

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3   **IN THE MATTER OF AMENDMENTS**  
4   **TO SUPREME COURT RULE 116**    }

ADKT NO.: 0525

**FILED**

MAY 08 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
CHIEF DEPUTY CLERK

7                   **PETITION**

8           The Board of Governors of the State Bar of Nevada (“State Bar”) hereby  
9 petitions this Court to amend Supreme Court Rule (“SCR”) 116 (Reinstatement) to  
10 set forth explicit reinstatement criteria to be met by lawyers who have been  
11 subjected to a disciplinary suspension of more than six (6) months. The proposed  
12 amendatory language is set forth in **Exhibit A**.

13                   **GROUND FOR THE AMENDMENT**

14           The State Bar proposes amending SCR 116 to include more explicit criteria  
15 which must be met in order for a suspended attorney to qualify for reinstatement.

16   **I.    Background**

17           Pursuant to SCR 116(1), attorneys who are suspended as discipline for more  
18 than six (6) months may not resume practice unless reinstated by order of the  
19 supreme court. SCR 116(2) sets out the procedure for seeking reinstatement,  
20 including therein the categories of information that must be proven in order for the  
21 suspended attorney to be reinstated.

22           Standard 2.3 of the ABA Standards for Imposing Lawyer Discipline  
23 recommends that jurisdictions establish clear reinstatement conduct criteria for  
24 suspended lawyers seeking reinstatement. Rule 25(e) of the ABA Model Rules for  
25 Lawyer Disciplinary Enforcement sets forth the following reinstatement criteria for

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1 lawyers who are required to petition for reinstatement following a disciplinary  
2 suspension:

- 3 • Full compliance with the terms and conditions of all prior disciplinary  
4 orders;
- 5 • The lawyer has neither engaged in nor attempted to engage in the  
6 unauthorized practice of law during the period of suspension;
- 7 • Any physical or mental disability or infirmity existing at the time of  
8 suspension has been removed; if alcohol or other drug abuse was a  
9 causative factor in the lawyer's misconduct, the lawyer has pursued  
10 appropriate treatment, has abstained from the use of alcohol or other  
11 drugs for a stated period of time, generally not less than one year and  
12 is likely to continue to abstain from alcohol or other drugs;
- 13 • The lawyer recognizes the wrongfulness and seriousness of the  
14 misconduct resulting in the suspension;
- 15 • The lawyer has not engaged in any other professional misconduct since  
16 suspension;
- 17 • Notwithstanding the conduct for which the lawyer was disciplined, the  
18 lawyer has the requisite honesty and integrity to practice law; and
- 19 • The lawyer has kept informed about recent developments in the law  
20 and is competent to practice.

## 21 II. Discussion

22 As currently written, SCR 116 (2) governs the procedure for reinstatement in  
23 pertinent part as follows (emphasis added):

24 2. **Procedure for reinstatement.** Petitions for  
25 reinstatement by a suspended attorney shall be filed with bar  
counsel's office, which shall promptly refer the petition to the  
chair of the appropriate disciplinary board. The chair shall  
promptly refer the petition to a hearing panel, which shall,  
within 60 days after referral, conduct a hearing. The attorney  
has the burden of demonstrating by clear and convincing  
evidence that he or she has the moral qualifications,  
competency, and learning in law required for admission to  
practice law in this state, and that his or her resumption of the  
practice of law will not be detrimental to the integrity and  
standing of the bar, to the administration of justice, or to the  
public interest.

1 The Rule places the burden of proof on the attorney seeking reinstatement,  
2 and sets forth somewhat broad categories of information that can be used to meet  
3 that burden. The breadth of these categories, by their very nature, could lead to  
4 arguably inconsistent results in the reinstatement analysis. By adopting the  
5 language of the ABA Rule, greater specificity would be provided for Panel  
6 consideration in the reinstatement review process, and create parameters for greater  
7 clarity in Panel findings.

8 The Nevada Supreme Court has adopted the ABA Standards with regard to  
9 imposition of lawyer sanctions. Similarly, it is useful to look to the ABA for  
10 reinstatement criteria. The ABA, through a Special Committee, has adopted a more  
11 objective list of conduct benchmarks with the mindset that consistent reinstatement  
12 criteria can be an effective means of protecting the public from future misconduct.  
13 *See Exhibit B (The ABA Model Rules for Lawyer Disciplinary Enforcement: A*  
14 *Look Back and Plans for the Future).*

### 15 **III. Analysis**

16 Creation of specific, objective reinstatement criteria, set out in the Supreme  
17 Court Rule, would provide for consistency in reinstatement review by Disciplinary  
18 Hearing Panels, and notice to suspended attorneys concerning the criteria for  
19 reinstatement and the evidence necessary to meet their burden in qualifying to  
20 return to the practice.

21 The criteria set forth in ABA Model Rule are logically and reasonably geared  
22 to ensure a lawyer is ready to return to the practice of law.

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1 **RECOMMENDATION**

2 The Board of Bar Governors recommends that SCR 116 be amended to set  
3 forth more specific reinstatement criteria for attorneys who seek reinstatement  
4 following a disciplinary suspension of more than six months, consistent with the  
5 ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 25(e). The proposed  
6 amendment is attached as **Exhibit B**.

7 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May 2017.

8 STATE BAR OF NEVADA  
9 BOARD OF GOVERNORS

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**EXHIBIT A**

## Rule 116. Reinstatement.

1. **Order of supreme court required.** An attorney suspended as discipline for more than 6 months may not resume practice unless reinstated by order of the Supreme Court.

2. **Procedure for reinstatement.** Petitions for reinstatement by a suspended attorney shall be filed with bar counsel's office, which shall promptly refer the petition to the chair of the appropriate disciplinary board. The chair shall promptly refer the petition to a hearing panel, which shall, within 60 days after referral, conduct a hearing. The attorney has the burden of demonstrating by clear and convincing evidence that he or she has ~~the moral qualifications, competency, and learning in law required for admission to practice law in this state, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest.~~ met the following criteria:

- Full compliance with the terms and conditions of all prior disciplinary orders;
- The lawyer has neither engaged in nor attempted to engage in the unauthorized practice of law during the period of suspension;
- Any physical or mental disability or infirmity existing at the time of suspension has been removed; if alcohol or other drug abuse was a causative factor in the lawyer's misconduct, the lawyer has pursued appropriate treatment, has abstained from the use of alcohol or other drugs for a stated period of time, generally not less than one year and is likely to continue to abstain from alcohol or other drugs;
- The lawyer recognizes the wrongfulness and seriousness of the misconduct resulting in the suspension;
- The lawyer has not engaged in any other professional misconduct since suspension;
- Notwithstanding the conduct for which the lawyer was disciplined, the lawyer has the requisite honesty and integrity to practice law; and
- The lawyer has kept informed about recent developments in the law and is competent to practice.

Within 60 days after the hearing concludes, bar counsel shall file the record of the proceedings, together with the panel's findings and recommendation, with the supreme court. Receipt of the record shall be acknowledged in writing by the supreme court clerk.

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**EXHIBIT B**



**The ABA Model Rules for Lawyer Disciplinary Enforcement:  
A Look Back and Plans for the Future**

by: **Professor Myles V. Lynk, Chair**  
**ABA Standing Committee on Professional Discipline**

**Ellyn S. Rosen**  
**Regulation Counsel**

The American Bar Association has long supported primary state judicial regulation of the legal profession. While the Association does not discipline lawyers or judges, it does have a premier role in developing and shaping professional regulatory policies and procedures in the United States, which has the effect not only of enhancing public protection, but also of maintaining an independent judiciary. The ABA fulfills this role by promulgating model rules and other policy documents for adoption by the states. The essential existing ABA policy documents on the subject of professional regulation are the Model Rules for Lawyer Disciplinary Enforcement, Model Rules for Judicial Disciplinary Enforcement, Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Report), and Standards for Imposing Lawyer Sanctions. All of these policies are available on the Center's web site at <http://ambar.org/CPRHome>.

The ABA Standing Committee on Professional Discipline ("Discipline Committee") is the entity charged by § 31.7 of the ABA Constitution and Bylaws with "developing, promoting, coordinating, and strengthening professional disciplinary and regulatory programs and procedures throughout the nation, including developing and promoting Association activities relating to professional discipline, model rules for disciplinary enforcement and standards for imposing lawyer sanctions." The Discipline Committee consists of nine members appointed by the ABA President. Members serve three-year terms.

**Development of the ABA Model Rules for Lawyer Disciplinary Enforcement**

Historically, states were not uniform in their approach to lawyer discipline.<sup>1</sup> In 1967, the ABA created the Special Committee on Evaluation of Disciplinary Enforcement (referred to as "the Clark Committee" for its Chair, former U.S. Supreme Court Justice Tom C. Clark) to conduct a study of the state of lawyer disciplinary enforcement in the United States.<sup>2</sup> The Clark Committee was also charged with making recommendations to the ABA House of Delegates. At the conclusion of its study in 1970, the Clark Committee issued its Report (Problems and Recommendations in Disciplinary Enforcement) decrying the "...existence of a scandalous situation that requires the immediate attention of the profession...Disciplinary action is practically nonexistent in many jurisdictions;

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<sup>1</sup> For a comprehensive history of the development of lawyer disciplinary procedures in the U.S., see Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (Spring 1994).

<sup>2</sup> SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT xiii (1970) [hereinafter CLARK REPORT].

practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.”<sup>3</sup> The Clark Report warned that unless prompt action was taken, the courts and the profession risked losing their ability to self-regulate, and further urged the judiciary to assert itself to avoid such loss.<sup>4</sup> The Clark Committee made thirty-six recommendations for addressing the then deplorable state of lawyer disciplinary enforcement. Those recommendations ranged from ensuring that the disciplinary agencies had adequate funding to professionalize the process to urging the adoption of specific procedures such as the immediate suspension of lawyers convicted of serious crimes.<sup>5</sup> In 1970, the ABA House of Delegates adopted the Clark Report and many jurisdictions amended their disciplinary rules to implement its recommendations. The ABA Standing Committee on Professional Discipline incorporated the Clark Committee’s recommendations into “Suggested Guidelines for Rules of Disciplinary Enforcement”. The Suggested Guidelines added public members to the model disciplinary structure and procedure.

The Discipline Committee then created a Subcommittee on Lawyer Standards to develop standards for courts to use in establishing a structure for lawyer disciplinary proceedings that would increase public confidence in the system.<sup>6</sup> This structure included one-third public membership, public proceedings upon the filing and service of formal charges, and complainants’ rights to notice and appeal. The ABA House of Delegates adopted the Standards for Lawyer Discipline and Disability Proceedings in February 1979. The Standards were published in “Professional Discipline for Lawyers and Judges”.

The ABA Standing Committee on Professional Discipline then transformed the Standards into court rule format. In 1989, the ABA House of Delegates adopted the Model Rules for Lawyer Disciplinary Enforcement. The Model Rules for Lawyer Disciplinary Enforcement (“MRLDE”) were intended to reflect the best policies and procedures for lawyer disciplinary enforcement under the inherent jurisdiction of the states’ highest courts of appellate jurisdiction. The MRLDE set forth a structure by which complaints against lawyers would be investigated and prosecuted in a fair and efficient manner, with appropriate due process for the lawyers who were subject to allegations of wrongdoing.

Also in 1989 the ABA created the Commission on Evaluation of Disciplinary Enforcement, which came to be known as the McKay Commission after the death of its Chair, Robert B. McKay.<sup>7</sup> Subsequent to his death, Raymond R. Trombadore chaired the Commission. The McKay Commission was charged with conducting a nationwide evaluation of the state of lawyer disciplinary enforcement and recommending a model

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 2, 8-9.

<sup>5</sup> *Id.*

<sup>6</sup> ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT PREFACE (2007).

<sup>7</sup> COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS’N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html).

“...for responsible regulation of the legal profession into the twenty-first century.”<sup>8</sup> Like the Clark Commission before it, the McKay Commission strongly asserted that the regulation of the profession must remain the responsibility of the states’ highest courts of appellate jurisdiction.

In other respects the recommendations of the McKay Commission were transformative. For example, the Commission recommended the creation of a central intake system to facilitate the more effective screening of disciplinary complaints along with what it described an expanded system of regulation that moved the disciplinary process away from its purely prosecutorial roots. The expanded system of regulation as recommended by the McKay Commission provided for the referral of complaints outside the scope of the disciplinary agencies’ purview to other relevant entities such as mediation or fee arbitration programs. For minor misconduct the Commission recommended what has come to be known as alternatives to discipline programs. Minor misconduct, while violations of the professional conduct rules, rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. The McKay Commission found that while these complaints should be removed from the disciplinary system, they should not be simply dismissed. Rather, if certain criteria are met, the disciplinary agency and lawyer can agree to a program that will address the shortcomings that led to the complaint. If the lawyer successfully completes the program, the matter is closed.

The McKay Commission also recommended that the public be permitted earlier access to information about the disciplinary process. Noting that “...secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems,” the McKay Commission recommended that the process be opened to public scrutiny much earlier.<sup>9</sup> Originally the McKay Commission recommended that disciplinary proceedings be open to the public from the time a complaint was filed, but ultimately that was a step too far for the profession and the House adopted a version urging that all proceedings be open to the public upon the finding of probable cause.<sup>10</sup>

In 1992, the ABA House of Delegates adopted all but four of the twenty-two recommendations of the Report of the McKay Commission (Commission on Evaluation of Disciplinary Enforcement). In August 1993, the Discipline Committee revised the MRLDE to reflect the policies approved by the House of Delegates in the McKay Report. This included allowing the public access to disciplinary proceedings and information about them after the finding of probable cause and the filing of the formal charges against a lawyer.<sup>11</sup> The Committee further elaborated, in Commentary to the MRLDE, the details of a Central Intake system and time guidelines for conducting lawyer disciplinary investigations, prosecutions and appeals. In August 1996, the House of Delegates adopted amendments to the MRLDE propounded by the Discipline Committee to provide for diversion programs as Alternatives to Discipline. At the 1999 Midyear Meeting, the

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<sup>8</sup> *Id.* at xi.

<sup>9</sup> *Id.* at 33.

<sup>10</sup> *Id.* at 33-42.

<sup>11</sup> ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16 (2007).

MRLDE were amended to change "conviction" to "found guilty of a crime" in Rule 19 for purposes of expediting the imposition of an interim suspension, and to and enhance the enforcement of subpoenas issued by another jurisdiction. These amendments were made to keep the MRLDE current and useful to jurisdictions considering review and revision of their lawyer disciplinary systems. In August 2002, the House adopted the Committee's proposed amendments to Rules 6 (Jurisdiction) and 22 (Reciprocal Discipline and Reciprocal Disability Inactive Status) to conform the MRLDE to the adopted report of the Commission on Multijurisdictional Practice.

### **The Discipline Committee's Project to Update the ABA Model Rules for Lawyer Disciplinary Enforcement**

Since their initial adoption by the ABA House of Delegates, state supreme courts have reacted positively to the MRLDE and to the other ABA regulatory policies. As a result, the regulation of the legal profession in the United States has evolved over the years into an effective, complex, professionally staffed enterprise. Each state's disciplinary mechanism operates under a sophisticated set of substantive and procedural rules adopted by the court. Disciplinary sanctions include admonition, reprimand, censure, suspension, disbarment, probation and restitution. The court may also order a disciplined lawyer to comply with specific conditions such as submitting to drug and alcohol testing, and monitoring of client trust accounts. The court may require a disciplined lawyer to reimburse the disciplinary agency for the costs of the investigation and prosecution. Publicizing the disciplinary process led to the development of a large, transparent body of regulatory case law in each jurisdiction. In many states information about disciplined lawyers is available via the internet.<sup>12</sup>

On behalf of the ABA, the Discipline Committee is the only entity in the nation that develops, updates, promotes, and implements national models of procedural rules regarding the structure and administration of lawyer and discipline systems and the imposition of disciplinary sanctions. In these ways the Committee's work directly enables the courts and their disciplinary agencies to effectively regulate the over 1,400,000 lawyers in the U.S to the benefit of the public and the profession. As the national leader in developing lawyer regulatory policies, the ABA and the Discipline Committee have the responsibility to ensure that its Model Rules and related policies keep pace with change and the evolution of law practice. The ABA's last "global" review of the MRLDE was that conducted by the McKay Commission.

In 2010, the Discipline Committee decided that the time had come for another overarching look at the MRLDE and it has commenced that in-depth study. This complex project will take several years to complete, and in doing so, the Discipline Committee and its Counsel are undertaking work that is typically done by an ABA Commission. The Discipline Committee has begun researching the implementation of each Model Rule and seeking input from those in the field of professional regulation. In particular, the Committee has asked the National Organization of Bar Counsel, the

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<sup>12</sup> See, e.g., [www.iardc.org](http://www.iardc.org) and [www.ladbb.org](http://www.ladbb.org).

**Association of Professional Responsibility Lawyers, and the National Council of Lawyer Disciplinary Boards to identify the Model Rules that they believe require amendment and provide the rationale for those recommendations. Because there can be no doubt that advancing technology and globalization of the practice of law has implications for the U.S. lawyer regulatory system, the Discipline Committee is also taking into account in its review of the MRLDE the work of the ABA Commission on Ethics 20/20. The Discipline Committee is actively participating in the Commission's efforts. At the conclusion of its review, the Discipline Committee will propose to the ABA House of Delegates for adoption proposed amendments to the MRLDE.**