COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

IN THE MATTER OF
VALERIANO DIVIACCHI

NO. SJC-13791

Petitioner

PETITIONER'S PRELIMINARY MEMORANDUM

Law and substantial justice based on the evidence as a whole require reinstatement conditioned upon re-passing the Mass Bar Exam. Matter of Gordon, 385 Mass. 48, 52 (1982).

If the Court will not do so, it should disbar the Petitioner without any further opportunity for reinstatement. The evidence as a whole establishes that Petitioner's sense of duty (based on his education, learning, and more than sixty years of life experience which includes surviving violence and injustice it is doubtful most of the Bar could even imagine let alone understand) honestly believes his actions and objections to the disciplinary and reinstatement process to be sound and valid moral stances. However, this moral stance and his emotional passion and words for defending it are seen by the Bar as a "temperament issue" exhibiting disrespect for their authority and thus immoral. The history of the Bar shows that these two opposing views will never be reconciled in Petitioner's lifetime. The Petitioner will never sacrifice his moral beliefs; until he does so, he will never be reinstated. Thus, the limited term suspension at issue is really a *de facto* disbarment for life and reinstatement procedure is a waste of time for the Bar and this Court and is a source of significant pain for the Petitioner. Any sense of substantive morality especially in the consequentialist sense beloved by the Bar requires this Court just shoot the wounded and get it over with.

I. Statement of the Case:

With Kafkaesque absurdity this case proceeds into a tenth-year of what was supposed to be a 27-month suspension. This time around, the substantive facts are ignored as are Petitioner's Constitutional objections to reinstatement procedure because of the Petitioner's "temperament issues" seen as "fixated on flouting or fighting the established standards rather than focusing on meeting them." Appendix p. 143, n. 2. Denial of reinstatement is founded upon Matter of Alger Hiss, 368 Mass. 447 (1975) in which an attorney perjured himself into reinstatement after disbarment. The Panel this time around inadvertently admitted that it was using the wrong standard by stating: "[t]he conduct giving rise to the petitioner's **disbarment** is affirmative proof that he lacks the moral qualifications to practice law" [emphasis added] while missing the fact that Petitioner was not disbarred. Id. p. 9. For purposes of brevity, in order not to waste time and resources on repeating arguments already made and ignored without decision:

PETITIONER RENEWS his Due Process and Equal Protection Objections to Reinstatement Procedure made before the hearing, renewed at its close, and renewed before the Board on appeal and before the Single Justice on appeal. Appendix (App.) pp. 67-92, 100-10 and Record (Rec.) Items ##19, 31, 32, 40. Such objections were ignored by the Panel, the Board, and the Single Justice without even a rescript denial despite their being the substantive law upon which the Petitioner is relying for reinstatement. Petitioner challenges on constitutional grounds the application of disbarment law to a limited term suspension; it is this application that allows for the substantive injustice of reducing morality to a popularity contest dependent on subjective arbitrary and capricious judgments of performative evidence as in Hiss and George, *infra*. Id. Petitioner submits he is entitled to rule of law rulings on these Objections not just subjective

irritation to what is interpreted as non-lawyerly temperament. For brevity, he incorporates herein by reference their argument. App pp. 67-92, 100-10 and Rec Items ##19, 31, 32, 40.

PETITIONER FURTHER RENEWS his Objection to Reinstatement Questionnaire Part II contained in the Record as an unlawful search and seizure in violation of the Massachusetts and United States Constitution that was filed as a hearing objection and renewed before the Single Justice. App pp. 67, 94-99. Petitioner respectfully submits that he is entitled to a ruling on this Objection that for purposes of brevity is incorporated herein by reference. Id.

In the prior reinstatement denial, such Objection was ignored because the Part II Questionnaire was not used as a basis to deny reinstatement and therefore this Court concluded, "[i]n any event, the issue appears not to have factored in the board's decision. In the circumstances, we need not consider it further." In Re Diviacchi, 491 Mass. 1003, n. 3 (2022). However, unconstitutional acts do not require damages to create a claim requiring adjudication. The "injury" that gives standing is the "deprivation of a constitutional right" not whether there was "compensable harm that may have been caused by the alleged constitutional deprivation". Estate of Macias v. Ihde, 219 F.3d 1018, 1028-29 (1st Cir. 2000). So, for example, "[a]n equal protection violation occurs when the government treats someone differently [from] another who is similarly situated" and not when any resulting compensable injury occurs. Id. at 1029 *quoting* Penrod v. Zavaras, 94 F.3d 1399, 1406 (10th Cir. 1996); Farrar v. Hobby, 506 U.S. 103, 114; 113 S.Ct. 566, 574 (1992) *quoting* Carey v. Piphus. 435 U.S. 247, 266; 98 S.Ct. 1042, 1054 (1978).

PETITIONER MOVES pursuant Matter of Gordon, 385 Mass. 48, 52 (1982) that his reinstatement be conditioned upon his once more passing the Mass Bar Exam. For purposes of brevity, as argument in support, Petitioner incorporates herein by reference App pp. 103-104.

PETITIONER SUPPLEMENTS his Objections with the following Facts and Argument.

II. Statement of the Substantive Facts:

The following is a summary of the undisputed facts of this reinstatement denial compared to the successful reinstatement facts of Robert George[1] as stated and criticized in In re Reinstatement of George, 610 F.Supp.3d 328 (D. Mass. 2022) and In re Reinstatement of George 2023 WL 3158912 (D.Mass. 2023). The absurd reality of reinstatement law is that the Petitioner's life would get more respect, equal treatment, and due process if he were a convicted, tax-evading, bankrupt felon "grudging[ly]" using a performative *mea culpa* for professional gain than he does as a life-long working, honest, tax-paying, contributing refugee citizen.

Petitioner is now 67 years old. The following undisputed facts are true:

1) As a refugee emigrant to the United States from Yugoslavia, since the age of 14 Petitioner has been either a full-time student and part-time worker or a full-time working tax-paying naturalized citizen or both including six years of service in the U.S. Navy;
2) Petitioner has never filed for bankruptcy nor ever had any bankruptcy problems, debt liens, unpaid creditors, or judgments against him;

[1] The Panel Report makes a false statement at page 11, note 1, of its Report that Petitioner argued or considers himself "a better person" than Mr. George. Petitioner did not make, does not make, nor implied any such moral judgment. In fact, at this point, Petitioner has submitted in the Record of his reinstatement petitions what probably total 100's of pages of summaries of his personal moral belief and conceptual analysis that the Bar should not be using any normative language of morality to make moral judgments about anyone either of the Petitioner or of George — just a snippet is contained in his filed Objections. As always, while falsely accusing the Petitioner of having made false statements, the Panel proceeds with making false statements that are far worse than any mistakes the Petitioner has made. It is the Panel who is saying that Mr. George is "a better person" because Mr. George has the "moral qualifications" to practice law in this Commonwealth whereas the Petitioner does not. All the Petitioner has asked is that he be judged by the same empirical standard as Mr. George and others. Petitioner has never claimed in the Record nor anywhere the moral superiority to make normative judgments of the ultimate value of the lives of the famed Other and it is an unwarranted personal insult to say he has. As the popular adage goes these days, the Panel should not project upon the Other its moral busybody need to make moral judgments of the lives of others. Note 1 should have been deleted if the Panel practiced what it preaches. *See* Rec. Item #42.

3) He always all of his personal and family debts including taxes in full and on-time including all student loans and mortgages;
4) He always paid his income taxes and all other taxes on time and never had any local, state, or federal tax liens;
5) He supported his family by working since he was 14 and as a married adult within thirty-five years of marriage supporting his child;
6) He never had nor has a criminal record nor any civil liability including no malpractice settlements nor judgments ever entered against him;
7) He is an honorably discharged veteran of the U.S. Submarine Service;
8) He spent the last seven years of his suspension using his personal income and retirement funds to earn a Ph.D. in philosophy, passed the California Bar Exam, and has throughout been willing to pass the Mass Bar Exam as a condition of reinstatement (as fairness would dictate, he is not willing to undergo the stress and financial cost of passing the Mass Bar if reinstatement can then be denied anyway based on his bad attitude);
9) He handled competently approximately one thousand cases in seven different jurisdictions for twenty-five years with no successful — either by judgment or settlement — malpractice case ever filed against him;
10) No one including no client has ever opposed the reinstatement of this Petitioner except for Bar Counsel;
11) Petitioner's limited term 27-month suspension, based on a preponderance of the evidence standard reviewed only by an administrative standard, was based on findings for which he accepts responsibility but for which he continues to deny and will always deny. App. pp. 74-78, 114-119; Rec Item #15 and it attached *Exhibit 2*.

Comparing for equal protection purposes, in the George reinstatement, he was at the time approximately three years older with the following undisputed facts:

1) Disbarred on 15 March 2015 retroactive to 21 June 2012 as a result of a federal criminal jury trial that resulted in convictions upon the criminal 'beyond a reasonable doubt' standard for seven felony counts involving drug money laundering; conspiracy and aiding and abetting of drug money laundering; and the structuring of financial transactions to avoid reporting them. The conviction was affirmed by the 1st Circuit using the standards of review for criminal appeals (de novo, clear error, abuse of discretion). "Petitioner engaged in criminal conduct solely for the purpose of making money";
2) He owed >$700,000 in unpaid federal and state taxes for the years 2007, 2008, 2009, 2010, and 2012 in which he failed to file or pay any income taxes;
3) He showed "complete disregard of his tax obligations, for which he has expressed no remorse or regret at all" and showed lawyerly pride in his resolution of his federal tax debt of >$600,000 by a $25,000 borrowed payment from his wife's family;
4) "Petitioner did not merely understate his tax obligations; he ignored them entirely, for years. ... Although he was not prosecuted for income-tax evasion, there can hardly be any doubt that he willfully disobeyed the law. He again minimizes that conduct, stating

that his disregard of the law was due to a 'bad habit of paying late.' ... And his apparent lack of concern over the fact that his federal tax liability was settled for approximately 4% of the outstanding amount — which he simply characterized as 'a good result' — is also disturbing";

5) Both George and many of his character witnesses excused his criminal conduct on entrapment by the government and on his being "targeted" by the government which "goes after" attorneys such as him. "More importantly, even today, petitioner's acceptance of responsibility is grudging at best. ... Similarly, the testimony of some of the witnesses called by petitioner at the hearing tended to downplay or minimize the nature of the crimes and his responsibility for having committed them, or suggested that he was somehow a victim of government misconduct. ... [George's] explanation as to his motive for committing the crimes is disingenuous at best";

6) George before disbarment had a successful attorney malpractice case brought against him derived from the loss of a medical malpractice trial as a result of his failure to prepare for trial and misrepresentations made to a client and the court regarding his preparedness. This case resulted in a bar admonition because "the hearing committee rejected substantial portions of Mr. George's testimony basically finding that Mr. George had been untruthful under oath in a bar disciplinary proceeding ...";

7) George had a second successful malpractice case filed against him alongside one of his character witnesses that were both settled during his disbarment. "The settlements of those cases did not contain any apologies from Attorney George but as usual required confidentiality agreements barring the release of any details absent a court order. The latter cases involved well into seven figure damages. Though the BBO disciplined Atty George for the prior case, they never asked about nor did anything about the latter cases";

8) Though George did not file for bankruptcy, he was *de facto* bankrupt because he "had some very serious financial obligations at the time that he got into the money laundering" in order to pay debts "and that likely he had hoped to obtain some income and possibly a steady stream of income from his involvement in the deals". "In fact, petitioner committed the crimes at a time when he was paying no federal or state income taxes, and indeed spending money at such a rate that (by his own admission) he could make no tax payments of any kind. As bar counsel noted while failing to oppose his reinstatement, his claim that his only motivation was to help a former client 'just doesn't ring true,' because he 'had some very serious financial obligation[s] at the time that he got into the money laundering and that likely he had hoped to obtain some income and possibly a steady stream of income from his involvement in the deals ....'. He nonetheless continues to deny that his motive, even in part, was financial gain."

9) Regarding George's Part I and his testimony at his reinstatement hearing, he "was not completely forthcoming about the nature and extent of his own criminal conduct, particularly his money laundering and structuring"; he "was not candid about the motivation for his misconduct ...."; he "on several occasions during his initial testimony, the petitioner showed an unfortunate tendency to try to minimize or explain away his crimes by adding or omitting detail to his narrative that did not square with the record";

10) Bar Counsel did not object to George's reinstatement and never bothered to

investigate the malpractice case against him filed and settled during his disbarment;
11) A former client objected and testified against George's reinstatement, but his testimony was dismissed as that of a "disgruntled former client";
12) In order to achieve reinstatement, the BBO gave him credit for the pro bono work and his reputation as a competent attorney prior to disbarment and then credit for his pro bono work and MCLE courses after disbarment. Bar Counsel did not investigate why the prior work and education did not stop him from committing crimes nor what charitable work if any George did once he was reinstated and got what he wanted. Nor did Bar Counsel investigate as to whether he attended or actually learned anything at MCLE — unlike passing a bar exam, paying a fee is enough. In re Reinstatement of George, 610 F.Supp.3d 328 (D. Mass. 2022); App. pp. 74-78, 114-119; Rec Item #15 at *Exh. 2*, ¶IV.

III. Argument

I. REINSTATEMENT IS CONSTITUTIONALLY NOT SUPPOSED TO BE USED AS A MEANS OF FURTHER DISCIPLINE FOR ACTS OR A BAD ATTITUDE ALREADY PUNISHED.

This Court constantly makes vague references to a "heavy burden" that is just as vague and ambiguous as "good moral character" and "competency and learning" but never gives any evidentiary standard for defining this "heavy burden". As argued in Petitioner's Equal Protection and Due Process Objections, the admittedly vague[2] standard stated by S.J.C. Rule 4:01, §18(5)4 as-applied actually consists of multiple and varied vague standards of "good moral character" and "competency" applied subjectively, arbitrarily, and capriciously without any evidentiary standard stated for reinstatement purposes. Further, such "heavy burden" is dependent on adding one-day to some limited-term suspensions with no rational basis as to why one-day is picked out-of-a-hat as the empirical foundation for going from no-burden to a heavy-burden instead of any other time period. "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).

[2] Konigsberg v. State Bar, 353 U.S. 252, 262-263 (1961).

This vagueness and ambiguity are normally cured through "long usage" of "well defined contours" so that it is "abundantly clear that ... construction of the [term] is both extremely narrow and fully cognizant of protected constitutional freedoms". Law Students Civil Rights Research Council, 401 U.S. 154, 159-160, 163; 91 S.Ct. 720, 725-27 (1971) *citing* and *quoting* Konigsberg, 366 U.S., at 54, 81 S.Ct., at 1009. However, as highlighted by the Panel's own confusion as to what is going on by its reference to "[t]he conduct giving rise to the petitioner's disbarment", there are here no such "defined contours" or "extremely narrow" terms.

Instead, the process based on such vague terms is little more than "a form of Kadi justice with a procedural overlay. Politically nonaccountable decisionmakers render intuitive judgments, largely unconstrained by formal standards and uninformed by a vast array of research that controverts the premises on which such adjudication proceeds." Rhode, Deborah L., "Moral Character as a Professional Credential", Yale Law Journal, Vol. 94:3, 491-603 (January 1985) p. 584. If any other licensing process or disciplinary process relied on such vague and undefined contours as attorneys use to judge their outcastes, it would be rejected as unconstitutional. Id. at 571 ("Surely moral merit is at least as elusive as other terms the [Supreme] Court has declared infirm, such as "gangsters," "sacreligious," "humane," and "credible and reliable" [citations ommitted]); *See* Genusa v. Peoria, 475 F. Supp. 1199, 1207-08 (C.D. Ill. 1979) ("The portion ... relating to 'showing evidence of rehabilitation sufficient to warrant the public trust' must fail constitutional scrutiny for the same reasons as the 'good character and reputation' standard ...").

If such unconstitutional nature were not bad enough, constitutionally attorney disciplinary proceedings are "quasi-criminal" in nature. In re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). Thus, issues such as what evidentiary standard to use and how it is used in

the reinstatement process are issues of fundamental fairness and of Due Process. Id.; *See* In Re Barach, 540 F.3d 82, 84 (An evidentiary standard may render "state court [disciplinary] proceedings fundamentally unfair, and thus, violated due process rights".); In Re Oliveras-Lopez De Victoria, 561 F.3d 1, 3 (1st Cir. 2009).

Thus, it is "improper" to use reinstatement "to extract further punishment" for past sanctioned misconduct. In the Matter of Weiss, 474 Mass. 1001, 1004 (2016). Citing to the 8th Amendment bar of cruel and unusual punishment, another state supreme court was prophetic in its warning that reinstatement should not be used to do what the disciplinary action did not:

> ... the Court in recent years has considered it disproportionate punishment to deny an attorney the right to practice law indefinitely. ... A good starting point for applying the cruel and unusual punishment standard ... is the concept of disproportionality. ... In general this Court has rejected vengence as a civilized instinct.
> ...
> (Concurring)
> ...
> And the sense of our original majority opinion that has been withdrawn was to set a clear guide for readmission to practice law, by a rule that readmitted persons disbarred who had continued their lives for five years without further default, after paying all penalties for any crime they had committed that resulted in disbarment; or after remedying whatever personal deficiency caused behavior for which they were disbarred.
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> It was a sensible rule — as sensible as any that I have seen laid down by any other court — in an area wherein every court has had great difficulty finding its way.
> Now, with this opinion, readmission to practice is tuned to rehabilitation ... The process is opened to prejudiced judgments of a most subjective nature because no one knows what rehabilitation is, in this context; and therefore its existence is nearly impossible of any kind of proof. One judge may believe that hours of work in good causes prove rehabilitation. Another may believe that helping in the soup line in a mission, for example, is proof of rehabilitation. But the applicant may have done the same work before disbarment. Should he then, in the process of demonstrating "rehabilitation", work twice as long? Should one prove rehabilitation by joining the Civitan Club in addition to the Kiwanis? Should one have a religious rebirth? *How does one prove he is no longer untrustworthy?* Especially if he maintains, as has he the right, that he *never was* untrustworthy?

> One might suppose that considering the tenor of the revised decision and of the dissents, that a lawyer, scarred by disbarment might by, say, a heroic, painful and disfiguring sacrifice to medical experimentation, gain a quicker rehabilitation! I would vote that he stay out five years, no matter what; and that all others return in five years, if their behavior was shown law-abiding in that time.
>
> To say that my reasoning is simply a mask for reluctance to do a difficult part of judging — that my insistence upon a provable standard for behavior that would entitle a disbarred lawyer to practice again is an avoidance of responsibility to make the subjective judgment necessary — simply turns the problem into the solution. Because the difficulty of the task — the difficulty in finding strands of logic to which to attach a reasoned decision about what one must do to regain a license to practice law, proves the ultimate subjectivity that I decry.
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> **Such subjective judgments are simply too fraught with danger to the rule of law.** In re Smith, 214 W.Va. 83, 585 S.E.2d 602, 605-06, 608-09 (1980) [Emphasis added].

For whatever temperament the Petitioner has and for whatever he did, or more accurately for whatever this Court believes the Petitioner did and has as a temperament, the sanction was not disbarment as the Panel stated but a 27-month suspension. The reinstatement process already is little more than a popularity contest enforcing subjective social class concepts of ethical beauty as is most of the disciplinary process. Using reinstatement as a means for further punishment for already disciplined acts, speech, and temperament morally makes the process far worse.

II. REGARDLESS OF WHATEVER SUBJECTIVE GATEKEEPER FUNCTION TEMPERAMENT SERVES TO THE SOCIAL STATUS OF THE BAR, OUT-OF-COURT ANGRY SPEECH AND BAD TEMPERAMENT IN RESPONSE TO ACTUAL OR PERCEIVED EVIL AND INJUSTICE ARE NOT IMMORAL.

As the Single Justice seems to admit, the Petitioner is not completely incompetent and has the intellectual capacity to understand the Court's emphasis and general requirement on customary lawyerly temperament and social civility within the Bar. Petitioner does understand it and, furthermore, accepts it as required social etiquette and habit both conceptually as a overall custom in the legal system and pragmatically for purposes of this case, *see* Record citations *infra*.

However, while acceptable as required etiquette, no normative system of ultimate values uses social civility or socially acceptable temperament as a moral foundation or as a moral competence standard. Petitioner in addition to his Reinstatement Petition testified as to his moral standards before the Panel but such testimony is completely ignored in their findings as are the substantive facts: Record Item ##15; 36 at pp. 26-36, 44-60, 62-63, 73-84, 87-88, 94-102,106-121, 190-91. In his testimony, in addition to repeating in detail his acceptance of responsibility for his suspension, Petitioner gave his moral analysis of the In re Rosen and In re Foster cases to exemplify both his individual moral standards and why his moral standards disagree with the Bar's performative ethics. Rec Item #15 *exhibit* 2; Item #36 pp. 109-122.

Petitioner understands that the concept of a legal profession as with any profession presupposes a shared cultural capital and some sense of common identity with a shared normative language and values. Similarly, a profession's requiring of its sinners and prodigal persons to repent publicly for their sins serves socialization and prophylactic purposes weeding out the socially incompatible and maintaining the social standing of the profession. Fine, Petitioner accepts such reality and for such reason he never has nor has any judicial or political ambitions. Petitioner is well aware that his cultural baggage does and should bar him from any position of normative power in the law. Petitioner's only ambition in the law was to be a trial attorney having adversarial duties. It is also for this reason that Petitioner has never been held in contempt of any court (despite many temptations) and has in detail accepted responsibility for his suspension despite his innocence of the false findings. Rec. Item ##15 and at its *Exhibit* 2; 36 *supra*. Responsibility and culpability are not the same concepts. Petitioner has acknowledged in the abstract his responsibility for his disciplinary facts and what they mean for the practice of

law; he cannot do it as a matter of fact because the disciplinary facts are not true facts. Id.

However, the social capital needs of a profession's elite demanding conformity with their intuitive judgments unconstrained by formal standards or empirical premises relying on customs and etiquette including their temperament only goes so far in terms of moral value, especially in a profession supposedly having the duty of safeguarding the lives of the unpopular. In the tortured history of the ethicocracy the Bar claims to be, personality traits such as "emotional impulses", "subordination of hard reason to sympathetic feeling", "natural and proper timidity and delicacy", "quick sensibility", "tender susceptibility", "delicacy", "lack of civility", "unused to the conduct of civil affairs", "smart aleck", "arrogance", "morally weak", and "incapable of understanding the art of government" and other supposed temperament traits of the lower classes have all been used to disbar or exclude from the Bar the socially unacceptable at the time varying from Ashkenazi Jews and antiwar protesters to refugees and women. Rhode, Deborah L. "Moral Character as a Professional Credential", Yale Law Journal, vol. 94:3, 491-603 (January 1985) pp. 497, 500-01, 543, & n. 36, 226; *See generally*, Girley, Brooke & Barry-Blocer, Jonathan. "The Gatekeepers: How State Bar Associations' Disciplinary Process Is Racialized and Classist", St. John's Law Review, vol. 98:1131 (2025) pp. 1132, 1136, 1138, 1141-45, 1147 ("Put simply, the Bar functioned more to police the "other" than to protect the rights of consumers and the profession."); Keeley, Theresa. "Good Moral Character: Already An Unconstitutionally Vague Concept". Journal of Constitutional Law. Vol. 6:844 (April 2004) pp. 866, 874, 879 ("The idea of lawyer exceptionalism - the notion that lawyer[s] have diminished expressive liberties because of their relationship with the rule of law - is even more frightening when you consider that the rule of law has not always been protective of the groups you want to protect.").

Unfortunately it is Petitioner's social baggage that he does not share a sense of common identity and a normative language with most of the Bar though he shares its values. Such is not disrespect of the law nor is it immoral.[3] The tortured history of this issue is summarized in Petitioner's Objections and Id. at 494-95, 529, 543, 546, 553, 556, 559, 561, 570-74, 592.

Pragmatically, Petitioner also understands that one of the flaws of the adversarial system is that it incentivizes denials of culpability and claims of "I didn't do it" right up until the parole hearing and for civil cases even longer. Petitioner understands that this Court as with most courts hears "I didn't do it" all the time and thus cannot get emotional about the claim nor show emotional irritation over it. In respect to such reality, Petitioner has consistently objected and

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[3] As two of Petitioner's character witnesses tried to explain in their character reference letters and were ignored by the Panel, Petitioner's youth was spent surviving a violent world of what is now called ethnic cleansing or genocide in Communist Yugoslavia; though at the time, it was simply known as life. The violence carried over into life in his refugee community in Chicago. Petitioner does not expect the Court to care nor anyone to care and, in fact, Petitioner knows that ultimately no one cares nor should they care — especially in the present post-modern world where everyone is a victim of some oppression or something that entitles them to judge the so-called Other and punish them for not being what they ought to be. But, for whatever good it does, in Petitioner' life experience, most of the darkest social injustices of reality do not result from lack of emotional control, anger, bad temperament, or irrationality. After WWII through the 60's, the lawyers, judges, teachers, politicians, and other well-educated who created and administered workers' committees, workers' communes, workers' courts, social courts, provincial courts, and other performances of a rule of law intentionally and knowingly cleansed (killed) approximately 500,000 politically or ethnically unworthy souls from Yugoslavia and forced the permanent displacement and emigration by escape of another 500,000. These Yugoslav legal arbiters of morality did not act with anger nor with emotional irrationality; they acted cold-bloodedly and with proper lawyerly temperament confident in their moral superiority and rationality acting in the name of justice and with the support of their rule of law. For this reason, the Petitioner rejects form-over-substance in morality with passion and with anger when warranted — such as when he is continually confronted with now dogmatic false findings that he is no longer allowed to deny. Since the Bar elite and this Court have given themselves the power of morality as well as law, Petitioner respectfully suggests that instead of worrying about proper temperament as a moral standard that instead it look up the concept of the "banality of evil" on the internet and read historical or scholarly books available on this topic.

moved *in limine* to exclude submission and discussion of the underlying disciplinary findings of his suspension. Rec Item #21. Supposedly, 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). However, such objection is always denied by making a nominal and purely illusory semantic 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 this 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.

Thus as always, over half the reinstatement hearing was spent going over the disciplinary findings, Petitioner was forced to explain why they are false and to explain that "he didn't do it". After which, the Panel concludes, as prior Panels did and as expected, with the intentionally and knowing misrepresentation that his claims are "unfounded" — after not having reviewed the old evidence nor allowed new evidence. Neither this Panel nor any prior Panel had any basis for this purely dogmatic misrepresentation that is worse than any good faith errors Petitioner made in the underlying case that led to his suspension.

A. If the reinstatement process does not want to hear Petitioner get passionate about false findings and false accusations of immorality that supposedly no longer matter for reinstatement, then it should not ask about them.

Though the old saying is that hypocrisy is the bow vice pays to virtue, an adverse emotional reaction including anger is to be expected to such constant hypocrisy by reinstatement panels forcing the Petitioner to relive 10-year-old false disciplinary findings for hours while they

know full well he will continue to deny them. False accusations can be calmly ignored through a lawyerly temperament by those with the power to judge but who are not personally prejudiced by falsity. However, to those who are harmed while powerless to do anything about it, an emotional response to evil is human nature unless one either is a psychopath or has been so beaten by life that one no longer cares. Petitioner is neither — yet, hopefully never. Rec #Item 36 pp. 63-64[4].

III. GROUNDING REINSTATEMENT ON "A CANDIDATE'S INCLINATION AND ABILITY TO STAGE A CONVINCING *MEA CULPA*"[5] AND OTHER PERFORMATIVE ACTS OF SUBMISSION IS DETRIMENTAL TO THE BAR, THE ADMINISTRATION OF JUSTICE, AND THE PUBLIC INTEREST.

George Orwell once said, "[t]here are some ideas so absurd that only an intellectual could believe them." Well, in any substantive comparison of the reinstatements of Hiss and George[6] to the denial of reinstatement of this Petitioner, any sense of justice, of equal treatment, or even of the diversity, equity, and inclusion of which the Bar constantly pontificates would be so absurd that only a lawyer would sense them. Only an attorney would miss the unjust irony of citing Hiss not only as legal but also as moral precedent — a case in which a non-repentant communist traitor and perjurer used his lawyerly temperament to perjure himself into reinstatement, *see* infra

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[4] " I think I'm controlling it pretty well.· If I accused you of being a liar, you think it wouldn't bother you at all? I mean, I don't -- I mean, you asked me about stuff that happened 12 years ago in order to deny my reinstatement and stuff that's false. I think I'm entitled to be emotional. Yeah. I mean, that's different between standing up and being in the middle of the room and yelling at each other. I mean, I had depositions where attorneys would be yelling at each other and clients will be trying to go outside and start a fight. I mean, you know, it's all relative. But yeah. I think I'm doing a pretty good job. Yeah." Rec #Item 36 pp. 63-64.

[5] Rhode, Deborah L., "Moral Character as a Professional Credential", at p. 561.

[6] Also, there are many other comparisons that could be used. App pp. 120-21.

— for denying reinstatement to this Petitioner as a survivor[7] of the communist violence supported and aided by Hiss's treason. Such absurdities "exemplify a commitment to conformity that makes a mockery of the bar's highest traditions" questioning what is the content of the Bar's ethics "apart from etiquette and social status". Yale, *supra*, at 495, 570.

This Court cites to Hiss for guidance on law and morality and as setting an example of how this Petitioner should act to be reinstated. As a prior Panel admitted and as history now shows, the esteemed Alger Hiss — whose name is still in good standing in the Massachusetts Bar while the Petitioner's is not — was a communist traitor and non-repentant perjurer who successfully used his lawyerly temperament, *pro bono* activities, cultural capital, and his Brahmin friends to perjure and con the Bar and this Court into reinstatement. To anyone other than lawyers, such citation serves more to discredit the rule of law's moral competence than it does the Petitioner's. According to scholarly histories of Alger Hiss including his reinstatement:

> Alger has for Americans in general an annihilating contempt, which he has dramatized by getting a considerable body of the most intelligent of them to believe in, and connive at, a lie, which, so far as I can see, has no parallel in history. Why should he not despise such dupes? For his lie which is aimed at their lives, they . . . heroize him.
> ...
> The covert nature of his espionage for the Soviets required him, as a professionally trained agent, to deny that he was. His success as an agent was not just a function of the degree of his access to materials the Soviets valued and the amount of material he was able to transmit, but of his ability to convince others that he was above suspicion.

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[7] In the Panel Report at p. 15, the Panel describes one of the character references as giving "a brief description of the petitioner's background and the hardships he overcame in his life to become a lawyer". What arrogance. Petitioner did not survive social and family violence to become a lawyer; out of pure luck given by the Fates, I survived it in order to survive. Whether I survived it to become a good sailor, engineer, mechanic, janitor, or whatever job is irrelevant to the luck of my survival or to my moral competence. Though most lawyers especially its moral busybody elite do not to realize it, simply being a lawyer does not make one morally superior. I have known lowly, bilge-scrubbing, oily, crude sailors to whom many lawyers would not give the time of day for whom I have more respect as moral persons than anyone I have met in the Bar.

> Fashioning a narrative of innocence was part of Hiss's job as an agent well before Chambers and others began to identify him with Soviet intelligence. The better a liar Hiss was, the more likely he was to be, and remain, an effective agent for Soviet ideals.
>
> Thus, from the outset, Hiss's narrative of innocence was bound up in the satisfaction he took from furthering the ideals of Soviet Communism and in the additional satisfaction he took from controlling the access of others to the secret life that inspired him. The more he could enlist others in furthering and embellishing the narrative of his innocence, the more he would be fulfilling his commitment. It was also why, after his conviction, not merely exoneration but vindication was so important to Hiss. With vindication, his secret life would be preserved, and his deep commitment to the Soviets appreciated by those who shared his loyalties. ...
> ...
> Hiss was a product of elite academic institutions. He was identified with Justice Oliver Wendell Holmes. He was associated with the birth of the United Nations. His narrative of innocence projected feelings of sorrow and bewilderment, but not of bitterness. He was consistently described as serene, graceful, courteous, concerned with the feelings of others, loyal, capable of achieving objectivity and detachment on his case, even though he believed it to have been deeply political and partisan. His enemies were the unstable Whittaker Chambers, the megalomaniacal Richard Nixon, the fanatical anti-Communist right wing, and the corrupt J. Edgar Hoover.
> ...
> ... When audiences that have been exposed to Alger Hiss's campaign for vindication combine some reflection upon that narrative with some reflection upon their own participation in Hiss's campaign, the frame will come more sharply into focus.
> White, G. Edward. "Alger Hiss's Campaign for Vindication". Boston University Law Review. 83 B.U. L. Rev. 1 (February 2003) pp. 21, 77-79.

Hiss is the case this Court cites as an example for how the Bar should determine moral competence? While lecturing to others about rehabilitation, this Court has yet to reflect on its being "dupe[d]" by Hiss's "temperament"? Such judgment error requires rehabilitation also.

The reinstatement of George is little better. As pointed out by the Federal Court in its initial denial of reinstatement and subsequent further sanctioning: George used his lawyerly temperament and legal competence not only to launder drug money but to set up a scheme for future laundering of drug money purely "for financial gain"; after conviction, despite "grudging" acceptance of responsibility, he and his character references blamed the convictions upon

entrapment by the government; he also proudly used his lawyerly skills intentionally and knowingly to avoid >$700,000 in unpaid federal and state taxes for which he "expressed no remorse or regret at all". In re George*, supra*. Isn't legal competence supposed to be used to help clients facing tax and criminal prosecution not to help the lawyer commit tax evasion and crimes? How is a competent lawyer entrapped by the government instead of the reverse?

Further, a former client opposed his reinstatement and the highly competent and esteemed George had two successful malpractice cases brought against him including one during his disbarment period; the BBO sanctioned him for misrepresentations made during the first malpractice case but did not even bother investigating the one successfully brought during his disbarment. Id.; Rec. Item ##15 at *exhibit* 2 ¶IV. The Bar has forgiven these substantial findings of legal and moral incompetence plus much more because George staged the required "convincing *mea culpa*" consisting of social networking, *pro bono* work, and MCLE work. Id. If his George's *pro bono* work, high-class friends, and law study did not stop him from committing a crime before his disbarment, why would it stop him after reinstatement? He was also given credit for his idyllic life growing up in West Roxbury, his political legislative and prosecutorial connections, and of course for his loving family. Id. Again, if this did not stop him before from committing a crime, why would it afterwards?

Because Petitioner is such a crude temperamental person, his family, life experience, and education before and after suspension can all be ignored. Only a lawyer would believe the absurdity that George was reinstated based on satisfying a "heavy burden" of proof of anything beyond performative acts of submission to required social etiquette and conformity. Federal court was credulous, to the public any such claim would be laughable. No one knows what is in the

heart or mind of another, substituting such knowledge by requiring acts of conformity, submission, and social networking is not a morally acceptable standard for moral competence regardless if it is for popularity and legal competence. As Justice Black observed: "... to force the Bar to become a group of thoroughly orthodox, time-serving, government fearing individuals is to humiliate and degrade it." In re Anastaplo, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

Any comparison of this Petition to Matter of Waitz, 416 Mass. 298 (1993) is equally absurd. App. 105-06. Only a lawyer could believe it has any application to this Petition. Id. In Waitz, a petitioner committed crimes, civil violations, and bankruptcy during his suspension period (and was still reinstated at one point), this Petitioner has done none of that.

Furthermore, the non-lawyer public would quickly see the unfairness of this Court's demand, made while knowing that reinstatement will eventually be denied anyway based on bad temperament and lack of a *mea culpa* performance, that Petitioner re-pass the MassBar Exam before considering reinstatement instead of conditioning reinstatement upon passing it. This demand is no more than an unfair show of force and not a fair criteria for competence or in the public interest. Gordon allows for reinstatement conditioned upon re-passing the Bar, it does not make re-passing the bar a condition for applying for reinstatement so that it can then be denied.

The rule of law is not supposed to be a subjective popularity contest nor is it supposed to give more respect, equal treatment, and due process to multiple conviction, tax-evading, bankrupt felons "grudging[ly]" using a performative *mea culpa* for professional gain than it does to life-long working, contributing, honest, law-abiding, and tax-paying citizens. According to some cited cases in the Record, Petitioner's life would get more respect, equal protection, and due process from the law if he had committed multiple felonies including one of child endangerment,

forged multiple official court records, misappropriated client funds, and been a drug dealer and addict or an alcoholic since high school. Matter of Scannell, 31 Mass.Atty.Disc.R. 554 (2015).

Regardless of the Bar's legal competence to fashion a performative ethics from the above absurdities, the above absurdities to the non-lawyer public expose the rule of law to accusations of a lack of honesty and integrity that are detrimental to the bar, the administration of justice, and the public interest. According to "the evidence as a whole" and related law including constitutional due process, equal protection, and 8th Amendment, denial of Petitioner's reinstatement is legal error, an abuse of discretion, not supported by substantial evidence, is disparate from other reinstatements, and results in substantial injustice.

THEREFORE, reinstatement should be allowed conditioned upon re-passing the Bar.

Petitioner
/s/ Valeriano Diviacchi
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24 Holton Street
Boston, MA. 02134
(617) 542-3175
val@diviacchi.com Date: 27 July 2025

CERTIFICATE OF SERVICE

Petitioner hereby certifies that he has served a copy of this Memorandum upon all parties through the Court's electronic filing system and upon those not be served by the Court's electronic system by mailing a copy by postage prepaid first-class mail or email (of which there are none).

/s/ Valeriano Diviacchi Date: 27 July 2025