

# The Office of DISCIPLINARY COUNSEL



Janet Hunt graduated from Western State University College of Law in Fullerton, California in 1980. She originally was self-employed, concentrating in probate, bankruptcy, and a general civil litigation practice. In 1987, she worked in the Disciplinary Counsel's office in California and retired from the state bar in June 2008. Subsequently, she accepted the offer to be the new Chief Disciplinary Counsel in Hawaii.

## OFFICE MYSTIQUE

Hawaii Bar Journal (HBJ): In the past, the Office of Disciplinary Counsel ("ODC") had an aura of mystery surrounding it. Will you be changing that?

Hunt: It was shocking to me when I got here that there was a sign that said you can't see anybody unless you have an appointment. I changed that.

We changed the entire phone system so we can have direct dial lines. The staff is supposed to give their direct dial numbers to people when they have a case with them.

We now have a website: [www.odchawaii.com](http://www.odchawaii.com). There are links to the HSBA and Judiciary. Nathan Natori, who is a private practitioner and a member of the ODC board, put it all together. We have articles that were published in the Hawaii Bar Journal;

complaint forms; and other documents.

If you put in "ODC Hawaii" on your Google search, you will find it. We are linked to the Judiciary website, the Rules of Professional Conduct, and the rules of the Disciplinary Board. We have posted our contact information, location, consumer complaint information, forms, information on what to expect when you file a complaint, how to file a complaint with the ODC, and formal opinions. We still do not accept complaints by email or facsimile. The complaint form can be filled out online, but the complainant still needs to print the form out and send it to us.

This is something that has recently happened within the past six months. We are still new at it. We are trying to make everything available to people so that they know about the office.

HBJ: Are there capabilities to keep track of cases?

Hunt: Oh sure, by counting it by hand.

HBJ: Why was the ODC's fax number unavailable in the past?

Hunt: The reason is that the machine is incredibly old and can't handle a lot of faxes coming in. It would break down. The other reason is that from my perspective in my other job-- people would inundate our fax machine to stop our business. I don't like giving out the fax

number except on an individual basis. If somebody needs to fax us something, we would be happy to accept a fax. It is my policy that when an attorney or investigator is handling a case that that person's direct line be given to those individuals involved in the case -- to the respondent, respondent's counsel, to the complainant, and any witnesses involved in that case so that they all have direct access to the person who is handling the case.

If the person presses "0," he/she will get a live person. It is a default system, and somebody will answer the phone. If you listen to the phone tree, for example, and you want an opinion, you can leave a message, and one of the staff will call you back. We don't handle emergencies, such as someone calling from the courthouse steps at the 11th hour.

HBJ: How many lawyers do you have?

Hunt: Five including me and five investigators. There is an office administrator; an assistant office administrator; and two secretaries. The office administrator will do secretarial work, and she is in charge of the financial operations of the office. She also functions as the Board's secretary. The Board does not have its own staff. In other jurisdictions, an attorney may be assigned to the Board, but that is not true here. The Board does not have its own staff. All corre-

spondence for the Board goes to the office administrator.

The bottom line here is that the office administrator has many hats. She is not only the assistant, she is also the receptionist. She does some secretarial work for the staff. We just don't have enough staff, and we don't have enough space either. It's problematic. It is a pressure point for every disciplinary agency across the country, because we don't have the luxury of turning away clients. We have to take everything that comes in the door and look at it. The vast majority of complaints that come in have some colorable language in it that requires us to take a better look at it.

The staff model before I came: There was only one investigator who did not investigate cases; only did discrete tasks such as finding an address for a respondent or finding a complainant who had disappeared.

#### INQUIRIES ABOUT CONFLICTS

HBJ: Please explain the conflicts issues.

Hunt: What people fail to understand

about conflicts is that we are not experts in other areas of law, and they always expect us to know about this other area of law that we have no knowledge about whatsoever. For us, a conflict raises three questions: whether a duty of loyalty is owed to the client; whether there is a duty to maintain the confidence; and whether the conflict can be waived. Those are the three considerations, and if people would just analyze it that way, then they don't need us to tell them that.

Many inquiries that come into the office involve conflicts. I believe that many can be resolved by the attorneys themselves. The remainder are matters that need to be litigated, and we would not be able to answer anyway.

From an ethical point of view, if it's not obvious up front that you have a conflict and it needs to be litigated, then how can this office make a determination about it at that point? Even if a court after litigation says that there was a conflict, then the only thing that we would be looking at is: what did you do? Did you steal something from your client? Did you self-deal and harm your client in some way? That is what we

would be looking at; not the conflict itself, but whether you behaved in a dishonest manner towards your client. We are talking about ethics and morals and what's right and what's wrong.

If the matter has to be litigated, we would defer to the courts.

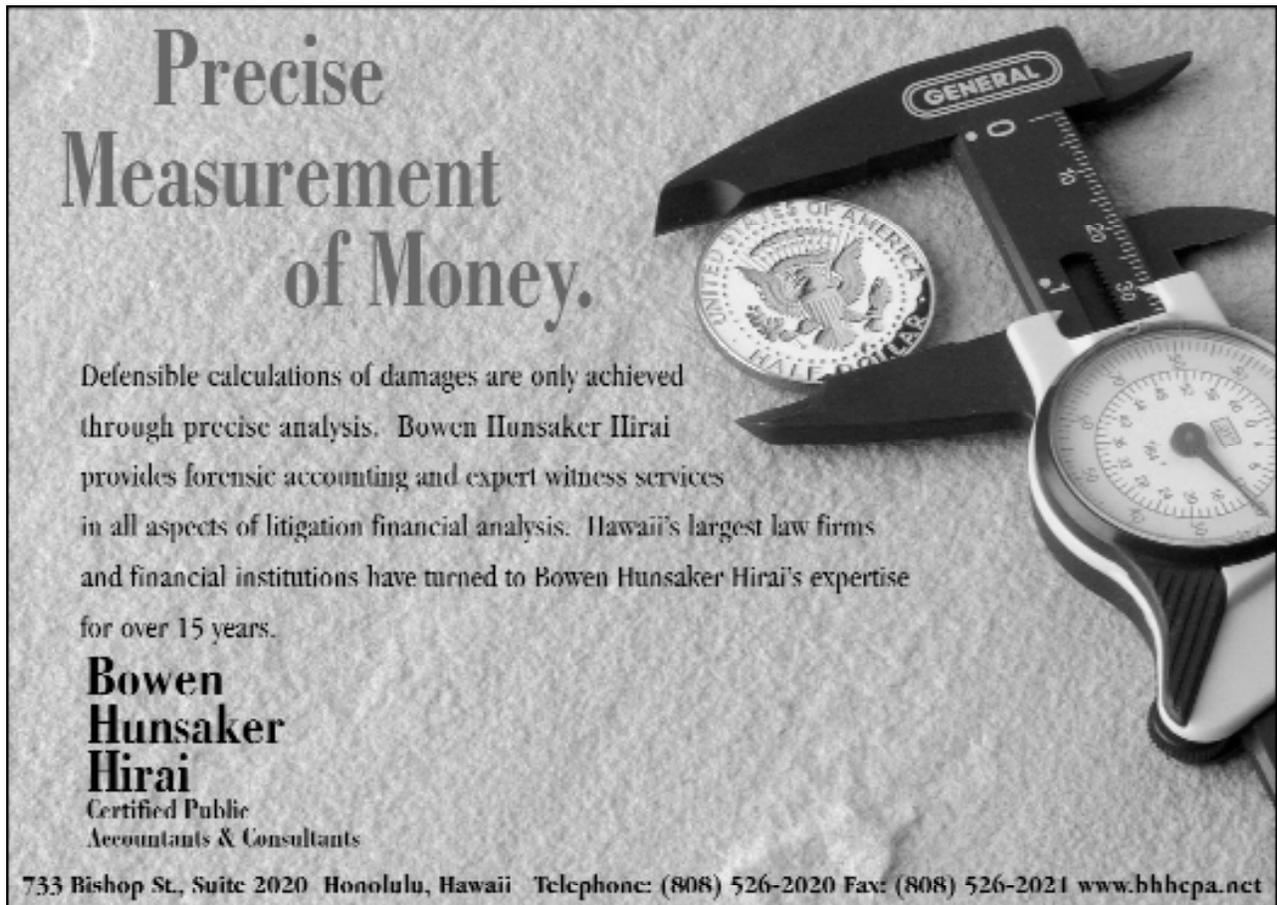
#### THE COMPLAINT PROCESS

HBJ: Take me through the process from the beginning. Someone submits a complaint. What happens?

Hunt: It has to be more than a bad lawyer and a bad result. When a complaint comes in, it is reviewed to see if there is an issue.

It has to be more than: my lawyer did not ask the right questions; my lawyer did not investigate my alibi; my lawyer is conspiring with the prosecutor or the judge. We tell the complainant that we don't handle ineffective assistance of counsel and legal incompetence.

There has to be a court decision about ineffective assistance of counsel. Then we distinguish between whether it



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is a mistake versus actual misconduct.

Similarly, with prosecutorial misconduct, even if the judge reverses because of prosecutorial error, we will not necessarily look at it as misconduct. We acknowledge that sometimes in the middle of trial you need to move quickly.

Usually the terms "ineffective assistance of counsel" and "prosecutorial misconduct" - are misnomers for some mistake that was made or some error that happened, but not misconduct that rises to the level of ethical misconduct where there is some intent going on to cover something up.

We do not discipline for negligence. It is legal malpractice versus ethical malpractice.

An example of lack of diligence or gross neglect is where an attorney filed a complaint on behalf of the client, then he decided that the client lacked credibility. He decided to get out of the case without telling his client.

A typical example is: The client gave his attorney a certain amount of money and the client does not hear from his lawyer. Another example is: The client visits the courthouse only to learn

that nothing was filed in his case. That kind of case will be assigned to an investigator.

The investigator will send a letter to the respondent-attorney stating that he received an initial letter from the complainant, and the attorney will be allowed normally two weeks to respond. If the respondent-attorney requests an extension, those will be granted generally.

If the attorney does not respond, then another letter will be sent giving the attorney a deadline. If the lawyer still does not respond, then the office will consider options of moving the case forward without it or charge the respondent with failure to cooperate with a petition to the Supreme Court and seek suspension.

Usually there will have to be lots of instances where the person has not responded before we will seek to file a complaint against that person for failure to cooperate with us.

HBJ: How much time does it usually take for such a situation to arise?

Hunt: It depends on the case. The attorney may ask for an extension and not give us anything. The process in the past has been to send out two letters, then subpoena the person. If the person does not show up, then we go forward. Or we send out two letters and a pattern develops, where we have to send out two letters then a subpoena, then the person shows up. Cooperation means cooperate. Don't make us subpoena you every time. If we get fifteen or twenty complaints against you and every time we send you two letters and a subpoena before you show up, that is not cooperation.

It costs money and employee time every time we are required to solicit a response from an attorney. It is in the best interests of the attorneys to cooperate right away. The quicker we hear their side of the story, the easier it is for us to make a decision to proceed or to close the case. The vast majority of the cases get closed without discipline.

If you need formal representation, then retain someone who has experience. The discipline system is a different

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system so an attorney who practices in a different area of law and does not know this area would not be a good representative because that attorney would be all over the place with a shotgun approach as to how he/she handles the case. An attorney doesn't really help his/her client when the attorney pretends that the issues are not the ones that the office is concerned about. It is a problem when the attorney representing the respondent-attorney does not know the procedures and does not know the law in the ethics area.

**HBJ:** Continuing with the complaint process, what happens next?

**Hunt:** The report either goes to the Deputy Chief Disciplinary Counsel ("Deputy Chief") or me for approval and we review the recommendation. It is solely a recommendation. The Deputy Chief tries to identify up front what the rule violations are and at the end the investigator says yes or no that violations exist. An attorney has to review that, so then I would look at it and determine that there is sufficient evidence for this or there is no evidence for that. Most of the time the recommendation is to close the case because there is insufficient evidence to establish a violation under any rule of professional conduct. Most of the time we close the case. Other recommendations could be: an informal admonition where a violation is not so serious that there is any harm to the client or may be a reprimand, or suspension. Then it is assigned to an attorney.

There are stages where we need to docket cases, and here comes the problem with the respondent not cooperating with us. If we had something that looks like a bald face violation and the attorney hasn't given us any explanation, then the standard is that this case is going to get docketed and we (this office) can no longer close that case without the participation of authority. A reviewing board member comes in at that point. So docketing a case actually means the equivalent of filing a case with the court. I would prefer not to have to do that. I would prefer to be able to look at it and make a decision on whether we have enough evidence or not, but when a respondent doesn't respond to us, then

human nature is they look guilty.

**HBJ:** If the case is serious enough for disbarment or suspension, then the matter is referred to an attorney?

**Hunt:** Yes. It will be docketed. Informal admonitions are treated as docketed cases.

If it is not docketed, then no reviewing board member would be looking at it. It is our decision, our discretion. Whether we are going to pursue a case is our discretion.

We don't have the power to unilaterally discipline anybody. We do have the power to unilaterally discontinue a case without discipline before it is docketed. We have that right.

What the investigators are doing is gathering evidence for us, and they are being guided along the way by one of the attorneys in the office. There is always an attorney guiding them and saying, "these are the elements that we need to establish," you need to look for this piece of evidence, this letter or this

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## YLD News

### Liberty Bell and Justice Award Nominations Sought

YLD is seeking nominations for the 2010 Liberty Bell and Justice Awards, which will be presented at the YLD Division Annual Meeting later this year.

The Liberty Bell Award honors non-lawyers or organizations who have helped to promote a better understanding and respect of government, for the legal system, and an appreciation of the role of law in our society. Past recipients include Helen Kobayashi, Cathy Izumi, The Kona Hawaiian Civic Club, Jane Kinoshita, Lurline Choy, Lyla B. Berg, Ph.D., Robert Masuda, The Elder Law Program, and Michael Anderson.

The Justice Award honors an attorney who has made an outstanding contribution to the ideals of justice. Considered factors include the extent of pro bono legal services, efforts to actively support legal activities beneficial to society as a whole and work that encourages the education of the public on legal issues. Past recipients include Judge Leslie Hayashi, Robert LeClair, William Darrah, Margaret Masunaga, Carol Kitaoka, Gavin Doi, Steven Chow, Kendall Wong, Chief Judge James Burns, and Naomi Hirayasu.

Nomination submissions may be sent in writing to the HSBA, Attn: James Maruyama, 1100 Alakea Street, Suite 1000, Honolulu, HI 96813. The deadline for submissions is August 6,

2010. Please include any supporting documentation for the qualification of the candidate.

### 2010 YLD Officers and Board of Directors Nominations Sought

The YLD Board is seeking qualified, well-rounded, assertive, and organized attorneys for an exciting opportunity to build a nonprofit leadership team around shared values and priorities. Interested in implementing the long-range goals of the HSBA? Promoting a positive role model of lawyers in the community? Organizing rewarding pro bono community and member service projects such as Law Week and Legal Line? Run for a position on the 2011 Young Lawyers Division Board of Directors.

Attorneys should be under 36 years of age and a member in good standing of the HSBA. Attorneys may be either currently active or on inactive status. Please submit your letter of interest with a brief biography and any supporting documentation to the HSBA office, Attn: YLD Board Nomination Committee, 1100 Alakea Street, Ste. 1000, Honolulu, HI 96813 by August 6, 2010.

The term of office for each officer is one year. The term of office for each director is two years. Whether the term of a position is one or two years will be stated on the official ballot, which will be distributed later this year.

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bank record, this answer to a question, this statement from a witness. They are being guided along the way as to what is needed. When they are finished and if they have met all the criteria that is required within a rule, and they have evidence that shows a violation of every element, then we would say that the rule has been violated. Unless that evidence exists, we are going to close it out.

HBJ: And when you close it out, at that point, how does the reviewing board member see the file?

Hunt: They don't see it unless it has been docketed. If we get a case and it appears that from the evidence that we are gathering that we are going for a violation no matter what and that becomes very clear early on, we can docket that case. Once it's docketed, then the reviewing board member can then make a decision: yes or no, it is going forward or not. If we have a pattern of misconduct or say we have 20 cases within our system already - same attorney, same pattern, and another one comes in, same complaint - that case is going to get docketed that day.

All we are trying to do is gather the evidence if it looks to us that there is a violation to take it to a reviewing board member or to file a petition. In my mind, it is merely testing our evidence against the rules to see if a violation has occurred. And if the board thinks yes or if the hearing committee or hearing officer thinks yes then okay, it goes to the board on review on appeal and either the board says yes or no a violation has occurred and then it goes to the Supreme Court for final decision. So there are three stages to test the evidence. That's really all we are doing.

HBJ: So when the reviewing board member agrees with your recommendation to proceed, what happens then?

Hunt: If it is an informal admonition, then the lawyer will receive a letter stating that this is an informal admonition and it will go on your record, but it will not interrupt your right to practice. Such an informal admonition could be

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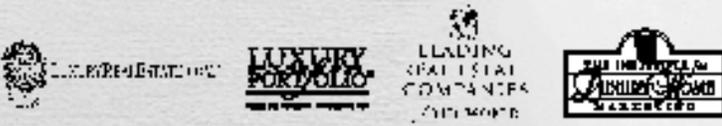
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used against that attorney in a subsequent disciplinary proceeding.

The letter would describe the violations, the facts that constituted the violations, and what the attorney should have done. The attorney has a right to reject that discipline, but must do so within ten days after receiving the letter.

A hearing officer or hearing committee will be set up. Then there is a hearing, and the officer or committee will issue a decision. From that point, it can go to the board on appeal if the respondent wants to appeal it or our office wants to appeal it. Once the board issues a decision, then the attorney can appeal it or our office can appeal it.

HBJ: How do you decide whether there will be a hearing committee or one officer?

Hunt: Sometimes it is a really simple case and one officer can hear it, but the hearing officers themselves - who are volunteers - have requested that we put committees together so that they can discuss matters with each other, otherwise they would be in isolation. We are trying to put committees together instead of just hearing officers. It is not easy to do it all by yourself.

HBJ: Are all the hearing officers and committees volunteers?

Hunt: Yes. There are 87 lawyers and lay people who are volunteers to be on the hearing committees or to be hearing officers. They are not board members.

A hearing committee decides on a majority vote after hearing all the evidence. The Supreme Court Rules and the Disciplinary Board Rules set forth the requirements for this evidentiary hearing. Evidence of the violation as well as evidence of aggravation and mitigation, if applicable, will be presented. The hearing committee issues findings of facts and conclusions of law and a recommendation for discipline. This goes to the Board and after all evidence is reviewed, the Board also decides on a majority vote whether to agree with the recommendation. It has its own standards of appeal similar to the courts. The Supreme Court has de novo stan-

dard of review.

There are not a lot of published decisions in this state. So by necessity, we look to decisions in other jurisdictions for similar conduct. The court follows the ABA standards for Lawyer Sanctions for guidance.

HBJ: Any published decisions?

Hunt: We only have 25 decisions by the Supreme Court from 1971 to 2008. We work cases by the level of the conduct that is involved and by how they came in the door. We try to get the oldest one out first, but assess according to the seriousness of the complaint. If somebody is out there stealing money, then we will try to shut that down right away.

HBJ: Is stealing money from the client the most serious violation?

Hunt: Mishandling of funds is probably the most serious violation, and the most likely to go forward. However, we receive the most complaints about the failure to communicate. If that is the only charge, then the office will try to mediate it. The usual complaint is that the lawyer has not been in contact with the client.

#### EDUCATION V. PUNISHMENT

HBJ: What is the priority of the office: educating the bar or punishing the bar?

Hunt: I don't like punishment; I believe in educational opportunities. There should be an attempt to rehabilitate someone. An attorney spends years and thousands of dollars going to law school, why ruin his/her career and reputation over ethical misconduct. I believe in education and diversion programs. I love the idea that we might have a minor misconduct program where we can have the Senior Counsel Division involved in helping attorneys who have lost their way to get back on the right track. I don't like punishment of any kind.

The Supreme Court has said that discipline is not punishment; there is a punitive aspect to it, but discipline is not punishment. Discipline is to maintain the integrity of the bar and the courts and to protect the public.

In the future, we hope to write and

seek publication of articles about ethics to provide guidance to the bar. The analysis would be based upon a review of decisions of courts in other jurisdictions, reviewing the majority and minority viewpoints, and taking a stand on how this office would approach the issues.

HBJ: Has informal advice over the telephone been stopped?

Hunt: It really is a resource issue. There was a backlog in this office that was enormous when I started. Cases are getting younger and younger as we speak because that is what I am attempting to handle here. Statistically last month, 67% of our cases are less than two years old.

Answering or doing research for someone for free is problematic. Attorneys should do their own research, and they were expecting us to do it for them. It is clear that when they call on the telephone they have not even read the Professional Rules of Conduct. They have not cracked the book in twenty or thirty years. We are not here to do your research for you. If you want to call us and talk to us about a situation, please do so, but don't make it an emergency. If an attorney needs ethical advice, call us in a timely manner so that we can talk to you about it, and we would be happy to do that. But people were abusing the office.

Think about it, which is more important? Somebody calling us to do research for them free or taking care of a situation with an attorney who has anxiety over having a complaint against him? To me, it is more important to make a resolution on the disciplinary complaint. We had 300 + complaints in the system and all those people's lives hanging in the balance.

I don't agree with the perspective that any grievance that comes into our system would have to take a back seat to an opinion being researched. The vast majority of the cases are usually closed and that is true all over the country. Clients complain, and mostly they are dissatisfied with the results. But, the clients make it sound like some heinous act took place, and so our office has to investigate and ask questions. That's our primary purpose. So when people were saying that we stopped giving opinions,

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we never stopped giving opinions. Never.

We are a regulatory system. We have an educational aspect to it, and we are trying to work with bar on helping with the MCPE presentations. We are happy to do that. Anybody who calls us and wants a presentation will get one, because we believe that it is important to educate. If we educate attorneys, then maybe they won't have problems. I do recognize that there may be some resistance on what you should be doing as an attorney versus what you are able to do. That is true not only out in private practice, but it is also true in this office. What we are able to do and what we would like to do are two different things.

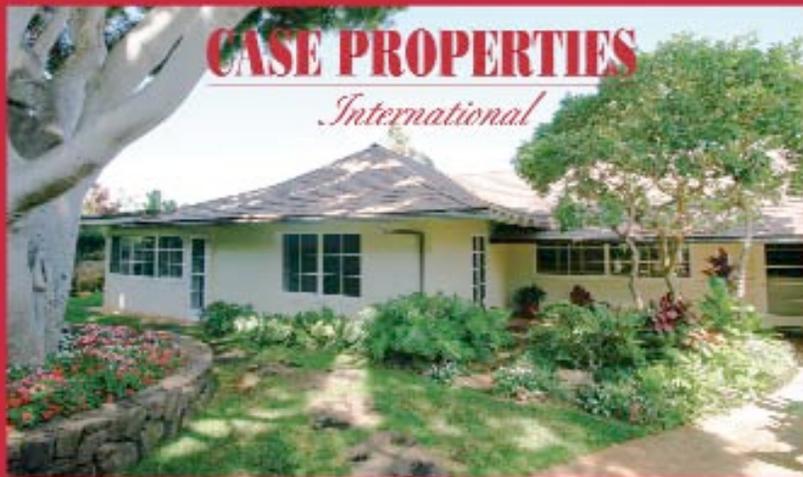
My whole goal is to elevate the profession, not discipline. It is more important that people understand what their obligations and responsibilities are. From my experience, what has happened is that most people who go to law school don't know how to operate a business and because they don't know how to operate a business, they get into trouble. There are two aspects to practicing law on your own: the aspect of just practicing law and the business part. It's the business part that gets them into trouble. They may be great lawyers, but lousy business people.

There are aspects of the business of law that get people into trouble that have absolutely nothing to do with the practice of law, but there are ethical violations that are associated with it. For example, there are some attorneys with the "any warm body syndrome" as I call it. Anybody who walks into their office who is willing to pay the retainer is accepted as a client without screening. They just sign them up, then learn that the client fired three attorneys before the client came to them. In this type of situation, it is more than likely that nothing the attorney will do will make the client happy and all the attorney has done is bought himself a disciplinary complaint. The client will come to this office and say, "I'm not happy with this attorney either."

So the more we are out in the community teaching people this is what you need to do and this is how you need to do it will help. We want to educate and elevate the practice.

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## GAMESMANSHIP

HBJ: Do you have a threshold that you could establish for the cases coming in?

Hunt: Each case is different. There are facts, which are not the same, in every case.

You have to look at the rule violations and determine what they are complaining about. Sometimes you have no clue. Sometimes we have to send a couple of letters saying it is unintelligible. We try and determine what the complaint is. If we can't figure it out, we try and make some determination about what it is that they are complaining about.

There are people who send us a pile of documents and we call them up and say could you explain to us what the problem is. No, is the response. There is no cooperation in explaining the ethical violation. There is no clear direction of the substance of the complaint, but pages of documents. They want us to get involved in the specifics of their complaint that they have filed in civil court, and we don't do that. It is a waste of our time and resources. When lay people do it, it is more understandable. They obviously have something in mind that they are upset about, but they won't tell us that either.

This is gamesmanship. In my mind, they are trying to use this office as leverage in their case. I don't want my office to be a lever for anybody.

Seriously, I don't practice probate law; I don't practice bankruptcy; I don't practice criminal law, so I don't know what the issues are within that area of practice. So you have to tell me what you are complaining about, because I practice in a different area. I know the Rules of Professional Conduct; I know how they are supposed to be applied.

HBJ: Have you started an investigation and discovered that gamesmanship was the purpose?

Hunt: When there is civil litigation ongoing, I close the case and specifically say in the letter: when you have a decision come back to us, and we will pick up the investigation at that point. To just use our office to gain some kind of advantage, I don't like that.

If we discover that the complaint

was initiated to use the ODC as leverage, then we will close the case without prejudice until there is a court decision. Some people attempt to immerse the ODC in their private disputes.

## PROPOSED TRUSTEESHIP RULE

HBJ: How did the new rule regarding trusteeships come about? Is there a real problem with trusteeships?

Hunt: Yes. When I got here, there were twelve or more trusteeships. If you walk around the office, you will see boxes sitting in the hallways. Those are all trusteeships. We don't have the resources to handle those. Our staff is overwhelmed with the disciplinary cases, so basically they are sitting there.

Someone just decided to ship us these boxes expecting that the office would take care of the cases. We are only supposed to act in the absence of anyone being available. If there is a family member out there, then it is not our responsibility to absorb the cost of your spouse's practice when the spouse dies. That was part of the problem. There was this expectation that no matter what happened that we were supposed to take it on. We were only supposed to take it on when somebody disappeared or died without anybody to move in to handle the cases or became disabled and there is no one else available. The "no one else available" was not happening. So every time an attorney was disbarred we had to go in to take over the practice and if an attorney became disabled, we had to go in to take over the practice. If an attorney died, we had to go in to take over the practice. A practice has some value to the estate. If they want to sell it, they could. It is not fair to our office or the membership that someone doesn't want to pay to shut down or to sell their relative's practice.

The trusteeships require an inordinate amount of time with too few staff.

I asked the Board about it (trusteeship cases), and the Board went to the Supreme Court and the Supreme Court had a meeting about it. The Chief Justice created a committee, which included three members of the HSBA and the Supreme Court and private attorneys and our office. The proposed trusteeship rule is the solution that we came up with. Other states across the

country require that you nominate someone to handle your cases in the event of an unexpected disability when no one else is available.

The regulation part of a disciplinary system is very expensive and time-consuming. It does not take into consideration: trusteeships and opinion calls. Those are services that a state bar should be offering. We are a regulatory agency. I am happy to provide education, but our primary focus is regulation. Most of the kinds of trusteeships that are sitting in this office could have been handled by family members. They are trying to shift the expense to this office and that is not right.

## DEDICATION OF THE OFFICE

Hunt: I am happy with the professionalism of the staff. I emphasize that we need to be open to the public and open to the profession. The office is dedicated to protecting the public and the bar. We want to educate the bar, yet maintain the priority of regulation.

*(This interview was conducted by Carol K. Muranaka)*



## ODC WEBSITE

The Office of Disciplinary Counsel ("ODC") has a new user friendly website, designed by ODC Board member Nathan Natori. The site includes CONSUMER COMPLAINT INFO, ATTORNEY INFO, DISCIPLINARY PROCESS, DISCIPLINED ATTORNEYS, ABOUT US, ABOUT ODC, LEGAL ETHICS, OTHER COMPLAINT AGENCIES, NEWS, FAQs, LINKS, and CONTACT INFORMATION.

Please check it out at  
[www.odchawaii.com](http://www.odchawaii.com)