

2009

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

Utah Supreme Court

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VanCott, Bagley, Cornwall and McCarthy; John A. Snow; Alex B. Leeman; Counsel for Appellant. Office of Professional Conduct; Utah State Bar; Billy L. Walker; Adam C. Bevis; Counsel for Appellee; Bruce Maak; Parr, Brown, Gee and Loveless; Chair, Ethics and Discipline Committee.

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IN THE UTAH SUPREME COURT

LARRY N. LONG,

Petitioner,

vs.

ETHICS AND DISCIPLINE
COMMITTEE OF THE UTAH SUPREME
COURT,

Respondent.

Appellate Case No. 20091018-SC

BRIEF OF THE PETITIONER

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

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

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

ORAL ARGUMENT REQUESTED

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Adam C. Bevis (#9889)
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Salt Lake City, UT 84111
Tel: 801-531-9110
Email: adam.bevis@utahbar.org
*Attorneys for the Ethics and Discipline
Committee of the Utah State Bar*

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

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has original jurisdiction over attorney discipline pursuant to Article VIII, Section 4 of the Utah Constitution. *See* Utah Const. art. VIII, § 4 (“The 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.”). Direct appeal of an informal order of the Ethics and Discipline Committee is provided by Supreme Court Rule of Professional Practice 14-510(f) (effective November 1, 2009). In the event Rule 14-510(f) is deemed inapplicable to this matter, review is sought 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 where “no other plain, speedy or adequate remedy is available.”¹

STATEMENT OF ISSUES, STANDARD OF REVIEW, AND SUPPORTING AUTHORITY

Petitioner Larry N. Long asserts the following issues on appeal:

I. The Ethics and Discipline Committee Failed to Articulate Findings of Fact Which Would Justify Its Conclusions of Law.

A. Standard of Review:

¹ On November 1, 2009, Rule of Professional Practice 14-510 was amended to provide for direct appeal to the Utah Supreme Court from informal proceedings before the Ethics and Discipline Committee. The Order of Discipline in each matter below was issued *after* the effective date of the amended Rule. However, proceedings were conducted *prior* to the effective date of the amended Rule. As set forth in Long’s Motion to Clarify Procedure for Review, deferred for plenary consideration, it is unclear whether the new direct appeal procedure is to apply to matters pending, or only to matters originating after the effective date of the amendment. Long asserts that Rule 14-510, as amended, applies to this matter.

“Judicial discipline and lawyer discipline in particular, are essentially original proceedings here. In the case of lawyer discipline, the authority to discipline lawyers rests entirely with this court and is delegated by our rules to the Utah State Bar for some functions, and to the district courts for others. . . . In both cases, they act under our original authority, and matters eventually brought to us for action come not as appeals, but by way of final confirmation or rejection of actions taken by our delegees.” *In re Anderson*, 2004 UT 7, ¶ 46, 82 P.3d 1334 (internal citations omitted).

B. Preservation:

Long preserved this issue by filing an Exception to the recommendation of discipline in each case, in accordance with Rule of Professional Practice 14-510(c). *See* Exceptions to Screening Panel’s Findings of Fact, Conclusions of Law, and Recommendations for Public Reprimand, Case No. 07-0497 (hereinafter “Shepard Exceptions Brief”), p.7-9; Exceptions to Screening Panel’s Findings of Fact, Conclusions of Law, and Recommendations for Public Reprimand, Case No. 08-0049 (hereinafter “Nelson Exceptions Brief”), p.7-9; Exceptions to Screening Panel’s Findings of Fact, Conclusions of Law, and Recommendations for Public Reprimand, Case No. 08-0080 (hereinafter “Henroid² Exceptions Brief”), p.7-11.³

² Because Judge Henroid did not to submit a verified, notarized complaint, Judge Henroid is not considered the complainant in OPC File No. 08-0080. Rather, the OPC is the official complainant. However, because Judge Henroid’s letter prompted the OPC’s investigation and is the origin of this matter, we refer to OPC File No. 08-0080 as the “Henroid matter” for clarity.

II. The Screening Panel’s Recommendation Was Not Based Upon Substantial Evidence.

A. Standard of Review:

“In reviewing cases involving attorney discipline, we ‘review the trial court’s findings of fact under the clearly erroneous standard,’ but ‘reserve the right to draw different inferences from the facts than those drawn by the trial court.’” *In re Discipline of Crawley*, 2007 UT 44, ¶ 17, 164 P.3d 1232 (quoting *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998)); *see also In re Discipline of Schwenke*, 849 P.2d 573, 576 (Utah 1993) (stating that factual findings are sustained so long as they are supported by substantial evidence).

B. Preservation:

Long preserved this issue by filing an Exception to the recommendation of discipline in each case, in accordance with Rule of Professional Practice 14-510(c). *See* Shepard Exceptions Brief, p.4-7; Nelson Exceptions Brief, p.4-6; Henroid Exceptions Brief, p 4-7.

III. The Screening Panel Misinterpreted the Rules of Professional Conduct, Erroneously Finding Violations of Rules 1.5 (a), 3.1, 5.3(a), 5.5(a), and 8.4(a).

A. Standard of Review:

A court’s interpretation of the rules of professional conduct is reviewed for correctness. *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 12, 86 P. 3d 712; *Nemelka v.*

³ The record filed with the court was not consecutively paginated across all three OPC matters. Per discussions with the clerk of the court and by agreement of counsel, documents which may be found in the record compiled by the Screening Panel will be identified by OPC matter using the numbering system of the Screening Panel’s record (i.e. “Shepard R. 000187”). Documents which postdate the Screening Panel’s record will be identified by OPC matter and document name (i.e. “Nelson Exceptions Brief, p. 3”).

Ethics & Discipline Comm. of the Utah Supreme Court, 2009 UT 33, ¶ 9, 210 P.3d 525

(“We therefore afford no deference to a panel chair's interpretation of our rules.”).

B. Preservation:

Long preserved this issue by filing an Exception to the recommendation of discipline in each case, in accordance with Rule of Professional Practice 14-510(c). *See* Shepard Exceptions Brief, p.9-13; Nelson Exceptions Brief, p.9-21; Henroid Exceptions Brief, p.11-13.

IV. The Screening Panel’s Disciplinary Recommendations, Including Recommended Discipline for Violating Rules 7.1 and 7.5(d), Are Improper and Inconsistent.

A. Standard of Review:

In re Doncouse, 2004 UT 77, ¶ 10, 99 P.3d 837 (“It is our duty to make an independent determination as to the appropriate sanction to be imposed.”); *In re Discipline of Harding*, 2004 UT 100, ¶ 12, 104 P.3d 1220 (“In determining an appropriate sanction, this court is free to examine all relevant facts and circumstances and is under no obligation to defer to the conclusions of any other body.”).

B. Preservation:

Long preserved this issue by filing an Exception to the recommendation of discipline in each case, in accordance with Rule of Professional Practice 14-510(c). *See* Shepard Exceptions Brief, p.12-15; Nelson Exceptions Brief, p.12-13; Henroid Exceptions Brief, p.13-15.

DETERMINATIVE LAW

The following rules are fully set forth in the Addendum to Brief of Petitioner, submitted herewith:

Rule of Professional Practice 14-510(b)(7) (formerly 14-510(b)(5).

Rule of Professional Practice 14-510(f)(5).

Rule of Professional Practice 14-602(d).

Rule of Professional Practice 14-605(d).

Rule of Professional Conduct 1.5(a).

Rule of Professional Conduct 3.1.

Rule of Professional Conduct 5.3(a).

Rule of Professional Conduct 5.5(a).

Rule of Professional Conduct 7.1.

Rule of Professional Conduct 7.5(d).

Rule of Professional Conduct 8.4(a).

STATEMENT OF THE CASE

A. Nature of the Case

This petition seeks review of and relief from an Order of Discipline: Admonition (OPC File No. 07-0497—Shepard) and an Order of Discipline: Public Reprimand (OPC File No. 08-0049—Nelson) issued by Respondent Ethics and Discipline Committee of the Utah Supreme Court (the “Committee”) on November 13, 2009, and an Order of Discipline: Public Reprimand (OPC File No. 08-0080—Henroid) issued by Respondent on November 24, 2009.

B. Course of the Proceedings

1. On October 3, 2007, the Office of Professional Conduct of the Utah State Bar (“OPC”) mailed to Long a Notice of Informal Complaint in OPC File No. 07-0497. (See Shepard R. 000065.) On September 9, 2008, OPC mailed to Long a Notice of Informal Complaint in OPC File No. 08-0049. (See Nelson R. 000066.) On March 4, 2008, OPC mailed to Long a Notice of Informal Complaint in OPC File No. 08-0080. (See Henroid R. 000038.)

2. Long timely responded to each Notice of Informal Complaint. (See Shepard R. 000070; Nelson R. 000078; Henroid R. 000053.) On February 19, 2009, a Screening Panel hearing was held on all three matters.⁴

3. On May 21, 2009, the Screening Panel issued its Findings of Fact, Conclusions of Law, and Recommendation of Discipline: Admonition in OPC File No. 07-0497 (hereinafter “Shepard Recommendation”).

4. On July 2, 2009, the Screening Panel issued its Findings of Fact, Conclusions of Law, and Recommendation of Discipline: Public Reprimand in OPC File No. 08-0049 (hereinafter “Nelson Recommendation”).

5. On June 10, 2009, the Screening Panel issued its Findings of Fact, Conclusions of Law, and Recommendation of Discipline: Public Reprimand in OPC File No. 08-0080 (hereinafter “Henroid Recommendation”).

6. Long timely filed Exceptions to each of the Screening Panel Recommendations on or about July 1, 2009. After retaining new counsel and with

⁴ Concerned about the potential prejudicial effect of three disciplinary complaints being presented to the Screening Panel at one time, Long requested that separate hearings be scheduled. (Shepard R. 000239-45.) This request was denied. (Shepard R. 000232-38.)

permission from OPC, Long submitted new Exceptions in each matter on October 22, 2009.

7. A consolidated hearing on Exceptions before the Chair of the Ethics and Discipline Committee, Bruce Maak, was held October 28, 2009.

8. On November 6, 2009, Mr. Maak issued a Ruling on Exception to Screening Panel Recommendation of Discipline in OPC File Nos. 07-0497 and 08-0049 (hereinafter “Shepard Exceptions Ruling” and “Nelson Exceptions Ruling” respectively). The Ruling on Exception to Screening Panel Recommendation of Discipline in OPC File Nos. 08-0080 was issued November 17, 2009 (hereinafter “Henroid Exceptions Ruling”).

9. An Order of Discipline: Admonition in OPC File No. 07-0497 and an Order of Discipline: Public Reprimand in OPC File No. 08-0049 were issued by the Committee on November 13, 2009 (hereinafter “Shepard Order” and “Nelson Order” respectively). An Order of Discipline: Public Reprimand in OPC File No. 08-0080 was issued on November 24, 2009 (hereinafter “Henroid Order”).

10. On December 8, 2009, Long filed a Petition for Review or Petition for Extraordinary Relief for each Order of Discipline. Long also filed a Motion to Clarify Procedure for Review and a Motion to Consolidate for proposes of review before the Supreme Court. The Motion to Consolidate was granted on January 7, 2010. The Motion to Clarify was deferred for plenary consideration on January 19, 2010.

11. On December 22, 2009, Long filed a Motion for Stay for each matter, seeking to stay publication of any notice of disciplinary action against Long in the Utah Bar Journal. The Motions for Stay were denied on January 18, 2010.

C. Disposition at agency

Following exhaustion of internal review within the Committee, an Order of Discipline: Admonition was issued in the Shepard matter on November 13, 2009. An Order of Discipline: Public Reprimand was issued in the Nelson matter on November 13, 2009 and in the Henroid matter on November 24, 2009.

STATEMENT OF FACTS

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

1. On October 3, 2007, OPC mailed to Long a Notice of Informal Complaint in OPC File No. 07-0497, arising from Long's representation of Steven Shepard. (*See* Shepard R. 000065.)

2. Long initially met with Shepard after regular business hours, accompanied Shepard to Pretrial Services and court the next morning, and prepared for and attended a subsequent hearing. (Shepard R. 000071-73, 000207-213.) At the initial consultation, Long discussed with Shepard the immediate and potential consequences of his legal problem, goals of representation, and terms of payment. (*See* Shepard R. 000070-71.)

3. Long reviewed the retainer agreement with Shepard in detail. Shepard initialed each paragraph and signed the agreement following the hearing the next morning. (Shepard R. 000196-97, 000209-10.) Shepard indicated that he did not believe he had hired Long, though he admitted to signing the retainer agreement. (Shepard R. 000197-98.) Long believed he had been retained by Shepard. (Shepard R. 000210.) At

the conclusion of the initial consultation, Shepard paid Long \$100 to secure his representation the following morning. (Shepard R. 000194.)

4. After being unable to come up with the money to pay Long's entire fee, Shepard testified that he contacted Long's office and told a secretary he had hired someone else. (Shepard R. 000198.) Later, Shepard received notice that he was being sued by a collection agent for Long's fee. (Shepard R. 000198-99.)

5. The retainer agreement specifies the scope of representation and indicates that Long's flat fee for services is considered earned once substantial services have been performed by Long. Shepard initialed alongside each paragraph of the agreement. (Shepard R. 000097-99.) Shepard also signed a Flat Fee Payment Arrangement & Promissory Note, (Shepard R. 000103-04), and a Representation Requirements document. (Shepard R. 000106-07.)

6. Long continued to work on Shepard's case, preparing for and attending another hearing a few weeks later. Upon arriving at the subsequent hearing, Long first became aware that Shepard had retained a different attorney. (Shepard R. 000211.) Shepard acknowledged at the hearing that Long attended the subsequent hearing, apparently unaware that he had been terminated. (Shepard R. 000204-05.)

7. Long spent an approximate total of 6 hours on Shepard's case. (Shepard R. 000213.)

8. According to Long's testimony, the collection action against Shepard was filed by Express Recovery after it received a copy of the signed retainer agreement from Long's office. After Shepard contacted Long's office and protested the lawsuit, Long

directed Express Recovery to cease their collection action. Shepard never paid Long anything beyond the initial \$100 for services provided, which included after-hours initial consultation with Shepard, preparation of a court filing due that same day, preparation that same evening for a hearing the following morning, assistance at Pretrial Services the next morning, and an appearance on behalf of Shepard at a hearing shortly thereafter which resulted in a positive result for Shepard. (Shepard R. 000194, 000200.)

9. The Screening Panel issued Findings of Fact, Conclusions of Law, and Recommendation of Discipline, recommending an Order of Discipline: Admonition for violations of Rules of Professional Conduct 1.5(a), regarding unreasonable fees; 3.1, regarding bringing an unmeritorious claim; 7.1 and 7.5(d), regarding use of a misleading firm name; and 8.4(a), misconduct. (*See* Shepard Recommendation, p.1.) A copy of the Shepard Recommendation is included in the Addendum hereto.

10. The Screening Panel also considered as a mitigating factor that Long did not actually collect the full flat fee from Shepard, but instead resolved the dispute by directing the collections company to drop its claim. (*See* Shepard Recommendation, p.5.)

11. In Exceptions proceedings, the Chair of the Committee, Bruce Maak, acknowledged that the Screening Panel's Findings of Fact do not enumerate the facts upon which the Screening Panel's decision was based. (*See* Shepard Exceptions Ruling, p.4 n.1.) Nevertheless, the Chair concluded that sufficient evidence did exist in the

record to sustain the Screening Panel's recommendation. (*See* Shepard Exceptions Ruling, pp.4-7.)⁵

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

12. On October 3, 2007, OPC mailed to Long a Notice of Informal Complaint in OPC File No. 07-0497, arising from Long's representation of David Merritt. (*See* Nelson R. 000065.) Gordon Nelson, Merritt's employer who arranged for Merritt's legal defense, is the actual complainant in this matter.

13. Nelson's complaint alleged that Nelson paid a \$750 retainer and signed a fee agreement arranging for Long's representation of Merritt. (*See* Nelson R. 000001.) Nelson alleged that Long failed to appear as agreed on Merritt's behalf, and failed to adequately represent Merritt. (*See* Nelson R. 000001-02.)

14. Nelson claimed that Long's employee, Joe Scheeler, assured Nelson that Long would represent Merritt. After a second missed hearing, Nelson claims that Scheeler said he would handle the matter himself. (*See* Nelson R. 000002.)

15. Long appeared at hearings on behalf of Merritt and also prepared various documents for Merritt's cases. (*See* Nelson R. 000129-210, 000231-236.) Scheeler was an employee of Long's firm who assisted with administrative tasks and client intake.

⁵ As discussed in Part I, *infra*, the Chair went to great lengths to muster scattered facts from the record and articulate a line of reasoning that the Screening Panel could have followed in order to arrive at its conclusions. However, it is important to note that the duty to state the basis of the Screening Panel's recommendation lies with the Screening Panel at the time the Panel makes its recommendation. *See* Rules of Professional Practice 14-510(b)(7), (9) (formerly 14-510(b)(5)(D), (E)).

Scheeler, pursuant to his employment agreement, was to comply with the Rules of Professional Conduct. (*See* Nelson R. 000112.)

16. Long was retained to represent Merritt in two criminal matters before the North Salt Lake Justice Court. Long appeared in these matters and later attempted to withdraw. When his motion to withdraw was denied, Long continued to represent Merritt until substituted by another attorney. (*See* Nelson R. 000129-210, 000231-236, 000251.) During the same time period, Merritt was also involved in criminal and civil matters before the Second and Third District Courts. Long was not engaged to represent Merritt in these matters. (*See* Nelson R. 000082-89.)

17. Nelson paid \$1,850 to Long's office to retain Long. Ultimately, Long's representation of Merritt was terminated. (*See* Nelson R. 000238-39.) Although Long believes he earned the money paid, all funds were later refunded to Merritt. (*See* Nelson R. 000127.)

18. At the Screening Panel hearing on this matter, substantial discussion centered around Long's 10-page employment agreement with Scheeler. (Unofficial Transcript of Nelson Screening Panel Hearing ("Nelson Transcript"), p.7.)⁶

⁶ Upon deciding to file exceptions to the Screening Panel's recommendations, Mr. Long obtained the official recording of the Screening Panel hearings and submitted the same to CitiCourt for transcription. CitiCourt made certified transcriptions of the Shepard and Henroid matter, which are found in the record. However, CitiCourt reported that the recording quality of the Nelson matter was too poor to make a substantial transcription. In an effort to recreate some record of the evidence against Mr. Long, administrative personnel in attorney Charles Gruber's office transcribed as much of the Nelson hearing as could be heard and understood from the recording. This unofficial transcript was submitted with Mr. Long's Exception to the Nelson Recommendation, and is found in the record.

19. The employment agreement with Scheeler specifically provided that Scheeler was to notify clients that he is not a lawyer and was to refrain from extending legal advice. (Nelson Transcript, pp.4-5.) Nelson acknowledged in his complaint that Long “told my wife and David that Joe did not have a license to practice law in any way.” (Nelson R. 000002.) Long primarily uses paralegals and non-lawyer assistants for client intake and screening, as well as for administrative support. (Nelson Transcript, p.3.) Clients were given a disclosure which indicated that non-lawyer assistants were not lawyers and could not give legal advice. (Nelson Transcript, p.3.)

20. Referencing the allegation that Scheeler appeared on behalf of clients, Long recounted that on one occasion, Long was delayed in getting to the courthouse for a hearing on Merritt’s behalf. Scheeler, who was present at the courthouse with Merritt, offered to “appear” at the hearing on behalf of Long. Long explicitly told Scheeler to inform the judge and the prosecutor that he was not a lawyer and explain Long’s delay. Scheeler did so and the court rescheduled the hearing for a new date. (Nelson Transcript, pp.7-8.) The relevant dockets do not indicate that Scheeler ever appeared before the court. (Nelson R. 000046-65, 000231-236.)

21. At one point, Long discovered Scheeler conducting an unauthorized mediation after hours and reaffirmed to Scheeler that such was unacceptable under the terms of their employment agreement. (Nelson Transcript, pp.4-5, 10.) Scheeler allegedly conducted a mediation without Long’s knowledge, and prepared a document memorializing the parties’ agreement. (Nelson Transcript, pp.5-6; Nelson R. 000002, 000025-30).

22. Scheeler was admonished and reprimanded by Long for overstepping his role as a paralegal assistant. Eventually, the employment relationship with Scheeler was terminated due to disagreement regarding the bounds of Scheeler's authority, his adherence to the terms and conditions of his employment contract, and his conduct in the workplace. (Nelson Transcript, p.6, 10.)

23. The Screening Panel issued Findings of Fact, Conclusions of Law, and Recommendation of Discipline, recommending an Order of Discipline: Public Reprimand for alleged violations of Rules of Professional Conduct 5.3(a), regarding failure to take measures to ensure employee conduct in compliance with the Rules; 5.5(a), regarding failure to supervise employees; and 8.4(a), misconduct. (*See Nelson Recommendation, p.1.*) A copy of the Nelson Recommendation is included in the Addendum hereto.

24. In Exceptions proceedings, the Chair of the Committee, Bruce Maak, acknowledged that the Screening Panel's Findings of Fact lack "evidentiary detail," but maintained that they were sufficient. (*See Nelson Exceptions Ruling, p.6.*) The Chair also concluded that sufficient evidence did exist in the record to sustain the Screening Panel's recommendation. (*See Nelson Exceptions Ruling, p.2-8.*)

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

25. On March 4, 2008, OPC mailed to Long a Notice of Informal Complaint in OPC File No. 08-0080, arising from Long's representation of Annalicia Vantreese, Mark Leroy Kenney, and Jose Luis Perez-Hernandez. (*See Henroid R. 000038.*)

26. The informal complaint was prompted by a letter from Judge Stephen L. Henroid, who reported that each client had been overcharged for legal services by Long, who he believed performed insubstantial work before withdrawing from each case. (*See* Henroid R. 000001.) None of the clients who are the subject of Judge Henroid's concern have complained of Long's representation.

27. Long contends that his representation of each client was complete and diligent, and that he earned the flat fee charged in each case. Long worked approximately 45 hours on the Vantreese matter, 10 hours on the Kenney matter, and 50-60 hours on the Perez-Hernandez matter. (Henroid R. 000059, 000599-600.)

28. Most of Long's work on behalf of each client was completed outside the courtroom. Thus, Judge Henroid may have been unaware of the full extent of Long's work on behalf of each client. (Henroid R. 000668.)

29. Long made numerous appearances in each case, filed motions, corresponded with opposing counsel, reviewed documents and evidence and conducted research, and counseled each client regarding their legal and personal problems and goals of representation. (Henroid R. 000002-35, 00064-78, 000095-105, 000127-253, 000278-89, 000303-09, 000326-46, 000370-485, 000499-525, 000533-534, 000540.)

30. The retainer agreement for each client specifies the scope of representation and indicates that Long's flat fee for services is considered earned once substantial services have been performed. Each client signed the retainer agreement. (Henroid R. 000085-87, 000318-22, 000487-490.) Kenney and Perez-Hernandez also signed a Flat Fee Payment Arrangement & Promissory Note, while Vantreese paid in full. (Henroid R.

000103-04, 000323-24, 000494-95.) Each signed a Representation Requirements document. (Henroid R. 000081-82, 000320-21, 000492-93.)

31. Flat fees are appropriate and customary in Utah for criminal matters, and Long's rates are comparable to those of other criminal defense attorneys in the area. (Henroid R. 000060, 000601, 000676-77. *See also* Utah Ethics Advisory Opinion No. 136 (1993).)

32. No evidence was presented at the hearing that flat fees were inappropriate under the circumstances, or that Long's flat fee was unreasonable. Aside from testimony presented by Long, no testimony, expert or otherwise, was offered that would establish what would be a reasonable fee for the services performed by Long.

33. Attorneys customarily do not attend drug court hearings unless some sort of problem is anticipated. (Henroid R. 000636-39, 000658-59.) Long remained involved in each case, and remained available to counsel each client until the conclusion of their legal matter or termination of the attorney-client relationship. (Henroid R. 000640-41, 000660.)

34. Judge Henroid appears to have been mistaken regarding several acts alleged in his letter. For example, Judge Henroid mistakenly complained that Long withdrew from all three cases, leaving the clients to the Legal Defender's Association. (*See* Henroid R. 000038.) In fact, Long remained involved in two of the three cases to their conclusion, and was terminated by the third client. (Henroid R. 000640-41, 000660, 000664-65.)

35. Regarding the firm name issue, Long is presently a solo practitioner, but has employed additional attorneys at his firm from time to time. (Henroid R. 000606-609.) Long also occasionally associates with other attorneys in the area, although not as employees. (Henroid R. 000607.) While at all times relevant to this matter there were no additional attorneys employed by Long, no one ever represented to clients that there were multiple attorneys at the firm and clients were consistently informed that only Long would be their lawyer. (Henroid R. 000609-610.)⁷ No testimony at the hearing or other evidence in the record indicates that any client or member of the public has been misled in this regard.

36. The Screening Panel issued Findings of Fact, Conclusions of Law, and Recommendation of Discipline, recommending an Order of Discipline: Public Reprimand for alleged violations of Rules of Professional Conduct 1.5(a), regarding unreasonable fees; 7.1 and 7.5(d), regarding use of a misleading firm name; and 8.4(a), misconduct. (See Henroid Recommendation, p.1.) A copy of the Henroid Recommendation is included in the Addendum hereto.

37. The Screening Panel made no findings of fact regarding the amounts actually charged by Long or the nature and extent of the work completed by him for each client. See Addendum, Exhibit I.

38. In Exceptions proceedings, the Chair of the Committee, Bruce Maak, acknowledged that the Screening Panel's Findings of Fact lack "evidentiary detail" and

⁷ Although the firm name issue arises in each of the three matters below, it was only discussed during the portion of the Screening Panel Hearing which concerned the Henroid matter.

indicated that the findings do not “articulate the specific evidence that the Screening Panel believed and disbelieved and the analytical process by which the Panel came” to its conclusion. (See Henroid Exceptions Ruling, p.6.) Nevertheless, Mr. Maak concluded that the findings were sufficient. (See Henroid Exceptions Ruling, pp.2-11.)

SUMMARY OF THE ARGUMENT

In ordering discipline against Petitioner Larry N. Long, the Committee adopted the Screening Panel’s Findings of Fact, Conclusions of Law, and Recommendation of Discipline in each matter. However, in each matter the Screening Panel’s disciplinary recommendation is improper. In arriving at its recommendation, the Screening Panel did not adequately articulate findings of fact which would justify its conclusions of law as required by the Rules of Professional Practice, failed to arrive at a decision based upon the substantial evidence in the record, misinterpreted the relevant Utah Rules of Professional Conduct, and recommended discipline which is unreasonable and inconsistent with discipline imposed for similar offenses and the stated purpose of the Rules of Professional Practice. Accordingly, each Order of Discipline is unfounded and improper.

ARGUMENT

The Utah Supreme Court has recognized “that there is a presumption of innocence in a disciplinary proceeding involving a license to practice law.” *In re Macfarlane*, 350 P.2d 631, 637 (Utah 1960). Rule 14-517 of the Rules of Professional Practice places the burden upon the OPC to prove a complaint of misconduct by a preponderance of the

evidence. In the present case, the evidence simply does not support a finding that Long violated Rules of Professional Conduct 1.5(a), 3.1, 5.3(a), or 5.5(a), and the circumstances of Long's violation of Rules 7.1 and 7.5(d) do not warrant the sanction imposed. Moreover, the findings and conclusions relied upon by the Committee fail to afford Long due process of law required by the Rules of Professional Practice and this Court's prior decisions.

I. The Ethics and Discipline Committee Failed to Articulate Findings of Fact Which Would Justify Its Conclusions of Law:

Due process requires that Long be apprised of the charges and facts against him. *See Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 455 (1985) (noting that due process requires a disciplinary board "to explain the evidence relied upon"). Similarly, Rule 14-510(b)(7) of the Rules of Professional Practice requires that after the Screening Panel reviews all the facts developed by the informal complaint, answer, investigation and hearing, the Screening Panel is to then make a recommendation for public reprimand in writing, stating "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)(7) (formerly 14-510(b)(5)(E) (emphasis added). In each matter, the Screening Panel failed to state the facts upon which it based its conclusions, articulating no specific facts and citing no specific evidence from the record to support each conclusion. Indeed, most of the

Findings of Fact are stated not as facts supporting a conclusion, but as conclusions themselves.

According to Rule of Professional Practice 14-510(d)(3) (formerly 14-510(c)), a respondent must be given the opportunity to show that the Screening Panel's recommendation "is unsupported by substantial evidence or is arbitrary, capricious, legally insufficient or otherwise clearly erroneous." The Utah Supreme Court has held that in cases of attorney disciplinary proceedings, "the seriousness of alleged violations of a lawyer's professional responsibility requires that a lawyer be afforded an opportunity to defend his or her good professional standing." *Nemelka*, 2009 UT 33, ¶ 19; *see also Harding*, 2004 UT 100, ¶¶ 20-21 (holding that a written report of the Screening Panel's findings and conclusions must be given to the lawyer to ensure due process to the lawyer accused of misconduct.).

The Utah Supreme Court has stated that factual findings of the bar are treated "much the same as findings of administrative agencies." *Schwenke*, 849 P.2d 576. In the agency context, Utah appellate courts have held that due process requires a tribunal's decision to be supported by findings of fact sufficient to permit review. *See Milne Truck Lines v. Public Service Commission*, 720 P.2d 1373, 1378 (Utah 1986) ("It is also essential that the [agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. . . ."); *LaSal Oil Co. v. Department of Env'tl. Quality*, 843 P.2d 1045, 1047 (Utah Ct. App. 1992) ("An administrative agency must make findings of fact and conclusions of law that are

adequately detailed so as to permit meaningful appellate review.”). This basic principle of due process is repeated in other contexts as well. *See Mosdell v. Mosdell*, 2001 UT App 115, ¶ 4 (“Here, the trial court’s findings of fact and conclusions of law are insufficient to support its order With such meager findings, this court cannot meaningfully review whether the trial court abused its discretion.”); *State v. Pharris*, 846 P.2d 454, 464 (Utah Ct. App. 1993) (stating that the need to review a decision for correctness requires that a trial court create a complete record, and that “merely record[ing] incomplete, conclusory statements in its findings of fact” required the court to remand the case for an evidentiary hearing); *Woodward v. Fazzio*, 823 P.2d 474, 478 (Utah Ct. App. 1991) (holding that a trial court’s findings of fact merely reflected the court’s desire to arrive at the necessary conclusions of law, the court found the statements conclusory and insufficient because they “provide no insight into the evidentiary basis for the trial court’s decision and render effective appellate review unfeasible”).

In the matters at issue, Long is denied the ability to adequately defend his good professional standing. Without knowing the basis of the Screening Panel’s recommendation, Long is impeded in contesting the substance of the recommendation. In each Ruling on Exceptions, Mr. Maak concedes that the findings of fact lack “evidentiary detail.” Shepard Exceptions Ruling, p.4 n.1; Nelson Exceptions Ruling, p.6; Henroid Exceptions Ruling, p.6. While the term “evidentiary detail” is never explained, Mr. Maak does elaborate in the Henroid Exceptions Ruling that the findings do not “articulate the specific evidence that the Screening Panel believed and disbelieved and

the analytical process by which the Panel came” to its conclusion. Henroid Exceptions Ruling, p.6. Mr. Maak concludes that this level of detail is not required. *Id.* p.6-7.

Long asserts that the level of detail excused by Mr. Maak is precisely what is required by the Rules and by due process. Proper findings of fact should contain “those facts on each issue which are necessary to make flow from them the law conclusion or make such law conclusions intelligible.” *Sandall v. Hoskins*, 137 P.2d 819, 822 (Utah 1943). As this Court explained in *Milne Truck Lines*:

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

720 P.2d at 1378.

In each Exceptions Ruling, Mr. Maak goes to great lengths to gather scattered facts from the record and offer a line of reasoning that the Screening Panel *could* have followed in order to arrive at its conclusions. For example, in the Shepard Exceptions Ruling, Mr. Maak justifies the Screening Panel’s decision by referring to evidence that “the Panel *believed or could have believed.*” Shepard Exceptions Ruling, p.5 (emphasis added). Similarly, in the Henroid Exceptions Ruling, Mr. Maak discusses what the Screening Panel “*could have concluded*” and “*could have chosen not to believe.*” Henroid Exceptions Ruling, p.5 (emphasis added). In each case, we are left to guess as to what evidence the Screening Panel accepted and rejected, and speculate as to whether

their legal analysis was sound—a practice certainly not contemplated by Rule 14-510(b)(7) (requiring the Screening Panel to “state . . . the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded.”) The facts upon which the Panel relied are not identified, and the basis of their decision is not explained.

Notwithstanding Mr. Maak’s efforts to justify the Screening Panel’s recommendations, the requirements of the Rules of Professional Practice have not been met. The duty to state the basis of the Screening Panel’s recommendation lies with the Screening Panel at the time the Panel makes its recommendation. *See* Rules of Professional Practice 14-510(b)(7), (9) (formerly 14-510(b)(5)(D), (E)). Any subsequent attempt by the Chair to connect the dots and justify the conclusions does not cure the Panel’s failure. Rule 14-510 is designed so that an attorney facing a disciplinary recommendation may analyze the recommendation and take exception to its findings and conclusions. Without adequate findings and conclusions, the Rule is deprived of its effectiveness and the attorney is deprived of due process of law.

Here, the facts and conclusions offered by the Screening Panel do not adequately apprise Long of the basis of the decision against him. Such a defect materially hinders Long’s ability to take exception to the recommendation, as well as in the current proceedings. Failure to comply with Article 5 of the Rules of Professional Practice is grounds for dismissal of a disciplinary action. *See* Rule of Professional Practice 14-510(f)(5)(D). Accordingly, the Screening Panel’s recommendation should be disregarded and the charges should be dismissed.

II. The Screening Panel's Recommendation Was Not Based Upon Substantial Evidence:

An attorney is entitled to due process in disciplinary actions. *Sonnenreich*, 2004 UT 3, ¶ 37. An essential characteristic of due process is that decisions be based upon evidence. *See McGrew v. Industrial Comm'n*, 85 P.2d 608, 618 (Utah 1938). In a context similar to this matter, the Utah Supreme Court held that due process requires “adjudicating the charges based upon the evidence adduced at the hearing.” *Anderson*, 2004 UT 7, ¶ 52 (concerning judicial misconduct).

In reviewing recommendations for discipline by the state bar, the Utah Supreme Court has stated that factual findings of the bar are sustained only “so long as they are supported by substantial evidence.” *Schwenke*, 849 P.2d at 576. “Substantial evidence is something less than the weight of the evidence, but more than a mere scintilla of evidence,” enough that a reasonable mind might consider adequate to support a conclusion. *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 35, 164 P.3d 384. In addition, this Court has held that a “residuum of legal evidence competent in a court of law” must support any agency finding. *Beehive Tel. Co. v. PSC of Utah*, 2004 UT 18, ¶ 39, 89 P.3d 131 (quoting *Lake Shore Motor Coach Lines, Inc. v. Welling*, 339 P.2d 1011, 1014 (Utah 1959)). In other words, a finding of fact cannot be based solely on hearsay. *Sandy State Bank v. Brimhall*, 636 P.2d 481, 486 (Utah 1981).

In the administrative setting, the Utah Supreme Court had held that an adjudicatory panel “cannot act on their own information. . . . Their findings must be based on evidence presented in the case. . . .” *Morris v. Public Serv. Comm’n*, 321 P.2d 644, 646 (Utah 1958). For example, where a finding of intent was necessary for imposition of a penalty by the state tax commission, the Utah Court of Appeals disapproved of the commission’s findings on the grounds that the commission had merely made a “mechanical conclusion” regarding the necessary elements of the charge. *See Clements v. Utah State Tax Comm’n*, 893 P.2d 1078, 1082 (Utah Ct. App. 1995). The court remanded, requiring specific findings as to whether the necessary elements of the charge were met. *See id.*

In each of the matters at issue, the record lacks sufficient evidence to support the Screening Panel’s findings and conclusions.⁸

A. Shepard Complaint:

In its findings for the Shepard matter, the Screening Panel found as a matter of fact that “Mr. Long charged an unreasonable fee for services rendered,” and concluded as a matter of law that “[b]y charging Mr. Shepard an unreasonable fee for services rendered, Mr. Long violated this rule.” *See Shepard Recommendation*, p.2-5. However, the record does not support either of these statements. Although ample evidence of Long’s fees and

⁸ We recognize our obligation under Utah R. App. P. 24(a)(9) to “marshal all record evidence that supports the challenged finding.” To that end, we have attempted to set forth in the statement of facts all relevant facts whether they support or contradict the Screening Panel’s recommendation. Where facts are disputed, we have endeavored to include both. *See, e.g.*, Fact No. 3. However, please note that the record is devoid of facts which would support many of the challenged findings. Long cannot marshal evidence where no evidence exists.

activities is found in the record, there is no evidence indicating what would constitute an “excessive” fee or suggesting that Long’s fees exceed customary charges in the area for similar cases or otherwise violate Rule 1.5(a).

The evidence cited by Mr. Maak is insufficient to support the Screening Panel’s recommendation. Not only is such evidence not enough, in light of the remainder of the record, to be reasonably considered adequate to support a conclusion, *Martinez*, 2007 UT 42, ¶ 35, but the record lacks evidence concerning several elements of the offenses charged. For example, no one but Long testified concerning the reasonableness of his fees and work done on behalf of Shepard. Long explained the basis of his fee and detailed his work, including time spent with Shepard and work done preparing for Shepard’s case. Shepard R. 000070-73, 000207-213. Similarly, there is no evidence in the record that would support a finding that the collections claim against Shepard was without merit. Long has a legitimate claim both in quantum meruit as well based upon the signed retainer agreement. Shepard R. 000219-20. [cite case] It is not sufficient to conclude that “[t]he Screening Panel accepted Shepard’s version of things.” Shepard Exceptions Ruling, p.3-4. Even accepting all of Shepard’s testimony as true, the record still lacks evidence to sustain each element of the recommended discipline.

The record plainly lacks, and the findings of fact and conclusions of law fail to refer to, substantial evidence sufficient to support finding violations of Rules in question. The finding of fact that “Mr. Long charged an unreasonable fee for services rendered” is a perfect example of a “mechanical conclusion,” wholly lacking any specific factual findings as to the necessary elements of the charged violation. As the Utah Supreme

Court has held, “[c]ommon sense likewise requires a holding that the findings required by statute be made in accordance with the evidence so presented. If there is no substantial evidence to support an essential finding, that finding cannot stand and [an] order predicated upon it must fall.” *Mountain States Tel. & Tel. Co. v. Public Serv. Comm’n*, 145 P.2d 790, 792 (Utah 1944). Accordingly, the Order of Discipline for violating Rules 1.5(a) and 3.1 should be vacated for being unsupported by the evidence in the record.

B. Nelson Complaint:

In the Nelson matter, the record lacks sufficient evidence to support several of the Screening Panel’s findings and conclusions. The Screening Panel found as a matter of fact that “Mr. Long failed to effect measures to make reasonably certain that Mr. Scheeler as his employee complied with the Rules of Professional Conduct” and that “Mr. Long failed to adequately supervise Joe Scheeler’s activities,” concluding as a matter of law that “[b]y failing to effect measures to make reasonably certain that Mr. Long’s employees complied with the Rules of Professional Conduct Mr. Long violated [Rule 5.3(a)]” and “By failing to adequately supervise Mr. Scheeler’s activities to insure that Mr. Scheeler was not engaging in the Unauthorized Practice of Law [sic] and by allowing Mr. Scheeler to hold himself out as a lawyer, Mr. Long violated [Rule 5.5(a)].” *See Nelson Recommendation*, pp.2-4. There is insufficient evidence in the record to support these findings and conclusions.

No other party testified at the hearing on the Nelson matter. According to Mr. Maak, the Screening Panel must have inferred from the evidence that Long was not only aware of his employee’s alleged misconduct, but “sought to take advantage of Scheeler’s

improper actions.” Nelson Exceptions Ruling, p.5. Such an inference is not only against the weight of the evidence, but also wholly unexplained by the Screening Panel’s findings and conclusions. Though it is certainly possible that the Screening Panel followed Mr. Maak’s line of reasoning, Mr. Maak, like Long, is only able to venture a guess as to the Screening Panel’s actual analysis.

The record shows Long’s efforts to ensure Scheeler’s compliance with the rules. The record also references the written agreement Long had with Scheeler concerning compliance with the Rules, and specific instructions and discipline Long directed at Scheeler to ensure his compliance with the Rules. In addition, the Screening Panel’s finding that Long “allowed Mr. Scheeler to appear in court, contact opposing party [sic] and conduct mediation proceedings at Mr. Long’s office” is not only unsupported by any evidence in the record, but is contrary to testimony of Long at the hearing and the court docket found in the record. Nelson R. 000046-65; Nelson Transcript, pp.7-8.

C. Henroid Complaint:

Similarly, the record in the Henroid matter lacks sufficient evidence to support several of the Screening Panel’s findings and conclusions. For example, the Screening Panel found as a matter of fact that “Mr. Long charged excessive fees for the work he completed in the Vantreese matter and the Perez Hernandez matter,” and concluded as a matter of law that “[b]y charging excessive fees for work he performed in two cases, Mr. Long violated Rule 1.5(a) (Fees).” *See* Henroid Recommendation, pp.2-5. However, there is no evidence in the record which would support either of these statements. Indeed, no such evidence was even proffered.

Long's fees and activities in the three cases before Judge Henroid are well-documented. *See* Fact No. 29. There is no evidence indicating what would constitute an "excessive fee" or suggesting that Long's fees exceed customary charges in the area for similar cases or otherwise violate Rule 1.5(a). In fact, no one but Long testified concerning the reasonableness of the fees of activities of Long. Long explained the basis of his fees, detailed his work on behalf of each client, and testified that his charges and methods are typical in the area for similar cases. *See* Henroid R. 000601, 000676-77. The evidence in the record indicates each of the fees in question were reasonable, and Long earned each fee.

In his Ruling on Exceptions, Mr. Maak concludes that "[t]he Screening Panel was not obligated to believe Long's written retrospective accounting, supported with no contemporaneous records that were introduced, of services he performed." Henroid Exceptions Ruling, p.5. While Long certainly does not argue with this proposition, it does not justify the Screening Panel's recommendation. The Screening Panel's decision must be *based on the evidence*. *See* Rules of Professional Practice 14-510(b)(7). Where evidence conflicts, the Screening Panel may believe some, and reject another. However, the Screening Panel may not reject the only evidence in the record and base its decision on unsupported speculation. *See* Rule of Professional Practice 14-510(b)(7), (9) (indicating that a screening panel determination must be based upon a preponderance of the evidence).

Here, Mr. Maak correctly notes that the Screening Panel is not obligated to believe Long. However, *evidence supporting Long's position is the only evidence in the record*.

Judge Henroid's letter is not evidence because it is not verified. *See* Rule of Professional Practice 14-510(a)(2) ("The informal complaint shall be notarized and contain a verification attesting to the accuracy of the information contained in the complaint."). Moreover, the letter recounts information relayed by Long's clients to Judge Henroid, which constitutes hearsay within hearsay. No evidence was presented nor testimony given that Long did not do sufficient work to earn his fee. There is no evidence in the record that Long charged an unreasonable fee. None of the clients complained of the fee they were charged. Accordingly, the Order of Discipline for violating Rule 1.5(a) should be vacated for being unsupported by substantial evidence.

In the Henroid Exceptions Ruling, Mr. Maak offers the unsupported statement that while the Rules of Professional Practice do assure "due process and a reasonable record in the event of an Exception," the Rules "do not envision the level of detail and precision embraced with respect to civil and criminal proceedings." Henroid Exceptions Ruling, p.7 n.2. Mr. Maak concludes that "such detail and precision would not be practical or feasible" given that the Screening Panel is comprised of volunteers.

In effect, the Chair of the Ethics and Discipline Committee appears to believe that although the Committee has the power to take disciplinary action against a lawyer's license, the fact-finding body upon which the Committee relies cannot be expected to act with "detail and precision." While the chair may consider detailed findings impractical, such findings are nevertheless required by the Rules of Professional Practice and this Court's prior decisions.

III. The Screening Panel Misinterpreted the Rules of Professional Conduct, Erroneously Finding Violations of Rules 1.5 (a), 3.1, 5.3(a), 5.5(a), and 8.4(a):

A. Rule 1.5(a)

In evaluating the reasonableness of a fee, Utah R. Prof. Conduct 1.5(a) enumerates several factors to be considered. Factors relevant to this case include (1) the novelty and difficulty of legal issues; (3) the fee customarily charged in the locality for similar legal services; (4) results obtained; (5) time limitations imposed by the client or circumstances; (7) the experience and ability of the lawyer to perform the services; (8) whether the fee is fixed or contingent. In both the Shepard and Henroid matters, the Screening Panel and OPC appears to err in defining an unreasonable fee under Rule 1.5(a).

Much of the concern over Long's fees is centered around Long's use of a flat fee agreement in his criminal practice. A flat fee, or task based billing, is an arrangement with the client that the lawyer will be paid a specific sum to complete the project. A flat fee may result in the attorney not receiving the full hourly rate normally charged. However, there is also the potential to receive compensation greater than a normal hourly rate. As explained by the Supreme Court of Arizona:

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

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

In the case of *Stalls v. Pounders*, 2005 Tenn. App. LEXIS 42 (Tenn. Ct. App. 2005) the court used the following analysis to determine if a non-refundable fee agreement was enforceable. The court stated:

This Court has long held that an attorney is entitled to compensation in the amount agreed upon by contract, provided that the contract is fair at its inception and entered into in good faith. . . . In order to prove such good faith and fairness, an attorney seeking to enforce a contract for attorney's fees must show: (1) the client fully understood the contract's meaning and effect, (2) the attorney and client shared the same understanding of the contract, and (3) the terms of the contract are just and reasonable.

Id. at 14-15. The Ethics Advisory Committee of the Utah Supreme Court has likewise opined that flat fee or fixed fee arrangements do not violate Rule 1.5(a) so long as the fee is structured to avoid a chilling effect upon the client's right to terminate their lawyer. *See* Utah Ethics Advisory Opinion No. 136 (1993). In other words, a portion of the fee may need to be disgorged if the attorney-client relationship is terminated before substantial services are performed. *See id.* Notably, Long's fee agreement provides that the fee is not earned until substantial services are performed, and tracks the language of Utah Ethics Advisory Opinion No. 136. *See, e.g.,* Shepard R. 000097 ("No portion of the flat fee will be refunded once substantial services have been performed, which would justify attorney retaining the fee.").

1. Shepard Complaint:

Rule 1.5(a) prohibits *making an agreement for, charging, or collecting* an unreasonable fee. In the Screening Panel Memo, OPC offers an incorrect standard for determining whether Long's fee is unreasonable. To the extent this standard was adopted by the Screening Panel, any discipline predicated thereon would be improper.

The Screening Panel Memo attempted to use Long's fee agreement to define whether the fee was proper. The Shepard Screening Panel Memo recommended discipline upon a finding that Long "did not earn the \$6,600 fee since Mr. Shepard did not pay the amount and under Mr. Long's Fee Agreement the fee is earned when payment is received." Shepard Screening Panel Memo, pp.5-6. Such a standard is not founded in the Rules of Professional Conduct.

The retainer agreement between Long and Shepard merely dictates the payment expectation and terms between the parties, not the applicable Rules of Professional Conduct. Long did not violate Rule 1.5(a) because he did not make an agreement for, charge, or collect an unreasonable fee. Shepard approached Long seeking help with a felony DUI. Considering Shepard's prior convictions and the factual circumstances of the case, the legal matter was rather complicated. Shepard was potentially at risk of up to 5 years. Imprisonment and a substantial fine. Additional factors properly considered and found in the record are that Shepard approached Long the night before he would need representation at a hearing, and Long has approximately 40 years of experience dealing with such matters. Long also presented evidence that \$6,600 is within the range of fees customarily charged in Utah for this type of case. These factors, all appropriately considered under Rule 1.5(a), indicate that the fee *agreed upon* would have been reasonable had Long represented Shepard for the duration of the matter as contemplated by the parties when the fee agreement was signed.

Similarly, the fee *charged* was reasonable. The fee agreement signed by Shepard indicated that the terms of representation provided for a flat fee. The fee would be

earned, in full, upon performance of any substantial work. Shepard signed the fee agreement—initialing each paragraph—after Long reviewed its provisions and details following the hearing. Shepard R. 000097-99, 000209-10. The record shows that Long performed substantial work for Shepard. It was reasonable for Long to conclude, based on the fee agreement, that he was justified in charging the agreed-upon fee.

Lastly, the fee *collected* was reasonable. Long did an after-hours initial consultation with Shepard, prepared and faxed a document due by midnight that day, prepared that same evening for a hearing the following morning, accompanied Shepard at 8:00 a.m. the following morning to Pretrial Services, appeared on behalf of Shepard at a hearing shortly thereafter, and attained a positive result for Shepard at the hearing. *See* Fact No. 2, 6. The actual fee collected by Long was only \$100. Considering the 6 hours of work Long testified he completed in Shepard’s case, this was not an unreasonable fee.

As noted above, *nothing in the record* supports a conclusion that the fee agreed upon or collected in the Shepard matter was unreasonable. In contrast, Long testified and presented evidence regarding the nature and extent of his services and the basis of his fee. This uncontroverted evidence requires that the Screening Panel’s recommendation of discipline be disregarded, and the charges against Long dismissed.

2. Henroid Complaint:

In the Henroid matter, the Screening Panel again adopted an incorrect standard for Rule 1.5(a) offered by OPC in its Screening Panel Memo. OPC suggested, and the Screening Panel found, that Long charged “excessive” fees. *See* Henroid Screening

Panel Memo, p.12; Henroid Recommendation, p.2. Rule 1.5(a) does not attempt to define whether a fee is “excessive,” only whether it is “reasonable.”

The Screening Panel concluded that Long’s fee was “excessive,” as opposed to the correct standard of unreasonable, in the Vantreese and Perez-Hernandez matters. As noted above, there is no evidence or testimony in the record to that effect. In fact, *nothing in the record* supports a conclusion that the fees charged in the Vantreese and Perez-Hernandez matters were unreasonable, save the initial letter from Judge Henroid complaining of Long’s fees, which is not evidence in this matter and is hearsay within hearsay. Similarly, OPC’s statement in the Notice of Informal Complaint that “the docket reflects that you performed minimal work” reflects an incomplete assessment of the facts and improper legal standard for Rule 1.5(a). Obviously not all work performed by an attorney is recorded in a court’s docket. It would be incorrect to conclude that only docketed acts are considered in determining the reasonableness of a fee.

In contrast, Long testified and presented evidence regarding the nature and extent of his services and the basis of his fee. OPC failed to even proffer evidence to dispute Long’s contentions. This uncontroverted evidence requires a finding that Long did not charge an unreasonable fee to any client in the Henroid matter.

B. Rule 3.1

Rule 3.1 prohibits a lawyer from bringing a claim unless there is a basis in law and fact for doing so that is not frivolous. The rule requires only that a lawyer be able to make a good faith argument in support of their position. *See* Utah R. Prof. Conduct 3.1,

comment 2. In the present case, the Screening Panel made an erroneous finding of fact in concluding that the collection claim against Shepard was frivolous.

The fee agreement between Long and Shepard indicated that the fee agreed upon by the parties was considered earned once Long performed substantial legal services for the client. *See* Shepard R. 000097. As explained above, Long performed substantial services for Shepard when he completed approximately 6 hours of legal work for Shepard, consulted with him after hours, drafted and faxed a request to the court which was due by midnight the day Long was engaged, represented Shepard before Pretrial Services and at a hearing, and prepared for a subsequent hearing. *See* Fact No. 2, 6-7. After Long represented Shepard at the hearing the next morning, Shepard signed the Fee Agreement and initialed each paragraph as it was explained to him. Shepard R. 000209. Although Shepard ultimately decided to retain another attorney, Long had a reasonable contractual expectation that he would receive the flat fee agreed upon, and was within his rights to seek that fee.

Other courts considering this issue have held that an attorney would be justified in attempting to enforce a flat fee agreement. As noted above, the Tennessee Court of Appeals held that an attorney is entitled to enforce a fee agreement so long as the agreement is “fair at its inception and entered into in good faith.” *Stalls*, 2005 Tenn. App. LEXIS 42, 14-15. Taking a different approach, the Oklahoma Supreme Court held that even where a flat fee contract may be unenforceable in full, an attorney may recover damages in quantum meruit or contractual damages if, in entering into such a contract, the

attorney changed positions or incurred expenses. *McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp.*, 195 P. 3d 35, 44 (Okla. 2008).

At the Screening Panel Hearing, Long argued both a contractual basis for enforcing the contract, and a claim in quantum meruit. The record shows that Long performed substantial services on Shepard's behalf. Shepard knowingly and intentionally signed the retainer agreement after Long commenced the representation and reviewed each paragraph with Shepard. It is simple error to conclude from this evidence that Long did not have a good faith claim to compensation either under the contract or in quantum meruit, and there is no evidence that Long was attempting to use the collection action to extract an unreasonable fee or limit the client's ability to terminate representation.⁹ Because Long could make a good faith argument that he was entitled to the fee sought, no action to collect that fee could be considered in violation of Rule 3.1.

C. Rule 5.3(a)

Rule 5.3(a) requires a supervising lawyer to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." Comment 1 states that a lawyer must give assistants "appropriate instruction and supervision."

In the Nelson Screening Panel Memo, OPC once again suggests an incorrect legal standard with respect to Rule 5.3(a). OPC directs that Long should be found to have

⁹ In fact, the undisputed evidence shows that as soon as Long became aware of the collection lawsuit, he directed that the claim should be dropped. This stands in stark contrast to *Fla. Bar v. Richardson*, 547 So. 2d 60 (Fla. 1990), where a lawyer was found to have violated Rule 3.1 after "obsessive" attempts to vacate a court order requiring him to refund an excessive fee.

violated the rule if Long's non-lawyer employee drafted a document that only a lawyer may draft under Rule 2.4(c) or Long's non-lawyer employee contacted an opposing party represented by counsel. *See* Nelson Screening Panel Memo, pp.9-10. As noted above, Rule 5.3(a) only requires "reasonable efforts" to give "reasonable assurance" that an assistant's conduct will comply with the Rules. A finding that a non-lawyer employee violated a Rule does not necessarily lead to the conclusion that Rule 5.3(a) was violated. The Arizona Supreme Court in *In re Galbasini*, 786 P.2d 971, 975 (Ariz. 1990), stated well:

An attorney who supervises a nonlawyer associate is not required to guarantee that the associate will never engage in "incompatible" conduct, for that would be tantamount to vicarious liability. . . . Circumstances will dictate what constitutes a "reasonable effort" to instill in nonlawyer personnel an appropriate respect for their duties. Certainly new personnel must be carefully screened and given at least some instruction in the fundamentals of professional responsibility.

Id. (quoting G. Hazard, Jr., & W. Hodes, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, p. 464 (1989)).

OPC misconstrued Rule 5.3(a) by implying that Long is strictly liable for acts of a non-lawyer assistant which violate the Rules of Professional Conduct. Even if Scheeler improperly drafted documents or held himself out to be a lawyer, such conduct would not automatically mean that Long violated Rule 5.3(a). To the extent that the Screening Panel adopted OPC's flawed reasoning, the Panel's recommendation is improper.

Other jurisdictions have held with respect to Rule 5.3 that "[a]lthough there may often be some question of what is a reasonable effort to ensure proper conduct by nonlawyer employees, at a minimum the lawyer must screen, instruct, and supervise." *In*

re Struthers, 877 P.2d 789 (Ariz. 1994). The Screening Panel correctly stated that Long could be found to have violated Rule 5.3(a) if he failed to have in effect measures to make “reasonably certain” that his employee’s conduct complied with the Rules of Professional Conduct. However, the Screening Panel made no findings of fact, other than the unsupported and conclusory statement in ¶ 10 of its findings of fact, that Long failed to design and implement such measures. Moreover, there is no evidence in the record that suggests Long failed to adequately have in place measures designed to prevent unethical conduct by non-lawyer assistants. To the contrary, Long had a written agreement with Scheeler requiring his strict compliance with the Rules. Nelson Transcript, p.7. *See also People v. Smith*, 74 P.3d 566, 571 (Colo. 2003) (“The evidence presented, however, revealed that Smith did have measures in place to reasonably assure that . . . Ross would conduct herself in such a manner as was compatible with his professional responsibilities. Ross didn’t follow those measures. Since such measures were in place, the charged violation of Colo. RPC 5.3(a) is dismissed.”).

In the Nelson Exceptions Ruling, Mr. Maak makes the argument that Scheeler’s conduct, some of which may have violated the Rules, implies that Long’s effort to control Scheeler were not reasonable. Rule 5.3(a) requires that a managerial lawyer make “reasonable efforts” to ensure ethical conduct, not that the lawyer’s efforts be impenetrable. Evidence in the record shows that Long took action even before Scheeler was hired to ensure his compliance with the Rules of Professional conduct. Ultimately, Long and Scheeler’s employment relationship was terminated in part due to non-compliance with that agreement and the Rules of Professional Conduct. It is simply

contrary to the evidence in the record to conclude that Long failed to make reasonable efforts to ensure the ethical conduct of his employees.

D. Rule 5.5(a)

Rule 5.5(a) directs that a lawyer may not engage in, or assist another in engaging in, the unauthorized practice of law. Rule 14-802(b) of the Rules Professional Practice defines the “practice of law” as “the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances.” The rule specifically excludes from the practice of law “[r]epresenting a party in any mediation proceeding” and “[s]erving in a neutral capacity as a mediator, arbitrator or conciliator.” Rule of Professional Practice 14-802(c)(7), (9).

In the Screening Panel Memo, OPC suggests that Long violated Rule 5.5(a) if he assisted Scheeler in attempting to practice law “by drafting documents that only lawyer mediators may draft.” Nelson Screening Panel Memo, p.11. Once again, OPC offers a legal standard that misinterprets the Rules of Professional Conduct. To the extent that standard was adopted by the Screening Panel, any recommendation of discipline is improper.

The Screening Panel appears to conclude that only a lawyer may draft a document that formally memorializes an agreement reached in mediation. In fact, Rule 2.4(c) merely states that a lawyer-mediator *may* draft such a document. It does not state anywhere that *only* a lawyer may draft such a document. Rule of Professional Practice 14-802(c)(7) and (9) specifically allow a non-lawyer to represent a party in a mediation

and serve as a mediator. Likewise, a non-lawyer may draft documents under the supervision of a lawyer.

There is no evidence in the record that Long allowed or assisted Scheeler in holding himself out as a lawyer or engaging in the unauthorized practice of law. Long testified that on multiple occasions he specifically prohibited Scheeler from holding himself out as or acting like a lawyer. Nelson Transcript, pp.7-8, 10. The complainant in this case, Gordon Nelson, stated in his hand-written complaint: “Larry told my wife & David that Joe [Scheeler] did not have a license to practice law in any way.” *See* Nelson Record 0001. In addition, there is no evidence in the record and no notation in any docket for any hearing that Scheeler entered an appearance on behalf of Merritt, as the Screening Panel claims in ¶ 12 of its findings of fact. The record lacks, and the Screening Panel failed to cite, any evidence which would explain its conclusion that Long violated Rule 5.5(a). In arriving at its recommendation, the Screening Panel appears to have mistaken the range of tasks which may be performed by a non-lawyer.

E. Rule 8.4(a)

Rule 8.4(a) provides that “a lawyer may not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Because Long did not violate Rules 1.5(a), 3.1, 5.3(a), or 5.5(a), it is not necessary to invoke the disciplinary function of Rule 8.4(a). Accordingly, the charge that Long violated Rule 8.4(a) should be dismissed.

IV. The Recommended Discipline for Violating Rules 7.1 and 7.5(d) Should Be Reduced:

In both the Shepard and Henroid matters, the Screening Panel recommended finding violations of Rules 7.1 and 7.5(d) on the grounds that Long misrepresented his status as a solo practitioner by referring to his firm as Long & Associates or L. Long Lawyers. Long concedes that at all times relevant, he was the only lawyer employed by the firm L. Long Lawyer, Inc. As Long testified in the hearing for the Henroid matter, the firm has employed associate lawyers in the past. Long has endeavored to represent himself as L. Long Lawyer, Inc. (as opposed to L. Long Lawyers, Inc.) when he has been the only attorney employed by the firm, but has admittedly been inconsistent in doing so. Henroid R. 000609. In the factual record for each of the cases at issue, documents can be found using both the singular and plural name of the firm. *Compare* Henroid R. 000085 *with* 000526.

The violation of Rules 7.1 and 7.5(d) has been the result of Long's negligence, not any purposeful attempt to deceive or mislead clients. Testimony at the hearing affirms that it was never suggested to clients that multiple attorneys work at the firm, or that anyone other than Long was their lawyer. As noted by Rule 14-607(b)(2) of the Rules of Professional Practice, absence of a dishonest or selfish motive should be considered in determining appropriate discipline for a violation of the Rules of Professional Conduct. The Findings of Fact and Conclusions of law for each matter do not indicate if appropriate consideration was taken.

V. The Screening Panel's Disciplinary Recommendations Are Improper and Inconsistent:

A. The Appropriate Sanction Under the Circumstances Is an Admonition.

In the Shepard matter, Long received an Admonition for violations of Rules 1.5(a), 3.1, 7.1, 7.5(d), and 8.4(a). In the Nelson matter, Long received a Public Reprimand for violations of Rules 5.3(a), 5.5(a), and 8.4(a). In the Henroid matter, Long received a Public Reprimand for violations of Rules 1.5(a), 7.1, 7.5(d), and 8.4(a). According to Rule 14-605 of the Rules of Professional Practice:

(c) Reprimand. Reprimand is generally appropriate when a lawyer:

(c)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct **and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding;** or

(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonition. Admonition is generally appropriate when a lawyer:

(d)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct **and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding,** but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding;

Rules of Professional Practice 14-605 (emphasis added). In each of the matters at issue, there is no evidence in the record that any party was injured by any alleged violation or that any of the charged conduct involved dishonesty, fraud, deceit, or misrepresentation. Thus, under the guidelines in Rule of Professional Practice 14-605, only an admonition would be appropriate discipline absent aggravating circumstances. No aggravating circumstances are mentioned in any of the Findings of Fact, Conclusions of Law and Recommendation of Discipline in each of the matters at issue.

B. The Sanctions Imposed Are Inconsistent.

An aggregate examination of the cases against Long reveals issues with consistency in the administration of attorney discipline. The Rules of Professional Practice specifically state that the Rules are designed to promote “**consistency** in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.” Rules of Professional Practice 14-602(d)(3) (emphasis added). Despite contemporaneous review of four¹⁰ factually similar cases, the Screening Panel arrived at inconsistent, and often illogical, resolution of each case.

For example, three of the four cases against Long included allegations that Long violated Rule 1.5(a). Disposing of the three cases, the Screening Panel recommended—without any explanation or substantially different findings of fact or conclusions of law—a dismissal, an admonition, and a public reprimand. Case 07-0542, with the largest allegedly improper fee (\$31,000), was dismissed on condition. The Henroid matter, with much smaller allegedly improper fees (\$8,900 and \$10,000), resulted in a public reprimand. Finally, the Shepard Matter (\$6,600) resulted in an admonition.

Similarly, in three of the four cases against Long, the Screening Panel considered allegations that Long was using an improper and misleading firm name, violating Rules 7.1 and 7.5(d). In the Shepard matter, Long was admonished concerning these violations. In the Henroid matter, the Screening Panel recommended a public reprimand. In the Nelson matter, OPC recommended further investigation of the firm name issue in its

¹⁰ OPC File No. 07-0542 was dismissed on condition and is not challenged in this Petition.

Screening Panel Memo, but the Screening Panel apparently found insufficient evidence to warrant any discipline on this charge, and no violation was recommended.

As argued in Part I of this brief, it is difficult for Long to defend against the Screening Panel's unexplained recommendations without any knowledge of the facts relied upon and reasoning employed. In an attempt to dismiss the inconsistency of the Screening Panel's recommendation in the Henroid matter, Mr. Maak sustains Long's complaint regarding inadequate findings and conclusions. Mr. Maak defends the Screening Panel's recommendation stating that to do otherwise, "one must assume that the Panel accepted Long's version of the work he performed on each of these matters, *a fact that does not appear in the record and which is inconsistent with the Panel's findings.*" Henroid Exceptions Ruling, p.7 (emphasis added). As Mr. Maak acknowledges, the record and findings of the Screening Panel do not explain the apparently inconsistent result in the Henroid recommendation. One is left to guess at the factual basis and reasoning of the Screening Panel—a practice certainly not contemplated by Rule 14-510(b)(7) (requiring the Screening Panel to "state . . . the basis upon which the screening panel has concluded, by a preponderance of the evidence, that the respondent should be admonished or publicly reprimanded.").

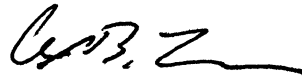
The Screening Panel neglected to adhere to the Court's instruction that a lawyer be given the opportunity to know the basis of the recommendation against him. *See* Rules of Professional Practice 14-510(c). The Panel likewise failed to promote consistent disciplinary sanctions for the same or similar offenses. *See* Rules of Professional Practice 14-602(d)(3).

CONCLUSION

In each of the three matters below, the rules promulgated by this Court regarding attorney disciplinary proceedings were not followed. As a result, an attorney was incorrectly subject to disciplinary action and denied due process of law. Based on the foregoing, each Order of Discipline should be vacated. Long should be admonished or issued a letter of caution regarding his inadvertent violations of Rules 7.1 and 7.5(d), and the Committee should be ordered to print a retraction in the Utah Bar Journal regarding sanctions imposed against Long.

DATED this 23 day of April, 2010.

VAN COTT BAGLEY CORNWALL & MCCARTHY



John A. Snow

Alex B. Leeman

Attorneys for Petitioner Larry N. Long

IN THE UTAH SUPREME COURT

LARRY N. LONG,

Petitioner,

vs.

ETHICS AND DISCIPLINE
COMMITTEE OF THE UTAH SUPREME
COURT,

Respondent.

Appellate Case No. 20091018-SC

ADDENDUM TO BRIEF OF PETITIONER

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

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

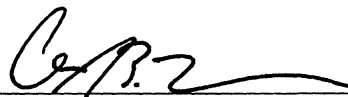
VAN COTT BAGLEY CORNWALL & MCCARTHY
John A. Snow (#3025)
Alex B. Leeman (#12578)
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
Tel: 801-532-3333
Fax: 801-534-0058
Email: jsnow@vancott.com,
aleeman@vancott.com
Attorneys for Petitioner Larry N. Long

Petitioner Larry N. Long, by and through counsel, submits this Addendum to Brief of Petitioner. The following documents are submitted herewith:

1. **Exhibit A:** Determinative Law
2. **Exhibit B:** OPC Matter No. 07-0497 (Shepard) Order of Discipline: Admonition
3. **Exhibit C:** OPC Matter No. 07-0497 (Shepard) Findings of Fact, Conclusions of Law, and Recommendation of Discipline: Admonition
4. **Exhibit D:** OPC Matter No. 07-0497 (Shepard) Ruling on Exception to Screening Panel Recommendation of Discipline.
5. **Exhibit E:** OPC Matter No. 08-0049 (Nelson) Order of Discipline: Public Reprimand
6. **Exhibit F:** OPC Matter 08-0049 (Nelson) Findings of Fact, Conclusions of Law, and Recommendation of Discipline: Public Reprimand
7. **Exhibit G:** OPC Matter 08-0049 (Nelson) Ruling on Exception to Screening Panel Recommendation of Discipline.
8. **Exhibit H:** OPC Matter No. 08-0080 (Henroid) Order of Discipline: Public Reprimand
9. **Exhibit I:** OPC Matter No. 08-0080 (Henroid) Findings of Fact, Conclusions of Law, and Recommendation of Discipline: Public Reprimand
10. **Exhibit J:** OPC Matter No. 08-0080 (Henroid) Ruling on Exception to Screening Panel Recommendation of Discipline.

DATED this 23 day of April, 2010.

VAN COTT BAGLEY CORNWALL & MCCARTHY



John A. Snow

Alex B. Leeman

Attorneys for Petitioner Larry N. Long

EXHIBIT A

DETERMINATIVE LAW

Rule of Professional Practice 14-510(b)(7):¹

(b)(7) Recommendation of admonition or public reprimand. A screening panel recommendation that the respondent should be disciplined under subsection (b)(6)(C) or (b)(6)(D) 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

¹ Prior to November 1, 2009, the proposition cited was numbered Rule of Professional Practice 14-510(b)(5), and read as follows:

(b)(5) *Screening panel determination.* Upon review of all the facts developed by the informal complaint, answer, investigation and hearing, the screening panel, in behalf of the Committee, shall make one of the following determinations:

...

(b)(5)(D) that the informal complaint be referred to the Committee chair with an accompanying screening panel recommendation that the respondent be admonished. Such 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. A copy of such screening panel recommendation shall be served upon the respondent prior to delivery of the recommendation to the Committee chair. The Committee chair shall enter an order admonishing the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent; or

(b)(5)(E) that the informal complaint be referred to the Committee chair with an accompanying screening panel recommendation that the respondent receive a public reprimand. Such 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 receive a public reprimand. A copy of such screening panel recommendation shall be served upon the respondent prior to delivery of the recommendation to the Committee chair. The Committee chair shall enter an order publically reprimanding the respondent if no exception has been filed within ten days of notice of the recommendation being provided to the respondent[.]

reprimanded. A copy of such screening panel recommendation shall be delivered to the Committee chair and a copy served upon the respondent.

Rule of Professional Practice 14-510(f)(5):

(f)(5) Respondent shall have the burden of demonstrating that the Committee action was:

(f)(5)(A) Based on a determination of fact that is not supported by substantial evidence when viewed in light of the whole record before the Court;

(f)(5)(B) An abuse of discretion;

(f)(5)(C) Arbitrary or capricious; or

(f)(5)(D) Contrary to Articles 5 and 6 of Chapter 14 of the Rules of Professional Practice of the Supreme Court.

Rule of Professional Practice 14-602(d):

(d) Purpose of these rules. These rules are designed for use in imposing a sanction or sanctions following a determination that a member of the legal profession has violated a provision of the Rules of Professional Conduct. Descriptions in these rules of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Rules of Professional Conduct. The rules constitute a system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote:

(d)(1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case;

(d)(2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and

(d)(3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

Rule of Professional Practice 14-605(d):

(c) Reprimand. Reprimand is generally appropriate when a lawyer:

(c)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonition. Admonition is generally appropriate when a lawyer:

(d)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding[.]

Rule of Professional Conduct 1.5(a):

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (a)(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- (a)(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (a)(3) the fee customarily charged in the locality for similar legal services;
- (a)(4) the amount involved and the results obtained;
- (a)(5) the time limitations imposed by the client or by the circumstances;
- (a)(6) the nature and length of the professional relationship with the client;
- (a)(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (a)(8) whether the fee is fixed or contingent.

Rule of Professional Conduct 3.1:

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, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in

incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule of Professional Conduct 5.3(a):

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer[.]

Rule of Professional Conduct 5.5(a):

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

Rule of Professional Conduct 7.1:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule of Professional Conduct 7.5(d):

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Rule of Professional Conduct 8.4(a):

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

EXHIBIT B

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the
Discipline of:

Larry N. Long #01989

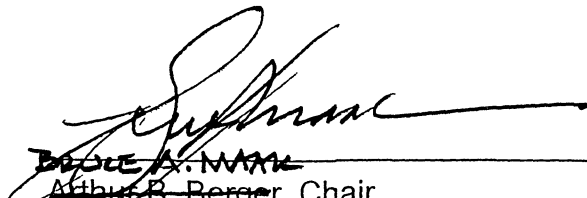
Respondent.

ORDER OF DISCIPLINE:
ADMONITION

Case No. 07-0497

This matter came on for a hearing on February 19, 2009, before Screening Panel "C-2" of the Ethics and Discipline Committee of the Utah Supreme Court. The Chair of the Ethics and Discipline Committee, having reviewed the Findings of Fact, Conclusions of Law, and the Recommendation of Discipline of the Screening Panel, and being fully advised in the premises, hereby orders that Larry N. Long be and is hereby, admonished for violating Rules 1.5(a) (Fees), Rule 3.1 (Meritorious Claims and Contentions) Rule 7.1 (Communications concerning a Lawyer's Services), Rule 7.5(d) (Firm Names and Letterheads) and 8.4(a) (Misconduct).

DATED this the 13 day of NOVEMBER, 2009.


~~DOUGLAS A. IVANKO~~
Arthur B. Berger, Chair
Ethics and Discipline Committee

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of November, 2009 I sent via United States first class mail, postage prepaid, a true and correct copy of the foregoing ORDER OF DISCIPLINE: ADMONITION to:

Larry N. Long
c/o John A. Snow
36 S. State Street, Ste. 1900
Salt Lake City, UT 84111

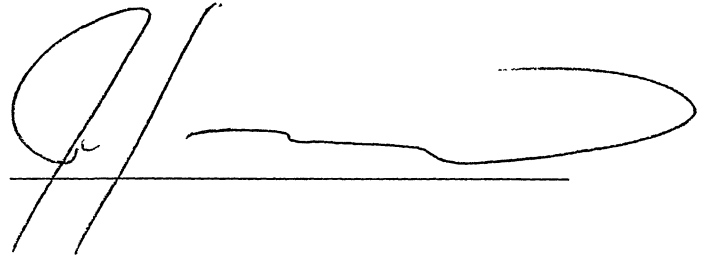
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EXHIBIT C

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the	:	FINDINGS OF FACT, CONCLUSIONS
Discipline of:	:	OF LAW, AND RECOMMENDATION
	:	OF DISCIPLINE: ADMONITION
Larry N. Long, #01989	:	
	:	Case No. 07-0497
Respondent.	:	
	:	

The matter of the complaint by Steven Shepard against Larry N. Long came on for hearing before Screening Panel "C-2" of the Ethics and Discipline Committee of the Utah Supreme Court on February 19, 2009. Mr. Long appeared in person with Charles Gruber as Counsel; Mr. Shepard appeared by phone; and Barbara L. Townsend, Assistant Counsel, appeared on behalf of the Utah State Bar's Office of Professional Conduct ("OPC").

The Screening Panel recommends that Mr. Long be admonished for violation of Rules 1.5(a) (Fees), Rule 3.1 (Meritorious Claims and Contentions), Rule 7.1 (Communications concerning a Lawyer's Services), Rule 7.5(d) (Firm Names and Letterheads) and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The facts upon which the Screening Panel has concluded, by a preponderance of the evidence, that Mr. Long should be admonished are as follows:

FINDINGS OF FACT

1. Mr. Shepard met with Mr. Long for a free consultation.
2. Mr. Long discussed his fees with Mr. Shepard and told him that his fee would be \$6,600.00, if Mr. Shepard chose to hire him.
3. Mr. Long appeared at one court hearing on an emergency basis.
4. Mr. Long met with Mr. Shepard afterwards and discussed his fee. Mr. Shepard paid \$100.00 for the appearance.
5. Mr. Shepard signed a retainer agreement but then decided and told Mr. Long he did not want his representation.
6. Mr. Shepard hired another attorney whose fee was less.
7. Even though he had not been retained, Mr. Long appeared at a driver's license hearing. Mr. Long left when he saw that Mr. Shepard had another attorney.
8. Mr. Long filed a collection lawsuit against Mr. Shepard for \$7,775.34.
9. Mr. Long charged an unreasonable fee for services rendered.
10. Mr. Long caused a debt collection to be filed for an amount more than what was owed.
11. Mr. Long used L. Long Lawyers and Long and Associates as firm names on his letterhead when he is the only attorney in his office.
12. L. Long Lawyers and Long and Associates represent to the public that there are other lawyers at Mr. Long's office.

CONCLUSIONS OF LAW

CONCLUSIONS OF LAW

(Rule 1.5(a) (Fees))

1. Rule 1.5(a). Fees. This rule states: "A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent." Mr. Long's fee of \$6,600 was unreasonable given that Mr. Shepard paid him for one hearing and then decided not to hire him. By charging Mr. Shepard an unreasonable fee for services rendered, Mr. Long violated this rule.

(Rule 3.1 (Meritorious Claims and Contentions))

2. Rule 3.1. Meritorious Claims and Contentions. This rule states: "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, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the

defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.” Mr. Long sued Mr. Shepard for \$7,775.34 when he knew that he had not earned this fee and by filing a debt collection case for an amount more than owed to him, Mr. Long violated this rule.

(Rule 7.1 (Communications concerning a Lawyer’s Services))

3. Rule 7.1. Communications concerning a Lawyer’s Services. This rule states: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading”. By using firm names of Long Lawyers and Long & Associates, Mr. Long misled the general public into believing that more than one lawyer worked at his office when in fact there was only one lawyer. By doing this , Mr. Long violated this rule.

(Rule 7.5(d) (Firm Names and Letterheads))

4. Rule 7.5(d). Firm Names and Letterheads. This rule states: “Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. Mr. Long violated this rule by stating that he practiced in a firm of lawyers when he did not.

(Rule 8.4(a) (Misconduct))

5. Rule 8.4(a). This rule states: "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." By violating the above described rules, Mr. Long violated this rule.

MITIGATING FACTORS


The Panel considered the following aggravating circumstances pursuant to Rule 14-607 of the Standards for Imposing Lawyer Sanctions:

1. Mr. Long did not actually collect the amount \$7,775 from his client but resolved the dispute with this client without charging additional fees for the work he had performed.

RECOMMENDATION OF DISCIPLINE

Based upon the foregoing, the Screening Panel recommends that Larry N. Long be admonished for violation of Rules 1.5(a) (Fees), Rule 3.1 (Meritorious Claims and Contentions), Rule 7.1 (Communications concerning a Lawyer's Services), Rule 7.5(d) (Firm Names and Letterheads) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

DATED this 21 day of MAY, 2007


Matt Evans, Chair
Screening Panel "C-2"

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of November, 200⁹, I sent via United States first class mail, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE: ADMONITION to:

Larry N. Long
c/o John A. Snow
36 S. State Street, Ste. 1900
Salt Lake City, UT 84111

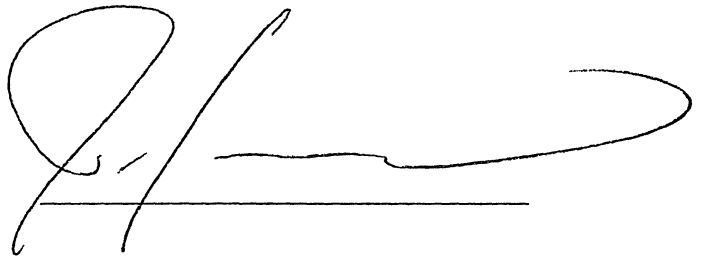
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EXHIBIT D

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

In the Matter of the Complaint of:)	
)	
Steven Shepard,)	RULING ON EXCEPTION TO
)	SCREENING PANEL
Complainant,)	RECOMMENDATION OF
)	DISCIPLINE
Against)	
)	
Larry N. Long,)	OPC File No. 07-0497
)	
Respondent.)	

This matter is before the Chair of the Ethics and Discipline Committee of the Utah Supreme Court pursuant to Rule 14-510(c) of the Utah Rules of Lawyer Discipline and Disability on Respondent's Exception to a Screening Panel recommendation that Respondent receive an admonition.

STANDARD FOR DECIDING RESPONDENT'S EXCEPTION

As to Exceptions, Rule 14-510(c) of the Utah Rules of Lawyer Discipline and Disability states that "[t]he respondent shall have the burden of proof of showing that the recommendation is unreasonable, unsupported by substantial evidence, arbitrary, capricious and otherwise clearly erroneous."

PRIOR PROCEEDINGS

The Screening Panel Proceeding. The Screening Panel hearing occurred on February 19, 2009 before Screening Panel C-2. The Screening Panel determined that Mr. Long violated Rule 1.5(a) through charging an unreasonable fee for services rendered and that he violated Rule

3.1 by causing to be filed a debt collection action for amounts in excess than those that were owed to him. The Panel also found that Mr. Long violated Rules 7.1 and 7.5(d) by placing on his letterhead “L. Long Lawyers” or “Long & Associates,” which led the public to believe that more than one lawyer was affiliated with the firm when in fact there was only one lawyer -- Mr. Long. The Panel recommended that the Respondent be admonished for these violations.

The Exception. OPC supplied Mr. Long with proposed Findings of Fact, Conclusions of Law and a Recommendation of Discipline and a proposed Order of Discipline by letter dated June 15, 2009. Long, through Charles A. Gruber as his counsel, filed an Exception on July 1, 2009. Thereafter, Mr. Gruber indicated his intention to call the Complainant at the Exception Hearing and to cross-examine him. Mr. Gruber withdrew as Mr. Long’s counsel by Notice of Withdrawal dated September 22, 2009. John A. Snow of the Van Cott firm entered his appearance as counsel for Mr. Long and (i) withdrew Mr. Gruber’s request to cross-examine the Complainant, indicated that Mr. Long would not rely upon the documents Mr. Gruber filed with respect to the Exception (other than procedurally to perfect the Exception), and on October 22, 2009 filed Exceptions to Screening Panel’s Findings of Fact, Conclusions of Law and Recommendation.

The Exception Hearing. The hearing of the Exception occurred on October 28, 2009 between 12:30 p.m. and 2:30 p.m. Present at the hearing were the undersigned Chair, Barbara L. Townsend, Assistant Counsel to OPC, Respondent Larry N. Long, John A. Snow, and Alex B. Leeman. Complainant was not present at the hearing. Respondent offered argument concerning the Exception and OPC counsel also made statements during the Exception hearing.

ANALYSIS OF EXCEPTION

The Screening Panel decision sheet and the Findings of Fact, Conclusions of Law and

Recommendation of Discipline find 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 that were due for services.
- (3) Rules 7.1 and 7.5(d) by communicating, issuing a communication, or using a firm name or letterhead implying that Mr. Long's firm employed more than one attorney when it did not.

Each of the foregoing three items will be addressed separately.

1. **Unreasonable Fee.** The Screening Panel found that Mr. Long charged an unreasonable fee. The Exception briefing and argument assert that there was not substantial evidence in the record to justify the finding that Long charged an unreasonable fee, that the only testimony concerning that issue was Long's testimony that the fees in question were reasonable, and that the Screening Panel's Findings of Fact failed adequately to articulate the facts upon which the Panel based its decision. The evidence before the Screening Panel included evidence that Long and Shepard agreed to Shepard's payment of \$100.00 to compensate Long for an initial consultation and attending the first hearing. The flat fee agreement for legal services between Shepard and Long dated October 24, 2006 provided for a fee of \$6,600.00 for Long's representation of Shepard up to and including the pretrial conference or preliminary hearing and subsequent sentencing upon entry of a plea. The record contains evidence that within two days after signing the fee agreement (and before Long had performed services beyond those for which he was compensated by the \$100.00), Shepard advised Long that he had hired another attorney

and did not wish to proceed with Mr. Long as his counsel. Thereafter, a collection service, Express Recovery Services, Inc., initiated an action against Shepard on or about April 16, 2007 (long after Shepard testified that he informed Long that he did not wish to utilize his services) to recover the full amount of \$6,600.00 under the fee agreement plus interest and attorney's fees. Long's counsel at the Screening Panel hearing indicated that Long rendered services valued at only \$1,500.00. Shepard indicated that his total contact with Long regarding the case lasted approximately 45 minutes. Ultimately, Long caused the collection service's lawsuit against Shepard to be dismissed with Shepard paying nothing.

The Screening Panel accepted Shepard's version of things, and Long has not carried his burden on this point to show that this recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, and otherwise clearly erroneous.¹

2. **Pursuing Unmeritorious Claim.** The Panel found that Long violated Rule 3.1 by causing to be filed a debt collection action for amounts in excess of those to which he had an entitlement. Long argues that because the fee agreement prescribed that the fee agreed upon by the parties is considered earned once Long performed substantial legal services, and because it provided that no portion of the fee was refundable once substantial services had been performed, Long earned the \$6,600.00 and causing a debt collection firm to pursue the entire matter was not, therefore, the pursuit of a frivolous claim. First, as indicated under the preceding section, there was evidence in the record that Long was fully compensated for the services he performed

¹Although the Findings of Fact do not enumerate the facts upon which the Panel's decision was based in evidentiary detail, they do make the requisite finding, albeit in somewhat conclusory form, that Long charged an unreasonable fee. Since the transaction with respect to which the fee was charged and the fee in question are self-evident (as there was only one engagement), the Panel's Findings were sufficient to support its conclusions.

through a payment of \$100.00 and that he performed no services thereafter pursuant to the fee agreement. Concededly, fixed-price fee agreements are permissible under the Code of Professional Responsibility, but any fee that is charged must still fulfill the requirements of Rule 1.5(a), which requires that the fee be reasonable in light of the factors set forth there. Here, upon evidence that the Panel believed or could have believed, Mr. Long did not render any services beyond those for which he was compensated through the initial \$100.00 payment. There was, therefore, substantial evidence that Long's charging \$6,600.00 (plus interest and attorney's fees) was charging or attempting to collect an unreasonable fee. Long next argues that Long, himself, did not file the collection action against Shepard, but rather assigned his rights under the fee agreement to Express Recovery Services, which itself filed suit. Based upon the evidence outlined above, the Panel concluded that Long referred for collection to Express Recovery Services an account receivable of \$6,600.00 arising under a fee agreement with respect to which he was in fact owed nothing and had performed no services. The evidence does establish that Express Recovery Services, not Long, was the party to the collection action. Rule 3.1 provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein," without a basis in law or fact that is not frivolous. Mr. Long, as an attorney, knows or should know that when an account receivable is assigned for collection, the collection agency will file an action to recover upon it. Thus, when Long referred the fee agreement for collection, he knew or should have known that an action would be filed against Shepard based upon it. Long, as an attorney, also should have known that to recover in the collection agency's action, evidence would be required that compensable services were rendered under the fee agreement. Thus, Long knew or should have known that by virtue of his assigning the Shepard account for collection, the agency would "bring . . . a proceeding" and "assert . . . an issue" [i.e., that

compensable legal services had been rendered]. Through assigning the account for collection, Long in substance brought a proceeding and asserted therein that he had rendered compensable services under the fee agreement, and there exists substantial evidence that this was not so.

Respondent Long has not carried his burden on this point to show that the Screening Panel's recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, and otherwise clearly erroneous.

3. **Rules 7.1 and 7.5(d) Concerning Letterhead.** The Screening Panel found that Mr. Long violated these Rules by including on his letterhead the name "L. Long Lawyers" and "Long & Associates" when there was not more than one attorney in the firm. Mr. Long's Exception acknowledges committing a violation of these Rules. Although admitting that he violated the Rules, he indicates that from time to time the firm has employed other lawyers. Since Long concedes the violation, further discussion is unnecessary. At the Exception hearing, Long's attorney argued that Long was in effect being punished twice for the same violation in two cases -- this case and in OPC No. 08-0080, with respect to which this violation was also found. A review of both files indicates that the communications that are the subject of the two cases are not the same -- Long communicated with respect to the Shepard matter on inappropriate letterhead with various parties and with completely different parties in case number 08-0080. In addition, the time frames are different. With respect to this case, Mr. Long's communications occurred in approximately the time frame of October, 2006 [see, for example, R. 31, 32], whereas in OPC No. 08-0080, the use of the inappropriate letterhead was in the April, 2007 time frame [R. 131 in that file] as well as April 28, 2008 [R. 61 in that file]. It appears that Long's use of inappropriate letterhead was utilized with different people in different time frames and therefore constitute separate violations. Concededly, they are separate violations of the same

sort, but the issue in this case is whether the Screening Panel's decision should be sustained. Respondent has not carried his burden on this point to show that its recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, and otherwise clearly erroneous.

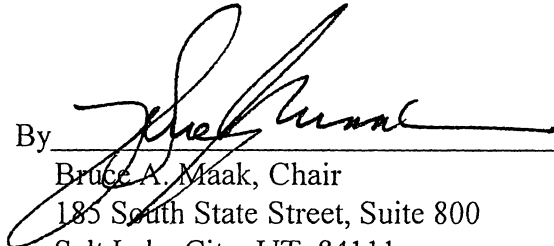
RULING

Respondent has failed to carry his burden to establish under Rule 14-510(c) that the Screening Panel's recommendation of an admonishment should be overturned. Respondent's Exception is therefore denied.

DATED this 6 day of November, 2009.

ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

By



Bruce A. Maak, Chair
185 South State Street, Suite 800
Salt Lake City, UT 84111

EXHIBIT E

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the
Discipline of:

Larry N. Long, #01989

Respondent.

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ORDER OF DISCIPLINE:
PUBLIC REPRIMAND

Case No. 08-0049

This matter came on for hearing on February 19, 2009 before Screening Panel "C-2" of the Ethics and Discipline Committee of the Utah Supreme Court. The Chair of the Ethics and Discipline Committee, having reviewed the Findings of Fact, Conclusions of Law, and the Recommendation of Discipline of the Screening Panel, and being fully advised in the premises, hereby orders that Larry N. Long be and is hereby, PUBLICLY REPRIMANDED for violating Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct.

DATED this the 13 day of NOVEMBER, 2009.


Arthur B. Berger
Arthur B. Berger, Chair
Ethics and Discipline Committee

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of November, 2009 I sent via United States first class mail, postage prepaid, a true and correct copy of the foregoing ORDER OF DISCIPLINE: PUBLIC REPRIMAND to:

Larry N. Long
c/o John A. Snow
36 S. State Street, Ste. 1900
Salt Lake City, UT 84111

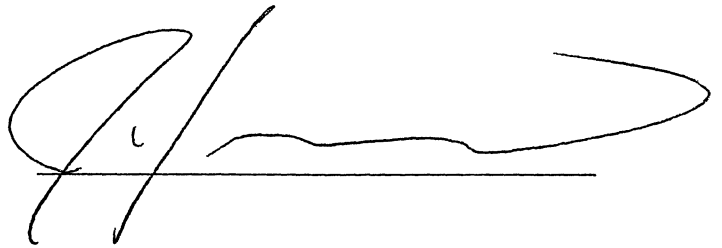
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EXHIBIT F

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the
Discipline of:

Larry N. Long, #01989

Respondent.

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDATION
OF DISCIPLINE: PUBLIC REPRIMAND

Case No. 08-0049

The matter of the complaint by Gordon Nelson against Larry N. Long came on for hearing before Screening Panel “C-2” of the Ethics and Discipline Committee of the Utah Supreme Court on February 19, 2009. Mr. Nelson did not appear, Mr. Long appeared in person with Charles Gruber as counsel; and Barbara L. Townsend, Assistant Counsel, appeared on behalf of the Utah State Bar’s Office of Professional Conduct (“OPC”). The Screening Panel recommends that Mr. Long be publicly reprimanded for violating Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The facts upon which the Screening Panel has concluded the record establishes probable cause of misconduct and, by a preponderance of the evidence, that Mr. Long should be publicly reprimanded are as follows:

FINDINGS OF FACT

1. Mr. Long was hired by Mr. Nelson to represent David Merritt on a violation of a Protective Order.

2. Mr. Nelson originally met with Joe Scheeler, a non lawyer working for Mr. Long, on April 18, 2007. Mr. Nelson paid a \$750.00 retainer fee to Mr. Scheeler for Mr. Long to represent Mr. Merritt.

3. After Mr. Long failed to appear at a court hearing for Mr. Merritt, Mr. Nelson called Mr. Long to inquire about his failure to appear and spoke to Mr. Scheeler.

4. After Mr. Long failed to appear at the next hearing scheduled for Mr. Merritt, Mr. Nelson called to speak with Mr. Long and again only spoke with Mr. Scheeler.

5. At one point, Mr. Scheeler planned to serve as a mediator for the parties in this dispute, while Mr. Long represented Mr. Merritt and while he was employed by Mr. Long.

6. Mr. Scheeler prepared a mediation settlement document and sent it to opposing counsel for signature.

7. Mr. Nelson was led to believe that Mr. Scheeler was an attorney.

8. At Mr. Merritt's second court hearing, Mr. Scheeler appeared to "represent David" and tried to negotiate with the opposing party.

9. Mr. Nelson only had contact with Mr. Scheeler and had the representation agreement explained by Mr. Scheeler.

10. Mr. Long failed to effect measures to make reasonably certain that Mr. Scheeler as his employee complied with the Rules of Professional Conduct.

11. Mr. Long failed to adequately supervise Joe Scheeler's activities to insure Mr. Scheeler was not engaging in the Unauthorized Practice of Law.

12. Mr. Long allowed Mr. Scheeler to appear in court, contact opposing party and conduct mediation proceedings at Mr. Long's office.

13. Mr. Scheeler drafted a settlement agreement that Mr. Long ratified.

CONCLUSIONS OF LAW

(Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants))

1. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) states that "With respect to a nonlawyer employed or retained by or associated with a lawyer": (a) "a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer. By failing to effect measures to make reasonably certain that Mr. Long's employees complied with the Rules of Professional Conduct Mr. Long violated this rule.

(Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law))

2. Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) states that "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." By

failing to adequately supervise Mr. Scheeler's activities to insure that Mr. Scheeler was not engaging in the Unauthorized Practice of Law and by allowing Mr. Scheeler to hold himself out as a lawyer, Mr. Long violated this rule.

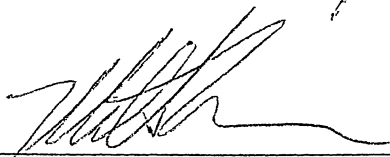
(Rule 8.4(a) (Misconduct))

3. Rule 8.4(a) (Misconduct) This rule states: "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." By violating the rules described above Mr. Long violated this rule.

RECOMMENDATION OF DISCIPLINE

Based upon the foregoing, the Screening Panel recommends that Larry N. Long be publicly reprimanded for violation of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and Rule 8.4(a) (Misconduct) of the Rules of Professional Conduct.

DATED this 2 day of July, 2009.



Matt Evans, Chair
Screening Panel "C-2"

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of November, 200⁹, I sent via United States first class mail, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE: PUBLIC REPRIMAND to:

Larry N. Long
c/o John A. Snow
36 S. State Street, Ste. 1900
Salt Lake City, UT 84111

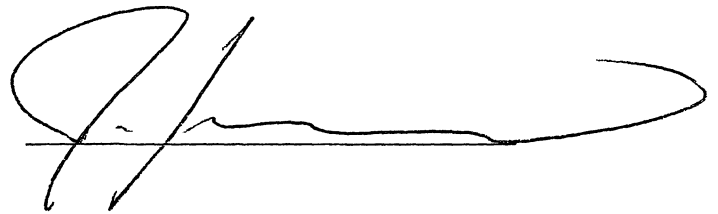
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EXHIBIT G

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the Complaint of:)	
)	
Gordon L. Nelson,)	RULING ON EXCEPTION TO
)	SCREENING PANEL
Complainant,)	RECOMMENDATION OF
)	DISCIPLINE
Against)	
)	
Larry N. Long,)	OPC File No. 08-0049
)	
Respondent.)	

This matter is before the Chair of the Ethics and Discipline Committee of the Utah Supreme Court pursuant to Rule 14-510(c) of the Utah Rules of Lawyer Discipline and Disability on Respondent's Exception to a Screening Panel recommendation that Respondent receive a public reprimand.

STANDARD FOR DECIDING RESPONDENT'S EXCEPTION

As to Exceptions, Rule 14-510(c) of the Utah Rules of Lawyer Discipline and Disability states that "[t]he respondent shall have the burden of proof of showing that the recommendation is unreasonable, unsupported by substantial evidence, arbitrary, capricious and otherwise clearly erroneous."

PRIOR PROCEEDINGS

The Screening Panel Proceeding. The Screening Panel hearing occurred on February 19, 2009 before Screening Panel C-2. The Screening Panel determined that Mr. Long violated Rule 5.3 through failing to make reasonable efforts to assure that the conduct of his non-lawyer

employee, Joe Scheeler (“Scheeler”), was compatible with Mr. Long’s professional obligations and that Mr. Long violated Rule 5.5 by failing adequately to supervise Mr. Scheeler to ensure that Mr. Scheeler was not engaged in the unauthorized practice of law and to ensure that Mr. Scheeler was not holding himself out as a lawyer. The Panel recommended that Mr. Long be publicly reprimanded for these violations.

The Exception. OPC supplied Mr. Long with proposed Findings of Fact, Conclusions of Law and a Recommendation of Discipline and a proposed Order of Discipline by letter dated July 7, 2009. Long, through Charles A. Gruber as his counsel, filed an Exception on July 23, 2009. Thereafter, Mr. Gruber indicated his intention to call the Complainant at the Exception Hearing and to cross-examine him. Mr. Gruber withdrew as Mr. Long’s counsel by Notice of Withdrawal dated September 22, 2009. John A. Snow of the Van Cott firm entered his appearance as counsel for Mr. Long and (i) withdrew Mr. Gruber’s request to cross-examine the Complainant, (ii) indicated that Mr. Long would not rely upon the documents Mr. Gruber filed with respect to the Exception (other than procedurally to perfect the Exception), and (iii) on October 22, 2009 filed Exceptions to Screening Panel’s Findings of Fact, Conclusions of Law and Recommendation.

The Exception Hearing. The hearing of the Exception occurred on October 28, 2009 between 12:30 p.m. and 2:30 p.m. Present at the hearing were the undersigned Chair, Barbara L. Townsend, Assistant Counsel to OPC, Respondent Larry N. Long, and his counsel, John A. Snow and Alex B. Leeman. Complainant was not present at the hearing. Respondent offered argument concerning the Exception and OPC counsel also made statements during the Exception hearing.

ANALYSIS OF EXCEPTION

The Screening Panel found that Long violated two specific ethical Rules: First, the Panel

found that Long violated Rule 5.3 by failing to make reasonable efforts to ensure that there were in effect measures reasonably assuring that the conduct of his assistant/office manager, Scheeler, would be compatible with Long's legal obligations. Second, the Panel found that Long violated Rule 5.5(a) by failing adequately to supervise Scheeler to ensure that he was not engaging in any unauthorized practice of law and by allowing Scheeler to hold himself out as a lawyer. Because the two are closely factually connected, they will be addressed together.

There is evidence in the record that Long employed Scheeler as his office manager for some nine months. Included in Scheeler's responsibilities were interviewing clients and doing paralegal work. In addition, Scheeler made himself available through Long's office to do mediations. Long had a website which, under the heading "BAD ASS DEFENDERS" identified Long as attorney, Scheeler as the "legal mediator," and Jim Kirkman as the "client manager." As concerns the Complainant's interaction with Long's law office, the Complainant, Gordon Nelson ("Nelson"), stated that he hired Scheeler to represent his friend David Merritt, who was incarcerated. Nelson testified that he contacted Long's office and spoke to Scheeler, who negotiated with him the retainer amount, which Nelson paid to Scheeler. Nelson understood that Scheeler was to appear at a hearing to attempt to get Merritt out of jail. No one from Long's office took action or appeared at the scheduled hearing. Nelson again spoke with Scheeler at Long's office, and Scheeler indicated that another \$1,100.00 was required, which Nelson then paid. Scheeler advised Nelson that he would handle the matter himself "as a mediator" between Mr. Merritt and his accuser and would arrange to get Merritt out of jail. Scheeler appeared at a Court hearing with Merritt and, on that occasion, communicated with Merritt's accuser, Debbie Smith ("Smith"). In his dealings with Scheeler, Nelson believed that Scheeler was an attorney. Scheeler is not a member of the Utah State Bar. Long later himself appeared at a Court hearing

and advised Nelson that he would take the case for \$3,000.00. Scheeler later conducted a “mediation” between Merritt and Smith and drafted a “Settlement Agreement” between Merritt and Smith.

The dates of some of the occurrences are pertinent. Long’s office 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 David Merritt. Long’s receipt of that letter in that time frame suggests his knowledge of his own office’s representation of Merritt very shortly after Scheeler collected the first two fee installments from Nelson. Based upon Nelson’s payments to Long’s office, it appears that Scheeler had his initial contacts with Nelson in the mid to late April, 2007 time frame [R. 225-226]. The Settlement Agreement was prepared by Scheeler and grew out of a mediation which occurred on June 1, 2007. After the mediation, Long wrote a letter on June 11, 2007 to Michael Nielsen, the prosecutor on the Merritt case, in which 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**.” [R. 141] Long’s fee agreement [R. 31-32] is dated May 23, 2007 -- after Scheeler took the original two payments and after Orifici’s letter to Long. This chronological sequence provides evidence that, first, Long knew that Orifici believed Long’s office was representing Merritt before Long, himself, claims to have entered into a fee agreement and undertaken the representation -- thereby suggesting that Long knew that there was some contact between his office (through Scheeler) and Merritt before he, Long, actually entered into a fee agreement relating to the Merritt representation. Second, it establishes that Long was aware of the “mediation” and efforts to agree on a settlement and division of property, which was apparently set forth in the Settlement Agreement that was prepared by Scheeler. Who did Long

think was doing all of this for Merritt? Negotiating a division of property for Merritt after the “mediation” constitutes the practice of law. It defies common sense that Long’s office, through Scheeler, could conduct a mediation aimed at a division of property and a resolution of issues and negotiate about a division of property but that Long would be completely ignorant that Scheeler had conducted such negotiations or prepared a Settlement Agreement relating to that mediation. Long’s letter suggests that he was aware that there was some agreement or negotiation of an agreement relating to the matter. If there were negotiations or an agreement, who did Long think was doing these things? He knew that he, the only lawyer in his office, was not doing these things. There is substantial evidence to indicate that Long was aware that Scheeler negotiated a property division and/or prepared the Settlement Agreement at least as of June, 2007, but Scheeler remained employed by Long’s office until November, 2007. Long claims that his employment agreement with Scheeler precluded Scheeler’s acting as an attorney. Indeed, that is the thrust of Long’s defense. But here there is substantial evidence that Long knew of Scheeler’s departure from such a restriction, yet Scheeler continued to be employed by Long until November, when Scheeler terminated the relationship. Long, while stating that he did not participate in the mediation, embraced and sought to take advantage of Scheeler’s mediation resolution, when Long knew that the other party (Smith) was represented and Long, himself, knew that he had not appeared at the mediation to represent his client, negotiated a property division, or prepared any agreement growing out of the mediation.

Long’s Exception asserts that there is not substantial evidence to justify the Panel’s Recommendation. As outlined above, there is substantial evidence to establish both that Scheeler was acting as a lawyer and that Long was aware that he was acting as a lawyer and, indeed, sought to take advantage of Scheeler’s improper actions through communications with

the prosecutor in the case in which he was defending Merritt. In addition to what is outlined above, the very fact that Scheeler could have acted as he did with Nelson and Merritt suggests a lack of appropriate supervision. Scheeler's participation in the mediation and Settlement Agreement, of which there is substantial evidence suggesting that Long was at least at some time aware, and the fact that Long sought to capitalize upon these efforts in his representation of Merritt suggests an approval or ratification of behavior prohibited by the Code of Professional Responsibility. The misleading website is the website of Long & Associates -- Long's law office. A reasonable inference that material appeared on Long's own website for an extended time is that he knew about it and did nothing timely to change it.

The Exception next asserts that the Findings of Fact are insufficient to justify the Conclusions of Law. The Findings of Fact here enumerate instances on which Scheeler functioned as an attorney, that Long was led to believe Scheeler was functioning as an attorney, and matters bearing upon Mr. Long's failure to prevent these behaviors or to adequately supervise Scheeler's activities. The Findings of Fact, although not entirely in evidentiary detail, are sufficient to support the Conclusions of Law.

The Exception also argues that there is no evidence that Long failed properly to supervise Scheeler and that the only evidence on that point is that it came from Long, who stated that he did make reasonable efforts to supervise Scheeler's conduct, including requiring Scheeler to sign an agreement in which Scheeler agreed not to practice law. Rule 5.3(a) requires that Long have in effect measures making "reasonably certain" that Scheeler's conduct complied with the Rules of Professional Conduct. Concededly, Long's written agreement with Scheeler is evidence that he made some effort in that regard. This, however, is not a de novo review. On the other side of the coin are the facts and chronology set forth above, which constitute substantial evidence that

Long was aware of Scheeler's inappropriate conduct and failed both (i) to take measures to make "reasonably certain" that Scheeler would not act in that way and (ii) after learning that Scheeler was in fact acting inappropriately, to make "reasonably certain" that it would not happen again.

The Exception further argues that the mere fact that Scheeler conducted a mediation is not evidence that Scheeler acted inappropriately. Long correctly notes that non-lawyers may properly conduct mediations. Here, there is evidence that goes far beyond the mere conduct of a mediation. First, Long knew that Scheeler was associated with his office and had interacted in that capacity with a representative of the client in engaging Long's office as counsel. Scheeler then purported to act as a mediator between the Long firm's client and his opponent -- plainly an inappropriate act for a representative of Long's office given that Long represented one of the parties to the mediation. Someone (presumably Scheeler) negotiated a property division for Merritt with Smith or her counsel. Next, Scheeler prepared a Settlement Agreement, which he supplied to opposing counsel, which was conceded by Long at the Exception hearing to constitute the practice of law. Finally, Long became aware that the mediation had occurred without his participation and that the mediation had been handled by Scheeler at his office. He also knew at this time that the opposing party had been represented by counsel. Who was representing Long's client at the mediation? Why was Long not involved in the mediation as Merritt's counsel and why did Long not participate in the negotiations relating to the division of property? There is substantial evidence that, at the very least at this point in time, Long had knowledge that Scheeler was acting in violation of the Rules of Professional Conduct but he then communicated with the prosecutor that the mediation and settlement had occurred or were in process and were factors favoring Merritt's position, vis-a-vis the prosecution.

Long's Exception finally argues that the Screening Panel's recommendation of a public

reprimand is inappropriate because of the lack of injury component set forth in Rule 14-605 of the Rules of Lawyer Discipline and Disability. There is evidence in the record to support the presence of such injury. Some, but by no means all, evidence of such injury is as follows:

(i) After Nelson engaged Scheeler to represent Merritt, Long did not appear at a hearing and Merritt remained in jail.

(ii) According to Nelson, he paid Long's office significant amounts for fees through Scheeler, but Long performed insubstantial services.

(iii) Long's client, Merritt, participated in a mediation proceeding handled by Scheeler at which Merritt was unrepresented.

(iv) Long's client, Merritt, was unrepresented in the negotiations relating to the property division and/or the Settlement Agreement.

The injury to the legal system is self-evident when a person integrally connected with a law office representing one party conducts a mediation between that office's client and the party adverse to that client, but the law office's client is unrepresented at the mediation. Finally, there exists injury to the legal system when a person holds himself out as qualified to practice law without the requisite training and membership in the Bar.

Long has not carried his burden of showing that the Screening Panel's recommendation is unreasonable, unsupported by substantial evidence, arbitrary, capricious, and otherwise clearly erroneous.

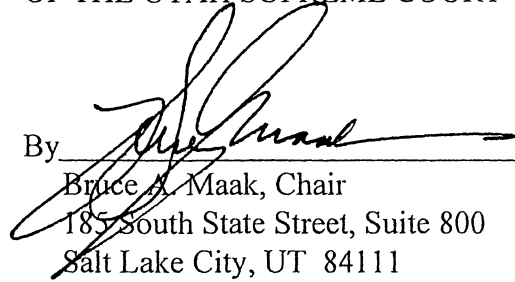
RULING

Respondent has failed to carry his burden to establish under Rule 14-510(c) that the Screening Panel's recommendation of a public reprimand should be overturned. Respondent's Exception is therefore denied.

DATED this 6 day of November, 2009.

ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

By



Bruce A. Maak, Chair
185 South State Street, Suite 800
Salt Lake City, UT 84111

EXHIBIT H

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the
Discipline of:

Larry N. Long, #01989

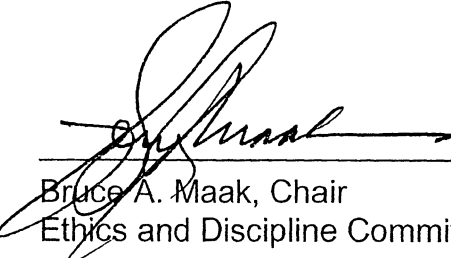
Respondent.

ORDER OF DISCIPLINE:
PUBLIC REPRIMAND

Case No. 08-0080

This matter came on for hearing on February 19, 2009, before Screening Panel "C-2" of the Ethics and Discipline Committee of the Utah Supreme Court. The Chair of the Ethics and Discipline Committee, having reviewed the Findings of Fact, Conclusions of Law, and the Recommendation of Discipline of the Screening Panel, and being fully advised in the premises, hereby orders that Larry N. Long be and is hereby, PUBLICLY REPRIMANDED for violating Rules 1.5(a) (Fees), 7.1 (Communications Concerning a Lawyer's Services), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

DATED this the 24 day of NOVEMBER, 2009.



Bruce A. Maak, Chair
Ethics and Discipline Committee

CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of December, 2009 I sent via United States first class mail, postage prepaid, a true and correct copy of the foregoing ORDER OF DISCIPLINE: PUBLIC REPRIMAND to:

Larry N. Long
c/o John A. Snow
VanCott Bagley Cornwall & McCarthy
36 S. State St. 19th Floor
Salt Lake City, UT 84111

Respondent

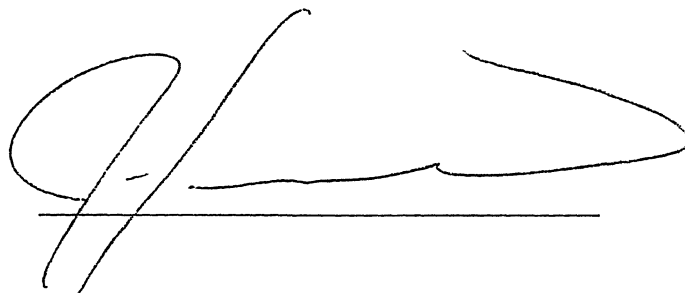
A handwritten signature in black ink, appearing to be "L. Long", written over a horizontal line.

EXHIBIT I

BEFORE THE ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

In the Matter of the	:	FINDINGS OF FACT, CONCLUSIONS
Discipline of:	:	OF LAW, AND RECOMMENDATION
	:	OF DISCIPLINE: PUBLIC REPRIMAND
Larry N. Long, # 1989	:	
	:	Case No. 08-0080
Respondent.	:	
	:	

The matter of the complaint by OPC against Larry N. Long came on for hearing before Screening Panel "C-2" of the Ethics and Discipline Committee of the Utah Supreme Court on February 19, 2009. Mr. Long appeared in person with counsel, Charles Gruber, and Barbara L. Townsend, Assistant Counsel, appeared on behalf of the Utah State Bar's Office of Professional Conduct ("OPC"). The Screening Panel recommends that Mr. Long be publicly reprimanded for violating Rules 1.5(a) (Fees), 7.1 (Communications Concerning a Lawyer's Services), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

The facts upon which the Screening Panel has concluded the record establishes probable cause of misconduct and, by a preponderance of the evidence, that Mr. Long should be publicly reprimanded are as follows:

FINDINGS OF FACT

1. Mr. Long charged excessive fees for the work he completed in the Vantreese matter and the Perez Hernandez matter.
2. At all times relevant to the conduct at issue, Mr. Long was the only lawyer in his office.
3. Mr. Long presented himself to the public using the names L. Long Lawyers and Long & Associates.
4. The use of these firm names led the public to conclude that there were other lawyers in Mr. Long's office.

CONCLUSIONS OF LAW

(Rule 1.5(a) (Fees))

1. Rule 1.5(a) (Fees). This rule states: "A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation and ability of the lawyer or lawyers performing the

services; and 8) whether the fee is fixed or contingent.” By charging excessive fees for work he performed in two cases, Mr. Long violated Rule 1.5(a) (Fees).

(Rule 7.1 (Communications Concerning a Lawyer’s Services))

2. Rule 7.1 (Communications Concerning a Lawyer’s Services). Under this rule, “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” By using the names L. Long Lawyers and Long & Associates, Mr. Long misled the public and thereby violated Rule 7.1 (Communications Concerning a Lawyer’s Services).

(Rule 7.5(d) (Firm Names and Letterheads))

3. Rule 7.1 (Communications Concerning a Lawyer’s Services). Under this rule, “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” By using the names L. Long Lawyers and Long & Associates, Mr. Long’s communications regarding his services were misleading and he violated Rule 7.5(d) (Firm Names and Letterheads).

(Rule 8.4(a) (Misconduct))

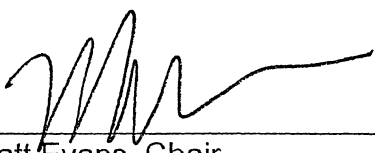
4. Rule 8.4(a) (Misconduct). This rule states: “It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly

assist or induce another to do so, or do so through the acts of another." By violating the aforementioned Rules of Professional Conduct, Mr. Long violated Rule 8.4(a) (Misconduct).

RECOMMENDATION OF DISCIPLINE

Based upon the foregoing, the Screening Panel recommends that Larry N. Long be publicly reprimanded for violation of Rules 1.5(a) (Fees), 7.1 (Communications Concerning a Lawyer's Services), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

DATED this 12 day of June, 2009.



Matt Evans, Chair
Screening Panel "C-2"

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of December, 2009, I sent via United States first class mail, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE: PUBLIC REPRIMAND to:

Larry N. Long
c/o John A. Snow
VanCott Bagley Cornwall & McCarthy
36 S. State St. 19th Floor
Salt Lake City, UT 84111

Attorney for Respondent

A handwritten signature in black ink, appearing to be "L. Long", written over a horizontal line.

EXHIBIT J

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

In the Matter of the Complaint of:)	
)	
Office of Professional Conduct,)	RULING ON EXCEPTION TO
)	SCREENING PANEL
Complainant,)	RECOMMENDATION OF
)	DISCIPLINE
Against)	
)	
Larry N. Long,)	OPC File No. 08-0080
)	
Respondent.)	

This matter is before the Chair of the Ethics and Discipline Committee of the Utah Supreme Court pursuant to Rule 14-510(c) of the Utah Rules of Lawyer Discipline and Disability on Respondent's Exception to a Screening Panel recommendation that Respondent receive a public reprimand.

STANDARD FOR DECIDING RESPONDENT'S EXCEPTION

As to Exceptions, Rule 14-510(c) of the Utah Rules of Lawyer Discipline and Disability states that "[t]he respondent shall have the burden of proof of showing that the recommendation is unreasonable, unsupported by substantial evidence, arbitrary, capricious and otherwise clearly erroneous."

PRIOR PROCEEDINGS

The Screening Panel Proceeding. The Screening Panel hearing occurred on February 19, 2009 before Screening Panel C-2. The Screening Panel determined that Mr. Long violated Rule 1.5(a) through charging an unreasonable fee for services rendered and that he violated Rules

7.1 and 7.5(d) by placing on his letterhead “L. Long Lawyers” or “Long & Associates,” which led the public to believe that more than one lawyer was affiliated with the firm when in fact there was only one lawyer -- Mr. Long. The Panel recommended that the Respondent be publicly reprimanded for these violations.

The Exception. OPC supplied Mr. Long with proposed Findings of Fact, Conclusions of Law and a Recommendation of Discipline and a proposed Order of Discipline by letter dated June 16, 2009. Long, through Charles A. Gruber as his counsel, filed an Exception on July 1, 2009. Thereafter, Mr. Gruber indicated his intention to call the Complainant at the Exception Hearing and to cross-examine him. Mr. Gruber withdrew as Mr. Long’s counsel by Notice of Withdrawal dated September 22, 2009. John A. Snow of the Van Cott firm entered his appearance as counsel for Mr. Long and (i) withdrew Mr. Gruber’s request to cross-examine the Complainant, indicated that Mr. Long would not rely upon the documents Mr. Gruber filed with respect to the Exception (other than procedurally to perfect the Exception), and on October 22, 2009 filed Exceptions to Screening Panel’s Findings of Fact, Conclusions of Law and Recommendation.

The Exception Hearing. The hearing of the Exception occurred on October 28, 2009 between 12:30 p.m. and 2:30 p.m. Present at the hearing were the undersigned Chair, Barbara L. Townsend, Assistant Counsel to OPC, Respondent Larry N. Long, John A. Snow, and Alex B. Leeman. Complainant was not present at the hearing. Respondent offered argument concerning the Exception and OPC counsel also made statements during the Exception hearing.

ANALYSIS OF EXCEPTION

The Screening Panel found Respondent Larry N. Long (“Long”) to have violated the following Rules contained in the Code of Professional Responsibility:

1. Long violated Rule 1.5(a) by charging an unreasonable fee for work he performed on behalf of two clients: Vantreese and Hernandez.

2. Long violated Rules 7.1 and 7.5(d) through using the names L. Long Lawyers and Long & Associates on letterhead and communication, which was misleading because at the applicable times there was only one lawyer associated with the firm -- Mr. Long himself.

3. Long violated Rule 8.4(a) by violating the Rules of Professional Conduct noted above.

Based upon those violations, the Panel recommended that Long be publicly reprimanded.

The claims that Long charged an unreasonable fee to Vantreese, charged an unreasonable fee to Hernandez, and used misleading letterhead will be addressed separately.

A. Vantreese Fee Issue.

Vantreese retained Long to represent her in defending against a charge of possession with intent to distribute, a second-degree felony, through a fee agreement dated April 5, 2007. The fee agreement was a flat fee agreement in the amount of \$8,910.00. The agreement provided that this fee included representation “up to and including the pre-trial conference or Preliminary Hearing and subsequent Sentencing upon entrance of a plea.” Long states that he actually received \$8,900.00 on the Vantreese account. [R. 344] The Docket in the Vantreese matter reflects that Long performed the following services [as will be discussed in greater detail below, Long asserts that he performed services beyond those reflected in the Docket]: Mr. Long appeared for a pre-trial conference on 12-4-06 and requested a continuance; on 1-22-07 Long appeared at a pre-trial and requested a continuance; although it is unclear what Mr. Long did in this regard, on January 25, 2007 Ms. Vantreese was accepted into Drug Court; on 2-26-07 Long

appeared for a pre-trial conference with the case being continued; on 4-20-07 Long appeared for a pre-trial conference; on 5-3-07 Long appeared for a Drug Court hearing; on 5-24-07 Long appeared for a plea hearing at which Vantreese pleaded guilty. Thereafter, Vantreese appeared at Drug Court on a regular basis, but Long did not appear again in the case. After completing Drug Court successfully, the case against Vantreese was dismissed on 10-28-08.

At the Screening Panel hearing, Long was asked about and testified concerning what he did on behalf of Vantreese. His testimony appears at pp. 38, et seq., in the transcript of the Screening Panel hearing. Long testified that he met with Vantreese to determine her objectives for his representation and that, thereafter, he performed the services outlined in the Docket as set forth above. Long testified about his consideration of various legal strategies on behalf of Vantreese, his review of the preliminary hearing tape, and his negotiations with the prosecutor, George Voduc. Long testified that it was atypical for a defense attorney to attend Drug Court cases, which accounted for his not attending Drug Court with Vantreese. Long testified that he achieved all of the representation goals outlined for him, achieved a good result for his client, and that his client never complained about the fees charged. Long submitted the Affidavit of Gregory Skordas [T. 60], which Mr. Skordas outlines his qualifications, and that the flat fees charged by Mr. Long in this case as well as the Hernandez case discussed below “are not unreasonable for the representation undertaken and are consistent with fees being charged by other attorneys in the Salt Lake City area for cases in which similar charges have been filed.”

In addition to the transcript of the hearing, Long submitted extensive materials, prepared by him after the subject Informal Complaint was filed, outlining a reconstruction of his activities in the case. Mr. Long concludes that he spent 45 hours of work which, at a rate of \$300.00 per

hour, is a reasonable fee.¹

In his Exception, Long first argues that its recommendation was not based upon substantial evidence. The Screening Panel had before it both Long's description at the hearing of the services he performed and the Docket's presentation of the court proceedings in which Mr. Long participated. That evidence collectively establishes that Long appeared at several pre-trial conferences that were seemingly uncomplicated -- many merely involved a request for continuance that was granted. Thereafter, Vantreese was accepted into Drug Court and Long appeared one more time -- again, for an insubstantial hearing. Long, in addition, offered testimony of additional services, including consultations with his client, settlement negotiations with the prosecution, and internal discussions of a strategy. Considering the court Docket's enumeration of Long's involvement and Long's testimony at the hearing of what he did for Vantreese, the Screening Panel could have concluded that Long spent an insubstantial amount of time in the Vantreese representation. The court Docket combined with Long's testimony before the Panel about what he did for Vantreese provide substantial evidence that he did not perform services commensurate with the \$8,900.00 fee that he charged and collected. The Screening Panel was not obligated to believe Long's written retrospective accounting, supported with no contemporaneous records that were introduced, of services he performed. The Screening Panel could have chosen not to believe that retrospective accounting because it was seemingly inconsistent with the Docket and Long's testimony at the hearing. In addition, as to most of the additional tasks outlined in the retrospective accounting, there was no evidence introduced to the effect that the tasks were necessary, that the products of the tasks were utilized, or that such

¹Dividing \$8,900.00 by 45 hours results in approximately a \$200.00 hourly rate.

products benefitted Vantreese in any way.

Fixed fee agreements are, concededly, permissible under the Code of Professional Responsibility. That notwithstanding, any fixed fee that is charged must be reasonable in light of the services actually performed giving consideration to the factors set forth in Rule 1.5. Thus, the Affidavit of Gregory Skordas, while providing evidence that a fixed fee for the amount charged by Mr. Long is reasonable does not address the second prong of the analysis -- that is, whether the fixed fee was reasonable in light of the services actually performed.

This is not a de novo review. The applicable standard requires that the Screening Panel's decision be affirmed if there is any substantial evidence to support it. For the reasons set forth above, the Chair concludes that there is substantial evidence from which the Screening Panel could conclude as it did that Long charged an unreasonable fee with respect to the Vantreese representation.

Long next argues in his Exception that the Screening Panel's Findings of Fact are insufficient to justify its conclusions of law. Long points out that Rule 14-510(b)(5)(E) requires that its recommendation "state the substance and nature of the informal complaint and defenses and the basis upon which the Screening Panel has concluded . . . that the Respondent should receive a public reprimand." Here, the Findings of Fact, although brief and not in evidentiary detail, do state that Long charged excessive fees for his work on the Vantreese matter. Again, although the Findings are not given in evidentiary detail, the Rule that Long violated, how he violated that Rule (by charging unreasonable fees), and the representation involved (the Vantreese representation) are all identified. What the Findings do not do is articulate the specific evidence that the Screening Panel believed and disbelieved and the analytical process by which the Panel came to the conclusion that Long overcharged Vantreese. The Chair does not believe

that Findings at that level of detail are required by Rule 14-510(b)(5)(E).²

Long also suggests that the procedure followed by the OPC and the Screening Panel did not give him reasonable notice of the charges against him. The Notice of Informal Complaint in this matter [R. 38, et seq.] sets forth in substantial detail the potential violations and the basis for those potential violations of the Code of Professional Responsibility. Long had ample notice of the charges against him and the basis for those charges to enable him to prepare a defense.

Finally, Long's Exception argues that the Screening Panel made inconsistent findings with respect to the Vantreese, Hernandez, and Kenney matters (all three of such matters being the subject of a single Informal Complaint). Long argues that because the hourly rate on the Vantreese and Hernandez matters (assuming Long's claim of the hours he spent on each matter are accepted) were each \$200.00 per hour and were found to be unreasonable, yet with respect to the Kenney matter, where Long charged an effective rate of over \$600.00 per hour, the Panel found no unreasonable fee was charged, the Panel's results are inconsistent. To reach that conclusion, one must assume that the Panel accepted Long's version of the work he performed on each of these matters, a fact that does not appear in the record and which is inconsistent with the Panel's findings.

B. Hernandez Fee Issue.

Long was engaged to represent Hernandez pursuant to a fixed fee agreement dated March 26, 2007. The agreement provided for a fixed fee of \$10,000.00 for representation through the

²The 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.

pre-trial conference or preliminary hearing and subsequent sentencing upon entry of a plea. Mr. Long states that he actually received \$7,750.00 of that amount.

The court Docket in the Hernandez matter indicates the following activities of Mr. Long: On March 23, 2007, Mr. Long made an initial appearance; on April 12, 2007, Mr. Long appeared at a roll call that was continued; on April 23, 2007, Mr. Long filed an appearance of counsel, a request for discovery, and a motion to preserve evidence; on May 31, 2007, Long appeared and advised the court that Hernandez had been accepted into Drug Court; on 6-28-07 Long appeared for a change of plea hearing that was continued; on July 5, 2007, Long appeared for a change of plea hearing. Hernandez appeared thereafter over an extended period for Drug Court. Mr. Long did not appear at any of these hearings.

Long's testimony at the hearing before the Screening Panel reflects that Long performed the following services in the Hernandez matter [Transcript pp. 60, et seq.]: Mr. Long testified that he prepared a request for discovery and a motion to preserve evidence (both appear to be form documents), that he participated in a plea in abeyance as a result of Hernandez being accepted by the Drug Court, and that he did not appear for Drug Court hearings with Hernandez because that is not typically done by defense counsel. Mr. Long testified that his client was satisfied with his representation and did not ask for any refund. Mr. Long submitted an accounting as to his activities on the Hernandez case [R. 64, et seq.]. The accounting was prepared after the Informal Complaint and is not based on contemporaneously prepared documents that were placed in the record. Mr. Long asserts that he believes he spent 50-60 hours of time representing Hernandez which, when divided into the actual fee charged of \$7,750.00,

yields an estimated hourly fee of \$300.00 per hour.³

Mr. Long's Exception to the excessive fee violation with respect to the Hernandez matter tracks his Exception with respect to the Vantreese matter outlined above. With respect to his assertion that there is no substantial evidence to justify the Screening Panel's recommendation, the analysis is much the same as with respect to the Vantreese matter. The Docket and testimony offered by Mr. Long at the Screening Panel hearing both indicate that Mr. Long did very limited work for the fee he charged. The Screening Panel was not required to accept the accounting submission prepared by Mr. Long after the Informal Complaint against him was submitted. Based upon the content of the Docket and the testimony offered, there is substantial evidence to support the Screening Panel's recommendations. Also, as was the case with Vantreese, with respect to most of the additional tasks outlined in Long's post-Initial Complaint accounting, there was no evidence introduced that the tasks were necessary, that the products of the tasks were utilized, or that such products benefitted Hernandez in any way.

This is not a de novo review. The applicable standard requires that the Screening Panel's decision be affirmed if there is any substantial evidence to support it. For the reasons set forth above, the Chair concludes that there is substantial evidence from which the Screening Panel could conclude as it did that Long charged an unreasonable fee with respect to the Hernandez representation.

The Exception further asserts that the Screening Panel failed to articulate sufficient Findings of Fact which would justify its Conclusions of Law. In this regard, the analysis of this aspect of the Exception mirrors that set forth above with respect to the Vantreese matter. The

³Dividing \$7,750.00 by 55 hours (he claims 50-60) yields approximately \$140.00 per hour.

reasons there stated, the Findings of Fact, while not in evidentiary detail, are sufficient to justify the Conclusions of Law. Further, like the Vantreese matter, the Notice of Informal Complaint gave Mr. Long adequate information about the charges against him to enable him to prepare a defense. The Exception's assertion of inconsistency is also treated above in connection with the Vantreese matter.

C. Violations of Rules 7.1 and 7.5(d).

The Screening Panel found that Long presented himself to the public using the names L. Long Lawyers and Long & Associates and that the use of these firm names led the public to conclude that there were other lawyers in Mr. Long's office besides Mr. Long himself. Long conceded at the Screening Panel hearing that, although from time to time Long employed lawyers besides himself, throughout the time period that his letterhead suggested that there were more than one lawyer in his office, there were times that Mr. Long was the only lawyer. See Transcript, pp. 15, et seq. The Exception concedes a violation of these Rules, but suggests that because the violation was innocent and because of the absence of a dishonest or selfish motive, the recommended discipline should be reduced (presumably from a public reprimand to an admonishment). As described above in Sections A and B, apart from the violation of Rules 7.1 and 7.5(d), there is substantial evidence that Long violated Rule 1.5. If one accepts that there was substantial evidence that Long charged an unreasonable fee to his clients, existence of damage to the client is self-evident. That being so, the elements of a public reprimand set forth in Rule 14-605(c) exist and public reprimand is an appropriate sanction even in the absence of a violation of Rules 7.1 and 7.5(d).

D. Long's Claim of Inconsistency Between Separate OPC Cases.

Long's Exception argues that the conclusions arrived at in various identified cases against

Long⁴ are inconsistent. Concededly, consistency is a goal in the imposition of disciplinary sanctions “for the same or similar offenses.” Rule 14-602(d)(3). For the following reasons, this argument is not a basis for rejecting the Screening Panel’s recommendation here. First, each of the cases identified by Long involves different parties, different facts, and different circumstances. Long has not shown that, based upon the Panel’s findings in each separate case, the conclusions of the Panel are not consistent. Second, with respect to this specific matter and this Exception, Long has the burden of proof showing that the recommendation was unreasonable, unsupported by substantial evidence, arbitrary, capricious, and otherwise clearly erroneous. That Long may have been disciplined less severely in another case that he identifies is not a basis for granting the Exception here -- the issue rather is whether in this matter, the recommendation is inappropriate under the standard set forth in Rule 14-510(c). For the reasons outlined above, Long failed to carry his burden in that regard.

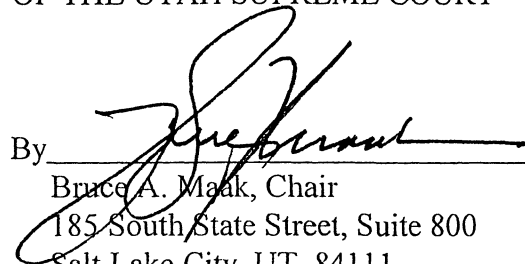
RULING

Respondent has failed to carry his burden to establish under Rule 14-510(c) that the Screening Panel’s recommendation of a public reprimand should be overturned. Respondent’s Exception is therefore denied.

⁴These cases include this case and cases numbered OPC File Nos. 08-0049 and 07-0497.

DATED this 17 day of November, 2009.

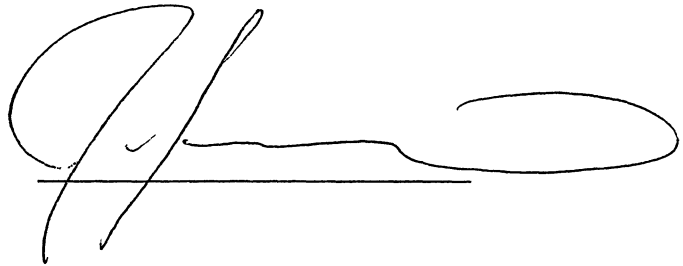
ETHICS AND DISCIPLINE COMMITTEE
OF THE UTAH SUPREME COURT

By 
Bruce A. Mack, Chair
185 South State Street, Suite 800
Salt Lake City, UT 84111

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2009, I mailed via United States first-class mail, postage pre-paid, a true and correct copy of the foregoing Ruling, dated November 17, 2009, signed by Bruce Maak, Chair of the Ethics and Discipline Committee to:

John A. Snow
Vancott Bagley Cornwall & McCarthy
36 South State St. 19th Floor
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "John A. Snow", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.

IN THE UTAH SUPREME COURT

LARRY N. LONG,

Petitioner,

vs.

ETHICS AND DISCIPLINE
COMMITTEE OF THE UTAH SUPREME
COURT,

Respondent.

Appellate Case No. 20091018-SC

CERTIFICATE OF SERVICE

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

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

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

I hereby certify that on the 23 day of April, 2010, I caused two (2) copies of the **BRIEF OF PETITIONER** and accompanying **ADDENDUM** to be delivered to each of the following:

Bruce A. Maak
Parr Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, UT 84111-1537

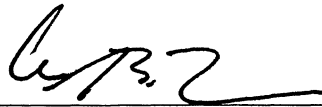
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Billy Walker
Adam Bevis
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

☐ U.S. Mail, postage prepaid
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☐ Electronically

DATED this 23 day of April, 2010.

VAN COTT BAGLEY CORNWALL & MCCARTHY



John A. Snow

Alex B. Leeman

Attorneys for Petitioner Larry N. Long