only after Judge Zagel had issued this threatening statement—if Grove Fresh lost the opportunity to settle its claims due to Mr. Messina's refusal to execute the Consulting Agreement, Judge Zagel had said, Mr. Messina would be subject to a $2 million malpractice liability that would not be dischargeable in bankruptcy.

The post-settlement disputes

66. After the settlement closed the journalists appealed from the order denying their access claims. The Labatt Judgment Creditors contested the appeal, reiterating in the Seventh Circuit the charges they had alleged in the district court—that the secrecy orders were justified because Grove Fresh and its lawyers had filed a complaint that included "baseless and scandalous allegations" that had "falsely accuse[d]" them in order "to extract a large settlement" from them, and that Grove Fresh and its lawyers had "sought to misuse the District Court's files to harm [the defendants]."

67. These charges ("Misconduct Charges" or "Charges") imputed to Mr. 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.

68. The Misconduct Charges were false. The Labatt Judgment Creditors and their lawyers presented the Charges recklessly, without any foundation in fact.

69. The false charges were placed in the Seventh Circuit's public files and delivered to reporters committed to publishing reports about the litigation. If accepted as true by the Seventh Circuit, the Misconduct Charges would suffice to affirm Judge Zagel's ruling. The Charges would likely be repeated in a news report and in a judicial opinion published in the West Publishing Co.'s National Reporter System, permanently damaging Mr. Messina's reputation.

The lack of an official record

70. As described more fully below in the *Sixth Counterclaim* and the *Seventh Counterclaim*, Judge Zagel had interfered with the clerk of court's duty to create an official record for the journalists appeal. The lack of a proper record heightened Mr. Messina's concern about the Seventh Circuit's wherewithal to sort out the truth or falsity of the Misconduct Charges.

Mr. Messina's response to the false charges

71. Upon learning of the Labatt Judgment Creditors' charges Mr. 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.

72. Citing R.P.C. 1.6(3), which authorizes a lawyer to "use or reveal…. confidences or secrets necessary …to defend the lawyer…against an accusation of wrongful conduct," Mr. Messina also gave notice that he would defend himself by presenting to appropriate tribunals pertinent information that might otherwise be subject to the secrecy covenants in the settlement documents.

73. The Labatt Judgment Creditors: (a) rejected Mr. Messina's rescission of the Consulting Agreement; (b) refused to rescind the Misconduct Charges; and (c) claimed that Mr. Messina had no right to respond to those Charges in any forum.

74. On October 22, 1993, Mr. 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 ("Fed. R. App. P. 46(c) Motion").* The motion argued that Mr. Messina's reputation would be damaged if the Seventh Circuit accepted as true, and repeated in a published opinion, the defendants' Misconduct Charges. Publishing such charges in the Federal Reporter would be a form of attorney discipline, Mr. Messina argued, for which he had a right to a hearing before the discipline was imposed.

75. The Labatt Judgment Creditors moved to strike Mr. Messina's motion, alleging he had no standing to be heard. The Seventh Circuit referred the motions to a disciplinary panel. The disciplinary panel, in turn, referred the motions to the ARDC for investigation.

76. In about July 1994 the Administrator notified Mr. Messina that she was opening an inquiry into the Labatt Judgment Creditors' allegation that the complaint Mr. Messina had drafted against them "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." The ARDC asked Mr. Messina to provide the Administrator 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."

77. Mr. Messina's response (Ex. 7, minus the attachments) described the events leading to the filing of the 90 CV 5009 complaint. It also described the evidence supporting the 90 CV 5009 complaint. The ARDC was satisfied with Mr. Messina's response and closed its inquiry into the referral from the Seventh Circuit.

78. On November 4, 1994, Mr. Messina filed a motion with the Seventh Circuit reporting on the proceedings at the ARDC and seeking a discharge of the rule to show cause. On November 17, 1994, the three-judge disciplinary panel granted the motion.

The ARDC's inquiry into Mr. Messina's complaints

79. On August 5, 1993, Mr. Messina complained to the ARDC regarding the Misconduct Charges in the Labatt Judgment Creditors' Seventh Circuit brief. On April 28, 1994, he expanded his complaint to the ARDC to include the Consulting Agreement, alleging that the Consulting Agreement was a sham arrangement designed to evade the strictures of R.P.C. 5.6(b).

80. In a letter dated December 16, 1994, the ARDC notified Mr. Messina that it was closing the inquiries into the Misconduct Charges and the Consulting Agreement. *See Eleventh Counterclaim*, below.

The contempt petition

81. In the meanwhile, on or about November 9, 1993, the Labatt Judgment Creditors had filed a petition to cite Mr. Messina for contempt. Judge Zagel held the petition in abeyance pending the Seventh Circuit decision's decision in the journalists' appeal, which issued in May 1994. Then, Judge Zagel held the petition in abeyance pending the resolution of the ARDC's inquiries into Mr. Messina's complaints regarding the Misconduct charges and the Consulting Agreement. Those inquiries were concluded on or about December 16, 1994.

82. Judge Zagel held a hearing on the contempt petition in early February 1995. He issued the Contempt Order on June 9, 1995.

FIRST COUNTERCLAIM
(Rule 1.6(3) privilege to disclose alleged confidences)

83. By virtue of the Consulting Agreement he had been required to execute as a condition of settlement, Mr. Messina was an attorney for the Labatt Judgment Creditors as of July 14, 1993. On that date the Labatt Judgment Creditors published the Misconduct Charges. They published the Charges in a brief that they placed in the Seventh Circuit's public files, where they were available to journalists who were following the case, including a reporter from the *New York Times*.

84. The publication of the Misconduct Charges triggered Mr. Messina's rights under R.P.C. 1.6(3). Under that Rule a lawyer has a right to "use or reveal…. confidences or secrets necessary …to defend the lawyer…against an accusation of wrongful conduct." Rule 1.6(3) "does not require the lawyer to await the commencement of an action or proceedings that charges such [misconduct]." *Comment to Rule 1.6(3)*, Northern District of Illinois. Rather, the accused lawyer can make the disclosure for the purpose of heading off the commencement of a groundless disciplinary proceeding.

85. Upon learning that the Labatt Judgment Creditors had published the false Misconduct Charges, Mr. Messina served notice that he would exercise his rights under Rule 1.6(3) unless they withdrew the charges.

86. The Labatt Judgment Creditors refused to withdraw the charges, whereupon Mr. Messina, on October 22, 1993, filed his *Fed. R. App. P. 46(c) Motion*. At the time Fed. R. App. P. 46(c) provided 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 or for failure to comply with these rules or any rule of the court, (emphasis added)

87. The *Fed. R. App. P. 46(c) Motion* argued that Mr. Messina's reputation would be damaged if the Seventh Circuit accepted as true, and repeated in a published opinion, the defendants' Misconduct Charges. Publishing such charges in the Federal Reporter would be a form of attorney discipline, Mr. Messina argued, for which he had a right to a hearing before the discipline was imposed.

88. The *Fed. R. App. P. 46(c) Motion* traveled a tortuous path, but in the end Mr. Messina achieved all of the relief sought by the motion:

(a) His motion was referred to a three-judge disciplinary panel in accordance with Rule 46(c). That panel, in turn, referred the matter to the ARDC, which inquired into the Misconduct Charges.

(b) The opinion adjudicating the journalists' appeal did not re-publish the Misconduct Charges. *See Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994).

(c) On remand, the Labatt Judgment Creditors abandoned the Misconduct Charges, tacitly admitting that they had no evidence to support those Charges. *See* II WIGMORE ON EVIDENCE §285 (Chad. rev. 1979).

(d) The ARDC and the Seventh Circuit Disciplinary Panel inquired into the Misconduct Charges and found the charges lacking.

89. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that the Misconduct Charges alleged in the brief the Labatt Judgment Creditors filed on July 14, 1993, were false and made with reckless disregard for their truth or falsity.

b. Declaring that the groundless Misconduct Charges triggered Mr. Messina's right under R.P.C. 1.6(3) to use or reveal confidences or secrets necessary to defend himself against the wrongful accusations.

c. Declaring that the *Fed. R. App. P. 46(c) Motion* was well grounded in fact and in law.

d. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

SECOND COUNTERCLAIM
(Due process –No notice or hearing regarding Judge Zagel's reason for sealing the 90 CV 5009 case)

90. Over a five-year period the Labatt Judgment Creditors and Judge Zagel articulated *seriatim* three different justifications for the order sealing 90 CV 5009. Mr. Messina litigated the merits of the first two alleged justifications and prevailed each time. He had no timely notice or opportunity to be heard on the third alleged justification, in violation of due process.

91. The first justification for the 90 CV 5009 seal order was the procedural claim that the Labatt Judgment Creditors alleged on August 24, 1990, in the *Emergency Motion*. Judge Zagel rejected this procedural claim in March 1991, after a full round of briefs. Nevertheless, he kept the seal in place without offering any alternative justification for it. *See* ¶¶48-49, above.

92. The second justification for the 90 CV 5009 seal order was the Misconduct Charges that the Labatt Judgment Creditors first alleged in the fall of 1991, when they opposed the journalists' claims for access to the 90 CV 5009 case file. The Labatt Judgment Creditors abandoned the Misconduct Charges in August 1994. Nevertheless, Judge Zagel kept the seal in place for ten more months.

93. The third justification for the 90 CV 5009 seal order was articulated by Judge Zagel on June 9, 1995, in the Contempt Order. There, Judge Zagel justified the seal with riffs denigrating Mr. Messina's character and fitness to practice law. He declared that "Mr. Messina's past behavior played a pivotal role in the granting of [the 90 CV 5009 seal order], since it appeared that he would go to any lengths to try his case on the courthouse steps rather than in the courtroom itself," and that he had a personal agenda "to hurt [the defendants] by disseminating information for the purposes of damaging them outside the walls of the courtroom." 888 F. Supp. at 1430.

94. The only "past behavior" cited in support of these riffs on Mr. Messina's character was an action protected by the First Amendment—Mr.

Messina's attempt to petition the FDA to investigate Everfresh. *See Third Counterclaim*, below.

95. Mr. Messina had no notice or opportunity to be heard on whether his attempt to petition the FDA was a legally sufficient reason for imposing the seal.

96. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that Judge Zagel violated Mr. Messina's right to due process by failing to give timely notice and an opportunity to be heard on the reason for the seal articulated in the Contempt Order.

b. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

THIRD COUNTERCLAIM
(Due process/First Amendment retaliation)

97. A lawyer has a duty to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." M.R.P.C. 1.3, comment 1.

98. A lawful and ethical measure that would have vindicated Grove Fresh's cause was Mr. Messina's attempt, described below, to petition the FDA to investigate Everfresh's manufacturing practices. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 138-39 (1961) (corporation has First Amendment right to petition government agency to bring about an advantage to it and a disadvantage to its competitors). These are the facts:

99. In June 1990 Everfresh produced 601 pages of Batch Sheets, which are business records of the recipes used to make beverages. These particular Batch Sheets were records of the recipes Everfresh had used in 1987 to make 3,190,000 gallons of a product that was labeled and sold to the public as "100% pure orange juice from concentrate." The Batch Sheets showed that all 3,190,000 gallons of that product were adulterated and misbranded.

100. Mr. Messina sought to include the Batch Sheets in a petition to the FDA for the following reasons:

(a) The Batch Sheets were evidence of criminal violations of the Food, Drug, and Cosmetic Act, as amended.

(b) If the FDA brought criminal charges against Everfresh, a criminal conviction would support a motion for partial summary judgment on the issue of liability in Grove Fresh's private lawsuit. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (approving the doctrine of offensive collateral estoppel).

(c) Prevailing on a motion for partial summary judgment on the issue of liability would save Grove Fresh substantial time and money in bringing its case to a successful conclusion.

101. Everfresh had designated the Batch Sheets as confidential documents under the 89 CV 1113 protective order. Under the terms of that order Grove Fresh had ten days in which to object to the designation. If Grove Fresh objected, the burden would shift to Everfresh to persuade the court that the Batch Sheets qualified for confidential treatment.

102. On July 2, 1990, Mr. Messina notified Everfresh that Grove Fresh objected to the claim of confidentiality for the Batch Sheets, and that copies of the Batch Sheets should be turned over to the FDA for the following reasons:

- "The recipes…are evidence of a fraud on the general consuming public;"
- "[D]isclosure of the recipes…[to] regulators would assist in the research and development of techniques for detecting adulterated orange juice;" and
- "[D]evelopment of such techniques will help keep the marketplace honest and…protect businesses such as Grove Fresh that sell only authentic juice."

103. On July 11, Everfresh filed a timely motion for a ruling on its claims of confidentiality, *but it did not articulate any grounds for claiming confidentiality*, even though the 89c1113 protective order placed the burden of proof on that issue on the party claiming confidentiality.

104. At the hearing on Everfresh's motion, Judge Zagel never asked the defense to explain why the Batch Sheets were entitled to confidential treatment, or why the Batch Sheets should not be turned over to the FDA. Instead, he said he would review samples of the Batch Sheets in chambers and decide for himself whether they should be treated confidentially.

105. Five days later, Judge Zagel issued a minute order sustaining the defense's claim of confidentiality:

> With respect to the batch sheets, the claim of confidentiality is well taken. The expressed desire of plaintiff's counsel to send these documents to the FDA does not outweigh the claim of confidentiality, at least at this stage of the litigation.

The order did not purport to explain why the claim of confidentiality was "well taken."

106. Mr. Messina complied with Judge Zagel's order; the FDA did not bring criminal charges against Everfresh.

107. Mr. Messina's intent to use the Batch Sheets in support of a petition the FDA is the only incident cited by Judge Zagel as justifying the minute order sealing 90 CV 5009. Judge Zagel did not disclose this alleged justification for the seal until June 9, 1995, or four years, nine months, and 12 days after he issued the minute order sealing 90 CV 5009.

108. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that Mr. Messina's attempt to petition the FDA was a lawful and ethical measure for vindicating Grove Fresh's rights.

b. Declaring that the seal order was an unlawful act of judicial retaliation for Mr. Messina's attempt to exercise his client's right to petition the FDA to bring about an advantage to the client and a disadvantage to the client's competitors.

c. Declaring that Judge Zagel did not afford Mr. Messina timely notice or opportunity to be heard on this alleged justification for the seal

d. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

FOURTH COUNTERCLAIM
(No notice or hearing that protective orders would authorize or require the sealing of court filings)

109. In the Contempt Order, Judge Zagel ruled that Mr. Messina had violated certain protective orders when papers he filed in the Seventh Circuit's public files included references to: (a) the amount the defendants had paid to settle Grove Fresh's claims, and (b) the names of certain witnesses who had invoked their fifth amendment privilege against self-incrimination.

110. Judge Zagel rested his contempt findings, in part, on the protective orders he had entered in 89 CV 1113 and 90 CV 5009. However, the procedural history of those orders, outlined below, shows that the lawyers who drafted those orders did not intend for the orders to authorize or require the automatic sealing of court papers that referred to information in documents designated as confidential.

111. During the period from July 1989 through April 1993 and later, General Rule 10 of the local civil rules of the Northern District of Illinois governed the sealing of papers filed with the clerk of court.

112. General Rule 10 provided that the clerk of court could not seal, suppress, or restrict access to documents filed by a party unless the court had previously entered a protective order authorizing the sealing, suppression or restriction. Subparagraph k of General Rule 10 provided that if a filing was not sealed, suppressed or restricted *pursuant to a previously entered protective order*, then that filing "shall be part of the public record of the proceedings."

113. If litigants intended for a protective order to authorize and require the sealing of court filings, then the order, if it were to satisfy General Rule 10k, had to include language such as the following:

> All [discovery] 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)

114. During the years in question the language quoted in the preceding paragraph was the standard boilerplate used by lawyers in the Northern District of Illinois to authorize the sealing of court filings in accordance with General Rule 10.

115. The protective orders in 89 CV 1113 and 90 CV 5009 were negotiated between Mr. Messina and defense counsel.

116. By mutual agreement, Mr. Messina and defense counsel intentionally excluded from the protective orders language that would have authorized or required the automatic sealing of papers that referred to information in documents designated as confidential.

117. By agreeing to protective orders in 89 CV 1113 and 90 CV 5009 that did not include the language required by General Rule 10 for the sealing of court filings that included references to documents designated as confidential, the defense agreed that there would be no automatic seal required on such filings in either case.

The tacit understanding regarding fifth amendment claims

118. The 89 CV 1113 case against Everfresh and the 89 CV 1114 case against Flavor Fresh were not under seal. From time to time Mr. Messina, without any objection from the defendants, filed motions and briefs in the public files of those cases in which he referred to witnesses who had invoked the fifth amendment privilege against self-incrimination ("Fifth Amendment Witnesses").

119. For example, on March 27, 1992, Mr. Messina filed *Grove Fresh's Amended Motion for Sanctions* in 89 CV 1113. At pages 4-5 of that motion he identified by name five Fifth Amendment Witnesses. By operation of General Rule 10k, the names of these Fifth Amendment Witnesses became "part of the public record of the proceedings."

120. As of April 1993, when the Grove Fresh litigation was settled, no defendant had ever complained about Grove Fresh's disclosing in publicly-filed papers the names of Fifth Amendment Witnesses.

121. As of October 22, 1993, Mr. Messina had a reasonable belief that the names of Fifth Amendment Witnesses were not subject to any protective orders.

122. On October 22, 1993, Mr. Messina filed his *Fed. R. App. P. 46(c) Motion* in the Seventh Circuit. In that motion he identified the five Fifth Amendment Witnesses he had previously identified, without objection, in *Grove Fresh's Amended Motion for Sanctions*.

123. In the June 1995 Contempt Order Judge Zagel punished Mr. Messina for having included in his *Fed. R. App. P. 46(c) Motion* in the Seventh Circuit the names of the five Fifth Amendment Witnesses that, by virtue of the 1992 filing of *Grove Fresh's Amended Motion for Sanctions* in 89 CV 1113, were "part of the public record of the proceedings" in 89 CV 1113.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that as of April 29, 1993, when the Grove Fresh litigation was dismissed with prejudice pursuant to a settlement agreement, the 89 CV 1113 and 90 CV 5009 protective orders did not require or authorize the automatic sealing of court filings that included references to information from allegedly confidential documents.

b. Declaring that as of October 22, 1993, Mr. Messina reasonably believed that the 89 CV 1113 and 90 CV 5009 Protective Orders did not bar him from filing in the Seventh Circuit's public files papers that included references to the settlement amount or to witnesses who had invoked their fifth amendment privilege.

c. Declaring that as of October 22, 1993, the five Fifth Amendment Witnesses identified in *Grove Fresh's Amended Motion for Sanctions* were "part of the public record of the proceedings" in 89 CV 1113.

d. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

FIFTH COUNTERCLAIM
(The sealing order and the protective orders were not gag orders)

124. At all relevant times *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970), governed the standards for orders that would gag the speech of a party or the party's attorney. In *Chase* the Seventh Circuit held that

> before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' *Craig v. Harney*, 331 U.S. 367, 373, 67 S. Ct. 1249, 1253, 91 L. Ed. 1546 (1947).

125. The *Emergency Motion* for an order sealing 90 CV 5009 did not ask for a gag order restraining the speech of the parties or their lawyers, nor did it include a single allegation that could be construed as alleging that Grove Fresh or its attorneys were engaged in conduct that was "a serious and imminent threat to the administration of justice" such that a gag order would be justified.

126. The motions for entry of protective orders in 89 CV 1113 and 90 CV 5009 did not ask for gag orders restraining the speech of the parties or their lawyers, nor did they include a single allegation that could be construed as alleging

that Grove Fresh or its attorneys were engaged in conduct that was "a serious and imminent threat to the administration of justice" such that a gag order would be justified.

127. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that the minute order sealing 90 CV 5009 was not a gag order that barred Mr. Messina from disclosing evidence to the Seventh Circuit.

b. Declaring that the protective orders entered in 89 CV 1113 and 90 CV 5009 were not gag orders that barred Mr. Messina from disclosing evidence to the Seventh Circuit.

c. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

SIXTH COUNTERCLAIM
(Judge Zagel's interference with the clerk's duty to create an official record of 90 CV 5009 filings and orders)

128. 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.

129. The docketing of a paper or order is crucial to a party's right to appeal. An order that is not docketed cannot be appealed. *Bankers Trust Co. v. Mallis*, 435 U.S. 357, 384n.4 (1978). A paper duly filed by a party, but which is not entered on the docket, is deemed not to be part of the official trial court record and cannot be considered by an appellate court. *International Business Machines Corp. v. Edelstein*, 526 F.2d 37, 45-46 (2d Cir. 1975).

130. Without notice to Grove Fresh or Mr. Messina, and without any opportunity to be heard, Judge Zagel ordered the Clerk of Court not to docket any of the papers in 90 CV 5009, in violation of Fed. R. Civ. P. 79(a).

131. Judge Zagel suppressed the 90 CV 5009 docket 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.

132. 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.

133. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that from August 28, 1990, through May 14, 1995, Judge Zagel, without justification in fact or in law, interfered with the clerk of court's duty to create an official record of the papers filed by the parties in 90 CV 5009.

b. Declaring that from August 28, 1990, through May 14, 1995, Judge Zagel, without justification in fact or in law, interfered with the clerk of court's duty to create an official record of the orders he issued in 90 CV5009.

c. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

SEVENTH COUNTERCLAIM
(Judge Zagel's interference with the record for the journalists' appeal from the order denying their access claims)

134. In November 1992 Judge Zagel denied the journalists' access claims. The journalists filed their notice of appeal on December 14, 1992. They filed their brief on the merits on January 4, 1993.

135. As a result of interference by Judge Zagel, described below, the district court clerk could not create a record of the 90 CV 5009 case for the journalists' appeal. Without a record the Seventh Circuit could not fairly review the merits of the claims for and against the seal.

Background

136. At all times relevant to the Administrator's complaint, the Northern District of Illinois complied with Fed. R. Civ. P. 79(a) electronically. The electronic docket for each new case would be captioned with the names of the initial plaintiff and initial defendant ("*Smith, et al., v. Jones, et al.*"). It would also list the name and address of the plaintiff's lawyers and describe the nature of plaintiff's claims and the relief sought. As and when parties filed new papers, or the court issued orders, the clerk would update the docket, recording both the date the paper (or order) was filed (or issued) and the date the paper (or order) was entered on the docket.

137. In the parlance of the clerk of court for the Northern District of Illinois, a pleading, motion, or brief filed by a party under seal is a "restricted document." A case in which the docket has been suppressed is a "restricted case." At all times relevant to the Administrator's complaint, the clerk of court for the Northern District of Illinois had the following internal operating procedures for restricted documents and restricted cases:

(a) Restricted documents were required to be delivered to the intake desk in a sealed envelope or other container that included a label with (i) the

caption of the case; (ii) the title of the document; and (iii) the date of the order authorizing the filing of the paper under seal.

(b) In a case where the docket was not suppressed, the intake desk would forward the restricted document to the docket clerk, who would make an appropriate entry on the docket. The clerk would also prepare an index card listing the case number and a description of the document. The restricted document would then be placed in the so-called suppressed room where it would be filed in numerical sequence by type of case, year, and number.

(c) In cases where the docket was suppressed, *i.e.*, a restricted case, the case file would be placed in the suppressed room by case type, year, and number. No entries would be made on the docket, nor would any index cards be prepared for any of the filings or orders.

(d) If an appeal was filed in a case where the docket was suppressed, the clerk would create a docket manually and then transmit the docket and the case file to the Seventh Circuit under seal.

138. If an appeal was filed in a case where the docket was suppressed, the clerk could not prepare a docket or a record for appeal unless the case file was in the suppressed room or otherwise available to the clerk.

139. Between August 28, 1990 and mid-April 1997, Judge Zagel obstructed the clerk's internal procedures for maintaining proper custody and control over the 90 CV 5009 case file in the following respects:

(a) He allowed the defendants to bypass the intake desk and to file their papers directly with his chambers. He never forwarded their papers to the clerk of court, so their papers were never placed in the suppressed room.

(b) He directed the deputy clerks on the intake desk to forward all filings by Grove Fresh and by Mr. Messina directly to his chambers. He never returned the papers to the clerk, so Grove Fresh's and Mr. Messina's papers were never placed in the suppressed room.

See Ex. 8, ¶¶14, 19; Ex. 9, ¶¶3-7; Ex. 11, ¶¶3, 5a.-d.

The journalists' appeal.

140. As of December 14, 1992, the date the journalists filed their notice of appeal, Judge Zagel had the entire 90 CV 5009 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.

141. Judge Zagel interfered with the record for the journalists' appeal in the following respects:

(a) He refused to release the 90 CV 5009 case file to the clerk of court, thereby obstructing the clerk from creating a docket manually.

(b) 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 90 CV 5009 case file, except for the complaint, the answer, and the stipulated order of dismissal.

(c) Had the 90 CV 5009 papers been removed from the courthouse, the journalists' appeal from the order denying them access to those papers would have been mooted.

142. In due time the journalists learned about the order authorizing the removal of records from the courthouse. On May 11, they 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*.

143. On May 12, 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 90 CV 5009 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.

144. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that Judge Zagel wrongfully interfered with the clerk of court's duty to create an official record for the journalists' appeal.

b. Declaring that the journalists' appeal was argued and decided without benefit of an official record of the 90 CV 5009 case.

c. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

EIGHTH COUNTERCLAIM
(Privileged communication with Mr. Elson-- R.P.C. 1.2(d))

145. On May 12, 1994, the Seventh Circuit remanded the journalists' appeal and instructed Judge Zagel to "articulate on the record" his reasons for the

seal order. The court also mandated that he articulate his reasons promptly because:

> "[O]nce found to be appropriate, access should be immediate and contemporaneous [because the] newsworthiness of a particular story is often fleeting. *To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.*"

24 F.3d at 897.

146. On or about August 1, 1994, the defendants abandoned the Misconduct Charges as a ground for keeping a blanket seal on the 90 CV 5009 case. They conceded that the blanket seal could be lifted, although they asked Judge Zagel to keep selective pleadings, briefs and orders under seal.

147. As of August 1, 1994, Mr. Messina had defeated the only two alleged justifications for the blanket seal offered to that date:

(a) He had litigated and defeated the procedural claim for a blanket seal alleged in the *Emergency Motion* presented on August 24, 1993.

(b) The *Fed. R. App. P. 46(c) Motion* he had filed in the Seventh Circuit in defending against the Misconduct Charges had caused the defendants to withdraw those Charges as a justification for the seal.

Nevertheless, Judge Zagel kept a blanket seal on 90 CV 5009, and continued to suppress the 90 CV 5009 docket.

148. As of September 20, 1994, Judge Zagel, in derogation of the Seventh Circuit's instruction that he forthwith explain why he had sealed 90 CV 5009, had failed to do so.

149. As of September 20, 1994, Mr. Messina had a reasonable good faith belief that:

(a) The seal order and the protective orders in 89 CV 1113 and 90 CV 5009 were not gag orders;

(b) The fifth amendment claims were not subject to the seal order or the protective orders; and

(c) The settlement amount was not subject to the seal order or the Protective Orders.

150. On September 20, 1994, Mr. Messina sent a letter to John Elson, the attorney for the journalists. The purpose of the letter was to assist Mr. Elson in litigating with the defendants over their claims that certain materials in the 90 CV 5009 case should remain sealed. The letter included references to the fifth amendment claims and the settlement amount.

151. Mr. Elson did not share the letter or its contents with any of his journalists-clients. He used the information in the letter solely for purposes of litigation, incorporating it into the journalists' *Memorandum In Support Of*

Intervenor's Motion For Public Access To All Documents That Are, And Ever Were, In The 90c5009 Court File, which he filed in mid-October 1994.

152. Rule of Professional Conduct 1.2(d) authorizes a lawyer to follow a course of conduct that is "a good-faith effort to determine the validity, scope, meaning or application of the law."

153. Mr. Messina's letter was privileged under R.P.C. 1.2(d) as a good-faith effort to determine the validity and scope of the seal order.

154. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that the letter to Mr. Elson was privileged under R.P.C. 1.2(d) as a good-faith effort to determine the validity and scope of the seal order.

b. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

NINTH COUNTERCLAIM
(Due Process—Mr. Messina's right to collateral estoppel treatment of the finding regarding his status as a Grove Fresh attorney post-January 21, 1993)

155. On January 21, 1993, Warren Radler of RR&K threatened to resign from the litigation unless Mr. Messina was "relieved of all responsibility" for the cases. The events leading to this threat are set out below.

156. Mr. Troy yielded to Radler's threats, but he also reaffirmed Mr. Messina's contingent fee contract and continued his attorney-client relationship with Mr. Messina. Thereafter, Mr. Troy, RR&K, defense counsel, and Judge Zagel all treated Mr. Messina as having continued in an attorney-client relationship with Grove Fresh after January 21 1993.

157. During the Rule 60(b) proceedings, a dispute arose over the confidentiality of Mr. Messina's communications with Grove Fresh and RR&K post-January 21, 1993. Judge Zagel ruled that those communications were protected by the attorney-client privilege and the work product doctrine. Six months later, Judge Zagel silently reversed this finding and imposed financial sanctions on Mr. Messina for having held himself out as an attorney of record for Grove Fresh post-January 21, 1993.

The dispute that led to Mr. Messina's being "relieved of all responsibility" for the Grove Fresh litigation.

158. On or about December 26, 1992, Mr. Troy authorized his lawyers to file papers supporting the journalists' appeal. Mr. Messina filed Grove Fresh's appearance in the journalists' appeal on December 28, 1992.

159. Unbeknownst to Mr. Troy or Mr. Messina, Radler had secretly promised the defense lawyers that Grove Fresh would not support the jorunalists' appeal.

160. On January 4, 1993, the journalists filed a motion to require the district court clerk to create a proper record for the appeal. The motion was styled as *Motion to Include the Sealed District Court Case File in 90 CV 5009 as Part of the Record in this Appeal and to Direct the District Court Clerk to Transmit the Sealed Record in 90 CV 5009 to the Court of Appeals* (*"Motion to Perfect the Record"*).

161. Also on January 4, 1993, the defendants moved to dismiss the journalists' appeal as an improper interlocutory appeal. Four days later, the Seventh Circuit issued a scheduling order—it would defer consideration of the journalists' *Motion to Perfect the Record* until after it ruled on the defendants' motion to dismiss the appeal.

162. Grove Fresh's response to the defendants' motion to dismiss was due on Friday, January 15, 1993. Mr. Messina drafted a memorandum opposing the motion. His draft included a nine-page procedural history of the 90 CV 5009 seal order and of the protective orders in 89 CV 1113 and 90 CV 5009. His draft also included the following arguments in opposition to the motion to dismiss the appeal:

- The journalists' claim for relief in 90 CV 5009 was ripe for appeal because the sealing order was an unconstitutional prior restraint that would escape review unless the journalists' appeal went forward.
- The court of appeals should grant the journalists' *Motion to Perfect the Record.*
- Grove Fresh's Memorandum opposing the motion to dismiss should be maintained in the public files.

163. The defendants were unhappy with the contents of *Grove Fresh's Memorandum on Appealability*. The following Monday (January 18), they threatened to terminate settlement negotiations unless Grove Fresh withdrew it.

164. Mr. Messina and his co-counsel disagreed over how to respond to this demand. Radler gave Mr. Troy an ultimatum: He and his firm would withdraw from the litigation unless they were given complete control over all aspects of Grove Fresh's claims.

165. Radler issued his ultimatum knowing that Mr. Messina lacked the financial and logistical resources to represent Grove Fresh on his own. Acknowledging RR&K's superior resources, Mr. Messina advised Mr. Troy to accede to RR&K's demand.

166. On January 21, 1993, Radler prepared the following letter for Mr. Troy's signature:

> This confirms our meeting today at Rivkin, Radler & Kremer. You are hereby relieved of all responsibility in the handling of this matter. Warren S. Radler and Dale R. Crider will act as our sole attorneys and trial lawyers.
>
> We very much appreciate all of your effort in getting this ready for trial and we are optimistic that the matter will be resolved favorably.
>
> *This will also advise you that you will continue to be entitled to receive 20% of any amount received by way of settlement or verdict*. [emphasis added.]

Mr. Troy signed the letter.

167. Radler and Mr. Troy knew that if Mr. Messina were discharged as a Grove Fresh attorney, the holding in *In re Estate of Callahan*, 144 Ill. 2d 32, 578 N.E.2d 985 (1991) would operate to strip Mr. Messina of his right to his contingent fee. Mr. Troy and his lawyers knew about the holding in *In re Estate of Callahan* because RR&K had recently cited that case in the course of resisting and defeating attorney Hine's attempt to enforce his contingent fee contract against Grove Fresh.

168. Mr. Troy did not want to discharge Mr. Messina or otherwise to end his association with Mr. Messina. He had no disputes with Mr. Messina.

169. Radler knew that discharging Mr. Messina without cause would have triggered Mr. Messina's right to an immediate payment in *quantum meruit* and to assert a possessory lien over the litigation files in his possession. *In re Estate of Callahan*, 144 Ill. 2d 32, 578 N.E.2d 985, 988 (1991); *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill. App. 3d 662, 663, 410 N.E.2d 159, 161 (1st Dist. 1980).

170. Radler did not want the letter he was drafting for Mr. Troy's signature to trigger litigation over a *quantum meruit* payment to Mr. Messina. To avoid any inference that Mr. Messina was being discharged as a Grove Fresh attorney, Radler reaffirmed Mr. Messina's status as a Grove Fresh attorney by reaffirming his right to collect a contingent fee, declaring that Mr. Messina would "continue to be entitled to receive 20% of any amount received by way of settlement or verdict."

171. On March 25, 1993, Judge Zagel treated Mr. Messina as a Grove Fresh attorney when he stated that Mr. Messina would be subject to a $2 million malpractice claim if Grove Fresh lost the settlement because of Mr. Messina's refusal to execute the Consulting Agreement. As of March 25, 1993, any acts or omissions by Mr. Messina could not give rise to malpractice liability unless he had an attorney-client relationship with Grove Fresh as of that date.

172. The Grove Fresh settlement closed on or about April 13, 1993. At closing, Grove Fresh paid Mr. Messina the full amount of the $400,000 contingent fee owed to him.

The Rule 60(b) litigation

173. On July 14, 1993, the Labatt Judgment Creditors published the Misconduct Charges in their Seventh Circuit brief.

174. On August 5, 1993, Mr. Messina served the Labatt Judgment Creditors with notice that he was rescinding the Consulting Agreement. He also served them with a copy of his letter to the ARDC (Ex. 6) complaining that the Misconduct Charges were false.

175. On August 20, 1993, the Labatt Judgment Creditors filed *Everfresh's Motion to Enforce Settlement or Relief from Judgment* ("*Rule 60(b) Motion*") in 90 CV 5009 seeking relief against Grove Fresh and Mr. Messina under Fed. R. Civ. P. 60(b). The gist of the motion was that Mr. Messina had fraudulently induced the settlement by falsely warranting that the Consulting Agreement complied with "the applicable ethical rules in Illinois." In support of this fraud claim the Labatt Judgment Creditors submitted to Judge Zagel copies of Mr. Messina's rescission letter and his August 5th letter to the ARDC.

176. The *Rule 60(b) Motion* prayed for an order specifically enforcing both the Settlement Agreement and the Consulting Agreement or alternatively, for an order rescinding the $2,000,000 settlement and requiring the return of all settlement proceeds, with interest.

177. If the Labatt Judgment Creditors were to prevail on their rescission claim, Mr. Messina would be required to return the $400,000 contingent fee he had received at closing.

178. For at least 19 months, from August 1993 through December 1994, Judge Zagel exercised subject matter jurisdiction over the *Rule 60(b) Motion* on the premise that Mr. Messina was a Grove Fresh attorney as of March 25, 1993; as of August 5, 1993; and as of August 24, 1993, the date the *Rule 60(b) Motion* was first presented in court.

179. In August 1994 the Labatt Judgment Creditors deposed Mr. Messina. During the deposition RR&K instructed Mr. Messina not to disclose 13 communications he had had with Grove Fresh, including ten occurring on or after January 21, 1993, on the ground that those communications were protected by the attorney-client privilege.

180. The defendants moved to compel discovery of those ten communications, alleging that Mr. Messina's attorney-client relationship with Grove Fresh had terminated on January 21, 1993. In lieu of a written response by Grove Fresh, Judge Zagel examined the disputed communications, including the ten dated on and after January 21, 1993.

181. All of the communications reviewed by Judge Zagel that were dated on and after January 21, 1993, concerned matters in the settlement negotiations or in the litigation that occurred on or after January 21, 1993.

182. On December 1, 1994, Judge Zagel sustained Grove Fresh's claim of privilege for Mr. Messina's communications with it both before and after January 21, 1993. His ruling included this finding:

> I read the documents in their entirety. I think the claim of privilege is well-taken with respect to Grove Fresh's attorney-client assertion, the attorney-client privilege with I think virtually every document. *And what is not covered by attorney-client is covered by work product.*

183. In the Contempt Order that issued six months later, Judge Zagel, without affording Mr. Messina any notice or opportunity to be heard, silently reversed his December 1994 ruling and made a finding that Grove Fresh had discharged Mr. Messina on January 21, 1993. He then sanctioned Mr. Messina under Rule 11 for having stated in his *Fed. R. App. P. 46(c) Motion*, which he had filed in the Seventh Circuit in October 1993, that he was one of the attorneys of record for Grove Fresh.

184. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that on January 21, 1993, by virtue of Grove Fresh's reaffirming Mr. Messina's right to collect his contingent fee, Grove Fresh reaffirmed its attorney-client relationship with Mr. Messina.

b. Declaring that after January 21, 1993, Grove Fresh and RR&K regularly communicated with Mr. Messina regarding contemporaneous developments in the journalists' appeal and in the settlement negotiations with the defendants, and did so with the expectation that the communications were confidential and protected by the attorney-client privilege.

c. Declaring that on March 25, 1993, Judge Zagel recognized Mr. Messina's attorney-client relationship with Grove Fresh when he declared that Mr. Messina would be subject to a $2 million malpractice claim if he refused to execute the Consulting Agreement.

d. Declaring that the fraud claim alleged in the *Rule 60(b) Motion* required a finding that Mr. Messina was a Grove Fresh attorney as of March 25, 1993, the date of the alleged misrepresentation.

e. Declaring that for 19 months Judge Zagel exercised subject matter jurisdiction over *Rule 60(b) Motion* on the premise that Mr. Messina had been a Grove Fresh attorney as of March 25, 1993.

f. Declaring that in the course of the proceedings on the *Rule 60(b) Motion*:

> (i) The Labatt Judgment Creditors alleged that on January 21, 1993, Grove Fresh had discharged Mr. Messina as its attorney.

(ii) The Labatt Judgment Creditors, Grove Fresh, and Mr. Messina fully and fairly litigated the merits of the claim that on January 21, 1993, Grove Fresh had discharged Mr. Messina as its attorney.

(iii) Judge Zagel ruled against the Labatt Judgment Creditors on December 1, 1994

g. Declaring that under the doctrine of collateral estoppel, Judge Zagel's December 1st ruling precluded the Labatt Judgment Creditors from relitigating whether Grove Fresh had discharged Mr. Messina on January 21, 1993.

h. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

TENTH COUNTERCLAIM
(Due process—Mr. Messina's procedural rights in the Rule 60(b) proceedings)

185. For at least 19 months, from August 1993 through December 1994, Judge Zagel exercised subject matter jurisdiction over the *Rule 60(b) Motion* on the premise that Mr. Messina was a Grove Fresh attorney as of March 25, 1993; as of August 5, 1993; and as of August 24, 1993, the date the *Rule 60(b) Motion* was first presented in court.

186. If the Labatt Judgment Creditors were to prevail on their rescission claim, Mr. Messina would be required to return the $400,000 contingent fee he had received at closing.

187. In derogation of Mr. Messina's personal stakes in the outcome of the *Rule 60(b) Motion*, Judge Zagel denied Mr. Messina the right to conduct discovery and excluded Mr. Messina and his counsel from in-chambers conferences with Mr. Messina's adversaries.

188. Prior to December 1, 1994, Grove Fresh and Mr. Messina had filed separate motions to dismiss the *Rule 60(b) Motion* on various grounds. At a hearing on December 1, 1994, Judge Zagel ordered the Labatt Judgment Creditors to file, by December 20, a reply brief in support of their *Rule 60(b) Motion*. He set a status hearing for December 22, at which he would rule on the *Rule 60(b) Motion*.

189. In the meanwhile, on or about December 16 the Labatt Judgment Creditors and Mr. Messina received notice that the ARDC had closed its inquiries into Mr. Messina's complaints. Four days later, Mr. Messina's attorneys received a voice mail message that the December 22nd status hearing had been cancelled. Follow-up telephone calls yielded conflicting explanations about the reason for the cancellation.

190. In fact, the news that the ARDC had removed itself from adjudicating the ethics of the Consulting Agreement allowed the Labatt Judgment Creditors to recalibrate their strategy for silencing Mr. Messina.

191. The Labatt Judgment Creditors' lawyers contacted RR&K and proposed that Grove Fresh, Mr. Troy's estate (Mr. Troy had passed away nine months earlier), and the Labatt Judgment Creditors suspend the Rule 60(b) proceedings while they discussed settlement.

192. The Labatt Judgment Creditors and RR&K excluded Mr. Messina from their talks. He moved to intervene in the Rule 60(b) proceedings on the ground that his interests were not being represented, but Judge Zagel denied his motion. Mr. Messina filed an appeal.

193. In or about April 1995 RR&K and the Labatt Judgment Creditors, without notice to Mr. Messina, presented Judge Zagel with a stipulated order dismissing the *Rule 60(b) Motion* with prejudice, pursuant to a secret settlement agreement. Judge Zagel entered the order as requested.

194. As of the date of dismissal, Mr. Messina had counterclaims pending against the Labatt Judgment Creditors that had not been adjudicated. To preserve those claims Mr. Messina filed a protective notice of appeal.

195. In April 1995 the Labatt Judgment Creditors moved to dismiss Mr. Messina's appeals, alleging that he lacked standing because Grove Fresh had discharged him as its attorney prior to the April 1993 settlement. Troy's heirs, who four months earlier had *prevailed* on a claim that Grove Fresh and Mr. Messina had *continued* as attorney and client after January 21, 1993 (*see Ninth Counterclaim,* above), joined in the motion.

196. Judge Zagel's December 1st finding regarding Mr. Messina's status as a Grove Fresh attorney post-January 21, 1993, would have sufficed to refute the challenge to Mr. Messina's standing, but only if that finding were included in the record for Mr. Messina's appeals. However, as of April 10, 1995, there was no record for his appeals because Judge Zagel was continuing to suppress the docket and refusing to release the 90 CV 5009 papers to the clerk of court.

197. On April 10, 1995, Mr. Messina sent a letter to Donald Walker, Judge Zagel's courtroom deputy, asking him to release the 90 CV 5009 papers to the deputy clerk on the appeals desk so that a record for Mr. Messina's appeals could be prepared. Mr. Messina followed up with telephone calls on April 21, April 25, and May 1. Judge Zagel did not act on any of the requests.

198. On May 1, 1995, the defendants sent Judge Zagel a copy of their motion to dismiss Mr. Messina's appeal for lack of standing.

199. On May 2, 1995, Mr. Messina filed in the Seventh Circuit a *Motion for Relief from the District Court Regarding the Record on Appeal*. The motion asked for an order directing Judge Zagel to release the 90 CV 5009 papers to the deputy clerk on the appeals desk so that a record for Mr. Messina's appeals could be created.

200. On May 12, 1995, 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."

201. As of May 15, 1995, there were approximately 380 records in the 90 CV 5009 case file. On May 15-18, 1995, a deputy clerk created a *partial* record of the 90 CV 5009 case when she entered 248 of those records on the electronic docket ("May 1995 Docket"). She omitted from the May 1995 Docket all of the post-settlement filings and orders, including the December 1st finding regarding Mr. Messina's status as a Grove Fresh attorney post-January 21, 1993.

202. In fact, all of the post settlement papers and orders, including the December 1st finding regarding Mr. Messina's status as a Grove Fresh attorney, remained in Judge Zagel's chambers. The deputy clerk on the appeals desk was never granted access to those papers and orders.

203. At a previously scheduled status hearing on June 9, 1995, Mr. Messina presented Judge Zagel with a motion requesting an order permitting the Clerk to docket the papers underlying his pending appeals, but which had been omitted from the May 1995 Docket. Judge Zagel entered and continued this motion until June 16, 1995.

204. On June 9, 1995, while the motion to complete the record was pending in district court, the Seventh Circuit granted the motion to dismiss Mr. Messina's appeals for lack of standing. One week later, Judge Zagel denied as moot Mr. Messina's motion to complete the record.

205. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that Mr. Messina had personal stakes in the outcome of the Rule 60(b) proceedings because:

(i) The *Rule 60(b) Motion* included a prayer for an order of specific performance of the Consulting Agreement.

(ii) The *Rule 60(b) Motion* included a prayer for alternative relief (rescission of the settlement agreement) that would have required him to disgorge the $400,000 contingent fee he had received at the closing of the settlement.

b. Declaring that Mr. Messina's personal stakes in the outcome of the *Rule 60(b) Motion* gave him standing to conduct discovery and to participate in conferences in chambers with counsel for his adversaries.

c. Declaring that throughout the proceedings on the *Rule 60(b) Motion*, Judge Zagel wrongfully deprived Mr. Messina of his rights to conduct discovery and to attend certain pretrial conferences with his adversaries.

d. Declaring that Judge Zagel wrongfully interfered with Mr. Messina's right to perfect the record for his appeals from adverse orders in the proceedings on the *Rule 60(b) Motion*.

e. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

THIRTEENTH COUNTERCLAIM
(ARDC abuse of discretion)

206. On August 5, 1993, Mr. Messina complained to the ARDC about the Misconduct Charges alleged in the brief the Labatt Judgment Creditors had filed in the Seventh Circuit on July 14, 1993. *See* Ex. 6.

207. In their responses to the ARDC's inquiries into Mr. Messina's complaint, the defense lawyers tacitly admitted that they had no evidence to support those Charges. *See* Ex. 16 ¶¶67-68, 75-76. The sole bases for the Charges, they acknowledged, were the *subjective* beliefs of the defendants and their lawyers. *See* Ex. 16 ¶¶70-72.

208. Subsequently, the defense lawyers abandoned the Misconduct Charges as grounds for resisting the journalists' access claims. *See* Ex. 6, pp. 3-4; Ex. 16 ¶85.

209. On August 16, 1994, Mr. Messina submitted to the ARDC a detailed statement of the evidence and legal analysis underlying the 90 CV 5009 complaint. *See* Ex. 6, pp. 6-12, 13-22.

210. Despite the admissions and the evidence described in the preceding paragraphs, the ARDC closed the inquiry into the Misconduct Charges. The Administrator's decision was reported to Mr. Messina in a letter dated December 16, 1994.

The inquiry into the Consulting Agreement.

211. In the meanwhile, on April 28, 1994, Mr. Messina expanded his complaint to the ARDC 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).

212. In support of this claim Mr. 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).

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

214. The defense lawyers admitted that they had required the Consulting Agreement as a condition of settlement and as a means for restricting Mr. Messina's right to practice law. *See* Ex. 16 ¶95.

215. Despite these admissions, the ARDC closed the inquiry into the Consulting Agreement. The Administrator's decision was reported to Mr. Messina in a letter dated December 16, 1994.

216. The Administrator has a duty to "investigate conduct of attorneys...which tends to defeat the administration of justice...." Sup. Ct. Rule 752(a). ARDC Rule 54 authorizes the Administrator to close an investigation only if "there is insufficient evidence to establish that the respondent has engaged in misconduct."

217. The Administrator abused her discretion when she closed her inquiries into Mr. Messina's complaints despite the admissions the defense lawyers made during the course of the investigations.

218. By reason of the premises set forth above, an actual controversy exists between the Administrator and Mr. Messina.

The inquiry into the Contempt Order

219. In July 1998 the Administrator referred the Contempt Order to an Inquiry Panel. In the course of that inquiry Mr. Messina presented the Administrator with evidence of misconduct by the lawyers representing the Labatt Judgment Creditors. *See* Ex. 10-12.

220. The Administrator closed the inquiry into the Contempt Order without calling the Labatt Judgment Creditors' lawyers to account

WHEREFORE, Mr. Messina prays that judgment be rendered as follows:

a. Declaring that the Administrator abused her discretion when she closed her inquiries into Mr. Messina's complaints.

b. Granting to Mr. Messina such further relief as the Hearing Board may deem necessary and proper in this action.

Dated this 23rd day of July, 2014.

_____
John P. Messina

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