

2011

In the Matter of the Discipline of Thomas v. Rasmussen : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Thomas S. Rasmussen; Pro Se.

Unknown.

Recommended Citation

Brief of Appellant, *Thomas v. Rasmussen*, No. 20110696 (Utah Court of Appeals, 2011).
https://digitalcommons.law.byu.edu/byu_ca3/2940

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE
DISCIPLINE OF THOMAS V.
RASMUSSEN

Utah State Bar No. 2693

Appellant.

Case No.: 20110696

BRIEF OF APPELLANT

~~~~~  
A DIRECT APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER OF DISBARMENT ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,  
COUNTY OF SALT LAKE, STATE OF UTAH.  
~~~~~

MR. THOMAS S. RASMUSSEN, *pro se*
4959 So. Highland Drive
Salt Lake City, Utah 84117

OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS

JUN - 4 2012

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE
DISCIPLINE OF THOMAS V.
RASMUSSEN

Utah State Bar No. 2693

Appellant.

Case No.: 20110696

BRIEF OF APPELLANT

~~~~~  
A DIRECT APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER OF DISBARMENT ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,  
COUNTY OF SALT LAKE, STATE OF UTAH.  
~~~~~

MR. THOMAS S. RASMUSSEN, *pro se*
4959 So. Highland Drive
Salt Lake City, Utah 84117

OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW	1
DETERMINATIVE, CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	11
<u>Affirmation Hearing March 8, 2011</u>	11
<u>Motion Hearing May 19, 2011</u>	16
SUMMARY OF THE ARGUMENT	22
ARGUMENT	25
ISSUE I: <i>Did the court exceed its jurisdiction in proceedings conducted under Ut. Lawyer Disc. and Disab. 14-524 by entertaining OPC's objection to Rasmussen's reinstatement to the practice of law outside the scope of the ten-day period of time contained therein?</i>	25
ISSUE II: <i>Did the court abuse its discretion in relitigating Rasmussen's reinstatement or, alternatively, in granting OPC post-judgment relief from the Reinstatement Order when both OPC's objection and subsequent motion failed to adequately articulate or support the requests under applicable provisions of the Utah Rules of Civil Procedures?</i>	29
A. <u>THE DISBARMENT PROCEEDINGS WERE BARRED BY THE DOCTRINE OF RES JUDICATA</u>	29
B. <u>THE COURT ERRED IN GRANTING POST-JUDGMENT RELIEF TO OPC FROM RASMUSSEN'S REINSTATEMENT</u>	33
ISSUE III: <i>Alternatively if the procedure below is sustained by this Court, did Rasmussen have a right to rely on his sanction being in the form of the court lifting the stay and imposing the one-year suspension?</i>	38
ISSUE IV: <i>Alternatively, did the court err in concluding that disbarment was the presumptively correct form of discipline and in failing to account for mitigating circumstances?</i>	40
A. <u>THE COURT ERRED IN APPLYING RULE 14-606 RATHER THAN UNDERTAKING AN ANALYSIS UNDER RULE 14-605</u>	40
B. <u>THE COURT ERRED IN NOT CONSIDERING MITIGATING CIRCUMSTANCES</u>	44
CONCLUSION	46

TABLE OF CONTENTS (Continued)

Attachments

Addendum “A”	<i>Findings of Fact, Conclusions of Law, and Order of Disbarment</i> , dated August 1, 2011 (the “ Disbarment Order ”)
Addendum “B”	<i>Verified Petition for Reinstatement of Thomas V. Rasmussen</i> , dated January 24, 2011 (the “ Petition ”).
Addendum “C”	<i>Affidavit of Thomas V. Rasmussen</i> , dated January 24, 2011 (the “ Affidavit ”).
Addendum “D”	<i>Order of Reinstatement of Thomas V. Rasmussen</i> , dated February 17, 2011 (the “ Reinstatement Order ”)
Addendum “E”	<i>Order</i> , dated March 29, 2011 (the “ Affirmation Order ”)
Addendum “F”	<i>Order of Sanction</i> , dated July 21, 2010 (the “ Sanctions Order ”)
Addendum “G”	<i>Letter</i> , dated December 20, 2010 from OPC to Rasmussen (the “ December Letter ”).
Addendum “H”	<i>Affidavit of John Schriver</i> , dated July 29, 2010
Addendum “I”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-501
Addendum “J”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-509
Addendum “K”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-524
Addendum “L”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-525
Addendum “M”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-526
Addendum “N”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-604
Addendum “O”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-605
Addendum “P”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-606
Addendum “Q”	SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. Rule 14-607
Addendum “R”	UT. R. CIV. P. 59 and 60

TABLE OF AUTHORITIES

Caselaw	Page
<u>Allen v. McCurry</u> , 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)	29
<u>Amica Mutual Insurance Co. v. Schettler</u> , 768 P.2d 950 (Utah App. 1989)	34,35
<u>Atwood v. Cox</u> , 55 P.2d 377 (Utah 1936)	2,25,28
<u>Bradshaw v. Kershaw</u> , 627 P.2d 528 (Utah 1981)	30,33
<u>Church v. Meadow Springs Ranch Corp., Inc.</u> , 659 P.2d 1045 (Utah 1983)	30,32
<u>Copper State Thrift & Loan v. Bruno</u> , 735 P.2d 387 (Utah App. 1987)	29
<u>Gillett v. Price</u> , 2006 UT 24, 135 P.3d 861	33,34
<u>Grynberg v. Questar Pipeline Co.</u> , 2003 UT 8, 70 P.3d 1	2
<u>In re Adoption of Baby E.Z.</u> , 2011 UT 38, – P.3d –	1
<u>In re Discipline of Crawley</u> , 2007 UT 44, 164 P.3d 1232	38,39
<u>In re Discipline of Doncouse</u> , 2004 UT 77, 99 P.3d 837	3,38,43
<u>In re Discipline of Oliver</u> , 2011 UT 29, 254 P.3d 181	26
<u>In re Ennenga</u> , 2001 UT 111, 37 P.3d 1150	3
<u>In re Johnson</u> , 2001 UT 110, 48 P.3d 881	3
<u>Jenkins v. Jordan Valley Water Conservancy Dist.</u> , 2012 UT App 1, – P.3d –	2
<u>Johnson v. Johnson</u> , 2010 UT 28, 234 P.3d 1100	2
<u>Kramer v. Pixton</u> , 72 Utah 1, 268 P. 1029 (Utah 1928)	26
<u>Macris & Associates, Inc. v. Neways, Inc.</u> , 2000 UT 93, 16 P.3d 1214	30
<u>Madsen v. Borthick</u> , 769 P.2d 245 (Utah 1988)	30
<u>Office of Recovery Servs. v. V.G.P.</u> , 845 P.2d 944 (Utah App. 1992)	29
<u>Penrod v. Nu Creation Creme, Inc.</u> , 669 P.2d 873 (Utah 1983)	30
<u>Robinson v. Baggett</u> , 2011 UT App 250, 263 P.3d 411	2,34,35,37
<u>State in Interest of Baby Girl Marie</u> , 561 P.2d 1046 (Utah 1977)	25,29
<u>State in Interest of J.J.T.</u> , 877 P.2d 161 (Utah App. 1994)	29,30,31,32
<u>State v. Montoya</u> , 825 P.2d 676 (Utah App 1991)	26
<u>State v. Rhinehart</u> , 2007 UT 61, 167 P.3d 1046	26,29
<u>United States v. Cotton</u> , 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)	26,29
<u>Wheadon v. Pearson</u> , 14 Utah 2d 45, 376 P.2d 946 (1962)	30
<u>Worker's Comp. Fund v. Argonaut Ins. Co.</u> , 2011 UT 61, 266 P.3d 792, <i>reh'g denied</i> December 8, 2011	33,34,36

Rules, Statutes and Constitutions:

SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-501	3,19,25,28
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-509	3,40
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-524	1,7,8,9,11,12,13,14,18,19,20,21,22,23,25,26,27,28,43
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-525	3,7,8,11,12,13,14,18,19,20,21,23,27,28,35,37
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-526	3,7,13,14,17,18,21,28,31,32

TABLE OF AUTHORITIES (CONTINUED)

Rules, Statutes and Constitutions (Continued):

SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-604	10,41
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-605	40,41,43
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-606	3,10,40,41,43
SUP. CT. R. OF PROF. PRAC., UT. LAWYER DISC. AND DISAB. RULE 14-607	3,44,45,46
UTAH CODE ANN. §78A-3A-102(3)(c)	1
UT. R. APP. P. 3(a)	1
UT. R. APP. P. 24(f)(1)	46
UT. R. CIV. P. 7(F)(1)	38
UT. R. CIV. P. 29(c)(1)(C)	4
UT. R. CIV. P. 59	3,33,36
UT. R. CIV. P. 60	3,33,34,36
UT. R. CIV. P. 61	33

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE
DISCIPLINE OF THOMAS V.
RASMUSSEN

Utah State Bar No. 2693

Appellant.

Case No.: 20110696

BRIEF OF APPELLANT

JURISDICTION

UT. R. APP. P. 3(a) and UTAH CODE ANN. §78A-3A-102 (3)(c) provide this Court with jurisdiction. This appeal is from the *Findings of Fact, Conclusions of Law, and Order of Disbarment* (the “**Order**”) entered by the Third District Court, on August 1, 2011, the Honorable L.A. Dever, presiding. The Order is attached as Addendum “A.”

**CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT
OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW**

ISSUE I: *Did the court exceed its jurisdiction in proceedings conducted under UT. LAWYER DISC. AND DISAB. 14-524 by entertaining OPC’s objection to Rasmussen’s reinstatement to the practice of law outside the scope of the ten-day period of time contained therein?*

PRESERVATION: Rasmussen’s *Amended Response to OPC’s Motion for the Court to Consider Evidence of Thomas V. Rasmussen’s Failure to Comply To Its Sanctions Order* filed on May 18, 2011. However, “[b]ecause subject matter jurisdiction goes to the heart of a court’s authority to hear a case, [citation omitted], it is not subject to waiver and may be raised at any time, even if first raised on appeal.” *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶25, --P.3d--; *see, e.g.*,

Johnson v. Johnson, 2010 UT 28, ¶10, 234 P.3d 1100. Excess of jurisdiction is a lack of subject matter jurisdiction. See, Atwood v. Cox, 55 P.2d 377 (1936).

STANDARD OF REVIEW: “Whether this court has subject matter jurisdiction is a question of law that we review under the correction of error standard, affording no deference to the court’s legal conclusion.” Jenkins v. Jordan Valley Water Conservancy Dist. 2012 UT App 1, ¶11, --- P.3d ----.

ISSUE II: *Did the court abuse its discretion in relitigating Rasmussen’s reinstatement or, alternatively, in granting OPC post-judgment relief from the Reinstatement Order when both OPC’s objection and subsequent motion failed to adequately articulate or support the requests under applicable provisions of the Utah Rules of Civil Procedures?*

PRESERVATION: Rasmussen’s *Amended Response to OPC’s Motion for the Court to Consider Evidence of Thomas V. Rasmussen’s Failure to Comply To Its Sanctions Order* filed on May 18, 2011, together with oral arguments at the Motion Hearing at R0557 at p. 18.

STANDARD OF REVIEW: This Court reviews a “motion for relief from judgment for an abuse of discretion.” Robinson v. Baggett, 2011 UT App 250, ¶ 13, 263 P.3d 411 (citation omitted). However, it “review[s] any underlying legal questions for correctness.” *Id.* “[The] application of res judicata presents a question of law, which we review for correctness.” Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 21, 70 P.3d 1.

ISSUE III: *Alternatively if the procedure below is sustained by this Court, did Rasmussen have a right to rely on his sanction being in the form of the court lifting the stay and imposing the one-year suspension?*

PRESERVATION: Rasmussen believed the suspension to be 181 days, but believed he was at risk for the one-year suspension if he failed to fulfill the conditions of the Sanctions Order. R0558 at p. 24. The court acknowledged the stay and that it needed to determine “whether or not Mr. Rasmussen is allowed to rely upon that...” R0558 at p. 25. OPC

acknowledged "...February 16th as the 181 days when the stay would have been up, ..."
R0557 at p. 5.

STANDARD OF REVIEW: "In reviewing attorney discipline cases, 'we review the court's findings of facts under the clearly erroneous standard.'" In re Discipline of Doncouse, 2004 UT 77, ¶ 9, 99 P.3d 837, *citing* In re Ennenga, 2001 UT 111, ¶ 9, 37 P.3d 1150. "However, 'we reserve the right to draw different inferences from the facts than those drawn by the court.'" *Id.*, *citing* Ennenga at ¶ 9 (quotation and citation omitted). "A different standard, however, applies to our review of the sanction imposed by the district court...[i]t is our duty to make an independent determination as to the appropriate sanction to be imposed." *Id.* at ¶ 10, *citing* Ennenga at ¶¶ 9-10. "We do not administer the sanction of disbarment lightly; we understand its devastating effects on an attorney." *Id.* at ¶ 16, *citing* In re Johnson, 2001 UT 110, ¶ 14, 48 P.3d 881.

ISSUE IV: *Alternatively, did the court err in concluding that disbarment was the presumptively correct form of discipline and in failing to account for mitigating circumstances?*

PRESERVATION: Mitigating circumstances were presented at the Motion Hearing.

STANDARD OF REVIEW: *See*, Issue III Standard of Review listed *supra*.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. SUP. CT. R. OF PROF. PRAC.; UT. LAWYER DISC. AND DISAB. Rules 14-501, 14-509, 14-524, 14-525, 14-526, 14-606, and 14-607.

B. UT. R. CIV. P. 59 and 60.

STATEMENT OF THE CASE

On May 27, 2009, the Office of Professional Conduct ("OPC") filed a *Complaint* (the "**Complaint**") against Thomas V. Rasmussen ("**Rasmussen**"). R0001. The Complaint

alleged that Rasmussen represented John Schriver in 2007 in Seventh Judicial District Court before Judge Anderson on a criminal matter (the “**Schriver Case**”). R0002. Trial was set for November 9, 2007, and the parties informed the jury would be summoned on October 26, 2007, with no plea bargain accepted thereafter. R0003. The Complaint alleged Rasmussen came to a consensus with the prosecutor about a plea bargain on October 26, 2007, but was cautioned that court approval was required. *Id.*

The Complaint indicated that Rasmussen sent a letter reciting the plea agreement on October 29, 2007, to the prosecutor and faxed it to the court. *Id.* The fax was received at 10:00 a.m. by the court; however, Judge Anderson was out of town and did not review it until November 5, 2007, and thereafter rejected the plea and proceeded towards trial on November 9, 2007. R0004.

Rasmussen filed to recuse Judge Anderson on November 6, 2007, which motion was denied by the presiding judge on November 7, 2007. R0005. Rasmussen filed a supplemental affidavit in support of recusal November 8, 2007. The Complaint alleged a party could only file one recusal motion under UT R. CIV. P. 29(c)(1)(c), believing Rasmussen’s affidavit to be a second one filed in an attempt to strike the trial date. *Id.*

On November 8, 2007, Rasmussen’s staff informed the court he would not be attending the trial. *Id.* The trial was not held, although all except Rasmussen appeared. R0006. Rasmussen was found in contempt for failure to appear and sanctioned \$1,000 to cover expenses for the trial and \$1,000 under Rule 11. *Id.*

On July 20, 2009, Rasmussen filed his *Answer* (the “**Answer**”) to the Complaint, arguing that the plea bargain was finalized before end of business Friday, October 26, 2007,

with a letter to memorialize the agreement sent on Monday morning, October 29, 2007. R0017-R0018. Rasmussen argued the supplemental affidavit was a motion to reconsider, and cited his courtesy call to the court to inform them he would not attend given the motion filing. R0020.

On May 24, 2010, OPC filed its *Sanctions Hearing Brief* requesting a one-year suspension for Rasmussen because of his misconduct. R0132. OPC argued misconduct for his failure to appear, violation of his duties to his client, the public, the profession, and the legal system, inconveniencing jurors and filing multiple recusal motions. R0138. OPC argued aggravating factors as follows: (1) Rasmussen's probation/stayed suspension from August 21, 2000, as a "pattern of misconduct;" however, such was dismissed and OPC could not evidence any actionable complaints filed with the Bar; (2) Rasmussen's refusal to acknowledge the wrongful conduct; and (3) Rasmussen's substantial experience in the law. R0142-144. OPC argued a lack of mitigating circumstances and requested a one-year suspension. R0144; R0146. Rasmussen filed his *Sanctions Hearing Brief* on May 28, 2010, arguing that a simple conference call could have resolved the plea agreement issues rather than Judge Anderson rejecting it, and that there was no potential/actual injury to Schriver, particularly given the later court acceptance of a substantively similar plea agreement and that Shriver was pleased with the representation. R0149-0151.

The sanctions hearing was held June 1, 2010 and the *Order of Sanction* (the "**Sanctions Order**") was entered July 21, 2010, determining that Rasmussen knew the motion to recuse was denied, knew he could only file one, and yet filed a second one (the affidavit). R0160. The court found that Rasmussen (1) failed to appear because he would be forced to go to

trial, violating his duty to his client, the profession, and the legal system; (2) burdened the legal system by filing two motions, expended judicial resources, and inconvenienced jurors; (3) acted knowingly; (4) caused harm to Schriver depriving him of counsel at trial and requiring him to appear multiple times to resolve it; (5) caused injury to the legal system, and (6) caused additional expenses. R0161-R0164. The court found aggravating factors of his prior dismissed discipline, failure to appear, pattern of misconduct, refusal to acknowledge wrongdoing, and substantial experience rising to suspension, with no mitigating circumstances existing. R0165-R0166, R0168.

Rasmussen was suspended for one year (1) with all but 181 days of the suspension stayed, as follows:

The Court will enter a suspension for one year in this matter but will stay all but 181 days. The Court is staying the imposition of the remaining time upon the following terms and conditions:

1. That he enter and complete an ethics and professional conduct course by the end of the 181 day suspension.
2. That he not practice law during the suspension and so certify that fact by affidavit.
3. That he have no violations of the rules for one year from the date of this Order.
4. That he will initiate a change in his office procedure whereby he personally communicates with the Court, its staff and opposing counsel and all such communication will be memorialized in his case file and will include the date, time and the named individual communicated with. Additionally, all changes of court dates must be followed by written communication to the Court.

R0169. Rasmussen filed to amend the Sanctions Order to a reprimand. R0171. OPC opposed it arguing a lack of grounds to alter it to a public reprimand. R0185-0186. The court denied the amendment on October 22, 2010. R0195.

On December 20, 2010, OPC informed Rasmussen (the “**December Letter**”) of

their knowledge that he had appeared before a court on December 17, 2010, telling him to cease and desist from the practice of law or be subject to an order to show cause. The December Letter stated his suspension was for six months and one (1) day subject to UT. LAWYER DISC. AND DISAB.14-526.

On January 24, 2011, Rasmussen filed his *Verified Petition for Reinstatement of Thomas V. Rasmussen*. (“**Petition**”), under UT. LAWYER DISC. AND DISAB. Rules 14-525 and 14-526 because of OPC’s December Letter, indicating he had complied with the terms and conditions of the Sanctions Order and asking that he be reinstated. R204. Rasmussen also filed his *Affidavit of Thomas V. Rasmussen* (“**Affidavit**”) on January 24, 2011, pursuant to UT. LAWYER DISC. AND DISAB. 14-524, indicating that by entry of the order he will have not practiced law for 181 days under the Sanctions Order. R0207. On February 17, 2011, Judge Dever indicated he would sign the reinstatement order because OPC had not objected. R0212. On February 17, 2011 an *Order of Reinstatement of Thomas V. Rasmussen* (“**Reinstatement Order**”) was entered. R0213.

On February 23, 2011, OPC filed a *Memorandum in Opposition to Order of Reinstatement of Thomas V. Rasmussen* (“**Reinstatement Opposition**”), arguing that the Reinstatement Order was premature under 14-525. R0215-R0218. On February 25, 2011 Rasmussen filed a *Reply to Memorandum in Opposition to Order of Reinstatement of Thomas V. Rasmussen* (“**Reinstatement Response**”) arguing that OPC’s Reinstatement Opposition to the Affidavit was untimely under 14-524, the deadline having passed February 7, 2011. R0219-R0225. On February 25, 2011 OPC filed it’s *The Office of Professional Conduct’s Reply to Reply to Memorandum in Opposition to Order of Reinstatement of Thomas V. Rasmussen* (the “**Reinstatement Reply**”), arguing in

favor of applying 14-525 since the suspension was for six months and one (1) day and Rasmussen had filed the Petition under 14-525. R0217-0222. OPC argued the Affidavit was inconsistent with 14-524, was deceptive, and not in compliance with UT. R. CIV. P. 7. R0217-0222.

On March 8, 2011, a hearing was held (the “**Affirmation Hearing**”) regarding the Reinstatement Opposition. R0241. The court affirmed the Reinstatement Order. *Id.* On March 29, 2011 the court issued its *Order* (“**Affirmation Order**”) affirming the Reinstatement Order, but indicating as follows:

The Court will not set aside its Order of reinstatement dated February 17, 2011. Thus, said Order will remain in full force and effect. However, the OPC may bring any information to the Court that it might have that Mr. Rasmussen acted in violation of its Order of Sanction in this case dated July 20, 2010.

R0263.

On March 17, 2011 OPC filed its *Motion for the Court to Consider Evidence of Thomas V. Rasmussen’s Failure to Comply with its Sanctions Order* and its *Memorandum in Support of Motion for the Court to Consider Evidence of Thomas V. Rasmussen’s Failure to Comply with its Sanctions Order*. (collectively, the “**Post-Judgment Motion**”), indicating the effective date of the Sanctions Order as August 19, 2010, with the Petition and Affidavit filed prematurely 158 days thereafter incorrectly indicating Rasmussen had not practiced law for 181 days. R0245-R0249. The Post-Judgment Motion argued Rasmussen had continued to practice law and had three dismissed bar complaints during his suspension, violating the Sanctions Order and warranting disbarment. R0250-0253.

On April 21, 2011 Rasmussen responded by filing his *Response to OPC’s Motion for the*

Court to Consider Evidence of Thomas V. Rasmussen's Failure to Comply with its Sanctions Order (“**Post-Judgment Response**”), conceding to OPC’s evidence of ongoing practice, stating that six (6) were withdrawals of counsel, twelve (12) were proceedings which he was winding up, and five (5) involved continuing matters until after he was reinstated. R270.

On April 25, 2011 OPC filed its *Reply to Memorandum in Support of Motion for the Court to Consider Evidence of Thomas V. Rasmussen's Failure to Comply with its Sanctions Order*. (“**Post-Judgment Reply**”), arguing Rasmussen’s concession. R0274-R0275. OPC sought disbarment based on a progressive discipline schematic. R0280.

On May 16, 2011 Rasmussen responded to the Post-Judgment Reply further clarifying the cases OPC had listed (“**Post-Judgment Response #2**”). R0501. On May 18, 2011, Rasmussen filed his *Amended Response to OPC's Motion for the Court to Consider Evidence of Thomas V. Rasmussen's Failure to Comply To Its Sanctions Order* (the “**Supplemental Post-Judgment Response**”), raising a procedural challenge to OPC’s failure to timely file an objection to the Affidavit within ten days as required by 14-524, and arguing that OPC committed prosecutorial misconduct by submitting additional pre-reinstatement evidence after the Reinstatement Order even after entry of the Affirmation Order denying the Reinstatement Opposition. R0512-R0513, R0517.

On July 19, 2011, the court entered its *Order* (the “**Disbarment Order**”), stating specifically as follows:

Rasmussen argues that the Court is without authority to consider his violation of the suspension because the OPC did not file a notice of violation before he was reinstated. The Court does not find any merit to this claim. The suspension entered by the Court was for one year with all but 181 days suspended. There is nothing in the Rules that states that violations of the

suspension provisions can only be brought during the active period of the suspension.

By his own admission, Rasmussen violated the terms and conditions of his suspension. He continued to handle cases and in fact accepted new clients during the period of suspension.

Rasmussen violated the Order of the Court. His disregard of the Order brings into play Rule 14-606(a). A review of the factors outlined in Rule 14-604 establish the following: First, there is no question that Rasmussen had a duty that was violated. The duty was complying with the Court Order. Second, his mental state was the stated need for money. Third, there was injury to the public and to the judicial system. A suspended attorney has no right to appear and represent individuals. Finally, there are no mitigating circumstances and the aggravating circumstances are clear. Rasmussen blatantly disregarded the Order of the Court for his own financial benefit. This violation was not a single episode but nearly two score. Rule 14-606(a) outlines the range of discipline for an attorney that violates a disciplinary order. The Court believes the appropriate sanction for violation of the suspension order is the next higher sanction.

This Court finds that the appropriate sanction for violations committed by Rasmussen is DISBARMENT.

R0523-R0524 (emphasis in the original).

On July 27, 2011, Rasmussen objected to the proposed findings, arguing against OPC's unsolicited presentation of a draft order. R0527. It was denied August 1, 2011. R0542. On July 27, 2011, Rasmussen filed to stay the Disbarment Order. R0529. The request was denied August 1, 2011. R0542. On July 27, 2011, Rasmussen filed his *Notice of Appeal*. R0536. The *Findings of Fact, Conclusions of Law, and Order of Disbarment*, was entered on August 1, 2011 (included in the defined term of "**Disbarment Order**" *supra*). R0544.

STATEMENT OF FACTS

Affirmation Hearing March 8, 2011

On March 8, 2011, the matter came for the Affirmation hearing on OPC's Reinstatement Opposition, as follows:

OPC stated the issue as whether or not Rasmussen's reinstatement applied under either 14-524 as Rasmussen asserted for suspensions less than six months, or 14-525 as OPC asserted for suspensions over six months. R0558 at p. 2-3. Rasmussen referenced his Reinstatement Response and asked the court to sustain its Reinstatement Order, citing that "this has created a tremendous hardship on me and those that I love and care about" but acknowledging that he bore the responsibility and desired to "see if I can get back in the saddle and support my family as I have before." R0558 at pp. 3-4.

OPC argued that the Sanctions Order stated Rasmussen's suspension as one year, invoking 14-525. R0558 at p. 4. OPC argued that Rasmussen's Petition was in line with 14-525, but acknowledging that 14-524 only required an Affidavit to start practicing immediately. R0558 at pp. 4-5. OPC conceded the ten day objection deadline for the Affidavit under 14-524. R0558 at pp. 4-5. However, OPC argued the Petition under 14-525 can be filed three months before the end of the suspension period, providing OPC sixty (60) days to object, and the court ninety (90) days to hold a hearing, with additional requirements under 14-525 outside the Sanctions Order, such as taking the "multi-professional responsibility thing." R0558 at pp. 5-6.

The court explained that it intended the suspension to be for six months and one (1) day, noting that it should not have used days in the Sanctions Order. R0558 at pp. 7-8.

OPC argued the Affidavit was to be filed under 14-524 at the end of the 181 days, but Rasmussen filed it only 158 days after. R0558 at p. 8. OPC received the Reinstatement Order on the 181st day. *Id.* OPC argued there was “no reason why we would ever think that that was an affidavit consistent with 14-524, which would trigger a response on our part.” R0558 at pp. 8-9.

OPC believed Rasmussen’s actions were “totally consistent” with 14-525; they proceeded accordingly by preparing a notice for the bar journal and serving discovery. R0558 at p. 9. OPC stated that they were doing their due diligence by checking their information, but believed Rasmussen had practiced during his suspension R0558 at p. 9. OPC argued that “[w]e need to make sure our evidence is solid, and that needs to be clarified before Mr. Rasmussen can begin practicing law...” R0558 at p. 9. OPC asked to set aside the Reinstatement Order and proceed under 14-525. R0558 at p. 10. OPC acknowledged a finding in Rasmussen’s favor would negate the proceedings under 14-525 stating “[t]here would be no need to answer our discovery.” R0558 at p. 10.

Rasmussen’s understanding when he filed the Affidavit was that 14-524 allowed a ten-day objection period for OPC *prior* to the reinstatement being in effect, so he filed it in advance so the reinstatement could occur on the 181st day. R0558 at p. 11. Absent objection from OPC, Rasmussen believed the court capable of reinstating him. R0558 at p. 12. Rasmussen also filed the Affidavit based on the Sanctions Order, which required that he undertake certain actions “by the end of the 181 day suspension.” R0558 at p. 12. Rasmussen acknowledged he had “probably created a little confusion” but that “[o]ut of an abundance of fear and caution” after receiving the December Letter, “not wanting to create

any confusion or unnecessary delay” he filed the Petition and an Affidavit and felt he had complied, albeit with “overkill.” R0558 at pp. 12-13.

The court questioned why Rasmussen thought 14-525 would not apply when the suspension had been for one year; he responded that the Sanctions Order only set forth conditions and referenced the end of 181 days. Tr. at p. 14. OPC argued Rasmussen was citing a subparagraph rather than the entire Sanctions Order, which was for one year upon which OPC relied. R0558 at p. 15.

OPC claimed it sent the December Letter because they thought Rasmussen was practicing law, and as a courtesy. R0558 at p. 16. OPC denied any affirmative duty to inform Rasmussen about application of 14-526. R0558 at p. 16. OPC mistakenly thought Rasmussen was referencing his Petition as the Affidavit, apparently failing to acknowledge the filing of two separate documents. R0558 at p. 16. Upon this mistaken idea, OPC argued that if he had filed an affidavit, they would have objected to it as premature. R0558 at p. 16.

The court questioned OPC whether the Sanctions Order should have included additional requirements if it fell under 14-525, to which OPC stated “he has to take the multi-state professional responsibility exam.” R0558 at p. 17. OPC conceded that reinstatement under 14-524 is automatic upon filing the Affidavit and cannot be interpreted otherwise. R0558 at p. 17.

OPC challenged the Affidavit as not meeting the requirements of 14-524, but stated that the Petition contained the necessary information for an Affidavit under 14-524. R0558 at pp. 18-19. OPC argued that the Affidavit was premature and had no significance under the rules, but that OPC had focused on the Petition. R0558 at pp. 18-19.

OPC argued the Sanctions Order did not list its effective date, but Rasmussen had located such under 14-526(a). R0558 at p. 19. OPC argued that specific reference to 14-525 was not required since the one-year suspension fell under its provisions. R0558 at p. 19. OPC noted the Petition was filed “way early,” so they did not respond to the Affidavit, but instead started their process under the Petition. R0558 at p. 20. OPC argued that a premature affidavit under 14-524 was a presumed “automatic objection” because the term had not expired, and it did not make sense to allow early filings under that rule. R0558 at p. 20.

Rasmussen clarified a separate Petition and Affidavit were filed, and he was not using the Petition as his Affidavit. R0558 at p. 21. Rasmussen filed the Affidavit under 14-524 and the Sanctions Order requirements. R0558 at p. 21. Rasmussen argued 14-524 did not prohibit early filings of an affidavit, stating that reinstatement could occur at the end of the suspension period. R0558 at pp. 21-22. Waiting to file the Affidavit would have required him to wait an additional ten days until reinstatement for OPC to object. R0558 at p. 22. Rasmussen argued that 14-524 simply states that the Affidavit had to be filed in anticipation of the end of suspension. R0558 at p. 22.

The court questioned Rasmussen why he thought 14-524 applied when it had ordered one-year and stayed all but 181 days of it. Tr. at pp. 22-23. Rasmussen responded that, the preamble to the conditions stated the suspension as one-year, but the conditions all addressed only a 181-day period. Tr. at pp. 23-24. Rasmussen stated, “I thought the balance of the suspension which was not to be imposed was there as a – the same as in a criminal sentence and a jail sentence – was there to make sure that I did not have violations of the

rules for one year, and that I initiated certain communication practices with the Court.” R0558 at p. 24.

Rasmussen believed the actual suspension to be 181 days, but “was laboring under the fact that there was some suspended time that could come back to haunt me if I did not fulfill obligations No. 3 and 4 of the Court’s order.” R0558 at p. 24. He “was of the opinion that if [he] fulfilled obligations No. 1 and 2 of the Court’s order, that the suspension would not exceed by any measure of time 181 days, the same as a jail sentence does not exceed 181 days if that is the time of the commitment with the balance suspended.” *Id.* The court articulated that it had intended that the suspension be for one year with a portion stayed, but absent clarity in the order the question was whether Rasmussen “is allowed to rely upon that, comply with what the Court said he had to do to be reinstated and file the necessary documents.” R0558 at p. 25.

The court ultimately determined it had not been clear in the Sanctions Order when it set the suspension at 181 days, particularly as to whether it was for less than or more than six months. R0558 at p. 27. The Reinstatement Order was affirmed as follows:

The question is, is should the Court now set aside that order. Well, I think in the interest of fair play and equity, I don’t think I can. I think that the Court made an error here, wasn’t clear in its order. I said 181 days; 181 days passed, and Mr. Rasmussen submitted the order to the Court and the Court signed it.

I think that if there’s any problems with what he’s done during the 181 days, certainly the OPC has the right to come back before the Court here and see if he violated the conditions of his suspension; and the Court then can entertain whether or not there should be another charge [sic] Mr. Rasmussen or an additional period of suspension ordered in this case.

Id.

Motion Hearing May 19, 2011

OPC presented evidence showing that Rasmussen practiced law after the effective date of his Sanctions Order. R0557 at p. 4. OPC argued against Rasmussen's reasoning that he was protecting clients by representing them, stating he should have protected them by finishing their cases and notifying them of his suspension. R0557 at p. 5. OPC argued there was no evidence that Rasmussen did anything to wind up his cases. R0557 at p. 7. OPC argued the Affirmation Order reinstated Rasmussen, but allowed OPC to present evidence of violations of the Sanctions Order. R0557 at p. 7. OPC argued they, "...accepted this order. We did not appeal it. Neither did Mr. Rasmussen." R0557 at p. 7. OPC argued that Rasmussen should be foreclosed from challenging procedural aspects of the case that were part of the Affirmation Order. R0557 at p. 7. OPC then ironically reiterated its previously determined challenges to the Affirmation Order. R0557 at pp. 7-10.

The court clarified the Motion Hearing pertained only to the "period of suspension, whatever the proper term should have been—and the Court noted that it should have said six months and a day, but it said 181 days-- ... and based upon that error made by the Court, I allowed your reinstatement based upon the rule, further stating as follows:

However, the issue that I allowed OPC to bring to me is whether or not during that six month period or those 181 day suspension that you violated the terms and conditions of the suspension order. That is that you practiced law during that period of time. That's the issues before the Court here today.

R0557 at p. 13.

OPC requested that Rasmussen be disbarred under a progressive discipline schematic based upon failure to comply with the Sanctions Order and the bar complaints that were filed, basing its argument on this Court's Johnson case. R0557 at pp. 11-12. Rasmussen

argued the finality of the Reinstatement Order and Affirmation Order, with 14-526(e) having required a determination of substantial compliance as a precondition to that reinstatement. R0557 at p. 14. Rasmussen argued that OPC had knowledge prior to the reinstatement as evidenced by their December Letter, but failed to present that evidence timely. R0557 at pp. 14-15.

When the court asked Rasmussen how he could reasonably believe he could go to court on December 17, 2010, when he was suspended, Rasmussen admitted he should not have done so, acknowledging that he made “errant judgment calls.” R0557 at p. 15. The court then asked about new clients and entering appearances of counsel during the suspension, to which Rasmussen replied as follows:

Well, I was going to lose my house. I was going to lose everything that I’ve worked 30 years for. I’ve had other attorneys come up to me after the fact and say, ‘Boy, if you’d have just asked we would have taken over your practice and helped you out.’

Well, my mind doesn’t think that way. I’m not scheming for ways to intentionally deceive; but Judge, this has been devastating to me. I have incurred over \$100,000 in debt, used up my savings. I have a house that is almost paid that was at risk. I have the – kind of the infrastructure of a law practice I was desiring to return to and did return to that was at risk.

I had a secretary whose husband has been at death’s door that I was going to no longer be able to provide an income to. I had people that relied on me, my spouse and my children, that I had failed by being suspended.

I was hoping not to lose everything in life, and I definitely, definitely, definitely curtailed my efforts except when it became life or death, if you will, in terms of my complete and utter financial ruin.

Unlike – unlike somebody that may be suspended and loses a job, they may lose their income, but they don’t have a continuing cost of trying to keep some infrastructure in place. Unlike somebody that’s a part of a big firm that may be suspended and others can absorb their workload, I was it. Not only did I have no one to absorb anything for me, and definitely I curtailed, I respect this Court, I always have –

R0557 at pp. 15-16. The court did not believe Rasmussen curtailed his practice based on the

evidence. R0557 at p. 17. It noted that Rasmussen had filed the Affidavit, but was now telling the court it was incorrect. *Id.* Rasmussen replied that the affidavit was based on “substantial compliance” reiterating his belief that he had curtailed his practice. *Id.* Rasmussen argued he only did minimal “to try and stay alive” and “it was the difference between life and death in terms – from a business, from an economic standpoint” with hope that he had “substantially complied.” R0557 at p. 17.

Rasmussen provided his 14-524 Affidavit and believed OPC would have brought its objection. R0557 at pp. 17-18. The court indicated that it had authorized OPC in the Affirmation Order to bring its objections later and Rasmussen had not objected. R0557 at p. 18. Rasmussen pointed out that regardless, OPC “was barred by statute of limitations, by estoppel, by waiver, by res judicata from bringing that up.” R0557 at p. 18. The court asked for the rule creating a deadline to bring violations of the Sanctions Order before the Court, to which Rasmussen replied that 14-524 applied. R0557 at p. 18.

Rasmussen argued that it was OPC own mistaken belief that caused them to overlook the ten-day deadline of 14-524. R0557 at p. 19. The court pointed out Rasmussen’s mistaken filing of a 14-525 Petition, to which Rasmussen indicated it was based on OPC’s December Letter referencing compliance with 14-526, which meant they thought 14-525 applied. R0557 at p. 19. Rasmussen further pointed out that the court agreed that 181 days was less than six months, as memorialized in the Affirmation Order. R0557 at p. 19.

The court sought clarification of Rasmussen’s position as follows:

You’re saying that this ten days to file an objection is the ten days to bring to the Court any information that you violated the terms and conditions; and if you violated the terms and conditions that – and they don’t catch it or see it, bring it to the Court’s attention, it can’t be done. Is that your position?

R0557 at p. 20. Rasmussen stated, “I don’t know why you would have a ten day cutoff or even a sixty day cutoff if these things were allowed to go on ad infinitum.” R0557 at p. 20. Rasmussen cited 14-501 that the rules are “to be construed so as to achieve substantial justice and fairness” which is what he believed occurred at the Affirmation Hearing, further citing that, “[t]he interests of the public, the Courts and the legal profession all require that disciplinary proceedings in all levels be undertaken and construed to secure the just and speedy resolution of every complaint.” R0557 at p. 21.

Rasmussen argued that 14-524 authorized an objection to be filed within ten days to toll the reinstatement, with OPC automatically given a hearing on that objection. R0557 at p. 22. Rasmussen believed OPC was trying to use the Affirmation Order to circumvent their own shortcomings in not presenting their case within the time limitations of 14-524. R0557 at p. 22. Rasmussen pointed out that OPC had not filed an order to show cause after the December Letter and had from December 20th to February 7th to investigate; however, they instead sought permission at the Affirmation Hearing after the fact to begin an investigation. R0557 at pp. 22-23. Rasmussen believed they relied on their mistaken interpretation that 14-525 applied and failed to timely object. R0557 at p. 23.

The court again sought clarification as follows:

Your position is...that if you violated the terms and conditions of the suspension, and that if it was a less than six month suspension, and you filed an affidavit saying you hadn’t practiced law and they didn’t object, that they are barred now to bring any complaint against you or any action against you or any revisiting to this Court for your violation of the order to suspend?

R0557 at p. 24. Rasmussen agreed and qualified this statement based on OPC’s stipulation to the Reinstatement Order via phone with the court clerk. R0557 at p. 25. Rasmussen

argued that OPC was ignoring the very rules that they were to uphold. R0557 at pp. 25-26. Rasmussen articulated that OPC's argument under 14-525 failed since it invoked application of 14-526, which contained preconditions to reinstatement, and OPC had stipulated to reinstatement. R0557 at p. 26.

OPC still argued that Rasmussen's suspension was for one-year and that the court intended it to be stayed for all but six (6) months and one (1) day. R0557 at p. 26. OPC reiterated its acceptance of the Affirmation Order, but argued that it was not entered under either 14-524 or 14-525, but simply resolved the reinstatement issue without doing so. R0557 at p. 27.

OPC argued that Rasmussen had not stopped practicing law. R0557 at p. 27. OPC argued that the December Letter was simply an "inkling" that Rasmussen might be practicing, but the rule did not require them to send him anything; it was just a courtesy. R0557 at pp. 27-28.

The court asked OPC to respond to the issue of the ten day objection deadline, and OPC conceded the answer was premised on a determination as to which rule applied. R0557 at p. 29. OPC argued the Affidavit did not meet 14-524 since it came only 158 days after the Sanctions Order. R0557 at p. 29. OPC argued that they were not bound by the rule under a premature filing of the Affidavit when Rasmussen had not complied with any of the conditions. R0557 at p. 29. OPC argued that under 14-525 a suspended lawyer could file their petition three (3) months early, allowing OPC 60 days to respond and the court 90 days to hold a hearing, with it all accomplished before the end of the suspension period.

R0557 at p. 30. However, OPC argued that an Affidavit cannot be filed early under 14-524. R0557 at p. 30.

OPC again argued that Rasmussen's was a one year suspension and his actions were consistent with 14-525, but notes that, "that ship has pretty much sailed...because of the Court's [Affirmation Order]. We are here today to talk about whether or not he practiced while suspended, in violation of the Court's order." R0557 at p. 31. The court asked OPC to respond to Rasmussen's argument that they failed to object. R0557 at p. 32. OPC responded that "the Court handled that procedural aspect of it by its [Affirmation Order], and we stand by that, and we're happy with that portion of it." R0557 at p. 32. OPC acknowledged that the Affirmation Order allowed Rasmussen to practice. R0557 at p. 32.

OPC argued the court never directed for inclusion in the Affirmation Order whether 14-524 or 14-525 applied, indicating that the court did not have to reach that conclusion. R0557 at p. 33. OPC stated on the record, "[t]he Court reinstated Mr. Rasmussen. So procedurally that issue has settled. There is really no standing for Mr. Rasmussen at this point in time to even assert that issue." R0557 at p. 33.

Rasmussen argued that 14-524 says nothing about when an affidavit can be filed, nor that it could only be filed after the period of suspension. R0557 at p. 34. Rasmussen argued that the Sanctions Order did not impose conditions contained in 14-526, that the Affirmation Order did not tell OPC "to what end that investigation would come" and that 14-526 indicates that the investigation was a precondition to reinstatement. *Id.*

SUMMARY OF THE ARGUMENT

The court exercised excess jurisdiction in proceedings conducted in accordance with UT. LAWYER DISC. AND DISAB. 14-524. On January 24, 2011, Rasmussen filed the requisite Affidavit under both 15-524 and the Sanctions Order. The court entered the Reinstatement Order on February 17, 2011, having received no objection but instead a stipulation to reinstatement from OPC's office. OPC opposed the Reinstatement Order on February 23, 2011, and received a hearing on March 8, 2011. At the Affirmation Hearing, OPC sought reversal of the Reinstatement Order by only arguing against application of 14-524. OPC only mentioned cursorily that it believed Rasmussen had violated the Sanctions Order, but presented no evidence and was ultimately found to have stipulated to Rasmussen's reinstatement by phone call with the court clerk. However, OPC requested that it be allowed to further investigate. The court entered the Affirmation Order, which OPC concedes concluded the reinstatement issue.

The court exceeded its jurisdiction by authorizing OPC to bring further evidence in the future challenging the Reinstatement Order outside the parameters of 14-524, creating an indefinite period of time to do so. The court erroneously entertained OPC's Post-Judgment Motion, which OPC believed it filed only pursuant to the court's authorization. OPC brought the Post-Judgment Motion without reference to any particular rule of procedure allowing such. The result was disbarment on evidence that was both discoverable and discovered by OPC prior to the ten (10) day time frame of 14-524, but brought and presented nearly four (4) months after the filing of the Affidavit, and three (3) months after entry of the Reinstatement Order.

This Court has recently charged attorneys with adequately notifying the parties and the courts of the post-judgment rule under which they seek relief. OPC's Post-Judgment Motion did not reference a specific rule of procedure, but relied entirely on the court's authorization to present further evidence in the future. Reference to a particular rule was requisite to obtain relief since, as OPC conceded below, the Reinstatement Order and Affirmation Order both settled the question of reinstatement of Rasmussen and remained unappealed by the parties.

Although OPC claims it did not seek reversal of the Affirmation Order by its Post-Judgment Motion, it presented its same argument to apply 14-525, which was contradictory to the Affirmation Order. OPC additionally presented "new" evidence that it had not presented previously during the 14-524 proceedings that culminated in the Reinstatement Order and the subsequent Affirmation Order, but did not argue how it had been incapable of obtaining or presenting this evidence during those proceedings. The December Letter evidences that OPC had more than a month after receiving notice of evidence to investigate further before Rasmussen even filed his Affidavit, in addition to the ten days thereafter in which to object.

OPC conceded it deliberately did not respond timely to the Affidavit because they thought it was premature, in insufficient form since 14-525 applied, and many other ever-changing reasons, which they could have argued in a timely filed objection but did not. OPC's only objection came late in the form of the Reinstatement Opposition, which was an unspecified post-judgment motion having been filed after the Reinstatement Order was entered. The court denied that Reinstatement Opposition, at which point the Affirmation

Order concluded the post-judgment matters and was subject only to another properly raised issue on post-judgment motion or appeal. OPC failed to properly specify its Post-Judgment Motion, and did not properly meet any of the grounds for obtaining reversal of the Reinstatement Order or Affirmation Order.

Alternatively, should this Court determine that the procedure was correctly undertaken by the court, Rasmussen had a right to rely on the Sanctions Order to dictate the sanction that should have been given him for violation of its conditions. Four (4) conditions were placed on Rasmussen in favor of staying all but 181 days of the one-year suspension. The Sanctions Order specifies that the remaining time of the one-year was suspended on those conditions; however, OPC wrongfully sought disbarment rather than a more appropriate lift of the stay under order to show cause proceedings. Rasmussen was placed on notice that he would be suspended for one-year if the four (4) conditions were not met, one of which specifically stated that he was to be able to attest to not having practiced law for 181 days. Upon determination of the violation of the conditions, the court should have lifted the stay and imposed the one-year sanction having put Rasmussen on notice that he was subjected to such.

Alternatively, should this Court determine that progressive discipline was appropriate rather than a lifting of the stay contained in the Sanctions Order, the court failed to take into consideration the mitigating circumstances which would not have warranted disbarment. The court found no mitigating circumstances; however, Rasmussen provided sufficient information and was both humble and accepting of responsibility for his actions, repeatedly acknowledging his errant lack of judgment during the suspension period. Disbarment was

excessive when considering the mitigating circumstances, and should be revisited by this Court to determine a more appropriate sanction.

ARGUMENT

ISSUE I: *Did the court exceed its jurisdiction in proceedings conducted under UT. LAWYER DISC. AND DISAB. 14-524 by entertaining OPC's objection to Rasmussen's reinstatement to the practice of law outside the scope of the ten-day period of time contained therein?*

UT. LAWYER DISC. AND DISAB. Rule 14-501 sets forth in pertinent part as follows:

- (c) ...These rules shall be construed so as to achieve substantial justice and fairness in disciplinary matters with dispatch and at the least expense to all concerned parties.
- (d) The interests of the public, the courts, and the legal profession all require that disciplinary proceedings at all levels be undertaken and construed to secure the just and speedy resolution of every complaint.

UT. LAWYER DISC. AND DISAB. 14-524 states as follows:

Reinstatement following a suspension of six months or less.

A respondent who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension upon filing with the district court and serving upon OPC counsel an affidavit stating that the respondent has fully complied with the requirements of the suspension order ... Within ten days, OPC counsel may file an objection and thereafter the district court shall conduct a hearing.

In Atwood v. Cox, this Court has held as follows:

Certainly excess of jurisdiction is lack of jurisdiction in regard to that judicial action which exceeds jurisdiction. It would appear that excess of jurisdiction means a case in which the court has initially proceeded properly within its jurisdiction but steps out of the jurisdiction in the making of some order or in the doing of some judicial act.

Ibid., 88 Utah 437, 55 P.2d 377, 384 (1936). Noncompliance with specific provisions of governing legislation or rules culminating in a judgment entered in excess of jurisdiction is void. *See, e.g., State in Interest of Baby Girl Marie*, 561 P.2d 1046, 1047 (Utah 1977).

In In re Discipline of Oliver it states that, “[s]ubject-matter jurisdiction is ‘authority to adjudicate the type of controversy involved in the action.’” *Ibid.*, 2011 UT 29, ¶8, 254 P.3d 181 (citation omitted). Furthermore, this Court stated that, “[p]leadings of some sort also are essential to invoke and confer jurisdiction of subject-matter of the action...[i]ndeed, “[o]nce a court imposes a valid sentence, it loses subject matter jurisdiction over the case.” Kramer v. Pixton, 72 Utah 1, 268 P. 1029, 1034 (Utah 1928), *citing* State v. Montoya, 825 P.2d 676, 679 (Utah Ct.App.1991). “Without subject matter jurisdiction, a court is powerless to adjudicate a case.” State v. Rhinehart, 2007 UT 61, ¶19, 167 P.3d 1046; *see* United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

In the Supplemental Post-Judgment Response, Rasmussen first challenged that OPC had not timely objected to his reinstatement within ten (10) days of the filing of the Affidavit under 14-524. R0513. Rasmussen further argued that OPC committed prosecutorial misconduct by continuing to challenge the Reinstatement Order, when it asked the court to look into his pre-reinstatement activities even after the court entered its Affirmation Order. R0517. At the Affirmation Hearing, OPC conceded they had only ten (10) days to object to the Affidavit. R0558 at pp. 4-5.

At the Affirmation Hearing, Rasmussen explained when he filed the Affidavit he believed 14-524 allowed a ten (10) day objection period for OPC *prior* to the reinstatement being in effect, so he filed the Affidavit in advance to allow that process to take place so the reinstatement could occur at the 181 day mark. R0558 at p. 11. Upon no objection from OPC, Rasmussen believed the Court capable of executing an order of reinstatement to finalize the proceedings. R0558 at p. 12.

At the Affirmation Hearing, the court stated as follows:

The question is, is should the Court now set aside that order. Well, I think in the interest of fair play and equity, I don't think I can. I think that the Court made an error here, wasn't clear in its order. I said 181 days; 181 days passed, and Mr. Rasmussen submitted the order to the Court and the Court signed it.

I think that if there's any problems with what he's done during the 181 days, certainly the OPC has the right to come back before the Court here and see if he violated the conditions of his suspension; and the Court then can entertain whether or not there should be another charge [sic] Mr. Rasmussen or an additional period of suspension ordered in this case.

R0558 at p. 27. The Affirmation Order memorialized the oral determination as follows:

The Court will not set aside its Order of reinstatement dated February 17, 2011. Thus, said Order will remain in full force and effect. However, the OPC may bring any information to the Court that it might have that Mr. Rasmussen acted in violation of its Order of Sanction in this case dated July 20, 2010.

R0263.

While there was much discussion among the parties and court below as to an interpretation of 14-524, the plain language speaks for itself. A respondent *shall* be reinstated at the end of the suspension period upon filing the requisite affidavit, and OPC counsel may file an objection “[w]ithin ten days” of receipt of the affidavit, and “thereafter the district court *shall* conduct a hearing.” 14-524 (emphasis added). The Affidavit was filed January 24, 2011, and the ten (10) day period ran February 7, 2011; the Reinstatement Order was entered February 17, 2011, on the 181st day after the effective date of the Sanctions Order. OPC's only objection came on February 23, 2011. Whether an objection under 14-524 or post-judgment in nature does not matter. The court afforded OPC its hearing under either on March 8, 2011, at which time OPC only argued that 14-525 should apply, mentioning that it believed it had evidence that Rasmussen had violated the Sanctions Order, but failing to

present that evidence. OPC sought to present the evidence at a future hearing *after* the court affirmed the Reinstatement Order consistent with 14-524.

OPC points out that the court never required reference in the Affirmation Order to 14-524 or 14-525; however, OPC believed it was unnecessary since the court resolved the reinstatement issue and allowed it to come back with further evidence. While this was a procedural anomaly in that the Affirmation Order could be read as applying both 14-524 and 14-525, presuming the regularity of such order it is clear that only 14-524 could apply since numerous provisions under 14-525 had not been satisfied as requisite preconditions to reinstatement as required by 14-526. Additionally, the Sanctions Order itself only required an affidavit, invoking application of 14-524 and not addressing any further requirements under 14-525 or 14-526.

Neither 14-524 nor 14-525 authorizes reinstatement with further hearings conducted thereafter to challenge such. The court initially proceeded properly within its jurisdiction under 14-524, but stepped outside of its jurisdiction in rendering that portion of the Affirmation Order that allowed further presentation of evidence after finality of the 14-524 proceedings, unless such language can be construed as nothing more than allowing a proper post-judgment motion to be filed, as more specifically addressed below. Atwood at 384. 14-524 does not specifically disallow hearings post-reinstatement; however, it must be read in conjunction with Rule 14-501 requiring that, “disciplinary proceedings at all levels be undertaken and construed to secure the just and speedy resolution of every complaint.” It was neither “just” nor “speedy” for the court to both affirm Rasmussen’s reinstatement in a final order and authorize open-ended further proceedings to challenge it.

The court exercised an excess of jurisdiction by entering a final order and then authorizing relitigation in the future, as addressed more particularly below. Without subject matter jurisdiction properly invoked post-judgment, the court was powerless to adjudicate the disbarment in this matter. *See, Rhinehart* at ¶19; *Cotton*, 535 U.S. at 630, 122 S.Ct. 1781. Noncompliance with 14-524 culminated in the Disbarment Order entered in excess of jurisdiction. *See, e.g., Baby Girl Marie* at 1047. This Court should reverse the Disbarment Order as void having been entered in excess of jurisdiction. *Id.*

ISSUE II: *Did the court abuse its discretion in relitigating Rasmussen's reinstatement or, alternatively, in granting OPC post-judgment relief from the Reinstatement Order when both OPC's objection and subsequent motion failed to adequately articulate or support the requests under applicable provisions of the Utah Rules of Civil Procedures?*

A. THE DISBARMENT PROCEEDINGS WERE BARRED BY THE DOCTRINE OF RES JUDICATA

In State in Interest of J.J.T., the Utah Court of Appeals undertook an analysis of the doctrine of res judicata as follows:

The doctrine of res judicata ... has evolved from common law jurisprudence to serve such public interests as "fostering reliance on prior adjudication," "preventing inconsistent decisions," "relieving parties of the cost and vexation of multiple lawsuits," and "conserving judicial resources." *Office of Recovery Servs. v. V.G.P.*, 845 P.2d 944, 946 (Utah App.1992) (citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980)).

Res judicata has two related but distinct branches, both of which are intended to promote judicial economy and the convenience afforded by finality in legal controversies. *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 389 (Utah App.1987). One branch, claim preclusion, or "pure" res judicata, bars, inter alia, the relitigation of claims which have been previously litigated between the same parties. *Id.* To invoke this branch of res judicata, three requirements must be satisfied:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). The other branch, issue preclusion, traditionally known as collateral estoppel, prevents relitigation of issues that have been decided, though the causes of action or claims for relief are not the same. *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983); *Copper State*, 735 P.2d at 389.

Ibid., 877 P.2d 161, 162-63 (Utah Ct. App. 1994). In Church v. Meadow Springs Ranch Corp., Inc. it states, “[t]he final adjudication of a claim for relief is binding on the parties and their privies and precludes a subsequent adjudication of the same claim.” *Ibid.*, 659 P.2d 1045, 1048 (Utah 1983)(citations omitted). “Res judicata bars not only the relitigation of claims which have been once adjudicated but also claims which should have been adjudicated in the initial proceeding but were not.” *Id.* (citations omitted). In Bradshaw v. Kershaw, it states as follows:

When a second claim, demand or cause of action is essentially the same as a prior claim, demand or cause of action which has gone to final judgment, res judicata means that neither of the parties can “again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action.”

Ibid., 627 P.2d 528, 531 (Utah 1981), *quoting* Wheadon v. Pearson, 14 Utah 2d 45, 46, 376 P.2d 946, 947 (1962). “Clearly, if an issue is actually raised by proper pleadings and treated as an issue in a case, it is conclusively determined by the first judgment.” Macris & Associates, Inc. v. Neways, Inc., 2000 UT 93, ¶40, 16 P.3d 1214.

At the Affirmation Hearing, OPC stated that “we think that there has been the practice of law during the course of – during the course of his suspension period.” R0558 at p. 9. OPC argued “[w]e need to make sure our evidence is solid, and that needs to be clarified before Mr. Rasmussen can begin practicing law...” R0558 at p. 9. OPC asked the court to set aside the Reinstatement Order and proceed under 14-525. R0558 at p. 10. OPC

also acknowledged that a finding by the court in Rasmussen's favor would negate the proceedings under 14-525. R0558 at p. 10.

A comparison of the transcripts from the Affirmation Hearing and the Motion Hearing indicate that OPC intended to relitigate the matters from the Affirmation Hearing at the latter, although conceding that Rasmussen's reinstatement had been concluded in the Affirmation Hearing. OPC argued at the Motion Hearing that, "the OPC accepted this [Affirmation] order. We did not appeal it. Neither did Mr. Rasmussen." R0557 at pp. 7, 32. OPC argued that "the Court handled that procedural aspect of [the reinstatement] by its [Affirmation Order], and we stand by that, and we're happy with that portion of it." R0557 at p. 32.

Rasmussen argued that the reinstatement was the finality of the proceedings and that 14-526(e) required a determination of substantial compliance as a precondition to that reinstatement. R0557 at p. 14. Rasmussen argued that, "while [OPC] had asked for the Court's permission to continue to investigate, the fact of the matter was is that [it] was barred by statute of limitations, by estoppel, by waiver, by res judicata from bringing that up." R0557 at p. 18. Rasmussen pointed out that OPC had stipulated to his reinstatement by phone call with the court clerk prior to the Reinstatement Order. R0557 at p. 25. Its Post-Judgment Motion was barred by the doctrine of res judicata.

First, both the Affirmation Hearing and the Motion Hearing involved the same parties. J.J.T. at 163. Second, OPC's claim that Rasmussen violated the Sanctions Order was presented in the Affirmation Hearing when OPC informed the court that they believed he had violated his suspension. R0558 at pp. 9-10; J.J.T. at 163. OPC failed to present its

evidence, asking that it be allowed to do so in the future under proceedings under 14-525. *Id.* However, under these 14-524 proceedings, OPC could and should have raised such evidence by timely objection to the Affidavit or in that Affirmation Hearing, but did not. J.J.T. at 163.

Third, as OPC concedes repeatedly, the Affirmation Hearing resulted in a final determination of Rasmussen's reinstatement. J.J.T. at 163. OPC told the court more than once how neither they nor Rasmussen appealed that order and that it concluded the reinstatement proceedings. R0557 at pp. 7 and 32. OPC went so far as to say that they were "happy" with that decision. *Id.*

However, the Disbarment Order evidences that the time frame during which the reinstatement was considered to be sustainable is the exact time frame containing evidence argued by OPC for disbarment. OPC sought disbarment on evidence predating the final order of reinstatement in this matter. The court and OPC relied only upon an portion of the Affirmation Order for support to hold the Motion Hearing at all—all while ignoring the preconditions to reinstatement mandated under 14-526(e); however, a court is without discretion or authorization to relitigate matters that have previously been fully litigated.

Rasmussen had a right to rely on the Reinstatement Order and subsequent Affirmation Order as the finality of that suspension period and for those orders to be binding upon the court and the parties. Church at 1048. When the Post-Judgment Motion was brought by OPC, it raised items it could have but failed to present before reinstatement. The prior matter—Reinstatement Opposition—had gone to final judgment; hence, "res judicata means that neither of the parties can 'again litigate that claim, demand or cause of

action or any issue, point or part thereof which he could have but failed to litigate in the former action.” Bradshaw at 531 (internal citation omitted). The court should not have entertained the Post-Judgment Motion brought by OPC, regardless of its erroneous authorization to do so in the Affirmation Order.

B. THE COURT ERRED IN GRANTING POST-JUDGMENT RELIEF TO OPC FROM RASMUSSEN’S REINSTATEMENT.

UT. R. CIV. P. 59 states as follows:

Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment: ... (a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. ... (b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Furthermore, UT. R. CIV. P. 60 discusses post-judgement motions as follows:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); ...

Under Workers Comp. Fund v. Argonaut Ins. Co., this Court determined that parties cannot file post-judgment motions without reference to the specific rule of procedure under which relief is sought and leave the task to the court to construe the motion within the rules. *Ibid.*, 2011 UT 61, ¶ 11, 266 P.3d 792, 795-97, *reh'g denied* (Dec. 8, 2011), *citing Gillett v. Price*, 2006 UT 24, ¶¶ 7-8, 135 P.3d 861. “Argonaut's motion was not captioned as a rule 59 motion, it did not cite to rule 59 or any other authority to show that Argonaut was entitled

to relief from judgment, nor was its motion accompanied by a supporting memorandum, as required by our rules.” Argonaut at ¶ 12. “In our system, the rules provide the source of available relief. They are designed to provide a pattern of regularity of procedure which the parties and the courts can follow and rely upon.” Gillett, at ¶ 8. “[A] movant’s failure to specify the rule governing the motion is unfairly prejudicial to the opposing party, whose task in preparing a response to the motion is made more difficult.” Argonaut at ¶ 13. “It should be Argonaut’s burden, not the burden of the district court or opposing counsel, to identify the rule under which it seeks relief from judgment.” *Id.* Argonaut’s motion “was neither captioned as a rule 60(b) motion nor did it cite to rule 60 or any other authority... [it] did not reference any of the circumstances enumerated in rule 60(b) as justifying relief from judgment... [and] the district court did not address rule 60(b) in its order denying Argonaut’s motion.” *Id.* at ¶ 14. This Court “refuse[d] to construe Argonaut’s ‘objection to judgment’ as a rule 60(b) motion.” *Id.*

Under Robinson v. Baggett, the Utah Court of Appeals has stated that, “[a]s a general rule, parties should allege all known grounds for relief in one motion for relief from judgment...” *Ibid.*, 2011 UT App 250, ¶ 23, 263 P.3d 411.

...[t]here must be finality, a time when the case in the court is really over and the loser must appeal or give up. Successive post-judgment motions interfere with that policy. And justice is not served by permitting the losing party to string out his attack on the judgment over a period of months, one argument at a time, or to make the first motion a rehearsal for the real thing the next month.

Id., citing Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 969 (Utah App.1989) (internal quotation marks omitted). Schettler’s second post-judgment motion for relief was barred by “ ‘law of the case’ because the ‘newly discovered evidence’ he asserted as the

ground for relief under his second motion ‘was available ... at the time he filed his first ... motion and with due diligence could have been included in the original motion,...’ *Id.*, citing Schettler. The Robinson court determined that a party may not file repeated post-judgment motions “until he either offers a meritorious ground for relief or exhausts himself and the court in an effort to do so.” *Id.*

In the instant matter, the Reinstatement Order was entered, the Reinstatement Opposition was filed by OPC and heard, and an Affirmation Order was entered affirming Rasmussen’s reinstatement to the practice of law. The Reinstatement Opposition was articulated as filed pursuant to 14-525, which did not apply under the court’s Affirmation Order. *See*, R0215-0218. Thus, Rasmussen considered it filed as a post-judgment challenge to the Reinstatement Order.

The oral and written determination by the court at the Affirmation Hearing indicated that OPC “may bring any information to the Court that it might have that Mr. Rasmussen acted in violation of its Order of Sanction” and “certainly the OPC has the right to come back before the Court here and see if he violated the conditions of his suspension; and the Court then can entertain whether or not there should be another charge [sic] Mr. Rasmussen or an additional period of suspension ordered in this case.” R0558 at p. 27, R 0263. The Affirmation Order affirmed the Reinstatement Order and all parties and the court agreed that it was the finality of those proceedings. Thus, this language authorizing the presentation of further evidence after entry of the final order can only be construed as post-judgment in nature.

The Post-Judgment Motion was filed by OPC only on the basis of the language of the Affirmation Order rather than pursuant to any applicable rules of civil procedures. Thus, Rasmussen approached it in the nature of post-judgment proceedings, challenging that the matter could not be relitigated and that OPC had maintained the ability to present the evidence in the prior Affirmation Hearing that it now sought to present in post-judgment proceedings. The court ultimately granted OPC post-judgment relief by entering the Disbarment Order.

UT. R. CIV. P. 59 authorizes a court, upon evidence of the grounds stated therein, to “open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:...” Under subsection (a)(4), the rule affords this relief on showing of “[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.” UT. R. CIV. P. 60(b)(2) also provides for relief from an order upon a showing of “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).”

Contrary to the dictated requirements of this Court, OPC did not file its Post-Judgment Motion under any specific provision of these rules. Argonaut at ¶¶ 11-15. Similar to Argonaut, OPC’s motion was not captioned as a rule 59 motion, it did not cite to rule 59 or any other authority to show that it was entitled to relief from the Reinstatement Order or Affirmation Order as required by the rules. *Id.* at ¶ 12. OPC’s “failure to specify the rule governing the motion is unfairly prejudicial” to Rasmussen, whose task in responding to and

now appealing the erroneous grant of such motion has been made more difficult. *Id.* at ¶ 13.

OPC made its challenges to the Reinstatement Order through its Reinstatement Opposition, which was also post-judgment in nature. As stated in Robinson, *supra*, “[t]here must be finality” and “[s]uccessive post-judgment motions interfere with that policy.” *Ibid.* at ¶ 23, *citing* Shettler at 969. “[J]ustice is not served by permitting the losing party to string out his attack on the judgment over a period of months, one argument at a time, or to make the first motion a rehearsal for the real thing the next month.” *Id.* The court’s procedure undertaken below in entertaining the Post-Judgment Motion did just that.

OPC was allowed to bring its first challenge under the Reinstatement Opposition that 14-525 should apply to defeat the Reinstatement Order, mentioning that it had evidence that Rasmussen had violated the Sanctions Order but failing to present that evidence. OPC was then erroneously authorized to bring additional evidence, post-judgment, by the court in subsequent proceedings even though it affirmed Rasmussen’s reinstatement and finalized the matter. The court then allowed the evidence, although it did not meet the criteria of “newly discovered,” and entered the Disbarment Order.

Similar to Robinson, the court should have denied OPC’s second Post-Judgment Motion as barred by “ ‘law of the case’ ” because the “newly discovered evidence” asserted as the ground for relief “was available ... at the time [OPC] filed [their] first [post-judgment] motion and with due diligence could have been included in the original motion.” *Ibid.* at ¶ 23. Absent a meritorious ground for relief under the applicable post-judgment rules, repeated motions for relief from a final order should not be entertained. *Id.*

The court abused its discretion in granting OPC relief under its improperly filed and

unsupported Post-Judgment Motion. Having entered the Disbarment Order as a result, such order should be reversed.

ISSUE III: *Alternatively if the procedure below is sustained by this Court, did Rasmussen have a right to rely on his sanction being in the form of the court lifting the stay and imposing the one-year suspension?*

UT. R. CIV. P. 7(f)(1) states that, “[a]n order includes every direction of the court, including a minute order entered in writing, not included in a judgment.” Under In re Discipline of Crawley, this Court stated as follows:

¶ 24 In Crawley’s case, we find that the district court appropriately exercised its discretion and uphold the sanction it imposed: a one-year stayed suspension with eighteen months of probation subject to a multitude of conditions. We also uphold the district court’s sanction with respect to Henderson and, in doing so, express the following concern. In *In re Doncouse*¹⁴ we stated that “[t]o serve as an effective deterrent for further misconduct, the penalty for violating an order of suspension must be more severe than the original suspension.”¹⁵ Henderson’s misconduct occurred, in part, while he was serving a two-year suspension, with all but six months of that suspension stayed. Although Henderson’s sanction in *this* matter should be more severe than the stayed suspension that he violated, we decline to impose a more severe sanction now because the OPC did not appeal on this issue. We thus uphold the sanction imposed by the district court of a one-year suspension with leave to petition the court for probation. But we put the bar and bench on notice that less severe terms of suspension and probation are inappropriate sanctions for an attorney who violates the terms of an existing suspension or probation.

Ibid., 2007 UT 44, ¶ 24, 164 P.3d 1232.

In the instant matter, the court entered the Sanctions Order specifically determining as follows:

The Court will enter a suspension for one year in this matter but will stay all but 181 days. The Court is staying the imposition of the remaining time upon the following terms and conditions:

5. That he enter and complete an ethics and professional conduct course by the end of the 181 day suspension.

6. That he not practice law during the suspension and so certify that fact by affidavit.
7. That he have no violations of the rules for one year from the date of this Order.
8. That he will initiate a change in his office procedure whereby he personally communicates with the Court, its staff and opposing counsel and all such communication will be memorialized in his case file and will include the date, time and the named individual communicated with. Additionally, all changes of court dates must be followed by written communication to the Court.

R0169.

Similar to the Crawley case, *supra*, the court herein opted to stay a portion of Rasmussen's suspension on certain conditions. However, unlike Crawley, OPC did not file an OSC on violations to pursue a lift of that stay. Instead, the matter was erroneously heard for disbarment under Post-Judgment Motion after Rasmussen had already been reinstated. Having done so, the Post-Judgment Motion maintained the benefit of both attaching itself to the prior proceeding for progressiveness, but yet also seeking relief outside those prior proceedings.

If the Post-Judgment Motion was in fact an extension of the suspension proceedings for the Sanctions Order as OPC and the court believed, then the proper sanction to implement for violation of the Sanctions Order was a lifting of the stay and imposition of the one-year suspension. Rasmussen reasonably believed that this was the sanction to which he was subjected if he violated such Sanctions Order.

At the Affirmation Hearing, Rasmussen stated that he believed the actual period of suspension to be 181 days, but that he was at risk for a one-year suspension if he failed to fulfill the conditions of the Sanctions Order. R0558 at p. 24. The court similarly stated that "when I entered this order, the suspension in this case, it was my intention that the

suspension be for one year and I was staying all but the time ... [s]o the question now comes down to ... whether or not Mr. Rasmussen is allowed to rely upon that, ..." R0558 at p. 25. The OPC also acknowledged the stay in Motion Hearing that "...February 16th [w]as the 181 days when the stay would have been up, ..." R0557 at p. 5.

OPC failed to seek an OSC against Rasmussen to lift the stay on the Sanctions Order, as it warned in its December Letter, instead seeking an excessive order of disbarment. The court erroneously allowed OPC to circumvent appropriate procedure in this matter by obtaining Rasmussen's disbarment on unarticulated and unsupported post-judgment filings when the sanction was appropriately set forth in the Sanctions Order. Rasmussen had the right to rely on the contents of the Sanctions Order, and the sanction in this matter should have been a one-year suspension as noticed to Rasmussen therein.

ISSUE IV: *Alternatively, did the court err in concluding that disbarment was the presumptively correct form of discipline and in failing to account for mitigating circumstances?*

A. THE COURT ERRED IN APPLYING RULE 14-606 RATHER THAN UNDERTAKING AN ANALYSIS UNDER RULE 14-605.

UT. LAWYER DISC. AND DISAB. Rule 14-509 states that, "[i]t shall be a ground for discipline for a lawyer to: ... (b) willfully violate a valid order of a court or a screening panel imposing discipline." Under the Rule 14-605 disbarment is appropriate under the following circumstances: Disbarment is generally appropriate when a lawyer:

- (a) Disbarment. Disbarment is generally appropriate when a lawyer:
 - (a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; ...

Rule 14-606 states as follows:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following principles generally apply in cases involving prior discipline.

(a) The district court or Supreme Court may impose further sanctions upon a lawyer who violates the terms of a prior disciplinary order.

(b) When a lawyer engages in misconduct similar to that for which the lawyer has previously been disciplined, the appropriate sanction will generally be one level more severe than the sanction the lawyer previously received, provided that the harm requisite for the higher sanction is present.

The Sanctions Order states that Rasmussen violated his duty by not appearing at the trial, burdening the public and the legal system by filing two motions to recuse the trial judge, expended judicial resources and inconvenienced jurors. R0161. The Disbarment Order states that Rasmussen violated the terms and conditions of his suspension, implicating Rule 14-606(a). R0524.

The court in this matter presumed that disbarment was the presumptively correct sanction, applying progressive discipline under Rule 14-606(a). However, for an escalation in severity to be appropriate under this rule, the additional conduct is required to be “similar to that for which the lawyer has previously been disciplined.” Rule 14-606(b). However, the Sanctions Order and the Disbarment Order evidence that the conduct was not similar in nature.

The initial Sanctions Order was based upon the failure to appear at trial and the filing of successive motions to recuse. These actions differ from practicing law while suspended. The plain language of Rule 14-606(b) does not support the court’s presumptive escalation of the discipline level. Instead, the matter was more appropriate to an application of Rule 14-605, which would have required a careful examination as to intent and whether any injury resulted from the conduct.

OPC presented no evidence to show how Rasmussen's behavior resulted in any injury, with the court only presumptively finding in this regard that "[a] suspended attorney has no right to appear and represent individuals." R0524. The court viewed Rasmussen's explanation as to why he had undertaken the conduct at issue--concern for supporting his family and the livelihoods of those employed by him--as his "own financial benefit" and "need for money." R0524. Rasmussen, however, had informed the court that he had incurred over \$100,000 in debt, depleted his own personal savings, and was simply trying to maintain the infrastructure of his nearly 30 year sole-practitioner business, doing as little as possible to accomplish that. If indeed Rasmussen had been disregarding the Sanctions Order the entire time in favor of making money, he would not have incurred the debt nor depleted his own savings but rather continued practicing as usual. Rasmusen took responsibility for his actions in this matter, and voiced his concern for those whom he had let down, including his family and employees.

Although the concept of 30 appearances and 14 filings by Rasmussen in the six (6) month period seems voluminous, it is not presumptively evident of a complete disregard for the Sanctions Order. A closer look indicates that the majority of the items presented by the OPC were very minor matters, although concededly still considered the practice of law from which Rasmussen was suspended. From the information submitted by OPC at R0284-R0489, the appearances include eleven (11) for scheduling purposes, two (2) for withdrawal, three (3) for prosecutor dismissals, four (4) for continuances, two (2) motion hearings, three (3) entries of pleas, four (4) sentencings, and one (1) trial on a Class C misdemeanor case. The pleadings filed were nine (9) standard appearance forms, and five (5) motions.

Rasmussen conceded each of these in open court, but explained that his representations were deliberately minimal in attempt to substantially comply with the Sanctions Order; nonetheless, he fully conceded at the Disbarment Hearing that, in hindsight, he made some errant judgment calls in all of these representations during his suspension. Rasmussen also indicated he refrained from the practice of law after receiving OPC's December Letter of warning until his reinstatement.

An analysis under Rule 14-605 rather than application of Rule 14-606 would show that Rasmussen was not intentionally trying to deceive, and reasonably believed he was substantially complying with the Sanctions Order. Although it became clear to him that he was not in compliance, he did not try to minimize his responsibility. An analysis under Rule 14-605 would have favored a more severe sanction than was previously afforded, but not severe enough to support disbarment. In In re Discipline of Doncouse, this Court has stated, “[w]e do not administer the sanction of disbarment lightly; we understand its devastating effects on an attorney.” *Ibid.*, 2004 UT 77, ¶16, 99 P.3d 837 (citations omitted).

Should this Court determine in the instant matter that the procedures undertaken below were appropriate under 14-524, the Disbarment Order nonetheless was excessive in that the application of Rule 14-606 to the proceedings was error. The discipline imposed should not have been under the progressive discipline schematic, but rather under Rule 14-605 for imposition of sanctions in a matter substantially differing from the prior actions leading to the Sanctions Order.

B. THE COURT ERRED IN NOT CONSIDERING MITIGATING CIRCUMSTANCES.

UT. LAWYER DISC. AND DISAB. Rule 14-607 states in pertinent part as follows:

After misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose.

...

(b) Mitigating circumstances. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating circumstances may include: (b)(1) absence of a prior record of discipline; (b)(2) absence of a dishonest or selfish motive; (b)(3) personal or emotional problems; ... (b)(5) full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings; ... (b)(7) good character or reputation; ... (b)(10) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay; (b)(11) interim reform in circumstances not involving mental disability or impairment; (b)(12) imposition of other penalties or sanctions; (b)(13) remorse; and (b)(14) remoteness of prior offenses.

The Disbarment Order specifically found that, “there are no mitigating circumstances and the aggravating circumstances are clear. Rasmussen blatantly disregarded the Order of the Court for his own financial benefit. This violation was not a single episode, but nearly two score.” R0524. The court considered Rasmussen’s articulated need for money to keep his family and business afloat as an aggravating factor demonstrative of a selfish motive; however, this was in fact a mitigating circumstance and should have been considered under Rule 14-607(b)(3) as a “personal or emotional problem.”

Rasmussen articulated his desire for continuity of representation for some of these clients as a way of helping them. Rasmussen also articulated his concern for having let down his family and employees and wanting to ease the impact of his errant judgments on them.

Rule 14-607(b)(2) allows evidence of the “absence of a selfish motive as a mitigating circumstance, which should have been considered at a minimum as an offset to the aggravating effects of what the court concluded was Rasmussen’s selfish desire of his “own financial benefit” under Rule 14-607(a)(2). R0524. The court failed to give due weight to potentially mitigating circumstances and found aggravating circumstances where it should not have.

Other mitigating factors were also applicable to this matter. Under Rule 14-607(b)(1), the absence of a prior record of discipline applied in that Rasmussen had a 29-year career with a virtually clean record of conduct but for the Sanctions Order and subsequent Disbarment Order in these proceedings. Pursuant to Rule 14-607(b)(5), Rasmussen took full responsibility and freely disclosed his conduct to the court, maintaining a cooperative attitude toward the proceedings. If Ramsussen is denied relief under Arguments I and II, *supra*, OPC’s delay in presentation of its evidence would be a mitigating factor under Rule 14-607(b)(10), particularly where Rasmussen was prejudiced as a result in reasonably believing the Reinstatement Order and/or Affirmation Order was the conclusion of such proceedings. Pursuant to Rule 14-607(b)(11), there was an interim reform on Rasmussen’s part upon receiving the December Letter to cease and desist from OPC, having then realized the error in his judgment. Under 14-607(b)(12) Rasmussen paid \$2000 in sanctions. Rasmussen relayed much remorse on the record for his actions, which supports the factor contained in Rule 14-607(b)(13).

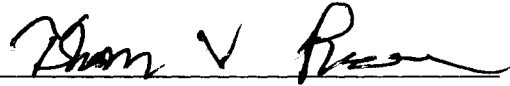
The court failed to consider any of these mitigating circumstances, erroneously finding instead that there existed none. It considered some factors aggravating that should

have instead been considered mitigating under Rule 14-607. Considering these factors in cases that have previously been before this Court, disbarment was an excessive sanction.

CONCLUSION

WHEREFORE, based upon the foregoing, Rasmussen respectfully requests that this Court grant him the relief which he requests and any further relief that this Court deems appropriate in this matter.

DATED this 4th day of June, 2012.



Thomas V. Rasmussen
Pro se Appellant

RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

Appellant herein certifies that this brief is in compliance with the limitations contained in UT. R. APP. P. 24(f)(1) in that it contains 14,000 words and 1,194 lines of text, as evidenced by use of a MicroSoft Word 2007 system.

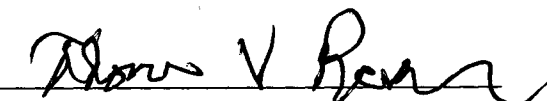


Thomas V. Rasmussen

CERTIFICATE OF MAILING

I hereby certify that, on the 4th day of June, 2012, I sent by first-class mail, postage-prepaid, true and correct copies of the *Brief of Appellant* to the following:

Office of Professional Conduct
645 South 200 East
Salt Lake City, UT 84111



Addendum “A”

Findings of Fact, Conclusions of Law, and Order of Disbarment,
dated August 1, 2011 (the “**Disbarment Order**”)

Billy L. Walker, #3358
Senior Counsel
Utah State Bar
Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

FILED DISTRICT COURT
Third Judicial District
AUG 01 2011
SALT LAKE COUNTY
By ESD
Deputy Clerk

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

**In the Matter of the
Discipline of:**

Thomas V. Rasmussen, #02693

Respondent.

)
) **FINDING OF FACT, CONCLUSIONS OF
LAW, AND ORDER OF DISBARMENT**
)

) **Civil No. 090908841**
)

) **Judge L A. Dever**
)

This matter came before the Court upon for hearing on the request of the Utah State Bar Office of Professional Conduct (OPC) for the Court to consider evidence of Thomas V. Rasmussen's (Rasmussen) Failure to Comply with the Sanction Order issued by the Court on July 21, 2010.

FINDINGS OF FACT

A Sanction Order was issued by this Court on July 21, 2010. The Order provided that Rasmussen was suspended for one year with all but 181 days suspended. Pursuant to Rule 14-526(a), the effective date was 30 days later on August 20, 2010. The 30 day period provided by the Rule is to allow Rasmussen the time to wind down his practice and cease representing clients.

544

The evidence presented by the OPC establishes that Rasmussen continued to practice beyond the August 20th deadline. Additionally, no evidence was presented that Rasmussen complied with the requirement that he obtain consent from his clients to wind down after giving full disclosure of the Court's Order.

The evidence established that during the period of suspension Rasmussen made 36 appearances in 17 courts. The evidence establishes that there were eleven cases where Rasmussen entered an appearance on the case after the effective date of his suspension (Robledo (2), Clarke, Smoot, Thangaraj, Willis, Poole, Gibson, Tait, Webster, and Robertson). The evidence presented by the OPC itemizes nine cases where he appeared where charges were not even filed against his clients until after the effective date of his suspension (Robledo, Wiersma (2), Thangaraj, Willis, Poole, Gibson, Tait, Webster). This alone establishes he was taking on new matters during his suspension.

Rasmussen filed with the Court an affidavit stating that during the period of suspension he had not practiced law. The evidence establishes that the affidavit was not truthful.

Rasmussen stated in Court on May 19, 2011, that he violated the suspension Order. His position was that because he needed money he had to violate the Order and practice law.

CONCLUSIONS OF LAW

Rasmussen argues that the Court is without authority to consider his violation of the suspension because the OPC did not file a notice of violation before he was reinstated. The Court does not find any merit to this claim. The suspension entered by the Court was for one year with all but 181 days suspended. There is nothing in the Rules that states that violations of the suspension provisions can only be brought during the active period of the suspension.

By his own admission, Rasmussen violated the terms and conditions of his suspension. He continued to handle cases and in fact accepted new clients during the period of suspension.

Rasmussen violated the Order of the Court. His disregard of the Order brings into play Rule 14-606(a). A review of the factors outlined in Rule 14-604 establish the following: First, there is no question that Rasmussen had a duty that was violated. The duty was complying with the Court Order. Second, his mental state was the stated need for money. Third, there was injury to the public and to the judicial system. A suspended attorney has no right to appear and represent individuals. Finally, there are no mitigating circumstances and the aggravating circumstances are clear. Rasmussen blatantly disregarded the Order of the Court for his own financial benefit. This violation was not a single episode but nearly two score. Rule 14-606(a) outlines the range of discipline for an attorney that violates a disciplinary order. The Court believes the appropriate sanction for violation of the suspension order is the next higher sanction.

The Court finds that the appropriate sanction for violations committed by Rasmussen is DISBARMENT.

ORDER

IT IS THEREFORE ORDERED that Thomas V. Rasmussen be disbarred effective 30 days from the date of this Order, pursuant to Rule 14-526(a) of the Rules of Lawyer Discipline and Disability. Mr. Rasmussen shall comply with all requirements of Rule 14-526 of the Rules of Lawyer Discipline and Disability.

IT IS FURTHER ORDERED THAT during the period of disbarment, Mr. Rasmussen is hereby enjoined and prohibited from practicing law in the State of Utah, holding himself out as an attorney at law, performing any legal services for others, giving legal advice to others, accepting any fee directly or indirectly for rendering legal services as an attorney, appearing as counsel or in any representative capacity in any proceeding in any Utah court or before any Utah administrative body as an attorney (whether state, county, municipal, or other), or holding himself out to others or using his name in any manner in conjunction with the words "Attorney at Law", "Counselor at Law", or "Lawyer."

IT IS FURTHER ORDERED that Mr. Rasmussen is to reimburse to the Utah State Bar Fund for Client Protection for any money that the Fund pays based upon its rules.

IT IS FURTHER ORDERED THAT to be readmitted to the practice of law from this Order, Mr. Rasmussen must fully comply with the provisions of Rule 14-525 of the Rules of Lawyer Discipline and Disability.

Entered this 30 day of July, 2011.

BY THE COURT:


Honorable L. A. Dayer
Third Judicial District Judge


CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2011, I mailed via United States mail, first-class postage pre-paid, a true and correct copy of the foregoing proposed FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER OF DISBARMENT to:

Thomas V. Rasmussen
4659 South Highland Drive
Salt Lake City, Utah 84117

Respondent

Alisa Webb

FILED
THIRD DISTRICT COURT
11 AUG -4 AM 12:03
SALT LAKE DEPARTMENT
BY 
DEPUTY CLERK


Billy L. Walker, #3358
Senior Counsel
OFFICE OF PROFESSIONAL CONDUCT
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

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

In the Matter of the Discipline of:)	CERTIFICATE OF SERVICE
)	
)	
Thomas V. Rasmussen, #2693)	Civil No. 090908841
)	
Respondent.)	Judge LA Dever

I hereby certify that on the 2nd day of April, 2011, I caused to be mailed via United States first class mail, postage prepaid, a true and correct copy of the FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISBARMENT in the above matter to Thomas V. Rasmussen, 4659 South Highland Drive, Salt Lake City, Utah 84117.

DATED this 2nd day of August, 2011.



Billy L. Walker
Senior Counsel
Office of Professional Conduct

FWM

Addendum “B”

Verified Petition for Reinstatement of Thomas V. Rasmussen,
dated January 24, 2011 (the “**P**etition”).

THOMAS V. RASMUSSEN, #2693
4659 So. Highland Drive
Salt Lake City, Utah 84117
Telephone: (801) 484-3000
Facsimile: (801) 273-1089

FILED
11 JAN 24 PM 3:44
CLERK OF DISTRICT COURT
SALT LAKE COUNTY
BY DC
DEPT. OF COURTS

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

In the Matter of the	:	VERIFIED PETITION FOR
Discipline of:	:	REINSTATEMENT OF
	:	THOMAS V. RASMUSSEN
Thomas V. Rasmussen, #2693	:	Civil No. 090908841
	:	Judge: L. A. Dever
	:	

COMES NOW RESPONDENT, Thomas V. Rasmussen, and hereby requests this Court to reinstate him as an Attorney at Law in good standing, in the State of Utah. This request is based on Respondent's compliance with the terms and conditions of the Court's Order of Sanction, dated July 20, 2010.

The Court and the OPC should be made aware that, during the course of Respondent's suspension and the attendant hardships brought on by said suspension, Respondent has had many quiet opportunities to be introspective about his suspension. I would like everyone to know that I take full ownership and accountability for every decision I made that resulted in the consequence of my being suspended. I do not blame any person, other than myself, for

204

my predicament; and I do not feel like a victim of the judicial system. I believe that most people bring adverse consequences upon themselves because of their own choices in life. After all, life is one continuing lesson in cause and effect. My decisions have created actual or potential harm not only to the judicial system but to people for which I have a responsibility to care (e.g., clients, my secretary, and my family). During the last six months, as sole practitioner, I have been devastated financially, having had to cash in fully my only 401(k) plan, with the 10% penalty for early withdrawal, and having to deplete my savings down to a sum of \$10.00, the amount required to keep my account open. Additionally, I have had to borrow a substantial amount on my Home Equity Line of Credit. All of the above actions have been done in an effort to not lose my home and to meet my on going financial obligations at my law office. Most, if not all, of my law office obligations exceed six months in duration, so I have had to pay for my respective obligations as they came due (e.g., advertising, bar dues, CLE, phone lines, secretary, etc.).

Please reinstate me at the earliest possible time, as I am running out of resources to sustain my office and my family. Again, I bear absolutely no ill will toward anybody for my suspension and believe that by taking a full accounting of my decisions I have grown as a person and as a lawyer.

205

DATED this 24 day of January, 2011.

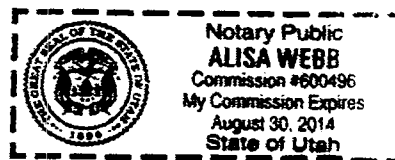
Thomas V. Rasmussen
THOMAS V. RASMUSSEN
Respondent

VERIFICATION AND ACKNOWLEDGEMENT

That personally appeared before me **THOMAS V. RASMUSSEN**, who has stated to me that the above-stated facts are based upon his personal knowledge and are truthful.

SUBSCRIBED AND SWORN to before me this 24th, day of January, 2011, by **Thomas V Rasmussen**.

Alisa Webb
Notary Public



2011

Addendum “C”

Affidavit of Thomas V. Rasmussen,
dated January 24, 2011 (the “**Affidavit**”).

FILED DISTRICT COURT
Third Judicial District

2011 29 2011

2000

3

Deputy Clerk

In the Matter of the : AFFIDAVIT OF
Discipline of: THOMAS V. RASMUSSEN
:
Thomas V. Rasmussen, #2693 : Civil No. 090908841
:
Judge: L. A. Dever
:

COMES NOW THOMAS V. RASMUSSEN, the undersigned affiant, having been first duly sworn upon oath, and deposes and states as follows:

- 207

4. On July 20, 2010, Judge L. A. Dever of the Third Judicial District Court, Salt Lake County, State of Utah, suspended me for 181 days.

5. I have not practiced law for a total of 181 days up to the time of my anticipated reinstatement in this matter.

DATED this 24 day of January, 2011.

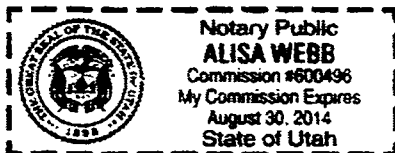
Thomas V. Rasmussen
THOMAS V. RASMUSSEN
Affiant

VERIFICATION AND ACKNOWLEDGEMENT

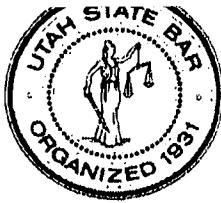
That personally appeared before me **THOMAS V. RASMUSSEN**, who has stated to me that the above-stated facts are based upon his personal knowledge and are truthful.

SUBSCRIBED AND SWORN to before me this 24th, day of January, 2011, by **Thomas V Rasmussen**.

Alisa Webb
Notary Public



208



Certificate of Attendance

I hereby certify that I attended the following course approved by the Utah State Board of Continuing Legal Education.

Tom Rasmussen

Signature of Attendee

Course: OPC Ethics School: What they Didn't Teach you in Law School
Date: January 19, 2011
Location: Utah Law & Justice Center
CLE: 6 Hrs. ethics (incl. 1 professionalism/civility credit)

Please RETAIN this certificate for your records!

209

FILED DISTRICT COURT
Third Judicial District

JAN 28 2011

SALT LAKE COUNTY

by [Signature] Deputy Clerk

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing VERIFIED PETITION FOR REINSTATEMENT OF THOMAS V. RASMUSSEN, accompanying AFFIDAVIT OF THOMAS V. RASMUSSEN and a CERTIFICATE OF ATTENDANCE TO OPC ETHICS SCHOOL, were hand delivered to the Office of Professional Conduct at 645 South 200 East, Salt Lake City, Utah 84111.

Dated this 24 day of January, 2011.

[Signature]
Thomas V. Rasmussen

Please file this
Cert. of Hand Del.
in Case #090908841
Discipline of:
Thomas V. Rasmussen
#2693

210

Addendum “D”

Order of Reinstatement of Thomas V. Rasmussen,
dated February 17, 2011 (the “**Reinstatement Order**”)

FILED DISTRICT COURT
Third Judicial District

FEB 17 2011

By [Signature]
SALT LAKE COUNTY
Deputy Clerk

THOMAS V. RASMUSSEN, #2693
4659 So. Highland Drive
Salt Lake City, Utah 84117
Telephone: (801) 484-3000
Facsimile: (801) 273-1089

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

In the Matter of the	:	ORDER OF REINSTATEMENT OF
Discipline of:	:	THOMAS V. RASMUSSEN
	:	
Thomas V. Rasmussen, #2693	:	Civil No. 090908841
	:	Judge: L. A. Dever
	:	

Based upon Respondent's Verified Petition for Reinstatement and accompanying documentation, and the fact that more than 181 days from the effective date of the Court's Order of Sanctions, dated July 20, 2010, has elapsed, and for good cause appearing, it is hereby;

ORDERED, ADJUDGED, & DECREED, that Thomas V. Rasmussen, #2693, is hereby Reinstated as an Attorney at Law in good standing in the State of Utah.

DATED this 17 day of February, 2011.

BY THE COURT:


[Signature]
Judge L. A. DEVER

213

CERTIFICATE OF MAILING

I hereby certify that I mailed postage pre-paid a true and correct copy of the foregoing Order of Reinstatement of Thomas V. Rasmussen to the Office of Professional Conduct at 645 South 200 East, Salt Lake City, Utah 84111.

Dated this 17 day of February, 2011.


A. L. Zdunich
Secretary

Addendum “E”

Order, dated March 29, 2011
(the “**Affirmation Order**”)

FILED DISTRICT COURT
Third Judicial District

MAR 30 2011

SALT LAKE COUNTY

By _____ Deputy Clerk

Billy L. Walker, #3358
Senior Counsel
Diane Akiyama, #7125
Assistant Counsel
Utah State Bar
Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

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

**In the Matter of the
Discipline of:**

)
) **ORDER**
)
)

**Thomas V. Rasmussen, #02693
Respondent.**

) **Civil No. 090908841**
) **Judge L. A. Dever**
)


The above entitled matter is before the Court for hearing on the Utah State Bar's Office of Professional Conduct's ("OPC"), Memorandum in Opposition to the Reinstatement of Thomas V. Rasmussen filed to contest an Order of Reinstatement signed by the Court on February 17, 2011. Billy L. Walker appeared on behalf of the OPC. The Respondent, Thomas Rasmussen appeared accompanied by counsel, James Deans. In addition to reviewing the submissions of the parties regarding the February 17, 2011 order, the Court heard oral argument. Therefore, being duly advised in the premises, the Court makes the following ruling:

2102

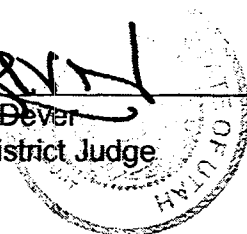
The Court will not set aside its Order of reinstatement dated February 17, 2011. Thus, said Order will remain in full force and effect. However, the OPC may bring any information to the Court that it might have that Mr. Rasmussen acted in violation of its Order of Sanction in this case dated July 20, 2010.

Entered this 29 day of March, 2011.

BY THE COURT:



Honorable L.A. Dever
Third Judicial District Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2011, I mailed via United States mail, first-class postage pre-paid, a true and correct copy of the foregoing proposed

ORDER to:

James H. Deans
440 South 700 East #101
Salt Lake City, Utah 84102

Counsel for Respondent

Alisa Webb

Addendum “F”

Order of Sanction, dated July 21, 2010
(the “**Sanctions Order**”)

JUL 21 2010

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of::

ORDER OF SANCTION

THOMAS V. RASMUSSEN, #02693

CASE NO. 090908841

Respondent.

Judge L. A. Dever

This matter was before the Court on the Matter of the Discipline of Thomas V. Rasmussen. The Court previously found that the respondent had violated the Rules of Professional Conduct 8.4(a) and 8.4(d). The Office of Professional Conduct (OPC) was represented by Diane Akiyama. The respondent was present and represented by James H. Deans. The Court having considered the aggravating and mitigating circumstances, finds and concludes as follows:

PRELIMINARY STATEMENT

The Standards for Imposing Lawyer Sanctions of the Supreme Court Rules of Professional Practice ("Standards") are the framework of rules used by the courts to impose the appropriate sanction for broad categories of misconduct. The Standards explain that:

[t]he purpose of imposing lawyer sanctions is to ensure and maintain the high standard of professional conduct required

154

of those who undertake the discharge of professional responsibilities as lawyers and to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or likely to be unable to discharge properly their professional responsibilities.

Rule 14-602(b), Standards.

Pursuant to the Standards, "[a] disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer has engaged in professional misconduct." Rule 14-603(a), Standards.

Factors a Court should consider in imposing a sanction are: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; (d) and the existence of aggravating or mitigating factors." Rule 14-604, Standards. The Standards also set forth presumptive appropriate sanctions, absent aggravating or mitigating circumstances. See Rule 14-605, Standards.

Pursuant to the Standards, a Court determines what would be the appropriate presumptive sanction, then considers and weighs aggravating and mitigating circumstances to decide what sanction to impose. Non-exhaustive lists of these factors are set forth in the standards. See Rule 14-607, Standards. Aggravating circumstances are actors that might justify an increase in the discipline imposed;

155

mitigating circumstances are those that might justify a decrease in the discipline imposed. See, Id.

FINDINGS OF FACT

Based on the Court's Findings of Fact and Conclusions of Law that were entered on April 29, 2010, the Court has already found the following facts:

1 Mr. Rasmussen is an attorney licensed in the State of Utah and a member of the Utah State Bar.

2 According to Utah State Bar records, Mr. Rasmussen has been a member of the Utah State Bar since 1981.

3 The Complaint was filed on behalf of the Utah State Bar's Office of Professional Conduct as directed by the Ethics and Discipline Committee of the Utah Supreme Court, and is based upon an Informal Complaint submitted against Mr. Rasmussen by the OPC.

4 The OPC served a Notice of Informal Complaint (NOIC) on Mr. Rasmussen on October 22, 2008.

5 A Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court heard the matter on March 5, 2009.

6 At the conclusion of the hearing on March 5, 2009, the

166

Screening Panel directed the OPC to file a formal Complaint against Mr. Rasmussen.

7 Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Supreme Court Rules of Professional Practice, Rules of Lawyer Discipline and Disability.

8 Venue is proper in this Court pursuant to Rule 14-511(b), Rules of Lawyer Discipline and Disability in that, at all relevant times, Mr. Rasmussen resided or practiced law in Salt Lake County.

9 Mr. Rasmussen served as a defense counsel in the case of State of Utah v. John Schriver in the Seventh District Court of San Juan County.

10 On August 20, 2007, Mr. Rasmussen appeared in court with his client for the arraignment hearing.

11 On August 20, 2007, at the arraignment hearing, the Court set a trial date of November 9, 2007.

12 At the arraignment hearing on August 20, 2007, the Court informed Mr. Rasmussen that the jury would be summoned on October 26, 2007, and that plea bargains would not be accepted after that date, except on a showing of why the agreement could not have been arranged

157

prior to that time.

13 On October 26, 2007, Mr. Rasmussen had some discussions with the prosecution about a possible plea agreement.

14 The prosecutor reminded Mr. Rasmussen of the Court's instructions, and cautioned that any plea would be conditioned upon the Court's willingness to depart from its rule.

15 The prosecutor informed Mr. Rasmussen that Mr. Rasmussen would need to confer with the Court so the parties could obtain the Court's approval via a telephone conference.

16 On October 29, 2007, Mr. Rasmussen sent to the prosecutor a letter reciting the plea agreement.

17 On October 29, 2007, Mr. Rasmussen's office faxed the letter reciting the plea agreement to the Court.

18 Mr. Rasmussen did not file a Motion, a written request for a scheduling conference, or other written request that the Court consider the plea agreement letter.

19 During the week of October 29, 2007, the assigned judge was traveling between Price, Moab, Cedar City and St. George, Utah.

20 The judge was informed by the court clerk that the letter

158

had been received and the judge indicated that he would try to review the letter and file on November 5, 2007.

21 Mr. Rasmussen's staff called the prosecutor during the week of October 29, 2007.

22 Mr. Rasmussen never personally attempted to contact the prosecution during the week of October 29, 2007.

23 The prosecutor told Mr. Rasmussen's staff that there needed to be a conference with the Court regarding the plea proposal.

24 Mr. Rasmussen did not submit any written request for a conference regarding the plea proposal to the Court.

25 Mr. Rasmussen did not contact the Court and request to schedule a conference.

26 Mr. Rasmussen's staff did not contact the Court and request to schedule a conference.

27 On November 5, 2007, the judge reviewed the letter, and issued an Order rejecting the plea agreement.

28 Mr. Rasmussen filed a Motion to Recuse the assigned judge on November 6, 2007.

29 The Motion to Recuse was referred to Judge Johansen on

159

November 7, 2007.

30 On November 7, 2007, Judge Johansen denied Mr. Rasmussen's
recusal Motion.

31 Mr. Rasmussen faxed a Supplemental Affidavit of Bias in
Support of Motion to Recuse and a Motion to Reconsider to the Court on
or around 4:42 p.m. on November 8, 2007.

32 Mr. Rasmussen filed the Supplemental Affidavit of Bias in
Support of Motion to Recuse and a Motion to Reconsider even though
Rule 19(c)(1)(c) restricts a party from filing more than one Motion of
Recusal.

At the sanctions hearing, the following facts were established:

33 Mr. Rasmussen had knowledge that the Motion to Recuse had
been denied.

34 Mr. Rasmussen admitted that he knew only one Motion to
Recuse was allowed and yet he proceeded to file the Motion to
Reconsider.

35 Mr. Rasmussen failed to appear at the criminal trial knowing
full well that the jury panel was present and the judge was waiting.

36 Mr. Rasmussen stated he did not appear because he was afraid

1160

the judge would force him to go to trial.

APPLICATION OF THE FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

Discipline is not based solely on the nature of the underlying rule violations. Thus, after a finding of lawyer misconduct, the Standards provide that the court should consider the following factors in imposing a sanction: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Rule 14-604, Standards.

1. The Duty Violated

Mr. Rasmussen violated his duty to his client, the public, the profession and the legal system. Mr. Rasmussen violated his duty to his client by not appearing at the trial in accordance with the Court's instruction. Mr. Rasmussen burdened the public and the legal system when he filed two Motions to Recuse the trial judge, forced the Court to expend judicial resources because of his nonappearance and multiple Motions, and inconvenienced jurors who were summoned to the court when the trial did not proceed.

161

2. The Lawyer's Mental State

A lawyer's mental state refers to the attorney's state of awareness - intent, knowledge and negligence. Utah's Standards define these as follows:

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

Standards, Rule 14-601.

The Court gave Mr. Rasmussen the cutoff date for the Court to entertain a plea agreement two months in advance. Mr. Rasmussen faxed the Court a copy of the plea agreement after the cutoff deadline. After the Court rejected the plea agreement, Mr. Rasmussen filed two Motions to Recuse despite Rule 26(c)(1)(c), which only permitted the filing of one recusal Motion in a case. The second recusal Motion was filed just prior to the end of the working day before the trial. Mr. Rasmussen acted knowingly when he disobeyed the Court's instruction and the procedural rules governing the court proceedings.

162

3. **The Potential or Actual Injury Caused by the Lawyer's Misconduct**

The Standards provide that:

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct... "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

Standards, Rule 14-6-1, Definitions.

Mr. Rasmussen's misconduct caused injury to Mr. Schriver by not appearing for his jury trial. This failure resulted in having Mr. Schriver to appear without counsel at the time of trial, thereby increasing his anxiety as well as causing Mr. Schriver to make additional appearances in court as a result of Mr. Rasmussen's conduct. Mr. Rasmussen's misconduct also caused injury to the reputation of the profession.

Mr. Rasmussen's deliberate nonappearance and filing of two Motions to Recuse also caused injury to the legal system. Mr. Rasmussen's misconduct led to an expenditure of resources to review the second Motion, the empanelment of the jury when the trial could not go forward, and an additional hearing where Mr. Rasmussen did not

appear, all of which inconvenienced the citizens and caused expense to the State that would not have been necessary without Mr. Rasmussen's actions.

4. The Existence of Aggravating or Mitigating Factors

Finally, there are numerous and substantial aggravating factors, and as this Order demonstrates, little or nothing in the way of mitigation.

SUSPENSION IS THE PRESUMPTIVE SANCTION FOR MR. RASMUSSEN'S MISCONDUCT

The Standards set forth the presumptive sanctions for broad categories of misconduct, absent the existence of aggravating or mitigating circumstances. See Rule 14-605, Standards. Pursuant to the Standards:

Suspension is generally appropriate when a lawyer:

(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding.

Rule 14-605(b), Standards.

Mr. Rasmussen's misconduct falls within the ambit of subsection (b)(1) of Rule 14-605(b), which is sufficient to establish suspension

as the appropriate presumptive discipline.

THE AGGRAVATING CIRCUMSTANCES APPLICABLE TO THIS CASE

Aggravating factors are "any considerations or factors that may justify an increase in the degree of discipline to be imposed." Rule 14-607(a). The facts already found and the evidence to be presented establish the following aggravating factors.

A. Prior Record of Discipline

A prior record of discipline is an aggravating factor. Rule 14-607(a)(1), Standards. The evidence shows that Mr. Rasmussen received a stayed suspension and one year probation on August 21, 2000.

B. Selfish or Dishonest Motive

The evidence shows that Mr. Rasmussen sought to avoid the trial for his own convenience and acknowledgment that he was not prepared. Mr. Rasmussen's violations of the Court's Order and procedural rules so that he would not have to drive to Monticello and appear at trial show his selfish motive for his actions and qualifies as an aggravating factor.

C. Pattern of Misconduct

A pattern of misconduct is an aggravating factor. In another

165

unrelated informal Bar Complaint which has not yet been adjudicated, Mr. Rasmussen has engaged in conduct that wasted the resources of the Court and opposing counsel. He asked for several continuances by telephone and eventually withdrew, however his client was not informed about the withdrawal until he appeared at the pretrial.

D. Refusal to Acknowledge the Wrongful Nature of the Misconduct

Either to the Client or to the Disciplinary Authority

Mr. Rasmussen did not acknowledge his wrongdoing when he was before the Court. Mr. Rasmussen also failed to acknowledge that he erred in any way before the OPC brought a discipline Complaint in this matter.

E. Substantial Experience in the Practice of Law

Mr. Rasmussen was admitted to practice law in Utah on October 6, 1981. Mr. Rasmussen had been an attorney for 27 years when this misconduct occurred. Twenty-seven years of practice is substantial experience and Mr. Rasmussen knew or should have known that his conduct was inappropriate.

MITIGATION OFFERED BY MR. RASMUSSEN

Mr. Rasmussen did not inform the OPC of any evidence of

1166

mitigating circumstances. The OPC served Interrogatories and a Request for Production of Documents on Mr. Rasmussen on November 23, 2009. The discovery requests asked Mr. Rasmussen to identify any possible mitigating factors, assuming a sanction hearing was held in this matter, and to provide any documents or other evidence to support the assertion. Mr. Rasmussen did not respond to the Request for Production of Documents. Mr. Rasmussen objected to the Interrogatory and indicated the Interrogatory was "based on a premise that is purely speculative." Mr. Rasmussen did not supplement his responses to the Interrogatories.

The evidence of mitigation must be substantial and significantly outweigh the evidence of aggravation for the Court to lower the discipline from the presumptive level of suspension. The Supreme Court has explained that "t[o] justify a departure from the presumptive level of discipline set forth in the Standards, the aggravating and mitigating factors must be significant." See Ince, 957 P.2d at 1237-1238;¹ see In re Ennenga, 2001 UT 111, ¶¶ 11, 12 (Utah 2001). Further,

¹In Ince, the Supreme Court concluded that the District Court "accorded too much weight to mitigating factors which were not particularly compelling. This is especially true given the number of aggravating factors that existed. Thus, the weight of the mitigating factors is at least balanced by the aggravating factors.

1107

the Court "must consider [] the mitigating factors in light of the particular misconduct." See Stubbs, 974 P.2d at 300. Mr. Rasmussen has yet to express remorse in regard to his misconduct. Mr. Rasmussen did not raise any significant mitigation at the hearing. The respondent argued at trial that no one was damaged and that he paid the monetary penalty imposed and that should be sufficient.

CONCLUSION

The Court does not accept the argument of the respondent. There is no question of the violation and the lack of any mitigating circumstances. The application of the Standards calls for suspension and the totality of the circumstances, including numerous examples of significant aggravating circumstances, certainly warrants it.

Pursuant to the Standards, "Generally, suspension should be imposed for a specific period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years." Rule 2.3(a), Standards.

nder such circumstances, no adjustment to the presumptively appropriate level of discipline is warranted." Ince, 957 P.2d at 1238, see also In re Rueniga, 2001 UT 11, ¶ 11 (although trial court correctly determined disbarment was appropriate resumptive sanction, it erroneously concluded mitigating factors were sufficient to overcome presumption).

1108

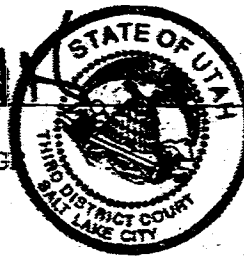
The Court will enter a suspension for one year in this matter but will stay all but 181 days. The Court is staying the imposition of the remaining time upon the following terms and conditions:

1. That he enter and complete an ethics and professional conduct course by the end of the 181 day suspension.
2. That he not practice law during the suspension and so certify that fact by affidavit.
3. That he have no violations of the rules for one year from the date of this Order.
4. That he will initiate a change in his office procedure whereby he personally communicates with the Court, its staff and opposing counsel and all such communication will be memorialized in his case file and will include the date, time and the named individual communicated with. Additionally, all changes of court dates must be followed by written communication to the Court.

Dated this 20th day of July, 2010.

BY THE COURT


L. A. DEVER
DISTRICT COURT JUDGE



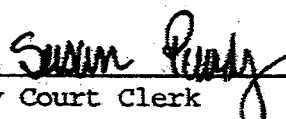
1109

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order of Sanction, this 21 day of July, 2010, to the following:

Diana Akiyama
Assistant Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

James H. Deans
Attorney for Respondent
440 South 700 East, Suite 101
Salt Lake City, Utah 84102



Deputy Court Clerk

170

Addendum “G”

Letter, dated December 20, 2010 from OPC to Rasmussen
(the “**December Letter**”).



Utah State Bar

Office of Professional Conduct

645 South 200 East, Suite 205 • Salt Lake City, Utah 84111-3834
Telephone: (801) 531-9110 • FAX: (801) 531-9912 • 1-800-698-9077
E-mail: opc@utahbar.org

December 20, 2010

James H. Deans
440 South 700 East #101
Salt Lake City, Utah 84102

Re: In the Matter of the Discipline of Thomas V. Rasmussen
Civil No. 090908841

Dear Mr. Deans:

This morning the OPC was notified that Mr. Rasmussen called the 8th District Court and held himself out as an attorney representing a client. It also appears that Mr. Rasmussen did not notify the court of his suspension. As you are aware, the Order of Sanction in this matter was signed on July 21, 2010. Pursuant to Rule 14-526 of the Rules of Lawyer Discipline and Disability, unless otherwise stated in the order, a suspension is effective 30 days after the date of the order.

Because Mr. Rasmussen has been suspended for six months and a day, he may not represent clients, hold himself out as an attorney or otherwise engage in the practice of law. If Mr. Rasmussen continues to practice while on suspension the OPC will file an Order to Show Cause. Also to date, we have not received anything from Mr. Rasmussen regarding his obligations under Rule 14-526 of the Rules of Lawyer Discipline and Disability.

I direct your attention to Rule 14-526 of the Rules of Lawyer Discipline and Disability with respect to Mr. Rasmussen's responsibilities. Thank you for your attention to this matter

Sincerely,

Diane Akiyama
Assistant Counsel
Office of Professional Conduct

DA/aw

226

Addendum “H”

Affidavit of John Schriver, dated July 29, 2010

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

By pc

chance in my Felony case was to hire an attorney outside of the San Juan County and Grand County areas where Judge Anderson is the only regularly sitting District Court Judge. The local lawyers appear to be afraid to deal too firmly with Judge Anderson out of a fear of reprisals.

4. I, therefore, made the decision to retain Thomas V. Rasmussen, Attorney at Law, from Salt Lake County.

5. During the course of Mr. Rasmussen's representation of me on the San Juan County matter, he and his paralegal were always available to answer my questions and meet my needs.

6. When Mr. Rasmussen finalized a plea bargain with the prosecutor, I was pleased with his efforts, because he had eliminated the Felony charge completely and saved me the cost and risk of a trial.

7. Although the Court was informed of the finalized plea bargain on Monday morning rather than Friday afternoon, because of my unavailability to approve it, Judge Anderson had made it clear in open Court that a tardy plea bargain still had a chance of being accepted by him.

8. While we were waiting for Judge Anderson's approval of the final plea bargain, I instructed Mr. Rasmussen to not work on my case any further so as to not incur any new legal fees.

9. When Judge Anderson belatedly denied the final plea bargain, only three days before my trial date, I was scared to

death, remembering my prior experience with him, and was convinced that Judge Anderson had absolutely no interest in providing me with a fair trial.

10. I expressed my concerns to Mr. Rasmussen who told me that he would do everything in his power to try to protect my Constitutional Rights to a fair and impartial trial, under the Utah and the United States Constitutions.

11. Mr. Rasmussen informed me that he would file a Motion in an effort to protect my Constitutional Rights to a fair trial.

12. Prior to my trial date, I was informed by Mr. Rasmussen that he believed that based on the filed Motion in my Felony case Judge Anderson was prohibited by law from going forward with the trial. Because of my immense fear that Judge Anderson would still go forward with the trial in spite of the Motion and given our lack of opportunity to prepare (eg., no time to subpoenae a critical witness) caused by Judge Anderson's own belated rejection of the plea bargain, Mr. Rasmussen told me that he would not be making the ten hour round trip to appear in Court based on his belief that the trial could not legally go forward on the scheduled date. Mr. Rasmussen, however, insisted that I appear on the trial date to avoid any kind of bench warrant being issued for my arrest. This I willingly did at no inconvenience to myself, because I lived relatively close to the courthouse.

13. Judge Anderson's untimely denial of the plea bargain prevented my eye witness to the event in question from being properly subpoenaed as a witness for my defense. He needed a

subpoena to get off work.

14. At no time did I ever feel harmed or inconvenienced by Mr. Rasmussen. To the contrary, it appeared he always had my best interests in mind, even when he was working for free.

15. I appreciated and still appreciate all of the efforts that Mr. Rasmussen expended on my behalf to protect all of my Constitutional Rights, following Judge Anderson's belated rejection of the original plea bargain. In fact, Mr. Rasmussen did not charge me a penny for any of his time, including travel to San Juan County, or expertise, from that time forward. He sacrificed earning five thousand dollars, which he would have earned by trying my case. Instead, at great sacrifice to himself, he protected my best interests and secured my future, while paying two thousand dollars out of his own pocket to the Court.

16. Had Mr. Rasmussen placed his own interests ahead of mine, he would have simply collected \$5,000.00 from me to try my case and then let the chips fall where they may. A trial may have resulted in my being convicted of a Felony I did not commit. In the alternative, Mr. Rasmussen, himself, paid \$2,000.00, to the Court and refused to charge me another penny on my case.

17. In the end, I was allowed by Judge Anderson to enter a plea to a plea bargain almost identical to the original one. I feel that the prosecutor on my case bore neither me nor Mr. Rasmussen any ill will or he would not have basically re-instated

the original plea bargain heretofore belately rejected by Judge Anderson.

18. At no time did I ever feel inconvenienced or harmed by Mr. Rasmussen. To the contrary, his loyalty to me and his dedication to preserving my Constitutional Rights allowed me to avoid, as a certainty, a conviction for a Felony I did not commit.

19. Because of the loyalty and dedication that Mr. Rasmussen showed to me, my wife and I attended the Utah State Bar's Screening Panel in support of Mr. Rasmussen. We could not believe that any attorney of his caliber and honesty would be subjected to discipline because of Judge Anderson's lack of timely communication.

20. My wife and I fully intended on coming to the hearing scheduled on June 1, 2010, in the Salt Lake District Court to tell anyone who would listen what a credit Mr. Rasmussen is to the legal profession, but our schedules would not permit our attendance. We were informed that the District Court in Salt Lake was unwilling to continue the hearing to allow us to attend.

21. Again, at no time was I ever harmed by Mr. Rasmussen, who kept me constantly informed and fully apprised of everything happening in my case from its beginning to its end. Without his help, the only person who was in a position to harm me and, in fact, was harming me through his lack of communication was Judge Anderson. Mr. Rasmussen's efforts prevented any harm from

180

happening to me, and it now appears Judge Anderson, through the Utah State Bar, desires to transfer that harm from me to my dedicated attorney, Mr. Rasmussen.

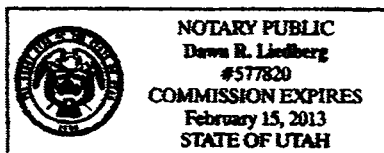
DATED this 29 day of July, 2010.

John P. Schriver
Affiant
John P. Schriver

VERIFICATION AND ACKNOWLEDGEMENT

That personally appeared before me JOHN P. SCHRIVER, who has stated to me that the above-stated facts are based upon his personal knowledge and are truthful.

SUBSCRIBED AND SWORN to before me this 29, day of July, 2010.



[Signature]
Notary Public

Addendum “I”

SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-501

Article 5. Lawyer Discipline and Disability

Rule 14-501. Purpose, authority, scope and structure of lawyer disciplinary and disability proceedings.

(a) The purpose of lawyer disciplinary and disability proceedings is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers and to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities.

(b) Under Article VIII, Section 4 of the Constitution of Utah, the Utah Supreme Court has exclusive authority within Utah to adopt and enforce rules governing the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

(c) All disciplinary proceedings shall be conducted in accordance with this article and Article 6, Standards for Imposing Lawyer Sanctions. Formal disciplinary and disability proceedings are civil in nature. These rules shall be construed so as to achieve substantial justice and fairness in disciplinary matters with dispatch and at the least expense to all concerned parties.

(d) The interests of the public, the courts, and the legal profession all require that disciplinary proceedings at all levels be undertaken and construed to secure the just and speedy resolution of every complaint.

Addendum “J”
SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-509

Rule 14-509. Grounds for discipline.

It shall be a ground for discipline for a lawyer to:

- (a) violate the Rules of Professional Conduct;
- (b) willfully violate a valid order of a court or a screening panel imposing discipline;
- (c) be publicly disciplined in another jurisdiction;
- (d) fail to comply with the requirements of Rule 14-526(e); or
- (e) fail to notify the OPC of public discipline in another jurisdiction in accordance with Rule 14-522(a).

Addendum “K”
SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-524

Rule 14-524. Reinstatement following a suspension of six months or less.

A respondent who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension upon filing with the district court and serving upon OPC counsel an affidavit stating that the respondent has fully complied with the requirements of the suspension order and that the respondent has fully reimbursed the Bar's Lawyers' Fund for Client Protection for any amounts paid on account of the respondent's conduct. Within ten days, OPC counsel may file an objection and thereafter the district court shall conduct a hearing.

Addendum “L”

SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-525

Rule 14-525. Reinstatement following a suspension of more than six months; readmission.

(a) Generally. A respondent suspended for more than six months or a disbarred respondent shall be reinstated or readmitted only upon order of the district court. No respondent may petition for reinstatement until three months before the period for suspension has expired. No respondent may petition for readmission until five years after the effective date of disbarment. A respondent who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the effective date of the interim suspension.

(b) Petition. A petition for reinstatement or readmission shall be verified, filed with the district court, and shall specify with particularity the manner in which the respondent meets each of the criteria specified in paragraph (e) or, if not, why there is otherwise good and sufficient reason for reinstatement or readmission. With specific reference to paragraph (e)(4), prior to the filing of a petition for readmission, the respondent must receive a report and recommendation from the Bar's Character and Fitness Committee. In addition to receiving the report and recommendation from the Character and Fitness Committee, the respondent must satisfy all other requirements as set forth in Article 7, Admissions. Prior to or as part of the respondent's petition, the respondent may request modification or abatement of conditions of discipline, reinstatement or readmission.

(c) Service of petition. The respondent shall serve a copy of the petition upon OPC counsel.

(d) Publication of notice of petition. At the time a respondent files a petition for reinstatement or readmission, OPC counsel shall publish a notice of the petition in the Utah Bar Journal. The notice shall inform members of the Bar about the application for reinstatement or readmission, and shall request that any individuals file notice of their opposition or concurrence with the district court within 30 days of the date of publication. In addition, OPC counsel shall notify each complainant in the disciplinary proceeding that led to the respondent's suspension or disbarment that the respondent is applying for reinstatement or readmission, and shall inform each complainant that the complainant has 30 days from the date of mailing to raise objections to or to support the respondent's petition. Notice shall be mailed to the last known address of each complainant in OPC counsel's records.

(e) Criteria for reinstatement and readmission. A respondent may be reinstated or readmitted only if the respondent meets each of the following criteria, or, if not, presents good and sufficient reason why the respondent should nevertheless be reinstated or readmitted.

(e)(1) The respondent has fully complied with the terms and conditions of all prior disciplinary orders except to the extent they are abated by the district court.

(e)(2) The respondent has not engaged nor attempted to engage in the unauthorized practice of law during the period of suspension or disbarment.

(e)(3) If the respondent was suffering from a physical or mental disability or impairment which was a causative factor of the respondent's misconduct, including substance abuse, the disability or impairment has been removed. Where substance abuse was a causative factor in the respondent's misconduct, the respondent shall not be reinstated or readmitted unless:

(e)(3)(A) the respondent has recovered from the substance abuse as demonstrated by a meaningful and sustained period of successful rehabilitation;

(e)(3)(B) the respondent has abstained from the use of the abused substance and the unlawful use of controlled substances for the preceding six months; and

(e)(3)(C) the respondent is likely to continue to abstain from the substance abused and the unlawful use of controlled substances.

(e)(4) Notwithstanding the conduct for which the respondent was disciplined, the respondent has the requisite honesty and integrity to practice law. In readmission cases, the respondent must appear before the Bar's Character and Fitness Committee and cooperate in its investigation of the respondent. A copy of the Character and Fitness Committee's report and recommendation shall be provided to the OPC and forwarded to the district court assigned to the petition after the respondent files a petition.

(e)(5) The respondent has kept informed about recent developments in the law and is competent to practice.

(e)(6) In cases of suspensions for one year or more, the respondent shall be required to pass the Multistate Professional Responsibility Examination.

(e)(7) In all cases of disbarment, the respondent shall be required to pass the student applicant Bar Examination and the Multistate Professional Responsibility Examination.

(e)(8) The respondent has fully reimbursed the Bar's Lawyers' Fund for Client Protection for any amounts paid on account of the respondent's conduct.

(f) Review of petition. Within 60 days after receiving a respondent's petition for reinstatement or readmission, OPC counsel shall either:

(f)(1) advise the respondent and the district court that OPC counsel will not object to the respondent's reinstatement or readmission; or

(f)(2) file a written objection to the petition.

(g) Hearing; report. If an objection is filed by OPC counsel, the district court, as soon as reasonably practicable and within a target date of 90 days of the filing of the petition, shall conduct a hearing at which the respondent shall have the burden of demonstrating by a preponderance of the evidence that the respondent has met each of the criteria in paragraph (e) or, if not, that there is good and sufficient reason why the respondent should nevertheless be reinstated or readmitted. The district court shall enter its findings and order. If no objection is filed by OPC counsel, the district court shall review the petition without a hearing and enter its findings and order.

(h) Successive petitions. Unless otherwise ordered by the district court, no respondent shall apply for reinstatement or readmission within one year following an adverse judgment upon a petition for reinstatement or readmission.

(i) Conditions of reinstatement or readmission. The district court may impose conditions on a respondent's reinstatement or readmission if the respondent has met the burden of proof justifying reinstatement or readmission, but the district court reasonably believes that further precautions should be taken to ensure that the public will be protected upon the respondent's return to practice.

(j) Reciprocal reinstatement or readmission. If a respondent has been suspended or disbarred solely on the basis of discipline imposed by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, and if the respondent is later reinstated or readmitted by that court, jurisdiction or regulatory body, the respondent may petition for reciprocal reinstatement or readmission in Utah. The respondent shall file with the district court and serve upon OPC counsel a petition for reciprocal reinstatement or readmission, as the case may be. The petition shall include a certified or otherwise authenticated copy of the order of reinstatement or readmission from the other court, jurisdiction or regulatory body. Within 20 days of service of the petition, OPC counsel may file an objection thereto based solely upon substantial procedural irregularities. If an objection is filed, the district court shall hold a hearing and enter its finding and order. If no objection is filed, the district court shall enter its order based upon the petition.

Addendum “M”

SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-526

Rule 14-526. Notice of disability or suspension; return of clients' property; refund of unearned fees.

(a) Effective date of order; winding up affairs. Each order that imposes disbarment or suspension is effective 30 days after the date of the order, or at such other time as the order provides. Each order that transfers a respondent to disability status is effective immediately upon the date of the order, unless the order otherwise provides. After the entry of any order of disbarment, suspension, or transfer to disability status, the respondent shall not accept any new retainer or employment as a lawyer in any new case or legal matter; provided, however, that during any period between the date of entry of an order and its effective date, the respondent may, with the consent of the client after full disclosure, wind up or complete any matters pending on the date of entry of the order.

(b) Notice to clients and others. In every case in which a respondent is disbarred or suspended for more than six months, the respondent shall, within 20 days of the entry of the order, accomplish the following acts:

(b)(1) notify each client and any co-counsel in every pending legal matter, litigation and non-litigation, that the respondent has been disbarred or suspended from the practice of law and is disqualified from further participation in the matter;

(b)(2) notify each client that, in the absence of co-counsel, the client should obtain a new lawyer, calling attention to the urgency to seek new counsel, particularly in pending litigation;

(b)(3) deliver to every client any papers or other property to which the client is entitled or, if delivery cannot reasonably be made, make arrangements satisfactory to the client or co-counsel of a reasonable time and place where papers and other property may be obtained, calling attention to any urgency to obtain the same;

(b)(4) refund any part of any fee paid in advance that has not been earned as of the effective date of the discipline;

(b)(5) in each matter pending before a court, agency or tribunal, notify opposing counsel or, in the absence of counsel, the adverse party, of the respondent's disbarment or suspension and consequent disqualification to further participate as a lawyer in the matter;

(b)(6) file with the court, agency or tribunal before which any matter is pending a copy of the notice given to opposing counsel or to an adverse party; and

(b)(7) within ten days after the effective date of disbarment or suspension, file an affidavit with OPC counsel showing complete performance of the foregoing requirements of this rule. The respondent shall keep and maintain for inspection by OPC counsel all records of the steps taken to accomplish the requirements of this rule.

(c) Lien. Any attorney's lien for services rendered which are not tainted by reason of disbarment or suspension shall not be rendered invalid merely because of the order of discipline.

(d) Other notice. If a respondent is suspended for six months or less, the district court may impose conditions similar to those set out in paragraph (b). In any public disciplinary matter, the district court may also require the issuance of notice to others as it deems necessary to protect the interests of clients or the public.

(e) Compliance. Substantial compliance with the provisions of paragraphs (a), (b) and (d) shall be a precondition for reinstatement or readmission. Willful failure to comply with paragraphs (a), (b) and (d) shall constitute contempt of court and may be punished as such or by further disciplinary action.

Addendum “N”

**SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-604**

Rule 14-604. Factors to be considered in imposing sanctions.

The following factors should be considered in imposing a sanction after a finding of lawyer misconduct:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

Addendum “O”
SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-605

Rule 14-605. Imposition of sanctions.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following sanctions are generally appropriate.

(a) Disbarment. Disbarment is generally appropriate when a lawyer:

(a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

(a)(2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(a)(3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

(b) Suspension. Suspension is generally appropriate when a lawyer:

(b)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

(b)(2) engages in criminal conduct that does not contain the elements listed in Rule 14-605(a)(2) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

(c) Reprimand. Reprimand is generally appropriate when a lawyer:

(c)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonition. Admonition is generally appropriate when a lawyer:

(d)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

(d)(2) engages in any professional misconduct not otherwise identified in this rule that adversely reflects on the lawyer's fitness to practice law.

Addendum “P”

SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-606

Rule 14-606. Prior discipline orders.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following principles generally apply in cases involving prior discipline.

(a) The district court or Supreme Court may impose further sanctions upon a lawyer who violates the terms of a prior disciplinary order.

(b) When a lawyer engages in misconduct similar to that for which the lawyer has previously been disciplined, the appropriate sanction will generally be one level more severe than the sanction the lawyer previously received, provided that the harm requisite for the higher sanction is present.

Addendum “Q”

SUP. CT. R. OF PROF. PRAC.,
UT. LAWYER DISC. AND DISAB. Rule 14-607

Rule 14-607. Aggravation and mitigation.

After misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose.

(a) Aggravating circumstances. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating circumstances may include:

- (a)(1) prior record of discipline;
- (a)(2) dishonest or selfish motive;
- (a)(3) a pattern of misconduct;
- (a)(4) multiple offenses;
- (a)(5) obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority;
- (a)(6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (a)(7) refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority;
- (a)(8) vulnerability of victim;
- (a)(9) substantial experience in the practice of law;
- (a)(10) lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved; and
- (a)(11) illegal conduct, including the use of controlled substances.

(b) Mitigating circumstances. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating circumstances may include:

- (b)(1) absence of a prior record of discipline;
- (b)(2) absence of a dishonest or selfish motive;
- (b)(3) personal or emotional problems;
- (b)(4) timely good faith effort to make restitution or to rectify the consequences of the misconduct involved;
- (b)(5) full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings;
- (b)(6) inexperience in the practice of law;
- (b)(7) good character or reputation;
- (b)(8) physical disability;
- (b)(9) mental disability or impairment, including substance abuse when:
 - (b)(9)(A) the respondent is affected by a substance abuse or mental disability; and
 - (b)(9)(B) the substance abuse or mental disability causally contributed to the misconduct; and
 - (b)(9)(C) the respondent's recovery from the substance abuse or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (b)(9)(D) the recovery arrested the misconduct and the recurrence of that misconduct is unlikely;
- (b)(10) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay;
- (b)(11) interim reform in circumstances not involving mental disability or impairment;
- (b)(12) imposition of other penalties or sanctions;
- (b)(13) remorse; and
- (b)(14) remoteness of prior offenses.

(c) Other circumstances. The following circumstances should not be considered as either aggravating or mitigating:

- (c)(1) forced or compelled restitution;

- (c)(2) withdrawal of complaint against the lawyer;
- (c)(3) resignation prior to completion of disciplinary proceedings;
- (c)(4) complainant's recommendation as to sanction; and
- (c)(5) failure of injured client to complain.

Addendum “R”

UT. R. CIV. P. 59 and 60

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Notes