

# Disciplinary Counsel's Report

By Gerald H. Kibe, Chief Disciplinary Counsel

[NOTE: Last month's article stated that the new financial recordkeeping rules (HRPC 1.15 amendments) took effect on June 20, 1994. However, to correct minor typographical errors, the Supreme Court issued an amended order on June 22, 1994 which also changed the effective date of the HRPC 1.15 amendments to JULY 1, 1994.]

Lawyers usually presume that the duty of diligent representation requires that a client's interests *always* be held paramount to those of an opposing party or other non-client.

The Hawaii Rules of Professional Conduct ("HRPC") differ, however, from the prior Code of Professional Responsibility by requiring avoidance of undue infringement on rights of non-clients.

While similar concepts were broadly stated in the former Ethical Considerations, those ideas are now embodied in black-letter rules.

For example, HRPC 4.4, for which there was no mandatory Code counterpart, states:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a *third person*, or use methods of obtaining evidence that violate the legal rights of such a person. [Emphasis added.]

The HRPC thus makes clear that the obligation to diligently represent a client does not translate into blanket permission to disregard rights of third persons. Comment to HRPC 4.4.

This approach is echoed in other rules:

HRPC 3.4(a) explicitly prohibits obstructing an opponent's access to evidence or unlawfully altering, destroying, or concealing evidence.

HRPC 3.4(f) prohibits frivolous discovery requests or failure to make reasonably diligent efforts to comply with an opponent's legally proper discovery request.

HRPC 4.1(a) proscribes making a false statement of material fact or law to a non-client.

HRPC 4.1(b) makes it unethical to fail to disclose a material fact to a non-client when disclosure is needed to avoid helping a client commit a crime or perpetrate a fraud.

HRPC 3.2 imposes an obligation to "make reasonable efforts to expedite litigation consistent with the legitimate interests of the client." "Dilatory" litigation practices, which "bring the administration of justice into disrepute",

are proscribed. Comment to HRPC 3.2.

HRPC 3.1 continues the prior Code prohibition against bringing or defending a proceeding or asserting or controverting an issue on "frivolous" grounds. "Frivolous" action is, *inter alia*, that which is taken primarily to "harass" or "maliciously injure" a non-client. Comment [2] to HRPC 3.1. An advocate's duty to use the legal process for a client's benefit is said to be coupled, therefore, with a concurrent duty not to "abuse" that process. Comment [1] to HRPC 3.1.

Bar members are asked to note these new provisions imposing duties to avoid unwarranted delay, distress, and inconvenience toward non-client participants in the legal process. These concepts underscore the heightened notions of fair play and respect for the legal system emphasized in the new rules of conduct. □

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