

2011

# In the Matter of the Discipline of Thomas V. Rasmussen: Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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IN THE MATTER OF THE  
DISCIPLINE OF THOMAS V.  
RASMUSSEN

Utah State Bar No. 2693

Appellant.

Case No.: 20110696

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REPLY BRIEF OF APPELLANT

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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.  
~~~~~

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED  
UTAH APPELLATE COURTS

OCT 10 2012

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IN THE UTAH SUPREME COURT

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REPLY BRIEF OF APPELLANT

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ARGUMENT

**I. OPC'S BRIEF DOES NOT ACKNOWLEDGE VITAL POINTS OF  
ADJUDICATED FACT, WHICH UNDERMINES THEIR  
POSITIONS ON APPEAL.**

“When faced with questions about proceedings in the trial court that are not adequately challenged on appeal, [this Court] appl[ies] a presumption of regularity.” In re Adoption of Connor, 2007 UT 33, ¶ 16, 158 P.3d 1097, *citing* State v. Robinson, 2006 UT 65, ¶ 21, 147 P.3d 448. It is important to note that Rasmussen is the only party to have appealed the granting of the Post-Judgment Motion in this matter; OPC opted not to cross-appeal. Having opted out, OPC is barred from challenging anything in its brief that would enlarge their own rights or lessen Rasmussen’s rights. *See, State v. South*, 924 P.2d 354, 355-56 (Utah 1996), *citing* Langnes v. Green, 282 U.S. 531, 538-39, 51 S.Ct. 243, 246, 75 L.Ed. 520 (1931)).

The parties’ briefs present strikingly divergent positions on the procedure which occurred below before the trial court in this matter. Several specific areas stand out



requiring specific addressing in this reply. It is first important to note the procedure<sup>1</sup> that *should* have occurred in a typical reinstatement proceeding—the “regularity” of the proceedings—where the suspension was less than six (6) months, as this one was.<sup>2</sup> Under Rule 14-524, an affidavit is filed and OPC is afforded 10 days to file an objection. Reinstatement occurs upon filing of the affidavit. The 14-524 objection time frame is akin to the procedures dictated under UT. R. CIV. P. 59 to set aside or amend the order. OPC is afforded a hearing under 14-524, just as they would be under Rule 59 proceedings. For such a simply process, the procedural posture of this case has become very convoluted by OPC’s attempts to explain what happened. However, it is clear that Rasmussen’s explanations of the procedure are well rooted in law and applicable provisions, while OPC’s are not. A chronological walk-through follows evidencing this.

A. OPC DOES NOT ACKNOWLEDGE THEIR OMISSION IN OBJECTING DURING THE 10-DAY TIME FRAME CONTAINED IN RULE 14-524, AND THEIR STIPULATION TO THE REINSTATEMENT.

The first point of interest in the process was that OPC did not object during the 10-day time frame under 14-524. They do not directly address their decision not to object during this time frame on appeal, presumably since they do not believe even now that 14-524 was applied even though the trial court explicitly stated it was, as addressed further below. OPC’s position before the trial court and on appeal has continually been that 14-525

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<sup>1</sup> UT. LAWYER DISC. AND DISAB. 14-603 governing sanctions specifically states that a lawyer who has been suspended can be reinstated *only* under grounds set forth in Rule 14-524 or 14-525, dependent on the length of the suspension. There are no other options set out for reinstatement from a suspension.

<sup>2</sup> Rasmussen could not even venture to try and analyze the case under 14-525 since virtually none of the requirements exist other than the petition filing, which was mooted in the both

applied since the Sanctions Order was for one (1) year with all but 181 days stayed, but ultimately argues neither provision was actually applied below.

The 10-day time frame under 14-524 for OPC's objections thus lapsed. OPC waived their right to object on grounds of violations given their mistaken belief that 14-525 applied, even though they had been served with the 14-524 affidavit. Rasmussen submitted the proposed reinstatement order to ensure the trial court was conducting 14-524 proceedings, particularly since it was clear to him from the December Letter and the discovery request served on him that OPC thought 14-525 applied. While Rule 15-524 does not require reinstatement by court order, it does not forbid submission of one to memorialize the reinstatement after no objection is filed in 10 days by OPC.

Even initially the trial court must have viewed the proposed reinstatement order and agreed with Rasmussen that 14-524 applied, because it directed its clerk to call OPC to see if they had any objections. The only time frame that had passed to alert the trial court to act by calling OPC was the 10-day time frame contained in 14-524. The clerk informed the trial court they had obtaining a stipulation to the reinstatement from OPC and, even though OPC denied such, the trial court relied upon it for reinstatement and affirmation. R558:25-27 ("My clerk called and said she made the call, and I certainly believe her. ... So based upon that, the Court made the order."). OPC does not address in its brief the fact that they raised objections to this stipulation below and that such objections were denied, instead simply referencing the stipulation as a "miscommunication" rather than an adjudicated fact. *See, Brief of the Appellee* at p. 24; R558:25-27.

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the Reinstatement Order and Affirmation Order when 14-524 was applied.

B. OPC DOES NOT ACKNOWLEDGE THAT IT RAISED ITS OBJECTIONS IN THE REINSTATEMENT OPPOSITION AND AT THE AFFIRMATION HEARING TO APPLY 14-525 AND TO WITHDRAW ITS STIPULATION, BUT THE TRIAL COURT DENIED BOTH OBJECTIONS.

The second point of interest is that OPC eventually filed an objection 30 days after the filing of the affidavit by means of the Reinstatement Opposition, raising their position that 14-525 applied. OPC argues on appeal for the first time that this Reinstatement Opposition was a post-judgment motion under the “catch-all” provision of UT. R. CIV. P. 60(b)(6), although not designated as such. Case law opposes OPC’s position.

First, OPC argues that under Argonaut specific designation in a post-judgment motion as to the proper provision relied upon for that motion does not matter unless OPC is appealing from a Rule 60(b) denial, then it only bears upon whether the motion effectuated a stay and preserved their right to appeal therefrom. However, Argonaut was applied in Gillett to Rule 60(b) motions, which have never effectuated a stay of an appeal absent specific motion for stay. Also, this Court has re-affirmed again at the beginning of this year the holdings in Gillet and Argonaut by simply stating “[f]orm matters.” Judson v. Wheeler RV Las Vegas, L.L.C., 2012 UT 6, ¶20 at fn. 9, 270 P.3d 456. In Judson this Court stated that they have “stressed, that moving parties must strive to direct the reviewing court to the specific relief they are seeking.” *Id.*, citing Workers Comp. Fund v. Argonaut Ins. Co., 2011 UT 61, ¶¶ 11-12, 266 P.3d 792, 795-96, *reh’g denied* (Dec. 8, 2011). This Court specifically noted the purpose behind its holdings that “[t]his specificity requirement is aimed at ensuring that the burden of argument and research remains on the party seeking relief and is not improperly shifted to opposing parties or to the court.” *Id.* It determined that

“Wheeler’s motion fell short not just in its failure to cite the specific subsection of Rule 60(b), but in its omission of the essential basis for 60(b) relief that it seeks to raise on appeal.” *Id.*

In Menzies v. Galetka, this Court determined as follows:

Because rule 60(b)(6) is meant to operate as a residuary clause, it may not be relied upon if the asserted grounds for relief fall within any other subsection of rule 60(b). *See Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir.2002); *Russell*, 681 P.2d at 1195; *Laub v. S. Cent. Utah Tel. Ass’n*, 657 P.2d 1304, 1306–07 (Utah 1982). In other words, the grounds for relief under 60(b)(6) are exclusive of the grounds for relief allowed under other subsections. *See Russell*, 681 P.2d at 1195; *Tani*, 282 F.3d at 1168 & n. 8. Furthermore, relief under rule 60(b)(6) is meant to be the exception rather than the rule; we have previously held that it should be “sparingly invoked” and used “only in unusual and exceptional circumstances.” *Laub*, 657 P.2d at 1307–08 (internal quotation marks omitted); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (remarking that under rule 60(b)(6) of the Federal Rules of Civil Procedure, a party must show “extraordinary circumstances”); *Tani*, 282 F.3d at 1168 (same).

*Ibid.*, 2006 UT 81, ¶71, 150 P.3d 480. Although it would appear that OPC’s position did not fit into another subsection of Rule 60(b), no “unusual or exceptional circumstances” applied herein to OPC’s position that the trial court had applied the incorrect law. Under current law, the Reinstatement Opposition could only have been altered to a Rule 59 motion, not a Rule 60(b) motion, as long as the substance of the objection comported therewith. Rosas v. Eyre, 2003 UT App 414, ¶ 28, 82 P.3d 185 (“[An] objection to [a] proposed order, although filed prior to the entry of judgment, is properly considered a post-judgment motion to alter or amend the judgment under rule 59(e) of the Utah Rules of Civil Procedure.”). Since OPC’s positions substantively could have been viewed as arguing (a)(1)(irregularity of the proceedings) or (a)(7)(error of law) and seeking a new trial, Rule 60(b)(6) cannot apply to the Reinstatement Opposition and alter its purpose in this appeal from what it was below.

Rasmussen's reply to the Reinstatement Opposition argued that OPC failed to respond within the 10-day time window of 14-524, and that 14-525 did not apply to a 181-day suspension. In response, OPC argued that 14-524 did not apply to the one (1) year suspension. The trial court entertained OPC's objection in post-judgment fashion from the Reinstatement Order, holding a hearing to address the irregularities or errors of law OPC raised. The trial court explicitly stated it relied upon OPC's stipulation and the error the trial court made in the Sanctions Order setting the suspension at 181 days to enter the Reinstatement Order, and it could not reverse that order in fairness and equity to Rasmussen. R558:25-27. It disallowed OPC's challenge that they had no record of a call from the clerk, opting to believe the clerk instead. *Id.* ("My clerk called and said she made the call, and I certainly believe her. ... So based upon that, the Court made the order.") In other words, OPC's objections were denied after oral argument before the trial court to apply 14-525 to the proceedings and withdraw their stipulation. They do not address these vital points in their brief, but instead continue to reargue them as though these facts do not exist.

For instance, OPC argues in Argument II(C) that "[t]he trial court's signing of the *Order of Reinstatement* was the culmination of several mistakes, assumptions and miscommunications." *Brief of the Appellee* at p. 24. It summarizes these as (1) trial court mistake in putting 181 days in Sanctions Order rather than six months and one day; (2) Rasmussen mistakenly assumed his suspension was for less than six months; (3) Rasmussen failed to allow OPC five days to object to his proposed *Order of Reinstatement* before submitting it to the trial court; (4) the trial court and the OPC miscommunicating about

whether the OPC intended to object to the proposed reinstatement order (i.e. the stipulation). Important to note is that none of these convinced the trial court to set aside the Reinstatement Order. In fact, the trial court utilized three (3) of these four (4) alleged “mistakes, assumptions and miscommunications” to reaffirm the Reinstatement Order and rendered the fourth one moot by adopting Rule 14-524 (i.e. the alleged failure to allow five days before submission of the proposed order to the court for signature). As mentioned before, the Affirmation Order finalized that determination, so OPC cannot now be heard to complain since they had their chance to argue such position below and the trial court found against them.

C. OPC FAILS TO ACKNOWLEDGE THE TRIAL COURT’S OWN INTERPRETATION OF ITS PRIOR ORDER THAT IT HAD APPLIED 14-524 TO THE REINSTATEMENT PROCEEDINGS.

The third point of interest is that OPC argues that neither 14-524 nor 14-525 were applied to the Affirmation Order or the Reinstatement Order, although OPC has consistently argued below and on appeal for application of 14-525. At the Affirmation Hearing, the trial court stated that, “I think that the Court made an error here, wasn’t clear in its [Sanctions] order. I said 181 days; 181 days passed, and Mr. Rasmussen submitted the [Reinstatement] order to the Court and the Court signed it.” R558:25-27. The trial court relied upon these findings explicitly for affirmation of reinstatement, stating that “[t]he 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.” *Id.* Later, the trial court provided further clarity addressing Rasmussen at the Disbarment Hearing, stating that, “... -- 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.*” R0557:15 (emphasis added). The only rule the trial court could have been referencing was 14-524 since no evidence respecting the several prerequisite criteria for reinstatement under 14-525(e) had been submitted. “A court’s interpretation of its own order is ... afford[ed] ... great deference.” Uintah Basin Med. Ctr. v. Hardy, 2008 UT 15, ¶ 9, 179 P.3d 786. Thus, reinstatement had occurred under 14-524 and was re-affirmed after denial of OPC’s objections, which OPC continues to improperly raise herein absent cross-appeal. *See, State v. South*, 924 P.2d 354, 355-56 (Utah 1996)(“the *Langnes* doctrine requires litigants to cross-appeal or cross-petition if they wish to attack a judgment of a lower court for the purpose of enlarging their own rights or lessening the rights of their opponent” *citing Langnes v. Green*, 282 U.S. 531, 538-39, 51 S.Ct. 243, 246, 75 L.Ed. 520 (1931)). The Affirmation Order was thus entered.

OPC then contradicts itself and raises application of 14-525 yet again in its appellee brief, contrary to its own position below and on appeal that neither provision was relied upon. OPC mistakenly argues in its brief that the trial court adopted its original intention to have the suspension be for more than six (6) months thus implicating Rule 14-525; however, this position as well as OPC’s citation was taken out of context and is contrary to the Affirmation Order and the trial court’s interpretation of its prior order at the Disbarment Hearing, as set out *supra*. *See, Uintah Basin Med. Ctr. v. Hardy*, 2008 UT 15, ¶ 9, 179 P.3d 786 (“A court’s interpretation of its own order is reviewed for clear abuse of discretion and we afford the district court great deference.”). Regardless, consideration of OPC’s position that 14-525 should apply would erroneously authorize OPC to “attack a judgment of a lower

court for the purpose of enlarging their own rights or lessening the rights of [Rasmussen]” absent a properly filed cross-appeal. South at 355-56, *citing* Langnes, 282 U.S. at 538-39, 51 S.Ct. at 246.

D. OPC CHANGED ITS THEORIES OF THE CASE ON APPEAL, ADOPTION OF WHICH WOULD HAVE CAUSED THE TRIAL COURT TO HAVE EXERCISED EXCESS JURISDICTION AND/OR WOULD RESULT IN MANIFEST INJUSTICE TO RASMUSSEN ON APPEAL.

The fourth point of interest is the phrasing and finality of the Affirmation Order.

The Affirmation Order itself states 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. At the Affirmation Hearing, the trial court’s actual words stated as follows:

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 Mr. Rasmussen or an additional period of suspension ordered in this case. So that would be the order.

R558:25-27. To explain the anomaly, OPC argued successfully below that the language of the Affirmation Order itself authorized it to bring additional evidence outside any provision of law and that *neither* 14-524 nor 14-525 were applied to govern those proceedings.

On appeal, Rasmussen challenged that the only provision that applied to govern post-Affirmation Order proceedings would be post-judgment in nature, which relief was unavailable to OPC after review of the substantive grounds of the Post-Judgment Motion. While OPC concedes in their brief that the proceedings were post-judgment in nature, it



then takes contradictory new positions on appeal, stating (1) it was authorized to bring the Post-Judgment Motion proceedings as an extension of the Rule 60(b)(6) Reinstatement Opposition in the Affirmation Order; and (2) that it was authorized to bring the Post-Judgment Motion because *both* 14-524 (in affirming reinstatement) and 14-525 (in authorizing presentation of further evidence) were relied upon in the Affirmation Order.

A trial court does not maintain discretion to “step[ ] outside its jurisdiction in making some order or doing some judicial act.” Atwood v. Cox, 88 Utah 437, 55 P.2d 377 (Utah 1936)(“ ‘Excess of jurisdiction’ is ‘lack of jurisdiction.’”). If any of OPC’s positions on the Affirmation Order were adopted, it would result in the trial court having unlawfully exceeded its jurisdiction by conducting proceedings outside and contrary to the applicable rules. Rasmussen’s position that the Post-Judgment Motion was either improperly raised or improperly granted, or both, does not exceed the trial court’s jurisdictional boundaries in this matter but instead adopts procedure well within the trial court’s authority.

As to the issue of finality, OPC explicitly stated below that “the Court handled that procedural aspect of it by its March 30<sup>th</sup> order [the Affirmation Order], and we stand by that, and we’re happy with that portion of it ... *even though Mr. Rasmussen is allowed to practice, we accepted that ... [w]e did not appeal that.*” R557:32 (emphasis added). Based on this position, Rasmussen argued below and on appeal that the Affirmation Order was a final order on the issue of reinstatement, raising the doctrine of res judicata to bar presentation of pre-reinstatement violation evidence both below and herein.

OPC’s brief contravenes its position below alleging for the first time on appeal that the Affirmation Order either granted them partial relief from the Reinstatement Order, or

they were given an extension of the Reinstatement Opposition in the Affirmation Order. However, OPC's altered theories would render a manifest injustice to Rasmussen since adoption of any such theories would unlawfully render the Affirmation Order nonfinal, the finality of which Rasmussen relied upon in bringing this appeal. *See, Lebcher v. Lambert*, 23 Utah 1, 63 P. 628 (Utah 1900)(it is manifestly unjust for an appellate court to permit a party to change his position and adopt another theory on appeal); *Bailey-Allen Co., Inc. V. Kurzet*, 945 P.2d 180 (Utah App 1997)("Party is not at liberty to argue one position below and then take the opposite position on appeal."). Also, given the underlying finality of the Affirmation Order, this Court should not reach the merits of that order on an appeal from the granting of relief under even a properly raised Rule 60(b). *See, Robinson v. Baggett*, 2011 UT App 250, ¶ 13, 263 P.3d 411 ("Generally an appeal from a rule 60(b) ruling does not reach the merits of the underlying judgment, 'lest rule 60(b) motions become a substitute for timely appeals.'" (*quoting Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶ 19, 2 P.3d 451)). The Affirmation Order was final, and OPC claimed it was "happy with that" and conceding they "did not appeal that."

The underlying concept to this position that OPC believes it could bring evidence post-reinstatement regarding violations is against the 10-day or 60-day limitations of 14-524 and 14-525, respectively. OPC has a time limit for a reason. The attorney involved in sanctions proceedings has a right to know the objections OPC has within the time frames set out in the applicable rule; otherwise, if OPC can present evidence when a 10-day limit applies as late as 3 months and even after reinstatement and affirmation of that reinstatement, then an attorney would never be able to rely on a conclusion of those

proceedings. OPC would be given an excess amount of authority with no limitation, against what was intended by this Court when the rules were created. Thus, the 10-day time frame of 14-524 is akin to a statute of limitations on objections from OPC, and OPC waived response on the premise that they believed 14-525 applied. Having put all their effort into that position, which the trial court did not adopt, effectively barred OPC from presentation of any further evidence towards pre-reinstatement violations, particularly since they were given a hearing in which to do so and did not avail themselves of such opportunity.

E. OPC'S THEORY OF EXTENSION OF THE REINSTATEMENT OPPOSITION TO THE POST-JUDGMENT MOTION PROCEEDINGS WOULD RESULT IN CLAIM PRECLUSION OF THE VIOLATIONS SINCE THEY WERE NOT RAISED IN THE REINSTATEMENT OPPOSITION.

Rather than appealing or filing another charge as mentioned by the trial court in its oral decision at the Affirmation Hearing, OPC opted to file a nonspecific Post-Judgment Motion. R558:25-27. Rasmussen's brief argues the Post-Judgment Motion's substance appeared to be brought under Rule 60(b)(2) motion for "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)," but that it did not meet those grounds given OPC's knowledge of the evidence in December of 2010 and its claim at the Affirmation Hearing that it had such evidence (although they opted not to present it then).

OPC's brief argued that the Post-Judgment Motion was filed and the proceedings conducted under an extension of its previously filed Rule 60(b)(6) motion (the Reinstatement Opposition). The substance of the Reinstatement Opposition shows that the only issue raised by OPC therein was application of 14-525 to the proceedings. There is no

mention of violations, which OPC only cursorily mentioned at the Affirmation Hearing, and no relief requested therein in the form of disbarment. Thus, adopting the concept that the Post-Judgment Motion was an extension or continuance of the previously filed Reinstatement Opposition would foreclose OPC from arguing anything new that it did not raise in the Reinstatement Opposition. *See, Dennis v. Vasquez*, 2003 UT App 168, ¶4 at fn. 1, 72 P.3d 135 (“Claim preclusion ... does not require ... the issues be ‘fully, fairly, and competently litigated ... rather ... one that could and should have been raised in the first action, and regardless of whether the claim in fact was raised in the first action, the first action resulted in a final judgment on the merits.” (internal citations omitted)).

F. OPC’S CONCESSION THAT THE POST-JUDGMENT MOTION WAS BROUGHT UNDER SUCH PROCEEDINGS CREATES AN ANOMALY IN THEIR REQUEST FOR DISBARMENT UNDER APPLICABLE RULES; RASMUSSEN COULD NOT HAVE REASONABLY BELIEVED THAT OPC WOULD BE AFFORDED RELIEF UNDER RULE 60(B) IN THE FORM OF A DISBARMENT.

Ut. R. Civ. P. 60(b) specifically states that, “[o]n 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:...” Note the plain language that authorizes a court to “relieve a party ... from a final judgment, order or proceeding ...” The rule itself is titled “[r]elief from judgment or order.” *Id.* The rule provides a setting aside of a judgment or order that was entered on the basis of “mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.” and is “for obtaining relief from a judgment ... by motion as prescribed in these rules or by an independent action.” *Id.* Note that there is no language authorizing a court to enter a reverse decision under Rule 60(b) proceedings. Rather they are simply for setting aside the judgment or

order to relieve the party who feels they are wronged by its existence.

Because of the Rule 60(b) nature of the Post-Judgment Motion, Rasmussen approached the Disbarment Hearing as one brought in a second stacked post-judgment manner and argued res judicata as a defense to OPC's second try at setting aside the Reinstatement Order. Rasmussen did not approach the disbarment hearing expecting that OPC could attain relief by not only revoking his reinstatement but also obtaining disbarment. Even in criminal law, "[a] revocation proceeding begun after probation has ended 'exceed[s] the trial court's jurisdiction and authority.'" State v. Grindberg, 1999 UT App 286, *citing Grate*, 947 P.2d at 1166; *see also Atwood, supra* (" 'Excess of jurisdiction' is 'lack of jurisdiction' in regard to that judicial action which exceeds jurisdiction, and means a case in which the court has initially proceeded properly within its jurisdiction, but steps outside of the jurisdiction in making some order or doing some judicial act.")). Rasmussen could not reasonably have believed that he was facing a full trial on the question of his disbarment raised for the first time in a second stacked Rule 60(b) motion when OPC had deliberately chosen not to present the evidence during the Affirmation Hearing. Nonetheless, the trial court erroneously ordered Rasmussen's disbarment in a very short post-judgment hearing and he appealed. This process clearly deprived Rasmussen of his due process rights. U.S. CONST. AMEND. XIV; UTAH CONST. ART. I §§ 7 and 12.

Given OPC's failure to acknowledge several adjudicated facts, and their having taken several positions contrary to established law which would lessen Rasmussen's rights or enlarge their own absent proper cross-appeal, Rasmussen respectfully requests this Court decline to entertain any such matters in determination of this appeal. Rasmussen has

presented a more appropriate procedure that occurred below—one that can be presumed “regular” in civil proceedings—that has not required deviation from any applicable provisions or precedent from this Court. Connor, at ¶ 16, *citing* Robinson, at ¶ 21. The matter should be determined based on the applicable rules and precedent from this Court.

## **II. THE ISSUE REGARDING RASMUSSEN’S CONTINUED PRACTICE OF LAW WAS RES JUDICATA AND THUS COULD NOT BE RAISED AT ADDITIONAL HEARINGS**

At the very heart of this appeal, and thus warranting separate analysis, is the question as to whether the doctrine of res judicata applied to preclude OPC from presenting evidence of violations occurring pre-reinstatement. Rasmussen properly raised the doctrine below and challenged the trial court’s denial of its application in his opening brief in this matter. Rasmussen’s position was that OPC was required to present the evidence of violations either within 10 days after filing of the affidavit, or at the first post-judgment hearing (the Affirmation Hearing) where they challenged that they thought 14-525 applied. In the abundance of caution—given that the trial court could find at the Affirmation Hearing that 14-524 applied—the OPC was required to present any evidence they had against reinstatement. Instead, OPC only alluded to the grounds against reinstatement, but was confident in their position that 14-525 should apply and so determined not to present such evidence. As mentioned in the opening brief, OPC proffered at the Affirmation Hearing that they maintained violations evidence, but they chose not to present it. *Brief of Appellant* at p. 30; R0558 at p. 9. When the trial court declined OPC’s objections, OPC was then foreclosed from bringing that pre-reinstatement violation evidence since the evidence was available to be presented but was not.

OPC's position is that claim preclusion does not apply in this matter. OPC argues that the second element of claim preclusion, where "the claim sought to be barred either must have been presented or have been available to be presented in the first case," was not met since "[t]he issue of whether Rasmussen continued to practice law while on suspension was not presented, nor was it available to be presented, to the trial court at the Affirmation Hearing." *Brief of Appellee* at p. 27, relying on the defined term from Murdock v. Springville Mun. Corp., 1999 UT 39, ¶16, 982 P.3d 65. OPC believes the only issue before the trial court at the Affirmation Hearing "was not whether Rasmussen had continued to practice law while on suspension, but rather would the trial court set aside the *Order of Reinstatement*, based on OPC's argument that Rasmussen's petition was premature, and would the trial court allow the OPC to present evidence of Rasmussen's violations at a subsequent hearing." *Id.* at pp. 28-29. OPC argues under Argument II(D) that "[t]he Affirmation Hearing was not intended to include the OPC's grounds for opposing the reinstatement. Its purpose was to determine if the OPC would be allowed to later present such grounds." *See, ibid.* at p. 30. OPC's omissions in accepting the application of 14-524 and the trial court's reliance on their stipulation as adjudicated facts at the Affirmation Hearing renders their position without effect.

The flaw apparent in OPC's position is that they specifically acknowledge they were challenging the Reinstatement Order as premature, but concede they did not challenge such order based upon alleged violations during the suspension period. The trial court stated the purpose of the Affirmation hearing as one to address "[t]he question is, is should the Court now set aside that order." R558:27. They could have, and should have challenged the

Reinstatement Order with their specific grounds at that juncture since reinstatement had occurred, and they obtained the evidence as early as December 2010 and proffered such to the trial court at the Affirmation Hearing. Their entire purpose for applying 14-525 was to present the violations evidence they had not presented within 10 days after the 14-524 affidavit was filed. Anyone could reasonably believed their claim of violations was included in their attempt to apply 14-525, but OPC claims it was not. The two cannot be bifurcated from one another. Under Rules 14-524 and 14-525 the time for presenting this evidence is either within 10 days after affidavit filing or *before* reinstatement is determined by court order. Reinstatement occurred by the filing of the affidavit on January 24, 2011, memorialized by court order on February 17, 2011, and was reaffirmed at the hearing held March 8, 2011, and by written order filed March 30, 2011.

OPC's confusion may stem from the differences between issue preclusion and claim preclusion. OPC argues more of an issue preclusion doctrine trying to bifurcate the reinstatement from the violations, but tries to do so under the claim preclusion doctrine. In Dennis v. Vasquez, the Utah Court of Appeals clarified the differences as follows:

Claim preclusion is distinguishable from the other branch of res judicata, issue preclusion. Under the issue preclusion branch,

the adjudication of an issue bars its relitigation in another action only if four requirements are met. First, *the issue in both cases must be identical*. Second, the judgment must be final with respect to that issue. Third, *the issue must have been fully, fairly, and competently litigated in the first action*. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

*Madsen v. Borthick*, 769 P.2d 245, 250 (Utah 1988) (emphasis added). Claim preclusion, on the other hand, does not require an identity of the issues, nor does it require that the issues be "fully, fairly, and competently litigated." *Id.* Rather, the precluded claim must be one that "could and should have been raised in the first action," and regardless of whether the claim in fact was raised in the first action, the first action "resulted in a final judgment on the



merits.” *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 34, 471 Utah Adv. Rep. 5, 73 P.3d 325 (quotations and citations omitted).

Dennis v. Vasquez, 2003 UT App 168, ¶4 at fn. 1, 72 P.3d 135. As noted, claim preclusion does not require identity of the issues nor that they be fully litigated, just that the claim could and should have been raised in the first action, in this matter that being either the 14-524 affidavit proceedings or the Affirmation Hearing. OPC had two opportunities before the Post-Judgment Motion. The Affirmation Hearing was not for the purpose of determining if OPC should get a second chance at raising that evidence, but rather that was their second chance to do so. They opted only to raise a legal challenge to the application of 14-525. The trial court, in the absence of such evidence, reaffirmed reinstatement. Thereafter, OPC could only raise the issue by proper post-judgment motion, which it attempted to do but did not meet the criteria given their prior omissions in presenting the evidence. Rule 60(b) specifically forecloses reaching the merits of the underlying judgment that could have been properly appealed, which is the Reinstatement Order and subsequently the Affirmation Order in this matter. Robinson v. Baggett, at ¶ 13.

To the extent that OPC claims the time frame was insufficient to allow them to present it at the Affirmation Hearing, if it was not available then it was because OPC did not investigate or organize their case to include such evidence at that time. None of the evidence they later presented was evidence that could not have been reasonably located within ten (10) days from the date of the affidavit. Alternatively, their Post-Judgment Motion was filed only two weeks after the Affirmation Hearing, so there is no reason why they should not have presented it then. Their failure to present it was their own doing from which they cannot now benefit. Thus, as OPC waived their opportunity to present evidence

regarding grounds against reinstatement, and such matter has been completed litigated, the doctrine of res judicata replies. The trial court thus erred in allowing further proceedings under the Post-Judgment Motion culminating in disbarment.

**III. PROGRESSIVE DISCIPLINE WAS ONLY APPLICABLE IF OPC HAD PROPERLY PRESENTED THE GROUNDS AGAINST REINSTATEMENT DURING THE APPLICABLE OBJECTION PERIOD.**

OPC argues that because Rasmussen had violated his suspension, only harsher sanctions should have been applied, citing to In re Discipline of Doncourse which specifically states that “violating an order of suspension must be more severe than the original suspension.” *Brief of Appellee* at p. 30; *Ibid.*, 2004 UT 77, ¶19, 99 P.3d 837. It is important to note that in Doncourse, the progressive discipline was from a one (1) year suspension to a three (3) year suspension. If the trial court believed it could revisit such Orders, then the next higher sanction from his 181 day suspension was to lift the stayed part of the suspension and implement the full one (1) year suspension, not to disbar Rasmussen. Otherwise, what was the purpose of the stay? Rasmussen could reasonably believe that would be his “progressive discipline” if he violated the Sanctions Order.

A violation of an order of suspension can be brought by OPC either through contempt proceedings under the suspension order or through objection in reinstatement proceedings initiated under 14-524 or 14-525, depending on the length of the suspension. *See*, UT. LAWYER DISC. AND DISAB. 14-603. Herein, OPC had sent a letter to Rasmussen in December 2010 on notification of a violation of his suspension order, but had not opted to bring contempt proceedings by the time Rasmussen’s 181 days were completed and his

affidavit both submitted, memorialized by the Reinstatement Order, and affirmed in the Affirmation Order.

Proper procedure for OPC if they maintained evidence of violations during the suspension was to bring it by contempt proceedings prior to Rasmussen's reinstatement. The Reinstatement Order and subsequent Affirmation Order were the final order from the proceedings initiated by the Sanctions Order. The suspension proceedings had terminated. Even in criminal law, "[a] revocation proceeding begun after probation has ended 'exceed[s] the trial court's jurisdiction and authority.'" State v. Grindberg, 1999 UT App 286, *citing Grate*, 947 P.2d at 1166; *see also Atwood*, *supra* (" 'Excess of jurisdiction' is 'lack of jurisdiction' in regard to that judicial action which exceeds jurisdiction, and means a case in which the court has initially proceeded properly within its jurisdiction, but steps outside of the jurisdiction in making some order or doing some judicial act. "). Because the Post-Judgment Motion raised OPC's previously waived challenges to the reinstatement, it was akin to having brought contempt proceedings after completion of the suspension proceedings. Given that neither 14-524 nor 14-525 authorizes proceedings after reinstatement, an excess of jurisdiction occurred. *See, In re Adoption of Baby E.Z.*, 2011 UT 38, 266 P.3d 702, 710 ("subject matter jurisdiction goes to the heart of a court's authority to hear a case, ... it is not subject to waiver and may be raised at any time, even if first raised on appeal."), *reh'g denied* (Sept. 19, 2011), *cert. denied*, 132 S. Ct. 1743, 182 L. Ed. 2d 529 (U.S. 2012), *citing Crump v. Crump*, 821 P.2d 1172, 1174–75 (Utah Ct.App.1991); *see, e.g., Johnson v. Johnson*, 2010 UT 28, ¶ 10, 234 P.3d 1100.

**IV. DISBARMENT WAS IMPROPER GIVEN THE VERY LIMITED INFORMATION INAPPROPRIATELY ADMITTED AT THE POST-JUDGMENT MOTION HEARING AND USED TO SUPPORT SUCH SANCTION.**

UT. LAWYER DISC. AND DISAB. 14-605 states as follows:

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.

Underlying Rule 14-605's language for "disbarment" is the requirement that the action "seriously adversely reflects on the lawyer's fitness to practice law." OPC failed to show even at the Disbarment Hearing that Rasmussen's actions had caused "injury to a party, the public, or the legal system, or cause[d] serious or potentially serious interference with a legal proceeding." Rasmussen's actions were minor, either wrapping up a case, continuing a

matter to a later date, or sending stock formed pleadings out. He did not conduct “business as usual” as OPC has tried to argue. He testified that he went into \$100,000 debt during the suspension and would not have done so had he conducted “business as usual.”

Rasmussen believed he was in substantial compliance when he submitted the 14-524 affidavit. If Rasmussen had properly been afforded a full trial on the question of disbarment, he would have explained that he mistakenly thought the “winding up” time could be spread over the 181 days, inadvertently believing that the suspension started immediately on entry of the Sanctions Order rather than 30 days later to give him a “winding up” time. He had mistakenly convinced himself that it was non-consecutive. Upon receiving the December Letter from OPC, Rasmussen immediately ceased and desisted even the minor “wrapping up” actions, revisiting the Sanctions Order and realizing the errors he had made. Upon entry of the Reinstatement Order and the Affirmation Order, Rasmussen did not believe providing such explanation was necessary since he had been reinstated. Even in the Post-Judgment Motion proceedings that culminated in the disbarment, Rasmussen reasonably believed he was only defending against improper post-judgment revisiting of the merits underlying the Reinstatement Order and Affirmation Order, thus conceding to the pre-reinstatement violations and providing heartfelt apologies for such.

OPC tries to paint a picture of dishonesty to support the improper procedure below that led to disbarment. OPC cites Ennenga as support for the idea that financial hardships cannot support mitigating circumstances. However, in that case an attorney took the client’s funds without doing any work on their cases to earn such funds, which is technically considered misappropriation. This matter is easily differentiated from the instant matter in

that Rasmussen, although concededly suspended from practice, still provided services to the clients who paid him. Rasmussen never stole from the clients as Ennenga apparently did. Ennenga's was overturned because theft is a crime. Rasmussen did not commit a crime and would never do so.

As further support for OPC's allegations of dishonesty, they also argue that in order for a person to take full responsibility and have that be a mitigating circumstance, they are required to report themselves. Once Rasmussen realized he had been violating the Sanctions Order after receiving the December Letter, there was no reason for him to report himself. OPC was already aware. Nonetheless, this concept should pertain more to circumstances where a person causes additional litigation time or costs by denying what happened when there is adequate proof to show otherwise. Rasmussen conceded the violations alleged by OPC, but OPC and the trial court overlooked this mitigating factor.

Rasmussen has practiced law for nearly 30 years in Utah, having no prior reports to the Utah Bar Association that have culminated in any sanctions through OPC. The initial Sanctions Order in this matter was based on an isolated case where he failed to appear for trial one time, and he paid \$2000 restitution to the trial court for such actions. His misconstruing of the Sanctions Order has caused him severe consequences, and he lays no blame but on himself. Rasmussen knows there were errors he committed, but he was not intentionally trying to deceive the public or violate his Sanctions Order. Once he received the December Letter and reread the Sanctions Order, Rasmussen was in anguish over the fact that he knew he had technically practiced during his suspension; however, Rasmussen still believed he had substantially complied since he was doing only minor "winding up"

processes or filing stock pleadings such as appearances and discovery requests. For the most part, Rasmussen had closed his business doors during the suspension and not conducted “business as usual,” which he believed was “substantial compliance.”

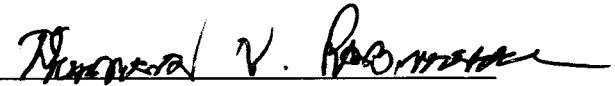
Rasmussen took the December Letter to simply be a warning from OPC, who stated they would take further action if he *continued* practicing law. OPC filed no contempt charges. They eventually did object, but Rasmussen does not feel his rights were protected through adoption of the unusual proceedings and an excessive progressive discipline below, and has thus expended time and energy protecting such interests in this appeal.

As of the filing of this reply, Rasmussen has been without the ability to practice law for almost 20 months since the Disbarment Order and has 100% compliance with that order. He has taken proper steps to challenge the disbarment, and is biding his time during this appeal process, knowing that by the time an order is entered he may have already been kept from practicing law for the duration of time ultimately determined by this Court. Rasmussen does not believe that OPC or the district court should be allowed to adopt a unique procedure under no applicable provisions of the rules governing UTAH LAWYER DISCIPLINE AND DISABILITY to the detriment of a person’s life-long career and takes this matter not only for himself but in hopes of establishing precedent respecting the strict procedures of rules 14-524 and 14-525.

### 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 10<sup>th</sup> day of October, 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)(A) in that it contains 632 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 10<sup>th</sup> day of October, 2012, I sent by first-class mail, postage-prepaid, true and correct copies of the *Reply Brief of Appellant* to the following:

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

