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

COMPLAINANT'S INITIAL BRIEF

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INTRODUCTION

THE FLORIDA BAR, Respondent in the lower proceedings, will be referred to as "The Florida Bar."

LOUIS VERNELL, Petitioner in the lower proceedings, will be referred to as "Louis Vernell" or "Mr. Vernell."

THE BOARD OF GOVERNORS OF THE FLORIDA BAR will be referred to as the "Board of Governors."

THE MEMBERS OF THE BOARD OF GOVERNORS FROM THE ELEVENTH JUDICIAL CIRCUIT will be referred to as "local board members."

The following symbols will be used in this Brief:

"T" - Transcript of the Reinstatement Hearing held on August 6, 1987.

"H" - Transcript of Hearing held on August 26, 1987.

"RR" - Report of Referee dated August 28, 1987.

"SRR" - Supplemental Report of Referee dated August 28, 1987.

POINTS ON APPEAL

I.

WHETHER THE REFEREE'S DENIAL OF THE FLORIDA BAR'S MOTION FOR CONTINUANCE WAS ERRONEOUS BASED ON THE CIRCUMSTANCES OF THIS CASE.

II.

WHETHER LOUIS VERNELL HAS FAILED TO DEMONSTRATE THE REQUISITE ELEMENTS FOR REINSTATEMENT AS INDICATED BY HIS LACK OF A SENSE OF REPENTANCE AND HIS MALICE AND ILL FEELINGS TOWARDS THOSE INVOLVED IN THE DISCIPLINARY PROCEEDINGS.

STATEMENT OF CASE AND FACTS

On January 5, 1987, Louis Vernell was suspended from The Florida Bar for a period of 91 days, The Florida Bar v. Vernell, 502 So.2d 1228 (Fla. 1987). The Court held that Mr. Vernell had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and conduct that adversely reflects on fitness to practice law based on the following facts:

> The facts culminating in the bar's complaint arose from respondent's representation of William Fahrenkopf. In 1978 Fahrenkopf was rendered a paraplegic after having surgery performed at Jackson Memorial Hospital in Miami. Fahrenkopf unsuccessfully attempted to secure legal representation to pursue his claims against the hospital and doctors. In November 1980, shortly before the statute of limitations would have barred his claims, Fahrenkopf contacted respondent, a friend for twenty years. Realizing that time was of the essence, respondent filed a claim on Fahrenkopf's behalf. In June 1981 respondent persuaded Fahrenkopf to retain attorney Schlesinger who specialized in medical malpractice claims; a retainer and contingent fee agreement was entered into by Fahrenkopf and Schlesinger on June 24. Respondent testified that once Schlesinger was retained he anticipated playing no further role in representing Fahrenkopf.
>
> On July 19, 1981, Fahrenkopf executed an agreement whereby respondent would receive ten percent of any recovery realized from the malpractice claim. According to Fahrenkopf's sworn statement introduced as evidence below, Fahrenkopf wanted respondent to stay active in the case and also desired to compensate respondent for the many personal kindnesses respondent had shown him over the years.
>
> The malpractice claim was settled in May 1983 for one million dollars cash. The settlement check was made payable to Schlesinger, Fahrenkopf and respondent; each endorsed the check and it was deposited in Schlesinger's trust fund account.

> Schlesinger then distributed the proceeds with each attorney receiving $200,000 plus costs reimbursement and $582,998 for Fahrenkopf as net settlement proceeds. Schlesinger entrusted respondent with the client's settlement check which was made payable to Fahrenkopf individually. Respondent added his own name as payee to Fahrenkopf's check, had Fahrenkopf endorse it and then deposited the check in respondent's trust account. Respondent then issued his own trust account check to Fahrenkopf in the amount of $482,998, reflecting a reduction of $100,000 pursuant to the July 1981 agreement between Fahrenkopf and the respondent. Subsequently, a civil suit was filed by Fahrenkopf against Respondent over this $100,000 and was settled when respondent returned approximately $60,000.00. 502 So.2d at 1228-1229.

On or about May 21, 1987, Louis Vernell, by and through counsel Rhea P. Grossman, filed a Petition for Reinstatement pursuant to Rule 3-7.9 of the Rules of Discipline. On May 27, 1987, the Court appointed the Honorable W. Herbert Moriarty to act as Referee. On or about June 1, 1987, the Miami office of The Florida Bar received a copy of the Petition for Reinstatement. The case was shortly thereafter assigned to Louis Thaler as bar counsel.

On June 5, 1987, the Referee's office called Paul A. Gross, Branch Staff Counsel of the Miami office, to set a hearing date for July 1987. On June 8, 1987, bar counsel contacted the Referee's office and was directed to set the Reinstatement Hearing for July 1987. Bar counsel requested that the matter be set at least later than July and was then directed to set the Reinstatement Hearing for August 6, 1987 (H.24).

On June 9, 1987, bar counsel sent out a Notice of Final Hearing setting the matter for August 6, 1987.

On June 11, 1987, Staff Investigator Enrique Torres was formally assigned by memorandum to investigate Mr. Vernell's fitness to resume the practice of law.

On or about June 16, 1987, Staff Investigator Torres contacted Mr. Vernell's counsel and obtained a letter of that same date authorizing the commencement of investigation regarding the reinstatement proceedings "tentatively scheduled for August 6, 1987" (Appendix "A").

On June 17, 1987, bar counsel forwarded copies of the Petition for Reinstatement to the presidents of nineteen (19) local voluntary bar associations for commentary or input regarding the reinstatement. Also on June 17, 1987, bar counsel placed a legal advertisement in the Miami Review giving "Notice of Petition for Reinstatement." The legal advertisement was published in the Miami Review on or about June 18-22, 1987.

On or about June 18, 1987, Staff Investigator Torres again contacted Mr. Vernell's counsel to request certain items including "a list of bank accounts, release for those bank accounts, personal assets, date of birth and social security number" (Appendix "B").

On June 26, 1987, bar counsel forwarded a copy of the Petition for Reinstatement to the chairpersons of the twelve (12) local grievance committees, in and for the Eleventh Judicial Circuit, for commentary and input. Also on June 26, 1987, bar counsel forwarded copies of the Petition for

Reinstatement to the six (6) local members of the Board of Governors, to wit, Patricia A. Seitz, Edward R. Blumberg, A.J. Barranco, Jr., Stephen N. Zack, Michael Nachwalter and Alan T. Dimond, for the purpose of requesting preliminary advices relative to the reinstatement of Louis Vernell (H.45).

On or about July 2, 1987, The Florida Bar encountered a problem in getting Mr. Vernell's tax returns from the Internal Revenue Service. To avoid delay, counsel for Mr. Vernell agreed to have Mr. Vernell furnish the returns directly.

Between July 3, 1987 and July 30, 1987, Mr. Vernell, by and through counsel, produced the requested tax returns. On July 9, 1987, Mr. Vernell provided Staff Investigator Torres with a one-page financial statement as of July 7, 1987, as well as the bulk of tax returns. By letter of July 20, 1987, Mr. Vernell's counsel provided what was purportedly the remaining tax returns.

On July 26, 1987, Staff Investigator Torres completed his Report of Investigation and same was received by bar counsel on July 28, 1987. On July 28, 1987, the tax returns were reviewed by Staff Auditor Carlos Ruga. Staff Auditor Ruga found several pages missing or illegible and found that the 1983 initial return was not provided, although the 1983 amended return, with a missing second page, was provided. By letter of July 29, 1987, sent to Mr. Vernell's counsel by courier, bar counsel advised of the various problems.

On July 29, 1987, the Report of Investigation and tax returns received to date were forwarded to the local board members to obtain the Board of Governor's final position regarding the reinstatement (H.46).

On July 30, 1987, the remaining tax returns were delivered to bar counsel by counsel for Mr. Vernell.

On July 30, 1987, bar counsel received input from three of the six local board members. Based on the input from the three members responding the day they received the Report of Investigation, bar counsel filed a Motion for Continuance dated July 31, 1987, setting forth grounds upon which a continuance of sixty (60) days should be granted to complete investigation.

On August 3, 1987, Mr. Vernell's counsel filed a Reply and Objection to Motion for Continuance.

On or about August 3, 1987, bar counsel spoke with an official of the Internal Revenue Service who revealed that the problem in obtaining Mr. Vernell's tax return directly from the Internal Revenue Service was occasioned by the fact that Mr. Vernell had supplied The Florida Bar with an invalid Social Security Number (T.6).

On August 6, 1987, approximately one hour before the hearing scheduled for 1:30 P.M., bar counsel was hand-delivered a letter from the Internal Revenue Service verifying that the Social Security Number supplied by and allegedly belonging to Louis Vernell was an invalid number (T.6). At the Final Hearing on August 6, 1987, Mr. Vernell

attributed the invalid Social Security Number to a name change in 1951 (T.71-74).

Further at the Reinstatement Hearing on August 6, 1987, bar counsel clearly stated the local board's position that Mr. Vernell's tax records, financial records and bank records were still at issue (T.5). The hearing proceeded and Mr. Vernell placed his entire case, including the testimony of eight witnesses and himself, before the Referee. The Florida Bar was only able to present available relevant documentary evidence and the testimony of Staff Investigator Torres at that time.

After arguing the Motion for Continuance at several points during the Reinstatement Hearing on August 6, 1987, the Referee, after expressly reluctance in doing so (T.126-127), denied the Motion for Continuance (T.129). However, representations were made on the record by counsel for Mr. Vernell that the production of bank records would be worked out between counsel (T.132). Both bar counsel and Referee relied on these representations (H.19-20, 23).

On Monday, August 10, 1987, bar counsel received a message from the office of counsel for Mr. Vernell that Mr. Vernell had taken the position to "give them nothing" (H.10-11). Bar counsel then filed a Motion for Clarification to determine the Referee's ruling regarding production of records in light of Mr. Vernell's noncooperation was set for hearing on August 26, 1987, at which time the Referee again

SUMMARY OF ARGUMENT

The Referee clearly abused his discretion by denying The Florida Bar's request for a 60-day continuance in order to complete its investigation of Louis Vernell's fitness to resume the practice of law. The facts of this case indicated that a continuance was necessary and would not have prejudiced Mr. Vernell in that The Florida Bar did not object to Mr. Vernell presenting his case on the date scheduled. The Florida Bar merely requested an opportunity to continue its investigation and present evidence in opposition, at a later date, if necessary. Considering the facts of this case, the case law on the subjects of reinstatement and the granting of continuances, and the Referee's apparent predisposition to resolve this case in favor of reinstatement, the Referee clearly abused his discretion in denying the Florida Bar's motion for continuance.

Because reinstatement proceedings afford a petitioner an opportunity to prepare and present a favorable case for reinstatement, The Florida Bar should be permitted an opportunity to fully investigate the petitioner's character and fitness and to present any evidence which would indicate that the elements necessary for reinstatement have not been met. By the actions of the Referee in denying the Bar's request for a continuance, The Florida Bar was denied this opportunity.

Accordingly, The Florida Bar should be allowed an additional period of time to examine Mr. Vernell's trust account as well as operating and personal bank account records for the years 1982 to the present as these records have always been an issue in the reinstatement investigation.

The Florida Bar further maintains that Louis Vernell has failed to satisfy all of the elements which are considered in the reinstatement of a suspended attorney. The record of this reinstatement proceeding demonstrates that Mr. Vernell has failed to show a true sense of repentance in that he believes the underlying order of suspension was "wrong" and the Supreme Court's interpretation of law involving negotiable instruments was incorrect. Further, Mr. Vernell has manifested ill feelings towards The Florida Bar.

I

THE REFEREE'S DENIAL OF THE FLORIDA BAR'S MOTION FOR CONTINUANCE WAS A CLEAR ABUSE OF DISCRETION BASED ON THE CIRCUMSTANCES OF THIS CASE.

The granting or denial of a motion for continuance is within the discretion of the trial court. Williams v. State, 438 So.2d 781 (Fla. 1983); Diaz v. Diaz, 258 So.2d 37 (Fla. 3DCA 1972). Further, in disciplinary proceedings, it is within the sound discretion of the referee, assigned by the Court to preside over a disciplinary proceeding to grant or deny a Motion for Continuance. Such a ruling will not be disturbed by the Court absent a clear abuse of discretion, The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). Accordingly, The Florida Bar's position is that there was a clear abuse of discretion by the Referee in denying The Florida Bar's Motion for Continuance in this case.

Initially, the nature of a reinstatement proceeding, as herein involved, can be distinguished from the nature of a disciplinary proceeding, as involved in Lipman. The burden is upon the petitioner seeking reinstatement to practice law to establish that he is entitled to resume the privilege without restriction, In Re Petition of Dawson, 131 So.2d 472 (Fla. 1961). The elements considered in regard to reinstatement are elements which the petitioner has the burden of satifying. In Re Timson, 301 So.2d 448 (Fla. 1974). The test which must be

passed is whether or not petitioner is qualified to resume the practice of law.[1] Further,

> The proceedings and findings of the referee shall relate to those matters described in this rule, and also to those matters tending to show Petitioner's rehabilitation, present fitness to resume the practice of law, and effect of such proposed reinstatement upon the administration of justice and purity of the courts and confidence of the public in the profession.[2]

In both disciplinary proceedings and reinstatement proceedings it is the responsibility of the Supreme Court to safeguard the right of the public to secure adequate representation by attorneys and to maintain the image and integrity of The Florida Bar as a whole. In re Timson, supra.

In order to allow Mr. Vernell to fulfill his burden, in order to allow The Florida Bar to carefully and thoroughly review the elements, in order to allow the Referee to administer the test based upon all the necessary information, and in order to allow the Supreme Court to determine whether this reinstatment is appropriate, The Florida Bar requested a continuance of 60-days to complete an investigation which had only been in progress for less than 60-days.

As detailed in the Statement of Facts and Case, bar counsel filed a Motion for Continuance on July 31, 1987, based

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[1]Rule 3-7.9(i) of the Rules of Discipline.

[2]Rule 3-7.9(n)(3) of the Rules of Discipline.

upon direction from the local board members,[3] who had received and review The Florida Bar's Report of Investigation on July 30, 1987.[4] The Report of Investigation had been received by bar counsel on July 28, 1987.

The written Motion for Continuance was filed in writing,[5] and met the criteria set forth in Williams, supra. Accordingly, the Motion for Clarification was filed in good faith, demonstrated due diligence and articulated the reasons for the continuance.[6]

The Motion for Continuance was filed in good faith and not interposed for delay of the proceedings. At the Reinstatement Hearing on August 6, 1987, bar counsel stated:

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[3]Although Mr. Vernell has contended that there is no provision in the rules whereby the local board members would review these proceedings (H.12, 30), Rule 3-7.9(a)(3) of the Rules of Discipline states "upon the appointment of a referee and bar counsel, copies of the petition shall be furnished by the executive director to the local board members, local grievance committees, and to such other person as are mentioned in the rule" and Rule 3-3.2 of the Rules of Discipline states "the board shall supervise and conduct disciplinary proceedings in accordance with the provisions of these rules." The Florida Bar's position is that the local board members are the proper authority to give bar counsel direction as to how to proceed during the initial stages of investigation and at the hearing before the referee.

[4]The local board members had already received the Petition for Reinstatement by letter of June 26, 1987 from bar counsel.

[5]See Rule 1.460 of the Florida Rules of Civil Procedure.

[6]This was the criteria set forth in Williams, 438 So.2d at 785.

> [I] don't intend to stop the proceedings here today. We have witnesses waiting and I think we should take them at this time.
>
> It is my intention to impress upon the court that the Board thinks ... the Board's position is that we need more time to study what we have and to possibly supplement our investigation. (T.5)

Due diligence was demonstrated within the Motion for Continuance wherein bar counsel set forth the chronology of events necessary to begin the investigation. At the Reinstatement Hearing on August 6, 1987, bar counsel further detailed the efforts of The Florida Bar to investigate this matter as well as various problems encountered (T.5-7). Due diligence was also demonstrated through the testimony of Staff Investigator Enrique Torres at the Reinstatement Hearing where he detailed his efforts in investigating the matter (T.104-113).

Although The Florida Bar sympathizes with Mr. Vernell's rush for reinstatement, these procedures require The Florida Bar to allocate resources to investigate and review the grounds for reinstatement. These procedures, however, take time. This Court has recognized that these procedures take time. The Referee, appointed May 27, 1987, was ordered to file his Report of Referee "within 180 days unless there are substantial reasons requiring delay." This Court has held, in a recent case involving a prematurely submitted petition for reinstatement, that "experience has taught us that the average time for a trial determination on such a petition is from six

to nine months."[7] The Florida Bar in Re Burnett Roth, 500 So.2d 117 (Fla. 1986).[8]

The reasons for the continuance were also articulated within the Motion for Continuance. Bar counsel was directed by the local board members,

> to request a continuance in order to conduct further investigation of matters contained in the Report of Investigation and the Petition for Reinstatement as well as further investigation of Petitioner's compliance with the terms of his suspension, activities during the period of suspension, financial and tax background, reputation in community and evidence of good character.[9]

These reasons were again identified at the Reinstatement Hearing of August 6, 1987 (T.5) and the hearing of August 26, 1987 (H.7-9).

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[7]The Florida Bar had no intention of prolonging this matter for six to nine months. In fact, the investigation would have been resolved had Mr. Vernell cooperated at the outset or immediately after the Reinstatement Hearing of August 6, 1987 or during a 20-day period described by the Referee after the second hearing of August 26, 1987. This will be discussed more thoroughly during the remainder of this section.

[8]According to Roth, Mr. Vernell was eligible to file his Petition for Reinstatement a reasonable time prior to the expiration of the suspension order, 500 So.2d at 118. The suspension expired on April 6, 1987, but the Petition was not filed until May 21, 1987, The Florida Bar should not be penalized for conducting a thorough investigation and accused of dilatory tactics where Mr. Vernell could have filed his petition 45 days earlier than he did.

[9]Paragraph three of the Motion for Continuance dated July 31, 1987.

Mr. Vernell should not be able to claim that the continuance, as requested,[10] would prejudice him because he was on notice that bar counsel opposed an early hearing date of August 6, 1987 from the very beginning. The Referee, along with counsel for Mr. Vernell and Mr. Vernell, were desirous of July 1987 hearing date. Bar counsel had to fight to get the date set at least on August 6, 1987 (H.24). Mr. Vernell was also on notice that a continuance was a good possibility in this case from the very beginning. Mr. Vernell's counsel, in a letter of June 16, 1987 to Staff Investigator Torres, with a carbon copy to Louis Vernell, Jr. (Appendix "A"), stated:

> This letter is authorization for you to commence your investigation regarding the reinstatement proceedings for Louis Vernell, Jr., which have been tentatively scheduled for August 6, 1987 (emphasis added).

It is also relevant that this letter of June 16, 1987 also indicates to Staff Investigator Torres that:

> I again apologize for the problems you encountered this morning in attempting to reach Mr. Vernell.

This investigation was no bed of roses for The Florida Bar. Initially, and throughout the entire pendency of the Referee level proceeding, The Florida Bar could not obtain Mr. Vernell's tax returns from the Internal Revenue Service. Also

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[10]The continuance requested was for 60 days to allow further investigation of Petitioner's fitness to resume the practice of law. As stated above, there was no intention to delay Mr. Vernell's presentation of his case on August 6, 1987 (T.5).

initially, Staff Investigator Torres had trouble communicating with counsel for Mr. Vernell about various matters, including Mr. Vernell's Social Security Number. Staff Investigator Torres initially requested Mr. Vernell's Social Security Number during the very early stages of his investigation (T.111), but did not obtain the Social Security Number until tax returns were delivered on "approximately July 3rd, 1987" (T.111).

Between July 3, 1987 and July 30, 1987,[11] Mr. Vernell, through counsel, supplied The Florida Bar with copies of his tax returns as The Florida Bar could not obtain the returns from the Internal Revenue Service. On or about July 30, 1987, bar counsel learned that the Social Security Number which Mr. Vernell had been using on his tax returns was an invalid Social Security Number (Appendix "C"). It was not until one-hour before the Reinstatement Hearing on August 6, 1987, that the Internal Revenue Service was able to confirm in writing that Mr. Vernell's Social Security Number was invalid. (T.5-7). It was not until the Reinstatement Hearing that Mr. Vernell attempted to explain why the Social Security Number he

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[11]Mr. Vernell supplied the returns in piecemeal fashion during this time period. The returns supplied to Staff Investigator Torres were included in the Report of Investigation dated July 26, 1987 and received by Bar Counsel on July 28, 1987. On July 28, 1987, Staff Auditor Ruga examined the returns and determined that pages/schedules were illegible or missing, an initial return was missing and one return was unsigned. On July 30, 1987 Mr. Vernell cured these problems.

had been using and filing tax returns for at least the past ten years was an invalid number (T.73-74).

Although Mr. Vernell testified that these returns were accurate (T.60), The Florida Bar was not able to verify this statement since, during the entire pendency of this matter before the Referee, the Internal Revenue Service was not able to supply the returns.

Given the nature of a reinstatement proceeding, the Roth case, the unreasonable time contraints imposed upon The Florida Bar to investigate this matter, the difficulties encountered during the investigation, the tax return verification problem, the problem with an invalid Social Security Number, Mr. Vernell's past disciplinary history[12] and Mr. Vernell's refusal to cooperate with regard to requested bank records, hereinafter detailed, the Referee should have granted the continuance as requested by The Florida Bar. The Board of Governors, however, believe that Mr. Vernell's refusal to turn over bank records is an overriding basis which has necessitated this appeal.

Although Mr. Vernell has contended that he did not know of any request for bank records until the hearing of August

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[12]In addition to a private reprimand in 1964, Mr. Vernell has been the subject of Public Reprimand in The Florida Bar v. Vernell, 296 So.2d 8 (Fla. 1974), a six-month suspension in The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), and a 91-day suspension in the matter underlying this reinstatement, The Florida Bar v. Vernell, 502 So.2d 1228 (Fla. 1987).

26, 1987 (H.35), the record clearly indicates the bank records were at issue at the very outset of the investigation.

This is easily verified by the testimony of Staff Investigator Torres (T.110, 111-112) and by counsel for Mr. Vernell's letter of June 18, 1987 to Staff Investigator Torres (Appendix "B"), wherein she states:

> I am sorry that we have been missing each other on the telephone and also that I did not forward to you what you needed.
>
> My understanding when I had spoken to you last week was a release regarding confidentiality and your right to discuss matters with anyone.
>
> I do not recall, and I apologize if you did tell me, that you needed a list of bank account, release for those bank accounts, personal assets, date of birth and social security number. (emphasis added).
>
> The next ten days will require my being out of the office in arbitration and various court appearances. I would appreciate if you would please forward to me a letter as to exactly what you need and I will have Mr. Vernell stop by my office and sign same.
>
> I don't think any letter signed by me will be sufficient to release the financial information you are seeking.

Although Staff Investigator Torres did not put such a request in writing, it is clear that, according to counsel for Mr. Vernell, neither side followed up in writing (T.125). Staff Investigator Torres continued to seek a list of bank accounts and releases for those bank accounts. Although engaged in other portions of investigation including, tracking down and obtaining the tax returns (T.112) and clarifying problems occasioned by Mr. Vernell's invalid Social Security

Number (T.109-110), the bank records were always at issue (T.114-115).

Perhaps, to avoid the pressure placed upon Mr. Vernell for his bank records, a "Financial Statement of Louis Vernell" dated July 7, 1987 was supplied (Appendix "D"). This document was wholly unsatisfactory for the purposes which the bank records were sought, to wit, verification of tax returns, resolving questions raised as a result of a 1983 tax lien, verification of compliance with suspension orders, verification of the contents of the Petition for Reinstatement, and verification of compliance with the Rules Regulating The Florida Bar. The Board of Governors believes the bank records to be essential to a complete and thorough investigation of Mr. Vernell's fitness to resume the practice of law, especially given the nature of Mr. Vernell's previous disciplinary history[13] which involved failure to file income tax returns and adding his name as payee to a settlement check.

At the outset of the Reinstatement Hearing on August 6, 1987, bar counsel again restated that the tax records, financial records and bank records of Mr. Vernell were still at issue (T. 5). Although the Referee denied the Motion for Continuance (T.129), he expressed reluctance in doing so:

> Let me ask you a question. The only reason I bring this up is that the Supreme Court and I, from time to time, have differences of opinion.

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[13]See footnote 12, supra.

> On another case which I handled for the Bar,[14] I denied the Bar a motion for continuance at the trial level and went on and made a recommendation.
>
> One of the Justices -- it must have been in the dissenting opinion[15] -- said that he felt the Bar should be given a little more time.
>
> The only thing I am saying here today is that I am satisfied. I hate to get penalized for expeditious.
>
> I am saying that the Bar sent me this -- whenever it was -- I am sure my secretary called them and set it some two months ahead of time, because I think I got it in June and it was set in August. I am not quite sure what purpose a continuance would serve, but I don't want to get into a position where if I deny the continuance, they may send it back to me.
>
> That is my question and the only reason I bring it up -- (T.126-127)

Although the Motion for Continuance was denied, counsel for Mr. Vernell made the following offer in an effort to appease the Board of Governors:

> [I] understand their position. The case law dealing with their position, I set forth in my reply to their Motion for Continuance.
>
> If between now and the time your opinion comes out, Mr. Thaler and I can work something out that will satisfy the Board in conjunction with your opinion, true. If not, we will proceed on it that way and work it out privately. (T.131-132)

Based on these representations made at the Reinstatement Hearing on Thursday, August 6, 1987, bar counsel believed some cooperation would be forthcoming.[16] However, before bar

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[14] The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987).

[15] 504 So.2d at 1235.

[16] It is noteworthy that the Referee also believed cooperation would be forthcoming (H.19-20, 23).

counsel had a chance to even confer with counsel for Mr. Vernell, bar counsel received a message on Monday, August 10, 1987, from the office of counsel for Mr. Vernell, that Mr. Vernell's position was to "give them nothing" (H.10-11). Upon request of bar counsel, this position was followed up in writing by letter of August 11, 1987 from counsel for Mr. Vernell (Appendix "E"). Accordingly, a Motion for Clarification was filed and a second hearing was held on August 26, 1987.

This case would have been resolved had Mr. Vernell supplied the bank records initially or during the period immediately subsequent to the Reinstatement Hearing. This case might have been resolved had Mr. Vernell adhered to the Referee's offer at the second hearing on August 26, 1987 which occurred as follows:

> That is the way it is going to go up. There isn't anything I can do about it. My only question is -- just tell me if you do not want to voluntarily produce these items and I will say, "Mr. Vernell does not wish to voluntarily produce these items."
>
> I will issue my recommendation. I will put on the bottom, "The Bar has asked for further items. Mr. Vernell does not wish to voluntarily produce them. I held a hearing and on the basis of my hearing, here is my recommendation."
>
> You can all move on up to the Supreme Court with that posture.
>
> The only other alternative that I am trying to ask you about is, if you wish to voluntarily produce those items, that it be done, and I will put a limitation on it, ten days to produce them and ten days for the Bar to examine them.
>
> Then I will set a hearing right here. If there is something that comes out of this that is

> tremendously prejudicial to Mr. Vernell and if the Bar wishes to make its point, fine. If there is nothing, we will close it and I will sent it on up.
>
> The discretion to appeal or not appeal is strictly in their hands. There isn't anything I can do about it, no matter what you do, and there isn't anything you can do about it, I don't believe, no matter what you do. (H.40-42).

Mr. Vernell, knowing that The Florida Bar was going to file this appeal if he did not produce the bank records, was confronted with a very reasonable offer[17] by the Referee to resolve this matter. Mr. Vernell would produce the records in ten days. The Florida Bar would examine the records for ten days. The Referee would then set a hearing and if the records presented no problem, The Florida Bar's investigation would be over (H.32). The Referee directly pointed out that:

> The bottom line is if Mr. Vernell does not voluntarily produce them and I send a supplemental recommendation ... The Bar is going to oppose his ppetition, and they are going to appeal. That is the bottom line. (H.50)

Mr. Vernell's contention that the request for bank records would result in a never-ending investigation is without merit. The Referee had already set an exact day limitation and had further indicated in response to Mr. Vernell's plea that "there will be no end" (H.31), that

> Just a minute. That's number one. The items are fixed.
>
> The question to me is whether you want to go ahead and cooperate with this committee and produce those

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[17]This offer was repeated several times by the Referee at the Hearing on August 26, 1987 (H.22, H.32).

> items within a limited period of time, ten days for you to do it and ten days for them to look at it. It will come in front of me, either yes or no -- (H.32)

Bar counsel, in an effort to show good faith and expedite the matter, indicated that another hearing before the Referee would not be necessary (H.32).

Bar counsel pointed out to the Referee that the Referee could have compelled Mr. Vernell to produce the requested records, in that,

> This is a case where he is petitioning, and he is supposed to show that he is fit to resume the practice of law.
>
> We shouldn't have to be in a position where we have to compel his records by subpoena. He should voluntarily give us what we want. (H.45)

Mr. Vernell's position not to produce the records is in conflict with the very rule under which he filed his Petition for Reinstatement. Rule 3-7.9(h)(3) of the Rules of Discipline states:

> Failure of petitioner to be examined. For failure of the petitioner to submit to examination as a witness pursuant to notice given, the Referee shall dismiss the petition for reinstatement unless good cause is shown for such failure.

Although Mr. Vernell has contended that he did not know until the hearing of August 26, 1987 that the bank records were at issue (H.35), the record clearly indicated otherwise. Mr. Vernell's counsel knew on or about June 18, 1987 as set forth in her own letter of that date (Appendix "B"). Staff Investigator Torres continued to pursue the bank records to no avail. Bar counsel stated, at the beginning of the

Reinstatement Hearing on August 6, 1987, that the bank records were at issue (T.5). The bank records were discussed throughout the Reinstatement Hearing on August 6, 1987 and were the subject of a compromise reached between counsel (T.132). Mr. Vernell's counsel, by letter of August 11, 1987 (Appendix "E"), with a copy to Mr. Vernell, stated:

> My secretary spoke with Mr. Vernell early yesterday, and he indicated he did not feel compelled to sign any additional waiver so that The Florida Bar can obtain bank records or other financial matters not previously given to you and/or Mr. Torres.

Accordingly, Mr. Vernell's statement on August 26, 1987 that there never was a request for bank records until August 26, 1987 was less than accurate.

As indicated at the beginning of this section, The Florida Bar must demonstrate a clear abuse of discretion on the part of the Referee to disturb the Referee's denial of the Motion for Continuance.

This brief has already outlined and set forth The Florida Bar's argument that the record clearly indicates that there were grounds for a continuance, as requested.

Accordingly, along with the Referee's apparent predisposition towards this case,[18] The Florida Bar has demonstrated

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[18]The Referee originally recommended that Mr. Vernell receive a Public Reprimand to resolve the underlying disciplinary matter, The Florida Bar v. Vernell, 502 So.2d 1228 (Fla. 1987). The Referee also believed that the Supreme Court should not have imposed a 91-day suspension (T.88) and also expressed problems with The Florida Bar's procedures (Footnote Continued)

that there was a clear abuse of discretion in denying The Florida Bar's Motion for Continuance in this case.

(Footnote Continued)
(T.139-140). It should also be noted that the Referee supported an early hearing date, attempting to set the Reinstatement Hearing for July 1987 (H.24).

II

LOUIS VERNELL HAS FAILED TO DEMONSTRATE THE REQUISITE ELEMENTS FOR REINSTATEMENT AS INDICATED BY HIS LACK OF SENSE OF REPENTANCE AND HIS MALICE AND ILL FEELINGS TOWARDS THOSE INVOLVED IN THE DISCIPLINARY PROCEEDINGS.

Generally, the elements to be considered in regard to reinstatement of an attorney are (1) strict compliance with disciplinary order, (2) evidence of unimpeachable character, (3) clear evidence of good reputation for professional ability, (4) evidence of lack of malice and ill feeling toward those involved in bringing disciplinary proceedings, (5) personal assurances of sense of repentance and desire to conduct practice in exemplary fashion in future, and (6) restitution of funds. In Re Petition of Timson, 301 So.2d 448, 449 (Fla. 1974). Also, clearly, the Supreme Court may consider the underlying or prior disciplinary proceeding which gave rise to the discipline. In Re Petition of Rubin, 323 So.2d 257 (Fla. 1975); In Re Petiton of Wolf, 257 So.2d 547 (Fla. 1972).

It is the position of The Florida Bar that Louis Vernell has failed to demonstrate a sense of repentance but has demonstrated malice and ill feelings towards those involving in bringing about the disciplinary proceedings.

Throughout these proceedings Mr. Vernell has maintained that the underlying disciplinary case resulting in a 91-day suspension was incorrect and wrong. Mr. Vernell stated this position at the Reinstatement Hearing on August 6, 1987,

wherein, in response to bar counsel's question "Do you think the Supreme Court's decision was fair" (T.91), Mr. Vernell responded, after objection from his counsel,

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

Further, throughout his testimony at both hearings, Mr. Vernell indicated his belief that The Florida Bar in some ways mishandled the disciplinary case against him and that the resulting discipline was wrong (T.88-93, H.29-31, 33-34).

However, nowhere is this attitude more telling than during the hearing of August 26, 1987 wherein Mr. Vernell actually began to argue that the Supreme Court of Florida wrongly interpreted the law which resulted in his suspension. Mr. Vernell stated:

> Just so this matter can be resolved once and for all, and not that I want to proceed further in the matter -- I just want to present to Mr. Thaler and the Court --
>
> During the period of my suspension, I did take it upon myself, Your Honor, to conduct areas of research in the U.C.C., because I wanted to see what I did wrong and I want to know that this never, ever be repeated.
>
> Your Honor, the citation which I am referring to, which comes out of treatises of U.C.C. law, indicates that there is some support to my position in adding my name as a payee on the check, that it had no effect, and that it is appropriate and is not a material alteration.
>
> The second citation that is included demonstrates the situation that I had, to the extent that you cannot restrictively endorse a negotiated check on the reverse side. I believe that is the law. (H. 29-30)

Despite expressions to the contrary which can be anticipated from Mr. Vernell in response to this position, there can be no true sense of repentance where Mr. Vernell has undertaken and continues to argue that The Florida Bar's handling of this case was wrong, the Supreme Court's interpretation of the law was wrong and the Supreme Court imposition of a 91-day suspension was wrong. Mr. Vernell still attempts to minimize and explain away the matter leading to his suspension.[19]

Further The Florida Bar would point to Mr. Vernell's "Facts Justifying Reinstatement" contained within the Petition for Reinstatement,[20] which, in part, states:

> These and other considerations have weighed heavily upon petitioner since the entry of this Court's order, with the same causing Petitioner to rethink and to otherwise take inventory of his life and professional commitments. In so doing Petitioner has fully accepted and reconciled both the suspension and the grievous consequences flowing therefrom without malice or ill feeling towards those individuals responsible for prosecuting the subject disciplinary proceedings. Moreover, Petitioner fully appreciates that it is not enough that he did not intend to benefit from his actions in adding his name as joint payee on the "Schlesinger check" or that no damage was occasioned thereby to anyone. Ethically and professionally, Petitioner concurs in the proposition that it is sufficient if he might reasonably perceive such action to be questionable or that a semblance of impropriety might be associated therewith (emphasis added).

Within this statement, which is clearly designed to be self-serving, Mr. Vernell indicates that he "fully appreciates

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[19] See In Re Timson, 301 So.2d 448, 450 (Fla. 1974).

[20] Section J of the Petition for Reinstatement.

that it is not enough that he did not intend to benefit from his actions in adding his name as joint payee on the 'Schlesinger check' or that no damage was occasioned thereby to anyone." Although the Referee pointed out to bar counsel that Mr. Vernell did not have intent do convert monies or cause damage (T.136-138), there is no doubt Mr. Vernell added his name to the "Schlesinger check" with the intent to secure an additional $100,000 in attorney fees which he believed was due from his paraplegic client. There is further no doubt that Mr. Vernell did cause damage to his client's interests since a lawsuit had to be brought against Mr. Vernell to protect the client's interests. Although there may have been no intent to do wrong, there certainly was an intent to benefit. Although Mr. Vernell perceived no damage to anyone, there certainly was damage to his paraplegic client's interests.[21] Mr. Vernell still argues and believes he did no wrong and caused no harm.

Further, Mr. Vernell states he concurs in the proposition that it is sufficient if he might reasonably perceive such action to be questionable or that a semblance of impropriety might be associated therewith." Again, Mr. Vernell does not openly admit he did wrong but rather refers to his conduct as that which could be reasonably perceived to be questionable or

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[21]There was also damage to the image of The Florida Bar (T.139).

that which a semblance of impropriety might be associated with. In contrast, The Florida Bar's position is that the underlying discipline, a 91 day suspension, as set forth in The Florida Bar v. Vernell, 502 So.2d 1228 (Fla. 1987), was imposed for conduct which was far more egregious than conduct which could reasonably perceived to be questionable and far more egregious than conduct which a semblance of impropriety might be associated with. At the very outset of these proceedings, as demonstrated within the Petition for Reinstatement, and throughout the proceedings, as demonstrated during the two hearings of this matter, Mr. Vernell has failed to show a true sense of repentance.

Mr. Vernell has clearly not recognized that his misconduct, in light of his previous disciplinary history, was serious and deserving of suspension by the Supreme Court. Until Mr. Vernell perceives that his misconduct was serious and deserving of a suspension, then there is no sense of repentance. Until there is a sense of repentance, there can be no full proof of rehabilitation under the case law.

Finally, it is noteworthy to indicate that these reinstatement proceedings allow any petitioner to present a case that is entirely favorable towards reinstatement, entirely self-serving and entirely one-sided. Mr. Vernell was prepared as a witness and gave testimony which was designed to reflect favorably upon his reinstatement.

Accordingly, Mr. Vernell's testimony was tailored to favor reinstatement. However, an attorney once removed or

suspended must demonstrate rehabilitation and the burden of doing so requires more than recitations of intent and contrition. In Re Petition of Rubin, 323 So.2d 257, 258 (Fla. 1975). Bar counsel has been compelled to point out the indicators of Mr. Vernell's true feelings.

Mr. Vernell is "mad" about the discipline imposed by the Supreme Court (T.92). Mr. Vernell believes the Supreme Court was "wrong" (T.92). Mr. Vernell believes The Florida Bar mishandled the disciplinary case against him (T.89-91, H.30-31, H.33-34). Mr. Vernell argues that the Supreme Court wrongly interpreted the law which resulted in his discipline (H. 29-30). Mr. Vernell argues that The Florida Bar is "almost an Ollie North type government" (H.44). These are his true feelings which demonstrate lack of repentance, as well as ill feelings and malice. These are the reasons why Mr. Vernell has not proved his fitness to resume the practice of law at this point based on the elements in the Timson case.

In the Timson case, the petitioning attorney was denied reinstatement, because the Referee therein observed:

> Mr. Timson's intention and assurances of his understanding of his problems and desire to correct them in the future where incomplete in two regards: He still tends to minimize and explain away the matters leading to his disbarment, he views his "rehabilitation as complete, upon demonstrating a change of attitude, intent and views, whereas it is the undersigned's view that is not sufficient in his case (emphasis added), Timson at 451.

Just as in Timson, Mr. Vernell has attempted to minimize and explain away his misconduct. Just as in Timson, Mr. Vernell should not be allowed reinstatement until he has

proved all the elements required to resume the practice of law.

CONCLUSION

The Referee clearly abused his discretion in not granting The Florida Bar's Motion for Continuance based upon the nature of a reinstatement proceeding, the case law, the unreasonable time constraints imposed upon The Florida Bar, the difficulties encountered in investigating the matter, the problems in securing Mr. Vernell's tax returns and with Mr. Vernell's invalid Social Security Number, Mr. Vernell's past disciplinary history and Mr. Vernell's refusal to not only produce his bank records, but refusal to even supply a list of bank account numbers. There was no prejudice to Mr. Vernell since he was able to present his case as scheduled. Mr. Vernell was also on notice that the hearing was "tentatively scheduled" and could be continued based on the need of The Florida Bar to complete investigation. Based upon Mr. Vernell's rush for reinstatement and the apparent rush to conclude this matter, The Florida Bar was allowed less than two months to receive the petition, assign bar counsel, assign an investigator, investigate the matter, have the local board members review the matter, solve any problems encountered, supplement any need for further information required by the Board of Governors and prepare a case for hearing.

Further, it is important to note that Mr. Vernell has not shown a true sense of repentance and has demonstrated ill feelings and malice. These reinstatement proceedings are designed to allow Mr. Vernell to show himself in the most

favorable light. However, even under these circumstances, there is negative feedback flowing from Mr. Vernell. These are the true indicators of Mr. Vernell's feelings. He is "mad", the Supreme Court is wrong in imposing "that one extra day," The Florida Bar is "almost an Ollie North type government." This second journey back to the practice of law was supposed to be easy for Mr. Vernell because he believed he should not have been suspended in the first place. The Supreme Court specifically ordered that Mr. Vernell show proof of rehabilitation and The Florida Bar respectfully submits that there is evidence that Mr. Vernell has not met his entire burden.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Complainant's Initial Brief was mailed by Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that a true and correct copy was mailed by Federal Express to John A. Weiss, Attorney for Petitioner, at 101 North Gadsden Street, Tallahassee, Florida 32302, on this 14th day of October, 1987.

Louis Thaler

LOUIS THALER
Bar Counsel