

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

In the matter of Amendments to Court Rules regarding attorney discipline, specifically, SCR 105.

AUG 31 2015

ADKT NO: 0505 SUPPLEMENT

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

SUPPLEMENTAL BRIEF BY THE BOARD OF GOVERNORS, STATE BAR OF NEVADA

On March 16, 2015, the State Bar Board of Governors ("Board") filed a petition to amend Nevada's Supreme Court Rules regarding attorney discipline. During the public hearing held on July 1, 2015, there were several comments made pertaining to the sufficiency of the written decisions submitted by disciplinary panels. The Supreme Court requested the Board to provide supplemental materials regarding what actions are being undertaken to address the sufficiency of the written decisions believed to be necessary to warrant a change to a deferential standard of review of the findings of fact under SCR 105(3)(b).

During the Annual Meeting in July 2015, the Office of Bar Counsel submitted a memorandum to the Board that discussed issues regarding the sufficiency of the written decisions and proposed solutions, which memorandum is attached hereto as Exhibit A. These matters were considered by the Board. Office of Bar Counsel was directed to develop training for the disciplinary boards relating to the implementation of the ABA Standards for Imposing Lawyer Sanctions. Additionally, the Board reviewed a proposed change to Rule 39 of the Disciplinary Rules of Procedure (DRP), attached hereto as Exhibit B,

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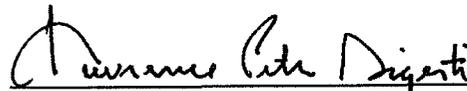
1 that would set forth the process for the implementation of the ABA Standards  
2 and define what should be required in Hearing Panel findings.

3 Training of the disciplinary boards as outlined in the attached  
4 memorandum has been undertaken by the Office of Bar Counsel. A work sheet,  
5 attached hereto as Exhibit C, has been developed and submitted to the  
6 disciplinary board members. The use of this worksheet will assist the panel  
7 chairs in preparing the written decisions that will provide more complete detail  
8 and analysis of the evidence to better assist this Court in understanding the  
9 rationale for the recommendations made by the respective disciplinary panel.

10 The only change requested by the State Bar is for the use of a deferential  
11 standard of review of the findings of fact. The State Bar has not proposed a  
12 change to the *de novo* review of the conclusions of law and the recommended  
13 sanctions. The concerns with the findings are more about what is not set forth  
14 as opposed to a rejection of what is set forth. Retaining the current *de novo*  
15 review of the findings of fact will not address issues with decisions that are  
16 lacking in findings. Such concerns can only be assuaged through the  
17 improvements that are being implemented.

18 Respectfully submitted this 26th day of August 2015.

19 STATE BAR OF NEVADA  
20 BOARD OF GOVERNORS

21 

22 LAURENCE PETER DIGESTI, President  
23 Nevada Bar No. 88  
24 State Bar of Nevada  
25 3100 W. Charleston Blvd., Suite 100  
Las Vegas, NV 89102  
(702) 382-2200

**EXHIBIT A**

EFFORTS UNDERTAKEN TO ADDRESS CONCERNS  
WITH THE CONTENT OF PANEL FINDINGS AND RECOMMENDATIONS  
SUBMITTED TO THE SUPREME COURT

I. Statement of the Issue

During the annual meeting between the Supreme Court and the State Bar in February a discussion was held regarding the content of the panel findings and recommendations. The Justices expressed concern that the findings failed to provide an analysis as to how the ABA Standards for Imposing Lawyer Sanctions were being applied by the panels, which consequently was resulting in seemingly inconsistent decisions.

II. Analysis of the Problem

The Supreme Court first addressed the issue of the application of the ABA Standards in *In the Matter of Discipline of Glen Lerner*, 124 Nev. 1232 (2008). The Court used the ABA Standards to uphold a panel recommendation. The Court noted that an application of the Standards requires an analysis of "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *Id.* at 1246.

The action taken by the Court to uphold the imposition of a public reprimand instead of a private reprimand suggested by the Respondent was based entirely on an application of the Standards. The Court observed "the Standards note that when a lawyer has received a private reprimand for similar misconduct, another private reprimand is not appropriate." *Id.* The Court concluded, in concert with the Standards, that "[s]ince a private reprimand has not had any effect on his conduct and in light of the aggravating factors, we agree with the hearing panel that a public reprimand is the appropriate discipline." *Id.* at 1247.

The Standards have not been enacted by the Nevada Rules of Professional Conduct, however, the Court has suggested the Standards are appropriate to be used as a guide in interpreting and applying the Rules of Professional Conduct. While not citing the Standards, NRPC 1.0A(c) embodies this concept in describing how discipline is imposed. The Rule states we must "presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations." *Id.* These guiding principles are at the heart of the Standards.

The typical findings previously submitted to the Supreme Court included a laundry list of findings of fact that generally were an entire cut and paste of the allegations in the complaint. The findings would then list the rules violated, by count, e.g. NRCP 1.5 (fees), NRCP 1.15 (safekeeping property), NRCP (nonlawyer assistants). Aggravating and mitigating factors as set forth in SCR 102.5 were likewise listed in a laundry list format, e.g. SCR 102.5 (prior disciplinary offenses). The findings would conclude with a statement of the recommended discipline.

Some variances are found in the procedures used between Northern and Southern panels. Findings in Northern panel cases that are contested are generally prepared by the panel chairs. These findings, while not perfect, do provide a better explanation of some of the factual disputes as set forth by the panel chair. Conversely, the findings in the South are prepared by bar counsel based solely on the basic information announced at the hearing regarding the list of rules violations, list of aggravating and mitigating factors and the recommended discipline.

What is noticeably absent from the typical findings is any analysis regarding the state of mind of the lawyer or how the aggravating or mitigating factors were balanced in determining the recommended discipline. The decisions from Southern panel also lacks any indication of what evidence the panel found persuasive or what evidence may have lacked credibility. These matters are of critical importance to an analysis of the application of the Standards as requested by the Supreme Court.

### III. Proposed Changes

What needs to be added to the findings is not difficult to articulate, but extremely difficult to implement within the current structure. Training the panel members was discussed at length during the last State Bar/Supreme Court meeting. Those efforts are necessary and are being implemented by the Office of Bar Counsel (OBC). Training alone will not solve the ultimate problem, particularly in the South, unless a fundamental change is made in the process of preparing the findings.

The first change proposed is a rule change that sets forth the application of the ABA Standards and defines what should be required in the findings. Enclosed is a draft of a proposed amendment to DRP 39. The proposed rule change also attempts to confront the problem of who should prepare the findings.

The most expedient solution would be to mandate the panel chairs write the findings. This could be aided through training, but likely would still result in inconsistencies of writing style and substance. A primary concern of the OBC is the burden this would place on our volunteer panel members and serve as a disincentive for participation, particularly as a panel chair.

While some panel chairs may welcome the opportunity to draft the findings, the OBC believes based on discussions with Board chairs and some existing panel chairs an option could be used for the parties to draft the proposed findings. This, however, obviously requires being provided with the necessary information as detailed above. There are many possible solutions, however, the OBC submits the rules should not be rigidly written so as to dictate a set procedure for all cases. The important element addressed in the proposed rule change is to allow for that exchange without dictating how it occurs.

The suggested process is not unlike what is done on a daily basis in most every courtroom in Nevada. It is not uncommon for judges to request the prevailing party to prepare the order based on the summation provided by the judge. The OBC believes this process is workable and could help alleviate the burden on our volunteer panel members.

To facilitate this exchange of information, the OBC believes a template that contained an outline of the type of information needed in the findings would be beneficial. Attached is a draft of a template that could be used by a panel chair to fashion a more appropriate finding or guide the drafting of the findings by one of the parties, which presumptively would fall on the OBC, before final approval by the panel chair.

The OBC recently completed a new version of findings that eliminates the cookie cutter approach to setting forth the findings of fact and includes legal conclusions, with citations, and an analysis of the factors delineated by the Standards. This version was developed in close consultation with defense counsel and the panel chair. It is important to note that this new version of findings cannot be implemented as a wholesale change unless and until a methodology is developed for the preparation of the findings as suggested herein. Without a rule change we may lack the authority to implement the type of changes that are needed to address the concerns of the Supreme Court.

The OBC has initiated changes that will assist this process. All bar counsel have been instructed to implement arguments and presentations that directly address how the standards should be applied in each instance. Bar counsel will be evaluated on the effectiveness of how they integrate the standards into their panel presentations. An integral element of every argument will be a discussion of the standards and walk the panels through the application. As reinforced by the upcoming training, the arguments from the OBC will focus the attention of the panels on the importance of the Standards and lead to more articulate findings that will be more readily accepted by the Supreme Court.

# EXHIBIT B

PROPOSED CHANGE TO  
DISCIPLINARY RULES OF PROCEDURE

Delete Rule 39 and substitute as follows:

**Rule 39. Panel Decision.**

**(a) Rendering of decision.** The hearing panel shall render a written decision within thirty (30) days of the conclusion of the hearing, unless post-hearing briefs are allowed by the panel or ordered by the chair pursuant to a request from either party, in which event the decision shall be rendered within sixty (60) days of the conclusion of the hearing. A decision to impose or recommend discipline as defined in SCR 102 by a five-member panel requires the concurrence of four (4) members of the panel. A decision to impose discipline by consent pursuant to SCR 113 by a three-member panel as set forth in DRP 5 requires the concurrence of two (2) members of the panel.

**(b) Contents of decision.** The decision shall be signed by the panel chair and include findings of fact; conclusions of law; statement of rule violations for each count; findings of aggravating and mitigating factors as set forth in SCR 102.5; and recommended discipline including terms of probation or conditions, if applicable. The written decision is to include such analysis as is necessary to support the recommended discipline based upon the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the applicable aggravating or mitigating factors as provided in the American Bar Association Standards for Imposing Lawyer Sanctions.

**(c) Preparation of decision.** The panel chair may request proposed findings be prepared by one of the parties at the discretion of the panel chair. In the event proposed findings are to be prepared by one of the parties, a post-hearing conference shall be held, in person or by telephone, between the chair and the parties to discuss any matters reasonably necessary to assist in the preparation of the written decision in conformance with the standards set forth in this rule.

**(d) Filing and service.** The decision shall be filed with bar counsel's office and served pursuant to SCR 109(1).

# EXHIBIT C

FINDINGS AND CONCLUSIONS WORKSHEET

1. RULES VIOLATIONS:

Count 1:

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Count 2:

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Count 3:

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Count 4:

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

Rule \_\_\_\_\_

2. KEY FACTUAL DETERMINATIONS:

A. Factors used to evaluate the significance of the duty(ies) violated by the lawyer's conduct:

B. The lawyer acted:

- \_\_\_\_\_ Intentionally-conscious objective or purpose to accomplish a particular result
- \_\_\_\_\_ With Knowledge-conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result
- \_\_\_\_\_ Negligently-failure to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation
- List key facts used to reach this determination.

C. Evaluation of the potential or actual injury caused by the misconduct:

D. Evaluation of Aggravating and Mitigating Factors

- Aggravating factors present in this case:
  
- Mitigating factors present in this case:
  
- How were factors balanced?
  
- Describe, if applicable, how aggravating or mitigating factors increased or decreased the level of discipline imposed.

E. General Findings of Fact

- Evidence found to be particularly persuasive:
  
- Evidence found to lack credibility:
  
- Misc. Comments:

3. RECOMMENDED DISCIPLINE

- Public or Private Letter of Reprimand (circle one if applicable)

With Fine in the amount of \$ \_\_\_\_\_  
(up to \$1000)

- Letter of Caution
- Suspension for term of \_\_\_\_\_
  - Stayed for term of \_\_\_\_\_ subject to terms of probation or conditions as set forth below
- Disbarment
- Restitution in the amount of \$ \_\_\_\_\_
- Costs of the proceedings in the amount of \$ \_\_\_\_\_
- Other Conditions:
  
- Terms of Probation (if applicable):