

NO. 26374

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

ROBERT A. SMITH, Respondent.

(ODC 96-391-5191)

ORDER OF DISBARMENT

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Upon consideration of (1) the Disciplinary Board's February 4, 2004 report and recommendation for the disbarment of Respondent Robert A. Smith (Respondent Smith) from the practice of law, (2) Respondent Smith's April 8, 2004 opening brief, (3) Petitioner Office of Disciplinary Counsel's (Petitioner ODC) May 18, 2004 answering brief, (4) Respondent Smith's May 27, 2004 reply brief, and (5) the record, we conclude that Petitioner ODC proved the violations of the Hawai'i Rules of Professional Conduct (HRPC), as set out below, by clear and convincing evidence.

1. While Respondent Smith represented a client in estate planning matters, Respondent Smith had a conflict of interest between his obligations to the client and his professional and personal relationship with Paz Abastillas (Ms. Abastillas) in violation of

- HRPC Rule 1.7(b) (prohibiting a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests); and

- HRPC Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the Hawai'i Rules of Professional Conduct or doing so through the acts of another).

2. Despite Respondent Smith's conflict of interest, Respondent Smith failed to withdraw from his representation of the client in the estate planning matters in violation of

- HRPC Rule 1.16(a)(1) (requiring that a lawyer shall not represent a client or shall withdraw from the representation of a client if the representation will result in a violation of the Hawai'i Rules of Professional Conduct); and
- HRPC Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the Hawai'i Rules of Professional Conduct or doing so through the acts of another).

3. Respondent Smith cashed the client's \$5,000.00 retainer before Respondent Smith earned it, and Respondent Smith failed to deposit the retainer into a client trust account, in violation of

- HRPC Rule 1.15(a)(1) (requiring a lawyer to maintain a client trust account, separate from any business and personal account, into which all funds entrusted to the lawyer's care shall be deposited);
- HRPC Rule 1.15(c) (requiring a lawyer to deposit funds into a client trust account when the funds belong in part to a client and in part presently or potentially to the lawyer);
- HRPC Rule 1.15(d) (requiring a lawyer to deposit all funds entrusted to the lawyer into a client trust account); and
- HRPC Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the Hawai'i Rules of Professional Conduct or doing so through the acts of another).

4. Respondent Smith failed to maintain complete financial records in violation of

- HRPC Rule 1.15(f) (3) (requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client for at least six years after completion of the employment to which they relate);
- HRPC Rule 1.15(g) (2) (requiring that a lawyer maintain a subsidiary ledger for each client for at least six years after completion of the employment to which it relates); and
- HRPC Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the Hawai'i Rules of Professional Conduct or doing so through the acts of another).

5. Respondent Smith charged the client legal fees that were unreasonably high in violation of

- HRPC Rule 1.5(a) (requiring that a lawyer's fee shall be reasonable); and
- HRPC Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the Hawai'i Rules of Professional Conduct or doing so through the acts of another).

6. In addition to the above rule violations, the record indicates the following eight aggravating factors with respect to Respondent Smith's misconduct:

- Respondent Smith has committed prior disciplinary offences, as shown by Petitioner ODC's January 25, 1999 informal admonition in ODC 4529;
- Respondent Smith had a dishonest motive while he was representing the client;
- Respondent Smith displayed a pattern of misconduct extending over a period of time;
- Respondent Smith violated several provisions of the Hawai'i Rules of Professional Conduct;

- Respondent Smith refused to acknowledge the wrongful nature of his conflict of interest in representing the client and his charging the client unreasonable legal fees;
- the victim of Respondent Smith's misconduct, the client, was an elderly, vulnerable woman who was in mental decline and subject to undue influence;
- although inexperienced in estate planning, Respondent Smith had substantial experience in the practice of law; and
- Respondent Smith is indifferent to making restitution to the client.

In the interest of protecting the public and maintaining the integrity of the legal profession, we adopt the Disciplinary Board's recommendation to disbar Respondent Smith. Therefore,

IT IS HEREBY ORDERED that Respondent Robert A. Smith (attorney number 1561) is disbarred from the practice of law in Hawai'i, effective thirty (30) days after entry of this order, as provided by Rule 2.16(c) of the Rules of the Supreme Court of Hawai'i (RSCH).

IT IS FURTHER HEREBY ORDERED that, in addition to the requirements for reinstatement set out in RSCH Rule 2.17, Respondent Smith shall reimburse Petitioner ODC and the Disciplinary Board for all costs ordered by this Court in accordance with RSCH Rule 2.3(c).

DATED: Honolulu, Hawai'i, August 30, 2004.