

Electronically Filed
Supreme Court
SCRU-11-0000068
25-JUN-2013
03:54 PM

SCRU-11-0000068

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

ORDER AMENDING RULE 2 OF THE RULES
OF THE SUPREME COURT OF THE STATE OF HAWAI'I
(By: Recktenwald, C.J., Nakayama, Acoba, McKenna, and Pollack, JJ.)

IT IS HEREBY ORDERED that Rule 2 of the Rules of the Supreme Court of the State of Hawai'i, is amended, effective July 1, 2013, as follows (deleted material is bracketed and stricken; new material is underscored):

2.4. Disciplinary board.

(a) The supreme court shall appoint a board to be known as the "Disciplinary Board of the Hawai'i Supreme Court" (hereinafter referred to as the "Board") [~~whom~~] that shall consist of eighteen members, each of whom shall be nominated and appointed separately. At least one-third of the members shall not be lawyers. To the extent possible, membership shall include at least one person from each of the four counties. All appointments shall be made from a list of nominees submitted by the Nominating Committee of the Hawai'i Supreme Court. The Disciplinary Board shall [~~appoint~~] elect from among its members, a Chairperson, a [~~nd~~] Vice-Chairperson, a secretary, and a treasurer [~~from amongst its members~~].

* * *

(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~~] employ, supervise, and terminate a Chief Disciplinary Counsel, hereinafter Chief 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 are hereinafter referred to as "Counsel." a Deputy Chief Disciplinary Counsel, Assistant Disciplinary Counsel, and staff employees, and to appoint volunteers to assist the Board in the exercise of its duties. The Board may delegate to Chief Counsel the authority to employ and supervise the Deputy Chief Counsel and Assistant Counsel, to employ, supervise and terminate staff, and to appoint volunteers.~~

* * *

(10) To retain, as needed, private counsel to assist the Board in the performance of its duties.

(11) To establish committees to assist the Board in the performance of its duties.

2.5. Hearing committees.

* * *

~~[(e) In addition to the hearing committee members or hearing officers appointed pursuant to these rules, the Board may appoint an attorney or attorneys knowledgeable about a particular area of practice to assist a hearing committee and the Board in the analysis of evidence and to advise the committee and the Board about a respondent's competence or the reasonableness of a respondent's fee, where such matters are at issue. Attorneys appointed under this subsection (e) are volunteers for purposes of Rule 2.8 and shall serve without fee, but may be reimbursed for travel and other expenses incidental to the performance of their duties. Such attorneys shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain.]~~

2.6. Disciplinary counsel.

(a) Chief Counsel, Deputy Chief Counsel, and Assistant Counsel shall not engage in private practice, except that the Board may agree to a reasonable period of transition after appointment.

(b) Chief Counsel shall have the power and duty:

(1) ~~[With the approval of the Board, to employ and supervise staff and volunteers needed for the performance of his or her duties. (2)]~~ To investigate all matters involving alleged misconduct called to his or her attention whether by complaint or otherwise.

~~[(3)]~~(2) To dispose, subject to review by members of the Board assigned by the Chairperson, of all matters involving alleged misconduct by dismissal, private informal admonition, referral to a minor misconduct or assistance program, or the institution of formal disciplinary proceedings before a hearing committee or officer. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Counsel until the accused attorney shall have been afforded the opportunity to state his or her position with respect to the allegations against him or her.

~~[(4)]~~(3) To file with the supreme court certificates of conviction of attorneys for crimes.

~~[(5)]~~(4) To prosecute all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing committees or officer, the Board and the supreme court.

~~[(6)]~~(5) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, to examine witnesses and to submit evidence, if any, relevant thereto.

~~[(7)]~~(6) To inform complainants and attorneys complained against of the status and disposition of their respective complaint matters.

~~[(8)]~~(7) To maintain permanent records of all matters processed and the disposition thereof.

~~[(9)]~~(8) To assist members of the public in preparation of requests for investigation.

~~[(10)]~~(9) To perform such other duties and provide such reports as the Board shall direct.

(c) Delegation. Chief Counsel may delegate performance of the duties set out in sections (b)(2) through (b)(9) to Deputy Chief Counsel, Assistant Disciplinary Counsel, and staff.

2.12A. Failure to cooperate.

(a) Grounds for suspension. 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 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 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) Petition; order to appear; findings. Upon the filing with 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 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 the supreme court's finding that the attorney has failed to cooperate, as outlined in (a) above. 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 the supreme court.

(c) Application to defend. In all cases where the petition described in (b) above is served in any manner other than personally, and the attorney so served does not appear, an application may be made by such attorney to the chief justice at any time within one year after the rendition of the final order of

suspension, and upon good cause shown and upon such terms as may be deemed just by the chief justice, such attorney shall be allowed to defend himself against such charges.

(d) Reinstatement. An attorney suspended under this Rule 2.12A may move for reinstatement. The motion shall be supported by proof respondent cured the failures to cooperate alleged in the petition. If conventionally filed, a copy of the motion for reinstatement shall be served upon Counsel at or before the time of filing. Counsel shall file a response to the motion within 20 days after the motion for reinstatement was filed. Counsel's response shall verify whether respondent has cured the allegations of non-cooperation.

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

* * *

(c) The order granting the request to resign in lieu of discipline or disbarment of 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 the supreme court or as otherwise allowed by these rules.

* * *

2.17. Reinstatement.

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

(b) Time to Apply.

(1) DISBARRED ATTORNEY. 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 supreme court, which may include successful completion of requirements for passing the bar examination.]~~

(2) ATTORNEY SUSPENDED 1 YEAR OR LESS. 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 supreme court at the end of the period of suspension by filing with the supreme court and serving upon Counsel an affidavit to that effect.

(3) ATTORNEY SUSPENDED MORE THAN 1 YEAR. 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.

(4) BURDEN OF PROOF; ELIGIBILITY. A ~~disbarred attorney~~ or 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 supreme court, which may include the successful completion of requirements for passing the bar examination.

(5) EVIDENCE COSTS, LAWYERS' FUND PAID. No suspended or disbarred attorney shall be eligible for reinstatement except upon a showing that he or she has reimbursed both the Board for all costs ordered including those incurred under RSCH 2.20, if any, and the Lawyers' Fund for Client Protection for monies paid out on account of the attorney's conduct, together with interest at the Hawai'i statutory judgment rate.

(6) REQUIRED EVIDENCE. A petitioner under parts (b)(1) and (b)(3) of this Rule 2.17 shall support the petition with the following information, submitted under seal:

(A) the petitioner's current residence address and telephone number;

(B) the address of each of petitioner's places of residence during the period of discipline, along with the dates the petitioner resided at each address;

(C) the name, address and, telephone number of each of petitioner's employers, associates, or partners during the period of discipline, including the dates of each employment and position held,

(D) the names of all supervisors and reasons for leaving the employment, association, or partnership;

(E) the case caption, general nature and disposition of every civil and criminal action initiated, pending, or resolved during the period of discipline to which the petitioner was party or claimed an interest;

(F) a statement of monthly earnings and other income during the period of discipline, including the source of the earnings/income;

(G) a statement of assets and financial obligations during the period discipline, including the dates acquired or incurred and the names and addresses of all creditors;

(H) a statement verifying that restitution, or reimbursement of costs, including to the client protection fund, if appropriate, has been made and in what amount(s);

(I) a statement as to whether during the period of discipline the petitioner applied for reinstatement in any other jurisdiction and the results of any such proceedings;

(J) a statement identifying any other licenses or certificates for business or occupation applied for during the period of discipline;

(K) the names and addresses of all financial institutions at which petitioner had, or was a signatory to, accounts, safety deposit boxes, deposits or loans during the period of discipline;

(L) written authorization for the ODC to secure any financial records relating to those accounts, safety deposit boxes, deposits or loans; and

(M) copies of petitioner's state and federal income tax returns for the three years preceding the period of discipline and during the period of discipline along with written authorization for the ODC to obtain certified copies of the originals.

(7) SUBSEQUENT PETITIONS. If a petition for reinstatement is denied, the petitioner may reapply for reinstatement no earlier than 1 year after entry of the supreme court's order denying reinstatement.

(c) Petition the board; serve counsel; investigation; hearing; reports. Petitions for reinstatement by a disbarred attorney or an attorney suspended [attorney] for more than one year 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 investigation shall be completed within 180 days unless the Board Chairperson, upon a showing of good cause, extends the time to complete the investigation. The hearing committee or officer shall promptly schedule a hearing, unless the petitioner requests the matter be heard upon the pleadings and exhibits and Chief Disciplinary Counsel agrees. Petitioner and Chief Disciplinary Counsel may stipulate to facts. Within 30 days after the conclusion of the hearing, the hearing committee or officer shall 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 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) Expenses. The supreme court shall direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the attorney seeking reinstatement.

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

(A) such time is extended by the Board Chairperson for no more than 45 days for good cause shown or

(B) the Board imposes private reprimand with the consent of the respondent and Counsel; or

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

* * *

DATED: Honolulu, Hawai'i, June 25, 2013.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

