

2002

In the matter of the Disciple of Sharon Sonnenreich : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

In the Matter of the	:	
Discipline of:	:	BRIEF OF APPELLEE
	:	Priority No. 5
	:	
SHARON SONNENREICH, #4918	:	
	:	Appellate Court No. 20020187-SC
Respondent/Appellee	:	District Court No. 000903289
	:	

Appeal from the Third District Court, Salt Lake County,
Judge Michael K. Burton

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UTAH SUPREME COURT

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CLERK OF THE COURT

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STATEMENT OF ISSUES

Issue One:

Whether minimal due process requires actual notice before a lawyer's property interest in a license to practice may be destroyed?

- A. May OPC evade due process requirements by the label it places on a "suspension"?
- B. Does Rule of Lawyer Discipline and Disability ("RLDD") 8(b) apply to the facts here to achieve that result?
- C. Hasn't this issue been decided in *In re Crandall*, 784 P.2d 1193 (Utah 1989)?

This is a legal issue which should be reviewed for correctness. *In re Babilis*, 951 P.2d 207 (Utah 1997).

Issue Two:

Was Judge Stirba correct in finding that OPC did not comply with Rule for Integration C20?

This is a legal issue which should be reviewed for correctness. *In re Babilis*, 951 P.2d 207 (Utah 1997).

Issue Three:

Can OPC tell Judge Stirba that it did not look to RLDD 8(b) for the Bar's alleged authority to administratively suspend lawyers then appeal based on her failure to consider RLDD 8(b)?

Sonnenreich accepts OPC's Statement of jurisdiction and of the Case.

SUMMARY OF ARGUMENT

A lawyer has a due process property right in a license to practice law. Minimal due process standards were not satisfied when OPC used an “administrative suspension” as to which Sonnenreich had neither actual or constructive knowledge to strip her of her license, then punish her for “practicing” or “holding out” as a lawyer while suspended.

Sonnenreich's due process rights were violated by the following:

- 1) Although she has a good faith issue as to how her Bar dues payment was processed, there was no mechanism to raise the dispute. *State ex rel Schwab*, 493 P.2d 1237 (Wash. 1972).
- 2) Sonnenreich was entitled to actual notice. *In re Schwenke*, 849 P.2d 573 (Utah 1993).
- 3) OPC used the administrative suspension to end-run its usual burden of proof and bootstrap itself into a discipline charge. *In re Crandall*, 784 P.2d 1193 (Utah 1989).
- 4) OPC failed to inform Sonnenreich as to what she allegedly did that constitutes practicing law or holding out. *In re Worthen*, 926 P.2d 853 (Utah 1996); *In re Ruffalo*, 390 U.S. 544 (1967).

OPC has conducted this matter in flagrant disregard of the rules that this Court has established for the conduct of lawyer discipline in Utah. Specifically:

- 1) At different times it presented no fewer than three different and inconsistent sources for what empowered the Bar to “administratively suspend” Sonnenreich.
- 2) It cannot produce the notice of removal from the rolls that is required by RLDD 8(b).
- 3) It did not follow Rule C20 of the Rules for Integration. It then engaged in completely improper conduct to hide the correct version of that Rule.
- 4) It did not follow RLDD 11(a) in that it failed to plead facts and did not premise the complaint on a screening panel finding of probable causes that there are grounds for public discipline.

Judge Burton did not abuse his discretion in finding bad faith. The record is rich with evidence that OPC has abused its prosecutorial authority, abused the screening panel process,

failed to deal candidly with the tribunal and launched this action without being able to produce any notice of suspension or articulate even an allegation describing the events and circumstances underlying the claimed offense.

Finally, OPC has also failed to meet its obligations as an appellant. It:

- 1) Attacked Judge Stirba for accepting the very argument as to the source of the Bar's authority that OPC made.
- 2) Failed to appeal from Judge Stirba's analysis concerning the effect of the screening panel report.
- 3) Failed to be candid concerning Rule for Integration C20 (and to adequately brief the issue).
- 4) Failed to marshal the evidence in support of Judge Burton.

ARGUMENT

I. INTRODUCTION

This case involves the administration of this Court's rules governing the practice of law. It involves the Bar's administrative activity in processing dues payments and in identifying tardy payers. It involves the Rules for Integration and the way in which the Court has determined unauthorized practice should be prevented. In this case the Bar did not handle dues payments and record keeping well. OPC got into the act and maladministered the Rules of Professional Conduct, the Rules of Lawyer Discipline and Disability, the Rules for Integration, this Court's case authority, and the Rules of Procedure.

Judge Stirba dismissed the complaint on a Motion for Judgment on the Pleadings which was converted into a summary judgment because both sides submitted evidentiary material. In those proceedings OPC exhibited extreme bad faith and lack of candor and tried to bob and weave around its complete lack of facts, evidence, probable cause and legal authority to support

its position. Later, when Sonnenreich moved for attorneys' fees, OPC continued its lack of candor and its misuse of authority. Judges Stirba and Burton followed the RLDDs, the Rules of Civil Procedure, the Rules for Integration and the cases.

Now OPC has appealed and the case is subject to the Utah Rules of Appellate Procedure and the standards developed by this court under them. RLDD 17 provides:

(a) Additional Rules of Procedure. Proceedings governed by rules civil procedure, appellate procedure, evidence. Except as otherwise provided in these rules, the Utah Rules of Civil Procedure, the Utah Rules of Appellate Procedure governing civil appeals, and the Utah Rules of Evidence apply in formal discipline actions and disability actions.

This case is to be judged as other civil appeals. *Cf., In re Babilis*, 951 P.2d 207, 215 (Utah 1997).

In considering OPC's appeal, this court will find that OPC has failed to preserve issues, failed to marshal evidence, urged positions contrary to those urged below and generally continued its lack of candor respecting the rules, its burden and its role, and failed to meet its burden of persuasion.

II. FACTS.

A. Facts Concerning the Lack of Notice.

1. This matter arises from the Utah Bar's "administrative suspension" of hundreds of lawyers and judges in September, 1999 for allegedly failing to timely pay bar fees. The Bar asserts that Sonnenreich was among those suspended. R 60-66;R 112.

2. It is undisputed in the record that no actual notice of the alleged suspension was received by Sonnenreich. R 51.

3. In July of 1999 Sonnenreich changed her address of record with the Bar from her office in the headquarters building of the Salt Lake Tribune, her former employer, to her husband's downtown address at #9 Exchange Place. The transaction was handled by Bar employee, Caroline Hinckley, whom Sonnenreich identified by name in her affidavit. R 51.

4. OPC did not present any contradictory evidence from Ms. Hinckley. OPC did not allege in its complaint (R 1-4) or in its Memorandum in Opposition To Sonnenreich Motion for Judgment on the Pleadings (R 88-207) that it had sent any type of notice to Sonnenreich. The complaint asserts that Sonnenreich's address of record was the Exchange Place address. R 1.

5. Throughout this matter, including in the proceedings before Judge Burton, OPC failed to produce any evidence from anyone at the Bar saying that he or she had sent either a notice of suspension or of removal from the rolls to Sonnenreich. Before Judge Stirba, it produce an affidavit from Arnold Birrell, the Bar's accountant, that did not either state Sonnenreich's address of record or say that notice of suspension or removal from the rolls had been sent. R 111-113.

6. OPC failed to produce anything purporting to be a 1999 suspension notice or notice of removal from the rolls from the Executive Director of the Utah Bar directed to Sonnenreich.

B. Facts Concerning Selective and Arbitrary Prosecution.

7. The record identifies attorneys who were referred to the Bar by the district court because their business with the court required a current bar license. For example, Wendy Hufnagel and Joyce Maughan paid their fees only after they were sent to the Bar by district court

clerks because they needed to make court appearances the day they were referred. R 68-69. OPC did not prosecute those attorneys. R 43; R 702-703.

8. Sonnenreich, who had faxed the Bar a credit card number on the last day to pay without a late fee, was not caught by the district court. Rather, she voluntarily and immediately called the Bar to investigate after she learned from her husband (who was using the web site to find another attorney's address) that Sonnenreich had been listed as suspended on the Bar's web site. She learned that the Bar keeps no record of faxed transactions and that her card had not been charged. R 51.

9. Sonnenreich was requested to file an explanation with the Bar, which she did. In response she received a phone call from OPC counsel Carol Stewart who called Sonnenreich a "liar" and demanded that she consent to a three month public suspension. Sonnenreich immediately wrote to Ms. Stewart's superior expressing her concern as to Ms. Stewart's behavior and objectivity. R 384; R 415. Sonnenreich's complaint was disclosed to Ms. Stewart. R 416. OPC failed to submit an affidavit from Ms. Stewart explaining her actions or contending that Sonnenreich's affidavit and letter did not accurately represent what Ms. Stewart said.

10. Ms. Stewart scheduled a screening panel to investigate Sonnenreich for practicing while suspended. Ms. Stewart called several of Sonnenreich's former clients and colleagues, informing them she was investigating Sonnenreich's ethics. She contacted a law firm where Sonnenreich had not worked in a decade. R 653. Mr. Lowrie was among those contacted. Ms. Stewart gave him the impression that Sonnenreich had been suspended as a disciplinary matter and was being investigated for practicing after that. R 653. Ms. Stewart presented no evidence from any of those individuals she contacted to the screening panel, nor did she include any

factual allegations based on those calls in the complaint. R 419-420. OPC failed to provide any evidence as to why Ms. Stewart would believe those individuals would have any relevant information. R508 -509. Ms. Stewart styled herself as the complainant initiating the investigation. R 117.

11. Before the panel, Sonnenreich candidly admitted she should have personally checked her credit card statements to make sure the Bar had in fact processed her card rather than relying on her spouse to remember to review the statement for any possible omissions. R 346, 561. The screening panel found Sonnenreich had committed a single negligent violation of Rule 5.5. It did not find that the violation caused any actual injury to a party, the public or the legal system nor actual interference with a legal proceeding. R 151 -156.

12. OPC did not ask the screening panel to identify any facts underlying its finding and it did not do so. It is unclear whether the charge was based on Sonnenreich's hindsight admission that she should have checked her credit card. R 151- 156.

13. Before Judge Burton, OPC provided no evidence concerning why Ms. Stewart chose Sonnenreich for prosecution while ignoring lawyers who were caught filing district court pleadings while tardy on fees. R 52, 53; R 491-515; R 905.

14. The charge against Sonnenreich was screened with several other cases that OPC represented were factually "similar." R 122. OPC instructed the screening panel that the Supreme Court had authorized the suspensions. It told the panel: "Although this is an administrative suspension in the sense that no formal disciplinary action is taken... **It is also a suspension imposed by the Utah Supreme Court.**" (Emphasis added). R 122.

15. The screening panel "voted discipline" as to all the cases. OPC, apparently however, ignored that instruction as to the other cases and filed only against Sonnenreich. R 53, R 43. R 702-703. It did not offer Judge Burton any explanation as to why it the ignored screening panel's instructions, but did not deny that it did so. R 905,R 491-515.

16. On April 24, 2000, Ms. Stewart filed a district court complaint against Sonnenreich without mentioning or attaching the screening panel report. R 1-4.

17. OPC did not seek or obtain approval under Rule for Integration C20 from the Bar Commission before it filed against Sonnenreich. R 41.

C. Facts Concerning the Rules for Integration.

18. On the same day OPC filed against Sonnenreich in district court, the Bar petitioned the Utah Supreme Court for certain changes to the Rules for Integration. Only minor changes to Rule C20 were requested. Those changes were so insignificant they were not mentioned specifically in the petition although they were redlined: renumbering it to IIIT; using "Utah" instead of within this state, making the language referring to lawyers gender inclusive; and adding a reference to foreign legal consultants. There was no request to remove the requirement for Board instigation of actions under the Rule. The redlined and the proposed final both use the language "Board" at IIIT. R 582-608. The text underlying the redline was the April 28, 1999 version. R 608. The specific changes to C20 are at R 604. The April 28, 1999 version appears in the record at R 427-443, R 438-439 and reflects "Board" approval.

19. On May 15, 2000, Chief Justice Howe signed an Order adopting "the amendments described in the petition" and making two additional minor amendments to Rule K2. The Court took no action to remove the requirement for Board instigation of complaints alleging holding

out or practicing while late in paying dues. R 241- 255. Justice Howe's order is stapled to the Proposed Final Version submitted with April petition. C20 now (IIIT) appear as R 253.

20. On June 9, 2000 Sonnenreich asked Judge Stirba to dismiss the case based in part on the Bar's non-compliance with Rule C20 in filing the district court action without getting Board approval as the rule required. R 40-43. Sonnenreich cited both Rule C20 and quoted the substantively identical statute in the Utah Code when the complaint was filed.

21. On June 28 2000, OPC filed its response to Sonnenreich's motion to dismiss. OPC told Judge Stirba that Sonnenreich's authority was "outdated" and submitted its own version of the Rules for Integration that included a version of C20 (now numbered IIIT), which omitted the requirement for Board instigation in favor of "Bar" institution, a condition arguably satisfied by the complaint. R 93, R 103-109, R 191-207. Exhibit J to Memorandum in Opposition To Motion for Judgment On [The] Pleadings.

22. Rule C20 as amended in April 1999 was in effect when the action below was filed, a fact Sonnenreich pointed out in her reply memo dated July 20, 2000. She told OPC the exhibit with the new Rule IIIT it submitted "is not a copy of the current Rules of Integration adopted by the Utah Supreme Court effective May 15, 2000. Nor is it a copy of those Rules, as they existed ... when this matter was filed." R 229.

23. A copy of the rules actually approved in May of 2000 was attached as an exhibit along with a copy of Judge Howe's manually signed order adopting the May 2000 version. R 241-255.

24. OPC did not immediately admit that it had submitted inapplicable rules. In its next pleading, after Judge Stirba had applied the correct version of Rule C20 to rule against it,

OPC referred to Sonnenreich as having raised “perceived inaccuracies” as to its version of the Rules for Integration. R 292.

25. Sonnenreich’s counsel sought to make absolutely sure that the district court was working from the correct Rules of Integration. OPC did not controvert the following evidence concerning OPC’s behavior toward that effort:

After Ms. Stewart has falsely asserted that Sonnenreich’s authority was “outdated,” Sonnenreich’s counsel sought to examine the Bar’s record copy of those rules, Ms. Stewart threatened him with disciplinary charges. In a voice mail message left by Counsel Stewart to Sonnenreich’s counsel in response to a request from a paralegal to the Bar seeking the Bar’s public record copy, Ms. Stewart asserted the following: “your employee [is] contacting directly a witness, an important witness in our case, and ...we think is [sic] violative of Rule 4.2 and let me remind you that we are the experts in ethics in the state.” She called later in the day to “cite you to 4.2(c)(2) of the Rules of Professional Conduct. In her phone message, she described the Rules for Integration as “a document you say is public.” R 654-659.

26. Later, in its memorandum opposing Sonnenreich’s request for attorneys’ fee, OPC abandoned its claim that Sonnenreich’s version of C20 was “outdated” or “inaccurate.” It constructed a new explanation as to why it submitted the rule that did not require Board approval to Judge Stirba. It claimed it erred by accidentally submitting the May 2000 version of Rule III.T. R 505. It makes that same assertion on appeal. Brief at 25.

27. OPC’s claim is false. This Court did not change the word Board to Bar in May of 2000. OPC knows that. It had the version signed by Judge Howe in its possession since July 20, 2000. R 236. OPC was told that its “May version” of the Rules was no such thing. In Sonnenreich’s reply on the attorneys’ fee issue, she told OPC that its exhibit: “is not what the Chief Justice signed in May of 2000.” R 549. OPC’s sole factual basis for claiming it submitted the May version of the rules is that “May 15, 2000” appears at the bottom. R 505. It had no

explanation as to why its version is inconsistent with the Bar's April, 2000 petition and what Judge Howe signed in May, 2000.

28. Indeed, although it appears from the current, published version of the Rules for Integration that the change from Board to Bar was made by this Court at some point, it has not been. It was the Bar that made it appear the Bar Commissioners had been stripped of their authority under Rule C20/IIIT. When the Bar petitioned this Court for additional changes to the Rules for Integration on February 1, 2001 (none of which addressed Rule IIIT) it used the same incorrect version of IIIT it had presented earlier to Judge Stirba as the original text underlying the redline version submitted with the petition. The change from Board to Bar was falsely treated as if the Court had already made it. This Court has not consciously changed the rule to match OPC's version-- not in May of 2000, not ever. R 360. The underlying documents are included in the accompanying supplemental authorities.

29. Sonnenreich was taking a break from downtown to be with her toddler during the summer of 1999. R51. Three years later she still doesn't know what she did to practice law. R51.

III. THE RECORD SHOWS SONNENREICH NEVER RECEIVED NOTICE OF SUSPENSION, NOTHING IN THE RECORD SUPPORTS A CLAIM OF CONSTRUCTIVE NOTICE; ACTUAL NOTICE WAS CONSTITUTIONALLY REQUIRED.

A. Sonnenreich Did Not Receive Notice of Suspension.

Sonnenreich's affidavit establishes she did not receive notice of suspension or removal from the rolls for failure to pay bar dues. R 51. OPC does not contravene the affidavit on that point. Sonnenreich's affidavit establishes that on approximately July 30, 1999 she faxed credit

card information and her changed address to the Bar within the period to pay without a late fee established by Bar rules. She was invited to do so by a Bar employee. R 51. OPC does not contravene this point either.

The Bar, however, apparently failed to process the credit card payment. It claims it later sent a notice of suspension to her prior address - a prior employer. She never received that notice (R. 51) and no copy or exemplar of it has been made a part of the record at any stage of the case. OPC has failed to identify any factual or legal basis for claiming Sonnenreich had been “suspended” in view of its failure to produce the notice that OPC claims to have sent. No one—not Judge Stirba, Judge Burton, Sonnenreich, nor this court—has ever known what the purported notice said. Because of this failure of proof, OPC never asked Judge Stirba to find either that the notice provisions of RLDD 8(b) are a sufficient protection of lawyers’ and judges’ due process rights or that any particular notice language complied with Rule 8(b).

OPC cannot appeal on the basis that Judge Stirba did not make those arguments on its behalf. See *Wisden v. Dixie College Parking Comm.*, 935 P.2d 550, fn. 2 (Utah 1997) (“failure to raise an issue below precludes its consideration on appeal.”)

OPC’s Memorandum In Opposition To Motion for Judgment On the Pleadings contains a “Statement of Relevant Facts”; nowhere therein did OPC’s even allege that notice was either sent or received. R 89-93. Nor did it allege in the complaint that notice was sent or received. R 1-4.

On appeal, OPC “contends” 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.” Brief at 24.¹ The record contains no support for that naked assertion.

It is undisputed that Sonnenreich advised the Bar of her new address. R 51. The record contains nothing showing OPC mailed Sonnenreich anything at the address Sonnenreich had put on record with the Bar. See R 1 (citing new address as address of record). The record does not contain a copy of OPC’s purported notice. OPC addressed the notice issue in its memorandum before Judge Stirba only by arguing that it did not need to give notice; not by claiming that it complied with express requirements of RLDD 8(b). R 100.

At oral argument, OPC asserted: “actual notice is not required,” R 905, page 22. Its explanation as to when it would produce its evidence was: “Subsequently down the line the Bar hopes to meet its burden of proof with regard to due process and notice given.” R 904 page 13 (emphasis added).²

As the plaintiff, OPC bears the burden of production of evidence. RLDD 17(c). Once Sonnenreich had submitted affidavits concerning the lack of notice, the Bar was compelled to present some contrary evidence if it had any.

[T]he plaintiff[] has the ultimate burden of proving all the elements of his cause of action . . . [after defendant produced affidavit attacking elements of plaintiff’s case]. Under Utah Rule of Civil Procedure 56(e), the burden then shifted to

¹Furthermore, OPC does not even contend that it followed RLDD 8(b). It does not contend that it was the Executive director who sent the notice or even that it was a notice of “removal from the rolls.” Even if OPC’s “contention” were a record fact, it still would not support a finding that the Bar complied with Rule 8(b).

²That admission alone supports Judge Burton’s determination that the complaint was launched in bad faith. Hope is an admirable virtue but it cannot justify filing a law suit. If “hoping” to meet the burden of proof serves to avoid summary judgment, no summary judgment will ever be granted.

[plaintiff] to provide some evidence, by affidavit or otherwise, in support of the essential elements of his claim.

Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994), *see also Schaer v. State ex el Dep't of Transp.*, 657 P.2d 1337, 1342 (Utah 1993).

OPC's "hopes" and "contentions" fail its burden.

On appeal OPC for the first time argues that Judge Stirba should have inferred notice from the affidavit from Arnold Birrell. Mr. Birrell said: (1) Sonnenreich had a history of tardy payment;³ and (2) that the Bar did not charge Sonnenreich's credit card or (3) mail her a sticker. OPC has never offered an explanation as to why Mr. Birrell's affidavit did not identify Sonnenreich's address of record or claim that notice had been sent let alone disclose the content of the notice.

OPC argues that Mr. Birrell's Affidavit proves that "[t]he OPC considered Sonnenreich 'on notice' concerning her administrative suspension." Brief at page 25. What OPC "considers" does not have the slightest probative value on the issue of whether notice complying with RLDD 8(b) was either sent or received in 1999. Nor does it resolve the issue of what, if anything, the Executive Director sent - a notice of "suspension" or a notice that complied with Rule 8(b) and addressed a "removal from the rolls."

³Sonnenreich knows nothing about the issue of prior alleged late payments and indicated as much in her affidavit. Until 1999, Sonnenreich's employers always directly paid her bar dues. R 50. OPC's use of previous uncharged alleged bad conduct is itself a violation of due process since Sonnenreich has not been accused of misconduct as to her employers' tardy payment and has not had an opportunity to present a defense. *See Lipson v. State Bar of California*, 810 P.2d 1007, 1010 (Cal. 1991) ("To find petitioner culpable based on uncharged conduct would be a denial of due process").

If OPC had a good faith basis for thinking it could find some evidence to contradict that presented by Sonnenreich as to the notice issue, it could have explained why and moved for discovery under Utah Rule of Civil Procedure 56(f). OPC's claim that it was relieved from seeking to invoke Rule 56(f) because "it considered the point [of notice] a peripheral one" is ridiculous. Brief at 25. The issue of notice was squarely raised before Judge Stirba and was a central point of the due process argument. Sonnenreich presented an affidavit, case law, and legal argument on the issue, all of which OPC ignored. OPC did not even suggest to Judge Stirba or later to Judge Burton that actual notice to Sonnenreich that she had been suspended could be inferred from the Birrell affidavit. Nor does it suggest to this Court from what portion of that affidavit the inference arises—that is probably because no portion of Birrell's affidavit gives rise to the inference she received notice or knew the Bar had suspended her.

Judge Stirba made the only finding possible on the record before her: (1) no notice in the record; (2) an un rebutted affidavit to the effect that no notice had been received; and (3) no request for further discovery.

Sonnenreich cited OPC's failure to produce the notice as evidence that the case was brought without a factual basis and in bad faith. R 354. This afforded OPC a second opportunity to establish that it provided Sonnenreich with proper and adequate Rule 8(b) notice of suspension.

In response, however, OPC merely told Judge Burton that it "contends" notice was given. It did not offer any supplement to the obviously inadequate affidavit of Mr. Birrell. R 492-493. Having lost before Judge Stirba because it failed to establish actual notice, OPC cannot seriously

assert that it still considered the issue “peripheral” in the context of a bad faith inquiry. Brief at page 25.

Judge Burton’s determination that OPC lacked a factual basis on the issue of notice was certainly not an abuse of discretion. To the contrary, it was the only conclusion the record supported.

B. Constitutional Due Process Required that Sonnenreich Receive Actual Notice of Suspension before She is Charged for Practicing While Suspended.

This Court has long recognized that Utah’s lawyers and “[j]udges are entitled to the same basic due process protections afforded to other professionals because these protections are, indeed, fundamental rights which inure to the benefit of every citizen of this state.” *In re Worthen*, 926 P.2d 853,877 (Utah 1996). The prior rulings of this Court on the importance of actual notice in suspension and disbarment cases are equally clear. Finding an order informing a lawyer of a 30 day suspension had been inadequately served, this Court said:

We think that suspension and disbarment proceedings call for adherence to minimum requirements of procedural due process, including notice of a hearing and notice that the attorney’s license has been restricted or withdrawn. We therefore hold that service by certified or registered mail must be on the attorney personally and cannot be accomplished by delivery to a common-area receptionist at the address of the attorney’s office. Such delivery does not amount to constructive notice. Nothing in the record or in the findings disputes *Schwenke*’s claim that the signature on the return receipt was not that of his personal agent. We acknowledge that actual personal service will often be required when service by mail is ineffectual. However, in suspension or disbarment proceedings, actual notice is essential. (Emphasis added.)

In re Discipline of Schwenke, 849 P.2d 573, 576 (Utah 1993) (emphasis added).

OPC apparently believes the due process requirement does not arise until this court explicitly so holds in a four square case. Brief at 28. OPC argues without citation and discussion

of a single case that Sonnenreich's cases "concerned disciplinary suspensions not administrative suspensions for failure to pay annual licensing fees. There are fundamental differences between the two types of suspensions and because of these differences, the cases are not controlling."

OPC Brief at 28. But by the end of its Brief, 15 pages later, OPC has not explained what those fundamental differences are.

Sonnenreich submits that a professional license, including a license to practice law, once earned, is a property right that cannot be taken away without procedural due process:

Once licenses are issued.... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment.

Stidham v. Peace Officers Standards and Training, 265 F.3d 1144, 1150 (10th Cir. 2001). This Court has described the suspension of a lawyer's license as a consequence that is "tantamount to disbarment." *In re Smith*, 872 P.2d 447, 450 (Utah 1994) (internal citation omitted). Disbarment implicates due process rights. *In re Ruffalo*, 390 U.S. 544 (1967).

OPC's contention that it can use the label on the suspension to abrogate Sonnenreich's due process right in her law license is wrong. OPC neither recognizes the existence of *Schwenke*, OPC Brief at iii, nor provides any analysis based on policy or case law explaining why it can ignore due process basics, if it labels a suspension "administrative," and then can turn around and use that suspension as a predicate for practicing while suspended.

"[T]he deprivation of a constitutional right does not depend on form. We must look at the substance of the actions taken relative to a constitutionally protected right." *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330, 336 (8th Cir. 1986). The substance of the

action taken against Sonnenreich clearly constituted the deprivation of a constitutionally protected property right without due process of law. “Procedural due process is implicated any time a lawyers' right to practice is even temporarily suspended.” *People v. Varallo*, 913 P.2d 1, 6 (Colo. 1996).

Had Sonnenreich’s license been jeopardized because she was accused of serious misconduct there would be no doubt as to her entitlement to actual notice and an opportunity to defend herself. Had she like *Schwenke* been suspended for 30 days because she had done something wrong for which she was being punished, she would unquestionably be entitled to actual knowledge of that fact. Sonnenreich submits that notice of a putative suspension must be given her, if she is to be charged with a violation for practicing law after the date of the so-called “administrative” suspension.⁴

State ex rel Schwab, 493 P.2d 1237 (Wash. 1972) is instructive.⁵ Schwab, an attorney, deliberately refused to pay his bar dues in order to challenge the Washington Bar’s administrative suspension power. The Washington Supreme Court agreed with the attorney that the State Bar could not jeopardize his right to practice law by imposing an “administrative” suspension although one was authorized by a statute.

The *Schwab* court recognized the use of an administrative suspension as a ministerial tool. However it was clear that attorneys must be able to “challenge” the suspension, that is

⁴No where in the RLDD, Rules for Integration or RPC does the adjective “administrative” appear before the word suspension.

⁵*Schwab* has been cited favorably by this Court twice in other contexts. See *In re [Robert] Hansen*, 584 P.2d 805 fn2 (Utah 1978); *In re [Phil] Hansen*, 586 P.2d 413 fn4 (Utah 1978).

explain the circumstances of the non-payment when there is a genuine controversy. The court held that, when there is a good faith defense, the Bar-imposed administrative suspension could not “[jeopardize the attorney’s] authority to practice law.” Nor did it render him “[subject] to the possibility of criminal prosecution under [a Washington statute] which makes it unlawful for anyone to practice while suspended from membership in the state bar.” *Id.* at 1239. OPC’s attempt to distinguish *Schwab* on the basis that the suspension there was based on a statute begs the question: So what? Whether the administrative suspension language appears in a statute or rule does not affect the constitutional right of due process of those who are suspended. *Schwab* is well-reasoned and should be accepted for this point.

Sonnenreich was provided no mechanism to raise the legitimate dispute over dues payment issues or to correct the non-payment. Instead the Bar putatively “suspended” her, gave her no actual notice, and then OPC prosecuted her for misconduct based solely on so-called “administrative suspension.” This action violates due process and is contrary to this court’s holding in *Schwenke* and the principals recognized in *Worthen* and *Schwab*.

IV. IN RE CRANDALL CONTROLS.

In re Crandall, 784 P.2d 1193 (Utah 1989) controls the case before the court.⁶ In *Crandall* the court ruled that in an attorney discipline case an administrative suspension by the Bar could not be the predicate for discipline for violations caused by the administrative suspension. 784 P.2d 1197. *Crandall* controls this case in two ways. OPC seeks to discipline Sonnenreich for practicing while administratively suspended, even though there is no evidence of any other form of misconduct by Sonnenreich. That effort is precisely what *Crandall* forbids and precisely what Section C20 of the applicable Rules for Integration provides be handled by the Board of Bar Commissioners through the institution of civil litigation.⁷

Second, OPC in its printed screening panel decision sheets purports to make a finding of any rule violation of RPC 8.4.⁸ In Sonnenreich's case OPC would have the practice of law while

⁶*Crandall* was administratively suspended and, pursuant to then Rule XX, the Bar continued the suspension after he tendered payment. He was then charged with ethics violations that this Court agreed "were either caused or aggravated by his [administrative] suspension and its indefinite extension." *Id.* at 1197.

This Court told the Bar that had misused the administrative suspension procedure by using it as "end-run approach" to allow it to avoid following the procedures for suspending lawyers set out in the rules. *Id.* at 1196. It noted that "there is no logical connection between an attorney's failure to pay his or her licensing fee and any claimed unfitness to practice law." *Id.* at 1196.

The court dismissed five charges against *Crandall* because they "all arose from situations which were either caused or aggravated by his Rule XX suspension and its indefinite extension..." The Court told the Bar that it was "free to seek discipline under the rules for any claimed unprofessional behavior that was not caused by *Crandall's* suspension under rule XX." *Id.* at 1197 (emphasis added).

⁷See Point V, *infra*.

⁸OPC's form is discussed in more detail at Point VII, *infra*.

suspended automatically bootstrapped into a violation warranting public discipline, even though the screening panel found her practicing while suspended to be the product of negligence, not willfulness, and even though the screening panel expressly declined to find any harm done to any one, including the legal system. OPC has again done exactly what this Court told OPC it could not do, and Judge Stirba rebuffed it. After discussing *Crandall's* holding, she said:

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 (R 285-86)

This court should affirm Judge Stirba's application of *Crandall*.⁹

⁹OPC's Brief presents the holding in *Crandall* backwards. OPC argues that *Crandall* is distinguishable:

because the allegations the OPC raised [against Sonnenreich] 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.

Brief at 19-20.

OPC seems to argue that *Crandall* left open a window, between the "administrative suspension" and the receipt of payment, during which OPC may prosecute. That result defies both the logic and the language of *Crandall*. OPC does not explain how the use of the administrative suspension to "end run" normal discipline was any different before the payment was offered. If the Court meant to allow to prosecution of *Crandall* for actions before his payment was offered, leaving the initial period of the administrative suspension intact, the Court would not have "return[ed] *Crandall* to the status quo; he is now in the same position he was in the day before his administrative suspension." Instead it would have returned him to he same status he was in the day he offered his payment. *Id.* at 1197.

OPC failed before Judge Stirba and Judge Burton to cite a single case in which an administrative suspension has been imposed against a lawyer who has a good faith defense and then successfully used as a "suspension" for the purpose of imposing Bar discipline.

V. RULE FOR INTEGRATION C20 ALSO DISPOSES OF THIS MATTER.

This action was not initiated by the Board of Bar Commissioners. R 41 Rule C20 of the Rules of Integration in force at the time the complaint was filed, however, embodies a direct instruction from this Court on the issue:

No person who is not duly admitted and licensed to practice law within this state nor any person whose right or license to so practice has terminated either by disbarment, suspension, failure to pay his license fee or otherwise, shall practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of an attorney within the state. . . . **this prohibition against the practice of law by any such person shall be enforced by civil action or proceedings**, including writ, contempt or injunctive proceedings, as may be necessary and appropriate, **which action or which proceedings shall be instituted by the Board.**¹⁰ (Emphasis added)

Rule of Integration C20, April 28, 1999. R 438-439.

That direct instruction requires the Board to initiate any district court action accusing a lawyers of practicing or holding out as a lawyer while tardy on fees. Faced with Rule C20, OPC offered Judge Stirba a different version of the rules which were not in force when the action was filed and which had not been properly adopted. The version then proffered said the action could be initiated by the Bar. R 205. Judge Stirba rejected that tactic. R 287¹¹ On this appeal, OPC refers to the mis-submission of rules as an inadvertent oversight and attempts to trivialize the significance of the issue. It fails to quote the language at issue then asserts that “[t]he differences between the two versions of the rules are insubstantial” brief at 15. OPC brief is not adequate in

¹⁰The Board is the Board of Bar Commissioners. (See April 19, 1999, Rules for Integration B.1 (R 428).)

¹¹OPC now takes the position it is a mistake to confuse the Bar with OPC, (Brief at note 6). Hence the tactic before Judge Stirba does not pass muster anyway because it was clearly OPC who initiated the proceeding.

this regard. *State v. Reiners*, 803 P.2D 1300 (Utah Ct. App. 1990). The difference is in fact crucial. Rule C20 required Board approval, which OPC did not obtain. Judge Stirba was correct in dismissing the Complaint on that basis. R 287. OPC now instead claims that the authority exists in RLDD 11 for it to act. This new theory, never presented to the district court, would give dual jurisdiction to OPC and the Board of Bar Commissioners to initiate actions for practicing without paying dues—something not even hinted at by the rules. And because it was not presented below, that argument cannot become the basis for reversal on appeal. *Wisden v. Dixie College Parking Comm.*, 935 P.2d 550, fn.2 (Utah 1997).¹²

VI. OPC TOLD JUDGE STIRBA THAT RULE 8(b) OF THE RLDD WAS NOT THE SOURCE OF ITS POWER OF ADMINISTRATIVE SUSPENSION. IT CANNOT NOW ACCUSE HER OF ERROR FOR AGREEING WITH IT.

Sonnenreich is accused of violating, RPC 5.5, prohibiting “unauthorized practice.” The rule is content neutral. See committee note to RPC 5.5. OPC had to look to other authority to support its claim that Sonnenreich was “suspended.”

Judge Stirba ruled the Bar lacked the authority to impose the administrative suspension upon which OPC predicated its claim that Sonnenreich practiced while suspended. OPC challenges Judge Stirba’s conclusion but its sole basis for the challenge is the argument that Rule 8(b) LRDD authorizes such suspensions.¹³ The use of the phrase “while suspended”

¹²OPC has not dealt candidly with C 20 and the Rules of Integration in this matter. See Discussion at Point IX D, *infra*.

¹³RLDD 8(b) says:

(b) Suspension for non-payment of licensing fee. Any 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

denotes that Rule 8(b) does not do the suspending. The court should also note that the Executive Director does not (as OPC says) send a “notice of suspension.” He or she is to send a “notice of such removal from the rolls,” language consistent with the Rules for Integration.

The suspension to which the rule refers may be read, consistently with *Crandall’s* holding, as a suspension pursued without an end-run of OPC’s burden. *Crandall* left the theoretical power of administrative suspension, but refused to allow such a suspension to end-run the burden of proof. Again, Rule 8(b) is careful, it does not say a lawyer who is “administratively suspended.” The Bar’s two potential remedies for tardy Bar dues are then: (1) suspend the lawyer under a suspension that does not let OPC end-run its burden. (*Schwab* tells us a simple procedure that allows a challenge when there is a basis for one will suffice); and (2) follow Rule for Integration C20 (IIIT). The current rules do not provide for option 1, so it is option 2 OPC should have followed. OPC adamantly told Judge Stirba the rule was not the authority for administrative suspensions:

The Bar’s current authority to administratively suspend an attorney for noncompliance can be found in two places: the Rules for Integration and the Bar’s formal and Board-approved licensing policies and procedures. ...
R 100.

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 by 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.

The Bar was adamant in telling Judge Stirba that Rule 8 was not the source of its authority and indeed that no part of the Rules of Lawyer Discipline or Disability could confer such authority:

As Respondent's Motion... correctly assumes, Rule 8 is not the authoritative source for administrative suspensions. Subsection 8(a) of Rule 8 merely restates the requirement to pay licensing fees set forth in the Rules for Integration and subsection (b) is the basis for disciplinary action in connection with an administratively suspended attorney who continues to engage in the practice of law.

R 101 (emphasis added).

And at the very end of its oral argument, OPC told Judge Stirba:

Now, my last point-and, again, this is a very important point... Rule 8 of the Lawyer-of the Rules of Lawyer Discipline and Disability... was enacted in 1993, April of '93, so it was in place at the time Ms. Sonnenreich was administratively suspended. It does not grant the authority to administratively suspend for nonpayment....

R 904, page 17.

OPC "invited the alleged error below" and obviously cannot base an appeal on the grounds that Judge Stirba should have disagreed with the position the Bar advocated before her. *See American Graphics, Inc. v. Travelers Indemnity Company*, 17 Fed. Appx 787 (10th Cir. 2001) (the requirement that issues be preserved for appeal would be destroyed if parties could "invite the error" then appeal from it.) As this Court noted in another context, "it might be observed that [the party] asked for what he got, and to use such request as a crowbar to release him from his predicament, is to invite error, a tactic or stratagem upon which courts frown or outrightly reject." *State v. Maguire*, 529 P.2d 421, 422 (Utah 1974).

VII. THE COMPLAINT DOES NOT ALLEGE THE REQUIRED SCREENING PANEL FINDING; THE SCREENING PANEL FAILED TO FIND THAT “THERE ARE GROUNDS FOR PUBLIC DISCIPLINE.”

RLDD 11 establishes two prerequisites before a district court complaint can be filed accusing a lawyer of unethical conduct. RLDD 11 limits such complaints to situations in which a “screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited.” RLDD 11(a)(emphasis added).

Here, the complaint does not allege such a finding because the screening panel never determined that there was probable cause to believe that there were grounds for public discipline. OPC’s Complaint was not based on the screening panel report it did not refer to it nor was it attached. The report was first produced in connection with the OPC’s responsive memo before Judge Stirba. R 151-156.

Judge Stirba examined that report and found that the screening panel had told OPC that Sonnenreich’s offense¹⁴ was committed “negligently” the panel did not find harm to anyone or the administration of justice. A quick examination of the screening panel report indicates that the panel did not follow the instructions and never made a finding of grounds for public discipline.

The instructions recognize three situations that warrant a “formal complaint.”¹⁵ The pertinent pages of the screening panel report appear at R 154-55.

¹⁴OPC never asked the screening panel to identify the facts underlying the offense. It appears that the offense it found was perhaps some sort of negligence in not making sure the payment was processed.

¹⁵The form OPC gave the screening panel never asks it to determine whether a district court complaint should be filed seeking “public discipline.” The form uses only the undefined phrase “formal complaint,” which OPC conflates into an instruction to file a complaint in district court, which may not be at all what the screening panel had in mind.

Box 5 authorizes a formal complaint when the offense is negligent but only when two additional factors are present, potential injury to the public or the legal system; and the lawyer has been disciplined previously (within five years). Sonnenreich has no disciplinary history and box 5 was not checked. There was no finding of potential harm.

Box 6 allows a formal complaint for negligent misconduct without a previous discipline only when there is “actual injury to a party, the public or the legal system or that there was actual interference with a legal proceeding...” That box was not checked. R 155. Moreover, OPC did not allege any actual injury. R 117-120.

The screening panel chair checked box 7, that reserved for “intentional or knowing misconduct.” However, the chair blacked out the words “intentional or knowing” and wrote in “negligently.” R 155.

Had the screening panel chair followed the instructions he could never have reached box 7. The panel found only negligence in answering question 2: “the panel specifically finds that the respondent acted: Intentionally/knowingly; [or] negligently.” The panel checked “negligently”. R 154. The instructions are clear: if the intentional/knowingly box is checked, “check and complete paragraph 7 authorizing a formal complaint for intentional or knowing misconduct.” R 154. That is the only path to box 7.

Under the Standards for Imposing Lawyer Sanctions, the category under which misconduct that is negligent and harmless falls is an admonition. Standards for Imposing Lawyer Sanctions 4.5. Those standards expressly state that an “[a]dmonition is nonpublic discipline.” 2.7. Judge Stirba was correct in her analysis that the screening panel’s finding was inadequate to

meet RLDD 11(a)'s mandate that a screening panel find "probable cause to believe there are grounds for public discipline." Therefore only one of the two requirements was met.

OPC did not follow either RLDD 11 or the screening panel's instructions. Had OPC read and followed Rule 11, it could not have filed the complaint since it knew from the screening panel report that the offense was harmless and negligent and was not therefore a finding of probable cause that there are ground for "public discipline" as required by Rule 11(a). Had OPC followed the screening panel's literal instructions it would have pleaded the charge based on the offense as to which the screening panel found probable cause, a single count of harmless negligence. It also would have filed against all of the respondents in the cases. R 53; R 43; R 703. OPC has failed to appeal from Judge Stirba's dispositive ruling on this point, which stands unassailed as the law of this case and disposes of this appeal. See Utah Rules of Appellate Procedure 9(f). This issue is not raised in the docketing statement or Brief.¹⁶

VIII. THE COMPLAINT DOES NOT CONTAIN A "PLAIN AND CONCISE" STATEMENT OF "THE FACTS UPON WHICH THE CHARGE IS BASED";

¹⁶The OPC launches a gratuitous and unfair attack on Judge Stirba's determination that the screening panel found no Rule 8 violation. Judge Stirba was entirely correct. First, OPC never alleged a RPC 8.4(a) violation. R 117. Moreover, the screening panel never found any violation of RPC 8.4 or any of its subparts. OPC charged Sonnenreich with several RPC 8.4 violations including 8.4(b) and 8.4(c). Those charges were specifically rejected.

OPC never asked the screening panel to determine whether Sonnenreich's conduct as charged actually violated RPC 8.4(a). Instead it preprinted a violation of Rule 8.4(a) on the form. OPC claimed it was authorized to pre-print the RPC 8.4(a) violation by a decision from the Mississippi Supreme Court. That decision, *Terrell v. Mississippi Bar*, 662 So. 2d 586 (Miss. 1995) says no such thing. It involved a sufficiency of evidence review after a fact finding not a preprinted violation on a screening panel form. In any event, the Mississippi Supreme Court cannot authorize OPC to avoid having a Utah screening panel answer the key question: is the alleged conduct as to which you found probable cause serious enough that you want it to be treated as a breach of the ethics rules per RPC 8.4(a).

JUDGE STIRBA DID NOT ERR IN DISMISSING THE COMPLAINT ON THAT BASIS. OPC WAS ALSO UNABLE TO PRESENT ANY FACTS SUPPORTING THE COMPLAINT TO JUDGE BURTON EVEN TO SAVE ITSELF FROM A FINDING IT ACTED IN BAD FAITH.

OPC has never identified any acts of Sonnenreich that could constitute either practicing law or holding herself out as an attorney. Instead, OPC merely “contends that Sonnenreich continued to practice law and hold herself out as an attorney after she had been administratively suspended.” Brief at 5.

RLDD 11(a) required OPC to file “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.” (emphasis added).

A fact is “an actual or alleged event or circumstance, as distinguished from its legal effect, consequence or interpretation.” *Black's Law Dictionary* (7th Edition 1998). The complaint fails to identify a single event or circumstance concerning Sonnenreich practicing law or holding herself out as a lawyer. It contains only a conclusory assertion.

Additionally, a lawyer’s procedural due process rights include the right to knowledge of the charge before the proceedings commence because knowledge of the charge is essential to the lawyer’s right to explain and defend. *In re Ruffalo, supra*; *see, also, In re Worthen, supra* (judge hailed before judicial conduct commission has right to be unambiguously informed as to specific issues he must meet).

OPC filed the complaint only after OPC had completed its own investigation, which was so thorough it involved calling a law firm where Sonnenreich had not worked in a decade (see Fact ¶ 10) and after OPC had conducted a screening panel hearing. If OPC had knowledge of

any actual or alleged “events or circumstances” involving Sonnenreich practicing law or holding herself out as a lawyer it would have been simple to set them forth in a short and concise statement.

Before Judge Burton, Sonnenreich argued that OPC’s inability to explain to whom Sonnenreich allegedly held herself out as a lawyer and for whom she practiced law and in what manner was powerful proof that the action was brought in bad faith. OPC did not respond by telling Judge Burton the factual basis for the charge. Instead, it merely repeated its earlier contention:

OPC contends that Sonnenreich continued to practice law after she had been administratively suspended for non-payment of dues.

R 493.

A contention that a rule was broken is not a “fact.” The record is devoid of a single “fact” suggesting Sonnenreich practiced law during the period OPC claims Respondent was suspended. Due to the utter absence of facts from the complaint, Judge Stirba had no choice but to dismiss it.

IX. OPC HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF JUDGE BURTON'S DECISION THAT OPC ACTED IN BAD FAITH. OPC'S ATTEMPTS TO BLAME THE SCREENING PANEL AND MR. WILSON ARE FURTHER PROOF OF ITS BAD FAITH. OPC'S BAD FAITH IS MANIFEST.

A. OPC Was Required to But Failed to Marshal the Evidence Supporting Judge Burton's Bad Faith Determination.

The rules and principles of appellate procedure apply in attorney discipline case unless specifically overridden by the Rules of Lawyer Discipline and Disability. RLDD 17. In deciding the first case under the new disciplinary procedures adopted in 1997, this Court noted that it would, with one exception, adhere to its usual "scope of review" and overturn fact findings only when they are "arbitrary, capricious or plainly in error." The exception recognized by the Court was a reservation, based on its Constitutional role, of its discretion to draw different inferences from facts found by the district court. *In re Babilis*, 951 P.2d 207, 213 (Utah 1997); *see also In re Ennenga*, 37 P.3d 1150, 1153 (Utah 2001) (applying "clearly erroneous" standard of factual deference in reviewing a lawyer discipline matter).

Marshaling is required when a fact finding concerning bad faith under Utah Code § 78-27-56 is examined on appeal. *Wardley Better Homes and Garden v. Cannon*, 21 P.3d 235, 238 (Utah Ct. App. 2001) ("a finding of bad faith is a factual question...[a]ppellants must marshal the evidence, citing... to all the evidence supporting the trial court's ruling.");¹⁷ *See, also, Chipman v. Miller*, 934 P.2d 1158, 1163 (Utah App 1997) (party should marshal in attacking bad

¹⁷Reversed on other grounds, *Wardley Better Homes and Gardens v. Cannon*, 458 Utah Adv. Rep. 15. (Utah 2002). The court held that imputing an agent's bad faith to the principal raises a legal question, but did not disapprove the Court of Appeals conclusion that marshalling of evidence is required in challenging factual determinations of bad faith. Even if marshalling is not required, Judge Burton was correct. *Id.* ¶ 14.

faith ruling but failure not fatal if only memorandum were reviewed); *Utah Department of Social Services v. Abrams*, 806 P.2d 1193 (Utah App. 1991). OPC has not even purported to marshal. Instead, it has presented the conclusions it “contends” it can establish. Brief at 5.

Judge Burton acknowledged in his decision that he did not make his bad faith finding lightly. He recognized that a bad faith finding “was a serious matter.” R 673. He however reviewed the affidavits and other evidence, observed OPC’s demeanor before him, and found there was a “total lack of factual basis” for the action, particularly on the issue of notice, and it could not have been brought “with an honest belief in its propriety.” R 674. The uncontroverted record facts set out below bear out that conclusion.

Rather than marshaling the facts, OPC offers two excuses to this Court. It says it’s the screening panel’s fault and that Mr. Wilson, Chair of the Ethics and Discipline Committee, also signed the complaint, so OPC is not responsible. Those contentions are baseless and belied by the record.

B. This Is Not the Screening Panel’s Fault.

OPC attempts on appeal to immunize itself from responsibility for its prosecution of Sonnenreich by arguing that the screening panel told it to bring the action and it had no discretion to do otherwise. Brief at 32. First, as explained above, the screening panel finding was made in defiance of the instructions and is legally inadequate to satisfy RLDD 11(a). Second, OPC’s discretion is a matter of public record. One need look no further than OPC’s last publicly posted report, for the year 1999 (available on the Bar’s web sit at www.utahstatebar.org under the heading archives). That report outlines the discipline process. It contains a section heading

stating “Formal Not Filed.” Far from indicating that OPC’s has no discretion once the screening panel has found grounds for a formal complaint, the report explains:

The Screening Panel may also recommend that a formal complaint be filed with the District Court. If the screening panel recommends that the case be filed as a formal complaint, negotiations can continue.

OPC’s 1999 Report at page 4.

The statistical section of the report shows 25 cases in the category “cases voted formal not filed.” *Id.* at page 8.

Additionally, OPC never asked the screening panel to find any facts. It was not asked what, if anything, Sonnenreich did that constituted the practice of law or holding out. OPC can’t neglect to have the screening panel tell it the facts then rely on the screening panel for its claim to have a factual basis. Further, OPC told the screening panel the suspension was valid. It cannot rely on the screening panel to as proof of OPC’s good faith basis for its own belief in the suspension’s validity.

OPC did not controvert that the screening panel “voted discipline” on all the similar cases screened that night but OPC ignored that instruction and again singled out Sonnenreich by filing in district court only against her. R 53; R47 R703. OPC offered Judge Burton no explanation.

C. This is not Mr. Wilson’s Fault.

OPC attempts to immunize itself by suggesting the Chair of the Ethics and Discipline Committee vouched safe OPC by signing the complaint. Brief at 27. That is both unfair to Mr. Wilson and utterly lacking in factual basis in the record. If OPC had accurately apprised

Mr. Wilson of the facts underlying this matter and provided a copy of the screening panel report for his review, it would seem a simple matter for OPC to obtain an affidavit from Mr. Wilson to that effect. OPC did not do so. OPC failed to submit any evidence to Judge Burton demonstrating the circumstances around Mr. Wilson's signature. It did not demonstrate what materials were received by Mr. Wilson and what he was told before he signed off on the complaint. Without such evidence OPC was again resting on a mere contention. Indeed, the only evidence on the point is that Mr. Wilson signed a complaint that did not have a copy of the screening panel report attached. R 1-4. Mr. Wilson did not learn the facts from the face of the complaint. R 1-4. Nothing in the record establishes whether Mr. Wilson acted as safeguard or as a perfunctor. OPC also fails to cite any legal authority for the notion that Mr. Wilson's signature immunizes it.

D. OPC's Bad Faith is Manifest.

OPC has failed to produce the RLDD 8 notice that it now claims was the instrument that worked the suspension. If OPC really believes it is such a notice of suspension that suspended Sonnenreich, it is inconceivable that it could believe this case was justified. It has not and cannot produce such a notice. R 24.

Sonnenreich demonstrated that she received no notice of her suspension. OPC tries to save the prosecution by contending evidence of notice will be discovered. That tactic is long discredited. See *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994).

OPC has been given two chances before Judge Stirba (on the issue of the adequacy of its pleadings) and before Judge Burton in the context of bad faith to explain the events and

circumstances surrounding Sonnenreich’s alleged practice of law or holding out to practice. It has failed to do anything beyond reassert that it “contends” Sonnenreich did something that could constitute practicing or holding out. R 492-493; Brief at 5.

OPC presents no evidence to rebut the evidence submitted by Sonnenreich that OPC’s prosecution of her was both inconsistent with its treatment of other attorneys (including those caught practicing by the district court (R 53, R491-515, R703, R905)) and showing OPC’s conduct was particularly vicious. See Facts ¶¶ 7, 10, above. On the latter point, the record demonstrates that OPC counsel contacted a firm where Sonnenreich had not worked in a decade and presented the matter as if she was investigating Sonnenreich for practicing while suspended as a matter of Bar discipline. R 653, 508-509. OPC never, before the screening panel, in the complaint or before Judge Stirba or Burton produced any evidence from those individuals. Facts ¶ 10. Nor did OPC explain why they were contacted. OPC presented no evidence from that counsel to explain a good faith basis for her behavior or to rebut the conclusion that she singled out Sonnenreich because she reported OPC counsel’s to the Bar director, nor to rebut Sonnenreich’s evidence in any other way.¹⁸

OPC grossly overcharged Sonnenreich before the screening panel R117. When the screening panel found only a single harmless and negligent violation, OPC was not deterred. R 155. Although a negligent and harmless violation cannot satisfy RLDD 11’s requirement that the screening panel find grounds for “public discipline,” OPC was undeterred. It simply omitted the screening panel report when it filed the complaint. R 1-4. OPC did not plead what the panel

¹⁸The Birrell affidavit goes to other issues; it does not controvert Sonnenreich’s affidavits.

found, R 155. Nor did it treat all the cases OPC took to the screening panel level alike although Sonnenreich asserted (and OPC failed to deny that) the panel so instructed. R 53, R 703.

In essence, the record before Judge Burton demonstrated that OPC prosecuted Sonnenreich for practicing while suspended: without being able to give a consistent explanation for the legal theory underlying the suspension, without producing any notice to her, without rebutting the fact that Sonnenreich did not receive notice; and without being able to explain what Sonnenreich allegedly did that constituted either practicing law or holding out. OPC admitted that its case is premised on the “hope” that “subsequently down the line” it will “meet its burden of proof with regard to due process and notice given.” R 904 at page 13. Lawsuits must have a good faith basis when they are filed, a “hope” to find a way to meet the burden of proof in the future is not adequate.

X. OPC ALSO FAILED TO MARSHAL THE EVIDENCE ON THE ATTORNEYS’ FEES AMOUNT ISSUE.

OPC was required to marshal evidence concerning attorneys fees. *Valcarce v. Fitzgerald*, 961 P.2d 305, 317 (Utah 1998), (appellant should have marshaled on attorneys’ fees amount). *Eggett v. Wasatch Energy*, 29 P.3d 668, 672 (Utah Ct. App. 2001) (appellant could not raise issue as to whether judge erred in not requiring apportionment of attorneys’ fees because appellant did not marshal). Instead of marshaling, OPC has resorted to a potshots approach in which it unfairly presents isolated and out of context criticisms of Judge Burton’s attorneys’ fee award.

Once Judge Burton found OPC violated, Utah Code §78-27-56. He had broad discretion in determining what constitutes a reasonable fee. *Valcarce, supra*. The standard of review requires OPC to demonstrate “patent error” or a “clear abuse of discretion.” *Valcarce* at 316. It has failed to demonstrate that there was any abuse of discretion, let alone a patent error or clear abuse by Judge Burton.

OPC argues in essence that Sonnenreich’s counsel is over-qualified and has too much experience and expertise. It asserts that only attorneys’ fees charged by attorneys who customarily defend attorney discipline cases are relevant. That is not what the case it cites at page 35 of its Brief says:

The choice of a lawyer, and the value of his services, may depend upon a number of factors, including his background of learning and experience, his ability, his integrity and his dedication to the causes with which he identifies himself. Also to be considered his the reputation he has acquired, the nature and importance of the matter, and the amount of money or value of property involved. . . .What the lawyer has to offer should be determined by considering the composite of all of the factors which the parties themselves think relevant. Within the limits of reason and good conscience, and where there is no over-reaching undue influence or oppression, the parties should be at liberty to contract as they desire.

Kerr v. Kerr, 610 P.2d 1380, 1385 (Utah 1980). The threat to a professional license and an accusation that a lawyer is unethical is a matter of great import and “deepest emotional content.” *Id.*

This matter is of paramount importance to Sonnenreich who has practiced law since 1986 with a spotless disciplinary record. OPC has sought to ruin her reputation and to impose on her a penalty so severe it “is sufficient in most cases to destroy an attorney's practice and is tantamount to disbarment.” *In re Smith*, 872 P.2d 447, 450 (Utah 1994) (internal quotes omitted). In light of

the importance of this matter it was not unreasonable for Sonnenreich to retain Jones Waldo as counsel. OPC's argument also ignores the fact that Mr. Lowrie's affidavit addresses the reasonableness of the hourly rate in light of both Jones, Waldo and general Salt Lake City fees for civil litigation-which is the area of legal expertise that should be examined. Indeed, Jones Waldo was not counsel to Sonnenreich until litigation was filed. OPC attempts to present discipline matters as something other than civil litigation. Brief at 33. It fails to cite *In re Ennenga*, 37 P.3d 1150, 1155 (Utah 2001) (rejecting ex-post facto law analysis in bar discipline case on the basis that bar discipline is civil litigation); see also RLDD 1(c) (discipline proceedings are civil).

OPC also asserts that fees could not be awarded for Sonnenreich's successful disposal of OPC's untimely appeal to this Court. Brief at pages 37-38. In fact, Judge Burton's subsequent determination that the action was brought in bad faith mandated an award of fees for the appeal. *Utah Department of Social Services v. Adams*, *supra* at 1197 (party awarded fees below is also entitled to fees on appeal).

OPC proceeds through the nit picking exercise of challenging a variety of line items on the bills on such utterly non-sensible grounds as a claim that because Mr. Lowrie looked at the Utah Code and conducted research, he was unqualified and lacked experienced and should not be allowed fees. Brief at page 36. OPC cites, as an example of Mr. Lowrie's putative naiveté, his research on the issue of whether a jury trial should be requested as indicative of an issue that can be resolved "by a glance at the RLDD." Brief at 36. If OPC had researched the issue it would know that while RLDD provides for a bench trial, at the time the research was performed, Utah

Code § 78-51-25 stated that one accused of practicing law while tardy on fees was “entitled to a trial by jury.” That statute was repealed only after this litigation was filed. See Annotation Notes to Utah Code §§ 78-51-1 to 78-51-45. Also, the pertinent Rules for Integration did not speak to the issue of inconsistent rules and statutes. The fruits of that research were ultimately presented to Judge Stirba at page 16 of Sonnenreich’s successful reply memorandum. R 231.

Likewise, fees for the Rule 11 Motion sent to OPC are perfectly reasonable. OPC lost the substantive issue raised in that motion. If OPC had read and followed the authority cited therein it could have avoided a loss before this Court. It was highly reasonable to try to persuade OPC to not file an unsuccessful appeal.

OPC also asserts that no fees should be awarded for the preparation of papers not listed in the Rules of Civil Procedure. That novel assertion is unsupported by any authority and fails to take into account that many of the papers routinely submitted by lawyers are not specified by name in the Civil Procedure Rules, for example a there is no such thing as a motion for reconsideration yet OPC filed one. R 290. OPC called it a Notice of Objection to Proposed Judgment but it was a drawn out rehash of the merits.

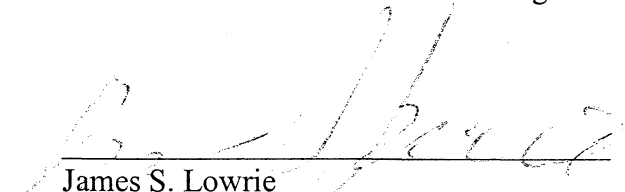
At page 39 of its Brief, OPC claims that "the affidavit includes charges attributable to legal work performed by Sonnenreich." That contention is unsupported by the itemization included with the Mr. Lowrie’s Affidavits. As explained in the First Affidavit, Sonnenreich, did the lion's share of the research and initial drafting of pleadings on this matter. It was not at all unreasonable for Mr. Lowrie who ultimately signed and submitted the papers to review the research and arguments.

CONCLUSION

This matter should have ended when Sonnenreich called the Bar, found out her credit card had not been process and paid her dues and the \$100.00 reinstatement fee. There are ample grounds for affirming both the dismissal of the complaint and also the award of fees. OPC has failed to preserve issues, failed to marshal evidence and, Sonnenreich submits, failed to persuade. This Court should affirm the district court's dismissal of the complaint and its award of attorneys' fees.

Respectfully submitted this 18th day of December, 2002.

Jones Waldo Holbrook & McDonough PC

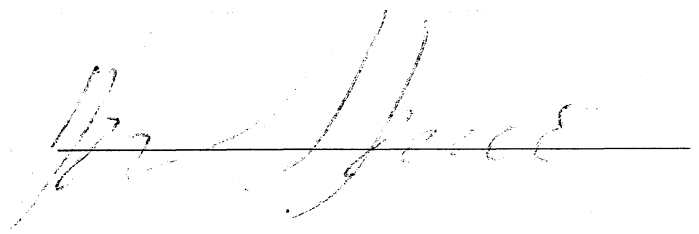
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CERTIFICATE OF MAILING

I hereby certify that on this 18th day of December, 2002, I caused to be mailed via United States mail, first-class postage pre-paid, two copies of the foregoing Brief of Appellee and Supplemental Addendum to:

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A handwritten signature in dark ink, appearing to read "Billy L. Walker", is written over a horizontal line.