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Supreme Court
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SCAD-18-0000497

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner

vs.

GARY VICTOR DUBIN, Respondent

ORIGINAL PROCEEDING

PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH RULE 2.23
[REDACTED PURSUANT TO JULY 17, 2018 COURT ORDER, JROA Dkt #98]

MEMORANDUM IN SUPPORT OF
PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH 2.23

AFFIDAVIT OF RYAN S. LITTLE

AFFIDAVIT OF ANDREA R. SINK

EXHIBIT 1

EXHIBIT 2 (FILED UNDER SEAL)

and

CERTIFICATE OF SERVICE

BRUCE B. KIM 2258
Chief Disciplinary Counsel
RYAN S. LITTLE 10536
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SCAD-18-_____

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PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH RULE 2.23

The Office of Disciplinary Counsel ("ODC"), by and through its Chief Disciplinary Counsel BRUCE B. KIM, and its Assistant Disciplinary Counsel RYAN S. LITTLE, hereby petitions this Court for an Order immediately suspending GARY VICTOR DUBIN ("Respondent") from the practice of law.

This Petition is made pursuant to Rules of the Supreme Court of Hawaii Rule 2.23, the Memorandum in Support of Petition for Interim Suspension Pursuant to RSCH Rule 2.23; Affidavit of Ryan S. Little, Affidavit of Andrea R. Sink, Exhibit 1, and Exhibit 2 (filed under seal).

DATED: Honolulu, Hawai'i, June 18, 2018.

OFFICE OF DISCIPLINARY COUNSEL

/S/Ryan S. Little

BRUCE B. KIM
Chief Disciplinary Counsel
RYAN S. LITTLE
Assistant Disciplinary Counsel

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner

vs.

GARY VICTOR DUBIN, Respondent

ORIGINAL PROCEEDING

MEMORANDUM IN SUPPORT OF
PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH RULE 2.23

I. INTRODUCTION

This Memorandum is submitted in support of the Office of Disciplinary Counsel's ("ODC") Petition for Interim Suspension Pursuant to Rules of the Supreme Court of Hawai'i ("RSCH") Rule 2.23 ("Rule 2.23").

II. DISCUSSION

Under Rule 2.23, this Court may immediately suspend an attorney who has violated the Hawai'i Rules of Professional Conduct ("HRPC") and poses a substantial threat of serious harm to the public. Gary Victor Dubin ("Respondent") should be immediately suspended from the practice of law because (1) he has been recommended for disbarment pursuant to seven violations of the HRPC, including misappropriating \$3,350 of client funds and engaging in dishonest and deceitful conduct with clients regarding his billable rate; and (2) he poses a substantial

threat of serious harm to the public, as Respondent is actively soliciting clients and is likely engaging in the same conduct that was found to warrant his disbarment.

A. A Hearing Officer Recommended Respondent For Disbarment Because Of Respondent's Numerous Violations Of The Hawai'i Rules of Professional Conduct

On April 12, 2018, following a five day hearing, the Hearing Officer in ODC v. Dubin ("Dubin I"),¹ found that the Respondent engaged in a pattern of serious ethical misconduct, which included, among other things, signing his clients' signatures on a settlement check without their consent,² depositing that settlement check into his trust account without their knowledge,³ and attempting to hold the proceeds hostage while re-negotiating the terms of their retainer agreement.⁴ The Hearing Officer also found in Dubin I that Respondent had engaged in misappropriation, refusal or failure to account for client funds, and "bad faith obstruction" of ODC's investigation.

Respondent's pattern of knowing and intentional violations of the HRPC in Dubin I earned him a recommendation for disbarment by the Hearing Officer.⁵ Respondent was found culpable for failing to preserve client property, behaving with a lack of

¹ ODC Nos. 16-0-213, 16-0-151, 16-0-147 and 16-0-326

² Exhibit 1 at 36.

³ *Id.* at 35.

⁴ *Id.* at 37.

⁵ *Id.* at 47.

candor, engaging in abuse of process, and showing a lack of diligence and competence.⁶ The Hearing Officer described Respondent's violations of the HRPC as "severe and extensive," and recommended Respondent be disbarred from the practice of law.⁷

Respondent's past disciplinary history, dishonest motives, pattern of misconduct, multiple offenses, bad faith obstruction, substantial legal experience, and refusal to acknowledge the nature of his wrongful conduct were all found to be aggravating factors.⁸

The Hearing Officer found no mitigating factors.

B. Respondent Represents A Substantial Threat Of Serious Harm To The Public Because He Continues To Engage In A Pattern Of Ethical Misconduct

This Court should immediately suspend Respondent from the practice of law because he represents a substantial threat of serious harm to the public. Respondent's pattern of misconduct can be conceptualized into three distinct steps: (1) mass solicitation of clients; (2) taking clients' money but later refusing to account for it; which leads to (3) the many sundry complaints against Respondent involving similar fact patterns.

⁶ *Id.* at 46.

⁷ *Id.* at 47.

⁸ *Id.* at 45.

1. Step One: Mass Solicitation

Respondent's first step is mass solicitation of clients. Respondent has a history of soliciting new clients through television commercials, however, more recently Respondent has begun soliciting clients through his weekly podcast-cum-AM-radio-show, "The Foreclosure Hour." Using his show, which has been airing since late 2013,⁹ Respondent makes promises ranging from innocuous puffery - "Our upcoming guests will help you save your home"¹⁰ - to outright guaranteeing outcomes - "We should go on television and ask anybody who wants to bring their loan package, we will guarantee them we can defeat summary judgment."¹¹ Regardless of means, the goal is clear: generation of new business by promoting himself.

2. Step Two: Taking Money And Refusing To Account For It

[REDACTED]

[REDACTED]

⁹ The Foreclosure Hour, <http://www.foreclosurehour.com/past-broadcasts.html> (last visited May 18, 2018).

¹⁰ *Id.*

¹¹ Gary Victor Dubin, Foreclosure Workshop #56: HSBC Bank v. Moore - Determining What Is Required In Court To Prove the Legal Right To Foreclose in Your State, The Foreclosure Hour (2018), <http://www.foreclosurehour.com/files/127657701.mp3>, (Clip begins at 3:40).

¹² Exhibit 1 at 34; See Exhibit 2 [REDACTED]

First there were the Andias.¹³ In early 2012, Respondent was retained by Robert and Carmelita Andia to handle a threatened foreclosure on their home.¹⁴ They paid Respondent a retainer of \$16,500.00.

In October 2015, following prolonged negotiations, the lender agreed to pay the Andias \$132,000 to settle the Andias' claims against the lender.¹⁵ According to a written settlement agreement in the case, any settlement proceeds from the case were to be paid directly to the Andias - and not the Respondent.¹⁶ However, when the settlement check arrived at Respondent's office a few weeks later, instead of notifying the Andias, Respondent signed his clients' names on the back and deposited the check into his own client trust account - entirely without the Andias' prior knowledge or consent.¹⁷

Additionally, in his written retainer agreement with the Andias, Respondent agreed to bill the Andias at the rate of \$150-\$250 per hour for his associate attorneys' time.¹⁸ However, Respondent violated that agreement by charging the Andias \$385.00 per hour for his associates' time - including time attributable to one associate who had not even been admitted to the bar. To

¹³ *Office of Disciplinary Counsel v. Gary V. Dubin*, (ODC No. 16-0-147).

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 45.

¹⁸ *Id.* at 19.

that end, Respondent overbilled the Andias nearly \$20,000.00 over the course of his representation.¹⁹ Respondent then kept the overbilled fees over the objection of the Andias.²⁰

Respondent never warned the Andias that he was increasing his billing rates, nor did the Andias ever consent to such an increase.²¹ Respondent also failed to provide the Andias an invoice until he negotiated their settlement - three and a half years into his representation of them - so the Andias did not know how much they supposedly owed Respondent until it was too late.²² Moreover, not only did Respondent claim that the Andias' original retainer was exhausted, he claimed that they owed him significant additional monies and he intended to take that money out of their settlement whether they agreed or not. When Mr. Andia attempted to confront Respondent about this, Respondent told him to "stop making an ass of yourself," and that Respondent was "very generous" for overbilling Mr. Andia by only \$20,000.00. Respondent then threatened to add additional charges to Mr. Andia's invoice.²³

Further, Respondent tried to intimidate the Andias into staying quiet about his ethical misconduct. Just before Mr.

¹⁹ *Id.* at 25.

²⁰ *Id.* at 25.

²¹ *Id.* at 37.

²² *Id.* at 35.

²³ *Id.* at 23.

Andia was set to testify at Dubin's ODC hearing, Respondent's counsel warned Andia that Respondent would be suing the Andias for defamation, and that Andia's testimony would be used as evidence against him.²⁴ Respondent never cited any legal grounds for such a suit, however, the timing of the threat, just before the start of Andia's testimony, was more than suspicious.

The Hearing Officer found that Respondent's misconduct in *Andia* constituted a lack of diligence, lack of candor, a failure to maintain integrity, and a violation of duties owed as a professional - and ultimately recommended that Respondent be disbarred.²⁵ He also recommended that Respondent pay restitution to the Andias in the sum of \$19,885.00, for overbilling them for his associates' time.

In *Kern*,²⁶ Respondent accepted \$45,000 in retainer payments from his client, Michael Harkey and, again, failed to account, despite multiple demands by Harkey - and the attorney Harkey hired to obtain an accounting from Respondent.²⁷ The investigation into Respondent's behavior revealed that he had good reason to avoid accounting to Harkey and his attorney - Respondent had misappropriated at least \$3,350.00 of Harkey's

²⁴ *Id.* at 26.

²⁵ *Id.* at 38, 41, 42.

²⁶ *Office of Disciplinary Counsel v. Gary V. Dubin*, (ODC No. 16-0-326).

²⁷ *Id.* at 30, 36.

funds during the time he represented him.²⁸ A Hearing Officer found that Respondent's misconduct in *Kern* constituted a failure to preserve client property, lack of diligence, and abuse of the legal process.²⁹

The Hearing Officer recommended disbarment for those violations.³⁰

3. Step Three: The Numerous Complaints Against Respondent

[REDACTED]

C. The Cycle Continues And Must Be Stopped

Respondent continues to broadcast "The Foreclosure Hour", continues to run television commercials, and continues to amass clients - even though he is facing disbarment. [REDACTED]

[REDACTED]

²⁸ *Id.* at 31.

²⁹ *Id.* at 39.

³⁰ *Id.* at 46.

³¹ See generally Exhibit 2.

³² *Id.*

[REDACTED]

As noted, Rule 2.23 permits this Court to immediately suspend attorneys who commit violations of the Hawai'i Rules of Professional Conduct and pose a substantial threat of serious harm to the public. The Court has not formally adopted a test for suspending attorneys under Rule 2.23 - however, other jurisdictions have applied standards resembling the preliminary injunction standard in such matters. For example, in *In re Malvin*, the D.C. Court of Appeals considered (1) whether the attorney is misappropriating funds (public interest), (2) whether there is a substantial likelihood that a significant sanction will be imposed on the attorney (success on the merits), and (3) whether balance of harms favors a temporary suspension.³⁴

Appearing to go further than *Malvin*, this Court has suspended attorneys in cases where misappropriation was merely alleged to have occurred, with sufficient evidence. In *Office of Disciplinary Counsel v. Fernandez*, this Court suspended Attorney Frank M. Fernandez under Rule 2.23 upon "sufficient evidence demonstrating" that misappropriation had occurred and that the attorney posed a substantial threat of serious harm to the public - even though Fernandez's case had not yet been heard by a trier of fact.³⁵

³⁴ 466 A. 2d 1220, 1222 (D.C. Ct. App. 1983).

³⁵ See *Office of Disciplinary Counsel v. Fernandez*, No. SCAD-11-0000032, Order of Interim Suspension (dated April 18, 2011).

Respondent's case satisfies all the *Malvin* factors and is even more compelling than the facts in *Fernandez*. This case meets the *Malvin* factors because Respondent was found to have misappropriated funds, was recommended for the most significant sanction possible (disbarment), and is alleged to have continued engaging in misconduct with no acknowledgement of the wrongful nature of his misconduct.³⁶

Second, this case's facts are significantly more compelling than *Fernandez* because, again, Respondent has actually been found to have misappropriated client funds. In *Fernandez*, the attorney was suspended upon "sufficient evidence" that he had misappropriated funds. Here, a trier of fact has actually determined that Respondent misappropriated \$3,350.00 in client funds from his client Harkey and overbilled his clients, the Andias, by \$19,885.00.

Moreover, because of his impending disbarment, Respondent may be incentivized to take on as many clients as possible, bill for whatever he thinks he can get away with, and otherwise try to make as much money as he possibly can before his practice comes to an end. He has shown consistent disregard for clients' funds, clients' dignity, and the legal process in general - there is no reason to expect that will stop with his

³⁶ Exhibit 1 at 46.

disbarment from the practice of law looming on the horizon. To that end, He should be suspended, as an injunctive matter, until his disbarment proceedings are complete.

III. CONCLUSION.

Based on the foregoing, ODC requests that this Court immediately **SUSPEND** Respondent from the practice of law pending final disposition of the pending disciplinary cases against him, pursuant to RSCH Rule 2.23.

DATED: Honolulu, Hawai'i, June 18, 2018.

OFFICE OF DISCIPLINARY COUNSEL

/S/Ryan S. Little

BRUCE B. KIM
Chief Disciplinary Counsel
RYAN S. LITTLE
Assistant Disciplinary Counsel

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner

vs.

GARY VICTOR DUBIN, Respondent

ORIGINAL PROCEEDING

AFFIDAVIT OF RYAN S. LITTLE

STATE OF HAWAI'I)
) SS.
CITY AND COUNTY OF HONOLULU)

RYAN S. LITTLE, being first duly sworn on oath, deposes and states that:


1. Your affiant is the Assistant Disciplinary Counsel with the Office of Disciplinary Counsel ("ODC"), and the attorney assigned to handle the above-captioned matter. Your affiant has personal knowledge of, and is competent to testify to the facts set forth below.

2. ODC investigated and prosecuted GARY VICTOR DUBIN ("Dubin") for professional misconduct in 2016.

3. Dubin was subsequently recommended for disbarment by a Hearing Officer in April of 2018.

4. [REDACTED]
[REDACTED]

FURTHER AFFIANT SAYETH NAUGHT.



RYAN S. LITTLE

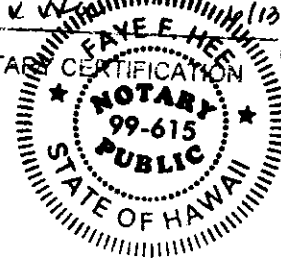
Subscribed and sworn to before me
this 13th day of June, 2018.

JMY v NU

FAYE HEE
Notary Public, State of Hawaii
My commission expires 12/26/2019



No. Date: 6/13/18 \$ Fees: 0
Name: FAYE F. HEE 1st 0.00
Doc. Description: Affiant of
Ryan S. Little
JMY v NU _____ / 6/13/18
Signature _____ Date _____



IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL,
Petitioner,

vs.

GARY VICTOR DUBIN,
Respondent.

ORIGINAL PROCEEDINGS
(ODC Case Nos. 16-O-217, 16-O-429, 17-O-054, 17-O-181, 18-O-002)

AFFIDAVIT OF ANDREA R. SINK

ANDREA R. SINK, being first duly sworn on oath, deposes and states that:

1. Your affiant is an Investigator employed by the Office of Disciplinary Counsel (hereinafter "ODC") and is assigned to [REDACTED]


[REDACTED] Your affiant has personal knowledge of, and is competent to testify to the facts set forth below.

2. Your affiant makes this declaration in support of the Petition for RSCH Rule 2.23 Immediate Suspension (hereinafter "Petition").

3. Your affiant personally reviewed each of the aforementioned case files and is intimately familiar with each investigation. Due to your affiant's familiarity with these investigations, your affiant prepared the Synopsis of Cases which is filed under seal due to the confidential nature of these

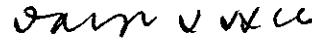
investigations and marked as Exhibit 2. This Synopsis contains accurate statements of each set of allegations.

FURTHER AFFIANT SAYETH NAUGHT.



ANDREA R. SINK

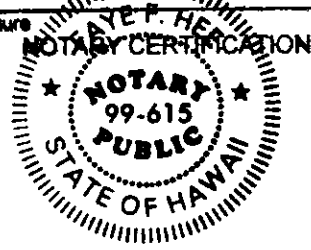
Subscribed and sworn to before me
this 31st day of May 2018.



Faye F. Hee
Notary Public for the State of Hawai'i
My commission expires: 2/26/2019



Doc. Date: 5/31/18 # Pages: 11
Name: FAYE F. HEE 1st Circuit
Doc. Description: Affidavit of
Andrea R. Sink
Faye F. Hee 5/31/18
Signature Date



DBF 71
DISCIPLINARY BOARD
OF THE
HAWAII SUPREME COURT
RECEIVED

12 April 2018
DAY MONTH YEAR
TIME: 2:20pm BY mn

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF DISCIPLINARY COUNSEL,)
)
Petitioner,)
v.)
)
GARY V. DUBIN,)
Respondent.)
_____)

ODC 16-0-213
16-0-151
16-0-147
16-0-326

HEARING OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDED DISCIPLINE

I. PROCEDURAL BACKGROUND

The Petition was filed on January 3, 2017. Disciplinary Board File ("DBF") 1. An Amended Petition was filed on January 9, 2017. **DBF 2.**

The Petition was personally served upon Respondent Gary V. Dubin ("Respondent") on January 20, 2017. DBF 3. Respondent filed his Verified Answer to Amended Petition on March 13, 2017. **DBF 6.**

Roy F. Hughes, Esq. ("Hearing Officer") was appointed the Hearing Officer in this matter on April 18, 2017. **DBF 8.**

The proceedings in this matter became public on April 20, 2017. **DBF 9.**

The initial Prehearing Conference was held on May 15, 2017. DBF 11. The formal hearing was set for September 18, 2017, and continuing from day to day until completed. **Id.**

On August 11, 2017, Yvonne R. Shinmura entered her appearance as lead trial counsel for Petitioner Office of Disciplinary Counsel ("Petitioner"). **DBF 13.**

Petitioner's Exhibit List and Witness List were filed on August 21, 2017. **DBF 14 and 15.**

Respondent requested an extension of time to submit his Witness List and Exhibit List on August 24, 2017. **DBF 17.** Respondent asked that the deadline to submit his Witness List and Exhibit List be extended from August 28, 2017 to August 31, 2017. **DBF 17 at 2.** The Hearing Officer granted Respondent's request for an extension on August 24, 2017. **DBF 18.**

On August 31, 2017, Respondent requested another extension of time to file his Witness List and Exhibit List from August 31, 2017 to September 1, 2017. **DBF 19.**

Respondent's Exhibit List and Witness List were filed on September 5, 2017, after the previously requested extension deadline had expired. **DBF 20 and 21.**

Respondent's Objections to Petitioner's Witness List and Objections to Petitioner's Exhibits were filed on September 5, 2017. **DBF 22 and 23.**

On September 5, 2017, Petitioner filed a request to extend the time for it to file its objections to the Respondent's Witness List and Exhibit List from September 8, 2017 to September 13, 2017. **DBF 24.**

On September 5, 2017, the Hearing Officer granted Petitioner's request for an extension to file its objections to Respondent's exhibits and witness list for September 13, 2017. **DBF 25.**

Petitioner's Prehearing Statement was filed on September 8, 2017. **DBF 26.**

Petitioner's Motion In Limine No. 1 Re: Precluding Respondent from Calling Assistant Disciplinary Counsel Jane S. Preece As a Witness In These Proceedings was filed on September 8, 2017. **DBF 27.** Petitioner's Motion In Limine No. 2 Re: Limiting Respondent In Eliciting Testimony from Investigator George Elerick as a Witness In These Proceedings was filed on September 8, 2017. **DBF 28.** Petitioner's Motion In Limine No. 3 Re: Limiting Respondent From Presenting Testimony From 25 Character Witnesses was filed on September 8, 2017. **DBF 29.**

Petitioner's Objections to Respondent Gary V. Dubin's Exhibit List and Proposed Exhibits were filed on September 12, 2017. **DBF 33.** Petitioner's Objections to Respondent's Witness List Filed on September 5, 2017 was filed on September 12, 2017. **DBF 34.**

On September 20, 2017, Respondent filed a Notice of Appearance of Counsel in which John D. Waihee, III, Gary Victor Dubin and the Dubin Law Offices entered their appearances as "co-counsel for Respondent for all purposes." **DBF 36.**

On September 20, 2017, a second Prehearing Conference was held. By agreement of the parties, the formal hearing was rescheduled for November 13, 2017, and continuing on November 20, 2017, November 21,

2017, November 22, 2017, November 27, 2017, November 28, 2017, November 29, 2017, November 30, 2017, and December 1, 2017. **DBF 37.**

The Hearing Officer granted all three of Petitioner's Motions In Limine. **DBF 37 at 3.** The parties stipulated to extend the time to complete the hearing to December 2, 2017. **Id.** The time in which the Hearing Officer could submit his report was extended to January 16, 2018. **Id.** All other prehearing and post-hearing dates remained the same.

Respondent's Opening Statement was filed on November 13, 2017. **DBF 38.**

The formal hearing was held on November 13, 2017, November 14, 2017, November 20, 2017, November 21, 2017, November 22, 2017, November 27, 2017 and November 28, 2017.

The following exhibits offered by Petitioner were received in evidence: **Petitioner's Exhibit ("PE") A1 (Transcript ("Tr.") 11/13/17 at 38:9); PE A2 (Tr. 11/13/17 at 83:2); PE A2-A (Tr. 11/13/17 at 83:22); PE A3-5 (Tr. 11/13/17 at 88:23); PE A3-6 (Tr. 11/13/17 at 110:10); PE A3-7 (Tr. 11/13/17 at 106:2); PE A3-8 (Tr. 11/13/17 at 106:13); PE A4 (Tr. 11/13/17 at 114:2); PE A5 (Tr. 11/13/17 at 116:15-16); PE A6 (Tr. 11/13/17 at 120:4); PE A7 (Tr. 11/13/17 at 136:9); PE A8 (Tr. 11/13/17 at 136:9); PE A9 (Tr. 11/13/17 at 140:6); PE A10 (Tr. 11/13/17 at 142:8); PE A11 (Tr. 11/13/17 at 145:7-8); PE A12 (Tr. 11/13/17 at 146:9); PE A13 (Tr. 11/13/17 at); PE A14 (Tr. 11/13/17 at); PE A15 (Tr. 11/13/17 at 150:3); PE A17 (11/13/17 at 164:11); PE B1 (Tr. 11/20/17**

at 602:4); PE B2 (Tr. 11/27/17 at 1259:1); PE B3 (Tr. 11/20/17 at 581:3); PE B4 (Tr. 11/20/17 at 669:1-2); PE B5 (Tr. 11/20/17 at 547:20); PE B6 (Tr. 11/20/17 at 571:17); PE B7 (Tr. 11/20/17 at); PE B7-A (Tr. 11/20/17 at 575:16); PE B7-B (Tr. 11/20/17 at 640:18); PE B8 (Tr. 11/20/17 at 485:12); PE B9 (Tr. 11/20/17 at 545:24); PE B10 (Tr. 11/20/17 at 553:1); PE B11 (Tr. 11/20/17 at 561:2); PE B12 (Tr. 11/20/17 at 562:14); PE B13 (Tr. 11/20/17 at 628:24); PE B14 (Tr. 11/20/17 at 636:19); PE B16 (Tr. 11/20/17 at 638:15); PE B17 (Tr. 11/20/17 at 644:12); PE B18 (Tr. 11/20/17 at 648:5); PE B19 (Tr. 11/20/17 at 653:17); PE B20 (Tr. 11/20/17 at 659:18-25); PE B21 (Tr. 11/20/17 at); PE B22 (Tr. 11/20/17 at 672:19); PE B23 (Tr. 11/20/17 at 673:25); PE B24 (Tr. 11/20/17 at 566:11); PE B34 (Tr. 11/20/17 at 677:11-12); PE B35 (Tr. 11/21/17 at 909:10); PE B36 (Tr. 11/22/17 at 1050:18); PE C1-44 (Tr. 11/14/17 at 260:16-17); PE D1 (Tr. 11/22/17 at 1135:9); PE D4 (Tr. 11/22/17 at 1126:7); PE D5 (Tr. 11/22/17 at 1140:1); PE D6 (Tr. 11/22/17 at 1143:10); PE D7 (11/22/17 at 1144:6); PE D8 (11/22/17 at); PE D9 (Tr. 11/22/17 at 1158:8); PE D10 (Tr. 11/22/17 at 1158:24); PE D11 (Tr. 11/22/17 at 1160:16); PE D12 (Tr. 11/22/17 at 1163:10); PE D13 (Tr. 11/22/17 at 954:2-3); PE D14 (Tr. 11/22/17 at 955:14-15); PE D15 (11/22/17 at 956:10-11); PE D16 (11/22/17 at 957:25); PE D17 (11/22/17 at 960:9); PE D18 (Tr. 11/22/17 at 962:7); PE D19 (Tr. 11/22/17 at 963:4); PE D20 (11/22/17 at 965:1); PE D21 (Tr. 11/22/17 at 966:4); PE D22 (Tr. 11/22/17 at 968:18); PE D23 (Tr. 11/22/17 at 969:25); PE D24 (Tr. 11/22/17 at 970:11); PE D25 (Tr. 11/22/17 at 971:2); PE D26 (Tr. 11/22/17 at

972:8); PE D27 (Tr. 11/22/17 at 976:12-13); PE D28 (Tr. 11/22/17 at 949:24); PE D29 (Tr. 11/20/17 at 434:1-3); PE D30 (Tr. 11/20/17 at 434:23); PE D31 (Tr. 11/22/17 at 437:7-9); PE D32 (Tr. 11/20/17 at 1134:10-13); PE E1 (Tr. 11/13/17 at 91:10; 11/28/17 at 1492:23-24); PE E2 (Tr. 11/28/17 at 1492:15-16); PE E3 (Tr. 11/20/17 at 431:7); and PE E4 (Tr. 11/22/17 at 1177:7).

The following exhibits offered by Respondent were received in evidence at the hearing:

Respondent's Exhibit ("RE") RE AA (Tr. 11/14/17 at 387:4-5); RE 1 (Tr. 11/28/17 at 1363:3-4); RE 2 (Tr. 11/20/17 at 460:4-5) (conditionally admitted); RE 2-A (Tr. 11/20/17 at 532:16); RE 4 (Tr. 11/28/17 at 1427:21-23); RE 5 (Tr. 11/22/17 at 999:22); RE 7 (Tr. 11/28/17 at 1389:10); RE 8 (Tr. 11/28/17 at 1371:23-24); RE 9 (Tr. 11/28/17 at 1406:11-12); RE 10 (Tr. 11/28/17 at 1492:8); RE 11 (Tr. 11/28/17 at 1492:8); RE 12 (Tr. 11/28/17 at 1492:8); RE 13 (Tr. 11/20/17 at 515:3-4) (withdrawn in part Tr. 11/27/17 at 1230:4-6 and 1233:1-7); RE 14 (Tr. 11/28/17 at 1492:8); RE 15 (Tr. 11/28/17 at 1492:8); RE 16 (Tr. 11/28/17 at 1492:8); RE 17 (Tr. 11/21/17 at 851:15-16); RE 18 (Tr. 11/28/17 at 1492:9); RE 19 (Tr. 11/28/17 at 1426:17-21); RE 23-A/B (Tr. 11/21/17 at 836:13); RE 26 (Tr. 11/21/17 at 853:23-24); RE 36 (Tr. 11/20/17 at 507:21-23); RR-1 (Tr. 11/28/17 at 1492:5); RR-3 (Tr. 11/28/17 at 1493:22-1494:2); RR-4 (Tr. 11/28/17 at 1493:22-1494:2).

On December 1, 2017, the Hearing Officer issued his Order, Re Post-Hearing Process. **DBF 51.** The Hearing Officer directed that no post-hearing briefs or memoranda shall be filed in the case, but each party shall file their respective proposed Findings of Fact, Conclusions of Law, and Recommendation for Discipline on or before 30 days following the filing and service of the last of the seven days of transcripts of the formal hearing. **Id. at 1-2.**

On December 1, 2017, the Hearing Officer requested an extension of the 7-month deadline to complete his report on the matter. **DBF 52.** The Hearing Officer requested an extension to March 15, 2018. **Id. at 2.**

The Hearing Officer's request for an extension to March 15, 2018 was granted on December 12, 2017. **DBF 53.**

On January 18, 2018, Petitioner requested a thirty-day extension of time to file its proposed findings of fact, conclusions of law, and recommendation for discipline from January 21, 2018 to February 22, 2018. **DBF 55.** The request was granted on January 23, 2018. **DBF 56.** The deadline for both parties to submit their respective proposed findings of fact, conclusions of law, and recommendation for discipline was extended to February 22, 2018.

On February 16, 2018, Respondent filed a letter requesting a request for a thirty-day extension of time to file his proposed Findings of Fact, Conclusions of Law and Recommended Discipline from February 22, 2018. **DBF 57.** Petitioner's request was granted by the Hearing Officer on February 22, 2018. **DBF 59.** The parties' proposed Findings of Fact,

Conclusions of Law, and Recommended Discipline were now due on March 22, 2018. **Id.**

On February 26, 2018, the Board granted the Hearing Officer's Second Request to Extend 7-Month Deadline [Re: DBF 60]. **DBF 62.** Under the Order, the 7-Month Deadline was extended to April 21, 2018. No further extensions would be permitted.

II. FINDINGS OF FACT

The following facts were established by clear and convincing evidence at the hearing:

A. JURISDICTIONAL FACTS

1. Petitioner is a duly organized office existing under the Rules of the Supreme Court of Hawai'i ("RSCH") Rule 2, and its address is 201 Merchant Street, Suite 1600, Honolulu, Hawai'i 96813. **DBF 1.**

2. Respondent was admitted to the practice of law in the State of Hawai'i on October 15, 1982, and was assigned Attorney Number 3181. **PE A1.** 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, 2017. **Id.** Respondent's last known address on file with the Hawaii State Bar Association is Harbor Court, Suite 3100, 55 Merchant Street, Honolulu, Hawai'i 96813. **Id.**

B. ODC 16-O-151 (Joe Smith, Complainant)

3. Respondent was convicted on January 30, 1995, of three misdemeanor counts for willfully failing to file federal income tax

returns in the United States District Court for the District of Hawai'i (U.S. v. Dubin, CR 93-01434 MLR 01). **PE A3-5.**

4. Respondent was sentenced to 30 months in federal prison. **PE A3-5 at 2.**

5. Following his conviction, Respondent was incarcerated for 19½ months at Boron Federal Prison Camp, Terminal Island Federal Correction Center, and Lompac Federal Correction Center. **Tr. 11/13/17 at 87:11-20.**

6. Respondent testified that his 1995 conviction has never been reversed on appeal, vacated, annulled, or expunged. **Tr. 11/13/17 at 86:18-87:7.**

7. On or about July 23, 2008, Respondent submitted an application for a mortgage solicitor's license to of the Hawai'i Department of Commerce and Consumer Affairs ("DCCA"). **PE A3-6.**

8. Respondent reviewed the application before he signed it. **Tr. 11/13/17 at 108:19-21; and 109:16-20.**

9. After reviewing his application, Respondent made a handwritten correction to his answer to Question No. 3 from "yes" to "no", before signing and submitting the application. **PE A3-6.**

10. Question No. 8 of the application asked "[i]n the past 20 years, have you ever been convicted of a crime in which the conviction has not been annulled or expunged?"

11. Respondent answered Question No. 8 "no". **PE A3-6.**

12. Respondent never corrected this misrepresentation on his application before signing and submitting it to the DCCA on July 23, 2008.

13. When he signed the application, Respondent certified that the "statements, answers and representations made on this application are true and correct." **PE A3-6**. He further certified that he "[understood] that any misrepresentations is grounds for refusal to grant or subsequent revocation of this license". **Id.**

14. On November 9, 2010, in MBS 2009-14-L, the DCCA, through its Regulated Industries Complaint Office, filed a petition to revoke Respondent's mortgage solicitor license. **PE A2**.

15. Following a hearing on March 29, 2011, the DCCA's petition was granted on April 21, 2011, by entry of the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Discipline. **PE A5**.

16. The hearing officer specifically found that Respondent's answer to Question No. 8 was "untruthful within the terms of HRS § 436B-19(2)." **PE A5 at 9**.

17. On June 9, 2011, the Director's Final Order was issued adopting the hearing officer's recommended decision and concluding that Respondent violated HRS §§ 436B-19(2), 436b-19(5) and 454-4(b). **PE A9 at 1-2**.

18. The Final Order revoked Respondent's mortgage solicitor's license and fined Respondent \$1,000.00 payable within sixty-days of the Final Order. **PE A9 at 2**.

19. On February 13, 2012, Judge Nishimura, Judge of the Circuit Court of the First Circuit, State of Hawai'i, issued her Order Affirming the Director's Final Order against Respondent. **PE A10.**

20. Respondent appealed Judge Nishimura's Order on March 6, 2012, to the Intermediate Court of Appeals ("ICA"). **PE A12.**

21. The ICA entered a Summary Disposition Order on June 3, 2015. Dubin Financial LLC v. Mortgage Brokers and Solicitors Program, CAAP-12-0000135, 2015 Haw. App. LEXIS 271 (Haw. June 3, 2015). **PE A15.** In its Summary Disposition Order, the ICA found there was substantial evidence to support the hearing officer's determination that violations occurred. The ICA found that Respondent did not dispute that misrepresentations regarding his prior conviction occurred. **Id. at 4.** The ICA further found that the misrepresentations were "material". **Id. at 7.**

22. Respondent did not seek reconsideration of the ICA's Summary Disposition Order, nor did he file an appeal with the Hawai'i Supreme Court. **Tr. 11/13/17 at 163:5-14.**

C. ODC-16-O-213 (ICA Complaint)

CAAP 12-0000070

23. On February 3, 2012, Respondent filed a Notice of Appeal to the ICA on behalf of his clients. Ke Kailani Partners, LLC v. Ke Kailani Development, LLC, CAAP 12-0000070 ("Ke Kailani Appeal"). **PE C2.** The Notice appealed from four separate rulings entered against his clients, the defendants, in the case of Ke Kailani Partners, LLC v. Ke Kailani Development, LLC, Civil No. 09-1-2523-10 BIA. **Id.**

24. On February 21, 2012, the Clerk in the Ke Kailani Appeal issued a Deficiency Notice advising Respondent that his Notice of Appeal did not include the Civil Appeals Docketing Statement ("CADS") required by Hawaii Rules of Appellate Procedure ("HRAP") 3.1. **PE C3 at 4.** Respondent was directed to file his CADS on or before March 2, 2012.

25. Respondent knew based upon his experience that he had to file the CADS on time. **Tr. 11/14/17 at 264:20-25.**

26. Respondent filed his CADS as instructed on March 2, 2012. **PE C4.**

27. On March 2, 2012, the ICA issued a Notice of Entering Case on Calendar. **PE C5.** Respondent's Jurisdictional Statement was due on April 2, 2012. The Opening Brief was due on May 2, 2012. **Id.**

28. Respondent failed to file a Jurisdictional Statement on or before April 2, 2012, and did not file his Opening Brief on or before May 2, 2012.

29. On July 10, 2012, the ICA issued a Default of Statement of Jurisdiction & Opening Brief. **PE C6.** Respondent was notified that his failure to timely file the Jurisdictional Statement and Opening Brief would be brought to the attention of the ICA on July 20, 2012 for such action as the ICA deemed proper. Respondent was put on notice that the appeal may be dismissed pursuant to HRAP Rule 30. **Id. at 2.**

30. Respondent finally filed the Jurisdictional Statement nine days later on July 19, 2012. **PE C7.**

31. The ICA issued its (1) Order Granting Motion For Leave to File Late Jurisdictional Statement; (2) Denying Without Prejudice Motion For Extension to File Opening Brief; and (3) Order to Show Cause on July 23, 2012. **PE C9.**

32. The ICA ordered Respondent to show cause within 15 days of the date of the order why he had failed to comply with the deadlines in the case. **PE C9 at 3.**

33. On August 30, 2012, the ICA issued its Order for Sanction against the Respondent in the Ke Kailani Appeal. **PE C10.** The ICA found that Respondent had failed to show good cause why sanctions should not be imposed for his failure to timely file a CADS, an Opening Brief or timely request an extension to file the Opening Brief.

34. The ICA noted in its order that Respondent was previously been sanctioned in other appellate cases, including appeal numbers 30698 and CAAP-11-0000485. **PE C10.**

35. The ICA imposed a \$150.00 monetary sanction against Respondent for his failure to comply with the orders and rules of the court. **PE C10.** The ICA further instructed the appellate clerk to immediately send Petitioner a copy of the order to review whether Respondent's conduct violated any of the Hawaii Rules of Professional Conduct, including but not limited to, HRPC 1.3. **Id. at 2.**

CONSOLIDATED CASES CAAP-12-0000070 AND CAAP-12-0758

36. On October 5, 2012, the ICA entered an order consolidating case numbers CAAP-12-0000070 and CAAP-12-0000758. **PE C12.** All future filings were to be made under CAAP-12-0000758. The

ICA ordered that the briefing should proceed according to HRAP Rule 28. **Id. at 3.**

37. On December 3, 2012, Respondent was granted a thirty-day extension to file his Opening Brief to January 3, 2013, by the clerk of the court. **PE C13.**

38. On January 7, 2013, the ICA granted Respondent's motion to extend the time to file his Opening Brief until January 31, 2013. **PE C13 at 3.**

39. On January 23, 2013, the ICA issued an Order 1) Granting In Part and Denying In Part and Denying In Part Plaintiff-Appellee Ke Kailani Partners, LLC's Motion for Reconsideration Filed on January 15, 2013; 2) Order to Show Cause; and 3) Motion is Denied In All Other Respects. **PE C16.**

40. The ICA granted Respondent relief from default and leave to file a late Opening Brief by January 31, 2013.

41. The ICA ordered the Respondent to show good cause why he failed to file his Opening Brief or timely request an extension of time to file the Opening Brief within 15 days of the date of its Order. **PE C16 at 3.**

42. Respondent filed his Opening Brief on January 31, 2013. **PE C17.**

43. On March 1, 2013, Plaintiff-Appellee Ke Kailani Partners LLC filed a Motion to Dismiss Appeal, or, In the Alternative, to Strike Opening Brief. **PE C18.**

44. On March 27, 2013, the ICA filed its Order Re Plaintiff-Appellee Ke Kailani Partners LLC's Motion to Dismiss Appeal or, In the Alternative, to Strike Opening Brief Filed March 1, 2013. **PE C19.** The ICA listed seven HRAP Rule 28 violations committed by Respondent in his Opening Brief. **Id. at 3-4.** The ICA struck Respondent's Opening Brief. It granted Respondent's clients leave to file an Amended Opening Brief in compliance with HRAP Rule 28, not to exceed 35 pages in length, within ten days of the order. **Id. at 4-5.** The ICA advised Respondent permission to extend the deadline to file the Amended Brief would not be granted. **Id. at 5.**

45. Respondent filed his Amended Opening Brief on April 8, 2013. **PE C20.**

46. On April 29, 2016, the ICA issued an order finding that Respondent's Amended Opening Brief "is in substantial non-compliance with the Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)". **PE C21 at 2.**

47. In light of Respondent's "repeated violations of court rules", the ICA ordered that Respondent be referred to Petitioner for initiation of an investigation of his conduct in the case. **PE C21 at 2.**

CAAP-13-0004290

48. On October 21, 2013, Respondent filed a Notice of Appeal to the ICA on behalf of his clients, the plaintiffs in Ke Kailani Development LLC v. Ke Kailani Partners LLC, Civil No. 11-1-1577-07 GWBC. **PE C23.**

49. The case was assigned appeal no. CAAP-13-0004290.

50. On November 13, 2013, the ICA clerk issued a Deficiency Notice to Respondent that he had failed to file the CADS required by HRAP 3.1. **PE C24.** Respondent was given until November 23, 2013 to correct the deficiency or the ICA could impose sanctions against him, including monetary sanctions.

51. Respondent filed his CADS on November 24, 2013, a day after the November 23, 2013 deadline set by the clerk. **PE C25.**

52. On January 6, 2014, February 10, 2014, May 1, 2014, and May 15, 2014, Respondent received extensions of time to file his Opening Brief. **PE C26 and C29.** The final extension gave Respondent until May 21, 2014, to file his Opening Brief. Respondent failed to file his Opening Brief by May 21, 2014.

53. On May 30, 2014, the ICA filed a notice entitled Default of Opening Brief (ND2). **PE C31.** The ICA advised the Respondent that the matter of the Respondent's failure to file his Opening Brief by the May 21, 2014 deadline would be brought to the attention of the ICA on June 9, 2014, for such action as the court deems proper.

54. On June 17, 2014, the ICA issued its Order 1) Granting In Part the June 8, 2014 Motion for Leave to File Late Opening Brief Forthwith; and 2) Order to Show Cause. **PE C33.**

55. The ICA made the following findings in its Order:

(1) The opening brief is in default as of May 21, 2014, as Appellants, through counsel Gary Victor Dubin, were notified pursuant to the May 30, 2014 notice of default, and as such, the instant motion for leave to file late opening brief forthwith

should more properly be entitled, and the court will review the instant motion as, a motion for relief from default (Motion).

(2) On at least two prior occasions, Appellants, through counsel Gary Victor Dubin, filed a motion for extension of time to file the opening brief on the due date and this court twice cautioned counsel that such extension requests should be filed prior to the due date, and on the last order warned counsel that future failure to comply may result in sanctions, and counsel failed to comply despite prior warnings.

(3) Appellants, through counsel Gary Victor Dubin, file the instant Motion almost three weeks after the last opening brief due date of May 21, 2014, requesting to file a late opening brief forthwith, indicating filing "on or before June 11, 2014" because of the workload of counsel Gary Victor Dubin, which, with variation in type of work, has been a basis of the three prior requests for extensions.

PE C33 at 1-2.

56. The ICA ordered Respondent to show cause within ten days why he should not be sanctioned for failing to file requests for extensions of the opening brief deadline prior to the due date despite two prior cautions by the court and for failure to timely file the opening brief. **PE C33 at 3.**

57. Respondent filed his Opening Brief on June 18, 2014.

PE C34.

58. On July 17, 2014, the ICA issued an Order imposing sanctions against Respondent for his conduct in CAAP-13-0004290. **PE C35.** The ICA noted in its Order that the Respondent, in addition to CAAP-13-004290, had been sanctioned in five prior cases for failing to file the opening brief which resulted in three sanction orders,

with the last two sanctions being for \$150.00 each. **See, PE C40, C41, C42, C43, and C44.** The ICA found that the Respondent failed to show good cause why he should not be sanctioned and imposed a \$200.00 monetary sanction against Respondent. **PE 35 at 2.**

59. Respondent testified that he is an experienced appellate attorney and stipulated that he is very familiar with the appellate rules he had to follow. **Tr. 11/14/17 at 264:7-19; 265:1-8; and 272:9-12.**

60. Respondent testified that when he receives an order from an appellate court, he reads the order. **Tr. 11/14/17 at 292:19-24.**

D. ODC No. 16-O-147 (Robert Andia, Complainant)

61. Robert K. Andia and Carmelita A. Andia, hereinafter collectively referred to as the "Andias", retained Respondent on or about February 17, 2012, to provide a foreclosure defense against an anticipated foreclosure action.

62. Respondent had the Andias sign a written retainer agreement prepared by his office. **PE B3.**

63. There was no foreclosure action pending against the Andias at the time they retained Respondent. **Tr. 11/20/17 at 594:3.**

64. The bank did not initiate a foreclosure action against the Andias until about four months later. **Tr. 11/20/17 at 594:10.**

65. Mr. Andia does not know if Respondent did any work on their case during the first four months. **Tr. 11/20/17 at 594:14.**

66. The retainer agreement stated in ¶ 4 that “[i]n foreclosure cases we are experimenting with a minimum flat fee retainer, subject to reevaluation as the case proceeds.” **PE B3 at 1.**

67. The Respondent’s retainer agreement provided that fees for associate attorneys would be billed to the Andias at “between \$250 and \$150 per hour”. **PE B3 at 2, ¶ 10.**

68. Mr. Andia testified that he was told by Respondent that the agreement was a flat fee agreement. **Tr. 11/20/17 at 597:55-19.**

69. Respondent agreed that his retainer agreement did not trump the rules of professional conduct. **Tr. 11/27/17 at 1290:24.**

70. Respondent agreed that he was in an attorney client relationship with the Andias after he signed their retainer agreement. **Tr. 11/27/17 at 1293:5.**

71. The Andias paid Respondent the agreed upon retainer of \$16,500.00 on February 23, 2012, which was deposited into the Respondent’s CTA on February 27, 2012. **Tr. 11/20/17 at 598:9-13; Tr. 11/21/17 at 768:12; and PE B1.**

72. Mr. Andia testified that they never agreed to change the agreement from a flat fee agreement after it was signed. **Tr. 11/20/17 at 601:14.** He also testified that they never agreed to pay for associate’s time at \$385.00 an hour at any time after he signed the agreement on February 17, 2012. **Tr. 11/20/17 at 601:17.**

73. Mr. Andia testified that the Respondent never made any changes to their retainer agreement either verbally or in writing. **Tr. 11/20/17 at 614:1-4.**

74. Respondent initially assigned his associate, Andrew Goff ("Goff") to work on the Andias' case.

75. Goff worked as an associate at the Respondent's office from 2011 into 2015, when he left the Respondent to work at the Hawaii Attorney General's Office. **Tr. 11/20/17 at 485:19-25; and 486:16.**

76. Goff was licensed to practice law in Hawaii on March 21, 2011. **PE 8.**

77. Goff was never awarded loadstar fees at the rate of \$385.00 an hour from any court during the time he worked at the Respondent's office. **Tr. 11/20/17 at 493:2.**

78. Goff was never lead trial counsel in any case in Circuit Court or the U.S. District Court for the District of Hawaii during the time he worked for the Respondent. **Tr. 11/20/17 at 493:18-24.**

79. Goff testified that while he worked for the Respondent, invoices were prepared only in a small percentage of cases. **Tr. 11/20/17 at 496:10-14.**

80. Richard Forrester ("Forrester") worked as an associate at the Respondent's office from 2012 to 2016. **Tr. 11/20/17 at 536:16-17.**

81. He was assigned to the Andias' case after Goff left the Respondent's office. **Tr. 11/20/17 at 539:8.**

82. Forrester graduated from law school in 2011. **Tr. 11/20/17 at 535:10-11.** He was not admitted to the Hawaii bar until November 5, 2012. **Tr. 11/20/17 at 6-7; and PE B9.**

83. Forrester testified that he was never awarded loadstar fees by any Hawai'i court between 2012 and 2015. **Tr. 11/20/17 at 578:2-11.** He also testified that he was never awarded loadstar fees by any Hawai'i court at the rate of \$385.00 an hour for the period 2012 through 2015. **Tr. 11/20/17 at 578:23-579:2.**

84. Forrester never tried a case in any Hawai'i circuit court or before the United States District Court for the District of Hawaii during the time he worked for the Respondent. **Tr. 11/20/17 at 579:3-10.**

85. Forrester testified that the settlement check was to be paid to the Andias under the terms of the Settlement Agreement and Release dated October 5, 2015. **PE B24; Tr. 11/20/17 at 566:16-24.**

86. The Andias agreed that the settlement would be paid to them and not Respondent. **Tr. 11/20/17 at 615:12-23.**

87. Mr. Andia testified that the Andias agreed as part of the settlement to pay the settlement proceeds to their servicer to cure arrearages owed to the servicer. **Tr. 11/20/17 at 609:7-23; and 617:1-11; and 11/21/17 at 789:22-790:5.**

88. The Respondent never read the Andias' settlement agreement. **Tr. 11/27/17 at 1243:19-24.**

89. The Respondent agreed that the Bank of America was to pay the Andias the \$132,000.00 under their settlement agreement. **Tr. 11/27/17 at 1313:25.**

90. Forrester testified that the Andias' signatures on the back of the check dated October 26, 2015, were not the same as the

Andias' notarized signatures on the Settlement Agreement and Release dated October 5, 2015. **Tr. 11/20/17 at 573:12 and 573:23.**

91. Mr. Andia testified that the Respondent attempted to make the endorsements on the check appear as though two different individuals had signed his wife and his names on the settlement check. **Tr. 11/21/17 at 800:15-801:8.**

92. Respondent admitted that he received the Andias' settlement check on November 3, 2013, filled out a deposit slip and deposited it the same day at 2:48 p.m. **Tr. 11/27/17 at 1260:4; 1266:20; 1274:2-7; and 1274:8-10; and PE B6.**

93. Respondent admitted that he signed the Andias' signatures on the back of the October 26, 2013 settlement check and deposited it into his CTA on November 3, 2013, without notifying the Andias. **Tr. 11/20/17 at 572:5-7; Tr. 11/22/17 at 1067:20-24; 1072:5-10; 1072:13-16; and 1087:1-6; and PE B6.**

94. Neither the Respondent nor Forrester told the Andias that they had received the Andias' settlement check on November 3, 2015. **Tr. 11/20/17 at 550:5-11; and 564:25-565:7; and Tr. 11/21/17 at 806:1-8.**

95. Respondent did not have the Andias' consent to endorse their settlement check for them or deposit it into his CTA. **Tr. 11/20/17 at 634:10-635:7; and 635:15.**

96. If Mr. Andia knew that Respondent was going to deposit the settlement check and withdraw money from it, he would not have agreed to settle. **Tr. 11/20/17 at 634:10-635:7; and 643:11-15.**

97. On November 7, 2015, Respondent sent a letter to the Andias. **PE B7.**

98. Respondent enclosed an undated invoice in which he claimed attorneys' fees and costs of \$78,202.87 for services and costs allegedly rendered between February 17, 2012 through November 6, 2015, less the Andias' retainer of \$16,500.00, for a net payable to Respondent of \$61,702.87, representing 47% of the Andias' entire settlement. **PE B7A at 4.**

99. Respondent retained an additional \$8,000.00 on top of the \$61,702.87 to "replenish retainer" even though he already informed Mr. Andia that he wouldn't do any further work on his case as of November 6, 2015. **PE B7A at 4.**

100. After deducting his claimed fees and costs and the additional "retainer", the Respondent sent the Andias a check for \$62,297.13 as their share of the settlement. **PE B7B.**

101. Respondent claimed that his payment to the Andias was "very generous of him". **Tr. 11/22/17 at 1097:10-16.**

102. According to the Respondent's invoice, he had exhausted the Andias' retainer within the first eight days of billings. **Tr. 11/21/17 at 734:6-20.** Yet the Respondent never asked the Andias to replenish their retainer during the entire time he represented them. **Tr. 11/21/17 at 733:9-12.**

103. Respondent never gave the Andias an opportunity to review his invoice before sending them his letter on November 7, 2015.

Tr. 11/20/17 at 647:1; Tr. 11/21/17 at 900:10-20; 906:18-22; 1094:15-24; and 1095:8-13; and PE B16.

104. Respondent claimed that he could, under the Rules of Professional Responsibility, propose any distribution of their settlement funds to the Andias that he wanted to. **Tr. 11/21/17 at 1095:19-24.**

105. Prior to sending them an invoice on November 7, 2015, Respondent had never notified the Andias that he had taken any money out of their CTA account. **Tr. 11/21/17 at 1106:11-22.**

106. After he received Respondent's invoice, Mr. Andia reviewed it and found a number of discrepancies and irregularities. **Tr. 11/20/17 at 647:8.**

107. In an email dated December 15, 2015, Mr. Andia informed Respondent that he was disputing charges contained in his invoice. **PE B18.**

108. Mr. Andia testified that they agreed under the 2012 retainer agreement to compensate Respondent for his associates' time at the rate of \$250 to \$150 an hour, yet the Respondent's invoice billed out associates, specifically Goff and Forrester, at the rate of \$385.00 per hour from the beginning of their representation in 2012 through 2015. **Tr. 11/20/17 at 649:19-650:18.**

109. Respondent's invoice charged the Andias \$385.00 an hour for Forrester's time from February 22, 2012 through August 30, 2012, even though Forrester was not admitted to practice law in Hawai'i at that time. **PE 7-A at 1.**

110. Respondent's invoice overcharged the Andias for Goff's and Forrester's services by \$19,885.00, after calculating the total number of hours attributed to Goff and Forrester at \$250.00 an hour, the highest agreed upon rate for associates. **Tr. 11/20/17 at 651:25-652:22; and 652:24-25; and PE B18.**

111. Despite attempts by Mr. Andia to get Respondent to repay these overcharges, Respondent failed to do so. **Tr. 11/20/17 at 674:25.** Respondent instead threatened to add additional charges to his invoice or tried to negotiate with Mr. Andia to avoid having to pay him back for the overcharges. **PE 19, 20, 21, 22, 23,**

112. Mr. Andia had to contact opposing counsel, Patricia McHenry ("McHenry"), to get a copy of the settlement check because Respondent would not give it to him. **Tr. 11/20/17 at 682:4-7.**

113. Respondent told Mr. Andia in a November 6, 2015 email that he was not the "Hawaii Legal Aid Society". **PE B12.**

114. In the same November 6, 2015 email, Respondent advised Mr. Andia that he was immediately stopping work on his case and that he should look for replacement counsel immediately. **PE B12.**

115. Respondent told Mr. Andia in a November 6, 2015 email to "[s]top making a complete ass out of yourself." **PE B14.**

116. Respondent testified that he didn't even remember the Andias. **Tr. 11/21/17 at 1107:21-24.**

117. In response to an email from the Respondent on December 23, 2015, Mr. Andia replied in part as follows:

[Dubin] 6. I went over the invoice with you beforehand and in my office you voiced no objections once I answered your questions, yet you now complain with hyperbole and threats.

[Andia] This is a flat lie. You did not go over the invoice with me "beforehand". You sent me the invoice by mail after you received and cashed a check made out to Carmelita and I. In fact, you would not provide me with an invoice until after you cashed the check made out to us, even though I had requested the invoice weeks prior. I brought the discrepancies to your attention when I picked up my files. I waited until then because you were still withholding \$8,000 of ours and I didn't trust you to pay me if I brought up the discrepancies to your attention.

PE B23.

118. Respondent sent an email to opposing counsel, McHenry, on January 12, 2016, in which he complained that Mr. Andia was looking for every way to cause trouble and defame him. **PE B34.** In the same email, Respondent disclosed confidential attorney-client communications to McHenry.

119. Mr. Andia had never consented verbally or in writing for the Respondent to disclose confidential attorney-client communications to McHenry. **Tr. 11/20/17 at 682:2-25.**

120. The settlement resolved the Andias' counterclaim. However, it did not resolve the foreclosure action against the Andias. **Tr. 11/27/17 at 1325:13.**

121. At the beginning of the hearing on November 20, 2017, and before Mr. Andia testified that day, Respondent's counsel represented to the Hearing Officer that he would be filing a defamation

lawsuit against Mr. Andia. **Tr. 11/20/17 at 418:14-419:3.**

Respondent's counsel further represented that he was making such disclosure "so that [Mr. Andia's] fully aware if he is going to show up in these proceedings that what he says here may be used elsewhere and so he might want to consider whether he will appear alone or not."

Id. at 418:14-19.

E. ODC 16-0-326 (ROBERT KERN COMPLAINANT)
Washington Bankruptcy Action

122. On December 23, 2105, the Respondent and Michael E. Harkey ("Harkey") entered into a retainer agreement. **PE D1.** Harkey agreed to hire the Respondent and pay him a \$16,753.91 retainer. **Id. at 3.**

123. Under the terms of the retainer, the Respondent was to "[r]eview of Existing Litigation in Client's cases in Bankruptcy Court, Western District of Washington State and in United States District Court, Las Vegas, Nevada, and Client's related loans for the purpose of preparing a litigation plan for Client." **PE D1 at 3.**

124. On January 3, 2016, Harkey and Respondent entered into a second retainer agreement. **PE D2.** Harkey agreed to pay Respondent a \$28,272.24 retainer. **Id. at 3.**

125. Under the terms of the second retainer, the Respondent was to conduct a "[r]eview of Existing Litigation in Client's cases in Bankruptcy Court, Western District of Washington State and in United States District Court, Las Vegas, Nevada, and Client's related loans

for the purpose of preparing a litigation plan for Client and filing lawsuits." **PE D2 at 3.**

126. On January 15, 2016, Respondent filed a Declaration in the Washington Bankruptcy case in support of Harkey's request for an extension of time which consisted of four numbered paragraphs on a single page. **PE D3.** In his Declaration, Respondent represented that he had been retained by Harkey and "could make a contribution to this Court's understanding of the jurisdictional issue under review and prepare a Second Amended Complaint accordingly." **Id. at 3 of 10.**

127. At the time he submitted his Declaration in the Washington Bankruptcy case, the Respondent was not admitted to practice law in that court. **Tr. 11/22/17 at 1125:12-19; and PE D32 at 2.**

128. On January 22, 2016, the Washington Bankruptcy case was dismissed by the Judge, seven days after Dubin filed his Declaration on January 15, 2017. **Tr. 11/22/17 at 1126:24-1127:15; and PE D4.**

129. The Respondent sent Harkey a text message on January 23, 2016, informing him that the Bankruptcy Judge dismissed his adversary proceeding saying that he gave him enough time. **PE D5.**

130. Harkey wired \$20,000.00 into the Respondent's CTA on January 25, 2016. **Tr. 11/22/17 at 1143:7; PE D6; and PE D7.**

Las Vegas Action

131. Respondent attempted to have Harkey execute a third retainer agreement for the purpose of representing Harkey in a pending case in the U.S. Dist. Court for the District of Nevada, Harkey v.

IS Bank, N.A., Case No. 2:14-cv-00177-RFB-GWF ("Las Vegas action").

PE D8 at 3.

132. In the third retainer agreement, Respondent set the fee at \$100,000.00 with an initial retainer of \$25,000.00 which was already paid by Harkey on April 1, 2016. **PE D8 at 3.** The third retainer agreement does not mention or account for the initial \$20,000.00 already paid to Respondent by Harkey. **Id.**

133. Harkey never signed and returned the third retainer to Respondent. **Tr. 11/22/17 at 1155:20-22.**

134. Harkey did pay Respondent the \$25,000.00 noted in the third retainer agreement on April 1, 2016. **PE D7.**

135. On April 21, 2016, Respondent filed a Verified Petition seeking leave to appear pro hac vice in the Las Vegas action. **PE D9.**

136. He also filed a Verified Petition seeking to have his associate, Frederick John Arensmeyer, admitted pro hac vice in the Las Vegas action. **PE D10.**

137. On April 27, 2016, six days later, Harkey's Las Vegas counsel, Richard Segerblom, filed a Motion to Withdraw Petitions for Pro Hac Vice in the Las Vegas action. **PE D11.**

138. The Order Granting the Motion to Withdraw Petitions was granted on May 2, 2016. **PE D12 at 2.**

Robert Kern's Complaint Seeking an Accounting From Respondent.

139. On May 25, 2016, Harkey hired a Las Vegas attorney, Robert Kern ("Kern"), to pursue an accounting and return of the unearned balance of the \$45,000.00 in retainers he had paid Respondent.

140. Kern first contacted Respondent on May 31, 2016. **Tr. 11/22/17 at 953:11; and PE D13.** He asked the Respondent to contact him if he had any questions. **PE D13.**

141. Despite numerous assurances from the Respondent that he would produce the accounting as requested by Kern, no accounting was forthcoming.

142. After trying for over two months to get the Respondent to comply with his requests, Kern advised the Respondent on August 9, 2016, that if Respondent did not produce the requested accounting by August 12, 2016, he would have no choice but to report the matter to the Office of Disciplinary Counsel. **Tr. 11/22/17 at 963:21-962:2; and PE D20.**

143. By August 30, 2016, Kern had exchanged a total of 15 emails with the Respondent regarding Kern's request for an accounting. **Tr. 11/28/17 at 1463:23-1464:2; and PE D13-27.**

144. Kern's August 31, 2016 complaint was filed with the Petitioner on September 2, 2016. **PE D28.** As part of his complaint, Kern attached a written authorization signed by Harkey. **Id.**

145. Respondent admitted that he never provided Kern with the requested accounting. **Tr. 11/22/17 at 1170:4-8.**

146. Respondent prepared an invoice in April 2017, after the petition in this matter was filed on January 4, 2017. **DBF 1.**

Respondent claimed that he prepared the invoice after he received a letter from a bankruptcy attorney in Minnesota, Kenneth Edstrom ("Edstrom"), on April 18, 2017. **Tr. 11/28/17 at 1421:23-25.**

147. Although Respondent claimed to have sent the Harkey invoice to Edstrom sometime after April 2017, he admitted that he has never sent the Harkey invoice to Kern. **Tr. 11/27/16 at 1451:2.**

Misappropriation

148. Adding the charges between December 22, 2015, and February 19, 2016, Respondent's invoice reflects that he had purportedly rendered services to Harkey amounting to \$16,650.00. **RE 1.**

149. The next billable event on the Respondent's invoice after February 19, 2016, occurred on March 11, 2016. **Tr. 11/28/17 at 1472:17; and RE 1.**

150. According to the Respondent's Client Trust Log, he withdrew the entire amount of Harkey's initial retainer of \$20,000.00 on March 7, 2016. **PE D7.**

151. At the time he withdrew the \$20,000.00 from Harkey's CTA, the Respondent had not earned the full amount of the retainer.

152. This resulted in the Respondent withdrawing \$3,350.00 in unearned fees from Harkey's CTA as of March 7, 2016.

153. Respondent never notified Harkey that he had withdrawn all of his initial retainer on March 7, 2016, even though he had not earned it.

154. Respondent withdrew the balance of Harkey's retainer on April 18, 2016, without notifying Harkey. **PE D7.**

Failure to Cooperate with ODC

153. On September 8, 2016, ODC Investigator George Elerick ("Elerick") forwarded a copy of Kern's complaint to the Respondent and asked him for his response by Friday, September 21, 2016. **Tr. 11/20/17 at 426:23-427:3; and 431:11-25; and PE E3.**

154. On September 23, 2016, the Respondent responded to Mr. Elerick but did not provide an accounting to him or Kern. **PE D29.**

155. Respondent did provide Mr. Elerick with a "Client Trust Log" reflecting that he withdrew Harkey's \$20,000.00 retainer from his CTA on March 7, 2016, and that he removed Harkey's \$25,000.00 retainer from his CTA on April 18, 2016. **PE 29.**

156. On October 3, 2016, Mr. Elerick sent a letter to Respondent which was hand-delivered to his office. **Tr. 11/20/17 at 435:1-436:5; and PE D30.**

157. Mr. Elerick asked the Respondent to produce four items including, but not limited to, "a copy of any billing or accounting or other correspondence you provided to Michael Harkey or Robert Kern or anyone else . . . that detailed the work you did for Michael Harkey." **PE D30 at 1-2.** Mr. Elerick requested a response by October 13, 2016.

158. Respondent never responded to Mr. Elerick's request of October 3, 2016. **Tr. 11/20/17 at 436:4-6.**

159. In an October 7, 2016 letter received on October 13, 2016, Respondent wrote to Mr. Elerick requesting an extension to respond to his October 3, 2016 request to October 24, 2016. **PE D31.**

160. Respondent failed to provide the requested information by October 24, 2016 prompting Mr. Elerick to follow up with him. **Tr. 11/20/17 at 438:21-439:2.** Respondent failed to produce the requested information to Mr. Elerick, including the accounting. **Id.**

161. According to Mr. Elerick, the Respondent failed to cooperate by providing him with the requested information he had asked for. **Tr. 11/20/17 at 443:3-6.**

F. PRIOR DISCIPLINARY OFFENSES

162. Respondent stipulated to the entry of a Public Reprimand before the State Bar Court of the State Bar of California on or about December 7, 1999, stemming from his conviction in U.S. v. Dubin, CR 93-01434 MLR 01. **PE E1.**

163. Respondent received an Informal Admonition on May 7, 2004 from Petitioner in ODC 7031, Myron W. Serbay, Jr., Complainant ("ODC 7031"). **PE E2.**

164. Respondent's conduct in ODC 7031 violated HRPC 8.1(a) lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); HRPC 8.4(d) (it is professional misconduct for a lawyer to fail to cooperate during the course of an ethics investigation or disciplinary proceedings); and HRPC 8.4(a) (it is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another). **PE E2 at 2.**

III. CONCLUSIONS OF LAW

The following Conclusions of Law are established by clear and convincing evidence:

165. Determining the appropriate level of discipline requires consideration of the ABA Standards for Imposing Lawyer Sanctions (2015) ("ABA Standards"). See Office of Disciplinary Counsel v. Au, 107 Haw. 327, 341, 113 P.3d 203, 217 (2005). In Au, the Hawai'i Supreme Court cited Office of Disciplinary Counsel v. Lau, 79 Haw. 201, 206, 900 P.2d 777, 782 (1995) for the proposition that "[t]he ABA Standards are a useful reference when determining disciplinary sanctions." Au at 341, 217.

166. The following factors should be considered when imposing a sanction after a finding of lawyer misconduct:

- 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 circumstances.

ABA Standards, § 3.0 at 113.

A. DUTIES VIOLATED

Failure to Preserve the Client's Property

167. By failing to comply with Kern's request for an accounting of the \$45,000.00 Harkey paid to Respondent, Respondent violated HRPC 1.15(d) (upon request by the client, a lawyer shall promptly render a full accounting regarding such property).

168. By withdrawing the \$20,000.00 balance of Harkey's client funds from his CTA on March 7, 2016, without earning all of it, Respondent violated HRPC 1.15(a) (client funds shall not be misappropriated for the lawyer's own use or benefit). See Office of Disciplinary Counsel v. Agard, SCAD-12-00001034, 2013 LEXIS 50 (2013) (attorney allowed the balance in the account to fall below the sum covered by the deposited client funds, thereby misappropriating client funds); and Edwards v. State Bar, 52 Cal. 3d 28, 37, 276 Cal. Rptr. 153, 158-59, 801 P.2d 396, 401-02 (1990) (evidence that the balance in a trust account fell below the amount credited to a client is sufficient to support a finding of willful misappropriation).

169. By failing to inform Harkey or Kern that he had withdrawn all of Harkey's \$45,000.00 from his CTA, Respondent violated HRPC 1.15(d) (a lawyer shall promptly notify the client upon disbursing funds in which the client has an interest).

Lack of Diligence

170. By not immediately informing his clients, the Andias, that their settlement check was received by Respondent, Respondent violated HRPC 1.4(a)(3) (a lawyer shall keep the client reasonably informed about the status of the matter).

171. By failing to provide his clients, the Andias, with an invoice in over three and one-half years from February 2012 until November 2015, Respondent violated HRPC 1.4(a)(3) (a lawyer shall keep the client reasonably informed about the status of the matter).

172. By failing to promptly provide an accounting to Kern of Harkey's \$45,000.00 as requested, Respondent violated HRPC 1.4(a)(4) (a lawyer shall promptly comply with reasonable requests for information).

173. By failing to tell his client or his client's agents that the client's \$45,000.00 retainer had all been removed from his CTA on or before April 18, 2016, Respondent violated HRPC 1.4(a)(3) (a lawyer shall keep the client reasonably informed about the status of the matter).

Lack of Competence

174. In the ICA matter, by repeatedly failing to timely file briefs and other documents, and repeatedly failing to comply with the rules governing brief preparation, Respondent violated HRPC 1.1 (pre- and post-2014 HRPC versions) (a lawyer shall provide competent representation to a client).

Lack of Candor

175. In the DCCA matter, Respondent failed to disclose material information on his licensing application and violated HRPC 8.4(c) (pre-2014 version) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

176. By signing the Andias' names on their settlement check without their permission, Respondent violated HRPC 8.4(c) (a lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation). Attorney Griev. Comm'n of Md. v. Gisriel, 409 Md. 331, 383, 974 A.2d

331, 361 (2009) (a lawyer's conduct in forging his client's signature was dishonest, deceitful, and criminal); In Re Burton, 274 Ga. 319, 553 S.E.2d 579 (2001); Silver v. State Bar of California, 13 Cal. 3d 134, 144, 528 P.2d 1157, 1163 (1974) (an attorney who endorses the name of a client on a settlement check without authorization engages in serious misconduct); and Restatement (Third) of the Law Governing Lawyers, § 21, cmt. e at 177.

177. By billing an hourly rate for his associates that exceeded the agreed upon rate with the Andias, without obtaining their consent to do so, and exceeded a reasonable rate for recently admitted attorneys, Respondent violated HRPC 8.4(c) (a lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation) and HRPC 1.5(a) (a lawyer shall not collect an unreasonable fee).

178. By failing to inform the Andias that the hourly rate had changed, Respondent violated HRPC 1.5(b) (any changes in the basis or the rates of the fee or expenses shall also be communicated to the client).

When a modified fee arrangement is proposed, Rule 1.4(b) reinforces the obligations under 1.5(b) to communicate the scope of the representation and the basis or rate of the fee and expenses to the client in a timely manner. Rule 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. An explanation of the lawyer's proposed modification of a fee arrangement, including the advice that the client need not agree to pay the modified fee to have the lawyer continue the representation, is necessary to enable the client to make an informed decision about the client's ability and willingness to pay the

modified fee for continual representation.
[Emphasis added.]

ABA Committee on Ethics & Professional Responsibility, Formal Op. 11-458 (2011), at 2 (changing fee arrangements during representation).

Failure to Maintain Integrity

179. In the DCCA matter, Respondent failed to disclose material information on his licensing application and violated HRPC 8.4(c) (pre-2014 version) (a lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation).

180. By signing the Andias' names on their settlement check without their permission, Respondent violated HRPC 8.4(c) (a lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation).

181. By charging the Andias an hourly rate that exceeded his agreement with the Andias, Respondent violated HRPC 8.4(c) (a lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation).

Violations of Other Duties Owed as a Professional

182. By billing an hourly rate that exceeded his agreement with the Andias, and which exceeded a reasonable rate for recently admitted attorneys, Respondent violated HRPC 1.5(a) (a lawyer shall not collect an unreasonable fee).

183. By failing to inform the Andias that the hourly rate had changed, Respondent violated HRPC 1.5(b) (any changes in the basis or the rates of the fee or expenses shall also be communicated to the client).

Abuse of the Legal Process

184. In the ICA matter, by repeatedly failing to timely file briefs and other documents, and repeatedly failing to comply with requirements for brief preparation, Respondent violated HRPC 3.4(e) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); HRPC 3.2 (a lawyer shall make reasonable efforts to expedite litigation consistent with the legitimate interests of the clients); and HRPC 3.1 (a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis which is not frivolous).

185. In the Kern matter, by failing to respond to questions 3 and 4, requested by Mr. Elerick in his letter dated October 3, 2016, Respondent violated HRPC 8.4(g) (it is professional misconduct for a lawyer to fail to cooperate during the course of an ethics investigation).

Violations of Pre-2014 HRPC

186. When Respondent violated the pre-2014 version of the HRPC, he violated HRPC 8.4(a) (it is professional misconduct for a lawyer violate or attempt to violate the rules of professional conduct).

B. RESPONDENT'S MENTAL STATE

Respondent acted "knowingly" or "intentionally" at all times relevant hereto.¹

¹ Respondent acted willfully and intentionally when he took a check made payable to the Andias, signed their names to it without their knowledge or consent and deposited it in his CTA. See, Gisriel, *supra* at 409 Md. 388, 974 A. 2d 364-65.

187. Under the ABA Standards, "intent" is defined as ". . . the conscious objective or purpose to accomplish a particular result". ABA Standards at xxi.

188. "Knowingly" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result".

189. According to the ABA/BNA Lawyer's Manual on Professional Misconduct, "Model Rule 1.15 on its face makes mishandling of client funds a strict liability offense, since intent and harm to the client are not elements of the violation." ABA/BNA Lawyer's Manual on Professional Misconduct, at 45:502. While Respondent's state of mind is not an issue for IOLTA violations, Respondent acted knowingly when he committed the IOLTA violations.

C. ACTUAL OR POTENTIAL INJURY

190. The Andias and Kern's client Harkey sustained actual injury as a result of Respondent's knowing and intentional misconduct.²

191. In the ICA matter, the injury was to the judicial system. In the DCCA matter, the injury was to the public and the profession.

192. The ABA Standards define "injury" much broader than injury only to a client. "Injury" may be ". . . harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct". ABA Standards, at xxi.

² Respondent's misappropriation of unearned funds in Harkey's account even for a short period caused Harkey actual injury. Miss. Bar v. Ogletree, 226 So. 3d 79, 84 (2015) (a client's loss of use of the funds for even a short time gives rise to an actual injury)

193. Respondent's conduct caused actual and potential injury to the public and the legal system. Office of Disciplinary Counsel v. Au, 107 Haw. 327, 344, 113 P.3d 203, 220 (2005) (an attorney's misconduct did not appear to have caused harm to his clients, but it did seriously harm the integrity of the legal system).

IV. DISBARMENT IS THE PRESUMPTIVE DISCIPLINE UNDER THE ABA STANDARDS

Without taking into account the aggravating and mitigating factors, the following sanctions apply to the specific duty breached by Respondent:

Failure to Preserve Client Funds

194. Respondent failed to account to his client Harkey for his client funds, disbursed client funds without notifying Harkey, and misappropriated Harkey's unearned client funds to Respondent's own use and benefit, thereby causing actual harm to Harkey. ABA Standard 4.11 applies:

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

Absent strong mitigating factors, misappropriation of the funds of a client violates the most basic rule of professional responsibility and requires the severest disciplinary action. Office of Disciplinary Counsel v. Ragasa, No. 25005, 2002 Haw. LEXIS 352 (Haw. June 3, 2002).

Respondent's Lack of Diligence

195. Respondent knowingly engaged in a pattern of misconduct when he failed to communicate with the Andias about their settlement check and to keep them reasonably informed about the status of their

case, and failed to comply with Kern's reasonable requests that he account to Harkey, causing serious or potentially serious injury to his clients. ABA Standards 4.41 and 4.42 apply:

4.41 Disbarment is generally appropriate when . . .
(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client.

Respondent's Lack of Competence

196. Respondent's repeated failures and pattern of misconduct in ignoring appellate court's rules for filing and brief preparation calls for the following presumptive discipline:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

Respondent's Lack of Candor

197. Respondent lacked candor when he failed to disclose material information on his licensing application to the DCCA, signed the Andias' names on the back of their settlement check without their knowledge or consent, billed the Andias an excessive hourly rate for associates in violation of his retainer agreement with them, and failed

to inform them and obtain their consent to change the rate for associates under their retainer agreement. Disbarment is the presumptive discipline:

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client.

Respondent's Failure to Maintain Personal Integrity

198. Respondent failed to maintain his personal integrity when he intentionally did not disclose material information in his DCCA application, signed the Andias' names to a settlement check without their knowledge or consent, billed the Andias an excessive hourly rate for associates in violation of his retainer agreement with them, and failed to inform them and obtain their consent to change the rate for associates under their retainer agreement. Respondent's misconduct reflects adversely on his fitness to practice. The presumptive discipline is disbarment:

5.11 Disbarment is generally appropriate when:

* * *

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Respondent's Abuse of Legal Process

199. In the ICA matter, Respondent repeatedly failed to timely file briefs and other documents, and repeatedly failed to comply with requirements for brief preparation, thereby knowingly disobeying obligations under the court rules, failed to make reasonable efforts

to expedite litigation, and asserted frivolous grounds for extensions.

In the Kern matter, Respondent failed to cooperate in the investigation.

Disbarment or suspension is the presumptive discipline:

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

V. AGGRAVATING FACTORS

The following factors in aggravation were proven by clear and convincing evidence:

200. Prior Disciplinary Offenses. ABA Standard 9.22(a).

Respondent's prior discipline in Hawaii and California are prior disciplinary offenses. Office of Disciplinary Counsel v. Songstad, SCAD-13-0057, 2013 Haw. LEXIS 138 (Haw. April 17, 2013) (clear and convincing evidence of a prior disciplinary record evincing similar misconduct was an aggravating factor); Office of Disciplinary Counsel v. Smith, SCAD-15-0785, 2016 Haw. LEXIS 213 (Haw. September 9, 2016) (prior disciplinary matters in attorney's record were an aggravating factor).

201. Dishonest or Selfish Motive. ABA Standards 9.22(b).

By signing his DCCA application attesting that the answers and representations were true and correct when they were not; by

repeatedly disregarding notices from the ICA to comply with the appellate rules; by signing the Andias' settlement check without the knowledge or consent of the Andias, and billing them excessive fees in violation of his agreement with them; and by misappropriating Harkey's unearned funds and failing to promptly account to him for the \$45,000.00 he paid Respondent, Respondent acted dishonestly or with a selfish motive.

202. A Pattern of Misconduct. ABA Standards 9.22(c).

Respondent engaged in a pattern of similar misconduct as evidenced by his 2004 Informal Admonition of knowingly failing to respond to a lawful demand for information from a disciplinary authority and in failing to cooperate during the course of an ethics investigation or disciplinary proceedings by the Disciplinary Board. ABA Standards 9.22(c).³ Office of Disciplinary Counsel v. Mujtabaa, SCAD-14-0799, 2014 Haw. LEXIS 197 (Haw. June 24, 2014) (a pattern of similar misconduct between two disciplinary matters was an aggravating factor).

203. Multiple Offenses. ABA Standards 9.22(d).

Respondent committed multiple violations of the HRPC.

204. Bad Faith Obstruction of the Disciplinary Proceeding. ABA Standard 9.22(g).

In the Kern complaint, Respondent intentionally engaged in a bad faith obstruction of the disciplinary proceeding by failing to produce the accounting requested by ODC Inv. Elerick despite repeated requests to do so.

³ When evidence demonstrates repeated instances of similar misconduct, courts have held that the aggravating factor of "a pattern of misconduct" may be established under Standard 9.22(c). ABA Standards at 426.

205. Refusal to Acknowledge Wrongful Nature of Conduct. ABA Standard 9.22(g).

Respondent has consistently failed and refused to acknowledge the wrongful nature of his conduct in any of the four complaints which comprise the Petition in this matter.

206. Substantial Experience in the Practice of Law. ABA Standard 9.22(i).

Respondent was admitted to the Hawai'i bar on October 15, 1982.

VI. MITIGATING FACTORS

207. Respondent failed to prove any mitigating factors by clear and convincing evidence.

VII. CONCLUSION

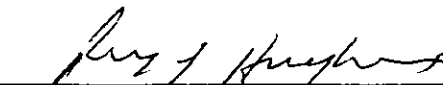
208. Having committed multiple violations of the Hawai'i Rules of Professional Conduct, the appropriate level of discipline in this case is dictated by the Respondent's most serious as the discipline necessary for those transgressions cover the discipline necessary for lesser transgressions. See ABA Standards, II Theoretical Framework at page xx ("The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors").

209. Respondent's most serious ethical violations center on his failure to preserve client's property, lack of candor, abuse of process, and lack of diligence and competence.

210. In committing these violations, Respondent acted knowingly and/or intentionally which calls for disbarment or suspension. Respondent's other violations should be considered as aggravating factors, warranting the imposition of more serious discipline in this case. Where disciplinary violations are severe and extensive and include misappropriation of client funds, it would be difficult, if not impossible, to establish sufficiently strong evidence of mitigation to warrant a lesser penalty than disbarment. Office of Disciplinary Counsel v. Silva, 63 Haw. 585, 595, 633 P.2d 538, 545 (1981); Office of Disciplinary Counsel v. LePage, No. 24616, 2007 Haw. LEXIS 285 (Haw. October 2, 2007).

211. Based on the clear and convincing evidence presented at the hearing, the Hearing Officer finds that Respondent knowingly and intentionally violated the Hawai'i Rules of Professional Conduct as set forth in the Petition and hereby recommends that Respondent be **DISBARRED**; that Respondent be ordered to pay restitution to the Andias in the sum of \$19,885.00; and that Respondent reimburse the Petitioner for all costs it incurred in this matter pursuant to RSCH 2.3(c).

DATED: Honolulu, Hawai'i, April 12, 2018.



ROY F. HUGHES
HEARING OFFICER

SCAD-18-_____

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner

vs.

GARY VICTOR DUBIN, Respondent

ORIGINAL PROCEEDING

CONFIDENTIAL INFORMATION

LIST OF ALL DOCUMENTS BEING SUBMITTED UNDER SEAL:

Date of Document	Title or Detailed Description
Attachment to Affidavit of Andrea R. Sink dated May 31, 2018	EXHIBIT 2: SYNOPSIS OF CASES, FILED UNDER SEAL

SCAD-18-_____

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner

vs.

GARY VICTOR DUBIN, Respondent

ORIGINAL PROCEEDING

CERTIFICATE OF SERVICE

I hereby certify that service of the copy of the PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH RULE 2.23; MEMORANDUM IN SUPPORT OF PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH RULE 2,23; AFFIDAVIT OF RYAN S. LITTLE; AFFIDAVIT OF ANDREA R. SINK; EXHIBIT 1; EXHIBIT 2 (FILED UNDER SEAL); and CERTIFICATE OF SERVICE, filed on June 18, 2018, was made on June 18, 2018, by hand delivery and by postage prepaid, regular mail upon the following:

GARY VICTOR DUBIN, Esq.
55 MERCHANT STREET, Suite 3100
HONOLULU, HAWAI'I, 96813

DATED: Honolulu, Hawai'i, June 18, 2018.

OFFICE OF DISCIPLINARY COUNSEL

/S/Ryan S. Little

BRUCE B. KIM
Chief Disciplinary Counsel
RYAN S. LITTLE
Assistant Disciplinary Counsel

Attorneys for Petitioner
OFFICE OF DISCIPLINARY COUNSEL

SCAD-18-0000497

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner

vs.

GARY VICTOR DUBIN, Respondent

ORIGINAL PROCEEDING

CERTIFICATE OF SERVICE

I hereby certify that service of the copy of the PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH RULE 2.23 [REDACTED PURSUANT TO JULY 17, 2018 COURT ORDER, JROA Dkt #98]; MEMORANDUM IN SUPPORT OF PETITION FOR INTERIM SUSPENSION PURSUANT TO RSCH 2.23; AFFIDAVIT OF RYAN S. LITTLE; AFFIDAVIT OF ANDREA R. SINK; EXHIBIT 1; EXHIBIT 2 (FILED UNDER SEAL); and CERTIFICATE OF SERVICE filed on July 20, 2018, was duly served by the Court's JEFS's System as follows:

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DATED: Honolulu, Hawai'i, July 20, 2018.

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