

2002

# In the Matter of of the Discipline of: Sonnenreich v. : Brief of Appellant

Utah Supreme Court

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## **STATEMENT SHOWING JURISDICTION OF THE UTAH SUPREME COURT**

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Constitution article VIII, section 4, which provides that “The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law,” and Utah Code section 78-2-2(3)(c), which provides that the Court has appellate jurisdiction over “discipline of lawyers.”

## **STATEMENT OF THE ISSUES**

**Issue 1:** Whether the District Court erred in concluding that the Utah State Bar’s Office of Professional Conduct (“OPC”) has no authority to premise an unauthorized practice of law complaint upon an administrative suspension. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue was preserved in the District Court by legal memorandum and the oral argument of counsel. (R. 88-207; 904:12-13)

**Issue 2:** Whether the District Court erred in concluding that the Bar has no authority to administratively suspend attorneys for failure to pay their annual licensing fees. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue was preserved in the District Court by legal memorandum and the oral argument of counsel. (R. 88-207; 904:12-18)

**Issue 3:** Whether the District Court erred in concluding that the OPC has no authority to bring this action. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue



was preserved in the District Court by legal memorandum and the oral argument of counsel. (R. 88-207; 904:12-18)

**Issue 4:** Whether the District Court erred in concluding that the Complaint failed to satisfy the requirements of Rule 11 of the Rules of Lawyer Discipline and Disability and Rule 8 of the Rules of Civil Procedure. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue was preserved in the District Court by legal memorandum. (R. 88-207)

**Issue 5:** Whether the District Court erred in the context of entering a summary judgment in making factual findings, such as the finding that Sonnenreich received no notice of the administrative suspension. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue was preserved in the District Court by legal memorandum and the oral argument of counsel. (R. 290-303; 904:12-18)

**Issue 6:** Whether the District Court erred in awarding attorney fees to Sonnenreich based upon its determination that the OPC's action against Sonnenreich was without merit and not brought or asserted in good faith within the meaning of Utah Code section 78-27-56. This issue is a mixed question of law and fact, and the applicable standard of review is an abuse of discretion standard. See Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998). The issue was preserved in the District Court by legal memorandum and the oral argument of counsel. (R. 491-538; 905:18-30)

**Issue 7:** Whether the District Court erred in awarding attorney's fees in an amount that was unreasonable. The applicable standard of review is an

abuse of discretion standard. See Salmon v. Davis County, 916 P.2d 890 (Utah 1996). The issue was preserved in the District Court by legal memorandum. (R. 707-731)

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES**

The following constitutional provisions, statutes, and rules are set forth verbatim in the addendum.

#### **Statutes**

Utah Code § 78-27-56

#### **Rules**

Rule 5.5 (Unauthorized Practice of Law), Rules of Professional Conduct  
Rules for Integration and Management of the Utah State Bar  
Rules of Lawyer Discipline and Disability

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This case originated in a disciplinary action the OPC filed in District Court against Sharon Sonnenreich. (R. 1-4) The OPC alleges that Sonnenreich engaged in the unauthorized practice of law ("UPL") in violation of the Rules of Professional Conduct when she continued to practice law after the Utah State Bar administratively suspended her for failure to pay her annual licensing fee. (R. 1-4)

### **Course of Proceedings and Disposition at Trial Court**

The OPC filed a District Court Complaint against Sonnenreich on April 24, 2000. (R. 1-4) Sonnenreich filed an Answer on May 24, 2000. (R. 12-20) The action terminated when the District Court entered a Memorandum Decision pursuant to Sonnenreich's Motion for Judgment on the Pleadings and ordered summary judgment in Sonnenreich's favor, dismissing the OPC's Complaint with prejudice on the merits. (R. 282-289; 331-332) Sonnenreich subsequently moved for an award of attorney's fees, which the District Court granted. (R. 342; 669-675; 803-805) Later, the District Court revised the amount of the award, but not its substantive basis. (R. 893-894)

## **RELEVANT FACTS**

### **The Events Leading to the Initiation of the Case in District Court**

The OPC contends that in 1999, Sonnenreich failed to pay her annual licensing fee.<sup>1</sup> (R. 1-4) The Utah State Bar ("the Bar") administratively suspended Sonnenreich for her alleged non-payment of the licensing fee, and during the period of her administrative suspension was not authorized to practice law in the State of Utah. (R. 1-4) The OPC contends that the Bar's Executive Director gave Sonnenreich notice<sup>2</sup> at her address on record with the Bar that her name had been removed from the roll of attorneys licensed to practice law in Utah by reason of her failure to pay her 1999-2000 license fees. (R. 115) The OPC contends that Sonnenreich continued to practice law and hold herself out as an attorney after she had been administratively suspended for non-payment of dues. (R. 1-4) Sonnenreich paid her 1999 licensing fee on January 7, 2000 and the Bar immediately reinstated her from the administrative suspension. (R. 3)

The OPC initiated an informal complaint against Sonnenreich predicated upon her alleged UPL during the time of her interim suspension, served her with a Notice of Informal Complaint, and referred the matter to a Screening Panel of the Ethics and Discipline Committee ("Screening Panel"). The Screening Panel convened to hear Sonnenreich's case in late March 2000. (R. 1-4)

The Screening Panel recommended "[t]hat a formal complaint be filed against the respondent." (R. 1-4; 151-156) The Screening Panel Information

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<sup>1</sup> This allegation, along with others noted herein, has never been adjudicated, inasmuch as the District Court summarily dismissed the OPC's action against Sonnenreich.

Sheet, a form filled out and signed by the Chair of the Screening Panel, stated in part as follows:

There is probable cause to believe that the Respondent was engaged in professional misconduct with regard to Rule 5.5. With specific reference to this Rule[ ], the Panel finds these facts by a preponderance of the evidence.

...

Based upon the facts found by the Panel that the Respondent engaged in professional misconduct with respect to Rule[ ] 5.5 and that the Respondent acted negligently, the Panel recommends that a formal complaint be filed against the Respondent regarding Rule[ ] 5.5.

(R. 154-155) In the alternative, the Screening Panel could, among other things, have dismissed the informal complaint altogether<sup>3</sup> or recommended that Sonnenreich receive an admonition; it took neither of these actions as to the UPL allegation. (R. 155-156)

### **The District Court Action**

The OPC filed the Complaint on April 24, 2000. (R. 1-4) It was signed by the OPC attorney assigned to the case and also by the person who was then the Chair of the Ethics and Discipline Committee.<sup>4</sup> (R. 1-4) The Complaint alleged that Sonnenreich had been administratively suspended for failing to pay her annual licensing fee, but nevertheless continued to hold herself out as an

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<sup>2</sup> One of the central issues of this case is whether the RLDD require actual notice.

<sup>3</sup> Indeed, the Panel dismissed two alleged rule violations brought against Sonnenreich based upon its "belief that there was not probable cause to conclude there was professional misconduct" as to those charges. (R. 156)

<sup>4</sup> The District Court Complaint, known as a "formal" Complaint, must be signed by the Chair of the Ethics and Discipline Committee, or by another Committee member in the Chair's absence. See Rule 11(a), RLDD. Accordingly, although the OPC attorney assigned primary responsibility for the case drafted and signed

attorney and practice law in violation of the Rules of Professional Conduct. (R. 1-4)

Sonnenreich filed an Answer on May 24, 2000. (R. 12-20) Shortly thereafter, she filed a Motion for Judgment on Pleadings, along with a memorandum and affidavit in support thereof. (R. 26-27; 28-49; 50-81) Sonnenreich filed the Motion for Judgment on Pleadings pursuant to Rule 12 of the Rules of Civil Procedure, but it was converted to a Motion for Summary Judgment because it was supported and opposed by papers outside of the pleadings. (R. 50-81; 111-113) Sonnenreich contended that the Bar has no authority to suspend attorneys or judges; that the action against Sonnenreich can only be instituted by the Board of Bar Commissioners; that the Complaint did not state in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable rules; the Complaint was not predicated upon a screening panel finding of probable cause to believe there are grounds for public discipline and that a formal complaint is merited. (R. 26-27)

The District Court heard brief oral argument on Sonnenreich's Motion for Judgment on the Pleadings, then entered a Memorandum Decision granting "judgment on the pleadings" in Sonnenreich's favor.<sup>5</sup> (R. 904; 281; 282-289) The Memorandum Decision stated grounds summarized as follows: (1) The Bar [OPC] may not premise a UPL action upon an administrative suspension; (2)

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the Complaint, the person who was the Chair at the time the action was filed against Sonnenreich also reviewed and signed it.

<sup>5</sup> The Judgment was signed by Judge Iwasaki for Judge Stirba. Judge Stirba entered the Memorandum Decision of January 8, 2001, and presided over the case to this point. By the time the case reached the phase at which the District

Sonnenreich received no actual notice of the administrative suspension; (3) only minor forms of discipline are warranted when an attorney's misconduct is negligent and causes no actual injury; (4) the OPC [Bar] has no authority to suspend attorneys because this is the province of the Supreme Court, and further, the OPC had no authority to bring this action because such actions must be instituted by the Board of Bar Commissioners; (5) the Complaint fails to provide sufficient facts to satisfy Rule 11 of the RLDD or Rule 8 of the Rules of Civil Procedure.<sup>6</sup> (R. 282-289) The court's decision was predicated in part upon this Court's decision in In re Crandall.<sup>7</sup> (R. 285-286)

Sonnenreich prepared a proposed Judgment which provided that she was entitled to costs pursuant to Rule 54(d) of the Rules of Civil Procedure, and that the Court retained jurisdiction to consider attorney fees under the bad faith filing statute. Pursuant to the Utah Rules of Judicial Administration, the OPC objected to the proposed Judgment, among other things noting that Sonnenreich's motion should be treated as a motion for summary judgment. (R. 290-304) Sonnenreich responded to the OPC's objections, and submitted a Judgment [Revised Form] that set forth the same ruling as the proposed Judgment, and

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Court considered Sonnenreich's Motion for Attorneys' Fees, it had been assigned to Judge Burton.

<sup>6</sup> The court appears to have made the common assumption that the Bar and its actions are one and the same as the OPC and its actions. Indeed, the nomenclatural distinction between the two has not always been vigorously maintained by the OPC itself, and often the difference is of no consequence. Nevertheless, the distinction is significant in this context because it is the Bar that administratively suspends attorneys, whereas the OPC has no authority to suspend anyone, either for disciplinary or administrative reasons.

<sup>7</sup> In re Crandall, 784 P.2d 1193 (Utah 1989).

included language to the effect that Sonnenreich had filed an Affidavit with Supporting Materials. (R. 305-320; 318-320)

The District Court through a Minute Entry found that Sonnenreich's [Revised Form of] Judgment accurately reflected its decision, but also found that through "clerical error," because of the affidavits filed by the parties, it should have considered Sonnenreich's motion under Rule 56 of the Rules of Civil Procedure rather than as a Motion for Judgment on the Pleadings. (R. 323-325) The District Court requested that Sonnenreich submit a corrected form of judgment. (R. 323) The District Court ordered Judgment on April 25, 2001 pursuant to Rule 56(c) of the Utah Rules of Civil Procedure, dismissing the OPC's action against Sonnenreich "with prejudice on the merits." (R. 331-332)

The Judgment of April 25 was the subject of a Notice of Appeal filed by the OPC in May 2001 ("first appeal"). (R. 333-335) Sonnenreich moved to summarily dismiss the OPC's first appeal. Motion for Summary Disposition and for Attorneys' Fees, Supreme Court Case No. 20010459-SC, June 15, 2001.

In June, Sonnenreich filed a Motion for Attorneys' Fees Pursuant to Utah Code § 78-27-56 ("the bad faith filing statute"). (R. 342; 344-487) The OPC opposed the motion, and Sonnenreich filed a reply. (R. 491-538; 542-652)

This Court summarily dismissed the OPC's first appeal. (R. 667) The Order noted that the dismissal was granted "for reasons other than those presented by the respondent," and although the appeal was dismissed because it was prematurely filed, "inasmuch as this precise question has not previously



been presented, we do not find the appeal to have been frivolous.” (R. 667) The Court denied Sonnenreich’s request for attorney fees. (R. 667)

The District Court<sup>8</sup> heard oral argument on Sonnenreich’s motion for attorney fees on October 16, 2001, and subsequently entered a Memorandum Decision granting the motion for fees pursuant to the bad faith filing statute and asking Sonnenreich’s counsel to submit an affidavit “of appropriate fees.” (R. 905; 669-675) The Memorandum Decision summarized the parties’ positions, and reviewed the elements for awarding attorney’s fees. (R. 669-675) The substance of the court’s decision is set forth verbatim:

Applying the aforementioned [elements] to the facts of this case, it appears Judge Stirba in her ruling found the Crandall and Schwenke cases to be applicable in this matter, thus resulting in a finding that the action was found to be clearly meritless.

As to the issue of whether the Complaint was brought in bad faith, “In order to find that a party acted in bad faith, the trial court must determine that at least one of the following factors existed: ( i) The party lacked an honest belief in the propriety of the activities in question; ( ii) the party intended to take unconscionable advantage of others; or ( iii ) the party intended to or acted with the knowledge that the activities in question would hinder, delay or defraud others.” See Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). Obviously an accusation that a party has brought a complaint in bad faith is a serious matter. However, in the present case, given the lack of foundation for the action,\* combined with the total lack of a factual basis on the issue of notice, the Court finds this matter could not have been brought with an honest belief in its propriety.

(R. 673-674) This passage included a footnote, the placement of which is shown by an asterisk, that stated, “Particularly true in light of the existing case law.” (R. 673)

Sonnenreich submitted a proposed Final Judgment (Attorney Fees) along with an Attorneys’ Fees Affidavit with attached timesheets. (R. 769-781) The

Initial Affidavit requested attorney fees in the amount of \$26,418.25 and costs in the amount of \$690.76. (R. 769-781) The OPC objected to the proposed Final Judgment, and to the Initial Affidavit. (R. 707-731) It also requested a hearing. (R. 707) After the OPC objected to particular aspects of the attorneys' fee award, Sonnenreich's counsel submitted another affidavit ("Second Affidavit"). (R. 749-753) In it, Sonnenreich's counsel recounted three experiences in the 1970s representing clients in admission cases, and "supervision of the defense of certain bar charges which have been brought against attorneys at Jones Waldo during the past twenty years." (R. 749-753) He also summarized his experience in administrative law and litigation, and added charges totaling \$3,673 for "preparing the reply to the OPC's response to our attorneys' fees claim." (R. 749-753) Additionally, Sonnenreich objected to the OPC's request for a hearing. (R. 746-748)

The District Court denied the OPC's request for a hearing, and awarded Sonnenreich attorney's fees in the amount of \$27,213.25. (R. 800-802; 803-805) It entered the judgment on January 11, 2002, and one week later Sonnenreich filed an Application for Writ of Garnishment. (R. 804; 806-807)

Sonnenreich subsequently filed a Rule 60 Motion for Relief of Clerical Error asking the District Court to revise the Final Judgment to an amount totaling \$30,886.25. (R. 821-823; 808-820) The District Court entered a revised judgment as requested. (R. 891-892; 893-894) The Revised Final Judgment raised no additional issues; it merely added several thousand dollars to the

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<sup>8</sup> By this time, Judge Burton had been assigned to the case.

amount of the judgment. The OPC will address particular details of the attorneys' fee award below.

### **The Case on Appeal**

The OPC filed a Notice of Appeal in the District Court on January 29, 2002 ("second appeal"), followed by a Docketing Statement in this Court. (R. 838-839; Docketing Statement, February 19, 2002) Sonnenreich filed a motion requesting that the Court summarily affirm the District Court. (Rule 10 Motion for Summary Affirmance, March 8, 2002) The Court deferred ruling on this motion "until further consideration," and directed the parties to "proceed to the next stage in the appellate process." (Order, April 8, 2002) Accordingly, the OPC proceeded with briefing its appeal; the brief was due June 5, 2002.

Just one week before the OPC's brief was due, Sonnenreich moved to dismiss the OPC's second appeal. She contended that the OPC's notice of appeal was not filed in a timely fashion. (Motion to Dismiss for Lack of Subject Matter Jurisdiction, May 29, 2002) Essentially, Sonnenreich argued that the OPC was required to file another Notice of Appeal after the District Court revised the amount of the final judgment. This Court denied the motion. (Order, August 12, 2002) Accordingly, the OPC resumed work on its brief. The matter is now before the Court on its merits.

### **SUMMARY OF THE ARGUMENT**

The Bar may administratively suspend attorneys who fail to pay their annual licensing fee. If the attorney continues to practice law during the period of administrative suspension, the OPC may prosecute the attorney for violating the

Rule of Professional Conduct prohibiting the unauthorized practice of law. The District Court erred in concluding otherwise in connection with the OPC's prosecution of a disciplinary action against Sonnenreich predicted upon her alleged UPL while she was administratively suspended. Additionally the District Court erred in concluding that the OPC's Complaint failed to satisfy applicable rules: the Complaint was sufficiently specific in identifying the OPC's allegations against Sonnenreich. The court also erred in finding that Sonnenreich did not receive notice of her administrative suspension; whether Sonnenreich received actual notice is a matter in dispute, but the OPC contends that the notice the Bar gives is sufficient. Finally, the District Court erred in awarding attorneys fees to Sonnenreich pursuant to the bad faith filing statute, and in awarding fees in an amount that was not reasonable. A Screening Panel directed the OPC to file the action, the Chair of the Ethics and Discipline Committee reviewed and signed it, and the OPC drafted and filed it in the honest belief in its propriety. Accordingly, the OPC asks the Court to reverse the District Court's award of attorneys' fees, and to remand the case for further proceedings in District Court.

#### **DETAIL OF THE ARGUMENT**

**I. The Rules Authorize the Utah State Bar to Administratively Suspend the Licenses of Attorneys Who Fail to Pay Their Licensing Fees**

**A. The Source of the Bar's Authority to Administratively Suspend the Licenses of Attorneys Who Do Not Pay the License Fee**

Lawyers are required to pay an annual license fee to the Utah State Bar; the Rules of Lawyer Discipline and Disability ("RLDD") provide that "[e]very lawyer admitted to practice in this state shall pay to the Bar on or before July 1 of each year an annual license fee for each fiscal year . . . ." Rule 8, RLDD.

The RLDD further provide that:

[a]ny attorney who shall practice law while suspended for non-payment of the license fee violates the Rules of Professional Conduct and may be disciplined for practicing while suspended for non-payment of dues. The Executive Director of the Bar shall give notice of such removal from the rolls to such non-complying member at the address on record at the Bar, to the Utah Supreme Court and to the judges of the district courts. The non-complying member may apply in writing for re-enrollment upon tendering the license fees and an additional \$100 delinquent fee. Upon receiving the same, the Board of Commissioners shall accept it and order re-enrollment. Re-enrollment based on suspension for non-payment does not negate any orders of discipline.

Rule 8(b), RLDD.<sup>9</sup> In short, the RLDD authorize the Bar, through its Executive Director, to suspend the licenses of attorneys who do not pay their annual license fee. Because such a suspension is not a disciplinary sanction, this Brief refers to it as an “administrative” suspension.<sup>10</sup>

**B. The District Court Erred In Concluding That Formal Complaints for Practicing While Administratively Suspended Must Be Instituted By the Bar Commission**

The District Court appears to have concluded that the Bar has no authority to administratively suspend an attorney. (R. 282-289) The basis of this contention is the court’s rejection of the Bar’s claimed authority to impose administrative suspensions. (R. 286-287)

Turning to OPC’s claimed sources of authority to ‘administratively suspend,’ the first, ‘board-approved licensing policies and procedures’ are dated January, 2000, and have no bearing on the suspension in September, 1999. Indeed, according to the Clerk of the Utah Supreme Court, such have not been presented, let alone

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<sup>9</sup> This portion of the rule was added on April 19, 1999—several months before Sonnenreich was administratively suspended for non-payment of her dues. See Amendment Notes, Rule 8, RLDD.

<sup>10</sup> Administrative suspensions also include suspensions for failure to comply with mandatory continuing legal education requirements. These are premised on other rules, however, and are not addressed in this Brief.

approved, by the Utah Supreme Court. Finally, with respect to the second source, the Utah Supreme Court's 1993 Integration Order, the Utah Supreme Court held in 1997 that:

The change in the initial formal adjudication of Bar complaints did not alter the unique constitutional role that this Court has in attorney discipline cases. Article VIII, section 4 of the Utah Constitution states, 'The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.' [citation omitted]

In re Babilis, 951 P.2d 207, 213 (Utah 1997). Furthermore, pursuant to the statute and rule in effect at the time of this suspension and now, district court actions for practicing while suspended must be instituted by the Bar Commission.

(R. 286-287)

When Sonnenreich filed a Motion for Judgment on Pleadings, and a memorandum in support thereof, contending among other things that the Bar lacks the power to suspend attorneys, and that a District Court action can only be instituted by the Board of Bar Commissioners, the OPC responded with a memorandum that attached as an exhibit the Rules for Integration and Management of the Utah State Bar ("Rules for Integration and Management").

(R. 191-207) Regrettably, the version of the rules used for the exhibit was a version amended in May 2000—after the period relevant to this matter. This was an inadvertent oversight, and Sonnenreich attached the appropriate version to one of her own memoranda. (R. 242-255)

The differences between the two versions of the rules are insubstantial with respect to the OPC's argument, however. Briefly summarized, the argument is that the Rules for Integration and Management implicitly provide for the Bar's administrative suspension of attorneys for failure to pay their annual licensing fees. The OPC's authority to prosecute attorneys who practice law while they

are under an administrative suspension resides in Rule 8 of the RLDD. This is the OPC's position under either generation of the Rules for Integration and Management. By administratively suspending Sonnenreich, the Bar did not impermissibly encroach upon the Court's territory. Likewise, by prosecuting attorneys who continue to practice law while their licenses to practice have been suspended, the OPC did not impermissibly encroach upon the territory of the Bar Commission. In both instances, the Bar and the OPC merely undertook their respective assigned roles.

**II. The OPC Can Premise a UPL Complaint Upon an Attorney's Administrative Suspension**

**A. The OPC's Authority to Bring a Disciplinary Complaint Based on an Attorney's Continued Practice of Law While on an Administrative Suspension Resides in the Rules of Lawyer Discipline and Disability**

The District Court appears to have concluded that the OPC has no authority to bring a District Court action against a respondent for practicing while administratively suspended.

Furthermore, pursuant to the statute and rule in effect at the time of this suspension and now, *district court actions for practicing while suspended must be instituted by the Bar Commission.*

(R. 287 (emphasis added)) This was error.

The RLDD provide: "In the event the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited, OPC counsel shall prepare and file with the district court a formal complaint setting forth in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable provisions of the

Rules of Professional Conduct.” Rule 11(a), RLDD. The RLDD extend no similar authority to the Bar Commission, let alone an exclusive authority of the sort suggested by the District Court.

Pursuant to its authority under Rule 10(b)(5)(E) of the RLDD, a Screening Panel of the Ethics and Discipline Committee directed “[t]hat a formal complaint be filed against the respondent.” (R. 155) That is what the OPC did.

**B. The District Court Erred In Concluding That the *Crandall* Decision Precludes the OPC from Bringing a District Court Action Upon a Respondent’s UPL While on an Administrative Suspension**

The District Court erroneously concluded that the Crandall case prohibited the OPC from proceeding as it did in prosecuting Sonnenreich for UPL allegedly committed while she was on an administrative suspension. The portion of the court's Memorandum Decision addressing this point is as follows:

As an initial matter, it is important to note that both the Bar and Sonnenreich agree her suspension was ‘administrative.’ This is critical because in the case of In Re Crandall, wherein Crandall was suspended and ultimately disbarred for failure to timely pay his fees, the Utah Supreme Court held ‘there is no logical connection between an attorney’s failure to pay his or her licensing fee and claimed unfitness to practice law.’ Id. at 1196. The Court instructed the Bar that it could not punish an attorney for alleged ethics violations ‘either caused or aggravated by the suspension.’ Id. at 1197. The Court expressly forbade the Bar from using the administrative suspension procedure as an ‘end-run approach’ around other procedures for disciplining attorneys. Id. at 1196. Finally, the Court noted that by premising discipline on its own administrative suspension, the Bar had evaded the requirement that it bear the burden of presenting evidence of the attorney’s lack of fitness to practice and establishing harm to the public. Id.

By premising Sonnenreich’s violation of Rule 5.5, which forbids practicing while suspended, on an administrative suspension, the Bar is doing exactly what the Court forbade in Crandall. Indeed, Sonnenreich’s violation of Rule 5.5 was caused by the administrative suspension and was not premised on the OPC



demonstrating Sonnenreich had 'irreparably' damaged the public and committed a violation of the code of professional conduct or was suffering from a disability as required by Rule 18 of the Rules of Lawyer Discipline and Disability.

Additionally, the Court in Crandall made clear the necessity for actual notice. In this case, it is undisputed no actual notice of the alleged suspension was received by Sonnenreich.

(R. 285-286)

This was error. Crandall does not forbid the OPC from taking the course of action it took in this case. See In re Crandall, 784 P.2d 1193 (Utah 1989). The Procedures of Discipline of the Utah State Bar, which were the rules effective at the time Crandall was prosecuted, included a rule permitting the Bar to suspend attorneys for failure to pay license fees and then to continue the suspension for unrelated reasons, "giving the Bar a summary method of handling disciplinary problems." See Crandall, 784 P.2d at 1194. Crandall received a letter from the Bar notifying him of his removal from the roll of attorneys because he failed to pay his annual license fee. See id. at 1195. After receiving the letter, Crandall contacted the Bar, offering to immediately submit his delinquent fee, but the Bar deferred action on his request for reinstatement for a couple of months. See id. In the meantime, Crandall appeared for a hearing on a complaint that predated the administrative suspension for failure to pay his dues, and the hearing panel recommended a suspension. See id. Subsequent hearings were conducted while Crandall continued under the administrative suspension, as well as the disciplinary suspension. See id. In other words, there was nothing Crandall could do to secure his reinstatement while the disciplinary matter was pending.

This Court struck the language of the rule permitting a suspension for failure to pay dues to continue beyond the time when the attorney paid the delinquent fee. See id. at 1196. The rules effective at the time included an interim suspension procedure that could be employed while a disciplinary proceeding is pending. See id. The Court noted that “The suspension of attorneys for failure to pay the license fee is necessary and appropriate. However, it is inappropriate that the Bar should be able to refuse reinstatement after the delinquent fee is paid for a reason unrelated to the initial suspension. The other procedures for disciplining attorneys under the Procedures of Discipline preclude any need for this ‘end-run’ approach.” Id.

Rule 8 of the RLDD, the rule applicable to this case, is consistent with the language adopted by the Court in Crandall. As previously noted, the rule requires the Board of Commissioners to accept the application and payment of the delinquent fee, and order re-enrollment. See Rule 8(b), RLDD. That is what happened with Sonnenreich: she paid her licensing fee and a delinquent fee and was immediately reinstated from her administrative suspension. The Crandall situation never even arose because, in contrast to the Bar’s refusal to reinstate Crandall when he petitioned for reinstatement and paid the fees, Sonnenreich was reinstated. The matter of Sonnenreich’s alleged UPL while she was on an administrative suspension was not adjudicated, and Sonnenreich was free to practice as soon as she paid the fee. Moreover, the OPC’s attempt to prosecute the UPL allegations against Sonnenreich was not an “end-run” in the sense discussed in Crandall because the allegations the OPC raised are directly related

to the administrative suspension—in Crandall, many of the additional complaints derived from wholly unrelated conduct, some of it even preceding Crandall's administrative suspension.

Rule 8 also explicitly provides that “[a]ny attorney who shall practice law while suspended for non-payment of the license fee violates the Rules of Professional Conduct and may be disciplined for practicing while suspended for non-payment of dues.” Rule 8(b), RLDD. The action against Sonnenreich was consistent with what this rule permits, and the OPC approached it in the manner specified by the rules. Meanwhile Sonnenreich’s ability to practice law was unimpaired, inasmuch as she was reinstated upon the payment of her fees.

The District Court also stated that “the Court in Crandall made clear the necessity for actual notice.” (R. 286) This Court did not, however, address in Crandall whether actual notice of the administrative suspension is required; Crandall did in fact receive the notice, and it therefore was not an issue in his case. See Crandall, 784 P.2d at 1195. Crandall raised notice arguments as to some of the subsequent disciplinary charges, but those were not specially addressed by the Court.

With respect to the District Court’s comments concerning Rule 18, RLDD, the OPC observes that the RLDD provide two mechanisms by which the OPC may seek in the District Court a respondent’s interim suspension for serious types of misconduct. See Rule 18, RLDD; Rule 19, RLDD.<sup>11</sup> These differ dramatically from administrative suspensions imposed by the Bar for failure to

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<sup>11</sup> It is the District Court, not the Bar or the OPC, that imposes interim suspension.

pay dues, and are employed to prevent an attorney from continuing to practice law pending the resolution of the underlying disciplinary matter. Neither of these mechanisms would have been appropriate to this case, given that Sonnenreich's alleged misconduct involved neither a criminal conviction within the meaning of Rule 19, nor conduct that "poses a substantial threat of irreparable harm to the public" within the meaning of Rule 18. The District Court's Memorandum Decision appears to be predicated in part upon an erroneous conflation of the interim suspension rules.

**III. The OPC's Complaint Satisfied the Requirements of the Applicable Rules**

The District Court erred in concluding that the OPC's Complaint failed to satisfy the requirements of Rule 11 of the RLDD and Rule 8 of the Rules of Civil Procedure. It stated,

[I]n the Complaint it is alleged, 'Respondent engaged in the unauthorized practice of law when she practiced and held herself out as an attorney during the period of her suspension prior to her reinstatement, thus violating Rules 5.5 and 8.4(a) of the Rules of Professional Conduct.' Besides the fact that the screening panel found no violation of Rule 8.4, the Complaint fails to provide sufficient facts to satisfy either Rule 11 of the Rules of Lawyer Discipline and Disability or Rule 8 of the Utah Rules of Civil Procedure. Indeed, although it can be assumed from the memorandum in opposition that it was Sonnenreich's statement to Mr. Birrel [sic] that constituted unauthorized practice, there is no indication in the Complaint as to what specific actions were taken by Sonnenreich.

(R. 287-288) The court's conclusions are erroneous in two respects.

First, contrary to what the District Court stated, the Screening Panel found a violation of Rule 8.4. The Screening Panel Information Sheet, which is signed by the Panel chair, includes the following paragraph:

Based upon any finding(s) that the Respondent violated the Rules of Professional Conduct, the Panel finds that the Respondent also violated Rule 8.4(a) (Misconduct) of the Rules, which provides, "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." This rule is known as the 'bread and butter' charge in professional misconduct cases because it accompanies other charges in Bar disciplinary actions. See e.g. Terrell v. Mississippi Bar, 662 So.2d 586 (Miss. 1995).

(R. 153) This was before the court as part of the OPC's memorandum opposing Sonnenreich's motion for judgment on the pleadings. (R. 88-207) The District Court's finding is obviously erroneous.

Second, the Complaint is sufficient to satisfy the applicable rules. The RLDD provide that:

OPC counsel shall prepare and file with the district court a formal complaint setting forth in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable provisions of the Rules of Professional Conduct.

Rule 11(a), RLDD. The Utah Rules of Civil Procedure have a similar requirement: "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; . . . ." Rule 8(a), Utah R. Civ. Pro.

The rules do not require more than notice of what is being pled. As this Court has indicated, "a pleader is required only to make a short and plain statement of his claim, . . . and the requirement of technical exactness is excluded. *Fine detail is not required.* . . . The new rules, . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery

process with a vital role in the preparation for trial.” Blackham v. A.M. Snelgrove, 280 P.2d 453, 454 (Utah 1955) (citations omitted; quoting Burr v. Childs, 265 P.2d 383 (Utah 1953)). Indeed, “a complaint is required only to ‘\*\*\* give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.’ It may also frequently be found stated in these cases that a complaint does not fail to state a claim unless ‘\*\*\* it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.’” Id. at 455 (footnotes omitted); see also Gill v. Timm, 720 P.2d 1352, 1353 (Utah 1986) (Rule 8(a) to be liberally construed when determining sufficiency of complaint).

Pursuant to the requirements of Rule 11 of the RLDD, the OPC’s Complaint identified the applicable Rules of Professional Conduct allegedly violated—Rules 5.5 and 8.4(a). (R. 3) As to the facts upon which the alleged rule violations were predicated, the Complaint stated that “During the period of her suspension, although she was removed from the rol[l]s of active attorneys in the State of Utah and was not, therefore, authorized to practice law in the State of Utah, Respondent continued to hold herself out as an attorney and practiced law.” (R. 3) Sonnenreich thus had fair notice of the nature and basis of the claims, including the allegation that she continued to hold herself out as an attorney, and the allegation that she continued to practice law, despite having been placed on an administrative suspension. Further details were not required.

IV. The District Court Erred In Finding That Sonnenreich Received No Notice of Her Administrative Suspension

The District Court stated, “the Court in Crandall made clear the necessity for actual notice. In this case, it is undisputed no actual notice of the alleged suspension was received by Sonnenreich.” (R. 286) It was error for the court to make such a finding in the context of entering summary judgment.

The OPC’s position is that Sonnenreich had notice when the letter informing her of the administrative suspension was sent by certified mail to the address she furnished to the Bar. The OPC believes this is sufficient because the RLDD require only that “[t]he Executive Director of the Bar shall give notice of such removal from the rolls to such non-complying member at the address on record at the Bar. . . .” Rule 8(b), RLDD. The RLDD do not require *actual notice* or personal service. Indeed, requiring actual notice would be an expensive process and unfairly reward those who do not pay their license fee and do not take steps to inform the Bar of their whereabouts. The Bar and the OPC believe this issue is a matter of first impression for the Court, and accordingly ask its guidance so that procedures may be amended if the Court deems necessary.

Further, the District Court erred in making findings of fact in the context of rendering a summary judgment. The finding that Sonnenreich received no actual notice is an instance of this. It is error because summary judgment may be rendered only when there is no issue as to any material fact. See Rule 56(c), Utah R. Civ. Pro.; Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984) (grant of summary judgment precluded where trial judge made and entered findings and conclusions, the content of which evidence

material issues of fact). Further, the OPC is not required to proffer affidavits to avoid summary judgment against it. See Mountain States Telephone, 681 P.2d at 1261 (“Doubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment.”). That the OPC considered Sonnenreich “on notice” concerning her administrative suspension is demonstrated by the contentions it made, which were supported by the Birrell Affidavit, concerning her tardiness in paying her annual license fee five other times since 1993, in one instance resulting in an administrative suspension, and the fact that she never received confirmation in the form of the annual licensing sticker issued by the Bar. That Sonnenreich may have had actual notice may be inferred from the Birrell Affidavit and from the OPC’s arguments throughout these proceedings. It did not, however, seek the District Court’s permission to make discovery, as Sonnenreich suggests it could have done, because it considered the point a peripheral one, inasmuch as Sonnenreich was on notice, and this is all the rule requires.

**V. The OPC Filed Its Complaint In Good Faith, and the District Court Erred in Awarding Sonnenreich Attorneys’ Fees Under the Bad Faith Filing Statute**

The District Court’s Memorandum Decision concerning the award of attorneys’ fees stated that “given the lack of foundation for the action, combined with the total lack of a factual basis on the issue of notice, the Court finds this matter could not have been brought with an honest belief in its propriety.” (R. 673-674) The District Court erred in awarding attorney fees to Sonnenreich based upon its determination that the OPC’s action against her was without merit



and not brought or asserted in good faith within the meaning of Utah Code section 78-27-56. The OPC assumes that if the Court determines that the OPC's Complaint against Sonnenreich had legal merit, at least as to its premises, then the award of attorneys' fees would be set aside. This would of course dispose of the necessity of the Court's further addressing the attorneys' fees issues. But even if the Court determines that the OPC, the Screening Panel, and the Chair of the Ethics and Discipline Committee were mistaken in their interpretations of the rules and the case law elucidating those rules, the OPC appeals the award of attorneys' fees because it had an honest belief in the propriety of its actions, thereby making the award inappropriate.

The OPC will not review the merits of its Complaint and the underlying authority therefor because these have been addressed above. Instead, this portion of its Brief will address whether the District Court erred in awarding attorney fees to Sonnenreich based on its determination that the OPC's action against her was not brought or asserted in good faith within the meaning of the bad faith filing statute. This issue is a mixed question of law and fact, and the applicable standard of review is an abuse of discretion standard. See Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998).

If the Screening Panel directs the OPC to file a District Court action against a respondent, the OPC has no discretion to do otherwise.<sup>12</sup> The RLDD

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<sup>12</sup> The exception would be if the Screening Panel directed the OPC to file a Complaint in District Court that the individual attorney could not file consistent with the attorneys' obligations under Rule 11 of the Utah Rules of Civil Procedure. Such a case has not yet arisen, but the OPC assures the Court that it would not blindly follow the Screening Panel's directive if it conflicted with the OPC attorneys' Rule 11 responsibilities. Although the RLDD do not address

provide no leeway or discretion on this: “In the event the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited, OPC counsel *shall* prepare and file with the district court a formal complaint setting forth in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable provisions of the Rules of Professional Conduct.” Rule 11(a), RLDD (emphasis added). The Screening Panel found probable cause in Sonnenreich’s case, and the OPC drafted the Complaint pursuant to the Panel’s directive. Additionally, the District Court Complaint must be signed by the Chair of the Ethics and Discipline Committee, or by another Committee member in the chair’s absence. See Rule 11(a), RLDD. Accordingly, although an OPC attorney drafted and signed the Complaint, the person who was the Chair at the time the action was filed against Sonnenreich also signed it. The probable cause hearing before the Screening Panel, coupled with the Chair’s review of Complaints before they are filed, safeguard the disciplinary process from any possible maverick action by the OPC. Given that these procedures were followed, the OPC could not have acted in bad faith.

Sonnenreich has argued that the OPC’s alleged bad faith is evidenced by the fact that it “entirely failed to raise any tenable legal argument on the key issue in this case.” Memorandum in Support of Rule 10 Motion, at 10. In support, she contends that she cited extensive case law supporting the right to “notice and an opportunity to defend before their licenses may be taken from them,” but the

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such a situation, it is possible that this Court could appoint Special Counsel under the direction of the Chair of the Ethics and Discipline Committee to file the

OPC “blew by the issue” with its response that “the cited case law pertains only to suspension for attorney misconduct rather than suspension for nonpayment.” Id. at 10-11.

The OPC did not address at further length the cases Sonnenreich cited because they are readily distinguished from the facts in Sonnenreich’s case. Each of the cases she cited concerned disciplinary suspensions, not administrative suspensions for failure to pay annual licensing fees. There are fundamental differences between the two types of suspension, and because of these differences, the cases are not controlling. This is not to deny that the Court may at some point in the future determine that some of the same safeguards that apply to disciplinary suspensions, including interim suspensions, also apply in the administrative suspension context; it is merely to say that the Court has not yet made this determination or given this directive.

Sonnenreich has also cited a decision from the Supreme Court of Washington. See Schwab v. Washington State Bar Ass’n, 493 P.2d 1237 (Wash. 1972); Memorandum in Support of Rule 10 Motion, at 11-13. Citing Schwab, Sonnenreich contends that administrative suspension cannot be the basis of a disciplinary proceeding. The differences between the licensing and discipline systems in Washington at the time Schwab was issued (the case is thirty years old) and Utah at the time of Sonnenreich’s alleged misconduct are substantial and render Schwab inapposite to this case. The licensing renewal process in Washington was set by statute, not by court rule. See Schwab, 493 P.2d 1237 (citations throughout the decision refer to the Revised Code of

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Complaint.

Washington). Schwab was suspended for nonpayment of his dues pursuant to a statute. See id. at 1238. Another statute provided that the bar's board of governors hears all cases involving discipline and makes recommendations to the Supreme Court of Washington subject to the Court's approval. See id. at 1239. The court continued, stating that "[t]he ultimate constitutional power clearly lies within the sole jurisdiction of the Supreme Court." Id. It concluded, "In the instant case, although the board of bar governors routinely proceeded with the suspension procedure, we did not exercise our exclusive power to issue an order of suspension. Until so ordered by the Supreme Court, petitioner's authority to practice law and his membership in the Washington State Bar Association were not suspended." Id.

In Utah, the RLDD and the Rules for Integration and Management of the Utah State Bar provide no mechanism by which this Court directly orders administrative suspensions for attorneys who fail to pay annual licensing fees.<sup>13</sup> By rule, the Bar does this. To be sure, this Court has exclusive jurisdiction over the regulation of the practice of law, but the Bar and the District Courts act as its agent in carrying out some of these functions.

Sonnenreich has contended that the record establishes that the OPC through one of its attorneys "selected her for prosecution" as retaliation for Sonnenreich's complaint against the attorney. See Memorandum in Support of

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<sup>13</sup> Sonnenreich notes that "[t]his court has favorably cited Schwab," and cites the Court's decision in In re Hansen. Memorandum in Support of Rule 10 Motion, at 12. This is correct, insofar as it goes, but it is not helpful to resolving this case. See In re Hansen, 586 P.2d 413, n.4 (Utah 1978). Hansen was decided long before the new procedural rules were implemented, at a time when

Rule 10 Motion, at 13-14. Sonnenreich contends that “the obvious conclusion” to draw from the fact that she complained about OPC attorney Carol Stewart to Executive Director John Baldwin is that “OPC counsel selected Sonnenreich with no evidence that she had received notice and no legal basis for so doing,” as “retaliation against her for her complaint against Stewart.” Sonnenreich’s conclusions are mistaken, however.

Carol Stewart, who was then the OPC’s Deputy Counsel, did not “select” Sonnenreich for prosecution. Every year, the Bar provides the courts and the OPC a list of attorneys who have been administratively suspended for failing to pay their annual licensing fees on time. The OPC does not initiate any type of investigation based on its receipt of the list: there are no implications for professional discipline arising solely from an attorney’s failure to pay dues.

The OPC does, however, initiate investigations upon its receipt of information suggesting that an attorney is practicing law while on administrative suspension. That is what it did in Sonnenreich’s case, as well as all similar cases. Ironically, to do otherwise with respect to Sonnenreich’s case would have been to single her out—the very result she contends has victimized her

Sonnenreich has stated that the OPC “larded its Memorandum in Opposition to Motion for Attorneys fees with repetitive assertions as to its own good faith, but it failed to submit even a self-serving affidavit from Ms. Stewart explaining that she was not influenced by the fact that Sonnenreich had reported her.” Memorandum in Support of Rule 10 Motion, at 14. This illustrates the

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disciplinary recommendations were made by the Bar, and only imposed by order of this Court.

OPC's dilemma: it could have submitted a "self-serving affidavit," but this would hardly end the matter. Instead, the OPC chose to assert its good faith with explanations concerning the manner in which it investigates and prosecutes similar complaints pursuant to the RLDD, and pointing out the disciplinary system's many safeguards for preventing retaliation of the type Sonnenreich alleges. (R. 491-538) This seemed preferable to submitting an affidavit that would have been unlikely to reassure Sonnenreich.

More specifically, the OPC explained to the District Court that it files actions pursuant to the directive of the Screening Panel and consistent with the RLDD. (R. 491-538) In other words, as the OPC noted above, whether to initiate the suit is not a decision made by the OPC, it is the decision of a quorum of four members of the Ethics and Discipline Committee appointed by this Court (not the Utah State Bar) who review the evidence and the law and, where warranted by probable cause, instruct the OPC to file the action. See Rules 10, 11, RLDD. Further, the Complaint is reviewed and signed by the Chair of the Ethics and Discipline Committee, who by doing so undertakes the certifications of good faith set forth in Rule 11(b) of the Utah Rules of Civil Procedure.

Sonnenreich has contended that the record "contains overwhelming and undisputed support for the district court's determination that OPC lacked a good-faith belief in the propriety of its position on the actual notice issue." Memorandum in Support of Rule 10 Motion, at 15. Again the OPC is constrained to observe that these "facts" were not the basis stated for the District Court's award of attorneys' fees, nor have they been adjudicated.

Sonnenreich has contended that the OPC exceeded the finding of the Screening Panel, and this evidences its bad faith. See Memorandum in Support of Rule 10 Motion, at 16. She added, “The record indicates that OPC made a parking ticket (and a dubious one at that) into a death penalty case.” Id.

The Screening Panel Informal Decision Sheet recommended that the OPC file a formal complaint against Sonnenreich in District Court for violations of Rules 5.5 and 8.4(a) of the Rules of Professional Conduct. As the OPC has explained elsewhere, this is a directive it must obey. The Screening Panel's handwritten notation to the effect that the violations were negligent and there was no finding of harm did not, in the estimation of the OPC, negate the Panel's clear instruction to file the Complaint in District Court.

Sonnenreich has also contended that “[t]he record also raises serious issues of selective prosecution.” Memorandum in Support of Rule 10 Motion, at 16. Sonnenreich is mistaken. The OPC prosecuted all similar cases that year, and did not “ignore[] attorneys who were ‘caught’ when they tried to file Third District Pleadings.” Id. The Screening Panel conducts what amounts to a probable cause hearing, and it alone decides which cases proceed to District Court through filing a formal Complaint. Of the other informal complaints presented to the Screening Panel on the date Sonnenreich's case was presented, the OPC has filed Complaints in District Court in each case in which it was directed to do so, and secured an admonition in the case in which an admonition was recommended. The Screening Panel directed the dismissal of the rest of the cases.

Finally, the OPC observes that it has prosecuted other similar complaints against respondent attorneys through the years. The Bar's authority to administratively suspend, and the OPC's authority to prosecute resides in the rules, but is also a matter of common sense: if there can be no administrative suspension and no disciplinary consequences arising from an attorney's practice of law while on an administrative suspension, there are few compelling reasons to pay the annual licensing fee.

**VI. The District Court Abused Its Discretion in Awarding All of the Attorneys' Fees Claimed**

The District Court abused its discretion in awarding attorneys' fees in the amount claimed in the two affidavits submitted by Sonnenreich's counsel. (R. 769-781; 749-753) The applicable standard of review is an abuse of discretion standard. See Salmon v. Davis County, 916 P.2d 890 (Utah 1996).

The Initial Affidavit provided no evidence, and the Second Affidavit provided only scant evidence, that the hourly rates charged are consistent with the rates customarily charged to defend attorney discipline cases in this community, and a significant number of the charges were unrelated to the District Court's ruling on the allowance of attorney fees. (R. 769-781; 749-753) Additionally, some of the charges set forth in the Initial Affidavit and awarded by the District Court are not legally proper. (R. 769-781) Moreover, the attorneys' fees set forth in the Initial Affidavit are excessive because the case terminated at an early stage by summary judgment. (R. 769-781) Finally, the District Court awarded costs in direct contravention of Rule 30, RLDD. (R. 769-781; 803-805) The OPC will address each of these in turn, but a preliminary review of the



history of the case is essential background for evaluating the award.

**A. The District Court Abused Its Discretion By Permitting an Excessive Hourly Rate**

In determining a reasonable fee, a trial court should answer four questions: What legal work was actually performed? How much of the work was reasonably necessary to adequately prosecute the matter? Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services? Are there circumstances that require consideration of additional factors including those listed in the Code of Professional Responsibility?<sup>14</sup> See Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988); see also Featherstone v. Schaerrer, 2001 UT 86 (Court reviewed reasonableness of \$22,000 of costs and fees generated in obtaining discovery order; concurring opinion exhorted trial judges to "closely scrutinize requests for attorney fees to determine that not only the hourly rate is reasonable, but the attorney's time spent has been used economically on the task. It is not enough that the number of hours claiming to have been spent was actually spent.").

The Initial Affidavit provides no evidence that the billing rate is consistent with the rates customarily charged in this locality for similar services. (R. 770-771) The Second Affidavit identified three experiences counsel had in the 1970s representing clients in admissions cases, and "supervision of the defense of certain bar charges which have been brought against attorneys at Jones Waldo during the past twenty years." (R. 749-753) Counsel also summarized his administrative law and litigation experiences, and added charges for

“preparing the reply to the OPC’s response to attorneys’ fees claim.” (R. 749-753)

The Sonnenreich matter is an attorney discipline case. Her counsel’s twenty-nine years of experience, his knowledge of the hourly rates customarily charged by attorneys of like experience, and the amount of time customarily required to perform the activities involved in this engagement, are only pertinent to the hourly rate claimed and time charged in this case if his experience included representing respondents in attorney discipline cases similar to that of attorneys with experience in defending discipline actions. No such certificate is made in either the Initial Affidavit or the Second Affidavit, which merely identifies the experience counsel gained in three admissions cases more than twenty-five years ago and vaguely alludes to supervising the defense of firm attorneys in disciplinary matters. See Kerr v. Kerr, 610 P.2d 1380, 1384-1385 (Utah 1980) (Supreme Court remanded divorce case on reasonableness of attorney fees issue where evidence was absent on rates commonly charged in community for divorce actions).

Almost all of the charges on the time sheet attached to the Initial Affidavit are attributed to the attorney who signed the affidavit. (R. 774-781) Counsel did not certify that he has had attorney discipline case defense work experience that would justify the hourly rate of \$230 or \$250,<sup>15</sup> or that his hourly rate is

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<sup>14</sup> The Rules of Professional Conduct replaced the Code of Professional Responsibility. See Compiler’s Notes, Rules of Professional Conduct.

<sup>15</sup> For most items, counsel claims the hourly rate of \$230, but several are charged at an hourly rate of \$250.

comparable to that of other attorneys in this locality who have had the same amount of attorney discipline case experience. (R. 771-773)

Indeed, the time sheet entries suggest counsel's lack of experience in the area of defending attorney discipline cases. One example of this is the 2.75 hours counsel charged on May 22, 2000 to confer with his client regarding a possible demand for a jury trial. (R. 774-781) A glance at the RLDD reveals that attorney discipline cases are tried before the bench, not a jury. Part of three hours of a paralegal's time at \$70 an hour was also used to research the jury trial issue on the same date. (R. 774-781) Bench trials are a fundamental aspect of attorney discipline cases in Utah, and the time counsel and his paralegal devoted to researching and discussing this particular question reflects his inexperience with attorney discipline cases.<sup>16</sup> The District Court abused its discretion when it failed to lower counsel's excessive hourly rates to the same hourly rates charged by attorneys in the community who have experience in attorney discipline cases.

**B. The District Court Abused Its Discretion By Allowing Charges for Work Not Reasonably Necessary, Including Charges for Work Unrelated to Matters Encompassed By the Award of Attorneys' Fees and By Allowing Charges Not Permitted By Law**

Sonnenreich can only claim attorney fees for work related to the main cause of action. See Paul Mueller Co. v. Cache Valley Dairy Ass'n, 657 P.2d 1279, 1288 (Utah 1982); see also Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d

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<sup>16</sup> Contrary to counsel's assertion in the Second Affidavit, the OPC is not suggesting that lawyers shouldn't review the law and the applicable procedural rules. (R. 751) Instead, what it is suggesting is that anyone familiar with basic procedural rules in attorney discipline cases would not require nearly three hours of attorney time and a comparable amount of paralegal time to answer such a

62, 66 (Utah 1981) (“A party is therefore entitled only to those fees resulting from its principal cause of action for which there is a contractual (or statutory) obligation for attorney’s fees.” ). Counsel itemized a number of charges for work unrelated to work that was the basis for the award of attorney fees pursuant to the bad faith filing statute. Examples of this include the charges related to responding to the OPC’s objection to the proposed Judgment, the OPC’s first appeal to this Court, and a Rule 11 Motion that Sonnenreich never filed with the District Court. (R. 774-781)

The OPC objected to Sonnenreich’s proposed Judgment, and Sonnenreich filed a response that is not permitted under Rule 4-504 of the Rules of Judicial Administration. (R. 676-706) Sonnenreich included in her claim for attorneys’ fees charges for preparing this impermissible response. (R. 774-781) The District Court abused its discretion by allowing charges for this work because it was unnecessary to the Court’s ultimate ruling on the allowance of attorney fees pursuant to the bad faith filing statute.

The District Court also abused its discretion by awarding attorney’s fees for work associated with the OPC’s first appeal. (R. 774-781) Sonnenreich moved for summary dismissal of the OPC’s first appeal, and asked this Court to award attorney fees. The Court granted summary dismissal of the first appeal, albeit on grounds other than those for which Sonnenreich sought the dismissal. Significantly, “inasmuch as this precise question has not previously been presented,” the Court did not find that the appeal was frivolous and denied

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basic question. If such fundamental research is required, the fees should be adjusted accordingly.

Sonnenreich's request for attorney fees. See In re Sonnenreich, Supreme Court No. 20010459-SC, Order, Sept. 18, 2001. Sonnenreich's claim in the District Court for attorney's fees for the work her counsel performed in connection with dismissing the first appeal circumvents this Court's decision denying attorney fees for the same work. The District Court abused its discretion by allowing these charges.

The District Court also abused its discretion by awarding attorney's fees for drafting a Rule 11 Motion. (R. 774-781) Sonnenreich's counsel served the OPC with a Motion for Rule 11 sanctions in an effort to induce it to withdraw its first appeal, but no such motion was ever filed, argued, or granted by the District Court. The District Court's allowance of the charges for preparing the Rule 11 Motion is tantamount to granting the motion, and is an abuse of discretion.

The District Court abused its discretion by permitting attorneys' fees for work associated with a Supplemental Response sent to the District Court in letter form by Sonnenreich's counsel after the oral argument on her motion for attorneys' fees. (R. 774-781) The District Court's Memorandum Decision specifically stated that the decision was made without consideration of the Supplemental Response, and it therefore is not a legitimate basis for an attorneys' fee award. (R. 674)

Additionally, there are miscellaneous charges for things that do not appear to be related to the District Court's ruling on attorney fees. For example, on February 1, 2001, there is a charge by JSL for \$172.5 (.75 hours) for a conference call with Sonnenreich regarding procedural and governmental

immunity issues. (R. 774-781) The OPC has no idea how procedural and governmental immunity issues relate to the issues of this case. Another example involves charges attributed to contact with a "DNS" office. (R. 774-781) The OPC does not know what the "DNS" office is.

The District Court abused its discretion by permitting charges that were not legally proper. For example, the Initial Affidavit encompasses charges attributed to legal work performed by Sonnenreich, although it also asserts that the fees claimed are conservative because "Sonnenreich, an accomplished attorney in her own right, rendered valuable cost savings assistance to her case by doing research, initially drafting pleadings and briefs and legal arguments and consulting on her defense." (R. 770) Attachments to the Initial Affidavit demonstrate that Sonnenreich was involved through conferences and phone calls in nearly 50 hours and more than \$10,000 of the claimed charges (and this does not count another 11.90 hours or \$2,869.50 of charges the OPC has addressed as unrelated or unnecessary to the cause of action for attorney fees). (R. 774-781)

The numerous conferences and phone calls with Sonnenreich do not appear to be "cost saving assistance;" they appear to be actual legal work performed by Sonnenreich, who by her counsel's account of it drafted the pleadings and briefs. It therefore seems likely that the numerous conferences and phone calls involving Sonnenreich went beyond simply advising her of the progress of the case. Instead, it appears that Sonnenreich was directing her counsel on the substantive and procedural editing of these documents, and this

translates into Sonnenreich actually doing the legal work. Sonnenreich is not entitled to attorney fees for legal work she performed on her own case. See Smith v. Batchelor, 832 P.2d 467, 473-474 (Utah 1992) (pro-se attorney-litigant is not entitled to recovery of attorney fees for successful litigation).

The District Court abused its discretion by permitting charges attributable to efforts to obtain competence in attorney discipline matters. Attorneys are required to provide competent representation to their clients. See Rule 1.1, Rules of Professional Conduct. Attorney discipline matters constitute a specialized area of the law. Competence in this area requires, at minimum, a working knowledge of the RLDD, the Rules of Professional Conduct, and the Standards for Imposing Lawyer Sanctions ("Standards"). Sonnenreich's counsel's timesheets demonstrate his lack of a working knowledge of these rules.<sup>17</sup> Moreover, Sonnenreich's claim of charges for 21.55 hours or \$4,071.50 to prepare and file an Answer is excessive because it results at least in some measure from her counsel's need to educate himself concerning attorney discipline cases.

**C. The Total of the Charges in Light of the Abbreviated Course of This Case Suggests the District Court Abused Its Discretion**

The Initial Affidavit identifies charges of \$26,418.25 based on 121.9 hours. (R. 769-781) The Second Affidavit and Revised Final Judgment merely increase the amount to \$30,886.25. (R. 749-753) Neither party conducted discovery; there was no trial; there have been only a handful of papers associated with the

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<sup>17</sup> The OPC does not mean to suggest that counsel is generally incompetent, or to in any way insult him on this point. It is merely suggesting that whereas

District Court's ruling of November 16, 2001, and just two brief hearings in the District Court. It is difficult to see how this could generate more than 121 hours and more than \$30,000 in fees.

**D. The District Court Abused Its Discretion in Awarding Costs**

The District Court abused its discretion in awarding \$690.76 in costs because such an award directly contravenes the express provisions of the RLDD. The Utah Rules of Civil Procedure provide that costs are awarded to the prevailing party "[e]xcept when express provision is made either in a statute of this state or in these rules." Rule 54(d)(1), Utah R. Civ. Pro. The RLDD provide that "The respondent shall not be entitled to costs." Rule 30, RLDD. Thus, costs against the OPC cannot be awarded, and the District Court abused its discretion by awarding them to Sonnenreich

**CONCLUSION**

The District Court erred in rendering summary judgment against the OPC. The Utah State Bar has the authority to administratively suspend attorneys who fail to pay their annual licensing fees, and in turn the OPC has the authority to predicate a disciplinary complaint for UPL upon an attorney's conduct while on administrative suspension. Whether Sonnenreich has violated the Rules of Professional Conduct by practicing law during the time of her administrative suspension is a fact that has never been determined because of the District Court's erroneous conclusion that the Bar and the OPC had exceeded their respective authorities. The OPC respectfully asks this Court to provide its

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counsel may be a skilled attorney in other settings, he lacks substantial experience in this area of practice.

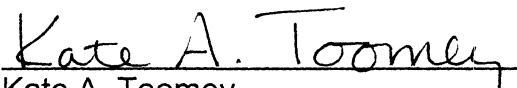


guidance concerning the appropriate interpretation of the RLDD, to reverse the District Court, and to remand this case for further proceedings.

Additionally, the OPC requests that the Court reverse the District Court as to the award of attorneys' fees under the bad faith filing statute. The OPC filed its Complaint at the direction of the Screening Panel and only after review and approval by the Chair of the Ethics and Discipline Committee. It simply could not have been taken in bad faith. In the alternative, if the Court permits such an award, the OPC asks the Court to reduce its amount. Much of what has been awarded is improper and an abuse of the District Court's discretion.

DATED: September 16, 2002.

OFFICE OF PROFESSIONAL CONDUCT

  
Kate A. Toomey  
Deputy Counsel

CERTIFICATE OF MAILING

I hereby certify that on this 16<sup>th</sup> day of September 2002, I caused to be mailed via United States mail, first-class postage pre-paid, two copies of the foregoing Brief of Appellant to counsel for the Respondent/Appellee, James S. Lowrie, 170 South Main Street, Suite 1500, P.O. Box 45444, Salt Lake City, Utah 84145-0444.

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