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September 26, 2000

William L. Gardner
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1800 M. Street, N.W.
Washington, D.C. 20036-5869

Re: Kamehameha Schools

Dear Mr. Gardner:

This letter responds to your request for my opinion, as an expert on the law governing lawyers, to the following questions about the duties of lawyers involved in the administration of a trust such as the Estate of Bernice Pauahi Bishop. In answering your questions, I shall refer to that Estate as the Bishop Trust.

Question One

> Who is the "client" when legal advisors render professional services to the Bishop Trust? For example, is the client the beneficiaries, the Trustees as a group, the individual Trustees, or the Trust itself?

I have reviewed Professor Langbein's letter of September 5, 2000. With the qualification noted below, I agree with his conclusion that the client is the Bishop Trustees as a group, acting in their fiduciary capacity, for the benefit of the Bishop Trust's charitable beneficiaries. The question you ask is, basically, what is the legal entity established under the Bishop will? It is that entity that enters into contractual and professional relationships, not only with lawyers, but with anyone whose goods or services are purchased for trust purposes. What that entity is will therefore be an issue of trust law, as expounded by Professor Langbein.

My one qualification to Professor Langbein's conclusion is to note that it *can* happen that a trust pays a lawyer to represent, not the trustees in their fiduciary capacity, but one or more trustees in their individual capacity. This might happen, for example, if someone sues a trustee individually for acts the trustee performed for the trust, or if a proceeding to remove a trustee is instituted, and the other trustees decide that the trust should fund that trustee's defense. When this occurs, one would expect to see indications that the lawyer was to represent a trustee in that trustee's individual capacity: a vote of the trustees authorizing such a representation, correspondence noting the lawyer's function, court appearances filed by the lawyer on behalf of a trustee in his or her individual capacity, bills sent by the lawyer specifying for whom services were rendered, and the like. If the lawyer in question also represented the trustees in their fiduciary capacity, whether in the same or another matter, it would also be necessary for the lawyer to ensure that no conflict of interest rule was violated.

In this letter, I will sometimes refer to "lawyers for a trust" or the like as shorthand for the more technically accurate phrase "lawyer for the trustees of a trust acting in their fiduciary capacity."

Question Two

What duties generally does a lawyer for a trust owe, and to whom?

Lawyers for a trust, like other lawyers, owe their clients (as defined above) a variety of duties. The Restatement of the Law Governing Lawyers § 16, summarizing these duties in general terms, says that, in matters within the scope of the representation a lawyer must: proceed as reasonably calculated to advance the client's lawful objectives, as defined by the client after consultation: act with reasonable competence and diligence; comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ adversely to the client advantages arising from the client-lawyer relationship; and fulfill valid contractual duties to the client.

When the client to whom a lawyer owes these duties is a trustee or group of trustees, that circumstance tinctures the lawyer's duties. Because the client is subject to fiduciary duties, the lawyer must, in matters within the scope of the representation, take that into account in advising and assisting the client. Objectives that would be lawful for an ordinary client, such as enriching himself or making gifts to a friend, are not lawful for a trustee acting as such. Likewise, trustees have duties that other clients do not, for example submitting accounts to a court. A lawyer representing trustees therefore owes them a duty to use reasonable diligence and competence to ensure that the trustees avoid what is forbidden them and do what is required. See, *e.g.*, Winter v. Hope, 861 P.2d 1282 (Kan. 1993).

Like other lawyers, lawyers for a trust owe certain duties to non-clients. For example, a lawyer who commits fraud on behalf of a client is subject to various civil and criminal sanctions. Restatement of the Law Governing Lawyers § 98; Hawaii R. Prof. Cond. 4.1. Determining what duties a lawyer owes to a non-client often requires careful balancing of the need for protecting the non-client against the need to secure loyal and vigorous representation for clients. See, *e.g.*, Restatement of the Law Governing Lawyers §§ 51, 56, 57. That remains true when the lawyer in question represents trustees. I will say more of this in response to the following question.

Question Three

> What duties does a lawyer for a trust owe to the trust's beneficiaries? In particular, does such a lawyer owe duties either to the beneficiaries or to the Probate Court to disclose trustee wrongdoing, and how are any such duties affected by the lawyer's duty of confidentiality and the attorney-client privilege?

In answering this question, I state no opinion as to which individuals, if any, count as legal beneficiaries of the Bishop Trust. The will establishing the Trust specifies no individual beneficiaries, and I am informed that the Trustees consider that none exist. This is an issue of trust law as to which I claim no expertise. Because your question asks about duties to beneficiaries, I shall assume for purposes of discussion that you are inquiring about trusts that do have individual beneficiaries.

It is important to distinguish between a lawyer's obligation to consider the interests of beneficiaries when advising the trustees, and duties in the strict sense that a lawyer may owe to beneficiaries. As explained in the previous answer, a lawyer's duty to the trustees requires the lawyer to take into account the trustees' fiduciary duties–that is, the duties the trustees themselves owe to administer the trust to benefit the beneficiaries as provided by the trust instrument. The trustees can enforce that duty of the lawyer by bringing an action if the lawyer fails to perform the duty properly, and a lawyer who neglects the duty may be subject to discipline. See Hawaii R. Prof. Cond. 1.1, 1.3. The remedies of the beneficiaries themselves, however, are much more limited than those of the trustees, for it is the trustees, not the beneficiaries, that the trustor and the law have entrusted with the administration of the trust. The lawyer for a trust does, however, have two kinds of duties that can more accurately be said to be owed to the beneficiaries themselves.

(a) A lawyer (or anyone else) who with actual knowledge assists a trustee to violate the trustee's fiduciary duties is liable in damages to a beneficiary damaged by the violation. Restatement, Second, Trusts § 326. See, *e.g.*, Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989)(lawyer participated in pension plan trustee's purchase of overvalued property)(ERISA case); Weingarten v. Warren, 753 F. Supp. 491 (S.D.N.Y. 1990)(lawyer helped trustee convert trust assets); Benvenuto v. Schneider, 678 F. Supp. 51 (E.D.N.Y. 1988)(lawyer received grossly excessive fee)(ERISA case); Pierce v. Lyman, 3 Cal.

Rptr. 2d 236 (Cal. Ct. App. 1991)(lawyer helped trustees conceal risky investment from probate court). Courts disagree about whether a lawyer is also liable to beneficiaries for negligence. Restatement of the Law Governing Lawyers § 51(4) & Comment *h* (adopting compromise position) & Reporter's Note (citing conflicting authority).

In my opinion, the claims of lawyer misconduct that have been advanced in Master Richards' Report of May 18, 2000 (assuming them to be well-founded) are unlikely to warrant liability of trust lawyers to individuals, for four reasons. First, it is unclear (as noted above) whether the Trust has individual beneficiaries, and if it does just who they are. Allowing individuals to seek money damages from the Trust's lawyers could thus entangle the Trust in multiple lawsuits that would be more likely to impair than to protect its funds and administration. Second, no individual has suffered quantifiable damage. The Trust was instituted for the benefit of a huge class, each of whose members is entitled at most to be fairly considered for admission to the Schools, which no lawyer has denied them. Third, to the extent that lawyer misconduct may have occurred and may have depleted the Trust's assets, the present trustees, who were not involved in any such misconduct, are able to seek such relief on behalf of the trust as they consider appropriate. One ground for permitting beneficiaries to sue their fiduciary's lawyer–that this is needed to enforce the lawyer's duty to the fiduciary–is thus absent. Fourth, if trustees do act unlawfully, the Attorney General and perhaps others apparently can pursue the less intrusive remedy of seeking instructions from the court as interested persons within the meaning of Probate Rule 126(c). *Cf.* Richards v. Midkiff, 396 P.2d 49 (Haw. 1964)(considering the standing of a single trustee to bring a derivative suit for other trustees' alleged breach of trust).

(b) In some circumstances, a Hawaii lawyer for a trust is required by court rules to make disclosures to the trust beneficiaries or for their protection. Whether or not the beneficiaries themselves have a remedy for violations of these rules, the rules can undoubtedly be enforced through court sanctions. See Hawaii Probate Rule 42(d); Hawaii R. Prof. Cond. 8.4; Restatement of the Law Governing Lawyers § 105.

Three rules bear on this issue. Hawaii Probate Rule 42(b) requires an attorney for a trust to notify beneficiaries "of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets . . . or the interests of the beneficiaries." Rule 42(c), after requiring an attorney for a trust to "assist the court in securing the efficient and effective management of the estate" and "to monitor the status of the estate and to ensure that required actions such as accountings and closing a probate estate are performed timely," states that "The attorney, after prior notice to the fiduciary, shall have an obligation to bring to the attention of the court the nonfeasance of the fiduciary." Lastly, Hawaii R. Prof. Cond. 1.6 *requires* a lawyer to disclose information that "clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used" when reasonably necessary to rectify the act's consequences if the act caused substantial financial injury, and *allows* a lawyer to disclose if the lawyer "reasonably believes" that such a past act was criminal or fraudulent or to prevent the client from committing a future criminal or fraudulent act that the lawyer reasonably believes likely to cause financial injury.

These rules reflect a balancing of competing policies, and must be read with that in mind. On the one hand, the disclosure rules arise from the view that a lawyer's duties never include assisting unlawful acts even inadvertently, and that the law should give special protection--which lawyers are ideally suited to provide--to those whose interests have been entrusted to the care of fiduciaries. These concerns have cause a number of states to adopt disclosure provisions like those of Rule 1.6[1] and a much smaller number to adopt provisions with some resemblance to Rule 42. See Wash. Disc. R. Prof. Cond. 1.6(c)(lawyer may disclose to tribunal client's breach of fiduciary obligation); ACTEC Commentaries on Model Rules of Professional Conduct, rule 1.6 (1993); Rust E. Reid, *et al.*, Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Prop., Prob. & Trust J. 541, 567-76 (1996). On the other hand, some fear that allowing exceptions to a lawyer's duty to preserve a client's confidences could discourage clients from seeking legal advice or disclosing relevant facts when they do so, depriving their lawyers of the opportunity to explain legal requirements and encourage clients to comply with them. It is just such fears that underlie the traditional confidentiality principles binding lawyers.

Probate Rule 42(b) implements these competing policies by requiring lawyers for fiduciaries to notify beneficiaries of specified misconduct: "activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets . . . or the interests of the beneficiaries." The rule is limited to "illegal" conduct, which in my opinion does not include acts such as deciding that the trust's interests will be served by breaking a contract to which it is a party, or acts that are unwise but permitted by law. It does, I believe, include acts such as crime, fraud, intentional torts, and breaches of fiduciary duty such as converting trust assets or investing them improperly in a business in which a trustee has an interest. Because the activities must be "actually known by the attorney to be illegal," only clear violations are covered. The actual knowledge requirement also establishes that a fiduciary's lawyer is not normally required to investigate his or her client or to presume that client to be a wrongdoer. The words "actually known" are at least as strong as those in Hawaii R. Prof. Cond. 3.3(4)'s provision that a lawyer may not offer evidence the lawyer "knows to be false:" in both instances, the lawyer's duty is usually to be a client's advisor or advocate, not his judge. Finally, the rule only applies to illegal activities threatening the security of the assets or the interests of beneficiaries.

Probate Rule 42(c) has a narrower scope. Its requirement that a lawyer report to the court "the nonfeasance of the fiduciary" should be read in the light of the previous sentence stating the lawyer's duty to "monitor the status of the estate" and "ensure that required actions such as accountings and closing a probate estate are performed timely." The "nonfeasance" that a lawyer must report is failure to perform such "required actions"–that is, actions required in the "efficient and effective management" of the trust or estate, which are typically actions about

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[1] ABA Model Rules of Professional Conduct 1.6 allows less disclosure than its Hawaii equivalent, but most states have broadened it, albeit in varying ways. For a survey of these variations, see Restatement of the Law Governing Lawyers § 67, Reporter's Note.

which it should be clear to the lawyer whether or not they have been performed on time.[2]

Hawaii Rule of Professional Conduct 1.6(b), lastly, requires a lawyer to reveal "information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used" when the act has caused substantial injury that disclosure is reasonably necessary to rectify. The requirement that the information "clearly establishes" misconduct, like Rule 42(b)'s reference to what is "actually known" by the lawyer, indicates that the lawyer should ordinarily give the client the benefit of the doubt. If the lawyer "reasonably believes" that misconduct has occurred but that is not clearly established, another part of the rule, Rule 1.6(c)(2), states that the lawyer "may" in his discretion reveal information but is not required to do so. The misconduct in question must be "a criminal or fraudulent act." Although one could read "fraudulent" to include constructive fraud–a term of broad application in trust law–the Restatement rejects that reading, limiting fraud to conduct involving knowing or reckless misrepresentation. Restatement of the Law Governing Lawyers §§ 67, Comment *d* & 82, Comment *d*.

A lawyer who violates the rules I have been discussing is, I believe, liable to the client for any resulting damage. The rules themselves do not purport to impose such liability, and such rules are construed not to create causes of action. See In re Disciplinary Board, 984 P.2d 688 (Haw. 1999). But courts and expert witnesses do rely on professional rules to define the contours of the duty of care that lawyers owe their clients and that is enforceable by the client's suit for legal malpractice. Restatement of the Law Governing Lawyers § 52(2) & Comment *f* & Reporter's Note. Thus, for example, trustees suing a lawyer for the trust for having failed to protect its interests could, in appropriate circumstances, contend that a lawyer of reasonable diligence and ability would have taken action called for by the rules.

When the rules do require a lawyer to disclose client confidences, neither the lawyer's obligation of confidentiality nor the attorney-client privilege stands in the way. As to confidentiality: the same rule that sets forth the duty of confidentiality also provides that a lawyer may disclose client confidences "to comply with other law or court order." Hawaii R. Prof. Cond. 1.6(c)(6). As to the attorney-client privilege: the privilege governs what evidence is admissible in evidence in judicial proceedings, not what a lawyer may properly disclose. Communications that a rule requires a lawyer to disclose may or may not be admissible in evidence, depending on the applicability of several exceptions to the privilege not necessary to discuss here, but that has no bearing on the lawyer's obligation to disclose them.

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[2]It could be argued that the Stipulation Concerning Master's Recommendations (109th Annual Account); Order filed December 19, 1997 creates for the future a new required action by obliging the Trustees to report to the Court when they determine that certain events have occurred.

Question Four

When a lawyer represents an "institutional" or "entity" client and deals with a "representative" of that client (*e.g.*, house counsel for a corporation), what if any duty does the lawyer have to look behind the statements of the representative and question whether a request for services is in the interest of the real client? Is the answer different when the client is not a corporation but a public or private trust, a public charity, or another tax exempt organization?

The starting point for answering this as well as the following question is that, as you mention, in these situations the lawyer's client is the entity (in this case, the trustees in their fiduciary capacity) rather than the individuals involved in its administration. Even though the lawyer has been retained to represent the entity by one or more of those individuals, and even though he or she deals with those individuals, his or her duty is to protect the interests of the entity, if necessary at the expense of those of the individuals. Often, the two sets of interests converge; sometimes they do not.

But although the entity is the lawyer's client, entities can only decide and act through their human agents, and the law entrusts to some of those agents the power to act for the entity in certain circumstances. A corporation makes decisions through directors elected by its shareholders, and through officers appointed and controlled by the directors. Similarly, a trust makes decisions through trustees appointed by the trustor or the court, and through subordinates they appoint. It is the directors or trustees who have been named by those entitled to do so, and who have presumably been selected because they have the skills and character needed to run the entity. The entity's lawyer, by contrast, is not entitled to decide what the entity should do. The directors or trustees may choose to delegate some decisions to their lawyer, but they are not obliged to do so. Ordinarily, therefore, with exceptions I shall discuss, the lawyer is obliged to abide by the decisions of the directors or trustees or their delegates.

If the directors or trustees ask the lawyer for advice about how and whether they may follow a given course of action, the lawyer has virtually no duty (to the client or anyone else) to question whether the request for advice is really in the entity's interest. The purpose of asking for advice is to permit those in charge to make an informed judgment of what is in the entity's interest. Until the advice is prepared and given, no one can be sure what it will be. Even if the lawyer foresees at the outset that the course of action to be considered will turn out to be unlawful, those in charge are still entitled to an explanation of why and in what ways it is unlawful, so that they can proceed to consider alternative courses.

I can think of only two qualifications to this conclusion. First, it will sometimes be appropriate for the lawyer to discuss the request before fulfilling it, in order to be sure just what the requesters are or should be seeking. Second, one can imagine a request for advice that could in no way benefit the entity. Suppose, for example, that corporation A asks its lawyer for advice on the tax problems of corporation B, with which it has no present or proposed relationship, but whose major stockholder is also the CEO of A. Unless the lawyer receives an adequate explanation of why A wants this advice, it would be inappropriate to seek payment for it from A without notifying responsible officials of A about the problem.

If an entity's lawyer is asked to help the entity act, rather than just to advise it, the lawyer's situation may be more difficult. A lawyer who assists a client to perform an unlawful act may be subject to civil liability to injured third parties, or even to prosecution. Whether this is so may depend on the lawyer's knowledge and intent, and on the requirements of the particular tort or crime in question. See Restatement of the Law Governing Lawyers §§ 8, 56, 57, 98.

Even, however, if the entity's lawyer is responsible to third parties or the criminal law for having assisted an unlawful act, it does not follow that the lawyer has violated any duty to the entity itself. So long as the decision to proceed has been made by persons receiving proper advice from the lawyer or others and entitled to decide for the entity, the entity is bound by that decision and cannot complain that the lawyer has acted in obedience to the client's instructions. Restatement of the Law Governing Lawyers 21, Comment *d*; *cf.* United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994). Of course, the lawyer may be liable to the entity if he or she negligently misadvises its officers about the lawfulness of the act. Likewise, the lawyer may be liable to the client if the lawyer knows that the persons deciding that the entity should proceed were not entitled to do so, for example because corporate law or bylaws entrusted such a decision to someone else, or because it disqualified the persons in question from voting because of a conflict of interest. Arguably, the same result should follow if the lawyer did not know this but should have known it on the basis of facts known to the lawyer.

The scope of the lawyer's representation may influence whether an entity's lawyer is subject to liability to the entity under the reasoning of the previous paragraph. Suppose, for example, that a corporation's general counsel retains outside counsel to close a land acquisition that corporate officials have approved, without telling outside counsel why the corporation is acquiring the land. Outside counsel may then assume, in the absence of information to the contrary, that the officials were authorized to approve the purchase and received adequate advice before doing so. By contrast, suppose that a law firm acts as a corporation's general counsel, and that one of its partners regularly attends board of directors meetings. That partner would ordinarily be expected to notify the board should there be substantial grounds to believe that a proposed transaction discussed at a board meeting would be unlawful or that a board member was disqualified to vote on it, even though no one on the board specifically requested advice on that transaction.

Although what I have said is applicable to trusts just as it is to other legal entities, two additional considerations may affect lawyers for trusts. First, a trustee or trust lawyer may be subject to special duties such as the duties to disclose under Hawaii Probate Rule 42 discussed above. If such a duty applies to a proposed act of a trust, a lawyer advising the trustees whether to proceed would have to advise them about the trustee's duty, or (when the duty falls on the lawyer) perform the duty. Second, trustees are in certain ways more closely regulated by law than directors of a business corporation, for example with respect to how the trust or corporation may invest its assets. There will therefore be more circumstances in which a lawyer for the trust may be required to give legal advice or may come to know that trustees are acting beyond their authority than would be the case for a corporation's lawyer. Of course, this is only a difference of degree, and trustees typically enjoy a broad measure of discretion which is for them, not their lawyers, to exercise. I do not believe that, simply because they represent a trust, lawyers have a greater duty to inquire into the legality of their retention than would lawyers for a corporation. Section 7 of the Uniform Trustees' Powers Act (Hawaii Rev. Stat. § 554A-7) seems to cut squarely against any such claim.

Finally, I note that, even if a lawyer violates the principles I have been discussing, the lawyer may have a defense against liability to a client. Some but not all jurisdictions, for example, impute to a corporation its officer's knowledge of his own fraudulent activities, and therefore bar the corporation from suing its lawyers for failing to warn the corporation of the fraud. See, *e.g.*, O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994); George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Client Through Disclosure of Constituent Wrongdoing*, 11 Geo. J. Leg. Ethics 597, 627-32 (1998).

Question Five

> Under what circumstances do lawyers for a trust have a duty to urge the trustees to seek instruction from a probate or other supervising court in areas where the lawyer has some concerns about what he or she is being asked to do?

If the scope of a lawyer's representation of trustees includes advising them about such matters as requesting court instruction, the lawyer must of course give appropriate advice to the trustees when the law governing the trust requires such a request or when it might be in the best interests of the trust. A request would be required, for example, if a trust proposed to engage in the sort of transaction subjecting the trustee to a conflict of interest for which section 5 of the Uniform Trustees' Powers Act (Hawaii Rev. Stat. § 554A-5(b)) requires court authorization. A request might be in the best interests of the trust, for example, if the trustee proposed to engage the trust in a transaction that would be advantageous to the trust but there was a reasonable doubt of the trustee's power to do so. Whether advice about such matters falls within the scope of a given lawyer's representation depends on the circumstances; it would clearly do so if, for example, the lawyer acts as a general counsel, advising trustees on legal ramifications of proposed trust activities.

Even when a lawyer acts for a trustee in a more limited capacity, his or her general duty to inform clients about possible dangers they face might well require the lawyer to bring to the attention of trustees such options as seeking court instruction. One situation in which this may be the case is the lawyer's discovery that someone acting for the trust is seeking to advance its interests through acts that may well be unlawful and may therefore in the long run backfire against the trust. (Two examples from the corporate area would be apparent violations of the securities or antitrust laws.) Another would be the lawyer's discovery that an agent of the trust appears to be harming it, for example by converting trust assets.

Because the lawyer's client is the entity–here, the trustees of the Bishop Trust in their fiduciary capacity–a lawyer facing situations like this must seek to promote the interests of the entity, even if this may harm a trustee or trust employee. Hawaii R. Prof. Cond. 1.13 outlines a lawyer's duty in such situations. But the duty arises, not from that rule, but from the lawyer's obligation under common law to use lawful methods to promote a client's interests, and in particular to do so by transmitting appropriate information to the client. Thus, courts have held lawyers liable to corporate clients for failing to inform them of apparently fraudulent activities of corporate officers. Restatement of the Law Governing Lawyers § 43; 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 24.9 (4th ed. 1996).

The protection of a client's interests, which gives rise to a lawyer's duty to inform the client in situations such as I have described, likewise defines that duty's scope. In the words of Hawaii R. Prof. Cond. 1.13(b), "the lawyer shall proceed as is reasonably necessary in the best interest of the organization," taking into account such matters as the seriousness of the misconduct and its probable impact on the client. The lawyer may take "among others" such steps as asking the client's agent to reconsider, advising that the entity seek another legal opinion, and referring the matter to higher authority in the organization. In extreme situations, a lawyer may be entitled or obliged to withdraw from the representation in order to avoid assisting improper conduct. Hawaii R. Prof. Cond. 1.13(c), 1.16(a)(1) & (b)(1,2,3); Ronald E. Mallen & Jeffrey M. Smith, *supra*, at § 27.24.

Advising trustees to seek instruction from the court is one measure that a lawyer can take in such circumstances when that is in the trust's best interests. It is like advising a separate legal opinion in that it calls for an additional and disinterested judgment as to the legality of trust activities, a judgment that the trustees are very likely (or indeed compelled) to heed. It also has some resemblance to referring the matter to higher authority in the entity in that the appropriate court has, in appropriate circumstances, the power to direct or remove trustees. But seeking instruction from the court is not a panacea. Under the law of trust administration, the court will only answer certain questions. Restatement, Second, Trusts § 259. Seeking the court's instruction sometimes involves expenses, delays, and disclosures that may not be in the trust's best interests. Another method such as submitting a matter to the disinterested trustees may in some situations be better for the trust than petitioning the court. *Cf.* Richards v. Midkiff, 396 P.2d 49 (Haw. 1964)(trustees may decide to rely on counsel's opinion rather than bring suit to obtain court decision). The trust lawyer's duty is thus to advise the trustees to request instructions when, considering the circumstances, that will be in the trust's best interests.

Question Six

What duties does a lawyer have, if any, to advise in areas related to those on which advice has been sought?

The scope of the representation determines a lawyer's duty to advise. A lawyer can be retained as a general advisor, as in the instance already discussed of the partner who is expected to attend board of directors meetings in order to comment on whatever legal issues the partner perceives. Often, however, a lawyer's retainer is more limited: to handle a securities registration, to litigate an action, to convey title to land, to handle a client's dealings with a regulatory agency, and so forth. This is especially likely to be the case when, as now tends to occur with large organizational clients, the client has its own house counsel or house counsel's office, retaining outside counsel to conduct particular matters. Ultimately, although certain extreme constrictions of scope may be forbidden as unfair to the client, the scope of a representation depends on the contemplation of the parties, as evidenced by such material as correspondence and discussions at the time of the retainer, past practice, ongoing client instructions, and the nature of the matter in question. See Restatement of the Law Governing Lawyers §§ 16, Comment *c*, 19, Comment *c*.

Within the scope of a representation, a lawyer may well be obliged to offer advice although the client has not requested it. For example, even when a client who asks a lawyer to draw a will provides detailed instructions about his or her wishes, the lawyer would ordinarily be required to tell the client of tax problems such a will would create and to suggest possible ways to avoid those problems. Clients do not always know all the right questions to ask, and often retain lawyers precisely to be protected from dangers of which they are unaware. The lawyer would be dispensed from this requirement only if the client had made clear that tax advice was not desired, for example because the client had already obtained it elsewhere.

Ordinarily, a lawyer is not liable for failing to advise on matters beyond the scope of the representation. In one colorful case, for example, a law firm that gave an opinion that mortgage documents created a binding obligation was held not liable for failing to observe and report that a document prepared by another firm stated the amount of the mortgage as $92,885 rather than $92,885,000, with the result that the supposedly secured party suffered large losses. Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y. 1992); see Restatement of the Law Governing Lawyers, § 50, Comment *d* & Reporter's Note. If this principle were rejected, it would be necessary for a law firm or lawyer retained to handle one part of a matter to investigate and criticize the activities of all other participating counsel, duplicating the role of the client's general counsel, and making it more difficult and expensive for clients to retain specialized firms.

This principle, however, has two qualifications. First, to the extent that the scope of a representation has not been specified precisely, a lawyer may be obliged to advise or act within what the client reasonably believes to be the scope, even though the lawyer believes otherwise. It is normally the lawyer's obligation, as an expert entrusted with the protection of a client's interests, to clarify the scope of the retainer, although this obligation is reduced when the client is sophisticated, for example when the client has house counsel. If, for example, a lawyer retained to try a suit fails to agree with the client that his or her duties do not include advising on any appeal, the lawyer is likely to be held liable if the lawyer fails to advise an appeal and as a result the client loses a meritorious appeal. See Restatement of the Law Governing Lawyers §§ 14, Comment *e*, 18(2) & Comment *h* & Reporter's Note, § 38, Comment *b*.

Second, even a lawyer who specifies precisely what a representation will include, may be required to explain what it will *not* include when the client might not otherwise understand that the lawyer will not be protecting all the client's rights. That is the case, for example, when clients are unlikely to be aware of the existence or significance of what is excluded, or when the representation is limited in an unusual or potentially dangerous way. Thus, a workers compensation lawyer who agrees to file a compensation claim for an injured worker should advise the client, when that is the case, that there is a significant possibility that the worker can recover not only workers compensation benefits but also personal injury damages by bringing a lawsuit, and that this will require finding another lawyer to bring the suit before the statute of limitations expires. 3 Ronald E. Mallen & Jeffrey M. Smith, *supra*, at § 22.27.

Question Seven

> Under what circumstances or rationales are clients permitted to request or require lawyers to disgorge or refund fees already paid? What conduct on the part of a lawyer triggers an obligation to refund or disgorge? For example, if a lawyer's work presents a conflict between the interests of the trust and the interests of the individual trustees, does this give rise to a claim for disgorgement?

This question addresses two bodies of law. One deals with when a client can recover (or need not pay) a lawyer's fee to the extent the fee was unreasonably large, the other with when the lawyer's misconduct forfeits the right to compensation. I will consider each in turn.

(a) Courts have long sought to protect clients from unreasonably large lawyer fees, both by limiting the lawyer's right to sue for a fee under a contract and by allowing clients to sue to recover fees already paid. Restatement of the Law Governing Lawyers §§ 34, 42. Excessively large fees may also expose a lawyer to discipline under Hawaii R. Prof. Cond. 1.5. In Hawaii, a statute applicable to both lawyers and others employed by a trustee authorizes the court to review the propriety of their employment and the reasonableness of their compensation and states that "Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds." Hawaii Rev. Stat. § 560:7-205. Hawaii Probate R. 40(b) contains a similar provision.

Because there is apparently no reported Hawaii authority on either this statute or the common law principles governing unreasonable fees, it is hard to say whether the courts would find any relevant differences in their application. In some jurisdictions, courts have held that a client's knowing payment of a lawyer's bill (at least when the bill is accurate and sufficiently detailed) bars the client from later suing for a refund. Restatement of the Law Governing Lawyers § 18(1)(b) & Comment *f* & Reporter's Note. Presumably, no such defense would be allowed under the Hawaii statute. The statute also provides for adjudication of a fee's reasonableness by "the court," while in some but not all jurisdictions fee refund suits are decided by juries. Restatement of the Law Governing Lawyers § 42, Comment *b* & Reporter's Note.

The typical claim for a refund is that a lawyer's fee was unreasonably high for such reasons as the lawyer's charging by the hour for unnecessary or inefficiently performed work, charging more than the client-lawyer contract provided, contracting for a contingent fee for an excessive percentage or where there was no risk of nonrecovery, or seeking a fee larger than permitted by an applicable statute. Restatement of the Law Governing Lawyers § 34 & Reporter's Note. The general standards for fees set forth in Hawaii Probate Rule 40(a) and Hawaii R. Prof. Cond. 1.5(a) would no doubt be considered in deciding when a fee becomes unreasonable. See also Trask v. Kam, 352 P.2d 320 (Haw. 1959)(standards for attorney fee in the absence of contract). The court might well reject authorities upholding large fees when sophisticated clients knowingly contracted to pay them (*e.g.*, Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210 (3d Cir. 1999); Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir.), cert. denied, 444 U.S. 981 (1979)), concluding that the relevant authorities are those calling on courts to exert their power to protect the beneficiaries of fiduciaries who retain lawyers. See In re Estate of Gilman, 446 N.Y.S.2d 975 (Surr. Ct. 1981); Charles W. Wolfram, Modern Legal Ethics 498 (1986).

At least one precedent known to me supports the reduction or refund of fees that are unreasonable in the sense that they are paid for lawyers' services that clearly ought never to have been rendered. Newman v. Silver, 553 F. Supp. 485 (S.D.N.Y. 1982), aff'd and rev'd, 713 F.2d 14 (2d Cir. 1983)(relying, among other factors, on the fact that the lawyer charged for making improper overtures to a judge). Because "the amount involved and the results obtained" are relevant to the reasonableness of a lawyer's fees (Hawaii R. Prof. Cond. 1.5(a)(4)), one can argue that a fee may be unreasonable if it is for services that promised no benefit to the client and did not in fact produce any. *Cf.* Restatement of the Law Governing Lawyers § 39, Comment *b(ii)* (when lawyer who had no fee contract seeks the fair value of services, market price may be excessive if paying that price would have been foolish for one in the client's circumstances).

In my opinion, however, such a reduction or refund is appropriate only when the lawyer's services were manifestly inappropriate or when the lawyer violated an obligation to inform the client of considerations indicating that the services should not be rendered. (See the discussion of Question Four above.) Ultimately, it is for the client, not the lawyer, to decide what legal services the client should receive. Like other clients, trustees have broad powers to decide what legal advice they wish to receive and what activities they wish lawyers for the trust to undertake. If trustees spend trust assets in ways that violate their fiduciary duties, they can be removed from office and required to reimburse the trust. Requiring trust lawyers to refund their fees, absent the circumstances I have described, would make it harder for trustees to obtain competent counsel even for appropriate activities, and would induce lawyers to insist on conducting elaborate investigations–for which the trust would ultimately pay–before accepting employment.

(b) A lawyer who seriously breaches professional duties to a client may be unable to recover compensation and may be required to repay compensation already received. One way of putting this is to say that a misbehaving lawyer forfeits the right to compensation. Another is to regard forfeiture as a sanction that the courts impose in order to deter lawyer misconduct.

Although no United States jurisdiction known to me rejects the doctrine of attorney fee forfeiture, jurisdictions and precedents vary widely in their application of the doctrine. Some cases regard certain misbehavior–for example, performing services in a state in which the lawyer is not admitted to practice–as automatically forfeiting all compensation. Others treat the doctrine more flexibly. Some cases emphasize the seriousness of the violation, or its impact on the client, or the lawyer's good or bad faith, while others do not. Some forfeit all of the lawyer's fees, others allow the lawyer to recover compensation for severable services not tainted by misconduct, and still others grant courts discretion to decide how large a forfeiture will be an appropriate sanction in the circumstances. See Burrow v. Arce, 997 S.W.2d 229 (1998)(citing cases, and adopting the Restatement's more discretionary approach); Restatement of the Law Governing Lawyers §§ 37, 40, and their respective Reporter's Notes. I know of no Hawaii authority on these issues. See City Council v. Sakai, 570 P.2d 565 (Haw. 1977)(denying forfeiture because lawyer's behavior was not improper).

Forfeiture requires a stronger showing of misconduct than the charging of an unreasonably large fee, because it brings more stringent consequences: the penalized lawyer is denied even reasonable payment for services the lawyer in fact performed at the client's request and for the client's benefit. Among the misbehavior for which forfeiture has been imposed one can find such acts as coercing or misleading a client, failing to return important documents after the representation, and conducting a client's case despite a conflict of interest.

Some imaginable views of the facts alleged in this case suggest two possible theories of forfeiture. First, a lawyer who accepts employment and payment from a trust for services that plainly do not benefit the trust but are solely for the personal benefit of one or more trustees could be considered to be assisting in the conversion of trust assets, which could be considered misconduct serious enough to warrant forfeiture. I have already explained why lawyers retained by trustees may normally assume that the trustees acted within their powers. In my view, forfeiture would be appropriate only if facts known to the lawyers in question made it clear that the services they were retained to perform would benefit trustees personally but could not be expected by any reasonable person to confer any benefit on the trust warranting their cost.

Second, lawyers who represent simultaneously a trust (that is, the trustees in their fiduciary capacity) and trustees in their personal capacity can be involved in a conflict of interest if the two groups of clients have interests inconsistent with each other, and this may warrant forfeiture. See Crawford & Lewis v. Boatmen's Trust Co., 1 S.W.3d 417 (1999). In *Crawford & Lewis*, forfeiture was imposed on lawyers who helped a trustee (against the other trustee's opposition) buy property in his own name with trust assets and later sell it for his own benefit. There, the lawyers not only pursued the trustee's personal interest in plain breach of his duties as a trustee, but clearly acted as his lawyers by representing him at the closing at which he took title. In this case, by contrast, one would have to argue that lawyers who purported to be representing only the trust (that is, the trustees in their fiduciary capacity) should also be treated as representing the trustees personally simply because the latter were (it would be argued) the ones benefitting from the lawyers' service, thus giving rise to a conflict of interest. As with the previous theory, that would seem to require a showing that the lawyers' services helped only the trustees personally and not the trust, to the extent that the lawyers should have recognized that they were representing the trustees personally. And one could still question whether, if the lawyers are indeed treated as representing the trustees personally, they should also be considered to have represented the trust, and whether the trust (that is, the trustees in their fiduciary capacity) gave informed consent to that representation.

Question Eight

Do the standards set forth in the Rules of Professional Conduct apply to claims that arise from the activities of lawyers practicing in accounting firms and providing tax advice to the Bishop Trust?

An accounting firm is liable for negligence to its customers, whether its services are provided by accountants, lawyers, or others. *E.g.*, Constance Frisby Fain, *Accountant Liability*, 21 Ohio N.U.L. Rev. 355 (1994). Most claims against such firms arise from inaccuracies in financial statements that an accounting firm has audited, and involve allegations that the firm failed to use appropriate diligence in checking figures provided by the customer, or approved statements violating generally accepted accounting standards. But an accounting firm is also liable for negligent tax advice. Bancroft v. Indemnity Ins. Co., 203 F. Supp. 49 (D. La.), aff'd, 309 F.2d 959 (5th Cir. 1962)(rejecting defense that accountant was not liable because not a lawyer); Annot., *Accountant's Malpractice Liability to Client*, 92 A.L.R.3d 396. In some situations, the applicable standard might be that of the tax lawyer of ordinary competence, for example if the firm represented that lawyers were performing or checking the work, or if the work was of the sort requiring legal skill and ordinarily performed by tax lawyers. See Restatement, Second, Torts § 299A, Comment *d*; Restatement of the Law Governing Lawyers §§ 48, Comment *e* & Reporter's Note, 52, Comments *b-d* & Reporter's Note; *cf.* Bolkiah v. KPMG, [1999] 1 All E.R. 517 (H.L. 1998)(Eng.)(applying solicitor conflict of interest precedent to accounting firm providing litigation services); Restatement, Second, Agency § 379(1)(agent must use whatever skills he possesses). I do not know that this standard of competence would differ significantly from that applicable in any event to accountants, who must provide "the skill and knowledge normally possessed by members of that profession or trade in good standing". Restatement, Second, Torts § 299A.[3]

Once one gets beyond the standard of competence and diligence, there are indeed differences between the professional rules of lawyers and accountants. Lawyers, for example, have more stringent conflict of interest rules than accountants, while accountants (at least those performing the audit function) are subject to rules requiring public disclosure of certain frauds. See Report of the N.Y.S. Bar Ass'n Special Committee on the Law Governing Firm Structure and Operation, Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers 309-24 (2000). Although, as already explained, a violation of a lawyer professional rule is not automatically actionable, courts do rely on the rules in delineating the duties lawyers owe clients. Restatement of the Law Governing Lawyers § 52(2) & Comment *f* & Reporter's Note. Obviously, one must compare separately each lawyer rule that might be involved in a case to its accountant equivalent to determine whether they differ.

Whether a lawyer rule governing the practice of law applies to a lawyer working for an accounting firm depends in general on the answers to two questions. First, is a lawyer engaging in the practice of law when he or she performs services often performed by lawyers but also lawfully performed by accountants or others? Federal law authorizes accountants to provide certain tax services, see 5 U.S.C. § 500(c), and some other activities are open to both lawyers and nonlawyers. Charles W. Wolfram, Modern Legal Ethics 834-44 (1986). My own view is that, at least when lawyers often perform a service and a client is aware that a member of the bar is performing it, the member should be subject to the rules governing the practice of law, at least absent the client's informed consent. (Of course, if a lawyer employed by an accounting firm were to perform services that only a lawyer may lawfully provide, it would be clear that the lawyer was practicing law.) Second, if the lawyer working for an accounting firm is practicing law, is the lawyer's client the accounting firm or that firm's customer? The accounting firms claim that their United States lawyers act as house counsel, helping the firm to perfect its "products" just as a General Motors house lawyer might advise General Motors about its products' compliance with automobile safety laws: in each case, any benefit received by the outside customers is merely incidental. Under this argument, for example, the lawyer and firm would not violate the lawyer conflict of interest rules even if the accounting firm provided services to each of two customers in relation to a dispute between them, because neither customer would be a client of the lawyer. In my view, this argument fails when the accounting firm's lawyer deals directly with the firm's customer or helps adapt a "product" to the needs of a particular customer.

Although I have just stated my own views, the important point is that both of the

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[3]On the liability of lawyers for negligent tax advice, see 3 Ronald E. Mallen & Jeffrey M. Smith, *supra*, at § 22.26.

questions described in the previous paragraph are fiercely contested, and that virtually no authority addresses them. Accounting firms have resisted the applicability of lawyer rules to their lawyer employees, not just because they consider some of those rules inappropriate for them, but because the rules flatly forbid a lawyer to practice (except as house counsel) as an employee of an enterprise in which nonlawyers have any control. Hawaii R. Prof. Cond. 5.4. Any accounting firm defendant can therefore be expected to mount a vigorous defense against any claim that one of its lawyer employees was subject to any lawyer rule. Many members of the bar strongly favor applying professional rules to such lawyer employees, whether in order to maintain professional standards among all members of the bar, or to discourage the provision by large accounting firms of services traditionally provided by lawyers. Eventually, the issues will be resolved or compromised. In the meantime, it is impossible to predict whether any given lawyer rule would be held applicable in an action brought by the Bishop Trust against an accounting firm.

Sincerely,

John Leubsdorf
Professor of Law