

9

RECORD: Doc. 41, Exhibit 4

Office of Disciplinary Counsel  
201 Merchant Street, Suite 1600  
Honolulu, Hawaii 96813

As the enclosed summary disposition order shows, the Hawaii Intermediate Court of Appeals affirmed the revocation of the mortgage solicitor's license of Hawaii attorney Gary Victor Dubin (attorney number 3181), based on the fact that Gary Victor Dubin lied in a response to a question on his application form that asked whether he had been convicted of a crime during the prior 20 years. The enclosed document is public information that is available to any member of the public on the Hawaii Judiciary internet web site. Rule 8.4(c) of the Hawaii Rules of Professional Conduct states: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" As a member of the public, I suggest that you investigate this incident that is already a matter of public record.

/s/ Joe Smith  
March 3, 2016

OFFICE OF DISCIPLINARY COUNSEL  
**RECEIVED**

MAR - 7 2016

TIME: 1:30pm BY CLW

ODC v. Gary Victor Dubin  
Petitioner's Exhibit **A17**  
For Identification \_\_\_\_\_  
In Evidence \_\_\_\_\_

# 10

RECORD: DCCA records. Judicial Notice

## **DUBIN FINANCIAL, LLC**

**55 Merchant Street  
Suite 3100, Harbor Court  
Honolulu, Hawaii 96813**

**Telephone (808) 585-8880**

**Facsimile (808) 585-8881**

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May 15, 2009

### **HAND DELIVERED**

Professional Licensing Division  
Department of Commerce  
and Consumer Affairs  
335 Merchant Street, Room 301  
Honolulu, Hawaii 96813

**Re: Withdrawal of Mortgage Broker's License and of that of Designated Solicitor**

Ladies and Gentlemen:

Effective today, Friday, May 15, 2009, Dubin Financial, LLC is no longer in the business of making mortgage loans, and therefore effective today the licenses for Dubin Financial, LLC (MB-1317) and for me (MS-18741) are hereby withdrawn entirely, inactive status not maintained.

Dubin Financial, LLC, will remain a Hawaii limited liability company.

Since I fired the company's designated solicitor, Richard Lindberg, last summer, I have attempted to salvage the mortgage business for Dubin Financial, LLC, prior thereto having not been active in the company, but economic conditions have not been favorable, and I have been unable to devote the time needed, the company having closed only one loan in the past twelve months.

It is therefore not financially feasible to continue mortgage operations on such low volume, especially since lenders are now requesting mortgage brokers understandably to have expensive errors and omissions insurance policies.

Thank you for your immediate processing of this request. We are releasing our solicitors by separate letter, returning the certificates we are presently able to locate.

Very truly yours,

**/s/ Gary Victor Dubin**

Gary Victor Dubin

GVD/o/enclosures

# 11

RECORD: Doc.41, Exhibit 5 and Judicial Notice

**Kim v. Contractors License Bd.**

Supreme Court of Hawai'i

October 28, 1998, Decided ; October 28, 1998, Filed

NO. 21152

**Reporter**

88 Haw. 264 \*; 965 P.2d 806 \*\*; 1998 Haw. LEXIS 413 \*\*\*

HARRY KIM, JR., and H K BUILDERS,  
INC., Appellants-Appellants, v.  
CONTRACTORS LICENSE BOARD,  
Appellee-Appellee

**Prior History:** [\*\*\*1] APPEAL FROM  
THE FIRST CIRCUIT COURT. CIV.  
NO. 96-4004-09.

**Core Terms**

license, misrepresentation, applications,  
circuit court, answers, Hearings,  
provides, material misrepresentation,  
material fact, Contracts, questions,  
contractor's license, clearly erroneous,  
contractor, fraudulent, suspend, induce,  
intent to deceive, Personnel,  
ambiguous, brackets, renew, statutory  
construction, financial integrity,  
qualifications, revocation, suspension,  
recipient, licensee, revoke

**Case Summary**

**Procedural Posture**

Appellant contractors challenged orders  
from the First Circuit Court (Hawaii),  
which affirmed appellee administrative  
board's final decision suspending  
appellants' licenses for six months and  
fining them because of

misrepresentations made by appellants.

**Overview**

One appellant applied for a contractor's  
license several times. When appellant  
applied for a third time, the other  
appellant also applied for a license.  
Thereafter, a regulatory board  
petitioned for disciplinary action against  
appellants for violations of state law. A  
hearing officer recommended that  
appellants' licenses be suspended  
because of misrepresentations.  
Appellee adopted the hearings officer's  
findings of fact and conclusions of law.  
The trial court affirmed appellee's  
decision. On appeal, the court held a  
material misrepresentation, in violation  
of Haw. Rev. Stat. § 444-17(10), did not  
have to be either fraudulent or  
intentional. One appellant conceded  
that his answers to questions in the  
application were carelessly and  
negligently answered and submitted.  
The court concluded that appellants  
misrepresented material facts in their  
applications. Judgment was affirmed.

**Outcome**

The trial court's judgment that affirmed  
appellee's final decision suspending

appellants' licenses for six months and a secondary appeal.  
fining them was affirmed because  
evidence showed that appellants made  
misrepresentations of material fact.

**LexisNexis® Headnotes**

Administrative Law > Judicial  
Review > Standards of  
Review > General Overview

Governments > State & Territorial  
Governments > Licenses

**HN1[↓] State & Territorial  
Governments, Licenses**

See Haw. Rev. Stat. § 444-17.

**HN4[↓] Judicial Review, Standards  
of Review**

An agency's decision carries a  
presumption of validity and an appellant  
has the heavy burden of making a  
convincing showing that the decision is  
invalid because it is unjust and  
unreasonable in its consequences.

Governments > State & Territorial  
Governments > Licenses

**HN2[↓] State & Territorial  
Governments, Licenses**

See Haw. Rev. Stat. § 436B-19.

Administrative Law > Judicial  
Review > Standards of  
Review > General Overview

**HN5[↓] Judicial Review, Standards  
of Review**

See Haw. Rev. Stat. § 91-14(g).

Administrative Law > Judicial  
Review > Standards of  
Review > General Overview

Environmental Law > Administrative  
Proceedings & Litigation > Judicial  
Review

Administrative Law > Judicial  
Review > Standards of  
Review > Clearly Erroneous  
Standard of Review

**HN3[↓] Judicial Review, Standards  
of Review**

When reviewing a circuit court's review  
of an administrative agency's decision,  
the appellate court essentially conducts

**HN6[↓] Standards of Review, Clearly  
Erroneous Standard of Review**

Findings of fact will not be disturbed  
unless clearly erroneous. A finding of  
fact is clearly erroneous when, despite  
evidence to support the finding, the



appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

#### **HN7 [⚖] Standards of Review, De Novo Standard of Review**

The interpretation of a statute is a question of law reviewable de novo.

Governments > Legislation > Interpretation

#### **HN8 [⚖] Legislation, Interpretation**

The starting point in statutory construction is to determine the legislative intent from the language of the statute itself. When construing a statute, a court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And a court must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose. When there is doubt, doubtfulness of meaning, or

indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Governments > Legislation > Interpretation

#### **HN9 [⚖] Legislation, Interpretation**

In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Haw. Rev. Stat. § 1-15(10) (1993). Courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. A reviewing court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning. Haw. Rev. Stat. § 1-15(2) (1993). Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another. Haw. Rev. Stat. § 1-16 (1993).

Governments > Legislation > Interpretation

#### **HN10 [⚖] Legislation, Interpretation**

A statute is ambiguous if it is capable of

being understood by reasonably well-informed people in two or more different senses.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

Governments > State & Territorial Governments > Licenses

### **HN11** State & Territorial Governments, Licenses

A material misrepresentation, in violation of Haw. Rev. Stat. § 444-17(10), need not be either fraudulent or intentional.

Contracts Law > Defenses > Fraud & Misrepresentation > Material Misrepresentations

Governments > State & Territorial Governments > Licenses

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

### **HN12** Fraud & Misrepresentation, Material Misrepresentations

In order for the Contractors License Board to revoke or suspend a license under Haw. Rev. Stat. § 444-17(10), the misrepresentation must be material.

Contracts Law > Defenses > Fraud & Misrepresentation > Material Misrepresentations

### **HN13** Fraud & Misrepresentation, Material Misrepresentations

A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. the materiality of a misrepresentation is determined from the viewpoint of the maker, while the justification of reliance is determined from the viewpoint of the recipient. The requirement of materiality may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent. There may be personal considerations that the recipient regards as important even though they would not be expected to affect others in his situation, and if the maker is aware of this the misrepresentation may be material even though it would not be expected to induce a reasonable person to make the proposed contract.

Governments > State & Territorial Governments > Licenses

### **HN14** State & Territorial Governments, Licenses

See Haw. Rev. Stat. § 444-11.

Governments > State & Territorial  
Governments > Licenses

**HN15 [↓] State & Territorial  
Governments, Licenses**

See Haw. Rev. Stat. § 444-16.5.

**Counsel:** Emlyn H. Higa, for appellants-appellants.

Bobbi W.Y. Lum, Staff, Attorney,  
Regulated, Industries Complaints,  
Office, for appellee-appellee.

**Judges:** MOON, C.J., KLEIN,  
LEVINSON, NAKAYAMA, AND RAMIL,  
JJ.

**Opinion by:** RAMIL

**Opinion**

**[\*\*808] [266] OPINION OF THE  
COURT BY RAMIL, J.**

Appellants-appellants Harry Kim, Jr. and H K Builders, Inc. appeal the First Circuit Court's orders affirming Appellee-appellee Contractors License Board's final decision suspending Appellants' licenses for six months and fining them, jointly and severally, \$ 2,000.00. Appellants argue that the circuit court erred (1) in applying the "clearly erroneous standard of review to the issue of statutory construction" and

(2) concluding that Hawai'i Revised Statutes (HRS) § 444-17(10) (1993) <sup>1</sup> does not require intent.

**[\*\*2]** First, Appellants misread the circuit court's decision, rendering their first point on appeal meritless. Second, although the circuit court correctly concluded that HRS § 444-17(10) does not require intent, we affirm for different reasons.

**I. BACKGROUND**

On May 29, 1992, Harry Kim applied for a contractor's license from the Contractors License Board (Board). Although all of his answers were correct, Kim did not pass all parts of the examination. On December 30, 1992, Kim applied again. He simply photocopied the first application and changed only the answer to the question regarding previous applications. Kim, again, did not pass all parts of the examination.

On September 20, 1993, Kim applied a third time. H K Builders also applied for a license. Kim again photocopied his application. Kim, who also applied as the Responsible Managing Employee

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<sup>1</sup> **HN1** [↑] HRS § 444-17 provides in relevant part:

**Revocation, suspension, and renewal of licenses.** In addition to any other actions authorized by law, the board may revoke any license issued pursuant to this section, or suspend the right of the licensee to use a license, or refuse to renew a license for any cause authorized by law, including but not limited to the following:

....

(10) Misrepresentation of a material fact by an applicant in obtaining a license . . . .

for H K Builders, testified that he did not read the applications before signing or submitting them.

The application conspicuously provides at the top of the first page: "Each applicable question must be fully and truthfully answered. Any material misrepresentation is grounds for refusal or subsequent revocation of license." At its end, [\*\*\*3] immediately above the signature line, the application repeats the previous statement and further provides: "The undersigned hereby apply for license pursuant to the provisions of Chapter 444, Hawai'i Revised Statutes and *vouch for the truth and accuracy of all statements, answers and representations made in this application*, including all supplementary statements hereto attached." (Emphasis added.)

The Regulated Industries Division of the Department of Commerce and Consumer Affairs petitioned for disciplinary action against Kim and H K Builders on February 15, 1995, for violations of HRS Chapters 436B <sup>2</sup> and

444. On April 8, 1996, the hearings officer found and concluded in pertinent part:

1. Respondent Kim was licensed as a contractor by the Contractor's License Board ("Board") on January 25, 1994, License [\*267] [\*\*809] No. CT 18771. Respondent Kim holds a license in the "B" classification, and is the Responsible Managing Employee ("RME") of Respondent H K Builders.

2. H K Builders was licensed as a contractor by the Board on January 25, 1994, License CT 18770. Respondent H K Builders holds a license in the "B" classification.

3. From May 1990 to approximately September 1993, Respondent [\*\*\*4] Kim was the president and supervisor of Land Data & Research Corporation ("Land Data") License No. CT 15991.

4. On May 29, 1992, Respondent Kim submitted an Application for Contractor's License ("Application") for the purpose of becoming the RME of Land Data. . . .

....

8. On June 24, 1993, Land Data filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code with the U.S. Bankruptcy Court for the District of Hawaii. Respondent *Kim signed the Voluntary Petition* on behalf of Land Data. The Final Decree was filed on May 12, 1995.

9. On September 20, 1993,

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<sup>2</sup> HN2[↑] HRS § 436B-19 (1993) provides in relevant part:

**Grounds for refusal to renew, reinstate, or restore and for revocation, suspension, denial, or condition of licenses.** In addition to any other acts or conditions provided by law, the licensing authority may refuse to renew, reinstate, restore, or may deny, revoke, suspend, or condition in any manner, any license for any one or more of the following acts or conditions on the part of the licensee or the applicant thereof:

....

(5) Procuring a license through fraud, misrepresentation, or deceit . . . .

Respondent Kim submitted an Application for the purpose of becoming the RME for Respondent H K Builders.

10. On September 20, 1993, Respondent H K Builders submitted an Application. The Application was signed by Angie Kim, its President/Treasurer/Secretary, and Respondent Kim, as its RME.

11. In each of the Applications submitted on September 20, 1993, Respondents Kim and H K Builders answered "No," to the following questions:

7. Are there now any unpaid past due bills or claims for labor, materials, or services, outstanding and unsatisfied, as a result of the operations of any person listed under "Personnel [\*\*\*5] of Applicant" or any construction organization in which any such person was a member of the personnel?

9. Has any person listed under "Personnel of Applicant" or has any construction organization in which any such person was a member of the personnel ever been adjudicated as bankrupt; or is any person listed under "Personnel of Applicant" or any construction organization in which any such person is a member of the personnel, presently in the process of bankruptcy proceedings?

....

13. *In the event that an applicant for a contractor's license answers "Yes" to the questions set forth in paragraph 11 above, the Board will conduct a further review of the application. Based on the information supplied by the applicant, the Board may request that the applicant appear before the Board to provide additional information about the unpaid bills or bankruptcy proceedings. If the Board has concerns about the applicant's qualifications, the Board may issue a conditional license or even deny the issuance of a license.*

14. Respondent Kim testified that he "just signed" the second and third applications without reviewing them carefully, and that he had no intent to deceive the Board or [\*\*\*6] anyone else.

....

### III. CONCLUSIONS OF LAW

....

There is no dispute that Respondents' answers to questions 7 and 9 of their September 20, 1993 Applications were incorrect. Based on evidence presented, the *Hearings Officer finds that Respondents did not intend to deceive the Board. However, the Hearings Officer finds that Respondents were careless and negligent in not ensuring that all the answers were accurate. The issue to be determined is whether Respondent's conduct constituted*

misrepresentation, in violation of HRS §§ 436B-19(5) and 444-17(10). Petitioner argued that Respondents' false statements, without a showing of an intent to deceive, constituted misrepresentation. Respondents argued that an intent to deceive must be an element of misrepresentation.

In *In the Matter of the Real Estate Broker's License of Marilyn S. Knutson, dba Knutson & Associates*, REC-91-2 (Commission's Final Order July 24, 1992), the Real Estate Commission rejected prior orders which adopted the elements of [\*268] [\*\*810] fraud in defining misrepresentation (which included an intent to deceive) and instead, adopted the following definition of misrepresentation:

Any manifestation by [\*\*\*7] words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists[.]

*Id.* In the absence of current Board orders defining misrepresentation, the Hearings Officer recommends that the Board adopt the definition approved by the Real Estate

Commission in the *Knutson* case. Accordingly, the Hearings Officer concludes that Respondents violated HRS § 444-17(10). (Emphases added.)

[\*\*\*8] After the Board adopted the hearings officer's findings of fact (FOF) and conclusions of law (COL), the Board, on August 28, 1996, suspended the Appellants' licenses for six months and fined them, jointly and severally, \$ 2,000.00. Appellants appealed this decision on September 30, 1996. The circuit court affirmed the Board's order adopting the hearing officer's FOFs and COLs on June 25, 1997,<sup>3</sup> and affirmed the Board's \$ 2,000.00 fine on October 23, 1997. The Appellants timely appealed.

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<sup>3</sup> The circuit court stated the following in its June 25, 1997 order:

The Court considered the Record on Appeal, the written briefs, and the arguments of counsel, and upon good cause shown, the Court finds and concludes as follows:

1. The decision by the Hearings Officer in the administrative proceeding below is supported by reliable, probative and substantial evidence. Pursuant to the standard of review as set forth in HRS § 91-14(g), and Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 794 P.2d 1115 (1990) and Camara v. Aqsalud, 67 Haw. 212, 685 P.2d 794 (1984), the findings, conclusions and the decision of the Hearings Officer are not clearly erroneous.

2. The decision of the Hearings Officer is entitled to deference by the Court because it is well-supported by the evidentiary record. Medeiros v. Hawaii County Planning Commission, 8 Haw. App. 183, 797 P.2d 59 (1990).

3. The plain language of HRS § 444-17(10) does not require that an intent to deceive is an essential element of misrepresentation for the purpose of review and consideration of an application for professional license.



## [\*\*\*9] II. STANDARD OF REVIEW

**HN3[↑]** When reviewing a circuit court's review of an administrative agency's decision, the appellate court essentially conducts a secondary appeal. See Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 229, 953 P.2d 1315, 1327 (1998); Gray v. Administrative Dir. of the Court, 84 Haw. 138, 144, 931 P.2d 580, 586 (1997); University of Hawai'i Professional Assembly v. Tomasu, 79 Haw. 154, 157, 900 P.2d 161, 164 (1995); Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). This court must determine whether the circuit court was right or wrong in its decision, pursuant to the standards set forth in HRS § 91-14(g).<sup>4</sup> Our review is "qualified by the principle that **HN4[↑]** the [agency's] decision carries a presumption of

<sup>4</sup>The applicable standards of review for decisions issued by administrative agencies are supplied by HRS § 91-14(g) (1993), providing in relevant part:

**HN5[↑]** Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of this agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

validity and [the a]ppellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Tomasu, 79 Haw. at 157, 900 P.2d at 164 (citations omitted and brackets added); see also Hardin v. Akiba, 84 Haw. 305, 309-310, 933 P.2d 1339, 1343-344 (1997).

### [\*269] **HN6[↑]**

[\*\*811] [\*\*\*10] Findings of fact will not be disturbed unless clearly erroneous. See Furukawa v. Honolulu Zoological Society, 85 Haw. 7, 12, 936 P.2d 643, 648, reconsideration denied, 85 Haw. 196, 940 P.2d 403 (1997) (citation omitted). "A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." State v. Kane, 87 Haw. 71, 74, 951 P.2d 934, 937 (1998); see also Britt v. United States Auto. Ass'n, 86 Haw. 511, 516, 950 P.2d 695, 700 (1998). **HN7[↑]** The interpretation of a statute . . . is a question of law reviewable *de novo*." Gray, 84 Haw. at 144, 931 P.2d at 586 (some brackets added and some in original).

## III. DISCUSSION

### A. The Circuit Court Applied the Proper Standard when Reviewing HRS § 444-17(10).

Appellants argue that the circuit court applied the clearly erroneous standard

when reviewing statutory construction. Appellants correctly point out that the proper standard of review is *de novo*. Clearly, however, the circuit court did not give any deference to the hearings officer's interpretation [\*\*\*11] of the statute and, indeed, looked at the statute anew.

The circuit court stated that "the plain language of HRS § 444-17(10) does not require that an intent to deceive is an essential element of misrepresentation for the purpose of review and consideration of an application for professional license." By the very language of the circuit court's order, and its analysis of the statute, the circuit court did not apply the clearly erroneous standard. Appellants' first point on appeal is, therefore, meritless.

**B. The Circuit Court Rightly Concluded that HRS § 444-17(10) Does Not Require Intent.**

**1. Material misrepresentation does not require intent.**

Appellants second point of error on appeal presents an issue of statutory construction. Appellants argue that the term "misrepresentation," as included in HRS § 444-17(10), requires intent. Appellees, of course, argue that the statute does not. This case, therefore, requires an interpretation of the statute governing the revocation, suspension, and renewal of contractors' licenses.

"**HN8**[↑] The starting point in statutory construction is to determine the

legislative intent from the language of the statute itself." State v. Kaakimaka, [\*\*\*12] 84 Haw. 280, 289, 933 P.2d 617, 626, reconsideration denied 84 Haw. 496, 936 P.2d 191 (1997) (quoting State v. Ortiz, 74 Haw. 343, 351-52, 845 P.2d 547, 551-52 (citations omitted), reconsideration denied, 74 Haw. 650, 849 P.2d 81 (1993)).

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .  
**HN9**[↑]

In construing an ambiguous statute, "the meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(10) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. Gray, 84 Haw. at 148, 931 P.2d at 590 (quoting [\*\*\*13] State v. Toyomura, 80 Haw. 8, 18-19, 904 P.2d 893,



903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "the reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be [\*270] [\*\*812] called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Korean Buddhist Dae Won Sa Temple of Hawaii, 87 Haw. at 229-30, 953 P.2d at 1327-28 (quoting State v. Cullen, 86 Haw. 1, 8-9, 946 P.2d 955, 963-64 (1997) (some brackets in original and some added)).

**HN10** [¶] "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses." State v. Toyomura, 80 Haw. 8, 19, 904 P.2d 893, 904 (1995) (citing 2A N. Singer, Sutherland Statutory Construction, § 45.02, at 6 (5th ed. 1992)) (internal quotation marks omitted). "[A] rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or [\*\*\*14] impracticable[.]" State v. Jumila, 87 Haw. 1, 9, 950 P.2d 1201, 1209 (1998) (quoting Keliipuleole v. Wilson, 85 Haw. 217, 221-22, 941 P.2d 300, 304-05 (1997) (brackets, internal quotation marks, and citations omitted)). "The legislature is presumed not to intend an absurd result, and

legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." State v. Arceo, 84 Haw. 1, 19, 928 P.2d 843, 861 (1996) (citation and internal quotation marks omitted).

Turning to the instant case, the hearings officer, when interpreting the statute, framed the primary question as whether Appellants' conduct constituted misrepresentation. The more precise question, however, is whether Appellants' conduct constituted a material misrepresentation. HRS § 444-17(10) provides that a "misrepresentation of a material fact" shall warrant the Board to revoke, renew, or suspend a license. As the circuit court stated, the language of HRS § 444-17(10) is plain and unambiguous.

Although Chapter 444 does not define "material misrepresentation," the term's common understanding can be found in both *Black's Law Dictionary* 977 (6th ed. 1990) [\*\*\*15] and the *Restatement (Second) of Contracts* § 159 (1981) (Restatement of Contracts). *Black's* defines material misrepresentation as one that "relates to a matter upon which plaintiff could be expected to rely in determining to engage in the conduct in question. . . . In law of deceit, a statement or undertaking of sufficient substance and importance as to be the foundation of an action if such representation is false." (Emphases added.) According to the *Restatement*

of *Contracts* § 159, misrepresentation<sup>5</sup> is "an assertion that is not in accord with the facts." The commentary provides that

an assertion *need not be fraudulent to be a misrepresentation*. Thus a statement intended to be truthful may be a misrepresentation because of *ignorance or carelessness*, as when the word "not" is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences under this Chapter unless it is *material*.

*Restatement of Contracts* § 159, cmt. a (emphases added). The commentary to § 162 also explains that "although a fraudulent misrepresentation need not be material in order to entitle the recipient [\*\*\*16] to relief . . . , a non-fraudulent misrepresentation will not entitle him to relief unless it is material." *Restatement of Contracts* § 162, cmt. c.

In support of Appellants' implicit argument that HRS § 444-17(10) is ambiguous and that "misrepresentation" as contained therein requires intent, they rely upon Swan Creek

<sup>5</sup> Similarly, the *Restatement (Second) of Torts* § 552C (1977) addresses liability for innocent misrepresentation:

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, *even though it is not made fraudulently or negligently*.

(Emphasis added.)

Communications, Inc. v. Federal Communications Commission, 309 U.S. App. D.C. 125, 39 F.3d 1217 (D.C. Cir. 1994). The *Swan Creek* court succinctly pointed out that the Federal Communications [\*\*\*17] Commission (FCC) "defined misrepresentation as 'an intentional misrepresentation of fact intended to deceive.'" 39 F.3d at 1222 (citing Silver Star Communications-Albany, Inc., 3 F.C.C.R. 6342, 6349 (Rev. Bd. 1988)). *Swan Creek*, therefore, is distinguishable from the instant case. Not only does HRS § 444-17(10) not [\*271] [\*\*813] define "material misrepresentation" as intentional, but also the Board specifically concluded, in contrast to the FCC's conclusion, that material misrepresentation as contained within HRS § 444-17(10) does not require intent.

The Board contrastingly urges this court to look first to the surrounding language of HRS § 444-17. See Mathewson v. Aloha Airlines, Inc., 82 Haw. 57, 71, 919 P.2d 969, 983 (1995). For example, HRS §§ 444-17(1), (4), (5), (6), (12), (13), and (14) require a level of intent, such as dishonest, fraudulent, deceitful, or wilful<sup>6</sup> conduct. HRS § 444-17(10) is conspicuously silent in describing

<sup>6</sup> Although it is unnecessary to find any of the hearings officer's factual findings clearly erroneous based on our holding in this case, we are not convinced that Appellants were not culpable for the misrepresentation of material facts on their applications. Especially in light of the fact that Kim signed the bankruptcy petition just months earlier, Kim's second failure not to re-read the application and not to insure that his answers were correct amounted to, at the very least, a blatant and reckless disregard for the truth.

misrepresentation.

[\*\*\*18] Looking beyond the statute, the Board relies upon attorney discipline cases where misrepresentation is defined as "a broad term encompassing nondisclosure of a material fact; it need not be done with the intent to deceive or commit a fraud." *In re Conduct of Leonard*, 308 Ore. 560, 784 P.2d 95, 100 (Or. 1989) (citing *In re Conduct of Hiller*, 298 Ore. 526, 694 P.2d 540, 543-46 (Or. 1985)). More closely related to the instant case, the Virginia Court of Appeals stated, when assessing a statute prohibiting "any false statement or misrepresentation of fact" in a building permit:

We recognize that this deficiency [in the application] may have been the result of oversight on Occoquan's part, and that Occoquan may not have intended to misrepresent information in its applications. USBC § 109.8, however, contains no language requiring that the false statements be intentionally made, and we decline to judicially amend that provision to require such intent.

*Cooper v. Occoquan Land Dev. Corp.*, 8 Va. App. 1, 377 S.E.2d 631, 635 (Va. Ct. App. 1989), reversed on other grounds by, 239 Va. 363, 389 S.E.2d 464 (Va. 1990) (holding county failed to perfect its appeal in a timely manner).

Similarly, the plain language [\*\*\*19] of *HRS § 444-17(10)* provides for the Board's revocation or suspension of licenses upon a "misrepresentation of a

material fact by an applicant in obtaining a license[;]" it does not require an intentional or fraudulent misrepresentation. Instead, it prohibits any misrepresentation of a *material* fact. Moreover, the application unambiguously informs the applicant *twice* that any misrepresentation of a material fact will be grounds for the Board to revoke or suspend a license.

We hold that *HN11* [7] a material misrepresentation, in violation of *HRS § 444-17(10)*, need not be either fraudulent or intentional. We are simply not prepared to "amend" the statute in order to read intent into it. Naturally, the next question that we must answer is whether Appellants' conduct constituted a *material* misrepresentation.

2. *The application's questions regarding the previous debts and bankruptcy of the applicant are material.*

Appellants admitted to negligently and carelessly providing false information on their applications. Therefore, Appellants "misrepresented" their answers to the application's questions regarding previous debts and bankruptcy. However, *HN12* [7] in order for the Board to [\*\*\*20] revoke or suspend a license under *HRS § 444-17(10)*, the misrepresentation must be material.

Section 162(2) of the Restatement of Contracts provides that *HN13* [7] "[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce

the recipient to do so." *Restatement of Contracts* § 162(2). The Restatement further provides that

the materiality of a misrepresentation is determined from the viewpoint of the maker, while the justification of reliance is determined from the viewpoint of the recipient. The requirement of materiality [\*272] [\*\*814] may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent. There may be personal considerations that the recipient regards as important even though they would not be expected to affect others in his situation, and if the maker is aware of this the misrepresentation may be material even though it would not be expected to induce a reasonable [\*\*\*21] person to make the proposed contract.

*Restatement of Contracts* § 162, cmt. c.

Appellants urge the court to look to the legislative history of HRS Chapter 444. Both of the relevant Senate and House committees reported that "the general intent of this bill is to protect the general public against dishonest, fraudulent, unskillful or unqualified contractors. *To that end this Bill requires application for licensing and the licensing for contractors who meet qualifications*

*required by this Bill . . .*" Sen. Conf. Comm. Rep. No. 629, in 1957 Senate Journal, at 617; Hse. Stand. Comm. Rep. No. 618, in 1957 House Journal, at 813 (emphasis added).

Reading the legislative history and the statute in their entirety, the construct of "qualifications" is particularly salient. Specifically, HN14 [†] HRS § 444-11 (1993) provides in pertinent part:

No license hereunder shall be issued to:

....

(3) Any person who does not possess a history of honesty, truthfulness, *financial integrity*, and fair dealing; *provided that any person who during the six years priors to application has failed to satisfy an undisputed debt or a judgment relating to services or materials rendered in connection* [\*\*\*22] *with operations as a contractor shall be presumed not to possess a history of financial integrity ....*

(Emphases added.) Further, HN15 [†] HRS § 444-16.5 permits the Board to

require each licensee, applicant, individual or corporate, who is a specialty [or general] contractor to put up bond in the sum of not less than \$ 5,000 executed by the licensee or applicant as principal and by a surety company authorized to do business in the State as surety.

....



The board, in exercising its discretion shall take into consideration the licensee's or applicant's *financial condition* and experience in the field.

(Emphasis and brackets added.) The legislature has also provided for a recovery fund for the owners of private residences who have suffered losses when contracting with licensed contractors, providing up to \$ 12,500 per contract. See HRS § 444-26 (1993).

Accordingly, it appears that financial integrity and solvency are "qualifications" an applicant must have in order to obtain a license. At the very least, financial integrity is a factor in determining whether to award a license upon condition of a bond.

Here, questions seven and nine on the Board's application [\*\*\*23] address the financial integrity and solvency of the applicant, by asking about past debts and bankruptcy. The uncontroverted findings adopted by the Board provide that:

in the event that an applicant for a contractor's license answers "Yes" to ... questions [seven and nine], the Board will conduct a further review of the application. Based on the information supplied by the applicant, the Board may request that the applicant appear before the Board to provide additional information about the unpaid bills or bankruptcy proceedings. If the Board has concerns about the applicant's

qualifications, the Board may issue a conditional license or even deny the issuance of a license.

Therefore, as a matter of law, an applicant's answers to questions seven and nine on the instant Contractors License Board's application are material.

Kim conceded that his answers to questions seven and nine were incorrect, being carelessly and negligently answered and submitted.

[\*273] [\*\*815] Therefore, Appellants misrepresented material facts in their applications, in violation of HRS § 444-17(10). Accordingly, the circuit court rightly concluded that HRS § 444-17(10) does not require intent and correctly [\*\*\*24] affirmed the suspension of Appellants' licenses and the imposition of the \$ 2,000.00 fine.

#### IV. CONCLUSION

Based upon the foregoing, we affirm the circuit court's ruling.

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# 12

REDORD: Doc. 41. Exhibits 3 and 4 to ICA Opening Brief  
and Judicial Notice

DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2011 APR 21 A 10:20

HEARINGS OFFICE



OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the Mortgage Solicitor's  
License of

GARY V. DUBIN,

Respondent

MBS-2009-14-L

HEARINGS OFFICERS FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
RECOMMENDED ORDER; EXHIBIT  
"A"

In the Matter of the  
Mortgage Broker's License of

DUBIN FINANCIAL, LLC,

Respondent.

MBS -2010-31-L

Senior Hearings Officer:  
David H. Karlen

HEARINGS OFFICERS FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER; EXHIBIT "A"

I. INTRODUCTION

On November 9, 2010, in MBS 2009-14-L, the Department of Commerce and Consumer Affairs, through its Regulated Industries Complaints Office (hereafter "Petitioner"), filed a petition for disciplinary action against the mortgage solicitor's license of Respondent Gary V. Dubin (hereafter "Dubin").

I HEREBY CERTIFY THAT THE ATTACHED  
IS A TRUE AND CORRECT COPY OF THE  
ORIGINAL ON FILE IN THE DEPARTMENT  
OF COMMERCE & CONSUMER AFFAIRS.

A handwritten signature, likely of David H. Karlen, is written over a horizontal line.

On November 9, 2010, in MBS 2010-31-L, Petitioner filed a petition for disciplinary action against the mortgage broker's license of Respondent Dubin Financial, LLC (hereafter "Dubin Financial").

Notices of Hearing and Pre-Hearing Conference were transmitted to the parties and served on Respondent Dubin and Respondent Dubin Financial on January 20, 2011.

On March 29, 2011, a hearing was conducted by the undersigned Senior Hearings Officer. Petitioner was represented by John T. Hassler, Esq. Respondent Dubin and Respondent Dubin Financial were represented by Frederick J. Arensmeyer, Esq.

Petitioner's Exhibits 1 through 8 were admitted into evidence. Mr. Dubin was called as a witness by Petitioner. Respondents' Exhibits 1 through 5 and 19 through 125 were admitted into evidence. In addition, Respondents' Joint Pre-Hearing Conference Statement, filed with the Office of Administrative Hearings on February 25, 2011, was admitted by stipulation into evidence in lieu of Respondents calling Mr. Dubin for further personal testimony.

Having reviewed and considered the evidence and argument presented at the hearing, together with the entire record of this proceeding, the Senior Hearings Officer renders the following findings of fact, conclusions of law, and recommended order.

## II. FINDINGS OF FACT

1. Respondent Dubin was first licensed as a mortgage solicitor by the Mortgage Brokers and Solicitors Program (hereafter "Program") under License No. MS 18741 on July 28, 2008.

I HEREBY CERTIFY THAT THE ATTACHED  
IS A TRUE AND CORRECT COPY OF THE  
ORIGINAL ON FILE IN THE DEPARTMENT  
OF COMMERCE & CONSUMER AFFAIRS



2. Respondent Dubin's mortgage solicitor's license was not renewed and was forfeited on December 31, 2009.

3. Respondent Dubin Financial was first licensed as a mortgage broker by the Program under License No. MB 1317 on or about May 16, 2007.

4. Respondent Dubin Financial mortgage broker's license was not renewed and was forfeited on December 31, 2009.

5. On January 30, 1995, Respondent Dubin was convicted of three misdemeanor counts for failure to file federal income tax returns in the United States District Court for the District of Hawaii in USA v. Dubin, CR93-01434-MLR. These three convictions were not reversed on appeal. In addition, these three convictions have never been vacated, annulled or expunged.

6. On account of these three convictions, Respondent Dubin was incarcerated for approximately nineteen and one-half months in federal prison.

7. Respondent Dubin Financial is a domestic limited liability company organized under the laws of the State of Hawaii on or about December 4, 2006.

8. Respondent Dubin was one of two members of Dubin Financial beginning on or about December 4, 2006. The other member of Dubin Financial was Long Huy Vu (hereafter "Vu").

9. On or about April 30, 2007, Respondent Dubin Financial, through its member Vu, submitted a signed application for a mortgage broker's license (hereafter "mortgage broker's application") to the Mortgage Brokers and Solicitors Program.

10. Question No. 6 on said mortgage broker's application by Respondent Dubin Financial asked the following:

In the past 20 years, has any owner, corporation, officer of the corporation, major stockholder, partner, manager, or member of the entity ever been convicted of a crime in which the conviction has not been annulled or expunged?

Respondent Dubin Financial answered "NO" to this question.

11. Instructions on the mortgage broker's application submitted by Respondent Dubin Financial included the following:

Circle or underline answers. If response is "YES" to question(s) 3 through 8, provide details on a separate sheet and attach pertinent documentation.

Respondent Dubin Financial did not attach to its mortgage broker's application any separate sheet or pertinent documentation regarding Question No. 6 on that application.

12. At the time Dubin Financial submitted its mortgage broker's application, Respondent Dubin was an owner, officer of the corporation, major stockholder, partner, manager, or member of Respondent Dubin Financial.

13. The work of preparing the mortgage broker's application of Dubin Financial was done by Richard Lindberg ("Lindberg"), and the application was signed on behalf of Respondent Dubin Financial by Vu. Both Lindberg and Vu knew or should have known that Dubin had been incarcerated in prison because of a criminal conviction.

14. There was no evidence that Respondent Dubin took part in the preparation of the mortgage broker's application of Respondent Dubin Financial or in the submission of that application. In addition, there was no evidence that either Lindberg or Vu consulted Respondent Dubin regarding the contents of the application or that Respondent Dubin had any knowledge of the contents of that application.

15. On or about July 23, 2008, Respondent Dubin submitted his application for a mortgage solicitor's license (hereafter "mortgage solicitor's application"). This application was signed by Respondent Dubin.

16. Question No. 8 on Respondent Dubin's mortgage solicitor's application asked:

In the past 20 years, have you ever been convicted of a crime in which the conviction has not been annulled or expunged?

Respondent Dubin answered "NO" to this question.

17. The work of preparing the application of Respondent Dubin, including answering the questions on the mortgage solicitor's application was initially performed by someone other than Respondent Dubin.

18. Respondent Dubin personally reviewed the contents of his mortgage solicitor's application before he signed and submitted it. He changed an incorrect answer to Question No. 3 before signing and submitting the application. He did not change the previously prepared answer "NO" to Question No. 8 before signing and submitting the application.

19. The mortgage solicitor's application form submitted by Respondent Dubin contained the following instructions for all of the questions it asked, including Question No. 8: "Circle answers. Attach detailed statement(s) as needed." Respondent Dubin did not attach any detailed statement to his application.

20. The mortgage solicitor's application form submitted by Respondent Dubin also contained the following instruction in bold type:

If response is "yes" to Questions 6, 7, 8, 9, provide details on a separate sheet and attach documentation from the proper authorities.

Respondent Dubin did not submit any separate sheet or documentation with his application.

21. Respondent Dubin is currently an attorney licensed to practice law in the State of Hawaii and has been so licensed since 1982. He has also been licensed to practice law in the State of California since 1964.

22. Petitioner does not assert or argue that there was an intent to deceive the licensing authority by Respondent Dubin Financial in its answer to Question No. 6 on its mortgage broker's application or by Respondent Dubin in his answer to Question No. 8 on his mortgage solicitor's application.

22. HRS §454-3(d) provides that applications for a license under Chapter 454 shall be on the "forms and in the manner and accompanied by evidence in support of the application as prescribed by the commissioner." That statute further provides that the "commissioner shall require information with regard to the applicant as the commissioner may deem desirable, with due regard to the paramount interests of the public, as to the experience, integrity, and competency of the application as to financial transactions involving primary or subordinate mortgage financing." In addition, HRS §§ 436B-19(12) and 436B-19(14) allow the denial of a license under certain circumstances if the applicant has been convicted of a crime.

23. Question No. 6 on Respondent Dubin Financial's mortgage broker's application and Question No. 8 on Respondent Dubin's mortgage solicitor's on the application require information that the commissioner has determined to be necessary in order to further the appropriate licensing of mortgage brokers and mortgage solicitors pursuant to Chapter 454.

24. A "Yes" answer to those questions would not necessarily result in a denial of a license. However, it would provide information that could lead the commissioner to request further information and/or make further inquiries regarding the reported criminal convictions in order to determine if the convictions had a bearing on the fitness of the applicant for a license. A "No" answer to those questions, on the other hand, would not lead the commissioner to request further information and/or make further inquiries regarding the unreported criminal convictions, and such an answer thus precludes the commissioner from determining whether the criminal convictions have a bearing on the fitness of the applicant for a license.

25. A misrepresentation of the absence of criminal convictions would be likely to induce the commissioner to approve a license application whereas a correct statement about the existence of criminal convictions could detrimentally affect the applicant's license application.

### III. MOTIONS TO DISMISS

At the commencement of the hearing, Respondents brought an oral motion to dismiss the petitions against them on the basis of lack of jurisdiction, lack of standing, mootness, and failure to state a claim upon which relief could be granted. The motion was taken under advisement by the undersigned at that time. This motion was subsequently denied by an order dated April 14, 2011, a copy of which is attached hereto as Exhibit "A."

At the conclusion of Petitioner's case-in-chief, Respondents made an oral motion to dismiss on the basis that Petitioner had failed to prove intentional conduct and failed to prove

any material misrepresentations. This motion was taken under advisement by the undersigned at that time.

#### IV. CONCLUSIONS OF LAW

Petitioner has charged Respondents with violating the following provisions of the

HRS:

**§436B-19 Grounds for refusal to renew, reinstate or restore and for revocation, suspension, denial, or condition of licenses.** In addition to any other acts or conditions provided by law, the licensing authority may refuse to renew, reinstate or restore, or may deny, revoke, suspend, or condition in any manner, any license for any one or more of the following acts or conditions on the part of the licensee or the applicant thereof:

\*\*\*\*\*

(2) Engaging in false, fraudulent, or deceptive advertising, or making untruthful or improbable statements;

\*\*\*\*\*

(5) Procuring a license through fraud, misrepresentation, or deceit;

**§454-4 Suspension, revocation.**

\*\*\*\*\*

(b) The commissioner may revoke a license if the application for the license contains a material misstatement, the licensee demonstrates by a course of conduct negligence or incompetence in performing any act for which the licensee is required to be licensed under this chapter, or the licensee for a second time is responsible for misconduct which warrants suspension under subsection (a).

Respondent's three federal misdemeanor convictions were convictions of a crime under federal law.

Under Hawaii law, an offense for which a sentence of imprisonment is authorized constitutes a crime. HRS §701-107.

The word "crime" in Question No. 6 of the mortgage broker's application of Respondent Dubin Financial and the word "crime" in Question No. 8 of the mortgage solicitor's application of Respondent Dubin is not ambiguous. Respondent Dubin's three federal tax misdemeanor convictions are all clearly crimes within the meaning of the word "crime" in the aforesaid application questions.

The word "untruthful" in HRS §436B-19(2) means "not truthful." It refers to a statement that is false or inaccurate. Webster's Third New International Dictionary (3<sup>rd</sup> ed. 1967). Proof of an untruthful statement within the meaning of this statute does not require proof of intent to lie or intent to not tell the truth.

Respondent Dubin Financial's response to Question No 6 on its license application was untruthful within the terms of HRS §436B-19(2). Respondent Dubin's response to Question No. 8 on his license application was untruthful within the terms of HRS §436B-19(2).

Proof of a "misrepresentation" as set forth in HRS §436B-19(5) does not require proof of any intentional or fraudulent action. In Kim v. Contractor's License Board, 88 Haw. 264, 965 P.2d 806 (1998), the Hawaii Supreme Court was concerned with a disciplinary action with respect to a contractor's license because of any "misrepresentation of a material fact" in connection with an application for that license. See HRS §444-17 (10). The Court held that the term "misrepresentation" did not require any intentional or fraudulent

~~misrepresentation.~~ The term "misrepresentation" encompassed any misrepresentation even though it may be the result of carelessness or ignorance. 88 Haw. at 812-813, 965 P.2d at 270-271. The same interpretation should apply to the word "misrepresentation" in HRS §436B-19(5).

Respondent Dubin Financial's response to Question No 6 on its license application was a misrepresentation within the terms of HRS §436B-19(5). Respondent Dubin's response to Question No. 8 on his license application was a misrepresentation within the terms of HRS §436B-19(5).

Respondent Dubin Financial and Respondent Dubin procured their licenses through misrepresentation within the meaning of HRS §436B-19(5).

The word "misstatement" in HRS §454-4(b) refers to a statement that is false or incorrect. Webster's Third New International Dictionary (3<sup>rd</sup> ed. 1967). Proof of misstatement within the meaning of this statute does not require proof of intent to lie or intent to not tell the truth.

Respondent Dubin Financial's response to Question No 6 on its license application was a misstatement within the terms of HRS §454-4(b). Respondent Dubin's response to Question No. 8 on his license application was a misstatement within the terms of HRS §454-4(b).

In order to revoke a license pursuant to HRS §454-4(b), the license application must contain a misstatement that is "material." The misstatements on the license applications of Respondent Dubin Financial and Respondent Dubin were "material" because they would likely induce the commissioner to approve the license applications. See Kim v. Contractor's License Board, supra, 88 Haw. at 813-814, 965 P.2d at 271-272. Contrary to the position of



~~Respondents~~, Petitioner did not have to prove that the licenses would not have been issued if Respondents had correctly answered the questions on their license applications and revealed the existence of the criminal convictions.

Respondents' motion at the conclusion of Petitioner's case-in-chief is denied.

#### V. RECOMMENDED ORDER

For the reasons set forth above and herein, the Senior Hearings Officer recommends that the mortgage broker's license of Respondent Dubin Financial be revoked, that the mortgage solicitor's license of Respondent Dubin be revoked, and that Respondents be ordered to immediately submit all indicia of licensure as a mortgage broker and mortgage solicitor, respectively, in the State of Hawaii to the Executive Officer of the Program. The Senior Hearings Officer further recommends that fines be imposed on both Respondents.

Negligent and careless actions resulting in incorrect responses to questions on the license applications regarding criminal convictions are not "minor." Instead, they detrimentally affect the integrity of the application process. Both applications forms gave ample notice and opportunity to explain the circumstances surrounding Respondent Dubin's convictions and to argue, as Respondent Dubin now argues here at length, that those convictions were unjust and should have no effect on the license applications. Instead of taking that path, the Respondents' incorrect answers on the license applications deprived the licensing authority of the ability to timely obtain full information on the convictions and evaluate the circumstances of those convictions before the applications were approved. Full disclosure of the situation after a subsequent investigation has already begun is no substitute for submitting a correct application in the first place.

Respondent Dubin Financial presented neither an explanation nor any mitigating factors concerning its actions. Therefore, in addition to the recommended revocation of Respondent Dubin Financial's license, the Senior Hearings Officer recommends that Respondent Dubin Financial be fined \$1,000.00.

Respondent Dubin presented some excuses for his actions that can also be considered to be an assertion that there were mitigating factors:

(1) He caught an error on Questions No. 3 on his application and corrected it but might not have looked at the answers to other questions on the application. This is neither an excuse nor a mitigating factor.

(2) He was previously told by someone connected to the Liquor Commission that it was not interested in misdemeanors when he applied for a liquor license, so he thought either that he did not have to reveal the misdemeanor convictions on his mortgage solicitor's application or that his failure to reveal them was not important. The Liquor Commission is an agency of the City and County of Honolulu, and it is not an agency of the State of Hawaii. What the Liquor Commission might have thought is irrelevant to Respondent Dubin's mortgage solicitor application. As an attorney, Respondent Dubin should have known this. Further, it was not Respondent Dubin's prerogative to decide whether the convictions were or were not important. That was for the licensing authority to decide, a decision Respondent Dubin prevented by his answer on the mortgage solicitor's application form.

(3) Because of the history surrounding his convictions and the personal ordeal that he has gone through because of those convictions, Respondent Dubin did not consider himself to have committed any crime. However, this hearing was not the forum in which to relive the history surrounding the convictions. The extensive documentation presented in

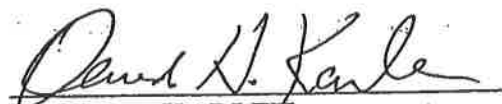
Respondents' exhibits could have been presented to the licensing authority at the time Respondent Dubin applied for his license. The mortgage solicitor application explicitly provided applicants with the opportunity to submit explanatory information, but Mr. Dubin failed to take advantage of that opportunity. He had previously participated in an explanatory process in connection with his liquor license application, but he provided no acceptable excuse as to why he did not go through any explanatory process with respect to the mortgage solicitor application.

Therefore, in addition to the recommended revocation of Respondent Dubin's mortgage solicitor's license, the Senior Hearings Officer recommends that a fine of \$1,000.00 be imposed on Respondent Dubin.

The Senior Hearings Officer further recommends that both Respondents be ordered to pay their respective fines within sixty (60) days of the Director's Final Order. Each Respondent shall send a certified check or money order for the amount of their respective fine, made payable to the DCCA Compliance Resolution Fund, to the Regulated Industries Complaints Office, 235 South Beretania Street, 9<sup>th</sup> Floor, Honolulu, Hawaii 96813 within the specified time. The Senior Hearings Officer also recommends that payment of the fine shall be a condition for licensing should Respondents apply for a license under HRS Chapter 454F or any other successor program to the now repealed HRS Chapter 454.

APR 21 2011

DATED: Honolulu, Hawai'i, \_\_\_\_\_

  
DAVID H. KARLEN  
Senior Hearings Officer  
Department of Commerce and  
Consumer Affairs

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AND CONSUMER AFFAIRS

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HEARINGS OFFICE

MORTGAGE BROKERS AND SOLICITORS PROGRAM  
OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the  
Mortgage Solicitor's License of  
  
GARY V. DUBIN,  
  
Respondent.

) MBS 2009-14-L

) DIRECTOR'S FINAL ORDER

In the Matter of the  
Mortgage Broker's License of  
  
DUBIN FINANCIAL, LLC,  
  
Respondent.

) MBS 2010-31-L

DIRECTOR'S FINAL ORDER

On April 21, 2011, the duly appointed Hearings Officer submitted his proposed Findings of Fact, Conclusions of Law and Recommended order in the above-entitled matter to the parties. The parties were given an opportunity to file written exceptions. On May 9, 2011, Respondents, by and through their attorney Frederick J. Arensmeyer, Esq. filed written exceptions to the Hearings Officer's recommended decision. On May 24, 2011, the Department of Commerce and Consumer Affairs ("Petitioner") by and through its attorney John T. Hassler, Esq. filed a statement in support of the Hearings Officer's recommended decision. Oral arguments were not requested.

Upon review of the entire record of this proceeding, including Respondents' exceptions and Petitioner's statement in support, the Director is of the opinion that the exceptions do not warrant a modification or reversal of the Hearings Officer's findings of ~~fact~~ or conclusions of law. Accordingly, the Director adopts the Hearings Officer's

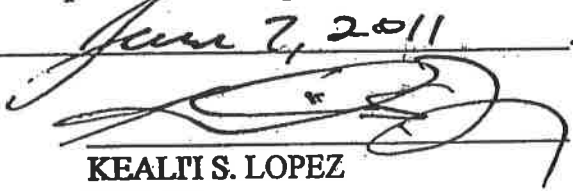
I HEREBY CERTIFY THAT THE ATTACHED  
IS A TRUE AND CORRECT COPY OF THE  
ORIGINAL ON FILE IN THE DEPARTMENT  
OF COMMERCE & CONSUMER AFFAIRS.

*Chel P.K. Pura*

recommended decision as the Director's Final Order and finds and concludes that Respondents violated Hawaii Revised Statutes ("HRS") §§ 436B-19(2), 436B-19(5) and 454-4(b).

For the violations found, the Director orders that Respondent Dubin Financial LLC's mortgage broker's license be revoked and that it pay a \$1,000.00 fine within sixty (60) days of the Director's Final Order. The Director further orders that Respondent Gary V. Dubin's mortgage solicitor's license be revoked and that he pay a \$1,000.00 fine within sixty (60) days of the Director's Final Order. Respondents are also ordered to return all indicia of licensure to the Executive Officer of the Mortgage Brokers and Solicitors Program. Indicia of licensure include wall certificates and pocket identification cards. Payment of the fine shall be a condition for licensing should Respondents apply for a license under HRS Chapter 454F or any other successor program to the now repealed HRS Chapter 454.

DATED: Honolulu, Hawaii,

  
KEALTI S. LOPEZ  
Director  
Department of Commerce  
and Consumer Affairs

# 13

Record: Doc. 41, 3/29/11 Transcript DCCA Hearing and  
Judicial Notice

MORTGAGE BROKERS AND SOLICITORS PROGRAM  
OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the Mortgage ) MBS-2009-14-L  
Solicitor's License of: )

GARY V. DUBIN, )

Respondent )

ORIGINAL

In the Matter of the Mortgage ) MBS-2010-31-L  
Solicitor's License of: )

DUBIN FINANCIAL, LLC, )

Respondent )

Transcript of audio-recorded hearing held on

March 29, 2011

Before Hearings Officer David H. Karlen

Transcribed by: Jessica R. Perry, CSR, RPR

1 HEARING OFFICER: Thank you. I asked you  
2 to go first because you have actually many more  
3 exhibits and more material and the petition is fairly  
4 straightforward, so it's a bit out of order and just  
5 to help clarify the issues in the defense side,  
6 because the Petitioner's side is pretty clear from the  
7 petition and you haven't raised any questions about  
8 it.

9 So now, Mr. Hassler, I'll go back to the  
10 traditional order.

11 MR. HASSLER: That's okay.

12 HEARING OFFICER: Maybe this is the reply  
13 opening statement, but I just did it a little bit  
14 differently in this case.

15 MR. HASSLER: No problem.

16 HEARING OFFICER: So now it's  
17 Petitioner's case and you can present it the way you  
18 feel appropriate.

19 MR. HASSLER: Thank you. The conduct  
20 described in the petition constituted what the state  
21 believes it will prove that the conduct undertaken by  
22 Mr. Dubin and whoever filled out the application on  
23 behalf of Dubin Financial, LLC constituted a violation  
24 of three discrete statutory provisions, 436B-19(2),  
25 which involves making improbably or untruthful



1 statements, 436B-19(5), procuring a license through  
2 misrepresentation, and 436 -- excuse me, 454-4(b),  
3 submitting an application for a license that includes  
4 a material misrepresentation.

5 I believe the first one, 436B-19(2) does  
6 not involve materiality. It simply says if you're  
7 making an untruthful statement, it's a violation. I  
8 believe that that -- I don't see how the Respondents  
9 can deny that they provided untruthful -- an  
10 untruthful statement. It may not have been  
11 intentionally untruthful, but it was untruthful.

12 The second provision, 436B-19(5),  
13 procuring a license through misrepresentation or  
14 misstatement, I believe, doesn't have an express  
15 requirement of materiality. And similarly, 454-4(b)  
16 involves submitting an application for a license that  
17 includes a material misrepresentation. And contrary  
18 to Respondents' argument, I believe that materiality  
19 is not determined based on whether or not a license  
20 would have been issued had the authority known about  
21 the information. It's whether or not that information  
22 would have made a difference in -- well, whether or  
23 not that information would have been relied upon by  
24 the authority as a criterion in determining whether  
25 someone was fit and capable of holding such a license.

1 upon a misrepresentation of a material fact by an  
2 applicant in obtaining a license. It does not require  
3 an intentional or fraudulent misrepresentation.

4 The Hawaii Supreme Court came to that  
5 conclusion based on its review of Chapter 444 and the  
6 fact that there was a complete absence of any explicit  
7 requirement of intentional state of mind on the part  
8 of the applicant in holding that they were --  
9 basically they were not going to read a requirement of  
10 intentional state of mind in a statute that just talks  
11 about material misrepresentation.

12 I believe, similarly, in this case there  
13 is no requirement of intent in that provision, at  
14 least in 454-4(b) and 436B-19(5). It simply says  
15 misrepresentation or material misrepresentation, and I  
16 don't believe that -- I believe that given the  
17 reasoning of the Hawaii Supreme Court in *Kim versus*  
18 *Contractors License Board*, it is the burden of the  
19 Respondent to show why they believe intent is a  
20 requirement in order to prove a violation of those  
21 provisions.

22 The Hawaii Supreme Court went on in *Kim*  
23 to note that the laws regulating contractors  
24 demonstrated a concern that contractors possess  
25 financial integrity and that Hawaii Revised Statute

1 this case. The issue in this case is whether he  
2 answer that had question on the application honestly.  
3 And I believe the evidence shows that he did not. So  
4 I believe that on the issue of whether it was a crime  
5 or not, it clearly was a crime.

6 In any case, if he had any question about  
7 that, it behooved him to seek clarification and not  
8 simply assume that his interpretation was correct. So  
9 we believe that the evidence presented shows  
10 violations of the three aforementioned statutes.

11 Now, assuming that -- now, on the issue  
12 of -- and this is an issue that the hearings officer  
13 is, by necessity, going to have to address. I believe  
14 that if Mr. Dubin intentionally misrepresented this  
15 information on the application, that's qualitatively a  
16 different scenario than if he simply recklessly or  
17 negligently answered the question the way he did.

18 Now, I don't really know if my personal  
19 opinion makes any difference. I don't think the  
20 evidence supports a finding that he intentionally  
21 tried to pull one over on the department by answering  
22 that question no, but it is rather perplexing and  
23 strange why he answered it the way he did, he says  
24 that one reason was he may have answered it the same  
25 way he answered the liquor commission application for

1 a license and that he thought that maybe there they  
2 were only asking for felonies, but the fact of the  
3 matter is he answered the question on the liquor  
4 commission application correctly, so it doesn't really  
5 make sense why he would do it incorrectly on the  
6 application for a mortgage solicitor's license.

7 I -- I don't -- it doesn't seem like  
8 Mr. Dubin's -- I mean I don't see the evidence that he  
9 was doing this intentionally, first, because he's a  
10 smart guy and he wouldn't think that the department  
11 was -- that -- that they wouldn't catch that, so I  
12 don't -- and, frankly, it was a matter of public  
13 record that he was convicted and I think anyone in the  
14 legal community probably knew that at the time that he  
15 applied for the license, and in any case it's a matter  
16 of public record and also a matter of some publicity,  
17 so I don't think Mr. Dubin would have done that with  
18 the hopes that the department wouldn't know.

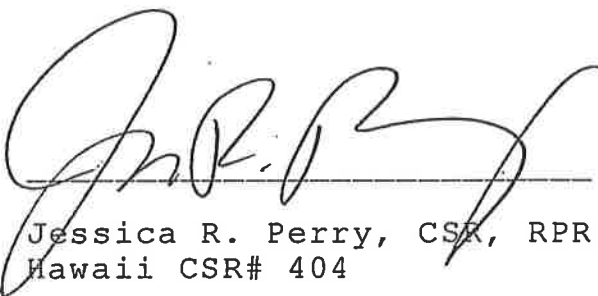
19 So -- but it is sort of mysterious why he  
20 answered it no. I think maybe there was some reason  
21 why he didn't really like having to answer these  
22 questions about his criminal record, so to speak, and  
23 out of some kind of -- I mean, I don't want to  
24 speculate about why he did this. I don't -- I'm not  
25 arguing that he did it intentionally. I'll leave it

## C E R T I F I C A T E

I, Jessica R. Perry, Certified Shorthand Reporter for the State of Hawaii, hereby certify that the audio-recorded proceedings were transcribed by me in machine shorthand and thereafter reduced to typewritten form; that the foregoing represents to the best of my ability, a true and correct transcript of the audio-recorded proceedings had in the foregoing matter.

I further certify that I am not attorney for any of the parties hereto, nor in any way concerned with the cause.

DATED this 15th day of May, 2011, in Honolulu, Hawaii.



Jessica R. Perry, CSR, RPR  
Hawaii CSR# 404

# 14

RECORD: Full page color ad in the Honolulu Star  
Bulletin (now the Advertiser), Doc. 41,  
Juducial Notice



## Real Trouble: a federal judge's behavior could move the line between judicial freedom and misconduct – By Terry Carter



Gary Dubin

Photo by Chris McDonough

Gary Dubin spent 19½ months in a California federal prison and returned to Hawaii in October 1996 to practice law. The state's Office of Disciplinary Counsel, in an extremely unusual decision concerning a matter of moral turpitude, determined that a finding of professional misconduct was "not warranted." Later, even the U.S. Internal Revenue Service reversed itself, saying he didn't owe the \$1.5 million that was the basis of his three misdemeanor convictions for failure to file tax returns.

In fact, the agency gave him nearly \$100,000, including interest, from payment in an earlier tax year. The IRS had found that he indeed had substantial business losses and

deductions for the years in question, and that they could be carried back.

He can't recoup the time behind bars; the same goes, thus far, for the \$131,000 the judge fined him. In 2006, the IRS looked into the possibility of crediting the fine to his next tax liability, but found it couldn't because the money went to the court.—

Dubin still seeks redress beyond his vindication from the bar and the IRS. He has filed complaint after complaint in venue after venue against the man who sentenced him—including a 2006 mandamus petition to the U.S. Supreme Court, where cert was denied.

Dubin had been Hawaii's example in "Project Esquire," a nationwide dragnet by the IRS to snare lawyers for failure to file tax returns. Dubin's case had been scheduled for a bench trial with a magistrate there.

But on short notice, it found its way to the docket of U.S. District Judge Manuel L. Real—a jurist known for a heavy hand with errant lawyers in the Central District of California—who was visiting on the bench from Los Angeles.

Dubin claims Real, now 84, railroaded him 14 years ago. It is a rare federal judge who hasn't attracted such complaints. But there have been many similar complaints about Real (the judge pronounces it "reel") over four decades by plaintiffs, defendants and lawyers alike, as well as appellate decisions occasionally attacking the judge's handling of cases. Three times this year, cases have been summarily removed from Real's docket.

In one decision by the San Francisco-based 9th U.S. Circuit Court of Appeals in March, *U.S. v. Hall*, the court remanded the case of two men convicted of securities fraud and ordered that it be given to a different judge.

The opinion noted "the catalog of inappropriate behavior by the trial court is long, so we merely summarize it here." One example: "Sua sponte interposing adverse evidentiary rulings with such frequency that the government was effectively relieved of its responsibility to make objections."

"That's what he did to me, among other things," says Dubin. In May he reworked his detailed, document-rich petition and filed it with the Judicial Conference of the United States, which recently expressed serious concerns about the judge's actions in scores of cases going back to the mid-1980s.

Since his conviction was upheld on appeal (though the 9th Circuit accepted on its face a crucial finding of fact that seems indisputably erroneous), Dubin knows he is seen by some—especially since serving as his own lawyer—as a kook wearing a tinfoil hat.

"I have to pursue it," the 69-year-old Dubin still says. "It was wrong."

### JUDICIAL REVIEW

The Judicial Conduct and Disability Committee of the U.S. Judicial Conference asked the 9th Circuit Judicial Council in January to review 89 of Real's cases in which the appeals court found problems. (The number reportedly has been cut some what. And the review would not include Dubin's conviction, because it was upheld on appeal.)

Judge Real did not respond to requests for an interview. He has granted them a number of times over the years with various publications. But he lately has hunkered down and lawyered up to battle investigations into whether he has a "pattern and practice" of not giving reasons for his decisions when required and whether it is "willful."

The story brings smiles to most who hear it. But if adopted generally, such an approach in the courtroom could free the guilty or send the innocent to prison.

Los Angeles criminal defense lawyer Stanley Greenberg believes one of his clients spent more than a year behind bars, fully innocent, before the case, *U.S. v. Mayans*, was remanded and later dropped.

On appeal, the 9th Circuit found Real made four reversible rulings concerning testimony and evidence. But the circuit was particularly rankled about what it viewed as the unconstitutional denial of an interpreter for the defendant, who had come from Cuba and struggled with English.

The remand opinion noted that "we find ourselves in the peculiar situation of being unable to review the district court's determination that appellant did not need an interpreter. The trial judge never conclusively made that determination, but rather urged appellant over and over to try testifying in English—to 'try it.'"

Otherwise, Real had said from the bench, the testimony "takes twice as long."

Although Greenberg, who was a federal prosecutor in L.A. in the early 1970s, is reluctant to criticize Real, others familiar with the case say he's still dismayed nearly 16 years later. At trial, instead of asking whether the prosecution had any more questions for a witness, an exasperated Greenberg is said to have asked if Real had anything further to add.

"He's a complex person and there is another side to him," Greenberg says now. "I've seen him do extraordinarily compassionate things from time to time, taking great interest in probationers and actually reading whatever I submitted—which you don't always expect with other judges."

"But given a choice, it's not a courtroom I'd ever choose. It's very unpleasant because he makes it very unpleasant."

Off the bench, Real is described by most who know him—including some who try to avoid his courtroom—as a caring gentleman and a charming, pleasant figure at social and professional gatherings.

Manny Real, as many call him, grew up in San Pedro, Calif., where he lives today. His parents emigrated from Spain and his father was a grocer.

For decades, he has insisted his law clerks live near enough to him that they can ride together for the 35- to 45-minute drives to and from the courthouse.

"It was our alone time with the judge," says Gregory Ellis, who clerked with the judge from 1999 to 2000. "We would listen to NPR and discuss the news, or we could talk to him about pending cases, what he thought of them, any motions we had heard; and if he had them, he'd ask us questions."

Real takes an interest in staff throughout the courthouse, Ellis says: "He tries to create a family atmosphere for everybody."

After finishing at Loyola Law School of Los Angeles in 1951, Real spent four years as an assistant U.S. attorney there and then 10 years in private practice with his brother in San Pedro.

In 1964, a close friend who was an influential Democrat recommended him to be U.S. attorney in Los Angeles. Just two years into the job, Real was appointed to the federal bench by President Lyndon Johnson.

about the judge. But Yagman's case drew so much scrutiny that other complaints were bound to gain traction.

When the Judicial Conference's conduct committee upheld a public reprimand of Real in the probationer's bankruptcy matter, it also issued another opinion concerning Real that was a bombshell: It asked the 9th Circuit council to review scores of cases for a willful pattern and practice of not giving reasons for decisions.

The matter had not previously been disclosed.

Real has found himself, in effect, on the receiving end of advice he is famous for giving lawyers in his court: "This isn't Burger King. We don't do it your way here."

Pittsburgh's Hellman says, "There has been evidence of problems with Judge Real for a long time, and the fact they are acting now in this way may be tied to the higher level of congressional interest and the raising of doubts whether the judiciary successfully policed misconduct in its ranks."

Yagman was just one on a long list of lawyers who Real has jailed or tried to jail over the years.

"Everybody has a horror story about a trial they had with Judge Real," says Maria Stratton, laughing because she thinks well of him. She was the public defender for the Central District of California from 1993 to 2006 and is now a judge in Los Angeles Superior Court.

Real once insisted she be in his courtroom at 9 a.m. rather than first appearing at the 9th Circuit, nearby. Protocol defers to the higher court.

"He threatened to hold me in contempt," says Stratton, who said she rushed and was only a few minutes late to Real's courtroom. "Then that night at a bar function, after I'd gotten an acquittal in his court and he seemed upset about it, he couldn't have been nicer."

### JEKYLL OR HYDE?

Others say they never see Dr. Jekyll, only Mr. Hyde, when dealing with Real.

In 1971, Santa Monica criminal defense lawyer Victor Sherman was ordered to jail for four days over a routine evidentiary question.

"But it was really because he found out from a marshal that I gave him the finger as he stepped from the bench in another case shortly before that," says Sherman, who had been exasperated by the judge's refusal to allow him to examine a witness on a particular point.

The 9th Circuit knocked down the jail term. "And I got him reversed on the evidentiary matter," Sherman says. "At one point, I got him reversed six times in a row."

"Lots of lawyers have these kinds of stories about Judge Real, but not many of them will talk about it publicly," he adds.

Indeed, a dozen Los Angeles lawyers contacted for this story, some of them well-known, were eager to talk about bitter experiences in Real's court, but not for the record. One who has spoken out in the past, and is known for his collection of negative information and court decisions about the judge, declined to go on the record now because he has a client awaiting sentencing before Real.

Real's defenders, and he has plenty (though some of them, too, declined either to be interviewed or to speak on the record), say his motives are not malevolent.

The president of the Los Angeles chapter of the Federal Bar Association, Gary Lincenberg, does speak out and disagrees with the mounting criticism of Real. The jurist has long been on the association's board and, while others occasionally miss meetings, he is always there, says Lincenberg. The judge is particularly interested in helping younger lawyers, he adds.

"Given the controversy he is in the middle of, I think that other judges might be bitter, but he stays very focused on the big picture," says Lincenberg. "It's fine if somebody wants to criticize his decisions—that's



Judge Real

Photo by Virginia Lee Hunter

Department of the Treasury  
Internal Revenue Service

Problem Resolution Office

Gary Victor Dubin 1040 1985 & 1986

Date 12-20-88

On Your Inquiry Card 12-2-88

Dear Sir,

We received your letter concerning Form 1040 for the tax periods ending December 31, 1985 and 1986. We have corrected our records to reflect the correct information.



wrong decisions— which is protected, and judicial misconduct, which isn't?" says Arthur Hellman, a professor at the University of Pittsburgh School of Law and a leading authority on federal judicial ethics.

"Does there come a point where a willful pattern and practice becomes misconduct?" Hellman continues. "This touches closely on the substance of judicial decision-making, which is off-limits from disciplinary proceedings. It could be a major test case of where that line is."

David Oswalt, a senior counsel in the Los Angeles office of Arnold & Porter, heads Real's team of lawyers, which draws from other firms as well as academia, but says he cannot comment given the nature of the proceedings.

After congressional rumblings in recent years about replacing the judiciary's self-regulation with an inspector general, the U.S. Judicial Conference is pushing harder for circuits to deal more forcefully with errant judges. Real became a prominent example in this effort. He was called to appear at a 2006 hearing of the U.S. House Judiciary Committee, which was considering his possible impeachment.

"If the Democrats had not taken back control of the Congress shortly after that, he might have been impeached," says Henry Weinstein, who for many years covered the 9th Circuit for the Los Angeles Times before recently leaving.

On the heels of such criticism, the U.S. Judicial Conference implemented in April the first-ever nationwide rules and procedures for all circuits' handling of judicial misconduct complaints. It's a step away from the decentralization that has given the circuits wide latitude in dealing with their own.

And one element in the new disciplinary procedures was clearly tailored to address the kinds of issues that have come up with respect to Real.

The changes resulted from recommendations by a committee headed by Supreme Court Justice Stephen G. Breyer. In 2004, partly responding to complaints from Congress, then-Chief Justice William H. Rehnquist created the committee to study whether the 1980 Judicial Conduct and Disability Act had been effective in dealing with complaints against judges.

The Breyer committee found that while for the most part the law was effective, there were significant shortcomings in high-profile matters. The report detailed several instances without naming names, but one could be clearly identified as Real. The report said that actions by the chief judge and circuit council in dealing with a complaint against him were "inconsistent with the law."

The rules declare that a "chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." Still, the complaint against Real was twice dismissed by Chief Judge Mary Schroeder based on her own findings—and upheld by the 9th Circuit council.

Likewise, the Judicial Conference's conduct committee found its hands tied when considering an appeal by the complainant: It could review only matters in which a chief judge named a special investigative committee, which Judge Schroeder had not done.

Under the new rules suggested by the Breyer committee, the conduct committee now can request that a circuit appoint one.

Compared to federal rules for judges, state canons for judicial ethics are more specific as to what judges can and cannot do. And it has been a long-held belief in the federal circuits that they could, and should, effectively police their own—often with a quiet, personal touch.

In the early 1990s, Charles Geyh, a professor at the Indiana University School of Law, interviewed more than 30 current and former chief judges in the circuits to study how they handled complaints against judges. He found that informal measures for dealing with abusive or troubled judges seemed to work.

"But as I've gotten farther down the road and also studied judicial discipline at the state level, I've begun to appreciate that even if federal judges take keeping a clean shop seriously, there still are two problems: The public doesn't know that they're doing so, so they suspect nothing is happening; and federal judges take pride in collegiality, making it very hard for them to deal with their own dirty laundry."

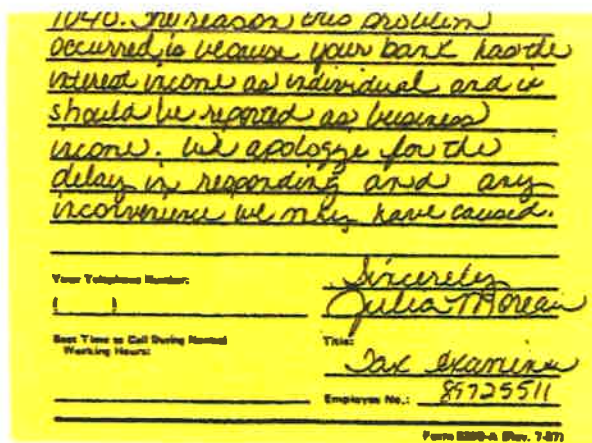
## REAL'S MODEL

Over the years, Manuel Real has told a story about a case he had as a young prosecutor in the early 1950s in front of a judge who became his judicial role model.

Real was prosecuting two men charged with sending pornography through the mail—nothing more than bare breasts; it was the early 1950s. One pleaded guilty before Judge Peirson Hall, who promptly acquitted the other in a bench trial. The first man then asked to withdraw his plea and go to trial with Hall. The judge agreed.

That piqued Real, who demanded a jury trial. The judge obliged, telling his courtroom clerk to call a jury for 10 p.m. Real said he couldn't prepare that soon.

Hall's reply: Case dismissed for lack of prosecution.



IRS letter informing Dubin he had no filing requirement, apologizing for "any inconvenience we may have caused," which he hung on the wall of his prison cell, not part of ABAJ article reprinted here.

Probably Real's most significant judicial decision came early in his career. In 1970, he ordered busing to desegregate the Pasadena public schools. It was the first such order outside the South. A Perris, Calif., elementary school was later named for him.

His most notorious decision was in 1985, after Hustler magazine publisher Larry Flynt appeared before him on a contempt charge from another judge in U.S. v. Flynt.

At sentencing, Flynt repeatedly taunted Real: "Motherf---, is that the best you can do?"

Not to be outdone, Real upped the ante each time: from six months to 12 months to 15 months. The scene was in the 1996 movie *The People vs. Larry Flynt*.

In real life, Real was reversed; the 9th Circuit ruled Real did not take into account Flynt's mental competency.

## PERSONAL TOUCH

With more normal defendants, Real is often known for his compassion, and—sentencing guidelines be damned—if he thinks a person is salvageable, he crafts unique remedies, often with thousands of hours of community service in lieu of doing time. He monitors each of these probationers personally.

In a case in 2000, he went too far to help one of his probationers. On his own motion, Real seized her personal bankruptcy case and, based on ex parte communication with her, stopped her landlord (former in-laws) from evicting her or even collecting rent.

It is the matter that found its way into the Breyer committee's report for having been mishandled by the 9th Circuit.

"Because he cares so much and gets personally involved in cases, I think that sometimes backfires on him," says Laurie Levenson, a former federal prosecutor in Los Angeles and now a professor at Loyola Law School there.

Real received a public reprimand in January for his handling of the bankruptcy matter, though it took five years after the initial complaint was filed in 2003. Interestingly, the complaint came from Stephen Yagman, a lawyer with no interest in the case—other than a grudge against Real.

It is a grudge Yagman has carried since 1984, when Real fined him \$250,000 for unprofessional conduct in a civil suit. Yagman was a prominent civil rights lawyer with a specialty in police misconduct.

Yagman said at the time that Real "is a tyrant who is a disgrace to democracy—he is a modern-day Torquemada. He suffers from boredom and indulges himself in infantile and harsh behavior to create situations to alleviate his boredom."

The 9th Circuit reversed the ruling and remanded the case for another judge. Real refused to let it go and instead sat on it—he was waiting for a ruling in another case in which he asked the appellate court to vacate an order taking that matter from him.

Real then did the unthinkable.

He filed personal petitions for certiorari with the Supreme Court, in 1986 and 1987, asking that the two cases be returned to him. Cert was denied on both *In re Real* and *Real v. Yagman*.

Earlier this year, Yagman went to prison, convicted of tax fraud. And there is no word on the source of a more recent and more significant complaint

sniffing out people who are unprepared and sniffing out witnesses not telling the truth. The accuracy of his BS detector was off the charts. Typically, if lawyers were prepared and knew the papers, they did OK in his courtroom, even if he didn't agree with them."

The celebrity lawyer Howard Weitzman says he always came prepared and still had difficulties peculiar to Real. In the 1970s he defended a lawyer in a criminal case who was convicted in a trial before Real. The case was remanded and tried again before Real. On the second remand, the case was heard before another judge. The lawyer was acquitted.

Weitzman has tried a half-dozen or more jury trials in front of Real, observed a number of others and found the judge's behavior problematic in all of them.

"I've seen him make it clear to jurors he doesn't agree with the direction of your questioning or doesn't believe your client," Weitzman says. "And I saw him take over questioning of witnesses if the side he prefers wasn't doing well. He continually demeans and puts down lawyers in front of juries in such a way that I think it averts a fair trial."

It was this sort of courtroom in which Dubin says he found himself in 1994.

His story in brief: Just before his trial, a psychiatrist was having Dubin admitted to a psychiatric hospital for depression over both the slow death of his son two years earlier from AIDS and the whirlwind of events that led to his case being moved suddenly to a bench trial by Real.

Dubin, a respected litigator and appellate attorney, had been scrambling, with the help of others, to get a top-notch lawyer—specifically, Richard Ben-Veniste of Washington, D.C.—to represent him. Real denied a continuance.

Real sent U.S. marshals to bring him to court for trial, just as he was being admitted to the hospital. Dubin was forced to defend himself for the next day and a half while sluggish with newly prescribed anti-depression and anti-anxiety medications, and without the letters and tax records he needed to make his case—including proof of extensive deductions and business losses, and a letter from the IRS saying he did not have to file yet for some of the years in question because he was already being audited before the dragnet.

When Dubin—who Real kept in lockup when he wasn't in court—complained that the evidence was at his home, the judge dispatched an acquaintance of Dubin's to obtain the files.

"The room at Dubin's home was wall-to-wall boxes of documents," says James Clement, the now-retired tax lawyer who ran the errand. "I came across some that looked right, but when I took them to the courthouse they turned out to be copies of the prosecution's exhibits."

"It is my understanding that everyone knew at the time that he didn't have the records he needed for trial, and that the judge just wouldn't be bothered with it," says Clement.

Despite this, in his finding of fact No. 11, Real said the defendant had his records "brought to him ... by a friend, also a lawyer, and those records were available to Dubin throughout the trial."

Real even tacked on four months extra under the sentencing guidelines he often openly eschews, for obstruction of justice—because Dubin was at the hospital instead of court.

Clement later wrote in a signed declaration: "I know of my own personal knowledge that finding of fact No. 11 is absolutely false."

At the appellate level, there is a presumption that findings of fact are just that—fact. And in the 9th Circuit, Real's findings went unchallenged.

"What is disturbing about [Dubin's complaint] is that quite a bit of evidence seems to have been available to the judiciary—long before the impeachment proceeding or misconduct proceedings that resulted in reprimands—that suggested the judge is really a danger on the bench," says Hellman, who has not studied the Dubin case.

The judiciary is now taking what many believe is a long-overdue, in-depth look at whether Real's decision-making runs so far afield of law and procedure that he is engaging in misconduct.

As Hellman says, the result could draw a new line of demarcation between independence and discipline—one of the touchiest areas for the judicial branch.

Considering the 9th Circuit council's call for a private reprimand for Judge Real, the Judicial Conference's conduct committee in January said, in effect, no.

"If the council finds willfulness, it should consider a more severe sanction, such as a public censure or reprimand and an order that no further cases be assigned to the judge for a particular period of time," the conduct committee wrote.

Short of impeachment, that would be the worst fate imaginable for a jurist who twice petitioned the Supreme Court personally in an effort to hold on to cases that had been reassigned.

Like his nemesis Dubin, Real is a man who fully believes he is right and has been wronged. And he presses every challenge as far as he can.



# 15

RECORD: Judicial Notice, found within Doc. 41 Exhibit 4  
exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

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Intermediate Court of Appeals  
CAAP-12-0000135  
03-JUN-2015  
08:10 AM

NO. CAAP-12-0000135

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

DUBIN FINANCIAL LLC, Appellant, v. MORTGAGE BROKERS AND  
SOLICITORS PROGRAM, OFFICE OF ADMINISTRATIVE HEARINGS, DEPARTMENT  
OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII, Appellee

and

GARY V. DUBIN, Appellant, v. MORTGAGE BROKERS AND SOLICITORS  
PROGRAM, OFFICE OF ADMINISTRATIVE HEARINGS, DEPARTMENT OF  
COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII, Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 11-1-1415 RAN (MBS-2010-31-L & MBS-2009-14-L))

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Appellants Dubin Financial, LLC, (Dubin Financial) and Gary V. Dubin (Dubin) (collectively, Appellants) appeal from the Order Affirming the Director's Final Order and Final Judgment entered by the Circuit Court of the First Circuit (Circuit Court)<sup>1</sup> on February 13, 2012. This appeal arises out of a recommended order by the Hearings Officer of the Department of Commerce and Consumer Affairs (DCCA), and entry of such order by the Director of DCCA, revoking Appellants' Mortgage Solicitor License and Mortgage Broker License and imposing a fine based on material misstatements on Dubin's license applications.

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<sup>1</sup> The Honorable Rhonda A. Nishimura presided.

On appeal, Appellants argue that the Circuit Court erred when it affirmed the order of the DCCA because (1) the DCCA cannot revoke a withdrawn license pursuant to Chapter 454 of the Hawaii Revised Statutes (HRS); (2) violation of HRS § 436B-19 does not permit imposition of a monetary fine; (3) the DCCA lacked standing to bring a consumer complaint pursuant to HRS § 92-17; (4) the DCCA erroneously relied upon unpublished decisions; and (5) there is not substantial evidence in the record to support the conclusion that Dubin's alleged misrepresentations were intentional or material.

Based on a careful review of the issues raised and the arguments made by the parties, the applicable authority, and the record, we resolve Appellants' points on appeal as follows and affirm.

1. The expiration of Appellants' licenses was not a bar to disciplinary action. Appellants argue that the DCCA erred when it revoked their respective licenses because a previously withdrawn license cannot be revoked. By a "withdrawn" license, Appellants apparently mean "forfeiture, nonrenewal, surrender, or voluntary relinquishment" thereof. The DCCA has jurisdiction over a license regardless of withdrawal or forfeiture and has the authority to revoke "withdrawn" licenses. HRS § 436B-22 (2013)<sup>2</sup>

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<sup>2</sup> Chapter 436B contains the Uniform Professional and Vocational Licensing Act. HRS § 436B-22 provides that

The forfeiture, nonrenewal, surrender, or voluntary relinquishment of a license by a licensee shall not bar jurisdiction by the licensing authority to proceed with any investigation, action, or proceeding to revoke, suspend, condition, or limit the licensee's license or fine the licensee.

"'Licensing authority' or 'authority' means the director," and the "'Director' means the director of commerce and consumer affairs." HRS § 436B-2 (2013). Chapter 436B "shall only be applicable to the professions and vocations required by law to be regulated by the licensing authority." HRS § 436B-3(a) (2013). Chapter 454 (1993) required licensing of mortgage brokers and mortgage solicitors by the director of commerce and consumer affairs. See HRS § 454-3 (1993 and Supp. 2009), "Licensing, requirements, application." and § 454-1 (1993), "Definitions." (defining the "commissioner" as the director of commerce and consumer affairs.)

and § 454-5(a) (1993).<sup>3</sup>

2. The DCCA has authority to fine a licensee. HRS §§ 436B-22, 436B-18 (2013)<sup>4</sup>.

3. The DCCA has standing to investigate a licensee upon its own motion. HRS § 92-17 provides that, "upon receipt of an investigation report generated by the board on its own motion," the DCCA may sanction a licensee.

4. The Hearings Officer did not err when he considered unpublished opinions. Appellants do not indicate

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<sup>3</sup> The Petitions in this case were filed on November 9, 2010. Chapter 454 was repealed and replaced by Chapter 454F, effective January 1, 2011. Act 84, §§ 29 and 38, 2010 Haw. Sess. Laws 156, 158. However, the repeal of Chapter 454 "does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before [January 1, 2011]. Act 84, § 35 *Id.*, at 158.

HRS § 454-5(a) provided that "[i]f the commissioner [DCCA Director, HRS § 454-1] has reason to believe that a licensee or any person has violated this chapter, or rules adopted pursuant thereto, or that any license issued under the chapter may be subject to suspension or revocation," the DCCA could investigate and take legal action. HRS § 454-5(a) (emphasis added).

HRS § 436B-18 provides that

In addition to the licensing sanctions or remedies provided by section 92-17 against any licensee, the licensing authority may also impose conditions or limitations upon a licensee's license after a hearing conducted in accordance with chapter 91. The violation of any condition or limitation on a licensee's license may be cause to impose additional sanctions against the licensee. Unless otherwise provided by law, any fine imposed by the licensing authority after a hearing in accordance with chapter 91 shall be no less than \$100 for each violation, and each day's violation may be deemed a separate violation.

(Emphasis added.)

HRS § 92-17 (2012) provides that

(b) Upon receipt of a written complaint or upon receipt of an investigation report generated by the board on its own motion or upon staff investigation which establishes an alleged violation of any provision of law or rule, the board or its authorized representative shall notify the licensee or person regulated of the charge against the licensee or person and conduct a hearing in conformity with chapter 91 if the matter cannot be settled informally. If the board finds that the charge constitutes a violation, the board may order one or more of the following remedies as appropriate relief: . . . (5) Imposition of a fine[.]

(Emphasis added.)

where in the record on appeal such an allegedly improper reliance occurred. Appellants thus failed to meet their burden of demonstrating "error by reference to matters in the record." State v. Hoang, 93 Hawai'i 333, 334, 3 P.3d 499, 500 (2000)). "[W]e will not presume error from a silent record." Id. at 336, 3 P.3d at 502. Moreover, Appellants present no supporting authority for their assertion that a Hearings Officer may not rely on prior agency decisions.

Regardless, we can find no clear prohibition, and the Hawai'i Supreme Court has noted administrative decisions in the past. See Kim v. Contractors License Bd., 88 Hawai'i 264, 268, 965 P.2d 806, 810 (1998) (referencing a real estate broker's disciplinary hearing) and Gov't Emp. Ins. Co. v. Dang, 89 Hawai'i 8, 15, 967 P.2d 1066, 1073 (1998) (applying an earlier agency decision to that case).

5. There was substantial evidence to support the Hearing Officer's determination that violations occurred. Appellants argue that "the record and hearing transcript contain insufficient evidence to establish the requisite intent and/or materiality of the alleged violations." Appellants apparently do not dispute that misrepresentations regarding Dubin's prior conviction occurred, but rather whether such misrepresentations were immaterial.

Pursuant to HRS § 91-14(g)(5), administrative findings of fact are reviewed under the clearly erroneous standard, which requires [the appellate] court to sustain its findings "unless the court is left with a firm and definite conviction that a mistake has been made." Bumanglag v. Oahu Sugar Co., Ltd., 78 Hawai'i 275, 279, 892 P.2d 468, 472 (1995) (block format and citation omitted). Administrative conclusions of law, however, are reviewed under the de novo standard inasmuch as they are "not binding on an appellate court." Id. (block format and citation omitted). "Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). "To be granted deference, however, the agency's decision must be consistent with the legislative purpose." Camara v. Aqsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984).

Peroutka v. Cronin, 117 Hawai'i 323, 326, 179 P.3d 1050, 1053 (2008).

The Hearings Officer made the following Findings of Fact:

23. Question No. 6 on Respondent Dubin Financial's mortgage broker's application and Question No. 8 on Respondent Dubin's mortgage solicitor's [] application require information that the commissioner has determined to be necessary in order to further the appropriate licensing of mortgage brokers and mortgage solicitors pursuant to Chapter 454.

24. A "Yes" answer to those questions would not necessarily result in a denial of a license. However, it would provide information that could lead the commissioner to request further information and/or make further inquiries regarding the reported criminal convictions in order to determine if the convictions had a bearing on the fitness of the applicant for a license. A "No" answer to those questions, on the other hand, would not lead the commissioner to request further information and/or make further inquiries regarding the unreported criminal convictions, and such an answer thus precludes the commissioner from determining whether the criminal convictions have a bearing on the fitness of the applicant for a license.

25. A misrepresentation of the absence of criminal convictions would be likely to induce the commissioner to approve a license application whereas a correct statement about the existence of criminal convictions could detrimentally affect the applicant's license application.

These unchallenged findings by the Hearings Officer indicate that the type of misrepresentations in question were material to the DCCA's application procedure. Appellants did not challenge these findings, and therefore they are binding on appeal. Pila'a 400. LLC v. Bd. of Land & Natural Res., 132 Hawai'i 247, 268, 320 P.3d 912, 933 (2014).

To the extent the Hearings Officer's findings represent mixed questions of law and fact, given the deference we must give such agency determinations, Peroutka, id., he was not wrong.

In Hawai'i, an incorrect answer on a license application "is material if it would be likely to induce a reasonable person to manifest his assent, or the maker knows that it would be likely to induce the recipient to do so." Kim, 88 Hawai'i at 271, 965 P.2d at 813 (citing Restatement of Contracts § 162(2)). Furthermore,

[t]he materiality of a misrepresentation is determined from the viewpoint of the maker, while the justification of reliance is determined from the viewpoint of the recipient. The requirement of materiality may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent. There may be personal considerations that the recipient regards as important even though they would not be expected to affect others in his situation, and if the maker is aware of this the misrepresentation may be material even though it would not be expected to induce a reasonable person to make the proposed contract.

Id., 88 Hawai'i at 271-72, 965 P.2d at 813-14 (quoting Restatement of Contracts § 162, cmt. c). In Kim, the Supreme Court of Hawai'i held that contractors made material misrepresentations on their license applications when they negligently and carelessly provided false information in response to questions regarding previous debts and bankruptcy because HRS Chapter 444, the relevant licensing chapter, implicitly required applicants to have a sound financial history. Id., 88 Hawai'i at 272-73, 965 P.2d at 814-15.

Similarly, in the instant case HRS Chapter 454 was concerned with the financial integrity of applicants and licensees. For example, the DCCA "require[d] information with regard to the applicant as the commissioner [DCCA] may deem desirable, with due regard to the paramount interests of the public, as to the experience, financial integrity, and competency of the applicant as to the financial transactions involving primary or subordinate mortgage financing." HRS § 454-3(d). Further, mortgage brokers were required to post \$15,000 bond to assure compliance with licensing statutes. HRS § 454-3(c). Finally, "[f]ailure to maintain a record or history of competency, trustworthiness, fair dealing, and financial integrity" were grounds for revocation or denial of all licensees or applicants. HRS § 436B-19(8) (2013).

Taken together, financial integrity is a factor in determining whether to award a license and where license application questions are relevant to a statutorily-mandated



NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

inquiry, those questions are necessarily material. See Kim, 88 Hawai'i at 272, 965 P.2d at 814 (holding that application questions addressing the financial integrity and solvency of the applicant, by asking about past debts and bankruptcy, were material). The Appellants' "NO" answers were material because failing to disclose three convictions for failing to file federal tax returns could have induced the Program not to request further information or make further inquiries regarding the unreported criminal convictions, thus interfering with the Program's ability to determine whether Appellants had "maintain[ed] a record or history of competency, trustworthiness, fair dealing and financial integrity." In short, the misrepresentations undermined the Program's applicant evaluation process and therefore warranted revocations and imposition of fines by the DCCA.

Based on the foregoing, the February 13, 2012 Order Affirming the Director's Final Order and Final Judgment entered by the Circuit Court of the First Circuit are affirmed.


DATED: Honolulu, Hawai'i, June 3, 2015.

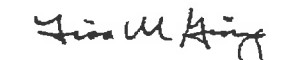
On the briefs:

Frederick J. Arensmeyer and  
John D. Waihee, III,  
for Appellants.

John T. Hassler,  
Regulated Industries  
Complaints Office, Department  
of Commerce and Consumer  
Affairs,  
for Appellees.

  
Presiding Judge

  
Associate Judge

  
Associate Judge

# 16

RECORD: Doc.41. attached to the ICA Opening Brief, and  
11/14/17 Transcript

DECLARATION OF LONG H. VU

I, LONG H. VU, DECLARE:

1. I am a Member of the Hawaii Bar. I reside in the State of Florida, visiting in Honolulu for the Holidays. I was employed in 2007-2008 as Mr. Dubin's assistant. I make the within statements of my own personal firsthand knowledge.

2. As Mr. Dubin's assistant, I regularly prepared numerous administrative papers for him and his companies, including forms and claims for workers' comp, temporary disability insurance, payroll taxes, hazard insurance, unemployment insurance, health insurance, general excise tax, personnel absences and vacation requests, equipment requisitions, DCCA applications, repair orders, etc.

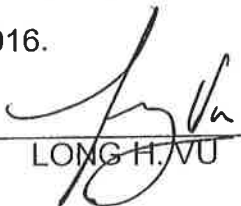
3. I also remember preparing mortgage broker/solicitor applications for Mr. Dubin for his company, Dubin Financial, located in the Suite adjacent to our law offices, after he discharged his company's mortgage broker for stealing.

4. In those applications, I checked the "no conviction" box, knowing the IRS had exonerated Mr. Dubin, apologizing to him, the IRS admitting owing him \$100,000 for the years for which he was tried for not filing, while having no filing requirement, and who was also exonerated by the Office of Disciplinary Counsel.

5. My practice was to meet with Mr. Dubin, routinely to put the various administrative forms before him on his desk, offer him a pen, and have him sign.

6. Given the volume of administrative papers that had to be filled out and signed by Mr. Dubin almost daily, and his professional workload, he relied upon my entries on the various forms for their accuracy. Any mistakes were my fault.

I declare under penalty of law that the foregoing is true and correct.  
Executed at Honolulu, Hawaii, on December 27, 2016.

  
\_\_\_\_\_  
LONG H. VU

Before the  
DISCIPLINARY BOARD  
of the  
HAWAI'I SUPREME COURT

OFFICE OF DISCIPLINARY ) ODC No. 16-0-213

COUNSEL, ) 16-0-151

Petitioner, ) 16-0-147

vs. ) **DBF45** 16-0-326

GARY V. DUBIN, ) DISCIPLINARY BOARD

OF THE

HAWAI SUPREME COURT

Respondent. )

**RECEIVED**

28 November 2017

DAY MONTH YEAR

TIME: 2:50 pm BY YH

H E A R I N G (Volume II),

Taken at the Office of Disciplinary Counsel, 201  
Merchant Street, Suite 1600, Honolulu, Hawaii  
96813, commencing at 9:05 a.m., on November 14,  
2017.

BEFORE: HEARING OFFICER ROY HUGHES, ESQ.

Reported By: SUE M. FLINT, RPR, CSR 274

Notary Public, State of Hawaii

1 questions that should be done under oath.

2 HEARING OFFICER HUGHES: Only when we get  
3 to the substance.

4 MR. WAIHEE: So Long, anyway, we are in  
5 this hearing. At this point, the first thing is  
6 that you need to be sworn in, so we are going to do  
7 that now.

8 HEARING OFFICER HUGHES: Mr. Vu, I'm Roy  
9 Hughes. I'm the hearings officer. I'm going to  
10 have the court reporter swear you in over the phone.

11  
12 LONG VU,  
13 called as a witness, being first duly sworn to tell  
14 the truth, the whole truth and nothing but the  
15 truth, was examined and deposed as follows:

16  
17 EXAMINATION

18 BY MR. WAIHEE:

19 Q. Would you state your name for the record?

20 A. Long Huy Vu.

21 Q. Are you a member of the Hawaii Bar?

22 A. Yes.

23 Q. Do you know -- where do you reside at the  
24 moment?

25 A. West Palm Beach, Florida.

1 Q. Do you recall making a declaration for --  
2 in a case regarding the filing of an application for  
3 a license to run a mortgage company?

4 A. Yes, I do.

5 Q. Do you happen to have that -- and the  
6 declaration was dated December 27, 2016; is that --

7 A. Yes. I have it in front of me.

8 Q. So you have a copy in front of you?

9 A. Yes.

10 Q. Mr. Vu, I want to go through this  
11 declaration and get you to -- get you to lay the  
12 foundation for it.

13 Were you employed as an assistant to  
14 Mr. Dubin in the year 2007 to 2018 [sic]?

15 A. Yes, I was.

16 Q. And are the statements in this declaration  
17 made from your own personal knowledge?

18 A. Yes, they are.

19 Q. As Mr. Dubin's assistant, what were your  
20 duties?

21 A. As his assistant, my duties were to fill  
22 out forms, such as company forms, workers' comp,  
23 temporary disability insurance, health insurance,  
24 and so forth, including the DCCA applications for  
25 the mortgage company.

1 He's just reading it into evidence now. He can do  
2 this in testimonial form. He doesn't need this  
3 paper.

4 MR. WAIHEE: Mr. Hearings Officer --

5 HEARING OFFICER HUGHES: I note the  
6 objection. Let's continue.

7 BY MR. WAIHEE:

8 Q. I just want to be very clear that you have  
9 the application before you and this is the result of  
10 your -- that you wrote this application and that the  
11 information on the application is accurate to the  
12 best of your knowledge.

13 A. Yes.

14 MR. WAIHEE: Mr. Hearings Officer, I'd  
15 like to submit as Exhibit 2 the application -- the  
16 declaration of Long H. Vu.

17 MR. KIM: We would object to the admission  
18 of Exhibit 2. The witness can testify to these  
19 matters, assuming he has personal knowledge of them.  
20 He doesn't need to testify from a piece of paper.  
21 What we're interested in is his personal knowledge  
22 regarding, I guess, matters related to the DCCA  
23 application, not some paper that he prepared in  
24 preparation for this particular hearing.

25 MR. WAIHEE: I'm just trying to get it



1 BY MR. WAIHEE:

2 Q. Do you recall preparing an application for  
3 Mr. Dubin's -- for a broker solicitation license for  
4 Mr. Dubin and Dubin Financial?

5 A. Yes.

6 Q. In the course of preparing that  
7 application, were you responsible for filling it  
8 out?

9 A. Yes. That was my responsibility.

10 Q. On the application form, there is a box  
11 that asks whether or not Mr. Dubin had prior -- been  
12 convicted of any kind of prior criminal activities  
13 or something -- do you recall having -- I think it  
14 was box eight.

15 A. Yes, I recall.

16 Q. Do you remember what you -- how you filled  
17 that out, or did you fill that out?

18 A. Yes, I did fill out question eight on the  
19 form. I circled no.

20 Q. Why would you do that?

21 A. I was answering the question to my  
22 knowledge.

23 Q. And your -- what was your belief regarding  
24 any kind of prior -- any kind of prior conviction or  
25 anything else?

1       A.       I was aware of the prior -- Mr. Dubin's  
2 past, but the question in its form asked if the  
3 conviction was not -- or had not been annulled or  
4 expunged. To my knowledge, the IRS had annulled the  
5 conviction and there were no disciplinary actions  
6 taken by the Hawaii Bar against Mr. Dubin. And  
7 these questions six, seven and eight, I didn't  
8 know --

9       Q.       And what was your practice when you filled  
10 out these applications? What do you do with it --  
11 or any of these forms which you did as a matter of  
12 being an assistant to Mr. Dubin?

13       A.       Any forms that I received that needs to be  
14 filled out, I filled out properly. I would take the  
15 time to find the rules of the form, fill out the  
16 form to my best knowledge and then present it to  
17 Mr. Dubin for signature, as in this mortgage form.

18       Q.       And so to your knowledge, Mr. Dubin had --  
19 well, it was your belief that Mr. Dubin had been  
20 exonerated because the IRS admitted the mistake and  
21 that the -- I'm trying to clarify your testimony --  
22 and that the Hawaii Bar had done -- taken no action  
23 as a result of this?

24               MR. KIM: He's leading the witness.

25       A.       Yes. To my --

1 MR. KIM: Excuse me. He's leading the  
2 witness and there's no foundation.

3 MR. WAIHEE: I'm trying to expedite this.

4 MR. KIM: But you're leading the witness  
5 and you haven't submitted any foundation for any of  
6 these so-called statements he's made.

7 BY MR. WAIHEE:

8 Q. All right. Long, would you mind  
9 reading --

10 HEARING OFFICER HUGHES: I'll permit the  
11 examination.

12 BY MR. WAIHEE:

13 Q. Is it my understanding that you would  
14 collect all of these papers, including the --  
15 including this particular application, take it to  
16 Mr. Dubin, stack it on his desk and wait there for  
17 his signature?

18 A. Yes. I would -- my responsibility was to  
19 fill out these forms, not just this mortgage form,  
20 but all other forms for the law firm. Mr. Dubin is  
21 always busy, so this was my full responsibility. I  
22 filled out the mortgage application accordingly, to  
23 my best knowledge, which was that the conviction was  
24 overturned; hence, the IRS exonerated Mr. Dubin for  
25 such conviction. And again, the Hawaii Bar, there

1 was no disciplinary actions taken against Mr. Dubin,  
2 nor did he lose his license in any shape or form.  
3 Thus, I filled out the application as such.

4 MR. WAIHEE: Thank you, Long. Just  
5 reserving the right to redirect, if necessary.

6 HEARING OFFICER HUGHES: Noted. Do you  
7 have any questions?

8 MR. KIM: Yes, I do.

9  
10 EXAMINATION

11 BY MR. KIM:

12 Q. Mr. Vu, did you talk to Mr. Dubin this  
13 week?

14 A. Yes, I did, when he called me up to tell  
15 me about this.

16 Q. Did you talk to him regarding preparing  
17 for your testimony today?

18 A. No, I did not.

19 Q. So what was the conversation about when he  
20 called you this week?

21 A. He called me up to tell me if I was  
22 available for this hearing.

23 Q. Were you living in the state of Hawaii  
24 back in December of 2016?

25 A. No, I was not.

1 after he had been in prison for 19 and a half months  
2 pursuant to that conviction?

3 A. Yes.

4 Q. And you started with Mr. Dubin after  
5 Mr. Dubin had served a year on probation after he  
6 was released from federal prison; is that right?

7 A. Yes.

8 Q. From the time you started with Mr. Dubin  
9 in 1999 until you purportedly filled out the form  
10 which is in evidence as Petitioner's Exhibit A3-6 --  
11 by the way, do you have that application for  
12 mortgage solicitor license document before you this  
13 morning?

14 A. Yes, I do.

15 Q. At any time between the time you -- strike  
16 that.

17 When did you first learn that Mr. Dubin  
18 had been exonerated by the IRS?

19 A. As I recall, it was just a couple of  
20 months after working with Mr. Dubin. He was very  
21 honest about it and it took a toll on him. However,  
22 his story was amazing in terms of what happened  
23 afterwards.

24 Q. So the only source of the information that  
25 you had to make -- upon which your declaration is

1 based is something that Mr. Dubin told you?

2 A. No.

3 Q. You said Mr. Dubin told you this. What  
4 else did he tell you?

5 A. You asked me what he told me. That's what  
6 he told me first.

7 Q. Did you have any other documents or  
8 information or anything else independent of  
9 Mr. Dubin to indicate that the IRS had exonerated  
10 him?

11 A. Yes.

12 Q. What was that?

13 A. To my recollection, there was  
14 documentation from the IRS, including a handwritten  
15 letter.

16 Q. Documents from the IRS?

17 A. Yes, including a handwritten letter.

18 Through the course of working with Mr. Dubin up  
19 until 2008, when I filled this out, I was able to  
20 see other documentation, as well, too --

21 Q. Who provided --

22 A. -- in terms of his exoneration.

23 Q. Who provided you with those documents?

24 A. Mr. Dubin did.

25 Q. Same question with respect to apologizing



1 to him. What other information, besides Mr. Dubin  
2 telling you that, did you have to base this  
3 declaration?

4 A. Well, there were letters from the IRS,  
5 documentation. I was able to take a look at the  
6 filings, the evidence that was put against him.

7 Q. Those documents came to you from whom?

8 A. Mr. Dubin's files.

9 Q. So Mr. Dubin gave them to you?

10 A. Yes.

11 Q. Same question with respect to the IRS  
12 admitted owing him \$100,000 for the years for which  
13 he was tried for not filing. Aside from Mr. --  
14 Mr. Dubin told you that; right?

15 A. Yes, supported by documentation.

16 Q. Where did the documents come from to  
17 support the allegation you make in this declaration  
18 that the IRS admitted owing him \$100,000?

19 A. Well, it was from the financial  
20 documentation that was presented before me.

21 Q. Who presented it for you?

22 A. Mr. Dubin and the accountant at the time.

23 Q. Okay. And then who -- Mr. Dubin told you  
24 he had been exonerated by the Office of Disciplinary  
25 Counsel in Hawaii?

1 A. Yes.

2 Q. Is that the only basis for your statement  
3 here in your declaration?

4 A. I don't recall. I thought I saw some  
5 other documentation, as well, too, but --

6 Q. So you don't remember, aside from what  
7 Mr. Dubin told you, with respect to your claim in  
8 this declaration that he had been, quote, unquote,  
9 exonerated by the Office of Disciplinary Counsel; is  
10 that a correct understanding of what you just said?

11 A. Yes.

12 Q. And you have no memory of any other  
13 documents being shown you to you by Mr. Dubin to  
14 confirm that he had been, quote, unquote, exonerated  
15 by the Office of Disciplinary Counsel?

16 A. Not that I recall.

17 Q. So basically, you have no personal  
18 knowledge of this statement that Mr. Dubin was  
19 exonerated by the Office of Disciplinary Counsel?  
20 You have no personal knowledge of that, do you?

21 A. That's incorrect. I mentioned to you that  
22 I saw documentation, but I don't recall to what  
23 extent.

24 Q. Who gave you those documents?

25 A. Which ones? Excuse me.



1 at that time, during the workday?

2 A. Yes. During the workday, people would  
3 walk in and out, talk to him.

4 Q. And during the time that this -- we're  
5 talking about this application for license of  
6 mortgage solicitor -- you don't remember anybody  
7 coming in the office during the time you spent with  
8 him that day?

9 A. I don't recall if anyone was in the office  
10 when I gave him this piece of paper.

11 Q. Mr. Vu, you claim you filled out this  
12 document for Mr. Dubin; correct?

13 A. Yes.

14 Q. Which part did you fill out; the typed-in  
15 part?

16 A. I filled out the whole form, including the  
17 typed-in part.

18 Q. So you typed it in; correct?

19 A. Yes.

20 Q. You physically typed it in, the  
21 information on the form?

22 A. Yes. We had a typewriter.

23 Q. Good. And then you -- what else did you  
24 fill in besides the typed-in portions of the form?

25 A. Including answering the questions?

1 Q. So when you say "answering the questions,"  
2 does that mean you circled the yes or no portions of  
3 the form?

4 A. That's correct.

5 Q. When you filled out this form, Mr. Vu, for  
6 Mr. Dubin, who did you understand was certifying the  
7 truthfulness of the responses in the form; you or  
8 Mr. Dubin?

9 A. The signature on the application,  
10 Mr. Dubin.

11 Q. Do you know who was certifying at that  
12 time on this form that any misrepresentations  
13 contained in the form is grounds for refusal or  
14 subsequent revocation of a license and is a  
15 misdemeanor, close quote, under various sections of  
16 the IRS?

17 Who did you understand was certifying that  
18 representation in the form; you or Mr. Dubin?

19 A. Excuse me. I don't understand the  
20 question in terms of the -- the preparer or  
21 signator?

22 Q. Let me withdraw the question and let me  
23 ask it this way: Do you have that application in  
24 front of you?

25 A. Yes, I do.

1 messenger in late 1999 or early 2000.

2 Q. During that time period, you were  
3 responsible for collecting the mail, processing the  
4 papers and so forth; is that correct?

5 A. Yes, that's correct.

6 Q. So as things came into the office, any  
7 kind of correspondence or the like, before anybody  
8 else would see it -- at least during the period  
9 around 2008 -- it would be processed through you?

10 A. Yes.

11 Q. So you would have information about --  
12 during that period, you would have seen an ABA  
13 article that was written about that -- as we have it  
14 in an exhibit as one of our things, but did you have  
15 an occasion to see an American Bar Journal article  
16 that reviewed the circumstances of the tax  
17 litigation?

18 MR. KIM: Objection. He's leading him.

19 A. Yes. I do remember seeing the ABA one --  
20 journal article.

21 BY MR. WAIHEE:

22 Q. So in the article, was the -- now, as I  
23 understand it -- and correct me if I'm wrong -- as I  
24 understand it, since you are aware of it -- the  
25 action that Mr. Dubin was unfortunately prosecuted

1 for was -- an action was taken by the IRS against  
2 Mr. Dubin; is that correct? The Internal Revenue  
3 Service accused Mr. Dubin of not filing his taxes?

4 A. Yes. That's correct. The ABA Journal --  
5 actually, what Mr. Dubin had mentioned and also the  
6 documentation I've seen.

7 Q. Right. And during that period of time,  
8 prior to signing this declaration, you were aware of  
9 these documents and their existence?

10 A. Yes.

11 MR. KIM: What documents?

12 HEARING OFFICER HUGHES: The ABA.

13 MR. WAIHEE: The ABA -- the thing that was  
14 entered into exhibits yesterday. I don't know  
15 what --

16 BY MR. WAIHEE:

17 Q. Now, were there any -- besides the  
18 American Bar Journal, was the -- were there any  
19 other documents that you may have seen during the  
20 period that you were filling out this --- the form,  
21 the application for the mortgage solicitor?

22 A. Yes. When I began, as I mentioned before,  
23 Mr. Dubin was very up-front about his conviction and  
24 his story behind it. I saw documentation in terms  
25 of certified IRS documentations, the letter from the

1     IRS claiming the financials, the documentation from  
2     the accountant and also the previous documentation  
3     in his file, as well, too.

4           Q.     Long, do you recall an article in the  
5     Star-Bulletin that was published discussing -- the  
6     Star-Bulletin, Advertiser, discussing these events?

7           A.     I don't recall the exact article, but over  
8     the course of the eight years, I've read a fair  
9     amount of information regarding Mr. Dubin's  
10    situation.

11          Q.     All right. So your statement saying that  
12    -- let me correct that. Now, I want to get back to  
13    the case. So your understanding of what the case --  
14    what was your understanding of the case that was  
15    prosecuted by the IRS?

16               MR. KIM: This has been gone over multiple  
17    times already.

18               MR. WAIHEE: He brought it up.

19               MR. KIM: It's really not his opinion --  
20    he's not here to give an opinion on this matter.

21               HEARING OFFICER HUGHES: He did not bring  
22    it up.

23               MR. WAIHEE: All right. Well, I want to  
24    get to the knowledge.

25    BY MR. WAIHEE:

## DECLARATION OF LONG H. VU

I, LONG H. VU, DECLARE:

1. I am a Member of the Hawaii Bar. I reside in the State of Florida, visiting in Honolulu for the Holidays. I was employed in 2007-2008 as Mr. Dubin's assistant. I make the within statements of my own personal firsthand knowledge.

2. As Mr. Dubin's assistant, I regularly prepared numerous administrative papers for him and his companies, including forms and claims for workers' comp, temporary disability insurance, payroll taxes, hazard insurance, unemployment insurance, health insurance, general excise tax, personnel absences and vacation requests, equipment requisitions, DCCA applications, repair orders, etc.

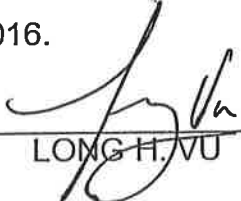
3. I also remember preparing mortgage broker/solicitor applications for Mr. Dubin for his company, Dubin Financial, located in the Suite adjacent to our law offices, after he discharged his company's mortgage broker for stealing.

4. In those applications, I checked the "no conviction" box, knowing the IRS had exonerated Mr. Dubin, apologizing to him, the IRS admitting owing him \$100,000 for the years for which he was tried for not filing, while having no filing requirement, and who was also exonerated by the Office of Disciplinary Counsel.

5. My practice was to meet with Mr. Dubin, routinely to put the various administrative forms before him on his desk, offer him a pen, and have him sign.

6. Given the volume of administrative papers that had to be filled out and signed by Mr. Dubin almost daily, and his professional workload, he relied upon my entries on the various forms for their accuracy. Any mistakes were my fault.

I declare under penalty of law that the foregoing is true and correct.  
Executed at Honolulu, Hawaii, on December 27, 2016.

  
\_\_\_\_\_  
LONG H. VU