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.
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THE FLORIDA BAR'S REPLY BRIEF

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REPLY ARGUMENT

Mr. Herman's Answer Brief does not follow the structure of the Initial Brief. It has proved impossible to file a reply brief using his structure. As a result, this brief uses a simplified structure.

I. The Answer Brief conflates the issues resolved in the Bankruptcy Court, at the first disciplinary hearing, and on remand from this Court.

Because disciplinary proceedings often arise out of underlying litigation with differing issues and burdens of proof, it is easy to become confused about the issues the Bar needs to prove by clear and convincing evidence. And it is often tempting for the lawyer to want to relitigate the underlying issue that was lost in the earlier case. This is such a case. It is helpful to identify the issues and burdens in three different proceedings.

A. The Bankruptcy Proceeding.

In the Bankruptcy Court, both the Trustee and the primary creditor challenged two primary issues: (1) was Mr. Herman's interest in the $10 million fee sufficiently vested to make his anticipated bonus property of the bankruptcy estate, *In re Herman*, 495 B.R. 555, 583-84, (Bkrtcy.S.D.Fla., 2013), and (2) was Mr. Herman's concealment of that bonus after filing the petition done with the intent to hinder, delay or defraud his creditors, such that he was not entitled to a discharge. It was not necessary for the Trustee

or the bank to prove that his fraud ultimately caused harm to the creditors. *Id.* at 593–94.

Despite Mr. Houston's claim that he believed Mr. Herman's anticipated bonus would not be an asset, Judge Olsen determined that it was, and that the failure to list that asset in Schedule B and the failure to provide an honest description of his reasonably anticipated income for the upcoming year was intentional misconduct justifying a decision to deny a discharge. He found Mr. Herman's testimony concerning Question 17 "incredible." That bankruptcy order was upheld on appeal by District Court Judge Kenneth Marra. *In re: Herman*, 2014 WL 11428191 (S.D. Fla. 2014). And the appeal to the Eleventh Circuit was dismissed when Mr. Herman did not file a brief, apparently after a settlement. (TFB-Ex. 6).

The fact that this proceeding occurred and reached this outcome under the applicable burden of proof in bankruptcy court is an indisputable fact, not merely something the Bar proved by clear and convincing evidence. Referee's are allowed to take judicial notice of such bankruptcy orders. *See The Florida Bar v. Gwynn*, 94 So. 3d 425, 429 (Fla. 2012).

It is also a fact that Mr. Herman did not raise advice of counsel for either of these misrepresentations, and we can only speculate how Judge Olsen might have ruled on those issues if they had been raised. None of

these issues were proper for relitigation or second-level appeal within the disciplinary proceeding.

B. The First Disciplinary Hearing.

At the first disciplinary hearing, the Bar charged Mr. Herman with several violations of the Florida Rules of Professional Conduct. The Referee made findings of fact expressly based on the clear and convincing evidence standard, and recommended that this Court find Mr. Herman guilty of (1) Rule 3-4.3, the commission of any act that is contrary to honesty and justice, (2) Rule 4.3.3(a)(1), knowingly making a false statement of fact to a tribunal, (3) Rule 4-8.4(a), violating the Rules of Professional Conduct, and (4) Rule 4-8.4(c) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. (ROR p. 40). It is the elements of these violations, and not the elements of issues in bankruptcy court that the Bar must prove by clear and convincing evidence.

As discussed in the initial brief, the original Report of Referee made findings of fact, including evaluations of Mr. Herman's credibility that aligned with Judge Olsen's evaluation of his credibility. The Referee found that the four violations had been proven and recommended a finding of guilt for each.

During the initial review, this Court did not decide that the Referee was incorrect on the findings for the four violations. If this Court had found the

evidence was insufficient to prove any of the four violations without regard to the new defense, this Court would have dismissed the unproven count and would not have given the Bar a second opportunity to prove those elements. As explained in the next section, this Court remanded solely for the Referee to determine whether the defense of advice of counsel would have changed the outcome on any of the 4 violations if the Referee had considered the defense at the initial hearing. The findings of intentional misrepresentations by Mr. Herman could be overcome by the defense if the answers concerning his assets on Schedule B or the odd answer to Question 17 were based on his lawyer's advice and Mr. Herman did not know his lawyer's advice was based on an incorrect understanding of the real facts. The case was not remanded for a new trial.

C. The Remand Proceeding on the Defense of Advice of Counsel.

In this Court's prior opinion in this proceeding, it announced for the first time that the defense of advice of counsel was applicable to bar proceedings in certain limited cases where the lawyer is represented and is not an expert in the relevant field. *The Florida Bar v. Herman*, 297 So. 3d 516 (Fla. 2020). It remanded this case to the Referee for further proceedings to determine if Mr. Herman could establish this defense under his burden of production and

whether the Bar in turn could overcome that defense by clear and convincing evidence.

The remanded question was not a request to determine how Judge Olsen would have ruled if the defense had been raised before him under a preponderance of the evidence standard, but whether a similar defense announced for use in Bar proceedings might change the outcome from the original findings and recommendations of the Referee concerning the four violations.

Essentially, the factual question on remand that was determinative was whether it should have been obvious to Mr. Herman that his attorney was mistaken and the answers provided by his attorney for Schedule B and for Question 17 were mistaken in fact. *Id.* at 520. If that was true under the clear and convincing standard, then the defense was not available in this disciplinary case, and the prior findings of fact and recommendations should have remained essentially unchanged.

Thus, the issue on review at this point is whether Mr. Herman fulfilled his burden of persuasion on this defense and, if so, whether the Bar overcame that defense by clear and convincing evidence that Mr. Herman knew that the non-responsive description in answer to Question 17, which was written by his attorney, was mistaken in fact. If he knew the answer was

such a mistake, he had no defense and he was presenting false evidence under oath to the bankruptcy court.

II. The Bar did not need to supplement the record.

On remand, both Mr. Herman and the Bar had the opportunity to present more evidence related to this one issue if they believed it was necessary. Neither party did.

Schedule B.

As to Schedule B, Mr. Herman repeatedly argues that the Bar's decision not to challenge the Referee's finding is a concession that the bankruptcy judge was wrong, and that Mr. Herman was correct that the bonus was not property. (AB p. 6, 40). Nothing is further from the truth. First, as a matter of established fact, the law of the case in Mr. Herman's bankruptcy is that his sizable bonus was sufficiently certain under the discretionary process used in the law firm, that the bonus was property of the bankruptcy estate. That fact cannot be changed in this proceeding.

But more importantly, as to both Schedule B and Question 17, the undisputed evidence is that Mr. Houston did not quickly prepare schedules for this client without giving this adequate thought. It is clear that this bankruptcy had two primary purposes: (1) discharge the bank's large judgment, and (2) allow Mr. Herman to keep his anticipated bonus for

himself. Mr. Houston met with the leaders of Tripp Scott.[1] He researched this issue. And he claims he concluded that the bonus could not be an asset because of the discretion exercised by the compensation committee.

The problem he has with this testimony is that he is a very experienced bankruptcy attorney. The default rule in preparing these filings is disclosure. He himself said that "over disclosure is best." (T2 118). If he actually was so certain this was not an asset, all his training and experience would have told him to disclose the bonus in Schedule B as a contingency that did not amount to an asset, and then to explain without hesitancy in Question 17 that his client would likely get a much larger bonus within the next twelve months than usual due to the contingency. There was no downside to disclosure based on his own legal opinion. But instead he hid the bonus both as a possible asset and as income. From a bankruptcy perspective, Mr. Houston's explanation is incredible. That incredibility is the problem that drove the outcome in Judge Olsen's opinion.

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[1] The answer brief seems to think it is relevant that Mr. Herman was not a shareholder in Tripp Scott. But that firm has two directors who hold stock in trust for all of the other directors. (TFB-Ex. 21, p.188). Functionally, the directors are comparable to partners and the bonus methodology is similar to the methods used in many firms to determine partner bonuses.

But in this case, Mr. Herman testified that he relied on his counsel for the answer to Schedule B. On remand, the Referee found that Mr. Herman was not a bankruptcy expert and, thus, he did not know his lawyer was mistaken. Even though the Bar questions whether this finding is correct, the Bar cannot in good faith challenge this finding under the rules for a review of the Referee's findings of fact. Contrary to the argument in Mr. Herman's answer brief, the Bar does understand bankruptcy law. Just as Judge Olsen understood why the testimony was incredible in light of bankruptcy law, the Bar too understands why Mr. Houston's explanation for his decision not to disclose the bonus in Schedule B is incredible. But that does not mean the Referee had no factual basis to find that Mr. Herman – who apparently did not understand the importance of disclosure under bankruptcy law – might not realize that his lawyer's advice as to Schedule B was incredible. This is the only reason the Bar does not challenge the findings as to Schedule B.

Question 17.

As to Question 17, the analysis is very different. Mr. Herman now essentially admits that "common sense" would have told him his lawyer's draft answer was mistaken. (AB p. 34). He has no real answer to the fact that his lawyer's draft description is not even responsive to the question,

much less an honest answer describing what he reasonably anticipated his increase in income would be in the upcoming year.

He continues to argue that the answer was "truthful information and was not incompatible with Mr. Herman's own knowledge." (AB p. 22). But the point is – both Mr. Houston and Mr. Herman had the information needed to clearly know that this answer was irrelevant historic information that plainly did not answer the clear and unambiguous question. They both knew the bankruptcy was being filed because Mr. Herman anticipated a very large bonus that he did not wish to give to the bank. He was not supposed to describe a historic "baseline to measure any such increase." (AB p. 31). He was clearly required to describe the anticipated increase itself.

As to this Court's concern about the "acceptable conventions of bankruptcy practice," he claims that the Bar presented "no evidence as to whether or how far Mr. Herman's answer to question 17 strayed any such practices." (AB p. 22). But Mr. Herman has no answer for the fact that his co-counsel, Mr. Pugatch, and his expert, Mr. Mrachek, never testified that there was some odd convention in bankruptcy where this answer was sufficient to explain one's reasonable expectation for the upcoming year. They never mentioned Question 17 in their testimony. (IB p. 23-24).

He has no response to the fact that Judge Olsen did very clearly in his opinion determine that the answer to Question 17 was not compatible with bankruptcy practice, and was a deception under the conventions of that practice.

He claims that the Bar's expert, Mr. Markowitz, testified that the answer to Question 17 might have been adequate without the parenthetical. (AB p. 35). But this takes the testimony out of context. (T2. 67-72). Mr. Markowitz was explaining that the answer provided in Schedule I might have been enough to disclose a possible asset as an answer to Schedule B. He explained that Question 17 was supposed to provide a description of income, not of pre-petition assets. (T2. 71). His testimony provides no support for a claim that a lawyer could advise a client that this non-responsive answer was an appropriate description of reasonably anticipated income under some odd bankruptcy rule or convention.

Although Mr. Herman suggests that Trustee Welt's testimony is helpful, it was Trustee Welt who decided to contest the bonus because he thought it was an asset and because the misrepresentations were grounds for denial of discharge. (T1. 83). He is not a lawyer, but as a very experienced trustee, he never testified this descriptive answer was acceptable under bankruptcy conventions.

Mr. Houston never testified that he told Mr. Herman that this non-responsive answer was acceptable due to some bankruptcy rule. He did not recall even discussing it with Mr. Herman. (T2. 119). His theory has always been that the bonus was as likely to be zero as a million dollars so he could describe the past rather than the near future. (T2. 116-117). But the detailed evidence, especially that of Mr. Pozzuoli, explained in the initial brief, is clearly to the contrary. The discretionary factors the compensation committee used – similar to the factors that a judge uses to set alimony for a stay-at-home wife after a 25-year-marriage with modest joint assets and a high-earning husband – give the decision-maker discretion as to the amount, but certainly not as to an award of a bonus for a lawyer that brings in $10 million.

The answer brief continues to argue that no increase in bonus was a reasonable answer because the bonus was "indeterminable." (AB p. 29). But that distorts the evidence. The Bar does not dispute that the precise amount of the bonus was subject to some discretion and, thus, indeterminable. But the "range" in which the reasonable bonus fell was predictable and was far higher than the three prior years. *See In re Herman*, 495 B.R. 555, 569 (Bkrtcy.S.D.Fla. 2013). Mr. Herman demonstrated that he knew that range well. The Referee rejected that argument initially, and

there was no basis to alter that ruling on remand. Admittedly, whether Mr. Herman described the bonus as likely to exceed a million dollars or two million dollars, in the words of this Court, "required the exercise of some judgment." *Herman* at 522. But Mr. Herman was not exercising judgment when he explained a historic pattern of bonuses in the range of $65,000 to $70,000. He was intentionally misrepresenting what he reasonably expected to receive in the upcoming year.

Mr. Herman did not claim he signed Schedule I without examining the answer to Question 17. He admitted he examined it. (T1. 170). As fully quoted in the answer brief, when Mr. Herman signed Schedule I under oath, he knew he had always gotten a discretionary bonus at the end of the year. (AB p. 17, T1. 170). Both his emails and the testimony of Mr. Pozzuoli confirm that the discretionary bonus could reasonably be expected to be much larger than the prior three years.

Instead, Mr. Herman says he was giving the Trustee a "clue." (T1. 170). Bankruptcy schedules are not a child's game where players search for an answer. Even Mr. Herman had to know from the plain text of the question that he was supposed to disclose his reasonable expectation, not provide a clue that might lead to the truth at the first meeting of creditors. As Trustee Welt explained, first meetings of creditors are often only a few minutes long.

(T1. 60). Bankruptcy filings are often timed by debtors to try to have assets come in after the fact; Schedule I requires an honest description of income in the near future in order to find and evaluate upcoming income that is actually a pre-petition asset.

This court explained in its prior opinion that Mr. Herman had the burden of persuasion on his defense of advice of counsel, and the Bar questions whether he ever presented the basic predicate evidence that his non-responsive answer to Question 17 was based on the legal advice of his attorney. But if it did, the evidence already in the record was sufficient to answer this Court's concerns. The Referee merely needed to supplement the findings to address the concerns expressed by this Court in its prior opinion. Mr. Herman knew this answer was misleading. It is non-responsive because Mr. Herman did not want to disclose what he knew he reasonably anticipated. The competent substantial evidence in this record simply does not support a finding that he signed this answer because it was compatible with what he knew to be true or that it was based on some odd legal rule that his lawyer claimed to exist concerning Question 17. The evidence is quite to the contrary. The Referee should have found that Mr. Herman could not rely on any advice of counsel for Question 17 and should have continued to find violations based on that finding.

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

Mr. Herman argues that the Referee's original detailed determination that Mr. Herman "intentionally misled the Trustee and creditors," (ROR p. 44-49), and the Bar's argument to the same effect is contrary to the record evidence and "defies common sense." (AB p. 38).

Mr. Herman must admit that, as quoted in the initial brief, Judge Olsen found that the omission of information in answer to Question 17 "was intentional and not the result of mistake." (IB p. 25). That finding, along with his assessment of credibility was made under a preponderance of the evidence standard, but it is still competent evidence to help support a finding by clear and convincing evidence in this case. *See The Florida Bar v. Gwynn*, 94 So. 3d 425, 429 (Fla. 2012). In the original Report of Referee, on this same evidence, the Referee made additional finding on this issue because he understood that more was needed in addition to the bankruptcy court's ruling.

The Bar's argument is not based on a misunderstanding of bankruptcy law. Much of the evidence of an intentional misrepresentation arises from that law. It is helpful to understand that the window of time between the filing of a petition and an order of discharge is relatively short. The order is usually

entered promptly following the expiration of the time for the filing of a motion objecting to discharge, which expires 60 days after the first meeting of creditors.[2] *See* Fed. R. Bankr. P. 4004(c)(1). Thus, if an issue can fly under the radar for this period, the debtor is usually discharged.

Mr. Herman discusses the testimony of Trustee Welt. (AB p. 18-19). The Bar presented his testimony to introduce the exhibits from the bankruptcy case and explain the circumstances surrounding his decision to join in the ancillary proceeding challenging the bonus as an asset and the misrepresentations as grounds to deny discharge.

Contrary to Mr. Herman's argument that Trustee Welt would have met with Tripp Scott in any event, the trustee testified that he rarely meets with a debtor's employer. (T1. 62-65). He explained that Mr. Herman's schedules were actually filed after an additional extension, and only six days before the first meeting of creditors. (T1. 97). Normally, that meeting is only a few minutes long. (T1. 60). Mr. Herman's schedules gave the Trustee no substantiation of the facts about the bonus. (T1. 99).

Oddly, it is Mr. Herman's theory that his lawyer was totally confident that the bonus was not legally an asset, but he was also confident that the

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[2] *See* https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics

bank would file an adversary proceeding claiming it was an asset and challenging discharge. But the timing and content of the schedules is consistent with a debtor attempting to avoid listing an asset and managing to stay under the radar for sixty days. He did not succeed in that tactic, but "common sense" does not support an argument that all of the effort he and his attorney went through to avoid listing the asset and disclosing his expected income was not intended to mislead the trustee and the court when he admits there is no downside to disclosure if you are playing by the rules. This issue was not "necessarily" going to an exemption hearing, as he argues, and he is not arguing he would have won that battle if it did. (AB p. 39). But the issue would be over if he could manage to get through the sixty day period.

The judgments were quite public, but that is why he was trying to time his bonus to increase the chance it would be future income and not an asset. That publicity was no excuse for giving the trustee a "clue" when he was required to give an adequate description of his reasonably anticipated income under oath.

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. This Court 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 that advice was incompatible with his own knowledge.

The Referee's original 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,

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CERTIFICATE OF SERVICE

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