

# ABC's of ODC

DCDC Rebecca Salwin

ADC Ryan Little

ADC Chloe Fasi

## ODC's Main Functions

- ***Ethics Hotline: 521-4591 \*\* [dbhawaii.org](http://dbhawaii.org)***
- ***Education & Outreach***
- ***Trusteeships***
- ***Disciplinary Cases - Misconduct***

## Trusteeships - RSCH 2.20

When there is no successor, ODC appoints trustee

- Paid from YOUR estate
- average: \$60,000
- worst: **\$150,000**

Over 1,300 solos

- only **139** solos identified a successor

# Trusteeships - what YOU can do

1. Succession plan

2. Tell your friends

3. When in doubt, *throw it out!!*



# Disciplinary Cases

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, ranging from light lime to dark forest green. These shapes are concentrated on the right side of the image, creating a dynamic, modern look. The rest of the background is a plain, light gray.


*How cases are initiated*

# How Complaints Are Initiated

*RSCH Rule 2.6(b)(2)*

**ODC has a duty to investigate  
all alleged misconduct**

# Allegations Are Made by “Complaint or Otherwise”

 Office of Disciplinary Counsel  
**Complaint Form**  
[ODC Form 1 (4/12/2019)]

**Note:** this complaint must be submitted on paper and signed, in ink, by the complainant. ODC does not accept on line submissions.

**ODC use only:**  
Date Filed: \_\_\_\_\_  
Case No: \_\_\_\_\_  
Clerk: \_\_\_\_\_

If you need more space, please attach additional pages. Please only provide copies – not originals – of your documents.

Date of this complaint: \_\_\_\_\_

Your Name: \_\_\_\_\_  
Your Mailing Address: \_\_\_\_\_  
City: \_\_\_\_\_, State: \_\_\_\_\_, Zip Code: \_\_\_\_\_

Your telephone numbers:  
preferred: \_\_\_\_\_  
alternate: \_\_\_\_\_

Who are you complaining against? (up to two attorneys if all in the same firm.)  
Attorney #1 \_\_\_\_\_ Attorney #2 \_\_\_\_\_  
Attorney Name: \_\_\_\_\_  
Law firm name (if any): \_\_\_\_\_  
Firm or Office Address: \_\_\_\_\_  
Tele. No.: \_\_\_\_\_  
*NOTE: If the attorneys work in separate firms, you must file separate complaints.*

(optional) Size of the law firm complained about:  
☒ 1 attorney ☐ 2-10 attorneys ☐ 11+ attorneys ☐ Government Agency ☐ Unknown

Have you or a member of your family complained about the attorney(s) previously?  
☐ Yes [approximate date of prior complaint: \_\_\_\_\_]  
☒ No

Did you employ the attorney(s)?  
☒ Yes [date of hire: \_\_\_\_\_, amount paid: \$ \_\_\_\_\_]  
☐ No [briefly explain your connection with this attorney(s): \_\_\_\_\_]

If your complaint is about a legal proceeding, provide:  
Title of the case: \_\_\_\_\_  
Name of court or agency: \_\_\_\_\_  
Case number: \_\_\_\_\_  
Approx. date filed: \_\_\_\_\_  
Your role in the suit: \_\_\_\_\_  
[e.g., Plaintiff, Defendant, other]

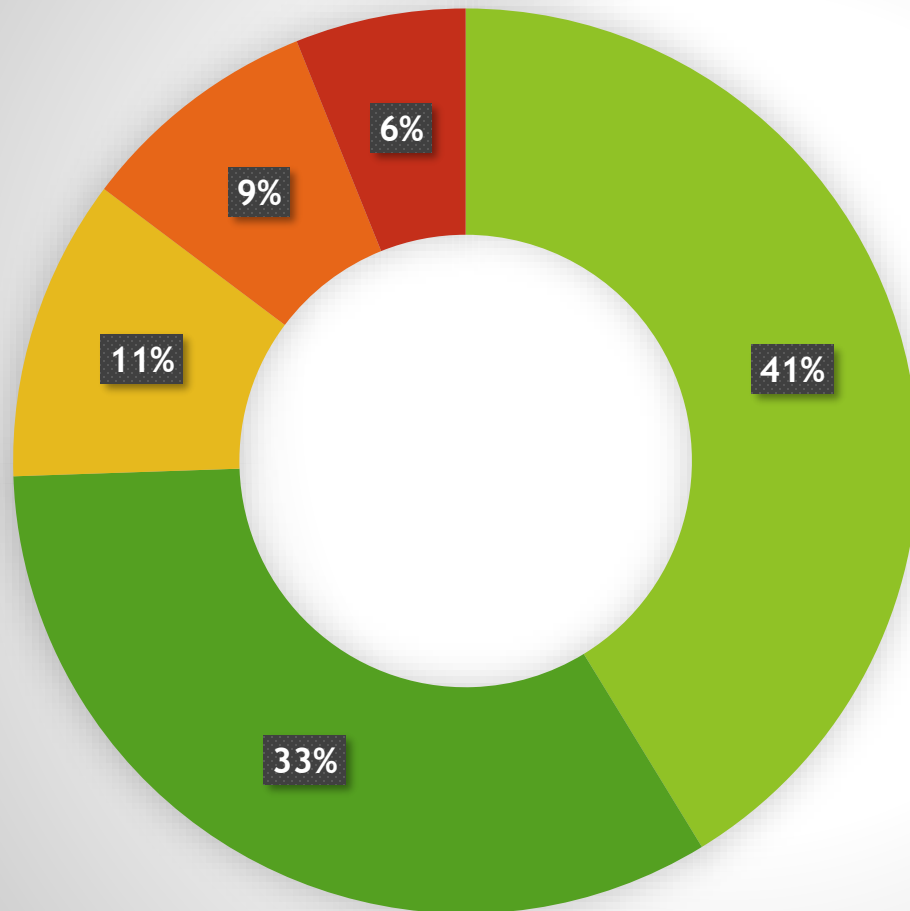
Mail to: Office of Disciplinary Counsel  
Complaint Processing Dept.  
201 Merchant Street, Suite 1600  
Honolulu, Hawaii 96813





# Sources of Complaints

2016-2018



■ Client

■ Opposing Party

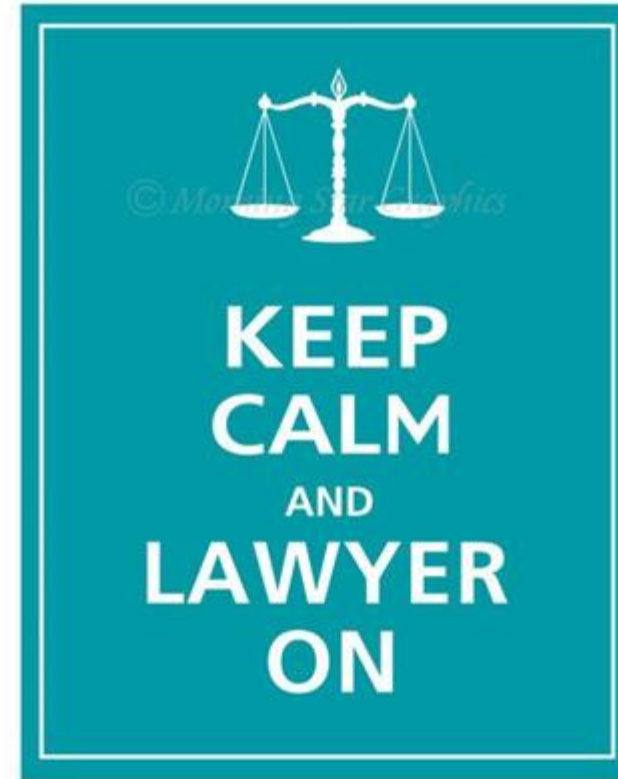
■ Public

■ Court/Gov't

■ Another Attorney

# What If I Get a Complaint Against Me?

1. Breathe
2. Work with us during investigation
3. Respond to our letters



# What If I Get a Complaint Against Me?

## Common Mistakes

1. Don't *ignore it*
2. Don't *play hardball*
3. Don't *go on the warpath*



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*How cases are resolved*

# What Happens to Complaints

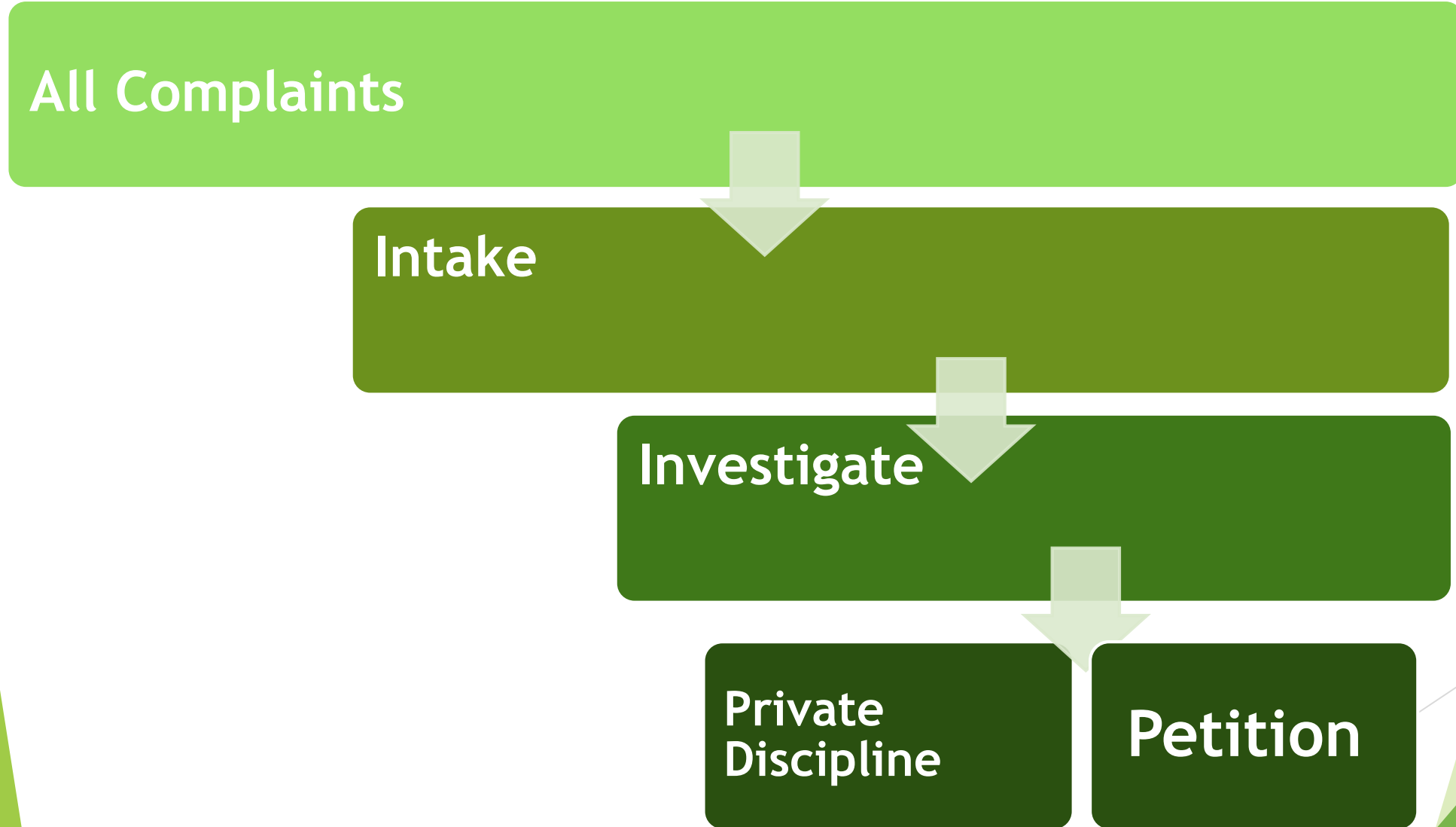
All Complaints

Intake

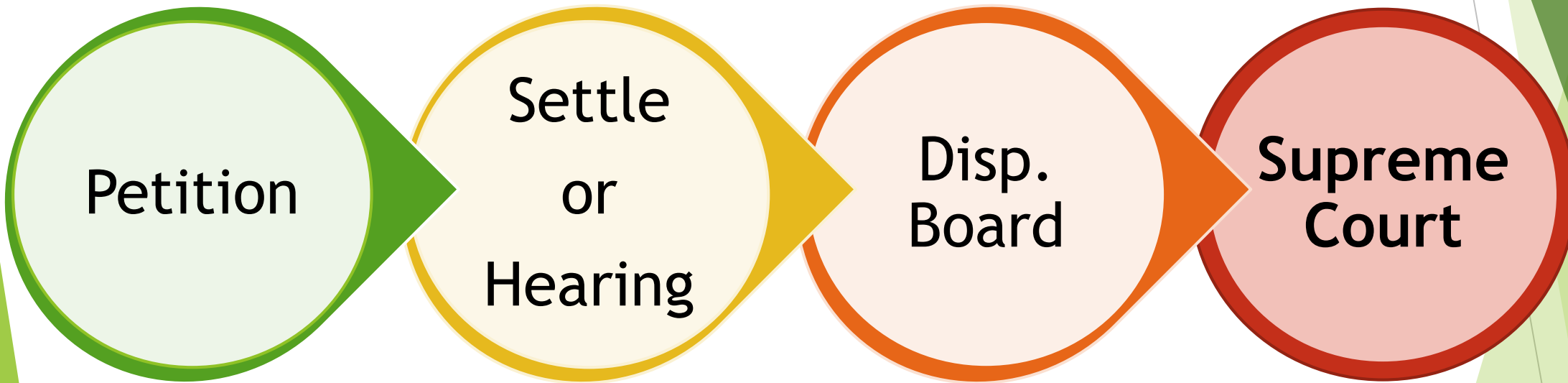
Investigate

Private  
Discipline

Petition



# What Happens to Petitions: Formal Discipline



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*Most common cases*

# Most Common Complaints

- ***Practice Management – 100 cases/ year***
  - *IOLTA, miss deadlines, neglect client calls*
- ***Civility – 55 cases/ year***
  - *abusiveness/harassment, fraud, intimidation*
- ***General incompetence – 20 cases/ year***
  - *HRPC Rule 1.1 requires preparation, knowledge, skill*



# ***Practice Management***

- HRPC 1.4 – communication with client
- HRPC 1.15, RGTA – trust accounting



## Civility

- HRPC 3.5(c) – likely to disrupt tribunal
- HRPC 4.4(a) – purpose is to embarrass or burden

### *ODC v. Kendal Luke*

- SCAD-16-834
- February 17, 2017
- Suspended ~~1 month~~ → 3 months

# How Attorney Sanctions Work

*Types of sanctions and when they are appropriate*

# Possible Sanctions

- ▶ RSCH Rule 2.3(a) governs sanctions
- ▶ Types of Sanctions:
  - ▶ **Dismissals:** dismiss, minor misconduct, caution letter
  - ▶ **Private Scoldings:** caution letter, informal admonition, private reprimand
  - ▶ **Public Scoldings:** public reprimand, censure
  - ▶ **Suspension**
  - ▶ **Disbarment**



# But wait - there's more!

## Bonus Suspensions!

- ▶ Other suspensions are provided for under the RSCH
  - ▶ 2.12A - Failure to cooperate with ODC's investigation
  - ▶ 2.13 - Felonies, would-be felonies, lying crimes
  - ▶ 2.15 - Reciprocal discipline
  - ▶ 2.19 - Incapacity
  - ▶ 2.20(e) - Trusteeship
  - ▶ 2.23 - Substantial threat of serious harm to public

# Additional “Sanctions”

*“As a condition of reinstatement following suspension or disbarment or as a condition in connection with the imposition of any lesser discipline, the Disciplinary Board or the supreme court may require a respondent, at the respondent's expense, to successfully complete the bar examination or some portion of it.” - RSCH Rule 2.3(d)*

- ▶ Costs
- ▶ Restitution
- ▶ MPRE
- ▶ CLE
- ▶ PALMS
- ▶ Bar



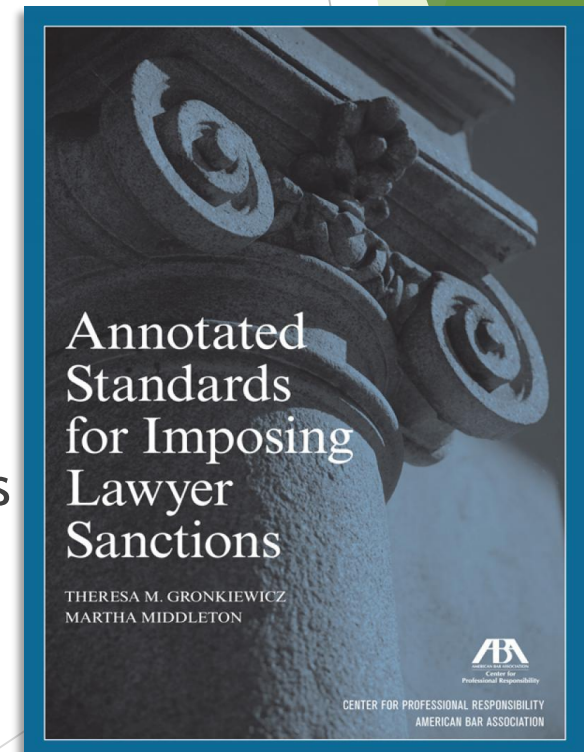
# How does the Court determine which sanction is appropriate?

- ▶ Hawai'i Supreme Court refers to the ABA Standards for Imposing Lawyer Sanctions when determining appropriate discipline

- ▶ *ODC v. Ronald Au*, 107 Haw. 327 (2005)

- ▶ ABA Standards Analyze 4 Primary Factors:

- |                  |                                   |
|------------------|-----------------------------------|
| 1. Duty Violated | 3. Injury/Potential Injury        |
| 2. Mental State  | 4. Aggravating/Mitigating Factors |



# Duty Violated

## *What'd you do?*

- ▶ Duties Imposed by the ABA Standards generally mirror those imposed by the HRPC
- ▶ Duties may be owed to:
  - ▶ Clients
    - ▶ E.g. - Loyalty, diligence, preserve client property
  - ▶ Public
    - ▶ E.g. - Refrain from dishonesty, interference w/ administration of justice
  - ▶ Legal System
    - ▶ E.g. - Refrain from creating false evidence or engaging in illegal conduct
  - ▶ Legal profession
    - ▶ E.g. - Advertising restrictions, reasonable fees, UPL, maintain integrity of prof.

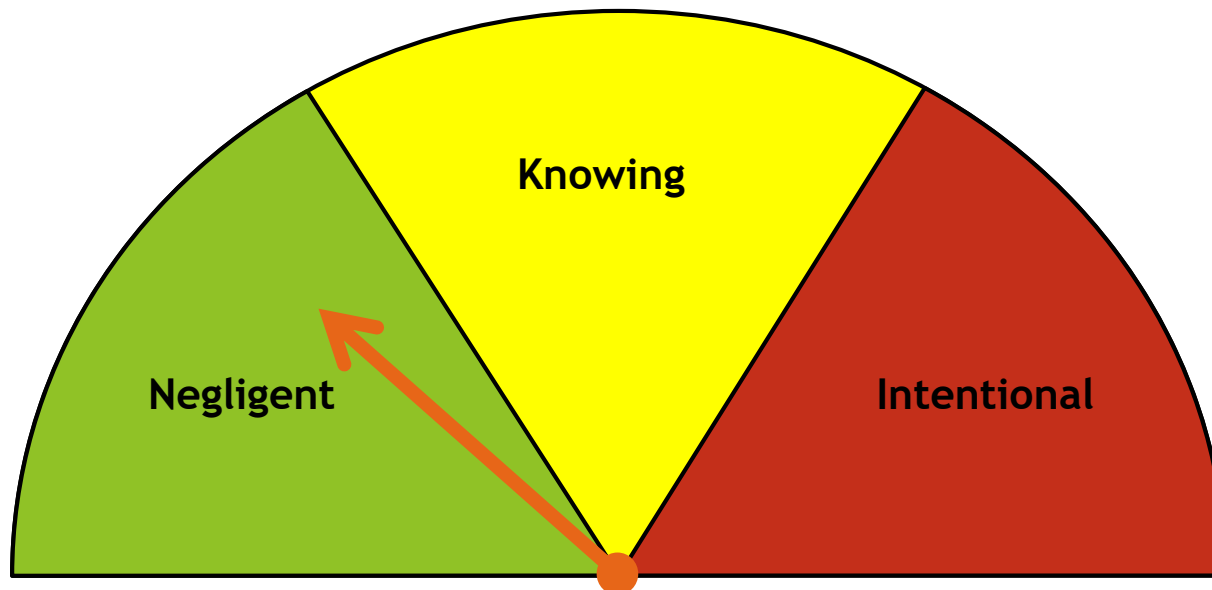


# Mental State

*It better not be intentional.*

## ► Three Mental States

- Intentional - conscious objective to accomplish particular result
- Knowing - conscious *awareness* that nature of conduct *could* produce result
- Negligent - fails to be aware of substantial risk that result will follow



# Injury

*No one has to actually get hurt for you to get pinched.*

- ▶ Injury means harm to client, public, legal system, or profession, which results from a lawyer's misconduct
  - ▶ Ranges from:
    - ▶ Little or no to
    - ▶ Serious
- 
- ▶ Potential injury means harm to client, public, legal system, or profession, that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct
  - ▶ *Actual injury not required*

# Aggravating and Mitigating Factors

*How can you make it better or worse?*

▶ Standard 9.2 - Any factor can aggravate or mitigate

## ▶ Aggravating Factors

- ▶ Repeat Offender
- ▶ Dishonest/Selfish motive
- ▶ Pattern of misconduct
- ▶ Multiple offenses
- ▶ False Statements
- ▶ Lack of remorse

## ▶ Mitigating Factors

- ▶ Absence of prior record
- ▶ Absence of dishonest motive
- ▶ Restitution
- ▶ Cooperation
- ▶ Inexperience



# The Curious Case of Frank Fernandez

- ▶ Not that curious
- ▶ Stole a bunch of money from clients
  - ▶ Claiming his fees were “earned on receipt”
- ▶ Also served as several clients’ bail bondsman and attorney
- ▶ Fernandez required clients to waive their rights to an accounting

# The New Flat Fee Rule (HRPC Rule 1.5)

*Do you know it?*

- ▶ Frank Fernandez' Legacy?
- ▶ New Rule's Requirements
  - ▶ All flat fee agreements must be in writing and must include:
    - ▶ Nature and scope of services
    - ▶ Total amount of fee and terms of payment
    - ▶ Basis or rate at which flat fee may be earned (Milestones or Hourly)
    - ▶ That lawyer will hold fee in trust account
    - ▶ That client is entitled to accounting
    - ▶ Lawyer will refund any unearned portion of flat fee if representation is termination
    - ▶ Reasonable efforts to notify client of fee withdrawal



# Common Types of Complaints

*...and some things to consider*

# IOLTA (“Interest on Lawyers Trust Accounts”) Account Violations

*Keeping track of your finances*—Relevant Rules are HRPC 1.15, and the Rules Governing Trust Accounting (“RGTA”)

# HRPC Rule 1.15—*Preserving Identity of Funds and Property of a Client or Third Person*

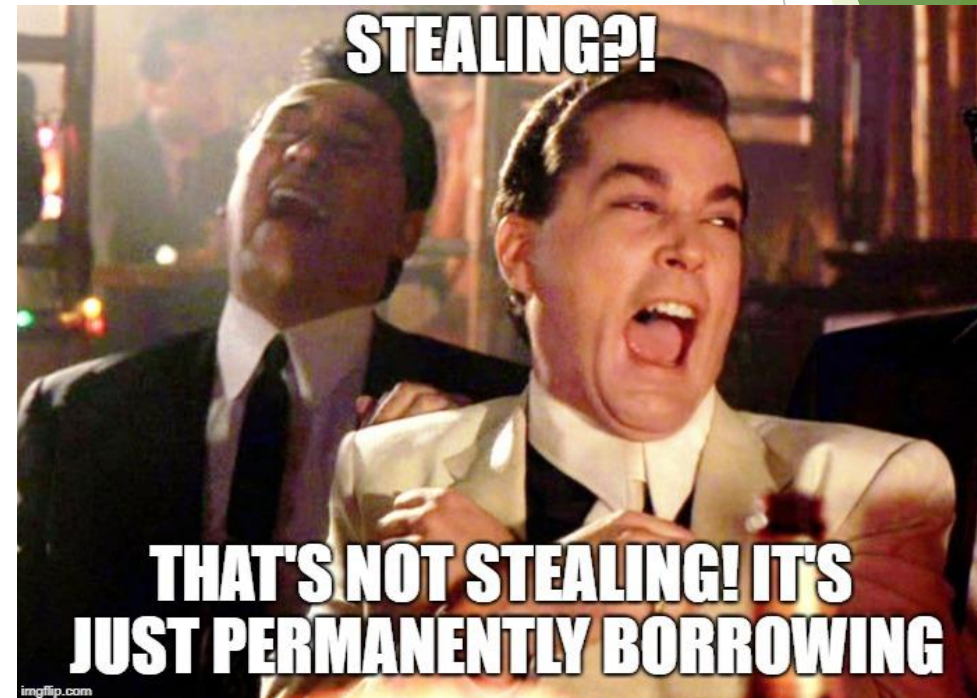
- (a) A Lawyer is required to hold property (in connection with legal representation) of Client *or* another, as a fiduciary.
- Cannot commingle or use for yourself
  - Funds **MUST** be kept in a separate account
  - Keep records for 6 years





# HRPC Rule 1.15—*Cont'd*

- b) Never put your own money into the CTA (exception)
- c) All legal fees go into CTA until earned
- d) Keep client informed as to what is happening to their money
- e) Disputed funds stay in the CTA



# Rules Governing Trust Accounting

## RGTA Rule 4—*Trust Account Regulations and Minimum Trust Accounting records*

- a) First part basically a repeat of HRPC Rule 1.15:
- No commingling, no misappropriating, prepaid legal fees go into CTA, etc.
  - CTA must be in the lawyer's name
  - Account, deposit slips, checks must be prominently labeled “Client Trust Account”



# Rules Governing Trust Accounting

## RGTA Rule 4—*Cont'd*

- b) Withdrawals— either authorized electronic bank transfer OR check payable to named payee
  - Only attorney can be authorized signatory
  - Earned fees can only be paid to named lawyer
  - NO personal or business expenses can be paid out of CTA

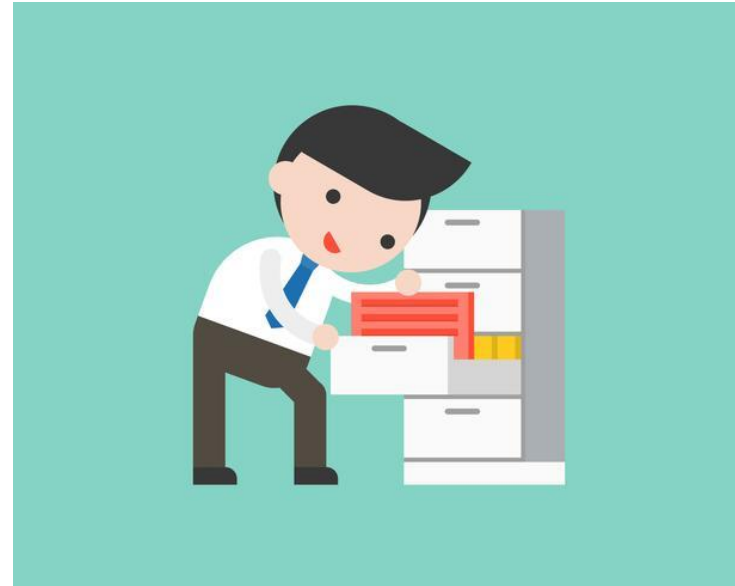


**“Very impressive collection of Elvis records, Dad, but have you kept any financial ones?”**

# Rules Governing Trust Accounting

## RGTA Rule 4—*Cont'd*

- d) Maintenance of Records
  - Records can be maintained electronically, but back up records!
  - Must be readily available for inspection and copying by ODC
- e) If law firm is dissolved or sold, make sure records are taken care of



# Rules Governing Trust Accounting

## RGTA Rule 5—*Minimum Trust Accounting Procedures*

- Get quarterly statements from the bank.
- Reconcile statement with books within 45 days of receipt,
- Correct any discrepancies within 60 days.

## RGTA Rule 6—*Immediate Reporting of Discrepancies*

- Notify ODC within 10 days, of any (i) discrepancy in excess of \$100, or (ii) check being returned for insufficient funds.
- Notice to ODC must be in writing.



# Rules Governing Trust Accounting

## RGTA Rule 7—*Annual Certificate and Report*

- Annual requirement to file certificate of compliance with trust accounting and record keeping procedures

## RGTA Rule 8—*Audit*

- Bar notifies ODC if you fail to file your annual certificate
- ODC may order an audit for bounced checks
- If do not correct error within 60 days, noncompliance matter gets referred to ODC

# *Trust Accounting Takeaway's*

- When in doubt, reread the rules!
- Keep organized records of everything.
- If you're struggling to keep track of finances on your own, consider:
  - Hiring additional staff or a bookkeeper
  - Get newer software (HSBA discounts!)
  - Ask for help!



# HRPC Rule 1.4—*Client Communication*

- a) Communication duties to clients:
  - Inform client of decisions made
  - Discuss how to accomplish his/her objectives
  - Keep client *reasonably* informed
  - Respond to *reasonable* requests for information
  - Inform client of any settlement offers/plea offers.
- b) Lawyer must explain matters well enough that client is able to make informed decisions.

**\*Keep good records of your communications with your client!**

