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SCRU-13-0004270

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the
HAWAI‘I RULES GOVERNING TRUST ACCOUNTING

ORDER AMENDING HAWAI‘I RULES
GOVERNING TRUST ACCOUNTING

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

IT IS HEREBY ORDERED that Rules 3, 4, 8, and Comments of the Hawai‘i Rules Governing Trust Accounting, are amended, effective January 1, 2014, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 3. APPLICABILITY.

These Rules apply to all attorneys and law firms which receive client funds that, under Rule 11 of the Rules of the Supreme Court of the State of Hawai‘i, must be deposited in a [~~F~~]trust [~~A~~]account.

Rule 4. TRUST ACCOUNT REGULATIONS AND MINIMUM TRUST ACCOUNTING RECORDS.

(a) A lawyer in possession of any funds or other property belonging to a client or third person, where such possession is incident to the lawyer’s practice of law, is a fiduciary and shall not commingle such funds or property with his or her own or misappropriate such funds or property to his or her own use and benefit. In keeping with that fiduciary duty, all client funds paid to an attorney or law firm, including advances for costs and expenses, shall be deposited and maintained in one or more identifiable client trust accounts established pursuant to Rule 11 of the Rules of the Supreme Court of the State of

Hawai'i. No funds belonging to the attorney or law firm shall be deposited or maintained in a client trust account except

- (1) funds reasonably sufficient to either pay bank charges or avoid paying bank charges on the account or to cover unanticipated overages, and
- (2) funds belonging in part to a client and in part presently or potentially to the attorney, though such funds shall be withdrawn promptly by the attorney when earned or upon resolution of any dispute over ownership of said funds, to avoid commingling of attorney and client funds.

Such client trust accounts shall be kept in Hawai'i in accordance with Rule 11 of the Rules of the Supreme Court of the State of Hawai'i and Rule 1.15 of the Hawai'i Rules of Professional Conduct, and in the lawyer's name, in the name of a partnership of lawyers, or in the name of the professional corporation of which the lawyer is a member, and each trust account, as well as deposit slips and checks drawn thereon, shall be prominently labeled "client trust account." All funds entrusted to a lawyer shall be deposited intact into the trust account. All fees[~~, except availability fees,~~] shall be maintained in trust until earned and are refundable until earned, but must be withdrawn by the attorney as earned to avoid commingling. All earned client funds shall be transferred to the attorney's or law firm's business account in a manner which allows records of such transfers to be maintained pursuant to Rules 4(c) and (d) of this Rule

* * *

(c) Every attorney and law firm who practices in this jurisdiction and maintains a trust account shall maintain complete current financial records of the account for at least 6 years after either completion of the employment to which they relate, or the last transaction on the account, whichever occurs last.

Such records shall include:

* * *

(3) Copies of retainer and compensation agreements with clients as required by this Rule or by Rule 1.5 of the Hawai'i Rules of Professional Conduct;

* * *

COMMENT:

* * *

[3] *Authorized electronic transfers shall be limited to (1) money required for payment to a client or third person on behalf of a client, (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation, [or] (3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or (4) money transferred from one client trust account to another client trust account.*

The requirement in paragraph (a) that receipts shall be deposited intact mean that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

[4] Rule 4(c)(7) of these Rules requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks or check stubs, and substitute checks be maintained for a period of 6 years after termination of each legal engagement or representation, or the last transaction on the account, whichever occurs later. The “Check Clearing for the 21st Century Act” or “Check 21 Act,” [;] codified at 12 U.S.C. §5001 et. seq., recognizes “substitute checks” as the legal equivalent of an original check. A “substitute check” is defined at 12 U.S.C. §5002(16) as a “paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition (MICR) line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check.” Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer’s responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

* * *

[6] There are 5 types of check conversions where a lawyer should be careful to comply with the requirements of Rule 4(c)(9) of these Rules . First, in a “point-of-purchase conversion,” a paper check is converted into a debit at the point of purchase and the paper check is returned to the issuer. Second, in a “back-office conversion,” a paper check is presented at the point of purchase and is later converted into a debit and the paper check is destroyed. Third, in an “account-receivable conversion,” a paper check is converted into a debit and the paper check is destroyed. Fourth, in a “telephone-initiated debit” or “check-by-phone” conversion, bank account information is provided via the telephone and the information is converted to a debit. Fifth, in a “web-initiated debit,” an electronic payment is initiated through a secure web environment. Rule 4(c)(9) of these Rules applies to each of the type of electronic funds transfers described. All electronic fund[s] transfers shall be recorded and a lawyer should not re-use a check number which has been previously used in an electronic transfer transaction.

Rule 8. AUDIT.

If a lawyer or law firm fails to file an annual Certificate and Report required by Rule 7 of these Rules, the Hawai'i State Bar shall forthwith report that fact to the Office of Disciplinary Counsel. If a lawyer or law firm discovers a trust account check was dishonored for insufficient funds, the lawyer or law firm shall forthwith report that fact to the Hawai'i State Bar and the Office of [~~the~~] Disciplinary Counsel, which may order an audit of the trust account(s) involved at the cost of the attorney or law firm audited. If a lawyer or law firm fails to correct any violation of either Rule 11 of the Rules of the Supreme Court of the State of Hawai'i or these Rules within 60 days after the violation is discovered through the audit process, or otherwise fails to comply with these Rules, the Hawai'i State Bar shall refer the matter to the Office of Disciplinary Counsel. However, nothing in these Rules shall prevent or discourage any attorney from immediately reporting to the Office of Disciplinary Counsel any violation of these Rules or the Hawai'i Rules of Professional Conduct involving a trust account.

As provided in Rule 11(f)(1) of the Rules of the Supreme Court of the State of Hawai'i, failure to provide certification within the registration period may result in administrative suspension from the practice of law in this jurisdiction in the manner provided in Rule 17(d)(4)(A) of the Rules of the Supreme Court of the State of Hawai'i.

DATED: Honolulu, Hawai'i, December 16, 2013.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

