


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

2  
3   IN RE COVID-19 EMERGENCY  
4   DISCIPLINARY HEARING  
5   PROCEDURES

ADKT NO.: 0565

**FILED**

AUG 20 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  CHIEF DEPUTY CLERK

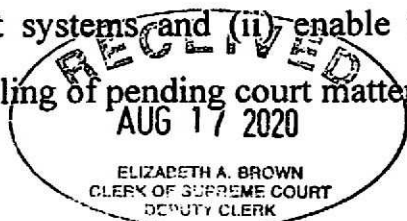
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7                   **PETITION**

8           The Board of Governors of the State Bar of Nevada ("State Bar") hereby  
9 petitions this Court to enter an Order mandating disciplinary proceedings be  
10 conducted via simultaneous audio/visual transmission ("SAT") until the health and  
11 safety concerns over the transmission of COVID-19 subside. The proposed Order  
12 is set forth in **Exhibit A**.

13                   **GROUND FOR THE ORDER**

14           The Nevada Supreme Court is charged with the exclusive power to discipline  
15 attorneys. *See* Rule 39 of the Nevada Supreme Court Rules ("SCR"). SCR 99 *et*  
16 *seq.* sets forth the jurisdiction and procedure for attorney disciplinary proceedings.

17           Since March 12, 2020 Governor Steve Sisolak has issued Directives  
18 governing activities in Nevada, including a stay at home order and directives  
19 limiting the number of persons who can gather, in response to the Coronavirus  
20 Disease ("COVID-19") pandemic. The district courts in the largest counties of  
21 Nevada have issued Administrative Orders pertaining to measures implemented to  
22 (i) take precautions to protect safety of court personnel and persons accessing the  
23 court systems and (ii) enable the courts to continue efficient and substantive  
24 handling of pending court matters.



1 In the Eighth Judicial District Court ("EJDC") and the Second Judicial  
2 District Court ("SJDC"), the Administrative Orders have required all counsel and  
3 party appearances at virtually all necessary court proceedings to be via audio/visual  
4 means in accordance with the Nevada Supreme Court Rules Governing Appearance  
5 by Audiovisual Transmission Equipment, Part IX. See Administrative Order: 20-  
6 17 (Eighth Judicial District Court), dated June 1, 2020, and Administrative Order  
7 2020-02(C) (Second Judicial District Court), dated June 11, 2020. Specifically, the  
8 EDJC has ordered that evidentiary hearings and "bench trial in all case types"  
9 should go forward when possible" with "appearances by witnesses, parties and  
10 lawyers" by "alternative means unless a District Court Judge finds a personal  
11 appearance by an individual is necessary." The SJDC has ordered that hearings "in  
12 general jurisdiction civil matters may be held at the discretion of the presiding judge  
13 via conference call or audiovisual platform."

14 Simultaneous Audio/visual Transmission is Appropriate for Disciplinary  
15 Proceedings.

16 Attorney discipline has much in common with criminal prosecution. Courts  
17 have characterized it as 'quasi-criminal' in nature. See, e.g., *In re Fisher*, 202 P.3d  
18 1186, 1199 (Colo.2009). But most courts follow the civil model for procedure in  
19 discipline proceedings. *People v. Kanwal*, 321 P.3d 494 (Colo. 2014). For example,  
20 the Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure  
21 control in the absence of a Supreme Court Rule. See SCR 119. Discipline  
22 proceedings therefore are neither criminal nor civil cases. Instead, they are unique,  
23 or "sui generis, designed to protect the citizenry. ..." *Whitehead v. Nevada Com'n*  
24 *on Judicial Discipline*, 893 P.2d 866, 111 Nev. 70 (Nev. 1995).

1        This Court established a formal hearing process in SCR 105, which provides  
2 for a three-member panel from the respective Disciplinary Board to hear the matter.  
3 Respondents have three enumerated rights, which are (1) the right to be represented  
4 by counsel, (2) to cross-examine witnesses, and (3) to present evidence. SCR  
5 105(2)(d).

6        The Confrontation Clause of the Sixth Amendment to the United States  
7 Constitution provides that “in all *criminal prosecutions*, the accused shall enjoy the  
8 right...to be confronted with the witnesses against him.” As unique or *sui generis*  
9 cases, attorney discipline proceedings are not criminal prosecutions. The  
10 Confrontation Clause of the Sixth Amendment therefore does not strictly apply.

11        The Ninth Circuit Court of Appeals agreed when it held, “A lawyer  
12 disciplinary proceeding is not a criminal proceeding. As a result, normal protections  
13 afforded a criminal defendant do not apply.” *Rosenthal v. Justices of the Supreme*  
14 *Court of Cal.*, 910 F.2d 561, 564 (9th Cir.1990) (citations omitted).

15        For example, the Pennsylvania Supreme Court rejected a respondent’s  
16 double jeopardy argument. After noting the separate sovereigns rule, it held, “If two  
17 Criminal prosecutions are possible, certainly one criminal proceeding and one  
18 quasi-criminal proceeding are within permissible constitutional bounds.” *Office of*  
19 *Disciplinary Counsel v. Campbell*, 463 Pa. 472, 345 A.2d 616 (Pa. 1975).

20        It also rejected reciprocal discipline due process claims in the case *In re*  
21 *Surrick*, 338 F.3d 224 (3rd Cir. 2003). Reciprocal discipline under SCR 114 permits  
22 the Court to impose identical discipline without a hearing.

23        In *In re Judicial Campaign Complaint Against Carr*, 667 N.E.2d 956, 76  
24 Ohio St.3d 320 (Ohio 1996), the Ohio Supreme Court reviewed a respondent’s due  
25 process claims after a default proceeding. It held,

1 A disciplinary proceeding is instituted to safeguard the courts and to  
2 protect the public from the misconduct of those who are licensed to  
practice law, and is neither a criminal nor a civil proceeding.

3 A license to practice law is a privilege to which there are attendant  
4 rights and duties. Therefore, an attorney has a duty to cooperate when  
5 called upon to assist in an investigation or to testify at a hearing in a  
disciplinary matter.

6 The Supreme Court of Louisiana noted “that the purpose of rules of  
7 evidence primarily intended to govern jury trials, particularly the hearsay rules, are  
8 less compelling in the context of imposing discipline on members of the legal  
9 profession.” *In re Quaid*, 646 So.2d 343 (La. 1994). Most other jurisdictions take a  
10 similar approach. *See, e.g., In re Kennedy*, 605 A.2d 600, 603 (D.C.App.1992);  
11 *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla.1986); *Werner v. State Bar*,  
12 24 Cal.2d 611, 150 P.2d 892, 893-94 (1944).

13 Even if disciplinary proceedings were criminal prosecutions, hearings  
14 conducted via simultaneous audiovisual transmission (“SAT”) would not  
15 necessarily impede a respondent’s right to confront witnesses. *See Lipsitz v. State*  
16 *of Nevada*, 442 P.3d 138 (Nev. 2019) (*allowing two-way video transmission of*  
17 *witness testimony pursuant to Nevada Supreme Court Rules Part IX-A (B)*). In  
18 *Lipsitz*, the Court applied a two-pronged test when it allowed SAT to be used for  
19 the witness’s testimony: (i) SAT is necessary to further an important public policy  
20 and (ii) the reliability of the testimony is otherwise assured. *See id.*, 442 P.3d at  
21 143.

22 Here, SAT is necessary to further the important public policy of protecting  
23 the public health from transmission of COVID-19. Nevada has seen over 43,831  
24 confirmed cases already. Of those, 739 Nevada citizens died. *See Nevada Health*  
25 *Response*, <https://nvhealthresponse.nv.gov/> (last visited July 27, 2020). District

1 Courts in Nevada have adopted SAT for all civil bench trials because of the health  
2 risks associated with COVID-19.

3 In addition, SAT testimony is reliable. The Court held in Lipsitz, “[SAT]  
4 allows the witness to swear under oath, the defendant can cross-examine the  
5 witness, and the court and jury have the ability to observe the witness’s demeanor  
6 and judge her credibility.” Disciplinary panels are neither judge nor jury, but the  
7 principle is the same. Disciplinary panels in both the North and South have  
8 successfully weighed SAT testimony in 13 disciplinary proceedings this year. But  
9 panels typically require the respondent’s consent.

10 Without consent, panel chairs have continued many hearings for months—  
11 some indefinitely. As of August 1, 2020, the Office of Bar Counsel has 86 matters  
12 pending formal hearing. For the last five years, the OBC has prosecuted just over 5  
13 cases per month on average. Even the 13 hearings resolved this year through SAT  
14 are well behind the normal prosecution pace. This puts the current caseload at  
15 almost an 18-month backlog.

16 “[T]he purpose of attorney discipline is to protect the public, the courts, and  
17 the legal profession...” *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d  
18 464, 527-28 (1988). This Court has long committed itself to the proposition that  
19 “justice delayed is justice denied.” *See Dougan v. Gustaveson*, 108 Nev. 517, 523,  
20 835 P.2d 795, 799 (1992), *abrogated on other grounds by Arnold v. Kip*, 123 Nev.  
21 410, 168 P.3d 1050 (2007). These tenets of safety and efficiency are not mutually  
22 exclusive. SAT hearings would promote both.

23 This Court retains power to determine the ultimate question of procedure  
24 under its original jurisdiction in *sui generis* disciplinary proceedings. It is  
25

1 appropriate during the current pandemic to hear disciplinary proceedings by SAT,  
2 and not confine them by strict application of criminal procedure.

3 Thus, it is appropriate to order all disciplinary proceedings to be conducted  
4 by SAT for the safety, health, and welfare of the community and judicial efficiency.

5 **RECOMMENDATION**

6 The Board of Bar Governors recommends that this Court Order all  
7 disciplinary proceedings to be conducted via simultaneous audio/visual  
8 transmission until the health and safety concerns over the transmission of COVID-  
9 19 subside.

10 RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August 2020.

11 STATE BAR OF NEVADA  
12 BOARD OF GOVERNORS

13  
14 ERIC DOBBERSTEIN, President  
15 Nevada Bar No. 3712  
16 State Bar of Nevada  
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8   attorneys. *See* Rule 39 of the Nevada Supreme Court Rules (“SCR”). SCR 99 *et*  
9   *seq.* sets forth the jurisdiction and procedure for attorney disciplinary proceedings.

10          SCR 105 provides that, in matters in which a Complaint has been filed against  
11   a lawyer for alleged misconduct, a hearing shall be conducted within 45 days of the  
12   appointment of the full hearing panel. This time requirement is a manifestation of  
13   the goals of the attorney disciplinary process: to protect the public and the integrity  
14   of the profession.

15          Since March 12, 2020 Governor Steve Sisolak has issued Directives  
16   governing activities in Nevada, including a stay at home order and directives  
17   limiting the number of persons who can gather, in response to the Coronavirus  
18   Disease (“COVID-91”) pandemic. These limitations inhibit the State Bar’s ability  
19   to conduct in-person hearings in attorney disciplinary proceedings. As the  
20   pandemic continues, it is important to ensure access to justice and to prevent a  
21   backlog of cases without sacrificing the safety of the public, the legal community,  
22   or State Bar employees.

23          Therefore, GOOD CAUSE APPEARING, during this time, to reduce the  
24   potential for the spread of infection and avoid a delay in proceedings, all  
25   disciplinary proceedings shall be conducted by alternative means which allow for

1 visual and audio transmission of all panel members, parties, and witnesses,  
2 consistent with the expectations set forth in Nevada Supreme Court Rules IX-B (B)  
3 unless the parties stipulate to proceed via audio transmission only.

4 IT IS SO ORDERED.

5  
6 ENTERED this \_\_\_\_ of August 2020.  
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KRISTINA PICKERING  
11 Chief Justice  
Nevada Supreme Court  
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