

Raising the Bar in Ethics

Distressed Property Consultants Ethics Alert

by Thomas Robertson

Pick up any newspaper and check out the volume of foreclosure notices. We are in a unique position to assist the thousands of fellow Hawaii citizens in danger of losing their share of the American Dream. Before you get involved with any nonlawyers, however, be careful to understand the recently enacted Mortgage Rescue Fraud Prevention Act (HRS Chapter 480-E), as well as the many ethical land mines to be avoided.

Chapter 480-E, enacted in 2008, extensively regulates the actions and contracts of "Distressed Property Consultants." In addition to providing property owners rights to cancel, the act prohibits these consultants from taking or asking for any money until the contract is fully performed and limits the amount of compensation they can be paid. In that "licensed attorneys engaged in the practice of law" are excluded from the definition of Distressed Property Consultants, it can be expected that entities unlicensed to practice law will attempt to circumvent the act by associating with Hawaii attorneys. Before you get involved, however, you should carefully consider the many ethical land mines involved. Some of these are:

Assisting in the Unauthorized Practice of Law

HRPC 5.5(b) prohibits assisting a person who is not a member of the bar in the unauthorized practice of law. Actions by nonlawyers with whom you associate, particularly where foreclosure proceedings are involved, can constitute

the practice of law. See *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541.

Partnering with Nonlawyers

HRPC 5.4(b) does not permit a lawyer to partner with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Sharing Legal Fees with Nonlawyers

HRPC 5.4(a) forbids a lawyer from sharing legal fees with a nonlawyer.

Allowing a Nonlawyer to Interfere with Your Professional Judgment

HRPC 5.4(c) precludes a lawyer from allowing someone who recommends, employs, or pays the lawyer from directing or regulating the attorney's professional judgment in rendering the legal services.

Unauthorized Entity Practicing Law

HRPC 5.4(d) restricts a lawyer's involvement with an entity practicing law in which a nonlawyer owns an interest, is an officer or director, or has the right to control the professional judgment of the lawyer.

Responsibility for Nonlawyer Assistants

Where the entity is set up with the lawyer in "control," the lawyer may be responsible for the nonlawyers' actions pursuant to HRPC 5.3

Reasonableness of Fee

HRPC 1.5(a) requires a lawyer's fee to be reasonable. Accepting a fee for little or no work would be problematic.

Accepting Compensation not from Client

HRPC 1.8(f) restricts a lawyer from accepting compensation for representing a client from one other than the client unless the client consults after consultation, there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship, and client confidential information is protected as required by HRPC 1.6.

Referral Fees to a Nonlawyer

HRPC 7.2 bans the giving of referral fees to nonlawyers unless they are not-for-profit lawyer referral services or qualified legal assistance organizations.

Indirect Unethical Conduct

HRPC 8.4(a) prohibits violating a rule of professional conduct through the acts of another. Thus actions such as improper solicitation or advertising, misrepresentations, fraud, or non-competent assistance by those with whom a lawyer associates may all subject the lawyer to discipline.

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Articles Wanted

If you are interested in writing either a short or long article of general interest to members of the bar, please send your submissions to Cynthia M. Johiro at cynthia.m.johiro@hawaii.gov ; Ed Kemper at edraders@aol.com or to our other volunteer editors. A short article is between 500 to 2,000 words. The longer law-review type articles are published in a special issue. These articles generally exceed 4,500 words.