

2009

Larry N. Long v. Ethics and Discipline Committee of the Utah Supreme Court : Reply Brief

Utah Supreme Court

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VanCott, Bagley, Cornwall & McCarthy; John A. Snow; Alex B. Leeman; Counsel for Appellant.
Billy L. Walker; Adam C. Bevis; Counsel for Appellee.

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IN THE UTAH SUPREME COURT

LARRY N. LONG,

Petitioner,

vs.

ETHICS AND DISCIPLINE
COMMITTEE OF THE UTAH SUPREME
COURT,

Respondent.

Appellate Case No. 20091018-SC

REPLY BRIEF OF THE PETITIONER

On Petition for Review or Petition for Extraordinary Relief
from a final Order of Discipline: Admonition, Order of Discipline: Public Reprimand,
and Order of Discipline: Public Reprimand
by Respondent Ethics and Discipline Committee of the Utah Supreme Court,
OPC File Nos. 07-0497, 08-0049, and 08-0080.

OFFICE OF PROFESSIONAL CONDUCT,
UTAH STATE BAR
Billy L. Walker (#3358)
Adam C. Bevis (#9889)
645 South 200 East
Salt Lake City, UT 84111
Tel: 801-531-9110
Email: adam.bevis@utahbar.org
*Attorneys for the Ethics and Discipline
Committee of the Utah State Bar*

VAN COTT BAGLEY CORNWALL & MCCARTHY
John A. Snow (#3025)
Alex B. Leeman (#12578)
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
Tel: 801-532-3333
Fax: 801-534-0058
Email: jsnow@vancott.com,
aleeman@vancott.com
Attorneys for Petitioner Larry N. Long

ORAL ARGUMENT REQUESTED

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Tel: 801-531-9110
Email: adam.bevis@utahbar.org
*Attorneys for the Ethics and Discipline
Committee of the Utah State Bar*

VAN COTT BAGLEY CORNWALL & MCCARTHY
John A. Snow (#3025)
Alex B. Leeman (#12578)
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
Tel: 801-532-3333
Fax: 801-534-0058
Email: jsnow@vancott.com,
aleeman@vancott.com
Attorneys for Petitioner Larry N. Long

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ARGUMENT

Petitioner Larry N. Long (“Long”) submits this Reply to the Brief of Appellee / Respondent Ethics and Discipline Committee of the Utah Supreme Court (the “Committee”). Petitioner seeks review of and relief from an Order of Discipline: Admonition (OPC File No. 07-0497—“Shepard” matter), an Order of Discipline: Public Reprimand (OPC File No. 08-0049—“Nelson” matter), and an Order of Discipline: Public Reprimand (OPC File No. 08-0080—“Henroid” matter).

I. The Screening Panel Was Required to Make More Detailed Findings of Fact in Support of Its Disciplinary Recommendations.

Although the Committee appears to acknowledge that the Findings of Fact offered by the Screening Panel are deficient, the Committee nevertheless claims these perfunctory findings are acceptable in the context of “low-level” matters dealt with in informal disciplinary proceedings. The Committee asserts that Long places a “false burden” on the Screening Panel by demanding detailed findings of fact and comparing the Screening Panel to a district court. *See* Brief of Appellee (hereinafter “Committee Brief”), p. 18. In effect, the Committee takes issue with the requirements of Supreme Court Rule of Professional Practice 14-510(b)(7) (formerly 14-510(b)(5)(D) and (E)), which requires a screening panel to state the basis of its disciplinary recommendation.

A. Contrary to the Committee’s Assertion, This Court Has Not Held that Informal Disciplinary Proceedings Deserve Less Attention and Detail.

In defending the Screening Panel’s findings of fact in each matter, the Committee first argues that the Screening Panel was not required to issue detailed findings of fact because informal disciplinary proceedings require only nominal due process, and not the

level of detail and precision sought by Long. The Committee asserts that this Court agreed with this position when it accepted the Petition to Amend the Rules of Lawyer Discipline and Disability, *In re State Bar*, Feb. 25, 2002.¹ Citing *In re Johnson*, 2001 UT 110, 48 P.3d 881, the Committee claims that “a closer level of scrutiny” is warranted only where an attorney may be subject to suspension or disbarment, and a screening panel’s “relatively slight” powers do not necessitate the “detail and precision” which may be required in more formal proceedings. *See* Committee Brief, pp. 19, 21.

The *Johnson* case does not support the Committee’s argument. *Johnson* says nothing of the level of scrutiny to be applied in attorney discipline cases. Contrary to the Committee’s assertion, the Court does not imply that an attorney subject to suspension or disbarment is entitled to a closer level of scrutiny, greater evaluation of the facts, or a more exhaustive explanation of any negative decision. Rather, the Court merely holds, for the practical reasons stated, that it may be appropriate where disbarment is ordered to stay imposition of the sanction “[b]ecause the private practice of law cannot easily be stopped and started again.” *Johnson*, 2001 UT 110, ¶ 17. Chief Justice Durham explains in her concurring and dissenting opinion that “[t]here is little likelihood that a practice could be restored or regenerated if this court were to reverse the sanction after appeal.” *Id.* at ¶ 22.

¹ The Committee claims that by acceptance of the 2003 amendment to Rule 14-510, this Court “acknowledged that the due process provided by Rule 14-510 . . . was sufficient for the imposition of the lesser non-restrictive sanctions.” *See* Committee Brief, p. 19. Long disputes this inference and submits that the 2009 amendment to Rule 14-510 following the *Nemelka* decision indicates that the procedures offered under the old rule were not sufficient.

This Court has not held that attorney discipline cases are subject to lower scrutiny or less-precise adjudication and review. To the contrary, in *Nemelka v. Ethics and Discipline Comm.*, 2009 UT 33, 212 P.3d 525, this Court held that “the seriousness of alleged violations of a lawyer’s professional responsibility requires that a lawyer be afforded an opportunity to defend his or her good professional standing.” *Id.* at ¶ 18. It is important to note that in *Nemelka*, like here, the Court reviewed the propriety of informal proceedings which resulted in a public reprimand.

The argument that “low-level” sanctions are entitled to a less-detailed adjudication also fails to acknowledge the progressive nature of attorney discipline. Under Supreme Court Rule of Professional Practice 14-606(b), when a lawyer is sanctioned for “misconduct similar to that for which the lawyer has previously been disciplined, the appropriate sanction will generally be one level more severe than the sanction the lawyer previously received.” Similarly, Rule 14-607 indicates that a prior record of discipline is an aggravating circumstance which “may justify an increase in the degree of discipline imposed.” Because “relatively slight” discipline today has the ability to aggravate and increase sanctions in future cases, it is incorrect to assert that “low-level” decisions have no effect upon a respondent’s ability to practice law and therefore are not entitled to the same level of detail and precision as more “serious” matters. *See* Committee Brief, p. 21.

B. Decisions Requiring Detailed Findings by Courts and Administrative Agencies Apply in the Attorney Discipline Context.

The Committee next argues that cases concerning the sufficiency of a district court or administrative agency’s findings of fact are misplaced, and that Long imposes a “false

burden” on the Screening Panel by comparing it to a district court. *See* Committee Brief, p. 18.

This Court has long held that factual findings in attorney discipline cases are treated “much the same as findings of administrative agencies.” *In re Schwenke*, 849 P.2d 573, 576 (Utah 1993); *see also In re Calder*, 795 P.2d 656, 657 (Utah 1990) (“[W]e treat factual findings by fact-finding entities within the Bar much the same as we treat such findings from administrative agencies.”). Administrative agencies are clearly tasked with stating the basis of their decisions with detail. *See Milne Truck Lines v. Public Service Commission*, 720 P.2d 1373, 1378 (Utah 1986) (“It is also essential that the [agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. . . .”); *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1047 (Utah Ct. App. 1992) (“An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review.”). As this Court explained in *Milne Truck Lines*:

The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed law and fact, are reached. Without such findings, this Court cannot perform its duty of reviewing the Commission’s order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.

Milne Truck Lines, 720 P.2d at 1378.

The Committee has cited no case law in support of its argument that attorney disciplinary matters do not require detailed factual findings. In contrast, Utah appellate courts have “emphasized that an administrative agency must make findings of fact that are sufficiently detailed so as to permit meaningful appellate review.” *Lucas v. Murray City Civil Serv. Commn.*, 949 P.2d 746, 763 n.5 (Utah Ct. App. 1997). In sum, informal disciplinary matters are just as deserving of the Committee’s full attention, complete with the “detail and precision” apparently only afforded to more “serious” matters.

C. The Rules Governing the State Bar Require More Detailed Findings of Fact.

The Committee’s central argument—that the Screening Panel should not be burdened with explaining its decision—has an additional fatal flaw: it fails to account for the explicit requirements of Supreme Court Rule of Professional Practice 14-510. Notwithstanding allowance for informal proceedings, the Utah Supreme Court has clearly stated by rule that a screening panel recommendation “shall state the substance and nature of the informal complaint and defenses and the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded.” Rule 14-510(b)(7) (formerly 14-510(b)(5)(D) and (E)).

It does not matter whether the Committee believes informal disciplinary proceedings are serious enough to merit the level of detail and precision afforded other judicial proceedings. This Court has directed that Screening Panels must explain “the basis upon which the screening panel has concluded, by a preponderance of the evidence,

that the respondent should be admonished or publicly reprimanded.” In the present case, the Screening Panel failed to adequately follow this rule. For example, finding as a matter of fact in the Henriod Recommendation that “Mr. Long charged excessive fees for the work he completed in the Vantreese matter and the Perez Hernandez matter,” and then concluding as a matter of law that “By charging excessive fees for work he performed in two cases, Mr. Long violated Rule 1.5(a) (Fees),” simply does not “state the basis” of the Screening Panel’s decision. *See State v. Pharris*, 846 P.2d 454, 464 (Utah Ct. App. 1993) (stating that “merely record[ing] incomplete, conclusory statements in its findings of fact” is insufficient); *Woodward v. Fazzio*, 823 P.2d 474, 478 (Utah Ct. App. 1991 (holding that a trial court’s findings of fact merely reflected the court’s desire to arrive at the necessary conclusions of law; such findings are conclusory and insufficient because they “provide no insight into the evidentiary basis for the trial court’s decision and render effective appellate review unfeasible”).

The rules and legal principles set forth by this Court send a clear message. Attorney discipline—even that dealing with a “mere” public reprimand—is a serious matter. *Nemelka*, 2009 UT 33, ¶ 18. Adjudicatory bodies are required to explain the basis of their decisions by articulating sufficiently detailed findings of fact to disclose the steps by which they reach their conclusions. *Milne Truck Lines*, 720 P.2d at 1378. This Court must be able to review whether the Screening Panel’s recommendation has a sound foundation, and whether OPC met its burden of establishing a violation of the Rules “by a preponderance of the evidence.” *See* Rule 14-510 (b)(7) (formerly 14-510(b)(5)(D) and (E)). Failure by the Screening Panel to explain the basis of its decision interferes with

Long's ability to obtain meaningful review of his case, and requires that sanctions in this matter be vacated. *See Woodward*, 823 P.2d at 477 ("Absent adequate findings of fact, meaningful review of a decision's evidentiary basis is virtually impossible.").²

II. Long Fulfilled His Duty to Marshal the Evidence.

Under Utah R. App. P. 24(a)(9), "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Respondent Ethics and Discipline Committee of the Utah Supreme Court (the "Committee") argues first that Petitioner Larry N. Long failed to adequately marshal all record evidence in favor of the challenged findings, and as such may not obtain review before this Court of the sufficiency of the evidence below. In so arguing, the Committee fails to acknowledge the dependent relationship between the marshaling requirement and the adequacy of findings of fact below, understates efforts by Long to marshal the evidence, and overstates the evidence against Long which may be found in the record.

² The system for imposing attorney discipline does not appear to have functioned properly in this case, perhaps reflecting a greater systemic breakdown which has been acknowledged by the Bar Commission. In the May/June issue of the Utah Bar Journal, Bar President Stephen W. Owens indicated that the Bar Commission recently completed an exhaustive internal review of the Bar's internal operations, including administration of attorney discipline. Among the recommendations adopted by the Commission is the following:

3. Provide better training to screening panel members of the Supreme Court's Ethics and Discipline Committee about their role in the disciplinary process, including clarification of their relationship with OPC, the burden of proof that must be met by OPC, witness cross examination, and no presumption in favor of accepting the recommendations of OPC.

Stephen W. Owens, *The Dreaded Letter from OPC*, UTAH BAR JOURNAL, May/June 2010, at 8-9. The present matter illustrates the timeliness and prudence of the foregoing recommendation.

A. The Obligation to Marshal Evidence In Support of the Challenged Findings Is Dependent Upon the Existence of Adequate Findings.

The marshaling requirement obligates an appellant to marshal all record evidence “that supports a challenged **finding**.” Utah R. App. P. 24(a)(9). This obligation applies when attempting to “demonstrate that the **factual findings** made by the trial court were erroneous.” *Save Our Sch. v. Bd. of Educ. of Salt Lake City*, 2005 UT 55, ¶ 10, 122 P.3d 611 (emphasis added). It is important to distinguish that the marshaling requirement applies only when challenging the substantive basis of findings of fact. It is not necessary to marshal evidence to challenge factual findings that are “inadequate as a matter of law.” *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 16 n.2, 164 P.3d 384.

As was discussed in Part I of the Brief of Appellant (hereinafter “Long Brief”) and in Part I of this brief, the Screening Panel’s findings of fact in each matter were deficient. The Screening Panel failed to state the facts upon which it based its determination that Long violated the Rules of Professional Conduct, articulated no specific facts and cited no specific evidence from the record to support its conclusions, and failed to make and articulate findings of fact with regard to each element of the alleged offenses. Indeed, most of the Screening Panel’s Findings of Fact are stated not as facts supporting a conclusion, but as conclusions themselves.

This Court has agreed that marshaling of the evidence is not required where “findings are so inadequate that they cannot be meaningfully challenged as factual

determinations.’’ *Martinez*, 2007 UT 42, ¶ 13 (quoting *Woodward*, 823 P.2d at 477).

The Utah Court of Appeals explained in *Woodward*:

[Appellant’s] marshaling effort was largely ineffectual by reason of the conclusory nature of the trial court’s findings of fact. “The process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial.” However, we will only grant this deference when the findings of fact are sufficiently detailed to disclose the evidentiary basis for the court’s decision.

Woodward, 823 P.2d at 477 (quoting *State v. Moore*, 802 P.2d 732, 739 (Utah Ct. App. 1990)) (internal citation omitted). The court explained further:

There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot be meaningfully challenged as factual determinations. In other words, the way to attack findings which appear to be complete and which are sufficiently detailed is to marshal the supporting evidence and then demonstrate the evidence is inadequate to sustain such findings. But where the findings are not of that caliber, appellant need not go through a futile marshaling exercise.”

Woodward, 823 P.2d at 477-478. Similar circumstances are present here. *See also Anderson v. Doms*, 1999 UT App 207, ¶ 10, 984 P.2d 392 (relieving appellant of his burden to marshal evidence because the trial court’s findings were inadequate and conclusory); *Campbell v. Campbell*, 896 P.2d 635, 638 (Utah Ct. App. 1995) (“[A]ppellants need not engage in a futile marshalling exercise if they can demonstrate the findings, as framed by the court, are legally insufficient.”).

In sum, “[i]f the findings are legally inadequate the exercise of marshalling the evidence in support of the findings becomes futile and the appellant is under no obligation to marshal.” *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah Ct. App. 1993) (holding that a trial court may not merely draw a conclusion; it must “articulate the basic

facts it found and the logical steps it used” to reach its conclusion).³ In the present case, the findings of fact in each matter are inadequate. They fail, on the whole, to explain the basis of the Panel’s recommendation. The marshaling requirement demands that an appellant present the evidence which would support the challenged findings of fact. It does not require that an appellant speculate as to what findings of fact could conceivably have been made and then search out evidence to support them.⁴

B. The Record Lacks Substantial Evidence to Support the Screening Panel’s Recommendations.

The Committee mischaracterizes Long’s attempt to marshal evidence where it claims that Long only included facts which favor his position. *See* Committee Brief, p. 12. Long offered numerous “unfavorable” facts. *See, e.g.*, Long Brief, Statement of Facts, ¶ 3 (recounting Shepard’s testimony that he had not retained Long), ¶¶ 13-15 (indicating that Long missed hearings and Scheeler said he would handle the matter himself), ¶ 20 (indicating that Scheeler offered to “appear” in court on behalf of a client), ¶ 21 (indicating that Long discovered Scheeler conducting an unauthorized mediation), ¶ 26 (expressing Judge Henroid’s opinion that Long has overcharged clients for insubstantial work). If Long failed to adequately connect these facts to the ultimate

³ For reasons not relevant to its holding, the Court of Appeals noted that custody proceedings require particular attention to factual findings. *Barnes*, 857 P.2d at 259 (“Specificity of findings is particularly important in custody determinations. This is so because the issues involved are highly fact sensitive.”). The Committee appears to acknowledge a similar need in the present case. *See* Committee Brief, p. 12 (stating that “the issues in this case present questions which are extremely fact-dependent”).

⁴ In addition, it is important to note that this argument is not made for the first time on Reply. For example, while discussing substantial evidence, Long indicated in his Brief that he is “only able to venture a guess as to the Screening Panel’s actual analysis.” Long Brief, p. 32.

conclusions reached by the Screening Panel, it is only because the Screening Panel failed to provide the required structure whereby this would be accomplished. Without adequate findings of fact, it is impossible for an appellant to marshal all record evidence “that supports a challenged finding.” Utah R. App. P. 24(a)(9). The marshaling requirement does not apply to ultimate conclusions of law. *See Peirce v. Peirce*, 2000 UT 7, ¶ 17 n.4, 994 P.2d 193 (“[T]he trial court’s determination . . . is a conclusion of law, and the marshaling requirement applies only to challenges of factual findings, not to conclusions of law.”).

The Committee specifically alleged inadequate marshaling with respect to the Nelson and Shepard cases, and argues that sufficient evidence exists to support the recommendation in all three cases. In response to the Committee’s arguments, the marshaling and sufficiency of the evidence with respect to each matter is addressed in turn.

1. Shepard Complaint:

Addressing the Shepard matter, Long specifically takes issue in his brief with the Screening Panel’s conclusory determination that “Mr. Long charged an unreasonable fee for services rendered.” *See* Long Brief, pp. 29-30 (quoting Shepard Finding of Fact, ¶ 9). Long argues that although ample evidence of Long’s fees and activities is found in the record, there is no evidence indicating what would constitute an “excessive” fee or suggesting that Long’s fees exceed customary charges in the area for similar cases or otherwise violate Rule 1.5(a). In addition, Long notes that this “finding” is a perfect example of a “mechanical conclusion,” wholly lacking any specific factual findings as to

the necessary elements of the charged violation. *See Clements v. Utah State Tax Comm'n*, 893 P.2d 1078, 1082 (Utah Ct. App. 1995). Long likewise argues that he had a legitimate basis upon which to bring a claim, whether in quantum meruit or based upon the signed retainer agreement; therefore, it cannot be said that the collection case was meritless.

The Committee finds fault with Long's marshaling of the evidence because Long did not cite a statement he made at the Screening Panel hearing agreeing that he did not think he'd performed enough work to earn the entire flat fee. Also, the Committee complains that Long did not recount details of his offer to settle the fee dispute with Shepard for \$1,500. These facts, the Committee argues, support the Screening Panels' findings that Long's fee was unreasonable and that he filed an unmeritorious claim. Notably, none of the findings of fact in the Shepard matter concern Long's statement at the hearing or subsequent attempts to settle the dispute with Shepard.

By the Committee's argument, an attorney would be subject to sanction for violation of Rule 3.1 any time a complaint is drafted that alleges greater damages than are ultimately found to be warranted. Moreover, a claim asserted by an attorney may not be considered unmeritorious simply because the attorney ultimately settles or dismisses a case. The only evidence in the record shows that Long had a basis upon which to assert a claim against Shepard. Evidence of Long's attempt to settle the case need not have been marshaled as it is not evidence of the propriety of the fee or the merit of the claim. Moreover, none of the Screening Panel's findings of fact concern settlement efforts.

Long recounted in his brief the nature and extent of work performed in the Shepard matter. *See* Long Brief, Statement of Facts, ¶¶ 2, 6-7. Long likewise stated the basis of his claim for compensation from Shepard, recounted that Shepard believed he had not hired Long, and indicated that he ultimately withdrew the collection suit. *See* Long Brief, Statement of Facts, ¶¶ 3, 8. These facts were recounted without exaggeration in favor of or against Long's position. They are the extent of relevant evidence on the question of whether Long charged an unreasonable fee or filed an unmeritorious claim.

2. Nelson Complaint:

In an attempt to demonstrate how Long should have marshaled the evidence in the Nelson matter, the Committee actually demonstrates the impossibility of doing so. The Committee begins by citing facts from the record which the Committee claims support certain factual determinations. Unfortunately, the Screening Panel did not make the factual determinations the Committee attempts to support.

For example, the Committee claims its facts “demonstrate[] that Long knew that his office was in some respect representing Merritt before his own fee agreement indicates the representation began.” *See* Committee Brief, p. 14. The Screening Panel made no such finding of fact, *see* Nelson Recommendation, and Long additionally disputes that the evidence cited would support such a finding. The Committee next states that “Long’s letter to Nielsen [sic] establishes that Long was aware of Scheeler’s ‘mediation’ and efforts to agree on a settlement and division of property. . . .” *See* Committee Brief, p. 15. Again, the Screening Panel made no such finding of fact and Long additionally disputes that the evidence cited would support such a finding. Next,

the Committee indicates that “Long knew Scheeler negotiated a property division and/or prepared the Settlement Agreement as of June 2007, but Scheeler remained employed by Long until he quit in November 2007.” *See* Committee Brief, p. 15. Again, the Screening Panel made no such finding of fact concerning Long’s knowledge or Scheeler’s employment. *See* Nelson Recommendation. Lastly, the Committee states that “Scheeler’s conduct was improper, and . . . Long not only knew of such conduct, but attempted to rely upon it for his client’s benefit in the protective order violation proceeding.” *See* Committee Brief, p. 15. Again, the Screening Panel made no such finding of fact, and Long disputes that the evidence cited would support such a finding.⁵

The only *findings* made by the Screening Panel which Long challenges are as follows:

7. Mr. Nelson was led to believe that Mr. Scheeler was an attorney.
8. At Mr. Merritt’s second court hearing, Mr. Scheeler appeared to “represent David” and tried to negotiate with the opposing party.
12. Mr. Long allowed Mr. Scheeler to appear in court, contact opposing party [sic] and conduct mediation proceedings at Mr. Long’s office.

See Nelson Recommendation, pp. 2-3; Long Brief, pp. 31-32, 41-45. The remaining findings are either not disputed or not proper findings at all. *See supra* Part I; Long Brief, Part I (discussing the insufficiency of conclusory findings which “provide no insight into

⁵ In addition, Long notes that much of the evidence “marshaled” by the Committee would not require a conclusion that Rule 5.3(a) or Rule 5.5(a) were violated. A non-lawyer may conduct a mediation. *See* Supreme Court Rule of Professional Practice 14-802(c). In addition, Rule 5.3(c) indicates that it is improper for a lawyer to ratify conduct which would violate the Rules “if engaged in by a lawyer.” Utah R. Prof’l Cond. 5.3(c). It follows, then, that if a lawyer could properly perform the conduct complained of, ratification would not automatically result in a violation of Rule 5.3.

the evidentiary basis for the trial court’s decision and render effective appellate review unfeasible”).

As was stated in Long’s opening brief, there is no evidence in the record that Nelson was led to believe that Scheeler was an attorney. There is no evidence in the record that Scheeler ever appeared in court on Merrit’s behalf.⁶ There is no evidence in the record that Long “allowed” Scheeler to conduct mediation proceedings at Long’s office or that Long knew of Scheeler’s mediation before it was conducted. **“If there simply is no supportive evidence, counsel need only say so and the challenge will be well-taken—counsel is not expected to marshal the nonexistent.”** *Kimball v. Kimball*, 2009 UT App 233, ¶ 20 n.5, 217 P.3d 733. Long offered evidence concerning the disputed findings, including evidence unsupportive to Long’s position. *See* Long Brief, Statement of Facts, ¶¶ 14, 19-22. Long adequately marshaled the evidence with respect to the Nelson matter.

3. Henroid Complaint:

The Committee did not specifically challenge whether Long adequately marshaled the evidence with respect to the Henroid matter. As the Screening Panel failed to make any legitimate findings of fact in the Henroid matter regarding Rule 1.5(a), it was sufficient for Long to simply present all facts concerning the work performed and amount charged to each client, including Judge Henroid’s opinion that Long’s charges were excessive. *See* Long Brief, Statement of Facts, ¶¶ 26-34.

⁶ The only evidence that could be remotely construed as supporting a finding that Scheeler “appeared” in court on Merrit’s behalf is restated in Paragraph 20 of the Statement of Facts in Long’s Brief of Appellant.

Responding to Long's contention that no one but Long presented evidence respecting the Henroid matters, the Committee argues that it was not necessary for additional evidence to be presented because "the Panel had the court dockets, which reflected the few appearances Long made for each client, the fee agreements, and Long's recounting of the work he performed" which the Committee concludes was not credible. *See* Committee Brief, p. 25. The Committee also had the letter from Judge Henroid which initiated the OPC inquiry. *Id.*

Whether a fee is reasonable depends in part upon the entire body of work performed by the attorney. What neither the Committee nor the Screening Panel explains is how the Screening Panel was able to conclude from a court docket and a letter from a judge that Long did not perform sufficient work to earn his fee. Neither the docket nor the letter are competent evidence of work performed outside the courtroom. If the Screening Panel doubted the credibility of Long's account,⁷ the Panel must nonetheless base its decision on evidence to the contrary. There is simply no evidence in the record that Long did not perform work outside the courtroom which would justify his fee. Notably, the Committee is unable to cite any such evidence in its brief.

C. Any Failure to Marshal Should Not Result in Dismissal.

Even if the Court concludes that Long failed to adequately meet the marshaling requirement, the Court should nevertheless make an independent review of the evidence in this case. This Court has held that even in the absence of marshaling, "[t]he reviewing

⁷ We do not actually know if the Screening Panel doubted the credibility of Long's account. There are no findings of fact which indicate what evidence the Screening Panel believed or which otherwise explain the basis of the Screening Panel's recommendation.

court . . . retains discretion to consider independently the whole record and determine if the decision below has adequate factual support.” *Martinez*, 2007 UT 42, ¶¶ 19-20, (internal citations omitted).

Matters of attorney discipline are original proceedings before this Court. *In re Anderson*, 2004 UT 7, ¶ 46, 82 P.3d 1334. The Committee acts under a delegation of authority, and matters eventually before the Court come as confirmation or rejection of actions taken by the Court’s delegees. *Id.* “In reviewing cases involving attorney discipline, we . . . ‘reserve the right to draw different inferences from the facts than those drawn by the trial court.’” *In re Discipline of Crawley*, 2007 UT 44, ¶ 17, 164 P.3d 1232 (quoting *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998)). Due to the unique nature of attorney discipline, an independent review of the record may be particularly appropriate even if the Court concludes that the evidence has been inadequately marshaled.

III. The Screening Panel Misinterpreted and Misapplied the Rules of Professional Conduct, Erroneously Finding Violations of Rules 1.5 (a), 3.1, 5.3(a), and 5.5(a).

A. Rule 1.5(a):

Rule 1.5(a) prohibits making an agreement for, charging, or collecting an unreasonable fee. With regard to the Shepard matter, the Committee does not appear to argue that the flat fee initially agreed upon by Long and Shepard was anything but reasonable. Nor does the Committee contend that the \$100 actually collected by Long was unreasonable. The Committee’s argument centers around whether it was

unreasonable for Long, after the representation was prematurely terminated, to file a collection action for the full amount of the agreed-upon fee.

Admittedly, a \$6,600 charge for six hours of work appears excessive after-the-fact. However, Long and Shepard entered into a flat fee agreement. A flat fee agreement, by its nature, represents a certain amount of risk sharing between the attorney and client. There is always a chance that the engagement will terminate quickly, in which case the attorney will receive an unexpectedly high fee for the amount of effort expended. Other times, the engagement may run longer than anticipated, in which case the client will pay an unexpectedly low fee for the amount of effort expended. As the Supreme Court of Arizona explained:

A non-refundable flat fee reflects “a negotiated element of risk sharing between attorney and client” whereby the “attorney takes the risk that she will do more work than planned, without additional compensation; and the client, in return, agrees that the attorney will earn the agreed-upon amount, even if that amount would exceed the attorney’s usual hourly rate. . . .” Because a non-refundable flat fee reflects a balancing of the risk to both client and lawyer, a flat fee can be larger than the fee generated by hourly rates without being excessive.

In re Connelly, 55 P.3d 756, 761-762 (Ariz. 2002) (quoting *In the Matter of Swartz*, 686 P.2d 1236, 1242-43 (Ariz. 1984))

There is no indication that the flat fee in the Shepard matter was unreasonable at the time the parties entered into the agreement, based on their mutual expectation of the services to be rendered. Ultimately, the fee received by Long was not unreasonable for the work performed. In the interim, a support staff employee in Long’s office caused the fee agreement and promissory note to be sent to Express Recovery for collection. *See*

Shepard R. 000213-16. The collection agency alleged the full contract amount in a pleading, as the contract was the only information they were provided by Long's office. However, as soon as it was brought to Long's attention that this particular collection action had been filed, Long agreed that Express Recovery should attempt to settle the matter for \$1,500—a reasonable fee for six hours of work. Ultimately, Long directed that the lawsuit be withdrawn. Beyond the initial allegation in the pleading which was made without Long's knowledge or direction, the evidence does not show that Long affirmatively attempted to collect from Shepard an amount to which he had no reasonable claim.

Addressing the Henroid matter, the Committee again makes the naked claim that “[t]he Panel found that the fees were excessive based upon substantial evidence.” Committee Brief, p. 27. As discussed above, no evidence was cited by the Screening Panel in its recommendation. To date, the Committee has also failed to cite evidence which shows that Long performed insufficient work to justify his fee, or that the fee was otherwise unreasonable. No such evidence is found in the record.

B. Rule 3.1:

Rule 3.1 prohibits bringing or defending a claim “unless there is a basis in law and fact for doing so that is not frivolous.” Utah R. Prof'l Cond. 3.1. The Committee claims that the action by Express Recovery against Shepard violated Rule 3.1 because Long was not entitled to the full amount sought, later attempted to settle the case for less than the amount sought, and ultimately directed Express Recovery to withdraw the suit.

As discussed above, an attempt to settle a suit or a decision to withdraw a claim is not an admission that the claim was without merit. Moreover, a lawyer should not be sanctioned for alleging damages which are greater than may ultimately be awarded, especially when the damages figure alleged is based on a written contract. Shepard signed a flat fee retainer agreement and a promissory note. A collection suit was filed based on the express terms of the agreement and note. It cannot be said that the claim was frivolous or had no basis in law or fact. *See State v. Romano*, 507 P.2d 1025, 1025 (Utah 1973) (“‘Frivolous’ is synonymous with ‘having no basis in law or fact.’”).

C. Rule 5.3(a):

Rule 5.3(a) requires a supervising lawyer to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.” Comment 1 to Rule 5.3 states that a lawyer must give assistants “appropriate instruction and supervision.” The Committee acknowledges that at the time Scheeler was hired, “Long took measures to ensure that Scheeler’s conduct would be compatible with Long’s ethical obligations.” *See* Committee Brief, p. 28. The Committee then argues that Long should have subsequently done a better job of investigating and monitoring Scheeler’s activities.⁸ In addition, the Committee again takes issue with Long’s “reliance” upon Scheeler’s conduct, arguing that it was improper for Long to use the settlement agreement prepared by Scheeler following the mediation.

⁸ We do not know if the Screening Panel had a similar basis for their recommendation, as their Findings of Fact do not address this.

Long disputes whether Scheeler violated the Rules of Professional Conduct by conducting a mediation and drafting a settlement agreement which memorialized the results of the mediation. *See infra* Part III.D. Rule 14-802(c) indicates that a non-lawyer may represent a party in a mediation or serve as a mediator. There is also no prohibition against a non-lawyer drafting a settlement document which memorializes an agreement reached during mediation.⁹ Likewise, the evidence does not support the Screening Panel’s finding that Scheeler “appeared” in court on behalf of a client. *See supra* Part II.B.2; Long Brief, Part III.D.

As discussed in Part II.B.2 above, even if Scheeler did engage in the unauthorized practice of law, reliance upon Scheeler’s improper conduct does not necessarily amount to a violation of the Rules of Professional Conduct. Rule 5.3 indicates that a lawyer may be disciplined for ratifying improper conduct “that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.” Utah R. Prof’l Cond. 5.3(c). The conduct complained of (conducting a mediation and drafting a settlement agreement) would clearly not be a violation of the Rules of Professional Conduct if engaged in by a lawyer. Thus, it is not improper for Long to have ratified or relied upon the conduct in question.

The Committee states that Long “failed to take any steps to correct what he *knew* was Scheeler’s ongoing improper conduct.” Committee Brief, p. 29. The Committee

⁹ Utah R. Prof’l Cond. 2.4(c) does not state that only a lawyer may draft documents memorializing the results of a mediation. It would be an odd circumstance if two non-lawyers properly came together representing parties in a mediation conducted by non-lawyer, but then the parties were unable to memorialize their agreement in writing because no lawyer was present to draft the document.

indicates that because Long **knew** Scheeler was engaging in improper conduct, Rule 5.3 was violated. This assertion misstates the facts and the Screening Panel’s findings. Even if Scheeler engaged in improper conduct that amounted to the unauthorized practice of law, there is **no** evidence in the record that Long **knew** Scheeler was engaging in the improper conduct and failed to take corrective action. None of the Screening Panel’s findings of fact state that Long knew Scheeler was engaging in improper conduct. To the contrary, the evidence shows that Long put in place measures to reasonably assure Scheeler’s compliance with the Rules. Scheeler failed to follow those measures. Ultimately, the employment relationship was terminated.¹⁰ *See People v. Smith*, 74 P.3d 566, 571 (Colo. 2003) (“The evidence presented, however, revealed that Smith did have measures in place to reasonably assure that . . . Ross would conduct herself in such a manner as was compatible with his professional responsibilities. Ross didn’t follow those measures. Since such measures were in place, the charged violation of Colo. RPC 5.3(a) is dismissed.”).

D. Rule 5.5(a):

Rule 5.5(a) directs that a lawyer may not engage in, or assist another in engaging in, the unauthorized practice of law. As discussed above addressing Rule 5.3, Long

¹⁰ The Committee attempts to make an issue of whether Long terminated Scheeler, or Scheeler quit. *See* Committee Brief, p. 29. The record is clear that the employment relationship terminated when it was determined that Scheeler was unwilling to conduct himself in compliance with the terms of his employment agreement, which required strict adherence with the Rules of Professional Conduct. Though not in the evidentiary record, Long notes that Scheeler is presently suing Long for wrongful termination. *See Scheeler v. L. Long Lawyer, Inc.*, Case No. 080908169, Third District Court, Salt Lake County, Utah. The Court may take judicial notice of such matters. Utah R. Evid. 201.

disputes whether the activities Scheeler allegedly engaged in amount to the unauthorized practice of law.

The Committee takes particular issue with Scheeler drafting a settlement agreement which memorialized an agreement reached at mediation. The Committee states that Long *knew* Scheeler was drafting the settlement agreement, which the Committee defines as the unauthorized practice of law. While it would appear the Long became aware of the settlement agreement after-the-fact, there is no evidence that Long knew of or assisted Scheeler in actually drafting the settlement agreement, and no such finding was made by the Screening Panel. Moreover, if Long had directed Scheeler to draft the agreement, it would not be the unauthorized practice of law for Scheeler to do so as he would be acting under the direction of a licensed attorney. In sum, the Committee misapplies Rule 5.5(a). A lawyer may not “assist” with activities he is unaware of.

IV. Disciplinary Recommendations for Violations of Rules 7.1 and 7.5(d) Should Be Reduced.

In two of the three matters before the Court, Long was held to have violated Rule 7.1 and Rule 7.5(d) because his firm was sometimes referred to as “L. Long Lawyer, Inc.,” and at other times referred to as “L. Long Lawyers, Inc.” At all times relevant, only one lawyer was employed at the firm.

Under Rule 14-610, the distinction between circumstances justifying an admonition and a public reprimand is either “caus[ing] injury” or “misconduct that involves dishonesty, fraud, deceit, or misrepresentation that adversely reflects on the lawyer’s fitness to practice law.” See Rule 14-605(c) and (d). Here, the Screening Panel

entirely failed to explain the basis of its recommendation of discipline. No findings of fact address the issue of harm or whether Long acted deceitfully in a way that adversely reflects on his fitness to practice law. No findings indicate why the Screening Panel recommended an admonition on one case and a public reprimand in others.

This Court reviews recommendations of discipline *de novo*. *In re Doncouse*, 2004 UT 77, ¶ 10, 99 P.3d 837 (“It is our duty to make an independent determination as to the appropriate sanction to be imposed.”). The circumstances of the violations of Rule 7.1 and Rule 7.5(d) do not justify a public reprimand as no evidence exists that any member of the public was actually harmed or that Long intended to deceive by inclusion of the inadvertent “s” on his firm’s letterhead.

CONCLUSION

This matter is before the Court because the system for imposing attorney discipline has not functioned properly. In each matter, the Screening Panel largely accepted OPC’s recommendations for discipline without making proper findings of fact regarding the necessary elements of each violation charged and without explaining the basis of its recommendation. Committee Chair Bruce Maak then reviewed the Screening Panel’s recommendations acknowledging that its findings are deficient. However, the Chair then concluded that the Screening Panel based its decision on evidence or at least did not believe Long. On appeal, the Committee argues that the Screening Panel’s recommendations should be sustained, notwithstanding its deficiencies, because the Court should defer to the Screening Panel findings. The Screening Panel, it is argued,

should not be required to explain its decision because this level of “detail and precision” is not contemplated in informal proceedings.

The Screening Panel’s failed to state “the basis upon which [it] has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded.” *See* Supreme Court Rule of Professional Practice 14-510(b)(7) (formerly 14-510(b)(5)(D) and (E)). This failure should not be excused. Accordingly, the Order of Discipline for each matter should be vacated. Long should be admonished or issued a letter of caution regarding his inadvertent violations of Rule 7.1 and Rule 7.5(d), and the Committee should be ordered to print a retraction in the Utah Bar Journal regarding sanctions imposed against Long.

DATED this 23 day of June, 2010.

VAN COTT BAGLEY CORNWALL & MCCARTHY

A handwritten signature in black ink, appearing to read 'J.A. Snow', is written over a horizontal line.

John A. Snow

Alex B. Leeman

Attorneys for Petitioner Larry N. Long

IN THE UTAH SUPREME COURT

LARRY N. LONG,

Petitioner,

vs.

ETHICS AND DISCIPLINE
COMMITTEE OF THE UTAH SUPREME
COURT,

Respondent.

Appellate Case No. 20091018-SC

CERTIFICATE OF SERVICE

On Petition for Review or Petition for Extraordinary Relief
from a final Order of Discipline: Admonition, Order of Discipline: Public Reprimand,
and Order of Discipline: Public Reprimand
by Respondent Ethics and Discipline Committee of the Utah Supreme Court,
OPC File Nos. 07-0497, 08-0049, and 08-0080.

OFFICE OF PROFESSIONAL CONDUCT,
UTAH STATE BAR
Billy L. Walker (#3358)
Adam C. Bevis (#9889)
645 South 200 East
Salt Lake City, UT 84111
Tel: 801-531-9110
Email: adam.bevis@utahbar.org
*Attorneys for the Ethics and Discipline
Committee of the Utah State Bar*

VAN COTT BAGLEY CORNWALL & MCCARTHY
John A. Snow (#3025)
Alex B. Leeman (#12578)
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
Tel: 801-532-3333
Fax: 801-534-0058
Email: jsnow@vancott.com,
aleeman@vancott.com
Attorneys for Petitioner Larry N. Long

I hereby certify that on the 23 day of June, 2010, I caused two (2) copies of the

REPLY BRIEF OF THE PETITIONER to be delivered to each of the following:

Bruce A. Maak
PARR BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111-1537

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Fax
- ☐ Overnight courier
- ☐ Electronically

Billy Walker
Adam Bevis
UTAH STATE BAR
645 South 200 East
Salt Lake City, UT 84111

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Fax
- ☐ Overnight courier
- ☐ Electronically

DATED this 23 day of June, 2010.

VAN COTT BAGLEY CORNWALL & MCCARTHY



John A. Snow

Alex B. Leeman

Attorneys for Petitioner Larry N. Long