

EXECUTIVE SUMMARY OF THE RECOMMENDED CHANGES TO THE *HAWAI'I RULES OF PROFESSIONAL CONDUCT* PREPARED BY THE COMMITTEE TO REVISE *HRPC*

I. INTRODUCTION: WHY CHANGE IS NECESSARY

Hawai'i's lawyers are currently governed by the *Hawai'i Rules of Professional Conduct (HRPC)* which the Hawai'i Supreme Court adopted 16 years ago in 1994.¹ In turn, the 1994 *HRPC* is based primarily on the American Bar Association (ABA) *Model Rules of Professional Conduct* adopted 11 years earlier in 1983.

In the ensuing decades, the practice of law in Hawai'i and elsewhere has changed dramatically, especially with the advent of certain technology including the internet and e-mail. In addition, high profile cases dealing with issues relating to lawyer mobility, fee sharing, confidentiality, conflict of interest, and the need for greater public protection have occurred necessitating a thorough review of Hawai'i's current lawyer conduct rules.

In 1997 the ABA established its "Commission on Evaluation of the Rules of Professional Conduct" known as the Ethics 2000 Commission to undertake a comprehensive examination and evaluation of the ABA's *Model Rules of Professional Conduct*. Similar commissions in various states were also established. The Disciplinary Board of the Supreme Court of Hawai'i constituted a committee in 2002 inviting members from the Hawai'i State Bar Association (HSBA), Lawyers' Fund for Client Protection (Lawyers' Fund), Disciplinary Board, and Office of Disciplinary Counsel (ODC).²

¹ The *HRPC* is attached as Exhibit "A" to the *Rules of the Supreme Court of the State of Hawai'i* (<http://www.state.hi.us/jud/ctrules/hrpcond.htm>). Prior to 1994, lawyer conduct in Hawai'i was governed by the *Hawai'i Code of Professional Responsibility* adopted in 1970 which, in turn, was based on the American Bar Association's *Model Code of Professional Responsibility* adopted by the ABA in 1969.

² The original committee members included Chair J. Michael Seabright; members of the HSBA: James A. Kawachika, William K. Meheula, and Evan R. Shirley; members of the Disciplinary Board: Thomas D. Welch, Charles T. Kleintop, Carroll S. Taylor, and Doug-

II. THE COMMITTEE TO REVISE *HRPC*

When Hawai'i's Committee began its work, the philosophical policy was to retain Hawai'i's existing rules of professional conduct where possible while adopting those portions of the *ABA Model Rules* where relevant and necessary.

However, in 2006, in order to have disciplinary rules consistent with the national trend, the Committee agreed to adopt the *ABA Model Rules* where possible and deviate only if necessary. This change in position required the Committee, now known as the "Committee to Revise the Hawai'i Rules of Professional Conduct (*HRPC*)," to begin its work anew.³ The Committee also opted to retain certain existing rules, which although they differed from the *ABA Model Rules*, were deemed preferable.

After many lengthy meetings, lively debates, and thorough consideration of the impact of the recommended changes, the Committee has completed its work. The Committee recognized the need to balance the public's protection against the recommended requirements placed on practicing lawyers.

III. SUMMARY OF THE SIGNIFICANT CHANGES

Like the ABA's Ethics 2000 Commission, the Committee to Revise *HRPC* proposes significant substantive changes to existing rules as well as the addition of new rules. While it is impractical to comment on every recommended change in an executive summary, the Committee has identified seventeen new or substantially revised rules which impact a large number of practicing lawyers and should, therefore, be closely examined.

All licensed lawyers are urged to study comparison versions of the existing

las A Crosier; member of the Lawyers' Fund: Gayle J. Lau; and then ODC Chief Disciplinary Counsel Carole R. Richelieu.

³ The members of the Committee to Revise *HRPC* include Chair Carroll S. Taylor; members of the Disciplinary Board: Diane D. Hastert, Judge Leslie A. Hayashi, Charles T. Kleintop, and Thomas D. Welch; member of the Lawyers' Fund: Gayle J. Lau; members of the HSBA: William K. Meheula and Evan R. Shirley; and, representatives from the Office of Disciplinary Counsel(ODC): Janet S. Hunt, and Charles H. Hite.

HRPC to the recommended rules which are available for review.⁴

A. *Preamble, Scope and Terminology—HRPC Rule 1.0*

Recommended *HRPC* Rule 1.0(b) defines confirmed in writing (informed consent which is acknowledged in writing by the person or a writing that the lawyer transmits to the person confirming an oral informed consent). Recommended *HRPC* Rule 1.0(e) defines informed consent (lawyer communicates adequate information and explanation about the risks and reasonable alternatives to the recommended course of conduct to which the person agrees. Recommended *HRPC* Rule 1.0(o) defines writing (tangible or electronic record of a communication; signed writing means a writing which is executed or adopted by a person and includes electronic methods). There are also instances in the recommended rules when both informed consent and confirmed in writing are required.

Attached as Exhibit A is a list of the recommended rules in which these defined terms appear. In general, they apply when *retaining* and *informing* clients and when dealing with client *conflicts*.

B. *Communication—HRPC Rule 1.4(c)*

Private practice lawyers must timely disclose to new and existing clients, in writing (see recommended *HRPC* Rule 1.0) , the *absence* of the minimum amounts of lawyer malpractice insurance which is \$100,000 per occurrence and \$300,000 in the aggregate. New clients should be informed at the time of retention and all clients should be informed when there is a lapse in coverage. Note this rule does not require the disclosure of the *existence* of the minimum levels of insurance; rather, only the *absence* thereof.

C. *Fees—HRPC Rule 1.5*

Recommended *HRPC* Rule 1.5(e) permits fee-splitting between lawyers who

⁴A redlined version comparing the existing *HRPC* to the recommended rules is available on the ODC webpage at www.odcHawaii.com.

are not in the same firm if the division is in proportion to the services performed by each lawyer *or* each lawyer assumes joint responsibility for the representation, and the client agrees to the arrangement confirmed in writing and the total fee is reasonable.

While the current rule requires that the fee be in proportion to the services performed, the recommended rule permits sharing of the fee in a different proportion if each lawyer assumes joint responsibility for the representation. The rationale behind the recommended change is that it encourages lawyers to refer cases to lawyers who have expertise in the matter and also works generally to increase the pool of legal malpractice coverage for the client if each lawyer assumes joint responsibility for the representation.

D. *Conflict of Interest—HRPC Rule 1.8*

Recommended *HRPC* Rule 1.8(j) creates a new conflict of interest rule prohibiting a lawyer from having sexual relations with a client unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced. The rationale behind the recommended rule is that the lawyer-client relationship is a fiduciary one and a lawyer's emotional involvement with a client creates a risk that the lawyer will not be able to exercise independent professional judgment.

However, sexual relationships that predate the commencement of the lawyer-client relationship are not prohibited based on the rationale that exploitation of the fiduciary relationship and client dependency are less likely to occur when the sexual relationship existed *prior* to the lawyer-client relationship. However, the lawyer still needs to determine whether the sexual relationship adversely affects the lawyer's ability to properly represent the client in violation of *HRPC* Rule 1.7(a)(2), the general conflict of interest rule. The prohibition under *HRPC* Rule 1.8(j) is not imputed to other members of the lawyer's firm.

E. *Organization as Client—HRPC Rule 1.13*

This recommended rule prescribes the conduct of a lawyer employed or retained by a private organization or governmental body where the lawyer becomes

aware of an illegal act that is likely to result in substantial injury to the organization."

The existing rule requires the lawyer to: (1) ask for reconsideration of the act; (2) advise the organization to obtain a separate legal opinion; or (3) refer the matter to a higher authority within the organization. As a last resort, the lawyer may resign if this is a private organization. If the lawyer is in government, the lawyer may disclose it to parties outside of government to the extent the lawyer reasonably believes it necessary to prevent harm to the public good subject to confidentiality under *HRPC* Rule 1.6.

However, under the recommended rule, the lawyer is permitted to disclose the matter outside of the organization whether the organization is private or the government and permits disclosure beyond the limits of confidentiality under *HRPC* Rule 1.6 if the lawyer reasonably believes disclosure is necessary to prevent substantial injury to the organization. The recommended rule broadens the lawyer's "whistle blower" protection.

F. *Safekeeping Property—HRPC Rule 1.15*

Recommended *HRPC* Rule 1.15 is the same subject matter as the current *HRPC* Rule 1.15 but the recommended rule shortened and modernized in many respects.

The basic obligations common to both current and recommended *HRPC* Rule 1.15 include but are not limited to:

1. Client property (including funds) must be kept separate from the lawyer's own property;
2. Client funds must be maintained in an account clearly identified as a client trust account. The rigid requirement that a client trust account be exactly labeled "Client Trust Account" is *not* in the recommended rule. "Clear identification" of the client trust account satisfies the labeling requirement of recommended *HRPC*;

3. Advance payments by clients must be deposited into the client trust account and withdrawn only when earned. All fees paid in advance are refundable until earned, and earned fees and incurred expenses must be promptly withdrawn from the client trust account;
4. All disbursements must identify the payee, none can be made to cash, and the only allowable methods of disbursement are by check or electronic bank transfer;
5. The lawyer must maintain financial records identified in recommended *HRPC* Rule 1.15 for six years following termination of the representation (Note that the descriptions of the records in current and recommended *HRPC* which the lawyer is required to maintain may differ);
6. Only a lawyer may be a signatory on a client trust account; and
7. Records of deposits into client trust accounts should be sufficiently detailed to identify each item.

Differences between the current and recommended *HRPC* Rule 1.15 include but are not limited to:

1. The lawyer still has obligations of notification, accounting, and delivery of funds or other property in the possession of the lawyer, but the events triggering these obligations differ; and
2. The lawyer in possession of funds or other property subject to claims by two or more persons must maintain the disputed funds or other property until the dispute is resolved, *whether or not one of the claimants is the lawyer.*

G. Duties to Prospective Clients—HRPC Rule 1.18

Recommended *HRPC* Rule 1.18 is a new rule that codifies the common law duties a lawyer owes to prospective clients. The recommended rule prohibits a lawyer from revealing information learned during the consultation even when no

lawyer-client relationship ensues unless otherwise permitted under the former client conflict of interest rule, *HRPC* Rule 1.9. The recommended rule also prohibits a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or substantially related matter. The law firm imputation rules apply to recommended *HRPC* Rule 1.18.

H. *Special Responsibilities of a Prosecutor—HRPC Rule 3.8*

Recommended *HRPC* Rule 3.8 contains additional ethical obligations for prosecutors and other government lawyers in criminal cases. They include, but are not limited to:

1. Making "reasonable efforts" to assure that an accused has been advised of the right to obtain counsel and has been given a reasonable opportunity to obtain counsel;
2. Not seeking waivers of important procedural rights from unrepresented defendants;
3. Not subpoenaing lawyers to testify about their clients except as allowed by the rules;
4. Disclosing new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit a crime; and
5. Remediating a conviction where a prosecutor knows of clear and convincing evidence establishing that a convicted defendant did not commit an offense.

I. *Respect for Rights of Third Persons—HRPC Rule 4.4*

This rule is revised to address the inadvertent receipt by a lawyer of a document not intended to be sent to him or her. The current rule does not address such a situation. Recommended *HRPC* Rule 4.4 (b) requires the recipient to notify the sender promptly.

However, the recommended rule does not address the recipient's permitted use of the document or the issues of lawyer-client privilege and waiver. This rec-

ommended rule is important in light of the increased risk of inadvertent transmission of electronic and e-mail communications.

J. *Professional Independence—HRPC Rule 5.4*

Recommended *HRPC* Rule 5.4(a)(4) creates a limited exception to the general rule that lawyers may not share lawyer's fees with a non-lawyer. Specifically, a lawyer may share Acourt-awarded legal fees with a non-profit organization that employed, retained, or recommended employment of the lawyer in the matter[.]"

K. *Unauthorized Practice of Law; Multijurisdictional Practice of Law—HRPC Rule 5.5*

Recommended *HRPC* Rule 5.5 acknowledges that modern law practice crosses jurisdictional boundaries. The recommended rule, however, retains the basic premise that lawyers may regularly practice law or hold out to the public that they can practice in Hawai'i only if they are admitted to practice by the Hawai'i Supreme Court.

The recommended rule identifies four exceptions to this general rule that generally do not create significant risk to clients and permit an out-of-state lawyer to provide legal services on a temporary basis in Hawai'i. One is providing legal services in relation to a pending or potential proceeding before a tribunal in Hawai'i or another jurisdiction (*pro hac vice*) where the lawyer has been authorized or reasonably expects to be authorized. Another exception is arbitration, mediation or ADR proceedings in Hawai'i or another jurisdiction. A third is where an out-of-state lawyer associates with a Hawai'i lawyer who actively participates in the matter. The fourth exception is where the legal services arise out of or are reasonably related to the lawyer's practice for an existing client in a jurisdiction where the lawyer is admitted to practice.

Recommended *HRPC* Rule 5.5 also permits a lawyer not licensed in Hawai'i to practice law in Hawai'i where the services: (1) are permitted under federal or Hawai'i law; (2) are provided to the lawyer's employer, so-called "general counsel," that do not provide legal services to third parties; or (3) are through a qualified legal aid services provider for a period not exceeding two years, provided that

the lawyer has not been denied admission to the Hawai'i bar.

Finally, recommended *HRPC* Rule 5.5 still prohibits lawyers from permitting any suspended and or disbarred lawyer from having contact with clients or others who have legal dealings with the lawyer or the law office.

**L. *Responsibilities Regarding Law
Related Services—HRPC Rule 5.7***

Recommended *HRPC* Rule 5.7 is a new rule. It concerns "law-related services" which are defined as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer."

Under the recommended rule there are two circumstances in which a lawyer's law-related business (owned solely or with others) must comply with the full complement of the *HRPC*. They are (1) when the lawyer operates a law-related business in circumstances that are not distinct from the lawyer's provision of legal services to a client; or, (2) when a lawyer fails to take reasonable measures to assure that the person obtaining the law-related services understands that he or she is not receiving legal services and is not entitled to the protections of a lawyer-client relationship.

**M. *Nonprofit and Court-Annexed Limited
Legal Services Programs—HRPC Rule 6.5***

Recommended *HRPC* Rule 6.5 is new and relaxes the conflicts rule applicable to certain legal services organizations, non-profit organizations, and court-sponsored organizations through which lawyers provide short-term legal services. Note that this rule does *not* by its terms apply to long term legal services.

N. *Advertising—HRPC Rule 7.2*

The changes made in recommended *HRPC* Rule 7.2 reflect a significant shift in how lawyers are allowed to advertise their services. The current rule describes lawyer advertising through public media, such as a telephone directory,

legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication." The recommended rule omits the examples and simply says that lawyers are permitted to advertise through written, recorded or electronic communications, including public media."

The recommended rule also omits the requirement that a lawyer retain copies or recordings of all advertisements for two years after its last dissemination along with a record of when and where the advertising was used. This requirement was removed because it was both burdensome and seldom, if ever, used in disciplinary proceedings.

The recommended rule provides that it is permissible to pay for print or online directory listings, TV or radio airtime, domain-names and direct mail provided that such advertisement includes the full name and office address of a lawyer responsible for the content.

Finally, recommended *HRPC* Rule 7.2 retains the part of the recently amended Hawai'i *HRPC* Rule 7.2 that a lawyer *may pay* a not-for-profit lawyer referral service or a "qualified legal assistance organization" a referral fee (including as a percentage of the recovery) provided that the nonprofit uses the money for operating expenses or public service activities. This portion of the rule differs from the ABA Model Rules.

O. Direct Contact with Prospective Clients—HRPC Rule 7.3

Recommended *HRPC* Rule 7.3 underwent significant change. It now equates in-person solicitation with "real-time electronic contact" such as "chat rooms" and live internet Q&A. Additionally, it broadens the ban on lawyer solicitation by including "electronic communication" such as e-mails. The recommended rule requires that every written, recorded or electronic communication to solicit professional employment from a prospective client "known to be in need of legal services" in a particular matter shall include the words "Advertising Material" on the outside of an envelope and at the beginning and end of a recording or electronic communication.

The recommended rule does not include the current prohibition against soli-

citation of professional employment for bodily injury cases for a period of 30 days after the injury because such a rule applies only to plaintiff's counsel, not defense or insurance counsel; interferes with obtaining evidence that is often crucial; and unduly interferes with people's right to the access to justice. In its place, recommended *HRPC* Rule 7.3 expressly prohibits solicitation by a lawyer "at the scene of an accident, fire or other disaster," which is modeled after the California rule.

Finally, *HRPC* Rule 7.3 drops the micromanagement of written communication to prospective clients such as (1) the communication must be "sent only by regular U.S. mail, not by...registered mail...and not by facsimile or email;" (2) documents must be marked "SAMPLE" in red ink in a type size one size larger than the largest used; and (3) if the communication is prompted by a specific occurrence, it shall "disclose how the lawyer obtained the information prompting the communication." Where applicable, recommended *HRPC* Rule 7.1 prohibits "false or misleading communication about the lawyer or the lawyer's services."

P. *Political Contributions to Obtain Government Legal Engagements or Appointments by Judges—HRPC Rule 7.6*

Recommended Rule 7.6 is new and is commonly referred to as a prohibition against "pay-to-play." Generally, "pay-to-play" is a system whereby lawyers and law firms are considered for or awarded government legal engagements or appointments by a judge when they make or solicit contributions for the political campaigns of officials who are in a position to steer such business their way. The rule is grouped with advertising rules because recommended *HRPC* Rule 7.2(b) also prohibits (except in limited circumstances) a lawyer from paying someone to recommend the lawyer's services.

Q. *Disciplinary Authority; Choice of Law—HRPC Rule 8.5*

This recommended rule describes the disciplinary authority. Hawai'i's disciplinary rules apply to Hawaii-licensed lawyers including conduct outside of the state. Recommended *HRPC* Rule 8.5 also extends Hawai'i's disciplinary authority to lawyers not licensed in Hawai'i who provide or offer to provide legal services in Hawai'i. A lawyer may be subject to more than one set of rules of professional conduct imposing different obligations.

Exhibit A

The following recommended rules contain references to "informed consent," "in writing," and "confirmed in writing"

HRPC Rule 1.0(b)

Definition of "confirmed in writing."

HRPC Rule 1.0(e)

Definition of "informed consent."

HRPC Rule 1.0(o)

Definition of "writing."

HRPC Rule 1.2 (c): Scope of Representation

A lawyer may limit scope of representation if limitation is reasonable and the client gives *informed consent*.

HRPC Rule 1.4 (a)(1): Communication

A lawyer must promptly inform the client of any decision to which the client's *informed consent* is required.

HRPC Rule 1.4 (c)(1): Communication

A lawyer must promptly inform new and existing clients *in writing* if the lawyer does not have the threshold amounts of malpractice insurance.

HRPC Rule 1.4 (c)(2): Communication

A lawyer must promptly inform the client *in writing* any time malpractice insurance is terminated.

HRPC Rule 1.5(b): Fees

The lawyer should communicate to the client the scope of representation and basis for the fee and expenses for which the client will be responsible, preferably *in writing*.

HRPC Rule 1.5 (c): Fees

A contingent fee agreement must be *in writing* signed by the client.

HRPC Rule 1.5 (e)(2): Fees

A client must *confirm in writing* an agreement to any fee sharing arrangement.

HRPC Rule 1.6 (a): Confidentiality of Information

A lawyer shall not reveal client information unless the client gives *informed consent*.

HRPC Rule 1.7(b)(4): Conflict of Interest: Current Clients

A lawyer may represent a client even if a conflict of interest exists provided each affected client gives *informed consent, confirmed in writing*.

HRPC Rule 1.8(a)(1): Conflict of Interest: Current Clients

A lawyer entering into a business transaction with a client must disclose the transaction and terms and transmit the information *in writing*.

HRPC Rule 1.8(a)(2): Conflict of Interest: Current Clients

A lawyer entering into a business transaction with a client must advise the client *in writing* of the desirability of seeking independent legal counsel.

HRPC Rule 1.8(a)(3): Conflict of Interest: Current Clients

A client gives *informed consent in a writing signed by the client* concerning the lawyer's role in the transaction and whether the lawyer is representing the client in the transaction.

HRPC Rule 1.8(b): Conflict of Interest: Current Clients

A lawyer shall not use information to the disadvantage of the client unless the client gives *informed consent*.

HRPC Rule 1.8(f)(1): Conflict of Interest: Current Clients

A lawyer shall not accept compensation from other than the client unless the client gives *informed consent*.

HRPC Rule 1.8(g): Conflict of Interest: Current Clients

When a lawyer represents two or more clients, each client must give *informed consent in a writing* signed by the client.

HRPC Rule 1.8(h)(2): Conflict of Interest: Current Clients

A lawyer shall not settle a claim or potential claim unless that person is advised *in writing*.

HRPC Rule 1.9(a): Duties to Former Clients

A lawyer who seeks to represent a new client in the same or a related matter in which the lawyer represented a former client whose interests are materially adverse to the new client must obtain *informed consent, confirmed in writing* from the former client.

HRPC Rule 1.9(b): Duties to Former Clients

A lawyer may represent a new client in the same or related matter although the lawyer's previous firm represented another client with mate-

rially adverse interests. However, the firm's former client must give *informed consent, confirmed in writing*.

HRPC Rule 1.11 (a)(2)(ii): Special Conflicts of Interests for Former and Current Government Officers and Employees

A lawyer shall not represent a client in connection with the matter in which the lawyer participated personally as a public officer or employee unless the government agency gives its *informed consent, confirmed in writing*.

HRPC Rule 1.11 (d)(2)(i): Special Conflicts of Interests for Former and Current Government Officers and Employees

A lawyer currently serving as a public officer or employee shall not participate in a matter unless the appropriate government agency gives its *informed consent, confirmed in writing*.

HRPC Rule 1.12(a): Former Judge, Arbitrator, Mediator, or other Third-Party Neutral

A lawyer shall not represent anyone or act as an arbitrator, mediator or other third-party-neutral unless all parties give *informed consent, confirmed in writing*.

HRPC Rule 1.18(d): Duties to Perspective Clients

A lawyer may continue to represent both an affected client and a prospective client in a disqualification situation when both clients give *informed consent, confirmed in writing*.

HRPC Rule 2.3(b): Evaluation for Use by Third Persons

A lawyer shall not provide an evaluation which affects the client's interests materially and adversely, unless the client gives *informed consent*.

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