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SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

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OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

GARY VICTOR DUBIN, Respondent

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ORIGINAL PROCEEDING  
(ODC #16-O-147, 16-O-151, 16-O-213, 16-O-326)

PETITIONER OFFICE OF DISCIPLINARY COUNSEL'S  
AMENDED ANSWERING BRIEF

STATEMENT OF RELATED CASES

and

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PETITIONER OFFICE OF DISCIPLINARY COUNSEL'S ANSWERING BRIEF

**I. STATEMENT OF THE CASE**

**A. Relevant Procedural Background**

On January 4, 2017, the Office of Disciplinary Counsel filed a Petition for Discipline against Respondent Gary V. Dubin with the Disciplinary Board of this Court. Dkt. #1 at 1 (DBF 1). ODC filed an Amended Petition on January 9, 2017, charging Mr. Dubin with numerous disciplinary violations arising from four separate complaints. Dkt. #2 at 25 (DBF 2). Mr. Dubin filed a Verified Answer on March 13, 2017. Dkt. #2 at 77 (DBF 6). The formal hearing began on November 13, 2017 and, after seven hearing days, concluded on November 28, 2017. Dkt. #4 at 700 (DBF 71). The Hearing Officer issued his Findings of Fact, Conclusions of Law, and Recommended Discipline on April 12, 2018(Dkt. #4 at 697), recommending disbarment; restitution of \$19,885.00 to Mr. Dubin's former clients, the Andias; and reimbursement of Disciplinary Counsel for costs. Dkt. #4 at 743 (DBF 7). On February 13, 2019, the Disciplinary Board issued its report. It unanimously adopted the Hearing Officer's report and recommended the same discipline. Dkt. #12 at 1 (DBF 104). On August 8, 2019, the Board issued its final report and denied Mr. Dubin's motion to disqualify the Hearing Officer and the entire Disciplinary Board. Dkt #1.

B. Relevant Facts

Mr. Dubin was admitted to practice in Hawai'i in 1982. Dkt. #17 at 1 (PE A1); Dkt. #3 at 1 (DBF 44 tr (11/13/17) 37:6-38:18) (Dubin).

**1. ODC 16-0-151 (“Joe Smith,” Complainant)**

In 1995, Mr. Dubin was convicted of three counts of failing to file federal income tax returns and was sentenced to 30 months' imprisonment. Dkt. #17 at 24 (PE A3-5) Dkt. #3 at 1 (DBF 44 tr (11/13/17) 84:12-86:17; 87:8-88:20) (Dubin). His conviction was never reversed, vacated, annulled, or expunged. Dkt. #3 at 1 (DBF 44 tr (11/13/17) 86:18-87:7) (Dubin).

In 2008, Mr. Dubin applied to the Department of Commerce and Consumer Affairs for a mortgage solicitor's license. Dkt. #17 at 29 (PE A3-6; Dkt. #3 at 1 (DBF 44 tr (11/13/17) 103:8-105:25) (Dubin). In response to a question on the application, “In the past 20 years, have you ever been convicted of a crime in which the conviction has not been annulled or expunged,” Mr. Dublin answered, “no.” Dkt. #17 at 29 (PE A3-6). The application was prepared by Long Vu, another lawyer in Mr. Dubin's office. Mr. Vu testified he believed the “the IRS had annulled the conviction,” Dkt. #3 at 206 (DBF 45 tr (11/14/17) 219:4-5) (Vu), although he had seen no document to that effect. Dkt. #3 at 206 (DBF 45 tr (11/14/17) 224:8-13, 226:6-17) (Vu). In Mr. Vu's presence Mr. Dubin reviewed the one-page form. He changed an answer to another question, but not the answer denying any criminal convictions, before he signed the application. Dkt. #17 at 29 (PE A3-6), Dkt. #3 at 206 (DBF 45 tr (11/14/17) 238:14-239:1) (Vu); Dkt. #3 at 1;(DBF 44 tr (11/13/17) 108:17-21, 111:9-12) (Dubin). Mr. Dublin's signature certified that his answers were “true and correct” and that he understood that any misrepresentations would be grounds for denial or subsequent revocation. Dkt. #17 at 29 (PE A3-6).

In 2010, after learning of this false answer, DCCA petitioned to revoke the license. Dkt. #17 at 2 (PE A2). A hearing officer found Mr. Dubin's answer was “untruthful. Dkt. #17 at 41 (PE A5) at 45. In June 2011, the DCCA Director's Final Order adopted the hearing officer's recommendation of revocation and fined Mr. Dubin \$1,000. Dkt.

#20 at 1 (PE A9). The Circuit Court affirmed (Dkt. #20 at 4 (PE A10)), and the Intermediate Court of Appeals affirmed this ruling in a summary disposition order. Dkt. #22 at 26 (PE A15). Mr. Dubin did not seek reconsideration, nor did he appeal to this Court. Dkt. #3 at 1 (DBF 44 tr (11/13/17) 163:5-17) (Dubin).

Although Mr. Dubin argued that he had not intentionally lied on his license application, neither the Hearing Officer, nor the Director in his Final Order (Dkt. #20 at 1 (PE A9)), nor the Circuit Court (Dkt. #20 at 4 (PE A10)), nor the ICA (Dkt. #22 at 26 (PE A15)) found that the false statement was unintentional. The issue was raised only before the Hearing Officer; he ruled that intent was irrelevant and made no finding. Dkt. #17 at 41 (PE A5) at 45.

## **2. *ODC-16-0-213 (ICA Complaint)***

Mr. Dubin filed a number of appeals to the Intermediate Court of Appeals of rulings in litigation arising from a failed real estate development. Mr. Dubin has stipulated that he was fully familiar with the Rules of Appellate Procedure, having litigated more than 100 appeals in Hawai'i. Dkt. #3 at 206 (DBF 45 tr (11/14/17) 264:25, 265:19) (Dubin). Yet, in each of the appeals, he ignored deadlines either required by rule or court order.

### **a. CAAP 12-0000070**

After filing a notice of appeal on February 3, 2012 (Dkt. #25 at 34 (PE C2)), Mr. Dubin failed to file the required Civil Appeals Docketing Statement until the clerk issued a deficiency notice. Dkt. #25 at 38 (PE C3), at 42 (PE C4). He then failed to file a jurisdictional statement and his opening brief, resulting in the issuance of a July 10, 2012 default. Dkt. #25 at 50 (PE C6). He eventually filed the jurisdictional statement more than three months late. Compare Dkt. #25 at 4 (PE C5) with Dkt. #25 at 54 (PE C7). The ICA ordered him to show cause why he had failed to comply with deadlines and ultimately sanctioned him for failing to file his brief on time or seek a timely extension. Dkt. #25 at 74 (PE C9) at 78 (PE C10). The ICA noted that Mr. Dubin had been sanctioned in other appellate cases (Dkt. #25 at 78 (PE C10)), which Mr. Dubin conceded

(Dkt. #3 at 206 (DBF 45 tr (11/14/17) 288:15-289:3) (Dubin), and referred its order to ODC. Dkt. #25 at 78 (PE C10).

b. Consolidated Cases CAAP 12-0000070 and CAAP 12-0000758

In October 2012, the ICA consolidated the first appeal (CAP 12-0000070) with another appeal (CAAP 12-0000758). Dkt. #25 at 92 (PE C12). Mr. Dubin's opening brief was due on January 3, 2013, but on that day, he sought and received an extension until January 31. Dkt. #25 at 106 (PE C15). The ICA ordered Mr. Dubin to show cause why he had failed to file his opening brief on time or seek a timely extension. Dkt. #25 at 130 (PE C16).

After Mr. Dubin filed his opening brief (Dkt. #25 at 134 (PE C17), the ICA struck it, noting seven violations of the Hawai'i Rules of Appellate Procedure, including exceeding the page limitations, failure to include a concise statement of facts with record citations, and failure to identify with record references the alleged errors committed by the trial court. Dkt. #25 at 225 (PE C19). Mr. Dubin filed an amended brief on April 8, 2013 (Dkt. #25 at 231 (PE C20)), but the ICA found that brief also was substantially non-compliant with HRAP 28(b), "most notably because it provides inadequate record citations throughout." Dkt. #25 at 295 (PE C21). The ICA also referred Mr. Dubin's conduct in this matter to ODC. Id.

c. CAAP-13-0004290

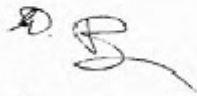
Mr. Dubin noticed an appeal in a related case, CAAP-13-0004290, on October 21, 2013. Dkt. #25 at 305 (PE C23). Once again, he neglected to file the docketing statement on time, resulting in a deficiency notice. The ICA clerk gave him until November 23, 2013 to file the docketing statement. Dkt. #25 at 329 (PE C24). He filed it a day late. Dkt. #25 at 331 (PE C25). Thereafter, Mr. Dubin sought and obtained three extensions for his opening brief. Dkt. #25 at 337 (PE C26), at 339 (PE C27), at 353 (PE C28), at 369 (PE C29). The third extension set a deadline of May 14, 2014. Dkt. #25 at 369 (PE C29). On that day he sought and obtained a fourth extension, until May 21. Dkt. #25 at 371 (PE

C30). Mr. Dubin failed to meet that deadline, resulting in a Default of Opening Brief notice. Dkt. #25 at 377 (PE C31). On June 8, 2014, Mr. Dubin moved to file his opening brief late. Dkt. #26 at 1 (PE C33). The ICA permitted him to file, which he did on June 18 (Dkt. #26 at 5 (PE C34)), but it also issued an order to show cause. The order noted that Mr. Dubin had been warned on at least two prior occasions that motions for extension should be filed prior to the due date, and the last order had warned him that failure to comply might result in sanctions. Dkt. #26 at 1 (PE C33). On July 17, 2014, the court sanctioned Mr. Dubin for failing to file his brief on time or to seek timely extensions, noting that he had been sanctioned in five prior cases for similar misconduct. Dkt. #26 at 91 (PE C35). See Dkt. #26 at 111 (PE C40) (Miller v. Bank of New York Mellon, *Order for Sanction*, June 20, 2011); Dkt. #26 at 115 (PE C41) (Western Financial Bank v. Indymac Bank, *Order for Sanction*, June 18, 2008); Dkt. #26 at 117 (PE C42) (Fidelis Capital Group v. Venture Out Properties, *Order for Sanctions to Gary Victor Dubin and Long H. Vu*, March 25, 2010); Dkt. #26 at 121 (PE C43) (JP Morgan Chase Bank v. Donald L. Lee, Trustee, *Sanction Order*, March 9, 2012); Dkt. #26 at 123 (PE C44) (Hogg v. Glenn Nobuki Murakami, *Order Granting Motion to File Opening Brief Forthwith*, Jan. 21, 2009).

**3. ODC No. 16-0-147 (Robert Andia, Complainant)**

Anticipating foreclosure on their home, Robert and Carmelita Andia retained Mr. Dubin in February 2012. They signed Mr. Dubin's form retainer agreement, the terms of which were ambiguous. Dkt. #23 at 2 (PE B3). Paragraph 4 provided that in "foreclosure cases," such as the Andias' matter, the firm was experimenting with a "minimum flat fee retainer, subject to reevaluation as the case proceeds." Id. Mr. Andia understood Mr. Dubin was charging a flat fee, and the Andias paid him a retainer of \$16,500. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 597:5-24) (Andia); Dkt. #3 at 689 (DBF 47 tr (11/21/17) 720:23-722:17) (Andia). Mr. Andia had no idea that the case would last more than three years, and so he believed a flat fee of \$16,500 was reasonable. Dkt. #3 at 689 (DBF 47 tr (11/21/17) 750:22-751:2) (Andia).

The retainer agreement form also discussed fee arrangements for other sorts of representations such as on-going general counsel services, complex counsel services, and contingency fees in personal injuries matters. Dkt. #23 at 2 (PE B3) at 2 ¶¶ 5, 7, 8. It contained a provision setting forth hourly rates, which provided that associates' time would be billed at \$180-250 per hour. It further provided for periodic statements to be sent to the client “only at intervals you may request” and had a provision for an “evergreen” retainer when the initial retainer was exhausted. Id. at 3 ¶¶ 10, 14, 15. The last item in the agreement was:

Legal Services To Be Provided: FOR ECUOTJAE OFFICE  
Agreed Minimum Retainer:  fees \$ 15,000  costs \$ 1,500  
 flat fee  \$ 16,500  
PAID 2/21/12   
- 3 -

Dkt. #23 at 4 (PE B3), *also see Appendices*. The “flat fee” bracket was not ticked, but neither was the bracket for the last item. Yet in the blank space next to the last box \$16,500 was hand-written with an arrow pointing from the words “Agreed Minimum Retainer.”

Mr. Andia did not believe these hand-written entries were made until after he and his wife signed the retainer agreement. Dkt. #3 at 689 (DBF 47 tr (11/21/17) 718:17-720:13) (Andia). At no place did the agreement explicitly say that the Andias were being charged on an hourly basis or for more than \$16,500. Mr. Andia’s belief that the retainer was for a flat fee was reinforced by Mr. Dubin’s failure for more than three years to seek additional funds. Dkt. #3 at 689 (DBF 47 tr (11/21/17) 733:1-734:20) (Andia). The retainer agreement provide that whenever the minimum retainer was exhausted, “you will be required to make additional deposits . . . .” Dkt. #23 at 1 (PE B2) at 3 ¶ 15 (emphasis added).

Mr. Dubin assigned Andrew Goff, an associate, to work on the case. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 486:21-25) (Goff). Mr. Goff had been admitted to practice in 2010, less than two years before, and had never been lead counsel in any circuit court trial or before the United States district court. He had tried one case in state district court. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 484:6-11, 485:20-25, 493: 10-24) (Goff). When he left the firm, another associate, Richard Forrester, also newly admitted, replaced him. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 535:2-7, 537:6-17, 538:18-539:8) (Forrester). Mr. Forrester also had never been lead counsel in a circuit court case or in the federal court. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 579:2-10) (Forrester).

After filing a counterclaim against Bank of America, Mr. Goff negotiated a settlement that was essentially a work-out. Bank of America would pay about one-half of the arrearage to the current loan server, and the Andias would pay the other half. Then the loan would be reinstated, and the foreclosure action dismissed. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 539:9-541:7) (Forrester). Before Mr. Goff left the case, this settlement was not finalized, and after Mr. Forrester took over the case, the settlement morphed into a \$132,000 payment by the bank. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 542:14-544:10) (Forrester). Mr. Forrester understood that, pursuant to the terms of the final settlement agreement, all these funds were to be paid to the Andias. Dkt. #24 at 1 (PE B24); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 566:16-24) (Forrester). Mr. Andia had a similar understanding, and he believed that he could use the money to retain ownership or at least possession of his house. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 544:11-545:18 (Forrester), 608:15-610:11, 614:24-615:21, 617:1-11 (Andia). He would not have agreed to the settlement had he been aware that Mr. Dubin was going to take part of the funds. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 643:11-15) (Andia).

On November 3, 2015, the bank delivered a settlement check, payable to the Andias, to Mr. Dubin's office. Mr. Dubin negotiated the check the day it was received by signing the Andias' names on the back, but without notifying them that he had received the check, much less obtaining their permission to sign their names. Dkt. #23 at 212 (PE

B6); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 633:11-635:15 (Andia); Dkt. #4 at 269 (DBF 49 tr (11/27/17) 1260:1-1265:24) (Dubin). He signed his clients' names in a fashion that made it appear there were separate signatures of two persons. Dkt. #23 at 12 (PE B6) at 13; Dkt. #3 at 413 (DBF 46 tr (11/20/17) 634:10-24) (Andia). The Andias did not learn that Mr. Dubin had signed their names to endorse the check until Bank of America's lawyer sent them a copy months later. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 602:17-603:10, 632:2-633:8) (Andia).

On November 6, 2015, Mr. Andia emailed Mr. Forrester, inquiring about the status of the settlement. Mr. Forrester told him that they were awaiting some documents from the bank's lawyers and that Mr. Dubin was preparing an invoice. Dkt. #23 at 23 (PE B10). This was the first time Mr. Andia learned that Mr. Dubin was billing him for more than the \$16,500 he had already paid. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 617:23-618:24) (Andia). When he asked Mr. Forrester about these additional fees, Mr. Forrester told him that the retainer agreement called for billing at hourly rates, not for a flat fee. Dkt. #23 at 24 (PE B11); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 619:18-620:10 (Andia). When Mr. Andia attempted to follow up, Mr. Forrester would not accept his telephone calls. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 622:1—9 (Andia). He sent an email suggesting that Mr. Andia contact Mr. Dubin. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 622:24-623:8) (Andia).

Mr. Andia then emailed Mr. Dubin, who emailed back that his law firm was not "the Hawaii Legal Aid Society," accused Mr. Andia of attempting to receive a "free ride," informed him that the firm was "immediately stopping work on your case," and suggested "you immediately secure replacement counsel." Dkt. #23 at 27 (PE B12). Mr. Andia sent another email to Mr. Dubin asking to meet (Dkt. #23 at 29 (PE B13)) but received no response. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 629:4-6) (Andia). So, Mr. Andia went to Mr. Dubin's office on November 6, but was told neither Mr. Forrester nor Mr. Dubin were available. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 629:13-630:10) (Andia).

He understood from Mr. Dubin's email that he would no longer represent him, so Mr. Andia contacted counsel for the bank to find out what was happening. She informed him that the settlement check had been delivered to Mr. Dubin's office on November 3. This surprised Mr. Andia because he had been asking Mr. Forrester about the status of the settlement and had never been told either by him or Mr. Dubin that a check had been received. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 630:19-632:14) (Andia). So he sent another email to Mr. Forrester, complaining that he had not been informed of receipt of the settlement check, to which Mr. Dubin responded almost instantaneously, telling Mr. Andia "to stop making a complete ass out of yourself" and claiming that the funds had not been released because the check had not cleared. Dkt. #23 at 31 (PE B14); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 634:25-635:25) (Andia).

On November 7, 2015, four days after he had deposited their check, Mr. Dubin mailed the Andias an invoice claiming fees and costs of \$78,202.87 for services rendered between February 17, 2012 and November 6, 2015. After crediting the \$16,500 retainer, Mr. Dubin kept \$61,702.87 or 47 percent of the \$132,000 settlement. Dkt. #23 at 16 (PE B7A). He also withheld \$8,000 from the Andias' share of the settlement to "replenish" the retainer. Id. at 19. Mr. Dubin had not obtained the Andias' permission to apportion the settlement proceeds in this fashion. Dkt. #4 at 1 (DBF 48 (11/22/17) 1095:19-24 (Dubin)).

Mr. Dubin's invoice claimed he had exhausted the \$16,500 retainer within the first eight days of the representation in 2012. Dkt. #28 at 7 (RE 1). Yet, at that time, no foreclosure action had been initiated, and none was filed for four months. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 594:3-10) (Andia). Mr. Andia was unaware of any work Mr. Dubin had done before the foreclosure. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 594:14) (Andia). Mr. Dubin had not previously notified the Andias that he had taken any of their funds from his trust account. Dkt. #4 at 1 (DBF 48 tr (11/22/17) 1105:14-1106:15) (Dubin). He had never sent the Andias an invoice between February 2012, when they entered into

the engagement until after the settlement in November 2015. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 613:12-20) (Andia).

Mr. Andia received the November 7 invoice and a check for \$62,297 on November 12, 2015. Dkt. #23 at 14 (PE B7); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 640:23-641:11) (Andia). He particularly objected to the \$8,000 that Mr. Dubin had withheld for future legal fees because Mr. Dubin had said he no longer wished to represent the Andias. Mr. Andias asked for a refund of the \$8,000 and for his files. Dkt. #23 at 34 (PE B17). On November 27, he went to Mr. Dubin's office to receive the check and his files. At that meeting, Mr. Andia questioned and challenged the \$385 billing rate shown on the invoice for the associates, Mr. Goff and Mr. Forrester. The billing rate for associates in the retainer agreement was for \$180-\$250. Dkt. #23 at 2 (PE B3) at 3. Mr. Dubin had never provided any prior notice that he was billing their time at \$385. Mr. Dubin claimed that Mr. Goff and Mr. Forrester were "senior associates." Dkt. #3 at 689 (DBF 47 tr (11/21/17) 650:6-651:14 (Andia); Dkt. #4 at 1 (DBF 48 tr (11/22/17) 1108:10-1109:15, 1115:22-1116:5) (Dubin). Mr. Andia acknowledged this explanation by saying, "okay," but he did not acquiesce. He was afraid that if he expressed an objection, Mr. Dubin might stop payment on the \$8,000 refund check, and he did not want to get into a confrontation in Mr. Dubin's office. Dkt. #3 at 689 (DBF 47 tr (11/21/17) 654:17-22, 867:19-869:16) (Andia).

When Mr. Andia reviewed the invoices, he found a number of discrepancies, and he notified Mr. Dubin in a December 15, 2015 email that he was still disputing the charges. Dkt. #23 at 35 (PE B18). The invoices showed that from the outset of the representation, Mr. Dubin had billed the time of both associates at \$385 per hour. Id. This included the period between February 2012 and August 30, 2012, when Mr. Forrester had not yet been admitted in Hawai'i. Dkt. #23 at 22 (PE B9). Had Mr. Dubin billed these associates' time at the maximum of \$250 specified in the retainer agreement, the invoice would have been reduced by \$19,885. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 651:25-652:25) (Andia).

Mr. Dubin refused to provide a refund and threatened to add additional charges. He said that fee schedules periodically changed and that fees were based on “skill and performance.” Dkt. #23 at 37 (PE B19). When Mr. Andia replied by forwarding a copy of the retainer agreement. Mr. Dubin replied, “You can tell whoever [sic] you are speaking with behind the scenes that he can stick the agreement you know where.” Dkt. #23 at 39 (PE B20). Mr. Dubin never repaid the \$19,885. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 674:17-675:23) (Andia).

In January 2016, Mr. Dubin contacted counsel for Bank of America, complained that Mr. Andias was causing trouble and defaming him, and disclosed information about Mr. Andia that he had learned in the course of the representation. Dkt. #24 at 86 (PE B34); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 682:2-25) (Andia). Before Mr. Andia testified at the hearing on November 20, 2017, Mr. Dubin’s lawyer represented to the Hearing Officer that Mr. Dubin would be filing a defamation action against Mr. Andia. He said that he was making this disclosure so Mr. Andia would understand the consequence of giving testimony. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 418:14-419:3). Mr. Dubin, who personally cross-examined Mr. Andia, made sure he was aware of this threat. Dkt. #3 at 689 (DBF 47 tr (11/21/17) 693:21-694:9) (Andia).

Because they did not receive the full \$132,000 settlement, the Andias were unable to resolve the foreclosure litigation. They remained in foreclosure as of the hearing and were unable to afford counsel. Dkt. #3 at 413 (DBF 46 tr (11/20/17) 645:15-24) (Andia). One lawyer they attempted to hire said that Mr. Dubin had taken all the money that could be recovered and that there would be no money to compensate new counsel. Dkt. #3 at #413 (DBF 46 tr (11/20/17) 661:13-25) (Andia).

#### ***4. ODC 16-0-326 (Robert Kern Complainant)***

On December 23, 2015, Michael E. Harkey retained Mr. Dubin. Dkt. #26 at 127 (PE D1). The retainer agreement called for a \$20,000.00 advance fee. Id. at 129. Mr. Harkey engaged Mr. Dubin to review existing litigation in the Western District of Washington, where Mr. Harkey had filed an adversary proceeding in an on-going

bankruptcy matter, and in the federal court in Nevada and to review Mr. Harkey's related loans in order to prepare a litigation plan. Dkt. #26 at 126 (PE D1) at 129. On January 3, 2016, Mr. Dubin and Mr. Harkey entered into a second retainer agreement, calling for an additional advance fee of \$25,000. The scope of the representation was identical to the first agreement, except that it added "filing lawsuits." Dkt. #26 at 131 (PE D2) at 133. In late January, Mr. Harkey wire-transferred \$20,000 to Mr. Dubin's trust account. Dkt. #26 at 149 (PE D6) at 151 (PE D7).

Shortly after the second retainer was entered into, but before he had sought pro hac vice admission, Mr. Dubin filed in the Washington bankruptcy proceeding a two-page declaration from Mr. Harkey, announcing his retention of Mr. Dubin, and a single-page declaration from Mr. Dubin, announcing his intention of filing a second amended complaint. Dkt. #26 at 135 (PE D3). One week later, on January 22, 2016, the bankruptcy court dismissed Mr. Harkey's adversary proceeding. Dkt. #25 at 145 (PE D4). This was Mr. Dubin's only participation in the Washington bankruptcy case. Dkt. #4 at 269 (DBF 49 tr (11/27/17) 1129:7-13) (Dubin).

Mr. Dubin withdrew the \$20,000 advance fee on March 7, 2016. Dkt. # 26 at 151 (PE D7). On April 1, 2016, Mr. Harkey wire-transferred an additional \$25,000 advance fee to Mr. Dubin's trust account. Dkt. #26 at 151 (PE D7). Mr. Dubin withdrew these funds on April 18. Dkt. #26 at 145 (PE D7). Later, on April 21, Mr. Dubin sought pro hac vice admission for himself and an associate in the Nevada federal court. Dkt. #26 at 157 (PE D9); Dkt. #26 at 170 (PE D10). Six days later, Mr. Harkey's local counsel moved to withdraw these petitions, citing "a falling out between out of state counsel and the Plaintiff." Dkt. #26 at 187 (PE D11); Dkt. #4 at 269 (DBF 49 tr (11/27/17) 1160:5-13 (Dubin). The court granted this motion on May 2, 2016. Dkt. #26 at 191 (PE D12) at 192 (ECF# 401). Mr. Dubin's firm rendered no further services to Mr. Harkey. Dkt. #4 at 1 (DBF 48 tr (11/22/17) 1164:24-1165:4) (Dubin).

Mr. Dubin's representation of Mr. Harkey lasted approximately four months. The only pleadings he filed were a declaration from Mr. Harkey announcing Mr. Dubin's

retention and Mr. Dubin’s declaration of his intent to seek admission and file a second amended complaint in the Washington bankruptcy court—which was quickly mooted by that court’s dismissal of the adversarial action—and two motions for pro hac vice admission in the Nevada federal case—which were withdrawn less than a week later. None of these filings required any substantial factual or legal research and are *pro forma*. See Dkt. #4 at 1 (DBF 48 tr (11/22/17) 946:19-947:11, 947:19-948:9) (Kern).

Robert Kern, a Las Vegas lawyer, then entered his appearance on behalf of Mr. Harkey in the Nevada litigation. Dkt. #26 at 191 (PE D12) at 192 (ECF# 402). Mr. Harkey asked Mr. Kern to obtain from Mr. Dubin an accounting of the \$45,000 advance fees he had paid and a return of any unearned fees. Dkt. #4 at 1 (DBF 48 tr (11/22/17) 945:2-946:1) (Kern). Mr. Kern first contacted Mr. Dubin on May 31, 2016. Dkt. #27 at 1 (PE D13); Dkt. #4 at 1 (DBF 48 tr (11/22/17) 953:2-23 (Kern). Despite many assurances that he would do so, Mr. Dubin never produced an accounting. Dkt. #27 at 3 (PE D14) – Dkt. #27 at 29 (PE D27).<sup>1</sup> Mr. Dubin’s initial response to the request for accounting was a promise to give the request priority “[a]s soon as my billing clerk returns from vacation this week . . . .” Dkt. #27 at 98 (PE E3) at 121. When no response had been received by June 23, Mr. Kern inquired again. Id. at 120. Still receiving no response, he inquired a third time on June 30 (Id. at 119) only to be told that Mr. Dubin could not provide an accounting because he was preparing for trial. Id. at 119–120. Subsequent excuses include the trial was winding up (July 6, Id. at 117), “[s]till battling court deadlines” (August 9, Id. at 115-116), an associate was on vacation plus there was another court appearance (August 16, Id. at 113-114), Mr. Dubin was in family court (August 23, Id. at 111-112), Mr. Dubin was suffering from a reaction to a vaccination (August 23, Id. at 110), and two hurricanes were bearing down on Hawai’i (August 30, Id. at 108).

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<sup>1</sup> (Some of the emails copies are difficult to read. Clearer copies are attached to Dkt. #27 at 98 (PE E3), the September 8, 2016 letter ODC sent to Mr. Dubin, attaching Mr. Kern’s complaint. **Such documents** showing the Kern letter and client authorization are also in the Appendices).

These excuses were accompanied by promises to provide the accounting “as soon as possible” (June 6, Id. at 120-121), “this weekend” (June 30, Id. at 118), “[w]ill have it for you on Monday” (August 9, Id. at 115-116), “[w]hen I return” from a court appearance tomorrow (August 16, Id. at 113-114), tomorrow (August 23, Id. at 111-112), and tomorrow (August 25, Id. at 109), and finally, “you are priority number one” next week (August 30, Id. at 108)

When Mr. Kern threatened to report his failure to account to ODC, Mr. Dubin responded: “No need to file with the ODC as then I will have to explain how Wendy [another lawyer representing Mr. Harkey, Dkt. #4 at 1 (DBF 48 tr (11/22/17 at 965:10-19) (Kern)] dishonestly appeared in the case. It will not be helpful to her. I have tried to put that behind us, but one threat deserves another. There is a lot you apparently do not know and do not need to know. Just stop threatening me.” Id. at 19.

At no place in these communications did Mr. Dubin ever claim that Mr. Kern was not authorized by Mr. Harkey to demand an accounting. Dkt. #4 at 430 (DBF 50 tr (11/28/17) 1464:10-1465:4) (Dubin); see Dkt. #4 at 1 (DBF 48 tr (11/22/17) 1031:3-8 (“You interacted with me telling me you were going to give it to me for months without ever disputing my right to have it, without ever asking for evidence . . . .”) (Kern)). To the contrary, Mr. Dubin wrote, “I would rather send it to Michael [Harkey], but I am assuming that you have Michael’s authority to receive the final invoice.” Id. at 16. Mr. Kern had sent Mr. Dubin a signed authorization from Mr. Harkey. Dkt. #4 at 1 (DBF 48 tr (11/22/17) 967:10-19) (Kern). His complaint to ODC attached such an authorization, dated May 28, 2016, a few days before he first contacted Mr. Dubin. Dkt. #27 at 31 (PE D28) at 33.

After warning Mr. Dubin, Mr. Kern complained to ODC. Dkt. #27 at 31 (PE D28); Dkt. #4 at 1 (DBF 48 tr (11/22/17) 969:1-11, 977:5- 18) (Kern). Thereafter, Mr. Dubin never produced an accounting either to Mr. Kern or to ODC (Dkt. #4 at 1 (DBF 48 tr (11/22/17) 982:13-16) (Kern), 1170:4-8 (Dubin), but in April 2017, over six months after ODC had petitioned this matter, he prepared an invoice. Dkt. #4 at 430 (DBF 50 tr

(11/28/17) 1475:23-1476:4 (Dubin). According to the invoice, Mr. Dubin had performed \$16,650 in services by March 7, 2016, and did not perform any other services until March 11. Dkt. #29 at 1 (RE 1). But his Client Trust Log showed that he had withdrawn Mr. Harkey's entire initial advance of \$20,000 on March 7, 2016. Dkt. #26 at 151 (PE D7); Dkt. #4 at 1 (DBF 47 tr (11/22/17) 1145:2-13) (Dubin). Thus, by Mr. Dubin's own reckoning, \$3,350 had not been earned when Mr. Dubin converted the entire \$20,000. Dkt. #4 at 430 (DBF 50 tr (11/28/17) 1473:11-1474:4 (Dubin). Nor had Mr. Dubin notified Mr. Harkey that he had withdrawn the \$20,000 from trust. Mr. Dubin withdrew the second advance fee, \$25,000, also without informing Mr. Harkey. Dkt. #26 at 151 (PE D7); Dkt. #4 at 1 (DBF 48 tr (11/22/17) 1148:20-1149:11) (Dubin).

His April 2017 invoice totaled almost \$70,000 in fees and costs (RE 1), when the only tangible work product were four minimal, routine filings. Because he was never admitted pro hac vice, Mr. Dubin could not legally practice in either jurisdiction where Mr. Harkey was involved in litigation. See Dkt. #4 at 1 (DBF 48 tr (11/22/17) 959:2-18, 987:14-21) (Kern). The charges were inflated after the fact to justify keeping Mr. Harkey's entire \$45,000 in advance fees. For example, Mr. Dubin claimed to have spent 11.2 hours (at \$450 per hour) preparing the five-paragraph declaration for Mr. Harkey and the four-paragraph declaration for himself that he filed in the Washington bankruptcy court. Compare Dkt. #29 at 1 (RE 1) at 1-2 with Dkt. #26 at 135 (PE D3); see Dkt. #4 at 1 (DBF 48 tr (11/22/17) 1017:5-1018:20, 1021:25-1022:3 ("So you claim to have billed 30.1 hours in a 24 hour day. . . . If I knew how to work 30 hours in a 24-hour day, I think I would be a rich man." (Kern))).

An ODC investigator forwarded Mr. Kern's August 31, 2016 complaint to Mr. Dubin and asked for a response. Dkt. #27 at 98 (PE E3); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 426:15-427:3, 430:15-431:17) (Elerick). On September 23, 2016, Mr. Dubin produced his Client Trust Log and some bank records, but he did not provide an accounting. Dkt. #27 at 57 (PE D29). On October 3 by hand-delivered letter, ODC asked for four additional items, including "a copy of any billing or accounting or other

correspondence . . . that detailed the work you did for Michael Harkey.” Dkt. #27 at 71 (PE D30). Mr. Dubin never responded, despite requesting additional time to do so, and despite a follow-up request from ODC. Dkt. #27 at 73 (PE D31); Dkt. #3 at 413 (DBF 46 tr (11/20/17) 438:21-439:9, 443:1-6) (Elerick). Specifically, he did not provide the invoice, Dkt. #29 at 1 (RE 1), that he introduced into evidence at his hearing, raising an issue of subsequent fabrication.

In his correspondence with ODC, and in contrast with his communications with Mr. Kern, Mr. Dubin suggested that Mr. Kern was not authorized by Mr. Harkey to request an accounting. In his first letter to ODC, dated September 23, 2016, he said Mr. Kern was not hired as a “collection attorney” but was retained to represent a trust, “which I will explain shortly.” Dkt. #27 at 57 (PE D29). This explanation was never forthcoming. Then in his October 7, 2016 letter seeking an extension, he referred to a “complaint supposedly submitted on behalf of Mr. Harkey.” Dkt. #27 at 73 (PE D31) (emphasis added). He provided no explanation once again as to why he questioned Mr. Kern’s authority.

## **II. STANDARD OF REVIEW**

The standard of review is de novo. Office of Disciplinary Counsel v. Lau, 79 Hawai’i 201, 206, 900 P.2d 777, 782 (1995), *as amended* September 14, 1995. The standard of proof is clear and convincing evidence. RSCH Rule 2.7(c).

## **III. LEGAL ARGUMENT**

### **I. THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT COMMITTED THE DISCIPLINARY VIOLATIONS FOUND BY THE HEARING OFFICER AND THE DISCIPLINARY BOARD.**

Most of Respondent’s Opening Brief is a restatement of the extensive testimony he provided during the seven-day hearing. Therefore, at the outset, it is necessary to grapple with the genie of credibility. While this Court conducts de novo review and is not bound by the findings of the Hearing Officer (or the Board), unlike the Hearing Officer, this

Court does not have the opportunity to observe the demeanor of the witnesses, hear their actual testimony, ask them questions, and base credibility decisions on more than a paper record. With the exception of the ICA referrals, an evaluation of the charges requires an assessment of Mr. Dubin's credibility: was he credible when he claimed to have signed the application for a mortgage solicitor's license without reading it, or when he claimed he had a basis for charging associates' time at \$385 per hour in the Andias' matter, or when he claimed he did not provide an accounting because he did not believe Mr. Harkey had authorized Mr. Kern to act on his behalf? By adopting ODC's statement of the facts, the Hearing Officer necessarily concluded that Mr. Dubin's contrary testimony was false.

These are the sort of credibility determinations to which appellate courts generally defer. This Court should weigh those credibility determinations against Respondent and in favor of ODC. *See Anderson v. City of Bessemer*, 105 S.Ct 1504, 470 U.S. 564 (1985) (appellate courts should review a trial court's determination of historical fact under a deferential standard even if that determination was not based upon an evaluation of credibility and demeanor); *Manzi v. State*, 88 S.W.3d 240, 243 (Tex. Crim. App. 2002), discussing "appellate court's traditional inability to find facts." The tribunals that hear the testimony are the traditional finders of fact and their determinations of historical fact are entitled to deference. *Id.* at 244. But in this case, Mr. Dubin's testimony is inherently incredible—so much so that even without having the opportunity to hear and observe witness testimony, his case falls apart.

#### **A. The DCCA Application.**

Mr. Dubin argues extensively that he was unjustly convicted of federal crimes. That is completely irrelevant. He was convicted, and that conviction was neither reversed nor set aside in post-conviction proceedings. Nor has he been pardoned, although if his version of events were true, it is difficult to understand why he would not have applied for and received a pardon. See 28 CFR §§ 1.1 *et seq.* As long as the conviction remained in place, he had an obligation to report it. Nor does it matter that disciplinary charges were not brought in Hawai'i based on the conviction. The application asked about

criminal convictions, not disciplinary charges. Mr. Dubin argues that he did not intentionally give a false answer when he denied having a criminal conviction. The fact that there was no finding of intentionality during the license revocation proves nothing; the hearing officer ruled intent irrelevant under the applicable statute. He made no finding because he did not need to do so. Dkt. #17 at 41 (PE A5) at 45-46. Mr. Vu drafted the application. Even though he saw no supporting documentation, Mr. Vu testified that he believed that the IRS had “annulled” Mr. Dubin’s conviction. Mr. Vu is a member of the Bar. He cannot possibly have believed that the IRS, an Executive Branch agency, had the authority to annul a criminal conviction entered by a federal court. Moreover, even if Mr. Vu had so believed, Mr. Dubin reviewed the application before he signed it. Mr. Vu saw him do so, and Mr. Dubin admits to changing an answer Mr. Vu provided to another question—changing from “yes” to “no” a question about whether Mr. Dubin had ever used another name. Of course, this change strengthened the application, whereas admitting to a criminal conviction would have weakened it. Mr. Dubin alleges that he only reviewed the “yes” answers Mr. Vu had circled on the application. This makes no sense. Why would he only review half of the questions? The application is only one-page long, and it only asks nine, “yes” or “no” questions. Dkt. #17 at 10 (PE A3), Ex. 6 at 25-29. It would take less than 30 seconds to review, and any experienced lawyer would have done so before signing and certifying its truthfulness.

If, in fact, Mr. Dubin signed the application without reading it completely, his conduct in certifying its truthfulness would have been at a minimum recklessly dishonest. In assessing whether a lawyer violated Rule 8.4(c), engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, reckless conduct has been found to violate the rule. In Office of Disciplinary Counsel v. Kaiama, No. 16-0000522, 2017 WL 1629365 (Haw. May 1, 2017) (*See Appendices*), an attorney made accusations against a judge without any evidence. “We further conclude these allegations were made with a reckless disregard to their truth or falsity, and were not assertions a reasonable attorney, considered in light of all his professional functions, would make in the same or similar

circumstances. See Standing Committee on Discipline v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995).

If reckless false statements are not deemed to violate the rule, a lawyer can always make the difficult-to-refute excuse that he did not read the application. A lawyer who certifies that the answers he provides in an application are truthful and signs that certification, is also certifying that he has read the answers he is attesting to. Cf. In re Rosen, 570 A.2d 728, 728-30 (D.C. 1989) (per curiam)(acting in reckless disregard of the truth constitutes dishonesty).

Finally, Mr. Dubin's public efforts to convince colleagues at the Bar and potential clients that he was unjustly convicted do not mean that he had no motive to withhold the information on a license application. Perhaps he might have explained the conviction to the satisfaction of the licensing authority, but as the DCCA hearing officer found, a "Yes" answer "could lead the commissioner to request further information and/or make further inquiries . . . . A 'No' answer to those questions . . . would not lead the commissioner to request further information and/or make further inquiries . . . ." Dkt. #17 at 41 (PE A5) at 44. Nor did his disclosure of his conviction on a liquor license application mean that he did not intentionally withhold the information on this later application. The earlier experience may well have taught him that disclosure only led to further complications; it may have been the incentive not to disclose this time.

Mr. Dubin's conduct violated Rule 8.4(c) (pre-2014 version) and Rule 8.4(a) (pre-2014 version) (violating or attempting to violate the Rules of Professional Conduct or knowingly assist or induce another to do so or do so through the acts of another).

### **B. The ICA Rule Violations**

The ICA referrals do not turn on the credibility of Mr. Dubin. His misconduct was documented. The ICA referred three sanction orders against Mr. Dubin to ODC. In CAAP 12-0000070, he missed three filing deadlines without seeking timely extensions. In Consolidated Cases CAAP 12-0000070 and CAAP 12-0000758, he missed the deadline for filing his opening brief without seeking a timely extension and then submitted two

briefs, one of which the court struck, that failed to comply with HRAP 28(b). In CAAP 13-0004290, he missed three filing deadlines, again without seeking timely extensions. Before it referred his conduct to ODC, the court warned Mr. Dubin, and its last referral noted five previous cases where he had engaged in similar misconduct. In fact, he has engaged in similar misconduct in these very proceedings, missing numerous deadlines without seeking timely extensions and filing an opening brief with inadequate record citations.

This constant nose-thumbing at appellate procedures violates Rules 1.1 (pre and post 2014) (incompetent representation), 3.2 (obligation to make reasonable efforts to expedite litigation), 3.4(e) (knowingly disobeying an obligation under the rules of a tribunal), and 8.4(a). Respondent's Opening Brief suggests that to find he violated these disciplinary rules, there must be a finding he intended to violate the Rules of Appellate Procedure. Clearly a lawyer incompetently represents a client if he violates the appellate rules out of ignorance or negligence. *See Tate v. Wiggins*, Case No. 3:18-cv-230 (W.D. Pa. Jun. 28, 2019); *See also, Consol. Freightways Corp. of Del. v. Larson*, 827 F.2d 916, 918 n.3 (3d Cir. 1987). Intent is not an element, and a lesser mens rea would/could show incompetence.

Similarly, there is no requirement in Rule 3.2 that a lawyer must intentionally seek to delay litigation. Comment [1] provides, "Significant delay should not be indulged merely for the convenience of the advocates," and there must be some substantial purpose for the course of action other than delay. Mr. Dubin has not contended that he had any purpose for delaying the appeals that he initiated on behalf of his clients other than his own convenience. Id.

In contrast, Rule 3.4(e), is one rule which requires knowing disobedience. In addition to Mr. Dubin's self-professed expertise in appellate rules and practices, he was given deficiency notices, and, in the consolidated case and in CAAP 13-0004290, he was specifically warned. Yet he continued to miss filing deadlines without seeking timely extensions.

Respondent's Opening Brief asserts In re Partington, SCWC-18-0000301 (March 5, 2020), prohibits treating court sanctions as evidence of disciplinary violations. That was not what Partington said. Partington held that ODC could not treat sanction orders by themselves as a violations of Rule 3.4(e)- the only rule violation charged here that has "knowingly" as an element- without a referral from the court, which occurred here, and without giving the lawyer the due process afforded by the rules, which also occurred here.

Finally, Respondent's Opening Brief contains a mélange of quasi-related points- the underlying litigation was complex and important; other lawyers have violated the rules without being sanctioned; and possible retaliation by the ICA because Mr. Dubin had made allegations against a judge, which he says required the ICA judges who sanctioned him be called to testify about the integrity of their sanction orders. Comment [1] to Rule 3.2 expressly provides, "It is not a justification that similar conduct is often tolerated by the bench and bar." Judges are discouraged from testifying except in cases where they are necessary witnesses. Otherwise, every time a judge's decision was the basis for a subsequent proceeding, a litigant could compel the judge to testify to justify her ruling. Here, Mr. Dubin can cite to no evidence of judicial bias that resulted in his being sanctioned for his clear violations of the appellate rules. Paranoia and/or a self serving rationale does not equate to evidence.

### **C. The Andia Complaint**

Mr. Dubin's form retainer agreement was ambiguous. Mr. Andia reasonably believed that he was being charged a flat fee. As the drafter of that agreement, and as a lawyer, that ambiguity should be construed against Mr. Dubin. *See* Luke v. Gentry Realty, Ltd., 105 Hawai'i 241, 249, 96 P.3d 261, 269 (2004) (ambiguous contract terms are construed against drafting party).

Moreover, for more than three years, Mr. Dubin never informed Mr. Andia that his advance payment had been exhausted and that he owed additional fees, despite a provision in the agreement that appeared to mandate this. Dkt. #23 at 2 (PE B3) at 3, ¶ 15. Mr. Dubin now cites paragraph 14 of the agreement that says billing statements would be

provided “only at intervals you may request.” Id. at 3 ¶ 14. Again, this is ambiguous drafting, which seems to conflict with the very next paragraph that provides when the initial advance was exhausted, the Andias “will” be required to make additional deposits. In context, paragraph 14 is properly interpreted as giving the client the option to determine the intervals at which bills would be provided.

In any case, a contractual provision, particularly an ambiguous one, does not trump Mr. Dubin’s obligation under Rule 1.4(a)(3) to keep his client reasonably informed of the status of a matter. Assuming Mr. Dubin was correct that this engagement was an hourly one, he allowed his client to accumulate substantial legal fees over more than three years that equaled almost 60 percent of his settlement recovery. Before allowing the Andias to enter into a settlement, Mr. Dubin should have informed them of their outstanding fees so that they could evaluate the economics of that settlement.

This failure to communicate cannot be blamed on Mr. Dubin’s associates. Mr. Goff apparently believed, and led Mr. Andia to believe, that this was a flat fee representation. When Mr. Andia suggested that they might be running up his bill with extended telephone conversations, Mr. Goff replied, “Yeah, but you know, if you’re on a flat fee agreement, it doesn’t matter.” Dkt. #3 at 689 (DBF 47 tr (11/21/17) 739:17-740:10) (Andia). Mr. Goff and Mr. Forrester assisted the Andias in negotiating a settlement that would have allowed them to keep their home, but which was dependent upon their receiving and utilizing the entire \$132,000 to pay arrearage. Indeed, the settlement that Mr. Goff was negotiating before he left would not have generated any cash to pay legal fees since it contemplated that Bank of America would pay the arrearage directly to the loan servicer in a workout arrangement.

Even assuming Mr. Goff and Mr. Forrester knew the firm was charging on an hourly basis, Mr. Dubin cannot lay off his responsibility to keep his client informed on his associates. He personally entered into the arrangements and signed the retainer agreement with the Andias. Dkt. #23 at 2 (PE B3) at 4. He was responsible under Rule 5.1 for

ensuring that his subordinates followed the Rules of Professional Conduct, including Rule 1.4.

This violation of Rule 1.4(a)(3) continued when Mr. Dubin failed to tell Mr. Andia that the settlement check had been received, despite his inquiries, thereby preventing Mr. Andia from objecting to Mr. Dubin's negotiating it. Dubin did not tell them before he negotiated the settlement check on November 3, 2015, nor when Mr. Andia emailed him on November 6. Mr. Andia learned that the check had been delivered only by asking opposing counsel. During this lacuna in communications, Mr. Dubin committed fraud and dishonest conduct in violation of Rule 8.4(c). Without permission he signed his clients' names to endorse the settlement check. This is highly improper and not permitted. See West's Hawai'i Revised Statutes Annotated § 708-852 (forgery in the second degree); § 708-853 (forgery in the third degree).

At the hearing, Mr. Dubin claimed that the attorney's lien provision of his retainer agreement permitted him to sign his clients' name and deposit the check in his account without their permission. Nothing in that provision says that. Dkt. #23 at 2 (PE B3) at 3, ¶ 16. Had the check been made out to Mr. Dubin or his firm, he could have deposited it and asserted the attorney's lien as justification not to disburse the funds until how to allocate the funds was resolved. But an attorney's lien does not permit a lawyer to forge a check payable to the client against whom he may have a lien. He can assert a lien against funds properly in his possession, but he cannot resort to self-help to take possession of those funds.

Mr. Dubin then generated a fraudulent bill, charging associates' time at \$385 per hour, when the retainer agreement called for no more than \$250, and then compounded the offense when caught by falsely claiming these lawyers were "senior associates." One of them was not even a member of the Hawai'i Bar when Mr. Dubin began to bill his time at \$385, and the term "senior associate" does not appear in the agreement. These were further violations of Rule 8.4(c), as well as violations of Rules 1.5(a) for charging an

unreasonable fee, and 1.5(b), for changing the rate for his associates without communicating this to his clients.

#### **D. The Kern Complaint**

Mr. Dubin misappropriated Mr. Harkey's advance fees in violation of Rule 1.15(a) by withdrawing them before they were earned. Respondent's Opening Brief claims that the invoice he eventually produced, may have contained inadvertent errors but that it accurately reflected the work he had done and showed he was entitled to the entire \$45,000 of advance fees. This Court need not decide whether the highly suspicious time charges were actually incurred in a representation that consisted of nothing more than filing routine declarations and form pro hac vice applications: did it take more than 11 hours of work to prepare two one-page declarations; could Mr. Dubin actually bill 30 hours in one day; etc.? There is a clear misappropriation of the first \$20,000 advance fee. Mr. Dubin withdrew \$20,000 on March 7, 2016, but his (*very dubious*) invoice showed he had only earned \$16,650 by that date. Compare Dkt. #26 at 151 (PE D7) with Dkt. #29 at 1 (RE 1).

Mr. Dubin also violated Rule 1.15(d) by failing to notify at all, much less promptly notify Mr. Harkey when he withdrew his advance fees on March 7 and April 18, 2016. Because he had not received this information, Mr. Harkey asked Mr. Kern to obtain an accounting and a return of his unearned advances. Rule 1.15(d) requires a lawyer, upon request of his client, to provide an accounting. Mr. Dubin invented one excuse after another to avoid fulfilling this duty, an obvious reluctance to disclose that he had taken fees he had not earned. When after three months of stalling, Mr. Kern complained to ODC, Mr. Dubin still did not provide an accounting. These Rule 1.15(d) violations also constituted violations of Rule 1.4(a)(3) (keeping clients reasonably informed about the status of a matter and Rule 1.4(a)(4) (failing to promptly comply with reasonable requests for information).

Mr. Dubin's claim that he did not believe Mr. Kern was properly authorized to ask for an accounting is a patent post hoc rationalization. Never once during their

communications did Mr. Dubin challenge Mr. Kern's authority. To the contrary, his only reference to Mr. Kern's authority was to state that he was confident it existed. Dkt. #4 at 1 (DBF 48 tr (11/22/17) 26:14-29:6 (Kern)). Mr. Kern had written authority from Mr. Harkey before he ever contacted Mr. Dubin, and he testified that he provided it to him. But if Mr. Dubin had any doubts, he could have merely asked Mr. Kern. He never did.

This refusal to account persisted even after ODC began its investigation of Mr. Kern's complaint. When ODC sent a letter on October 3, 2016 asking Mr. Dubin four specific questions, he refused to answer two of them, including one that asked for billing or accounting information. Dkt. #27 at 71 (PE D30). Such attorney actions violated Rule 8.4(g), which required Dubin to cooperate in ethics investigations. When he did provide an invoice, after this case had been petitioned, the reason for his previous reluctance became manifest: disclosure would have revealed his misappropriation and dubious, in fact false billing charges.

## **II. THERE WERE NO DUE PROCESS VIOLATIONS**

### **A. Conflicts of Interest**

This Court, of course, is the ultimate trier of fact and law in disciplinary matters, so the effect of alleged conflicts of interest at the hearing and Board level is unclear. Mr. Dubin asserts that the hearing officer and one member of the Board had conflicts of interest because they represented parties in unrelated appellate matters who were adverse to parties represented by Mr. Dubin. He alleges this gave rise to an appearance of impropriety, but it does not. There is no judicial analogy to these alleged conflicts since, once they take the bench, judges no longer represent clients. A judge therefore would never be in the position of adjudicating a case involving a lawyer who was representing an adversary to the judge's client in another matter. The closest analogy would be a lawyer, who had represented an adverse party while the judge was still practicing law, appearing before the judge. No one would claim that gave rise to an appearance of impropriety; it was the clients who had adverse interests, not their lawyers.

The conflict of interest rules for lawyers prevents them from representing a client directly adverse to another client or when there is a significant risk that the representation of one client will be materially limited by the lawyer's representation of another client. Rule 1.7(a). Representing a client, who may be adverse to one of Mr. Dubin's client in another matter, is not adverse to Mr. Dubin himself. It does not create a conflict for a lawyer serving as a third-party neutral. Rule 2.4, governing lawyers serving as third-party neutrals, does not impose additional conflict of interest restrictions other than those imposed by the general rules governing lawyers. Finding for or against Mr. Dubin does not in any way affect the interest of the neutral's other client.

Mr. Dubin did not raise his conflict of interest claims in timely fashion. Board Rule 21(a) requires a party to challenge a hearing officer in writing within ten days of appointment. This Court has held that an attorney must raise a timely motion for recusal or disqualification, and failure to do so is a waiver. Office of Disciplinary Counsel v. Au, 107 Hawai'i 327, 338, 113 P.3d 203, 214 (2005). "There can be no excuse for filing of the suggestion until after rulings are made in the matter, particularly where such rulings may be considered adverse to the movant." Id.

Roy F. Hughes was appointed hearing officer on April 18, 2017. Dkt. #2 at 112 (DBF 8). On May 15, 2017, at a prehearing conference, Mr. Hughes disclosed that he had represented on appeal a party whose opponent was represented by Mr. Dubin. A decision remanding that case for trial had been entered in October 2008, and the matter had been inactive since then—for more than eight years. Dkt. #9 at 1 (DBF 96) at 2. Mr. Dubin acknowledged that the proper procedure, if the hearing officer did not recuse, was to bring a motion to disqualify. Id. at 4. He never did, even though on May 23, 2017, Mr. Hughes wrote the parties reiterating that the case was inactive. Dkt. #9 at 42 (DBF 97) at 114.

At the oral argument before the Board, one Board member revealed that he represented a party in an active case on appeal, apparently where Mr. Dubin represented the opponent. Mr. Dubin declined to ask for recusal. Dkt. #9 at 370 (DBF 98) at 373.

Another Board member, Mr. Horovitz, also had an appellate case in which Mr. Dubin was opposing counsel. Mr. Dubin, of course, would have had personal knowledge of this. At the oral argument, Mr. Dubin acknowledged that he and Mr. Horovitz represented opposing parties, but that he did not have a problem with that. Dkt. #16 at 5 (DBF 124) at 8. After the Board Decision (Dkt. #12 at 1 (DBF 104), Mr. Dubin moved to disqualify the entire Board because of Mr. Horovitz's participation. Dkt. #13 at 147 (DBF 110). The Board reconvened, and Mr. Horovitz put on the record what had occurred, then recused himself and did not participate in issuing the final Report. Dkt. #16 at 5 (DBF 124) at 7-14. The Board then denied the motion to disqualify the hearing officer, because Mr. Dubin had waived the issue, and then denied the motion to disqualify the entire Board. Dkt. #1.

### **B. Other Claims**

1. There is nothing improper about the Hearing Officer's adoption of the ODC's proposed findings of fact. The Board Rules call for tight deadlines (Board Rule 23(a)), and the Hearing Officer's proposed findings were amply supported by the record. *See* L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc., 880 F.2d 219, 222, (9th Cir. 1989) (*citing* Unt v. Aerospace Corp., 765 F.2d 1440, 1444 (9th Cir. 1985)) Moreover, the Board conducted its own review, and this Court reviews the matter *de novo*.
2. Permitting Mr. Kern, a Nevada resident outside subpoena range, to testify by telephone is explicitly permitted by Board Rule 22(d). Mr. Dubin can point to no prejudice from testimony presented in this fashion.
3. Nor can Mr. Dubin point to any prejudice he suffered by the consolidation of four cases into one matter or by permitting two witnesses to testify out of order. These are routine procedural decisions committed to the tribunal's discretion. *See* Paul's Electrical Service, Inc. v. Befitel, 104 Hawai'i 412, 419, 91 P.3d 494, 501 (2004) (*citing* Booker v. Midpac Lumber Co., Ltd., 65 Haw. 166, 172, 649 P.2d 376, 380 (1982) "Discretion is a flexible concept: '[w]hen invoked as a guide to judicial

action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.”

4. The determination of the Hearing Officer to exclude Mr. Dubin’s proposed 25 character witnesses (Dkt. #2 at 256 (DBF 37) at 258) was clearly within his discretion. *Cf.* Hawai’i Rule of Evidence Rule 403. Mr. Dubin filed his witness list late and did not disclose required information about his witnesses. Dkt. #2 at 228 (DBF 29). However he never responded to ODC’s motion in limine.
5. The failure of Mr. Harkey and Mrs. Andia to testify also did not prejudice Mr. Dubin. Mr. Kern, not Mr. Harkey, was the complainant, and Mr. Dubin can point to no concrete evidence that Mr. Harkey might have offered that would have assisted him. Mr. Andia, not his wife, was the primary person who dealt with Mr. Dubin. Mr. Dubin can point to no evidence that Mrs. Andia might have offered that would have been exculpatory. Similarly, the anonymous “Joe Smith” who filed the complaint about Mr. Dubin’s false statements on a license application was not available to either party. There is no indication he could have offered any probative evidence where the only issue was Mr. Dubin’s failure to disclose truthful information on a written application.
6. The only “stale grievances” of which Mr. Dubin complains were the referrals from the ICA, which were not dependent on live testimony or subject to the frailty of fading memories. Here again, he can point to no prejudice.
7. There is no requirement that ODC meet with a respondent before it petitions a matter, although ODC clearly indicated its willingness to speak to Mr. Dubin about these complaints. See, e.g., Dkt. #27 at 98 (PE E3) (“If you need to contact me, please do not hesitate to call me at my direct number . . . .”). Rule 1.6 (b)(2) requires only that a respondent be “afforded the opportunity to state his or her position with respect to the allegations against him or her,” which clearly occurred.

Nor is there any requirement that ODC inform a respondent in its petition that it intends to seek disbarment, and Mr. Dubin can point to no prejudice that resulted from the absence of that information.

8. Mr. Dubin asserts that his California Public Reprimand, a form of discipline, stemming from his criminal conviction, (Dkt. #27 at 80 (PE E1)), should not have been considered because ODC guaranteed him it would not impose any reciprocal discipline. He offers no evidence to support this claim, but ODC did not seek reciprocal discipline based on the California discipline. Considering the California discipline as an aggravating factor in this proceeding is not the same as imposing reciprocal discipline. Mr. Dubin also says that his 2004 Informal Admonition, for failing to cooperate in an earlier ODC investigation, (Dkt. #27 at 92 (PE E2)), should not be considered because it was ordered expunged. He offers no proof of this claim either. In light of the litany of serious violations Mr. Dubin committed in these matters, however, including misappropriation of client funds and multiple acts of dishonesty, the absence of disciplinary history would make no difference to the sanction imposed.

### **III. MR. DUBIN SHOULD BE DISBARRED.**

The Hearing Officer thoroughly reviewed the ABA Standards for Imposing Lawyer Sanctions (2015). Dkt. #4 at 580 (DBF 71) at 628-643. The Board did so as well. Dkt. #1 at 1 (Disciplinary Board's Report And Recommendation) at 5 – 11. Both recommended disbarment. This Court gives deference to the Board's recommendation. Disciplinary Board v. Bergan, 60 Haw. 546, 554, 592 P.2d 814, 819 (1979). Respondent's Opening Brief does not address sanction, nor does it attempt to grapple with the analysis of the Hearing Officer and the Board in this regard. ODC sees no need to review that unchallenged analysis here.

The Court should also consider as an aggravating factor Mr. Dubin's conduct during these proceedings. See In re Yelverton, 105 A.3d 413 (D.C. 2014) (where attorney

sanctioned for pattern of repetitive frivolous filings); In re Cleaver-Bascombe, 892 A.2d 396, 412 (D.C. 2006) (false testimony at disciplinary hearing). To the extent that the purpose of sanction is to specifically deter Mr. Dubin from engaging in future misconduct and generally deter other members of the Bar, it is relevant to consider Mr. Dubin's failure to follow this Court's rules in these proceedings and his false testimony under oath at the disciplinary hearing. On multiple occasions, Mr. Dubin missed deadlines to file his brief without first seeking extensions. As a result, a brief due in late 2019 was not filed until May 2020. Not only did he delay these proceedings, but also, he afforded himself the opportunity to continue to practice law, thereby placing other clients at risk of enduring what the Andias and Mr. Harkey experienced. In addition, his blatant false testimony—particularly, but not limited to his claim that he never reviewed the DCCA application before he signed it and his claim that he doubted Mr. Kern's authority to ask for an accounting—evidence not only the complete absence of acceptance or responsibility, but also his willingness to continue to engage in dishonesty. It is entirely appropriate that the Court consider conduct that occurred before it in imposing sanction.

The Court should also consider in aggravation Mr. Dubin's threat to sue Mr. Andia for defamation if he testified at the hearing, a blatant example of witness intimidation, entirely inconsistent with the immunity afforded complainants in the disciplinary process by the rules of this Court. RSCH 2.8.

#### **IV. CONCLUSION**

With respect to ODC 16-0-151 (the licensing application), the Court should find that Mr. Dubin violated Rules 8.4(c) (pre-2014 version) (conduct involving dishonesty) and 8.4(a) (attempting to violate the Rules or assisting or inducing others to do so). With respect to ODC-16-0-213 (ICA complaint), the Court should find that Mr. Dubin violated Rules 1.1 (competency), 3.2 (failure to expedite litigation), 3.4(e) (knowingly disobeying an obligation under the rules of a tribunal), and 8.4(a). With respect to ODC 16-0-147 (Andia), the Court should find Mr. Dubin violated Rules 1.4(a)(3) (failure to keep clients

reasonably informed) in two instances, 8.4(c) (conduct involving dishonesty in two instances), 1.5(a) (charging an unreasonable fee), 1.5(b) (failure to communicate to client changes in rate of fee), and 8.4(a). With respect to 16-0-326 (Kern), the Court should find Mr. Dubin violated Rules 1.4(3) (failure to keep client reasonably informed), 1.4(a)(4) (failure to promptly comply with request for information), 1.15(a) (misappropriation), 1.15(d) (failure to provide accounting), 1.15(d) (failure to notify client of disbursement of funds), 8.4(g) (failure to cooperate in ethics investigation), and 8.4(a).

The Court should order that Respondent Gary V. Dubin be disbarred; that he make restitution of \$19,885, plus interest running from November 3, 2015, to Robert K. Andia and Carmelita A. Andia, to be paid within seven days of the entry of the Court's final order; and that he pay the costs of these proceedings to Disciplinary Counsel.

DATED: Washington, DC, July 9, 2020.

1S1 *Hamilton P. Fox*  
HAMILTON P. FOX, *pro hac vice*  
Special Asst. Disciplinary Counsel

DATED: Wailuku, Maui, HI, July 9, 2020



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MATTHEW S. KOHM  
Special Asst. Disciplinary Counsel

## APPENDICES

- A. Rules
- B. Andia Retainer Fee Page
- C. Kern Letter and Client Authorization
- D. ODC v. Kaiama (unpublished decision)



## RULES OF DISCIPLINARY BOARD

### Rule 21. ASSIGNMENT OF HEARING OFFICER OR HEARING COMMITTEE.

- (a) Conflict of Interest. The Filing Clerk shall ascertain any conflicts of interest from the prospective Hearing Officer or Hearing Committee members prior to their appointment. A party alleging a conflict of interest by a Hearing Officer or Hearing Committee shall submit a written request to the Filing Clerk for disqualification within 10 days of the appointment, with copy to the opposing party.

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### Rule 22. CONDUCT OF FORMAL DISCIPLINARY PROCEEDING.

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- (d) Conduct of Formal Hearing. The Hearing Officer or Hearing Committee shall receive evidence to resolve any factual issues. The Hawai'i Rules of Evidence do not apply. Only trustworthy evidence may be admitted in accordance with RSCH 2.7(c). The Hearing Officer or Hearing Committee must disregard any error or defect in the proceeding that does not affect a substantial right or result in a miscarriage of justice.

### Rule 23. HEARING OFFICER'S OR HEARING COMMITTEE'S REPORT TO THE BOARD.

- (a) Report; Contents; Due Date. The Hearing Officer's or Hearing Committee's report shall include:
  - (I) Findings of fact;
  - (ii) Conclusions of law;
  - (iii) Each ethical rule violated and constituting grounds for discipline;
  - (iv) Any aggravating and mitigating circumstances; and
  - (v) Recommended disposition.

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## HAWAII RULES OF PROFESSIONAL CONDUCT

### Rule 1.1. COMPETENCE.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

### Rule 1.4. COMMUNICATION.

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's consent after consultation, as defined in Rule 1.0(c), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information;
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law; and
  - (6) promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case which the lawyer receives.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### Rule 1.5. FEES.

- (a) Reasonableness of Fee. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;

- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent, and in contingency fee cases the risk of no recovery and the conscionability of the fee in light of the net recovery to the client.
- (b) Manner In Which Fees are Earned. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate, or if it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$250.00 or less. Any changes in the basis or the rates of the fee or expenses shall also be communicated to the client in writing. Fee payments received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account pursuant to Rule 1.15 of these Rules. Fee agreements may not describe any fee as non-refundable or earned upon receipt.

**Rule 1.15. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT OR THIRD PERSON.**

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, as a fiduciary. The lawyer shall not commingle such funds or property with his or her own or misappropriate such funds or property to his or her own use or benefit. Funds shall be kept in a separate account in Hawai'i in accordance with Rule 11 of the Rules of the Supreme Court of the State of Hawai'i, and Rule 4 of the Hawai'i Rules Governing Trust Accounting. Other tangible property owned by a client or third person shall be identified as such, appropriately safeguarded, and a record kept of the item's receipt and disbursement. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 6 years after the termination of the representation.
- (b) A lawyer may deposit into a trust account the lawyer's own funds reasonably sufficient to either pay bank charges or avoid paying bank charges on the account, or to cover unanticipated overages.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

- (d) Upon receiving or disbursing funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (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. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL.

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

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Rule 3.2. EXPEDITING LITIGATION.

A lawyer shall make reasonable efforts to expedite litigation consistent with the legitimate interests of the client.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not:

....

- (e) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

Rule 8.4. MISCONDUCT.

It is professional misconduct for a lawyer to:

- (a) attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Reserved;
- (e) state or imply an ability to influence improperly a government agency or official;  
or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) fail to cooperate during the course of an ethics investigation or disciplinary proceeding.

**SCAD-19-0000561**

**IN THE SUPREME COURT OF THE STATE OF HAWAII**

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**OFFICE OF DISCIPLINARY COUNSEL, Petitioner,**

**vs.**

**GARY VICTOR DUBIN, Respondent**

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ORIGINAL PROCEEDING  
(ODC #16-O-147, 16-O-151, 16-O-213, 16-O-326)

STATEMENT OF RELATED CASES

Counsel for Petitioner is unaware of any pending related cases to the matters before this Court herein.

DATED: Wailuku, Maui, Hawaii, July 9, 2020.



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MATTHEW S. KOHM  
HAMILTON P. FOX, *pro hac vice*  
Special Asst. Disciplinary Counsel



17. Termination. You may discharge us at any time, subject to court rules. We may withdraw with your consent or for good cause when required or permitted by professional and ethical rules of the Bar or the Courts. Good cause also includes any breach of this agreement by you, your refusal to cooperate with us, or your decision to disregard our advice on a material matter or any fact or circumstance that would render our continuing representation unlawful or unethical.
18. Termination Responsibilities. When our services are concluded, all unpaid charges will immediately become due and payable. After our services are concluded, we will, upon request, deliver your files to you, along with any funds or property of yours in our possession, upon reasonable notice to us in writing. It is however our policy to keep you fully informed by providing you with copies of all documents received and generated by us pertaining to your case; when our services are concluded therefore we will have no obligation to provide you with items or copies of items which have already been provided to you during the course of our representation unless you specifically request and you pay the additional expense.
19. Disclaimer Of Guaranty. Nothing in this agreement or in our statements to you will be construed as a promise or guaranty about the outcome of your matter. We can make no such promises or guaranties given the uncertainties of legal matters. Any comments by us about the outcome of your matter are comments of expressions of opinion only.
20. Effective Date. This agreement will take effect only when you have performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date we first performed services. Even if this agreement does not take effect, you will be obligated to pay us for the reasonable value of any services we may have nevertheless performed for you with your knowledge and consent in anticipation of our being retained by you.

Acknowledgement

I/We have carefully read and accept the terms of this 2012 Legal Services Agreement:



SIGNATURE(S) ABOVE

DATED: 02/17/12

PLEASE PRINT NAME(S) BELOW:

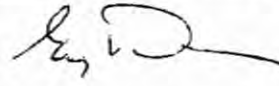
Robert King Andria  
Carmelita Andria

ADDRESS BELOW:

7113 Piilaa Place  
Honolulu, Hawaii  
96825

TELEPHONE, FAX, E-MAIL ADDRESS BELOW:

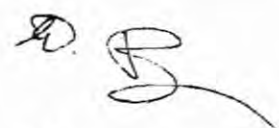
(808) 234 7257  
(808) 395 6111  
kinglaw@shawni.com

APPROVED BY: 

DATED: 2/17/12

Legal Services To Be Provided: FORECLOSURE DEFENSE

Agreed Minimum Retainer: [] fees \$ 15,000 [] costs \$ 1,500  
[ ] flat fee [ ] \$ 16,500

PAID 2/21/12 



# KERN LAW

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2421 TECH CENTER CT., SUITE 104  
LAS VEGAS, NEVADA 89128  
(702) 518-4529

OFFICE OF DISCIPLINARY COUNSEL  
**RECEIVED**

August 31, 2016

SEP - 2 2016

Hawai'i Bar Association  
Office of Disciplinary Counsel  
201 Merchant Street, Suite 1600  
Honolulu, Hawai'i 96813

TIME: 1:41pm BY uo  
Fed - ER

Re: *Complaint against Hawai'i Attorney Gary Dubin, JD# 3181*

To Whom it May Concern:

I am writing to file a complaint against Hawai'i attorney Gary Dubin on behalf of my clients, the Harkey Trust and Michael Eugene Harkey. The essential issue is that my client provided Mr. Dubin a retainer fee of \$45,000.00 for his work on a pro hac vice litigation (\$20,000.00 sent on January 25, 2016, \$25,000.00 sent on April 1, 2016). However before filing anything, and before my client signed a retainer agreement, Mr. Dubin withdrew as counsel due to personal conflicts on April 25, 2106. Months have passed, and despite many requests, Mr. Dubin has refused to give an accounting of the funds, or to return them.

After Mr. Dubin's withdrawal, my client requested an accounting and return of funds on multiple occasions to no avail. I was asked to seek the return of the funds beginning on May 25. I first contacted Mr. Dubin on May 31 to request an accounting (All emails attached). He indicated his staff would handle the matter within a week or so. On June 23, I contacted him again to ask for status, as I had expected the accounting long before. He did not respond. I wrote him again on June 30, and indicated that I would be forced to bring this matter to the ODC if he did not provide the accounting of the funds. He responded to say that he was in trial, and that he would complete it by the weekend (the weekend of July 2). On July 6, having heard nothing, I wrote again asking for status. He replied that he was still winding up his trial. I continued to wait. Over a month later, on August 9, I had still not heard from him and wrote again, indicating that if I did not have the accounting by the end of the week (August 12), I would be filing a complaint. Dubin replied with a threat (which he identified specifically as a threat) that he would provide damaging information if I filed a complaint with the ODC, and promised that he would get me the accounting by Monday (August 15). On August 16, he promised he had completed the accounting, but did not send it, promising it would be sent in a few days when he had accounting from a colleague. I provided one last demand to Dubin to provide his accounting, even if it does not include his colleague's accounting on August 23. He agreed to send his accounting alone, and to supplement when the other was received, promising it would be sent by end of day, later amended to the next day, August 24. On August 25, still having sent nothing, Dubin indicated that he had received his colleague's hours and would give the full accounting by August 26. Despite a reminder, he failed to provide anything

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August 26, nor the day after, nor over the weekend. Mr Dubin continues to have excuses, and I gave him the benefit of the doubt the first five or six times, but my client has been deprived of \$45,000.00 for five months waiting on a process that should take two hours or so. Mr. Dubin clearly either has no intention of providing the funds and accounting, or considers it such a low priority that he does not care about the impact to my client of wrongfully retaining his funds. It is now August 31, with still nothing provided by Dubin's office to justify any expenditures, and still no return of any of the \$45,000.00 he was provided for a pro hac vice representation in which he never even filed the pro hac vice application. At no time did Mr. Dubin claim that the funds were not owed back to my client, or that the funds were not received by Mr. Dubin, or that there was any legitimate basis to refuse to return funds, or to provide an accounting of the work he had done.

Although I thought it highly improper that a client need use an attorney to get an accounting and return of funds from his own attorney, I have been courteous and professional with Mr. Dubin from the beginning, however Mr. Dubin has repeatedly lied about providing the accounting, and with over four months passed since his withdrawal, it appears he has no intention of returning my client's funds. By failing to return these funds, he has significantly impacted my client's ability to hire new counsel in his litigation after Mr. Dubin's withdrawal.

The case is 2:14-cv-00177-RFB-GWF Harkey v. US Bank, N.A. et al. In the Federal district court, District of Nevada. Attached is the docket sheet of the case, showing no filings by Mr. Dubin, the proposed retainer agreement between my client and Mr. Dubin, which was never signed by my client before the withdrawal. Also note that the retainer agreement identifies that the first \$25,000.00 had been received at that time. All emails between myself and Mr. Dubin are attached, as well as the text message Mr. Dubin sent to my client, indicating that he was withdrawing because he did not like working with the trust administrator Wendy Nora. I stand ready to provide any additional evidence of information that your office requires for its determination.

As an attorney that cares about the integrity of my profession, I find it reprehensible that an attorney would refuse to return client funds without excuse.

Thank you for assistance in this matter.

Regards,



Robert Kern, Esq.  
KERN LAW, Ltd.

## AUTHORIZATION TO REPRESENT

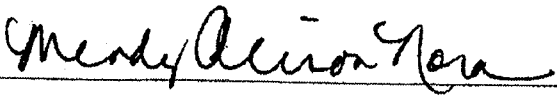
The undersigned hereby authorize Kern Law, Ltd., its employees and agents, including but not limited to Robert Kern, Esq., to represent the undersigned in all matters related to the issues listed below.

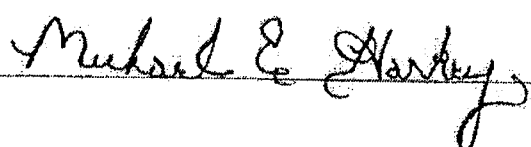
Any information that may be deemed privileged may be disclosed to Kern Law, Ltd. in the course of Kern Law's representation on the undersigned's behalf. Kern Law's contact information is: 2421 Tech Center Ct., Suite 104, Las Vegas, Nevada 89128; Telephone (702) 518-4529; Facsimile (702) 825-5872; Email Robert@KernLawOffices.com.

Client Name: the Harkey Operating Trust, as successor by transfer from Michael E. Harkey, of refunds of all attorney's fees paid prior to the registration of the Harkey Operating Trust with the Secretary of State for the State of Minnesota on May 2, 2016.

Scope of Representation: Representation of the Harkey Operating Trust in the recovery of up to \$45,000.00 in attorney's fees paid to Dubin Law Offices of Hawaii and California for services to be rendered on behalf of Michael E. Harkey: \$20,000.00 paid in December, 2015 or January, 2016 for representation of Michael E. Harkey in Adv. No. 15-01355 in the United States Bankruptcy Court for the Western District of Washington and \$25,000.00 acknowledged to have been received by Attorney Gary Dubin on April 1, 2016 for representation of Michael E. Harkey in *Harkey v. U.S. Bank, N.A. as Trustee for the CSMC Mortgage-Backed Trust 2007-6, et al.*, Case No. 2:14-cv-00177-RFB-GWF.

IMAGED COPIES OF THE SIGNATURES BELOW  
SHALL HAVE THE SAME FORCE AND EFFECT AS THE ORIGINALS

Date: May 28, 2016 Client Signature: 

Date: May 28 2016 Client Signature: 



2017 WL 1629365

Only the Westlaw citation is currently available.

Unpublished opinion. See HI  
R RAP Rule 35 before citing.

Supreme Court of Hawai'i.

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

v.

Dexter K. KAIAMA, Respondent.

SCAD-16-0000522

|  
May 1, 2017

ORIGINAL PROCEEDING (ODC 13-006-9076)

(By: [Recktenwald, C.J.](#), [Nakayama](#), [McKenna](#), [Pollack](#) and  
[Wilson, JJ.](#))

#### ORDER OF PUBLIC CENSURE

\*1 Upon examination of the July 18, 2016 report filed with this court by the Disciplinary Board of the Hawai'i Supreme Court, the exhibits appended to it, and the record as a whole, and upon full and careful consideration of the briefs in this matter submitted to this court by Respondent Dexter K. Kaiama and by the Office of Disciplinary Counsel, we conclude, by clear and convincing evidence, that the record supports the violations identified by the Disciplinary Board:<sup>1</sup> specifically, that, on July 13, 2012, by filing the Notice of Protest and its attachments in the Third Circuit litigation presided over by the Judge in question, Respondent Kaiama, with reckless disregard as to the truth or falsity of the allegation, accused the presiding Judge of committing war crimes under international Conventions, and thereby filed a frivolous document that served no legal or practical purpose, in violation of Rule 3.1 of the Hawai'i Rules of Professional Conduct (HRPC) (1994), harassed and embarrassed the Judge, in violation of HRPC Rule 3.5(b), engaged in conduct reasonably likely to disrupt the tribunal—and which did disrupt the tribunal—in violation of HRPC Rule 3.5(c), and made statements with reckless disregard as to their truth or falsity concerning the integrity of the Judge, in violation of HRPC Rule 8.2.

With regard to Respondent's arguments concerning the scope of permitted testimony at the disciplinary hearings, we note Respondent Kaiama had an opportunity to argue before the Hearing Officer for the admission of witness testimony, and was allowed to submit written evidence into the proceedings regarding the legal arguments which he asserted supported his accusations against the Judge. We therefore conclude the Hearing Officer's evidentiary rulings, made following the October 17, 2014 hearing, and the general conduct of the proceedings did not deny Respondent Kaiama's rights to due process. See [Bank of Hawaii v. Kunimoto](#), 91 Hawai'i 372, 388, 984 P.2d 1198, 1214 (1999).

We conclude that Respondent Kaiama's allegations are clearly false upon the evidence in the record, as Respondent Kaiama has not proffered any evidence the Judge in question has been convicted of war crimes by any court or tribunal.

We further conclude the Respondent's accusations were not opinion based upon fully-disclosed facts, but were mere allegations, based upon tenuous legal analysis of broad statutory provisions which do not survive analysis. We conclude Respondent Kaiama's allegations “ ‘imply a false assertion of fact’ ” which could “ ‘reasonably be interpreted as stating actual facts about their target’ ” which are not true, and the charge of war criminal does, by its plain language, charge the Judge with “ ‘commission of a criminal offense.’ ” See [Standing Comm. on Discipline of the U.S. Dist. Ct. v. Yagman](#), 55 F.3d 1430, 1438 (9th Cir. 1995) (quoting [Milkovich v. Lorain Journal Co.](#), 497 U.S. 1, 19 (1990)). In sum, in the words of the United States Court of Appeals for the Ninth Circuit, Respondent Kaiama's accusations “ ‘erode public confidence without serving to publicize problems that justifiably deserve attention,’ ” *id.* at 1438. As such, Respondent's allegations are not protected speech. Cf. [State ex. rel. Oklahoma Bar Ass'n v. Porter](#), 766 P.2d 958, 968 (1988). We further conclude these allegations were made with a reckless disregard to their truth or falsity, and were not assertions a reasonable attorney, considered in light of all his professional functions, would make in the same or similar circumstances. See [Yagman](#), 55 F.3d at 1440, [U.S. Dist. Ct. v. Sandlin](#), 12 F.3d 861, 866–67 (9th Cir. 1993); [In re Terry](#), 394 N.E.2d 94, 95–96 (Ind. 1994); [In re Comfort](#), 159 P.3d 1011, 1019–20, 1027 (Kan. 2007); [Kentucky Bar Ass'n v. Blum](#), 404 S.W.3d 841, 856 (Ky. 2013); [In re Cobb](#), 838 N.E.2d 1197, 1212 (Mass. 2005); [In re Petition for Disciplinary Action Against Nathan](#), 671 N.W.2d 578, 584–86 (Minn. 2013), [In re Coe](#), 903 S.W.2d 916, 917 (Mo. 1995); [Matter of Westfall](#), 808 S.W.2d 829, 837 (Mo. 1991);

*Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 429 (Ohio 2003); *Lawyer Disciplinary Bd. v. Hall*, 765 S.E.2d 187, 198 (W.Va. 2014).

\*2 We also emphasize Respondent Kaiama faces discipline for the allegations made in the Notice of Protest, not for his arguments in the underlying litigation that the court lacked jurisdiction because of the continued existence of the Kingdom of Hawai‘i, an argument which, if successful, could achieve an articulable objective for his client, *i.e.*, dismissal of the litigation. See *ODC v. Burgess*, No. 12608 (August 3, 1988) (drawing a similar distinction and imposing a public censure for Burgess's personal denial of the *de jure* legitimacy of the government of the State of Hawai‘i and its courts, in so doing repudiating his oath taken upon admission to the bar). By contrast, the allegations for which Respondent Kaiama faces discipline do not serve any discernible purpose within the underlying litigation and, hence, cannot be characterized as mere ‘zealous representation’ of the Respondent's clients. Nor do the allegations bear a rational relationship to any previous opinions of this or other courts of the State and, hence, are not good faith arguments for an extension of such precedent. Nor was the filing of the Notice justified for any other proper purpose: Respondent Kaiama does not offer any specific evidence, cite to any court rule or procedure of any other fora, or articulate any reasonable legal theory to support his assertion that filing the Notice of Protest was necessary to preserve the issue for review by another forum. In short, we conclude that the allegations serve no other purpose but to harass the presiding Judge by threatening him with dire consequences for his previous and subsequent rulings in the litigation.

#### Footnotes

- 1 We accept the Findings and Conclusions as amended by the Board, with two exceptions. Based upon the Hearing Officer's role as finder of fact, we accept Finding No. 12 as proposed by the Hearing Officer, and accept Finding 13, as amended to read “It was never Respondent's intent to be disruptive.” Nevertheless, insofar as we join other jurisdictions in applying an objective test regarding such conduct, and conclude Respondent Kaiama, at a minimum, leveled his accusations with a reckless disregard to their truth or falsity, we conclude the record supports the violations of the Hawai‘i Rules of Professional Conduct identified by the Board.

Respondent Kaiama's conduct warrants suspension, absent mitigating circumstances. See American Bar Association *Standards for Imposing Lawyer Sanctions* (2000), Standards 6.22 and 6.32; *ODC v. Ng*, SCAD–12–414 (March 1, 2013); *ODC v. Shea*, SCAD–11–777 (May 1, 2012); see also *ODC v. Cook*, No. 28300 (March 6, 2007); *Gardner*, 793 N.E.2d at 424, *Sandlin*, 12 F.3d at 862–63, 867; Cf. *Westfall*, 808 S.W.2d at 838.

We find, in aggravation, that Respondent Kaiama has substantial experience in the practice of law while, in mitigation, we find Respondent Kaiama has a clean disciplinary record, his conduct was absent a dishonest or selfish motive, and he was fully cooperative with the disciplinary proceedings. Therefore, in light of the mitigating factors, which outweigh those in aggravation,

IT IS HEREBY ORDERED that Respondent Kaiama is publicly censured for his misconduct. Respondent Kaiama is, however, cautioned that further such conduct may result in a period of suspension.

IT IS FINALLY ORDERED that Respondent Kaiama shall bear the costs of the disciplinary proceedings upon the approval of a timely-submitted verified bill of costs from the Office of Disciplinary Counsel.

#### All Citations

Not Reported in Pac. Rptr., 2017 WL 1629365

SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

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OFFICE OF DISCIPLINARY COUNSEL, *Petitioner*,

vs.

GARY VICTOR DUBIN, *Respondent*

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ORIGINAL PROCEEDING  
(ODC #16-O-147, 16-O-151, 16-O-213, 16-O-326)

STATEMENT OF RELATED CASES

Counsel for Petitioner is unaware of any pending related cases to the matters before this Court herein.

DATED: Wailuku, Maui, Hawaii, June 13, 2020.



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MATTHEW S. KOHM  
HAMILTON P. FOX, *pro hac vice*  
Special Asst. Disciplinary Counsel

SCAD-19-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAII

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OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

GARY VICTOR DUBIN, Respondent

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ORIGINAL PROCEEDING  
(ODC #16-O-147, 16-O-151, 16-O-213, 16-O-326)

CERTIFICATE OF SERVICE

1. PETITIONER OFFICE OF DISCIPLINARY COUNSEL'S AMENDED ANSWERING BRIEF

I hereby certify that a true and correct copy of the above listed documents were duly served on those individuals or entities identified on the below service list, as indicated by either (1) JEFS/JIMS electronic filing, (2) by personal service, or by (3) U.S. First Class mail, postage prepaid.

DATED: Wailuku, Maui, Hawaii, July 9, 2020.



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MATTHEW S. KOHM

**SERVICE LIST:**

***By JEFS/JIMS electronic filing:***

John Waihee, III ([jwaihee@dubinlaw.net](mailto:jwaihee@dubinlaw.net))

Gary V. Dubin ([gdubin@dubinlaw.net](mailto:gdubin@dubinlaw.net))

Philip H. Lowenthal ([phl@maui.net](mailto:phl@maui.net))