

Raising the Bar in Ethics

Proposed Amendments to HRPC

The Hawaii Supreme Court announced that the amendments to the Hawaii Rules of Professional Conduct (HRPC) are being proposed. The comment deadline is **March 11, 2011**.

Please check the full executive summary of the proposed rules at <http://www.odchawaii.com> under "News," at the judiciary website, <http://www.courts.state.hi.us>, or at the HSBA website.

One of the proposed amendments requires mandatory disclosure of malpractice insurance. The proposed Rule 1.4 is noted below.

RULE 1.4: COMMUNICATION

(a) *A lawyer shall:*

(1) *promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*

(2) *reasonably consult with the client about the means by which the client's objectives are to be accomplished;*

(3) *keep the client reasonably informed about the status of the matter;*

(4) *promptly comply with reasonable requests for information; and*

(5) *consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law; and*

(6) *promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case which the lawyer receives.*

(b) *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

(c) *A lawyer shall:*

(1) *promptly inform new and existing clients, in writing, if the lawyer does not have malpractice insurance in the amounts of at least \$100,000 per occurrence and \$300,000 in the aggregate;*

(2) *promptly inform the client, in writing, any time the lawyer's malpractice insurance is terminated; and*

(3) *promptly maintain a record of these disclosures for six years from the conclusion of the client's representation.*

(d) *The requirements in (c) do not apply to a member of the judiciary, a government lawyer, or an in-house counsel when acting in that capacity.*

Comment:

[1] *Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.*

Communicating with Client

[2] *If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly inform and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. See Rule 1.2(a).*

[3] *Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the*

lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] *A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. Rules of court or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.*

Explaining Matters

[5] *The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.*

In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail.

The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in

the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

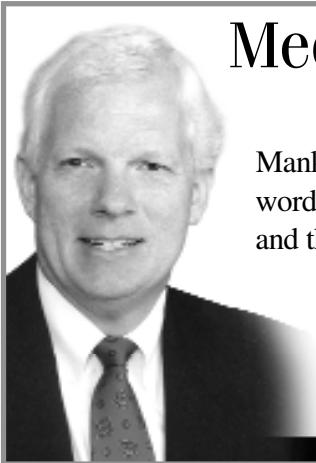
[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. A lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such Rules or orders.

Disclosure of Lack of Malpractice Insurance

[8] Lawyers are not required to maintain professional liability insurance. This Rule requires prompt notification to the client as required by subsection (c). Lawyers' funds for client protection (Client Security Funds) are designed to reimburse clients only in the event of their lawyer's dishonesty. See Rule 1.15, Comment [6]. The absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.



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