

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Publication
of the
Rules of the Disciplinary Board of the Hawaii Supreme Court

AMENDED¹

ORDER AUTHORIZING PUBLICATION OF THE RULES OF THE
DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT

(By: Moon, C.J., Nakayama, Acoba, and Duffy, JJ., and
Intermediate Court of Appeals Chief Judge Recktenwald,
assigned by reason of vacancy)

IT IS HEREBY ORDERED that the Rules of the Disciplinary Board of the Hawaii Supreme Court, were amended April 24, 2008 and adopted in accordance with Rule 2.4(e)(6) of the Rules of the Supreme Court of the State of Hawaii, as attached hereto, shall be published in their entirety as Exhibit A-2 to the Rules of the Supreme Court of the State of Hawaii, effective nunc pro tunc, July 1, 2008.

DATED: Honolulu, Hawaii, January 22, 2009.

¹ The original order filed on January 12, 2009 inadvertently cited Rule 2.4(e)(5) of the Rules of the Supreme Court of the State of Hawaii. This amended order corrects the cited rule to Rule 2.4(e)(6) of the Rules of the Supreme Court of the State of Hawaii and the effective date to nunc pro tunc, July 1, 2008.

EXHIBIT A-2
RULES OF THE
DISCIPLINARY BOARD

Appended by Order of December 6, 2007

As Amended April 24, 2008

The Judiciary
State of Hawai i

RULES OF THE DISCIPLINARY BOARD

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I. TITLE; PURPOSE; DEFINITIONS

Rule 1. Title; Citation.

These rules shall be known as the "Disciplinary Board Rules." Particular rules shall be cited as "DBR."

Rule 2. Purpose.

These rules of the Disciplinary Board of the Hawai i Supreme Court are promulgated pursuant to Rule of the Supreme Court of the State of Hawai i ("RSCH") 2.4(e)(6). RSCH 2.1 through 2.24 apply to all proceedings before the Board.

Rule 3. Definitions.

(a) **"Alleged Misconduct"** means grounds for discipline that are under consideration, investigation, review, or that have been made the subject of a formal disciplinary proceeding.

(b) **"Attorney"** includes any person admitted to practice law in this State or specially admitted by a court in this State for a particular proceeding, but does not include a full-time judge, except as provided by RSCH 8.2(c).

(c) **"Board"** means the Disciplinary Board of the Hawai i Supreme Court, which has the power and duty to investigate ethical Complaints and Attorney incapacity; supervise the Office of Disciplinary Counsel ("ODC"); adopt and publish advisory opinions; and act as a reviewing body in which formal disciplinary action is taken. In matters before the Board, if a sanction is a Private Informal Admonition, a Private Reprimand or a Public Reprimand, the Board makes the final determination with the consent of the Respondent and the ODC; and if the recommendation is for Suspension or Disbarment, the Board submits its recommendation to the Supreme Court.

(d) **"Complaint"** is a Grievance involving an Attorney that falls within the jurisdiction of the Attorney discipline system.

(e) **"Complainant"** is a person who has expressed dissatisfaction with an Attorney to the ODC.

(f) **"Conclusion of a Hearing"** occurs when all of the evidence has been submitted. If post-hearing pleadings have been ordered or authorized, then the hearing is concluded when the last authorized pleading is filed.

(g) **"Conclusion of an Investigation"** occurs when Counsel has submitted a recommendation to a Reviewing Board Member for the disposition of a matter that has been under investigation.

(h) **"Counsel"** means the Chief Disciplinary Counsel, Deputy Chief Disciplinary Counsel and Assistant Disciplinary Counsel appointed pursuant to RSCH 2.4(e)(2) or Special Assistant Disciplinary Counsel pursuant to RSCH 2.4(e)(3).

(i) **"Disability Proceeding"** means an investigation or proceeding before the Board or the Supreme Court pursuant to RSCH 2.19 or DBR 31.

(j) **"Disbarment"** means the termination of a person's status as an Attorney authorized to practice law in Hawai i.

(k) **"Filing"** is accomplished when a document is stamped by the Filing Clerk "Received by the Disciplinary Board", together with a date and time.

(l) **"Filing Clerk"** is a clerk designated by the Board, who is authorized to accept and file documents.

(m) **"Formal Hearing"** is a hearing where a Petition for Discipline is adjudicated by a Hearing Officer or Hearing Committee and a recommendation is made to the Board.

(n) **"Formal Disciplinary Proceeding"** is the process commencing with the Filing of a Petition for Discipline with the Board.

(o) **"Grievance"** means any expression of dissatisfaction with an Attorney that is submitted to or initiated by the ODC.

(p) **"Hearing Committee"** means a three-person panel, one of whom may be a layperson, appointed by the Board Chairperson to preside over a Formal Disciplinary Proceeding.

(q) **"Hearing Officer"** means an Attorney appointed by the Board Chairperson to preside over a Formal Disciplinary Proceeding.

(r) **"Minor Misconduct"** is a violation of the Hawai i Rules of Professional Conduct of a minor nature, resolved by way of non-disciplinary proceedings or dismissal pursuant to RSCH 2.7(b).

(s) **"ODC"** is the entity established by the Supreme Court of the State of Hawai i with the power and duty to investigate, prosecute, dispose of, and make recommendations concerning Attorney disciplinary matters.

(t) **"Party/Parties"** mean the ODC and the Respondent.

(u) "**Petition for Discipline**" is a pleading filed with the Board specifying formal charges of violations of the Hawai i Rules of Professional Conduct.

(v) "**Petitioner**" is the ODC.

(w) "**Private Informal Admonition**" is the least severe form of discipline imposed by Counsel or the Board. It declares specified conduct of an Attorney unethical, but does not limit the Attorney's ability to practice law. When imposed it is non-public; however, it may become public as a circumstance in aggravation in any subsequent Formal Disciplinary Proceeding.

(x) "**Private Order of Discipline**" is a written order that memorializes the imposition of the sanction of Private Reprimand.

(y) "**Private Reprimand**" is a form of discipline imposed by the Board that declares specified conduct of the Attorney unethical, but does not limit the Attorney's ability to practice law. When imposed it is not public; however, it may become public as a circumstance in aggravation in any subsequent Formal Disciplinary Proceeding.

(z) "**Public Censure**" is a form of Public Discipline imposed solely by the Hawai i Supreme Court pursuant to RSCH 2.3(a)(3) that declares the conduct of the Attorney unethical, but does not limit the Attorney's ability to practice law.

(aa) "**Public Discipline**" includes Public Reprimand, Public Censure, Suspension, and Disbarment.

(bb) "**Public Reprimand**" is a form of Public Discipline imposed by the Board that declares the conduct of the Attorney unethical, but does not limit the Attorney's ability to practice law.

(cc) "**Record of Formal Disciplinary Proceeding**" shall consist of the Board file, which includes all materials commencing with the Petition for Discipline, all hearing transcript(s), and all exhibits.

(dd) "**Respondent**" includes any Attorney against whom a Grievance or Complaint has been made or who is the subject of an investigation by the ODC.

(ee) "**Reviewing Board Member**" is a Board member assigned to review Investigative Files and make a determination pursuant to DBR 16.

(ff) "**Suspension**" is the removal of an Attorney from the practice of law for a period of time not to exceed five years.

II. BOARD ORGANIZATION

Rule 4. Officers; Duties.

(a) **Chairperson.** The Chairperson shall preside over Board meetings and coordinate and supervise the administration of RSCH 2. The Chairperson approves the filing and dismissal of all petitions and Supreme Court motions and performs all duties imposed by the RSCH and DBR.

(b) **Vice Chairperson.** The Vice Chairperson shall assist the Chairperson and perform all duties and functions of the Chairperson in the latter's absence, disqualification, or disability.

(c) **Secretary.** The Secretary shall prepare minutes for each Board meeting, and shall certify the index to the Record of Formal Disciplinary Proceedings. In the case of the absence, disqualification, or disability of the Chairperson and Vice Chairperson, the Secretary shall perform all duties and functions of the Chairperson.

(d) **Treasurer.** The Treasurer shall oversee the Board's budget and monies. In the case of the absence, disqualification, or disability of the Chairperson, Vice Chairperson, and Secretary, the Treasurer shall perform all duties and functions of the Chairperson.

Rule 5. Meetings; Quorum.

(a) **Upon Call of Chairperson.** Meetings shall be at the call of the Chairperson at least once each quarter. In the absence of the Chairperson, the Vice Chairperson shall call the meeting.

(b) **Upon Call of Members.** Upon the call of five Board members, a special meeting shall be held.

(c) **Quorum.** Seven Board members shall constitute a quorum; the Board shall act only with the concurrence of seven or more of its members.

Rule 6. Organizational Meeting; Elections.

(a) Organizational Meeting. The Board shall hold an annual organizational meeting following the Supreme Court's appointment of Board members at such time and place as the incumbent Chairperson shall specify. At the organizational meeting, the Board shall elect a Chairperson, a Vice Chairperson, a Secretary, and a Treasurer to serve until the next organizational meeting.

(b) Elections. The election of officers shall be by members present, in person or by telephone, and shall be by secret ballot and *seriatim* in order of Chairperson, Vice Chairperson, Secretary, and Treasurer. The Chairperson shall first call for nominations by secret ballot for Chairperson. After all nominees have been proposed, the Chairperson shall declare the nominations closed. The Chairperson shall select two inspectors of election, who are not nominees. The Office Administrator or designee of the ODC will act as tally clerk. The Chairperson shall recess the meeting while votes are cast and collected for tallying. When the vote is complete, the Chairperson shall call the meeting to order and announce the results. If no candidate has a majority of votes cast, and two or more persons are nominated for the office, the process shall repeat for the two persons with the highest number of votes for the office. Each office will be filled based upon a simple majority of the votes.

Rule 7. Fiscal Responsibilities; Outside Services.

(a) Fiscal Responsibilities. Withdrawals of monies of the Board shall require the signatures of two of the following: Chairperson, Vice Chairperson, Secretary, Treasurer, and Chief Disciplinary Counsel.

(b) Outside Services. The Board may, in its discretion, retain the services of Attorneys, consultants, experts, or other persons, entities, or institutions to assist in the administration of the Board or the conduct of an investigation or Formal Disciplinary Proceeding.

Rule 8. Committees.

(a) Executive Committee. The Executive Committee shall include the Chairperson, Vice Chairperson, Secretary, Treasurer, and such other

Board members as may be appointed by the Chairperson.

(i) The Executive Committee shall make recommendations to the Board concerning the custody of the monies and other assets of the Board, investment of the monies of the Board, and the maintenance of appropriate financial records. The Executive Committee shall provide the Board with quarterly financial statements and a proposed annual budget.

(ii) The Executive Committee may make recommendations to the Board concerning personnel matters, prospective Board members, and the establishment of Board member criteria. The Executive Committee also shall undertake all matters delegated to it by the Board.

(iii) Members of the Executive Committee whose terms as Board members are expiring and who wish to be reappointed to the Board shall recuse themselves from making any recommendation to the Board of prospective Board members.

(b) Opinion Committee. The Opinion Committee shall formulate advisory formal opinions interpreting the Hawaii Rules of Professional Conduct for adoption by the Board. A member of the Opinion Committee shall also approve all informal written opinions by the ODC.

(c) Rules Committee. The Rules Committee shall formulate all rule changes for adoption by the Board or for recommendation by the Board to the Supreme Court.

(d) Ad Hoc Committees. The Board Chairperson may appoint ad hoc committees.

III. ABSTENTION, RECUSAL, DISQUALIFICATION, AND GRIEVANCES AGAINST COUNSEL, BOARD MEMBERS, HEARING OFFICERS, OR HEARING COMMITTEE MEMBERS

Rule 9. Abstention; Recusal.

(a) By Counsel. If Counsel determines that the ODC should abstain from a particular matter, Counsel shall inform the Board Chairperson, who shall appoint Special Assistant Disciplinary Counsel to discharge the powers and duties of Counsel.

Rule 9

RULES OF THE DISCIPLINARY BOARD

(b) By Board Members. If a Board member determines that he or she should abstain from a particular matter, the Board member shall inform the Board Chairperson.

(c) By Hearing Officers or Hearing Committee Members. If a Hearing Officer or a Hearing Committee member determines that he or she should abstain from a particular matter, he or she shall inform the Board Chairperson.

Rule 10. Disqualification.

(a) Of Counsel. If a Respondent submits a written request to disqualify Counsel, the matter shall be decided by the Board Chairperson, after Counsel has had an opportunity to respond.

(i) The Board Chairperson shall decide whether to grant or deny the request. The Board Chairperson's decision shall be communicated to the Parties without further Board action.

(ii) If Counsel is disqualified, the Board Chairperson shall appoint Special Assistant Disciplinary Counsel to discharge the powers and duties of Counsel in the particular matter.

(b) Of Board Members. If a Respondent submits a written request or orally moves to disqualify a Board Member, the matter shall be decided by the Board Chairperson, after Counsel has had an opportunity to respond.

(i) The Board Chairperson shall decide whether to grant or deny the request. The Board Chairperson's decision shall be communicated to the Parties without further Board action.

(ii) Ad hoc members may be appointed to the Board pursuant to RSCH 2.4 (c).

(iii) A Board member shall not represent a Respondent in the investigation of a Grievance or Complaint or in any investigation or proceeding before any Hearing Officer, Hearing Committee, or the Board while serving or within a one-year period after the conclusion of his or her term. A former Board member shall not accept representation of a Respondent in any matter that was pending with the ODC while said member was serving.

(c) Of Hearing Officers or Hearing Committee Members.

(i) No person representing a Respondent in any investigation or proceeding shall be appointed as a Hearing Officer or as a Hearing Committee member.

(ii) If, after a person has been appointed as a Hearing Officer or as a Hearing Committee member, that person undertakes representation of a Respondent, that person shall be disqualified from further service as a Hearing Officer or as a Hearing Committee member and shall be replaced.

(iii) A Hearing Officer or a Hearing Committee member shall not represent a Respondent in the investigation of a Grievance or Complaint or in any investigation or proceeding before any Hearing Officer, Hearing Committee, or the Board within a one-year period after the conclusion of his or her term as a Hearing Officer or Hearing Committee Member, or accept representation of a Respondent that involves any pending matters of which he or she has personal knowledge that was obtained during such term.

Rule 11. Grievances.

(a) Against Counsel or Attorney Board Members. Grievances alleging a violation of the Hawaii Rules of Professional Conduct against Attorney members of the Board or Counsel shall be handled as follows:

(i) The original Grievance shall be immediately forwarded to the Board Chairperson for initial review and analysis.

(ii) If a Grievance is filed against the Board Chairperson, the reviewer shall be the Vice Chairperson and, upon the absence, disability, or disqualification of the Vice Chairperson, the Secretary shall undertake the duties of the Chairperson described above.

(iii) If the reviewer determines that: (A) a Grievance falls outside the jurisdiction of the Board pursuant to RSCH 2; (B) sufficient information is not contained in a Grievance to allow a meaningful investigation; or (C) a finding of an ethical violation and the imposition of discipline is not likely to occur, the reviewer shall notify the Complainant that no investigation will be undertaken.

(iv) If the reviewer determines that: (A) a Grievance falls within the jurisdiction of the Board pursuant to RSCH 2; (B) sufficient information is contained in a Grievance to allow a meaningful investigation; or (C) a finding of an ethical violation and the imposition of discipline may occur, the reviewer shall appoint an Attorney member from the list of Hearing Officers or

Hearing Committee members to serve as a Special Assistant Disciplinary Counsel to conduct the investigation.

(v) In investigating the Complaint, the Special Assistant Disciplinary Counsel shall request written and oral input from the Complainant and the Respondent as necessary. The Special Assistant Disciplinary Counsel may not use the services of attorneys, paralegals, or investigators employed by the ODC to investigate the matter.

(vi) Based on information acquired during the investigation, the Special Assistant Disciplinary Counsel shall prepare and forward to the reviewer a summation of the file and a recommended disposition of the matter in the format required by DBR 16.

(vii) The reviewer shall affirm or modify the recommendation of the Special Assistant Disciplinary Counsel or remand the matter to the Special Assistant Disciplinary Counsel for further investigation.

(viii) If the reviewer dismisses the matter, the Complainant and the Respondent shall be notified.

(ix) If the reviewer's decision is that a Private Informal Admonition should be imposed, the reviewer shall impose the Private Informal Admonition in accordance with DBR 25.

(x) If the reviewer decides that a Formal Disciplinary Proceeding should be commenced, the Special Assistant Disciplinary Counsel shall present the case pursuant to RSCH 2.7 (c), (d), and (e).

(xi) Upon final completion of the investigation or proceeding, all files in the case shall be forwarded to the ODC, which shall maintain a permanent record of the matter in accordance with DBR 33.

(b) Against Hearing Officers or Hearing Committee Members. Grievances against Hearing Officers or Hearing Committee members shall be handled in accordance with the DBR Rules contained in Section IV below.

**IV. INVESTIGATION;
RECOMMENDATION BY COUNSEL**

Rule 12. Commencement; Scope of Investigation; Time Limits; Protective Order.

(a) Duty of Counsel to Investigate. Counsel has a duty to investigate all matters involving alleged violations of the Hawai i Rules of Professional Conduct in accordance with RSCH 2.6(b)(2) and 2.6(b)(3).

(b) Scope of Investigation. Counsel shall investigate to elicit factual information relevant to any misconduct alleged or reasonably indicated by the circumstances.

(c) Motion for Protective Order.

(i) If a Respondent disputes the information sought, he or she may file a motion for protective order with the Board Chairperson through the Filing Clerk. A copy shall be served upon Counsel, and Counsel shall have an opportunity to respond. The Board shall decide the motion on the written submissions within 30 days. In his or her discretion, the Board Chairperson may hold oral argument on the motion.

(ii) If the motion for protective order is denied, a Respondent may file a motion for protective order with the Hawai i Supreme Court. A copy shall be served upon Counsel, and Counsel shall have an opportunity to respond.

(d) Time Limits.

(i) Counsel shall complete its investigation within two years from either the date the Grievance was received by the ODC, or if no Grievance was received, within two years of the date the ODC initiated its investigation.

(ii) Within 90 days from the date an initial response is received or due from a Respondent, a grievance shall be docketed or dismissed.

(iii) For good cause, including without limitation delay caused by a Respondent, the Board Chairperson may extend the time limits to complete an investigation and docket or dismiss a grievance. If an extension is granted, the Board Chairperson shall notify the Respondent.

(e) Failure to Meet Time Limits. Failure of the ODC to meet the time frames provided for in these rules is not a ground for the dismissal of any matter.

(f) Failure to Cooperate. If a subpoena is

issued due to an attorney's failure to cooperate, the minimum sanction is an Informal Admonition in the absence of substantial mitigating circumstances showing a lack of fault on the attorney's part.

Rule 13. Docketing Standard for Complaints.

Counsel shall docket a Grievance as a Complaint if Counsel determines that a finding of an ethical violation and the imposition of discipline are likely to occur assuming the facts to be true and no other credible information contradicts those facts.

Rule 14. Notification to Respondent.

After a Complaint has been docketed and before the Conclusion of an Investigation, Counsel shall notify the Respondent in accordance with RSCH 2.11(b) by communication marked "CONFIDENTIAL" and afford the Respondent an opportunity to respond.

Rule 15. Notice to Respondent of Third Person Subpoenas.

If Counsel causes a subpoena to be issued to a third person for the production of documents, Counsel shall serve a copy of the subpoena upon the Respondent in the manner provided by RSCH 2.11(b) not later than two full business days before the time specified in the subpoena for compliance therewith.

Rule 16. Conclusion of Investigation.

(a) Preparation and Submission of Investigative File. Upon the Conclusion of an Investigation, Counsel shall forward or present the following to a Reviewing Board Member:

- (i) Counsel's summation of the file;
- (ii) Relevant portions of the file, including substantive communications received from the Respondent in response to the notice given under DBR 14; and
- (iii) Counsel's recommendation as to the disposition of the matter by any of the following based on clear and convincing evidence:
 - " Dismiss the matter;
 - " Dismiss with a letter of caution, with or without violation;
 - " Minor Misconduct;
 - " Impose a Private Informal Admonition; or
 - " Institute a Formal Disciplinary Proceeding

(b) Deadline for Reviewing Board Member's Review of Investigative File. The Reviewing Board Member shall review and respond to an Investigative File within seven days of receiving the file.

(i) The Reviewing Board Member shall return the file within seven days regardless of whether the review has been completed. If the Reviewing Board Member fails to return the file to Counsel within the prescribed time, Counsel shall contact him or her to determine the status of the review of the file.

(ii) If the Reviewing Board Member retains the file and fails to complete his or her review within an additional seven days after Counsel's inquiry, Counsel shall notify the Board Chairperson.

(c) Non-Disclosure of Identity of Reviewing Board Member. The name of the Reviewing Board Member shall not be disclosed.

(d) Non-Disclosure of Counsel's Recommendation. Counsel shall not reveal his or her recommendation to the Complainant or the Respondent.

Rule 17. When Counsel's Recommendation Is Approved.

If the Reviewing Board Member approves Counsel's recommendation, then it shall be implemented, and the Respondent and the Complainant shall be notified.

Rule 18. When Counsel's Recommendation Is Disapproved.

If the Reviewing Board Member disapproves Counsel's recommendation, he or she shall return the file to Counsel with his or her decision. Counsel shall then have ten days from the date of receipt of the decision in which to request a review by a second Reviewing Board Member. Counsel may forward the file to the second Reviewing Board Member, who shall review it in accordance with DBR 16(b).

A decision is final when Counsel does not timely request a second review or when a second Reviewing Board Member makes a decision.

In a case where Counsel has determined that Minor Misconduct applies, RSCH 2.7(b) shall control.

V. FORMAL DISCIPLINARY PROCEEDING

Rule 19. Institution of Formal Disciplinary Proceeding.

A Formal Disciplinary Proceeding shall be instituted as follows:

(a) when a Formal Disciplinary Proceeding is approved or ordered by a Reviewing Board Member;

(b) when a Respondent rejects Counsel's imposition of a Private Informal Admonition and demands a Formal Hearing pursuant to DBR 25(b)(i); or

(c) as provided by RSCH 2.13 (Attorneys Convicted of Crimes).

Rule 20. Initiation of Formal Disciplinary Proceeding.

(a) **Petition for Discipline; Notice.** A Formal Disciplinary Proceeding shall be commenced by Counsel's Filing of a Petition for Discipline with the Filing Clerk after review and approval by the Board Chairperson. The Petition for Discipline shall name the ODC as the Petitioner and shall be sufficiently clear and specific to inform the Respondent of the alleged ethical violations.

Counsel shall attach a notice to the Petition for Discipline stating the name and address of Counsel and notifying the Respondent to file a written answer with the Filing Clerk within 20 days after service and to serve a copy upon Counsel.

(b) **Service; Notification.** Counsel shall serve a copy of the Petition for Discipline upon the Respondent as provided by RSCH 2.11(a) and shall notify the Respondent's employer, where applicable, as required by RSCH 2.7(c).

Counsel also shall notify the Complainant that a Petition for Discipline has been filed; however, no copy of the Petition for Discipline shall be provided to the Complainant.

(c) **Answer; Admission for Failing to Answer.** Every defense, in law or fact, may be asserted in the answer, including circumstances in mitigation. Allegations in the Petition for Discipline are admitted if not denied in the answer or if no answer is filed.

If the Respondent fails to answer, the Record of Formal Disciplinary Proceeding shall be transmitted directly to a Hearing Officer or

Hearing Committee for review and disposition in accordance with RSCH 2.7(c).

(d) **Amended Petition for Discipline; Service; Time to Answer.** Counsel may amend a Petition for Discipline to add additional allegations at any time with approval from a Reviewing Board Member. Service and the allowable time for answering an amended Petition for Discipline shall be the same as for an original Petition for Discipline.

(e) **Pleadings.** Only pleadings or motions ordered by a Hearing Officer, a Hearing Committee chairperson, or expressly permitted by the RSCH or these rules may be filed by the Parties.

(f) **Stipulation.** If Counsel and the Respondent file a stipulation with the Board setting forth facts relevant to a determination of the matter, the disciplinary violations that serve as grounds for discipline, and an agreement as to the recommended form of discipline, the Record of Formal Disciplinary Proceeding shall be transmitted directly to the Board for review and disposition in accordance with RSCH 2.7(e). The proceedings before any Hearing Officer or Hearing Committee appointed prior to the Filing of the stipulation shall be suspended pending the Board's decision.

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. The Parties shall have the opportunity to raise alleged conflicts at the initial prehearing conference.

(b) **Request for Three-Person Hearing Committee by Counsel or Respondent.** For good cause, Counsel or the Respondent may request a three-person Hearing Committee. A written request must be submitted to the Board Chairperson within 14 days following service of the Respondent's answer. The Board Chairperson shall decide the request, and the Filing Clerk shall notify the Parties of the decision.

(c) **Assignment.** The Board Chairperson shall assign the matter to a Hearing Officer, or if a request for three-person hearing committee has been granted, to a Hearing Committee and notify the Filing Clerk of the assignment.

(d) Notification. The Filing Clerk shall notify Counsel and the Respondent of the names and contact information of the Hearing Officer or Hearing Committee. The Filing Clerk shall also transmit copies of the Petition for Discipline and answer to the Hearing Officer or Hearing Committee.

(e) Request for Three-Person Hearing Committee by Hearing Officer. Upon review of the Petition for Discipline and answer, for good cause, the Hearing Officer may request appointment of a three-person Hearing Committee. A written request must be submitted to the Board Chairperson within 14 days following the Hearing Officer's appointment. The Board Chairperson shall decide the request, and the Filing Clerk will notify the Hearing Officer of the decision.

Rule 22. Conduct of Formal Disciplinary Proceeding.

(a) Prehearing Conference. The Hearing Officer or Hearing Committee chairperson shall hold a prehearing conference as authorized by RSCH 2.12 no later than 30 days after appointment, unless extended by the Board Chairperson for good cause. Where the matter has been assigned to a Hearing Committee, the chairperson or a designated member may conduct the prehearing conference without all members present.

(i) The purposes of the conference are to: address alleged conflicts; expedite matters; narrow contested issues; establish deadlines to exchange exhibit and witness lists; explore possible stipulations; discuss proposed submissions of any discovery requests to the Board Chairperson; discuss requests for permission to file motions; and to set the hearing date.

(ii) Following the conclusion of a prehearing conference, a prehearing conference order shall be issued.

(b) Discovery Requests. No discovery may be initiated by a Respondent until the matter is addressed at the prehearing conference.

(i) All requests for discovery shall be made in writing to the Board Chairperson through the Hearing Officer or the Hearing Committee. A Party making the request shall provide a copy of the request to the opposing Party at the same time it is submitted to the Hearing Officer or Hearing

Committee. The Board Chairperson may order discovery for good cause.

(ii) In the event a deposition upon oral examination is permitted, it may be recorded by any means agreed upon by the Parties, and in the absence of agreement, as ordered by the Board Chairperson under DBR 22(b).

(c) Formal Hearing Date; Notice. The Hearing Officer or the Hearing Committee chairperson shall set the date, time, and place of the Formal Hearing and provide at least 14 days' notice to Counsel and the Respondent. The Formal Hearing shall be concluded no later than seven months following the final appointment of a Hearing Officer or a Hearing Committee unless extended by the Board Chairperson for good cause. The report of the Hearing Officer or Hearing Committee must be filed within 30 days following the Conclusion of the Formal Hearing as required by RSCH 2.7(c).

(d) Conduct of Formal Hearing. The Hearing Officer or Hearing Committee shall receive evidence to resolve any factual issues. The Hawaii 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.

The Respondent may appear with or without an Attorney. Witnesses may testify by telephone, unless the Hearing Officer or Hearing Committee chairperson determines otherwise for good cause.

(e) Record of Formal Disciplinary Proceeding. Each Hearing Officer or Hearing Committee shall record and preserve in writing, on tape, or by the use of such other device as appropriate, the proceedings and evidence in the Formal Disciplinary Proceeding. In designating the manner of recording and preserving the proceeding, the Hearing Officer or Hearing Committee may include any provision to assure that the record will be accurate and trustworthy. Each Formal Hearing shall be transcribed, and the original of each transcript shall be filed as part of the Record of Formal Disciplinary Proceeding.

(f) Post Formal Disciplinary Hearing Proceeding. Parties may be ordered by the Hearing Officer or Hearing Committee to file briefs or

memoranda and to submit proposed findings of fact, conclusions of law, and recommendations pertaining to discipline. Copies shall be filed with the Filing Clerk and served upon the Hearing Officer or Hearing Committee.

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) An aggravating and mitigating circumstances; and
- (v) Recommended disposition.

The report must be submitted to the Board within 30 days following the Conclusion of the Hearing and shall be accompanied by the Record of Formal Disciplinary Proceeding. Upon receipt of the report, the Board Chairperson shall schedule the matter for the next available Board meeting.

(b) Service of the Report; Notice. The Filing Clerk shall serve a copy of the report upon Counsel and the Respondent in accordance with RSCH 2.11(b). Counsel shall notify the Complainant that a report has been filed with the Board; however, no copy of the report shall be provided to the Complainant.

(c) Requests for Briefing or Oral Arguments. Either Party may request permission to submit briefs or to present oral argument to the Board. Such a request must be made in writing to the Board Chairperson within ten days after service of the Hearing Officer's or Hearing Committee's report in accordance with RSCH 2.7(d).

(d) Failure to Observe Deadlines. If a report is not submitted timely, Counsel shall immediately notify the Board Chairperson, who shall take appropriate action, including but not limited to the following:

- (i) Set a final deadline for the Hearing Officer or the Hearing Committee to comply;
- (ii) Reassign the responsibility to prepare the Hearing Committee's report to another member of the Hearing Committee;

(iii) Appoint a substitute Hearing Officer or substitute Hearing Committee members and remand the case for further proceedings as appropriate; or

(iv) Take such other action deemed necessary to procure the timely submission of the Hearing Officer's or Hearing Committee's report.

VI. BOARD REVIEW AND DISCIPLINARY SANCTIONS

Rule 24. Board Disposition of Formal Disciplinary Proceeding.

(a) Briefs; Oral Argument. If briefs or oral arguments are requested by the Board or any Party, the Chairperson shall issue an order setting forth the dates by which briefs are due and oral argument is scheduled. The Filing Clerk shall notify the Parties of the order.

(i) If no briefs are submitted or no oral argument is requested, then the Board Chairperson shall issue an order setting the deliberation date. The Filing Clerk shall notify the Parties of the order.

(ii) If neither Party timely requests submission of briefs or oral argument, the Board may order submission of briefs or oral argument by a majority vote pursuant to RSCH 2.7(d).

(iii) Oral arguments shall be recorded and preserved in writing, on tape, or by the use of such other device as appropriate. Oral arguments shall be transcribed, and the original of each transcript shall be filed as part of the Record of Formal Disciplinary Proceeding.

(iv) The Board Chairperson may set time limits for oral arguments.

(b) Closed Deliberations. Only Board members shall be present during the deliberations.

(c) Review Standards.

(i) **FINDINGS OF FACT.** Findings of fact, including circumstances in mitigation and circumstances in aggravation, are subject to the "clearly erroneous" standard of review.

(ii) **CONCLUSIONS OF LAW.** Conclusions of law are subject to the "right/wrong" standard of review.

(iii) **MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW.** Mixed findings of fact and conclusions of law are subject to the "clearly erroneous" standard of review.

(iv) *DE NOVO* REVIEW OF RECOMMENDED DISCIPLINE. Recommended discipline is subject to *de novo* review by the Board.

(v) HARMLESS ERROR. The Board must disregard any error or defect in the proceeding that does not affect a substantial right or result in a miscarriage of justice.

(d) Disposition of Formal Disciplinary Proceeding. The Board shall promptly affirm or modify the report of the Hearing Officer or Hearing Committee; remand the case for further proceedings with instructions; or dismiss the Petition for Discipline with the consent of Counsel, when required by RSCH 2.7(d). The Board may remand to the same or a new Hearing Officer or Hearing Committee.

(e) Announcement of Decision; Certification. Following its deliberations, the Board shall reconvene on the record and announce its decision. The Board Chairperson shall then file a certificate of the decision in the record.

(f) Imposition of Board Sanctions. If the Board imposes a Private Informal Admonition or Private or Public Reprimand, DBR 25, 26, or 27 shall apply.

(g) Board Report to the Supreme Court. If the Board recommends discipline to the Supreme Court, then the Board shall file a report setting forth its findings, conclusions, and recommendation. The report shall be accompanied by the Record of Formal Disciplinary Proceeding. The Filing Clerk shall serve a copy of the report upon Counsel and the Respondent in accordance with RSCH 2.11(b).

(h) Notice to Complainant. Counsel shall notify the Complainant that the Board has filed its report with the Supreme Court; however, no copy of the report shall be provided to the Complainant, unless the report is non-confidential pursuant to RSCH 2.22 and the Complainant requests a copy.

Rule 25. Private Informal Admonition.

(a) Significance. A Private Informal Admonition signifies that: (i) misconduct has been found but is not of sufficient gravity to warrant a Formal Disciplinary Proceeding; or (ii) the gravity of the misconduct is substantially offset by a clear and convincing showing of circumstances in mitigation.

(b) When and How Imposed. A Private

Informal Admonition may be imposed by Counsel at the Conclusion of an Investigation based on the facts of the case upon the approval of a Reviewing Board Member or by the Board as a result of a Formal Disciplinary Proceeding.

(i) BY COUNSEL. If a recommendation for Private Informal Admonition is approved or otherwise ordered by a Reviewing Board Member, Counsel shall prepare and serve the Private Informal Admonition upon the Respondent. The basis for the imposition of the Private Informal Admonition shall be stated, including the misconduct and the violations of the Hawaii Rules of Professional Conduct. The Private Informal Admonition shall further inform the Respondent that: (A) within ten days of receipt of the Private Informal Admonition, he or she may demand that a Formal Disciplinary Proceeding be instituted against him or her; and (B) in the event such demand is received by Counsel within the ten-day period, the order for Private Informal Admonition shall be vacated, and a Formal Disciplinary Proceeding shall be instituted. If no demand is received within the ten-day period, the Private Informal Admonition shall be final.

If the Respondent rejects the Private Informal Admonition imposed by Counsel, the Respondent must submit a demand within ten days of the receipt of the Private Informal Admonition requesting that a Formal Disciplinary Proceeding be instituted.

(ii) BY THE BOARD. If the Respondent and Counsel accept the Hearing Officer's or Hearing Committee's recommendation for a Private Informal Admonition or the Board determines that a Private Informal Admonition is the appropriate sanction, the Board Chairperson shall prepare the Private Informal Admonition. The basis for the imposition of the Private Informal Admonition shall be stated, including the misconduct and the violations of the Hawaii Rules of Professional Conduct. The Filing Clerk shall file a copy in the Record of Formal Disciplinary Proceeding and serve the Parties with a copy of the Private Informal Admonition.

(iii) REJECTION OF PRIVATE INFORMAL ADMONITION. If either Party rejects a Private Informal Admonition, the Board shall file a report with the Supreme Court.

(c) Service. The Private Informal Admonition

shall be served in accordance with RSCH 2.11(a) or by certified or registered mail, return receipt requested, at the Respondent's address shown on the Respondent's current Attorney Registration Statement or other last-known mailing address.

(d) Effect of Stipulation. By stipulating to a Private Informal Admonition, the Parties have consented to its imposition.

(e) Confidentiality. If a Private Informal Admonition is imposed by the Board prior to the time when the matter is no longer confidential pursuant to RSCH 2.22(a)(7), then the matter and its disposition shall remain confidential.

(f) Notice to Complainant. Counsel shall notify the Complainant that a Private Informal Admonition has been imposed; however, no copy will be provided to the Complainant unless the Private Informal Admonition is non-confidential pursuant to RSCH 2.22 and the Complainant requests a copy.

Rule 26. Private Reprimand.

(a) Significance. A Private Reprimand signifies that misconduct has been found, and that while the matter does not warrant the filing of a report with the Supreme Court, the misconduct is too serious to be addressed by a Private Informal Admonition.

(b) Board Decision; Parties' Rights. If the Board determines that a Formal Disciplinary Proceeding should be concluded by Private Reprimand, the Board Chairperson shall so notify the Parties. The Parties shall have ten days from receipt of the Board's notice to reject the Private Reprimand. A Private Reprimand is complete upon its imposition on the Respondent in the presence of the Board. The Respondent shall receive a copy of the text of the Private Reprimand.

(i) If neither Party rejects a Private Reprimand within ten days, the Board Chairperson shall notify the Respondent of the date and time to appear for the imposition of the Private Reprimand.

(ii) If the Respondent fails to appear for the Private Reprimand without good cause, the Board may reconsider Respondent's discipline.

(iii) If either Party rejects the Private Reprimand or the Respondent fails to appear without good cause, the Board shall file a report with the Supreme Court.

(c) Effect of Stipulation. By stipulating to a

Private Reprimand, the Parties have consented to its imposition.

(d) Private Order of Discipline. Following the imposition of a Private Reprimand, a Private Order of Discipline shall be issued and filed in the Record of Formal Disciplinary Proceeding.

(e) Confidentiality. If a Private Reprimand is imposed by the Board prior to the time when the matter is no longer confidential pursuant to RSCH 2.22(a)(7), then the matter and its disposition shall remain confidential.

(f) Notice to Complainant. When a Private Reprimand is imposed or the Board files a report with the Supreme Court, the Complainant shall be notified in accordance with RSCH 2.6(b)(7). No copy of the text of the Private Reprimand shall be provided to the Complainant and the Complainant shall not be provided with a copy of the Private Order of Discipline, unless the Order is non-confidential pursuant to RSCH 2.22 and the Complainant requests a copy.

Rule 27. Public Reprimand.

(a) Significance. A Public Reprimand signifies that misconduct has been found, and that while the matter does not warrant the filing of a report with the Supreme Court, the misconduct is too serious to be addressed by a Private Informal Admonition or a Private Reprimand, and requires public notice.

(b) Board Decision; Parties' Rights. If the Board determines that a proceeding should be concluded by Public Reprimand, the Board Chairperson shall notify the Parties. The Parties shall have ten days from receipt of the Board's notice to reject the Public Reprimand. A Public Reprimand is complete upon its imposition on the Respondent in the presence of the Board. The Respondent shall receive a copy of the text of the Public Reprimand.

(i) If neither Party rejects the Public Reprimand within ten days, the Board Chairperson shall notify the Respondent of the date and time to appear for the imposition of the Public Reprimand.

(ii) If the Respondent fails to appear for the Public Reprimand without good cause, the Board may reconsider the Respondent's discipline.

(iii) If either Party rejects the Public Reprimand or the Respondent fails to appear without good cause, the Board shall file a report

with the Supreme Court.

(c) **Effect of Stipulation.** By stipulating to a Public Reprimand, the Parties have consented to its imposition.

(d) **Public Order of Discipline.** Following the imposition of a Public Reprimand, a Public Order of Discipline shall be issued and filed in the Record of Formal Disciplinary Proceeding.

(e) **Notice to Complainant.** If a Public Reprimand is imposed, Counsel shall furnish the Complainant with a copy of the Board's Public Order of Discipline, but not the text of the Public Reprimand.

(f) **Public Notice.** Counsel shall issue a press release regarding the matter.

Rule 28. Board's Role in Cases of Resignation in Lieu of Discipline or Disbarment by Consent.

Upon receipt of an RSCH 2.14 affidavit by a Respondent, if the Board Chairperson finds it to be in proper form, he or she shall direct Counsel, on behalf of the Board, to promptly file it with the Supreme Court for entry of an appropriate order. If the Board Chairperson finds the affidavit is not in proper form, he or she shall return it to the Respondent with an explanation of that finding.

Rule 29. Board's Role in Cases of Disbarred and Suspended Attorneys.

The following duties of the Board are delegated to Counsel:

(a) Publication of notices of Suspension and Disbarment required by RSCH 2.16(e).

(b) Transmission of certified copies of orders of Suspension and Disbarment to judges as required by RSCH 2.16(f). The certified copies referenced to herein shall be transmitted, at a minimum, to all State judges, and to the Chief Clerks of the United States District Court for the District of Hawaii, the Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

(c) Issuance of a press release regarding the matter.

Rule 30. Board's Role in Cases of Reinstatement of Disbarred Attorneys or Attorneys Suspended for More than One Year.

(a) **Scope.** An Attorney who has been disbarred or suspended for more than one year may seek reinstatement. For purposes of this Rule, an Attorney who resigned in lieu of discipline shall be treated as a disbarred Attorney.

(b) **Petition for Reinstatement; Service.** An eligible disbarred Attorney or an eligible Attorney suspended from practice for more than one year as defined by RSCH 2.17(b) may file a Petition for Reinstatement with the Filing Clerk of the Board and shall serve a copy upon Counsel. The Petition for Reinstatement shall state:

(i) The date of entry of: (A) the order imposing Suspension or Disbarment; and (B) any order restraining the applicant from engaging in the practice of law or setting aside such order;

(ii) That a certified copy of each order is attached to the petition;

(iii) That the time period required by RSCH 2.17(b) has elapsed;

(iv) That from the entry of the order imposing Suspension or Disbarment, the applicant has complied with all applicable provisions of RSCH 2 and the Disciplinary Board Rules, and if a restraining order was issued pursuant to RSCH 2.13, that the applicant has complied with the provisions of the order while it was in effect and is prepared to prove compliance;

(v) That the applicant has completed the prescribed questionnaire and attached it to the petition; and

(vi) All facts and supporting materials upon which the applicant relies in support of his or her reinstatement.

(c) **Prescribed Questionnaire.** The questionnaire shall be in the form prescribed by Counsel and approved by the Board Chairperson ("Prescribed Questionnaire"). The applicant's answers shall be verified under oath.

(d) **Pleadings; Record of Petition for Reinstatement; Public Notice.** The Petition for Reinstatement and the Prescribed Questionnaire shall constitute the entire pleadings; no other pleadings shall be permitted.

Counsel shall notify all State and United States District Court for the District of Hawaii judges and the president of each bar association of the filing of the Petition for Reinstatement, and seek written comment. Counsel shall cause a notice of the filing of the Petition for Reinstatement to be published in a newspaper of general circulation, and seek written comment.

(e) Assignment to Hearing Officer or Hearing Committee. Following a reasonable investigation by Counsel of the applicant's fitness for reinstatement, the Petition for Reinstatement shall be assigned by the Board Chairperson to a Hearing Officer or Hearing Committee.

The same process as a Formal Disciplinary Proceeding shall be followed, except the applicant must show proof by clear and convincing evidence that he or she should be reinstated in accordance with RSCH 2.17(b).

(f) Proceeding Before the Board After Service of Hearing Officer's or Hearing Committee's Report. Following the Filing of the report of the Hearing Officer or Hearing Committee, briefing and oral argument shall be permitted in accordance with DBR 24 (a).

Rule 31. Proceedings Where an Attorney Is Declared Incompetent or Alleged to Be Incapacitated.

(a) Judicial Determination of Incompetency and Involuntary Commitment. Whenever it comes to Counsel's attention that an Attorney has been judicially declared incompetent by a court or involuntarily committed on the grounds of incompetency or disability in any jurisdiction, Counsel shall obtain a certificate of the adjudication or commitment, if possible.

(i) Where the adjudication or commitment did not occur in this jurisdiction, Counsel shall obtain such additional documents as may be needed to show that the proceeding, if it had occurred within this State's jurisdiction, would have been deemed an adjudication of incompetency or commitment.

(ii) Counsel shall file with the Supreme Court a Petition for Judicial Determination of Incompetency appending the required documents and requesting that the Supreme Court enter an order under RSCH 2.19(a) transferring the Attorney to inactive status effective immediately.

(b) Investigation by Counsel and Board Action; Proceedings Pursuant to RSCH 2.19(b). Whenever it comes to Counsel's attention that an Attorney is or may be incapacitated from continuing the practice of law by reason of mental or physical infirmity or illness or because of the use of drugs or intoxicants, Counsel may investigate the matter and prepare a report of the investigation, including Counsel's summation of the file and a confidential recommendation as to the disposition of the matter.

(i) Before concluding an investigation, Counsel shall notify the Respondent that within a reasonable time, he or she may state his or her position with respect to the grounds of disability under investigation, which shall be set out in the notice. The report shall be submitted by Counsel to the Board Chairperson and shall include any communication received from the Respondent. If the Board Chairperson decides that a proceeding shall be instituted in the Supreme Court under RSCH 2.19(b), Counsel shall prepare the necessary petition and proceed as provided in Paragraph (a) of this rule. Counsel shall allege the grounds of disability authorized by the Board Chairperson as the basis for the petition.

(ii) If the Board Chairperson decides that no proceeding should be instituted under RSCH 2.19(b), the Attorney whose capacity has been in question shall be so notified by Counsel.

(c) Proceedings to which RSCH 2.19(c) Applies. If Counsel determines that RSCH 2.19(c) applies by reason of the Respondent's contention in a disciplinary proceeding that he or she is suffering from a disability, Counsel shall file a petition with the Supreme Court setting out or appending the pertinent portions of the record and requesting that the Supreme Court: (i) enter an order under RSCH 2.19(c) transferring the Respondent to inactive status until a determination is made of the Respondent's capacity to practice law; and (ii) determine the Respondent's capacity in a proper proceeding.

(d) Copies; Service. Copies of all petitions and supplementary petitions filed with the Supreme Court pursuant to RSCH 2.19 and this rule, together with a copy of the Supreme Court's order transferring the Attorney to inactive status, shall be served on the Attorney, his or her guardian, if any, the director of the institution to which he or she has

been committed, if any, and such other persons as the Court may order.

(e) Notice of Transfer to Inactive Status.

The Board delegates to Counsel its duties under RSCH 2.19(d) and (e). In addition, certified copies of any order of transfer to inactive status shall be transmitted, at a minimum, to all State judges and to the Chief Clerks of the United States District Court for the District of Hawai i, the Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

Rule 32. Reserved.

VII. RETENTION OF RECORDS

Rule 33. Retention of Records.

(a) General Rule. The ODC shall maintain permanent electronic or paper data records of all RSCH 2 matters. The ODC shall maintain the Board s records as set forth in (d) below.

(b) Formal Disciplinary Proceeding. When a Formal Disciplinary Proceeding or other RSCH 2 proceeding has reached final adjudication, the file shall be deposited with the ODC as a permanent record, except that exhibits to a Formal Disciplinary Proceeding may be destroyed after the matter has been closed for six years. RSCH 2.14 resignations are excluded.

(c) Other Proceedings. In all other matters, the files shall include at a minimum:

(i) Counsel's summation of the file prepared pursuant to DBR 16 (or the Grievance and relevant papers if the matter was dismissed without docketing), Counsel's recommendation, the order of the Reviewing Board Member, and Counsel's correspondence informing the Complainant and the Respondent of the disposition of the matter. The files in matters concluded by screening, pending, dismissal, and dismissal with caution shall be destroyed after the matter has been closed six years. All files of deceased Attorneys may also be destroyed, except files of a Formal Disciplinary Proceeding.

(ii) If a Private Informal Admonition was imposed, Counsel's summation of the file prepared pursuant to DBR 16, the statement of the basis for the Private Informal Admonition prepared pursuant to DBR 25, the certified or registered mail or

service records evidencing imposition of the Private Informal Admonition, and Counsel's correspondence informing the Complainant of the disposition of the matter as a permanent record.

(d) Board administrative documents include financial records, contract and lease documents, and general correspondence.

(i) Financial records include checks, disbursements, deposit slips, and daily items.

These records may be destroyed by ODC after six years. However, Board accounting books, records, and annual financial records are to be kept indefinitely.

(ii) Contracts, leases, and documents of a similar nature may be destroyed by ODC six years following the expiration of the contract.

(iii) General correspondence may be destroyed by ODC after three years.

VIII. EFFECTIVE DATE

These Disciplinary Board Rules apply to all Grievances submitted to or initiated by the ODC on or after July 1, 2007, and all proceedings under RSCH 2.14, RSCH 2.16, RSCH 2.17, RSCH 2.19, and RSCH 2.23 initiated on or after July 1, 2007.