

1995

John L. Black v. H. James Clegg, Paul T. Moxley,
John C. Baldwin, Stephen A. Trost and Nayer H.
Honarvar : Appellant's Addendum of Exhibits

Utah Court of Appeals

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Carmen E. Kipp; Gregory J. Sanders; Sandra L. Steinvoort; Kipp and Christian, P.C.; Thomas L. Kay; Snell & Wilmer; Attorneys for Appellees.

Parker M. Nielson; Daniel Darger; Attorneys for Appellant.

Recommended Citation

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UTAH SUPREME COURT

BRIEF

950334

IN THE SUPREME COURT OF THE STATE OF UTAH

John L. Black,

Plaintiff/Appellant,

v.

H. James Clegg, Paul T. Moxley,
John C. Baldwin, Stephen A.
Trost and Nayer H. Honarvar

Defendant/Appellees,

:
:
:
:
:
:
:
:
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:
:

Case No. 950334
940903074CV

Priority no. 5

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH, The Honorable Glenn K. Iwasaki

APPELLANT'S ADDENDUM OF EXHIBITS

CARMEN E. KIPP
GREGORY J. SANDERS
SANDRA L. STEINVOORT
KIPP AND CHRISTIAN, P.C.
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111

THOMAS L. KAY
SNELL & WILMER
111 E. Broadway, #900
Salt Lake City, Utah 84111

Attorneys for Appellees

PARKER M. NIELSON
655 South 200 East
Salt Lake City, Utah 84111

DANIEL DARGER
1000 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

Attorneys for Appellant

FILED
MAR 11 1996
CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

John L. Black,	:	
	:	
Plaintiff/Appellant,	:	Case No. 950334
	:	940903074CV
v.	:	
	:	
H. James Clegg, Paul T. Moxley,	:	Priority no. <u>5</u>
John C. Baldwin, Stephen A.	:	
Trost and Nayer H. Honarvar	:	
	:	
Defendant/Appellees,	:	

**ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH, The Honorable Glenn K. Iwasaki**

APPELLANT'S ADDENDUM OF EXHIBITS

CARMEN E. KIPP
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KIPP AND CHRISTIAN, P.C.
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111

PARKER M. NIELSON
655 South 200 East
Salt Lake City, Utah 84111

DANIEL DARGER
1000 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

THOMAS L. KAY
SNELL & WILMER
111 E. Broadway, #900
Salt Lake City, Utah 84111

Attorneys for Appellees

Attorneys for Appellant

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CARMAN E. KIPP, ESQ. - #1829
GREGORY J. SANDERS, ESQ. - #2858
KIPP AND CHRISTIAN, P.C.
Attorneys for Respondents
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

8-12-81

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN L. BLACK,	:	
	:	RESPONSE TO PETITION FOR
Petitioner,	:	EXTRAORDINARY WRIT
	:	
vs.	:	
	:	Case No. 930381
NAYER HONARVAR, STEPHEN L.	:	
TROST, H. JAMES CLEGG,	:	
PRESIDENT, and UTAH STATE BAR,	:	
	:	
Respondents.	:	

Respondents hereby respond to the Petition for Extraordinary Writ as follows:

FIRST RESPONSE

Petitioner fails to state an appropriate claim for relief under circumstances where no other plain, speedy, and adequate remedy is available.

SECOND RESPONSE

1. Respondents admit Utah Code Ann. §78-2-2(2) provides that the Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs.

2. Respondents deny the allegations contained in Paragraph B on page 1 stating that the Respondents have "exceeded their jurisdiction or abused their discretion." Respondents, in this instance as in all disciplinary matters, have acted in accordance with the Procedures of Discipline of the Utah State Bar (POD) promulgated by the Supreme Court on 7/1/87.

3. Respondents admit the allegations contained in Paragraph C, Page 1 of the petition.

4. Respondents deny the allegations contained in Paragraph D, Page 1 of the petition. See the Respondents' answer to Paragraph 2 above.

5. Respondents admit that John Black is a resident of Utah and a member of the Utah State Bar since 1952.

6. Respondents admit the allegations contained in Paragraph B on Page 2 of the petition.

7. Respondents admit the allegations contained in Paragraphs C, D, and E on Page 2 of the petition.

8. Respondents deny the factual allegations contained in "Petitioner's Statement of Issues," Paragraphs A, B, C, and D on Page 3 .

9. Respondents admit with reference to Paragraph A, Page 4 that (a) a hearing panel entered Findings, Conclusions, and

a Recommendation on 6/18/93, (b) following the procedure of Rule XII(e) POD the Board reviewed the same on 6/24/93 and a copy of the Findings, Conclusions and Recommendation and Order Affirming on Findings, Conclusions and Recommendation of the Hearing Panel was forwarded to Mr. Black's counsel the following Tuesday, 6/29/93, by certified mail, (c) Mr. Black was found to have violated Rules 8.4(c) and 1.13(b) of the Rules of Professional Conduct (RPC), (d) Mr. Black's counsel filed a Petition for Reconsideration on 7/9/93 knowing that the POD Rule XII(f) was abolished on June 30, 1993, and (e) the Respondent Trost filed a Motion for Clarification on 7/19/93 with this Court seeking appropriate guidance.

10. Respondents deny the allegations contained in Paragraph B on Page 5 of the petition and affirmatively state that the lien language directly above John Black's signature speaks for itself and determines the extent of Black's obligation.

11. Respondents admit the "Procedural History" of events contained in Paragraph C of Page 6 and deny the balance of said paragraph and affirmatively state that Respondent's counsel never objected nor requested a continuance of the trial for lack of time to prepare a defense or for any other reason.

12. Respondents deny the allegations contained in Paragraph D on Page 7 of the petition. The case in chief was generally based upon the evidence that the Office of Attorney Discipline (formerly known as the Office of Bar Counsel) introduced, admissions in the pleadings, and stipulations between the

parties. Neither the Petitioner nor the Respondents can precisely refer to what transpired at the trial because neither the record nor the transcript are available at this time.

13. Respondents deny that no final order has been entered as alleged on Page 8 of the petition entitled "STATEMENT OF REASONS WHY NO OTHER PLAIN, SPEEDY OR ADEQUATE REMEDY EXISTS." The appropriate course of action asserted by the Office of Attorney Discipline is an appeal wherein both parties can brief the issues, cite to the record and cite to a transcript.

14. Respondents, referring to the "STATEMENT OF REASONS WHY IT IS IMPRACTICAL OR INAPPROPRIATE TO PETITION THE DISTRICT COURT," p. 9, admit that the district court lacks jurisdiction in that a trial on the merits has occurred and errors are alleged that should be briefed and heard by this Court.

15. Respondents have submitted a Memorandum Supporting Response to Petition for Extraordinary Writ and in opposition to Respondent's "MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION," p. 9., but as to specific factual allegations, responds as follows:

a) Respondents deny the allegations contained under the heading "Point I," appearing on Pages 10 through 17 of the petition.

b) Respondents deny the allegations contained under the heading "Point II," Pages 17 through 25 of the petition. The fact is that John Black, in order to receive the diagnostic and treatment report from Dr. C. M. Wilkerson, agreed to execute and

return to Dr. Wilkerson the "lien." Thereafter, he received the medical report, settled the personal injury case with the insurance carrier, took his fees and costs, and remitted the balance to his client without honoring the lien. This was found to be in violation of Rules 1.13(b) and 8.4(c) of the Rules of Professional Conduct. To say that the conduct is simply a breach of contract issue is both misstating the facts and contrary to the conclusions of three adjudicative bodies, namely, the screening panel, the hearing panel, and the Board of Bar Commissioners, and as well as the weight of authority from other jurisdictions.¹

c) Respondents deny the allegations contained under the heading "Point III," Pages 25 through 30 of the petition. With respect to the outstanding amount, John Black, at trial, personally acknowledged the receipt of the billing statement from Dr. Wilkerson in the amount of approximately \$2,685.00. Subsequently and for a short period of time, January through September of 1992, Ms. Landers made a total payment of \$220.00, leaving an outstanding balance of \$2,465.00. The Hearing Panel, at its own discretion, recommended that John Black make a restitution payment of \$1,635.91, see copy of Finding of Facts, Conclusions of Law & Recommendation attached hereto as Exhibit "A." With reference to

¹ Johnstone v. State Bar, 64 Cal. 2d 153 (1966) (when an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. Thus the funds in his possession are impressed with a trust and his conversion of such funds is a breach of trust; Galardi v. State Bar, 43 Cal. 3d 683 (1987); Guzetta v. State Bar, 43 Cal. 3d 962 (1987); In Re Charles Rawson, New Mexico Sup. Ct. #15,897 (filed June 1, 1992); Alaska Bar Opinion 86-4 (1988); Arizona Bar Opinion 88-2 (1988); Washington Formal Opinion #185

the allegations of extortion, Pages 27 & 28 of the petition, Steve Trost and Nayer Honarvar deny said allegations. The recommendations of discipline and restitution were made initially by the Screening Panel. The Screening Panel's recommendation of Private Reprimand was conditioned upon John Black making restitution payment to Dr. Wilkerson. The Screening Panel has traditionally relied upon the authority of Rule I, IV(d), VII(h) and Rule IX(d)(C) to fashion a sanction in the best interest of the complainant, the respondent, the administration of justice and the standards of professional conduct. (See Exhibit B.) Black rejected the Screening Panel's conditional offer of a Private Reprimand and the matter was voted formal. After the trial on June 15, 1993, the Hearing Panel entered its Findings of Fact, and Conclusions of Law and also Recommended that John Black make restitution to Dr. Wilkerson. At no time during the investigation and prosecution of the Black case did Steve Trost or Nayer Honarvar make any demand for restitution from John Black or impose any sanction on him.

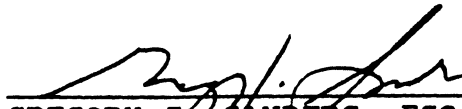
d) Respondents deny the allegations contained under the heading "Point IV," Pages 30 through 34 of the petition. The allegations that Nayer Honarvar and Steve Trost acted in bad faith are wholly unfounded. Respondents, upon receiving the letter of complaint from Dr. Wilkerson, simply engaged in the investigation and prosecution of the alleged violations of the Rules of Professional Conduct. Their conduct falls squarely within the procedures of discipline.

e) Respondents deny any award of attorney fees is appropriate since the actions taken by the Respondents were pursuant to the Procedures of Discipline and accordingly, the Respondents are immune pursuant to Rule XVI POD and the reasoning and holding of Bailey v. Utah State Bar, 205 Utah Adv. Rep 3 (SC, 1/20/93).

WHEREFORE, Respondents request the Court dismiss the Petition for Extraordinary Writ for the above-stated reasons and for those reasons explained in the Supporting Memorandum of Law which accompanies this response.

DATED this 12th day of August, 1993.

KIPP AND CHRISTIAN, P.C.


GREGORY J. SANDERS, ESQ.
Attorneys for Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12th day of August, 1993, I caused two true and correct copies of the foregoing to be mailed, postage prepaid, to the following:

Parker M. Nielson, Esq. #2413
655 South 200 East
Salt Lake City, UT 84111

BAR\BLACK\PL2



NAYER H. HONARVAR, #5484
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 S. 200 E.
Salt Lake City, Utah 84111
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

Disciplinary Hearing Panel:
Robert S. Howell, Chair
Sandra L. Sjogren
Stanley B. Bonham


In the Matter of the)	
Complaint by)	
)	
C. M. WILKERSON	)	ORDER AFFIRMING
	)	FINDINGS OF FACT
against	)	CONCLUSIONS OF LAW AND
	)	RECOMMENDATION OF DISCIPLINE
)	
JOHN L. BLACK	)	F-557
DOB: 8-25-23)	
ADM: 6-12-52)	

Pursuant to Rule XII(e) of the Procedures of Discipline, the Board has reviewed the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Disciplinary Hearing Panel. Upon the recommendation of the Office of Bar Counsel the Public Reprimand be reduced to a Private Reprimand, the Board hereby recommends that for violating Rules 8.4(c), Misconduct; and 1.13(b), Safekeeping Property, of the Rules of Professional Conduct of the Utah State Bar, the Respondent be ordered as follows:

1. Respondent make restitution to C. M. Wilkerson in the amount of \$1,635.91 or the outstanding balance of Wilkerson's bill, whichever is less within thirty (30) days from the entry of the final order by the Supreme Court; and
2. Respondent be Publicly Reprimanded.

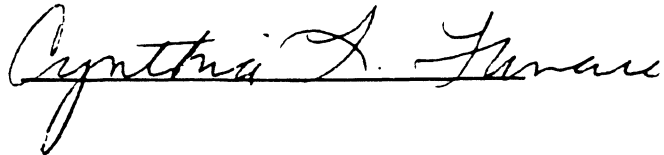
DATED this 24th day of June, 1993.

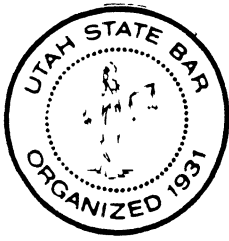
BOARD OF BAR COMMISSIONERS

By: 
H. James Clegg
President-Elect

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was mailed to Parker M. Nielson, Attorney at Law at 655 South 200 East, S.L.C., UT 84111 on this 29 day of June, 1993.





Utah State Bar

Office of Bar Counsel

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111 3834
Telephone (801) 531-9110 • FAX (801) 531-0660 • WATS 1 800-698-9077

June 1, 1993

Stephen A. Trost
Bar Counsel

P. Gary Ferrero
Assistant Bar Counsel

Nayer H. Honarvar
Assistant Bar Counsel

Wendell K. Smith
Assistant Bar Counsel

Pamela Blevins
Paralegal

Boyd Bryan
Paralegal

Parker Nielson
Attorney at Law
655 S. 200 E.
S.L.C., UT 84111

RE: Formal Complaint F-557 against John Black

Dear Mr. Nielson:

Enclosed please find a copy of a minute entry by the Utah Supreme Court adopting new procedural rules for disciplinary cases. A copy of those rules are enclosed for your convenience.

Please note that hearing panels will cease to exist as of June 30, 1993. All formal cases will be transferred to the district court with proper venue as of July 1, 1993. Accordingly, there is a narrow window of opportunity to settle your case. The Bar Commission will conduct their final review of proposed disciplines by consent on June 25 which provides enough time to have the same to the Supreme Court by June 30. Thereafter the Bar Commission will no longer be involved in any way with discipline.

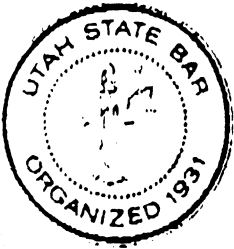
In order to provide a reasonable amount of time for each Bar Commissioner to review the proposed disciplines by consent prior to their meeting on June 25, the same must be signed by June 18.

If you would like to seriously discuss a discipline by consent, please call me at your earliest possible convenience.

Sincerely,

Nayer H. Honarvar
Nayer H. Honarvar
Assistant Bar Counsel

NHH:clf
Enclosures
2079



Utah State Bar

Office of Bar Counsel

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834

Telephone (801) 531-9110 • FAX (801) 531-0660 • WATS 1-800-698-9077

Stephen A. Trost
Bar Counsel

P. Gary Ferrero
Assistant Bar Counsel

Nayer H. Honarvar
Assistant Bar Counsel

Wendell K. Smith
Assistant Bar Counsel

Pamela Blevins
Legal Secretary

Boyd Bryan

M E M O R A N D U M

TO: Penny S. Brooke, Maureen L. Cleary, Charles H. Thronson, Elliot J. Williams, Daniel W. Hindert, Dennis V. Haslam, Randy L. Dryer, Brent Wilcox (UTLA), Elizabeth Conley, Richard Dibblee and John C. Baldwin

FROM: Stephen A. Trost, Bar Counsel

DATE: April 27, 1993

RE: Proposed Interprofessional Code, Third Edition, Dated February 4, 1993

On April 22, 1993 the Bar Commission reviewed the Third Edition of the Interprofessional Code. I pointed out to the Commission that Section IX(E), entitled "Responsibility for Payment of Physician's Charges," could be improved by (1) a further explanation of the ethical responsibilities of an attorney regarding a client's medical expenses, and (2) an explanation of an attorneys duties when a medical lien is being asserted by a provider. Attached as Exhibit 1 please find a copy of the original section with additions noted in brackets.

The Rules of Professional Conduct specifically provide in Rule 1.8(e)(1) and (2) that a lawyer may advance court costs and expenses of litigation contingent upon the outcome of the case and for indigent clients the same may be provided whether or not the retainer agreement requires repayment. Therefore, I have included additional language to the first sentence of Section IX(E) referencing this rule.

The more substantive addition concerns medical liens. This office frequently reviews claims by providers that an attorney has breached the Rules of Professional Conduct, specifically Rule 8.4(c), by ignoring a medical lien executed by the client and the provider and distributing the proceeds of a settlement or judgment directly to the client, or even worse, being a signatory of the lien and distributing funds without regard thereto.

It occurs to me that by simply adding a short third paragraph to Section IX(E), as indicated in Exhibit 1, could help alleviate conflict and tension in this area.

The Bar Commission suggested that I contact the above-referenced individuals for their perspective on my proposal and, accordingly, I would welcome your thoughts. Please give me a call or forward your comments before May 3, 1993, since the full Legal/Health Care Committee is meeting May 4, 1993 to discuss any proposals for amendments and to adopt a final version of the same.

Thank you for your cooperation.

INTERPROFESSIONAL CODE

E. Responsibility for Payment of Physician's Charges

An attorney is ethically forbidden to pay debts, medical or otherwise, incurred by a client [except as provided in Rule 1.8(e) of the Rules of Professional Conduct]. However, where the attorney contracts for services on behalf of his/her client, which expenses are necessary to the proper preparation and presentation of the client's case, the attorney should expect to make payments for the services. Therefore, while the attorney should not ~~(and ethically cannot)~~ pay for or guarantee payment of medical services rendered to the client [except where obligated by a medical lien], the attorney should pay directly for medical reports, conferences with physicians, time spent in depositions or in court, and look to the attorney's client for reimbursement of these costs which the attorney has advanced on behalf of the client.

The physician should bill the patient and not the attorney for medical care rendered to the patient. The physician should bill the attorney for services rendered on behalf of the patient at the attorney's request. The attorney should pay these amounts promptly and as they are billed, and should not wait the outcome of litigation before paying the same.

[Where the attorney is directed not to honor, in whole or in part, an otherwise lawful medical lien, an attorney shall either (1) hold in trust sufficient funds from the proceeds to pay off the lien and expeditiously pay the same upon receipt of a written¹⁴

authorization executed by the client and the provider, or (2) interplead sufficient funds to pay off the lien in the event that the client and provider cannot agree on a settlement amount.]

ORIGINAL

FILED

Stephen A. Trost, #3286
Chief Disciplinary Counsel
Office of Attorney Discipline
645 S. 200 E.
SLC, UT 84111-3834
801-531-9110

DEC 13 1993

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of
the Complaint by

C.M. WILKERSON

against

JOHN L. BLACK
DOB: 08-25-23
ADM: 06-12-52

ORDER OF DISCIPLINE:
PUBLIC REPRIMAND

F- 557

930594

Having reviewed the Findings of Fact, Conclusions of Law and Recommendation of the Hearing Panel of the Disciplinary Hearing Panel Committee of the Utah State Bar dated June 18, 1993, and having reviewed the Order of the Board of Commissioners of the Utah State Bar dated June 24, 1993, this Court, being fully advised in the premises, orders and decrees as follows:

IT IS HEREBY ORDERED That the Order of the Board of Bar Commissioners affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the above-referenced Hearing panel be and the same hereby is approved.

IT IS FURTHER ORDERED That the Findings of Fact, Conclusions of Law, and Recommendation of Discipline of the above-referenced Hearing Panel be and the same hereby is incorporated herein as though fully set forth.

IT IS FURTHER ORDERED That the Respondent, JOHN L. BLACK, be and he hereby is disciplined for conduct unbecoming a member of the Utah State Bar as follows:

1. That Respondent shall make restitution to C.M. Wilkerson in the amount of \$1,635.91 or the outstanding balance of Wilkerson's bill, whichever is less within thirty (30) days from the entry of this order.

2. That Respondent shall be PUBLICLY REPRIMANDED.

DATED this _____ day of _____, 1993.

UTAH SUPREME COURT

Gordon R. Hall
Chief Justice

Richard C. Howe
Associate Chief Justice

I. Daniel Stewart
Justice

Christine M. Durham
Justice

Michael D. Zimmerman
Justice

Approved as to form:

Parker M. Nielson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing proposed Order of Discipline was mailed postage pre-paid to Parker M. Nielson, Attorney for Respondent at 655 South 200 East, S.L.C., UT 84111 on this 20th day of October, 1993.

Cynthia L. Jensen

Parker M. Nielson Attorney at Law (P.C.)

655 South 200 East
Salt Lake City, Utah 84111
(801) 532-1150

June 3, 1993

Hand Delivered

Stephen A. Trost
Bar Counsel
Utah State Bar
645 South 200 East, Suite 205
Salt Lake City, UT 84111-3834

Nayer H. Honarvar
Assistant Bar Counsel
Utah State Bar
645 South 200 East, Suite 205
Salt Lake City, UT 84111-3834

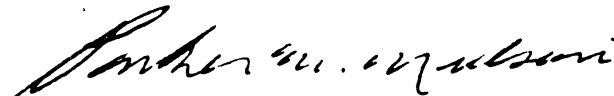
Re: Formal Complaint F-557 against John Black

Dear Mr. Trost and Mrs. Honarvar:

Mrs. Honarvar's letter of June 1, 1993 is certainly good news. We are gratified to learn that this matter will now be handled by a real court.

I agree that this development provides "a narrow window of opportunity." After July 1 you and Mrs. Honarvar will be subject to the same rules as apply to other litigants, including Rule 11 and the prohibitions against bad faith litigation contained in Utah Code Annotated § 78-27-56. In the same spirit as expressed in Mrs. Honarvar's letter of June 1, Mr. Black will accept a stipulation to dismiss your groundless, bad faith complaint prior to July 1. Failing your doing so, Mr. Black has expressed a resolve to pursue his remedy under the foregoing provisions.

Sincerely,



Parker M. Nielson

PMN/lh (0691)
cc: John Black Esq.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR


HEARING PANEL:
Robert S. Howell, Chair
Sandra L. Sjogren
Stanley B. Bonham

In the Matter of the)	
Complaint by:)	
	)	NOTICE OF TRIAL
C.M. WILKERSON)	
)	
	)	F-557
against)	
)	
JOHN L. BLACK)	
DOB: 05-25-23)	
ADM: 06-12-52)	

TO: JOHN L. BLACK

Notice is hereby given that a trial in the above-entitled matter will be heard on Tuesday, June 15, 1993 at 9:00 a.m. in the Utah State Bar Law and Justice Center, 645 South 200 East, Salt Lake City, Utah 84111 before the above-named hearing panel.

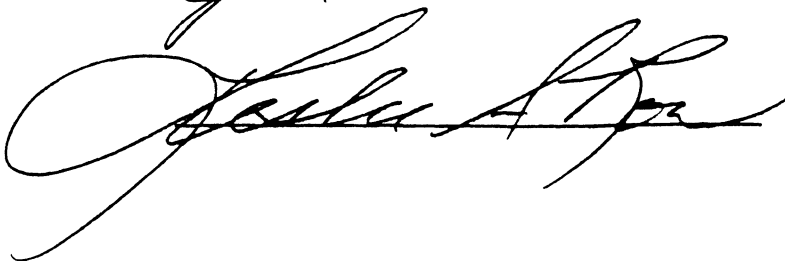
DATED this 7th day of June, 1993.



John C. Baldwin
Executive Director

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Notice of Hearing was hand delivered to Parker M Nielson, Attorney for Respondent John L. Black at 655 South 200 East, Salt Lake City, Utah 84111 on this 7th day of June, 1993.



Parker M. Nielson
Attorney for Respondent

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

Hearing Panel:
Robert S. Howell, Chair
Sandra L. Sjogren
Stanley B. Bonham

In the Matter of the	:	
Complaint by	:	
C. M. WILKERSON	:	FINDINGS OF FACT,
against	:	CONCLUSIONS OF LAW &
	:	RECOMMENDATION
JOHN L. BLACK	:	
DOB: 08-25-23	:	F-557

On June 15, 1993, the Hearing Panel convened for a formal hearing of the complaint by C. M. Wilkerson. Nayer H. Honarvar and Stephen A. Trost appeared on behalf of the Office of Bar Counsel. John L. Black appeared in person and was represented by Parker M. Nielson. From the evidence presented at the hearing, the Panel makes the following:

FINDINGS OF FACT

1. John L. Black [hereafter Black] represented Ruby Landers [hereafter Landers] in a personal injury claim against 7-11 Stores beginning August 13, 1990 (ex. A).
2. The fee for Black's services was a contingency fee of 33 1/3% of any recovery from 7-11 (ex. A).
3. On August 16, 1990, Landers notified Black that she had seen on that day a chiropractic physician, C. M. Wilkerson [hereafter

Wilkerson], due to persistent pain from her injuries (ex. c).

4. Black received a form entitled "Authorization of Direct Payment and Doctor's Lien" [hereafter Lien] which he signed and returned to Wilkerson along with a letter dated August 20, 1990 requesting a medical report (ex. D, ex. E).

5. The Lien, which is signed by Landers and Black, clearly directs Black to withhold sufficient funds from Landers' settlement for the amount due Wilkerson and to pay Wilkerson for his medical services (ex. E).

6. Black's signature on the Lien appears directly below a paragraph which clearly states that Black agrees to withhold the funds from the settlement to protect Wilkerson.

7. Black glanced over the Lien and realized that it involved paying Wilkerson for his medical services out of any recovery received by Landers.

8. On February 19, 1991, Black again wrote to Wilkerson requesting a medical report for use in settling the case (ex. F).

9. Wilkerson produced a report dated February 19, 1991 (ex. H).

10. Black received the report from Wilkerson.

11. Black sent a copy of the report to the insurance adjustor who represented 7-11's insurer.

12. Mr. Tsakalos, the attorney who represented 7-11's insurer, noticed a deposition of Landers and Black began negotiations to settle the lawsuit to avoid increasing Landers' costs.

13. Tsakalos had a copy of the medical report during the negotiations.
14. 7-11 offered \$5000.00 to settle the case and Landers accepted the offer.
15. Tsakalos sent Black a check for \$5000.00 made out to Black and Landers.
16. On August 26, 1991, Black sent Landers a check in the amount of \$3,364.09 and retained the remainder of the \$5000.00 settlement as his fee (ex. I, ex. K).
17. Black did not withhold any portion of the settlement to pay Wilkerson and did not pay Wilkerson as promised in the Lien.
18. Black was admitted to the Utah State Bar in 1952 and has a reputation as an excellent personal injury lawyer.
19. The panel adopts the expert opinion of Judge D. Frank Wilkins that a lawyer should not pay a client's medical expenses unless he is clearly directed to do so by the client.
20. The panel also adopts Judge Wilkins' opinion that Black has an excellent reputation for honesty and integrity.
21. Judge Wilkins would be surprised if Black read the Lien (ex. E) and then failed to withhold the funds necessary to protect Wilkerson.
22. Judge Wilkins would be surprised to hear that Black had failed to read ex. E.
23. The charges for Wilkerson's services amount to \$2,465.00.

Based upon the foregoing Findings of Fact, the Panel enters the following:

CONCLUSIONS OF LAW

1. John L. Black violated Rule 8.4(c) of the Rules of Professional Conduct by representing that he agreed to withhold funds to pay Dr. Wilkerson's charges and then failing to do as he agreed in the Lien.
2. John L. Black violated Rule 1.13(b) of the Rules of Professional Conduct by failing to pay Wilkerson's charges out of the settlement proceeds.

Having made its Findings of Fact and Conclusions of Law, the Panel considered the following aggravating factors in determining the appropriate sanctions:

1. refusal to acknowledge wrongful nature of conduct;
2. vulnerability of victim;
3. substantial experience in the practice of law;
4. indifference to making restitution.

The Panel found the following mitigating factors:

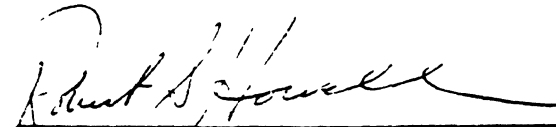
1. absence of a prior disciplinary record;
2. character or reputation;

Having weighed the aggravating and mitigating factors, the Panel determines that the aggravation exceeds the mitigation in this case and issues the following:

RECOMMENDATION

John L. Black should be required to make restitution to C.M. Wilkerson in the amount of \$1,635.91 or the outstanding balance of Wilkerson's bill, whichever is less. While the panel may not recommend anything less than a public reprimand, and does recommend such discipline, the panel also strongly recommends that the Board of Bar Commissioners consider reducing the public reprimand to a private reprimand upon compliance with the restitution order.


DATED this 18th day of June, 1993.



ROBERT S. HOWELL, CHAIR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact, Conclusions of Law & Recommendation were mailed to Parker M. Nielson, 655 South 200 East, Salt Lake City, Utah 84111 by certified mail, postal certificate number P396818 117 on this 29 day of June, 1993.



Stephen A. Trost, #3286
Disciplinary Counsel
Office of Attorney Discipline
645 S. 200 E.
SLC, UT 84111-3834
801-531-9110

IN THE SUPREME COURT
OF THE STATE OF UTAH

In re	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR CLARIFICATION
Rules of Lawyer Discipline)	
and Disability	)	Case No. 920334
)	

COMES NOW the Office of Attorney Discipline, by and through,
Stephen A. Trost, Chief Disciplinary Counsel and respectfully
submits this Memorandum in Support of the Motion for Clarification.

INTRODUCTION AND PROCEDURAL HISTORY

The issue to be resolved by the Motion for Clarification
relates solely to the procedural implementation of the newly
adopted Rules of Lawyer Discipline and Disability (RLDD). The RLDD
was the product of over four years of study by the Supreme Court
Advisory Committee on the Rules of Professional Conduct, and after
being submitted for public comment, were adopted by the Court by a

Minute Entry dated May 28, 1993, effective July 1, 1993. See Exhibit A.

A second Minute Entry, attached as Exhibit B and dated June 29, 1993, ordered that,

...all lawyer discipline matters which have been voted as formal complaints by the screening panels but which have not yet been heard by the hearing panels shall be removed to the district courts effective July 1, 1993.

Since implementing the new procedures a case¹ has arisen that was tried by a hearing panel June 15, 1993, with Findings, Conclusions and a Recommendation being submitted on June 18, 1993 and the same being reviewed by the Board of Bar Commissioners on June 24, 1993. An Order Affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline was then entered.

The Respondent's counsel served (among others) the Executive Director of the Bar on July 9, 1993 with a "Petition for (1) Amendment, Modification or Reconsideration, And to Vacate the Order

¹ The OAD has refrained from referencing the caption of the case or otherwise identifying the Respondent since if the Court orders the Bar Commission to hear the petition the Bar Commission could reverse the Recommendation of the Hearing Panel for a Public Reprimand and reduce to a private sanction which would prohibit disclosure of the name of the Respondent to the public and to this Court.

Affirming Findings of Fact, Conclusions of Law And Recommendation of Discipline, And (2) For Sanctions Against Bar Counsel And Assistant Bar Counsel" citing Rule XII(f), attached as Exhibit C, of the former rules of procedure.

ISSUE FOR CLARIFICATION

Did the Board of Bar Commissioners lose jurisdiction to review (reconsider) a prior Order accepting the Findings, Conclusions and Recommendations of a Hearing Panel.

DISCUSSION

Under the former rules, the Bar Commission, pursuant to Rule XII(e) acts as a intermediate appellate tribunal subsequent to a trial before a hearing panel and prior to review by the Court. Rule XII(e) states:

The Board shall review and consider the findings, conclusions and recommendation of the Hearing Committee [sic], and it may affirm, modify or disaffirm the Hearing Committee [sic] determinations in whole or in part. (emphasis added)

Following the Bar Commission's review and order, former Rule XII(f) provided a means by which either Bar Counsel or the Respondent could petition the Board for reconsideration of its order to "affirm, modify or disaffirm". In considering a petition

for reconsideration the rule clearly contemplates that again the Board is acting in an appellate capacity and that no evidentiary hearing will be granted. After directing the petition to be filed with the Executive Director of the Bar the rule states:

The petition shall specify any proposed amendment or modification and any reasons advanced for reconsideration. The petition may be supported by legal argument and may be accompanied by a request for oral argument. The Board shall permit oral argument on the petition if requested. (emphasis added)

The Minute Entry of May 28, 1993 repeals the Board's jurisdiction as of midnight June 30, 1993 while the Minute Entry of June 29, 1993 requires the removal to the district courts all formal disciplinary cases "which have not yet been heard by the hearing panels." This case is therefore unique in that there was a trial and therefore under a strict literal reading of the June 29, 1993 Minute Entry the case cannot be removed to the district court yet cannot progress under the old rules since they were abolished as of June 30, 1993.

The Office of Attorney Discipline suggests to the Court that the petition should be dismissed and the Respondent directed to file an appeal for the alleged errors, inappropriate sanction and

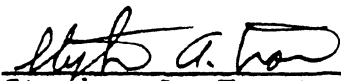
other relief requested in the petition. The Respondent will incur no prejudice in that he will be afforded appellate review by this Court in lieu of the Bar Commissions appellate review. Judicial economy and unnecessary delay also are compelling arguments for the Court to consider the appeal in that even if the old rules were in place and the Commission heard the petition the ultimate appeal of the issues raised lies with this Court.

CONCLUSION

The Court should order the Respondent to file an appeal since he will incur no prejudice and to (1) keep the Minute Entry of May 28, 1993 an inviolate expression of the Court's intention to remove the Bar Commission from discipline as of June 30, 1993, (2) forego an unnecessary review by an intermediate body i.e., the Bar Commission, and (3) expedite the proceedings.

RESPECTFULLY SUBMITTED this 19th day of July, 1993.

OFFICE OF ATTORNEY DISCIPLINE

By: 
Stephen A. Trost
Chief Disciplinary Counsel

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION was mailed postage prepaid to Parker Nielson, at 655 S. 200 E., S.L.C., UT 84111 on this 19 day of July, 1993.



Parker M. Nielson Attorney at Law (P.C.)

655 South 200 East
Salt Lake City, Utah 84111
(801) 532-1150

December 31, 1993

HAND DELIVERED

H. James Clegg, Esq.
President, Utah State Bar
10 Exchange Place #1100
Salt Lake City, UT 84111

Paul T. Moxley, Esq.
President Elect, Utah State Bar
One Utah Center, 13th Floor
Salt Lake City, UT 84111

Re: John L. Black, F-557

Dear Messrs. Clegg and Moxley:

The enclosed "Certificate of Readiness for Supreme Court Review" in the above matter signed by John C. Baldwin, Executive Director of the Utah State Bar on December 10, 1993, has never been served on either myself or John L. Black. I am aware of it only because Mr. Geoffrey J. Butler, Clerk of the Utah Supreme Court, advised me of it on December 30, 1993.

Failure to serve copies of papers on an adverse party (I represent Mr. Black, as you both know) is itself a serious breach of professionalism, ethics and the rules of the Supreme Court. There are much more serious matters involved here, however.

The certificate filed by Baldwin is a knowing, intentional, calculated falsehood. The statement that "Respondent has not filed a Petition for Amendment, Modification or Reconsideration as required by Rule XII(f)" is -- to put it bluntly, in the language of the street -- a lie. You both know that the certification is false, for Mr. Black's Petition dated July 9, 1993, plainly denominated "pursuant to Rule XII(f), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987)," was served on each of you, personally. (I knew, even then, what kind of people I was dealing with and took no chance on them not bringing the Petition to your attention.)

There can be no doubt that Baldwin knows that his certification is false. The Petition filed by Mr. Black is attached to the certification. Moreover, Mr. Black sued Baldwin, personally, on September 8, 1993 for relief in the nature of

mandamus to force him to bring Mr. Black's Petition before the Board of Bar Commissioners. Neither can there be any doubt that Baldwin is aware of the mandamus proceeding, for he "back doored" Chief Justice Hall on September 13, 1993 in an attempt to "moot" the mandamus proceeding.

Baldwin then filed an affidavit with Judge Medley dated September 16, 1993 alleging that Mr. Clegg conspired with him on "back dooring" the Chief Justice. (The affidavit recites that "on September 13, 1993 I telephoned Jim Clegg and indicated . . . that I would communicate directly with Chief Justice Hall regarding the motion.") After all that has transpired, I do not vouch for the veracity of Baldwin, but you are both on notice of these matters now, even if you were not aware of them before.

The conduct of Baldwin, and Stephen A. Trost at whose instance he is acting, is a blatant violation of Rule 11, Utah Rules of Civil Procedure, which is applicable to proceedings in the Supreme Court. [See Rule 1(a).] It is also a violation of Rule 33, Utah Rules of Appellate Procedure, and the following provisions of Rule 3.3, Rules of Professional Conduct of the Utah State Bar (1988):

(a) A LAWYER SHALL NOT KNOWINGLY:

(1) MAKE A FALSE STATEMENT OF MATERIAL FACT
OR LAW TO A TRIBUNAL [OR];

* * * *

(4) IF A LAWYER HAS OFFERED MATERIAL
EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE
LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES,

I have notified Baldwin of those matters by letter hand delivered to him on this date and demanded that his certification be withdrawn.

You, and both of you, also have responsibility for these matters. Rule 5.1, Utah Rules of Professional Conduct (1988) provides:

(c) A LAWYER SHALL BE RESPONSIBLE FOR ANOTHER
LAWYER'S VIOLATION OF THE RULES OF PROFESSIONAL
CONDUCT IF:

* * * *

(2) THE LAWYER . . . HAS DIRECT SUPERVISORY
AUTHORITY OVER THE OTHER LAWYER, AND KNOWS OF THE
CONDUCT AT A TIME WHEN ITS CONSEQUENCES CAN BE
AVOIDED OR MITIGATED BUT FAILS TO TAKE REASONABLE
REMEDIAL ACTION.

I notified Mr. Moxley of the foregoing rule, and his obligation under it with respect to Trost by letter dated July 28, 1993. I am notifying both of you, again, by this letter.

Baldwin's false certification, and the order accompanying it which was filed by Trost, are scheduled for hearing before the Supreme Court on January 10, 1994. There is ample time to avoid or mitigate the effects of the false certification before that date. I have demanded that Baldwin withdraw the false certification. I hereby demand that you, and each of you, discharge your supervisory authority with respect to both Baldwin and Trost by seeing that they withdraw their false filings. Failing your doing so, I will hold you strictly accountable under the foregoing provisions.

Govern yourselves accordingly.

Very truly yours,


Parker M. Nielson

PMN:
Enclosure
(0699)

Parker M. Nielson Attorney at Law (P.C.)

655 South 200 East
Salt Lake City, Utah 84111
(801) 532-1150

December 16, 1993

CERTIFIED MAIL

H. James Clegg, Esq.
President, Utah State Bar
645 South 200 East
Salt Lake City UT 84111

Re: John L. Black, F-557

Dear Mr. Clegg:

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure [applicable to appeals to the Board under Rule 17(a), Amended Rules of Lawyer Discipline and Disability (effective July 1, 1993)], I am advising of significant new authority bearing upon your order of June 24, 1993, and Mr. Black's pending Petition for Reconsideration and Sanctions dated July 9, 1993.

State v. Robinson, 222 Utah Adv. Rep. 73 (decided Sept. 29, 1993) (Russon, J.), held an order of restitution unconstitutional under the Utah and United States constitutions in cases involving "only negligence, and not criminal intent." Id. 75. The Court of Appeals reviewed numerous Utah cases holding that the essence of due process "is the opportunity to be fully heard," that an order of restitution must be "preceded by notice and an opportunity for hearing" (emphasis by the court) and that the right "has little reality or worth unless one . . . can choose for himself whether to contest."

That dicta has particular application to your order of "restitution" against Mr. Black dated June 24, 1993. There was no hearing before the Board preceding your order, and there was no finding that Mr. Black had criminal intent. The Board subsequently adopted Rule IX-E of the Interprofessional Code, a copy of which is attached, which (after the "exception" Trost inserted, without the approval of the Committee, was deleted) conclusively establishes that Mr. Black properly refused to pay the claim of his client's chiropractor, and that your order directing him to do so was improper. It follows, therefore, that your order, like the one of Judge McCleve that Judge Russon had before him, is unconstitutional. Mr. Black demanded a hearing before the Board by his Petition dated July 9, 1993, which demand is "at issue," a Notice to Submit for Decision having been filed on July 27, 1993.

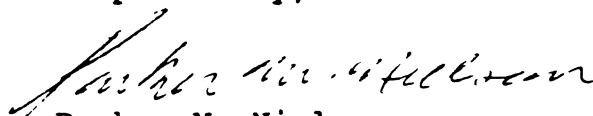
H. James Clegg, Esq.
December 16, 1993
Page 2

The foregoing dicta is directly relevant, as well, to the allegations of the Petition concerning Trost and Honarvar withholding notice of your Order of June 24, 1993. Rather than transmit the Order, as you surely intended, they held it until June 29, 1993 and then mailed it, knowing that it would not and could not be delivered until after July 1, 1993 and then claimed that the jurisdiction of the Board had expired. Their obvious purpose was to frustrate and deny Mr. Black the right to demand a hearing. Judge Russon's opinion effectively declares that the Order was rendered unconstitutional by Trost and Honarvar's cunning and that Mr. Black's Petition of July 9, 1993, must be granted.

Mr. Geoffrey J. Butler, Clerk of the Utah Supreme Court, has also advised me that someone, who he did not identify, has purported to file papers concerning Mr. Black, the nature of which I do not know. Such filing is a blatant violation of Rule 21(b), Utah Rules of Appellate Procedure, for no papers were served on Mr. Black or his counsel. Moreover, such a filing disregards Rule XII(g), Procedures of Discipline of the Utah State Bar (1987), which required that you certify "all proceedings before the Board having been concluded." Obviously, all proceedings are not concluded unless and until Mr. Black's Petition of July 9, 1993 is heard and decided.

A final matter I should mention is that Ethics Advisory Opinion No. 115 of the Utah State Bar, issued on May 20, 1993 has come to my attention. In the opinion the Board concludes that "Rule 4.2 [Utah State Bar, Rules of Professional Conduct] allows unrestricted access to government agencies and employees for communications 'authorized by law.'" Failure of the Board to act on Mr. Black's Petition of July 9 demonstrates that it has been withheld from the Board by someone, presumably Mr. Baldwin, with or without your consent and in disregard of your own opinion that the right of Petition cannot be interfered with. Mr. Black has the right to, and will expect that the Board conform to its own opinions.

Respectfully,


Parker M. Nielson

PMN/lh (0088)
cc: Stephen Trost

E. Responsibility for Payment of Physician's Charges

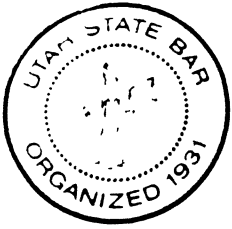
An attorney is ethically forbidden to pay debts, medical or otherwise, incurred by a client except as provided in Rule 1.8(e)¹ of the Rules of Professional Conduct. However, where the attorney contracts for services on behalf of his/her client, which expenses are necessary to the proper preparation and presentation of the client's case, the attorney should expect to make payments for the services. Therefore, while the attorney should not pay for or guarantee payment of medical services rendered to the client, the attorney should pay directly for medical reports, conferences with physicians, time spent in depositions or in court, and look to the attorney's client for reimbursement of these costs which the attorney has advanced on behalf of the client.

The physician should bill the patient and not the attorney for medical care rendered to the patient. The physician should bill the attorney for services rendered on behalf of the patient at the attorney's request. The attorney should pay these amounts promptly and as they are billed, and should not wait the outcome of litigation before paying the same.

¹Rule 1.8(e): A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. Rules of Professional Conduct, Rule 1.8(e), p. 12 (Amended 1988); Utah Court Rules, Chapter 13, Rules of Professional Conduct, p. 970 (1993).



Utah State Bar

Office of Attorney Discipline

645 South 200 East, Suite 205 • Salt Lake City Utah 84111-3834

Telephone: (801) 531-9110 • FAX (801) 531-0660 • WATS 1-800-698-9077

Stephen A. Trost

Chief Disciplinary Counsel

P. Gary Ferrero

Assistant Disciplinary Counsel

Nayer H. Honarvar

Assistant Disciplinary Counsel

Wendell K. Smith

Assistant Disciplinary Counsel

Pamela Blevins

Paralegal

Boyd Bryan

Paralegal

October 20, 1993

Parker Nielson, Esq.
655 S. 200 E.
S.L.C., UT 84111

RE: John L. Black, F-557

Dear Mr. Nielson:

As you know, the Utah Supreme Court on August 16, 1993, in response to my Motion for Clarification, granted "leave for respondent to file an appeal with this court."

Although the Supreme Court did not require a Notice of Appeal to be filed within the customary 30 day period, nonetheless, I presumed you would. It has now been in excess of 60 days since the Court entered their order and I would like to move this case along.

To that end I'm enclosing a copy of Rule XIV of the Procedures of Discipline of the Utah State Bar that were in effect until July 1, 1993. As you can see the respondent is required to file a Notice of Appeal within 30 days of being served the Findings, Conclusions and Recommendation of the Board. The Board served the same on about June 29, 1993 by mailing a copy to you.

If you would rather have the Supreme Court enter an order on the Board's order and proceed with the appeal thereafter, I have prepared the same for your approval as to form. In short, I have no preference as to which procedural course you choose to take, I simply want to conclude this case.

Sincerely,

Stephen A. Trost
Chief Disciplinary Counsel

SAT:clf
Enclosure
1795

Gregory J. Sanders, #2858
KIPP & CHRISTIAN
175 East 400 South, #330
Salt Lake City, UT 84111-2314
(801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN L. BLACK	:	
	:	
Petitioner,	:	
	:	
vs.	:	AFFIDAVIT OF
	:	JOHN C. BALDWIN
STEPHEN A. TROST, NAYER H.	:	
HONARVAR, H. JAMES CLEGG, JOHN C.	:	
BALDWIN AND THE UTAH STATE BAR	:	Civil No.
	:	
Respondents.	:	Judge

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, JOHN C. BALDWIN, being first duly sworn, affirm and state that:

1. On August 18, 1993 I received a Motion for Appointment of Special Counsel and Screening Panel. The motion was captioned "In the Matter of the Complaint by C. M. Wilkerson against John L. Black, F-557, and moved the Board of Bar Commissioners to request the appointment of a special counsel and screening panel to present and hear allegations of ethical misconduct by Stephen A. Trost and Nayer H. Honarvar of the Office of Attorney Discipline. The motion was signed by John L. Black, Respondent and Parker M. Nielson, Attorney for Respondent.

2. On August 19, 1993 I notified Bar President H. James Clegg that the Bar had received the Motion; that the procedure by which such a request would be handled was

unclear under the new Rules of Lawyer Discipline and that under the former Rules of Discipline we would have referred this matter directly to Dale Kimball, Chair of the Ethics & Discipline Committee. I also indicated to him that a similar procedure would be appropriate under the new rules but that Dale Kimball and his committee had not yet been reappointed by the Supreme Court. Jim advised me to communicate with the Utah Supreme Court to request that the Court reappoint the Ethics & Discipline Committee, and that once the committee had been reappointed I should direct this matter to Dale Kimball for him to resolve with the Court. Jim also indicated to me that I should notify the Commission at its upcoming meeting on August 26th regarding the motion and the procedures followed to have it processed.

3. On August 26, 1993 I notified the Bar Commission that we had received the motion; that we would request the Supreme Court to reappoint the Ethics & Discipline Committee and we would forward on the motion to Dale Kimball once the appointments had been made.

4. On August 27, 1993 I mailed a letter to Chief Justice Hall from H. James Clegg which proposed that the Court reappoint the Ethics & Discipline Committee pursuant to Rule 3(a) of the new Rules of Discipline.

5. On September 13, 1993 I telephoned Dale Kimball and explained to him that we had requested the Supreme Court to reappoint the Ethics & Discipline Committee; that we had received a Motion for Appointment of Special Counsel and Screening Panel and that ordinarily we would have directed this immediately to him but because it was unclear under the new rules as to how we should proceed and because his committee had not yet been reappointed, we had been waiting for the Supreme Court to act upon our request. I indicated to Dale, I would be willing to communicate directly with Chief Justice Hall to inquire regarding the status of

reappointments to the Ethics & Discipline Committee and would inform him about the request for special appointment.

6. On September 13, 1993 I telephoned Jim Clegg and indicated that I had discussed the motion with Dale Kimball and that I would communicate directly with Chief Justice Hall regarding the motion and our request that the committee be reappointed.

7. On September 13, 1993 I telephoned Chief Justice Hall and indicated that we had received a complaint against Stephen Trost and Nayer Honarvar which required the appointment of a special counsel and screening panel pursuant to the new rules. I indicated that the new rules were unclear regarding how to proceed in this matter; that we had been awaiting the Court's reappointment of the Ethics & Discipline Committee so that we could have followed our regular procedures and referred the motion directly to Dale Kimball, but because the committee had not been reappointed yet, I would be referring these matters directly on to the Court.

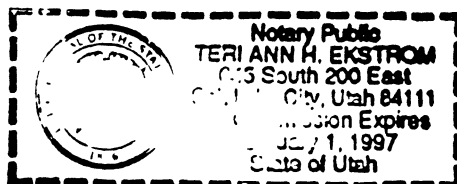
7. On September 14, 1993 I mailed a copy of the Motion for Appointment of Special Counsel and Screening Panel to Chief Justice Hall.

FURTHER AFFIANT SAYETH NOT.

DATED this 16th day of September, 1993.



Subscribed and sworn before me this 17th day of September, 1993.





Notary Public
Residing in Salt Lake County

Stephen A. Trost, #3286
Disciplinary Counsel
Office of Attorney Discipline
645 S. 200 E.
SLC, UT 84111-3834
801-531-9110

IN THE SUPREME COURT
OF THE STATE OF UTAH

In re	)	MOTION FOR CLARIFICATION
)	
Rules of Lawyer Discipline	)	Case No. 920334
and Disability)	
)	

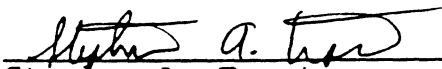
COMES NOW the Office of Attorney Discipline, by and through, Stephen A. Trost, Chief Disciplinary Counsel and moves this Honorable Court pursuant to Rule 23 for clarification of 1) the Court's Minute Entry dated May 28, 1993 wherein the former Procedures of Discipline were repealed as of June 30, 1993, and 2) the Court's Minute Entry dated June 29, 1993 transferring all formal complaints, which had not been tried, to the district courts effective July 1, 1993.

This motion is accompanied by a Memorandum in Support of the Motion for Clarification.

Oral argument is not requested.

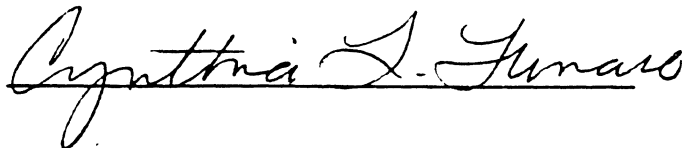
DATED this 19th day of July, 1993.

OFFICE OF ATTORNEY DISCIPLINE

By: 
Stephen A. Trost
Chief Disciplinary Counsel

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing MOTION was mailed postage prepaid to Parker Nielson, at 655 S. 200 E., S.L.C., UT 84111 on this 19 day of July, 1993.



Parker M. Nielson Attorney at Law (P.C.)

655 South 200 East
Salt Lake City, Utah 84111
(801) 532-1150

December 31, 1993

HAND DELIVERED

John C. Baldwin, Esq.
EXECUTIVE DIRECTOR
Utah State Bar
645 South 200 East
Salt Lake City UT 84111

Re: John L. Black, F-557

Dear Mr. Baldwin:

:
Your "Certificate of Readiness for Supreme Court Review" in the above matter dated December 10, 1993, a copy of which is attached, has never been served on either myself or John L. Black. I am aware of it only because Mr. Geoffrey J. Butler, Clerk of the Utah Supreme Court, advised me of it on December 30, 1993.

Your certificate, the representation that "Respondent has not filed a Petition for Amendment, Modification or Reconsideration as required by Rule XII(f)" in particular, is false. In fact, John L. Black's Petition, plainly denominated "pursuant to Rule XII(f), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987)" is at pages 215-233 of the Document Index which you filed with the Supreme Court with your certificate.

Demand is hereby made that you withdraw your certification, immediately. Failure to do so will be deemed a violation of Rule 11, Utah Rules of Civil Procedure, which is applicable to proceedings in the Supreme Court. [See Rule 1(a).] It will also be a violation of Rule 33, Utah Rules of Appellate Procedure.

You are further notified of the following provisions of Rule 3.3, Rules of Professional Conduct of the Utah State Bar (effective January 1, 1988):

(a) A LAWYER SHALL NOT KNOWINGLY:

(1) MAKE A FALSE STATEMENT OF MATERIAL FACT
OR LAW TO A TRIBUNAL [OR];

* * * *

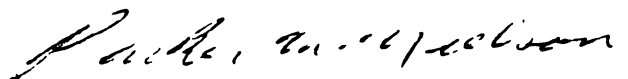
(4) IF A LAWYER HAS OFFERED MATERIAL EVIDENCE AND COMES TO KNOW OF ITS FALSITY, THE LAWYER SHALL TAKE REASONABLE REMEDIAL MEASURES,

There can be no doubt that you have actual knowledge that your certification is false. Not only is Mr. Black's Petition plainly contained in the file which you certified to the Supreme Court, but Mr. Black sued you, personally, on September 8, 1993 for relief in the nature of mandamus to force you to present Mr. Black's Petition to the Board of Bar Commissioners. There can be no doubt that you are fully aware of that proceeding, for you then "back doored" Chief Justice Hall in an attempt to "moot" the mandamus proceeding, and filed an affidavit with Judge Medley acknowledging that you did so.

If you fail to withdraw your false certification, and do so before January 10, 1994 when this matter is scheduled for hearing before the Utah Supreme Court, both Mr. Black and myself will take any and all remedial action which is appropriate under any of the foregoing rules.

Govern yourself accordingly.

Very truly yours,



Parker M. Nielson

PMN:
Enclosure

(01-8 11)

UTAH STATE BAR
ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 115
(Approved May 20, 1993)

Issue: Under what circumstances may a lawyer who represents a private party contact the employees of a government agency if the private party is involved in litigation against the agency?

Opinion: Because the Utah and United States Constitutions guarantee all private citizens access to government, all communication, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted. Thus, a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts a government employee about pending litigation, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel and (b) about his representation of a private party in that litigation.

Analysis: Access to government agencies must be unrestricted. Rule 4.2 of the Rules of Professional Conduct provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comment to Rule 4.2 states (emphasis added):

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party . . . does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, . . . a lawyer having independent

justification for communicating with the other party is permitted to do so. *Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.*

Rule 4.2 allows unrestricted access to government agencies and employees for communications “authorized by law.” The comment to Rule 4.2 provides that a communication authorized by law includes “the right of a party to a controversy with a government agency to speak with government officials about the matter.” This part of the comment to Model Rule 4.2 was grounded in the U. S. Constitution, and finds nearly identical support in the Utah Constitution.¹

Thus, private citizens have a constitutional right of access to government, including government officials. Any interest a government agency might have in being protected from statements made by its employees is outweighed by the First Amendment interests of private parties to “petition for redress” and of the agency’s own employees.² Further, the government has a “duty to advance the public’s interest in achieving justice, an ultimate obligation that outweighs its narrower interest in prevailing in a lawsuit.”³

One commentator has noted:

Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government and statutory policies encouraging government in the sunshine seems hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the party’s lawyer. Because of such considerations, the comment to [Model Rule] 4.2 provides that the rule does not impair the right of a party to speak with government offi-

¹“Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U. S. Const. amend. I. “All men have the inherent and inalienable right . . . to assemble peaceably, protest against wrongs, and petition for redress of grievances.” Utah Const. art. I, § 1.

²Vega v. Bloomsburgh, 427 F. Supp. 593, 595 (D. Mass. 1977).

³Frey v. Dept. of Health & Human Services, 106 F.R.D. 32, 37 (E.D.N.Y. 1985).

cials.⁴

The broad language of the comment to Rule 4.2 does not restrict a private party's right of access, whether personally or through counsel, even in those instances when litigation is pending.⁵ The California Bar Association has gone so far as to clarify this unrestricted access by amending Model Rule 4.2 to provide that the rule "shall not apply to communications with a public officer, board, committee or body."⁶ This Committee interprets Rule 4.2 as written to incorporate this access to public officials by a party's attorney.

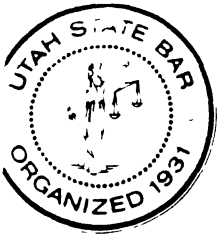
Obligations of Contacting Attorney. The authorities cited above give counsel for a private party wide rein in contacting government employees, both generally and with respect to matters in litigation. As an officer of the court, however, counsel has an obligation to deal with those employees in an open and honest manner. Therefore, if counsel is contacting a government employee about pending litigation, counsel shall inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel, and (b) about his representation of a private party in that litigation. The government employee is free to refuse to speak to counsel for the private party or to request that the agency's counsel or counsel for the employee be present.⁷

⁴C. Wolfram, *Modern Legal Ethics* 614-15 (footnotes omitted).

⁵See Kentucky Bar Op. E-332 (1988), which cites the comment to Rule 4.2 in support of its conclusion to permit broad access to public officials by attorneys for private parties.

⁶C. Wolfram, *Model Legal Ethics* at 615 n.59.

⁷See *Frey*, 106 F.R.D. at 38.



nn C Baldwin
Executive Director

Utah State Bar

645 South 200 East • Suite 310
Salt Lake City, Utah 84111-3834
Telephone: (801) 531-9077 • (WATS) 1-800-698-9077
FAX (801) 531-0660

July 19, 1993

Parker M. Nielson
655 South 200 East
Salt Lake City, Utah 84111

Re: John Black F-557

Dear Mr. Nielson:

While Mr. Howell advised you that a tape recording of the hearing would be made available in his letter dated June 21, 1993, he was only half correct. I am not able to provide you with a copy of the tape, but I can allow you to receive a transcript of the proceedings for June 15, 1993. This would require that the tapes be sent out for transcription and the cost of the transcription would be assessed to your office.

The Board of Bar Commissioners meeting on June 24, 1993 was not recorded and I do not have access to the proceedings of this meeting. I am not sure if there were minutes taken, but you may wish to contact Mr. John Baldwin, Executive Director to determine how the meeting was recorded.

Please advise me as soon as possible if you request a transcript and I will have the tapes sent out.

Sincerely,

Leslee A. Ron
Clerk of the Court

cc: Nayer Honarvar

Board of Commissioners

Gay L. Dryer
President
James Clegg
President Elect
Steve A. Dragoo
Graham
Michael Hansen
Thomas V. Haslam
Steven M. Kautman
Robert F. McKeachnie
Tom Moxley
Greg M. Snyder
Robert Thorne

Officio Members

Thomas Z. Davis
William H. Reese Hansen
William S. Johnson
John A. Kelly
John L. Martineau
Michael N. Martinez

PARKER M. NIELSON (2413)
Attorney for John Black
655 South 200 East
Salt Lake City, UT 84111
Telephone: (801) 532-1150

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

-----ooo0ooo-----

In the Matter of the)	
Complaint by	)	PETITION FOR (1) AMENDMENT,
	)	MODIFICATION OR RECONSIDER-
C.M. WILKERSON	)	ATION, AND TO VACATE THE
	)	ORDER AFFIRMING FINDINGS OF
against	)	FACT, CONCLUSIONS OF LAW AND
	)	RECOMMENDATION OF DISCIPLINE,
JOHN L. BLACK	)	AND (2) FOR SANCTIONS AGAINST
DOB: : 05-25-23	)	BAR COUNSEL AND ASSISTANT BAR
ADM: 06-12-52	)	COUNSEL
)	
	)	File No. F-557

-----ooo0ooo-----

Respondent John L. Black ("Petitioner" herein) petitions the Board of Commissioners of the Utah State Bar ("Board" herein), pursuant to Rule XII(f), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987), for vacation of the Findings of Fact, Conclusions of Law & Recommendation of the Hearing Panel herein dated June 18, 1993 ("findings" herein), a copy of which is attached as Exhibit "A," and the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline herein dated June 24, 1993, (the "Order" herein), a copy of which is attached as Exhibit "B," or, in the alternative, for the amendment, modification or reconsideration thereof.

Petitioner and his undersigned counsel further petition the

Exhibit "R"

Board of Bar Commissioners for the censure of Stephen A. Trost, Bar Counsel ("Trost" herein), and Nayer H. Honarvar, Assistant Bar Counsel ("Honarvar" herein), for reprehensible and unprofessional conduct unbecoming one holding public office, and for imposition of damages against Trost and Honarvar for bad faith litigation pursuant to Utah Code Ann § 78-27-56.

In support thereof, Petitioner respectfully represents:

1. Rule XII(g), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987), provides that a determination by the Board in a disciplinary matter shall be certified to the Utah Supreme Court, which certification shall be "upon all proceedings before the Board having been concluded," including a petition pursuant to Rule XII(f) to amend, modify or reconsider the findings, conclusions or recommendation, after oral argument before the Board (if requested).

2. The Board is without jurisdiction, including to entertain a Petition to amend, modify or reconsider the findings, conclusions or recommendation pursuant to Rule XII(f), or certify any determination to the Utah Supreme Court pursuant to Rule XIII(g), because of the misconduct of Trost and Honarvar set out herein, including in particular Trost and Honarvar's corrupt and reprehensible practice of withholding notice of action by the Panel and the Board until June 29, 1993 knowing that the jurisdiction of the Board over disciplinary proceedings would expire and the Procedures of Discipline of the Utah State Bar had been repealed effective June 30, 1993, at 12 midnight,

by virtue of the Minute Entry of the Supreme Court of the State of Utah dated May 28, 1993, a copy of which is attached hereto as Exhibit "C." The letter of Honarvar dated June 1, 1993 attached hereto as Exhibit "D" establishes that both she and Trost were well aware that any order concerning discipline must be "to the Supreme Court by June 30" and that "thereafter the Bar Commission will no longer be involved in any way with discipline."

3. The Order should be set aside because it, and the proceedings leading up to it, are incoherent, unintelligible, contradictory and unenforceable. Honarvar recommended a public reprimand at the time of hearing, but the Panel recommended a private reprimand. The Order adopted "the recommendation of the Office of Bar Counsel [that] the Public Reprimand be reduced to a Private Reprimand," but then ordered that "Respondent be Publicly Reprimanded" without offering any explanation of the inconsistency. [We submit that the Order shows on its face that it was, in fact, prepared by Honarvar and is further evidence of ineptitude of Bar Counsel.]

4. Trost and Honarvar wrongfully and corruptly conspired to deprive Petitioner of due process under the rules of procedure applicable to the conduct of nonjury civil trials in the district courts of the State of Utah, which apply to disciplinary proceedings by virtue of Rule XII(b), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987), including by the following:

(a) Failing to provide Petitioner notice of the

proposed Findings of Fact, Conclusions of Law & Recommendation of the Hearing Panel pursuant to Rule 4-504(2), Utah Code of Judicial Administration, or pursuant to the directions of the Chairman of the Panel, which is documented by the letter of Robert S. Howell attached hereto as Exhibit "E."

(b) Failing to provide Petitioner notice of the proposed Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline, pursuant to Rule 4-504(2), Utah Code of Judicial Administration.

(c) Failing to provide Petitioner notice in a prompt and lawyerlike fashion that the Order dated June 24, 1993 had been entered, pursuant to Rule 4-504(2), Utah Code of Judicial Administration.

(d) Trost acted to deprive Petitioner of due process by instructing Hearing Panel Chairman Howell that he must make his decision at or before a date specified by Trost, for the purpose of enabling Trost and Honarvar to complete the other acts alleged herein before June 30, 1993.

(e) Wrongfully acting, and Petitioner is informed and believes, conspiring, to deprive Petitioner of the right to petition the Board, to request oral argument and to demonstrate the impropriety of the findings, conclusions and Order herein in a hearing before the Board, as set out herein, by withholding notice of the foregoing findings and Order entered on June 18 and 24, respectively, until the 29th day of June, 1993, and even at that late date mailing notice to Petitioner's counsel, even though counsel's office is a few scant feet from Bar Counsel's

office, at 655 South 200 East, knowing that it would not be delivered until June 30, 1993 at the earliest and that the jurisdiction of the Board would expire at 12 midnight on June 30, 1993 before Petitioner could exercise his rights.

(f) Each of the foregoing was knowing, intentional and for the corrupt purpose of depriving Petitioner of his procedural and substantive rights, as is documented by the letter of Honarvar dated June 1, 1993 attached hereto as Exhibit "D."

5. For the foregoing reasons, the findings, conclusions and Order herein (dated June 18, 1993) and the Order of President-Elect Clegg (dated June 24, 1993) were not properly entered and are a nullity under Rule 4-504(2), Utah Code of Judicial Administration, requiring that "copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature" and that "notice of objections shall be submitted to the court and counsel within five days after service." The Utah Supreme Court has held that orders entered without conforming to Rule 4-504(2) are void and of no effect. *Bigelow v. Ingersoll*, 618 P.2d 50, 53 (Utah 1983) (the Rule "requires that copies of a proposed judgment be served on opposing counsel before being presented to the court"). *Accord, Calfo v. D.C. Steward Co.*, 717 P.2d 697, 699 (Utah 1986); *Wayne Garff Constr. Co., Inc. v. Richards*, 706 P.2d 1065 (Utah 1989 (per curiam); *Larsen v. Larsen*, 674 P.2d 116 (Utah 1983).

6. Trost and Honarvar are guilty of reprehensible conduct,

evident on the face of the findings, conclusions and Order herein, in disregard of Rule XII(i), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987), which provided that

Neither Bar Counsel nor members of the disciplinary staff shall engage in ex parte communications with members of the Board or members of the Hearing Committee concerning any disciplinary case that is being or may be considered by the Board or the Hearing Committee.

The findings, conclusions and Order herein were not served on Petitioner or his counsel as required by Rule 5, Utah Rules of Civil Procedure, but there was obvious and necessary ex parte contact between Bar Counsel and President-Elect Clegg in disregard of the foregoing Rule, for the Order signed by President-Elect Clegg shows on its face that it was prepared for Mr. Clegg's signature by Honarvar and that a secretary to Bar Counsel signed the mailing certificate. Honarvar, Trost and/or disciplinary staff have also, obviously, been in contact with Robert S. Howell, Chair of the Hearing Panel, for the same secretary to Bar Counsel signed the certificate of service of the findings, notice of which had never been given to Petitioner.

7. We will leave it to President-Elect (now President) Clegg to explain how his Order came to be prepared for him by Honarvar, how she was directed or authorized to do so without notice to counsel for Petitioner, how the Order dated June 24, 1993 was signed before Petitioner had an opportunity to demand a hearing before the Panel and how it came into the possession of Honarvar and disciplinary staff, but was not delivered to

Petitioner and counsel for Petitioner despite the clear provision at Rule XII(e) "that a copy of the findings, conclusions and recommendation shall be served upon Bar Counsel and the attorney in question or his counsel" (emphasis added) and how or why Honarvar and disciplinary staff held the Order for five (5) days before sending it to counsel for Petitioner, or if President-Elect Clegg authorized them to do so, and what, if any purpose there was in the critical five (5) day delay other than to frustrate Petitioner's right to object under Rule 4-504(2), Utah Code of Judicial Administraion and to permit the jurisdiction of the Board to expire before Petitioner could take any action to preserve his right to due process, including a hearing before the Board.

8. The Findings of Fact, Conclusions of Law & Recommendation of the Hearing Panel herein dated June 18, 1993, and the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline herein dated June 24, 1993, are in error and should be set aside or amended, as follows:

(a) The Order should be vacated because Bar Counsel failed to meet the burden of proof prescribed at Rule XII(c), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987), requiring that the "burden of proof shall be on Bar Counsel to sustain the Formal Committee Complaint, or various counts thereof, *by clear and convincing evidence.*"

(Emphasis added.) Neither the Order nor the findings determine that the necessary burden of proof was met and, to the contrary, the recording of the proceedings herein will reveal that Bar

Counsel presented *no evidence* -- none, of any description -- at the time of hearing.

(b) The Findings of Fact, Conclusions of Law and Recommendation of the Hearing Panel herein dated June 18, 1993 conclusively reveal that Bar Counsel failed to meet its burden of proof, or to adduce *any evidence, of any description*, in that every exhibit cited in support of the findings was an exhibit offered by Petitioner. *Viz.*, Bar Counsel exhibits were numbered while Petitioner's exhibits were lettered. The lettered exhibits do not meet the "clear and convincing" evidence standard, but cannot properly be relied upon by Bar Counsel in any event because Petitioner moved to dismiss the complaint at the conclusion of Bar Counsel's case, at which time no evidence had been offered. The motion was denied, improperly under the foregoing rule, and evidence taken thereafter cannot be considered as meeting Bar Counsel's burden.

(c) The findings and Order are in error, as a matter of law, in light of Utah State Bar Ethics Advisory Opinion No. 98, a copy of which is attached hereto as Exhibit "F." The Ethics Advisory Opinion, a copy of which was filed with the Panel, states as follows:

Absent dishonesty, fraud, deceit or misrepresentation, disputes resulting from the failure of an attorney to make payment for services rendered by third parties should be treated as questions of substantive law, which should be examined under traditional contract and agency doctrines, rather than questions of the ethical propriety of the attorney's actions.

The findings and Order make no reference to Ethics Advisory

Opinion No. 98 and fail to distinguish its conclusions and are therefore in error.

(d) The findings and Order are in error, as a matter of law, in light of Utah State Bar Interprofessional Code (Second Edition), a copy of which was filed with the Panel and is attached hereto as Exhibit "G," which plainly states at Section IX(E):

An attorney is *ethically forbidden* to pay debts, medical or otherwise, incurred by a client. . . . the attorney should not (*and ethically cannot*) pay for or guarantee payment of medical services rendered to the client. . . .

The physician should bill the patient and not the attorney for medical care rendered to the patient. The physician should bill the attorney for services rendered on behalf of the patient at the attorney's request. (Emphasis added.)

The findings and Order make no reference to the foregoing provision and fail to distinguish its clear provisions and are therefore in error.

(e) The recommendation that "John L. Black should be required to make restitution to C.M. Wilkerson in the amount of \$1,635.91" is without any basis in the evidence. Bar counsel never offered evidence of any description, testimonial or otherwise, of any amount owing to Dr. Wilkerson. The only evidence was the testimony of Petitioner that his client had paid or was paying Dr. Wilkerson's bill. Indeed, the sum of \$1,635.91 does not appear anywhere in these proceedings, including in the evidence, in the discovery, in the pleadings or in the memoranda submitted by the parties. Honarvar simply inserted the figure in the findings, from whence we do not know, and neither Petitioner

nor the Board can determine its source.

(f) Conclusions of Law Nos. 1 and 2 are in error, as a matter of law, because there was *no evidence, of any description*, that Petitioner was involved in dishonesty, fraud, deceit or misrepresentation in violation of Rules 1.13(b) or 8.4(c). The most that can be said of Bar Counsel's claim is that Petitioner signed a document, which Bar Counsel contends and Petitioner denies was a medical lien. Even if that contention be accepted, *arguendo*, violation of the agreement is, at most, a breach of contract claim.

(g) Findings of Fact No. 21 is improper and misstates the evidence in that Judge Wilkins did not testify that he would "be surprised if Black . . . failed to withhold the funds necessary to protect Wilkerson."

(h) Conclusions of Law Nos. 1 and 2 are in error, as a matter of law, because they are inconsistent and irreconcilable with Finding of Fact No. 19, adopting the opinion of Judge Wilkins "that a lawyer should not pay a client's medical expenses unless he is clearly directed to do so by the client." There is no evidence of such a direction herein and there was no finding of any such direction.

(i) Conclusions of Law Nos. 1 and 2 are in error, as a matter of law, because they are inconsistent and irreconcilable with Finding of Fact No. 20, adopting the opinion of Judge Wilkins that Petitioner "has an excellent reputation for honesty and integrity."

9. The conduct of Trost and Honarvar herein is reprehensible

and unethical in that they are employing, or attempting to employ, the disciplinary process to collect, or force the payment of a mere civil claim asserted on behalf of a California chiropractor.

10. The conduct of Honarvar herein is reprehensible and sanctionable in that she refused, during the course of discovery, to admit that she had no evidence of specific acts of dishonesty, yet produced absolutely no evidence, of any description, either testimonial or documentary, at the time of hearing to support that allegation. Honesty and fairness on the part of Bar Counsel and the lawyer's obligation of candor with court and counsel required, therefore, that Honarvar voluntarily dismiss the charge of violation of Rule 8.4(c).

11. The tape recording of the proceedings before the Panel will reveal that Trost and Honarvar made knowingly false accusations against Petitioner, and his undersigned counsel, for the purpose of depriving Petitioner of substantive due process. The recording will show that Honarvar, with Trost seated at her side, stated on the record that Mr. Black should be subjected to a public reprimand because he had made false statements in the disciplinary proceedings. When the Chairman of the Disciplinary Panel, Mr. Robert S. Howell, challenged that statement because there had been no showing that any evidence had been misrepresented, and asked Honarvar what evidence she claimed had been misrepresented, she admitted that there had been no misrepresentation, but then repeated the charge again, on the record, the second time adding the accusation that counsel for Mr. Black, the undersigned Petitioner, had misrepresented the

evidence and therefore Mr. Black should be publicly reprimanded. The undersigned counsel for Mr. Black, Parker M. Nielson, then "demanded" that Mrs. Honarvar state what false statements she had reference to. She refused, and neither she nor Trost offered to withdraw the accusations.

12. The accusations by Trost and Honarvar that Petitioner and his counsel had misrepresented the evidence is blatant and reprehensible under the Comment to Rule 3.3, Utah State Bar Code of Professional Conduct, which explains that "an assertion purporting to be on the lawyer's own knowledge . . . may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of reasonably diligent inquiry." There can be no pretense that either Trost or Honarvar knew, or believed it to be true that either Mr. Black or Mr. Nielson had misrepresented evidence. Mr. Howell declared, on the record, that there had been no evidence of a misrepresentation and Mr. Nielson *demanded* that any claimed misrepresentation be stated. Neither Mr. Trost nor Mrs. Honarvar offered any support for their claims, but nevertheless repeated them. The Comment to Rule 3.3 explains the prohibition against "Misleading Legal Argument" further, as follows:

Legal argument based on a knowingly false representation of law constitutes dishonesty toward a tribunal.

13. Trost and Honarvar further acted to deprive Petitioner of due process herein, including reasonable notice and a right to reasonably prepare his defense, by submitting the letter dated June 1, 1993 attached hereto as Exhibit "D," attempting to

"extort" Petitioner into consenting to discipline. Specifically, the letter states that, if Petitioner did not "consent" to discipline, the matter would be presented to the courts under the recent revision of disciplinary proceedings by the Utah Supreme Court. When Petitioner responded that he would be delighted to present Trost's and Honarvar's fanciful charges to a "real court," but that Trost and Honarvar would be subject to Rule 11 sanctions and prohibitions against "bad faith" litigation pursuant to Utah Code Ann. § 78-27-56, they disregarded Petitioner's stated request and immediately set the matter for trial before a disciplinary panel -- with but one weeks notice, and without the courtesy of determining if the date was convenient to Petitioner or his counsel. The implication is clear. Trost and Honarvar knew that their complaint would not withstand "bad faith" scrutiny, nor would their charges against Mr. Black and his counsel withstand the test of good faith imposed by Rule 11. They could not permit it to be reviewed by a "real court," and did not have the professionalism to withdraw it.

14. Trost has acted to deprive Petitioner of substantive due process in these proceedings by attempting to change the rules, *ex post facto*, to cover a complaint against Petitioner which he knew did not state an ethical violation. The Memorandum of Trost dated April 27, 1993, attached hereto as Exhibit "H" documents his attempt to change the Rules of Professional Conduct, *ex post facto*, to cover complaints he had caused to be filed against members of the Bar which his own

Memorandum acknowledge did not state ethical violations. In context, it is clear that Trost's Memorandum contemplates the Complaint against Petitioner herein.

15. The reprehensible conduct of Honarvar in these proceedings is further evident in that she has caused Finding of Fact No. 23 to be entered, reciting that "the charges for Wilkerson's services amount to \$2,465.00," without presenting any evidence supporting the finding and, moreover, while concealing the fact, well known to her, that Petitioner's client has paid or was paying the bill and that there may, in fact, be no amount owing.

16. These proceedings illustrate that Trost and Honarvar practice outright extortion, in the name of the Bar, as a routine policy. "Extortion" consists of "control over the property of another" by threatening to "take action against anyone." See Utah Code Ann. § 76-6-406(g). "Offer[ing] to reduce the charge from a formal to a private reprimand if [Mr. Black] made restitution [of what we are at a loss to know] within thirty (30) days" (see e.g., letter of Honarvar to Petitioner dated March 24, 1992, attached hereto as Exhibit "I") fits the definition, perfectly. Rule 8.4, Rules of Professional Conduct, Utah State Bar, provides:

IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:
(a) KNOWINGLY ASSIST OR INDUCE ANOTHER
TO [VIOLATE THE RULES OF PROFESSIONAL CONDUCT],
OR DO SO THROUGH THE ACTS OF ANOTHER.

Trost knows that it is unethical for a lawyer to agree to pay the health care costs of his client. He so acknowledged in his

Memorandum dated April 27, 1993 attached hereto as Exhibit "H." Despite that knowledge, the entire effort of Trost and Honarvar in these proceedings has been to force Petitioner, under threat of disciplinary proceedings, to pay a claim which Petitioner could not pay because it would be unethical for him to do so, and which Trost and Honarvar acknowledged knowing would be unethical.

17. Petitioner, and his counsel, state that in their combined experience of more than seventy (70) years as practicing lawyers they have never witnessed a more inept display than that of Honarvar in these proceedings. The tape recording will show that she began the proceedings by presenting her final argument, before she had presented any evidence and without making an opening statement. Counsel for Petitioner stipulated to the authenticity of four documents referred to in her final (opening) argument, even though they were not in evidence, consisting of the disputed document signed by Petitioner, two letters from Petitioner to his client, and a so-called medical report which are probative of nothing. Honarvar then rested, without presenting any evidence. The incompetence of Honarvar and Trost should be a source of embarrassment to the Board, but it's relevance to this Petition is that it disregards Petitioner's right to due process, the requirement of clear and convincing evidence in particular.

18. Petitioner submits that neither Trost nor Honarvar are qualified, by temperment or ability, to occupy public office, particularly a public office as sensitive as that of Bar

Counsel. Neither of them have a proper grasp of the nature and purpose of rules of ethics, of a lawyer's fiduciary duty to his client, that disciplinary proceedings are abused when they are employed to enforce civil disputes of third parties involving lawyers, of the meaning of concepts like "restitution," and that threatening public reprimand unless a lawyer complies with a demand by Bar Counsel that payments be made to satisfy contract claims of third parties is a pure act of extortion. More seriously, neither Trost nor Honarvar have any grasp of the role of a public prosecutor, which was defined by Mr. Justice Jackson in *Berger v. United States*, 295 U.S. 78, 88 (1934), when he declared that the prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. . . . He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Petitioner therefore submits that Trost and Honarvar should be relieved of their positions as Bar Counsel and Assistant Bar Counsel, respectively. Trost and Honarvar have displayed a mean spirited, highly partisan, "win at any cost" approach to disciplinary matters that is improper and positively evil. Other persons should be appointed to those positions who have a proper ethical sense, or outside counsel having a proper sense should be

utilized on an *ad hoc* basis.

19. Utah Code Ann. § 78-27-56 provides:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith. . . .

We submit that the facts of this matter present a compelling case of bad faith litigation within the meaning of the foregoing statute and that bad faith damages should be awarded against Trost and Honarvar.

20. Petitioner requests a hearing before the Board, and the right to present oral argument before the entire Board, pursuant to Rule XII(f), Procedures of Discipline of the Utah State Bar (as amended through July 1, 1987).

Wherefore, Petitioner prays

A. That Petitioner be granted a hearing before the Board on this Petition.

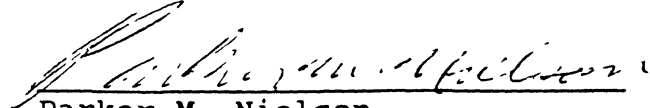
B. That the Findings of Fact, Conclusions of Law and Recommendation of the Hearing Panel dated June 18, 1993 and the Order Affirming Findings of Fact and Conclusion of Law and Recommendation of Discipline dated June 24, 1993 be vacated and the Complaint herein dismissed.

C. In the alternative, that said Findings and Order be modified or amended to reflect that Petitioner was guilty of no unethical conduct, or that there was no clear and convincing evidence of unethical conduct, or both.

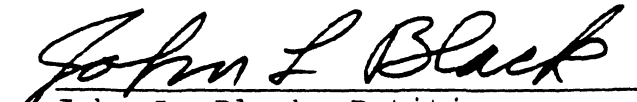
D. Censuring Trost and Honarvar, including the award of damages against them for bad faith litigation.

E. Relieving Trost and Honarvar of their positions as Bar Counsel and Assistant Bar Counsel, respectively.

DATED this 9th day of July, 1993.

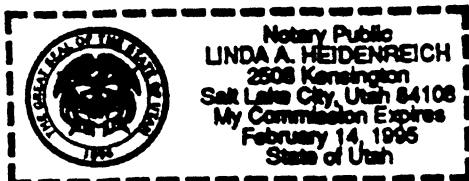

Parker M. Nielson
Attorney for Petitioner

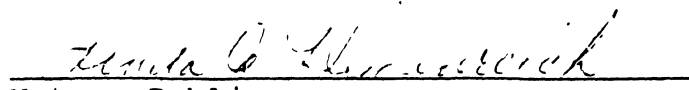
Having read the foregoing Petition for (1) Amendment, Modification or Reconsideration, and to Vacate the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline, and (2) for Sanctions Against Bar Counsel and Assistant Bar Counsel, I affirm that all matters stated therein are true, other than matters stated on information and belief as to which I believe them to be true and correct.


John L. Black, Petitioner

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On this 9th day of July, 1993, personally appeared before me JOHN L. BLACK, who being by me duly sworn, did sign the above and foregoing PETITION.




Notary Public
Residing in Salt Lake City, Utah

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the foregoing PETITION FOR (1) AMENDMENT, MODIFICATION OR RECONSIDERATION, AND TO VACATE THE ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DISCIPLINE, AND (2) FOR SANCTIONS AGAINST BAR COUNSEL AND ASSISTANT BAR COUNSEL, were hand delivered to:

John Baldwin, Director
Office of Bar Counsel
Utah State Bar Association
645 South 200 East
Salt Lake City, UT 84111

and copies were hand delivered to:

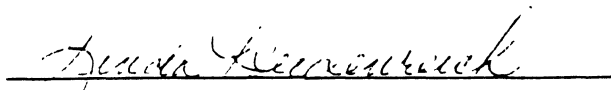
James Clegg, President
Utah State Bar Association
645 South 200 East
Salt Lake City, UT 84111

Paul T. Moxley, President-Elect
Utah State Bar Association
CAMPBELL MAACK & SESSIONS
201 South Main #1300
One Utah Center
Salt Lake City, UT 84111

Stephen A. Trost
Office of Bar Counsel
Utah State Bar Association
645 South 200 East
Salt Lake City, UT 84111

Nayer H. Honarvar
Office of Bar Counsel
Utah State Bar Association
645 South 200 East
Salt Lake City, UT 84111

this 9th day of July, 1993.



(0067)

CARMAN E. KIPP, ESQ. - #1829
GREGORY J. SANDERS, ESQ. - #2858
SANDRA L. STEINVOORT, ESQ. - #5352
KIPP AND CHRISTIAN, P.C.
Attorneys for Utah State Bar
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

IN THE UTAH SUPREME COURT

In the Matter of the Complaint	:	MEMORANDUM IN RESPONSE TO
by:	:	SUGGESTION OF MOOTNESS AND
	:	MOTION TO DISMISS AND ENFORCE
C.M. WILKERSON	:	RULE 4, RULES OF LAWYER
	:	DISCIPLINE AND DISABILITY AND
against	:	IN SUPPORT OF ORDER OF
	:	DISCIPLINE: PUBLIC REPRIMAND
JOHN L. BLACK	:	
DOB: 08-25-23	:	No. 930594
ADM: 06-12-52	:	

The Utah State Bar hereby submits the following Memorandum in Response to Mr. Black's Suggestion of Mootness and Motion to Dismiss and Enforce Rule 4, Rules of Lawyer Discipline and Disability and in Response to his Memorandum in Opposition to Order of Discipline: Public Reprimand:

PROCEDURAL SETTING

Pending before the court is a proposed Order of Discipline: Public Reprimand against attorney John L. Black. This proceeding has become unnecessarily complicated procedurally

but, as will be shown below, is properly before this court for final action.

On June 18, 1993, a hearing panel of the Utah State Bar entered Findings of Fact and Conclusions of Law with a recommendation of discipline against Mr. Black. The Utah State Bar Commission affirmed the hearing panel Findings and Conclusions on or about June 24, 1993.

Effective July 1, 1993, this court ordered new Rules of Lawyer Discipline and Disability. A problem arose because, under the old rules, Mr. Black had a right to petition within 10 days the Bar Commission to amend, modify, or reconsider under Rule XII(f) the recommendation entered June 24, 1993 by the Bar Commission, but the new rules removed Bar Commission jurisdiction as of July 1, 1993.

On July 19, 1993, the Office of Attorney Discipline filed a Motion for Clarification with this court asking the court to clarify the procedural status of the case. On or about August 17, 1993, this court granted leave for Mr. Black to file an appeal of the recommendation of discipline with the Utah Supreme Court. This court also denied a Petition for Extraordinary Writ which Mr. Black had filed with the court.

This court's Order of August 17, 1993, had the effect of curing the questions raised by the adoption of the new rules so that Mr. Black could file his appeal. For reasons known only to Mr. Black and his counsel, the appeal was never filed. Bar counsel, by letter, reminded Mr. Black, through his counsel, of

the need to follow through on the appeal but none has been made to this date. See Exhibit "A".

No appeal of the recommendation having been filed with this court, the Utah State Bar then took the next appropriate step of certifying on or about December 10, 1993, that the Utah Supreme Court could review the proposed recommendation and enter an Order of Discipline.

Mr. Black then filed a Memorandum in Opposition to the Order of Discipline and further challenged the appointment of outside counsel to act as Bar counsel along with a Motion to Dismiss. The purpose of this Memorandum is to reply to all pending points raised by Mr. Black rather than file a collection of memoranda in response to the various pleadings filed.

ARGUMENT

A. Counsel are Not Disqualified

Mr. Black argues that under Rule 4 of the new Rules of Lawyer Discipline and Disability outside counsel are disqualified from acting in the stead of Bar counsel. This is a matter of first impression but, fortunately, the plain language of the applicable rules and common sense lead to a conclusion that the outside counsel are not disqualified.

A review of Rule 4, specifically, and the current Rules of Lawyer Discipline and Disability, generally, does not lead to the conclusion that one has a right to a particular person acting as disciplinary counsel. An examination of the structure of the

rules shows that outside counsel can so act in appropriate circumstances as disciplinary counsel.

For example, Rule 1 provides that the rule should be construed so as to achieve substantial justice and fairness with dispatch and at the least expense to all concerned parties. The rule further provides that the interest of the public, the courts, and the legal profession be taken into consideration and that the rules be construed to secure the just and speedy resolution of every complaint.

Rule 2 provides that disciplinary counsel means the counsel appointed by the Board of Bar Commissioners and includes other counsel employed to assist appointed counsel.

Rule 4 provides the Board of Commissioners shall appoint the chief disciplinary counsel. The rule then contains a prohibition that the chief disciplinary counsel nor any full-time staff disciplinary counsel engage in the private practice of law. Nothing in that language limits the ability of the Bar to hire outside counsel and the ability of the outside counsel to engage in the general practice of law. Rule 4(b)(6) invoked by Mr. Black clearly was intended to be part of a list of duties and responsibilities of the chief disciplinary counsel. There is nothing in that rule which indicates that outside counsel cannot be utilized in an appropriate situation.

An examination of the record before this court shows that this is an appropriate situation for the employment of outside counsel. Reading of Mr. Black's Memorandum in Opposition

to the Order of Discipline shows that he claims that Bar counsel and the staff conspired against him in "shocking disregard of fundamental fairness and due process", made false certifications, and generally threatened and engaged in other personal activity that was wrongful.

If one were to follow the logic of Mr. Black, almost nobody could act as disciplinary counsel under the circumstances. He claims that the staff of the Utah State Bar, including the president of the Bar, the executive director, the disciplinary counsel, and supporting staff, are all engaged in a conspiracy to deny him his rights. He would have them all disqualified from participating in the disciplinary process. When the Utah State Bar takes the commendable action of removing themselves from the proceeding so as to preserve fairness, Mr. Black claims that nobody is qualified if they are engaged in the private practice of law. Simple logic leads one to conclude that only attorneys who work for government or who are not practicing law at all could act as counsel where the Bar disciplinary counsel is disqualified. There is no apparent legal reason to adopt the strained interpretation.

In fact, there is no prohibition in the rules to the Bar retaining outside counsel to act. The actions of the Utah State Bar in retaining outside counsel are completely consistent with the mandate in Rule 1 to construe the rules towards the speedy and effective administration of justice. Absent any specific prohibi-

tion on retaining outside counsel, the arguments that are proposed should be rejected.

B. This Court has Jurisdiction

Mr. Black argues in his opposition to the Order of Discipline that this court lacks jurisdiction to impose the Order. This argument is patently incorrect. This court explained in some detail in Bailey v. Utah State Bar, 846 P.2d 1278 (Utah 1993), that this court has the inherent power to regulate the practice of law through Article VIII, Section 4 of the Utah Constitution. Contrary to the allegation that this court does not have jurisdiction, it is the very source of jurisdiction over attorneys in disciplinary proceedings.

Mr. Black raises a number of procedural points in an attempt to show the court that jurisdiction does not exist. These points are not well founded, but require a brief response.

Mr. Black first argues that the proceedings are untimely and that the Findings of Fact and Conclusions of Law were not presented "forthwith" as required by former Rule XII(g). In fact, the procedural history shows that the Utah State Bar always pressed the resolution of this action forward and was, admittedly, delayed while the question of the effect of the new rules was considered. There is no evidence in the record that any unusual delay was incurred because of the failure of the Utah State Bar to act. The argument is also inconsistent with his other that the bar acted too fast in forwarding the recommendation to this court.

Next, Mr. Black argues that Bar counsel did not have the express direction of the Bar Ethics and Discipline Committee to conduct proceedings. There is no amplification of this point contained in the Black memorandum. There is a presumption in law that proceedings are regular until someone presents evidence to the contrary. Cf., Ferro v. Utah Dept. of Commerce, 828 P.2d 507 (Utah App. 1992); Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990). The argument should be rejected summarily.

Next, Mr. Black claims that because of the "reprehensible practice" of the Bar counsel that there was no service as required upon him. While no one would argue that maximum disclosure is desirable, the argument that somehow the proceeding is void for lack of service is misplaced.

First, however he found out, it is clear that Black has actual notice of the pending Order. The Affidavit of Parker Nielsen attached to the Memorandum before this court describes the circumstances of learning that there was a pending Order. Consequently, even if one were to assume that some rule was violated, no prejudice has been shown. Failure to show prejudice amounts to harmless error. In re Disciplinary Action of McCune, 717 P.2d 701 (Utah 1986).

Next, the failure of Mr. Black to enter his appeal after the court's Order allowing the same several months ago constitutes a waiver of additional notice. One searches in vain through the Rules of Lawyer Discipline and Disability to find a requirement that the proposed Order be served upon Mr. Black. Rule 14 of the

new Rules of Lawyer Discipline and Disability suggest that one look to the Utah Rules of Civil Procedure for such a requirement. Rule 5 of the Utah Rules of Civil Procedure provides for the general service of papers in connection with litigation but creates an exception for the requirement of service where parties are in default. Failure to make the required appeal is tantamount to a default and the opposing side may assume that no opposition is made to entering an order. See In re Judd, 629 P.2d 694 (Utah 1981).

Rule XII, under the old rules, provides for a routine process by which Findings of Fact and Conclusions of Law with a Recommendation are entered by the Board of Bar Commissioners and transmitted routinely to the Utah Supreme Court. The requirement for service should be interpreted in the context of the proceeding that is at issue. These proceedings are not routine court proceedings but are quasi-administrative in that the Bar is acting as an extension of the Utah Supreme Court.

Additionally, Rule XIV(b) of the former rules, in effect when this proceeding commenced, simply provided for the court to enter an order approving and adopting the findings, conclusions and recommendations of the Board of Bar Commissioners where there has been no appeal and a review by the Supreme Court shows that there is no cause to act contrary to the recommendation rendered.

The usual procedure for submitting an order without sending a copy to the respondent is not defective for other reasons. First, carrying the administrative analogy forward, it

is basic law that the agency need not submit the order to a party before it is actually entered. See 2 Am. Jur. 2d, Administrative Law § 471. Similarly, any requirement the party be advised of the actual notice has been satisfied by the notice of this court of hearing set for February 7, 1994 to consider the order.

What Black really objects to is the timing of the notice rather than the existence of the notice. As he has had ample notice in this court and actually filed an objection, no error attaches.

Mr. Black should be charged with the knowledge that the Utah State Bar will follow the regular and routine procedure set forth in published rules and forward the Recommendation and proposed order to this court. This argument has particular force because Bar counsel advised counsel for Mr. Black by letter that a formal order was going to be submitted unless a Notice of Appeal was filed. See Exhibit "A".

Finally, the argument that failure to serve voids the proposed action elevates form over substance. Even when there is a default judgment, the failure to give proper notice of a judgment does not invalidate the default judgment where a party learns of the default in time to act against the judgment. Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties, 838 P.2d 672 (Utah App. 1992). Similarly, where Black has known of the proposed order for several weeks now, the complaint about service is exalting form over substance. His very Memorandum is

evidence that he had time to overcome any defect in notice and has made what he views to be an appropriate response.

Black next argues that appellate jurisdiction is not invoked and relies on Title 78 governing the original jurisdiction of the Supreme Court. This argument ignores entirely Article VIII of the Utah Constitution and the implementing case law, such as Bailey, discussed above. The review by the Utah Supreme Court of a Bar disciplinary recommendation is not an appeal in the same sense as with civil litigation. What the Utah Supreme Court reviews under the old rules is a recommendation, not a final judgment. The term "appeal" is used in a loose sense to really refer to review by this court and resulting order upon the recommendation by the Bar. The reliance upon Title 78 concerning appeals of civil actions is misplaced.

Mr. Black next argues that the proceedings before the State Bar are not concluded because the Bar Commission did not specifically consider his Petition to Modify or Amend the Recommendation. This argument fails because the effect of the July 1, 1993, implementation of the new rules was to deprive the Bar Commission of any jurisdiction to act further on the case. This Court's subsequent order in August, 1993 retained the right of appeal to this Court but did not reserve the jurisdiction of the Bar Commission to reconsider under the old rules. While Mr. Black may believe that it would have been more appropriate to have the Bar Commission act first, what happened was that the door for

full review by the Supreme Court was opened to him so that no harm resulted when jurisdiction was lost by the Bar Commission.

Mr. Black also argues that the Bar counsel is precluded from filing the proposed Order of Discipline by the doctrines of estoppel, laches, and waiver. The basic principles of law advanced are not in disagreement. The argument fails on factual grounds. As reviewed above, the Utah State Bar has pressed this matter forward with dispatch considering all the circumstances. There was a brief period of uncertainty concerning the effect of the new rules but that was resolved by the Order of this court. The resulting delay has been caused by the failure of Mr. Black to take the necessary step to obtain review even after receiving the reminder to do so from the Bar counsel. There is no evidence of any reliance by Mr. Black to his detriment on any representation of the Utah State Bar or of prejudice worked against him by any delay. It is significant that his Memorandum does not talk in terms of prejudice other than to make reference to legal expenses associated with bringing an Extraordinary Writ that was dismissed because it was inappropriate. Absent a showing of prejudice or detrimental reliance, the legal principles of estoppel, laches, and waiver do not apply. Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976).

CONCLUSION

Before this court is a record of regularly conducted proceedings resulting in a recommendation of the Board of Bar Commissioners of the Utah State Bar that attorney John Black be disciplined. Some delay was experienced because of the implementation of new rules, but Black failed to take appropriate steps to protect his interest by seeking further review of this court once the door had been opened to him. A reading of the memoranda he has filed with this court shows that none of them deal with the substantive issue of whether Black ought to be disciplined. Instead, a variety of procedural complaints combined with charges of misconduct of Bar officials is made. This Memorandum has shown that none of the procedural objections are valid. Black makes no showing of any misconduct on the substantive question of whether he ought to be disciplined. Absent such a showing, what remains before this court is a clear recommendation that discipline be imposed without apparent reason for this court to do otherwise.

This court is respectfully requested to reject the procedural objections raised by Mr. Black and to enter the proposed Order of Discipline.

DATED this 27th day of January, 1994.

KIPP AND CHRISTIAN, P.C.



CARMAN E. KIPP, ESQ.
GREGORY J. SANDERS, ESQ.
SANDRA L. STEINVOORT, ESQ.
Attorneys for Utah State Bar

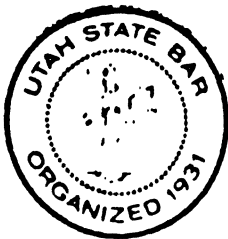
CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 27th day of January, 1994,
I caused a true and correct copy of the foregoing MEMORANDUM AND
RESPONSE TO SUGGESTION OF MOOTNESS AND MOTION TO DISMISS AND
ENFORCE RULE 4, RULES OF LAWYER DISCIPLINE AND DISABILITY AND IN
SUPPORT OF ORDER OF DISCIPLINE: PUBLIC REPRIMAND to be hand
delivered, to the following:

Parker M. Nielson, Esq.
Attorney at Law
655 South 200 East
Salt Lake City, Utah 84111



BAR\BLACK\MEMORAND.S



Utah State Bar

Office of Attorney Discipline

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834

Telephone: (801) 531-9110 • FAX: (801) 531-0660 • WATS: 1-800-698-9077

Stephen A. Trost
Chief Disciplinary Counsel

P. Gary Ferrero
Assistant Disciplinary Counsel

Nayer H. Honarvar
Assistant Disciplinary Counsel

Wendell K. Smith
Assistant Disciplinary Counsel

Pamela Blevins
Paralegal

Boyd Bryan
Paralegal

October 20, 1993

Parker Nielson, Esq.
655 S. 200 E.
S.L.C., UT 84111

RE: John L. Black, F-557

Dear Mr. Nielson:

As you know, the Utah Supreme Court on August 16, 1993, in response to my Motion for Clarification, granted "leave for respondent to file an appeal with this court."

Although the Supreme Court did not require a Notice of Appeal to be filed within the customary 30 day period, nonetheless, I presumed you would. It has now been in excess of 60 days since the Court entered their order and I would like to move this case along.

To that end I'm enclosing a copy of Rule XIV of the Procedures of Discipline of the Utah State Bar that were in effect until July 1, 1993. As you can see the respondent is required to file a Notice of Appeal within 30 days of being served the Findings, Conclusions and Recommendation of the Board. The Board served the same on about June 29, 1993 by mailing a copy to you.

If you would rather have the Supreme Court enter an order on the Board's order and proceed with the appeal thereafter, I have prepared the same for your approval as to form. In short, I have no preference as to which procedural course you choose to take, I simply want to conclude this case.

Sincerely,

Stephen A. Trost
Chief Disciplinary Counsel

SAT:clf
Enclosure
1795

Stephen A. Trost, #3286
Chief Disciplinary Counsel
Office of Attorney Discipline
645 S. 200 E.
SLC, UT 84111-3834
801-531-9110

IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of)	
the Complaint by)	
C.M. WILKERSON	)	ORDER OF DISCIPLINE:
	)	PUBLIC REPRIMAND
against)	
	)	F- 557
JOHN L. BLACK)	
DOB: 08-25-23)	
ADM: 06-12-52)	

Having reviewed the Findings of Fact, Conclusions of Law and Recommendation of the Hearing Panel of the Disciplinary Hearing Panel Committee of the Utah State Bar dated June 18, 1993, and having reviewed the Order of the Board of Commissioners of the Utah State Bar dated June 24, 1993, this Court, being fully advised in the premises, orders and decrees as follows:

IT IS HEREBY ORDERED That the Order of the Board of Bar Commissioners affirming the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the above-referenced Hearing panel be and the same hereby is approved.

IT IS FURTHER ORDERED That the Findings of Fact, Conclusions of Law, and Recommendation of Discipline of the above-referenced Hearing Panel be and the same hereby is incorporated herein as though fully set forth.

IT IS FURTHER ORDERED That the Respondent, JOHN L. BLACK, be and he hereby is disciplined for conduct unbecoming a member of the Utah State Bar as follows:

1. That Respondent shall make restitution to C.M. Wilkerson in the amount of \$1,635.91 or the outstanding balance of Wilkerson's bill, whichever is less within thirty (30) days from the entry of this order.

2. That Respondent shall be PUBLICLY REPRIMANDED.

DATED this _____ day of _____, 1993.

UTAH SUPREME COURT

Gordon R. Hall
Chief Justice

Richard C. Howe
Associate Chief Justice

I. Daniel Stewart
Justice

Christine M. Durham
Justice

Michael D. Zimmerman
Justice

Approved as to form:

Parker M. Nielson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Order of Discipline was mailed postage pre-paid to Parker M. Nielson, Attorney for Respondent at 655 South 200 East, S.L.C., UT 84111 on this ____ day of _____, 1993.

Stephen Trost, #3286
Chief Disciplinary Counsel
OFFICE OF ATTORNEY DISCIPLINE
645 South 200 East
SLC, UT 84111-3834
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

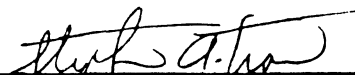
In The Matter of	)	MOTION TO CONTINUE PROCEEDINGS
Complaint by	)	RELATED TO RESPONDENT'S PETITION
	)	FOR RECONSIDERATION AND SANCTIONS
C.M. Wilkerson)	
	)	Case No. F-557
against)	
)	
John L. Black)	
DOB: 05-25-93)	
ADM: 06-12-52)	

COMES NOW the Office of Attorney Discipline, by and through, Stephen A. Trost, Chief Disciplinary Counsel and hereby moves this Board pursuant to Rule 40(b) Utah Rules of Civil Procedure to continue further proceedings in the above-captioned cause until the Utah Supreme Court rules on the Office of Attorney Discipline's Motion for Clarification filed on July 19, 1993.

A Memorandum in support accompanies this motion.

RESPECTFULLY SUBMITTED this 19th day of July, 1993.

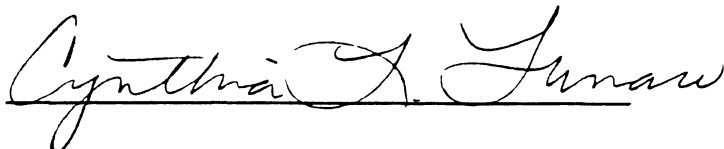
OFFICE OF ATTORNEY DISCIPLINE

By: 
Stephen A. Trost
Chief Disciplinary Counsel

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing
MOTION TO CONTINUE PROCEEDINGS was mailed postage prepaid to Parker
Nielson, at 655 S. 200 E., S.L.C., UT 84111 and to H. James Clegg
at P.O. Box 45000, S.L.C., UT 84145 on this 19 day of

July, 1993.



Certificate of Hand-Delivery

I hereby certify that a true and correct copy of the foregoing
MOTION TO CONTINUE PROCEEDINGS was hand-delivered to John Baldwin,
at 655 S. 200 E., S.L.C., UT 84111 on this 19 day of
July, 1993.

Cynthia A. Furrow

Stephen Trost, #3286
Chief Disciplinary Counsel
OFFICE OF ATTORNEY DISCIPLINE
645 South 200 East
SLC, UT 84111-3834
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of)	
Complaint by	)	MEMORANDUM IN SUPPORT
	)	OF MOTION TO CONTINUE
C.M. Wilkerson)	
	)	Case No. F-557
against)	
)	
John L. Black)	
DOB: 05-25-93)	
ADM: 06-12-52)	

COMES NOW the Office of Attorney Discipline, by and through, Stephen A. Trost, Chief Disciplinary Counsel and respectfully submits this Memorandum in Support of the Motion to Continue.

The Respondent's counsel in the above-captioned case served (among others) the Executive Director of the Bar on July 9, 1993 with a "Petition for (1) Amendment, Modification or Reconsideration, And to Vacate the Order Affirming Findings of Fact, Conclusions of Law And Recommendation of Discipline, And (2)

For Sanctions Against Bar Counsel And Bar Counsel" citing Rule XII(f) of the former rules of procedure.

However by the Supreme Court's Minute Entry of May 28, 1993 the new Rules of Lawyer Discipline and Disability were adopted as of June 30, 1993 abolishing henceforth the role of the Bar Commission in disciplinary cases. Thus it would appear that the Board lacks jurisdiction to hear the Respondent's petition. If this were the only minute entry by the Supreme Court there would be little to question as to procedure. But on June 29, 1993 the Supreme Court entered another Minute Entry requiring the removal to the district courts of all formal disciplinary cases "which have not yet been heard by the hearing panels." Since in this case a hearing panel did hear the case, it apparently can't go forward because of the June 29, 1993 Minute Entry nor go back (to the Bar Commission following the former rules) because jurisdiction was negated by the May 28, 1993 Minute Entry.

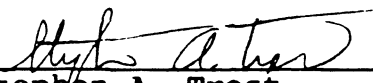
To rescue this case from the procedural black hole it fell into, the Office of Attorney Discipline filed with the Supreme Court on July 19, 1993 the attached Motion for Clarification.

Accordingly, the Office of Attorney Discipline, submits that good cause exists for the Bar Commission to continue without date

proceedings in this case until the Supreme Court responds to the Motion for Clarification.

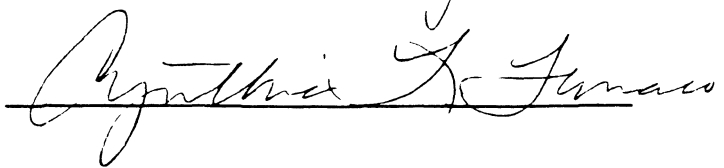
RESPECTFULLY SUBMITTED this 19th day of July, 1993.

OFFICE OF ATTORNEY DISCIPLINE

By: 
Stephen A. Trost
Chief Disciplinary Counsel

Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT was mailed postage prepaid to Parker Nielson, at 655 S. 200 E., S.L.C., UT 84111 and to H. James Clegg at P.O. Box 45000, S.L.C., UT 84145 on this 19 day of July, 1993.



Certificate of Hand-Delivery

I hereby certify that a true and correct copy of the foregoing
MEMORANDUM IN SUPPORT was hand-delivered to John Baldwin, at 655 S.
200 E., S.L.C., UT 84111 on this 19 day of July, 1993.

Gynthia A. Thomas

CARMAN E. KIPP, ESQ. - #1829
GREGORY J. SANDERS, ESQ. - #2858
KIPP AND CHRISTIAN, P.C.
Attorneys for Utah State Bar
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

IN THE UTAH SUPREME COURT

In the Matter of the Complaint :
by: :
C.M. WILKERSON :
against :
JOHN L. BLACK :
DOB: 08-25-23 :
ADM: 06-12-52 :
AFFIDAVIT OF :
JOHN C. BALDWIN :
No. 930594 :
F-557 :

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

Affiant, being first duly sworn, deposes and says:

1. I am the Executive Director of the Utah State Bar and was during the year 1993. One of my responsibilities during 1993 was to act as the Clerk of the Disciplinary Court.

2. Attached is a copy of the Certificate of Readiness for Supreme Court Review which Mr. Black complains was not executed by myself. In fact, I did not sign the certificate and it was signed by a deputy clerk whose responsibility it was to assemble documents concerning all disciplinary actions, when requested, to

the Utah Supreme Court. I delegated those routine administrative procedures to this deputy clerk.

3. This deputy clerk was authorized to sign my name on administrative documents. I accept responsibility for what was signed under my authorization.

4. The Certificate of Readiness is a standard form which is routinely processed as part of the record of disciplinary action and was not created specifically for the John Black matter. I have been since told that the statement that the respondent had not filed a Petition for Reconsideration is in error and appears to be the result of the deputy clerk executing a standard form without detailed review thereof.

DATED this 12th day of July, 1994.

John C. Baldwin
JOHN C. BALDWIN

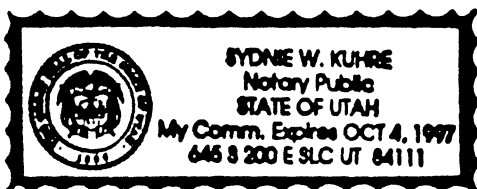
On this 12th day of July, 1994, before me
Sydney W. Kuhre, a Notary Public in and for
the State of Utah, personally appeared John C. Baldwin known to me
to be the person(s) who executed the within affidavit and acknowl-
edged to me that he executed the same for the purposes therein
stated.

My Commission Expires:

Oct. 4, 1997

Sydney W. Kuhre
NOTARY PUBLIC

Residing at:



IN THE SUPREME COURT
STATE OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

August 16, 1993

OFFICE OF THE CLERK

Parker M. Nielson
Attorney at Law
655 South 200 East
Salt Lake City, UT 84111

In re: Rules of Lawyer Discipline No. 920334
 and Disability

In response to motion for clarification, the court grants
leave for respondent to file an appeal with this court.

Geoffrey J. Butler
Clerk

IN THE SUPREME COURT OF THE STATE OF UTAH

-----ooOoo-----

Regular February Term, 1994

February 7, 1994

In re: John L. Black, F-557
Supreme Court Number 930594

MINUTE ENTRY

The Utah State Bar's motion to ratify the disciplinary action of John Black is denied and respondent's motion to dismiss is granted with directions to the Bar to process the complaint against Mr. Black under the new rules of professional conduct.

For the Court

I Daniel Stewart

I. Daniel Stewart
Associate Chief Justice

CARMAN E. KIPP, ESQ. - #1829
GREGORY J. SANDERS, ESQ. - #2858
KIPP AND CHRISTIAN, P.C.
Attorneys for Defendants
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN L. BLACK,
Plaintiff,

vs.

STEPHEN A. TROST, NAYER H.
HONARVAR, H. JAMES CLEGG, JOHN
C. BALDWIN, and the UTAH STATE
BAR,

Defendants.

**MEMORANDUM IN
SUPPORT OF AMENDED
MOTION TO DISMISS**

Civil No. 930905141CV

Judge Tyrone E. Medley

Defendants hereby submit the following Memorandum in Support of their Motion to Dismiss:

BACKGROUND

This action arises out of disciplinary action proposed against attorney John L. Black by the Utah State Bar pursuant to its responsibilities as the first line disciplinary agent of the Utah Supreme Court. Mr. Black had a formal disciplinary hearing which was decided adversely to him, on or about June 24, 1993.

Effective July 1, 1993 by order of the Utah Supreme Court, new Rules of Lawyer Discipline and Disability were adopted. A problem arose because, under the old rules, Mr. Black had a right to appeal the adverse decision directly to the supreme court. He perceived his right to appeal had disappeared under the new rules before his time to appeal under the old rules had run. Mr. Black then filed a Petition for Extraordinary Writ with the Utah Supreme Court. A copy of that Writ is attached as Exhibit "A" hereto. Note that the Petition originally had many pages of exhibits which have been omitted for convenience of review in this proceeding.

The Utah Supreme Court, by Order dated August 16, 1993, denied the Petition for Extraordinary Writ. See Exhibit "B".

Mr. Black, who does not acknowledge that he did anything to merit discipline, filed this Petition requesting sanctions and monetary damages against the defendants.

An examination of the Amended Petition shows that plaintiff engages in an analytical exercise whereby he makes up his own rules governing the procedure which should be followed in these circumstances and then asks this court to grant extraordinary relief when the Utah State Bar does not respond as he thinks they ought.

STANDARD OF REVIEW

A Motion to Dismiss for failure to state a claim is typically resolved by applying the standard that the Motion should be granted where it appears to a certainty that the plaintiff would not be^{1.} entitled to relief under any stated facts which could be proved in support of the claim. Christensen v. Lelis Automatic Transmission Serv., Inc., 467 P.2d 605 (Utah 1970). The court has discretion to consider matters outside the pleadings. Strand v. Associated Students, 561 P.2d 191 (Utah 1977). Matters considered outside the pleadings require application of the standard of review for a Motion for Summary Judgment. Harvey v. Sanders, 534 P.2d 905 (Utah 1975). Applying that standard, once the moving party has shown that there is no genuine issue of material fact, the responding party has an obligation to affirmatively show that there are facts in issue or the motion may be resolved as a matter of law. D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989).

ANALYSIS

A. There is No Dispute Here

When one cuts through the various allegations of wrongdoing and gets to the heart of the plaintiff's request for extraordinary relief, it becomes apparent there is no meaningful dispute. The heart of this dispute is that Mr. Black wants a special prosecutor appointed to investigate and pursue alleged wrongful conduct of the Bar counsel. As can be seen from the attached Affidavit of John Baldwin, the Bar has, in fact, made

such a request to the Utah Supreme Court. He then complains that this contact was improper and seeks monetary damages.

A review of the Petition shows that a major portion of his complaint is that Mr. Black does not believe the state Bar has acted quickly enough. A reading of his Petition in this case along with the Baldwin Affidavit shows that his Petition for sanctions against the Bar counsel was filed on or about July 9, 1993, only one week after the new rules took effect and eliminated authority of the Board of Bar Commissioners to act as a tribunal. His request that a special counsel be appointed was not filed until August 18, 1993. This Petition was filed on September 8, 1993. Mr. Black allowed only twenty-one calendar days after requesting special counsel be appointed before he thought it appropriate to complain to this court.

A review of the Rules of Lawyer Discipline and Disability, attached as Exhibit "C", shows that there are no time requirements imposed upon the Utah State Bar to obtain appointment of a special counsel. Mr. Black seeks, through this Petition, to make up his own time limitation rule and enforce it through order of this court.

One cannot ignore that this Petition fails because, as the Baldwin Affidavit shows, the Utah State Bar has already done what the Petition seeks. That is, the Utah State Bar has approached the Utah Supreme Court with a request for appointment of special counsel. The very language of Rule 65B provides that extraordinary relief is appropriate where there is "no other

plain, speedy and adequate remedy". Obviously, where the relief sought by the plaintiff has already been accomplished, there is plain, speedy and adequate remedy.

Similarly, though Utah has apparently not specifically yet addressed the question, other states have held it fundamental that one seeking to order another to act pursuant to an extraordinary writ must fail where the act has already been accomplished. Draper v. State, 621 P.2d 1142 (Okla. 1980); Kay v. David Douglas School Dist. #40, 738 P.2d 1389 (Or. 1987).

Put another way, the claim made herein is moot. The desired request was timely made by the Bar and any further complaint at this point would amount to nothing more than requesting the district court to order the supreme court to act quicker.

B. The Second Cause of Action States No Recognized Claim

An examination of the amendment to the original Petition for Extraordinary Relief shows that Mr. Black is essentially complaining that John Baldwin, executive director of the Utah State Bar, violated Rule 3.5(c) of the Rules of Professional Conduct in that he sent a letter to the Utah Supreme Court, dated September 13, 1993 requesting appointment of a Special Counsel. While the act complained of is clear, the nature of the cause of action alleged is not clear.

No legal authority is cited for the proposition that violation of a Bar rule somehow creates a cause of action. Allegation number 29, which cites various federal and state

constitution provisions, along with the most recent rules of lawyer discipline and disability, similarly fails to identify a recognized cause of action. Defendants are placed in the procedurally awkward position of having to respond to a negative. Defendants cannot be required to run through a list of potential torts or constitutional claims to discover if something fits the allegation made.

The courts have correctly placed the burden on the plaintiff to at least plead a recognized cause of action. A complaint is required to give fair notice of the nature and basis of the claim to avoid dismissal. Utah Steel & Iron Co. v. Bosch, 475 P.2d 1019 (Utah 1970). The complaint, here Petition, is then viewed in light of whether the allegations made would establish that the plaintiff would be entitled to no relief under any stated facts which could be proved in support of the claim. Liquor Control Comm'n v. Athas, 243 P.2d 441 (1952). Applying those standards, there is no recognized cause of action pled in the Second Cause of Action.

The second major problem with the Amended Petition is that it assumes that the letter from Baldwin to the Utah Supreme Court is an ex parte communication. That conclusion is incorrect because it ignores the reality of how the system is structured in disciplinary proceedings.

First, it must be kept in mind that the communication arises out of a request for special counsel to be appointed to investigate alleged improprieties of the Bar counsel. It is not

a communication concerning the substantive merits of the disciplinary proceeding against Mr. Black. The communication relates to only whether a proceeding ought to commence against Bar counsel. Mr. Black is not a party to a disciplinary proceeding of the Bar Counsel any more than, by analogy, a victim in a criminal proceeding is a party to the criminal prosecution case.

Second, the relationship between the Utah State Bar and the Utah Supreme Court in Bar disciplinary proceedings is not the relationship between a party and a judge in court proceedings. The Utah State Bar is not an association of attorneys, but is an extension of the Utah Supreme Court that functions in a quasi-judicial capacity. These principles were explained in some detail in Bailey v. Utah State Bar, 846 P.2d 1278 (Utah 1993). As the court explained there, the Utah Supreme Court has inherent power to regulate the practice of law and has also received affirmation of that power through Article VIII, Section 4 of the Utah Constitution.

Bailey explains that the court has delegated its regulatory and disciplinary duties to the Utah State Bar through the procedures of discipline. Rules 1 and 10 of the Rules of Lawyer Discipline and Disability clearly provide that the legal basis through which disciplinary proceedings are held is by appointment of the State Bar. Initial discipline activity which supreme court justices obviously are not procedurally positioned to do personally is formally delegated to the Bar. See Exhibit "C".

The communication of Baldwin to the supreme court cannot be labelled an ex parte communication when Baldwin acts, in effect, as an agent of the supreme court in administering State Bar procedure. The letter is nothing more than an internal communication to which no particular procedural rights attach.

C. Defendants are Immune From Liability

A third reason that the Amended Petition fails to state a claim upon which relief may be granted is that the defendants are protected by quasi-judicial immunity. The Bailey case arose out of a lawsuit brought against the Utah State Bar for failure to protect the plaintiffs against the incompetence of a member of the Bar. The Utah Supreme Court explained with clarity that the Bar itself and those participating in the process are immune from civil liability.

As with Bailey, Mr. Clark cannot here seek monetary damages in any form against these defendants. A reading of the Amended Petition shows that the wrongful acts alleged all arose out of the function of participating in the disciplinary process. Consequently, even if the standard of construing the Petition in favor of the petitioner is applied, these defendants are immune from the claim for monetary damages as a matter of law.

D. Attorney's Fees are Not Available

Passing mention should be made of the request for relief for attorney's fees. It is curious that in a Petition which alleges that certain attorneys failed to follow appropriate rules

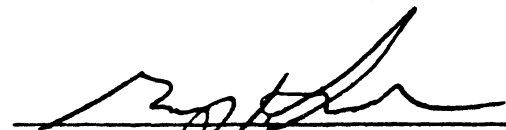
that a request for attorney's fees, which is clearly against all established law in Utah, would be included. Utah law was settled long ago to the effect that attorney's fees may not be recovered unless provided for by statute or by contract. B&R Supply Co. v. Bringham, 503 P.2d 1216 (Utah 1972). Plaintiff identifies no contract or statute that would allow Mr. Black an award of attorney's fees even if he was able to state some cause of action.

CONCLUSION

The court is respectfully requested to dismiss the Petition for Extraordinary Relief on the grounds that the entire claim is moot and no justiciable claim is stated. A request has been made by the Utah State Bar to the Utah Supreme Court to appoint special counsel and no legal basis exists for this Petition to move forward. Additionally, these defendants are immune from suits seeking monetary damages. There is no legal reason to proceed.

DATED this 22nd day of October, 1993.

KIPP AND CHRISTIAN, P.C.



CARMAN E. KIPP, ESQ.
GREGORY J. SANDERS, ESQ.
Attorneys for Defendants

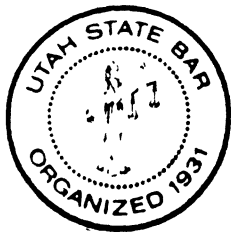
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 22nd day of ^{October}~~September~~, 1993, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF AMENDED MOTION TO DISMISS to be mailed, postage prepaid, to the following:

Parker M. Nielson, Esq.
Attorney for Plaintiff
655 South 200 East
Salt Lake City, Utah 84111

R. Hedstrom

BAR\BLACK\MEMORAND.1



Utah State Bar

Office of Attorney Discipline

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834

Telephone: (801) 531 9110 • FAX: (801) 531-0660 • WATS: 1-800-698-9077

Stephen A. Trost
Chief Disciplinary Counsel

Alan E. Barber
Assistant Disciplinary Counsel

P. Gary Ferrero
Assistant Disciplinary Counsel

Wendell K. Smith
Assistant Disciplinary Counsel

Pamela Blevins
Paralegal

Boyd Bryan
Paralegal

June 16, 1994

John L. Black
10 W. Broadway, #500
S.L.C., UT 84101

NOTICE OF INFORMAL COMPLAINT

Dear Mr. Black:

A complaint has been filed against you with the Ethics and Discipline Committee of the Utah State Bar by Dr. C.M. Wilkerson. You have previously been provided a copy of the complaint but another is enclosed for your convenience. You have twenty (20) days from the receipt of this Notice of Informal Complaint to submit an Answer as per Rule 10(a)(5) of the Rules of Lawyer Discipline and Disability. Preliminary investigation by the Office of Bar Counsel indicates that the activities described in the complaint may constitute violations of one or more of the following Rules of Professional Conduct of the Utah State Bar, to wit:

1. Rule 1.13(a), (b) and (c) **SAFEKEEPING PROPERTY** - which states that a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept the lawyer and shall be preserved for a period of five years after termination of the representation; (b) upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person, except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property; (c) and when in the course of

John L. Black
Page Two

representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved; and/or

2. Rule 8.4(c) MISCONDUCT - which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Our investigation indicates you may have violated these Rules when in the course of representing Ms. Ruby Landers for personal injuries related to her slipping on oil and falling in the parking lot of a certain "7-11" store located at 2102 South State, Salt Lake City, Utah on or about July 23, 1990, you received settlement funds on or about August 26, 1991 and failed to withhold from these funds proceeds assigned to Dr. Wilkerson in a document which you signed on August 20, 1990 entitled "Authorization of Direct Payment and Doctor's Lien," a copy of which is enclosed for your convenience, knowing that Dr. Wilkerson would not provide a medical report as to your client's diagnosis, treatment and prognosis without a signed lien in his possession.

We will notify you of the date and time set for a hearing before a Screening Panel of the Ethics and Discipline Committee. Should you fail to respond to the complaint, the Panel may take the view that the factual allegations of the complaint are to be taken as true by reason of your default.

At the Panel hearing, you will be given an opportunity to appear and testify under oath and present witnesses in your behalf in addition to your written response. For a more complete description of the Proceedings before the Screening Panel please review Rule 10(b), Rules of Lawyer Discipline and Disability, adopted by the Utah Supreme Court on July 1, 1993.

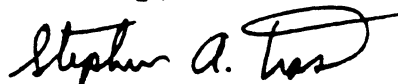
If the Screening Panel recommends an admonition (under the prior rules denominated a "private reprimand"), you will have the right to file with the Committee Chair an exception to the recommendation and may also, if desired, request a hearing. If a request for a hearing is made, the Committee Chair, or a Screening Panel chair designated by the Committee Chair, shall proceed to hear the matter in an

John L. Black
Page Three

expeditious manner, with disciplinary counsel and the respondent having the opportunity to be present.

The Panel also has the authority to issue a Formal Complaint. In the event the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited, disciplinary counsel shall prepare and file a formal complaint with the district court of proper venue. See Rule 11, Rules of Lawyer Discipline and Disability, adopted July 1, 1993. The action shall be brought and the trial shall be held in the county in which the alleged offense occurred or in the county where the respondent resides or practices law or last practiced law in Utah. The District Court can order disbarment, suspension, a public reprimand, probation, or dismissal of the case. In the event of a suspension, disbarment, probation, or public reprimand, notice will be published in the Utah State Bar Journal. Suspension may, and disbarment shall, carry with it the requirement that your clients be notified. The District Court may also order restitution of money and other sanctions they deem appropriate.

Sincerely,



Stephen A. Trost
Chief Disciplinary Counsel

SAT:db

Enc.

cc: Dr. C.M. Wilkerson
Ruby Landers

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Notice of Informal Complaint was mailed postage pre-paid to Parker M. Nielson, Attorney for John L. Black, at, 655 S. 200 E., S.L.C., UT 84111 this 16th day of June, 1994.



CARMAN E. KIPP, ESQ. - #1829
GREGORY J. SANDERS, ESQ. - #2858
SANDRA L. STEINVOORT, ESQ. - #5352
KIPP AND CHRISTIAN, P.C.
Attorneys for Defendants
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111
(801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN L. BLACK,	:
	:
Plaintiff,	: DEFENDANT TROST'S RESPONSE
	: TO PLAINTIFF'S FIRST REQUESTS
	:
	: FOR ADMISSIONS
	:
H. JAMES CLEGG, PAUL T. MOXLEY,	:
JOHN C. BALDWIN, STEPHEN A.	:
TROST and NAYER H. HONARVAR,	: Civil No. 940903074CV
	:
Defendants.	: Judge Timothy R. Hansen
	:

Defendant, Stephen A. Trost, answers Plaintiff's First
Requests for Admissions as follows:

REQUESTS FOR ADMISSIONS

1. With respect to the allegation in ¶ 15 of your
Answer and Counterclaim, in which it is "[d]enied that [Trost] is
a 'chief prosecutor,'" admit that Rule 4(a), Utah Rules of Lawyer
Discipline and Disability (1993), provides for appointment of a
"chief disciplinary counsel," that Rule 4(b), Utah Rules of Lawyer
Discipline and Disability (1993), provides that "Chief disciplinary

counsel shall perform all prosecutorial functions," and that Trost was appointed chief disciplinary counsel pursuant to those provisions.

RESPONSE: Admit subject to the qualification that the bar counsel is not a criminal prosecutor, that the proceedings are civil in nature.

2. With respect to ¶ 16 of your Answer and Counterclaim, in which it is alleged that "Defendant Honarvar was never the agent of defendant Trost," admit that a Petition for Extraordinary Writ, Supreme Court docket No. 930381, was served on you on or about July 22, 1993, containing the following allegation:

E. Respondent Nayer Honarvar ("Honarvar" herein) is an agent of Trost, employed by and subordinate to Trost as to matters alleged herein.

and that the attached document marked as Exhibit "A" is a true and correct copy of your answer, filed by your counsel herein, Gregory J. Sanders, containing the following admission:

7. Respondents admit the allegations contained in Paragraphs C, D, and E on Page 2 of the petition.

RESPONSE: Admit subject to the qualification that the use of the term "agent of Trost" means that the admission is made in the context of her working within the scope of her employment as a person supervised by Trost and not as his personal agent.

3. With respect to ¶ 17 of your Answer and Counterclaim, in which it is alleged that the Utah State Bar "had jurisdiction to enter final orders concerning discipline of attorneys," admit that the attached Exhibit "B" is a true and correct copy of such a final order concerning John L. Black.

RESPONSE: Admit subject to the qualification that only the Utah Supreme Court can enter a final Order of Discipline.

4. With respect to your denial at paragraph 33 of your Answer and Counterclaim of the letter dated June 1, 1993, quoted in paragraph 33 of the Complaint, admit that the letter dated June 1, 1993, a copy of which is attached as Exhibit "D," (a) is authentic, (b) was mailed on or about the date it bears with your knowledge and consent, and (c) was substantially the same as letters sent to all, or substantially all persons as to whom disciplinary complaints were then pending.

RESPONSE: Admit.

5. With respect to your denial at paragraph 34 of your Answer and Counterclaim, admit that the letter dated June 1, 1993, a copy of which is attached as Exhibit "D," (a) is authentic, and (b) threatened to take action as Bar Counsel and/or Assistant Bar Counsel against John L. Black, or cause such action to be taken.

RESPONSE: Admit that the letter is authentic. The remainder of the request is denied.

6. With respect to your denial at paragraph 35 of your Answer and Counterclaim, admit that (a) the Memorandum dated April 27, 1993, a copy of which is attached as Exhibit "E," is authentic, (b) bears your initials next to the words "Bar Counsel," (c) was mailed or transmitted to its addressees on or about the date that it bears, and (d) that you were aware, at all times subsequent to the Memorandum, that the following language in the document attached to the Memorandum, was contained in the Interprofessional Code (2d Ed.): "An attorney is ethically forbidden to pay debts, medical or otherwise, incurred by a client the attorney should not (and ethically cannot) pay for a guarantee payment of medical services rendered to the client"

RESPONSE:

(a) Admit.

(b) Admit.

(c) Admit.

(d) Deny for lack of personal knowledge as to what addition was quoted.

7. With respect to your denial at paragraph 36 of your Answer and Counterclaim, admit that the letter of Parker M. Nielson dated June 3, 1993, a copy of which is attached as Exhibit "G," was received by you after its date, allowing normal time for mail delivery.

RESPONSE: Admit.

8. With respect to your denial at paragraph 37 of your Answer and Counterclaim, admit that the Notice of Trial dated June 7, 1993, a copy of which is attached as Exhibit "H," (a) is authentic and (b) was mailed to John L. Black, through his attorney of Record.

RESPONSE: Admit.

9. Admit that the Notice of Trial dated June 7, 1993, a copy of which is attached as Exhibit "H," was not signed by defendant John C. Baldwin.

RESPONSE: Admit

10. With respect to your denial of the allegations of ¶¶ 48, 70 and 78 of the complaint, admit that the document attached hereto as Exhibit "F" (a) is a true and correct copy of a proposed Order of Discipline: Public Reprimand filed with the Utah Supreme Court on or about December 13, 1993, (b) by defendant Stephen A. Trost, or with his knowledge and approval, (c) was preceded by the letter of Stephen A. Trost dated October 20, 1993, a copy of which is attached as Exhibit "M," and (d) that the Certificate, a copy of which is attached as Exhibit "C," accompanied Exhibit "F."

RESPONSE:

(a) Admit.

(b) Admit subject to the qualification that it was not personally filed by defendant Trost but was part of the routine processing of his office for which he is responsible.

(c) Admit.

(d) Deny.

10. [sic.] With respect to your denial of the allegations of ¶ 49 of the complaint, admit that (a) a copy of John Black's Petition for Amendment, Modification or Reconsideration in disciplinary case No. F-557 was served on you, by mail, on or about July 9, 1993, and (b) the Memorandum in Support of Motion for Clarification, a copy of which is attached hereto as Exhibit "J," is an authentic copy of a document filed by you with the Utah Supreme Court on or about July 19, 1993, containing the following statement at page 2 thereof: "The Respondent's counsel served (among others) the Executive Director of the Bar on July 9, 1993 with a 'Petition for (1) Amendment, Modification or Reconsideration, And to Vacate the Order Affirming Findings of Fact, Conclusions of Law and Recommendation of Discipline, And (2) For Sanctions Against Bar Counsel and Assistant Bar Counsel' citing Rule XII(f), attached as Exhibit C, of the former rules of procedure."

RESPONSE:

(a) Admit.

(b) Admit.

11. With respect your evasive allegation in ¶ 54 of your Answer and Counterclaim, neither admitting nor denying the letters alleged at 54 of the Complaint, (a) admit that a letter dated December 31, 1993, a copy of which is attached as Exhibit "K," was hand delivered to defendant H. James Clegg on the date that it bears, and (b) that a letter dated December 31, 1993, a copy of which is attached as Exhibit "K," was hand delivered to defendant Paul T. Moxley on the date that it bears.

RESPONSE: Denied for lack of personal knowledge and because there is no evasive allegation.

12. With respect to your allegation at ¶¶ 53 and 57-60 of your Answer and Counterclaim the [sic] "Baldwin had no authority to take any action after July 1, 1993" and "jurisdiction had been removed from [defendants] by the rule change of July 1, 1993."

(a) Admit that you knew, at all material times, that if "jurisdiction had been removed from [defendants] by the rule change of July 1, 1993" the Board of Bar Commissioners nevertheless had jurisdiction to dismiss, in accordance with numerous authorities including, e.g., *Varian-Eimac, Inc. v. Lamoreaux*, 767 p.2D 569, 570 (Utah App. 1989) holding that "[w]hen a matter is outside the court's jurisdiction it retains only the authority to dismiss the action."

(b) Admit that you filed the proposed order, a copy of which is attached as Exhibit "F," in December of 1993, and relied on procedures under the rules of attorney discipline in effect prior to July 1, 1993 in doing so.

(c) Admit that an order was signed by defendant Clegg in a disciplinary proceeding against Donn E. Cassity on June 24, 1993.

(d) Admit that a Notice of Appeal was filed by Donn E. Cassity in Utah Supreme Court Docket No. 930372 on or about July 26, 1993.

(e) Admit that the Notice of Appeal by Donn E. Cassity in Utah Supreme Court Docket No. 939372 was, by its terms, pursuant to Rule XIV, Procedures of Discipline of the Utah State Bar as in effect prior to July 1, 1993.

(f) Admit that you never claimed, or took the position that there was no jurisdiction after July 1, 1993 to entertain an appeal pursuant to Rule XIV, Procedures of Discipline of the Utah State Bar as in effect prior to July 1, 1993.

(g) Admit that the Utah Supreme Court entertained, and decided Docket No. 930372 and noted at footnote No. 1 of its opinion that it had jurisdiction to do so because "Bar counsel filed this case when the prior procedures were in effect."

(h) Admit that the office of Disciplinary Counsel, and the Board of Bar Commissioners, has continued to process the

complaint against Donn Cassity pursuant to the mandate of the Utah Supreme Court and has not taken the position that it lacks jurisdiction to do so because of the rule change on July 1, 1993.

RESPONSE:

(a) Deny

(b) Admitted that the proposed Order was filed. Denied that it was done under the old rules.

(c) Admit.

(d) Admit.

(e) Admit that the notice reads as it reads. Denied so far as the request implies the Utah State Bar took a position concerning jurisdiction.

(f) Objection is made to the request as vague. If the request is asking whether the Utah State Bar took a position that it had jurisdiction, the request is denied because the Utah State Bar does not entertain appeals.

(g) Admit.

(h) Objection is made to this request as being a compound question. Admitted that the Utah Supreme Court considered the complaint against Mr. Cassity and that the Utah State Bar never challenged the jurisdiction of the Utah Supreme Court. Any other implication of this request is denied.

13. With respect to your denial at ¶ 62 of your Answer and Counterclaim, admit that the affidavit of John C. Baldwin, a copy of which is attached hereto as Exhibit "N," is authentic.

RESPONSE: Admit.

14. With respect to your denial at ¶ 66 of your Answer and Counterclaim, admit that the Notice of Trial over the name of John C. Baldwin dated June 7, 1993, a copy of which is attached as Exhibit "H," was not signed by defendant John C. Baldwin.

RESPONSE: Admit

15. With respect to your denial at ¶ 68 of your Answer and Counterclaim, admit (a) that attached Exhibit "O" is a true and correct copy of the certified mail receipt for the delivery of the Order of Clegg dated June 24, 1993, and the Findings of Fact, Conclusions of Law & Recommendation signed by Robert S. Howell dated June 18, 1993 and (b) that they were mailed by your office, pursuant to your direction or with your knowledge and authority, on June 29, 1993.

RESPONSE: Admit.

16. With your respect to denial at ¶ 82 of your Answer and Counterclaim, admit (a) that the conduct of disciplinary proceedings against John L. Black in disciplinary proceeding No. F-557 was not pursuant to Utah Code Ann. §78-51-12, (b) at proceeding No. F-557 did not allege violations of Utah State Bar, Rules of

Professional Conduct (1988) and (c) that the filing of the certificate attached as Exhibit "C" and the Order of Discipline attached as Exhibit "F" were not pursuant to regulations, customs and usages of the Utah State Bar.

RESPONSE:

- (a) Admitted.
- (b) Denied.
- (c) Denied.

17. Admit that the statement in Item 5.2 of the Minutes attached hereto as Exhibit "Q" to the effect that action on Ethics Opinion #124 would be deferred "for about 60 days pending receipt of a related ruling" refers to an anticipated or hoped for ruling concerning John L. Black.

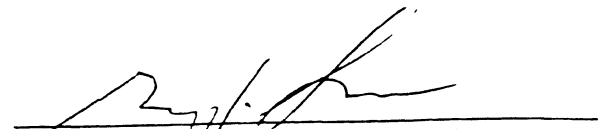
RESPONSE: This request is denied because Exhibit "Q" is not as represented in this response but is Ethics Opinion No. 115.

18. Admit that Defendant Trost and/or Defendant Baldwin have declined to present the Petition "for . . . sanctions against Bar Counsel and Assistant Bar Counsel" of John Black dated July 9, 1993 to the Board of Bar Commissioners to whom it was addressed.

RESPONSE: Deny.

DATED this 20th day of July, 1994.

KIPP AND CHRISTIAN, P.C.



GREGORY J. SANDERS, ESQ.
Counsel for Defendant
Stephen A. Trost

CARMAN E. KIPP, ESQ. - #1829
GREGORY J. SANDERS, ESQ. - #2858
KIPP AND CHRISTIAN, P.C.
Attorneys for Defendants
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111-2314
Telephone: (801) 521-3773

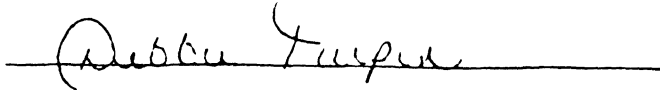
IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN L. BLACK,	:	
	:	
Plaintiff,	:	CERTIFICATE OF
	:	SERVICE
vs.	:	
	:	
STEPHEN A. TROST, NAYER H.	:	
HONARVAR, H. JAMES CLEGG, JOHN	:	
C. BALDWIN, and the UTAH STATE	:	Civil No. 930905141CV
BAR,	:	
	:	Judge Tyrone E. Medley
Defendants.	:	

I HEREBY CERTIFY that on the 20th day of July, 1994, I caused a true and correct copy of the foregoing Defendant Trost's Response to Plaintiff's First Request for Admissions to be mailed, postage prepaid, to the following:

Parker M. Nielson, Esq.
Attorney for Plaintiff
655 South 200 East
Salt Lake City, UT 84111

BAR\BLACK\CERT SER



RECEIVED
JUN 30 1993
OFFICE OF BAR COUNSEL

IN THE SUPREME COURT OF THE STATE OF UTAH .

-----00000-----

Regular June Term, 1993

June 29, 1993

In re:

Case No. 920334

Rules of Lawyer Discipline and Disability

MINUTE ENTRY

Due to the adoption of the new Rules of Lawyer Discipline and Disability, effective July 1, 1993, it is hereby ordered that all lawyer discipline matters which have been voted as formal complaints by the screening panels but which have not yet been heard by the hearing panels shall be removed to the district courts effective July 1, 1993.

P 396 818 117



**Receipt for
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Parker M. Nielson	
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Attorney at Law	
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655 South 200 East	
S.L.C., UT 84111	
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PS Form 3800, June 1991