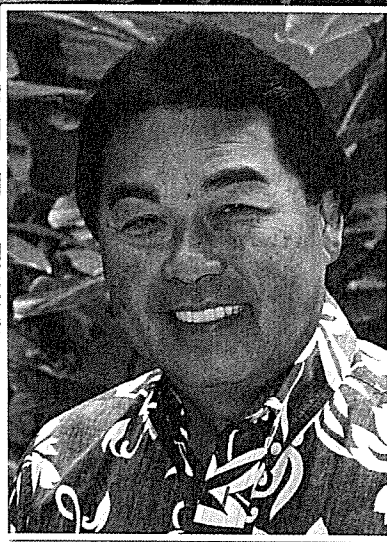


by James A. Kawachika

Unless you've been living under a rock for the past several months, you should have heard by now that the Hawai'i Supreme Court has undertaken a major revamping of our legal ethics rules, *i.e.*, the Hawai'i Rules of Professional Conduct ("HRPC"). These are the rules by which we must guide and regulate our individual practice of law. Ignore them, or worse, violate them, and you do so at the risk and expense of being investigated and prosecuted by the Office of Disciplinary Counsel and potentially sanctioned by



either the Disciplinary Board of the Hawai'i Supreme Court or the Court itself, let alone having civil remedies pursued against you by your current or former clients or even third parties.

The New Hawai'i Rules of Professional Conduct: **What you ABSOLUTELY need to know and why-** Part I

This article will attempt to explain some of the more significant changes made to the rules so that you can be adequately forewarned and hopefully forearmed. It is, of course, not intended to be a substitute for actually reading and understanding the new rules and its comments, but to simply give you a bird's eye view of what at least one author thinks you should be aware of and why. Not a scholarly dissertation on the new rules, but, at the

risk of a little knowledge being dangerous thing, simply the guts of what you need to know. As Sgt. Joe Friday of the old *Dragnet* tv series used to say, "Just the facts, ma'am."

What? When did this all happen? How did it happen?

On June 25, 2013, the Hawai'i Supreme Court issued its Order Amending the Hawai'i Rules of Professional Conduct. Attached to the Order as Exhibit A was the new legal ethics rules, as amended by the Court. The new rules became effective on January 1, 2014.

The HRPC is modeled after the American Bar Association ("ABA") Model Rules of Professional Conduct. While it has never wholesale adopted all of the provisions of the ABA Model Rules, the HRPC has generally patterned itself after the ABA Model Rules, with some exceptions.

The ABA Model Rules are adopted by the ABA House of Delegates. The House of Delegates, the ABA's policy-making body, is comprised of representatives from each state and U.S. territory, of which Hawai'i sends two delegates. Since 1997, the ABA has undertaken a comprehensive study and revision of its Model Rules and since 2001, the House of Delegates has adopted major changes to the rules based upon that study's recommendations. The House then circulated the revised Model Rules to each state's supreme courts for their consideration and hopeful adoption.

The Hawai'i Supreme Court has

now completed its study of whether the HRPC should be revised in light of what the ABA has done with its Model Rules, and the current revised set is the result of that effort.

When do the new rules go into effect?

Don't look now, but the new rules have already been in effect for over two months. They became effective on January 1, 2014. However, you can find some solace and comfort in knowing that if your behavior, or misbehavior, as it were, occurred pre-January 1, 2014, then the old rules (the pre-January 2, 2014 rules) govern your con-

cover some of the other new ethics rules to the point where, in the end and if you've been diligent in reading the articles, we'll have pretty much all the bases covered.

Conflicts of interest

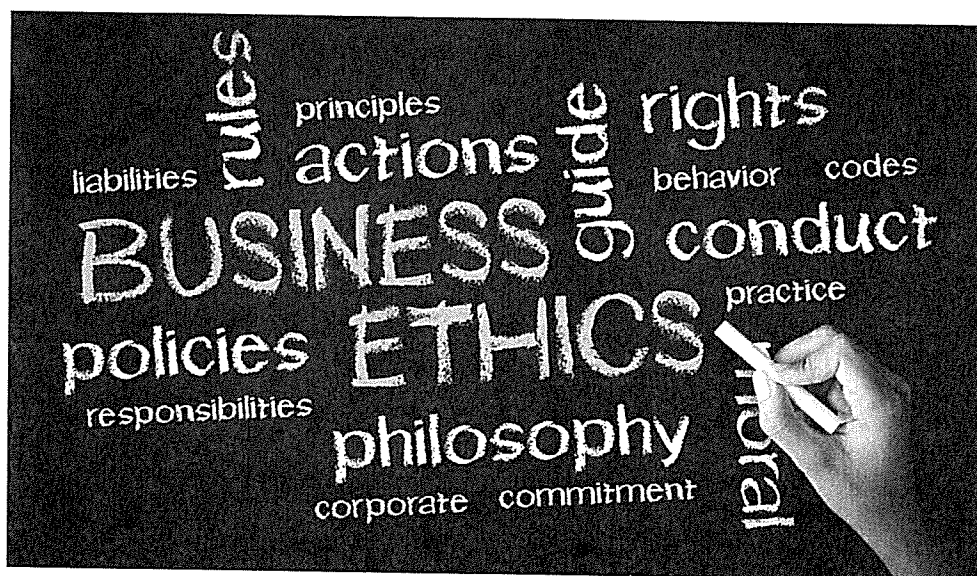
There are four rules that regulate conflicts of interest: HRPC 1.7, 1.8, 1.9, 1.10, and 1.18. Four of these rules (1.7, 1.8, 1.9 and 1.10) already existed before the Court's recent amendment of them. The fifth rule (1.18) is a entirely new add-on rule. In addition, there are two specialized conflict-of-interest rules that pertain only to either government attorneys or neutral arbitrators (HRPC 1.11 and 1.12).

HRPC 1.7 (Current-client conflict of interest)

Rule 1.7 has always prohibited a lawyer from representing a client if (1) his representation of that client would be

directly adverse to another of his clients, even if such adversity occurs in totally unrelated matters or (2) his representation of that client may be materially limited by his responsibilities to another client or to a third person, or by the lawyer's personal interests. The only way for the lawyer in these circumstances to continue to represent the client is if he reasonably believes that his representation will not adversely affect his relationship with the other client or his representation of the client, and each client consents (waives the conflict). Generally and broadly speaking, the new Rule 1.7 does not change that proscription or exception.

What new Rule 1.7 does do, however,



duct or misconduct. In short, you need to only sweat the new rules if your questionable behavior or conduct occurred prospectively from January 1, 2014 forward.

So, tell me, what do I really need to know?

There are unfortunately no shortcuts here. You need to know all the new rules as if you were studying for the bar exam again. This article will, however, hopefully help guide you in the right direction by discussing the rule changes in two major areas that fundamentally affect all of our practices: (1) conflicts of interests and (2) fees. In future articles, we'll attempt to

is more specifically set forth the types of conflicts which can be consented to and what must be done to obtain such consent from the client. New Rule 1.7(b) provides that a lawyer may represent a client despite a current conflict of interest only if: (1) the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives consent after consultation, confirmed in writing. In other words, if a lawyer does not reasonably believe (as determined by a disinterested-lawyer standard) that he will be able to provide competent and diligent representation to each client, or the representation of both clients is prohibited by law, or the representation would pit one client against another in the same litigation or other proceeding before a tribunal, then the lawyer cannot even ask for a conflict waiver from the client or provide representation on the basis of the client's consent. In short, there are certain conflicts that are not waivable by a client.

New Rule 1.7 also makes a significant and important change to the manner in which a lawyer must obtain a conflict waiver from a client. Whereas previously, a lawyer could have obtained an "oral" conflict waiver from the client, new Rule 1.7 requires that the waiver now be "confirmed in writing". "Confirmed in writing", in turn, is now a defined term under the new HRPC and denotes "[c]onsent that is given in writing or a writing that a lawyer promptly transmits, confirming an oral consent obtained after consultation." See New Rule 1.0(b) (Terminology) for definition of "Confirmed in writing."

Note, therefore, that, while it is



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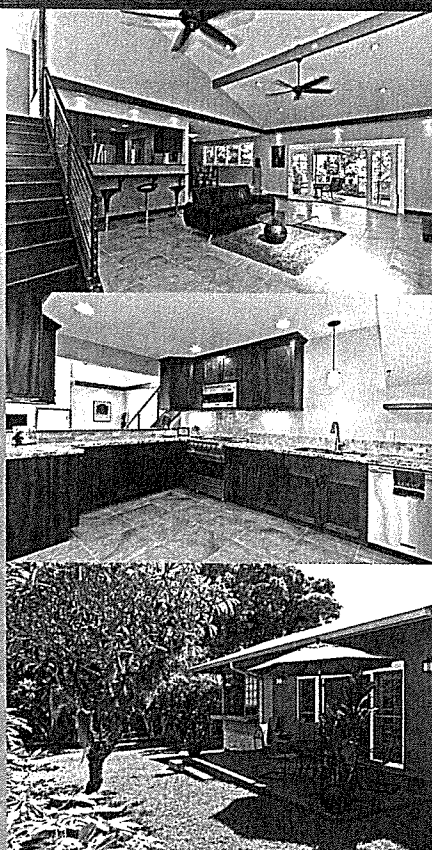
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highly desirable to do so, it is not necessary in every instance to have a "signed" consent by the client. New Rule 1.0(b) allows the written conflict waiver to simply be a writing that a lawyer promptly transmits to the client, confirming the client's oral consent obtained after consultation. Moreover, if it is not feasible for the lawyer to obtain or transmit the writing at the time consent is given, then the lawyer must obtain or transmit it within a reasonable time thereafter. *Id.*

Finally, new Rule 1.7 adds a new provision whereby when the representation of multiple clients in a single matter is contemplated, the lawyer's consultation with the clients in the process of obtaining their consent to the multiple representation, must include an explanation of the implications of the common representation, including both the advantages and the risks involved. Among other things, the lawyer should thus advise each client that information will be shared with the other clients and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the others. *See* Comment [31] to new Rule 1.7. Likewise, the lawyer should advise his clients that if litigation between the clients should ever arise in the future, the client-lawyer confidentiality privilege will not protect any previous communications that any of the clients may have had with the lawyer. *See* Comment [30] to new Rule 1.7.

HRPC 1.8 (Particular types of conflicts of interest)

HRPC 1.8 deals with particularized kinds of conflicts of interest and how they must be dealt with. New Rule 1.8 changes some of the requirements for handling those conflicts of interest.

New Rule 1.8(a)

HRPC 1.8(a) relates to if, when, and how a lawyer may enter into a

business transaction with a client or acquire an ownership, possessory, security, or other pecuniary interest adverse to a client. Under the old rule 1.8(a), a lawyer was not permitted to enter into a business transaction with a client or obtain a pecuniary interest adverse to his client unless (1) the transaction and terms on which the lawyer acquired the interest were fair and reasonable to the client and fully disclosed in writing to the client, (2) the client was given a reasonable opportunity to seek the advice of independent counsel in the transaction, and (3) the client consented in writing thereto.

New Rule 1.8(a) broadens and adds to the requirements of old rule 1.8(a) by requiring that not only must the client be given a reasonable opportunity to seek the advice of independent counsel in the transaction, but that the lawyer must also advise the client *in writing* of the desirability of seeking the advice of such counsel. Further, in addition to requiring that the client consent in writing to the essential terms of the transaction, new Rule 1.8(a) now requires that the client consent *in writing* to the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. While the black letter of the rule itself does not state that the consent must be signed by the client, Comment [2] to new Rule 1.8 explains that the consent must be "in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role." Note that this requirement for a "signed" consent by the client under new Rule 1.8(a) differs from the client consent required under the previously-discussed new Rule 1.7, which only requires that the client consent be confirmed in writing by either the client or the lawyer, but not necessarily signed by the client.

New Rule 1.8(c)

HRPC 1.8(c) deals with the matter of a lawyer obtaining a substantial gift

from a client, including a testamentary gift. Old rule 1.8(c) only prohibited a lawyer from "preparing an instrument" giving the lawyer or a related person any such substantial gift from a client, except where the lawyer or his relative was related to the client. New Rule 1.8(c) now also proscribes a lawyer from even "soliciting" such a gift from a client unless, again, the lawyer or his relative was related to the client. The new rule also expands the definition of a related person to include a grandchild, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

New Rule 1.8(g)

HRPC 1.8(g) relates to a lawyer making an aggregate settlement on behalf of two or more clients. Old rule 1.8(g) prevented a lawyer who represented multiple clients from participating in making an aggregate settlement of the claims by or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consented to the agreement after consultation. New rule 1.8(g) expands on that requirement by now requiring that the client consent "in a writing signed by the client" after consultation. Thus, note that, like new Rule 1.8(a) and unlike new Rule 1.7, the client consent here must be in writing *and* signed by the clients.

New Rule 1.8(h)

HRPC 1.8(h) addresses, *inter alia*, the matter of how a lawyer must settle a malpractice claim against him by an unrepresented client or former client. Old rule 1.8(h) prohibited a lawyer from settling such a claim unless the client was first advised that independent representation was appropriate in connection therewith. New Rule 1.8(h) extends the rule's requirements to even settling a "potential" claim for malpractice and additionally now requires

that the client be advised *in writing* of the desirability of seeking independent counsel in connection with the settlement *and* be given a reasonable opportunity to seek such advice. It is thus no longer enough to simply orally advise the client of the appropriateness of seeking independent representation on the settlement.

New Rule 1.8(j)

New Rule 1.8(j) is a completely new add-on rule. It prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. But even in the latter instance, the lawyer should consider whether his ability to represent the client will be materially limited by the relationship. *See* Comment [18] to new Rule 1.8.

When the client is an organization, the rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters. *See* Comment [10] to new Rule 1.8.

Under new Rule 1.8(l), however, the conflict of interest arising out of the lawyer's sexual relationship with a client is not imputed to the other lawyers in his firm. Thus, while the conflicted lawyer may be disqualified from representing the client, other lawyers in his firm who are not so similarly conflicted, may assume the representation. *See* New Rule 1.8(l).

New Rule 1.8(k)

New Rule 1.8(k) was formerly old rule 1.8(i) and applies to related lawyers who are in different firms. The rule essentially prohibits a lawyer in one firm who is related to another lawyer in another firm from representing a client in a representation directly adverse to a

person who the lawyer knows is represented by his related lawyer, except with the consent of his client after consultation regarding the relationship. New Rule 1.8(k) simply expands who is considered to be a related lawyer to include a domestic partner, in addition to a parent, child, sibling or spouse. The new rule does not specify whether the client consent needs to be in writing or signed by the client.

Under new Rule 1.8(l), however, the lawyer's conflict of interest arising out of this related-lawyers prohibition, however, is not imputed to the other lawyers in his firm. Thus, again, while the conflicted lawyer himself may be disqualified from representing the client, other lawyers in his firm who are not so similarly conflicted, may assume the representation. See New Rule 1.8(l).

New Rule 1.8(l)

New Rule 1.8(l) is also a completely new add-on rule. It provides that a

lawyer's prohibition from representation of a client arising out of any conflict of interest set forth in paragraphs (a) through (i) of new Rule 1.8, also applies by imputation to all the other lawyers in his firm. This imputation rule, however, does *not* apply, as discussed before, to a conflict of interest created by a lawyer's sexual relationship with a client (New Rule 1.8(j)) or to the related-lawyers prohibition (New Rule 1.8(k)).

HRPC 1.9 (Former-client conflict of interest)

HRPC 1.9 has always essentially prohibited a lawyer who has represented a client in a matter from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation. New Rule 1.9 does not change that proscription or the proscriptions contained in the corollaries of that rule, *i.e.*, HRPC 1.9(b) and (c), at all. All it does is to now require that the former-client consent be "confirmed in writing." And, once again, "confirmed in writing" means a consent that is given in writing or a writing that a lawyer promptly transmits, confirming an oral consent obtained after consultation. *See again*, New Rule 1.0(b) (Terminology) for the definition of "confirmed in writing."

What is particularly noteworthy about new Rule 1.9, however, is the discussion in its Comment section wherein the term "substantially related" is for the first time defined and explained. Comment [3] to New Rule 1.9 states:

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

For example, a lawyer who has represented a businessperson and... learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer may not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for non-payment of rent. . . . In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

This commentary should assist the bar in more accurately attempting to decipher whether a former and present clients' matters are the "same or substantially related" for disqualification purposes. While the bar was previously principally guided by the Hawai'i Supreme Court's discussion of what is "substantially related" in the case of *Otaka, Inc. v. Klein*, 71 Haw. 376, 791 P.2d 713 (1990), new Rule 1.9 and its comments greatly expands upon and lends clarity to the definition and application of that term.

HRPC 1.10 (Imputation of conflicts of interest)

HRPC 1.10 is the general imputation of conflicts of interest rule. Simply put, what conflict infects and disqualifies me, also disqualifies you if we are members of the same firm. New Rule 1.10 changes old rule 1.10 in two respects: (1) it excepts out from imputation to other lawyers in the firm


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those conflicts that are created because of a personal interest of the conflicted lawyer and which does not present a significant risk of materially limiting the representation of the client by other lawyers in the firm; and (2) it also excepts out from imputation to other lawyers in the firm any conflict that a lawyer joining the firm may bring with him as a result of his former firm having represented a client with interests materially adverse to a person whom the lawyer's new firm wishes to represent, provided that certain conditions are met.

The first change to new Rule 1.10, *viz.*, new Rule 1.10(a), has already been partially discussed herein. See discussion of new Rule 1.8(j), (k) and (l). It is also meant to cover situations such as where one lawyer in the firm is not able to handle a given client because of strong political beliefs, but that lawyer will do no work on the case and the personal beliefs of that lawyer will not materially limit the representation by other lawyers in the same firm. In that instance, the disqualification of the conflicted lawyer will not be imputed.

The second change to new Rule 1.10, *viz.*, new Rule 1.10(c), is ostensibly meant to ease the trauma created by a lawyer switching firms and bringing with him to the new firm conflicts of his former firm that may, but for the rule change, otherwise infect and disqualify his new firm's lawyers from representing a person whose interests are materially adverse to the former firm's client. New Rule 1.10(c) is a completely new add-on provision to HRPC 1.10. It allows a switching lawyer's new firm to now represent a person whose interests are materially adverse to a client at the switching lawyer's former firm in the same or substantially related matter, if three conditions are met: (1) the switching lawyer did not, while at the former firm, participate in the matter giving rise to the conflict of interest and has no confidential information regarding the matter; (2) the

switching lawyer is timely screened from any participation in the matter at his new firm and is apportioned no part of the fee therefrom; and (3) written notice is promptly given to the former client to enable it to determine whether the rule has been complied with.

What is curious about this second change to new Rule 1.10, *viz.*, new Rule 1.10(c), is its ultimate utility and necessity. New Rule 1.9(b) (the former-client conflict of interest rule) already says that a lawyer cannot represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated with had previously represented a client *if* (1) that client's interests are materially adverse to the person *and* (2) the lawyer acquired confidential information from the client that is material to the matter. Logically speaking, then, the converse would have to be true. If the lawyer had *not* acquired any confidential information from the former client that is material to the matter in question while at his former firm, then the lawyer should be able to represent the new client/person. To be sure, Comment [5] to new Rule 1.9 would seem to recognize this when it states, "Paragraph (b) operates to disqualify the lawyer *only* when the lawyer involved has actual knowledge of information protected by Rule 1.6 and 1.9(c) of these Rules. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or substantially related matter even though the interests of the two clients conflict." (emphasis added).

Thus, if the foregoing is true and the lawyer did not acquire confidential information about a client at his former firm and is therefore not disqualified in any event from thereafter representing

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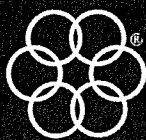


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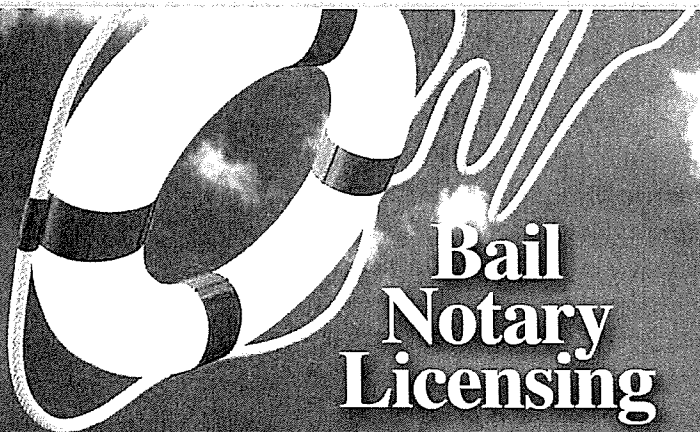
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a person whose interests are materially adverse to the interests of the former client in the same or substantially related matter, at his new firm, there would not appear to be any necessity for him to be screened or for any of the other safeguards under new Rule 1.10(c) to be employed. Food for thought, anyway.

HRPC 1.18 (Duties to prospective clients)

New Rule 1.18 is an entirely new add-on rule. It did not exist before and defines the duties that a lawyer owes to a prospective client whom he interviews or with whom he has had discussions, but with whom a client-lawyer relationship is never formed thereafter. New Rule 1.18(b) provides that the lawyer must not use or reveal information learned in the consultation.

More importantly, new Rule 1.18 addresses the issue whether the lawyer may thereafter represent a person with interests materially adverse to those of the prospective client in the same or a substantially related matter. In other words, if Client A is suing Client B and Client A meets with the lawyer one day to retain his services in the case but the lawyer decides not to take Client A's case, may the lawyer the very next day, when he is approached by Client B to defend him in the same matter, take Client B's case? New Rule 1.18(c) prohibits the lawyer from doing so *if* he received information from Client A (the prospective client) that could be "significantly harmful" to Client A in the matter. The term "significantly harmful" is not defined. Moreover, if the lawyer is disqualified from representing Client A because he received significantly harmful information from Client A, no other lawyer in the lawyer's firm may knowingly undertake or continue any representation that is adverse to Client A in the matter. In short, if the lawyer can't do it, neither can any other lawyer in his firm.

There is, however, one very important exception to the foregoing rule.

New Rule 1.18(d)(1) provides that even if the lawyer has received disqualifying information (significantly harmful information) from Client A, he may nonetheless represent Client B if both Clients A and B consent to the representation after consultation, confirmed in writing. Alternatively, new Rule 1.18(d)(2)(i) and (ii) allows the other lawyers in the disqualified lawyer's firm to undertake the representation of Client B if (1) the disqualified lawyer who received the information did not obtain more disqualifying information than was reasonably necessary to determine whether to represent Client A; (2) the disqualified lawyer is timely screened from any participation in the case and is apportioned no part of the fee therefrom; and (3) written notice is promptly given to Client A.

Fees

HRPC 1.5 regulates what and how you can and must charge a client for your services. While the new Rule 1.5 still does not require that fee agreements be in writing, it continues to advise that such written agreements are preferable. However, the new Rule does change the factors that are to be considered in determining whether a fee is reasonable and also adds to the requirements as to what must be communicated to the client as far as fees are concerned.

New Rule 1.5(a)

New Rule 1.5(a) (relating to the factors to be considered in determining whether a fee is reasonable) is identical to old rule 1.5, except two factors have now been eliminated: the relative sophistication of the lawyer and the client; and the informed consent of the client to the fee agreement. No explanation is given as to why those factors were eliminated. The previous inclusion of the two factors appears to have been unique to Hawai'i. The ABA Model Rules do not contain those factors.

New Rule 1.5(b)

New Rule 1.5(b) adds to those items that lawyer must communicate to his client when discussing his fees. In addition to the basis or rate of his fee (already covered by old rule 1.5(b)), the lawyer must now communicate to his client (1) the scope of his representation, (2) the basis and rate of his expenses (in addition to his fees), and (3) any changes in the basis or the rates of his fees and expenses. The new rule also adds that fee payments received by a lawyer before legal services are rendered, are presumed to be unearned and must therefore be held in a client trust account.

New Rule 1.5(c)

New Rule 1.5(c) now requires all contingency fee agreements not only to be in writing but also to be *signed by the client*. In addition to those items already required by old rule 1.5(c) to be in the contingency fee agreement (*i.e.*, the method by which the fee is to be determined, the expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated), new Rule 1.5(c) now requires that the agreement must also clearly notify the client of any expense for which the client will be liable whether or not the client is the prevailing party.

New Rule 1.5(e)

New Rule 1.5(e) is identical to old Rule 1.5(e), relating to the division of fees between lawyers who are not in the same firm. A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. The only significant change here is found in the Comments to new Rule 1.5. New and old Rule 1.5(e) provide, *inter alia*, that the division of fees must be pursuant to a written agreement with the client that each of the dividing lawyers assumes "joint responsibility" for the representation. The old Comment to old Rule 1.5 provided

that "joint responsibility" entailed the obligations stated in HRPC 5.1 (essentially relating to the responsibility of partners in a firm to be responsible for each other's ethical behavior and violation of the ethics rules). In short, the dividing lawyers must have agreed with the client to be responsible for each other's ethical behavior in the representation to the same extent as if they were partners in the same firm.

New Comment [7] to new Rule 1.5 now modifies and expands the meaning of "joint responsibility" to include not only the dividing lawyers' joint ethical responsibility but also their joint financial responsibility for the representation ("Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.").

There's more to come

There are more than 40 noteworthy rule changes made to the new Hawai'i Rules of Professional Conduct. This article covers approximately one-half of those major rule changes. Future articles will attempt to survey the remaining important changes. Stay tuned.

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