

NO. 26681

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OFFICE OF DISCIPLINARY COUNSEL, Petitioner,

vs.

PAUL J. DURBIN, Respondent.

(ODC 04-012-7992)

ORDER GRANTING IN PART AND DENYING IN PART
PETITIONER'S MOTION TO TRANSFER RESPONDENT PAUL
J. DURBIN TO INACTIVE STATUS DUE TO INCAPACITY
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Upon consideration of (1) Petitioner Office of Disciplinary Counsel's (Petitioner ODC) July 12, 2004 motion to transfer Respondent Paul J. Durbin (Respondent Durbin) to inactive status due to incapacity pursuant to Rule 2.19 of the Rules of the Supreme Court of Hawai'i (RSCH), (2) Respondent Durbin's lack of response thereto, and (3) the record, it appears that Petitioner ODC contends that Respondent Durbin is incapacitated from continuing the practice of law by reason of physical infirmity, mental infirmity, or illness, and Petitioner ODC requests the supreme court to either (A) immediately transfer Respondent Durbin to inactive status pursuant to RSCH Rule 2.19(a) or (B) take or direct such action as necessary or proper to determine whether Mr. Durbin is incapacitated pursuant to RSCH Rule 2.19(b). However, Petitioner ODC has not submitted sufficiently trustworthy evidence to show that a court either expressly declared Respondent Durbin incompetent or involuntarily committed Respondent Durbin on the grounds of incompetency or disability, as RSCH Rule 2.19(a) requires.

Although Petitioner ODC submitted several exhibits in support of its motion, none of the exhibits indicate that a medical doctor has examined Respondent Durbin in person and determined that Respondent Durbin is incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants, as RSCH Rule 2.19(b) requires. Furthermore, although Petitioner ODC submitted medical records and a physician's letter regarding Respondent Durbin, the medical records and the physician's letter are not properly authenticated. See Pioneer Mill Co., Ltd. V. Dow, 90 Hawai'i 289, 297, 978 P.2d 727, 735 (1999) ("[U]nless counsel wishes to relinquish his or her role as advocate and become a witness in the case, an affidavit of counsel swearing to the truth and accuracy of exhibits does not authenticate exhibits not sworn to or uncertified by the preparer or custodian of those exhibits."). Therefore,

IT IS HEREBY ORDERED that Petitioner ODC's July 12, 2004 motion is granted in part and denied in part as follows. Within ninety (90) days after the date of this order, Petitioner ODC shall either

1. submit to the supreme court properly authenticated evidence that a court has expressly declared Respondent Durbin incompetent or involuntarily committed Respondent Durbin on the grounds of incompetency or disability, as RSCH Rule 2.19(a) requires,
2. submit to the supreme court a properly authenticated statement by a physician that indicates the physician has examined Respondent

Durbin in person and determined that Respondent Durbin is incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants, as RSCH Rule 2.19(b) requires, or

3. nominate a medical doctor to examine Respondent Durbin in person and determine whether Respondent Durbin is incapacitated from continuing the practice of law by reason of physical infirmity, mental infirmity, illness, or the use of drugs or intoxicants, as RSCH Rule 2.19(b) requires.

Upon Petitioner ODC's compliance with this order, we will further review whether we should transfer Respondent Durbin to inactive status pursuant to RSCH Rule 2.19(a) or RSCH Rule 2.19(b).

IT IS FURTHER ORDERED that Petitioner ODC shall serve a copy of this order on Respondent Durbin in accordance with RSCH Rule 2.19(a), RSCH Rule 2.19(b), and RSCH Rule 2.11(a).

DATED: Honolulu, Hawai'i, August 31, 2004.