

**DISCIPLINARY BOARD
OF THE HAWAI'I SUPREME COURT**

OFFICE OF DISCIPLINARY
COUNSEL,

Petitioner,

v.

MARY A. WILKOWSKI

Respondent.

ODC No. 14-062-9205

**DECISION AND PUBLIC
REPRIMAND; CERTIFICATE OF
SERVICE**

DECISION AND PUBLIC REPRIMAND

Pursuant to RSCH 2.2 et. seq., and DBR 24,¹ this matter came before the DISCIPLINARY BOARD OF THE HAWAI'I SUPREME COURT ("Board") on February 26, 2015. Mark L. Bradbury appeared on behalf of Petitioner, Office of Disciplinary Counsel ("Petitioner" or "ODC") and Respondent Mary A. Wilkowski ("Respondent") appeared *pro se*.

¹ Unless otherwise noted, "RSCH" indicates the Rules of the Supreme Court of Hawaii, and "DBR" indicates the Rules of the Disciplinary Board of the Hawaii Supreme Court.

After hearing and deliberation, the Board DECIDED to accept and adopt in part, and reject in part, the RSCH 2.7(e) Stipulation of Facts, Conclusions of Law, and Recommendation for Discipline (“Stipulation”) between Petitioner and Respondent, filed on February 12, 2015. DBF 8. As a preliminary matter, the Board notes that this matter is no longer Confidential pursuant to RSCH 2.22(a)(7). See: DBF 2.

The Board adopts the stipulated facts and conclusions of law that Respondent violated the Hawai‘i Rules of Professional Conduct by willfully failing to file State of Hawai‘i General Excise Tax returns or to supply information, individually, as manager, and on behalf of Vetiver Systems Hawai‘i LLC, for tax years 2010 through 2012, Respondent violated HRPC 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects); and that by violating the foregoing Rule of Professional Conduct, Respondent violated HRPC 8.4(a). DBF 8 at 5. However, the Board rejects the recommendation for discipline to the extent that the parties seek the imposition of a private reprimand. DBF 8 at 8.

The Board notes that the ABA Standards for Imposing Lawyer Sanctions,² provides that “[i]n imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.” ABA Std. 3.0.

A lawyer’s failure to file tax returns as required by law violates the “duty to the public to maintain h[er] personal integrity.” *In re Conduct of Lawrence*, 332 Or. 502, 513, 31 P.3d 1078, 1084 (Ore. 2001). Further one willfully fails to file tax returns where s/he knowingly fails to file it. *People v. Wendt*, 183 Ill.App.3d 389, 394 (Ill. App. 1989). Also, the failure to file or pay income taxes is misconduct which causes actual injury to the legal profession. *In re Tos*, 610 A.2d 1370, 1373 (Del. 1992). Thus, the first three factors the Board needs to consider in determining the appropriate lawyer sanction are met. The fourth factor – the existence of aggravating or mitigating factors – will be considered infra.

The ABA Standards then categorize violations into those owed to clients, to the public, to the legal system and to the profession. ABA Std. 4.0 - 7.0. Included in the category pertaining to “Violations of Duties Owed to the Public” is the sub-category pertaining to the “Failure to Maintain Personal Integrity” which is

² “ABA Standards” or “ABA Std. ___.” “The ABA Standards are a useful reference when determining disciplinary sanctions.” *ODC v. Lau*, 79 Haw. 201, 206 (1995), citing *ODC v. Rapp*, 70 Haw. 539, 544 (1989).

relevant to “cases involving commission of a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation.” ABA Std. 5.1.

That portion of the ABA Standards further provides that “[5.1] ... [a]bsent aggravating or mitigating circumstances ... [5.12 s]uspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11³ ... [and 5.13 r]eprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation ...” (emphasis added).

Here, Respondent had judgment entered against her in both *State v. Wilkowski*, 1-DCW-14-1-1151 and *State v. Vetiver Systems Hawai‘i, LLC*, 1-DCW-14-1-1152 [Stipulation Ex. 1 and 2], by way of Respondent’s Deferred Acceptance of Nolo Contendere Plea (DANC plea). Stipulated Fact #8. While HRE 410(2) may preclude the use of a DANC plea against Respondent in this proceeding,⁴ the Board notes that Respondent has stipulated to the conclusion that

³ ABA Std. 5.11 “(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.” (emphasis added).

⁴ HRE 410(2) precludes use of the DANC plea “in any civil or criminal proceeding” See also *State v. Brown*, 1 Haw. App. 602, at fn. 2 (1981) (“The apparent legal reason for pleading nolo contendere is that a plea of nolo contendere cannot be used against the defendant in any civil suit.”), *c.f. ODC v. Scott*, 71 Hawai‘i 647, 649 (Hawai‘i 1990) (“The

her conduct constituted a criminal act. Conclusion of Law #1. The criminal acts for which Respondent entered her plea – nine counts of “Willful Failure to make and file its General Excise Tax Returns or Supply Information” – are all misdemeanors under the statute as charged. HRS § 231-35. Therefore, under the facts of this case, the acts do not “contain the elements listed in Standard 5.11” of “serious criminal conduct” indicating disbarment, but nonetheless constitutes knowing “criminal conduct” rather than “other conduct” for which a reprimand is indicated.⁵ Thus, the appropriate level of discipline “absent aggravating or mitigating circumstances” is Suspension. ABA Std. 5.12.

Furthermore, it is noted that “suspension” under the ABA Standards refers to the removal of a lawyer from the practice of law for six months to three years. ABA Std. 2.3. Reprimand however, is defined as “...censure or public censure ... but does not limit the lawyer’s right to practice.” ABA Std. 2.5. Finally, Admonition is defined as a “private reprimand ... a form of non-public discipline.” ABA Std. 2.6. The ABA Standards use similar terminology that differ in definition. *Compare*: RSCH 2.3(a). Thus, when viewing the ABA Standards, the Board reads “reprimand” to indicate either public censure or public reprimand

trial court's acceptance of the DANC plea, and the Respondent's discharge thereunder, are factors which can be considered in mitigation, but certainly do not bar disciplinary proceedings under our rules.”)

⁵ The Board is sensitive to a distinction between a failure to file tax returns and the filing of false tax returns. The later being just that sort of serious criminal conduct warranting disbarment, which is not present in this case. *See: In re Scholl*, 200 Ariz. 222, 225 (Ariz. 2001).

under RSCH 2.3(a)(3)-(4), and “admonition” to indicated either private reprimand or private informal admonition under RSCH 2.3(a)(5)-(6). Hence, even if the Board was to adopt the ABA Std. 5.13 “reprimand” sanction, the RSCH 2.3(a) equivalent of a “private reprimand” that the parties request would not be indicated.

As to “the existence of aggravating or mitigating factors” the parties have stipulated⁶ to two aggravating factors: substantial experience in the practice of law, and prior discipline resulting in the 2007 imposition of a private informal admonition for a prior trust account violation. DBF 8 at 7. The parties also stipulated to six mitigating factors consisting of unspecified personal and emotional problems, Respondent’s entry of the DANC plea, payment of “all sums due under the plea agreement” and cooperation with ODC, evidence of good character and reputation, imposition of significant monetary penalties in connection with the DANC plea, prompt disclosure to ODC and sincere expression of remorse, and the arguable remoteness of the prior discipline.⁷ *Id.* Matters in aggravation and mitigation must be established by the proponent and meet the

⁶ For purposes disciplinary proceedings, “the facts to which the parties have stipulated are considered to have been proven by clear and convincing evidence.” *Matter of Starcher*, 202 W.Va. 55, 63, 501 S.E.2d 772, 780 (W.Va. 1998); *In re Wilfong*, 234 W.Va. 394, 765 S.E.2d 283, 291 (W.Va. 2014) (quoting *Starcher* in judicial disciplinary proceeding.); *c.f.*, *State ex rel. Oklahoma Bar Ass’n v. Besly*, 136 P.3d 590, 606 (Okla. 2006) (“The mere factual stipulation a loan was made from client to attorney, coupled with a bare stipulation to a legal conclusion that Rule 1.8 generally was violated, does not suffice as clear and convincing proof of a Rule 1.8(a) violation.”)

⁷ The parties acknowledge that the prior discipline was imposed in 2007, but contend it is remote because the conduct which led to the discipline occurred in 2003. DBF 8 at 7 (mitigating factor #6). The Board expresses no opinion as to whether it is the date of the act or the date of the sanction which is determinative in finding “remoteness of the prior offense” under ABA Std. 9.3(m).

clear and convincing evidentiary standard of proof. *ODC v. Rapp*, 70 Haw. 539, 541 (Hawai'i 1989); *ODC v. Manuia*, 2013 WL 2156247, *2 (Haw. 2013); *ODC v. Wooten*, 2013 WL 599660 (Haw. 2013). While the evidentiary record as to these factors is sparse, the Board sees no reason to declare any stipulated aggravating or mitigating factor as clearly erroneous.

The Board also acknowledges the unpublished authority cited by the parties. DBF 8 at 8. In each of those three cited matters, a RSCH 2.3(a)(4) public reprimand was imposed for criminal conduct involving the “willful failure to file general excise tax returns.” *ODC v. H.K. Bruss Keppeler*, 96-210-5010 (stipulated public reprimand); *ODC v. David G. Bettencourt*, ODC 01-362-7106 (public reprimand); *ODC v. Robin R. Horner*, ODC 12-028-9044 (public reprimand).⁸

The Board is also aware of other cases which received equal or more severe sanctions: *ODC v. Thomas D. Collins III*, SCAD 10-196 (public censure); *ODC v. Donald S. Wikerson*, SCAD 12-491 (public censure); *ODC v. Emmanuel G. Guerrero*, SCAD 12-180 (public censure); and *ODC v. Thomas P. Dunn*, ODC 11-034-8958 (public reprimand). See also *ODC v. Ken Harimoto*, SCAD #9400 (1986) (public censure); *ODC v. John M. Rolls, Jr.*, SCAD #1983 (1988) (public censure); *ODC v. Michael A. Weight*, SCAD #1364 (1987).

⁸ The *Horner* matter was a consolidated proceeding under the lead case number 11-065-8989. Ultimately, the lead case was dismissed, and the sanction of public reprimand following a DANC plea for three counts of violating HRS § 231-35.

Many of these cases also presented with multiple mitigating factors. *In ODC v. Horner*, the respondent had no prior disciplinary record, no dishonest or selfish motive, freely disclosed and cooperated, and expressed remorse. In *ODC v. Thomas D. Collins III*, the respondent freely disclosed and cooperated. In *ODC v. Wilkerson*, the respondent freely disclosed, cooperated, demonstrated a series of personal or emotional problems, expressed remorse, paid all fines and costs of the criminal proceeding, paid the outstanding taxes and performed 600 hours of pro bono work. In *ODC v. Thomas P. Dunn*, respondent freely disclosed and cooperated, made restitution and rectified the consequences of his misconduct, suffered serious health problems, expressed remorse, demonstrated good character and reputation, and was active in community and church activities.

On balance, the Board is not persuaded that the mitigating factors demonstrated in the case *sub justice* is any more, or less, compelling than the mitigating factors present in these other similar “willful failure to file tax return” disciplinary matters. All of those cases resulted in the imposition of either a public reprimand by the Board, or public censure by the Supreme Court. Further, the Board does not recall ever imposing a private reprimand or admonition in connection with a criminal conviction for willful failure to file tax returns.

Therefore, the Board concludes that the appropriate sanction for the misconduct present in this case would normally be a period of suspension,

however, in light of the multiple factors in mitigation, imposition of a public reprimand is appropriate.

Therefore, it appearing that a PUBLIC REPRIMAND is warranted,

IT IS HEREBY ORDERED that:

A. Pursuant to RSCH 2.3(a)(4) a PUBLIC REPRIMAND is the appropriate discipline to be imposed upon Respondent, and, pursuant to DBR 27, a PUBLIC REPRIMAND shall be imposed on Respondent by the entry of this Decision.

B. Pursuant to RSCH 2.3(c), Respondent shall reimburse the Board for all costs related to this proceeding. In this regard, Petitioner shall file a verified bill of costs, with service on Respondent, not later than April 13, 2015. The Board may thereafter enter a separate Order for the payment of such costs.

C. This Decision and Order, pursuant to DBR 27(d) shall constitute a permanent record of the imposition of such a Public Reprimand upon Respondent and be served upon Respondent.

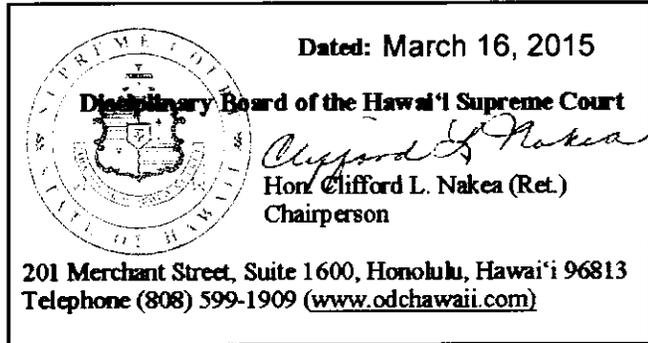
D. Respondent shall also be provided with a copy of the text of the reprimand per DBR 27(b).

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E. Pursuant to DBR 27(f), Petitioner shall issue the appropriate press release, however, the release of such press release shall be stayed until the eleventh day following RSCH 2.11(b) service of this Decision and Order, without the filing of any notice of rejection under DBR 27(b).



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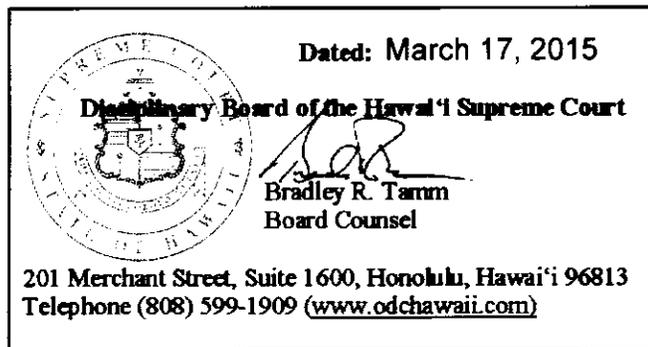
DECISION AND PUBLIC ORDER OF DISCIPLINE

CERTIFICATE OF SERVICE

1. **DECISION AND PUBLIC ORDER OF DISCIPLINE**
2. **TRANSCRIPT OF PROCEEDINGS**

I hereby certify that the foregoing documents were filed with the Clerk of the Disciplinary Board this date, and that service of true and correct copies of same were made on the parties identified in the below service list by either:

- 1) regular U.S. Mail, postage prepaid, or
- 2) hand delivery



SERVICE LIST:

Party	1) by US mail	2) hand delivery
MARY A. WILKOWSKI 4622 302C Iolani Avenue Honolulu, Hawai'i 96813 Respondent <i>pro se</i> courtesy copy to: mwilkowski@gmail.com	<input checked="" type="checkbox"/>	<input type="checkbox"/>
MARK L. BRADBURY, ESQ. Assistant Disciplinary Counsel 201 Merchant Street, Suite 1600 Honolulu, Hawai'i 96813 Attorneys for Petitioner courtesy copy to: markb@odchawaii.com	<input type="checkbox"/>	<input checked="" type="checkbox"/>