

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Amendment  
of the  
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

ORDER AMENDING RULE 2 OF THE SUPREME COURT  
OF THE STATE OF HAWAI'I

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

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IT IS HEREBY ORDERED that Rule 2 of the Rules of the Supreme Court of the State of Hawai'i, is amended, effective January 1, 2008 as follows (deleted material is bracketed and stricken; new material is underscored):

**2.2. Grounds for discipline.**

(a) The Hawai'i Rules of Professional Conduct, attached hereto as Exhibit A, [~~amended by this court~~] shall govern the conduct of all attorneys subject to discipline under this rule.

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**2.3. Types of discipline.**

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(b) Where a respondent has, with the written concurrence of the Director of the Attorneys and Judges Assistance Program, proposed a program of monitoring of the respondent's efforts toward rehabilitation from "substance abuse" (as that term is defined in Rule 16.1(a) of [~~this court~~] these rules), [~~this court~~] the supreme court or the Board may impose such a monitoring program. The monitoring program, which shall in all cases be supervised by the Director of the Attorneys and Judges Assistance Program, may be in lieu of or in addition to a disciplinary sanction. The duration and conditions of monitoring shall be stated in the final order issued by [~~this court~~] the supreme court or the Board. Violation of any conditions shall result in the imposition of disciplinary sanctions, but only to the extent set forth in the order establishing the monitoring program.

(c) Restitution and/or payment of costs (exclusive of attorney's fees) may also be ordered by [~~this court~~] the supreme court or by the Board. Counsel shall file its verified bill of costs within 60 days after imposition of discipline.

(d) As a condition of reinstatement following suspension or disbarment or as a condition in connection with the imposition of any lesser discipline, the Disciplinary Board or [~~this court~~] the supreme court may require a respondent, at the respondent's expense, to successfully complete (i) the bar examination or

some portion of it, (ii) seminars or classes in particular subjects of the law, (iii) a program specifically designated by the Board or ~~[this court]~~ the supreme court to meet some deficiency in the attorney's understanding of the law or the practice of it, (iv) a practice management audit, and/or (v) a trust account audit. In addition, the Disciplinary Board or ~~[this court]~~ the supreme court may order the return to the client of all unearned fees or funds and unused deposits against future costs. The Board may consult with the Hawai'i State Bar or others to find or develop such seminars, classes, and programs.

## 2.4 Disciplinary board.

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(e) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Disciplinary Rules, including the power and duty:

\* \* \*

(2) To appoint a Chief Disciplinary Counsel and such Assistant Disciplinary Counsel and staff of employees and/or volunteers as may from time to time be required to properly perform the functions hereinafter prescribed. The Chief Disciplinary Counsel and Assistants ~~[Disciplinary Counsel]~~ are hereinafter referred to as "Counsel."

(3) To appoint Special Assistant Disciplinary Counsel when Chief Disciplinary Counsel and all full time Assistant Disciplinary Counsel are disqualified.

~~[(3)]~~4) To appoint from time to time, and establish the terms of office of, an appropriate number of persons to serve as hearing committee members and officers.

~~[(4)]~~5) To approve assignments made annually by the Chairperson for rotation of members of the Board to review for stated periods all recommended dispositions by Counsel and to authorize changes in such assignments from time to time necessitated by unforeseen circumstances.

~~[(5)]~~6) To adopt rules of procedure governing the Board and hearing committees and officers which are not inconsistent with these rules.

~~[(6)]~~7) To adopt and publish advisory opinions interpreting the Hawai'i Rules of Professional Conduct.

~~[(7)]~~8)(i) To develop an annual budget for operating the Office of Disciplinary Counsel and performing the functions of the Board, to develop appropriate financial policies for managing of all funds received by the Board, and to propose an annual fee;

(ii) to submit, no later than September 15 each year, the developed budget, financial policies, and fee structure to the Hawai'i State Bar to allow an opportunity for meaningful review, analysis, input, and comment by the Hawai'i State Bar prior to submission to the supreme court;

(iii) to receive written comments, if any, from the Hawai'i State Bar regarding the budget, financial policies, and fee structure;

(iv) to reply in a timely fashion in writing to any written comments from the Hawai'i State Bar regarding section (iii), provided the comments were received no later than October 15; and

(v) to submit, no later than November 1 each year, the budget, financial policies, and annual fee along with any and all written comments received from

the Hawai'i State Bar, and any replies thereto, to the supreme court for its review and approval.

([8]9) To receive from the Bar all funds collected by the Bar for the Board, and to have exclusive control and responsibility over all financial transactions; and to develop and maintain appropriate accounting records showing the receipt and disposition of those funds, which records shall be subject to audit as directed by the supreme court.

## 2.7. Procedure.

\* \* \*

**(a) Investigation.** All investigations, whether upon complaint or otherwise, shall be conducted under the supervision of Counsel. Each investigation shall be confined to the facts of the grievance and matters reasonably related thereto that could be violations of the Hawai'i Rules of Professional Conduct or other Rules of the Supreme Court that regulate the practice of law. Upon motion, an attorney subject to an investigation may seek protective orders in the first instance from the Board and, if denied, then, within 10 days thereafter from the supreme court. Upon the conclusion of an investigation, Counsel shall recommend dismissal, informal admonition of the attorney concerned, the institution of non-disciplinary proceedings for minor misconduct, or the institution of formal disciplinary proceedings before a hearing committee or officer. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that purpose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of Counsel's recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

### **(b) Minor misconduct.**

\* \* \*

(3) Subject to the provisions of Rule 2.7(a), Counsel shall, in Counsel's sole discretion, exclusively determine whether a matter constitutes minor misconduct. In that event, Counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, or any other non-disciplinary proceedings authorized by the supreme court. Counsel shall then refer the matter to the agency or agencies authorized by ~~[the court]~~ the supreme court to conduct the proceedings.

\* \* \*

**(c) Formal Hearing.** Formal disciplinary proceedings shall be instituted by Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent in accordance with Rule 2.11(a). Notwithstanding Rule 2.22, if at the time the petition is served, the respondent is engaged in the act of the practice of law as a part of a firm, partnership, corporation or governmental entity or other group,

Counsel shall provide a notice to the respondent's employer of the fact that formal disciplinary proceedings have been filed with the Board. The respondent shall serve his or her answer upon Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Board Chairperson. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairperson to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect. Following the service of the answer or upon failure to answer, the matter shall, unless the provisions of (e) below apply, be assigned by the Chairperson to a hearing committee or officer. The hearing committee or officer receiving the assignment shall serve a notice of hearing upon Counsel and the respondent, or the respondent's counsel, stating the date, time, and place of the hearing. At every hearing wherein factual issues are to be resolved, the respondent shall have a full opportunity to confront and cross-examine such witnesses presented by Counsel and to present evidence on his or her own behalf. The hearing committee or officer shall, in every case, submit a report containing findings and recommendations, together with a record of the proceedings, to the Board within 30 days after the conclusion of the hearing unless such time is extended by the Board Chairperson for no more than 30 days for good cause shown. The findings of the hearing committee or officer shall be supported by clear and convincing evidence. The hearing committee or officer shall not be bound by the formal rules of evidence, but shall admit only trustworthy evidence. The hearing committee or officer shall not rely upon any evidence outside the formal record in reaching a decision.

**(d) Review by Board and Supreme Court.** Upon receipt of a report from a hearing committee or officer, the Board will not entertain briefs or oral argument except: (1) within the Board Chairperson's discretion upon application of Counsel or the respondent (submitted within 10 days after service of the report of the hearing committee or officer); or (2) upon a vote of a majority of the Board. If such application is granted or vote occurs, the Board Chairperson shall set the dates for submission of briefs and for any oral argument before the Board. After reviewing the report of the hearing committee or officer, the ~~b~~Board shall promptly either affirm or modify the [recommendation] report of the hearing committee or officer, remand the matter for further proceedings before the hearing committee or officer, or dismiss the petition with the consent of Counsel, provided that no such consent shall be required where the hearing committee or officer recommended dismissal of the petition. In the event the Board determines that the proceedings shall be concluded by informal admonition or private or public reprimand, such admonition or reprimand shall be imposed in accordance with procedures established by the Board.

Unless the Board ~~[shall]~~ dismisses the petition with any required consent of Counsel, remands the petition, or concludes the matter by informal admonition or private or public reprimand, the Board shall promptly submit a report containing its findings and recommendations, together with the entire record, to the supreme court. After the filing of such report, a copy thereof shall be served on the parties in accordance with Rule 2.11(b). ~~[The court]~~ The supreme court will not entertain briefs or oral argument except: (1) within its discretion upon application of the respondent or Counsel (submitted within 10 days after service of the Board's report); or (2) upon request of ~~[the court]~~ the

supreme court. If such application is granted or request is made, [~~the court~~] the supreme court shall set the dates for submission of briefs and for any oral argument before [~~the court~~] the supreme court. In its discretion, [~~the court~~] the supreme court may in all disciplinary cases issue and publish written opinions or by per curiam order adopt and publish the findings and conclusions contained in the written report of the Board.

**(e) Elimination or suspension of hearing proceedings.** All proceedings before the hearing committee or officer shall be eliminated or suspended (1) where the respondent has filed no answer (and the charges have thus been deemed admitted) because, after due and diligent effort by Counsel, the respondent cannot be located for personal service and does not receive registered or certified mail at any of his or her addresses last known to Counsel; or (2) where Counsel and the respondent at any time subsequent to the filing of a petition file with the Board a stipulation setting forth an admission by the respondent of the facts deemed relevant to a determination of the matter, the disciplinary violations which serve as grounds for discipline, and an agreement as to the recommended form of discipline which should be imposed upon the respondent based upon the admitted violations. The entire record in the case shall thereupon be transmitted directly to the Board for review in accordance with (c) above. The parties may request that the record be supplemented by documentary exhibits. In any event, the Board may accept a request by the parties that the submission of briefs and/or oral argument before the Board be waived. In the case of a stipulation filed by the parties, neither the Board nor the supreme court shall be bound to accept the parties' stipulated factual and legal agreements or recommended disposition, and the Board or [~~the court~~] the supreme court may either decide the matter based upon the factual admissions set forth in the parties' stipulation or may remand the matter for further proceedings before a hearing committee as outlined in (b) above.

#### **2.11 Service.**

**(a)** Service upon the respondent of the petition or order to show cause in any disciplinary disability, or trustee proceeding shall be made by personal service by any person authorized by the Board Chairperson ~~of the Board~~, except that in the event the respondent cannot be found within the state or has departed therefrom, service shall be made by registered or certified mail at the respondent's address shown in his or her registration statement filed pursuant to Rule 17(d) or other last known address.

\* \* \*

#### **2.12. Power to subpoena respondents and witnesses; pretrial proceedings.**

Any member of a hearing committee or any hearing officer, in matters before it or them, and Counsel, in matters under investigation by him or her, may administer oaths and affirmations, and compel by subpoena the attendance of the respondent and witnesses and the production of pertinent books, papers and documents. A respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents before a hearing committee or officer after formal disciplinary proceedings are instituted. Writs

of subpoena shall be issued in blank by the clerk of ~~[this court]~~ the supreme court upon application by any member of a hearing committee or any hearing officer, Counsel or the respondent. ~~[This court]~~ The supreme court may, upon proper application pursuant to HRAP Rule 27, enforce the attendance and testimony of the respondent and may, as set forth in Rule 2.12A, immediately suspend the respondent from the practice of law for the failure to comply with any lawful demand of ~~[this court]~~ the supreme court, a hearing committee or officer, or Counsel made in connection with any investigation, hearing, or disciplinary proceeding. Upon application pursuant to HRAP Rule 27, ~~[this court]~~ the supreme court may also enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in criminal cases in the circuit courts.

There shall be no discovery proceedings except upon the order of the Board Chairperson ~~[of the Board]~~ for good cause shown.

At the discretion of the hearing committee or officer, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the officer or the chairperson of the committee or any member of the committee designated by its chairperson.

#### **2.12A. Failure to cooperate.**

(a) An attorney who is the subject of an investigation by Counsel, or who is the subject of a disciplinary proceeding pending before a hearing committee or officer, the Disciplinary Board, or ~~[this court]~~ the supreme court, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of a failure to cooperate with the investigation or disciplinary proceeding. Such a finding shall be based upon the attorney's default in responding to the petition or notice filed by Counsel, or the attorney's failure to submit a written response to pending allegations of professional misconduct, or to comply with any lawful demand of ~~[this court]~~ the supreme court, the hearing committees, hearing officers, or Counsel made in connection with any investigation, hearing, or disciplinary proceeding, including failure to comply with a subpoena issued under Rule 2.12.

(b) Upon the filing with ~~[this court]~~ the supreme court of a petition approved by the Board Chairperson or his or her designee on the Board, an order shall be issued directing the attorney to appear within ten days of the service of the order, and inform ~~[the court]~~ the supreme court as to why the attorney should not be immediately suspended. Service upon the attorney shall be made pursuant to Rule 2.11(a). The suspension shall be made upon ~~[this court's]~~ the supreme court's finding that the attorney has failed to cooperate, as outlined in (a) above. ~~[The court]~~ The supreme court shall briefly state its reasons for its order of suspension, which shall be effective immediately and until such time as the disciplinary proceedings before the Disciplinary Board have been concluded, and until further order of ~~[this court]~~ the supreme court.

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**2.13. Attorneys convicted of crimes.**

- (a) Upon learning an attorney has been found guilty of a crime that:
- (1) is a felony;
  - (2) would have been a felony if committed in Hawai'i, or
  - (3) involves dishonesty or false statement,

Counsel shall obtain proof of the finding of guilt and file it with the Board and with the clerk of [~~this court~~] the supreme court. For purposes of this rule, a finding of guilt is a verdict or judgment of guilty, a guilty plea, or a no contest plea. Deferred acceptance of a plea, a sentence suspension, or a conditional discharge does not change the definition of guilt for purposes of this rule.

(b) When proof of a finding of guilt is filed with [~~this court~~] the supreme court, [~~this court~~] the supreme court shall, unless the interests of justice indicate otherwise, enter an order immediately restraining the attorney from the practice of law, pending final disposition of a disciplinary proceeding based on the finding of guilt.

(c) [~~This court~~] The supreme court may set aside such order restraining the attorney from the practice of law in the interest of justice and for good cause shown. An order restraining an attorney from the practice of law shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless [~~this court~~] the supreme court so orders.

(d) When proof of a finding of guilt is filed with [~~this court~~] the supreme court, [~~this court~~] the supreme court shall refer the matter to the Board for institution of a formal proceeding in which the sole issue to be determined shall be the discipline to be imposed. Such a disciplinary proceeding shall not be brought to hearing until the conviction is final, unless the respondent requests that the proceeding continue. For purposes of this rule, a conviction is deemed final when:

\* \* \*

(f) If a lawyer suspended solely under the provisions of paragraph (b) demonstrates to [~~this court~~] the supreme court that the underlying finding of guilt has been reversed or vacated, the order for interim suspension shall be vacated and, upon payment of all required registration fees, the lawyer may be placed on active status. Vacation of the interim suspension will not automatically prohibit or terminate any formal proceeding against the lawyer and disposition of any formal proceeding against the lawyer must be on the basis of the available evidence other than the finding of guilt.

**2.14. Resignation in lieu of discipline or disbarment by consent of attorneys under disciplinary investigation or prosecution.**

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of grounds for his or her discipline may resign in lieu of discipline or consent to disbarment, but only by delivering to the Board Chairperson an affidavit stating that he or she desires to resign in lieu of discipline or consent to disbarment and that:

\* \* \*

(b) Upon receipt of the required affidavit, the Board shall file with [~~this court~~] the supreme court and [~~this court~~] the supreme court shall enter an order granting the request to resign in lieu of discipline or disbarment the attorney on consent.

(c) The order granting the request to resign in lieu of discipline or disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of ~~[this court]~~ the supreme court or as otherwise allowed by these rules.

\* \* \*

#### **2.15. Reciprocal Action.**

(a) An attorney who has, in any other jurisdiction:

\* \* \*

(4) been placed on interim suspension due to misconduct, incapacity, incompetence, or disability; shall notify Counsel promptly of the foreign action. Upon notification of the foreign action, Counsel shall obtain a certified copy of the order and file it with ~~[this court]~~ the supreme court.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this state has been the subject of a foreign action as set out in (a), ~~[this court]~~ the supreme court shall forthwith issue a notice directed to the attorney containing: (1) a copy of the order from the other jurisdiction; and (2) an order directing that the attorney inform ~~[the court]~~ the supreme court, within 30 days from service of the notice, of any claim by the attorney that an equivalent or substantially equivalent order in this state would be unwarranted and the reasons therefor.

(c) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, ~~[this court]~~ the supreme court shall enter an order imposing the same or substantially equivalent discipline, or restrictions or conditions upon the attorney's license to practice law in this jurisdiction, unless Counsel or the attorney demonstrates, or it clearly appears upon the face of the other jurisdiction's record, that:

(1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) there was such an infirmity of proof establishing the factual basis for the discipline, or restrictions or conditions as to give rise to the clear conviction that ~~[the court]~~ the supreme court could not, consistent with its duty, accept as final the other jurisdiction's conclusion on that subject; or

(3) the reason for the other jurisdiction's discipline, or restrictions or conditions no longer exist; or

(4) the conduct established warrants substantially different discipline, or restrictions or conditions in this state. Where ~~[this court]~~ the supreme court determines that any of said elements exist, ~~[this court]~~ the supreme court shall enter such other order as it deems appropriate.

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#### **2.16. Disbarred or suspended attorneys.**

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(b) A disbarred or suspended attorney shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, each of his or her clients who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his or her disbarment or suspension and consequent inability to act as an attorney after the effective date of his or her disbarment or suspension.

The notice to be given to the client shall advise the client of the desirability of the prompt substitution of another attorney or attorneys in his or her place.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended attorney to move in [~~the court~~] the supreme court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

\* \* \*

(d) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with [~~this court~~] the supreme court an affidavit showing: (1) that he or she has fully complied with these rules and with the portions of the order requiring completion before the effective date of the order; (2) all other state, federal and administrative jurisdictions to which he or she is admitted to practice; and (3) that he or she has served a copy of such affidavit upon Counsel. Such affidavit shall also set forth the residence or other address of the disbarred or suspended attorney where communications may thereafter be directed to him or her.

\* \* \*

#### 2.17. Reinstatement.

(a) No suspended or disbarred attorney may resume practice until reinstated by order of [~~this court~~] the supreme court except as provided in Rule 17(d).

(b) An attorney who has been disbarred may not apply for reinstatement until the expiration of at least five years after the effective date of the disbarment and shall not be reinstated unless he or she can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements imposed by [~~the court~~] the supreme court, which may include successful completion of requirements for passing the bar examination.

An attorney suspended from practice for one year or less who has complied with the suspension order and has paid all required fees shall be reinstated by order of [~~the court~~] the supreme court at the end of the period of suspension by filing with [~~the court~~] the supreme court and serving upon Counsel an affidavit to that effect. An attorney suspended from practice for more than one year may not apply for reinstatement until the expiration of at least one-half of the period of suspension. An attorney suspended from practice for more than one year shall not be reinstated unless he or she can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements imposed by [~~the court~~] the supreme court, which may include the successful completion of requirements for passing the bar examination.

\* \* \*

(c) Petitions for reinstatement by a disbarred or suspended attorney shall be filed with the Board and served upon Counsel. Upon receipt of the petition,

the Board shall, following a reasonable investigation by counsel of the attorney's fitness for reinstatement, refer the petition to a hearing committee or officer. The hearing committee or officer shall promptly schedule a hearing. Within 30 days after [At] the conclusion of the hearing, the hearing committee or officer shall [promptly] submit to the Board a report containing its findings and recommendations, together with the record of the proceedings before it unless such time is extended by the Board Chairperson for no more than 30 days for good cause shown. The Board shall review the report of the hearing committee or officer and the record and shall either: (1) submit a report containing its findings and recommendations, together with the record, to [this court] the supreme court, which shall promptly enter an appropriate order, or (2) remand the matter for further proceedings before the hearing committee or officer.

(d) [This court] The supreme court shall direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the [petitioner] attorney seeking reinstatement.

**2.19. Proceedings where an attorney is declared to be incompetent or is alleged to be incapacitated.**

(a) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, [this court] the supreme court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of [this court] the supreme court. A copy of such order shall be served upon such attorney, his or her guardian, and/or the director of the institution to which he or she has been committed in such manner as [this court] the supreme court may direct.

(b) Whenever the Board shall petition [this court] the supreme court to determine whether an attorney is incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants, [this court] the supreme court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as [this court] the supreme court shall designate. If, upon due consideration of the matter, [this court] the supreme court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status on the ground of such disability for an indefinite period and until the further order of [this court] the supreme court.

[This court] The supreme court shall provide for such notice to the respondent attorney of proceedings in the manner as it deems proper and advisable and shall appoint an attorney to represent the respondent if he or she is without adequate representation.

(c) If, during the course of a disciplinary proceeding, the respondent contends that he or she is suffering from a disability by reason of mental or physical infirmity or illness, or because of the use of drugs or intoxicants, which makes it impossible for the respondent to defend himself or herself adequately, [this court] the supreme court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of (b) above.

If ~~[this court]~~ the supreme court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

\* \* \*

(f) No attorney transferred to inactive status under the provisions of this rule may resume active status until reinstated by order of ~~[this court]~~ the supreme court. Any attorney transferred to inactive status under the provisions of this rule shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as ~~[this court]~~ the supreme court may direct in the order transferring the respondent to inactive status or any modification thereof. Such application shall be granted by ~~[this court]~~ the supreme court upon a showing that the attorney's disability has been removed and he or she is fit to resume the practice of law. Upon such application, ~~[this court]~~ the supreme court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as ~~[this court]~~ the supreme court shall designate. In its discretion, ~~[this court]~~ the supreme court may direct that the expense of such an examination shall be paid by the attorney.

Where an attorney has been transferred to inactive status by an order in accordance with the provisions of (a) above, and, thereafter, in proceedings duly taken, he or she has been judicially declared to be competent, ~~[this court]~~ the supreme court may dispense with further evidence that his or her disability has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(g) The filing of an application for reinstatement to active status by an attorney transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of his or her disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since his or her transfer to inactive status and he or she shall furnish to ~~[this court]~~ the supreme court written consent to each to divulge such information and records as requested by court-appointed medical experts.

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## **2.20. Trustee proceedings.**

(a) **Grounds for appointment of trustee.** Whenever an attorney has been transferred to inactive status because of incapacity or disability, or disappears or dies, or has been suspended or disbarred and has not complied with Rule 2.16, or there is other good cause exhibiting an attorney's inability to protect the interests of the attorney's clients, and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, ~~[this court]~~ the supreme court, upon proper proof of the fact, shall appoint an attorney as trustee to inventory the files of the inactive, disappeared, deceased, suspended, or disbarred attorney and to take such action as seems indicated to protect the interests of that attorney's clients.

When appointment of a trustee is warranted, Counsel shall file with the supreme court a motion for appointment of an attorney to serve as trustee. Trustees ~~shall~~ may receive ~~no~~ compensation for their services, ~~but~~ and may be reimbursed for traveling and other expenses incidental to the performance of their duties.

**(b) Confidentiality.** A trustee shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates, except as necessary to carry out ~~[this Court's]~~ the supreme court's order appointing the attorney to make such inventory and cooperate in investigations by Counsel or the Lawyers' Fund for Client Protection (Fund).

**(c) Duties of trustees.**

\* \* \*

(2) A trustee appointed under this rule may:

\* \* \*

(ii) take possession of any trust and other bank accounts found or known to exist, determine amounts therein and amounts due the clients for whom the accounts are held, and seek orders from ~~[this court]~~ the supreme court for disbursement of amounts due to the clients;

\* \* \*

(vi) take such further action as ~~[this court]~~ the supreme court directs.

\* \* \*

**(e)** Upon appointment of a trustee, the attorney whose files are the subject of the trusteeship may, by order of ~~[the court]~~ the supreme court, be suspended from the practice of law in this state until the trusteeship is completed and may be required to pay to the Board all costs ordered and incurred, together with interest at the Hawai'i statutory judgment rate.

**2.22. Confidentiality.**

**(a) General rule.** The files, records and proceedings of the Board, the hearing committees or officers, and Counsel, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

(1) As between Counsel, the committees or officers, the Board and ~~[the court]~~ the supreme court in the furtherance of their duties;

\* \* \*

(4) Where permitted by ~~[this court]~~ the supreme court;

\* \* \*

~~[(7) Where this court enters an order transferring the respondent to inactive status pursuant to Rule 2.19; or]~~

~~[(8)](7)~~ Where 90 days have passed since the service on a respondent of a Petition for discipline, unless such time is extended by the Board Chairperson for no more than 45 days for good cause shown.

(8) Where reinstatement proceedings are initiated pursuant to RSCH 2.17(c).

\* \* \*

**(d)** An affidavit resigning in lieu of discipline or consenting to disbarment submitted pursuant to Rule 2.14 shall be submitted to the hearing

committee or officer, to the Board, and to ~~[this court]~~ the supreme court at any time that the attorney applies for reinstatement. Such affidavit shall also be supplied to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice.

\* \* \*

(f) Except as ordered by ~~[this court]~~ the supreme court, or as otherwise provided by these rules, the files, records and proceedings filed with ~~[this court]~~ the supreme court by the Board, by Counsel or by a respondent, as well as any oral argument held before ~~[the court]~~ the supreme court in connection with any disciplinary proceedings, are not confidential, except that in RSCCH 2.19 proceedings, a final order transferring an attorney to inactive status shall be a matter of public record, but otherwise, the record of the proceedings shall not be publicly disclosed.

(g) In addition, the Board shall transmit notice of all public discipline imposed by ~~[this court]~~ the supreme court, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

### 2.23. Interim suspension.

(a) ~~[If at any time during the pendency of an investigation or a disciplinary proceeding, it appears that the continuation of an attorney's authority to practice law is causing or is likely to cause serious harm to the public, Counsel may request the Chairperson of the Board to appoint three Board members to serve on a committee whose function will be as follows:]~~ Upon receipt of sufficient evidence demonstrating that an attorney has committed a violation of the Hawai'i Rules of Professional Conduct and poses a substantial threat of serious harm to the public, Counsel may:

(i) transmit the evidence to the supreme court; and

(ii) contemporaneously make a reasonable attempt to provide the attorney with notice, which may include notice by telephone, that a request for immediate interim suspension has been transmitted to the supreme court.

~~[(1) The committee will issue an Order to Show Cause to the respondent directing him or her to appear before the committee within five days of the service of the Order to Show Cause upon the respondent. At the hearing on the Order to Show Cause, Counsel shall present evidence and/or witnesses to the committee to substantiate his or her allegations that the respondent's continued privilege of practicing law during the pendency of the disciplinary proceedings is causing or is likely to cause serious harm to the public. The respondent shall have the right to appear at the hearing and to present evidence and/or witnesses opposed to the Order to Show Cause.]~~

~~[(2) After conducting the hearing, if the committee concludes that respondent's authority to practice law during the pending disciplinary proceedings is causing or is likely to cause serious harm to the public, the committee shall enter its findings and direct Counsel to file a petition with this court requesting that respondent's license to practice law be immediately suspended pending the outcome of the disciplinary proceedings.]~~

~~[(3) Upon the filing of such a petition with this court, this court shall immediately enter an order directing the respondent attorney to show cause why~~

he or she should not be placed on an interim suspension. If no good cause is shown, the court shall enter an order of interim suspension which shall remain in full force and effect until further order of the court.]

(b) Upon examination of the evidence transmitted to the supreme court by Counsel and of rebuttal evidence, if any, that the attorney has transmitted to the supreme court prior to the supreme court's ruling, the supreme court may enter an order immediately suspending the attorney, pending final disposition of disciplinary proceedings predicated upon the conduct of causing the harm, or may order such other action as it deems appropriate.

(c) On notice to Counsel, an attorney suspended pursuant to (b) may move for dissolution or modification of the order of suspension, and in that event, the motion shall be heard and determined as expeditiously as justice requires.

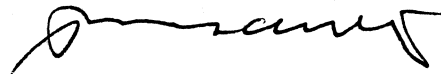
(bd) An order imposing an interim suspension on an attorney under this rule shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless [this court] the supreme court shall otherwise order.

DATED: Honolulu, Hawai'i, November 23, 2007.



Steven H. Levinson

Puna C. Nakayama



James E. Duffly, Jr.