

1 crime, other than a misdemeanor traffic violation not
2 involving the use of alcohol or a controlled substance, bar
3 counsel shall obtain a certified copy of proof of the
4 conviction and shall file a petition with the supreme court,
5 attaching the certified copy. Upon being advised that an
6 attorney subject to the disciplinary jurisdiction of the
7 supreme court has been convicted of a misdemeanor
8 involving the use of alcohol or a controlled substance and
9 the offense is *not* the attorney's first such offense, bar
10 counsel shall investigate and present the matter to the
11 appropriate panel of the disciplinary board prior to the
12 filing of the petition. The petition shall be accompanied by
13 the panel's recommendation regarding the appropriate
14 disciplinary action, if any, to be imposed under these or
15 any other rules of the supreme court that pertain to the
16 conduct of attorneys.

5.
6. Definition of "serious crime." The term "serious
10 crime" means (1) a felony and (2) any crime less than a
11 felony a necessary element of which is, as determined by
12 the statutory or common-law definition of the crime,
13 improper conduct as an attorney, interference with the
14 administration of justice, false swearing,
15 misrepresentation, fraud, willful failure to file an income
16 tax return, deceit, bribery, extortion, misappropriation,
17 theft, or an attempt or a conspiracy or solicitation of
18 another to commit a "serious crime."

15 As required by the current iteration of SCR 111, the Office of Bar Counsel
16 ("OBC") routinely complies with this notification mandate, including automatic
17 referral of first-time Driving Under the Influence ("DUI") convictions.

18 OBC data indicates that, pertinent to the first-time DUI convictions, the
19 Supreme Court generally declines to suspend the attorney or to refer the attorney
20 for disciplinary proceedings; instead, it simply dismisses the petition without
21 further action. In 2015, seven (7) first-time DUI convictions were referred to the
22 Court; six (6) were referred back to Bar counsel with no disciplinary action
23 recommended; one (1) was consolidated for disciplinary consideration with other
24 pending discipline against the attorney for Rule of Professional Conduct ("RPC")
25 violations unrelated to the DUI. In 2016, six (6) first-time DUI convictions were

1 referred to the Supreme Court; five (5) were referred back to Bar counsel with no
2 disciplinary action recommended; one (1) was consolidated for disciplinary
3 consideration with other pending discipline against the attorney for RPC violations
4 unrelated to the DUI.

5 Application of SCR 111 requirements concerning misdemeanor convictions,
6 including first-time DUI matters, generally occurs as follows:

- 7 1. The State Bar is advised of the conviction;
- 8 2. OBC staff obtains a certified copy of the proof of conviction, a task
9 which can often take several weeks;
- 10 3. An SCR 111 Petition is prepared by OBC staff, then reviewed, edited,
11 approved, and signed by an Assistant Bar Counsel;
- 12 4. The State Bar files the petition with the Supreme Court; and
- 13 5. The Supreme Court enters an order advising whether or not the attorney
14 should be temporarily suspended from the practice of law, and whether
15 or not the State Bar should initiate disciplinary action against the
16 attorney.

17 As noted above, professional discipline action has rarely been recommended
18 by the Supreme Court for first-time misdemeanor DUI related referrals, and when
19 it has been, the attorney had been subject to discipline for RPC violations other than
20 just the misdemeanor conviction-related misconduct. Therefore, changes to SCR
21 111 are suggested.

22 **II. Discussion**

23 Bar counsel's office engaged in a survey of other jurisdictions concerning
24 their rules and procedures for reporting criminal convictions. Most of the
25 jurisdictions surveyed have a rule or reporting procedure which closely resembles
Rule 19 of the ABA Model Rule for Lawyer Disciplinary Enforcement. In pertinent
part, the ABA Model Rule provides:

1 **ABA Model Rules for Lawyer Disciplinary Enforcement**
2 **Rule 19**

3 A. Transmittal of Proof of Determination of Guilt
4 by Clerk of Trial Court. The clerk of any court in this
5 state in which a lawyer is found guilty of a crime shall
6 within [ten] days after the finding of guilt transmit a
7 certified copy of proof of the finding of guilt to counsel
8 for the lawyer disciplinary agency of every state in which
9 the lawyer is admitted to practice.

10 B. Determination of "Serious Crime." Upon being
11 advised that a lawyer subject to the disciplinary
12 jurisdiction of this court has been found guilty of a crime,
13 disciplinary counsel shall determine whether the crime
14 constitutes a "serious crime" warranting immediate
15 interim suspension. If the crime is a "serious crime,"
16 disciplinary counsel shall prepare an order for interim
17 suspension and forward it to the court and the respondent
18 with proof of the finding of guilt. Disciplinary counsel
19 shall in addition file formal charges against the respondent
20 predicated upon the finding of guilt. . . .¹

21 C. Definition of "Serious Crime." A "serious
22 crime" is any felony or any lesser crime that reflects
23 adversely on the lawyer's honesty, trustworthiness or
24 fitness as a lawyer in other respects, or any crime a
25 necessary element of which, as determined by the
statutory or common law definition of the crime, involves
interference with the administration of justice, false
swearing, misrepresentation, fraud, deceit, bribery,
extortion, misappropriation, theft, or an attempt,
conspiracy or solicitation of another to commit a "serious
crime."

...

19 In each surveyed jurisdiction with a Model Rule 19-style conviction reporting
20 process, while there are slight differences in the language of their rules, each state
21 essentially defines "serious crimes" as (1) felonies or (2) any level of crime,
22 including misdemeanors, which involve moral turpitude. Utilizing this application,
23 the surveyed states do not generally pursue professional discipline concerning a

24 ¹ The Rule also provides process for challenging the determination of the
25 "serious" nature of the crime. That process is not addressed here as no change is
being recommended concerning Nevada's due process provisions.

1 misdemeanor conviction unless the attorney's conduct somehow involves a
2 lawyer's honesty, trustworthiness, or fitness as an attorney. A first-time
3 misdemeanor DUI conviction, absent other factors, would not be sufficient to
4 trigger disciplinary action.

5 In concert with the focus on "serious crimes" the ABA Model Rule of
6 Professional Conduct, adopted in Nevada, concerning attorney misconduct, in
7 pertinent part provides:

8 **Rule 8.4. Misconduct.**

9 It is professional misconduct for a lawyer to:

10 (b) Commit a criminal act that reflects adversely on the
11 lawyer's honesty, trustworthiness or fitness as a lawyer in
12 other respects;

13 (c) Engage in conduct involving dishonesty, fraud, deceit
14 or misrepresentation;

15 (d) Engage in conduct that is prejudicial to the
16 administration of justice;

17 ...

18 It is this RPC that is implicated when an attorney engages in criminal activity.
19 Absent other professional misconduct, not all misdemeanor convictions, including
20 a first-time misdemeanor DUI, involve the type of activity contemplated by the
21 plain language of RPC 8.4. Consequently, the current blanket reporting
22 requirement in SCR 111, mandating that the Supreme Court be informed of all
23 misdemeanor convictions except for misdemeanor traffic convictions not involving
24 alcohol or controlled substances, has the practical effect of expanding the reporting
25 requirement beyond the enforcement parameters set forth in RPC 8.4.

Accordingly, it is suggested that the language of SCR 111 be modified to
eliminate the requirement to automatically file petitions concerning all
misdemeanors except non-alcohol/controlled substance related traffic offenses.
Specifically, it is recommended that the language be amended so the Rule does not

1 encompass nearly every criminal act. Instead, consistent with ABA Model Rule 19,
2 and Nevada RPC 8.4, reporting requirements would focus on felony convictions
3 and “serious crime” misdemeanor convictions which invoke the attorney’s
4 professional responsibility obligations, and raise a negative inference regarding an
5 attorney’s integrity or suitability to practice law.

6 **III. Analysis**

7 The purpose of disciplinary rules and procedures is to protect the public, the
8 courts, and the legal profession – not to punish the attorney. *State Bar of Nevada*
9 *vs. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988). Criminal
10 convictions which negatively reflect on conduct of an attorney and his/her fitness
11 to practice law are therefore an appropriate matter for professional discipline. A
12 misdemeanor criminal conviction which does not reflect on an attorney’s fitness to
13 practice law is, by contrast, not an appropriate matter for professional discipline.

14 Consistent with this purpose, SCR 111(1) defines a “conviction” to include a
15 criminal guilty plea, regardless of whether a sentence is suspended or deferred. This
16 definition recognizes that attorney discipline is intended to address the attorney’s
17 conduct, and not be limited by the ultimate criminal label or punishment imposed
18 for that conduct. Referral to the Supreme Court or to a Disciplinary Hearing Panel,
19 of all non-traffic-related misdemeanor convictions, without analysis of the
20 relationship between the criminal conduct and the attorney’s fitness to practice law,
21 utilizes both Court and State Bar resources in matters that are not necessarily related
22 to an attorney’s professional conduct obligations. Accordingly, changes to SCR
23 111 are recommended to require reporting to the Supreme Court of all “serious
24 crimes” to include (1) felonies or (2) any level of crime, including misdemeanors,
25

1 which reflect on the attorney's fitness to practice law, as more specifically defined
2 in the attached proposed rule change.

3 **RECOMMENDATION**

4 It is respectfully suggested that the criminal conviction reporting
5 requirements of SCR 111 focus on conduct which implicates professional
6 responsibility obligations, as prohibited by RPC 8.4. The proposed amendment is
7 attached as **Exhibit A**.

8 RESPECTFULLY SUBMITTED this 1st day of May 2017.

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EXHIBIT A

Rule 111. Attorneys convicted of crimes.

1. **“Conviction” defined.** For purposes of this rule, in addition to a final judgment of conviction, a “conviction” shall include a plea of guilty or nolo contendere, a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), or a guilty verdict following either a bench or a jury trial, regardless of whether a sentence is suspended or deferred or whether a final judgment of conviction has been entered, and regardless of any pending appeals.

2. **Duty to inform bar counsel.** Upon being convicted of a crime by a court of competent jurisdiction, other than a misdemeanor traffic violation not involving the use of alcohol or a controlled substance, an attorney subject to these rules shall inform bar counsel within 30 days.

3. **Court clerks to transmit proof of conviction.** The clerk of any court in this state in which an attorney is convicted of a crime, other than a misdemeanor traffic violation not involving the use of alcohol or a controlled substance, shall transmit a certified copy of proof of the conviction to the supreme court and bar counsel within 10 days after its entry.

4. **Bar counsel’s responsibility.** Upon being advised that an attorney subject to the disciplinary jurisdiction of the supreme court has been convicted of a crime, ~~other than a misdemeanor traffic violation not involving the use of alcohol or a controlled substance,~~ any felony or “serious crime” as defined hereinbelow, bar counsel shall obtain a certified copy of proof of the conviction and shall file a petition with the supreme court, attaching the certified copy. Upon being advised that an attorney subject to the disciplinary jurisdiction of the supreme court has been convicted of a misdemeanor involving the use of alcohol or a controlled substance and the offense is not the attorney’s first such offense, bar counsel shall investigate and present the matter to the appropriate panel of the disciplinary board prior to the filing of the petition. The petition shall be accompanied by the panel’s recommendation regarding the appropriate disciplinary action, if any, to be imposed under these or any other rules of the supreme court that pertain to the conduct of attorneys.

5. **Certified document conclusive.** A certified copy of proof of a conviction is conclusive evidence of the commission of the crime stated in it in any disciplinary proceeding instituted against an attorney based on the conviction.

6. **Definition of “serious crime.”** The term “serious crime” means (1) a felony and (2) any crime less than a felony ~~a necessary element of which is, as determined by the statutory or common-law definition of the crime,~~ which adversely reflects on the attorney’s fitness to practice law, or involves involving improper conduct as an attorney, interference with the

administration of justice, false swearing, misrepresentation, fraud, willful failure to file an income tax return, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

7. **Suspension on certification.** Upon the filing with the supreme court of a petition with a certified copy of proof of the conviction, demonstrating that an attorney has been convicted of a serious crime, the court shall enter an order suspending the attorney, regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding, which shall be commenced by the appropriate disciplinary board upon referral by the supreme court. For good cause, the court may set aside its order suspending the attorney from the practice of law.

8. **Referral to disciplinary board.** Upon receipt of a petition filed under subsection 4 of this rule, demonstrating that an attorney has been convicted of a serious crime, the supreme court shall, in addition to suspending the attorney in accordance with the provisions of subsection 7 of this rule, refer the matter to the appropriate disciplinary board for the institution of a formal hearing before a hearing panel in which the sole issue to be determined shall be the extent of the discipline to be imposed. The panel may, for good cause, postpone the proceeding until all appeals from the conviction have been concluded.

~~9. **Conviction for other than a serious crime.** Upon receipt of a petition demonstrating that an attorney has been convicted of a crime which is not a serious crime, the supreme court may refer the matter to the appropriate disciplinary board for any action it may deem warranted under these or any other rules of the supreme court that pertain to the conduct of attorneys, provided, however, that the supreme court may decline to refer a conviction for a minor offense to the board. If the conviction adversely reflects on the attorney's fitness to practice law, the supreme court may issue an order to show cause, requiring the attorney to demonstrate why an immediate temporary suspension should not be imposed.~~

10. **9. Reinstatement.** An attorney suspended under the provisions of subsection 7 or 9 of this rule may be reinstated by filing a certificate with the supreme court demonstrating that the underlying conviction has been reversed, but reinstatement will not terminate any formal proceeding pending against the attorney, the disposition of which shall be determined by the hearing panel on the basis of the available evidence.

11. **10. Conviction of attorney who is prohibited from practicing.** If an attorney convicted of a crime is at that time prohibited from practicing due to a disciplinary suspension or transfer to disability inactive status under

Rule 117, then the petition filed under subsection 7 ~~or 9~~ of this rule shall state that the attorney is prohibited from practicing and under what provision. If the attorney has been suspended as discipline, then the petition shall indicate the suspension's length and whether the attorney must file a reinstatement petition under Rule 116 to regain active status. The supreme court shall then enter an appropriate order directing how the conviction shall be addressed.