

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 erroneous¹ or substantial evidence² 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 ¹ Alabama, Colorado, Connecticut, Florida, Illinois, Kentucky, Maine,
Maryland, Minnesota, Utah, and Vermont.

25 ² 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 **Rule 105. Procedure on receipt of complaint.**

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6 3. *Review by supreme court.*

7 ...

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

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

25 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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...

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

2 Respectfully submitted this 10th day of March 2015.

3 STATE BAR OF NEVADA
4 BOARD OF GOVERNORS

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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

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EXHIBIT A

1 D. MISCONDUCT
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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
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.

25 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
challenging party had no notice until after the contested matter was considered.

5 Any challenge that is not raised in a timely manner shall be deemed waived.
The chair or vice chair may make ad hoc appointments to replace
6 designated panel members in the event challenges or disqualification reduce the
7 number to less than the number required for the hearing panel. Ad hoc appointees
8 shall be subject to disqualification under Rule 103(7) and any remaining
9 peremptory challenges unexercised by either the attorney(s) or bar counsel. A
10 hearing panel as finally constituted shall include a non-lawyer.

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

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

23 (d) *Time to conduct hearing; notice of hearing; discovery of evidence
24 against attorney.* The hearing panel shall conduct a hearing within 45 days of
25 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
findings and recommendations. If an opening brief is filed, briefing shall
thereafter proceed in 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

1 parties shall not be required to prepare an appendix, but rather shall cite to the
2 record of the disciplinary proceedings. If no opening brief is filed, the matter will
3 be submitted for decision on the record without briefing or oral argument.

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

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