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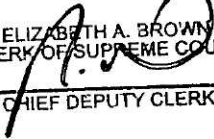
March 14, 2023

*Via Email: NVSCClerk@nvcourts.nv.gov*

Elizabeth A. Brown  
Clerk of the Supreme Court  
Nevada Supreme Court  
201 South Carson Street  
Carson City, NV 89701

FILED

MAR 14 2023

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

Re: *In the Matter of Amendments of SCRs Relating to Attorney Misconduct;*  
*SCRs 99-123, ADKT 0608*

Dear Ms. Brown:

We have reviewed the proposed amendments to the Supreme Court Rules relating to Attorney Misconduct, SCRs 99-123, which were attached to the Petition filed by the Board of Governors ("BOG") on February 10, 2023. As background, the undersigned frequently represent attorneys in disciplinary proceedings before the Disciplinary Boards of the State Bar of Nevada (Southern and Northern). As a result, we have experience with these rules and the measures that must be taken to protect the fundamental due process rights of any attorney who has been charged with violating the Nevada Rules of Professional Conduct. Further, one of us (Mr. Kennedy) served for nine years as a member of the Southern Nevada Disciplinary Board, three years as Chairman, and thus, has experience enforcing these rules in disciplinary proceedings.

With that in mind, we offer the following comments for the Nevada Supreme Court's consideration in deciding whether to adopt the proposed amendments to SCRs 99-123:

**SCR 101(1):** The proposed rule amendment would authorize the Office of Bar Counsel ("OBC") to seek discipline for any attorney who violates, or attempts to violate, "any other rules of this jurisdiction regarding professional conduct of attorneys." The language is vague and does not give sufficient notice to attorneys of which rules apply for which discipline may be imposed.

**SCR 101(3):** The proposed rule amendment would authorize the OBC to seek discipline for any attorney who engages in conduct that is, in effect, prejudicial to the administration of justice (e.g., intentionally violating a court order). Nevada RPC 8.4(d) already covers that. Further, Nevada RPC 8.1(b) already prevents an attorney from "knowingly fail[ing] to respond to a lawful demand for information" from the OBC. Because the alleged misconduct at issue is already covered by the Nevada RPCs, we do not understand the legal or factual basis for the proposed rule amendment.

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**SCR 102(1)(b):** The proposed rule amendment would make it more difficult for hearing panels to recommend suspensions of less than 6 months by saying that suspensions will be “for a fixed period *generally* not less than 6 months.” (Emphasis added.) Hearing panels should be free to decide, on a case-by-case basis, whether a suspension of less than 6 months is warranted, depending on the entirety of the circumstances—without having to justify departing from a pre-determined rule of thumb that suspensions are normally for 6 months. This Court should thus refrain from codifying a presumption *against* any suspension of less than 6 months.

**SCR 102(1)(f):** The proposed rule amendment would prevent hearing panels from issuing admonitions. Although we would welcome the return of private discipline as an option in disciplinary proceedings, there is no basis for preventing hearing panels from issuing admonitions following a formal hearing at which an attorney has a chance to present argument, call and cross-examine witnesses, and offer evidence in support of his or her defenses. In other words, hearing panels should be permitted to issue admonitions under appropriate circumstances, taking into account all applicable aggravating and mitigating circumstances. Although it is true that a disciplinary hearing is public, an admonition would not be readily available over the internet (*i.e.*, through the State Bar’s website) or published, with the attorney’s name, in the *Nevada Lawyer*. The ABA Standards for Imposing Lawyer Sanctions do not limit the use of admonitions as urged by the BOG. Thus, the proposed rule amendment should be modified to eliminate the restriction on when admonitions may be issued.

Further, there should not be a limit on the number of admonitions that may be issued to an attorney – subparts (3) and (4) under the proposed amendment to SCR 102(1)(f). Instead, the decision should be left to a screening or hearing panel to be decided on a case-by-case basis; the OBC retains the right to argue for greater discipline if an attorney previously received an admonition. The fact that screening and hearing panels have issued admonitions in successive cases despite objection from the OBC is not grounds for eliminating the ability for them to do so.

**SCR 102(3):** The proposed rule amendment would allow the OBC to do indirectly that which the OBC is presently forbidden from doing directly: Introducing into evidence at a formal hearing a dismissal, with cautionary language, of a prior grievance. There is no basis for altering this Court’s long-standing practice of preventing hearing panels from learning of dismissals of prior disciplinary cases against an attorney, which is unfairly prejudicial and which requires the attorney to defend himself or herself against charges that were dismissed without any finding of wrongdoing.

**SCR 105(1)(a)-(c):** The proposed rule amendments would eliminate the possibility of a screening panel issuing a reprimand to an attorney. Depending on the circumstances, a screening panel may prefer to issue a reprimand in lieu of directing the OBC to file a complaint against the attorney, which extends the duration of the disciplinary process and increases the costs and

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expenses for all involved. An attorney should retain the right to object to a proposed reprimand as allowed under the current rule, the same way that an attorney would have the right to object to a proposed admonition issued by a screening panel under the proposed rule amendment.

Further, consistent with the comments raised above regarding SCR 102(1)(f), we disagree with preventing hearing panels from issuing admonitions simply because the “hearing records become public when bar counsel files the formal complaint.” An admonition should be among the forms of discipline that may be imposed by a hearing panel; otherwise, an attorney who did not have an opportunity to be heard in front of a screening panel must unfairly risk public discipline upon electing to object to a screening panel’s proposed disposition of a grievance.

**SCR 102(2)(d):** The proposed rule amendment would eliminate the due process requirement for the OBC to give advance written notice to an attorney of a summary of the evidence to be presented against the attorney at a formal hearing, together with a brief statement of the testimony from each witness who will be called by the OBC at the hearing. There is no legal or evidentiary support for permitting the OBC to withhold material evidence that it intends to present against an attorney in connection with seeking to prove that the attorney violated the Nevada RPCs. It would be wrong to do so.

It is true that comparable language was recommended for inclusion under SCR 105(2)(d). However, the first part of that rule says, “The chairs ... *may* adopt disciplinary rules of procedure, subject to approval by the board of governors.” (Emphasis added.) It should remain an absolute requirement (not a choice) for the OBC to provide a summary of the evidence, including anticipated testimony, to be presented against an attorney at a formal hearing.

**SCR 105.5(1)(d)(4):** The proposed rule amendment would prevent an attorney who has received an admonition or a reprimand “within the last 3 years” from being offered participation in a probation, diversion, or mentoring program. There is no basis for such a restriction. The prior discipline may be unrelated to the reason for possible referral to an approved probation, diversion, or mentoring program, and it should be available to a screening or hearing panel, upon review of the entirety of the circumstances, as an alternative to a disciplinary sanction.

**SCR 110(1):** Although we have no objection to the proposed rule amendment, we urge this Court to require the BOG to further amend this rule to require advance written notice to an attorney if and when the OBC seeks to subpoena records in connection with the investigation of a grievance. Advance written notice is required under the comparable Nevada Rule of Civil Procedure (NRCP 45) and ensures that an attorney may enforce the right to contest a subpoena as provided under SCR 110(4), with the matter being heard by the disciplinary chair (or vice chair) pursuant to SCR 103(5). Absent advance notice, the right to contest a subpoena is illusory and

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the OBC is able to subpoena potentially privileged or protected records without an opportunity for the attorney to object.

**SCR 113(1):** The proposed rule amendment would prevent an attorney from tendering a conditional guilty plea directly to a hearing panel to be approved, modified or rejected—a right that exists under the current rule. In the Petition, the BOG says that attorneys “have abused the vague language of SCR 113 to negotiate pleas directly with the panel in the past.” Our office has invoked the right that exists under SCR 113(1) in the past. No abuse occurred—the *ABA Model Rules for Lawyer Disciplinary Enforcement* recognize that an attorney may bypass the trial phase of a formal hearing and proceed with the sentencing phase by tendering a plea directly to the hearing panel. The OBC remains free to argue against adoption of the proposed form of discipline set forth in the tendered plea. No legal or evidentiary support has been offered to modify the rule to require an attorney to reach a negotiated agreement with the OBC before tendering a conditional guilty plea to a hearing panel.

**SCR 116(2):** The proposed rule amendment would prevent an attorney from initiating the reinstatement process prior to the end of his or her period of suspension. The reinstatement process takes several months to complete (if not longer), and there is no basis for preventing an attorney from preparing in advance to show why he or she meets the qualifications to resume the practice of law.

**SCR 119(5):** The proposed rule amendment would elevate the Disciplinary Rules of Procedure above the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure. Unlike the DRPs, the NRCs and the NRAPs are reviewed and adopted by this Court. They must continue to take precedence over the DRPs, which are adopted by the disciplinary chairs at the request of the BOG—outside the purview of this Court.

**SCR 121.1(6):** The proposed rule amendment reinforces the recommendation from the BOG that only screening panels may issue admonitions. For the reasons stated above, hearing panels should likewise be able to issue admonitions.

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In sum, we urge this Court to refrain from adopting the proposed rule amendments in their current form and request that this Court direct the BOG to modify the proposed rule amendments to address the issues outlined above. We appreciate this Court's time and attention to this matter. We (Dennis L. Kennedy and Joshua P. Gilmore) will attend and participate – to the extent appropriate – at the March 21, 2023 hearing on the Petition. Thank you.

Sincerely,

*/s/ Dennis L. Kennedy*

Dennis L. Kennedy

Sincerely

*/s/ Joshua P. Gilmore*

Joshua P. Gilmore