No. A-_____

In the

Supreme Court of the United States

GARY VICTOR DUBIN,

Petitioner,

v.

SUPREME COURT OF THE STATE OF HAWAII,

Respondent.

APPLICATION FOR EMERGENCY STAY
SUBMITTED TO THE HONORABLE ELENA KAGAN
PENDING THE FILING OF PETITION FOR WRIT OF CERTIORARI

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Petitioner
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A

Introduction

This Is a Professional Death Penalty Disbarment Case with Exceptional Constitutional Significance for This Court and for Every Member of the Bar.

Petitioner, 82, an attorney with a 57-year unblemished professional record never before having been found to have committed any ethical violation against a client whatsoever, has been ordered cavalierly disbarred as a result of disciplinary proceedings completely abhorrent to established, fundamental First, Fifth and Fourteenth Amendment constitutional guaranties, in the protection of which Petitioner has no other remedy than to urgently apply to this Court for relief.

Petitioner is only one of many attorneys, and perhaps one with the highest national visibility, specializing in foreclosure defense, presently being disbarred throughout the United States, in California, in the District of Columbia, in Illinois, in Oregon, in Washington State, in Wisconsin and elsewhere, being denied fair hearings, in most cases simply because of their advocacy of homeowners opposing powerful interests in their State.

This slaughter is occurring because State regulatory agencies expose attorneys advocating unpopular causes to the potential of low visibility constitutional abuses as shown below, while as a practical matter not being able to be properly supervised by sky-level State Justices, their cases never first going through the evidentiary rigors of a judicial trial as other cases before being reviewed by appellate courts.

Petitioner's case moreover is unique as no attempt has been made to cover up such brazen constitutional abuses throughout the record in his case, providing this Court uniquely with the best case ever to come before it clearly raising such issues and compelling your intervention, if not triggering your constitutional duty to safeguard the rights of attorneys by, it is submitted, opening up federal district court jurisdiction to allow federal supervision of attorneys' constitutional rights to a fair hearing, rather than as now having such fundamental rights rendered irrelevant due to the low mathematical vagaries of certiorari petitions.

Petitioner's dual purpose in seeking review in this Court is therefore not only for his own protection against an impending personal catastrophic loss, but to advocate on behalf of all Members of the Bar similarly situated to secure from this Court the opening up of effective institutional supervisory relief in our District Courts for disbarment cases notwithstanding present Rooker-Feldman restrictions.

Toward that end, Petitioner now irrevocably faced with the complete loss of his law practice and his family's livelihood, seeks an immediate emergency stay pending consideration of his forthcoming Petition for Writ of Certiorari by the entire Court.

Petitioner is respectful of the limited, valuable time of every Member of this Court, and for that reason this Application for Emergency Stay is supported by an Appendix divided into Two Parts: the first, much smaller, containing a few lettered exhibits required by Court Rules and a few of special relevance, and the second, much larger, containing numbered exhibits submitted only should Your Honor wish to review selected record documentation to substantiate the merits of this Application.

The Supreme Court of the State of Hawaii is the named Respondent in this Application since the Bar disciplinary agencies in Hawaii are considered to be an arm of that Court and an integral part of it, including its sole decision-making authority ("The [ODC] and the Disciplinary Board are creatures of this Court," In re Disciplinary Board, 91 Haw. 363, 368, 984 P.2d 688, 693 (1999)).

B

Standard of Review

There Is More Than a Reasonable Probability That at Least Four Members of This Court Will Grant Certiorari and Agree To Review the Merits of this Case.

Petitioner graduated *summa cum laude* with an A.B. degree in 1960 from the University of Southern California, earning his J.D. degree *cum laude* from New York University School of Law as a Root-Tilden Scholar in 1963.

Petitioner is a Member of the California State Bar (1964), the Bar of the Ninth Circuit Court of Appeals (1964), the Hawaii State Bar (1982), and the Bar of this Court (1976), as well as numerous Federal District Court Bars in several States, all of which are in the process of serving him with Orders To Show Cause why he should not be reciprocally disbarred, although Petitioner has never been found to have violated any ethical duty to a client in any of those jurisdictions, except for the current Hawaii disputed ethical charges.

Petitioner's heretofore unblemished ethical record has extended to his early law teaching career at Stanford, Berkeley, Denver, Harvard, USC, UCLA, Texas, and at the RAND Corporation, and being admitted *pro hac vice* in state and federal courts in Oregon, Washington State, Arizona, Nevada, New York, New Jersey, and

Tennessee, again without ever being disciplined for any ethical violation toward a client or anyone else in any of those venues at any of those times either.

Petitioner's diverse legal career has also included employment with the law firm of Covington and Burling in Washington, D.C., assisting Supreme Court Associate Justice William O. Douglas, heading a nationwide Criminal Justice Courts Task Force appointed to that position by President Lyndon B. Johnson, and arguing before the International Court of Arbitration in the Hague, again without ever being disciplined there for any ethical violation toward a client.

Petitioner is and remains proud of his professional career and his awards and achievements, and his more than 100 appellate victories for homeowners, including in this Court, a summary of which is set forth in Appendix One, Exhibit A.

Petitioner is also proud of his ethical standing with his clients and their many appreciated testimonials supporting his character and legal ability received unsolicited in recent years, some of which are shown in Appendix One, Exhibit B.

On September 9, 2020, however, the Hawaii Supreme Court unexpectedly entered an Order of Disbarment against Petitioner, effective on October 9, 2020, set forth in Appendix One, Exhibit C, the effective date subsequently extended to November 9, 2020, when Petitioner requested a stay, which otherwise was denied without comment, Appendix One, Exhibit D.

The Order of Disbarment states as its basis for entering a professional death penalty against Petitioner, merely eight conclusionary charges absent any supporting analysis, written in a manner considerably below the judicial scholarly workmanship

of that Court or any Court, lacking in both detail and in consideration of all relevant and material facts, notwithstanding the severity of the punishment.

Consequently, in order to protect his Hawaii Bar license, Petitioner timely moved the Hawaii Supreme Court for Reconsideration on September 21, 2020, setting forth his complete specific defenses to those eight erroneous charges, together with extensive record documentation, further challenging the state court disciplinary proceedings for numerous obvious prejudicial federal due process violations at every stage in the underlying agency proceedings. Reconsideration was denied without comment.

For instance, highlighting for that Court at the outset some of the most egregious due process violations were, first the Hearing Officer was conflicted, having an initially undisclosed conflict of interest upon his appointment, being an ongoing opposing counsel in one of Petitioner's appellate remanded cases, his even negotiating a settlement of that case during the disbarment proceedings, nevertheless accepting that voluntary appointment and refusing to recuse himself when challenged, as shown in Appendix One, Exhibit E.

Arguably even worse, the Chairperson of the Disciplinary Board later admitted on the record that he had met secretly with a Board Member in advance of the Board disciplinary review hearing to assess the conflicted Hearing Officer's findings, which Board Member sought him out and confided in him that that Member had a conflict of interest being an ongoing opposing counsel of Petitioner in two current state court appeals likely to be remanded.

Yet the Chairperson admitted on the record that he told that Board Member not to disclose the conflict and concealed that fact at the Board's first hearing, Appendix One, Exhibit F, while asking the full Board sitting around a large square conference table, obstructing Petitioner's view, at the start of the hearing to raise their hands if any of them had such a conflict, several doing so, but not that other conflicted Member, Appendix One, Exhibit G.

The findings of the conflicted Hearing Officer which were adopted *verbatim* from the prosecutor's proposed findings were then adopted *verbatim* by the conflicted Board, eight of which conclusions were then adopted, *supra*, by the Hawaii Supreme Court in its Order of Disbarment, none of which were supported by clear and convincing evidence as shown below, the supposed standard for such proof in attorney disciplinary proceedings, and actually contradicted by the record.

And those two instances subjecting Petitioner to biased decision makers is only a small sample of the due process violations that ensued as explained below. If this Court were not to review this case, which seems unthinkable, it would leave the Bar hostage to Star Chamber agency proceedings.

C

Proof of Due Process Violations Exists in the Record
There Is Overwhelming Evidence in the Record Below That Petitioner Was Denied His Fifth and Fourteenth Amendment Due Process Fair Hearing Rights.

The record below is riddled with due process hearing violations, identified below, far more serious and deserving of much more consideration than set forth in the Hawaii Supreme Court's Order of Disbarment, ignored with a one-sentence

cryptic rejection: "Petitioner'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.

Petitioner asks Your Honor and this Court to read the following summary of the record for yourselves.

C1

Proof of Due Process Pre-Hearing Violations

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

The culture at the ODC for decades 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 Petitioner unless accused attorneys have 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 Petitioner, 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 submitted anonymously, and belatedly burdened.

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

For example, many States understandably restrict filing 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).

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 Petitioner 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 pre-hearing conference that the ODC prosecutors threaten disbarment, which was after Petitioner had filed his position statements, had decided to represent himself, had been preparing for hearing, and most importantly, had not sought any Hawaii Supreme Court Rule 2.22(a)(7) confidentiality extension relief before the time to do so had expired, which led to

irresponsible one-sided "disbarment" press accounts that prematurely devasted Petitioner'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 all Hawaii agency proceedings except within the ODC.

C2

Proof of Due Process Hearing Violations

Petitioner 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, Petitioner constantly objecting as making it very difficult to keep track of case specific testimony.

Such a smorgasbord of witness testimony not only deprived Petitioner 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 Petitioner

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, to be highlighted below.

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 the presiding over a disciplinary case by such a conflicted Hearing Officer.

As soon as Petitioner recognized that Mr. Hughes, the appointed Hearing Officer, had been opposing counsel in one of Petitioner's appellate cases, Moyle v. Y & Y Hyup Shin Corporation, 118 Haw. 385, 191 P.3d 1062 (2008), reversed in favor of Petitioner's client, Petitioner 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 Petitioner provided with uncontroverted documentary evidence that the case was still active in First Circuit Court and indeed that settlement offers were being exchanged with Petitioner 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, Petitioner could only preserve that due process challenge for later appeal to the Board, which post-judgment he did.

Petitioner 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 Petitioner's objection by the Hearing Officer through the testimony of surrogates.

First, the cast of characters to be fully identified in the next section of this Application below, Ms. Andia, subpoenaed, ignored the ODC subpoena and the Hearing Officer simply excused her while her husband was allowed to testify for her in her place.

Second, Mr. Harkey's alleged attorney, Mr. Kern, who was not even representing Mr. Harkey during the events complained of, was allowed to testify by telephone for Mr. Harkey about what Mr. Harkey's testimony supposedly would have been, without any attempt by the ODC to have Mr. Harkey testify himself by telephone or explain why not.

Moreover, the Hearing Officer adopted the proposed findings of the ODC prosecutor without changing a single word, which were moreover substantially incomplete, failing to address most of the material factual issues in the case, *infra,* another reason why they were untrustworthy, as if the voluntary Hearing Officer, an opposing attorney at the time in one of Petitioner's cases, was abandoning his own

decision-making responsibilities of drafting and entering his own findings, another due process hearing violation.

Such "adopted findings of fact and conclusions of law" - when finders of fact lazily merely swallow whole proposed findings and conclusions prepared by opposing 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 Petitioner an independent decision maker, considered contrary to sound adjudicative policy, causing disrespect for a tribunal or agency, raising additional concerns regarding a lack of due process.

C3

Proof of 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 Petitioner at the time, the Board Chairperson and one loud outspoken Board Member, Mr. Horovitz, concealed from Petitioner, subsequently admitted by them, that Mr. Horovitz had a conflict of interest as one of two opposing counsel in two of Petitioner's cases, *supra*.

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 Chairperson 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 Petitioner, *supra.*

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 Petitioner's cases (Sakal) in which Petitioner's client prevailed on appeal, still ongoing, and the other Board Member, Mr. O'Neill, disclosed that he was an IRS lawyer during the time the IRS was involved in one of the cases under review.

However, Petitioner 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 prior IRS matter.

No other Board Member nor the Board Chairperson made any such additional disclosure and Petitioner recognized no other Board Member who had any conflict.

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 the Hawaii Supreme Court, during which time on or about April 2, 2019 Petitioner learned that another Board Member, Mr. Horovitz, participating in the Board's vote, had a conflict of interest as opposing counsel in two of Petitioner's cases, sitting at the far end of a very large conference table unrecognized by Petitioner until after the Board hearing on December 13, 2018 had

been adjourned, in which two cases considerable personal acrimony between the two had been ongoing.

Petitioner 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 Petitioner'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 Petitioner 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 Petitioner's objection was nevertheless supposedly untimely without explanation.

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 Petitioner's ability to defend himself in many other ways, *e.g.,* denying page limit enlargement, requiring all four cases be briefed in 14-point type with double spacing throughout the opening brief (DB Rule 24), any modifications denied, explaining in writing erroneously that that was the requirement for Hawaii appellate briefs which it was not and is not.

Finally, Hawaii Supreme Court Rule 2.7(d) requires that any Board vote recommending sanctions requires majority approval of the Board, yet over

Petitioner's objection the Board refused to announce its vote recommending the disbarment of Petitioner and although that same Rule requires that it promptly submit its Report to the Hawaii Supreme Court it waited months before doing so.

And when it did, it did not submit to the Hawaii Supreme Court its earlier announced and published Report, but the Board hired attorney Charlene Norris to submit her own version of the Board Report.

The Hawaii Supreme Court at Petitioner's request then immediately disqualified her due to her having represented Petitioner in the past, another ethical violation by the Board, but the Hawaii Supreme Court refused nevertheless to strike her penned Report in the Record as the Board Report, even though it was not the Board Report originally entered by the Board.

What was originally entered pursuant to the requirements of Hawaii Supreme Court 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

No Proof of Any Ethical Violations Exists in the Record
There Is Overwhelming Evidence in the Record Below That Petitioner Did Not Commit Any Ethical Violations and Instead Obeyed All Applicable Ethical Rules.

Despite the agency targeting of Petitioner and despite all of its due process violations in an attempt to create a false factual record of misconduct by Petitioner, the ODC and the Board failed to do so.

Yet it did nonetheless succeed in convincing a busy Hawaii Supreme Court, saddled by an increasing caseload, by being one Justice short, and by the

complications caused the Judiciary by COVID-19, to enter its Order of Disbarment (Appendix Two, Exhibit 1), rubberstamping eight of the ODC's and Board's adopted findings: "we find and conclude, by clear and convincing evidence, that Petitioner Gary V. Dubin committed the following misconduct."

Those eight conclusory charges, more *verbatim* parroting as identified, scissored, and *boxed* below, are grouped within four separate subsections.

And consulting the documentation, if thought necessary by Your Honor at this stage in these proceeding, as set forth and as referenced below in Appendix Two, does not even require a legal education to determine that those eight charges are all false.

D1

The "Two Prior Disciplines" Allegations Were Proven To Be Untrue.

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

Contrary to this adopted conclusion, taken from the ODC's self-serving narrative, Petitioner has never been disciplined for any ethical violation against a client in his entire 57-year career as an attorney (Appendix Two, Exhibit 2).

That is a fact, and there is nothing whatsoever contradictory in the underlying record. It was therefore fundamental prejudicial error for the Hawaii Supreme 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 Petitioner'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 Petitioner under the circumstances did not commit any professional misconduct (Appendix Two, 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 Petitioner 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 Petitioner the minimum public reproval which when published read like approval and not reproval (Appendix Two, 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 Petitioner in writing that it would not be seeking reciprocal discipline, and did not, since the ODC had earlier found no professional wrongdoing by Petitioner on the same facts (Appendix Two, Exhibit 5).

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

Yet at the hearing the ODC prosecutor tried to deny that exculpatory evidence that the ODC itself had cleared Petitioner 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 Petitioner, until Petitioner 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 (Appendix Two, 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 Petitioner's client, for supposedly 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 the notice was received too late for Petitioner to reject when he tried, seeking reconsideration, only to be told there was no procedure for reconsideration (Appendix Two, 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, in the Honolulu First Circuit Court, nevertheless dishonestly resurfacing at the hearing below.

Petitioner repeats that he has never been found to have committed any misconduct toward a client or anyone else as an aggravating factor, and that the Order of Disbarment nevertheless erroneously adopting the ODC/Hearing Officer/Board's erroneous adopted findings and ignoring Petitioner's unblemished disciplinary record was prejudicial error.

D2

The DCCA "False Certification" Allegations Were Proven To Be Untrue.

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

Since "knowingly" is the ABA standard that the Hawaii Supreme 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 the above conclusion in the Smith/DCCA Case, since at the hearing the ODC presented no witnesses at all on that issue, 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 the 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 (Appendix, 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, Petitioner 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 or lying, but were treated as mere *malum prohibitum* violations without any

proof of wrongful intent which is exactly how Petitioner answered the ODC's Amended Petition.

Frustrated by residential lending abuses while practicing foreclosure defense, on December 4, 2006, Petitioner, 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 Petitioner discovered that the licensed mortgage broker he had hired was cheating borrowers and stealing from Petitioner, which was the culture of the times, Petitioner fired him and as a matter of public record voluntarily closed Dubin Financial in early 2009 (Appendix Two, Exhibit 10).

However, a mortgage brokerage cannot operate without a designated mortgage solicitor in charge, so Petitioner had to hurriedly apply to become a mortgage solicitor himself, 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 State Department of Commerce and Consumer Affairs (DCCA) brought charges against Petitioner 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 Petitioner'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 Petitioner 13 years earlier, in 1995 had been bench tried and convicted of IRS misdemeanor charges, *supra*.

Petitioner 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 Petitioner's request to meet first, informed Petitioner 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 its Amended Petition for Discipline solely on the basis of the DCCA's use of the word "misrepresentation" nine years earlier, ignoring the DCCA's stated position nonetheless that Petitioner's intent was not at issue, and ignoring the ICA's appellate *malum prohibitum* decision that it had not found Petitioner to have personally intentionally misrepresented anything on his mortgage solicitor's form, and ignoring proof of intent (*mens rea*) 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 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.)

Petitioner 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 Petitioner 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 by the DCCA nor the ICA of knowledgeable or intentional misrepresentation.

To the contrary, despite the misleading nomenclature of "misrepresentation," the DCCA considered itself bound by the decision of the Hawaii Supreme Court in Kim v. Contractor's License Board, 88 Haw. 264, 965 P.2d 806 (1998) (Appendix Two, Exhibit 11), holding that such omission of any finding of proof of knowledge or intent was irrelevant since it was a *malum prohibitum* violation, not requiring proof of any intent (Appendix Two, 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 (Appendix Two, 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 Petitioner 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 Petitioner was not trying to hide anything (Appendix Two, Exhibit 14).

Petitioner, 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 Petitioner 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 and nothing more, absent any finding of knowledge or intent.

Petitioner appealed, arguing a *mens rea* defense. The ICA however affirmed, holding knowledge or intent was not a part of the violation charged, based on the prior Kim decision rejecting a *mens rea* defense (Appendix Two, Exhibit 15).

No certiorari petition was filed in the Hawaii Supreme Court, Petitioner 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 Petitioner known that it would later be used to disbar him, he would have certainly sought further review, for the Kim decision is largely 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 Petitioner's former paralegal, appearing at the hearing by telephone from Florida, submitted a Declaration and testified that he was the one that filled out the form including the one that had checked the wrong box, not the Petitioner (Appendix Two, 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 hearing, which nevertheless ultimately submitted erroneous, proposed findings of fact and conclusions of law to the ODC Hearing Officer accusing Petitioner of personally lying on the form, trying to do 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 100% *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, although rejecting intent as relevant to disbarment yet basing disbarment upon the "cumulative" effect of the four complaints, which the Board also circuitously subsequently adopted *verbatim* (Appendix Two, 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 Petitioner, 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 accompanying recommendation to the Board]

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

And since the Hawaii Supreme Court itself has now completely ignored the fourth complaint against Petitioner concerning allegations of filing an appellate brief without record references, 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 the Hawaii Supreme Court's Rules were supposed to be sent immediately to the Hawaii Supreme Court, were not and instead changed by a newly hired ODC staff attorney immediately thereafter disqualified as conflicted.

Instead ODC lawyers continued to pay lip service to the Hearing Officer's adopted findings, calling its rewritten version, never formally approved if even ever seen by Board Members or certainly not by the Petitioner, the "Board's Report," and submitting it to the Hawaii Supreme Court half a year late (Appendix Two, Exhibit 18).

The Hawaii Supreme 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.

D3

The "Kern Allegations" Were Proven To Be Untrue.

"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.

When Petitioner was forced to withdraw from representing Mr. Harkey, explained below, Mr. Harkey owed Petitioner $69,475.44 in fees and costs (Appendix Two, 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 the $3,500.00 issue, without providing Petitioner time to investigate and knowledgeably respond (Appendix Two, 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.

Petitioner 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 Petitioner or otherwise intentionally done.

Furthermore, Petitioner replied that the ODC prosecutor did not include costs and general excise tax in his calculations, and lots of documented work on the case by other members of Petitioner'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 Petitioner 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 Petitioner.

Nor should a contrary prosecutorial record be made by ambush.

Petitioner 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 earned withdrawals, all ironically in the client's favor, and what was being complained about at the very conclusion of the hearings with only minutes to go.

> *"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.*

That wild professed hearsay 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 Petitioner, 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 by that Court for misbehavior 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 Petitioner 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 (Appendix Two, 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 Petitioner 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 Mr. Harkey was in bankruptcy at the time, yet Mr. Kern was permitted to speak for Mr. Harkey at the hearings by the Hearing Officer without any foundation for his testimony and without there being any opportunity for Petitioner to cross-examine Mr. Harkey nor any explanation why Mr. Harkey was not also on the telephone.

The Record is filled with thousands of pages of email and text correspondence between Mr. Harkey and Petitioner, too numerous to exhibit in Appendix Two, but upon request Petitioner can make any additional part of the Record available that any Member of this Court may wish be separately submitted.

Second, although the ODC prosecutor through his investigator did claim that the Petitioner had not timely responded to his inquires, that testimony was proven to be mistaken at the hearing and completely and expressly recanted by the ODC investigator after being shown at the hearing a fax to him responding to his supposed unanswered request for further information (one can never satisfy the endless requests from the ODC) and embarrassingly withdrawn (Appendix Two, Exhibit 21), yet somehow made its way inexplicably back before the Hawaii Supreme Court as a justification for disbarment no less.

In order to understand the truth, it is necessary to understand the chronology of events, and why Mr. Kern was not a trustworthy firsthand witness at the hearings (Appendix Two, Exhibit 22), and why Petitioner had to withdraw from representing Mr. Harkey due to a Ms. Nora suddenly becoming the plaintiff in the case replacing as Plaintiff my client Mr. Harkey as the Harkey Trust Trustee (Appendix Two, Exhibit 23), which Petitioner 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 (Appendix Two, Exhibit 24), came to Petitioner 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 the Plaintiff 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 (Appendix Two, Exhibit 25).

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

Petitioner 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. All of that work is detailed in the Record within Petitioner's thousands of pages of submissions for the Kern/Harkey Case alone.

Mr. Harkey's existing wrongful foreclosure amended pleadings had been earlier 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 even as a paralegal following heated objections by opposing counsel before Petitioner 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 then being subsequently suspended from the practice of law for two years (Appendix Two, Exhibit 26).

During Petitioner'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 of his being wired to Petitioner 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 Petitioner only through a friend in Washington State.

In one such text message from Mr. Harkey, sent to Petitioner in his representation of him, when his retainer funds had become exhausted, Mr. Harkey wrote Petitioner acknowledging that Petitioner 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) (Appendix Two, Exhibit 27).

Petitioner, however, became ethically required to withdraw from 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 Petitioner what to do, as a ploy overcoming her being disqualified from *pro hac vice* representation in Nevada, and Petitioner by email on April 25, 2016 let Ms. Nora know why he was not going to join her in the fraud on the Nevada federal court:

> 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 Petitioner (explaining further why he could not ethically continue representing Mr. Harkey in the case) and Mr. Harkey (asking Petitioner naively to please stay on and work with Ms. Nora behind the scenes) and Ms. Nora (threatening Petitioner, while explaining the way she intended to control the case).

That correspondence, in the Record, is similarly voluminous. There was no way that Petitioner 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 Petitioner, Mr. Harkey continuing to beg Petitioner to stay on and work with Ms. Nora, culminated with final text messages from Petitioner to Mr. Harkey again explaining why he could not ethically further represent Mr. Harkey (Appendix Two, Exhibit 28).

Whereupon, Petitioner moved to withdraw as did his chosen 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 Petitioner 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 Petitioner only of irreconcilable differences between client and counsel so as not to prejudice Mr. Harkey's case. Meanwhile, Petitioner warned Mr. Harkey that Ms. Nora was not competent to handle his case.

Ms. Nora as Trustee replaced Petitioner with her personally selected out of state counsel who in turn selected as his local counsel Mr. Kern, joining in on the fraud, who together completely wrecked Mr. Harkey's case as Petitioner had predicted, 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 attempted to blame Petitioner 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 Petitioner had predicted, the Nevada District Judge wanted nothing more to do with the case and before dismissing, entered 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. She was not capable of doing anything correctly. That part of the saga is also voluminously documented in the Record below by Petitioner.

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

Petitioner was contacted by the Trust's bankruptcy attorney, Mr. Edstrom, who informed Petitioner that Ms. Nora had the Trust file a claim against Petitioner for the return of all of Mr. Harkey's paid retainer fees based on allegations from Mr. Kern, not from Mr. Harkey.

Whereupon, Petitioner explained the situation to Mr. Edstrom and although Mr. Harkey's Trust (who was never Petitioner's client) was now the Debtor according to Mr. Edstrom in federal bankruptcy court and Petitioner had nevertheless been contacted by an official bankruptcy attorney not a part of Mr. Nora's fraud and claiming to have Mr. Harkey's approval, Petitioner provided a complete written accounting showing way in excess of what Petitioner had been paid as Mr. Harkey had never added his promised funds, *supra*, and that was the end of the matter, with Petitioner'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 having become final.

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

When the Kern complaint was first called to Petitioner's attention by the ODC, Ms. Preece, then Assistant Disciplinary Counsel, no longer there, had already made up her mind to add the Kern matter to her planned Petition for Discipline, refusing in writing to meet with Petitioner 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 Petitioner'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. Petitioner repeatedly tried to contact Mr. Harkey but received no reply.

This saga is all documented within the seven days of hearings and in the resulting hearing transcripts.

Petitioner should not be prejudiced by the voluminous nature of the Record, already probably more than desired exhibited here. However, everything in these Motion Papers is all documented in the Record.

Mr. Kern was unable to testify with personal knowledge regarding *any* of the ODC's charges against Petitioner, producing no evidence whatsoever that Mr. Harkey had even so instructed him to inquire or had any objections:

E.g.: (a) Mr. Kern, with respect to the requirements of Hawaii Rules of Professional Conduct (HRPC) Rule 1.15(d), had no personal knowledge of what the agreement had been between Mr. Harkey and Petitioner regarding accounting for

hours and costs, (b) Mr. Kern, with respect to HRPC Rule 1.15(c), had no personal knowledge of Petitioner's deposits made by Mr. Harkey into Petitioner's client trust account, which happened to be two direct wire transfers into Petitioner'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 Petitioner concerning the disbursement of funds from Petitioner'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 Petitioner had or had not kept Mr. Harkey informed.

Mr. Kern's unsupported hearsay testimony was moreover completely contradicted by Petitioner and Petitioner's 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 at the hearings, and despite the fact that Petitioner 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 Petitioner'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 Petitioner by Mr. Harkey, one based on more than 24 hours charged in one day, that and a few others being clear accounting errors by Petitioner's office accountant who

tabulates the hours and prepares the invoices as Petitioner testified, not the Petitioner, and another infinitesimal challenge based on the entry of an alleged incorrect date for Petitioner's trip to Las Vegas to meet with Mr. Harkey, when in fact accompanying airline and hotel receipts in the record showed that Petitioner's trip dates were correct.

Mr. Kern simply did not know how to read date stamps on text messages, admittedly sometimes confusing, as he looked for anything to complain about.

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

To attempt to do so despite the absence of any credible evidence is itself another violation of due process and the right to a fair trial.

D4

The "Andia Charges" Were Proven To Be Untrue.

> *"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.*

The actual material facts were all summarized and documented for the ODC as early as 2016 in a specially prepared Andia Fact Book (see complete copy set forth in Appendix Two, Exhibits 29A, 29B, and 29C) which contradict the naked conclusory statement above.

For the truth is that although at first Mr. Andia demanded the entire $132,000, claiming it was all his, not all of the $132,000 settlement funds were actually owned by the Andias.

Close to fifty percent of the settlement funds Mr. Andia later had to concede and he agreed, as did the Hearing Officer and the Board and the Hawaii Supreme Court eventually, belonged to Petitioner.

Thus, of the $132,000, $70,297.13 was immediately paid to the Andias by Petitioner once the Bank of America settlement check written on a Rhode Island Bank cleared Petitioner'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 Petitioner's services were terminated by the Andias.

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 Petitioner's W-9 IRS clearance form, and Petitioner 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.

Petitioner consulted with officers of First Hawaiian Bank (FHB) who had to approve any third-party check being deposited, and suggested if Petitioner 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 Petitioner thus had control over the monies, as every attorney as well as monies held in client trust accounts is bound by Court Rules, and it is conceded that none of the monies left the client trust account until Petitioner met with Mr. Andia to discuss the distribution.

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 had fully approved at that early meeting), and only then was the remaining $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 Petitioner'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 after Mr. Andia agreed.

More than a full month later, Mr. Andia changed his mind, whereupon Petitioner offered to put $19,885.00 back into his client trust account, but Mr. Andia refused.

Petitioner offered to enter into Bar fee mediation or arbitration. Mr. Andia refused, instead threatening First Hawaiian Bank and Petitioner with lawsuits.

First Hawaiian Bank sought exoneration in First Circuit Court, Judge Chang presiding. Petitioner 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 Petitioner and that the Andias were not entitled to the entire amount.

These are the material facts of ownership and full compliance with Hawaii Rules of Professional Conduct, contradicting the above conclusory finding.

Neither Petitioner 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 generates 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 Petitioner's law firm which pioneered foreclosure defense in Hawaii, but for Hawaii trial courts also, as evidenced by Foreclosure 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 in his courtroom, and Judge Castagnetti in Honolulu last year having to stop proceedings in her courtroom in one case to summons armed deputies to eject a yelling homeowner from her courtroom.

The Hawaii Supreme Court also has not escaped on the Internet the wrath of some foreclosed homeowners either, calling its Justices part of "the mob".

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. Petitioner'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 Petitioner's law firm unlike many, never withdraws from a case for nonpayment, being paid only if there is a settlement.

Mr. and Ms. Andia became Petitioner'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 Petitioner's initial meeting with the Andias, Petitioner participated only initially in their case, researching and preparing a litigation plan and for nearly four years thereafter had absolutely no contact whatsoever with the Andias until the

dispute described below arose, their case being exclusively conducted by Associates in Petitioner'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 Petitioner or a Senior Associate will handle the trial if any as lead counsel.

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

The Andias' representation consisted of defending against foreclosure and eventually the Associates in charge of their case at their 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. Petitioner'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, Petitioner'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 their paying Petitioner'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 settlement also.

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

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 Petitioner's law firm, the Dubin Law Offices, jointly, which is standard settlement procedure in Hawaii lawsuit settlements, if not everywhere.

It was and is also standard procedure everywhere, expressly reserved in the Andias' written retainer agreement at Paragraph 16, that Petitioner had an attorney's lien covering settlement proceeds giving Petitioner 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 Petitioner before its settlement check would be released, which both the Andias and Petitioner thus signed and returned to opposing counsel.

The settlement agreement itself placed burdens on Petitioner 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 Petitioner's office, it was mistakenly made payable to the Andias only.

Petitioner 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 Petitioner, no matter how much legal work had to be done and no matter how much costs were incurred.

Petitioner discussed the payee 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 the accompanying delays, that Petitioner 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 Petitioner sign the Andias' names and initial also.

Petitioner agreed, and as he had been similarly instructed to do by First Hawaiian Bank Private Banking Vice Presidents ever since 1982 when receiving two-party settlement checks except usually jointly payable to Petitioner, and 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 Petitioner's client trust account and not released until the dispute was resolved, which is what Petitioner and First Hawaiian Bank intended and Petitioner did so until the Andias approved of the distribution of the funds, *supra*, which they subsequently did.

Previously, for about four years, Petitioner 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 Petitioner's office; moreover the Andias had never complained to Petitioner regarding even once about anything having to do with their foreclosure case or the Bank of America settlement until after the settlement check arrived.

Upon Petitioner 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 Mr. Andia withdrew his flat fee allegation, yet raised it again at the hearing, on the biased urging of the Hearing Officer.

Petitioner 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 a check for the balance due the Andias, crediting the Andias with their initial retainer payment after their first check bounced.

Petitioner 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 Petitioner 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, Petitioner's law firm could not agree to facilitate a fraud against the State and refused, which greatly upset Mr. Andia, and appears to have been the reason for his anger.

Mr. Andia was invited by Petitioner 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 Petitioner's Associates, Messrs. Goff and Forrester, which amounted to a $19,885.00 dispute.

Mr. Andia met Petitioner at Petitioner'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 with a carefully staged homeless look straight from a Hollywood casting agency.

Petitioner 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 year-long mediation effort and settlement work.

Petitioner 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 Petitioner that much or more.

Petitioner further testifying without contradiction 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, his law firm 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 Petitioner's Client Trust Account a few days later which he had held for weeks, as well as cashing an $8,000.00 refund check since refusing to replenish the retainer account for the work ahead, his also cashing that additional Petitioner's Client Trust Account check a week or so after cashing the $62,297.13 check upon informing Petitioner that he was changing attorneys in their foreclosure action still ongoing, although their Counterclaim no longer in the case.

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

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

that he only agreed because he was afraid that otherwise Petitioner 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, Petitioner 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 Petitioner'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 change his mind during a Christmas Party attended by several unnamed attorneys, and thereafter started to accuse Petitioner of "forgery" in an effort to harm Petitioner, 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 by law enforcement as not containing any of the elements of forgery.

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

And coincidentally, when Petitioner withdrew from the Andias' foreclosure case, ironically over Mr. Andia's inconsistent filed objection nevertheless approved by Judge Ayabe, James Hochberg, a Hawaii attorney who Petitioner had successfully earlier sued for legal malpractice in the Honolulu First Circuit Court before Judge Border for a client for whom Petitioner 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 (Appendix Two, Exhibit 31), presumably another attorney Christmas guest of Mr. Andia.

Hawaii is a small community and attorneys should be protected against case related vendettas.

Petitioner in good faith, 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 Petitioner his approval of the distribution and having thereafter cashed both the $62,297.13 check and the $8,000 check given him months earlier, upon whose agreement Petitioner relied.

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

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 Petitioner's associate attorneys, writing, for instance, that he was "sick of being bullshitted" by his lender and accused respected opposing Hawaii counsel Pat McHenry of being "a dirt bag and a liar".

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

Petitioner'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 Petitioner's deposit of the settlement check into his attorney client trust account and to pled their case if any against Petitioner 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, subpoenaed by Judge Crandall to attend, and court approval for the release of Petitioner'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 Petitioner's case, sought to withdraw its lawsuit before Judge Chang that sought to have the otherwise disputed funds returned to Petitioner's Client Trust Account if it had in any way wrongfully approved the deposit of the settlement check.

Petitioner and First Hawaiian Bank filed joint positions that neither did anything wrong.

The Andias' stale claim, rejected by the Honolulu Police Department and by First Hawaiian Bank and by Petitioner, 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 next filed their forgery grievance with the ODC, whose personnel unfortunately not only lack investigative training or judicial training nor expertise, but whose personal personnel gotcha incentives historically have not placed a premium on finding the truth unless it advances their careers.

The ODC prosecutor drafted a self-serving hodgepodge of irresponsible, blatantly false proposed findings of fact (FOF) for consideration by the Hearing Officer, most of which completely contradicted the dispositive documentation and supporting testimony set forth 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 Petitioner and also initialed as approved by an officer of First Hawaiian Bank (vs. FOF 91); none of those funds were withdrawn from Petitioner'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 Petitioner 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. FOF102); an additional $8,000 was retained only if the Andias wanted Petitioner'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); Petitioner 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 Petitioner 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 Petitioner 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 Petitioner and by First Hawaiian Bank, in which when asked by both presiding Judges to explain their positions regarding the money deposited in Petitioner'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 Petitioner of forgery; there is no mention of the fact that after the Andias suddenly cried forgery, Petitioner 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.

Petitioner'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 Petitioner were fully protected after the Bank of America, mailing the settlement check to Petitioner'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 Petitioner and his clients, and all of that after Mr. Andia at first insisted in bad faith that he had no obligation to pay Petitioner anything. He wanted the entire $132,000.00 and to hide it from his former wife so as to avoid child support.

The check was deposited in Petitioner'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 Petitioner being bound by the balance of that same Rule 1.15(e), after Mr. Andia approved the distribution, including the funds to be paid to Petitioner, 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 have done so at that time would have been a HRPC ethical violation.

Additionally, the ODC prosecutor contended that Petitioner'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 therein once, and the Andias' retainer agreement specified fees "were subject to periodic increases".

Moreover, it was not the Petitioner, 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 Petitioner did not even have any contact with the Andias whatsoever, yet now an attempt is being made to disbar *vicariously*.

None of the Associates were charged with any ethical violations, nor should they or the Petitioner have been.

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.

The above unsupported, conclusory finding that Petitioner violated a disciplinary rule in the handling of a settlement check is contradicted by the material record facts.

> *"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.*

This next conclusory ethical criticism is similarly not true. Petitioner has already explained above with ample supporting 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 Associates, and that the Andias were immediately paid all undisputed amounts as soon as the settlement check cleared and as Petitioner best recalls even just 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.*

The Hawaii Supreme Court 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 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, Petitioner was paid nothing for the successful work of his law firm for four years on the Counterclaim, ultimately 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 Petitioner'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) escaped 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. Nowhere.

When Petitioner 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 the agreed 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 Petitioner's billing conduct in this case (Exhibit 32).

How can any Court be allowed to impose the professional death penalty of disbarment on an attorney 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 Petitioner, 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 an issue because Mr. Andia raised the same questions at his meeting with Petitioner 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 been explained and approved, and it was only then that the disputed settlement funds sitting untouched in Petitioner'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.

For all of the reasons already explained above, Petitioner had no contact with the Andias for the approximately four years leading up to the time his office receiving the Bank of America settlement check which fact is not contested, and it was not Petitioner's responsibility, but the responsibility of the Associates 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 Hawaii's own prescribed standards of reasonableness, *supra*, could not have been determined until the results were known without possessing clairvoyance and without contradicting the laws of physics.

And, most importantly, Mr. Andia himself admittedly in writing later that he ultimately agreed upon the billings and the final distribution of the settlement funds while still remaining safely in Petitioner's client trust account.

All of the above material facts, again, are painstakingly fully documented in the Andia Fact Book set forth in three parts within Appendix Two, Exhibit 29A, 29B, and 29C.

E

Legal Argument Supporting a Stay

There Is Overwhelming Evidence in the Record Below That Petitioner Was Denied a Fair Hearing in Violation of the Fifth and Fourteenth Amendments.

Disbarment is a professional death sentence and must be subjected to the strictest procedural due process scrutiny, as was summarized succinctly by the United States Court of Appeals in In re Fisher, 179 F.2d 361, 370 (7th Cir. 1950), quoting from Circuit Court Opinions and from the Opinions of this Court:

> 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." [quoting In Ex parte Secombe, 19 Haw. 9, 13, 60 U.S. 9, 15, 15 L.Ed. 565 (1856)]

One could easily teach a two-semester class on due process fair hearing requirements based on this case alone and still be unable to discuss every abuse that Petitioner experienced and still not finish the course.

Emphasis below is placed only therefore, limited space permitted, on some of the more egregious due process violations.

E1

Petitioner Has Been Ordered Shortly To Be Disbarred on an Untrustworthy Record

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 *verbatim* and in part so did the Hawaii Supreme Court as set forth above.

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 constitutional mistrust as explained by this 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 a fair hearing and 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").

In adopting the prosecutor's findings *verbatim*, neither the ODC nor the Hearing Officer nor the Board nor the Hawaii Supreme Court addressed the material facts set forth above favorable to Petitioner, denying Petitioner a fair hearing.

E2

Petitioner Has Been Ordered Shortly To Be Disbarred on a Biased Record.

If Petitioner. over his objection, having had an opposing attorney as his Hearing Officer, even while settlement negotiations in their shared case were ongoing, is not enough appearance of impropriety to invoke due process guaranties, surely the presence of Mr. Horovitz, *supra*, on the Board, given his hidden conflict, voting to disbar Petitioner is itself reason enough to reject 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, this 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, this Court in Williams v. Pennsylvania, 136 S. Ct. 1899 (2016), a death penalty case akin to Petitioner'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 at first by either gentlemen until challenged, for instance not until after the Board Chairperson and Mr. Horovitz when challenged admitted that they had meet secretly just before the

Board met to decide Petitioner's fate, they discussed Mr. Horovitz's conflict, yet said nothing while the Board Chairperson had other attorneys on the Board otherwise raise their hands for the same reason.

F

A Stay Is Need To Avoid Irreparable Harm
Irreparable Harm Will Result Unless a Stay Is Granted and Meanwhile the Balance of the Equities Favors Petitioner as Well as the Public at Large.

Petitioner, 82, successfully recovering from triple bypass open heart surgery earlier this year, is threatened imminently with the loss of his law practice which represents his entire livelihood, his attorneys and staff will be unemployed, his more than 300 clients invested in Petitioner's representation, a majority of whom are being represented on a *pro bono* basis, will be without representation, and more than 300 cases in Hawaii trial and appellate courts will be disrupted, all during a pandemic.

On the other hand, the targeted charges against Petitioner are older than 12 years (DCCA 2008+), 8 years (Andia 2012+), and 4 years (Harkey 2016+), with no prejudice occurring to anyone if the Order of Disbarment be stayed until Petitioner can have his forthcoming Petition reviewed on the merits by the full Court.

The equities clearly balance way on Petitioner's side.

Moreover, the granting of an emergency stay in this case, it is respectfully submitted, is equally important to this Court as well in order to preserve the *status quo* from this case becoming moot following a disciplinary death sentence.

An emergency stay will allow this Court to consider the merits of Petitioner's claims and determine what protections are needed to protect fairness in disciplinary

proceedings for all attorneys in this heretofore low visibility area of federal constitutional law.

DATED: Honolulu, Hawaii; October 3, 2020.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel of Record
Petitioner

DECLARATION OF GARY VICTOR DUBIN

I, GARY VICTOR DUBIN, HEREBY DECLARE:

1. I am the Petitioner in these proceedings, a Member of this Court's Bar since 1976, the author of the attached Application for Emergency Stay, and I make the within statements based on my own personal firsthand knowledge that I affirm are true.

2. The factual statements contained in the accompanying Application are true of my own personal firsthand knowledge, and the exhibits included in Appendix One and in Appendix Two in support of this Application are true and correct as described therein and a part of the Record below.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Honolulu, Hawaii, on October 3, 2020.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN

DECLARATION OF JOHN D. WAIHEE, III

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.

2. I am a former Governor of the State of Hawaii, having had the privilege of serving in that position from 1986 through 1994, and before that as Hawaii State Lieutenant Governor and before that in the Hawaii State Legislature, and my overriding goal in life has always been and remains above all else the well-being and protection of the people of Hawaii.

3. For that reason alone, I write to you because I have read the September 9, 2020 Disbarment Order of Gary Victor Dubin and personally know that that is in grave error, apparently in reliance upon the mistaken judgment of staff, and therefore encourage Your Honor to review this Application personally.

4. In the many positions I have held in Hawaii Government, 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 most contributing Members of our entire legal community and who does not deserve to be disbarred on this record before you now.

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, concerned, I personally sat through the many

prehearing conferences and all seven days of his disciplinary hearings in his case, witnessing firsthand the abuse he experienced, and I can personally verify the truth of all of his factual representations to this Court in these Application papers, including my personally eye-witnessing the extraordinary manner in which he was constantly denied due process of law, as he truthfully summarizes in his Application now before this Court.

6. Unless he is granted emergency relief by Your Honor, the result will truly be the shameful and tragic conclusion of one of the most unjust chapters in the legal history of my 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 appellate decisions he has secured, including in this Court.

8. Some talk about Access to Justice in my State and elsewhere. Mr. Dubin in his area of practice has done more than talk about it; through his advocacy 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 in public life, even though he serves as advocate and not decision maker.

10. This is a practice and a people's advocate who this Court should protect and applaud, not allow him to be disbarred on such a flawed record as now before you, without a stay and without being heard.

I declare under penalty of perjury under the laws of the United States of América that the foregoing is true and correct. Executed at Honolulu, Hawaii, on October 3, 2020.

/s/ John D. Waihee, III

JOHN. D. WAIHEE, III

PROOF OF SERVICE

I hereby certify that true and correct paper copies, including a signed original and two copies of the aforementioned *Application* with its Appendix One and Appendix Two, were duly sent by U.S. Express Mail today, October 3, 2020, to the Clerk of this Court after being electronically transmitted to the Court through its electronic filing system, and will be separately hand delivered to Respondent's counsel immediately upon the opening of its offices the following Monday morning, as follows:

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DATED: Honolulu, Hawaii; October 3, 2020.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel of Record
Petitioner