

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
DISCIPLINE OF LYNN R. SHOEN,

Petitioner,

vs.

Nevada State Bar Disciplinary Board,

Respondent.

Case No.: 79288

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PETITIONER LYNN R. SHOEN'S REPLY BRIEF

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Statutes and Rules

NRAP Rule 21(3)

SCR 116(2)

Utah R.CIV.P.65A(E)

I. REQUIRED CONTENTS AND INTRODUCTION

NRAP Rule 21(3) requires the following information:

- a. **Whether this matter falls within NRAP 17(a)** (Supreme Court Matters) or 17(b) (Appellate Court Matters). This is a matter of attorney discipline; thus it is a Supreme Court Matter pursuant to NRAP 17(a)(4).
- b. **The relief sought is**
 - i. Writ of Mandamus directing the State Bar Attorney Disciplinary Board to vacate its Order Striking SHOEN'S Petition for Reinstatement since the Disciplinary Board did not properly apply SCR Rule 116.
- c. **The issues presented** are whether the Nevada Bar Disciplinary Board properly applied SCR Rule 116 since the Board only considered whether (after paying full restitution), a failure to pay \$25,100 in fee disputes was cause to deny reinstatement without considering the rest of SCR 116 which allows SHOEN to be reinstated **nevertheless** if there are other good and sufficient reasons.

- d. **The Facts necessary to understand the issues presented.** The facts are set forth below.
- e. **The reasons why the writ should issue including points and authorities.** The reasons and authorities are presented below, but one reason is that SHOEN has no direct appeal from the Disciplinary Board's Order striking her Petition for Reinstatement. A Writ of Mandamus may issue to compel performance of an act which the law enjoins as a duty i.e., the Board had a duty to consider all of SCR Rule 116, but failed in this duty.

II. STATEMENT OF FACTS

On April 22, 2016 this Court entered an Order Approving Conditional Guilty Plea Agreement.¹ The Order approved a 4 year and six (6) month suspension retroactive to April 24, 2014². Shoen was required to:

- Take 6 CLE classes per year (**which she did**);

¹ *See* Shoen/Petitioner's Appendix attached to her Petition for Reinstatement filed with the State Bar of Nevada Southern Nevada Disciplinary Board at Bates No.021-023 (Shoen/Petitioner's Appendix).

² This 4-year 6 month period was a critical part of the Disciplinary Board's Decision and the Court's Order so Ms. Shoen would not need to retake the Bar Examination.

- Pass the MPRE examination within six (6) months of applying for reinstatement (**which she did**).
- Pay \$25,100 to be paid in full by monthly payments within one year of the date of this Court’s Order (**which she was financially unable to meet**);
- Repay the costs incurred by the Nevada State Bar (**which was also financially unable to accomplish. SHOEN has provided the Court with information regard the chronic health issues of her minor daughter, the child’s hospitalizations and SHOEN’s own health issues**).

On April 23, 2019 Shoen filed her Petition for Reinstatement, 4 ½ years after the April 24, 2014 suspension.³

On May 29, 2019 the State Bar Southern Disciplinary Board granted the State Bar’s Motion to Strike Shoen’s Petition for Reinstatement⁴ because “The Chair and the Bar does not have the authority to hear an application of reinstatement until the restitution is paid.” This decision is an incorrect statement of the law in Nevada as to the Disciplinary Board’s authority. At the time of the Disciplinary Board hearing, it was undisputed that Shoen had paid 100% of the restitution, the misappropriated

³ See Shoen’s Appendix at Bates No. 021.

⁴ See Shoen’s Appendix at Bates No. 025.

trust funds which were the subject of the disciplinary proceedings. The invasion of her trust account ultimately resulted in this Court's April 22, 2016 Order approving the Conditional Guilty Plea Agreement.

On June 28, 2019 Shoen filed a Petition for Writ of Mandamus and Motion to Amend.

On July 29, 2019 Shoen filed a Petition for Writ of Mandamus directing the Disciplinary Board to vacate its Order striking Shoen's Petition for Reinstatement.

On October 11, 2019, the Nevada Supreme Court entered an order requiring the State Bar to answer Shoen's Petition.

On November 22, 2019 the Nevada Bar filed its Answer basically taking the position that only a portion of SCR 116 applies and the Disciplinary Board did not have authority to consider her petition.

Unlike many of the other attorneys who have been suspended and later reinstated, SHOEN has never been arrested for any crime. She has never been incarcerated. She has never been placed on probation for any charge. No criminal charges have been filed against her.

Since her suspension in April of 2014, SHOEN has had no issues with the Nevada State Bar or law enforcement.

III. LEGAL ARGUMENT

Nevada Supreme Court Rule 116, as amended in 2017, provides in pertinent part as follows:

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 or vice chair shall promptly refer the petition to a hearing panel, which shall within 60 days after referral. conduct a hearing. An attorney may be reinstated or readmitted only if the attorney demonstrates by clear and sufficient reason why the attorney should nevertheless be reinstated or readmitted:

(a) Full compliance with the terms and conditions of all prior disciplinary orders;

(b) The attorney has neither engaged in nor attempted to engage in the unauthorized practice of law during the period of suspension.

(d) The attorney recognizes the wrongfulness and seriousness of the misconduct resulting in the suspension;

(e) The attorney has not engaged in any other professional misconduct since suspension;

(f) Notwithstanding the conduct for which the attorney was disciplined, the attorney has the requisite honesty and integrity to practice law; and

(g) The attorney has kept informed about recent developments in the law and is competent to practice.

The Nevada Bar completely avoided Shoen's precedent for allowing an attorney to file a Petition for Reinstatement prior to satisfying the payment condition precedent for reinstatement.

For example, in *In The Matter Of The No. 65284 Reinstatement Of Douglas C. Crawford, Bar No. 181*, this Court allowed CRAWFORD to file a Petition for Reinstatement, and be reinstated to the practice of law, even though he, unlike SHOEN, had not even paid full restitution of the funds he misappropriated, which was a condition precedent for his filing a Petition for Reinstatement:

This is a petition for reinstatement to the practice of law by suspended attorney Douglas Crawford. A hearing panel of the Southern Nevada Disciplinary Board recommended that Crawford be reinstated to the practice of law, subject to conditions. In February 2009, this court suspended Crawford from the practice of law for five years based on his misappropriation of client funds in order to support his gambling addiction. See *In re Discipline of Crawford*, Docket No. 51724 (Order of Suspension, February 18, 2009). **In that order, we imposed numerous conditions pertaining to Crawford's application for reinstatement. Id. The State Bar contends that Crawford's reinstatement petition is premature because he has not satisfied one condition: the condition that he make restitution for the misappropriated funds. Our intent behind the imposition of that condition was to allow Crawford to petition for reinstatement after the expiration of his term of suspension, assuming all other conditions were met, if he could demonstrate that he had paid restitution in full or that he could demonstrate that he was making a regular, concerted, and continuous effort to satisfy his restitution obligation. Although he has not yet paid restitution in full, Crawford has demonstrated that he has been making a regular, concerted, and continuous effort to satisfy his debt. Thus, we conclude that his reinstatement petition is not premature.** (Emphasis added).

The Disciplinary Committee had found that the requirements of SCR

116 for an attorney seeking reinstatement had been met by Crawford, and that CRAWFORD had demonstrated by clear and convincing evidence that he has the moral qualifications, competency, and learning in law required for readmission to the practice of law, and that Crawford's resumption of the practice of law would not be detrimental to the integrity and standing of the bar, to the administration of justice or to the public interest. The court allowed CRAWFORD to be reinstated to the practice of law, but added additional conditions for repayment of the misappropriated funds.

Here, SHOEN, unlike CRAWFORD, paid 100% of the misappropriated funds prior to her October 2010 Disciplinary hearing, more than nine (9) years ago. The \$25,100.00 plus costs at issue consist of fee disputes and Bar costs which SHOEN proposes will be paid through her salary from MUELLER & ASSOCIATES, INC. once she obtains employment at that firm as an attorney. She has been employed with MUELLER & ASSOCIATES, INC. as a law clerk since March 2019, and Craig A. Mueller has already indicated that if SHOEN is reinstated, he will hire her as an associate. Such an arrangement would insure that former clients would receive the fees which were in dispute.

SHOEN proposes that she be reinstated to the practice of law, with conditions requiring her to pay \$1,500.00 per month toward to amounts owed. Under such an arrangement, full restitution would be paid within 22 months of her reinstatement. Such an arrangement would be consistent with the ruling of *In Re: Reinstatement of Douglas Crawford, Id.*

Like CRAWFORD, SHOEN has made a good faith effort to comply with the terms of her Conditional Guilty Plea, and has succeeded, saved and except for the payment of the fee disputes and the costs. She also paid \$3,5000.00 to the Nevada State Bar at the time she filed her Petition for Reinstatement.

SCR 116(2) requires that an attorney seeking reinstatement demonstrate, 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." SHOEN has not engaged in any misconduct since her April 2014 suspension.

SHOEN is asking that The Disciplinary Board's Order be reversed and her Petition for Reinstatement be considered and that she be allowed to demonstrate that her reinstatement will not be detrimental to the bar or to the public.

SHOEN has otherwise fully complied with the following terms of the April 22, 2016 Order Approving Conditional Guilty Plea Agreement:

<p>1. <u>1--Take 6 CLE classes each year until reinstatement;</u></p>		<p>✓ Completed</p>
<p>2. <u>2--Take and pass the MPRE exam within 6 months of applying for reinstatement;</u></p>		<p>✓ Completed with a score of 90</p>
<p>3. <u>3--Pay restitution to her clients regarding misappropriated trust funds—all of which were fully paid prior to the Conditional Guilty Plea;</u></p>		<p>✓ Completed in full by October 2010, prior to the conditional plea</p>
<p>4. <u>Pay \$3,500 the cost of the Bar opposing her current Petition for reinstatement.</u></p>		<p>✓ Completed</p>

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<p>5. <u>Upon reinstatement, SHOEN cannot maintain her own practice; must work under the supervision of another attorney with at least 15 years of experience and may never be a signatory to or have access to any trust account, client or third-party funds of any kind, regardless of their characterization such as a “flat-fee.”</u></p>		<p>SHOEN has obtained employment with Craig Mueller of MUELLER & ASSOCIATES, INC. who has agreed to:</p> <p>a—meet the requirements of supervision and require no trust account access, as well as</p> <p>b—set aside \$1,500 from each of SHOEN’s paychecks to pay the fee dispute clients in full as well as the previous disciplinary costs.</p>
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In, *State Bar of Nevada v. Claiborne* 756 P.2d 464 (Nev. 1988) the court held:

The paramount objective of bar disciplinary proceedings is not additional punishment of the attorney, but rather to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole; (2) in a disciplinary proceeding, it is the duty of this court to look beyond the label given to a conviction in order to determine whether the underlying circumstances of the conviction warrant discipline; (3) this court must also consider the isolated nature of an attorney's conduct as well as his prior, exemplary professional standing; and (4) this court should examine the retribution and punishment already exacted in determining whether further discipline is warranted. Furthermore, humanitarian concerns such as age, ill health, or other disability warrant consideration in disciplinary proceedings. (Emphasis added). Id at 473.

Unlike Claiborne, SHOEN has never been indicted, arrested, charged or convicted or any crime. She has not been impeached or tried and convicted by the United States Senate. See *United States v. Claiborne*, 781 F.2d 1327, 1328 (9th

Cir.1986). Other attorneys who have been convicted of crimes for which they were incarcerated have likewise been reinstated to the practice of law.

For example, Noel A. Gage was suspended from the practice of law after being convicted of Federal crimes. He was reinstated to the practice of law after the court found him to be remorseful and to have the requisite moral character. See, *In The Matter Of Reinstatement of Noel A. Gage*, Bar No. 6305, Case No. 66902.

Randolph H. Goldberg, pleaded guilty to tax evasion in 2013, and was sentenced to prison. On December 28, 2018 the court entered an order of reinstatement finding that he had satisfied “his burden of seeking reinstatement by clear and convincing evidence.” *In The Matter Of Reinstatement of Randolph H. Goldberg*, Bar No. 5970, Case No. 76355

In the matter of *In Re: Discipline of R. Christopher Reade*, Bar No. 6791, No. 70989, the court likewise allowed Reade to be reinstated to the practice of law, in spite of his criminal conviction. The facts in the Reade manner were as followed: Christopher Reade began representing Global One and its owner, Richard Young. Young organized a fraudulent scheme through which he obtained approximately \$16 million in loans from members of Global One by falsely promising them a return of future profits. young directed Reade to establish a holding corporation, and Reade

was listed as the corporation's director, secretary, and president. young transferred the fraudulently obtained proceeds to the holding corporation's account to purchase a FOREX brokerage business while concealing the source of payment.

The National Futures Association (NFA) regulates trading practices in FOREX, and it must review and approve all FOREX broker purchases in the United States. When the NFA interviewed Reade, he falsely stated that (1) “he was unaware who owned Global One,” (2) “Global One's assets were not used to purchase [the FOREX brokerage]” (3) “he was unaware of how Global One raised money,” and (4) “the funds in the [holding corporation's] accounts came from his personal contributions and assets.”

Reade knew that his false representations to NFA would hinder the investigation and were intended to prevent Young from being prosecuted for money laundering.

Reade was subsequently convicted of a felony conviction under 18 U.S.C. § 3 for one count of accessory after the fact to money laundering, was sentenced to 366 days in prison, was required to pay a \$40,000 fine, and was placed on a term of supervised release of up to 3 years.

The Nevada Supreme Court suspended Reade from the practice of law for four (4) years. However, Reade was reinstated to the practice of law. with new conditions. See, *In Re: Reinstatement of R. Christopher Reade* Bar No.: 6791 Case No.: 76935 Filed: 11/28/2018:

- Reade was required to provide the State Bar with any information or reports required by any other State Bar or Bar Counsel.
- Reade must obtain a mentor, the identity of whom must be agreed upon by the State Bar. Reade shall meet with the mentor on a regular basis to discuss his practice. The mentor shall file a monthly report with the State Bar for a period of one year following Reade's reinstatement.

If no disciplinary action is commenced against Reade within the one-year probationary period, all conditions of reinstatement will end at that time.

In, *The Matter of Harvey Whittemore* Bar No.: 1089 Case No.: 64154 is another case in which this Court examined the factors outlined in *In Re Discipline Of Trujillo*, 24 P.3d 972, 979 (Utah 2001) concerning temporary suspensions from the practice of law in order to determine whether to allow Whittemore to be reinstated to the practice of law. In *Trujillo*, the court held,

Thus, in determining whether an attorney poses a substantial threat of irreparable harm to the public, a disciplinary court must consider (1) whether the public will suffer irreparable harm unless the order of interim suspension issues, (2) whether the threatened injury to the public outweighs whatever damage the proposed order may cause the attorney temporarily suspended from the practice of law, (3) whether the proposed order, if issued, would be adverse to the public interest, and (4) whether there is a substantial likelihood, based on all the available evidence, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings. *See* Utah R.Civ.P. 65A(e) (outlining the factors to be considered in determining whether to grant a preliminary injunction or temporary restraining order); (citation omitted) It is a balancing of these factors, not a litmus test premised upon the finding of wrongful intent, that justifies a determination by a disciplinary court that an attorney poses a substantial threat of irreparable harm to the public. *Id* at 979.

Thus, this court was agreeing that when determining whether an attorney should be reinstated, the court must balance numerous factors, rather than applying a single litmus test.

The court held that in determining whether to allow an attorney to practice law, the court must weigh the following factors: (1) whether the public will suffer irreparable harm unless the attorney is suspended from practicing law; (2) whether the threatened injury to the public outweighs whatever damage the proposed order might cause the attorney suspended from the practice of law, (3) whether the order of suspension would be adverse to the public interest, and (4) whether there is a

substantial likelihood, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings

Here, SHOEN has not engaged in any misconduct during her suspension and there was not a significant sanction which was imposed on SHOEN at the end of the disciplinary proceedings, other than an order requiring her to refrain from practicing law, to pay fee disputes, to take CLE courses, and to pass the MPRE exam. SHOEN stands ready and willing to practice law under whatever conditions are imposed, and to make arrangements to repay the fee disputes. SHOEN is not a danger to the public and allowing her to practice law would not be adverse to the public interest.

IV. CONCLUSION

Like Douglas Crawford, Shoen should be allowed to file petition for Refinement and to participate in a hearing before the Disciplinary Committee even though not all of her conditions precedent have been met. If she is allowed to be reinstated, she will make arrangements with her employer to repay the amounts owed at the rate of \$1500.00 per month, with the total amount due to be repaid within

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22 months. Shoen's reinstatement should be conditioned upon such a repayment. Shoen's Petition for Reinstatement filed on April 23, 2019 should be allowed to proceed.

Dated this 23rd day of December, 2019.

MARQUIS AURBACH COFFING

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

proportionally spaced, has a typeface of 14 points or more and contains 3796 words; or

does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of December, 2019.

MARQUIS AURBACH COFFING

By: /s/ Phillip S. Aurbach

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITIONER LYNN SHOEN'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 23rd day of December, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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