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)

AMENDED REPLY/CROSS-ANSWER BRIEF ON APPEAL OF THE FLORIDA BAR

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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."

References to Cross-Petitioner/Respondent's Answer and Cross-Initial Brief shall be by the symbol "RACIB" followed by the appropriate page number (e.g., RACIB 1).

STATEMENT OF THE CASE AND FACTS

The Florida Bar herein adopts and reincorporates its Statement of the Case and Facts, as stated in its Initial Brief that was filed in this cause on February 14, 2019. The Statement of the Case and Facts that is included in Respondent's Cross-Petitioner/Respondent's Answer and Cross-Initial Brief is argumentative and contains opinions held by Respondent. The Statement of the Case and Facts should be fair, complete, and objective. Williams v. Winn Dixie Stores, Inc., 548 So.2d 829 (Fla. 1st DCA 1989); Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991). The Amended Reply/Cross Answer Brief on Appeal of The Florida Bar follows.

SUMMARY OF ARGUMENT

The Florida Bar appeals the Referee's recommendation on sanctions. The Referee's recommendation that Respondent is guilty of violating Rules 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) is buttressed by competent and substantial evidence (RR 54). As the trier of fact, the Referee presided over a four-day final hearing where he personally observed all twelve witnesses testify and he received further testimony on a fifth day that was set aside for the parties to make their recommendations regarding sanctions.

Respondent filed for personal bankruptcy under Chapter 7. Prior to his bankruptcy petition, schedules and Statement of Financial Affairs (hereinafter referred to as "SOFA") being submitted to the federal bankruptcy court, Respondent was required to attest that he had read the documents and that those documents were true and correct. Respondent was required to disclose any reasonably anticipated increase or decrease in income he expected to receive in the next twelve months. Respondent reasonably expected he would receive a substantial bonus somewhere in the millions of dollars, far exceeding any bonus he

had received from his law firm in the past. In anticipation of his financial windfall, Respondent sent numerous emails to the president of his law firm which detailed how Respondent thought the firm should divide a multi-million dollar contingency fee, how quickly Respondent believed this distribution should be accomplished and how much Respondent should receive for his role in securing the $10 million fee.

Respondent intentionally chose not to disclose his interest in a $10 million contingency fee in his bankruptcy schedules or SOFA. Respondent, who petitioned the bankruptcy court to grant him a financial reprieve, purposefully did not include information in his bankruptcy court filings that he expected to receive a substantial financial bonus from his law firm. The Referee appropriately found that there was clear and convincing evidence that Respondent's conduct in his bankruptcy case was intentional, materially misleading and motivated by self-interest (RR 41, 48, 49, 57). The Referee's findings of fact and recommendation on guilt should be upheld.

As to the disciplinary sanction, the Referee erred in recommending an 18-month suspension. Under the facts and circumstances of this case, the only appropriate sanction is disbarment.

ARGUMENT

(THE FLORIDA BAR'S ANSWER BRIEF)

THE REFEREE PROPERLY FOUND THAT RESPONDENT ENGAGED IN DISHONEST CONDUCT IN VIOLATION OF THE RULES REGULATING THE FLORIDA BAR.

"A referee's recommendation as to guilt will be approved by the Court if the referee's factual findings are sufficient under the applicable rules to support the recommendation." The Florida Bar v. Parrish, 241 So.3d 66 (Fla. 2018), *citing*, The Florida Bar v. Shoureas, 913 So.2d 554, 557-558 (Fla. 2005). Respondent, as the objecting party in this case, has the burden of showing that this Referee's findings of fact are clearly erroneous. The Florida Bar v. Barrett, 897 So.2d 1269, 1275 (Fla. 2005).

A. Competent and substantial evidence exists in the record to support the Referee's findings that Respondent deliberately or knowingly materially misrepresented his interest in a $10 million fee in his personal bankruptcy schedules and Statement of Financial Affairs.

Respondent, a member of The Florida Bar since 1982, was not a novice lawyer when he filed his petition, schedules and SOFA in his personal Chapter 7 bankruptcy case (TR 1, 45-46, 129; TFB Ex. 9, 13; RR 28). Respondent held the title of director at the law firm of Tripp Scott, P.A. and his practice at Tripp Scott involved complex litigation in intellectual property and infringement (TR 1, 130-131; RR 50). In December of 2011, Respondent had a $4.5 million deficiency

judgment entered against him as the defendant in a civil case and thereafter a writ of garnishment was issued against his wages (TR 1, 143, 166; TFB Ex. 29, 44).[1] In 2012, Respondent filed for personal bankruptcy because he did not have the money to pay the $4.5 million deficiency judgment (TR 1, 166). The bankruptcy court denied Respondent's request for discharge finding that Respondent intentionally concealed his interest in the $10 million fee and the U.S. District Court for the Southern District of Florida affirmed the bankruptcy court's Findings of Fact and Conclusions of Law (TFB Ex. 3, 4).[2]

In 2011, Respondent, as co-lead counsel for the prevailing party in a civil case against Security Mutual Life Insurance Co., secured the largest judgment award ($26 million) he had ever received over his 30 years with Tripp Scott (TR 1, 131). In 2010, Respondent was co-lead counsel for the prevailing party in a case against Home Depot, where the judgment award was $23,450,889.13 (TR 1, 132; TFB Ex. 39). Starting on December 6, 2011, Respondent began emailing Ed Pozzuoli, president of Tripp Scott, regarding the contingency fees from the

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1 Respondent was a defendant in the case CIB Marine Capital, LLC v. Esquire Ventures, LLC, Case No. 2009CA010465 (Fla. 19th Cir. Ct. Dec. 9, 2011) (TFB Ex. 28).

2 In Re: Herman, Debtor, Case No. 12-1398-JKO, Adv. No. 12-1785-JKO (Bankr. S.D. Fla. 2013) and Herman, Appellant v. CIB Marine Capital, LLC, et al, Appellees, Case No. 13-cv-62251-KMM (S.D. Fla. 2014).

Security Mutual and Home Depot cases (collectively referred to as the "contingency fee cases") to discuss how he believed the money should be divided at the firm; what percentage was due to him from these cases; how he was disappointed that he and his co-counsel who procured the $10 million fee were not being kept in the loop; and how the firm should reward him for this unprecedented result (TR 1, 146-152, 154-156, 161-163; TFB Ex. 26, 27; R Ex. 1). When Respondent began emailing Mr. Pozzuoli regarding the division of the money from the contingency fee cases, Mr. Pozzuoli was also on the firm's compensation committee (TR 1, 145).

The Referee found that based on the evidence presented in the Bar disciplinary proceeding that:

- "[R]espondent's failure to disclose his interest in the $10 Million Fee was materially misleading." (RR 41).

- "[R]espondent knew that he was well positioned to actually receive a multi-million-dollar bonus from the $10 Million Fee." (RR 43).

- "To be sure, those emails speak volumes as to Respondent's state of mind around the time he filed his Petition, Schedules and SOFA. As stated, they 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).

- "Further, as was pointed out in the BK Orders by not disclosing his bonus,

Respondent was in a position to retain for himself his $2.7 Million bonus free from any claim by his prepetition creditors, including CIB. From this it can be inferred that Respondent had a clear motive not to disclose this bonus in the Schedules." (RR 43).

- "It follows that while both the Trustee and CIB may have been aware of the verdicts in the Contingency Fee Cases, by not disclosing his interest in the $10 Million Fee, Respondent intentionally misled the Trustee and creditors." (RR 49).

Respondent's claim that the Referee did not take into account his contention that he did not include any reference to his interest in the $10 million contingency fee in his schedules or SOFA based on the advice of his bankruptcy attorney rings hollow. The "mere fact that the referee ruled against respondent does not demonstrate that the referee erred or prohibited respondent from presenting a defense." The Florida Bar v. Bethiaume, 78 So.3d 503, 507 (Fla. 2011). Not only did the Referee devote a section of his report to Respondent's contention, the Referee specifically addressed why he rejected Respondent's argument on this point. The Referee stated the following in his report:

- "First and arguably foremost, reliance on advice of counsel is not available as a defense in a Bar discipline proceeding." (RR 49).

- "Second, as the Bar argues, it is Respondent, and not his attorney, that is ultimately responsible for the accuracy of the factual information contained in the Schedules and SOFA. Respondent and not his attorney is the one who declares under oath that the information contained in those items is true and accurate." (RR 49, 50).

- "[R]espondent conducted his own legal research on the issue as to whether he was required to disclose his bonus from the $10 Million Fee in the Schedules and SOFA. This clearly undermines any claim that his decision not to disclose this rested entirely on the advice of his attorney." (RR 50).[3]

In The Florida Bar v. St. Louis, 967 So.2d 108 (Fla. 2007), this Court found that respondents in Florida Bar disciplinary proceedings cannot avail themselves of the defense of advice of counsel and that a lawyer is required to adhere to the rules of professional conduct "even if the lawyer is instructed otherwise by another person." Respondent wrongly asserts that the Referee's reliance on the St. Louis case is misplaced. Respondent argues that the Referee should not have used the St. Louis case to reach the conclusion that this Respondent could not avail himself of the advice of counsel defense in this bar case. The Referee properly relied on this caselaw and this principle as one of his reasons for rejecting Respondent's advice of counsel defense. Moreover, none of the Rules that the Referee is recommending that Respondent be found guilty of specifically state that Respondent's misconduct can be excused because it was based on the advice of his counsel.[4]

In The Florida Bar v. Adorno, 60 So.3d 1016 (Fla. 2011), this Court found that a lawyer was responsible for his own misconduct despite his claim that he

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3 Respondent conducted an "independent review of the applicable case law…" (RACIB 43).

4 "Thus, a defense based on advice of counsel is not available to respondents in Florida Bar discipline cases unless specifically provided for in a rule or considered as a matter in mitigation." The Florida Bar v. St. Louis, 967 So.2d at 118.

should be found not guilty of violating the Rules because "he relied on the advice of others." The Court in Adorno, found that Rule 4-5.2(a) is unambiguous and states a "lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." Adorno, 60 So.3d at 1028. The Adorno opinion cited to the St. Louis case for the proposition that the defense of advice of counsel is not available to respondents in Bar discipline cases. Adorno, 60 So.3d at 1028. The evidence presented in the instant case shows that Respondent had been a member of The Florida Bar well prior to when the schedules and SOFA were filed in his Chapter 7 bankruptcy case, and thus, bears full responsibility for his violation of the Rules Regulating The Florida Bar.

Respondent's claim that his due process rights were violated in this case is completely without merit. In bar disciplinary proceedings, due process is achieved "where the attorney is served with notice of the Bar's charges and is afforded an opportunity in the disciplinary hearing to be heard and defend himself." The Florida Bar v. Tipler, 8 So.3d 1109 (Fla. 2009). The Referee permitted Respondent to present his advice of counsel defense at the final hearing (RACIB 41). Not only did Respondent testify at the final hearing, but so did his bankruptcy attorney Bart Houston. The fact that the Referee took a position contrary to Respondent does not

mean that Respondent did not receive due process. Rather, Respondent was provided every opportunity to put forth a vigorous defense in this case.

There is no question that Respondent was in a superior position to know that he expected to receive a substantial bonus from the $10 million contingency fee, but he failed to disclose this knowledge in his schedules or SOFA (TR 4, 61; TR 5, 17, 26, 36; RR 43). There is no question that Respondent believed that he, along with his co-counsel, had procured the $10 million fee in the Home Depot and Security Mutual cases. It is with this belief that he sent numerous emails to the president of his law firm to discuss how the contingency fees from those two cases would be distributed at the law firm and to finalize the formula for the allocation of the fees from the Security Mutual and Home Depot cases. (TR 1, 146 -147 151-152, 156; TFB Ex. 26, 27; R Ex. 1). There is no question that Respondent knew that he was required to be truthful in his bankruptcy petition, schedules and SOFA (TFB 1, 180; TFB Ex. 9, 10, 13, 15). "Because the Schedules and SOFA are submitted under oath, the Schedules and SOFA are official records provided by Respondent to the Bankruptcy Court" (RR 42). There is competent and substantial evidence in the record to demonstrate that Respondent's actions were deliberate or knowing, dishonest and in violation of Rules 3-4.3, 4-3.3(a)(1), 4-8.4(a), and 4-8.4(c).

B. The Referee as the trier of fact, properly considered the final hearing evidence and the rulings of the bankruptcy court and U.S. District Court in reaching his conclusion that Respondent's conduct violated the Rules Regulating The Florida Bar.

The Referee completed an independent review of the evidence; he did not rely solely on the bankruptcy court orders that were issued in Respondent's Chapter 7 bankruptcy case (RR 40, 44). In addition to the findings in the bankruptcy court orders, the Referee considered the testimony and evidence presented in this case, including evidence and testimony presented by Respondent that he decided not to disclose in his schedules or SOFA that he was expecting a substantial bonus in the millions of dollars because he believed that the bonus was discretionary (RR 40, 41, 44, 45). A "referee in a bar disciplinary proceeding can properly rely upon facts established in orders and decisions of other tribunals to support his or her findings of fact." The Florida Bar v. Gwynn, 94 So.3d 425, 430 (Fla. 2012). The Referee found that the Bar had met its burden in this case and that there is clear and convincing evidence that Respondent violated Rules 3-4.3, 4-3.3(a)(1), 4-8.4(a) and 4-8.4(c) (RR 40, 41).

"To succeed in challenging a referee's findings of fact, the challenging party must establish there is a lack of evidence in the record to support such findings or that the record clearly contradicts the referee's conclusions." The Florida Bar v. Glueck, 985 So.2d 1052 (Fla. 2008). In fact, the Respondent cannot meet this

burden by "simply pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings." Glueck, 985 So.2d at 1056. The Referee is in the best position to judge the credibility of witnesses and to resolve conflicts in the testimony. The Florida Bar v. Batista, 846 So.2d 479 (Fla. 2003). In this case, the Referee found that Respondent's purported reason for not making any disclosure in his schedules and SOFA that he believed he would receive a bonus of millions of dollars because of his work in the contingency fee cases was not credible (RR 44). The Referee found Respondent's assertion that he decided not to disclose that he expected to receive a substantial bonus because the bonus was a discretionary award was contrary to the evidence (RR 44). Furthermore, the Referee found that the emails Respondent sent to the president of Tripp Scott revealed that "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).

In his report, the Referee made note of Respondent's argument that CIB, one of his creditors, took inconsistent legal positions in the bankruptcy case and in a subsequent state court proceeding (RR 45-46). The Respondent's claim that the Referee disregarded his argument on this point is not supported by the record.

Ultimately, it was the bankruptcy court, and not CIB, that made the determination that Respondent's interest in the $10 million fee from the contingency cases was vested. The Referee did not find the Respondent's argument to be persuasive (RR 46). In his report, the Referee also noted that the bankruptcy court had determined that "Respondent was required to disclose his inchoate bonus for the $10 Million Fee" (RR 46). The Referee concluded that Respondent's disclosure in his schedules that "any reasonably anticipated increase in his income over the next twelve (12) months would be 'historically 65,000-70,000,' was simply not true." (RR 46).

In his RACIB, Respondent states that the 2013 decision of the Bankruptcy Appellate Panel of the Eighth Circuit, In Re: Klein-Swanson, 488 B.R. 628 (8th Cir. BAP 2013) guided him and his counsel to the conclusion that his potential bonus "could not properly be considered property owned by Mr. Herman as of his Petition date" (RACIB 49-50). The evidence in this case shows that Respondent submitted his bankruptcy petition, schedules and SOFA to the bankruptcy court more than a year before Klein-Swanson was decided.

Similarly, here as in his appeal of the bankruptcy court's Findings of Fact and Conclusions of Law, Respondent argues that Klein-Swanson and Rionda v. HSBC Bank U.S.A., N.A., No. 10-20654, 2010 WL 547675 (Bankr. S.D. Fla.

2010) support his position that the bonus was not property of the bankruptcy estate. It is important to note that the Chief Judge of U.S. District Court for the Southern District of Florida in his opinion affirming the bankruptcy court's Findings of Fact and Conclusions of Law in Respondent's bankruptcy case analyzed Klein-Swanson and Rionda, determined that the two cases were inapplicable in Respondent's case and found that the bankruptcy court's Findings of Fact and Conclusions of Law were not clearly erroneous (TFB Ex. 4). The bankruptcy court ruled that Klein-Swanson and Rionda were distinguishable from Respondent's bankruptcy case and were not applicable under these facts and circumstances because:

- *"[T]he $10 million fee was incontrovertibly tied directly to the Debtor's prepetition labors in working up the cases, taking them to trial and winning at trial."*

- *"[T]he Debtor's interest in the $10 Million Fee was understood to be a component of his compensation as a Director…."*

- *"[T]he Debtor provided Tripp Scott with consideration (work for which he was not fully paid) for the bonus paid out of the $10 Million Fee and that bonus was part of his compensation package." (TFB Ex. 3).*

C. The Referee did not err in finding that Respondent's reasonably anticipated bonus should have been disclosed on his schedules or SOFA.

"Referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they deem relevant in resolving the

factual question." The Florida Bar v. Rood, 620 So.2d 1252 (Fla. 1993). Prior to the presentation of witnesses at the final hearing, the Referee without objection, granted the Bar's motion to take judicial notice of the bankruptcy court's Findings of Fact and Conclusions of Law of August 5, 2013 and U.S. District Court order of September 29, 2014, which affirmed the bankruptcy court's decision. Respondent's displeasure with the Findings of Fact and Conclusions of Law of the bankruptcy court or the affirmance of that ruling by the U.S. District Court does not take away the Referee's authority to consider the rulings of those tribunals.

The bankruptcy court in its Findings of Fact and Conclusions of Law found that Respondent's interest in the $10 million fee was property of his bankruptcy estate, that Respondent had a vested prepetition interest in the $10 million contingency fee, that Respondent should have disclosed this information in his schedules or SOFA and that Respondent's concealment of his interest was done with the intent to "hinder, delay or defraud" his creditors and the trustee (TFB Ex. 3). The bankruptcy court found that Respondent's misrepresentations on Schedule I provided an independent basis for denying his discharge and the evidence showed that Respondent expected to receive a multi-million dollar bonus from Tripp Scott in 2012 when he filed his Chapter 7 case, but he only disclosed on Schedule I that

he anticipated an "[a]nnual performance bonus (historically 65,000-70,000)" (TFB Ex. 3).

The Referee stated in his report that there were various places in the schedules where Respondent could have disclosed his reasonably anticipated increase in income (RR 44). The bankruptcy court listed specific sections in the schedules where Respondent could have disclosed his interest in the $10 million fee, including schedule B, schedule C and schedule I (TFB Ex. 3). The Bar's expert Jerry Markowitz testified that Respondent's interest in the $10 million fee was property of the estate and he should have disclosed his interest in this prepetition asset in his initial bankruptcy schedules (TR 2, 15, 19-20, 72). Respondent's expert witness L. Mrachek testified that a vested interest had to be disclosed, but he took the position that Respondent's bonus in this case was a mere expectancy that did not have to be disclosed (TR 4, 88-89).

The Referee's finding that Respondent should have disclosed his reasonably anticipated income is supported by the competent and substantial evidence in the record.

D. The Referee's finding that Respondent had a clear motive not to disclose anywhere in his schedules and SOFA that he believed he would receive a bonus in the millions of dollars because of work he completed prepetition on two contingency fee cases, that resulted in multi-million dollar judgment awards, is supported by competent and substantial evidence.

In this case, Respondent knew he was getting a substantial bonus as a result of work that he had completed prepetition and he sent numerous emails to the president of his law firm about what his share of the $10 million contingency fee should be. In his RACIB, Respondent acknowledges that he wrote the emails to Mr. Pozzuoli, but describes them as being insufficient to prove that when he signed his schedules, he believed he had a vested right to a bonus (RACIB 42). Neither the bankruptcy court, the U.S. District Court or the Referee agreed with Respondent on this point.

On December 6, 2011, a hearing took place on CIB's Motion for Deficiency Judgment in the Esquire Ventures case and on December 9, 2011, a final judgment of deficiency was entered against Respondent in the amount of $4,569,464.48 (TFB Ex. 28). From December 6, 2011 to January 9, 2012, Respondent sent Mr. Pozzuoli the following emails:

- *December 6, 2011 - "I wanted to discuss and finalize the formula for the allocation of the SML and Home Depote [sic] cases …." (TFB Ex. 26; R Ex. 1).*

- *December 15, 2011 - "I hope you understand my frustration and disappointment that the people who procured the $10 million dollars are being kept out of the loop." (TFB Ex. 26; R Ex. 1).*

- *December 21, 2011 - "It is a heck of a lot of money that is going to result in everybody getting a great payday …. I appreciate the fact that the firm took some risk in the 3-year HD litigation, but that is precisely why everyone is getting an enormous return on that investment." (TFB Ex. 26; R Ex. 1).*

- *December 22, 2011 – "I agree there should be 5% or less set aside for others as you recommended. However, I do not necessarily agree that money should be set aside for the practice area. No Director is required to do that .... Also Eddie, I don't want to sound like a broken record but I was extremely serious that this should be resolved today." (TFB Ex. 26; R Ex. 1).*

- *January 8, 2012 - "I would suspect having 10 million dollars to disburse would be equally important to the Firm. This is very important to me at this stage of my career as well as my life .... the split that I have proposed seems close to what is fair and reasonable for all .... I believe the Firm should want me and Alex to have a feeling that we are being treated fairly and being rewarded fairly for this tremendous and unprecedented result." (TFB Ex. 27).*

- *January 9, 2012 - "I believe I have complete control over when we receive the settlement funds, and in fact, I could have had that money by the end of the year; however, in talking with Greg and the client, it was better to push it into this year for tax reasons .... The court has recently entered an order granting our motion wherein Mayback's fee is the only thing that needs to be held in abeyance until resolved. Mayback was trying to hold up the entire judgment amount. Therefore, his arrangement does not affect our fee and, in fact, the only thing that will potentially happen will be that we will be receiving more money." (TFB Ex. 26; R Ex. 1).*

Respondent filed his bankruptcy petition on February 18, 2012 and his schedules and SOFA on March 20, 2012 (TFB Ex. 9, 13). When Respondent filed his bankruptcy petition, he knew that his successful efforts as co-lead counsel on the Home Depot and Security Mutual contingency fee cases resulted in "a heck of a lot of money" and "everyone was getting an enormous return on that investment" (TFB Ex. 26).

Although Respondent did not disclose any information about the $10 million contingency fee and the substantial bonus he expected to receive anywhere in his schedules or SOFA, he argues that his decision not to disclose his future income was not done with the intent to mislead anyone. The Referee did not find Respondent's argument to be credible (RR 44-45). The Referee found that the emails submitted into evidence in this case "speak volumes as to Respondent's state of mind around the time he filed his Petition, Schedules and SOFA" (RR 44). The bankruptcy court also found these emails to be very persuasive and that they revealed that Respondent "believed he had an interest in the $10 Million Fee worth millions of dollars prior to the Petition Date" (TFB Ex. 3).

The Referee properly considered the Respondent's prepetition actions in making his finding that the emails Respondent sent to Mr. Pozzuoli prepetition "unquestionably reveal that 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" (TFB Ex. 3). There is competent and substantial evidence in the record to support the Referee's findings that Respondent had a clear motive not to disclose his bonus because this put Respondent in position to take his substantial bonus "free from any claim by his prepetition creditors, including CIB" (RR 43).

ARGUMENT

(THE FLORIDA BAR'S REPLY BRIEF [5])

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.

A lawyer is responsible for his or her conduct whether it involves the practice of law or a personal matter. The Florida Bar v. Swann, 116 So.3d 1225, 1238 (Fla. 2013). The Referee has recommended that Respondent receive an 18-month suspension for violating the Rules of honesty and justice [3-4.3], candor [4-3.3(a)(1)], professional conduct [4-8.4(a)], and for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation [4-8.4(c)] (RR54). While this Court usually will not second-guess the Referee's sanction recommendation if that sanction is reasonable in light of existing caselaw and the Florida Standards for Imposing Lawyer Sanctions, the Referee's factual findings in this case necessitate, that Respondent be given an increased sanction. The Florida Bar v. Berthiaume, 78 So.3d 503, 510 (Fla. 2011); The Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999).

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5 This section contains the Bar's argument replying to the answer portion of the Respondent's Answer/Cross-Initial Brief.

"A referee's findings as to mitigation and aggravation carry a presumption of correctness and will not be disturbed unless clearly erroneous or without support in the record." The Florida Bar v. Valentine-Miller, 974 So.2d 333 (Fla. 2008). 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 or SOFA (RR 48, 49). The Referee also rejected Respondent's argument that he did not include any reference in his schedules and SOFA to his interest in the $10 million contingency fee based on the advice of counsel (RR 49, 50). Nowhere in the Referee's report does it state that advice of counsel should be considered as a mitigating factor in this case. Despite this, Respondent is not only asking this Court to reweigh the evidence in this case, he is asking this Court to disturb the Referee's recommendations on mitigation. Respondent's request that advice of counsel should be a mitigating factor in this case should be denied.

Respondent knowingly allowed official documents to be submitted to a federal bankruptcy court, even though he knew he had not been candid in those documents. Respondent intentionally misled the trustee and his creditors by not disclosing his interest in the $10 million fee (RR 49). The emails that were admitted into evidence contain Respondent's prepetition thoughts about the $10 million contingency fee, his instrumental role in securing the $10 million fee as

well as what he believed his share of the $10 million fee should be (TFB Ex. 25, 26, 27). Respondent's suggestion that the fact that he was expecting a substantial bonus was public knowledge and known to the trustee and his creditors before he filed his schedules is without merit (RACIB 68). The trustee testified that he knew about the judgments in the Home Depot and Security Mutual cases before Respondent's schedules were filed on March 20, 2012, but he did not know anything about how Respondent would profit because of his role in those two cases (TR 1, 97-99, 124). In fact, the Referee found that neither the trustee nor CIB "had any idea as to what amount, if any Respondent would be receiving from the Contingency Fee Cases as his bonus" (RR 48).

Contrary to Respondent's argument, the existing caselaw and the Florida Standards for Imposing Lawyer Sanctions do not support Respondent receiving less than a rehabilitative suspension from the practice of law for his misconduct. Respondent intentionally submitted materially misleading information about his financial interest in the $10 million fee in an official bankruptcy court filing. Respondent made deliberate and knowing misrepresentations, in his personal bankruptcy case; disbarment is the only appropriate sanction under these facts.

Section 5.1 of the Florida Standards for Imposing Lawyer Sanctions is entitled 'Failure to Maintain Personal Integrity' and is relevant to the misconduct

at issue in this case because it applies to "cases involving dishonesty, fraud, deceit or misrepresentation." Conduct where disbarment is appropriate is addressed in section 5.11.

> **5.11 Disbarment is appropriate when:**
>
> **(f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously reflects on the lawyer's fitness to practice.**

Maintaining personal integrity is essential to the legal profession. After his independent review of the evidence, the Referee found clear and convincing evidence that Respondent violated four Rules that related to Respondent failing to uphold the standards of personal integrity and honesty. Respondent's deception in his personal bankruptcy case is serious, not just because he knew he was expecting a bonus in the millions of dollars, but because he took affirmative steps not to disclose this information and signed a declaration under penalty of perjury professing that he was being truthful. The gravity of Respondent's conduct was not lost on the Referee. In aggravation, the Referee found that Respondent had a dishonest or selfish motive, refused to acknowledge the wrongful nature of his conduct and has substantial experience in the practice of law. Florida Standards for Imposing Lawyer Sanctions 5.11(f) supports disbarment in this case.

Section 6.1 of the Florida Standards for Imposing Lawyer Sanctions is entitled 'False Statements, Fraud, and Misrepresentation' and is relevant to the misconduct at issue because it applies to cases involving "dishonesty, fraud, deceit or misrepresentation to a court." Conduct where disbarment is appropriate is addressed in section 6.11.

6.11 Disbarment is appropriate when a lawyer:

(a) with the intent to deceive the court, knowingly makes a false statement or submits a false document.

The Referee has recommended that Respondent be found guilty of four Rule violations, including Rule 4-8.4(c) which requires the element of intent. In order to show intent in a bar disciplinary case "it must be shown that the conduct was deliberate or knowing." Adorno, 60 So.3d 1016 (Fla. 2011), quoting, The Florida Bar v. Fredericks, 731 So.2d 1249,1252 (Fla. 1999). The Referee found competent and substantial evidence that Respondent provided materially misleading information in official court documents in his personal bankruptcy case and that his conduct was deliberate or knowing. Respondent's actions were purposeful and intentional. Florida Standards for Imposing Lawyer Sanctions Section 6.11(a) supports disbarment in this case.

In his RACIB, Respondent asks this Court to consider a 91-day suspension that was approved in The Florida Bar v. Russell-Love, 135 So.2d 1034 (Fla. 2014)

(RACIB 74, 75). The commonality between Respondent and the attorney in the Russell-Love case is that they were both found in violation of Rule 4-8.4(c) for filing documents declaring under penalty of perjury that the information contained in the documents were truthful although they knew the documents contained misrepresentations. But, unlike the attorney in Russell-Love, the Referee has recommended that in addition to Rule 4-8.4(c), Respondent should be also found guilty of Rules 3-4.3, 4-3.3(a)(1), and 4-8.4(a) (RR 54). The Referee found in aggravation that Respondent had substantial experience in the practice of law, refused to acknowledge the wrongful nature of his conduct and that he had a dishonest or selfish motive not to disclose his interest in the $10 million fee because he stood to gain $2.7 million dollars (RR 57). On the other hand, no selfish motives were ascribed to Russell-Love's actions, with the referee finding that her misrepresentation was done in order to expedite her client's immigration filing. Also, the referee in Russell-Love found no aggravating factors applied and found four factors in mitigation: no prior disciplinary history; inexperience in the practice of law; character or reputation; and remorse. Russell-Love, 135 So.3d at 1037, 1039.

This Court has not been hesitant to disbar lawyers who violate the Rules of Professional Conduct in their personal affairs. The mitigating factors

recommended by the Referee do not outweigh the seriousness of Respondent's misconduct. Respondent's actions were deliberate or knowing prior to his filing for bankruptcy, Respondent knew he was expecting a substantial monetary bonus from his work on the Home Depot and Security Mutual cases (TFB Ex. 25, 26, 27). When Respondent filed his bankruptcy petition, schedules and SOFA, his creditors and the trustee were not privy to the emails between Respondent and Mr. Pozzuoli or between Respondent and the Chief Financial Officer, Mr. McLaughlin that contained information about how the $10 million contingency fee might have been allocated at Tripp Scott (TFB Ex. 25, 26, 27).

This Court's decisions in The Florida Bar v. Hall, 49 So.3d 1254 (Fla. 2010), The Florida Bar v. Kaufman, 684 So.2d 806 (Fla. 1996) and The Florida Bar v. Rood, 620 So.2d 1252 (Fla.1993) are applicable to this case. Respondent, like the three lawyers in these cases, was found in violation of the Rules for conduct that was unrelated to his representation of clients. All three of the lawyers in these cases, like Respondent, were found to have violated Rules relating to dishonesty. Moreover, all three of the lawyers in these cases stood to gain financially and like Respondent they were found to have been motivated by selfish or dishonest reasons when they made their misrepresentations. This Court found

that disbarment was an appropriate sanction in Hall, Kaufman and Rood. The existing caselaw supports disbarment in this case.

CONCLUSION

The Florida Bar respectfully requests that this Court adopt the Referee's findings of fact and his recommendation that Respondent be found guilty of violating R. Regulating Fla. Bar 3-4.3; 4-3.3(a)(1); 4-8.4(a); and 4-8.4(c). Furthermore, The Florida Bar requests that this Court enter an order of disbarment and require Respondent to pay the costs incurred by the Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Amended Reply/Cross-Answer Brief on Appeal of The Florida Bar 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; Jeanne T. Melendez, via E-mail at JTM@Rothmanlawyers.com and to Staff Counsel, The Florida Bar via E-mail at aquintel@floridabar.org on this 9 day of May, 2019.

Joi L. Pearsall, Bar Counsel

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 filed by e-mail in accord with the Court's order of October 1, 2004. 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.

Joi L. Pearsall, Bar Counsel