IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Howard Rosenberg,

Complainant

vs.

LOUIS VERNELL, JR.,

Respondent

Supreme Court Case No. 90,010

AMENDED
REPLY BRIEF OF RESPONDENT

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AMENDED REPLY BRIEF OF THE RESPONDENT

The Respondent, LOUIS VERNELL, Jr., appearing pro se, herewith files Respondent's Reply Brief, respectfully stating as follows:

At the outset, it should be noted that although the Bar's Answer Brief "rejected virtually all of the Respondent's Statement of the Case and Facts (Answer brief, p. 1), it is submitted that the "version" as presented by the Bar not only belies the true facts, but demonstrates a concerted effort to distort the same, e.g.___

The Record:

Significantly, and although the Bar has vigorously objected to Respondent's use of the two Appendices accompanying Respondent' initial Brief, the Bar has yet to dispute or deny the underlying necessity therefor, i.e.__ the total absence of any exhibits being made a part of the **record** herein and/or the lack of any copies thereof being furnished to Respondent in violation of Rules 3-7.6 (1)(2) and 3-7.6 (k) (2) [See Introduction, pp. 1-3, Respondent's initial Brief and Respondent's Response to the Bar's Motion to Strike and Respondent's Accompanying Motion to Summarily Vacate the Referee's Finding and Recommendations, the contents of which are incorporated herein for purposes of brevity].

Indeed, even the **"Court's Exhibit 1"** received in evidence by the referee (T. 70) is **NOT**, for some inexplicable reason, included within the **record** herein despite its signal importance (See pp. 2,3, infra).

The total absence of credibility on the part of the Bar's sina qua non witness, Howard Rosenberg

Significantly, and although the Bar has, in both its Answer Brief and at trial, continuously vouched for and otherwise relied upon, the credibility of Mr. Rosenberg in its prosecution of Respondent, it is submitted that the record convincingly establishes that Mr. Rosenberg's trial testimony is patently **false, contradictory and/or otherwise untrustworthy.**

Albeit, and aside from Mr. Rosenberg's reputation as a "smooth liar" (T. 400), as evidenced in part by his brazen lies to FAA inspectors (T 398), the record convincingly demonstrates a concerted and consistent pattern of vacillation and deception on the part of Mr. Rosenberg. e.g.__

As noted, an examination of the trial proceedings conducted herein incredibly reveal that Mr. Rosenberg testified that he **"doesn't remember" on no less than <u>76</u> different occasions, i.e.__**

(T.84, 96, 99, 101, 111, 112, 119, 121, 124, 139, 140, 143, 144, 145, 152, 153, 154, 155, 156, 157, 159, 160, 161, 162, 165, 168, 174, 175, 186, 187, 192, 198, 207, 211, 214, 215, 218, 221, 226, 230, 231, 244, 257, 278, 279, 280, 283, 284, 285, 292, 296, 312, 313, 314, 683, 684, 685, 688, 690, 691, 692, 693, 694, 695, 696, 697, 698, 700, 701, 702, 703, 709).

Significantly, prior to such **avalanche** of "I don't remember" responses, Mr. Rosenberg was "conveniently" able to testify for the Bar **without difficulty <u>while surreptitiously utilizing three pages of copious notes during his testimony.</u>** covering a period of **12 years ago** (T.66).

As an incident thereto, and upon learning that Mr. Rosenberg had intentionally prepared **all** of such notes **the night before testifying in the cause,** (T. 66), Respondent's trial attorney made not one, but two motions for mistrial T. 65, 70), which were

summarily denied by the Referee after Ms. Evans defended Mr. Rosenberg's use in order to "organize" his testimony, viz:

> MS. EVANS: Judge, I don't think that he needed those notes. Again, I think that Mr. Rosenberg has a clear recollection of these matters. He just wanted to be organized, as he testified." (T. 70)

Ironically, before discovering Mr. Rosenberg's use of such notes, the record was virtually devoid of any "I don't remember" responses. Conversely, after such discovery, Mr. Rosenberg felt obliged to utilize such response **76** times during his testimony, supra.

Indeed, Mr. Rosenberg replied so many times that he couldn't remember that, when asked, he could not recall the number of times he gave such response, viz:

> "Q. Do you know how many times you have answered that you don't remember --
>
> A. I have no idea."
>
> (Transcript, p. 695)

Coincidentally, and notwithstanding that the very presence of such "script" (sic, notes) seemingly runs afoul of a fair trial, it is nonetheless interesting to note that portions of these same notes serve to materially **contradict** critical areas of **sworn** testimony provided by Mr. Rosenberg during trial proceedings, e.g. despite Mr. Rosenberg's false but persistent claims (as echoed by the Bar) that Respondent never gave him an accounting of any services rendered, the subject notes **do** reflect that after the conclusion of the eminent domain appeal, Mr. Rosenberg did, in fact, receive **both** notice and knowledge of Respondent's filing of

a Motion for Taxation of Attorney fees and costs on September 1, 1992 (T. 68). Additionally, and as noted, such motion for attorney fees not only contained a detailed accounting of all prior services rendered by Respondent in the eminent domain proceedings, but also included Respondent's claim for an award of **$75,915.00** as reasonable attorney fees therefor (A. 23).

Certainly, the subsequent denial by the trial court of Respondent's claim for appellate attorney fees in 1992 should not now serve as an appropriate basis for the Bar to demean the efforts expended by Respondent in such appeal (Answer Brief, p. 2), especially since it affirmatively appears that the 31 page brief filed by Respondent in the eminent domain appeal bespeaks of both competence and completeness (Supplementary Appendix 1)

Moreoever, and as further noted from its Answer Brief, the Bar is in manifest error in stating that the Respondent had not moved for a recusal of the Referee herein (Answer Brief, p. 21). Contrary thereto, the record demonstrates that Respondent did, in fact, file a timely "Motion for Disqualification" (Supp.Ap. 2); an "Affidavit of Prejudice" (Supp. Ap. 3); and a "Certificate of Counsel" (Supp. Ap. 4) which affirmatively evidenced an abiding and well grounded fear that Respondent could not receive a fair trial before Referee Fierro; such motion was, however, summarily denied within moments after its presentment (T. 321).

Indeed, and as demonstrated from the record, the Bar's studious efforts to distort the facts is otherwise typified in an examination of another of the Bar's false assertions, i.e.__ that

the Respondent "did not take any steps to file a suit" against the FAA (Answer Brief, p. 3). Contrary thereto, the record vividly demonstrates that Respondent did, in fact, file a comprehensive and well composed complaint in the United States District Court against the FAA in Mr. Rosenberg's behalf (A. 26).

Albeit, and aside from the myriad of such and other distortions of fact as contained in the Bar's Answer Brief, it is submitted that the Bar's arguments relating to the issues herein is deemed to be equally unfounded, viz:.

ARGUMENT

I

WHERE IT AFFIRMATIVELY APPEARS THAT THE FLORIDA BAR FAILED TO FOLLOW APPLICABLE AND PRESCRIBED PROCEDURE IN INITIATING AND/OR IN PROSECUTING DISCIPLINARY PROCEEDINGS AGAINST THE RESPONDENT, SUCH PROCEEDINGS SHOULD BE DISMISSED.

Contrary to the Bar's assertions in its Answer Brief (p. 8), **at no time** has the Respondent ever claimed that the signature on Mr. Rosenberg's otherwise **blank** form of complaint was not his.

To the contrary, it was (**and still is**) the unyielding position of Respondent that notwithstanding the presence of Mr. Rosenberg's signature thereon, the narrative statement of facts as attached to such form was **not** signed by Mr. Rosenberg; was **not** prepared by him; was **not** submitted by him; was **not** dated; and was **not** executed under oath.

Albeit, and aside from such and other erroneous recitations of fact herein, it affirmatively appears that the Bar has studiously ignored the **controlling** principles of law as set forth by this

Honorable Court in The Florida Bar v Rue, Fla. 1994, 643 So 2d 1080 wherein this Court **mandated that "all complaints, except those initiated by the Florida Bar shall be in writing and under oath."**

Indeed, **not once**, throughout the entire brief filed by the Bar was the Rue case even mentioned.

Significantly, and as otherwise noted, during trial proceedings herein the Bar virtually conceded that Mr.Rosenberg did **not** sign his complaint under oath, although it suggested by the Bar that Mr. Rosenberg may have **"meant'** to do so, viz:

> "Q. Is this a copy of your Bar complaint (handing)?
>
> A. Yes
>
> BY MS. EVANS:
>
> Q. Does it contain an appendix?
>
> A. Yes, it does.
>
> Q. You **meant** to provide all of this under oath?
>
> A. That's correct.
>
> (Howard Rosenberg, T. 41)

Albeit, and inasmuch as the complaint submitted in behalf of Howard Rosenberg clearly fails to comply with applicable requirements, it is submitted that the complaint filed herein should be dismissed.

II

WHERE IT AFFIRMATIVELY APPEARS THAT THE FLORIDA BAR UTILIZED AND RELIED UPON A WITNESS WHOSE TESTIMONY IS BARRED AND OTHERWISE PRECLUDED AS A MATTER OF LAW, THE COMPLAINT AS FILED HEREIN SHOULD BE DISMISSED AS A MATTER OF LAW.

Respondent respectfully submits that the Bar's argument with respect to the within issue conflicts not only with this Honorable Court's decision in Glossom v State, Fla. 1985, 462 So 2d 1080, but with the very facts circumscribed by the within cause.

It is accordingly noted that although the Bar concedes that a "third party" witness may well cause a due process violation where his testimony may be affected by a "contingency fee" arrangement, the Bar argues that such principle is not applicable herein based upon its assertion that Mr. Rosenberg is not a witness but a party to the cause (Answer Brief, p. 14).

In conflict therewith, the Bar previously took an opposite position in describing the status of Mr. Rosenberg when, in denying all discovery requests previously made by Respondent, the Bar stated that **"Mr. Rosenberg is not a party in these proceedings"** (A. 10).

Significantly, the total failure of the Florida Bar to reveal to either the Respondent **or to this Honorable Court** (even as of this date) the pendency of the claims of Mr. Rosenberg **and his attorney**, Michael Eisler, to recover monies from the Client's Security Fund is deemed, per se, to be violative of Respondent's due process rights.

Certainly, the impact of such **undisclosed** claims upon Mr. Rosenberg's credibility as a witness should be a determining factor in excluding Mr. Rosenberg's testimony from any consideration herein.

In this regard, the record further demonstrates that not only

does Mr. Rosenberg have a financial interest in securing proceeds from the client's security Fund but so, too, does Mr. Eisler, as evidenced in the following colloquy with Mr. Rosenberg:

BY MR. RODERMAN: Q. How much did you spend with Mr. Eisler?

A. For me personally or the business or the companies or what?

Q. You have not paid him anything yet?

A. That's correct.

Q. Did you give him a retainer?

A. No, sir.

Q. Do you know how many hours he's spent?

A. No, sir

(T. 683, 684)

Surely, in submitting a **blank** form of complaint in Mr. Rosenberg's behalf and in attaching thereto the factual scenario **"composed"** by Mr. Eisler; and, further, in accompanying Mr. Rosenberg to **all** proceedings herein so as insulate him from any form of contact with Respondent, Mr. Eisler has clearly evidenced his own concerted interest in obtaining disciplinary sanctions as against Respondent as a prerequisite to Mr. Rosenberg's quest for the long sought after **30 pieces of silver** (Rule 7-2.4).

Certainly, and inasmuch as the Respondent may well have become the subject of a "shark feeding frenzy" between Mr. Rosenberg and Mr. Eisler, this Court should appropriately view as "suspect" the otherwise uncorroborated testimony of Mr. Rosenberg.

It is accordingly of little wonder therefore that when, as in

the case at bar, a witness may, by his testimony, seek an award based upon the conviction of another, that both our state and federal courts have looked upon such "contingent fee" arrangement as not only "suspect" but unconstitutional, viz:

In Williamson v United States, 5 th Cir. 1962, 311 F 2d 441, the Fifth Circuit Court of Appeals decried the receipt of such type testimony in a cause and held:

> "It becomes the duty of the Courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes. Moye's testimony, standing alone and unexplained, discloses a form of employment of an informer which this Court cannot approve or sanction." (id, at 444)

In accordingly applying the principles of Glossom, supra, it is submitted that the testimony of Mr. Rosenberg should be stricken and held for naught.

III

WHERE THE REFEREE NOT ONLY CONSIDERS THE MERITS OF AN UNCHARGED OFFENSE, BUT RECOMMENDS A FINDING OF GUILT THEREON, AS WELL AS DISBARMENT THEREFOR, THE FINDINGS AND RECOMMENDATIONS AS MADE BY THE REFEREE SHOULD BE DETERMINED TO BE NULL AND VOID

Needless to state, the Bar's argument with respect to the within issue reflects a concerted effort to becloud the issues and to otherwise distort the facts.

As noted, unlike the Stillman and DeSerio cases relied upon by the Bar in its Answer Brief, the "uncharged offense" herein was **not** utilized by Referee Fierro for purposes of assessing punishment, but, to the contrary, Referee Fierro utilized such "uncharged offense" as an **added charge against Respondent for which**

he recommended the ultimate penalty of disbarment.

Significantly. the Supreme Court of the United States in The Matter of John Ruffalo, 390 U.S. 544, 20 L. Ed 2d d 117, 88 S Ct. 1222, addressed the identical issue as presented herein and determined that such "Rush to Justice" procedures of Referee Fierro herein were not only unlawful, but unconstitutional.

In Ruffalo, the disbarment of an attorney was ordered based upon a "charge of misconduct which was not in the original charges, but was added as a result of testimony presented during the disbarment hearings" on another charge.

Unlike the case sub judice, the attorney in Ruffalo was granted a continuance in order to have time to respond to the new charge.

Notwithstanding, the Supreme Court in such instance held that the order disbarring Ruffalo was unconstitutional, stating:

> "These are adversary proceedings of a quasi-criminal nature. Cf In re Gault, 387 US 1, 33, 18 L. ed 2d 527, 549, 87 S Ct. 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been included in those leveled against petitioner by the Ohio Board of Commissioners on Grievance and Discipline, no one knows.
>
> The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived him of due process. (id, at 551).

Certainly, Referee Fierro's findings and recommendations

that the Respondent be disbarred for the uncharged offense of having written a letter to his "friend" of 35 years is not only unconstitutional, but frightening.

IV

WHERE IT AFFIRMATIVELY APPEARS THAT NONE OF THE OFFENSES CHARGED AGAINST THE RESPONDENT WERE PROVEN BY CLEAR AND CONVINCING EVIDENCE, THE COMPLAINT AS FILED HEREIN SHOULD BE DISMISSED

Respondent respectfully submits that the standard of review suggested by the Bar to overturn the findings and recommendations of the Referee herein is both erroneous and unrealistic.

As noted from the record, the testimony of the sina qua non witness relied upon by the Bar, Howard Rosenberg, was totally impeached and otherwise contradicted by the testimony of Respondent; the Respondent's wife; the testimony of two FAA inspectors; the testimony of a "friend of the family," Sherry Freeman and, in addition, the testimony of Mr. Rosenberg's own wife, Ellen Koga, who repeatedly contradicted her husband's testimony.

Albeit, aside from the total impeachment of Mr. Rosenberg's testimony by all of the witnesses testifying in the cause, it is significant to note that even his own testimony was deceptively evasive and uncertain, supra.

In The Florida Bar v Rayman, Fla. 1970, 238 So 2d 594, this Honorable Court stated:

> ". .the power to disbar should be exercised only in a clear case for weighty reasons and on clear proof. In Bass, the Court discussing the evidence of deceit charged to the respondent reversed stating that the evidence was not 'sufficiently

> clear and convincing . . on the basis of conflicting evidence.
>
> In State ex rel Florida Bar v Junkin, 89 So 2d 481 (Fla. 1956), we held that evasive and inconclusive evidence which was given by the complaining witness was insufficient to sustain the disbarment judgment recommended by the Referee (id, at 597).

As further noted, this Honorable Court in The Florida Bar v Thomson, Fla 1972, 271 So 2d 758 relied upon the "great interest" of a witness in overturning a Referee's finding of guilt, stating:

> "Considering the great interest of the witness in the outcome of the divorce, the admitted penchant for perjury, the animosity voiced for Thomson and the lack of any other evidence, a finding of guilt of the act charged cannot be upheld. (id, at 760)

Likewise, in State v Junkin, Fla 1956, 89 So 2d 481, this Honorable Court held such type evidence to be insufficient to support a judgment for disbarment, stating:

> "The evidence is evasive and inconclusive; it does not establish with any degree of certainty the nature of the employment of the attorney nor the exact amount of the payments to such attorney that were received by him. There is no evidence in the record except the accuser's statements that the money was not used for the purpose for which it was given and these statements are the conclusions of a man who condemned the lawyer who had been previously handling the matter for having "balled up" the situation and who, he informed the Committee, told the accused attorney that he would make it hot for him if the case was not satisfactorily handled. Considering the inconclusive nature of the testimony of the sole witness, the lapse of time from the taking of the testimony. . .and other circumstances of the case, it is our view that it is insufficient to support the judgment of disbarment.

In applying such principles to the case at bar, it is submitted that **not one** of the critical facts and issues relied upon by the Bar in its Answer Brief were proven by clear and convincing

evidence and, to the contrary, the record demonstrates that each of the same were totally and convincingly refuted.

Significantly, in considering Respondent's special 35 year relationship with Mr. Rosenberg, this Honorable Court recognized a very real difference in charging practices relating to both old and new clients as noted from the following case comment appearing in The Florida Bar Rules Regulating the Florida Bar, Fla. 1986, 494 So 2d 977, to wit:

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship,however, an understanding as to the fee should be promptly established."

In applying such principles to the case at bar and in considering that Respondent's fee was derived from the net proceeds of the eminent domain award, the decision rendered by this Honorable Court in The Florida Bar vs Ragano, Fla. 1981, 403 So 2d 401 appears to be both appropriate and applicable, viz:

In Regano, this Honorable Court considered the issue of an attorney's handling of funds "coming into the hands of an attorney" and held:

> "This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for his services **or to preclude the payment of agreed fees from the proceeds of transactions or collections.** Controversies as to the amount of fees are **not** grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent.
>
> In order for the Referee to have concluded that Respondent's actions regarding the money he held in trust warrants disciplinary action with restitution as part of that judgment,he would have

> had to find that Respondent's fee was 'excessive, extortionate. . or fraudulent.' Moreover,the provisions of Rule 11.02 that funds held intrust are not subject to set off or counterclaim is qualified by the provision that **payment of agreed fees from funds so held is not precluded.** (at 405)

In applying such principles to the case at bar,it is noted that

none of the nominal proceeds retained by Respondent were received or held in trust by Respondent and, to the contrary, all of such proceeds were derived from checks payable to Respondent in full accord with Respondent's somewhat naive agreement with Mr. Rosenberg.

V

WHETHER THE REFEREE HEREIN VIOLATED THE DUE PROCESS RIGHTS OF THE RESPONDENT TO AN EXTENT AS TO WARRANT AND MANDATE THE VACATING OF THE REFEREE'S FINDINGS AND RECOMMENDATIONS

Respondent submits that aside from the innumerable violations of Respondent's due process rights **observed** in the within cause, Exhibits (1) through (5) of Respondents Appendix B otherwise reflect an ongoing and pre-existing propensity on the part of both Referee Fierro and Elena Evans to violate Respondent's due process rights.

As noted from such exhibits, despite Respondent's objections to a proposed Report of Referee, Ms. Evans nonetheless submitted the same to Referee Fierro for entry (B. 1). Prior to such submission, however, the proposed report had been **uni-laterally** changed by Mr. Evans without Respondent's knowledge or consent (B. 5). Notably, the change was a **material** alteration greatly affecting the "Discipline" to be Applied in such case (See: Para. IV, B. 3

and B. 4)

Incredibly and notwithstanding that Referee Fierro was put on express notice as to Respondent's objections to such uni-lateral change, he nonetheless entered such altered report **ex parte**.

Similarly, and as noted in Exhibit 3 of Respondent's Supplemental Appendix 2, the due process rights of Respondent's wife were likewise violated as an incident to Referee Fierro's **ex parte** denial of Mrs. Vernell's motion for protective order, wherein she had desperately sought relief from the wrongful, deliberate and **unlawful** dictates of the Florida Bar.

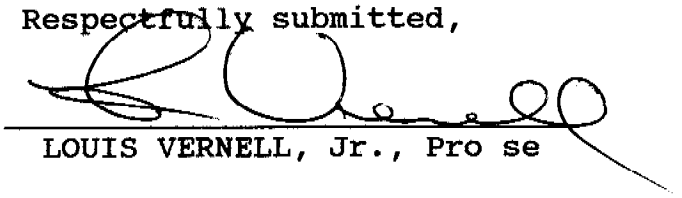
CONCLUSION

Respondent respectfully submits that not since Sacco & Vanzetti has the due process rights of any individual been so violated in any court in the United States as in the case at bar.

Needless to state, in reviewing the record herein, it is deemed to essential to Respondent's fundamental rights of due process that Referee Fierro's unbridled, vindictive and egregious "Rush to Justice" procedures should not be condoned by this Honorable Court

Certainly, as noted from a review of the entire record, there is substantially more at stake in these proceedings than the success of the Respondent herein. . . Indeed, Referee Fierro and the Florida Bar have put in question the very heart of our judicial system.

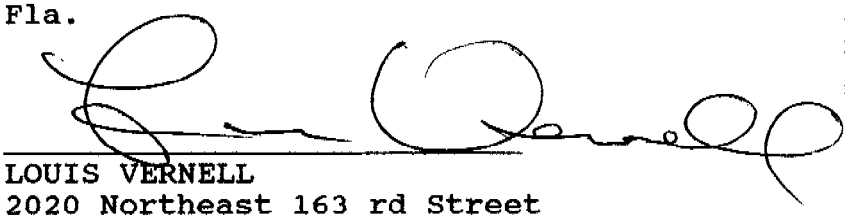
Respectfully submitted,



LOUIS VERNELL, Jr., Pro se

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing Amended Reply Brief was this 2nd day of March, 1998 furnished to Elena Evans at The Florida Bar, 444 Brickell Avenue,Miami, Fla. and to John Boggs, The Florida Bar, at 650 Appalachee Drive, Tallahassee, Fla.



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