COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-12025

IN RE VALERIANO DIVIACCHI

RESPONDENT'S PRELIMINARY MEMORANDUM

Respondent respectfully asks for reversal of the Single Justice's Order because of: 1) errors of law and fact that first occurred in the Panel Report and that were simply reiterated up the review process with even obvious math errors called "true"; and 2) the following undisputed substantive facts and requested rulings of law that have been ignored throughout this matter, all of this resulting in substantial injustice to the Respondent, the Bar, and to the integrity of the Bar disciplinary process.

STATEMENT OF UNDISPUTED FACTS: RESPONDENT CANNOT WIN ON CREDIBILITY IF THE BBO IS ALLOWED TO IGNORE UNDISPUTED FACTS AND THE SUBSTANTIVE EVIDENCE AND TO MAKE FALSE FINDINGS.

Respondent as an experienced solo trial attorney is well aware that his combative nature makes him an unsympathetic and usually not credible witness before inexperienced, law firm attorney panels such as the Hearing Panel on this matter. It is for this reason that he spent considerable effort trying to submit detailed facts, documents, expert opinion, and briefing on the convoluted facts and legal issues involved. Given the 20 page limit of this Preliminary Memorandum, he is not able to repeat such here. Therefore, Respondent respectfully incorporates herein by reference his Brief on Appeal with attached Requests and Memoranda, Appendix pp. 37-169, 225-230, and respectfully asks this Court consider them and not simply Bar Counsel's filings.

Determinations of credibility and intent must be supported by the evidence and testimony. In re Murray, 455 Mass. 872, 883 (2010). Even determinations of credibility may be disturbed, if the credibility determination is "wholly inconsistent with another implicit finding" or if it lacks "substantial evidence" in support. In re Abbott, 437 Mass. 384, 395 (2002) *quoting* Matter of Hachey, 11 Mass. Att'y Discipline Rep. 102, 103 (1995) and Matter of Segal, 430 Mass. 359, 364-365 (1999). "[A]n administrative agency cannot choose to believe one version of testimony without a reasonable basis for its choice." In re Segal, 430 Mass. 359, 366 (1999).

The Hearing Panel's Report is essentially fiction adopting almost verbatim Bar Counsel's submissions as true. The carelessness to detail exhibited by the Panel and its appellate review is exemplified by the continually repeated acceptance as true that 1/3 of $340,000 "is $112,000" (n. 6 of *Single Justice Decision*) while ignoring all of the Respondent's Exhibits and Requests for Findings of Fact and Rulings of Law with their citation to hundreds of pages of undisputed evidence and facts that speak for themselves and rely on no one's credibility. According to the Panel's fiction, Respondent has lied about every aspect of the underlying facts; is wrong about all of the law at issue including his area of expertise (lender liability and contingent fee cases) that was supported by the only expert testimony in the Record (Appendix 117-119); and goes so far as to find his testimony not credible even when his client Warrender's testimony agrees with it – even though the Panel decided she was credible on every aspect of her testimony while ignoring, for example, that she knowingly filed a fraudulent bankruptcy simply for delay. It cannot be that the client's statements are always credible except when they agree with Respondent's statements.

The reality of the facts is that Warrender as a sophisticated developer of millions of dollars worth of property in California and Massachusetts with extensive experience both representing herself and hiring attorneys, both on hourly and contingent fee bases, walked into Respondent's office after 9 months of negotiation and discussion on multiple contingent fee possibilities to sign a contingent fee agreement not only with full informed consent but, we now know, with no intent whatsoever to honor that agreement either in its form or in good faith with its substance. Once she got Respondent to file an appearance, cure the defective complaint filed by prior counsel, and oppose the pending unopposed motion to dismiss thus avoiding a default judgment of >$2.5 million, it was always her intention while Respondent was 2500 miles away in California trying to enjoy his daughter's college graduation: 1) to breach the agreed upon limited litigation strategy; 2) to find unscrupulous counsel willing to file meritless motions for injunctive relief, a fraudulent bankruptcy, and meritless appeals; and 3) to avoid honoring the contingent fee agreement. So far, as further demonstration of her sophistication, she has successfully used the Massachusetts Bar disciplinary process to deny Respondent a trial by a jury of his peers — instead of an administrative Panel made up of attorneys who considers themselves his Betters — on his fee claim with such denial her only goal for her BBO filing.

Respondent for emphasis purposes repeats the following findings from the Single Justice Order **as undisputedly wrong, not as a matter of credibility, but based on undisputed evidence**:

I) Respondent "does not deny that he did not explain these modifications [of the contingent fee agreement] to the client". Respondent did and does deny this and tried to testify at length to the nine months of negotiations and discussions that occurred between him and the client on 4-5 possible contingent fee cases. Even based on the limited testimony allowed by the Hearing Panel, it is undisputed for example that Respondent told Warrender the following yet she returned to him to negotiate further:

> You already are in litigation? Forget it. I wasted too much time on this as it is. It is clear that you are willing to give your time and money to attorneys who tell you what you want to hear but not to anyone that is honest with you. It is clear that we cannot work together. I am no longer interested in the case do not contact me again. *4 April 2012.* Appendix pp. 55-59; 93-133.

II) "$25,000 in costs in addition to a contingent legal fee". As Warrender's "credited" testimony admitted, the $25,000 was decided upon beginning in January/February of 2012 as a flat rate fee because that was the anticipated costs of "embarking on extensive litigation ... [and] foreclosure ... wasn't part of my [Warrender] case and that wasn't part of what you [Diviacchi] were pursuing." Warrender conceded that this flat rate was to be treated as "Compensation" "[t]hat although it was for costs, **whether you [Diviacchi] spent it or not, you were going to keep it.**" Transcript Vol. II p. 115; Vol. IV, p. 97; Exhibit 5, ¶4.

III) "From the very beginning, the client wanted to avoid a foreclosure and wanted to conclude the matter with a short sale"(Memorandum at p. 3). This was not true at the time she hired Diviacchi, as Warrender's "credited" testimony says:

> **Q:** When you [Warrender] came to my office the bank had filed a motion to reopen the case that was allowed and the litigation was continued am I correct?
> **A:** That's right.
> **Q:** When you came to my office there was a motion to dismiss pending against you correct?
> **A:** Right.
> **Q:** You understood what happened with that motion to dismiss.
> **A:** Yes.
> **Q:** If it wasn't opposed what would happen?
> **A:** The case would be over.
> **Q:** And by the case being over, it means you would have had a judgment against you for $2.5 million and the property would be foreclosed upon, am I correct?
> **A:** Well they had already issued the foreclosure so that seemed to be independent of the case and we had lost that on appeal so.
> **Q:** So you can't answer my question yes or no?
> **A:** No. I just took exception with your point about the foreclosure. **That wasn't part of my case and that wasn't part of what you were pursuing.**
> Id. (Emphasis added).
> Transcript Vol. IV, p. 97. (Emphasis added).
> **Q.** **By the term now that the bank sees that we can go the distance**, is it fair to say what you [Warrender] meant by that the bank knew now that you could afford to have an attorney to go to trial and beyond if necessary?
> **A.** Yes. That the bank saw that I had an attorney and could proceed.
> Transcript Vol. III pp. 151. (Emphasis added).
> **A.** Well, you know, I [Warrender] think at that point [1

May 2012] it looked as if we were embarking on extensive litigation which turned out not to be the case.
And I know after leaving your office I called you and told you again that the sale
might happen and I asked you whether you wanted to wait.
Q. You asked me [Diviacchi] or told me not to file an appearance because you were still trying to settle.
...
Q. You left the office, you called me back and told me to hold off, that you were still trying to settle, am I correct? That's what you just testified to.
A. Yes.
...
Q. So you called me back and **told me that it didn't work out** and you had me file an appearance. (Emphasis added).
A. Yes.
Transcript Vol. III pp. 104-105.
I don't know if you [Diviacchi have filed a formal motion for preliminary injunction. **I know it was not what you originally intended.** [emphasis added]. But even though my cash situation is not great, it there's anything else to be filed that would make the request for a restraining order as strong as possible, **I would like to offer to pay you separately for that**. [emphasis added] Please let me know.
Thanks again for taking my case.
Best regards,
Camilla
Exhibit(s) 76, *email dated 10 May 2012.*
A: The settlement didn't work, and I needed you to file an appearance.
Transcript Vol. II pp. 125-126 (Emphasis added).
Val-
It was good to meet with and discuss where things are with the case. **And if I have to move forward against the bank, I'm confident that I'll be in good hands. As we discussed, as we both agreed**, because of my current financial situation and my mom's, I'm going to do my best to reawaken the settlement / short sale and make it work. If you could please put things on hold one or two days, **I'll return to you with the results. If I'm not able to settle, we're off and running**. If I succeed, I'll pay you hourly for all your time expended." (Emphasis added) Exhibit 76 *email of 1 May at 2:47 P.M.;* Transcript Vol. III pp. 132-35

IV) "... [C]ontrary to respondent's statement, the bankruptcy filing stayed the foreclosure for about two months". This "bankruptcy filing" by Warrender done with the aid of her other attorneys was a fraudulent bankruptcy filed solely for delay. At the time, Warrender was earning $7000 to $8000 monthly rental income from the property that <u>was not</u> her residence while defaulting on the mortgage for >1 year yet she claimed in the bankruptcy that she could not afford filing fees nor to make any payments on the mortgage:

> The sketal filing stopped the FC [foreclosure] until at least July 27th, which means I [Warrender] can honor the summer rentals and give my mom some money. I checked with the court and confirmed my ability to pull out after the initial filing. Just to be sure I'll have that control, I agreed to pay the filing fee in installments, which do not finish until September - and the bankruptcy will not proceed without me paying the fee in full and giving them a list of creditors.

<u>Transcript Vol. I</u> pp. 53-54, 147, 188-89, 192; <u>Transcript Vol. III</u> pp. 163-67, 178, 192, 213-54, 269, 278-82, 324-28; <u>Transcript Vol. IV</u> pp. 136-39; <u>Exh.(s)</u> 8-9, 28, 46-47, 76.

V) " ... [T]he client received no net funds. (Ex. 87, HUD-1 settlement statement)". The full HUD exhibit not only shows the Seller (Warrender) receiving $340,000 in gross proceeds after paying off the debt to Sovereign that avoided a $2.8 million dollar judgment against her but then specifically states "CASH TO SELLER $75,750" in addition to the $100,000 "Deposit held by Seller". <u>Addendum</u> attached.

VI) "... [T]he respondent knew and agreed to accept $15,000 at the initial meeting is consistent with his own fee agreement". Diviacchi admitted and never disputed that he *accepted* $15,000 at the initial meeting. <u>The contested issue is whether he *accepted* such despite the fact that Warrender</u>

was supposed to bring $25,000 to the meeting. If she was not supposed to bring $25,000 to the meeting, why would this sophisticated client who had several attorneys representing her at the time, had spent months negotiating the fee and handling the litigation with years of experience handling litigation and attorneys, and had a week to review the contingent fee agreement with her other attorneys after leaving the 1 May signing sign its provision clearing stating in capital letters that the "Compensation" included a "$15,000 NON-REFUNDABLE FLAT RATE PAYMENT OF $15,000 PAID NOW AND $10,000 STILL DUE." The Record evidence establishes Warrender was supposed to bring $25,000 to the 1 May meeting. Having failed to do so by bringing only $15,000 to her office meeting, the hybrid contingent fee agreement she signed that day made clear that another $10,000 was due and owed. Respondent states again: **this was a true statement at all times at issue and is a true statement now.** Warrender:

> I cannot make the decision without you reviewing the case. I would like to postpone the hearing while you do that. Would you please consider reducing a bit the amount you would charge to review it? **And if you decide the case is strong, would you apply that amount toward the 25K in costs I'll be giving you?**" Exhibit 76, *3 April 2012 email* (Emphasis added).

When asked as to what the amount of this reduction was and whether Diviacchi's proposal **solely for "something to review the case" was $15,000**, Warrender replies that "I don't remember." Tr. III, p. 123. Thus, it is undisputed record testimony that the $15,000 flat rate proposal was solely for reviewing the case and trying to settle it just as all of the other attorneys did – **the $15,000 flat rate payment did not involve an actual, general appearance in the Civil Action**. <u>Tr.I</u>, pp. 40, 42, 72-80, 158-64; <u>Tr.II</u>, 20-26.

VII) "His [Diviacchi's] awareness of the ... settlement discussions, both before and after the mediation, is apparent ...." Diviacchi admitted and never disputed that he was aware of ongoing "settlement discussions". That is why he filed his lien. The issue is whether the case was "settled" behind his back. **"<u>Settlement discussions</u>" and actual "<u>settling</u>" are two different matters.** It is undisputed that the actual 20 July 2012 "settlement" Stipulation that led to the case dismissal and the September 5 closing on the "settlement" went forward without notice to Diviacchi. <u>Exhibit(s)</u> 1 *at* ##75, 78; <u>15</u>, <u>16</u>; <u>Trans. Vol. III</u> pp. 254-55. Otherwise, why wait until after closing to act?

VIII) "Under the respondent's fee agreement, the contingency to be achieved was recovery ... on the counterclaim". This is not true. The contingent fee agreement states: "The claim, controversy, and other matters with reference to which services are to be performed are: SOVEREIGN BANK V. WARRENDER <u>&</u> COUNTERCLAIM". <u>Exhibit 5</u> (Emphasis added).

IX) "... [T]he contingency that is the subject of the fee agreement is not achieved". The Hearing Report admits that "Warrender understood [recovery] to mean success in the litigation against the bank", with "recovery" referring to the contingency of the contingent fee agreement of "recovery by judgment or settlement or otherwise." Report at ¶26. It is difficult to imagine how settlement of the Civil Action in which Warrender's $2.8 million debt is released with money left over of $340,000 was not, as described in the contingent fee agreement, "success in the litigation against the bank"? Transcript Vol. III pp. 227-28, 257, 275, 278, 289-90, 318; Exhibit 76. Respondent's Brief at 14-23, 28-40.

X) "To summarize: the client [Warrender] had 'nowhere near fifteen' prior attorneys". It is undisputed in the Record that Warrender in the last ten years **had >15 different attorneys** advising her or representing her in a half-dozen matters ranging from a multi-million dollar divorce in probate court to the multi-million dollar Civil Action:

a) Attorneys Margaret Xifaras, Paul M. Kane, Jacob Atwood, Franklin H. Levy in her divorce;

b) Attorneys Scott Fink, Josh Vitullo, Francis O'Rourke, Christopher Sheehan, Kristen Stathis, Erik Hammerelund, David Krumsiek, and Diviacchi in the *Warrender v. Young* matter.

c) Michael Gilleran of Adler and Pollock; Bill Delahunt; Bob Laurie; John Roddy ("I just had an interesting conversation with John Roddy, Boston attorney who came recommended as a predatory lending specialist."); Jeoffrey H. Smith, Debra A. Squires-Lee, R. Victoria Fuller of Sherin & Lodgen; Harold Jacobi, Nancy Sue Keller, Jacqueline M. Cronin of Jacobi and Chamberlain; and Diviacchi in the Civil Action; her mother's attorney, Tim Hughes; "Maury Mariani"; John Roddy, "who came recommended as a predatory lending specialist"; Attorneys Geoffrey H. Smith, Debra A. Squires-Lee, and R. Victoria Fuller of Sherin & Lodgen.

d) Other unidentified attorneys such as "I sent the bank a 93A letter, to which a friend of mine had added case law"; "[o]ne of the attorneys I spoke with earlier said he thought the bank will likely try to claim that my loan was a commercial loan, so I kept that in mind as I went through the file" and "[s]omeone expressed surprised that there was no escrow for taxes."

e) Ken Gullicksen & Arthur Reade as her general counsel / "long-time attorneys for ... 20 years or so."

Exhibit(s) 88, 89, 76; Transcript Vol. I pp. 221-34; Transcript Vol. II pp. 134-45; Transcript Vol. III pp. 73-110, 125-27, 135-152; Transcript Vol. IV pp.24-67, 80-81; Exhibit(s) 76, 83, 84, 85, 88, 89, 90, 92.

LEGAL ISSUES

I) RESOLUTION OF "INFORMED CONSENT" TO A CONTINGENT FEE AGREEMENT MUST TAKE INTO CONSIDERATION THE CLIENT'S SOPHISTICATION, HER OTHER ADVISING ATTORNEYS, AND THE MONTHS OF PRECEDING NEGOTIATION.

The underlying client is a sophisticated real estate developer of millions of dollars worth of property and an experienced *pro se* litigant who over a nine month period negotiated by phone, by email, and by in-person in-court conferences with the Respondent with the assistance of her numerous other attorneys and litigation agents for representation by Respondent in 4-5 separate contingent fee matters including the one at issue. Neither the Single Justice nor any prior Panel took into consideration these undisputed facts but give the appearance that a naive client magically showed up one day to blindly sign a contingent fee agreement forced upon her by Respondent — an attorney she admittedly did not "trust" until long afterward. ("I am sorry I have had to learn the hard way that I can trust you." *29 May 2012,* Exhibit 76.).

The client here undisputedly agreed to limit Respondent's representation to what he agreed to handle: litigation and trial of a lender liability case that was doomed to foreclosure.

Respondent respectfully submits it cannot be the case that because Diviacchi is not a "big firm" (Panel Report at p.25) that the Panel Report, the Board Memorandum, and the Single Justice can ignore this undisputed sophistication and months of negotiation to determine her "informed consent" to the fee agreement at issue. *See* Cambridge Trust Co. v. Hanify & King Professional Corp., 430 Mass. at 472, 477-478 (1999).

II. DETERMINATION OF THE REASONABLENESS OF A CONTINGENT FEE MUST INCLUDE AN OBJECTIVE ANALYSIS OF THE RISKS INCURRED AT THE TIME OF SIGNING NOT SUBJECTIVE INTENT.

The Single Justice and all prior Reports treat the contingent fee agreement as purely a hindsight billable hour issue ignoring the risk taken at time of signing and the admitted [by Warrender and Attorney Jacobi] risk of the "settlement" failing in September as **all** prior settlements failed in the previous year of litigation. They further assumed that the underlying settlement was always destined to occur and that the Respondent should have known it – this is a false assumption.

The underlying case of the contingent fee agreement at issue was a convoluted lender liability case in which at the time of the signing **all** settlement attempts had failed, prior counsel was withdrawing because the client owed them $55,000 in fees after promising her that the case would cost only $3000 to $5000 in fees to resolve, the Bank had filed an unopposed motion to dismiss, the client was facing a default judgment of >$2.5 million, and even with Respondent's appearance the case was "embarking on extensive litigation". It is undisputed that even after the underlying litigation was settled without notice to him there was still a chance that the settlement would fall through as with all prior settlement attempts and that Respondent at that point would still be responsible to take it to trial with all other counsel withdrawing (Appendix 51, 107-08).

> It is important to keep in mind that the reasonableness as well as the appropriateness of a [contingent] fee arrangement necessarily must be judged at the time it is entered into. ... If a lawyer accepts a given risk - for example, the settlement - and offers a fee contract reflecting that risk, which is accepted by a fully informed client, the lawyer should not be required as a matter of ethics to give up the benefits of the agreement because the opposing party, to everyone's surprise, offers an early settlement that is acceptable to the client. *ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 94-389 (1994)

The Single Justice affirmed the Panel's subjective conclusion that the client did not agree to a short-sale gross recovery as being the basis for the contingent fee agreement's contingency even though the Hearing Report admits that "Warrender understood [recovery] to mean success in the litigation against the bank", with "recovery" referring to the contingency of the contingent fee agreement of "recovery by judgment or settlement or otherwise." Report at ¶26. Transcript Vol. III pp. 227-28, 257, 275, 278, 289-90, 318; Exhibit 76. Even if such subjective determination is correct such should not affect the objective reasonableness of such a claimed fee. It is not simply an issue of subjective interpretation of a contract at issue. Otherwise, every fee dispute between an attorney and a client would be a "clearly excessive fee" dispute: an attorney bills a client $10,000 for legal work; client states that it never agreed nor wanted half the work on the bill; according to the Report such is automatically a "clearly excessive fee" issue because the client did not agree to the work. If the client is proven right as a result of error or ambiguity in the fee agreement, according to the Report, the attorney must be disciplined for a "clearly excessive" fee. Ambiguity is a contract issue not a fee issue. Please see extensive briefing at Appendix pp. 37-92, 133-68, 225.

III. ALLEGED VIOLATIONS OF RULES 1.1, 1.2, AND 1.3 ARE TO BE DETERMINED BY AN OBJECTIVE STANDARD EQUIVALENT TO THE STANDARD FOR ATTORNEY MALPRACTICE.

The Comments to these Rules establish that violation of these Rules is to be determined by an objective standard equivalent to the standard for attorney malpractice as follows.

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. Rule 1.1, *Com. 1.*

It is unclear as to what standard the Single Justice or the underlying Panel used. The Respondent undisputedly and without opposition from any expert witness testified that in his experienced opinion there was no meritorious basis to file for a preliminary injunction nor to appeal from the denial of the meritless injunction motion filed by the client's other counsel on a limited appearance and that the client's bankruptcy filing was fraudulent – by her own admission. The Single Justice dismisses this unopposed testimony by simply referencing "the outcome of the case" (p. 14), apparently concluding that since the meritless motions and fraudulent bankruptcy succeeded in delaying litigation and the delay contributed to settlement that the Respondent should have filed the meritless motions, meritless appeal, and fraudulent bankruptcy himself. Apparently, the ethical nature of filing meritless motions and fraudulent bankruptcy case is dependent solely on whether an attorney gets away with them. This cannot be the law and is error.

IV. ALLEGED VIOLATIONS OF RULES 3.3 / 8.4 ARE TO BE EVALUATED ON A SUBJECTIVE, GOOD FAITH BASIS STANDARD.

Like *Massachusetts Rule of Civil Procedure Rule 11*, inferences both from the text and from related case-law require that both Rule 3.3 and Rule 8.4 should be evaluated on a subjective, good-faith-basis standard.

The Single Justice admitted that the Panel rejected this subjective standard (p. 15) but then somehow without stating what standard should be used or what standard the Single Justice used affirmed the filing that the Respondent violated these Rules. Given that the Single Justice cannot make credibility findings, if the Panel used an incorrect standard, it cannot be affirmed.

V. ALLEGING ACTS TO BE "ETHICAL" VIOLATIONS SHOULD NOT NEGATE OBJECTIVE STANDARDS OF CARE AND REQUIRED EVIDENCE FOR ESTABLISHING THE UNDERLYING FACTS.

The Hearing Panel took upon itself adjudicatory powers that not even a real Judge or jury hearing a bench or jury trial would have. According to Bar Counsel and the BBO, for example, a hearing panel made up of tax and real estate attorneys can make factual findings without aid of expert testimony on whether a medical malpractice attorney had a medical basis for alleging a doctor's negligence or had a scientific basis for a product liability case. Even a court judge handling a medical malpractice or product liability case could not do such without expert testimony, regardless of the judge's experience with prior such cases or qualifications. To this date, the experience and qualifications of the Panel Members is unknown and was unknown to the Respondent during the entire hearing process. All that is known is that one non-attorney Panel Member did not even bother to show up for one full day of hearing in which the primary witness, the underlying client, was cross-examined yet still signed off on credibility findings – it is clear that she just went along with what the attorney members concluded.

Despite the undisputed fact that the underlying case involved convoluted and esoteric issues of lender liability law not usually known by general attorney practitioners but requiring expertise in this area of law including federal preemption issues, the meritorious basis of motions in lender liability cases, the reasonable likelihood of success in such cases and in associated equitable and appellate relief, and the reasonableness of contingent fees in such cases, the only expert testimony admitted into the Record is Respondent's expert witness affidavit considering all **objective** factors required by Rule 1.5 and case law and concludes in favor of Respond. Appendix 117-19.

Bar Counsel provided no expert testimony on either the objective standard for alleged Rules 1.1, 1.2, and 1.3 violations nor for determination of the reasonableness of claimed attorneys' fees – "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, **experienced in the area of the law involved**, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee," creates explicitly an objective standard by which attorneys' fees are to be judged." *Matter of Fordham*, 423 Mass. 481, 493-94 (1996) (emphasis added).

The Panel and the BBO based on their unknown experience and qualifications that was never subject to cross examination by Respondent ridicules and demeans the Respondent's legal work in the underlying case and acts if the settlement result was guaranteed despite the fact that it did not occur before his appearance and that no one except the Respondent was willing to file a general appearance on behalf of the client to avoid her default and to handle the complex litigation and trial that undisputedly was expected to occur by the client at the time of the signing of the fee agreement at issue. Respondent in the short time granted to him before leaving the state amended the defective *Chapter 93A §9* complaint that would have been dismissed and then filed a 30 page opposition to the Bank's *magnum opus* Motion to Dismiss in mid-June after returning from California.

The Single Justice simply affirms by saying that expert testimony is not required on ethics. Respondent respectfully submits that such makes a mockery of the disciplinary process. Ethical violations may not require expert testimony but factual conclusions on the merits of complex litigation issues and filings, motions, fees, and appearances either require such or require a Panel made up of attorneys experienced in such an esoteric area of law both under the applicable standard of care and under basic principles of Due Process. It is substantively unjust to allow inexperienced Panel members to do so.

As far as anyone knows, the attorney Panel members had no experience with lender liability cases, trials, contingent fee cases, with difficult and dishonest clients such as Warrender, injunctive relief, bankruptcy, or any of the complex issues involved and yet are allowed to make findings on the merits, competence, and objectivity of all of these issues and more. Lack of such expert testimony and lack of experience and qualifications by the Panel members would explain why due to their inexperience they simply rubberstamped Bar Counsel's findings, ignored all contrary evidence, and were so bothered by Respondent's "combative" nature that they made unsupported credibility determinations against him.

Even up to the level of the Single Justice, everyone continues to repeat as "true" the Hearing Panel's obvious math error 1/3 of $340,000 "is $112,000". This reiteration exhibits the disciplinary process' emphasis on form over substance.

VI. THERE ARE MULTIPLE DUE PROCESS AND EQUAL PROTECTION ISSUES THAT RESPONDENT PROPERLY MADE IN THE RECORD.

It is not true as the Single Justice concludes that the Respondent "does not attack" *Section 3.7(c)* of the Rules of the Board of Bar Overseers as a violation of Due Process. Respondent did attack it and filed written and verbal motions and objections to it during the hearing. It is substantively unjust to allow a Panel Member to miss an entire day of hearing in which the primary witness against the Respondent is cross examined and then to make credibility findings on that witness. Appendix pp. 83-86.

Respondent made further Due Process objections to allowing the Panel to make findings without required expert testimony based on their own unknown experience and qualifications without being subject to cross examination on such experience and qualifications and their refusal to stay proceedings. Id.

Respondent submitted a substantive Equal Protection objection to the Panel's refusal to consider Warrender's sophistication because Respondent is not a big firm that exemplifies the same bias and prejudice that makes the form requirements of Rule 1.5(f) **optional** for big firms and their business, organization, and government clients but is a basis for disciplining practitioners having only individuals as clients. Appendix pp. 77-78, 147-89, 207-16, 267-82.

MITIGATION / SANCTION

From the Respondent's perspective, after 7 - 9 months of contingent fee negotiations regarding several different potential civil cases, Warrender a sophisticated businesswoman and experienced litigator on 1 May 2012 first hired but than again delayed until 8 May hiring Diviacchi to take on the defense and counterclaim of Sovereign Bank's $2.8 million dollar Civil Action on a contingent fee basis that limited the "Compensation" if they lost to a flat rate of $25,000. If they won, he was entitled to

1/3 of any "recovery by judgment or settlement or otherwise." Respondent took such risk that no other attorney involved would because such risky cases have been the nature of his practice for over 20 years. Instead of being commended for taking such risk and his efficient work saving his client from default and a real bankruptcy, his practice of law is over, forever, because he does not fit into the inexperienced Panel's naive, large firm expectation of a Walmart Greeter personality for trial attorneys.

Based on his over 100 trials, Diviacchi is well aware that sympathy is the key factor that decides verdicts and that he is not a sympathetic witness in any credibility battle between his combative nature and the sophisticated con artist that is Ms. Warrender. However, he never expected and is at a loss responding to the BBO's contempt of his nature that allows fellow attorneys, supposedly well-educated to think objectively, to ignore hundreds of pages of undisputed documents and testimony to make findings of perjury when in fact he was the only one acting and talking honestly and being forthright in the testimony. What Diviacchi finds most troubling is the attitude toward his family. **Nowhere** in the Panel/appeal findings is there any mention that from 9 May to 22 May 2012 when Warrender commenced her demands that Diviacchi file meritless motions that he was 2500 miles away in California trying to enjoy his daughter's college graduation – as Warrender was fully aware. Even the lowest criminals in the lowest form of criminal enterprise respect each other's families. Such apparently is not true of members of the Bar and the BBO.

Respectfully submitted,
Valeriano Diviacchi,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Bar Counsel by first class postage prepaid mail on 11 Jan 2015.

/s/ Valeriano Diviacchi

ADDENDUM

(EXHIBITS 56 & 87 showing gross recovery of $340,000 to Ms. Warrender with her net recovery at the closing of $175,750 including closing check payable to her of $75,750 plus "cash" deposit for her as seller of $100,000)

EXHIBIT

tabbies

56

A. Settlement Statement (HUD-1)

COPY

OMB No. [illegible]

B. Type of Loan		
1. ☐ FHA 2. ☐ RHS 3. ☐ CONV. UNINS. 4. ☐ VA 5. ☐ CONV. INS.	6. File Number: DWYER-1	7. Loan Number:	8. Mortgage Ins. Case No.:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name and Address of Borrower: Matthew F. Dwyer, Jr. 33 Silver Hill Road, Weston, MA 02493 Marjorie D. Dwyer	F. Name and Address of Lender: None
E. Name and Address of Seller: Camilla Warrender 5 Meeks Road, Nantucket, MA 02554	H. Settlement Agent: Vaughan, Dale, Hunter & Beaudette, P.C. 2 Whaler's Lane Nantucket, MA 02554 Phone No.:
G. Property Location: 5 [illegible] Road Nantucket, MA 02554	I. Settlement Date: 09/[illegible]/2012 Disbursement Date:
	Place of Settlement: Vaughan, Dale, Hunter and Beaudette, PC 2 Whaler's Lane Nantucket, MA 02554

J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due From Borrower		400. Gross Amount Due To Seller	
101. Contract sales price	2,240,000.00	401. Contract sales price	2,240,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	44,173.[illegible]	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes [illegible] to [illegible]/2012	611.[illegible]	406. City/town taxes [illegible] to [illegible]/2012	611.[illegible]
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due From Borrower	$2,[illegible],784.97	420. Gross Amount Due To Seller	$2,[illegible]
200. Amounts Paid By Or In Behalf Of Borrower		500. Reductions In Amount Due To Seller	
201. Deposit or earnest money	100,000.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	[illegible]
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff 1st Mtg Ln, Nantucket Bank	[illegible]
205.		505. Payoff 2nd Mtg Ln, [illegible]	[illegible]
206.		506. Deposit held by Seller	100,000.00
207.		507. Annette Warrender, Trustee	[illegible]
208.		508. Outstanding RE Taxes ([illegible]-2012)	[illegible]
209.		509. FY13 1Q RE Taxes	[illegible]
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes to		510. City/town taxes to	
211. County taxes to		511. County taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid By/For Borrower	$100,000.00	520. Total Reductions Amount Due Seller	$2,[illegible]
300. Cash At Settlement From/To Borrower		600. Cash At Settlement To/From Seller	
301. Gross amount due from borrower (line 120)	$2,[illegible],784.97	601. Gross amount due to seller (line 420)	$2,[illegible]
302. Less amount paid by/for borrower (line 220)	($100,000.00)	602. Less reductions in amount due seller (line 520)	([illegible])
303. CASH ☑ FROM ☐ TO BORROWER:	$2,[illegible],784.97	603. CASH ☑ TO ☐ FROM SELLER:	$[illegible]

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No confidentiality is assured; this disclosure is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settling process.

Previous editions are obsolete

HUD-1

MDD

MDD

CJW

L. Settlement Charges

		Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700. Total Real Estate Broker Fees			
Division of Commission (line 700) as follows:			
701. $ to			
702. $ to			
703. Commission paid at Settlement			
704. Island Properties			35,000.00
705.			
800. Items Payable in Connection with Loan			
801. Our origination charge	(from GFE #1)		
802. Your credit or charge (points) for the specific interest rate chosen	(from GFE #2)		
803. Your adjusted origination charges	(from GFE A)	0.00	
804. Appraisal fee to	(from GFE #3)		
805. Credit report to	(from GFE #3)		
806. Tax service to	(from GFE #3)		
807. Flood certification to	(from GFE #3)		
808.			
809.			
810.			
811.			
812.			
813.			
900. Items Required by Lender to Be Paid in Advance			
901. Daily interest charges from 09/05/2012 to @ $ /day for days	(from GFE #10)		
902. Mortgage insurance premium for mo. to	(from GFE #3)		
903. Homeowner's insurance for yrs. to	(from GFE #11)		
904. yrs. to			
1000. Reserves Deposited with Lender			
1001. Initial deposit for your escrow account	(from GFE #9)		
1002. Homeowner's insurance months @ per month			
1003. Mortgage insurance months @ per month			
1004. City property taxes months @ per month			
1005. months @ per month			
1006. months @ per month			
1007 months @ per month			
1008. Aggregate Adjustment			
1100. Title Charges			
1101. Title services and lender's title insurance	(from GFE #4)	13,119.00	
1102. Settlement or closing fee to Vaughan, Dale, Hunter and Beaudette PC	13,119.00		
1103. Owner's title insurance 6725	(from GFE #5)	6,725.00	
1104. Lender's title insurance	118.00		
1105. Lender's title policy limit $			
1106. Owner's title policy limit $ 2,240,000.00			
1107. Agent's portion of the total title insurance premium $ 5,359.00 to Vaughan, Dale, Hunter & Beaudette, P.C.			
1108. Underwriter's portion of the title insurance premium $ 1,375.00 to First American Title Insurance Company			
1109. Municipal Plat Plan to [illegible] Surveying		1,321.25	
1110. to			
1111. Real Estate Legal fee to Jamieson & Chamberlain LLP			2,000.00
1112. Outstanding Legal Fee to Jamieson & Chamberlain LLP			25,000.00
1113. to			
1200. Government Recording and Transfer Charges			
1201. Government recording charges	(from GFE #7)	195.00	
1202. Recording fees: Deed 225.00 ; Mortgage ; Releases 690.00			690.00
1203. Transfer taxes	(from GFE #8)	0.00	
1204. City/county tax stamps: Deed 10,214.40 ; Mortgage			10,214.40
1205. State tax/stamps: Deed ; Mortgage			
1206 Municipal Lien Certificate to Nantucket Registry of Deeds	65.00		
1207 to			
1208 to			
1300. Additional Settlement Charges			
1301. Required services that you can shop for	(from GFE #6)	0.00	
1302. Nantucket Land Bank Fee to Nantucket Land Bank		44,500.00	
1303. Wire Transfer Fee (2) to Nantucket Bank			54.00
1304. to			
1305. to			
1306. to			
1307. to			
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)		964,171.25	270,[illegible].40

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement (pages 1 and 2).

Borrower [signature] Seller [signature]

Matthew F. Boyle, Jr. — Marjorie H. Boyle — Leslie Warrender

Settlement Agent [signature] Date 09/05/2012

Kevin F. Dale, Esquire

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

Previous editions are obsolete

3

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement (pages 1, 2 and 3).

Borrowers		Sellers	
Matthew F. Dwyer, Jr.	Marjorie [illegible] Dwyer	Camilla Warrender	

Settlement Agent: Kevin F. Dale Esquire Date: 09/05/2012

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

Previous editions are obsolete

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C.
Client Funds Account IOLTA
P. P. Box 659
Nantucket, MA 02554

NANTUCKET BANK, A DIVISION
NANTUCKET, MA 02554
53-7013/2113

62197

9/5/2012

PAY TO THE ORDER OF Jacobi & Chamberlain, LLP $ **2,000.00

Two Thousand and 00/100** DOLLARS

Jacobi & Chamberlain, LLP

MEMO Dwyer:1 (Warrender real estate legal fee)

062197 211370133 [redacted]7769

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62197

Jacobi & Chamberlain, LLP 9/5/2012

Warrender real estate legal fee 2,000.00

[redacted]7769 Dwyer:1 (Warrender real estate legal fee) 2,000.00

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62197

Jacobi & Chamberlain, LLP 9/5/2012

Warrender real estate legal fee 2,000.00

PAYMENT RECORD

[redacted]7769 Dwyer:1 (Warrender real estate legal fee) 2,000.00

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NANTUCKET BANK, A DIVISION
NANTUCKET, MA 02554
53-7013/2113

62198

9/5/2012

PAY TO THE ORDER OF Jacobi & Chamberlain, LLP $ **20,000.00

Twenty Thousand and 00/100** DOLLARS

Jacobi & Chamberlain, LLP

MEMO Dwyer:1 (Warrender outstanding legal fee)

062198 211370113 [redacted] 7769

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62198

Jacobi & Chamberlain, LLP 9/5/2012

Warrender outstanding legal fee 20,000.00

[redacted]7769 Dwyer:1 (Warrender outstanding legal fee) 20,000.00

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62198

Jacobi & Chamberlain, LLP 9/5/2012

Warrender outstanding legal fee 20,000.00

PAYMENT RECORD

[redacted]7769 Dwyer:1 (Warrender outstanding legal fee) 20,000.00

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C.
Client Funds Account IOLTA
P. P. Box 659
Nantucket, MA 02554

NANTUCKET BANK, A DIVISION
NANTUCKET, MA 02554
[illegible]

62199

9/5/2012

PAY TO THE ORDER OF Camilla Warrender $ **75,750.00

Seventy-Five Thousand Seven Hundred Fifty and 00/100********** DOLLARS

Camilla Warrender

MEMO Dwyer:1 (net sale proceeds)

[illegible] [redacted] [illegible]

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62199

Camilla Warrender 9/5/2012

net sale proceeds 75,750.00

[redacted]7769 Dwyer:1 (net sale proceeds) 75,750.00

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62199

Camilla Warrender 9/5/2012

net sale proceeds 75,750.00

PAYMENT RECORD

[redacted]7769 Dwyer:1 (net sale proceeds) 75,750.00

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53-7013/2113

62207

9/5/2012

PAY TO THE ORDER OF Margaret D. Xifaris $ **23,000.00

Twenty-Three Thousand and 00/100** DOLLARS

Margaret D. Xifaris

MEMO Dwyer:1 (Warrender payoff)

[illegible] [redacted] 7769

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62207

Margaret D. Xifaris

Warrender payoff 9/5/2012 23,000.00

[redacted]7769 Dwyer:1 (Warrender payoff) 23,000.00

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62207

Margaret D. Xifaris

Warrender payoff 9/5/2012 23,000.00

PAYMENT RECORD

[redacted]7769 Dwyer:1 (Warrender payoff) 23,000.00

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P. O. Box 659
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NANTUCKET BANK A DIVISION
NANTUCKET, MA 02554
53-7013/2113

62208

9/5/2012

PAY TO THE ORDER OF Annette Marie Warrender $ **32,388.38

Thirty-Two Thousand Three Hundred Eighty-Eight and 38/100****** DOLLARS

Annette Marie Warrender

MEMO Dwyer:1 (Warrender payoff)

⑈062208⑈ ⑆211370135⑆ [redacted]

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62208

Annette Marie Warrender 9/5/2012

Warrender payoff 32,388.38

[redacted]7769 Dwyer:1 (Warrender payoff) 32,388.38

VAUGHAN, DALE, HUNTER AND BEAUDETTE, P.C. 62208

Annette Marie Warrender 9/5/2012

Warrender payoff 32,388.38

PAYMENT RECORD

[redacted]7769 Dwyer:1 (Warrender payoff) 32,388.38

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NANTUCKET, MA 02554
53-7013/2113

62212

9/5/2012

PAY TO THE ORDER OF Jacobi & Chamberlain, LLP

$ **334.00

Three Hundred Thirty-Four and 00/100****************************** DOLLARS

Jacobi & Chamberlain, LLP

MEMO Dwyer:1 (excess funds)

⑈062212⑈ ⑆211370134⑆ [redacted] 7769⑈

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