IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

PETER G. HERMAN,

Respondent.
_____/

Supreme Court Case
No. SC17-2050

The Florida Bar File
No. 2014-50,165 (17E)

AMENDED REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein pursuant to R. Regulating Fla. Bar 3.7.6, the following proceedings occurred:

1. On November 16, 2017, the Florida Bar ("Bar"), pursuant to R. Regulating Fla. Bar 3-7.4 filed a formal complaint against Respondent alleging he violated the following: RR. Regulating Fla. Bar 3-4.2; 3-4.3; 4-3.3(a)(1); 4-3.4(a); 4-8.4(a); and 4-8.4(c) ("Complaint")(R1[1]).
2. By order dated November 12, 2017, the Supreme Court referred the matter to the Chief Judge of the Fifteenth Judicial Circuit for the

[1] All references to the Record will be denoted as "R" followed by the corresponding tab number. References to the party's exhibits contained at tabs 51 through 57 will be denoted as follows: "(R x, sub ex. y)" where "x" denotes the tab number and "y" denotes the corresponding exhibit number assigned by each party.

appointment of a referee, (R3) and the Chief Judge appointed the undersigned as referee on December 11, 2017 (R4).

3. On January 5, 2018, Respondent filed his Answer to the Complaint (R8).

4. The matter was bifurcated and proceeded to an evidentiary hearing beginning on June 21, 2018 and continuing through June 26, 2018. The Bar introduced exhibits one (1) through forty-six (46) into evidence without objection (R51-52). Respondent's exhibits one (1) through eighty-nine (89) were likewise admitted into evidence without objection (R53-57).

5. The undersigned granted the Bar's unopposed Motion to Take Judicial Notice of the following two Orders arising from Respondent's personal bankruptcy proceedings: *In Re Peter G. Herman* (Bankruptcy Court Case No. 12-13989-JKO[2]); and *Herman v. CIB Marine Capital, LLC* (USDC Case No.: 13-cv-62251-KMM)(collectively referred to as the "Bankruptcy Orders")(R32).

6. As the undersigned has taken judicial notice of those cases, it is respectfully submitted that the undersigned may rely upon, and adopt the factual findings set forth in the Bankruptcy Orders in making the

[2] This case is reported at *In Re Herman*, 495 Bankr. 555 (S.D. Fla.)

necessary findings and conclusions in this matter.[3] *See, The Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012); *The Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010); *The Florida Bar v. Rood*, 620 So. 2d 1252, 1255 (Fla. 1993)("Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the factual question.").

7. The following persons testified as witnesses at the hearing: For the Bar, Kenneth Welt, Jerry Markowitz, Esquire, and Respondent. For Respondent, Bart Houston, Esquire, Miles McGrance, Esquire, Roger Banks, Amy Galloway, Esquire, Alex Brown, Esquire, Honorable Thomas Lynch, Chad Pugatch, Esquire, Michael Powell, L. Louis Mrachek, Esquire and Respondent.

8. On October 22, 2018, the instant matter proceeded to a Sanctions Hearing at which the Respondent testified. In addition, both parties presented arguments as well as Supplemental Proposed Findings as to Recommended Sanctions.

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[3] The undersigned has likewise taken judicial notice of evidence and testimony not presented to, nor considered, by the Bankruptcy Court, in particular, regarding: (1) Respondent's reliance on advice he received from his Bankruptcy counsel, Bart Houston, prior to filing and swearing to the accuracy and truth of his financial schedules and SOFA; (2) the Trustee's and CIB's knowledge of the contingency case judgments prior to the filing of Respondent's schedules; (3) the arguments raised by CIB in both the bankruptcy and state court proceedings; and (4) Respondent's testimony regarding his lack of knowledge of the transfers made by his then-spouse Pamela Herman and documentation for the accounts and expenses paid from the accounts. In addition, the undersigned takes judicial notice that in making factual findings, the Bankruptcy Court applied a lower standard of proof (preponderance of the evidence) as opposed to a clear and convincing standard which must be applied in this Bar matter

9. On November 19, 2018, the undersigned filed his Report and Recommendation with this Court ("R&R").

10. On June 18, 2020, the Court issued its opinion in which it remanded the case and ordering that the undersigned file an Amended Report and Recommendation addressing Respondent's advice of counsel defense. *The Florida Bar v. Herman,* SC17-2050 (June 18, 2020)[4]

11. Case Management Conferences were held on June 23, and July 2, 2020. Both sides have advised the undersigned that they would not be presenting any additional evidence, and that they intended to rely upon the record in its current state.

12. On October 7, 2020, the Respondent submitted his Proposed Report & Recommendation (R 82). The Bar submitted its Proposed Report & Recommendation on October 9, 2020 (R 83). On October 8, 2020, both parties appeared before the undersigned to present additional argument addressing Respondent's advice of counsel defense.

13. By leave of this Court (R 86), the parties have each submitted a Supplement to their respective Proposed Amended Report and Recommendation (RR 84; 87).

[4] Reported at *The Florida Bar v. Herman,* 297 So.3d 576 (Fla. 2020).

14. During the course of these proceedings, Joi L. Pearsall, Esquire, represented The Florida Bar and David B. Rothman, Esquire represented Respondent. The pleadings, hearing transcripts and all other papers filed in this cause, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record.

II. FINDINGS OF FACT

A. Jurisdictional Statement.

15. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary of the Case.

1. Introduction and Background

16. This matter arises from the Respondent's conduct in connection with his personal bankruptcy proceedings. Specifically, The Florida Bar alleges that Respondent violated the foregoing Bar Rules in that during his personal bankruptcy proceedings, Respondent intentionally failed to disclose in his sworn bankruptcy schedules ("the Schedules") as well as his Statement of Financial Affairs ("SOFA") his bonus from approximately the $10 million of legal fees that were generated by his work as an attorney in obtaining successful judgments in two of his cases

("10 Million Fees").[5]

2. Failure to Disclose Respondent's Bonus from the $10 Million Fees

a. Respondent's Compensation Structure

17. To fully understand the basis of the Bar's allegation surrounding Respondent's failure to disclose his bonus from the $10 Million Fees, a brief overview of Respondent's employment and compensation structure is appropriate. At the time he filed his petition for bankruptcy, Respondent was employed as an attorney with the law firm of Tripp Scott ("Tripp Scott"). He was given the title of "director," in his more than 30 years with Tripp Scott. However, he never was an equity partner or a shareholder of the firm. (R 66, 6/21/18, p.129-130; 6/25/18, p.107-108, 112-113) Respondent was a W-2 employee and did not have a contract with the firm. (R 66, 6/25/18, p. 112) His compensation consisted of a monthly salary and an annual discretionary performance bonus. (R 66, 6/25/18, p. 113)

18. Three witnesses (Peter Herman, Alexander Brown and Edward Pozzuoli), all from Tripp Scott, were the only witnesses who testified at the bankruptcy trial regarding the historical practices of Tripp Scott in the

[5] The Complaint also alleges that the Respondent violated the foregoing Bar Rules in that he failed to disclose a series of transfers of his personal assets in an attempt to defraud his creditors in the bankruptcy proceeding ("PH Transfers")(R 1). The undersigned has addressed the PH Transfers in the R&R and respectfully will rely upon the undersigned's findings and recommendation stated therein that the Respondent be found not guilty of violating the Bar Rules charged as they relate to those transfers.

awarding of bonuses to non-shareholder attorneys. Their testimony concerning this issue was admitted into evidence in the instant proceedings. (TFB Exh. 20 & 21; Resp. Exh. 38) Based upon the witnesses' testimony, performance bonuses were considered and awarded by the Tripp Scott Compensation Committee, which had the sole and absolute discretion as to: (1) whether to award bonuses; (2) determine the timing of any bonus award; (3) whether to award a bonus to any particular director/employee; and (4) determine the amount of any bonus award. (TFB Exh. 20 & 21; Resp. Exh. 38) (Bankruptcy Trial Transcript, p. 84-85; 153-154; 218-219). If awarded, bonuses are historically awarded at year-end.[6] (R 66, 6/25/18, p. 42-47)

19. Two of the bankruptcy trial witnesses, Respondent and Alex Brown, testified at the Bar trial and testified consistent with their prior testimony that the bonuses at Tripp Scott were discretionary. (R 66, 6/25/18, p. 85-88, 126-127) Respondent specifically testified that for the 30 years preceding 2012 he had received a discretionary bonus determined in the same fashion. (R 66, 6/25/18, p. 126-127) An additional witness, Amy

[6] This testimony is fairly consistent with the findings of the Bankruptcy Court. *See, In Re Herman,* 495 B.R. 555, 563-64 (discussing the structure of the Respondent's compensation package, which includes receiving a salary and a bonus "based upon the satisfaction of 'certain performance criteria' (described by Mr. Pozzuoli as the 'one-third' portion of Director's compensation), which are typically made in December of each fiscal year." However, the Court also found based on the testimony and evidence submitted in that case that is unlikely that Respondent would receive a zero bonus. *Id.* at 564.

Galloway, who had also worked at Tripp Scott as a director for years, testified in the Bar proceedings. Her testimony was consistent with the testimony of the other three witnesses on the issue. In addition, she gave very specific examples of reasons why bonuses may not be awarded in any given year. (R 66, 6/25/18, p. 41-44)

20. Galloway also testified that at year-end it is common practice for lawyers at Tripp Scott to send emails to members of the Compensation Committee to lobby for their performance bonuses. According to Galloway, these emails are nothing more than the attorneys expressing their thoughts on their expectations. (R 66, 6/25/18, p. 51, 58, 60-61).

21. The Bar did not present any witness testimony to rebut the testimony of these witnesses.

b. The CIB Judgment, Contingency Fee Cases and the $10 Million Fees

22. In December 2011 and while the Respondent was employed with Tripp Scott, CIB Marine Capital, LLC ("CIB") obtained a deficiency judgment of approximately $4.5 million dollars against Respondent, based upon the non-payment of a loan that he personally guaranteed for Esquire Ventures, LLC. The loan was made in connection with a failed real estate investment by the Respondent. (R 52, sub. ex 28)("CIB Judgment"). CIB immediately began pursuing collection proceedings

against Respondent.

23. Meanwhile at around this same time, Tripp Scott had been representing plaintiffs in two separate lawsuits pursuant to contingency fee agreements. Respondent was the co-lead counsel, along with another Tripp Scott attorney, Alex Brown, in each of these cases. The first was a suit against Home Depot for patent infringement ("HD Case"). The other case was against Security Mutual Life Insurance Company of New York ("SM Case")(collectively, the "Contingency Fee Cases").

24. The plaintiffs in each of those cases prevailed. The jury in the HD Case awarded the plaintiff approximately $23.45 million and the one in the SM Case awarded the plaintiff $26 million. On October 13, 2011, the court entered a final judgment in the SM Case. Ultimately, the parties reached a settlement in the SM Case and a fully executed Satisfaction of Judgment was filed on March 13, 2012 (R 52, sub ex. 35). The Final Judgment in the HD case was affirmed by the Eleventh Circuit on November 14, 2011 (R 52, sub ex 40). Mandate was issued on February 12, 2012. Pursuant to the fee arrangements in the Contingency Fee Cases, Tripp Scott received the $10 Million Fee.[7]

[7] The fees were $4.1 million and $5.8 million for the HD and SM Case, respectively.

c. The Respondent's Expectations Regarding Receiving a Bonus from the $10 Million Fees: The Pozzuoli Emails

25. Beginning in December 2011 and continuing into early January 2012, Respondent sent approximately six (6) emails to Pozzuoli, the President of Tripp Scott, as well as other members of the firm all of whom were members of the Firm's Compensation Committee ("Pozzuoli Emails"). In each of those emails, Respondent discussed how the bonuses from the $10 Million Fee should be distributed to those who worked on the two contingency cases, including himself and Brown. (R 52, sub exs. 25, 26).

26. He stated that he was "hearing rumors" regarding the distribution methodology of the bonuses. He also mentioned he wanted Tripp Scott to be "consistent" with its historical practices in considering the award of bonuses. In his December 6, 2011 email, Respondent stated that he wanted Tripp Scott to finalize the distribution methodology of the bonuses.

27. Then, in his December 15, 2011 email, Respondent stated that he was frustrated and disappointed that the people who had procured the $10 Million Fee were being "kept out of the loop." After meeting with Pozzuoli, Respondent sent him another email on December 21, 2011 describing the $10 Million Fee as a "heck of a lot of money that is going

to result in everybody getting a great payday."

28. Respondent proposed to Pozzuoli that he and Brown should receive approximately $5.2 million due to their successful work on the Contingency Fee Cases. In reaching this amount, Respondent explained to Pozzuoli that it was $500,000 lower than what he had proposed the day before. Respondent then goes on to further state that based upon his "profit analysis," "the number for both [Brown] and [Respondent] would end up being north of $7,000,000." (R 52, sub ex. 26).

29. In his December 21, 2011 email, Respondent stated, "[W]e have a huge amount of money coming in that will benefit us all" and "I don't want to sound like a broken record, but I was extremely serious that this should be resolved today. It's important to me" (R 52, sub ex. 26).

30. On January 8, 2012, Respondent sent Pozzuoli yet another email in which he stated, "As you know, I have been trying to get a resolution to the fair and proper distribution of the monies coming from [Contingency Fee Cases] for the last two months.... I believe the Firm should want me and [Brown] to have a feeling that we are being treated fairly and being rewarded fairly for this tremendous and unprecedented result." (R 52, sub ex. 27).

31. In his January 9, 2012 email, Respondent said that the final details of the settlement in the SM Case were being worked out, that he, Respondent, had complete control over when Tripp Scott would be receiving the settlement funds from that case, and that the money could have been in 2011, but the receipt was pushed out to 2012 for tax reasons. Respondent stated that the HD Case "should be resolved in the next 60 days if not sooner now that the judges are back from the holiday." (R 52, sub ex. 26).

32. Even though the fees from the Contingency Fee Cases had not been received by Tripp Scott before the December 2011 compensation meeting, the anticipation of the arrival of the influx of cash into the firm was palpable and the employees were excited that the two Contingency Fee Cases were going to pay off (R Ex. 27, p. 68, 70, 71).

33. The expectation of the distribution of the $10 Million Fee to the directors and staff at Tripp Scott was so highly anticipated that not only did the Respondent meet with Pozzuoli to discuss the allocation of those fees, he also sent the Pozzuoli Emails to him to convey his expectations that he would get a substantial bonus (R 66, October 22, 2018, p. 26; TFB Ex. 26; TFB Ex. 27). In fact, Pozzuoli told respondent on December 22, 2011 that when Tripp Scott receives the fees from those cases, Tripp

Scott should set aside some money for the approximate $9.7 million for the non-directors and staff at the firm, and subsequently $300,000.00 was distributed to non-directors (TFB Ex. 21, p. 96-197; TFB Ex. 26, R. Ex. 1).

d. Tripp Scott's Expectations Regarding Awarding Bonuses from the $10 Million Fees For the Contingency Fee Cases: The Pozzouli Deposition.

34. The parties each submitted excerpts from Pozzuoli's deposition given in the bankruptcy case relating to Tripp Scott's position on awarding bonuses for the Contingency Cases. Pozzouli provided the following testimony: When Respondent sent the Pozzouli Emails seeking to resolve the amount of his bonus from $10 Million Fee, he informed Respondent that there was "nothing to discuss" and the allocation of the money for bonuses could not be determined at that time because the money had not yet been received and accounted for by the firm. See Resp. Exh. 27 (Deposition of Edward Pozzuoli, May 13, 2013, p. 65, 68, 79, 80, 90, 92).

35. At that time, "no certainty" was provided to Respondent because "[t]he money was not in the door." *Id.* p. 95. In addition, Tripp Scott utilizes multiple factors and concerns which caused uncertainty regarding how much of the $10 million fee would be allocated and disbursed as bonuses,

particularly in relation to having funds to ensure the firm's financial survivability and pay potential cash flow needs. These include funds needed in the event a hurricane closed the firm, the firm experienced an increase in malpractice issues or a partner had died, or to pay for anticipated cash flow needs, such as renovations or market adjustments for associates' salaries. *Id.* p. 92-93.

36. He also testified that there were factors, which delayed the allocation of bonuses even after the fees, were received in March 2012. These include the need to determine how much would be set aside for non-director staff, as well as the need to wait until the July/August 2012 period so that the firm could project the revenues through the balance of the year in order to ensure the law firm, "from a financial standpoint, was on a strong course." *Id.* p. 169-170.

37. He explained that the firm "had a slow beginning of the year" and there was a concern regarding expenditures for a new department in the firm. *Id.* p. 170. Pozzuoli also confirmed that, despite the statement in Respondent's email that a dispute with previous co-counsel in the Contingency Fee Cases litigation should not delay the resolution of Respondent's bonus, the firm waited for settlement of the dispute prior to disbursing any bonuses because, as president of Tripp Scott, he "wasn't

going to hang [the] law firm out while this dispute was pending." *Id.* p. 175-177.

38. When the multi-million dollar verdicts came down in the Contingency Fee Cases, Respondent was considered by Pozzuoli to possess a number of factors that the Compensation Committee looked at favorably when determining how it would distribute additional compensation to the directors in the firm. (R Ex. 27, p. 36). Indeed, Pozzuoli described Respondent as an accomplished litigator who was not only knowledgeable about the history of the firm, but also contributed to the stability of Tripp Scott. (R Ex. 27, p. 39).

39. Additionally, factored into the Compensation Committee's decision on director bonuses was the amount of fees earned by Tripp Scott as a result of an individual director's work (R Ex. 27, p. 36). Respondent, as co-lead counsel in the Contingency Fee Cases, brought in approximately $9.9 million of fees into Tripp Scott (TFB Ex. 21, 196-197).

40. Prior to testifying in the bankruptcy trial, Pozzuoli described in his deposition how Tripp Scott compensated the lawyers who worked on Contingency Fee Cases: "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" (R Ex. 27, p. 54).

41. Of the twenty directors at Tripp Scott, Respondent was one of small number of attorneys whose practice consisted of over 50% contingency fee cases (R Ex. 27, p.14). While two-thirds of a Tripp Scott director's compensation was a predetermined monthly salary, the other one-third came from the revenues of the firm. (R. Ex. p. 34, 46).

42. Respondent met with Pozzuoli a short time before the December 2011 Compensation Committee meeting to talk about how hard he had worked on the two Contingency Fee Cases and how much money he should get (R Ex. 27, p.78). This meeting between the Respondent and Mr. Pozzuoli is memorialized in the December 21, 2011 email that respondent sent to Mr. Pozzuoli (TFB Ex. 26). Respondent stated in that email that Pozzuoli told him that that they had a "huge amount of money coming in that will benefit us all." (R 66, June 21, 2018, p. 153 -154; TFB Ex. 26). Pozzuoli acknowledged that during that meeting he probably asked respondent if he had a thought about "[h]ow to split this money up..." (R Ex. 27, p. 80).

3. The Adversary Proceedings in the Bankruptcy Court and Appeal to the U.S. District Court

43. As creditor, CIB objected to the petition for discharge alleging, *inter alia*, that Respondent intentionally concealed prepetition assets and made false oaths in connection therewith. (R 51, sub ex. 11; R 53, sub ex. 22). Specifically, CIB claimed that Respondent intentionally failed to disclose on the Schedules and SOFA his bonus from the $10 Million Fee (R 53, sub ex. 22). On June 5, and June 6, 2013, the Bankruptcy Court held a trial on Respondent's bankruptcy petition at which the Court-appointed Bankruptcy Trustee, Kenneth Welt, intervened.

44. On August 5, 2013, the Bankruptcy Court entered its Order denying Respondent's Petition for discharge based, *inter alia,* upon Respondent's willful failure to disclose both his bonus from the $10 Million Fee in the Schedules and SOFA. Pointing to the Respondent's "level of sophistication" as a seasoned trial attorney and applying what it determined to be prevailing bankruptcy law, the Bankruptcy Court concluded that Respondent "acted with intent to hinder, delay or defraud his creditors and Trustee Welt when he concealed his interest in the $10 Million Fee ... in [the Schedules and SOFA] after the Petition Date." For these reasons, the Bankruptcy Court denied Respondent's Petition for

discharge. *In Re Herman*, 495 Bankr. 555 (S.D. Fla.) (Bankruptcy Orders, R 32).

45. It is important to note that for purposes of this proceeding the Respondent did not raise his claim that he relied upon the advice of his Bankruptcy attorney, Bart Houston, in completing and submitting the Schedules and SOFA. This is because Houston did not timely plead this as a defense. Although Respondent testified at the bankruptcy trial regarding his review of case law, he was precluded from testifying regarding any reliance on the advice he received from his Houston (R 51, sub ex 20, Bk Tr. pp. 102-105).

46. On September 29, 2014, the United States District Court for the Southern District of Florida entered an order affirming the Bankruptcy Court's Findings of Facts and Conclusions of Law and Final Judgment in favor of CIB and the Bankruptcy Trustee against Respondent. In addition, based upon the "nature of the bankruptcy court's finding and this Court's affirmance," the District Court forwarded the Bankruptcy Orders to the US Attorney for the Southern District and to the Florida Bar (R 32, p. 19, *Herman v. CIB Marine Capital, LLC, supra.*).

47. Respondent appealed the Bankruptcy Orders to the Eleventh Circuit Court of Appeals however, on December 19, 2014, he voluntarily

dismissed this appeal (R 51, sub ex. 6) based apparently on reaching a settlement with CIB.

4. The Instant Bar Proceedings.

a. Testimony of Respondent's Bankruptcy Counsel, Bart Houston.

48. Respondent's bankruptcy counsel, Bart Houston, provided the following testimony: At the time the Petition was filed, Houston had almost 26 years of bankruptcy practice experience. He has been practicing law since 1986. Eventually he ended up practicing law with his father, who at one point was a bankruptcy judge in the Southern District. Houston's current practice entails representing debtors in various insolvency cases. Prior to this, he spent some twenty-eight (28) years exclusively practicing bankruptcy law, predominately in Chapter 11 reorganization and litigation cases.

49. His representation of Respondent began as co-counsel in the CIB deficiency case. After the CIB Judgment was entered against Respondent, Houston continued to represent him in settlement negotiations with CIB. Those negotiations proved unsuccessful. (R 66, 6/22/18, p. 88-91) CIB then initiated a garnishment action against the Respondent's salary at Tripp Scott. It is at that point, Houston advised Respondent to institute a voluntary Chapter 7 bankruptcy proceeding.

50. On February 18, 2012, Houston filed the Petition on Respondent's behalf, which he described as a "skeletal filing." He moved for and obtained an extension or until March 16, 2012 in which to file Respondent's Schedules and SOFA. (R 51, sub ex. 8).

51. Prior to filing the Schedules and SOFA, Houston performed the following investigation: a.) He reviewed the financial information provided to him by Respondent; b.) He met with Respondent several times; and c.) He conducted his own investigation and analysis of the facts and circumstances related to the Contingency cases, the fees Tripp Scott would receive from them, and Tripp Scott's compensation structure. This investigation included meeting with Respondent's co-counsel Alex Brown and Pozzuoli as well as reviewing trust documents and firm memos dealing with the methodology for deciding distribution of performance bonuses by the Tripp Scott Compensation Committee.

52. *Schedule B- Property of the Bankruptcy Estate.* Schedule B requires a debtor to identify "property" of the debtor's bankruptcy estate. Based upon the information he obtained through his investigation as described above regarding Tripp Scott's compensation structure, Houston concluded that non-equity "directors" of the firm, including the Respondent, did not have a legally enforceable entitlement to a bonus

because the bonuses were discretionary. Houston reviewed bankruptcy case law and concluded that Respondent did not have a vested right to a bonus and, therefore, any potential discretionary bonus would not be considered his property, but rather the property of Tripp Scott, until such time as the bonus was actually awarded.

53. Houston also discussed with Respondent the issue regarding the expectation of being awarded a bonus from the fees the firm would later be receiving from the Contingency Cases. He advised Respondent that he did not have a legal property right or interest in the contingency fees or bonus at that point in time because the fees had not been received and he had not yet been awarded a bonus. He further advised him that the bonus should not be reported as an asset on the Schedules.

54. Houston discussed with Respondent the cases upon which he relied and when he gave the advice to Respondent, he was "unequivocal." He testified that although Respondent is an experienced civil litigation attorney, he was "a bab[e] in the woods" when it came to bankruptcy law. In Houston's view, Respondent was "not knowledgeable about even the most basic of bankruptcy matters." Respondent in turn told Houston that he, Respondent, was not skilled in bankruptcy law so he deferred to Houston. Respondent independently reviewed bankruptcy case law and

advised Houston that he too reached the same conclusion that any disclosure of the interest in the $10 Million Fee was not required. As a result, Schedule B does not contain any reference to Respondent having an interest in the $10 Million Dollar Fee (TFB Exh. 13).

55. *Schedule I- Current Income of Debtor.* One of the questions contained in Schedule I requires the debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of [the Schedules.]" In response to this question, Houston advised Respondent to state the following: "Annual performance bonus (historically 65,000 – 70,000)." (R 51, sub ex. 13). Houston chose the exact wording used. He had asked Respondent to average out the last three to four years of his annual performance bonuses.

56. Houston explained that he chose this methodology in order to put the Trustee on notice that Respondent could be expected to receive an intangible bonus within the next year. Houston testified that, because the amount of Respondent's bonus was indeterminate, "[y]ou 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." (R 66, 6/22/18, p. 116-118) According to Houston, this "historical" language was never intended to mislead anybody about

the Contingency Fee Cases. He does not recall having any other discussions with Respondent about this other than asking him to provide the average of previous annual bonuses received.

b. Respondent's Testimony.

57. Respondent essentially gave the following testimony in the instant proceedings: He has been a member of the Florida Bar since 1982. He started working at Tripp Scott in 1981 as a law clerk. At the time he filed the Petition he was employed as a Director. Attorneys employed with Tripp Scott are classified at different levels: associates, junior directors, directors, and senior directors. During his career at Tripp Scott, Respondent represented clients in large cases. Beginning in 2000, Respondent began litigating commercial and personal injury cases for Tripp Scott.

58. *Schedule B- Property of the Bankruptcy Estate.* In 2006, Respondent took on intellectual property litigation and patent infringement cases.[8] The two judgments in the Contingency Fee Cases represent the largest judgments Respondent has ever obtained. As a Director, Respondent received as part of his compensation package an annual salary. In 2011 and 2012, his salary was between $220 and $230k.

[8] His biography was admitted at the Bar trial (R 55, sub ex. 71).

59. Respondent's compensation package also included the award of any bonus from the Contingency Cases. This would take into account that in addition to being co-lead counsel, Respondent was also given origination credit for the HD case (TFB Ex. 20, p. 41). The term originator means the person who is given credit for bringing that case to the law firm (R 66, June 21, 2018, p. 134). As Respondent explained, the terms "origination" and "allocation" describe how Tripp Scott gives credit for originating the client or working on the case (R 66, June 21, 2018, p. 134).

60. The SM Case ultimately settled for $26 million and a Satisfaction of Judgment was entered on March 13, 2012 (R 52, sub ex. 35). Until this time, Tripp Scott had been in settlement discussions with the defendants in that case.[9]

61. At the time, he wrote the Pozzuoli Emails, Respondent held only an expectation that Tripp Scott would receive the $10 Million Fee before the end of 2011, and that it would be available before the year-end performance bonuses were determined. According to Respondent, in these emails he was merely speaking up, not only for himself, but also for all the Tripp Scott employees who had worked on the Contingency Fee

[9] Respondent was to some extent involved with the SM settlement discussions. Brown handled the discussions directly. The email correspondence between Brown and the attorneys for SM were admitted at the hearing ("Brown Emails") (R 52, sub ex. 41)

Cases. He claims the sole purpose of the Pozzuoli Emails was to discuss what would be fair to award as bonuses if the $10 Million Fee actually came into the Firm.

62. Respondent still believed that any receipt by Tripp Scott's of the $10 Million Fees was uncertain. This is true even though at the time he wrote these emails, he was aware that he had the potential to receive a large bonus for his work on the Contingency Fee Cases. He claims that his motivation in writing them were unrelated to the garnishment proceedings by CIB.

63. Respondent claims he made the decision to file for Chapter 7 Bankruptcy in February 2012 because he was unable to satisfy the CIB Judgment and CIB was becoming "very aggressive" in its collection efforts. Toward the end of 2011, the creditor for CIB Judgment had begun initiating wage garnishment proceedings. Further, at the time, he filed the Petition in February 2012, Tripp Scott had not yet received the $10 Million Fee and there was the ongoing Mayback Fee Dispute. This dispute continued several months past the date Respondent filed the Schedules.

64. When questioned on cross-examination as to why he failed make any mention of his interest in the $10 Million Fee Schedule B as property of

his estate, Respondent answered that he was relying on his attorney's legal advice that such disclosure was not required. Respondent also researched bankruptcy case law on the subject and read those cases that Houston was relying upon. He concurred with Houston's opinion that because only the members of the Tripp Scott Compensation Committee had the authority to award bonuses, any property interest that he would have had stemming from the $10 Million Fee was purely "discretionary." Thus, he believed he was not obligated to disclose it in Schedule B as property of the estate.

65. *Schedule I- Current Income of Debtor.* With respect to his response given to Question 17 of Schedule I (R 51, sub ex 13), Respondent explained this amount represents what he had actually received as a bonus in previous years and what he expected to receive in 2012. He emphatically denies any claim that this response to the question was done with the intent to deceive or mislead anyone. According to Respondent, he was inexperienced in bankruptcy law and deferred to Houston's advice. In addition, based upon Respondent's review of the case law provided to him by Houston and similar to Schedule B, Respondent believed the advice he was given was correct.

66. Also, Houston had advised Respondent that there would be follow-up by the Trustee in order for him to learn more detail about the performance bonus: "For instance, Schedule I, [Houston] said, the bonus, likely what will happen is, the [T]rustee will go to your employer and come to you and try to figure out what that might be, and that's exactly what happened in this case." (R 66, 6/25/18, p.134)

67. When Bar counsel asked Respondent: "When you wrote that answer to [Schedule I], you weren't referencing any of the fees from [the Contingency Fee Cases], were you?", Respondent answered:

> That's not true. First of all, this was written by Mr. Houston. I certainly reviewed it and signed it, no question about that. However, in my practice at Tripp, Scott for 30 years, we've always gotten a discretionary bonus at the end of the year for whatever work we had done. Some years, we didn't get bonuses, but if there was going to be an award of a bonus, it was usually toward the end of the year. So, in my mind, based on whatever performance and money that would come in and would be available for a bonus, that would be considered an increase in my salary, an annual performance bonus, and parenthetically, the reason that's parenthetical, is because it says, it gave him a clue, that's what I got in the past, and I would likely get a bonus for 2012.
>
> (R 66, TR 6/21/18, p. 170)

c. Testimony of the Bankruptcy Trustee.

68. In the instant proceedings, the bankruptcy Trustee, Kenneth Welt, provided the following testimony. He is a U.S. Bankruptcy Trustee in the

Southern District of Florida. He has approximately thirty-two (32) years of experience and over the course of his career has handled over 100,000 bankruptcy cases. Welt is neither an accountant nor a lawyer. He was assigned to serve as the Court-appointed Trustee on Respondent's bankruptcy case upon the filing of the Petition. He has never worked for Tripp Scott. He did not know Respondent prior to having been assigned as Trustee.

69. Welt relies upon a debtor to be complete and truthful when disclosing the debtor's assets in the Schedules and SOFA. This, he explained, is because it is neither possible, nor is it the Trustee's responsibility to research the assets and income of every debtor.

70. Shortly after Respondent filed his Petition and prior to filing the Schedules and SOFA, Welt met with the law firm representing CIB. It was during this meeting that Welt became aware of the verdicts in the Contingency Fee Cases. He also met with members of Tripp Scott. Prior to this, Welt had no idea as to what amount, if any, Respondent would be receiving as his bonus from the $10 Million Fee.

71. Even though he was aware of the verdicts in the Contingency cases, Welt believes the Schedules and SOFA should have included the Respondent's interest in the $10 Million Fee. This is because the

Schedules and SOFA are not just used by the Trustee, but also because the information contained in them is for the benefit of all of Respondent's creditors. Indeed, Welt explained the purpose of the Schedules and SOFA is to give a blueprint or menu for the Trustee to use in administering the estate for the benefit of those creditors.

72. Even if property may be exempt under state law, he opined that the Debtor still has a duty to disclose it and then claim the exemption in Bankruptcy Court. While it is true that he and CIB were aware of the verdicts in the Contingency Fee Cases prior to the filing of the schedules, when CIB objected to Respondent's discharge, Welt was nonetheless forced to intervene.

73. Welt was aware that the $10 Million Fee belonged to Tripp Scott. However, he believed that if Respondent had an arrangement with Tripp Scott to receive a portion of that fee, it could be a possible source from which the creditors may collect. Citing to a confidentiality agreement, Welt declined to answer on cross-examination whether Tripp Scott advised him any bonus paid from the $10 Million Fee was discretionary.

d. Testimony of the Expert Witnesses.

(i) The Bar's Expert Witness: Jerry Markowitz

74. Each side presented their own expert witness on the subject of federal bankruptcy law.[10] Jerry Markowitz testified as an expert witness for the Bar. Essentially, he gave the following testimony:

75. He is an attorney who has practiced in the area of bankruptcy law since he graduated law school in 1974. He has been a member of various professional committees and organizations in the area of bankruptcy law. In preparing for his testimony in this case, he reviewed the following: Respondent's bankruptcy Petition; the Schedules, statements and the amendments thereto; the Bankruptcy Orders; the Bankruptcy trial transcripts; and a substantial amount of bankruptcy case law.

76. The goal of a Chapter 7 proceeding is to liquidate assets belonging to the debtor and obtain a discharge in bankruptcy, which would forever free the debtor of his or her prepetition debts. The Bankruptcy Code requires a debtor utilizing the Schedules and SOFA to disclose the following: All of the debtor's creditors; a schedule of all assets and liabilities; a schedule of all current income and expenditures; and a statement of the debtor's financial affairs. All of this comprises the property of the

[10] The curricula vitae of both expert witnesses are part of the record. (R 52, sub ex. 34; R 55, sub ex. 72).

debtor's estate.

77. Markowitz opined that the definition of property of the estate is very broad and expansive under bankruptcy law. To this end, all of the Schedules are designed to afford a debtor the means by which to disclose all assets that would constitute the property of the debtor's estate. Because they are submitted under oath, the Schedules and SOFA are official records provided to the Bankruptcy Court.

78. 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. An asset or cash that a debtor has earned as income but has not yet received in hand, may be disclosed in various places contained throughout the Schedules, including Question 17, Schedule I (R 51, sub ex. 14, at pp. 7; 35).[11]

79. According to Markowitz, the section of the Schedules dealing with contingent claims is intended for the debtor to disclose claims that have not yet been reduced to a certain amount. This is so the creditors and the Trustee can have an opportunity to find out whether the contingent claim is of any value. Markowitz opined that Respondent was required under

[11] In addition, according to Markowitz Respondent could have disclosed his interest in the $10 Million Fee in response to Questions 19, 21, and 35 of Schedule B as well as in Schedule C, if Respondent was claiming his bonus as exempt property. The bankruptcy Judge likewise references specific sections in the Schedules where Respondent could have listed his interest in the $10 million fee (R 51, sub ex. 3).

the Bankruptcy Code to disclose his interest in the $10 Million Fee in either his Petition or one of the Schedules.

80. In reaching this conclusion, Markowitz acknowledged that case law on the subject might be interpreted differently when it comes to determining whether these items were required to be disclosed. However, when a debtor is confronted with such a situation, the better rule in his opinion would be to disclose.[12] This is true here because there would have been no detriment to Respondent to disclose his interest in the $10 Million Fee as opposed to not disclosing them at all.

81. Markowitz conceded that based upon the reported decisions on this issue, "there is some uncertainty as to what the outcome is, not just on the law, but on the facts, and that you have to look into the practicalities from a practice standpoint of how to respond to the questions [on the Schedules]." (R 66, 6/22/18, p. 31). He agreed that it essentially comes down to "practice experience," and it is up to the lawyer to advise the client in bankruptcy situations like this, and clients follow the advice because of the lawyer's practice knowledge. (R 66, 6/22/18, p. 36, 74-75) Markowitz did not have any opinion as to whether the Respondent should

[12] The District Court Judge noted in his order, "Clearly, the better course of action in the case of a possible 'difference of opinion about the law' is to air on the side of disclosure." (R 32, at p. 14, fn. 9 (USDC Case No.: 13-cv-62251-KMM)).

have followed the advice of his counsel. (R 66, 6/22/18, p. 73-74).

(ii) The Respondent's Expert Witness: L. Louis Mrachek

82. L. Louis Mrachek testified for Respondent. He provided essentially the following testimony: He has practiced in the area of bankruptcy law for 40 years. Like Markowitz, Mrachek reviewed numerous documents and pleadings filed both in this case as well as in the bankruptcy proceedings, including but not limited to the Bankruptcy Orders as well as the case law cited therein.

83. Based upon his review of this case, the bankruptcy proceedings and federal bankruptcy code and various case law, he reached the opposite conclusion that was reached by Markowitz as well as the findings and conclusions of the Bankruptcy Judge. In Mrachek's opinion, Respondent's $2.7 million bonus from the $10 Million Fee was a mere "expectancy," as opposed to a "vested" interest. As such, he opined, Respondent was not required under bankruptcy law to disclose it in any of the Schedules or SOFA. Consequently, Respondent provided "no false oath" and therefore he truthfully answered all of the questions contained in the Schedules and SOFA. In reaching this conclusion, Mrachek disagreed with both the findings and conclusions of the Bankruptcy Judge as well as Markowitz' interpretation of the bankruptcy

case law.

84. In addition, Mrachek provided extensive testimony on his interpretation of the various bankruptcy cases cited in the Bankruptcy Orders. In his opinion, given the methodology utilized by Tripp Scott in awarding bonuses, the advice given by Houston that Respondent was not required to disclose anything regarding the Contingency Fee Cases on the Schedules was accurate.

III. RECOMMENDATIONS AS TO GUILT

1. Standard of Proof.

85. Because of the serious consequences attendant to a recommendation of discipline for a member of The Florida Bar, the quantum of proof necessary to support such a recommendation is required to be "clear and convincing." *The Florida Bar v. McCain*, 361 So. 2d 700, 706 (Fla. 1978); *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (Fla. 1970). This intermediate level of proof "entails both a qualitative and quantitative standard":

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without

> hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983)).

86. Further, "to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252 (Fla. 1999). In addition, where, as here, intent is at issue, and, as in this case, the Bar's proof depends on circumstantial evidence, to be legally sufficient evidence of guilt, circumstantial evidence must be *inconsistent with any reasonable hypothesis of innocence. Fla. Bar v. Marable*, 645 So. 2d 438 (Fla. 1994) (e.s.).

87. In addition, it is well-settled that all members of the Bar must demonstrate honesty at all times even when, as here, they are proceeding as a litigant in a personal capacity:

> [W]hen lawyers are litigants they do not cast aside the oath they take as an attorney or their professional responsibilities ... Not only does the law demand truthfulness under oath, but the obligations of our profession demand it. As former Justice Ehrlich has stated, ['Jour profession can operate properly only if its individual members conform to the highest standard of integrity in all dealings within the legal system.['']...

The Florida Bar v. Cibula, 725 So. 2d 360, 364–65 (Fla. 1998)(c.o.)(*see, R. Regulating Fla. Bar* 3-4.3 (stating in part, "The

commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise..."); *see also, The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994).

2. The Herman I Decision

88. In *Herman I,* the Court held that the Respondent is entitled to raise as a defense to the Complaint his claim that his responses contained in the Schedules and SOFA were based upon the advice of his bankruptcy attorney and therefore he lacked any intent to deceive the Bankruptcy Court or his creditors in his bankruptcy proceeding. If this is the case, then it would follow that, Respondent would not be guilty of violating any of the Rules Regulating the Florida Bar charged by the Bar:

> The Bar rules at issue did not require of Herman anything over and above what federal bankruptcy law already required—honesty and good faith in completing his bankruptcy schedules. To the extent that federal bankruptcy law permits an advice of counsel defense to negate a finding of bad intent, we conclude that such a defense should also be available to Herman in this Bar discipline proceeding.

Herman, 297 So.3d at 520.

89. The Court has instructed the undersigned to apply the principles that are used in bankruptcy cases. Importantly, the Court also stressed that,

"Though [Respondent] bears a burden of production to come forward with the evidence necessary to support his advice of counsel defense, the ultimate burden of proof always remains on the Bar." *Id* at 523 (e.s.). Therefore, it is the Bar's burden to prove by clear and convincing evidence that The Respondent's answers to the questions on his bankruptcy schedules were not made in good faith reliance on the advice of his bankruptcy counsel but rather with the intent to mislead the Trustee and creditors.

3. Findings Based Upon Independent Review of Evidence.

i. Bankruptcy Law Dealing With Advice of Counsel Defense.

90. In this case, the Bankruptcy Court denied Respondent's Petition finding that he intentionally (1) made a false oath in his responses to Schedules B and I; and (2) concealed his interest in the $10 Million Fee. *In Re Herman, supra.* (R32); *see also,* 11 U.S.C. §§ 727(a)(4)(A), (a)(2)(A), and (a)(2)(B). As stated, the Bankruptcy Judge did not address the Respondent's advice of counsel defense because it was not timely pled.

91. In *Robinson v. Worley*, 849 F.3d 577, 585 (4th Cir. 2017)(c.o.), the Court explained that a debtor may avoid being denied a discharge based upon a showing that the debtor relied upon the advice of his or her counsel when completing the Schedules and SOFA:

> While reliance on counsel generally absolves a debtor of fraudulent intent... the bankruptcy court must still consider whether the debtor acted in good faith... A debtor must demonstrate that he provided the attorney with all of the necessary facts and documentation. Likewise, the advice of counsel is no defense when it should have been obvious to the debtor that his attorney was mistaken...

92. Additionally, in *In re McLaren*, 236 B.R. 882, 897 (Bkrtcy.D.N.D.,1999)(c.o.) that Court likewise explained:

> 'Where a debtor's actions were motivated by attorney advice, that reliance, if reasonable, may excuse acts which otherwise bear indicia of fraud. However, the attorney must have been made fully aware of all relevant facts—that is, the debtor must have made a full and fair disclosure to him. Reliance on attorney advice absolves one of intent only where that reliance was reasonable and where the advice given was informed advice.'

ii. Did the Respondent make a "fair and full disclosure" of all "relevant facts" to his Bankruptcy Attorney?

93. In addition to meeting with and receiving information from the Respondent, Houston conducted his own investigation into understanding the overall compensation structure of Tripp Scott. This included interviewing members of Tripp Scott's Executive Committee and reviewing its documents dealing with how performance bonuses were decided. (R 66, 6/22/18, p. 103-109).

94. The Bar presented no evidence disputing this or even suggesting that the Respondent failed to furnish Houston with all of the facts and

documentation that would be necessary to correctly advise the Respondent regarding his disclosure obligation related to his potential to receive a bonus from the $10 Million Fee. Nor for that matter did the Bar present any evidence that it was obvious to the Respondent that his attorney's advice was based upon mistaken information. Based upon the record in this case, the undersigned finds and concludes that the Respondent "provided [Houston] with all of the necessary facts and documents," *Robinson, supra.*, which led Houston to advising the Respondent as to what he was required to disclose in the Schedules and SOFA. *Cf., In re Retz,* 606 F.3d 1189, 1202 (9th Cir. 2010)(upholding Bankruptcy Court's finding that debtor's reliance on attorney's advice is insufficient to vitiate fraudulent intent where debtor failed to make a full disclosure of all relevant facts to his attorney.).

iii. Was Respondent's Reliance on His Attorney's Advice in Completing Schedules B & I Reasonable and in Good Faith?

95. Schedule B. Personal Property. Schedule B requires the disclosure of all assets owned by the Respondent at the time he files his petition for bankruptcy. It is undisputed that the Respondent did not disclose in Schedule B his interest in the $10 Million Fee as property of his estate. He testified that he did so relying upon the advice of his attorney, which

was that the Respondent was not required to it. Houston reached his conclusion based on his determination that Respondent lacked any legal right or interest in the $10 Million Fee and any bonus arising therefrom until such time that the Compensation Committee made the decision to award the Respondent a bonus. In other words, in Houston's opinion, Respondent had a mere contingent interest in receiving a bonus from the $10 Million Fee. This conclusion in turn is based upon the information provided by the Respondent as well as Houston's own investigation into all the facts and circumstances, including his review and analysis of the compensation structure of Tripp Scott as well as relevant bankruptcy case law.

96. The Bankruptcy Court nonetheless found that under its interpretation of the then-prevailing bankruptcy, case law the Respondent had a vested interest in the bonus, and therefore he was legally required to disclose it on Schedule B. The undersigned agrees with the Respondent's argument that it would be unnecessary to address whether the Bankruptcy Court's or Houston's interpretation of the law on this issue is correct. Rather, as stated the issue here is whether the Respondent's failure to disclose the bonus was done with the actual intent to defraud his creditors as opposed to his good faith reliance on his attorney's advice. *See, In re Arnold*, 369

B.R. 266, 271 (Bankr. W.D. Va., 2007). ("Actual intent to hinder, delay or defraud may be negated by a good faith reliance upon the advice of an attorney.")(citing *In re Adeeb,* 787 F.2d 1339, 1343 (9th Cir.1986); *see also United States v. Miller,* 658 F.2d 235, 237 (4th Cir.1981) ("The essential elements of the [reliance] defense are (a) full disclosure of all pertinent facts to an expert, and (b) good faith reliance on the expert's advice."); *In re Ingle,* 70 B.R. 979, 984–85 (Bankr.E.D.N.C.1987) (citing *Adeeb,* 787 F.2d at 1343).

97. Applying these principles, the undersigned finds from the record in this case that the Bar has failed to prove by clear and convincing evidence that the Respondent's omission of his bonus in Schedule B was done with an actual intent to defraud his creditors. Rather, the evidence presented establishes that the Respondent's reliance on his attorney's advice was in good faith after full disclosure of all relevant facts. Therefore, the undersigned finds the Respondent is entitled to rely upon this advice as a defense to the charges in the Complaint. *See, id.*

98. The Bar nonetheless argues that Respondent's reliance on the advice of his bankruptcy attorney is not reasonable. This is because while the Respondent may have disclosed all the pertinent facts to his attorney, his failure to disclose his interest in the $10 Million Fee is incompatible with

what the Respondent knew about those fees at the time he filed his petition. For this proposition, the Bar points to the fact that Respondent possessed extensive institutional knowledge of the Compensation Committee and its methodology for distributing bonuses. The undersigned respectfully disagrees with this argument.

99. The argument ignores the undisputed fact that disclosure or non-disclosure of the Respondent's interest in the $10 Million Fee turned in large part on Houston's interpretation of then-controlling bankruptcy law dealing with the subject. As stated, Houston testified he discussed with Respondent the cases upon which he relied and when he gave the advice to Respondent, he was "unequivocal." Further, the Respondent was entitled to rely on this advice. Indeed, Houston testified that although Respondent is an experienced civil litigation attorney, he was "a bab[e] in the woods" when it came to bankruptcy law. In Houston's view, Respondent was "not knowledgeable about even the most basic of bankruptcy matters." Respondent advised Houston that he, Respondent, was not skilled in bankruptcy law so he deferred to Houston's advice. Respondent independently reviewed bankruptcy case law and advised Houston that he too reached the same conclusion that any disclosure of the interest in the $10 Million Fee was not required. What this

demonstrates is that while it may be true that the Respondent may have been highly knowledgeable of Tripp Scott's compensation structure and the methodology it used to award bonuses, he was not well versed in bankruptcy law as it applies to this process. Therefore, he would be entitled to rely upon the "unequivocal" advice of his bankruptcy attorney.

100. Also, the argument fails to recognize that Houston was likewise in possession of these same "institutional" knowledge and facts. This is because he spent a considerable amount of time conducting his own independent review and investigation of Tripp Scott's compensation structure. The Bar has presented no evidence to refute this or suggest that somehow the Respondent held back on disclosing relevant facts to his attorney. It follows that the Bar failed to prove by clear and convincing evidence that the legal advice given is "incompatible with [the Respondent's] own knowledge of the applicable facts." *Robinson, supra.,*, 849 F.3d at 583.

101. In addition, the Pozzuoli Emails likewise do nothing to alter the conclusion that the Respondent's decision not to disclose his interest in the $10 Million Fee was done in a good faith reliance on his attorney's advice and not with any malevolent intent to defraud his creditors, as the Bar argues. Indeed, what those emails demonstrate is the *Respondent's*

expectation of what he believed he was entitled to receive. However, they do not disclose what expectations, if any, expectations Tripp Scott may have had as to whether any bonus would be awarded to the employees, including the Respondent. Thus, while the Pozzuoli Emails may form the basis for the Bankruptcy Judge's findings and the Respondent's subjective expectations, it does nothing to dispute that the Respondent was in good faith following his attorney's advice by not disclosing this information.

102. Also important is Tripp Scott's expectation of what amount, if any, bonus that would be awarded. This is may be found in the excerpts of Pozzuoli's depositions that were given in the bankruptcy case. A fair reading of those depositions reveal that while the Respondent believed he was entitled to a substantial bonus from the $10 Million Fee, the Tripp Scott Compensation Committee, for multiple reasons, did not share the same belief.

103. For instance, Pozzuoli made it clear that Tripp Scott utilizes multiple factors and concerns, which caused uncertainty regarding how much of the $10 million fee would be allocated and disbursed as bonuses, particularly in relation to having funds to ensure the firm's financial survivability and pay potential cash flow needs throughout the year.

Indeed, he explained that the firm "had a slow beginning of the year" and there was a concern regarding expenditures for a new department in the firm. *Id.* p. 170. Pozzuoli also confirmed that, despite the statement in Respondent's email that the Mayback & Hoffman co-counsel dispute should not delay the resolution of Respondent's bonus, the firm waited for settlement of the dispute prior to disbursing any bonuses because, as president of Tripp Scott, he "wasn't going to hang [the] law firm out while this dispute was pending." *Id.* p. 175-177. Given this, Houston concluded that any expectation the Respondent had to receiving a bonus from the $10 Million Fee was contingent on the decision of the Compensation Committee.

104. Additionally, the testimony of both Galloway and Brown support this. Indeed, each testified at that the bonuses at Tripp Scott were discretionary. In addition, Galloway provided very specific examples of reasons why bonuses may not be awarded in any given year and further that at year-end it is common practice for lawyers at Tripp Scott to send emails to members of the Compensation Committee to lobby for their performance bonuses. According to Galloway, these emails are nothing more than the attorneys expressing their thoughts on their expectations. The Bar did not present any witness testimony to rebut the testimony of

these witnesses.

105. Lastly, each side presented testimony from two learned experts who, having analyzed these facts and circumstances, reached opposite conclusions as to whether then-prevailing bankruptcy required that the Respondent disclose his interest in the $10 Million Fee on Schedule B. The Respondent's expert testified that the bonus was discretionary and a mere expectancy that did not need to be disclosed on that schedule. Following the Bankruptcy Court's analysis, the Bar's expert witness testified to the contrary. In light of the differing opinions of these two learned experts on the state of the law dealing with this subject, it would have been neither "obvious to [the Respondent] that his attorney was mistaken," nor "transparently plain" that his expected bonus should have been listed on Schedule B. *See, Robinson,* 849 F.3d at 583; *In re Zizza*, 875 F.3d 728, 732 (1st Cir. 2017.[13] For these reasons, the undersigned finds that the Respondent's reliance on his attorney's advice in omitting

[13] In the R&R, the undersigned pointed this out in making the disciplinary recommendation that the Respondent's privilege to practice law be suspended for 18 month:

> **9.22(i)** substantial experience in the practice of law. Respondent has been a member of the Florida Bar since 1982. Undersigned notes however that the bankruptcy law dealing with this issue is subject to differing opinions as was testified to by the expert witnesses. Thus, while the evidence in this matter is that Respondent undertook his own review of the bankruptcy case law related to the issues in his case, he does not practice bankruptcy law and to a great degree, he relied upon the advice of his bankruptcy counsel, Bart Houston. (R&R ¶119, part 9.22(i))(e.s.).

Arguably, while this was a factor that the undersigned considered in making the disciplinary recommendation that the Respondent be suspended for 18 months, it becomes more significant for purposes of addressing the merits of the Respondent's advice of counsel defense.

his interest in $10 Million Fee was in good faith and the Bar presented no clear and convincing evidence to overcome this.

106. Schedule I. Current Income. Question 17 on Schedule I asks the debtor to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document." The answer to Question 17, provided by the Respondent, stated "Annual performance bonus (historically 65,000 – 70,000)." (TFB Exhibit 13). According to the Respondent, he followed Houston's advice that he answer this question using this exact language that was provided to him by Houston.

107. Indeed, Houston testified that he had in fact chosen this wording. He testified that because the amount of the Respondent's bonus was indeterminate, he, Houston, made the judgment call, not the Respondent, to average out two or three years and put that number down so that, when the Trustee followed-up on the bonus, he would have the historical information. He testified that, because the amount of the Respondent's bonus was indeterminate, "[y]ou 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."

108. The Bar has not presented any evidence to suggest that the Respondent's reliance on Houston's methodology in formulating this response was not in good faith. To be sure, *Herman I* seems to have laid out the necessary groundwork for the Bar to overcome by clear and convincing evidence that the Respondent's reliance on Houston's methodology and advice was not in good faith:

> Admittedly, there is a heavy factual component to schedule I, question 17, whereas in schedule B the legal issues are more prominent. That is what makes the potential viability of Herman's advice of counsel defense as to schedule I a closer call. But there are several reasons why the defense cannot be entirely discounted at the threshold, without additional consideration and findings by the referee. 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.
>
> *Herman*, 297 So.3d 516, 522.

109. As already discussed, Tripp Scott's expectation as to what, if any, bonus would be awarded from the $10 Million Fee was not in line with the Respondent's. It also bears repeating that, as with Schedule B, Houston formulated his response to Schedule I based upon his own investigation into all the facts and circumstances surrounding Tripp Scott's compensation structure as well as his analysis of bankruptcy law. Thus, contrary to the Bar's argument the Respondent was in no better position than Houston was as to his knowledge of all of the applicable facts. It follows that, similar to Schedule B, Houston's advice was not "incompatible with [The Respondent]'s own knowledge of the applicable facts." *Worley*, 849 F.3d at 583.

110. It was incumbent upon the Bar to present clear and convincing evidence beyond what was presented in the Bankruptcy case in order to "complete the picture" as to what the Respondent's state of mind was at the time he signed the Schedules. Yet, the Bar failed to present clear and convincing evidence in this proceeding establishing that it was unreasonable for the Respondent to rely upon what he was told by Houston. Rather, the Bar appears to reiterate much of the same arguments that it has already made in *Herman I* to support its position that the Respondent's reliance on his attorney's advice was

unreasonable.[14] Lastly, inasmuch as the Respondent's advice of counsel defense was not addressed by the Bankruptcy Court and since the burden of proof in this proceeding is one that is greater than the one used in the bankruptcy trial, the undersigned does not find the Bar's arguments persuasive. For these reasons, the undersigned finds that the Respondent's reliance on Houston's advice as it relates to his answer provided in Schedule I was done in good faith reliance on his attorney's advice. *See, id.*

IV. CONCLUSION.

111. For the foregoing reasons, the undersigned finds as follows: The Respondent reasonably relied upon the advice of his bankruptcy counsel in completing the Schedules and SOFA. The Respondent's reliance was in good faith after full disclosure of all facts to his bankruptcy attorney. The Bar failed to prove, by clear and convincing evidence, that the Respondent's reliance on the advice of counsel was not reasonable. Accordingly, the undersigned respectfully recommends that Respondent be found not guilty of any of the Rules set forth in the Complaint.

[14] For instance, the Bar continues to rely on the Bankruptcy Court's findings arguing that the Pozzouli Emails "speak volumes" that the Respondent "was expecting a substantial bonus in the millions of dollars, not a historical bonus of 65-70,000." From this, the Bar argues the Respondent's answer to Question 17 was "materially misleading."(R. 83).

112. **Case Law**. The undersigned has considered the following case law: *The Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012); *The Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010); *The Florida Bar v. Rood*, 620 So. 2d 1252, 1255 (Fla. 1993)("Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the factual question."); *The Florida Bar v. McCain*, 361 So. 2d 700, 706 (Fla. 1978); *The Florida Bar v. Rayman*, 238 So.2d 594, 598 (1970); *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994); *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252 (Fla. 1999)("To satisfy the element of intent it must only be shown that the conduct was deliberate or knowing."); *The Florida Bar v. Marable,* 645 So.2d 438 (Fla. 1994); *The Florida Bar v. Cibula*, 725 So. 2d 360, 364–65 (Fla. 1998); *The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994); *Robinson v. Worley,* 849 F.3d 577 (4th Cir. 2017); *In Re McLaren,* 236 B.R. 882 (Bankr. D.N.D. 1999); *In Re Retz,* 606 F.3d 1189 (9th Cir. 2010); *In Re Arnold,* 369 B.R. 266 (Bankr. W.D. Va. 2007); *In Re Adeeb,* 787 F.2d 1339 (9th Cir. 1986); *United States v. Miller,* 658 F.2d 235 (4th

Cir. 1981); *In Re Ingle,* 70 B.R. 979 (Bankr. E.D.N.C. 1987); *In Re Zizza*, 875 F.3d 728 (1st Cir. 2017).

Dated this 17 th day of December, 2020.

AUGUST A. BONAVITA, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to **JOHN A. TOMASINO**, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, a copy sent in Word format by electronic mail to ***e-file@flcourts.org***, and that copies were furnished by regular U.S. Mail to **DAVID BILL ROTHMAN, ESQ.**, Respondent's Counsel, Rothman & Associates, P.A., 200 S. Biscayne Blvd., Ste 2770, Miami, FL 33131-5300; via email at dbr@rothmanlawyers.com, jtm@rothmanlawyers.com; **JOI L. PEARSALL, ESQ.**, Bar Counsel, The Florida Bar, Ft. Lauderdale Branch Office, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; via email at jpearsall@florida bar.org, esanchez@floridabar.org; and **PATRICIA ANN TORO SAVITZ**, Staff Counsel, The Florida Bar, 651 E Jefferson Street, Tallahassee, FL 32399; via email at psavitz@floridabar.org on this 17th day of December, 2020.

AUGUST A. BONAVITA, Referee