

2009

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

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LARRY N. LONG,

Petitioner/Appellant,

v.

**ETHICS AND DISCIPLINE
COMMITTEE OF THE UTAH
SUPREME COURT,**

Respondent/Appellee.

Appellate Case No. 20091018

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STANDARD OF REVIEW	2
DETERMINATIVE LAW	2
STATEMENT OF FACTS	2
A. Shepard Complaint: OPC File No. 07-0497	2
B. Nelson Complaint: OPC File No. 08-0049	5
C. Henriod Complaint: OPC File No. 08-0080.....	8
Vantreese	8
Hernandez.....	9
Firm Name & Letterhead	10
Screening Panel Determinations	10
SUMMARY OF THE ARGUMENT	11
ARGUMENT	12
I. Long Has Failed to Meet His Duty to Marshal the Evidence	12
II. The Findings of Fact Articulated by the Ethics and Discipline Committee Were Sufficient to Justify Its Conclusions of Law	17
III. The Screening Panel's Recommendations Were Based Upon Substantial Evidence in the Record.....	22
A. Shepard Complaint	22
B. Nelson Complaint.....	24
C. Henriod Complaint	24
IV. The Screening Panel Correctly Interpreted the Rules of Professional Conduct When It Found Long Had Violated Rules 1.5(a), 3.1, 5.3(a), 5.5(a) and 8.4(a)	26

A. Rule 1.5(a)	26
B. Rule 3.1.....	27
C. Rule 5.3(a)	28
D. Rule 5.5(a)	30
E. Rule 8.4(a)	31
V. The Screening Panel's Disciplinary Recommendations for Violations of Rules 7.1 and 7.5(d) Should Not Be Reduced	31
VI. The Screening Panel Recommendations Result From the Proper Application of the Rules of Lawyer Discipline and Disability. Should the Court Believe There Were Unintended Results, They Are Properly Addressed Here, and not Through Additional Proceedings Before the Committee or District Court.....	32
CONCLUSION	33
ADDENDUM	

Petition to Amend the Rules of Lawyer Discipline and Disability, *In re Utah State Bar*, Feb. 25, 2002

TABLE OF AUTHORITIES

CASES:

<i>Attorney Grievance Comm'n of Md. v. Monfried</i> , 794 A.2d 92 (Md. 2002)	27
<i>Chen v. Stewart</i> , 2004 UT 82, 100 P.3d 1177 (Utah 2004)	12, 13
<i>Commercial Debenture Corporation v. Ament</i> , 2010 UT 10.....	12, 17
<i>Harding v. Bell</i> , 2000 UT 108, 57 P.3d 1093 (Utah 2000)	13
<i>In re Babilis</i> , 951 P.2d 207 (Utah 1997).....	2, 18
<i>See In re Edens</i> , 544 S.E.2d 627 (S.C. 2001).....	31
<i>In re Farmer</i> , 950 P.2d 713 (Kan. 1997).....	29
<i>In re Johnson</i> , 48 P.3d 881 (Utah 2001).....	19
<i>Nemelka v. Ethics & Discipline Comm.</i> , 2009 UT 33, 210 P.3d 525 (Utah 2009)	2
<i>State v. Clark</i> , 2005 UT 75, 124 P.3d 235 (Utah 2005)	12
<i>Travis L. Bowen v. Utah State Bar</i> , 2008 UT 5, 177 P.3d 611 (Utah 2008).....	1, 2
<i>United Park City Mines Co. v. Sticking Mayflower Mountain Fonds</i> , 2006 UT 35, 140 P.3d 1200 (Utah 2006).....	12-13, 17
<i>Utah Med. Prods. v. Searcy</i> , 958 P.2d 228 (Utah 1998).....	17

RULES:

Summary, Rules of Lawyer Discipline and Disability	18
Rule 14-510, Amendment Notes, Rules of Lawyer Discipline and Disability	19
Rule 14-510(b), Rules of Lawyer Discipline and Disability	1
Rule 14-510(b)(5)(E), Rules of Lawyer Discipline and Disability	19
Rule 14-510(c), Rules of Lawyer Discipline and Disability	19
Rule 14-510(f), Rules of Lawyer Discipline and Disability	1
Rule 1.5(a), Rules of Professional Conduct	26
Rule 3.1, Rules of Professional Conduct	27
Rule 5.3(a), Rules of Professional Conduct.....	28
Rule 5.5(a), Rules of Professional Conduct.....	30
Rules of Professional Practice 14-510(b)(5)(D), (E) (amended to Rule 14-510(b)(7))	18
Rule 24(a)(9), Utah Rules of Appellate Procedure	12

CONSTITUTIONAL PROVISIONS:

Utah Constitution article VII, § 4	1
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OTHER AUTHORITIES:

Black's Law Dictionary 184 (Abridged 7th ed. 2000)	26
Petition to Amend the Rules of Lawyer Discipline and Disability, <i>In re Utah State Bar</i> , Feb. 25, 2002	19-20

JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this matter pursuant to the Utah Constitution article VIII, section 4, which provides that “[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.” Effective November 1, 2009, the Rules of Lawyer Discipline and Disability were amended to provide for the direct review of a final determination of an admonition or public reprimand from the Ethics and Discipline Committee. Rule 14-510(f), Rules of Lawyer Discipline and Disability. The underlying proceedings before the Committee were conducted prior to November 1, 2009, and the Office of Professional Conduct asserts that the amendment was not intended to have retroactive effect. Therefore, this matter should come before the court as a Petition for Extraordinary Relief under Rule 65B of the Utah Rules of Civil Procedure and Rule 19 of the Utah Rules of Appellate Procedure.¹

STATEMENT OF ISSUES

- I. Whether the Findings of Fact articulated by the Ethics and Discipline Committee were sufficient to justify its Conclusions of Law.
- II. Whether the Screening Panel's Recommendations were based upon substantial evidence in the record.

¹ As is noted in the Appellant's Brief, Long filed a Motion to clarify Procedure for Review in light of the amendments to Rule 14-510. Appellant's Brief at 5. The OPC opposed Long's attempt to seek review under the newly amended Rule 14-510(f) for the reasons set out in its Memorandum in Opposition to Motion to Clarify Procedure for Review, essentially arguing that the amendments cannot be treated as having retroactive application because they alter substantive rights. However, this Court made clear in *Travis L. Bowen v. Utah State Bar*, 2008 UT 5, 177 P.3d 611, that respondents could seek review to this Court through Rule 65B, which the OPC believes is the proper procedure in this instance.

III. Whether the Screening Panel misinterpreted the Rules of Professional Conduct when it found Long had violated Rules 1.5(a), 3.1, 5.3(a), 5.5(a) and 8.4(a).

IV. Whether the Screening Panel's Disciplinary Recommendations, including recommended discipline for violations of Rules 7.1 and 7.5(d), were improper or inconsistent.

STANDARD OF REVIEW

For all the above issues, this is a case of first impression with respect to the standard of review for attorney discipline sanctions of public reprimands (or admonitions) imposed by the Utah Supreme Court's Ethics and Discipline Committee.² Pursuant to the Rules of Lawyer Discipline and Disability, the standard of review for sanctions imposed for professional misconduct in attorney discipline actions before the state district courts is a correctness standard and the Utah Supreme Court may make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. See *In re Babilis*, 951 P.2d 207 (Utah 1997).

DETERMINATIVE LAW

The relevant rules are set forth verbatim in the Appellant's Addendum.

STATEMENT OF FACTS

A. Shepard Complaint: OPC File No. 07-0497:

1. On October 19, 2006, Steven Shepherd was charged in Third District

² Other attorneys have sought review from this Court for discipline entered by the Ethics and Discipline Committee. See *Nemelka v. Ethics & Discipline Comm.*, 2009 UT 33, 210 P.3d 525, and *Bowen*, 2008 UT 5. In each case, the Court did not ultimately address the issues presented here. In *Bowen*, the Court found that the respondent had waived his claim for relief and denied his Petition. In *Nemelka*, the Court remanded the case for a new Exceptions Hearing, without addressing whether the Committee had erred in finding rule violations and recommending discipline.

Court with various crimes stemming from an arrest on October 14, 2006. (Shepard R. 00014.)

2. After he was charged, Shepherd received correspondence from Long dated October 16, 2006 offering a free consultation. (Shepard R. 000031-32.) He made an appointment to meet with Long. (Shepard R. 000001.)

3. Shepard met with Long on October 24, 2006, the day before Shepard was scheduled for an initial court appearance. Long agreed to accompany Shepard to court the next day for \$100, which Shepard paid in cash. (Shepard R. 000194.)

4. Shepard signed a Flat Fee Agreement for Legal Services. That flat fee agreement provided for a fee of \$6,600 for Long's representation of Shepard up to and including the pretrial conference or preliminary hearing and subsequent sentencing upon entry of a plea. (Shepard R. 000097-99.) Long also had Shepard sign a Flat Fee Payment Agreement & Promissory Note, (Shepard R. 000103-04), and a Representation Requirements document. (Shepard R. 000106-07.)

5. Long attended Shepard's initial appearance with him, which, according to Shepard's testimony, lasted approximately five minutes. After the appearance they spoke outside the courthouse for approximately fifteen minutes. That was the last time Shepard spoke directly to Long. (Shepard R. 000194-96.)

6. Shepard testified that approximately two days after the first hearing he contacted Long's office and informed them that he had decided to retain another attorney. (Shepard R. 000198.) He further testified that he did not believe he had retained Long to represent him in the DUI case. (Shepard R. 000198).

7. Long testified that he spent no more than six hours working on Shepard's case. (Shepard R. 000213.)

8. On or about April 16, 2007 Express Recovery Services, Inc. (a collection service) initiated an action against Shepard to recover the full amount of \$6,600.00 under the flat fee agreement, plus interest and attorney's fees (a total of \$7,775.34). (Shepard R. 000037-38.) Long testified that his office must have provided the flat fee agreement and promissory note to the collections service. (Shepard R. 000213.)

9. Shepard discussed the collection action with an attorney, who then contacted counsel for the collections service to negotiate a settlement. (Shepard R. 000199.) When the collection service's attorney contacted Long about the case, Long initially informed him to negotiate for a \$1,500 payment. (Shepard R. 000216.) After Shepard complained to the Bar, and Long retained counsel, his counsel advised him to cease the collection effort, which he did. (Shepard R. 000216-217.) Long testified to the Screening Panel that the \$6,600 fee he charged was "absolutely not" reasonable in light of the work performed. (Shepard R. 000213.) Shepard ultimately did not pay Long any fees beyond the \$100 for the initial appearance. (Shepard R. 000200.)

10. Long's correspondence to Shepard of October 16, 2006 uses the title "L. Long Lawyers," as does the fee agreement paperwork. (Shepard R. 000031-32 & 000097-107.) Long conceded that "L. Long Lawyers" was a solo practice at the time the letterhead was used. (See Long's 'Exceptions to Screening Panel's Findings of Fact,

Conclusions of Law, and Recommendation of Public Reprimand',³ Case No. 07-0497 at 13.)

11. Shepard's complaint came for a hearing before Screening Panel C-2 on February 19, 2009. The Screening Panel reviewed the file, and heard testimony from both Long and Shepard. Following the hearing, the Screening Panel recommended that Long be admonished for violation of Rules 1.5(a), 3.1, 7.1, 7.5(d) and 8.4(a). (See Shepard Recommendation, p.1, Appellant's Addendum, Exhibit C.)

12. Long filed an Exception to the Panel's recommendation, and that Exception was heard by the Chair of the Ethics and Discipline Committee, Bruce Maak, on October 28, 2009. (See Ruling on Exception, p.1-2, Appellant's Addendum, Exhibit D.)

13. The Chair concluded that Long failed to carry his burden on Exception. The Chair ruled Long failed to establish that the Screening Panel's recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, or otherwise clearly erroneous, and denied the Exception. (*Id.* p.7.)

B. Nelson Complaint: OPC File No. 08-0049:

14. On January 15, 2008 Gordon Nelson submitted information to the OPC regarding his friend, David Merritt. Merritt was incarcerated, and asked Nelson to find him a lawyer. (Nelson R. 000001.) Nelson contacted Long's office and talked to a non-lawyer employee named Joe Scheeler. (Nelson R. 000001.)

³ The actual recommendation was an admonition. For this citation, the OPC refers to the title of the document in the record, which is dated October 22, 2009.

15. Nelson stated that he talked to Scheeler, who negotiated the retainer amount, and paid him \$750 on or about April 18, 2007 (the receipt is dated April 18, 2007 but the check is dated April 28, 2007) (Nelson R. 000225.) Nelson stated that no one appeared at a hearing for Merritt, so he called Long's office and again spoke to Scheeler. Merritt had another hearing, and no one from Long's office appeared, so Nelson again contacted Scheeler, and was told he needed to pay another \$1,100, which he did on April 20, 2007 (Nelson R. 000226.) Nelson stated that Scheeler informed him that he could handle the matter himself, "as a mediator." (Nelson R. 000001-02.)

16. On May 2, 2007 attorney Joseph Orifici wrote to Long, stating that he represented Debbie Smith in matters relating to the protective order between her and Merritt. (Nelson R. 000247.)

17. Long's flat fee agreement with Merritt, for the defense of a violation of a protective order, is dated May 23, 2007. (Nelson R. 000031-32.)

18. On or about June 1, 2007 Scheeler conducted a "mediation" between Merritt and Smith, and thereafter drafted a "Settlement Agreement." (Nelson R. 000025-30.) The Settlement Agreement addressed the division of personal property, a restraining order, counseling and other general provisions. (*Id.*) The Settlement Agreement notes that Merritt was Long's client, and Smith was represented by Orifici. (*Id.*) Long did not participate in the "mediation" or the drafting of the Settlement Agreement. (Unofficial Transcript of Nelson Screening Panel Hearing, pp.5-6.)⁴

⁴ As is noted in the Appellant's Brief at p.16, a transcript of the Nelson Screening Panel Hearing could not be prepared by a transcription service due to the poor quality of the audio recording. This citation is to an informal transcript Long prepared for the Nelson Exception Hearing, and is found in the record.

19. On June 11, 2007 Long wrote to Michael Nielsen, the prosecutor in Merritt's protective order violation case, and informed him that Merritt and "the alleged victim VOLUNTARILY COMPLETED a mediation with Joseph Scheeler and they are currently working on a settlement and division of their property." (Nelson R. 000141.)

20. According to Long, he employed Scheeler from February 3, 2007 to November 2007, when Scheeler quit. (Nelson Transcript, p.2.)

21. Long testified that he had an employment agreement with Scheeler which informed Scheeler that he could not hold himself out as an attorney. (*Id.* at 4.)

22. Nelson's complaint came for a hearing before Screening Panel C-2 on February 19, 2009. The Screening Panel reviewed the file, and heard testimony from Long. Following the hearing, the Screening Panel recommended that Long be publicly reprimanded for violation of Rules 5.3(a), 5.5(a) and 8.4(a). (See Nelson Recommendation, p.1, Appellant's Addendum, Exhibit F.)

23. Long filed an Exception to the Panel's recommendation, which was heard by the Chair of the Ethics and Discipline Committee, Bruce Maak, on October 28, 2009. (See Ruling on Exception, p.1-2, Appellant's Addendum, Exhibit G.)

24. The Chair concluded that Long failed to carry his burden on Exception. The Chair ruled Long failed to establish that the Screening Panel's recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, or otherwise clearly erroneous, and denied the Exception. (*Id.* p.8.)

C. Henriod Complaint: OPC File No. 08-0080:

25. Judge Stephen Henriod wrote to the OPC on January 9, 2008 regarding Long's representation of three defendants who had appeared before him: Annalicia Vantreese, Jose Hernandez and Mark Kenney.⁵ Judge Henriod was prompted to write to the OPC by what he believed were "egregious instances of overcharging." (Henriod R. 00001.) Judge Henriod declined to notarize his complaint, and the OPC proceeded with the investigation as the complainant. (Henriod R. 000038-42.)

Vantreese

26. Vantreese was charged with possession with intent to distribute, a second-degree felony. (Henriod R. 000020.) She retained Long to defend her and signed a flat fee agreement for legal services on April 5, 2007 (Henriod R. 000488-90.) The fee agreement provided for the payment of \$8,000, which would cover representation "up to and including pre-trial conference or Preliminary Hearing and subsequent Sentencing upon entrance of a plea." (*Id.*) Long testified that he actually received \$8,900 from Vantreese. (Henriod R. 000344.)

27. According to the docket, Long performed the following services: Appeared for a pre-trial conference on December 4, 2006 and requested a continuance; appeared for a pre-trial conference on January 22, 2007 and requested a continuance; Vantreese was accepted into Drug Court on January 25, 2007; appeared at a pre-trial conference on February 26, 2007 and requested a continuance; appeared for a pre-trial hearing on April 20, 2007; appeared at a Drug Court hearing on May 3, 2007; and, appeared at a

⁵ The Screening Panel's Recommendation does not reference any findings regarding Kenney, thus, that representation is not relevant to this review and is not discussed further. (See Henriod Recommendation, p.2, Appellant's Addendum, Exhibit I.)

plea hearing on May 24, 2007 where Vantreese pleaded guilty. Long did not appear with her at subsequent Drug Court hearings. (Henriod 000020-35.)

28. Long testified that he performed work for Vantreese which is not reflected in the docket. He told the Screening Panel he reviewed a tape of a preliminary hearing, talked to his staff about the case, and negotiated with the prosecutor assigned to the case. (Henriod R. 00634-36.)

29. Long submitted an affidavit from attorney Gregory Skordas, stating, essentially, that the rate Long charged was not unreasonable for the work performed. (Henriod R. 000060.) Long also submitted to the Panel a lengthy "Accounting" of the work he performed for Vantreese, which he constructed after the Informal Complaint was initiated. (Henriod R. 00328-346.)

Hernandez

30. Hernandez retained Long to defend him against two drug-related charges. (Henriod R. 000008.) He signed a flat fee agreement for legal services on March 29, 2007 for the sum of \$10,000. (Henriod R. 000085-87.) As in Vantreese, this agreement provided for representation through the pre-trial conference or preliminary hearing and subsequent sentencing upon entry of a plea. (*Id.*) Long collected \$7,750 from Hernandez. (*Id.* at 000653.)

31. According to the docket, Long performed the following services: On March 23, 2007 he made an initial appearance; on April 12, 2007 he appeared at a roll-call which was continued; Long filed an appearance of counsel, a request for discovery, and a motion to preserve evidence; on May 31, 2007 Long informed the Court that Hernandez had been accepted into Drug Court; on June 28, 2007 Long appeared for a

change of plea hearing which was continued; and, on July 2, 2007 Long appeared for a change of plea hearing. (Henriod R. 00008-18.) As with Vantreese, Hernandez then proceeded through Drug Court without Long. (*Id.*)

32. Long testified that he performed work for Hernandez which is not reflected in the docket. He prepared a request for discovery and a motion to preserve evidence, and he participated in a plea in abeyance when Hernandez was accepted into Drug Court. (Henriod R. 000654.)

33. As in Vantreese, Long submitted an affidavit from Skordas stating that his fee was not unreasonable. (Henriod R. 000060.) Long also submitted to the Panel an "Accounting" of the work he performed for Hernandez, which was compiled after the Informal Complaint was initiated. (*Id.* at 000063-78.)

Firm Name & Letterhead

34. Long concedes that he presented himself to the public using the names "L. Long Lawyers" and "Long & Associates" though he was often a solo practitioner when those names were used. (Henriod R. 000608-10.)

Screening Panel Determinations

35. The Henriod complaint came for a hearing before Screening Panel C-2 on February 19, 2009. The Screening Panel reviewed the file, and heard testimony from Long. Following the hearing, the Screening Panel recommended that Long be publicly reprimanded for violation of Rules 1.5(a), 7.1 and 7.5(d). (See Henriod Recommendation, p.1, Appellant's Addendum, Exhibit I.)

36. Long filed an Exception to the Panel's recommendation, which was heard by the Chair of the Ethics and Discipline Committee, Bruce Maak, on October 28, 2009. (See Ruling on Exception, p.1-2, Appellant's Addendum, Exhibit J.)

37. The Chair concluded that Long failed to carry his burden on Exception. The Chair ruled Long failed to establish that the Screening Panel's recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, or otherwise clearly erroneous, and denied the Exception. (*Id*, p.11.)

SUMMARY OF THE ARGUMENT

The Ethics and Discipline Committee ordered discipline against Petitioner Long in three underlying cases. Each matter was heard by a Screening Panel, which issued Findings of Fact, Conclusions of Law and a Recommendation of Discipline. Long filed an Exception in each case, which were heard by the Committee Chair. The Chair denied each Exception, and Long now seeks review by this Court.

As an initial matter, Long has failed to meet his obligation to marshal the record evidence before this Court, and the Court should affirm the Committee's Orders of Discipline. Regarding the merits of the arguments: the Screening Panel fulfilled its obligation under the Rules of Professional Practice to state the basis upon which it made its recommendations, based its recommendations upon substantial evidence, correctly interpreted the Rules of Professional Conduct, and correctly applied the Rules in each case.

ARGUMENT

I. Long Has Failed to Meet His Duty to Marshal The Evidence.

Because Long is challenging the Screening Panel's Findings of Fact in each case, the issues in this case present questions which are extremely fact-dependant. Long is required to marshal all record evidence that supports the findings he challenges on review. See Rule 24(a)(9) of the Utah Rules of Appellate Procedure. "To pass this threshold, parties protesting findings of fact must 'marshal all the evidence in support of the findings and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.'" *United Park City Mines Co. v. Sticking Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200 (quoting *State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235). As this Court recently held, "[i]f the marshaling requirement is not met, we assume that the evidence supports the trial court's findings and may affirm on that basis alone." *Commercial Debenture Corporation v. Amenti, Inc.*, 2010 UT 10 (internal omissions omitted) (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177).

Long notes in his Brief that he is aware of the appellant's obligation to marshal all record evidence which supports the challenged finding. Long Br. at 29. He ostensibly endeavored to do this in the Brief's "Statement of Facts" section. That section, however, only contains certain facts which support the arguments he raised first on Exceptions, and now to this Court for review. In *United Park City Mines*, this Court instructed:

'[P]arties are required to remove [their] own prejudices and fully embrace the adversary's position'; [they] must play the 'devil's advocate.' In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light most favorable to their case.... In sum, to properly marshal the evidence the challenging party must demonstrate

how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence.

2006 UT 35 at ¶ 26, citing *Chen*, 2004 UT at ¶ 78 (quoting *Harding v. Bell*, 2000 UT 108, ¶19, 57 P.3d 1093). When a party fails to fulfill its marshaling obligation they will face grim consequences, and the Court can rely on that failure to affirm the lower court's findings of fact. *United Park City Mines*, 2006 UT 35 at ¶ 27.

The essence of Long's argument on review is that the Screening Panel failed to articulate sufficient Findings of Fact which would support its Conclusions of Law and Recommendations of Discipline. It is not enough to state that the Findings, as written, fail to sufficiently enumerate every last detail of evidence upon which the Conclusions are based. Rather, to marshal the evidence on review, Long must delve into the record and demonstrate that there was not any evidence before the Panel which would have allowed it to reach the Conclusions of Law in the underlying cases. Long has failed to meet this burden in the "Statement of Facts" he presents, and this Court may properly affirm the Committee's Orders.

The record of evidence which was before the Panels, and is now before this Court, is voluminous. Despite Long's claim that "the record is devoid of facts which would support many of the challenged findings" and that he "cannot marshal evidence where no evidence exists," the record is replete with facts which support the Screening Panel's Recommendations. Long Br. at 29, fn. 8. Without conducting an analysis of each point in Long's "Statement of Facts", it should be sufficient to demonstrate by way of example that Long has failed to marshal the evidence before this Court.

In the Nelson Complaint, the Screening Panel found that Long violated Rules 5.3(a), 5.5(a) and 8.4(a). See Nelson Recommendation, p.1, Appellant's Addendum,

Exhibit F. These violations were based upon work Long's non-lawyer employee, Scheeler, conducted for Long's client, Merritt, and Long's contemporaneous knowledge of that work. Long asserts that Scheeler conducted "an unauthorized mediation after hours" and "allegedly conducted a mediation without Long's knowledge, and prepared a document memorializing the parties' agreement." Long Br. at 17, point 21. This understates the evidence in the record which establishes Long's knowledge of Scheeler's actions.

The record establishes that Nelson (Merritt's friend, who sought representation for Merritt) had his initial contacts with Scheeler in mid to late April, 2007. Nelson R. 000225. Scheeler prepared a Settlement Agreement which grew out of a mediation which occurred on June 1, 2007. Nelson R. 000025-30. Long received a letter from attorney Joseph Orifici dated May 2, 2007 which communicated that Orifici had been retained to represent Smith concerning issues with Long's client, Merritt. Nelson R. 000247. Long's fee agreement with Merritt is dated May 23, 2007, weeks after Orifici's letter and his receipt of Nelson's payments. Nelson R. 000031-32. After the mediation Scheeler conducted, Long wrote a letter to Michael Nielsen, the prosecutor in Merritt's protective order violation case, dated June 11, 2007. Nelson R. 000141. In that letter, Long stated, "On June 1, 2007, David [Merritt] and the alleged victim VOLUNTARILY COMPLETED a mediation with Joseph Scheeler and they are currently working on a settlement and division of their property." *Id.*

This sequence of events demonstrates that Long knew that his office was in some respect representing Merritt before his own fee agreement indicates the representation began. Orifici's letter predates the fee agreement by 21 days. Further,

and more significantly, Long's letter to Nielsen establishes that Long was aware of Scheeler's "mediation" and efforts to agree on a settlement and division of property, which was set forth in the Settlement Agreement Scheeler prepared. There is no evidence in the record that Long, the only attorney in his office at the time, was assisting Merritt in negotiations related to a settlement or property division, yet he informed the prosecutor that the parties were doing just that. There is substantial evidence in the record to demonstrate 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. The evidence in the record establishes that Scheeler's conduct was improper, and that Long not only knew of such conduct, but attempted to rely upon it for his client's benefit in the protective order violation proceeding. Long's "Statement of Facts" fails to address this substantial evidence in the record, yet these facts directly underpin the Rule violations the Screening Panel found in the Nelson complaint.

Another example of Long's failure to marshal the evidence can be found in the Shepard complaint. Shepard consulted with Long on October 24, 2006 and Long appeared with him at a brief hearing the next morning. Shepard did initial and sign fee agreement paperwork indicating a flat fee of \$6,600, provided that Long represent him through a pretrial conference or entry of a plea. Shepard R. 000097-99. Just two days after meeting with Long, Shepard decided to retain another attorney and informed Long that he was terminated. Shepard R. 000198. Long apparently failed to receive that message, and appeared at Shepard's next hearing, where he learned that Shepard had hired someone else. Shepard R. 000211. At that point, Shepard had paid Long \$100,

and Long had appeared at a brief hearing, provided a free consultation, and mistakenly appeared at a follow-up hearing.

According to Long's "Statement of Facts," "[l]ater, Shepard received notice that he was being sued by a collection agent for Long's fee." Long Br. at 13, point 4. Long states that "[a]fter Shepard contacted Long's office and protested the lawsuit, Long directed Express Recovery to cease their collection action." *Id.* at point 8. As in the Nelson complaint, this factual presentation seriously understates the facts and evidence in the record pertaining to Long's collection efforts.

Six months after Shepard informed Long that he no longer needed representation, Long caused a debt collection case to be filed against his former client for the full amount of his flat fee agreement, plus costs and attorney's fees, for a total attempted recovery of \$7,775.34. Shepard R. 000037-38. By the terms of Long's own flat fee agreement, he had not performed sufficient work to generate such a fee, as he testified before the Screening Panel. Shepard R. 000213.

Long states that after "Shepard contacted [his] office and protested the lawsuit, [he] directed Express Recovery to cease their collection action." Long Br. at 13, point 8. That "fact" is not consistent with Long's testimony to the Screening Panel. When Shepard learned that he was being sued for recovery of the flat fee, he contacted a lawyer. That lawyer contacted Express Recovery to negotiate a settlement. According to Long's testimony, he told Express Recovery how much time he had spent working on the case, and Express Recovery told him they would negotiate for a \$1,500 settlement, instead of the full flat fee plus interest and costs. Shepard R. 000216. Around that same time period, Shepard contacted the OPC about Long's actions, and Long retained

attorney Charles Gruber to represent him for the Bar complaint. Upon Gruber's advice, Long decided to cease the collections case to "buy peace with [the] man." Shepard R. 000216-217.

Again, Long understates the evidence and facts in the record which support the Findings and Conclusions reached by the Screening Panel. In the Shepard case, the Panel found that Long violated, among other Rules, Rules 1.5(a) (fees) and 3.1 (meritorious claims). The facts, as stated above, regarding Long's attempts to collect a fee, which even he thought was unreasonable, by causing a meritless lawsuit to be filed against his former client, are glossed over in Long's "Statement of Facts." These are the very facts Long needs to marshal to fulfill his obligation under Rule 24(a)(9).

As the courts have done in *United Park City Mines and Commercial Debenture Corporation v. Amenti, Inc.*, *supra*, and as Utah courts have done in numerous other cases, this Court should assume that all the lower findings are supported by substantial evidence in the record. See, e.g., *Utah Med. Prods. v. Searcy*, 958 P.2d 228, 233 (Utah 1998).

II. The Findings of Fact Articulated by The Ethics and Discipline Committee Were Sufficient to Justify Its Conclusions of Law.

When the Long Screening Panel hearings were held, Rule 14-510(b)(5) of the Supreme Court Rules of Discipline and Disability controlled a Screening Panel's recommendation of an admonition or public reprimand.⁶ The Rule states, in

⁶ When the November 1, 2009 amendments became effective Rules 14-510(b)(5)(D), (E) were consolidated into one section, which is now Rule 14-510(b)(7). The relevant language of the Rule is unchanged, and is set out verbatim in Appellant's Addendum. As previously stated, the OPC believes the pre-amended Rules apply to this proceeding and the citations in this section are to the Rules prior to the 2009 amendments.

relevant part, that a “screening panel recommendation shall be in writing and 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. Rules of Professional Practice 14-510(b)(5)(D), (E) (amended to Rule 14-510(b)(7)).

To support his argument that the Panel failed to sufficiently detail Findings of Fact to support its disciplinary Recommendations, Long points to several civil and criminal cases which consider the sufficiency of a district court’s Findings of Fact. This analysis misunderstands the attorney discipline system, and the very nature of the disciplinary rules adopted by this Court. Essentially, Long attempts to place a false burden upon the Screening Panels by comparing them to district courts. Some background into the disciplinary rules is helpful in demonstrating why this is a mistake.

The Rules of Lawyer Discipline and Disability were adopted in 1993, significantly changing the existing system of discipline to employ the district court as the fact finder for formal complaints. See Summary, Rules of Lawyer Discipline and Disability. The Advisory Committee on the Rules of Professional Conduct concluded that this model was preferable “in terms of economy, efficiency, public access, fairness and familiarity. Discipline ordered by a district court would be appealable to the Supreme Court without prior review by the Bar Commission.” See *id.*

The new rules maintained the use of the Ethics and Discipline Committee for imposing private discipline, but provided for review of private discipline by the Chair of the Ethics and Discipline Committee, rather than the Board of Bar Commissioners. See *id.*; see also *In re Babilis*, 951 P.2d 207, 211 (Utah 1997).

In 2003, the Court expanded the powers of the Ethics and Discipline Committee to permit Screening Panels to recommend imposing public reprimands, which in turn are entered by the Committee's Chair. See Rule 14-510(b)(5)(E), Rules of Lawyer Discipline and Disability; see also Amendment Notes, Rule 14-510, *id.* The rule permitting a respondent to submit an exception to the Screening Panel's recommendation of private admonition, and to have a hearing if requested, was amended to include public reprimands. See Rule 14-510(c), Rules of Lawyer Discipline and Disability.

It should be noted that this Court seems to have the view that a closer level of scrutiny by the Court is warranted in cases where an attorney's license might be subject to restrictive discipline such as a suspension or disbarment. See *In re Johnson*, 48 P.3d 881, 886-887 (Utah 2001), where the Court states: "Because the private practice of law cannot easily be stopped and started again, unless there is a substantial threat of irreparable harm to the public, a disbarred lawyer should be entitled to a stay of judgment pending appeal to this court where the final authority for discipline rests." The OPC submits that because neither admonitions nor public reprimands restrict an attorney's license to practice, the Court by its rule change acknowledged that the due process provided by Rule 14-510 of the Rules was sufficient for the imposition of the lesser non-restrictive sanctions.

Additionally, this expansion of the Screening Panel's authority acknowledged the fact that "[u]nder the current sanctions standards the factual basis for a private admonition and a public reprimand is essentially the same with the difference being the level of harm to the client, the legal profession, or the administration of justice." Petition

to Amend the Rules of Lawyer Discipline and Disability, *In re Utah State Bar*, Feb. 25, 2002, at 19, a copy of which is provided in the Addendum. As outlined further by that Petition:

The change will allow the expedited resolution of similar cases because it will eliminate the need to file formal complaints in the district court on those cases that are only slightly above the standards for an admonition. . . . As a practical matter, screening panels rarely, if at all, vote a matter “formal” (i.e., find probable cause to send a case to the district court) unless they believe the violation warrants suspension or disbarment. This is because the time and expense required at the district court level is considerable, and it is often difficult to justify the imposition of a “mere” public reprimand.

Id.

The disciplinary system adopted by this Court recognizes that there is a difference in the due process requirements for various levels of attorney discipline. More serious discipline, which restricts the attorney's right to practice, is handled through one of the district courts, which have enhanced responsibilities to enumerate more detailed Findings of Fact. Had Long's case been a formal disciplinary action under Rule 14-511, his arguments regarding the sufficiency of the Findings of Fact may have needed more attention. That is, however, not the case before the Court.

Long suggests that the Screening Panel members should be held to the same standards as a district court judge when he challenges the sufficiency of the Panel's Findings of Fact. This misstates the Panel's obligation. As stated by the Committee Chair in the Henriod Ruling:

The Screening Panel procedure contemplated by the Rules of Lawyer Discipline and Disability, while containing provisions assuring due process and a reasonable record in the event of an Exception, do not envision the level of detail and precision embraced with respect to civil and criminal proceedings. Indeed, given the very nature of Screening Panel

proceedings and the volunteers who conduct them, such detail and precision would not be practical or feasible.

Henriod Ruling, at 7, Appellant's Addendum, Exhibit J.

The Screening Panels are made up of volunteer attorneys and lay people. The Rules provide that they can dismiss cases, issue letters of caution, dismiss cases upon condition, refer cases to the Committee Chair for recommendations of low-level discipline, or direct the OPC to file a formal case against the respondent for further proceedings in district court. Rule 14-510(b), Rules of Lawyer Discipline and Disability. The Screening Panels are not district courts, and their powers are relatively slight. They suggest limited punishments which do not affect a respondent's ability to practice law, they cannot compel respondents to settle financial disputes, and they certainly do not contemplate any criminal sanctions. They have before them the investigative file assembled by the OPC, and they solicit, during a scheduled one-hour hearing, testimony from the respondent, complainant, and necessary witnesses, to fill in information gaps which may exist in the file. They then deliberate about the evidence, and, if they determine discipline is warranted, fill out a brief decision sheet addressing their determination. The system is more informal than a district court, but it is so by design, and helps to speed the efficiency of low-level attorney discipline cases. The due process which is afforded to respondents is sufficient for the minimal discipline they face from a Screening Panel. Long was afforded his necessary due process when the recommendations were reviewed on Exception, and the Court should affirm the Committee's disciplinary determinations.

III. The Screening Panel's Recommendations Were Based Upon Substantial Evidence in the Record.

Long challenges here, as he did in the Exceptions, the sufficiency of the evidence in the record which supports the Screening Panel's findings and conclusions. This issue has already been covered in some detail when the OPC addressed Long's failure to marshal the record evidence in Argument Section I, but the OPC will address each matter individually.

A. Shepard Complaint:

The Screening Panel found violations of the following Rules of Professional conduct based upon the following general behaviors: 1) Rule 1.5(a) based upon making an agreement for, charging, or collecting an unreasonable fee; 2) Rule 3.1 based upon the bringing of a debt collection action for amounts in excess of those due for services rendered; and, 3) Rules 7.1 and 7.5(d) for communicating, issuing a communication, or using a firm name or letterhead implying Long's firm employed more than one attorney when it did not. Shepard Ruling at 3, Appellant's Addendum, Exhibit D.

The record contains ample evidence regarding Long's excessive fee upon which the Screening Panel based its Findings. The Panel heard from both Long and Shepard about the representation Long did, in fact, provide. That was limited to a free consultation, an appearance at a brief hearing, and some preparation for a subsequent hearing (though, had Long communicated with his staff, he would have known that Shepard terminated his services prior to the subsequent hearing). The Panel had the signed agreement for a flat \$6,600 fee for work up to and including a pretrial conference or entry of plea. The record contains evidence that Shepard terminated Long well before the case proceeded to that level. Long testified at the panel that a fee of \$6,600 was

excessive for the work he performed. The record contains evidence that Long caused a collections action to be filed against Shepard for the full flat fee amount, plus interest and costs, six months after Shepard terminated Long's representation. Long testified that he was willing to negotiate that amount down to \$1,500, and eventually dropped the collections action after Shepard filed a Bar complaint and Long's counsel urged him to cease the action.

The Panel entered Findings of Facts consistent with this evidence and concluded that Long had "charged Shepard an unreasonable fee for services rendered," thereby violating Rule 1.5(a). Shepard Recommendation at 3, Appellant's Addendum, Exhibit C. Further, the Panel found that the evidence pertaining to Long's debt collection established a violation of Rule 3.1. *Id.* at 4. Long argues that because he was the only one who provided testimony regarding the reasonableness of the fee, the record lacks evidence to suggest otherwise. Long Br. at 30. In actuality, Long testified to the Panel that the fee was unreasonable, and then tried to blame his staff for sending the flat fee agreement to the collections agency for action. Long, of course, cannot remove himself from responsibility under the Rules of Professional Conduct by blaming his employees, for it is he who is ultimately responsible for the conduct of his office. A review of the record plainly establishes that the Panel had sufficient evidence to support their Findings, Conclusions, and Recommendations of discipline for Rules 1.5(a) and 3.1. Long doesn't dispute that the record supports the Rule 7.5(d) violation in the Shepard Complaint. Accordingly, the Court should affirm the Committee's Order.

B. Nelson Complaint:

Long argues that the record lacks sufficient evidence to support “several of the Screening Panel’s findings and conclusions” in the Nelson Complaint. Long Br. at 31. The Panel found violations of two substantive Rules in the Nelson Complaint: Rules 5.3(a) and 5.5(a).⁷ The Findings of Fact, and Conclusions of Law in the Nelson Complaint clearly set forth the evidence upon which the Panel relied. Nelson Recommendation, Appellant’s Addendum, Exhibit F.

Rather than restate the record evidence which has already been presented, the OPC will direct the Court’s attention to this brief’s Argument Section I, which specifically lays out all the relevant evidence which directly supports the two substantive Rule violations the Panel found in the Nelson Complaint. Accordingly, the Court should affirm the Committee’s Order.

C. Henriod Complaint:

Long argues that the record lacks sufficient evidence to support several of the Panel’s Findings of Fact and Conclusions of Law regarding the fees he charged to clients Vantreese and Hernandez. The Panel found that “Long charged excessive fees for the work he completed in the Vantreese matter and the Perez Hernandez matter.” Henriod Recommendation, p.1, Appellant’s Addendum, Exhibit I.

⁷ The Panel also found a violation of Rule 8.4(a). As the Court is likely aware, Rule 8.4(a) of the Rules of Professional Conduct states that it is professional misconduct to violate or attempt to violate the Rules of Professional Conduct. This Rule ties the Rules of Professional Conduct to the Standards for Imposing Lawyer Sanctions, and is found in every instance where a respondent violates one of the substantive Rules of Professional Conduct.

The Panel had before it both Long's description of the services he performed and the court docket's presentation of the court proceedings in which Mr. Long participated. The Panel also had Long's "Accounting[s]" of the services he performed, which were generated after the Informal Complaint was initiated by the OPC. Essentially, the argument Long sets out in his Brief is that he testified that the fees he charged were reasonable, and no one else appeared to counter that testimony, so the record lacks evidence to establish that his fee was unreasonable.

It is not necessary for the complainant, or someone else, to appear before the Panel and state that a fee is unreasonable when there is sufficient evidence presented in the file, and at the hearing, for the Panel to make that determination. In this case, 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 in each case.⁸ The Panel also had the letter from Judge Henriod, who presided over the matters and was familiar with the actual work Long performed.⁹

Based upon the weight of the evidence before it, the Panel concluded that there was sufficient evidence to establish Long had, as a matter of fact, charged

⁸ It should be noted that much of the information Long provides in the "Accounting" statements submitted in reply to the Informal Complaint are rambling narratives detailing Long's thoughts regarding each matter. Long submitted little in the way of substantive work product: such as pleadings filed with the court, letters to the prosecution, or other credible evidence that he performed sufficient work to earn such large flat fees.

⁹ Long argues that Judge Henriod's letter isn't evidence because it wasn't verified. Long Br. at 34. While it is true that an Informal Complaint needs to be notarized, and contain a statement attesting to the accuracy of the information contained in the complaint under Rule 14-510(a)(2), there is no requirement in the Rules which states the evidence a Panel considers needs to meet such a requirement. The Screening Panels are free weigh all the evidence which is before them to reach their conclusions. Much of that evidence is generated during the OPC's investigation, which generally occurs after the initiation of an Informal Complaint.

unreasonable fees and, as a matter of law, violated Rule 1.5(a). Long does not challenge the sufficiency of the evidence for the violation of Rule 7.5(d). Accordingly, the Court should affirm the Panel's recommendation.

IV. The Screening Panel Correctly Interpreted the Rules of Professional Conduct When It Found Long Had Violated Rules 1.5(a), 3.1, 5.3(a), 5.5(a) and 8.4(a).

A. Rule 1.5(a)

Rule 1.5(a) states that a lawyer shall not "make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." Rule 1.5(a), Rules of Professional Conduct. The Rule then lists several factors to be considered when determining whether a fee is excessive.

Long argues that in the Shepard Complaint he did not violate this Rule because he did not "make an agreement for, charge or collect an unreasonable fee." Again, the record disputes that statement, and provides ample evidence to support the Rule violation.

Long had a flat fee agreement with Shepard for \$6,600 which contemplated representation through a preliminary hearing or entry of a plea. Shepard fired Long two days after that agreement was made. As stated in Utah Ethics Advisory Opinion No. 136 (1993), a flat fee agreement is not a *per se* violation of the ethics rules. The flat fee, however, still needs to be earned under the factors listed in Rule 1.5(a). In this case, Long's own testimony provides that he did not earn a fee of \$6,600. Yet, he caused a debt collection case to be filed against Shepard for that amount, plus interest and costs. To "charge" is to demand payment; to bill.¹⁰ Long demanded payment, by way of a

¹⁰ Black's Law Dictionary 184 (Abridged 7th ed. 2000).

frivolous debt collection lawsuit, for an unreasonable fee. When an attorney charges a lot, for doing very little work, they violate Rule 1.5(a). See *Attorney Grievance Comm'n of Md. v. Monfried*, 794 A.2d 92 (Md. 2002) (hearing judge's failure to find Rule 1.5 violation was clear error when lawyer received flat \$1,000 fee to represent a client in parole revocation, but did nothing beyond making a few phone calls to have the hearing date scheduled). Thus, the Panel concluded that Long violated Rule 1.5(a). There was no misinterpretation of this Rule in the Shepard Complaint.

In the Henriod matter, Long argues that the Panel's Finding that the fees were "excessive" does not support its Conclusion that the fees were "unreasonable" under Rule 1.5(a). This is terminological hair-splitting. The Panel found that the fees were excessive based upon substantial evidence. They then concluded that excessive fees are unreasonable under the factors of Rule 1.5(a). Again, there was no misinterpretation of the Rule.

B. Rule 3.1

Rule 3.1 states, in part, that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Rule 3.1, Rules of Professional Conduct. Long caused a debt collection action to be filed against his former client for a debt that Long testified was unreasonable. By his own testimony, Long did not have a non-frivolous factual basis to bring the action.

Long argues that he had a legal basis to bring his debt collection action. He argues that he had a claim for fees earned for the work he performed after the free consultation, and would have had a contractual basis for enforcing the signed flat fee

agreement. Long Br. at 40-41. Had Long brought a collections action for the fees he actually earned, it's likely that the OPC would not have charged Rule 3.1. Long, however, caused a collections case to be filed against Shepard for the entire flat fee amount of \$6,600, plus interest and fees, six months after his client fired him. Long admitted to the Screening Panel that the fee he tried to collect was "absolutely not" reasonable, thus Long lacked a non-frivolous basis in fact to bring his claim, and the Panel correctly interpreted and applied Rule 3.1. Shepard R. 000213.

C. Rule 5.3(a)

Rule 5.3(a) required Long to make "reasonable efforts" to ensure that his firm had in effect measures giving reasonable assurance that Scheeler's conduct complied with the Rules of Professional Conduct. Rule 5.3(a), Rules of Professional Conduct. There was testimony at the Screening Panel that Scheeler's employment agreement with Long prohibited Scheeler from holding himself out as a lawyer and from engaging in conduct which would constitute the practice of law. Nelson Transcript, p.7. That testimony shows that when Scheeler was hired, Long took measures to ensure that Scheeler's conduct would be compatible with Long's ethical obligations. That finding does not necessarily end the analysis under Rule 5.3(a), and the Panel had other evidence before it which supports the Rule violation.

The facts before the Panel which support the Rule 5.3(a) violation are fully discussed in Argument Section I of this Brief. Essentially, Long hired Scheeler in February 2007 and set out in an employment agreement that Scheeler's conduct needed to comply with the Rules of Professional Conduct. In early May 2007, Long received correspondence from Joseph Orifici, which referenced Long's client, Merritt.

According to Long's own fee agreement, Merritt was not even his client at that point. There is no evidence in the record that Long began, at that point, to investigate why Orifici believed he was representing Merritt. As Long was the only attorney in his office, it would have been reasonable at that time to take measures to ascertain the conduct his non-lawyer staff was engaging in with Merritt. Instead, Long did nothing, and then, two weeks later, relied upon Scheeler's improper conduct in correspondence to the prosecutor in Merritt's protective order violation case. By that point, Long knew that someone had been conducting legal work for Merritt (negotiating a division of property), Long knew it wasn't him, and Long used that information in the protective order case. Long states in his Brief that Scheeler was terminated because he failed comply with the terms of his employment agreement, which limited and controlled his conduct. Long Br. at 43. Before the Screening Panel, however, Long testified that Scheeler quit in November 2007. Nelson Transcript p.2. Rule 5.3(a) requires attorneys to be pro-active in their supervision of non-lawyer employees. See *In re Farmer*, 950 P.2d 713 (Kan. 1997) (lawyer has affirmative duty to ensure that non-lawyer assistants do not give legal advice to clients). Long failed to take any steps to correct what he knew was Scheeler's ongoing improper conduct.

Rule 5.3(a) does not, of course, seek to discipline attorneys when non-lawyer members of their staff engage in misconduct which is completely concealed from the lawyer. For example, the OPC has reviewed cases where a firm's non-lawyer bookkeeper siphons money out of a trust account, despite the attorney's efforts to ensure that the firm's accounting was handled properly. We have reviewed other cases where paralegals meet with clients and engage in the unauthorized practice of law,

outside the view of their attorney supervisor, concealing their actions for their own financial gain. When an attorney in such cases had reasonable measures in place to ensure ethical conduct, and an employee ignored those measures and concealed their wrongdoing, the OPC did not believe the conduct rose to the level of 5.3(a) violation. That is not the situation in the present case.

Long may have initially taken measures to ensure Scheeler's compliance with the Rules, but within a few months of employment Long knew Scheeler was engaging in misconduct. Long did not take steps, in this case, to reaffirm for Scheeler what his ethical obligations were, and he relied upon Scheeler's misconduct in his correspondence to the prosecutor. The Panel correctly interpreted and applied Rule 5.3 in light of the evidence in the record.

D. Rule 5.5(a)

Rule 5.5(a) prohibits an attorney from engaging in the unauthorized practice of law or assisting another in doing so. Rule 5.5(a), Rules of Professional Conduct. Long argues that Scheeler conducted a mediation, conduct which does not rise to the level of the unauthorized practice of law. Long Br. at 44-45. The evidence in the record establishes that Scheeler's conduct went well beyond merely conducting a mediation.

Long knew that Scheeler conducted a mediation and then prepared a Settlement Agreement. That Agreement, which was provided to opposing counsel, negotiated a property division between Merritt and Smith (who was represented by counsel). Long conceded at the Exception hearing that this conduct constituted the practice of law. Nelson Ruling at 7. As is discussed in the Rule 5.3(a) analysis, given the timeline established by the evidence, Long knew of these actions and attempted to use them to

his client's benefit in the protective order violation matter. Though a non-lawyer may conduct mediations, Scheeler's conduct went beyond the scope of a mediator and crossed the line into the unauthorized practice of law. When an attorney fails to supervise their non-lawyer staff, and the attorney knows that the non-lawyer has engaged in the unauthorized practice of law, the attorney violates Rule 5.5(a). *See In re Edens*, 544 S.E.2d 627 (S.C. 2001) (lawyer allowed office manager to conduct real estate closing and obtain client signature in his absence). The Panel correctly interpreted and applied Rule 5.5(a).

E. Rule 8.4(a)

Because the other Rule violations were proper, the Panel correctly found a violation of Rule 8.4(a) in each case.

V. The Screening Panel's Disciplinary Recommendations for Violations of Rules 7.1 and 7.5(d) Should Not Be Reduced.

In the Shepard Complaint, the Panel found violations of Rules 1.5(a), 3.1, 7.1, and 7.5(d). In his Brief, Long tries to separate the 7.1 and 7.5(d) violations from the 1.5(a) and 3.1 violations to conduct an analysis of the appropriate level of discipline under the Standards for Imposing Lawyer Sanctions. That analysis of the Rules is flawed, and the Panel based the discipline upon all the Rule violations found in the case. Long argues that the appropriate level of discipline is an admonition, which is what he received in the Shepard Complaint. Thus, no further argument or analysis on that matter is warranted.

In the Henriod Complaint, the Panel found violations of Rules 1.5(a), 7.1, and 7.5(d) and recommended a public reprimand. Long argues that the appropriate level of discipline for the 7.1 and 7.5(d) violations is an admonition. In applying the Standards

for Imposing Lawyer Sanctions to a particular case, the Panel does not separate each rule violation into individual levels of discipline. Rather, the most severe rule violation will generally establish the appropriate level of discipline for the case. It would be improper to separate the 7.1 and 7.5(d) violations from the 1.5(a) violation in the Henriod Complaint, and the total recommendation should remain intact.

VI. The Screening Panel. Recommendations Result From the Proper Application of the Rules of Lawyer Discipline and Disability. Should the Court Believe There Were Unintended Results, They Are Properly Addressed Here, and not Through Additional Proceedings Before the Committee or District Court.

The OPC acknowledges that Screening Panels may reach different disciplinary recommendations when analyzing similar factual patterns in separate cases. This is, really, no different from the district court system, where disparate outcomes may be reached in factually similar cases by different judges. Even when examining cases before the same judge, facts are never identical, and though consistency is a goal, outcomes will be shaped by the facts unique to each case.

In the Long cases, the OPC recommended that the Panels direct the OPC to prepare and file a formal complaint in the district court. See Nelson Screening Panel Memo, p.12; Shepard Screening Panel Memo, p.7; Henriod Screening Panel Memo, p.14. Had the Panels followed that recommendation, these matters would have been consolidated into one district court filing, with a singular outcome. Instead the Panel heard the three cases and issued the challenged Recommendations. Long challenges the Panel's Recommendations because the allegations were factually similar, implicated similar Rules, but had different disciplinary outcomes.

Each case involved different parties, different facts and different circumstances. In each case the Panel was free to weigh the credibility of Long's testimony differently. Long has failed to demonstrate that based upon the Panel's findings in each case, the conclusions are internally inconsistent. That Long received a reprimand in the Henriod Complaint does not mean that the admonition he received in the Shepard complaint is suspect. Indeed, the cases were different, the evidence before the Panel was different, the Panel had to evaluate the significance of the evidence in each distinct case, and apply that evidence to the Standards for Imposing Lawyer Sanctions.

Should the Court believe that there are inconsistencies which were not intended by the operation of the Rules of Lawyer Discipline and Disability, the Court, of course, has the authority under the Utah Constitution to review this matter and issue its final determination for Long's discipline.

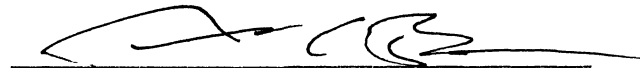
CONCLUSION

Long has failed to fulfill his obligation to marshal the record evidence before the Court. Nevertheless, Long's arguments fail on review. The record in each of the three underlying disciplinary cases is full of evidence which the Screening Panel considered for its disciplinary determinations. Long filed Exceptions to the Panel's determinations, which were heard by the Committee Chair and ruled upon. Long has been afforded the

due process intended for low-level attorney discipline. The Rules were correctly interpreted and applied, and the disciplinary conclusions, as set out by the Committee, should stand.

DATED this 20th day of May, 2010

UTAH STATE BAR:

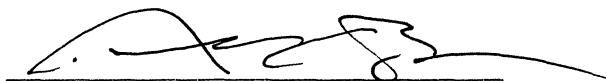
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Adam C. Bevis
Assistant Counsel
Office of Professional Conduct

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2010, I caused to be mailed via United States mail, first class postage pre-paid, two true and correct copies of the foregoing BRIEF OF THE APPELLEE to:

John A. Snow
Alex B. Leeman
VanCott, Bagley, Cornwall & McCarthy
36 South State Street, Suite 1900
Salt Lake City, Utah 84111-1478

A handwritten signature in black ink, appearing to read "Alex B. Leeman", written over a horizontal line.

ADDENDUM

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IN THE SUPREME COURT OF THE STATE OF UTAH

In Re:)	
)	
Utah State Bar)	Petition to Amend the Rules of
)	Lawyer Discipline and Disability
Petitioner.)	
)	

THE UTAH STATE BAR by and through its General Counsel Katherine A. Fox hereby petitions the Court to amend the Rules for Lawyer Discipline and Disability (the "Rules"). The proposed changes encompass editing changes for clarity and internal consistency as well as more substantive revisions to improve the disciplinary process. For the Court's convenient reference, an addendum which accompanies this petition contains a copy of the current Rules, a copy of the redline version of the Rules and a copy of the final version of the Rules with the proposed modifications incorporated. The proposed changes were posted for several months on the Bar's web site and member comment was invited. As of the deadline of January 31, 2002 two comments were submitted, both of which have been included in the addendum.

BACKGROUND

The Utah Supreme Court approved the Rules of Lawyer Discipline and Disability in May 1993 when the disciplinary system was modified to delegate authority to the state district courts instead of the Board of Bar Commissioners (the "Commission") in order to adjudicate formal complaints against attorneys.¹ In recommending adoption of the Rules to the Court, the Court's Advisory Committee on the Rules of Professional Conduct contemplated that the disciplinary rules would need revision from time to time, and in fact, the Rules have been periodically amended.²

Beginning in 1998 James C. Jenkins, President of the Bar, met with Office of Professional Conduct Senior Counsel Billy L. Walker to explore the feasibility of several amendments to streamline and decrease the cost of the disciplinary process. The Office of Professional Conduct ("OPC") had previously reviewed the Rules and arrived at a number of suggestions to clarify aspects of the disciplinary process, address problems relating to the 1993 Rules that had surfaced, incorporate selected language taken from the ABA Model Rules of Lawyer Disciplinary Enforcement and generally make the disciplinary process more efficient. In the spring of 2000, the Commission discussed the suggested changes, but required additional information to make a final

¹ The new Rules became effective July 1, 1993 and replaced the former Procedures of Discipline

² Since 1993, the following Rules have been amended as follows: Rule 3 (Ethics and Discipline Committee), to add provisions for alternates on screening panels on March 26, 1996; Rule 3 (Ethics and Discipline Committee) to increase the number of alternates serving on screening panels on December 26, 1997; Rule 3 (Ethics and Discipline Committee) to increase number of screening panel public members on January 26, 1999; Rule 3 (Ethics and Discipline Committee), to change the Office of Professional Conduct Annual Report due date on May 15, 2000; Rule 4 (Office of Professional Conduct Counsel, to change titles of Office of Attorney Discipline to Office of Professional Conduct and Chief Disciplinary Counsel to Senior Counsel on December 26, 1997 and April 8, 1999; and Rule 8 (Periodic Assessment of Lawyers) to their state delinquent fee for suspended attorneys on April 15, 1999.

determination. In the fall Bar President David Huffer appointed a Rules Review Subcommittee (the "Subcommittee"), consisting of Commissioners John A. Adams, Debra J. Moore and C. Darin Nolan to review the Rules and make more comprehensive recommendations to the Commission for overall improvement. The Subcommittee met numerous times, and at times included Billy L. Walker, James B. Lee, Ethics and Disciplinary Committee chair and R. Clark Arnold, Ethics and Disciplinary Committee vice-chair in several of those meetings. The proposed modifications to the Rules which appear below were approved after extensive review and discussion at regularly scheduled Commission meetings on June 8, July 4, July 27, August 24 and December 7, 2001.

The contents of this petition are organized to reflect how the four components of the Rules of Lawyer Discipline and Disability appear in the Utah Code. Thus, proposed changes to the "table of contents," the "compiler's notes" and the "summary," all of which precede the Rules in the Code, are listed before the proposed amendments to the Rules. Where proposed revisions have been based in whole or in part on the ABA Model Rules for Lawyer Disciplinary Enforcement, the same has been noted. Finally, care has been taken to identify proposed changes which are, or even could be considered to be, substantive in nature and in such cases, an asterisk appears before the particular Rule.

THE TABLE OF CONTENTS SECTION

Rule 30 (Costs)

- * Rule 30: Editing change reflects a proposed substantive change in Rule 30.

The title of Rule 30 in the table of contents has been modified to add "attorneys fees" to evidence the proposed change that grants the district court discretion to award attorney fees against a respondent when the defense was without merit and not asserted in good faith. (For a more complete description of the changes, see the explanation below under Rule 30 in the Rules section.)

Rule 32 (Failure to answer charges)

- * Rule 32(a) and (b): Editing change in the table of contents reflects the proposed addition of a new Rule. Rule 32(a) provides that at the screening panel level, a respondent's failure to answer charges which have been filed constitutes an admission of the allegations but only if actual notice was received. Rule 32(b) provides that failure to appear before a screening panel hearing, after receipt of actual notice, constitutes an admission of the allegations. (For a more complete description of the changes, see the explanation below under Rule 32 in the Rules section.)

THE COMPILER'S NOTES SECTION

Compiler's Notes: No changes

THE SUMMARY SECTION

Summary: Editing changes only; adds numeric equivalents for the words "three" and "four."

THE RULES OF LAWYER DISCIPLINE AND DISABILITY

Rule 1 (Purpose, authority, scope and structure of lawyer discipline and disability)

Rule 1(a): No changes.

Rule 1(b): Editing changes only; spells out the abbreviated word "art." and substitutes the word "section" in lieu of the section symbol (§) which appears in the current Rule.

Rule 1(c): No changes.

Rule 1(d): No changes.

Rule 2 (Definitions)

Rule 2(a): No changes.

Rule 2(b): No changes

Rule 2(c): No changes.

Rule 2(d): Editing changes only; adds "OPC" to the definition of "complainant" in matters where OPC determines to open an investigation based on information it receives. The change is needed to codify what already occurs in practice and provides

consistency with current Rule 10(a)(1) which authorizes, in part, OPC counsel to initiate an informal complaint against an attorney for misconduct

Rule 2(e): Editing changes only adds a definition for OPC "Senior Counsel" and further refines the definition of "OPC Counsel "

Rule 2(f): No changes

Rule 2(g): No changes

* Rule 2(h): Both substantive and editing change, provides a definition for the currently existing "NOIC" or "Notice of Informal Complaint" referenced in Rule 10

Rule 2(i): Editing changes only, replaces the term "OPC" with the word "Office" since the "Office" referred to throughout the Rules is the Bar's Office of Professional Conduct. Change also re-numbers subsection to accommodate new subsection (h) above

Rule 2(j): Editing change only; re-numbers subsection to accommodate new subsection (h) above

Rule 2(k): Editing change only, re-numbers subsection to accommodate new subsection (h) above.

Rule 3 (Ethics and discipline committee)

Rule 3(a): Editing changes only, spells out the number "26" and provides numeric equivalents for numerous spelled-out numbers for clarification purposes

Rule 3(a)(1) No changes

Rule 3(b): Editing changes only, replaces the word "base" with the more appropriate word "basis" and clarifies that the "chair" referenced in this subsection is the chair of the Ethics and Discipline Committee versus a screening panel chair.

Rule 3(c): Editing changes only; clarifies that the "vice chair" referenced in this subsection is the vice chair of the Ethics and Discipline Committee versus a screening panel vice chair.

* Rule 3(d): Both substantive and editing changes; substantive amendments provide that when a screening panel of four members is convened, the chair or vice chair of a Ethics and Discipline screening panel shall act as a tie-breaker. Currently, the number for a quorum is four and consists of three members of the Bar and one public member. There are no tie breaking procedures and OPC has had at least one instance where a screening panel voted in a tie which resulted in no decision. The proposed revisions also change the number of Committee members required to constitute a quorum to three persons consisting of two Bar members and one public member. The number three instead of five is suggested because it is easier to convene a smaller number of people than a larger number. Editing changes also correct the misspelling of the word "or" to "of," make the word "member" plural where needed, and provide numeric equivalents for numerous spelled out numbers. Finally, while proposed revisions do not increase the actual number of public members on the Ethics and Discipline Committee, the four screening panels are now organized with two public members instead of one.

Rule 3(d)(1): Editing changes only, capitalizes the first letter of the word "committee" in three different places to make clear reference is being made to the Ethics and Discipline Committee outlined in Rule 3.

Rule 3(e): Editing changes only; proposed revisions substitute the abbreviated term "OPC" for the word disciplinary" which is more consistent with the prior name change of "Office of Attorney Discipline" to "Office of Professional Conduct." In addition, reference to the Utah Rules of Professional Conduct has been made because those rules provide the basis upon which an attorney should conform his or her conduct.

* Rule 3(f): Substantive change; this subsection has been deleted and reformulated into other more detailed subsections which appear below as Rule 3(f)(1) through (4). Rule 3(f) as currently written allows any party or a screening panel to request under seal of the court a subpoena allowing discovery prior to the filing of a formal complaint (with a five day notice generally being issued). One reason OPC seldom uses this Rule is that it is unduly cumbersome. When used by the respondent or complainants, however, the informal disciplinary process is often diverted to irrelevant issues and the entire process is delayed.

* Rule 3(f)(1): Substantive change; the proposed amendments grant the power to OPC counsel to issue investigatory subpoenas with the approval of the chair of the Ethics and Discipline Committee. The change and the language is, in large part, based on Rule 14 of the Model Rules for Lawyer Disciplinary Enforcement promulgated by the ABA's Center for Professional Responsibility. These changes are sought to improve efficiency and to reduce the cost of the investigatory process in discipline matters. Currently, prior to filing a formal complaint for good cause shown, subpoenas can be

obtained by any party who files a petition under seal with the district court. When used, this process can slow down case processing by allowing complainants and/or respondents to divert the informal disciplinary process to tangential issues. The proposed language is feasible because prior to the filing of formal charges, the disciplinary process is more an administrative-type investigation. Investigatory subpoenas only will be obtained when independent evidence is needed (e.g., bank records) that the respondent or complainant is unwilling to provide to OPC or where there are unwilling witnesses who refuse to testify. As a safeguard OPC counsel may only use the subpoena power with the approval of the Ethics and Discipline Committee Chair.

* Rule 3(f)(2) and (3) and (4): Substantive changes; the Utah Rules of Civil Procedure and in particular, Rule 45 governing subpoenas, witness fees and mileage reimbursement, will now apply under these proposed revisions. Enforcement of the subpoena can be sought through the district court. The respondent or complainant is protected in that he or she is accorded the right to file a motion to quash the subpoena if its appropriateness or validity is questioned.

* Rule 3(g): Substantive and editing changes; editing changes substitute the term "OPC" for the word "disciplinary" in three places for reason stated above in proposed changes to Rule 3(e). The reference to word "time" should be plural (i.e., "times") to make sentence grammatically correct. A more substantive revision also inserts the phrase "during a [screening panel] hearing" after the phrase "screening panel" and before the phrase "the respondent" in the last sentence of the first paragraph. This is to clarify what is already implicit in practice: that the respondent has the right to be

present during a hearing if OPC is present. A proposed editing amendment also inserts the word "the" after the word "of" and before the word "subsequent" in the second to last line of the second paragraph for language clarity. Finally, editing-type changes add the numeric equivalent of the word "three."

Rule 3(h): Editing changes only; substitutes the term "OPC" for the word "Office" for consistency reasons. A proposed amendment also changes the word "ethical" to "ethics" (as it modifies "opinion") as it is an informal ethics advisory opinion that is being referenced.

Rule 4 (OPC counsel)

Rule 4(a): Editing changes only; deletes the redundant word "staff" and substitutes the word "payment" for the word "profit" since attorneys in OPC should be barred from engaging in private practice which could involve conflicts of interest rather than be prohibited from engaging in legal service for profit which implies an income analysis.

Rule 4(b) and 4(b)(1) and (2) and (3): Editing changes only; adds the modifier "the" in Rule 4(b) and substitutes the term "OPC" for the word "Office" in Rule 4(b)(1) and (2) and (3). In subsection 4(b)(3) for consistency purposes, the revision also references the proposed changes in Rule 10, i.e., "for each matter not covered in Rule 10" brought to the attention of OPC.

Rule 4(b)(3)(A): No changes.

Rule 4(b)(3)(B): No changes.

Rule 4(b)(3)(C): No changes.

Rule 4(b)(3)(D): Editing change only; makes clear what is already implicit, i.e., an OPC petition to transfer attorneys to disability status must be filed in the district court.

* Rule 4(b)(4): Substantive change; defines the duties of OPC counsel to include prosecuting disciplinary matters and proceedings for transfer to disability status before any court (which would include the federal courts).

* Rule 4(b)(5): Substantive changes; more accurately details that OPC should "attend" Character and Fitness Committee proceedings rather than actually "represent" OPC at these proceedings since attendance is needed to gather information for subsequent representation of OPC in connection with readmission cases in the district court under Rule 25. Also, changes specify that OPC may appear before any court in matters of reinstatement and readmission in order to mirror the proposed changes in Rule 4(b)(4) above.

* Rule 4(b)(6): Both substantive and editing changes; formally adds to the duties of OPC counsel the supervision of volunteer attorneys who monitor the practice of respondents who have been placed on probation. Editing change also expressly allows OPC counsel to "appoint" as well as "employ" these volunteer attorneys as these volunteer attorneys are not paid for their oversight responsibilities.

Rule 4(b)(7): No changes.

Rule 4(b)(8): Editing change only; more clearly delineates that any discipline which has been imposed on an attorney, and of which notice is provided to other licensing jurisdictions, must be public discipline. Currently, Rule 4(b)(8) reads that other

licensing jurisdictions are notified when a Utah attorney is suspended or disbarred or subject to other public discipline.

Rule 4(b)(9): Editing change only; more clearly delineates that when OPC seeks to impose reciprocal discipline, that any discipline imposed by the other licensing jurisdiction must be public discipline, e.g., a suspension or disbarment.

* Rule 4(b)(10): Substantive and/or editing change; strikes the seemingly superfluous phrase "in other respects."

* Rule 4(b)(11): Substantive and/or editing change; as this Rule currently reads it would appear that OPC is required to maintain a permanent record of "transcripts of all proceedings," implying that transcripts should be produced in all proceedings so that a permanent record can be maintained. The proposed change would seem to indicate that only in cases where a transcript is actually produced is OPC under such an obligation.

Rule 4(b)(12): Editing change only; adds numeric equivalent of the word "seven."

Rule 4(b)(12)(A): Editing changes only; replaces the word "office" with the term "OPC" and in the word "respondent," replaces the upper case "R" with a lower case "r." Also, this subsection was not specifically numbered before and has now become subsection "(A)."

Rule 4(b)(12)(B): Editing changes only; replaces the word "office" with the term "OPC" and in the word "expungement," replaces the upper case "E" with a lower case 'e' for consistency purposes. Also, this subsection was not specifically numbered before and it now has become subsection "(B)."

* Rule 4(b)(13): Substantive change; expressly allows OPC to publish results of all disciplinary proceedings (while maintaining the confidentiality of respondents subject to private discipline) in the *Utah Bar Journal* which is consistent with the Utah Supreme Court's decision in the Pendleton case.³

Rule 4(b)(14): Editing change only; replaces the word "office" with the term "OPC" for consistency purposes.

* Rule 4(c): Substantive change; this new subsection expressly subjects former OPC counsel to Rule 1.11 of the Utah Rules of Professional Conduct concerning successive government and private employment. The proposed change disqualifies former OPC counsel from representing in disciplinary proceedings any such lawyer who was previously investigated or prosecuted.

Rule 5 (Expenses)

Rule 5(a): No changes.

Rule 5(b): Editing changes only; replaces the phrase "OPC counsel" to "Senior Counsel" to more accurately reflect that OPC's Senior Counsel rather than a staff attorney should prepare that office's budget.

³ See Garv W. Pendleton, Plaintiff and Appellee v. Utah State Bar, et al., 16 P.3d 1230 (Ut. 2000), where a defamation action arising from the publication of details in the *Utah Bar Journal* of the plaintiff's interim disciplinary suspension was dismissed by this Court.

Rule 6 (Jurisdiction)

Rule 6(a): Editing changes; clarifies that OPC's and the district court's jurisdiction extends to formerly admitted Utah lawyers for acts that violate the rules of any disciplinary authority where the lawyer was licensed at the time of committing the act. The change codifies the intent and understanding that attorneys are subject to Utah discipline for alleged misconduct in other states. Editing changes also include replacing the word "office" with the term "OPC" and adding the modifier "Supreme" before "Court."

* Rule 6(b): Substantive change; while full-time judges are still only accountable to OPC for conduct that occurred prior to their taking of office, after leaving office a judge who is also a lawyer will now expressly be subject to OPC for any misconduct that occurred while the lawyer was a judge if the misconduct would have been grounds for lawyer discipline. Currently, if the Utah Supreme Court makes a final determination about a judge's misconduct after the judge left office, even though the misconduct was grounds for lawyer discipline, OPC has no jurisdiction. Pursuant to a July 2001 letter from the late Senator Pete Suazo to Chief Justice Richard C. Howe and the Judicial Council, the Legislature was concerned that when a judge is removed from office, it did not automatically follow that the judge's license to practice law was also affected.

* Rule 6(c): Substantive change; clarifies that OPC's jurisdiction extends to part-time judges for acts outside of their judicial capacity. The current Rule does not specifically distinguish full-time incumbent judges who cannot have private legal practices from part-time incumbent judges who can engage in such practice.

Rule 7 (Roster of lawyers)

Rule 7: Editing changes only; the change from the phrase "OPC counsel" to the word "Bar" acknowledges that while OPC is the particular office of the Bar that at times needs ready access to the information set forth in this Rule, it is not OPC that collects and maintains this information. In fact, as is the case with most integrated or unified bar associations the Bar's membership record database is maintained by the Bar's financial and licensing office. For confidentiality reasons consistent with these Rules, Bar policies differentiate between private and public information, and access to private information is substantially limited within and without the Bar. No private information is disclosed absent certain circumstances such as a decision by a court ordering the Bar to release the confidential information pursuant to a subpoena.

Rule 8 (Periodic assessment of lawyers)

Rule 8(a): No changes.

Rule 8(b): Editing changes; minor revision spells out the amount of \$100 in writing. In addition, the term "Board of Commissioners" is replaced by the word "Bar" since the Board other than setting policies, is not involved in the administrative function of collecting licensing fees or suspending attorneys for nonpayment. Finally, Rule 8(b) now specifies that the Bar's Executive Director shall give notice to lawyers of their suspension for nonpayment at their *designated mailing* address on record at the Bar. The designated mailing address is the address lawyers specify on the licensing form to which they want their mail sent. Currently, the Rule merely states that the Bar shall give

notice at the "address on record" but the Bar collects both home and business addresses

Rule 9 (Grounds for discipline)

Rule 9: No changes.

Rule 9(a): No changes.

Rule 9(b): Editing change; proposed amendment strikes the word "or."

Rule 9(c): Editing change; proposed punctuation change reflects that subsection (c) is no longer the last Rule 9 subsection in a series and accommodates the addition of new subsections (d), (e) and (f).

* Rule 9(d) and (e) and (f): Substantive changes; OPC often has a difficult time obtaining information relating to: (1) a lawyer's conviction of a crime; (2) a lawyer's public discipline in another jurisdiction; and (3) a lawyer's violation of the Rules of Judicial Conduct while the lawyer is serving as a judge. New subsections (d) and (e) within this Rule provide that a lawyer's failure to notify OPC of the enumerated misconduct is in and of itself a ground for discipline. The proposed revisions are, in large part, based upon a similar California disciplinary rule and are needed because on a *prima facie* basis, these enumerated circumstances adversely reflect upon a lawyer's fitness to practice law in accordance with the Utah Rules of Professional Conduct.

Rule 10 (Prosecution and appeals)

Rule 10(a): No changes.

Rule 10(a)(1): No changes

providing that a person who files a complaint against an attorney must not only have his or her signature notarized (which is the current requirement) but also must verify that the information contained in the informal complaint is accurate was prompted at the urging of Utah Senator Terry P. Spencer. Senator Spencer, who is an active member of the Bar, met with the Commission and expressed his concerns about frivolous attorney discipline complaints filed by disgruntled clients and others. While Senator Spencer suggested a number of ways to reduce on the number of frivolous complaints such as requiring the complainant to post a bond, the Commission believes that adding the verification language was a reasonable compromise to address Senator Spencer's concerns and to protect the purpose and integrity of the attorney misconduct complaint process. If OPC initiates an investigation as permitted by Rule 4(b) in conjunction with Rule 10, this verification is not required since OPC may not have personal knowledge of the misconduct but instead, may learn of it from other sources (such as the newspaper). The term "OPC" is also substituted for the word "office" in the third line to be consistent with the proposed amended definition in Rule 2(h).

Rule 10(a)(3): No changes.

Rule 10(a)(4): Editing change only; in order to more accurately caption this subsection's content, Rule 10(a)(4)'s title has been changed from "OPC counsel" to "Notice of informal complaint." The term "professional" [counsel] has also been replaced by the term "OPC" [counsel] for accuracy.

Rule 10(a)(5): Editing changes only; the numbers 20 and 30 have been spelled out.

* Rule 10(a)(6): Both substantive and editing changes; proposed changes embody the idea that the dismissal of disciplinary cases should be based on probability, not possibility. The amendments recognize that it is a waste of resources to investigate and prosecute cases which are more likely than not to result in ultimate dismissal. In addition to complaints which are frivolous, unintelligible and unsupported by facts, complaints which are barred by the applicable statute of limitations or which are more adequately addressed in another forum should be dismissed.⁴ These latter two concepts are new. Informal complaints which OPC declines to prosecute should also be dismissed. This proposed addition codifies OPC's current practice of dismissing complaints similar to the way screening panels are authorized to dismiss cases. Finally, the proposed amendments clarify that the complainant may appeal all dismissals which occur without a hearing to the chair of the Ethics and Discipline Committee. The remainder of the changes are minor in nature and are proposed for editing clarification and consistency.

Rule 10(b): No changes.

Rule 10(b)(1): No changes.

Rule 10(b)(2): Editing changes only; spells out the number "14" and provides numeric equivalents for the numbers "six" and "five."

Rule 10(b)(3): No changes.

Rule 10(b)(4): No changes.

Rule 10(b)(5): No changes.

⁴ The applicable statute of limitations is four years. Examples of complaints 'more adequately addressed in other forums' include criminal prosecutions and ineffective assistance of counsel claims.

Rule 10(b)(5)(A) and (B) and (C): No changes.

Rule 10(b)(5)(D): Editing changes only; adds the numeric equivalent of the number "ten."

✱ Rule 10(b)(5)(E): Substantive change; this new subsection adds another choice that a disciplinary screening panel can make after a hearing. Currently, the Ethics and Discipline Committee only has the authority to issue private admonitions. Under this new provision the Ethics and Discipline Committee would be given the authority to issue public reprimands in addition to private admonitions. Under the current sanctions standards the factual basis for a private admonition and a public reprimand is essentially the same with the difference being the level of harm to the client, the legal profession, or the administration of justice. (See Rule 4.4 and 4.5 of the Standards for Imposing Lawyer Sanctions.) The change will allow the expedited resolution of similar cases because it will eliminate the need to file formal complaints in the district court on those cases that are only slightly above the standards for an admonition. This revision will also allow OPC to avoid more expensive formal proceedings when the respondent is willing to stipulate to a public reprimand and where an admonition does not adequately address the conduct. As a practical matter, screening panels rarely, if at all, vote a matter "formal" (i.e., find probable cause to send a case to the district court) unless they believe the violation warrants suspension or disbarment. This is because the time and expense required at the district court level is considerable, and it is often difficult to justify the imposition of a "mere" public reprimand.

Rule 10(b)(5)(F): Editing change only; re-numbers this subsection commensurate with the addition of new subsection 10(b)(5)(E) above.

Rule 10(b)(6): Editing change only; adds the numeric equivalent for the number "five."

Rule 10(b)(7): No changes.

* Rule 10(c): Substantive change; adds "public reprimands" to this subsection to provide consistency with the proposed new subsection (10)(b)(5)(E) above which would allow the Ethics and Discipline Committee to issue public reprimands. Minor editing change also spells out the number "10."

Rule 11 (Proceedings subsequent to finding of probable cause)

Rule 11(a): No changes.

Rule 11(b): Editing change only; expressly states what is allowed under law: OPC and the respondent may stipulate to a change in venue under current law (Utah Code § 78-13-9).

Rule 11(c): Editing changes only; replaces the word "Office" with the term "OPC" and the term "USB" with the word "Bar" for consistency purposes.

Rule 11(d): No changes.

* Rule 11 (d)(1): Substantive change; Rule 11(d)(1) currently reads to permit either OPC or a respondent to file a notice of change requesting reassignment to another judge in the same – or different – district. The Commission's Subcommittee did not want a respondent to avoid publicity relating to the disciplinary proceedings in the district where the respondent practices. The proposed change therefore removes OPC's and the respondent's option to request reassignment of the disciplinary matter to

a different judge in another district. There is also a minor editing change which adds the numeric equivalent of the number "one."

Rule 11(d)(2): Editing change only, spells out the number "30."

Rule 11(d)(3): Editing change only; adds the phrase "of the Supreme Court" in order to modify "Chief Justice" for clarity and identification purposes.

Rule 11(d)(4): Editing change only; replaces the lower case "a" to an upper case "A" in the reference to "Rule 63a" contained in the title of this subsection.

Rule 11(e): No changes.

Rule 11(f): Editing changes; proposed amendment allows what is implicit in that a district court can expedite a sanctions hearing. This subsection addresses what happens after a court makes a finding of misconduct and provides that a sanctions hearing should be held as soon as reasonably practicable and not more than thirty days after the district court enters its findings of fact and conclusions of law. The intent of this subsection is to ensure that the sanctions hearing is separate from the hearing if the latter is needed for determining misconduct. However, because of the wording "as soon as reasonably practicable," it is somewhat unclear whether the sanctions hearing can be held the same day (i.e., in the afternoon) as the hearing for finding misconduct (i.e., in the morning). The amendment clearly states that the district court at its discretion can hold a sanctions hearing immediately consecutive to the disciplinary proceeding on the same day. Editing changes also spell out the number "30" and add the numeric equivalent of the number "five."

✱ Rule 11(g): Substantive change: proposed amendment broadens the current Rule to recognize the fact that district courts may also enter orders of private discipline

and that both private and public orders of discipline can be appealed to the Supreme Court.

Rule 12 (Sanctions)

Rule 12: No changes.

Rule 13 (Immunity)

* Rule 13(a): Substantive change; proposed amendment refines the current Rule and in this subsection, differentiates between immunity in civil suits and immunity in criminal proceedings. The change designates and extends immunity from civil suit to: (1) special counsel appointed by the Court under Rule 17(f); (2) supervising attorneys who monitor lawyers who have been placed on probation; and (3) trustees appointed by a Court under Rule 27 who oversee the closure of a law practice of an attorney who has been placed on disability status. The Rule currently provides immunity from lawsuits for "statements made during the course of disciplinary proceedings" (comparing the latter to judicial proceedings) and is provided to "participants, district courts, committee members, and OPC counsel and staff." The current Rule fails, however, to specifically include special counsel who perform the identical work of OPC counsel, as well as attorneys who supervise lawyers on probation and lawyer trustees. Although the term "participants" may have been intended to cover these individuals, the amendment makes it clearer. Minor editing changes also provide consistency in terminology

* Rule 13(b): Substantive change; this is a new addition which would allow a district court, upon notice to and consideration of the position of the prosecuting

authority, to grant a witness in a disciplinary proceeding immunity from criminal prosecution. This change is patterned after the ABA's Lawyer Disciplinary Enforcement Model Rule 12 and will aid OPC's investigative efforts by allowing a reluctant witness in fear of criminal prosecution to come forth to testify.

Rule 14 (Service)

Rule 14: No changes.

Rule 15 (Access to disciplinary information)

Rule 15(a): No changes.

* Rule 15(a)(1): Substantive change; specifies that a respondent's waiver of confidentiality must be in writing.

Rule 15(a)(2): No changes.

Rule 15(a)(3): Editing change only; replaces a period with a semicolon to reflect a continuation of a series of subsections.

* Rule 15(b): Substantive change; explicitly recognizes that the filing of a motion or petition for interim suspension is a public proceeding absent the exception of issuance of a protective order.

Rule 15(c) and (d): No changes.

Rule 15(e): Editing change; minor revisions tighten up the grammatical construction of this subsection governing requests for nonpublic (confidential) information.

Rule 15(e)(1): Editing changes only; minor revisions improve clarity and readability.

Rule 15(e)(2): Editing changes only; minor revisions improve clarity and readability.

* Rule 15(f): Substantive change; proposed amendment states that respondents shall be notified of requests for nonpublic information at their designated mailing address rather than their business office address. As discussed above in Rule 8(b), the designated mailing address is the address lawyers specify on the annual licensing form to which they want their mail sent. The amendments also require that a respondent's waiver to permit others to obtain nonpublic information must be in writing. The remainder of the revisions are minor editing changes which improve clarity and readability and spell out the number "21."

* Rule 15(g): Both substantive and editing changes; editing changes improve clarity and readability, substantive changes provide that any waivers of confidentiality pertaining to subsection (e) above must be in writing.

Rule 15(g)(1) and (2) and (3): No changes.

* Rule 15(h)(1) and (2): Substantive changes; proposed new provisions still allow OPC counsel to disclose nonpublic information without notice to the respondent but only under limited and specific circumstances when the disclosure is essential to the furtherance of an ongoing OPC investigation. Without the ability to disclose selected confidential information to potential witnesses in order to gain information in some matters, OPC cannot complete its investigations.

Rule 15(i): Editing changes only; capitalizes the first letter in the word "rules" as it refers to the Rules of Lawyer Discipline and Disability.

Rule 16 (Dissemination of disciplinary information)

* Rule 16(a): Substantive change; this subsection currently lists which notices of disciplinary information must be transmitted to various disciplinary agencies, the public and the courts. The proposed addition obligates OPC to transmit such notices to the Judicial Conduct Commission if the subject of the discipline is a sitting or former judge. The disciplinary notice which heretofore has been inadvertently omitted from this subsection is "resignation with discipline pending" (which is tantamount to disbarment) and this omission has been added with the proposed amendments.

* Rule 16(b): Substantive change; the proposed amendment requires the Executive Director of the Bar rather than the Administrative Office of the Courts ("AOC") to publish notices of disciplinary suspensions and disbarments as well as public resignations with discipline pending and transfers to disability status. The change is consistent with the Rule's original intent that such notice be given, but removes the burden on the AOC pursuant to the AOC's request. In fact, insofar as the Bar has ascertained, the AOC has never published these notices under the current Rule.

* Rule 16(c): Substantive change; the proposed amendment requires the Bar's Executive Director rather than the AOC to transmit notices of certain disciplinary information to all Utah courts. As is the case with the proposed changes in subsection (b) above, the AOC has requested the Bar to transmit these notices directly. Changes

also add the inadvertently omitted disciplinary category of "resignation with discipline pending" to the list.

Rule 17 (Additional rules of procedure)

Rule 17(a): Editing change only; minor revision is proposed to improve readability and consistency.

Rule 17(b): No changes.

* Rule 17(c): Substantive and editing changes; the word "private" is eliminated to correlate with the substantive changes proposed for Rules 10(b)(5)(E) and 10(c) which give screening panels the authority to recommend public reprimands.

Rule 17(d): No changes.

Rule 17(e): No changes.

* Rule 17(f): Substantive changes; proposed amendment expressly applies the same procedures for handling attorney ethics complaints against Bar Commissioners and OPC counsel as to members of the Ethics and Discipline Committee. The proposed revisions also adopt the same grounds for dismissal of such complaints as the grounds required for dismissal of all other attorney misconduct complaints. The changes clarify that special counsel for handling such complaints is a lawyer other than an OPC lawyer, that special counsel must be appointed by the Supreme Court, and that special counsel shall report the results of the investigation to OPC. The proposed changes in Rule 10(a)(6) dealing with dismissals of informal complaints have also been incorporated into this Rule for consistency purposes.

Rule 18 (Interim suspension for threat of harm)

* Rule 18(a): Substantive change; to comport with the Pendleton attorney discipline decision, the proposed modification to this subsection states that "an action is covered under this rule when the petition for interim suspension is filed."⁵

Rule 18(b): Editing change only; minor grammatical revision replaces the word "the" to the word "an."

Rule 18(b)(1): No changes.

Rule 18(b)(2): Editing changes only; proposed amendment replaces the word "office" with the term "OPC" for consistency purposes.

Rule 18(c): No changes.

Rule 18(d): Editing change only; adds numeric equivalent of the number "two."

Rule 19 (Lawyers convicted of a crime)

* Rule 19(a): Substantive change; this proposed new provision requires a lawyer convicted of any crime to notify OPC in writing of that fact within 30 days after being convicted. Heretofore, only crimes which adversely reflected on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects needed to be reported. The current Rule leaves it in the hands of the convicted attorney to determine whether or not a crime meets that standard. OPC believes it is in a better position to make that decision.

⁵ In the matter of the Discipline of Gary W. Pendleton, 11 P.3d 284 (Utah 2000) at page 293

* Rule 19(b): Both substantive and editing changes; proposed revisions comport with new requirements in Rule 19(a) above for consistency purposes, including re-numbering the subsection. The more important substantive amendment requires that an attorney report all crimes to OPC, and not just those crimes which "reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . ."

* Rule 19(c): Substantive change; to comport with the Pendleton disciplinary opinion, this substantive revision states that an action is commenced under this Rule when both the petition for interim suspension and the formal complaint are filed.⁶ Proposed amendments also clarify that a respondent under the circumstances set forth in Rule 19(c) is not entitled to an evidentiary hearing but may request an informal hearing. This change is consistent with the provisions of current Rule 19 that state that the district court shall place the respondent on interim suspension upon proof that the respondent has been convicted of a crime which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, regardless of the pendency of any appeal. The proposed change is also consistent with the current provision in Rule 19 which states that a certified judgment of conviction constitutes conclusive evidence that the respondent committed the crime. These provisions seem to indicate as a whole that the hearing a respondent attorney is entitled to is not an evidentiary hearing to attack the facts underlying the conviction. In this regard, if a hearing is to be held, it is to be held solely upon the issue of whether or not the crime legally reflects adversely on the respondent's honesty, trustworthiness or fitness as a lawyer. Editing change re-numbers this subsection.

Rule 19(d), (e), (f), (g) and (h): Editing changes only; proposed amendments provide for re-numbering of subsections to comport with the addition of new subsection (a) in Rule 19.

Rule 20 (Discipline by consent)

* Rule 20(a): Substantive change; proposed amendment clarifies that a respondent proposing discipline by consent must waive the right to a screening panel hearing. It also deletes the cumbersome requirement that the proposed discipline by consent first be submitted to the screening panel chair (as opposed to just the Ethics and Discipline Committee Chair) before being presented to the Ethics and Discipline Committee Chair for consideration. The remainder of changes are minor editing revisions for consistency and clarity purposes.

Rule 20(b): Editing changes only; proposed minor revisions suggested for clarity, readability and consistency purposes.

Rule 20(c): No changes.

Rule 20(c)(1): Editing changes only; minor revisions for consistency purposes.

Rule 20(c)(2) and (3) and (4): No changes.

Rule 20(d): No changes.

Rule 20(d)(1) and (2) and (3) and (4): No changes.

* Rule 20(d)(5): Substantive change; the current Rule reads that the respondent shall submit an affidavit consenting to imposition of the approved disciplinary sanction and acknowledging that the material facts alleged are true. The modifying phrase "for

⁵ In the Matter of Discipline of Gary W. Pendleton, 11 P.3d 284 (Utah 2000), at page 293 footnote 4

purposes of discipline” has been added to the beginning of the sentence in subsection (d)(5). OPC has had a number of cases where consents to discipline have been placed in jeopardy because although a respondent was willing to acknowledge the facts for purposes of disciplinary proceedings, he or she was not willing to acknowledge them for other purposes, e.g., criminal prosecutions or pending civil suits, etc. The proposed limitation should not affect a respondent's exposure in those other types of proceedings since the standard of proof differs in each of the other proceedings. This change is consistent with a similar provision in the ABA's Model Rules for Lawyer Disciplinary Enforcement.

Rule 20(d)(6): No changes.

Rule 20(e): Editing changes only; the proposed changes in the other subsections of Rule 20 make current subsection (e) inaccurate and unnecessary and it therefore should be deleted.

Rule 21 (Resignation with discipline pending)

Rule 21(a): Editing change; the current Rule provides that a respondent may resign from the Bar prior to the adjudication of a pending complaint with the consent of the Supreme Court and upon such terms as the Supreme Court may impose for the protection of the public. The proposed amendment specifically states that a resignation can be made only with the consent of the Supreme Court.

* Rule 21(b)(1): Substantive change; consistent with the proposed amendment to Rule 20(d)(5) and for reasons discussed therein, respondents should be required to

admit for only the purposes of the disciplinary proceeding the facts upon which the allegations of misconduct are based in order to resign with discipline pending

Rule 21(b)(2) and (3) and (4) and (5): No changes.

Rule 21(b)(6): Editing change only; proposed amendment specifies that in order to resign with discipline pending, respondents must agree to comply with all the Rules of Lawyer Discipline and Disability including Rule 26(b) regarding notices to clients and return of clients' property. Rule 26(b) sets forth the exact requirements that apply when a respondent winds up his or her legal practice.

Rule 21(b)(7): No changes.

Rule 21(c): Editing changes only; proposed change spells out equivalent of the number "20" and adds the numeric equivalent of the number "ten."

Rule 21(d): No changes.

Rule 21(e): Editing changes only; proposed change specifies that respondents who resign with discipline pending must comply with Rule 25 governing re-admissions to the Bar. The specification makes explicit what is already implicit: a resignation with discipline pending is tantamount to disbarment.

* Rule 21(f): Substantive changes; proposed subsection (f) is entirely new. The proposed amendments allow an attorney to resign with discipline pending when the allegations of legal misconduct, if proven, may not justify disbarment. In such cases, the respondent must comply with requirements set forth in this subsection. The requirements differ from those imposed by subsections (b) and (c) in that: (1) the respondent need not admit that the facts constitute grounds for discipline and that the

admittance is for purposes of the disciplinary proceedings only; and (2) the provisions contained in subsection (c) do not apply.

Rule 22 (Reciprocal discipline)

✱ Rule 22(a): Substantive change; the current Rule states that a lawyer admitted to practice law in Utah shall promptly inform OPC that he or she has been publicly disciplined by another regulatory body having disciplinary jurisdiction. The proposed revision replaces the word "promptly" with a definitive time period of 30 days. The remaining changes are minor editing changes.

Rule 22(b) and (b)(1): No changes.

Rule 22(b)(2), (d) and (e): Editing changes only; proposed revision spells out equivalent of the number "30" and more accurately rephrases "in all other aspects" except as provided in [subsections] (c) and (d) above.

Rule 23 (Proceedings in which lawyer is declared to be Incompetent or alleged to be incapacitated)

✱ Rule 23(a): Both substantive and editing changes; provides that in cases where no guardian or legal representative has been appointed for a lawyer on disability status, a copy of the court's order shall be served on the director of the institution to which the lawyer has been committed.

Rules 23(b) and (c) and (d)(1)-(4): No changes.

Rule 23(d)(5): Editing changes only more appropriate sentence structure more accurately states that the Bar rather than the Bar Examiners Committee certifies successful completion of the Bar examination for admission to practice

Rule 23(d)(6) and (7): No changes

Rule 24 (Reinstatement following a
suspension of six months or less)

* Rule 24: Substantive change, proposed amendment imposes new requirement that a respondent file an affidavit with OPC stating that he or she has fully reimbursed the Client Security Fund for amounts paid on account of the respondent's misconduct in reinstatement cases following a suspension of six months or less. Editing changes spell out the equivalent of the number "10" and provide the numeric equivalent of the number "six."

Rule 25 (Reinstatement following a suspension
of more than six months: readmission)

Rule 25(a): Editing changes only, proposed amendment's provide numeric equivalents of various spelled out numbers

* Rule 25(b): Substantive changes. proposed amendment eliminates an advance cost deposit for petitions for reinstatement to cover the anticipated costs of the reinstatement proceeding because this requirement has not been imposed in practice. Another substantive revision requires a respondent seeking readmission to receive a report and recommendation from the Bar's Character and Fitness Committee before

filing a petition in the district court. No where is it specified in either the Rules Governing Admission or the Rules for Lawyer Discipline and Disability whether the petitioner should apply for readmission and undergo a character and fitness review before or after filing a petition with the district court. The Commission, based on recommendations from OPC and the Bar's Admission Committee, believes it makes more sense to have the character and fitness evaluation readily available for the district court's review in conjunction with the former attorney's petition. A further revision makes clear that a petitioner is obligated to fulfill the remainder of admission requirements (such as educational requirements and payment of fees) before being eligible for admission pursuant to district court order.

Rule 25(c): No changes.

Rule 25(d): Editing changes; minor amendments spell out the number "30."

Rule 25(e)(1) and (2) and (3) and (3)(A): No changes.

Rule 25(e)(3)(B): Editing change; minor amendment provides numeric equivalent of the number "six."

Rule 25(e)(3)(C): No changes.

* Rule 25 (e)(4): Substantive change; this subsection's proposed revisions provide that a respondent who seeks readmission (after disbarment) must give OPC a copy of the Bar's Character and Fitness Committee's report and recommendation. The changes also provide that a copy of the report should be forwarded to the district court assigned to the petition for readmission after the respondent files the petition. These changes clarify the order of some of the steps a respondent must take in order to be considered for readmission.

Rule 25(e)(5): No changes.

Rule 25(e)(6): Editing changes; provides numeric equivalent for the spelled out number "one."

Rule 25(e)(7): No changes.

* Rule 25(e)(8): Substantive change; subsection (e)(8) which is new expressly requires that a respondent fully reimburse the Client Security Fund for any amounts the Bar has paid on account of the respondent attorney's misconduct.

Rule 25(f): Editing change; minor amendment adds spelled out word "sixty."

Rule 25(g): Editing changes; provides spelled out numeric equivalent of "90."

Rule 25(h): Editing changes; provides numeric equivalent of the number "one."

Rule 25(i): No changes.

Rule 25(j): Editing changes; adds spelled out number "twenty."

Rule 26 (Notice of disability or suspension; return
of clients' property; refund of unearned fees)

Rule 26(a): Editing change only; minor revision adds spelled out equivalent of the number "30."

Rule 26(b): Editing changes only; provides numeric equivalent of "six" and spelled out equivalent of the number "20."

Rule 26(b)(1) through (6): No changes.

Rule 26(b)(7): Editing change; provides spelled out equivalent of the number "10."

Rule 26(c): No changes.

Rule 26(d): Editing change; provides numeric equivalent of the number "six."

Rule 26(e): No changes

Rule 27 (Appointment of trustee to protect clients' interest when lawyer disappears, dies, is suspended or disbarred, or is transferred to disability status)

Rule 27(a) and (b): No changes.

* Rule 27(c): Substantive change; proposed amendment expressly provides immunity for a person appointed under Rule 30 as a trustee the change is commensurate with the proposed changes in Rule 13.

Rule 28 (Appeal by complainant)

Rule 28: Editing change; any dismissal, just not a "summary" dismissal, may be appealed under Rule 10(a)(6).

Rule 29 (Statute of limitations)

Rule 29: Editing change only; adds the numeric equivalent of spelled out number "four."

Rule 30 (Costs and attorney fees)

* Rule 30(a): Substantive change; makes discretionary rather than mandatory the award of costs against a respondent when OPC prevails. The proposed amendments also grant the court discretion to award attorney fees against a respondent when the defense was without merit or not asserted in good faith. Authorizing OPC to collect

attorney fees in successful cases may provide a deterrent and a quicker resolution in those cases where attorneys lack a meritorious defense. In such cases, respondents often have nothing to lose regarding expenditure of attorney fees since they either represent themselves or their attorney friends or relatives represent them pro bono. Under the proposed change, attorney fees may be charged for work performed beginning with the filing of the formal complaint. Finally, the proposed revisions also expressly exclude a respondent's entitlement or award of attorney fees. Currently, a respondent is not entitled to costs.

Rule 30(b): No changes.

* Rule 30(c): Substantive change; proposed amendment recognizes an exception (set forth in new subsection (d) below) to the general rule that costs should not be recoverable in disability cases.

* Rule 30(d): Substantive change; proposed amendment allows trustees to collect costs for notification to a respondent's clients. The reason for the change is the belief that trustees who donate time to attorney disability cases should not be responsible for costs associated with their volunteer efforts such as charges for postage or copying.

Rule 31 (Noncompliance with child support order, child visitation order, subpoena or order relating to paternity or child support proceeding)

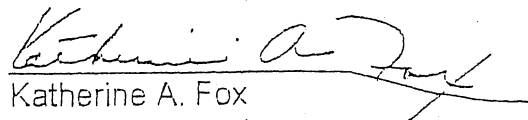
Rule 31(a) and (b): Editing changes; minor revisions are proposed to provide clarity and consistency.

Rule 32 (Failure to answer charges)

✱ Rule 32(a) and (b): Substantive change; Rule 32 is new. These subsections provide that a respondent's failure to answer charges constitutes an admission of the allegations, and that failure to appear before a screening hearing panel, after actual receipt of notice, constitutes an admission of the allegations under consideration or concession of the motion or recommendations under consideration. These changes are based in large part on the corresponding ABA Model Rules for Lawyer Disciplinary Enforcement. The proposed Rule also requires good cause to delay proceedings because of a respondent's failure to appear.

WHEREFORE, the Utah State Bar requests the Court to approve the changes to the Rules of Lawyer Discipline and Disability as set forth above and reflected in the redline version of the Rules contained in the addendum.

Dated this 25th day of February, 2002.


Katherine A. Fox
General Counsel