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SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner,

vs.

GARY VICTOR DUBIN,

Respondent.

OPENING BRIEF

John D. Waihee, III 1864
Gary Victor Dubin 3181
Dubin Law Offices
55 Merchant Street, Suite 3100
Honolulu, Hawaii 96813
Telephone: (808) 537-2300
Facsimile: (808) 523-7733
E-Mail: jwaihee@dubinlaw.net
E-Mail: gdubin@dubinlaw.net
Attorneys for Respondent

TABLE OF CONTENTS

page

A. The Respondent....1

B. The Four Separate Unrelated ODC Cases....1

1. The Smith/DCCA Allegations (ODC Case No. 16-0-151)....2
2. The ICA/Ke Kailani Allegations (ODC Case No. 16-0-213)....10
3. The Andia Allegations (ODC No. 16-0-147)....17
4. The Kern/Harkey Allegations (ODC No. 16-0-126)....29

C. Respondent's Attorney's Due Process Rights Were Violated....36

1. The Lack of an Impartial Investigation....37
2. The Lack of a Timely Notice of Intended Discipline....38
3. The Lack of Separate Evidentiary Hearings....38
4. The Lack of an Impartial Hearing Officer....39
5. The Lack of Cross-Examination Rights....39
6. The Lack of Trustworthy Findings of Fact....40
7. The Inclusion of Erroneous Aggravating Circumstances....41
8. The Exclusion of Exculpatory and Mitigating Evidence....42
9. The Lack of an Impartial Board....42

D. Conclusion....45

Certificate of Service....--

TABLE OF AUTHORITIES

page

CASES

Aetna Life Insurance v. Lavoie, 475 U.S. 813 (1986)....................43-45

Breiner v. Sunderland,
112 Haw. 60, 143 P.3d 1262 (2006)....................37

In re Fisher,
179 F.3d 361 (1950)....................36

In re Magoon,
15 Haw. 244 (1903)....................27

In re Partington,
SCWC-18-0000301 (2020)....................16

In re Peters,
642 F.3d 381, 2011 U.S. App. LEXIS 8489....................32

Isobe v. Sakatani,
212 Haw. App. LEXIS 587, 2012 WL 1951332 (2012)....................38

Kim v. Contractor's License Board,
88 Haw. 264, 965 P.2d 806 (1998)....................5-6

Moyle v. Y & Y Hyup Shin Corporation,
118 Haw. 385, 191 P.3d 1062 (2008)....................39

Photo Electronics Corp. v. England,
581 F.2d 772 (9th Cir. 1978)....................40

Shannon v. Murphy,
49 Haw. 661, 426 P.2d 816 (1967)....................41

United States v. El Paso Natural Gas Co.,
376 U.S. 651 (1964)....................40

Williams v. Pennsylvania, 136 S. Ct. 1899 (2016)....................44-45

OPENING BRIEF

A. The Respondent

Respondent, 81, 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.

Respondent is a Member in Good Standing of the California State Bar (1964), the United States Supreme Court (1976), and the Hawaii State Bar (1982), having never in over 56 years ever been disciplined for any ethical violation against any client of his.

Respondent has also taught law at Stanford, Berkeley, Denver, Harvard, USC, UCLA, Texas, and at the RAND Corporation, and has been 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.

Respondent's diverse legal career has also included employment with the firm of Covington and Burling in Washington, DC, assisting Supreme Court Associate Justice William O. Douglas, heading a nationwide criminal justice courts task force appointed by President Lyndon B. Johnson, and arguing before the International Court of Arbitration in the Hague, again without ever being disciplined for any ethical violation.[1]

B. The Four Separate Unrelated ODC Cases

Meaningful appellate review of the subject Petition is dependent upon a separate understanding of the material facts and ethical charges arising out of four completely independent legal proceedings in which Respondent participated starting 25 years ago.

The institutional situation at the ODC at the time these four separate grievances were docketed, prosecuted, and merged into one Petition for Discipline[2] was one of personnel chaos, the affairs of the ODC being managed in abrupt tag-team fashion by four successive chief disciplinary counsel, with the deputy chief disciplinary counsel and the assistant disciplinary counsel handling the prosecution of Respondent and signing the Petition for Discipline both resigning in the middle of Respondent's prosecution.

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[1] For Respondent's full background summary, see Record, at Doc. No. 41 (JSmith 5) [R41(5)].

[2] R1(see Petition and Amended Petition).

As a result of those resignations, the scheduled pretrial conference to discuss witnesses and documents and the format for the hearing(s), for example, never occurred, with the hearing proceeding willy nilly, and the formal request by Respondent for four separate hearings or a three-hearing-officer panel similarly going ignored.[3]

1. The Smith/DCCA Allegations (ODC Case No. 16-0-151)

Before adventuristically moving his law practice to Hawaii in 1982, at first joining Mukai, Ichiki, Raffetto, and MacMillan, Respondent was a recognized national expert in what was then called "lender liability," representing mainly corporate borrowers.

Arriving in Hawaii, Respondent's attention quickly was drawn to the plight of homeowners, particularly those caught within the abuses of securitized trusts, and with the leadership of this Court, Respondent has contributed to major case law reform, securing 100 appellate reversals in the past 20 years alone, including not only in this Court, in the ICA, and in the United States Supreme Court as well.[4]

Frustrated by residential lending abuses while practicing law full-time, on December 4, 2006, Respondent, as a sole investor only, formed Dubin Financial, LLC, a mortgage brokerage, hiring a licensed mortgage broker to manage the company.

Unfortunately, mortgage brokers at that time were largely unregulated, and when Respondent discovered that the licensed mortgage broker he had hired was cheating borrowers and stealing from Respondent, which was the culture of the times, Respondent fired him and voluntarily closed Dubin Financial in 2008.[5]

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

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

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[3] R2(6)(p .26).

[4] R1(Successful Appellate Record) (since that list was prepared in 2016, Respondent has prevailed in 48 more appeals, with numerous other appeals and certiorari cases pending disposition in Hawaii Courts).

[5] See Respondent's testimony, Transcript (TR) 11/13/17, R3 (DB44).

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

The basis for the belated DCCA revocation was that Respondent's application failed to disclose that he had been previously convicted in 1995, thirteen years earlier, of federal failure-to-file income tax misdemeanors, because the form question asking whether an applicant had been convicted of a crime was checked "NO" instead of "YES," hence not disclosing that Respondent 13 years earlier, in 1995 had been bench tried and convicted of IRS misdemeanor charges in Honolulu by Visiting California U.S. District Judge Manuel Real, recently deceased, a controversial federal judge widely criticized for erratic and abusive behavior.[6]

Respondent testified at the DCCA hearing that he did not knowingly and intentionally check the wrong box on the form, but that the form was filled out mistakenly by a law clerk either before or after he had signed it.

Furthermore, Respondent explained to the DCCA Hearing Officer that despite his misdemeanor convictions he had been cleared of any intentional professional wrongdoing concerning those convictions by the ODC after a multi-year investigation:[7]

> 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 <u>not</u> warranted due to the unique circumstances pertaining to your matter. [Emphasis in the original]

And the California Bar Court's Settlement Judge also reviewing the conviction, fully familiar with Judge Real, after numerous hearings in California, two years later ignored Respondent's misdemeanor convictions altogether, over the prosecutor's

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[6] Ibid.

[7] The referenced letter should have been included in Doc. 41 consisting of Respondent's Exhibits 10 and 11 to Respondent's Opening Brief to the Board, but the entire contents of those exhibits appear to be missing from the Record and a motion to supplement the Record will be necessary.

objection, even though failure-to-file convictions in California were by then recent California Supreme Court decisions supposed to result in automatic three-year suspensions, instead in June 2000 apologetically issued California Bar Court findings in the form of a "public reproval," explaining to Respondent that that was the minimal settlement option within his authority, which reads however more like an exoneration:[8]

> 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.

Simultaneously, the then ODC Chief Disciplinary Counsel confirmed to Respondent in writing that the ODC would not be seeking reciprocal discipline, and did not, despite the California public reproval, since she ruled that the ODC had earlier found no professional wrongdoing by Respondent on the same facts.[9]

Subsequently, eight years later in 2008 the American Bar Association completed its own multi-year investigation and published its final report in its *ABA Journal* regarding Respondent and Judge Real, further exonerating Respondent following the reckless attempt by the U.S. Justice Department to target one attorney in every State in order to intimidate attorneys nationwide to file timely returns, finding:[10]

> Gary Dubin spent 19½ months in California federal prison and returned to Hawaii in October 1996 to practice law. The state's Office of Disciplinary Counsel, in an extremely unusual decision concerning a matter of moral turpitude, determined that a finding of professional misconduct was "not warranted." Later, even the U.S. Internal Revenue Service reversed itself, saying he didn't owe the $1.5

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[8] Ibid.

[9] Ibid. See TR 11/28/17, pp. 1485-1494.

[10] R41 ("Real Trouble").

> million that was the basis for his three misdemeanor convictions for failure to file tax returns.
>
> In fact, the agency gave him nearly $100,000, including interest, from payment in an earlier tax year. The IRS had found that he indeed had substantial business losses and deductions for the years in question, and that they could be carried back.
>
> He can't recoup the time behind bars; the same goes, thus far, for the $131,000 the judge fined him. In 2006, the IRS looked in to the possibility of crediting the fine to his next tax liability, but found it couldn't because the money went to the court.

The IRS investigation in the Seattle District Office had taken seven years, the result of a formal request by all four Members of the Hawaii Congressional Delegation, led by the late Representative Patsy Mink, to which Respondent will forever be thankful.

Appreciative of those findings beyond words, far from hiding his misdemeanor convictions, the Respondent wanted the whole world to know the true facts in order to try to get back his good name and reputation, and whereas at the same time that the crime box had inconsistently been checked "no," Respondent had paid for and published full page color ads in the *Star Bulletin* reprinting the ABA findings and the IRS letter informing him before his prosecution that he had no such filling requirement.[11]

Returning to the later DCCA hearing, almost ten years ago the prosecuting attorney nevertheless argued and the Hearing Officer nevertheless found Respondent to have "misrepresented" his criminal history, revoking the Dubin Financial license after-the-fact and imposing a minor fine which was promptly paid.

However, there was no finding whatsoever of intentional misrepresentation. To the contrary, despite the misleading nomenclature of "misrepresentation," the DCCA considered itself bound by the decision of this Court in Kim v. Contractor's License Board, 88 Haw. 264, 965 P.2d 806 (1998), holding that such omission was irrelevant since it was a *malum prohibitum* violation, not requiring proof of or even actual intent.[12]

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

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[11] R41 ("Star Bulletin").

[12] The Kim decision of this Court is set forth within R41.

> 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.

Respondent, the evidence at the DCCA hearing further showed, had earlier contemporaneously applied for a Honolulu liquor license for a convenience store of his and had personally checked "yes" on its form regarding prior convictions, and the liquor license was granted upon investigation nevertheless, further evidence that Respondent was not trying to hide anything, but freely acknowledging those discredited convictions.[13]

The DCCA Hearing Officer agreed with the DCCA prosecuting attorney, finding a *malum prohibitum* violation absent any finding of intent. Respondent appealed, arguing a *mens rea* defense. The ICA however affirmed, holding intent not a part of the violation charged, based on this Court's prior Kim decision rejecting a *mens rea* defense.[14]

Respondent had voluntarily relinquished his mortgage license years earlier as explained above, paying the minor DCCA fine; meanwhile, personal responsibility for the legal cases of others pressing at the time persuaded Respondent to not seek further, *certiorari* review in this Court to overrule Kim, believing that the matter was unfair and Kim should be reversed, but since the DCCA decision did not accuse him of

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[13] R41 (Dubin DCCA testimony, p. 40).

[14] The relevant DCCA record is found in R41.

any falsification, that matter was over with, Respondent concentrated instead on rebuilding his law practice, having lost all of his clients while unfairly incarcerated.

On March 7, 2016, the ODC received an anonymous half-page, typed letter from "/s/ Joe Smith" describing himself "as a member of the public," with an obvious personal animus, claiming, *inter alia*, as follows:[15]

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

When notified of the Smith letter by the ODC, Respondent replied explaining exactly the facts set forth above, providing the ODC with the identical documentation.

Nevertheless the ODC, cavalierly denying Respondent's request to meet first, informed Respondent that they would meet with him to discuss the issues *after* the Petition for Discipline was first filed, and the ODC then proceeded to include the Smith complaint within its January 2017 Petition for Discipline solely on the basis of the DCCA's use of the word "misrepresentation" nine years earlier, ignoring the DCCA's stated position nonetheless that Respondent's intent was not at issue, ignoring the ICA's appellate *malum prohibitum* decision that it had not found Respondent to have personally intentionally misrepresented anything on his mortgage solicitor's form, and ignoring the requirement of intent in a violation of professional ethics:

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

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

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[15] A copy of the letter, Respondent's Smith4 and Petitioner's A17, is missing from the Record which will have to be supplemented.

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

However, the ODC petitioned for discipline against Respondent on the sole basis that he supposedly had been found to have intentionally lied on his solicitor's application, the ODC ignoring not only all of the contrary evidence of lack of intent, both in Respondent's responses and in his formal Answer, while also ignoring the conclusions of the DCCA Hearing Officer that Respondent had not committed any intentional wrongdoing, but even ignoring the eye-witness evidence that Respondent was not the one who had even filled out the form according to the testimony of his former law clerk at the time:[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 intent was provided by the ODC at the ODC hearings, which nevertheless ultimately submitted erroneous, proposed findings of fact and conclusions of law to the ODC Hearing Officer accusing Respondent of lying on the form ("The 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).

Even more egregious, the ODC prosecutor tried to deny exculpatory evidence that the ODC had cleared Respondent of any wrongdoing regarding his earlier misdemeanor convictions and other claimed ethical charges, hiding from the Hearing Officer the fact that any such documentary evidence refuting the ODC's aggravating

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[16] TR 11/14/17 (pp. 213-246).

circumstances claim existed in the ODC files, until Respondent found and produced later in the hearings copies of that documentation existing within the ODC's own files.

The ODC Hearing Officer after an overall lengthy seven days of hearings robotically adopted verbatim the partisan findings of fact and recommendations of the ODC prosecutor without even addressing or differentiating among the four separate ODC cases, merely adjourning by submitting a one-paragraph statement, objectively as well as embarrassingly truly incomprehensible, which speaks for itself:[17]

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

The Disciplinary Board merely then adopted the Hearing Officer's Findings and Recommendations, and by doing so also adopted verbatim the prosecutor's proposed Findings and Recommendations,[18] without changing a single word or even a single punctuation mark in the prosecutor's proposed findings and recommendations, a prosecutor's every dream rarely realized, with no accompanying attempt at any explanation whatsoever, penning only for review by this Court its announced "decision":

> The Board, with quorum present, having fully considered the matters before it, decides to accept and adopt the Hearing Officer's Findings and Recommendation for Discipline DBF-71.

Returning to the Amended Petition for Discipline, should charges as a due process matter be considered relevant especially for disbarment, Respondent was and is accused of and found to be violating HRPC Rule 8.4(c) (pre 2014 version): "A lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation," yet Supreme Court Rule 2.7 specifically requires that "the findings of the hearing committee or officer shall be supported by clear and convincing evidence, and with regard to the above claimed

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[17] R4 (DB-70).

[18] R4 (DB-71), compare with R4 (DB-66) which is identical.

"dishonesty, fraud, deceit or misrepresentation" there is nothing in the record but contrary admissions by the original DCCA prosecutor himself.

Finally, the Hawaii Rules of Professional Conduct were never thus intended to serve as a trap for unintentional or even negligent ethical violations; *see, e.g.*, Comment 6 to HRPC Rule 1.0 Terminology: "When used in these Rules, the terms 'fraud' or 'fraudulent' refer to conduct that is characterized as such under the substantive law of the applicable jurisdiction and has a purpose to deceive. This does not include mere negligent misrepresentation."

Similarly, the HRPC Scope Section, its Comment 8, emphasizes "the Rules presuppose that whether or not discipline is to be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation."

See also, e.g., ABA Standards for Imposing Lawyer Sanctions, R. 6.21-6.24 (1986, amended 1992): "To be sanctionable, the attorney's violation must be accompanied by a culpable state of mind."

2. The ICA/Ke Kailani Allegations (ODC Case No. 16-0-213)

On January 3, 2013, Respondent filed a consolidated opening brief with exhibits in the Ke Kailani Litigation seeking review of a foreclosure decree *and* the confirmation of sale, which brief on March 27, 2013 the ICA ordered stricken "for violations of HRAP Rule 28(b)." Respondent was ordered to pay a minor fine, which he did.[19]

An amended consolidated opening brief was thereafter filed on April 8, 2013. It was not until three full years later on April 29, 2016 that the ICA made a referral to the ODC.

On April 29, 2016, the ICA entered an Order, *per* Foley, Fujise and Ginoza, JJ., referring Respondent to the ODC for "an investigation of his conduct in this case" in 2013, three years earlier, for allegedly violating court rules, "most notably because" of alleged "inadequate record references."

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[19] The Ke Kailani saga in short form is summarized in the petition for writ of certiorari filed in this Court (denied) on August 30, 2017, set forth in R37.

Despite Respondent's full explanation to the ODC beforehand in writing, *supra*, this matter was also included in its 2017 Petition for Discipline as follows, denying Respondent a meeting until after the Petition for Discipline was to be filed:

> On March 27, 2013, the [Ke Kailani] Opening Brief was stricken. The ICA struck the Brief for not being in compliance with HRAP 28 in numerous respects. * * * *
>
> On April 29, 2016, the ICA found that Respondent's amended brief was defective because it provided inadequate record citations throughout. The ICA further ordered that the matter be referred to ODC for investigation. * * * *
>
> By repeatedly failing to timely file briefs and other documents, and repeatedly failing to comply with requirements for brief preparation Respondent violated the following provision[s] of the Hawaii Rules of Professional Conduct: (pre and post 2014; 1.1 . . . ; 3.4(e) . . . ; 3.2 . . . : 3.1; . . . ; 8.4(a) . . . .

Those Rules cited, however, all require wrongful intent. The ICA failed to explain why if such alleged violations took place over ten years, if they were so egregious, why the ICA needed to refer the matter to the ODC for "investigation" since the ICA itself had the facts and could act on its own and already did, imposing a small fine.

Respondent in his Verified Answer denied any wrongdoing, explaining for instance, in addition to the unworkability of the ICA's five-day extension request rule, *infra*, timely filing of the Civil Appeal Docketing Statement requires first securing copies of orders and judgments to attach that frequently were delayed reaching attorneys' offices under the former circuit court filing system, and that the late-filing instances obliquely referenced occurring more than five years prior to the ICA referral put Respondent at a disadvantage due to the difficulty of recalling those exact situations in his defense due to the passage of time, and in every situation regardless any missed filing was corrected approvingly by an ICA panel different from the one doing the 2016 referral to the ODC. and the appeal usually won.[20]

To understand the circumstances behind this otherwise baffling then three-year-old, belated ICA referral reciting some ten-year-old appeals, said referred to the ODC

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[20] R1 (Verified Answer, pp. 7-14).

"for investigation" to determine *if* there had in fact been any ethical violations, one needs to understand the context concerning what had occurred in the Ke Kailani Litigation.[21]

Briefly, Michael Fuchs, the Home Box Office Founder, had invested $100 million in a 65-acre subdivision project known as Ke Kailani on the Big Island, $70 million of which had been borrowed from local banks, the vast majority of which were short-term, renewable loans that had already been paid back, but due to the 2008 mortgage crisis the remaining $30 million in short-term loans could not be renewed due to emergency government regulations, which forced those loans artificially into foreclosure.

Following the entry of a decree of foreclosure, Fuchs accepted a mortgage rescue offer from a third party, which however at closing double-crossed him, aborting its rescue deal, and bought the local loans instead, then proceeded to credit bid and became the confirmed purchaser, also being given the land and awarded with accrued interest a nearly $30 million deficiency judgment.

Meanwhile, Fuchs filed his own lawsuit for breach of contract and for fraud against, *inter alia*, his third-party "rescuer," that second case assigned to the same foreclosure judge, who in granting a foreclose decree and confirmation of sale including a deficiency judgment, refused to consolidate the two cases, instead dismissing the breach of contract/fraud case against the rescuer and the remaining claims in that second lawsuit against the attorneys complicit in the double cross which second lawsuit after the foreclosure was assigned to another division.

The other circuit court judge, unlike Fuchs' foreclosure judge, permitted discovery, whereupon, through extensive oral depositions, sworn eye-witness testimony was secured proving the third-party purchaser's fraud, which Fuchs then tried unsuccessfully to bring to the attention of the ICA, asking for judicial notice in his ongoing appeal of the foreclosure, confirmation, and deficiency judgments against the rescuer as purchaser, or the consolidation of that consolidate first appeal with the appeal from the second case.

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[21] See footnote 19 *supra*. See also R37 for copies of the voluminous case docket sheets admitted into evidence during Respondent's hearing testimony, TR 11/28/17, and Respondent's trial testimony TR 11/14/17, pp. 270-364.

What added to the complexity of the Ke Kailani Litigation was one additional issue raised timely in the lower court in both cases by Mr. Fuchs, a New York State resident, which issue seemed to taint the proceedings, most notably on appeal.

After the foreclosure decree was entered and before auction and confirmation of sale, Fuchs discovered that his foreclosure judge owned tens of thousands of dollars in the lead foreclosing plaintiff bank, requested recusal, and when denied recusal in both cases was included as an identical point on appeal in both ICA appeals.

The first, consolidated appeal which, *inter alia*, included the recusal issue, was dismissed after proceeding for several years for lack of appellate jurisdiction, held untimely as one day late, despite an undisputed JEFS malfunction causing a one-day delay in filing the notice of appeal, and notwithstanding immediately that malfunction having been brought to the attention of the Clerk, which was fully documented, and Respondent being told prophetically by this Court's Clerk not to worry.

The second appeal which, *inter alia*, also included the recusal issue was also dismissed years later, even though no notice of the decision appealed was sent by the clerk or the second judge, who apologetically granted permission to file a belated notice of appeal within the extended time provided by our appellate rules, which years later in dismissing that appeal the ICA said excusable neglect had not been shown.

The above encapsulated summation of the Ke Kailani protracted litigation which files fill 76 filing cabinet drawers in Respondent's office is here necessary for an understanding of what the ICA termed, without however any explanation, "inadequate record references," for in briefing the first, consolidate appeal within which the ODC referral occurred, Respondent had asked the ICA for judicial notice of the eye-witness deposition testimonial evidence that had been secured in the second case then also on appeal or to consolidate both the first, consolidated appeal and the second separate single appeal taken from the other, second case.

Instead, the ICA refused to consolidate those appeals, apparently thus rendering those record references set forth in the first, consolidated appellate opening brief and amended opening brief to be considered "inadequate." The ICA simply did not want that evidence to be considered through either judicial notice or through consolidation.

Otherwise, there is no other apparent explanation for the "inadequate record references" referral to the ODC.

Those unidentified inadequate record references, wherever and whatever they were, were nowhere identified in the cryptic ICA referral to the ODC, *supra*, as if our appellate courts cannot discipline attorneys appearing before them themselves, which however they could, and those unidentified "most notably" inadequate record references supposedly were contained in an amended opening brief filed by Respondent on April 8, 2013, *three years before the ICA referral to the ODC.*

Surely, those "inadequate record references" should have been identified and a time limit imposed upon such holier-than-thou retroactive hindsight, the passage of time itself straining appellate credibility, rather than subsequently causing triggered and targeted stall disciplinary proceedings to become an ODC game of hide-and-go seek.

And although the subject ICA referral order to the ODC does also vaguely reference earlier March 27, 2013 HRAP alleged violations in Respondent's filing of the first, opening brief for which a small fine was paid by Respondent, the belated ICA referral to the ODC on April 29, 2016 makes it clear that only the "most notably" inadequate record references in the amended opening brief are being referred to the ODC "for investigation" which was three years after the fact, and even then belatedly referred without any advance finding of any specific ethical violations accompany the referral:

> On March 27, 2013, this court issued an order striking Appellants' opening brief and exhibits for violations of HRAP Rule 28 (b) with the admonition that "[f]ailure to comply with HRAP Rule 28 or this order [requiring the filing of an amended opening brief] may result in sanctions, including dismissal of the appeal." [Bracketed matters added]

Most notably, the amended opening brief in the first, consolidated appeal was filed three years earlier with inconsistently no referral to the ODC for any "most notably" inadequate record references, and equally most notably is the fact that the ICA referral to the ODC itself is inadequate with respect to containing any special reference concerning what those inadequate record references were.

As for other assertions that prior opening briefs in other appeals were filed late, that was mainly caused by the appellate rule that one must seek an extension within

five working days of a briefing deadline or otherwise be OSC-fined no matter what, and it occasionally becomes impossible to comply to the arbitrary five-day rule due to unexpected or emergency events, and in such cases motions to file a late opening brief were filed and were eventually all approved, including in appeals won.

Furthermore, Respondent has filed hundreds of Hawaii appellate briefs in the past few decades and only a few collided with that appellate court's five-day rule to place that nonissue here in proper perspective.[22]

Nevertheless, a blood thirsty ODC, oblivious to all of Respondent's documented explanations submitted by Respondent to the ODC voluminously before being charged, included the so-called ICA vacuous briefing violations in its Petition for Discipline:

> By repeatedly failing to timely file briefs and other documents, and repeatedly failing to comply with requirements for brief preparation Respondent violated the following provision [sic] of the Hawaii Rules of Professional Conduct (pre and post 2014} 1.1 (A lawyer shall provide competent representations to a client); 3.4(e) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal) [etc. including a litany of duplicative alleged violations].

Respondent objected both before and during the hearing, explaining that he had no intention to delay the filing of any appellate brief, that the extensions were ultimately granted, that he had paid the minor administrative sanctions under protest, that the ICA had not so found but instead made a referral presumably for that purpose yet the ODC offered no evidence of intent or any other evidence but only the ICA written referral itself, that anyone could ask his almost 100 past appellants who won their appeals whether he was considered competent, and that contrary to this Court's Rule 2.7(c) he was specifically in pretrial proceedings denied any opportunity "to confront and cross-examine" the ICA witnesses testifying in effect solely by their nebulous written Order.

The ODC Hearing Officer once again after an overall lengthy seven days of hearings robotically adopted verbatim the partisan findings of fact and recommendations of the ODC prosecutor, *supra*, without even addressing or differentiating among the four separate ODC cases, merely adjourning by submitting his

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[22] That was laboriously explained and documented at the hearing for the Hearing Officer, which however the Hearing Officer later admitted into evidence but with characteristic smugness said he would not consider in his decision making, TR 11/28/17, p. 1493.

one-paragraph statement, objectively as well as embarrassingly truly incomprehensible, which speaks for itself, as already explained above:

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

The Disciplinary Board merely then again adopted the Hearing Officer's Findings and Recommendations, and by doing so also adopted verbatim the prosecutor's proposed Findings and Recommendations, without changing a single word or even a single punctuation mark in the prosecutor's proposed findings and recommendations, a prosecutor's every dream rarely realized, with no accompanying attempt at any explanation whatsoever, penning only for review by this Court its announced "decision":

> The Board, with quorum present, having fully considered the matters before it, decides to accept and adopt the Hearing Officer's Findings and Recommendation for Discipline DBF-71.

Recently, this Court in In re Partington, SCWC-18-0000301, decided March 5, 2020, rejected at page 24 the erroneous notion that the ODC is empowered to treat court sanction referrals for alleged violations of court orders as evidence of ethical wrongdoing *per se* as the ODC did in Respondent's case:

> [E]ven after a specific referral by a judge, the ODC may not consider orders for sanctions as evidence of aggravation under ABA Standard 9.22(c) unless a determination has been made through the procedures set forth in the RSCH and RDB that the sanctioned conduct is a "clear and convincing" and "knowing" violation constituting "misconduct" under the HRPC.

Applying the holding in Partington, the ODC prosecutor's findings were improperly rubber-stamped verbatim by the Hearing Officer *and* the Board, lacking not only any evidence in the record of Respondent's intentional violation of appellate rules, but lacking even any specific finding that a single missed deadline in the hundreds of appeals filed was the result of clear and convincing evidence of intentional wrongdoing.

3. The Andia Allegations (ODC No. 16-0-147)

Since moving his law practice to Hawaii in 1982, Respondent has pioneered an extensive residential foreclosure defense practice on all Islands, aided by his Sunday KHVH-AM "Foreclosure Hour" informative talk show which Respondent has co-hosted for seven years with former Hawaii Governor John Waihee, heard nationwide on iHeart Radio *via* the Internet.

Although receiving probably more unsolicited and enthusiastic client testimonials than any other attorney in Hawaii history, Respondent nor any other attorney can please every client as the Court is the decision maker in such cases, which is especially true in the area of foreclosure defense trying to save homes, traditionally generating enormous personal stress for affected homeowners who may suffer from lender abuses or who instinctively may and often do blame their attorneys if they lose their foreclosure case.

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

This Court has not escaped the wrath of some foreclosed homeowners either.[23]

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.

Foreclosure defense also is not a lucrative calling. Respondent's law firm routinely charges an initial retainer for foreclosure defense clients, most of whom thereafter are frequently unable to pay as the cases can continue for years, turning

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[23] Most notable recently Members of this Court and our Judiciary and Respondent having been characterized as hoodlums and mobsters on the Internet; see Appellate Doc, 47 (R39) filed 8/15/19, Exhibits "D" – "K"(R49-R51). How does one protect one's reputation in a society were guilt by accusation thrives?

cases into *pro bono* efforts, yet Respondent's law firm unlike many, never withdraws from a case for nonpayment, being paid only if there is a large enough settlement.[24]

Mr. and Ms. Andia became Respondent's clients on or about February 17, 2012, signing a retainer agreement for $16,500. They had not paid their mortgage for several years and were in the process of being sued for foreclosure and eviction. Their first retainer check was dishonored by their local bank.[25]

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

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 however was not a part of their written retainer agreement nor covered by their initial retainer.

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

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[24] Respondent reluctantly volunteered copies of his tax returns to the ODC investigators irresponsibly charging him with being "a menace to the general public," supposedly getting rich by stealing money from homeowners facing foreclosure, notwithstanding how many trials and appeals Respondent has won for homeowners and how many homes Respondent has saved, while at the same time doing so as his law firm had to pay its bills with his retirement moneys; see R28 (DB-39 sealed); R165.

[25] Every fact set forth herein as to the Andias in this Opening Brief regarding the Andias was already fully set forth and factually documented for the ODC before being charged, and for the Hearing Officer during the hearings, and for the Board prior to its decision making, which detailed summation with its exhibits is listed in the "Index To The Record Transmitted To The Hawaii Supreme Court," denoted "Respondent's Exhibit List Andia 0 through 39," yet Respondent has been unable to find it anywhere in the Record and will be filing a motion to supplement the record. Meanwhile the same documentation was presented to this Court earlier in opposition to Petitioner's motion to suspend Respondent which was denied.

Almost four years later, Respondent's law firm, while managing to keep the Andias in their home at great savings for them otherwise in rent payments, for instance, and without their paying on their mortgage or Respondent's law firm further for almost four years, the Bank of America offered to settle for a dismissal alone of the Andia Counterclaim against it, while the foreclosure case was to continue.

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

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 payable to the Andias and to the Respondent's law firm, the Dubin Law Offices, jointly, which is standard settlement procedure in this jurisdiction, if not everywhere.

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

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

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

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

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

Respondent was informed by the Associate in his office at that time, Richard Forrester, who was in charge of the Andias' foreclosure litigation taking over for Associate Andrew Goff who had negotiated the settlement regarding the Counterclaim, that Mr. Andia was claiming he was entitled to all of the settlement monies supposedly having had a flat fee agreement with Respondent, no matter how much legal work had to be done and no matter how much costs were incurred.

Respondent discussed the mistake with an officer at First Hawaiian Bank where his attorney client trust account has been located since 1982, and it was agreed to avoid having to return the check and attendant delays that Respondent deposit the disputed funds in his attorney client trust account where they could remain until the matter was resolved. The deposit was approved by the Bank and its officer's initials.

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

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

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

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

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

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

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

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

Mr. Andia met Respondent at Respondent's Office clean shaven and dressed in a business suit, explaining at the beginning of their meeting that he, Mr. Andia, was a successful businessman with his own photography company.

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

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

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

Mr. Andia at the conclusion of their meeting agreed that his proposed share of the distribution was reasonable and withdrew his $19,885.00 objection based on Associate billing rates and cashed his $62,297.13 check payable from the Dubin Client Trust Account a few days later, as well as cashing a $8,000.00 refund check otherwise refusing to replenish the retainer account for the work ahead, payable from the Dubin Client Trust Account a week or so after cashing the $62,297.13 check upon informing Respondent that he was changing attorneys in their foreclosure action still ongoing without their Counterclaim in the case.

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

Subsequently, in email correspondence with Respondent, Mr. Andia admitted in writing that he had agreed to the distribution:

> At our meeting, you gave me your explanation and I said "okay".

Months later, in an email to Respondent Mr. Andia tried to explain away his consent to the agreed upon distribution, without which Respondent would never have removed from his client trust account those monies ($19,885.00) that Mr. Andia had already agreed were for Respondent's law firm, Mr. Andia for the first time claiming that he only agreed because he was afraid that otherwise Respondent would stop payment on the separate $8,000 check:

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

In truth, Respondent had earlier assured Mr. Andia in writing that:

> If however you wish to replace us as your counsel, the $8,000 will be immediately released to you.

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

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

Respondent, immediately upon learning of Mr. Andia' 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 had given to Respondent his approval of the distribution and having thereafter cashed both their $62,297.13 check and their $8,000 check months earlier. Mr. Andia, however, refused mediation or arbitration, warning that he intended to harm Respondent.

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

When the police refused to prosecute Respondent for forgery, Respondent accused First Hawaiian Bank also of financial wrongdoing, threatening to sue First Hawaiian Bank which he however never did, causing First Hawaiian Bank to file a

lawsuit for its exoneration by the First Circuit Court or having Respondent put the disputed funds back into his client trust account (which Respondent initially agreed to do by Mr. Andia refused), and causing Respondent also to file his own lawsuit to have his deposit of the settlement funds placed into his client trust account approved by the First Circuit Court.

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

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

But neither Mr. Andia nor Ms. Andia bothered to even show up at the next hearing to which they had been formally served and subpoenaed by Judge Crandall, and court approval for the release of Respondent's portion of the settlement funds went uncontested .First Hawaiian Bank's lawsuit was next heard before Judge Chang. Again, the Andias, timely served by First Hawaiian Bank as plaintiff, did not show up at the first hearing before Judge Chang, and First Hawaiian Bank following Judge Crandall's ruling in Respondent's case, sought to withdrew its lawsuit before Judge Chang that sought to have the otherwise disputed funds returned to the Dubin Law Offices Client Trust Account if it had in any way wrongfully approved the deposit of the settlement check.[26]

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

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[26] TR 1/21/17, pp. 889-891.

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

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

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

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

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

E.G.: there is no mention of the undisputed fact of the two lawsuits, brought respectfully by Respondent and by First Hawaiian Bank, in which when asked by both presiding Judges to explain their positions regarding the money deposited in

Respondent's client trust account and whether those monies should be returned to the client trust account and given to the Andias, they refused to even show up in court in either case; there is no mention of the fact that the Dubin Law Offices had represented them in their foreclosure case for close to half a decade defending against foreclosure and prosecuting their Counterclaim to the point were the Bank of America settled for $132,000, hardly the usual achievement in a foreclosure case, after their not having paid there mortgage or a penny for fees or costs since February 2012; there is no mention of the fact that after having approved the distribution of the settlement funds according to Mr. Andia, the Andias waited months before suddenly deciding to accuse Respondent of forgery; there is no mention of the fact that after the Andias suddenly cried forgery, Respondent offered to put the Associates' disputed $19,885 back into his client trust account, offering the alternative of mediation or arbitration, which offers were refused, and no mention that First Hawaiian Bank approvingly initialed the deposit also.

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

The ownership interests of both the clients and the Respondent were fully protected after the Bank of America, mailing the settlement check to Respondent's Office, the Bank having made a mistake in not making it jointly payable as the Settlement Agreement by its terms provided for bargained for performances by both Respondent and his clients, and all of that after Mr. Andia at first insisted in bad faith that he had no obligation to pay Respondent anything. He wanted the entire $132,000.

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

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

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

lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute." Not to do so at that time would have been a HRPC violation.

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

Moreover, it was not the Respondent, but the Associates working the case alone for almost four years who were responsible for communicating with the Andias and doing the billing, for in those years Respondent did not even have any contact with the Andias whatsoever, yet now an attempt is being made to disbar vicariously.

In truth, Mr. Andia admitted he agreed to the distribution of the settlement funds never removed from the client trust account until he agreed, only months later did he change his mind, then declining Respondent's offer both to put the disputed funds back in the trust account and to resolve the dispute by Bar mediation or arbitration.

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 for themselves, a skillful victor for which the Andias had paid nothing.

A somewhat similar situation arose before this Court in In re Magoon, 15 Haw. 244 (1903). A Hawaii attorney faced disbarment proceedings, accused of charging unreasonable fees to a man who had, like here, agreed to the fees, but, unlike here, said to be "of weak mind and easily influenced" and virtually 'helpless."

There, however, was no such claim or finding of exceptional vulnerability made here, and this Court may take judicial notice of the Andias' business Website. Also, Mr. Andia testified that he had legal advice before he met with Respondent and before he cashed the checks and agreed to the distribution.[27]

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[27] 11/21/17, pp. 597-699.

Magoon should not be and was not disbarred, the Chief Justice Frear reasoned, because attorney discipline is quasi-criminal, whereas the civil courts provide effective remedies for unjust enrichment and so forth, yet in this case the Andias snubbed showed disrespect for our civil courts, for both Judge Crandall and Judge Chang, both fair minded jurists who tried to give the Andias their day in court, but they refused:

> The application against him is a quasi criminal proceeding . . . whether he has acted improperly and dishonestly. The evidence . . . . shows the respondent did not say a word [about the money until the case over and the deposit made]. . . . Now, in our opinion the respondent's fee was excessive even for all the services rendered and to be rendered. But is that material to this case? If every attorney is to be liable to disbarment or suspension whenever he charges a fee that is excessive in the opinion of the court or otherwise acts on a view in which the court differs from him in opinion, the profession will be a pretty dangerous one to follow. An attorney should be allowed considerable scope for the exercise of judgment. Much leeway should be allowed for honest difference of opinion – especially in proceedings of a quasi criminal nature, ... The respondent even advanced monies [for the client during the case]. . . . {T]he respondent should [not] be punished quasi-criminally. . . when . . . the fee was asked for in good faith. . . . .Of course, if [the client] , , , were a man of ordinary strength of mind, it would be preposterous to hold that the respondent should be punished. . . . Must he first have seen that [his client] . . . had legal advice as to the amount of the fee? There is no rule of law requiring that. . . . {H]ow can the court inflict a penalty in a proceeding of this kind – merely because it differs in opinion from the attorney as to the reasonableness of the charge? The complaint is dismissed.

The ODC Hearing Officer once again after an overall lengthy seven days of hearings robotically adopted verbatim the partisan findings of fact and recommendations of the ODC prosecutor without even addressing or differentiating among the four separate ODC cases, nor paying any attention to the fact that after Respondent's initial work on the case he had had no contact with the Andias or their case for several years and it was his Associates who if anyone had failed to keep the Andias informed, the Hearing Officer merely adjourning by submitting a one-paragraph statement, objectively as well as embarrassingly truly incomprehensible, which speaks for itself:

> I shall be submitting, as my report, the findings and recommendations of the Office of Disciplinary Counsel. As respects

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

Ironically, the Andias argued that they had a flat fee agreement with Respondent, *supra*, and that they were entitled therefore to receive the entire $132,000 settlement amount, yet the Hearing Officer adopted the ODC Recommendation that Respondent owed them instead the lesser amount of $19,885, in effect both the ODC and the Hearing Officer ruling in effect in favor of Respondent considering that the entire dispute began when the Andias demanded the entire $132,000, even worst thereafter waiving their $19,885 claim before asserting it months later after the trust account disbursement.

The Disciplinary Board merely then again showed no understanding of the actual facts, and adopted verbatim the Hearing Officer's Findings and Recommendations, however false and contradictory, and in doing so also adopted verbatim the prosecutor's proposed Findings and Recommendations, without changing a single word or even a single punctuation mark in the prosecutor's proposed findings and recommendations, a prosecutor's every dream rarely realized, with no accompanying attempt at any explanation whatsoever, penning only for review by this Court its announced "decision":

> The Board, with quorum present, having fully considered the matters before it, decides to accept and adopt the Hearing Officer's Findings and Recommendation for Discipline DBF-71.

4. The Kern/Harkey Allegations (ODC No. 16-0-126)

Briefly, Mr. Harkey, who became a foreclosure client of Respondent several years ago 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, came to Respondent in late 2015 thereafter with various cases seeking *pro hac vice* representation, one case that had just been

dismissed in Washington State based on lack of jurisdiction and another ongoing at the time in Nevada federal district court in Las Vegas, where he was appearing *pro se*.[28]

Mr. Harkey unsolicited came to Respondent's Office and hired Respondent first to attempt to salvage through reconsideration his Washington State loss, which Respondent started to do, but ultimately Mr. Harkey instructed Respondent to cease working on the Washington State case and to concentrate on the Las Vegas action.[29]

Respondent applied successfully for *pro hac vice* status with another member of his law firm in federal district court in Las Vegas, Nevada, thoroughly researching the case and communicating with nearly a dozen opposing counsel over discovery and other pretrial matters, and traveling to Nevada, meeting with Mr. Harkey and other local counsel, while drafting new pleadings and discovery requests.[30]

Mr. Harkey's existing wrongful foreclosure amended pleadings had been ghost written by a Midwestern attorney, Wendy Nora, who at the time was under disciplinary investigation in her home State and therefore unable to secure *pro hac vice* status in Nevada, and indeed had been not so politely removed from doing any work in the Nevada case following heated objections by opposing counsel before Respondent was retained, her having been discovered working on the case as an alleged paralegal sidestepping that Court's *pro hac vice* rules, and then warned off the case by the presiding federal district judge after she visibly surfaced in Mr. Harkey's case.

During Respondent's representation of Mr. Harkey, Mr. Harkey signed two written retainer agreements. Mr. Harkey, otherwise preferring to conduct his financial affairs orally, was at his request provided only with oral financial updates, as he emphatically specifically wanted nothing financially to be in writing, maintaining a low financial profile after his incarceration and apparently fearful of the IRS, having no bank accounts, and all retainer funds were wired from bank accounts that were not his.[31]

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[28] See Respondents' hearing testimony supporting all of the factual recitals in this Section TR 11/22/17).

[29] R29(6).

[30] TR 11/22/17, pp. 1153-1154, 1156-1162.

[31] R29(3, 4).

Similarly, Mr. Harkey would principally conduct business on the telephone and by text messaging, occasionally sending emails at least at first to Respondent only through a friend in Washington State.[32]

In one such text message from Mr. Harkey, sent to Respondent in his representation of him, when his retainer funds had become exhausted, Mr. Harkey wrote Respondent acknowledging that Respondent had kept him orally fully informed and up-to-date regarding his fees and costs as Mr. Harkey had requested, and that Mr. Harkey was in the process of wiring additional funds for his Nevada litigation ("I have already pledged to get another installment to you as soon as I can. A Commitment" – dated April 21, 2016).[33]

Respondent, however, became ethically required to withdraw his representation when Ms. Nora convinced Mr. Harkey to transfer his real property, which was the subject of the Nevada action, to a newly formed operating trust headed by her as Trustee so that she could again take control of the Nevada litigation, telling Respondent what to do, as a ploy overcoming her being disqualified from *pro hac vice* representation in Nevada, and Respondent by email on April 25, 2016 let Ms. Nora know why:[34]

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

Thereafter contemporaneously followed a series of similar email exchanges between and among the Respondent (explaining further why he could not ethically continue representing Mr. Harkey in the case) and Mr. Harkey (asking Respondent naively to please stay on and work with Ms. Nora behind the scenes) and Ms. Nora (threatening Respondent while explaining the way she intended to control the case).[35]

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[32] R29(8).See 29(18.1-18.6) for complete copies of Respondent/Harkey emails.

[33] Id. at 25 pages from the rear of R29(8), as the same time that Mr. Nora entered and Respondent was forced to exit.

[34] 11/22/17, p. 1165.

[35] R29(9).

Whereupon, Respondent moved to withdraw as did his assigned local counsel, at the time a Nevada State Representative and Chairman of Bernie Sanders' 2016 Presidential Campaign in Nevada, himself about to run for U.S. Senate in Nevada, who Respondent could earlier assured, now embarrassingly, that being local counsel would not in any way risk his receiving any bad publicity due to the Harkey litigation).[36]

The motion to withdraw was granted by the federal district judge who was told only of irreconcilable differences between client and counsel so as not to prejudice Mr. Harkey's case. Meanwhile, Respondent warned Mr. Harkey that Ms. Nora was not competent to handle his case.[37]

Ms. Nora then immediately demanded an accounting from Respondent, who replied on April 26, 2016: "Michael was my client, not you. My accounting will go to Michael and not to you. I do not recognize your power of attorney, and I do not have to, for to do so I would be participating in unethical conduct."[38]

Ms. Nora as Trustee replaced Respondent with her personally selected out-of-state counsel who in turn selected as his local counsel Mr. Kern, who together wrecked Mr. Harkey's case, failing to cooperate in discovery, finally to the point where Mr. Harkey and Mr. Kern were sanctioned by the federal district judge who then dismissed the case with prejudice for noncompliance with federal rules.[39]

In desperation, Ms. Nora and Mr. Kern had attempted to blame Respondent for their discovery failings, but the Nevada federal district judge was not fooled and did not agree, and when Ms. Nora surfaced on the record as the Trustee, as Respondent had predicted, the presiding federal district judge wanted nothing more to do with the case and dismissing financially sanctioned all of them.[40]

Ms. Nora then placed Mr. Harkey's trust in bankruptcy ("The Harkey Operating Trust") while appealing the dismissal by the Nevada federal district court, which

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[36] R29, pp. 1022-1025.

[37] Same as footnote 31, et seq.

[38] R29(9).

[39] R29(11-14).

[40] R29(14),

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.[41]

The bankruptcy case was opposed by the IRS as could be expected and eventually dismissed with no discharge.[42]

Respondent was contacted by the Trust's bankruptcy attorney, Mr. Edstrom, who informed Respondent that the Trust had filed a claim against Respondent for the return of all of Mr. Harkey's paid retainer fees based on allegations from Mr. Kern.[43]

Whereupon, Respondent explained the situation to Mr. Edstrom and since Mr. Harkey was now a Debtor in federal bankruptcy court and he had been contacted by his bankruptcy attorney, Respondent provided a complete written accounting way in excess of what Respondent had been paid as Mr. Harkey had never added his promised funds, *supra*, and that was the end of the matter, with Respondent's accounting never challenged in the Harkey Operating Trust Bankruptcy, with all appeals from the Nevada dismissal rejected, and Ms. Nora suspended from the practice of law by her State's disciplinary agency.[44]

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

When the Kern complaint was first called to Respondent's attention by the ODC, Ms. Preece, then Assistant Disciplinary Counsel, had already made up her mind to add the Kern matter to her planned Petition for Discipline, refusing in writing to meet with Respondent until the Kern matter was submitted to a Member of the Disciplinary Board.[45]

The ODC chose to take Mr. Kern's testimony by telephone at the hearing, whose testimony regarding Respondent's representation of Mr. Harkey was all hearsay, the ODC making no attempt to call Mr. Harkey as a witness even by telephone, ignoring the

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[41] R29(15-16).

[42] Ibid.

[43] TR 11/28/17, pp. 1417-1418, 1421-1423, 1445-1450, 1468-1470, 1476.

[44] 29(1)(Invoice For Professional Services And Costs = $69,475.44 Balance Due).

[45] TR 11/28/17, pp. 1402, 1413.

fact that Mr. Kern had brought the charges so he could self-servingly be paid his fees. Respondent repeatedly tried to contact Mr. Harkey but received no reply.

Mr. Kern was unable to testify with personal knowledge regarding *any* of the ODC's charges against Respondent: (a) Mr. Kern with respect to the requirements of HRPC Rule 1.15(d) had no personal knowledge of what the agreement had been between Mr. Harkey and Respondent regarding accounting for hours and costs, (b) Mr. Kern with respect to HRPC Rule 1.15(c) had no personal knowledge of Respondent's deposits made by Mr. Harkey into Respondent's client trust account, which happened to be two direct wire transfers into Respondent's client trust account, (c) Mr. Kern with respect to the requirements of HRPC Rule 1.15(d) had no personal knowledge of notices given to Mr. Harkey by Respondent concerning the disbursement of funds from Respondent's client trust account, and (d) Mr. Kern with respect to the requirements of HRPC Rule 1.4(a)(3) (misquoted by Petitioner in its Amended Petition), had no personal knowledge of how Respondent had or had not kept Mr. Harkey informed.

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

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

trip to Las Vegas to meet with Mr. Harkey, when in fact accompanying airline and hotel receipts in the record showed that Respondent's trip dates were correct.[46]

Mr. Kern had merely mistakenly blindly misread the way certain text messages were date-stamped on the several illegible text messages between Respondent and Mr. Harkey that Mr. Kern had faxed over during the hearing referencing that trip, doggedly refusing to believe the actual printed dates on airline tickets and hotel invoices.[47]

There is yet another aspect of the Kern complaint which further illustrates how the ODC has a self-serving appetite for being both prosecutor and complaining witness, as in the Kern matter it also charged Respondent with a violation of HRPC Rule 8.4(g) ("It is unprofessional conduct for a lawyer to fail to cooperate during the course of an ethics investigation"), alleging a lack of cooperation with its investigator, Mr. Elerick.

In an earlier hearing session, Mr. Elerick had testified in Respondent's behalf that Respondent had cooperated with every other investigation of his except the Kern matter, his testimony based entirely on one letter he had sent to Respondent that Mr. Elerick claimed Respondent supposedly had not answered, the ODC's only firsthand evidence of failure to cooperate with it.

Yet, when Respondent confronted Mr. Elerick at the hearing thereafter with Respondent's written fax response to that Elerick letter contradicting Mr. Elerick's testimony, he recanted his testimony. The ODC at the hearing provided no other alleged firsthand evidence of any Rule 8.4(g) lack of cooperation by Respondent.[48]

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[46] TR 11/22/17, pp. 929-1190, testimony of Mr. Kern, showing self-servingly extreme bias against Respondent, trying to get money to cover his own unpaid fees and costs.

[47] Compare his testimony with the actual airline and hotel receipts he refused to believe, R29(1) attached to invoice.

[48] TR 11/20/17, pp. 444-460.

The ODC Hearing Officer once again after an overall lengthy seven days of hearings robotically adopted verbatim the partisan findings of fact and recommendations of the ODC prosecutor without even addressing or differentiating among the four separate ODC cases, merely adjourning by submitting a one-paragraph statement, objectively as well as embarrassingly truly incomprehensible, which speaks for itself:

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

C. Respondent's Attorney's Due Process Rights Were Violated

Not only is support for the findings and recommendations of the ODC prosecutor, adopted verbatim by the Hearing Officer, and then adopted verbatim by the Board, untrustworthy, falling way below the required clear and convincing standard of proof.

They are the product of flagrant violations of Respondent's right to a fair and impartial hearing, thus doubly untrustworthy, as attorney disbarment proceedings are often referred to as quasi-criminal in nature, depriving attorneys of their livelihood.

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

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

This Court, it is respectfully submitted, on this record not only has a duty to reject the ODC/Hearing Officer/Board parroted adopted findings and recommendations, but a duty *not* to discipline Respondent and instead to discipline its own disciplinary counsel, Breiner v. Sunderland, 112 Haw. 60, 143 P.3d 1262 (2006).

1. The Lack of an Impartial Investigation

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

The culture at the ODC for decades now has been to represent complainants as if 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 unless having the right political affiliations, while increasing the financial burden of defending himself with ironically the ODC 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 banging his fist on the table for a full minute when not getting the answers he wanted from the Respondent.

There is also a question of fairness and trustworthiness depending how long otherwise stale grievances should be able to be raised and attorneys belatedly burdened. Two of the charges against Respondent here were decades old when brought. Other States set time limits on bringing attorney disciplinary grievances, since memories fade, witnesses die, and documents are lost.

For example, some States restrict fling of grievances against attorneys to 2 years (*e.g.*, West Virginia), to 4 years (*e.g.,* Nevada and Utah), to 6 years (*e.g.*, Alabama), or to a "reasonable" time (*e.g.*, Ohio and Texas).

Furthermore, this is a small legal community, and the ODC processes are completely susceptible to complainants and their advisors manipulating the "gotcha" ODC to wage personal vendettas, what appears to have happened in the Andia case.[49]

In the absence of any effort at impartial fact-finding, the ODC prosecutor turned the November hearings into an old-fashioned Star-Chamber inquisition.

2. The Lack of a Timely Notice of Intended Discipline

Both the Petition for Discipline and the Amended Petition for Discipline make no mention of requesting disbarment, in their concluding prayers for relief only reciting that Respondent be required to take the Multistate Professional Responsibility Exam and innocently phrased whatever appropriate discipline that should additionally be imposed.

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

The failure to disclose the actual recommended discipline intended at the outset rendered the proceedings also procedurally defective of due process.

3. The Lack of Separate Evidentiary Hearings

Respondent was charged with professional ethics violations in four separate and unrelated cases. Yet those cases were tried together in the same set of 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 hearing in another case, and for the convenience of witnesses, were taken out of order interspersed between cases, Respondent constantly objecting as making it difficult to keep track of testimony.

Such a smorgasbord of witness testimony not only deprived Respondent of meaningful hearings, but having the same Hearing Officer preside over all four cases at

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[49] Andia testified that he spoke with several attorneys at his house party naming a few. When Respondent withdrew from his foreclosure case, attorney Hochberg, unnamed, suddenly appeared in the foreclosure case for the Andias, the same Hochberg who Respondent had sued for legal malpractice for a c\lent and won the appeal in the ICA, Isobe v. Sakatani; 212 Haw. App. LEXIS 587, 2012 WL 1951332 (2012).

the same time, which Respondent timely objected to pursuant to DB Rule 21(e) requesting a three-person Hearing Panel or separate Hearing Officers for each case instead, cross-contaminated the appointed Hearing Officer's eventual decision making as is evident by his truly incomprehensible, one-paragraph, overlapping, concluding, *malum prohibitum* "adoption" explanation, *supra*.

4. The Lack of an Impartial Hearing Officer

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

Mr. Hughes refused, claiming that the Moyle case had been terminated, even though Respondent proved with uncontroverted documentary evidence that the case was still active in First Circuit Court and indeed that settlement offers were being exchanged with Respondent and Mr. Hughes. Mr. Hughes still refused to disqualify himself. Due to DB Rule 20(e), no motions being permitted, Respondent could only preserve that due process challenge for later appeal to the Board (which he did unsuccessfully) and now to this Court.[50]

5. The Lack of Cross-Examination Rights

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

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[50] For the details, see R13 (DB-110-117), R14 (DB-118-119), R15 (DB-120-121), R16 (DB-122-124).

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

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

Meanwhile, of course Mr. Smith did not testify, his anonymous DCCA complaint believed to have been penned by Ms. Andia, which she would have been asked had she appeared, and Respondent's request to have the ICA Panel explain its referral at the hearing denied by the Hearing Officer as well *in limine*.

6. The Lack of Trustworthy Findings of Fact

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

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

Moreover, those adopted findings are totally incomplete, another reason why they are untrustworthy, as if frankly both the voluntary Hearing Officer and the voluntary Board Members decided they had no further time to spend, abandoning their duties.

This Court,, for example, has long required that findings of fact be "clear, specific, and complete," and "sufficiently comprehensive and pertinent to the issues to form a basis for the decision and whether they are supported by the evidence," Shannon v. Murphy, 49 Haw. 661, 668, 426 P.2d 816 (1967), yet the Hearing Officer and the Board ignored all of the issues and defenses presented at the November hearings, *supra*.

7. The Inclusion of Erroneous Aggravating Circumstances

The ODC/Hearing Officer/Board "Prior Disciplinary Offenses" Section F of their joint Findings, p. 33, erroneously cites two alleged "prior disciplinary offenses" while dishonestly ignoring the actual record facts.

First, the record shows that the ODC itself cleared Respondent of any wrongdoing in his IRS misdemeanor convictions 25 years ago even before the IRS Seattle District Office exonerated him as did in effect the California Bar Court with its published sympathetic settlement, *supra*, which the ODC prosecutor, as already explained, unsuccessfully tried to hide from the Hearing Officer.

Second, similarly the ODC guaranteed Respondent that he would not and he did not receive any reciprocal discipline as a result of his sympathetic settlement with the California Bar Court over the same IRS issue, upon which ODC agreement he relied before settlement with the California Bar Court, *supra*, despite the ODC's erroneous findings in supposed aggravation to the contrary.

Third, the referenced 16-year-old ODC informal admonishment in 2004, belatedly mailed and received too late for Respondent to reject, was subsequently ordered expunged when a Special Assistant Disciplinary Counsel who brought the 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 wrongdoing in part pertaining to that charge, with all Gyler-related records pertaining thereto by agreement which the State Attorney General ordered destroyed.

8. The Exclusion of Exculpatory and Mitigating Evidence

In addition to the ODC prosecutor's attempt to deny that Respondent had been cleared of any criminal wrongdoing by the ODC 25 years earlier, Respondent's witness list named numerous clients prepared to testify on his behalf as to his honesty in the handling of their client trust funds, in the timeliness and reasonableness of his client billings, and the success Respondent has produced for them in Hawaii trial and appellate courts and how his disbarment would produce hardship for them and adversely affect their cases on all Islands. Those witnesses were all stricken from his witness list *in limine* proceedings by the Hearing Officer.

9. The Lack of an Impartial Board

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

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

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

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

However, Respondent immediately waived both conflicts of interest as not requiring disqualification as there is and had been no acrimony among counsel in the

Sakai case and Mr. O'Neill stated that he had no connection with the IRS matter. No other Board Member nor the Board Chair made any such disclosure and Respondent recognized no other who had.

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

Respondent immediately filed to disqualify Mr. Horovitz *and* the entire Board, seeking to set aside the Board's parroted decision of the ODC's findings.[51]

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

> For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking -- whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion -- posed an unacceptable danger of subtly distorting the decisionmaking process.
> * * * * *
>
> And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive "leading role," *ante*, at 828, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6 to 3, Aetna would somehow not have been injured by his participation.
>
> More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due

[51] See footnote 50.

Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. . . . .

> The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events -- that another justice switched his vote and that Justice Embry wrote the court's opinion -- illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

More recently, the United States Supreme Court in Williams v. Pennsylvania, 136 S. Ct. 1899 (2016), a death penalty case akin to Respondent's professional death penalty disciplinary case, 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.

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

Throughout the Board's review, it hindered Respondent's ability to defend, *e.g.,* denying page enlargement requiring all four cases be briefed in 14-point type with double spacing throughout the opening brief (DB Rule 24), modifications denied.

D. CONCLUSION

It is respectfully requested that the proceedings against Respondent be dismissed with prejudice, and that this Court take such other and further action deemed necessary to restore the Bar's confidence in the fairness and integrity of our attorney disciplinary system in order to foster the important work that it should be doing.

DATED: Honolulu, Hawaii; May 5, 2020.

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

SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,

Petitioner,

vs.

GARY VICTOR DUBIN,

Respondent.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

Matthew S. Kohm, Esq.
1335 Hiahia Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 249-8968
E-Mail: mkohm@hawaii.rr.com

Special Counsel to Petitioner

Hamilton Phillips Fox, III, Esq.
515 Fifth Street, NW, Room 117, Bldg. A
Washington, DC 20001
Telephone: (202) 638-1501
E-Mail foxp@dcodc.org

Special Counsel to Petitioner

DATED: Honolulu, Hawaii; May 5, 2020.

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