

# **The Feasibility of Requiring All Licensed Attorneys to Carry Legal Malpractice Insurance**

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## **FOREWORD**

This report was prepared in response to House Resolution No. 294, H.D. 1, which was adopted during the Regular Session of 1992. The resolution requested the Legislative Reference Bureau to study the feasibility of requiring all attorneys engaged in the private practice of law in the State of Hawaii to purchase legal malpractice insurance. This report contains the results of that study.

The Bureau extends its appreciation to all those whose participation and cooperation made this report possible. The Bureau is especially grateful to Larry Gilbert, Richard Turbin, Gerald H. Kibe, and Brad Oliver for their cooperation in this endeavor.

Samuel B. K. Chang  
Director

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## **Chapter 1**

### **INTRODUCTION**

#### **Scope**

In 1992, the House of Representatives of the Sixteenth Legislature of the State of Hawaii referred to its Committee on the Judiciary House Resolution No. 294 (1992), entitled "House Resolution Requesting a Study on the Feasibility of Requiring All Attorneys in the State of Hawaii that are Engaged in Private Practice to Carry Legal Malpractice Insurance" (Appendix A). Underlying the Resolution was a concern that the public has no monetary recourse for legal malpractice when the attorney is unable to pay damages and does not carry legal malpractice insurance coverage.

The Committee on the Judiciary amended the Resolution, and in so doing, enlarged the scope of the study. As amended, House Resolution No. 294, H.D. 1 (1992) and Standing Committee Report No. 1445-92 (Appendix B) also requested data on the numbers of non-insured attorneys and attorney-specialties in the State of Hawaii along with an assessment of whether non-mandatory legal malpractice insurance coverage for attorneys practicing in the State of Hawaii actually presents a problem. The committee report also requested the research be conducted in consultation with the Hawaii State Bar Association.

#### **Methodology of the Study**

The second chapter of this study describes current mechanisms for public recourse for attorney misconduct in the State of Hawaii. A brief review of the Hawaii State Bar Association's self-governance in the areas of attorney/client relations and legal ethics is also included. The chapter also explains the legal malpractice insurance coverage available to attorneys engaged in practice in the State of Hawaii and discusses the number of attorneys covered by legal malpractice insurance. Written and appropriate oral information from the following sources was considered:

- President of the Hawaii State Bar Association;
- Chair of the Hawaii State Bar Association's Committee on Professional Liability Insurance;
- Office of the Disciplinary Counsel;
- Rules of the Supreme Court of the State of Hawaii;
- Marsh & McLennan, Insurance Brokers;

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- Administrator of the Lawyers' Fund for Client Protection;
- Hawaii Insurance Commissioner; and
- Hawaii Academy of Plaintiffs' Attorneys.

Malpractice and disciplinary actions against attorneys are covered in chapter 3 of this study. The chapter also discusses monetary damages suffered by clients.

The fourth chapter describes the requirements in other states and of their respective bar associations in regards to mandatory or non-mandatory legal malpractice insurance coverage. The feasibility of similar requirements for Hawaii's attorneys is considered in view of the types of legal malpractice coverage already available to attorneys practicing in the State of Hawaii and other matters unique to practicing law in the State of Hawaii.

The fifth chapter reviews the choices available in Hawaii, which include non-mandatory legal malpractice insurance coverage, mandatory legal malpractice insurance coverage and mandatory bonding. Alternate administrative approaches are also considered.

The conclusions and recommendations of the study are included in the sixth and final chapter.

## **Chapter 2**

### **THE CURRENT SITUATION**

This chapter begins by covering attorney self-governance, the Disciplinary Board and its Office of the Disciplinary Counsel (ODC), the Lawyers' Fund for Client Protection (LFCP) and available legal malpractice coverage in the State of Hawaii. Each of these areas is conceptually very distinct from the others. For instance, a lawyer's innocently missed deadline might be malpractice, but it would not necessarily constitute either unethical behavior, which might be addressed by the ODC, or a theft, which might be addressed by the LFCP. There are instances, however, in which an act or an omission might fall into the purview of each of these entities.

#### **Attorneys' Self-Governance**

Attorneys licensed and practicing in the State of Hawaii are supervised by the Hawaii Supreme Court. The Court is the sole regulating authority over admission to the Hawaii State Bar, as well as suspension and disbarment. The Supreme Court is also vested with the responsibilities of disciplining attorneys and providing a means of compensating clients who have been harmed by certain types of attorney misconduct. These responsibilities are set forth in rules two and ten of the Rules of the Supreme Court of the State of Hawaii. The rules in turn establish the respective agencies: the Disciplinary Board and the Lawyers' Fund for Client Protection.

The Supreme Court has accepted responsibility to discipline attorneys and consider the compensation of attorneys' clients in cases of theft, fraud, neglect and other clear misconduct. However, this does not cover all situations where parties may be damaged. It is possible that attorneys may act, or not act, in ways which might be considered legal malpractice. The attorney self-governance system does not accept the administration and enforcement of all legal malpractice matters but, rather, leaves the majority of them to be decided in the appropriate courts of law.

Attorneys who wish to practice law in Hawaii must belong to the unified Bar of the State of Hawaii and be subject to the Hawaii Supreme Court's supervision. The unified Bar is funded by its members. The 1992 Hawaii State Bar Association (HSBA) dues schedule ranges between \$100 per year for attorneys with less than five years experience to \$160 per year for more experienced attorneys. The Hawaii State Bar Association's 1991 Annual Report indicates that there were 3,984 dues paying active members of the Bar at the end of 1991.<sup>1</sup> In a telephone conversation, Mr. Tom Wong, Controller of the HSBA, reported a corrected number of active attorneys and disclosed the numbers of judges and government attorneys, who do not provide legal services directly to the public, as follows:

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Active, dues paying attorneys	3,802
Less: Judges	( 79)
Less: Government attorneys	( 678)
Attorneys representing private clients	<u>3,045<sup>2</sup></u>

Other attorneys who are active, dues paying members of the Hawaii Bar may not be serving the public directly. For instance, attorneys serving as in-house counsel to corporations are in this category. However, since a reliable count of these attorneys is not available, they are not subtracted from the population of attorneys likely to consider obtaining legal malpractice coverage.

Attorneys admitted to practice solely before the federal courts are not subject to supervision by the Hawaii Supreme Court and are not considered in these figures.

### Rule 2: Disciplinary Board

Attorney discipline is administered through the Disciplinary Board. In 1970, the Court established standards of conduct for attorneys licensed in Hawaii by adopting the Hawaii Code of Professional Responsibility.<sup>3</sup> The Hawaii Code of Professional Responsibility is modeled on the American Bar Association's Model Code of Professional Responsibility.

The Code of Professional Responsibility enumerates the specific standards or canons of professional conduct expected of lawyers in their relationships with the public, to the legal system, and within their profession. The Code also includes ethical considerations and disciplinary rules relating to each of the Code's canons.

In July 1974, the Supreme Court further strengthened its disciplinary system by establishing the Disciplinary Board and the Office of the Disciplinary Counsel.

### Office of the Disciplinary Counsel (ODC)

The Disciplinary Board's purpose is to consider and investigate any alleged grounds for discipline or alleged incapacity of any attorney and to take action appropriate under the Disciplinary Rules. Briefly stated, the Board focuses on the ethical conduct of attorneys.

The Supreme Court appoints the eighteen members of the Disciplinary Board of the Hawaii Supreme Court from a list of nominees submitted by the governing board of the Hawaii State Bar Association. The Disciplinary Board hires a Chief Disciplinary Counsel and staff to carry out its work. The Disciplinary Board also appoints a number of three member hearing committees to consider complaints and report their findings and recommendations to the full Disciplinary Board. At least two of the three members of each hearing committee are members of the Hawaii Bar.

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Discipline is imposed through:

- (1) Private informal admonition by the Disciplinary Counsel;
- (2) Private reprimand by the Disciplinary Board with the consent of the respondent;
- (3) Public reprimand by the Disciplinary Board with the consent of the respondent;
- (4) Public censure by the Supreme Court; or
- (5) Suspension for up to five years or disbarment by the Supreme Court.<sup>4</sup>

In addition, the Supreme Court may order restitution and the payment of costs, exclusive of attorney's fees. With the consent of a respondent, the payment of restitution and costs may be included among the terms of a public or private reprimand issued by the Disciplinary Board.

Examples of unethical conduct include:

- Neglect, such as failure to work on a case;
- Misappropriation of a client's money or property;
- Fraud;
- Conflict of interest; and
- Disclosure of confidential information.

According to the Office of the Disciplinary Counsel, "unethical conduct does not include every instance of inadequate representation or poor performance by an attorney."<sup>5</sup> The ODC points out that an attorney's mistake or a bad judgment may not rise to the level of unethical conduct subject to discipline but may be a basis for a legal malpractice action. However, there are instances where an attorney's action or inaction constitutes both unethical behavior and legal malpractice.

During 1991, the number of new ethical complaints rose by nearly 50 percent, from 225 in 1990 to 330. In 1990 and 1991, 271 and 344 cases, respectively, were closed. At the end of 1991, there were 196 pending complaints. The ODC reported that 14 formal disciplinary proceedings were filed against attorneys in 1991 and the following sanctions were imposed during that year:

- 3 Disbarments

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- 4 Suspensions
- 1 Public censure by the Supreme Court
- 2 Public reprimands by the Disciplinary Board
- 3 Private reprimands by the Disciplinary Board
- 25 Private Informal Admonitions by ODC
- 1 Restraint from practice by the Supreme Court

The Disciplinary Board and ODC are subsidized by the members of the Hawaii State Bar. In addition to the annual Bar Association dues discussed earlier in this chapter, the 1992 Disciplinary Board assessment for each member of the Hawaii State Bar was \$100 for attorneys with less than five years of practice and \$200 for all other attorneys. During 1991, the total budget for both the Disciplinary Board and ODC amounted to \$757,370.<sup>6</sup>

For a fuller discussion of these issues, please refer to the article entitled "Overview of the Hawaii Attorney Discipline System", by Disciplinary Counsel Gerald H. Kibe, published in Volume XXII of the *Hawaii Bar Journal*, 1990 (Appendix C), and the "1991 Annual Report of the Hawaii Attorney Grievance System", published by the Office of the Disciplinary Counsel (Appendix D).

### Rule 10: The Lawyers' Fund for Client Protection (LFCP)

The Hawaii Supreme Court adopted rule 10 establishing the Lawyers' Fund for Client Protection, which was originally known as the Clients' Security Fund. This fund is designed to compensate clients who are the victims of dishonesty, such as theft or similar misconduct, by their attorneys. Dishonest conduct means "...wrongful acts committed by an attorney in the manner of defalcation or embezzlement of money; or the wrongful taking or conversion of money, property or other things of value."<sup>7</sup> These types of acts may constitute malpractice. However, the LFCP does not compensate for damages resulting from other forms of legal malpractice.

The Lawyers' Fund for Client Protection is administered by five trustees appointed by the Hawaii Supreme Court. Three trustees are lawyers while the remaining two are non-lawyers. The LFCP is funded by periodic assessments of every active member of the Bar in Hawaii. Certain attorneys, however, are exempt. For example, attorneys who are employed by the State of Hawaii or any of its political subdivisions and do not engage in the private practice of law are not required to pay into the fund.<sup>8</sup> The 1992 assessment was \$25 for attorneys with less than five years experience and \$50 for all other attorneys.

## THE CURRENT SITUATION

The LFCP assumes a maximum liability of \$50,000 per claimant and \$150,000 in aggregate claims per attorney. During 1991, the LFCP received 30 formal claims, approved 10 and made awards totalling \$94,654. Sixteen other claims were either settled between the claimants and the respective attorneys or denied by the LFCP. At the end of 1991, there were 44 pending claims and the LFCP had reserves approximating \$344,000.<sup>9</sup>

### Available Legal Malpractice Insurance Coverage

As of August 1992, legal malpractice insurance coverage is available from three insurance providers. CNA, National Union Insurance Company and The Home Insurance Company are all nationally known insurance providers who are also registered with the Hawaii Insurance Commissioner. Coverage is also available to certain Hawaii law firms through the Attorneys' Liability Assurance Society (ALAS).

Rates and coverages vary. Except in the case of ALAS, basic coverage generally consists of several hundred thousand dollars of coverage with a small deductible that would be paid by the attorney. Rates are generally lower for attorneys with less experience and average less than \$2,000 per attorney in Hawaii. Attorneys with little experience generally pay lower premiums because they ordinarily have handled fewer cases than their more experienced colleagues and the providers of legal malpractice coverage have traditionally taken the position that a lower volume of cases is an indication of lower risk under the "claims made" basis of legal malpractice insurance. The "claims made" basis is explained later in this chapter.<sup>10</sup>

With respect to ALAS, it provides coverage with much higher deductibles, starting at \$100,000 and ranging over \$1 million.<sup>11</sup> ALAS is a two-tier organization serving larger law firms throughout the nation. The average size of an ALAS covered law firm was 130 attorneys on November 30, 1991. The parent, ALAS, LTD., is a Bermuda mutual insurance company owned by its member law firms. Its wholly-owned captive insurance subsidiary, ALAS, Inc., is located in Chicago, Illinois and is organized under the Illinois Captive Act. ALAS, Inc. issues insurance policies and administers claims and loss prevention. The parent company reinsures its subsidiary for all risks in excess of \$100,000 and reinsures its risks in the commercial markets. Deductibles under an ALAS policy range from a low of \$100,000 upwards to \$1 million or more. Limits of coverage range from \$10 million per claim and \$20 million in the aggregate annually to \$50 million per claim and \$100 million in the aggregate annually.<sup>12</sup>

All available legal malpractice insurance operates on a "claims made basis". This means that the insured is covered for claims made during the period of contracted coverage. It does not matter when the alleged legal malpractice occurred unless a prior acts restriction is imposed. Malpractice which occurred ten or more years in the past would still be covered. However, the claim must be made during the period of coverage. When an attorney retires

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from practice, he or she may obtain insurance coverage for possible claims made during his or her retirement years. This type of coverage is called "tail coverage" and is generally available for 2.25 times the attorney's last annual insurance premium.

### Attorneys With Legal Malpractice Coverage

As of December 31, 1991 approximately 1,940 members of the Hawaii State Bar had some form of legal malpractice coverage, estimated as follows:

The Home Insurance Company	1,190
ALAS	400
National Union Insurance	250
CNA	<u>100</u>
Total	1,940 <sup>13</sup>

These estimates of attorneys with legal malpractice coverage are confirmed by a recent HSBA survey. Based on the results of a 1991 HSBA survey, 64 percent or 1,948 of the HSBA members serving private clients were covered by professional liability insurance.<sup>14</sup> This compares favorably to California where a survey conducted by the State Bar of California in 1987 concluded that about 30,000 of the state's 60,000 to 70,000 private practitioners--almost half--carry no insurance.<sup>15</sup>

### Attorneys Without Legal Malpractice Coverage

Of 3,047 attorneys covered by a 1991 HSBA survey, 1,099 attorneys indicated they did not have professional liability insurance. Reasons given for not being covered were as follows:<sup>16</sup>

Coverage not needed	629
Premium cost	259
Other	85
Chose to self-insure	84
Cancelled but not renewed	23
Lack of availability	19

## ENDNOTES

1. 1991 Hawaii State Bar Association Annual Report, Hawaii State Bar Association, (Honolulu: 1992), p. S-9.
2. Telephone interview with Mr. Tom Wong, Controller, Hawaii State Bar Association, July 27, 1992.
3. Rules of the Supreme Court of Hawaii, Rule 2, April 16, 1984.

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4. Ibid.
5. The Disciplinary Board of the Hawaii Supreme Court, Disciplinary Complaints Against Lawyers (Brochure), 1992.
6. 1991 Hawaii State Bar Association Annual Report, p. S-17.
7. Rules of the Supreme Court of Hawaii, Rule 10. April 16, 1984.
8. Rules of the Supreme Court of Hawaii, Rule 2. April 16, 1984.
9. 1991 Hawaii State Bar Association Annual Report, p. S-18.
10. Interview with Mr. Brad Oliver, Vice President, Marsh and McLennan (insurance brokers). July 15, 1992.
11. 1991 Annual Report, Attorneys' Liability Assurance Society (Bermuda) Ltd. (Bermuda, 1992), p. 11.
12. Ibid., pp. 9-11.
13. Interview with Mr. Brad Oliver, Vice President, Marsh and McLennan (insurance brokers). July 28, 1992.
14. 1991 Hawaii State Bar Association Survey tabulated and analyzed by SMS Research.
15. Debra Moss, "Going Bare: Practicing Without Malpractice Insurance," ABA Journal, December 1987, pp. 82-86.
16. 1991 Hawaii State Bar Association Survey.

## **Chapter 3**

### **EXTENT OF LEGAL MALPRACTICE**

#### **Extent of Legal Malpractice**

##### **Nationally**

Information on certain national cases is available from ALAS, which serves the larger law firms throughout the country. Typical deductibles under ALAS policies range from \$100,000 upwards to \$1 million or more. According to ALAS, the 13 largest legal malpractice cases in the history of the American legal profession were settled or tried before juries during the six years ending April 1992. The 11 cases settled involved amounts equal to or greater than \$20 million each. The two cases tried before juries resulted in awards of \$35 million and \$18 million.<sup>1</sup>

Claims against all of ALAS' insureds have increased in each of the last five years from 324 claims in 1987 to 501 claims in 1991. Since 1981 and through November 30, 1991, ALAS experienced 2,742 claims averaging \$175,000 in losses per claim. These claims involved a variety of matters. The areas of the law experiencing the highest frequency of claims during that time were litigation (34 percent) and corporate law (31 percent). The next greatest frequency of cases involved real estate law (7 percent).<sup>2</sup>

ALAS covers very large law firms and so does not have information that is relevant to all law practices in Hawaii. Oregon, on the other hand, due to its size, among other things, would have a more comparable experience. As discussed in Chapter 4, according to Mr. Kirk Hall, Chief Executive Officer of the Oregon Plan, the great majority of legal malpractice claims in Oregon amount to \$10,000 or less.

##### **Hawaii**

Information regarding the specific types of legal malpractice claims in Hawaii is unavailable. This is because most malpractice claims are settled, and the terms of those settlements are confidential.<sup>3</sup> While legal malpractice coverage providers have access to this information they likewise are unable to disclose it. As regards legal malpractice cases which have gone to trial and where judgment has been entered by the courts, these cases represent too small a portion of all cases to provide meaningful information about all legal malpractice claims.

Over the years, a few cases of attorney misconduct and legal malpractice have been reported by the media. One lawyer, since disbarred, was responsible for numerous claims by several clients in 1988. These claims exhausted the moneys available in the Lawyers' Fund for Client Protection at that time.<sup>4</sup> Another lawyer, who was placed on inactive status for being "incapacitated by reason of mental illness or infirmity", was accused of embezzling \$765,000 by

## EXTENT OF LEGAL MALPRACTICE

two of his clients.<sup>5</sup> Another lawyer was disbarred in 1983 after stealing from his clients and his law firm.<sup>6</sup>

These few sensational cases do not provide an accurate indication of the extent of legal malpractice. However, the extent of the problem can be inferred from data available in the Hawaii Insurance rate filings of The Home Insurance Company (The Home). See an analysis of Certain Loss Data of The Home Insurance Company at Appendix E to this study. There were 258 claims made against attorneys covered under The Home's basic limits (minimum coverage) during the five years ending December 31, 1990. During that time The Home was the major provider of legal malpractice insurance coverage. As of December 31, 1991, for instance, The Home Insurance Company covered approximately 60 percent of the estimated 1,940 attorneys covered by legal malpractice providers and about 40 percent of all attorneys licensed to practice in the State of Hawaii. See Chapter 2 of this report for further discussion on the number of attorneys licensed to practice in the State of Hawaii. At the end of 1991, The Home Insurance Company insured 1,190 attorneys in Hawaii.<sup>7</sup> Thus, assuming The Home covered about 1,200 attorneys in each of the five years ending December 31, 1990, there was one claim per year for every 23 attorneys covered by The Home Insurance Company during that five-year period. However, this is not a statistically pure representation of the situation in Hawaii. For instance, it is possible that the attorneys not covered by The Home Insurance Company received a great many more, much less, or even no claims during the same period. It is also possible that attorneys covered by The Home Insurance Company settled malpractice claims without involving the insurer. At best, these figures provide an indication of the extent of the problem.

Clients of attorneys without legal malpractice insurance coverage and whose alleged misconduct does not qualify for redress by the LFCP either must settle their claim or file a lawsuit. The 1991 HSBA survey is helpful in determining whether wronged clients are able to seek justice in the courts. When asked how many times during the last five years they had represented a plaintiff in a legal malpractice case, attorneys responded as follows:<sup>8</sup>

None	2,691
1 to 3 times	157
4 or more times	26

In regard to the reasons malpractice cases were rejected, attorneys responded as follows:<sup>9</sup>

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	<u>None</u>	<u>1-3 Times</u>	<u>4 plus Times</u>
Attorney uninsured & lacks sufficient assets	283	84	8
Amount of claimed damages too small	245	69	34
Conflict of interest	221	92	7
Don't handle malpractice cases	171	294	39
Too busy	241	38	30
Other	230	57	23

Based on these data it is clear that several hundred, and perhaps more, legal malpractice cases have been accepted by attorneys during the last five years. However, it would also appear that at least some malpractice cases have not been accepted because of the perceived inability of a defendant attorney to pay damages.

## Legal Malpractice Damages Suffered By Clients

Specific information about all alleged legal malpractice damages in the State of Hawaii is not available. However, a review of rate filings at the Hawaii Insurance Commissioner's office was helpful. In a letter accompanying a rate request to the Hawaii Insurance Commissioner, the Home Insurance Company, which insured more attorneys in Hawaii than any other insurer on December 31, 1991, reported loss information for basic limits policies during each of the five calendar years 1986 through 1990.<sup>10</sup> See Appendix E for an analysis of these data. Based on this information, the average annual loss per claim varied widely from year to year and ranged from a low of about \$5,600 in 1989 to a high of about \$20,600 in 1988. Losses averaged only \$12,200 for the five year period ending December 31, 1990.

The approximate average annual loss per claim incurred by The Home Insurance Company for basic limits policies was:

1986	\$15,100
1987	9,300
1988	20,600
1989	5,600
1990	8,700

While this information does not relate to all attorneys practicing in the State of Hawaii, it does reflect the activity of a large segment of the attorney population.

## EXTENT OF LEGAL MALPRACTICE

Based on this information, money damages suffered by the victims of legal malpractice in Hawaii appear to be moderate or very low compared to the national experience of ALAS covered attorneys. However, it is possible that extremely high legal malpractice claims may have been made and settled as part of confidential legal settlements in Hawaii.

### Extent of Misconduct Compensable by the Lawyers' Fund for Client Protection

During 1991 the Lawyers' Fund for Client Protection approved and awarded ten claims averaging about \$9,500 each. There were no claims in excess of the limits under the Lawyers' Fund for Client Protection rules: \$50,000 per claimant and \$150,000 in the aggregate claims per attorney.<sup>11</sup> The average claim of about \$9,500 is very close to the average malpractice loss experienced by The Home Insurance Company in the analysis above. One claim had to do with theft of client funds. The other sixteen claims closed during 1991 were either settled between the claimants and their attorneys or denied by the LFCP.

It would appear that the current mix of coverage providers meets the needs of the majority of those making legal malpractice claims. There is a likelihood, however, that some clients will be economically harmed by attorneys without either assets or legal malpractice coverage.

## ENDNOTES

1. 1991 Annual Report, Attorneys' Liability Assurance Society (Bermuda) Ltd. (Bermuda: 1992), p. 31.
2. Ibid., pp. 15-17.
3. Interview with Mr. Larry Gilbert, President, Hawaii State Bar Association, June 30, 1992, and interview with Mr. Brad Oliver, Vice President, Marsh and McLennan (insurance brokers), July 15, 1992.
4. Honolulu Advertiser, September 11, 1989, p. A3.
5. The Sunday Star-Bulletin and Advertiser, September 10, 1989, p. A4.
6. Ibid., p. A4.
7. Interview with Mr. Brad Oliver, Vice President, Marsh & McLennan (insurance brokers), July 15, 1992.
8. 1991 Hawaii State Bar Association Survey tabulated and analyzed by SMS Research.
9. Ibid.
10. Letter from Ms. Floreen Cox, The Home Insurance Company, to Mr. Alvin Yafuso, Insurance Department, State of Hawaii, February 22, 1991.
11. 1991 Hawaii State Bar Association Annual Report, Hawaii State Bar Association (Honolulu: 1992), p. S-18.

## Chapter 4

### REQUIREMENTS OF OTHER STATES

#### Requirements of Other States

Attorneys' professional liability insurance is a topic drawing considerable interest in recent years, not only in Hawaii and the United States, but also in other parts of the world. While it is not appropriate to directly compare the American legal system to those of other countries, it is interesting to note that some countries, including Australia and Canada, require some form of legal malpractice coverage.

Many other states have considered requiring legal malpractice coverage, including: Arizona, California, Colorado, Connecticut, Delaware, Nebraska, Oregon, Washington, and Wisconsin.<sup>1</sup> However, only one state, Oregon, has done so to date.

Other states considering the issue face the same concerns discussed in Chapter 5 of this study: (1) there is little demonstrated need for mandatory legal malpractice coverage; (2) mandatory legal malpractice coverage would force some lawyers to acquire coverage they do not need and/or do not want; (3) mandatory coverage would lead to an increase in the number of frivolous claims, thereby increasing the real economic cost to the community; (4) the administration of a mandatory legal malpractice coverage program would add to the real economic cost to the community; (5) a mandatory program would place the authority over who practices law into inappropriate hands; and (6) almost universal support for a mandatory program among the members of a state's bar would be required.

In 1969, the Nebraska Supreme Court incorporated in its rules a requirement that every professional corporation carry minimum amounts of professional liability insurance so there would be adequate funds to compensate a client who had been damaged. This rule applied only to lawyers operating as professional corporations. Because of subsequent problems in securing legal malpractice insurance, the Nebraska Supreme Court amended its rules to abolish the requirement. The current Court rule requires shareholders in a professional corporation to agree to be individually responsible for any judgments returned against their fellow shareholders. This was prompted by a state statute providing that "...any officer, shareholder, agent or employee of a [professional] corporation...shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct...".<sup>2</sup>

To date, compelling reasons to establish a long term mandatory legal malpractice coverage program have arisen in only one jurisdiction in the United States--Oregon. Chief among those reasons was an economic one. During the mid-1970s, lawyers in Oregon experienced an insurance "crunch", a time period when insurance was generally very high-priced or unavailable. Lawyers in Oregon suddenly found that legal malpractice insurance coverage often was not

## REQUIREMENTS OF OTHER STATES

available to lawyers who wanted it. The cost of premiums was too high or insurers simply were not offering coverage.<sup>3</sup>

In 1977 the Oregon State Bar created the Oregon Professional Liability Fund (hereinafter "Fund" or "The Oregon Plan"). The Fund began operations as the mandatory provider of primary malpractice coverage to Oregon lawyers on July 1, 1978.<sup>4</sup> Appendix F, entitled "Minimum Financial Responsibility for Lawyers" provides a more complete description of the Oregon plan.

Currently, the Oregon Plan provides coverage of \$300,000 per claim and \$300,000 in the aggregate per year, including defense costs, to all attorneys engaged in the private practice of law in Oregon. There is no deductible. Each member of the Bar in private practice was assessed \$1,800 for this coverage in 1992.<sup>5</sup> This approximates the estimated annual cost for lawyers in Hawaii, who, however, often must carry a deductible of several thousand dollars or more.

About 69 percent, or 5,400, of the approximately 7,800 members of the Oregon Bar are in private practice in Oregon and participate in the Fund. Attorneys who are exempt include corporate counsel, law professors and government lawyers, among others.<sup>6</sup> It is estimated that no more than 80 percent of Hawaii's active, licensed lawyers served the public privately as of December 31, 1991. The number is probably far fewer, since the statistics include Hawaii's corporate counsel and law professors.

The Fund provides coverage on a "claims made" basis rather than on an "occurrence" basis. This means that the coverage in a given year covers any claims made during that year. "Tail" coverage, which extends coverage into the future after an attorney retires from the practice of law is provided at no cost.<sup>7</sup> In 1991, the Oregon Fund began offering excess coverage to its Bar members.<sup>8</sup> Excess coverage, which provides coverage in amounts that exceed the maximum available from the Fund, is carried by many of Oregon's lawyers in private practice.

Legal malpractice claims are addressed by an in-house staff of experienced attorneys. Cases in actual litigation are assigned to selected outside counsel. According to Mr. Kirk Hall, Chief Executive Officer of the Oregon Plan, the great majority of legal malpractice claims in Oregon amount to \$10,000 or less.<sup>9</sup>

In addition to legal malpractice coverage, the Oregon Plan also has implemented a loss prevention program. Such activities include: (1) education; (2) law office systems' consulting; (3) alcohol and chemical dependant counseling and intervention; and (4) stress, burnout and career-change counseling and intervention.<sup>10</sup>

### Applicability to Hawaii

The Oregon Plan is attractive to both lawyers and the public. However, in addition to the problems and concerns discussed earlier in this chapter, there are other impediments to the successful establishment of a similar program in Hawaii.

The Oregon Plan was established only because legal malpractice insurance generally was very hard to secure at the time of its establishment. No such compelling reason currently exists for lawyers in Hawaii. Instead, legal malpractice coverage is offered by three registered insurance companies, as well as other providers, in Hawaii. Thus, the great majority of lawyers who desire coverage are currently able to secure it at reasonable prices.

Further, the costs of administering such a program are daunting. Since the Oregon Plan is a new concept in legal malpractice insurance coverage, the managerial expertise necessary to successfully and economically operate such a program is in short supply in Hawaii. Since Hawaii's population of lawyers providing private representation is barely more than half that in Oregon, the administrative costs per attorney in Hawaii would be almost double that of each attorney in Oregon. This would make the program more costly and, presumably, less attractive to attorneys in Hawaii.

### ENDNOTES

1. Telephone interview with Ms. Alice Huey, Bar Services Division, American Bar Association, June 22, 1992.
2. Nebraska Statutes, Section 21-2210.
3. Kirk R. Hall, Chief Executive Officer, Oregon State Bar Professional Liability Fund, "Description of the Oregon State Bar Professional Liability Fund and Discussion of Alternatives for State Bar Insurance Funds" (Mimeographed), May 23, 1991, p. 1.
4. Ibid., p. 3.
5. Ibid., pp. 3 and 4.
6. Ibid., p. 4.
7. Ibid., pp. 5 and 6.
8. Ibid., p. 15.
9. Telephone interview with Mr. Kirk R. Hall, Chief Executive Officer, Oregon State Bar Professional Liability Fund, July 16, 1992.
10. Hall, "Description of the Oregon State Bar Professional Liability Fund", pp. 9 and 10.

## **CHAPTER 5**

### **ANALYSIS OF ALTERNATE APPROACHES**

#### **Alternate Approaches**

##### **Introduction**

This chapter covers attorneys' consideration of mandatory legal malpractice coverage and presents four general alternatives. Hawaii may maintain the status quo, require legal malpractice insurance coverage, require proof of financial ability to pay damages, or opt not to require legal malpractice insurance while working to improve public awareness of the issue.

The views of certain parties at interest are located at Appendix H. Those parties include the Chair of the Hawaii State Bar Association's Committee on Professional Liability Insurance, the Chief Disciplinary Counsel, a representative of an insurance brokerage firm, the Chair of the Lawyer's Fund for Client Protection, and the Deputy Commissioner of the Insurance Division of the Department of Commerce and Consumer Affairs. The parties responded to the following questions presented in the letter located at Appendix G:

DO YOU PERCEIVE THAT NON-MANDATORY LEGAL MALPRACTICE INSURANCE ACTUALLY PRESENTS A PROBLEM FOR THE PUBLIC IN THE STATE OF HAWAII?

IF YOU PERCEIVE THAT NON-MANDATORY LEGAL MALPRACTICE INSURANCE DOES PRESENT A PROBLEM FOR THE PUBLIC IN THE STATE OF HAWAII, WHAT SOLUTION(S) DO YOU FAVOR?

Of the five respondents, four were unaware of any problems with non-mandatory legal malpractice in the State of Hawaii. The fifth respondent, the Chief Disciplinary Counsel, expressed his personal preference for some form of legal malpractice coverage.

##### **Attorneys' Consideration of Mandatory Legal Malpractice Coverage**

A joint committee of the Hawaii Disciplinary Board and the Hawaii State Bar Association is considering whether legal malpractice insurance coverage should be mandatory for all lawyers representing clients. In its March 1992 report, the joint committee unanimously recommended that "the American Bar Association and the Hawaii State Bar Association should continue studies to determine whether a model program and model rule should be created to: (a) make appropriate levels of malpractice insurance available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients."<sup>1</sup>

## REQUIRING ALL LICENSED ATTORNEYS TO CARRY LEGAL MALPRACTICE INSURANCE

Mr. Larry Gilbert, the current President of the Hawaii State Bar Association, Mr. Brad Oliver of Marsh and McLennan, insurance brokers, and others have studied this area in depth at various times in recent years. Their work indicates that mandatory legal malpractice insurance is a complex issue.

The complexity arises as a result of two conflicting concerns. As business people, attorneys are appropriately interested in the economic aspects, that is, the availability of adequate professional liability coverage at reasonable rates of cost. On the other hand, as providers of professional services to the public, lawyers are concerned about their responsibilities to the public.

From the economic perspective, attorneys have varying degrees of interest in carrying any legal malpractice coverage at all. For example, an attorney in the early years of practice who has not yet accumulated a large population of client cases may feel there is an acceptably small risk of a legal malpractice claim. A young attorney may also be influenced by a perceived high premium cost when still in the early years of building a practice. Some attorneys may feel their area of practice is relatively risk free, perhaps because of either the sophistication of their clients or the straightforward nature of their legal work. Legal malpractice coverage in this situation might be considered an unnecessary expense. Other attorneys belong to, or are employed by, partnerships which are de facto risk pools for claims at or below the level of basic coverage ordinarily available from legal malpractice insurers. Such attorneys may also feel that basic coverage is an unnecessary expense but that higher limits are more appropriate for their size practice.

While discussing the de facto risk pool nature of legal partnerships, it is worthwhile to note that a partnership, under which all partners are responsible for the acts of each partner, increases the probability that a member of the public could collect a legal malpractice judgment from the combined assets of the partners.

Experts in this area generally agree that mandatory legal malpractice coverage would require broad support among the members of the Bar Association.<sup>2</sup> Further complicating the issue of mandatory legal malpractice coverage is the difficulty of designing a fair and equitable rule. Attorneys who would not otherwise carry legal malpractice coverage might feel as though they were subsidizing those attorneys who felt they needed legal malpractice coverage. This is because, under a mandatory program, overhead expense would be spread over all attorneys rather than over the smaller number who would choose to carry legal malpractice coverage. Coverage, theoretically, without considering the increase in premiums that might be necessary to cover perceived "high risks", would be less expensive for all attorneys but would be forced on those attorneys who would not otherwise be insured.

Requiring universal legal malpractice insurance coverage might also have a negative impact on the pro bono (volunteer public interest) work done by attorneys who would not otherwise be required to obtain coverage. Lawyers who are employed in government or as in-

house counsel might be disinclined to pay several thousand dollars for the right to donate their legal assistance to the public.

Another philosophical issue involves the authority over who can practice law in Hawaii. The Hawaii Supreme Court is currently the sole authority deciding who practices law in the State of Hawaii. However, in the event malpractice insurance coverage is required, the coverage providers, through their right to deny malpractice to high risk applicants, would indirectly determine who could and could not practice law. The creation of a high risk pool for attorney malpractice, similar to that for high risk motorists under the State of Hawaii's no-fault automobile insurance program, would not solve this problem. A high risk pool would almost certainly result in malpractice insurance premiums of a magnitude which would effectively "disbar" the attorneys deemed to be "high risk". In the end, the coverage providers would ultimately decide who practices law in Hawaii.

Further, Richard Turbin, Chair of the HSBA's Committee on Professional Liability Insurance believes "many of those companies [those providing malpractice insurance] would leave the Hawaii market rather than be required to insure high risk lawyers".<sup>3</sup>

Also, it must be acknowledged that competitive pressures, investment results or other matters may cause insurers to raise premiums or pull out of the legal malpractice insurance market altogether. As a result, a lawyer who was insurable one year may become uninsurable in the following year, despite there being no change in that lawyer's practice or claims history.

### **Status Quo**

Under the status quo, reliance is placed solely on the commercial markets to provide legal malpractice coverage to those who desire coverage. Competition among the current coverage providers keeps costs down and coverage reasonably available. Market forces also provide coverage to attorneys in response to their needs. Large law firms can self-insure at the lower levels of risk while obtaining excess insurance to cover their larger risks. Sole practitioners can obtain insurance at basic levels, with or without a deductible. Lawyers serving sophisticated clients with standardized, routine services may decide to go without legal malpractice coverage. Of course, it is still possible that some lawyers will not purchase adequate insurance coverage.

The current situation requires no administration other than that already required by the Insurance Division of the Department of Commerce and Consumer Affairs and state insurance laws. The coverage providers and the attorneys who contract for coverage negotiate directly and maintain their own records.

### **Require Universal Legal Malpractice Insurance Coverage**

Assuming there is a need for mandatory malpractice insurance coverage, Hawaii would have to establish or designate a reliable vehicle or vehicles for providing universal coverage to all attorneys in Hawaii at economical rates. There are different approaches to this goal.

Establishing a professional liability fund such as the Oregon Bar's Professional Liability Plan would provide good quality, readily available coverage to all lawyers licensed by the State of Hawaii. However, because the cost of such a plan in Hawaii would have to be spread over about half as many attorneys as there are in the Oregon Plan, the cost of such a plan would likely greatly exceed the current annual charge of \$1,800 per participating Oregon attorney. Thus, a similar plan in Hawaii would likely represent a more expensive prospect for Hawaii attorneys who currently pay about \$2,000 per attorney per year. Also, the managerial expertise needed to establish and administer such an ambitious program is in very short supply in Hawaii. The next such plan to come into being would be only the second such plan in the United States.

Another similar approach requires all lawyers in private practice to obtain the basic levels of insurance available. Questions raised earlier are pertinent here. Particular attention should be paid to the de facto power to disbar attorneys that this option would provide to legal malpractice coverage providers. In effect, coverage providers would determine who practices law in the State of Hawaii by either (1) denying coverage to attorneys deemed to be "high risks" in the sole judgement of the coverage provider, or (2) placing such attorneys in "high risk" pools and possibly exacting premiums so high as to make legal malpractice coverage unavailable.

### **Require Legal Malpractice Insurance Coverage for Attorneys Who Have Committed Malpractice**

An alternative to requiring all attorneys to obtain legal malpractice coverage is requiring only those attorneys who have committed legal malpractice to obtain a minimum amount, say \$1 million, of legal malpractice coverage. In this scenario, a criminal verdict of guilty (e.g., of theft from a client) or a civil judgment involving damages of \$10,000 or more might be recognized as a determination that an attorney had committed legal malpractice. The attorney would be required to obtain the mandated amount of coverage before being allowed to renew the license to practice. The Office of the Disciplinary Counsel would be a natural administrator of such a provision.

This approach likely would not result in large additional costs. However, it places the coverage providers in the same uncomfortable position discussed in the previous section regarding a universally mandatory program. The coverage providers would, in effect,

determine who practices law in the State of Hawaii. This is something the coverage providers wish to avoid.<sup>4</sup>

### **Require Proof of Financial Ability to Pay Damages**

Yet another alternative is to require proof of financial ability to pay damages or proof of current legal malpractice coverage. This could be accomplished through a variety of methods. One reliable approach would involve posting a bond from a bonding company. For instance, it is common in the construction industry for contractors to post a bond for each specific construction project. Large automobile self-insurers in the State of Hawaii post bonds or certificates of deposit with the Hawaii Insurance Commissioner as proof of their ability to pay claims. In this instance, a lawyer would post a bond which would stand ready to pay any damages arising out of legal malpractice claims. Certain liquid assets could be posted in lieu of a bond. Alternative liquid assets might include certificates of deposit, investment grade bonds, and certain classes of publicly traded common stocks.

Should proof of financial responsibility be required for all licensed attorneys practicing in Hawaii, additional administration would certainly be required. The type and complexity of choices would depend on the specific situations.

Employing the honor system is one available choice. Under this, attorneys would be required by law to maintain some level of legal malpractice coverage or proof of financial ability to pay damages. No registration or filing with any authority would be required. It would be a very economical approach, both in terms of time and expense. However, a program without any administration might be perceived as mere public relations by some members of the public. Also, in the event an attorney violated this law, there may be no other "safety net" for the injured client.

Existing entities may be able to provide administrative assistance. Either proof of malpractice coverage from an approved provider or proof of ability to pay damages, such as an insurance company's bond, a certificate of deposit or a liquid, investment-grade security, would be deposited with the Insurance Commissioner by each attorney wishing to practice. Annual licensing (i.e., the annual payment of dues and fees required to maintain licensure) of an attorney would then require written acknowledgment by the Insurance Commissioner.

### **Improve Public Awareness of the Issue**

Establishing an ongoing public awareness program, while not requiring lawyers to obtain legal malpractice coverage, may be a viable alternative. Under this approach, attorneys would not be required to disclose whether they carry legal malpractice coverage. The Hawaii State Bar Association would increase its efforts to enhance the public's awareness and knowledge of legal malpractice issues. In addition, the HSBA would assist the

## REQUIRING ALL LICENSED ATTORNEYS TO CARRY LEGAL MALPRACTICE INSURANCE

public with information voluntarily supplied by attorneys about whether they carry legal malpractice insurance. This would allow attorneys to choose the level and quality of their legal malpractice coverage while allowing the public to carefully choose attorneys in an informed manner. One negative factor is that such a program might encourage spurious lawsuits and result in unnecessary costs.

Instituting such a program would not constitute de facto mandatory legal malpractice because attorneys would not be required to carry such coverage or to disclose whether such coverage exists.

Providing reliable information to the public would be critical in accomplishing this objective. First the public must understand legal malpractice in general. Among other things, it would be prudent to explain that under the "claims made" nature of legal malpractice coverage, an attorney's insurance policy probably would not cover claims made beyond the terms of the insurance policy. Claims made in the future would ordinarily be covered by future insurance arrangements, which may not yet be contracted. Then the interested public must be able to inquire as to whether an attorney carries legal malpractice coverage.

Such a public awareness program could be administered through existing programs. "Law line", a free telephone information service funded by the state Judiciary and the HSBA, could provide a taped message and supporting brochures about legal malpractice issues to the public. In addition, the Hawaii State Bar Association's office could maintain information volunteered by attorneys about whether they carry legal malpractice coverage and respond to telephonic or written inquiries. The Bar has already acted to begin this process by requiring attorneys listed in its Lawyer Referral Service to carry legal malpractice coverage of at least \$100,000 beginning in July 1993.<sup>5</sup>

Such a program would be equally desirable if coupled with a loss prevention educational program for attorneys. This would entail training and support to attorneys and their staffs by the HSBA. Training could address matters such as administration of a law office to minimize the risk of legal malpractice through missed deadlines, lost assets or lost records. It could also include the value of clearly communicating the scope of services and the reasonable expectations of each assignment to each client.

## ENDNOTES

1. Final Report of the Disciplinary Board/Hawaii State Bar Association Joint Committee on Evaluation of Disciplinary Enforcement (Honolulu, Hawaii: March 1992).
2. Interview with Mr. Larry Gilbert, President, Hawaii State Bar Association, June 30, 1992; interview with Mr. Brad Oliver, Vice President, Marsh and McLennan (insurance brokers), July 15, 1992; and telephone interview with Mr. Kirk Hall, Chief Executive Officer, Oregon State Bar Professional Liability Fund, July 16, 1992.
3. Letter from Mr. Richard Turbin, Chair, Hawaii State Bar Association on Professional Liability Insurance, to Mr. John Candon, September 8, 1992 (see Appendix H).

## ANALYSIS OF ALTERNATE APPROACHES

4. Interview with Mr. Brad Oliver, Vice President, Marsh and McLennan (insurance brokers), July 15, 1992.
5. Telephone interview with Mr. Larry Gilbert, President, Hawaii State Bar Association on October 28, 1992.

## Chapter 6

### FINDINGS AND RECOMMENDATIONS

#### Findings

The purpose of this study is twofold. House Resolution No. 294, H.D. 1 (1992), requested a study on the feasibility of requiring all licensed attorneys in the State of Hawaii engaged in private practice to carry legal malpractice insurance. House Standing Committee Report No. 1445-92, concerning this measure, requested the study also address whether non-mandatory legal malpractice insurance coverage for attorneys practicing in the State of Hawaii actually presents a problem.

Based on the information gathered and analyzed in this study, non-mandatory legal malpractice insurance coverage does not pose a great problem in Hawaii. The numbers and dollar amounts of the typical legal malpractice claims in Hawaii reviewed in the course of this study were small to moderate in nature compared to the national experience of ALAS covered attorneys and the experience of the Oregon Plan. The Office of the Disciplinary Counsel conducts its disciplinary and educational responsibilities in an active and diligent manner. The ODC's efforts both increase the understanding and enhance the awareness of attorneys to their responsibilities to the public. The Lawyers' Fund for Client Protection is responsive to the public.

The current arrangement could be improved. However, based on the work done in this study, non-mandatory legal malpractice coverage generally does not present a significant problem to the public in Hawaii at this time.

Further, this study reveals that requiring universal legal malpractice coverage would be considered "unfair" and would be resisted by many lawyers in Hawaii. A 1991 survey conducted by the Hawaii State Bar Association indicates 629 attorneys felt such coverage was not needed, 259 others felt the premium cost was a problem and 84 chose to self insure. Over 100 other attorneys had other reasons for not carrying legal malpractice coverage. As discussed in Chapter 5, among other things, experts in this field believe broad support among the members of a Bar Association is a necessary ingredient in the success of a universal legal malpractice requirement.

Attorneys differ in their needs for legal malpractice coverage because of differing practice areas, differences in the ways they conduct their practices and the sizes of their partnerships, professional corporations or associations. There is currently no compelling reason strong enough to overcome the differences cited above.

In addition, even if the resistance among some attorneys were overcome, the costs of establishing and administering any of the options addressed in this study would likely be higher than those involved in the current situation.

## Recommendations

The current situation in Hawaii does not warrant mandatory legal malpractice insurance for all attorneys in private practice. While the "safety net" beneath Hawaii's public could be strengthened by such a requirement, the costs involved may not justify the improvements.

The public might be greatly aided by the implementation of a low-cost, legal malpractice public awareness program of the type discussed in Chapter 5, handled by the Hawaii State Bar Association. A taped message on "Law Line" and accompanying brochures could educate the public on the issues. The office of the Hawaii State Bar Association's could also maintain information voluntarily supplied by attorneys about whether those attorneys carry legal malpractice insurance. This information could be provided to the public upon request.

In addition, a legal malpractice loss prevention program administered by the HSBA could help to reduce the incidence of malpractice in Hawaii.

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## HOUSE RESOLUTION

REQUESTING A STUDY ON THE FEASIBILITY OF REQUIRING ALL ATTORNEYS  
IN THE STATE OF HAWAII THAT ARE ENGAGED IN PRIVATE PRACTICE  
TO CARRY LEGAL MALPRACTICE INSURANCE.

WHEREAS, in Hawaii, lawyers are not required to carry legal malpractice insurance even though their negligence can cause great harm and loss to clients; and

WHEREAS, moreover, a lawyer's negligence can jeopardize the faith and trust the public should have in their attorney and the legal profession; and

WHEREAS, although most of the larger law firms have legal malpractice insurance, it is very expensive and difficult for the smaller law firms to get this type of insurance coverage; and

WHEREAS, currently, approximately 84 percent of Hawaii's attorneys in private practice have legal malpractice insurance; and

WHEREAS, however, even if clients are successful in suing for legal malpractice, they may not fully recover because 16 percent of Hawaii's attorneys who actually engage in the practice of law do not have legal malpractice insurance; and

WHEREAS, while the Disciplinary Counsel investigates complaints of unethical conduct by lawyers and does not normally investigate fee disputes or allegations of legal malpractice, it does not have the power to enforce any payments or have a fund to make compensatory payments; and

WHEREAS, if all other avenues of recovery are exhausted clients or claimants can apply for compensation with the Clients' Security Fund; and

WHEREAS, administered by the Hawaii State Supreme Court, the Clients' Security Fund, is limited to clients who have lost money or other property through dishonesty and not because of negligence or malpractice; now, therefore,

BE IT RESOLVED by the House of Representatives of the Sixteenth Legislature of the State of Hawaii, Regular Session of 1992, that the Legislative Reference Bureau is requested to study

the feasibility of requiring that all active members of the Hawaii State Bar who are engaged in the private practice of law and whose principal offices are in the State of Hawaii to carry legal malpractice insurance; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau submit a report with findings and recommendations with proposed legislation, if appropriate, to the Legislature at least twenty days before the convening of the 1993 Regular Session; and

BE IT FURTHER RESOLVED that a certified copy of this Concurrent Resolution be transmitted to the Legislative Reference Bureau, the Administrative Director of the Courts, the Hawaii State Bar Association, and the Office of Disciplinary Counsel.

## Appendix B

STAND. COM. REP. NO. 1445-92

Honolulu, Hawaii  
April 15, 1992

RE: H.R. No. 294  
H.D. 1

Honorable Daniel J. Kihano  
Speaker, House of Representatives  
Sixteenth State Legislature  
Regular Session of 1992  
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.R. No. 294 entitled:

"HOUSE RESOLUTION REQUESTING A STUDY ON THE FEASIBILITY OF  
REQUIRING ALL ATTORNEYS IN THE STATE OF HAWAII THAT ARE  
ENGAGED IN PRIVATE PRACTICE TO CARRY LEGAL MALPRACTICE  
INSURANCE., "

begs leave to report as follows:

The purpose of this resolution is to request the Legislative Reference Bureau to study the feasibility of requiring that all active members of the Hawaii State Bar who are engaged in the private practice of law and whose principal offices are in the State of Hawaii to carry legal malpractice insurance.

Your Committee received testimony in support of this resolution from the Hawaii Academy of Plaintiffs' Attorneys and a private individual.

The resolution proposes that the Legislative Reference Bureau conduct a study to look into the feasibility of requiring that all private attorneys who practice within the State of Hawaii carry legal malpractice insurance. Attorneys have a fiduciary duty to their clients, however, there has been incidents when an attorney has breached that fiduciary duty to the client or by acts or omissions caused financial hardship to their client. Subsequently, the attorney is charged and found guilty of legal malpractice, however, because the attorney declares bankruptcy or is not covered by legal malpractice insurance the client is left

HSCR JUD HR294 HD1

with no means of recovering damages. Consequently, the innocent client often experiences great financial, emotional and possible physical damages.

Your Committee has amended this resolution to request that the Legislative Reference Bureau conduct this study in consultation with the Hawaii Bar Association. The Legislative Reference Bureau is also requested to do an assessment to discover if there is an actual problem with non-mandatory legal malpractice insurance for attorneys practicing in the State of Hawaii and to include data on the number of non-insured attorneys and specialties within the legal profession where mandatory legal malpractice is warranted.

Your Committee on Judiciary concurs with the intent and purpose of H.R. No. 294, as amended herein, and recommends that it be referred to the Committee on Legislative Management in the form attached hereto as H.R. No. 294, H.D. 1.

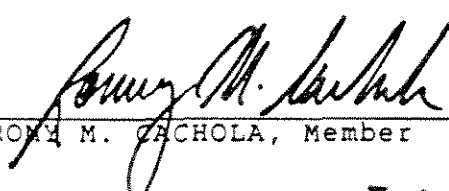
Respectfully submitted,

  
\_\_\_\_\_  
WAYNE METCALF, Chair

*excused*  
\_\_\_\_\_  
ANNELLE AMARAL, Vice Chair

  
\_\_\_\_\_  
DENNIS A. ARAKAKI, Member

  
\_\_\_\_\_  
DUKE BAINUM, Member

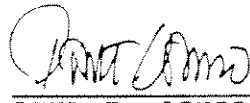
  
\_\_\_\_\_  
ROMY M. CACHOLA, Member

*excused*  
\_\_\_\_\_  
DAVID M. HAGINO, Member

  
\_\_\_\_\_  
KENNETH T. HIRAKI, Member

*excused*  
\_\_\_\_\_  
MAZIE HIRONO, Member

  
DAVID MORIHARA, Member

  
PAUL T. OSHIRO, Member

*excused*  
HENRY H. PETERS, Member

  
DWIGHT Y. TAKAMINE, Member

*excused*  
EDWARD K. THOMPSON III, Member

  
CYNTHIA THIELEN, Member

  
GENE WARD, Member

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OFFICIAL PUBLICATION OF THE HAWAII STATE BAR ASSOCIATION

## OVERVIEW OF THE HAWAII ATTORNEY DISCIPLINE SYSTEM

GERALD H. KIBE\*

On July 1, 1990, the Hawaii attorney discipline system began its sixteenth year of operation. It was on July 1, 1974 that the Supreme Court of Hawaii implemented a *full-time* disciplinary system (under the supervision of the Disciplinary Board) to handle complaints of unethical conduct against Hawaii attorneys.<sup>1</sup>

The past 15 years has been a period of tremendous growth and change throughout the legal profession. In Hawaii alone, the size of the bar increased by about 340% from 1974 to 1989.<sup>2</sup> The growth in bar membership has, among other factors, presented a unique challenge to the professional responsibility system. Although the ethics system has not expanded in size at the same rate as the bar, necessary adjustments have been made under the leadership of the Supreme Court and Disciplinary Board to enable the system to remain an effective factor in ensuring bar accountability.

During the past several years, greater awareness and sensitivity have developed among bar members toward ethical precepts and the need to strive for higher standards of conduct. This heightened concern and awareness has most recently spawned further significant developments for the enhancement of professionalism among bar members in Hawaii, such as the unification of the bar<sup>3</sup> and the implementation of a judges' and lawyers' assistance program.<sup>4</sup>

Despite the relatively long existence of the full-time discipline organization and increased attention devoted to professionalism, many bar members remain largely unfamiliar with the structure and functions of the discipline system. This is true even though all attorneys on active status pay an annual mandatory registration fee which finances the operations of the disciplinary system.<sup>5</sup>

Of course, many lawyers regard attorney *discipline* with some measure of self-concern or fear, even though ethical issues are increasingly at the forefront of modern practice. Attorneys belong, however, to the only profession which is not regulated through the executive branch of government. Since our professional responsibility system is based on the principle of *self-regulation*, bar members should take time to obtain an understanding of the features of that organization. Familiarity with the framework and operations of the discipline system will help to reassure that the procedures and policies established by the Supreme Court and Disciplinary Board ensure fair *and* thorough adjudication of complaints against attorneys.

This article will provide a general overview of the Hawaii lawyer ethics system (including a

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\* Chief Disciplinary Counsel, 1983-present; Assistant Disciplinary Counsel, 1979-81. The author wishes to thank Charlene M. Norris and Carole R. Richelieu (for their editorial comments), Eric Van Deusen and Shauna Candia (for drafting case summaries), and Debra Tamanaha (for statistical compilations).

<sup>1</sup> Prior to 1974, two volunteer ethics committees (known as the Legal Ethics Committee of the Hawaii State Bar Association and the Rule 16 Committee of the Hawaii Supreme Court) investigated and prosecuted complaints against lawyers. See D. Heely, *Bringing an End to a Scandal*, XV HAW. BAR J. No. 1, at 4 n. 6 (1980).

<sup>2</sup> As of July 1, 1974, there were a total of 1,425 attorneys licensed in Hawaii. As of December 31, 1989, that number had increased to 4,851 (including non-active members).

<sup>3</sup> Rule 17, Rules of the Supreme Court of Hawaii (RSCH) (adopted October 27, 1989; effective November 1, 1989).

<sup>4</sup> Rule 16, RSCH (adopted July 7, 1989).

<sup>5</sup> See Rule 2.18(a), RSCH (November 1989).

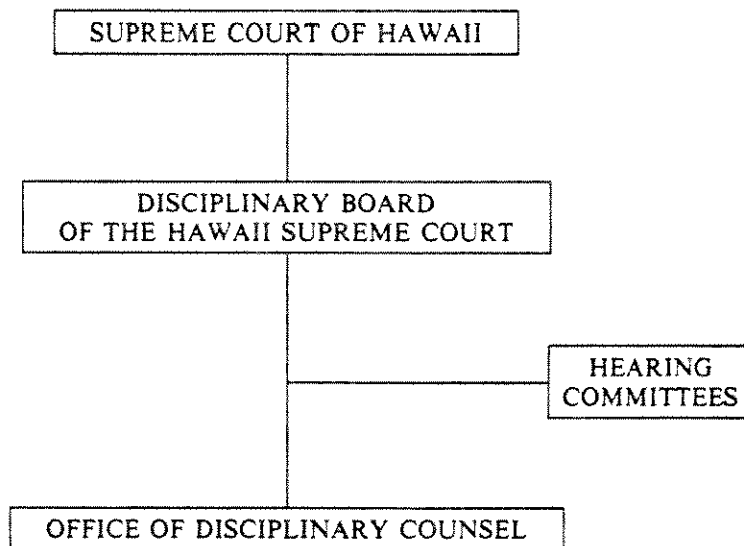
summary of public disciplinary action taken by the Supreme Court and Disciplinary Board since 1980). The effect of bar unification upon the discipline system, as well as some other developments which will have an impact upon legal ethics and discipline in the future, will also be briefly discussed.

### I. STRUCTURE AND FUNCTIONS OF THE HAWAII ATTORNEY DISCIPLINE SYSTEM

From July 1974 through June 1990, the Hawaii lawyer ethics system has handled over 2,700 docketed ethics complaints. Those complaints have cumulatively resulted in 28 disbarments, 21 suspensions, 6 public censures, 4 public reprimands, 26 private reprimands, and 217 private informal admonitions.<sup>6</sup>

The lawyer discipline organization reflects, of course, more than sanctions and statistics. It is a formalized system of lawyers and non-lawyers who carry out educational and preventive, as well as disciplinary, functions to help ensure that bar members are aware of—and adhere to—the high standards of ethical conduct promulgated by the Supreme Court.<sup>7</sup> This system operates under specific rules and guidelines adopted by the Supreme Court and Disciplinary Board.<sup>8</sup>

A chart illustrating the relatively simple framework of the Hawaii lawyer ethics system is set forth below:



The functions of each part of this system are generally described as follows:

#### A. Supreme Court

The attorney discipline system is organized and ultimately supervised by the Supreme Court of Hawaii, which has "inherent authority" to govern lawyer admissions and conduct.<sup>9</sup> By

<sup>6</sup> See Records of the Disciplinary Board (1974 through 1990). It should be noted that many public sanctions involve multiple complaints. Hence, from July 1974 through June 1990, a cumulative total of 525 investigations (or 19% of closed cases) were concluded as a result of the imposition of disciplinary sanctions. The proportion is larger for later years alone, with 307 investigations (or 26% of closed cases) concluded as a result of imposition of disciplinary sanctions from January 1985 through June 1990.

<sup>7</sup> See Hawaii Code of Professional Responsibility.

<sup>8</sup> See Rule 2, RSCH (September 1984, as amended); Rules of Procedure of the Disciplinary Board ("Disciplinary Board Rules").

<sup>9</sup> *In re Trask*, 46 Haw. 404, 415, 380 P.2d 751, 758 (1963); *Disciplinary Board v. Bergan*, 60 Haw. 546, 555, 592 P.2d 814, 819 (1979); see HRS §605-1(a) (Supreme Court has "sole power to revoke or suspend the license of

its decisions and directives, the Court guides the operation of the discipline system.

In carrying out its inherent authority to establish standards of conduct for bar members, the Court in 1970 adopted the Hawaii Code of Professional Responsibility, which is based on the American Bar Association (ABA) Model Code of Professional Responsibility. The Hawaii Code has been amended in certain limited respects since 1970.<sup>10</sup>

Rule 2, RSCH, which incorporates the Hawaii Code of Professional Responsibility, provides the organizational and procedural framework for enforcement of the Code.<sup>11</sup> These enforcement functions are carried out primarily through the Disciplinary Board and Office of Disciplinary Counsel, although the Supreme Court retains ultimate authority for attorney discipline matters. The Court is also the only entity which can impose the most serious disciplinary sanctions of disbarment, suspension, and public censure.<sup>12</sup>

## B. Disciplinary Board

The Disciplinary Board of the Hawaii Supreme Court consists of 18 members appointed by the Supreme Court.<sup>13</sup> Board members serve staggered 3-year terms.<sup>14</sup>

The Disciplinary Board directly supervises the functions of the Office of Disciplinary Counsel, sets policy guidelines for the handling of discipline matters (subject to Supreme Court review), issues formal opinions on ethics issues, and acts as a reviewing body for all cases in which formal disciplinary proceedings have been initiated.<sup>15</sup> Certain forms of discipline (i.e., public and private reprimands) may be imposed directly by the Board.<sup>16</sup>

The Board also appoints three-member hearing committees (consisting of non-Board members) which initially receive evidence and make recommendations for disposition in formal disciplinary cases.<sup>17</sup>

Under authority granted under Rule 2, the Board has also promulgated rules of procedure governing hearing committee and Board proceedings.<sup>18</sup>

Non-lawyer members presently comprise about one-third of the Board. The presence of lay members on the Board ensures that the attorney discipline system remains accountable to the public. The participation of non-lawyers on the Board enhances the credibility of the lawyer ethics process and defeats allegations that complaints against lawyers are simply "swept under the rug" by their peers.

## C. Office of Disciplinary Counsel

The Office of Disciplinary Counsel (ODC) is the day-to-day operational arm of the Disciplinary Board. Members of the ODC staff are employed by the Disciplinary Board.<sup>19</sup>

ODC discharges two primary responsibilities:

1. *Complaint Investigation and, Where Necessary, Prosecution.* The primary function of ODC is, of course, the investigation of complaints of alleged unethical conduct on the part of Hawaii attorneys.

These investigations may lead to determinations ranging from a finding of no unethical

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any . . . practitioner") and §605-6 (Supreme Court may prescribe . . . rules for the government of practitioners"); Hawaii Constitution, art. VI, §7 (Supreme Court has power to promulgate rules and regulations for all courts relating to "practice").

<sup>10</sup> See, e.g., Canon 2, Hawaii Code of Professional Responsibility (advertising, solicitation, and firm name rules have been the most extensively revised sections); DR 9-102(B) (rules regarding financial recordkeeping).

<sup>11</sup> Rule 2, RSCH (September 1984) (originally adopted as Rule 16, RSCH (November 1974)).

<sup>12</sup> Rules 2.3(a), (b), and (c), RSCH (September 1984).

<sup>13</sup> Rule 2.4(a), RSCH (November 1989).

<sup>14</sup> Rule 2.4(b), RSCH (September 1984).

<sup>15</sup> Rule 2.4(c), RSCH (September 1984).

<sup>16</sup> Rules 2.3(d) and (e), RSCH (September 1984).

<sup>17</sup> Rule 2.4(e)(3), RSCH (September 1984).

<sup>18</sup> See 2.4(e)(5), RSCH (September 1984); Disciplinary Board Rules.

<sup>19</sup> Rule 2.4(e)(2), RSCH (September 1984) (the ODC staff serves at the pleasure of the Board and, ultimately, the Supreme Court).

conduct (resulting in dismissal of the complaint) to the institution of formal proceedings leading to imposition of disciplinary sanctions upon the subject attorney. If formal disciplinary proceedings are instituted,<sup>30</sup> ODC attorneys serve as the "prosecutors" in those actions.

2. *Educational Activities.* A substantial amount of time is also spent by ODC in responding to requests from Hawaii attorneys for ethics opinions and in preparing other educational materials to assist the legal profession in maintaining ethical standards of practice. In 1989, for example, 80 written and 1,061 verbal ethics opinions were issued by ODC. Opinions are binding upon ODC (but not necessarily the Board or Supreme Court), and cover an attorney's *own prospective* conduct only.

Other educational functions undertaken by ODC include writing monthly articles on ethics for the *Hawaii Bar News*, preparing ethics information for various Continuing Legal Education programs, and speaking to groups of lawyers, law students, legal secretaries, and paralegals (as well as members of the public) about ethics and discipline. These activities (in addition to the provision of ethics opinions to bar members) require the devotion of a significant amount of time by the ODC staff. However, these activities are regarded as crucial because they lessen the number of instances of misconduct which might otherwise occur.

Beyond these functions, the ODC staff also handles numerous inquiries from members of the public who have questions or concerns regarding attorneys. In 1988 and 1989, for example, ODC handled 1,249 and 1,178 such inquiries, respectively, by telephone. While the ODC staff is not permitted to give legal advice or assistance, general guidance is offered concerning, for example, possible methods of resolving attorney-client disputes or misunderstandings and how, if necessary, ethics complaints may be submitted and the manner in which those complaints will be processed.

#### D. Hearing Committees

The Disciplinary Board appoints a "pool" of hearing committee members (consisting of non-Board members) who sit as fact-finders in formal discipline cases (or on petitions for reinstatement filed by disbarred or suspended attorneys).<sup>31</sup>

Three-member panels are randomly appointed from that "pool" by the Chairperson of the Disciplinary Board to preside over discipline or reinstatement proceedings as they arise. One layperson may be assigned to each hearing panel.<sup>32</sup>

Hearing committees cannot themselves impose disciplinary sanctions. Instead, they issue findings of fact, conclusions of law, and recommendations for discipline to the Disciplinary Board.<sup>33</sup>

## II. OVERVIEW OF DISCIPLINARY PROCEDURES

#### A. Investigation by ODC

Most ethics complaints come to ODC in the form of letters from clients who are dissatisfied with some aspect of their lawyer's performance. However, complaints can be taken from any source (not just clients), and ODC can also begin an investigation on its own without a complaint.<sup>34</sup> From 1985 through 1989, 71% of all docketed complaints were from clients, with the remainder from other sources, such as other attorneys, judges, and ODC itself.

Complaints which are submitted to ODC must be in writing and must contain sufficient factual detail to permit a meaningful investigation to be commenced. Each grievance is carefully

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<sup>30</sup> See *infra* §II.C.

<sup>31</sup> See Rule 2.5(b), RSCH (September 1984).

<sup>32</sup> See Rule 2.5(a), RSCH (September 1984) (of the 74 persons presently in the hearing committee "pool", 19 are laypersons; the presence of non-lawyers on hearing committees also helps to ensure public accountability of the discipline system).

<sup>33</sup> See Rule 2.5(b), RSCH (September 1984); DB 12, Disciplinary Board Rules.

<sup>34</sup> Rule 2.6(b)(2), RSCH (September 1984) (Disciplinary Counsel has the power and duty to "investigate all matters involving alleged misconduct called to his attention *whether by complaint or otherwise*").

reviewed to determine whether the facts alleged raise specific issues under the Hawaii Code of Professional Responsibility. If a complaint contains insufficient facts, the complaining party is asked to submit further information before an investigation is begun.

Also, some areas of dissatisfaction, such as "simple" fee disputes, are not normally handled within the disciplinary process but are instead referred to the Hawaii State Bar Association for fee mediation/arbitration. In addition, complaints alleging malpractice (negligence) must normally be addressed through the courts rather than the disciplinary process, unless the negligence may have resulted from possible ethical misconduct (such as neglect, lack of proper preparation, or lack of proper qualification to practice in the specific area of law). Also, complaints against full-time judges (and part-time judges relating to their actions on the bench) fall within the exclusive jurisdiction of the Commission on Judicial Discipline.<sup>35</sup> Finally, complaints involving unauthorized practice of law are handled by the Department of the Attorney General, State of Hawaii.<sup>36</sup>

If a formal investigation is undertaken, the attorney complained against (who is referred to as the "respondent") is notified immediately by mail, and a detailed written response is requested concerning the matter.<sup>37</sup>

In many instances, respondents are urged to obtain counsel to ensure that they are represented by an independent, objective viewpoint throughout the investigation.

A respondent has a duty to cooperate fully in the investigation of a complaint. Failure to cooperate (for example, by failing to respond to requests for information from ODC) is a serious matter and can result in summary suspension and may form a separate basis for a finding of unethical conduct.<sup>38</sup>

ODC investigates each matter as thoroughly as possible to ensure that all relevant facts are brought to light before a disposition is recommended. In addition to input from the respondent and the complaining party, other witnesses may be interviewed and records may be obtained (from courts and financial institutions, for example). All information essential to a proper determination is carefully weighed.

A completed investigation will result in one of three outcomes: (i) the complaint will be dismissed with a finding of no disciplinary violation (occasionally, cautionary information is provided in the dismissal notice to assist the attorney in avoiding similar complaints in the future); (ii) an informal admonition may be imposed by ODC;<sup>39</sup> or (iii) formal disciplinary proceedings may be instituted by ODC.<sup>40</sup>

No docketed investigation may be concluded (or formal proceeding instituted) without the approval of at least one member of the Disciplinary Board who has reviewed the investigation.<sup>41</sup>

## B. Informal Admonition

An informal admonition is the least serious form of discipline which can be imposed.<sup>42</sup> An admonition is a *private* sanction imposed by ODC and is usually imposed for first-time misconduct of a relatively non-serious nature.<sup>43</sup>

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<sup>35</sup> See Rule 8.2(c), RSCH (March 1985).

<sup>36</sup> See HRS §605-15.1; *Reliable Collection Agency v. Cole*, 59 Haw. 503, 584 P.2d 107 (1978).

<sup>37</sup> See DB 5, Disciplinary Board Rules (except when a complaint is "frivolous on its face or falls outside the jurisdiction of the Board," ODC must, before bringing the investigation to a conclusion, (1) notify the respondent that he or she may, within a time certain, state his or her position regarding the alleged misconduct, and (2) give consideration to the statement of position filed by the respondent).

<sup>38</sup> Rule 2.12A, RSCH (April 1988) (summary suspension may be ordered for failure to cooperate in a disciplinary proceeding); see *Office of Disciplinary Counsel v. Battista*, No. 13626 (Order of suspension under Rule 2.12A filed March 20, 1989) (summary suspension); *Office of Disciplinary Counsel v. Hitchcock*, No. 7222 (Order of Disbarment issued April 25, 1979) (failure to cooperate constitutes violations of DR 1-102(A)(5) and (6)).

<sup>39</sup> See *infra* §11.B.

<sup>40</sup> See *infra* §11.C.

<sup>41</sup> See Rule 2.7(a), RSCH (September 1984); DB 6 and 7, Disciplinary Board Rules. See also Rule 2.7(b), RSCH (July 1989) (any determination that an ethical violation has occurred must be supported by "clear and convincing" evidence).

<sup>42</sup> See Rule 2.3(f), RSCH (September 1984).

<sup>43</sup> See, e.g., Kibe, Disciplinary Counsel's Report, 24 *Hawaii Bar News* No. 4 (April 1987); Kibe, Disciplinary

An admonition, which does not prevent a respondent from continuing to practice of law, is imposed by ODC by way of a certified letter setting forth the reasons for the sanction. All disciplinary actions, including an admonition, are "cumulative" in the sense that a subsequent ethical violation may result in a more severe sanction due to the prior discipline.<sup>44</sup>

If the respondent agrees to accept the informal admonition, no hearing is held. If the respondent rejects the informal admonition, however, formal discipline proceedings must be commenced with opportunity for a full hearing.<sup>45</sup>

### C. Formal Disciplinary Proceedings

A formal discipline proceeding can result in imposition of any of the following sanctions upon a respondent:<sup>46</sup>

- (a) Disbarment by the Supreme Court; or
- (b) Suspension by the Supreme Court for a period not exceeding five years; or
- (c) Public censure by the Supreme Court; or
- (d) Public reprimand by the Disciplinary Board with the consent of the respondent; or
- (e) Private reprimand by the Disciplinary Board with the consent of the respondent.

In addition, restitution and/or payment of costs (exclusive of attorney's fees) may be ordered by the Supreme Court or Disciplinary Board.<sup>47</sup> However, although restitution may be ordered, monetary recompense is not the primary purpose (or probable outcome) of a formal discipline proceeding. A person who feels monetarily aggrieved as a result of the "dishonest" conduct of an attorney should pursue direct legal action against the attorney and/or file a claim for possible compensation through the Clients' Security Fund of the Bar of Hawaii.<sup>48</sup>

A formal disciplinary proceeding is initiated by the filing of a Petition for discipline with the Disciplinary Board. After service of the Petition,<sup>49</sup> the respondent is afforded the opportunity to file an Answer.<sup>50</sup>

Discovery is *not* allowed in a discipline proceeding absent the approval of the Chairperson of the Disciplinary Board.<sup>51</sup>

After an Answer has been filed, a three-member hearing committee is assigned to conduct a full evidentiary hearing and ultimately issue findings of fact, conclusions of law, and a recommendation as to discipline.<sup>52</sup>

Where ODC and the respondent enter into a full stipulation of facts and recommended discipline, the case is submitted directly to the Disciplinary Board for review *without* presentation before a hearing committee.<sup>53</sup>

Counsel's Report, 25 *Hawaii Bar News* No. 7 (July 1988); Kibe, Disciplinary Counsel's Report, 26 *Hawaii Bar News* No. 7 (June 1989); Kibe, Disciplinary Counsel's Report, 27 *Hawaii Bar News* No. 7 (July 1990).

<sup>44</sup> See, e.g., ABA Standards for Imposing Lawyer Sanctions, Standard 9.22(a) (1986) (prior disciplinary offenses may be considered an aggravating factor which can increase the sanction to be imposed).

<sup>45</sup> DB 9, Disciplinary Board Rules.

<sup>46</sup> Rule 2.3, RSCH (September 1984).

<sup>47</sup> Rule 2.3(f), RSCH (September 1984).

<sup>48</sup> See Rule 10, RSCH (September 1984).

<sup>49</sup> See Rule 2.11(a), RSCH (September 1984) (service is made personally by any individual authorized by the Chairperson of the Disciplinary Board, except that if the respondent "cannot be found within the state or has departed therefrom", service may be made by registered or certified mail at the respondent's last address shown on his or her attorney registration statement filed under Rule 2.18, RSCH, or any other last known address; service by publication in the latter situation is not, therefore, necessary).

<sup>50</sup> Rule 2.7(b), RSCH; DB 11(a), Disciplinary Board Rules (as in civil proceedings, the Answer must be filed within 20 days of service of the Petition). See generally DB 28, Disciplinary Board Rules (extensions of time to file an Answer may be obtained only from the Chairperson of the Disciplinary Board, and are to be granted only upon a showing of "extreme hardship").

<sup>51</sup> Rule 2.12, RSCH; DB 11(f), Disciplinary Board Rules.

<sup>52</sup> Rule 2.7(b), RSCH (September 1988); DB 11 and 12, Disciplinary Board Rules. See n. 31, *supra* (findings must be supported by "clear and convincing" evidence).

<sup>53</sup> Rules 2.7(b) and (d), RSCH (September 1988) (this procedure, adopted in 1988, has helped to reduce the processing time in a number of recent formal disciplinary cases).

After a hearing committee report (or a full stipulation) has been filed with the Disciplinary Board, the Board may adopt or modify the report (or stipulation) or may require further hearing committee proceedings.<sup>44</sup>

After reviewing any formal discipline case, the Disciplinary Board may choose to impose a public or private reprimand upon the attorney. The consent of the attorney is required before these forms of discipline can be imposed.<sup>45</sup> If the attorney does not consent, the case must be presented to the Supreme Court for final review.<sup>46</sup>

A public reprimand is imposed by the Board's issuance of a public order setting forth the reasons for the reprimand. A private reprimand is imposed by the appearance of the attorney before the full Disciplinary Board, at which time the reprimand is verbally imposed upon the respondent by a member of the Board. A reprimand (public or private) does not prevent the respondent from continuing to practice, but signifies that the misconduct was too serious to warrant only an informal admonition.<sup>47</sup>

If the Board determines that disbarment, suspension, or public censure is warranted, or if the attorney refuses to accept a public or private reprimand, the case is forwarded by the Board to the Supreme Court for final review and disposition.<sup>48</sup> After written and (if ordered) oral argument is presented to the court,<sup>49</sup> a final decision is rendered.

#### D. Supplementary Proceedings

In addition to actual disciplinary action, the Disciplinary Board—or, where applicable, ODC—is empowered to take certain steps to protect the public in limited situations. These supplementary proceedings are summarized as follows:

1. ODC may seek the temporary restraint from practice of an attorney who has been convicted of a felony (or of any other crime which, even if not a felony, involves "dishonesty or false statement").<sup>50</sup>

2. The Board may seek the transfer of an attorney to inactive status where the attorney may be incapacitated from practicing law due to mental or physical disability.<sup>51</sup>

3. ODC may seek the appointment by the Supreme Court of counsel to inventory and distribute to clients the files of an attorney who is on inactive status due to disability, or who has disappeared or died, and for whom there is no other person responsible for conducting his or her affairs.<sup>52</sup>

4. ODC may seek the interim suspension of an attorney where it appears that continuation of the attorney's authority to practice law "is causing or is likely to cause serious harm to the public".<sup>53</sup>

5. ODC may, upon approval of the Disciplinary Board Chairperson, cause an attorney's financial accounts to be audited when improper maintenance of those accounts is suspected.<sup>54</sup>

Although the discipline system is not generally designed to function as a "consumer protec-

<sup>44</sup> Rule 2.7(c), RSCH (September 1988); DB 13 and 14, Disciplinary Board Rules.

<sup>45</sup> Rules 2.3(d) and (e), RSCH (September 1984).

<sup>46</sup> DB 15, Disciplinary Board Rules.

<sup>47</sup> See *infra* §IV.D (public reprimands); e.g., Kibe, Disciplinary Counsel's Report, 25 *Hawaii Bar News* No. 7 (July 1988) (private reprimands); Kibe, Disciplinary Counsel's Report, 26 *Hawaii Bar News* No. 6 (June 1989) (private reprimands); 27 *Hawaii Bar News* No. 7 (July 1990) (private reprimands).

<sup>48</sup> Rule 2.7(c), RSCH (September 1988); DB 17, Disciplinary Board Rules.

<sup>49</sup> Rule 2.7(c), RSCH (September 1988) (rules governing briefing and argument of civil appeals are generally applicable in attorney discipline proceedings).

<sup>50</sup> Rule 2.13, RSCH (September 1984) (from 1977 through June 1990, 8 attorneys have been temporarily restrained from practice under this provision).

<sup>51</sup> Rule 2.19, RSCH (September 1984) (from 1977 through June 1990, 7 attorneys have been placed on inactive status due to disability).

<sup>52</sup> Rule 2.20, RSCH (May 1990) (from 1979 through June 1990, 11 such receiverships have been undertaken under this Rule).

<sup>53</sup> Rule 2.23, RSCH (September 1984) (this provision has been invoked on 4 occasions since it was adopted in 1981).

<sup>54</sup> Rule 2.24, RSCH (September 1988) (this provision was invoked on one occasion since it was adopted in 1988).

tion" agency (it has for example, no authority to seek injunctive relief against a respondent), the supplementary proceedings outlined above do provide methods by which the public may be shielded from harm.

### E. Reinstatement

Attorneys who have been disbarred or suspended may be reinstated if specific criteria are met.<sup>65</sup>

A disbarred attorney may not petition the Supreme Court for reinstatement until at least 5 years have elapsed after the effective date of the disbarment.<sup>66</sup> An attorney who has been suspended for more than one year may not petition the Supreme Court for reinstatement prior to the expiration of at least one-half the period of suspension.<sup>67</sup>

After a formal reinstatement petition is filed, a full hearing is required to determine the disbarred or suspended attorney's fitness and rehabilitation to resume the practice of law. Reinstatement is not allowed in any case unless ordered by the Supreme Court.<sup>68</sup>

### F. Confidentiality of Discipline Matters

A significant feature of the discipline system is the broad confidentiality requirements imposed by Rule 2, RSCH.

Investigations conducted by ODC, and proceedings before the Disciplinary Board and Supreme Court, remain confidential unless, for example:

- (a) The attorney requests that the matter be made public;
- (b) The investigation is based upon the conviction of the attorney of a crime;
- (c) The Disciplinary Board files with the Supreme Court a report recommending that the attorney be *disbarred* or *suspended*;
- (d) The Supreme Court transfers the attorney to inactive status due to mental or physical disability; or
- (e) Information is sought by an attorney admission or discipline authority or judicial discipline authority regarding the affected attorney.<sup>69</sup>

Confidentiality requirements under Rule 2 are strictly observed. Absent any of the exceptions noted above, ODC must refrain from providing any comment regarding the non-public complaint record of an attorney. Hence, the fact that there are *no* complaints on file concerning an attorney may not ordinarily be revealed by ODC in response to a general inquiry.

This broad confidentiality requirement protects attorneys from undue publicity regarding complaints which may not be firmly supported. However, a corresponding element is that complainants are afforded absolute immunity from civil liability in submitting their grievances.<sup>70</sup> Indeed, it is relatively easy to file a complaint against an attorney since there are no special standing requirements (one need not be a client to file a complaint) and no statute of limitations. These features are built in to encourage the airing of grievances.

This is only a summary of the disciplinary organization and process in Hawaii. Rule 2, RSCH, and the Disciplinary Board Rules should be consulted for further guidance.

As indicated, the discipline system is organized to provide fair and complete investigation of lawyer complaints. Mandatory review levels ensure that an attorney is not sanctioned unless disciplinary action is found to be fully warranted by the facts.

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<sup>65</sup> See Rule 2.17, RSCH (September 1984).

<sup>66</sup> Rule 2.17(b), RSCH (September 1988).

<sup>67</sup> *Id.* (an attorney suspended for *one year or less* may be automatically reinstated—without hearing—on the expiration of the full term of suspension upon his or her filing an affidavit with the Supreme Court demonstrating compliance with the terms of the disciplinary order).

<sup>68</sup> Rule 2.17(a), RSCH (September 1984) (from 1974 through June 1990, 4 suspended attorneys were reinstated to practice; no disbarred attorneys were reinstated during that time).

<sup>69</sup> Rule 2.22(a), RSCH (September 1984).

<sup>70</sup> See Rule 2.8, RSCH (September 1984).

### III. COMPLAINTS HISTORY IN HAWAII

While the number of ethics complaints docketed for investigation has fluctuated somewhat from year to year, there has been a marked overall increase in the number of those complaints over the last several years.

The following table summarizes the number of ethics complaints docketed by ODC since 1980:<sup>61</sup>

<u>Year</u>	<u>Complaints Docketed</u>
1980	143
1981	120
1982	120
1983	133
1984	113
1985	232
1986	216
1987	248
1988	313
1989	294

The number of complaints docketed in 1988 and in 1989 was thus over twice the number docketed in 1980. The overall increase appears to roughly parallel the increase in the size of the bar.<sup>62</sup>

### IV. PUBLIC DISCIPLINE SUMMARY

The following synopsis of cases illustrates the various forms of misconduct for which public discipline has been imposed from 1980 to 1990:<sup>63</sup>

#### A. Disbarments

Since 1980, 20 Hawaii attorneys have been disbarred by the Supreme Court.

##### 1. *Office of Disciplinary Counsel v. Johnson*, 62 Haw. 95, 611 P.2d 993 (1980)

The respondent misappropriated client's funds on two separate occasions. He also neglected and abandoned four of his clients for whom he had been performing legal services. In disbaring the respondent, the Supreme Court noted that it also could not condone his failure to provide information or to cooperate during the course of the disciplinary proceedings.

##### 2. *Office of Disciplinary Counsel v. Smith*, 62 Haw. 467, 617 P.2d 80 (1980)

The respondent misappropriated funds of a client which had been entrusted to him for the client's benefit. He also falsely represented in a separate case that he was the personal representative of a deceased client's estate, opened fictitious bank accounts to receive funds from the estate's debtors, misappropriated certain of those funds for his own use, and withheld material information from the probate court in an attempt to deceive the court. In disbaring the respondent, the Supreme Court noted that an attorney's restitution to a client after legal action has been taken to recover the funds will not be considered a factor in mitigation.

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<sup>61</sup> Records of the Disciplinary Board.

<sup>62</sup> See Records of the Disciplinary Board (as of January 1, 1980, there were approximately 2,100 attorneys licensed on active status in Hawaii; as of June 30, 1990, that number had increased to approximately 3,900 attorneys).

<sup>63</sup> See also Heely, *supra*, at 7 (the last such summary, covering public discipline imposed in 1978-79, was published by ODC in the *Hawaii Bar Journal* in 1980).

**3. *Office of Disciplinary Counsel v. Cashman*, 63 Haw. 382, 629 P.2d 105 (1981)**

The respondent was convicted of felony grand theft in California based on his misappropriation of two client's funds totalling \$15,735. He resigned his bar membership in California while disciplinary charges were pending there due to the conviction. He was later convicted in California of the misdemeanor offense of practicing law without a license for filing pleadings in a civil case after having resigned from the bar. Based on his misconduct in California, the respondent was disbarred in Hawaii.

**4. *Office of Disciplinary Counsel v. Silva*, 63 Haw. 585, 633 P.2d 538 (1981)**

While representing the heirs of an estate, the respondent stated that he could improperly influence a public official on zoning issues, converted estate funds to his own use on numerous occasions, failed to pay estate bills, lied to his clients, and failed to surrender estate funds and provide an accounting. The respondent also gave false testimony and failed to comply with a subpoena issued to him by ODC during the investigation of the matter. In two other cases, he converted additional client funds to his own use and forged his client's name on a settlement check. The Supreme Court held that the attorney's lack of rehabilitation from alcoholism precluded consideration of the alcoholism as a factor in mitigation.

**5. *Office of Disciplinary Counsel v. Tuohy*, No. 8855 (Order of Disbarment Upon Consent filed October 22, 1982)**

The respondent was disbarred by consent under Rule 16.14, RSCH (July 1974),<sup>44</sup> which provides that while the disbarment is public, the reasons for the sanction remain confidential unless the Supreme Court otherwise directs (the respondent had earlier been placed on interim suspension by the Supreme Court on September 27, 1982).<sup>45</sup>

**6. *Office of Disciplinary Counsel v. Peckron*, No. 8706 (Order of Disbarment filed June 17, 1983)**

The respondent misappropriated client funds in four separate cases. He also variously engaged in misrepresentations to his clients and employer, neglected client matters, charged illegal and unreasonable fees, attempted to exonerate himself from malpractice liability, and engaged in misrepresentations to ODC during the investigation of those matters (the respondent had earlier been placed on interim suspension by the Supreme Court on May 24, 1982).

**7. *Disciplinary Board v. Robertson*, No. 10128 (Public Order Disbarring Attorney on Consent filed September 4, 1984)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

**8. *Office of Disciplinary Counsel v. McKellar*, No. 9995 (Order of Disbarment filed January 18, 1985)**

The respondent commingled and misappropriated funds received in his fiduciary capacity as a federally-appointed receiver, failed to maintain adequate books and records documenting his handling of the receivership funds, submitted a falsely-created letter to ODC and the U.S. District Court relating to a bar admission question, and failed to disclose to a client his own personal interest in a real property transaction being conducted with the client.

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<sup>44</sup> Now Rule 2.14, RSCH (September 1984).

<sup>45</sup> See *supra* §II.D (interim suspension).

**9. *Office of Disciplinary Counsel v. Goo*, No. 10422 (Order Accepting Permanent Relinquishment of License to Practice Law filed September 20, 1985)**

The respondent was convicted of federal felony offenses of immigration fraud and subornation of perjury. He was sentenced to probation for 5 years and fined \$3,000 (following his conviction, he was restrained from practice on March 29, 1985 pursuant to Rule 2.13(a), RSCH (September 1984)).<sup>66</sup> After formal discipline proceedings were initiated, the respondent consented to disbarment. However, citing his age (71 years) and his cessation of law practice, he asked the Supreme Court to allow him to instead "turn in" his license to practice. The Supreme Court granted the request, and the respondent physically turned his license over to the Clerk of the Supreme Court without possibility of reinstatement.

**10. *Office of Disciplinary Counsel v. Cody*, No. 11025 (Order of disbarment filed February 12, 1986)**

The respondent, who had been licensed in both Hawaii and Arizona, was reciprocally disbarred in Hawaii pursuant to Rule 2.15, RSCH (September 1984), after being disbarred in Arizona for abandoning his practice and misappropriating client funds.<sup>67</sup>

**11. *Office of Disciplinary Counsel v. Clark*, No. 11530 (Order of disbarment filed November 25, 1986)**

The respondent engaged in serious neglect of four client's cases, failed to return one client's fee advance after failing to complete that legal matter, and failed to cooperate with ODC, the Disciplinary Board, the Third Circuit Court, and the Supreme Court in various aspects of the matter (the respondent had been placed on interim suspension by the Supreme Court on February 11, 1986).

**12. *Office of Disciplinary Counsel v. Sandkuhler*, No. 9159 (Order of Disbarment filed November 25, 1986)**

The respondent was convicted of federal felony charges of conspiracy to possess and to distribute cocaine. He also failed to maintain adequate records concerning a \$400 cost advance provided to him by a client in a false arrest case (thereby resulting in a long delay in the return of those funds to the client), and also failed to cooperate with ODC in the investigation of the latter matter. Based largely on the attorney's criminal conviction, the Disciplinary Board concluded that notwithstanding *Disciplinary Board v. Bergan*, 60 Haw. 546, 592 P.2d 814 (1979), and *Office of Disciplinary Counsel v. Bronson*, *infra*, which resulted in suspensions for similar misconduct, drug usage among bar members was of such concern that imposition of the most serious sanction was required. The Supreme Court concurred and (despite the respondent's claims of mitigation that he had served time in prison, had been drug-free for over five years, had returned to Hawaii and performed well in his new non-law employment, and had expressed repentance for his misconduct) ordered disbarment (the disbarment was made retroactive to March 8, 1983, which was the date on which the respondent had been restrained from practice due to his felony conviction).

**13. *Office of Disciplinary Counsel v. Scott*, No. 11329 (Order of Disbarment filed November 25, 1986)**

The respondent was disbarred for neglect and abandonment of clients, misrepresentations to

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<sup>66</sup> *Id.* (temporary restraint following criminal conviction).

<sup>67</sup> See generally Rule 2.15(c), RSCH (September 1984) (a Hawaii attorney disciplined by another state in which he or she is also admitted to practice may be reciprocally disciplined in Hawaii in a summary proceeding filed directly with the Supreme Court by ODC; the Court will impose identical discipline unless special conditions are found to apply).

one client concerning the status of her case, misappropriation of funds of a probate estate for which the attorney was personal representative and counsel, and failure to cooperate with ODC in its investigation of some of the complaints. The Supreme Court and Disciplinary Board rejected as mitigation the respondent's claims that his misconduct stemmed largely from his addiction to alcohol and cocaine and that he had made great strides toward recovering from his addictions (the disbarment was made retroactive to June 30, 1984, which was the date on which the respondent had voluntarily assumed inactive status).

**14. *Office of Disciplinary Counsel v. Stewart*, No. 11512 (Public Order Disbarring Attorney on Consent filed December 3, 1987)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

**15. *Office of Disciplinary Counsel v. McCarthy*, No. 13321 (Public Order Disbarring Attorney on Consent filed September 26, 1988)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

**16. *Office of Disciplinary Counsel v. Ebinger*, No. 13365 (Order of Disbarment filed December 22, 1988)**

Disbarment was ordered due to the respondent's neglect and/or abandonment of six client matters, failure to account for and to refund unearned fees to clients in three of those matters, failure to take steps to avoid prejudice to clients upon withdrawing from their cases, and violation of established procedural rules of court. The respondent also failed to cooperate in the investigation of the complaints and did not appear and participate in the disciplinary proceedings.

**17. *Office of Disciplinary Counsel v. Appell*, No. 12101 (Public Order of Disbarment filed May 17, 1989)**

The respondent was disbarred based on a pattern of misconduct in thirteen separate matters, including giving false testimony before a court, commingling of client funds with his own funds, misappropriating a client's funds, establishing a trust account to defraud his creditors, making false statements in his application to practice before the United States District Court, neglecting his representation of clients, engaging in a pattern of threats and use of coarse and vulgar language, and failing to cooperate in the investigation of several complaints.

**18. *Office of Disciplinary Counsel v. Kahr*, No. 13766 (Order of Disbarment filed June 16, 1989)**

The respondent abandoned her law practice on Kauai and was disbarred based on ten complaints filed by clients and others. The respondent also failed to provide certain clients with file materials and to provide other clients with an accounting of their funds. In addition to ordering disbarment, the Court ordered that the respondent reimburse to five of her clients unearned retainer amounts which they had provided to her.

**19. *Office of Disciplinary Counsel v. Gore*, No. 10584 (Order of Disbarment filed August 31, 1989)**

The respondent was disbarred as a result of his April 1985 felony conviction for engaging in (a) a conspiracy to knowingly and intentionally distribute non-narcotic controlled substances, and (b) a conspiracy to knowingly and intentionally possess, with intent to distribute, non-narcotic controlled substances (quaaludes). He served two years in prison after his conviction was affirmed on appeal in 1986 (he had been temporarily restrained from the practice of law in May 1985

based on the felony conviction).

**20. *Office of Disciplinary Counsel v. Hurley*, 71 Haw. — 787 P.2d 688 (1990)**

The respondent resigned from the Texas Bar while complaints were pending against him in that state (the Texas complaints involved the respondent's failure to complete five client's legal matters after closing his office and leaving town without notice to his clients). The Hawaii Supreme Court found that the respondent's resignation in Texas was "tantamount to disbarment" based on language in the Texas resignation rule. It thus *disbarred* him on a reciprocal basis in Hawaii even though he had actually resigned in Texas.

**21. *Office of Disciplinary Counsel v. Tschirhart*, No. 14397 (Order of Disbarment filed May 7, 1990)**

The respondent had been disbarred by consent on January 26, 1990 in Maryland, where he had been the subject of an investigation regarding his receipt and accounting of funds in a real estate matter. He was reciprocally disbarred in Hawaii under Rule 2.15(b), RSCH (September 1984).

**22. *Office of Disciplinary Counsel v. Gaylord*, No. 14479 (Order of Disbarment by Consent filed May 11, 1990)**

The respondent was disbarred by consent (thus requiring that the factual bases for the disbarment remain confidential unless otherwise ordered by the Supreme Court).

The cases described above in which the reasons for discipline are public generally demonstrate that disbarment will almost certainly result from misappropriation of client funds, abandonment of a practice, or conviction of a felony drug offense.

**B. Suspensions**

Since 1980, 18 attorneys have been suspended from practice.

**1. *Office of Disciplinary Counsel v. Kagawa*, 63 Haw. 150, 622 P.2d 115 (1981)**

The respondent neglected and abandoned his clients in ten separate cases and was suspended for 4 years. The Supreme Court cited, *sua sponte*, the attorney's marital difficulties as mitigation in imposing suspension rather than disbarment.

**2. *Office of Disciplinary Counsel v. Koolpe*, No. 8082 (Order of suspension filed on March 2, 1981)**

The respondent entered a plea of guilty to felony charges of promoting a detrimental drug (marijuana) in the first degree. He then moved for deferred acceptance of the guilty plea, and his motion was granted. He was ordered to pay a fine of \$5,000. Based on his criminal conduct, the respondent was suspended for 1 year.<sup>66</sup>

**3. *Office of Disciplinary Counsel v. Rodrigues*, No. 10688 (Order of suspension filed on December 2, 1985)**

The respondent was suspended for 5 years for neglect and abandonment of several clients. The Supreme Court ordered that he provide restitution to three of his former clients for unearned

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<sup>66</sup> By Supreme Court Order filed March 6, 1986, this respondent was reinstated to practice (effective April 10, 1986) pursuant to Rule 2.17, RSCH (September 1984) following a full reinstatement hearing and his successful completion of the Professional Responsibility section of the Hawaii bar examination (as ordered by the Supreme Court).

retainers which he had failed to return.

**4. *Office of Disciplinary Counsel v. Bronson*, No. 10960 (Order Suspending Attorney filed December 13, 1985)**

The respondent was convicted in federal court of felony offenses of making a false material statement to a federal grand jury and of conspiracy to possess and to distribute cocaine. In a separate matter, he engaged in misrepresentations while testifying under oath as a witness at a federal probation revocation hearing. Finally, he neglected two clients whose civil matters he was handling, and he also made various misrepresentations to those clients. The respondent was suspended for 5 years based on his overall misconduct (he had been restrained from practice on March 8, 1983 due to his felony conviction).

**5. *Office of Disciplinary Counsel v. Loo*, No. 10799 (Order of Suspension filed April 18, 1986)**

The respondent was suspended for 18 months due to his misconduct in eight separate cases, including neglect and failure to communicate with clients, failure to withdraw from employment upon being discharged by a client, entering into an illegal fee agreement, charging excessive fees, failure to promptly deliver a client's file upon being discharged, accepting employment when it was obvious that a client wished to bring frivolous litigation, and engaging in misrepresentations to ODC regarding one of the complaints.

**6. *Office of Disciplinary Counsel v. Miyamoto*, No. 10226 (Order of Suspension filed April 18, 1986), *appeal dismissed*, 479 U.S. 925 (1986)**

The respondent was suspended for 18 months for materially altering a medical report which was subsequently offered by him as evidence in a workers' compensation case.

**7. *Office of Disciplinary Counsel v. Yee*, No. 11085 (Order of suspension filed June 9, 1986)**

The respondent was suspended for 18 months for abandoning his law office (thus requiring the appointment of an attorney to take possession of and inventory his files and records pursuant to Rule 2.20, RSCH (September 1984)), neglecting a client's legal matter, failing to communicate with the client, failing to return the client's file and retainer, and failing to cooperate in the disciplinary proceedings.

**8. *Office of Disciplinary Counsel v. Searl*, No. 11513 (Order of Disciplinary Suspension filed July 25, 1986)**

The respondent was suspended for 2 years for neglect of several clients' legal matters, failure to maintain a client's money in trust due to inadequate recordkeeping (thus resulting in a delay in providing those funds to the client), failure to withdraw from a legal matter when discharged by a client, misrepresentations to a client, failure to promptly deliver to clients their files upon being discharged, failure to render an accounting of retainer funds provided by a client, and failure to cooperate with ODC during the investigation of the complaints.

**9. *Office of Disciplinary Counsel v. Thompson*, No. 10441 (Order of suspension filed October 29, 1987)**

The respondent was convicted of the felony offense of knowingly and wilfully submitting a document containing false information to a federal agency (the Immigration and Naturalization Service). The document, which was prepared by the respondent and filed by him on behalf of an immigration client, falsely stated the net income of the prospective local employer of the immigrant and also contained a false signature of the immigrant's local agent. The respondent was

sentenced by the federal court to pay a fine of \$5,000, but no term of imprisonment was imposed. After considering in mitigation the respondent's lack of a prior disciplinary record, his full disclosure and cooperation in the disciplinary proceedings, his practice without incident or complaint since his conviction, and his continued good reputation among his peers, the Supreme Court ordered that he be suspended for 2 months.<sup>69</sup>

**10. *Office of Disciplinary Counsel v. Arnett*, No. 12616 (Order of Suspension filed June 22, 1988)**

The respondent was suspended for 6 months for neglecting and abandoning her client's interests and failing to carry out contracts of employment in six cases, violating court procedural rules in three cases, and failing to cooperate in the investigation of a total of ten complaints.<sup>70</sup>

**11. *Office of Disciplinary Counsel v. Miyasaki*, No. 13499 (Order of suspension filed December 12, 1988)**

The respondent was suspended for 8 months. His misconduct in three separate cases included: (1) neglecting a client's legal matter, as well as failing to properly withdraw from that case or to take other reasonable steps to avoid prejudice to his client's interests; (2) making a false statement in a demand letter sent to third parties on behalf of his client in another case; (3) taking legal positions on behalf of his client in a third case in contravention of court orders, and continuing the employment when a conflict of interest precluded him from doing so; and (4) failing to cooperate with the investigation of all three complaint matters.

**12. *Office of Disciplinary Counsel v. Peetz*, No. 13106 (Memorandum Opinion filed February 17, 1989)**

Suspension for 3 years was ordered due to the respondent's neglect of a client's legal matter, failure to properly withdraw from the client's civil case, and failure to provide an accounting of funds at the client's request. An aggravating factor was the attorney's neglect of three prior client matters for which he received a private reprimand from the Disciplinary Board in 1982.

**13. *Office of Disciplinary Counsel v. Rapp*, 70 Haw. 539, 777 P.2d 710 (1989)**

The respondent was suspended for 3 years for neglecting and mishandling twelve separate client matters over a two-year period (six of those matters involved divorce cases, while the other six involved DUI defense cases). In most of the cases, the respondent accepted initial retainers and performed certain preliminary services, after which he failed to take steps to complete those matters in timely fashion. He also failed repeatedly to return telephone calls and to respond to other requests for information from his clients. The respondent also missed court appearances for two of his DUI clients, thus causing penal summonses to be issued against them. In addition, he was found to have engaged in misrepresentations to ODC in the investigation of one case.

**14. *Office of Disciplinary Counsel v. Bowyer*, No. 12123 (Order of suspension filed September 26, 1989; Amended Order filed September 27, 1989)**

The respondent abandoned numerous pending divorce matters for which he was counsel of record. He was suspended for 3 years.

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<sup>69</sup> By Supreme Court Order filed February 19, 1988, this respondent was reinstated to practice following a full reinstatement hearing under former Rule 2.17(b), RSCH (September 1984).

<sup>70</sup> By Supreme Court Order filed April 28, 1989, this respondent was reinstated to practice on a summary basis pursuant to amended Rule 2.17(b), RSCH (September 1988) (because the suspension was for a period of one year or less).

**15. *Office of Disciplinary Counsel v. Battista*, No. 13626 (Order of suspension filed September 27, 1989)**

The respondent was suspended for 3 years for engaging in a pattern of neglect in six client matters. He failed to, *inter alia*, file and/or serve court documents in a timely manner, failed to appear at court hearings, failed to maintain records and/or provide an accounting of client funds, and repeatedly failed to return his clients' telephone calls. Several clients' cases were adversely affected by his neglect. Aggravating factors included a prior informal admonition for neglect.<sup>71</sup>

**16. *Office of Disciplinary Counsel v. Smith*, 71 Haw. \_\_\_, 780 P.2d 87 (1989)**

The respondent was suspended for 1 year and 1 day in Colorado for dishonest, harassing, and occasionally bizarre conduct toward his former client, the client's mother, the Colorado disciplinary office, and an attorney retained by the former client to defend against a civil suit for fees which had been filed by the respondent. Suspension in Hawaii for the same period was ordered on a reciprocal basis.

**17. *Office of Disciplinary Counsel v. Bicoy*, No. 11586 (Order of suspension filed October 2, 1989)**

Suspension for 5 years was ordered due to the respondent's felony conviction for first degree theft and conspiracy to commit theft. The charges stemmed from misrepresentations made by the respondent in his application for public financing for his 1982 campaign for lieutenant governor. (The suspension was made retroactive to October 2, 1986, which was the date on which the respondent had been temporarily restrained from practice due to the felony conviction).

**18. *Office of Disciplinary Counsel v. Kunimura*, No. 14173 (Order of Suspension filed January 3, 1990)**

The respondent was suspended for 2 years for neglect of four client matters, as well failure to cooperate with the investigation of certain aspects of those matters. In one case, the respondent failed to take steps to complete a probate despite the filing of the ethics complaint and repeated warnings from ODC (the probate remained uncompleted five years after having been opened by the respondent). The respondent declined to provide evidence in explanation or mitigation of her misconduct.

As generally demonstrated by these cases, instances of multiple or lengthy neglect of clients' legal matters will result in suspension.

**C. Public Censures**

Six public censures have been imposed by the Supreme Court since 1980.

**1. *Office of Disciplinary Counsel v. Bettencourt*, No. 9402 (Order of Public Censure filed November 22, 1985)**

The respondent was publicly censured due to his federal misdemeanor conviction of failure to file a federal income tax return for 1978.

**2. *Office of Disciplinary Counsel v. Harimoto*, No. 9400 (Order of Public Censure filed May 6, 1986)**

The respondent was publicly censured for his federal misdemeanor conviction of failure to

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<sup>71</sup> By Supreme Court Order filed March 20, 1989, this respondent had been summarily suspended from practice pursuant to Rule 2.12A, RSCH (April 1988), for failure to cooperate in the investigation of unrelated ethics complaints. See *supra* n. 28.

file federal income tax returns for 1978 and 1979.

**3. *Office of Disciplinary Counsel v. Weight*, No. 9401 (Order of Public Censure filed May 4, 1987)**

The respondent was publicly censured for his federal misdemeanor conviction of failure to file federal income tax returns for 1978 and 1979.

**4. *Office of Disciplinary Counsel v. Rolls*, No. 13104 (Order of Public Censure filed July 15, 1988)**

The respondent was publicly censured for his federal misdemeanor conviction of failure to file federal income tax returns for 1981. He also failed to file timely returns for 1982 and 1983, but had not been criminally charged for those omissions.

**5. *Office of Disciplinary Counsel v. Burgess*, No. 12608 (Decision and Order of Public Censure filed August 3, 1988)**

The respondent was publicly censured for discourteous conduct degrading to a tribunal stemming from his refusal to rise upon entry into the courtroom of the members of the Supreme Court in an appellate case in which the respondent served as counsel.

**6. *Office of Disciplinary Counsel v. Haraguchi*, No. 14136 (Order of Public Censure filed February 20, 1990)**

The respondent stipulated to negligently misrepresenting to the Family Court in a 1986 divorce hearing that neither he nor his client had received word from the client's spouse regarding the divorce. In fact, the client's spouse had verbally informed the client that he (the spouse) objected to certain portions of the proposed decree. Based on the respondent's statements, the Family Court issued a divorce decree by default. The respondent was publicly censured for his misrepresentation to the Family Court.

**D. Public Reprimands**

Four public reprimands have been imposed by the Disciplinary Board since this form of sanction was first permitted in 1981.

**1. *Office of Disciplinary Counsel v. Nam*, ODC No. 1136 (Public Order of Discipline filed June 12, 1985)**

The respondent was publicly reprimanded based on his misdemeanor conviction for contempt of court, which stemmed from his discourteous and undignified courtroom statements and physical actions directed toward a circuit court judge.

**2. *Office of Disciplinary Counsel v. Malloy*, ODC No. 2100, (Public Order of Discipline filed July 28, 1989)**

The respondent pleaded no contest to the misdemeanor offense of making a false unsworn statement in nomination papers filed for State office (he had untruthfully stated that he met the three-year residency requirement imposed by the Hawaii State Constitution). His motion for deferred acceptance of no contest plea was granted, and he was placed on probation for one year and ordered to pay a fine of \$350. He acknowledged during the disciplinary proceedings that he was aware when filing his nomination papers that he did not meet the three-year residency requirement, although he stated that he had questions at the time as to whether the requirement was constitutional. A public reprimand was imposed by stipulation.

**3. *Office of Disciplinary Counsel v. Shimokusu*, ODC Nos. 2500 and 2501 (Public Order of Discipline filed November 30, 1989)**

The respondent was publicly reprimanded by stipulation for neglecting to file two deeds for over 3 years. The neglect continued despite numerous inquiries from the grantees as to the status of the deeds (the grantor, who was the grantees' father, had passed away shortly after executing the deeds) and the filing of ethics complaints regarding the matter. The respondent also falsely informed the grantees on several occasions, including after the grievances had been lodged, that the deeds had been submitted for filing.

**4. *Office of Disciplinary Counsel v. Sakamoto*, ODC No. 2239 (Public Order of Discipline issued on January 18, 1990)**

The respondent was publicly reprimanded for failing to disclose to the circuit court all of the terms of a plea agreement which he believed had been made on behalf of his client in a criminal case.

Public and private reprimands are usually imposed where, although the misconduct is deemed to have been somewhat serious, there is no aggravated pattern of repeated misconduct and the ethical violation is deemed unlikely to recur. Conduct which is deemed relatively more serious will naturally result in a public, rather than a private, reprimand.

These summaries have hopefully provided a flavor of the factual circumstances which have led to various forms of public discipline since 1980. Of course, the results reached in each of these cases may have been affected by certain mitigating and aggravating circumstance which, due to the necessarily abbreviated nature of certain of these summaries, may not have been fully recited. Accordingly, researchers should consult actual case files or opinions instead of relying on these summaries alone.

## **V. BAR UNIFICATION AND THE DISCIPLINE SYSTEM**

By order filed October 27, 1989 and adopted as Rule 17, RSCH (November 1, 1989), the Supreme Court created a unified bar in Hawaii. The Court concurrently adopted amendments to Rule 2, RSCH, to confer upon the unified bar certain administrative duties concerning the lawyer discipline system.<sup>73</sup>

Rule 17 and the amendments to Rule 2 do not alter the established procedures for review and processing of ethics grievances. The Supreme Court will still retain "at all times its ultimate authority over admission and discipline of attorneys licensed to practice in this State".<sup>74</sup> Hence, the unified bar will not become involved in the handling of individual ethics complaints.

The bar unification amendments to Rule 2 will, however, result in the following limited administrative changes:

### **A. Attorney Registration**

Under the new rules, responsibility for administrating the annual attorney registration process will be shifted from the Disciplinary Board to the unified bar. As the organization designated to serve as the administrative body of the unified bar,<sup>75</sup> the Hawaii State Bar Association ("HSBA") will now carry out this function.

This will be the most obvious change for attorneys because registration billings will be prepared and processed by HSBA rather than the Disciplinary Board. HSBA is now responsible for collecting all bar-related assessments, including the annual Disciplinary Board registration fees under Rule 2.18, RSCH. These registration fees, which (as previously indicated) are the sole

<sup>73</sup> See also Rule 1, RSCH (November 1989) (amendments concerning Board of Examiners rules); Rule 10, RSCH (November 1989) (amendments concerning Clients' Security Fund rules).

<sup>74</sup> Rule 17(b), RSCH (November 1989).

<sup>75</sup> See Unification of the Hawaii State Bar Implementation Order No. 2 (January 22, 1990).

source of funding for the Disciplinary Board system, will continue to be specially earmarked for use by the Board and ODC and may not be utilized for any other purposes. After collecting those fees, HSBA must remit the funds to the Disciplinary Board.<sup>76</sup>

While the annual Disciplinary Board registration fees may not be reduced below 1989-90 levels without authorization from the Supreme Court, those fees may be increased at the discretion of the HSBA board of directors.<sup>78</sup>

Also, due to the transfer of administrative responsibility for attorney registration, HSBA—and not the Disciplinary Board—will be responsible for maintaining current address information for all bar members. Any bar member address changes must thus be directed to HSBA instead of to the Disciplinary Board.

### B. Appointment of Disciplinary Board Members

The members of the Disciplinary Board have previously been appointed from nominees obtained directly by the Supreme Court. Most recently, the Disciplinary Board itself has suggested possible nominees to the Court.

Under the unified bar rules, the members of the Board will be appointed by the Court from a list of nominees submitted solely by the HSBA board of directors.<sup>77</sup> This change was adopted primarily to allow the bar to have greater formal input into attorney disciplinary issues.<sup>78</sup>

### C. Disciplinary Board Budget

Under the new rules, the HSBA board will now be permitted to review the Disciplinary Board's annual budget.<sup>79</sup> Such budgetary review authority was also included to allow the bar more formal input into the disciplinary system.

However, while the HSBA board will have authority to review the Disciplinary Board's budget, HSBA will not hold "veto" power over the budget. HSBA will thus be able to suggest possible revisions to the Board's budget, but it will not be empowered to mandate those changes. The Supreme Court retains final authority to review and approve the Board's budget, and will resolve any disagreements between the HSBA board of directors and the Disciplinary Board concerning budget allocations or registration fees.<sup>80</sup>

As indicated, the changeover to a unified bar will not affect the substantive functions of the Disciplinary Board and ODC. Although mechanisms have been included by the Supreme Court to permit more formalized inquiry and input by the bar into the funding and operations of the discipline system, those mechanisms do not allow the bar to dictate to the Disciplinary Board or ODC the manner in which the merits of individual ethics grievances will be determined. The Court's wise adoption of this approach will help to protect the functional independence of the discipline system.

## VI. FUTURE DEVELOPMENTS

In addition to the bar's enhanced ability, through the unified bar structure, to provide input and resources concerning the disciplinary process, three other developments will have an impact

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<sup>76</sup> Rule 2.18(a), RSCH (November 1989).

<sup>77</sup> *Id.* (annual registration fees, which are currently set at \$50, \$100, or \$150 per attorney, depending on the number of years the attorney has been in practice, may thus be raised by HSBA without Supreme Court approval).

<sup>78</sup> See Rule 2.4(a), RSCH (November 1989) (a person may serve concurrently on the Disciplinary Board and on the unified bar board of directors).

<sup>79</sup> See Committee on Integration of the Bar, Memorandum to All Active Members of the Bar re: Unification of the Hawaii Bar (August 18, 1989).

<sup>80</sup> See Rule 2.4(e)(7), RSCH (November 1989) (Disciplinary Board has the power and duty to "develop in consultation with" the unified bar board of directors an annual budget for the operation of the lawyer discipline system); Rule 2.21, RSCH (November 1989) (Disciplinary Board's annual budget "shall be subject to review" by the unified bar board of directors).

<sup>81</sup> See Rule 2.21, RSCH (November 1989); Hawaii State Bar Association, Report of Disciplinary Board Task Force (February 23, 1990), at 5.

upon the future regulation of lawyer conduct.

#### A. Model Rules of Professional Conduct

In 1983, the American Bar Association House of Delegates approved the Model Rules of Professional Conduct ("Model Rules"), which replaced the ABA Model Code of Professional Responsibility ("Model Code").

While the Model Rules do not *drastically* change the standards of ethical behavior which are applicable to lawyers (many of the provisions in the Model Rules are either similar to Model Code requirements or codify existing interpretations which have developed through case law), there are some substantive differences between the Model Rules and Model Code (in such areas, for example, as client perjury, fee splitting between lawyers, and duties of supervisory attorneys).

Also, the Model Rules follow a restatement of laws format (with black letter rules followed by commentary, rather than "Canons", "Ethical Considerations", and "Disciplinary Rules"). The Model Rules are also organized generally according to the different roles which a lawyer performs (and are thus divided into areas such as "Client-Lawyer Relationship", "Counselor", "Advocate", "Transactions with Persons Other than Clients", "Law Firms & Associations", "Public Service", "Information About Legal Services", and "Maintaining the Integrity of the Profession").

A total of 34 states plus the District of Columbia have thus far adopted the Model Rules.<sup>81</sup> Four other states have incorporated portions of the Model Rules into their existing Codes of Professional Responsibility.<sup>82</sup>

A committee jointly appointed by the Hawaii Supreme Court and the U.S. District Court of Hawaii is reviewing the Model Rules and plans to submit its report in late 1990. It is thus possible that the Model Rules could be adopted within the next year by both our Supreme Court and U.S. District Court as the new set of mandatory guidelines for attorney conduct in Hawaii.

Upon adoption of the Model Rules, bar members will need to adjust to its new language and organizational framework. As indicated, however, the standards of conduct are not (other than in a few defined areas) expected to change radically.

#### B. ABA Commission on Evaluation of Disciplinary Enforcement

As ethical standards have become closer to the fore in the minds of bar members and the public, the mechanism for enforcing those standards has also become the subject of greater interest and scrutiny.

At the suggestion of the National Organization of Bar Counsel (a national membership body for lawyer discipline agencies in which ODC is an active participant), the ABA has commissioned an in-depth study of lawyer discipline nationwide. The ABA Commission on Evaluation of Disciplinary Enforcement, which was appointed in 1989, has been gathering data and will hold hearings throughout 1990 concerning the purposes, processes, and results of lawyer discipline. The Commission is charged with the task of evaluating lawyer discipline on a national scale and will make recommendations on how to improve the system to better serve the public and the profession.<sup>83</sup>

While the improvements which may be recommended by the Commission are not presently known, it is expected that modifications will be suggested to permit more effective and efficient processing of attorney grievances. The conclusions and recommendations of the ABA Commission

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<sup>81</sup> *ABA/BNA Lawyers' Manual on Professional Conduct* 01:3-4 (1990) (list of jurisdictions which have adopted the Model Rules as of March 28, 1990).

<sup>82</sup> *Id.*

<sup>83</sup> See also American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (June 1970) (this last nationwide study, carried out by a committee chaired by retired U.S. Supreme Court Associate Justice Tom C. Clark, became popularly known as the "Clark Committee Report". Its sweeping recommendations brought about the development of full-time disciplinary systems nationwide, including Hawaii. The current ABA-sponsored national review of lawyer discipline has thus been informally dubbed "Clark II").

may closely affect our Hawaii attorney discipline system because the structural and procedural features of our system are based on the ABA Model Rules of Disciplinary Enforcement. To the extent that the ABA Commission recommends changes to the ABA model, corresponding changes to the Hawaii system may be judged appropriate.

### C. Restatement of the Law Governing Lawyers

The American Law Institute (ALI), whose members include lawyers, judges, and law professors, has been earnestly working on a proposed *Restatement of the Law Governing Lawyers*.

Chapters being considered are: the lawyer-client relationship; lawyer-client contracts for legal services; lawyers' liability to clients and non-clients; lawyers in the adversary system; lawyers as counselors; conflicts of interest; client confidentiality; and the delivery of legal services.<sup>64</sup> It is perhaps not coincidental that these areas are similar to those covered under the functional approach of the ABA Model Rules of Professional Conduct.

The effort by ALI to formulate a Restatement of the law of attorney conduct demonstrates that the area has achieved full substantive recognition.

However, the extent to which the principles expressed in the *Restatement* will conflict with any provisions of the Model Rules or Model Code is presently unknown. Efforts are being made by ALI, of course, to take into account the provisions of both ethical models in fashioning the Restatement.<sup>65</sup> Although the provisions of the ethics rules adopted by our Supreme Court would, for disciplinary purposes, be considered paramount, the *Restatement* would no doubt provide fertile ground for discussion as to how official rule provisions should be interpreted.

The Restatement project is not expected to be completed for another three to five years.<sup>66</sup> but it will no doubt stir much interest and debate well before that time as tentative drafts are circulated. We look ahead with great interest to the outcome of this project.

## VII. CONCLUSION

This article has attempted to provide a functional overview of the Hawaii lawyer ethics system. It is hoped that this information will bring about a better understanding of the workings of our professional responsibility system.

As the success of our system relies on the concept of self-regulation, we must each do our best to ensure that high levels of conduct are maintained throughout our profession. The following thoughts from the ABA Commission on Professionalism are thus instructive:

The legal profession is more diverse and provides more legal services to more people today than ever before. These are not inconsiderable achievements. Further, most lawyers. . .are conscientious, fair, and able. They serve their clients well and are a credit to the profession. Yet the practices of some lawyers [do] cry out for correction. . . .

\* \* \* \* \*

The transition from the Canons to the Code to the Model Rules was paralleled by the development of disciplinary enforcement machinery in the several states. As a consequence, lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits. However, lawyers have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.

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All segments of the bar should [thus] [r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.<sup>67</sup>

<sup>64</sup> ABA/BNA *Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 4, No. 10, at 176 (1988).

<sup>65</sup> See *Id.*, Vol. 5, No. 9, at 160 (1989).

<sup>66</sup> See *Id.*, Vol. 4, No. 10, at 176; *Id.*, Vol. 6, No. 8, at 150 (1990).

<sup>67</sup> Report of ABA Commission on Professionalism (1986) at 1, 7 (footnote omitted), and 15 (the ABA Commission

As lawyers, we must always strive to conduct ourselves beyond the bare minimum required by our ethics rules. If we seek continually to meet higher standards of behavior in our dealings with clients, the courts, opposing parties, opposing counsel, and the general public, our "professionalism" will most assuredly be secured.

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on Professionalism was appointed in 1985 to examine and report "on matters affecting the performance of legal services by the Bar" and to "make specific suggestions for change [where] appropriate"; in its report, the Commission presented various recommendations on steps which law schools, practicing attorneys, law firms, bar associations, and judges should take to foster professionalism within the bar).

Appendix D

1991  
ANNUAL REPORT  
OF THE  
HAWAII ATTORNEY GRIEVANCE SYSTEM

Office of Disciplinary Counsel  
1164 Bishop Street, Suite 600  
Honolulu, Hawaii 96813

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1991 ANNUAL REPORT  
HAWAII ATTORNEY GRIEVANCE SYSTEM

INTRODUCTION

The Hawaii attorney grievance system experienced another busy year in 1991.

Following successive declines in 1989 and 1990, the number of docketed ethics complaints rose by 47% in 1991 compared to the previous calendar year. Despite the upsurge in new matters received, there were 27% more complaints closed in 1991 than in the previous year. At year-end, the number of pending investigations remained at the lowest level in five years.

At the same time, continued emphasis was placed on further shortening the time needed to bring complaint investigations to a conclusion. To meet demands for faster case processing time, two more full-time investigators were added to the Office of Disciplinary Counsel staff in 1991. By year-end, the processing time for cases which were both opened and closed during the year averaged less than two months.

The number of disciplinary actions imposed during 1991 remained steady, with 38 Hawaii attorneys being disciplined for unprofessional conduct through sanctions ranging from private informal admonition to disbarment.

Considerable time was also devoted to giving ethics advice and education to both the bar (to prevent ethics grievances from arising) and the public (to inform citizens of the availability of the lawyer grievance system).

Finally, an in-depth training seminar on disciplinary law and procedure was conducted in January 1991 for all adjudicators in the grievance system. This was the first such seminar held in several years and was widely complimented for the perspectives and insights provided.

All of the efforts summarized above were aimed at helping ensure that Hawaii attorneys continue to conform their conduct to the highest ethical standards.

## OVERVIEW OF HAWAII ATTORNEY GRIEVANCE SYSTEM

### I. COMPONENT ENTITIES OF THE ATTORNEY GRIEVANCE SYSTEM.

The Hawaii attorney grievance system, which began operations on July 1, 1974, consists of four main parts:

- (1) The Supreme Court of Hawaii;
- (2) The Disciplinary Board of the Hawaii Supreme Court;
- (3) Hearing Committees; and
- (4) The Office of Disciplinary Counsel.

The Supreme Court organized the grievance system in 1974 through adoption of Supreme Court Rule 2. The Court serves as the ultimate overseer of professional conduct matters concerning lawyers.

The Disciplinary Board is appointed by the Supreme Court and exercises more immediate supervision over the operations of the grievance system. The Board also directly oversees the Office of Disciplinary Counsel.

Hearing Committees are appointed by the Disciplinary Board to act as triers of fact in formal disciplinary and reinstatement proceedings.

The Office of Disciplinary Counsel is the day-to-day operational arm of the grievance system and has two main functions: (1) handling disciplinary investigations and prosecutions; and (2) providing ethics advice and education.

An organizational chart reflecting the structure of the grievance system is shown in Figure 1.

### II. SUPREME COURT.

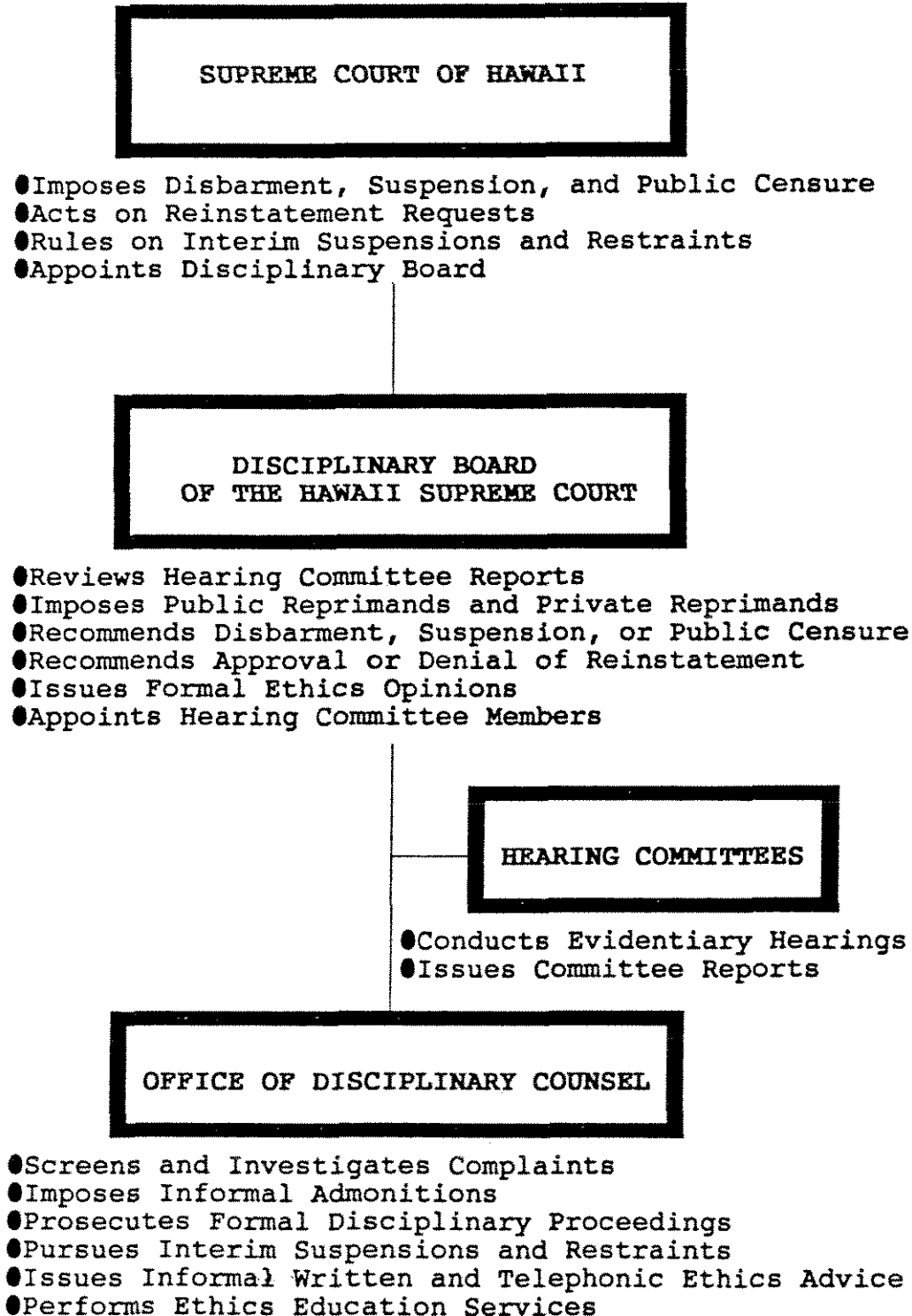
The members of the Hawaii Supreme Court during 1991 were as follows:

Honorable HERMAN LUM, Chief Justice  
Honorable FRANK D. PADGETT, Associate Justice  
Honorable YOSHIMI HAYASHI, Associate Justice  
Honorable JAMES H. WAKATSUKI, Associate Justice  
Honorable RONALD T.Y. MOON, Associate Justice

Justice Padgett has served as Liaison Justice to the Disciplinary Board since 1986.

Smooth and efficient operation of the attorney grievance

Fig. 1.  
ORGANIZATIONAL STRUCTURE OF  
THE HAWAII ATTORNEY GRIEVANCE SYSTEM



system would not be possible without the close support and guidance of the Supreme Court.

### III. DISCIPLINARY BOARD.

The members of the 18-person Disciplinary Board ("Board") represent a cross-section of both lawyers and non-lawyers statewide.

The Board sets policy guidelines for the handling of discipline matters, reviews cases in which formal disciplinary proceedings have been filed, and issues formal ethics opinions. Also, the Board approves the hiring of the Chief Disciplinary Counsel and Assistant Disciplinary Counsel.

Board members are appointed by the Supreme Court from a list of nominees submitted by the Hawaii State Bar Association's Board of Directors. Rule 2.4(a), RSCH. Board members serve for staggered three-year terms, with the terms of one-third of the Board members expiring each June 30.

The members of the Board as of December 31, 1991 (with the years of expiration of their terms in parentheses) were as follows (non-lawyer Board members are denoted by asterisks):

Helen Gillmor, Esq., Chairperson (1993)  
Dwight M. Rush, Esq., Vice Chairperson (1994)  
Ellen Godbey Carson, Esq. (1993)  
C. Jepson Garland, Esq. (1992)  
Madeleine J. Goodman, Ph.D. (1992)\*  
John Jubinsky, Esq. (1992)  
James A. Kawachika, Esq. (1994)  
Bernice Littman, Esq. (1994)  
Ms. Dorothy Lum (1993)\*  
B. Martin Luna, Esq. (1992)  
Mr. Robert F. Mougeot (1993)\*  
Honorable Clifford L. Nakea (1994)  
Mr. Gregory G. Ogin (1992)\*  
Stephanie A. Rezens, Esq. (1994)  
Carolyn Staats, Ph.D. (1992)\*  
Manuel R. Sylvester, CPA (1993)\*  
S.Y. Tan, M.D., J.D. (1994)  
Peter C. Wolff, Jr., Esq. (1993)

Board members Rush and Nakea were reappointed to new three-year terms effective July 1, 1991, while new members Kawachika, Littman, Rezens, and Tan were appointed to the Board in place of the following members whose terms expired June 30, 1991 (and whose dedicated service on the Board collectively totalled 60 years):

James H. Kamo, Esq.  
Honorable Linda K.C. Luke  
Honorable Marjorie Higa Manuia  
Stanley F.H. Wong, DDS\*

Judge Clifford Nakea served as Board Secretary until June 30, 1991, when B. Martin Luna assumed that position.

At least one-third of the Board is (and has for a number of years been) comprised of non-lawyers to ensure public accountability of the grievance system. Hawaii was one of the first jurisdictions to have laypersons serve on the Disciplinary Board.

Board members are reimbursed for travel and other out-of-pocket expenses, but they do not receive any other compensation for their service.

#### IV. HEARING COMMITTEES.

A total of 121 persons are appointed by the Board to serve as Hearing Committee members. See Rule 2.4(e)(3), RSCH.

Hearing Committee members, who preside over evidentiary hearings in formal discipline and reinstatement proceedings, serve for three-year terms. Hearing Committees cannot themselves impose discipline, but instead file factual findings, legal conclusions, and recommendations for discipline with the Board.

The members of the Hearing Committee "pool" (with the years of expiration of their terms in parentheses) are as follows (non-lawyer Committee members are denoted by asterisks):

#### OAHU

Ethan D.B. Abbott, Esq. (1993)	Nathan T.K. Aipa, Esq. (1992)
Robert A. Alm, Esq. (1994)	Paul D. Alston, Esq. (1994)
Ms. Sharon Amano (1993)*	Roger B. Atkins, Esq. (1992)
Ms. Joy Barnhart (1993)*	A. Bernard Bays, Esq. (1993)
John R. Bond, Ph.D. (1992)*	Edward D. Boyle, Esq. (1993)
Sherry P. Broder, Esq. (1994)	Margery S. Bronster, Esq. (1993)
Gilbert D. Butson, Esq. (1992)	Naomi S. Campbell, Esq. (1993)
Catherine O.Y. Chang, Esq. (1992)	John W.K. Chang, Esq. (1994)
Peter C.P. Char, Esq. (1994)	Vernon F.L. Char, Esq. (1993)
Robert A. Chong, Esq. (1993)	Harold Chu, Esq. (1992)
Richard C.F. Chun, Esq. (1994)	Thomas E. Cook, Esq. (1992)
Douglas A. Crosier, Esq. (1994)	Mr. John P. Damon (1993)*
C.F. Damon, Jr., Esq. (1994)	Chris A. Diebling, Esq. (1992)
Nicholas C. Dreher, Esq. (1992)	David L. Fairbanks, Esq. (1993)
Rosemary T. Fazio, Esq. (1993)	Ms. Barbara Fischlowitz (1993)*
Shelby A. Floyd, Esq. (1993)	Angela Fong, Esq. (1993)
Peter C.K. Fong, Esq. (1993)	Julia Frohlich, M.D. (1994)*
Gerald I. Fujita, Esq. (1993)	Mervyn S. Gerson, Esq. (1994)
Ms. Mary Ann Grant (1992)*	Diane D. Hastert, Esq. (1992)
Sherman S. Hee, Esq. (1993)	Cheryl K. Hetherington, Esq. (1994)
Lynn H. Hiatt, Esq. (1993)	Charles H. Hite, Esq. (1992)
Roy F. Hughes, Esq. (1992)	Neil F. Hulbert, Esq. (1994)
Walter H. Ikeda, Esq. (1994)	Hon. Thomas K. Kaulukukui, Jr. (1994)
Diane T. Kawauchi, Esq. (1992)	Valri Lei Kunimoto, Esq. (1992)

Hon. Barry M. Kurren (1993)	Rear Adm. Paul Lacy, Jr. (1992)*
Laurence K. Lau, Esq. (1992)	Dale W. Lee, Esq. (1992)
Ms. Judy Lind (1993)*	Bernice Littman, Esq. (1993)
Elliot, H. Loden, Esq. (1992)	Howard K.K. Luke, Esq. (1993)
David M.K. Lum, Esq. (1994)	Clyde W. Matsui, Esq. (1994)
Patricia A. Mau-Shimizu, Esq. (1992)	Michael J. McGuigan, Esq. (1993)
Ms. Lynn Michael (1992)*	Hon. Marie N. Milks (1994)
William J. Nagle, III, Esq. (1992)	Ms. Beverly Nagy (1994)*
Mei Nakamoto, Esq. (1993)	Craig H. Nakamura, Esq. (1994)
David A. Nakashima, Esq. (1992)	Rev. Dorothy M. Nakatsuji (1993)*
Patricia M. Napier, Esq. (1992)	Terri Needels, Ph.D. (1992)*
Joyce Y. Neeley, Esq. (1992)	Evelyn H. Nowaki, Esq. (1993)
Rev. Brian Nurdin, (1992)*	Roy T. Ogawa, Esq. (1994)
Pastor Doug Olsen (1994)*	Wayne M. Pitluck, Esq. (1992)
Ms. Sarah Richards (1993)*	Crystal K. Rose, Esq. (1994)
Wayne M. Sakai, Esq. (1992)	Gregory M. Sato, Esq. (1993)
Judith A. Schevtchuk, Esq. (1994)	Gerald Y. Sekiya, Esq. (1993)
Marguerite B. Simson, Esq. (1994)	Chris J. Smith, AIA (1994)*
Ms. Kate Stanley (1992)*	Randall K. Steverson, Esq. (1994)
Kevin P.H. Sumida, Esq. (1993)	Tod Z. Tanaka, Esq. (1993)
Hon. Jane Tatibouet (1994)*	Carl Tom, Esq. (1994)
Robert S. Toyofuku, Esq. (1994)	Michael C. Webb, Esq. (1994)
Cynthia J. Winegar, Esq. (1992)	Colleen I. Wong, Esq. (1993)
Ms. Sharon Wong (1994)*	A. James Wriston, Jr., Esq. (1993)
William J. Wynhoff, Esq. (1994)	Milton M. Yasunaga, Esq. (1993)
Peter L. Yee, Esq. (1994)	Randall S. Yoshida, Esq. (1992)
Terry N. Yoshinaga, Esq. (1994)	Anthony H. Yusi, Esq. (1993)

#### HAWAII

Mr. Raymond Glory (1993)*	Geraldine N. Hasegawa, Esq. (1993)
Raymond K. Hasegawa, Esq. (1993)	Richard T. Ishida, Esq. (1994)
Fred J. Koehnen (1994)*	Roy K. Nakamoto, Esq. (1994)
Ms. Natalie Pfeifer (1992)*	Diana L. Van De Car, Esq. (1994)
Thomas D. Welch, Esq. (1992)	Jerel I. Yamamoto, Esq. (1992)

#### KAUAI

Ted A. Chihara, Esq. (1992)	Daryl Y. Dobashi, Esq. (1993)
Christobel Kealoha, Esq. (1994)	James W. Licke, Esq. (1992)
Rev. Jan Rudinoff (1994)*	

#### MAUI

Ms. Bertha P. Drayson (1994)*	Stephen E. Goldsmith, Esq. (1992)
Deborah K. Wright, Esq. (1992)	Glenn M. Kosaka, Esq. (1992)

A Hearing Committee appointed to preside over a disciplinary or reinstatement hearing consists of three persons, one of whom may be (and most often is) a non-lawyer. The presence of non-lawyers at the evidentiary stage of the formal discipline process also ensures public accountability of the grievance system.

As with Board members, Hearing Committee members are reimbursed for travel and other out-of-pocket expenses, but do not otherwise receive compensation for their service.

## V. OFFICE OF DISCIPLINARY COUNSEL.

PRIMARY FUNCTIONS. The Office of Disciplinary Counsel ("ODC") carries out two main functions: (1) disciplinary investigations and prosecutions; and (2) ethics education.

INVESTIGATION AND PROSECUTION OF ALLEGED UNETHICAL CONDUCT. The primary function of ODC is handling complaints of alleged unethical conduct on the part of Hawaii attorneys. Ethics investigations lead to determinations ranging from a finding of no unethical conduct (resulting in dismissal of the complaint) to institution of formal disciplinary proceedings (leading to possible imposition of disciplinary sanctions).

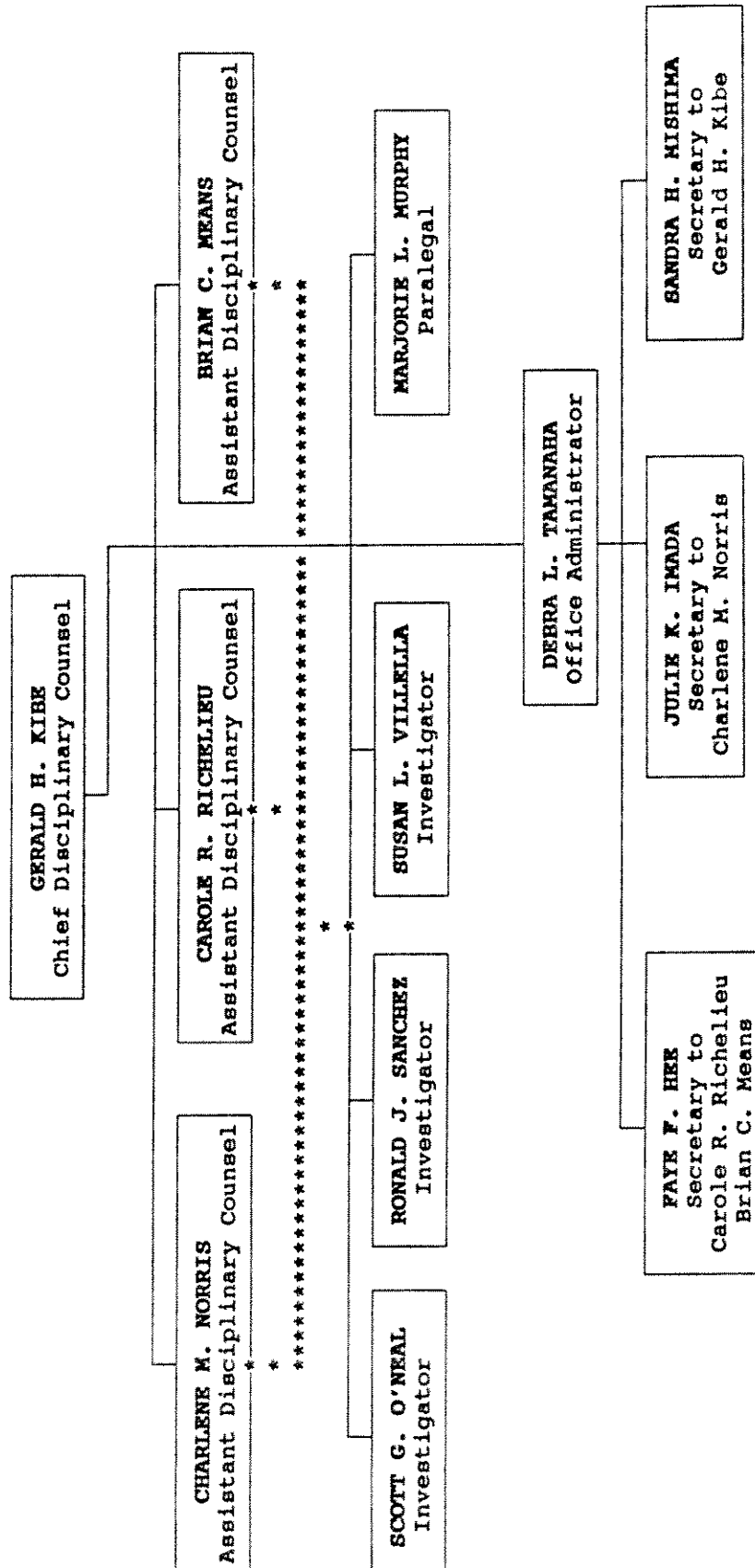
EDUCATIONAL FUNCTIONS. In addition to handling complaints, ODC spends considerable time responding to requests from Hawaii attorneys for ethics advice. ODC also prepares other educational material to assist the legal profession, such as writing monthly articles on ethics topics for the Hawaii Bar News, preparing ethics-related materials for various continuing legal education programs, and speaking to groups of lawyers and non-lawyers about attorney ethics and discipline issues.

STAFF. A chart reflecting the organizational structure of ODC is shown in Figure 2.

As indicated in the Introduction to this Report, a milestone in 1991 was the expansion of the ODC investigative staff from one to three full-time investigators. This expansion has enabled ODC to decrease the routine use of correspondence in favor of direct field interviews to conduct the bulk of investigative work. This has enhanced the thoroughness of investigations while reducing the average processing time for cases.

Another significant staff adjustment in 1991 was the assignment of primary responsibility for handling formal disciplinary prosecutions to Assistant Disciplinary Counsel Brian Means. This adjustment allowed the Chief Disciplinary Counsel and other Assistant Disciplinary Counsel to devote more time to screening grievances, handling complaint investigations, and responding to written ethics opinion requests.

Fig. 2.  
STAFF STRUCTURE  
Office of Disciplinary Counsel



## OVERVIEW OF HAWAII LAWYER DISCIPLINE PROCESS

### I. ETHICS INVESTIGATIONS.

ODC has the power and duty to investigate all matters called to its attention (whether by complaint or otherwise) involving possible unethical lawyer conduct.

Written Complaints. To ensure the clarity of matters alleged, complaints from clients and others are generally required to be in written form (an exception is made where the complainant is unable, because, for example, of physical disability or language difficulties, to submit a written complaint). While complaints need not be in a special format and may normally consist of a letter stating the facts underlying the complaint (with related documents attached), they should be as detailed as possible to clearly inform ODC of the basis for the grievance.

Screening of Complaints. Each complaint is carefully screened upon receipt. During the screening stage, the complaint is generically referred to as a "grievance". A grievance becomes a "docketed" complaint (i.e., is assigned a case number) and a formal investigation is commenced where the facts in the letter, if assumed to be true, are sufficient to raise a viable issue under the lawyers' ethics code (known as the Hawaii Code of Professional Responsibility).

"Mediation". Where the grievance appears to arise from a simple misunderstanding between an attorney and client which might be amicably resolved through the efforts of ODC, such efforts will first be made in lieu of commencing a formal investigation. If mediation efforts succeed, a full investigation will be unnecessary and the matter will be closed. However, if the minor dispute or problem cannot be amicably resolved, a full investigation will be undertaken.

Decision not to Investigate or "Mediate". Where a grievance does not raise ethics issues or does not contain sufficient factual information, the complaining party is informed by ODC of that assessment in writing and (where appropriate) is given guidance on steps which may be taken to formulate a proper complaint and/or to resolve the dissatisfaction directly with the attorney.

"Pending" Inquiry. In some cases, ODC will, upon receiving a grievance, also conduct a preliminary inquiry to clarify facts and/or issues to determine whether there is sufficient information justifying a formal investigation. The attorney may be asked to provide input concerning the matter, and further information may also be sought from the complainant. In some cases, the informal inquiry will lead to the docketing of the case. In other cases, the inquiry will confirm that there is no sound basis for further review of the grievance.

Self-Initiating Investigations. ODC may investigate any matter which comes to its attention (through, for example, news reports). Hence, a formal complaint is not necessarily needed before an investigation is begun.

Statute of Limitations. There is no statute of limitations in attorney discipline proceedings. A lapse of time between the misconduct and the filing of a grievance is not deemed a denial of due process and does not constitute a defense to a charge of misconduct, but it may be considered in mitigation if specific prejudice to the attorney is shown.

Response from Attorney. Upon determining that a matter, whether received by complaint or otherwise, should be investigated, ODC immediately notifies the attorney (who is referred to as the "respondent") in writing of the pendency of the investigation. The respondent is initially asked to submit a detailed written response concerning the matter. A respondent has a duty to respond and to cooperate in an ethics investigation, and failure to do so can constitute a separate act of misconduct which could further result in summary suspension.

Thoroughness of Investigations. Each docketed complaint is fully investigated before a determination is made as to the proper disposition. The complainant and respondent are given full opportunity to provide input. Where necessary, other witnesses are interviewed and supporting documents are obtained. ODC has the power to subpoena witnesses and records. ODC staff investigators assist in completing most docketed investigations.

Evaluation and Review. After ODC has completed an investigation, all information is evaluated and a decision is made as to the proper disposition of the matter. Each docketed investigation must be reviewed and approved by at least one member of the Disciplinary Board before the investigation may be concluded.

## II. POSSIBLE COMPLAINT DISPOSITIONS.

Upon approval of a reviewing Board member, the following dispositions may result from an investigation:

(1) Dismissal with Finding of No Unethical Conduct. Letters are sent to the complainant and the respondent by ODC advising them that the complaint has been dismissed based on a finding that a finding of unethical conduct on the part of the attorney is not supported.

(2) Dismissal with Letter of Caution. Where a finding of unethical conduct is not supported, the respondent may nonetheless be advised by ODC that certain steps should be taken to prevent grievances of a similar nature from arising in the future.

(3) Informal Admonition. This least severe form of discipline is imposed by ODC by way of a letter (sent to the respondent by certified or registered mail) containing a description of the conduct found to be violative of the ethics code. The respondent may refuse the Informal Admonition and demand a formal hearing.

(4) Formal Proceedings. A formal discipline Petition is filed against the respondent by ODC. Evidentiary proceedings are then conducted before a three-member Hearing Committee, whose report is subject to mandatory review by the Disciplinary Board. The Board can itself impose certain forms of discipline (i.e., private or public reprimand). However, only the Supreme Court can disbar, suspend, or publicly censure an attorney, and the case must be further reviewed by the Court if those forms of discipline are to be imposed.

The possible sanctions which can result from a formal disciplinary proceeding are:

- (1) Disbarment, suspension, or public censure (imposed by the Supreme Court only); and
- (2) Public reprimand or private reprimand (imposed by the Disciplinary Board).

A respondent who is censured by the Supreme Court or reprimanded by the Board may continue to practice law. The sanction can later be taken into account, however, to increase the level of discipline where the respondent commits another ethical violation.

A flow chart illustrating the Hawaii lawyer discipline process is presented in Figure 3.

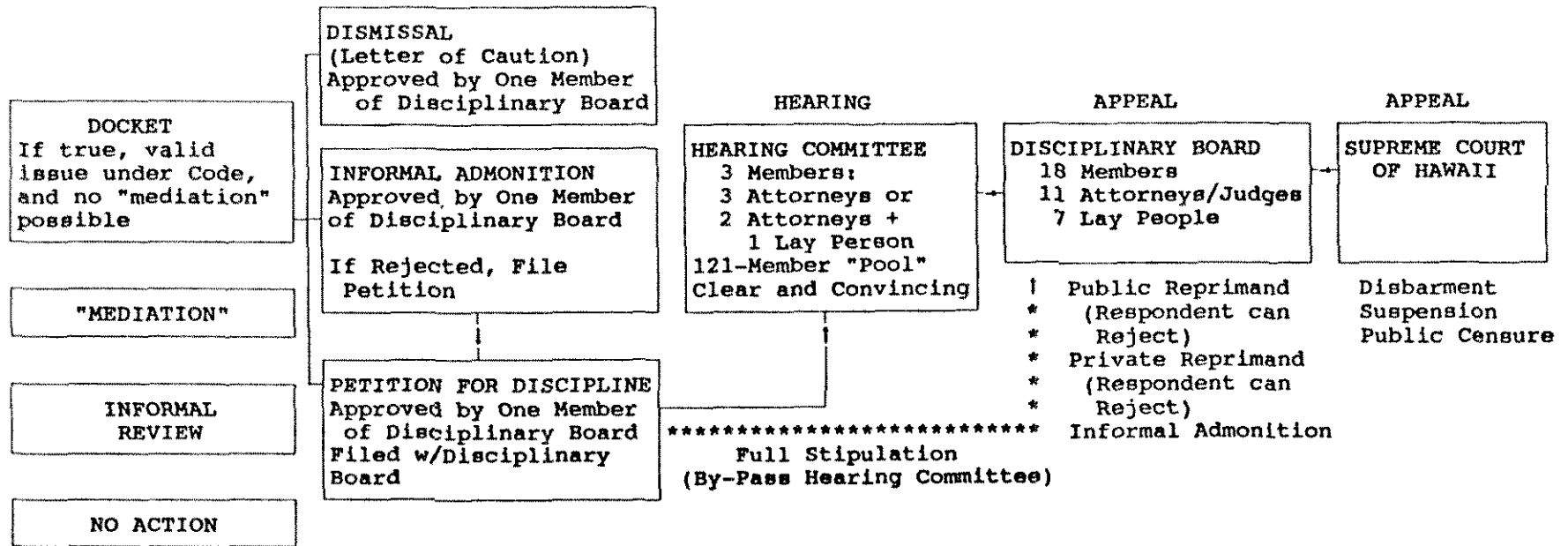
### III. CONFIDENTIALITY.

Investigations conducted by ODC and formal proceedings before hearing committees, the Board, and the Supreme Court become a matter of public record when:

1. The Board files with the Supreme Court a report recommending that the respondent be disbarred or suspended;
2. The Supreme Court issues an order imposing a public censure--or affirming the imposition of a public reprimand--upon the respondent;
3. The respondent requests that the matter be public;
4. The investigation is based on the conviction of the respondent for a crime; or

Fig. 3.  
THE HAWAII ATTORNEY GRIEVANCE PROCESS

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5. The Supreme Court enters an order transferring the respondent to inactive status due to physical or mental disability.

Where any of these conditions exists, ODC is permitted to reveal information regarding the complaint or discipline record of the respondent. See Rule 2.22, RSCH.

A reason for confidentiality of complaint information in other circumstances is that a complaint against a lawyer may arise out of his or her transactions with a client, which are confidential. This confidence would be violated (and the private affairs of the client exposed) if the complaint matter is made public without restriction. Also, publicity unfair to the lawyer may result if a complaint is fully revealed but later found to lack substance. Further, public access to all complaint records or information during an investigation may compromise the effectiveness of the investigation.

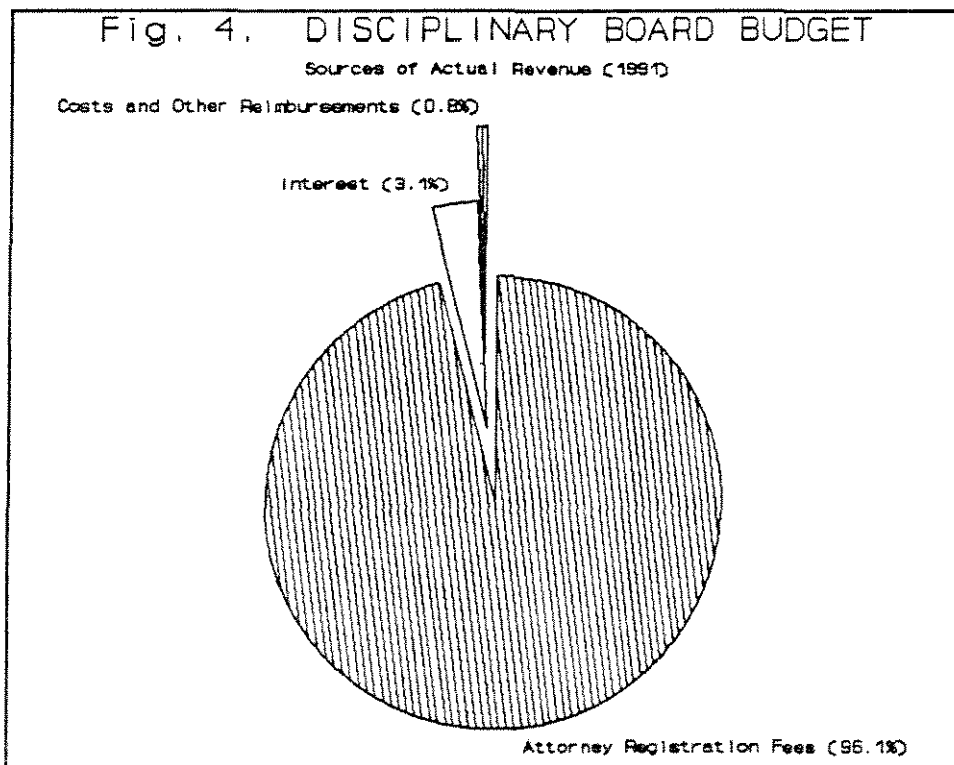
Investigations or proceedings which conclude with the imposition of private discipline (i.e., informal admonition or private reprimand) remain, by their nature, confidential.

## FUNDING THE HAWAII ATTORNEY GRIEVANCE SYSTEM

Mandatory annual attorney registration fees are the central source of funding for the operations of the attorney grievance system. See Rule 17(d)(2)(ii), RSCH. No public tax dollars are devoted to funding the grievance system.

A comparison of the relative size of fund sources for the 1991 grievance system budget is reflected in Figure 4.

Interest earned on registration fees comprises a small proportion of funding. Miscellaneous income, which also adds a relatively small amount to funds on hand, primarily includes costs levied upon disciplined attorneys. See Figure 4. Since cost payments generally represent reimbursements for amounts previously expended to process discipline proceedings, however, these amounts are not really considered an active source of "new" funds.



Hawaii lawyers must register annually and (unless they are full-time judges or on inactive status) pay annual licensing fees to the Disciplinary Board. For administrative efficiency, the attorney registration system is now operated by the Hawaii State Bar Association ("HSBA") pursuant to bar unification rules adopted by the Supreme Court in late 1989. Once collected by HSBA, discipline registration fees must be turned over to the Board on at least an annual basis. See Rule 17(d)(2)(ii), RSCH.

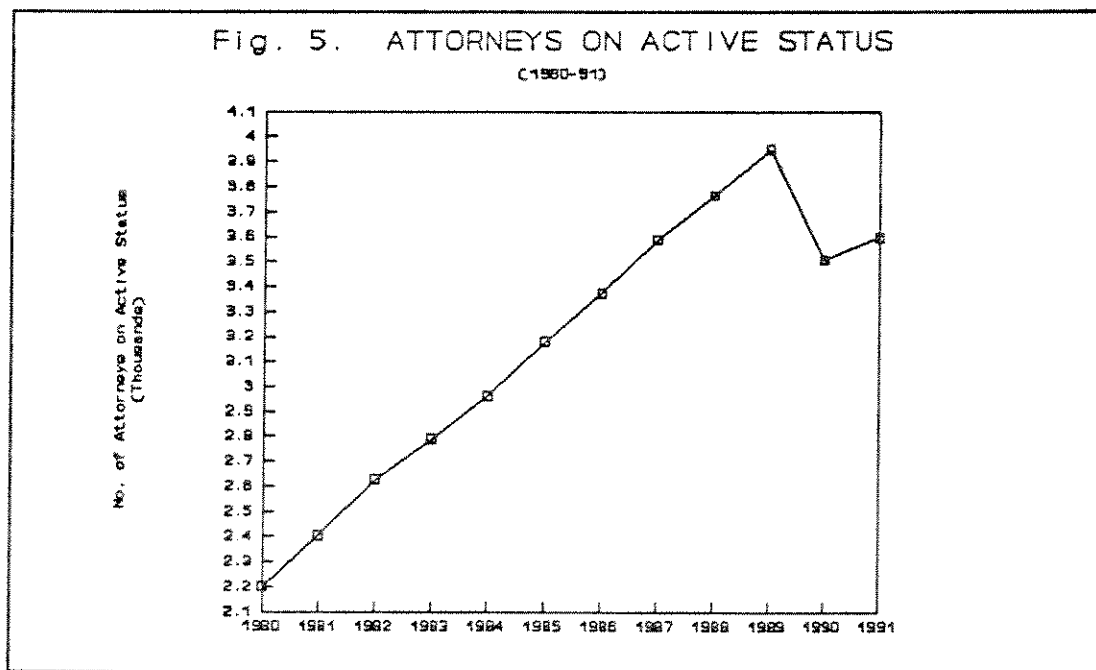
Annual discipline registration fees are established by the HSBA Board of Directors, but cannot be set below levels in effect as of July 1, 1989. Id. The annual discipline registration fees for 1991 were as follows (fees are collected on a calendar year basis):

\$100.00 -- 1st through 4th years of admission to any bar.

\$200.00 -- 5th year and beyond of admission to any bar.

The Disciplinary Board formulates the annual budget for the lawyer ethics and discipline system in "consultation" with the HSBA Board of Directors. Rule 2.4.(e)(7), RSCH. The annual budget is, however, subject to ultimate review and approval by the Supreme Court. Rule 2.21, RSCH.

The Disciplinary Board's 1991 Budget (formulated in August 1990) reflected total allocations of \$757,370.00. See Table 1. However, because of the unexpectedly large number of attorneys who began transferring from active to inactive status in 1990 (ostensibly due to the increase in registration fees and bar dues following bar unification), a dramatic decrease in the number of attorneys required to pay discipline registration fees occurred. See Figure 5. This large shift in active bar membership was not known to the Board until early 1991 due to the transfer of fee collection responsibilities to HSBA. The number of attorneys registering on active status increased slightly in 1991 over 1990, but that increase was much less than expected.



Restructuring of the discipline registration fee schedule for 1991 had been approved by the Supreme Court in 1990 and was expected to significantly enhance the fiscal resources available to

the Board in 1991. The projected increase in resources was firmly supported by the Bar Association and was needed to meet such goals as continued improvement of case processing time and expansion of ethics opinion services to bar members.

Although overall Board revenues increased in 1991 (over total revenues in 1989 and 1990), the projected 1991 funding level was not attained due to the unexpected nosedive in the number of active attorneys. Hence, instead of receiving an anticipated \$757,400.00 in registration fees in 1991, the Board received only \$685,750.00 in fees (a difference of \$71,650.00). After earned interest and miscellaneous reimbursements were taken into account, a net shortfall of \$43,754.12 in "actual" over "projected" 1991 Board revenues resulted.

Despite the net revenue shortfall, the Board was able to continue operation without impairment in 1991 due to a contingency surplus accumulated through prudent spending practices in prior years. Significant planned outlays were required in 1991 for salaries for added staff, office expansion, increased office rent, and purchase of expanded telephone and computer systems, as well as sponsorship of the half-day training seminar for all Hearing Committee and Board members. Actual expenditures in 1991 thus exceeded actual revenues by \$45,502.07. A comparison of projected versus actual Board expenditures for 1991 is shown in Table 1.

Table 1.  
DISCIPLINARY BOARD AND OFFICE  
OF DISCIPLINARY COUNSEL BUDGET

	<u>Projected</u>	<u>Actual</u>
<u>REVENUES</u>		
Revenues (Registration Fees, Etc.)..	\$757,400.00	\$713,645.88
<u>EXPENDITURES</u>		
Total Salaries .....	\$448,000.00	\$406,987.38
Total Employee Benefits .....	112,920.00	86,230.10
Professional Services .....	18,500.00	58,914.64
Office Rent .....	90,000.00	96,748.44
Administrative Expenses .....	48,950.00	56,788.75
Investigative Litigation Expenses ..	12,000.00	7,158.34
SUBTOTAL .....	\$169,450.00	818.23
Capital Expenses .....	\$ 27,000.00	46,320.30
Total Expenditures .....	\$757,370.00	\$759,147.95
REVENUES LESS EXPENDITURES .....	\$ 30.00	(\$45,502.07)

As reflected in the next section of this Report, the shortfall in actual Board revenues did not prevent the attorney grievance system from achieving its goals of faster case processing time,

improved case investigation methods, and continued provision of ethics advice and education.

Further, through continued observation of prudent financial management practices, an increase in registration fees was not requested by the Board for 1992 despite the lower-than-projected number of actively-registered attorneys. However, fee levels for 1993 will depend upon the direction and magnitude of any further changes in the number of actively-registered attorneys.

## COMPLAINT AND DISCIPLINE SUMMARY

### I. NEW COMPLAINTS.

#### A. Grievances Received.

In 1991, a total of 519 grievances were received by ODC, of which 330 were docketed for formal investigation (as more fully described in Section B below). The 519 grievances received in 1991 represented the highest number of inquiries received since by ODC such statistics were first compiled in 1988.

Of the 189 grievances not docketed for formal investigation in 1991, 146 matters did not present sufficient information by which ODC could proceed with a meaningful investigation (frequently, efforts to obtain further information from the complaining party were unsuccessful) or, after a preliminary review was undertaken by ODC (with information being obtained from the attorney and the complaining party), no clear ethics issue could be discerned. The remaining 43 non-docketed grievances were resolved through "mediation" efforts undertaken by ODC between the attorney and the complaining party.

Hence, even where a decision was made to refrain from docketing a matter for full investigation, careful screening and review of the new grievance was undertaken by the ODC staff.

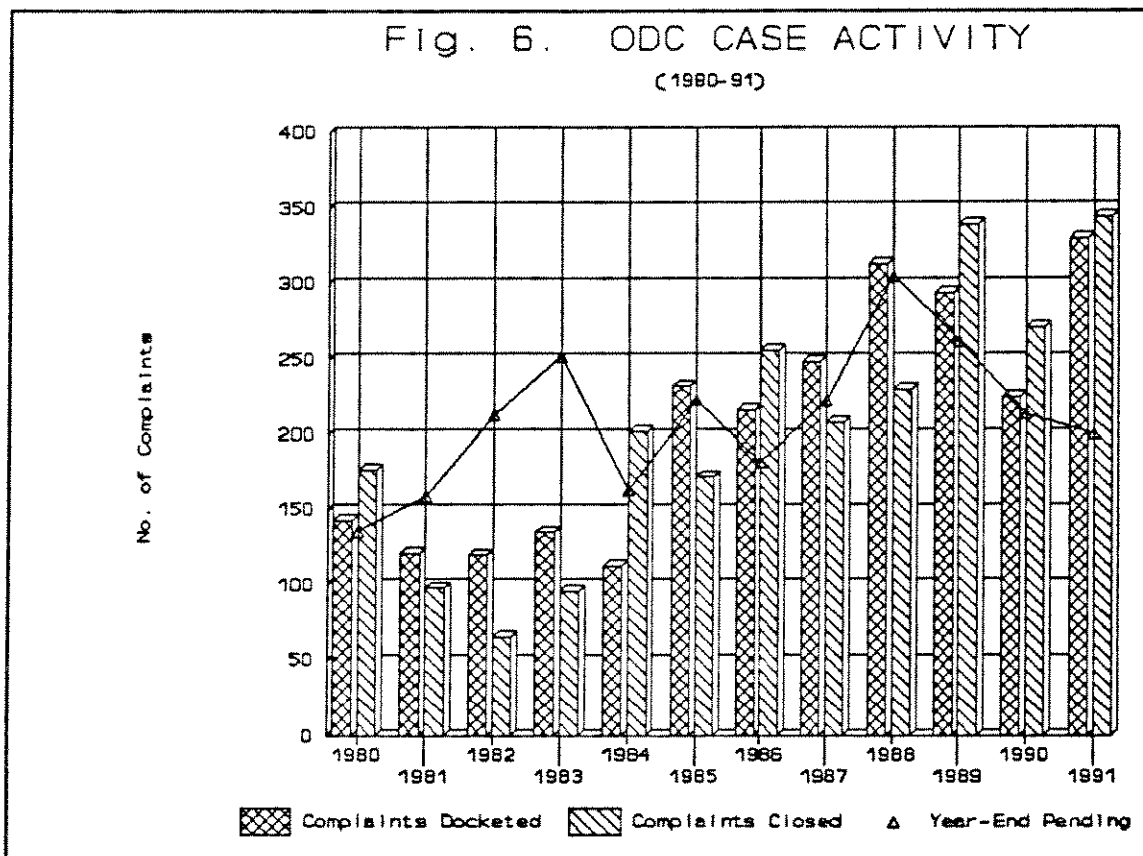
It should also be noted that the ODC staff spends a significant amount of time each year fielding telephone calls from persons having questions or concerns regarding the conduct of attorneys. In 1991, the ODC staff handled 921 such telephone calls, during which information concerning the lawyers' ethics code, the manner in which a grievance may be registered, and the discipline process was explained. Information may also be provided to assist the inquirer in resolving a concern or problem with the attorney in question, thereby avoiding the need to pursue a formal grievance.

#### B. Cases Docketed.

Of the 519 grievances received in 1991, 330 were docketed for formal investigation. As indicated on Page 8, a grievance is generally docketed (i.e., assigned a case number) if the facts presented by the complaining party are, if assumed to be true, sufficient to raise a viable issue under the lawyers' ethics code.

The number of grievances docketed in 1991 reflected a substantial increase over the number docketed in 1990. The growth in docketed complaints (from 225 docketed cases in 1990 to 330 in 1991) represented a 47% increase. The 330 complaints docketed in 1991 also exceeded the previous annual high of 313 complaints docketed in 1988. See Figure 6.

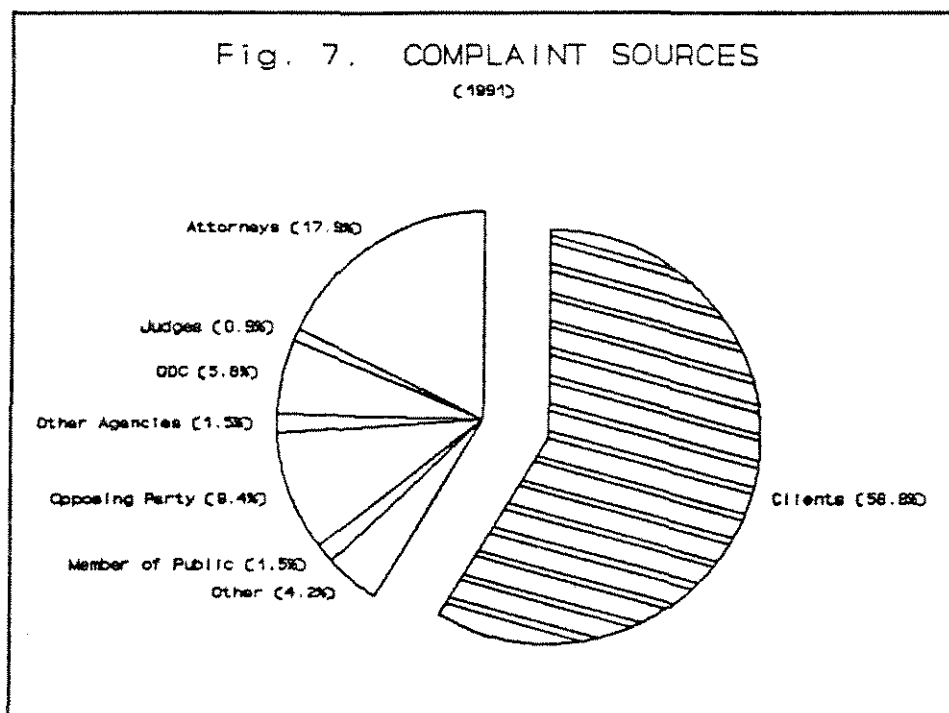
All docketed complaints require a full investigation by the ODC staff. Also, as indicated on Page 9, each docketed investigation must, upon completion, be reviewed and approved by at least one member of the Disciplinary Board before the matter can either be dismissed or moved forward for disciplinary action.



### C. Docketed Complaint Sources.

Of the 330 complaints docketed in 1991, the largest complaint source (58.8%) was clients, while other lawyers (17.9%), opposing parties (9.4%), and ODC (5.8%) were responsible for originating the next highest proportions of investigations. See Figure 7.

This apportionment of primary complaint sources is generally consistent with trends established over previous years.



#### D. Docketed Complaint Categories.

The largest complaint category in 1991 (comprising 27.0% of all complaints docketed during the year) involved alleged neglect of clients' legal matters (perennially the largest complaint area).

Failure to promptly pay out funds (7.0%), conflict of interest (6.4%), misrepresentations to the court (5.2%), incompetence (i.e., lack of education or training) (3.9%), misrepresentations to non-clients (3.6%), failure to account for funds (3.3%), and clearly unreasonable fees (2.7%) made up the next largest complaint categories. See Figure 8.

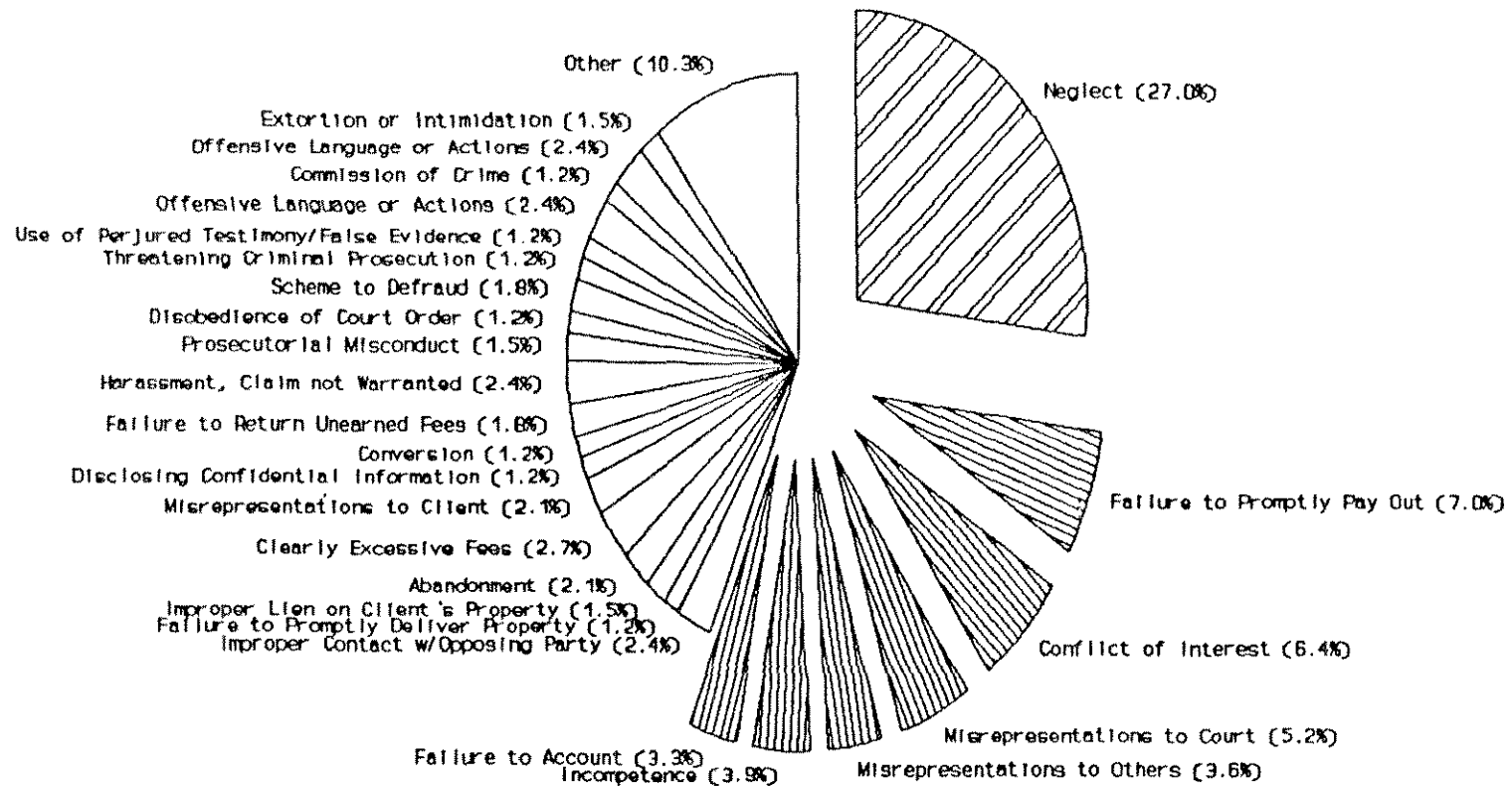
#### E. Docketed Complaint Law Areas.

ODC began for the first time in late July 1991 to compile statistics regarding the general law categories giving rise to docketed complaints.

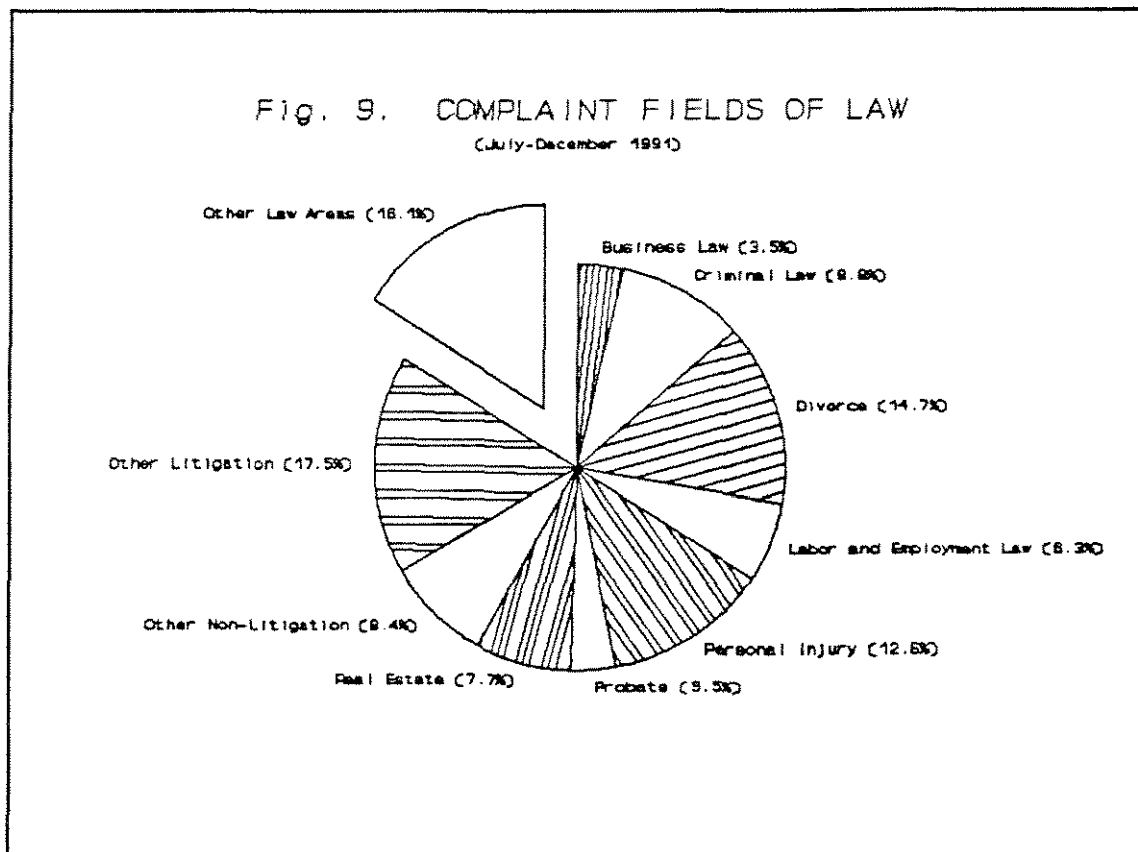
This half-year compilation shows that for the complaints docketed during the second half of 1991, divorce (14.7%), personal injury (12.6%), criminal law (9.8%), real estate (7.7%), and labor and employment law (6.3%) were the practice areas which generated the highest proportion of complaints. Complaints involving other civil litigation matters (17.5%) and other non-litigation matters (8.4%) collectively gave rise to relatively large proportions of complaints as well. See Figure 9.

Fig. 8. COMPLAINT CATEGORIES

(1991)



The complaint categories utilized in 1991 have been slightly expanded and refined for formal statistical purposes in 1992.



#### F. Historical Docketed Caseload Summary.

A chart comparing the number of complaints docketed and closed, as well as the number of cases pending at year-end, for the calendar years 1980-91 is shown in Figure 6.

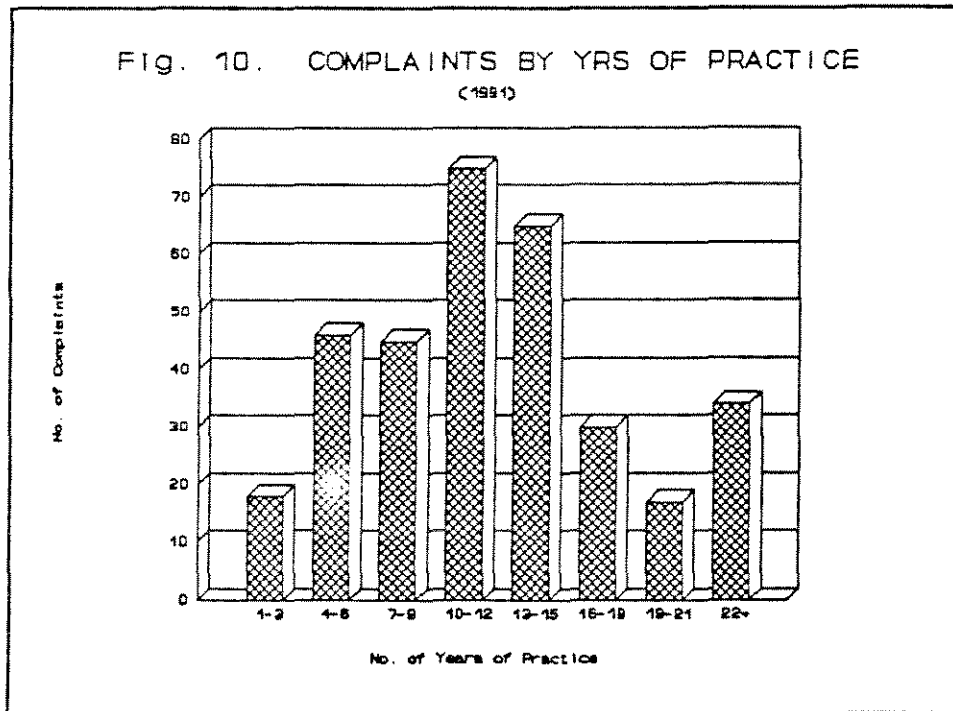
The chart reveals that case docketings have generally risen in rough correlation to the increase in the number of actively-registered attorneys in Hawaii.

It is also significant to note, however, that the number of cases pending at year-end has steadily decreased since 1988 (the year in which the previous high of 313 complaints was docketed). Despite the record number of cases docketed in 1991, the number of cases pending at the end of the year (196) was the lowest in five years, thereby reflecting a continued high level of productivity by the ODC staff.

### G. Years of Practice Summary.

An informal comparison of the number of years which each respondent had been a member of the bar at the time he or she was complained against reveals that the number of complaints filed appears to peak when attorneys reach their 10th through 15th years of practice. See Figure 10.

However, as these figures do not take into account the number of attorneys actually licensed in each time-line category, they should be viewed for general interest purposes only.



## II. CASES CLOSED.

Despite the record number of complaints docketed in 1991, a record 344 complaints were brought to conclusion during the year. This represents a 27% increase over the number of complaints closed in 1990 (271).

As of December 31, 1991, the number of docketed cases remaining open (196) was the lowest since 1986 (when 114 fewer complaints were docketed). See Figure 6.

## III. DISCIPLINE IMPOSED.

Of the 344 complaints closed in 1991, 68 (or nearly 20%) were brought to conclusion in—connection with the imposition of discipline. In all, 38 Hawaii lawyers were the subject of disciplinary sanctions in 1991.

The number of disciplinary sanctions imposed in 1991 include:

- (1) 3 disbarments, 4 suspensions, and 1 public censure by the Supreme Court;
- (2) 2 public reprimands and 3 private reprimands by the Disciplinary Board; and
- (3) 25 private informal admonitions by ODC.

These sanctions are more fully summarized in Table 2.

Table 2.  
COMPLAINT DISPOSITION IN 1991

	<u>No. of Attorneys</u>	<u>No. Complaints Involved</u>
Disbarments	3	5
Suspensions	4	8
Public Censures	1	4
Public Reprimands	2	7
Private Reprimands	3	3
Informal Admonitions	<u>25</u>	<u>25</u>
Subtotal 1	38	52
Held in Abeyance (due to disbarment or suspension on other complaints)	<u>1</u>	<u>16</u>
Subtotal 2	39	68
Dismissed Due to Lack of Evidence Proving Unethical Conduct	198	272
Other	<u>3</u>	<u>4</u>
TOTAL	<u>240</u>	<u>344</u>

#### IV. MISCELLANEOUS PROCEEDINGS.

Beyond the imposition of actual disciplinary sanctions, a number of miscellaneous proceedings were also initiated by ODC in 1991 for purposes of expedited protection of the public.

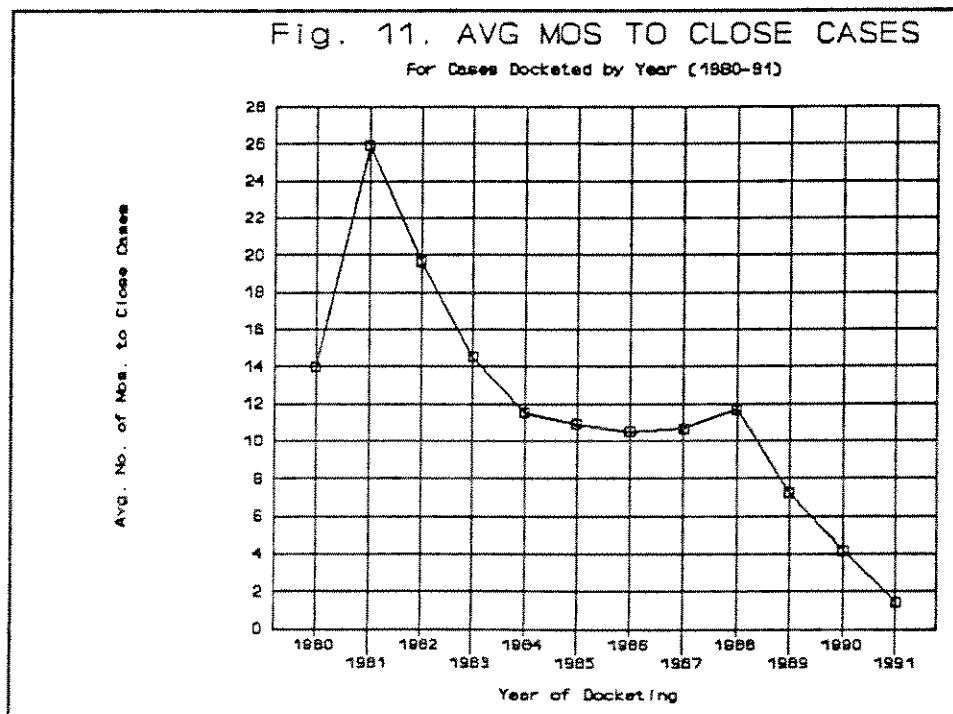
For example, at ODC's request, the Supreme Court restrained 1 attorney from practice due to a felony conviction, transferred 2 attorneys to inactive status due to disability, and suspended 2 attorneys for failing to cooperate in ethics investigations. Also,

the Supreme Court appointed trustees in 2 cases at ODC's request to respectively inventory the files of a respondent who had disappeared and another respondent who had been transferred to inactive status due to disability. In addition, an audit for cause of a respondent's financial records was initiated with the approval of the Board Chairperson when questions arose regarding the respondent's handling of client funds. Finally, one reinstatement proceeding was concluded during 1991.

#### V. CASE PROCESSING TIME.

The challenge to the grievance system has been to balance the need for expeditious case processing with the need for continued thoroughness of investigative work and fairness to the parties involved. Through hard work and dedication, the system has managed to successfully balance those requirements.

A general downward trend in average case processing time for complaints docketed since 1980 is reflected in Figure 11. From a high of 25 months required to close all cases docketed in 1981, the average case closure time has decreased to less than 2 months for complaints docketed in 1991. A caveat, of course, is that because these figures reflect the average time for bringing all complaints to conclusion (whether by dismissal, imposition of informal admonition, or upon completion of formal discipline proceedings), the figures for the latter two or three years could rise slightly upon closure of more complex newer investigations or formal proceedings which currently remain pending. Nonetheless, an overall downward trend in average case closure time is evident.



ODC Investigator Scott O'Neal, who has been with ODC since 1989, has assisted greatly in coordinating the expansion of the investigative staff in 1991. Through the efforts of Mr. O'Neal, as well as new ODC Investigators Ron Sanchez and Susan Villella, the grievance system has managed to steadily improve its case processing performance during the year.

Finally, while average case closure time has continued to improve, the total number of disciplinary sanctions imposed has remained relatively stable since approximately 1986. See Figure 12. For general informational purposes, Figure 12a reflects the number of disciplinary sanctions imposed in relation to the number of miscellaneous protective actions (e.g., interim suspensions, transfers to inactive status due to disability, and trustee appointments) and reinstatement requests processed annually between 1980 and 1991.

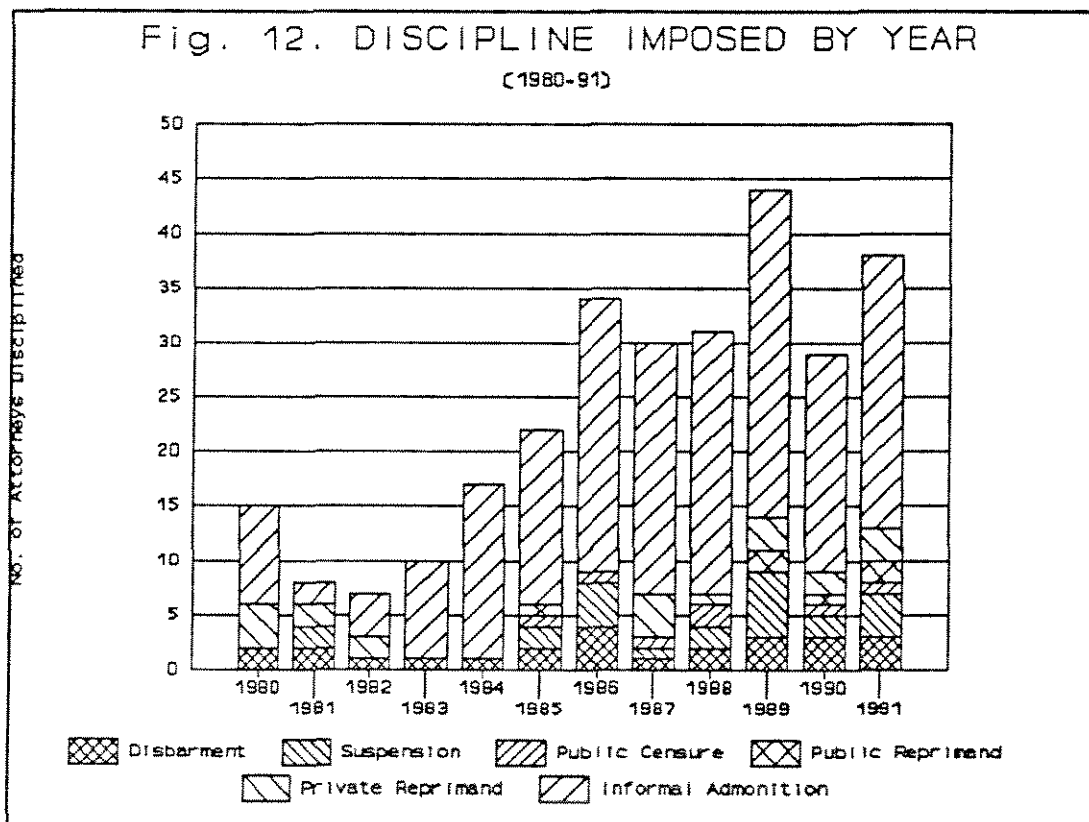
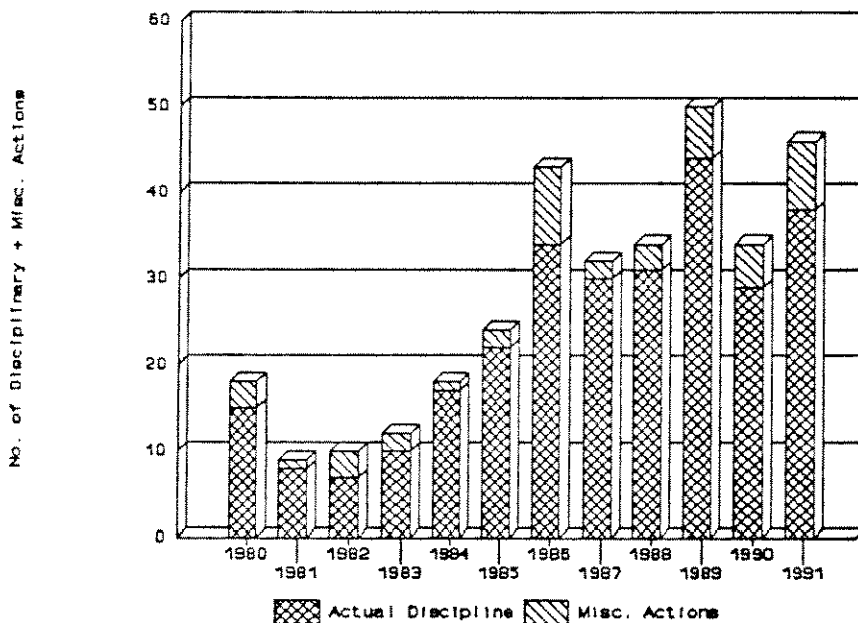


Fig. 12a. DISCIPLINE AND MISC. ACTIONS  
(1980-91)



Of course, it should be mentioned that disciplinary sanctions may be imposed at somewhat different rates each year because formal discipline proceedings vary in complexity and difficulty. Hence, a number of coincident factors may lead to a larger number of formal proceedings being concluded in one year as compared to the year before (or after). It would indeed be highly unusual for formal discipline proceedings to come to conclusion at the same annual rate. Formal proceeding dispositions must thus be viewed over a number of years to correctly gauge general trends.

## SUMMARY OF DISCIPLINARY AND RELATED PROCEEDINGS

### I. PUBLIC DISCIPLINE SUMMARIES.

The following are summaries of public disciplinary action taken in 1991:

#### A. DISBARMENTS.

Office of Disciplinary Counsel v. Russell D.C. Kim, No. 15009 (Order of Disbarment filed February 7, 1991).

The respondent misappropriated client funds in two cases, failed to provide accounts to clients regarding their funds, and failed to cooperate with ODC in its investigation. The misappropriation occurred in connection with funds received by the respondent from clients for investment on their behalf. The company into which the respondent "invested" the clients' funds was a sham, and the respondent failed to reveal to his clients his personal relationship with that company.

Office of Disciplinary Counsel v. Robert E. Rosenfield, No. 15378 (Order of Disbarment filed August 9, 1991).

The respondent was disbarred in Hawaii on a reciprocal basis following his disbarment in Pennsylvania on April 1, 1991. The Pennsylvania disbarment resulted from the respondent's various acts of misconduct there, including dishonesty, fraud, misrepresentation, false statements, and mishandling of client funds between December 1984 and May 1985.

Office of Disciplinary Counsel v. Stephen A. Nordyke, No. 15463 (Order of Disbarment filed September 19, 1991).

While representing clients in a business loan matter, the respondent failed to maintain adequate records of his handling of the clients' loan proceeds, failed to furnish an accounting of those funds, and failed to deliver files belonging to the former clients when they discharged him from employment. In another matter, the respondent improperly converted to his own use funds belonging to a probate estate, failed to complete the probate, failed to inform the estate's beneficiaries of the status of the probate, made false statements to the beneficiaries and others regarding the estate, failed to obey a probate court order removing him as personal representative of the estate and ordering reimbursement to the estate, failed to provide accountings of estate property, and failed to maintain adequate records regarding his handling of estate assets. The respondent was also cited for failure to cooperate with ODC in its investigation of these cases.

## **B. SUSPENSIONS.**

Office of Disciplinary Counsel v. Andrew S. Ono, No. 15222  
(Order of Suspension filed May 13, 1991).

The respondent was suspended for one year and one day for failure to perform services in a probate case for nearly twelve (12) years. The respondent was twice disciplined on prior occasions for neglect of probate matters.

Office of Disciplinary Counsel v. Robert W. Jinks, No. 1487  
(Order of Suspension filed April 15, 1991).

The respondent was suspended for three years on a reciprocal basis due to his suspension for that period of time in California on November 29, 1990. The respondent stipulated in California that as the sole trustee of a trust and as an employee of a law firm, he: commingled funds; was involved in conflicts of interest among the trust, the investors, and his employer law firm; performed services for the trust without having adequate skills; failed to use reasonable diligence and his best judgment as trustee; failed to maintain complete records and to render appropriate accounts for the trust; and failed to preserve financial records.

Office of Disciplinary Counsel v. Erick T.S. Moon, No. 15496  
(Order of Suspension filed October 17, 1991).

The respondent was suspended for one year and one day for: failing to make court appearances for four clients; failing to complete interrogatories for clients in a lawsuit and failing to answer their questions; failing to withdraw from a divorce case after being discharged by the client and failing to timely release her file to her; failing to meet deadlines for filing documents in four criminal appeals; and failing to pay fines imposed by trial judges and the Supreme Court.

Office of Disciplinary Counsel v. Mamoru Shimokusu, No. 15515  
(Order of Suspension filed October 23, 1991).

The respondent was suspended for three months for failing to record a client's deed for some two years despite repeated requests. In 1989, the respondent received a Public Reprimand from the Disciplinary Board for similar misconduct, as well as for making false statements to his clients concerning the status of the recordation of their deeds. The prior discipline was taken into account in determining the three-month suspension.

## **C. PUBLIC CENSURE.**

Office of Disciplinary Counsel v. Brian M.C. Pang, No. 11764  
(Order of Public Censure filed January 11, 1991).

The respondent misappropriated client trust funds in one case, neglected and abandoned clients' legal matters in four cases,

failed to comply with court directives and procedures in two cases, and failed to cooperate with ODC during the ethics investigation. Mitigating factors included the respondent's prior transfer to inactive status, and his successful completion of a one-year period of rehabilitative treatment from substance abuse, continuing efforts at rehabilitation, and participation in the Attorneys and Judges Assistance Program.

#### D. PUBLIC REPRIMANDS.

Office of Disciplinary Counsel v. Barbara Lee Melvin, ODC 2149, 2250, 2023, 2212, 2271, 2609 (Public Order of Discipline issued on March 11, 1991).

The respondent was publicly reprimanded (based on an agreed statement of facts) for failing to adequately communicate with six clients regarding their cases and for failing to complete a client's adoption matter in a timely fashion. The Board noted that since the respondent had previously received an Informal Admonition for neglect of a client's criminal appeal, as well as two other Informal Admonitions for respectively neglecting a divorce case and failing to promptly turn a divorce client's file over to the client's new attorney, any future ethical violations by her would be considered with great seriousness.

Office of Disciplinary Counsel v. Myles S. Breiner, ODC 3105 (Public Order of Discipline issued on October 24, 1991).

The respondent was publicly reprimanded for falsely certifying to state unemployment insurance officials in 1989 that he was not working when he was in fact receiving payments for legal work during the period in question.

#### II. MISCELLANEOUS PROCEEDINGS.

As stated above, the Supreme Court in 1991 also suspended 2 attorneys for failing to cooperate in ethics investigations (Rule 2.12A), restrained 1 attorney from practice due to a felony conviction (Rule 2.13(a)), and transferred 2 attorneys to inactive status due to disability (Rule 2.19). The Supreme Court also appointed trustees in 2 cases to inventory the files of an attorney who had disappeared and an attorney who had been transferred to inactive status due to disability (Rule 2.20).

These additional dispositions are summarized below:

##### A. RULE 2.12A PROCEEDINGS.

Office of Disciplinary Counsel v. Ronald D. Dicker, No. 15122 (Order of suspension filed March 15, 1991).

The respondent was suspended under Supreme Court Rule 2.12A for failing to cooperate in the investigation of several ethics complaints filed against him. Under Supreme Court Rule 2.12A, an

attorney who fails to cooperate in an ethics investigation may be summarily suspended from the practice of law until further order of the Supreme Court. The respondent had failed to respond over a period of several weeks to multiple requests from ODC for information concerning a number of complaints filed against him by clients and others. The respondent will remain suspended until the completion of formal disciplinary proceedings.

Office of Disciplinary Counsel v. John Tumacder, No. 15290  
(Order of suspension filed May 28, 1991).

The respondent was suspended under Supreme Court Rule 2.12A for failing to cooperate in the investigation of an ethics complaint filed against him by a former client. While the respondent had sporadically provided some general information to ODC regarding the complaint from May to November 1990, he failed to reply to follow-up inquiries from ODC beginning in November 1990.

#### B. RULE 2.13 PROCEEDING.

Office of Disciplinary Counsel v. William D. Mett, No. 15036  
(Order of temporary restraint filed February 4, 1991).

The respondent was temporarily restrained from the practice of law under Supreme Court Rule 2.13 based on his felony conviction for federal mail and wire fraud on November 5, 1990. The respondent is thus prohibited from practicing law pending the disposition of formal attorney discipline proceedings to be filed against him.

#### C. RULE 2.19 PROCEEDINGS.

Office of Disciplinary Counsel v. Kathy J. Gumpel, No. 15404  
(Order of transfer to inactive status filed September 26, 1991).

The respondent was transferred to inactive status for an indefinite period under Supreme Court Rule 2.19 due to mental incapacity. On June 26, 1991, the Supreme Court had entered an interim order transferring the respondent to inactive status pending her examination by a medical expert. Following examination, the expert confirmed her disability. The respondent will be returned to active status only upon certification by a qualified medical expert that she is no longer disabled.

Office of Disciplinary Counsel v. Katsuya Yamada, No. 15333  
(Order of transfer to inactive status filed on May 29, 1992 and October 8, 1991).

The respondent was transferred to inactive status for an indefinite period under Supreme Court Rule 2.19 due to mental incapacity. On May 29, 1991, the Supreme Court had entered an interim order transferring the respondent to inactive status due to his assertion that he is suffering from a mental or physical infirmity or illness which makes it impossible for him to defend

himself adequately in pending disciplinary proceedings. See Supreme Court Rule 2.19(c). Following an examination, a medical expert confirmed the respondent's disability. The respondent will be returned to active status only upon certification by a qualified medical expert that he is no longer disabled.

D. RULE 2.20 PROCEEDINGS.

Office of Disciplinary Counsel v. Ronald D. Dicker, No. 15122 (Order Appointing Trustee filed March 19, 1991).

After the respondent was suspended by the Supreme Court on March 15, 1991 for failing to cooperate in ethics investigations, a trustee was appointed at ODC's request under Supreme Court Rule 2.20 to take custody of the respondent's case files and to return those files to his clients.

Office of Disciplinary Counsel v. Kathy J. Gumpel, No. 15404 (Order appointing trustee filed June 26, 1991).

After the respondent was transferred to inactive status by the Supreme Court on September 26, 1991 due to mental incapacity, a trustee was appointed at ODC's request under Supreme Court Rule 2.20 to take custody of the respondent's case files and to return those files to her clients.

## ETHICS OPINIONS AND EDUCATION

### I. ETHICS OPINIONS.

As a service to bar members, ODC furnishes verbal and written ethics advice to attorneys who inquire as to their own prospective conduct. Opinions are not provided concerning the conduct of another attorney or of the inquirer's past conduct.

In 1991, ODC furnished 91 written ethics opinions and 1,003 telephone opinions to Hawaii attorneys. A comparison of the provision of ethics information to bar members in 1990 and 1991 is shown in Table 3.

Table 3.

#### ETHICS GUIDANCE PROVIDED TO BAR MEMBERS (1990 & 1991)

	<u>1990</u>	<u>1991</u>
Letter Opinions	99	91
Telephone Opinions	954	1,003
Written reference information (no opinion necessary)	<u>137</u>	<u>167</u>
TOTAL	1,190	1,261

ODC's Paralegal, Marjorie Murphy, has played an invaluable role in researching and drafting responses to most of the written opinion requests received from Hawaii attorneys.

### II. OTHER ETHICS EDUCATION.

#### A. Bar News Articles.

In addition to providing written and verbal ethics advice, ODC publishes monthly articles in the Hawaii Bar News pertaining to ethics law and procedure.

The Bar News articles published in 1991 by ODC covered the following topics:

January	POLICIES ON ETHICS OPINION REQUESTS
February	PUBLIC DISCIPLINE SUMMARIES
March	CONFLICTING CLAIMS OF CLIENTS AND THIRD PARTIES TO FUNDS HELD BY AN ATTORNEY
April	TWO NEW ODC INVESTIGATORS HIRED
May	STATISTICAL REPORT FOR 1990

June	HANDLING OF FEE ADVANCES/NON-REFUNDABLE RETAINERS
July	SUMMARIES OF PRIVATE DISCIPLINE IMPOSED IN 1990
August	LIST OF ODC <u>BAR NEWS</u> ARTICLES PUBLISHED SINCE JUNE 1988
September	REPORT OF THE ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT
October	SUBSTANCE ABUSE AND DISCIPLINE
November	PUBLIC DISCIPLINE SUMMARIES
December	GIFTS AND LOANS TO JUDGES AND COURT STAFF

B. Speeches and Presentations.

The ODC staff also made a number of public appearances in 1991 to provide information to attorneys, attorneys' staff members, and the public regarding lawyer discipline and ethics.

The presentations given in 1991 by the ODC staff were as follows:

Disciplinary Law & Procedure Training Seminar (1/19/91)

Inns of Court--Conflicts of Interest (1/23/91)

National Organization of Bar Counsel--  
Current Developments (2/9/91)

People's Law School (2/21/91)

HICLE--"How to Face the Media" (2/27/91)

Damon Key Bocken Leong & Kupchak (3/8/91)

Family Law Section (3/20/91 & 4/17/91)

People's Law School (4/18/91)

CAPA Seminar (5/7/91)

AG's Legal Assistants (6/13/91)

HICLE--"Conflicts of Interest" (6/22/91)

National Organization of Bar Counsel--  
"Handling Special Cases" (8/9/91)

Rush Moore Craven Sutton Morry & Beh (8/16/91)

Medicolegal Seminar--St. Francis Medical Center (8/22/91)

Government Attorneys Conference (8/30/91)

Hawaii State Bar Association Staff (9/16/91)

UH Lab School (10/9/91)

People's Law School (10/16/91)

HICLE--"Trust Accounting Rules & Practices" (11/21/91)

HICLE--"Ethics & Divorce" (11/22/91)

C. Manual of Law and Procedure for Hawaii Attorney Discipline Proceedings.

In conjunction with the Disciplinary Law and Procedure Training Seminar conducted in January 1991 for all adjudicators in the attorney grievance system, the ODC staff (together with Supreme Court Staff Attorney James Branham) produced a completely-revised Manual of Law and Procedure for Hawaii Attorney Discipline Proceedings.

The Manual, which was originally developed in 1981, contains narrative guidelines and references for all aspects of lawyer discipline proceedings in Hawaii. A further update in light of rule changes adopted by the Supreme Court during 1991 will be issued in the Summer of 1992.

## RULE CHANGES

As indicated on Page 1 of this Report, the organizational and procedural rules pertaining to the ethics and discipline system are contained in Hawaii Supreme Court Rule 2.

During 1991, the Supreme Court issued two Orders amending certain portions of Rule 2 as follows:

1. On January 11, 1991, the Supreme Court amended Rule 2.7(b) and Rule 2.7(d) to clarify (i) service requirements in formal discipline proceedings, and (ii) the circumstances under which a formal discipline case may be heard directly by the Disciplinary Board (without first convening a Hearing Committee) upon the default of a respondent who has disappeared.
2. On November 8, 1991, the Supreme Court:
  - a. Amended Rule 2.3 to allow the Court or the Board to impose a substance abuse monitoring program upon a respondent in lieu of or in addition to the imposition of discipline.
  - b. Amended Rule 2.7(b) to shorten from 60 to 30 days the time for a Hearing Committee to file its report with the Disciplinary Board following completion of a formal disciplinary hearing.
  - c. Amended Rule 2.7(c) to (i) shorten from 40 to 20 days the time for a respondent to file with the Court an opening brief objecting to the report and recommendation of the Board, and (ii) shorten from 40 to 20 days the time for ODC to file with the Court an answering brief.
  - d. Amended Rule 2.22 to allow the Board Chairperson, upon receipt of "trustworthy" evidence, to authorize ODC to disclose to the Attorneys and Judges Assistance Program an attorney's possible substance abuse, physical or mental illness, or other infirmity.

These amendments were all proposed by the Disciplinary Board and fully supported by the Hawaii State Bar Association.

## OTHER DEVELOPMENTS

### I. ABA MODEL RULES OF PROFESSIONAL CONDUCT.

During 1991, Gerald Kibe and Charlene Norris served as members of the Model Rules Committee appointed jointly in 1989 by the Hawaii Supreme Court and the U.S. District Court to review the ABA Model Rules of Professional Conduct ("Model Rules"). The Committee began deliberations in 1989 and completed its initial run-through of all Model Rules provisions in 1991. A final draft report of the Committee's determinations is being prepared.

It is not known when the Model Rules, which are intended to replace the present Code of Professional Responsibility, will be adopted. The Model Rules do not vary substantially from the Code, thus making wholesale adjustment in the manner in which attorneys practice unnecessary. However, certain limited variations between the Model Rules and the Code will probably be included, which will require education and awareness on the part of bar members.

### II. DISCIPLINARY BOARD/HSBA JOINT COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT.

A joint committee comprised of representatives of the Disciplinary Board and the Hawaii State Bar Association was formed in August 1991 to review the May 1991 Report of the American Bar Association Commission on Evaluation of Disciplinary Enforcement.

The joint committee, chaired by attorney Vernon Char, met several times during the Fall of 1991 to review the ABA Commission's 22 recommendations for improvement of the lawyer discipline process nationwide. Board members Gillmor, Carson, Jubinsky, Lum, Rush, and Wolff served as members of the joint committee, and Chief Counsel Kibe served as Reporter.

By the end of 1991, the joint committee was taking steps to complete its review and to prepare a final report regarding action on recommendations for Hawaii. Upon completion of the final report in early 1992, the joint committee's determinations were to be presented to both the Disciplinary Board and the Bar Association Board for action.

### III. HSBA COMMITTEE ON SOLICITATION AND LAWYER ADVERTISING.

Gerald Kibe and Carole Richelieu participated during 1991 in the activities of a 14-member ad hoc Hawaii State Bar Association Committee on Solicitation and Lawyer Advertising chaired by attorney Mark Davis.

The Committee determined to act as a clearinghouse for lawyer solicitation concerns and will refer appropriate matters to ODC for possible investigation.

The Committee has also endorsed closer communication with medical professionals and other segments of the public to enhance

awareness of the impropriety of uninvited, in-person solicitation of legal business. Also, a possible amendment to the Disciplinary Rules to require disgorgement of fees received by a lawyer who has obtained a case through improper solicitation is also being considered.

#### CONCLUSION

The Hawaii attorney grievance system diligently strives to ensure that lawyers licensed to practice in this State remain mindful of--and continuously conform their conduct to--the high ethical standards established by the Supreme Court of Hawaii.

In 1991, the grievance system implemented further operational refinements to maintain the ability to fairly, thoroughly, and expeditiously handle complaints alleging unethical attorney conduct. These refinements enabled the system to review an increased number of grievances while continuing to reduce the period of time during which those grievances remained pending.

With continued support from the Supreme Court, the Disciplinary Board, the practicing bar, and the public, the ethics and discipline system will successfully remain at the forefront of ensuring the accountability of the members of the legal profession toward their clients and the community.

**Appendix E**  
**The Home Insurance Company**  
**Hawaii**

Accident Years as of 12/31  
Basic Limits  
(in \$ thousands, except for numbers of claims)

	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>5 Yrs</u>
Earned Premiums*	1,956	1,887	1,791	1,787	1,967	9,388
Incurred Losses* (Capped at \$100K per)	1,104	429	908	218	489	3,148
Incurred Claims*	73	46	44	39	56	258
Average Loss	15.1	9.3	20.6	5.6	8.7	12.2

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\*Data compiled by the Home Insurance Company. Drawn from a letter to Hawaii Insurance Department dated February 22, 1991.

## Appendix F

### MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS

#### DESCRIPTION OF THE OREGON STATE BAR PROFESSIONAL LIABILITY FUND AND DISCUSSION OF ALTERNATIVES FOR STATE BAR INSURANCE PROGRAMS

By Kirk R. Hall  
Chief Executive Officer  
Oregon State Bar Professional Liability Fund

May 23, 1991

The Oregon State Bar Professional Liability Fund is the nation's only mandatory state bar malpractice coverage fund. The program has been in operation since 1978 with considerable success. This article presents details of the Oregon Fund, and discusses other alternatives available to state bar associations.

#### History of Fund

The Oregon State Bar is an integrated, mandatory bar association. The Professional Liability Fund was created in 1978 to achieve two objectives: (1) to create a stable market for malpractice coverage for Oregon lawyers, and (2) to protect the Oregon public by ensuring that all Oregon lawyers would carry malpractice coverage.

The first idea for a Fund arose in the mid-1970s, when lawyers, doctors, and other professionals experienced a "hard" market in the commercial insurance industry. The cost of malpractice coverage rose, terms and availability decreased, and in many cases carriers disappeared from the marketplace. These insurance industry problems had nothing to do with the history of claims against lawyers in Oregon, but instead were dictated by world reinsurance trends, changes in the business objectives or

ownership of insurance companies, etc. Roughly half the lawyers in Oregon were practicing "bare", without any malpractice coverage. The lawyers of the state became dissatisfied with the product provided by the commercial insurance industry, and decided to take action to form a locally-based fund for Oregon lawyers which would provide coverage through both hard and soft insurance cycles. The concept of a fund was similar in many respects to the Oregon Client Security Fund, which was established a decade earlier.

Several other state bar associations reached the same conclusions at the same time. Those states opted to form mutual insurance, reciprocal, or stock companies under applicable state law, in effect simply competing against the commercial carriers. Lawyers in those states were not required to carry malpractice coverage, and the bar-related mutual insurance companies which were created likewise were not required to provide coverage to all lawyers of the state. As a result, lawyers in these states have enjoyed lower and more stable rates from the bar-related insurance companies, but the public is not assured that every lawyer practicing in the state carries malpractice coverage and individual lawyers are not assured that they can obtain coverage.

In Oregon, the lawyers decided that creating an alternative coverage source solved only half the problem. We believed it was also important to make coverage mandatory for lawyers in private practice, just as auto insurance is mandatory for all drivers. After considerable study, we determined that the best approach was to pool all Oregon lawyers in a state bar malpractice fund as to

the first \$300,000 of coverage. Once the state bar imposed the requirement of mandatory coverage, the only alternative to a mandatory bar fund for all would have been to create an assigned risk pool or joint underwriting association for only those lawyers rejected by the commercial carriers, which has not proved successful in other lines of insurance. An assigned risk pool would also have created problems when lawyers shifted from one carrier to another or in and out of the pool, raising questions concerning prior acts coverage, tail coverage, disputes among carriers as to responsibility for a particular claim, etc.

To create the Fund, the Board of Governors of the Oregon State Bar obtained authorizing legislation from the 1973, 1975, and 1977 Oregon legislatures. A final proposal was approved by the Board of Governors and the membership at the November, 1977 bar convention. The Fund commenced operations on July 1, 1978, and has been in operation ever since.

While the Oregon Professional Liability Fund is unique to the United States, there are similar mandatory bar programs in every province of Canada, Great Britain, Ireland, and Australia. All have performed well over the past two decades, resulting in considerable protection of the public and savings to the practicing lawyers.

#### Current Program

Under the current program, all lawyers in private practice in Oregon must obtain malpractice coverage from the Fund in the amount of \$300,000 per claim/\$300,000 aggregate per year. There is no

deductible. Coverage is written on an individual basis, not firm basis, so the aggregate limits for a firm are equal to the number of lawyers with coverage at the firm (e. g., a 10-member firm effectively has PLF limits of \$300,000 per claim/\$3 million aggregate). Lawyers who fail to pay the annual Fund assessment are suspended from bar membership and may no longer practice law in the state.

There are roughly 10,400 members of the Oregon State Bar, of which approximately 7,800 are active and reside in Oregon. Of these lawyers, approximately 5,400 are in private practice and participate in the Fund, while the remaining 2,400 lawyers claim exemption from the Fund. These are lawyers who work as in-house corporate or government counsel, law professors, employed legal aid attorneys, retired attorneys, etc. The Fund offers coverage on a claims-made basis, and the terms of coverage are as broad as commercial programs.

#### Cost of Coverage

The cost for coverage in 1991 is \$1,800 per attorney. This is roughly equivalent to a premium of \$1,190 for a commercial policy with limits of \$100,000 per claim/\$300,000 aggregate with a \$1,000 deductible. Our present projection is that the cost of coverage will stay the same or decrease in the coming years.

New attorneys are charged only half the regular assessment in their first year of practice. The cost of coverage is then "step-rated" up to the full assessment over the following four years.

### Surcharges, Debits, and Credits

Unlike a commercial carrier, the Fund does not attempt to underwrite attorneys prospectively based upon their areas of practice. That is, we do not charge some lawyers more and other lawyers less for new coverage based upon an analysis of each lawyer's practice by subject area. This is generally inaccurate and involves a tremendous amount of bureaucratic paperwork. Because we are a mandatory Fund, we know that the lawyers we cover will be obtaining additional coverage from us in the future. Accordingly, we can effectively "underwrite" and surcharge lawyers for future coverage based on actual prior claims experience, not just a guess as to future risk based on practice area.

Under our Special Underwriting Assessment (SUA) system, attorneys with prior claims are charged an additional amount for their coverage in future years. There is no surcharge for claims which are defended or settled for a total amount of \$10,000 or less, which is the great majority of claims. For larger claims, the surcharge is equal to two percent of the total of defense and indemnity costs in excess of \$10,000. The surcharge is paid each year for a total of five years if the attorney remains in private practice. Most attorneys have found this a fair way of making those attorneys causing claims bear a greater portion of the cost of the Fund, while keeping the mandatory malpractice coverage affordable.

### Extended Reporting or "Tail" Coverage

Because the PLF is a claims-made plan, attorneys must obtain

extended reporting or "tail" coverage when they leave the private practice of law. This tail coverage applies to claims first made against the attorney after retirement arising from actions occurring before retirement.

Most commercial companies offer tail coverage to retiring attorneys on a very unfavorable basis--e.g., at a price of 200 percent of the annual premium for only a one- or two-year extended reporting period. In contrast, our Fund provides tail coverage to retiring attorneys automatically at no additional cost. This applies also to attorneys who are leaving the private practice of law for other ventures, such as government or corporate work or business ventures.

#### Coverage of Individuals vs. Firms

It is a new concept for many lawyers to consider malpractice coverage that is written on an individual basis, not on a firm basis. Our main reason for this choice is that participation in the Fund is tied to membership in the Oregon State Bar, not to membership in any particular firm. Collection of the annual assessment and suspension for nonpayment must necessarily relate to individuals and not firms. However, there are other additional benefits as well. Lawyers frequently change firm association mid-year, and firms themselves merge and split. It would be an additional bureaucratic burden to keep track of all these hirings, firings, mergers, and splits, and to have to reissue coverage each time. In contrast, because Fund participation is tied to bar membership, we provide coverage to individual lawyers wherever they

may be practicing.

#### Multi-State Firms

Some Oregon firms have opened branch offices in other states. These firms typically buy excess coverage above our \$300,000/- \$300,000 primary limits, and have had no difficulty in obtaining "drop-down" primary coverage for their out-of-state attorneys from the commercial excess carriers. The PLF also offers excess coverage to multi-state firms, as discussed in detail below.

#### Differences Among Segments of the Bar

As noted above, the Fund charges each lawyer in Oregon the same amount for coverage, with a surcharge for attorneys with prior claims. This is underwriting based on actual claims experience, not a hypothetical projection of claims based on such factors as firm size, area of practice, etc.

On occasion, we have been asked why we don't offer discounts to selected "low risk" firms or specialties and impose surcharges on selected "high risk" firms or specialties. Our answer is that we cannot see significant and long-term statistical differences between lawyers and between groups of lawyers in Oregon. For example, large firms of 100 lawyers or more tend to have fewer reported claims per lawyer, but the severity of large firm claims is significantly worse. On balance, we have paid out as much in defense and indemnity of claims against large firms in Oregon as the firms have paid to us in annual assessments. Put another way, the large firms have not been "subsidizing" other segments of the bar through their regular annual assessments.

Similarly, while some practice areas appear to present lower risk than others, there is no guarantee that any particular lawyer will practice solely in a low risk area during a given year. Oregon does not certify lawyers for practice in specialty areas, and so each attorney is authorized to take on any type of practice matter. Some of our worst claims have been business or securities matters taken on by lawyers whose regular practice is concentrated on criminal defense, or financial matters taken on by insurance defense lawyers. Rather than attempt to analyze each year the practices of each of the 5,400 lawyers participating in the Fund in order to make small variations in the annual assessment, we treat all lawyers the same until they have shown themselves to be different by generating claims (at which point the lawyers are surcharged). This eliminates a tremendous amount of paperwork, and treats all Oregon lawyers as equals.

#### Reinsurance

Insurance companies often obtain reinsurance to protect them on the risks assumed and spread those risks to other financial entities, the reinsurers. Because Oregon has a mandatory program, and because the limits of coverage (\$300,000 per claim) are relatively low, we are able to operate safely without reinsurance. This is a great strength, as we are able to charge Oregon lawyers for coverage based solely on the Oregon claims experience. When the national and international reinsurance markets tighten, the price of reinsurance skyrockets and availability shrinks (as occurred in 1985-87). This affects commercial companies writing

lawyers' malpractice insurance in every state. However, because we are limited to Oregon lawyers, and because we are insulated from the reinsurance markets, we are able to ride out hard-market insurance cycles without any effect on price or availability in Oregon.

### Loss Prevention

Loss prevention is one of our greatest achievements, and one which can only be implemented to the greatest extent through a mandatory bar program. On average, we spend \$70 per lawyer per year on loss prevention activities. In contrast, the other bar-related mutual insurance companies spend only \$5 to \$10 per lawyer per year on loss prevention, and the commercial companies spend virtually nothing.

This discrepancy is for two reasons. First, the commercial companies have little interest in loss prevention, as they are not particularly anxious to decrease the number and severity of claims, which in turn would decrease the total premium charged and the profit to the insurer. Second, both the commercial companies and the bar-related insurance companies have to worry that their current insureds will shift to another company in the next year; this would mean that any money spent on loss prevention for the insured firm would effectively be "wasted" and the benefits would be enjoyed by another insurer. The bar-related companies also operate in a competitive environment, and cannot pass on the cost of loss prevention through their premiums.

In contrast, because the Oregon Professional Liability Fund

is a mandatory, ongoing program, we know that every dollar invested in loss prevention will result in a benefit of several dollars to us in future years through the reduction of malpractice claims. Our loss prevention activities focus on four areas: (1) education by way of written materials and workshops, (2) in-office assistance with law office systems, (3) alcohol and chemical dependency counselling and intervention, and (4) stress, burnout, and career change counselling and intervention.

Our education programs all qualify for mandatory CLE credit, and are provided free of charge several times a year. As a result, our programs are heavily attended. In addition, we make available audio cassette programs which qualify for CLE credit and which are mailed free to lawyers upon request.

We also print handbooks on malpractice avoidance in special areas of concern. These handbooks are mailed free to each member of the bar, and are presented to new bar members upon admission. Our current list of handbooks includes malpractice avoidance information relating to time deadlines and statutes of limitations, securities law, office systems (docket control, conflicts, etc.), and environmental law. We also mail a loss prevention newsletter approximately six times a year.

In addition, we maintain four staff members who travel around the state working with lawyers on a confidential basis in such areas as law office systems, alcohol and chemical dependency problems, and stress, burnout, and career change problems. We also maintain separate downtown facilities where group support

meetings are held on a daily basis to deal with problems of substance abuse, co-dependency, and other matters which can impair a lawyer's performance. This assistance program operates independently of the bar, and does not report any information to the bar discipline staff. As a result, we receive dozens of referrals every month from lawyers and judges around the state concerning impaired lawyers who need help. Over the past nine years, we have assisted approximately 400 lawyers and judges with alcohol or chemical dependency problems back into productive sobriety, and we have assisted literally hundreds of law offices, large and small, in straightening out their law office systems relating to docket control, conflicts, mail handling procedures, and similar matters. This has all been accomplished on a 100 percent confidential basis.

All these activities are funded from our assessment dollars as a valuable investment in prevention of future claims. This is an especially good reason for a mandatory bar malpractice fund, as there usually will be no other funding source available for such intensive loss prevention programs. We believe in loss prevention, as it helps not only the lawyers but the image of the profession and the public at large.

#### Claims Handling

When claims are made, they are handled primarily by staff attorneys with several years' experience in private practice. We employ independent lawyers from a select defense panel for cases in actual litigation, but staff attorneys always monitor cases

closely even while in litigation. If a lawyer has made a mistake causing damages, we try to repair or pay the claim as quickly as possible; on the other hand, if the lawyer has not made a mistake or has not caused damages, our policy is to defend the claim all the way. We have made it widely known throughout the state that we will not pay "defense costs" or "nuisance value" settlements, as this would only increase our costs over the long run. As a result, only 45 percent of claims go into litigation, and the plaintiff wins a verdict in only seven percent of those cases in litigation (often with damages below our settlement offer). More than 55 percent of our claim files are closed without any payment of indemnity. We believe our claims handling is far superior to that of most commercial carriers, which do a good job of marketing but a bad job of actual claims handling.

We have occasionally been asked whether the existence of a mandatory fund creates claims against lawyers. The answer is probably yes, but that is not necessarily a drawback. The existence of a mandatory fund may allow unrepresented claimants to present small claims with merit which would have otherwise gone uncompensated due to the cost of hiring another lawyer. Spurious or frivolous claims which are presented because of the existence of a mandatory fund are dealt with firmly as described above, which tends to inhibit the presentation of similar claims in the future. On average, an Oregon lawyer has a one-in-ten chance of having a claim made in any given year; this is approximately the same as the national average. Our cost of coverage is below the cost of

comparable commercial coverage in neighboring states. For these reasons, we do not believe that the existence of a mandatory fund increases the cost of malpractice coverage for participating lawyers.

### Legal Challenges

Over our 12 years of operation, we have faced a number of legal challenges to our existence and our requirements. These have included claims relating to due process, equal protection, anti-trust statutes, civil rights, etc. In each case we have prevailed. Both state and federal courts have found that the existence of a mandatory malpractice fund in an integrated state bar association is proper, just as the requirement of participation in a client security fund was upheld in many states a generation ago.

### Need for Mandatory Participation

We have occasionally been asked what is the justification for requiring all lawyers in private practice to carry malpractice coverage. The question is sometimes asked whether we are aware of any malpractice claims in Oregon before 1978, or any malpractice claims in any other state, which went unpaid because a lawyer did not carry malpractice coverage. The answer is a resounding "yes". We know anecdotally of meritorious malpractice claims which either went unpaid or which were settled at a reduced amount because the erring attorney had no malpractice coverage and few assets. We also know of cases where attorneys defending themselves on meritorious claims created such difficulties for the claimant that the claim was abandoned. Finally, we know from the claims which

we pay that in many cases our "insured" lawyer could not have paid the claim on his or her own.

This question can be considered in another fashion. In most states, roughly half the practicing attorneys carry no malpractice coverage at all. Is there any reason to believe that these attorneys do not make errors causing claims, while their fellow attorneys with malpractice coverage do? Assuming that each group (those with malpractice insurance and those without) generate roughly equal numbers of losses, is there any reason to believe the uninsured lawyers are paying all such claims' out of their own pockets? It is more likely that many claims against uninsured attorneys are simply dropped or significantly compromised if the uninsured attorneys either have few assets or indicate a willingness to litigate to the bitter end, even on a meritorious claim.

We believe in Oregon that some form of malpractice coverage should be mandatory, just as auto drivers are required to carry coverage. We have long required lawyers to be responsible in their ethics through the Disciplinary Rules. A generation ago we required lawyers to be responsible in their fiduciary capacity through the creation of a state bar client security fund. The next logical step, in our opinion, was to require lawyers to be financially responsible for their own mistakes. This lead to the creation of a mandatory bar malpractice fund.

### Excess Coverage

Of the 5,400 lawyers in private practice in Oregon, approximately half carry additional malpractice coverage above our \$300,000/\$300,000 limits. Until this year, the lawyers obtained this excess coverage from the commercial market. Starting in 1991, the Oregon Professional Liability Fund is offering excess coverage to firms on an optional, underwritten basis. Firms can obtain aggregate coverage of up to \$2 million at rates which are significantly lower than those charged by the commercial carriers. Higher coverage limits are available on a facultative basis. The program is reinsured through Lloyds of London and other reinsurers, and is financially separate from the mandatory, primary fund. The lawyers of Oregon are pleased that they can now obtain all their malpractice coverage from a single source located in their home state at advantageous prices.

### Disadvantages of A Mandatory Bar Fund

This article has concentrated on the many advantages of a mandatory bar malpractice fund. Needless to say, there are certain disadvantages which should be considered:

(1) The mandatory nature of the program can offend some lawyers who don't like to be told what to do;

(2) There is the possibility that, due to the mandatory nature of a bar fund, "bad" lawyers will cause the cost of coverage to go up for the majority of "good" lawyers; this has definitely not been the experience in Oregon;

(3) There is a potential problem for young lawyers and part-

time lawyers who do not wish to carry any malpractice coverage because of cost (even though new lawyers pay a reduced amount in Oregon); however, for the protection of the public it may be important to require such lawyers to carry coverage;

(4) The practice of law has changed significantly since the mid-1970s. At that time, all lawyers and firms went to the same sources for malpractice coverage, and all suffered equally from a hard-market cycle. Today, there is a segmentation of the bar based upon firm size, type of practice, and the existence of multi-state firms. Special insurance programs are offered for large firms, plaintiffs' firms, insurance defense firms, etc. which may appear preferable to a single bar program in the eyes of the targeted firms. In particular, large firms may wish to carry significant deductibles or self-insured retentions, (e.g., \$500,000 per claim) rather than participate in a state bar fund. However, as noted above, we believe each segment of the bar benefits equally from a mandatory bar fund, and would not experience any long-term savings from a special commercial program.

(5) Although the chances are exceedingly small, there is a chance that a bar malpractice fund could face financial problems or even fail in the event of bad claims experience. However, not a single bar-related insurance company or bar fund has failed over the past 13 years, and there is virtually no risk of failure from a mandatory fund with proper administration.

(6) Creation of a mandatory fund eliminates competition with the commercial market at the primary coverage level. Competition

is always beneficial as a spur against complacency. However, many of the benefits of a local bar program can only be achieved if the program is mandatory (for example, strong loss prevention programs). Complacency from non-competition is avoided because the bar program is locally based and run by the lawyers' own elected representatives.

While there are potential problems, we believe the Oregon program has shown that any possible drawbacks are greatly outweighed by the benefits:

(1) All lawyers in the state are covered, and so the public is assured of protection in the event of malpractice;

(2) Lawyers are rated and pay premiums based on actual claims experience in the local state only, not the national experience;

(3) Because of the large base of lawyers and relatively moderate limits of coverage, no reinsurance is required and so a bar fund is free from the fluctuations of world reinsurance markets;

(4) A mandatory bar fund can afford to set up a full-scale loss prevention program which is tied into existing bar CLE programs. These programs can deal effectively with alcohol- and drug-dependent lawyers, office system problems, etc.

(5) A mandatory bar fund can compile a full range of claims data for the state. This is information not available from any other source.

(6) A mandatory bar fund is subject to local control by the lawyers themselves.

(7) There will automatically be significant price savings from elimination of broker commissions, marketing costs, taxes, regulatory fees, and contributions to state guaranty funds. In many cases, these costs can account for 30% of the commercial insurance premium.

(8) Creation of a mandatory bar malpractice fund will improve the image of the bar among the public;

(9) A mandatory fund results in easy procedures for maintaining coverage. Lawyers are not required to fill out annual applications or be involved in other paperwork;

(10) Because of the mandatory and ongoing nature of a bar fund, there is no requirement of a start-up capital contribution from bar members. In contrast, creation of a bar-related mutual insurance company will require an initial capital contribution from each lawyer of between \$1,000 and \$2,000;

(11) Finally, a bar fund will result in superior claims handling from in-house staff and from a carefully selected defense panel of local attorneys.

#### Summary and Conclusion

We believe the benefits from a mandatory bar malpractice program have been demonstrated many times over in Oregon since 1978, and from similar mandatory bar programs in Canada, Great Britain, Ireland, and Australia. We also believe that similar benefits can be realized in other states. However, a mandatory bar fund can succeed in a state only if it is widely supported by lawyers from all segments of the bar and all regions of the state.

This, in turn, requires that lawyers and firms put aside their own personal interests to some degree and consider what is best for the bar as a whole and the public interest. If bar members believe that malpractice coverage should be mandatory for all attorneys in private practice, we believe that a single bar fund is the best, least expensive, and most efficient way to go.

### Biography of Kirk R. Hall

Kirk R. Hall is the Chief Executive Officer of the Oregon State Bar Professional Liability Fund, the mandatory source of malpractice coverage for attorneys in Oregon. Mr. Hall is a graduate of Harvard College and the Northwestern School of Law, Lewis and Clark College. He also received a Master's Degree from Yale University. He practiced law with a large firm in Portland, Oregon before joining the Professional Liability Fund.

## Appendix G

### John Candon + Co.

■  
Certified Public Accountants  
Management Consultants

August 6, 1992

Mr. Richard Turbin  
Chair, Professional Liability Committee  
HAWAII STATE BAR ASSOCIATION  
Suite 1850, Mauka Tower  
737 Bishop Street  
Honolulu, Hawaii 96813

Dear Mr. Turbin:

As you know, the Legislative Reference Bureau has contracted me to research the question of whether attorneys practicing in the State of Hawaii should be required to carry malpractice insurance coverage. As a part of this research, I am also considering whether non-mandatory legal malpractice insurance actually presents a problem for the public in the State of Hawaii.

I would like to include your insights and opinions on these issues. I would also like to obtain the insights and opinions of certain of the other parties at interest, such as the Chair of the Clients' Security Fund, the Chief Disciplinary Counsel of the ODC, the State of Hawaii's Insurance Commissioner, Marsh & McLennan and the Hawaii Academy of Plaintiffs' Attorneys.

Will you kindly send me your thoughts on the following questions?

DO YOU PERCEIVE THAT NON-MANDATORY LEGAL MALPRACTICE INSURANCE ACTUALLY PRESENTS A PROBLEM FOR THE PUBLIC IN THE STATE OF HAWAII?

IF YOU PERCEIVE THAT NON-MANDATORY LEGAL MALPRACTICE INSURANCE DOES PRESENT A PROBLEM FOR THE PUBLIC IN THE STATE OF HAWAII, WHAT SOLUTION(S) DO YOU FAVOR?

Thank you in advance for your participation. My final deadline for submission of this research is late September 1992, so I would appreciate receiving your contribution on or about September 7, 1992. Please contact me if you have any questions.

Very truly yours,

JOHN R. CANDON, CPA



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## Appendix H

### INSIGHTS FROM CERTAIN PARTIES AT INTEREST

In an effort to obtain the written comments of parties at interest in this matter, a standardized letter request was mailed to certain individuals. Following are the responses received.

Richard Turbin, Esq.  
Chair, Hawaii Bar Association's Committee on Professional  
Liability Insurance

"This is in response to your letter of August 6, 1992. As you know, the Hawaii State Bar Association has been conducting a study on whether non-mandatory legal malpractice insurance presents a problem for the public in the State of Hawaii.

"A survey was accomplished which indicated that there has been a small number of legal malpractice claims in Hawaii where the public has not been able to gain compensation for injuries caused by their attorneys due to the fact that their attorneys did not carry legal malpractice insurance or were underinsured. However our study indicates that approximately 85% of attorneys in private practice do carry legal malpractice insurance and it does not present a imposing financial burden for the great majority of private practitioners to carry such insurance. Many of the private practitioners who do not carry legal malpractice insurance are part time practitioners, semi-retirees, public interest lawyers, or university professors. Most of the other non covered lawyers are deemed an acceptable risk by the insurance companies who write legal malpractice insurance.

"The problem with imposing a requirement to carry malpractice is that such a requirement would have to be carried over to the insurance companies who sell legal malpractice insurance and many of those companies would leave the Hawaii market rather than be required to insure high risk lawyers. Additionally the expense of insuring the high risk lawyers would be passed over to the great majority of lawyers who are low risk. Overhead would increase and that cost would have to be passed on to the consumer. Thus it is questionable that it would truly benefit the public by

imposing mandatory legal malpractice insurance on Hawaii's lawyers."

"In summation, based on the study that I and such others as Hawaii State Bar President Larry Gilbert have performed, I do not believe that imposing a requirement for mandatory legal malpractice insurance would benefit the public at this time. If such a requirement was imposed, it would probably mandate the establishment of a state and Hawaii State Bar Association run insurance system which would prove to be very expensive and difficult to administer. It would be far better to bring other carriers into the community so rates would be more competitive, and Hawaii would be better able to withstand a future "insurance crisis". Finally the Hawaii State Bar Association is contemplating joining a captive insurance company which would be partially owned by the Hawaii State Bar Association and this would enable our bar to control and participate with an insurance company run by bar associations. This would inure to the benefit of Hawaii's public and Hawaii's legal community.

\* \* \* \* \*

Gerald H. Kibe, Esq.  
Chief Disciplinary Counsel,  
Office of the Disciplinary Counsel

"I personally favor some form of mandatory legal malpractice coverage for practicing attorneys since the absence of legal malpractice insurance coverage poses a loophole in terms of the legal profession's accountability to the public. However, I am not sufficiently versed in the intricacies of insurance coverage to determine whether imposition of a requirement that practicing attorneys carry legal malpractice insurance can give rise to other unintended problems."

\* \* \* \* \*

Mr. Brad Oliver  
Marsh & McLennan, insurance brokers

In response to the question: Do you perceive that non-mandatory legal malpractice insurance actually presents a problem for the public in the State of Hawaii?

"NO. I am not aware of any problems which non-mandatory malpractice insurance has caused. Those who wish to purchase this protection can do so. There is active competition for this line of coverage. I am not aware of any firm with five or more attorneys that is without coverage.

"Furthermore, I have seen no evidence of harm caused by uninsured and judgement-proof attorneys. In the rare instance where a problem arises, it could be handled by expanding the mechanism currently in place which provides assistance to members of the public who have been deceived by attorneys. The real estate industry has a recovery fund which might serve as a model."

In response to the question: If you perceive that non-mandatory legal malpractice insurance does present a problem for the public in the State of Hawaii, what solution(s) do you favor?

"Although I do not believe that we have identified a major problem, I believe any of the following solutions would be less traumatic than going to mandatory insurance.

1. Compulsory contributions to an assigned risk pool or exemption through demonstration of financial responsibility.
2. Disclosure of the fact that an attorney has chosen to go uninsured could be required. The statement would appear on letterhead or a notice could be displayed in the office. Buyers of legal services will know in advance that there is no opportunity to collect from a malpractice insurer. Buyer beware! This small step protects the public with a minimal cost.
3. Expansion of the client security fund could satisfy those situations where the public is harmed by an uninsured and judgement-proof attorney."

\* \* \* \* \*

Christopher P. McKenzie, Esq.  
Chair, Lawyers' Fund for Client Protection

"I do not feel there is a problem with the present system of non-mandatory malpractice insurance. Although, from the standpoint of the Lawyers Fund for Client Protection, the very few attorneys against whom claims are made and eventually sustained do not usually carry malpractice insurance. Even if they did, it is doubtful whether the policy would provide coverage for the types of defalcations that the fund deals with.

"The big question I would have with mandatory insurance would be whether it would in fact increase attorney malpractice litigation as, I understand, it has in other jurisdictions."

\* \* \* \* \*

Hiram Y. Tanaka, Deputy Commissioner  
Insurance Division, Department of  
Commerce and Consumer Affairs  
State of Hawaii

"In response to your letter of August 6, the Insurance Division is unaware of any problems or concerns presented by either the general public or the practicing legal community relative to the issue of legal malpractice insurance, including whether such insurance should or should not be mandatory."

\* \* \* \* \*