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DECISION FROM DISCIPLINARY REPORTS AND DECISIONS SEARCH

Filed June 26, 2013

In re Joseph Henry Martin
Attorney-Respondent

Commission No. 2011PR00048

Synopsis of Hearing Board Report and Recommendation
(June 2013)

The Administrator filed a six-count Complaint against Respondent, charging him with misconduct relating to his employment as chief legislative counsel for a Native American tribe. The allegations of misconduct involved lawsuits Respondent filed against the Tribe and tribal officials and certain of Respondent's communications and statements. Respondent denied misconduct.

The Hearing Board found the Administrator proved some, but not all, of the misconduct charged. The proven misconduct included bringing a frivolous proceeding in three matters, threatening another attorney with disciplinary action unless he withdrew from representing parties opposing Respondent in litigation, communicating with parties he knew were represented by counsel and engaging in conduct that is prejudicial to the administration of justice.

The Hearing Board regarded Respondent's improper behavior as the result of a gross lapse of judgment, occurring in the context of a particularly difficult employment relationship, and the product of unresolved anger. The Hearing Board recommended Respondent be suspended for five months, but with the suspension stayed in full by one year probation, subject to conditions including anger management counseling.

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

In the Matter of:

JOSEPH HENRY MARTIN,

Attorney-Respondent,

No. 6226946.

Commission No. 2011PR00048

REPORT AND RECOMMENDATION OF THE HEARING BOARD

INTRODUCTION

The hearing in this matter was held on November 6, 2012, at the Chicago offices of the Attorney Registration and Disciplinary Commission (ARDC), before a Panel of the Hearing Board consisting of Joseph A. Bartholomew, Chair, Mara S. Georges and Cheryl M. Kneubuehl. Meriel R. Coleman appeared on behalf of the Administrator. Respondent appeared *pro se*.

PLEADINGS

Complaint

The Administrator filed a six-count Complaint against Respondent on May 20, 2011, which was served upon Respondent by mail on June 20, 2011. The Complaint charged Respondent with misconduct arising out of his employment with the Little River Band of Ottawa Indians (LRBOI). All Counts except Count III involved lawsuits Respondent filed against the LRBOI, tribal government officials and/or a tribal judge. Count I also concerned Respondent's negative remarks regarding a Tribal Council member. Count II also concerned Respondent's conduct during a court proceeding and alleged threat to initiate disciplinary charges against opposing counsel. Count III involved a letter Respondent sent to tribal government officials.

PAGE 2:

Answer

On July 18, 2011, Respondent filed an Answer. Respondent's Answer was stricken on motion of the Administrator. Subsequently, within the time permitted by the Hearing Board, Respondent filed an Amended Answer, which admitted some of the Complaint's factual allegations, denied other factual allegations and denied misconduct.

ALLEGED MISCONDUCT

The Administrator alleged Respondent committed the following misconduct: 1) continued to represent a client when the representation was materially limited by Respondent's own interests (Counts I and II); 2) used means that have no substantial purpose other than to embarrass, delay or burden a third person (Count I); 3) threatened to present a professional disciplinary allegation against another attorney to force that attorney to withdraw from representing the opposing party in civil litigation (Count II); 4) asserted a position or took other action he knew or reasonably should know would serve merely to harass or maliciously injure another (Count III); 5) communicated with a party in a proceeding he knew was represented by counsel (Count III); 6) advanced a claim against a person he knew was unwarranted under existing law (Count IV); 7) brought a frivolous proceeding (Counts IV, V and VI); 8) engaged in conduct that is prejudicial to the administration of justice (Counts I through VI); and 9) engaged in conduct which tends to defeat the administration of justice or bring the courts or legal profession into disrepute (Counts I through VI) in violation of Rules 1.2(e), 1.2(f), 1.7(b), 3.1, 4.2, 4.4, 8.4(a)(5), 8.4(d) of the Illinois Rules of Professional Conduct and Supreme Court Rule 770.

Counts I and III of the Complaint charged misconduct under the Illinois Rules of Professional Conduct of 1990. Count II charged misconduct under the 1990 Rules, but also

PAGE 3:

alleged Respondent violated Rule 8.4(d) of the 2010 Rules. Counts IV, V and VI charged misconduct under the Illinois Rules of Professional Conduct of 2010.

THE EVIDENCE

The Administrator presented testimony from David Giampetroni, Wilson D. Brott and Respondent. Administrator's Exhibits 1 through 34 were admitted into evidence.

Respondent testified on his own behalf. He did not present testimony from other witnesses. Respondent's Exhibits 1 and 2 were admitted into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In an attorney disciplinary proceeding, the Administrator must prove the misconduct charged by clear and convincing evidence. In re Winthrop, 219 Ill. 2d 526, 542, 848 N.E.2d 961 (2006). Clear and convincing evidence is a degree of proof which, considering all the evidence, produces a firm and abiding belief it is highly probable the proposition at issue is true. *Cleary & Graham's Handbook of Illinois Evidence*, sec.301.6 (9th ed. 2009). Clear and convincing evidence is not as stringent as the criminal standard of proof beyond a reasonable doubt, but requires more than the usual civil standard of a preponderance of the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 213, 647 N.E.2d 273 (1995); *People v. Williams*, 143 Ill. 2d 477, 484, 577 N.E.2d 762 (1990). Clear and convincing evidence requires a high level of certainty. *In re Stephenson,* 67 Ill. 2d 544, 556, 367 N.E.2d 1273 (1977).

Not every attorney error constitutes professional misconduct. *In re Mason*, 122 Ill. 2d 163, 169, 522 N.E.2d 1233 (1988). To prove an attorney has committed a disciplinary violation, the Administrator must prove the elements of the rule under which the attorney is charged. *In re Owens*, 144 Ill. 2d 372, 378, 581 N.E.2d 633 (1991). A rule violation cannot be found unless the

conduct at issue falls within the scope of the rule charged. *In re O'Donnell*, 04 CH 115, M.R. 22181 (Mar. 17, 2008).[1]

Background and Admitted Facts

The Little River Band of the Ottawa Indians (LRBOI or the Tribe) is a federally-recognized Native American tribe in Michigan. (Answer at par. 1). In LRBOI tribal government, the chief executive is the Ogema and the legislature is the Tribal Council. There is also a Tribal Court. (Tr. 22-23). Except as indicated otherwise, all lawsuits at issue in this case were filed in LRBOI Tribal Court. (Adm. Exs. 4, 7, 8, 10, 11, 12, 26).

At the time of the matters at issue, the LRBOI was a relatively new governmental entity. Tribal law was being developed, and certain issues needed to be addressed and resolved. The relationship between the Ogema and Tribal Council was contentious. Multiple lawsuits had been filed trying to define the parameters of their respective authority. (Tr. 123-24, 132-33, 136-37).

On September 10, 2007, Respondent entered into a written contract for employment as chief legislative counsel of the LRBOI. (Tr. 140; Adm. Ex. 1). The contract provided this job would be Respondent's sole professional employment. (Adm. Ex. 1). Respondent moved from Wisconsin to Michigan for this employment. (Tr. 142-43).

Illinois is the only state in which Respondent has ever been licensed to practice law. For several years before accepting the job with the LRBOI, Respondent was a tribal court judge for the Menominee and Saginaw Chippewa Tribes, in Wisconsin. Those positions did not require a Wisconsin law license. (Tr. 140, 198-99). Among other requirements, Respondent's contract with the LRBOI provided Respondent had to maintain his Illinois law license. (Adm. Ex. 1).

On March 17, 2008, the LRBOI Tribal Court notified Respondent he could not practice before the Tribal Court until he could produce a certificate of good standing from a state in

PAGE 5:

which he had a valid law license. (Adm. Ex. 2). At that time, Respondent learned he had been removed from the roll of attorneys licensed to practice in Illinois, for nonpayment of his registration fee. Respondent paid his Illinois registration fee on March 18, 2008 and was restored to the Master Roll. Respondent testified he was not required to pay the registration fee while serving as a judge and, when he began private practice, there was confusion as to the years for which the fee was due. (Tr. 144-45, 192-93). *See* Supreme Court Rule 756(a)(4).

COUNT I

I. Respondent is charged with continuing to represent the LRBOI when the representation was materially limited by Respondent's own interests, as he filed a lawsuit against the LRBOI, while employed as its chief legislative counsel in violation of Rule 1.7(b).

A. Evidence Considered

In addition to the evidence outlined above, the following evidence is relevant to our consideration of this charge.

Under his contract with the LRBOI, Respondent was required to obtain a license to practice law in Michigan, within six months of his employment. (Tr. 140, 199; Adm. Ex. 1). He had not done so. Respondent testified he understood he had twelve months to obtain a Michigan law license and did not learn otherwise until February 2008. The contract had not been amended. Respondent based his belief on negotiations with an LRBOI representative and on provisions of the Legal Counsel Reform Act, an LRBOI law. Respondent understood the requirement of a Michigan law license to be contractual in nature and testified the law governing practice before the LRBOI Tribal Court did not require him to have a Michigan license, so long as he was licensed in some state. (Tr. 140-43, 188, 195, 199-201).

Nine months after he began working for the LRBOI, Respondent had not begun an application for a Michigan law license. Respondent testified the significant time required to

PAGE 6:

obtain the license deterred him from doing so, particularly as issues had arisen which created uncertainty as to Respondent's continued employment. Respondent did not want to get a Michigan license if he would not remain at the job with the LRBOI. (Tr. 193-97).

On April 14, 2008, the Ogema sent Respondent a letter stating his employment was terminated. According to this letter, the primary ground for termination was Respondent's failure to obtain a license to practice law in Michigan. The letter asserted, as an additional ground, that Respondent failed to maintain his Illinois law license. (Adm. Ex. 3).

David Giampetroni is an attorney who represented the Tribe in some matters. Giampetroni testified the Ogema's action prompted a power struggle between the Ogema and Tribal Council over who had the constitutional authority to terminate Respondent. (Tr. 16-18, 23). The Ogema and Tribal Council had had other disagreements involving the employment of attorneys, and the Tribal Council had terminated the Ogema's attorney. Respondent believed some of the Ogema's actions toward him were taken in retaliation for that conduct. (Tr. 136-37, 210-11).

The Tribal Council immediately sued the Ogema, seeking declaratory and injunctive relief (declaratory judgment action). Respondent was not a party to the declaratory judgment action, and he did not represent either party in that litigation. The issues in the declaratory judgment action concerned solely who had authority to terminate Respondent's employment and did not involve any circumstances specific to Respondent's employment. (Tr. 75, 146-47).

On April 16, 2008, the assigned judge, Judge Angela Sherigan, entered a temporary restraining order, which was continued following a hearing on May 1, 2008. (Adm. Ex. 4). Respondent testified he understood these orders maintained the status quo in relation to his employment and meant he did not need to obtain a Michigan license right away. (Tr. 161, 196).

PAGE 7:

Judge Sherigan issued her decision, on January 22, 2009, concluding the Ogema had authority to terminate Respondent's contract. (Adm. Ex. 4).

In the meantime, in May 2008, Respondent sued the Ogema, alleging breach of contract. (*Martin v. Ogema*). In February 2009, Respondent filed a motion to amend the complaint to add the Tribal Council as a defendant and a count alleging the Tribal Council breached Respondent's employment contract. The Tribe was not a defendant in *Martin v. Ogema*. Respondent testified the Tribe, the Ogema and the Tribal Council were separate entities. (Tr. 149-52; Adm. Ex. 7).

Respondent was employed by the LRBOI when he filed *Martin v. Ogema* and when he moved to amend the complaint to add the Tribal Council as a defendant. (Tr. 152-53). The motion to amend was to be heard on April 30, 2009. Given intervening circumstances, on that date, Respondent instead voluntarily dismissed the action in its entirety, without prejudice. (Adm. Ex. 10 at 3; Adm. Ex. 11 at 4).

Respondent's employment contract identified the Tribe as his client. Under the contract, Respondent was to act in the interests of the Tribe. (Adm. Ex. 1 at 1, par. 3).

Respondent was employed as chief legislative counsel for the LRBOI Tribal Council. As such, he was the head attorney for the legislative branch of the LRBOI government. His duties included drafting legislation and advising the Tribal Council. (Tr. 20, 152-53). Respondent was subject to the Tribal Council's primary supervision and direction, and he was to act for and on behalf of the Tribal Council. (Adm. Ex. 1). At one point, Respondent referred to the Speaker as his client. (Tr. 200). The Speaker is the leader of the Tribal Council. (Tr. 74). Respondent never advised the Ogema. (Tr. 153).

Respondent testified he informed the Tribal Council of his intent to file the original and amended complaints in *Martin v. Ogema*. According to Respondent's testimony, after

PAGE 8:

consulting with the associate legislative counsel, the Tribal Council gave him permission to sue, to clarify the legality of certain surrounding conduct. Respondent testified many Tribal Council members were concerned with possible violations of the Legal Counsel Reform Act arising from conduct on the part of the Ogema as well as conduct by some Tribal Council members, who dealt directly with the associate legislative counsel, rather than with Respondent. (Tr. 150, 153-56).

On April 6, 2009, the Ogema notified Respondent he was rescinding the termination of Respondent's employment due to subsequent events, particularly the restoration of Respondent's Illinois law license. In this letter, the Ogema asked Respondent to advise him within thirty days of his plans to address the issue of licensure in Michigan. (Adm. Ex. 6). Respondent agreed to do so. (Tr. 202). Subsequently, *Martin v. Ogema*

was dismissed by agreement. (Tr. 156).

Respondent testified he had intended to seek a license to practice law in Michigan and started the application process shortly after receiving the Ogema's letter. He did not ultimately file an application. Respondent believed his lack of a Michigan law license was being used as an excuse to terminate him. Respondent testified, as of June 2009, problems had resumed, including issues regarding the LRBOI's Gaming Commission, disagreements between Respondent and some Tribal Council members, differences among Tribal Council members and disputes between the Tribal Council and other branches of tribal government, particularly as to the scope of their respective authority. (Tr. 157-58, 162, 201-202, 209-11).

B. Analysis and Conclusions

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person or by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after disclosure. Ill. Rs. Prof'l Conduct R. 1.7(b) (1990). To prove an attorney violated Rule 1.7(b), the Administrator must prove each of the elements of that Rule by

PAGE 9:

clear and convincing evidence. *In re Svec*, 09 CH 28, M.R. 25306 (May 18, 2012). The Administrator did not meet that burden here.

The Complaint charged Respondent violated Rule 1.7(b) because he filed a lawsuit, *Martin v. Ogema*, against the LRBOI while employed as its chief legislative counsel. According to the evidence, the Ogema, the Tribal Council and the LRBOI were distinct legal entities. Only the Ogema and the Tribal Council were defendants in *Martin v. Ogema*; the LRBOI was never named as a defendant in that lawsuit. Given this evidence, the Administrator did not prove the facts which were alleged in Count I as the basis of the charge Respondent violated Rule 1.7(b). Therefore, the Administrator did not prove Respondent violated Rule 1.7(b). *In re Bilal*, 05 CH 87, M.R. 22687 (Jan. 20, 2009).

Further, to establish a violation of Rule 1.7(b), there must be proof the lawyer's representation of the client may be materially limited by the lawyer's own interests or the lawyer's responsibilities to another person. *Bilal*, 05 CH 87 (Review Bd. at 18-19). The lack of clear and convincing evidence to establish this element provides an additional basis for our decision. The evidence reflects significant infighting among members of the tribal government, particularly as to the respective authority of different branches of government. Other than background information provided by Giampetroni, Respondent was the only witness to testify about the *Martin v. Ogema* lawsuit. Respondent testified part of the reason he filed *Martin v. Ogema* was to determine the legality of certain conduct by the Ogema and some Tribal Council members. We accept this testimony. That testimony suggested Respondent believed his interests were not adverse to those of his client and his client's interests would be served by clarifying the issues raised in *Martin v. Ogema*. This belief was not unreasonable, given the facts presented to us.[2]

PAGE 10:

II. Respondent is charged with using means that have no substantial purpose other than to embarrass, delay or burden a third person in violation of Rule 4.4.

A. Evidence Considered

In addition to evidence outlined in Section I above, we consider the following evidence.

The Tribal Council met on June 19, 2009. Respondent testified he went to the meeting, but did not attend the meeting itself. Respondent testified he went because he understood his contract would be discussed at the meeting and he wanted to see certain friends on the Tribal Council. Respondent's job duties included attending Tribal Council meetings, but Respondent testified he had stopped going and, as a practical matter, his attendance was not required. (Tr. 158-60).

At the meeting, Respondent exchanged words with Norbert Kelsey, a Tribal Council member. (Tr. 160-61). Respondent referred to Kelsey as a "joke." (Tr. 164). According to Respondent, at that time, the meeting had ended. Some Tribal Council members were present; others had left. Respondent and Kelsey left and continued their exchange of words outside. (Tr. 164-65).

Respondent returned to the meeting room. (Tr. 165). Respondent testified two or three other people were present, but the meeting was over. (Tr. 166-69). Respondent unleashed a series of invective remarks and expletives concerning Kelsey, which need not be repeated here. Among other things, Respondent stated he would make Kelsey, who used a cane, into a popsicle. Unbeknownst to Respondent, his statements were recorded, as the recording device used to record the Tribal Council meeting had remained on. (Tr. 165, 167-69).

B. Analysis and Conclusions

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person. Ill. Rs. Prof'l Conduct R. 4.4 (1990).

PAGE 11:

Respondent publicly used extremely intemperate and inappropriate language in relation to Kelsey. The Complaint charged Respondent's remarks concerning Kelsey violated Rule 4.4.

Respondent's testimony was the only evidence presented concerning the statements and surrounding circumstances. No one else who was present at the time testified. According to Respondent's testimony, Respondent's comments were not made during the Tribal Council meeting, but after the meeting had ended. Further, Respondent testified he was not present for the purpose of representing a client. The evidence does not clearly and convincingly demonstrate otherwise.

Respondent's comments were improper, and we do not condone them in any way. However, despite their clearly inappropriate nature, Respondent's remarks were not made in the course, or as a means, of representing a client. Therefore, the Administrator did not prove a violation of Rule 4.4.

III. Respondent is charged with engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(a)(5).

A. Evidence Considered

We consider the evidence discussed in Sections I and II in relation to this charge.

B. Analysis and Conclusions

An attorney shall not engage in conduct that is prejudicial to the administration of justice. Ill. Rs. Prof'l Conduct R. 8.4(a)(5) (1990). The Administrator did not present clear and convincing evidence that Respondent engaged in improper conduct which prejudiced the administration of justice. Respondent's improper remarks regarding Kelsey were not proven to have had any impact on any proceeding. The fact that Respondent filed *Martin v. Ogema* does not establish prejudice to the administration of justice, as the

Administrator did not prove

PAGE 12:

Respondent acted improperly by filing that lawsuit. Therefore, the Administrator did not prove Respondent violated Rule 8.4(a)(5) as charged in Count I.

COUNT II

I. Respondent is charged with continuing to represent the LRBOI when the representation was materially limited by Respondent's own interests, as a result of a lawsuit by Respondent, in violation of Rule 1.7(b).

A. Evidence Considered

In addition to the evidence discussed in Section I of Count I, the following evidence is relevant to our consideration of this charge.

On July 16, 2009, the Ogema and Tribal Council Speaker met with Judge Sherigan and requested that she clarify the January 2009 judgment in the declaratory judgment action. (Adm. Ex. 5). According to Respondent, this was an informal meeting, over lunch. (Tr. 148-49). After the meeting, Judge Sherigan issued an order stating the prior judgment did not give the Ogema sole authority to terminate Respondent and both the Ogema and the Tribal Council had independent authority to terminate the contract. (Adm. Ex. 5).

On or about August 17, 2009, Respondent, through counsel, filed a lawsuit against the LRBOI, the Tribal Council and the Ogema. At that time, Respondent was employed as chief legislative counsel. This suit (*Martin I*) was based primarily on an alleged breach of contract and sought monetary damages and injunctive relief. (Tr. 18-20; Adm. Ex. 8).

Shortly thereafter, on August 21, 2009, the Speaker and Ogema notified Respondent his access to tribal buildings and computer systems was being temporarily curtailed, while his status was being reviewed. This letter stated Respondent's employment status was not changed, but instructed Respondent to refrain from entering tribal properties and communicating with third parties on behalf of the LRBOI, until further notice. (Adm. Ex. 11 at 45).

PAGE 13:

Other letters followed, from the Ogema and Speaker to Respondent. This correspondence and Respondent's reply reflect significant differences of opinion concerning Respondent's employment and its terms. (Adm. Ex. 11 at 6, 46-48, 50-52; Resp. Ex. 1). Ultimately, the Ogema and Speaker sent Respondent a letter, dated October 16, 2009, by which the LRBOI terminated Respondent's employment. (Adm. Ex. 9).

On November 3, 2009, Respondent, through counsel, filed a lawsuit against the LRBOI, the Tribal Council and the Ogema. In this suit (*Martin II*), Respondent alleged violations of the Tribe's Whistleblower Protection Act and sought injunctive relief, reinstatement, back pay and other remedies. (Tr. 20-21; Adm. Ex. 11). *Martin I* and *Martin II* were consolidated, and, with leave of court, Respondent filed an amended complaint. (Tr. 33, 93-95; Adm. Ex. 10).

On November 6, 2009, Respondent filed a *pro se* lawsuit against the LRBOI, the Tribal Council, the Ogema and Judge Sherigan. This lawsuit (*Martin III*) arose out of the July 16, 2009 order modifying Judge Sherigan's original ruling in the declaratory judgment action. *Martin III* primarily sought declaratory and injunctive relief. (Tr. 21, 23; Adm. Ex. 12).

The defendants filed motions to dismiss and for summary disposition in *Martin I*, *Martin II* and *Martin III*. All three lawsuits were dismissed. (Tr. 33-37).

Respondent testified, when he filed *Martin I*, he believed tribal officials were considering terminating his employment and the potential termination of his employment was part of the reason he sued. (Tr. 177-78). Respondent testified he also filed *Martin I* because of the manner in which members of the tribal government were dealing with the Tribe's Gaming Commission. (Tr. 178). Respondent acknowledged it was wrong to file *Martin I* because the suit might have been barred by sovereign immunity. (Tr. 175-76).

PAGE 14:

B. Analysis and Conclusions

Count II charged, by continuing to represent the LRBOI when the representation was materially limited by his own interest, as a result of Respondent's lawsuit, Respondent violated Ill. Rs. Prof'l Conduct R. 1.7(b) (1990). Count II does not specify the lawsuit on which the charge is based.

Count II described multiple lawsuits Respondent filed. Of those lawsuits, *Martin II* and *Martin III* were filed after October 16, 2009. Those lawsuits cannot serve as the basis for finding a violation of Rule 1.7(b) because they were filed after Respondent's employment was terminated. A present attorney-client relationship must exist for a violation of Rule 1.7 to be found. *In re Nagler*, 07 CH 12, M.R. 23644 (May 17, 2010). Respondent was not charged with violating the separate rule which governs conflicts of interest as to former clients. *See* Ill. Rs. Prof'l Conduct R. 1.9.

Martin I was filed before October 16, 2009. Therefore, we must determine whether the Administrator proved Respondent had an impermissible conflict of interest in filing *Martin I*.

In determining whether the Administrator proved Respondent violated Rule 1.7(b), we must consider all the evidence, including the circumstances surrounding this employment relationship as a whole. Based on the evidence presented to us, the LRBOI was a relatively new governmental entity, whose officials were attempting to stake out the boundaries of their jurisdiction. There was contention between different branches of government and between different factions within the Tribal Council. These disputes affected Respondent's employment, and Respondent's employment itself became a subject of dispute. As a result, Respondent was placed in an extremely difficult situation and was faced with the choice of either seeking legal redress during his employment or quitting a job he had relocated to accept.

PAGE 15:

In the context of civil litigation against a former employer/client, the Supreme Court has decided attorneys employed as in-house counsel do not have the full array of civil legal remedies available to a non-attorney employee. *Balla v. Gambro, Inc*., 145 Ill. 2d 492, 501-502, 584 N.E.2d 104 (1991). The case before us, however, arises in the significantly different context of an attorney disciplinary proceeding. It is one thing to decide an attorney cannot sue an employer/client for retaliatory discharge, (*Balla*, 145 Ill. 2d at 501), and quite another to determine an attorney should be disciplined for doing so. An attorney, employed as in-house counsel, who sues the employer to redress a legitimate employment grievance should not be automatically subject to professional discipline, simply because the employment has not terminated. *In re Nelson*, 02 CH 12, M.R. 19657 (Nov. 17, 2004); *see In re Welzien*, 05 CH 89, M.R. 21730 (Sept. 18, 2007) (declining to find an absolute prohibition against an attorney filing a claim against an estate he or she represents). Rather, the issue of whether the attorney has violated a professional disciplinary rule must be based on the circumstances of the individual case.

The attorney in *Nelson* sued her employer alleging discrimination and disparate pay. Misconduct, including a

violation of Rule 1.7(b), was found. However, the finding of misconduct was not based solely on the fact that Nelson sued her employer while still employed. Nelson had used her position as in-house counsel to access confidential information and then used that information for her own benefit in filing a lawsuit against her employer/client. *Nelson*, 02 CH 12 (Hearing Bd. at 15-16). Thus, Nelson went beyond merely redressing a wrong and instead used her position as an attorney against her client. *Id*. at 16. Similar circumstances are not present here.

PAGE 16:

The Administrator did not present clear and convincing evidence Respondent engaged in a conflict of interest by filing *Martin I*,. We reach this conclusion for a number of reasons.

Respondent's employment with the LRBOI had been a source of uncertainty from early on. We are convinced part of the difficulty involved the disagreements over jurisdiction between the Ogema and the Tribal Council and differences of opinion between factions on the Tribal Council. This is reflected in the fact that some Tribal Council members sought to go around Respondent and deal instead with the associate legislative counsel. There were ambiguities as to who had authority over Respondent. Under his contract, Respondent's client was the LRBOI. Respondent negotiated his contract with the Ogema, but was subject to the direction of the Tribal Council. Given the infighting among the different branches of government, it was not at all certain who within the government spoke for the Tribe.

Based on the evidence presented, it appears Respondent's employment became a political football. In the past, the Ogema had acted to terminate Respondent's employment, exclude Respondent from his office and bar Respondent from using LRBOI computers. Issues were arising again in August 2009, when Respondent filed *Martin I*, a suit for breach of contract.

Given these circumstances, the evidence did not clearly and convincingly demonstrate that Respondent acted unreasonably or improperly by seeking to have the court system resolve whether his contract had been breached. Similarly, in light of these circumstances, there was not clear and convincing evidence that, by filing *Martin I*, Respondent's representation of his client, the LRBOI, was materially limited by his own interests. Therefore, the Administrator did not prove Respondent violated Rule 1.7(b).

PAGE 17:

II. Respondent is charged with threatening to present a professional disciplinary allegation against Giampetroni to force his withdrawal from representing the opposing party in civil litigation in violation of Rule 1.2(e).

A. Evidence Considered

In addition to the evidence outlined in Section I of Count II, we consider the following evidence in relation to this charge.

Giampetroni represented the defendants, other than Judge Sherigan, in *Martin I*, *Martin II* and *Martin III*. (Tr. 17-18, 20-22). On December 4, 2009, Giampetroni and Respondent had a telephone conversation about the cases. Giampetroni testified, during the conversation, Respondent stated Giampetroni had to withdraw, because of a conflict of interest, and, if he did not do so within five days, Respondent would file a grievance against Giampetroni with the Michigan State Bar. (Tr. 24-25). Giampetroni did not withdraw. (Tr. 25-26).

During a court proceeding on December 7, 2009, in which Giampetroni and Respondent participated, Respondent objected to Giampetroni representing the defendants given the alleged conflict of interest. In that context, Respondent threatened to complain to disciplinary authorities if Giampetroni did not withdraw. (Tr.

26-27; Adm. Ex. 13 at 1-2). Specifically, Respondent stated: ". . . Mr. Giampetroni you should have taken my offer on Friday to withdraw on all of these cases that letter is going to the Michigan Bar on Wednesday." (Adm. Ex. 13 at 2). Respondent acknowledged it was wrong for him to make that threat. (Tr. 244).

B. Analysis and Conclusions

A lawyer shall not present or threaten to present a professional disciplinary action to obtain an advantage in a civil matter. Ill. Rs. Prof'l Conduct R. 1.2(e) (1990). To prove this charge, the Administrator must show both that the attorney made a threat to bring a professional disciplinary action and that the threat was made for the purpose of obtaining an advantage in

PAGE 18:

civil litigation. *In re Levin*, 05 CH 71, M.R. 22344 (May 19, 2008). The Administrator proved Respondent violated Rule 1.2(e).

Giampetroni testified Respondent threatened to file a grievance against him with the Michigan State Bar if he did not withdraw from representing the Tribe, the Ogema and the Tribal Council in the three civil lawsuits Respondent had filed against them. Respondent reiterated that threat during a court proceeding a few days later, as demonstrated by both Giampetroni's testimony and the transcript of the proceeding. The evidence, therefore, clearly established the fact Respondent made the threat and the words Respondent used, which directly linked the threat of disciplinary action to the result Respondent sought.

Giampetroni was representing the LRBOI, the Ogema and the Tribal Council in civil litigation Respondent had brought against them. Respondent threatened to bring disciplinary charges against Giampetroni if Giampetroni did not withdraw from that representation. Respondent clearly was seeking to induce Giampetroni to withdraw from representing the parties whose interests were adverse to Respondent's own in the litigation. If Respondent had succeeded in his efforts, the opposing parties would have been left without representation by the attorney of their choice. We infer Respondent believed such a situation would operate to his benefit and that his purpose in making the threat was to gain an advantage in the civil litigation.

III. Respondent is charged with engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(a)(5) and Rule 8.4(d).

A. Evidence Considered

In addition to the evidence outlined as to Sections I and II of Count II, we consider the following evidence.

During the court proceedings on December 7, 2009, Respondent was agitated. (Adm. Ex. 14). Respondent made an oral motion to disqualify the presiding judge, Judge Daniel Bailey.

PAGE 19:

(Tr. 26; Adm. Ex. 13 at 1). Judge Bailey instructed Respondent to have a seat twice. Respondent refused and stated "that's it," three times. (Tr. 175; Adm. Ex. 13 at 2-3). After Judge Bailey asked that police be called, Respondent asked: "(w)hat are you going to do hold me in contempt?" (Adm. Ex. 13 at 3). Respondent left the courtroom, stating Judge Bailey should hire a lawyer and Respondent would see him in federal court. (Tr. 175; Adm. Ex. 13 at 3).

On December 7, 2009, following these proceedings, Judge Bailey entered an order, holding Respondent in contempt of court for his unprofessional and irrational behavior in court and assessing a $200 fine, to be paid within fourteen days. (Adm. Ex. 14).

Respondent appealed. On September 23, 2010, the Tribal Court of Appeals affirmed. (Adm. Ex. 15). Respondent issued a check for $200 to the Tribal Court on December 27, 2010. (Adm. Ex. 16). Respondent testified, around that time, he asked another judge to convey his apology to Judge Bailey. (Tr. 174). Respondent acknowledged his behavior in Judge Bailey's courtroom was inappropriate, disrespectful and rude. (Tr. 173, 175, 207, 243).

On March 2, 2011, a bench warrant was issued. The warrant was based on an alleged failure to pay a contempt sanction. (Adm. Ex. 25). As discussed in relation to Count IV, a separate $200 fine was imposed as a sanction in relation to a different matter. (Adm. Ex. 24).

B. Analysis and Conclusions

An attorney may not engage in conduct that is prejudicial to the administration of justice. Ill. Rs. Prof'l Conduct R. 8.4(a)(5) (1990); Ill. Rs. Prof'l Conduct R. 8.4(d) (2010). Prejudice to the administration of justice can be shown where an attorney's improper conduct has an adverse impact on a court proceeding or has caused a court work which would have been unnecessary but for the attorney's improper conduct. *In re Bradley Verett*, 07 SH 105, M.R. 22567 (Sept. 17, 2008).

PAGE 20:

Respondent's conduct in Judge Bailey's courtroom was clearly improper. As a result of Respondent's improper behavior, Judge Bailey held Respondent in contempt. Based on this evidence, we find Respondent engaged in conduct prejudicial to the administration of justice, in violation of Rule 8.4(a)(5) of the 1990 Rules.

Count II also charged Respondent violated Rule 8.4(d) of the 2010 Rules, which similarly proscribes conduct prejudicial to the administration of justice. However, there was not clear and convincing evidence Respondent engaged in conduct which prejudiced the administration of justice, after the effective date of the 2010 Rules.

The evidence as to this portion of the charge was very limited. The delay in paying the sanction, in and of itself, did not clearly and convincingly establish Respondent engaged in conduct which prejudiced the administration of justice. The evidence did not demonstrate Respondent's failure to pay immediately was willful or contumacious, and no evidence was presented of what, if any, additional work resulted for the other parties or the court system. Contrary to the Complaint's allegations, it appears Respondent paid the sanction and did so before the bench warrant was issued. Therefore, the Administrator did not prove, by clear and convincing evidence, Respondent violated Rule 8.4(d).

COUNT III

I. Respondent is charged with asserting a position or taking other action he knew or reasonably should have known would serve to merely harass or maliciously injure another, in violation of Rule 1.2(f)(1), communicating with a party in a proceeding Respondent knew was represented by counsel, in violation of Rule 4.2 and engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(a)(5).

A. Evidence Considered

In addition to the evidence set out in Sections I and II of Count II, we consider the following evidence.

PAGE 21:

On December 11, 2009, Respondent sent a letter to the Ogema and the Speaker of the Tribal Council. Respondent described this as a demand letter, sent in an effort to avoid litigation to resolve Respondent's claims against the Tribe. (Adm. Ex. 17 at 1). The letter, consisting of seven, single-spaced pages, recited Respondent's theories for his claims against the Tribe, intended choice of venue and other matters. (Adm. Ex. 17). In that context, Respondent stated:

> every assertion of tribal sovereignty and jurisdiction will be vigorously opposed by bringing out ALL facts in a forum and lawsuit where there can be no claims of attorney-client privilege and confidentiality. As I am sure your legal staff and Mr. Giampetroni have told you, in a breach of contract lawsuit between attorney and client, any and all claims of privilege and confidentiality are deemed waived, and therefore EVERYTHING I learned and/or advised the Tribe of during my tenure, including Commercial Fishing, the Casino, illegal payments to members, lawsuits, personnel, boundary disputes, etc., is fair game in any court of law. And, because of this Tribe's stunning failure to tamp down the staggering amount of information leaked to third parties by certain Tribal Council members and the Ogema, including legal advice, whether by e-mail to the Karol Ann Chabot's of the world and her followers or by other means, all of that information is not privileged and/or confidential and can be shared with anybody at my discretion, including federal and state authorities, those opposing the Tribe in any venture, etc.

(Adm. Ex. 17 at 3-4).

Respondent stated he would not "go away" and no defenses were available. Respondent suggested litigation would be "particularly damaging, legally and politically," to the Tribe and the lawsuit he intended to file would be the "absolute last thing" the Tribe would want. (Adm. Ex. 17 at 4-5). Respondent set out reasons his intended lawsuits would be detrimental and embarrassing to the Tribe, including the negative impact on the Tribe of the information to be revealed merely by filing the suits. (Adm. Ex. 17 at 5-6). Respondent's letter proceeded to state:

> in return for voluntarily dropping all lawsuits and a confidentiality agreement covering all knowledge, confidential or not, gained during the employment with the Tribe, the Tribe will agree to pay me the sum of $225,000.00, will promise to work with the Tribal Court on serious and meaningful Tribal Court reform, and will allow me to collect all of my possessions it has been keeping from me.

PAGE 22:

(Adm. Ex. 17 at 6). According to the letter, the amount demanded was based on an approximation of Respondent's salary for the balance of his contract, as well as Respondent's estimate of the Tribe's exposure. (Adm. Ex. 17 at 6).

When Respondent sent this letter, Giampetroni represented the Ogema, the Tribal Council and the Tribe. Respondent knew Giampetroni represented these parties. (Tr. 29). Respondent's letter referred to Giampetroni multiple times, in his capacity as the recipients' lawyer. (Adm. Ex. 17).

The Ogema and Speaker told Giampetroni of the letter immediately upon receiving it. Giampetroni had not authorized Respondent to communicate directly with his clients. (Tr. 30). Giampetroni testified, in the letter, Respondent "dropped a number of very sensitive topics," which were not public information and which his clients "found alarming." (Tr. 31-32). Giampetroni and his clients perceived the letter as a threat. (Tr. 73-74). In response, Giampetroni promptly sent a letter to Respondent's attorney, Dennis Swain, insisting that the Tribe's confidential information be kept confidential. (Tr. 32; Resp. Ex. 2).

Respondent recognized his communication should have been with Giampetroni. While, at least at the time, he thought he had a basis for doing so, Respondent acknowledged he "should have thought better of" contacting persons who were represented by counsel. (Tr. 207-208).

B. Analysis and Conclusions

During the course of representing a client, a lawyer who knows a person is represented by an attorney may not communicate with the person about the subject of the representation, without the attorney's prior consent. Ill. Rs. Prof'l Conduct R. 4.2 (1990). Respondent knew Giampetroni was representing the Tribe, the Ogema and the Tribal Council in relation to matters involving Respondent's employment by the Tribe. Respondent's correspondence directly concerned those matters. Respondent was acting on his own behalf, *pro se*, in this matter.

PAGE 23:

Giampetroni had not consented to direct communication between Respondent and his clients. The evidence clearly establishes Respondent violated Rule 4.2.

When Respondent sent his letter to the Ogema and the Speaker, litigation was pending between the parties. The letter was improper, violating Rule 4.2. Respondent's letter prompted Giampetroni to send correspondence to Respondent's attorney, action Giampetroni would not have had to take but for Respondent's improper communication with his clients. Conduct prejudicial to the administration of justice can be found in such circumstances. *Bradley Verett*, 07 SH 105 (Hearing Bd. at 34) (misconduct was prejudicial to the administration of justice where other attorneys involved in the litigation endured additional inconvenience and work as a result of the attorney's misconduct). The evidence presented in this case established Respondent's conduct prejudiced the administration of justice. Ill. Rs. Prof'l Conduct R. 8.4(a)(5) (1990).

The Complaint also charged, by sending the December 11, 2009 letter, Respondent violated Rule 1.2(f)(1). Rule 1.2(f)(1) proscribes certain types of activity. As relevant here, in representing a client, a lawyer shall not assert a position or take other action when the lawyer knows or reasonably should know such action would merely serve to harass or maliciously injure another. Ill. Rs. Prof'l Conduct R. 1.2(f)(1).

The Administrator must prove the elements of the misconduct charged, by clear and convincing evidence. *Winthrop*, 219 Ill. 2d at 542. To prove a violation of Rule 1.2(f)(1), the Administrator must prove the attorney asserted a position or took action he or she knew or reasonably should know would serve merely to harass or maliciously injure another. *In re Starr*, 00 CH 70, M.R. 20008 (May 20, 2005). In considering this issue, the question is not whether the attorney's statements were well-advised or well-grounded, but rather whether the attorney knew

PAGE 24:

or reasonably should have known the statements would serve merely to harass or maliciously injure another. *Starr*, 00 CH 70 (Review Bd. at 11-12).

The comments at issue were made in the context of a lengthy letter in which Respondent essentially was seeking to put an end to his very contentious employment with the LRBOI and recoup the value of his contract with the Tribe. Respondent did not use good, professional methods in doing so, and his statements were clearly improper. Attorneys are not at liberty to threaten their clients with revelation of confidences or secrets. Ill. Rs. Prof'l Conduct R. 1.6(a) (1990). Respondent, however, was not charged with violating Rule 1.6(a). The fact that his statements were improper does not constitute clear and convincing proof Respondent violated Rule 1.2(f)(1). *Starr*, 00 CH 70 (Review Bd. at 11-12).

Given the background of the case as a whole, including the heavy political overlay affecting Respondent's employment, the evidence presented did not convince us Respondent was seeking merely to harass or maliciously injure the LRBOI, or that he knew or should have known that would be the result of his communication. The Administrator did not meet his burden in relation to Rule 1.2(f)(1).

COUNT IV

I. Respondent is charged with advancing a claim against Judge Sherigan he knew was unwarranted under existing law in violation of Rule 1.2(f)(2), bringing a frivolous proceeding in violation of Rule 3.1, and engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).

A. Evidence Considered

The following evidence is relevant, in addition to that outlined above in Sections I of Count I and I of Count II.

Martin III involved the circumstances surrounding the modification of the decision in the declaratory judgment action. (Tr. 23; Adm. Ex. 12). Respondent was not a party to the

PAGE 25:

declaratory judgment action and had not appealed from the modification order. There was testimony he could have appealed. Respondent also could have sought to intervene or brought a mandamus action, but did not do so. (Tr. 101, 122, 135-36, 146).

Judge Sherigan was a defendant in *Martin III*. Respondent alleged her actions, and those of the other defendants, violated his statutory and constitutional rights. The primary relief sought in *Martin III* was a declaration that Judge Sherigan's July 2009 order was null and void and an injunction prohibiting enforcement of that order. Respondent also sought an award of costs and attorney fees. (Tr. 23-24; Adm. Ex. 12).

The defendants filed motions to dismiss and/or for summary disposition in *Martin III*. Respondent did not file responsive pleadings, although he had an opportunity to do so and participated in the oral argument on the motions. *Martin III* was dismissed, with prejudice. Respondent did not appeal from the dismissal order. (Tr. 35-37; Adm. Ex. 19).

In January 2010, Michigan attorney Wilson D. Brott was assigned as a temporary judge of the LRBOI Tribal Court to hear cases Respondent filed, including *Martin III*. Judge Brott regularly serves as a judge for another tribe. He was assigned to the LRBOI Tribal Court for Respondent's matters because Respondent had filed lawsuits against both of the regularly assigned LRBOI trial judges. (Tr. 89-91).

Judge Brott concluded Respondent's claims against Judge Sherigan in *Martin III* were barred by judicial immunity. (Adm. Ex. 19 at 7-11). Judge Brott also considered those claims frivolous, even if the facts on which Respondent relied were assumed to be true. Judge Brott reasoned judicial immunity was a well-established legal principle. There did not appear to be any authority, and Respondent had not cited any authority, to support the proposition that a judge could be held liable for the conduct alleged. Respondent had not advanced any legitimate basis

PAGE 26:

for seeking an extension, modification or reversal of existing law. (Tr. 99-100, 116-18; Adm. Ex. 19 at 11-

13).

On July 30, 2010, Judge Brott awarded Judge Sherigan $13,966.66 as costs and attorney fees against Respondent. (Adm. Ex. 20 at 16-18; Adm. Ex. 21). Although given an opportunity to do so, Respondent had not objected to Judge Sherigan's motion for fees and costs. (Tr. 103-104). Respondent appealed, unsuccessfully. (Adm. Ex. 22).

As of December 20, 2010, Respondent had not paid Judge Sherigan's costs and legal fees. On that date, Judge Brott conducted a hearing and directed Respondent to submit financial information from which Judge Brott could determine an appropriate sanction. Respondent did not submit a financial affidavit or seek an extension of time to do so. Consequently, on February 7, 2011, Judge Brott imposed a $200 contempt fine on Respondent, which Respondent was to pay within twenty-one days. (Adm. Ex. 24). Respondent had not paid the contempt fine, even at the time of the disciplinary hearing. Respondent testified this was partly due to financial inability to pay. Respondent also testified he intended to continue to pursue the matter, in federal court, when he obtained the money with which to do so. (Tr. 171-72).

Respondent did not believe it was inappropriate for him to sue Judge Sherigan. (Tr. 178). Respondent considered the method used to obtain Judge Sherigan's July 2009 order extremely improper and did not think he had any other method of redress available. (Tr. 148-49, 185). Respondent believed tribal court judges were not immune from suits seeking injunctive relief. (Tr. 241).

B. Analysis and Conclusions

Count IV alleged Respondent violated Rule 1.2(f)(2) of the Illinois Rules of Professional Conduct of 2010. The 2010 Rules do not include a Rule 1.2(f)(2). Therefore, we do not find a violation of Rule 1.2(f)(2) as to Count IV.

PAGE 27:

A lawyer shall not bring a proceeding or assert an issue therein unless there is a basis in law and in fact for doing so that is not frivolous. Ill. Rs. Prof'l Conduct R. 3.1 (2010). Typically, a proceeding is frivolous if there is no objectively reasonable legal or factual basis for pursuing the claim. *In re Carr*, 2010PR00046, M.R. 25521 (Nov. 19, 2012). In making this determination, we consider Judge Brott's rulings, but those rulings are not binding on us. *In re Olivero*, 01 SH 59, M.R. 19681 (Nov. 17, 2004). Based on our review of the record, we conclude Respondent did not have an objectively reasonable basis in law or fact for including Judge Sherigan as a defendant in *Martin III*. Therefore, his lawsuit against her was frivolous and violated Rule 3.1.

Judicial immunity is a well-established legal principle. *Stump v. Sparkman*, 435 U.S. 349, 355, 98 S.Ct. 1099 (1978). Judges are immune from civil suits arising out of the performance of their judicial duties. *Stump*, 435 U.S. at 355-56; *In re Mason*, 33 Ill. 2d 53, 58-59, 210 N.E.2d 203 (1965). Judicial immunity bars the suit itself, not just an assessment of damages. *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286 (1991). This is because the public interest requires that judges be able to perform their judicial duties unimpeded by fear of personal consequences, (*Stump*, 435 U.S. at 355), or the harassment of litigation by disgruntled litigants. *Mason*, 33 Ill. 2d at 58-59. Principles of judicial immunity apply to tribal court judges, and preclude suits, such as *Martin III*, against a tribal court judge for alleged civil rights violations. *Sandman v. Dakota*, 816 F.Supp. 448, 452 (W.D. Mich. 1992), *aff'd*, 1993 U.S. App. LEXIS 25117 (1993).

Respondent's claims against Judge Sherigan involved conduct taken in Judge Sherigan's judicial capacity, in a case properly before the Tribal Court over which she had been assigned to

PAGE 28:

preside. Judicial immunity clearly precluded the suit, even if the alleged behavior was improper. *Mireles*, 502 U.S. at 11; *Stump*, 435 U.S. at 356-57.

The fact that *Martin III* was phrased so as to seek declaratory and injunctive relief does not obviate the frivolous nature of Respondent's claims against Judge Sherigan. In making this assessment, we consider the real nature of Respondent's claims. *Welch v. Illinois Supreme Court*, 322 Ill. App. 3d 345, 358-59, 751 N.E.2d 1187 (3d Dist. 2001).

It is clear from a review of the *Martin III* complaint that Respondent was not seeking the type of relief for which an injunction or declaratory judgment is designed, but rather redress of a perceived past wrong. The purpose of a declaratory judgment action is not to redress a past wrong. *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 390, 739 N.E.2d 445 (2000). Injunctive relief is designed to correct or avoid an irreparable harm for which there is no adequate legal remedy. *Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1, 28-29, 426 N.E.2d 824 (1981).

In *Martin III*, Respondent alleged his rights were violated by the manner in which Judge Sherigan modified her judgment in the declaratory judgment action. The declaratory judgment action concerned which branch of tribal government had constitutional authority to terminate Respondent's employment. Judge Sherigan's original judgment determined the Ogema had authority to do so; the modified judgment determined the Tribal Council and the Ogema had equal, independent authority. By the time Respondent filed *Martin III*, the Ogema and Tribal Council Speaker had jointly acted to terminate Respondent's employment. The Ogema had independent authority to terminate Respondent's employment under the original and modified judgment. Respondent's employment was terminated, regardless of which judgment was valid.

PAGE 29:

Respondent has suggested judicial immunity did not bar his suit against Judge Sherigan as he sought injunctive relief. Prior precedent permitted suits for prospective injunctive relief against judges for alleged civil rights violations. *E.g.*, *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970 (1984). However, subsequent statutory modifications have abrogated this principle. *SKS & Associates, Inc. v. Dart*, 650 F.Supp. 835, 837 (N.D. Ill. 2009), *aff'd*, 619 F.3d 674 (7th Cir. 2010). Further, as stated above, *Martin III* did not really seek prospective injunctive relief.

By filing a frivolous lawsuit against Judge Sherigan, Respondent engaged in conduct that prejudiced the administration of justice. *In re Betts*, 90 SH 49, M.R. 9296 (Sept. 27, 1993). Therefore, the Administrator proved the alleged violation of Ill. Rs. Prof'l Conduct R. 8.4(d).

COUNT V

I. Respondent is charged with bringing a frivolous proceeding in violation of Rule 3.1 and engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).

A. Evidence Considered

The following evidence is relevant, in addition to that outlined above in Sections I of Count I and I of Count II. The prior lawsuits Respondent filed arising out of his employment are relevant to the charges in Count V, which are based on a lawsuit Respondent filed in 2010.

The *Martin I* complaint alleged the defendants breached Respondent's employment contract and violated the LRBOI Legal Counsel Reform Act by: 1) the Ogema's termination of Respondent's employment via the April 14, 2008 letter; 2) actions on April 15, 2008 in which tribal police removed Respondent from his office

and the Tribe's Management of Information Department blocked his access to the Tribe's computers; 3) elimination from the Tribe's budget of funding for Respondent's travel and training expenses; and 4) various actions which advanced the position of the associate legislative counsel over Respondent's, even though Respondent was

PAGE 30:

her supervisor. (Adm. Ex. 8). The relief sought in *Martin I* included compensatory damages and an order enjoining further breaches of Respondent's contract. (Adm. Ex. 8 at 6).

In *Martin II*, Respondent alleged the defendants had violated certain provisions of tribal law by their conduct involving Respondent's employment. The actions on which the *Martin II* complaint was based included excluding Respondent from access to his office and the Tribe's computer system and terminating his employment on less than sixty days' notice. (Adm. Ex. 11). Respondent's contract with the LRBOI provided either party could terminate the contract, by giving sixty days written notice to the other party. (Adm. Ex. 1). The *Martin II* complaint alleged defendants took these actions because Respondent had sued the LRBOI and tribal officials, in violation of the LRBOI's Whistleblower Protection Act. The relief sought in *Martin II* included an order reinstating Respondent to his job and directing the defendants to cease and desist their unlawful practices. (Adm. Ex. 11).

With leave of court, Respondent filed an amended complaint in *Martin I* and *Martin II*, which included allegations of breach of contract and violations of the LRBOI Whistleblower Protection Act. (Adm. Ex. 10; Adm. Ex. 20 at 4). The defendants filed motions to dismiss and/or for summary disposition. Respondent could have, but did not, file pleadings in response to those motions. He appeared in court when the motions were heard and presented an argument. But for cases cited during oral argument, Respondent did not present authority to support his position. (Tr. 33-35, 94-96; Adm. Ex. 20 at 1).

On July 7, 2010, Judge Brott issued a detailed written decision in which he dismissed *Martin I* and *Martin II* with prejudice. (Adm. Ex. 20). Judge Brott dismissed Respondent's claims for breach of contract as barred by sovereign immunity. Judge Brott considered and rejected Respondent's claims that sovereign immunity had been implicitly waived. (Tr. 82-83,

PAGE 31:

107; Adm. Ex. 20 at 8-9). Judge Brott concluded the Legal Counsel Reform Act did not provide a remedy for the violations Respondent alleged. (Adm. Ex. 20 at 8). Judge Brott dismissed Respondent's claims under the Whistleblower Protection Act primarily because Respondent had not complied with the statutory notice and reporting requirements. (Adm. Ex. 20 at 14). Although he dismissed these suits, Judge Brott testified he did not consider Respondent's claims against the LRBOI and its officials frivolous. (Tr. 97).

Respondent did not appeal from the dismissal of *Martin I* and *Martin II*. He recognized during the hearing an appeal would have been the proper way to raise disagreements with the judge's ruling. (Tr. 169-70).

On September 29, 2010, Respondent filed a lawsuit against the LRBOI, the Tribal Council and the Ogema ("*Martin IV*") (Answer at 56). In *Martin IV*, Respondent alleged the defendants breached his employment contract by terminating him on less than sixty days' notice, failing to make a good faith effort to negotiate the compensation due and eliminating the training and travel budget the contract provided. (Adm. Ex. 26).

The defendants moved for summary disposition of *Martin IV*. (Adm. Ex. 27). Following briefing by both sides, Judge Brott dismissed *Martin IV*. (Adm. Ex. 28).

Judge Brott concluded the claims Respondent raised in *Martin IV* were barred by sovereign immunity and

res judicata. (Tr. 39; Adm. Ex. 28). Judge Brott determined *Martin IV* raised claims which were identical to those raised in the lawsuits he had previously dismissed. There were some differences between the allegations of *Martin IV* and Respondent's prior suits, and the complaints in Respondent's prior cases did not allege breach of contract based on an alleged failure to negotiate with Respondent as to compensation on termination. However, Judge Brott determined all the claims in *Martin IV* were or could have been raised in Respondent's

PAGE 32:

prior lawsuits, which had been resolved on their merits against Respondent. (Tr. 124-25; Adm. Ex. 28 at 3-4, 8).

Judge Brott found *Martin IV* frivolous. (Adm. Ex. 28 at 9). Judge Brott determined the claims raised in *Martin IV* essentially rehashed claims that had been raised in Respondent's prior actions against the same defendants, which had been dismissed with prejudice. Judge Brott concluded, particularly given his prior rulings, Respondent should have known sovereign immunity would have barred additional contract claims. (Tr. 106-107; Adm. Ex. 28 at 10-11). From Judge Brott's perspective, there was no substantive argument for finding waiver of sovereign immunity based on the arbitration provision in Respondent's contract with the LRBOI, and Judge Brott had considered, and rejected, this theory before. (Tr. 83, 126-27).

Judge Brott observed Respondent had filed a "steady stream" of lawsuits involving the termination of his employment, all of which had been unsuccessful. Therefore, Judge Brott concluded sanctions were warranted. Judge Brott granted the LRBOI's request that Respondent be enjoined from filing similar suits, absent prior authorization from the Tribal Court. (Adm. Ex. 28 at 11-12). On March 1, 2011, after defendants submitted a bill of costs, Judge Brott entered judgment against Respondent for $11,305.27, to be paid within twenty-one days. (Adm. Ex. 29).

Although he had an opportunity to do so, Respondent did not file objections to the bill of costs. Respondent did not appeal from the dismissal of *Martin IV* or the sanction order. He had not paid the judgment. (Tr. 41-42).

Respondent did not consider his lawsuits to be the same. (Tr. 170). Respondent testified he believed sovereign immunity was implicitly waived in relation to his suit against the LRBOI and its officials. Respondent based this view on a provision in his contract that, in the event of termination, the parties would make a good faith effort to agree on appropriate compensation

PAGE 33:

and, if they could not agree, the Tribal Court would make a determination. Respondent's contract did not contain an express waiver of sovereign immunity. Respondent testified he had tried to negotiate an express waiver of sovereign immunity, but the Tribe declined. (Tr. 189-90; Adm. Ex. 1).

Judge Brott was appointed as a temporary judge for the LRBOI because Respondent had filed suits against each of the two sitting LRBOI trial court judges. Judge Bailey, as the chief judge, appointed Judge Brott as judge *pro tem*. Judge Bailey had recused himself. Respondent questioned whether Judge Brott's appointment was legal because Judge Bailey had appointed Judge Brott. In February 2010, at the first status conference after his appointment, Judge Brott asked if the parties objected to his sitting as a visiting judge. Respondent was present at that conference and did not object. (Tr. 114-16, 187; Adm. Ex. 18). Respondent testified at that time he did not know the circumstances of Judge Brott's appointment. (Tr. 214). Later, in December 2010, Respondent objected. (Tr. 113-14). Respondent's 2009 lawsuits had been dismissed in July 2010. (Adm. Ex. 20).

B. Analysis and Conclusions

Count V charged, by filing *Martin IV*, Respondent brought a frivolous proceeding. We find *Martin IV* was frivolous, as there was no objectively reasonable legal or factual basis for pursuing the claims raised in that lawsuit. *See Carr*, 2010PR00046 (Review Bd. at 11-12). By filing a frivolous lawsuit, Respondent engaged in conduct prejudicial to the administration of justice. *Id*. at 15. Therefore, the Administrator proved Respondent violated Rules 3.1 and 8.4(d) of the Illinois Rules of Professional Conduct (2010).

As a federally recognized Native American tribe, the LRBOI can be sued only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 754, 118 S.Ct. 1700 (1998). The doctrine of

PAGE 34:

tribal immunity is settled law. *Kiowa Tribe*, 523 U.S. at 756. Congress has not abrogated tribal immunity from suits on contracts and, absent waiver by the tribe, tribes are immune from such suits. *Id*. at 760. The tribe's immunity extends to its officials, acting in their representative capacity and within the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985).

As Respondent knew, the LRBOI had refused to waive its immunity in relation to Respondent's contract. Judge Brott considered and rejected Respondent's argument for an implicit waiver of immunity. That ruling, which Respondent did not appeal, foreclosed Respondent from seeking to relitigate that issue in *Martin IV*.

Martin IV was also frivolous given *res judicata* principles. An action is barred by *res judicata* where there is: 1) a final judgment on the merits rendered by a court of competent jurisdiction; 2) an identity of the parties or their privies; and 3) an identity of cause of action. *Hudson v. City of Chicago,* 228 Ill. 2d 462, 467, 889 N.E.2d 210 (2008). *Res judicata* bars not only those issues which were actually decided in the first suit, but also any issues that could have been decided. *Cooney v. Rossiter*, 2012 IL 133227 para. 18.

The decisions in *Martin I* and *Martin II* were final decisions on the merits. *See Hudson*, 228 Ill. 2d at 468 (involuntary dismissal on immunity grounds is adjudication on the merits). The decisions were made by a court of competent jurisdiction. Respondent filed *Martin I* and *Martin II* in the LRBOI Tribal Court, which clearly had jurisdiction over these lawsuits. Judge Brott acted in these matters in his capacity as a duly appointed temporary judge of the LRBOI Tribal Court. Judge Brott's appointment was necessitated by Respondent's own conduct in suing both the LRBOI's trial level judges. Judge Bailey, acting in his capacity as chief judge,

PAGE 35:

appointed Judge Brott. Nothing in this record shows that appointment was either tainted by any impropriety or prejudicial to Respondent.

The parties in *Martin I*, *Martin II* and *Martin IV* were identical. Respondent was the plaintiff in all the cases and sued the same defendants. All three cases involved the same subject matter and the same operative facts, *i.e*., Respondent's employment for the LRBOI, and the issues raised in *Martin IV* were raised or could have been raised in *Martin I* and *Martin II*. There was, therefore, an identity of the causes of action. *Cooney*, 2012 IL 133227 para. 22; *Hudson*, 228 Ill. 2d at 467, 471.

If Respondent had disagreed with the dismissal of *Martin I* and *Martin II*, his proper remedy was to appeal. Instead, Respondent filed yet another lawsuit. That lawsuit, *Martin IV*, was a frivolous proceeding. *In re Meyer*, 95 CH 948, M.R. 18764 (Sept. 19, 2003). The Administrator proved, by filing *Martin IV*, Respondent

violated Rules 3.1 and 8.4(d).

COUNT VI

I. Respondent is charged with bringing a frivolous proceeding in violation of Rule 3.1 and engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).

A. Evidence Considered

At the request of the Ogema and Tribal Council Speaker, Giampetroni sent the ARDC a request for investigation of Respondent. Subsequently, on March 9, 2010, Respondent sent a letter to the Ogema and the Speaker in which he threatened to file a lawsuit for defamation and libel if they did not withdraw the request for investigation. (Tr. 42-43; Adm. Ex. 30).

The request for investigation was not withdrawn. On or about April 23, 2010, Respondent sued multiple persons, including the Ogema, the Speaker, individual Tribal Council members and Giampetroni in Michigan state court for defamation, libel and slander (defamation

PAGE 36:

suit). The factual allegations on which the defamation suit was based concerned the request for investigation sent to the ARDC and statements made in that request. (Tr. 43-44; Adm. Ex. 31).

After the lawsuit was filed, Respondent sent a letter to the Ogema and the Speaker, stating he would withhold service of process on the other defendants until April 30, 2010, to give the LRBOI time to consider possible resolution of the matter. (Adm. Ex. 31 at 1). The case proceeded. A motion to dismiss was filed on behalf of the tribal defendants and Giampetroni, on the grounds of sovereign immunity and immunity for complaints to disciplinary authorities. After briefing, the lawsuit was dismissed, by agreement. (Tr. 44-45; Adm. Exs. 32, 33, 34).

Respondent denied the lawsuit was frivolous. (Tr. 180-81). Respondent knew, under Illinois law, persons were immune from suit based on complaints to the ARDC. While stating he was not aware of it, Respondent "guess[ed]" Michigan had a similar provision. (Tr. 180). Respondent acknowledged the suit could be seen as inappropriate, but considered it legal as the parties were not in Illinois. Respondent also stated the information had been disseminated outside the ARDC. (Tr. 179). Respondent testified he agreed to withdraw the suit because, given his health, he could not fight constantly. (Tr. 181).

Respondent did not consider his letter to the Ogema and Speaker improper. However, Respondent testified, if a similar situation arose in the future, he would not write such a letter but would deal solely with the ARDC. (Tr. 208-209).

B. Analysis and Conclusions

Count VI charged Respondent brought a frivolous proceeding and engaged in conduct prejudicial to the administration of justice by filing the defamation suit, thereby violating Rules 3.1 and 8.4(d) of the Illinois Rules of Professional Conduct of 2010. The Administrator proved this misconduct, as Respondent had no objectively reasonable legal or factual basis for bringing the defamation suit. *See Carr*, 2010PR00046 (Review Bd. at 11-12, 15).

PAGE 37:

Statements made to the ARDC or its agents as part of a request for an investigation of an attorney are

absolutely privileged and may not form the basis for a lawsuit for any civil liability that might otherwise arise from such statements. Supreme Court Rule 775; *In re Palmisano*, 92 CH 109, M.R. 10116 (May 19, 1994). Statements made to attorney disciplinary authorities are likewise immunized under Michigan law. MCR 9.125. The allegations in the defamation suit arose specifically out of the request for investigation to the ARDC and statements in that request. This is apparent from the complaint in the defamation suit. It is also apparent from the letters Respondent sent the Ogema and Tribal Council Speaker, before and after filing the defamation suit, in which Respondent clearly sought to have the request for investigation withdrawn.

The immunity provided under Rule 775 is limited to communications made to the ARDC or its agents and does not apply to statements made to outside third parties. *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 166-67, 700 N.E.2d 1064 (1st Dist. 1998); *cf*. MCR 9.125 (comparable Michigan court rule). However, this principle does not avoid the frivolous nature of Respondent's defamation suit. Review of the complaint in the defamation suit demonstrates that lawsuit arose solely out of the request for investigation by the ARDC and was not based on any broader dissemination. This is particularly true when the allegations in the defamation suit are considered in light of Respondent's letters to the Ogema and Speaker.

These principles warrant finding the defamation suit frivolous. Therefore, we need not determine whether the suit would also be frivolous based on sovereign immunity grounds.

EVIDENCE OFFERED IN MITIGATION AND AGGRAVATION

Mitigation

Respondent graduated from Northwestern University Law School in 1994. He was licensed to practice law in Illinois in 1995. Initially, Respondent worked in Washington, D.C. as

PAGE 38:

a trial attorney in the Environmental Enforcement Section of the Justice Department. Beginning in 1999, Respondent was Chief Justice for the Menominee Indian Tribe of Wisconsin, of which Respondent is a member. In 2004, Respondent became Chief Judge for the Saginaw Chippewa Tribe. At the time of the hearing, Respondent was a prosecutor for the Menominee Tribe of Wisconsin. (Tr. 139-40). Respondent testified, in that job, he dealt mostly with unrepresented persons and did a good job. (Tr. 184). Respondent has been involved in bar association activity. (Tr. 186).

Judge Brott first met Respondent when Respondent was serving as Chief Judge for the Saginaw Chippewa Tribe. (Tr. 90). Judge Brott testified, in their dealings, Respondent was not disrespectful and his courtroom demeanor was appropriate. (Tr. 133-34).

Respondent's contract provided a time period within which, in the event of termination, the parties were to meet and negotiate compensation. (Adm. Ex. 1). Respondent testified, through counsel, he sought to meet with the Tribal Council and/or Speaker for this purpose, but they refused to do so. Acting on the advice of his attorney, Respondent did not present the matter to the Tribal Court. (Tr. 216).

Respondent acknowledged he acted improperly in suing Judge Bailey. (Tr. 178, 207). In February 2010, Respondent agreed to dismiss his lawsuit against Judge Bailey. That matter was dismissed shortly thereafter. (Tr. 93).

Respondent recognized he had not dealt properly with some of the matters at issue, although he did not recognize it at the time. He stated his behavior at that time was not typical for him. (Tr. 183-85). He believed he would act differently if similar situations arose in the future. (Tr. 206).

PAGE 39:

Respondent's sister, who served three tours of military duty, died after returning from Iraq. Respondent testified his sister's death affected the way he behaved and his interactions with others during the time at issue. In particular, Respondent testified his behavior toward Kelsey was partly a reaction to statements Kelsey made about Respondent's sister. (Tr. 183-84).

The LRBOI Tribal Court has a disciplinary mechanism. The Tribal Court had not initiated any disciplinary action against Respondent. (Tr. 226).

Aggravation

Judge Brott believed Respondent filed the actions against Judge Sherigan and Judge Bailey for harassment purposes and to force those judges to recuse themselves from hearing cases in which Respondent was involved. As a result of Respondent's lawsuits against the LRBOI trial judges, the Tribal Court was put to the effort and expense of obtaining an outside judge to hear Respondent's cases. (Adm. Ex. 19 at 12-13).

Respondent did not consider his suit against Judge Sherigan inappropriate. (Tr. 178). Respondent also testified he intended to file further proceedings against the LRBOI in federal court, once he obtained funds with which to do so. (Tr. 172). Respondent believed he still could litigate the propriety of the two orders directing him to pay sanctions. (Tr. 248). Respondent testified, if he did not present the issues to the court in a timely way, he would begin paying the sanctions. No one had attempted to collect on either of the contempt sanctions. (Tr. 249-50).

In November 2011, Respondent complained to the Michigan Attorney Grievance Commission, alleging Judge Brott was engaged in the unauthorized practice of law by sitting as a judge *pro tem* in the LRBOI Tribal Court. (Tr. 112-13). Judge Brott responded to the Grievance Commission with a four-page letter, accompanied by about eighty pages of exhibits. The Grievance Commission decided not to pursue the matter. (Tr. 115). Respondent believed his

PAGE 40:

complaint was legitimate. Respondent testified, when he did not object to Judge Brott presiding, he had not known how Judge Brott had been appointed. (Tr. 213-14).

Prior Discipline

Respondent has no prior discipline.

RECOMMENDATION

The purpose of attorney discipline is not punishment. *In re Gorecki*, 208 Ill. 2d 350, 360, 802 N.E.2d 1194 (2003). Rather, attorney discipline is undertaken to protect the public, maintain the integrity of the profession and protect the administration of justice from reproach. *Gorecki*, 208 Ill. 2d at 360. In determining the appropriate sanction to recommend, we consider the nature of the misconduct, as well as any aggravating or mitigating factors. *Id*. at 360-61. While some consistency is sought in sanctions for similar misconduct, each case is unique and must be evaluated based on its own particular facts and circumstances. *In re Timpone*, 157 Ill. 2d 178, 197, 623 N.E.2d 300 (1993).

The Administrator has requested a five-month suspension and cites a number of cases to support that sanction. The sanction requested by the Administrator assumed we would find all the misconduct charged; we have not done so. Respondent requested supervision, which is not an available form of discipline.

Supreme Court Rule 770.

We have considered the cases cited by the Administrator. None of the cases on which the Administrator relies is so similar to this one as to direct a particular sanction. Those cases do, however, provide parameters from which we determine the sanction to recommend.

The attorney in *In re Holman*, 96 CH 679, M.R. 12939 (Nov. 26, 1996) was suspended for five months. Holman filed a frivolous lawsuit, against multiple defendants. Holman failed to sufficiently investigate the facts, and the case was dismissed when facts became apparent during

PAGE 41:

discovery which seriously undermined the claim. Holman also concealed a medical report which directly contradicted his client's claim. Holman did not disclose the report or the doctor during discovery and falsely denied knowledge of the report when questioned by opposing counsel. Similar dishonesty is not present here.

In *In re Dore*, 07 CH 122, M.R. 24566 (Sept. 20, 2011), the attorney was suspended for five months and until he completed the ARDC Professionalism Seminar. Dore filed multiple frivolous pleadings, as well as a frivolous lawsuit, after opposing counsel accused Dore of being involved in preparing a false document. Dore's client had forged the document and sent it to the opposing party. While apparently not involved in that conduct, Dore attempted to obstruct the court's inquiry into the actual facts, misconduct which is not present here. In a separate matter, Dore accused opposing counsel of suborning perjury and filed multiple pleadings which baselessly accused the judge of misconduct. Dore engaged in misconduct in two unrelated matters. In contrast, Respondent's misconduct was solely confined to matters relating to his employment with the LRBOI. As discussed below, we believe Respondent's improper behavior was a response to particular circumstances surrounding that specific employment.

A ninety-day suspension was imposed in *In re Nelson*, 02 CH 12, M.R. 19657 (Nov. 17, 2004). While employed as in-house counsel for the Chicago Transit Authority (CTA), Nelson surreptitiously removed confidential files of other employees from the CTA's offices, to investigate whether she might have a claim for disparate pay and unequal treatment. Nelson provided documents from those files to her own attorneys, who used the confidential client information in suing the CTA on Nelson's behalf. Nelson's misconduct, like Respondent's, arose out of a dispute with her employer and included suing the employer while still employed. Nelson did not act with a malevolent or malicious intent. Instead, while her method of doing so

PAGE 42:

was inappropriate, Nelson acted in an effort to redress a situation she perceived as a substantial denial of her legal rights, and took those issues to a court, the proper forum for dispute resolution. *Nelson*, 02 CH 12 (Review Bd. at 11-12). We believe Respondent, despite the misguided nature of his actions, also was motivated by a desire to redress a perceived wrong, by presenting his issues to the court system. Unlike Nelson, Respondent appears to have faced some particularly difficult employment circumstances, given the evidence of political infighting, which we believe contributed significantly to his misconduct. Further, Respondent's misconduct did not involve dishonesty. Nelson's misconduct began with dishonesty, as she improperly obtained confidential client information, without the client's knowledge or consent.

The attorney in *In re Chiang*, 07 CH 67, M.R. 23022 (May 18, 2009), was suspended for five months and until further order of the Court, with the suspension stayed after the first 120 days and the attorney placed on probation for two years, subject to conditions. *See also In re Andion*, 95 CH 808, M.R. 11898 (Jan. 23, 1996) (reciprocal discipline; one year suspension, stayed after sixty days by probation, for attorney who filed frivolous pleadings in multiple proceedings). Chiang knowingly made false and disparaging statements about

judges in pleadings. In addition, Chiang failed to provide competent representation in a number of matters, misconduct which is not present here. Probation was imposed, even though Chiang did not appear to understand his misconduct and his misconduct had harmed his clients. Conversely, Chiang's misconduct resulted from gross lapses in judgment rather than any malevolent intent or desire for personal gain. *Chiang*, 07 CH 67 (Review Bd. at 16-19). Chiang's familiarity with the customs and language of the community he served supported a probationary sanction. *Id*. at 16. Respondent likewise is familiar with the customs of the community he serves in his current employment. His errors also arose from serious lapses in judgment.

PAGE 43:

Respondent clearly engaged in misconduct. As an attorney, Respondent was obliged to act in accordance with professional ethical standards, even if a client's circumstances contribute to difficulty in the professional relationship. *In re Marshall*, 05 CH 97, M.R. 23146 (Sept. 22, 2009).

Certain factors aggravate Respondent's misconduct. Although Respondent recognized he could have handled some matters differently, he has failed to acknowledge most of his misconduct. This is an aggravating factor. *In re Samuels*, 126 Ill. 2d 509, 531, 535 N.E.2d 808 (1989). Further, although all his lawsuits have been dismissed, Respondent stated he intends to bring further litigation against the LRBOI, once he obtains funds to do so. Such conduct would be unwarranted; the court system has already addressed, on multiple occasions, issues arising out of Respondent's employment with the LRBOI.

In contrast, there are mitigating factors. Respondent has no prior discipline. Judge Brott testified Respondent had treated him with respect, even though they disagreed on legal positions. We accept Respondent's testimony that his sister's untimely death adversely affected his behavior.

Further, all of Respondent's misconduct was confined to matters involving his employment with the LRBOI. Especially given that fact, we found it significant that no member of the LRBOI tribal government testified. The evidence presented demonstrated there was infighting among tribal leadership, which affected Respondent's employment and created significant uncertainty for Respondent as to his job security. Respondent's employment was accompanied by some unusually difficult circumstances. The unique circumstances of this situation are relevant in determining the sanction to recommend. *See In re Gavin*, 21 Ill. 2d 237, 246, 171 N.E.2d 588 (1961).

PAGE 44:

In our view, Respondent did not act out of any malevolent intent or for personal gain. We are convinced Respondent's improper actions resulted from very poor judgment and a lack of objectivity, arising in the context of this specific employment. Respondent's behavior as a whole appears to be based in unresolved anger arising out of his treatment by LRBOI officials. The nature and extent of Respondent's reaction to the behavior of tribal officials reflects unchecked emotion and a failure to recognize appropriate limits, not intentional, purposeful misconduct. Respondent's judgment was clouded by anger at what he perceived as the unfair behavior of the LRBOI. Respondent conducted himself appropriately during this disciplinary hearing, but we perceived an undertone of anger in Respondent's demeanor in dealing with issues involving the LRBOI.

In our view, Respondent engaged in misconduct in response, albeit improperly, to the specific circumstances of this employment. We do not believe Respondent is likely to engage in misconduct in his current position or future misconduct in general, unrelated to the LRBOI.

However, Respondent's unresolved anger must be addressed. During the hearing, both Respondent and counsel for the Administrator agreed anger management counseling would be appropriate. Anger

management counseling can be an appropriate condition of probation. *In re Guadagno*, 2010PR00065, M.R. 24962 (Jan. 13, 2012); *In re Prusak*, 06 CH 66, M.R. 22666 (Nov. 18, 2008).

Probation is warranted where an attorney's practice of law needs to be monitored or limited, rather than suspended or revoked. *In re Jordan*, 157 Ill. 2d 266, 275, 623 N.E.2d 1372 (1993). We believe Respondent can practice successfully, particularly in the context in which he is currently employed, and those concerns which we have about Respondent's practice are best addressed through probation.

PAGE 45:

For this reason, we recommend that Respondent be suspended for five months, but with the suspension stayed in full and Respondent placed on probation for one year, subject to the following conditions:

a. successful completion, before the end of the probationary period, of the ARDC's Professionalism Seminar;

b. successful completion, before the end of the probationary period, of an anger management program with a qualified therapist or treatment professional approved by the Administrator;

c. Respondent shall comply with the treatment recommendations of the therapist as to the nature and frequency of counseling and maintain a log of the dates and times of his attendance at counseling;

d. Respondent shall provide the therapist with an appropriate release, authorizing the therapist to report to the Administrator on at least a quarterly basis information pertaining to Respondent's participation and progress in counseling and to respond to any inquiries from the Administrator concerning Respondent's compliance with any treatment plan;

e. Respondent shall attend meetings scheduled by the Commission probation officer as requested by the Administrator and submit quarterly written reports to the Administrator concerning the status of his practice of law and the nature and extent of his compliance with the conditions of probation;

f. Respondent shall notify the Administrator within fourteen (14) days of any change of address;

g. Respondent shall comply with the Illinois Rules of Professional Conduct and timely cooperate with the Administrator in providing information regarding any investigations relating to his conduct.

h. If Respondent fails to comply with the terms of his probation, we recommend that he be placed on suspension for the full five month period, with the suspension to begin as of the date on which a violation of probation, if any, is found.

Respectfully Submitted,

Joseph A. Bartholomew
Mara S. Georges
Cheryl M. Kneubuehl

PAGE 46:

CERTIFICATION

I, Kenneth G. Jablonski, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Hearing Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on June 26, 2013.

Kenneth G. Jablonski, Clerk of the
Attorney Registration and Disciplinary
Commission of the Supreme Court of Illinois

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[1] Each Count of the Complaint included a charge that Respondent engaged in conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute in violation of Supreme Court Rule 770. The Illinois Supreme Court has recently stated "Rule 770 is not itself a Rule of Professional Conduct. . . (and) one does not ?violate' Rule 770. Rather, one becomes subject to discipline pursuant to Rule 770 upon proof of certain misconduct." *In re Thomas,* 2012 IL 113035, ? 92. Accordingly, we do not find a violation of Rule 770 as to any Count of the Complaint. This decision does not affect our recommendation as to discipline, which is based on Respondent's conduct, not the number of rule violations found. *In re Gerard,* 132 Ill. 2d 507, 532, 548 N.E.2d 1051 (1989).

[2] Our decision would not change if the Tribal Council were considered Respondent's client, given the issues to be resolved, the stated purpose for filing the suit and Respondent's uncontradicted testimony that some Tribal Council members gave him permission to sue.

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