

Proposed Trusteeship Rule Changes

The Hawaii Supreme Court is seeking comments on proposed changes to Rules 2.20, 17 and proposed new rule 2.21 of the Hawaii Supreme Court Rules. If adopted in their present form, these rule changes will significantly affect the legal practices of most attorneys, especially solo practitioners, and will impose new burdens, duties and expenses on the HSBA that could well require increases in HSBA annual dues. The proposed rules are intended to deal with an attorney's files and clients when they become incapacitated or unexpectedly pass away or simply disappear—these “trusteeships” are currently handled by the Office of Disciplinary Counsel.

Comments to the proposed rules may be done online via the Judiciary's website: <http://www.courts.state.hi.us>. The deadline for comments is April 25, 2010.

The proposed rule changes raise the following concerns:

(1) The proposed rule would require all practitioners to designate a trustee for their client files and trust accounts as part of the annual attorney registration process. If an attorney does not designate a trustee, then he/she must pay an annual fee to the HSBA in an amount to be determined by the court. The annual fee would be paid as part of the attorney registration process.

(2) The amendments to Rule 17 place the responsibility on HSBA members, under penalty of automatic suspension, to designate a trustee or certify exemption as part

of a member's annual certification. This will add burdens on the renewal process.

(3) There will be concomitant responsibilities by the HSBA staff in administering the proposed rule changes, which may necessitate dues increases.

(4) The real and substantial need for such changes to the rules governing trusteeships and the imposition of additional registration burdens on attorneys and the HSBA should be examined.

(a) Information received from ODC and gleaned from its budget indicates that there are currently twelve open trusteeships. Of these, six have been opened during or since 2006, and six predate 2006.

(b) The out-of-pocket costs budgeted by ODC in its 2010 budget for trusteeships is \$10,000. The ODC has indicated that one-half of an attorney full-time employee (“FTE”) and one-half of a staff FTE are dedicated to trusteeships.

(c) The ODC has the staff and experience to handle trusteeships, which are actually apparently fewer than one case per year. The ODC has five full-time attorneys and has budgeted for the out-of-pocket expenses. The ODC enjoys a reserve of \$1,409,171.00, almost equal to its 2010 operating budget of \$1,561,750.00.

(5) There are several “drafting” flaws with the rules:

(a) The “designation” of a trustee must be accepted, but can be revoked before the need for a trustee (Rule 2.20) arises, leaving to question whether a designated trustee can revoke designation after getting a look at the files.

(b) Rule 2.21(e) provides immunity for Designated Trustees, but this brings attention to the lack of an immunity provision in Rule 2.20. The immunity provision for trustees appointed under Rule 2.20 is contained in Rule 2.8 and differs from the immunity provision included in Rule 2.21.

(c) The rules are part of a continuing expansion of the requirements of Rule 17 on an attorney's renewal, placing numerous reporting requirements subject to attorney suspension. These requirements do not follow the existing requirements for attorneys to “certify” and then assume responsibility for the necessary follow-up. For example, if an attorney has experienced a disciplinary violation elsewhere during the year, it is the attorney's responsibility to self-report to the ODC, not the bar's responsibility to collect the information. Likewise for the trustee requirement, an attorney should answer simply “yes” or “no” to the question and be then required to submit the necessary information separate from the renewal process.