

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Amendment
of the
RULES OF THE SUPREME COURT OF THE STATE OF HAWAII

ORDER AMENDING RULES 2.7, 2.8, AND 2.22 OF THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAII
(By: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.)

IT IS HEREBY ORDERED that Rules 2.7, 2.8, and 2.22 of the Rules of the Supreme Court of the State of Hawaii is amended, effective July 1, 2010, as follows (deleted material is bracketed and stricken; new material is underscored):

2.7. Procedure.

* * *

(b) Minor misconduct.

(1) Notwithstanding the provisions of Rules 2.2 and 2.3, any act or omission by an attorney which, although violative of the Hawaii Rules of Professional Conduct, is of a minor nature may be resolved by way of non-disciplinary proceedings or dismissal.

(2) In the absence of unusual circumstances, misconduct shall not be regarded as minor if any of the following conditions exists:

(i) The misconduct involved misappropriation of a client's funds or property.

(ii) The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person.

(iii) The respondent was publicly disciplined within the past [~~three~~(3)] years.

(iv) The misconduct involved is of the same nature as misconduct for which the respondent was disciplined within the past [~~five~~(5)] years.

(v) The misconduct included dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.

(vi) The misconduct constituted the commission of a felony under applicable law.

(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, mentoring, 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 supreme court to conduct the proceedings.

(4) If the respondent enters into an agreement for referral to a minor misconduct program established by the Hawai i State Bar and enters into a mentoring relationship, all records and information maintained by the mentor relating to the minor misconduct of the respondent shall be deemed confidential and shall not be disclosed to the Counsel, the Board, the supreme court or any other person and shall not be subject to discovery or subpoena unless such confidentiality is waived in writing by the respondent; provided, however, that the mentor may compile and disclose to Counsel a final report summarizing the mentoring program and the completion thereof to the satisfaction of the mentor. The mentor and the respondent have a privilege to refuse to disclose information shared or provided between the mentor and the respondent. The limitations on disclosure set forth in this section will not apply to information relating to the respondent s failure to cooperate with the mentoring program, or with a repondent s unsuccessful completion of a mentoring program.

~~[(4)]~~ (5) If Counsel shall fail to reach agreement with the respondent to submit the matter of non-disciplinary proceedings, Counsel may undertake or resume disciplinary proceedings.

~~[(5)]~~ (6) If the respondent shall fail to comply with the terms of the agreement, Counsel may undertake or resume disciplinary proceedings.

~~[(6)]~~ (7) If the respondent shall fulfill the terms of the agreement, Counsel shall dismiss the disciplinary proceedings.

* * *

2.8. Immunity.

Complaints submitted to the Board or Counsel or testimony given with respect thereto or trustee proceedings conducted pursuant to Rule 2.20 shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, hearing officers, Counsel, staff, volunteers, experts appointed pursuant to Rule 2.19, ~~and~~ trustees and assistants appointed pursuant to Rules 2.20 and 2.5, and mentors appointed pursuant to Rule 2.7(b)(4) shall be immune from suit and liability for any conduct in the course of their official duties.

COMMENT :

The purpose of extending immunity to mentors appointed pursuant to Rule 2.7(b)(3) is to enhance the ability to attract participants to participate as mentors in minor misconduct programs and to provide to these mentors

protections provided to those serving in other capacities under the auspices of the Disciplinary Board.

2.22. Confidentiality.

(a) General rule. The files, records and proceedings of the Board, the hearing committees or officers, and Counsel, and of mentors participating in minor misconduct programs pursuant to Rule 2.7(b), 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 supreme court in the furtherance of their duties;

(2) As between the Board, Counsel and an attorney admission or disciplinary authority, or judicial selection or disciplinary authority, of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice;

(3) Upon the request of the attorney affected;

(4) Where permitted by the supreme court;

(5) Where required or permitted by these rules;

(6) Where the investigation is predicated upon a conviction of the respondent for a crime;

(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] Rule 2.17(c).

* * *

(f) Except as ordered by the supreme court, or as otherwise provided by these rules, the files, records and proceedings filed with the supreme court by the Board, by Counsel or by a respondent, as well as any oral argument held before the supreme court in connection with any disciplinary proceedings, are not confidential, except that in [RSCH] Rule 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.

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DATED: Honolulu, Hawaii, April 5, 2010.