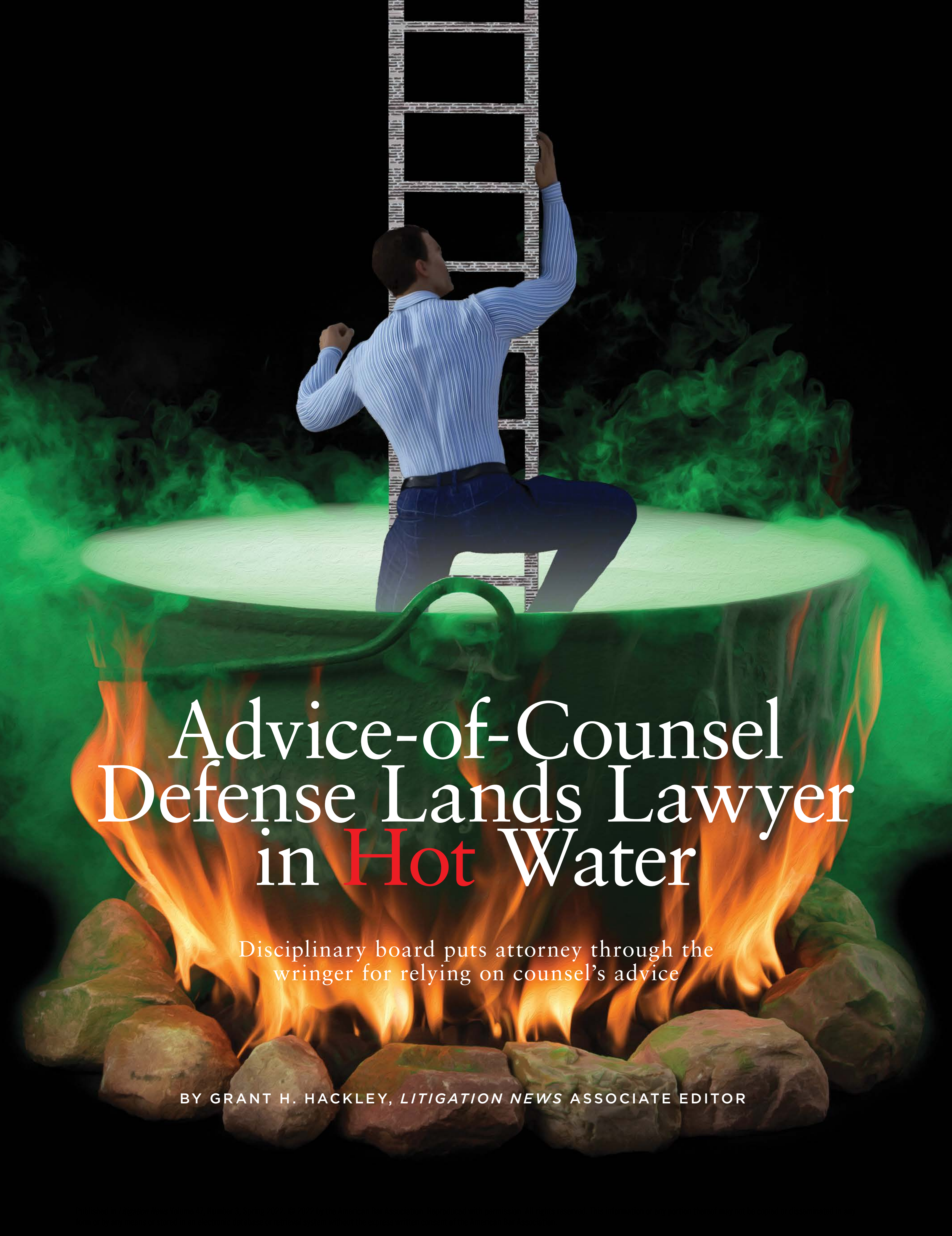

Advice-of-Counsel Defense Lands Lawyer in Hot Water

Disciplinary board puts attorney through the wringer for relying on counsel's advice

BY GRANT H. HACKLEY, *LITIGATION NEWS* ASSOCIATE EDITOR

A lawyer who relied on another lawyer's advice found himself hauled before his state's disciplinary board, facing suspension of his law license for not disclosing anticipated bonuses to his creditors in bankruptcy. In *Florida Bar v. Herman*, the state bar brought an ethics complaint against an experienced trial attorney, alleging he misled a bankruptcy court and his creditors in violation of state ethics rules. While the attorney was ultimately exonerated, ABA Litigation Section leaders suggest that this is a cautionary tale and that—for lawyers especially—honesty is always the best policy.

Questions Arise Following Bankruptcy Disclosures

Peter Herman was licensed to practice law in Florida in 1982 and had worked at his firm for more than 30 years. Though he had the title of director at the firm, he was not an equity partner and did not have a contract of employment. He was paid W-2 wages and received an annual discretionary bonus, determined by the firm's compensation committee.

During his time at the firm, Herman was engaged in a separate business, Equity Ventures, LLC. To fund that endeavor, Herman personally guaranteed a loan of $6.8 million. The Equity Ventures deal was unsuccessful, though, and the creditor obtained a deficiency judgment of $4.5 million on the loan Herman had guaranteed. The creditor aggressively pursued collection of the judgment, and Herman was forced to file for Chapter 7 bankruptcy protection.

After commencing the bankruptcy proceeding, but before he filed his financial disclosures with the bankruptcy court, Herman prevailed in two large civil contingency-fee cases, for which his firm was entitled to attorney fees. Herman anticipated a significant year-end bonus out of the $10 million his firm had earned. However, the amount of his bonus was indeterminate and dependent on the discretion of his firm's compensation committee.

Because the bonus was not guaranteed, Herman disclosed in bankruptcy only his ordinary salary and an estimated bonus based on his typical end-of-year discretionary bonus, approximately $65,000–$70,000. The creditor learned of the $10 million fee and objected to the bankruptcy discharge, pointing to Herman's failure to disclose his anticipated—and potentially much larger—bonus on his interest in the $10 million fee.

The bankruptcy court held a trial, after which it denied the petition for discharge of Herman's debt. It concluded that Herman had a "level of sophistication" as a seasoned trial attorney, and he "acted with intent to hinder, delay or defraud" his creditors and the bankruptcy trustee when he failed to disclose the interest in the $10 million fee. The U.S. District Court for the Southern District of Florida affirmed the bankruptcy court's Findings of Fact and Conclusions of Law and referred the matter to both the U.S. Attorney for the Southern District of Florida and to the Florida Bar to determine whether further action was warranted.

Advice of Counsel Defense Initially Falls Flat

The Florida Bar filed a disciplinary action against Herman, alleging violations of Florida Rules of Professional Conduct. Among other things, the Bar alleged that Herman had committed an act that was unlawful or contrary to honesty and justice, had made false statements to a tribunal, had obstructed another party's access to evidence, and had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Florida Supreme Court referred the matter for appointment of a referee to conduct and oversee disciplinary proceedings and to make a report and recommendation to the court.

In the disciplinary proceeding, Herman relied on an advice-of-counsel defense. Uncertain whether to disclose his anticipated bonus in the bankruptcy proceeding, Herman had explained the circumstances to his bankruptcy counsel, an experienced debtor's attorney. The bankruptcy attorney had represented insolvent debtors for decades in legal matters. The bankruptcy attorney had further investigated the underlying facts, going so far as to interview members of Herman's firm's compensation committee about the methodology for distributing bonuses and Herman's reasonable expectation of receiving a bonus on the $10 million fee. He had also researched relevant case law and provided those cases to Herman to support not disclosing the anticipated bonus.

The bankruptcy attorney ultimately advised Herman that he did not have to disclose the anticipated bonus in the bankruptcy proceeding because it was not discretionary and not vested in Herman at the time that he filed the bankruptcy petition. Herman had expressly relied on the bankruptcy attorney's opinion to that effect in signing his bankruptcy disclosures.

The referee in the disciplinary proceeding found Herman's explanation unavailing, concluding disciplinary precedent held that attorneys in Florida were not entitled to rely on an advice-of-counsel defense in ethics proceedings. The referee recommended that the Florida Supreme Court find Herman guilty of professional misconduct and suspend his law license for a period of 18 months. The bar objected, arguing that the suspension was too lenient. Instead, it requested disbarment.

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Good Faith Reliance on Advice Sufficient to Avoid Sanction

The Florida Supreme Court reviewed the report and recommendation and issued an opinion and order, remanding the matter back to the referee for further proceedings and issuance of an amended report. The supreme court noted that the "reason an advice of counsel defense is usually unavailable in Bar discipline proceedings is that the Bar rules themselves charge Florida lawyers with knowledge of the rules and of 'the

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standards of ethical and professional conduct prescribed by this court.'" But here, the supreme court noted, Herman was not acting as a lawyer in the particular matter for which discipline was sought, nor was the particular underlying issue for which he was seeking advice of counsel related to the standards of ethical and professional conduct. Rather, Herman had been a client seeking legal advice on a complicated and disputed issue of bankruptcy law.

Following the remand, the referee held further proceedings and issued an amended report and recommendation, reversing his prior decision and finding that Herman had appropriately relied on the advice of counsel in determining whether to disclose his anticipated bonus. The referee found that Herman had acted in good faith after full disclosure of all relevant facts, and that the bar had failed to demonstrate with clear and convincing evidence that he had acted with intent to defraud his creditors. This time, the referee recommended no discipline, and the Florida Supreme Court adopted his report and recommendation.

Competent Counsel Is Key

Practicing law is complicated. Nevertheless, the very first rule of professional responsibility, ABA Model Rule 1.1, requires that a lawyer provide "competent representation." Inherent in this concept of competent representation, recognized by the comments to the Model Rule, is that a lawyer should have the knowledge and skill of a general practitioner. Moreover, a licensed attorney is charged with knowledge of the rules of professional responsibility. But what about a niche practice area? And what about the client who also happens to be a lawyer?

"Rule 1.1 requires competence," states David B. Seserman, Denver, CO, cochair of the Section's Solo & Small Firm Committee. "We have to either possess a level of competence ourselves or associate with someone who has that competency," he advises, suggesting that he believes Herman did the right thing in this case. "He, in good faith, sought advice about something he knew nothing about," Seserman continues. "[Herman] did not hide from his bankruptcy counsel his expectation" in the $10 million fee.

"He Who Represents Himself Has a Fool for a Client"

A predicate to the analysis in *Herman* is that the attorney facing disciplinary sanctions was seeking advice as a client in an area of law unrelated to his day-to-day practice. "It is always in the interest of attorneys facing litigation against them[selves] individually to seek the advice of counsel," notes Tiffany A. Rowe, Washington, DC, cochair of the Section's Professional Liability Litigation Committee. "Herman may have been a practicing civil litigator for 30 years, but he knows very little about bankruptcy, a very complex area of law," says Rowe.

Indeed, Herman's own bankruptcy attorney had testified that Herman was a "babe in the woods" and was "not knowledgeable about even the most basic of bankruptcy matters." Rowe explains that "here, the question was not a general legal proposition." Rather, "he should be entitled to use the advice of counsel to defend this complex issue."

"I believe it is a best practice to consult with counsel where an ethical violation arises," Rowe concludes, "the same as any law firm would consult their ethics and compliance counsel."

Herman's Extenuating Circumstances

Section leaders believe that the Florida Supreme Court ultimately did the right thing in *Herman*. "Herman was accused of fraud. He did not have the intent to defraud," explains Seserman. "He did not hide anything from his bankruptcy attorney. He went to a lawyer, he had a question about how he should disclose this information, and his lawyer—who conducted due diligence—said he should not," Seserman elaborates.

The specific circumstances supported the ultimate outcome, observes Rowe, who points out that "[t]he facts and case law were in [Herman]'s favor." She suspects that when Herman was seeking the advice of his bankruptcy counsel, he may not have even considered the ethical implications of deciding wrongly on the question of whether to disclose the interest in the $10 million fee to the bankruptcy court.

"This is not a case where Herman [himself] was practicing law," Seserman notes. "He was not representing any-

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one and was relying on counsel."

In this sense, "a client-lawyer should not be considered differently than any other client," Rowe posits. Nevertheless, "the facts reiterated in this opinion suggest to me that [Herman] and his counsel fully considered the issue and made disclosures they believed in good faith to be accurate and appropriate."

Seserman agrees, even if he might have acted differently himself. "I'm a trial lawyer—I believe in full and complete disclosure of all the facts," he states. Despite this, "[Herman] did not have a reasonable anticipation of receiving the bonus—that's a factual finding that you have to accept, even if you don't agree with it," he chides. Accordingly, Herman did not have to disclose it here and could rely on the advice-of-counsel defense.

How Far Can the Advice-of-Counsel Defense Go?

Lawyer-clients would be wise to consider themselves held to a higher standard than the average client, Section leaders conclude. "I do not think this

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case answers the broader question of whether an attorney can rely on the advice-of-counsel defense to say 'I should not be disciplined,'" asserts Seserman.

"[Herman] didn't go to a lawyer to create a cover story [for unethical conduct]. That's not what occurred, and that's not what the court found," he emphasizes, predicting the outcome would have been different had Herman been merely seeking a favorable legal opinion that he was permitted to hide the interest in the $10 million fee. Accordingly, attorneys should not take this case to suggest that they can hide behind the advice-of-counsel defense in all situations, Seserman advises.

Rowe notes that "there will always be instances where affirmative defenses like this are overused or stretched." The case here, though, "is different than seeking counsel regarding questionable conduct in order to still receive the benefit of that act, but avoid ethical issues by bending the rules," she clarifies.

Setting a Higher Bar

Ultimately, lawyers are held to extremely high ethical standards across the board, Rowe reiterates. She suspects Florida's high court saw the *Herman* case as a vehicle to reinforce how high those ethical standards are—especially when a lawyer is representing another lawyer.

"The attorney should have very frank discussions with the client lawyer," she counsels. The representing lawyer should "do some extra diligence on ethical violations claims and take a step back from the case law in the substantive area," Rowe advises. She suggests that the representation be conducted with a potential future disciplinary review in mind. "Look at the matter from an ethical perspective and confirm that the matter is handled not only in a legally defensible manner, but also at a separate and often higher standard," she concludes.

Seserman agrees. Although the outcome "depends on the facts and circumstances of each case," he says, at the end of the day, "I think this case says that lawyers are subject to a different standard." LN

RESOURCES

- *Fla. Bar v. Herman*, No. SC17-2050 (Fla. Dec. 21, 2020).
- Theresa Gronkiewicz, "Twelve Tips to Help You Avoid Disciplinary Proceedings," *Ctr. for Professional Responsibility* (2020).
- Thomas G. Wilkinson Jr. and Douglas B. Fox, "ABA Issues Guidance on Lawyers' Duties Regarding Clients' Fraudulent, Criminal Behavior," *Ethics & Professionalism* (June 8, 2020).
- Brian Spahn, "Advice of Counsel: Impact on Attorney-Client Privilege and Waiver," *Corp. Counsel* (Dec. 28, 2018).
- Florida Rules of Professional Conduct.
- ABA Model Rule of Professional Conduct 1.1: Competence.

Business and Commercial Litigation in Federal Courts, Fifth Edition

Both a substantive research treatise and a practical training guide, this authoritative source includes checklists, jury charges, and other forms. Litigation Section members save 25% with code 25BUSCOM. Also available on Westlaw with a subscription. Learn more at ambar.org/litigationbooks.

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