

EXHIBIT "F"

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF THE DISCIPLINARY
COUNSEL,

) ODC No. 16-0-147
)
)
)
)
)

vs.

GARY DUBIN,

Respondent.

DISCIPLINARY BOARD
OF THE
HAWAII SUPREME COURT

RECEIVED

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TRANSCRIPT OF PROCEEDINGS BEFORE THE
DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT

The above-entitled matter came on for hearing on April 25, 2019, at the Office of Disciplinary Counsel, 201 Merchant Street, Suite 1600, Honolulu, Hawai'i, BEFORE:

DISCIPLINARY BOARD MEMBERS: Hon. Clifford L. Nakea (Ret.),
Chairperson
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Philip D. Hellreich, M.D.
James K. Hoenig, JD, Ph.D.
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Richard H.S. Sing
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Leilani T. Young

DISCIPLINARY BOARD COUNSEL: Philip H. Lowenthal, Esq.

FOR PETITIONER OFFICE OF
DISCIPLINARY COUNSEL: Rebecca M. Salwin, Esq.
Assistant Disciplinary Counsel

FOR RESPONDENT: John D. Waihee, III, Esq.

RESPONDENT: Gary Victor Dubin, Esq.

ALSO PRESENT: Bradley Tamm, Esq.
Chief Disciplinary Counsel

Ryan S. Little, Esq.
Assistant Disciplinary Counsel

Josiah K. Sewell, Investigator

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1 JUDGE NAKEA: This is the matter of the Office of
2 Disciplinary Counsel v. Gary Victor Dubin, ODC number 16-0-217,
3 16-0-429, 17-0-54, 17-0-181, and 18-0-2. For the record, please.

4 MS. SALWIN: Rebecca Salwin on behalf of ODC.

5 MR. DUBIN: Gary Dubin, Respondent, with John Waihee,
6 co-counsel.

7 JUDGE NAKEA: Thank you. Before we hear, Mr. Dubin and
8 Ms. Salwin -- by the way, we're going to allow ten minutes for
9 each side. You get to go first. And let me know if you want me
10 to tell you how far you've gotten, if you want to save some time
11 for responding to Ms. Salwin, and I'll --

12 MR. DUBIN: Well, I appreciate it if I could reserve
13 maybe two or three minutes.

14 JUDGE NAKEA: Sure. Okay. And then, Ms. Salwin, do
15 you want to save two or three? I'll save you three.

16 MR. DUBIN: Okay.

17 JUDGE NAKEA: Before we begin, Mr. Horovitz would like
18 to say something.

19 MR. HOROVITZ: Thank you. I was asked by our counsel
20 Phil Lowenthal to describe my decision not recuse myself for the
21 last hearing, and then explain a bit about the underlying case
22 that Mr. Dubin cited in his briefing, so I'll do that.

23 The underlying case itself -- well, first of all, in
24 terms of before the hearing last fall for Mr. Dubin, I did
25 actually reach out to Judge Nakea and Mr. Lowenthal explaining

1 the case that we had been involved with, with Mr. Dubin's office.
2 Explaining the status of it and asking whether I did need to
3 recuse myself, and the answer came back no, I did not.

4 After the hearing -- my recollection is after the
5 hearing for Mr. Dubin and before we went into deliberations, Mr.
6 Dubin looked at me and acknowledged that he had a case with me,
7 but he didn't have a problem with that. I don't believe that
8 made it into the official record.

9 The underlying case was a commercial landlord/tenant
10 case, fairly straightforward. Initially, it was a corporate
11 tenant. Our firm represented the landlord. There's no personal
12 guarantees on the lease at all. So it was only against the
13 corporation. The corporation appeared pro se, initially, in the
14 case, and we got a fairly standard judgment and writ of
15 possession. This was a district court case.

16 After the judgment and writ were entered, the -- my
17 client took -- we took possession, and then we filed a motion for
18 default judgment once we knew the costs. At that point, Mr.
19 Dubin appeared and filed various motions to ask the Court to
20 reconsider its default judgments, and the judgments, and the
21 writ. The Court heard a hearing on that and denied those
22 motions, and Mr. Dubin took various appeals from those denials.

23 The notice of appeal -- there were three appeals that
24 were ultimately consolidated. The notice of appeal was
25 originally filed in March 1st, 2018. The underlying district

1 court case was filed in October of 2017. So, they were dated.
2 But the appeal was filed in March -- March 1st of 2018. Various
3 opening things were filed. Mr. Dubin, on March -- or May 16th,
4 obtained a standard 30-day extension of time to file his initial
5 opening brief, and the Court granted that, and the opening brief
6 was to be due on July 5th, 2018.

7 July 5th came and went without an opening brief being
8 filed, and then on July 17th, the Clerk of the Court issued to
9 Mr. Dubin a notice of default for the filing of the opening brief
10 and indicated that the matter would be -- and I'm quoting from
11 the pleading -- the matter will be called to the attention of the
12 Court on July 27th, 2018, for such action as the Court deems
13 proper and the appeal may be dismissed.

14 On July 27th, Mr. Dubin filed a motion to correct the
15 record from relief for default and to reset the briefing and
16 scheduling order. In a nutshell, he indicated he had
17 consolidated the three appeals, and they didn't -- had meant to
18 include the request to extend the time with -- you know, to file
19 the opening brief within that, but they didn't do that.

20 We didn't oppose that motion at all and the Court
21 granted him time, until September -- he had asked for 60 days and
22 the Court granted him those 60 days, until September 6th of 2018,
23 in which to file his opening brief.

24 On September 6th -- I'm sorry, let me go back. Yeah.
25 So on September 6th of 2018, Mr. Dubin filed a motion for leave

1 for an additional two weeks to file his opening brief. He
2 indicated that his office got a little backed up because of the
3 hurricane. Hurricane Lane had been coming through the Islands at
4 the time. And he stated in his brief, Declarant is cognizant of
5 this Court's policy to require request for briefing extensions to
6 be filed five days in advance. He stated he had tried to meet
7 that -- to meet the filing deadline, but it just became
8 impossible because of the hurricane.

9 Again, we didn't file any opposition to that. And then
10 the Court, on September 13th, issued its order granting. And
11 they added notations. Mr. Dubin had submitted a form order and
12 the Court added their own notations to the order and said: The
13 opening brief shall be filed on or before September 20th, 2018.
14 No further extensions of time will be granted, absent
15 extraordinary circumstances. And then it went on to say: A
16 motion for extension of time for a brief shall be filed at least
17 five days before the briefing is due. Further violations may
18 result in the motion being denied, sanctions, or both.

19 So at that point, the opening brief was due on
20 September 20th, and the Court stated that there would be no
21 further extensions absent further -- or absent extraordinary
22 circumstances and that had to be -- they had to be notified of
23 those at least five days before September 20th, 2018. So there
24 was no filing of any opening brief on September 20th. There was
25 no further filings in any of the deals -- or in the consolidated

1 appeal in October, November, December, or January of 2019.

2 In February 11th of 2019, our client contacted our
3 office and asked whether the appeal could simply be, you know,
4 moved -- you know, taken out -- taken off. And we, at that
5 point, indicated to our client that, you know, the way these
6 things happen is the Court will either dismiss it or you can file
7 a motion. And the Court -- and our client, could you please
8 simply file the motion.

9 So our office filed a motion to dismiss the appeal and
10 there were really two paragraphs, you know, as to why. We set
11 out the procedural history and just simply said, you know, the
12 Court had ordered that the opening brief be filed by September
13 20th, and no further extensions would be granted, and that there
14 was never any request to extend, so please just go ahead and
15 dismiss.

16 And then February 20th of 2019, Mr. Dubin files a
17 motion for leave to file a consolidated brief, essentially asking
18 for an additional extension. He indicated in his declaration --
19 he stated, he was unaware that it had not been filed earlier and
20 that the opening brief herein will be filed today. It later
21 stated in his declaration -- and this was on February 20, 2019 --
22 he stated: I am now preparing the opening brief, which will be
23 filed today. I would appreciate the Court's understanding.

24 There was no opening brief filed on February 20th. The
25 next filing was on March 4th, a supplemental declaration, where

1 he stated that shortly after filing the February 20th request,
2 half of my office personnel, including me, came down with the
3 flu, and I wound up spending most of my time in bed. If not
4 tonight, the consolidated brief will be filed tomorrow. And this
5 was on March 4th of 2019.

6 There was no opening brief filed on March 4th, and none
7 on March 5th, and none on March 6th, all of which were weekdays.
8 He ultimately filed his opening brief on March 7, 2019.

9 The Court then, on March 22nd, issued its order denying
10 the motion to dismiss the consolidated appeal, granting the
11 motion for leave to file a consolidated opening brief, and order
12 to show cause essentially stating that everyone deserves their
13 day in Court, so it will accept the March 7th opening brief,
14 which was fine, but it further stated: Within ten days from the
15 date of this order, Gary Victor Dubin shall show cause and
16 response in the form of a declaration, affidavit, or other sworn
17 statement indicating additional reasons, if any, why he failed to
18 timely file the opening brief or request an extension of time.
19 And, moreover, why he failed to file the opening brief on or
20 before March 5th, 2019, as indicated in his March 4th, 2019,
21 supplemental declaration. Failure to timely respond to this
22 order or to show good cause, may result in sanctions.

23 On April 1st, in response to that, Mr. Dubin filed a
24 declaration. The attorneys in our office handling the appeal --
25 and I am still counsel of record of this. There are other

1 attorneys who are primarily handling it, but I am the counsel of
2 record. The other attorneys in the office did not feel that Mr.
3 Dubin's declaration adequately answered or even addressed what
4 the Court had ordered him to address in the order to show cause,
5 and so they filed a motion on April 4th.

6 A motion for sanctions and/or dismissal of the
7 consolidated appeal, basically stating that the Court had ordered
8 him to give some very specific information, and we don't think it
9 rose to the level of what the Court was asking and that the Court
10 should impose appropriate sanctions as it saw fit. Mr. Dubin, on
11 April 11th, had filed an opposition to that and that's where it
12 stands.

13 We had taken, you know, the Court's September 6th,
14 ruling to be fairly dispositive where they had stated that there
15 were no further extensions absent extraordinary circumstances,
16 and that nothing was filed within the time ordered by the Court.
17 So, at that point, you know, we viewed it fairly -- as a fairly
18 ministerial matter.

19 Again, you know, beyond that, there was simply no
20 activity from September through February of this year, when our
21 office filed the motion to dismiss. How the Court will treat the
22 motions, we don't know, it's still pending.

23 So with that disclosure, since my name is in the
24 current motion, I'm going to recuse myself from any further --
25 any further hearing of the motion or deliberations. So I will

1 recuse myself and excuse myself from the hearing.

2 JUDGE NAKEA: Thank you. Anyone else wants -- do
3 either of you want to have them not participate in this matter?

4 Ms. Salwin, do you have any objections to the present group?

5 MS. SALWIN: No. No objections.

6 JUDGE NAKEA: Mr. Dubin.

7 MR. DUBIN: Of course.

8 JUDGE NAKEA: Well, no objections --

9 MR. DUBIN: Pardon?

10 JUDGE NAKEA: -- no objection to the remaining members
11 participating -- Members of the Board?

12 MR. DUBIN: Oh, no.

13 JUDGE NAKEA: Okay. Thank you. Then, Mr. Dubin,
14 you're on.

15 MR. DUBIN: I've been ambushed again. He spent over
16 ten minutes, and I'm supposed to respond to him, and I only have
17 ten minutes for everything? I would ask that I be allowed to
18 respond to him without it coming out of my ten minutes.

19 JUDGE NAKEA: You know, I see some rational to that.

20 MR. DUBIN: I will be as brief as I can.

21 JUDGE NAKEA: No, you will be as brief as I give you.
22 Sure ten minutes sounds fair. Go ahead. Now, this is going to
23 -- you want to comment on what Mr. Horovitz just said?

24 MR. DUBIN: Just what he just said, yes.

25 JUDGE NAKEA: Okay.

1 MR. DUBIN: Yeah. First of all, as we know, Members of
2 the Board are restricted just like they were a judge. The Hawaii
3 Revised Code of Judicial Conduct, I have in front of me. Rule
4 2.11, talks about disqualification or recusal when there's an
5 appearance of impropriety. I don't know of any member of the
6 Hawaii Bar who would agree to have a board member, who was
7 against him in an open case. This was a lower court case and an
8 appeal.

9 Mr. Horovitz says that he made a disclosure to the
10 Board Chairman. That is not how the rules work. You make a
11 disclosure to the parties, not to another member of the panel.

12 The appeal was open at the time. Unfortunately, I was
13 unaware that the opening brief had not been filed by my office.
14 The way it works in the Intermediate Court of Appeals is that if
15 you don't file the opening brief in the set time, the Clerk sends
16 out a notice that the opening brief has not been filed. And many
17 times, opposing counsel will call you up and say, what's
18 happened, you missed the deadline for the opening brief. In this
19 case, extremely rare, the Clerk did not send out the notice.
20 Therefore, I was not aware of that.

21 We have about 300 cases in our office. We have, at any
22 one time, about 80 appeals in the Intermediate Court of Appeals
23 and in the Hawaii Supreme Court. I got overloaded and, not
24 unusual, I asked somebody else to prepare the opening brief. I
25 didn't know the opening brief was not prepared. The Clerk didn't

1 even send out the normal notice. But, of course, the Clerk's are
2 never sanctioned.

3 In the last three years, we've had a lot of difficulty
4 with deadlines. Because of these proceedings, I lost two
5 attorneys. I couldn't hire any other attorneys. The word gets
6 out about what's going on here. I lost three staff members. I'm
7 unable to replace them. Yes, we've had a difficult time because
8 of these proceedings in fulfilling our responsibilities to the
9 courts.

10 When I found out the opening brief had not been filed,
11 I immediately told the Court I'm going to file it. Fortunately,
12 I had done the work below, but it was complicated, and I did
13 contract an incredibly viscous flu. It puts you to sleep. And
14 so, it took me a little bit of time, and I filed the opening
15 brief.

16 What's submitted in the opening brief -- and you have a
17 copy -- the opening brief is based upon the unethical conduct of
18 Mr. Horovitz in serving my client in a way that he would never
19 know that the complaint had been served, then taking a default
20 judgment, and then violating every principle of Hawaii law
21 involving default judgments and went ahead, behind my back after
22 I had entered my notice of appearance, and got \$112,000 judgment
23 against my client, which was never stated in the complaint. And
24 for those of you who don't know, when you get a default judgment,
25 you can't get more than what's in the complaint. So that appeals

1 filed on the basis of the unethical conduct of Mr. Horovitz.

2 Now because I hadn't been associated with the opening
3 brief for a while and not only that, I didn't -- I don't know Mr.
4 Horovitz. He doesn't practice in my kind of cases. I don't
5 these landlord/tenant things, normally. I only do it because I
6 have clients that then get in trouble with these kind of things.
7 So I didn't -- I don't know him.

8 When it came time -- and by the way, when my cases
9 began, he was not a member of the Board. He was not on any of
10 the letterheads I had seen. And I'm just frankly not really that
11 familiar with him. He sat over there, and I can't read -- I
12 can't read those name tags over there. Eighty years old, and I'm
13 pleased to say I've never had a major illness in my life, but the
14 eyes are not my strong point. It's not an uncommon thing. I'm
15 told one eye is farsighted and one eye is nearsighted. And my
16 whole life they fight each other, but the brain corrects the
17 thing and gives me -- gives me a good measure of accurate
18 eyesight, but I can't read the name tags. I can read his -- he
19 wasn't sitting here though, but I can't read the one at the far
20 end.

21 So I was just not familiar with him, and I don't know
22 any attorney in the state who had this kind of a case with Mr.
23 Horovitz. And with an appeal ongoing, would feel comfortable
24 having him as a judge in my case. His duty was to disclose it to
25 me in the beginning.

1 As you recall, Mr. Miller sat here, and he made the
2 disclosure. I don't know if Judge Nakea said you got to make the
3 disclosure or told him the same thing that Mr. Horovitz says he
4 was told by Judge Nakea, but Mr. Miller did. I don't know Mr.
5 Miller. He wasn't in the case below. He was briefing an appeal,
6 which I happened to win. But I've never met him before. There
7 was never a hearing. There was no acrimony in that case. It was
8 all a question of interpretation of the governing instruments of
9 an association. So I didn't feel any discomfort at all having
10 Mr. Miller on the case.

11 But I certainly -- if disclosure had been made to me in
12 the beginning, I would have objected to Mr. Horovitz because of
13 the nature of that case. Now I have not been sanctioned by the
14 ICA. They didn't sanction me.

15 I provided the panel with the relevant case law from
16 the United States Supreme Court on two death penalty cases. Mine
17 is also a death penalty case. A professional death penalty case.

18 JUDGE NAKEA: Mr. Dubin, I'm sorry to interrupt you,
19 but I need to get a new estimate for you about when you want me
20 to interrupt you to tell you how much time you have left. I
21 imagine that some of what you said already --

22 MR. DUBIN: No, I have to --

23 JUDGE NAKEA: Okay.

24 MR. DUBIN: -- as far as my --

25 JUDGE NAKEA: And I imagine some of what you already

1 have said would have been included, I would think, in what you
2 had planned to say for today's meeting.

3 MR. DUBIN: Well, I'm hoping that the panel has
4 questions for me.

5 JUDGE NAKEA: Okay.

6 MR. DUBIN: But as far as --

7 JUDGE NAKEA: All right. So --

8 MR. DUBIN: -- as far as this topic's concerned, I
9 agree.

10 JUDGE NAKEA: Okay. So when would you like me to stop
11 you? Tell me now, do you want another seven minutes before I
12 tell you, you've only got three minutes left or?

13 MR. DUBIN: Yes.

14 JUDGE NAKEA: Okay.

15 MR. DUBIN: Thank you.

16 JUDGE NAKEA: I'm sorry for the interruption.

17 MR. DUBIN: You have before you six papers for this
18 hearing. You have two letters I sent to Judge Nakea when I
19 discovered more information on the conflicts. You have my
20 motion, you have my memorandum, and you have my supplemental
21 memorandum. I always mention that because one time I had a case
22 and when I was all done, I found out the judge hadn't gotten the
23 papers.

24 I want to spend my time on the Hughes matter. I've
25 read the opposition paper. I asked for an opportunity to reply.

1 Replies are normally whenever an adjudicated body allows it, but
2 I was not given the opportunity to reply, so I have to answer the
3 opposition now.

4 The opposition pretty much depends upon the Au case. I
5 ask you all to read the Au case. If you don't have a copy, I
6 would be happy to provide every member of the Board with a copy.
7 The Au case is misrepresented in the opposition paper. In Au--
8 they pointed out that what happened in Au was he walked into the
9 -- I'm going to quote the case.

10 As between a judge already assigned to the Panel and a
11 lawyer who thereafter appears, in circumstances where the
12 appearance might cause an assigned judge to be recused, the
13 lawyer will go, and the judge will stay. A lawyer's acceptance
14 of employment solely or primarily for the purpose of
15 disqualifying a judge, creates the impression that, for a fee,
16 the lawyer is available for sheer manipulation of the judicial
17 system.

18 I did not enter the case for the purpose of
19 disqualifying Mr. Hughes. Mr. Hughes entered the case after I
20 was in the case. Now I don't know, but the Board Chairperson
21 assigns the Hearing Officer. Did Mr. Hughes tell Judge Nakea --
22 or what would have happened if the Hearing Officer had told Judge
23 Nakea, I would like to discuss and disclose to you that my client
24 has an open case with Mr. Dubin on the other side as opposing
25 counsel, and my client would benefit if Mr. Dubin were disbarred?

1 Would Judge Nakea move on to the next name on the panel list?

2 Instead, Mr. Hughes appeared in the case.

3 Now we had a trial before Judge Marks. Mr. Hughes was
4 not in the case. Mr. Hughes came into the case for the appeal,
5 obviously, representing the insurance company. An appeal which
6 we won. I had never met Mr. Hughes. Hughes is a common name.
7 He was appointed as the hearing examiner. I had no recollection
8 that he had come in as an appellant attorney on the Moyle
9 (phonetic) case.

10 When later on someone in my office discovered it, at a
11 pretrial conference, which you're supposed to do, I confronted
12 Mr. Hughes, as you all know, you have the transcript, and I
13 objected to his being the hearing examiner. Well, he studied it,
14 and he told me later in a writing, and he sent it to everybody,
15 that he would not recuse himself, that the case was dormant.
16 Well, there's no such thing as a dormant case. The case is
17 either active or it's closed.

18 The case was open. It was open because, unfortunately,
19 Mr. Moyle had -- my client had died in a motorcycle accident and
20 his two surviving relatives was his mother and his brother. And
21 his mother, even at that time, was about 80, 85, and his brother
22 was having a series of operations.

23 In addition to that, they had the problem that to
24 continue the case, they would have to spend money to go to the
25 Probate Court to have a personal representative appointed. In

1 addition to that, Mr. Moyle had a will, and they were searching
2 for a copy of the will. And then to continue the case, it would
3 be a little bit difficult because Mr. Moyle was dead, so we would
4 be allowed to use the transcript of the trial, to some extent,
5 but the trial would probably have cost another \$50,000 or more.

6 I take orders from my clients, it's not my case. So
7 they were very slow to figure out what to do. The mother wanted
8 us to pursue it and the brother, I can't go into all the details,
9 you know, some of this is attorney-client protected information,
10 but the brother wanted to settle the case.

11 And lo and behold, Mr. Hughes comes into the case,
12 creating an ethical problem on my part. Am I going to settle the
13 case while he's the hearing examiner and what -- and is that --
14 is there a quid pro quo involved, et cetera? So I felt very
15 uncomfortable to that point trying to settle the case.

16 Now as far as my remedy is concerned, I have had
17 occasion to ask a judge to recuse himself. Never Judge Nakea.
18 There has to be grounds. And I have to file a writ of
19 prohibition, a writ of mandamus in the Hawaii Supreme Court, and
20 I'm always told you can appeal it if you want. We're not going
21 to hear it on a special writ.

22 So my alternative is what I did. I put it in my
23 opening brief, asking this Court to recognize that there was an
24 ethical problem with Judge Hughes. It's in my opening brief. I
25 asked this body for relief. That's what you're supposed to do.

1 That's what I did.

2 Now I didn't notice at the time that the intermediate
3 -- at the time of the pretrial hearing, but I did find out that
4 the Rules of the Disciplinary Board, your rules, Rule 20(e), says
5 that you can't file a motion unless it's ordered by the hearing
6 officer. And what good does it do, anyway, to file a motion that
7 the Hearing Officer said he's not going to disqualify himself
8 because the case is dormant. Look that up in the Black's
9 Dictionary, dormant. There's no such thing. A case is active,
10 or it's closed.

11 Now one last thing I want to say. How much time do I
12 have left?

13 JUDGE NAKEA: It's just about -- you're approaching
14 your third minute.

15 MR. DUBIN: All right. Just one thing I want to say.
16 The relevant case is not the Au case. The relevant case is
17 Peters v. Jameson. Peters v. Jamieson, 48 Haw. 247 (1964). That
18 was the year I became a member of the bar. In this case there
19 were a lot of rulings that were suspicious by the judge, they
20 were an error. The Court said -- the Hawaii Supreme Court said,
21 we adhere to the rule that mere erroneous or adverse rulings by
22 the trial judge do not spell bias or prejudice and cannot be made
23 the basis for disqualification. But -- I'm still quoting -- when
24 other factors such as appear on the record in the instant case
25 are collectively considered together with such rulings, we do not

1 hesitate to hold that they do not form -- excuse me -- they do
2 form -- they do form a basis upon which bias and prejudice can be
3 predicated.

4 And in this case, it appears that Mr. Hughes did not --
5 disclosed his conflict to Judge Nakea, at least to me. He
6 excluded witnesses. I couldn't call Ms. Andia, Harkey, the ICA.
7 All the people that were accusing me of this or that, I was not
8 able to call.

9 However, they selectively brought a lawyer in, in place
10 of Mr. Harkey, who I had no personal knowledge of anything, to
11 appear by telephone. Mr. Andia said, oh, Mrs. Andia is ill. So,
12 he said, okay, no proof of anything, we'll just have her
13 statements on the record made by Mr. Andia.

14 He refused a three member panel. I asked for a three
15 member panel for a complex case like this. He refused. He tried
16 all four cases together. If you're accused in a criminal case --
17 and, by the way, it's recognized that these kinds of proceedings
18 are quasi criminal. In a criminal case, you can't try somebody
19 for murder, and arson, and hit and run all at the same time. But
20 that's what happened here.

21 And look at his one page, one paragraph conclusion
22 after weeks of oral testimony. Looking at the record as a whole,
23 he talks something about malum prohibitum, which is only in one
24 case. He just fused all the cases together. No separate
25 findings of fact by him. He adopted the prosecutor's findings of

1 fact and conclusions of law verbatim without even changing a
2 punctuation mark or a syllable.

3 JUDGE NAKEA: Mr. Dubin, you've got one minute left.

4 MR. DUBIN: Thank you. I'm just about done. He
5 omitted -- Mr. Hughes omitted any reference to any of my
6 defenses. And Mr. Andia, for example, had agreed. Right after
7 he had agreed, I had an obligation under the Hawaii Rules of
8 Professional Conduct to remove the money from the trust account,
9 but later on he objects, so then I offer to put it back. You
10 can't win.

11 And when the prosecutor, at the hearings, wanted to
12 quote something for the record, he let him put it in. When I
13 wanted to quote something for the record, I was not allowed.
14 Exculpatory evidence wasn't allowed on the issue of my experience
15 with Judge Real and the fact that the ODC found that I had done
16 nothing wrong. The prosecutor put on the record that I had done
17 something wrong and wouldn't allow in the record that the ODC had
18 cleared me.

19 JUDGE NAKEA: Thank you, Mr. Dubin.

20 MR. DUBIN: And then --

21 JUDGE NAKEA: Thank you.

22 MR. DUBIN: -- and then finally, Mr. Hughes had no
23 judicial experience.

24 JUDGE NAKEA: Thank you. Ms. Salwin.

25 MS. SALWIN: Yes. Mr. Dubin has had ample opportunity

1 to respond to what Mr. Horovitz told us, but the one thing he
2 didn't respond to was the first very thing that Mr. Horovitz
3 said, which was that Mr. Dubin came up to him before the hearing,
4 before the deliberations and said, I know we have a case
5 together, and I don't have a problem with it. I think it's
6 interesting that for how lengthy that was, Mr. Dubin didn't
7 acknowledge that.

8 Moving on. Mr. Dubin says that the reason he kept this
9 hearing officer's supposed conflict issue in his back pocket
10 until after he learned that Hearing Officer Hughes wanted him
11 disbarred, the reason that he did that is because that's the
12 proper procedure and there's no point in bringing a motion to
13 disqualify to the Hearing Officer himself.

14 That's sort of interesting because at the prehearing
15 conference where this all shook out, the ODC and the Hearing
16 Officer invited Mr. Dubin to file a motion right then and there
17 and what Mr. Dubin said was, well, the proper procedure is to
18 bring that to the attention of the Hearing Officer and the
19 Hearing Officer would make a decision. And if the Hearing
20 Officer doesn't recuse himself, of course, I would bring a motion
21 to disqualify the Hearing Officer. That's at page 4, lines 3 to
22 7.

23 So he's saying to the Hearing Officer at that time that
24 the proper procedure is to bring the motion to the Hearing
25 Officer. For the next year, he doesn't bring a motion. And I

1 will say, the Hearing Officer ruled on this and said, yes, that's
2 the proper procedure. Mr. Dubin said throughout, I will bring a
3 motion to disqualify the hearing examiner. He basically
4 threatened it over and over again, saying I will file a motion, I
5 will file the motion. He didn't file the motion for a year. He
6 waited to see what the Hearing Officer was going to say, and in
7 this case it was disbarment, and then he pulls this supposed
8 conflict out of his back pocket in order to try to thwart the
9 disbarment proceedings.

10 So just to do a quick timeline of that issue, in May
11 2017, the Hearing Officer discloses that they had had a case
12 together. That case was dormant in that it went up on appeal and
13 there was no activity in the case since 2012. It was never
14 returned to the trial docket after an appeal. So he discloses
15 the issue. Mr. Dubin says in May 2017; I will file a motion to
16 disqualify the Hearing Officer. He doesn't.

17 April 2018, the Hearing Officer recommends disbarment,
18 so nearly a year later, and then like that, June 2018, Mr. Dubin
19 says that there's a conflict. This whole time there was a
20 conflict.

21 January 2019, so later, Mr. Dubin tries to revive this
22 dormant appeal. So he's right in that it is a little different
23 from the Au case. He's not creating a new case. He's a little
24 bit more clever. What he's doing is he's reviving an old case to
25 try to conjure up a conflict that way. So January, he revives

1 the case and April, he brings this motion.

2 All right. Similar kind of timeline with the
3 Disciplinary Board Member Horovitz. He gave you a very detailed
4 timeline, so I won't get too far into it, but just to line up
5 what happened in that appeal with what happened with the
6 disciplinary proceedings.

7 March 1, Mr. Dubin files a notice of appeal. In Mr.
8 Dubin's own filing, he lists Mr. Horovitz. He does not file an
9 opening brief as you heard Mr. Horovitz explain. Every now and
10 then he would pipe up with a motion for extension of time to file
11 an opening brief, but mostly he does nothing.

12 All right. So March to September 20th, that's when the
13 Court says final deadline, September 20th, to file your opening
14 brief. September 20th. He let that lapse. All right.

15 December 13th, that's when we all met in this room and
16 had the presentation on Mr. Dubin's disbarment. And then after
17 that is February 13th, the Board issues its decision to say we
18 also recommend disbarment. All right. And then like that again,
19 Mr. Dubin revives his appeal, February 20th, one week later.

20 Right. So for a year, he didn't file an opening brief.
21 And then one week after the Board issues its decision, he's
22 reviving that appeal that that he had with Mr. Horovitz. He
23 finally files his actual opening brief on March 7th, after asking
24 for another extension. And then right after he revives that
25 case, he brings this motion in April.

1 All right. So he lets it sit, lets it lag, no case
2 activity. He finds out he's up for disbarment, revives the case,
3 brings this motion. It's a pattern.

4 And the Hawaii Supreme Court has seen this pattern many
5 times with sanctioning attorneys, with criminal defendants, and
6 they have a word for it. It's called gamesmanship. That's the
7 word they use in ODC v. Au. They say -- they call it knowing
8 concealment of an ethical issue for strategic purposes. And they
9 say it cannot be tolerated, and it would tarnish the concept of
10 impartial justice. This very proceeding of I am going to claim a
11 conflict after the fact, because I don't like the ruling that the
12 adjudicant made. Or the way they phrased it is that litigants
13 cannot take the heads I win, tails you lose position of waiting
14 to see whether they win, and if they lose, moving to disqualify a
15 judge who voted against them, right. The Supreme Court has
16 handled this situation before, and they know it's gamesmanship.

17 The United States Supreme Court has seen it too, and
18 they say, a litigant who repeatedly stated to the Court that he
19 was happy to litigate here, we will not consider his claim to the
20 contrary now that he is back. That's Stern v. Marshall, a U.S.
21 Supreme Court case, 564 U.S. 462.

22 And the only other point I would like to make is that
23 the only legal grounds he cites for why this supposed conflict is
24 the reason that Mr. Horovitz couldn't have participated is
25 Judicial Canon 2.11, which discusses the appearance of

1 impropriety. Not that there's any actual evidence of bias or
2 foul play. In fact, he acknowledged the case law says just
3 because you lose that doesn't mean he's biased.

4 So the only thing he's citing to is 2.11, the
5 appearance of impropriety. And our Supreme Court has squarely
6 held that that is not a reason to overthrow a judge's decision
7 after the fact. A litigant, if they're going to claim appearance
8 of impropriety, they have to claim it before the decision gets
9 made. And that's State v. Gomez, a case from 2000, 93 Haw. 13.

10 I could bore you with the logical reasoning
11 underpinning it, but essentially appearance of impropriety, it
12 just has to be raised, or it's not preserved, and you've waived,
13 it, which is what Mr. Dubin did. He did it on purpose. It's
14 gamesmanship. He was just trying to get out of disbarment, and
15 it should not be tolerated. Thank you.

16 JUDGE NAKEA: Ms. Salwin -- I'm sorry. Ms. Salwin and
17 Mr. Dubin --

18 MS. SALWIN: I was going to ask if Mr. Dubin had any
19 time for rebuttal remaining.

20 JUDGE NAKEA: I'm sorry.

21 MS. SALWIN: I believe Mr. Dubin used his time for
22 rebuttal during his opening presentation.

23 JUDGE NAKEA: So, as I was saying -- about to say --

24 MS. SALWIN: Oh, I'm sorry.

25 JUDGE NAKEA: -- Ms. Salwin and Mr. Dubin, we are going

1 to go into deliberations, and we'll let you know our decision.

2 MR. DUBIN: I have final comments I would like to make.

3 JUDGE NAKEA: I'm sorry, Mr. Dubin, you knew the time
4 limits and you --

5 MR. DUBIN: Well --

6 JUDGE NAKEA: -- that's it, Mr. Dubin. Thank you.

7 MR. DUBIN: I'm accused of four things.

8 JUDGE NAKEA: Mr. Dubin, thank you.

9 MR. DUBIN: It's very unfair, because she doesn't have
10 the facts, and I have answers to all those things. The Board
11 should have my answers to all those things.

12 JUDGE NAKEA: Thank you, Mr. Dubin. You had your
13 opportunity. You chose to spend your time on what you said.

14 MR. DUBIN: Ten minutes is hardly enough time to do
15 anything.

16 JUDGE NAKEA: Thank you.

17 MS. SALWIN: Thank you.

18 JUDGE NAKEA: By the way, you had a total of 23
19 minutes. Thank you.

20 MR. DUBIN: I was ambushed by someone who took ten
21 minutes.

22 (Proceedings concluded at 2:49 p.m.)

23

24

25

CERTIFICATE

I, Jessica B. Cahill, court approved transcriber, do hereby certify that the foregoing is a complete, true, and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: June 25, 2019



A handwritten signature in black ink, appearing to read "Jessica B. Cahill", is written over a horizontal line. Below the signature, the name "Jessica B. Cahill" is printed in a smaller, sans-serif font, followed by the identifier "CER/CET-708".

EXHIBIT "G"

Before the
DISCIPLINARY BOARD
of the
HAWAII SUPREME COURT

OFFICE OF THE DISCIPLINARY)
COUNSEL,) ODC No. 16-0-213
Petitioner,) 16-0-151
vs.) 16-0-147
GARY V. DUBIN,) 16-0-326
Respondent.)

)

DBF98
DISCIPLINARY BOARD
OF THE
HAWAII SUPREME COURT
RECEIVED
10 January 2019
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TIME: 12:20pm BY YH

TRANSCRIPT OF PROCEEDINGS BEFORE THE
DISCIPLINARY BOARD OF THE HAWAII SUPREME COURT

The above-entitled matter came on for hearing on December
13, 2018, at the Office of Disciplinary Counsel, 201 Merchant
Street, Suite 1600, Honolulu, Hawai'i, BEFORE:

DISCIPLINARY BOARD MEMBERS:

Hon. Clifford L. Nakea (Ret.),
Chairperson
Tanya M. Hellum, MBA, Treasurer
Brian R. Black
Vlad Devens
Marlaina K. Fujisawa, M.S.W.
Philip D. Hellreich, M.D.
Peter A. Horovitz
Shelton G.W. Jim On
Jeffrey P. Miller
Henry O'Neill
Leta H. Price
Judith A. Schevtchuk
Richard H.S. Sing
Diana L. Van De Car
Leilani T. Young

DISCIPLINARY BOARD COUNSEL: Philip H. Lowenthal, Esq.

FOR PETITIONER OFFICE OF
DISCIPLINARY COUNSEL: Rebecca M. Salwin, Esq.
Deputy Chief Disciplinary Counsel

FOR RESPONDENT: John D. Waihee, III, Esq.

RESPONDENT: Gary Victor Dubin

ALSO PRESENT: Bradley Tamm, Esq.
Executive Director

Ryan Little, Esq.
Assistant Disciplinary Counsel

Chloe M.R. Dooley, Esq.
Assistant Disciplinary Counsel

Josiah Sewell, Investigator
Barbara Gash, Investigator

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1 JUDGE NAKEA: Thank you. This is the matter of the
2 Office of Disciplinary Counsel v. Gary Victor Dubin, ODC numbers
3 16-0-147, 16-0-151, 16-0-213, and 16-0-326. For the record,
4 please.

5 MS. SALWIN: Rebecca Salwin on behalf of Petitioner,
6 ODC.

7 MR. DUBIN: Gary Dubin and John Waihee on behalf of the
8 Respondent.

9 JUDGE NAKEA: Thank you. I would ask both of you to
10 look around the table and see if there's anyone whose
11 participation you would object to. Before that, there are two
12 Board Members who wanted to make disclosures.

13 UNIDENTIFIED BOARD MEMBER: Yeah, I need to disclose
14 that I represent Jonah Kogan in the Christian Sacall (phonetic)
15 v. ADAO at Hawaiian Monarch, and it's currently on appeal. So,
16 it's an active case.

17 JUDGE NAKEA: Mr. Dubin, any comment or response?

18 MR. DUBIN: If you feel it's a problem, that's fine.

19 UNIDENTIFIED BOARD MEMBER: I think I can be fair.

20 JUDGE NAKEA: Okay. Mr. O'Neill.

21 MR. O'NEILL: Mr. Dubin, I don't know you, but my
22 background, I was an IRS lawyer here in lawyer from 2000 -- no,
23 from 1981 to 2008, which encompasses the time frame that's
24 involved underlying the Joe Smith matter. I'm wanted to let you
25 know.

1 JUDGE NAKEA: And you had no exposure to that case?

2 MR. O'NEILL: No, I had no involvement in that case. I
3 was aware of it at the time.

4 MR. DUBIN: You feel you can be fair?

5 MR. O'NEILL: I do.

6 MR. DUBIN: I have no problem.

7 JUDGE NAKEA: Thank you. Yes.

8 UNIDENTIFIED BOARD MEMBER: I'll make a disclosure too
9 that I went to law school with Governor Waihee and worked on his
10 campaign way back when. I haven't seen him since then, but I
11 should make the disclosure.

12 JUDGE NAKEA: In addition to that, Ms. Salwin, Mr.
13 Dubin, objections to any other members participating?

14 MS. SALWIN: Not on behalf of ODC.

15 JUDGE NAKEA: Okay.

16 MR. DUBIN: No objection.

17 JUDGE NAKEA: Okay. The time limits are as follows, 20
18 minutes per side. You being the movant will go first. I can
19 tell you at any point how much time you have left in case you
20 wanted to save some for rebuttal. And would you like me to
21 interrupt you and tell you when you reach a certain point?

22 MR. DUBIN: No, I'm going to keep time myself.

23 JUDGE NAKEA: Okay. And you have one shot at it.

24 MS. SALWIN: Sure.

25 JUDGE NAKEA: Okay. So, the floor is yours. I'm

1 sorry.

2 MS. SALWIN: Before we begin, Judge, there are two --
3 as a housekeeping matter, there are two objections pending. I
4 don't know how important they are at this point, but I do think
5 just for the sake of the record, it's probably worth having a
6 ruling on them.

7 In DBF 82 and DBF 76, ODC objected to Mr. Dubin's
8 filings. In DBF 82, ODC objected because Mr. Dubin had filed two
9 opening briefs. One of the briefs he filed was timely and before
10 ODC filed its answering brief. One of the briefs he filed was
11 untimely and after ODC filed its answering brief. There are some
12 differences between the two briefs. At this point, I'm prepared
13 to make arguments and answer questions about both briefs, but I
14 do think it's worth knowing that that objection is still pending.

15 As to the other objection, that was an objection filed
16 in DBF number 76, stating that the 83 exhibits that Mr. Dubin
17 attached to his opening brief were untimely filed. But, again,
18 at this point, I think everyone is probably familiar with the
19 filings and prepared to discuss them, so.

20 JUDGE NAKEA: Were these objections filed?

21 MS. SALWIN: They were filed. They were Board filed in
22 writing.

23 JUDGE NAKEA: And not addressed?

24 MS. SALWIN: Mr. Dubin responded to them, but there was
25 no rulings on them. So, Mr. Dubin responded in DBF 77 and DBF

1 83.

2 JUDGE NAKEA: Well, I would say let's argue about that
3 first.

4 MS. SALWIN: Okay.

5 JUDGE NAKEA: Okay.

6 MS. SALWIN: Well, the concern with the second opening
7 brief, of course, is that it was untimely filed, and it was filed
8 after ODC filed its answering brief, so preventing ODC from its
9 opportunity to respond. We've compared the two briefs. It does
10 raise -- the latter brief raises an due process argument.

11 The latter brief also changes throughout the phrase
12 that Mr. Dubin testified at the hearing to Mr. Dubin explained at
13 the hearing. I don't know what the purpose of that is, or if
14 that indicates he wasn't still obligated to tell the truth. I
15 think he was obligated to tell the truth either way, but those
16 are the differences that we could find, if there's other
17 differences throughout. I do think that we should be addressing
18 the original opening brief, which was filed timely on June 4th,
19 in DBF 74.

20 JUDGE NAKEA: Okay. I am at the point where I need to
21 consult with the Board on that particular -- well, probably all
22 of your objections.

23 MS. SALWIN: Okay.

24 JUDGE NAKEA: Did you want to respond to that, Mr.
25 Dubin?

1 MR. DUBIN: The briefs are essentially identical. The
2 Board has -- this is a very complex situation involving four
3 charges and yet if it was only one charge, I have the same time.
4 So, I did the best I could.

5 JUDGE NAKA: Anything?

6 MS. SALWIN: But perhaps the Board would like to know
7 why he filed two different briefs -- two different opening
8 briefs.

9 JUDGE NAKA: Did your second brief intend to
10 contradict your first brief?

11 MR. DUBIN: No, frankly, I don't even recall, but I
12 think it was for the purpose of adding the record references. I
13 think that was the difference. As I sit here, I don't recall
14 what the difference was, but it was no intention to change the
15 opening brief. I think it was the addition of the exhibits.

16 MS. SALWIN: The exhibits were filed well before the
17 second opening brief was filed. The exhibits were filed on June
18 15th. The second opening brief was filed on July 16th.

19 MR. DUBIN: And, as I recall, it was a mistake in the
20 titling of the fifth issue regarding -- which was the fourth, but
21 it was numbered five, regarding Kern. It was a typographical
22 mistake, which repeated, the heading for it, and in the heading
23 for Kern, and it did not contain the table of contents.

24 MS. SALWIN: There's a table contents in both briefs.

25 MR. DUBIN: But it was mistaken. You'll find that the

1 reference to Kern was mistakenly labeled Andia. That's what I
2 recall.

3 MS. SALWIN: We compared the two briefs and did not see
4 that change. What we saw was an additional due process argument,
5 a change of the phrase "testified at the hearing" to "explained
6 at the hearing," and a slightly lengthier caption to one of the
7 arguments, but the arguments itself was the same.

8 JUDGE NAKEA: Are you at a disadvantage if we proceed
9 with the second and first -- with both filings?

10 MS. SALWIN: Again, I'm prepared to answer questions
11 and make arguments about either brief. I do think that the
12 concern is that Mr. Dubin raised very generalized, unspecified
13 due process arguments in the latter brief, which ODC then didn't
14 have a chance to respond to because he filed that brief a few
15 hours after the ODC filed its answering brief.

16 So, the ODC filed its answering brief in the morning.
17 That afternoon, Mr. Dubin filed his second brief, which now has
18 new due process arguments in it.

19 JUDGE NAKEA: And there was -- was there another matter
20 that you wanted to address?

21 MS. SALWIN: The other matter is that he filed his 83
22 exhibits untimely by about 11 days, without seeking an extension
23 in advance.

24 JUDGE NAKEA: And are you objecting to that filing?

25 MS. SALWIN: No, because at this point, I've read all

1 the exhibits, so I've become familiar with them at this point.

2 JUDGE NAKEA: Okay. So, you wouldn't feel prejudiced
3 if we proceed?

4 MS. SALWIN: I can't honestly say that I would.

5 JUDGE NAKEA: Okay. So, we're limited to the raising
6 of the due process arguments?

7 MS. SALWIN: Correct.

8 JUDGE NAKEA: Are you prepared to respond to those
9 today?

10 MS. SALWIN: I can respond to those.

11 JUDGE NAKEA: Yes.

12 UNIDENTIFIED BOARD MEMBER: May I just ask what was the
13 new due process argument that was in the second brief?

14 MS. SALWIN: It was basically that he's been deprived
15 of due process, and the record is in shambles, I think, is the
16 extent to the argument.

17 JUDGE NAKEA: Okay. Counsel, excuse me, should we have
18 a closed hearing to decide what to do with that?

19 MR. LOWENTHAL: Yes.

20 JUDGE NAKEA: Yes, please. Thank you. We'll call you
21 back in.

22 (Closed Board hearing from 2:40 p.m. to 2:45 p.m.)

23 JUDGE NAKEA: Thank you. The Board has decided to
24 proceed with the situation as it exists. Mr. Dubin, you've got
25 your 20 minutes.

1 MR. DUBIN: Judge Nakea, Judge Waihee, Members of the
2 Board, and Members of the Office of Disciplinary Counsel, I
3 appeared before many judges, including appellate judges, and
4 including the Royal Court, but I have never appeared before 20
5 judges in my life, so this is a new experience.

6 I would like to address five topics in the brief 20
7 minutes I have. One, I would like to talk briefly about myself;
8 second, I would like to talk about the charges; third, I would
9 like to talk about the Hearing Officer and the findings of fact
10 and conclusions of law; fourth, about the process; and then,
11 fifth, about your decision. Twenty minutes is hardly enough time
12 to cover everything. Normally, I don't do oral arguments with
13 notes, but I have them today, because I want to make sure that in
14 the brief time I have I cover everything.

15 I'm going to first tell you that I earned my right to
16 practice law. First in my class in high school, first in my
17 class in college, the top of my class in law school. I taught
18 law at Stanford, Berkley, Denver, Harvard, USC, UCLA, the RAND
19 Corporation. Fifty five years. Twenty in California, 35 in
20 Hawaii, and I have never been found guilty of any wrongdoing
21 involving a client of mine, and believe me, I've had thousands.

22 And I don't sit back and write wills. I'm a litigator,
23 where people have a lot of emotions. I've been years ago in
24 Judge Nakea's court where people are fighting. And some of my
25 clients, unfortunately, don't understand the legal system, and

1 they go after their attorney. There are some of my clients, I
2 have to say, have been dishonest, because I meet the general
3 public.

4 When I started to practice law, I represented the
5 National Football League, IBM in California, entertainers Sammy
6 Davis, Jr., Redd Foxx, Jerry Lewis. I never had a complaint.

7 When I came to Hawaii, I got involved in foreclosure
8 defense and people are losing their homes. They're going to be
9 thrown on the street, literally. They're very emotional. And
10 foreclosure defense attorneys know that they're going to get
11 complaints because the clients sometimes don't understand the
12 system and some of them ask for their money back.

13 I'm very proud of my record in Hawaii. You have a copy
14 of the testimonials. You got 12 pages, I think, of testimonials.
15 I've got more. How many lawyers in Hawaii had that many
16 testimonials? People thank me for saving their home, for saving
17 their families. It gives me a lot of satisfaction.

18 Also, because of the radio show, which I have shared
19 with Judge Waihee, I've gotten national recognition. I have
20 hundreds of thousands of listeners, and I'm so proud that some
21 people pro se, use the information on our show to save their
22 homes.

23 Let me go on to the charges. The Smith charge.
24 Supposedly, I lied on the solicitor's license ten years ago. You
25 know, a lot of states have statute of limitations on disciplinary

1 procedures. They don't go back ten years. You know, witnesses
2 die. It's kind of hard to prove things. But this all started
3 because the Disciplinary -- excuse me -- the Office of
4 Disciplinary Counsel filed a grievance because they said that the
5 Court had found me to have misrepresented my situation regarding
6 the income tax problem I had with the IRS. They didn't
7 understand the law. It was a -- it was a malum prohibitum
8 offense.

9 The prosecutor with DCCA who prosecuted me on the
10 record, and you have a copy of that, said they're not claiming
11 that I intentionally did anything. They're just claiming that
12 the wrong box was checked. Well, I found that -- my paralegal
13 testified that he was the one who checked the box, not me. The
14 standard is supposed to be clear and convincing evidence. There
15 was no evidence that I intentionally checked the wrong box, but
16 what evidence there was, was that I had been exonerated by the
17 IRS District Office in Seattle. They found that rather my having
18 failed to have filed tax returns -- in fact, they owed me
19 100,000, and I didn't have a file requirement in those three
20 years, and they credited me with \$100,000.

21 The U.S. District Court, took with interest, \$300,000
22 from me. So, I sued to get the money back. The IRS said they
23 couldn't give me the money, because the District Court had it. I
24 can't get the money unless I go back to my original case with
25 Judge Manuel Real. If anybody who knows Judge Manuel Real would

1 know you don't want to go before him. It's not worth 300,000,
2 but as soon as he passes away, I hope to get my \$300,000 back
3 from the District Court.

4 But the point is there was no intent. There was no
5 proven intent. They just made a mistake. They didn't understand
6 what the law was. I appealed it to the Intermediate Court of
7 Appeals arguing that malum prohibitum without intent just made no
8 sense, but I didn't succeed with that particular appeal.

9 Let me move on -- let me say, is that a reason to
10 disbar an attorney? The peculiar thing was that at the same time
11 I'm publishing full page ads in the newspaper, on the ABA Journal
12 investigative report that found me to be innocent of the charges.
13 So, why would I not check the box when I was advertising all over
14 the place. I wanted everybody to know that I was innocent,
15 because I had suffered a lot of bad press. I wanted everybody to
16 know.

17 So, with that in mind, how could you find that I had
18 the intent to hide when I was publishing in the newspaper. I
19 would like to know from the Office of Disciplinary Counsel, why
20 the hearing examiner didn't comment on my defenses. He just
21 accepted the idea that I was found to have misrepresented. Okay.
22 I got to move on here.

23 The ICA. That I was late and had inadequate record
24 references. Well, as I say in the brief, the record references
25 were more than adequate and from what I gathered from the clerks

1 at the Intermediate Court of Appeals, over half of the appellate
2 bar would be disbarred if that were the grounds because a lot of
3 people are late. The ICA has this rule that you have to ask for
4 an extension within five days -- before five days of the
5 deadline. A lot of times emergencies arise. I would be
6 surprised if there is anybody here who practices appellate work
7 hasn't missed a deadline because of that. And I responded, and I
8 explained why, and I paid a \$50 fine.

9 Three years later, the ICA refers me to the Office of
10 Disciplinary Counsel. Who are the ICA? Well, in the last 20
11 years I won more than 70 appeals and maybe 15 of the Hawaii
12 Supreme Court overruling the ICA. And I'm told that a couple of
13 people on the staff at the ICA don't like me. Maybe I had too
14 much success in reversing them, but nobody testified. Nobody
15 from the ICA testified. So, I paid a \$50 fine. I think it's
16 double jeopardy after I pay the fine, three years later to
17 suddenly conclude that I should be referred for ethical charges.

18 Again, where is the intent? No one is claiming that I
19 intentionally intended to miss the deadline. Like that's all I
20 have to do in life is, you know, miss deadlines. There's no
21 intent. If you read the preamble to the Hawaii Rules of
22 Professional Conduct, you'll see where they talk about intent.

23 Let's talk about Andia. The funds were disputed. I
24 had nothing to do with the case after initially. For three years
25 I had nothing to do with the case. I had never talked to Andia,

1 never written him. The only -- when it came time, I didn't know
2 what was going on in the case. He paid \$16,500. The case went
3 on for over three years, maybe four years. The lawyers of my
4 office filed a counterclaim and the Bank of America agreed to pay
5 132,000, just to get rid of the counterclaim. Now, a lot of my
6 clients would think that's a victory.

7 Up to that time, I only had about -- from Bank of
8 America, only about 300 or \$400,000 settlements. Those were the
9 largest we ever had. But the guy had not paid us anything after
10 the initial retainer. And according to our records, he owed us
11 about 70,000.

12 So, I presented him with a bill, and I met with him.
13 And he agreed to accept the charges. And in the submission, in
14 our opening brief, you'll see he said okay. He said -- in an
15 email he said, yes, I accepted it, but yet he went -- a month
16 later he met with some friends of his and decided he would
17 object. What did I do when he said he would object?

18 First of all, there's a rule in the Hawaii Rules of
19 Professional Conduct that once he agreed, then I had an
20 obligation to take the money out. So, I took the money out. But
21 this all started because the Office of Disciplinary Counsel told
22 the reviewing board member that I had put the money in my
23 personal funds and that's what they said in the original
24 complaint against me. And then they had to change it. It went
25 into the client trust account. And why did it go in the client

1 trust account? Well, the settlement agreement provided that I
2 give them my W9 form, which I did. It was a mistake that I
3 wasn't -- that the (indiscernible) were not listed as part of the
4 receipt.

5 And the First Hawaiian Bank agreed -- they told me to
6 initial it, and they would put it in the client trust account.
7 And the money didn't go anywhere, and the client was notified.
8 And, in fact, there's a rule in the Professional Conduct that
9 says disputed funds have to stay in the client trust account
10 until the client agrees. When he agreed, the money came out of
11 the trust account.

12 Then he starts objecting over a month later. So, I
13 said, okay, I'll put the money back in. That wasn't good enough
14 for him. I said that I would go and submit it to -- the dispute
15 to the Bar. He didn't want to do that either. He just wanted to
16 go around town and go to the police, saying I had committed
17 forgery. Well, they didn't accept that.

18 But then, First Hawaiian Bank filed a lawsuit on the
19 issue. I filed a lawsuit. My lawsuit was before Judge Crandall.
20 She wanted to hear the facts, so she gave an order to show cause
21 that Andia should come into her court and explain his position,
22 and he didn't show up. And he didn't show up before Judge Chang
23 either. So, he had his chance. He didn't show up.

24 Originally, he said, well, it was a flat fee. Let's
25 talk about boxes being checked. The flat fee on my retainer

1 agreement was not checked. Peculiarly, the hearing examiner
2 supported my position because his conclusion was that I ought to
3 pay 19,000 to Andia and keep the rest of the 70,000. Andia
4 wanted to run off with all the money.

5 Lawyers should be paid for their services. We have a
6 right to be paid. He wanted to run off with everything. I did
7 the right thing. I put it in the trust account. He agreed, then
8 he disagreed. I was willing to put it back. Even the hearing
9 examiner concluded that I was entitled to about 50 of the 70,000,
10 indirectly. It also turned out that his real reason was he
11 wanted to hide the money from his ex-wife, because he wasn't
12 paying support and that's document in Ho'ohiki.

13 Also, I won a couple of big cases in the Hawaii Supreme
14 Court involving Gerry Mount. One of Andia's emails to me had a
15 copy to Gerry Mount. Gerry Mount is involved in sailing, as I
16 am, at the yacht club and apparently, he talked to Gerry Mount.
17 So, I asked the ODC to do an investigation of that and, of
18 course, they didn't bother.

19 The fourth one is Kern. It's all hearsay. Kern is not
20 my -- Kern was not my client. Why didn't they have Harkey
21 testify by phone? The ODC can pick and choose who they want, so
22 they bring the lawyer who represented Harkey. I never believed
23 that Harkey ever approved of that charge against me.

24 And I had to withdraw and so, I'll explain here,
25 because they were committing a fraud on the Nevada District

1 Court. They had picked me as -- Harkey had picked me as his
2 attorney, and then I get a notice that they're putting everything
3 in a trust and Nora, who was a suspended Wisconsin attorney, for
4 ethical reasons, was going to -- the trustee was going to control
5 me, and I said, I can't do that, because she couldn't come into
6 the case. So, that was a mess.

7 Let me talk to you about the process. Unfortunately, I
8 don't have too much time, but four cases were put together.
9 Disciplinary actions are quasi criminal. Whoever heard of trying
10 to a defendant on isolated cases -- criminal cases altogether. I
11 was prevented from calling adverse witnesses. Mrs. Andia, she
12 testified through her husband, but the hearing examiner said,
13 well, she's ill because Mr. Andia said she was ill, and she can't
14 come. I think she's the one who put in the anonymous Smith
15 letter.

16 There was no pre-screening. I asked to speak to the
17 Office of Disciplinary Counsel about these charges, and they said
18 after the petition is filed then they'll talk to me. One of the
19 investigators, Ms. Sink, she was with her husband's law firm when
20 he was filing -- when he put on that T.V. add, he was committing
21 legal malpractice. I had to hire an attorney, and then he took
22 it down.

23 He sued me twice for legal malpractice while she was in
24 the office and those cases were dismissed. And in the last one,
25 I got my attorney's fees. So, there's a lot of animus there, but

1 she was assigned as my investigator. And they had several
2 investigators, and I said, give me another investigator. They
3 never gave me another investigator.

4 The hearing examiner. I have an active case still
5 ongoing with him, but he would not disqualify himself. I asked
6 for a three judge panel --

7 JUDGE NAKEA: Excuse me, what was that noise?

8 MR. DUBIN: Oh, that meant my time was up. If I can
9 just finish.

10 JUDGE NAKEA: Okay.

11 MR. DUBIN: So, the hearing examiner, I asked for a
12 three judge panel, ignored. It comes time to file briefs in this
13 tribunal, I'm told it's got to be double spaced, 35 pages, 14
14 point type. It was an effort getting all my thoughts in. That's
15 not the requirement. You can go one-and-a-half spaces in the
16 Hawaii Supreme Court. And you can get an extension -- they'll
17 give you an extension. Of course, Judge Nakea was nice enough to
18 give me a 30 day extension. I only get 20 minutes to talk about
19 four charges. What if there was 50 charges? Would I still get
20 20 minutes? If it was one, I would get 20 minutes.

21 There was no decision by the hearing examiner on any of
22 these charges. Just one paragraph and one letter. It's
23 incomprehensible about cumulative effect of all these charges. I
24 don't understand what he meant, but it was adopted. He took --
25 he took the ODC Prosecutor's findings of fact and conclusions of

1 law. And you can imagine, they were not favorable to me. And he
2 adopted them without a change in a comma, punctuation, or
3 syllable.

4 Well, I gave you some citations. Judges don't like
5 that, because they think, rightly so, you know, that maybe they
6 didn't -- maybe the hearing officer or the judge did not properly
7 understand.

8 And about your decision. Rule 24(d) and Rule 25. You
9 can affirm -- to me that's unthinkable -- but you can affirm the
10 hearing examiner, my opposing attorney in one case. And you can
11 read the transcripts if you want, he just gave the ODC everything
12 they wanted and denied me. And when it came to the IRS matter, I
13 pointed out that I was found not guilty of any professional
14 wrongdoing by the ODC, and the ODC Prosecutor wouldn't admit
15 that. And the hearing examiner said, well, I'm not going to
16 recognize that. I found it later. Denial of exculpatory
17 evidence.

18 MS. SALWIN: Judge, I believe we're over time.

19 JUDGE NAKEA: Thank you.

20 MR. DUBIN: And in conclusion, my final words. I was
21 not told that I was threatened with disbarment until just before
22 the hearing. Had I been told that, I would have sought to keep
23 the thing private. The only thing it said in the petition was,
24 you'll find, that I'm going to take a course in ethics. That
25 trick exposed me to bad press. I have -- it has been in the

1 press that this group is considering disbarring me.

2 As a result, I've lost clients, I've lost cases, I've
3 had -- I've lost staff members, because why not? I'm supposedly
4 about to be disbarred. I was unable for two-and-a-half years to
5 accept pro hac vice appointments, to help people out in other
6 states where I'm not licensed because, ethically, the courts
7 would not allow me to come into their court. I've lost over \$1
8 million in the costs, I gave each of you one of these, in the
9 time lost, and I can't explain to you in dollars and cents the
10 emotional aggravation this has caused me and my family. No
11 member of the Hawaii Bar should ever again be exposed to this
12 kind of treatment. Never again. Never again.

13 In concluding, Mr. Waihee, who I've gotten to know is
14 as fair a guy as I know Judge Nakea to be. He was there for all
15 of the hearings. And if you want really an unbiased opinion, you
16 can go and ask him. Thank you very much.

17 JUDGE NAKEA: Thank you. For the record, Mr. Dubin,
18 it's 27 minutes later. Thank you. Ms. Salwin.

19 MS. SALWIN: I would like to start by discussing the
20 Andia case, which is when Mr. Dubin forged his client's name on
21 the back of the check. And I don't say that glibly, I'm
22 referring to the statutory definition of forgery, 708-852, Hawaii
23 Revised Statutes, which defines forgery as: With the intent to
24 defraud, falsely endorsing a written instrument, which is a
25 commercial instrument. So, case law State v. Mason, has also

1 defined putting someone else's signature on the back of a check
2 as an act of forgery.

3 Mr. Dubin did forge his clients' names on the back of
4 his check. You'll see it in Exhibit B-6 from the hearing
5 exhibits. You can see that he even changed the handwriting on
6 the check, the way that he wrote Andia each time, so that it
7 looked like two different people had signed it. The As are
8 different, the Ns are different.

9 And you might be thinking, well, why would somebody
10 forge their clients' name on a check just to securely put it into
11 a trust account, because I had the same thought when I picked up
12 this case a few months ago. The truth is, he had no right to
13 those funds.

14 The check was made out exclusively to the clients, who
15 were under the impression from 2012, when they retained him, that
16 they were paying him a flat fee of \$16,500. He didn't provide
17 them any invoices. He didn't provide them any charges while this
18 cases pended for three years. Then he got the check --
19 settlement check from opposing counsel and, contrary to what he
20 just said, he did not notify the client that he received the
21 check. He took the check and without telling them, let alone
22 getting their authorization, he put their signature on the check,
23 so that he could put it into his bank account.

24 After the fact, he came up with some invoice that
25 justified, supposedly, the \$70,000 worth of charges he had racked

1 up over the past three years. Mr. Andia testified that if he had
2 known that this was how he was going to be charged, he would have
3 shopped around for a different attorney. If he had known that
4 \$70,000 was going to be taken out of his settlement funds, he
5 wouldn't have settled.

6 So, he was depriving his client of the chance to make
7 decisions about his client's money. Mr. Dubin wasn't entitled to
8 those funds. For the additional reason that the bill that he did
9 come up with, after the fact, vastly overcharges. And the
10 hearing officer wrote a very conservative hearing officer's
11 findings that only highlights the most clear cut case of
12 overcharging, which is \$19,885. That's the conservative number.
13 That even by Mr. Dubin's own account is how much he overcharged
14 his client.

15 How did he do it? He told the Andias in their written
16 agreement that he would be charging associate's rates at 185 to
17 250 an hour. So no more than 250 an hour. But when the bill
18 came out, it lists these associates as being charged at 385 an
19 hour. So, when you do the math of the number of hours that the
20 associates got billed out at senior rates, it came out to
21 \$19,885. That also includes an entire month where an associate
22 was being billed out at senior rates who didn't even have a
23 Hawaii license.

24 So, not only was he not a senior attorney, he wasn't an
25 associate, he wasn't a lawyer, and he was being billed out at

1 senior partner rates. And, again, that's just the most clear cut
2 and obvious example of the over charge. The hearing officer made
3 this finding at around 110 of the hearing officer's findings.

4 And as to the idea that the Andias had a flat -- did
5 not have a flat fee agreement because Mr. Dubin should have
6 checked the box, I believe what he's referring to is in Exhibit
7 B-3, which is the signed client -- legal services agreement with
8 the client, at the bottom it says: \$16,500, and it checks that
9 this is for fees and costs as a retainer, not checked for flat
10 fee, right, but that's dated 2/21/12.

11 When you look up to their signature, their signature
12 was dated 2/17/12. So, what this money was for was written in
13 after they signed it and returned it to him. They even provided
14 -- and that's the next exhibit over -- before their copy of the
15 legal services agreement, which doesn't have any reference to
16 what the sixteen-five was for.

17 The other thing to point out about this case is that
18 when the Andias -- when Mr. Andia specifically asked Mr. Dubin
19 for a simple follow-up with what was happening with my
20 settlement, Mr. Dubin not only didn't tell him that he had
21 already received the settlement funds, already signed his name on
22 the check, and already put the money into the bank, he got
23 antagonistic. And if you can look quickly after we leave through
24 Exhibits B-10 through B-22, you can see as Mr. Andia stays
25 surprisingly composed and respectful throughout as he's asking

1 questions, I'm a bit confused about why we're getting invoiced.
2 We paid a \$16,500 flat fee. And Mr. Dubin responds that:
3 Apparently, you thought you were getting a free ride. You're
4 finding phony reasons not to pay. You are not grateful. We have
5 been so successful. You must immediately secure new counsel. We
6 are immediately stopping working on your case because of your
7 attitude. Going over to B-14, he writes to Mr. Andia: Stop
8 making a complete ass of yourself.

9 Going over to B-18, Mr. Andia just lays out, very
10 objectively, here's the math, here's the rates I thought I was
11 being charged based on the legal services agreement. Based on
12 this, there's a discrepancy of \$19,885. Mr. Dubin responds in B-
13 19: These schedules periodically change.

14 Well, that wasn't true because these first year
15 associates and even the non-lawyer were being charged premium
16 rates from day one. So, it wasn't that they became more
17 experienced and became more valuable. They were charged those
18 rates from day one. He threatens them and says: If you keep
19 pushing this, I'm going to charge you a new invoice with
20 additional charges.

21 Going to B-20, Mr. Andia writes back: Thank you, Mr.
22 Dubin. Attached is the agreement I signed. Sincerely, Robert
23 King Andia. Dubin responds: You can tell whoever you are
24 speaking with behind the scenes that he can stick the agreement
25 you know where.

1 So, I would encourage everyone to take a quick scan
2 through those emails, because I think that's very telling of how
3 Mr. Dubin has treated his client during this case.

4 And to move on. There is a similar pattern that you
5 see in the Harkey/Kern matter. Charges \$45,000 up front, leaves
6 thereafter. Spends about two months ignoring his client and
7 stringing them -- and stringing Mr. Kern along as Mr. Kern
8 actively seeks return of the funds or at least an accounting.

9 Mr. Dubin eventually, not to his client, but to the
10 ODC, a year-and-a-half later, provides an invoice. And, again,
11 even going conservatively, even if we choose to believe this
12 invoice that's unethical billing instances throughout that
13 invoice and that's exhibited in Respondent's Exhibit 1.

14 And if you compare that to volume 5 of the transcripts,
15 pages 1017 through 1023, Mr. Kern goes, and he highlights some of
16 the most egregious examples of improper billing, including that
17 according to this invoice on April 11th, Mr. Dubin earned 30.1
18 hours' worth of work in one day. There's instances of him
19 charging 12.5 hours for a six minute text exchange. Charging ten
20 hours for a one hour phone conversation that was, basically, just
21 asking someone respond to him as pro hac vice. Mr. Kern reached
22 out to that attorney and said, we didn't discuss this for ten
23 hours, we discussed it for less than one. So, that transcript
24 highlights the overbilling in that case.

25 But even by Mr. Dubin's own invoice, there's still

1 instances of him taking over \$3,000 out of the client trust
2 account into his own account, before he earned it even by his
3 invoice, even if you believe that invoice.

4 Moving on to the DCCA case. You know, he says why
5 would I be hiding the fact that I had a situation with the IRS,
6 right. And he couldn't even say the words to you today that he
7 was convicted. He was convicted. There was no appeal. He tried
8 in venue, after venue to get that overturned. He stands
9 convicted. He couldn't even say the words to you. So, yes, he
10 had a motive to lie.

11 And he says that at the DCCA, they found that it wasn't
12 intentional. What they actually found was that they didn't need
13 to prove intent, to prove he made an untruthful statement. They
14 didn't to prove motive. And not only did they revoke his
15 license, they gave him a \$1,000 fine.

16 He says that it was his paralegal that, Mr. Vu, who
17 made a mistake on the application, but when pressed at the
18 hearing, what came out is that Mr. Dubin was telling his
19 assistant my conviction has been overturned. I have been
20 exonerated. And at page 227 and 228 of that transcript, the
21 assistant said that Mr. Dubin even provided him a handwritten
22 letter purporting to be from the IRS, clearing him of his
23 conviction and that that's the information the assistant used
24 when filling out the application.

25 So, Mr. Dubin on the one hand is telling his assistant

1 my conviction has been overturned and on the other hand, hands
2 his assistant an application that asks about his conviction.
3 Then when he gets caught lying on the application, he turns
4 around and blames the assistant. When he was caught with that at
5 the hearing, he said: well, I didn't read the application before
6 I signed it.

7 But, of course, on the application he made changes, and
8 he hand wrote in changes where he wanted to change the answers
9 that his assistant had put. He changed a yes answer to a no
10 answer. He circled it, he wrote his initials, and he even
11 spelled out N-O in his own handwriting to make it abundantly
12 clear the answer that he wanted. When he was asked about that at
13 the hearing, he said, well, I only read the ones that were
14 already marked yes. If it was marked no, I didn't bother reading
15 it. So, these are the series of statements that he made about
16 that DCCA case.

17 Turning to the ICA case. He states that the ICA has
18 this unfair policy of requiring people to make extension motions
19 five days in advance, otherwise they fine you \$50. Those are
20 inaccurate statements as well. His motions for extensions of
21 time occurred in the 2012 consolidated case, 2.5 months late.
22 Not five days early, not four days early, 2.5 months late. In
23 the 2013 appeal, it was three weeks late. And he was not fined
24 the routine \$50, he was fined \$150 and \$200, respectively.

25 So, he is not like the entire bar who occasionally

1 misses a deadline. He dragged these cases out for years before
2 even filing a compliant opening brief.

3 Finally, as to the consent about the hearing officer
4 having an active case against him, that case has been inactive
5 since 2012. I have nothing further.

6 JUDGE NAKEA: Thank you. The Members of the Board will
7 be entitled to ask questions of both parties.

8 MR. DUBIN: I would be happy to respond.

9 JUDGE NAKEA: I know you would, Mr. Dubin, but your 27
10 minutes is 27 minutes.

11 MR. DUBIN: I know. We're talking about justice. The
12 Prosecutor will say anything they want.

13 JUDGE NAKEA: You expected that, and I guess -- you
14 should have saved some time if you expect the prosecutors to say
15 anything they want. You should -- I'm not in a position to
16 lecture anybody. Sorry.

17 MR. DUBIN: I appreciate it.

18 JUDGE NAKEA: Any questions? Any questions? No
19 questions?

20 MS. SCHEVTCHUK: I have one question.

21 JUDGE NAKEA: For the record, please, you are?

22 MS. SCHEVTCHUK: Judy Schevtchuk. Mr. Dubin, I believe
23 you testified with regard to the Andia settlement check along the
24 lines of the First Hawaiian Bank had notified the client that the
25 settlement check had come in. I don't know if that was my -- if

1 I correctly heard that or not.

2 MR. DUBIN: No, I think you -- you misunderstood the
3 testimony. The check came in. I wasn't the assigned attorney,
4 so I didn't get any of this stuff at first. I just heard about
5 it when Andia was running to the opposing attorney, Patricia
6 McHenry, trying to get the check. That's when I got upset
7 because he was going to the opposing attorney. And she called
8 me, and she was upset that he was going to her. First Hawaiian
9 Bank had this policy where I initial it, they initial the check.
10 They approve the check. I initial the signature. There was no
11 question that I was signing it. They approved it.

12 MS. SCHEVTCHUK: The check that was made out to your
13 client?

14 MR. DUBIN: Right. Right. And it was a mistake
15 because the settlement agreement provided for my company. We
16 gave them our W9. Usually a check is made out to the law firm
17 and the client because otherwise we could go after our legal
18 fees. So, in just about every instance we ever had, the check
19 was made out to the law firm.

20 MS. SCHEVTCHUK: You stated that the check came into
21 your office, but not somebody -- that you weren't personally
22 handling the case at that point?

23 MR. DUBIN: That's right.

24 MS. SCHEVTCHUK: So, you had an associate that was
25 responsible for the case at the time of the settlement check?

1 MR. DUBIN: That's right. He would get all the stuff
2 involving Andia.

3 MS. SCHEVTCHUK: But he was still supervised by you?

4 MR. DUBIN: He was supervised by me, but the Office of
5 Disciplinary Counsel says -- excuse me, the Hawaii Rules of
6 Professional Conduct say when you supervise somebody, you know,
7 you're not liable ethically unless you had the intent to do
8 something wrong. So -- but that individual, Richard Forrester,
9 he was also accused by the Office of Disciplinary Counsel, and
10 they found him not to be liable for anything.

11 MS. SCHEVTCHUK: Thank you. No further questions.

12 JUDGE NAKEA: Questions. For the record, please.

13 MR. BLACK: Brian Black. Do you agree with the ODC
14 that the hearing's officer in the case that you have with him has
15 been inactive since 2012?

16 MR. DUBIN: I'm sorry, I didn't hear you.

17 MR. BLACK: The case that you have with the hearing's
18 officer -- involving the hearing's officer, do you agree with the
19 ODC that that case has been inactive since 2012?

20 MR. DUBIN: I don't know what you mean by inactive.
21 It's still there. We haven't settled the case yet. The fact
22 that he would be involved created an ethical problem for me
23 because the client could think that I was negotiating that case.
24 That case has not yet been resolved. It was just delayed because
25 the client died in a motorcycle accident.

1 MR. BLACK: Do you -- did you raise this concern about
2 the hearing's officer to the hearing's officer --

3 MR. DUBIN: Yes.

4 MR. BLACK: -- or at the time?

5 MR. DUBIN: I raised it at a prehearing conference, and
6 he said he would take it under advisement, and then he submitted
7 something that said he could be -- he could be neutral. That's
8 on the record.

9 MR. BLACK: Okay. And your concern about his
10 participation, can you explain that to me?

11 MR. DUBIN: Well, I'm concerned -- I think anybody
12 would be concerned if an opposing counsel were the hearing
13 officer, and it puts me in an ethical dilemma with my client.
14 The heir is -- is on the mainland and the thing has still not
15 been resolved.

16 MR. BLACK: Thank you.

17 MR. DUBIN: You know, I asked for many things. I asked
18 for a three judge panel. I didn't get that either. He ignored
19 my requests.

20 JUDGE NAKEA: Questions? Yes, for the record.

21 MR. JIM ON: Shelton Jim On for the record, please.

22 Mr. Dubin, you testified right before the hearing that you had
23 met with Mr. Andia, you had presented him the bill, and he
24 agreed. When did that take place? Before -- was it before or
25 after the check was deposited?

1 MR. DUBIN: The check was put in the trust account, he
2 was notified. He came in, we discussed it. He raised an
3 objection to the hours -- the billable hours, which -- it's Rule
4 1.15(e), does not even have the word billable -- the phrase
5 billable hours. And it says you can charge a reasonable fee,
6 including based upon the outcome.

7 So, I thought that was reasonable. And at first, he
8 objected to that, and then in the end he accepted it. And then
9 when we had our email correspondence after he says that he
10 disputed it. I reminded him -- and you have those emails -- that
11 he had agreed. He then said, yeah, I said okay. And this is
12 very important. He said -- he said it was okay because he was
13 afraid, he wouldn't get the -- he wouldn't get the money. The
14 check was waiting for him, if he didn't agree, but yet when he
15 got the check he waited, I think, it was ten days before he
16 cashed the check.

17 So, he comes up with, you know, every -- an answer for
18 everything, but the record doesn't bear that out. So, we met,
19 and he said he accepted it and in accordance with the Rule of
20 Professional Conduct, I'm obligated to take the money out of the
21 account immediately. So, that's the first time I took the money
22 out of the account after he acknowledged that he accepted -- he
23 accepted the distribution.

24 Then when he told me he didn't accept it, I said I'll
25 put the money back in, but at that time he seemed only to want to

1 go after me. He went to the police with a forgery charge.
2 Forgery requires intent. There's no intent here when you sign
3 your initials, and you put the money in the trust account, you
4 let them know it's in the trust account. So, the police didn't
5 do anything. It was not forgery by definition. And that was the
6 procedure with First Hawaiian Bank as well.

7 JUDGE NAKEA: Questions. Mr. Sing, for the record
8 please.

9 MR. SING: Richard Sing. I heard your questions
10 following or your answer following Mr. Black. My questions are
11 along the same lines. You suggested that you had been treated
12 unfairly by the process, and I'd like to -- you know, besides
13 that instance with the hearing's officer, what's the next biggest
14 thing --

15 MR. DUBIN: Well --

16 MR. SING: -- maybe you think were you treated
17 unfairly?

18 MR. DUBIN: -- when a lawyer is accused of wrongdoing,
19 they ought to talk to the lawyer because, you know, you're all
20 volunteers. So, this is taking your time. It has taken a lot of
21 my time. You would think that -- before the present regime came
22 in and which is no longer here, when there would be a complaint
23 filed, the investigator would call you up, and talk to you, and
24 get your side of the story. And then, you know, that would --
25 that would all factor in, but I had no opportunity to explain any

1 of this.

2 And the clearest example is that the Board was told
3 that I had misrepresented when I hid my -- supposedly, hid my
4 criminal problem with Judge Real and the IRS. I could have
5 easily explained all that, but if you look at the cases, the
6 cases say it has nothing to do with intent.

7 But the key is if you look at the original complaint
8 against me, that charge merely says I was found guilty of
9 misrepresentation in that case, which I wasn't. And although the
10 license was revoked due to financial, I had -- I had given up the
11 license two years before. I started a mortgage company, because
12 I wanted to do something which was fair to the homeowner. And,
13 in reality, the mortgage industry was a bunch of thieves and the
14 guy running it was stealing money and giving people bad loans.

15 So, I fired him, I took over the mortgage company for
16 about three months in order to get the loans cleared. I never
17 intended -- when I became, you know, the solicitor in charge, I
18 never intended to run the place. And I ended it. And two years
19 later, they decided to prosecute me or to take away the license.
20 The actual license had been voluntarily surrendered. Yet, here,
21 it makes them look like they took my license away. There was no
22 license at that time.

23 But, in answer to your question, a lawyer ought to have
24 the ability to talk to the ODC. Instead, I was told by Dane
25 Percy, if I pronounced the name correctly, she said that I would

1 have an opportunity to talk to her after the Board decided --
2 after the Members of the Board decided to prosecute me.

3 After that, it's been like a fast moving freight train.
4 I tried to get my facts in. And I don't think the ODC should be
5 a prosecutor, like a criminal prosecutor. They should want to
6 know the facts. And, yet, they twist everything.

7 MR. SING: Thank you, sir.

8 MS. SALWIN: To answer the previous question --

9 MR. JIM ON: Yes, I would like an answer. Shelton Jim
10 On. I would like an answer from Ms. Salwin about the previous
11 question about whether or not there was an acceptance.

12 MS. SALWIN: So, if you turn to page 4 of the
13 complaint, which was the Petitioner's Exhibit B-1, and that --
14 the whole complaint is, actually, very organized and well laid
15 out. It explains that on November 3rd, is when the Dubin Offices
16 cashed that settlement check. On the 6th, the client, Mr. Andia,
17 happened to send an email just asking about the status. He got
18 emails back from an associate and from Mr. Dubin. That's also
19 the same day that the emails devolved into accusations and Mr.
20 Dubin fired his client on the 6th.

21 Then on November 10th, Mr. Dubin provided an invoice,
22 which included \$8,000 to replenish the retainer even though the
23 client had been fired. Then on the 12th, the client went to Mr.
24 Dubin's office to work out this confusion about the invoices and
25 said that he left -- he said, okay, and left. He didn't want to

1 push it any further given the antagonistic emails and the fact
2 that there was this \$8,000 check that he hadn't been able to cash
3 yet and that as soon as the check cleared, which was one month
4 later, he then continued bringing up the dispute directly with
5 Mr. Dubin on December 13th.

6 JUDGE NAKEA: Mr. Black.

7 MR. BLACK: Brian Black. ODC, I would just like to
8 have your position regarding the conflicts with the hearing's
9 officer -- the alleged conflict of interest.

10 MS. SALWIN: My understanding is that there was no
11 conflict of interest, much like when a judge rules on a motion to
12 recuse himself. It was brought to the hearing officer's
13 attention. The case on Ho'ohiki has had no activity since 2012.
14 It sounds like, basically, the case went up for appeal, got
15 remanded, never got recalendared for anything. The hearing
16 officer, I believe, in his letter said that he tried to get it
17 recalendared, but basically the case just dropped after 2012,
18 because a party had died.

19 I think -- I don't -- and I don't know that much about
20 that exact case, but my general understanding, based on the
21 record, is that the fact that it's even open on Ho'ohiki is more
22 of a housekeeping oversight than a reflection of act of
23 litigation.

24 MR. BLACK: I would like to hear from Mr. Dubin.

25 JUDGE NAKEA: Mr. Black, would like a response, I

1 guess.

2 MR. DUBIN: Well, we had a settlement offer of about
3 10,000 from the insurance company. When we were pondering that
4 -- the client was survived by his father, who is in ill health.
5 And that was the situation. The Court wanted us to bring in a
6 real party-in-interest when it looked like the father was going
7 to die. So, the case was open. It was never closed. It's still
8 open. We were -- we had a settlement offer from Mr. Hughes.

9 MS. PRICE: Leta Price. Mr. Dubin, did you have
10 permission from your clients to endorse the settlement check?

11 MR. DUBIN: Yes and no. It was by contract. We have a
12 lien on settlement proceeds. We had a procedure with First
13 Hawaiian Bank that we could put the money in the trust account
14 because if a client put in the trust account -- excuse me. If
15 the client would put the money in his account, it would take ten
16 days to clear. It would clear faster with my arrangement with
17 First Hawaiian Bank.

18 So, I asked First Hawaiian Bank and First Hawaiian Bank
19 said if I initial it, they'll put it in the trust account, as
20 long as the money is not taken out unless there's agreement.

21 MS. PRICE: Is that the yes part of your answer?

22 MR. DUBIN: Pardon?

23 MS. PRICE: Is that the yes part of your answer? Your
24 explanation, is that the yes part of your answer.

25 MR. DUBIN: That's the yes part.

1 MS. PRICE: Okay. And what is the no?

2 MR. DUBIN: The no is that there was -- there was no
3 injury. There was no harm, except the harm to my law firm
4 because even the hearing examiner concluded that about 51 percent
5 or 51,000 was ours. He didn't ask that -- what the client wanted
6 to do, the client wanted to run away with all the money.

7 MS. PRICE: Okay. Thank you. So, my question was did
8 you have permission from your clients to endorse the check, yes
9 or no?

10 MR. DUBIN: Yes, because there was a settlement. The
11 settlement agreement provided consideration for my law firm. The
12 negotiations of the settlement agreement, we had provided our W9
13 form. Everybody was surprised, including opposing counsel, when
14 the check was not made out to both of us.

15 MS. PRICE: So, when you received the check, the client
16 said, yes, Mr. Dubin, you can endorse the check that's payable to
17 us? Did they say that?

18 MR. DUBIN: The money went nowhere. That's one of the
19 benefits of the client trust account.

20 JUDGE NAKEA: Mr. Dubin, this is --

21 MS. PRICE: Just answer my question.

22 JUDGE NAKEA: -- excuse me. I think the question is
23 clear. Did they verbally say yes or in writing say yes you can
24 cash this particular check.

25 MS. PRICE: Correct. That's my question. Did they

1 verbally tell you, yes, you can cash my check, or do you have
2 anything in writing from your client that says, yes, you can cash
3 my settlement check?

4 MR. DUBIN: He did ratify it. So, obviously, I put the
5 check for safekeeping in the client trust account.

6 MS. PRICE: Did they give -- that's okay. Thank you,
7 Mr. Dubin. You've answered my question.

8 JUDGE NAKEA: Questions?

9 MR. HOROVITZ: And I have one last question on the
10 check as well.

11 JUDGE NAKEA: For the record, please.

12 MR. HOROVITZ: Peter Horovitz. You signed their names
13 on the back of the check, and you initialed it. That was all
14 your writing?

15 MR. DUBIN: Correct.

16 MR. HOROVITZ: Thank you.

17 MR. DUBIN: And First Hawaiian Bank initialed the check
18 as well.

19 MR. HOROVITZ: I understand. Thank you.

20 JUDGE NAKEA: Thank you. Questions.

21 MS. SALWIN: If it's helpful, the hearing officer's
22 report at findings 94 and 95, state that: Neither Mr. Dubin nor
23 the associate even told the Andias they got the settlement check,
24 and he found that he did not have their consent to endorse the
25 settlement check. And then it cites to the transcript where that

1 testimony came out.

2 MR. DUBIN: Well, that's written by the ODC, as was the
3 entire findings of fact and conclusions of law.

4 JUDGE NAKA: Question. Yes.

5 MS. SCHEVTCHUK: Last question. Judy Schevtchuk. Mr.
6 Dubin, how much did your firm make at the end of the day in the
7 Andia matter?

8 MR. DUBIN: As approved by the hearing officer, 51,000
9 plus 16,500 for almost four years' worth of work and foreclosure
10 defense, plus the counterclaim, and the 132,000 from Bank of
11 America, which was the settlement of which the largest part went
12 to Andia.

13 MS. SCHEVTCHUK: Thank you.

14 JUDGE NAKA: Questions. Yes.

15 MS. PRICE: Leta Price. Mr. Dubin, do you have other
16 situations or other cases where you receive settlement checks
17 made payable to your clients where you have endorsed their names?
18 Have you done that in the past?

19 MR. DUBIN: There probably were some of those and the
20 clients in all cases were most grateful because it speeded up the
21 process. It's in the client trust account. Disputed funds are
22 supposed to be put in the client trust account and there's a rule
23 that says that disputed funds are to be put in the client trust
24 account. These were disputed funds.

25 MS. PRICE: In those cases, did you have the client's

1 specific permission to endorse those checks?

2 MR. DUBIN: I really don't recall.

3 MS. PRICE: But you have signed and endorsed your
4 client's signatures on other checks?

5 MR. DUBIN: This is something that went -- this is
6 something that went back probably 25 years ago or so, when First
7 Hawaiian Bank approved the process, when I would have a check
8 that for one reason or another it was only made out to the
9 client. It might have even been a payment to me from somebody to
10 the client -- only to the client and the client gave it to me in
11 payment of a fee, and I talked it to the bank, and the bank said
12 it's okay to put it in your trust account.

13 UNIDENTIFIED MALE: Judge Crandall held it for us.

14 Judge Crandall held it for us.

15 MR. DUBIN: Yeah, this went before Judge Crandall and
16 Judge Gary Chang, and they gave Andia a chance to object, and
17 they didn't even show up, even with an order to show cause. So,
18 they had an opportunity to litigate this, and they didn't do it.
19 I just want to point out, there was no intent, like a forgery.
20 There was no intent to take the money for my own personal use,
21 and it was only released when I had to -- when, in fact, Andia
22 agreed to the distribution.

23 MS. PRICE: Leta Price. If First Hawaiian Bank allows
24 you to initial, as you stated, right, you just testified that, or
25 you just stated that First Hawaiian Bank allows this procedure

1 where you can just initial; is that correct? You worked out some
2 sort of procedure or process with First Hawaiian Bank?

3 MR. DUBIN: They thought it was appropriate.

4 MS. PRICE: Okay. Did they tell you to sign your
5 client's name?

6 MR. DUBIN: Yes.

7 MS. PRICE: In addition to your initial?

8 MR. DUBIN: Right. And then they had to initial the
9 check. So, a check was presented -- when a check was presented,
10 they would initial the check, because the banks were under a lot
11 of regulations, and they're very careful these days. As I say,
12 honestly, there's no intent on my part to take the money. They
13 were safe in the client trust account. It was disputed funds. I
14 was supposed -- the check was supposed to be made out to me and
15 to the Andias. As a practical matter, I suppose I could have
16 rejected the check, created a stink, and that would have delayed
17 things. It seemed to me, the best thing to do was to put it in
18 my account as disputed funds, and then work it out with the
19 Andias, which I did. And they admitted they agreed. And when
20 they, over a month later, said they disagreed, I said I'll put
21 the money back in. I'll mediate it or anything you want to do,
22 but at that point, all they wanted to do was go after me.

23 MS. PRICE: Thank you.

24 MS. SALWIN: I just want to add that, of course, that
25 may or may not be true about whatever he had worked out with

1 First Hawaiian Bank. Obviously, we don't know, because no one
2 from First Hawaiian testified and there was no email, or
3 declaration, or any evidence other than Mr. Dubin's testimony.
4 But, certainly, if that's an acceptable procedure, it's one that
5 requires the client consent at the risk of my sounding like a
6 broken record here, but also looking at the check on B-6, I mean,
7 the signatures -- the initials are supposedly making it clear
8 that he's signing on someone else's behalf is a little tiny
9 circle right next to the word Andia.

10 JUDGE NAKEA: Questions. That's it. We're going into
11 deliberations, and we will notify you at a later date of our
12 decision. Thank you.

13 MR. DUBIN: Thank you very much.

14 (Proceedings concluded at 3:50 p.m.)

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CERTIFICATE

I, Jessica B. Cahill, court approved transcriber, do hereby certify that the foregoing is a complete, true, and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: January 9, 2019



Jessica B. Cahill
Jessica B. Cahill, CER/CET-708

EXHIBIT "H"

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IN THE SUPREME COURT OF THE STATE OF HAWAII

OFFICE OF DISCIPLINARY COUNSEL,
Petitioner,

vs.

GARY VICTOR DUBIN,
Respondent.

ORIGINAL PROCEEDING
(ODC Case Nos. 16-0-147, 16-0-151, 16-0-213, and 16-0-326)

ORDER

(By: Recktenwald, C.J., Nakayama, McKenna, and Wilson, JJ.,
and Intermediate Court of Appeals Associate Judge Leonard,
assigned by reason of vacancy)

Upon consideration of the October 14, 2020 motion,
filed by Respondent Gary Dubin, for a stay of the November 9,
2020 effective date of his disbarment in this jurisdiction, the
declaration and materials filed on October 18, 2020 by Respondent
Dubin, which we deem additional argument and accompanying
materials for the October 14, 2020 motion, the October 19, 2020
memorandum in opposition filed by the attorneys appearing on

behalf of the Office of Disciplinary Counsel, and the record in this matter,

IT IS HEREBY ORDERED that the motion is denied. The effective date of Respondent Dubin's disbarment remains November 9, 2020.

IT IS FURTHER ORDERED that the clerk of this court shall transmit certified copies of this order and Respondent Dubin's October 14, 2020 motion, at Docket 248, to the appropriate clerk at the United States District Court for the District of Hawai'i and the United States Court of Appeals for the Ninth Circuit.

DATED: Honolulu, Hawai'i, October 21, 2020.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Katherine G. Leonard

