

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF AMENDMENTS  
TO COURT RULES REGARDING  
ATTORNEY DISCIPLINE,  
SPECIFICALLY, SCR 105.

ADKT 0505

**FILED**

APR 28 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

**ORDER SETTING PUBLIC HEARING**

On March 16, 2015, the Board of Governors of the State Bar of Nevada filed a petition seeking amendment of Supreme Court Rule 105. A copy of the petition and the proposed amendments is attached to this order.

The Nevada Supreme Court will conduct a public hearing to consider the petition. The public hearing will be held on Wednesday, July 1, 2015, at 1:00 p.m. in the Nevada Supreme Court Courtroom, 201 South Carson Street, Carson City, Nevada. The hearing will be videoconferenced to the Nevada Supreme Court Courtroom, 200 Lewis Avenue, 17<sup>th</sup> Floor (Regional Justice Center), Las Vegas, Nevada.

Further, this court invites written comment from the bench, bar and public regarding the petition. An original and 8 copies of written comments are to be submitted to: Tracie K. Lindeman, Clerk of the Supreme Court, 201 South Carson Street, Carson City, Nevada 89701 by 5:00 p.m., June 26, 2015. Comments must be submitted in hard-copy format. Comments submitted electronically will not be docketed. Persons interested in participating in the hearing must notify the Clerk no later than June 26, 2015.





1 judgment." *In re Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204, *modified by* 31  
2 P.3d 365 (2001), *cert. denied*, 534 U.S. 1131 (2002).

3 However, a significant number of state supreme courts review the  
4 conclusions of law and recommended sanction *de novo*, but employ a clearly  
5 erroneous<sup>1</sup> or substantial evidence<sup>2</sup> standard for the findings of fact. These courts  
6 recognize that the hearing panel may be in a better position to examine the  
7 evidence and witness credibility.

8 It has been specifically held that "[t]he State Bar of Nevada is the  
9 investigative arm of the Nevada Supreme Court charged with investigating and  
10 disciplining the legal profession in Nevada." *O'Connor v. State of Nevada*, 57  
11 F.Supp. 546, 550 (D. Nev. 1981), *aff'd*, 686 F.2d 749 (9th Cir. 1982), *cert. den.*,  
12 459 U.S. 1071, 103 S.Ct. 491 (1982). In a recent order declining the State Bar's  
13 motion for order to show cause, this Court observed,

14 [T]his court concludes that the office of bar counsel is in a better  
15 position to evaluate the allegations that [respondent] has continued  
16 to practice law. Indeed, such a determination will require significant  
17 fact-finding and is therefore better left to the disciplinary panel,  
which can conduct the appropriate investigation and hearings.

18 *In re Discipline of Martin Crowley*, Docket No. 59895 (Order Denying Motion,  
19 October 23, 2013). By adopting a more deferential standard to the fact-finding  
20 function of disciplinary panels, the Court can streamline its consideration of  
21 attorney discipline while still maintaining *de novo* review of the law and policy  
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24 <sup>1</sup> Alabama, Colorado, Connecticut, Florida, Illinois, Kentucky, Maine,  
Maryland, Minnesota, Utah, and Vermont.

25 <sup>2</sup> District of Columbia, South Dakota, Texas, and Washington.

1 considerations in determining an appropriate sanction.

2 The State Bar proposes the Court consider this alternative review process.

3 The proposed amendment would impact SCR 105(3), as follows:

4  
5 **Rule 105. Procedure on receipt of complaint.**

6 ...

7 **3. Review by supreme court.**

8 ...

9 (b)~~[De novo review]~~ Review of public discipline. Except for disbarments by  
10 consent pursuant to Rule 112 or a public reprimand agreed to in writing by the  
11 attorney pursuant to Rule 113, a decision recommending a public reprimand,  
12 suspension or disbarment shall be automatically reviewed by the supreme court.  
13 Review under this paragraph shall be commenced by bar counsel forwarding the  
14 record of the hearing panel proceedings to the court within 30 days of entry of the  
15 decision. Receipt of the record in such cases shall be acknowledged in writing by  
16 the clerk of the supreme court.

17 The attorney and bar counsel shall have 30 days from the date the supreme  
18 court acknowledges receipt of the record within which to file an opening brief or  
19 otherwise advise the court of any intent to contest the hearing panel's findings and  
20 recommendations. If an opening brief is filed, briefing shall thereafter proceed in  
21 accordance with NRAP 31(a). Extensions of time to file briefs are disfavored and  
will only be granted upon a showing of good cause. The parties shall not be  
required to prepare an appendix, but rather shall cite to the record of the  
disciplinary proceedings. If no opening brief is filed, the matter will be submitted  
for decision on the record without briefing or oral argument.

The supreme court shall affirm the decision of the hearing panel unless it  
determines that, based on the record, the findings of fact of the hearing panel are  
clearly erroneous. The supreme court may conduct a *de novo* review of the  
conclusions of law and appropriate sanction to impose.

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23 ...

24 ...

1 The proposed rule, as amended, is attached hereto in its entirety as **Exhibit A**.

2 Respectfully submitted this 10<sup>th</sup> day of March 2015.

3 STATE BAR OF NEVADA  
4 BOARD OF GOVERNORS

5  
6 

7 ELANA TURNER GRAHAM, President

8 Nevada Bar No. 3429

9 State Bar of Nevada

10 600 E. Charleston Boulevard

11 Las Vegas, NV 89104

12 (702) 382-2200

EXHIBIT A

1 D. MISCONDUCT  
2  
3 ...

4 **Rule 105. Procedure on receipt of complaint.**

5 1. *Investigation.*

6 (a) *Investigation and screening panel review.* Investigations shall be  
7 initiated and conducted by bar counsel or bar counsel's staff or other investigative  
8 personnel at bar counsel's direction prior or pursuant to the opening of a grievance  
9 file. At the conclusion of an investigation of a grievance file, bar counsel shall  
10 recommend in writing dismissal with or without prejudice, referral to diversion or  
11 mentoring pursuant to Rule 105.5, a letter of caution, a private reprimand, or the  
12 filing of a written complaint for formal hearing. The recommendation shall be  
13 promptly reviewed by a screening panel. A screening panel shall consist of three  
14 members of the disciplinary board, appointed by the chair or vice chair in  
15 accordance with Rule 103(6). Two of the three reviewers must be members of the  
16 bar. By majority vote they shall approve, reject, or modify the recommendation, or  
17 continue the matter for review by another screening panel.

18 (b) *Notice and election.* The attorney shall be notified by bar counsel in  
19 writing of a decision by a screening panel to issue a private reprimand and shall be  
20 served with the notification and private reprimand in the manner prescribed by  
21 Rule 109(1). The attorney shall have 14 days after receipt of the notice within  
22 which to serve on bar counsel written objections to the issuance of the private  
23 reprimand along with the basis of the objections. The attorney shall include with  
24 his or her written objections a statement electing either (i) a formal hearing before  
25 a five-member panel of the appropriate disciplinary board on a written complaint  
filed by bar counsel; or (ii) an informal hearing before a three-member panel of  
the appropriate disciplinary board.

(c) *Hearing.* Upon receipt by bar counsel of written objections to the  
issuance of a private reprimand and a statement of election by the attorney within  
the time prescribed, the matter shall be set for a formal or informal hearing in  
accordance with the attorney's election. A formal hearing shall proceed in  
accordance with Rule 105(2). At an informal hearing the attorney shall be given  
the opportunity to appear, to present oral argument, and to present evidence  
related to the written objections or any relevant issue. Rule 105(2)(a) applies to an  
informal hearing. The issuance of a private reprimand not objected to by the  
attorney within 14 days of notice or imposed after an informal hearing shall be  
final and shall not be appealable. A screening panel member who has reviewed  
bar counsel's recommendation on a grievance shall not be appointed to an

1 informal or formal hearing panel for any subsequent and related proceedings.  
2 Except in matters requiring dismissal because the grievance is frivolous or clearly  
3 unfounded on its face, or falls outside the disciplinary board's jurisdiction, or is  
4 resolved informally pursuant to Rule 104(2), a panel shall not make a finding of  
misconduct until the attorney has been given an opportunity to respond to the  
allegations against the attorney.

5 (d) *Appeal of a screening panel's dismissal of a grievance.* Bar counsel  
6 may appeal a decision to dismiss a grievance to a five-member panel appointed by  
7 the chair or vice chair of the respective northern or southern disciplinary board.  
8 The chair of the respective board shall be one of the five members on the panel  
9 and shall serve as chair of the panel. The panel shall determine whether the  
10 decision is supported by the record and is in the best interests of justice. Such an  
11 appeal must be filed with bar counsel's office and served upon the chair of the  
12 appropriate disciplinary board within 20 days of receipt of the decision by filing  
13 and serving a petition, together with the record of the matter being appealed. The  
petition shall contain the name and address of the appropriate northern or southern  
disciplinary board chair and identify the chair as the person to whom the petition  
must be sent. The chair shall issue an order advising the attorney or bar counsel of  
when any answering or other brief is due. The panel shall decide the matter on the  
record without oral argument or appearance and shall issue a written decision.

14 2. *Commencement of formal proceedings.* Formal disciplinary  
15 proceedings are commenced by bar counsel filing a written complaint in the name  
16 of the state bar. The complaint shall be sufficiently clear and specific to inform the  
17 attorney of the charges against him or her and the underlying conduct supporting  
18 the charges. A copy of the complaint shall be served on the attorney and it shall  
19 direct that a verified response or answer be served on bar counsel within 20 days  
20 of service; the original shall be filed with bar counsel's office. The time to  
21 respond may be extended once by the chair for not more than 20 days for good  
cause or upon stipulation of the parties. In the event the attorney fails to plead, the  
charges shall be deemed admitted; provided, however, that an attorney who fails  
to respond within the time provided may thereafter obtain permission of the  
appropriate chair to do so, if failure to file is attributable to mistake, inadvertence,  
surprise, or excusable neglect.

22 (a) *Challenges to and ad hoc appointments of panel members.* The  
23 complaint shall be served with the list of members of the appropriate disciplinary  
24 board. The attorney, or each if more than one, and bar counsel may exercise five  
25 peremptory challenges each to the people on the list by delivering such in writing  
to bar counsel on or before the date a response to the complaint is due.

Challenges to any member for cause under Rule 103(7) shall be made as  
soon as possible after receiving either actual or constructive notice of the grounds

1 for disqualification, and shall be made by motion to the chair in accordance with  
2 these rules. In no event will a motion seeking the disqualification of a member be  
3 timely if the member has already heard, considered or ruled upon any contested  
4 matter, except as to grounds based on fraud or like illegal conduct of which the  
5 challenging party had no notice until after the contested matter was considered.  
6 Any challenge that is not raised in a timely manner shall be deemed waived.

7 The chair or vice chair may make ad hoc appointments to replace  
8 designated panel members in the event challenges or disqualification reduce the  
9 number to less than the number required for the hearing panel. Ad hoc appointees  
10 shall be subject to disqualification under Rule 103(7) and any remaining  
11 peremptory challenges unexercised by either the attorney(s) or bar counsel. A  
12 hearing panel as finally constituted shall include a non-lawyer.

13 (b) *Assignment for hearing panel and chair.* Within 30 days, following  
14 service of a responsive pleading, or upon failure to plead, the matter shall be  
15 assigned by the chair or vice chair of the disciplinary board to a hearing panel  
16 chair, who shall preside over any and all motions or other requests as provided by  
17 SCR 103(6) and the subsequent hearing. Thereafter, the remaining hearing panel  
18 members shall be assigned by the chair or vice chair of the disciplinary board.

19 (c) *Venue.* Venue shall be the county in which the attorney resides or  
20 maintains his or her principal office for the practice of law, where the alleged  
21 offense was committed or where the parties have stipulated. If the attorney neither  
22 resides nor maintains his or her principal office in Nevada, or has left the state to  
23 avoid proceedings under these rules, the hearing may be conducted in any county  
24 designated by the chair of the disciplinary board.

25 (d) *Time to conduct hearing; notice of hearing; discovery of evidence against attorney.* The hearing panel shall conduct a hearing within 45 days of assignment and give the attorney at least 30 days' written notice of its time and place. The notice shall be served in the same manner as the complaint, and shall inform the attorney that he or she is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence. The notice shall be accompanied by a summary prepared by bar counsel of the evidence against the attorney, and the names of the witnesses bar counsel intends to call for other than impeachment, together with a brief statement of the facts to which each will testify, all of which may be inspected up to 3 days prior to the hearing. Witnesses or evidence, other than for impeachment, which became known to bar counsel thereafter, and which bar counsel intends to use at the hearing, shall be promptly disclosed to the attorney. For good cause shown, the chair may allow additional time, not to exceed 90 days, to conduct the hearing.

(e) *Quorum; time for decision of panel; votes required to impose discipline.* Any five members of the panel shall be a quorum. The hearing panel

1 shall render a written decision within 30 days of the conclusion of the hearing,  
2 unless post-hearing briefs are requested by either bar counsel or the attorney and  
3 allowed by the panel or requested by the chair, in which event the decision shall  
4 be rendered within 60 days of the conclusion of the hearing. The decision shall be  
5 served pursuant to Rule 109(1), accompanied by the panel's findings and  
6 recommendation, all of which shall be filed with bar counsel's office. A decision  
7 to impose or recommend discipline requires the concurrence of four members of  
8 the panel.

9 (f) *Rules of evidence; support of panel's decision.* The rules applicable  
10 to the admission of evidence in the district courts of Nevada govern admission of  
11 evidence before a hearing panel. Evidentiary rulings shall be made by the chair of  
12 the panel, if one has been designated, or by the chair of the appropriate  
13 disciplinary board prior to such a designation. The findings of the panel must be  
14 supported by clear and convincing evidence.

15 (g) *Court reporter.* All formal hearings shall be reported by a certified  
16 court reporter, which cost may be assessed against the attorney pursuant to Rule  
17 120. Any party desiring to have any other disciplinary proceedings reported must  
18 arrange in advance for a certified court reporter at the party's own expense.

19 3. *Review by supreme court.*

20 (a) *Time and manner of appeal.* A decision of a hearing panel shall be  
21 served on the attorney, and service shall be deemed Notice of Entry of Decision  
22 for appeal purposes. Except as provided in Rule 105(3)(b), a decision is final and  
23 effective 30 days from service, unless an appeal is taken within that time. To the  
24 extent not inconsistent with these rules, an appeal from a decision of a hearing  
25 panel shall be treated as would an appeal from a civil judgment of a district court  
and is governed by the Nevada Rules of Appellate Procedure.

(b) [~~De novo review~~] *Review of public discipline.* Except for  
disbarments by consent pursuant to Rule 112 or a public reprimand agreed to in  
writing by the attorney pursuant to Rule 113, a decision recommending a public  
reprimand, suspension or disbarment shall be automatically reviewed by the  
supreme court. Review under this paragraph shall be commenced by bar counsel  
forwarding the record of the hearing panel proceedings to the court within 30 days  
of entry of the decision. Receipt of the record in such cases shall be acknowledged  
in writing by the clerk of the supreme court.

The attorney and bar counsel shall have 30 days from the date the  
supreme court acknowledges receipt of the record within which to file an opening  
brief or otherwise advise the court of any intent to contest the hearing panel's  
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parties shall not be required to prepare an appendix, but rather shall cite to the record of the disciplinary proceedings. If no opening brief is filed, the matter will be submitted for decision on the record without briefing or oral argument.

The supreme court shall affirm the decision of the hearing panel unless it determines that, based on the record, the findings of fact of the hearing panel are clearly erroneous. The supreme court will conduct a *de novo* review of the conclusions of law and appropriate sanction to impose.

4. *Rules of procedure.* The chairs, after consulting with their respective disciplinary boards, may adopt rules of procedure, subject to approval by the board of governors.