

IN THE SUPREME COURT OF THE STATE OF NEVADA

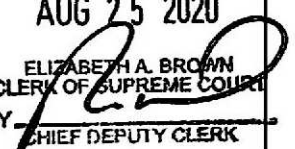
IN RE: COVID-19 EMERGENCY
DISCIPLINARY HEARING
PROCEDURES.

ADKT 0565

FILED

AUG 25 2020

*ORDER SCHEDULING PUBLIC HEARING
AND REQUESTING COMMENT*

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

On August 20, 2020, the Board of Governors of the State Bar of Nevada filed a petition requesting this court enter an order mandating disciplinary proceedings be conducted via simultaneous audio/visual transmission until health and safety concerns over the transmission of COVID-19 subside. A proposed order for consideration is attached to the petition.

The Nevada Supreme Court will conduct a public hearing on the petition on September 24, 2020, at 2:00 p.m. There will be no physical location for this hearing. The hearing may be viewed on the Supreme Court's website at www.nvcourts.gov/supreme. Persons interested in participating in the hearing may join the meeting at www.bluejeans.com. Click on join meeting; enter meeting ID 721 521 071; participant passcode 7187. For BlueJeans phone dial in, call 1-408-419-1715 or 1-408-915-6290; enter meeting ID 721 521 071; participant passcode 7187.

The Court invites written comment from the bench, bar, and public regarding the proposed amendments. Comments may be submitted electronically or in hard-copy format to: Elizabeth A. Brown, Clerk of the Supreme Court, 201 South Carson Street, Carson City, Nevada 89701 or nvscclerk@nvcourts.nv.gov by 5:00 p.m., September 17, 2020. Persons

interested in participating in the hearing must notify the Clerk no later than September 17, 2020.

Dated this 25TH day of August, 2020

Pickering, C.J.
Pickering

cc: Eric Dobberstein, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
All District Court Judges
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Elko County Bar Association
Douglas County Bar Association
Administrative Office of the Courts

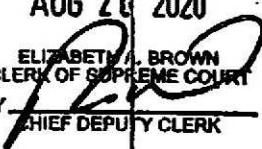
1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

6
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.

25 AUG 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

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 6th day of August 2020.

11 STATE BAR OF NEVADA
12 BOARD OF GOVERNORS

13
14 ERIC DOBBERSSTEIN, President
15 Nevada Bar No. 3712
16 State Bar of Nevada
17 3100 W. Charleston Blvd., Suite 100
18 Las Vegas, NV 89102
19 (702) 382-2200
20
21
22
23
24
25

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

2
3 In re COVID-19 EMERGENCY
4 DISCIPLINARY PROCEEDING
5 PROCEDURES

ADKT NO.:

6
7 The Nevada Supreme Court is charged with the exclusive power to discipline
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.

7
8
9
10

KRISTINA PICKERING
11 Chief Justice
12 Nevada Supreme Court
13
14
15
16
17
18
19
20
21
22
23
24
25