

1992

Kent Blaine Hansen and Brent D. Hansen v. Division of Occupational and Professional Licensing : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Paul Van Dam; attorney general; Robert Steed; assistant attorney general; attorneys for respondent. Jackson Howard, Leslie W. Slaugh, Linda J. Barclay; Howard, Lewis and Petersen; attorneys for petitioners.

Recommended Citation

Brief of Respondent, *Hansen v. Occupational and Professional Licensing*, No. 920302.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4272

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF
JTAH
DOCUMENT
KFU
50
A10
DOCKET NO. 920302

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO. 920302

IN THE SUPREME COURT OF THE STATE OF UTAH

KENT BLAINE HANSEN, AND
BRENT D. HANSEN,

Petitioner/Appellant

vs.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING,

Respondent/Appellee.

Case No. 920291 - CA
920302

APPEAL FROM AN ORDER
OF THE UTAH COURT OF APPEALS

BRIEF OF RESPONDENT DIVISION OF OCCUPATIONAL
AND PROFESSIONAL LICENSING

Attorneys for Petitioners:

JACKSON HOWARD #1548
LESLIE W. SLAUGH #3752
and LINDA J. BARCLAY, #4967
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

Attorney for Respondent:

PAUL VAN DAM #3312
Utah Attorney General
ROBERT STEED #6036
Assistant Attorney General
36 South State, #1100
Salt Lake City, Utah 84111

FILED

JUL 31 1992

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

KENT BLAINE HANSEN, AND)	
BRENT D. HANSEN,)	
)	
Petitioner/Appellant)	Case No. 920291 - CA
)	
vs.)	
)	
DIVISION OF OCCUPATIONAL AND)	
PROFESSIONAL LICENSING,)	
)	
Respondent/Appellee.)	

APPEAL FROM AN ORDER
OF THE UTAH COURT OF APPEALS

BRIEF OF RESPONDENT DIVISION OF OCCUPATIONAL
AND PROFESSIONAL LICENSING

Attorney for Petitioners:

JACKSON HOWARD #1548
LESLIE W. SLAUGH #3752
and LINDA J. BARCLAY, #4967
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

Respondent's Attorney:

PAUL VAN DAM #3312
Utah Attorney General
ROBERT STEED #6036
Assistant Attorney General
36 South State, #1100
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF JURISDICTION	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS,	1
STATEMENT OF FACTS	2
ARGUMENT	4
I. THE SUPREME COURT SHOULD DENY PETITIONER'S PETITION FOR WRIT OF CERTIORARI	4
II. THE COURT OF APPEALS HAS DISCRETION TO GRANT OR DENY INTERLOCUTORY APPEALS.	5
III. THE UTAH COURT OF APPEALS LACKS JURISDICTION TO REVIEW NON-FINAL ADMINISTRATIVE ORDERS.	9
IV. SECTION 63-46b-14(2)(b) SHOULD NOT DISPEL OF THE REQUIREMENT OF FINALITY OF ADMINISTRATIVE DECISIONS IN.	14
V. PETITIONERS' CLAIM OF IRREPARABLE HARM AND INADEQUATE ADMINISTRATIVE REMEDIES ARE WITHOUT MERIT.	16
VI. THE POTENTIAL HARM TO PETITIONERS BY REQUIRING EXHAUSTION IS OUTWEIGHED BY THE PUBLIC INTEREST IN PROCEEDING TO HEARING	18
CONCLUSION	20
APPENDIX Aorder of the Court of Appeals dated 5/29/92	
APPENDIX B orders of the Administrative Law Judge	
APPENDIX C Petitioner's Brief to the Court of Appeals	
APPENDIX D Constitutional and Statutory Provisions and Rules	

TABLE OF AUTHORITIES

CASES CITED

Baird v. State, 574 P.2d 713, 718 (Utah 1978)	13
Barney v. Division of Occupational and Professional Licensing, 828 P.2d 542 (Utah Ct. App.), Cert denied, (Utah Sup. Ct. June 19, 1992)	12, 13
DeBry v. Salt Lake County Bd. of Appeals, 764 P.2d 627 (Utah Ct. App. 1988)	9, 10, 13
Heaton v. Second Injury Fund, 796 P.2d 676, 677 (Utah 1990) .	13
In Re License Revocation of Polk, 449 A.2d 7, 14 (N.J. 1982)	19
Johnson v. Utah State Retirement Office, 621 P.2d 1234, 1237 (Utah 1980)	15
S&G, Inc. v. Morgan, 797 P.2d 1085, 1087 (Utah 1990)	15
Sloan v. Board of Review of Industrial Commission 781 P.2d 463 (Utah Ct. App. 1989)	11, 12, 13
State v. Hoffman, 558 P.2d 602, 605 (Utah 1976)	19
Steadman v. SEC, 450 U.S. 91 (1981)	19
Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 570 (Utah App. 1989)	9

OTHER AUTHORITIES CITED

Utah Const. art I § 11.	9
Utah Code Ann. § 13-1-12. (Supp.1992)	1, 18
Utah Code Ann. § 52-4-1 et seq	3
Utah Code Ann. § 63-46b-14(1) (1989)	1, 13, 14
Utah Code Ann. § 63-46b-16 (1989)	1, 11, 14
Utah Code Ann. § 63-46b-18 (1989)	1, 18

Utah Code Ann. § 78-2a-3 (1992)	passim
Utah Code Ann. § 78-2a-4 (1992)	1
Utah Rules of App. Proc. 5	1, 8
Utah Rules of App. Proc. 14	1, 7, 8
Utah Rules of App. Proc. 17	1, 18
Utah Rules of App. Proc. 19	1, 8
Utah Rules of App. Proc. 46 (1992)	1, 4, 5
Utah Rule of App. Proc. 50	1
Utah Rules of Civ. Proc. 65b	1, 8

QUESTIONS PRESENTED FOR REVIEW

1. Was the order of the Court of Appeal's Denying petitioners' request for judicial review discretionary or did it constitute a dismissal for lack of jurisdiction?

2. Are Petitioners required to exhaust their administrative remedies before seeking judicial review of five non-final orders of the administrative law judge?

STATEMENT OF JURISDICTION

Petitioners bring this appeal pursuant to Utah Code Ann. § 78-2a-4 (1992), from an order of the Utah Court of Appeals entered on May 29, 1992. Respondent, the Division of Occupational & Professional Licensing ("Division") submits this brief in opposition to Petitioners' petition for writ of certiorari pursuant to Rule 50 of the Utah Rules of Appellate Procedure. Utah Court Rules Ann. § (1992).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Interpretation of the following statutes rules are determinative for this appeal: Utah Const. art I § 11, Utah Code Ann. § 13-1-12 (Supp. 1992), Utah Code Ann. § 63-46b-14(1) (1989), Utah Code Ann. § 63-46b-16 (Supp. 1989), Utah Code Ann. § 63-46b-18 (1989), Utah Code Ann. § 78-2a-3 (1992), Utah Rules of App. Proc. 5, 14, 17, and 19, Utah Rules of Civ. Proc. 65b.

Verbatim citation of all statutes and rules listed above are contained in Appendix D.

STATEMENT OF FACTS

Petitioners are licensees of the Division of Occupational & Professional Licensing ("Division"). Petitioners are licensed to practice Dentistry and to prescribe and administer controlled substances. Petitioners are brothers who practice Dentistry in two offices located in Spanish Fork and Midvale, Utah.

In August 1989, a petition was filed by the Division alleging that Petitioners engaged in unprofessional conduct including incompetence in the practice of dentistry, fraudulent billing and record keeping practices, over-prescribing controlled substances, engaging in inappropriate physical contact with patients and employees including sexual acts with a patient in exchange for drugs, and taking lewd nude photographs of a patient while she was under the influence of nitrous oxide.

On June 14, 1991, counsel for the Division filed a Motion in Limine to Exclude Irrelevant Evidence. Petitioners filed their response on June 26, 1992. Oral argument was heard on the Division's motion in limine on April 1, 1992. On April 17, 1992, Administrative Law Judge, Stephen Eklund, issued an order permitting Petitioner's to present evidence of K.W.'s or any other witness' prior sexual behavior "with a licensed health care

professional within the context of a physician/patient relationship, both on cross-examination of that witness and for possible impeachment purposes of rebuttal." (Order on Division's Motion in Limine, April 17, 1992 p.9) Only evidence of K.W.'s or another witness' "general prior sexual history or reputation shall be excluded." Id.

On June 21, 1991, Petitioners filed a motion to close the hearing to the public and a memorandum regarding the appropriate standard of proof for disciplinary hearings. The Division filed a response to Petitioner's motion on July 1, 1991. With respect to the motion to close the hearing, the Salt Lake Tribune filed a petition to intervene on July 1, 1991. Administrative law judge Stephen Eklund granted the Tribune's petition on July 2, 1991.

On April 1, 1992 oral argument on Petitioners' motion to close was heard before the administrative law judge and the Dentist and Dental Hygienist Licensing Board. Pursuant to section 52-4-1 et seq. the Board voted four to two to keep the hearing open. On April 7, 1992 the administrative law judge issued an order on behalf of the Board providing that the hearing would remain open to the public pursuant to the Utah Open and Public Meetings Act.

On April 1, 1992, argument on the standard of proof was heard by the ALJ. The ALJ issued an order on April 17, 1992 stating that the standard of proof in administrative proceedings is preponderance of the evidence.

All of the above orders of the ALJ are non-final orders, and a hearing on the merits in this case is scheduled to be heard on September 28 - October 3, 1992.

ARGUMENT

I. THE SUPREME COURT SHOULD DENY PETITIONER'S PETITION FOR WRIT OF CERTIORARI

A petition for Writ of Certiorari according to Rule 46 of the Utah Rules of Appellate Procedure, is "granted only for special and important reasons." Utah Rules of App. § (1992). The following considerations, while neither controlling nor the only measure of the Supreme Court's discretion to grant or deny petitions for writ of certiorari, are listed under Rule 46 as follows:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call

for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

Utah Rules of App. Proc. § 46 (1992). None of the considerations provided under Rule 46 are found in Petitioners' petition for writ of certiorari. The Court of Appeal's denial of Petitioners' interlocutory appeal was merely an exercise of their broad discretion to grant or deny requests for judicial review.

II. THE COURT OF APPEALS HAS DISCRETION TO GRANT OR DENY INTERLOCUTORY APPEALS.

Petitioners sought interlocutory review before the Court of Appeals of five non-final orders issued by the administrative law judge ("ALJ") in the administrative proceeding below. Without stating its reasons for doing so, the Utah Court of Appeals denied Petitioners' request for interlocutory review and extraordinary relief.

This petition for writ of certiorari is premised on the false assumption that the Court of Appeals determined that it was without jurisdiction to consider Petitioners' appeal. (Petition for Writ of Certiorari, p. 6-13.) It is clear on the face of the order that the Court of Appeals made no such determination. Their order, in its entirety states:

This matter is before the court upon a petition for review of a non-final administrative order.

IT IS HEREBY ORDERED that the petition is denied. In light of this ruling, it is further ORDERED that respondent's motion to accept a late filed response is denied.

The Court of Appeal's order cannot, nor should it be construed, as a determination by the court that it lacked jurisdiction to review Petitioners' interlocutory appeal. Although it is the Division's assertion that the Court of Appeals lacks jurisdiction to review non-final administrative orders, the Court of Appeals did not decide that issue. The only assumption that can be made, based on the written order of the Court of Appeals, is that the court, in its sound discretion, denied Petitioners' request for judicial review and extraordinary relief.

To show that the Court of Appeals erred in denying their interlocutory appeal, Petitioners set forth a somewhat detailed although flawed analysis of Utah Code Ann. § 78-2a-3(2) (1992 & Supp.). Specifically, Petitioners contend that the terms "final orders" and "decrees" found in that statute are distinct and that the term "decrees" signifies non-final orders rather final decrees. (Petition for writ of certiorari p.7-10) Petitioners also invoke well established canons of statutory interpretation to support their construction of section 78-2a-3(2). Petitioners

argue that the Court of Appeals somehow misinterpreted or ignored section 78-2a-3(2) and therefore erred in denying their petition for interlocutory review and extraordinary relief.

Petitioners' arguments lack merit for the following reasons: First, as expressed above, the Court of Appeals did not hold that it lacked jurisdiction to review Petitioners' appeal. There is no support for Petitioners' claim that Court of Appeals misinterpreted section 78-2a-3(2). Second, Petitioners never raised section 78-2a-3(2) as a grounds for appellate jurisdiction. Section 78-2a-3(2) was overlooked entirely. Because Petitioners neglected to raise section 78-2a-3(2) as a grounds for appellate jurisdiction on their appeal, Petitioners' argument that the Court of Appeals misinterpreted section 78-2a-3(2) is unjustified. It is also improperly raised as a basis for appeal in their petition for writ of certiorari. It is nonsensical to challenge the decision of the Court of Appeals over an issue that was not even raised. Also, Petitioners' claim has not been properly preserved on appeal to this court.

In their petition for judicial review with the Court of Appeals, Petitioners' raised two "alternative theories of jurisdiction", (1) An interlocutory appeal under Rule 14 of the Utah Rules of Appellate Procedure, and (2) an extraordinary writ

under civil procedure rule 65B and rule 19 of the Utah Rules of Appellate Procedure. (Petition to the Court of Appeals p. 8-9)

By their own admission, Petitioners' first alternative was to file their appeal as a request for review under Rule 14. Petitioners did not file a motion as required under rule 65B or rule 19. (Petition to the Court of Appeals p. 15) Instead of complying with the filing rules, Petitioners asked the court to choose which alternative theory of jurisdiction was proper, then, if the court concluded that they were without jurisdiction pursuant to Rule 14, requested that the court grant Petitioners leave to properly file a motion in accordance with rule 65B and appellate Rule 19. (Petition to the Court of Appeals p. 14-15)

Because rule 14, as Petitioners admitted, does not provide for interlocutory appeals from administrative agencies, and Petitioners failed to comply with the filing rules under rule 65b and rule 19, the Court of Appeals had sufficient grounds to deny Petitioners' interlocutory appeal and request for extraordinary relief. The Court of Appeals, in their discretion may also have declined to exercise its jurisdiction without deciding whether it had jurisdiction to review the appeal. Utah Rules of Appellate Procedure § 5 (1992)(Discretionary Appeals from Interlocutory Orders).

None of the considerations listed under Rule 46 in aid of this court's authority to grant or deny writs of certiorari are present in this case. Unless the Court of Appeals is held by this court to have abused its discretion in denying Petitioners' interlocutory appeal, Petitioners' petition for writ of certiorari should be denied.

III. THE UTAH COURT OF APPEALS LACKS JURISDICTION TO REVIEW NON-FINAL ADMINISTRATIVE ORDERS.

Although its the Division's contention that the Court of Appeal's order denying Petitioners' request for interlocutory was merely discretionary, the Division also asserts in the alternative that the Court of Appeals would, in any event, have been required to dismiss Petitioners' petition for lack of jurisdiction. "It is a court's first duty to determine if it has jurisdiction." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 570 (Utah App. 1989). "If the court concludes that it does not have jurisdiction, it retains only the authority to dismiss the action." Id.

The jurisdiction of the Court of Appeals is conferred by statute. Despite Petitioners' arguments to the contrary, the court's denial of Petitioners' request for interlocutory review did not deprive them of a constitutional right under Utah Const. art. I, sec. 11. There is no constitutional right to judicial review. See, DeBry v. Salt Lake County Bd. of Appeals, 764 P.2d

627 (Utah App. 1988). The jurisdiction of the Court of Appeals is embodied in section 78-2a-3(2)(a) which vests the Court of Appeals with "[a]ppellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings . . .

. . . (4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings." . . .

Utah Code Ann. § (1992) (emphasis added). This section also refers to all other types of cases that confer original appellate jurisdiction on the Court of Appeals.

In the context of appeals from the final orders of an administrative agency, the Utah Court of Appeals made this comment with respect to section 78-2a-3(2)(a): "This general statute defines the outermost limits of our appellate jurisdiction, allowing us to review agency decisions only when the legislature expressly authorizes a right of review." DeBry v. Salt Lake County Bd. of Appeals, 764 P.2d 627, 628 (Utah Ct. App. 1988). "It is not a catchall provision authorizing us to review the orders of every administrative agency ... but allows review only when the legislature expressly authorizes a right of review." Id.

According to section 78-2a-3(4), compliance with the administrative procedures act is required by the Court of Appeals. Utah Code Ann. § (1992). Section 63-46b-16(1) of the Administrative Procedures Act grants the Court of Appeals "jurisdiction to review all final agency action resulting from formal adjudicative proceedings. Utah Code Ann. § (1989). Finality, has long been acknowledged as a prerequisite for judicial review. While this principle has a well established history in administrative jurisprudence it is also a prerequisite to review of decisions from the regular court system.

The ALJ's orders that Petitioners seek to appeal are not final orders, nor do the interlocutory orders of the ALJ constitute final agency action as required by administrative procedures act and section 78-2a-3(2)(a). A final order will be issued by the Division only after formal adjudicative proceedings in this matter have been concluded and all issues pending before the Division have been determined.

In Sloan v. Board of Review of Industrial Commission, 781 P.2d 463 (Utah App. 1989), the Utah Court of Appeals held that a remand order to an administrative law judge was not a final order and dismissed the appeal for lack of jurisdiction. In Sloan, the Utah Industrial Commission adopted the findings of an administrative law judge but remanded to the administrative law

judge the issue of whether the claimant was entitled to medical expenses. The Sloan court held that the remand order was not a final appealable order. "We agree that an order of the agency is not final so long as it reserves something to the agency for further decision." Id. at 464.

Attempts to seek interlocutory review of non-final orders of the ALJ in licensing proceedings are not new to the Division nor to the Court of Appeals. For example, in Barney v. Division of Occupational and Professional Licensing, 828 P.2d 542 (Utah Ct. App.), Cert denied, (Utah Sup. Ct. June 19, 1992) this court recently denied certiorari to review an order of the Utah Court of Appeals dismissing an interlocutory appeal from a non-final order issued by the ALJ in a professional disciplinary proceeding. Barney involved a licensed health facility administrator whose license is still the subject of disciplinary proceedings initiated by the Division. The licensee in Barney, sought interlocutory review with the Utah Court of Appeals of a non-final order issued by the ALJ. The order of the ALJ denied Barney's motion to dismiss the Division's petition based on double jeopardy grounds. Referring to Sloan, the Court of Appeals held it did not have jurisdiction to review the order of the administrative law judge because the order lacked "finality".

The court distinguished the requirement of finality with that of exhaustion of administrative remedies stating:

[T]he issue before the agency and the issue before this court [in Heinecke v. Dept. of Commerce] was whether all levels of agency review were complete at the time judicial review was sought. In contrast, ... the requirement of finality contemplates that the agency proceedings have been brought to their conclusion by disposition of all issues before the agency. The denial of a motion to dismiss allows the proceeding to continue in the agency and is not a final order for purposes of judicial review.

Barney, 828 P.2d 544 (emphasis added).

In addition to Sloan, Debry and Barney, this court has recognized the prerequisite of final agency action before a party may obtain judicial review. See Heaton v. Second Injury Fund, 796 P.2d 676, 677 (Utah 1990) (The court dismissed the first petition for review of an ALJ's refusal to grant permanent total disability benefits because there was no final appealable order.); Baird v. State, 574 P.2d 713, 718 (Utah 1978) ("The proper procedure to challenge the statute and the administration thereof is by judicial review after final administrative action has been taken.").

Petitioners claim that section 63-46b-14(2) confers jurisdiction on the Court of Appeals to review non-final orders under certain circumstances. Section 63-46b-14(2)(b) provides that "the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion." Utah Code Ann. § (1989).

Sections 63-46b-14(2)(b) and 63-46b-16(1) both embody the related requirements of finality and exhaustion of administrative remedies before seeking judicial review. However the exception to the exhaustion requirement does not apply to Petitioner's interlocutory appeal of the ALJ's orders.

IV. SECTION 63-46b-14(2)(b) SHOULD NOT DISPEL OF THE REQUIREMENT OF FINALITY OF ADMINISTRATIVE DECISIONS IN.

Although section 63-46b-14(2)(b) provides an exception to the requirement that a party exhaust all administrative remedies before seeking judicial review, it does not provide for automatic appellate rights every time a party claims that a non-final decision of an administrative court is in error. The principle of exhaustion of administrative remedies and finality are well established in the jurisprudence of administrative law. Although well established, the principles are often confused.

Once agency action commences and adjudicative proceedings are under way, review of the agency's decisions can only be had after a final order or final action is taken. Utah Code Ann. § 78-2a-3(2)(a) (1992), Utah Code Ann. § 63-46b-16(1)(1989). Even where some, but not all of issues that are raised, may be outside

of the competence or jurisdiction of the agency to decide, courts in this state adhere to the requirement that the agency reach a final determination on all matters properly before it before permitting judicial review. Johnson v. Utah State Retirement Office, 621 P.2d 1234, 1237 (Utah 1980) ("Administrative agencies do not generally determine the constitutionality of their organic legislation [citations omitted] But the mere introduction of a constitutional claim does not obviate the need for exhaustion of administrative remedies.")¹

On the other hand, exhaustion of administrative remedies allows parties under unusual circumstances to by-pass the administrative forum all together and seek judicial review or judicial determination of their claim. Only in rare circumstances can parties by-pass the administrative forum and proceed directly to the courts for relief. In S&G, Inc. v. Morgan, 797 P.2d 1085, 1087 (Utah 1990), this court explained,

The requirement of participation as a prerequisite to standing to appeal is a corollary of the doctrine of exhaustion of administrative remedies. It is well settled under this doctrine that persons aggrieved by decisions of administrative agencies 'may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine . . . matters properly determinable originally by such agencies. [citations omitted]

¹. In addition, the court in Johnson noted the well established principle that "[e]xhaustion of administrative remedies may not be necessary when it would serve no useful purpose." Id.

The exhaustion requirement should not be excused for interlocutory review of an ALJ's orders concerning matters of procedure, the admissibility of evidence, etc. An interlocutory order of an administrative law judge that does not affect the rights of the parties or which determines questions of law or fact pertaining to the merits of the case are not contemplated in the statute excusing the exhaustion requirement. The Division has not taken any action with respect to Petitioner's licensees. Moreover, Petitioners' appeal does not concern any question outside the competence of the ALJ to determine. The Division should be afforded the opportunity to bring proceedings on this matter to a conclusion after determining all issues that are within its jurisdiction to decide.

V. PETITIONERS' CLAIM OF IRREPARABLE HARM AND INADEQUATE ADMINISTRATIVE REMEDIES ARE WITHOUT MERIT.

To excuse their failure to exhaust administrative remedies or await a final order, Petitioners claim that they will suffer irreparable harm if the proceedings before the Division are allowed to continue on its present course. Petitioners specifically refer to the publicity this case, which is now nearly three years old, has received in the media and press. Although a complete review of the media and publicity that has attended this case is not warranted and is irrelevant, it is worthy to note that Petitioners have also made numerous oral and

written statements to the press, including statements to the national and local media.

Regardless of the attention imparted to these proceedings by the press, it has been made evident that the Dental Board, who will serve as the fact finder in this matter, has not been tainted by any pre-hearing publicity. Petitioners' conducted voir dire of the Dental Board on April 1, 1992. During voir dire, it became absolutely clear that the Dental Board has been largely unaware and completely unaffected by any media attention directed at this case (a favorable result that becomes more difficult to sustain as this hearing is delayed by court actions filed by Petitioners). Petitioners passed on all members of the Board for cause, excluding the Board's public member who served as a past director of the Department of Commerce. The public member was subsequently recused from participating in these proceedings because of his prior relationship with the Division.

Petitioners claim that no adequate remedy exists other than an interlocutory appeal or extraordinary relief to prevent irreparable harm to their reputations. Regardless of whether interlocutory relief is granted, the courts cannot prevent bad publicity. This argument also belies the fact that Petitioners claim that there has already been extensive publicity in this

case. None of Petitioner's arguments go to the issue of the adequacy or inadequacy of petitioners' administrative remedies.

Petitioners are afforded administrative remedies that adequately protect their rights and insure that their licenses and livelihood will not be harmed without due process of law. For example, following formal adjudicative proceedings, Petitioners may seek agency review of the final order with the Department of Commerce. Utah Code Ann. § 13-1-12. (Supp.1992) Also, in the event Petitioners' licenses are suspended, revoked or placed on probation, Petitioners may move to have the ordered stayed by the agency pending appeal of the agency's decision. See, Utah Code Ann. § 63-46b-18 (1989). In addition to the above, Petitioners can also request a stay from the Court of Appeals pending appeal. Utah Rules of Appellate Procedure § 17 (1992). These remedies are more than adequate to protect Petitioners from the unwarranted invasion of their due process rights.

**VI. THE POTENTIAL HARM TO PETITIONERS BY REQUIRING
EXHAUSTION IS OUTWEIGHED BY THE PUBLIC INTEREST IN
PROCEEDING TO HEARING**

Petitioners clearly have a protected property interest in their licenses as Dentists. However, courts have long recognized that although licensee's interest in their livelihood and profession is substantial, the government's interest in

protecting the public health and safety is paramount.

"[G]overnment has a paramount obligation to the protect the general health of the public. The right of physicians (or dentists) to practice their professions is necessarily subordinate to this governmental interest." In Re License Revocation of Polk, 449 A.2d 7, 14 (N.J. 1982); See also Steadman v. SEC, 450 U.S. 91 (1981) (U.S. Supreme Court implicitly concluded that there was no fundamental liberty interest at stake in a proceeding to revoke license to pursue a profession); State v. Hoffman, 558 P.2d 602, 605 (Utah 1976) (Practice of healing professions is not a right, but a privilege).

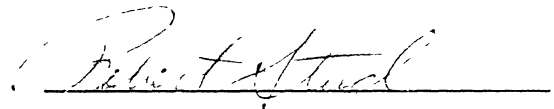
Despite Petitioners' assertion that it would be more efficient to resolve legal disputes on appeal to this court before the hearing, this would be the least efficient manner to resolve the legal issues raised by Petitioners. Requiring Petitioners to exhaust their administrative remedies serves to prevent the impairment of administrative processes by avoidable interruption and delay, and the conservation of judicial resources by avoiding piecemeal or interlocutory review. Moreover, in the event Petitioners are absolved of any professional violation, review by this court would be moot. Rather than review administrative orders in piecemeal fashion, it would be more efficient to review those orders with a complete

record in conjunction with all other potential grounds for appeal.

CONCLUSION

The Court of Appeals denial of Petitioners' interlocutory appeal is a matter within the court's judicial discretion. Petitioners' Petition for Writ of Certiorari should be denied. Petitioners' Petition for Writ of Certiorari does not present any issue of fact or law that warrants review by this court. None of the considerations listed under Rule 46 in aid of this court's discretion to accept or reject writs of certiorari are present.

Submitted this 31st day of July, 1992.

A handwritten signature in cursive script, appearing to read "Robert H. Hurd", is written over a horizontal line.

CERTIFICATE OF SERVICE

I, Michael Peterson, certify that on 5-3-12,

I served a copy of the attached **RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI** to Jackson Howard, counsel for Petitioners in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Jackson Howard, Esq.
Howard, Lewis & Peterson
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603

Michael Peterson

APPENDIX A

MAY 29 1992

John T. Noonan
Clerk of the Court
Main Court of Appeals

-----00000-----

Respondent.

Case No. 920291-CA

Dated this 27th day of May, 1992.

Judith M. Billings
Judith M. Billings, Judge

HOWARD, LEWIS & PETERSEN

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of May, 1992, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Jackson Howard
Leslie W. Slaugh
Linda J. Barclay
Howard, Lewis & Petersen
Attorneys at Law
120 East 300 North
P.O. Box 778
Provo, UT 84603

Robert E. Steed
Brent A. Burnett
Assistant Attorney General
Tax & Business Regulation Division
36 South State Street, 1100 Floor
Salt Lake City, UT 84111

Dated this 29th day of May, 1992.

By

Shirley Slaughter
Deputy Clerk

APPENDIX B

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	ORDER ON PROCEDURES
BRENT D. HANSEN	:	GOVERNING DISPOSITION OF
TO PRACTICE AS DENTISTS	:	RESPONDENTS' MOTION TO
AND TO PRESCRIBE AND ADMINISTER	:	CLOSE HEARING
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Jackson Howard and Leslie W. Slaugh for Respondents

Robert E. Steed for the Division of Occupational and
Professional Licensing

Sharon E. Sonnenreich for the Salt Lake Tribune

BY THE ADMINISTRATIVE LAW JUDGE:

On June 20, 1991, Respondents filed a motion to close the hearing in the above-entitled matter to all members of the press and public. On July 1, 1991, the Division filed a memorandum opposing that motion and the Salt Lake Tribune filed a petition to intervene with respect to the motion. By Order, dated July 2, 1991, the Court granted that petition and the Intervenor's memorandum in opposition to Respondents' motion was filed on July 3, 1991. Respondents filed replies to the submissions by the Division and the Intervenor on July 9, 1991 and July 10, 1991, respectively.

Oral argument on the motion was conducted on April 1, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Dentists and Dental Hygienists

Board. Aside from the merits of the motion, the narrow issue initially presented was the manner in which the motion should be addressed. Specifically, the issue is whether the motion is one properly before the administrative law judge or the Board. At the conclusion of argument in that regard, the Court entered an order, the terms of which are restated as follows:

CONCLUSIONS OF LAW

Respondents assert parties to a formal adjudicative proceeding have a statutory right to be present at any hearing, but urge the press and the public have no such right. Respondents thus contend the presiding officer may take appropriate measures to preserve the integrity of the hearing and may thus exclude the press and public in an appropriate case.

Respondents further assert the presiding officer in this proceeding is the administrative law judge. Since the Open and Public Meetings Act (Utah Code Ann. Section 52-4-1, et seq., hereinafter, the Act) only applies to meetings convened by a public body which consists of two or more persons, Respondents urge it is the administrative law judge - as the presiding officer - who is authorized to determine whether the subsequent hearing in this proceeding should be closed.

The Division and the Intervenor jointly contend the Act applies to the hearing to be conducted in this proceeding, any decision to close the hearing is thus governed by the Act and that determination is to be made by the public body before whom the hearing will be held.

The Act generally governs meetings convened by a public

body, as those terms are defined in Sections 52-4-2(1) and (2), respectively. Sections 52-4-2(1) defines "meeting" as:

. . . the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power. . . .

Section 52-4-2(2) defines "public body" as:

. . . any administrative, advisory, executive or legislative body of the state or its political subdivisions which consists of two or more persons that expends, disburses, or is supported in whole or in part by tax revenue and is vested with the authority to make decisions regarding the public's business

On April 11, 1977, an opinion was issued (#77-94) by James L. Barker of the Office of the Utah Attorney General to Ronald E. Casper, then Director of the Department of Registration, now known as the Division of Occupational and Professional Licensing. The just-stated opinion was in response to various questions concerning the scope of the Act with regard to meetings conducted by boards and committees established pursuant to Section 58-1-1 et seq. The opinion set forth the conclusion that such boards and committees are "public bodies" with the meaning of Section 52-4-2 and that quasi-judicial hearings "to determine findings and recommendations for disciplinary action" are subject to the Act.

The Utah Administrative Procedures Act (Section 63-46b-1 et seq., hereinafter, the UAPA) does not expressly provide that hearings conducted in formal adjudicative proceedings are subject to the requirements of Section 52-4-1 et seq. Section 63-46b-8

generally sets forth hearing procedures applicable in formal adjudicative proceedings. Subsection (1)(i) of that statute merely provides all hearings "shall be open to all parties". However, Comments of the Utah Administrative Law Advisory Committee on the Drafting and Interpretation of the UAPA (Code Co. at 14) provide as follows:

Non-parties may also be afforded the opportunity to observe hearings. See e.g., Section 52-4-1 et seq. (Open and Public Meetings Act).

Given the foregoing, the Court concludes the Act applies to hearings conducted in professional disciplinary licensure proceedings initiated by the Division if the presiding officer at the hearing is a "public body" within the meaning of Section 52-4-2(2). The Court also notes Section 13-1-11, which authorizes the Department to employ administrative law judges "to conduct hearings for the department". If an administrative law judge is the presiding officer duly authorized to conduct a hearing and subsequently enter an order pursuant to Section 13-1-12(1)(a), the Act would not apply because an administrative law judge is not a "public body" within the meaning of the Act.

. Section 63-46b-8(2) of the UAPA expressly provides that nothing in that section precludes the administrative law judge - as the presiding officer - "from taking appropriate measures necessary to protect the integrity of the hearing". Further, R151-46b-10(B) of the rules of procedure which govern departmental adjudicative proceedings provides:

Unless ordered by the department for good cause, if a hearing is conducted, it shall be open to the public.

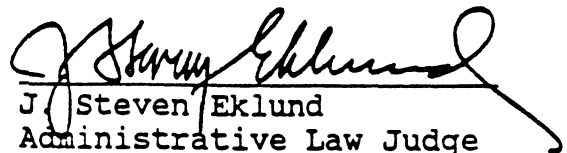
Pursuant to the just-quoted rule, an administrative law judge - as the presiding officer authorized to conduct a hearing - could determine to close the hearing for good cause (e.g., an in camera proceeding could be conducted, as was done at the conclusion of Respondents' April 1, 1992 voir dire examination of the Board). Such a determination would not be governed by the Act.

However, it is the Board which is duly authorized to act as the presiding officer in the subsequent hearing in this proceeding with respect to the entry of findings of fact, conclusions of law and any recommended order regarding Respondents' licenses. Thus, the hearing to be held is governed by the Act and the decision whether to close the hearing is a matter properly addressed to the Board.

ORDER

WHEREFORE, IT IS ORDERED that Respondents' motion to close the hearing to be conducted before the Board is a matter governed by the Act. The Board - as the presiding officer authorized to enter findings of fact, conclusions of law and a recommended order subsequent to any such hearing - shall address Respondents' motion and determine whether the hearing should be closed, consistent with the provisions of the Act.

Dated this 7th day of April, 1992


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	ORDER ON RESPONDENTS'
BRENT D. HANSEN	:	MOTION TO CLOSE HEARING
TO PRACTICE AS DENTISTS	:	
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Jackson Howard and Leslie W. Slauch for Respondents

Robert E. Steed for the Division of Occupational and
Professional Licensing

Sharon E. Sonnenreich for the Salt Lake Tribune

BY THE BOARD:

On June 20, 1991, Respondents filed a motion to close the hearing in this proceeding to all members of the press and public. On July 1, 1991, the Division filed a memorandum in opposition to that motion and the Salt Lake Tribune filed a petition to intervene with respect to the motion. By Order, dated July 2, 1991, the Court granted that petition and the Intervenor's memorandum in opposition to Respondents' motion was filed on July 3, 1991. Respondents filed replies to the submissions by the Division and the Intervenor on July 9, 1991 and July 10, 1991, respectively.

Oral argument on Respondents' motion was conducted on April 1, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Dentists and Dental Hygienists

Board. Members of the Board present were Mark L. Christensen, Paul R. Lunt, Elizabeth A. Reinerth, Max A. Blackham, Floyd R. Tanner, and Roger E. Grua. The remaining Board member, William E. Dunn, was also present, but Mr. Dunn had been recused from any participation as a Board member in this proceeding and did not participate with respect to the pending motion.


After the conclusion of oral argument, the Board deliberated the matter. Pursuant to Utah Code Ann., Section 52-4-1 et seq., the Board subsequently entered an order, the terms of which are restated as follows:

ORDER

WHEREFORE, IT IS ORDERED Respondents' motion to close the hearing to be conducted before the Board is denied. Specifically, Dr. Lunt, Ms. Reinerth, Dr. Blackham, and Dr. Tanner vote to conduct a hearing in this proceeding which shall be open to the press and public. Dr. Christensen and Dr. Grua would close the hearing.

Dated this 7th day of April, 1992

FOR THE BOARD


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	SUPPLEMENTAL NOTICE
BRENT D. HANSEN	:	AND ACCOMPANYING ORDER
TO PRACTICE AS DENTISTS	:	
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Jackson Howard and Leslie W. Slaugh for Respondents

Robert E. Steed for the Division of Occupational and
Professional Licensing

BY THE ADMINISTRATIVE LAW JUDGE:

The instant adjudicative proceeding was initiated pursuant to an August 17, 1989 Notice of Agency Action. The notice, which was signed by David E. Robinson as the Director of the Division of Occupational and Professional Licensing, recited a hearing would be conducted on October 4, 1989 and indicated the presiding officer at the hearing would be J. Steven Eklund, Administrative Law Judge for the Department of Commerce.

On April 30, 1991, Respondents filed a motion to dismiss. Oral argument was conducted with respect to that motion on May 23, 1991. Prior to conclusion of that argument, counsel for Respondents made inquiry regarding the procedures which would govern any subsequent hearing conducted to address whether a disciplinary sanction would enter as to Respondents' licenses. The Court informed counsel for Respondents as to the respective

roles of both the Dentists and Dental Hygienists Board and the Administrative Law Judge in that process.

Respondents now seek further clarification, urging the presiding officer in this proceeding should be the Administrative Law Judge, as initially indicated in the August 17, 1989 notice. Respondents assert the Administrative Law Judge should enter findings of fact, conclusions of law and then submit any recommendation to the Board for its review. On April 1, 1992, oral argument was presented as to the just-referenced matter and the Administrative Law Judge entered an order, the terms of which are restated as follows:

CONCLUSIONS OF LAW

Respondents assert this proceeding should be conducted in a manner consistent with that set forth in the August 17, 1989 notice. Specifically, Respondents urge no basis exists to designate various presiding officers to act in different capacities during the course of this proceeding. The Division contends the Utah Administrative Procedures Act (hereinafter, the UAPA) provides such flexibility and does not require the same individual or body of individuals to act as the presiding officer for all purposes throughout an adjudicative proceeding.

The UAPA clearly provides that different individuals or entities may act as the presiding officer with regard to a given phase of a proceeding. For example, Section 63-46b-3(2)(a) provides the notice of agency action shall be signed by "a presiding officer". Mr. Robinson thus acted as the presiding officer for that purpose when the August 17, 1989 notice of

agency action was issued. Section 63-46b-3(2)(a)(x) also requires the notice of agency action to identify the "name, title, mailing address and telephone number" of the presiding officer. The confusion in this case has been prompted by the August 17, 1989 notice, which failed to specifically and adequately inform Respondents as to the respective role of the Board and the Administrative Law Judge in this proceeding. In that regard, it is necessary to review the UAPA, the legislative history of Section 13-1-12 and Section 58-1-16 and the nature of agency practice pursuant to those statutes.

The UAPA, which became effective January 1, 1988, generally applies to all state agencies. Section 63-46b-2(h) defines "presiding officer" as:

. . . an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.

Section 63-46b-2(h) further provides:

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding;

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as the presiding officer during all phases of the proceeding.

The just-quoted statutes provide some guidance and limitations regarding who can serve as presiding officers. See Comments of Utah Administrative Law Advisory Committee on the Drafting and Interpretation of the UAPA (Code Co. at 11). Section 63-46b-2(h)(ii) and (iii) jointly operate to provide that different individuals or entities may act as the presiding officer with

respect to a given phase of a proceeding and, significantly, it is not necessary any given presiding officer during an earlier stage of a proceeding continue as the presiding officer throughout the latter stages of the proceeding.

Section 13-1-8.5(1) provides the Department of Commerce and its various divisions shall comply with the UAPA in their adjudicative proceedings. Section 13-1-1 provides the Department may employ administrative law judges to conduct hearings before the Department. Prior to January 1, 1988, Section 13-1-12 stated:

(1) The administrative law judge or an occupational board or representative committee, with assistance from the administrative law judge, shall render a written recommendation of administrative action, supported by findings of fact and conclusions of law . . .

Section 13-1-12 now provides:

(1)(a) At the close of an adjudicative proceeding, the administrative law judge or an occupational board or representative committee with assistance from the administrative law judge, shall issue an order.

Section 58-1-1 et seq. both establishes and generally governs the Division of Occupational and Professional Licensing. Section 58-1-16(1)(a) expressly provides the Division shall comply with the UAPA in all disciplinary licensure proceedings. Prior to January 1, 1988, Section 58-1-16 stated as follows:

(1)(a) Before suspending, revoking, or refusing to renew a license, and before issuing a cease and desist order, the division shall notify the licensee or license applicant of the action by letter deposited in the post office with postage prepaid

addressed to the last address of the licensee or license applicant known to the division, that the action is being considered and that the division will provide the licensee or license applicant with a formal hearing before an appropriate hearing officer or board, as designated by the director.

Section 58-1-16(2) further stated:

All hearings provided under this section shall be held before an appropriate hearing officer or board, as designated by the director, pursuant to Chapter 1, Title 13. The board or hearing officer shall render a written recommendation supported by the findings of fact and conclusions of law made at the hearing together with a recommendation for action. The director, with the concurrence of the appropriate board, may issue a written order based on the recommendations but is not bound to follow the recommendations of the administrative law judge or the hearing officer. The written order of the director shall include the rationale and justification for the decision. If the director does not issue an order within 10 days after the administrative law judge or the hearing officer has made the recommendations, the recommendations shall be binding on the parties to the administrative action.

Section 58-1-16 was amended, effective January 1, 1988. That statute now provides:

(a) All adjudicative proceedings shall be held before an appropriate presiding officer, as designated by the director;

(b) The presiding officer shall make written recommendations for action, findings of fact, and conclusions of law;

(c) The director, with the concurrence of the appropriate board, may issue a written order based on the recommendations but is not bound to follow the recommendations of the presiding officer;

(d) If the director does not issue an order within ten days after the presiding

officer has made the recommendations, the recommendations of the presiding officer shall become the order.

Section 58-7-2(6) specifically governs possible entry of a disciplinary sanction with respect to an individual licensed to practice dentistry. That statute provides:

The division, upon recommendation of the board, may suspend or revoke the license of a dentist or dental hygienist for unprofessional conduct and may reinstate such license.

Prior to January 1, 1988, Section 58-1-16 provided for a hearing before "an appropriate hearing officer or board" and recognized that either the board or the hearing officer was authorized to render a written recommendation. Subsequent amendments to Section 58-1-16 now generally provide that adjudicative proceedings may be held before "an appropriate presiding officer". The statute, as amended, reflects no legislative intent that the presiding officer could not be either an appropriate hearing officer or the board.

Prior to January 1, 1988, Section 13-1-12 authorized either an administrative law judge, or an occupational board or representative committee with assistance from the administrative law judge, to issue findings of fact, conclusions of law and a recommendation for action. Although that statute was subsequently amended, it still authorizes either the administrative law judge, or the board or committee with assistance from the administrative law judge, to issue an order at the close of an adjudicative proceeding (i.e. after the conclusion of a hearing).

The Court takes notice of the fact that the Division's practice has been to designate an administrative law judge as presiding officer for the purposes of ruling on questions of law and procedure and to also designate the appropriate board of the specific licensed profession to enter findings of fact, conclusions of law and a recommendation. Such has consistently been the prevailing agency practice, both prior to and after the 1988 amendments to Section 58-1-16 and Section 13-1-12. It appears that practice has been employed to utilize the respective expertise of an administrative law judge, consistent with the provisions of Section 13-1-11, as well as the recognized expertise of the various boards set forth in Title 58.

To the extent the term "presiding officer" - used in Section 58-1-16 - is ambiguous, a reasonable administrative interpretation and practice should be given some weight. Salt Lake City v. Salt Lake County, Utah, 568 P.2d 738 (1977); Cannon v. Gardner, Utah, 611 P.2d 1207 (1980). Given the reasonable administrative interpretation of - and practice under - the statutes in question, the Court concludes the instant adjudicative proceeding may properly be conducted in a similar manner and the August 17, 1989 notice failed to accurately identify that procedure.

Thus, supplemental notice is now provided that the Board will act as the presiding officer in this proceeding to thus render a written recommended order, supported by the findings of fact and conclusions of law. Consistent with Section 13-1-12(1)(a), further notice is now provided the administrative law

judge will assist the Board in preparing that order for its issuance. Consistent with Section 13-1-11 and the long standing practice in professional disciplinary licensure hearings, notice is further provided the administrative law judge will rule on questions of law and procedure which may arise, both prior to and during the hearing.

One further matter should be addressed. The Court notes Respondents previously filed a June 20, 1991 motion to recuse David E. Robinson from participating in this proceeding. Further, the Division has filed a March 10, 1992 notice, whereby Mr. Robinson has recused himself in that regard. Pursuant to Section 58-1-16, Mr. Robinson could have been otherwise authorized to act as the presiding officer as to any findings of fact, conclusions of law and recommended order entered by the Board.

This Court's March 19, 1992 Scheduling Order indicated oral argument could be presented as to whether any recommended order submitted by the Board may properly be subject to review and subsequent action by David L. Buhler, Executive Director of the Department of Commerce. The UAPA is silent as to both any procedure which governs possible recusal of a presiding officer and the consequences of any such recusal. However, Section 13-1-12(2) provides as follows:

If a division director is unable for any reason to fairly review or rule upon an order of the administrative law judge or a board or committee, the executive director shall review and rule upon the order.

Given the language of the just-quoted statute, it would appear

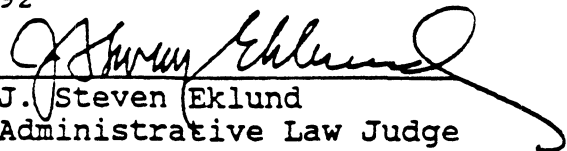
David L. Buhler is thus authorized to rule on any findings of fact, conclusions of law and recommended order subsequently entered by the Board in this proceeding. The Court will contact respective counsel on April 13, 1992 to identify whether Respondents anticipate filing any motion to recuse Mr. Buhler from participation in this proceeding.

ORDER

WHEREFORE, IT IS ORDERED that the Dentists and Dental Hygienists Board shall act as the presiding officer in this proceeding to render a written recommended order, supported by findings of fact and conclusions of law. Further, the administrative law judge will assist the Board in preparing that order for its issuance and the administrative law judge shall rule on all questions of law and procedure which may arise during the pendency of this proceeding.

It is further ordered that any motion to recuse David L. Buhler from participation in this proceeding shall be filed within ten (10) days after the Court has conducted a conference call with respective counsel to determine whether any such motion is anticipated.

Dated this 7th day of April, 1992


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	
BRENT D. HANSEN	:	ORDER ON DIVISION'S
TO PRACTICE AS DENTISTS	:	MOTION IN LIMINE
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Robert E. Steed for the Division of Occupational and
Professional Licensing

Jackson Howard and Leslie W. Slauch for Respondents

BY THE ADMINISTRATIVE LAW JUDGE:

By motion, dated June 14, 1991, the Division seeks to exclude certain evidence in the hearing to be conducted before the Dentists and Dental Hygienists Board in the above-entitled matter. Specifically, the Division urges: (1) evidence concerning K.W.'s prior sexual history and general reputation should be excluded; and (2) evidence of that nature as to other witnesses similarly situated should also be excluded.

Respondents filed a response to the just-described motion on July 1, 1991 and the Division's reply was filed July 2, 1991. Oral argument was conducted April 1, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the matter was taken under advisement.

The Court, now being fully advised in the premises, enters the following:

CONCLUSIONS OF LAW

The Division contends none of the above-referenced evidence is relevant as to whether Respondents engaged in unprofessional conduct, as alleged in the August 17, 1989 Petition. The Division further asserts the evidence should be excluded because its probative value - if any - is substantially outweighed by the danger of unfair prejudice, such evidence would confuse the issues and "drag out details of K.W.'s private life for no legitimate reason or purpose".

Respondents note Count I of the petition, which contains an allegation they took "sexual liberties" with certain patients. Respondents urge that allegation places the sexual activity of the supposed victims at issue, the Board must determine whether the actions allegedly taken were "liberties" or "invited responses" and evidence of the supposed victim's consent is thus relevant.

Respondents also contend K.W.'s past sexual conduct demonstrates her propensity to brazenly pursue sexual relations, the conduct which allegedly occurred between her and Respondents was prompted by her aggressive suggestion and the alleged conduct thus reflects an isolated incident not indicative of any public threat. Respondents thus assert evidence of K.W.'s consenting participation is a relevant mitigating factor to be considered by the Board as to any disciplinary sanction which may be warranted in this proceeding.

Section 63-46b-8 of the Utah Administrative Procedures Act (hereinafter, the UAPA) provides:

(1) . . . in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to avoid all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious . . .
..

Comments of the Utah Administrative Law Advisory Committee on the drafting and interpretation of the UAPA reflect as follows:

The intent of the Advisory Committee was that the grant of authority to the presiding officer found in Section 63-46b-8(1)(a) should be broadly construed. (Code Co. 1988 at 13-14).

The above-quoted statute does not expressly make the Utah Rules of Evidence applicable in formal adjudicative proceedings.

However, Section 63-46b-8(1)(b)(i) allows a presiding officer to exclude irrelevant evidence. Instructively, Rule 401 of the Utah Rules of Evidence defines relevant evidence as:

. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403 generally provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . ."

The evidence which is the subject of this pending motion

specifically involves Rule 404, which states:

(a) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(3) Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

Rule 608 governs evidence offered concerning the character and conduct of a witness as follows:

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

During oral argument on the pending motion, Respondents asserted K.W.'s credibility (or that of any other witness) may be assailed by evidence of the prior sexual history or reputation of that witness. Such assertion is without merit for numerous reasons. First, Rule 608 expressly precludes extrinsic evidence of that nature for such a purpose. Further, prior sexual history of a witness is not probative of the veracity of the witness. In State v. Johns, 615 P.2d 1260, 1264 (Utah 1980), the Utah Supreme Court stated as follows:

Because the law does not and should not recognize any connection between the veracity of a witness and her sexual promiscuity, the

proposed evidence has no relevancy in regard to the truthfulness of her testimony

Such evidence, if offered to attack the credibility of a witness, should be particularly excluded because "its primary purpose and effect" would be to "cast aspersions" on the witness and "besmirch her character" in the eyes of the Board. See Bullock v. Ungricht, 538 P.2d 190, 192 (Utah 1975).

The remaining issue is whether the evidence in question is admissible regarding K.W.'s possible consent (or that of any other patient) to the alleged conduct of either of the Respondents. In State v. Johns, supra, the Court stated:

. . . in cases involving forcible rape or aggravated sexual assault, the fact a woman has consented to sexual activity in the past under different circumstances and with individuals other than the defendant has little if any relevancy to the question of her consent and the situation involved here.

However, . . . there are some cases in which the reputation of the prosecutrix and in which specific prior sexual activity may become relevant and its probative value outweighs the detrimental impact of its introduction. Id. at 1263-64.

The Court thus set forth the following test:

While the balancing of the probative value of the evidence and its detrimental effect is entrusted to the discretion of the trial judge, in the usual case such evidence, either of general reputation or specific prior acts, is simply not relevant to any issue in the rape prosecution including the consent of the prosecutrix. Such evidence is admissible only when the court finds under the circumstances of the particular case such evidence is relevant to a material factual dispute and its probative value outweighs the inherent danger of unfair prejudice to the prosecutrix, confusion of issues, unwarranted invasion of the complainant's privacy, consideration of undue delay and time waste,

and the needless presentation of cumulative evidence. Id at 1264. (Emphasis added.)

Although this is not a criminal proceeding, the just-stated principles are persuasive and should also be applied in this case.

Evidence of consensual participation by a patient with respect to unprofessional conduct allegedly undertaken by either of the Respondents has significant probative value as to both the circumstances which may have prompted whatever occurred between Respondents and a given patient and the nature of any disciplinary sanction which should enter if unprofessional conduct is found to have occurred. The Utah Court of Appeals has recognized the vital function of cross-examination in professional licensure disciplinary proceedings. D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145, 1147 (1989). Respondents may thus cross-examine any given patient concerning the specific circumstances of this case and the possible existence of the above-referenced mitigating factor.

Further, evidence of a patient's prior consensual sexual behavior with a licensed health care professional within the context of a physician/patient relationship has some probative value, insofar as it relates to the issue of consensual participation of that patient in this case. Within the just-stated constraints, Respondents may cross-examine such a witness in this proceeding as to that matter.

However, any evidence of a witness' general prior sexual history or reputation should be excluded for various reasons.

The right to cross-examine a witness "does not entail the right to harrass, annoy or humiliate [a] witness on cross-examination". State v. Chestnut, 621 P.2d 1228, 1233 (Utah 1980), quoting Evans v. Alaska, 550 P.2d 830, 837 (Alaska 1976). Character evidence of prior sexual behavior is often of "slight probative value, is very prejudicial and may confuse the issues at trial". State v. Moton, 749 P.2d 639, 644 (Utah 1988). As that Court further stated:

One of the trial judge's duties is to regulate the admission of character evidence so as to exclude evidence which tends to distract the trier of fact from the main question of what actually happened on a particular occasion. This process prevents the trier of fact from rewarding one individual and punishing another because of their respective characters, instead of focusing upon the evidence in the case. Id.

Given the foregoing, the Court necessarily concludes any evidence of a witness' prior sexual history or reputation - beyond the limited scope of cross-examination identified herein - would unduly subject either K.W. or another witness similarly situated to humiliation and constitute an unwarranted invasion of their privacy. The degree of unfair prejudice which would result is thus clear.

Importantly, such evidence would also tend to confuse the issues and mislead the Board by shifting what should be the predominant focus of this proceeding (i.e., the nature of whatever conduct occurred between Respondents and K.W. or other patients) to the myriad relationships which existed or conduct which occurred regarding any given patient and a third party.

Further, if any extrinsic evidence of that nature were allowed, it would also require the Board to assess the credibility of the various witnesses who testify regarding those relationships. Such would be particularly indirect and potentially fruitless process with respect to the Board's primary charge, which is to determine the nature of Respondents' conduct with respect to K.W. or other patients.

Respondents urge the Board is more capable than a common jury of assessing the evidence sought to be admitted and such evidence should thus be allowed, even though of minimal probative value, because a lesser risk of undue prejudice exists in this administrative setting. The Court is not persuaded Rule 403 is any less applicable in this adjudicative proceeding than it would be in a criminal or civil action. Simply put, the initial and continuing focus of this proceeding should be directed toward whatever conduct was undertaken by either Respondent with respect to those individuals referenced in the petition, the circumstances which prompted whatever may have occurred, whether any basis exists to impose a disciplinary sanction as to either Respondent and the nature of any sanction which is warranted.

Given the disposition of the pending motion, Respondents will thus be allowed to present and support their theory of the case, subject to restrictions which are necessary to ensure the evidence received in this proceeding is admitted within the proper scope of those issues to be addressed by the Board.

ORDER


Evidence of consensual participation by K.W. or another

patient with respect to unprofessional conduct allegedly undertaken by either of the Respondents is admissible in this proceeding. Respondents may thus cross-examine those witnesses concerning those circumstances in an attempt to establish the existence of such a mitigating factor.

Further, evidence of K.W.'s or another witness' prior sexual behavior with a licensed health care professional within the context of a physician/patient relationship shall be also admissible, both on cross-examination of that witness and for possible impeachment purposes on rebuttal.

However, evidence of K.W.'s or another witness' general prior sexual history or reputation shall be excluded for the reasons set forth herein.

Dated this 17th day of April, 1992


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	
BRENT D. HANSEN	:	ORDER ON APPLICABLE
TO PRACTICE AS DENTISTS	:	STANDARD OF PROOF
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Robert E. Steed for the Division of Occupational and
Professional Licensing

Jackson Howard and Leslie W. Slaugh for Respondents

BY THE ADMINISTRATIVE LAW JUDGE:

The instant adjudicative proceeding was initiated pursuant to an August 17, 1989 notice of agency action. Sparing detail, Respondents filed a motion to dismiss on April 30, 1991 and oral argument was conducted on May 23, 1991. Prior to the conclusion of oral argument, counsel for Respondents made inquiry regarding the standard of proof which would govern any subsequent hearing conducted to address whether a disciplinary sanction should enter as to Respondents' licenses.

The Court thus requested both parties to submit memoranda as to that matter. The Division filed its brief on June 11, 1991, Respondents filed their memorandum on June 21, 1991 and the Division's final reply was filed July 1, 1991. Oral argument was subsequently conducted April 1, 1992 and the Court took the matter under advisement.

The Administrative Law Judge, now being fully advised in the premises, enters the following:

CONCLUSIONS OF LAW

Respondents contend the applicable standard of proof in this proceeding should be clear and convincing evidence. Specifically, Respondents urge this proceeding is quasi-criminal in nature and that the Division seeks to impose a punitive sanction which would impinge on their constitutionally protected rights. Respondents also assert Utah courts have required clear and convincing proof in a civil contempt case and such a case is "strikingly similar" to this professional licensure disciplinary proceeding. Given both the nature of this proceeding and Respondents' respective interests in maintaining their ability to practice their chosen profession, they contend the Division should be required to prove its case by clear and convincing evidence.

The Division asserts Utah courts adhere to the general rule that the standard of proof in administrative proceedings is a preponderance of the evidence. The Division notes there is no statutorily established standard of proof which governs the instant proceeding and many other courts in other states have utilized the preponderance standard in professional licensure disciplinary proceedings.

In Rogers v. Division of Real Estate, 790 P.2d 102 (Utah 1990), the Utah Court of Appeals described a professional licensure disciplinary proceeding as:

. . . a special, somewhat unique, statutory proceeding, in which the disciplinary board investigates the conduct of a member of the profession to determine if disciplinary action is appropriate to maintain sound professional standards of conduct and protect the public. Id. at 105-06.

The Utah Court of Appeals has also recognized that a person "whose freedom to pursue his profession is seriously restricted by an official action . . . may compel the government to afford him a hearing complying with the traditional requirements of due process". D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145, 1146 (Utah App. 1989), quoting Endler v. Schutzbank, 68 Cal.2d 162, 436 P.2d 297, 304 (1968).

No statute exists which establishes the standard of proof applicable in this proceeding. The Utah Administrative Procedures Act (Sections 63-46b-1 et seq., hereinafter, the UAPA), those statutes governing the Department of Commerce (Sections 13-1-1 et seq.) and the Division of Occupational and Professional Licensing (Sections 58-1-1 et seq.) are all silent in that regard, although Section 63-46b-16(4)(g) of the UAPA provides the standard on judicial review as "substantial evidence when viewed in light of the whole record before the court". Further, Utah courts have not specifically addressed the appropriate standard of proof in professional licensure disciplinary proceedings initiated by the Division. Thus, the issue presented should be resolved based on a review of analogous cases decided by the courts of this state and the more persuasive decisions rendered by courts in other states.

The Utah Supreme Court has recognized that driver license

revocation proceedings are not necessarily "criminal" or "quasi-criminal" in nature. Ballard v. State Motor Vehicle Division, 595 P.2d 1302, 1304 (Utah 1979). In Ward v. Smith, 573 P.2d 781 (Utah 1978), the Court held a parole revocation hearing was an administrative, rather than a criminal, proceeding. *Id.* at 782. See also Johns v. Shulsen, 717 P.2d 1336 (Utah 1986); Walker v. Board of Pardons, 803 P.2d 1241 (Utah 1990).

In further contrast to prosecutions under criminal statutes, the Utah Supreme Court has acknowledged that a driver license revocation proceeding "requires proof only by a preponderance of the evidence and not beyond a reasonable doubt". Garcia v. Schwendiman, 645 P.2d 651, 652 (Utah 1982). The preponderance standard also applies in a parole revocation proceeding. Johns v. Shulsen, *supra*, at 1338; Walker v. Board of Pardons, *supra*.

Respondents contend their respective interests in the continuation of their livelihood are deserving of more protection than that afforded a motorist merely faced with the loss of driving privileges or a parolee who might lose their conditional freedom. Even assuming Respondents are correct, many courts in sister states have applied the preponderance standard of proof in professional licensure disciplinary proceedings. Rucker v. Michigan Board of Medicine, 138 Mich. App. 209, 360 N.W.2d 154, 155 (1984); In re Schultz, 375 N.W.2d 509, 514 (Minn. App. 1985); Forster v. Board, 103 N.W. 776, 714 P.2d 580, 582 (1986); Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 237 (Iowa 1991).

Other courts have utilized a clear and convincing evidence

test. Ettinger v. Board of Medical Quality Assurance, 185 Cal.Rptr. 601, 603 (1982); In re Zar, 434 N.W.2d 598, 602 (S.D. 1989). In Hogan v. Mississippi Board of Nursing, 457 So.2d 931 (Miss. 1984), the Court characterized a license revocation proceeding as "penal" in nature and thus required proof by clear and convincing evidence. Id. at 934. The South Dakota Supreme Court has emphasized a higher standard of proof should apply in such a proceeding due to the interest involved (i.e., a professional's career), stating:

The revocation of a license of a professional [person] carries with it dire consequences. It not only involves necessarily disgrace and humiliation, but it means the end of [his or her] professional career.

In re Zar, supra.

However, a professional licensure disciplinary hearing is not a criminal proceeding in nature. See Rogers v. Division of Real Estate, supra, and cases cited herein. Concededly, Respondents' respective interests in maintaining their professional livelihood and the possible deprivation of that ability as a result of this proceeding are substantial. In re Polk, 90 N.J. 550, 449 A.2d 7, 14 (1982). Nevertheless, this Court seriously questions Respondents' implicit suggestion that a license to practice dentistry represents a fundamental constitutional right. The New Jersey Court squarely rejected a similar contention in the case of In re Polk, supra, instructively stating as follows:

A license to practice a profession is not a basic individual right. While it embraces a

substantial individual interest which deserves abundant protection, it cannot be equated with a fundamental right, the reasonable regulation of which can be measured and justified only by a compelling state interest. The right to practice medicine itself is granted in the interest of the public and is "always subject to reasonable regulation in the public interest." Id. at 17 (Citation omitted).

In its persuasive and well reasoned decision, the Court further recognized the government's "paramount obligation to protect the general health of the public" and the right of physicians to practice their profession as being "necessarily subordinate to this governmental interest". Id at 14. Significantly, the Court concluded:

We are satisfied that the preponderance of the evidence burden of proof is sufficient for purposes of an administrative adjudication concerning professional guilt and discipline against a licensed medical doctor. In view of the subject matter of such proceedings, the nature of the evidence, the qualifications of witnesses, the special expertise of the tribunal, the relative advantages and resources of the parties, and the minimal risk of inaccurate or erroneous factfinding and final decisionmaking, confidence in a final adjudication would not be imperiled by employing the preponderance of the evidence standard. These proceedings do not demand an enhanced burden of proof. Id. at 16. (All emphasis herein added).

The Utah Supreme Court has frequently addressed the standard of proof applicable in an attorney disciplinary proceeding. In the early case of In re Hanson, 48 Utah 163, 158 P. 778 (1916), the Court commented that evidence in such a proceeding "should be clear and convincing" and such a rule "is based upon a most solid foundation". Id at 779. The Court later recognized the

applicable test as being a "clear preponderance of the evidence".
In re Barclay, 82 Utah 288, 24 P.2d 302, 305 (1933).

In a subsequent case, the Court stated that charges in an attorney disciplinary proceeding "should be clearly sustained by convincing proof and a fair preponderance of the evidence". In re McCullough, 97 Utah 533, 95 P.2d 13 (1939). More recently, the Court has stated as follows:

We agree that because of the seriousness of the consequences to the attorney involved touching upon the important right to follow his vocation and make a livelihood, that such is the established rule (i.e., the persuasion of his misconduct must be by clear and convincing evidence).

In re MacFarlane, 10 Utah 2d 217, 350 P.2d 631, 633 (1960). The somewhat misleading phrase "clear preponderance", as used by the Court in the case of In re Barclay, supra, has been defined by the Washington Supreme Court as follows:

"Clear preponderance" is an intermediate standard of proof in these cases, requiring greater certainty than "simple preponderance" but not to the extent required under "beyond reasonable doubt". This intermediate standard reflects the unique character of disciplinary proceedings. The standard of proof is higher than the simple preponderance normally required in civil actions because the stigma associated with disciplinary action is generally greater than that associated with most tort and contract cases. Yet because the interests in protecting the public, maintaining confidence, and preserving the integrity of the legal profession also weigh heavily in these proceedings, the standard of proof is somewhat lower than the beyond reasonable doubt standard required in criminal prosecutions.

In re Allotta, 109 Wash.2d 787, 748 P.2d 628, 630-31 (1988).

Respondents thus suggest the enhanced standard of proof in attorney disciplinary proceedings should also be applicable in professional disciplinary licensure proceedings initiated by the Division. Since the underlying purpose of disciplining both attorneys and physicians is protection of the public, one court has recognized the same enhanced standard should apply to a practitioner of either profession. Ettinger v. Board of Medical Quality Assurance, supra.

However, the New Jersey Supreme Court has acknowledged a "less stringent burden of proof" can be rationally applied in medical licensure proceedings "as more protective of society's important interest in individual life and health". In re Polk, supra, at 18. Further, the Iowa Supreme Court has upheld dissimilar standards of proof as between those professions "where the regulations being compared have been established by differing branches of government". Eaves v. Board of Medical Quality Examiners, supra.

The Minnesota Supreme Court has addressed the same issue and applied the preponderance standard of proof in a dental licensure disciplinary proceeding, stating:

We note the burden of proof in attorney disciplinary cases is clear and convincing evidence. Attorney disciplinary proceedings, under the supervision and control of the judiciary, are sui generis. Attorney misconduct, striking as it does, at the administration of our justice system, gives society a heightened interest in the outcome of attorney discipline. A higher standard of proof is indicated. (All citations omitted).

In re Wang, 441 N.W.2d 488, 492 (1989). The Court nevertheless

recognized the nature of the proceeding and appropriately provided the following caution:

. . . these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft. The reputation of a profession and the reputation of a professional as well as the public trust are at stake. Id.

Respondents cite other cases decided by the courts of this state where a clear and convincing standard of proof was applied. Wycoff Co. v. Public Service Commission, 13 Utah 2d 123, 369 P.2d 283 (1962); Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). However, neither of those cases involved a disciplinary sanction with respect to a professional license. Since those cases are distinctly different in nature from this proceeding, the principles set forth therein provide no meaningful guidance for purposes of the matter now under review. Further, this tribunal has previously concluded the standard of proof which should apply in professional disciplinary licensure proceedings initiated by the Division is a preponderance of the evidence. In re Barney (Case No. OPL-91-69, filed August 2, 1991).


Based on the foregoing, a considered review of existing case law and the arguments presented by both parties, this Court is not persuaded the standard of proof previously applied in professional disciplinary licensure proceedings initiated by the Division should be abandoned. The Court further concludes the

clear and convincing standard of proof applied in attorney disciplinary proceedings in this state should not be extended as to govern this proceeding.

ORDER

WHEREFORE, IT IS ORDERED the standard of proof in this professional licensure disciplinary proceeding shall be a preponderance of the evidence.

Dated this 17th day of April, 1992


J. Steven Eklund
Administrative Law Judge

APPENDIX C

JACKSON HOWARD (1548),
LESLIE W. SLAUGH (3752) and
LINDA J. BARCLAY (4967), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 19,199

Attorneys for Appellants

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

KENT BLAINE HANSEN and BRENT D. HANSEN,	:	PETITION FOR REVIEW OR, IN THE
	:	ALTERNATIVE, FOR
Petitioners,	:	EXTRAORDINARY RELIEF
	:	
vs.	:	Case No. OPL-89-47
	:	
DIVISION OF OCCUPATIONAL AND	:	
PROFESSIONAL LICENSING,	:	
	:	
Respondent.	:	

Kent Blaine Hansen and Brent D. Hansen, hereby petition the Utah Court of Appeals to permit an appeal from the interlocutory orders of the Honorable J. Steven Ecklund entered in this matter on the following dates:

1. Order on Procedures Governing Disposition of Respondents' Motion To Close Hearing, dated April 7, 1992.
2. Order on Respondents' Motion to Close Hearing, dated April 7, 1992.

3. Supplemental Notice and Accompanying Order, dated April 7, 1992.
4. Order on Division's Motion in Limine, dated April 17, 1992.
5. Order on Applicable Standard of Proof, dated April 17, 1992.

A copy of the orders sought to be reviewed are attached, as is a brief memorandum explaining the jurisdictional basis for this petition for review.

PERSONS SUBSTANTIALLY AFFECTED

Petitioners Kent Blaine Hansen and Brent D. Hansen are the only persons substantially affected by these orders of the Division, although such orders, to the extent that they represent ongoing and established procedures of the Division, may affect all persons against whom actions are brought by the Division.

STATEMENT OF FACTS

On August 17, 1989, the Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah filed a Notice of Agency Action against petitioners Kent Blaine Hansen and Brent D. Hansen. The Notice of Agency Action sought to suspend or revoke petitioners' dental licenses for unprofessional conduct under the provisions of Utah Code Ann. § 58-7-2(6). Among other things, the Notice alleged that petitioners had violated the provisions of Utah Code Ann. § 58-7-1.1(7)(k), (l), (q) and (r) by, among other things, the taking of lewd nude photographs of K.W., a patient, and performing unnecessary treatments in order to exchange drugs for K.W.'s sexual favors. The Notice also indicated that

the presiding officer would be J. Steven Ecklund, Administrative Law Judge for the Department of Commerce.

On April 30, 1991 respondents filed a motion to dismiss this action. On May 23, 1991, the Division heard oral arguments on this motion. As a result, it made a preliminary order as to the identity of the presiding officer. On April 1, 1992, in oral argument, respondents requested a clarification of the identity of the presiding officer. On April 7, 1992, Judge Ecklund filed a Supplemental Notice and Accompanying Order which stated that the Board of Dentists and Dental Hygienists would act as the presiding officer in the hearing to determine factual issues and rendering a written recommended order, and that the administrative law judge would act as the presiding officer regarding legal issues and would assist the Board in preparing that order.

On June 20, 1991, petitioners filed a motion to close the hearing on the matter to all members of the press and public. On July 1, 1991, the Division filed an opposing memorandum. The Salt Lake City Tribune filed a petition to intervene in this motion. On July 2, 1991, the Division granted the Tribune's motion to intervene, and on July 3, 1991, the Tribune filed its memorandum in opposition to petitioners' motion. On July 9 and 10, 1991, petitioners filed replies to the submissions of the Division and the Tribune. Oral argument on this motion was heard on April 1, 1992 by Judge Ecklund. On April 7, 1991, he ordered that petitioners' motion to close the hearing be conducted before the Board and that the hearing was governed by the Open and Public Meetings Act because the Board, rather than the Administrative Law

Judge was the presiding officer authorized to enter findings of fact, conclusions of law and a recommended order subsequent to any hearing on the merits. He also denied petitioners' motion to close the hearing, ordering that the hearing be open to the press and public.

On June 14, 1991, the Division filed a motion seeking to exclude certain evidence, including: (1) K.W.'s prior sexual history and general reputation, and (2) evidence of that nature as to similarly situated witnesses. Petitioners filed a response to this motion on July 1, 1991. On July 2, 1991, the Division filed a reply memorandum. Judge Ecklund heard oral argument on this motion on April 1, 1992. He ordered that evidence of K.W.'s and other witnesses' general prior sexual history or reputation shall be excluded from the proceeding on April 17, 1992.

On June 11, 1991, the Division filed a brief on the issue of the standard of proof which should govern a hearing on the merits of the action. Petitioners filed a response on June 21, 1991, to which the Division replied on July 1, 1991. Judge Ecklund also heard this motion on April 1, 1992. Following the oral argument, on April 17, 1992, he ordered that the standard of proof for professional licensure proceedings initiated by the Division of Occupational and Professional Licensing is the preponderance of the evidence rather than clear and convincing evidence.

Petitioners bring this Petition to appeal from all of these orders.

QUESTIONS OF LAW

1. Did the Administrative Law Judge err in ordering that the Board would act as presiding officer for the purpose of making findings of fact and conclusions of law and, at the same time in the same proceeding, that the Administrative Law Judge would be the presiding officer for purposes of ruling on questions of law and procedure?

2. Did the Administrative Law Judge err in denying petitioners' motion to close the hearing and in ordering that the hearing be open to the press and public?

3. Did the Administrative Law Judge err in ordering that petitioners' motion to close the proceedings to the public and press was governed by the Open and Public Meetings Act because the finder of fact in the present action was the Board rather than the Administrative Law Judge?

4. Did the Administrative Law Judge err in ordering that the evidence of K.W.'s and other witnesses' general prior sexual history be excluded from the proceeding?

5. Did the Administrative Law Judge err in determining that the standard of proof for professional licensing proceedings initiated by the Division of Occupational and Professional Licensing is the preponderance of the evidence rather than clear and convincing evidence?

Petitioners seek, for relief, the resolution of these issues.

ISSUES RAISED BEFORE THE AGENCY

The factual recitation above indicates that each of these issues was briefed and argued before the Division of Professional Licensing, and that the Administrative Law Judge considered

each of these issues and issued separate orders on them. Copies of each of these orders are attached to this Petition.

IMMEDIATE APPEAL NECESSARY

Immediate appeal from these orders is necessary because petitioners will be irreparably harmed if they are forced to continue litigating this matter under these orders in order to obtain a final judgment. The major harm which will, in all probability, ensue should this petition be denied and petitioners be forced to continue litigation under the present orders is the complete, total and irreparable damage to their personal and professional reputations resulting from an open and public hearing on the merits of the case. Because of the extremely controversial and inflammatory nature of the charges made by the Division against petitioners and the highly prejudicial nature of the evidence which might be introduced, petitioners, even if they were ultimately cleared of the Division's charges, would likely lose their dental practices and personal reputations as a consequence of extensive publicity in this matter. That any hearing on the merits will be highly publicized by the press and other media is extremely likely. The Salt Lake Tribune has already intervened in opposition to petitioners' motion to close the proceedings. K.W., one of the more controversial witnesses for the Division, has already appeared on local and national television and made statements about the case, which has already had serious repercussions for petitioners. Should this matter become a "media event," the ensuing trouble and loss of reputation for petitioners will be uncontainable and incalculable. For this reason, an interlocutory appeal on this order is critical to the administration of justice.

Petitioners should not be tried and convicted in the media, as they will almost assuredly be, but the issue should be adjudicated within the non-public confines of the appropriate, legislatively established tribunal.

The issue of the identity of the presiding officer, similarly, needs immediate attention; the Division is only able to justify the application of the Open and Public Meetings Act to the present proceeding because of its order making the Board, rather than the Administrative Law Judge, the trier of fact. The order identifying the presiding officer responsible for factual findings as the Board is, therefore, the "cause" of the closure problem. If the Administrative Law Judge were the trier of fact, as the Utah Administrative Procedure Act contemplates, then the issue of closure of the hearing would possibly not exist. Further, there is substantial chance that this order, which allows the Division to "switch" presiding officers at will during the course of this single matter, in contravention of the intent of the Utah Administrative Procedures Act and other related statutes, will result in substantial arbitrariness and prejudice to petitioners.

Petitioners will also be exposed to substantial prejudice as a result of the remaining two orders, which prejudice could be avoided should this Court grant their Petition for Review. Central to petitioners' defense is evidence of K.W.'s reputation for sexual immorality in general, and her previous, extensive, and ongoing pattern of behavior in seducing other medical practitioners by means of offering sexual favors in return for controlled substances. As a consequence of the Administrative Law Judge's Order excluding evidence of K.W.'s prior sexual history, petitioners' defense will be substantially impaired. This problem should be

remedied immediately, not after rendition of a final order, because petitioners will not be able, under the present order, to even proffer, let alone prove substantial evidence necessary for their defense, making an incomplete and ineffective record for appeal from the final order.

ADVANCE TERMINATION OF LITIGATION

Resolution of all four of these issues on an interlocutory appeal will materially advance the termination of the litigation because all four of them, if not resolved now, will need to be resolved on an appeal if a final order adverse to petitioners is issued. The likelihood of such an adverse result is greatly increased by the exclusion of evidence of K.W.'s prior sexual history, which will deprive petitioners of a substantial and important defense, and the order determining that the applicable standard of proof is the preponderance of the evidence rather than clear and convincing evidence. Should an adverse final order issue, petitioners would appeal these very issues and this Court would consider the appeal. Should this Court find an abuse of discretion on even one of these orders, the matter would have to be heard again at a substantial waste of time and expense to all parties concerned, with the additional danger that memories would have faded and evidence lost. In the context of the present litigation, it would be in the clear interest of efficiency as well as fairness to grant petitioners' Petition for Review of these interlocutory orders.

JURISDICTIONAL BASIS

The present Petition for Review arises from four non-final administrative orders. This petition is, accordingly, brought under two alternative theories of jurisdiction: (1) an

interlocutory appeal under rule 14 of the Utah Rules of Appellate Procedure and Utah Code Ann. § 63-46b-14(2)(b) (1991), and (2) an extraordinary writ under rule 65B of the Utah Rules of Civil Procedure and rule 19 of the Utah Rules of Appellate Procedure.

Interlocutory Appeal

Under the new Utah Administrative Procedures Act (UAPA) and the applicable rules promulgated by the Division of Occupational and Professional Licensing, "[a] party aggrieved may obtain judicial review of final agency action" Utah Code Ann. § 63-46b-14(1). Although the UAPA provides substantial rules for review of final administrative orders, see e.g., Utah Code Ann. §§ 63-46b-12(1)(a) (1991), 63-46b-13(1)(a) (1991), and 63-46b-14 (1991), there appears to be absolutely no provision for an interlocutory appeal from an administrative order, except under following language from Utah Code Ann. § 63-46b-14(2)(b) (1991):

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

. . . .

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Under this language, a party need not exhaust any or all administrative remedies, including obtaining a final order, in order to seek judicial review of the proceeding if the administrative remedies are inadequate or the exhaustion of remedies would result in irreparable harm disproportionate to the public benefit received from exhaustion.

Administrative remedies are inadequate in the present case because irreparable harm will be done to the professional and personal reputations of petitioners, regardless of the outcome of this proceeding, should the hearings be open to the press and public. Petitioners will also be damaged by the three other orders, as discussed above, unless afforded immediate relief. There is no provision in the UAPA or elsewhere that serves to remedy any of these problems. Consequently, the available administrative remedies are inadequate. The damage that would be done to the individual petitioners' reputations and ability to defend themselves from the Division's charges should they not be afforded immediate relief would be devastating to them, effectively putting them out of business regardless of the ultimate outcome of the matter. This is, surely, "irreparable harm disproportionate to the public benefit derived from requiring exhaustion."

Accordingly, this Petition for Review is brought under the applicable provisions of the Utah Rules of Appellate Procedure, including rule 14, which allows for judicial review by the Supreme Court or the Court of Appeals "of an order or decision of an administrative agency, board, commission, committee, or officer." This language does not require that an order appealed from be a final order; because section 63-46b-14(2)(b) allows an interlocutory appeal under the present circumstances, this Petition should be granted.

Further, this Petition is brought within 30 days of the date of the first order appealed from, and supplies the information required in Rule 14. Because this petition is in the nature of an interlocutory appeal, petitioners, in an effort to assist the Court, have followed the

format of a rule 5 petition even though rule 5 is inapplicable to administrative orders under rule 18.

Extraordinary writ.

Rule 65B of the Utah Rules of Civil Procedure allows for relief to be granted under its provisions "where no other plain, speedy, and adequate remedy exists." If this Court should determine that a Petition for Review under rule 14 is unavailable to petitioners, this Court should grant review of the orders at issue under rule 65B.

Under this rule, which was enacted in its present form in 1991, relief is available for several categories of injury, including the wrongful use of or failure to exercise public authority. Utah R. Civ. P. 65B(e) (1992). Under subsection (e), "[a]ppropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion"

Although the form of rule 65B has been substantially changed recently, the substantive intent behind the rule, and the requirements for its application, have not changed over the last several decades. The Utah Supreme Court and the Utah Court of Appeals have given instruction as to how this rule governing extraordinary writs is to be applied. Most instructive are the guidelines set forth in Anderson v. Baker, 5 Utah 2d 33, 296 P.2d 283 (1956):

(1) If the lower tribunal is without jurisdiction or is proceeding in excess of its jurisdiction and there is no adequate remedy, the writ should issue as a matter of right.

(2) If the lower tribunal is proceeding without jurisdiction, but it appears that there is an adequate remedy, the writ should generally not issue, but the court is not entirely without discretion.

(3) If the lower tribunal has jurisdiction but it appears that by an erroneous order it has placed one party in a position where he will be irreparably injured and that he has no adequate remedy to prevent the injury or retrieve his loss, then the court may in the exercise of its sound discretion use the writ as a procedure for intermediate review.

(4) If there is no want or excess of jurisdiction and there is an adequate remedy, the writ should never issue.

Rules (1) and (4) are absolutes. Rules (2) and (3) are guides.

Id. at 285-86, (citations omitted) (emphasis in original) (quoting Robinson v. City Court for City of Ogden, 112 Utah 36, 185 P.2d 256, 261)).

In the present case, petitioners are appealing from orders of an administrative agency which are, in their view, abuses of the agency's discretion, thus falling squarely within subsection (e) of the rule. This situation also falls within section (3) of the Anderson guidelines, in that the Division has jurisdiction over the matter but the erroneous orders of the Division are placing petitioners in a position where they will be irreparably injured absent immediate review of the orders, and there is no other remedy of any sort available for petitioners. Consequently, this Court may, in the exercise of its sound discretion, use an extraordinary writ as a procedure for the intermediate review of the present orders.

It is axiomatic that a party who has an adequate remedy at law cannot avail himself of a rule 65B petition. For example, the plaintiff, in Crist v. Mapleton City, 28 Utah 207, 497

P.2d 633, 634 (Utah 1972), did not avail himself of readily available remedies at law, so "placed himself out of the reach of the extraordinary writ of mandamus." Likewise, the Anderson court ruled that "[a]n extraordinary writ is not a proceeding for general review, and cannot be used as such." Anderson, 296 P.2d at 285. Should this tribunal determine that an appeal under rule 14 is unavailable to petitioners, there is no other available remedy and petitioners should be entitled to review of the orders under rule 65B.

It is equally axiomatic that where there is no adequate remedy at law, a rule 65B petition is available. For example, the Utah Court of Appeals, in Davis County v. Clearfield City, 756 P.2d 704 (Utah Ct. App. 1988), found that an action for extraordinary relief was the appropriate vehicle for obtaining review of the Davis City Council's decision to uphold denial of a conditional use permit sought by Davis County where there was no statutory provision for review of a city council action. Id. at 707. Petitioners, should this Court determine that a rule 14 petition is unavailable, will be similarly situated with Davis County; a rule 65B writ should, therefore, be available to petitioners.

In the present case, it is impractical and inappropriate to file this petition for a writ in the Division because there is no procedural provision for filing such a writ before the Division and a request to to the Division to reverse the order will likely be an exercise in futility.

MEMORANDUM ON THE MERITS

A petition for review brought under rule 14 does not require a memorandum on the merits of the case to be filed at the time the Petition is filed; briefing occurs pursuant to rules

18, 24, and other applicable rules of the Utah appellate courts subsequent to the filing of the Petition. Rule 19 of the Utah Rules of Appellate Procedure requires that a Petition for Extraordinary Writ be accompanied by a memorandum of points and authorities in support of the Petition. Petitioner has not filed such a memorandum concurrently with this Petition for two reasons: First, petitioner has brought this Petition, in the first alternative, as a rule 14 Petition; should this Court determine that rule 14 relief is unavailable to petitioners then petitioners will promptly submit a rule 19 memorandum. Second, to adequately brief the merits of the issues, petitioners must have access to the transcript of the relevant proceedings before the Division. No transcript has yet been prepared, but, under the procedures outlined in rules 15 and 16 of the Utah Rules of Appellate Procedure, would become available. Should this Court grant review on either theory, petitioners seek the assistance of this Court in obtaining the record of the proceedings from the Division, including the relevant transcripts. Petitioners also seek leave of the court in either granting them the opportunity to fully brief the merits of the issues pursuant to rules 18, 24, and all other applicable rules or, in the alternative, granting them an extension of time in which to file a rule 19 memorandum of points and authorities on the merits of the issues.

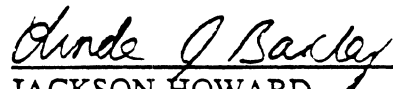
CONCLUSION

Petitioners respectfully request that this Court grant their Petition for Review under the provisions of rule 14 of the Utah Rules of Appellate Procedure and Utah Code Ann. §63-46b-12(2)(b). Should this Court determine that a Petition for Review is not available to petitioners

under these rules, petitioners request that this Court grant review through rule 65B of the Utah Rules of Civil Procedure and rule 19 of the Utah Rules of Appellate Procedure.

Should this Court grant review under either theory, petitioners seek the assistance of the Court in obtaining the record of the proceedings, including the relevant transcripts, from the Division, and permission to brief the merits of the issues in full upon receipt of the transcripts.

DATED this 7th day of May, 1992.



JACKSON HOWARD,
LESLIE W. SLAUGH, and
LINDA J. BARCLAY, for
HOWARD, LEWIS & PETERSEN
Attorneys for Petitioners

APPENDIX D

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

History: Const. 1896.

13-1-12. Order by hearing officer or body — Appeal of order to the division director or the executive director.

- (1) (a) At the close of an adjudicative proceeding, the administrative law judge or an occupational board or representative committee with assistance from the administrative law judge, shall issue an order.
- (b) The order may be appealed to the executive director or the division director for review.
- (2) If a division director is unable for any reason to fairly review or rule upon an order of the administrative law judge or a board or committee, the executive director shall review and rule upon the order.

63-46b-14. Judicial review — Exhaustion of administrative remedies.

- (1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.
- (2) A party may seek judicial review only after exhausting all administrative remedies available, except that:
 - (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
 - (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
 - (i) the administrative remedies are inadequate; or
 - (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.
- (3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13:3(b).
- (b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted

(4) If the agency has denied a stay or other temporary remedy to protect the public health safety, or welfare against a substantial threat the court may not grant a stay or other temporary remedy unless it finds that

(a) the agency violated its own rules in denying the stay or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter,

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings, and

(iv) the threat to the public health safety or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

(a) to carry into effect its judgments, orders, and decrees, or

(b) in aid of its jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals over

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas and Mining and the state engineer,

(b) appeals from the district court review of

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies and

(ii) a challenge to agency action under Section 63-46a-12.1,

(c) appeals from the juvenile courts,

(d) appeals from the circuit courts, except those from the small claims department of a circuit court,

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony,

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony,

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony,

(h) appeals from district court involving domestic relations cases, including but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity,

(i) appeals from the Utah Military Court, and

(j) cases transferred to the Court of Appeals from the Supreme Court

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction

(4) The Court of Appeals shall comply with the requirements of Title 63 Chapter 46b, in its review of agency adjudicative proceedings

Rule 5. Discretionary appeals from interlocutory orders.

(a) **Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

(b) **Fees and copies of petition.** The petitioner shall file with the Clerk of the Supreme Court an original and seven copies of the petition, or, with the Clerk of the Court of Appeals, an original and four copies, together with the fee for filing a notice of appeal in the trial court and the docketing fee in the appellate court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition and filing fee, to the trial court where the petition and order shall be filed in lieu of a notice of appeal. If the petition is denied, the filing fee shall be refunded.

(c) **Content of petition.** The petition shall contain:

(1) A statement of the facts necessary to an understanding of the controlling question of law determined by the order sought to be reviewed;

(2) A statement of the question of law and a demonstration that the question was properly raised before the trial court and ruled upon;

(3) A statement of the reasons why an immediate interlocutory appeal should be permitted; and

(4) A statement of the reason why the appeal may materially advance the termination of the litigation.

(5) The petition shall include a copy of the order of the trial court from which an appeal is sought and any related findings of fact, conclusions of law and opinion.

(d) **Answer.** Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. An original and seven copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) **Grant of permission.** An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. If the petition is granted, the appeal shall be deemed to have been docketed by the granting of the petition, and all proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments.

TITLE III.
REVIEW AND ENFORCEMENT OF ORDERS OF
ADMINISTRATIVE AGENCIES, COMMISSIONS, AND COMMITTEES.

Rule 14. Review of administrative orders: how obtained; intervention.

(a) **Petition for review of order; joint petition.** When judicial review by the Supreme Court or the Court of Appeals is provided by statute of an order or decision of an administrative agency, board, commission, committee, or officer (hereinafter the term "agency" shall include agency, board, commission, committee, or officer), a petition for review shall be filed with the clerk of the appellate court within the time prescribed by statute, or if there is no time prescribed then within 30 days after the date of the written decision or order. The term "petition for review" includes a petition to enjoin, set aside, suspend, modify, or otherwise review a notice of appeal or a writ of certiorari. The petition shall specify the parties seeking review and shall designate the respondent(s) and the order or decision, or part thereof, to be reviewed. In each case, the agency shall be named respondent. The State of Utah shall be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) **Statutory and docketing fees.** At the time of filing any petition for review, the party obtaining the review shall pay to the clerk of the appellate court such filing fees as are established by law, and also the fee for docketing the appeal. The clerk shall not accept a petition for review unless the filing and docketing fees are paid.

(c) **Service of petition.** A copy of the petition for review shall be served by the petitioner on the named respondent(s), upon all other parties to the proceeding before the agency, and upon the Attorney General of Utah, if the state is a party, in the manner prescribed by Rule 3(e). The petitioner, at the time of filing the petition for review, shall also file with the clerk of the appellate court a certificate reflecting service upon all parties to the agency proceeding who have been served.

(d) **Intervention.** Any person who seeks to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and upon all parties who participated before the agency, and file with the clerk of the appellate court a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 40 days of the date on which the petition for review is filed.

Rule 17. Stay pending review.

Application for a stay of a decision or order of an agency pending direct review in the appellate court shall ordinarily be made in the first instance to the agency if the agency is authorized by law to grant a stay. If a motion for such relief is made to the appellate court, the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed those parts of the record relevant to the relief sought. Reasonable notice of the filing of the motion and any hearing shall be given to all parties to the proceeding in the appellate court. The appellate court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

Rule 19. Extraordinary writs.

(a) **Petition for extraordinary writ to a judge or agency; petition; service and filing.** An application for a writ of quo warranto, mandamus, prohibition, certiorari, or other extraordinary writ referred to in Rule 65B, Utah Rules of Civil Procedure, except a writ of habeas corpus, directed to a judge, agency, person or entity shall be made by filing a petition with the clerk of the appellate court or, in an emergency, with a justice or judge of the appellate court. Service of the petition shall be made on the respondent judge, agency, person, or entity and on all parties to the action or case in the trial court or agency. In the event of an original petition in the appellate court where no action is pending in the trial court or agency, the petition shall be served personally on the respondent judge, agency, person or entity and service shall be made by the most direct means available on all persons or associations whose interests might be substantially affected.

(b) **Contents of petition and docket fee.** A petition for an extraordinary writ shall contain the following:

(1) A statement of all persons or associations, by name or by class, whose interests might be substantially affected;

(2) A statement of the issues presented and of the relief sought;

(3) A statement of the facts necessary to an understanding of the issues presented by the petition;

(4) A statement of the reasons why no other plain, speedy, or adequate remedy exists and why the writ should issue;

(5) Except in cases where the writ is directed to a district court, a statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court;

(6) Copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition; and

(7) A memorandum of points and authorities in support of the petition.

Upon receipt of the prescribed docket fee, unless waived by the court, the clerk shall docket the petition.

(c) **Response to petition and oral argument.** Within seven days after service of the petition, or such shorter time as may be fixed by the appellate court, any respondent or any other party may file a response in opposition or concurrence, together with a supporting memorandum of law. The judge, agency, person, or entity and all parties in the action other than the petitioner shall be deemed respondents for all purposes. Two or more respondents may respond jointly. If any respondent does not desire to appear in the proceedings, that respondent may advise the clerk of the appellate court and all parties by letter, but the petition shall not thereby be taken as admitted. Unless the appellate court determines that the petition is frivolous on its face, the clerk shall advise the parties of the date of oral argument.

(d) **Denial or grant of petition.** The court shall deny or grant the petition, and the clerk shall immediately notify the petitioner and all respondents of the court's determination. In an emergency, a single justice or judge may grant a writ subject to review by the court at the earliest possible time.

(e) **Effect of granting petition for writ of quo warranto or certiorari.** If the appellate court grants a petition for a writ of quo warranto or certiorari, it shall order the record to be transmitted by the respondent to whom the writ is directed. The briefing and oral argument shall proceed on an expedited basis, and the clerk shall advise all parties of the dates on which briefs are to be filed and of the date of oral argument. Briefs submitted pursuant to this subsection shall address the merits and shall comply with the requirements of Rules 24 and 27. The appellate court shall issue its opinion as in other cases.

(f) **Number of copies.** An original and seven copies of the petition and any response shall be filed in the Supreme Court. An original and four copies of the petition and any response shall be filed in the Court of Appeals.

(g) **Issuance of extraordinary writ by appellate court sua sponte.** The appellate court, in aid of its own jurisdiction in extraordinary cases, may issue a writ of certiorari sua sponte directed to a judge, agency, person, or entity. A copy of the writ shall be served on the named respondents in the manner and by an individual authorized to accomplish personal service under Rule 4, Utah Rules of Civil Procedure. In addition, copies of the writ shall be transmitted by the clerk of the appellate court, by the most direct means available, to all persons or associations whose interests might be substantially affected by the writ. The respondents and the persons or associations whose interests are substantially affected may, within four days of the issuance of the writ, petition the court to dissolve or amend the writ. The petition shall be accompanied by a concise statement of the reasons for dissolution or amendment of

Rule 65B. Extraordinary relief.

(a) **Availability of remedy.** Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful imprisonment), paragraph (c) (involving other types of wrongful restraint on personal liberty), paragraph (d) (involving the wrongful use of public or corporate authority) or paragraph (e) (involving the wrongful use of judicial authority and the failure to exercise such authority). There shall be no special form of writ. The procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) Wrongful imprisonment.

(1) **Scope.** Any person committed by a court to imprisonment in a state prison, other correctional facility or county jail who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement.

(2) **Commencement.** The proceeding shall be commenced by filing a petition, together with a copy thereof, with the clerk of the court in which the commitment leading to confinement was issued, except that the court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(3) **Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to the legality of the commitment. Additional claims relating to the legality of the commitment may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(i) the place where the petitioner is restrained.

(ii) the name of the court by which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner.

(iii) in plain and concise terms, all of the facts on the basis of which the petitioner claims a substantial violation of rights as the result of the commitment.

(iv) whether or not the judgment of conviction or the commitment for violation of probation or parole has been reviewed on appeal, and if so, the number and caption or title of the appellate proceeding and the results of the review.

(v) whether the legality of the commitment has already been adjudicated in any prior post-conviction or other civil proceeding, and if so, the reasons for the denial of relief in the prior proceeding.

(4) **Attachments to the petition.** The petitioner shall attach to the petition affidavits, copies of records or other evidence available to the petitioner in support of the allegations. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the commitment, and a copy of all orders and memoranda of the court. If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.

(5) **Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(6) **Assignment by the presiding judge.** On the filing of the petition, the clerk shall promptly deliver it to the presiding judge of the court in which it is filed. The presiding judge shall if possible assign the proceeding to the judge who issued the commitment.

(7) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the issues presented in the petition have already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(8) **Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition is not frivolous on its face, the court shall designate the portions of the petition that are not frivolous and direct the clerk to serve a copy of the petition and a copy of any memorandum by mail upon the attorney general and the county attorney.

(9) **Responsive pleading.** Within twenty days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the attorney general and county attorney, or within such other period of time as the court may allow, the attorney general or county attorney shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within twenty days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(10) **Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. Upon motion for good cause, the court may grant leave to either party to take discovery or to extend the date for the hearing. Prior to the hearing, the court may order either the petitioner or the state or county to obtain any relevant transcript or court records. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding.

(11) **Orders.** If the court rules in favor of the petitioner, it shall enter an appropriate order with respect to the validity of the challenged commitment and with respect to rearraignment, retrial, resentencing, custody, bail or discharge. The court shall enter findings of fact and conclusions of law, as appropriate, following any evidentiary hearing or any hearing on a dispositive motion. Upon application of the attorney general or the county attorney, or upon its own motion, the court may stay release of the petitioner pending appeal of its order.

(12) **Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is unable to pay the costs of the proceeding, the petitioner may proceed upon an affidavit of impecuniosity, in which event the court may direct that the costs be paid by the county in which the complainant was originally charged.

(13) **Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

(c) Other wrongful restraints on personal liberty.

(1) **Scope.** Except for instances governed by paragraph (b) of this rule, this paragraph (c) shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) **Commencement.** The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) **Contents of the petition and attachments.** The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(5) **Issuance and contents of the hearing order.** If the petition is not dismissed as being frivolous on its face, the court shall issue a hearing order directing the respondent to appear before the court at a specified time for a hearing on the legality of the restraint. The court shall direct the clerk to serve a copy of the petition and the hearing order by mail upon the respondent. In the hearing order, the court may direct the respondent to bring before it the person alleged to be restrained. The court may direct the respondent to file an answer to the petition within a period of time specified in the hearing order. If the petitioner waives the right to be present at the hearing, the hearing order shall be modified accordingly.

(6) **Temporary relief.** If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(7) **Alternative service of the hearing order.** If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(8) **Avoidance of service by respondent.** If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(9) **Hearing and subsequent proceedings.** At the time specified in the hearing order for the hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. If the hearing order requires an answer to the petition, the respondent shall file an answer within the time prescribed in the hearing order. The answer shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(d) Wrongful use of or failure to exercise public authority.

(1) **Who may petition the court; security.** The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph (d). Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph (d) may petition the court under this paragraph (d) if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this

paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(2) **Grounds for relief.** Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(3) **Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(e) Wrongful use of judicial authority or failure to comply with duty.

(1) **Who may petition.** A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph (e) may petition the court for relief.

(2) **Grounds for relief.** Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; or (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled.

(3) **Proceedings on the petition.** On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) **Scope of review.** Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

(Amended effective September 1, 1991.)