IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Case No.05-RB-2455(BNB)

CHARLES H. CLEMENTS,

Plaintiff,

v.

JANIS E. CHAPMAN, THOMAS C."DOC" MILLER, and KATHERINE GRIER,

Defendants

PLAINTIFF'S RESPONSE TO DEFENDANT THOMAS C.MILLER'S CONCURRENCE WITH RECOMMENDATIONS OF UNITED STATES MAGISTRATE, AND REBUTTAL OF THE SUPPLEMENTAL INFORMATION IN SUPPORT OF DEFENDANT KATHERINE GRIER'S MOTION FOR RULE 11 SANCTION AND PRAYER

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1. Comes now Charles H. Clements, the Proper Person Injured Plaintiff proceeding in Pro se by doctrine of necessity, and respectfully submits the following above-titled Plaintiff's Response to Defendant's Concurrence and Rebuttal of purported 'Supplemental Information', and in support thereof states, and Prays the Honorable Court as follows:

Plaintiff reiterates that no charge of 'malpractice' is listed in the Complaint and the Statute simply doesn't apply to the instant case.

Plaintiff is suing Defendant Thomas C. 'Doc' Miller in his Person, independent of his professional associations, for Fraud, for Witness tampering, the obstruction of justice, evidence tampering and destruction, extortion, violations of Plaintiff's Constitutional rights under color of authority as a State Actor on behalf of the interests of, and using the power of, the Colorado State Attorney General's Office, predating any professional relationship with Plaintiff, and tainting any relationship with Fraud ab initio dating to late 2001 and unsuspected until the date certain of 04 March, 2004 and the events surrounding his Phone Call with Defendant Grier.

> Notwithstanding Supreme Court's holding that witnesses in judicial proceedings are absolutely immune from liability under *42 USCS §1983*, if person plans or group of persons conspire to frustrate and violate legitimate judicial process to extreme and aggravated event, cause of action under §1983 will be established; cause of action is limited to fact pattern in which (1) persons decide in advance to give false and perjured testimony before grand jury and/or in court and this is only testimony presented, (2) result of testimony must be indictment and arrest and (3) following that, person must be discharged, either before trial, or acquitted after trial or discharged after reversal on appeal. *Macko v Byron (1983, ND Ohio) 576 F Supp 875*, affd (1985, CA6 Ohio) *760 F2d 95.*

Defendant Miller's professional credential as a Juris Doctor certainly gave additional authority to and further enabled his Fraud of Plaintiff, but the Fraud itself was independent of Defendant Miller's professional obligations, and pre-dates any professional relationship with Plaintiff.

> Fraud vitiates every transaction and all contracts. Indeed, the principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters, and that it vitiates the most solemn contracts, documents, and even judgments. Fraud, as it is sometimes said, vitiates every act, which statement embodies a thoroughly sound doctrine when it is properly applied to the subject matter in controversy and to the parties thereto and in a proper forum. As a general rule, fraud will vitiate a contract notwithstanding that it contains a provision to the effect that no representations have been made as an inducement to enter into it, or that either party shall be bound by any representation not contained therein, or a similar provision attempting to nullify extraneous representations. Such provisions do not, in most jurisdictions, preclude a charge of fraud based on oral representations. 37 AmJur 2nd, "Fraud," § 8.

2. Defendants and Defendant's Counsel are fully cognizant of the mendacious nature of the re-statement of Plaintiff's causes of action, and the deliberate and willful ignoring of that body of fact constitutes a further attempt on Defendants' part to materially mislead the Honorable Court and is sanctionable at the Court's discretion, and Plaintiff so prays.

Defendants try to maintain some sort of 'Chinese Wall' between cases, but each of the Defendants is aware and responsible in due diligence for the factual context contained in the present Record; that of 03DR1773, of 00CR3372, of the RICO action 01ES1145; the Grievances to the Attorney Regulatory Counsel, and to the Chief Disciplinary Judge, Mr. Justice Lucero, and everything in the Record, which information directly contradicts their submissions and the fantasy re-statement of Plaintiff's position, case history, and the character of my complaints.

Even slight diligence due on their parts reveals the failure of the re-statement to describe Plaintiff's cause of action, and Counsel is either remiss in their diligence, or trying to mislead the Court.

> An intentional perversion of truth, for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that she shall act upon it to his legal injury.
> A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. Johnson v. Mcdonald, county 196 minn 194, 264, n.w. 779,780.170 okl. 117, 39, p.2d 150.

3. Stipulated, with Plaintiff's Exception noted by reference as if fully reproduced herein

4. Stipulated, with Plaintiff's Exception noted by reference as if fully reproduced herein.

5. Plaintiff's very respectful Exception to the Recommendations of the Honorable Magistrate Judge is fully supported by the evidence in the Record, and Plaintiff respectfully submits that the Honorable

Magistrate's Recommendations be declined by the Honorable District Judge, and sanctions issue against Defense Counsel for their failure to be candid before the Court or such other infractions as the Honorable Court might more professionally describe from the circumstances of the Case..

6. Plaintiff fits no legitimate criteria for the definition of 'vexatious litigant' and Defendant's Counsel's vague, conclusory, and mendacious allegations are themselves frivolous, groundless and vexatious, meant to divert the Court's attention from the true nature of my complaints and the culpability under Law of his client associate.

Contemplating the denial of Plaintiff's civil rights to petition the government for redress of grievance and to the due process of the Law on such illusory and groundless assertions by Counsel would not serve justice nor comport with the requirements for the Rule of Law as guaranteed in our Bill of Rights.

> This section should be interpreted with sufficient liberality to fulfill its purpose of providing federal remedy in federal court in protection of federal right. Birnbaum v. Trussell, C.A.2 (N.Y.) 1966, 371 F.2d 672. See, also, Schorle v. City of Greenhills, D.C.Ohio 1981, 524 F.Supp. 821; Courtney v. School Dist. No. 1, Lincoln County, Wyoming, D.C.Wyo.1974, 371 F.Supp. 401; Nanez v. Ritger, E.D.Wis.1969, 304 F.Supp. 354.

7. Plaintiff requests an Evidentiary Hearing prior to any judgment for award; an opportunity to present evidence, eye-witness testimony and the Record in support of the good faith and substance of my allegations and complaints.

Plaintiff is confident that, as in the Boulder Case No. 04C1779 (hereinafter the 'Boulder Case'), Defendant Miller and Counsel's allegations of frivolity and alleged lack of grounds for a valid cause of action will, again, fail, and any demand for attorney's fees be denied.

> Court must conduct a hearing, on the reasonableness of an award of attorney fees if a party requests a hearing. In re Aldrich, 945 P.2d 1370 (Colo. 1997).

Defense Attorney Massaro isn't quite forthcoming when he fails to report to the Court that his efforts to get attorney's fees for defending a 'groundless and frivolous' charge, in the Boulder Case, failed when the claims against Defendant Miller, absolutely material to the instant case as well, were proven well-founded and responsible by both documentation and witness' testimony, and so ruled the Honorable Court.

Plaintiff stipulates that this set of circumstances must be both bizarre and disturbing to the legal community, as the implications of lawlessness and criminal behaviour taint the integrity of the Legal System and bring opprobrium on the trusted administrators of our system of jurisprudence and threaten our guarantees under the Constitution and its Bill of Rights.

> The plaintiff's civil rights pleading was 150 pages and described by a federal judge as "inept". Nevertheless, it was held "Where a plaintiff pleads pro se in a *suit for protection of civil rights,* the Court should endeavor to construe Plaintiff's Pleadings *without regard to technicalities.*" Picking v. Pennsylvania Railway, 151 F.2d. 240, Third Circuit Court of Appeals (emphasis added)

> Constitutional guaranties of due process of law, equal protection of law, of judicial process, and of certain inalienable rights operate only to prohibit deprivation of rights where such rights exist by substantive law. Const. art. 2, § § 3, 6; U.S.C.A.Const. Amend. 14. Faber v. State, 353 P.2d 609 Colo.,1960

8. Plaintiff's Exception to the Recommendations include the following:

a. Plaintiff's claims have matured and refined subsequent to filing the Original Complaint. New Evidence has turned up through the various investigations of Defendant Miller; by the Boulder Police Dept., towards the Security and Exchange Commission action by Pamela White Hadas, PhD, towards the claim for damages resulting from the theft from an at-risk person accusations against Defendant Miller, from the Pugliese action against Miller for defamation, from the action about 'fee-splitting' that Defendant Miller had in Boulder as Defendant, the multiple Attorney Regulatory Counsel grievances, and the Complaint for Civil Rights Violations associated with the Removal of Action from Boulder County Court to the Federal venue as pending by Mr. Gartin.

b. The 'failure to state a claim' depends only on the employment status governed by the statute, i.e.; U.S. government employees. The claims of witness tampering, extortion, fraud, evidence destruction, and the broad denials of due process in violation of civil rights of Plaintiff stand unanswered.

Further, a Leave to Amend granted by the Honorable Court would allow those small corrections of citation, a true exposure of the nature of the Actors' employment and associations as agents, particularity and specificity in the descriptions of the crimes by defendants, and the addition of appropriate Defendants as exposed by New Evidence and the result of diligence and investigation generated by Defendants' responses and pleadings.

Plaintiff's claims don't derive from any 'actual state court judgment' as required by Statute or subject to the Rooker-Feldman Doctrine as stated clearly in the Honorable Magistrate Judge's Recommendation, and such actions clearly enjoy no validity in Law;

> "The Rooker-Feldman doctrine "prohibits a lower federal court from considering claims *actually decided* by a state court and claims inextricably intertwined with a prior state-court judgment." Id. (internal quotations and citations omitted and emphasis added).

> "Notice and an opportunity to be heard are the touchstones of procedural due process."); V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 (10th Cir. 1979) [**17] (stating that a default judgment is void if the court "has acted in a manner inconsistent with due process") Sonus Corp. v. Matsushita Elec. Indus. Co., Ltd., 61 F.R.D. 644, 649 (D. Mass. 1974) (holding that lack of notice "raises a question of due process"); Ken-Mar Airpark, Inc. v. Toth Aircraft & Accessories Co.; 12 F.R.D. 399, 400 (W.D. Mo. 1952) (holding that a failure to provide notice is "a failure of due process" rendering the default judgment a "nullity"); see also 51 A.L.R.2d at 839 ("Courts holding that default judgments entered without compliance with notice required by [Fed. R. Civ. P.] 55(b)(2) and its state counterparts are void have often based such holdings on the proposition that notice required by the Rule is necessary to afford due process" to the defaulting party.)

Plaintiff's applicable claims are restricted to the void judgments made ex parte to any notification and without Plaintiff's presence or any opportunity to give evidence or present testimony. The Defendants' failures to notify and give opportunity to the Protected Parties to give evidence before the modification of the Permanent Restraining Orders in 03C5606, upon ex parte application of the Defendant against whom the P.R.O. is directed, is a clear denial of due process and an abdication of valid jurisdiction.

> Our supreme court has cautioned that trial judges must take great care to avoid ex parte communications with a party, attorney, or individual affiliated with a party concerning pending judicial proceedings. See *Wilkerson v. District Court, 925 P.2d 1373 (Colo. 1996);* see also Code of Judicial Conduct Canon 3(A)(4), which provides that, except as authorized by law, a judge should neither initiate nor consider ex parte communications concerning a pending proceeding.
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> This court has many times held that notice is essential to due process. Great West Min. Co. v. Woodmas of Alston Min. Co., et al., 12 Colo. 46, 55, 20 P. 771; People v. Max, 70 Colo. 100, [***5] 198 P. 150; Weber v. Williams, 137 Colo. 269, 324 P. (2d) 365.
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> Ex parte adjudication without notice is not due process. Dalton v. People ex rel. Moors, 146 Colo. 15, 360 P.2d 113 (1961)
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> Allegations of conspiratorial conduct between a state court judge and plaintiffs in a nonjury state court libel action stated a procedural due process violation which could be addressed in a § 1983 action; civil rights plaintiffs alleged covert ex parte meetings and telephone conversations during course of trial in which plaintiffs and judge conspired to produce a verdict based on extra-judicial considerations. Lipson v. Snyder, E.D.Pa.1988, 701 F.Supp. 541.
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> We have considered the effect of a void judgment on numerous occasions and have consistently held that a judgement entered where a jurisdictional defects exist is a nullity. See, e.g., People v. Dillon, 655 P.2d 841 (Colo. 1982) ("It is axiomatic that any action taken by a court when it lacked jurisdiction is a nullity." (citations omitted)); Davidson Chevrolet, Inc. v. City and County of Denver, 138 Colo. 171, 330 P.2d 1116 (1958) [**24] (same), cert. denied 359 U.S. 926, 3 L. Ed. 2d 629, 79 S. Ct. 609 (1959); see also In re Marriage of Pierce, 720 P.2d 591 (Colo. App. 1985) (same).
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> We were emphatic about the effect of a void judgment in Davidson:
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> > A judgment entered where such a defect exists [lack of subject matter jurisdiction] has neither life nor incipience, and a court is impuissant to invest the judgment with even a fleeting spark of vitality, but can only determine it to be what it is -- a nothing, a nullity.
> >
> > Being naught, it may be attacked directly or collaterally at any time. Davidson Chevrolet, Inc. v. City and County of Denver, 138 Colo. 171, 175, 330 P.2d 1116, 1118-19. [*229] Further, we have explained that a trial court has no discretion in setting aside a judgment that is void. Stroud, 631 P.2d 168 at 170 n.5 (A "judgment either is void or it isn't and relief must be afforded accordingly.").

Plaintiff respectfully submits that the event is virtually unique in the history of American jurisprudence; to grant ex parte hearings to a Defendant to Permanent Restraining Orders made by another Magistrate as a Trial Order, and dropping or modifying such Orders without input from the Protected Parties must be virtually unprecedented.

> Due process of law affords to everyone the right to have the complaint, in any proceeding affecting his property, made in a court of competent jurisdiction, to have due notice thereof, and opportunity to defend. Archuleta v. Archuleta, 52 Colo. 601, 123 P. 821 (1912). See Brown v. City of Denver, 7 Colo. 305, 3 P. 455 (1884).
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> Denial of "due process" includes denial of "equal protection of the law". The contention that a statute abridges the privileges and immunities of citizens and denies equal protection of the law is included within the objection that it denies "due process". They stand or fall together. People v. Max, 70 Colo. 100, 198 P. 150 (1921).

Further, Plaintiff complains of Defendants Chapman and Grier's failure to state the true nature of hearings, denying Plaintiff the opportunity to prepare a defense to the unstated controversy before the Court.

Defendant Chapman's modification of Magistrate Juarez' Permanent Trial Orders of Case 03C5606, without notice to Plaintiff, the Protected Party and advocate for the minor children also protected by Permanent Trial Order, denies Plaintiff the due process, equal protection and equal application of the law, a clear violation of Plaintiff's civil rights.

> Elements of procedural due process. The elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also, to have the assistance of counsel, if desired, and a reasonable time for preparation for trial. Colorado State Bd. of Medical Exmrs. v. Palmer, 157 Colo. 40, 400 P.2d 914 (1965).
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> Due process implies timely notice and reasonable opportunity to defend rights. Due process of law within the meaning of this section includes law in its regular course of administration through courts of justice; it also implies that any individual whose life, liberty or property may be affected by any judicial proceeding shall have timely notice thereof and reasonable opportunity to be heard in defense of his rights. In re Dolph, 17 Colo. 35, 28 P. 470 (1891). See Woodson v. Ingram, 173 Colo. 65, 477 P.2d 455 (1970).
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> Person must be apprised of object of hearing. Where the purpose of the proceeding is or may be equivocal from the vantage of the person to be affected, it is the duty of the court to apprise him of the object of the hearing. Austin v. City & County of Denver, 156 Colo. 180, 397 P.2d 743 (1964).

c. Title 42 §1985 allows Plaintiff's allegation of a Conspiracy between State Actors, and Plaintiff so alleges. Plaintiff has offered specificity in naming a time and place for the conspiracy to defraud Plaintiff to be asserted and onerous threats made by Defendant Grier on behalf of Defendant Chapman, to wit; the Phone Call between Defendants Miller and Grier on 04 March, 2004, and documented at the time, and in exhibit before the Court unchallenged and unrefuted.

> A judge should avoid the appearance of impropriety in all activities. Code of Judicial Conduct Canon 2. See People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977); Wood Bros. Homes, Inc. v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).
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> Also, courts have the duty to eliminate every semblance of reasonable doubt or suspicion that a trial by a fair and impartial tribunal was denied. Johnson v. District Court, 674 P.2d 952 (Colo. 1984).

d. The conversations between Defendant Chapman and Defendant Grier, on the Record, reflect such comments as 'We know where these come from', as regards Plaintiff's submissions; accusations of being a 'Posse Comitatus' adherent, or somehow associated with the Militia Movement, or the Common Law movement, or presenting 'pro se' for an inherently vexatious purpose.

The invidious discriminatory animus against pro se litigants, particularly those with a civil rights agenda in support of the rights of 'Negroes' and the disenfranchised classes, is what Title 42 § 1985 addresses.

Defendant Grier's threats in her Phone Call to Tom Miller were about Plaintiff's 'pro se' litigation, her ability to influence Magistrate Chapman's powers, and Defendant Grier's ability to have Plaintiff arrested, detained, charged and incarcerated on 'trumped-up charges like they did with Gartin' as Defendant Miller reported on 04 March, 2004 at approximately 11:15 A.M.

> (for purposes of Section 1983, acting under color of state law is misuse of power possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law). Norton v. Liddel, 620 F.2d 1375, 1379-80 (10th Cir. 1980); Brown v. Chaffee, 612 F.2d 497, 501 (10th Cir. 1979)

Plaintiff, having already been falsely arrested on the 19th of February, 2001; wrongfully jailed in Jefferson County for several days, and charged with 17 false and unfounded charges (see 00CR3372) on the unauthorized initiative of the Colorado State Attorney General's Office Actors; Marleen M. Langfield, Gary Clyman, and Don Estep, to intimidate Plaintiff's testimony as a Witness against them in Federal Court RICO action # 01ES1145 and the associated actions by Mr. Gartin (95B1747, 97D1036, 97N1501, and 97S1523).

Plaintiff found Attorney Grier's threats of similar treatment in Adams County, as reported by Attorney Miller, both entirely credible and imminent of execution and so documented the event by time-stamped electronic communication to Witnesses, and is in Exhibit before the Court.

Defendant Miller's threat to Plaintiff on 04 March, 2004, in front of an eye-witness and noted in contemporary documentation of 05 March, 2004, was; 'I'm the only thing standing between you and jail.' on 'trumped up charges like they did with Gartin', using that threat to enforce his 'welshing' on his retainer and commitment of two years standing to prosecute Plaintiff's interests in the case against the Attorney General's Office for malicious/retaliatory/vindictive prosecution and civil rights violation in dismissed case 00CR3372, and to Extort Plaintiff's compliance by both threat and fraud.

e. Plaintiff's Original Complaint and subsequent pleadings labor to cognizably state a claim for relief under the sections of Title 42 as cited in the Title Bar of the Complaint, as do subsequent filings to the Court whether stricken for forma or not. A pleading to the Court is about the movement of the instrument; its facts

stand independent of that movement, or so one would think if the process is about the finding of such facts and the doing of justice with full information and appreciation of the body of fact.

The Original Complaint's claims and allegations have been refined by Plaintiff's subsequent replies to Defendant's filings, including in Exhibits, proffer of witnesses and factual specificity. While the Original Complaint may have some small typographical errors, corrected immediately, it alleges claims that have, in fact, come to be proven true in the period of time having elapsed since the initial filing and would seem, by settled law, to admit, if not require, Amendment due to New Evidence.

> In light of Plaintiff's pro se status, and in light of *Fed. R. Civ. P. 15(a)*'s requirement that leave to amend be "freely given," we hold that the court's refusal to grant Plaintiff leave to amend was an abuse of discretion. See *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)* (refusal to grant leave to amend without justifying reason is abuse of discretion and inconsistent with spirit of Federal Rules).

Plaintiff has presented documentation and has proffered witness testimony to support his claims of Fraud and of civil rights violations by each of the Defendants.

> To prove the existence of a conspiracy under Section 1985(3), plaintiffs must allege facts which show a mutual understanding or meeting of the minds amongst the conspirators. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230-31 (10th Cir. 1990)(civil conspiracy requires combination of two or more persons acting in concert); Green v. State Bar of Texas, 27 F.3d 1083, 1089 (5th Cir. 1994); Taliaferro v. Voth, 774 F. Supp. 1326, 1332 (D. Kan. 1991).

f. Title 42 § 1979 (R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.) is cited in the Title Bar of the Original Complaint, and Plaintiff's 'one-letter' typographical error in the citations in the body of the Complaint was immediately corrected in Plaintiff's first replies to submissions by Defendants.

Continuing to cite such a harmless and insignificant typo, corrected so long ago, doesn't invalidate the application of Title 42 § 1979 to Plaintiff's claims nor give any credibility to accusations of vexatious intent on Plaintiff's part.

g. Title 42 § 1979 grants a private right of action by removing the criminal culpability in 'willfully' and making tort actions from statutory crimes to afford a civil remedy to the '1983' complainant unable to get justice in a State Court.

> (a) The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws. Pp. 172-187. [365 U.S. 168]
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> **(b)** One of the purposes of this legislation was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Pp. 174-180.

(c) The federal remedy is supplementary to the state remedy, and the state remedy need not be sought and refused before the federal remedy is invoked. P. 183.

(d) Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken "under color of" state law within the meaning of § 1979. United States v. Classic, 313 U.S. 299; Screws v. United States, 325 U.S. 91. Pp. 183-187.

3. Since § 1979 does not contain the word "willfully," as does 18 U.S.C. § 242, and §1979 imposes civil liability, rather than criminal sanctions, actions under §1979 can dispense with the requirement of showing a "specific intent to deprive a person of a federal right." P. 187. Monroe v. Pape, 365 U.S. 167 (1961) (emphasis added)

Plaintiff's claims gain standing under Title 42, §§ 1983, 1979 as Plaintiff has applied to all available law enforcement agencies and prosecutorial offices germane to the geographical locus of the crimes; to the disciplinary counsel charged with overseeing their professional conduct, if not personal activities; to the State Bench, and to the Federal Department of Justice to prosecute these crimes. While each has uniformly agreed that I have a valid cause of action against State Actors, each has declined jurisdiction. Plaintiff has no other course of action than to proceed in Propria Persona and pray the jurisdiction of the Federal District Court over crimes of this nature.

Ex rel.: for the people of the united states defined: "...But it is the manner of enforcement which gives 42 U.S.C. 1983 its unique importance, *for the enforcement is placed in the hands of the people*." Each citizen, "acts as a private attorney general who takes on the mantle of the sovereign, guarding for all of us the individual liberties enunciated in the constitution." *Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all. Thus, it is of special import that suits brought under this statute be resolved by a determination of truth."* Wood v. Breier, 54 F.R.D. 7, (1972). (Emphasis added)

9. Plaintiff's 'self-serving' and 'conclusory allegations' are, at their most basic foundation, well-informed reports of felony activity under color of authority by the State Actors, Defendants Chapman, Miller and Grier.

Plaintiff's naïve` literary style, lack of familiarity with Terms of Art or the arcana of procedure, has little or nothing to do with the Defendants' crimes and conspiracies in aid of their violations of Plaintiff's civil rights as complained from the inception of this action. These are the sorts of controversies and actions over which the Honorable Federal District Court commonly exercises jurisdiction, even if such jurisdiction was invoked under the wrong rubric.

We conclude, therefore, that, if a complaint is filed within the time required by any controlling statute or rule and contains *substantive allegations sufficient to invoke the court's jurisdiction on some basis*, the fact that the pleader mistakenly relies upon an inapplicable statute or rule *is not fatal to his cause*. If the court would otherwise have authority to adjudicate the claim, it is not deprived of its jurisdiction simply because the plaintiff designates an inapplicable statute or rule. See Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961) (fact that complaint alleged that plaintiff was proceeding under a particular statute not controlling). See also People v. District Court, 200 Colo. 65, 612 P.2d 87 (1980). (emphasis added)

10. The Honorable Magistrate Judge's note that the complaints *appeared to be* 'frivolous and groundless' has been answered in detail and with attendant evidence in exhibit- again, a complaint about Plaintiff's literary style rather than the merits of the content. Plaintiff has been assiduous and conscientious in trying to achieve a specificity of charge that would make these crimes cognizable to the Court in each succeeding pleading.

> Plaintiff's pro se pleadings must be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972). This means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal theories or unfamiliarity with pleading requirements. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

If the Honorable Court has some sort of direction as to what information or citation would make Plaintiff's submissions cognizable to the Honorable Court, I'd be anxious to please in any way I can.

> "Following the simple guide of rule 8(f) that all pleadings shall be so construed as to do substantial justice"... "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The court also cited Rule 8(f) FRCP, which holds that all pleadings shall be construed to do substantial justice. Conley v. Gibson, 355 U.S. 41 at 48 (1957)

11. Attorney Massaro again fails in his obligation of candor to the Court's attention that he and Plaintiff had privileged Attorney Client communications about the proposed civil rights action contemplated resulting from the unlawful imprisonment, malicious, vindictive and retaliatory prosecution, false charging, witness intimidation and obstruction of justice in Jefferson County Case 00CR3372 near three years ago.

> This Circuit has long recognized a constitutional right under the Fourth Amendment "to be free from malicious prosecution." Kerr v. Lyford, 171 F.3d 330, 339 (5th Cir. 1999); see also Eugene v. Alief Ind. Sch. Dist., 65 F.3d 1299, 1303, 1305 (5th Cir. 1995)(holding that this right was clearly established as early as 1972). But "malicious prosecution may be a constitutional violation . . . only if all of its common law elements are established." Evans v. Ball, 168 F.3d 856, 862 n.9, 863 (5th Cir. 1999). To sustain a malicious prosecution claim, Texas law requires that a plaintiff show "(1) a criminal action was commenced against him; (2) the prosecution was caused by the defendant or with his aid; (3) the action terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) the defendant acted without probable cause; (6) the defendant acted with malice; and (7) the criminal proceeding damaged the plaintiff." Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994).

Counselor Massaro omits to candidly admit to the Court that Plaintiff was named as a Plaintiff's Witness in the A. F. Pugliese matter he defended on Tom Miller's behalf for slander, libel and defamation filed on or about May 06, 2004 in Boulder County Colorado.

Attorney Massaro fails to note to the Court that Plaintiff was named by the Complainant as a Witness in the Kevin Brown Grievance, #03-03413 with the Colorado Supreme Court Office of Attorney Regulation defended by Attorney Massaro.

Attorney Massaro fails to mention that Plaintiff was named as a Witness in the Gartin action about attorney fee-splitting with a layman which Attorney Massaro defended for Tom Miller in Boulder County Court 04C1779.

Attorney Massaro certainly fails to bring to the Court's attention that Plaintiff is a Witness in Dr. Hadas' complaint against Tom Miller for 'theft from an at-risk person' presently under investigation by Boulder Police Department,

Attorney Massaro knows full well that Plaintiff will be a Witness in Dr. Hadas' civil complaint against Defendant Miller for torts from criminal actions of varying sorts as well as gross malfeasance in his professional performance and fiduciary responsibilities. As it is a State Action which presumably will include claims of malfeasance by Dr. Miller, there surely will be a Certificate of Review, as required by law.

Additionally, Plaintiff will likely be called as a Witness in the Gartin pending matter of civil rights action against Defendant Miller and Attorney Massaro, as well as the co-conspirators Langfield, Clyman and Estep and other Defendants as well, inherent in the Removal of Boulder County Case 04C1779 to the Federal District venue as already filed by Mr. Gartin.

Kevin further omits the fact that we had an extended private e-mail correspondence independent of any other communications between us long prior to his defense of Defendant Miller in the instant case.

Attorney Massaro's failure to be candid and forthcoming with the Honorable Court reflects his ongoing pattern of such professional behaviour as was noted by the Honorable Judge in the Boulder Case. His failure to be anything but evasive, selectively truthful, and his failure to be forthright and candid, is as mendacious in its omissions as would be more active prevarication.

Attorney Massaro's professed indignation at being 'served at home' is feigned, as he labors to evade service of process in any case. The Service was done by a professional functionary as a consequence of his own tracing of Mr. Massaro's location and had nothing to do with any direction by Plaintiff. Attorney Massaro's room at the Englewood Law Building is generally unoccupied, and his building co-operative doesn't provide for such amenities as responsible reception of legal process by an active attorney.

12. Plaintiff very respectfully submits a Prayer to the Honorable Court based on Exception founded in the self-serving re-statement and mis-characterization of Plaintiff's complaint by State Actors' Defense Counsels. Any dismissal based on that mis-characterization wouldn't speak to the controversy at Bar nor render justice to any Party.

Plaintiff's literary deficiencies and legal naivete` have nothing to do with the content and character of the Defendants' crimes and abuses, and Counsel's complaints of mis-steps of process are particularly contradictory and self-serving when emanating from the very Defendant hired, paid and retained to professionally address that specific inadequacy of the pro se litigant.

> "Following the simple guide of rule 8(f) that all pleadings shall be so construed as to do substantial justice"... "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The court also cited Rule 8(f) FRCP, which holds that all pleadings shall be construed to do substantial justice. Conley v. Gibson, 355 U.S. 41 at 48 (1957)

Plaintiff never intended to litigate without an attorney. Plaintiff engaged attorneys whenever opportunity has presented. Plaintiff paid and retained Attorney Miller, and that retainer has neither been earned nor returned as well.

Every moment that Defendant Tom Miller spent with Plaintiff was a Fraud, initiated prior to Plaintiff's payment and retainer of DocsLaw, Attorney Miller's lawfirm, and inherent in every attorney/client interaction we ever had.

13. Defense Counsel's ad hominem attacks appear to be a compensatory measure for lack of a credible defense for his long-time associate. Such calumnies are particularly notable as the defense of the very person, presenting as an Attorney at Law, who was hired and paid to submit Plaintiff's complaint in a manner professionally cognizable to the Honorable Court, 'welshing' on the agreement on 4 March, 2004, using Defendant Grier's threats of undue influence with Defendant Chapman as the hammer for the Extortion.

14. Plaintiff's supposed tedious prolixity is the sum of trying to be specific and detailed and to conform to some naïve` idea of legal construction and respectful proforma soas to make the instrument cognizable to the Honorable Court.

Additionally, Plaintiff is generally speaking to three sets of crimes and civil rights violations, intermingled and mutually enabling as they are as regards the three present Defendants.

There are no 'manuals' for a layman proceeding in court pro se against Officers of the Court as State Actors for their failures, abuses, denials and fraud. Plaintiff has been forced, by the abuses of these very Defendants, to advance action on my own behalf or see it undone at all. Mis-steps in the stately dance of the process are generally of no material relevance to the merits of the case, and settled Law would seem lead us to seek justice by a liberal reading of such complaints.

15. Plaintiff has twice been denied Leave to Amend the Complaint for missteps of forma, not for merit of the Claims or a failure to advance evidence in support of those claims.

> A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).* This broad reading of a pro se plaintiff's complaint does not, however, relieve him of the burden of alleging sufficient facts on which a cognizable claim could be based. Id. Even so, [HN2] a pro se plaintiff who fails to allege sufficient facts is to be given a reasonable opportunity to amend his complaint if justice so requires. See *Roman-Nose v. New Mexico Dept. of Human Services, 967 F.2d 435, 438 (10th Cir. 1992)* (citing *Fed. R. Civ. P. 15(a)*, "leave [*4] [to amend pleading] shall be freely given when justice so requires).

While Defense Counsel may not be responsible to reply in the procession of pleadings, they are surely responsible for the information and evidence before them in simple due diligence.

> Plaintiff's pro se pleadings must be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *See Haines v. Kerner, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).* This means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal theories or unfamiliarity with pleading requirements. *See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).*

16. It must be an unusual circumstance, startling to any legal professional much less an untrained and unsophisticated Layman as is Plaintiff, for a Defense Counsel to make such an egregious procedural error as was submitted by Counselor Massaro in his Stricken Pleading. Plaintiff respectfully submits the explanation of having to proceed while learning on the fly and the occurrence of such a Pleading being of such unique nature as to condone a small misapprehension on Plaintiff's part as to procedural responses to such an instrument.

Plaintiff respectfully submits that the distinction of which parts of Attorney Massaro's Pleading were Stricken, and which were not, wasn't clearly drawn until after Plaintiff filed the First Proposed Amended Complaint. The Rule says that the Complaint may be amended before an Answer is made. As the Answer seemed stricken along with the rest of the material, Plaintiff submitted a good faith Amended Complaint that tried to speak to specificity and small corrections of typos and such.

More importantly, what Attorney Massaro seems to advance as a theory of vexatious intent on Plaintiff's part is actually evidence of Plaintiff's good faith efforts to make these valid and well-founded claims cognizable to the Honorable Court and to comport myself to the Rules in a respectful and forthright manner before all Parties.

17. Attorney Massaro fails to candidly acknowledge to the Court that Attorney Miller was Defendant to that Boulder Case action for his failure to honor a fee-splitting agreement with a layman, and represented by Attorney Massaro.

Defendant Miller lost the questions before the Court on the 7th of June, and both Defendant Miller and Counselor Massaro were chided by the Honorable Magistrate Judge for attempting to mislead the Court in the face of irrefutable evidence and the five eye-witnesses to Defendant Miller's conduct available in the Courtroom that day.

Plaintiff respectfully asks the Honorable Court to note that the Transcript of Boulder Case 04C1779 has been ordered, pre-paid, and hasn't been delivered as of the time of this submission, thus is not available to Plaintiff for citation.

> Under Fed. R. Civ. P. 9(b), an allegation "on information and belief" may be sufficient, if accompanied by a statement on which the belief is founded, when the facts in question are peculiarly within the opposing party's knowledge and the complaint sets forth the factual basis for the plaintiff's

belief. See Scheidt v. Klein, 956 F.2d 963 (10th Cir. 1992); see also Thompson v. Beck, 92 Colo. 441, 21 P.2d 712 (1933).

Plaintiff asserts that Defendant Miller's defrauding of Steve Gartin is materially germane to the instant case as it is the self-same fraud that compelled Miller, commencing in early 2002, to also defraud and mislead Plaintiff on behalf of the Colorado State Attorney General's Office by falsely alleging an illegal and improper unwritten requirement to refrain from suing them, violating Plaintiff's civil rights and committing numerous criminal acts in the process.

18. Plaintiff's Petition for Leave to Amend the Complaint was made having never been served any Motion for Extension of time by Defendant Grier's Counsel. Plaintiff filed the Petition prior to Defendant Grier's Reply, and unknowing of any extension of time granted by the Honorable Court.

There is no justifiable implication that Plaintiff petitioned frivolously, groundlessly or for a vexatious purpose. Rather, again it is evidence of Plaintiff's good faith attempts to correct harmless errors, clarify and specify the crimes alleged against Defendants; to submit evidence by Exhibit supporting the allegations made by Plaintiff, and to present New Evidence revealed subsequent to the filing of the Original Complaint in a manner which the Court can 'see' and to which the Court can become cognizant.

There is no onus for Plaintiff to be aware of rulings made without notification to me, rather an affirmative duty to Katherine Grier's Defense Counsel to Serve Plaintiff with timely notice of such pleadings. Defense Counsel for Katherine Grier have produced no Certificate of Service or otherwise answered the requirement for Proof of Service as is questioned by Plaintiff, and Plaintiff considers the allegation as being admitted by Defendant Grier.

19. Plaintiff respectfully submits that any judgment made devoid of jurisdiction is not an 'actual state court judgment' for purposes of the Statutory requirements or application of the Rooker-Feldman Doctrine.

> Legal encyclopedia 46 AmJur2d Judgments, section 27, informs us "in the absence of jurisdiction over the person, any judgment or order the court might enter against defendant is void." Section 31 continues with "a void judgment is a complete nullity and without legal effect...and is open to attack or impeachment in any proceeding, direct or collateral...where the invalidity appears upon the face of the record."
>
> Generally, judges are immune from suit for judicial acts within or in excess of their jurisdiction even if those acts have been done maliciously or corruptly; the only exception being for acts done in the clear absence of all jurisdiction. Hoffsomer v. Hayes, 92 Okla 32, 227 F. 417

The statute and doctrine specify an 'actual' state court judgment. Rooker-Feldman does not, on its face, confer jurisprudential validation to rulings made without jurisdiction. In fact, a failure in jurisdiction is the exception noted to 'judicial immunity'. One of the cornerstones of jurisdiction is the requirement that all Parties be notified, have the opportunity to defend themselves and be present at the hearing.

> Other adjudication has been more direct: "A judgment rendered in violation of due process is void." World Wide Volkswagen v Woodsen, 444 US 286, 291 (1980); National Bank v Wiley, 195 US 257

> (1904); Pennoyer v Neff, 95 US 714 (1878), and "...the requirements of due process must be met before a court can properly assert in personam jurisdiction." Wells Fargo v Wells Fargo, 556 F2d 406, 416 (1977). The legal encyclopedia Corpus Juris Secundum informs us in volume 16D, section 1150 on Constitutional Law: "Only by due process of law may courts acquire jurisdiction over parties." 16D CJS Const. Law, §1150.

Plaintiff respectfully alleges that Defendants Grier and Chapman failed to rise to that standard for jurisdiction, and proceeded anyway, to Plaintiff's damage, and in violation of Plaintiff's civil rights. Defendant Grier has admitted in Court her failures to notify Plaintiff and has failed to answer or challenge Plaintiff's assertions in that regard in the instant case, the omission admitting the truth of Plaintiff's assertions.

> Constitutionally and in fact of law and judicial rulings, state-federal "magistrates-judges" or any government actors, state or federal, may now be held liable, if they violate any Citizen's Constitutional rights, privileges, or immunities, or guarantees; including statutory civil rights. Forrester v. White, 484 U.S. at 227-229, 108 S. Ct. at 544-545 (1987); Westfall v.Erwin, 108 S. Ct. 580 (1987); United States v. Lanier (March 1997)

20. In fact, it is just that political or social position of civil rights activism as ascribed to Plaintiff by Defendant Grier in her 04 March, 2004 Phone Conversation with Defendant Miller, and in Court on the Record in 00DR1773, that Defendant Grier advanced as the motivation for her threats of the proposed false arrest, false charging and illegal incarceration of Plaintiff. Defendant Grier has actually referred to Plaintiff as an adherent of the 'Posse Comitatus' and tried to link Plaintiff with Senatorial Candidate Rick Stanley, tax protestors and civil rights activists; a continuing material deception on her part and of the parcel of 'invidious discriminatory animus' against such political and social activists.

Defendant Grier went so far as to prepare the Adams County Sheriff's Department to assault Plaintiff, using her familiarity with the Courthouse enterprise and special access to the State's resources and powers, to advance her extortion and to conceal her ongoing fraud of Plaintiff as reflected in Plaintiffs Petition for Writ of Habeas Corpus submitted to the Colorado State Supreme Court, as well as pleadings in 00DR1773.

Falsely accusing Plaintiff of being a civil rights activist of Senatorial Candidate Stanley's ilk, or some lunatic fringe of militia or other despised class, evokes an unjustified invidious and discriminatory judicial animus against Plaintiff. The discrimination by members of the Courthouse enterprise in Adams County Colorado is particularly strong as Plaintiff's case was congruent with the bizarre actions of Mr. Stanley, mentioned by Katherine Grier as 'some guy who threatened a judge's life' in the Phone Call above cited.

That mere accusation by Defendant Grier was sufficient to invoke class-related abuse of Plaintiff by the powers of the State administrated by the judiciary of Adams County Colorado, and to threaten Plaintiff

with their misuse if Plaintiff proceeded pro se or petitioned for redress of grievance or complained of malice and abuse by the present Defendants.

21. Defense Attorney Massaro fails in his duty of candor before the Tribunal when he omits to note that the Boulder Case, as above cited, found his feigned protestations of outraged professional dignity to be sprurious in the face of credible witnesses to his Client's conduct. The Honorable Magistrate Judge found merit in the claims by Plaintiff Gartin which are indivisibly material to Plaintiff's claims in this instant case.

Further, the Honorable Judge found it cogent to publicly chide both Defendant Miller and his counsel, Attorney Massaro, noting their attempts to mislead the Court as he ruled against them in each regard.

22. Again, Mr. Massaro fails in his duty of candor to the Tribunal and omits that Plaintiff said; 'If the (Federal District) Court allows me to amend the Complaint', referring to the instant case and Plaintiff's continuing petition before this Honorable Court for Leave to Amend the Original Complaint for clarity and to introduce New Evidence and to add New Defendants pursuant to the ongoing investigations and the new evidence revealed.

Kevin Massaro's involvement in the Fraud upon Mr. Gartin goes back a couple of years prior to acting as Defense Counsel for Defendant Miller, and professionally independent of his defense of Defendant Miller in the numerous complaints against Mr. Miller for criminal and civil actions as well as multiple Grievances before the Chief Disciplinary Judge, Mr. Justice Lucero.

Plaintiff contacted Mr. Massaro, while he was affiliated with Brega & Winters lawfirm, in privilege prior to ever meeting Tom Miller, and it was upon Mr. Massaro's recommendation that Plaintiff sought out Mr. Miller for representation. Mr. Massaro and Mr. Miller are longtime personal associates as well as business associates, and their relationship is far deeper than solely a professional interaction.

23. Nothing Plaintiff has done has been frivolous, and the mere assertion of it by Counsel Massaro isn't sufficient for any finding by the Court or proper review in Appeal. Plaintiff's assertions are well grounded in fact and in settled law; and not for any vexatious purpose, but in the pursuit of justice and judgment for damages against Defendants in petition for grievance to the Honorable Court.

Defense Attorney Massaro is reduced to literary critique` as a red-herring, and to contrast with a substantive Answer to Plaintiff's claims, and in defiance to Plaintiff's evidence, and fretfully contemplating the prospect of another confrontation with numerous eye-witnesses, as well as another cross-examination of Defendant Miller under Oath, as proved so efficacious in the Boulder Case.

24. This is the same spurious claim that Counselor Massaro presented in defense of Defendant Miller in the Boulder Case, wherein he both lost and was noted by the Honorable Magistrate. His defense of Defendant Miller, in the face of eye-witnesses and documentation fell short, as did his presentation and demand for attorney's fees, which failed as well.

25. Plaintiff has approached the Honorable Court for Sanctions on Defense Counsel Massaro as well, as noted to the Honorable Court in PLAINTIFF'S ANSWER TO DEFENDANT THOMAS C. MILLER'S NOTICE OF PLAINTIFF'S FRAUD BEFORE THE COURT, FED.R.CIV. P.11 AND REQUEST FOR SANCTIONS filed on or about the 3rd Day of February, 2005.

Plaintiff incorporates the above cited 'Answer and Request' by reference and as if fully reproduced herein.

Plaintiff would respectfully ask the Court to note that I have submitted well-founded rebuttal to all accusations of bad faith conduct, as well as documented support for my claims, as well as the proffer of eye-witnesses to Defendants' conduct and actions to include Defendant Grier's client at the time.

Accusations of Plaintiff being 'prolix' reflect the specificity and thorough explication of Plaintiff's position, particularly in the tedious repetition of each Defendants' individual long litany of crimes, abuses and violations of Plaintiff's Constitutional rights, and the refutation of their spurious 'history' of the case and Plaintiff's causes of action.

In point of fact, Plaintiff has relied on the Honorable Court's discretion. Plaintiff has relied on the liberal reading of his pleadings; in the hope of each pleading doing substantial justice, in the expectation that reporting professional infractions and obvious mendacity to the Honorable Court would evoke action on your part, or that of some law enforcement agency or disciplinary mechanism.

> The action of a court in exercising its power to disbar or suspend an attorney is judicial in character, but the inquiry is in the nature of an investigation by the court into the conduct of one of its own officers, and is not the trial of an action at law, as the order which is entered is only an exercise of the disciplinary jurisdiction which a court has over its officers. It is recognized in this State and generally in America that in such an investigation, mere forms not affecting its merits should not stand in the way of protecting the court and the public by appropriate action after a full hearing. In re Williams, 180 Md. 689, 23 A. 2d 7, 11.
>
> In Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285, 293, the Supreme Court of the United States, speaking through Justice Field, commented on this practice as follows:
> [*337] [HN4] "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from [***15] what the court learns of the conduct of the attorney from his own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."
> [HN5] The usual practice in proceedings to disbar attorneys in State courts is to make written charges or allegations of misconduct. The specific offense charged should be set out so that the attorney may be aware of the precise nature of the accusation he is to meet and may know how to defend. Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214; People v. Amos, 246 Ill. 299, 92 N. E. 857. However, no formal or technical allegations or descriptions of the alleged offense are necessary.

> Gould v. State, 99 Fla. 662, 127 So. 309, 69 A. L. R. 699; In re Keenan, 287 Mass. 577, 192 N. E. 65, 96 [***16] A. L. R. 679.
>
> A complaint against an attorney is sufficient if it is intelligible and informing enough to advise the court of the matters complained of, so that it can determine whether or not to institute an inquiry, and to inform the attorney of the accusations so as to enable him to prepare a defense. State v. Peck, 88 Conn. 447, 91 A. 274.

26. Plaintiff has maintained from the onset that his claims are not frivolous, not groundless; are made from settled law and a valid and defensible theory of law. Were Plaintiff proceeding under the circumstances outlined in Defendants' self-serving restatement of Plaintiff's causes of action, admonitions might have had some justification, but that's not so in the instant case.

> A good faith presentation of a legal theory which is arguably meritorious is sufficient to avoid an award of attorney fees. SaBell's, Inc. v. City of Golden, 832 P.2d 974 (Colo. App. 1991), cert. denied, 846 P.2d 189 (Colo. 1993).

Plaintiff admits that this case is Exceptional, and asserts that it is just that much more important that it be resolved by Trial on the merits of the case soas to achieve substantial justice. The entire statutory intent of Title 42 §§ 1986, 1985, 1983, 1981, 1979, is to hold persons accountable for their misuse of public trust and authority in violation of the civil rights of individuals. Proceeding in pro se is a natural and foreseeable inherent feature in actions against Officers of the Court in particular.

> *Colo. Rev. Stat. § 13-17-102(7)* (1987 Repl. Vol.) specifies that no attorney or party may be assessed fees as to any claim or defense brought in a good faith attempt to establish a new theory of law. It is not logical to allow an award of fees against an attorney or party relying in good faith upon established law and to deny one against the adventurer.
>
> In determining whether a case is "exceptional" I look to whether the plaintiff's conduct in bringing the litigation is vexatious, unjustified, inequitable, willful, frivolous, or in bad faith. See Beckman Instruments, Inc. v. LKB Produkter AB, 892 F.2d 1547, 1551 (Fed.Cir. 1989). Again, such conduct must be supported by clear and convincing evidence. See id.

27. Plaintiff denies any accusation of being a 'vexatious litigant'. The simple assertion by Counsel is inadequate and should be examined in Hearing to form a record for meaningful Appellate Review. Plaintiff's 'prolix' and 'tedious' pleadings have consisted of proofs that Defense Counsel's assertions are groundless and in themselves 'vexatious', inconsiderate of the Court's time and resources, and made for a mendacious purpose to further seek to mislead the Honorable Court. The discretion of the Honorable Court to exert Sanctions on any Party to this case would be well served by a rigorous scrutiny of Defense Counsel's conduct, submissions and presentations of 'facts', and Plaintiff so prays the Honorable Court.

> In Pedlow v. Stamp, supra, our supreme court held that [HN3] a party is entitled to an evidentiary hearing before sanctions may be imposed under § 13-17-101, et seq., C.R.S. (1987 Repl. Vol. 6A), which authorizes an award of attorney fees whenever a claim or defense is found to be substantially frivolous, [**4] groundless, or vexatious. This does not mean, however, that a trial

court is required to set a hearing sua sponte. Instead, the right to a hearing may be waived when a party fails to make a timely request in the trial court for that purpose. Schmidt Construction Co. v. Becker-Johnson Corp., 817 P.2d 625 (Colo. App. 1991)

In determining if an award of attorney fees is warranted and in assessing the amount of such fees under Colo. Rev. Stat. § 13-17-102, the trial court is required to make findings based on the relevant factors set out in Colo. Rev. Stat. § 13-17-103(1), to permit meaningful appellate review of its disposition. Also, conclusory statements that a claim is frivolous, groundless, or vexatious are insufficient for purposes of appellate review and inadequate to satisfy the statutory requirement of specificity. Board of Commissioners, County of Boulder v. Robert Eason, 976 P.2d 271; 1998 Colo. App. LEXIS 139; 1998 Colo. J. C.A.R. 2709

If the trial court orders an award of attorney fees, it is required to make detailed evidentiary findings pursuant to statute. However, even if the trial court makes no award of attorney fees, it may still be required to provide an evidentiary hearing and make findings of fact regarding the statutory criteria for awarding attorney fees, at least if such a hearing has been timely demanded by either party. However, no court has yet stated that, even in the absence of a demand by any party, a trial court, having sat through the presentation of the parties' evidence, must hold an additional evidentiary hearing before making its determination that there exists no basis for an award of attorney fees pursuant to *Colo. Rev. Stat. § 13-17-101*.

Defense Counsel Massaro and his Client, Defendant Miller, having enjoyed Plaintiff's Privilege in their professional roles, are more aware than anyone else of the truth of Plaintiff's assertions, as is Defendant Grier through her privileged access to Plaintiff's longtime companion and the intimacies of our relationship. Their mendacious attempts to materially mislead the Honorable Court are, themselves, sanctionable, and Plaintiff prays the Honorable Court to exercise it's discretion sua sponte and so sanction.

Plaintiff has attempted in good faith to correct small errors, to more specifically describe Defendants' frauds, abuses, denials and failures, to introduce New Evidence come to light after the Original Complaint was filed, and to strive to comport myself in a manner cognizable to the Honorable Court and respectful of the Court's dignity, expectations and requirements.

This statutory requirement is qualified by § 13-17-102(6). It provides that attorney fees may not be assessed against a party appearing without an attorney unless the court finds that the party "clearly knew or reasonably should have known that the action or defense, or any part thereof, lacked substantial justification." (emphasis added)

"'Where, as here, a party places in issue a claim for attorney fees pursuant to § 13-17-101 . . . that party has the right to, and the trial court has a duty to conduct, a hearing upon that claim. [This section] . . . requires that the trial court then enter findings of fact and conclusions of law as to whether the claim or defense is "frivolous" or "groundless." And, if a claim or defense is deemed to be frivolous or groundless, the trial court must make findings of fact sufficient to justify the amount of attorney fees awarded, if any.'" Pedlow v. Stamp, 776 P.2d 382 (Colo. 1989), and Board of County Commissioners v. Auslaender, 745 P.2d 999 (Colo. 1987)
As Pedlow makes clear, therefore, [HN3] if the trial court [**3] orders an award of attorney fees, it is required to make detailed evidentiary findings pursuant to statute. However, even if the trial court makes no award of attorney fees, it may still be required to provide an evidentiary hearing and make findings of fact regarding the statutory criteria for awarding attorney fees, at least if such a hearing

has been timely demanded by either party. See Board of County Commissioners v. Auslaender, supra.

In awarding attorney fees, the trial court must "set forth the reasons for said award." § 13-17-103(1), 6A C.R.S. (1987). A claim or defense is frivolous if the party asserting it "can present no rational argument based on the evidence or law in support of that claim or defense." Western United Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984). This standard does not apply to legitimate but unsuccessful attempts to establish a new theory of law, or to extend, modify, or reverse existing law. Id. In contrast, bad faith may include the following: conduct that is "arbitrary, vexatious, abusive, ... stubbornly litigious [or] . . . . aimed at unwarranted delay or disrespectful of truth and accuracy." Id.

(magistrates must "inform a pro se litigant not only of the time period for filing objections [to magistrate's findings and recommendations], but also of the consequences of a failure to object"). United States v. Gutierrez, 839 F.2d 648, 651 (10th Cir. 1988) [**9] (citing Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454 (10th Cir. 1978), and Nichols v. United States, 796 F.2d 361, 364 (10th Cir. 1986)); cf., Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991

'WHEREFORE, Charles H. Clements, the Proper Party Injured Plaintiff in Pro Se by doctrine of necessity, very humbly and respectfully takes Exception with the recommendations of the Honorable Magistrate Judge and asks that this Court DECLINE to implement them; to DENY Defendant Katherine Griers Motion for Rule 11 Sanctions against Plaintiff Charles H. Clements; to FIND that Plaintiff has acted in good faith; to DECLARE Plaintiff's right to a full hearing of the merits and facts of the instant action before the Bar; to DENY Defendants request for attorney fees; and to GRANT whatever other such relief this Court finds in the best interests of justice; sanctions against attorneys, leave to amend the Original Complaint, or as the Honorable Court deems appropriate.

Respectfully submitted this 06th day of July, 2005.

_____

Charles H. Clements
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(303) 364-0403
chasclements@comcast.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 06th day of July, 2005, a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT THOMAS C.MILLER'S CONCURRENCE WITH RECOMMENDATIONS OF UNITED STATES MAGISTRATE, AND REBUTTAL OF THE SUPPLEMENTAL INFORMATION IN SUPPORT OF DEFENDANT KATHERINE GRIER'S MOTION FOR RULE 11 SANCTION AND PRAYER was sent via US Mail, first class postage prepaid, to the following:

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