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DECISION FROM DISCIPLINARY REPORTS AND DECISIONS SEARCH

Filed December 31, 2013

In re Joseph Henry Martin
Respondent-Appellee

Commission No. 2011PR00048

Synopsis of Review Board Report and Recommendation
(December 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 partly the result 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.

Upon review, the Administrator contended that probation was not an appropriate sanction. Respondent agreed that anger management counseling was not appropriate. The Review Board was troubled by the nature of Respondent's misconduct and his refusal to reflect objectively on his actions. The Review Board concluded that probation was unwarranted because there was no evidence that the misconduct occurred as a result of a temporary or minor condition and because the nature of the misconduct did not lend itself to monitoring. The Review Board recommended that Respondent be suspended for six months and until Respondent attends the ARDC Professionalism Seminar and until Respondent pays any outstanding judgments, orders for fees and costs, and contempt fines arising out of his misconduct in this matter.

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

In the Matter of:

JOSEPH HENRY MARTIN,

Respondent-Appellee, Commission No. 2011PR00048

No. 6226946.

REPORT AND RECOMMENDATION OF THE REVIEW BOARD

SUMMARY

This matter arises out of Respondent's termination from employment as chief legislative counsel for a Native American tribe. The Hearing Board found Respondent brought a frivolous proceeding in three matters, threatened another attorney with disciplinary action unless he withdrew from representing parties opposing Respondent in litigation, communicated with parties he knew were represented by counsel and engaged in conduct that is prejudicial to the administration of justice. The Hearing Board recommended that Respondent be suspended for five months, with the suspension stayed in full by a one year probationary period subject to certain conditions, including the condition that Respondent receive anger management counseling.

The only issue in this case is the appropriate sanction. The Administrator argues that probation is not appropriate in this case, and asks that Respondent be suspended for five months, the same sanction sought by the Administrator at hearing. Respondent agrees that anger management counseling is not an appropriate condition of probation but contends that probation, a censure, or a reprimand is the appropriate sanction. For the following reasons, we recommend

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to the Court that Respondent be suspended for six months and until Respondent pays any and all fines and judgments arising out of his misconduct in this matter and until he attends the ARDC Professionalism Seminar.

RESPONDENT'S MISCONDUCT

Because the parties do not dispute the Hearing Board's findings of fact and conclusions of misconduct, we will briefly summarize the facts surrounding the misconduct as found by the Hearing Board.

In 2007, Respondent entered into a written contract for employment in Michigan as chief legislative counsel for Little River Band of the Ottawa Indians ("LRBOI"). In LRBOI tribal government, the chief executive is the Ogema and the legislature is the Tribal Council. There is also a Tribal Court. Respondent's contract with LRBOI provided that Respondent was to obtain a license to practice law in Michigan within six months of his employment. He did not do so; he maintained a license in Illinois but was not registered for a time due to his failure to register and pay his registration dues. In April 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. The Ogema's action prompted a power struggle between the Ogema and Tribal Council over who had the authority to terminate Respondent. 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. As a result, Respondent took action to challenge the termination.

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The Administrator's six count Complaint charged Respondent with misconduct with regard to Respondent's conduct in challenging his termination and his alleged attempts to obtain Tribal Court reform. The Hearing Board did not find misconduct with respect to Count I. With respect to Count II, the Hearing Board concluded Respondent violated Rule 1.2(e) of the 1990 Rules (now Rule 8.4(g)) by threatening to present a professional disciplinary action to obtain an advantage in a civil matter. On several occasions, Respondent clearly threatened to complain to disciplinary authorities if attorney David Giampetroni, who was representing the defendants in lawsuits filed by Respondent, did not withdraw from representing the defendants. In addition, the Hearing Board concluded Respondent engaged in conduct prejudicial to the administration of justice as a result of his conduct before the court during a hearing on December 7, 2009. Respondent was agitated and behaved irrationally during the hearing. Respondent made an oral motion to disqualify the judge. The judge asked Respondent twice to sit down, and Respondent refused. The judge asked for the police to be called into the courtroom. Respondent asked if the judge was going to hold him in contempt, and left the courtroom telling the judge to obtain a lawyer as the Respondent would see him in federal court. The judge held Respondent in contempt and fined him $200 which he paid.

As set forth in Count III of the Complaint, the Hearing Board concluded that Respondent violated Rule 4.2 by communicating directly with parties he knew were represented by counsel. In the course of Respondent's litigation against the Tribal Council and others, Respondent sent a letter in December 2009 directly to the Ogema and the Speaker of the Tribal Council when he admittedly knew the parties were represented by an attorney, David Giampetroni. The letter stated that Respondent would "not go away" and that litigation would be damaging for the defendants. The letter stated in part:

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> 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?.

The 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.

Giampetroni testified that his clients understandably felt threatened by the letter and found that Respondent's claims that he would disclose sensitive and confidential information alarming. Respondent conceded that he should have communicated with the parties through their counsel although he expressed little understanding of his duties of confidentiality or other duties to his clients.

Respondent filed a number of lawsuits arising out his termination. Counts IV through VI of the Administrator's Complaint charged Respondent with filing frivolous actions in three of the many lawsuits filed by Respondent. Respondent filed a lawsuit in November 2009 against the LRBOI, the Tribal Council, Judge Sherigan and others under the Indian Civil Rights

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Act alleging that Respondent's due process and equal protection rights had been violated because of Judge Sherigan's decision determining the scope of the LRBOI's constitutional authority to terminate Respondent's employment contract. The claim against Judge Sherigan was ultimately barred by judicial immunity. The court ordered Respondent to pay Judge Sherigan's costs and legal fees of $13,966.66. When he did not do so, the court conducted a hearing and directed Respondent to submit financial information supporting his claim that he could not pay the award. When he failed to produce the information to the court, the court imposed a $200 contempt fine. Respondent had not paid this contempt fine or Judge Sherigan's costs and fees as of the date of his disciplinary hearing. The Hearing Board concluded that Respondent did not have an objectively reasonable basis in law or in fact for including Judge Sherigan as a defendant in his lawsuit. Because the claim was frivolous, the Hearing Board found Respondent violated Rule 3.1 of the 1990 Rules. Because Respondent knowingly filed a frivolous lawsuit, the Hearing Board also found that Respondent engaged in conduct prejudicial to the administration of justice.

In 2010, Respondent filed another lawsuit against various defendants alleging that the parties violated the LRBOI Legal Counsel Reform Act. The claims in this lawsuit were virtually the same claims that Respondent had made in two previous lawsuits that had been dismissed by the court as they were without merit. In February 2011, the court granted the defendants' motion for summary disposition, costs and injunctive relief, stating that Respondent's claims were "nearly identical to claims brought in prior actions involving identical Defendants." The court ruled that Respondent's complaint was frivolous, noting that because Respondent had filed a "steady stream of lawsuits related to termination of employment, each of which has been unsuccessful, the court must conclude that the suit's primary purpose was to harass, embarrass, or injure the Tribe, and to cause the Tribe to incur additional expenses in

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defending the action." The court entered a judgment and ordered Respondent to pay $11,305.27 to the LRBOI. As of the date of hearing, Respondent had neither appealed the order nor paid the judgment. The Hearing Board concluded Respondent violated 3.1 and 8.4(d).

In February 2010, counsel for the LRBOI sent a request for investigation to the ARDC alleging that Respondent had filed harassing lawsuits, had threatened to disclose confidential information and had improperly threatened disciplinary action against the LRBOI's attorney. When Respondent learned of the report to the ARDC, he threatened to sue the parties who had reported him and he followed through on his threat by filing a defamation suit. At hearing, Respondent denied the defamation suit was frivolous. However, Respondent admitted he knew that under Illinois law persons were immune from suit for making a complaint to the ARDC. Respondent testified he agreed to withdraw the suit because, given his health, he could not fight constantly. The Hearing Board concluded that Respondent again violated Rule 3.1 and 8.4(d) by his conduct.

SANCTION RECOMMENDATION

The Hearing Board's recommendation as to a sanction is advisory. *In re Ingersoll*, 186 Ill.2d 163, 178, 710 N.E.2d 390 (1999). However, the sanction imposed should be "consistent with those imposed in other cases involving comparable misconduct." *In re Chandler*, 161 Ill.2d 459, 472, 641 N.E.2d 473 (1994). The

purpose of the attorney disciplinary system is not to punish the attorney for his or her misconduct, but "to protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach." *In re Winthrop*, 219 Ill. 2d 526, 559, 848 N.E.2d 961, 981(2006). In determining the appropriate sanction, this Board considers the nature of the misconduct charged and proved, and any

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aggravating and mitigating circumstances shown by the evidence. *In re Gorecki*, 208 Ill. 2d 350, 360-61, 802 N.E.2d 1194, 1200 (2003).

Respondent's conduct in repeatedly filing frivolous actions is serious. The Hearing Board concluded that Respondent's actions resulted from "very poor judgment and a lack of objectivity." While we do not disagree with this statement, we are troubled by his conduct in threatening his opposing counsel and his clients in order to settle his civil claims. His letter to his clients threatening to disclose confidential information is particularly alarming and reflects a disturbing tendency by Respondent to ignore his ethical and professional obligations in order to obtain a personal victory. Such a tendency does not bode well for his future representation of clients.

In mitigation, Respondent has not been previously disciplined. Also in mitigation, Respondent testified that during this period, his sister died after returning from three tours of duty in Iraq. Respondent testified that her death affected his ability to deal with people. Finally, Respondent testified he was involved in bar association activities. He did not present any character testimony.

While Respondent's misconduct originated from an isolated incident in that it arose largely out of his termination from employment, we note that the misconduct, which was very serious, occurred over the course of several years in several venues offering Respondent ample opportunity to reflect objectively on his actions. This he failed to do. Instead, Respondent has repeatedly failed to acknowledge the majority of his misconduct. *In re Samuels*, 126 Ill.2d 509, 531, 535 N.E.2d 808 (1989)(failure to acknowledge misconduct a proper aggravating factor).

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In *In re Holman*, 96 CH 679, *petition for discipline on consent allowed,* No. M.R. 12939 (Nov. 26, 1996), the attorney filed a frivolous lawsuit and concealed a medical report directly contradicting his client's claim. Unlike this Respondent, he paid the sanctions imposed upon him by the court and acknowledged his misconduct. He was suspended for five months upon consent. In *In re Dore*, 07 CH 122, *Respondent's petition for leave to file exceptions denied,* No. M.R. 24566 (Sept. 20, 2011), the lawyer was also suspended for five months and until he completed the ARDC Seminar for asserting frivolous positions or claims in three matters, for filing a frivolous lawsuit, and for falsely accusing a judge of misconduct. We view Respondent's conduct as more serious than the conduct in either of these cases.

The Hearing Board cited the above cases where five month suspensions had been imposed, and then concluded that probation was warranted relying upon *In re Jordan*, 157 Ill.2d 266, 623 N.E.2d 1372 (1993). The Hearing Board recommended that Respondent be suspended for five months, with the suspension stayed in full, by a one year period of probation, subject to conditions that Respondent attend the ARDC Professionalism Seminar and obtain treatment for anger management.

We believe probation is entirely unwarranted in this case for two principal reasons: 1. There was no evidence that the misconduct occurred as a result of a temporary minor condition and 2. The nature of the misconduct (i.e., filing numerous frivolous suits, threatening former clients with divulging confidential information in order to extract a financial settlement for himself, and causing financial harm to a Judge who was clearly just

doing his duty) is simply not the kind of conduct that lends itself to monitoring and are not the extenuating circumstances found in *In re Jordan*. The Hearing Board stated that in their view, Respondent did not act out any malevolent intent, but acted out of "unresolved anger." This statement was not based on any

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medical testimony or any evidence whatsoever. Instead, the Hearing Board concluded that Respondent had "unresolved anger" issues based simply upon their observations of Respondent. Respondent, himself, rejected the prospect of anger management therapy.

> In *In re Jordan*, 157 Ill.2d 266, 623 N.E.2d 1372 (1993), the Court extended the use of probation as a sanction to limited additional unique circumstances. As this Board stated in *In re Giamanco*, 97 SH 27 (Review Bd., Feb. 17, 1999) at 12, *Respondent's petition for leave to file exceptions denied,* No. M.R. 15818 (May 26, 1999):

In *Jordan*, the respondent forged the signature of a hospital employee on a release of lien form in order to expedite his client's receipt of settlement monies and then attempted to conceal his conduct by blaming an employee and his wife. *Jordan* noted extenuating circumstances: a) no motivation for personal gain or profit, b) no pecuniary harm to the client or adverse party, c) an isolated incident in an otherwise exemplary career, d) the respondent's community service and *pro bono* work and e) a practice which primarily served a poor and underrepresented segment of the community. The Supreme Court imposed a three-year suspension stayed by a three year period of probation.

We conclude that the extenuating circumstances that were present in *Jordan* are not present here. Respondent's conduct was not isolated. Respondent's conduct caused pecuniary harm to Respondent's opponents as they were forced to expend financial resources to oppose his numerous frivolous lawsuits. Respondent was not motivated to engage in the misconduct with a grander purpose or a charitable goal as found by the Court in the *Jordan* case. Accordingly, we see no reason to extend *Jordan* to the circumstances in this case.

The imposition of probation as an appropriate sanction is set forth in two separate Supreme Court Rules. Supreme Court Rule 770, which addresses the types of discipline that can be imposed, authorizes probation as a possible sanction in conjunction with a term of suspension. Supreme Court Rule 772 authorizes probation that may be imposed with a term of suspension stayed in whole or in part. However, pursuant to Supreme Court Rule 772, an attorney must

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demonstrate his qualifications for probation, including that he has demonstrated a disability which is temporary or minor; can perform legal services without causing the courts or the legal profession to fall into disrepute; is unlikely to harm the public during the period of rehabilitation and the conditions can be adequately supervised; and is not guilty of acts warranting disbarment.

Respondent's conduct does not fall within the parameters of Rule 772. Respondent has not demonstrated a disability that is temporary or minor. In oral argument before this Board, Respondent again stated he has not engaged in counseling. No evidence was introduced at hearing that suggested that such counseling could be an appropriate condition of probation. *Cf., In re Guadagno*, 2010PR0065, *petition for discipline on consent allowed,* No. M.R. 24962 (Jan. 13, 2012); *In re Prusak*, 06 CH 66, *petition for discipline on consent allowed,* No. M.R. 22666 (Nov. 18, 2008). Moreover, probation and anger management counseling will do little to refrain Respondent from engaging in future misconduct. Probation suggests that the attorney has a problem or condition that can be fixed. In this matter there was no evidence presented at hearing that could support

the need for anger management treatment. Respondent concedes that no evidence was presented before the Hearing Board demonstrating that Respondent is a candidate for anger management therapy.

We have previously declined to impose probation where there has not been evidence of a condition that could effectively improve or reform an attitude or behavior. In *In re Hoffman*, 08 SH 65 (Review Bd., June 23, 2010), *petition for leave to file exceptions denied,* No. M.R 24030 (Sept.22, 2010), an attorney made false statements about the integrity of two judges and made improper statements to another attorney relating to the attorney's religion. Without any expert testimony, the Hearing Board determined that Hoffman had serious anger issues. Like in this case, the Hearing Board recommended probation with conditions that Hoffman enroll in an

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anger management program. This Board rejected the recommendation of probation in part because there was a strong likelihood that Hoffman would repeat the behavior since he refused to acknowledge his misconduct at hearing. Here, Respondent similarly refuses to fully acknowledge his misconduct. Accordingly, we conclude that probation is not warranted.

We believe that a six month suspension is warranted in this matter. We agree with the Hearing Board that Respondent should attend the ARDC Professionalism Seminar before he is allowed to resume his practice. In addition, we believe that, if he has not already done so, Respondent should attempt to make amends for his misconduct by paying the $11,305.27 judgment imposed upon Respondent as a result of his misconduct in Count III of the Administrator's Complaint and the $13,966.66 in fees and costs and the contempt fine of $200 imposed as a result of his misconduct in Count IV of the Administrator's Complaint. We believe that he should pay any outstanding judgments, awards and fines that resulted from his misconduct as found by the Hearing Board before he be allowed to return to practice, if he has not already done so.

For the foregoing reasons, we affirm the findings of facts and conclusions of law of the Hearing Board and we recommend to the Court that Respondent, Joseph Henry Martin, be suspended for six months and until he attends the ARDC Professionalism Seminar and pays any outstanding judgments, orders for fees and costs, and contempt fines arising out of his misconduct in this matter.

Respectfully Submitted,

Richard A. Green
Jill W. Landsberg
Benedict Schwarz, II

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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 Review Board, approved by each Panel member, entered in the above entitled cause of record filed in my office on December 31, 2013.

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