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2 IN THE SUPREME COURT OF THE STATE OF NEVADA  
3

4 LIBORIUS AGWARA

5 Petitioner,

6 vs.  
7

8 STATE BAR OF NEVADA and  
9 SOUTHERN NEVADA DISCIPLINARY  
10 BOARD,

11 Respondents.

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Elizabeth A. Brown  
Clerk of Supreme Court


Case No. 70888

12 **PETITIONER'S RESPONSIVE POINTS AND AUTHORITIES IN**  
13 **SUPPORT OF THE PETITION FOR WRIT OF MANDAMUS OR, IN**  
14 **THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION**

15 COMES NOW, LIBORIUS AGWARA, by and through his counsel,  
16 WILLIAM B. TERRY, ESQ., of the law offices of WILLIAM B. TERRY,  
17 CHARTERED and files the instant response to the Respondent's Answer to the  
18 Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition.

19 This response is made and based upon the pleadings and papers on file herein,  
20 the attached analysis of facts and points and authorities in support hereof.

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## ANALYSIS OF FACTS

On July 27, 2016, the Petitioner, Liborius Agwara, file a Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition in reference to what can broadly be characterized as Fifth Amendment issues as they apply to Mr. Agwara. This Honorable Court eventually directed the State Bar to respond to the Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition which they did on October 17, 2016. The instant document constitutes Mr. Agwara's answer to the Respondent's opposition. In the original petition, Petitioner Agwara asserted his Fifth Amendment rights at the time that a Subpoena was served upon him to produce an abundance of documentation not the least of which were accounting records, withdrawals and disbursements, as well as retainer agreements, documents pertaining to settlements, etc. Critically, however, the Bar also requested all of the Petitioner's personal & business tax returns along with accompanying documentation for a period of time greatly in excess of what the Subpoena originally called for. Exceptions to the Subpoena were filed by Mr. Agwara and without any hearing ruled upon by the Chairman of the Southern Nevada Disciplinary Board, Mr. Puschnig. That in turn cause the filing of the mandamus/prohibition. The Court is respectfully reminded that in fact two Subpoenas were issued to Mr. Agwara, both of which he asserted the Fifth Amendment right to. Within the original Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Prohibition there were certain prayers for relief which were requested including the request that the Chairman of Souther Nevada Disciplinary Board be ordered to modify his order denying the motion to quash the subpoenas to prohibit the Bar from enforcing the orders to grant the motions to quash the subpoenas to prohibit the Bar from enforcement under Rule 25(c) of the Disciplinary Rules of Procedure and for further relief as the Court deems fit in reference to the Fifth Amendment assertion.

1 **I. THE PETITION FOR WRIT OF MANDAMUS OR, IN THE**  
2 **ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION SHOULD**  
3 **BE GRANTED AND THE PRAYERS FOR RELIEF LIKEWISE**  
4 **GRANTED.**

5 The mere fact that the United States Bankruptcy Court Judge made a referral  
6 to the State Bar does not necessarily mean any wrong doing on behalf of the  
7 Petitioner nor does it negate his Fifth Amendment rights. Even this Honorable Court  
8 has directed investigations by the State Bar after lawyers failed to comply with such  
9 things as appellate rules, time periods for filing briefs, etc. While the Bar asserts a  
10 co-mingling, the Bar does not assert that clients were not paid nor that lien holders  
11 were not paid. It simply asserts a co-mingling and the failure to keep track of funds  
12 by certain documents "mandated" under the Rules of Professional Conduct. At page  
13 8 of their brief the Bar asserted that "Agwara had routinely failed to fully distribute  
14 client funds deposited into the trust account..." They do not assert, however, that  
15 funds were not distributed but simply that they were not distributed from the trust  
16 account.

17 There is no doubt that the Bar can attempt to issue Subpoenas but there is  
18 further no doubt that the Petitioner Agwara in this case can assert a Fifth  
19 Amendment right.

20 The Bar in their responsive pleadings uses interesting phraseology. Mr.  
21 Agwara is not attempting to "hide behind the Fifth Amendment..." (page 16 of Bar's  
22 brief) but is asserting his Fifth Amendment right. In *Spevack v. Klein*, 385 U.S. 511  
23 (1967) the United States Supreme Court found that a lawyer in a disciplinary  
24 proceeding has the same right to remain silent and to refuse to give testimony in a  
25 disciplinary proceeding without suffering a disciplinary sanction. This would apply  
26 equally to records. This Honorable Court is also reminded that the bankruptcy court  
27 also referred the matter to the United States Attorney's office for investigation.  
28 Cited in Petitioner's opening brief was *In Re: Artis*, 883 A.2d 85 103 (DC 2005)


1 amongst other cases which holds that the Fifth Amendment protects against any  
2 disclosures that a witness reasonably believes could be used in a criminal  
3 prosecution or could lead to other evidence that might be used. Counsel herein will  
4 not attempt to recite the cases set forth within the original petition but they clearly  
5 stand for the proposition that the Fifth Amendment right applies to both testimony  
6 and the production of documents. The Bar cites among others *In Re: Zisook*, 88  
7 Ill.2d 321, 430 N.E.2d 1037 (1981). The Bar, however, maintains that there are not  
8 reasonable grounds to fear self-incrimination in the instant case. When the State Bar  
9 of Nevada subpoenas one's personal as well as individual tax returns and had  
10 knowledge of the fact that the matter has already been referred to the United States  
11 Attorney's office for a review. It is suggested that this creates a reasonable ground  
12 to fear self-incrimination. *Zisook* said that the claim had to be unfounded. There is  
13 no unfounded claim in the instant case. The Bar neglects to answer a number of the  
14 other cases cited by the Petitioner that indicate that the production of records in an  
15 of themselves is self-authenticating situation. If an individual attorney has them then  
16 the attorney is forced to produce them and they are presumed to be true. If the  
17 attorney does not have them then there is a per se violation, allegedly, of the Rules  
18 of Professional Conduct. The Bar maintains that the subpoenaed documents are not  
19 testimonial in nature. The rule, however, is not that narrow in that if production is  
20 granted and a Fifth Amendment right is overridden then the documents themselves  
21 are self-authenticated which is in effect saying that there is no Fifth Amendment  
22 right. Even the Bar at page 21 of their responsive points and authorities still  
23 continues to request the income tax returns. The Bar maintains that "the State Bar  
24 does not make it a practice to seek income records in the form of tax returns..." That  
25 is precisely what they have done in the instant case and that is why it is necessary for  
26 this Honorable Court to intercede.

1 CONCLUSION

2 For the above-indicated reasons, the original requested Writ of Mandamus or,  
3 in the Alternative, Writ of Prohibition should be granted.


4 DATED this 28<sup>th</sup> day of November, 2016.

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