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SCRU-11-0000068

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

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ORDER AMENDING RULE 2.7 OF THE  
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I  
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

IT IS HEREBY ORDERED that Rule 2.7 of the Rules of the Supreme Court of the State of Hawai‘i is amended, effective January 1, 2019, as follows (new material is underscored):

**2.7. Procedure.**

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**(b) Minor misconduct.**

(1) Notwithstanding the provisions of Rules 2.2 and 2.3 of these Rules, any act or omission by an attorney which, although violative of the Hawai‘i 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 3 years.
- (iv) The misconduct involved is of the same nature as misconduct for which the respondent was disciplined within the past 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) of this Rule, 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 respondent's unsuccessful completion of a mentoring program.

(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.

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

(7) If the respondent shall fulfill the terms of the agreement, Counsel shall dismiss the disciplinary 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) of these Rules. Notwithstanding Rule 2.22 of these Rules, 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~~ the respondent's 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~~ the respondent's own behalf. Absent good cause warranting the use of a court reporter, Counsel shall electronically record disciplinary hearings for transcription at a later time, if appropriate. The hearing committee or officer shall, in every case, submit a report containing findings and recommendations, together with a record of the proceedings, including a transcription of the audio recording of the hearing, 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 Board shall promptly either affirm or modify the 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 proceeding 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 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) of these Rules. 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 supreme court. If such application is granted or request is made, the supreme court shall set the dates

for submission of briefs and for any oral argument before the supreme court. In its discretion, 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~~] the respondent's 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 (d) 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 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 (c) above.

DATED: Honolulu, Hawai'i, December 19, 2018.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

