

Ethics & Issues

Government Attorney Conflicts and Screening Guidelines

Under the Hawaii Rules of Professional Conduct, conflicts created by attorneys moving between private firms are treated differently from those created by attorneys moving between private firms and government employment. HRPC 1.10, Comment [6]. While government attorneys may be subject to statutes or regulations in addition to the ethics rules, this article only addresses duties under the HRPC. The relevant rules, and suggested screening guidelines, are given below.

HRPC 1.10(d) provides that HRPC 1.7 (conflict of interest-general rule) and HRPC 1.9(a) (conflict of interest-former client) disqualifications will not be imputed to government attorneys who have been "screened" from participation in adverse matters and who have not acquired confidential information.

While screening can be used to prevent a government attorney's personal disqualification from being imputed to other government attorneys, it cannot be used to avoid conflicts of interest for attorneys moving between private firms. Screening prevents ordinary disqualification rules from acting as excessive deterrents against attorneys entering public service. HRPC 1.11, Comment [3].

Thus, where an attorney represents the government after having served private clients, the situation is governed by HRPC 1.11(c)(1), as well as HRPC 1.6 (confidentiality), HRPC 1.7, and HRPC 1.9. Although not specifically mentioned in HRPC 1.11(c), the personally disqualified government attorney may be screened in order to allow another government attorney to undertake or continue the representation. HRPC 1.11, Comment [9]; HRPC 1.10(d).

HRPC 1.12(a) applies a similar rule to former judges, arbitrators, other adjudicative officers, or law clerks to such persons. HRPC 1.12(c) allows an attorney disqualified by HRPC 1.12(a) to be screened from the matter, thereby allowing another attorney in the firm to undertake or continue the representation.

When an attorney joins a private firm after representing the government, HRPC 1.11(a) and (b) apply. HRPC 1.10, Comment [5]. HRPC 1.11(a) bars an attorney from representing a private client in connection with a matter in which the attorney participated "personally and substantially" as a public officer or employee.

Where an attorney is prohibited from representing a private client by HRPC 1.11(a), another attorney in the firm may undertake such a representation if the disqualified attorney is screened from participation in the matter and receives no part of the fee therefrom, and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of HRPC 1.11.

HRPC 1.11(b) provides that an attorney having confidential government information about a person acquired when the attorney was a public officer or employee may not represent a private client with adverse interests in the matter. As in HRPC 1.11(a), the attorney's firm may undertake or continue such a representation only if the disqualified attorney is screened and apportioned no part of the fee therefrom.

The following screening measures are recommended for purposes of avoiding imputed disqualification. For purposes of this section, the "screened" attorney is being screened from the "pending" matter.

1. **Communication.** Non-screened members of the office must refrain from communicating, orally or in writing, with the screened attorney regarding the pending matter. Conversely, the screened attorney must not communicate with other members of the office about the pending matter.

2. **Access to Files.** The screened attorney should not have access to files and materials relating to the pending matter. The files of the pending matter should be physically segregated from the regular filing system, specifically tagged and accessed only by those attorneys and personnel who are

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"unfitness," supported by clear and convincing evidence must be made.

The statutory presumption in favor of substitute parents and families at the permanent plan hearing is constitutionally improper. It is also improper at an HRS § 587-73 permanent plan hearing to order a divestiture of parental rights based primarily on a determination that it is in the "best interests of the child" to do so. Because of the sacredness of parental rights, clear and convincing evidence of a parent's "unfitness" is required before the parent's rights in a child can be divested. It is also constitutionally improper for a permanent custody order to be entered divesting a parent of his or her parental rights in a child, based solely on the parent's failure to strictly comply with a court-ordered service plan.

When important parental rights are at stake, DHS should do some preliminary investigation into anonymous complaints before filing petitions for temporary custody.

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working on the matter or need access for other reasons.

3. Physical Location. The screened attorney's office should be located away from the offices of those working on the pending matter.

4. Statement of Policy. These measures should be stated in a written policy explained to all attorneys and support personnel within the office with an admonition that violations of the policy will result in sanctions.

Notice of Resignation

The Supreme Court of Hawaii granted Honolulu attorney George K. Noguchi's request to resign in lieu of discipline, effective February 15, 2001. The Court's order is a public record. Noguchi's

affidavit, which sets forth the factual allegation against him, remains confidential. Resignation from the practice of law in lieu of discipline is disbarment for all purposes under the Supreme Court Rules, including reinstatement.

Noguchi, 65, and a graduate of George Washington University, was admitted to the Hawaii bar in 1969.

Trusteeship Notices

On January 18, 2001, the Supreme Court appointed Assistant Disciplinary Counsel Michael T. Lee to inventory files and protect the interests of clients of former attorney Stephen K. Yamada, pursuant to RSCH 2.20. Former clients of Yamada may be able to recover their files by contacting ODC.

On December 28, 2000, the Court discharged Lee, with thanks, as trustee for former attorney John A. Chanin.

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