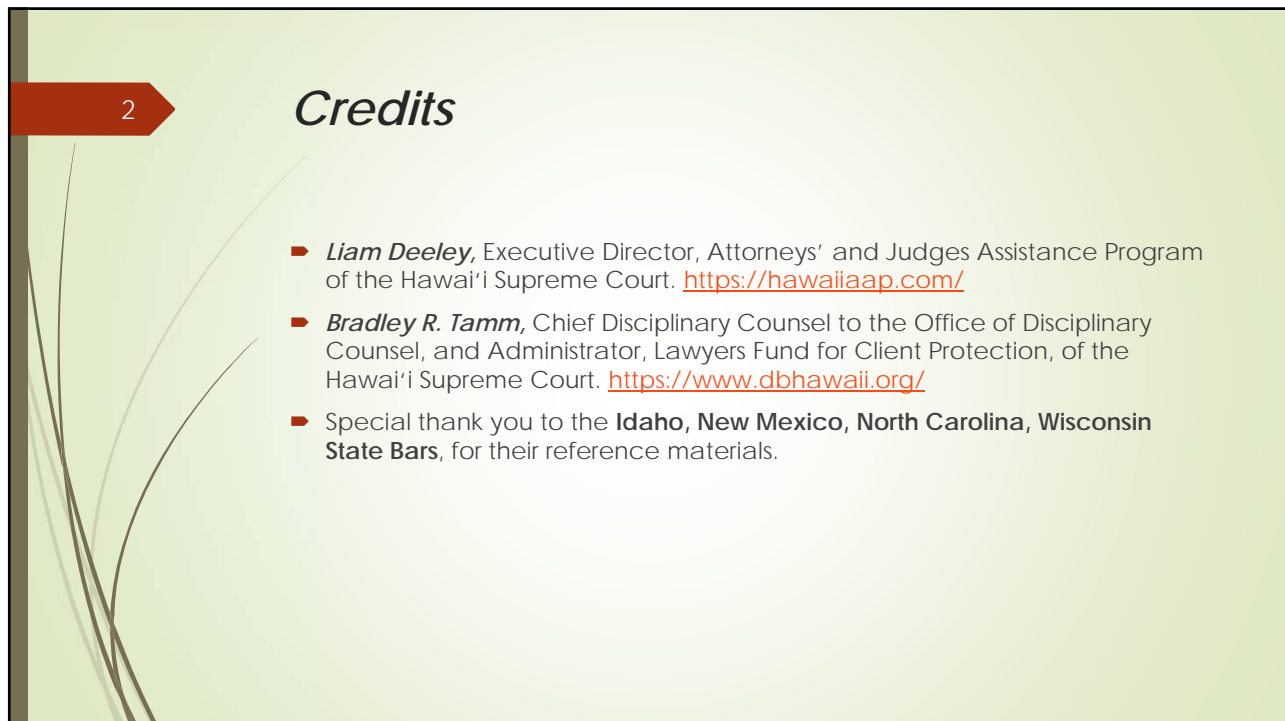




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Succession Goals – leaving the practice of law

- ▶ Why it matters ... In a letter to lawyers from the Chief Justice of the New Mexico Supreme Court ... the problem was nicely identified ...
- ▶ "When a client hires a lawyer ... the client expects the lawyer to complete the assignment."
- ▶ Ask yourself:
 - ▶ "If I suffer an unexpected tragedy rendering me ... incapacitated, ... or if I simply want to retire, do I have a plan in place to protect my clients ... with the least disruption possible?"

3

4

What is the "Plan B"

- ▶ *When clients hire you, they hire a competent professional to protect their interests, safeguard their property, and, trust you to map out a strategy to secure their futures.*
- ▶ *Many don't realize that you might fall victim to an unexpected tragedy.*
- ▶ *They don't have a Plan B in place ... it is your job to set up that Plan B for your clients.*
- ▶ *It is your duty to competently and diligently represent your clients.*
- ▶ *More importantly, it is the right thing to do.*

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Succession Planning ...

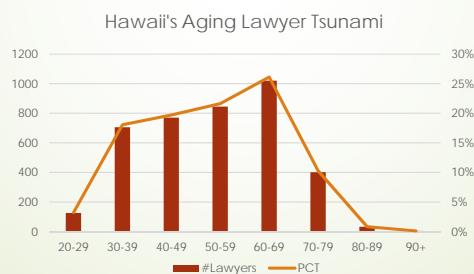
- *How do you protect your clients?*
You develop a succession and transition plan!
- *Help protect:*
 - *(a) your clients,*
 - *(b) your hard-earned reputation, and*
 - *(c) your family and loved ones.*
- *Have a plan, put it in writing.*
- *If time permits, talk to your clients about the plan.*
- *This seminar is presented to help you develop such a plan.*

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6

HSBA Bar Statistics (2018)

- *7,991 lawyers – 4,931 active/government/judges*
- *3,905 in private practice – 1,342 “solo” + 640 in 2-5 lawyer firms*
- *5,461 lawyers in state – 4,588 Oahu, 341 Maui, 142 Kaua’i, 290 BI*
- *Age progression of us ... 59% over 50, 34% between 60 and 79.*



6

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Successor designation question

- Your annual registration with the Bar asks solo practitioners if they have designated a successor.
- Of 1,310 solo practice lawyers, 455 answered "YES"
 - But only 139 identified the successor. *So how is ODC going to find the 316 who are not named?*
- *It is every one's problem as more than ½ of your annual registration fee funds the disciplinary system, and a lot of that money goes to the administration of law practices where the attorney left without a succession plan.*

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8

Old, tired and want to hang it up?

- "You'll know when it's time" ... but will you be ready?
 - Spiritually?
 - Financially?
- 10,000 people in the U.S. reach age 65 every day. What are you going to do?
- AARP says you need \$1.18 million to support a 30-year retirement at \$40,000 per year (assuming 6% investment returns and 2.5% inflation.)
- Social Security might contribute maybe \$20,000 to the average retired lawyer.
- Honolulu – 4th most expensive in U.S., 11th most expensive in the world.

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Are you "on track?"

- ▶ **Spiritual wellness ...**
 - ▶ Family ...
 - ▶ Hobbies ...
 - ▶ Other things to do ... not law related.
- ▶ **Engagement in other activities ...**
 - ▶ Leisure plans ...
 - ▶ Travel desires ...
 - ▶ Bucket lists ...
 - ▶ Pro bono activities? VLSH, LASH, YWCA/YMCA, ...

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Some can't ... or won't ... *Impairment Issues:*

- ▶ *Physical, mental, emotional illnesses ...*
- ▶ *Family, financial of other circumstances ...*
- ▶ *Stress of legal practice ...*
 - ▶ *Irritability, isolation, sleeplessness, ...*
- ▶ *Other stressors (gambling, depression, neuroses, other health problems).*

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11

Cognitive Decline

- ▶ 11.6% of population >45 report some confusion or memory loss.
- ▶ 1/3 over 85 suffer some form of dementia
 - ▶ 60-80% are Alzheimer's ...
- ▶ "Tween" 45 and 85, were mostly "when" not "if."
- ▶ Legal obligations to report colleagues mental decline?
 - ▶ HRPC Rule 8.3(a) requires lawyers to report ethical breaches that raise a question of another lawyer's fitness – to the "appropriate professional authority." **Calling AAP satisfies this obligation, just as good as (maybe better than) calling ODC.**
 - ▶ South Carolina 2015 rule requires firm to "take action" when they realize a lawyer in the firm is mentally impaired. Goes on to suggest "judges also have a duty to act when they see that a lawyer or another judge is impaired."

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HRPC 1.1 (Competence) and HRPC 1.3 (Diligence)

- ▶ Competence requires present legal knowledge and skill, thoroughness and preparation, and maintenance of that competence.
- ▶ Diligence comment [2] "A lawyer's work load must be controlled so that each matter can be handled adequately."
 - ▶ Where lawyer is in mental decline, the old work load is too much ... and as long as the lawyer is mentally competent, the lawyer has a duty to reduce that work load to fit his/her mental abilities.
 - ▶ **Mental decline does not equal incompetence unless the lawyer fails to reduce the workload to fit!**

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13

Financial Instability / Unpreparedness

- Where the lawyer is financially unstable or not prepared for retirement, that lawyer may continue practicing law, and taking on cases, beyond that lawyers' ability.
- Such may lead to charges of incompetence, and a host of other violations as deadlines are missed, rules violated, funds not accounted for or comingled, instructions by clients forgotten or misunderstood.
- **If the lawyer is found to have taken on the case only because of the lawyer's financial need and that he/she knowingly disregarded mental decline, any violations may be found aggravated by "selfish motive" (ABA Std. 9.22(b)) resulting in more severe forms of discipline.**

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Lawyer Assistance Programs – ... not "just a place for drunks."

- ABA Survey of problems in the lawyer population
 - 21-36% surveyed lawyers indicate some problematic behaviors – compare with 7% general population, and 15% of physicians.
 - 28% experience some form of depression (from mild to severe)
 - 61% experience anxiety
 - 11.5% have suicidal thoughts
- While alcoholics and other substance abusers are welcome, these programs are for lawyers with any kind of problem that effects, or has the potential to effect their practice of law.

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Hawai'i's Attorneys' and Judges' Assistance Program (AAP)

- Attorneys and Judges Assistance Program ("AAP") was created by RSCH Rule 16.
- Attorneys and Judges Assistance Program... "is to provide immediate and continuing assistance to attorneys and judges who suffer from problems, disability or impairment which affect their professional performance for any reason ("impairment"), ...to protect the interest of a client, litigant, or law school career."
- AAP has three goals:
 - 1. Protect clients from impaired lawyers, judges, and law students
 - 2. Help attorneys, judges, and law students with substance abuse, mental health, and other impairment issues.
 - 3. Educate the legal community about these issues.

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AAP a "confidential resource" for our profession ...

- AAP is a confidential resources.
- AAP provides referrals, counseling, and support to impaired attorneys and their families
- The legal profession is a self regulated one: We have a responsibility to look out for one another.
- If you see unprofessional behavior call AAP to find out what might be causing that behavior.
- AAP is there to help you for when "life" happens.

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Disposition of your license to practice law. Options ...

- ▶ **Inactive Voluntary** – Member elected inactive status per RSCH 17(d)(3)(8) and does not engage in any practice of law in Hawaii. Not eligible to practice.
- ▶ **Inactive Pro Bono** – Member does not engage in the practice of law in Hawaii except as a *Pro Bono* under RSCH Rule 20. Limited eligibility to practice.
- ▶ **Resigned Voluntary** – Member, with no pending discipline charges or subject to disciplinary order, and no lawyer fund claim pending or debt, chooses to resign in good standing per RSCH 1.10. Not eligible to practice.
- ▶ **Resigned Discipline** – Member with disciplinary case pending and chooses to resign in lieu of discipline per RSCH 2.14. Not eligible to practice.
- ▶ **Suspended Non-Payment** – Member suspended for failure to pay dues/fees or properly complete attorney renewal statement. Not eligible to practice.
- ▶ **Suspended CLE** – Member is suspended for failure to comply with CLE requirements set of RSCH 22. Not eligible to practice.
- ▶ **Deceased** – Member has died.

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Voluntary Resignation of License - RSCH Rule 1.10

- ▶ An attorney wishing to **resign in good standing** from the Hawaii State Bar may do so upon securing permission from the Supreme Court pursuant to the process set forth in RSCH Rule 1.10.
- ▶ This procedure, if successfully completed, will result in an attorney's name and bar number being permanently removed from the Supreme Court of Hawaii's attorney list.
- ▶ Procedure and forms
 - ▶ <https://hsba.org/LicenseResignation>
- ▶ Petition must be granted prior to December 31 to avoid paying an additional year's fees. So file early and allow time for processing.

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19

Steps to Close your Law Practice – the “short course”

- First, properly terminate all client relations. Review:
 - HRPC Rule 1.3 (Diligence), and Rule 1.4 (Communication)
 - HRPC Rule 1.16 (Terminating Representation)
- Close IOLTA and other Client Trust Accounts
 - HRPC Rule 1.15 (Client Funds and Property)
 - HRGTA (Hawai'i Rules Governing Trust Accounts)
 - RSCH Rule 11 (IOLTA program)
- Notify all clients, courts, opposing counsel of withdrawal/termination, return all property and funds, securely destroy everything that is left (except client financial records <6 years from termination, and that which your insurer recommends that you keep.)

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IOLTA Approved Banks

RSCH Rule 11 certified financial institutions

- There are only 9 Hawai'i banks certified to hold IOLTA funds:
 - Prime partner banks (pays higher interest rates to HJF):
 - American Savings Bank (ASB)
 - Bank of Hawai'i (BOH)
 - Central Pacific Bank (CPB)
 - First Hawaiian Bank (FHB)
 - Other certified banks
 - First Foundation Bank
 - Bank of the Orient
 - Hawai'i National Bank
 - Home Street Bank
 - Ohana Pacific Bank

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Client Property & File Destruction

- ▶ HRPC Rule 1.15(a):
- ▶ **“Preserving Identity of Funds and Property of a Client or Third Person:** (a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property, as a fiduciary.
- ▶ The lawyer shall not commingle such funds or property with his or her own or misappropriate such funds or property to his or her own use or benefit.”
 - ▶ Property is more than just money ... “property” includes papers and stuff ... including the files of the client or third party.
 - ▶ Files and papers need to be segregated from the lawyer’s own property.

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HBJ December 1997 – Disposition of Sole Practitioners’ Client Fees

- ▶ [the articles cited in this presentation are available at www.dbhawaii.org/resources/
- ▶ Make a plan so that:
 - ▶ reasonable efforts to contact all clients and request instructions on how to proceed.
 - ▶ provide for return of documents & property belonging to client or third person.
 - ▶ **Rules don’t specifically cover client files retention;** but HRGTA Rule 4(c) requires books and records regarding funds, etc., shall be preserved for at least 6 years after completion of the matter.
 - ▶ Unclaimed funds in the IOLTA/CTA after reasonable efforts are **subject to contract** and ultimately a matter of state law. HRS § 523 (Uniform Unclaimed Property Act). Preserve any evidence which the client would need in order to reclaim the funds in the event the client is located.
 - ▶ Where another attorney who assumes responsibility, he/she should keep a record of clients who receive their files and/or funds, clients who did not wish to receive their file or who could not be contacted, and files **ultimately destroyed.**

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HBJ April 1998

– Dispo of Closed Client Files (pt. 1)

- ▶ **Office, garage, storage bulging with closed client files?** Before destruction, attorneys should be aware of certain ethical and practical considerations.
- ▶ No specific HRPC rule on client files, but HRGTA talks about records such as books, ledgers, journals, and receipts relating to funds and property must be kept for 6 years post-termination.
- ▶ HRPC Rule 1.16(d) requires upon termination “surrendering papers and property to which the client is entitled, refunding any advance payment of fee or expense that has not been earned or incurred, and, upon request, providing an accounting of such funds.” But see: Comment [10] for exceptions.
- ▶ Special attention for estate planning and real estate lawyers!

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HBJ April 1998

– Dispo of Closed Client Files (pt. 2)

- ▶ First step is to try to contact the former clients and ask their preference regarding the disposition of the files. Some want their file back, others don't care. If the client wants it back, give it – and remember, any copy kept for the attorney's own records is at the expense of the attorney, not the client.
- ▶ Prior to destruction of abandoned files (no instruction by client to destroy), examine each file for materials of legal or material value. Special attention should be given to stuff not previously provided or that is otherwise unavailable.
- ▶ **Files are confidential!** Only attorney or staff may review, and destruction must be by secure means.
- ▶ Keep record of clients who received files, declined to recover files, and those who could not be contacted.

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HBJ September 1998

– Returning Client Files After Term...

- Article addresses "situations in which the client's legal matter is ongoing, as distinguished from completed or closed matters."
- ... take steps reasonably practicable to protect the client's interests, such as surrendering papers/property to which the client is entitled. Lawyer may retain papers relating to the client to the extent permitted by other law (sealed court records, material that would cause injury).
- Turn over all file materials which, if not released, would prejudice the rights of the client. No retaining lien against the file. FO 28 (1983, am 2015).
 - all pleadings and legal memo prep for or filed on behalf of the client.
 - final contracts, conveyances, agreements, and other end-product docs prep by attorney.
 - Correspondence which is relevant to further continuation of the client's case.
 - all documents and other materials provided by the client to the attorney.

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HBJ September 1998

– Returning Client Files (part 2)

- Questions as to what is the lawyer's property in a particular case are normally questions of law. However, all materials related to the preparation of the case must be provided to the client upon request.
- An attorney's work product, including papers revealing the attorney's impressions, conclusions, opinions, legal research, and legal theories, is reasonably necessary to the representation and must be turned over to avoid prejudice to the client. See California Bar Opinion 1992-127 (1992).
- As all material that would benefit the client in the continuation of their legal matter should be provided to the client, any notes and internal memoranda fitting that description should be turned over to the client. Questions regarding the beneficial nature of those materials should be resolved in favor of release to the client. Again: the interests of the client should not be prejudiced by their inability to obtain file materials from the attorney.

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What to Keep, Return or Destroy ... (part 1)

- Can't keep it all forever, so what can you destroy?
- After attempting to secured client's consent and instructions ... destruction is generally appropriate for court pleadings and recorded documents as public records.
- All original documents should be returned to the client, so don't accept originals! Tell client to only give you copies (unless needed for evidentiary purposes).
- Furnish clients with original or a conformed set of formal documents, such as contracts, agreements, settlements, etc., then keep a record of such so that you can destroy what is in your files.

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What to Keep, Return or Destroy ... (part 2)

- Segregate the contents of a file as to:
 - 1. Docs that are client's property and of intrinsic value [e.g., wills, deeds], which should be retained indefinitely or deposited with a court or recorder.
 - 2. Docs that are client's property and would expect returned or documents that are not the client's property but may be of future use, which should be retained for a reasonable time; and
 - 3. All other documents which may be destroyed.
- Reasonable Time? depends on the circumstances of the case. Lawyer should attempt to contact the former client.
- The lawyer must continue to protect the client's confidences.

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Trusteeships under RSCH Rule 2.20 (part 1)

- ▶ “Whenever an attorney has been transferred to inactive status because of incapacity or disability, or disappears or dies, or has been suspended or disbarred and has not complied with Rule 2.16, or there is other good cause exhibiting an attorney’s inability to protect the interests of the attorney’s clients, ...
 - ▶ Triple D; DDD (dead, disabled or disbarred)
- ▶ “... and no partner, executor or other responsible party capable of conducting the attorney’s affairs is known to exist, ...”
 - ▶ “Partner” means “law partner” and to be qualified, the “executor or other responsible party” must be an actively licensed Hawai’i lawyer to be found “capable of conducting the attorney’s affairs.”

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Trusteeships under RSCH Rule 2.20 (part 2)

- ▶ “... the supreme court, upon proper proof of the fact, shall appoint an attorney as trustee to inventory the files of the inactive, disappeared, deceased, suspended, or disbarred attorney and to take such action as seems indicated to protect the interests of that attorney’s clients.”
 - ▶ **“Inventory the files” not take over: Current and former client files. Other “action” includes primarily seizing the IOLTA/CTA account(s) for the benefit of the attorney’s clients.**
- ▶ “When appointment of a trustee is warranted, Counsel shall file with the supreme court a motion for appointment of an attorney to serve as trustee.”
 - ▶ **Only ODC has standing to seek appointment.**

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Trusteeships under RSCH Rule 2.20 (part 3)

- ▶ "Trustees may receive compensation for their services, and may be reimbursed for traveling and other expenses incidental to the performance of their duties."
 - ▶ We encourage volunteers to serve pro-bono. But if no volunteer can be found, the Disciplinary Board will pay, subject to Supreme Court approval and ODC oversight. Going rate is \$60 per hour.
- ▶ Trustee, appointed to protect clients of the DDD attorney and in that capacity, cooperates with ODC and the LFCP.
- ▶ Trustee must promptly secure client files and freeze/take control of client funds in IOLTA and CTA accounts. May also seize other accounts if evidence of commingling is found.
 - ▶ Absent court order, trustee cannot disburse any funds!

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Trusteeships under RSCH Rule 2.20 (part 4)

- ▶ File storage controlled by Trustee, paid for by the Disciplinary Board, and post discharge, files are destroyed by ODC.
- ▶ Undead attorneys can expect to be suspended by the supreme court if trustee appointed.
- ▶ Disciplinary Board and LFCP will file claims, take liens, on attorney's property or attorney's estate to recover costs of trusteeship, including any trustee compensation, and file storage destruction costs.
 - ▶ Solution? Designate a Hawai'i lawyer to wind up your affairs in the event of your death or disability; and memorialize that designation in a durable power of attorney and/or will or trust document.
- ▶ Volunteers Needed !!!!!!!!!!!!!!!

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Residual Professional Liability Coverage

- HSBA statistics for 2018 – only 2,614 (67%) of 3,905 lawyers reported to carry malpractice coverage. What percentage of retired or semi-retired lawyers are covered?
 - **No need? Wrong. You need, probably more than before you retired.**
- Extended Reporting Periods (tails) ... get the lifetime tail: you never know.
- Not as expensive as you might expect.
- Example: 2018 policy for \$1M/\$2M for 2 lawyers: \$4,470.72. Life time tail purchased in 2019: \$9,743.00.
- Peace of mind.

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Disability Issues – Legal Incapacity RSCH Rule 2.19 (part 1)

- RSCH Rule 2.19 provides for the transfer of an attorney to inactive status by reason of physical or mental incapacity.
- Three paths to involuntary transfer to inactive status:
 - (a) judicial declaration/commitment,
 - (b) Disciplinary Board suggestion,
 - (c) attorney's declaration of such severe impairment that makes his/her defense impossible.

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Disability Issues – Legal Incapacity RSCH Rule 2.19 (part 2)

- **Judicial Declaration/Commitment:**
- Transfers may be predicated on judicial declaration of incompetence or involuntary commitment. Attorney placed on indefinite inactive status as long as incapacity continues.
- **Disciplinary Board Suggestion:**
- Where Disciplinary Board suspects "attorney is incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants."
- Board may petition the court for interim suspension and competence evaluation.
- If substantiated, attorney is placed on inactive status; if not substantiated, disciplinary proceeds move forward.

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Disability Issues – Legal Incapacity RSCH Rule 2.19 (part 3)

- **Attorney's Declaration:**
- Where attorney contends that he/she is "suffering from a disability by reason of mental or physical infirmity or illness, or because of the use of drugs or intoxicants, which makes it impossible for the respondent to defend himself or herself adequately," and the claim is substantiated by medical/psychological evidence, attorney may be ordered to indefinite inactive status.
- **Reinstatement requires court order:**
- Only given "upon a showing that the attorney's disability has been removed and he or she is fit to resume the practice of law.
- Request for reinstatement is a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of his or her disability.
- Requires disclosure of every psychiatrist, psychologist, physician and hospital or other institution attorney has been examined or treated.

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Disability Issues – Legal Incapacity RSCH Rule 2.19 (part 4)

- ▶ **Resumption of disciplinary charges on reinstatement:**
- ▶ While on inactive status, no formal disciplinary charges can be commenced, and any pending case is stayed.
- ▶ However, ODC may continue to gather and preserve evidence. Further, on reinstatement, ODC is clear to resume disciplinary proceedings as appropriate.
- ▶ **Sealed Records:**
- ▶ The record of RSCH Rule 2.19 proceedings are confidential, except for interim and final orders transferring an attorney to inactive status, and any subsequent order returning the attorney to active status.

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Additional Resources

- ▶ HSBA's Transitioning Lawyers Committee
- ▶ https://hsba.org/HSBA/For_Lawyers/Transitioning_Lawyers/HSBA/For_Lawyers/Transitioning_Lawyers.aspx?hkey=89d05682-0fe3-49dd-86e1-3b2498c9d4d9
- ▶ ABA Lawyers in Transition
- ▶ https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/

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Fini ...

