IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

RAMON MANUEL RODRIGUEZ,

Respondent.

_____/

Supreme Court Case
No. SC17-36

The Florida Bar File
No. 2014-70,054(11G)

AMENDED REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On January 11, 2017, The Florida Bar filed its Complaint against Respondent in these proceedings. On January 31, 2017, the Respondent filed his Answer and Affirmative Defenses. On April 16 - 17, and June 26 - 27, 2019, a referee trial or final hearing was held in this matter. All items properly filed including pleadings, recorded testimony, discovery requests and responses thereto, appellate proceedings and exhibits thereto, documentary exhibits in evidence at the

hearing and the report of referee, constitute the record in this case and are forwarded to the Supreme Court of Florida.

The Respondent's documentary exhibits at the hearing consisted of 219 documents and are referred to here as [R. #]. The Florida Bar's exhibits at the hearing consisted of 51 documents and are referred to here as [TFB #]. Transcripts of the proceedings before this Referee are referred to as [FH #].

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdictional Statement

Respondent is a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Legal Standard

In a referee trial of a prosecution of professional misconduct, The Florida Bar has the burden to prove its accusations and the Respondent's guilt by clear and convincing evidence. *Florida Bar v. Martocci*, 699 So.2d 157, 1359 (Fla. 1997), *Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994), *Florida Bar v. Simring*, 612 So.2d 561, 565 (Fla. 1993), *Florida Bar v. Hooper*, 509 So.2d 289, 290 (Fla. 1987), *Florida Bar v. Musleh*, 453 So.2d 794, 796 (Fla. 1984), and *Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970).

Rule 4-3.1 Meritorious Claims and Contentions states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, **unless there is a basis in law and fact for**

> **doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.** A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. [Emphasis supplied].
>
> The Comments to the Rule provide in relevant part:
>
> The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
>
> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

The Rule itself does not define "frivolous." As the First District acknowledged in the case of *de Vaux v. Westwood Baptist Church*, 953 So.2d 677, 683 (Fla. 1st DCA 2007) "It is not certain that the standard for determining whether an action is frivolous under rule 4–3.1 is substantially the same as the standard for awarding fees under section 57.105(1). . ." Nonetheless, the First District

essentially applied the standard contained in 57.105(1)(b) Fla. Stats. and said, "Section 57.105(1) mandates a court to award fees to the prevailing party in equal amounts to be paid by the losing party and the losing party's attorney where the court finds that the losing party or the losing party's *attorney knew or should have known that a claim was, among other things, not supported by the application of then-existing law to the material facts relating to the claim.* § 57.105(1)(b), Fla. Stat." *Id.* at 684. Nor where there is "no effort to distinguish the applicable or, in good faith, to argue for an extension, modification or reversal of existing law." *Id.* [Emphasis supplied]. Alternatively, 57.105(a), Fla. Stats. provides that sanctions may be justified where an attorney *knew or should have known that a claim or defense "[w]as not supported by the material facts* necessary to establish the claim or defense." [Emphasis supplied].

A referee in a bar disciplinary proceeding can properly rely upon facts established in orders and decisions of other tribunals to support his findings of facts. *Florida Bar v. Gwynn*, 94 So.3d 425, 430 (Fla. 2012), *Florida Bar v. Tobkin*, 944 So.2d 219, 223 (Fla. 2006), see also, *Florida Bar v. Head*, 27 So.3d 1, 7-8 (Fla. 2010), and *Florida Bar v. Shankman*, 41 So.3d 166, 170 (Fla. 2010). A referee has wide latitude to admit or exclude evidence and may consider any relevant evidence, including hearsay, transcripts or rulings in a legal proceeding. *Gwynn,* at 430, *Tobkin,* at 170.

C. Findings of Fact and Conclusions of Law

In this matter, The Florida Bar has alleged in its Complaint a violation of Rule 4-3.1 (Advocate: Meritorious Claims and Contentions) on three principle bases: 1) "[T]hat Respondent pursued perjury and fraud claims against Lewis Tein despite the fact that he knew, or should have known, that same were unsupported by competent evidence" ¶10 and that "respondent frivolously alleged that Tein falsely testified that the Miccosukee Tribe of Indians was 'in no way responsible' for payment of the attorney's fees in the case . . . [and] used poster boards with these exact words in bold and capital letter throughout the [evidentiary] hearing" ¶ 6; 2) That on November 21, 2012, Respondent filed a frivolous appeal where he "frivolously asserted that the hearings set for November 26 and 27, 2012 had been set *sua sponte* by the trial court without any notice, only that morning, and further frivolously asserted that he had been denied the opportunity to obtain ' full' discovery" ¶13; and, 3) That "Respondent filed a frivolous garnishment case against Lewis Tein ... Lewis Tein contested the garnishment action on the basis that it was a sham attempted by Respondent to avoid payment of the sanction." ¶ 14 and that "[a]t the Oral Argument in that case, Justice Schwartz roundly castigated Respondent for his "horrendous" "efforts to trap Lewis Tein." Judge Schwartz opined that Respondent's actions in seeking to garnish a check tendered in payment for sanctions imposed by the court below, were a "total 100%

subterfuge," "a fake," "nefarious," "beyond belief," and finally adding that he would, "never run out of analogies." ¶15.

Three witnesses appeared at the trial of this matter before me, the Referee: Lewis Tein, on behalf of the Florida Bar, the Respondent Ramon M. Rodriguez and Darren Bock, on behalf of the Respondent. Additionally, I heard testimony contained in various deposition transcripts, hearing and appellate transcripts and reviewed countless documents submitted by the parties.

1. Whether Respondent was Frivolous in Filing and Pursuing a *Supplemental* Motion for Rehearing and Motion for Relief Pursuant to Rule 1.540

At the outset I note that the actions charged by the Florida Bar did not occur in a vacuum. The wrongful death case and the post-judgment activities took place over a decade of litigation and the information ascertained during that process informed the Respondent's interpretation of events and the positions he advocated. Accordingly, it is essential to fairness to properly contextualize the factual and chronological events in this matter and how they evolved. It is only in this context that an assessment of the Respondent's total font of knowledge, and how it could have underpinned his actions, that a determination can be made as to whether his conduct meets the "frivolous" standard. The narrative in this matter is therefore unavoidably lengthy given the period involved and the number of events that occurred during the pendency of the wrongful death litigation.

Respondent was retained by the Estate of Lilian Bermudez, who was survived by her husband and two-year old son. Mrs. Bermudez was killed in an automobile accident when the vehicle in which she was a passenger was struck head-on by an automobile operated by Tammy Gwen Billie, a member of the Miccosukee Indian Tribe of Florida (hereinafter referred to as the "Tribe"). The titled owner to the vehicle driven by Ms. Billie was her father, Jimmie Bert, also a tribal member. Ms. Billie was under the influence of cocaine at the time of the collision when she drove the automobile across the center line of a divided highway and killed Mrs. Bermudez. Mr. Bermudez was the driver of the Plaintiff's vehicle, and Mrs. Bermudez and their minor son, Matthew, were passengers at time of the collision. Ms. Billie was criminally convicted of causing the death of Mrs. Bermudez. In the criminal matter, she was represented by attorney Michael Diaz, Esq.

Mr. Bermudez had difficulty in acquiring counsel to represent the Estate and Mrs. Bermudez's survivors, given the sovereign immunity normally claimed by the Tribe. Mr. Rodriguez agreed to the representation on a contingency fee basis, conscious of the efforts that would be necessary to collect a judgment on behalf of his clients.

A lawsuit was filed in the Circuit Court in the Eleventh Judicial Circuit in and for Miami-Dade County against Tammy Gwen Billie and Jimmie Bert. The

Tribe was not a party to the lawsuit due to its immunity. Nonetheless, the Tribe filed an action in federal court seeking injunctive relief, claiming that service on Ms. Billie and Mr. Bert in the Bermudez wrongful death suit should be quashed. [R. 214]. This is the first of several actions by the Tribe that created a question in the mind of the Respondent as to whether the Tribe could be a true party in interest.

The wrongful death civil action was be set for trial several times in 2008 and 2009. Prior to the December 2008 trial date, an issue arose regarding the timely disclosure of trial experts by the Estate. At the time, neither defendant nor plaintiff had disclosed the identity of trial experts, because a mediation was taking place during the same period. After the mediation resulted in an impasse, plaintiff disclosed his trial experts and defendants moved to strike the experts and prohibit them from testifying at trial. In support of the defendants' motion to strike experts, defendant represented to the court that they had accepted the consequences of non-disclosure of experts and would therefore not be calling experts at trial. [R. 216, p. 4, line 6 to p. 7, line 2; and FH. p. 308, line 5 to p. 310, line 24]. The trial court denied the motion to strike and instead awarded sanctions against the plaintiff and instructed counsels to agree on an appropriate monetary amount of sanctions. [R. 194]. The order also required that both parties disclose experts by February 15, 2009. *Id.* As related previously, plaintiff had already disclosed its experts. Later,

Defendant would identify five experts they intended to call at trial [R. 216] and these experts were deposed by the Respondent.

The parties could not agree to an amount of appropriate sanctions, and subsequently there was a hearing to set the amount of sanctions. An order awarding sanctions in the amount of $7,820.00 was entered against the Estate on February 19, 2009. [R. 215]. At the hearing held on November 20, 2008 and in support of the sanctions amount claimed, Michael Tein, Esq.[1] stated to the court: "But there's no other way to compensate my client for what, this gamesmanship did to us. . . .All that time is lost, all that money that was spent paying for my time on that, on my co-counsel, other attorneys in my firm, that is a real economic question. . . . my client is going to be out of money, serious, a serious problem." [R. 213, p. 50, line 12-13 and p. 51, line 6-9]. At the referee trial, Mr. Tein admitted that when he sought the sanction in the amount of $7,820.00 against the Estate, he had represented to the trial court that Mr. Bert and Ms. Billie were running out of money for their defense, and it was important to get the money back for them; that was also the reason that the sanction check was addressed personally to the defendants. [FH., 4/16/19, P. 172, line 3 to line 23].

A timely appeal was taken of the Order awarding sanctions; however, the case was set for trial in the Spring and Summer of 2009, and Respondent testified

1 Lewis Tein undertook the defense of the wrongful death action in 2005.

that the appeal of this sanction order took a backseat to trial preparation, which included the deposition of defendants' numerous trial experts.

The wrongful death action was tried in July 2009. On the first day of trial, defendants for the first time admitted liability in the wrongful death of Mrs. Bermudez. A verdict was delivered in favor of the Estate in the amount of $3,177,000.00 and judgment was entered in August 2009. Defendant filed a Notice of Appeal of the Judgment. Respondent testified that the Estate's appellate counsel recommended that it would be best to concentrate efforts on the appeal of the judgment rather than expend efforts on the appeal of the order of sanctions for late disclosure of expert witnesses. Accordingly, the appeal of the order of sanctions was voluntarily dismissed. Subsequently, defendants did not file their appellate briefs to support their appeal of the judgment and The Third District Court of Appeal dismissed the appellate case.

In September 2009, Plaintiff propounded discovery in aid of execution. According to the Respondent, even before the trial of the wrongful death action, Respondent had already retained an investigator and an expert in Indian Gaming Law to investigate and advise possible strategies for the collection of any award resulting from a judgment favorable to the Estate. The investigator was Darrin Bock. The Indian Gaming Law expert was Dennis Whittlesey, Esq., who had

played a role in the development of federal law governing Indian gaming revenue and how it may be distributed to tribal members.

The pre-trial investigation by Mr. Bock confirmed suspicions that the Tribe was paying distributions to its tribal members from Indian gaming revenues. This information was obtained from the case files of the Clerks of the Court as well County property records. Additionally, Mr. Bock made requests based on the Freedom of Information Act to the Bureau of Indian Affairs and the National Indian Gaming Commission.[2] [R. 217]. Likewise, Mr. Whittlesey contacted the Bureau of Indian Affairs and the National Indian Gaming Commission by telephone and in writing regarding the distributions of Indian gaming revenue by the Tribe. [R. 26]. Specifically, both men sought the Tribe's Revenue Allocation Plan (RAP), a plan required by federal law.

The pre-trial investigation conducted by Mr. Bock and Mr. Whittlesey on behalf of the Respondent disclosed that the Tribe was in violation of Federal Indian Gaming Law by failing to have a Revenue Allocation Plan (RAP), and that no such plan had ever been approved or authorized by Secretary of the Department. Federal law prescribes that an Indian tribe may not distribute any Indian gaming

---

2 Mr. Bock testified before me and confirmed all aspects of his investigation including his contacts with the Bureau of Indian Affairs, the National Indian Gaming Commission, and his review of public court and property records of the Circuit Court in Miami Dade County, PACER, US Tax Court, IRS, government and professional publications regarding Indian gaming, and federal court dockets.

money to any tribal member by any method, if it does not have an approved RAP. Furthermore, Indian gaming revenue in possession of a tribe is protected by sovereign immunity, but money distributed to a tribal member is not protected by sovereign immunity. At the time of these events, the Respondent testified that he knew of several actions that had been prosecuted or were pending in federal court, where some tribes were alleged to have attempted to avoid federal income taxes and avoid waiver of tribal sovereign immunity by disguising Indian gaming distributions as loans or by other similar means. It is with this background knowledge that Respondent initiated post-judgment discovery in aid of execution.

The discovery in aid execution was directed to Ms. Billie and Mr. Bert in the form of a Rule 1.977, Fla. R. Civ. P. standard form, interrogatories and request for production. Generally, the responses to the propounded discovery could be characterized as somewhat evasive or at best incomplete or uninformative. The response to the 1.977 request [R. 15 and 16] did disclose the existence of bank accounts with Bank of America. These accounts would be garnished in the amount of $32,000.00 which is the total recovery received by the Estate to date. The response did not disclose any liabilities or loans.

In December 2009, the Third District Court of Appeal decided the case of *Abu-Ghazaleh v. Chaul,* 36 So.3d 691, 694 (Fla. 3d DCA 2009) in which a non-party could be converted to a judgment debtor where it either paid for the defense

and expenses and/or it was directing or controlling the defense of an action. On March 16, 2010, Respondent informed the trial court and opposing counsel that the Estate intended to make the Tribe a judgment debtor pursuant to the holding in *Abu Ghazaleh* and would seek discovery to that end. [R. 17, p. 82, line 21 to p. 84, line 12]. Plainly stated, the Estate would attempt to make the Tribe a judgment debtor for the verdict amount since it was the real party in interest, paid for the defense of the wrongful death action and directed or controlled the defense of the wrongful death suit.

At the same time and at the same hearing, Mr. Whittlesey appeared and explained to the trial court the significance of the Tribe's failure to have a RAP and the relevance certain discovery information. [R. 17, p. 34-45].

The Estate's request for production [R. 4 and 6] encompassed information about invoices for representation in the wrongful death action, distribution checks, loan documents and lines of credit, checks for reimbursement of expenses, promissory notes, and transfer of money from any sources related to Mr. Bert and Ms. Billie. In response to these requests for production and to the Form 1.977 request, there was no disclosure of any loans between the Tribe and Mr. Bert or the Tribe and Ms. Billie related to the cost of the defense of the wrongful death matter, nor the payment of Lewis Tein attorneys' fees in the civil matter.

On May 13, 2010, Mr. Bert was deposed in aid of execution. [R. 27]. During the deposition, Mr. Bert would testify that he did not know who was paying his legal fees in this matter [R. 27, p. 114, line 1 to p. 116 line 16], he did not receive a loan to pay the Lewis Tein legal fees [R. 27, p. 117, line 10 to p. 121 line 10], he was not aware of the final judgment or that the appeal of the judgment had been dismissed [R. 27, p. 193, line 24 to p. 197, line 24], and he was not aware that the judgment had resulted in the suspension of his driver license [R. 27, p. 199, line 2-11]. Mr. Bert was represented by the Lewis Tein firm at the time of the deposition and the court reporter advised Mr. Bert of his right to make changes to his testimony and provided a blank errata sheet as part of the deposition transcript. No errata sheet was returned or submitted.

On May 4, 2010, Ms. Billie was deposed in aid of execution. [R. 28]. She testified under oath that she did not know how much had been paid for Lewis Tein's legal fees [R. 28, p. 111, line 4 to p. 112, line 11] and that she had not received any loans to pay Lewis Tein's legal fees [R. 28, p. 146, line 9 to p. 148, line 10]. Ms. Billie was represented by Lewis Tein firm at the time of the deposition and the court reporter advised her of her right to make changes to her testimony and provided a blank errata sheet as part of the deposition transcript. No errata sheet was ever returned or submitted.

Respondent testified during the referee trial that he was struck by what appeared to be the lack of a normal attorney-client relationship between the defendants and Lewis Tein, and this observation served as one of the bases for adding the Tribe as a judgment debtor pursuant to *Abu Ghazaleh*, i.e., the Tribe was the true party in interest controlling and paying for the defense. Also, Lewis Tein could not produce a retainer agreement between Mr. Bert and Ms. Billie and their firm, or any of the predecessor defense lawyers with whom the defendants were associated. [R. 218]. The only retainer ever produced in any litigation involving Lewis Tein and related tribal matters is the retainer between the Tribe itself and Shook Hardy. [R. 218].

During the two-year post-judgement discovery period, the responses to the Estate's discovery requests consisted primarily of objections. After 20 months and numerous hearings, the final response to virtually all the requests for documents was "none." Respondent testified that because of the wasted time, effort and money for pursuing discovery of documents that did not exist, on April 1, 2011, he filed a motion for sanctions for discovery abuse [R. 52] seeking an award of fees and costs.

Prior to the filing of this motion for sanctions for discovery abuse, Respondent had acquired several documents from the United States Tax Court on March 12, 2011. [R. 46, 47, 48, 49, 50]. Additional documents were acquired

from federal court dockets and have been previously filed in the Appendix filed by Respondent in response to the appeal of certain discovery rulings entered by me.

The documents acquired from the US Tax Court, showed that Lewis Tein were representing the then-Chairman of the Tribe, Billie Cypress, as well as other tribal members regarding possible tax evasion. Among the defenses raised by Lewis Tein on behalf of Chairman Cypress was that "loans and advances subject to repayment are non-taxable." [R. 46, defense no.3, dated July 2, 2010].

The Respondent testified that he learned that Lewis Tein were participating in strategy meetings as far back as 2005 regarding the defense of the Tribe and tribal members against subpoenas issued by the IRS for information on gaming distributions. [R. 212]. At the referee trial, Mr. Tein testified that there was a strategy wherein the Tribe and its members took the position that distributions to tribal members were non-taxable on a theory involving sovereign rights and gambling [FH., 4/17/19, p. 228, line 8 to p. 229, line 8]. The period during which these strategy meetings took place coincides with Lewis Tein's representation of Mr. Bert and Ms. Billie in the wrongful death action in 2005. Mr. Tein also testified that at the time the Respondent was propounding post judgment discovery in aid of execution, Lewis Tein were representing the Tribe and tribal members regarding the issue of tax liability for gaming distributions. [FH., 4/17/19, p. 236, line 18-25].

The Estate's motion for sanctions for abuse of discovery was heard on June 24, 2011. [R.57]. On July 21, 2011, the sanctions were granted, and the amount of the sanctions was to be determined later. [R.58].

On August 30, 2011 an evidentiary hearing was held before Judge Ronald Dresnick to determine the amount of the sanctions to be awarded. [R.63]. During the hearing, the various attorneys, including Mr. Tein, were placed under oath. The relevant testimony is as follows:

> Tein: And you're not contending to Judge Dresnick that we've been paid by the Miccosukee Tribe of Indians, are you?
>
> Harris[3]: I believe that you were paid in this case directly from the Miccosukee Tribe. I do believe that.
>
> Tein: Do you have any evidence of that?
>
> Harris: I believe that given the financial disclosure which we finally received, it is incomprehensible to me that these Defendants, if they were truthful in their discovery answers which we don't know, but if they were truthful, it would not support what I would believe was the work . . . . based on the file, 12 years, probably $10 Million has been earned by your firm in work power. . . . we tried to get your attorney/client records. We believe that we are entitled to them . . .
>
> Tein: What evidence do you have?
>
> Harris: I don't have any evidence that they paid you because we requested those records and you didn't provide them to us.
>
> Tein: And ***what evidence do you have that the Miccosukee Tribe paid a cent to us in this case?*** (emphasis added by this Referee)

3 At the time, Andrew Harris, Esq. was appellate counsel for the Estate.

Harris: Do I have evidence of that? I don't have direct. Common sense says – I do not have evidence. But I do not have evidence of that. I would suspect that you didn't work for eight years for free, pro bono. But we can ask you that, I guess, in – your presentation of the case.

[R. 63 p. 161, L23- p. 163, L 22].

Later in the hearing Mr. Tein was placed under oath [R. 63, P. 195, L 2-6] and stated as follows:

Tein: . . . Our client is not the Miccosukee Tribe. The Miccosukee Tribe is not a party to this case. The affidavit that Mr. Rodriguez gave you is absolutely true. They [Mr. Bert and Ms. Billie] have been responsible for – the Defendants have been responsible for our fees and they – they—at that time they have been paying our fees. . . . But it would be mixing the responsibilities of the Tribe with the responsibilities of the Defendants for a judgment. That would be the equivalent of saying that if someone from Nicaragua, that the Nicaraguan government has a responsibility to step and pay the fee.

The Court: . . . I think they were a little more factual . . . They were more – I would like to hear the facts. I mean, I – *I did hear facts. I heard ... you know "they're paying." . . . "They're paying. We don't represent the Tribe."*

Tein: Yeah, I'll focus you on the facts. . . . There is no Indemnity Agreement here between the Tribe and anybody that I know of. There's no Indemnity Agreement between the Tribe and our firm. There is no Indemnity Agreement that I know of between the Tribe and our clients. Any sanctions that you impose will – if you impose it on the Defendants, that's one thing. If you impose it on Mr. Lewis and my firm, that's another thing.

[R. 63, p. 195, line 7- 20, p. 196 – line 10-17, p. 197, line 8-17, p. 197. line 24].

Tein: I – I know I spoke to Tammy Billie about these – the nature of these requests before they the requests were done, were -- were filed.

> And I know that I advised her about – and we discussed some of the issues about the fact that there were – there was an IRS investigation going on right now of the Tribe and that these guys – it was our impression that they really wanted to hurt Tammy and Jimmie and the Tribe by gong to the IRS. . . Mr. Whittlesey and Mr. Rodriguez were already quoted about how the Tribe members don't pay taxes and it's illegal. And I knew what they were doing.
>
> [R. 63, p. 236, L 6-16].

On September 13, 2011, the trial court entered an order granting $3,500.00 in sanctions against Lewis Tein. [R. 69]. An amount substantially less than the $150,000.00 sought by the Estate for two years of work pursuing discovery. At the time of the entry of the order, the trial court, had been addressing the various post-judgment discovery issues for quite some time. Judge Dresnick's order states in relevant part:

> ORDERED AND ADJUDGED that Lewis Tein, PL shall pay Plaintiff's attorneys, **Ramon M. Rodriguez, Dennis J. Whittlesey and Andrew A. Harris the total sum of $3,500 as a sanction for the discovery abuse** within ten days of this Order.
>
> . . . **Another and probably the main factor as it relates to the dollar amount of the sanction is the apparent impression that Plaintiff attempted to present of Tein and Lewis as representing the Miccosukee Indian Tribe and not the named Defendants in this case**. Maybe Plaintiff's attorneys actually believed that Lewis Tein were attempting to protect the Miccosukee Tribe from paying this judgment and not merely representing their individual clients who happen to be Miccosukee Tribe members. **Both Mr. Tein and Mr. Lewis made it very clear at the hearing that they did not represent the tribe, that they were representing these individual Defendants only and that the tribe in no way was paying for this representation.** The Court noted out loud at the end of the hearing that the Plaintiff chose not to contest that representation by Mr. Lewis or Mr. Tein. They did not ask a single question concerning

that representation. To the Court that meant that they accepted that representation. The Court therefore accepted that representation. **Had the Court found that Mr. Lewis and/or Mr. Tein was in fact representing the Miccosukee Tribe in attempting to avoid paying this judgment the Court can assure both sides that the results of this order would have been significantly different.**
[R. 69]. [Emphasis added by this Referee].

On September 23, 2011, the Estate filed a Motion for Rehearing regarding the amount of the award of sanctions. [R. 70]. In the motion, Respondent sets forth that Tein's position at the hearing that the clients and not the Tribe were paying their fees and costs was not mathematically plausible; and that the billing records were necessary to substantiate Plaintiff's belief that Lewis Tein were being paid by the Tribe. The motion discussed the contention that the trial court had denied the Estate access to the billing of records of Lewis Tein, thereby depriving Plaintiff of the ability to challenge the testimony or impeach any witnesses. The motion set forth the testimony of Mr. Bert and Ms. Billie about their lack of knowledge of Lewis Tein's invoices. The relief sought was additional discovery and a rehearing as to the amount of sanctions. Much of these proceedings had caught the interest of the press and was in the public domain.

On October 11, 2011, General Counsel for the Tribe, Bernardo Roman, delivered to Respondent 61 checks [R. 72] issued from the Tribe's General Account payable to Lewis Tein totaling over $3,000,000.00 in paid fees and costs. When Respondent received the checks, he contacted his investigator, Mr. Bock, to

independently confirm the origin of the checks. Mr. Bock examined Miami-Dade County property records and confirmed that the checks issued by the Tribe to Lewis Tein were from the very account the Tribe used to pay property taxes, and not from the accounts used for distributions to the tribal members from Indian gaming revenue referred to as NTDR. [R. 219]. The name of the account on the checks was the "General Account" of the Tribe. Respondent viewed the checks as confirmation of his suspicions that the Tribe was the real party in interest in the wrongful death action.

As a result of this evidence, Respondent filed two motions on behalf of the Estate on October 21, 2011: a "*Supplemental* Motion for Rehearing" [R. 75] supplementing the grounds for the original motion for rehearing filed September 23, 2011. [R. 70] and a "Supplemental Motion" seeking relief in the form of additional discovery and reconsideration as to the amount of the sanctions.

Respondent also filed a Motion for Relief Pursuant to 1.540 [R. 73]. The motion sought as relief an evidentiary hearing and a return of the funds paid as a sanction by the Respondent directly to Ms. Billie and Mr. Bert for the delayed disclosure of experts. *Id.* Both motions relied on substantially the same factual and legal bases. The basis for each motion:

> "As explained in clear detail below, supported by the attached financial records, the Plaintiffs have discovered that the sworn testimony offered by Mr. Tein at the August 30th hearing was perjurious and that Messrs. Tein and Lewis made repeated misrepresentations to this Court and

thwarted the administration of justice and fair play. These financial records establish that from May 2005 to April 2010, the Miccosukee Tribe paid the law firm of Lewis Tein, P.L. over **$3.1 million** for their representation in this matter. This is a figure that nearly exceeds the Final Judgment and does not account for the last eighteen months in the post-judgment phase of this case.

***

8. During the evidentiary hearing, Michael R. Tein, provided sworn testimony before this Court, and in the presence of his law partner, Guy A. Lewis, that Lewis Tein, P.L. did not represent the Miccosukee Tribe and **had not been paid by the Miccosukee Tribe for their representation in the case at bar.**

9. Additionally, during the evidentiary hearing, Plaintiffs' counsel testified to his belief that the Miccosukee Tribe had been paying Mr. Tein and his firm for their representation of the defendants. Plaintiffs' counsel testified that it appeared to him that millions of dollars in invoices had been generated by defense counsel, or at least in dollar value, based on the number of attorneys involved in this case. Plaintiffs' counsel presented this testimony merely to show that the requested fees award for the discovery misconduct was very small in comparison.

10. Mr. Tein decided to vigorously cross-examine Plaintiffs' counsel. During this cross-examination, Mr. Tein repeatedly represented to this Court that the defendants, alone, paid the legal bills in this case. Mr. Tein also challenged the value of the services his firm provided and gave this Court the clear impression that millions of dollars in fees had not been generated.

11. Furthermore, at the evidentiary hearing, when this Court asked Mr. Lewis about the concerns that would exist in this case if the Miccosukee Tribe were paying for the legal bills of the defendants, Mr. Lewis acknowledged this would be a concern. Mr. Lewis, however, did not inform this Court that there was in fact a financial relationship between the Miccosukee Tribe and his firm, regarding the legal representation of the defendants in this case. The clear impression Mr. Lewis gave to this Court was that there had never been a relationship.

12. Plaintiffs were unable to challenge this sworn testimony or representations with financial record evidence at the time of the evidentiary hearing. The defendants' discovery responses they belatedly filed, however,

did not support their ability to pay the millions of dollars in fees that appeared to have been generated by Lewis Tein, P.L. As Plaintiffs' counsel conveyed to the Court, it was not mathematically plausible for the defendants to have paid the legal fees generated by Lewis Tein, P.L.

13. Based on this sworn testimony, this Court made a factual finding that Mr. Tein and Mr. Lewis were not paid by the Miccosukee Tribe for their representation of the individual defendants in this matter.

16. Plaintiffs have since discovered that the Miccosukee Tribe has, in fact, paid Lewis Tein, P.L. for their representation in this matter and that Mr. Tein committed perjury when he testified to the contrary. Mr. Tein's perjurious testimony was provided in the presence of his law partner, Mr. Lewis, who knew that Mr. Tein was willfully and intentionally providing false testimony before the Court but remained silent. From May 2005 to April 20 l 0, the Miccosukee Tribe has paid the law firm of Lewis Tein, P.L. over **$3.1 million** for their representation in this matter.

17. This newly discovered evidence entails copies of 61 checks detailing the following payments by the Miccosukee Tribe to Lewis Tein, P.L. for their representation in this matter (Copies of the respective checks are attached as **Composite Exhibit 1):** [Table Omitted].

***

19. It should be clear that the misconduct by Mr. Tein and his law firm was not limited to the evidentiary hearing of August 30th. This newly discovered evidence also establishes that Mr. Tein and Lewis Tein, P.L. earlier in the case perpetrated a fraud on this Court and the Plaintiffs when it secured a sanctions Order against undersigned Plaintiffs' counsel to reimburse the defendants for attorneys' fees the defendants never paid. As a result of the fraudulently-obtained sanctions Order, undersigned Plaintiffs' counsel delivered a check on November 23, 2009 payable to "Tammy Billie or Jimmie Bert" for$8,294.77 ($7,820 sanction amount plus interest). A copy of that check is attached hereto as Exhibit 2.

20. Indeed, at the hearing to consider whether to impose sanctions on Plaintiffs' counsel, Mr. Tein represented that the only way for the defendants to be made whole - for having paid fees to Mr. Tein and his firm to litigate this case - would be for the defendants to be reimbursed. As the record

evidence is now clear, these defendants were not actually paying the legal fees. As a result, there was nothing for defendants to be reimbursed.

21. This misconduct was then compounded when Lewis Tein, P.L. turned the $8,294.77 check over to Tammy Gwen Billie (who quickly cashed it), despite a pending Writ of Garnishment against Lewis Tein, P.L.

***

36. The record is clear that Lewis Tein, P.L. has grossly abused the litigation process for their own financial gain, and that Mr. Tein provided perjurious testimony to this Court when he testified that the Miccosukee Tribe never paid Lewis Tein, P.L. for their representation in this matter."

[R. 73, see also, R. 75]

Contrary to the allegations in the Bar Complaint, Respondent did not attribute to Mr. Tein the specific words used by Judge Dresnick in his order dated September 13, 2011, nor did Respondent allege in his motion that Judge Dresnick's characterization or wording was perjurious. The bases for Respondent's motions are alleged to be the representations made by Mr. Tein to Judge Dresnick during the hearing of August 30, 2011, and his representations at the sanctions hearing, which resulted in Respondent paying sanctions for delayed expert disclosure directly to Mr. Bert and Ms. Billie. The specific representation the Respondent believed to be false was Mr. Tein's statement to the Judge Dresnick that Mr. Bert and Ms. Billie had been paying fees and expenses and were running out of money when, in fact, the Tribe was the payor.

The Lewis Tein invoice dated October 31, 2011, documents charges for activities on August 27, 2011, as follows: "Edit omnibus response to motions; edit letter to J Dresnick; draft letter to J Dresnick; draft notice of filing affidavits; consult with Mr. Tein about the same." No charges for conversation or conferences with Mr. Bert or Ms. Billie are listed. It appears that the actions to change or amend the testimony of Ms. Billie and Mr. Bert only arose when Mr. Tein's began to formulate his opposition to the Supplemental Motions for Rehearing and Motion for Relief, and not based on any identifiable communication originating from Mr. Bert or Ms. Billie.

This same Lewis Tein invoice dated October 31, 2011, revealed charges for the date of October 25, 2011, for reviewing and proofreading affidavits changing the sworn deposition testimony of Mr. Bert and Ms. Billie given in May 2010. [R. 211]. There are also charges for, "Locate Ms. Billie and Mr. Bert's prior affidavits for Mr. Tein; review and proofread T Billie affidavit; review Ms. Billie's deposition testimony; consult with Mr. Tein about statements about loans; provide Mr. Tein with excerpts of depo testimony." There is no indication in this invoice that any conversation took place with Mr. Bert or Ms. Billie.

The invoice dated October 31, 2011, also lists charges for the date of October 26, 2011, regarding the defendants' affidavits changing their prior sworn testimony, with the notation: "Consult with Mr. Tein and Ms. Chiong about Ms.

Billie's affidavit; draft omnibus response to motions for rehearing and relief; consult with Mr. Tein about edits to response; edit response to motion; conduct research on standard for evidentiary hearing." Again, no mention of any conversation or conference with Mr. Bert or Ms. Billie is documented in this invoice.

A close inspection of the Lewis Tein invoices to the Tribe reveals that prior to the filing of the *Supplemental* Motion for Rehearing and Motion for Relief, the invoices for several years where directed to the Tribe, the Tribe's Chairman, or the Tribe's financial officer – ***but not to Mr. Bert or Ms. Billie***. Curiously, and highly suspect to me, the Referee, the invoice date October 31, 2011, is the first invoice directed to Mr. Bert and Ms. Billie.

On October 27, 2011, defendants filed an Omnibus Response to Motion for Relief, Rehearing and Supplemental Motion, which is signed by Mr. Lewis [R. 79], and which is consistent with the Lewis Tein charges for that date. Among the statements made by Mr. Lewis on behalf of Lewis Tein is that since Mr. Bert and Ms. Billie did not maintain checking accounts, they could not pay bills so that the Tribe would issue checks on their behalf. This statement was untrue on its face since in response to Form 1.977 post-judgment discovery, Lewis Tein disclosed the existence of Bank of America account, which was garnished by the Estate. Further, Mr. Lewis stated that the Tribe's checks were charged against Defendant's

tribal distribution. However, the source of the checks was the Tribe's general account and not the NTDR account which was the money distributed to and held for tribal members. [R. 219].

Significantly, in this Omnibus Response, for the first time Lewis Tein contended that defendants had loans issued by the Tribe to pay their legal expenses. To corroborate that assertion, the signed affidavit of Ms. Billie was submitted with the Omnibus Response, the same affidavit which was referred to in the invoice dated October 31, 2011. Ms. Billie's affidavit is in direct contradiction to her sworn deposition testimony rendered approximately 18 months before. No similar affidavit was filed on behalf of Mr. Bert. Also noteworthy is that as of October 27, 2011, the date of the Omnibus Response, defendants had not produced any evidence of loans, any notes, any response to discovery requests for production acknowledging or demonstrating the existence of any loans or loan balances. Nor was there any evidence of a RAP approving any bona fide loan program as required by federal law.

Respondent filed a Reply [R. 81] to the Omnibus Response on December 2, 2011. In the Reply, Respondent addressed the fact that the defendants did have bank accounts, and that defendants' assets and income were insufficient to pay the legal fees now known to have exceeded $3,000,000.00 for the civil case *alone,* with a table demonstrating that impossibility. In the Reply, the Respondent

addressed the issue that the payment of such legal fees by the Tribe could not be bona fide loans under federal law and would constitute taxable income subject to the Indian Gaming Revenue Act, 25 USC § 2704. *(Recall that the Respondent knew that allegedly various Indian tribes sought to avoid taxes by claiming income as loans and that Lewis and Tien were representing the Tribe in just such a dispute, as previously discussed.)* Respondent attached as an exhibit the Amerind Conference Guide for October of 2010 to the Reply, which identified Lewis Tein as "experts in **Indian Law, gaming law,** civil litigation, **IRS** and other federal criminal matters" and that the firm **"proudly represents"** the Miccosukee Tribe."

On December 15, 2011, the Respondent filed the RAP provisions governing impermissible uses of Indian gaming revenue, particularly as to loans, [R. 84], contained in Bulletin No. 05-1, National Indian Gaming Revenue Bulletin, Subject; Use of Net gaming Revenues Bulletin. The Bulletin addresses various forms of Impermissible Uses of Gaming Revenues. Of special relevance the Respondent was where it said:

> Other impermissible uses can occur if a tribe creates a fund with gaming revenues, from which **cash payments are made to individual tribal members without any objective criteria based on the needs and requirements of the tribal membership.** An example of this is when an individual tribal leader is given a portion of gaming revenues for members for medical, emergency or other reasons, **without using any eligibility criteria to determine who was entitled to receive payment. A variation on this situation occurs when a tribal government makes loans to select individual tribal members,** or to businesses owned by individual tribal

members, **with no eligibility criteria or expectation of repayment.** [Emphasis Supplied]

On January 10, 2012, Judge Dresnick entered an order granting reconsideration, allowing additional discovery and granting an evidentiary hearing. [R. 94]. The Order states that the Court's focus is on whether the Tribe "paid for their representation." This was material not only to the Estate's pending motions but ultimately as to the Tribe's ultimate liability for the judgment as an additional judgment debtor pursuant to *Abu Ghazaleh.* The Order states in part:

> "In granting this Motion to Reconsider the Court is however limiting the depositions to the issue presented, which is Plaintiff's claim that Mr. Tien and Mr. Lewis committed perjury when they testified that they were not paid by the Miccosukee Indian Tribe for their representation of the Defendants. The issue was significant to the Court's ruling on Plaintiff's Motion for Sanctions and may have further significance regarding whether the Tribe is ultimately responsible for the judgment."

At this juncture, Lewis Tein moved to disqualify Judge Dresnick and Judge Dresnick denied the motion. Lewis Tein appealed the denial of the Motion to Disqualify. [R. 110]. The Third District Court of Appeal affirmed Judge Dresnick's denial. In their opinion, *Bert v. Bermudez,* 95 So.3d 274 (Fla. 3d DCA 2012), The Third District Court of Appeal acknowledged that discovery was ongoing related to the Estate's motions for sanctions and that an evidentiary hearing was set to take place. The Third District did not comment on the

appropriateness of the pending actions before Judge Dresnick, but they did summarize in detail the contradictory evidence in the record as of that date.

Likewise, in a previous opinion, *Miccosukee v. Bermudez,* [R. 106], wherein the general counsel for the Tribe sought to prohibit Lewis Tein from taking his deposition in this matter, the Court stated in Footnote 2: "At the same time, the trial court **[Judge Dresnick]** also reminded counsel of his statement made at the conclusion of the hearing held on August 30, 2011, in the presence of Mr. Lewis and Mr. Tein that '[t]hey [Lewis Tein] stated they weren't paid by the Miccosukee Indians," a statement which, if not true, was not corrected by either Mr. Lewis or Mr. Tein." Id. at 233. The appellate court did not find Respondent's position frivolous, or his discovery efforts discovery or his request for hearing unnecessary.

Respondent re-deposed Mr. Bert on November 23, 2012, a deposition which was continued on December 3, 2012. [R. 134 and 136]. Mr. Bert does not speak or read English. As in his previous depositions, the deposition was conducted through an interpreter of the Miccosukee's language. [R. 134, p. 21, lines 11 – 17]. Under oath, Mr. Bert testified in relevant part:

p. 25, line 16 - p. 26 line 9	He did not receive invoices from Lewis Tein nor was he informed of the amount of legal fees, or the hourly rate charged, or time spent, and never told anyone including, Lewis or Tein that he was responsible for their fees.
p. 48, lines 14 - 17	He did not obtain loans from the Miccosukee Tribe to pay Lewis Tein's legal fees.
p. 49, lines 6 - 8	Lewis Tein did not keep him informed on status of

	the case.
p. 51, line 18 - p. 52, line 4	No one interpreted the affidavit of 01/18/11 that repudiated his prior deposition testimony.
p. 53, lines 4 - 8	Michael Tein did not tell him about the amount of his legal bills.
p. 54, lines 20 - 23	He did not actually see a legal bill from Lewis Tein.
p. 57, lines 3 - 21	He did not give permission for any appeal and was not aware of $948,264.24 paid in legal fees to Lewis Tein after the Bermudez verdict.
p. 62, lines 1 - 10	Lewis Tein did not explain the consequences of the judgment and no one told him the appeal of the judgment had been dismissed by the appellate court.
p. 94, lines 1 - 5	He did not receive any billing records or invoices from Lewis Tein.
p. 94, line 20 - p. 95, line 4	Lewis Tein did not provide him with a list identifying amounts billed or monies received for his defense.
p. 125, lines 2 - 17	When Jimmie Bert signed the 1/18/11 affidavit, it was not his intention to change his deposition testimony of 05/03/10 and Lewis Tein did not inform him that the affidavit was changing his previous testimony.
p. 207, lines 8 - 12	Jimmie Bert does not know who is Jeanine Bennett.

Mr. Bert's failure to recognize the name of Ms. Bennett was noteworthy to the Respondent because she was employed by the Tribe and supported their contention that a loan existed. She, however, would not be called to testify at the evidentiary hearing on these matters held in April 2013.

During these proceedings, the Tribal attorney (B. Roman) produced minutes of Miccosukee council meetings related to loans [R. 139]. The notes produced, as well as Mr. Roman's testimony at the evidentiary hearing described the procedure for the Tribe's approval of loan applications [R. 159, p. 173, line 18 to p. 176, line 4]. The tribal member would either go before the Tribe's General Council or Business Council and request a loan which would then be voted upon by the appropriate council. There were no minutes produced demonstrating that either council approved loans for payment by any Tribe member to Lewis Tein at any time. [R. 159, p. 188, line 21 to p. 189, line 13]. By contrast, there were two meetings which took place to approve loans to pay for Ms. Billie's defense fees arising from Michael Diaz's representation in the criminal matter where Mrs. Bermudez was the victim. [R. 139]. The council meeting held November 15, 1998 approved a loan to Ms. Billie for Michael Diaz's representation expenses in 1998, when no civil action was yet filed and before any civil lawyers were retained. [R. 139]. Likewise, the general council meeting held February 3, 2000, addressed a December distribution to be received by Ms. Billie without deduction for Mr. Diaz's fees. [R. 139].

During post-judgement discovery and during the pendency of the Estate's sanctions motions, Respondent looked for indicia of a bona fide loan program with eligibility criteria, as set forth in the Bulletin and any indicia of an attorney-client

relationship between the defendants and Lewis Tien. During this discovery phase as to either of the defendants, no evidence was found of any written policies or procedures regulating loans to tribal members, any written description of a loan program, any loan contract, any loan application, any notes or promissory notes, any amortization schedules, any details of any method for disbursement of loan proceeds, any details of methods for repayment of loans, any requirements for collateral requirements for loans, any methods or descriptions of procedure to enforce repayment, any information as to the term of any loan, the amount of any loan, any listed the conditions for determination of default, any evidence of a bonafide loan produced, any agreement as to hourly rate per category of attorney or staff, any agreement for reimbursement of costs, any negotiated cap or limit to the amount of hours to be expended, any statement as to the actual amount of any loan, and any of the terms of the engagement or retainer for which any loan was undertaken.

Throughout the course of the sanctions-related discovery, there ***were*** statements from employees or contractors of the Tribe (people whose livelihood depended on staying in the good graces of the Tribe) that contradicted the defendants' sworn testimony. It is my view that any reasonable lawyer would, standing in the shoes of the Respondent, not just simply take these tribal employees and contractors' words as gospel, when the mounting and persuasive

evidence supported by over $3,000,000.00 worth of cancelled checks implicated the Tribe as the real party in interest, apparently having paid for the defense and directed the defense of the wrongful death action. If mere denials by opposing parties' in the face of plausible and concrete evidence required abandonment of actions in court, without more, then the judiciary should just pack up and find new jobs. Respondent correctly entrusted the trial court to resolve the conflicts in the evidence at the subsequent evidentiary hearing. The Respondent presented evidence at that hearing showing that the alleged borrowers denied the existence of any loan or debt in four separate sworn depositions, there were none of the typical indicia associated with a bona fide loan as outlined above, there were no minutes of any tribal council approving the any loans for fees for Lewis Tein for the civil case, in stark contrast to the approval reflected in the minutes for a loan to pay the fees for Michael Diaz, Esq, in the criminal matter, there was no RAP compliance which would have prohibited a bogus loan, that the claim of the existence of loans to the defendants arises contemporaneously with an IRS battle where one of the defenses raised by Tein on behalf of those tribal members is that monies received are not income because they are loans, that there is no retainer agreement between Mr. Bert or Ms. Billie with Lewis Tein, that the only existing agreement for representation was between the firm and the Tribe, that Mr. Bert and Ms. Billie were not aware of the legal fees charged, never saw any invoices nor were they

aware of significant activity in the case – **in fact they never attended the trial or mediation,** there are no loan documents for an alleged multi-million dollar loan to either of the defendants, that all invoices are directed to the Tribe until Respondent filed his Motions mid-October of 2011, and, that the 61 payments made by check to Lewis Tein are from the Tribe's general account and not the NTDR account for tribal members.

During the civil wrongful death action and the criminal defense over $5,300,000.00 [R. 159, p. 220, line 19 to p. 221, line 18.] were charged as attorney's fees or costs. If these fees were not loans, they are taxable income to the IRS, as was acknowledged by Mr. Tein to Respondent and Mr. Whittlesey at a discovery conference. As these events occurred, Respondent was aware of the ongoing IRS investigations, had direct contact with federal agents and had an in-depth understanding of the claims being pursued by them against Mr. Bert, Ms. Billie and other tribal members. The IRS utilized the information acquired by Respondent as part of their investigation.

It is not credible, for anyone to say that Respondent had no *reasonable* basis in fact for his contention that the Tribe was the real party in interest, had paid for the defense, directed and controlled the defense. It is not credible to say that the Respondent had no basis in fact when he alleged that Mr. Tein had misled the court and counsel, when he [Mr. Tein] stated that Mr. Bert and Ms. Billi paid for the

defense of this matter and not the Tribe. It cannot be said that submitting conflicting facts to a trial court judge for resolution is a frivolous action by a lawyer particularly when Respondent could not resolve the conflicting facts nor rule on his own motions and he had the quantity and quality of evidence he presented.

On April 4, 2013, Judge Dresnick issued an Order outlining the focus of the evidentiary hearing set for April 15-17, 2013. [R. 153]. The Court specifically stated that for him "one of the matters of concern to this court and that this court wishes to be addressed at the hearing of April 15, 2013 relates to the attorney's obligation of candor to the court." The Order stated:

> THIS ORDER is to place all parties on notice that one of the matters of concern to this Court and that this Court wishes to be addressed at the hearing on April 15, 2013 relates to an attorney's obligation of "candor to the Court." The Court is referring to that portion of this Court's Order of September 19, 2011 which states:
>
> "Another and probably the main factor as it relates to the dollar amount of the sanction is the apparent impression that Plaintiff attempted to present of Tien and Lewis as representing the Miccosukee Indian Tribe and not the named Defendants in this case. Maybe Plaintiff's attorney actually believed that Tien and Lewis were attempting to protect the Miccosukee Tribe from paying this judgment and not merely representing their individual clients who happen to be Miccosukee Tribe members. Both Mr. Tien and Mr. Lewis made it very clear at the hearing that they did not represent the tribe, that they were representing these individual Defendants only and that the tribe was **in no way** was paying for that representation. The Court noted out loud at the end of the hearing that the Plaintiff chose not to contest that representation by Mr. Tien or Mr. Lewis. Plaintiff did not ask a single question concerning that representation. To the Court that meant that they accepted that representation. The Court therefore accepted that

representation. Had the Court found that Mr. Tien and/or Mr. Lewis were in fact representing the Miccosukee Tribe in attempting to avoid payment of this judgment, the Court can assure both sides that the results of this Court's Order of September 13, 20122 would have been significantly different." (emphasis supplied by the Court)

After the Court's Order and prior to Plaintiffs Motion for Reconsideration there was never a clarification from Mr. Tien or from Mr. Lewis concerning any money they had received from the Miccosukee Tribe on behalf of their clients or otherwise.

In response to that Order, Lewis Tein did not seek to correct the Court's alleged mis-statement in the same fashion that he had not sought clarification of or amendment to prior orders using similar language.

On April 9, 2013, Respondent formally moved to add the Tribe as a judgement debtor pursuant to *Abu Ghazaleh.* [R. 154].

On April 10, 2013, Respondent filed with the trial court every deposition taken during the post-judgment proceedings. [R. 155].

The evidentiary hearing took place over three full days, from April 15-17, 2013. At the evidentiary hearing, Mr. Bert and Ms. Billie were called to the stand [R. 159] and in the presence of Judge Dresnick, both denied that they had loans or had borrowed money from the Tribe to pay the attorneys' fees due Lewis Tein. No party raised any concerns about the ability or competency of these witnesses to testify. The trial court had the opportunity to observe the witnesses' demeanors, ask questions and make his own conclusions of their credibility and competency.

Notably, Lewis Tein did not call any of the Tribe's employees or contractors to testify at the evidentiary hearing.

On direct and cross examination of Ms. Billie at the evidentiary hearing and in the presence of Judge Dresnick, she testified under oath as follows:

p. 72, line 8- 21	She had not received invoices from Lewis Tein re Bermudez.
p. 73, line 9 to 12	She did not know how much Lewis Tein billed for the defense in Bermudez.
p. 73, line 17-21	She was not asked for permission to file an appeal.
p. 73, line 22-24	She does not know of and does not recall any loans to pay Lewis Tein.
p. 74, line 4 – 18	She, nor her mother or father, Jimmie Bert, did not pay any of the Lewis Tein legal fees. She does not know who paid them and she does not know how much Lewis Tein had been paid as fees.
p. 75, line 3 to 5; line 11 -25 to p. 76, line 9	She did not pay the legal fees for Lewis Tein. She was not told by anyone at Lewis Tein that the affidavit was repudiating her prior testimony and that she was admitting to having paid legal fees to Lewis Tein.
p. 83, line 21 - 25	During cross examination by Lewis Tein's counsel: She was not asked to come to her own trial.
p. 85, line 13 - 19	During cross examination by Lewis Tein's counsel: She did not attend mediation.

On direct and cross examination of Mr. Bert at the evidentiary hearing and in the presence of Judge Dresnick, he testified under oath as follows:

p. 141 line 21 to p. 142, line 10;	He did not obtain any loans to pay Lewis Tein's legal bills, nor did he receive bills or invoices from the firm, did not know the amount of the bills, and never made any payments to the firm
p. 143, line 22 to p. 144, line 3	He never told anyone that he wanted to change his deposition testimony of May 2010 and stands by his May 2010 deposition testimony.
p. 144, line 12 – 22	He did not tell anyone at Lewis Tein that he was paying their legal fees, and no one interpreted the two-page document [affidavit] or explained it before he signed it.
p. 167, line 5-7	He asked for no assistance to pay Lewis Tein's fees.

At the evidentiary hearing, the 61 checks issued from the Tribe's general account were in evidence. [R. 159, p. 200- line 22 to p. 201, line 9].

"In No Way Paying"

The Bar charges are directed or focused on the contention that the alleged perjurious statement subject of the Respondent' motions were based on Mr. Tein having used the phrase *"in no way paying."* Part of the Bar's allegations are that certain enlargements on fiber board used at the evidentiary hearing contained the *"in no way"* statement.

The actual contents of the subject motions were previously reviewed and discussed above and confirm that that was not the allegation made by the

Respondent. Likewise, a review of the evidentiary hearing transcript [R. 159] and the four enlargements on fiber board used at the evidentiary hearing [R. 161] demonstrates that there is no factual support for such an allegation against the Respondent. At the referee trial, Mr. Tein acknowledged that the reference on the board to in *"no way was paying"* was not frivolous or improper. [FH. 4/16/19, P. 162, lin2 24 to p. 163, line 23]. Mr. Tein also testified at the referee trial that the statement *"in no way paying"* for the representation was true and did not need to be corrected. [FH. 4/16/19, p. 168, line 19 to p. 169, line 13].

The *"in no way paying"* statement is a characterization by Judge Dresnick as to what he understood Lewis Tein's position or statement to be. That phrase also appears in the Third District's opinion of June 20, 2012. Judge Dresnick repeats the phrase in his Order of April 4, 2013. The enlarged board at the evidentiary hearing shows the subject order, credits the order for the statement and quotes the wording from the order. The Boards do not imply that the statement was made by Mr. Tein. Although, it is remarkable to me, as Referee, after having heard all the testimony and reviewed innumerable pages of documents, that anyone would dispute that Mr. Tein unequivocally, clearly and emphatically testified that the Tribe did not pay for the defendants' legal representation. To have latched on to this phrase to form the partial basis of a Bar complaint is puzzling.

Notably, at no time did Lewis Tein move for clarification, move for rehearing nor did they take any other action to correct the record or amend the order as erroneous. They never told the trial court that the language of the order was erroneous because they in fact did not believe it to be erroneous. In addition to Mr. Elegant, Paul Calli, Esq. represented Lewis Tein in the post-judgment proceedings. In the Bench Memorandum filed by Mr. Calli on April 12, 2013, three days before the evidentiary hearing, he specifically stated the Court's characterization that Tribe was in *"no way paying"* for the defense was a correct statement by the trial court. [R. 157] He stated: "The Court was also correct that "the Tribe in no way was paying for this representation." *Id.* at p. 3.

Likewise, at the evidentiary hearing, Mr. Calli repeated to the trial court that "no way" was a correct statement by the trial court. [R. 159, p. 33, line 10-19] Mr. Calli stated, "Both Mr. Tein and Mr. Lewis made it very clear at that hearing that they did not represent the Tribe, that they were representing these individuals - - individual defendants only, and that the Tribe was in no way paying for that representation." *Id.* Mr. Tein himself stated at the evidentiary hearing that the court's *"in no way"* statement was a correct statement. [R. 159, p. 467, line 1 and Line 14-18]. Mr. Tein directing himself to Judge Dresnick stated, "Your Order was correct in all respects, . . . We were representing these individual Defendants

only and the Tribe was in no way paying for the representation in terms of paying the fees." *Id.*

Mr. Tein testified before me at the final hearing that the statement "the Tribe in no way was paying for this representation" was a correct statement and further represented that he drafted the Bench Memorandum. [FH. 4/16/19, P. 146, line 25 to p. 147, line 10, and p. 147, line 24 to p. 148, to line 6]

During the evidentiary hearing, Judge Dresnick stated that the focus of the hearing were the checks issued by the Tribe. [R. 159, p. 45, Line 1-21]. He further reflected, apparently ascribing possible motive, that Lewis Tein may not have been incentivized to correct the record, if it indeed was an incorrect position, since it was to their benefit by keeping the sanctions lower. [R. 159, p. 47 line 21 to p. 48, line 8]

Judge Dresnick commented that if the *"in no way"* statement was not correct, Mr. Tein should have written a letter correcting the impression if it was a mistake, [R. 159, p. 556, line 16] and that it did not fall to the Respondent to do so. The Respondent, based on the record, did not believe that the Court's use of the phrase required correction. The Court repeated more than once that it was known that his focus was on the Tribe *"in no way"* paying for the defense and it was on Lewis Tein to clarify that was not the case. [R. 159, p. 463, line 16 to p. 465, line

1; p. 525, line 13 to p. 526, line 7; p. 556, line 16-25 to 557, line 3; p. 526, line 22 to p. 527, line 11].

At the evidentiary hearing, Respondent informed the court that he would not pursue the perjury allegations considering the Court's comments but would pursue material misrepresentation. [R. 159, p. 537, line 8 to p. 538, line 25].

Judge Dresnick also addressed the issue of Lewis Tein's sympathy argument at the hearing of August 30, 2011, and its effectiveness at the time. [R. 159, p. 549, line 14 to p. 551, line 6]. Judge Dresnick stated:

> "Now, I am sitting at a hearing [August 30, 2011] to impose sanctions based upon an order which was already granted imposing sanctions. It's a dollar amount period. I hear Mr. Lewis get up and tell me about his wife and his kid. And I hear about his practice and his reputation. And – I hear: "anything you do is coming out of our pocket." Which - - which, to me - - and I don't mean to characterize it as poor mouth, but it sounds like you're saying - - well, better yet, I hear: "I'm in this case because, I really truly feel for these people." . . . And I bought it hook, line and sinker. I just bought it. But I had known that they got - - had been paid that kind of money - - and I said it in the order the different - - there would have been a different result, at least in the dollar amount of sanctions. And that is what this hearing really is a motion to reconsider that order. . . . And had I known, "yeah, it's coming out of my pocket. Now, we got a lot of money. We were paid well, very well" I - - don't think my order would have been 3, 000 dollars."
> *Id.*

At the conclusion of the evidentiary hearing the Court raised the sanctions against Lewis Tein to $50,000.00. [R. 159, p. 562, line 14 to line 25]. Mr. Elegant submitted a proposed order on behalf of Lewis Tein to Judge Dresnick mistakenly writing that the motion for rehearing was denied but awarding the sanction amount.

[R. 162]. The Respondent had not agreed to the wording of the order prior to its submission.

As a result, on May 20, 2013, Respondent filed a Motion for Clarification to correct the erroneously entered order. [R. 163]. On June 24, 2013, a hearing was held on the Motion for Clarification [R. 169] and it was granted. The resulting amended order made it clear that the Respondent's Motion for Rehearing had, in fact, been granted. [R. 170]. At the hearing on the Motion for Clarification the Court stated, "In fact, I did find out that the Tribe had been paying." [R. 169, p. 9, line 15-24]. Respondent was the prevailing party on the merits of the motions when the court (Judge Dresnick) concluded that the Tribe had been paying Lewis Tein's fees.

On June 21, 2013, an evidentiary hearing is held on the Estate's motion to add the Tribe as a judgment debtor pursuant to *Abu Ghazaleh*. [R. 168]. At the hearing, the court noted that at the prior evidentiary hearing involving sanctions directed to Lewis Tein, the court had found that the Tribe had paid the expenses of the defense of the wrongful death litigation and controlled the defense of that action. [R. 168, p. 41, line 22 to p. 42, line 23 and p. 43, line 12 to 18]. The court specifically stated:

> "And the facts that were established at that last hearing were that the Tribe had paid the expenses of this litigation and that they controlled the actions, ah, to – put of – I think they had to control all the cations, other than the ones that the – that Lewis & Tein took independently, just exercising – their

judgment. But clearly there was this evidence presented to me that they were involved in communications with the Tribe about how the case would proceed, whether it be the – whether it be settled or not, whether people would be allowed on the property there to – serve process, whether the Tribal police would come out with regard to getting these people off – off the Reservation, and – and I think strategy. . . . Having said that, I also have made the same findings that they have contributed the – toward the expenses of – of this litigation. I think they have, by their actions, prolonged the expenses, increased the cost of this litigation and – and, as a result they are a party."

Id.

Nonetheless, on July 2, 2013, within a week of the trial court's affirmative statement that it found that Tribe had paid and controlled the defense of the wrongful death action at the hearing for clarification and at the hearing for the motion to add the Tribe as a judgment debtor, Lewis Tein filed a sworn complaint with the Florida Bar against Respondent claiming that his actions were frivolous. [R. 171]. Although they initiated this Bar complaint, Lewis Tein did not seek rehearing of the trial court's findings, clarification of the orders and did not file an appeal. Final Judgement was entered against the Tribe as a judgement debtor on July 3, 2013[4]. [R. 172]. The final judgement against the Tribe states:

---

4 This ruling was reversed on appeal in the case of *Miccosukee Tribe of Indians of S, Fla, v Bermudez*, 145 So.3d 157 (Fla. 3d DCA 2014), wherein the Third District limited the application of *Abu Ghazaleh*, however the opinion leaves unaltered the factual finding of the trial court. The appellate expressed its concern that a broad application of this theory would punish people for helping others and have a chilling effect. [R.178] The Third District observed, "In the final analysis, we are sympathetic with the frustrations that the Bermudez family may justly feel because the family's attempts to collect its judgment have been thwarted. And, when the Tribe could have simply paid the judgment for its tribal members and recouped the funds by a gradual and incremental assessment over time against tribal distributions made to Billie and Bert, we

> "Over the last two (2) years, this Court has conducted a number of hearings it became clear that the Miccosukee Tribe of Indians of Florida (the "Tribe") was funding the defendants' legal fees for the defense of Tammy Gwen Billie and Jimmie Bert to the tune of $3,111,567.73. In addition, Lewis Tein. PL's billing records introduced at the April 15-17, 2013 evidentiary hearing on sanctions reflected the Tribe's involvement in directing and shaping the defense of Tammy Gwen Billie and Jimmie Bert in the litigation of the case at bar."
> *Id.*

During these Bar proceedings, Respondent sought corroborating evidence of the information that had been provided to him during the pendency of his Motion for Relief and his Supplemental Motion for Rehearing and which was known to him prior to the three-day evidentiary hearing in April 2013. That corroboration came in the form of the Examination Reports prepared by the IRS with respect to Mr. Bert and Ms. Billie. [R. 189, 190, 191, 192, and 193]. The IRS is presently attempting to collect back taxes for the monies paid by the Tribe for Lewis Tein's attorneys fees, as well as for the sanctions check paid by the Respondent directly to Mr. Bert and Ms. Billie. The IRS has concluded that the fees paid by the Tribe to Lewis Tein for the defense of Mr. Bert and Ms. Billie in the Bermudez civil matter and the sanctions check paid by the Respondent constitute income to Mr. Bert and Ms. Billie and are not loans as previously represented by Lewis Tein. The deposition testimony acquired by Respondent and the documentary evidence

---

may wonder at the wisdom of the Tribe in squandering legal fees and community goodwill in amounts that exceed the money required simply to pay the judgment." Id. at 160.

developed by Respondent during post-judgment proceedings is specifically cited to and included in the papers prepared by the IRS.

The Florida Bar has not carried its burden to prove that the Respondent's actions were frivolous in filing the subject motions, having an evidentiary hearing and submitting to an impartial trier of fact the conflicting evidence on the subject issues. Given all the information known to the Respondent, I find that he had a well-founded and eminently reasonable basis for having a strong conviction that his positions and actions were solidly founded on the facts and the law.

2. **Whether Respondent was Frivolous in Seeking to Garnish Sanction Paid Individually to Mr. Bert and Ms. Billie to Pay Down Judgement Owed to the Estate.**

Respondent paid the sanction ordered by Judge Thomas, which with accumulated interested was $8,294.77. [R. 197]. The sanction was paid by surety check issued to Mr. Bert and Ms. Billie and was delivered to their attorneys Lewis Tein. This mode of payment was the one requested by Lewis Tein and the form of payment was issued by a surety, Jurisco. [R. 10]. At the referee trial, Mr. Tein acknowledged that the money represented by the check belonged to Mr. Bert and Ms. Billie. [FH. 4/16/19, p. 172, line 9 to 23].

Since the amount was an asset of Mr. Bert and Ms. Billie, whose attorneys Lewis Tein claimed were destitute, running out of money and unable to pay any

amount on the judgement, Respondent sought to garnish the check on behalf of the Estate.

Mr. Tein on behalf of Lewis Tein argued to Judge Dresnick on February 1, 2011, that the actions taken by Respondent were "disingenuous" and "silly." Judge Dresnick did not believe it to be silly and stated: "[w]hy is that so silly? I mean, if he's saying, 'Look, I'm going to pay $ 8,000, I'd rather pay it to my client rather than pay it to the tortfeasor'—". [R. 40, p. 36, line 21 to p. 37, line 15].

The Estate's attempts to garnish the sanction check [R. 195 to 204, 206-207] having been unsuccessful, an appeal was filed in the Third District Court of Appeal seeking a ruling as to whether it was an asset subject to garnishment, and if so – whether the correct procedure was utilized and whether Lewis Tein should not have turned over the asset to Mr. Bert and Ms. Billie without compliance with Chapter 77.04, the relief was denied to the Estate and affirmed in the form of a PCA. See, *Bermudez v. Bert*, 122 So.3d 377 (Table) (Fla. 3d DCA 2013).

The transcript of the oral argument contained some critical statements and challenges by Judge Schwartz; however, the transcript shows no objection by Judge Fernandez or Judge Salter to the Estate seeking garnishment of the sanction check. To the contrary, Judge Fernandez comments seemingly acknowledge that the money is an asset of the defendants but is critical of both Respondent and Lewis Tein on procedural issues. [TFB 15, p. 9 to p. 10, line 20, line 16- p. p. 27,

line 20-24 to p. 28, line 1 to 6, p. 30, line 10-19, p.36. line 16-25]. Judge Fernandez suggested that Lewis Tein should have complied with Section 77.04, Fla. Stats. and sought a determination from the Court as to whether the funds were an asset subject to garnishment before delivering the check in its possession to Mr. Bert and Ms. Billie. Judge Fernandez also stated that Respondent should not have abandoned his appeal on the merits of the sanctions and filed a writ of mandamus if the trial court was reluctant to rule on his motion seeking permission for garnishment. Since there is no written opinion, it is not known what constituted the basis of the Third District's affirmance.

On those occasions where the court explored with Respondent whether his actions were a set up or a trap – the Respondent made clear that he had attempted to acquire a ruling from the trial court regarding his ability to garnish, even though such a step was unnecessary, for the very reason of avoiding any misinterpretation or misapprehension that his intent was to avoid the sanction obligation. [TFB 15, p. 3-6; p. 9, line 1 to 22]. Further, he stated that by use of the Safe Harbor provision of Chapter 77.04, Lewis Tein had the ability to retain the check and await the Court's ruling. [TFB 15, p. 19, line 9 to p. 20, line 19].

At the referee trial, Mr. Tein agreed that the inclination of the appellate judges was that the check might have been an asset subject to garnishment but that

they had concerns about procedure, but without an opinion we cannot tell what lead to the affirmance. [FH. 4/16/19, p. 170, line 12 to 19].

I find that Respondent was not frivolous in attempting to garnish an asset of the defendant judgement debtor, in seeking a ruling of the trial court as to whether garnishment should be allowed and which the court did not hear, and for arguing for an extension of the Safe Harbor provision contained in Chapter 77.04, where a stop payment is not available in relation to a surety check.

3. Whether Respondent was Frivolous in Seeking an Emergency Writ on the November 21, 2012 Order Setting All Pending Motions for Hearing on November 26, 2012

The Florida Bar has not carried its burden to demonstrate that Respondent frivolously filed an appeal on November 21, 2012. At the time of the appeal there were five motions pending before the trial court. Ira Elegant, Esq. was legal counsel for Lewis Tein. On September 12, 2012, Mr. Elegant filed a Request for Special Set Hearing on just two of the five pending motions, specifically, Defendants' Motion for Sanctions, pursuant to Section 57.105, and Plaintiffs' Motion for Rehearing Regarding the Order Denying Plaintiffs' Motion for Criminal Contempt Against Michael R. Tein and Denying Plaintiffs' Motion for Sanctions Against Guy A. Lewis. [R.118]. On the same date, Mr. Elegant filed a Notice of Hearing, for November 26, 2012, listing only two of the five pending motions: Defendants' Motion for Sanctions, pursuant to Section 57.105; and

Plaintiffs' Motion for Rehearing Regarding the Order Denying Plaintiffs' Motion for Criminal Contempt Against Michael R. Tein and Denying Plaintiffs' Motion for Sanctions Against Guy A. Lewis. [R. 119]. Plaintiffs' Motion for Rehearing, Supplemental Motion for Rehearing and Motion for Relief were not noticed for hearing by Mr. Elegant.

Subsequently on November 14, 2012, an Order was entered on Plaintiff's Emergency Motion for Stay. [R. 133, Att.1]. Among the rulings included in a handwritten Order entered at the motion calendar are the rulings: "2.) Defendants 57.05 Motion for Sanctions shall not go forward on November 26, 2012; 3.) The only motion to be heard on November 26, 2012 shall be the Plaintiffs' Motion for Rehearing Regarding the Order Denying Plaintiffs' Motion for Criminal Contempt Against Michael R. Tein and Denying Plaintiffs' Motion for Sanctions Against Guy A. Lewis." No objection to the contents of the Order was made at the Motion Calendar, no motion for clarification was subsequently filed nor was a motion for rehearing filed.

The deposition of a Jimmie Bert was scheduled for November 23, 2012, the Friday after Thanksgiving. [R. 134]. The subject of the deposition were facts relevant to Plaintiff's Motions for Relief pursuant to Rule 1.540 and Supplemental Motion for Rehearing. On the morning of November 21, 2012, the Wednesday before Thanksgiving, over Respondent's objection the trial court stated that

pending motions (except Defendants motion for 57/105 sanctions) would be heard beginning Monday, November 26, 2017, even though discovery was incomplete, and Mr. Bert's deposition was pending.

As a result, on November 21, 2012, Respondent filed an Emergency Petition for Writ of Certiorari before the Third District Court of Appeal [R. 132] seeking a stay of the November 26, 2012, on the grounds that the Estate is entitled to full discovery which was incomplete and only had 5 days' notice that all the Plaintiffs motions would be heard on that date. Simultaneously, Respondent filed Plaintiff's Emergency Motion to Stay Evidentiary Hearing. [R. 133]. In the Writ and Emergency Motion, Respondent accurately sets forth the above stated history. [R. 132, and R. 133, pp. 6-8].

The Florida Bars Grievance Committee 11-G was assigned Lewis Tein's sworn complaint against Respondent for investigation and review. Grievance Committee 11-G, assigned as the investigator of the facts William P. McCaughan, Esq., who prepared a Memorandum on June 30, 2015, directed to Bar Counsel summarizing his factual findings. [R. 179]. With regards to this specific issue, Mr. McCaughan found as follows:

FACTS

> "There are two factual allegations which are the basis of complaint by Lewis Tein against Ramon Rodriguez ("Rodriguez"): (i) Rodriguez made false statements to the Third District Court of Appeals in order to obtain a

stay of hearings; and (ii) Rodriguez improperly pursued a claim against Lewis Tein for perjury, fraud and lack of candor.

As to the first issue Lewis Tein assert Rodriguez falsely stated to the Third District Court of Appeals that a November hearing in the lower court had just been set when the hearing had been noticed in September. In fact, there were several motions at issue of which two had been set back in September and two additional hearings were set in November right before Thanksgiving to be heard on the Monday after Thanksgiving. Attached as Exhibit A is Mr. Rodriguez's Emergency Motion to Stay to the Third DCA. The motion appears to disclose that some of the other matters has been noticed for hearing in September while other motions were set by the court immediately before Thanksgiving for hearing on the Monday after Thanksgiving. There does not appear to be a factual basis for an ethics violation based on the first issue."
[R.179, p. 1]

Mr. Tein was the only witness called by the Florida Bar on this allegation. Mr. Tein testified during the referee trial and reluctantly admitted that only two motions were set for trial on Monday, November 26, 2012, and not all five motions. Mr. Tein's testimony at the referee trial on April 16, 2019, was as follows:

p. 190
Rubio: So, Mr. Tein, I think we spoke earlier that Mr. Elegant was your attorney.

Tein: Yes.

p. 191
Rubio: Now, Mr. Elegant filed a request with the court for special set hearing correct?

Tein: Yes.

Rubio: And he asked the court for hearing dates for two motions, defendant's motion for sanctions pursuant to 57.105, and the plaintiff's motion for rehearing regarding the order denying plaintiff's motion for criminal contempt against Michael R. Tein and denying plaintiff's motion for sanctions against Guy Lewis; do you see that? [R.118]

Tein: Yes.
p. 191-192

Rubio: Now, Mr. Elegant was the one that noticed the hearings for November 26, 2012 at 10:30 am correct?

Tein: Okay.

Rubio: And he only noticed these two hearings, correct?

Tein: Okay . . . Correct.

Rubio: The only two hearings he sets is defendant's motion for sanctions pursuant to 57.105, and plaintiff's motion for rehearing regarding the order denying the plaintiff's motion for criminal contempt, right?

Tein: Okay.

p. 194
Rubio: So, it was your understanding then that all the motions were not to be heard on Monday?

Tein: Yeah, the motions that were going to be heard were those two motions that were listed.

p.196
Rubio: So, you felt that all five motions were to be heard that day?
Tein: No, I did not.

The evidence is overwhelming and conclusive that Respondent's representations in both the Writ and Emergency Motion for Stay where well

supported by the documentary evidence in this matter. The Florida Bar did not carry its burden to prove by clear and convincing evidence that there was a violation of Rule 4-3.1 by the Respondent.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found not guilty of violating Rule 4-3.1, Rules Regulating The Florida Bar and that this matter be dismissed.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

Not applicable in this matter.

V. CASE LAW

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

No disciplinary measures are recommended.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Personal History of Respondent:

Age: 54

Date admitted to the Bar: December 20, 1989

Prior discipline: None

Mr. Rodriguez is a graduate of Belen Jesuit Prep in Miami, Florida. He attended and received his Bachelor of Arts degree from Fordham University as a Political Science and History Major. He then attended law school and graduated

from American University in Washington D.C., where he was President of the Hispanic Law Student Association. He was a National Hispanic Scholarship Fund Scholar and worked in the law school's clinical program regarding political asylum and clerked for the law firm of Telesforos del Valle in New York City which practiced criminal defense in state and federal courts.

At the start of his career he was employed by the Law Offices of Alberto Palader and then started his own practice in 1990 as a solo practitioner. He concentrates his practice in the representation of claimants in personal injury and wrongful death matters pursuant to contingency fee agreement. He practices by himself with only the assistance of his wife as a legal assistant.

Aggravating Factors:

Not applicable since no discipline is recommended.

Mitigating Factors:

Not applicable since no discipline is recommended.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

On July 27, 2019, I issued my Report of Referee, recommending that Respondent be found not guilty of the allegations contained in the Bar's Complaint.

At page 56 of the Report, I held that "having prevailed in this matter, Respondent shall be awarded necessary taxable costs and attorney's fees, if any, allowed by law."

In their motion for reconsideration and/or clarification, The Florida Bar correctly stated that attorney's fees may not be awarded in a Bar disciplinary action. *The Florida Bar v. Chilton*, 616 So. 2d 449 (Fla. 1993) (In a Bar disciplinary proceeding, neither the Bar nor attorney subject to proceeding may recover attorney fees.).

The award of fees and costs was qualified by the phrase, "if any, allowed by law." In this case, the award is not allowed by The Florida Bar Rules. Therefore, the award is ineffective. **And this order serves to strike that language.**

In Bar disciplinary cases, costs are not assessed to the prevailing party in the same manner as in a civil proceeding.

Rather, the Rules Regulating the Florida Bar provide that a Respondent who prevails in a disciplinary case may only be awarded costs, "in the event that there was *no justiciable issue of either law or fact* raised by the Bar." R. Reg. Fla. Bar 3-7.6(q)(4) (emphasis added).

In the instant matter, no such finding was made by me. In fact, I cannot envision a circumstance in which The Florida Bar could raise "*no justiciable issue of either law or fact.*"

Merriam-Webster Dictionary defines *justiciable* as:

a. liable to trial in a court of justice;

b. capable of being decided by legal principles or by a court of justice

(The Respondent did not move for a directed verdict at the close of the Bar's case, and neither did I initiate a directed verdict *mea sponte*.)

Such a broad, vague and minimal standard effectively insulates The Florida Bar from a claim for recovery of costs.

It is regrettable that that is the case. I have conducted an in-depth and thorough analysis of the evidence in this case. I cannot think of a party more worthy of an award of attorney's fees and costs than this Respondent.

Dated this 31st day of July 2019.

Jorge E. Cueto, Referee
Lawson E. Thomas Courthouse
175 NW 1st Avenue, Room 1118
Miami, FL 33128

Original (via U.S. Mail) to:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

Conformed Copies to:

Maria L. Rubio for Respondent, via email to maria@marialrubio.com

Jennifer R. Falcone, Bar counsel, Miami Branch Office, via email to jfalcone@floridabar.org

Allison C. Sackett, Legal Division Director, The Florida Bar, via email to asackett@floridabar.org