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SCRU-11-0001047

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the

HAWAI‘I RULES OF PROFESSIONAL CONDUCT

ORDER AMENDING RULE 1.15 AND COMMENTS, COMMENT [5] TO RULE 3.7,
COMMENT [3] TO RULE 3.8, AND COMMENT [3] TO RULE 8.5
OF THE HAWAI‘I RULES OF PROFESSIONAL CONDUCT

(By: Recktenwald, C.J., Nakayama, Acoba, McKenna, and Pollack, JJ.)

IT IS HEREBY ORDERED that Rule 1.15 and Comments of the Hawai‘i Rules of Professional Conduct, is vacated and replaced in its entirety, effective January 1, 2014, as follows:

Rule 1.15. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT OR THIRD PERSON.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account in Hawai‘i in accordance with Rule 11 of the Rules of the Supreme Court of the State of Hawai‘i. Other tangible property owned by a client or third person shall be identified as such, appropriately safeguarded, and a record kept of the item’s receipt and disbursement. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 6 years after the termination of the representation.

(b) A lawyer may deposit into a trust account the lawyer’s own funds reasonably sufficient to either pay bank charges or avoid paying bank charges on the account, or to cover unanticipated overages.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving or disbursing funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claims interests, the property shall be kept separate by the lawyer until the dispute is resolved. Disputed client funds shall be kept in a client trust account until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENTS:

[1] *A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping Rules established by law or court order. See, e.g., Hawai'i Rules Governing Trust Accounting.*

[2] *While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) identifies several instances in which it is permissible to do so. See also Rule 11(c)(1)(A) of the Rules of the Supreme Court of the State of Hawai'i. Accurate records must be kept regarding which part of the funds are the lawyer's. See, e.g., Rule 4(c)(1) through (9) of the Hawai'i Rules Governing Trust Accounting.*

[3] *Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees earned and owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account. See Rule 4(a) of the Hawai'i Rules Governing Trust Accounting. The lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds*

shall be promptly distributed. See also Rule 1.5 of these Rules regarding a lawyer's duties related to Fees.

[4] A mere debtor-creditor relationship is generally itself insufficient to establish a financial interest in funds or property within the meaning of paragraphs (d) and (e). Paragraphs (d) and (e) recognize, however, that third parties may have lawful entitlement to funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party entitlements against wrongful interference by the client. In such cases, the lawyer must refuse to surrender the funds or property to the client until the dispute is resolved. A lawyer should not unilaterally assume to arbitrate a dispute between a client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] The Lawyers' Fund for Client Protection provides a means through the collective efforts of the Hawai'i bar to reimburse persons who have lost money or property as a result of a lawyer's dishonest conduct. Lawyer participation is mandatory. See Rules and Regulations Concerning the Lawyers' Fund for Client Protection of the Supreme Court of the State of Hawai'i (aka Lawyers' Fund Rules and Regulations).

IT IS FURTHER ORDERED that Comment [5] to Rule 3.7, Comment [3] to Rule 3.8, and Comment [3] to Rule 8.5 of the Hawai'i Rules of Professional Conduct, promulgated on June 25, 2013, are further amended, effective January 1, 2014, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 3.7. LAWYER AS WITNESS.

* * *

COMMENTS:

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[5] A recurring situation involves the lawyer as impeaching witness, that is, as the means by which another

witness' prior inconsistent statement is to be proved. In such a situation the need for such impeachment should be foreseen not only in preparation for trial but even in advance of the initial witness interview that produced the impeaching material. Cf. ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.3[d](e): "[T]he lawyer] should avoid interviewing a prospective witness except in the presence of a third person."

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Rule 3.8. PERFORMING THE DUTY OF PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER.

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COMMENTS:

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[3] "Defense" as used in paragraph (b) refers to a defense lawyer or a defendant if unrepresented.

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Rule 8.5. DISCIPLINARY AUTHORITY; CHOICE OF LAW.

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COMMENTS:

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[3] Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate practice within their borders may conflict with the authority of ~~as~~ federal tribunals ~~may have~~ to regulate practice before them.

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DATED: Honolulu, Hawai'i, October 21, 2013.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

