

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the matter of Amendments to Court Rules regarding attorney discipline, specifically, SCR 102, 103, 104, 105, 105.5, 110, 111, 113, 116, and 117.

ADKT NO.: 0506

FILED

AUG 10 2015

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. On July 1, 2015, at the public hearing, the Supreme Court directed the Board to supplement its Petition with a survey of the demographic make-up of the members of the Northern and Southern Nevada Disciplinary Boards, along with any other information the Board felt pertinent for the Court's consideration.

I. NORTHERN AND SOUTHERN NEVADA DISCIPLINARY
BOARDS.

Attached as Exhibit A is a list of the current members of the Northern and Southern Nevada Disciplinary Boards. This includes an additional 19 members added to the Southern Board at the Board of Governor's Annual Meeting. Also included is a breakdown of the demographics of the membership of the disciplinary boards based on a survey of the membership recently conducted by the State Bar, attached as Exhibit B.

The significance of any demographic imbalances should be analyzed within the context of the voluntary nature of membership on a disciplinary board. Selection of the disciplinary board members begins only upon the submission of

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1 a statement of interest by a member of the Nevada Bar for consideration
2 following a solicitation for applications sent to the Bar as a whole. The State
3 Bar does not ask for or consider any of the demographic factors used in the recent
4 survey. The only inquiry made is a review of the disciplinary history of each of
5 the interested members. The recommendations are then submitted to the Board
6 of Governors for their approval.

7 The survey results suggests a demographic breakdown that is consistent
8 with the demographics of the overall Bar. 70% of the State Bar is male with an
9 average age of 45.9 and 13.4 years of experience. 76% of the State Bar describes
10 their practice setting as "private practice." The disciplinary boards, by
11 comparison, are 74% male with a median age of approximately 45 years and 19
12 years of experience. 74% of the disciplinary board members describe their
13 practice settings "private practice." A comparison by ethnicity was not made
14 as such data for the overall Bar is not available.

15 **II. ADDITIONAL ISSUES FOR THE COURT'S CONSIDERATION.**

16 **A. Incorporating the ABA Standards into Discipline Record.**

17 Some of the significant proposed changes involve reducing the size of
18 hearings panel from five to three members as well as reducing the number of
19 members that must concur, from 4-1 to 3-2 (or 2-1 if the size of the panel is
20 reduced). In addition, ADKT 0505 proposes that the Supreme Court give greater
21 deference to factual findings while maintaining de novo review of legal
22 conclusions and recommended sanctions.

23 The Court has expressed concern with the adequacy of the findings it must
24 review to ensure imposing appropriate and consistent discipline. Specifically,
25 the Court has directed that the Panels better delineate in the Findings and

1 Recommendations the analysis employed under the ABA Standards for
2 Imposing Lawyer Sanction, which the Court utilized in *In the Matter of*
3 *Discipline of Glen Lerner*, 124 Nev. 1232, 197 P.3d 1067 (2008).¹

4 **1. Disciplinary board training in ABA Standards.**

5 The State Bar has scheduled training programs in August 2015 for all
6 Disciplinary Board members specifically directed at applying the methodology
7 and criteria in the ABA Standards to discipline cases. A point of emphasis will
8 be the discussion of evidence of the offending attorney's state of mind in
9 committing the misconduct and how aggravating and mitigating factors were
10 weighed by the panel. In addition, the Office of Bar Counsel (OBC) has
11 instructed all bar counsel to make specific recommendations for an appropriate
12 sanction and to implement arguments and presentations that directly address
13 how the ABA Standards should be used as guidance in the deliberations of the
14 panel.

15 **2. Rule change regarding content of panel findings.**

16 At Annual Meeting, the Board reviewed a proposed change to Rule 39 of
17 the Disciplinary Rules of Procedure that would set forth the application of the
18 ABA Standards and define what should be required in Hearing Panel findings.
19 A copy of this proposed rule change is attached as Exhibit C.

20 Additionally, OBC has developed a template that contains an outline of
21 the type of information needed in the findings. This would be used by a panel
22 chair to fashion a more appropriate findings or guide the drafting of the findings
23 by one of the parties, if so directed by the Chair. During the training sessions,
24

25 ¹In 2007, the Supreme Court previously adopted verbatim Standards 9.1
– 9.4 (Aggravating and Mitigating factors, codified as SCR 102.5.)

1 OBC will elicit feedback from the Disciplinary Board members and present the
2 final rule and template to the Board for approval in September.

3 **B. Letters of Caution.**

4 Issues were raised during public comment concerning the frequency of
5 the imposition of letters of caution on younger attorneys and with the long-term
6 effect of these letters. While letters of caution are defined as a type of discipline,
7 *see* SCR 102(8), significant differences exist with respect to the treatment of a
8 letter of caution as compared to other forms of discipline. For example, SCR
9 102(8) provides "[a] letter of caution may not be used as an aggravating factor
10 in any subsequent disciplinary proceeding."

11 Letters of caution primarily are imposed by a screening panel following
12 investigation by bar counsel. *See* SCR 105(1)(a). Because no formal complaint
13 is filed on a case that has been dismissed with the issuance of a letter of caution,
14 the disciplinary record becomes public upon the conclusion of the screening
15 panel proceedings. *See* SCR 121(2).

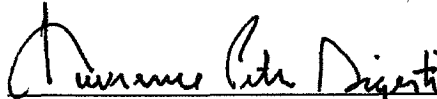
16 Letters of caution issued by a screening panel are expunged after three
17 years pursuant to SCR 121(14). After a file has been expunged, the State Bar is
18 obligated to respond to any inquiry about that letter of caution by stating "there
19 is no record of such matter." *Id.* The potential effect of a letter of caution is
20 therefore limited to the three period following issuance of such letter.

21 A review of screening panel proceedings over the past eighteen months
22 indicate 4 attorneys in practice less than five years were issued a letter of caution
23 out of a total of 106 reported cases. All of the cases involving younger attorneys
24 included multiple grievances and other factors that contributed to the imposition
25 of discipline. The average years of practice for attorneys receiving a letter of

1 caution as a sole form of discipline from a screening panel during the period of
2 this survey is 15.5 years.

3 Respectfully submitted this 3rd day of August 2015.

4 STATE BAR OF NEVADA
5 BOARD OF GOVERNORS

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7 _____
8 LAURENCE PETER DIGESTI, President
9 Nevada Bar No. 88
10 State Bar of Nevada
11 3100 W. Charleston Blvd., Suite 100
12 Las Vegas, NV 89102
13 (702) 382-2200
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT A

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EXHIBIT B

SURVEY RESULTS

Responses Received:

Total Members:

Northern Board	37		55
Southern Board	57		99
Attorney Members	68		120
Lay Members	26		34
Total:	94		154

1. GENDER

	Responses	
Male	69	74%
Female	24	26%
Total	93	100%

2. AGE

	Responses	
Under 35 years of age	4	4%
35-44 years of age	22	23%
45-54 years of age	20	21%
55-64 years of age	28	30%
65 years of age or older	20	21%
Total	94	

3. RACE/ETHNICITY

	Responses	
Caucasian	81	87%
Hispanic	4	4%
Asian/Pacific Islander	4	4%
African American	1	1%
Native American	1	1%
Other	4	4%
Total	93	

4. LENGTH OF TIME LICENSED TO PRACTICE LAW

	Responses	
Under 4 years	1	1%
4-9 years	14	21%
10-19 years	18	26%
20-29 years	20	29%
30 years or longer	15	22%
Total	67	

5. SIZE OF FIRM/ORGANIZATION

	Responses	
Solo	18	27%
2-4 attorneys	15	23%
5-14 attorneys	19	29%
15 attorneys or more	14	21%
Total	66	

6. PRACTICE SETTING

	Responses	
Private Practice	50	74%
Government	8	12%
Corporate/In House	6	9%
Retired	2	3%
Judiciary	1	1%
Private Trials/Arbitration/Mediation	1	1%
Total	68	

7. FIELD OF PRACTICE

	Responses	
General Civil (defense)	21	31%
General Civil (plaintiff)	16	24%
General Practice	14	21%
Personal Injury	13	19%
Construction Litigation	8	12%
Criminal (defense)	8	12%
Family Law	7	10%
Insurance Defense	7	10%
Transactional	6	9%
Bankruptcy	5	7%
Criminal (prosecution)	4	6%
Estate Planning/Probate/Wills & Trusts	3	4%
Labor & Employment Law	3	4%
Other	14	21%

8. LOCATION OF PRACTICE

	Responses	
Clark County	41	60%
Washoe County	23	34%
Rural Counties	4	6%
Carson City	0	0%
Total	68	

EXHIBIT C

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).