COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

IN THE MATTER OF
VALERIANO DIVIACCHI

NO. SJC-13241

Petitioner

PETITIONER'S PRELIMINARY MEMORANDUM

Law and equity require reinstatement be allowed conditioned upon the Petitioner re-passing the Massachusetts Bar Examination just as he was required to re-pass the MPRE.

In the alternative, this Court should remand this Petition for Reinstatement and order the reinstatement hearing be re-opened before a new panel with instructions from this Court to exclude inadmissible First Amendment speech and to exclude re-litigation of disciplinary findings because reinstatement is not contingent upon admission of guilt and repentance.

Furthermore, this Court should declare Bar Counsel's Questionnaire Part II required of all petitioners for reinstatement irrespective of any probable cause or reasonable basis for such document production to be an unconstitutional unreasonable search and seizure.

I. Introduction:

With Kafkaesque absurdity this case proceeds as a morphing of ideology into morality. The errors of law, abuse of discretion, and substantial injustice at issue are a legacy of Matter of Hiss, 368 Mass. 447 (1975) and its progeny forever unjustly clouding what once was a bright-line rule-following distinction between fixed term suspension and disbarment[1].

[1] *See generally*, "The Reinstatement Dilemma: The Legacy of the Hiss Case in Massachusetts." Brown, Barry. Journal of the Legal Profession, vol. 02 (1977-78).

In Hiss, "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"[2]. Hiss was disbarred twenty-five years earlier based on a criminal trial conviction of perjury as a communist traitor during World War II — a conviction subsequent history has established as true and thus that Hiss was also a perjurer at his reinstatement.[3] The Brahmin Hiss never admitted to any guilt or repentance; spent the entire disbarment period touring the country proclaiming his innocence; and yet was reinstated based solely on the character references of his fellow Boston and New York Brahmins plus an unstated dogma that he was an innocent victim of McCarthy Era ideology. *See* Matter of Gordon, 385 Mass. 48, 59 (1982) (Dissent). Appendix pp. 31; 120.

So far in this Diviacchi tragedy of errors, because of a fixed term 27-month suspension by an administrative hearing before those who were his opponents in practice and whose factual findings Diviacchi has repetitively stated are factually false, factually not true, *factually incompetent*, factually biased, and which he consistently and soundly denies, this Court has passed moral judgment on 60 years of the Petitioner's life as an irrelevant "vanity project"[4]. The Court further uses Petitioner's Free Amendment speech critical of the Brahmin class to conclude he is unworthy to be in the same ideological elite as Hiss. Unlike for Hiss, the reinstatement process explicitly and implicitly in all its reasoning expects Diviacchi to admit guilt and to repent of the false factual findings of his suspension as a prerequisite to reinstatement. The fact that part of those 60 years includes the Petitioner being an escaped refugee from the communist tyranny

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[2] Matter of Gordon, 385 Mass. 48, 59 (1982) (Dissent).

[3] Appendix pp. 7, n. 3; 31; 120.

[4] Id. pp. 10, 167.

which the morally superior Hiss benefitted through his treason and against which the Petitioner served as a veteran is perfect irony. Kafka — a lawyer himself — could not write any better story of the Massachusetts Bar as gatekeepers *Before the Law*[5] than this story.

Petitioner incorporates herein by reference his Brief on Appeal; Plaintiff's Motion To Amend/Correct the Record; Petitioner's Corrected Renewed Objections to Reinstatement Procedure with included Motion to Re-Open with Instructions; Petitioner's Renewed Motion to Exclude Part II Questionnaire as Unconstitutional; and Petitioner's Reply Letter to Judge Kafker. Appendix (hereinafter App) at pp. 29-76, 78-152, 156-59, 171-76.

II. Statement of the Case:

Despite one hundred and fifty years of advances in normative and scientific social constructs by which the Massachusetts Bar could regulate its practice, the Massachusetts Bar still uses the 1887 term "good moral character" concept of the first Code of Ethics created by the ex-Confederates of the Alabama Bar to segregate social inferiors from its ranks.[6] This "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).

On or about 01/02/2016, Petitioner was suspended for 27 months. On or about 01/22/2018, Petitioner filed for reinstatement. It took the disciplinary process just short of three

[5] "Before the Law" by Franz Kafka. https://www.kafka-online.info/before-the-law.html

[6] App. pp. 104-121.

years (34 months) until 11/19/20 to deny *nunc pro tunc* to a year earlier that petition. Such denial was by rescript affirmation that did not rule upon any of the Petitioner's First Amendment and other U.S. Constitutional and Massachusetts Declaration of Rights objections. So far, no one in the Bar disciplinary process preaching about "good moral character" has shown any self-awareness of the fact that it takes them three years after expiration of a fixed term 27 month suspension for supposed dilatoriness in litigation to act upon a petition for reinstatement from that suspension. During those three years, over the Petitioner's repeated objections, approximately 3/4 of the substantive litigation was spent re-litigating the suspension findings whose truth Petitioner denies. The remainder was spent litigating Petitioner's First Amendment criticism of the Bar. His 60 years of life are dismissed as irrelevant. App. pp. 31-37, 44-58.

Petitioner re-applied for reinstatement on 12/11/2020. Now, sixteen months later, reinstatement has been denied again with the Petitioner's U.S. Constitutional and Massachusetts Declaration of Rights objections summarily dismissed without decision. Again, over Petitioner's repeated objections, approximately 3/4 of the substantive litigation was spent on re-litigating suspension findings whose truth Petitioner denies. Again, most of the remainder was spent litigating Petitioner's First Amendment criticism of the legal system. This time the remainder of his 60 years of life are dismissed as a "vanity project". App., *id.*, pp. 10, 31, 166.

III. Statement of Facts:

The Single Justice makes a distinction without a difference between requiring "an admission to the factual predicates of misconduct" and a "reasonable understanding of the misconduct that led to his ... suspension". This distinction is a semantic illusion because the meaning of such "understanding" requires from the Petitioner an "admission" to the factual

predicates of the suspension misconduct plus repentance and remorse for that misconduct — the misconduct the Petitioner denies he committed. App. pp. 5-18, 29-76, 161-64.

This semantic gamesmanship once again forces Petitioner — over his objections and despite his apologies and acceptance of responsibility — to state that the factual predicates of his suspension misconduct are factually not true, *are factually false*, are factually denied, and were issued by an incompetent biased hearing panel. Petitioner repeats himself because the message does not seem to be getting through. The true facts are again summarized from the Record:

> **(1)** violated Mass.R.Prof.C. 1.5(f) ... without obtaining [client's] informed consent ... App. p. 161
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> **Truth:** *The client was fully informed and consented* to what she was getting into and how it would benefit or hurt her; she was more aware of the complexities and benefits at issue and how she could use the hybrid agreement to her benefit in a complex lender liability action that any of the disciplinary process attorneys involved other than the Petitioner and his expert witness. The sophisticated client here with years of experience in contingent fee matters including with this Petitioner in prior litigation spent 4 months in detailed negotiation and bargaining for the hybrid contingent fee agreement at issue. The facts of those 4 months of negotiation and the Petitioner and his expert's attempts to educate the disciplinary process on those facts *were and are ignored and were excluded from the factual findings of this suspension as if they never existed*. Such exclusion and false finding can only result from a combination of incompetence and biases.
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> **Petitioner's Understanding:** Despite the truth of informed consent, Petitioner has admitted that it was a mistake for Petitioner or for any attorney to rely on a hybrid contingent fee agreement such as here whose contingency is "recovery by judgment, settlement, or otherwise" — trying to compensate for the fact that there are almost countless known and unknown possible resolutions of such cases. Such is an unavoidably vague and ambiguous phrase that will lead to indeterminacy in execution especially within the complexities of the defense of a $2.8 million dollar lender liability case and of an associated counterclaim. Thus, Petitioner has repetitively stated that if he is reinstated:
>
> he will 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;
> b) he will collect no client funds;
> c) for which he will use no hybrid contingent fee agreements;
> d) from which he will withdraw at the first sign of dispute with the client;

e) for which he will pursue no fee collection action if stiffed on any fee to which he believed himself entitled. App. p. 40.

(2) violated Mass. R. Prof. C. 1.1, 1.2(a), and 1.3 by refusing to further the client's lawful objective of attempting to halt the foreclosure, a goal that he knew was important to the client, because doing so would risk harm to the predatory lending counterclaim which he hoped would be the source of his fee, by refusing to meet and talk with the client despite her begging, by refusing to participate in settlement discussions, and by unilaterally limiting his representation despite describing himself as "counsel of record for all purposes"... . App. p. 161

Truth: Petitioner by his appearance, amended pleadings, and opposition to dismissal filed within a couple of days of being hired and before leaving Massachusetts to attend his daughter's college graduation — 2500 miles away in California[7] — saved the client from a default judgment (set up by her prior counsel suing her for fees who did nothing on the case) on a $2.8 million note and the loss of her counterclaim. At such time, the client as she testified and admitted *fully understood and consented that Petitioner would not be trying to halt* the foreclosure because the only options for trying — bankruptcy and injunctive relief — would not only *be meritless at the time but fraudulent*. Again, such would have been fraud, meritless, *a fraud upon the Court*, were fraudulent and *completely without merit*, and would have unavoidably been denied. Petitioner repeats himself because the message does not seem to be getting through. At the time, the client was earning $7000-$8000 a month in rents and was more than able to pay the mortgage but stopped doing so a year earlier *fully knowing the investment was doomed to foreclosure*. This factual reality is omitted from the disciplinary findings due to incompetence or bias.

While Petitioner was away for three weeks trying to enjoy his daughter's college graduation, it was only at that point that the client began "begging" that he file the *fraudulent attempts* despite knowing he could not do so. He refused to give her advice on how to commit fraud. Somehow, while Petitioner was 2500 miles away, the client found dishonest counsel who was willing to file such fraud; who filed an illegal "limited appearance" for doing so; who did so on a verbal contingent fee agreement; and who did so because they knew they could rely on the Petitioner's general appearance to handle the matter to trial if they failed. By the time Petitioner got back to Massachusetts three weeks after leaving, the client had already lost on the fraudulent injunctive attempts and through her new counsel had filed a meritless appeal of the fraudulent filings in which she was represented by her new dishonest attorneys. Petitioner never filed an appearance in the appeal in which a mediation conference was scheduled. Again, all of this factual reality is

[7] Again, this panel and this Court omit from the facts that the Petitioner was 2500 miles away in CA trying to enjoy his daughter's college graduation when the client started "begging" him to file her fraudulent claims which he had refused to do before leaving. The contempt the legal system shows for the Petitioner's life is one thing, **but its contempt for his family is an ever present source of anger**. Even criminal organizations usually respect each other's families.

omitted from the false findings due to incompetence or bias.

It is *not true* that Petitioner unilaterally limited his appearance or refused to participate in anything — other than the *fraudulent and meritless* litigation that would by definition prejudice the counterclaim because it was fraudulent and meritless. A $2.8 million lender liability case does not settle because of pleasant conversations at mediation, they settle just as this case settled by Petitioner being willing, ready, and able to take the case to trial. The Petitioner's status as an aggressive trial attorney willing, ready, and able to take the case to trial if the attorneys attempting to settle failed — as they had for the previous year — was his contribution to settlement as agreed upon. This is called a "good cop/bad cop" settlement practice *of which the client was fully aware*. Again, this true factual reality is all omitted from the false findings because of ... .

Petitioner's Understanding: Saying the client was "lucky" to have Petitioner as an attorney is not insolence. A hybrid fee agreement was the only option and any client *who finds any competent attorney willing to enter into such an agreement is lucky to have them*. She could no longer afford to pay anyone the high attorneys' fees normally charged for complex lender liability claims or counterclaims involving millions of dollars. No attorney in his right mind can "defend" a $2.8 million claim on a contingency. Again, for the umpteen time, Petitioner admits he made a mistake resulting from his aggressive and combative litigation and trial attitude that resulted in his suspension. It is a mistake for any attorney to rely on a hybrid contingent fee agreement whose contingency is "recovery by judgment, settlement, or otherwise". Such is an unavoidably vague and ambiguous phrase that will lead to indeterminacy in execution especially within the complexities of the litigation of a $2.8 million dollar lender liability case and of an associated counterclaim. Thus, Petitioner has stated that he would never use a hybrid contingent fee agreement again and *will withdraw* from any litigation at the first sign of disputes over unlawful filings or allegations of misconduct. If he is reinstated, he would "handle only 4-5 cases (instead of 40-50 cases as he did before)" at any given time:

a) he will stop being the angry and combative attorney he once was and:
b) he will collect no client funds;
c) for which he will use no hybrid contingent fee agreements;
d) from which he will withdraw at the first sign of dispute with the client;
e) for which he will pursue no fee collection action if stiffed on any fee to which he believed himself entitled. App. p. 40.

(3) violated Mass.R.Prof.C. 3.3(a)(1) and 8.4(c) by knowingly making false statements of material fact ... . App. p. 161

Truth: It is *not true* that Petitioner made false statements. The following are true:

— 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.

— As to the third alleged false statement at issue, just like the multiple false statements made by the Panel findings and other false statements made by prior Panels (such as that Warrender received "no net funds" and that there was no "settlement agreement"[8]), Petitioner did not "knowingly" make a false statement. What happened is that he made a good faith mistake while under significant stress in his inferences.

Petitioner's Understanding: There is nothing Petitioner can do about the first two statements which were and are true. As to the third, for the umpteen time, Petitioner apologizes for his haste in making this statement. I admit again that my inference and wording as to how many times the client 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 act so hastily. I should not have made the statement. App. pp. 44-52.

The disciplinary process does not accept the genuineness of my 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.

(4) violated Mass.R.Prof.C. 1.5(a) by claiming ... attorney's fees, where no contingency on which to ground such recovery ... and where the attorney-client relationship had effectively ended well before the sale of the house ... App. p. 161

The Truth: The findings of misconduct are false. They ignore the undisputed fact that Petitioner not only based his fee claim on the contingency of "recovery by judgment, settlement, or otherwise" but also upon multiple breaches of contract and tort

[8] It is noteworthy that finally after over six years of litigation, this hearing panel at least finally has the decency not to repeat the prior hearing panel misrepresentations that Warrender received "no net funds" and that there was no "settlement agreement" — misrepresentations that were undisputedly false based on documentary evidence. Yet, they still lack self-awareness of the misrepresentations they make while acting in good faith quickly under stress and fail to treat the Petitioner's honest mistake with the empathy they give themselves. App. pp. 35-37; 47-50.

requirements of good faith and upon an equitable basis. As this Court ought to be well aware, pursuant to a case the Petitioner argued before this Court, upon the failure of the contingency upon which a contingent fee is grounded, a contingent fee attorney may still be able to collect a fee based on bad faith breaches of contract requirements of cooperation by the client and upon implied covenants of good faith and fair dealing or on an equitable basis of *quantum meruit*[9]. Even in cases of an illegal contingent fee agreement, the attorney is entitled to collect either in *quantum meruit* or in tort.[10]

It is *not true* that the attorney-client relationship ended before closing on the short-sale settlement. It was undisputed testimony by the client and her dishonest attorneys handling the fraudulent claims that if the closing fell through — as they had for the previous year — that the Petitioner would be expected to take the case to trial. Again, $2.8 million lender liability cases do not settle because of pleasant conversations at mediation, they settle just as this case settled by Petitioner being willing, ready, and able to take the case to trial. Petitioner had expert testimony verifying the reasonable of his fees — again, this expert testimony *was completely omitted from the factual findings*.

Petitioner's Understanding: This Court has decided that the objective basis case law required for a Rule. 1.5 finding of clearly excessive fees does not apply to the Petitioner. If Petitioner loses on a fee claim because of subjective disagreements as to the meaning of contract terms such as "recovery by judgment, settlement, or otherwise", his fees will be considered clearly excessive regardless of the merit of his tort and equitable claims for fees. Thus, in order to abide by this ruling, if reinstated, Petitioner will handle only 4-5 cases 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. App. p. 40.

The above statements are all from the Part I Questionnaire and testimony. For purposes of brevity, Petitioner incorporates the Petitioner's Brief On Appeal and its citations to the Record that go into detail as to the truth of what actually occurred in the underlying case. App. pp. 29-76.

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[9] Liss v. Studeny, 450 Mass. 473, 476-77 (2008).

[10] *Guenard v. Burke*, 387 Mass. 802, 809-10 (1982); *Mulhern v. Roach* 398 Mass. 18 (1986); *Berman v. Linnane*, 434 Mass. 301, 303 (2001); *Johnson v. Blacke*, 32 Mass.App.Ct. 399, 403 (1992); *Donald v. Shoblom*, 409 Mass. 63, 67 (1991); See generally, *Redlich v. Lanell*, 20 Mass.L.Rptr. 688, 719 (Mass.Superior 2006).

IV. Argument:

A. IT IS ERROR, ABUSE OF DISCRETION, DISPARATE TREATMENT, AND A SUBSTANTIAL INJUSTICE TO TREAT REINSTATEMENT PETITIONS AS ADVERSARIAL RE-LITIGATION OF DISCIPLINE.

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).

Hiss was reinstated despite testifying, "I have not had any complete change in moral character. I am the same person I have been, I believe, throughout my life." Hiss, at 467-68. By the testimony of Hiss himself, he was the same person before his conviction for perjury as he was during the conviction and as he was twenty-five years later at his reinstatement. By his admission, it is disingenuous at best to say that the evidence warranted any finding that Hiss "would not commit the crime of which he was convicted"[11]. In fact, the funny (or sad) part is that he committed perjury at his reinstatement, has gotten away with it, and no one cares. App. p. 31.

Unlike Hiss, in which the details of Hiss' criminal perjury and treason were ignored and omitted from the restatement hearing and findings with the criminal conviction waived off by this Court in one sentence, in this Petition three-quarter's of its substance is spent on re-litigating and constantly repeating the false administrative findings made against this Petitioner. For Diviacchi, as a condition of reinstatement, he must fall prostrate before the BBO as a repentant sinner asking forgiveness for sins he did not commit despite having completed penance for them. The Court ridicules Petitioner as "vengeful" and "unrepentant" with a "dismissive attitude" who

[11] App. p. 165 *citing* Hiss at 467.

is not "trustworthy" because he *honestly and sincerely* maintains his innocence when *forced to do so* by a hearing panel instead of cowering before its hypocritical pompous presumption of moral superiority. All of this occurs because of forced re-litigation of findings — plus the prejudicial use of First Amendment speech — that Diviacchi admits he must accept and for which he has apologized and accepted as his responsibility. Such result is substantively unjust and an error of law. For brevity, Petitioner refers to Brief on Appeal. App. pp. 29-76.

B. IT IS ERROR, ABUSE OF DISCRETION, DISPARATE TREATMENT, AND A SUBSTANTIAL INJUSTICE TO TREAT FIXED-TERM SUSPENSION THE SAME AS DISBARMENT.

Relying on disbarment case law, the Single Justice erroneously states that a fixed term suspension is "conclusive evidence that he was, at the time, morally unfit to practice law" and this conclusive evidence continues to prove lack of moral character for purposes of reinstatement. App. p. 163. This standard is used to avoid a holistic view of the Petitioner's life because using this standard makes the entirety of life before suspension irrelevant.

Under this standard, the following would be true:

1) an attorney suspended for 30 days is at the time of suspension morally unfit to practice law and the suspension continues to be evidence of lack of moral character, yet the attorney is reinstated automatically the following month — while the presumption of lack of moral character remains and is uncontested;
2) an attorney suspended for a year is morally unfit to practice law and the suspension continues to be evidence of lack of moral character, yet the attorney is reinstated automatically the following day — while the presumption of lack of moral character remains and is uncontested;
3) an attorney suspended for one-year-*and-a-day* can be effectively disbarred for life nationwide because the suspension is proof of moral inferiority that the attorney may not be able to overcome through reinstatement procedure. *See* App. p. 156.

Such reasoning mocks the concepts of both morality and justice as capricious semantic

gamesmanship subject to arbitrary and capricious picking of time periods from a hat.

The case law cited by the Single Justice deals with disbarment and indefinite suspension and not with fixed-term suspension. 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" is 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"... .).

There is no basis in legal reasoning to use *res judicata* principles to apply a presumption of life-long "lack of moral character" from a fixed term suspension. Bar Counsel and the BBO treat suspension as disbarment through incorrect reasoning and use of *dicta* and inapposite citation as delineated in Petitioner's Brief on Appeal. App. pp. 29-76.

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

For purposes of brevity, Petitioner refers and incorporates by reference App. pp. 40-76. At age 64, having completed a severe penance for his one mistake in a 1000 cases handled, Petitioner's life justifies a conclusion that he will not sin again and thus justifies reinstatement.

D. IT WAS ERROR TO ALLOW ADMISSION OF PETITIONER'S FIRST AMENDMENT SPEECH CRITICAL OF THE BAR BECAUSE IT WAS AND IS DEFINITELY USED AGAINST HIM AND IS PREJUDICIAL.

The Single Justice states Petitioner's First Amendment speech critical of the legal system was not considered as a basis for denying reinstatement; right after saying this, *in the very next sentence*, the Single Justice uses that First Amendment speech against the Petitioner and chastises him for his opinions. App. pp. 166. Just as with the hearing panel, the Single Justice uses the Petitioner's First Amendment criticism of the legal system as evidence that the Petitioner has not "redeemed himself"; is not repentant; is not remorseful; and that his critical opinions mark him with a Scarlet Letter as a sinner not to be trusted. App. pp. 18-21; 166.

Petitioner's thousands of pages of essays, publications, and other writings over 25 years of criticism of the legal system were not submitted and considered by the hearing panel. Instead, the panel used a few pages of opinion in the form of hyperbole and metaphor carefully chosen by Bar Counsel out of context for their prejudicial effect. This trial by sound-bite is the same technique by which Bar Counsel achieved the false disciplinary findings before a hearing panel too incompetent to understand what was going on. Over Petitioner's objections, the hearing panel admitted into evidence and spent several pages of their recommendation whining about how hurt they felt by his First Amendment speech as a basis to recommend against reinstatement. Id.

It is clear by the panel's decision that they took the criticism personally; distorted the evidence as a result of their hurt pride and delicate sensibilities; and that it affected their recommendations just as it did the Single Justice. Even if not used directly, it was used to create substantial prejudice and bias against the Petitioner. It was legal error and created substantial injustice to admit such First Amendment speech. For purposes of brevity, Petitioner incorporates

by reference his Brief on Appeal. App. pp. 52-76, 87-92.

E. IT IS ERROR, ABUSE OF DISCRETION, DISPARATE TREATMENT, AND A SUBSTANTIAL INJUSTICE TO TREAT REINSTATEMENT AS A POPULARITY CONTEST FOR VIRTUE SIGNALING LAWYERING.

It is disingenuous for the Bar or the legal system to say it is the "public's respect" of the legal system and the disciplinary process that is at issue in this reinstatement or really in any aspect of the disciplinary process. *No one* other than Bar Counsel and the select few of the BBO oppose the Petitioner's reinstatement. Given other disciplinary cases whose reinstatements were arbitrary at best and even outright laughable, *there is plenty of evidence in the Record* by which to allow reinstatement of the Petitioner Diviacchi if the evidence were considered instead of ignored and if Petitioner's life were viewed holistically. These other cases vary from the criminal traitor Hiss who did nothing for 25 years but preach his innocence to his fellow Brahmin; to Scannell[12] who after the commission of multiple felonies was reinstated because he successfully completed Alcohols Anonymous ignoring its 85% recidivism rate as irrelevant; to Ellis[13] who was reinstated after disbarment for a criminal conviction because he coached kids' sports on weekends while unemployed and uneducated during the entire disbarment period. App. pp. 63-68. *Compare* Hiss with Gordon, *supra*. ("However, by comparison with the national notoriety of the Hiss trial ... Gordon's prosecution was only a local media attraction."). The issue really is not the public's respect for authority but whether the Petitioner's claims of innocence and First Amendment speech show sufficient Cartman-like respect for authority to warrant empathy.

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[12] Matter of Scannell, 31 Mass. Att'y Disc. R. 554 (2015)

[13] In the Matter of Ellis, 457 Mass. 413 (2010)

There is no empirical evidence or even conceptual clue admitted in the disciplinary process as to what the "public" respects, wants, or needs. All the submitted evidence (which was submitted by the Petitioner) shows a rising social class separation between what the legal system wants and needs to maintain its elitism and what the public wants and needs in terms of legal services — such as competent attorneys to handle the defense and counter-litigation of multi-million dollar lender-liability actions by hybrid fee agreements (something the Petitioner will never do again nor should any attorney try to do given the unavoidable indeterminacy that will occur at fee collection time). App. pp. 38-40. Out of a Massachusetts population of ten million with forty-thousand lawyers, it is a handful of unelected exclusive lawyers who in backrooms privately decide among themselves what the "public" respects, wants, or needs. Using history as a guide, these few have always been on the wrong side of history and thus there is most likely little if any correlation between what the "public" respects, wants, or needs and what the Bar respects, wants, or needs. App. 52-68, 104-121.

In the finest traditions and as a progeny of the 1887 Alabama first Code of Ethics, the issue here is not what the public respects but what the handful of esteemed members of the Bar who have the power of admission and re-admission to its elite and reclusive status of power demand as respect. Despite the Bar's nominal virtue-signaling marketing emphasis on "diversity and inclusion within the legal field over the past decade or so, the legal profession remains one of the least diverse of any profession"[14]. "About 12 percent of ... lawyers ... are the children of

[14] "The legal profession remains one of the least diverse of any profession. How can we change it?". By Allison E. Laffey and Allison Ng. ABA Judicial Intern Opportunity Program Articles; May 02, 2018.

lawyers, and another 36 percent had some other close relative who was an attorney"[15]. In fact, just as was true for the 19th into the 20th Century[16], lawyers are "even more likely to have one or more parents who were also lawyers than those in other occupations, such as doctors (7.89 percent) or accountants (4.26 percent), were to have one or more parents in their occupation" [17].

An example of its elite moral superiority at work, the Bar wants to ignore and dismiss as a "vanity project" the Petitioner's *entire holistic 60 years of life*; his expenditure of his personal resources and time during his suspension at pursuing and providing graduate education in his old age; and his willingness to re-take the Bar examination — all this is ignored as not worthy of consideration for purposes of reinstatement. Instead, Petitioner is chastised for being "unrepentant" of sins he unequivocally and in great detail honestly denies but for which he has completed severe penance. Further, he is chastised for stating honestly and with complete candor his opinions based on life and education as to the competence and normative nature of the legal system. Despite Petitioner's repeated admissions, acceptance of responsibility, apologies, and statements of how his professional attitudes and practice have changed that now total hundreds of pages of record; and, despite Petitioner's objections and clear law stating Petitioner is not required to admit guilt; the Single Justice has allowed the BBO to treat and deny reinstatement as further punishment for the disciplinary findings and as a snipe at Petitioner's First Amendment

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[15] "Following in Their Footsteps: What the data says about multigenerational lawyers." Harvard Law School Center on the Legal Profession Portraiture in the Legal Profession. Volume 7, Issue 1 (November/December 2020). https://thepractice.law.harvard.edu/article/following-in-their-footsteps/

[16] App. pp. 111-12.

[17] "Following in Their Footsteps", *supra*.

personal opinions critical of the legal system. This is error and substantively unjust. For brevity, Petitioner incorporates by reference his Brief on Appeal, App. pp. 29-76.

F. IT IS A SUBSTANTIAL INJUSTICE NOT TO ALLOW PETITIONER TO ESTABLISH COMPETENCE BY RE-PASSING THE BAR EXAM.

An arbitrary and vague requirement for "competence" based on MCLE courses is further evidence of the arbitrary and capricious nature of Bar discipline and reinstatement. How many and which MCLE courses are required to establish competence? No one has any clue. Might as well pick them out of a hat just like the one-year and one-year-and-a-day distinction. Without doubt, just as the BBO finds ways to ignore the multiple character references submitted by the Petitioner[18], they will ignore any MCLE courses Petitioner takes; the BBO will find some reason to reject them as they find a way to ignore his character references. For brevity, App. pp. 58-76.

Reinstatement can be "conditioned upon [an attorney] once more passing the bar." Matter of Gordon, 385 Mass. 48, 52 (1982). 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. 86, 95 (1996). If Petitioner can pass the Bar exam again, as with a new attorney admitted to the Bar, his competence should be accepted for purposes of reinstatement.

[18] If they know him before suspension, they are rejected as not knowing him after; if they know him after suspension, they are rejected as not knowing him before; if they know him through both, they are simply omitted from the Record like so many other unwanted facts.

G. THE PART II QUESTIONNAIRE CREATED BY BAR COUNSEL AS A REQUIREMENT FOR REINSTATEMENT IS AN UNLAWFUL SEARCH AND SEIZURE UNDER ARTICLE XIV AND THE 4TH AMENDMENT.

The standard for readmission as part of a reinstatement "is adequately amenable to the fitness inquiry of original applicants" for admission to the Bar. In the Matter of Prager, 422 Mass. 86, 95, 100-01 (1996). The Board of Bar Examiners does not go around asking original applicants to the Bar to produce checking account records, savings account records, all financial account records, and income tax records as does the Part II Questionnaire. They ask if an applicant has ever filed for bankruptcy, defaulted on debt, had judgments entered against them, been a derelict, been arrested, had tax lines, and other such specific factual events, but they do not start fishing expeditions into an applicant's private finances. Even if an applicant has done any of these events, any follow-up investigation goes into that specific instance of financial difficulty not into a fishing expedition into the applicant's entire private family finances.

Petitioner has worked and has been a tax-paying contributing member of society since he was fourteen. Plaintiff has never in his life filed for bankruptcy, defaulted on any loans, notes, or debts; nor has he ever had any tax liens or judgments against him. Whatever debt he had in his life was always paid timely and he was never delinquent. He has no criminal record or adverse civil judgments. Despite the stresses of being a solo practitioner for almost 25 years, he was always able and did financially support his family. Thus there is no probable cause, no reasonable basis, and no basis for a fishing expedition through his confidential personal finances.

For this Panel Report, neither the Panel nor Bar Counsel bothered to make up any reason for the Part II Questionnaire and have finally honestly admitted:

> It is part of your reinstatement questionnaire, the rules allow for us to see it and

we would like to see it. Hearing Transcript, p. 9.

Such fishing expedition is an unlawful search and seizure of the Petitioner's private financial records. For purposes of brevity, Petitioner refers and incorporates by reference App. pp. 78-82.

H. PETITIONER'S LIFE HAS NOT BEEN A "VANITY PROJECT".

The Single Justice as did the hearing panel after expressing the *noblesse oblige* that the Petitioner has the "raw intellectual firepower" to practice law and that the Panel is "favorably impressed" with his MPRE score of 106[19] then go on to use their *imperium* to reject the entirety of his 60 years of life and the hard work and expenditure of the last few years in seeking a graduate education. His life is summed up and rejected as a "vanity project"[20]. As worthless of a life as this Court and the Bar believes the Petitioner to have lived, Petitioner has learned at least one lesson that the esteemed members of the Bar have failed to learn in their lives: the ultimate immoral vanity project in life is to pass moral judgment on the lives of others. The reality of the disciplinary process is that — regardless of whether it is 1880's Alabama or 2022 Massachusetts — that Petitioner would be more respected as a person and as an attorney if he were a cold-blooded *but likeable* perjurer and traitor telling clients and attorneys what they want to hear instead of being a sincere *but unlikeable* honest individual and loyal to his beliefs. Luckily, Petitioner rejects such vanity and its immorality.

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[19] App. pp. 22, 167.

[20] Id. pp. 10, 166.

CONCLUSION:

Viewing the Petitioner's entire life as a whole, law and equity require reinstatement from a penance of 27 months of suspension be allowed conditioned upon the Petitioner re-passing the Massachusetts Bar Examination just as he was required to re-pass the MPRE.

In the alternative, this Court should remand this Petition for Reinstatement and order the reinstatement hearing be re-opened before a new panel with instructions from this Court to exclude inadmissible evidence of First Amendment speech and to exclude a re-litigation of the disciplinary findings so as not to require repentance in addition to penance.

Furthermore, this Court should declare Bar Counsel's Questionnaire Part II required of all petitioners for reinstatement irrespective of any probable cause or reasonable basis for such requirement to be an unconstitutional unreasonable search and seizure.

Petitioner
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Date: 19 March 2022

CERTIFICATE OF SERVICE

I, Valeriano Diviacchi, certify that on 19 March 2022, I served one copy of this Memo on the Board of Bar Overseers and upon Bar Counsel by first class postage prepaid mail.

/s/ Valeriano Diviacchi