

Before the
DISCIPLINARY BOARD
of the
HAWAI'I SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL,) ODC 10-041-8875
)
)
Petitioner,)
)
)
v.)
)
)
GRAHAM D. MOTTOLA,)
)
)
Respondent.)
_____)

DISCIPLINARY BOARD
OF THE
HAWAII SUPREME COURT

RECEIVED

11 DEC 2012

DAY MONTH YEAR
1:00 pm
BY *ph*

ORDER OF PUBLIC REPRIMAND

EXHIBIT A

and

CERTIFICATE OF SERVICE

DISCIPLINARY BOARD OF THE
HAWAI'I SUPREME COURT
1132 Bishop Street, Suite 300
Honolulu, Hawai'i 96813
Telephone: (808)599-1909

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL,) ODC 10-041-8875
)
Petitioner,) ORDER OF PUBLIC REPRIMAND
)
v.)
)
GRAHAM D. MOTTOLA,)
)
Respondent.)
_____)

ORDER OF PUBLIC REPRIMAND

The DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT ("Board") hereby certifies that after a hearing and deliberation in the above-referenced matter on November 15, 2012, it accepts and adopts the Stipulation of Facts, Conclusions of Law, and Recommendation for Discipline ("Settlement Agreement") filed on September 17, 2012, which was the result of a Voluntary Settlement Conference conducted by Settlement Officer the Honorable Dean E. Ochai, on July 20, 2012, and its decision is as follows:

1. The Board accepts, and adopts the Settlement Agreement;
2. The Board shall impose a PUBLIC REPRIMAND upon Respondent GRAHAM D. MOTTOLA; and
3. The Board shall further assess Respondent with all costs associated with these proceedings as approved upon timely submission of a bill of costs as prescribed by RSCH Rule 2.3.

Pursuant to the Board's Decision, it is ORDERED as follows:

1. A PUBLIC REPRIMAND is the appropriate discipline to be imposed upon Respondent pursuant to RSCH 2.3(a)(4), RSCH 2.7(d), and DBR 27.

2. On November 15, 2012, the Board imposed a PUBLIC REPRIMAND upon Respondent pursuant to the Settlement Agreement (**Exhibit A**), and with the consent of Petitioner Office of Disciplinary Counsel and Respondent.

3. Respondent shall reimburse the Board for all costs related to this proceeding pursuant to RSCH 2.3(c).

This Order shall constitute a permanent record of the imposition of such PUBLIC REPRIMAND upon Respondent and be served upon Respondent.

DATED: Kapaa, Kauai, Hawaii, December 10, 2012.

DISCIPLINARY BOARD OF THE
HAWAI'I SUPREME COURT

By *Clifford L. Nakea*
HON. CLIFFORD L. NAKEA (Ret.)
CHAIRPERSON, DISCIPLINARY BOARD
OF THE HAWAI'I SUPREME COURT

JANET S. HUNT 9113
Chief Disciplinary Counsel
YVONNE R. SHINMURA 2310
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Attorneys for Petitioner

DISCIPLINARY BOARD
OF THE
HAWAII SUPREME COURT
RECEIVED
17 Sept. 2012
DAY MONTH YEAR
10:00 am BY *js*

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL,) CONFIDENTIAL
)
Petitioner,) ODC 10-041-8875
v.)
)
GRAHAM D. MOTTOLA,)
)
Respondent.)
_____)

SETTLEMENT AGREEMENT, AND STIPULATION OF FACTS,
CONCLUSIONS OF LAW, AND RECOMMENDATION FOR DISCIPLINE

The Office of Disciplinary Counsel ("Petitioner"), by its Chief Disciplinary Counsel, Janet S. Hunt, and its Assistant Disciplinary Counsel, Yvonne R. Shinmura, and Respondent GRAHAM D. MOTTOLA, ("Respondent"), by and through his counsel, Eric A. Seitz, Esq., agreed to participate in a Voluntary Settlement Conference ("VSC"), as part of the Pilot Project Voluntary Settlement Conferences.

Pursuant to the parties' joint request, on or about June 28, 2012, the Chairman of the Disciplinary Board of the

EXHIBIT A

Hawai'i Supreme Court ("Disciplinary Board"), appointed Board member Hon. Dean Ochiai as Settlement Officer ("SO").

On July 20, 2012, Petitioner and Respondent, through its respective counsel, participated in the VSC conducted by the SO. As a result of the VSC, Petitioner and Respondent have entered into this Stipulation of Facts, Conclusions of Law, and Proposed Recommendation for Discipline ("Stipulation") with the following agreement and understanding:

1) This agreement is not necessarily binding upon the Hearing Officer, Disciplinary Board, or the Hawai'i Supreme Court; and,

2) Should the Disciplinary Board reject this Stipulation, this matter will be remanded to the Hearing Officer for continuation of the formal proceedings.

STIPULATED FACTS

1. Petitioner is a duly organized office existing under RSCH 2 and DB 11(a), Disciplinary Board Rules, and its address is 1132 Bishop Street, Suite 300, Honolulu, Hawai'i 96813.

2. Respondent was admitted to the practice of law in the State of Hawai'i on January 31, 1994, and was assigned Attorney Number 6142. Since being admitted to the Bar of the Supreme Court of Hawai'i, Respondent has registered and paid his

attorney registration fees and bar dues through December 31, 2012. Respondent's business address registered with the Hawai'i State Bar Association is 1079 Kahaapo Loop, Kihei, Hawai'i 96753.

3. On or about October 2, 2009, Complainant Tracy O'Reilly ("Complainant") was arrested for driving under the influence of an intoxicant ("DUI charge") under § 291E-61(a) of the Hawai'i Revised Statutes, as amended ("HRS"). The arrest generated an Administrative Drivers' License Revocation Office ("ADLRO") Notice of Administration Revocation of her license pursuant to Chapter 291E, Part 3, of the Hawai'i Revised Statutes, as amended.

4. On or about October 3, 2009, Respondent and Complainant met and entered into a verbal agreement that Respondent would represent Complainant at an ADLRO revocation hearing in the matter entitled State v. Tracy M. O'Reilly, Case ID 0975664DM, ADLRO, for a fixed fee of \$450.00.

5. During the October 3, 2009 meeting, Respondent and Complainant also entered into a verbal agreement that Respondent would represent Complainant on the DUI charge, entitled State v. Tracy M. O'Reilly, 2DTA-09-01050, in the District Court of the Second Circuit (Wailuku Division) ("District Court") for \$450.00. Complainant's first court appearance in District Court was scheduled for November 3, 2009.

6. On October 3, 2009, Complainant wrote Respondent a personal check number 3297, to pay Respondent advanced fees (including attorneys' fees and costs) of \$900.00.

7. On October 5, 2009, Respondent did not deposit Complainant's advanced fees of \$900.00 into his client trust account, identified as "Graham Mottola, Attorney at Law, dba Mottola & Associates, Client Trust Account," Account Number XXXXX-XX791 at Central Pacific Bank, Kihei, Hawai'i, ("CTA").

8. As of October 5, 2009, Respondent had not achieved the objective of representation (representing Complainant at the ADLRO hearing, and did not appear on her behalf in the District Court on the DUI charge).

9. On October 5, 2009, instead of depositing Complainant's advanced fees of \$900.00 into his CTA, Respondent cashed Complainant's check at Central Pacific Bank using his personal account identified as "Graham Mottola," Account Number XXXXX-XX831, at Central Pacific Bank, Kihei, Hawai'i, as the reference number.

10. On October 13, 2009, an ADLRO hearing was requested, and a hearing date was scheduled for October 20, 2009.

11. As of October 19, 2009, Complainant was dissatisfied with Respondent's advice to her, and she met with two other attorneys, one of whom agreed to take her case. On the

same day, Complainant informed Respondent that she intended to retain other counsel and requested a refund.

12. On October 20, 2009, the day of the ADLRO hearing, Respondent provided Complainant's new counsel with her file at the ADLRO location and her hearing was continued.

13. On November 2, 2009, Complainant wrote to Respondent requesting a partial refund.

14. On November 3, 2009, Complainant's new counsel appeared with her in District Court on the DUI charge.

15. As of November 19, 2009, Respondent informed Complainant that he was not giving her any money back and did not then provide her with an accounting of her advanced fees and any unearned portion of the \$900.00 in advanced fees.

16. On January 11, 2010, Complainant filed an ethics complaint against Respondent with the Office of Disciplinary Counsel, and requested a refund of \$450.00.

17. On February 18, 2010, Respondent attended "ODC 101" on Maui for three MCPE credits.

18. On February 19, 2010, Respondent deposited \$900.00 cash into his CTA which was earmarked for Tracy O'Reilly.

19. On January 26, 2011, Respondent attended "Client Trust Accounting and IOLTA, A Review of the Rules With Guidelines for Staying in Compliance" for three MCPE credits.

20. On July 24, 2012, Respondent refunded \$450.00 to Tracy O'Reilly to settle the dispute over the value of legal services rendered to her by Respondent.

CONCLUSIONS OF LAW

1. When Respondent received payment of Complainant's advanced fees of \$900.00 on or about October 5, 2009, he was entrusted with Complainant's property and had not completed the objective of representation. Respondent's failure to deposit the \$900.00 amount into his CTA violated the following provisions of the Hawai'i Rules of Professional Conduct:

HRPC 1.15(a)(1) All funds entrusted to a lawyer's care shall be deposited into a trust account separate from any business and personal account.

HRPC 1.15(d) All funds entrusted to a lawyer shall be deposited intact into a trust account.

2. On October 5, 2009, when Respondent cashed Complainant's check of \$900.00, he asserted his possession and control over Complainant's client property and violated the following provisions of the Hawai'i Rules of Professional Conduct:

HRPC 1.15(c) A lawyer is a fiduciary shall not commingle client funds with his own or misappropriate such funds to his own use and benefit.

HRPC 1.15(d) All fee retainers shall be maintained in trust until earned and all fee retainers are refundable until earned.

HRPC 8.4(c) It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

3. Respondent's failure to account to Complainant for the advanced fees of \$900.00 paid to Respondent on October 5, 2009, upon termination of representation, and to refund any advance payment of fees that had not been earned violated the following provisions of the Hawai'i Rules of Professional Conduct:

HRPC 1.15(f)(3) A lawyer shall promptly render appropriate accounts of all client funds coming into possession of the lawyer to the client.

HRPC 1.16(d) Upon termination of representation, a lawyer shall surrender property to which the client is entitled and refund any advance payment of fee that has not been earned.

4. With regard to each of the violations of the Hawai'i Rules of Professional Conduct alleged herein, Respondent also violated HRPC 8.4(a) (it is professional misconduct to violate the rules of professional conduct).

RECOMMENDED DISCIPLINE

1. ABA Standards for Imposing Discipline, Generally

Generally, the ABA Standards for Imposing Lawyer Sanctions state that the imposition of discipline should take several factors into consideration. ABA Standard 3.0 provides:

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

2. Specific ABA Standards

a. Mishandling of Client Funds: Standard 4.1 of the ABA Standards for Imposing Lawyer Sanctions applies to the Respondent's alleged conduct HRPC 1.15 (Safekeeping Property):

4.1 Failure to Preserve the Clients Property

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

7.0 Violations of Duties Owed As A Professional

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes

little or no actual or potential injury to a client, the public, or the legal system.

AGGRAVATING FACTORS

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose. ABA Standard 9.1. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. ABA Standard 9.21.

1. Substantial experience in the practice of law. ABA Standard 9.22(i). Respondent has been licensed to practice law in Hawai'i since 1994, or for approximately 18 years.

MITIGATING FACTORS

The following factors are recognized in mitigation of Respondent's misconduct:

1. Absence of a prior disciplinary record. ABA Standard 9.32(a). Respondent has no prior discipline.

2. Full and free disclosure to disciplinary board or cooperative attitude toward proceeding. ABA Standard 9.32(e). Respondent has cooperated with Petitioner's investigation, and agreed to participate in a Voluntary Settlement Conference.

3. Character and Reputation. ABA Standard 9.32(g). Respondent has provided letters in support of his good character

and reputation from a retired judge, a colleague, two clients, and two business colleagues.

4. Remorse. ABA Standard 9.32(1) Respondent has expressed remorse and taken the following actions. Respondent has completed three Mandatory Continuing Professional Education Courses ("MCPE") in 2010 and 2011 which addressed proper use and maintenance of his CTA: 1) "ODC 101" (February 18, 2010, on Maui for three PE credits, 2) "Ten Steps to Professional Success" (October 22, 2010 for three credits), and 3) "Client Trust Accounting and IOLTA" (January 26, 2011, for three MCPE credit). Respondent has also settled the dispute with his client over the amount of fees earned and refunded \$450.00 to Complainant; provided a copy of an attorney contract in which he explains to his client in writing how a flat fee will be earned; and has had an accountant provide ODC with an independent reconciliation of his Central Pacific Bank client trust account.

RECOMMENDED DISCIPLINE

Petitioner and Respondent hereby stipulate and agree, based upon the foregoing uncontested facts, conclusions of law, aggravating and mitigating circumstances, and the parties' agreement to the admission of Stipulated Exhibits 1 through 23 into evidence, that this matter should be resolved by the imposition of a Public Reprimand.

The undersigned respectfully request that the Disciplinary Board accept this Stipulation to Facts, Conclusions of Law, the Recommendation for Discipline, and impose a Public Reprimand on Respondent and that the Board assess Respondent with all costs recoverable for these proceedings.

DATED: Honolulu, Hawai'i, September 17, 2012.

OFFICE OF DISCIPLINARY COUNSEL



JANET S. HUNT
Chief Disciplinary Counsel
YVONNE R. SHINMURA
Assistant Disciplinary Counsel

Attorneys for Petitioner

DATED: Honolulu, Hawai'i, September 10, 2012.



ERIC A. SEITZ, ESQ.
Counsel for Respondent
GRAHAM MOTTOLA

Before the
DISCIPLINARY BOARD
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CERTIFICATE OF SERVICE

I hereby certify that service of the ORDER OF PUBLIC REPRIMAND and EXHIBIT A, filed on December 11, 2012, was made by the United States Postal Service, postage prepaid regular mail on December 11, 2012, to:

ERIC A. SEITZ, Esq.
Haseko Center
820 Mililani Street, Ste. 714
Honolulu, Hawai'i 96813

Attorney for Graham D. Mottola, Esq.

and by hand-delivery to:

Yvonne R. Shinmura, Esq.
Assistant Disciplinary Counsel
1132 Bishop Street, Suite 300
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, December 11, 2012.

OFFICE OF DISCIPLINARY COUNSEL

Faye F. Hee

FAYE F. HEE
Office Administrator