



**ORIGINAL**

(Do not write above this line.)

**State Bar Court of California  
Hearing Department  
Los Angeles**

<p>Counsel For The State Bar</p> <p><b>Eli D. Morgenstern</b> Deputy Trial Counsel 1149 South Hill Street Los Angeles, CA 90015-2299 (213) 765-1334</p> <p>Bar # <b>190560</b></p>	<p>Case Number (s) <b>07-J-11781-DFM;</b> <b>07-J-12546;</b> <b>07-J-12547</b></p>	<p>(for Court's use)</p> <p><b>PUBLIC MATTER</b></p> <p><b>FILED</b></p> <p><b>OCT 31 2007</b></p> <p>STATE BAR COURT CLERK'S OFFICE LOS ANGELES</p>
<p>In Pro Per Respondent</p> <p><b>Barry Nakell</b> 149 Dixie Drive Chapel Hill, North Carolina 27514 (919) 967-7325</p> <p>Bar # <b>39298</b></p>	<p>Submitted to: <b>Settlement Judge</b></p> <p>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</p> <p><b>ACTUAL SUSPENSION</b></p> <p><input type="checkbox"/> PREVIOUS STIPULATION REJECTED</p>	
<p>In the Matter Of: <b>Barry Nakell</b></p> <p>Bar # <b>39298</b></p> <p>A Member of the State Bar of California (Respondent)</p>		

**Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.**

**A. Parties' Acknowledgments:**

- (1) Respondent is a member of the State Bar of California, admitted **December 23, 1966**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **15** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(Do not write above this line.)

- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 284, Rules of Procedure.
  - costs to be paid in equal amounts prior to February 1 for the following membership years: **three billing cycles following the effective date of the discipline herein. Please see pages 13 and 14 for additional discussion concerning costs.**  
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
  - costs waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs"
  - costs entirely waived

**B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.**

- (1)  **Prior record of discipline** [see standard 1.2(f)]
- (a)  State Bar Court case # of prior case
  - (b)  Date prior discipline effective
  - (c)  Rules of Professional Conduct/ State Bar Act violations:
  - (d)  Degree of prior discipline
  - (e)  If Respondent has two or more incidents of prior discipline, use space provided below.
- (2)  **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.
- (3)  **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4)  **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5)  **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (6)  **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.
- (7)  **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.
- (8)  **No aggravating circumstances** are involved.

**Additional aggravating circumstances:**

**C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.**

- (1)  **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2)  **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.
- (3)  **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings. **Please see page 11.**
- (4)  **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct. **Please see page 11.**
- (5)  **Restitution:** Respondent paid \$ \_\_\_\_\_ on \_\_\_\_\_ in restitution to \_\_\_\_\_ without the threat or force of disciplinary, civil or criminal proceedings.
- (6)  **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7)  **Good Faith:** Respondent acted in good faith.
- (8)  **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities. **Please see pages 10 and 11.**
- (9)  **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
- (10)  **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11)  **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct. **Please see pages 11 and 12.**
- (12)  **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation. **Please see page 11.**
- (13)  **No mitigating circumstances** are involved.

**Additional mitigating circumstances**

**D. Discipline:**

(1)  **Stayed Suspension:**

(a)  Respondent must be suspended from the practice of law for a period of **three years**.

- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii) Standards for Attorney Sanctions for Professional Misconduct.
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:

(b)  The above-referenced suspension is stayed.

(2)  **Probation:**

Respondent must be placed on probation for a period of **three years**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

(3)  **Actual Suspension:**

(a)  Respondent must be actually suspended from the practice of law in the State of California for a period of **30 days**.

- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:

**E. Additional Conditions of Probation:**

- (1)  If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.
- (2)  During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (3)  Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (4)  Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the

probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

- (5)  Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

- (6)  Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.
- (7)  Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.
- (8)  Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.
- No Ethics School recommended. Reason: **Please see page 14 .**
- (9)  Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10)  The following conditions are attached hereto and incorporated:
- |   |   |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions         | <input type="checkbox"/> Financial Conditions             |

#### F. Other Conditions Negotiated by the Parties:

- (1)  **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 321(a)(1) & (c), Rules of Procedure.**
- No MPRE recommended. Reason:
- (2)  **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

- (3)  **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (4)  **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension:
- (5)  **Other Conditions: Please see page 13.**

**ATTACHMENT TO**  
**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF:        BARRY DAVID NAKELL

CASE NUMBERS:            07-J-11781; 07-J-12546; 07-J-12547

**AGREEMENTS AND WAIVERS PURSUANT TO BUSINESS AND PROFESSIONS  
CODE SECTION 6049.1.**

1. Respondent's culpability determined in the disciplinary proceedings in the State of North Carolina would warrant the imposition of discipline in the State of California under the laws or rules in effect in this State at the time the misconduct was committed; and
2. The proceedings in North Carolina provided Respondent with fundamental constitutional protection.

**FACTS AND CONCLUSIONS OF LAW.**

Respondent admits that the following facts are true and that he is culpable of violations of the specified statute.

**Facts**

**Case No. 07-J-12546**

1. On January 6, 1991, Respondent intentionally removed a book valued at \$11.95 from the premises of Archive Records in Carrboro, North Carolina without first paying for the book.
2. On January 17, 1991, Respondent entered a guilty plea in Orange County District Court to a charge of misdemeanor larceny with respect to the January 6, 1991 incident.
3. The Court entered a prayer for judgment continued in the case, and ordered Respondent to pay \$151 in court costs, contribute \$100 to a charity, and to perform 75 hours of community service.
4. Respondent successfully completed the terms of the prayer for judgment and subsequently the larceny charge was dismissed.
5. On February 4, 1992, the Disciplinary Hearing Commission of the North Carolina State Bar ("Disciplinary Commission") ordered that Respondent be suspended for one year, stayed imposition of the suspension, and placed Respondent on probation for four years based

upon the facts and circumstances surrounding the 1991 larceny conviction as set forth in the Consent Order of Discipline in the matter titled *The North Carolina State Bar v. Barry David Nakell*, Case No. 91 DHC 11. Thereafter, the decision of the Disciplinary Hearing Commission of the North Carolina State Bar became final. A true and correct copy of the Consent Order of Discipline in Case No. 91 DHC 11 is attached hereto as Exhibit 1 and incorporated by reference.

6. In Case No. 91 DHC 11, Respondent stipulated to having violated former rule 1.2(c) of the North Carolina Rules of Professional Conduct, current rule 8.4(c) of the North Carolina Rules of Professional Conduct. Former rule 1.2(c) of the North Carolina Rules of Professional Conduct provided that, “[I]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

7. Respondent successfully completed the terms of probation imposed in Case No. 91 DHC 11.

### **Legal Conclusion**

By knowingly and intentionally removing a book from the premises of Archives Records without first paying for it, Respondent committed an act of dishonesty in wilful violation of Business and Professions Code section 6106.

### **Facts**

#### **Case No. 07-J-12547**

1. On October 1, 1996, Respondent concealed \$6 worth of deli food in his jacket at a Southern Season restaurant in Chapel Hill, North Carolina, and removed the food from the premises without first paying for them.

2. Respondent was subsequently charged with shoplifting in violation of N.C.G.S. Section 14-72.1 and pled guilty to the offense.

3. The Court entered a prayer for judgment continued in the case and ordered Respondent to comply with conditions of probation. Respondent successfully completed the terms of the prayer for judgment and the shoplifting violation was dismissed.

4. On or about December 29, 1997, the Grievance Committee of the North Carolina State Bar ordered that Respondent receive a Censure based upon the facts and circumstances surrounding Respondent’s 1996 shoplifting offense in the matter titled *In the Matter of Barry Nakell, Attorney at Law*. A true and correct copy of the Censure is attached as Exhibit 2 and incorporated by reference.

5. Pursuant to the Censure, Respondent stipulated to having violated former rule 1.2(c) of the North Carolina Rules of Professional Conduct, current rule 8.4(c) of the North Carolina Rules of Professional Conduct.

### **Legal Conclusion**

By knowingly and intentionally removing the Triangle Dining Guide and deli food from the premises of Southern Season without first paying for them, Respondent committed an act of dishonesty in wilful violation of Business and Professions Code section 6106.

### **Case No. 07-J-11781**

### **Facts**

1. On July 22, 1999, Respondent entered the Encore Bookstore in Albemarle, North Carolina with a newspaper folded under his arm.

2. Respondent concealed a copy of the book, *A Civil Action*, under his newspaper and intentionally left the bookstore without first paying for the book.

3. Respondent was subsequently charged with the misdemeanor crime of larceny for taking the book.

4. On November 22, 1999, Respondent entered a plea of guilty and was convicted of misdemeanor larceny in Stanly County District Court.

5. On March 15, 2002, the Disciplinary Hearing Commission of the North Carolina State Bar ("Disciplinary Commission") ordered that Respondent be suspended from the practice of law for five years, that the suspension be stayed, and the Respondent be placed on probation for five years, based upon the facts and circumstances surrounding the 1999 larceny conviction as set forth in the Findings of Fact, Conclusions of Law And Order of Discipline in the matter titled, *The North Carolina State Bar v. Barry Nakell*, Case No. 00 DHC 8. Thereafter, the decision of the Disciplinary Commission became final. A true and correct copy of the Findings of Fact, Conclusions of Law and Order of Discipline in Case No. 00 DHC 8 is attached hereto as Exhibit 3 and incorporated by reference.

6. In Case No. 00 DHC 8, Respondent stipulated to having violated Rules 8.4(b) and 8.4(c) of the North Carolina Rules of Professional Conduct. Rule 8.4(b) provides that, "[I]t is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(c) provides that, "[I]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

7. On March 15, 2007, Respondent successfully completed the terms of probation imposed in Case No. 00 DHC 8.

### **Legal Conclusion**

By knowingly and intentionally removing a book from the premises of Encore Bookstore without first paying for it, Respondent committed an act of dishonesty in wilful violation of Business and Professions Code section 6106.

### **MITIGATING CIRCUMSTANCES.**

Standard 1.2(e) of the Standards for Attorney Sanctions for Professional Misconduct("Standard(s)") defines a mitigating circumstance as "an event or factor established clearly and convincingly by the member subject to a disciplinary proceeding as having caused or underlain the member's professional misconduct and which demonstrates that the public, courts, and legal profession would be adequately protected by a more a lenient degree of sanction than set forth in these standards for the particular act of professional misconduct found or acknowledged."

### **FACTS SUPPORTING MITIGATING CIRCUMSTANCES.**

Standard 1.2(e)(iv) provides that emotional difficulties existing at the time of the misconduct which expert testimony establishes was directly responsible for the misconduct, provided that such difficulties were not the product of any illegal conduct by the attorney, such as illegal drug or substance abuse, and provided further that the attorney no longer suffers from such difficulties or disabilities, is a mitigating circumstance.

Respondent has suffered for many years from Dysthemic Disorder, a psychiatric condition which represents a low-grade chronic depression that impairs Respondent's ability to deal appropriately with stressful situations. Respondent's shoplifting offenses were a direct result of the dysthemia. Respondent's behavior with regards to the shoplifting offenses was unplanned, off-the-cuff, impulsive behavior intended to diffuse his level of stress, albeit with serious consequences (*e.g.* losing his tenured faculty position at the University of North Carolina School of Law as a result of being fired following the 1996 conviction, the embarrassment of adverse newspaper coverage, the disappointment of his family, and his difficulties with the North Carolina and California Bars). Importantly, Respondent's behavior with respect to the shoplifting offenses did not represent a means of gaining monetarily and is not a form of kleptomania.

Although Respondent received psychiatric treatment after both the 1991 and 1996 convictions, the treatments he previously received did not improve his ability to understand the link between the stress in his life and his impulsive, inappropriate behavior or the signals that stress had built up and required an appropriate response to diffuse the stress.

But, in the fall of 2000, Respondent began treatment with Nathan R. Strahl, M.D., Ph.D. Respondent has received treatment from Dr. Strahl for the last seven years. Dr. Strahl's work with Respondent has centered around the issues regarding the shoplifting offenses that Dr. Strahl confirmed were the direct result of significant stress and clinical depression. Dr. Strahl has been successful in getting Respondent to understand his illness and to recognize and deal appropriately with stress. Respondent has had no further incidents of shoplifting since July 22, 1999. Dr. Strahl has advised that the State Bar of California that Respondent is unlikely to repeat as a shoplifter and that there are no longer any issues for Respondent to address with Dr. Strahl.

Nevertheless, since Respondent's probation ended in March 2007 in connection with Case No. 00 DHC 8, Respondent has met with Dr. Strahl on two occasions. Respondent intends to continue to periodically meet with Dr. Strahl for the foreseeable future.

In addition to his treatment with Dr. Strahl, Respondent has been involved in group therapy with the Lawyers Assistance Program ("LAP") in North Carolina since October 2001. Although he is no longer required to do so, Respondent continues to participate in group therapy through LAP. Every Monday night, Respondent participates in group therapy through LAP; at least once per month, Respondent also participates in a lunch meeting sponsored by LAP; and Respondent occasionally attends the monthly dinner meetings sponsored by LAP.

Since March 2002, Respondent has spoken several times to Bar groups and law students in North Carolina about the Lawyers Assistance Program.

Standard 1.2(e)(v) provides that spontaneous candor and cooperation displayed to the victims of the attorney's misconduct and to the State Bar during disciplinary investigations and proceedings is a mitigating circumstance. Respondent has been candid and cooperative with both the State Bars of North Carolina and California.

Respondent has also demonstrated remorse and recognition of wrongdoing to both the State Bars of North Carolina and California, while also taking steps to atone for the consequences of his misconduct. This is mitigating factor under Standard 1.2(e)(vii).

An extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities is a mitigating circumstance under Standard 1.2(e)(vi). Although the State Bar did not request that Respondent provide character letters drafted by acquaintances in the legal and general communities, the Findings of Fact, Conclusions of Law, and Order of Discipline in Case No. 00 DHC 8 states on page 3, paragraph 9 that:

"Nakell has a long history of representing poor and disadvantaged clients in pursuit of cases that resulted in positive social change. He was instrumental, for example, in founding North Carolina Prisoner Legal Services and in helping to found North Carolina Legal Services. Nakell has assisted many clients unable

to afford legal representation on a pro-bono basis in ways that have brought credit to the legal profession.”

The Findings of Fact, Conclusions of Law, and Order of Discipline in Case No. 00 DHC 8 further states on page 4, paragraph 12(d) that: “Nakell’s misconduct is mitigated by the following facts . . . (d) “Good character and reputation, including support from the councilor and Senior Resident Superior Court Judge from his district . . .”

The passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation is mitigating circumstance under Standard 1.2(e)(viii). Respondent has not committed a shoplifting offense for over 8 years and has provided the State Bar with convincing proof of his rehabilitation.

#### **AUTHORITIES SUPPORTING DISCIPLINE.**

The determination of discipline begins "by looking to the purpose of sanctions for attorney misconduct." (*In re Morse* (1995) 11 Cal.4th 184, 205.) "The primary purposes of disciplinary proceedings . . . are the protection of the public, the courts[,] and the legal profession; the maintenance of high professional standards by attorneys[;] and the preservation of public confidence in the legal profession." (Standard 1.3.)

The standards provide guidance and deserve "great weight." (*In re Silverton* (2005) 36 Cal. 4th 81, 92; *In re Morse, supra*, 11 Cal.4th at p. 205; *In re Naney* (1990) 51 Cal.3d 186, 190; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933, fn. 5.) "[A]dherence to the standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar misconduct." (*In re Naney, supra*, 51 Cal.3d at p. 190; see also *In re Brown* (1995) 12 Cal.4th 205, 220.) The California Supreme Court accepts a disciplinary recommendation resulting from application of the standards unless it has "grave doubts" about the recommendation's propriety. (*In re Morse, supra*, 11 Cal.4th at p. 206; *In re Lamb* (1989) 49 Cal.3d 239, 245.) More recently, the California Supreme Court has maintained that the Court will accept a disciplinary recommendation resulting from the application of the standards unless it "would be manifestly unjust" to do so. (*In re Silverton, supra*, 36 Cal.4th at p. 92, interpreting Standard 1.7(a).)

Respondent has stipulated that his misconduct involved dishonesty. Accordingly, Standard 2.3 must be considered in determining the appropriate level of discipline.

Standard 2.3 provides that culpability of a member of an act of intentional dishonesty toward a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member’s acts within the practice of law.

Respondent's misconduct is based on his convictions for criminal offenses which inherently involved dishonesty. Therefore, Standard 3.2 must also be considered in the discipline determination.

Standard 3.2 provides that final conviction of a member of a crime which involves dishonesty, either inherently or in the facts and circumstances surrounding the crime's commission, shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances.

The State Bar submits that in light of the purposes of attorney discipline, the facts and circumstances surrounding Respondent's misconduct, and the compelling mitigating circumstances that are present in this matter, the application of Standard 3.2 would be manifestly unjust.

For instance, Respondent's misconduct was a direct result of his dysthemia; Respondent did not commit the misconduct as a means of gaining monetarily. According to Dr. Stahl, Respondent has overcome his dysthemia through the hard work that he underwent during his seven years of therapy. And although Respondent has not committed a shoplifting offense in over eight years and notwithstanding Dr. Stahl's confidence in his full rehabilitation, Respondent continues to periodically meet with Dr. Stahl and remains active in North Carolina's Lawyers Assistance Program. Accordingly, the recommended level of discipline herein deviates downward from the discipline proscribed by Standard 3.2.

#### **OTHER CONDITIONS NEGOTIATED BY THE PARTIES.**

With each quarterly report that Respondent must submit to the Office of Probation, Respondent shall provide satisfactory evidence of attendance at no less than 5 group therapy sessions with the Lawyers Assistance Program in North Carolina.

#### **PENDING PROCEEDINGS.**

The disclosure date referred to, on page one, paragraph A.(7), was October 22, 2007.

#### **COSTS OF DISCIPLINARY PROCEEDINGS.**

Respondent acknowledges that the Office of the Chief Trial Counsel has informed Respondent that as of October 22, 2007, the costs in this matter are \$1,636. The costs are to be paid in equal amounts prior to February 1 for the following three billing cycles following the effective date of the Supreme Court Order. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

If Respondent fails to pay any installment within the time provided herein or as may be modified by the State Bar Court pursuant to section 6086.10, subdivision (c), the remaining balance of the costs is due and payable immediately and enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment unless relief has been granted under the Rules of Procedure of the State Bar of California. (Rules Proc. of State Bar, rule 286.)

**STATE BAR ETHICS SCHOOL EXCLUSION.**

Respondent resides in Chapel Hill, North Carolina is unable to attend State Bar Ethics School without considerable inconvenience. As an alternative to State Bar Ethics School, the parties agree that Respondent will complete the following courses:

Within one year of the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of no less than six hours of Minimum Continuing Legal Education (“MCLE”) approved courses in general legal ethics. The requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for attending these courses. (Rule 3201, Rules of Procedure of the State Bar.)

Respondent’s completion of six hours of MCLE approved courses in general legal ethics any time after this stipulation is signed by Respondent and before the effective date of the discipline will be deemed to satisfy this condition.

(Do not write above this line.)

In the Matter of Barry Nakell	Case number(s): 07-J-11781-DFM; 07-J-12546; 07-J-12547
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**SIGNATURE OF THE PARTIES**

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Fact, Conclusions of Law and Disposition.

<u>10/24/07</u> Date	<u>Barry Nakell</u> Respondent's Signature	<u>Barry Nakell</u> Print Name
<u>10/30/07</u> Date	<u>Eli D. Morgenstern</u> Respondent's Counsel Signature	<u>Eli D. Morgenstern</u> Print Name
<u>10/30/07</u> Date	<u>Eli D. Morgenstern</u> Deputy Trial Counsel's Signature	<u>Eli D. Morgenstern</u> Print Name

(Do not write above this line.)

In the Matter Of <b>Barry Nakell</b>	Case Number(s): <b>07-J-11781-DFM; 07-J-12546; 07-J-12547</b>
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**ORDER**

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulation as to facts and conclusions of law is APPROVED.
- The stipulation as to facts and conclusions of law is APPROVED AS MODIFIED as set forth below.
- All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation; or 3) Respondent is not accepted for participation in the Program or does not sign the Program Contract. (See rule 135(b) and 802(b), Rules of Procedure.)

10-31-07  
Date

  
Judge of the State Bar Court

**RICHARD A. PLATEL**

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NORTH CAROLINA  
WAKE COUNTY

BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
91 DHC 11

THE NORTH CAROLINA STATE BAR, )  
Plaintiff )  
vs. )  
BARRY DAVID NAKELL, ATTORNEY )  
Defendant )

CONSENT ORDER  
OF DISCIPLINE

This matter, coming before the undersigned Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar pursuant to section 14(H),(U), and (Y) of article IX of the Discipline & Disbarment Rules of the N.C. State Bar; and it appearing that, following the presentation of the State Bar's case and argument of the parties respecting the Defendant's motion to dismiss the State Bar's charges, that both parties have tendered to the Committee for consideration and the Committee has accepted the following disposition:

FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. The Defendant, Barry David Nakell (hereafter, Nakell), was admitted to the North Carolina State Bar in 1979, and is, and was at all times referred to herein, an Attorney at Law licensed to practice in North Carolina, subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During all of the periods referred to herein, Nakell was employed as a professor of law at the University of North Carolina School of Law in Chapel Hill.

4. On Jan. 31, 1989, Nakell filed a complaint in the United States District Court for the Eastern District of North Carolina on behalf of eight named plaintiffs, alleging that the defendants, who included a number of state and local officials, had deprived the plaintiffs of their constitutional rights. The plaintiffs in the 1989 federal civil rights action, who included Eddie Hatcher and Timothy Jacobs, sought injunctions against the alleged constitutional violations, damages and an order enjoining the criminal prosecution of Hatcher and Jacobs in state court.

5. On March 16, 1989, Nakell and his co-counsel filed an amended complaint in the 1989 federal civil rights action.

6. On April 24, 1989, Nakell filed a motion to dismiss the 1989 federal civil rights action with prejudice. The court granted the motion and entered an order of dismissal on May 2, 1989.

7. Six weeks later, the defendants in the civil rights action filed motions to impose sanctions against Nakell and his co-counsel pursuant to Rule 11 the Federal Rules of Civil Procedure.

8. The federal court later granted the motion and imposed sanctions upon Nakell and his co-counsel pursuant to Rule 11. Portions of this matter are still on appeal.

9. On Jan. 6, 1991, Nakell intentionally removed a book valued at \$11.95 from the premises of Archive Records in Carrboro without first paying for the book.

10. On Jan. 17, 1991, Nakell entered a guilty plea in Orange County District Court to a charge of misdemeanor larceny respecting the Jan. 6 incident.

11. Hon. Stanley Peele entered a prayer for judgment continued in the case, and ordered Nakell to pay \$151 in court costs, contribute \$100 to a charity, and to perform 75 hours of community service.

12. Nakell has successfully completed the terms of the prayer for judgment and the larceny charge has been dismissed.

13. In November 1989, while representing Hatcher on the state criminal charges in Robeson County Superior Court, Nakell was held in contempt of court. Nakell anticipates filing a petition for writ of certiorari regarding the contempt matter before the U.S. Supreme Court.

Based upon the foregoing Findings of Fact, the Committee enters the following

#### CONCLUSIONS OF LAW

As to Count One of the State Bar complaint:

1. The Hearing Committee does not find by clear, cogent, and convincing evidence that Nakell lacked a factual basis for alleging that Hatcher and Jacobs could not be subjected to prosecution in the state court criminal proceeding and for alleging that his clients may have been subjected to civil rights violations at the time of the filing of the federal civil rights action.

2. The Hearing Committee does not find by clear, cogent, and convincing evidence that the civil rights claims regarding Hatcher and Jacobs were brought for an improper purpose.

3. The Hearing Committee finds by clear, cogent, and convincing evidence that Nakell did not have a sufficient legal

basis to assert the civil rights actions regarding the various defendants and that his actions embarrassed state officials and may have affected the prosecution of a pending criminal action.

As to Count Two of the State Bar complaint

4. The Hearing Committee finds by clear, cogent and convincing evidence that by knowingly and intentionally removing a book from the premises of Archives Records without first paying for it, Nakell engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(C).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Committee hereby enters the following

#### ORDER OF DISCIPLINE

Based upon the Committee's Findings of Fact and Conclusions of Law respecting the State Bar's First Claim for Relief, it is hereby ordered:

1. The Hearing Committee considered the disposition of the Rule 11 proceeding in federal court and of the 1989 state court contempt proceeding and determined that no additional discipline is necessary or required as to that claim.

Based upon the Committee's Findings of Fact and Conclusions of Law respecting the State Bar's Second Claim for Relief, it is hereby ordered:

1. The license of Barry D. Nakell to practice law in the State of North Carolina is hereby suspended for one year. The suspension of the Defendant's license is stayed for a period of four years from the effective date of the entry of the order herein, based upon the following conditions:

a. The Defendant shall violate no provisions of the Rules of Professional Conduct during the four year stay period.

b. The Defendant shall violate no laws of the State of North Carolina during the four year stay period.

c. The Defendant shall complete 45 hours of continuing legal education courses during four-year stay period. At least 23 hours of the CLE courses must be in the subject of ethics or professional responsibility and all courses must be offered by a sponsor approved by the Continuing Legal Education Department of the N.C. State Bar. The Defendant shall submit written proof of completion of the CLE courses to the Secretary of the N.C. State Bar no later than one week prior to the expiration of the four-year stay period.

d. The Defendant shall continue receiving psychological treatment until he provides to the Secretary of the N.C. State Bar a certificate from his treating physician terminating that treatment. He shall submit written certification to the Secretary of the N.C. State Bar by December 31 of each year of the four year stay period indicating compliance with the treatment plan.

e. The costs have been assessed pursuant to an agreement between the N.C. State Bar and the Defendant.

Signed by the Chairman for the Committee with the express consent of all members of the Disciplinary Hearing Committee and the parties.

This the 4th day of February, 1992.

Samuel Jerome Crow  
Samuel Jerome Crow, Chairman  
Disciplinary Hearing Committee

Seen and consented to:

Joseph B. Cheshire, V  
Joseph B. Cheshire, V  
Attorney for the Defendant

Alan M. Schneider  
Alan M. Schneider  
Attorney for the Defendant

Barry D. Nakell  
Barry D. Nakell, Defendant

Carolin D. Bakewell  
Carolin D. Bakewell  
Attorney for the Plaintiff

R. David Henderson  
R. David Henderson  
Attorney for the Plaintiff

The foregoing 4 pages are true and accurate copies of the official records of the N. C. State Bar.

D. Thomas Jenkins  
Secretary, N.C. State Bar

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NORTH CAROLINA

WAKE COUNTY

BEFORE  
GRIEVANCE COMMITTEE  
OF THE  
NORTH CAROLINA STATE BAR

96 61255

IN THE MATTER OF )

BARRY NAKELL, )  
ATTORNEY AT LAW )

CENSURE )

On October 23, 1997, the Grievance Committee of the North Carolina State Bar met and considered the grievance filed against you by the North Carolina State Bar.

Pursuant to section .0113(a) of the Discipline and Disability Rules of the North Carolina State Bar, the Grievance Committee conducted a preliminary hearing. After considering the information available to it, including your response to the letter of notice, the Grievance Committee found probable cause. Probable cause is defined in the rules as "reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action."

The rules provide that after a finding of probable cause, the Grievance Committee may determine that the filing of a complaint and a hearing before the Disciplinary Hearing Commission are not required and the Grievance Committee may issue various levels of discipline depending upon the misconduct, the actual or potential injury caused, and any aggravating or mitigating factors. The Grievance Committee may issue an admonition, a reprimand, or a censure.

A censure is a written form of discipline more serious than a reprimand, issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or a member of the public, but the misconduct does not require suspension of the attorney's license.

The Grievance Committee believes that a hearing before the Disciplinary Hearing Commission is not required in this case and issues this censure to you. As chairman of the Grievance Committee of the North Carolina State Bar, it is now my duty to issue this censure. I am certain that you will understand fully the spirit in which this duty is performed.

On October 1, 1996, you concealed a Triangle Dining Guide valued at \$30 and \$6 worth of deli food in your jacket at a Southern Season in Chapel Hill. You were charged with shoplifting in violation of N.C.G.S. Section 14-72.1. You admitted your responsibility for the

offense and received a pra, or judgment continued. You on ing offense violated Rule 1.2(c) of the Rules of Professional Conduct.

The Grievance Committee was particularly concerned because this was your second shoplifting offense. However, the Grievance Committee weighed the severity of this second shoplifting offense against your 27 years of public service and your efforts to prevent future occurrences of this type of behavior by seeking therapy. The Committee also considered the fact that you had been discharged from your employment as a Law School professor as a penalty or sanction already imposed for your conduct. As a result of the weighing of these factors, the Committee determined that, rather than sending you to the Disciplinary Hearing Commission for a trial, this Censure was the appropriate sanction.

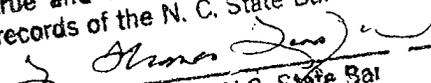
You are hereby censured by the North Carolina State Bar for your violation of the Rules of Professional Conduct. The Grievance Committee trusts that you will ponder this censure, recognize the error that you have made, and that you will never again allow yourself to depart from adherence to the high ethical standards of the legal profession. This censure should serve as a strong reminder and inducement for you to weigh carefully in the future your responsibility to the public, your clients, your fellow attorneys and the courts, to the end that you demean yourself as a respected member of the legal profession whose conduct may be relied upon without question.

In accordance with the policy adopted October 15, 1981 by the Council of the North Carolina State Bar regarding the taxing of the administrative and investigative costs to any attorney issued a censure by the Grievance Committee, the costs of this action in the amount of \$50.00 are hereby taxed to you.

Done and ordered, this 29<sup>th</sup> day of DECEMBER 1997.



T. Paul Messick, Jr., Chair Grievance Committee  
The North Carolina State Bar

The foregoing 2 pages are  
true and accurate copies of the official  
records of the N. C. State Bar.  
  
Secretary N.C. State Bar

W



6. Nakell concealed a copy of the book, *A Civil Action*, under his newspaper and intentionally left the bookstore without paying for the book.

7. Nakell was subsequently charged with the misdemeanor crime of larceny for taking the book.

8. On November 22, 1999, Nakell entered a plea of guilty and was convicted of misdemeanor larceny in Stanly County District Court.

BASED UPON the foregoing Findings of Fact, the hearing committee makes the following:

#### CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Nakell and the subject matter.

2. Nakell's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(a) & (b)(2) as follows:

By intentionally concealing and taking away a copy of the book, *A Civil Action*, from the Encore Bookstore, Nakell committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b) and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

Based upon the foregoing Findings of Fact, the Conclusions of Law, the stipulations contained in the pre-trial order and the evidence presented at the hearing, the hearing committee hereby makes the following:

#### FINDINGS OF FACT REGARDING DISCIPLINE

1. On January 6, 1991, Nakell intentionally removed a book valued at \$11.95 from the premises of Archive Records in Carrboro without paying for the book. On January 17, 1991 Nakell entered a plea of guilty to misdemeanor larceny in Orange County District Court and received a PJC. By order of the Disciplinary Hearing Commission in 91 DHC 11, Nakell received a one-year suspension of his license for this offense stayed for four years on certain conditions. Nakell complied with the conditions until the period of the suspension and stay terminated.

2. On October 1, 1996, Nakell concealed \$6.00 worth of deli food in his jacket at A Southern Season in Chapel Hill. On January 16, 1997, Nakell entered a plea of guilty to the offense of shoplifting in Orange County District Court and received a PJC. Citing Nakell's dismissal as a tenured professor at UNC School of Law as a penalty or sanction already imposed, Nakell received a Censure from the Grievance Committee of the North Carolina State Bar for this offense.

3. Nakell has suffered for many years from Dysthemic Disorder, a psychiatric condition that represents a low-grade chronic depression that impairs Nakell's ability to deal appropriately with stressful situations. Nakell's shoplifting incidents were a direct result of the dysthemia. Although Nakell received psychiatric treatment after both of his prior offenses, the treatments he previously received didn't improve Nakell's ability to understand the link between the stress in his life and his impulsive, inappropriate behavior or the signals that stress had built up and required an appropriate response to diffuse the stress.

4. Nakell began treatment with Dr. Nathan R. Strahl in the fall of 2000. Dr. Strahl has been successful in getting Nakell to understand his illness and to recognize and deal appropriately with stress. Dr. Strahl's prognosis is that Nakell has learned how to appropriately respond to stress and it is very unlikely that he will ever shoplift again.

5. In addition to his treatment with Dr. Strahl, Nakell has been involved in group therapy with the Lawyers Assistance Program since October 2001. Nakell's participation in that therapy has been beneficial to Nakell and to those in the group.

6. Others have noticed positive changes in Nakell since he began treatment with Dr. Strahl that they had not noticed when he previously received treatment. Lunsford Long, the councilor from Nakell's district, observed that Nakell's demeanor has had a positive change and his concentration and affect have improved.

7. Nakell has voluntarily refrained from entering stores alone since his last incident.

8. Nakell's misconduct was not related to his law practice.

9. Nakell has a long history of representing poor and disadvantaged clients in pursuit of cases that resulted in positive social change. He was instrumental, for example, in founding North Carolina Prisoner Legal Services and in helping to found North State Legal Services. Nakell has assisted many clients unable to afford legal representation on a pro-bono basis in ways that have brought credit to the legal profession.

10. Nakell voluntarily ceased taking on new client matters after the July 1999 incident except for a few pro-bono matters and one contingency fee matter.

11. Nakell's misconduct is aggravated by the following factors:

- (a) Prior disciplinary offenses;
- (b) Criminal conduct;
- (c) A pattern of misconduct;
- (d) Substantial experience in the practice of law.

12. Nakell's misconduct is mitigated by the following factors:

- (a) Personal or emotional problems;
- (b) Timely good faith efforts to rectify the consequences of his misconduct by seeking treatment from Dr. Strahl and cooperating with the Lawyers Assistance Program;
- (c) Full and free disclosure to the hearing committee and cooperative attitude toward the proceedings;
- (d) Good character and reputation, including support from the councilor and the Senior Resident Superior Court Judge from his district;
- (e) Physical or mental disability or impairment that led to his misconduct;
- (f) Interim rehabilitation; and
- (g) Remorse.

BASED UPON the foregoing Findings of Fact Regarding Discipline and the arguments of the parties, the hearing committee hereby enters the following:

#### ORDER OF DISCIPLINE

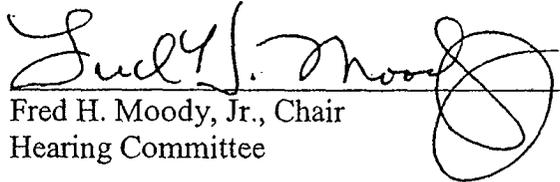
1. The license of the defendant, Barry Nakell, is suspended for four years.
2. The four-year suspension is stayed for five years on the following terms and conditions:
  - a. Nakell shall violate no federal or state laws (other than minor traffic offenses).
  - b. Nakell shall violate no provisions of the Revised Rules of Professional Conduct.
  - c. Nakell shall continue treatment with Dr. Nathan R. Strahl, or some other psychiatrist acceptable to the North Carolina State Bar, during the entire period the stay is in effect. Nakell shall follow all treatment recommendations made by the psychiatrist and shall direct the psychiatrist to report any failure to follow the psychiatrist's treatment plan, and the specifics related thereto, to the Office of Counsel. Even if the psychiatrist concludes in the future that Nakell needs treatment less often, Nakell must continue to see the psychiatrist at least quarterly.
  - d. Nakell shall provide semi-annual reports to the Office of Counsel during the period of the stay, signed by Nakell and the psychiatrist, certifying that Nakell is in compliance with the terms and conditions of the above paragraph of this order. The

reports shall be completed and transmitted to the Office of Counsel by each six-month anniversary of the date of this order.

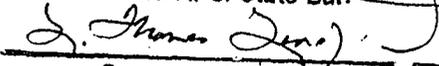
e. Nakell shall enter into a contract with the Lawyer Assistance Program by June 1, 2002. Nakell shall comply with the terms of that contract. As a part of that contract, Nakell shall direct the Lawyer Assistance Program to report any failure to comply with the terms of this paragraph, and the specifics related thereto, to the Office of Counsel.

f. Nakell shall pay the costs of this proceeding by June 1, 2002.

Signed by the chair with the consent of the other hearing committee members, this the 12 day of March, 2002.

  
Fred H. Moody, Jr., Chair  
Hearing Committee

The foregoing 5 pages are true and accurate copies of the official records of the N. C. State Bar.

  
Secretary, N.C. State Bar

**CERTIFICATE OF SERVICE**  
**[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]**

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on October 31, 2007, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION  
AND ORDER APPROVING**

in a sealed envelope for collection and mailing on that date as follows:

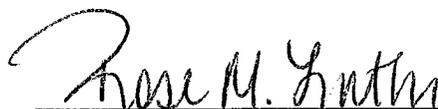
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**BARRY NAKELL, ESQ.**  
**149 DIXIE DR**  
**CHAPEL HILL, NC 27514**

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**ELI MORGENSTERN, ESQ., Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **October 31, 2007**.

  
\_\_\_\_\_  
**Rose M. Luthi**  
Case Administrator  
State Bar Court