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Kosmann v. Dinius Appellant's Reply Brief Dckt. 45779

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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

APPELLANT'S REPLY 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. INTRODUCTION

This appeal arises out of a Court-ordered mediation that was interrupted by a blatant violation of Idaho's long-standing and well-known ethical rule that prohibits any attorney from having unauthorized contact with the opposing counsel's client. Dinius's secret, prohibited contact with the opposing party Kosmann resulted in immediate damage to Kosmann: he was tricked into reducing his existing $40,000 settlement to $32,000. When Messerly, Kosmann's attorney, learned of the unauthorized, ex parte negotiations, he immediately demanded that the violation be remedied by the painless resolution of returning to the original $40,000 settlement that had been agreed upon after hours of mediation. Instead, the mediator Judge Dunn, opposing counsel Dunbar, and Dinius all unashamedly insisted that the secret, ex-parte communications were valid and the reduced settlement was the only enforceable agreement. They misled Kosmann (about the ethical violation and the need for the counsel release) and threatened him (with sanctions and more litigation) into ignoring his counsel's objections and capitulating to place the reduced settlement on the record.

Fortunately, Messerly put an objection on the record that made clear what had happened and caused Judge Dunn, Dinius, and Dunbar to admit on the record that they had secret, ex parte negotiations with the opposing counsel's client, which resulted in the settlement being reduced from $40,000 to $32,000. This is not a "he said, she said" debate about the key elements of what happened during mediation. Here, Dinius, Dunbar, and Judge Dunn all readily admitted (on the record and in their subsequent affidavits) their role and participation in violating IRPC 4.2.

Thereafter, Messerly convinced Kosmann that what happened was unethical, unjust, and

dishonest and needed to be challenged (regardless of the difficulty of challenging the ethical violations of a sitting District Judge and two attorneys). Kosmann merely insisted he be paid his full $40,000 settlement as originally agreed upon. Instead, Dinius asked the District Court to approve the reduced $32,000 settlement amount that he renegotiated behind Messerly's back. The District Court used its best mental gymnastics to avoid recognizing the ethical violation. In order to reach the result it wanted, the District Court treated this litigation like a run-of-the-mill contract dispute about a settlement agreement, rather than as an ethics violation and equitable remedy case. The District Court even ruled it did not matter whether an ethics violation occurred.

Imagine, during a formal, court-ordered mediation, you (the attorney) reach a final resolution for your client after six long hours of extremely intense negotiations, your client leaves the room for a few minutes and you later learn that the supposedly neutral mediator (a sitting Judge) set up a meeting (telling everyone except you) for your client to secretly negotiate directly with the opposing client, who happens to be a notoriously disreputable attorney, and that opposing attorney-party uses that secret meeting to bad mouth you, give legal advice to your client, and then convince your client to reduce the settlement that you had already reached. This was a flagrant violation of one of the most foundational rules of American litigation.

This appeal asks the Court to recognize that this is an ethics law case, that the District Court committed legal error and abused its discretion in ignoring the central, material ethics violation and rewarding rather than remedying the blatant violation, and that the proper resolution of the violation is straightforward under ethics law, equity and common sense – make Kosmann whole both as to his full settlement amount (the missing $8,000) and as to his attorney

fees incurred and impose whatever additional sanction against Dinius and Dunbar that is reasonable considering the many aggravating factors in this case. In addition, the retaliatory sanctions improperly requested by Dinius and Dunbar and imposed by the District Court against Kosmann/Messerly should be rescinded and refunded, with Dinius paying the fees incurred by Kosmann to defend against the frivolous Rule 11 sanction requests from Diniuis.

II. ARGUMENT

A. The District Court and Dinius and Dunbar Take Positions Contrary to Idaho Law and That Would Greatly Damage Idaho Law; Kosmann Applies Existing, Uniform Law.

This case is remarkable in many, many ways: (1) a District Judge, acting as a mediator, admitted on the record to orchestrating a secret meeting between an attorney and the opposing party, without telling the opposing party's counsel (7/26/17 Tr. P.2 L.16-21; P.10 L.10-16); (2) the District Judge also stated on the record that he believed there was nothing wrong with facilitating this secret meeting behind Messerly's back (*Id.*, P.10 L.14-16: "I allowed them to do that because clients can meet if they wish."); (3) Dinius and Dunbar somehow thought Dinius could meet alone with Kosmann during the mediation, without asking anyone (e.g., Kosmann, Judge Dunn, or Messerly) if Messerly had authorized the ex parte meeting (Respondent's Brief ("RB"), p.15-16); (4) after learning during the mediation that they had "accidentally" met with Messerly's client without authorization, neither Dunbar or Dinius would apologize or fix what they had done and they have repeatedly refused to fix it during more than a year of litigation; (5) when provided the opportunity to avoid litigation about their ethical mistake and instead only pay the $8,000 that the malpractice insurer had already promised to pay (R. Vol. 3, p. 315, ¶26-

27, p.415-416, ¶24, & p.423.), Dinius and Dunbar refused and choose instead to unapologetically argue that they did nothing wrong by secretly negotiating with an opposing attorney's client; (6) when presented with the *Runsvold* case that rejected their main legal argument that Dinius was merely a "party" (not an attorney) and did nothing wrong, instead of admitting their mistake and fixing the problem, Dinius and Dunbar just pivoted to a new legal argument of arguing a new loophole to "distinguish" the *Runsvold* case; (7) a District Judge ruled that he lacked authority to stop, sanction, or remedy attorney ethical violations occurring in and prejudicing his case (R. Vol. 2, pp. 170-71); (8) a District Judge repeatedly ruled that it did not matter that an attorney secretly met with the opposing counsel's client to reduce that client's existing settlement (R. Vol. 2, pp. 193-94); (9) a District Judge ruled that retaliatory Rule 11 sanctions would be imposed solely because a lawyer accidentally and temporarily forgot to file a motion for leave (*Id*., pp.173-74); (10) a District Judge ruled that an attorney secretly meeting with the opposing attorney's client would not be punished but forgetting to file a motion for leave would be sanctioned; (11) a District Judge ignored the undisputed fact that Rule 11's 21-day safe-harbor requirement was violated (R. Vol. 2, pp.194-95); (12) Dinius and Dunbar knew that they did not comply with Rule 11's 21-day notice requirement, yet they still sought and continue to seek sanctions, in direct violation of that requirement; (13) a District Judge gave his judicial blessing to reward an ethical violation by enforcing reduced terms that were only obtained through the ethical violation (R. Vol. 2, pp. 190-92); (14) Dinius and Dunbar threatened Kosmann during the mediation that if he challenged their ethical violation then they would run up his litigation costs and seek sanctions against him, and they have repeatedly made good on that threat, with

impunity; and (15) two experienced Idaho attorneys think so little of the ethical rules that they choose to argue that secretly negotiating with an opposing counsel's client is not prohibited, rather than have their insurer pay the $8,000 as agreed upon. Truth is truly stranger than fiction.[1]

Respondent's position on appeal is a continuation of the absurd things that have occurred in this litigation. The Respondent's Brief argued that this Court should rubber stamp everything done by the District Court and thereby create new Idaho law in a number of areas, including the following highly problematic legal and factual conclusions: (1) a District Judge has no authority to enforce the ethical rule violations that affect his case and cannot remedy any damages caused in his case (RB, pp.31-33); (2) an attorney-party has a loophole around the *Runsvold* decision and IRPC 4.2 to violate the no-contact rule by speaking secretly with the opposing party, as long as the attorney-party has hired an attorney of record (RB, pp.28-30); (3) an attorney-party can violate IRCP 4.2 and get away with it as long as they are able to threaten and manipulate the opposing party into temporarily not following his attorney's advice; (4) a District Judge does not abuse its discretion by ignoring a crucial, admitted ethical violation that directly resulted in a unfair, renegotiated settlement agreement; (5) a District Judge does not abuse its discretion by

[1] That 15-point list could be significantly longer. Dinius also argued: that a declaration should be stricken because it was signed with an electronic signature rather than a hand-written signature (R. Vol. 3, p.431); that portions of a declaration should be stricken because they used the terms "secret" and "ex parte" to describe the meeting that occurred behind Messerly's back (*Id.*, p. 437-38); that the secret, ex parte meeting was "court ordered" within the meaning of IRPC 4.2 because the mediator helped set it up (*Id.*, p. 266); that every reply brief from Messerly was improper when it cited to new case law, even though those cases directly responded to arguments raised by Dinius in opposition briefs; that motions to reconsider cannot include new legal theories (*Id.*, p. 461); that this Court did not issue the Idaho Rules of Professional Conduct (*Id.*, p. 462); and that Kosmann's attempt to enforce IRPC 4.2 was so contrary to law that it merited Rule 11 sanctions (*Id.*, pp. 279-87). Those arguments were also frivolous.

giving its judicial blessing to a settlement agreement that was obtained through an attorney ethical violation; (6) no Idaho attorney can allow his client to be alone with a mediator and/or District Judge because if he does, then he is impliedly allowing his client to also meet alone with the opposing party and/or attorney (RB, p.30); (7) a violation of IRPC 4.2 is ignored and the resulting settlement is legally enforced as long as the violating attorneys claim they had good reason to assume (incorrectly) that the opposing party had authorized the ex parte negotiations; (8) a violation of IRPC 4.2 is ignored as long as the mediator improperly facilitated the secret, ex parte communication (RB, p.30); (9) a District Court can ignore/distinguish existing Supreme Court precedent (*Runsvold*) as long as the District Court can find any factual difference, and the District Court does not have to articulate why that factual difference is material (RB, p.26); (10) a Court can find that a settlement is knowing and voluntary, without even addressing the sworn declarations and other evidence in the record showing that the settlement was a product of ethical violations, leveraging of the improper advantages gained by violation of the no-contact rule, deception of a layperson by a District Judge and two attorneys, and improper threats of litigation costs and sanctions; (11) an attorney who violates an ethical rule can force the other party to litigate to prove the ethical violation and can avoid reimbursing all of those attorney fees; (12) a District Court does not abuse its discretion by claiming that it will not enforce the ethical rules impacting its case because it would rather delegate the issue entirely to the Idaho State Bar; (13) Rule 11 sanctions can be imposed for any trivial, procedural error by an attorney; (14) Rule 11 sanctions can be imposed even if the 21-day notice requirement in Rule 11 was not followed and even if the procedural error was fixed within two days; (15) Rule 11 sanctions can be requested

for retaliatory, obstructionist, frivolous, and other improper reasons, again without any consequences; (15) attorneys can request Rule 11 sanctions, despite knowing that they have not complied with the 21-day notice requirement and thus knowing they are legally prohibited from seeking sanctions, again with no consequences; (16) it is not an abuse of discretion for the court to ignore all or almost all of the arguments made by one side, declining to even explain how they are wrong; (17) it is not an abuse of discretion for the court to strike an entire memorandum and declaration merely because there was reasonable confusion about the briefing deadlines, despite no prejudice being shown and lesser, non-prejudicial remedies being available. It is remarkable that Dinius and Dunbar would make any of the above, nonsensical and legally incorrect arguments; here, they explicitly make all of them. None of them are supported by common sense or Idaho law and it would be highly problematic if even one of them became Idaho law.

In contrast, Kosmann merely asks this Court (as it asked the District Court below) to enforce existing Idaho and/or black letter law, as follows: IRCP 4.2 and *Runsvold* hold that an attorney-party cannot have secret, ex parte meetings with the opposing party without explicitly requesting and receiving authorization from opposing counsel (Appellant's Opening Brief ("AOB"), Part III.B); Idaho case law and common sense holds that courts have inherent authority to enforce court rules, which would include enforcing attorney ethical rules issued by this Court; black letter law across jurisdictions holds that Courts should remedy ethical violations that impact their cases, using common sense solutions; black letter law holds that parties are not allowed to profit from ethical violations; black letter law holds that violations of the no-contact rule are remedied by unwinding the damage done from the improper contact, which in this case

would mean voiding the result of prohibited and manipulative communications that reduced Kosmann's settlement amount from $40,000 to $32,000 (i.e. awarding Kosmann the $8,000 taken from him) and reimbursing all attorney fees incurred in order to litigate regarding the violation; Rule 11's official notes state that retaliatory and frivolous Rule 11 sanctions requests, that clearly do not comply with the requirements of Rule 11 or its interpretive case law, are improper and should result in fee awards against the party requesting the sanctions. Such a straightforward resolution is supported by public policy, incentivizes ethical behavior, incentivizes voluntary corrections of unethical actions, and is consistent with existing Idaho law and related black letter ethics law.

B. The Undisputed Facts Are the Key Facts That Support Reversal of the District Court.

The Respondent's Brief is important in pointing out that Dinius cannot challenge the key facts of what occurred during the mediation at issue. Dinius claims that there is disagreement about what occurred during the mediation. However, that disagreement is about facts that do not need to be resolved in order to recognize the ethical violation and impose the proper remedy. A close review of the Respondent's Brief (and its silence regarding the many undisputed facts) and the declarations in the record from Dinius and Dunbar show that Dinius cannot dispute the key facts that should have been dispositive in the litigation before the District Court:

- The mediation was to settle (1) Dinius's claim to more fees from the Gilbride litigation, (2) Kosmann's claim of Dinius's malpractice in the Gilbride litigation, and (3) Kosmann's attempt to get the Court to release his $32,000 from the Gilbride litigation.
- After numerous hours of negotiations between the parties, both represented by counsel, they reached an agreement that in exchange for mutual releases of all claims, Kosmann would get back his $32,000, plus he would receive an additional $8,000 from Dinius's malpractice insurer, and Dinius would receive an undisclosed amount (later disclosed as

$15,000) from Dinius's malpractice insurer (though this payment would be routed to Dinius through Kosmann, as required by the insurer);

- The parties then had a disagreement about the scope of the mutual release, with Kosmann wanting the release from Dinius to also release Kosmann's counsel Messerly (the "Messerly release") and Dinius refusing to include Messerly;
- Kosmann wanted the Messerly release because Dinius had twice threatened to sue Messerly, and Kosmann did not want his counsel sued frivolously as retaliation;
- The dispute about the Messerly release was about whether it was ethical, and the parties did not discuss Kosmann paying anything for this Messerly release; rather the Messerly release was discussed at the end of the mediation, after the settlement amounts had already been approved by the parties and malpractice insurer;
- Dinius claimed he could not agree to include Messerly in the release because it would be an ethics violation, and Judge Dunn agreed, even threatening Messerly (in front of Kosmann) that he may have to report this request to the State Bar;
- Messerly ultimately counseled Kosmann to drop the issue of the Messerly release, and Messerly told Kosmann he would not accept the release because Bar Counsel had indicated it could be ethically suspect;
- Kosmann told the mediator the release was dropped and the case was settled for $40,000;
- Kosmann asked Judge Dunn to let him talk to Dinius about not suing Messerly;
- Messerly was unaware that Kosmann made this request and would not have authorized this ex parte meeting had he known about it;
- Judge Dunn did not notify Messerly of Kosmann's request to meet with Dinius;
- Judge Dunn asked Dinius and Dunbar to have Dinius meet alone with Kosmann to "clear the air" and discuss the issue of the Messerly release;
- Dinius and Dunbar did not ask Kosmann or Judge Dunn if Messerly had agreed to this ex parte meeting;
- Dinius and Dunbar did not ask Messerly if he would agree to the ex parte meeting;
- Instead, Dinius and Dunbar claim they assumed Messerly was okay with the ex parte meeting because it was being requested by Kosmann and the mediator;
- Dinius, with Dunbar and Judge Dunn's consent, had the ex parte meeting with Kosmann;
- During the meeting, Dinius discussed including a release of any claims against Messerly in exchange for Kosmann receiving only the return of his $32,000, i.e., Kosmann would reduce his settlement by $8,000 in order to pay for Messerly's release;

- This reduced settlement offer from Dinius to Kosmann had never been made during the hours of negotiations through Kosmann's attorney, i.e. when Messerly was no longer around to protect Kosmann, Dinius changed his position and said he would include the counsel release, but only if Kosmann would pay for it;
- Dinius's offer during the ex parte meeting was the first time in approximately two hours of debate over the Messerly release that Dinius admitted the Messerly release could be included without violating any ethics, i.e. when Messerly was no longer around to protect Kosmann, Dinius flipped his position to agree with Messerly that the release was not unethical, thereby using the release dispute (and Kosmann's naivete about it) to obtain a financial benefit for Dinius;
- Similarly, once Dinius reached this new agreement with Kosmann, Judge Dunn also immediately flipped his position and claimed the release for Messerly was not unethical, even though Kosmann was now paying for the release for his counsel (which actually did create a significant potential conflict);
- Dinius has not alleged that he had any direct claim against Messerly that he released but instead he claims he had some potential derivative defense against Messerly that he released, i.e. <u>if</u> Kosmann lost his lawsuit against his realtor McCarthy based on a statute of limitation defense and <u>then</u> Kosmann sued Messerly for malpractice in not suing McCarthy sooner, and <u>then</u> Messerly tried to cross-sue Dinius for contribution for also not suing McCarthy sooner, <u>then</u> Dinius was somehow releasing his "defense" to Messerly's theoretical contribution claim (at least that is the best Messerly can make of what Dinius was promising to Kosmann that he would release as against Messerly);
- When Messerly learned of the new terms that Dinius and Judge Dunn were claiming, he immediately objected and said this was improper, the case had already been settled for better terms for his client, and he had already said he would not accept any release and certainly would not let his client pay for it;
- Messerly put these facts on the record: that there was a $40,000 settlement that had been reduced to $32,000 through secret, ex parte communications by Dinius with his client that he would never have allowed to happen had he known about it, and he had already renounced the consideration that Dinius claimed he was giving to Kosmann, consideration that Dinius had previously claimed was unethical, so Kosmann had been tricked into giving up $8,000 in exchange for nothing;
- Dinius and Dunbar and Judge Dunn all admitted on the record that the ex parte communications with Kosmann happened and that the communications resulted in a $40,000 settlement being reduced to $32,000;
- Judge Dunn said on the record that the ex parte communications happened purposely and that he orchestrated them because parties can "always" speak without their attorneys and the attorneys do not have to authorize it (Judge Dunn talked with Dinius's attorney but

not with Kosmann's attorney about having the meeting); Dinius and Dunbar said on the record that the ex parte communications were an accident because they thought Messerly knew about the communications;

- Kosmann said on the record that he was not doing what his attorney advised but needed the litigation to be over;
- Kosmann further explained in his filed declarations that he went against his attorney and put the lesser settlement on the record because he was being threatened with more litigation and possible sanctions if he did not go along with what Judge Dunn, Dunbar, and Dinius were claiming about the ex parte meeting not being a violation and the reduced settlement being enforceable.

(AOB, Part I.B.1-8; RB, Part II.)

C. The Appropriate Non-Judicial or Judicial Resolution of These Undisputed Facts Should Have Been Easy.

These facts do not create a challenging legal question. To the contrary, the resolution should have been extremely simple. The concept that attorneys do not get to go behind the back of opposing counsel (even if "accidental") in order to negotiate a more advantageous settlement with a naïve, layperson is the classic "no brainer" in the law. It is a concept entrenched in law since at least the 1908. (AOB, p.29, fn.2.) The "no-contact rule" has been described as a bedrock principle that ensures the proper functioning of our adversary legal system. (*Id.*) Similarly, the concept that attorneys should not profit from their ethical violations is black letter law. *See Boe v. Boe*, 163 Idaho 922, 422 P.3d 1128, 1140 (2018) ("Hopper reflects the cornerstone maxim of our justice system that a party cannot reap a profit by virtue of committing misconduct. *See, e.g.*, 30A C.J.S. Equity § 110 (2018)."). This case shows exactly what happens to our legal system when these principles are breached (and when a District Judge refuses to acknowledge and enforce these bedrock principles of equity and justice).

Here, it is undisputed that the parties had mediated a global settlement resolution and

then one unexpected and minor issue arose that they were debating: would Dinius agree that his release would also include a release of Messerly and was there anything unethical about such a release of counsel. Dinius claimed he would not give the release because it was unethical to include such a release, and Kosmann claimed it was not unethical and would protect his attorney from future retaliatory lawsuits. Messerly ultimately decided that the dispute about whether the release was ethical meant he would not accept the release even if offered, and so he sent Kosmann to the mediator to confirm there was no longer any dispute on any issue, i.e. the settlement was final. After relaying that message, Kosmann then naively asked if he could speak with his ex-attorney Dinius about this release of counsel (because he was worried Dinius was going to try to sue his friend Messerly as retaliation for the malpractice lawsuit against Dinius). Such an error in judgment by Kosmann is why the no contact rule is in place, as it "prevents a lawyer from nullifying the protection a represented person has achieved by retaining counsel." *Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996) (*quoting* G. HAZARD, JR. & W. HODES, THE LAW OF LAWYERING, § 4.2.101 (2d ed. 1993)); *see also* IRPC 4.2, cmt. 3 ("**The Rule applies even though the represented person initiates or consents to the communication**.") (emphasis added).

The law is clear about what Judge Dunn, Dinius, and Dunbar (three attorneys) were **required** to do in this situation. If they wanted to have the ex parte meeting, then they needed to come to Messerly, sitting a few feet away behind a closed door, and ask him whether he would

consent to this ex parte meeting between Kosmann and Dinius.[2] Of course, Messerly would not have allowed it had he been asked (for numerous reasons, including that the case was already settled, Dinius's poor reputation in the community, the numerous improper things that Dinius and Dunbar had already done during the litigation and during the mediation, Kosmann's naivety in litigation, and Dinius's extra advantage as Kosmann's prior attorney). (7/26/17 Tr. P.6 L.25-P.7 L.3: "I have grave concern about this because I wasn't there and I would never have allowed [it]."). Thus, it should be undisputed that but for the ethics violation, the mediation would have ended with the $40,000 settlement and no Messerly release, which was agreeable to both sides. (*Id.*, P.5, L.19-25: "And I told my client, take the $40,000 and don't put me on the release. … So I said take that deal. I sent him out of the room to go take that deal ….").

Dinius, Dunbar, and Judge Dunn, however, did not ask Messerly for permission. Instead, for various reasons (Judge Dunn claimed they were just parties so he did not have to get Messerly's permission; Dinius and Dunbar claim they just assumed Messerly was okay with it), they took zero actions to confirm whether Messerly had consented to such a meeting, i.e. they did not ask Messerly whether he consented and no one told them Messerly had consented.

The result was predictable for any situation where a savvy and infamous attorney is

[2] Most attorneys would not even ask opposing counsel for permission to have an ex parte communication with the opposing party, knowing that no responsible attorney would allow such a meeting between an attorney and an unsophisticated client. Ethical attorneys would be uncomfortable having even non-substantive conversations with the other party without their counsel present. *See Fucile, Mark*, ADVOCATE, Making Contact: The "No Contact With Represented Parties" Rule, June 2006 ("Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. Given those possible sanctions coupled with the natural reaction of opposing counsel who learns of a perceived 'end run' to get to his or her client, this is definitely an area where it's better to be safe than sorry.").

meeting alone with an ex-client (a layperson with no business or legal experience). In this secret meeting, Dinius flipped his position regarding the release for Messerly, now claiming that the release could be ethically provided. Dinius then made an offer to Kosmann that he had never made during the time that Kosmann had Messerly's legal protection: Dinius would give the release in exchange for Kosmann dropping his settlement payment by $8,000. Further, he gave Kosmann legal advice about Messerly's potential liability (falsely claiming Messerly committed malpractice and had harmed Kosmann by taking over Kosmann's representation from Dinius) and about the waiver of an alleged conflict of interest, and he used his prior attorney-client relationship with Kosmann to manipulate Kosmann into paying $8,000 for a release that was not even directly for Kosmann. All of this was way out of bounds ethically and resulted in immediate harm to Kosmann.

So, again, the legal resolution of this scenario should have been easy for both Dinius and Dunbar and for the District Judge. Once Dinius and Dunbar realized their "mistake", they had every opportunity to resolve the situation voluntarily by going forward with the settlement that everyone had already agreed upon: $40,000 to Kosmann and no Messerly release.[3] Once Dinius and Dunbar refused to do the ethical and obvious thing to resolve the situation without any further litigation, then the District Judge had just as easy a resolution: recognize the ethical

[3] This Court has stated that the cost of litigation, and particularly unnecessary litigation, is concerning. Here, the parties knew there was an ethical violation and it had the simplest and cheapest resolution: proceed with the settlement the parties had already agreed upon, a difference of only $8,000. Kosmann repeatedly made that offer, to avoid litigation. Yet, inexplicably, Dinius and Dunbar forced the parties to litigate for well over a year. This approach was highly beneficial to Dunbar, who undoubtedly earned significant fees for taking this litigious approach.

violation and remedy it by enforcing the original $40,000 settlement and ordering attorney fees against Dinius and Dunbar for refusing to admit their "mistake" and instead pursuing unnecessary litigation. Justice, common sense, and decades of legal precedents regarding the no-contact rule and enforcing ethical rules would have supported such an easy resolution.

Instead, for reasons that are still unclear,[4] the District Judge refused to implement that simple remedy. Dinius and Dunbar filed numerous briefs and declarations admitting that they had this secret, ex parte negotiation with Kosmann that reduced the settlement that Kosmann's counsel had negotiated, but they argued that this was totally permissible and they had done nothing wrong. (R. Vol. 3, pp. 19-59, 190-97, 198-202, 238-46, 249-53.) Not only that, they repeatedly filed briefs seeking retaliatory sanctions against Kosmann and Messerly for baseless reasons. (R. Vol. 3, pp. 187-89; pp. 206-07; pp. 268-69; pp. 277-87; pp. 327-32; pp. 463-64.)

The District Judge went along with Dinius and Dunbar in every respect: he repeatedly ruled that he (1) would not decide whether there was a violation of the no-contact rule, (2) would do nothing about it even if there was a violation, (3) would enforce the better settlement that Dinius and Dunbar obtained by going behind Messerly's back, manipulating and deceiving Kosmann, and then threatening Kosmann, and (4) would impose the retaliatory sanction against Kosmann under Rule 11. In order to reach the result it wanted, the District Court issued written rulings that superficially and incorrectly addressed a few legal issues and did not address the vast

[4] A cynical interpretation of the result in this case would be that Judge Dunn acted in an improper and biased way during the mediation in order to protect his fellow lawyers and help them get a better resolution of their malpractice case, and the District Court ignored the law in this case and retaliated with sanctions against Kosmann and Messerly as an attempt to protect a fellow District Judge and two fellow attorneys from having their unethical actions exposed.

majority of the overwhelming legal citations and arguments provided by Kosmann in this case.

This appeal is a request that the Court right this wrong, first reversing all three of the key, unsupportable rulings of the District Judge, and then remanding with instructions that implement the simple remedy that was requested from the start and that should not have required years of litigation: recognize the blatant ethical violation and implement the logical remedy by reimbursing Kosmann (1) the lost $8,000 and (2) all of his attorney fees in having to litigate these issues before the District Court and through the end of this appeal, including fees related to all of Dinius's improper sanctions requests. If the Court so chooses, it could go further and order that on remand the District Judge should further sanction Dinius and Dunbar for all the aggravating factors in this case and/or should disgorge any fees Dunbar has earned in forcing the parties to have to litigate about a clear ethical violation, in which she was an active participant. *See* IRPC 8.4 ("knowingly assist").

D. Dinius and Dunbar Falsely Allege Kosmann Has Not Challenged All Relevant Rulings of the District Court.

The facts and the law do not support any of Dinius and Dunbar's many and varied substantive positions in this case. As pointed out to the District Court and as continues in this appeal, Dinius cannot cite any case law to support their substantive arguments. (R. Vol. 3, pp. 502-03). Instead, their Respondent Brief is mostly false claims about the record and about procedure, apparently hoping that this Court will allow them to get away with everything based upon some procedural technicality (as they were able to get the District Court to do). Their claims about the record below are false and not cited.

Dinius falsely claims that Kosmann's Appellant Brief did not challenge all of the relevant conclusions of the District Court in this case. The District Court issued three memorandum decisions (November 2 and November 22, 2017, and January 24, 2018) that all merit reversal. The Appellant Opening Brief points out how the District Court's rulings were incorrect, ignored the law, ignored the correct arguments raised by Kosmann, kept changing the reasoning in order to get to the predetermined result, made numerous errors of law, and consistently abused its discretion. To avoid duplication, the Appellant Brief argument section did not address each memorandum ruling separately but instead focused on the key, incorrect substantive holdings of the District Court (which spanned multiple memorandum decisions).[5]

[5] The sheer volume of errors by the District Judge in this case did pose a significant challenge in addressing them all within the fifty page limit of the Appellant Opening Brief: applying irrelevant contract law to ignore an ethics violation; allowing an attorney-party to financially benefit from his ethics violation; improperly distinguishing a key precedent; ignoring all arguments for why the precedent could not be distinguished; refusing to consider all of the aggravating factors regarding the ethical violation in this case; ignoring all arguments for why ethics law and not contract law should be applied; citing the summary judgment standard for enforcement of settlement agreement but then ignoring all disputed facts regarding the voluntariness of the reduced settlement; claiming the district court lacked authority to enforce ethics violations affecting their cases; claiming it could make the discretionary decision to ignore an ethics violation that directly impacted the settlement terms in the case and benefited the party violating the rules; claiming that it should defer to the Idaho State Bar's disciplinary powers rather than enforce the attorney ethics rules in its cases; failing to explain why having an attorney of record would allow an attorney-party to reasonably believe they could violate the no-contact rule; claiming that Idaho law is unclear on whether an attorney-party can secretly negotiate with the opposing party; claiming that ethics rules should not be enforced by the District Court if Rule 11 (which deals with briefing arguments not violating the no-contact rule) is not implicated; citing to no-contact cases from other jurisdictions that had already been rejected in the *Runsvold* case; imposing no sanctions for a violation of the no contact rule but imposing sanctions for briefly forgetting to file a motion for leave; citing the abuse of discretion standard for imposing Rule 11 sanctions but citing none of the other ample case law surrounding Rule 11; ignoring all of the Rule 11 case law cited by Kosmann; ignoring the safe-harbor provision in Rule 11 and

1. The Rule 4.2 Violation and the *Runsvold* Case Require Reversal of All District Court Rulings.

In all three of its memorandum decisions, the District Court reviewed the ethics violation, including Rule 4.2 and the *Runsvold* case, and claimed that an attorney secretly negotiating with the opposing attorney's client was not a significant cause for concern, was debatable whether it was a violation, and/or was not an issue for it to resolve. (R. Vol. 2, pp. 149-53, 166-71, 192.) That error of law is the root of all the injustice and incorrect rulings in this case and should lead to a reversal of all the District Court's rulings.

A violation of Rule 4.2 cannot just be ignored. This Court, in adopting these ethical rules and their official comments, has already stated that this ethical rule is crucial:

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

IRPC 4.2, cmt. 1. The rule is so important that the law has built up numerous protections against erosions of the rule. For example, attorneys: cannot get around it by relying upon the layperson's

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imposing sanctions without any showing of compliance with that provision; sanctioning an attorney for a trivial procedural mistake that caused no damage and was fixed well-within the safe-harbor timeframe; refusing to sanction a party for using Rule 11 for retaliatory and other improper purposes; sanctioning one party for a trivial procedural mistake while helping the other party to fix its own procedural mistake that it made in asking for those sanctions; citing the abuse of discretion standard for deciding whether to strike an untimely pleading but then not discussing any relevant issues like prejudice or lesser, non-substantive sanctions; failing to explain whether striking the brief and declarations had any substantive significance; and ignoring all arguments by Kosmann regarding why the brief and declaration should not be stricken.

Literally every conclusion of law by the District Court was an error of law and/or an abuse of discretion and often for multiple, independent reasons. Hence the unusual request that on remand this case be sent to a different District Judge, which this Court has ordered in other cases involving shocking and inexplicable rulings.

consent, have to expressly ask for consent from the opposing attorney, cannot claim that consent was assumed or implied, and cannot avoid a violation by claiming ignorance or mistake.

Similarly, this Court's logical interpretation of Rule 4.2 in *Runsvold* is not properly distinguishable, ignored, or marginalized. This Court long ago (1996) ruled that attorney-parties are not allowed to have secret meetings with the opposing attorney's client, and this Court gave detailed policy reasons for this interpretation of Rule 4.2 (which did not even mention the important fact that attorney-parties are much more motivated to violate the no-contact rule in order to manipulate the opposing party, because it benefits them personally as the client). That ruling has stood the test of time and has been adopted by most or all other jurisdictions.

In three separate opinions addressing *Runsvold* (R. Vol. 3, pp. 149-53, 166-71, 192), the District Court failed to give a reasoned explanation for why *Runsvold*'s holding and policy bases would not apply in this case, nor did it respond to any of Kosmann's many reasoned arguments for why *Runsvold* is controlling (R. Vol. 3, pp. 221-23, 383-89). In particular, the District Court had no answer for why this Court would approve of a loophole to allow an attorney-party to violate the no-contact rule as long as the attorney-party put another attorney on the pleadings. It is an error of law to ignore or marginalize the Rule 4.2 violation and an error of law to distinguish applicable precedent without providing a reasoned explanation.

Had the District Court correctly recognized the significance of this blatant ethics violation, including the various important policy objectives that were undermined, then the Court's three rulings certainly should have been different and should be overturned. For example, had the District Court correctly recognized the significance of this ethics violation, it

would not have claimed the violation should be dealt with only by the Idaho State Bar, thus using the Court's authority to approve and validate the tainted result from the violation, helping Dinius reap the financial benefits of his ethics violation, and leaving the naïve layperson damaged by the violation. *See Boe*, 163 Idaho 922, 422 P.3d at 1140 ("cornerstone maxim of our justice system that a party cannot reap a profit by virtue of committing misconduct").

Had the District Court correctly recognized the significance of this ethics violation, it would not have concluded the violation was irrelevant merely because Kosmann temporarily decided to just give in to what had happened, against the wishes of his own attorney. Instead, the District Court would have recognized that Kosmann's temporary actions in putting the lesser settlement on the record were not willful and voluntary in any ordinary sense:

- during the ex parte meeting, Kosmann was manipulated by his ex-attorney into believing that he needed to pay for this counsel release;
- during the ex parte meeting, Dinius bad mouthed Messerly and claimed malpractice, causing Kosmann to doubt Messerly's counsel;
- Kosmann was trusting his ex-attorney Dinius's claims about Messerly needing a release and Dinius's "graciousness" in offering it;
- Kosmann was blaming himself for asking for the meeting and then being tricked by Dinius into agreeing to something less;
- Kosmann is not a lawyer and did not understand Rule 4.2 or the obligations on Dinius;
- Kosmann was manipulated by Dinius, Dunbar, and Judge Dunn into believing that he was going to lose any litigation about the violation of the no-contact rule and any litigation over the two different settlements;
- Kosmann was manipulated by Dinius, Dunbar, and Judge Dunn into believing that he was going to be sanctioned if he did not go along with the new settlement that he knew he had been involved in reaching;
- Kosmann was justifiably worried about months more of litigation and the cost, if he fought against what they had done.

So, it was no surprise that Kosmann went against his attorney (7/26/17 Tr. P.8 L.21-23: "Probably didn't do what he asked. But I'm doing this for my own accord because today is the day to move forward.") and foolishly capitulated in putting the lesser settlement on the record, giving up $8,000 in exchange for literally nothing (*Id.*, P.7 L.15-19: "Kosmann gave up $8,000 for nothing. And it was all done in personal negotiations directly with Mr. Dinius without my involvement."). A layperson taking actions that are detrimental to his interests, and contradicting his own attorney's work and counsel, is exactly the type of damage that often results from a violation of Rule 4.2 and that the District Court is supposed to remedy. Instead, the District Court's approach made a mockery of Rule 4.2, and its rulings indicated that attorney-parties can get away with ethical violations that benefit themselves.

2. A District Court Does Not Have the Discretion to Reward an Ethical Violation and Ignore the Damage the Violation Caused to a Party in the Litigation.

In its two most recent rulings, the Court ruled that even if it found an ethics violation, it would not remedy the violation. In its November 22nd ruling, the Court said it would not remedy the violation because it lacked authority to enforce the Idaho Rules of Professional Conduct. (R. Vol. 2, pp. 170-71.) In its January 24, 2018 ruling, the District Court seemed to back off that ruling somewhat, but still indicated that it was not going to address the ethical violation because it believed that the Idaho State Bar should handle the issue. (R. Vol. 2, p. 193.) Both rulings are errors of law and/or an abuse of discretion and must be reversed.

To the extent the District Court is still claiming it lacks authority to enforce the ethical rules, that is an error of law, as pointed out by all of the caselaw and policy arguments in the

Appellant Brief. (AOB, pp. 33-37.) To the extent the District Court is exercising its discretion to delegate the issue solely to the Idaho State Bar, that is an abuse of discretion, as a District Court cannot ignore a violation directly impacting the litigation, *see, e.g.*, *Montgomery v. Montgomery*, 147 Idaho 1, 11, 205 P.3d 650, 660 (2009) ("The magistrate judge, rather than exercising his discretion in the matter, delegated the resolution of the issue. The magistrate judge's refusal to act was an abuse of discretion …."), and cannot use its judicial power to enforce the tainted reduced settlement and thereby help an attorney benefit from his/her ethical violations. *See Boe*, 163 Idaho 922, 422 P.3d at 1140 ("cornerstone maxim of our justice system that a party cannot reap a profit by virtue of committing misconduct").

This Court has repeatedly cited to *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991):

> [W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than the inherent power. But in the informed discretion of the court, neither the statue nor the rules are up to the task, the court may safely rely on its inherent power.

Talbot v. Ames Const., 127 Idaho 648, 651–53, 904 P.2d 560, 563–65 (1995) (quoting *Chambers*); *State v. Rogers*, 143 Idaho 320, 322–23, 144 P.3d 25, 27–28 (2006), as amended on denial of reh'g (Sept. 19, 2006) ("However, this Court has recognized that trial courts also have an 'inherent authority to assess sanctions for bad faith conduct against all parties appearing before it.'") (quoting *Chambers*). Unethical conduct by an attorney during a mediation must be sanctionable; Rule 11 has no application to actions during a mediation, so the inherent power to sanction bad faith conduct must apply.

Other jurisdictions have consistently held that its courts have inherent power to enforce

the ethical rules. *See, e.g.*, *Matter of Doe*, 801 F. Supp. 478, 488 (D.N.M. 1992) ("Certainly, if permitted to act unethically any attorney could gain advantage over his or her adversary. But to prevail in litigation by unfair means not only rewards the unscrupulous but relegates justice to a hollow victory. This is exactly what the codes of ethics is designed to prevent"); *MMR/Wallace Power & Indus, Inc. v. Thames Assocs.*, 764 F. Supp. 712, 717—18 (D. Conn. 1991) ("Federal courts have inherent authority to discipline attorneys who appear before them for conduct deemed inconsistent with ethical standards imposed by the court"); *Kleiner v. First Nat. Bank Of Atlanta*, 102 F.R.D. 754, 773—75 (N.D. Ga. 1983), aff'd in part, vacated in part, 751 F.2d 1193 (11th Cir. 1985) ("This Court has the inherent authority to impose monetary sanctions against attorneys for misconduct"); *Vertical Res., Inc. v, Bramlett*, 837 A.2d 1193, 1201—02 (Pa. 2003) ("Unquestionably, courts possess the inherent power to disqualify counsel for a Violation of ethical standards"). The District Court erred by ignoring all of this case law and logic.

Dinius and the District Court point to Idaho statute and regulations that give the Idaho State Bar the authority to discipline attorneys for ethical violations. (R. Vol. 2, p. 193.) However, Kosmann did not ask the District Court to act against Dinius or Dunbar's licenses. Kosmann asked the District Court to use its inherent powers to enforce the attorney ethical rules and remedy the damages that an attorney did to an opposing party in on-going litigation. Disciplinary proceedings are not an adequate or complete substitute. This basic concept is explicitly recognized in the very regulations cited by Dinius and the District Court: "**Powers of Lower Courts**. These Rules shall not be construed to deny to any court the powers necessary to maintain control over its proceedings." Idaho Bar Commn. R. 500(b).

The District Court also seemed to argue that it decided not to impose sanctions for violation of the ethical rules because IRCP 11 was the more applicable approach:

> This Court determined that the motions for sanctions were most appropriately analyzed pursuant to I.R.C.P. 11, and declined to exercise its discretion to rely exclusively on its inherent authority to sanction conduct that the Court determined did not violate Rule 11.

(R. Vol. 2, p. 193.) Rule 11 has nothing to do with sanctioning and remedying the ethics violation that occurred during the mediation.[6] Rule 11 is applicable to court filings, not to actions occurring during a mediation. It is error of law and abuse of discretion for the District Court to use the irrelevant Rule 11 as a reason to not enforce the ethical rules.

The District Court's two rulings must be reversed that refuse to remedy and/or impose sanctions for violations of IRPC 4.2 based on the incorrect and/or unexplained belief that the issue must or should instead be resolved by the Idaho State Bar. It is legal error to claim the District Court lacked authority or to claim that Rule 11 had some relevance to ethical violations during a mediation. It is an abuse of discretion for the District Court to claim it would not address the issue because of the irrelevant Rule 11 or because the Idaho State Bar could also pursue disciplinary proceedings. It is an abuse of discretion for the District Court to ignore, rather than address, all the case law and policy arguments raised by Kosmann.

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[6] In the Respondent's Brief, Dinius repeatedly argues, incorrectly, that Kosmann was asking the District Court to sanction Dinius's unethical actions during the mediation based on IRCP 11. Kosmann never asked the District Court to use Rule 11 to sanction violations of IRPC 4.2. It was the District Court that decided to evaluate the issue based on Rule 11. The Court's rulings on that issue were irrelevant. Kosmann repeatedly asked the District Court to remedy the unethical conduct during the mediation pursuant to the Court's inherent authority to enforce the ethical rules. (R. Vol. 3, pp. 337-41, 395-98, 493-96.)

3. Idaho Law Does Not Support the Rule 11 Sanctions Imposed on Kosmann/Messerly and Not Imposed on Dinius.

In its second and third rulings (following up on an initial oral ruling), the District Court claimed that Rule 11 sanctions would awarded against Kosmann for not initially filing a motion for leave when submitting a supplemental brief and declaration. (R. Vol. 3, pp. 173-74, 194-95.) Kosmann has provided numerous arguments for why that was both an error of law and an abuse of discretion. (AOB, Part I.C.3-8, Part III.E.) In the Respondent's Brief, Dinius could not cite any Rule 11 law/case or even present a logical argument for why the District Court correctly applied Rule 11 (despite the fact that Dinius asked for those sanctions seven different times).

Even now, Dinius refuses to concede that he improperly requested sanctions against Kosmann/Messerly under Rule 11 without complying with the 21-day safe-harbor requirement. Dinius refuses to withdraw his sanction request and return the $200. Instead, in the Respondent's Brief, Dinius claims that his violation of the 21-day safe harbor provision should be allowed because Messerly did not catch it soon enough below (not until the reply brief on the motion to reconsider).[7] (RB, p.22, 35-36.). That argument is wrong for many reasons.

First, Rule 11 puts the onus on Dinius to comply with the 21-day notice requirement (not on Kosmann to catch the violation). 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 … is corrected within

[7] Messerly did not catch it sooner for at least four reasons: (1) he is not familiar with the details of the Rule, having never filed a Rule 11 motion against another attorney nor had such a motion filed against himself; (2) he knew Dinius's request was frivolous, so he spent as little time on it as possible; (3) using only common sense he was able to give the District Court numerous and sufficient reasons to reject the frivolous motion; (4) working without pay, Messerly has tried to reasonably minimize the time and research expense.

21 days after service….") When Dinius sought Rule 11 sanctions, he was obligated as part of his prima facie case to provide proof that he complied with the 21-day safe-harbor requirement. The record shows Dinius never provided that prima facie showing (any of the seven times he requested sanctions), so he should never have qualified for sanctions. Second, Messerly repeatedly asserted in his briefs and declarations that he was unaware of his procedural mistake, was not been told by Dinius about the mistake prior to the sanctions request being filed, and fixed it immediately, two days after it was raised. (R. Vol. 3, pp.304, 316 ¶30.) Thus, Messerly raised the "notice and opportunity to correct" issue immediately, and thereby should have put both the Court and Dinius and Dunbar on notice regarding Rule 11's safe-harbor requirement.

Third, Dinius and Dunbar have only themselves to blame for not complying with the Rule's requirements. Dinius and Dunbar violated the rule and now they improperly argue they should be allowed to violate the rule because they almost got away with it before Messerly figured it out (and because the District Court never figured it out or just did not care). Fourth, the issue was clearly raised in the reply brief, so Dinius and Dunbar could have challenged it below. (R. Vol. 3, pp. 506-07.) Instead, they choose not to contest it before the District Court because they cannot contest it. It is undisputed they did not comply with the 21-day requirement, though they have refused to admit it (they do not deny it and the record speaks for itself).

Fifth, Kosmann's arguments in the reply brief were a specific response to arguments that Dinius and Dunbar made in their opposition brief. Dinius and Dunbar argued, "Notable, Kosmann has failed to raise any argument or cite any case law to support his contention that an abuse of discretion occurred [with regard to the Rule 11 sanctions imposed]." (R. Vol. 3, p. 464.)

In the reply brief, Messerly responded directly to that argument and cited overwhelming law on numerous issues that showed the District Judge had improperly imposed sanctions. (*Id.*, pp. 504-07.) Dinius and Dunbar bluffed that there was no case law, and they cannot complain when they opened the door and Messerly called their bluff by properly responding in the reply brief to show their arguments were incorrect. Dinius and Dunbar have now had more than a year to come up with any law to support the validity of their seven Rule 11 sanction requests against Kosmann; they cannot provide anything.

The only Rule 11 sanctions that should have been imposed in this case are sanctions against Dinius for bringing a Rule 11 sanctions request for improper purposes, i.e. retaliatory, to increase fees, etc. Dinius falsely claims that this issue was not raised below. Kosmann raised the issue immediately in his briefing, pointing out repeatedly that Dinius was abusing Rule 11, using it to retaliate and making frivolous arguments. (R. Vol. 3, pp. 303-305, 340, 498.) Then, in response to Dinius's argument that there was no law to support Kosmann's position, Kosmann cited to the advisory notes for Rule 11 and related caselaw:

> The advisory notes also point out that this misuse of Rule 11 motions could itself lead to sanctions: "As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirement of the rule and can lead to sanctions. **However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11— whether the movant or the target of the motion— reasonable expenses, including attorney's fees, incurred in presenting or 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 based upon disputable issues and trivial issues and using it to argue on the merits and to be combative).

R. Vol. 3, p.507 (emphasis added). Thus, the issue was raised below (the District Court just

ignored it) and the caselaw points out that a cross-motion for fees is unnecessary; fees should automatically be awarded when the evidence shows that Dinius was making frivolous and retaliatory sanction requests against Kosmann/Messerly.

The District Court did not even consider any of the law related to Rule 11. (R. Vol. 3, pp. 173-74, 194-95.) Instead, the District Court's rulings give only one reason for the sanction: Messerly made a procedural error. That is not sufficient reasoning to support Rule 11 sanctions (otherwise every attorney error would result in automatic sanctions and Dinius and Dunbar would have been sanctioned many times in this case) and that lack of a detailed analysis is an abuse of discretion. The District Court also ignored all of the reasoning offered by Messerly, who provided numerous reasons why such a sanction would be unheard of, unfair, and bad policy. It was abuse of discretion (not an "exercise of reason") for the District Court to just ignore Kosmann's arguments, suggesting that the District Court could not refute them and had a pre-determined result it wanted.

4. The District Court Erred in Distorting Contract Law Principles and Ignoring Contrary Facts In Order to Whitewash Ethical Violations.

In its first and third rulings, the District Court ruled that the reduced settlement was enforceable pursuant to contract law principles. As argued in the Appellant's Opening Brief, that ruling tries to ignore the ethical violation and should be reversed, for all the reasons stated above regarding the importance of Rule 4.2 and the *Runsvold* decision. (*Supra*, Part II.D.1) In addition, that ruling goes against the basic legal principle that courts will not assist parties in benefiting from their ethical violations. (AOB, pp. 3, 32.)

In the Appellant Brief, Kosmann also argued that (1) such a ruling is incorrect because the factual findings by the District Court (claiming that Kosmann somehow knowingly and voluntarily agreed, after receiving advice from counsel) improperly ignore all the contrary evidence in the record (AOB, pp. 24, 33), (2) such a ruling is incorrect because the Court should properly evaluate this case as an ethics law case, not a contract case, and should fully remedy the ethical violation that put Kosmann into the unfair predicament of putting a lower settlement on the record (AOB, p.37, noting that the contract law analysis should be "moot"), (3) even if the District Court wants to enforce the agreement put on the record, it still must use ethics law to remedy the damages to Kosmann and make him whole by reimbursing his $8,000 and attorney fees (AOB, p. 34; 11/8/17 Tr. P.40 L.18 to P.41 L.25), (4) such an interpretation of contract law would have disastrous policy implications in allowing an attorney to get away with violating the no-contact rule as long as the attorney is able to trick the opposing party into "voluntarily" putting the new agreement into writing or on the record (AOB, pp. 37-38), and (5) there are numerous contract defenses that could be applied, if necessary, in order to avoid the unfair result of an attorney directly benefiting from an obvious ethical violation (AOB, pp. 37, fn.3).

As stated repeatedly in the Appellant Brief, the District Court issued rulings that blatantly ignored all the facts put in the record that showed it was not a voluntary decision by Kosmann in giving up $8,000 in exchange for a worthless release that his counsel said would not be accepted. (AOB, Part I.B.4-8; R. Vol. 3, 389-95.). The District Court is ignoring how Dinius's ethical violation created a "Sophie's Choice" or no-win situation for Kosmann, which is not a true voluntary decision. It was an error of law for the District Court to ignore all the facts in the

record that contest the voluntariness of the reduced settlement. *See Vanderford Co. v. Knudson*, 150 Idaho 664, 671–74, 249 P.3d 857, 864–67 (2011) ("Thus, we hold that the district court erred in granting what was in effect summary judgment … because Knudson raised genuine issues of material fact concerning the existence of both the Knudson–Vanderford Settlement and the Greifs–Vanderford Settlement in his affidavit."); *see also Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 419 P.3d 1139, 1146 (2018) (reversing enforcement of settlement based on genuine issue of material fact).

Even more important, the District Court improperly sought to resolve this case based upon contract law principles, rather than ethic law principles. Kosmann asked the District Court to resolve the case based upon ethics law principles, rather than trying to force it to fit into contract law principles. (R. Vol. 3, 221-30, 334-41, 395-98.) Neither Dinius nor the District Court ever cited even one contract law case addressing a factually similar scenario. Kosmann cited two cases where courts refused to enforce agreements that were tainted by ethical violations. *See Mathews v. Bronger Masonry, Inc.*, No. 1:09-CV—00478-SEB, 2011 WL 7334035, at *9—12 (SD. Ind. Dec. 29, 2011), report and recommendation adopted, N0. 1:09-CV—00478-SEB, 2012 WL 515886 (S.D. Ind. Feb. 15, 2012); *Sandstrom v. Sandstrom*, 884 P.2d 968, 971 (Wyo. 1994) ("We refuse to enforce an agreement in favor of an attorney who admittedly engaged in conduct which we consider to be unethical to obtain the agreement."). Kosmann also cited to the similar fruit of the poisonous tree doctrine and its logic in not allowing the bad actor to benefit from the fruits of their bad acts. Contract law does not easily apply to this scenario. Ethics law does easily apply, as pointed out by the various treatises and case law. *See,*

e.g., ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, p. 420 (Ellen J. Bennett et al., 7th ed. 2011). It was legal error for the District Court to claim that contract law could resolve this case without ever addressing the ethic violation at the center of the dispute.

Kosmann did not have space in the opening brief to address all of the contract defenses that might be applicable to this factual scenario. Instead, Kosmann listed numerous examples, like he listed numerous examples for the District Court. None of these contract principles are a simple or straightforward fit to the facts of this case because this is not a contract law dispute. Kosmann properly did not waste this Court's time with pages of irrelevant contract law discussion. The District Court's rulings that improperly try to apply contract law (and ignore all contrary, relevant facts) should be reversed. This issue should be resolved based upon IRPC 4.2, its application to the facts in this case, and logical equitable remedies for violations of IRPC 4.2.

5. Striking the Memorandum and Declaration in Support of the Motion to Reconsider Was an Abuse of Discretion.

The District Court ruled that it would not consider the Memorandum and Declaration of Counsel filed in support of Kosmann's Motion to Reconsider, finding that these filings were untimely. (R. Vol. 2, pp. 184-85.) However, the District Court did consider the motion to reconsider and supporting Kosmann Declaration, it did consider the reply brief in support of the motion, and it did issue a ruling. (Id. pp. 181-95.) The ruling did not state if there were any issues that went unconsidered because the initial memorandum was stricken or whether any key facts were left undisputed because the counsel declaration was stricken. (*Id.*) It is not clear if the Court's ruling to strike the Memorandum and Declaration actually had any substantive impact.

However, in an abundance of caution, Kosmann also appealed the District Court's decision to strike those two filings as an abuse of discretion.

The Motion to Reconsider stated that a supporting memorandum and declaration would be filed prior to the hearing, in compliance with IRCP 7. (R. Vol. 3, p.345.) Both were then timely filed more than fourteen days prior to the schedule hearing date for the motion. However Dinius and Dunbar argued that this Court had held that motions to reconsider under IRCP 59 were different and briefs and declarations were supposed to be filed with the motion (it does not say that in IRCP 59(e)). Messerly did not dispute what the cases appeared to say and asked that the "untimely" filings be allowed because they were important, they were untimely because of reasonable confusion between IRCP 7 and 59, no one was harmed by the timing of the filings, procedure should not be elevated over substance, and a lesser remedy could be given that allowed Dinius and Dunbar additional time to respond.

As noted in Appellant's Opening Brief, the District Court's decision to strike the two filings was not based on some detailed reasoning. Instead, the only consideration of the District Court was that the attorney had admitted to misunderstanding the timing rules: filing the brief and declaration in compliance with IRCP 7 timing rules but apparently out-of-compliance with IRCP 59 timing rules. The District Court's belief about a procedural error was its only consideration. It did not give any other reason for its decision to completely disregard an important memorandum and declaration.

As this Court has stated many times, a court should not elevate procedure over substance. *See, e.g.*, *Stoner v. Turner*, 73 Idaho 117, 121, 247 P.2d 469, 471 (1952) ("But, except as to those

which are mandatory or jurisdictional, procedural regulations should not be so applied as to defeat their primary purpose, that is, the disposition of causes upon their substantial merits without delay or prejudice."); *see also Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 247–48, 178 P.3d 606, 612–13 (2008) ("[T]his Court will construe the provisions of the Idaho Rules of Civil Procedure liberally in order to resolve cases on their merits instead of on technicalities."); *Bunn v. Bunn*, 99 Idaho 710, 711–13, 587 P.2d 1245, 1246–48 (1978). It is an abuse of discretion for a court to strike filings merely because of an alleged procedural error (if it even was an error, considering the plain language of IRCP 7 and 59, *see* AOB, p.41, fn. 5) and for no other stated reason. At a minimum, a court should find some prejudice to the opposing party or some significant aggravating circumstances.

It was also an abuse of discretion for the court to use the heavy-handed sanction of striking filings rather than finding a less prejudicial approach. The Court had numerous ways to address a procedural mistake in a way that would not prejudice the substantive arguments in the case. For example, the District Court could have addressed any possible timing error by giving Dinius additional response time. Instead, the Court's punishment did not fit the crime.

It was also an abuse of discretion for the court to not even consider all of the arguments made by Kosmann about why not to strike the memorandum and declaration: that they contained important arguments, citations, and evidence to help the court avoid legal error, that they were filed in good faith within the timing rules of IRCP 7, that striking the filings based on an innocent and understandable misunderstanding of briefing deadlines would be elevating procedure over substance, and that the timing caused no prejudice to the opposing party (in fact

they were filed early to give the opposing party more than the normal seven days to respond to a motion). Kosmann made all of those arguments in the briefing, but the District Court did not even address them. It is not an "exercise of reason" to just ignore all contrary persuasive arguments. The District Court's penchant for ignoring all arguments that it cannot refute with law or logic is indicative of a result-oriented approach that is an abuse of discretion.

E. Kosmann Is Entitled to Recovery of Attorney Fees on Appeal.

The main source for recovering appellate attorney fees should be IRPC 4.2 and this Court's inherent power to award attorney fees as part of a sanction/remedy for a violation of an ethical rule. It appears to be black letter law that a Court should award attorney fees to reimburse a party that has to litigate to remedy an ethical violation. *See, e.g.*, ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, p. 420 (Ellen J. Bennett et al., 7th ed. 2011) ("courts have ordered evidentiary remedies, return of documents, monetary sanctions, and even disqualifications."); *see also 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 v. Thornton*, 863 F. Supp. 1204, 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); *Featherstone v. Schaerrer*, 34 P.3d 194, 200–08 (Utah 2001). This is the law because logically, a party cannot fully protect itself against ethical violations if it cannot recover the cost of being forced to prove up the violation in litigation.

Appellate fees are a big part of that cost.

Here, Dinius refused to do the simple remedy of his ethical violation, paying the full $40,000 settlement rather than the $32,000 amount. Instead, Dinius filed the motion seeking to force Kosmann to accept the $32,000 as the settlement amount. Kosmann was thus forced to litigate the ethical violation that he did not want to litigate. For more than a year, he has been forced to incur thousands of fees to litigate what is an obvious ethical violation. Dinius has raised every possible argument to justify the ethical violation and obtain the tainted fruit of that violation. Dinius has cut no corners in causing Kosmann to incur massive legal fees. Dinius has filed frivolous and retaliatory sanction requests to further run up Kosmann's costs. Messerly did the work based on the case law and the logic that indicates those fees would eventually be reimbursed. If Idaho law does not reimburse those fees, as part of the sanction for the ethical violation, then ethical violations will go unpunished. Unethical attorneys would use the cost of litigation in order to avoid sanction.

In fact, that is almost what happened here. Kosmann initially put the lesser settlement on the record, in part, because of his fear of the litigation cost of challenging the ethical violation: Dinius, Dunbar, and Judge Dunn told him (and Messerly could not disagree) that fighting it would cost him more money, more time in litigation, and would continue to tie up his $32,000 held by the District Court. Kosmann only changed his mind, in part, because Messerly was willing to do all this work based on the belief (based on case law, general ethics and sanctions law, and common-sense equitable principles) that the fees would eventually be paid by the parties who violated the ethical rule, refused to fix it, and caused the parties to have to litigate it.

The Court also has other options for awarding appellate fees, pursuant to both statute and contract. The statute is I.C. § 12-121, and Kosmann has already fully described all of the frivolous arguments and positions that Dinius has taken in this litigation. (*E.g., supra*, Part II.A.)

The contract is the written Settlement Agreement that Dinius sought to enforce in this case. That written Settlement Agreement that Dinius drafted is in the record; it seeks to make Kosmann agree that he would only receive a $32,000 settlement and it contains an attorney fee provision that applies if there is any litigation "concerning, relating to, or arising out of this" Settlement Agreement. Dinius filed a motion seeking to enforce that written Settlement Agreement, and he submitted the written Settlement Agreement to the District Court. (R. Vol. 3, p. 17: "the Defendants respectfully request that the Court enforce the settlement pursuant to the terms agreed to by the parties and as set forth in Version 4 of the Mutual Release and Settlement Agreement."; pp. 23-24, ¶¶ 10-11; p. 54-59.) Clearly, this litigation has been "concerning, relating to, or arising out of this" Settlement Agreement, so the attorney fee provision in the Settlement Agreement applies. It is irrelevant that the written Settlement Agreement was never signed by the parties. This Court has previously held that by seeking to enforce a contract, Dinius was seeking to enforce all portions of the Agreement, including the attorney fee provision, so he cannot now complain that it would be operative upon him as written. *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).

Thus, on remand, Kosmann asks this Court to instruct the District Court to award all reasonable fees incurred by Kosmann in proving up and remedying the ethical violation, including his appellate fees, pursuant to IRCP 54, I.C. § 12-121, Version 4 of the Mutual Release and Settlement Agreement contract, and pursuant to IRPC 4.2 and the courts' inherent powers to enforce the ethical rules and its inherent sanctioning powers.

III. CONCLUSION

For all the reasons stated above and in the Appellants' Opening Brief, Kosmann respectfully requests that this Court reverse the District Court's three, key memorandum decisions, as to all aspects, and remand to a different district judge with instructions that: (1) confirm that Dinius 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) the proper remedy is to void the renegotiated settlement, enforce the original agreement (thus, award the $8,000 in lost settlement funds), and reimburse all post-mediation attorney fees, including appellate attorney fees, incurred by Kosmann, and (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.

RESPECTFULLY SUBMITTED this 5th day of October, 2018.

MESSERLY LAW, PLLC

Loren Messerly
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2018, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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___/s/ Loren Messerly _____
Loren K. Messerly