IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	The Supreme Court Case No. 70,594
In Re: LOUIS VERNELL, JR. (Petition for Reinstatement)	)	The Florida Bar File No. MRE87005

PETITIONER'S ANSWER BRIEF

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INTRODUCTION

Petitioner adopts the abbreviations set forth by the Bar in its introduction.

POINTS ON APPEAL

I.

THE REFEREE'S DENIAL OF THE FLORIDA BAR'S LAST MINUTE MOTION FOR CONTINUANCE WAS WITHIN HIS SOUND DISCRETION AND SHOULD NOT BE OVERTURNED.

II.

PETITIONER HAS DEMONSTRATED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE HIS REHABILITATION AND SHOULD BE IMMEDIATELY REINSTATED TO PRACTICE.

STATEMENT OF CASE AND FACTS

The Florida Bar appeals the Referee's recommendation that Petitioner be reinstated to the practice of law.

The Bar's statement of facts in its brief is replete with facts de hors the record. While normally Petitioner's counsel would move to strike all offending portions of the statement of facts, such action would only further delay the reinstatement of a lawyer who has already been out of practice for over nine months, despite only being suspended for 91 days.

Petitioner's counsel will supplement the statement of facts filed by the Bar to give this Court a more complete and accurate picture of the proceedings below.

A. CHRONOLOGY OF ACTIONS IN THESE PROCEEDINGS

The petition for review initiating these proceedings was served on May 21, 1987, 16 days after Petitioner's 91-day suspension terminated. (The Bar improperly states in footnote 8 on page 5 of its brief that Petitioner could have filed his petition 45 days earlier than it was filed.) The Supreme Court acknowledged receipt of the petition on May 26, and The Florida Bar acknowledged it by letter dated May 27, 1987.

On May 27, 1987, this Court appointed a Referee to preside over these proceedings.

According to the Bar's brief, they received the petition for review in their Miami office on June 1, 1987. On June 9, 1987, The Florida Bar sent forth a notice setting final hearing down

for August 6, 1987. The Bar indicated on page vi of its brief that the Referee's secretary wanted to set the hearing down in July, but Bar counsel prevailed upon her to delay the matter until August.

Copies of all of Petitioner's tax returns were provided to the Bar prior to final hearing. Although The Florida Bar initially inquired about Petitioner's personal financial records, the Bar's investigator "did not follow through to obtain a copy of the bank records" from Petitioner's counsel. (T. 112). That same investigator later acknowledged that he was never denied during his investigation access to any records. (T. 114, 115).

On August 3, 1987, three days before final hearing, the Referee received the Bar's Motion for Continuance. (T. 3). The Referee denied the Motion for Continuance.

On August 26, 1987, almost three weeks after final hearing, a hearing was held on the Bar's Motion for Clarification--protracting reinstatement proceedings an extra three weeks. At that hearing, the Court once again denied the Bar's Motion for Continuance.

At final hearing, Bar counsel stated that the Board of Governors of The Florida Bar was requiring him to seek continuance because they wanted to see "more in terms of tax records, financial records and bank records." (T. 5).

Part of the Bar's reason for wanting the continuance was their belief that the Social Security number provided to them by Petitioner was invalid. (T. 6). However, Petitioner testified

that he had been using the same Social Security number without difficulty for 35 or 36 years. (T. 72). Petitioner expressed his belief that some of the difficulty may have resulted from the fact that he changed his name in 1951. (T. 72, 73).

Attached to the Petition for Reinstatement was an authorization to the IRS to supply Petitioner's tax records to the Bar. (T. 7). The Bar's investigator testified that by July 10, he had copies of all of the appropriate tax returns with the exception of a few illegible pages. (T. 111).

The Florida Bar was provided copies of all of Petitioner's trust account records. (H. 39).

In response to the Bar's last minute demand for all of Petitioner's personal financial records extending back to 1982, Petitioner pointed out to the Referee the only purpose of his refusal was to avoid further delay of reinstatement proceedings. (H. 51).

B. PROOF OF REHABILITATION

At final hearing, Petitioner testified on his own behalf and presented as witnesses his wife, his former legal secretary of 19 years (now retired), and six judges and attorneys. All testified as to Petitioner's superlative legal ability, his good character, and his sense of ethics.

Despite mailing copies of the Petition for Reinstatement to 19 local Bar associations and to 12 grievance committee chairmen, and despite running ads in the Miami Review announcing

Petitioner's bid to be reinstated, The Florida Bar was able to present but one witness, its investigator, in rebuttal to Petitioner's case. After conducting an extremely thorough investigation, the investigator acknowledged to the Court that Petitioner was an "A-1 attorney." (T. 123). The investigator's only reservation was his skepticism about the fact that only once during the preceding 10 years had Petitioner earned over $100,000 in income. (T. 121).

SUMMARY OF ARGUMENT

The Referee properly denied the Bar's Motion for Continuance. That motion, dated July 31, 1987, was received by the Referee three days before a hearing that had been noticed almost two months earlier.

Granting or denying a motion for continuance is within the sound discretion of a referee in disciplinary proceedings. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

The Referee's denial of the continuance was proper because the motion was untimely and because it was predicated upon nothing more than a desire by various members of the Board of Governors, expressed to Bar counsel a week prior to final hearing, that they wanted to look further into Petitioner's tax and financial matters.

The Referee's recommendation that Petitioner be reinstated was based upon the overwhelming weight of the evidence presented. His findings should not be overturned unless clearly erroneous or

lacking in evidentiary support. The evidence presented showed that Petitioner is rehabilitated. Even the Bar's investigator acknowledged that Petitioner is an "A-1" lawyer. Despite zealous investigation, The Florida Bar was able to rebut none of Petitioner's testimony.

The Referee emphatically rejected the Bar's argument that Petitioner shows a lack of repentance and carries ill will toward The Florida Bar. That argument is based upon a few statements made by Petitioner that are taken out of context. However, in one instance, the Bar improperly attributed a statement to Petitioner that was made by his lawyer.

ARGUMENT

I.

THE REFEREE'S DENIAL OF THE FLORIDA BAR'S LAST MINUTE MOTION FOR CONTINUANCE WAS WITHIN HIS SOUND DISCRETION AND SHOULD NOT BE OVERTURNED.

The Referee's decision to grant or deny a motion for continuance is within his sound discretion. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). It will not be disturbed by this Court absent a clear abuse of discretion.

In Lipman, a Referee in disciplinary proceedings denied a respondent's motion for continuance filed two weeks before final hearing. This Court observed that the Referee's actions were within his sound discretion.

In the case at hand, the Bar's Motion for Continuance was filed a mere six days prior to final hearing (the Referee did not see it until three days before final hearing) and it was filed almost two months after Bar counsel had noticed the matter for final hearing.

The date of the final hearing in these proceedings was over ten weeks after The Florida Bar acknowledged receipt of the Petition for Reinstatement filed in this cause.

In fact, The Florida Bar had already received one extension of time because the Referee's secretary originally tried to set final hearing down for a July date. However, at the urging of Bar counsel, the matter was not set for hearing until August 6.

During final hearing, Bar counsel stated the following to the Referee as the basis for his motion:

> MR. THALER: I get my position from the local board members of the Board of Governors of the (sic) Florida Bar.
>
> They reviewed, last week, as a matter of fact, the petition and the report of investigation and came back to me and said that they want to see more in terms of tax records, financial records and bank records. (T. 4, 5). (Emphasis supplied).

A mere one week before final hearing, the Board of Governors of The Florida Bar decided that they wanted to go on a fishing expedition into Petitioner's personal finances. The Board's instructions to its lawyer indicates bad faith on its part. In fact, during final hearing, Bar counsel pointed out to the Referee that five of the six local Board members in Miami were opposed to Petitioner's reinstatement to the Bar before any evidence whatsoever was submitted to the Referee. (T. 130).

This is the same Board of Governors that urged this Court to disbar the Petitioner in his earlier disciplinary proceedings despite the fact that the Referee recommended but a public reprimand. Even this Court found the Bar's position untenable, ordering the shortest possible suspension period still allowing for proof of rehabilitation.

Isn't it obvious what the Board of Governors is trying to accomplish? They are trying to do everything they can to keep Petitioner from resuming the practice of law. Their tactics have succeeded to the extent that, as of the date of this brief, Petitioner's 91-day suspension has lasted nine months.

The Referee saw through the Bar's ploy. In his supplemental report dated August 28, 1987, the Referee noted that the Bar had

over two months to investigate Petitioner. Petitioner's suspension was but for 91 days, and a great deal of investigation was not necessary. The Referee specifically noted that prior to final hearing, Petitioner had produced all of his required tax returns together with an affidavit that they were correct.

The Referee did not mention it, but Petitioner testified that all of his trust account records were provided to The Florida Bar prior to final hearing also. (H. 39).

In denying the Bar's Motion for Continuance, the Referee also made the following statement in his supplemental report:

> Subsequent to the hearing of August 6th, the Bar counsel now wishes the Petitioner to produce all of his personal bank accounts and trust bank accounts from 1982 to date. The only basis for this is that the investigator is skeptical that Petitioner in the 10-year period prior to his suspension only once had a gross income of over $100,000, even though all his tax returns have been produced.
>
> It is this Referee's opinion that the request made by Bar counsel at this late date is unwarranted.

Petitioner supplied all of his tax returns to the Bar by July 10, 1987. He certified to the Bar and to the Referee that they were correct, and testimony was given to the Referee that the IRS had audited Petitioner's tax returns every year since 1979. (H. 49). No further investigation was necessary.

The Bar's cries of insufficient time to investigate is obviated in part by the testimony of its own investigator, Enrique Torres. While testifying before the Referee, Mr. Torres candidly acknowledged that the Bar's failure to obtain records from Petitioner was due in part to Mr. Torres' failure to "follow

through to obtain a copy of the bank records." (T. 112). Mr. Torres testified that he was never denied access to the bank records by Petitioner's counsel. (T. 115).

Petitioner stated to the Referee during the August 17, 1987, supplemental hearing that his refusal to produce bank records to The Florida Bar after the August 6 hearing was predicated only upon his desire to keep his reinstatement proceedings from being further delayed. (H. 51).

The Bar, incredibly, points to The Florida Bar: In Re Roth, 500 So.2d 117 (Fla. 1986), as support for its position that its motion should be granted. In Roth, the Supreme Court, after noting that The Florida Bar generally takes over nine months to process reinstatement petitions, announced a policy of allowing lawyers suspended for three years to petition for reinstatement nine months prior to the termination of their suspension.

Roth does not support the Bar's position that lawyers suspended for 91 days should expect their petitions for reinstatement to be processed for nine months. In fact, it is this Court's declaration to the Bar that their dragging out reinstatement proceedings is unduly delaying the reinstatement of lawyers.

Obviously, the longer a lawyer is suspended, the more protracted an investigation into his fitness will be. While a nine-month investigation period might be proper for a lawyer suspended for three years, it is ridiculous to argue that nine months is necessary to investigate a lawyer suspended for a mere 91 days.

In essence, The Florida Bar is asking this Court to decree that there is no such thing as a suspension lasting less than one year. If a lawyer is suspended for 91 days, the Bar seems to feel that an additional nine months is automatically tacked on to investigate his petition.

The Bar's argument must be rejected.

There are three elements of Petitioner's argument that are, at best, improper, and at worst, misleading.

On page 5 of the Bar's brief, at footnote 8, the Bar argues that it

> should not be penalized for conducting a thorough investigation and accused of dilatory tactics when Mr. Vernell could have filed his petition 45 days earlier than he did.

That statement is false.

Petitioner filed his Petition for Reinstatement 16 days after he was eligible to do so.

On page 12 of its brief, The Florida Bar goes de hors the record to argue that Petitioner's position relative bank account records requested after final hearing was to "give them nothing." Bar counsel then cites in his brief as record support for this statement, his own argument (not evidence) to the Referee that such a statement was made. Petitioner disputes that any such message was communicated to the Bar. (Petitioner's counsel respectfully submits to the Court that messages left on telephone pads or transmitted via a chain of secretaries become truncated, garbled, and frequently loses the entire tenor of the communication.)

Finally, Bar counsel improperly questions the motive of the Referee by arguing the "Referee's apparent predisposition towards this case." Obviously, the Bar's position is predicated upon its disagreement with the Referee's ruling that Petitioner's misconduct warranted but a public reprimand. Petitioner would ask this Court to note The Florida Bar's predisposition towards this case. After having its argument that Petitioner should be disbarred for his offense soundly rejected by this Court, the Board of Governors of The Florida Bar decided to oppose Petitioner's reinstatement before any evidence was submitted to the Court. Furthermore, the Bar even announced to the Referee that five of the six local Board of Governors members were going to vote to appeal the Referee's recommendation should he recommend that Petitioner be reinstated. (T. 130).

The Referee acted within his sound discretion denying the Bar's Motion for Continuance. It was untimely (received by the Referee a mere three days prior to a final hearing set two months earlier). It was based upon a desire expressed only one week prior to final hearing by local Board members to delve into Petitioner's tax records during the preceding ten years. Finally, the Bar's lack of obtaining records was due in part to its own investigator's failure to follow up on conversations with Petitioner's counsel.

The Referee's decision should be upheld.

II.

PETITIONER HAS DEMONSTRATED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE HIS REHABILITATION AND SHOULD BE IMMEDIATELY REINSTATED TO PRACTICE.

The Referee's findings of fact will not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 70 (Fla. 1968) at 72. The matter to be decided in reinstatement proceedings is "the fitness of the Petitioner to resume the practice of law." Rule 3-7.9(g), Rules of Discipline.

After listening to the testimony of nine witnesses on behalf of Petitioner, including two sitting circuit court judges and four other lawyers, the Refereee found that Petitioner

> has strictly complied with the disciplinary order of the Supreme Court dated January 5, 1987, and through his witnesses has brought forth evidence of unimpeachable character, along with clear evidence of an excellent reputation for professional ability.
>
> Further, the Referee finds, based upon the Petitioner's testimony, evidence of his lack of malice and ill feeling toward those involved in the disciplinary proceedings and finds from his testimony a sincere sense of repentance and a desire to conduct his legal practice in an exemplary fashion in the future.

The Referee then recommended Petitioner's reinstatement to practice.

In his supplemental report, the Referee stated that he "hereby rejects . . . outright" the Bar's allegations that Petitioner shows ill feeling and malice towards the Bar and has no sense of repentance.

The Referee's findings of fact are supported by the overwhelming weight of the evidence, are not clearly erroneous, and should be upheld by this Court. The Bar builds its argument of a lack of malice and the lack of repentance upon a few statements taken out of context.

During his testimony for the Referee, the following dialogue took place:

> Q. Whether or not you agree with the legal determination concerning the suspension by the Supreme Court, have you in your petition, as well as now, under oath, recognized and apologized for the actions that caused this suspension?
>
> A. With every deepest sincere emotion and feeling I apologize to Judge Moriarty, the Supreme Court, the members of The Florida Bar, my family and friends or anybody that raised an eyebrow, because this is something that I would prefer to have avoided.
>
> I extend my apologies and just hope the opportunity that I can fulfill the confidence that these people have shown in me who have been before the Court, and the Bar expects. (T. 70)
>
> * * *
>
> Q. My last question is, do you believe that you deserve the 91-day suspension for your conduct in the underlying disciplinary case?
>
> A. I accept it. There is no question in my mind -- although I didn't intend to benefit and I did not in fact benefit -- there is no question that you can perceive -- I have to admit that it was enough to raise eyebrows.
>
> I am fortunate that while the Court imposed a 91-day suspension, that it wasn't anything more serious. (T. 88-89)
>
> * * *

Q. Do you have any animosity towards the Supreme Court of Florida or The Florida Bar?

A. No. Let me tell you.

I respect the Supreme Court of Florida. I respect their opinions, their decisions, and their wisdom. They certainly are charged with the interpretation of the law, and that's what this whole thing is about.

That's what I went to school for, and that's what I worked so hard for.

Insofar as The Florida Bar is concerned, I commend The Florida Bar and its efforts to discipline and to keep clean the ranks of the Bar so that the people and the public can have proper respect. I really do mean that.

I don't condone nor do I participate, nor would I even permit any sleazy type practice.

I think that the Bar certainly polices themselves. In my instance, I feel maybe it was vigorous, certainly appropriate. (T. 92-93)

Clearly, the Referee properly rejected "outright" the Bar's assertions that Petitioner showed animosity towards the Bar and expressed no remorse.

Petitioner's testimony and that of his witnesses proved up all of the elements required by this Court in proving rehabilitation, including:

1. Strict compliance with the specific conditions of the disciplinary order;

2. Evidence of unimpeachable character and moral standing in the community;

3. Clear evidence of a good reputation for professional ability;

4. Evidence of a lack of malice and ill feeling towards the Bar;

5. Personal assurances, supported by corroborating evidence, revealing a sense of repentance, as well as a desire and intention of the Petitioner to conduct himself in an exemplary fashion in the future;

6. Restitution (when appropriate).

Petition of Dawson, 131 So.2d 472 (Fla. 1961). The Petitioner's evidence proving each of the afore-stated elements was overwhelming and completely unrebutted by the Bar. The Referee properly found that Petitioner fulfilled the burden placed upon him by Dawson.

Even the Bar's investigator acknowledged to the Referee that Petitioner was an "A-1 attorney." (T. 123). But for the investigator's pure speculation that Petitioner should have earned more $100,000 per year income for each of the preceding ten years, he would have wholeheartedly recommended Petitioner to practice. (T. 122).

The Bar presented no witnesses to testify against Petitioner although it actively investigated and sought opposition to the reinstatement. It sent out copies of the petition to 19 local Bar associations and to 12 grievance committee chairmen (Bar's brief vii). It also ran notices about the Petition for Reinstatement in the Miami Review. It had two months to investigate Petitioner, during which time the Bar's investigator canvassed Petitioner's neighborhood, did a court records search, and checked with credit bureaus. As was true in The Florida Bar v. Ragano, 403 So.2d 401 (Fla. 1981):

> The Florida Bar in its active opposition to the Petition has been unable to produce any witnesses to testify contrary to the conclusions of the petitioner's witnesses.

As did Mr. Ragano, Petitioner has met the criteria for reinstatement.

After the Referee had completed his report and recommended reinstatement, Petitioner made several comments during the hearing on the Bar's Motion for Clarification which the Bar now claims is an attempt by Petitioner to minimize and explain away the matter leading to his suspension (Bar's brief, pp. 18 and 19). In fact, the Referee heard those same statements and emphatically rejected the Bar's contentions about a lack of rehabilitation.

As support for its argument that Petitioner shows malice towards the Bar, Bar Counsel has attributed statements to Petitioner that the record reflects as being made by his counsel. Specifically, on page 18 of its brief, the Bar argues that the following statement shows that Petitioner believes the Bar mishandled the disciplinary case against him.

> I will be glad to answer it. I am mad about the one day. I think they were wrong in overruling the judge in that extra day, I think was wrong. (T. 92)

In fact, the record clearly indicates that the above-quoted statement was made by Petitioner's lawyer, Rhea Grossman.

Petitioner has been suspended from the practice of law since February 4, 1987--a period of nine months to date. He has

already served a period of suspension three times longer than that ordered by this Court.

The Florida Bar is, at best, trying to drag out Petitioner's reinstatement, and, at worst, is trying to use these reinstatement proceedings as a fishing expedition to explore Petitioner's last ten years' tax returns (despite the fact they have all been audited) in an attempt to turn these rehabilitation proceedings into disbarment. This Court rejected the Bar's attempt to impose a ridiculously harsh penalty upon Petitioner for his misconduct in its January 5, 1987, order of discipline. It should now reject the Bar's attempt to turn these reinstatement proceedings into a long term suspension.

There is another compelling reason to promptly reinstate Petitioner. He has a wife and a ten year old daughter to support. At the age of 59, Petitioner has no other means to support his family besides the practice of law. As was true in Ragano, supra, Petitioner

> has demonstrated no ability to generate income other than the practice of law. . . .

Petitioner's 91-day suspension, while entirely deserved, exacted a severe financial penalty. Petitioner refinanced his house, sold his wife's car, and has borrowed money to live. Extending the suspension to its present nine months is devastating. Extending the suspension indefinitely will be fatal.

> Petitioner deserve reinstatement and an opportunity to earn a living in the field in which he is trained.

The Florida Bar re Whitlock, 506 So.2d 400 (Fla. 1987).

The purpose of reinstatement proceedings is not to re-try the Petitioner for his past misconduct, but to determine his fitness to resume the practice of law. Petition of Stalnaker, 9 So.2d 100 (Fla. 1942).

The Supreme Court in In Re: Stoller, 36 So.2d 443 (Fla. 1948), stated that:

> To rehabilitate means to restore to one's former rank, privilege, or status, to clear the character or reputation of stain, to retrieve forfeited trust and confidence. Forgiveness and pardon are as much a part of our scheme of things as prosecution and punishment. . . .

Petitioner has proved his rehabilitation. He has proved his fitness to practice law. The Florida Bar, despite ten weeks of investigation, could come up with no evidence to rebut Petitioner's overwhelming evidence indicating his compliance with the Dawson factors. He has paid the penalty imposed for his misconduct. It is time to allow Petitioner to get back to the point where he can once again support his family by practicing law.

CONCLUSION

The Referee's denial of the Bar's untimely Motion for Continuance was within his sound discretion and should not be overturned by this Court.

The Referee found that Petitioner met the burden of proving his rehabilitation. That finding is based upon the overwhelming preponderance of the evidence, is not erroneous, and, therefore, should be adopted by this Court.

Petitioner should be immediately reinstated to practice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed to Louis Thaler, Bar Counsel, The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131, on this 4th day of November, 1987.

JOHN A. WEISS