SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner,

vs.

GARY VICTOR DUBIN,

Respondent.

MOTION FOR RECONSIDERATION OF ORDER OF DISBARMENT ENTERED SEPTEMBER 9, 2020

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MOTION FOR RECONSIDERATION OF
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COMES NOW Respondent and hereby timely moves this Honorable Court for the reconsideration of its above-referenced Order, pursuant to Rules 2 (suspension of rules in the interests of justice), 17 (original proceeding rules), 26(b) (computation of time), 27(d) (excludes motions for reconsideration from page limitations), and 40 (motions for reconsideration rules) of the Hawaii Rules of Appellate Procedure.

This Motion for Reconsideration is submitted in good faith for the reasons set forth in the accompanying Declarations, supported by the accompanying Exhibits and the records and files in these proceedings.

A. Introduction

The fact-finding process in the underlying disciplinary proceedings was fundamentally flawed, lacking both evidentiary and due process support, resulting in mere prosecutorial accusations becoming factual conclusions taken out of context absent any underlying proof of misconduct.

Four disciplinary cases were combined over Respondent's objection, and tried and decided together. This Court found ethical violations in three of the four cases.

After the omnibus hearings, the accusations of the Office of Disciplinary Counsel (ODC) embodied in its proposed findings were adopted *verbatim* by the Hearing Examiner, then adopted *verbatim* by the Disciplinary Board (Board), and now in material respects adopted *verbatim* by this Court.

The purpose of this Motion for Reconsideration is to prove to this Court that its September 9, 2020 generalized conclusions set forth in its Order of Disbarment (Exhibit 1) are not only not supported by the actual record, but contradicted by it.[1]

[1] Pertinent parts of the Record are contained in the accompanying Exhibits. Record references are set forth in the Cover Sheet preceding each Exhibit. Due to the large nature of the Record and the many issues in the three cases under review, it is not possible to document every reference in these Motion Papers in the time allowed to file for reconsideration. If the Court will extend time, even more documentation can be added.

This Court's decision consists of eight such dispositive, yet wholly conclusory factual statements, each identified, boxed, and questioned below in this Motion for Reconsideration, announced by this Court although void of any supporting specifics, contrary to this Court's otherwise appellate workmanship.

You have ordered a professional death sentence against Respondent with less than four full pages of text, disgracing and ending the career and the life of an 82-year-old lawyer with an otherwise unblemished national 57-year-old ethical record, who you otherwise recognize "has contributed positively to the development of the law." Order, Page 4.

B. There Was Insufficient Proof of Any Misconduct by Respondent

This Court began its Order of Disbarment by concluding that "we find and conclude, by clear and convincing evidence, that Respondent Gary V, Dubin, committed the following misconduct," shown below highlighted within eight boxes.

1. This Court's Prior Disciplines Conclusion Is Factually Not True

"In aggravation, Respondent Dubin has two prior disciplines," Order, page 4.

Not true. Contrary to this adopted conclusion, taken from the ODC's self-serving narrative, Respondent, whose professional background any attorney would be proud of (Exhibit 2), has never been disciplined for any ethical violation against a client in his entire 57-year career as an attorney, either as a Member of any State or Federal Bar or while appearing *pro hac vice* in any other jurisdiction.

That is a fact, and there is nothing whatsoever contradictory in the underlying record. It was therefore fundamental prejudicial error for this Court to adopt in aggravation the ODC's accusation of prior discipline.

There are two possible explanations for this mistake.

First, the ODC mistakenly tried to use Respondent's quarter-century-old, 1995 federal failure-to-file income tax misdemeanors to claim prior misconduct, having been bench tried and convicted of IRS misdemeanor charges in Honolulu by Visiting California U.S. District Judge Manuel Real, recently deceased, a controversial federal

judge widely criticized for erratic and abusive behavior, even though the ODC following a three-year investigation ruled that Respondent under the circumstances did not commit any professional misconduct (Exhibit 3):

> Based upon the information and documents obtained by our investigation, the Reviewing Member of the Disciplinary Board has determined that a finding of professional misconduct on your part, regarding your 1995 misdemeanor conviction for Willful Failure to File Income Tax Returns in violation of 26 United States Code section 7203, is not warranted due to the unique circumstances pertaining to your matter. [Emphasis in the original]

Thereafter, the California Bar Court, of whose Bar Respondent has been a Member since 1964, conducted their similar investigation, the Bar Court Settlement Judge agreeing with the ODC, nevertheless within his limited authority gave Respondent the minimum public reproval which when published read like approval and not reproval (Exhibit 4):

> In January 1994 Dubin was convicted of violation of 26 USC section 7203 failure to file federal income tax returns, from 1986 through 1988. He has since filed the returns but owed no taxes for those years because of business losses. At about the same time he failed to file those returns, he was audited. He received a letter from an employee of the Internal Revenue Service stating that he was not required to file income tax returns for the years covered by the audit.
>
> There were no factors in aggravation. In mitigation, at about the time of the misconduct, Dubin was under great stress because his son had been terminally ill and passed away in 1992. The misconduct was due, in part to the letter he received from the IRS stating that he was not required to file the tax returns. Also, the misconduct did not involve clients.

And thereafter, the ODC confirmed to Respondent in writing that it would not be seeking reciprocal discipline, and did not, since the ODC had earlier found no professional wrongdoing by Respondent on the same facts (Exhibit 5).

Respondent then appealed to the IRS Seattle District Office, and the IRS apologized to Respondent that it was wrong and admitted that it actually owed Respondent almost $100,000 for the tax years in question, and Respondent was further exonerated by a seven-year investigation by the American Bar Association published as a front-page story in its *Journal* (Exhibit 6).

Yet at the hearing the ODC prosecutor tried to deny that exculpatory evidence that the ODC itself had cleared Respondent of any wrongdoing regarding his earlier misdemeanor convictions, at first emphatically intentionally denying before the Hearing Officer the fact that any such documentary evidence refuting the ODC's aggravating circumstances claim existed in the ODC files, with the Hearing Officer refusing to compel the ODC to produce the documents, instead placing that burden on Respondent, until Respondent found and produced later in the hearing copies of that documentation, *supra*, exculpatory evidence being concealed by the ODC prosecutor in the ODC's own files (Exhibit 7).

Second, the ODC presented the Hearing Officer with evidence of a 16-year-old ODC informal admonishment in 2004 in a case brought by someone not even Respondent's client, for being late in providing an irrelevant requested document, which notice of admonishment was ironically belatedly mailed days after the September 11, 2001 bombing of the New York World Trade Towers when the whole Country including the U.S. Post Office was closed and not sorting and delivering mail and was received too late for Respondent to reject when he tried, seeking reconsideration, only to be told there was no procedure for reconsideration (Exhibit 8).

That informant admonishment was however subsequently ordered expunged when a Special Assistant Disciplinary Counsel who brought that noncooperation charge (playing prosecutor, judge, and jury as the ODC prosecutors like to do, self-servingly charging failure to cooperate with them), later was fired for bias for his own wrongdoing pertaining to that very investigation, with all related records pertaining thereto ordered destroyed by the State Attorney General in Civil No. 06-1-1485 GWBC, subject to judicial notice by this Court, nevertheless dishonestly resurfacing below.

Respondent repeats that he has never been found to have committed any misconduct toward a client or anyone else and that this Court's Order nevertheless erroneously adopting the ODC/Hearing Officer/Board's erroneous adopted findings and ignoring Respondent's unblemished disciplinary record was prejudicial error.

2. This Court's Smith/DCCA Conclusion Is Factually Not True

> "Respondent knowingly misrepresented the truth on a government form; he certified the information thereon as true. Smith/DCCA Case," Order, pages 1-2.

Not true. Since "knowingly" is the ABA standard that this Court approvingly cites in its September 9, 2020 Order, page 4, as controlling its disbarment decisions, it is difficult to understand how the Court came to that conclusion in the Smith/DCCA Case, since at the hearing the ODC presented no witnesses at all on that issue, in fact no witnesses whatsoever.

To understand how all this came about, one needs to consult the record chronologically in order to understand the factual context, which unfortunately is completely absent from this Court's Order.

Four years ago, on March 7, 2016, the ODC received an anonymous half-page, typed letter signed "/s/ Joe Smith" describing himself "as a member of the public," with an obvious personal animus, claiming, *inter alia*, as follows (Exhibit 9):

> As the enclosed summary disposition order shows, the Hawaii Intermediate Court of Appeals affirmed the revocation of the mortgage solicitor's license of Hawaii attorney Gary Victor Dubin (attorney number 3181) based on the fact that Gary Victor Dubin lied in a response to a question on his application form that asked whether he had been convicted of a crime during the prior 20 years. * * * * Rule 8.4(c) of the Hawaii Rules of Professional Conduct states: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation [.]"

When notified of the Smith letter by the ODC, Respondent replied, explaining that he was not aware of the mistake and that that DCCA decision and the subsequent decision of the ICA were not based on any finding of wrongful knowledge or intent, but were treated as mere *malum prohibitum* violations without any proof of wrongful intent which is exactly how Respondent answered the ODC's Amended Petition.

Frustrated by residential lending abuses while practicing foreclosure defense, on December 4, 2006, Respondent, as a sole nonparticipating investor only, had formed Dubin Financial, LLC, a mortgage brokerage, hiring an experienced licensed local mortgage broker to manage the company.

Unfortunately, mortgage brokers at that time were largely unregulated, and when Respondent discovered that the licensed mortgage broker he had hired was cheating borrowers and stealing from Respondent, which was the culture of the times, Respondent fired him and as a matter of public record voluntarily closed Dubin Financial in early 2009 (Exhibit 10).

However, a mortgage brokerage cannot operate without a designated mortgage solicitor in charge, so Respondent had to hurriedly apply to become a mortgage solicitor, so designated, in order to briefly maintain Dubin Financial's license, solely for the purpose of completing a few loans already in the pipeline so as not to prejudice any existing loan applicants.

No new business was undertaken, and Dubin Financial, LLC was closed, and the mortgage brokerage license voluntarily terminated.

Two years later *after the closing*, the DCCA brought charges against Respondent alleging his 2008 solicitor's license contained a "misrepresentation" it deemed to be *malum prohibitum* grounds for revocation of a mortgage brokerage license and a fine, *albeit* illogically as the license had already been voluntarily released two years earlier.

The basis for the belated DCCA revocation was that Respondent's application failed to disclose that he had been previously convicted in 1995, thirteen years earlier, of federal failure-to-file income tax misdemeanors, *supra*, because one of the several form questions asking whether an applicant had been convicted of a crime was checked "NO" instead of "YES," hence not disclosing that Respondent 13 years earlier, in 1995 had been bench tried and convicted of IRS misdemeanor charges, *supra*.

Respondent explained that he did not knowingly nor intentionally check the wrong box on the form, but that as he recalled, it was a long time ago, the form was filled out mistakenly by a law clerk either before or after he had signed it and in any event he had not been found by the DCCA to have knowingly done so.

Nevertheless the ODC, cavalierly denying Respondent's request to meet first, informed Respondent that they would meet with him to discuss the issues *after* the Petition for Discipline was first filed, and the ODC then proceeded to include the Smith complaint within its January 2017 Petition for Discipline and it amended Petition for Discipline of record herein solely on the basis of the DCCA's use of the word

"misrepresentation" nine years earlier, ignoring the DCCA's stated position nonetheless that Respondent's intent was not at issue, and ignoring the ICA's appellate *malum prohibitum* decision that it had not found Respondent to have personally intentionally misrepresented anything on his mortgage solicitor's form, and ignoring proof of intent as a part of any professional ethics investigation::

> By failing to disclose information on his licensing application [in 2008] Respondent violated the following provision of the Hawaii Rules of Professional Conduct: 8.4(c) (pre [*sic post*] 2014 version) (A lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation; 8.4(a) (pre 2014 version) (A lawyer shall not violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.)

Respondent appropriately filed a Verified Answer, *inter alia*):

> Respondent hereby responds that he denies that there were any findings whatsoever that Respondent made any misrepresentations; instead it was considered a *malum prohibitum* regulatory violation, and indeed both the DCCA prosecutor and the hearing examiner as recorded refused to find any intention by the Respondent or any personal wrongdoing by the Respondent to misrepresent anything, which if anything should be res judicata and/or collateral estoppel and/or issue preclusion as to such a charge here based entirely upon such rejected finding or misrepresentation.

However, the ODC petitioned for discipline against Respondent on the sole basis that he supposedly had been found by the DCCA to have intentionally lied on his solicitor's application and lost his appeal in the ICA).

There nevertheless was no finding whatsoever of knowledgeable or intentional misrepresentation by the DCCA nor the ICA.

To the contrary, despite the misleading nomenclature of "misrepresentation," the DCCA considered itself bound by the decision of this Court in Kim v. Contractor's License Board, 88 Haw. 264, 965 P.2d 806 (1998) (Exhibit 11), holding that such omission of proof of knowledge or intent was irrelevant since it was a *malum prohibitum* violation, not requiring proof of any intent (Exhibit 12):

> There was no evidence that Respondent Dubin took part in the preparation of the mortgage broker's application of Respondent Dubin Financial or in the submission of that application. In addition, the was no evidence that either Lindberg or Vu consulted Respondent Dubin regarding the contents of the application or that

> Respondent Dubin had any knowledge of the contents of that application. * * * * Proof of an untruthful statement within the meaning of this statute does not require proof of intent to lie or intent to not tell the truth.

Indeed, that was the stated legal position of the DCCA prosecutor throughout, who on March 29, 2011 in his final argument before the DCCA Hearing Officer freely conceded the point (Exhibit 13):

> The Hawaii Supreme Court came to that conclusion [in Kim] based on its review of Chapter 444 and the fact that there was a complete absence of any explicit requirement of intentional state of mind on the part of the applicant in holding that they were – basically they were not going to read a requirement of intentional state of mind in a statute that just talks about material misrepresentation. . . . I believe, similarly, in this case there is no requirement of intent in that provision. * * * *
>
> I don't think the evidence supports a finding that he [Respondent] intentionally tried to pull one over on the department by answering that question no . . . . I mean I don't see the evidence that he was doing this intentionally. First, because he's a smart guy and he wouldn't think that the department was – that they would not catch that, so I don't – and, frankly, it was a matter of public record that he was convicted and I think anyone in the legal community probably knew that at the time that he applied for the license, and in any case it is a matter of public record and also a matter of some publicity; so I don't think Mr. Dubin would have done that with the hope the department wouldn't know.

The publicity that the DCCA prosecutor was referring to was the fact that the Respondent himself at the very same time the application was being signed had been publicizing his discredited misdemeanor convictions by publishing full page color ads in local newspapers copying the ABA Journal report together with the letter he had received from the IRS prior to being charged, stating that he had no filing requirement for the tax years in question, further evidence that Respondent was not trying to hide anything (Exhibit 14).

Respondent, the evidence at the DCCA hearing, *supra*, further similarly showed, had earlier applied for a Honolulu liquor license for a convenience store of his and the prior convictions question had been checked "yes," and the liquor license was immediately granted nevertheless, further evidence that Respondent was not trying to

hide anything or felt he had to hid anything, always freely acknowledging those discredited convictions to the entire world every chance he had to this day, trying to erase what for some it seems is nevertheless indelibly etched in their brain, which is how public smears remain prejudicial even when, as here, the complaining witness, the IRS, admits that was wrong.

The DCCA Hearing Officer agreed with the DCCA prosecuting attorney, finding a *malum prohibitum* violation absent any finding of knowledge or intent.

Respondent appealed, arguing a *mens rea* defense. The ICA however affirmed, holding knowledge or intent not a part of the violation charged, based on this Court's prior Kim decision rejecting a *mens rea* defense (Exhibit 15).

No *certiorari* petition was filed in this Court, Respondent considering the matter closed and having a primary obligation to work instead on clients' cases, never believing that the matter would be revived a decade later *via* an anonymous complaint to the ODC, or be taken this seriously given no finding or knowledge or intent or wrongdoing. Had Respondent known, he would have certainly sought *certiorari* in this Court, for the Kim decision is nonsensical, just another reason why there should be a statute of limitations in Hawaii for disciplinary complaints as there is in other States, *supra*.

What finally should have resulted was ODC's Smith/DCCA Case being dismissed with prejudice when Respondent's former paralegal, appearing by telephone from Florida, submitted a Declaration and testified at the ODC hearing that he was the one that filled out the form including the one that had checked the wrong box, not the Respondent (Exhibit 16):

> [M]y responsibility was to fill out these forms, not just this mortgage form, but all other forms for the law firm. Mr. Dubin is always busy, so this was my full responsibility. I filled out the mortgage application accordingly, to my best knowledge, which was that the conviction was overturned; hence the exoneration of Mr. Dubin for such conviction. And again, the Hawaii Bar, there was no disciplinary actions taken against Mr. Dubin, nor did he lose his licenses in any shape or form. Thus, I filled out the application as such.

No contrary evidence of wrongful knowledge or intent was provided by the ODC who had no witnesses at the ODC hearings, which nevertheless ultimately submitted erroneous, proposed findings of fact and conclusions of law to the ODC Hearing Officer

accusing Respondent of personally lying on the form doing an end run around the DCCA unique statutory definition of truthful ("The [DCCA] Hearing Officer specifically found that Respondent's answer to Question No. 8 was 'untruthful within the terms of HRS § 436B-19(2)'"— ODC FOF #16).

The most charitable explanation for all of this linguistic confusion might be that during the entire four years of this aggressive prosecution the membership of the ODC kept changing, and those who brought the charges and those who prosecuted the charges abruptly disappeared, including at least four Chief Disciplinary Counsel and at least three Assistant Disciplinary Counsel.

The ODC Hearing Officer after an overall lengthy seven days of hearings nevertheless robotically adopted *verbatim* the partisan findings of fact and recommendations of the ODC prosecutor without changing a single word, by submitting a one-paragraph statement, embarrassingly incomprehensible, rejecting intent as relevant to disbarment and basing disbarment upon the "cumulative" effect of the four complaints, which the Board also adopted *verbatim* (Exhibit 17):

> I shall be submitting, as my report, the findings and recommendations of the Office of Disciplinary Counsel. As respects the proposed findings and recommendations of Respondent, while researched and consistent with his position throughout the proceeding, that the charges are "malum prohibitum" (that is, unlawful by rule or statute, but not evidencing wrongful intent), the conduct at issue and the cumulative complaints warrant the result [disbarment] requested by the Office of Disciplinary Counsel. [word in brackets added from his recommendation to the Board]

Is there any Member of this Court that can make any sense out of the Hearing Officer's logic and conclusion?

And since this Court has now completely ignored the ICA/ODC fourth complaint against Respondent, what does this do the Hearing Officer's reasoning and his view that an attorney's exposure to disbarment has nothing to do with intent, but in this case was "cumulative?"

Moreover, the Hearing Officer's findings which the Board, *supra*, adopted *verbatim* and which by this Court's Rules were supposed to be send immediately to this Court, were not.

Instead ODC lawyers paid lip service to the Hearing Officer's adopted findings, while drawing up their own version, calling its version, never before formally approved if even ever seen by Board Members or certainly not by the Respondent, the "Board's Report," and submitting it to this Court half a year late (Exhibit 18).

This Court's finding of "knowingly" as the ABA basis for disbarment on this record is really indefensible, and certainly not justifiable either by the decision of the Hearing Officer nor by any requisite "cumulative" clear and convincing evidence.

3. This Court's Kern/Harkey Conclusions Are Factually Not True

> "Respondent withdrew $3,500.00 of the clients' funds at a time when, based upon Respondent's own accounting, Respondent had not yet earned those funds."
> Kern/Harkey Case, Order, page 3.

Not true. When Respondent was forced to withdraw from representing Mr. Harkey, explained below, Mr. Harkey owed Respondent $69,475.44 in fees and costs (Exhibit 19).

It was only on November 28, 2017, just a few minutes before the conclusion of the combined omnibus hearings, that the ODC prosecutor waited for the first time to raise that issue, without providing Respondent time to investigate and knowledgeably respond (Exhibit 20):

> Q. According to my calculations, as of the date you withdrew the $20,000 on March 7th, 2016, you withdrew $3,350 from Mr. Harkey's $20,000 in unearned fees.
>
> A. I don't know if your calculations are correct. I also do not know whether or not the accountant made a mistake in the dates, so -- . . . There could have been a mistake. After all, we're 70,000 in arrears. I'm not even charged for this in the amended petition.

Respondent further replied that the invoicing is done by his in-house accountant, and there was no evidence submitted that any such mistake was knowingly made by her or by the Respondent or otherwise intentionally done.

Furthermore, Respondent replied that the ODC prosecutor did not include costs and general excise tax in his calculations, lots of documented work on the case by other members of Respondent's law firm he noticed was inadvertently omitted from the

calculations, and replied that the invoicing dates could have been mistaken by four days, and that he would have to check his office records, but the ODC prosecutor continued to repetitiously badgering him at the hearing with his usual habit of banging his fist on the table, not explaining why he brought that issue up at the very end of the hearings without giving Respondent time to investigate.

Errors by accident committed by others, moreover, in the absence of evidence of willfulness, does not equate to a clear and convincing, knowing ethical violation, and certainly not one justifying disbarment, and such questions should not have been reserved for the last few minutes of the hearings to prejudice Respondent.

Nor should a contrary prosecutorial record be made by ambush.

Respondent upon checking his records after the hearing discovered that there was an almost two-month gap shown in the client invoice starting at the end of January 2016 caused by lost manual time slips resulting in lost billings during that period explaining the difference between the periodic oral reports given to the client at his request triggering withdrawals, all in the client's favor, and what was being complained about at the conclusion of the hearings.

> "Respondent did not inform the client when he fully disbursed the client's $45,000.00 from the firm's client trust account, and he did not respond to clear inquiries from ODC regarding the matter. Kern/Harkey Case," Order, page 3.

Not true. That conclusion is wrong on both counts.

First, the ODC's only witness, the record shows, was Mr. Kern who had no personal knowledge of what had transpired between Mr. Harkey and the Respondent, who was retained by Mr. Harkey for the Nevada case only after Mr. Dubin withdrew.

Mr. Kern, after substituting for Mr. Dubin in the USDC Nevada case and being rebuked with court sanctions and having lost the case for Mr. Harkey, dismissed for litigation abuse, was not paid, and his motivation was only to secure funds for himself.

While Mr. Kern did very belatedly, after Respondent challenged his authority, finally produce Mr. Harkey's signature with that of Ms. Nora (whose involvement is discussed below) authorizing Mr. Kern to seek information (Exhibit 20), however there

was not only no proof that that was Mr. Harkey's signature, itself described at the hearings as a facsimile, but Respondent had plenty of reason to doubt it.

There was also no proof that Mr. Kern's hearsay testimony at the hearings reflected Mr. Harkey's views, not mentioned in his alleged authorization letter, notwithstanding that he was in bankruptcy at the time, yet Mr. Kern was permitted to speak for Mr. Harkey at the hearings without any foundation for his testimony and without there being any opportunity for Respondent to cross-examine Mr. Harkey nor any explanation why Mr. Harkey was not also on the telephone.

The Record is complete with thousands of pages of email and text correspondence between Mr. Harkey and Respondent, too numerous to exhibit here, but upon request Respondent will make whatever part any Member of this Court may wish be separately submitted as unfortunately the Record as prepared by the ODC is in shambles.

Second, although the ODC prosecutor through his investigator did claim that the Respondent had not timely responded to his inquires, that testimony was proven false at the hearing and recanted by the ODC investigator after being shown a fax to him responding to his supposed unanswered request for further information (one can never satisfy the endless requests from the ODC) and seemingly embarrassingly dropped (Exhibit 21), yet somehow made its way inexplicably back before this Court as a justification for disbarment.

In order to understand the truth, it is necessary to understand the chronology of events, why Mr. Kern was not a trustworthy firsthand witness at the hearings (Exhibit 22), and why Respondent had to withdraw from representing Mr. Harkey due to Ms. Nora becoming the plaintiff in the case as the Harkey Trust Trustee (Exhibit 23), which Respondent testified to at the hearings and fully documented, summarized as follows:

Mr. Harkey, after having previously been convicted of federal financial felonies in federal court on the U.S. Mainland and later a felon in possession of a firearm, serving between ten to fifteen years in federal prisons (Exhibit 24), came to Respondent in late 2015 thereafter with various cases seeking *pro hac vice* representation.

One of his cases had just been dismissed in Washington State based on lack of jurisdiction and another ongoing at the time in Nevada federal district court in Las

Vegas, where he was appearing *pro se*, which after Mr. Kern was sanctioned by the presiding Federal District Court Judge, that case was involuntarily dismissed with prejudice on July 6, 2017 (Exhibit 25).

Mr. Harkey hired Respondent first to attempt to salvage through reconsideration his Washington State loss, which Respondent started to do, but ultimately Mr. Harkey instructed Respondent to cease working on the Washington State case and to concentrate on the Las Vegas action.

Respondent applied successfully for *pro hac vice* status with another member of his law firm in federal district court in Las Vegas, Nevada, thoroughly researching the case and communicating with nearly a dozen opposing Nevada counsel over outstanding discovery and other pretrial matters, and traveling to Nevada, meet with Mr. Harkey and other local counsel, while drafting new pleadings and discovery requests. Al of that work is detailed in the Record under Respondent's thousands of pages of submissions for the Kern/Harkey Case alone.

Mr. Harkey's existing wrongful foreclosure amended pleadings had been ghost written by a Midwestern attorney, Wendy Nora, who at the time was under disciplinary investigation in her home State of Wisconsin and therefore unable to secure *pro hac vice* status in Nevada, and indeed had been not so politely removed by the presiding Nevada District Judge from doing any work in the Nevada case following heated objections by opposing counsel before Respondent was retained, her having been discovered working on the case as an alleged paralegal sidestepping that District Court's *pro hac vice* rules, and then warned off the case by that Court after visibly surfacing in Mr. Harkey's case, and being subsequently suspended from the practice of law for two years (Exhibit 26).

During Respondent's representation of Mr. Harkey, Mr. Harkey signed two written retainer agreements. Mr. Harkey, otherwise preferring to conduct his financial affairs orally, and was at his request provided only with oral client trust account updates, as he emphatically specifically wanted nothing financially to be in writing, maintaining a low financial profile after his incarceration and apparently fearful of the IRS, having no bank accounts, and all retainer funds were wired to Respondent from bank accounts that were not his.

Similarly, Mr. Harkey would principally conduct business on the telephone and by text messaging, occasionally sending emails at least at first to Respondent only through a friend in Washington State.

In one such text message from Mr. Harkey, sent to Respondent in his representation of him, when his retainer funds had become exhausted, Mr. Harkey wrote Respondent acknowledging that Respondent had kept him orally fully informed and up-to-date regarding his fees and costs as Mr. Harkey had requested, and that Mr. Harkey was in the process of wiring additional funds for his Nevada litigation ("I have already pledged to get another installment to you as soon as I can. A Commitment" – dated April 21, 2016) (Exhibit 27).

Respondent, however, became ethically required to withdraw his representation when Ms. Nora convinced Mr. Harkey to transfer his real property, which was the subject of the Nevada action, to a newly formed operating trust headed by her as Trustee so that she could again take control of the Nevada litigation, telling Respondent what to do, as a ploy overcoming her being disqualified from *pro hac vice* representation in Nevada, and Respondent by email on April 25, 2016 let Ms. Nora know why:

> As you know, no attorney can accept the relationship you propose. You are forcing my law firm to withdraw our petition for pro hac vice appearances. I had hoped in recently emailing you that you could work with us on the Nevada case, not that you would control our representation and not that we would be stand-ins for you. Your proposal is unethical and would be contrary to the rules governing pro hac vice representation in the State of Nevada.

Thereafter contemporaneously followed a series of similar email exchanges between and among the Respondent (explaining further why he could not ethically continue representing Mr. Harkey in the case) and Mr. Harkey (asking Respondent naively to please stay on and work with Ms. Nora behind the scenes) and Ms. Nora (threatening Respondent, while explaining the way she intended to control the case).

This correspondence is similarly voluminous. There was no way that Respondent was going to participate in a fraud on the Nevada District Court, no matter how much money he was being offered.

The discussion between Mr. Harkey and Respondent, Mr. Harkey continuing to ask Respondent to stay on and work with Ms. Nora, culminated with final text messages

from Respondent to Mr. Harkey explaining why he could not ethically further represent Mr. Harkey (Exhibit 28).

Whereupon, Respondent moved to withdraw as did his assigned local counsel, at the time a Nevada State Representative and Chairman of Bernie Sanders' 2016 Presidential Campaign in Nevada, himself about to run for U.S. Senate in Nevada, who Respondent could earlier assured, now embarrassingly, that being local counsel would not in any way risk his receiving any bad publicity due to the Harkey litigation.

The motion to withdraw was granted by the Nevada Court who was told by Respondent only of irreconcilable differences between client and counsel so as not to prejudice Mr. Harkey's case. Meanwhile, Respondent warned Mr. Harkey that Ms. Nora was not competent to handle his case.

Ms. Nora as Trustee replaced Respondent with her personally selected out-of-state counsel who in turn selected as his local counsel Mr. Kern, joining the fraud, who together wrecked Mr. Harkey's case, failing to cooperate in discovery, finally to the point where Mr. Harkey and Mr. Kern were sanctioned by the Nevada District Judge who then dismissed the case with prejudice for noncompliance with federal rules, *supra*. See case docket sheet referenced above.

In desperation, Ms. Nora and Mr. Kern had attempted to blame Respondent for their discovery failings, but the Nevada District Court was not fooled and did not agree, and when Ms. Nora surfaced on the record as the Trustee, as Respondent had predicted, the Nevada District Judge wanted nothing more to do with the case and dismissing, entering sanctions against all of them.

Ms. Nora then placed Mr. Harkey's trust in bankruptcy ("The Harkey Operating Trust") while appealing the dismissal by the Nevada Court, which bankruptcy was incorrectly filed by Ms. Nora in the U.S. Bankruptcy Court in Minnesota, then transferred to the U.S. Bankruptcy Court in Nevada. That part of the saga is also voluminously documented in the Record by Respondent.

The bankruptcy case was opposed by the IRS as could be expected and eventually dismissed with no discharge.

Respondent was contacted by the Trust's bankruptcy attorney, Mr. Edstrom, who informed Respondent that the Trust had filed a claim against Respondent for the return

of all of Mr. Harkey's paid retainer fees based on allegations from Mr. Kern, not Mr. Harkey .

Whereupon, Respondent explained the situation to Mr. Edstrom and since Mr. Harkey was now a Debtor in federal bankruptcy court and he had been contacted by his official bankruptcy attorney not a part of Mr. Nora's fraud, Respondent provided a complete written accounting showing way in excess of what Respondent had been paid as Mr. Harkey had never added his promised funds, *supra*, and that was the end of the matter, with Respondent's accounting never challenged in the Harkey Operating Trust Bankruptcy, with all appeals from the Nevada dismissal rejected, and Ms. Nora suspension from the practice of law by her State's disciplinary agency became final.

The ODC meanwhile received a complaint from Ms. Nora's chosen, discredited local counsel, Mr. Kern, accusing Respondent of failing to provide Mr. Harkey with a written accounting, even though Mr. Harkey had instructed Respondent not to do so.

When the Kern complaint was first called to Respondent's attention by the ODC, Ms. Preece, then Assistant Disciplinary Counsel, had already made up her mind to add the Kern matter to her planned Petition for Discipline, refusing in writing to meet with Respondent until the Kern matter was submitted to a Member of the Disciplinary Board.

The ODC chose to take Mr. Kern's testimony by telephone at the hearing, whose testimony regarding Respondent's representation of Mr. Harkey was all hearsay, the ODC making no attempt to call Mr. Harkey as a witness even by telephone, ignoring the fact that Mr. Kern had brought the charges so he could self-servingly be paid his fees. Respondent repeatedly tried to contact Mr. Harkey but received no reply.

This is all documented in seven days of hearings and the resulting hearing transcripts. Respondent should not be prejudiced by the voluminous nature of the Record. However, everything in these Motion Papers is all documented there.

Mr. Kern was unable to testify with personal knowledge regarding *any* of the ODC's charges against Respondent producing no evidence that Mr. Harkey had even so instructed him: (a) Mr. Kern with respect to the requirements of HRPC Rule 1.15(d) had no personal knowledge of what the agreement had been between Mr. Harkey and Respondent regarding accounting for hours and costs, (b) Mr. Kern with respect to HRPC Rule 1.15(c) had no personal knowledge of Respondent's deposits made by Mr.

Harkey into Respondent's client trust account, which happened to be two direct wire transfers into Respondent's client trust account, (c) Mr. Kern with respect to the requirements of HRPC Rule 1.15(d) had no personal knowledge of notices given to Mr. Harkey by Respondent concerning the disbursement of funds from Respondent's client trust account, and (d) Mr. Kern with respect to the requirements of HRPC Rule 1.4(a)(3) (misquoted by Petitioner in its Amended Petition), had no personal knowledge of how Respondent had or had not kept Mr. Harkey informed.

Mr. Kern's unsupported hearsay testimony was moreover completely contradicted by Respondent and his voluminous supporting documentation to the contrary, including evidence of Mr. Kern's attempted and rejected fraud on the Nevada Court, but nevertheless the ODC's findings of fact adopted every factually contradicted statement made by Mr. Kern, and despite the fact that Respondent was bound by HRCP Rule 3.3 not to aid Mr. Kern in his and Ms. Nora's waging of their fraud on the Nevada Court.

One need look no further to confirm Mr. Kern's bias than to observe his attempt to speculate at the hearing how Respondent's final accounting produced to Mr. Edstrom was supposedly in miniscule error, by his challenging a few time entries which represented an infinitesimal fraction of the overall balance of fees and costs owed to Respondent by Mr. Harkey, one based on more than 24 hours charged in one day, that and a few others being clear accounting errors by Respondent's office accountant who tabulates the hours and prepares the invoices as Respondent testified, and another infinitesimal challenge based on the entry of an alleged incorrect date for Respondent's trip to Las Vegas to meet with Mr. Harkey, when in fact accompanying airline and hotel receipts in the record showed that Respondent's trip dates were correct.

This is certainly not a record on any clear and convincing evidence upon which to disbar any attorney.

4. This Court's Andia Conclusions Are Factually Not True

> "Respondent by signing the names of his clients, without their permission, in the endorsement section of a $132,000.00 settlement check made out to them alone and depositing it in his client trust account thereby gained control over those funds."
> Andia Case, Order, page 2.

Not true. The above conclusory statement standing alone, if presented to this Court as the sole finding of fact by a Hawaii Circuit Court or by the Hawaii Intermediate Court of Appeals would be reversed as insufficient, ignoring material facts and making further review impossible, especially if it merely had adopted *verbatim* an adversary party's conclusory finding of fact, yet that is exactly what the Hearing Officer, the Board, and now this Court has done in this case.

For, none of the material facts summarized in these Motion Papers which were all documented for the ODC as early as 2016 is a specially prepared Andia Fact Book (Exhibit 29 – in Three Parts, "A", "B", and "C") for the ODC which contradict this naked conclusory statement above have yet to be shown to have been considered by the ODC, the Hearing Officer, the Board, and now this Court, notwithstanding pronouncing a death sentence upon a contributing Member of the Bar with otherwise no disciplinary sanctions in his entire 57-year legal career.

That Andia Fact Book tells the true story, everything documented therein, summarized in the Andia part of these Motion Papers.

Starting at ground zero, not all of the $132,000 settlement funds were owned by the Andias. Close to fifty percent of the settlement funds as first disputed by Mr. Andia he later agreed belonged to the Respondent.

Of the $132,000, $70,297.13 was immediately paid to the Andias once the Bank of America settlement check written on a Rhode Island Bank cleared Respondent's First Hawaiian Bank Client Trust Account, including $8,000.00 otherwise by written agreement replenishing the Andias' retainer account, also immediately paid to the Andias when Respondent's services were terminated.

The ownership of the remaining $61,702,87 was initially disputed, Mr. Andia claiming the entire $61,702.87 as his, pursuant to a claimed "flat fee" agreement.

The settlement check was supposed to have been made out to the Andias *and* the Dubin Law Offices, as the Bank of America had requested and been provided with Respondent's W-9 IRS clearance form, and Respondent as well as the Andias assumed legal obligations pursuant to the settlement agreement, but when the settlement check arrived it was mistakenly made payable to the Andias alone.

Respondent consulted with officers of First Hawaiian Bank who had to approve any third-party check being deposited, and suggested if Respondent sign the Andias' names, with his initials, they would approve the deposit into the trust account. FHB initialed its approval on the settlement check for the deposit.

It is erroneous to say that Respondent thus had control over the monies, as every attorney is bound by Court Rules, and it is admitted that none of the monies left the client trust account until Respondent then met with Mr. Andia.

During that meeting, Mr. Andia disputed only $19,885.00 of the $61,702,87, and after being explained the basis for the Associates' charges, which he approved (and later admitted in writing that he approved at that early meeting), and only then was the $61,702.87 disbursed to the Dubin Law Offices.

Every Hawaii Rule of Professional Conduct was adhered to. All disputed funds were placed safely in Respondent's client trust account, and the funds only removed and were required to be removed when the clients approved the distribution, Indeed it would have been a violation of our Rules not to have removed those earned funds.

More than a month later, Mr. Andia changed his mind, whereupon Respondent offered to put $19,885.00 back into his client trust account, but Mr. Andia refused. Respondent offered to enter into Bar fee mediation or arbitration. Mr. Andia refused, instead threatening First Hawaiian Bank and Respondent with lawsuits.

First Hawaiian Bank sought exoneration in First Circuit Court, Judge Chang presiding. Respondent sought exoneration in First Circuit Court, Judge Crandall presiding. Both Judges ordered the Andias to show up in their courtrooms. The Andias refused.

Even the Hearing Officer and the Board both ultimately agreed that the $61,702,87 was correctly disputed by Respondent and that the Andias were not entitled to the entire amount..

These are the material facts of ownership and compliance with Hawaii Rules of Professional Conduct contradicting this Court's naked conclusory finding above.

Respondent nor any other attorney can please every client as our courts are the decision makers in such cases, which is especially true in the area of foreclosure defense trying to save homes, which traditionally understandably generating enormous personal stress for affected homeowners who may suffer from lender abuses or who instinctively may and often do blame their attorneys as well as their judge if they lose their foreclosure case.

This has created occasional grief not only for Respondent's law firm which pioneered foreclosure defense in Hawaii, but for our Circuit Courts also, as evidenced by Judge Blondin in Honolulu at the end of her term as foreclosure judge having had to require an armed deputy in her courtroom, and Judge Cardoza on Maui before retiring occasionally requiring two armed deputies in attendance, and Judge Castagnetti last year having to stop proceedings in one case to summons armed deputies to eject a yelling homeowner from her courtroom.

This Court has not escaped on the Internet the wrath of some foreclosed homeowners either.

No wonder then that foreclosure defense clients generate the most Bar regulatory complaints nationwide. Clients are often confused by the inner-workings of the legal system, or conclude that their judges are biased in favor of lenders, and some foreclosure defense clients are simply dishonest, believing that by complaining against their defense attorneys they will get their monies or their homes back.

And when the ODC gets a complaint against a foreclosure defense attorney, it begins a feeding frenzy, with a Neanderthal mindset contrary to the reality.

Foreclosure defense also is not a lucrative calling. Respondent's law firm routinely charges an initial retainer for foreclosure defense clients, most of whom thereafter are frequently unable to pay as the cases can continue for years, turning cases into *pro bono* efforts, yet Respondent's law firm unlike many, never withdraws from a case for nonpayment, being paid only if there is a large enough settlement.

Mr. and Ms. Andia became Respondent's clients on or about February 17, 2012, signing a retainer agreement for $16,500. They had not paid their mortgage for several

years and were in the process of being sued for foreclosure and eviction. Their first retainer check was dishonored by their local bank.

After Respondent's initial meeting with the Andias, Respondent participated only initially in their case, researching and preparing a litigation plan and for nearly four years thereafter had absolutely no contact with the Andias whatsoever until the dispute described below arose, their case being exclusively conducted by Associates in Respondent's law firm, the Associates being responsible for keeping track of their hours and case costs, billing the clients, preparing court documents, attending hearings, and communicating with the clients and opposing counsel, whereas Respondent or a Senior Associate will handle the trial if any as lead counsel.

Although Respondent is a sole proprietor, he is not a sole practitioner, his law firm handling hundreds of case, for which many an Associate is assigned full responsibility. Respondent has full responsibility for his own cases. That is how law firms work.

The Andias' representation consisted of defending against foreclosure and eventually the Associates in charge of their case at the request filed a Counterclaim, which additional work including suing the Bank of America however was not a part of their written retainer agreement nor covered by their initial retainer.

Throughout their representation, the Andias reportedly continued to state that they were unable to pay for their legal representation further. Respondent's law firm, however, continued to represent them at considerable additional expense not contemplated at the time of retention and not a part of their written legal services agreement, what amounted to a forced contingency arrangement.

Almost four years later, Respondent's law firm, while managing to keep the Andias in their home at great savings for them otherwise in rental payments estimated to be a savings of more than $120,000, and without their paying their mortgage or property taxes or hazard insurance estimated to be a savings of $240,000, and without paying Respondent's law firm further for almost four years saving more than $60,000, the Bank of America offered to settle for a dismissal alone of the Andia Counterclaim against it, while the foreclosure case was to continue with however a likely very attractive loan modification offer.

It took negotiations lasting almost a year, including a sustained mediation effort, before the settlement was finalized by the Associates who neglected to inform Respondent about all of the extra work done on the Counterclaim, on the Mediation before retired Supreme Court Justice Duffy, or the Settlement until agreed upon (Exhibit 50A).

The settlement as negotiated required the Bank of America to pay $132,000, *which included the Andias' attorneys' fees and costs* in exchange for a dismissal of the Counterclaim, with the settlement check to be made payable to the Andias and to the Respondent's law firm, the Dubin Law Offices, jointly, which is standard settlement procedure in this jurisdiction, if not everywhere.

It was and is also standard procedure in this jurisdiction, expressly reserved in the Andias' written retainer agreement at Paragraph 16, that Respondent had an attorney's lien covering settlement proceeds giving Respondent a lawful ownership interest in settlement proceeds in the case:

> Attorney's Lien. You hereby grant us a lien on your claims or causes of action which are the subject of our representation, and on any recovery or settlement thereof, for any sums owed us during or after our representation.

Accordingly, local counsel for the Bank of America requested IRS W-9 forms signed by both the Andias and by the Respondent before its settlement check would be released, which both the Andias and Respondent thus signed and returned to opposing counsel.

The settlement agreement itself placed burdens on Respondent as consideration for signing to agree to certain settlement terms, and the standard policy of having settlement funds made payable to opposing parties and their attorneys is also specifically so that opposing counsel does not subsequently seek fees and costs.

When the settlement check was received by Respondent's office, it was mistakenly made payable to the Andias only.

Respondent was informed by the Associate in his office at that time, Richard Forrester, who was in charge of the Andias' foreclosure litigation taking over for Associate Andrew Goff who had negotiated the settlement regarding the Counterclaim,

that Mr. Andia for the first time was demanding all of the settlement monies supposedly having had a "flat fee" agreement with Respondent, no matter how much legal work had to be done and no matter how much costs were incurred.

Respondent discussed the mistake with an officer at First Hawaiian Bank where his attorney client trust account has been located since 1982, and it was agreed to avoid having to return the check and attendant delays that Respondent deposit the disputed funds in his attorney client trust account where they could remain until the matter was resolved. The deposit was approved by the Bank and its officer initialed the settlement check allowing it to be deposited, requiring only that Respondent sign the Andias' names and initial also.

Respondent agreed, and as he had been similarly instructed to do so by First Hawaiian Bank Private Banking Vice Presidents eve since 1982 when receiving two-party settlement checks except usually jointly payable to Respondent, he deposited the settlement check writing the names of the Andias followed by his initials as required by First Hawaiian Bank, with First Hawaiian Bank afterwards approving the deposit by initialing the settlement check also.

Obviously, the disputed funds were to be kept in Respondent's client trust account and not released until the dispute was resolved, which is what Respondent and First Hawaiian Bank intended and Respondent did so until the Andias approved of the distribution of the funds *supra*.

Previously, for about four years Respondent had had no contact with the Andias whatsoever, and the responsibility to keep them informed of the status of their foreclosure case and their fees and costs was entirely the responsibility of assigned Associates in Respondent's office; moreover the Andias had never complained to Respondent regarding even once about anything having to do with their foreclosure case or the Bank of America settlement before the settlement check was due.

Upon depositing the settlement check in his attorney client trust account, Mr. Forrester testified before the Hearing Officer that he explained to Mr. Andia that his case was not accepted on a "flat fee" basis, providing him with a copy of his signed retainer agreement showing that the "flat fee" box was not checked, at which point

reportedly Mr. Andia withdrew his flat fee allegation yet raised it again at the hearing, it seemed on the based urging of the Hearing Officer.

Respondent timely wrote and informed the Andias of the deposit into his attorney client trust account and their responsibility for fees and costs, also providing them with an invoice for the total charges from 2012 through 2015 in the amount of $78,202.87, and enclosed the balance due the Andias, crediting the Andias with their initial retainer payment after their first check bounced.

Respondent however did not charge the Andias for the more than a dozen hours spent by Mr. Goff in mediation efforts for the Andias which ironically resulted in the settlement, as Mr. Goff had left the law firm to join the Attorney General's Office without billing for those hours.

Mr. Forrester advised Respondent that Mr. Andia was anxious to hide the funds from his former wife and the State of Hawaii, wanting to keep the funds from appearing in his name if possible, since he was behind in child support payments. Of course, Respondent's law firm could not agree to facilitate a fraud against the State and refused, which greatly upset Mr. Andia, and appears to be the reason for his anger.

Mr. Andia was invited by Respondent to meet to discuss the distribution of the settlement funds in his client trust account, specifically the amount payable to the Andias, after Mr. Andia voicing objection beforehand and at the meeting solely concerning the billing rates of Respondent's Associates, Messrs. Goff and Forrester, which amounted to a $19,885.00 dispute.

Mr. Andia met Respondent at Respondent's Office clean shaven and dressed in a business suit, explaining at the beginning of their meeting that he, Mr. Andia, was a successful businessman with his own photography company. At the later hearing before the Hearing Officer, however, he appeared unshaven with ragged clothing and a staged homeless look.

Respondent explained to Mr. Andia the Associates' billing rates at the meeting based on their superior performance and successful result as the term "reasonable" is defined in the Hawaii Rules of Professional Conduct, and again showed Mr. Andia a copy of the retainer agreement he signed showing that the representation was not based on a "flat fee," but on the fees and costs incurred in his case during the past four

years, although the Andias were not even charged for the extensive mediation and settlement work.

Respondent explained to Mr. Andia specifically all of the successful work that his law firm had achieved for Mr. Andia and for his wife, keeping them in their home since 2012 and securing for them a six-figure victory just on the Counterclaim alone which was outside of the scope of their retainer agreement, without being paid for that work, and that based on a contingency fee arrangement they would have owed Respondent more.

Respondent explained to Mr. Andia that Messrs. Goff and Forrester apparently never provided him with a prior fee and cost statement because as provided in the retainer agreement he never asked for one and that he kept telling them that he had no more money to pay the law firm for the work.

Nevertheless, we continued to do the work for the Andias.

Mr. Andia at the conclusion of their meeting agreed that his proposed share of the distribution was reasonable and withdrew his $19,885.00 objection based on Associate billing rates and cashed his $62,297.13 check payable from Respondent's Client Trust Account a few days later which he had held for weeks, as well as cashing a $8,000.00 refund check since refusing to replenish the retainer account for the work ahead, also payable from Respondent's Client Trust Account a week or so after cashing the $62,297.13 check upon informing Respondent that he was changing attorneys in their foreclosure action still ongoing their Counterclaim no longer in the case.

Upon Mr. Andia's agreement, Respondent then and only then paid the Andias and transferred the agreed upon $69,702.87 payable to the Dubin Law Offices from the Respondent's Client Trust Account to Respondent's Operating Account.

Subsequently, in email correspondence with Respondent, Mr. Andia admitted in writing that he had agreed to the distribution ("**At our meeting, you gave me your explanation and I said 'okay'**" (emphasis added).

Months later, in an email to Respondent, Mr. Andia tried to explain away his consent to the agreed upon distribution, without which Respondent would never have removed from his client trust account those monies ($19,885.00) that Mr. Andia had already agreed were for Respondent's law firm, Mr. Andia for the first time claiming that

he only agreed because he was afraid that otherwise Respondent would stop payment on the separate $8,000 check:

> I had just received a check from you in the amount of $8,000 and understood that if I disagreed with you in our meeting that you would most likely put a "stop payment" on the check.

In truth, Respondent had earlier assured Mr. Andia in writing that "If however you wish to replace us as your counsel, the $8,000 will be immediately released to you".

Additionally, Mr. Andia's excuse for agreeing to the distribution was further belied by the fact that he and his wife had belatedly cashed Respondent's much earlier, way larger $62,297.13 check 10 days earlier upon which no "stop payment" had been placed.

Meanwhile, according to Mr. Andia, he decided to renege during a Christmas Party attended by several mostly unnamed attorneys, and thereafter started to accuse Respondent of "forgery" in an effort to harm Respondent, openly telling that to local counsel for the Bank of America, to executive officers of First Hawaiian Bank, and to other local attorneys, including filing a police report which was ignored as not containing any of the elements of forgery.

Coincidentally, the list of Mr. Andia's Christmas invitees emailed to Respondent shows that one his sailing buddies has been an opposing client of Respondent's law firm who lost a major case in this Court in 2016 which probably did not make him very happy, 139 Haw. 167, 384 P.3d 1268 (2016) (Exhibit 30).

And coincidentally, when Respondent withdrew from the Andia foreclosure case, ironically over Mr. Andia's filed objection nevertheless approved by Judge Ayabe, James Hochberg, an attorney who Respondent had successfully earlier sued for legal malpractice in the First Circuit Court before Judge Border for a client for whom Respondent had also won the ICA appeal, 212 Haw. App. LEXIS 587, 2012 WL 1951332 (2012), suddenly appeared for Mr. and Ms. Andia, entering a "special appearance" in their foreclosure case (Exhibit 31).

This is indeed a small community and attorneys should be protected against vendettas.

Respondent in good faith, believed to be responding ethically, immediately upon learning of Mr. Andia's about face, offered to return the $19,885 to his client trust account and to mediate or arbitrate the dispute under the auspices of the Hawaii State Bar Association, notwithstanding Mr. Andia's having acknowledged that he was given a full explanation of the billing charges and billing rates previously and had given to Respondent his approval of the distribution and having thereafter cashed both the $62,297.13 check and the $8,000 check months earlier.

Mr. Andia, however, refused mediation or arbitration, warning that his intention was to harm Respondent.

Mr. Andia had been a difficult client from the beginning according to the firm's Associates working with him. Mr. Andia throughout the foreclosure litigation was, for example, extremely hostile toward the legal system and to the opposing party and its counsel, constantly using foul language in telephone discussions and in his emails to Respondent's associate attorneys, writing, for instance, that he was "sick of being bullshitted" by his lender and accused respected opposing counsel Pat McHenry of being "a dirt bag and a liar".

When the police refused to prosecute Respondent for forgery, Respondent accused First Hawaiian Bank also of financial wrongdoing, threatening to sue First Hawaiian Bank and Respondent, which he however never did, causing First Hawaiian Bank to file a lawsuit for its exoneration in the First Circuit Court or having Respondent put the disputed funds back into his client trust account (which Respondent initially agreed to do but Mr. Andia refused), and causing Respondent also to file his own separate lawsuit in First Circuit Court to have his deposit of the settlement funds placed into his client trust account approved by that Court,

Respondent's lawsuit, assigned to Judge Crandall, was heard first.

The Andias, aware of the first hearing scheduled before Judge Crandall, did not even show up. Judge Crandall, a very thorough judge, now retired, wanted nevertheless to hear from the Andias, giving them their day in court, and issued an order to show cause to each of them which was served personally on both of them to appear at the next hearing before her, stating their objections if any to Respondent's deposit of the

settlement check into his attorney client trust account and to pled their case against Respondent and First Hawaiian Bank.

But neither Mr. Andia nor Ms. Andia bothered to even show up at the next hearing to which they had been formally served with an OSC and subpoenaed by Judge Crandall, and court approval for the release of Respondent's portion of the settlement funds went uncontested.

First Hawaiian Bank's lawsuit was next heard before Judge Chang. Again, the Andias, timely served by First Hawaiian Bank as plaintiff, did not show up at the first hearing before Judge Chang, and First Hawaiian Bank following Judge Crandall's ruling in Respondent's case, sought to withdraw its lawsuit before Judge Chang that sought to have the otherwise disputed funds returned to Respondent's Client Trust Account if it had in any way wrongfully approved the deposit of the settlement check.

The Andias' stale claim, rejected by the Honolulu Police Department and by First Hawaiian Bank and by Respondent, and their failing to even show up in two First Circuit Court courtrooms before two separate judges, one of whom had them served with an order to show cause and subpoenas compelling their attendance, the Andias filed their forgery grievance next with the ODC, whose personnel unfortunately not only lack investigative training or judicial expertise, but whose personal personnel gotcha incentives historically have not placed a premium on finding the truth.

The ODC prosecutor drafted a self-serving hodgepodge of irresponsible, blatantly false proposed findings of fact for consideration by the Hearing Officer, most of which completely contradicted the dispositive documentation and supporting testimony above at the hearings.

E.g.: the "flat fee" box was not checked by the Andias on their retainer agreement (vs. FOF 66, 68); no attempt was made to represent that the Andias had signed the back of the check, having to the contrary been initialed by Respondent and also initialed as approved by an officer of First Hawaiian Bank (vs. FOF 91); none of those funds were withdrawn from Respondent's client trust account or used in any way by anyone until the withdrawal and the distribution of those funds was approved by the Andias, as subsequently verified by Mr. Andia in an admission against interest in writing (v. FOF 105).

Moreover, no substantive work contrary to the ODC was undertaken by Respondent or any associates until five months *after* retention when the complaint was served and the Associates continued to work on the case without more funds, because the Andias said they had no money, planning to pay when the case settled (v. FOF 102); an additional $8,000 was retained only if the Andias wanted Respondent's Associates to continue working on the foreclosure claims which continued after the settlement only because the Andias agreed to settle on the Counterclaim only (v. FOF 99, 120); Respondent never refused to put the Associates' disputed $19,885 back into his client trust account; months later after approving the distribution of the settlement funds Mr. Andia simply reneged,

Whereupon in writing Respondent offered immediately to maintain the *status quo ante*, but that offer was refused, Mr. Andia preferring instead to file a police report for forgery, subsequently rejected, and to threaten First Hawaiian Bank who had approved the deposit, with suit, nor did Respondent ever threaten Mr. Andia with additional charges, only mentioning he was not even charged for all of the work (v. FOF 111).

Even more revealing are the material facts that were completely ignored by the ODC prosecutor in his draft of the proposed findings:

E.G.: there is no mention of the undisputed fact of the two lawsuits, brought respectfully by Respondent and by First Hawaiian Bank, in which when asked by both presiding Judges to explain their positions regarding the money deposited in Respondent's client trust account and whether those monies should be returned to the client trust account and given to the Andias, they refused to even show up in court in either case; there is no mention of the fact that the Dubin Law Offices had represented them in their foreclosure case for close to half a decade defending against foreclosure and prosecuting their Counterclaim to the point where the Bank of America settled for $132,000, hardly the usual achievement in a foreclosure case, after their not having paid there mortgage or a penny for fees or costs since February 2012; there is no mention of the fact that after having approved the distribution of the settlement funds according to Mr. Andia, the Andias waited months before suddenly deciding to accuse Respondent of forgery; there is no mention of the fact that after the Andias suddenly cried forgery, Respondent offered to put the Associates' disputed $19,885 back into his

client trust account, offering the alternative of mediation or arbitration, which offers were refused, and no mention that First Hawaiian Bank approvingly initialed the deposit also.

Respondent's conduct was without any intention to act contrary to the wishes of the clients and was in conformity with the requirements of the Hawaii Rules of Professional Conduct.

The ownership interests of both the clients and the Respondent were fully protected after the Bank of America, mailing the settlement check to Respondent's Office, the Bank having made a mistake in not making it jointly payable as the Settlement Agreement by its terms provided for bargained for performances by both Respondent and his clients, and all of that after Mr. Andia at first insisted in bad faith that he had no obligation to pay Respondent anything. He wanted the entire $132,000.00.

The check was deposited in Respondent's client trust account and kept there until its distribution was agreed upon, pursuant to HRPC Rule 1.15(e):

> When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claims interests, the property shall be kept separate by the lawyer until the dispute is resolved. Disputed client funds shall be kept in a client trust account until the dispute is resolved.

And Respondent being bound by the rest of that same Rule 1.15(e), after Mr. Andia approved the distribution, including the funds to be paid to Respondent, the Rules mandated that the funds be immediately removed from the client trust account:

> The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Not to do so at that time would have been a HRPC violation.

Additionally, the ODC prosecutor contended that Respondent's published billing rates were departed from in Andias' case. Yet nowhere in the HRPC is there a single mention of the billable hour as controlling what clients are billed, not even found once, and the Andias' retainer agreement specified fees "were subject to periodic increases".

Moreover, it was not the Respondent, but the Associates working the case alone for almost four years who were responsible for communicating with the Andias and

doing the billing, for in those years Respondent did not even have any contact with the Andias whatsoever, yet now an attempt is being made to disbar vicariously.

HRPC Rule 1.5(a) sets forth eight factors for determining the reasonableness of fees, and notably some of the factors can be applied only *after* and *not before* the legal services are first rendered, depending, for instance, on "the time and labor required," on "the novelty and difficulty of the questions involved," and on "the results obtained."

And who could argue with the results obtained: $132,000 for the winning of the Counterclaim alone after four years of effort, which the Andias wanted to run away with all $132,000.00 for themselves, a skillful victory for which the Andias had paid nothing.

This Court's unsupported conclusory finding that Respondent violated a disciplinary rule in the handling of a settlement check is contradicted by the material record facts, and clear and convincingly by a simple ponderance of the evidence.

> "Respondent did not immediately inform the clients of the receipt of the check when he learned of it. The invoice he subsequently issued to the clients on November 7, 2015 was the first billing statement or accounting since the inception of his representation of them in February 2012 wherein he asserted $69,702.87 in fees and costs owing, based upon an hourly rate of $385.00 an hour for associates on the case."
> Andia Case, Order, page 2.

Not true. Respondent has already explained above with documentation that he had no contact with the Andias or their case for approximately four years prior to his office receiving the settlement check, that keeping him informed was the responsibility of their assigned attorneys, and that the Andias were immediately paid all undisputed amounts as soon as the settlement check cleared and as Respondent best recalls even shortly before that Rhode Island check cleared in his client trust account.

> "That rate was unreasonable because it exceeded by $115.00 per hour the rate agreed upon in the retainer agreement for associates and was also applied to one associate for work done at a time when that associate was not licensed to practice law in this jurisdiction". Andia Case, Order, page 2.

Not true. The Court has failed to apply the "reasonableness" standard for judging the appropriateness of fees found in its own Rule 1.5(a) of the Hawaii Rules of Professional Conduct, since some of the factors adding to hourly rates can only be applied after and not before the legal services are first rendered, depending, for instance, on "the time and labor required," on "the novelty and difficulty of the questions involved," and on "the results obtained."

In Andias' situation, Respondent was paid nothing for the successful work of his law firm for four years on the Counterclaim, yielding $132,000.00 in settlement funds, which not only was a very successful outcome challenging loan modification abuses, but to this day an unprecedented recovery for any homeowner.

Additionally, the Andias in those four years while Respondent's law firm pursued their Counterclaim (1) saved a total of more than $420,000.00, *supra*, not paying any legal fees or having to pay alternatively for renting elsewhere, nor being burdened with any mortgage payments or any real property tax or hazard insurance obligations instead being paid by their lender, plus (2) escaping hundreds of thousands of dollars more in any deficiency judgment, while being offered an attractive loan modification terminating the foreclosure.

All of this was reflected in the above questioned billing rates, for that is the language of the day, the "billable hour," notwithstanding that nowhere in Rule 1.5(a) is the "billable hour" mentioned or anywhere for that matter mentioned throughout the Hawaii Rules of Professional Conduct

This Court might be surprised to learn that when Respondent began the practice of law in 1964 there was no such thing as the "billable hour" or "hourly billable rate." Instead, clients were billed based mainly upon value of legal services, the risk of nonrecovery, and results obtained, precisely as set forth in Rule 1.5(a), the century old language of which still comprises the ABA standards of reasonableness to this day.

The history of the application of the ABA standard of "reasonableness" is thoroughly explained in a paper published in the 1977 University of Pennsylvania Law Review justifying Respondent's billing conduct in this case (Exhibit 32).

How does this Court justify on this point imposing the professional death penalty on Respondent without even applying its own published "reasonableness" standards?

Finally, as for Mr. Forrester, not only was he a Member of the Nevada Bar before being employed by Respondent, but he became a Member of the Hawaii Bar a few months after he started working on the case at which time thereafter the majority of his billing on the Andia case occurred.

Moreover, why is all of this even any issue because Mr. Andia raised the same questions at his meeting with Respondent shortly after the settlement check was received, all of this was explained to Mr. Andia, and he agreed with the billing which he later acknowledged in written he had approved, and it was only then that the disputed settlement funds sitting safely in Respondent's Client Trust Account were released.

> "We also find the clients were never contacted or consulted regarding an amendment of the agreed-upon rate. As a result, Respondent overcharged the clients a minimum of $19,885.00." Andia Case, Order, page 2.

Not true. For all of the reasons already explained above, Respondent had no contact with the Andias for the approximately four years leading up to his office receiving the Bank of America settlement check which is not contested by anyone, and it was not Respondent's responsibility, but the responsibility of the attorney assigned to the Andias' case to keep them informed.

And, if that was not done, and there is no contrary testimony other than that from Mr. Andia, the "agreed-upon rate," notwithstanding Mr. Andia's discredited insistence that there was to the contrary a "flat fee" agreement only, was followed in the retainer agreement by the language subject to periodic change,

And, in any event the amount billed according to this Court's own prescribed standards of reasonableness, could not be determined until the results were known without contradicting the laws of physics.

And, in any event, Mr. Andia admittedly ultimately agreed upon the billings.

All of the above facts, again, I fully documented in the Andia Fact Book set forth in Three Parts in Exhibit 29.

C. Respondent Was Denied Due Process

This Court has for decades been a national leader in assuring that court as well as agency hearings are conducted fairly pursuant to the full requirements of due process of law, as mandated by both Section 5 of Article I of our State Constitution and by the Fifth and Fourteenth Amendments to the United States Constitution, before approving the results of any decision-making official.

A fair hearing, however, means much more than sitting in a courtroom or around a table in front of a decision maker whether robed or not.

It requires fairness in substance and is not satisfied by mere fairness in form.

The record below, in addition to being factual flawed as shown above, is also riddled with due process hearing violations, as identified below, far more serious and deserving of much more consideration, it is respectfully submitted, than set forth in this Court's Order of Disbarment, otherwise ignored with a one-sentence cryptic rejection: "Respondent's arguments regarding alleged violations of his right to due process throughout the disciplinary process we find them to be without merit," Order, page 3.

1. Due Process Prehearing Violations

From the outset, the ODC prosecutors abandoned any pretense in Respondent's cases of impartial fact-finding in favor of "gotcha" investigations, assuming everything asserted against Respondent to be true, refusing his request for a meeting until after their petitions were filed, *supra*, and contrary to DB Rule 13 docketing the cases immediately before any investigation whatsoever was undertaken by them.

The culture at the ODC for decades now has been to represent complainants as if they were their own private clients, and to weigh their chances of promotion to be increased by the number of suspensions or disbarments they can rack up, especially against high profile attorneys like Respondent unless having the right political affiliations, while increasing the financial burden of attorneys having to defend themselves with ironically the ODC being funded by Bar dues.

Any fair reading of the hearing transcripts reveals a complete absence of any fact-finding effort on the part of the ODC prosecutor, at one point totally lacking even

any civility, banging his fist on the table for a full minute when not getting the answers he wanted from the Respondent, while the Hearing Officer did nothing but look away.

There is also a question of fairness and trustworthiness of the ODC's pretrial investigation depending how long otherwise stale grievances should be able to be raised and attorneys investigated. especially anonymously by a Joe Smith, and belatedly burdened.

Two of the charges against Respondent here were decades old when brought. Other States set time limits on bringing attorney disciplinary grievance investigations, since memories fade, witnesses die, and documents lost.

For example, some States restrict fling of grievances against attorneys to 2 years (*e.g.*, West Virginia), to 4 years (*e.g.,* Nevada and Utah), to 6 years (*e.g.*, Alabama), or to a "reasonable" time (*e.g.*, Ohio and Texas), of which this Court and its staff may take judicial notice.

Another pretrial due process right violated here was when the Petition for Discipline and the Amended Petition for Discipline made no mention of requesting disbarment, in their concluding prayers for relief only reciting that Respondent be required to take the Multistate Professional Responsibility Exam while obliquely adding whatever other discipline that might be imposed.

It was only at a subsequent prehearing conference that the ODC prosecutors threaten disbarment, which was after Respondent had filed his position statements and had decided to represent himself, and most importantly had not sought any Rule 2.22(a)(7) confidentiality extension before the time to do so had expired, which led to irresponsible one-sided "disbarment" press accounts that prematurely devasted Respondent's law practice, adding tremendously to his financial burden of defending himself.

That failure to disclose the actual recommended penalties at the outset of charging in disciplinary proceedings rendered the Amended Petition below procedurally in violation of fundamental fairness.

Given the recognized quasi-criminal nature of disciplinary proceedings, not informing the accused of the specific potential penalties when charged is anathema to

due process of law and unheard of in Hawaii agency proceedings except within the ODC.

2. Due Process Hearing Violations

Respondent was charged with professional ethics violations in four separate and unrelated cases. Yet those cases were tried together in the same combined hearings before the same Hearing Officer and where witnesses in each case, for the convenience of the ODC prosecutor said to be conducting at the same time other hearings in other cases, and for the convenience of witnesses, were taken out of order interspersed between cases, Respondent constantly objecting as making it very difficult to keep track of case specific testimony.

Such a smorgasbord of witness testimony not only deprived Respondent of a meaningful and coherent hearing as to each of the four cases, but having the same Hearing Officer preside over all four cases at the same time, which Respondent timely objected to pursuant to DB Rule 21(e) requesting a three-person Hearing Panel or separate Hearing Officers for each case instead), cross-contaminated the appointed Hearing Officer's eventual decision making as is evident by his one-paragraph, overlapping, concluding, *malum prohibitum* "adoption" explanation, *supra*.

Furthermore, as still another due process hearing violation of bedrock proportions, DB Rule 9(c) requires as does due process everywhere that an appointed Hearing Officer be free of the appearance of a conflict of interest, and if so to abstain from hearing a case, and DB Rule 21(a) provides for a party to challenge presiding over a disciplinary case by such a conflicted Hearing Officer.

As soon as Respondent recognized that Mr. Hughes, the appointed Hearing Officer, had been opposing counsel in one of Respondent's appellate cases, Moyle v. Y & Y Hyup Shin Corporation, 118 Haw. 385, 191 P.3d 1062 (2008), reversed in favor of Respondent's client by this Court, Respondent immediately requested Mr. Hughes' recusal at the pretrial conference.

Mr. Hughes heard the motion, filed his denial of the motion in writing, claiming that the Moyle case had been terminated, even though Respondent provided with uncontroverted documentary evidence that the case was still active in First Circuit Court

and indeed that settlement offers were being exchanged with Respondent and Mr. Hughes. Mr. Hughes still refused to disqualify himself.

No objection to the recusal request as being untimely was made by Mr. Hughes.

Due to DB Rule 20(e), no motions being permitted, Respondent could only preserve that due process challenge for later appeal to the Board.

Respondent was also denied his due process right to cross-examine two material witnesses, one subpoenaed by the ODC who refused to testify in person, and another not called by the ODC – yet both of them were ostensibly adroitly permitted to testify over Respondent's objection by the Hearing Officer through the testimony of surrogates.

First, Ms. Andia, subpoenaed, ignored the ODC subpoena just as she did the OSC from Judges Crandall and Chang, after Mr. Andia informed the Hearing Officer, offering no proof of illness, that she was too emotional to attend, which was after Mr. Andia was allowed to freely testify on her behalf her state of mind and alleged damages.

Second, Mr. Kern, secured as a witness by the ODC from Nevada, appeared by telephone, his placing on the record the surrogate testimony as to Mr. Harkey's recollections, particularly as to client billings, without any explanation why Mr. Harkey was refusing to testify on his own behalf.

Meanwhile, of course "Mr. Smith" did not testify, his anonymous DCCA complaint believed to have been penned by Ms. Andia, which she would have been asked had she appeared, which is believed to be why she refused to appear.

And finally, the Hearing Officer issued untrustworthy finding of fact by adopting *verbatim*, not changing a single word or punctuation mark, the partisan findings of the ODC prosecutor.

Such "adopted findings of fact and conclusions of law" – when finders of fact lazily merely swallow whole proposed findings and conclusions prepared by prevailing parties as was done here -- have always been subject to great mistrust by courts.

Such mechanically "adopted findings of fact and conclusions of law" moreover further denied Respondent an independent decision maker, considered contrary to sound adjudicative policy, causing disrespect for a tribunal or agency, raising additional concerns regarding due process requirements.

Moreover, the Hearing Officer's adopted findings were substantially incomplete, failing to address many material factual issues in the case, *supra*, another reason why they were untrustworthy, as if the voluntary Hearing Officer, an opposing attorney at the time in one of Respondent's cases, was abandoning his decision-making duties, another due process hearing violation.

3. Due Process Post-Hearing Violations

The Board on February 13, 2019, also adopted *verbatim* the ODC's Findings of Fact and Recommendations which had been adopted *verbatim* by the Hearing Officer, and in so doing, unknown to Respondent at the time, the Board Chairperson and one loud outspoken Board Member, Mr. Horovitz, concealed from Respondent, subsequently admitted by them, that Mr. Horovitz had a conflict of interest as one of two opposing counsel in two of Respondent's cases.

DB Rule 2.4(c) prohibits Board Members "from taking part in any proceeding in which a judge, similarly situated, would be required to abstain," and the Hawaii Revised Code of Judicial Conduct, Rule 1.2, prohibits participation of a judge where that participation presents the "appearance of impropriety," and its Rule 2.11 requires "disqualification" or "recusal" of a judge in such circumstances.

Accordingly, the Board Chair went around the room at the December 13, 2018 Board Hearing to consider the Hearing Officer's Report, asking if any Board Member had a conflict of interest adverse to Respondent.

Two Board Members raised their hands, Board Member Jeffrey P. Miller disclosing that he has been and still is an opposing attorney in one of Respondent's cases (Sakal) recently before this Court in which Respondent's client prevailed, and the other Board Member, Mr. O'Neill, disclosed that he was an IRS lawyer during the time involved in the Smith matter.

However, Respondent immediately waived both conflicts of interest as not requiring disqualification as there had been no acrimony among counsel in the Sakai case and Mr. O'Neill stated that he had no connection with the IRS matter. No other Board Member nor the Board Chair made any such disclosure and Respondent recognized no other Board Member who had,

The Board, adopting *verbatim* on February 13, 2019 the Hearing Officer's Report which adopted *verbatim* the ODC's flawed, prosecutorial, self-serving version of the facts, nevertheless contrary to this Court's Rule 3.7(d) waited months without turning in its Report to this Court, during which time on or about April 2, 2019 Respondent learned that another Board Member, Mr. Horovitz, participating in the Board's vote, had a conflict of interest as opposing counsel in two of Respondent's cases, sitting at the far end of a very large conference table unrecognized by Respondent until after the Board hearing on December 13, 2018 had been adjourned, in which two cases personal acrimony between the two had been ongoing.

Respondent immediately filed to disqualify Mr. Horovitz *and* the entire Board, seeking to set aside the Board's parroted decision of the ODC's findings.

Another Board hearing was held on April 25, 2019, to consider Respondent's disqualification motion, at which hearing the Board Chairperson disclosed for the first time that Mr. Horovitz had met with him secretly before the December 13, 2018 meeting and had disclosed his conflict of interest to the Board Chairperson, who thereafter failed to disclose it to Respondent at the earlier December 13, 2018, Board Meeting, although inconsistently inviting the conflicts of interest of Messrs. Miller and O'Neill to be disclosed at that same hearing -- the Board then concluding that Respondent's objection was nevertheless untimely.

That Decision also violated the Due Process Clauses of both the Hawaii State Constitution and the United States Constitution, not depending, for instance, upon whether Mr. Horovitz, the disqualified Board Member, cast the deciding vote or not.

And throughout the Board's review, it hindered Respondent's ability to defend himself in many other ways, *e.g.,* denying page enlargement requiring all four cases be briefed in 14-point type with double spacing throughout the opening brief (DB Rule 24), modifications denied, explaining in writing erroneously that that was the requirement for Hawaii appellate briefs.

Finally, Supreme Court Rule 2.7(d) requires that any Board vote recommending sanctions requires majority approval of the Board, yet over Respondent's objection the Board refused to announce its vote recommending the disbarment of Respondent and although that same Rule requires that it promptly submit its Report to this Court it waited

months before doing so and when it did it did not submit to this Court its earlier announced and published Report, but hired Charlene Norris to submit her own version of the Board Report, whereas this Court disqualified her due to having represented Respondent in the past, but left her penned Report in the Record as the Board Report even though it was not the Board Report originally entered the Board.

What was originally entered pursuant to the requirements of your Rule 2.7(d) was a *verbatim* adoption of the Hearing Officer's *verbatim* adoption of the proposed findings and recommendation of the ODC prosecutor.

D. Legal Argument

Disbarment is a professional death sentence and must be subjected to the strictest procedural due process scrutiny, as was explained by the United States Court of Appeals in In re Fisher, 179 F.3d 361, 370 (1950):

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. * * * * * A removal of an attorney from practice for a period of years entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his fellow lawyers. In the meantime, his income and livelihood have ceased to exist. * * * * * The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

1. This Court's Conclusions Are Based on Untrustworthy Insufficient Findings

Findings of fact are required to be "clear, specific, and complete," and "sufficiently comprehensive and pertinent to the issues to form a basis for the decision and whether they are supported by the evidence." Shannon v. Murphy, 49 Haw. 661, 668, 426 P.2d 816 (1967).

State courts as well as state agencies similarly are required to make findings of fact in proceedings which are injunctive in nature that are "definite" and "pertinent," and

"they must include as much of the subsidiary facts as are necessary to disclose to this court the steps by which the trial court reached his ultimate conclusion on each factual issue." Lopez v. Tavares, 51 Haw. 94, 97, 451 P.2d 804, *rehearing denied*, 51 Haw. 141, 451 P.2d 804 (1969).

"A bare statement of ultimate conclusion" is insufficient under Hawaii case law to support a judgment. Scott v. Contractors License Board, 2 Haw. App. 92, 94, 626 P.2d 199 (1981); such egregious an error requires orders and judgments to normally be vacated and remanded on that ground alone. Ventura v. Grace, 3 Haw. App. 371, 376, 650 P.2d 620 (1982).

Neither the ODC nor the Hearing Officer nor the Board addressed any of the material facts set forth in this Motion bearing directly on the conduct of the Respondent, and for that reason alone this Court's eight above conclusory statements should be withdrawn.

2. This Court's Conclusions Are Based on Untrustworthy Adopted Findings

The Hearing Officer adopted *verbatim*, not changing a single word or punctuation mark, the partisan findings of the ODC prosecutor and so did the Board. Such "adopted findings of fact and conclusions of law" – when finders of fact merely swallow whole proposed findings and conclusions prepared by prevailing parties as was done here -- have always been subject to great mistrust as explained by the United States Supreme Court in United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657 and no. 4 (1964) (rubber stamping adopted findings "has been denounced by every court of appeals save one" as "an abandonment of the duty and trust" placed in judges).

Such mechanically "adopted findings of fact and conclusions of law" are furthermore considered contrary to sound adjudicative policy, causing disrespect for the tribunal as explained by the United States Court of Appeals for the Ninth Circuit in Photo Electronics Corp. v. England, 581 F.2d 772, 776-777 (9th Cir. 1978) ("wholesale adoption of the prevailing party's proposed findings complicates the problems of appellate review. . . . [It raises] the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves. These concerns have caused us to

call for more careful scrutiny of adopted findings . . . . We scrutinize adopted findings by conducting a painstaking review of the lower court proceedings and the evidence").

With respect to the eight conclusory findings created by the ODC, this Court should have done to same before issuing a professional death sentence against Respondent.

Neither the ODC nor the Hearing Officer nor the Board furthermore addressed any of the material facts set forth in this Motion bearing directly on the conduct of the Respondent, and for that reason alone this Court's eight above adopted conclusory statements should be withdrawn.

3. This Court's Conclusions Are Not Based on Clear and Convincing Evidence

The actual documented facts set forth above, in contrast to this Court's three-time adopted, insufficient, ODC proposed findings, bear no resemblance to facts that actually occurred in the underlying cases nor with regard to Respondent's truly unblemished legal career free of any imposition by any court of any ethical discipline upon him with respect to a single client out of many thousands.

Indeed, Respondent's record number of client testimonials attests to how well his legal services are appreciated and respected, and how successful he has been for his clients, most of whom would be overjoyed to secure such a settlement, for instance, as the Andias did, especially after free of their monthly mortgage for four years and not paying for legal services (Exhibit 33).

Yet those same character witnesses, even a few, were excluded from testifying at the hearings by the Hearing Officer..

Surely common sense, surely an integral part of legal reasoning, suggests for instance that the Andias have had a personal motive other than protecting the public.

4. This Court's Conclusions Are Those of Disqualified Triers of Fact

The presence of Mr. Horovitz alone on the Board voting to disbar Respondent is reason enough to withdraw this Court's Order of Disbarment, especially considering that he and the Chairperson sought to hide that fact, *supra.*

In Aetna Life Insurance v. Lavoie, 475 U.S. 813 (1986), for instance, the United States Supreme Court vacated an Alabama Supreme Court judgment because a state supreme court judge, one of the five judges entering the judgment, was disqualified, Justices Brennan and Blackburn finding it irrelevant that the disqualified judge had cast the deciding vote, 475 U.S. at 830-831, and Justice Blackburn, with whom Justice Marshall concurred, went even further, concluding, 475 U.S. at 831-833:

> For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking -- whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion -- posed an unacceptable danger of subtly distorting the decisionmaking process.
> * * * * *
>
> And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive "leading role," *ante*, at 828, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6 to 3, Aetna would somehow not have been injured by his participation.
>
> More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. . . . .
>
> The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events -- that another justice switched his vote and that Justice Embry wrote the court's opinion -- illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

More recently, the United States Supreme Court in Williams v. Pennsylvania, 136 S. Ct. 1899 (2016), a death penalty case akin to Respondent's professional death penalty disciplinary sentence, confronted the same issue as in Lavoie, and in a 5-to-3

decision by Justice Kennedy writing for the majority, adopted the language and the reasoning of the concurring opinions, *supra*, in Lavoie, 134 S. Ct. at 144-147:

> In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. See *Lavoie, supra, at 827-828, 106 S. Ct. 1580, 89 L. Ed. 2d 823* (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative) . . . . [and] even if the judge in question did not cast a deciding vote.
>
> The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett v. United States, 556 U. S. 129, 141, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)* (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. . . . . As Justice Brennan wrote in his *Lavoie* concurrence,
>
> > "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *475 U. S., at 831, 106 S. Ct. 1580, 89 L. Ed. 2d 823*.
>
> These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position.

Moreover, being tried twice by opposing counsel, first at the ODC level by Hearing Office Hughes, and then being tried again at the Board level by Board Member Horovitz, should shock the due process conscience of any court, especially when no

conflict disclosure or recusal statement was made, even after the Board Chairperson and Mr. Horovitz when challenged admitted that they had meet secretly just before the Board met to decide Respondent's fact, they discussed Mr. Horovitz's conflict, yet said nothing while the Board Chairperson had other attorneys on the Board raise their hands for the same undisclosed reason.

5. This Court's Conclusions Deny Respondent a Meaningful Hearing

This Court is no stranger to the procedural due process requirements of a fair hearing, as well of the past overreaching by the ODC, Breiner v. Sunderland, 112 Haw. 60, 143 P.3d 1262 (2006), upholding the right to a meaningful hearing in virtually every possible context; see, for instance:

In re Smith, 68 Haw. 466, 471, 719 P.2d 397 (1986) (Hawaiian Homes Commission writ-of-assistance lease cancellation and seizure held violation of due process of law under Section 5, Article I of the Constitution of the State of Hawaii and the Fifth Amendment of the Constitution of the United States of America, because of lack a hearing);

Bank of Hawaii v. Kunimoto, 91 Haw. 372, 388, 984 P.2d 1198 (1999) (a criticized pro hac vice attorney has the right to a hearing);

State v. Christian, 88 Haw. 407, 424, 967 P.2d 239 (1998) (a criminal defendant must be given a reasonable opportunity to defend);

Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 243, 953 P.2d 1315 (1998) (reaffirming the right to be heard in height variance dispute, otherwise finding harmless error);

Kerman v. Tanaka, 75 Haw. 1, 22, 27-28, 856 P.2d 1207, *cert. denied*, 510 U.S. 1119 (1993) (administrative revocation of driver's license upheld where reasonable opportunity to be heard protected);

Evans v. Takao, 74 Haw. 267, 282-283, 842 P.2d 255 (1992) (reasonable opportunity to be heard required in contempt proceedings);

Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 261, 378, 773 P.2d 250 (1989) (use permits require reasonable opportunity to be heard, otherwise finding no due process violation);

In re Smith, 68 Haw. 466, 471, 719 P.2d 397 (1986) (Hawaiian Homes Commission writ-of-assistance lease cancellation and seizure held violation of due process of law because of lack a hearing); and

KNG Corporation v. Kim, 107 Haw. 73, 80, 82, 110 P.3d 397, *reconsideration denied*, 107 Haw. 348, 113 P.3d 799 (2005) (reasonable notice and an opportunity to be heard are "the basic elements of procedural due process of law," decided in the context of the imposition of a rent trust fund).

It is not a hearing, it is submitted, in the due process sense when relevant material facts as here are simply ignored by the trier of fact, or an absent witness although subpoenaed is allowed to testify as here through her husband yet unable to be cross-examined, or the decision makers at two levels consist of one's opposing counsel in several cases..

6. This Court's Disbarment Order Should Be Reconsidered as Manifest Error

The policy of the law favors disposition of litigation on the merits. Webb v. Harvey, 103 Haw. 63, 67, 79 P.3d 681, 685 (2003) (*citing* Compass Development, Inc. v. Blevins, 10 Haw. App. 388, 402, 876 P.2d 1335, 1341 (1994)); Rearden Family Trust v. Wisenbaker, 101 Haw. 237, 255, 65 P.3d 1046 (2003) (*citing* Oahu Plumbing & Sheet Metal, Inc. v. Kona Constr., Inc., 60 Haw. 372, 380, 590 P.2d 570, 576 (1979) (noting "the preference for giving parties an opportunity to litigate claims or defenses on the merits")).

Reconsideration is one means where appropriate of achieving that goal.

There is no "motion for reconsideration" by that express nomenclature at least provided for anywhere in our Rules.

Recognizing the understandable need for flexibility, however, in allowing some intelligent method for calling to a court's attention and for its reviewing possible decisional errors, without first subjecting the parties and our already case-clogged appellate courts to otherwise potentially unnecessary, wasteful, and expensive further proceedings and delay, in this case in federal court, courts have always freely permitted, although admittedly not encouraged such motions except in clear cases of manifest error.

And motions for reconsideration have therefore frequently been employed for that purpose in Hawaii and in our federal courts from whose civil practice rules Hawaii has borrowed *verbatim*, Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350 (5th Cir. 1993).

For instance, in the well-known Wright and Miller Treatise on Federal Practice and Procedure, 11 Fed. Prac. & Proc. Civ.2d, Section 2810.1 (rev. 1995), four separate and independent grounds for proper Rule 59(e) consideration are identified:

> First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based.
>
> Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence.
>
> **Third, the motion will be granted if necessary to prevent manifest injustice.** Serious misconduct of counsel may justify relief under this theory. [Emphasis added]
>
> Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

The federal case law, upon which Hawaii law relating to reconsideration is based, recognizes the obvious, that none of us are always if ever infallible -- neither judges, nor law clerks, and certainly not attorneys -- amply demonstrating that there is room in American law for changes of mind.

Thus, in Atlantic States Legal Foundation, Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 54, 55 (N.D. N.Y. 1993), Chief Judge McAvoy granted reconsideration, "the court believing that its earlier ruling was in error," having been based, that Court freely admitted, upon its "misunderstanding" of the applicable law.

And, as explained by the United States Court of Appeals for the First Circuit in F.D.I.C. v. World University, Inc., 978 F.2d 10, 16 (1st Cir. 1992), "Rule 59(e) motions are 'aimed at *re* consideration, not initial consideration'" (citations omitted), and as such, by their very nature -- as the name of the motion itself more than implies -- they are addressed to matters *already heard and litigated*.

That does not mean, of course, that motions seeking reconsideration allow Movants to merely reargue a case – and that is not what Respondent is doing here – for

as explained succinctly by the United States District Court for the District of New York in Motor Vehicles Manufacturers Association of the United States, Inc. v. New York State Department of Environmental Conservation, 831 F. Supp. 57, 60-61 (N.D. N.Y. 1993), there is a difference between *re*argument and the *correction* of manifest error:

> Nonetheless, a motion for reconsideration under Rule 59(e) is not simply a second opportunity for the movant to advance arguments already rejected, or to present evidence which was available but not previously introduced. Rather, the movant must come forward and specifically identify those matters which it believes the Court has overlooked and why such matters would render the Court's prior decision erroneous. Absent such a showing, the Court should not reconsider its earlier ruling. In the instant case Defendants have made an appropriate showing. The record before the Court supports reconsideration at this time, and for the reasons expressed below, the judgment previously entered is hereby vacated ["because there are material questions of fact remaining"].

To suggest to the contrary, that a court lacks the power to correct its own mistakes is not only contrary to sound judicial policy, but not the law anywhere.

Going back to the origin of Rule 59(e), for instance, the twin of Rule 40 of the Hawaii Rules of Appellate Procedure, as the United States Supreme Court in White v. New Hampshire Department of Employment Security, 455 U.S. 445, 450, researched and explained:

> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment.

This Court has furthermore described Hawaii's Rule 59(e) as even more liberal in this regard than its federal counterpart, Sousaris v. Miller, 92 Haw. 505, 513 n.9, 993 P.2d 539 (2000).

And Respondent had no way of knowing which ODC arguments out of many this Court would single out as the basis for its Order of Disbarment.

E. Relief Sought by Respondent

Respondent responded in each situation above in complete conformity with the applicable Hawaii and **ABA** Rules of Professional Conduct.

For all of the above reasons, this Court is therefore respectfully requested take a second look at the Record for yourselves and to order the following relief in the protection of the presumption of innocence, alternatively or combined as you may deem appropriate:

First, to suspend the Rules allowing for the studied reexamination of these important issues given the severity of this Court's Order of Disbarment, and staying all related deadlines pending a decision on this Motion for Reconsideration, and consider scheduling an oral argument to clarify the Record, and if the Court wishes, Respondent will have counsel represent him at any scheduled oral argument, and/or

Second, during the consideration of this Motion for Reconsideration and should thereafter this Motion for Reconsideration be denied, to at once stay all related deadlines in order to allow for an orderly transition.

Respondent is responsible for almost 400 cases in our courts and presently on appeal, several in this Court.

Time is therefore needed to restructure his law firm without him, to protect his dozen employees and their families and children from sudden unemployment, to protect his clients from sudden loss of representation many of whom have no money to employ replacement counsel for their *pro bono* cases, and to protect court calendars on all Islands from sudden incalculable scheduling disruptions.

DATED: Honolulu, Hawaii; September 21, 2020.

JOHN D. WAIHEE, III
GARY VICTOR DUBIN
Attorneys for Respondent

SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner,

vs.

GARY VICTOR DUBIN,

Respondent.

DECLARATION OF GARY VICTOR DUBIN IN SUPPORT OF RECONSIDERATION

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DECLARATION OF GARY VICTOR DUBIN IN SUPPORT OF RECONSIDERATION

I, GARY VICTOR DUBIN, DECLARE:

1. I am the Respondent in these proceedings, and I make the within statements based upon my own personal firsthand knowledge, pursuant to HRAP Rule 40(b), and that the factual recitals in these Motion Papers are true and correct as are the Exhibits.

2. I am begging every Member of this Court to personally review these motion papers, because the conclusions set forth in this Court's disbarment order are not consistent with and in fact are often contradicted by the actual underlying record.

3. Please allow me this one last request, as contrary to your finding, I have never before been disciplined for ethical violations against a client, practicing for 57 years.

4. I came to Honolulu nearly 40 years ago and have gained tremendous, deserved respect for every Member of this Court, including those Justices on all sides of your more recent 3-2 opinions, and appreciate the role as advocate that I have been privileged to play in some of this Court's most important consumer protection decisions.

5. In fact, I have won over 100 Hawaii appeals, including on *certiorari* review in this Court and in the United States Supreme Court, with more granted review now pending, mostly in the protection of Hawaii homeowners as well as Hawaii businesses owning real properties, and I have so much more to contribute still to this community.

6. At the same time, I am mindful of the important and large workload of this Court and respectful of this Court's limited time, especially your being one Member short and having to coup now with the problems caused for the Judiciary by COVID-19.

7. Nevertheless, neither I nor any other attorney should have his life, especially at 82, ended in such mistaken disgrace on a misapprehended, rambling, voluminous, hodgepodge of a record, without being granted this one final courtesy and request.

I declare under penalty of law that the foregoing is true and correct. Executed at Honolulu, Hawaii, on September 21, 2020.

GARY VICTOR DUBIN

SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner,

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GARY VICTOR DUBIN,

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DECLARATION OF JOHN D. WAIHEE, III IN SUPPORT OF RECONSIDERATION

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DECLARATION OF JOHN D. WAIHEE, III IN SUPPORT OF RECONSIDERATION

I, JOHN D. WAIHEE, III, DECLARE:

1. I am a Member of the Bar of this Court, and I make the within statements based upon my own personal firsthand knowledge, and in good faith pursuant to HRAP Rule 40(b), asking each Member of this Court urgently to personally review these motion papers and to take a second look at the record in these proceedings.

2. Those Members of this Court who know me personally know I am not known for exaggeration or hyperbole, and that as former Governor my overriding goal in life remains above all else as yours the well-being and protection of the people of Hawaii.

3. For that reason alone, I write to you because I have read your September 9, 2020 Disbarment Order of Gary Victor Dubin and personally know you have made a grave error, apparently relying upon the mistaken judgment of another, and therefore encourage each of you to personally review these motion papers prior to final judgment.

4. In the many positions I have held both in the State Legislature and as Governor, I have met and interacted with countless Members of the Hawaii Bar, including Mr. Dubin who I have worked closely with for a number of years and who in my experience without reservation is among the most honest and contributing Members of our entire legal community and who does not deserve to be disbarred on this record.

5. I say this not only as a knowledgeable friend in support of his character and his worth as a practicing attorney to this State, and certainly not because of that friendship alone, but instead because I sat through the many prehearing conferences and the seven days of his disciplinary hearings, witnessing firsthand the abuse he experienced and can verify the truth of his factual representations to this Court in these motion papers, including personally eye-witnessing the extraordinary manner in which he was constantly denied due process of law as he summarizes for the Court.

6. Unless you withdraw your Order of Disbarment, the result will truly be the tragic conclusion of one of the most unjust chapters in the legal history of this State.

7. Mr. Dubin has been the champion of the rights of ordinary people in our community who are neither wealthy nor influential, as their advocate and without regard to his own personal financial sacrifices, and most of his cases have been of a *pro bono* nature, including the many important decisions he has secured in this Court.

8. Some talk about Access to Justice. Mr. Dubin in his area of practice has done more than talk about it; through his advocacy and the response of our appellate courts in his cases he has created Access to Justice for thousands of Hawaii homeowners without seeking any personal recognition or monetary or system rewards.

9. A people's practice such as his, however, spawns many irritated and powerful adversaries and unseen vendettas, not an uncommon experience to many of us as well, even though he serves as advocate and not decision maker, who in the role of decision maker this Court has reversed in so many of his more than 100 successful appeals.

10. This is a practice and a people's advocate who this Court should protect and applaud, not disbar on such a flawed record as before you.

11. Again, neither Mr. Dubin nor I are asking anything more of you than each of you personally read these motion papers; if so, we are confident that you and anyone else reviewing this record would withdraw any such Order of Disbarment.

12. Your next step, it is respectfully submitted, might be to reexamine the entire attorney regulatory system in Hawaii that in the name of this Court has fostered such undeserved personal abuse waged against such an undeniably contributing Member of the Hawaii Bar, and for that purpose after this experience I gladly volunteer my services.

I declare under penalty of law that the foregoing is true and correct. Executed at Honolulu, Hawaii, on September 21, 2020

JOHN. D. WAIHEE, III

SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,

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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on the date first written below true and correct copies of the foregoing document were duly served upon the following attorneys *via* the Court's JEFS' System, as follows:

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DATED: Honolulu, Hawaii; September 21, 2020.

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GARY VICTOR DUBIN
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