

# Ethics & Issues

by Carole-R. Richelieu, Chief Disciplinary Counsel

## Lawyer Serving as a Fiduciary for an Estate or Trust

---

From time to time, a client will ask an attorney for whom the attorney is preparing a will or trust that the attorney (or a member of the attorney's firm) accept appointment as the personal representative or trustee named in the will or trust. While such an appointment is not, in and of itself, unethical, several ethical considerations should be contemplated.

An attorney who is preparing a will or trust has an attorney and client relationship with the testator or trustor. RSCH 3(3). The attorney shall receive his or her instructions from, and give his or her advice to, the client. *Id.* While an attorney reserves the right to advise the client with respect to the choice of a fiduciary (RSCH 3(4)), the attorney generally should not seek to displace the fiduciary of the client's choice by inducing the appointment of another (like the attorney). RSCH 3(5).

That said, when asked to accept an appointment, the attorney must first explain the matter to the extent reasonably necessary to permit the client to make the decision to appoint. HRPC 1.4(b). Second, the attorney must ensure that the attorney can represent the client without material limitation imposed by the attorney's responsibilities as a fiduciary. HRPC 1.7(b). The issue of conflict of interest should be continually revisited and evaluated for the duration of any dual role by the attorney; for example, attorney for testator and named personal representative for testator or personal representative under a will while representing or advising the estate. Third, compensation for legal services must be reasonable taking into account the compensation for fiduciary services. HRPC 1.5(a). See also ABA Formal Opinion 02-426 (2002).

## Discipline Notice

---

The Hawai'i Supreme Court suspended Honolulu attorney NEAL J. KUGIYA from the practice of law for

a period of one year and one day effective September 23, 2002, for commingling and misappropriating client settlement funds that were claimed by a third party (the State of Hawaii).

Kugiya unethically deposited a settlement check into his business rather than his client trust account, misappropriated the State's \$7,500.00 portion, and failed to pay the State for two years despite numerous reminders and a lawsuit. Kugiya also failed to provide his client with a written settlement statement and mislabeled his business account.

Kugiya moved for reconsideration of the decision. The Court denied the motion.

Kugiya, 46, was admitted to the Hawaii bar on May 9, 1986 and is a graduate of Lewis and Clark College.

We again caution attorneys to read and comply with HRPC 1.15 which relates to funds of both clients and third persons. As with a client, an attorney must both promptly notify a third person of the attorney's receipt of funds in which the third person has an interest (HRPC 1.15(f)(1)) and promptly pay to the third person, as requested by the third person, the funds in the attorney's possession which the third person is entitled to receive (HRPC 1.15(f)(4)). HRPC 1.15(c) strictly prohibits the commingling and misappropriation of client funds and third person funds alike.

## Amendment to RSCH 2.22

---

Effective January 1, 2003, RSCH 2.22(b) states: Upon receipt of trustworthy evidence that an attorney has committed a crime and to protect the interests of the public, the administration of justice, or the legal profession, the Chairperson of the [Disciplinary] Board may authorize Counsel [Disciplinary Counsel] to disclose the evidence to appropriate law enforcement or prosecuting authorities. Counsel may not disclose that an attorney voluntarily sought, received, or accepted treatment from the Attorneys and Judges Assistance Program or the record of such treatment.

Former (b) is now (c) et cetera.