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

In the Matter of:	)	
	)	
JOHN PATRICK MESSINA,	)	
	)	Commission No. 2014PR00002
Attorney-Respondent,	)	
	)	
No. 1802622.	)	

ADMINISTRATOR'S MOTION TO STRIKE CERTAIN PARAGRAPHS OF RESPONDENT'S ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS AND EXHIBITS

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, by his attorney, Meriel Coleman, as his Motion to Strike Certain Paragraphs of Respondent's Answer, Affirmative Defenses, Counterclaims, and Exhibits, states as follows:

1. The Administrator filed his one-count complaint in this matter on January 7, 2014, alleging misconduct that included the filing of frivolous appeals in federal court. On February 28, 2014, the Administrator filed his First Amended Complaint to correct scrivner's errors.

2. Between April 16, 2014 and July 24, 2014, Respondent had filed three answers and amended answers with affirmative defense to the Administrator's First Amended Complaint. The most recent answer was filed by Respondent on July 24, 2014 and is entitled "Amended Answer, Counterclaims and Affirmative Defense to the First Amended Complaint" As part of Respondent's most recently filed amended answer, he also adopted 17 exhibits that he previously filed with another answer.

A. Respondent's Answers to Certain Paragraphs of the Administrator's Complaint and the Attached Exhibits Should Be Stricken

3. Commission Rule 233 states:

> **Answer to be Specific**. The answer shall specifically admit or deny each allegation of the complaint. Every allegation not specifically denied is deemed admitted unless the answer states the reason the respondent is unable to make a specific denial.

4. Further, the Illinois Code of Civil Procedure, 735 ILCS 5/2-610, requires pleadings to be specific and contain an explicit admission or denial of each allegation of a pleading.

5. Respondent's answers to paragraphs 5, 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 20, 22, 23, 24, 25, 28, 29, 30, 31, 33, 37, 38, 40, 41, 42, and 43 of the complaint, however, do not comply with Commission Rule 233 or with the Illinois Code of Civil Procedure (735 ILCS 5/2-610). Respondent's clear admissions or denials to the allegations in the above paragraphs of the complaint are encumbered with Respondent's conclusions and extraneous statements, which attempt to characterize acts, and purport to assert defenses in narrative form. Furthermore, Respondent fails to admit or deny the entire allegation as pled, and instead admit then excepts in a restatement of the allegations.

6. Respondent has not complied with Commission Rules or the Illinois Rules of Civil Procedure, as set forth above, and, therefore, the Administrator seeks the entry of an order striking the designated portions of Respondent's answer.

B. Respondent's Purported Affirmative Defenses Should be Stricken

7. In his answer, Respondent also asserts arguments matters which he represents to be "affirmative defenses".

8. Section 5/2-613(d) of the Illinois Code of Civil Procedure provides as follows:

> "[t]he facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply."

9. However, Section 5/2-613(d) is not without limits. In fact, "[w]here a claimed [affirmative defense] is inconsistent with a complaint's allegation, it will be stricken (nothing is lost by defendant in that situation, because the denial of that allegation in the answer has already put the matter at issue.)" *State Farm Mutual Automobile Ins. Co. v. Riley, et al.*, 199 F.R.D. 276 (N.D. Ill. Feb. 26, 2001)[1]. See also *U.S. v. Tarcom Corp.*, 2002 WL 31509777 (N.D. Ill. Nov. 12, 2002)

10. Further, Rule 234 of the Rules of the Attorney Registration and Disciplinary Commission sets forth that "[a]ny new matter alleged in the respondent's answer shall be deemed denied."

11. The matters pled by Respondent as affirmative defenses are not appropriate affirmative defenses, but instead are simply the Respondent's efforts to contradict the allegations pled in the dministrator's complaint by claim that court orders which he is alleged to have violated or that sanctioned Respondent were not applicable to Respondent. The matters set forth in Respondent's affirmative defenses could be appropriately raised at a hearing, assuming *arguendo* that they are relevant, but should not be raised in Respondent's answer to the complaint as affirmative defenses.

[1] The ruling in *State Farm* is derived from Rule 8(c) of the Federal Rules of Civil Procedure, which is counterpart to § 5/2-613(d) of the Illinois Code of Civil Procedure.

C. Respondent's purported Counterclaims for Declaratory Judgements should be stricken

12. Respondent has also pled 13 counterclaims and requested certain relief by the Hearing Board. (See Respondent's Answer at pp 14-50) While Respondent attempts to pled the matters as counterclaims, they are not counterclaims, but instead are simply Respondent's continued attempt to provide narrative denials of the allegations in the Administrator's complaint.

13. Furthermore, the Hearing Board does not have the authority to grant any of the relief sought by Respondent in his counterclaims, which includes, but is not limited to, requesting that this Hearing Board make detemrinations that Respondent's due process rights were violated in federal court and that the former Administrator abused her discreation by closing investigation requests submitted by Respondent is within the power of the Hearing Board to grant.

D. Exhibits provided by Respondent as part of his answer should be dismissed

14. Respondent's July 24, 2014 amended answer also seeks to incorporate an appendix of 17 exhibits previously filed by Repondent on April 16, 2014 as part of a previously filed answer. Respondent current answer also includes two additional documents, which were attached.

15. The pertinent rules of the Illinois Code of Civil Procedure and the Supreme Court Rules provide that responsive pleadings shall admit, deny or plead insufficient knowledge. Nowhere in the rules is it provided that exhibits such as those attached by Respondent are appropriately attached to responsive pleadings.

16. While the exhibits attached to the answer may be appropriately admitted into evidence at a hearing in this matter, there is no basis to attach the exhibits to Respondent's answer.

WHEREFORE, the Administrator respectfully requests the entry of an order striking paragraphs paragraphs 5, 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 20, 22, 23, 24, 25, 28, 29, 30, 31, 33, 37, 38, 40, 41, 42, and 43 of Respondent's answer, as well as Respondent's affirmative defenses, counterclaims, and exhibits and giving Respondent seven days to file an answer that comports with the applicable rules on pleadings.

Respectfully submitted,

Jerome Larkin, Administrator
Attorney Registration and
Disciplinary Commission

By: _____
Meriel Coleman

Meriel Coleman
Counsel for the Administrator
One Prudential Plaza
130 E. Randolph Dr., Suite 1500
Chicago, Illinois 60601
Telephone: (312) 565-2600