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Kosmann v. Dinius Appellant's Brief Dckt. 45779

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID A. KOSMANN, Plaintiff-Appellant, vs. LEO GILBRIDE, Defendant,	Supreme Court Docket No. 45779-2018 Canyon County No. CV-2013-795
DAVID A. KOSMANN, Plaintiff-Appellant, vs. KEVIN DINIUS an individual; and DINIUS & ASSOCIATES, PLLC, an Idaho professional limited liability company, Defendants-Respondents.	Canyon County No. CV-2017-568 REF. NO. 18-82

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GENE A. PETTY, District Judge, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an attorney malpractice lawsuit and attorney-lien claim that settled for $40,000 during a formal, Court-ordered mediation, with both sides represented by counsel and zero interaction between the parties. However, before the settlement was put on the record, defendant-attorney Kevin Dinius ("Dinius") met alone with plaintiff David Kosmann ("Kosmann"), his former client, and convinced him to instead settle for $32,000. Dinius was able to convince Kosmann to take a lesser sum because Kosmann's attorney Loren Messerly ("Messerly") was not told of these renegotiations and was not present to protect his client from being deceived. During the secret meeting, Dinius bad-mouthed Messerly and used knowledge of his ex-client's timidity and naivete to trick him into giving up $8,000 in exchange for a worthless release for Messerly. The mediator, Stephen Dunn ("Judge Dunn"), a District Judge from Bannock County, arranged the secret meeting for Dinius with Kosmann, and neither Judge Dunn, Dinius, nor Dinius's attorney Yvonne Dunbar ("Dunbar") told Messerly about the meeting.

This was a flagrant violation of a foundational rule of American litigation. It was also a violation of Idaho Rules of Professional Conduct, Rule 4.2, which prohibits Idaho lawyers from having unauthorized communications with represented parties (aka: the "no-contact rule"). Rule 4.2 required Dinius and Dunbar (and Judge Dunn) to ask Messerly if he consented to a meeting between just Dinius and Kosmann (Dinius, Dunbar, and Judge Dunn undoubtedly knew Messerly would not have allowed it). The no-contact rule has been in place for at least a century

to stop what happened here: a naive party manipulated by a lawyer to **give up part of his settlement in exchange for something valueless** -- release of non-existent liability for counsel.

Upon learning what happened, Messerly immediately demanded that Dinius proceed with the original $40,0000 settlement. Dinius could have easily remedied the violation: apologize for the improper contact with a represented party and concede the original $40,000 settlement. Instead, Dinius claimed he did nothing wrong. In fact, Dinius and Dunbar instead argued that Kosmann and Messerly would be sanctioned if Kosmann failed to abide by this new agreement. Inexplicably, Judge Dunn supported Dinius, claiming no ethics violation and arguing to Kosmann that the amended agreement was the only enforceable agreement and he would pay expensive attorney fees (and possibly sanctions) if he challenged it. Unsurprisingly, Kosmann believed he had no choice. He was being threatened by two attorneys and a Judge. Against his attorney's advice, Kosmann put the amended agreement on the record. Messerly put an objection on the record, to make clear that he denied the validity of the new terms and believed Kosmann had been cheated out of $8,000 and tricked into paying for a counsel release. On the record, Dunbar, Dinius, and Judge Dunn (1) admitted to facilitating the *ex parte* meeting that reduced Kosmann's settlement by $8,000, and (2) did not deny failing to inform Messerly of the meeting.

Any ethical attorneys would not have secret negotiations, and if they somehow "innocently" erred, then they would have quickly remedied it. Dinius and Dunbar, however, refused to concede they had done anything improper and instead insisted they could use the court to profit from Dinius's unauthorized contact, filing a motion to enforce the $32,000 settlement. Kosmann and Messerly were forced to ask the District Court to remedy the situation by awarding

the lost $8,000 settlement funds and reimbursing all attorney fees. Litigation should have been minimal because this should have been an easy issue to resolve. The no-contact rule is known by all lawyers and used every day in their practice, and Idaho has case law directly on point, *Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996), holding that an Idaho attorney, even when a party in a lawsuit, cannot have contact with the represented opposing party without first obtaining explicit consent from opposing counsel. The rule is rooted in common sense policy that "prevents a lawyer from nullifying the protection a represented person has achieved by retaining counsel." G. HAZARD, JR. & W. HODES, THE LAW OF LAWYERING, § 4.2.101 (2d ed. 1993) (quoted in *Runsvold*).

The District Court, however, repeatedly refused to do justice and enforce Idaho ethical rules and caselaw precedent. On the record at the end of mediation, Dinius and Dunbar had asserted they did nothing wrong because they assumed Messerly knew about the *ex parte* meeting. In the subsequent litigation, however, Dinius and Dunbar changed their position to add many other excuses. The District Court initially ruled in favor of their new argument that Rule 4.2 was inapplicable because Dinius was not "representing a client" other than himself. When presented with the *Runsvold* case rejecting that argument, the District Court just changed its position to reach the same result by relying on three other excuses. In the end, the Court not only refused to identify ethical violations or remedy them; it gave legal authorization to the violations by ruling that Dinius could enforce the reduced terms that would not exist but for unethical and unauthorized contact with a represented party.

As a final act of judicial abuse and retaliation, the District Court instead awarded monetary sanctions against Kosmann and Messerly. The sanctioned conduct was the "egregious" act of submitting a supplemental filing and accidentally forgetting to file a separate motion for leave (which "error" was immediately corrected). When Messerly pointed out a dozen reasons why this sanction was contrary to law and equity (including how Dinius violated Rule 11's safe-harbor requirement), **the District Court again ignored the law** and Kosmann's arguments.

Therefore, Kosmann asks the Court to reverse the District Court and (1) confirm that Dinius (with Dunbar and Judge Dunn's assistance) violated IRPC 4.2 when he negotiated alone with the opposing party without first obtaining consent from opposing counsel, (2) remedy the damages caused by the ethical violation by awarding the $8,000 in lost settlement funds and reimbursing all post-mediation attorney fees, including appellate attorney fees, incurred because of Dinius and Dunbar's refusal to voluntarily remedy their ethical violation, (3) reverse the monetary sanctions against Kosmann and sanction Dinius and Dunbar for abusive use of sanction requests, and (4) remand to a different district judge who will follow the law.

B. Statement of Facts.

1. Two Issues in Two Cases to Settle at Mediation.

The mediation at issue is tangentially related to litigation previously before this Court. *See Kosmann v. Gilbride*, 161 Idaho 363, 386 P.3d 504 (2016). Dinius represented Kosmann in that litigation against Leo Gilbride ("Gilbride") regarding Kosmann's residence. R. Vol. III, p.84. After losing Kosmann's home to fraudster Gilbride, Dinius claimed that he was owed more than $50,000 in additional attorney fees. *Id.* Dinius filed a notice of attorney's lien against the

$31,000 judgment that Gilbride owed to Kosmann (funds Kosmann loaned to Gilbride and then Gilbride tried to steal, claiming they were for his imaginary car parts). *Id.*

Gilbride posted a cash bond for the $31,000 judgment and filed an appeal to this Court seeking to recover approximately $100,000 in attorney fees as the "prevailing party," which would have wiped out the judgment and bankrupted Kosmann. *Id.* Dinius refused to defend that appeal without first being paid the additional $50,000 he believed he was owed. *Id.* Kosmann hired Messerly as pro bono new counsel and eventually prevailed in defending the appeal. *Id.* Kosmann then asked the District Court to release the approximately $32,000 (after interest) cash bond, but the Court refused based on Dinius's attorney lien. Supp.R., pp.12-20. Kosmann also filed a malpractice lawsuit against Dinius, pointing out numerous errors causing Kosmann to lose his home to an obvious fraudster. R. Vol. II, pp.12-82. The common-sense result, which Dinius failed to pursue, was the unwinding of the sale (based on fraud by Gilbride and the malpractice of the realtor who recommended and directed the transaction) and returning Kosmann's lender to its secured position on the property. *Id.* Kosmann sought thousands of dollars in damages for Dinius's malpractice. *Id.* Thus, there were two issues for resolution: Dinius's claim to an additional $50,000 in fees and Kosmann's claim to malpractice damages; tangentially, release of the $32,000 of Kosmann's own money, held by the court for two years, was also at issue.

2. At Court-Ordered Mediation, the Matters Settle for $40,000 to Kosmann.

The District Court encouraged both parties to use the Court's free mediation services and both parties agreed. On June 19, 2017, the Court issued its Mediation Order stating, "The Court hereby appoints Stephen S. Dunn, District Judge, to serve as mediator" on "July 26, 2017, at

9:00 A.M. at the Canyon County Courthouse." R. Vol. II, p.106. On that date, Kosmann (and his girlfriend) and his counsel Messerly appeared and were placed in a room, while Dinius and his counsel Dunbar were placed in a separate room (Dinius' malpractice insurer was on the telephone in Dinius's room), separated only by a wall. R. Vol. III, pp.61-62, ¶¶3-4; p.85-87, ¶¶6-17; p.215, ¶3; pp.348-49, ¶¶2-3; 408-14, ¶¶5-6, 20-21. Judge Dunn met with each side separately. *Id.* All negotiations during the mediation were through the mediator (except for one heated discussion between Messerly and Dunbar in the hall). *Id.* The parties negotiated approximately five hours regarding an amount to be paid by Dinius's malpractice insurer to settle all issues. *Id.* Around 1 or 2 p.m., the parties reached an agreement for $40,000 to be paid to Kosmann and an "undisclosed amount" to be paid to Dinius. *Id.* Kosmann already had the $32,000 being held by the Court, so this was an agreement that the malpractice insurer would pay only $8,000 in new money to Kosmann and the undisclosed amount to Dinius. *Id.* Dinius requested for his payment to initially come from Kosmann's $32,000 held by the Court and then his malpractice insurer would reimburse Kosmann (this strange money flow was used because the insurer was unwilling to directly pay its insured Dinius). *Id.* In exchange for their respective payments, Kosmann dropped his malpractice claims and Dinius dropping his claims for additional fees. *Id.*

3. The Dispute About the Scope of the Mutual Release to Include Counsel.

After reaching agreement about the key payment issues, the parties discussed a couple uncontested ancillary issues, i.e. a basic confidentiality and non-disparagement agreement. R. Vol. III, p.68-70, ¶¶10-12, 17-21, 27-28; pp.158-65; p.215, ¶3; pp.318-25. Also part of the "wrap

up," the parties discussed the mutual release, and Kosmann said the scope of the release would include a protection against future lawsuits against his attorney Messerly. *Id.* Kosmann explained that Dinius threatened to sue Messerly twice (once during the mediation), and Kosmann believed such a lawsuit would be frivolous but he did not want his counsel tied up with frivolous litigation (because his counsel represented him, mostly pro bono, in two other active cases). *Id.* The release of counsel was discussed only after his $40,000 settlement amount was finalized, so Kosmann was not offering to pay anything for the release for his counsel (like Dinius had not paid anything for the confidentiality and non-disparagement add-on terms he wanted). *Id.*

Kosmann and Messerly were surprised when Dinius refused to include Messerly in the scope of the release, suggesting Dinius was planning on filing a frivolous lawsuit against Messerly. R., Vol. II, p.114-15, ¶¶2-4; Vol. III, pp.61-62, ¶¶3-4; pp.88-90, ¶¶18-32; p.215, ¶3; pp.408, ¶5. Judge Dunn indicated that Dinius and Dunbar claimed Dinius was ethically forbidden from agreeing to this release of counsel. *Id*. Judge Dunn took the side of Dinius and Dunbar and claimed that such a release was unethical to ask for, agree to, or accept, though Judge Dunn could not articulate what valid claim against Messerly was being released or why it was unethical to include a release of counsel that the client was paying nothing to obtain. *Id.* Messerly made clear to the mediator that he believed a release of counsel was a normal term found in many release agreements (Messerly has provided two example settlement releases drafted by other attorneys that included release of counsel). *Id.* Judge Dunn suddenly claimed he was considering making an ethics Complaint against Messerly to Bar Counsel. *Id.* Judge Dunn's threats caused significant anxiety for Kosmann and Messerly. *Id.* Judge Dunn also stated that he

agreed with Dinius and Dunbar that the release for counsel was requested too late and the parties already had a final settlement for $40,000. *Id.* During this debate about the scope of the mutual release, Dinius never asked Kosmann to pay anything for release of his counsel, and Messerly and Kosmann specifically discussed that Kosmann would never pay anything for a release that was not even for Kosmann, particularly since there was no actual counsel liability to Dinius to release. R. Vol. III, p.93, ¶39. Messerly eventually told Kosmann to drop the issue and move forward with the existing agreement: settlement for $40,000 and a mutual release that did not include counsel. R., Vol. II, p.114-15, ¶¶2-4; Vol. III, pp.61-62, ¶¶3-4; pp.88-90, ¶¶18-32; pp.408, ¶5. Messerly told Kosmann that because of the accusations of the release being unethical, Messerly would now not accept a release from Dinius even if it was offered. *Id.*

Messerly sent Kosmann out of the room to tell Judge Dunn that the mediation had been fully resolved based on the existing $40,000 agreement, without a release of counsel. R. Vol. III, p.91, ¶33; p.309, ¶¶8-9. The mediation was now over. R. Vol. III, p.215, ¶5. Typically, Messerly would convey this final acceptance, but Messerly sent Kosmann because of the repeated accusations from Judge Dunn (in front of Kosmann) that Messerly was improperly making the decisions rather than Kosmann (an absurd notion by Judge Dunn since it is counsel's job to give Kosmann the best advice about settlement options). *Id.*

4. Kosmann Meets Alone With Dinius and Everyone Knows Except Messerly.

Kosmann told Judge Dunn that he had dropped the release of counsel issue and the case was settled for $40,000. R. Vol. II, p.115, ¶5; Vol. II, p.62, ¶5; Vol. III, pp.309-10, ¶¶3-7; p.349-351, ¶¶4-5, 12. He also asked Judge Dunn if he could speak to Dinius about getting an informal

promise that he would not sue Messerly. *Id.* Kosmann had not discussed this idea with Messerly. *Id.* In fact, during two years since Dinius stopped representing Kosmann in 2015, the two had never spoken and all communication from Dinius and Dunbar to Kosmann and vice versa had gone through Messerly. *Id.* Judge Dunn did not tell Messerly (sitting a few feet away behind a closed door) about his client's request. *Id.* Instead, Judge Dunn took Kosmann's request to Dinius and Dunbar. *Id.* Neither Judge Dunn, Dinius, nor Dunbar told Kosmann that *ex parte* meetings are not allowed unless his counsel consents. *Id.* Neither Dinius nor Dunbar asked Kosmann or Judge Dunn whether Messerly knew or had consented. *Id.* Dinius (with Dunbar and Judge Dunn's blessing) met with Kosmann alone (without telling Messerly). *Id.*

After approximately 20-25 minutes had passed without Kosmann returning, Messerly opened the door to leave their negotiation room, intending to look for his client. R. Vol. II, pp.115, ¶5; Vol. III, pp.61-62, ¶¶3-4; pp.91-92, ¶¶33-37; pp.215-16, ¶¶6-8; pp.310-11, ¶¶10-15; p.349, ¶¶4-6. Messerly was surprised to discover Judge Dunn leaning against the wall right outside the door. *Id.* Messerly asked Judge Dunn why he was not writing up the final settlement. *Id.* Judge Dunn explained that Kosmann was in a closed room across the hall meeting with Dinius. *Id.* Messerly immediately objected and asked why this was happening. *Id.* Judge Dunn explained that he set it up, that it was to clear the air, and that the $40,000 settlement was already final. *Id.* Messerly stated that a secret meeting between a lawyer and an opposing party during mediation was improper, but Judge Dunn said it was proper. *Id.* Messerly did not know what to do (since a Judge was telling him to back off). *Id.* Before he could decide what to do, Kosmann returned, with Judge Dunn accompanying him, and announced that he had reached a new

settlement: all the same terms except Dinius would now give the broader release to include a release of Messerly in exchange for Kosmann giving up $8,000 of the prior settlement, i.e. Kosmann was now just receiving back his approximately $32,000 being held by the Court. *Id.*

Messerly immediately objected and indicated that this was improper: a secret meeting that Judge Dunn, Dinius, and Dunbar knew about but Messerly did not, the renegotiation of a settlement reached hours before, Judge Dunn's incorrect claim that the meeting was just to "clear the air," and the exchange of $8,000 for a release that minutes earlier Judge Dunn, Dinius, and Dunbar had claimed was unethical and that Messerly had said he would not accept and certainly would never allow his client to pay for. R. Vol. III, pp.61-62, ¶¶3-4; pp.92-94, ¶¶38-45; p.216, ¶9; pp.311-13, ¶¶16-19; p.350-52, ¶¶7-13; pp.410-12, ¶¶11-14. Judge Dunn disagreed with Messerly and told Kosmann that the new agreement was now the final agreement, eliminating the prior settlement. *Id.* Judge Dunn unequivocally told Kosmann and Messerly that there was nothing improper with Dinius meeting with Kosmann without getting Messerly's consent. *Id.* Messerly insisted that Judge Dunn tell Dinius and Dunbar about the impropriety of their unauthorized meeting with Kosmann and demand they stick with the original agreement for $40,000. *Id.* When Judge Dunn returned, he indicated that they had refused and he again agreed with them. *Id.* Judge Dunn told Kosmann and Messerly that he would just put the new agreement on the record. *Id.* He also indicated that Dinius and Dunbar had stated they would file motions to have Messerly and Kosmann sanctioned if Kosmann refused to follow through with the new agreement (which they subsequently did). *Id.* Judge Dunn said Messerly would be acting improperly if he tried to unwind an agreement already reached between the parties. *Id.*

5. Kosmann Puts New Settlement on Record After Threats by Judge Dunn and Dinius.

Messerly told Kosmann that he would not accept the release from Dinius and he would not support the renegotiated settlement. R. Vol. III, pp.61-62, ¶¶3-4; pp.94-95, ¶¶46-48; p.217, ¶¶10-12; pp.313-14, ¶¶20-24; p.352-53, ¶¶14-17. Messerly said Kosmann now had two options, neither of which were good: (1) ignore Messerly's advice and give away the $8,000 (in exchange for nothing) over Messerly's stated objections; or (2) let Messerly fight to enforce the original settlement agreement and oppose the new terms, knowing it would be a lengthy fight and Judge Dunn was going to support the other side. *Id.* Kosmann was overwhelmed and in tears because of the situation. *Id.* Messerly was angry at the unethical behavior by Dinius, Dunbar and Judge Dunn and distraught for his client. *Id.* Kosmann decided to not fight Judge Dunn, Dinius, or Dunbar anymore. *Id.* Kosmann made this decision based on the misrepresentations by Dinius during the secret meeting, Judge Dunn and Dinius's false claims about the validity of the secret meeting, and his fear of the threats that he would go through months more litigation and pay sanctions and other fees if he challenged what they had done. *Id.*

6. Judge Dunn Admits Orchestrating Secret Meeting; Messerly States His Objection.

The parties then went on the record. Judge Dunn spoke first:

> … I've been mediating the matter with the parties and their representative counsel. And they have reached a settlement agreement. The essence of the agreement is that for a payment of … $32,047.19 that – to Mr. Kosmann. There will be a complete release and dismissal of any and all claims between the parties, each party to bear their own costs and fees. … I'll note for the record that there were, in the last few minutes, individualized discussions between the parties, Mr. Kosmann and Mr. Dinius, outside the presence of counsel that that discussion led, in part, to this agreement. … But the essence of the agreement is for a complete dismissal of all – any and all claims. There will be that payment. …

Tr. p.2, L. 2:6-3:2. Judge Dunn did not mention the payment going to Dinius, the release of Messerly that Dinius had promised to Kosmann, that Judge Dunn arranged those *ex parte* "discussions between the parties," or that Judge Dunn had purposely not disclosed them to Messerly (undoubtedly knowing Messerly would never have consented to it). *Id.*

Messerly then stated an objection to what was happening,

> … this litigation was originally settled, I don't know, about an hour ago or two hours ago for $40,000, … the understanding was my client requested that I be also released from all claims, that Mr. Dinius would release me as well as my client from all claims. And my client expressed the fact that the reason why he wanted that was because he has additional litigation that he's got ongoing against other parties and doesn't want his lawyer being sued for whatever reason that Mr. Dinius might have. And Mr. Dinius had already threatened during the negotiations, through the mediator, that an indemnity claim was going to be brought against me and the lawsuit and that [Kosmann] wouldn't be able to have me as his attorney. … In this lawsuit. … And the mediator expressed concerns that this was an ethical violation on my behalf. And so I had phone conversations with multiple parties. … And Brad Andrews was concerned enough that it gave me enough concern that I told my client I don't want to be on that release anymore. …And I told my client, take the $40,000 and don't put me on the release. That's the agreement that had been said many times by the mediator that that was what was the agreement. So I said take that deal. I sent him out of the room to go take that deal, to go speak to the mediator. Next thing I know, I – half an hour later, I went out to go see what was going on, why he hadn't come back, and I learned that he was having communications directly with Mr. Dinius. And then he came back in to tell me that he'd settled the agreement – settled the lawsuit for $32,000, giving away $8,000 that he'd already settled for. And he explained that the reason he got that lesser amount was because he got some sort of personal promise from Kevin Dinius that Kevin Dinius would not sue me in any way. So in other words, even though Kevin Dinius had … throughout the entire mediation, alleged that I was acting unethically by supposedly me forcing my client to ask for this release, now when he gets in the room with [Kosmann], he gets [Kosmann] to agree that he'll give up $8,000 in exchange for that exact same promise. … And now [Kosmann] has $8,000 less. … I have grave concern about this because I wasn't there and I would never have allowed – I would never have counseled him – he didn't ask me. … And I am shocked that Mr. Dinius would ask for that benefit when he had specifically said that he had all those concerns about that being an ethical violation. … I, of course, can't enforce that promise. If I tried to enforce that promise, there would be an ethical

> violation, as I've been told over and over and over again today.… Dave Kosmann gave up $8,000 for nothing. And it was all done in personal negotiations directly with Mr. Dinius without my involvement.…

Id. pp.2-3: 4:13-7:19. Messerly's statement reflects his anger with: how an existing settlement had been renegotiated without his knowledge or involvement, how Kosmann was receiving $8,000 less in exchange for nothing, and how Dinius manipulated his ex-client by claiming a trivial attorney release was unethical but then changed his tune when he had Kosmann alone. Messerly would have said more but he had only a few minutes to prepare and was unsure how to contest unethical conduct by a judge who had personally threatened Messerly during the mediation. R.Vol. III, p.412, ¶14 ("I was clearly holding back much of what I wanted to say because of my fear of crossing a District Judge."). Kosmann then stated,

> It is my hope to be done today. And I want to move forward with my life. I feel comfortable with the agreement that I made with Kevin just from man to man, besides all the legal stuff. Would I prefer having more money? Yes. But I also want my peace of mind. And I want to continue with my lawyer, Loren, to go on to the litigation that I have ahead of me. And I want bygones to be bygones between Kevin and I so that we can end on good terms and we can – we can both move on with our lives. This did not end the way we wanted it to end today. But from just man to man, today was the day that, you know, it's time to move on and be done. And I'm happy with it. Loren has to protect himself for those types of things. I want him to protect himself. Probably didn't do what he asked. But I'm doing this for my own accord because today is the day to move forward.

Id. p.3: 8:5-23. This statement does not show how Kosmann was in tears because of his position: caught between his attorney who was angrily arguing this was completely unethical and Judge Dunn, Dinius, and Dunbar who were claiming it was totally valid and stating that Kosmann would face more litigation, sanctions, and fees if he failed to capitulate. Kosmann's statement

shows his continued incorrect belief (based on legal advice by Dinius during the secret meeting) that there would be a release of Messerly -- Messerly had just stated he would not accept it. *Id.*

7. Dinius and Dunbar Admit $40,000 Settlement and Unauthorized Communications.

Dunbar then admitted the prior, finalized $40,000 settlement:

> when the $40,000 agreement was made, Mr. – the potential of releasing Mr. Messerly had never been discussed at that point in time. **We had an agreement**. And then after the fact is when there was a demand for Mr. Messerly to be on the agreement.

Id. p.3: 9:15-24 (emphasis added). She tried to excuse the secret meeting: "We weren't aware that Mr. Messerly didn't know his client and my client were actually going to sit down and talk," *id.* p.4: 10:4-8, but she did not apologize or offer to proceed with the agreement she admitted was reached prior to the *ex parte* meeting. *Id.* pp.2-4. Judge Dunn then chimed in to support Dunbar:

> That's right. You didn't know that. It was a request by Mr. Kosmann to visit with Mr. Dinius. I came in and asked Mr. Dinius to at least have a conversation with him. All he had to do was get in a room and converse with him because that was Mr. Kosmann's request. And so I allowed them to do that because clients can meet if they wish.

Id. p.4: 10:9-16. It is unclear whether this is a common practice for Judge Dunn: assisting represented clients in communicating without the protection of their counsel and without telling counsel that the Court is facilitating such meetings. This practice would be highly improper. *See* Idaho Code of Judicial Conduct, Rule 1.1 (Compliance with the Law), Rule 1.2 (Promoting Confidence in the Judiciary), Rule 2.2 (Impartiality), and Rule 2.9 (Ex Parte Communications).

Dinius also claimed he had no idea that Messerly was unaware of the secret meeting: "I had no idea that Mr. Kosmann had asked to meet with me without Mr. Messerly's knowledge of that." *Id.* p.4: 10:20-22. So, both Dinius and Dunbar used the same excuse: they did not realize (because they did not ask) Messerly was unaware of the meeting. Neither of them argued that

they did it because Dinius was a party and did not need Messerly's permission (only Judge Dunn made this argument) or because Dinius had an attorney and therefore was not bound by the *Runsvold* holding (an after-the-fact argument they now rely upon). *Id.* pp.2-4. Dinius then also admitted the $40,000 agreement: "At no point prior to after having reached that initial – what we thought was the agreement of $40,000 – did I have any understanding that Mr. Messerly wanted to be included in the release." *Id.* p.4: 10:22-25. Dinius also tried to explain why it was suddenly okay for him to give a release that he had previously claimed was unethical:

> I did not raise any ethical issues with that until that time at which point I too spoke with Brad Andrews. And Brad walked me through the process by which that could have been and can be, which I've agreed with [Kosmann] to do, and avoid any impropriety under our rules of professional conduct. … in compliance with Rule 1.7 that [Kosmann] … understands that there is a potential conflict with Mr. Messerly's release in the context it was portrayed to us or conveyed. … as long as he knowingly understands that as a potential for conflict, he can …, by way of informed consent, agree to waive that conflict. When [Kosmann] and I met, [Kosmann] and I have not directly spoke since about July of 2015. [Kosmann] and I cleared the air. The terms of the agreement were modified consistent with the discussion that he and I had … in clearing the air and trying to restore the friendship that he and I had before ….

Id. p.4: 11:1-25. Dinius, thus, admitted using the meeting to: give legal advice to Kosmann about the release, use his prior attorney-client relationship with Kosmann to manipulate Kosmann, and obtain a conflict of interest waiver <u>on behalf of Messerly</u> (as if that were possible). *Id.* Dinius has not explained what claims against Messerly he gave up. There were none.

After the mediation, Messerly interviewed Kosmann more closely regarding what was said during the *ex parte* meeting and learned that Dinius also told Kosmann: (1) Messerly committed malpractice; (2) he would have protected Kosmann in the Gilbride appeal and related litigation but for Messerly causing all the litigation between Kosmann and Dinius; and (3)

Messerly is a hot head. R.Vol. III, p.93, ¶40. In sum, the meeting was exactly the dishonest attorney manipulation (of an ex-client no less) that is supposed to be prohibited by IRPC 4.2.

8. Dunbar's Proposed Settlement Agreement.

Shortly after mediation, Dunbar sent a proposed settlement agreement that stated Dinius would receive $15,000 (the first disclosure of Dinius's payment) and tried to revise history:

> The Defendants also herein agree not to pursue any indemnification claims against Kosmann's current counsel, Loren Messerly, with regard to Kosmann's claim that the Defendants failed to timely file litigation against real estate agent Justin McCarthy. Kosmann represents his understanding that the inclusion of his current counsel in this Agreement creates a potential conflict of interest between him and Messerly; that the potential conflict was fully explained to him by Messerly; that he consents to waiving any potential conflict …

R.Vol. III, p.26, ¶3, p.27, ¶5. Dunbar's language says Messerly "fully explained" an alleged conflict of interest to Kosmann and received his waiver, even though she knew it was Dinius, not Messerly, who claimed to have had those conflict and waiver discussions with Kosmann during the secret meeting. Tr. p.4, L. 11:1-25; R. Vol. III, p.97, ¶57. The statement claiming Messerly failed to timely file litigation against McCarthy was particularly specious considering Messerly did bring the lawsuit (that Dinius failed to bring) and received a significant settlement from McCarthy for Kosmann. R. Vol. III, p.407, ¶3. Dunbar also included a signature line for Messerly to approve the document even though Messerly had objected on the record. *Id.*, p.30.

C. Statement of Procedural History.

1. Initial Cross-Motions to Enforce Two Different Settlements.

On August 2, 2017, Dunbar filed a motion to compel enforcement of the settlement agreement that had been put on the record on July 26, 2017. R. Vol. II, p.110. The next day,

Messerly filed a cross-motion to enforce the initial settlement agreement for $40,000. *Id.*, p.112. Fulfilling their threat from the mediation, Dinius and Dunbar immediately retaliated and filed a memorandum seeking sanctions under I.C. §12-121 and IRCP 11(c) against Kosmann and Messerly for challenging the $32,000 settlement. *Id.*, pp.17-18. This was the first of seven different briefs where Dinius and Dunbar sought retaliatory sanctions against Messerly and Kosmann. R. Vol. III, p.187-89; pp.206-07; pp. 268-69; pp. 277-87 (seeking approximately 50 hours of fees, i.e. $10,000 or more, to be paid as sanction); pp. 327-32; pp. 463-64.

The affidavits filed by Messerly and Kosmann detailed the improper actions of Dinius, Dunbar, and Judge Dunn during the mediation. R. Vol. III, pp. 61-2, 83-98. Messerly's affidavit also noted that this was putting his career at risk, since he was pointing out to one judge the improper actions by another judge. *Id.*, p.79, ¶59; *see* ICJC, 2.15 (Responding to Judicial and Lawyer Misconduct) ("Taking action to address known misconduct is a judge's obligation."); Rule 2.16(B) ("A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer."). Dinius and Dunbar submitted declarations wherein they: again admitted not telling Messerly about the *ex parte* meeting; continued to accuse Messerly of unethical actions regarding Kosmann's initial request for a release of counsel; admitted the settlement for $40,000; accused Messerly of malpractice by letting a statute of limitation run; and tried to blame Kosmann. R. Vol. III, pp.190-97; 198-202. Dinius and Dunbar were completely unapologetic:

> [N]either I nor my client [Dinius] had any duty to confirm whether Mr. Messerly was aware that his client repeatedly asked the mediator to speak with Mr. Dinius or that the parties were going to meet at his client's request.… [IRPC] 4.2 only precludes an

> attorney from communicating with a represented opposing party where the attorney is representing his or her client during such communication. It does not preclude an attorney-party from communicating directly with a represented opposing party.

Id., pp. 195-96, ¶¶ 13 & 15. That statement is completely contrary to Rule 4.2 and *Runsvold*.

2. The Initial Hearing on the Cross-Motions to Enforce Two Different Settlements.

The District Court heard the cross-motions on August 31, 2017. Messerly expecting the Court to be unhappy with Dinius and Dunbar for meeting secretly with an opposing party during a Court-ordered mediation to obtain a better settlement than what had already been agreed upon and for refusing to just remedy the situation by paying the additional $8,000 they had already agreed to pay. Tr. pp.7-8, L. 12:12-21, 14:3-7; *see* ICJC, Rule 2.15 ("Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the legal system."). Instead, the District Court had no questions for Dinius and Dunbar about their unauthorized contact with a represented party.[1] Tr. pp. 5-11. The District Court's only substantive questions

[1] The Court never asked any of the obvious questions, including: what was their normal procedure when a represented party contacted them; why they were sure during the mediation that Dinius could speaking with Kosmann alone; had they ever had secret contacts with represented parties before; if they thought the contact was okay, why hadn't Dinius spoken with Kosmann earlier in the case; why they hadn't asked Kosmann about Messerly's consent; why they hadn't knocked on Messerly's door to find out if he consented and in order to be cautious; whether Dinius, Dunbar and/or Judge Dunn discussed whether to get Messerly's consent; why they assumed Messerly would be okay with letting them meet alone with his client; why they believed including counsel in the mutual release was unethical; why, during negotiations with opposing counsel, they never offered to trade the release of counsel for money but did make that offer once they had Kosmann alone; whether Dinius believed that his prior attorney-client relationship with Kosmann provided him with an advantage in convincing Kosmann to change the settlement; what exactly was said during the secret meeting; what legitimate claims Dinius had against Messerly that were worth $8,000 to Kosmann; why Dinius bad mouthed an opposing lawyer to that lawyer's client; what legal advice Dinius gave to an opposing party without

were directed at Messerly, arguing that the plain language of IRPC 4.2 allowed Dinius to have the secret meeting with Kosmann (the argument rejected by *Runsvold*): "Mr. Dinius in this case was a client. He's not representing a client." Tr. p.7, L. 10:1-7.

Stunned by the District Court's approach of defending the unauthorized communications, Messerly immediately filed a short supplemental brief and declaration from Kosmann to respond to the Court's comments and fact questions. R. Vol. II, pp.114-126. Messerly inadvertently did not file a separate motion for leave to file supplemental briefing. Messerly's normal practice is to request leave if he files supplemental materials. Tr. pp.40-41; R. Vol. III, p.316, ¶31. In fact, previously in this same case, Messerly filed supplemental materials after a hearing and he filed a motion for leave. R. Vol. III, p.25 (2/28/17 Motion).

3. Dinius's Motion to Strike and For Sanctions That Does Not Comply with Rule 11.

Without warning, six days later on September 5, 2017, Dinius and Dunbar filed a motion to strike Kosmann's supplemental filings and said they were improperly filed without a separate motion requesting leave to file. R. Vol. III, pp.203-08. Dinius and Dunbar asked the Court to sanction Kosmann and Messerly under Rule 11 for this alleged procedural error of not filing the separate motion for leave. *Id.* Prior to filing their motion to strike, Dinius and Dunbar did not

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opposing counsel knowing; why they did not return to the original settlement once they knew Messerly was unaware of the secret renegotiations and was objecting; why they believed they could sell the release of counsel to Kosmann for $8,000 even after they learned Messerly would not accept it; whether they had done any subsequent research after the mediation to confirm they were allowed to have this unauthorized contact; why it was not already a settlement for $40,000 when Kosmann went to Judge Dunn and said he was dropping the release issue; and whether it might make more sense to pay the $8,000 rather than expend thousands in fees to try to prove they did nothing wrong.

contact Messerly to point out any alleged procedural error nor did they provide the required 21-day notice. R. Vol. III, p.316, ¶31; *see* IRCP 11(c)(2) ("The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days …."). Messerly immediately fixed any error, filing a motion for leave two days later on September 7th. R. Vol. III, pp.208-18. Also on September 7th, Messerly sent Dunbar an email stating that Plaintiff would waive fees and the litigation could be resolved if they would just pay the additional $8,000. R. Vol. III, p. 315, ¶26-27, p.415-416, ¶24, & p.423. Dunbar and Dinius never responded.

4. Kosmann Seeks Sanctions Based on Idaho *Runsvold* Case That Is Controlling Law.

On September 14, 2017, the Court set the matter for another hearing on October 2nd. R. Vol. III, p.6. In preparation for that hearing, Messerly did more research on IRPC 4.2 and found that Idaho had a case directly on point that rejected the Court's statements during the last hearing: Dinius was not allowed to meet secretly with a represented party even if Dinius was not representing anyone other than himself. *See Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996). It is unclear whether Dinius and Dunbar were aware of this controlling Idaho case law. They had not disclosed it, which suggests they were unaware of it and had not even adequately researched their own excuse to get around Rule 4.2.

Messerly immediately drafted a motion for sanctions relying on Idaho's long-standing *Runsvold* controlling precedent; he finished it and filed and served it on September 20th, two days short of the normal fourteen days prior to the existing hearing date of October 2nd, so he also filed a motion to shorten time and proposed order and stipulated that Dinius would have the

full seven days to respond. R. Vol. III, pp.6-7, 236. Dinius opposed the motion to shorten time. R. Vol. II, pp.127-32. However, on September 27th, Dinius filed an opposition brief, with two additional affidavits. R. Vol. III, pp.238-69. Dinius called the brief a "Supplemental Reply In Support of Motion to Enforce Settlement," which was highly ironic and inconsistent since he did not file a motion for leave to file supplemental materials. *Id.* The new affidavits from Dinius and Dunbar were an attempt to protect against the *Runsvold* decision: claiming Dinius was never acting *pro se* (even though he met alone with Kosmann to negotiate a settlement and Dunbar claimed no involvement), arguing it was reasonable to assume that Messerly had okayed the meeting, and blaming Messerly ("[T]he standard practice during mediations is for an attorney to remain with his client during any and all communications with the mediator. Otherwise, the attorney is leaving his client unrepresented with an individual, the mediator, whose job it is to convince the client to change his expectations and position and settle."). *Id.*

5. Court's Oral Ruling to Sanction Messerly and Kosmann.

At the October 2nd hearing, the Court denied the motion to shorten time, without giving a reason, and only addressed Kosmann's motion for leave to file supplemental materials and Dinius's motion to strike. Tr. pp.27-38. The Court granted Kosmann's motion for leave and allowed Dunbar time to file responsive supplemental materials. *Id.* Shockingly, the Court also stated that it would impose a monetary sanction upon Kosmann and Messerly for failing to initially file the motion for leave. Tr. p.38, L. 16:13-22. Messerly immediately saw the retaliatory purpose of this unheard-of sanction: "… they violate the rules, and I bring it to your attention, and your approach is to award attorneys fees to them?" *Id.*, L. 17:10-13.

On October 5, 2017, the Court entered its Order Granting Motion for Leave to File Supplemental Materials. R. Vol. II, 136-40. The Order concluded, "The Court noted at the hearing that it intended to award fees incurred in filing and prosecuting Dinius's Motion to Strike. However, because Dinius did not file his request for fees in a separate motion as required by Rule 11(c)(2), no fees shall be awarded." *Id.*, p.140. In other words, the Court noted that Dinius and Dunbar made their own procedural error in their motion asking for sanctions for a procedural error. The Court failed to note the more important error: Dinius and Dunbar also erred in not following the mandatory 21-day service and notice requirement in Rule 11(c)(2).

On October 17th, Kosmann re-noticed his Motion for Sanctions for a November 8th hearing. R. Vol. III, pp.7-8. Predictably, on October 25th, Dinius filed his own retaliatory Motion for Sanctions, which included a renewed request for sanctions based on the August 31st failure to file a separate motion for leave and a request for sanctions because Kosmann and Messerly dared to challenge the Rule 4.2 violation. R. Vol. III, pp.274-87. Defendants sought monetary sanctions for approximately 50 hours of fees, *i.e.* $10,000-$14,000 at $200-280 an hour. *Id.* Dinius and Dunbar were again fulfilling the threat made during the mediation when they told Kosmann they would sue him for monetary sanctions if he did not go through with the renegotiated settlement.

6. In First Ruling, the Court Rejects *Runsvold* and Enforces the New Settlement.

On November 3rd, the Court issued its Memorandum Decision and Order to Enforce Settlement Agreement and Order to Release Funds ("Nov. 3rd Order"). R. Vol. II, pp.142-160. As would be its consistent approach, the District Court's analysis ignored most of the arguments

raised by Kosmann. Regarding the key issue of ethical violations by Dinius and Dunbar during mediation, the Court remarkably claimed this was an issue of first impression in Idaho:

> Had Dinius been representing himself *pro se* in this matter, under existing Idaho precedent Rule 4.2 would have prohibited his communication with Kosmann. … However *Runsvold* did not address the particular fact scenario presented here—whether an attorney, who is a party to a lawsuit and represented by counsel, may speak to a represented, non-attorney opposing party. …
> ….
> This is a matter of first impression in Idaho. In *Runsvold*, the Court recognized that ignoring a pro se attorney-litigant's status as an attorney would frustrate the intent of Rule 4.2, because the opposing party "would lose the protection a represented person has achieved by obtaining counsel." … The Court also notes, however, that because Idaho courts have not previously addressed the precise issue, Dinius's counsel had a good faith basis to believe that the contact between Dinius and Kosmann was appropriate based on the text of Rule 4.2, comment 2 to Rule 4.2, and the rationale articulated by the South Carolina Bar and Connecticut Supreme Court.
> Whether Dinius's meeting with Kosmann violated Rule 4.2 is not clearly settled under Idaho law.

Id., pp.156-58. This analysis was rife with errors. The Court did not explain: how *Runsvold* was not controlling despite Dinius doing the exact thing that attorney Runsvold had been sanctioned for doing; how Dinius was not *pro se* despite renegotiating the settlement with Kosmann alone; or how the explicit policy reasons driving the *Runsvold* ruling were inapplicable to this case (they are obviously applicable). *Id.* The District Court's discussion also implies that any Idaho attorney-party can in "good faith" get around the ethical rules and protections for represented parties by merely putting another attorney on the pleadings (which is non-sensical). *Id.* Lastly, the District Court incorrectly relied upon cases from other jurisdictions, e.g. the *Pinsky* case, that were specifically rejected by the *Runsvold* court and are therefore irrelevant. *Id.*

The District Court then ruled it would enforce the renegotiated settlement regardless of whether it arose out of unethical conduct because Kosmann put it on the record. *Id.*, pp.152-53. To support the fiction that the unethical actions had no impact on the ultimate settlement put on the record, the Court ignored all contrary facts in the record and did not even mention them. *Id.* In remarkable contrast, the District Judge needed five pages of analysis to resolve Dinius and Dunbar's frivolous claim that Messerly and Kosmann should be sanctioned. *Id.*, pp. 153-58. The Court failed to point out how Dinius and Dunbar were abusing Rule 11 sanctions. *Id.*

7. Court Sanctions Kosmann and Not Dinius.

On November 22, 2017, the Court issued its Memorandum Decision and Order on Parties' Cross-Motions for Sanctions ("Nov. 22 Order") that found:

- neither Dinius nor Dunbar would be sanctioned for their secret meeting with Kosmann because IRPC 4.2 and the *Runsvold* case were somehow inapplicable;
- even if it had found a violation, the Court could do nothing because "district courts do not have authority to sanction attorneys for violations of the professional rules"; and
- Kosmann and Messerly were monetarily sanctioned, pursuant to Rule 11, for not filing a separate Motion for Leave on August 31, 2017.

R. Vol. II, pp. 162-76. As to the first bullet, the Court again refused to acknowledge or address any of Messerly's arguments about why the Court could not distinguish *Runsvold*. *Id.*, pp.166-70. As to the second bullet, the District Court did not cite case law to support that conclusion, it ignored cases from every possible jurisdiction where courts enforce rules of professional conduct, and it provided no explanation for why attorneys would be allowed to violate ethical rules to obtain more favorable resolutions of a lawsuit and the court would be unable to remedy it. *Id.*, pp.170-71. As to the third bullet, the Court reversed course again to award the retaliatory

sanctions requested by Dinius and Dunbar. R. Vol. II, pp.173-74. As always, the District Court did not cite case law to support these monetary sanctions. *Id.* Messerly and Kosmann interpreted this second sanction award as the District Court's newest attempt to intimidate and bully them for raising allegations of unethical behavior by Judge Dunn, Dinius and Dunbar. *See* ICJC, Rule 2.16(B) ("A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.").

The District Court's Nov. 22nd Order ignored the overarching injustice of the case: Dinius and Dunbar committed a major ethical violation, with an Idaho case directly on point, directly resulting in $8,000 in damages and thousands of attorney fees, and the Court claimed it both would not and could not remedy the issue; in contrast, Messerly committed a trivial procedural error that was fixed two days after it was raised, causing no damages, and the Court awarded a monetary sanction without any legal support. The District Court issued its Judgment on November 22, 2017, that ordered Kosmann to pay $200 to Defendants for his sanction and ordered the payment of the $32,000 settlement funds to Kosmann (his own money) and $15,000 to Dinius. R. Vol. II, pp.178-79. Messerly paid the $200 sanction to Dinius.

8. Motion to Reconsider Filed to Correct Numerous Errors.

On December 5th, Kosmann filed a timely Motion to Reconsider, hoping to avoid the delay and cost of this appeal. R. Vol. III, pp.344-345; IRCP 59(e). Almost everything the District Court had done in the case had been contrary to law and common sense. In addition, the Court had written opinions that mostly ignored the correct arguments raised by Messerly, something Messerly had never experienced at any time in his fifteen years in the law. Messerly requested a

hearing date on the Motion to Reconsider and on December 11th, the District Court issued its Order that set a hearing for January 11, 2018, and did not set a briefing schedule. R. Vol. III, p.9; Supp.R. p.21. Messerly followed the briefing rules for any motion: the memorandum in support and declarations must be filed no later than fourteen days prior to the hearing. *See* IRCP 7(b)(3)(A) & (D). Messerly believed the memorandum and additional declaration were due on December 27th, so he filed them early on December 24th. R. Vol. III, p.9. Dunbar filed a motion to strike those two filings because they were not filed within fourteen days of the November 22nd Judgment. R. Vol. III, pp.427-43. After reading the cases in the motion to strike, Messerly believed he erred in the timing but he asked the Court to still consider the memorandum and declaration that were filed based on a good faith understanding of the procedural timing rules, did not create any prejudice to Dinius and Dunbar, and contained arguments and additional facts that could help the Court to avoid erroneous legal rulings. *Id.*, pp.445-52.

9. Court Refuses to Reconsider Any of Its Rulings.

On January 24, 2018, the District Court issued its Memorandum Decision and Order on Plaintiff's Motion to Reconsider and Defendants' Second Motion to Strike. R. Vol. II, pp.181-95. In its ruling, the Court again did not address most of the correct arguments raised by Kosmann. *Id.* The Court said that the memorandum and declaration filed on December 24, 2017, would not be considered because Messerly admitted he misunderstood the timing schedule and filed them late. *Id.*, pp.183-85. That was apparently the Court's only relevant consideration. *Id.* The Court also stated, "This is the second time in this case that Plaintiff has filed untimely documents without first filing a motion for leave," which is an illogical statement since Messerly

did not know his documents were untimely when he filed them, and he was unable to transport himself back in time to file a motion for leave. *Id.*, p.185. Such obviously specious and falsely accusatory comments from the Court against Messerly are further reason why Messerly lost any belief that the Court was acting as a neutral and fair-minded decision maker in this case.

The District Court then restated its prior arguments, ignoring Kosmann's arguments. For example, the Court did not acknowledge its error in claiming it lacked authority to enforce the Rules of Professional Conduct; instead, the Court reached its same desired result by "exercising its discretion" to not enforce the Rules of Professional Conduct. *Id.*, p.194. As another example, the Court reiterated its Rule 11 sanction of Messerly and Kosmann without even mentioning the approximately fifteen reasons given for why its sanction was improper. *Id.*, pp.194-95; *see* IRCP 11(c)(2). On February 2, 2018, Kosmann filed a timely Notice of Appeal. R. Vol. II, pp.197-205.

II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court's erred in finding the *Runsvold* holding distinguishable and Dinius's *ex parte* meeting with Kosmann during the mediation was not a violation of IRPC 4.2.

3. Whether the District Court erred in refusing to remedy the damages from the ethical violations, including voiding the renegotiated settlement and awarding monetary damages of the lost $8,000 in settlement funds and all reasonable attorney fees incurred proving the violations.

4. Whether the District Court erred in finding that, regardless of a violation of IRPC 4.2, the renegotiated settlement for $32,000 (and not the $40,000 settlement) would be enforced.

5. Whether the District Court erred in sanctioning Kosmann and Messerly for a minor procedural error that was immediately remedied and/or in failing to sanction Dinius and Dunbar

for repeatedly requesting sanctions in bad faith and for retaliatory purposes.

6. Whether the District Court abused its discretion in refusing to consider certain filings related to the motion to reconsider.

7. Whether Appellant's appellate fees should be awarded pursuant to the settlement agreement contract Dinius sought to enforce, pursuant to I.C. § 12-121, and/or as a remedy for Dinius's ethical violation that he refused to remedy and instead forced Kosmann to litigate.

III. ARGUMENT

A. Standard of Review of District Court's Rulings.

The issue of whether unauthorized contact between Dinius and a represented party is a violation of the Idaho Rules of Professional Conduct is a question of law reviewed de novo. How to remedy attorney violations of the Rules of Professional Conduct is typically discretionary, reviewed for abuse of discretion. The decision how to sanction attorneys for alleged violations of Rule 11 is typically reviewed for abuse of discretion. However, whether the moving party complied with the mandatory requirements of Rule 11 is a question of law reviewed de novo. The decision of whether to consider a filing is reviewed for abuse of discretion.

B. District Court Refused to Follow Controlling Authority Finding IRPC 4.2 Violation.

One of the District Court's most glaring errors of law was its steadfast refusal to apply binding Idaho precedent from this Court, the *Runsvold* case. Attorney Runsvold was sanctioned for doing the same thing Dinius did in this case: communicating with the other represented party without first obtaining the consent of opposing counsel. The Idaho Supreme Court, relying upon common sense and the purposes of the rule, could not have been clearer in rejecting any loophole

that would allow such actions by an attorney who was also a party:

> Runsvold argues that Rule 4.2 does not explicitly prohibit a pro se attorney from communicating directly with a represented opposing party. He claims that since an attorney proceeding pro se is "not representing a client," … citing *Pinsky v. Statewide Grievance Committee*, ….
>
> In the present case, we hold that a pro se lawyer/litigant does represent a client when representing himself or herself in a matter; thus, I.R.P.C. 4.2 applies to prevent the pro se attorney from directly contacting a represented opposing party. The purpose of the identical ABA Model Rule 4.2 has been explained as follows:
>
> > Rule 4.2 prevents a lawyer from nullifying the protection a represented person has achieved by retaining counsel. According to Rule 4.2, therefore, Lawyer A may not speak to Lawyer B's client about "the subject of the representation," except under circumstances controlled by Lawyer B.
>
> If Runsvold's position that he must be treated only as a party and that his status as an attorney should be ignored is accepted, the intent of I.R.P.C. 4.2 would be frustrated. His ex-wife would lose "the protection a represented person has achieved by obtaining counsel," and her attorney would lose the ability to control access to his client, a fundamental element of the attorney-client relationship.

That ruling has been law for all Idaho lawyers since 1996.[2] The District Court, however,

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[2] Idaho's *Runsvold* decision helped establish the clear majority rule on this issue. *See, e.g.*, *Medina Cty. Bar Assn. v. Cameron*, 958 N.E.2d 138, 140–42 (Ohio 2011); *In re Disciplinary Action Against Lucas*, 789 N.W.2d 73, 77–78 (N.D. 2010); *In re Haley*, 126 P.3d 1262 (Wash. 2006); *In re Discipline of Schaefer*, 25 P.3d 191, 198–200 (Nev. 2001); *Fishelson v. Skorupa*, No. CIV.A 2001-3173-A, 2001 WL 888369, at *2 (Mass. Super. Ct. July 31, 2001); *Sprauve v. Mastromonico*, 86 F. Supp. 2d 519, 530 (D.V.I. 1999) ("The plaintiff is an attorney whenever he appears before the Court, the public, or the mirror"); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108–09 (Wyo. 1994); *Niesig v. Team I*, 558 N.E.2d 1030, 1032–33 (N.Y. 1990); *Siguel v. Trustees of Tufts Coll.,* 1990 WL 29199, at *1–2 (D. Mass. Mar. 12, 1990); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894 (W. Va. 1990); *In re Glass*, 784 P.2d 1094, 1097 (Or. 1990); S.C. Bar, Ethics Op. 11-01 (2011); 39 Md. B.J. 57 (2006); Haw. Disciplinary Bd., Formal Op. 44 (2003); D.C. Bar, Ethics Op. 258 (1995); Mich. Bar, Ethics Op. CI-1206 (1988).

It is supported by policies going back at least a century. *See, e.g.*, ABA Canon of Professional Ethics, Canon 9 (1908); ABA Model Code of Professional Responsibility, Ethical Consideration 7-18 (1969); Model Rules of Professional Conduct (1983), Rule 4.2, cmt. 1 ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers

apparently disagreed with that ruling, refusing to do the obvious and rule that Dinius (with assistance from Dunbar and Judge Dunn) had violated Rule 4.2. *See State v. Hanson*, 152 Idaho 314, 325, 271 P.3d 712, 723 (2012) ("[W]e … remind trial judges that they do not have the liberty to consciously disregard the principles of law articulated by the appellate courts of this state."); *Robinson v. Mueller*, 156 Idaho 237, 242, 322 P.3d 319, 324 (Ct. App. 2014) (similar). It appears the District Court would not make this ruling because it did not want to implicate Judge Dunn in the ethics violation. *See* ICJC, Rule 1.1 (Compliance with the Law) & Rule 2.15.

Instead, the District Court found one factual distinction -- attorney Runsvold had no attorney of record but Dinius did --and claimed this made it an issue of first impression. Neither Dinius, Dunbar, nor Judge Dunn had used this excuse at the time of the mediation or during their initial briefings on the issue. Rather, this was an after-the-fact argument raised by Dinius, Dunbar, and the District Court once they realized that the *Runsvold* case was right on point. The District Court could not articulate any reason why this one factual difference made the *Runsvold* decision inapplicable. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1169–80 (9th Cir. 2001) (explaining that precedent can only be distinguished based on "material" facts and only on a "principled basis" after detailed analysis of the "reason and spirit of the cases" and more). The District Court could not explain how the policy language from *Runsvold* was inapplicable when an attorney-party has hired an attorney. Kosmann is not aware of any case from any jurisdiction doing what the District Court did in this case, *i.e.* applying the no-contact rule to attorney-parties

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who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.").

who are *pro se* but not to attorney-parties who hire an attorney. Kosmann is aware of a case rejecting that non-sensical distinction. *See Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 258–60 (Tex. App. 1999) ("[W]e hold that an attorney's designation of counsel of record does not, as a matter of law, preclude the application of Rule 4.02(a) to his actions in contacting an opposing party."). Kosmann filed numerous briefs pointing out many reasons why the Court was not properly distinguishing the controlling authority. The District Court did not explain why those arguments were wrong; it just ignored those arguments.

Were this loophole to become the law of Idaho, every attorney-party would hire a lawyer to get around *Runsvold* and communicate directly with the opposing party to negotiate a more favorable settlement. For that crucial policy reason alone, this Court should reverse. *See* G. HAZARD, JR. & W. HODES, THE LAW OF LAWYERING § 41.02 (4th ed. 2017) ("Model Rule 4.2 prevents a lawyer from taking advantage of a lay person … **to achieve an unconscionable settlement of a dispute**.") (emphasis added). The starting point in this case is recognizing that Dinius (with Dunbar's assistance) violated IRPC 4.2. It is legal error for the District Court to ignore binding legal precedent from this Court and also all the policies of Rule 4.2. This Court should reverse the District Court and confirm that *Runsvold* already conclusively resolved the ethical issue that an attorney cannot have unauthorized communications with the opposing party even if the attorney is also a party in the lawsuit and that legal conclusion does not change (has no reason to change) if the attorney-party hires an attorney.

C. The District Court Abused Its Discretion.

Once a violation of the Rules of Professional Conduct is recognized, the Court has

discretion to decide the proper sanction and/or remedy of the damages caused by the attorney's violation. *See, e.g.*, *State v. Rogers*, 143 Idaho 320, 322–23, 144 P.3d 25, 27–28 (2006); *Talbot v. Ames Const.*, 127 Idaho 648, 651–53, 904 P.2d 560, 563–65 (1995); *see also* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, p. 420 (Ellen J. Bennett et al., 7th ed. 2011) ("As a practical matter, violation of Rule 4.2 occurring in the course of a civil proceeding are generally addressed by the court hearing the proceeding; courts have ordered evidentiary remedies, return of documents, monetary sanctions, and even disqualifications."). To suggest otherwise (as the District Court initially incorrectly ruled, *see* R. Vol. II, pp.170-71) would be to suggest that Idaho courts are powerless to fully deter violations of the Rules of Professional Conduct and powerless to do equity to remedy violations impacting their cases.

1. District Court's Bases For Not Remedying the Violation Abused Its Discretion.

Here, the District Court abused its discretion by not only imposing no sanctions but then even giving its judicial blessing to the violations by enforcing the renegotiated settlement that was the "fruit" of the ethical violation. The District Court gave three reasons for these decisions: no clear ethical violation occurred; Kosmann voluntarily choose the renegotiated settlement despite any violations; and the Idaho Bar should resolve the issue rather than the Court. These reasons are highly flawed and/or unsupported by the factual record, i.e. an abuse of discretion.

First, as discussed above, the *Runsvold* case is not distinguishable and no attorney can claim good faith by violating its holding. *See, e.g.*, *Dist. Idaho Loc. Civ. R. 83.5* ("[a]ll members of the bar ... must familiarize themselves with and comply with the Idaho Rules of Professional Conduct of the Idaho State Bar and the decisions of any court interpreting such rules."). There is

no Idaho case law suggesting Dinius could have *ex parte* negotiations with Kosmann without first confirming that Messerly consented.

Second, Kosmann did not voluntarily choose the $32,000 settlement rather than the $40,000 settlement. Kosmann, like any reasonable person, wanted more money, not less. Kosmann provided sworn testimony, corroborated by Messerly, that the only reason he put the $32,000 settlement on the record was because he was told by Judge Dunn, Dinius, and Dunbar that: no violation had occurred, they would not allow him to proceed with the prior settlement for $40,000, they would put the $32,000 settlement on the record regardless, the only enforceable settlement was the $32,000 settlement, he was potentially going to be sanctioned by the Court if he refused to put the $32,000 on the record (motions that Dinius and Dunbar subsequently brought), and he would spend thousands more in attorney fees fighting the issue (which has also proven to be true). *Supra*, Part I.B.4-5. That is not a voluntary decision. A voluntary settlement, after disclosure of the ethical violation and with advice of counsel, would have looked very different: Messerly would have explained on the record that an error had been made regarding unauthorized conduct but that it caused no harm because after further consultation with his counsel Kosmann had decided that the renegotiated settlement was preferred over the original settlement. That is the opposite of what Messerly stated on the record and thereafter.

Third, it is illogical to claim that the Idaho State Bar, rather than the District Court, should deal with the violation. This violation caused immediate and significant damages in the litigation, upending an existing settlement, and the violators were the first to file a motion asking the Court to bless their violation by enforcing the resulting new terms. It was impossible for the

District Court to avoid the issue – by enforcing the renegotiated settlement it was making the decision to ignore the violation and not void the new terms. The District Court was also being disingenuous: the District Court issued rulings suggesting no violation occurred, Dinius and Dunbar acted in good faith, Kosmann suffered no harm, and the settlement obtained through unauthorized contacts was still legally enforceable, rulings that (if left unchallenged) would have directed the Idaho State Bar to do nothing. In fact, the District Judge has not referred any of these ethical violations to the Idaho State Bar, despite the requirements in ICJC, Rule 2.15.

2. Ethical Violation Should Have Resulted In Two Monetary Sanctions.

The appropriate minimum sanction for any ethical violation is to remedy any damages caused by the ethical violation, in order to make the party whole. *See, e.g.*, *Faison v. Thornton*, 863 F. Supp. 1204, 1221 (D. Nev. 1993) ("The court has broad discretion in fashioning an appropriate penalty or sanction to remedy the problems caused by an attorney's improper *ex parte* communications with a party represented by counsel."). Here, there were two obvious damages. First, the initial damage was loss of a $40,000 settlement that was replaced with a $32,000 settlement, i.e. $8,000 in settlement funds should be reimbursed. Second, just as important, Kosmann incurred thousands of dollars in attorney fees because Dinius and Dunbar would not act reasonably to admit their error and pay the settlement amount they admit their insurer already agreed to pay. Early on, Kosmann offered to drop his attorney fees claim if Dinius would pay the $8,000. Instead, Dinius and Dunbar choose to deny liability, earn fees for themselves by litigating, and force Kosmann to incur many tens of thousands of dollars of fees to litigate for now more than a year. *See, e.g.*, *Idaho State Bar v. Souza*, 142 Idaho 502, 506, 129

P.3d 1251, 1255 (2006) ("It is appropriate in attorney discipline cases to consider as an aggravating factor the degree of harm suffered by the client.").

Courts have consistently held that reimbursement of attorney fees is the appropriate sanction for parties that force litigation by refusing to admit and remedy ethical violations. *See, e.g.*, *Hammond v. City of Junction City, Kan.*, 126 F. App'x 886, 888–90 (10th Cir. 2005); *Goswami v. DePaul Univ.*, 8 F. Supp. 3d 1004, 1015–19 (N.D. Ill. 2014); *Parker v. Pepsi-Cola Gen. Bottlers, Inc.*, 249 F. Supp. 2d 1006, 1009–14 (N.D. Ill. 2003); *Larry James Oldsmobile-Pontiac-GMC Truck Co. v. Gen. Motors Corp.*, 175 F.R.D. 234, 246 (N.D. Miss. 1997); *Faison*, 863 F. Supp. at 1221 (D. Nev. 1993) (awarding $45,600 in attorney fees incurred in proving that two attorneys violated Rule 4.2); *Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237, 1240 (Nev. 2002) ("Sanctions for violating the rule have included disqualification of counsel, monetary sanctions, exclusion of information obtained by *ex parte* contact ...."); *Featherstone v. Schaerrer*, 34 P.3d 194, 200–08 (Utah 2001).

In this case, there are numerous aggravating factors for these ethics violations, including:

- Dinius has eighteen years of Idaho legal experience, and Dunbar has thirteen years;
- The ethical rule at issue is one that every lawyer follows every day in their law practice – you cannot talk with a represented party about the case;
- This improper, *ex parte* communication happened during a formal mediation when there can be no debate that they knew Kosmann had counsel who was actively involved;
- The improper communication was used to significantly impact a case –reducing a final settlement, to obtain a result they were unable to obtain while counsel was involved;
- It is still unclear exactly why Dinius and Dunbar believed they could get around the no-contact rule -- they keep suggesting different excuses;
- They cannot claim Idaho law was unclear because the only applicable Idaho case says that they could not contact Kosmann without obtaining Messerly's explicit consent;

- They cannot claim they believed the *Runsvold* case was distinguishable because they were not even aware of the case yet (nor would it be proper to do potentially unethical actions with the hope of convincing a court to authorize a loophole);
- They cannot shift blame to Judge Dunn because they have not alleged that he told them Messerly had consented or that he told them not to tell Messerly;
- They cannot credibly claim that they thought Messerly had consented because they admit they never asked anyone whether Messerly knew about the meeting or had consented;
- They cannot credibly claim that they thought Messerly had consented because they knew Messerly despised and distrusted them;
- They cannot claim they took any steps to err on the side of caution regarding their ethics;
- They cannot blame Kosmann for initiating contact, since Rule 4.2 rejects that excuse;
- They used the prohibited contact to violate the underlying policies for Rule 4.2 – including (1) tricking Kosmann into accepting a lesser settlement that had never been discussed with Kosmann's counsel; (2) bad mouthing Kosmann's attorney in order to get Kosmann to change the settlement that he had reached with the assistance of counsel; (3) falsely claiming counsel had committed malpractice in order to trick Kosmann into believing that the release of counsel was valuable; and (4) tricking Kosmann into paying $8,000 for a release that was not even for Kosmann;
- They have shown zero remorse, instead claiming that they did nothing wrong and trying to blame everyone (Kosmann, Messerly, and Judge Dunn) but themselves;
- Despite many months to research the issue and recognize their error, they did nothing to remedy the violation, instead the opposite – they have tried to profit off the violation;
- Rather than just paying the additional $8,000 settlement their insurer had already agreed to pay, they chose to litigate to earn fees and force Kosmann to incur huge legal bills;
- They have retaliated against Kosmann and Messerly for raising the ethics violation, bringing numerous frivolous sanction requests against Kosmann and Messerly;
- Months into the litigation about their actions, they were still making incorrect claims about the law in Idaho and apparently had never researched the issue;
- They have earned tens of thousands in fees in this case from Dinius's malpractice insurer to litigate their own ethics violations;

See ABA, Standards for Imposing Lawyer Sanctions, Standard 9.22 (1991) (e.g., aggravating factors b, c, d, f, g, h, i, and j). These facts are deplorable and show that in addition to making Kosmann whole, the Court should impose a sanction that punishes Dinius and Dunbar for

abusive practices, deters them from future unethical practices, and encourages them to voluntarily admit and/or remedy ethical errors in the future.

D. The District Court Incorrectly Enforced the Renegotiated Settlement Agreement.

The proper resolution of this case is to recognize the ethical violation and remedy the damages and deter future unethical practices, as discussed above. However, the District Court also erred in its application of contract law to the renegotiated and original settlements. Kosmann briefly (due to lack of space) addresses these contract issues that should be moot.

The District Court ordered that the renegotiated settlement would be enforced pursuant to Idaho contract law. This is alarming and contrary to law. Were this contract analysis to become the law of Idaho, every attorney-party would hire a lawyer and then try to communicate directly with the opposing party to negotiate a favorable settlement and avoid the protections of opposing counsel. If you could convince the opposing party to sign something or "put it on the record", over the objection of their attorney (e.g. by bad-mouthing their attorney), then you would reap the rewards of this manipulative and unethical contact. Fortunately, this is not the law of Idaho and this Court has its pick of contract-related defenses[3] to do justice and reject the new terms that were only discussed because of unethical communications, only agreed to initially because Messerly was not there to prevent manipulation, and only put on the record because of Dinius's

[3] For example: public policy (against obtaining settlements by violating ethical rules), *see Trees v. Kersey*, 138 Idaho 3, 56 P.3d 765 (2002); failure of consideration ($8,000 for a release of counsel that was rejected by counsel), *see* IDJI 6.04.1; fraud (misrepresentations by Dinius during the secret meeting), *see* IDJI 6.27.1; mistake (about the release of counsel and about the Rule 4.2 violation), *see* IDJI 6.05.7; and substantive and procedural unconscionability (settlement obtained during prohibited contacts and giving up $8,000 in exchange for nothing), *see, e.g., Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 72 P.3d 877 (2003).

manipulation of an ex-client during the *ex parte* meeting and because of subsequent threats and pressure by Dinius, Dunbar, and Judge Dunn.

E. The District Court Incorrectly Sanctioned Messerly and Kosmann.

Messerly and Kosmann have not done anything that even hints at sanctionable conduct. The sole basis given for awarding Rule 11 sanctions is so trivial as to be frivolous: forgetting to file a motion for leave when making supplemental filings. Messerly fixed the error two days after he was alerted of it. Thus, even if a trivial procedural mistake could be sanctionable (it is not), as a matter of law it could not be sanctioned because of the 21-day safe harbor in Rule 11.

1. Sanctions Were Awarded in Violation of Common Sense and Rule 11 Policy.

It should be obvious that temporarily forgetting to file a motion for leave is not sanctionable conduct. Messerly provided the Court with numerous reasons why justice would never support such a sanction, including: (1) minor procedural errors are not sanctioned;[4] (2) the temporary error caused no prejudice or damages; (3) Dinius made the exact same error when making supplemental filings; (4) the supplemental filings stated the good faith reason for why they were being filed, making a separate motion for leave duplicative; (5) Messerly has no history of sanctionable conduct; (6) the Court and Defendants submitted no caselaw in Idaho or anywhere suggesting monetary sanctions would be equitable; and (7) Dinius and Dunbar made

[4] Rule 11 caselaw holds that it has no application to trivial procedural errors. *See Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731, 741 (2005) ("[Rule 11] is considered 'a management tool to be used by the district court to weed out, punish, and deter specific frivolous and other misguided filings' and should be exercised narrowly."); *see also* FRCP 11, Notes of Advisory Committee on Rules—1993 Amendment ("Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b)."). The District Court (and Dinius and Dunbar) just ignored this caselaw, again rejecting Idaho law.

greater procedural errors in just the process of seeking sanctions against Messerly and Kosmann. In three written rulings addressing the Defendants' sanction requests, the District Court did not even acknowledge or address these common-sense arguments.

2. Sanctions Were Awarded in Violation of the Mandatory Requirements of Rule 11.

In addition to violating common-sense, the District Court violated the mandatory 21-day safe harbor requirement in Rule 11, which is legal error as a matter of law. Rule 11(c)(2) states,

> A motion for sanctions must be made separately …. The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

see also FRCP 11, Notes of Advisory Committee on Rules—1993 Amendment ("To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party … of a potential violation before … a Rule 11 motion."); *see also Barber v. Miller*, 146 F.3d 707, 710–11 (9th Cir. 1998) ("Carlsen was not given the opportunity to respond to Imageware's motion by withdrawing his claim … An award of sanctions cannot be upheld under those circumstances."). It is undisputed that Dinius and Dunbar just filed a motion seeking sanctions without giving any formal or informal notice. It is also undisputed that Messerly "appropriately corrected" the error in two days. Therefore, it was contrary to law for Dinius and Dunbar to even have filed a motion seeking sanctions. *See* IRCP 11(c)(2). Shockingly, when Messerly pointed out this non-debatable violation of Rule 11's requirements, Dinius and Dunbar did not apologize and withdraw the request for sanction and the District Court did not correct its

error of law and withdraw the sanctions. They openly ignored and rejected Idaho law.

3. The District Court Should Have Sanctioned Dinius/Dunbar for Abuse of Rule 11.

Dinius and Dunbar used Rule 11 (and § 12-121) sanction requests for improper purposes: to harass, to run up attorney fees that got themselves paid by their insurance carrier while Kosmann had no funds to pay fees for his counsel, to obfuscate regarding their own sanctionable conduct, and to retaliate against Messerly and Kosmann. The District Court should not have allowed this abuse of Rule 11. *See* FRCP 11, Notes of Advisory Committee on Rules—1993 Amendment ("Nor should Rule 11 motions be prepared to … to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, ….").

In this case, there are at least four indicia of abuse. First, remarkably, Dinius and Dunbar filed 7 different memorandums seeking sanctions against Messerly and Kosmann, and only when the District Court pointed out (in its October 5th Order) that such requests needed to be in a separate motion, did Dinius and Dunbar stop including the request in every brief they filed. Second, when Messerly and Kosmann filed a brief challenging the settlement, Dinius and Dunbar immediately retaliated with their first sanctions demand; when Messerly and Kosmann filed their first brief seeking sanctions regarding the violation of IRPC 4.2, Dinius and Dunbar again immediately retaliated and filed a cross-motion for sanctions. Third, Dinius and Dunbar never provided any legitimate reason for seeking sanctions. They sought sanctions for a trivial procedural error and because Kosmann was challenging their ethics violation and the validity of the settlement. Those are frivolous reasons. Fourth, and perhaps most egregious, when Messerly pointed out that the Rule 11 sanction violated the mandatory safe harbor, Dinius and Dunbar did

not withdraw the request for sanctions. Rather, they continued to argue for sanctions, ignoring the law, and they ultimately demanded and received payment from Messerly.

The District Court should have stopped those abuses of Rule 11 and this Court should impose a fee award against Dinius and Dunbar to deter future abuses of Rule 11. *See* FRCP 11, Notes of Advisory Committee on Rules—1993 Amendment ("[T]he court may award to the person who prevails … reasonable expenses, including attorney's fees, incurred in …opposing the motion."); *see, e.g., Smith v. Psychiatric Sols., Inc.*, 750 F.3d 1253, 1261 (11th Cir. 2014) (awarding sanctions against party bringing motion for sanctions for improper purpose).

F. The District Court Refused to Consider a Supporting Memorandum and Declaration.

It is unclear,[5] but potentially the memorandum and declaration filed on December 24, 2017 were filed late. This Court, however, has also said that a Court has discretion to still consider any untimely filings. *See Marek v. Hecla, Ltd.*, 161 Idaho 211, 221, 384 P.3d 975, 985 (2016). Here, the memorandum and declaration in support were filed well before the hearing date and the District Court did not give any equitable reason for why it refused to consider the filings. It exercised its discretion to promote a procedural technicality over substantive legal issues, contrary to law. *See, e.g.*, *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 247–48, 178 P.3d 606, 612–13 (2008) ("… this Court will construe the provisions of [IRCP] liberally in

[5] Messerly initially conceded the issue of the memorandum and declaration being untimely, but upon further review the case law appears unclear. The cases reference a prior version of Rule 7 that had language requiring memorandum and affidavits to be filed jointly with the motion. The current IRCP 7 has language indicating that the supporting memorandum does not have to be filed at the same time as the motion and the filings just need to be filed fourteen days before the hearing date, *see* IRCP 7(b)(3)(A) & (D). IRCP 59(c) requires affidavits to be filed at the same time as the motion, but that rule is inapplicable to this case, *see* IRCP 59(e).

order to resolve cases on their merits instead of on technicalities."). The substantive arguments and evidence in the memorandum and declaration should have been considered. Of course, even ignoring those filings, the record is clear regarding the District Court's many errors.

G. If Remanded, This Case Should Be Remanded to a Different Judge

If the Court remands for further substantive proceedings, then Kosmann requests that the Court send the case to a different judge. Without belaboring the point, as discussed in detail above, the District Judge disregarded the law, repeatedly got the law wrong, ignored common sense, refused to even acknowledge most arguments raised by Kosmann, showed clear bias for Dinius and Dunbar (and Judge Dunn), and twice used improper Rule 11 sanctions to intimidate and wrongfully punish Kosmann and Messerly for seeking to enforce basic ethical rules.

IV. ATTORNEY FEES ON APPEAL

Kosmann is entitled to an award of his reasonable appellate attorney fees pursuant to three independent bases: contract, I.C. § 12-121, and damages from ethical violations. First, Dinius is trying to enforce the settlement agreement that he submitted after the mediation. That settlement agreement stated, in pertinent part,

> 15. ATTORNEYS' FEES. The prevailing Settling Party in any litigation or other enforcement action concerning, relating to, or arising out of this Agreement shall be awarded its reasonable attorney's fees and costs incurred in connection with such litigation or enforcement.

R.Vol. III, p.29. This litigation is "concerning, relating to, or arising out of" the settlement agreement that Dinius tried to enforce. As discussed above, Kosmann should be the prevailing party regarding the settlement terms. Dinius is obligated to pay Kosmann's "reasonable attorney's fees and costs incurred in connection with such litigation," which includes attorney

fees on appeal. *See Allied Bail Bonds, Inc. v. Cty. of Kootenai*, 151 Idaho 405, 414–15, 258 P.3d 340, 349–50 (2011) (”Where a court holds a contract is unenforceable, the prevailing party may nonetheless be entitled to an award of attorney fees under the contract.”); *O'Connor v. Harger Const., Inc.*, 145 Idaho 904, 909–12, 188 P.3d 846, 851–54 (2008).

Second, the arguments raised in this case by Dinius and Dunbar are frivolous. The *Runsvold* case is controlling authority. Dinius and Dunbar provided no reasonable argument for why *Runsvold* should be distinguished consistent with the known policies of IRPC 4.2. Similarly, their seven sanction request against Kosmann and Messerly were frivolous and unsupported by case law. Dinius and Dunbar acted frivolously in causing over a year of litigation disputing an obvious ethical violation that had an easy remedy that would have avoided all this litigation and fees. This is exactly the type of case where this Court should award attorney fees pursuant to I.C. § 12-121. *See, e.g.*, *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 631–32, 329 P.3d 1072, 1079–80 (2014) (Dinius pursued claims known to be unsupportable).

Lastly, as discussed above, case law across jurisdictions holds that ethical violations should be remedied by awarding attorney fees caused by having to bring litigation to prove up the ethical violation. *Supra*, Part III.C.2. Appellate fees are part of the damages flowing from this ethical violation. Equity demands an award of these damages that were both caused by Dinius and Dunbar and easily avoidable by Dinius and Dunbar by merely fixing their ethical violation (and perhaps a disgorgement of the fees that they earned by requiring this litigation).

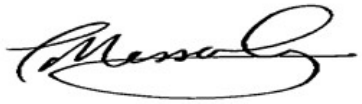
V. CONCLUSION

For all the reasons stated above, the Kosmann respectfully request that this Court reverse

the District Court and: (1) confirm that Dinius (with Dunbar and Judge Dunn's assistance) violated IRPC 4.2 when, during formal mediation, he met alone with the opposing party without first obtaining consent from opposing counsel for that meeting, (2) remedy the ethical violation by voiding the renegotiated settlement, awarding the $8,000 in lost settlement funds, and reimbursing all post-mediation attorney fees, including appellate attorney fees, incurred by Kosmann because of Dinius's refusal to voluntarily remedy his ethical violation, (3) unwind the Rule 11 monetary sanctions against Kosmann and Messerly and return their funds, with interest, and sanction Dinius and Dunbar for their abusive use of Rule 11 to harass and retaliate, and (4) remand to a different district judge for any further proceedings.

RESPECTFULLY SUBMITTED this 19th day of July, 2018.

MESSERLY LAW, PLLC



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