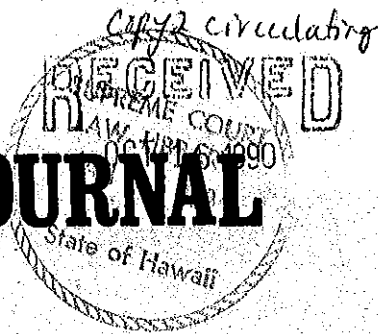


# HAWAII BAR JOURNAL



VOL. XXII

NO. 2

1990

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OFFICIAL PUBLICATION OF THE HAWAII STATE BAR ASSOCIATION

## OVERVIEW OF THE HAWAII ATTORNEY DISCIPLINE SYSTEM

GERALD H. KIBE\*

On July 1, 1990, the Hawaii attorney discipline system began its sixteenth year of operation. It was on July 1, 1974 that the Supreme Court of Hawaii implemented a *full-time* disciplinary system (under the supervision of the Disciplinary Board) to handle complaints of unethical conduct against Hawaii attorneys.<sup>1</sup>

The past 15 years has been a period of tremendous growth and change throughout the legal profession. In Hawaii alone, the size of the bar increased by about 340% from 1974 to 1989.<sup>2</sup> The growth in bar membership has, among other factors, presented a unique challenge to the professional responsibility system. Although the ethics system has not expanded in size at the same rate as the bar, necessary adjustments have been made under the leadership of the Supreme Court and Disciplinary Board to enable the system to remain an effective factor in ensuring bar accountability.

During the past several years, greater awareness and sensitivity have developed among bar members toward ethical precepts and the need to strive for higher standards of conduct. This heightened concern and awareness has most recently spawned further significant developments for the enhancement of professionalism among bar members in Hawaii, such as the unification of the bar<sup>3</sup> and the implementation of a judges' and lawyers' assistance program.<sup>4</sup>

Despite the relatively long existence of the full-time discipline organization and increased attention devoted to professionalism, many bar members remain largely unfamiliar with the structure and functions of the discipline system. This is true even though all attorneys on active status pay an annual mandatory registration fee which finances the operations of the disciplinary system.<sup>5</sup>

Of course, many lawyers regard attorney *discipline* with some measure of self-concern or fear, even though ethical issues are increasingly at the forefront of modern practice. Attorneys belong, however, to the only profession which is not regulated through the executive branch of government. Since our professional responsibility system is based on the principle of *self-regulation*, bar members should take time to obtain an understanding of the features of that organization. Familiarity with the framework and operations of the discipline system will help to reassure that the procedures and policies established by the Supreme Court and Disciplinary Board ensure fair and thorough adjudication of complaints against attorneys.

This article will provide a general overview of the Hawaii lawyer ethics system (including a

\* Chief Disciplinary Counsel, 1983-present; Assistant Disciplinary Counsel, 1979-81. The author wishes to thank Charlene M. Norris and Carole R. Richelieu (for their editorial comments), Eric Van Deusen and Shauna Candia (for drafting case summaries), and Debra Tamanaha (for statistical compilations).

<sup>1</sup> Prior to 1974, two volunteer ethics committees (known as the Legal Ethics Committee of the Hawaii State Bar Association and the Rule 16 Committee of the Hawaii Supreme Court) investigated and prosecuted complaints against lawyers. See D. Heely, *Bringing an End to a Scandal*, XV HAW. BAR J. No. 1, at 4 n. 6 (1980).

<sup>2</sup> As of July 1, 1974, there were a total of 1,425 attorneys licensed in Hawaii. As of December 31, 1989, that number had increased to 4,851 (including non-active members).

<sup>3</sup> Rule 17, Rules of the Supreme Court of Hawaii (RSCH) (adopted October 27, 1989; effective November 1, 1989).

<sup>4</sup> Rule 16, RSCH (adopted July 7, 1989).

<sup>5</sup> See Rule 2.18(a), RSCH (November 1989).

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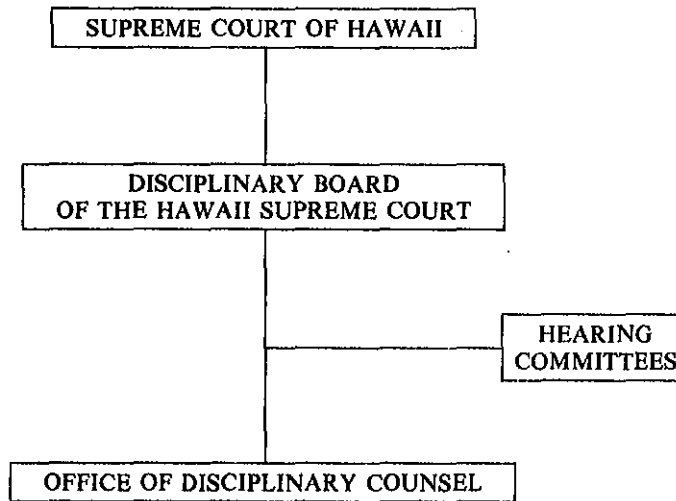
summary of public disciplinary action taken by the Supreme Court and Disciplinary Board since 1980). The effect of bar unification upon the discipline system, as well as some other developments which will have an impact upon legal ethics and discipline in the future, will also be briefly discussed.

### I. STRUCTURE AND FUNCTIONS OF THE HAWAII ATTORNEY DISCIPLINE SYSTEM

From July 1974 through June 1990, the Hawaii lawyer ethics system has handled over 2,700 docketed ethics complaints. Those complaints have cumulatively resulted in 28 disbarments, 21 suspensions, 6 public censures, 4 public reprimands, 26 private reprimands, and 217 private informal admonitions.<sup>6</sup>

The lawyer discipline organization reflects, of course, more than sanctions and statistics. It is a formalized system of lawyers and non-lawyers who carry out educational and preventive, as well as disciplinary, functions to help ensure that bar members are aware of—and adhere to—the high standards of ethical conduct promulgated by the Supreme Court.<sup>7</sup> This system operates under specific rules and guidelines adopted by the Supreme Court and Disciplinary Board.<sup>8</sup>

A chart illustrating the relatively simple framework of the Hawaii lawyer ethics system is set forth below:



The functions of each part of this system are generally described as follows:

#### A. Supreme Court

The attorney discipline system is organized and ultimately supervised by the Supreme Court of Hawaii, which has "inherent authority" to govern lawyer admissions and conduct.<sup>9</sup> By

<sup>6</sup> See Records of the Disciplinary Board (1974 through 1990). It should be noted that many public sanctions involve multiple complaints. Hence, from July 1974 through June 1990, a cumulative total of 525 investigations (or 19% of closed cases) were concluded as a result of the imposition of disciplinary sanctions. The proportion is larger for later years alone, with 307 investigations (or 26% of closed cases) concluded as a result of imposition of disciplinary sanctions from January 1985 through June 1990.

<sup>7</sup> See Hawaii Code of Professional Responsibility.

<sup>8</sup> See Rule 2, RSCH (September 1984, as amended); Rules of Procedure of the Disciplinary Board ("Disciplinary Board Rules").

<sup>9</sup> *In re Trask*, 46 Haw. 404, 415, 380 P.2d 751, 758 (1963); *Disciplinary Board v. Bergan*, 60 Haw. 546, 555, 592 P.2d 814, 819 (1979); see HRS §605-1(a) (Supreme Court has "sole power to revoke or suspend the license of

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## DISCIPLINE

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In carrying out its inherent authority to establish standards of conduct for bar members, the Court in 1970 adopted the Hawaii Code of Professional Responsibility, which is based on the American Bar Association (ABA) Model Code of Professional Responsibility. The Hawaii Code has been amended in certain limited respects since 1970.<sup>10</sup>

Rule 2, RSCH, which incorporates the Hawaii Code of Professional Responsibility, provides the organizational and procedural framework for enforcement of the Code.<sup>11</sup> These enforcement functions are carried out primarily through the Disciplinary Board and Office of Disciplinary Counsel, although the Supreme Court retains ultimate authority for attorney discipline matters. The Court is also the only entity which can impose the most serious disciplinary sanctions of disbarment, suspension, and public censure.<sup>12</sup>

### B. Disciplinary Board

The Disciplinary Board of the Hawaii Supreme Court consists of 18 members appointed by the Supreme Court.<sup>13</sup> Board members serve staggered 3-year terms.<sup>14</sup>

The Disciplinary Board directly supervises the functions of the Office of Disciplinary Counsel, sets policy guidelines for the handling of discipline matters (subject to Supreme Court review), issues formal opinions on ethics issues, and acts as a reviewing body for all cases in which formal disciplinary proceedings have been initiated.<sup>15</sup> Certain forms of discipline (i.e., public and private reprimands) may be imposed directly by the Board.<sup>16</sup>

The Board also appoints three-member hearing committees (consisting of non-Board members) which initially receive evidence and make recommendations for disposition in formal disciplinary cases.<sup>17</sup>

Under authority granted under Rule 2, the Board has also promulgated rules of procedure governing hearing committee and Board proceedings.<sup>18</sup>

Non-lawyer members presently comprise about one-third of the Board. The presence of lay members on the Board ensures that the attorney discipline system remains accountable to the public. The participation of non-lawyers on the Board enhances the credibility of the lawyer ethics process and defeats allegations that complaints against lawyers are simply "swept under the rug" by their peers.

### C. Office of Disciplinary Counsel

The Office of Disciplinary Counsel (ODC) is the day-to-day operational arm of the Disciplinary Board. Members of the ODC staff are employed by the Disciplinary Board.<sup>19</sup>

ODC discharges two primary responsibilities:

1. *Complaint Investigation and, Where Necessary, Prosecution.* The primary function of ODC is, of course, the investigation of complaints of alleged unethical conduct on the part of Hawaii attorneys.

These investigations may lead to determinations ranging from a finding of no unethical

any. . . practitioner") and §605-6 (Supreme Court may prescribe. . . rules for the government of practitioners"); Hawaii Constitution, art. VI, §7 (Supreme Court has power to promulgate rules and regulations for all courts relating to "practice").

<sup>10</sup> See, e.g., Canon 2, Hawaii Code of Professional Responsibility (advertising, solicitation, and firm name rules have been the most extensively revised sections); DR 9-102(B) (rules regarding financial recordkeeping).

<sup>11</sup> Rule 2, RSCH (September 1984) (originally adopted as Rule 16, RSCH (November 1974)).

<sup>12</sup> Rules 2.3(a), (b), and (c), RSCH (September 1984).

<sup>13</sup> Rule 2.4(a), RSCH (November 1989).

<sup>14</sup> Rule 2.4(b), RSCH (September 1984).

<sup>15</sup> Rule 2.4(e), RSCH (September 1984).

<sup>16</sup> Rules 2.3(d) and (e), RSCH (September 1984).

<sup>17</sup> Rule 2.4(e)(3), RSCH (September 1984).

<sup>18</sup> See 2.4(e)(5), RSCH (September 1984); Disciplinary Board Rules.

<sup>19</sup> Rule 2.4(e)(2), RSCH (September 1984) (the ODC staff serves at the pleasure of the Board and, ultimately, the Supreme Court).

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conduct (resulting in dismissal of the complaint) to the institution of formal proceedings leading to imposition of disciplinary sanctions upon the subject attorney. If formal disciplinary proceedings are instituted,<sup>20</sup> ODC attorneys serve as the "prosecutors" in those actions.

2. *Educational Activities.* A substantial amount of time is also spent by ODC in responding to requests from Hawaii attorneys for ethics opinions and in preparing other educational materials to assist the legal profession in maintaining ethical standards of practice. In 1989, for example, 80 written and 1,061 verbal ethics opinions were issued by ODC. Opinions are binding upon ODC (but not necessarily the Board or Supreme Court), and cover an attorney's own prospective conduct only.

Other educational functions undertaken by ODC include writing monthly articles on ethics for the *Hawaii Bar News*, preparing ethics information for various Continuing Legal Education programs, and speaking to groups of lawyers, law students, legal secretaries, and paralegals (as well as members of the public) about ethics and discipline. These activities (in addition to the provision of ethics opinions to bar members) require the devotion of a significant amount of time by the ODC staff. However, these activities are regarded as crucial because they lessen the number of instances of misconduct which might otherwise occur.

Beyond these functions, the ODC staff also handles numerous inquiries from members of the public who have questions or concerns regarding attorneys. In 1988 and 1989, for example, ODC handled 1,249 and 1,178 such inquiries, respectively, by telephone. While the ODC staff is not permitted to give legal advice or assistance, general guidance is offered concerning, for example, possible methods of resolving attorney-client disputes or misunderstandings and how, if necessary, ethics complaints may be submitted and the manner in which those complaints will be processed.

#### D. Hearing Committees

The Disciplinary Board appoints a "pool" of hearing committee members (consisting of non-Board members) who sit as fact-finders in formal discipline cases (or on petitions for reinstatement filed by disbarred or suspended attorneys).<sup>21</sup>

Three-member panels are randomly appointed from that "pool" by the Chairperson of the Disciplinary Board to preside over discipline or reinstatement proceedings as they arise. One layperson may be assigned to each hearing panel.<sup>22</sup>

Hearing committees cannot themselves impose disciplinary sanctions. Instead, they issue findings of fact, conclusions of law, and recommendations for discipline to the Disciplinary Board.<sup>23</sup>

## II. OVERVIEW OF DISCIPLINARY PROCEDURES

### A. Investigation by ODC

Most ethics complaints come to ODC in the form of letters from clients who are dissatisfied with some aspect of their lawyer's performance. However, complaints can be taken from any source (not just clients), and ODC can also begin an investigation on its own without a complaint.<sup>24</sup> From 1985 through 1989, 71% of all docketed complaints were from clients, with the remainder from other sources, such as other attorneys, judges, and ODC itself.

Complaints which are submitted to ODC must be in writing and must contain sufficient factual detail to permit a meaningful investigation to be commenced. Each grievance is carefully

<sup>20</sup> See *infra* §II.C.

<sup>21</sup> See Rule 2.5(b), RSCH (September 1984).

<sup>22</sup> See Rule 2.5(a), RSCH (September 1984) (of the 74 persons presently in the hearing committee "pool", 19 are laypersons; the presence of non-lawyers on hearing committees also helps to ensure public accountability of the discipline system).

<sup>23</sup> See Rule 2.5(b), RSCH (September 1984); DB 12, Disciplinary Board Rules.

<sup>24</sup> Rule 2.6(b)(2), RSCH (September 1984) (Disciplinary Counsel has the power and duty to "investigate all matters involving alleged misconduct called to his attention *whether by complaint or otherwise*").

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reviewed to determine whether the facts alleged raise specific issues under the Hawaii Code of Professional Responsibility. If a complaint contains insufficient facts, the complaining party is asked to submit further information before an investigation is begun.

Also, some areas of dissatisfaction, such as "simple" fee disputes, are not normally handled within the disciplinary process but are instead referred to the Hawaii State Bar Association for fee mediation/arbitration. In addition, complaints alleging malpractice (negligence) must normally be addressed through the courts rather than the disciplinary process, unless the negligence may have resulted from possible ethical misconduct (such as neglect, lack of proper preparation, or lack of proper qualification to practice in the specific area of law). Also, complaints against full-time judges (and part-time judges relating to their actions on the bench) fall within the exclusive jurisdiction of the Commission on Judicial Discipline.<sup>25</sup> Finally, complaints involving unauthorized practice of law are handled by the Department of the Attorney General, State of Hawaii.<sup>26</sup>

If a formal investigation is undertaken, the attorney complained against (who is referred to as the "respondent") is notified immediately by mail, and a detailed written response is requested concerning the matter.<sup>27</sup>

In many instances, respondents are urged to obtain counsel to ensure that they are represented by an independent, objective viewpoint throughout the investigation.

A respondent has a duty to cooperate fully in the investigation of a complaint. Failure to cooperate (for example, by failing to respond to requests for information from ODC) is a serious matter and can result in summary suspension and may form a separate basis for a finding of unethical conduct.<sup>28</sup>

ODC investigates each matter as thoroughly as possible to ensure that all relevant facts are brought to light before a disposition is recommended. In addition to input from the respondent and the complaining party, other witnesses may be interviewed and records may be obtained (from courts and financial institutions, for example). All information essential to a proper determination is carefully weighed.

A completed investigation will result in one of three outcomes: (i) the complaint will be dismissed with a finding of no disciplinary violation (occasionally, cautionary information is provided in the dismissal notice to assist the attorney in avoiding similar complaints in the future); (ii) an informal admonition may be imposed by ODC;<sup>29</sup> or (iii) formal disciplinary proceedings may be instituted by ODC.<sup>30</sup>

No docketed investigation may be concluded (or formal proceeding instituted) without the approval of at least one member of the Disciplinary Board who has reviewed the investigation.<sup>31</sup>

## B. Informal Admonition

An informal admonition is the least serious form of discipline which can be imposed.<sup>32</sup> An admonition is a *private* sanction imposed by ODC and is usually imposed for first-time misconduct of a relatively non-serious nature.<sup>33</sup>

<sup>25</sup> See Rule 8.2(c), RSCH (March 1985).

<sup>26</sup> See HRS §605-15.1; *Reliable Collection Agency v. Cole*, 59 Haw. 503, 584 P.2d 107 (1978).

<sup>27</sup> See DB 5, Disciplinary Board Rules (except when a complaint is "frivolous on its face or falls outside the jurisdiction of the Board," ODC must, before bringing the investigation to a conclusion, (1) notify the respondent that he or she may, within a time certain, state his or her position regarding the alleged misconduct, and (2) give consideration to the statement of position filed by the respondent).

<sup>28</sup> Rule 2.12A, RSCH (April 1988) (summary suspension may be ordered for failure to cooperate in a disciplinary proceeding); see *Office of Disciplinary Counsel v. Battista*, No. 13626 (Order of suspension under Rule 2.12A filed March 20, 1989) (summary suspension); *Office of Disciplinary Counsel v. Hitchcock*, No. 7222 (Order of Disbarment issued April 25, 1979) (failure to cooperate constitutes violations of DR 1-102(A)(5) and (6)).

<sup>29</sup> See *infra* §11.B.

<sup>30</sup> See *infra* §11.C.

<sup>31</sup> See Rule 2.7(a), RSCH (September 1984); DB 6 and 7, Disciplinary Board Rules. See also Rule 2.7(b), RSCH (July 1989) (any determination that an ethical violation has occurred must be supported by "clear and convincing" evidence).

<sup>32</sup> See Rule 2.3(f), RSCH (September 1984).

<sup>33</sup> See, e.g., Kibe, Disciplinary Counsel's Report, 24 *Hawaii Bar News* No. 4 (April 1987); Kibe, Disciplinary

An admonition, which does not prevent a respondent from continuing to practice of law, is imposed by ODC by way of a certified letter setting forth the reasons for the sanction. All disciplinary actions, including an admonition, are "cumulative" in the sense that a subsequent ethical violation may result in a more severe sanction due to the prior discipline.<sup>34</sup>

If the respondent agrees to accept the informal admonition, no hearing is held. If the respondent rejects the informal admonition, however, formal discipline proceedings must be commenced with opportunity for a full hearing.<sup>35</sup>

### C. Formal Disciplinary Proceedings

A formal discipline proceeding can result in imposition of any of the following sanctions upon a respondent:<sup>36</sup>

- (a) Disbarment by the Supreme Court; or
- (b) Suspension by the Supreme Court for a period not exceeding five years; or
- (c) Public censure by the Supreme Court; or
- (d) Public reprimand by the Disciplinary Board with the consent of the respondent; or
- (e) Private reprimand by the Disciplinary Board with the consent of the respondent.

In addition, restitution and/or payment of costs (exclusive of attorney's fees) may be ordered by the Supreme Court or Disciplinary Board.<sup>37</sup> However, although restitution may be ordered, monetary recompense is not the primary purpose (or probable outcome) of a formal discipline proceeding. A person who feels monetarily aggrieved as a result of the "dishonest" conduct of an attorney should pursue direct legal action against the attorney and/or file a claim for possible compensation through the Clients' Security Fund of the Bar of Hawaii.<sup>38</sup>

A formal disciplinary proceeding is initiated by the filing of a Petition for discipline with the Disciplinary Board. After service of the Petition,<sup>39</sup> the respondent is afforded the opportunity to file an Answer.<sup>40</sup>

Discovery is *not* allowed in a discipline proceeding absent the approval of the Chairperson of the Disciplinary Board.<sup>41</sup>

After an Answer has been filed, a three-member hearing committee is assigned to conduct a full evidentiary hearing and ultimately issue findings of fact, conclusions of law, and a recommendation as to discipline.<sup>42</sup>

Where ODC and the respondent enter into a full stipulation of facts and recommended discipline, the case is submitted directly to the Disciplinary Board for review *without* presentation before a hearing committee.<sup>43</sup>

Counsel's Report, 25 *Hawaii Bar News* No. 7 (July 1988); Kibe, Disciplinary Counsel's Report, 26 *Hawaii Bar News* No. 7 (June 1989); Kibe, Disciplinary Counsel's Report, 27 *Hawaii Bar News* No. 7 (July 1990).

<sup>34</sup> See, e.g., ABA Standards for Imposing Lawyer Sanctions, Standard 9.22(a) (1986) (prior disciplinary offenses may be considered an aggravating factor which can increase the sanction to be imposed).

<sup>35</sup> DB 9, Disciplinary Board Rules.

<sup>36</sup> Rule 2.3, RSCH (September 1984).

<sup>37</sup> Rule 2.3(f), RSCH (September 1984).

<sup>38</sup> See Rule 10, RSCH (September 1984).

<sup>39</sup> See Rule 2.11(a), RSCH (September 1984) (service is made personally by any individual authorized by the Chairperson of the Disciplinary Board, except that if the respondent "cannot be found within the state or has departed therefrom", service may be made by registered or certified mail at the respondent's last address shown on his or her attorney registration statement filed under Rule 2.18, RSCH, or any other last known address; service by publication in the latter situation is not, therefore, necessary).

<sup>40</sup> Rule 2.7(b), RSCH; DB 11(a), Disciplinary Board Rules (as in civil proceedings, the Answer must be filed within 20 days of service of the Petition). See generally DB 28, Disciplinary Board Rules (extensions of time to file an Answer may be obtained only from the Chairperson of the Disciplinary Board, and are to be granted only upon a showing of "extreme hardship").

<sup>41</sup> Rule 2.12, RSCH; DB 11(f), Disciplinary Board Rules.

<sup>42</sup> Rule 2.7(b), RSCH (September 1988); DB 11 and 12, Disciplinary Board Rules. See n. 31, *supra* (findings must be supported by "clear and convincing" evidence).

<sup>43</sup> Rules 2.7(b) and (d), RSCH (September 1988) (this procedure, adopted in 1988, has helped to reduce the processing time in a number of recent formal disciplinary cases).

After a hearing committee report (or a full stipulation) has been filed with the Disciplinary Board, the Board may adopt or modify the report (or stipulation) or may require further hearing committee proceedings.<sup>44</sup>

After reviewing any formal discipline case, the Disciplinary Board may choose to impose a public or private reprimand upon the attorney. The consent of the attorney is required before these forms of discipline can be imposed.<sup>45</sup> If the attorney does not consent, the case must be presented to the Supreme Court for final review.<sup>46</sup>

A public reprimand is imposed by the Board's issuance of a public order setting forth the reasons for the reprimand. A private reprimand is imposed by the appearance of the attorney before the full Disciplinary Board, at which time the reprimand is verbally imposed upon the respondent by a member of the Board. A reprimand (public or private) does not prevent the respondent from continuing to practice, but signifies that the misconduct was too serious to warrant only an informal admonition.<sup>47</sup>

If the Board determines that disbarment, suspension, or public censure is warranted, or if the attorney refuses to accept a public or private reprimand, the case is forwarded by the Board to the Supreme Court for final review and disposition.<sup>48</sup> After written and (if ordered) oral argument is presented to the court,<sup>49</sup> a final decision is rendered.

#### D. Supplementary Proceedings

In addition to actual disciplinary action, the Disciplinary Board—or, where applicable, ODC—is empowered to take certain steps to protect the public in limited situations. These supplementary proceedings are summarized as follows:

1. ODC may seek the temporary restraint from practice of an attorney who has been convicted of a felony (or of any other crime which, even if not a felony, involves "dishonesty or false statement").<sup>50</sup>

2. The Board may seek the transfer of an attorney to inactive status where the attorney may be incapacitated from practicing law due to mental or physical disability.<sup>51</sup>

3. ODC may seek the appointment by the Supreme Court of counsel to inventory and distribute to clients the files of an attorney who is on inactive status due to disability, or who has disappeared or died, and for whom there is no other person responsible for conducting his or her affairs.<sup>52</sup>

4. ODC may seek the interim suspension of an attorney where it appears that continuation of the attorney's authority to practice law "is causing or is likely to cause serious harm to the public".<sup>53</sup>

5. ODC may, upon approval of the Disciplinary Board Chairperson, cause an attorney's financial accounts to be audited when improper maintenance of those accounts is suspected.<sup>54</sup>

Although the discipline system is not generally designed to function as a "consumer protec-

<sup>44</sup> Rule 2.7(c), RSCH (September 1988); DB 13 and 14, Disciplinary Board Rules.

<sup>45</sup> Rules 2.3(d) and (e), RSCH (September 1984).

<sup>46</sup> DB 15, Disciplinary Board Rules.

<sup>47</sup> See *infra* §IV.D (public reprimands); e.g., Kibe, Disciplinary Counsel's Report, 25 *Hawaii Bar News* No. 7 (July 1988) (private reprimands); Kibe, Disciplinary Counsel's Report, 26 *Hawaii Bar News* No. 6 (June 1989) (private reprimands); 27 *Hawaii Bar News* No. 7 (July 1990) (private reprimands).

<sup>48</sup> Rule 2.7(c), RSCH (September 1988); DB 17, Disciplinary Board Rules.

<sup>49</sup> Rule 2.7(c), RSCH (September 1988) (rules governing briefing and argument of civil appeals are generally applicable in attorney discipline proceedings).

<sup>50</sup> Rule 2.13, RSCH (September 1984) (from 1977 through June 1990, 8 attorneys have been temporarily restrained from practice under this provision).

<sup>51</sup> Rule 2.19, RSCH (September 1984) (from 1977 through June 1990, 7 attorneys have been placed on inactive status due to disability).

<sup>52</sup> Rule 2.20, RSCH (May 1990) (from 1979 through June 1990, 11 such receiverships have been undertaken under this Rule).

<sup>53</sup> Rule 2.23, RSCH (September 1984) (this provision has been invoked on 4 occasions since it was adopted in 1981).

<sup>54</sup> Rule 2.24, RSCH (September 1988) (this provision was invoked on one occasion since it was adopted in 1988).



tion" agency (it has for example, no authority to seek injunctive relief against a respondent), the supplementary proceedings outlined above do provide methods by which the public may be shielded from harm.

### E. Reinstatement

Attorneys who have been disbarred or suspended may be reinstated if specific criteria are met.<sup>65</sup>

A disbarred attorney may not petition the Supreme Court for reinstatement until at least 5 years have elapsed after the effective date of the disbarment.<sup>66</sup> An attorney who has been suspended for more than one year may not petition the Supreme Court for reinstatement prior to the expiration of at least one-half the period of suspension.<sup>67</sup>

After a formal reinstatement petition is filed, a full hearing is required to determine the disbarred or suspended attorney's fitness and rehabilitation to resume the practice of law. Reinstatement is not allowed in any case unless ordered by the Supreme Court.<sup>68</sup>

### F. Confidentiality of Discipline Matters

A significant feature of the discipline system is the broad confidentiality requirements imposed by Rule 2, RSCH.

Investigations conducted by ODC, and proceedings before the Disciplinary Board and Supreme Court, remain confidential unless, for example:

- (a) The attorney requests that the matter be made public;
- (b) The investigation is based upon the conviction of the attorney of a crime;
- (c) The Disciplinary Board files with the Supreme Court a report recommending that the attorney be *disbarred* or *suspended*;
- (d) The Supreme Court transfers the attorney to inactive status due to mental or physical disability; or
- (e) Information is sought by an attorney admission or discipline authority or judicial discipline authority regarding the affected attorney.<sup>69</sup>

Confidentiality requirements under Rule 2 are strictly observed. Absent any of the exceptions noted above, ODC must refrain from providing any comment regarding the non-public complaint record of an attorney. Hence, the fact that there are *no* complaints on file concerning an attorney may not ordinarily be revealed by ODC in response to a general inquiry.

This broad confidentiality requirement protects attorneys from undue publicity regarding complaints which may not be firmly supported. However, a corresponding element is that complainants are afforded absolute immunity from civil liability in submitting their grievances.<sup>70</sup> Indeed, it is relatively easy to file a complaint against an attorney since there are no special standing requirements (one need not be a client to file a complaint) and no statute of limitations. These features are built in to encourage the airing of grievances.

This is only a summary of the disciplinary organization and process in Hawaii. Rule 2, RSCH, and the Disciplinary Board Rules should be consulted for further guidance.

As indicated, the discipline system is organized to provide fair and complete investigation of lawyer complaints. Mandatory review levels ensure that an attorney is not sanctioned unless disciplinary action is found to be fully warranted by the facts.

<sup>65</sup> See Rule 2.17, RSCH (September 1984).

<sup>66</sup> Rule 2.17(b), RSCH (September 1988).

<sup>67</sup> *Id.* (an attorney suspended for *one year or less* may be automatically reinstated—without hearing—on the expiration of the full term of suspension upon his or her filing an affidavit with the Supreme Court demonstrating compliance with the terms of the disciplinary order).

<sup>68</sup> Rule 2.17(a), RSCH (September 1984) (from 1974 through June 1990, 4 suspended attorneys were reinstated to practice; no disbarred attorneys were reinstated during that time).

<sup>69</sup> Rule 2.22(a), RSCH (September 1984).

<sup>70</sup> See Rule 2.8, RSCH (September 1984).

### III. COMPLAINTS HISTORY IN HAWAII

While the number of ethics complaints docketed for investigation has fluctuated somewhat from year to year, there has been a marked overall increase in the number of those complaints over the last several years.

The following table summarizes the number of ethics complaints docketed by ODC since 1980.<sup>61</sup>

<u>Year</u>	<u>Complaints Docketed</u>
1980	143
1981	120
1982	120
1983	133
1984	113
1985	232
1986	216
1987	248
1988	313
1989	294

The number of complaints docketed in 1988 and in 1989 was thus over twice the number docketed in 1980. The overall increase appears to roughly parallel the increase in the size of the bar.<sup>62</sup>

### IV. PUBLIC DISCIPLINE SUMMARY

The following synopsis of cases illustrates the various forms of misconduct for which public discipline has been imposed from 1980 to 1990.<sup>63</sup>

#### A. Disbarments

Since 1980, 20 Hawaii attorneys have been disbarred by the Supreme Court.

##### 1. *Office of Disciplinary Counsel v. Johnson*, 62 Haw. 95, 611 P.2d 993 (1980)

The respondent misappropriated client's funds on two separate occasions. He also neglected and abandoned four of his clients for whom he had been performing legal services. In disbarring the respondent, the Supreme Court noted that it also could not condone his failure to provide information or to cooperate during the course of the disciplinary proceedings.

##### 2. *Office of Disciplinary Counsel v. Smith*, 62 Haw. 467, 617 P.2d 80 (1980)

The respondent misappropriated funds of a client which had been entrusted to him for the client's benefit. He also falsely represented in a separate case that he was the personal representative of a deceased client's estate, opened fictitious bank accounts to receive funds from the estate's debtors, misappropriated certain of those funds for his own use, and withheld material information from the probate court in an attempt to deceive the court. In disbarring the respondent, the Supreme Court noted that an attorney's restitution to a client after legal action has been taken to recover the funds will not be considered a factor in mitigation.

<sup>61</sup> Records of the Disciplinary Board.

<sup>62</sup> See Records of the Disciplinary Board (as of January 1, 1980, there were approximately 2,100 attorneys licensed on active status in Hawaii; as of June 30, 1990, that number had increased to approximately 3,900 attorneys).

<sup>63</sup> See also Heely, *supra*, at 7 (the last such summary, covering public discipline imposed in 1978-79, was published by ODC in the *Hawaii Bar Journal* in 1980).

**3. *Office of Disciplinary Counsel v. Cashman*, 63 Haw. 382, 629 P.2d 105 (1981)**

The respondent was convicted of felony grand theft in California based on his misappropriation of two client's funds totalling \$15,735. He resigned his bar membership in California while disciplinary charges were pending there due to the conviction. He was later convicted in California of the misdemeanor offense of practicing law without a license for filing pleadings in a civil case after having resigned from the bar. Based on his misconduct in California, the respondent was disbarred in Hawaii.

**4. *Office of Disciplinary Counsel v. Silva*, 63 Haw. 585, 633 P.2d 538 (1981)**

While representing the heirs of an estate, the respondent stated that he could improperly influence a public official on zoning issues, converted estate funds to his own use on numerous occasions, failed to pay estate bills, lied to his clients, and failed to surrender estate funds and provide an accounting. The respondent also gave false testimony and failed to comply with a subpoena issued to him by ODC during the investigation of the matter. In two other cases, he converted additional client funds to his own use and forged his client's name on a settlement check. The Supreme Court held that the attorney's lack of rehabilitation from alcoholism precluded consideration of the alcoholism as a factor in mitigation.

**5. *Office of Disciplinary Counsel v. Tuohy*, No. 8855 (Order of Disbarment Upon Consent filed October 22, 1982)**

The respondent was disbarred by consent under Rule 16.14, RSCH (July 1974),<sup>64</sup> which provides that while the disbarment is public, the reasons for the sanction remain confidential unless the Supreme Court otherwise directs (the respondent had earlier been placed on interim suspension by the Supreme Court on September 27, 1982).<sup>65</sup>

**6. *Office of Disciplinary Counsel v. Peckron*, No. 8706 (Order of Disbarment filed June 17, 1983)**

The respondent misappropriated client funds in four separate cases. He also variously engaged in misrepresentations to his clients and employer, neglected client matters, charged illegal and unreasonable fees, attempted to exonerate himself from malpractice liability, and engaged in misrepresentations to ODC during the investigation of those matters (the respondent had earlier been placed on interim suspension by the Supreme Court on May 24, 1982).

**7. *Disciplinary Board v. Robertson*, No. 10128 (Public Order Disbarring Attorney on Consent filed September 4, 1984)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

**8. *Office of Disciplinary Counsel v. McKellar*, No. 9995 (Order of Disbarment filed January 18, 1985)**

The respondent commingled and misappropriated funds received in his fiduciary capacity as a federally-appointed receiver, failed to maintain adequate books and records documenting his handling of the receivership funds, submitted a falsely-created letter to ODC and the U.S. District Court relating to a bar admission question, and failed to disclose to a client his own personal interest in a real property transaction being conducted with the client.

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<sup>64</sup> Now Rule 2.14, RSCH (September 1984).

<sup>65</sup> See *supra* §II.D (interim suspension).

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**9. Office of Disciplinary Counsel v. Goo, No. 10422 (Order Accepting Permanent Relinquishment of License to Practice Law filed September 20, 1985)**

The respondent was convicted of federal felony offenses of immigration fraud and subornation of perjury. He was sentenced to probation for 5 years and fined \$3,000 (following his conviction, he was restrained from practice on March 29, 1985 pursuant to Rule 2.13(a), RSCH (September 1984)).<sup>66</sup> After formal discipline proceedings were initiated, the respondent consented to disbarment. However, citing his age (71 years) and his cessation of law practice, he asked the Supreme Court to allow him to instead "turn in" his license to practice. The Supreme Court granted the request, and the respondent physically turned his license over to the Clerk of the Supreme Court without possibility of reinstatement.

**10. Office of Disciplinary Counsel v. Cody, No. 11025 (Order of disbarment filed February 12, 1986)**

The respondent, who had been licensed in both Hawaii and Arizona, was reciprocally disbarred in Hawaii pursuant to Rule 2.15, RSCH (September 1984), after being disbarred in Arizona for abandoning his practice and misappropriating client funds.<sup>67</sup>

**11. Office of Disciplinary Counsel v. Clark, No. 11530 (Order of disbarment filed November 25, 1986)**

The respondent engaged in serious neglect of four client's cases, failed to return one client's fee advance after failing to complete that legal matter, and failed to cooperate with ODC, the Disciplinary Board, the Third Circuit Court, and the Supreme Court in various aspects of the matter (the respondent had been placed on interim suspension by the Supreme Court on February 11, 1986).

**12. Office of Disciplinary Counsel v. Sandkuhler, No. 9159 (Order of Disbarment filed November 25, 1986)**

The respondent was convicted of federal felony charges of conspiracy to possess and to distribute cocaine. He also failed to maintain adequate records concerning a \$400 cost advance provided to him by a client in a false arrest case (thereby resulting in a long delay in the return of those funds to the client), and also failed to cooperate with ODC in the investigation of the latter matter. Based largely on the attorney's criminal conviction, the Disciplinary Board concluded that notwithstanding *Disciplinary Board v. Bergan*, 60 Haw. 546, 592 P.2d 814 (1979), and *Office of Disciplinary Counsel v. Bronson, infra*, which resulted in *suspensions* for similar misconduct, drug usage among bar members was of such concern that imposition of the most serious sanction was required. The Supreme Court concurred and (despite the respondent's claims of mitigation that he had served time in prison, had been drug-free for over five years, had returned to Hawaii and performed well in his new non-law employment, and had expressed repentance for his misconduct) ordered disbarment (the disbarment was made retroactive to March 8, 1983, which was the date on which the respondent had been restrained from practice due to his felony conviction).

**13. Office of Disciplinary Counsel v. Scott, No. 11329 (Order of Disbarment filed November 25, 1986)**

The respondent was disbarred for neglect and abandonment of clients, misrepresentations to

<sup>66</sup> *Id.* (temporary restraint following criminal conviction).

<sup>67</sup> See generally Rule 2.15(c), RSCH (September 1984) (a Hawaii attorney disciplined by another state in which he or she is also admitted to practice may be reciprocally disciplined in Hawaii in a summary proceeding filed directly with the Supreme Court by ODC; the Court will impose identical discipline unless special conditions are found to apply).

one client concerning the status of her case, misappropriation of funds of a probate estate for which the attorney was personal representative and counsel, and failure to cooperate with ODC in its investigation of some of the complaints. The Supreme Court and Disciplinary Board rejected as mitigation the respondent's claims that his misconduct stemmed largely from his addiction to alcohol and cocaine and that he had made great strides toward recovering from his addictions (the disbarment was made retroactive to June 30, 1984, which was the date on which the respondent had voluntarily assumed inactive status).

**14. *Office of Disciplinary Counsel v. Stewart*, No. 11512 (Public Order Disbarring Attorney on Consent filed December 3, 1987)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

**15. *Office of Disciplinary Counsel v. McCarthy*, No. 13321 (Public Order Disbarring Attorney on Consent filed September 26, 1988)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

**16. *Office of Disciplinary Counsel v. Ebinger*, No. 13365 (Order of Disbarment filed December 22, 1988)**

Disbarment was ordered due to the respondent's neglect and/or abandonment of six client matters, failure to account for and to refund unearned fees to clients in three of those matters, failure to take steps to avoid prejudice to clients upon withdrawing from their cases, and violation of established procedural rules of court. The respondent also failed to cooperate in the investigation of the complaints and did not appear and participate in the disciplinary proceedings.

**17. *Office of Disciplinary Counsel v. Appell*, No. 12101 (Public Order of Disbarment filed May 17, 1989)**

The respondent was disbarred based on a pattern of misconduct in thirteen separate matters, including giving false testimony before a court, commingling of client funds with his own funds, misappropriating a client's funds, establishing a trust account to defraud his creditors, making false statements in his application to practice before the United States District Court, neglecting his representation of clients, engaging in a pattern of threats and use of coarse and vulgar language, and failing to cooperate in the investigation of several complaints.

**18. *Office of Disciplinary Counsel v. Kahr*, No. 13766 (Order of Disbarment filed June 16, 1989)**

The respondent abandoned her law practice on Kauai and was disbarred based on ten complaints filed by clients and others. The respondent also failed to provide certain clients with file materials and to provide other clients with an accounting of their funds. In addition to ordering disbarment, the Court ordered that the respondent reimburse to five of her clients unearned retainer amounts which they had provided to her.

**19. *Office of Disciplinary Counsel v. Gore*, No. 10584 (Order of Disbarment filed August 31, 1989)**

The respondent was disbarred as a result of his April 1985 felony conviction for engaging in (a) a conspiracy to knowingly and intentionally distribute non-narcotic controlled substances, and (b) a conspiracy to knowingly and intentionally possess, with intent to distribute, non-narcotic controlled substances (quaaludes). He served two years in prison after his conviction was affirmed on appeal in 1986 (he had been temporarily restrained from the practice of law in May 1985

based on the felony conviction).

**20. Office of Disciplinary Counsel v. Hurley, 71 Haw. — 787 P.2d 688 (1990)**

The respondent resigned from the Texas Bar while complaints were pending against him in that state (the Texas complaints involved the respondent's failure to complete five client's legal matters after closing his office and leaving town without notice to his clients). The Hawaii Supreme Court found that the respondent's resignation in Texas was "tantamount to disbarment" based on language in the Texas resignation rule. It thus *disbarred* him on a reciprocal basis in Hawaii even though he had actually resigned in Texas.

**21. Office of Disciplinary Counsel v. Tschirhart, No. 14397 (Order of Disbarment filed May 7, 1990)**

The respondent had been disbarred by consent on January 26, 1990 in Maryland, where he had been the subject of an investigation regarding his receipt and accounting of funds in a real estate matter. He was reciprocally disbarred in Hawaii under Rule 2.15(b), RSCH (September 1984).

**22. Office of Disciplinary Counsel v. Gaylord, No. 14479 (Order of Disbarment by Consent filed May 11, 1990)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

The cases described above in which the reasons for discipline are public generally demonstrate that disbarment will almost certainly result from misappropriation of client funds, abandonment of a practice, or conviction of a felony drug offense.

**B. Suspensions**

Since 1980, 18 attorneys have been suspended from practice.

**1. Office of Disciplinary Counsel v. Kagawa, 63 Haw. 150, 622 P.2d 115 (1981)**

The respondent neglected and abandoned his clients in ten separate cases and was suspended for 4 years. The Supreme Court cited, *sua sponte*, the attorney's marital difficulties as mitigation in imposing suspension rather than disbarment.

**2. Office of Disciplinary Counsel v. Koolpe, No. 8082 (Order of suspension filed on March 2, 1981)**

The respondent entered a plea of guilty to felony charges of promoting a detrimental drug (marijuana) in the first degree. He then moved for deferred acceptance of the guilty plea, and his motion was granted. He was ordered to pay a fine of \$5,000. Based on his criminal conduct, the respondent was suspended for 1 year.<sup>68</sup>

**3. Office of Disciplinary Counsel v. Rodrigues, No. 10688 (Order of suspension filed on December 2, 1985)**

The respondent was suspended for 5 years for neglect and abandonment of several clients. The Supreme Court ordered that he provide restitution to three of his former clients for unearned

<sup>68</sup> By Supreme Court Order filed March 6, 1986, this respondent was reinstated to practice (effective April 10, 1986) pursuant to Rule 2.17, RSCH (September 1984) following a full reinstatement hearing and his successful completion of the Professional Responsibility section of the Hawaii bar examination (as ordered by the Supreme Court).

retainers which he had failed to return.

**4. *Office of Disciplinary Counsel v. Bronson*, No. 10960 (Order Suspending Attorney filed December 13, 1985)**

The respondent was convicted in federal court of felony offenses of making a false material statement to a federal grand jury and of conspiracy to possess and to distribute cocaine. In a separate matter, he engaged in misrepresentations while testifying under oath as a witness at a federal probation revocation hearing. Finally, he neglected two clients whose civil matters he was handling, and he also made various misrepresentations to those clients. The respondent was suspended for 5 years based on his overall misconduct (he had been restrained from practice on March 8, 1983 due to his felony conviction).

**5. *Office of Disciplinary Counsel v. Loo*, No. 10799 (Order of Suspension filed April 18, 1986)**

The respondent was suspended for 18 months due to his misconduct in eight separate cases, including neglect and failure to communicate with clients, failure to withdraw from employment upon being discharged by a client, entering into an illegal fee agreement, charging excessive fees, failure to promptly deliver a client's file upon being discharged, accepting employment when it was obvious that a client wished to bring frivolous litigation, and engaging in misrepresentations to ODC regarding one of the complaints.

**6. *Office of Disciplinary Counsel v. Miyamoto*, No. 10226 (Order of Suspension filed April 18, 1986), appeal dismissed, 479 U.S. 925 (1986)**

The respondent was suspended for 18 months for materially altering a medical report which was subsequently offered by him as evidence in a workers' compensation case.

**7. *Office of Disciplinary Counsel v. Yee*, No. 11085 (Order of suspension filed June 9, 1986)**

The respondent was suspended for 18 months for abandoning his law office (thus requiring the appointment of an attorney to take possession of and inventory his files and records pursuant to Rule 2.20, RSCH (September 1984)), neglecting a client's legal matter, failing to communicate with the client, failing to return the client's file and retainer, and failing to cooperate in the disciplinary proceedings.

**8. *Office of Disciplinary Counsel v. Searl*, No. 11513 (Order of Disciplinary Suspension filed July 25, 1986)**

The respondent was suspended for 2 years for neglect of several clients' legal matters, failure to maintain a client's money in trust due to inadequate recordkeeping (thus resulting in a delay in providing those funds to the client), failure to withdraw from a legal matter when discharged by a client, misrepresentations to a client, failure to promptly deliver to clients their files upon being discharged, failure to render an accounting of retainer funds provided by a client, and failure to cooperate with ODC during the investigation of the complaints.

**9. *Office of Disciplinary Counsel v. Thompson*, No. 10441 (Order of suspension filed October 29, 1987)**

The respondent was convicted of the felony offense of knowingly and wilfully submitting a document containing false information to a federal agency (the Immigration and Naturalization Service). The document, which was prepared by the respondent and filed by him on behalf of an immigration client, falsely stated the net income of the prospective local employer of the immigrant and also contained a false signature of the immigrant's local agent. The respondent was

sentenced by the federal court to pay a fine of \$5,000, but no term of imprisonment was imposed. After considering in mitigation the respondent's lack of a prior disciplinary record, his full disclosure and cooperation in the disciplinary proceedings, his practice without incident or complaint since his conviction, and his continued good reputation among his peers, the Supreme Court ordered that he be suspended for 2 months.<sup>69</sup>

**10. Office of Disciplinary Counsel v. Arnett, No. 12616 (Order of Suspension filed June 22, 1988)**

The respondent was suspended for 6 months for neglecting and abandoning her client's interests and failing to carry out contracts of employment in six cases, violating court procedural rules in three cases, and failing to cooperate in the investigation of a total of ten complaints.<sup>70</sup>

**11. Office of Disciplinary Counsel v. Miyasaki, No. 13499 (Order of suspension filed December 12, 1988)**

The respondent was suspended for 8 months. His misconduct in three separate cases included: (1) neglecting a client's legal matter, as well as failing to properly withdraw from that case or to take other reasonable steps to avoid prejudice to his client's interests; (2) making a false statement in a demand letter sent to third parties on behalf of his client in another case; (3) taking legal positions on behalf of his client in a third case in contravention of court orders, and continuing the employment when a conflict of interest precluded him from doing so; and (4) failing to cooperate with the investigation of all three complaint matters.

**12. Office of Disciplinary Counsel v. Peetz, No. 13106 (Memorandum Opinion filed February 17, 1989)**

Suspension for 3 years was ordered due to the respondent's neglect of a client's legal matter, failure to properly withdraw from the client's civil case, and failure to provide an accounting of funds at the client's request. An aggravating factor was the attorney's neglect of three prior client matters for which he received a private reprimand from the Disciplinary Board in 1982.

**13. Office of Disciplinary Counsel v. Rapp, 70 Haw. 539, 777 P.2d 710 (1989)**

The respondent was suspended for 3 years for neglecting and mishandling twelve separate client matters over a two-year period (six of those matters involved divorce cases, while the other six involved DUI defense cases). In most of the cases, the respondent accepted initial retainers and performed certain preliminary services, after which he failed to take steps to complete those matters in timely fashion. He also failed repeatedly to return telephone calls and to respond to other requests for information from his clients. The respondent also missed court appearances for two of his DUI clients, thus causing penal summonses to be issued against them. In addition, he was found to have engaged in misrepresentations to ODC in the investigation of one case.

**14. Office of Disciplinary Counsel v. Bowyer, No. 12123 (Order of suspension filed September 26, 1989; Amended Order filed September 27, 1989)**

The respondent abandoned numerous pending divorce matters for which he was counsel of record. He was suspended for 3 years.

<sup>69</sup> By Supreme Court Order filed February 19, 1988, this respondent was reinstated to practice following a full reinstatement hearing under former Rule 2.17(b), RSCH (September 1984).

<sup>70</sup> By Supreme Court Order filed April 28, 1989, this respondent was reinstated to practice on a summary basis pursuant to amended Rule 2.17(b), RSCH (September 1988) (because the suspension was for a period of one year or less).



**15. *Office of Disciplinary Counsel v. Battista*, No. 13626 (Order of suspension filed September 27, 1989)**

The respondent was suspended for 3 years for engaging in a pattern of neglect in six client matters. He failed to, *inter alia*, file and/or serve court documents in a timely manner, failed to appear at court hearings, failed to maintain records and/or provide an accounting of client funds, and repeatedly failed to return his clients' telephone calls. Several clients' cases were adversely affected by his neglect. Aggravating factors included a prior informal admonition for neglect.<sup>71</sup>

**16. *Office of Disciplinary Counsel v. Smith*, 71 Haw. \_\_\_, 780 P.2d 87 (1989)**

The respondent was suspended for 1 year and 1 day in Colorado for dishonest, harassing, and occasionally bizarre conduct toward his former client, the client's mother, the Colorado disciplinary office, and an attorney retained by the former client to defend against a civil suit for fees which had been filed by the respondent. Suspension in Hawaii for the same period was ordered on a reciprocal basis.

**17. *Office of Disciplinary Counsel v. Bicoy*, No. 11586 (Order of suspension filed October 2, 1989)**

Suspension for 5 years was ordered due to the respondent's felony conviction for first degree theft and conspiracy to commit theft. The charges stemmed from misrepresentations made by the respondent in his application for public financing for his 1982 campaign for lieutenant governor. (The suspension was made retroactive to October 2, 1986, which was the date on which the respondent had been temporarily restrained from practice due to the felony conviction).

**18. *Office of Disciplinary Counsel v. Kunimura*, No. 14173 (Order of Suspension filed January 3, 1990)**

The respondent was suspended for 2 years for neglect of four client matters, as well failure to cooperate with the investigation of certain aspects of those matters. In one case, the respondent failed to take steps to complete a probate despite the filing of the ethics complaint and repeated warnings from ODC (the probate remained uncompleted five years after having been opened by the respondent). The respondent declined to provide evidence in explanation or mitigation of her misconduct.

As generally demonstrated by these cases, instances of multiple or lengthy neglect of clients' legal matters will result in suspension.

**C. Public Censures**

Six public censures have been imposed by the Supreme Court since 1980.

**1. *Office of Disciplinary Counsel v. Bettencourt*, No. 9402 (Order of Public Censure filed November 22, 1985)**

The respondent was publicly censured due to his federal misdemeanor conviction of failure to file a federal income tax return for 1978.

**2. *Office of Disciplinary Counsel v. Harimoto*, No. 9400 (Order of Public Censure filed May 6, 1986)**

The respondent was publicly censured for his federal misdemeanor conviction of failure to

<sup>71</sup> By Supreme Court Order filed March 20, 1989, this respondent had been summarily suspended from practice pursuant to Rule 2.12A, RSCH (April 1988), for failure to cooperate in the investigation of unrelated ethics complaints. See *supra* n. 28.

suspension filed

file federal income tax returns for 1978 and 1979.

**3. Office of Disciplinary Counsel v. Weight, No. 9401 (Order of Public Censure filed May 4, 1987)**

The respondent was publicly censured for his federal misdemeanor conviction of failure to file federal income tax returns for 1978 and 1979.

**4. Office of Disciplinary Counsel v. Rolls, No. 13104 (Order of Public Censure filed July 15, 1988)**

The respondent was publicly censured for his federal misdemeanor conviction of failure to file federal income tax returns for 1981. He also failed to file timely returns for 1982 and 1983, but had not been criminally charged for those omissions.

**5. Office of Disciplinary Counsel v. Burgess, No. 12608 (Decision and Order of Public Censure filed August 3, 1988)**

The respondent was publicly censured for discourteous conduct degrading to a tribunal stemming from his refusal to rise upon entry into the courtroom of the members of the Supreme Court in an appellate case in which the respondent served as counsel.

**6. Office of Disciplinary Counsel v. Haraguchi, No. 14136 (Order of Public Censure filed February 20, 1990)**

The respondent stipulated to negligently misrepresenting to the Family Court in a 1986 divorce hearing that neither he nor his client had received word from the client's spouse regarding the divorce. In fact, the client's spouse had verbally informed the client that he (the spouse) objected to certain portions of the proposed decree. Based on the respondent's statements, the Family Court issued a divorce decree by default. The respondent was publicly censured for his misrepresentation to the Family Court.

**D. Public Reprimands**

Four public reprimands have been imposed by the Disciplinary Board since this form of sanction was first permitted in 1981.

**1. Office of Disciplinary Counsel v. Nam, ODC No. 1136 (Public Order of Discipline filed June 12, 1985)**

The respondent was publicly reprimanded based on his misdemeanor conviction for contempt of court, which stemmed from his discourteous and undignified courtroom statements and physical actions directed toward a circuit court judge.

**2. Office of Disciplinary Counsel v. Malloy, ODC No. 2100, (Public Order of Discipline filed July 28, 1989)**

The respondent pleaded no contest to the misdemeanor offense of making a false unsworn statement in nomination papers filed for State office (he had untruthfully stated that he met the three-year residency requirement imposed by the Hawaii State Constitution). His motion for deferred acceptance of no contest plea was granted, and he was placed on probation for one year and ordered to pay a fine of \$350. He acknowledged during the disciplinary proceedings that he was aware when filing his nomination papers that he did not meet the three-year residency requirement, although he stated that he had questions at the time as to whether the requirement was constitutional. A public reprimand was imposed by stipulation.

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**3. *Office of Disciplinary Counsel v. Shimokusu*, ODC Nos. 2500 and 2501 (Public Order of Discipline filed November 30, 1989)**

The respondent was publicly reprimanded by stipulation for neglecting to file two deeds for over 3 years. The neglect continued despite numerous inquiries from the grantees as to the status of the deeds (the grantor, who was the grantees' father, had passed away shortly after executing the deeds) and the filing of ethics complaints regarding the matter. The respondent also falsely informed the grantees on several occasions, including after the grievances had been lodged, that the deeds had been submitted for filing.

**4. *Office of Disciplinary Counsel v. Sakamoto*, ODC No. 2239 (Public Order of Discipline issued on January 18, 1990)**

The respondent was publicly reprimanded for failing to disclose to the circuit court all of the terms of a plea agreement which he believed had been made on behalf of his client in a criminal case.

Public and private reprimands are usually imposed where, although the misconduct is deemed to have been somewhat serious, there is no aggravated pattern of repeated misconduct and the ethical violation is deemed unlikely to recur. Conduct which is deemed relatively more serious will naturally result in a public, rather than a private, reprimand.

These summaries have hopefully provided a flavor of the factual circumstances which have led to various forms of public discipline since 1980. Of course, the results reached in each of these cases may have been affected by certain mitigating and aggravating circumstance which, due to the necessarily abbreviated nature of certain of these summaries, may not have been fully recited. Accordingly, researchers should consult actual case files or opinions instead of relying on these summaries alone.

## V. BAR UNIFICATION AND THE DISCIPLINE SYSTEM

By order filed October 27, 1989 and adopted as Rule 17, RSCH (November 1, 1989), the Supreme Court created a unified bar in Hawaii. The Court concurrently adopted amendments to Rule 2, RSCH, to confer upon the unified bar certain administrative duties concerning the lawyer discipline system.<sup>72</sup>

Rule 17 and the amendments to Rule 2 do not alter the established procedures for review and processing of ethics grievances. The Supreme Court will still retain "at all times its ultimate authority over admission and discipline of attorneys licensed to practice in this State".<sup>73</sup> Hence, the unified bar will not become involved in the handling of individual ethics complaints.

The bar unification amendments to Rule 2 will, however, result in the following limited administrative changes:

### A. Attorney Registration

Under the new rules, responsibility for administrating the annual attorney registration process will be shifted from the Disciplinary Board to the unified bar. As the organization designated to serve as the administrative body of the unified bar,<sup>74</sup> the Hawaii State Bar Association ("HSBA") will now carry out this function.

This will be the most obvious change for attorneys because registration billings will be prepared and processed by HSBA rather than the Disciplinary Board. HSBA is now responsible for collecting all bar-related assessments, including the annual Disciplinary Board registration fees under Rule 2.18, RSCH. These registration fees, which (as previously indicated) are the sole

<sup>72</sup> See also Rule 1, RSCH (November 1989) (amendments concerning Board of Examiners rules); Rule 10, RSCH (November 1989) (amendments concerning Clients' Security Fund rules).

<sup>73</sup> Rule 17(b), RSCH (November 1989).

<sup>74</sup> See Unification of the Hawaii State Bar Implementation Order No. 2 (January 22, 1990).

source of funding for the Disciplinary Board system, will continue to be specially earmarked for use by the Board and ODC and may not be utilized for any other purposes. After collecting those fees, HSBA must remit the funds to the Disciplinary Board.<sup>76</sup>

While the annual Disciplinary Board registration fees may not be reduced below 1989-90 levels without authorization from the Supreme Court, those fees may be increased at the discretion of the HSBA board of directors.<sup>76</sup>

Also, due to the transfer of administrative responsibility for attorney registration, HSBA—and not the Disciplinary Board—will be responsible for maintaining current address information for all bar members. Any bar member address changes must thus be directed to HSBA instead of to the Disciplinary Board.

### B. Appointment of Disciplinary Board Members

The members of the Disciplinary Board have previously been appointed from nominees obtained directly by the Supreme Court. Most recently, the Disciplinary Board itself has suggested possible nominees to the Court.

Under the unified bar rules, the members of the Board will be appointed by the Court from a list of nominees submitted solely by the HSBA board of directors.<sup>77</sup> This change was adopted primarily to allow the bar to have greater formal input into attorney disciplinary issues.<sup>78</sup>

### C. Disciplinary Board Budget

Under the new rules, the HSBA board will now be permitted to review the Disciplinary Board's annual budget.<sup>79</sup> Such budgetary review authority was also included to allow the bar more formal input into the disciplinary system.

However, while the HSBA board will have authority to review the Disciplinary Board's budget, HSBA will not hold "veto" power over the budget. HSBA will thus be able to suggest possible revisions to the Board's budget, but it will not be empowered to mandate those changes. The Supreme Court retains final authority to review and approve the Board's budget, and will resolve any disagreements between the HSBA board of directors and the Disciplinary Board concerning budget allocations or registration fees.<sup>80</sup>

As indicated, the changeover to a unified bar will not affect the substantive functions of the Disciplinary Board and ODC. Although mechanisms have been included by the Supreme Court to permit more formalized inquiry and input by the bar into the funding and operations of the discipline system, those mechanisms do not allow the bar to dictate to the Disciplinary Board or ODC the manner in which the merits of individual ethics grievances will be determined. The Court's wise adoption of this approach will help to protect the functional independence of the discipline system.

## VI. FUTURE DEVELOPMENTS

In addition to the bar's enhanced ability, through the unified bar structure, to provide input and resources concerning the disciplinary process, three other developments will have an impact

<sup>76</sup> Rule 2.18(a), RSCH (November 1989).

<sup>77</sup> *Id.* (annual registration fees, which are currently set at \$50, \$100, or \$150 per attorney, depending on the number of years the attorney has been in practice, may thus be raised by HSBA without Supreme Court approval).

<sup>78</sup> See Rule 2.4(a), RSCH (November 1989) (a person may serve concurrently on the Disciplinary Board and on the unified bar board of directors).

<sup>79</sup> See Committee on Integration of the Bar, Memorandum to All Active Members of the Bar re: Unification of the Hawaii Bar (August 18, 1989).

<sup>80</sup> See Rule 2.4(e)(7), RSCH (November 1989) (Disciplinary Board has the power and duty to "develop in consultation with" the unified bar board of directors an annual budget for the operation of the lawyer discipline system); Rule 2.21, RSCH (November 1989) (Disciplinary Board's annual budget "shall be subject to review" by the unified bar board of directors).

<sup>81</sup> See Rule 2.21, RSCH (November 1989); Hawaii State Bar Association, Report of Disciplinary Board Task Force (February 23, 1990), at 5.

upon the future regulation of lawyer conduct.

#### A. Model Rules of Professional Conduct

In 1983, the American Bar Association House of Delegates approved the Model Rules of Professional Conduct ("Model Rules"), which replaced the ABA Model Code of Professional Responsibility ("Model Code").

While the Model Rules do not *drastically* change the standards of ethical behavior which are applicable to lawyers (many of the provisions in the Model Rules are either similar to Model Code requirements or codify existing interpretations which have developed through case law), there are some substantive differences between the Model Rules and Model Code (in such areas, for example, as client perjury, fee splitting between lawyers, and duties of supervisory attorneys).

Also, the Model Rules follow a restatement of laws format (with black letter rules followed by commentary, rather than "Canons", "Ethical Considerations", and "Disciplinary Rules"). The Model Rules are also organized generally according to the different roles which a lawyer performs (and are thus divided into areas such as "Client-Lawyer Relationship", "Counselor", "Advocate", "Transactions with Persons Other than Clients", "Law Firms & Associations", "Public Service", "Information About Legal Services", and "Maintaining the Integrity of the Profession").

A total of 34 states plus the District of Columbia have thus far adopted the Model Rules.<sup>81</sup> Four other states have incorporated portions of the Model Rules into their existing Codes of Professional Responsibility.<sup>82</sup>

A committee jointly appointed by the Hawaii Supreme Court and the U.S. District Court of Hawaii is reviewing the Model Rules and plans to submit its report in late 1990. It is thus possible that the Model Rules could be adopted within the next year by both our Supreme Court and U.S. District Court as the new set of mandatory guidelines for attorney conduct in Hawaii.

Upon adoption of the Model Rules, bar members will need to adjust to its new language and organizational framework. As indicated, however, the standards of conduct are not (other than in a few defined areas) expected to change radically.

#### B. ABA Commission on Evaluation of Disciplinary Enforcement

As ethical standards have become closer to the fore in the minds of bar members and the public, the mechanism for enforcing those standards has also become the subject of greater interest and scrutiny.

At the suggestion of the National Organization of Bar Counsel (a national membership body for lawyer discipline agencies in which ODC is an active participant), the ABA has commissioned an in-depth study of lawyer discipline nationwide. The ABA Commission on Evaluation of Disciplinary Enforcement, which was appointed in 1989, has been gathering data and will hold hearings throughout 1990 concerning the purposes, processes, and results of lawyer discipline. The Commission is charged with the task of evaluating lawyer discipline on a national scale and will make recommendations on how to improve the system to better serve the public and the profession.<sup>83</sup>

While the improvements which may be recommended by the Commission are not presently known, it is expected that modifications will be suggested to permit more effective and efficient processing of attorney grievances. The conclusions and recommendations of the ABA Commission

<sup>81</sup> *ABA/BNA Lawyers' Manual on Professional Conduct* 01:3-4 (1990) (list of jurisdictions which have adopted the Model Rules as of March 28, 1990).

<sup>82</sup> *Id.*

<sup>83</sup> See also American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (June 1970) (this last nationwide study, carried out by a committee chaired by retired U.S. Supreme Court Associate Justice Tom C. Clark, became popularly known as the "Clark Committee Report". Its sweeping recommendations brought about the development of full-time disciplinary systems nationwide, including Hawaii. The current ABA-sponsored national review of lawyer discipline has thus been informally dubbed "Clark II").

may closely affect our Hawaii attorney discipline system because the structural and procedural features of our system are based on the ABA Model Rules of Disciplinary Enforcement. To the extent that the ABA Commission recommends changes to the ABA model, corresponding changes to the Hawaii system may be judged appropriate.

### C. Restatement of the Law Governing Lawyers

The American Law Institute (ALI), whose members include lawyers, judges, and law professors, has been earnestly working on a proposed *Restatement of the Law Governing Lawyers*.

Chapters being considered are: the lawyer-client relationship; lawyer-client contracts for legal services; lawyers' liability to clients and non-clients; lawyers in the adversary system; lawyers as counselors; conflicts of interest; client confidentiality; and the delivery of legal services.<sup>84</sup> It is perhaps not coincidental that these areas are similar to those covered under the functional approach of the ABA Model Rules of Professional Conduct.

The effort by ALI to formulate a Restatement of the law of attorney conduct demonstrates that the area has achieved full substantive recognition.

However, the extent to which the principles expressed in the *Restatement* will conflict with any provisions of the Model Rules or Model Code is presently unknown. Efforts are being made by ALI, of course, to take into account the provisions of both ethical models in fashioning the Restatement.<sup>85</sup> Although the provisions of the ethics rules adopted by our Supreme Court would, for disciplinary purposes, be considered paramount, the *Restatement* would no doubt provide fertile ground for discussion as to how official rule provisions should be interpreted.

The Restatement project is not expected to be completed for another three to five years.<sup>86</sup> but it will no doubt stir much interest and debate well before that time as tentative drafts are circulated. We look ahead with great interest to the outcome of this project.

## VII. CONCLUSION

This article has attempted to provide a functional overview of the Hawaii lawyer ethics system. It is hoped that this information will bring about a better understanding of the workings of our professional responsibility system.

As the success of our system relies on the concept of self-regulation, we must each do our best to ensure that high levels of conduct are maintained throughout our profession. The following thoughts from the ABA Commission on Professionalism are thus instructive:

The legal profession is more diverse and provides more legal services to more people today than ever before. These are not inconsiderable achievements. Further, most lawyers . . . are conscientious, fair, and able. They serve their clients well and are a credit to the profession. Yet the practices of some lawyers [do] cry out for correction. . . .

\* \* \* \* \*

The transition from the Canons to the Code to the Model Rules was paralleled by the development of disciplinary enforcement machinery in the several states. As a consequence, lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. However, lawyers have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.

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All segments of the bar should [thus] [r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.<sup>87</sup>

<sup>84</sup> *ABA/BNA Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 4, No. 10, at 176 (1988).

<sup>85</sup> *See Id.*, Vol. 5, No. 9, at 160 (1989).

<sup>86</sup> *See Id.*, Vol. 4, No. 10, at 176; *Id.*, Vol. 6, No. 8, at 150 (1990).

<sup>87</sup> Report of ABA Commission on Professionalism (1986) at 1, 7 (footnote omitted), and 15 (the ABA Commission

As lawyers, we must always strive to conduct ourselves beyond the bare minimum required by our ethics rules. If we seek continually to meet higher standards of behavior in our dealings with clients, the courts, opposing parties, opposing counsel, and the general public, our "professionalism" will most assuredly be secured.

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on Professionalism was appointed in 1985 to examine and report "on matters affecting the performance of legal services by the Bar" and to "make specific suggestions for change [where] appropriate"; in its report, the Commission presented various recommendations on steps which law schools, practicing attorneys, law firms, bar associations, and judges should take to foster professionalism within the bar).