COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

IN THE MATTER OF
VALERIANO DIVIACCHI
Petitioner

PETITIONER'S BRIEF ON APPEAL

No. BD-2015-042

SUMMARY STATEMENT OF POSITION

> A hearing to determine character and fitness should be more of a mutual inquiry for the purpose of acquainting this court with the applicant's innermost feelings and personal views on those aspects of morality, attention to duty, forthrightness and self-restraint which are usually associated with the accepted definition of 'good moral character.' ... The approach should not be that of the adversarial nature of bar discipline cases ... In the Matter of Prager, 422 Mass. 86, 100-01 (1996).

Ignoring the above, Bar Counsel and the Panel pursued the reinstatement process as an adversarial re-litigation of the disciplinary findings and a snipe at Petitioner's First Amendment personal morality opinions critical of the legal system. Thus, Petitioner was and is forced to respond in kind to defend his critical opinions. Petitioner incorporates herein by reference his filed Renewed Objections to Reinstatement Procedure / Motion to Re-open with Instructions.

The standard for readmission after a fixed term suspension "is adequately amenable to the fitness inquiry of original applicants" for admission to the Bar. In the Matter of Prager, 422 Mass. 86, 95 (1996); SJC Rule 4:01, §18(5). Petitioner has satisfied such original admission standard if judged by an unbiased interpretation of the empirical evidence of his holistic 63 years of life except for re-passing the Bar exam which can be required. Matter of Gordon, 385 Mass. 48, 52 (1982) (reinstatement can be "conditioned upon his once more passing the bar.").

> The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of

the right to practice law. Konigsberg v. State Bar, 353 U.S. 252, 262-263 (1961). The difference between suspension and disbarment is that suspension "is primarily a punishment for the offending lawyer" and thus unlike disbarment "the time elapsed since the [suspension]" and the "chastening effect of a severe sanction" may be sufficient to warrant reinstatement where the disciplinary offense "occurred in the private sphere of the attorney-client relationship and did not result in public scandal" with no opposition except from Bar Counsel. In the Matter of Hiss, 368 Mass. 447, 454, n. 19 (1975); In the Matter of Pool, 401 Mass. 460, 467 (1988); *See* In the Matter of Daniels, 442 Mass. 1037, 1038-39 (2004) (It is proper to consider that the actual period of suspension "is greater than the sanction" actually imposed); *See generally*, "The Reinstatement Dilemma: The Legacy of the Hiss Case in Massachusetts." Brown, Barry. Journal of the Legal Profession, vol. 02 (1977-78). It is just as immoral to turn a suspension of 27 months into a lifetime disbarment as it would be to turn a 27 month jail sentence into a life sentence simply because the jailors' prejudices, personal views, and predilections do not believe the prisoner is worthy of being re-admitted into their closed society.

It is error to require "admission of guilt and repentance as part of the proof of present good character and rehabilitation". In the Matter of Dawkins, 432 Mass. 1009, 1112, n. 4 (2000). It is "improper" to use reinstatement as a means "to extract further punishment" for past sanctioned misconduct. In the Matter of Weiss, 474 Mass. 1001, 1004 (2016).

"A State's power to inquire about a person's beliefs or associations is limited by the First Amendment, which prohibits a State from excluding a person from a profession solely because of membership in a political organization or because of his beliefs." Baird v. State Bar of Arizona, 401 U.S. 1, 1; 91 S.Ct. 702 (1971).

There is no basis in law or morality to treat reinstatement as a popularity contest; the law

as a trade; charity as self-serving virtue signaling; and the words "learned" and "competent" as a referral service for MCLE which is only used by a quarter of active attorneys and not an educational requirement for any. The law is supposedly a profession, Petitioner's joy in studying its conceptual nature as an end-in-itself discovered in his old age after a lifetime of practical work he hated is a virtue not a vice.[1]

The Panel Report is such a hodge-podge of distortions, inconsistencies, faulty reasoning, and irrelevant concerns about Petitioner's "inner motivations" and Free Amendment speech that it is difficult if not impossible to make sense of it. The following statement in the Hearing Report exemplifies the erroneous process by which the Panel is trying to read "inner motivations":

> We acknowledge that later-developed evidence supports a finding that Hiss was in fact guilty — and therefore continued to lie at his reinstatement hearing — but we are here concerned with the evidentiary basis for the decision in Hiss, whether or not later developments militated towards a different result. Hearing Panel Report, p.7 n. 3

Right, what really happened empirically that allowed a perjurer to pass as an epitome of "good moral character" does not matter to the issue of how the reinstatement process works to determine credibility, good moral character, and to protect the integrity of the Bar. The Panel wrongfully demands Petitioner admit guilt and deny his honest good faith moral beliefs they consider to be a "vanity project"[2] in order to be re-admitted into their polite society with its ultimate vanity project of being self-appointed moral betters over the lives of Others.

STATEMENT OF PROCEEDINGS

This is Petitioner's second petition for reinstatement from what was supposed to be a 27 month suspension whose practical effect is to place him into a United States Bar outcaste class

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[1] *See* Argument ¶V *infra*.

[2] Panel Report (Report) at p. 10 referring to Petitioner's work of the last five years.

through lifetime disbarment. Exhibit 1 (Exh.) p. 1. It took the disciplinary process 34 months to deny the first timely filed petition for reinstatement from a 27 month suspension. Seven months of that was spent getting an SJC order compelling the BBO to give Petitioner a hearing on his *Petition* and its *Objections* as to the *Part II Questionnaire*. Petitioner finally, after 33 months, had to file a mandamus petition in the SJC asking it to compel the Single Justice to issue a decision. At one point, after realizing the absurdity of the dilatory process by which the BBO and Bar Counsel were handling his *Petition*, Petitioner made various attempts to expedite the process such as by a *Motion to Re-Open* and by a *Motion to Dismiss/Withdraw* the *Petition*, however these motions were opposed and were denied by the Single Justice. Docket *SJC-BD-2015-042.*

It is not true that Petitioner "waived any appeal and instead moved that the order denying his reinstatement be issued *nunc pro tunc*".[3] Petitioner appealed both the Panel Findings by filing a *Brief on Appeal* and by filing separate *Objections to the Hearing Panel's Misrepresentations on Reinstatement*. Docket #56 *SJC-BD-2015-042.* The separate *Motion for Judgment nunc pro tunc* was filed as to "any entry of judgment", it did not waive any issue nor any appeal. The Single Justice after a year and the mandamus filing did enter judgment *nunc pro tunc* denying reinstatement but did so without issuing any decision nor issuing any findings on either the *Objections* or the *Recommendations*; thus the prior judgment is not a waiver or a final finding of anything nor binding on anything[4]. Petitioner never waived anything. Petitioner incorporates herein the above referenced *Brief*, *Objections*, and the *Docket*.

Petitioner timely filed this *Second Petition* a couple of weeks after the *nunc pro tunc*

[3] Id. p. 5.

[4] Report at page 6 claims waiver, finality, and binding findings by the Single Justice; there were none, there was no waiver, and there is nothing binding in the prior Record.

entry of Judgment of the prior denial. Petitioner was again forced to file a *Motion to Compel a Prompt BBO Hearing* in order to get a timely hearing on this Second Petition. Docket, *supra*.

The Panel over Petitioner's objections spent about 3/4 of the hearing allowing Bar Counsel to re-litigate the underlying disciplinary findings. For the remainder, the Panel allowed Bar Counsel to take two paragraphs from publicly available thousands of pages of Petitioner's Free Speech essays and other writings to use against him. Transcript (Tr.). pp. 10-17, 102-258. Petitioner has been a critic of the disciplinary process for over 25 Years. Exh 11.

A. Material Misrepresentations in the Panel Findings

Though the Panel is quick to criticize Petitioner for "misrepresentations" he supposedly made, there is no shortage of misrepresentations in their own Report:

> 1. First, the petitioner made it clear that he would put up with difficult behavior from the well-heeled that he would refuse to accept from poor clients ... [and having a] pecuniary interest [in their case].[5]

Not true. This fabrication is intended to make the Petitioner look evil that is worse that any good faith erroneous statement the Petitioner has ever made. Petitioner **has never "refused" and there is no evidence that he ever refused any poor or other client because of "bad behavior" despite it often reaching physical threats from these clients**; in fact, Petitioner's willingness to deal with and to accept without withdrawing and giving up on his clients is what eventually got him into trouble in the Warrender case — Petitioner would not be suspended if he had refused to deal with her behavior as he did at one point instead of accepting her as a client when she returned asking for his representation. Petitioner's cited testimony was trying to explain the difficult nature of his practice and why it often involves disputes and arguments with some clients and not others — something which Panels and the BBO do not understand because they do not bother dealing with difficult clients but withdraw and abandon them when clients do get difficult. Exh. 1, pp. 12-14, Tr. pp. 47-54, 69-82, 165-69, 197-99, 210-14, 218-31. Such out-of-context distortion of testimony is a problem throughout this case. At least this Panel did not repeat the prior Record lies that Warrender received "no net funds" or that there was "no settlement agreement". Exh 1, pp. 3-4, 63-72; Exh. 2. However, the need to make Petitioner look bad does not cease. The "pecuniary interest" consisted of wanting to get paid when he wins as contingent fees go; it appears the Panel expects lawyers to work

[5] Id. p. 10.

for free. Only those whose lifetime law practice is free may throw the first stone here.

2. ... the petitioner refuses to accept the *legal significance* of his misconduct ... The petitioner insisted on attempting to re-litigate the underlying disciplinary findings and conclusions.[6]

Not true. Petitioner insisted and filed multiple motions *in limine* and objections to try to stop re-litigating the underlying disciplinary hearing. Tr. pp. 10-13, 17 ("I don't want the hearing to turn into a re-litigation of the case ...") Instead, over Petitioner's objections, Bar Counsel was allowed to re-litigate the underlying disciplinary findings and conclusions and thus forced Petitioner to respond to each of them. Petitioner has accepted the *legal significance* of the SJC Decision even though the Panel has not because they still do not understand the novel Rule 1.5 standard here created by the SJC. See *infra.*

3. Still, the petitioner is unwilling to accept the legal significance of his acts: he was not entitled to a contingent fee based on purported net proceeds of the client's sale of her own property because the contingency set forth in the fee agreement he wrote had not occurred, and his lawsuit against his client therefore constituted an effort to collect a clearly excessive fee.[7]

Not true. Petitioner has repeatedly accepted the legal significance of his acts. Exh 1, pp. 2-5, 12-14; Exh 19, ¶2; Tr. pp. 51-66, 85-87, 106-126, 143, 165-169, 192, 197-99, 210-28, 236, 230-37, 247, 252-53. In fact, because Petitioner is the only one so far who understands the legal significance of the SJC's creation of a subjective standard for the Rule 1.5 findings made against him, he understands the legal significance of those findings more than does the Panel. *See* Argument ¶III *infra*. Petitioner filed a fee dispute based on a contingency of "recovery by judgment or settlement or otherwise" and on the law as it was at the time before the new law of this case. The Panel does not believe his acceptance is genuine as they do not accept anything he says is genuine. *See* ¶IV *infra*.

4. The Court's pronouncements meant that, *as a matter of law*, there was no 'recovery', i.e., the contingency on which recovery of a percentage fee depended.[8]

Not true. What was meant by "recovery" in the contingent fee agreement which actually stated "recovery by judgment or settlement or otherwise" was a factual issue upon which "[t]he hearing committee found that the contingency called for in the agreement did not occur." *In the Matter of Diviacchi*, 1014, 1019. Based on an administrative appellate review standard, the SJC accepted this factual finding; such acceptance does not make it

[6] Id. p. 12.

[7] Id. p. 13.

[8] Id. n. 9.

a "*matter of law"* conclusion anymore than affirming any factual finding on appeal converts it to a "*matter of law*" finding. (Even if it was a "*matter of law*" conclusion, it was a novel one; Petitioner filed his fee claim based on known law and could not reasonably be expected to predict that the SJC would create new contract law.) Exh 1, p. 4, 12-14; Exh. 5, pp. 166-69; Exh. 6, pp. 180-86; Exh. 19, ¶2; Tr. pp. 85-86, 126, 197-99.

5. There appears to be no dispute that the petitioner flatly refused to discuss the client's case with her ... . The petitioner acknowledged before us more than once that he did not talk to his client enough and that he should have withdrawn when unwilling to discuss the client's case with her.[9]

Not true. What Petitioner acknowledged was that he refused continually and repetitively to discuss with her the filing of a fraudulent injunction motion and a fraudulent bankruptcy and that at that point he should have withdrawn given her continuing contacts demanding such. He discussed with her repeatedly her breach of her good faith obligations not to file fraudulent claims and not to waste time.[10] He did not try to "finesse" his way out of anything. Petitioner admitted that given his status as a solo, the complexity of the case, and his family obligations, it was simply not physically and mentally possible for him to engage in the waste of time and resources demanded by the client: he should have withdrawn at that point as would any Panel or BBO member. Exh 1, pp. 2-5, 12-14; Exh. 5, ¶¶10-39 (pp. 146-58); Exh 19, ¶2; Tr. pp. 51-66, 69-72, 85-87, 106-126, 143, 159, 161, 165-169, 192, 197-99, 210-28, 236, 230-37, 247, 252-53.

6. The petitioner has not shown that he in fact *contested at his disciplinary hearing* the fact that he did not have a reasonable basis for his accusations ... .[11]

Not true. Petitioner has always contested this and contests it to this day — unsuccessfully but it is contested just as in Hiss. Exh. 1 pp. 2-5; Tr. pp. 46, 64-65, 79, 82-84, 104-10, 247-49. Hiss by criminal verdict was convicted of perjury based on two statements. He did not challenge making the statements, he unsuccessfully contested that they constituted perjury. Hiss was never cross-examined at his reinstatement hearing about the week of jury trial evidence against him. Like Hiss, Petitioner admits to making the statements at issue but denies they are or constitute misrepresentations. Why, unlike Hiss, is Petitioner being cross-examined on the findings against him and forced again to contest them when it is clear neither Bar Counsel nor the BBO will ever believe him?

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[9] Id. pp. 13-14.

[10] Petitioner notes that once again this Panel as everyone before fails to acknowledge that Petitioner was 2500 miles away in California trying to enjoy his daughter's college graduation when many of the events to which they cite happened. Exh. 1, pp. 3; Tr. pp. 50, 52, 64. 68, 79, 217-18. As always, the BBO and Bar Counsel preach concern about the "Well-Being" of attorneys but do not practice any concern for it. *See* infra at Argument I(A) *citing* Matter of Zankowski, 487 Mass. 140, 155-56 (2021).

[11] Report p. 16.

7. The petitioner has been accepted into a doctoral program in philosophy.[12]

Not true. Petitioner never said this. Petitioner has been accepted into multiple masters programs as he attempts both by independent study and by these masters programs to eventually fulfill his life-long dream of getting a Ph.D. in philosophy. Exh. 1 p. 6. Though working hard at it and using my retirement assets to get it, I have yet to be accepted into a Ph.D. program. At 63 years old with one foot in the grave, it is doubtful I ever will be but I am trying and will continue trying as long as my age and health allow. This work is a "labor of love" as would be a return to reinstated practice. Tr. p. 40.

8. Because the accusation of bigotry was baseless and, therefore, reckless ... .[13]

This is not really a misrepresentation because it is a good faith opinion by the Panel. Petitioner is placing this here to show how good faith excuses bad inferences. The Panel is so blinded by Petitioner's First Amendment good faith opinion that they cannot even think straight at the simplest level. Petitioner defined a bigot as "someone who makes decisions based on their bias and prejudices instead of the facts". Tr. p. 177. One of the several examples Petitioner was allowed to give before being cut-off[14] was the undisputed fact that "[y]ou had one board member there that didn't even bother to show up for the hearing yet they signed off on calling me not believable, immoral and all this stuff"[15]. The Panel considers this undisputed statement of fact to be "baseless" and "reckless" because undisputedly the act of not bothering to show up is legal. At a basic 5th grade level of reasoning, if an accused act of bigotry is legal does not mean the accusation of bigotry is "baseless" and "reckless", it simply makes bigotry legal. Under the Panel's reasoning, if slavery were made legal again, it would be baseless and reckless to call it bigotry. This is a good faith difference of opinion. The Panel sees good faith in themselves but is incapable of the empathy required to see good faith in an Other's beliefs with which they disagree, yet they engage in the vanity project of judging Others.

9. "... the fact that he [Petitioner] ... ignored and then turned on a client by lying to a court in an effort to obtain from the client a fee that was not contemplated... ."[16]

Not true. This is a distortion of events by a Panel who was not there and has no clue as to what actually happened nor has any competence moral or otherwise to decide what happened in a very complicated case handled competently by the Petitioner. Exh. 1 pp. 4-

[12] Id. p. 22.

[13] Id. p. 21.

[14] Petitioner was continually cut-off when trying to explain. Tr. pp. 158-61.

[15] Tr. pp. 177, 180-82 contains this example and several others.

[16] Id. p. 26.

5; Tr. Tr. pp. 51-66, 69-72, 85-87, 106-126, 143, 159, 161, 165-169, 192, 197-99, 210-28, 236, 230-37, 247, 252-53. **Petitioner HAS NEVER IGNORED OR ABANDONED ANY CLIENT NOR ANY JUST CAUSE OR FIGHT LEGAL OR OTHERWISE AND HAS REMAINED IN FIGHTS LONG AFTER ATTORNEYS SUCH AS THE PANEL AND THE BBO WOULD HAVE ABANDONED THE CLIENT AND THE FIGHT.** As it turns out, Petitioner would have been better off had he abandoned his client Warrender to her real bankruptcy fate as Sherin and Lodgren, the Jacobi attorneys, all her other attorneys, the Panel attorneys, the BBO, and every other attorney involved in her case did or would have done**. IT IS ONE OF THE ABSURDITIES OF THIS CASE THAT IF HE HAD IN FACT ABANDONED HER AS THE PANEL CLAIMS, PETITIONER WOULD NEVER HAVE BEEN SUSPENDED AND WARRENDER WOULD BE A BANKRUPT INSTEAD OF A RECOVERY.** Petitioner handled a lender liability case competently and saved his client from default and real bankruptcy; prepared the case for trial and was willing to take the case to trial which is what really settled the case not the fraudulent work of other counsel; and pursued a fee collection case based on what was good law at the time. See *Infra*.

SUMMARY STATEMENT OF FACTS

Petitioner as a young child with his family escaped communist Yugoslavia and emigrated to this country as refugees. Since the age of 14 up to his retirement prematurely forced by this suspension at age 58, Petitioner has been a law-abiding, tax-paying, debt-honoring, debt-paying, working, physically and mentally healthy, contributing member of society whose contribution included six years of military service in defense of the Constitution and its rule of law. His adult life includes thirty-and-continuing years of marriage while supporting and raising a family into adulthood. By any ethical or moral standard naturally or socially constructed that can be empirically examined, Petitioner has led a life which by no moral standard may anyone reject as immaterial to reinstatement. Exh. 1 pp. 4-7, 133-34; Tr. pp. 7, 16, 47-50, 88.

During and after this suspension, though Petitioner no longer has paying work, he still has no criminal record, no bankruptcies, no unpaid or dishonored tax nor any other debts, and no empirical blemishes on his life that would entitle anyone to ignore his entire life as immoral. His marriage, financial stability, and physical and mental health continue as the Fates allow. Exh. 1

pp. 2-7. Petitioner is not rich but neither he is poor which economic status seems to matter to the Bar as exemplified by its Questionnaire Part II though it should be immaterial to reinstatement.

According to the finest traditions of Civilization at least in its Classical form, the search for knowledge and truth are supposedly intrinsically desirable as ends-in-themselves of ultimate value regardless of empirical, practical, pragmatic, or popular value. In Petitioner's tired but as yet undefeated old age with the little time of life he has remaining, the Fates with the support of his family have given the Petitioner the good fortune to be physically and mentally able to engage in research and writing work that he enjoys, works at full time as a "labor of love", and upon which he is expending a significant portion of his retirement assets and income. Petitioner now has the good fortune of no longer having to pass on work that gives him joy in life because of the practical need to make a life for his family doing work he hates. Exh. 1, pp. 5-14, 109-29; Tr. pp. 39-43, 87, 90. The Panel by no moral standard may ridicule it as a "vanity project".

You can ridicule it all you want, but the fact remains that Petitioner honorably did his duty as an attorney in approximately 1000 cases including 100 mostly jury trials (40-50 of which were attorney malpractice trials) and 100 appeals for 25 years. Disbelieve and ridicule it all you want as pretending to be a "'warrior' for the downtrodden who took on cases for the 'underserved' that no-one else would take on a contingency basis"[17], the fact remains that Petitioner successfully practiced for 23 years as a solo trial attorney taking on complicated non-personal injury civil cases such as attorney malpractice, lender liability, consumer protection/bad faith insurance practices, and much more on a contingent fee basis. He did this for clients who were not able to find competent representation elsewhere or whose cases were too convoluted for

[17] Id. p. 10.

other attorneys to take on a contingent fee basis. While handling such a difficult practice in a "cutthroat"[18] business, Petitioner has never committed malpractice; never converted or misused client funds; never defaulted on any debts or taxes; and never suffered a bankruptcy or other financial, physical, or mental breakdown while keeping his family intact. Exh. 1, pp. 4-7, 11-14; Tr. pp. 47-53, 64-69, 210-19, 236, 251-53.

This suspension is the blemish on his professional record that destroyed what was a successful practice. There is no need to repeat here either the constantly and publicly repeated false findings made against Petitioner; his true responses to those false findings; nor his constantly repeated admissions and apologies as to what he did wrong that are constantly and repeatedly ignored. Petitioner only emphasizes that once again even this Panel does not have the decency to admit and state that Petitioner was 2500 miles away in California trying to enjoy his daughter's college graduation when Warrender began her demands that Petitioner file a fraudulent injunction motion and bankruptcy petition nor admit the circumstances of those demands and his refusal to do so nor his actions in response. Exh. 1, p. 3, 13; Exh. 5, pp. 142-145, 147, 149-164; Tr. pp. 51-63, 68-69, 71-81, 89, 252-53. The underlying events of this Warrender representation caused no empirical harm to anyone but to the Petitioner and his family. Not only have the false findings destroyed my law career, they have destroyed what should have been the unblemished joy of having my daughter be only the second person (after me) in my family to achieve education behind grammar school. The Bar's personal contempt of me goes on to contempt of my family. If there is any moral failure here, it is not with me.

As for the future, the empirical evidence warrants a finding based on the Petitioner's

[18] Exh. 1, p. 12.

holistic whole of 63 years of contributing and trustworthy life which included service to the Bar as a practicing trial attorney that he will continue to be a contributing and trustworthy member of society and the Bar at age 64 until infirmity or death. Petitioner seeks reinstatement so as:

1) to correct the injustice of his wrongful suspension;
2) to give the Bar and the clients who seek its assistance the benefit of my 25 years of trial and litigation experience as a warrior of the underserved;
2) to handle only 4-5 cases (instead of 40-50 cases as he did before) at any given time with clients he trusts and who trust him in which:
    a) he will stop being the angry and combative attorney he once was;
    a) he will collect no client funds;
    b) for which he will use no hybrid contingent fee agreements;
    c) from which he will withdraw at the first sign of dispute with the client;
    d) for which he will pursue no fee collection action if stiffed on any fee to which he believed himself entitled. Exh. 1 pp. 11, 12-14, 133-34; Exhs. 8, 9, 10; Tr. p. 87-88, 216-19, 250-251.

ARGUMENT

I. THERE IS A SUBSTANTIVE DIFFERENCE BETWEEN SUSPENSION AND DISBARMENT: THE PETITIONER'S LIFE IS JUDGED HOLISTICALLY AND THE TIME LAPSED MATTERS.

A fixed-term suspension is not a finding that the Petitioner is morally unfit to practice law as is assumed here from case law making such a finding for disbarment; fixed term suspension unlike "disbarment is primarily a punishment for the offending lawyer". In the Matter of Hiss, 368 Mass. 447, n. 19 (1975). The disciplinary judgment did not find the Petitioner to be unworthy of practicing law and disbarred him from the Massachusetts list of attorneys, he was found to be unworthy of practicing law for 27 months. As a result of the Hiss case, there has been a blurring of the line between suspension for a fixed term and disbarment and indefinite suspension in case law thus resulting in blurring of reinstatement standards. *See generally*, The Reinstatement Dilemma: The Legacy of the Hiss Case in Massachusetts*, supra*. Disbarment is the most severe of disciplinary sanctions; "absent a showing of extraordinary

circumstances, the public and members of the profession perceive reinstatement following disbarment, as opposed to a suspension of limited duration, to be an act of generosity motivated by influence, friendship, pity, or a combination of these factors" Id. p. 81. The Panel refuses to ask why Hiss was not able to get away with perjury before a jury but was able to get away with it before his Brahmin friends in the intelligentsia for decades and before the ruling caste of the BBO and the SJC at his reinstatement. However, the SJC through a notable *Dissent* has questioned this blurring both relative to the Bar and to the public perception of the Bar:

> In 1975, this court unanimously granted the petition for reinstatement of an unrepentant but convicted perjurer in spite of an adverse recommendation by the Board of Bar Overseers. Matter of Hiss, 368 Mass. 447 (1975). In this case, the Board of Bar Overseers recommends the reinstatement of Gordon, but the court denies his petition.
>
> In trying to gauge the impact of Gordon's readmission to the bar on the public, the court reminds us of the scandal of the Boston Common Garage cases and describes them as "a notorious saga of corruption and theft." However, by comparison with the national notoriety of the Hiss trial ... Gordon's prosecution was only a local media attraction. ... I find it most difficult to understand the reason for the difference in treatment between Hiss and Gordon. ... I would allow Gordon's petition for reinstatement on condition that he pass the Massachusetts bar examination. Matter of Gordon, 385 Mass. 48, 59 (1982).

One of the after-effects of this blurring of the line between fixed term suspension and disbarment is that case law from disbarment and indefinite suspension cases is inattentively and carelessly erroneously applied to fixed term suspensions. Perhaps not only inattentiveness or carelessness is the reason for this error; this misuse of case law may derive from its usefulness as a means to seize power improperly to "extract further punishment" for past sanctioned misconduct. *See* In the Matter of Weiss, 32 Mass. Att'y Disc. R. 263 (2016); 474 Mass. 1001, 1004 (2016). The most material of such inapposite citation and application of case law is:

> ... the conduct giving rise to the petitioner's suspension is 'conclusive evidence that he was, at the time, morally unfit to practice law….' Dawkins, 432 Mass. at 1010, 16 Mass. Att'y Disc. R. at 95 (citations omitted). That misconduct continued to be evidence of his lack of moral character … when he petitioned for reinstatement.' Matter of Leo, 484 Mass. 1050, 1051, (2020), Dawkins, id., and to same effect, see Matter of Centracchio,

345 Mass. 342, 346 (1963), and Matter of Waitz, 416 Mass. at 304 ...
Panel Report at pp. 5-6.

The Panel uses these citations to conclude that the Petitioner's entire life up to his January 2016 suspension at 58 years of age is immoral and can be ignored. Further, using these citations, the denial of the First Petition for Reinstatement according to them is *res judicata* that Petitioner's life from January 2016 to the final denial of reinstatement in October 2020 was immoral and can be ignored. So, if the Panel reasons consistently and takes their reasoning to its required conclusion, this Second Petition for Reinstatement is to be decided upon Petitioner's life from October 2020 to the present — the last nine months of 63 years of life. This is absurd reasoning.

The case history allowing judgments of disbarment to create a life-long presumption of "lack of moral character" derives from *res judicata* principles based on disbarment at least initially being a life-long indefinite suspension. The Panel's cited Dawkins involved an attorney with a previous fixed term suspension who was now moving for reinstatement from a second indefinite suspension. Dawkins, 432 Mass. 1009, 1010 (2000). Looking to and following the case law back from Dawkins at 1010, it cites back to "*Matter of Waitz*, 416 Mass. 298 , 304 (1993). *Matter of Pool*, supra at 464. *Matter of Keenan*, 313 Mass. 186 , 219 (1943)." This cited Waitz involves an indefinite suspension and states at Waitz, 304: "**[d]isbarment** [emphasis added] 'is conclusive evidence of his lack of moral character at the time of his removal from office. And it continues to be evidence against him with respect to lack of moral character at later times.' *Matter of Pool*, 401 Mass. 460, 464 (1988), quoting *Matter of Keenan*, *supra* at 219." This cited Pool involves disbarment and states at Pool, 464: "[t]he petitioner's **disbarment** [emphasis added] 'is conclusive evidence of his lack of moral character at the time of his removal from office. And it continues to be evidence against him with respect to lack of moral

character at later times.' *Matter of Keenan*, 313 Mass. 186, 219 (1943)." All of these citations go back to Keenan which is a disbarment case and states at 219:

> ... **a person who has been disbarred** [emphasis added] ... from his office of attorney at law does not have the effect merely of removing him. It amounts also to an adjudication of the facts upon which the removal was based. While the judgment remains unreversed the adjudication of facts stands against the person removed ... is conclusive evidence of his lack of moral character at the time of his removal from office. And it continues to be evidence against him with respect to lack of moral character at later times in accordance with the principle that 'a state of things once proved to exist may generally be found to continue.' *Galdston v. McCarthy*, 302 Mass. 36, 37.

The cited Galdston is a 1938 case involving a divorce and the equity remedy of specific delivery. The Matter of Centracchio, 345 Mass. 342 (1963) is also a disbarment case that also cites back to *Keenan*, supra. Disbarment has a *res judicata* effect because it "exclude[s] from the office of attorney ... for the preservation of the purity of the courts and the protection of the public, one who has demonstrated that he is not a proper person to hold such office". Keenan at 169.

As admitted by the Panel, the wording of Keenan is not reflected in S.J.C. Rule 4:01 §18(5) setting the standard for reinstatement as being the same as "required for admission to practice law". Report p. 3. Despite this long case history of disbarment not term suspension being the foundation for a presumption of "lack of moral character", the Leo court — the only other case on this issue cited by the Panel — without analysis and seemingly without thought in 2020 cites the disbarment wording of Keenan as if it were a suspension case. Matter of Leo, 484 Mass. 1050, 1051 (2020). Given the lack of reasoning and lack of case law in support, Petitioner submits such is either *dicta* or simply an error inadvertently citing an inapposite case.

Fixed term suspension unlike "disbarment is primarily a punishment for the offending lawyer" and thus unlike disbarment "passage of time" may be sufficient to warrant reinstatement because of the "chastening effect of a severe sanction". In the Matter of Hiss, 368 Mass. 447,

454, n. 19 (1975); *See* In the Matter of Pool, 401 Mass. 460, 467 (1988). There is no basis in legal reasoning to use *res judicata* principles to apply a presumption of life-long "lack of moral character" as resulting from a fixed term suspension.

Even if everything the disciplinary findings say are true, the resulting punishment was a twenty-seven month suspension not disbarment nor an indefinite suspension. As the Panel admits, "the time elapsed since the [suspension]" may be considered for purposes of reinstatement even from disbarment, thus it must be considered for purposes of reinstatement from a fixed term suspension. Panel Report p. 3; *See* Pool at 467, 469; Daniels, 442 Mass. 1037, 1038-39 (2004). "[A] long enough time span between disbarment and petition for reinstatement, during which the petitioner's conduct was exemplary" may justify reinstatement. Hiss, at 460 n. 19. It is proper to consider that the actual period of suspension "is greater than the sanction" actually imposed. Daniels, 442 Mass. 1037, 1039 (2004). There is no legal or moral basis to ignore Petitioner's holistic life as a contributing and trustworthy member of society; nor is there any basis to ignore the "chastening effect" of a sanction that not only destroyed Petitioner's law practice and made him an outcaste, but also ruined a family event and memories. Pool, at 469. No modern wordgame of morality condemns persons as immoral based on one act or even upon multiple acts; an individual act may be immoral but not the whole life of the individual.

II. THE PANEL DESPITE ADMITTING "THAT OUR SYSTEM IS FALLIBLE" AGAIN ARE OBSESSED WITH HAVING THE PETITIONER ADMIT A *MENS REA* HE CONTESTS.

The Panel as with everyone else so far involved in this matter are obsessed with getting the one thing from Petitioner that they will never get and which would make Petitioner a perjurer if he did give it: admission that he made knowing and intentional misrepresentations to a court. Just as cold-blooded liars are able to defeat lie detectors, it seems it would be better for the

Petitioner if he were a cold-blooded liar for reinstatement purposes — be another Hiss.

> The Panel's verbiage on the Hiss case makes no sense:
>
> — Hiss admits making statements, the statements were found to be perjury by a jury, he denies the statements were perjury — allowed and Hiss is reinstated;
>
> — Petitioner admits making statements, the statements were found to be misrepresentations by those who are his opponents, he denies the statements were misrepresentations — not allowed and reinstatement is denied.

Hiss by a criminal standard of proof beyond a reasonable doubt was convicted of two acts of perjury consisting of two statements he made as an attorney under oath to Congress. Hiss, *supra*. The verdict was appealed all the way to the U.S. Supreme Court and reviewed using criminal standards of review. Id. Hiss admitted making the statements, he simply claimed they were true statements not perjury. Id. Hiss' claims of innocence were allowed to stand without cross-examination at his reinstatement; there was no attempt to use the statements against him. Id. Perjury as with all actionable misrepresentation requires the necessary *mens rea*.

Petitioner was twice denied a jury trial on the allegations against him. Exhs 3, 4. Instead, as summarized *supra*, two attorneys with no training nor any required qualifications or experience in any of the convoluted issues who bothered to show up for the entirety of his disciplinary hearing — who would normally be his opposing counsel — by a preponderance of the evidence found he did make misrepresentations. This administrative finding was reviewed on appeal by the lower administrative standard of review. Petitioner has admitted making the statements but claims two were true and thus not misrepresentations and has admitted and apologized for the third as being a good faith error lacking the required factual *mens rea* of being knowingly and intentionally a false statement. Petitioner over his objections has been forced again to respond and contest the findings without hope of anyone in the legal system believing

him.

Why is Petitioner expected to admit guilt while Hiss was allowed to deny it? Historically, the Panel admits, it turns out Hiss was a perjurer including at his reinstatement, but the Panel admits "that our system is fallible" and is thus willing to forgive and forget the reinstatement of Hiss through perjury[19]. Yet, the Panel are obsessed with having Petitioner admit to a *mens rea* he has always contested in order for them to forgive and reinstate. As the SJC warned in Hiss:

> Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit. For him, a rule requiring admission of guilt and repentance creates a cruel quandary: he may stand mute and lose his opportunity; or he may cast aside his hard-retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law. Men who are honest would prefer to relinquish the opportunity conditioned by this rule: "Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt . . . may be rejected, -- preferring to be the victim of the law rather than its acknowledged transgressor -- preferring death even to such certain infamy." [Note 17] Burdick v. United States, 236 U.S. 79, 90-91 (1915). Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, would be tempted to commit perjury by admitting to a nonexistent offense (or to an offense they believe is nonexistent) to secure reinstatement. So regarded, this rule, intended to maintain the integrity of the bar, would encourage corruption in these latter petitioners for reinstatement and, again paradoxically, might permit reinstatement of those least fit to serve. Hiss at 459-460.

It is not true that Petitioner "admits committing the alleged act but honestly believes it is not unlawful"[20] — a standard not reached in Hiss or since by the SJC. Such would be the case if Hiss or the Petitioner admit to committing perjury but claim that such was justified by some moral or legal standard. For example: Hiss lied about being a Russian spy but this was lawful as self-defense or in defense of others because otherwise his handlers would execute him or would

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[19] Report at notes 3, 7. Petitioner's filed Objections to Reinstatement Procedure/Hearing Brief incorporated herein by reference.

[20] Id. p. 12.

execute imprisoned Jews in a Stalinist Gulag; so forth. Again, Petitioner is forced to state:

> — Warrender was supposed to bring $25,000 to the 1 May meeting. Having failed to do so by bringing only $15,000, the hybrid contingent fee agreement she signed that day made clear and she was informed by the Petitioner that another $10,000 was due and owed. Petitioner states again: this was a true statement at all times at issue and is a true statement now and will be true as long as the English language is as it presently is.
>
> — The statement that the underlying case was settled (actually settled not just settlement negotiations as had been ongoing for a year) behind my back was a true statement at all times at issue and is a true statement now established by the Record including by undisputed documents that present no credibility issue regardless of how other attorneys successfully distort the Record to say otherwise.

A. The Panel's Distortion of Events and Memories that Occurred Ten Years Ago Makes No Sense nor Negates *Hiss.*

By the Panel's own cited case, "situational pressures cannot be ignored when assessing the likelihood that such misconduct will recur". In the Matter of Pool, 401 Mass. at 467 (1988).

The third misrepresentation for which Petitioner was disciplined was always a moving target but was finally finalized by the SJC in its Decision to be as follows:

> Discovery has further revealed that such deceit by the [client] is her standard habit and business routine for dealing with attorneys. In the past ten years, [the client] has had >15 different attorneys represent her in a half-dozen matters ranging from a divorce in probate court to a lender liability action in federal court with the same pattern: she hires an attorney, works him or her until she stops paying the bill, fires that attorney and disputes the bill and files a board complaint, and then gets another attorney and starts the process again. *In Re Diviacchi*, at 1017.

The above statement was made nine years ago as a badly worded summary under very stressful circumstances of events that happened about ten years ago. At this point, Petitioner does not remember whether he talked to five of Warrender's attorneys, fifteen, twenty-five, or whatever of them. He no longer has any clue as to how many he contacted, and he never said in the above how many attorneys he contacted. What he said was based on "Discovery" and inferences from "Discovery". The "Discovery" that was the basis of the above statement consisted in addition to

talking to multiple counsel of thousands of pages and digital records that took up a 4-draw file cabinet of material — it was not just talking to a bunch of attorneys about a simple, *i.e.* slip-fall case, as Bar Counsel, the BBO, and the SJC constantly assume. The underlying Warrender file "Discovery" consisted of a $2.8 million lender liability case; plus records from a week long trial involving Warrender and a bunch of Nantucket or Martha's Vineyard attorneys/brokers in which to Petitioner's present memory she had half-dozen attorneys who dealt with her; her divorce records in which she went through multiple attorneys; and at least two other court cases involving numerous other attorneys. At the time of the above statement, Petitioner was dealing with Warrender and her multiple attorneys filing a fraudulent bankruptcy, motions, and appeals, and waiving the BBO complaint against the Petitioner in the BMC before multiple judges as an obvious attempt to prejudice them against Petitioner and to use it as leverage for a dismissal. Exh. 1, p. 4; Exh. 5 pp. 170-72; Tr. pp. 50-52, 64-68, 79, 217-18.

Just like the multiple misrepresentations made by the Panel in its Report, summarized *supra*, and other misrepresentations made by prior Panels (such as that Warrender received "no net funds" and that there was no "settlement agreement", Exh. 1 pp. 3-5), Petitioner did not knowing and intentionally lie. What happened is that he made a mistake while under significant stress in his inferences from the facts and based on his 25 years of handling attorney malpractice cases in which clients routinely use Bar Counsel as leverage. Id. Petitioner has repeatedly admitted the mistake and apologized and does again *infra*. Exh. 1, p. 4; Tr. pp. 83-84, 248-49.

No one believes my apologizes, everyone is insisting that I admit that I knowingly and intentionally lied — apparently so as to deny reinstatement because I am a knowing and intentional liar instead of denying reinstatement because I refuse to admit that I am a knowing and intentional liar which I am not. I am not going to admit to lying, I did not. I state again:

> As to the convoluted third statement as to how many attorneys Warrender previously had and on how many of their fees she disputed, I admit again that my inference and wording as to how many times she disputed fees or filed BBO complaints were wrong and that I made a stupid but good faith mistake and used bad wording made in the heat of argument while under significant stress; I have repeatedly apologized for such mistake; I apologize for it again; and I state again that I will never again allow himself to get so carried away in the heat of stress again. I should not have made the statement.

The Panel does not accept the genuineness of this admission and apology as they do not accept the genuineness of anything I say — even if I were to say the earth is round — not because of anything Petitioner has done since his suspension but because they are blinded by what they consider to be his "contempt" of their status as moral betters as expressed in his First Amendment speech. Determinations of credibility and intent must be supported by the evidence and testimony. In re Murray, 455 Mass. 872, 883 (2010).

According to recent 2021 guidance by the SJC, issues of stress and the resulting adverse effects upon attorneys' "Well-Being" is supposed to be a factor in disciplinary proceedings:

> The troubled state of lawyer well-being, including "major issues negatively affecting well-being in the legal profession," has been well documented. See Supreme Judicial Court Steering Committee on Lawyer Well-Being: Report to the Justices, at 5 (July 15, 2019) ... (Well-Being Report). Among the issues identified in the report are the "relentless pace [that] makes it very difficult for lawyers to set boundaries between work and the rest of life"; the "pure volume of work expected." Id. at 8. Those issues appear amply illustrated in this case. The Well-Being Report also cites stigma associated with seeking help on a variety of well-being issues. Id. at 5-8.
>
> It is not just lawyers' health and personal life that pay the price for this troubled state. As the Well-Being Report makes plain, lawyer well-being is connected to competence, ethical behavior, and professionalism. See Well-Being Report, Appendix 11, at 1. See also The Path to Lawyer Well-Being: The Report of the National Task Force on Lawyer Well-Being, at 8 (Aug. 14, 2017), ... (National Well-Being Report) ("lawyer well-being influences ethics and professionalism"). Recognizing that connection, taking steps to promote lawyer well-being, and supporting the lawyers who avail themselves of those measures will surely enhance the physical and mental health of individual lawyers and improve the quality and ethical standing of the profession as a whole.
>
> ...
>
> n. 9: We urge leaders of the bar, supervisors in the public sector, partners in law firms, private employers, and individual attorneys to be mindful that attorney well-being and competence are interconnected, and that "lawyer well-being influences ethics and

professionalism." National Well-Being Report at 8.
Matter of Zankowski, 487 Mass. 140, 155-56 (2021).

III. THOUGH THE PANEL DOES NOT UNDERSTAND THE SJC NOVEL SUBJECTIVE CLEARLY EXCESSIVE FEE RULING, PETITIONER DOES AND HAS ACKNOWLEDGED HIS DUTY TO COMPLY WITH IT.

Once again, the Panel is not up to the task of understanding the subtle legal concepts at issue in the SJC's novel ruling creating a subjective standard for Rule 1.5 applicable solely to the Petitioner.[21] Petitioner tries again to explain by two different tactics. Petitioner has accepted the SJC finding and agreed he will never again sue for fees; collect IOLTA funds; nor get involved in hybrid contingent fees. Exh 1, pp. 4.

A. Because Warrender could have agreed to the claimed fee, the claimed fee as a matter of law could not and cannot "objectively" be a clearly excessive fee.

"'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' fee are to be judged". Matter of Fordham, 423 Mass. 481, 493-94 (1996). A client's subjective agreement or disagreement is irrelevant to a determination of whether a fee is clearly excessive; "[t]he test as stated in the [Rule 1.5] is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client." Fordham, at 494. *See* Matter of Zankowski, 487 Mass. 140, 155-56 (2021) (It is immaterial to Rule 1.5 that "clients testified that they were satisfied" with the attorneys' bills.)

The underlying fee at issue was for 1/3 of the "recovery by judgment or settlement or otherwise" in the underlying litigation because unlike simple personal injury cases there are

[21] Exh 1, p. 4, 12-14; Exh. 5, pp. 166-69; Exh. 6, pp. 180-86; Exh. 19, ¶2; Tr. pp. 85-86, 126, 197-99.

numerous unpredictable means by which a lender liability case can settle. Unfortunately, Petitioner did not specifically go on to say, "... or by short sale" nor state countless other possible recoveries. Petitioner claimed 1/3 of the recovery Warrender received as part of the Exhibit 14 Stipulation settling the underlying litigation which was achieved as a **result of Petitioner's appearance and work avoiding dismissal and his general appearance for trial if there was no settlement as Warrender admitted in her testimony**. The Hearing Panel made a factual finding that Warrender did not interpret or understand that "recovery by judgment or settlement or otherwise" as encompassing the short sale settlement agreed upon in Exhibit 14. This finding clearly admits that if she did agree to Petitioner's interpretation of these contractual terms, there would have been no fee dispute and the fee would have been collectible.

The SJC affirmed the Panel's administrative factual finding as to what was meant by the contractual term of "...or otherwise"; as always, interpretation of an ambiguous contractual term is an issue for the jury or the trier of fact. However, this admits that if Warrender had agreed to such "recovery", the Petitioner would be entitled to collect 1/3 of this recovery. Thus, the finding of a clearly excessive fee was not an objective finding but a subjective finding on the contract.

B. The claimed fees could have been damages in a tort or equity fee claim.

As explained in Exhibit 19, ¶2, and its Record and case citations, even when there is no recovery in a contingent fee case, the contingent fee attorney may still have a claim for fees if the client breaches their covenant of good faith and fair dealing implied as a matter of law in every contract including in contingent fee contracts. Petitioner did have expert testimony supporting his fee claim[22] based on the Rule 1.5 objective standard and factors — though it was

[22] Exh. 5, pp. 166-68.

completely ignored without mention in the disciplinary findings. The client's agreement to such a fee claim based in tort or in equity is unnecessary. If a fee claim can be collected in tort or in equity, it cannot be a clearly excessive fee as a matter of law. Exhibit 19, ¶2.

IV. THE LAW IS NOT A RELIGION NOR A CULT: PETITIONER IS NOT REQUIRED TO HAVE A WINSTON-LIKE, PRODIGAL-SON, SEE-THE-LIGHT CONVERSION TO LOVING A SHELTERED VIEW OF LAW.

Petitioner is forced once again to talk and get into personal matters over which the BBO has no business judging him. No human being has any knowledge as to the "inner motivations" of any other human beyond guesses and inferences created by "attitudes, experiences, and prejudices of the definer" and these are "easily adapted to fit personal views and predilections". Konigsberg, *supra*. This is especially applicable to the sheltered bubble of life experience in which the Panel seems to have lived and in which they have developed their sheltered views on life and the law. Petitioner has criticized the BBO and Bar Counsel for 25 years. Exh. 11.

Petitioner has no criminal record, no civil judgments against him of any kind, no contempts, no unpaid debts, no unpaid taxes, and for a lifetime has complied with his social duties to family, society, and country; he has always shown respect for the law as required — exercising Free Speech to criticize it is itself a defense of the law not a violent rebellion against it.[23] As an honorably discharged enlisted veteran, Petitioner knows how to do his duty; follow lawful orders; and show respect for his superiors and their lawful orders **regardless** of how little respect he actually has for them. He has done his duty in much more miserable and hate-filled conditions that anything the Bar can impose — or imagine. (Regardless, if called, Petitioner would serve in defense of his adopted country again.) The fact that the Panel has lived such

[23] Tr. pp. 15-16, 214, 245, 257; Exh 1, p. 12-15.

sheltered lives that they have no understanding of how someone can do their duty, show respect, and follow the lawful orders of those whom they do not actually respect is an another example of why "[t]he term 'good moral character' ... is unusually ambiguous. ... for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." Konigsberg, *supra.*

There is no reason in the Record to believe — except based on ignorance or prejudice ignoring an Other's life well lived — that because of one mistake the Petitioner now at age 63, when he has finally found some joy in work, will not do his best to continue with his duty to follow lawful orders and to defend the Constitution of the United States. Exh 1, p. 15; Tr. pp. 15-16, 145, 214, 245-46, 257. The Panel's ignorance of the reality of duty is an insult to all veterans.

A. The Panel cannot think straight regarding the Petitioner's First Amendment speech as exemplified by their "bigot" analysis.

Petitioner has been forced once again to get into what Bar Counsel admits is "opinion"[24] and that thus should be irrelevant First Amendment speech when cross-examined about his definitional ideas and conceptual analyses of such metaphors and hyperbole as "hypocrites", "moral busybodies", "delusional", "overseers", "the House of Stuart Star Chamber", "bigots", and much more. "Under the First Amendment there is no such thing as a false idea". Gertz v. Robert Welch, Inc., 418 U.S. 323, 339; 94 S.Ct. 2997 (1974). When his objections to such questions were denied, Petitioner repeatedly offered to go over his essays in more detail stating that he could go on for "hours" answering such conceptual questions. Tr. p. 158. Instead, the Panel would then cut-off his answering by the Panel Chairperson stating "ask another question" or "can we move on". Tr. pp. 15-16,158-184, 214, 245, 257. When asked, Petitioner defined a bigot as "someone who makes decisions based on their bias and prejudices instead of the facts",

[24] Tr. p.140.

Tr. p. 177, 180, and then gave multiple examples of such bigotry in the Record[25]. Out of the multiple examples provided, the one with which the Panel is obsessed is the undisputed fact that "[y]ou had one board member there that didn't even bother to show up for the hearing yet they signed off on calling me not believable, immoral and all this stuff". Tr. p. 177. The Panel considers this example of bigotry as "baseless" and "reckless" because not showing up is legal: the unstated assumption being that anything that is legal cannot constitute bigotry; *ergo*, *i.e.*, slavery cannot be bigotry where it is legal? This type of 4th grade reasoning was ridiculed by the very Supreme Court case they cite: Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

In Garrison, the government tried to get around First Amendment protections by prosecuting and convicting an attorney of criminal defamation for attributing in a press conference "a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of particular judges" and joked about possible "racketeer influences on our eight vacation-minded judges." Garrison at 65-67. The government's logic was that if it is criminal, it must not be protected speech. Garrison reversed the conviction and stated "speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Garrison, at 74-75 *quoting* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The Panel apparently believes themselves to be judges handling a pending case, but they

[25] It is not true that Petitioner only gave one example as the Panel states. Petitioner gave multiple examples: "The argument [of bigotry] could be made given the fact they ignored all my evidence, ignored all my testimony, ignored my expert, misrepresented facts, ... there is no other way to explain what happened." Tr. p. 182.

are not. Petitioner is not attacking "the integrity of a judge, without basis, during a pending case" and therefore the *Matter of Cobb*, 445 Mass. 452, 21 Mass. Att'y Disc. R. 93 (2005) is inapposite. "[S]peech cannot be punished when the purpose is simply to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed." Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 842 (1978). "A State's power to inquire about a person's beliefs or associations is limited by the First Amendment, which prohibits a State from excluding a person from a profession solely because of membership in a political organization or because of his beliefs." Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702 (1971).

As with everything else in this complicated case, the Panel has little understanding of the complex and subtle relationship between law, morality, and freedom. Petitioner has been forced over his objections to try to educate the Panel on this reality but to no avail. Tr. pp. 15-16,158-184, 214, 245, 257; *See* Petitioner's filed Objections to Reinstatement Procedure/Hearing Brief incorporated herein by reference. The belief that the law is a ruling class monopoly on violence and that there is no moral obligation to comply with law is a mainstream belief that goes beyond Petitioner's "sophomoric"[26] and "vanity project"[27] views. If the Panel were as "learned" as they claim to be they would know this view of law has been advocated by lawyers and judges for centuries and throughout the world and is still being advocated.[28] In twenty-five years of

[26] The Panel makes a side comment that Petitioner did not present the document in which Bar Counsel called his work "sophomoric". Petitioner as requested emailed the document to them. Tr. p. 152; Exhibit A *attached*. He did not mark it as an exhibit because he did not believe it was necessary to do so.

[27] Report p. 10.

[28] According to some advocates, even judges ought to disobey immoral laws. *See e.g.*, Pitts, Joe W. "Judges in an Unjust Society: The Case of South Africa". *Denver Journal of International Law &*

practicing law, Petitioner has more often than he wants to remember seen the guilty go free and the innocent punished. He is entitled to his opinions and to publish them without punishment from the supposed protectors of Free Speech. There are far worse opinions and beliefs accepted by the Bar such as Marxist, Critical Legal Studies, and "Whiteness Theory" beliefs and opinions that are far more in "contempt" of the legal system and the rule of law than any of the Petitioner's beliefs and which unlike the Petitioner advocate for violent overthrown of the U.S. government.[29] Outright communist and neo-Marxist beliefs are readily accepted by the Bar even though they do advocate violent overthrow.[30] However, the Petitioner, a refugee from communism who had a good portion of his family destroyed by the power of its law and who served to defend the United States Constitution is denied reinstatement for his views?

Petitioner has been a working, contributing, law-abiding, tax-paying member of society since he was 14. Like many emigrants to the United States, Petitioner did "work Americans did not want to handle" including when he was an attorney[31] — taking on clients other attorneys did

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Policy Denver Journal of International Law & Policy Volume 5 Number 1 Spring Symposium (20 May 2020). "There is 'no moral obligation to obey the law' and law 'should be broken from time to time' if moral obligations require it". Sumption, Jonathan (retired Judge, Supreme Court of Britain). "Retired Supreme Court justice says there is 'no moral obligation to obey the law'". Scottish Legal News (18 April 2019). "This is a court of law not of justice." U.S. Supreme Court Judge Oliver Wendell Holmes. "Law and the Court", Speech at a dinner of the Harvard Law School Association of New York, New York City (15 February 1913); published in "Speeches by Oliver Wendell Holmes" (1934), p. 102.

[29] Tr. pp. Tr. pp. 15-16,158-184, 214, 245, 257. According to such Neo-Marxist views naively accepted and adopted by many esteemed judges, attorneys, and law professors, the law is not normative but a ruling class ideology that must be defeated by violent revolution to establish a dictatorship of the proletariat so as to eventually eliminate the need for law altogether in a classless society.

[30] *See generally,* Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702 (1971) (Allowing admission to the Bar of someone who belonged to a communist organization advocating the violent overthrow of the U.S. government is permitted.)

[31] Tr. p. 47.

not want to handle. Exh. 1 pp. 12-14. He paid for all of his own education after high school up to the present and into the future. He served in the United States Navy for six years — the Petitioner has spent at least 2 ½ years of his life underwater in submarines patrolling somewhere in the world from the Arctic to the South Pacific and from the China Sea to the North Sea in defense of the Constitutional rule of law. The Panel's fear of his beliefs and opinions results from their own ignorance and sheltered existence. As always, as has been true since Petitioner started law school, the esteemed members of the Panel and most attorneys and judges do not credit anything he says — this is why Petitioner prefers and wants jury trials on anything he can get. Exh 3, 4; Tr. pp. 13, 44, 236-37. Of course, to them, Petitioner is nothing but a greedy "pecuniary interest" attorney because they of course would handle a $2.8 million lender liability case *pro bono.* Not. However, the undisputed facts show that even if everything they accuse of the Petitioner of doing were true, his intended goal and desired result was solely to get a jury trial on his claims — something everyone else including Bar Counsel was trying to avoid. The reality is the Petitioner has more respect for the legal system than the Panel with its obsession to punish Petitioner for First Amendment speech.

B. The Bar should practice the diversity of which they preach and accept the social divide between the petitioner and them that will never be bridged.

There will always be those who rule and those who are ruled; Petitioner has always been and will be among the latter. Just as the military will always have superior officers and their inferiors the enlisted, the Bar will always have its self-appointed moral superiors and the moral inferiors over which they have power. I have the moral integrity to live with the self-appointed moral betters' love of power over Others, the Bar should practice what it preaches and have the moral integrity to live with my hate of it. Another example of why "[t]he term 'good moral

character' ... is unusually ambiguous. ... will necessarily reflect the attitudes, experiences, and prejudices of the definer." Konigsberg, *supra.*

The Panel's "concern about the petitioner's inner motivations towards the Court and the legal system is deepened by his testimony that he 'hated ... every minute' of his 25-year legal career." Report, p. 20 *citing* Tr. 87. Well, the feeling is mutual. Petitioner is and has always been deeply concerned about those who love to self-appoint themselves the power to sit in moral judgment of Others' lives. Here is a touch of reality for the sheltered world in which the Panel and the BBO seem to live: for much of humanity now and past not only is there no happiness in most of their lives but there is not even any hope for happiness, yet they struggle, survive, prosper, and are good and moral people. If you cannot accept this reality, you have no business taking up the vanity project of passing moral judgment over Others.

V. MORALITY AND REINSTATEMENT ARE NOT POPULARITY CONTESTS FROM A PREP-SCHOOL VIRTUE SIGNALING VIEW.

According to the SJC, the moral qualification to practice law consists of:

> ... such an appreciation of the distinctions between right and wrong in the conduct of men toward each other as will make him a fit and safe person to engage in the practice of law. .. Such an appreciation, if deeply felt and strongly anchored, will serve as a firm foundation and justification for the order of reinstatement.
> In the Matter of Alger Hiss, 368 Mass. 447, 457-58 (1975).

Throwing into this vague and indeterminate standard words such as "learned" and "competent" does not make it any less vague and indeterminate. The prior Reinstatement Panel ignored and dismissed the holistic whole of Petitioner's life with a patronizing "[we] acknowledge and respect the petitioner's willingness to advocate for those in need, and to accept unpopular cases, as well as his evident energy and intellect and his military service" (First Reinstatement Report at p. 19). Then, they concluded Petitioner's sixty-three years of being a contributing member of

society does not translate into any belief that the Petitioner has such an appreciation of right and wrong. This Panel, to their credit, does not bother with such patronizing pretentious acknowledgments of respect stated but not believed; it simply does not bother to deal with Petitioner's life holistically just dismisses everything that he has lived as irrelevant. Again, another example of how "[s]uch a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law". Konigsberg, *supra*.

A. "[C]ompetency and learning" does not convert the profession of law into a trade nor into a referral service for MCLE.

According SJC Rule 4:01, §18(5), reinstatement requires the "... competency, and learning in law required for admission to practice law"; thus, it agrees with case law stating that the standard for readmission as part of a reinstatement "is adequately amenable to the fitness inquiry of original applicants" for admission to the Bar. Prager, 422 Mass. at 95.

Massachusetts has no CLE requirements for licensed attorneys except that newly admitted attorneys are required to take Practicing with Professionalism within 18 months of admission. According to available 2020 statistics, there are approximately 42,000 licensed lawyers in Massachusetts.[32] According to the last published MCLE data, MCLE has about 9000-10,000 "program participants" in its fiscal year.[33] So, out of 42,000 licensed attorneys — considered "competent" and "learned" enough to represent any client in any court in Massachusetts — about **32,000** take **no** MCLE courses in any given year. If MCLE courses are

[32] ABA Legal Profession Statistics, https://www.americanbar.org/about_the_aba/profession_statistics/ ; iLawyerMarketing; https://www.ilawyermarketing.com/lawyer-population-state/

[33] The last available published statistics are for 2017. *Attached* as Exhibit B.

the means by which active attorneys are to be considered "competent" and "learned" as the Panel claims, it is a means ignored by the majority of supposedly competent and learned attorneys.

The required Practicing with Professionalism course is a one-day, in-person course which Petitioner has completed in-person. Exh. 1 p. 105. This course consists of:

> Practicing With Professionalism is one of the most demoralizing experiences I ever had in law. We spent a whole day there. The first two hours was a bunch of attorneys who got up there telling us what great attorneys they were and how important it is to network, that it's important that you be civil and that other attorneys get to like you and it's important that judges like you because judges talk about you and if they don't talk nicely about you it's going hurt your case. That was like the first two hours.
>
> Then for the next 45 minutes retired Judge Lauriat got up there, and he happens to be probably one of the three worst trial judges I ever appeared in front of. I was not happy at that moment.
>
> He spent 45 minutes or so saying what a great judge he was and what a great attorney he was and how it's important that you network and how it's important that other attorneys like you and it's important that judges like you and if they don't like you they are going to talk about you. It's the same thing.
>
> In the afternoon we got a representative from the Superior Court, an assistant clerk who said the same thing. Then we got a representative from bar counsel who said the same thing. They just added that it's important that bar counsel like you and that you respect them or it can really hurt you.
>
> Basically the whole day for professionalism in lawyering could have been a whole day for professionalism in selling used cars. It was a sad comment on what lawyering has become and why I don't fit into it anymore. Tr. 37-39.

Attending MCLE courses is a quick and easy way nominally for a manipulative attorney to check off the boxes of "competence" and "learning" in a reinstatement petition even if one sleeps through them and especially for any attorney who considers the law to be a trade, but it is a narrow-minded view of what constitutes a profession. The profession of law is not a referral service for MCLE. This is another example of the Petitioner having more respect for the law and of being more "learned" than the Panel. Petitioner has spent the last 5 years trying to make sense of his 25 years of practice so as to become more of a learned attorney, "learned" in the professional sense in which law is more than just a practical trade. Exh. 1, pp. 13-14; 111-17.

Petitioner passed the MPRE with a 106 score of which the Panel is "favorably impressed".[34] Re-taking and passing the Massachusetts Bar Exam as a condition for reinstatement is allowed by case law. Gordon, *supra*, at 52. As the Panel admits, Petitioner has offered to re-take and pass the Massachusetts Bar Exam as a condition for reinstatement and has argued that such re-taking is more consistent with the requirements of Due Process and Equal Protection than forcing Petitioner's lack of public speaking and social skills into vague and ambiguous "learned" and "competency" personal predilections. Tr. pp. 13, 131. Petitioner has graduated law school and has the experience of approximately 1000 court cases, 100 mostly jury trials, and 100 appeals under his belt. By any empirical standard of competence and learning "amenable to the fitness inquiry of original applicants", Petitioner is competent and learned.

Instead of MCLE, Petitioner has read and studied learned treatises on jurisprudence and its philosophy of law foundation that greatly exceed what he read in law school or during his practicing career and what most attorneys have time to read while practicing; Petitioner in his old age using his own resources is pursuing both independent study and post-graduate academic study in an attempt to make conceptual sense of what he experienced during his twenty-five years of practicing law. Exh 1 pp. 5-6, 8-9, 12-15; Tr. 39-42. He is a better person and a more competent and learned attorney by understanding the foundational jurisprudence and philosophy of law in the finest traditions of Civilization. The search for knowledge especially among those who call themselves a "profession" is supposed to be an end-in-itself not a practical trade.

In addition, Petitioner has done what many practicing attorneys do to stay competent and

[34] Panel Report p. 22.

learned in the law, he maintains a subscription and regularly reads Massachusetts Lawyers Weekly and researches any associated case law writing up detailed notes that the Panel admits were "clearly a time-consuming task". Tr. p. 24; Exh. 18. Through Petitioner's on-line subscription, the Petitioner has access to MLW editions going back to 2012 and to all of the cited case law and legal publications which access I used to "I publish cases. I have a couple of binders full of cases, and a lot of them are on my computer PDF files." Tr. p. 186. Petitioner gave several pages of testimony summarizing many of his notes upon which neither Bar Counsel nor the Panel cross-examined him. Tr. pp. 91-101. There is no evidence in the Record that Petitioner has failed to keep up with case law, rule, and substantive changes in the general trial or litigation area in which he practiced for 25 years. Id. As a general practitioner, every case will unavoidably involve some learning but Petitioner has stated he will handle only 4 - 5 cases at any one time and not the 40-50 he handled while practicing as a younger more energetic lawyer.

According to Massachusetts Lawyers Weekly, it has 8,956 subscribers.[35] Thus out of 42,000 licensed lawyers in Massachusetts, approximately 33,000 do not even read Lawyers' Weekly yet are considered fully competent and learned to represent any client in any court. Even assuming that those who do not take MCLE courses are distinct from those who do not read MLW, that leaves about **22,000 or 50%** of the active Bar as doing no continuing education.

The reality is that Petitioner's empirical experience, scores, and education viewed holistically make him more "learned" and "competent" than most practicing attorneys except from a trade school, check-the-boxes predilection and networking used-car-sales view of law.

[35] Mass.LawyersWeekly, 20 October (2020) p. 24.

B. Lack of social skills or of popularity promoting pity is not immoral.

The Panel cites to Matter of Scannell, 31 Mass. Att'y Disc. R. 554 (2015) as an example of how the Petitioner can prove his good moral character. Scannell involves an attorney who received two year-and-a-day suspensions for disciplinary offenses that by Petitioner's count total: five felonies including one of child endangerment; forging multiple official court documents and associated perjury; and misappropriation of $5000 and an other unquantified client fees. In allowing reinstatement in Scannell with no opposition from Bar Counsel, the BBO examined the petitioner's life all the way back to his alcoholism in high school; concluded he was a recovering alcoholic; excused his felonies as a result of his alcoholism; excused the forgeries and misrepresentations as occurring under "emergent circumstances"; excused the misappropriation of fees because he had paid the clients back; ignored all the other problems in his life from divorce to child endangerment and financial improprieties; and accepted as sufficient the witness testimony from that petitioner's Alcohols Anonymous sponsors.

Is this some kind of joke? According to the Panel, Petitioner would have a better chance at reinstatement (also, he would have received a shorter suspension) if he had been an alcoholic since high school; committed multiple felonies; forged court documents; committed perjury; endangered the lives of children; and misappropriated funds because such a life would allow him to fall prostrate before the Panel and receive its pity. The BBO is not a vanity project, much?

Though acknowledging the system is "fallible", the Panel makes no attempt to learn from Hiss nor to answer the question of the *Dissent* in Gordon. Decades of partisan bickering in law and politics and the resulting blurring of the line between reinstatement and disbarment are the Hiss legacy that could have been avoided if Brahmin Hiss had admitted he was communist spy. A legacy now absurdly being used to punish Petitioner Diviacchi — a refugee from communism

— for being too honest in his opinions after being denied a jury trial, convicted by those who are his opponents using a preponderance standard, and then wrongly suspended by them.

Petitioner freely admits he lacks the public speaking and social skills expected by Bar etiquette and as exemplified by cold-blooded perjurers such as the Brahmin Hiss. Tr. p. 13, 131, 143, 244. Petitioner was a solo practitioner for the last 23 years of his 25 years of practice in which he had to be "a very aggressive and combative trial attorney because I had to be in order to survive the cutthroat nature of the litigation and trial work I handled." Exh. 1, p. 12. I was able to get the three attorney character references required of the Part I Reinstatement Questionnaire with which Bar Counsel has apparently found no problems. Exh. 1 p. 12. Four character witnesses voluntarily submitted character references by letter. Exh 1, p. 133; Exhs. 8, 9, 10. These were submitted from professional clients: two who knew Petitioner when he practiced and two who have come to work with him after his suspension. The Panel arbitrarily rejects them all because they want references from professionals who knew the Petitioner before and after suspension.[36] The reality is Petitioner has no one beyond family to support him and the Panel does not want to hear from his family. Petitioner will never win a popularity contest.

Petitioner's submissions would allow for his admission as an original applicant to the Bar which luckily do not require networking to establish popularity, social skills, or to receive pity from the Bar. As a matter of equity, these submissions are enough for reinstatement.

C. "Charity" is not virtue-signaling nor a prep-school application view of life.

In the Panel's cited case of In the Matter of Ellis, 457 Mass. 413 (2010), the petitioner for reinstatement after disbarment based on a criminal conviction was a young attorney (which was

[36] The first Panel rejected the one attorney, John Fitzpatrick, who actually satisfied this condition and showed up to testify as a character witness because he did not know the Petitioner well-enough.

one of the reasons given for reinstatement) who spent his entire disbarment period unemployed yet was reinstated based on "the parenting of his children at home while his wife worked, his [failed] efforts to become a teacher, his coaching endeavors on four of his town's youth teams, and his [unspecified] many charitable activities through his church and other organizations". Ellis, at 416. The Petitioner here for the first time in his life, having worked at jobs he hated since he was a child of 14 in order to survive, has now in his 60's finally found work that gives him some joy. He is expending a significant portion of his retirement funds and his remaining years seeking knowledge and education as an end-in-itself and trying to educate others in his social class as to what he knows — especially about the nature of law and jurisprudence — instead of playing golf, traveling, or the countless other options available for retirement for those with the good fortune to have health and financial stability in retirement. Exh. 1, pp. 5-9, 12-15. So, what does the Panel do? After pretentiously expressing concern for the Petitioner having hated every minute of his work life, now that he has found joy in his work, they admonish him for not doing enough "charity" work pursuant to their naive prep-school view of life. After ridiculing his life as a vanity project, they expect him to talk more about it. Not.

Unlike the young attorney Ellis, Petitioner is a tired old man who is trying to be a contributing member of society and the Bar while he still has his health. Unlike Ellis, who relied on family and networking to survive right up to the point cowardly of following them into criminal activity and disbarment, this Petitioner survived on his own from late childhood and did so without falling into any criminal business — family or otherwise (My father was a non-English speaking illiterate construction laborer and my mother was a non-English speaking illiterate cleaning woman when they were able to work, but they were more noble, moral, and honest than any of the sheltered cowards of the Bar such as Ellis.) Unlike Ellis, who was

unemployed because he failed to find work and thus had plenty of time to expend his youthful energy upon sports and whatever unspecified activities he considered to be charity, Petitioner here intentionally and knowing is avoiding financial reward so that he can concentrate his limited old age time, energy, and funds on education and the education of others within his social class. The Panel considers this a "vanity project". However, by any moral standard, doing charitable work as a prep-school resume technique to virtue-signal into reinstatement diminishes and negates any charitable intent so that it is no longer charitable work --- it is a cynical vanity project using the misfortune of Others for personal gain. As with Hiss, the Bar likes Ellis because he acts as etiquette expects. Again, Petitioner loses on popularity.

The Bar should practice what it breaches about "inclusion" and accept Petitioner as he is. If Ellis as a disbarred attorney who spent his entire disbarment period unemployed and uneducated is considered moral by the Bar, the Petitioner who has expended significant personal resources and time in seeking an education and knowledge as an end-in-itself so as to educate Others within his social class must also be credited with being a moral person.

D. Trustworthiness and public interest are measured from the public's view.

Without doubt, the members of the BBO and the vast majority of members of the Bar who view themselves as moral betters do not trust the Petitioner; would not hire him as their attorney or for any employment; nor would they recommend him as an attorney or for any employment. This was true of the Petitioner when he was an unwashed 14 year-old, a common sailor, a young attorney struggling to start a practice, and at any point in his life and thus most definitely while he is a suspended attorney. However, the issue is not whether the Bar trusts the Petitioner but whether the public can trust him and the effect his reinstatement will have upon the public **not** upon the delicate sensitivities of the Bar's self-appointed moral betters.

The most pressing problems of the Bar, the administration of justice, the legal system, and of the public interest have nothing to do with the Petitioner's or any disciplinary proceedings (unfortunately, because as this case and many other cases the Petitioner has witnessed through the years exemplify, it has serious issues). If one does a Google search or any type of search about what are the important problem issues affecting lawyers and the public, it will not turn up anything about lawyers not being punished severely enough for being imperfect humans, what will show up are : 1) for the Bar, the "Well-Being" touched upon in Zankowski, *supra* at 155-56; 2) for the public, the rising economic class separation of lawyers and their legal services:

> More than 80% of people with low incomes as well as many middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody and support, debt collection, eviction, and foreclosure. Approximately 76 per cent of civil matters in one major study of ten major urban areas had at least one self-represented party. Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs. As a result of those and related problems, the United States ties for 99th outof 126 countries in terms of the accessibility and affordability of civil legal services. Trouble at the Bar, An Economics Perspective on the Legal Profession and the Case for Fundamental Reform. Clifford Winston, David Burk, Jia Yan. Brooking Institute Press: Wash., D.C. (2021) p. 170.

As far as the Bar goes, Petitioner's Reinstatement despite his brutal honest criticism of the legal system will serve to prove its respected status as the ultimate protector of Free Speech and will begin the process of reforming the disciplinary process so that "Well-Being" is not diminished by a Sword of Damocles hanging over lawyers consisting of "vague qualification[s], ... easily adapted to fit personal views and predilections" so as to "be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law". *See* Konigsberg. *See* Petitioner's filed Renewed Objections to Reinstatement Procedure/Motion to Re-Open with Instructions.

For the public, reinstatement will allow for an experienced, learned, competent trial attorney "to advocate for those in need, and to accept unpopular cases, ... [with] evident energy

and intellect". *Supra*. The underlying Warrender matter, though resulting in antagonistic and adversarial struggle between the Petitioner, Bar Counsel, and the BBO, did not result in any national or local publicity. *See*, In the Matter of Gordon, 385 Mass. 48, 59, *Dissent* (1982). The Petitioner's problems occurred in "emergent circumstances" as an "isolated instance ... which arose in highly unusual circumstances" and "occurred in the private sphere of the attorney-client relationship [that] did not result in public scandal". Scannell, at 562; Pool, *supra* at 464, 467. "Such situational pressures cannot be ignored when assessing the likelihood that such misconduct will occur". Pool, at 467. Exh. 170-72. "It is significant" that there is no opposition to reinstatement except from Bar Counsel, not even from the former client. In the Matter of Pool, 401 Mass. 460, 468 (1988); *See generally*, "The Reinstatement Dilemma", *supra*, pp. 102-105.

CONCLUSION:
"YOU KNOW, YOU DON'T THROW A WHOLE LIFE AWAY JUST 'CAUSE HE'S BANGED UP A LITTLE".[37]

Ignoring biased "attitudes, experiences, and prejudices" and ignorant "personal views and predilections", the required conclusion from the empirical evidence of the Petitioner who for sixty-three years of life was a contributing trustworthy member of society is that he will continue to be a contributing trustworthy member of society. This conclusion is especially required given "the chastening effect of a severe sanction" paying a heavy price for a mistake that caused no empirical harm to anyone except the attorney and his family. Whether reinstatement is conditioned upon re-passing the bar exam or not, Petitioner is a learned and competent attorney with an "appreciation of the distinctions between right and wrong". His reinstatement will be good for the public even if not popular among the rulers of the Bar.

[37] Trainer Tom Smith, movie "Sea Biscuit" (2003).

/s/ Valeriano Diviacchi
Valeriano Diviacchi
24 Holton Street Boston, MA. 02134
(617) 542-3175 Date: 24 June 2021

EXHIBIT A

VALERIANO DIVIACCHI

From: VALERIANO DIVIACCHI <vdiviacchi@me.com>
Sent: Thursday, April 15, 2021 1:33 PM
To: 'Paul Rezendes'
Subject: RE: Valeriano Diviacchi Reinstatement Hearing, Day 1

notes.pdf

Attached please find my notes exhibit and the "sophomoric" reference.

Sop.pdf

VALERIANO DIVIACCHI
vdiviacchi@me.com

-----Original Appointment-----
From: Diviacchi, Valeriano (REI) [mailto:DiviacchiValerianoREI@massbbo.org] **On Behalf Of** Diviacchi, Valeriano (REI)
Sent: Tuesday, April 13, 2021 10:31 AM
To: Michelle Yu; Production Manager; Paul Rezendes; Marsha V. Kazarosian, Esq; Elizabeth (Lisa) Rodriguez-Ross, Esq; Elisabeth O. da Silva, CPA, CFF; Elaine Buckley; Dorothy Anderson; Matthew Stewart; val; Diviacchi, Valeriano (REI)
Cc: Kathleen Benoit; Deb Gutierrez
Subject: Valeriano Diviacchi Reinstatement Hearing, Day 1
When: Thursday, April 15, 2021 9:30 AM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where:

Hearing starts at 10:00AM; 9:30AM start is for technical issues and witness identification for the reporter.

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VALERIANO DIVIACCHI

From: Paul Rezendes <p.rezendes@massbbo.org>
Sent: Thursday, April 15, 2021 1:55 PM
To: Valeriano Diviacchi
Cc: Dorothy Anderson
Subject: RE: Valeriano Diviacchi Reinstatement Hearing, Day 1

I have saved both documents to my desktop and they are available for reference during the hearing or marking as exhibits, which I can accomplish using Adobe Acrobat.

From: VALERIANO DIVIACCHI <vdiviacchi@me.com>
Sent: Thursday, April 15, 2021 1:33 PM
To: Paul Rezendes <p.rezendes@massbbo.org>
Subject: RE: Valeriano Diviacchi Reinstatement Hearing, Day 1

Attached please find my notes exhibit and the "sophomoric" reference. <<...>> <<...>>

VALERIANO DIVIACCHI

vdiviacchi@me.com

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EXHIBIT B

MCLE
DashBoard FY2017
9/1/2016–8/31/2017

		Customers	Revenue
OnlinePass			
727 new subscriptions | 947 renewals | 5,489 users (plus over 5,000 law students) 18,234 program registrations/views | 163,020 publications downloads/views		1,674	$1,256,834
Program Registrations			
269 programs 7,849 in-person | 1,077 webcast | 470 CD, mp3 recordings 1,296 volunteer speakers		9,396	$1,235,468
Program Royalties			
WestLegalEdcenter (WLEC) webcast registrants		10,550	$340,103
Publication Sales			
7,139 print books | 5,628 book supplements | 741 eBooks 763 volunteer authors		13,508	$1,278,123
Publication Royalties			
Bloomberg, Lexis, and West book royalties		–	$427,796
Sponsor Membership			
365 firms (7,156 lawyers) | 377 individuals		7,533	$201,116
Fundraising Gifts			
$3,317,600 campaign total | 66% of $5 million goal 6 Legacy Society members | $500,000 +/-		–	$154,700
Scholarships Awarded			
1,259 pro bono and legal services tuition vouchers | $182,555 value 377 needs-based | $91,685 value		–	($274,240)
Facility Rentals		–	$82,775
FY2017 Unique Customers + Total Income	**MCLE**	**15,126**	$5,180,006
	WLEC	**10,550**	Operating surplus
		25,676	$374,952

MCLE Strategic Agenda 2020

- **Develop** online training and research subscription product: MCLE OnlinePass®
- **Acquire, curate and leverage** feature-rich dynamic content
- **Position** MCLE as the go-to resource for law practice development offerings
- **Convert** more new lawyers to MCLE customers
- **Exploit** social media marketing opportunities
- **Expand** MCLE's technological footprint
- **Fund** building, technology and operations reserves, scholarship endowment