IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No.: SC17-2050

v. Fl. Bar File No.: 2014-50, 165 (17E)

PETER G. HERMAN,

Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

Joi L. Pearsall, Esq.
Fl. Bar No. 182427
Bar Counsel
The Florida Bar
1300 Concord Terrace, Suite 130
Sunrise, FL 33323
(954) 835-0233
jpearsall@floridabar.org

Chris W. Altenbernd, Esq.
Fl. Bar No: 197394
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066
caltenbernd@bankerlopez.com

Patricia Ann Toro Savitz, Esq.
Fl. Bar No. 559547
Staff Counsel
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
psavitz@floridabar.org

Joshua E. Doyle, Esq.
Fl. Bar No. 25902
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399
(850) 561-5600
jdoyle@floridabar.org

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PRELIMINARY STATEMENT

A. Abbreviated Names

Peter G. Herman, the Respondent, will be referred to as Mr. Herman or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the original Report of Referee will be cited as (ROR p.**). References to the Amended Report of Referee will be cited as (A-ROR p.**).

References to specific pleadings will be made by Tab number in the Index of Record and, when appropriate, to a document within the tab. (Tab #1, document).

The transcript of the final hearing will be cited as (T1.**) for the first volume of the transcript, (T2. **) for the second volume of the transcript, (T3. **) for the third volume of the transcript, and (T4. **) for the fourth volume of the transcript.

The transcript of the sanction hearing will be cited as (TS. **)

The transcript of the rehearing on the defense of advice of counsel will be cited as (TR. **).

The Bar's exhibits will be cited as (TFB-Ex. *) with specific reference to the transcript page number when needed.

Respondent's exhibit will be cited as (R-Ex. *).

The Bar provides an appendix of critical portions of the record to facilitate review. This brief cites to the appendix as (A. **).

NATURE OF THE CASE

In its prior opinion in this case, the Court recognized the defense of advice of counsel for the first time in a disciplinary proceeding. *See The Florida Bar v. Herman*, 297 So. 3d 516 (Fla. 2020). This Court remanded this case to the Referee for further proceedings and reconsideration on the limited issue of that defense.

The defense of advice of counsel had been raised concerning information Mr. Herman provided in two responses in the schedules filed in his own Chapter 7 bankruptcy proceeding. One response dealt with assets and the other with his anticipated income from his law firm. The Court explained that Mr. Herman could rely on advice of counsel unless it should have been obvious to him that his attorney was mistaken or if a response proposed by his attorney was incompatible with his own knowledge. *Id.* at 520.

On remand, the Referee concluded that the defense of advice of counsel applied to both responses. Thus, the Referee recommended that Mr. Herman be found not guilty of any violation. (A-ROR p. 50)(A. 119).

In this review, the Bar is challenging the Referee's decision concerning only the response concerning anticipated income. Schedule I, Question 17 requested:

Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:

Mr. Herman's description stated:

Annual performance bonus (historically 65,000 -70,000)

The Bar maintains that this description, provided by Mr. Herman's attorney, was not a description of an increase in income, and it was not responsive to the plain text of Question 17 in Schedule I. It was also incompatible with Mr. Herman's own knowledge. The question called for a description of "income," which the record establishes is not a technical, legal bankruptcy term.

The Bar recognizes that Mr. Herman's performance bonus was legally discretionary and that he had no guaranty of receiving the $2.7 million bonus that he ultimately received following his two wins in the contingency cases against Home Depot and Security Mutual. But from the undisputed evidence of the law firm's perspective, there were well-established guidelines and methods for awarding performance bonuses in a process open to the directors in order to maintain stability in the law firm.

With $9.9 million in firm revenue from the two cases in which Mr. Herman played a lead role, these guidelines and methods left no reasonable doubt that Mr. Herman was entitled to receive a bonus that would be many

times higher than the "historic" bonus described in his lawyer's proposed answer to Question 17. And Mr. Herman clearly knew that.

Thus, the Bar maintains that the Referee's findings of fact as to Question 17 are clearly erroneous, and the Referee's application of this defense to the answer to Question 17 is legal error. When Mr. Herman used his attorney's proposed non-responsive answer to this factual question, he was not relying on legal advice. He was using an answer that was clearly incompatible with his own knowledge of the then-existing facts. He was intentionally using the lawyer's proposed answer to misrepresent the truth to the bankruptcy court.

STATEMENT OF THE CASE AND FACTS

Because this case was fully briefed once before and the facts were developed in the Court's prior opinion, as well as in the bankruptcy court's earlier opinion, this statement of the case and facts focuses on the evidence related to Mr. Herman's defense of advice of counsel and the concerns expressed by this Court in its prior opinion. The issue of sanctions was fully briefed by both sides in the first set of briefs, and it will not be addressed in this brief.

In the Bar's complaint, it alleged that Mr. Herman intentionally made false statements under oath in his bankruptcy filings. (Tab #1) The Bar maintained that Mr. Herman violated six rules:

> (1) Rule 3-4.2 – violating a rule of professional conduct;
>
> (2) Rule 3-4.3 – committing an act that is contrary to honesty and justice; (3) Rule 4-3.3(a)(1) – knowingly making or failing to correct a false statement of fact or law to a tribunal; (4) Rule 4-3.4(a) – unlawfully obstructing another party's access to evidence the lawyer knows or reasonably should know is relevant to a pending proceeding; (5) Rule 4-8.4(a) – violating the Rules of Professional Conduct or knowingly assisting another to violate those rules; and (6) Rule 4-8.4(c) – engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. (Tab #1).

As this Court's prior opinion reflects, the primary issues at the hearing were whether Mr. Herman had failed to disclose prepetition assets in Schedule B of his bankruptcy filings, and whether he had failed to disclose reasonably anticipated income in question 17 of Schedule I on those filings.

At the conclusion of the original hearing, the Referee found that the clear and convincing evidence supported a recommendation of guilt for four

of the six alleged violations – Rules 3-4.3, Rule 4-3.3(a)(1), Rule 4-8.4(a), and Rule 4-8.4(c). (ROR p. 40)(A. 48). In the next several pages of the Report, it explained its reasoning in some detail.

In paragraph 96, the Referee explained:

> Given this, any claim by Respondent's (sic) that his decision not to disclose [his anticipated bonus] *anywhere* in the Schedules and SOFA because he believed at the time it was a "discretionary" award, is contrary to the evidence submitted and is not credible.

(ROR p. 44) (emphasis original) (A. 52).

As to Mr. Herman's claim that he did not intend to mislead anyone, the Referee found in paragraph 97:

> After carefully considering the evidence and testimony presented by Respondent in support of this claim, the undersigned does not find it credible.

(ROR p. 45)(A. 53).

When this Court remanded this matter for further proceedings and reconsideration, the parties presented no additional evidence, each side maintaining that the additional findings required by the Court could be made from the existing evidence. Following legal argument, the Referee issued an Amended Report of Referee that is not an addendum of additional findings, but rather a complete restatement that incorporates portions of the original

Report, omits portions of it, including the findings of credibility above, and adds additional content. (A-ROR pp. 1–52)(A. 70–121).

It is undisputed that the legal definition of "asset" for purposes of bankruptcy is more expansive than the definition one might use as an accountant or as a loan applicant at a bank. Because this legal definition is a term of art for bankruptcy, the Referee found that Mr. Herman reasonably relied on the advice of his counsel when signing his Schedule B forms under oath. (A-ROR p. 46–47). The Bar does not seek review of that decision.

The Referee also concluded that the defense of advice of counsel applied to the answer to Question 17 in Schedule I. Accordingly, it recommends that Mr. Herman be found not guilty. The Bar challenges these decisions.

This Court's prior opinion recognized that the application of an advice of counsel defense concerning the non-responsive description given in answer to Question 17 in Schedule I was "a closer call." *Herman*, 297 So. 3d at 521. (A. 7). Despite the "heavy factual component" to this question, this Court discussed three reasons to remand for reconsideration. The opinion states:

> First, because the amount of Herman's bonus remained unknown at the relevant time, and because the range of the law

> firm's discretion was open to dispute, answering question 17 required the exercise of some judgment.
>
> Second, the question asks about "reasonably anticipated" increases or decreases in income. Here we observe that the referee made ample findings as to Herman's subjective expectations, but none as to the law firm's perspective (and what it conveyed to Herman) at the time. The picture is incomplete without that information.
>
> And finally, the Bar expert's testimony left some doubt as to whether or how far Herman's answer to question 17 strayed from the acceptable conventions of bankruptcy practice. If Herman could conceivably have complied with the governing requirements simply by answering "annual performance bonus" (and omitting the parenthetical about his bonus historically), then Herman's advice of counsel defense might make a difference.

Id. at 522 (paragraph indents added for readability).

The following statement of the facts is directed to these three concerns.

A. The Law Firm's Perspective.

For purposes of Mr. Herman's answer to Question 17, the issue is not whether the bonus became a vested property right prior to the filing of the petition. Instead, the issue is, when Mr. Herman filed for bankruptcy and answered this question, was there any reasonable, good-faith basis – given the law firm's perspective – for Mr. Herman not to reasonably anticipate that

he would receive a performance bonus that was many times higher than his historic average bonus.

The findings relevant to this issue are contained in the Amended Report at paragraphs 18 to 21 and 34 to 42. (A-ROR p. 6–8; p. 13–16)(A. 75–77; 82–85). Other than Mr. Herman, the evidence derives from the testimony of Edward Pozzuoli, Amy Galloway, and the attorney who assisted Mr. Herman in the two contingency cases, Alexander Brown. (A-ROR p. 6–7).

There is no dispute that the Tripp Scott Compensation Committee determined bonuses, and it had sole legal discretion in making those decisions. It had the power, at least theoretically, to make any award or no award for any arbitrary or capricious reason or for no reason at all. (A-ROR p. 7).

But there is extensive evidence that the Tripp Scott Compensation Committee had long used a well-known set of policies and procedures to help set the directors' bonuses.

Amy Galloway testified live at the hearing in this proceeding. (T3. 37–62). She merged a small law firm into Tripp Scott in 2006, coming into the firm as a director. (T3. 38). She stayed there until approximately 2013. (T3. 39).

The firm did not have shareholders or partners, but the more experienced lawyers could be voted in as "directors," and that allowed them to share in the distribution of a "pool" of money. (T3. 41–42). This distribution was over and above their salary "package." (T3. 41–42). She confirmed that the bonus was 100 percent discretionary. (T3. 42). As an example, if someone left mid-year, they would not participate. (T3. 43). She explained that the directors would meet monthly and were kept advised of matters that influenced how much money might be in the pool in a given year. (T3. 43). For example, at one point they started up a foreclosure defense practice that was "a giant money suck." (T3. 44).

She described the typical end-of-year process where the pool was established after they had paid all of their bills. Once the pool was established, "there was a variety of some objective, some very subjective factors that the executive committee would then look to determine what percentage of the pool they were going to award to you in their discretion." (T3. 44). All of the directors knew this process for awarding discretionary bonuses. (T3. 45).

She confirmed that the normal process began in mid-December. There was a big push to get in revenue. (T3. 45). Then the committee had to determine "origination credit," year-end expenses, and "then, there was

this factoring process, you know, based upon achievement and dollars." (T3. 46).

Only once while she was at the firm did it distribute "an unusual bonus," which was the mid-year bonus when Mr. Herman brought in the $10 million in 2012. (T3. 46). The directors had little notice of this – "you know, there was this announcement, and then there was the scurrying to try to figure out all those factors I just reiterated, and then, the same comp committee made the decision." (T3. 46). She was upset about it because she thought it was not good management not to wait until year-end. (T3. 48). But she accepted her bonus. (T3. 52–53).

She explained that she thought it was common for directors to lobby the committee about the bonuses. (T3. 58). She explained: "You know, I mean, it's communication, fundamentally, about something that's pretty important, and the people need to know where you stand and what your opinions are." (T3. 59). People did not always receive what they lobbied for.

By the time of the hearing, both Mr. Herman and Ms. Galloway had left Tripp Scott and they shared the same office suite. (T3. 48–49).

Edward Pozzuoli testified at the bankruptcy trial, and that testimony is the Bar's Exhibit 21 in this case. (TFB-Ex. 21 185–219)(A. 137–71). He was

also deposed in the bankruptcy case in May 2013 and that deposition is the Bar's Exhibit 27. (TFB Ex. 27)(A. 201–18).[1] Additional information from that deposition is provided after the following summary of his testimony at trial.

Mr. Pozzuoli had been president of Tripp Scott for twelve years at the time of his testimony in the bankruptcy case. (TFB-Ex. 21 185)(A. 137). In that capacity, he served on the compensation committee. (TFB-Ex. 21 185).

He explained the general function of the four-person committee as follows:

> The committee is there to exercise a review of performance for whatever period of time we're talking about, and then makes disbursements based upon performance, certain performance criteria, essentially filling the one-third, from a performance standpoint, of a compensation package that we have for directors.
>
> The other portion of the function of the compensation committee is more longer term. We also set the two-thirds, or the monthly amount of money each director receives for any given year. (TFB-Ex. 21 186)(A. 138).

[1] Portions of Mr. Pozzuoli's deposition were redacted to keep some business issues confidential. The appendix contains the portion of the deposition most relevant to the issues of concern to this Court.

He explained that the firm operated on a calendar year and the committee normally met just prior to the end of the year, considering these performance factors for the year. (TFB-Ex. 21 186–87)(A. 138–39). They set monthly salaries with the expectation that the salary would normally constitute two-thirds of a director's compensation, while the bonus would be the final third. (TFB-Ex. 21 192)(A. 144). The committee actually had a document, Goal 5, that provided criteria and factors for setting performance bonuses and salaries. (TFB. Ex. 21 193)(A. 145).

The document was not an exclusive list or formula for calculating bonuses. The committee also took into consideration the opinions of the individual directors in this relatively transparent process. (TFB-Ex. 21 193)(A.145). There was no formal appeal process from the committee's decision; for all practical purposes the committee's decision was final. (TFB-Ex. 21 193)(A. 145).

The only exception Mr. Pozzuoli described was in 2012 when they met around August to distribute revenue from the two big cases that Mr. Herman had won. (TFB-Ex. 21 187)(A. 139). The committee had earlier decided what money should be set aside as bonuses from that revenue for employees other than directors. (TFB-Ex. 21 194)(A. 146). In August, they decided how to divide revenue from the two settlements for the entire

directorship, not merely for Mr. Herman and Mr. Brown. (TFB-Ex. 21 194). The total pool was $9.9 million and $300,000 had been set aside for the employees. Thus, roughly $9.6 million was distributed to the directors. (TFB-Ex. 21 196–97)(A. 148–49). Mr. Herman received $2.7 million. (TFB-Ex. 21 197)(A. 149). His distribution was by far the largest. (TFB-Ex. 21 197)(A. 149). It was likely the largest bonus the law firm had ever paid to a director. (TFB-Ex. 21 197)(A. 149). The firm had never "enjoyed" a recovery of attorneys' fees in any other matter that totaled such a large amount. (TFB-Ex. 21 198))A. 150).

The firm had received these funds in March or April, but it did not distribute them immediately in order to resolve a claim by a co-counsel and to be confident of the firm's other cash needs. (TFB-Ex. 21 198–99)(A. 150-151).

During cross-examination, Mr. Pozzuoli discusses, in a long answer, the step-by-step process the compensation committee used in applying the Goal 5 criteria. (TFB-Ex. 21 199–201)(A. 150-153). His explanation is worth reading in its entirety. He explains at the end:

> Mr. Linden, I don't know how your firm works, but we are an open compensation system, and so we shine a light on compensation, we allow participation, and at the end of the process everybody also gets to see what everybody else makes,

> which certainly can be messy at times, but allows for everybody to be fully satisfied that they have full information.

(TFB-Ex. 21 201)(A. 153).

Mr. Pozzuoli explained that the Tripp Scott firm was a fairly stable law firm, and he attributed the stability of the firm, in part, to the compensation policies and procedures that create an open compensation process for all of the directors. (TFB-Ex. 21 212)(A. 164). Thus, while the compensation committee had discretion, the evidence clearly established that they had created a stable, open model that the directors could understand and find reasonably predictable.

The testimony at Mr. Pozzuoli's deposition is consistent with his testimony at trial. There is some added detail in his deposition testimony. He explained that the two-thirds salary/one-third bonus method is essentially a budget projection and that sometimes the bonus is less and sometimes it is more than one-third of a director's salary. (R-Ex. 27, p. 34–35)(A. 203). He explained the factors used to set bonus in even greater detail than in his trial testimony. (R-Ex. 27, p. 35–56)(A. 203-204). He actually explains his evaluation of Mr. Herman under these factors, and it is very clear that Mr. Herman does well on the factors considered by the compensation committee. (R-Ex. 27 p.39–45)(A. 204–06).

Although there apparently had been times when the law firm did not give out a bonus, that had occurred before Mr. Pozzuoli had been on the committee. (R-Ex. 27 p. 47)(A. 206). And he had been on the committee for at least twelve years. (R-Ex. 27 p. 47)(A. 206). He said the committee had the ability to give a director a zero bonus, but then explained that it would be "unusual" for a director to get a zero bonus for a reason other than law firm finances. He could recall no director that received a zero bonus in the previous ten years. (R-Ex. 27 p. 47–48)(A. 206). As he explained, "the factors don't change." (R-Ex. 27, p. 48). If a lawyer was not a director at the end of the year, i.e. if a director died or left the firm, he or she would not get a bonus. (R-Ex. 27 p. 49)(A. 207).

Similar to his trial testimony, Mr. Pozzuoli explained that when a lawyer was working primarily on contingency cases, the firm would try to "flatten" the impact by providing some bonus money in years when contingency fees were not coming in, but "in a firm like ours, what we're trying to do is, clearly when they hit a big case, you want to pay them, but they're certainly not going to make as much as they would have if they were on their own." (R-Ex. 27, p. 54)(A. 208).

Alexander Brown worked at Tripp Scott for ten years, from 2005 to 2015. (T3. 64). He worked extensively with Mr. Herman. He worked on the two

contingency cases that brought in the major revenue in 2012. (T3. 68). He explained that the two cases coincidently resolved around the same time and the money from both cases came to the law firm within days of one another in early March 2012. (T3. 77).

He had become a director just a year before this revenue was received by the law firm. (T3. 85). He emphasized that the bonus was not vested and was discretionary. (T3. 85). The mid-year bonus was a surprise, and he did not think the firm had ever done that before. (T3. 86). He knew the compensation committee set the bonuses for each lawyer, but he did not think there was "a particular formula" that was used. (T3. 87). He received a $600,000 bonus in 2012 and was dissatisfied with his bonus. (T3. 87). He believed his bonus should have been "substantially more." (T3. 97). The two lawyers had worked on these two cases for several years without generating any revenue. (T3. 88–89). He believed that his bonus a year earlier in 2011 was less than $50,000. (T3. 94). In 2013, he believed his bonus was around $100,000. (T3. 101).

Mr. Brown testified that Mr. Herman was not happy with his $2.7 million bonus. He was not happy for two reasons:

> One is, no, I could tell that he wasn't happy with it. He expected and hoped to receive a lot more. But, two – and this is what I mean by not trying to be cute. I'm a lawyer, I'm trying

to listen to words – he never received it. That money never went into his coffers. (T3. 101).

B. Mr. Herman's exercise of judgment as to the amount of his reasonably anticipated bonus.

Concerning the exercise of judgment as to the amount of his reasonably anticipated bonus, the Referee makes findings in paragraphs 25 to 33 of the Amended Report of Referee. (ROR p. 10–13)(A. 18–21). Mr. Herman had initially thought the revenue might come in before the end of fiscal year 2011, and he began what Ms. Galloway's testimony describes as the "lobbying" process in December. The Report speaks for itself, but Mr. Herman believed that he and Mr. Brown together were due $5.2 million during these communications. As discussed earlier, the findings on his reasonable expectations were even stronger in the first Report with no change of evidence on that portion of the issue.

It is significant that Mr. Herman had been a member of the compensation committee in the past. (T1. 145). In one of his emails to Mr. Pozzuoli, as he explained in his testimony before the Referee, he used a calculation based on 41.5% of the pool to justify his $5.2 million request. (T1. 152). Mr. Herman knew how the performance factors worked in the firm's calculation of discretionary bonuses.

C. The acceptable conventions of bankruptcy practice

At the hearing, the expert testimony focused primarily on whether the anticipated bonus needed to be disclosed as an asset of the bankruptcy estate in Mr. Herman's Schedule B. That is not the question on review. The question here is whether it should have been classified as income that Mr. Herman reasonably anticipated receiving in the year following the filing of his petition.

Mr. Markowitz, the Bar's expert, testified that section 521 of the Bankruptcy Act requires a debtor, in addition to disclosing assets and liabilities, to disclose reasonably anticipated increases in income over the 12-month period following the filing of the petition. (T2. 9). The actual statute describing "Debtor's duties" states:

> (a) The debtor shall--
> (1) file--
> . . . .
> (B) unless the court orders otherwise --
> . . . .
> (vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.

See 11 U.S.C. § 521(a). This is the legal source for the requirement to answer Question 17 on Schedule I. (T2. 9–10). He explained that even if Mr. Herman did not think the anticipated bonus was an asset, he should have

disclosed it. (T2. 28). Even if Mr. Herman had been correct that it was not an asset, there was no downside to disclosing the bonus. (T2. 56).

The Referee found in paragraph 78, discussing Mr. Markowitz's testimony, that: "Additionally, Schedule I requires that a debtor must disclose any reasonably anticipated increase in income or expenditures over the twelve (12) month period following the date the Petition is filed." (A-ROR p. 31)(A. 100).

Bart Houston, Mr. Herman's bankruptcy attorney, testified that he worded the answer to Question 17. (T2.116). He explained:

> That's my wording. It requires you to disclose whether there's an expectation of future increases or decreases for income, and I knew Peter had received annual performance bonuses. I asked him to average out three or four years for me, he gave me the number, I put it in there so that the bonus, the intangible item bonus that could be expected within the next year was disclosed, and there was – the amount of bonuses just really was a dynamic number. You couldn't really pick one out, so I averaged out two or three years and put that number down, and if the trustee wanted to take off from there, he had the information to do it.

(T2. 116–17).

He explained that he did not think he needed to disclose the higher number because it was all discretionary: "It could be anything. It could be

zero, and that zero could be on a number of factors." (T2. 126). He suggested that Mr. Herman could have gotten a DUI and been fired and received a zero bonus. (T2. 126). Of course, if a future crime or death is a reason not to disclose anticipated income, it would justify never revealing any future income because these speculative events might intervene.

Mr. Houston never claimed that "income" for bankruptcy purposes had any different meaning than its ordinary and usual meaning. He did suggest that he personally thought the question was more important in Chapter 13 wage-earner proceedings than in Chapter 7 proceedings, but he does not claim there is any legal authority for providing different amounts of information about future income in the two proceedings. (T2. 165).

Chad Pugatch became co-counsel for Mr. Herman in the bankruptcy proceeding well after the filing of these schedules. He entered the case in November 2013 when Bankruptcy Judge Olson issued an order to show cause why both Mr. Herman and Mr. Houston should not be held in contempt, apparently relating to Mr. Houston's disclosure of his retainer for attorney's fees in Mr. Herman's bankruptcy proceeding. (T4. 18–19). That contempt plays no direct role in this proceeding, although it did result in a separate disciplinary order for Mr. Houston. *See The Florida Bar v. Houston*, No. SC15-2120 (Fla. Apr. 28, 2016).

The $2.7 million performance bonus had already been declared an asset of the bankruptcy estate when Mr. Pugatch entered the case. In the bankruptcy proceeding, he primarily attempted to establish that the asset was exempt property. (T4. 23).

In Mr. Pugatch's testimony in this case, he explained:

> Because the whole concept of bankruptcy is you're supposed to make disclosure and put all your cards on the table, and the bankruptcy code requires that bankruptcy schedules be filed. Those schedules have to contain all of your assets and all of your liabilities, and you can claim your exemptions, and the schedules are filed under penalty of perjury to make sure that the process is kept clean.

(T4. 30). The focus of Mr. Pugatch's testimony related to the advice of counsel issue concerning the disclosure of the bonus as an asset on Schedule B. It was his opinion that Mr. Houston had a "plausible basis" for giving the advice not to list the bonus. (T4. 31–32). He explained that this decision was not necessarily the way he would have handled it, but he opined that Mr. Herman - without bankruptcy expertise – could rely upon that advice. (T4. 31–32). He essentially disagreed with Judge Olson that the failure to disclose the asset was "material." (T4. 31); *cf. In re Herman*, 495 B.R. 555 (Bankr. S.D. Fla. 2013) (TFB-Ex. 3)(A.220–53).

Mr. Pugatch did not discuss Question 17 or Schedule I, and does not appear to render any opinion about advice of counsel for that question. He does not opine that "income" has a special meaning in bankruptcy law.

Lorin Mrachek was retained by Mr. Herman as an expert after Ms. Galloway called him and asked him whether he would be willing to testify for Mr. Herman. (T4. 86). He saw the central issue in the bankruptcy as whether the answer to Question 21 in Schedule B was a misrepresentation sufficient to cause a discharge to be denied. (T4. 87). Thus, the bulk of his testimony discussed the law related to whether a discretionary bonus should be listed as an asset. (T4. 89–122). On that issue, he simply opined that Judge Olson reached the wrong decision.

Mr. Mrachek does not appear to have used the words "Question 17," "schedule I," or "reasonably anticipated," or "increase" in his testimony. He does not appear to express any opinion about advice of counsel and the answer to Question 17. He does not opine that there is any special definition of "income" for purposes of Question 17.

Judge John Olson did not testify in these proceedings, although his opinion was much discussed. Portions of his opinion discussing Question 17 are worthy of consideration:

Finally, the Debtor did not list his interest in the $10 Million Fee in any other place on Schedule B, including in response to No. 19, "Equitable or future interests ...." or No. 35, "Other personal property of any kind not already listed...." Ex. 12 at 6, 8.

2. Schedule I Issues

Question No. 17, Schedule I, required the Debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document." Ex. 12 at 16. The Debtor answered No. 17, Schedule I, as follows: "Annual performance bonus (historically 65,000–70,000)." Id. The Debtor admitted at Trial that No. 17, Schedule I does not make reference to the anticipated increase in income from the $10 Million Fee. ***Again, the information provided and omitted by the Debtor on Schedule I was intentional and not the result of a mistake.***

Indeed, by referring to his "annual performance bonus" in the historical amount of $65,000 to $70,000 as the only prospective income change he anticipated receiving in the next year, the Debtor's disclosure was materially misleading. He had, as of the Petition Date, sought (and ultimately received) a special bonus in the millions of dollars. The evidence is clear that Tripp Scott had never issued a mid-year special bonus to its Directors, and had never received a lump sum fee collection remotely as high as the $10 Million Fee. ***The Debtor demanded, expected, knew he would receive and did receive a huge bonus in mid-year 2012. His failure to disclose anything with respect to***

this assured bonus renders his Schedules and SOFA materially misleading and willfully false.

The Tripp Scott compensation system vested the Debtor with a prepetition interest in the $10 Million Fee. The Pozzuoli Prepetition E-mails, the McLaughlin Prepetition E-mails, judgments in the Contingency Fee Cases, and the Brown Settlement E-mails, show the Debtor knew that he was going to receive a multi-million dollar bonus in 2012 in addition to his annual performance bonus. In short, on the Petition Date, the Debtor reasonably anticipated receiving a multi-million dollar bonus from the $10 Million Fee and did not disclose this reasonable belief on Schedule I.

Contrary to the Debtor's testimony, which the Court finds incredible, the Court finds that based upon the evidence presented at Trial, the disclosures made by the Debtor in response to No. 17, Schedule I, did not disclose his interest in the $10 Million Fee. *Based upon the testimony and documentary evidence at Trial, the words "Annual performance bonus (historically 65,000–70,000)" did not disclose the Debtor's interest in a bonus from the $10 Million Fee. Ex. 12 at 16.*

Finally, the Court questions how, if both the historical bonus and bonus from the Contingency Fee Cases were dependent on the firm's consideration of the same factors, one could be subject to disclosure on the Debtor's Schedules and the other not.

In re Herman, 495 B.R. at 576–77 (Bankr. S.D. Fla., 2013) (emphasis supplied)(A.235–36).

The opinion also states:

> *Accordingly, he reasonably anticipated (consistent with his prepetition communications) that his income would increase dramatically within the year following March 20, 2012, but opted to keep that information to himself and affirmatively misled all parties and the Court as to what he "reasonably anticipated," as contrary to what is required by Schedule I. These knowing and intentional omissions were made under oath in his Schedules and SOFA.*

Id. at 598 (A. 251–52).

SUMMARY OF THE ARGUMENT

When Mr. Herman was asked to answer the question:

> *Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:*

as this Court noted in its prior opinion, he was required to exercise some judgment in light of the law firm's discretion. In exercising that judgment:

- He knew that he was already on record advocating for a bonus well in excess of $1,000,000.
- He knew that, from the law firm's perspective, the discretionary performance bonus would be based on the same list of factors that the compensation committee had used when he was a member. The bonus system was an open system, so the firm's history of awarding performance bonuses to directors over the many years that he had been a director was known to him. He could not know the exact bonus that he would receive, but he did know the reasonable range in which that bonus would fall. That range was dramatically higher than the bonuses he had received in the several prior years.
- He knew that his bonuses in the several prior years had been, in the words of Mr. Pozzuoli, "flattened" because his contingency cases had not yet paid off.

- He believed he could actually time the payment of one settlement to the firm, and that the other settlement would clearly arrive prior to December 2012, providing the law firm with more than $9 million in revenue.
- From a legal, bankruptcy perspective, there is no evidence that anyone ever told him that the answer to this question involved special bankruptcy concepts or that "income," "increase," and "reasonably anticipated" did not have their everyday meaning in the question asked of all debtors in a Chapter 7 proceeding.

But the Referee found that Mr. Herman relied on the advice of legal counsel to respond to this question with:

Annual performance bonus (historically 65,000 -70,000)

This proposal, from his attorney, was not even responsive to the plain text of Question 17's request for a description of an increase in anticipated income. It is flatly incompatible with everything that Mr. Herman knew and everything he personally reasonably anticipated for the upcoming twelve months. And there is no basis to find that this false answer is somehow good law that overrides a common-sense description. Even if Mr. Herman were not a lawyer, he could not rely on advice of counsel in this context. The Referee's findings to the contrary are clearly erroneous.

There was no legitimate "bankruptcy" reason not to disclose this anticipated income. All of the bankruptcy attorneys agreed that there is no downside to disclosure in bankruptcy. There is only an upside if you are trying to hide income that might constitute a contingent asset in the bankruptcy. Mr. Herman's answer was a knowing and intentional misrepresentation of the facts to the bankruptcy court that fortunately was caught by the bankruptcy judge.

Accordingly, the Referee's recommended finding of not guilty should be rejected by this Court. This Court should find Mr. Herman guilty of the same four violations recommended by the Referee in his prior Report. This Court should impose an appropriate sanction based on the earlier briefing; and the Bar still maintains that sanction is disbarment.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

In a typical review of an opinion from a district court of appeal, the parties are obligated to discuss the standard of review in their briefs. But this is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of the decision-making process and the applicable rules governing this Court's ultimate determination on the issues presented in a disciplinary proceeding. It helps everyone focus on the structure that leads to a correct decision.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida*

Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

2. Credibility

In reaching its findings of fact, the Referee has a heightened role in determining issues of credibility, which are important in this particular review.

This Court has long held, "The referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." *The Florida Bar v. Tobkin,* 944 So. 2d 219, 224 (Fla. 2006) (quoting *The Florida Bar v. Thomas*, 582 So. 2d 1177, 1178 (Fla. 1991)); *see also The Florida Bar v. Petersen*, 248 So. 3d 1069, 1077 (Fla. 2018); *The Florida Bar v. Brutus*, 216 So. 3d 1286, 1290 (Fla. 2017); *The Florida Bar v. Head*, 27 So. 3d 1, 8 (Fla. 2010).

3. Recommendation of Guilt

The Referee's recommendation of guilt as to any allegation of misconduct would seem to be, at least in most cases, a mixed question of fact and law. This Court has explained that: "the referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt." *The Florida Bar v. Shoureas*, 913 So. 2d 554,

557–58 (Fla. 2005); *see also The Florida Bar v. Spear*, 887 So. 2d 1242, 1245 (Fla. 2004).

"Ultimately, the party challenging the referee's findings of fact and recommendations as to guilt has the burden to demonstrate 'that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.' *The Florida Bar v. Germain*, 957 So. 2d 613, 620 (Fla. 2007)." *The Florida Bar v. Schwartz,* 284 So. 3d 393, 396 (Fla. 2019).

ARGUMENT

I. The Referee's findings:

(1) that Mr. Herman did not reasonably anticipate a major increase in income in 2012, and

(2) that Mr. Herman relied in good faith on the proposed response prepared by his attorney to Question 17,

are clearly erroneous. The proposal was not even responsive to the question, and it was contrary to Mr. Herman's own knowledge.

In the words of Charles Dickens in "A Tale of Two Cities," for Mr. Herman at the end of 2011, "it was the best of times, it was the worst of times." After working for several years on two major contingency fee cases that had produced no revenue that might impress his law firm during the annual decisions for discretionary production bonuses, he finally was in a spot to be the lead lawyer in two cases producing the biggest fees the law

firm had ever received. It was clear to him that, either for the bonus year in 2011 or 2012, his production bonus was going to be based in significant part upon revenue that could easily approximate $10 million. Even if the law firm had to share some of that revenue with co-counsel, his production for the firm was about to skyrocket.

But as bad luck would have it, he had invested in a real estate deal that had failed. The lenders obtained a deficiency judgment against him in December 2011 for $4.5 million. (A-ROR p. 8) (A. 77). Now most of his hard work for years on the two cases was going to produce income primarily to benefit the bank.

This judgment was his only exceptional debt. (TFB-Ex. 13, Schedule F) (A. 219).[2] Somehow, he needed to get free from the judgment while keeping as much of his anticipated bonus as possible. So he looked for bankruptcy advice. He retained Mr. Houston. Mr. Houston knew the judgment could be discharged in bankruptcy. He also knew that assets in bankruptcy included more than cash in hand and that the anticipated bonus, if it were not already an asset, would become a contingent asset belonging

[2] For reasons that are unclear, Schedule F lists the $4.5 million judgment twice as a "Guaranty of development loan." Thus, the total debt listed is about $9 million.

to the bankruptcy estate sometime in the near future. If Mr. Herman had any chance to discharge the judgment and also keep his upcoming bonus, the bankruptcy petition needed to be filed quickly. Thus, the petition for Chapter 7 bankruptcy was filed February 18, 2012 with the mandatory schedules to be filed later. (ROR p. 4)(A.12).

When Mr. Herman filed the schedules under oath on March 20, 2012, the law firm had already received both fees. The fees for the Home Depot case arrived on March 1, 2012, and the fee for the Security Mutual case arrived on March 13, 2012. *In re Herman*, 495 B.R. at 574 ("By March 20, 2012, Tripp Scott had received the entire $10 Million Fee, having received the Home Depot fee on March 1, 2012, and the Security Mutual Fee on March 13, 2012."). Mr. Houston advised Mr. Herman that his anticipated bonus was not yet legally an asset, as that term is defined in bankruptcy law. He advised Mr. Herman that the law did not require him to disclose the anticipated bonus in Schedule B.

But then Mr. Herman needed to fill out Schedule I to describe his current income. He accurately gave advice about his current salary which was about $220,000. The final question was essentially a request to describe a near-term prediction of his income.

"*Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document*:"

To be clear, the Bar does not maintain that Mr. Herman needed to answer this question: "I'll be getting $2.7 million toward the end of the summer." He could not reasonably predict the precise amount of his bonus or the exact date when he would receive it. He may not have been aware in March that the compensation committee would pay out a huge bonus before December. But he knew from his many years at the law firm that bonuses were paid out before the end of December – about nine or ten months after the filing of Schedule I, which would be well within the time frame set forth in Question 17. He also knew that the reasonable range of the bonus would be far larger than the bonuses he had received in the prior three years.

Nevertheless, the description proposed by his lawyer, after the lawyer had some lengthy discussions with the law firm, was:

Annual performance bonus (historically 65,000 -70,000)

Mr. Herman was not a bankruptcy lawyer, but he was experienced enough with asking and answering questions in the English language to know that his lawyer's proposed answer was not a description and it did not describe an increase or a decrease at all. The proposed description was

simply not responsive to the text of Question 17. And his lawyer never advised him that “income” or “reasonably anticipated” or “increase” were specially defined words or terms of art in bankruptcy law. When he was signing this answer under oath, the money to fund his bonus was already in the possession of the law firm.

Mr. Herman had been on the law firm’s compensation committee. Within a range, he knew how the decisions were made. He knew the law firm had a set of factors (like many other law firms have) to fairly divide up the pool at the end of the year. As Mr. Pozzuoli explains this was an open process designed to create stability in the law firm by demonstrating that the committee’s discretion was and would be exercised in a manner that tried to be fair to each director.

Thus, Judge Olson was on the mark when he found that, while the process was legally discretionary, there was no prospect that a director who produced as much as $10 million was going to be denied a substantial bonus. A discretionary process does not mean that the range of a reasonable outcome cannot be reasonably predicted by the guidelines, the customs, and the practices established for the exercise of the discretion process. And it is undisputed that Tripp Scott was aiming for a reasonable outcome.

The Bar is not claiming that Mr. Herman's early lobbying emails required him to reveal that he was going to receive over $5 million as the combined production bonus for Mr. Herman and Mr. Brown. But those emails demonstrate that he reasonably anticipated a very large bonus, and he was negotiating at the high end of what he thought might be the reasonable range for the discretionary bonus.

Mr. Brown was the younger, second-chair lawyer. And he was upset when his bonus was $600,000. That is nine or ten times the bonus that Mr. Houston was proposing for use in Schedule I as the good faith description of Mr. Herman's upcoming annual performance bonus. One can only imagine what Mr. Herman's response would have been if his bonus actually had turned out to be $600,000.

****

The law for this review of the advice of counsel defense is not complex. As this Court stated in its prior opinion:

> But there are conditions on the availability of this defense. The court must determine whether the debtor acted in good faith. To make that showing, the "debtor must demonstrate that he provided the attorney with all the necessary facts and documentation." *Id*. And even then, the defense is unavailable if "it should have been obvious to the debtor that his attorney was

> mistaken" or if a disclosure is incompatible with the debtor's own knowledge." *Id*. The advice of counsel defense does not negate fraudulent intent "when it is transparently plain that the property should be scheduled." *In re Zizza*, 875 F.3d 728, 732 (1st Cir. 2017) (citation omitted). In short, "[a] debtor may rely on the advice of counsel only when the advice is reasonable." *In re Creasy*, 138 F. App'x 45, 46 (9th Cir. 2005).

Herman, 297 So. 3d at 520.

The Bar's argument is not based on a theory that Mr. Herman hid the facts from Mr. Houston. The Bar submits that the Referee erred in deciding that Mr. Herman acted in good faith when he agreed to swear to his lawyer's non-responsive description of his anticipated increase in income for fiscal year 2012 in light of Mr. Herman's own knowledge.

As demonstrated in the statement of facts, the disclosure was "incompatible" with Mr. Herman's own knowledge. This advice, not on a legal issue, but on a question that called for a factual short-term prediction of income by Mr. Herman, was patently unreasonable. Mr. Herman may not have been able to predict that his 2012 performance bonus would turn out to be more than 38 times larger than the high end of his historic bonus, but he certainly expected that it would be more than $1 million, which is more than 14 times higher. Moreover, Mr. Herman knew that his "historic" bonus was

based on the three years where his work on these cases limited the revenue that he was producing for the firm.

II. The undisputed evidence from the law firm's perspective demonstrated an open, factor-based, decision-making process for discretionary bonuses. This process made a bonus much larger than his "historic average" a near certainty for Mr. Herman.

In the prior opinion, this Court expressed concern on whether the advice of counsel applied to Question 17 because the initial Report contained insufficient findings on "the range of the law firm's discretion," and the law firm's perspective on his performance bonus. *Id.* at 522. On remand, the Bar concluded that the evidence necessary for these findings was already in the record; that evidence simply was not incorporated into the findings in the original report.

The Amended Report of Referee continues to emphasize the discretion of the compensation committee, but it also finds that Mr. Herman and Mr. Brown had brought revenue of $9.9 million into the law firm. (A-ROR p. 15) (A. 84). It recognized Mr. Pozzuoli's testimony that: "In a law firm like ours, what we were trying to do is clearly when they hit a big case, you want to pay them, but they're certainly not going to make as much as they would have if they were on their own." (A-ROR p. 15–16).

The Amended Report does not discuss the undisputed testimony of the decision-making process of the compensation committee under its multi-

factored approach, or the significance of the openness of the process and the ability of the directors to have a reasonable sense of the fair range of the bonuses they would receive. Yes, Mr. Herman was not going to keep the $9.9 million as if he were a sole practitioner. But the firm was undisputedly committed to paying Mr. Herman fairly when he hit it big, and he had just hit the ball out of the park twice in one year. Despite the fact that the other directors undoubtedly did not wish to provide harmful testimony for Mr. Herman, not a single witness from the law firm suggested that there was a reasonably probability that Mr. Herman would receive no bonus or even a "historic" bonus in this case. There is no evidence that the law firm was actually thinking of denying Mr. Herman his bonus, or that it would be the small bonus he had received in the three previous, less-productive years.

The findings on Question 17 between paragraph 106 and 110 of the Amended Report of Referee emphasize that Mr. Houston had as much information about the bonus system as did Mr. Herman. It is certainly true that he had extensive knowledge of that system. But the Amended Report does not find that Mr. Houston actually believed his carefully calculated answer was a good faith response to Question 17. It certainly was not a response describing the anticipated bonus based on the factors Mr. Houston had learned were actually utilized by the compensation committee.

Simply put, Mr. Houston knew that, by the time of the filing of the petition, and certainly by the time Mr. Herman was swearing to this answer, it was increasingly likely that the bonus was a contingent asset, as was ultimately determined to be the case by Judge Olson. As early as January 9, 2012, concerning the Security Mutual settlement, Mr. Herman had represented to Mr. Pozzuoli that:

> I believe I have complete control over when we receive the settlement funds and, in fact, I could have had that money before the end of the year; however, in talking with Greg and the client, it was better to push it into this year for tax reasons.

(R-Ex. 1, p. 11). This "historic," non-responsive answer was a blatant attempt to try to minimize the chances that the large bonus would become an asset of the bankruptcy estate.

The Amended Report says that the Bar does not establish Mr. Herman's state of mind when signing the description provided by Mr. Houston. But state of mind, except perhaps in the rare case of a confession, is always established by circumstantial evidence. *See In re Allen,* 998 So. 2d 557, 562 (Fla. 2008) ("Although there is no direct evidence presented that animus was the motive for Judge Allen's concurring opinion, motive and intent are generally proven through circumstantial evidence."). When one examines Mr. Herman's emails, it is irrefutable that his state of mind included

a strong determination to receive and keep a multi-million-dollar bonus. It is irrefutable that he knew the factors to determine a bonus, and the range of bonuses those factors would produce. If he spent even a few seconds reflecting on the question and the proposed answer, he knew it was non-responsive and concealed what he reasonably anticipated. And the evidence is that he and his lawyer conferred for more than a few seconds during the month they worked on his schedules. The Amended Report is clearly erroneous in finding that Mr. Herman's state of mind is not clearly established by the evidence in this record.

III. The expert testimony and the testimony of Mr. Herman's lawyers provides no basis for him to believe in good faith that the answer to Question 17 was altered by some odd rule of bankruptcy law.

Finally, in the prior opinion, this Court was concerned about whether the answer to Question 17 "strayed from the acceptable conventions of bankruptcy practice." Obviously, Judge Olson found that it did stray. But perhaps more important, none of the lawyers who testified in this case suggested that "income" or "increase" or "reasonably anticipated" had special meanings in bankruptcy. Mr. Houston does not say that he told his client that any statute or judicial decision placed a special gloss upon Question 17 that required him not to provide an ordinary, common-sense answer to the question.

This question was supposed to be answered using the usual and ordinary meanings that a debtor would give to those terms. It plainly asked for a description of an increase or a decrease, and the answer proposed by Mr. Houston provided neither. It plainly asked for a prediction, based on what the debtor "reasonably anticipated to occur." And it plainly limited the prediction to the upcoming year.

When Mr. Herman signed this document, he knew the funds from the two successful cases were in the possession of his law firm. Even when he filed the petition, he knew the firm would receive the funds in the near future. He knew the content of his emails and the method used to determine the parameters for the bonus he would receive. The plain and simple description called for by Question 17 was something similar to:

> *I reasonably anticipate that I will receive an annual performance bonus before the end of 2012 that will be an increase from last year. Although I do not know the precise amount of my bonus, I would reasonably anticipate that it will exceed $1 million.*

The problem with that answer, of course, is that it highlights the bonus that he wants to keep post-bankruptcy for himself. His personal goal and that of his attorney is jeopardized by that answer. The answer would virtually

assure that the bankruptcy court would conduct proceedings to determine whether the large bonus had become a contingent asset of the estate.

The Referee's recommendation is based on a faulty analysis of the undisputed evidence in this record.

IV. The sworn answer to Question 17 was an intentional misrepresentation that violates the Florida Rules of Professional Conduct.

If this Court finds that the Referee erred in determining that Mr. Herman was entitled to a defense of advice of counsel concerning Question 17 for the reasons discussed in the three prior sections of this brief, then the Court is back to where it was during the prior review.

In the first Report, the Referee found violations of Rule 3-4.3, Rule 4-3.3(a)(1), Rule 4-8.4(a), and Rule 4-8.4(c). (ROR p. 40)(A. 48). The Referee found in paragraph 96 of that report that Mr. Herman's claim that he did not disclose his anticipated bonus "*anywhere*" in the schedules because he believed it was discretionary was contrary to the evidence and "not credible." (ROR p. 44). The Referee found in paragraph 97 that Mr. Herman's claim that "his disclosure regarding future income was not done with the intent to mislead anyone" was not "credible." (ROR p. 44-45).

Indeed, when it is clear that the answer is incompatible with Mr. Herman's knowledge at the time he swore to its truth, it is even more obvious

that the answer was given to mislead the trustee, the bankruptcy court, and his creditors.

In his testimony, Mr. Herman stated that there was “no way in God’s green earth” that he could ever imagine concealing that he won the two contingency fee cases. (TS3. 135). But he was not trying to conceal his victories; he was trying to conceal that those victories might fund his bankruptcy estate.

All of the bankruptcy attorneys who testified in this hearing recognized that there is no downside to disclosure in bankruptcy. The more you disclose, the more debts you discharge and the lower the risk that you will be denied a discharge. And yet, Mr. Herman – with the help of Mr. Houston – worked hard not to disclose the huge bonus that Mr. Herman reasonably anticipated he would receive in 2012.

There was no legitimate reason, legal or otherwise, for Mr. Herman to provide this non-responsive answer to the question. His intent was to deceive in hopes that the deception would help him keep an exceptionally large bonus. The trial in front of Judge Olson dashed those hopes, but it did not change the fact that Mr. Herman provided a misrepresentation under oath to the bankruptcy court.

Thus, the evidence concerning the misrepresentation involving Question 17 still supports each and every violation recommended by the Referee in paragraph 116 of his original Report of Referee.

That recommendation as to Question 17 still causes the Standards applied in the first Report to apply at this time. (ROR pp. 55–57) (A. 63–65). It does not change the aggravating factors found in the first Report. (ROR p. 57).

Thus, at a minimum, the current status of the case supports the Referee's recommendation of an 18-month suspension, and the Bar stands by its arguments for a harsher sanction of disbarment, as presented in its original briefing.

CONCLUSION

This Court should find that the Referee's findings of fact on the defense of advice of counsel as to Question 17 are not supported by the evidence in this record and are clearly erroneous. It should conclude that the proper legal analysis of that defense can only reach the conclusion that Mr. Herman did not rely in good faith on any legal advice from Mr. Houston as to the descriptive answer to Question 17, because it was incompatible with his own knowledge.

The Referee's findings that Mr. Herman's testimony was incredible should stand. Thus, the recommendation of guilt for the four violations found in the original Report of Referee should be adopted by this Court, and this Court should impose an appropriate sanction, which the Bar still argues is disbarment. This Court should award the Bar costs.

Respectfully submitted,

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.
Florida Bar No: 197394
Email: service-caltenbernd@bankerlopez.com
BANKER LOPEZ GASSLER P.A.
501 E. Kennedy Blvd., Suite 1700
Tampa, FL 33602
(813) 221-1500
Fax No: (813) 222-3066

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 5th day of April 2021 to:

David Bill Rothman, Esq.
Jeanne T. Melendez, Esq.
200 S. Biscayne Blvd., Suite 2770
Miami, FL 33131
dbr@rothmanlawyers.com
jtm@rothmanlawyers.com
Attorney for Respondent

Joi L. Pearsall, Esq.
1300 Concord Terrace, Suite 130
Sunrise, FL 33323
jpearsall@floridabar.org
esanchez@floridabar.org
Attorneys for The Florida Bar

Patricia Ann Toro Savitz, Esq.
651 E. Jefferson St.
Tallahassee, FL 32399
psavitz@floridabar.org
Attorneys for The Florida Bar

/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.

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/s/ Chris W. Altenbernd
Chris W. Altenbernd, Esq.