

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PETER G. HERMAN,

Respondent.

Supreme Court Case  
No. SC17-2050

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

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## **PRELIMINARY STATEMENT**

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

References to the Report of Referee will be by the symbol “RR” followed by the corresponding page number (e.g., RR 1). References to specific pleadings will be made by title. References to the transcripts of the Final Hearing are by symbol “TR”, followed by day of the hearing (references to June 21, 2018 will be made by the number 1; June 22, 2018 by the number 2; June 25, 2018 by the number 3, June 26, 2018 by the number 4, and October 22, 2018 by the number 5) and the appropriate page number(s) (e.g., TR 2, 123).

References to Bar exhibits shall be by the symbol “TFB Ex.” followed by the appropriate exhibit number (e.g., TFB Ex.10). References to Respondent’s exhibits shall be by the symbol “R Ex.” followed by the appropriate exhibit number (e.g., R Ex. 1). References to the Rules Regulating The Florida Bar may be made as “Rule” or “Rules.”

## STATEMENT OF THE CASE AND FACTS

On November 16, 2017, The Florida Bar filed a complaint charging Respondent with misconduct in his personal Chapter 7 bankruptcy case related to his omission of his prepetition interest in a \$10 million contingency fee from two cases, where Respondent served as co-lead trial counsel for the prevailing parties in their respective claims against Home Depot and Security Mutual Life Insurance Co.<sup>1</sup> The complaint also charged that Respondent did not disclose prepetition transfers of funds out of his jointly held bank account.

The final hearing was held on June 21, June 22, June 25, and June 26, 2018, before the Honorable August A. Bonavita. The final hearing was bifurcated with the matter reconvening on October 22, 2018, for the parties to present their recommendations to the Referee regarding sanctions. Prior to the first witness being called to testify at the final hearing, the Referee, without objection, granted the Bar's motion for the Referee to take judicial notice of:

- the Findings of Fact and Conclusions of Law entered on August 5, 2013, in Respondent's personal Chapter 7 bankruptcy case In Re: Peter G.

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<sup>1</sup> Michael S. Powell, Plaintiff v. The Home Depot U.S.A., Inc., Defendant, No. 07-80435-civ-Hurley/Hopkins (S.D. Fla.).  
Member Services, Inc., Roger D. Banks, and R. Aaron Banks, Plaintiffs v. Security Mutual Life Insurance Company of New York and Archway Technology Services, Inc. Defendants, No. 3:06-cv-1164 TJM/Dep (N.D. N.Y.).

Herman, Debtor, Case No. 12-13989-JKO, Adv. No. 12-1785-JKO

(Bankr. S.D. Fla.) and

- the order entered on September 29, 2014 in Herman, Appellant v. CIB Marine Capital, LLC, et al, Appellees, Case No. 13-cv-62251-KMM (S.D. Fla.) by the Chief Judge of the U.S. District Court for the Southern District of Florida which affirmed the bankruptcy court's Findings of Fact and Conclusions of Law (RR 2, 16; TFB Ex. 3, 4).

Respondent filed his petition for Chapter 7 bankruptcy as a debtor on February 18, 2012 (TR 1, 45-46; TFB Ex. 9, 12). Respondent filed for bankruptcy because he did not have the funds available to pay a \$4,569,464.48 judgment that had been levied against him as a defendant in the case CIB Marine Capital, LLC v. Esquire Ventures, LLC, Case No. 2009CA010465 (Fla. 19th Cir. Ct. Dec. 9, 2011) (TR. 1, 142, 166; TFB Ex. 28). In June of 2013, the bankruptcy court held a two-day trial in Respondent's personal bankruptcy case and afterward the bankruptcy court issued its Findings of Fact and Conclusions of Law (TFB Ex. 3). The bankruptcy court concluded that Respondent's interest in the \$10 million fee was the property of his bankruptcy estate (TFB Ex. 3). The bankruptcy court denied Respondent's petition for discharge based on his concealment of his interest in the \$10 million fee, his false oaths in his bankruptcy schedules and Statement of

Financial Affairs (SOFA), and concealment of transfers within one year before his bankruptcy petition date (TFB Ex. 3). Subsequently, the Bar filed a complaint against Respondent for his misconduct in his personal bankruptcy case.

The Referee entered his Report of Referee on November 15, 2018, finding that Respondent failed to disclose his interest in the \$10 million fee in his schedules and Statement of Financial Affairs (SOFA) and this conduct was materially misleading (RR 41, 43, 48). The Referee recommended that Respondent receive an 18-month suspension from the practice of law and be found guilty of violating Rules Regulating The Florida Bar 3-4.3 (commission of an act that is unlawful or contrary to honesty and justice); 4-3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal); 4-8.4(a) (violating or attempting to violate the Rules of Professional Conduct); and 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) (RR 54).<sup>2</sup>

The Referee found the following mitigating factors: absence of a prior disciplinary record; character or reputation; personal or emotional problems; timely good faith effort to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and imposition of

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<sup>2</sup> The Referee found Respondent not guilty of violating any of the Rules charged as they relate to Respondent not disclosing the transfers of funds of his jointly held bank account to bank accounts held solely by his then ex-wife (RR 53-54).

other penalties or sanctions (RR 58-59). In aggravation, the Referee found that Respondent had a dishonest or selfish motive that was evidenced by the millions of dollars Respondent stood to gain by not disclosing his interest in the \$10 million fee (RR 57). The Referee found two additional aggravating factors, Respondent's substantial experience in the practice of law and Respondent's refusal to acknowledge the wrongful nature of his conduct (RR 57).

The Florida Bar called three witnesses to testify at the final hearing, Kenneth Welt, Jerry Markowitz, and Respondent.

Kenneth Welt, is a U.S. Trustee for the Southern District of Florida (TR 1, 41). Trustee Welt, a bankruptcy trustee with thirty-two years of experience, testified that he administers bankruptcy cases that are filed under Chapter 7 and Chapter 11 and he was assigned as the trustee in Respondent's Chapter 7 bankruptcy case (RR 18; TR 1, 41-44). Respondent filed his initial petition for Chapter 7 bankruptcy as a debtor on February 18, 2012, but the petition was a skeleton filing and not complete (TR 1, 43-46 and 49; TFB Ex. 9). Respondent filed the schedules for his bankruptcy case on March 20, 2012 (TR 1, 50-51; TFB Ex. 13). Trustee Welt did not know Respondent before he was assigned to Respondent's bankruptcy case, nor had he worked at Respondent's law firm, Tripp Scott, P.A. (hereinafter referred to as "Tripp Scott") (TR 1, 43-44).

The forms for petitions and schedules that debtors use are uniform throughout the United States and its territories (TR 1, 46). Trustee Welt stated that it is not the responsibility of the trustee to spend a lot of time researching every debtor and he relies on the debtors to be truthful and complete in their filings (RR 18; TR 1, 60-62). Trustee Welt reviewed Respondent's bankruptcy petition, schedules and Statement of Financial Affairs (SOFA) (TR 1, 54-55). As part of his filings in his Chapter 7 bankruptcy case, Respondent had to declare that his petition, schedules and statements were true and correct (TR 1, 49-54; TFB Ex. 10, 13, 15).

Trustee Welt was aware of the verdicts and judgments in the Home Depot and Security Mutual cases before Respondent filed his schedules on March 20, 2012, but he "had no substantiation at the time, because the debtor, who swore under oath did not put them in his schedules" (RR 19; TR 1, 97-99). Trustee Welt testified that Respondent did not mention in his bankruptcy schedules that he anticipated receiving a monetary benefit from an award distribution for his involvement in lawsuits against Home Depot and Security Mutual (TR 1, 63-64, 97, 99). Trustee Welt stated that while the schedules or SOFA may not per se have a section labeled with the word bonus, they provide a place for a debtor to include contingency rewards or contingency receivables so that a trustee and creditor can

have that information (TR 1, 107). Before March 20, 2012, Trustee Welt did not know what profit Respondent would receive as a result of the verdicts in the Home Depot and Security Mutual cases (TR 1, 124).

The Bar called attorney Jerry Markowitz to testify as an expert witness in bankruptcy and debtor/creditor law (TR 2; 6-7). Mr. Markowitz is a member of The Florida Bar who specializes in bankruptcy, debtor and creditor's rights and has practiced insolvency law since 1974 (TR 2, 6; TFB Ex. 34). He said the goal of an individual debtor in Chapter 7 bankruptcy is to get a discharge which means the debtor is free of debts (TR 2, 8). Mr. Markowitz testified that a debtor petitioning the bankruptcy court for relief under Chapter 7 has certain duties and those duties are spelled out in section 521 of Title 11 in the bankruptcy code (TR 2, 8-9).

The bankruptcy schedules are the official record that the debtor puts before the court; the debtor signs the schedules under penalty of perjury and there is an obligation to be truthful and honest in the responses to the questions to permit any party with an interest in the case to examine the filings and make whatever inquiry they deem appropriate (RR 34; TR 2, 21-24). Mr. Markowitz testified that question 17 of Schedule I replicates the requirement under section 521 that a debtor's duties include disclosing any "reasonably anticipated increase in income or expenditures

over the 12-month period following the date of the filing of the petition” (RR 34; TR 2, 8-10).

Mr. Markowitz testified that in his opinion Respondent’s interest in the \$10 million fee was property of the estate and his interest in the \$10 million fee should have been included on the initial schedules that Respondent filed in his bankruptcy case (TR 2, 15, 19-20). Mr. Markowitz stated that property of the estate is a broad concept and it includes all legal and equitable interest that a debtor has in property at the start of the case (TR 2, 13). Per Mr. Markowitz, a debtor can disclose information about work he completed before filing for bankruptcy although he has not received the money or asset in hand, under the following schedules:

- Schedule B question 19 - equitable or future interest life estates and rights or powers exercisable for the benefit of the debtor;
- Schedule B question 21 - other contingent and unliquidated claims of every nature; and
- Schedule C - property claimed as exempt.

(TR 2, 12-13)

Further, the contingent claims section of the bankruptcy schedules permits the debtor to disclose claims that have not been “reduced to a sum certain,” so the

creditors and trustee can have an opportunity to find out whether the contingent claim is of any value (TR 2, 21).

The Bar called Respondent as a witness and Respondent also testified in his own defense (TR 1, 128; TR 3, 107). By the time Respondent filed his petition as a debtor under Chapter 7 bankruptcy on February 18, 2012, he had been practicing law for 30 years (TR 1, 129). Respondent has been licensed to practice law in Florida since 1982 (RR 28; TR 1, 129). In 1981, Respondent began his career with Tripp Scott as a law clerk and in 2011 and 2012 he was a director at the law firm (TR 1, 129-130). Respondent testified that from the year 2006 forward his practice was more focused on intellectual property and he also handled infringement cases (TR 1, 130-131).

While he was working at Tripp Scott, Respondent formed the company Esquire Ventures, LLC with his brother, Mr. Heprin and possibly one other person (TR 1, 129, 143). In 2007, Respondent executed an unconditional guaranty on behalf of Esquire Ventures for \$6,000,787.00 (TR 1, 143-143; TFB Ex. 44). In December of 2011, the court entered a deficiency judgment against Respondent for approximately \$4.5 million as a result of a foreclosure action that was entered in favor of CIB Marine Capital against Esquire Ventures and a writ of garnishment was issued against his wages on December 29, 2011 (TR 1, 143; TFB Ex. 29, 44).

In 2011, while he worked at Tripp Scott, Respondent secured the largest judgment award for a client since he had been with the law firm, \$26 million for the plaintiffs in the Security Mutual case (TR 1, 131). Respondent represented plaintiffs Member Services, Rodger Banks and Banks' son in their lawsuit against Security Mutual under a contingency fee agreement they had with his firm (TR 1, 137, 142; TR 3, 29). Respondent testified that he started working on the Security Mutual case on November 4, 2010 and a judgment was entered in his clients' favor on October 13, 2011 (TR 1, 139; TFB Ex. 36). On March 13, 2012, Respondent signed the Satisfaction of Judgment confirming that the \$26 million judgment had been fully paid by the defendants in the Security Mutual case (TR 1, 138-139; TFB Ex. 35). Respondent acknowledged that prior to March 13, 2012, his co-counsel Alexander Brown was in settlement talks with the lawyers who were representing Security Mutual and he was copied on the emails of December 22, 2011 and February 3, 2012 when the settlement agreement was discussed (TR 1, 136, 140-142; TFB Ex. 41).

In the beginning of 2007, Michael Powell signed a contingency fee agreement with Tripp Scott and hired Respondent and Alex Brown to represent him in his patent dispute case against Home Depot (TR 1, 134; TR 4, 76-77). An Amended Final Judgment dated June 3, 2010, was entered against Home Depot

and in favor of Mr. Powell in the amount of \$23,450,889.13 (TR 1, 132; TFB Ex. 39). The judgment in the Home Depot case was affirmed on November 14, 2011 (TR 1, 132; TFB Ex. 40).

Ed Pozzuoli was the president of Tripp Scott and he also sat on the Tripp Scott compensation committee (TR 1, 146 -147; TFB Ex. 26). Respondent wrote Mr. Pozzuoli a number of emails to discuss how the contingency fees from the Home Depot and Security Mutual cases would be distributed at the law firm (TR 1, 156).

Respondent sent an email to Mr. Pozzuoli on December 6, 2011, to “discuss and finalize the formula for the allocation of the SML and Home Depot cases” (TR 1, 146-147; TFB Ex. 26). He emailed Mr. Pozzuoli on December 15, 2011, expressing his frustration and disappointment as he and Alex Brown procured the \$10 million fee in the Home Depot and Security Mutual cases and were not being kept in the loop (TR 1, 148-150; TFB Ex. 26; R Ex.1). Respondent testified that he and Alex Brown tried the cases and they procured the \$10 million fee (TFB 1, 150). Respondent emailed Mr. Pozzuoli on December 21, 2011, concerning the percentage that would be due him from the Home Depot and Security Mutual cases (TR 1, 151-152; TFB Ex. 26; R Ex.1).

On December 22, 2011, Respondent sent another email to Mr. Pozzuoli voicing his agreement with the proposal that five percent or less of the contingency fee should be set aside for others in the firm and stating that the issue had been vetted enough and he believed the matter should be resolved that day (TR 1, 154-156; TFB Ex. 26; R Ex.1). Respondent testified that he thought the money would come in 2011 (TR 1, 154).

On January 8, 2012, Respondent emailed Mr. Pozzuoli requesting that the firm reward him and Mr. Brown for the unprecedented result obtained and that the money from Home Depot and Security Mutual should be fairly and properly distributed (TFB Ex. 27).

On January 9, 2012, Respondent emailed Mr. Pozzuoli with a status update that the Home Depot award should be resolved in sixty days or less and the final details were being worked out in the Security Mutual settlement (TR 1, 161-163; TFB Ex. 26).

Respondent was still employed with the Tripp Scott law firm on March 20, 2012 (TR 4, 59). Respondent signed his bankruptcy schedules under penalty of perjury and filed the following response to question 17 of Schedule I: “Annual performance bonus (historically 65,000-70,000)” (TR 1, 180; TFB Ex.13). Respondent testified that in his mind, the 65,000-70,000 dollar amount that was

placed in parenthesis gave a clue as to what annual performance bonus he had gotten in the past and that he would likely receive a bonus in 2012 (TR 1, 169-170). Respondent testified that his counsel advised that he did not need to put any information under other contingent claims in section 21 of schedule B regarding the monetary award he was to receive for his work on the Home Depot and Security Mutual cases (TR 1, 169). Respondent provided contradictory testimony by stating that during his thirty years of practice at Tripp Scott a discretionary bonus was always paid out while also testifying that some years they did not get a bonus (TR 1, 170).

Respondent testified that there was no reference, on the face of his March 20, 2012, bankruptcy schedules, to the key role he had in procuring the \$10 million fee in the Home Depot and the Security Mutual cases (TR 4, 61). As a result of the contingency fee agreement, Respondent's law firm received approximately \$4.1 million for the Home Depot case and \$5.8 million for the Security Mutual case (RR 6). Respondent testified that he explained to his attorney, Bart Houston, that the fees for the Home Depot and Security Mutual cases would likely come in 2012 (TR 3, 127). In 2012, Tripp Scott allocated \$2.7 million to Respondent (TR 1, 175).

Respondent called the following witnesses: Bart Houston, Chad Pugatch, L. Louis Mrachek, Alexander Brown, Amy Galloway, Rodger Banks, Michael Powell, Thomas Lynch and Miles A. McCrane, III.

Bart Houston represented Respondent in his Chapter 7 bankruptcy case (TR 2, 92). He recommended to Respondent that he file for bankruptcy (TR 2, 92). He prepared Respondent's bankruptcy schedules and Respondent reviewed and signed them before they were filed (TR 2, 162). When he filed Respondent's bankruptcy petition on February 18, 2012, the judgments in the Home Depot and Security Mutual cases were in, but the fees had not been collected (TR 2, 110). Mr. Houston testified that the compensation committee had the discretion to give Respondent a bonus and Respondent did not have a property interest in the bonus at the time the bankruptcy petition was filed (TR 2, 109, 165).

Chad Pugatch testified that after the bankruptcy court denied Respondent's request for discharge, he became Respondent's attorney in his bankruptcy case (TR 4, 11-12, 18). Mr. Pugatch testified that his role in the bankruptcy case did not begin until after the bankruptcy trial was completed (TR 4, 38-39). Mr. Pugatch represented Respondent in the bankruptcy case on Respondent's claim that his \$2.7 million bonus was exempt (TR 4, 18). Mr. Pugatch testified that Respondent

reached a settlement with the trustee related to his claim to exempt his \$2.7 million bonus and Respondent received some money from the settlement (TR 4, 39-40).

Respondent called L. Louis Mrachek to testify as an expert in bankruptcy (TR 4, 82-83). Mr. Mrachek has practiced bankruptcy law for approximately 40 years (TR 4, 85). Mr. Mrachek testified that the central issue in the bankruptcy court's Findings of Fact and Conclusions of Law and the appeal was whether there was a misrepresentation sufficient enough for Respondent's petition for discharge to be denied (TR 4, 87-88). Mr. Mrachek testified that a vested interest has to be disclosed (TR 4, 88). Mr. Mrachek stated that, in his opinion, the bonus in this case was a mere expectancy and Respondent did not have to disclose it (TR 4, 88-89).

Alexander Brown testified that Respondent was his mentor (TR 3, 65). Mr. Brown was Respondent's co-counsel on the Home Depot case and the Security Mutual case (TR 1, 136; TR 3, 68). Mr. Brown testified that he had a "heavy hand" in helping bring in the \$10 million fee and he was anticipating a larger bonus because of the years he worked on the contingency cases (TR 3, 87-88). Mr. Brown's bonus in 2011 was less than \$50,000.00 and his bonus in 2012 was about \$600,000.00 (TR 3, 87, 94). Mr. Brown testified that the Home Depot and Security Mutual cases were resolved in February 2012 and the money arrived in early March (TR 3, 77).

Amy Galloway, an attorney at the Tripp Scott law firm from 2006 to July of 2013 or 2014, testified that she became a director at the firm and thinks Respondent is very ethical and honest (TR 3, 36-37, 39, 41, 49). Ms. Galloway stated that in 2012 the law firm awarded bonuses based on Respondent's two victories (TR 3, 46).

Rodger Banks, the plaintiff in the Home Depot case, testified that the trial was three and a half weeks long and that the jury came back with a favorable verdict of \$40 million (TR 3, 30-31). Mr. Banks believes Respondent is an honest person, but Respondent never discussed any of his personal financial issues with him (TR 3, 32, 34).

Michael Powell, the plaintiff in the Security Mutual case, testified that he was pleased with Respondent's services and he received a \$24 million judgment (TR 4, 81-82). Mr. Powell had no independent knowledge about Respondent's bankruptcy case and Respondent never told him that he was having financial problems (TR 4, 82-83).

Retired judge Thomas Lynch testified that he has known Respondent professionally for probably twenty-five to thirty years and Respondent appeared before him in court as a practicing attorney (TR 4, 7-8). He further testified that, in

his opinion, Respondent is an honest person who has a very good reputation (TR 4, 8-9).

Miles A. McCrane, III testified that Respondent has the highest reputation as a commercial litigator, is honest and has integrity (TR 3, 18).

During the sanctions hearing, Respondent testified that he expected to receive a substantial bonus as an employee at Tripp Scott (TR 5, 17, 36).

Respondent stated he has never denied that the emails he wrote to his law firm in the months before he filed for bankruptcy conveyed his expectation that he would get a substantial bonus in the future because of the work that was done on the files (TR 5, 26).

The Referee found that Respondent intentionally chose not to disclose his interest in the \$10 million fee in his schedules or Statement of Financial Affairs, although Respondent “knew that he was well positioned to actually receive a multi-million-dollar bonus from the \$10 Million Fee” (RR 43, 48). The Referee concluded that the emails between Respondent and the president of Tripp Scott that were admitted into evidence in the instant Bar case spoke volumes “as to Respondent’s state of mind around the time he filed his Petition, Schedules and SOFA” (RR 44). The Referee also found that the Pozzuoli emails “unquestionably reveal there was never any serious doubt in Respondent’s mind that he would be

receiving a substantial bonus totaling in the millions of dollars as a result of his role as co-lead counsel in the Contingency Fee Cases” (RR 44). Moreover, the Referee determined that the evidence and testimony presented in the instant Bar case established that Respondent’s conduct was materially misleading (RR 41).

## **SUMMARY OF ARGUMENT**

Respondent, engaged in materially misleading conduct in his personal bankruptcy case. The Referee made specific findings that Respondent's decision not to disclose his interest in the \$10 million fee was materially misleading and he intentionally misled the trustee and his creditors by failing to disclose his interest on his bankruptcy schedules and Statement of Financial Affairs. In his report, the Referee recommended that Respondent be found guilty of violating Rules Regulating The Florida Bar 3-4.3 (commission of an act that is unlawful or contrary to honesty and justice); 4-3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal); 4-8.4(a) (violating or attempting to violate the Rules of Professional Conduct); and 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) (RR 54).

Based on the Referee's findings, there is no reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions for an 18 month suspension; disbarment is the appropriate sanction in this case.

## ARGUMENT

**DISBARMENT IS APPROPRIATE WHEN AN ATTORNEY FILES FOR PERSONAL BANKRUPTCY, SUBMITS MATERIALLY MISLEADING INFORMATION ABOUT A SUBSTANTIAL MONETARY BONUS HE REASONABLY ANTICIPATED RECEIVING AND FAILS TO DISCLOSE HIS INTEREST IN A MULTI-MILLION DOLLAR FEE.**

The Referee recommended that Respondent receive an 18-month suspension from the practice of law for violating four Rules Regulating The Florida Bar. (RR 54). After a four-day trial, the Referee made specific findings as to Respondent's conduct in his personal bankruptcy case as follows:

- Respondent's "failure to disclose his interest in the \$10 Million Fee was materially misleading,"
- Respondent "had a clear motive not to disclose this bonus in the Schedules," and
- Respondent's explanation about why he did not disclose the substantial multi-million-dollar bonus expected anywhere in his schedules and Statement of Financial Affairs was not credible.

(RR 41, 42, 44)

In his report, the Referee recommended that Respondent be found guilty of violating Rules 3-4.3; 4-3.3(a)(1); 4-8.4(a); and 4-8.4(c). The Referee's specific

findings about the misconduct committed by Respondent in his personal bankruptcy case, caselaw and the Florida Standards for Imposing Lawyer Sanctions warrant disbarment.

“The Supreme Court shall have exclusive jurisdiction to regulate the admissions of persons to the practice of law and the discipline of the persons admitted.” Art. V, § 15, Fla. Const. The Court has broad discretion to review a Referee’s recommended sanctions and determine what sanction is appropriate. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). This Court usually will not second-guess the Referee’s sanction recommendation, if the recommendation is reasonable in light of existing caselaw and the Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Berthiaume, 78 So.3d 503, 510 (Fla. 2011); The Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999).

This matter involves Respondent in his personal capacity as a debtor seeking protection under Chapter 7 bankruptcy. The bankruptcy court denied Respondent’s request for discharge citing to Respondent’s concealment of his interest in the \$10 million fee, false oaths in his bankruptcy schedules and Statement of Financial Affairs and undisclosed transfers (TFB Ex. 3). In the Bar proceeding, the Referee found that Respondent engaged in materially misleading conduct by not disclosing his interest in the \$10 million fee, all while knowing that “he was well positioned

to actually receive a multi-million-dollar bonus from the \$10 Million fee” (RR 41, 43). Additionally, the Referee found that Respondent had a clear motive not to disclose because this put him in a position to retain the “bonus free from any claim of his prepetition creditors” (RR 43).

Respondent is not excused from abiding by the Rules just because his actions occurred outside of an attorney-client relationship. “This Court has long held that ethical violations which occur while a member of The Florida Bar is not acting as an attorney can nonetheless subject the attorney to disciplinary proceedings.” The Florida Bar v. Swann, 116 So.3d 1225 (Fla. 2013). Nor is he permitted to use advice of counsel as a defense to his violations of the Rules Regulating The Florida Bar. The Florida Bar v. St. Louis, 967 So.2d 108, 118 (Fla. 2007). Respondent declared, under penalty of perjury, that the information contained in his bankruptcy petitions, schedules, and statements that were filed with the bankruptcy court were true and correct (TR 1, 49-54; TFB Ex. 10, 13, 15).

Respondent strongly believed that his efforts in the Home Depot and Security Mutual cases were instrumental in procuring a \$10 million fee for Tripp Scott (TR 1, 150). Even before he filed for bankruptcy on February 18, 2012, Respondent sent a number of emails to the president of Tripp Scott in December 2011 and January 2012 describing how he thought the \$10 million fee should

be divided and what percentage he should receive from the fee (TFB Ex. 26-27). The Referee specifically stated that there is no question that those emails that Respondent sent to Mr. Pozzuoli “reveal there was never any serious doubt in Respondent’s mind that he would be receiving a substantial bonus totaling in the millions of dollars as a result of his role as co-lead counsel in the Contingency Fee Cases” (RR 44). Respondent confirmed this during his testimony at the October 22, 2018 sanctions hearing when he stated that he has never denied that the emails he wrote to his law firm in the months before he filed for bankruptcy conveyed his expectation that he would get a substantial bonus in the future because of the work that was done on the files (TR 5, 26).

It clearly states in the Declaration Under Penalty of Perjury to Accompany Petitions, Schedules and Statements Filed Electronically that Respondent signed on March 19, 2012, that the debtor declares under penalty of perjury that he has “reviewed and signed the original(s) of the document(s) identified and the information contained in the Verified Document(s) is true and correct to the best of my knowledge and belief” (TFB Ex. 15). Respondent was not forthright or candid in his March 20, 2012, bankruptcy schedules. Respondent had the opportunity to make a candid disclosure in question 17 of Schedule I by describing how much he reasonably anticipated his income would increase within the year, but he chose not

to make that disclosure. Instead, Respondent answered question 17 of Schedule I as follows: “Annual performance bonus (historically 65,000-70,000)” (TFB Ex. 13).

The Court has a general rule of strict discipline for attorneys who “deliberately and knowingly perpetrate a fraud on the court.” The Florida Bar v. Kickliter, 559 So.2d 1123, 1124 (Fla. 1990). In Kickliter, the Court disbarred a lawyer who committed fraud, by forging his client’s signature on a will and submitting that will for probate.<sup>3</sup>

In circumstances where “lawyers are litigants they do not cast aside the oath they take as an attorney or their professional responsibilities.” The Florida Bar v. Cibula, 725 So.2d 365 (Fla. 1998). “Not only does the law demand truthfulness under oath, but the obligations of our profession demand it.” Cibula, 725 So.2d 360 at 365. Respondent was trying to discharge his debts through bankruptcy (RR 43). About two months before Respondent filed for bankruptcy, a deficiency judgment of approximately \$4.5 million was entered against him and he could not pay it (TR 1, 142,166; TFB Ex. 28). Respondent was the one seeking bankruptcy protection, and as the debtor, it was his sole responsibility to be truthful in his petition,

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<sup>3</sup> See also, The Florida Bar v. Tuerk, Case No. SC17-62 (Fla. July 20, 2017). This Court disbarred an attorney for misrepresenting to the Court that he did not receive notice of court proceedings.

schedules and Statement of Financial Affairs. The Referee found that Respondent intentionally misled the trustee and his creditors by not disclosing his interest in the \$10 million fee in his schedules and Statement of Financial Affairs (RR 49).

In The Florida Bar v. Hall, 49 So.3d 1254 (Fla. 2010), this Court found that disbarment was appropriate when a lawyer made a misrepresentation in a personal matter that was not related to that lawyer's representation of a client. In the Hall case, a lawyer, with no prior disciplinary history was found guilty of a single violation of Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The Referee found that the lawyer changed the title of a document and added additional language to a lease in a clandestine fashion to gain a personal benefit. This Court found that disbarment was appropriate under Florida Standards for Imposing Lawyer Sanctions 5.11(b) and 5.11(f). This Court also concluded that although Hall was well respected in the community she engaged in "dishonest and fraudulent conduct in her personal affairs, which demonstrates that she failed to maintain personal integrity." Hall, 49 So.3d at 1261.

Respondent, like the lawyer in Hall, was trying to obtain a personal benefit. Respondent was seeking a discharge in bankruptcy. And like the lawyer in Hall, Respondent has no prior discipline history and the Referee found in mitigation that Respondent has good character and a positive reputation in the community (RR

58). Respondent's misconduct was more egregious than Hall's as he was found in violation of four Rules (3-4.3; 4-3.3(a)(1); 4-8.4(a); and 4-8.4(c)), one of which (4-3.3(a)(1)) resulted from Respondent making materially misleading statements to the court.

This Court also determined that disbarment was the appropriate sanction in The Florida Bar v. Kaufman, 684 So.2d 806 (Fla. 1996). In Kaufman, the referee recommended that a lawyer be disbarred for actions he took as a landlord and not as an attorney. A civil judgment for more than \$333,000.00 was entered against Kaufman in his capacity as a landlord. The judge in the civil case issued an order stating Kaufman was hindering the judicial process and hiding his assets. A default judgment was entered against Kaufman in the Bar proceeding and the Referee recommended that he be found guilty of violating Rules 4-3.3(a)(1) (candor toward the tribunal); 4-3.4(a) (fairness to opposing party and counsel); 4-8.4(a) (misconduct); 4-8.4(c) (misrepresentation); and 4-8.4(d) (conduct prejudicial to the administration of justice). The Court in Kaufman determined that disbarment was the appropriate sanction under 5.11(f) and 6.11(a) of the Florida Standards for Imposing Lawyer Sanctions. Kaufman, 684 So.2d at 810. Similarly, Respondent also had a civil court judgment levied against him, and in his capacity as a debtor

in bankruptcy, the bankruptcy court found that Respondent concealed his interest in a \$10 million fee (TFB Ex. 3, 28).

In The Florida Bar v. Rood, 620 So.2d 1252 (Fla. 1993), this Court approved the referee's recommended sanction of disbarment for a lawyer who was found in violation of the Rules in a matter that was unrelated to his representation of a client. A jury determined that the lawyer had committed fraud and conspiracy to commit fraud and awarded damages in the amount of \$196,000.00 in favor of the opposing party. After the judgment was entered against him, Rood conveyed a piece of property to his father without receiving any consideration for the transferred property. When the opposing party filed proceedings alleging that Rood transferred the property to his father to avoid paying the judgment, the trial court concluded that Rood intended to defraud his creditors when he conveyed the property to his father, thus hindering his creditors' collection efforts. In the Bar disciplinary proceedings, the referee found that Rood "engaged in fraudulent conduct" when he conveyed the property to his father and that the lawyer lacked the assets to pay the judgment. The referee recommended that Rood be found guilty of violating Rules 4-3.3(a)(1) (candor toward the tribunal); 4-3.3(a)(4) (offer evidence that lawyer knows to be false); 4-8.4(b) (commit a criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer); 4-8.4(c)

(dishonesty, fraud, deceit, or misrepresentation); and 4-8.4(d) (conduct prejudicial to the administration of justice).

Recently, this Court in The Florida Bar v. Kinsella, 44 Fla. L. Weekly S14 (Fla. Dec. 20, 2018) disapproved of the referee's recommendation that a lawyer receive a ten-day suspension and ordered the lawyer to show cause why a more severe sanction "up to and including disbarment" should not be imposed. The Referee recommended that Kinsella be found in violation of Rules 3-4.3 (misconduct and minor misconduct); 3-4.4 (criminal conduct); 4-8.4(b) (criminal act that reflects adversely on honesty trustworthiness, or fitness as a lawyer); and 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation) for misconduct unrelated to the practice of law. Approximately three months after being admitted to the Bar, Kinsella was arrested for stealing \$760.00 from the department store where she worked. She entered a no contest plea to a charge of misdemeanor first degree petit theft, adjudication was withheld and she was placed on twelve months of probation. The referee found that Kinsella showed significant remorse. In imposing a three-year suspension, the Court pointed out that there was extensive mitigation, Kinsella was remorseful, and she voluntarily entered treatment to address her debt management issues.

Respondent was also in financial distress when he filed for bankruptcy. However, in this case, the Referee did not find remorse as a mitigating factor (RR 58-59). In fact, the Referee found in aggravation that Respondent has refused to acknowledge the wrongful nature of his conduct (RR 57). Respondent is not a novice lawyer. Respondent had been practicing law for 30 years when he filed for bankruptcy and submitted documents that were materially misleading. Respondent did not disclose his interest in the \$10 million fee in his bankruptcy schedules or Statement of Financial Affairs, although he reasonably anticipated receiving a substantial bonus because of his performance as co-lead trial counsel on the Home Depot and Security Mutual cases. Respondent's conduct was misleading, intentional, and motivated by self-interest. Also, unlike Kinsella, the instant case was more egregious because it involved a fraud on the court.

In The Florida Bar v. Adler, 126 So.3d 244, 247 (Fla. 2013), this Court stated that the "Court has moved towards stronger sanctions for attorney misconduct." "A bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct." The Florida Bar v. Lawless, 640 So.2d 1098, 1100 (Fla. 1994). In light of the Rule violations committed by

Respondent, the findings of the Referee, caselaw, and the Florida Standards for Imposing Lawyer Sanctions, disbarment is the only appropriate sanction here.

**CONCLUSION**

The Florida Bar respectfully requests that this Court reject the Referee's disciplinary recommendation and enter an order of disbarment.

A handwritten signature in cursive script that reads "Joi Pearsall".

Joi L. Pearsall, Bar Counsel

## CERTIFICATE OF SERVICE

I certify that this Initial Brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida with copies provided via E-mail to Respondent's Counsels, David Bill Rothman, Rothman & Associates, P. A., 200 S. Biscayne Blvd., Ste. 2770, Miami, FL 33131- 5300 at [dbr@rothmanlawyers.com](mailto:dbr@rothmanlawyers.com); Jeanne T. Melendez, via E-mail at [JTM@Rothmanlawyers.com](mailto:JTM@Rothmanlawyers.com) and to Staff Counsel, The Florida Bar via E-mail at [aquintel@floridabar.org](mailto:aquintel@floridabar.org) on this 14 day of February, 2019.



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**CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN**

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

A handwritten signature in cursive script that reads "Joi Pearsall".

Joi L. Pearsall, Bar Counsel