

## 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 has been extended to **June 9, 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.

The new proposed definition of "informed consent" is:

*(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and [ not merely negligent misrepresentation or failure to apprise another of relevant information] explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.*

The bracketed language is deleted.

The new proposed definition of "confirmed in writing" is:

*(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.*

The definition of "writing" is proposed as follows:

*(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.*

One of the significant changes to the HRPC rules deal with informed consent. There are instances in the recommended rules when **both** informed consent and confirmed in writing are required. In general, the above defined terms apply when retaining and informing clients and when dealing with client conflicts. The following recommended rules contain references to "informed consent," "in writing," and "confirmed in 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; (c)(1) A lawyer must promptly inform new and existing clients in writing if the lawyer does not have the threshold amounts of malpractice insurance; (c)(2) 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; (c) A contingent fee agreement must be in writing signed by the client; (e)(2) 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; (a)(2) A lawyer entering into a business transaction with a client must advise the client in writing of the desirability of seeking independent legal counsel; (a)(3) 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; (b) A lawyer shall not use information to the disadvantage of the client unless the client gives informed consent; (f)(1) A lawyer shall not accept compensation from other than the client unless the client gives informed consent; (g) When a lawyer represents two or more clients, each client must give informed consent in a writing signed by the client; (h)(2) 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; (b) A lawyer may represent a new client in the same or related matter although the lawyer's previous firm represented another client with materially 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; (d)(2)(i) 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.