PART IV: APPLICABLE LEGAL STANDARDS

I. INTRODUCTION

To ensure that we applied the proper legal standards in reaching the conclusions set forth in this Report, we retained the services of Professor John Langbein of Yale Law School and Professor John Leubsdorf of Rutgers Law School. Professor Langbein is a nationally recognized expert on trust law and trust administration. Professor Leubsdorf is a nationally recognized expert on legal malpractice and professional responsibility issues, and served as Associate Reporter for the Restatement of The Law Governing Lawyers. We met separately with Professors Langbein and Leubsdorf to discuss the legal principles applicable to the activities under review. Thereafter, we requested and received written reports from each of these professors discussing the legal standards applicable to our review. Copies of these reports are attached as Appendices A and B, respectively. In addition, we have conducted our own legal research and analysis of the applicable rules. Finally, to confirm that we applied correctly the appropriate legal standards in reaching our conclusions, we provided a draft of this Report to Professors Langbein and Leubsdorf for their review and comment. Copies of the letters received from each of these professors following their review of this Report are attached as Appendices C and D, respectively.[20]

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[20] This discussion of applicable legal standards focuses exclusively on those standards applicable to attorneys engaged in the practice of law. The standards set out in this section are applicable to all providers here under review. The case of PWC, however, raises the issue of what standards apply to lawyers working for an accounting firm. In the case of such "tax practitioners," an additional set of standards applies. Because PWC is the only Provider to which this other set of standards applies, we have deferred our discussion of these standards to Part V of this Report, in the section analyzing the work that PWC provided to KS during the Review Period.

II. IDENTIFICATION OF THE CLIENT AND RELATED ISSUES

The Providers represented the five KS Trustees as a collective body. A trust is not a recognized entity under the law. *See* Langbein Opinion Letter at 2 (Sept. 5, 2000) (hereinafter Langbein) (Appendix A). Instead, a trust "is a relationship of obligation imposed upon the trustee for the benefit of the beneficiaries in accordance with the settlor's intent." *See id.* Trustees act on a trust's behalf. Trustees, in their official capacity as trustees, are therefore empowered to employ outside counsel and other service providers. By the same token, outside counsel and other providers servicing a trust have as a client the trustees, in their collective and representative capacity as trustees.

The Hawaii Probate Rules confirm this analysis. Rule 42(a) states that an "attorney employed by a fiduciary for an estate . . . or trust represents the fiduciary as client . . . and shall have all the rights, privileges, and obligations of the attorney-client relationship with the fiduciary insofar as the fiduciary is acting in a fiduciary role for the benefit of one or more beneficiaries." Haw. Probate R. 42(a). Rule 42(b) gives the negative corollary: "An attorney for an estate . . . or trust does not have an attorney-client relationship with the beneficiaries." *Id.* at 42(b).

KS has five Trustees, who act as a collective body. Under the terms of the Will, a majority vote of three Trustees constitutes a Trust Estate decision, and, therefore, binds the Trust Estate. Indeed, in interpreting the Will, the Hawaii Supreme Court has already stated both that "multiple trustees can only act as a unit" and that "[w]hen a majority of the trustees act it is the act of all as a 'collective trustee.'" *Richards v. Midkiff*, 48 Haw. 32, 40-41, 396 P.2d 49, 55 (1964). A group of three Trustees can, therefore, vote to retain outside counsel, and can similarly vote on what the scope of representation will be. A vote of three Trustees can determine what actions the Trust Estate will take. Dissenting Trustees are obligated to seek judicial relief if they feel that the majority has breached its duty to the Trust Estate. *See* Langbein at 4.

Generally speaking, attorneys are not obligated to question trustee decisions; outside counsel may assume that trustee decisions are proper, unless counsel knows them to be illegal, they are based on counsel's own negligent advice, or they are completely adverse to the Trust Estate's interest and lacking any legitimate justification. *See* Leubsdorf Opinion Letter (Sept. 26, 2000) at 7-8 (hereinafter Leubsdorf) (Appendix B). Attorneys are similarly not obligated to second-guess the Trustees' request for legal advice. *See* Langbein at 13. Indeed, Professor Leubsdorf explains this principle as follows:

> If . . . 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 [trust's] interest. The purpose for asking for advice is to permit those in charge to make an informed judgment of what is in the [trust'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.

Leubsdorf at 7. Here, as elsewhere, attorneys representing a charitable trust such as KS are governed by the same legal standards as an attorney representing any other client. The only caveat here is that a lawyer cannot give legal advice when the work requested can in no way benefit the trust. *See id.* at 7-8. Hawaii law confirms this result:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers the trustee purports to exercise.

Haw. Rev. Stat. § 554A-7 (2000). We disagree with the pervasive theme throughout the Richards Report that suggests lawyers for a trust have a general obligation to question the propriety of trustee decisions and requests for legal advice. Indeed, if an expenditure is later found to further a trustee's personal interests, that expenditure is surchargeable to the trustee. Such a finding does not, however, call into question an attorney's undertaking the representation in the first instance at the Trust Estate's expense. *See* Langbein at 4-7.

III. DUTIES OF DISCLOSURE, AND OTHER PROVISIONS REGULATING ATTORNEY CONDUCT

A. Duties of Disclosure

1. Hawaii Probate Rules

There are a number of applicable provisions that address an attorney's duty to disclose wrongdoing by the client—here, the KS Trustees. The Probate Rules state that, although an attorney for a trust has an attorney-client relationship only with the fiduciary and not the beneficiaries, the attorney "shall owe a duty to notify such beneficiaries . . . of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets under administration or the interests of the beneficiaries." Haw. Probate R. 42(b). Rule 42(b), in short, requires attorneys for a trust to disclose to the beneficiaries trustee conduct that the lawyer actually knows to be illegal.

The disclosure requirement in Probate Rule 42(b) applies only to "illegal" conduct. Professors Leubsdorf and Langbein read this limitation as meaning that the provision requires disclosure of trustee conduct known to the attorney only when such conduct is "patently wrongful." Langbein at 9; *see also* Leubsdorf at 5. Professor Leubsdorf does not view the provision as encompassing "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."

Professors Leubsdorf and Langbein agree with this reading of Rule 42(c). *See* Leubsdorf at 5-6; Langbein at 10. The "'nonfeasance' that a lawyer must report [under Rule 42(c)] is failure to perform . . . actions required in the 'efficient and effective management' of the trust or estate." Leubsdorf at 5. Rule 42(c) thus "provides slender support for the suggestion that it requires a trustee's attorney to . . . report to the court arguable weaknesses in the trustee's position in fiduciary matters." Langbein at 10.

Carroll Taylor, a Honolulu attorney who served on the Committee that drafted Rule 42(c), has informed us that he believes the rule should be interpreted more expansively. Taylor contends that "nonfeasance" includes nonfeasance in all aspects of the fiduciary's duties to an estate and is not limited to trust administration. Thus, he believes that attorneys must report fiduciary conduct that has not risen to the level of illegality. Even under Taylor's more expansive reading of Rule 42(c), he would, however, limit its application to disclosure of situations in which the Trustees were obligated to take affirmative action to avoid a breach of their fiduciary duties, or in which the Trustees had disregarded sound advice that taking certain actions would breach their fiduciary duties. Moreover, we note that in reviewing documents from the Ashford & Wriston firm, we found a memorandum written on December 15, 1997 in which Ronda Kent, a lawyer at the Ashford & Wriston firm, set forth her discussions with Carroll Taylor. In those discussions, Taylor stated that Rule 42(c) was to be read narrowly, consistent with our reading noted above.

2. Rules of Professional Conduct

The Rules of Professional Conduct also contain provisions that discuss an attorney's duty to disclose a client's wrongful conduct. The Rules of Professional Conduct help define the standard of care, but do not themselves establish a cause of action. *See Delmonte v. State Farm Fire & Cas. Co.*, 90 Haw. 39, 54 n.12, 975 P.2d 1159, 1174 n.12 (1999). A violation of the rules therefore can help support a finding that the attorney violated the applicable standard of care, making the attorney liable in a malpractice action. *See Finley v. Home Ins. Co.*, 90 Haw. 25, 35, 975 P.2d 1145, 1155 (1998). In short, a violation of the Rules of Professional Conduct is contrary to the "degree of care, skill, [and] diligence" practiced "and exercised by a reasonable, careful and prudent lawyer in the practice of law." *See id.* at 1155-56.

The Rules of Professional Conduct mandate that an attorney disclose a client's criminal or fraudulent conduct "in the furtherance of which the lawyer's services [were] used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another." Haw. R. of Prof'l Conduct 1.6(b) (hereinafter HRPC). On the other hand, a lawyer is not required to, but may, disclose a client's wrongful conduct, to the extent necessary "(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another; [or] (2) to rectify the consequences of a client's act which the lawyer reasonably believes to have been criminal or fraudulent and in the furtherance of which the lawyer's services [were] used." HRPC 1.6(c). The District of Columbia Rules of Professional Conduct, by contrast, permit, but in no case require, disclosure when criminal conduct is at issue, or to "prevent the bribery or intimidation of . . . persons who are involved in proceedings before a tribunal." *See* D.C. R. of Prof'l Conduct 1.6 (c)(2) (hereinafter D.C. Rule(s)).[21]

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[21] The Hawaii Rules of Professional Conduct apply to those providers under review who practiced law in the State of Hawaii—namely, Ashford & Wriston, the Cades, McCorriston, and Pitluck firms, and some members of Verner Liipfert. The other providers here under review—PWC and some members of Verner Liipfert—practiced for the most part in the District of Columbia, and, therefore, are subject to the D.C. Rules of Professional Conduct where appropriate.

In addition to providing competent representation and keeping the client adequately educated and informed about a matter, a lawyer must not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." HRPC 1.2(d); D.C. Rule 1.2(e). The commentary to Rule 1.2 further states that the provision requires a lawyer "to give an honest opinion about the actual consequences that appear likely to result from a client's conduct." HRPC 1.2, cmt. 6; D.C. Rule 1.2, cmt. 6.

A comment to Rule 1.2 also provides: "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary." HRPC 1.2, cmt. 8; D.C. Rule 1.2, cmt. 8. In the case of an attorney representing KS, this comment must be read together with the commentary to Probate Rule 42(b), which states that an attorney for an estate or trust "has a duty to the beneficiaries to inform them of any serious and clear malfeasance of the fiduciary, which the attorney knows to be illegal."

2. Rules Governing the Lawyer's Duty as an Advisor

The Rules of Professional Conduct set forth a lawyer's duty as an advisor. Rule 2.1 provides that "a lawyer shall exercise independent professional judgment and render candid advice." HRPC 2.1; D.C. Rule 2.1. The commentary to Rule 2.1 explains that a "client is entitled to straightforward advice expressing the lawyer's honest assessment," and that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." HRPC 2.1, cmt. 1; D.C. Rule 2.1, cmt. 1.

In general, lawyers are not required to give advice unless asked to do so by the client. Attorneys can, however, be held liable for failing to advise the client on matters within the scope of representation. The Rules of Professional Conduct address the failure to advise, stating:

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that the client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the

client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.

HRPC 2.1, cmt. 5; D.C. Rule 2.1, cmt. 5.

3. Conflict of Interest Standards

The Rules of Professional Conduct set forth standards governing conflicts of interest. A lawyer is prevented from representing a client when that representation "will be directly adverse to another client." HRPC 1.7(a); D.C. Rule 1.7(a) & (b). The Rules of Professional Conduct further state that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." HRPC 1.7(b); D.C. Rule 1.7(b).[22] The commentary explains that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." HRPC 1.7, cmt. 6.

4. A Lawyer's Duty of Candor Toward the Court and Third Persons

The Rules of Professional Conduct also govern a lawyer's conduct towards courts and third persons. A lawyer owes a duty of candor towards the court. *See* HRPC 3.3; D.C. Rule 3.3. Indeed, a "lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . or (4) offer evidence that the lawyer knows to be false." HRPC 3.3(a); D.C. Rule 3.3(a). The terminology section of both the Hawaii and District of Columbia Codes define "knowingly" as requiring "actual knowledge," which may be inferred from the circumstances. The commentary to Rule 3.3 further specifies that "an assertion purporting to be on the lawyer's own knowledge . . . may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." HRPC 3.3, cmt. 2; D.C. Rule

[22] The Rules of Professional Conduct do make an exception, however, for instances in which the client gives informed consent to such representation.

3.3, cmt. 2. Courts apply an objective reasonableness standard to determine whether the lawyer believed the representations were true. *See, e.g., Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 604 (Pa. 1999).

In addition to owing a duty of candor towards the tribunal, lawyers owe a duty of honesty in their statements to third persons generally. *See* HRPC 4.1(a); D.C. Rule 4.1(a). The provision states: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." HRPC 4.1; D.C. Rule 4.1. This duty of truthfulness precludes misrepresentations by lawyers. *See* HRPC 4.1, cmt. 1; D.C. Rule 4.1, cmt. 1. Again, the term "knowingly" requires "actual knowledge," which may be inferred from the circumstances.

The ethical rules furthermore provide that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." HRPC 8.4(c); D.C. Rule 8.4(c). The rules define fraud as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to appraise another of relevant information." Terminology Sections of HRPC & D.C. Rules. A prima facie case of a violation of Rule 8.4 (c) is made "where the record establishes that the misrepresentation was knowingly made, or made with reckless ignorance of the truth or falsity of the representation." *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 604 (Pa. 1999).[23]

Courts have been willing to penalize attorneys for lack of candor both toward the court and toward third parties. Most of these cases involve an attorney lying to a court or other decision making body, or making representations wholly unsupported by the evidence. *See, e.g., Myers v. Colgate-Palmolive Co.*, 173 F.R.D. 296 (1997), *aff'd and dismissed on other grounds*,

[23] In addition to the ethical rules, a lawyer can be subject to civil liability under the general law of fraud.

102 F. Supp. 1208 (D. Kan. 2000) (counsel for plaintiff violated Rule 3.3(a) by filing meet-and-confer certificate in support of motion to compel discovery where no such meeting took place); *In re Ault*, 728 N.E.2d 869, 874-75 (Ind. 2000) (pleading that partnership had contacts in Indiana sufficient to confer jurisdiction on court without any evidence at all to support that contention violated Rule 3.3, and, along with other unethical conduct, warranted a 90 day suspension); *In re Fletcher*, 694 N.E.2d 1143 (Ind. 1998) (attorney violated Rules 3.3 and 8.4(c) by stating to the judge that he had not met with his client on the night in question, but had only spoken with him by phone, when, in fact, the attorney had met with the client briefly). The line between misrepresentation and putting an appropriate "spin" on the facts in order to paint a favorable picture, however, is not well defined.

IV. STANDARDS FOR ASSERTING A PROFESSIONAL LIABILITY/LEGAL MALPRACTICE CLAIM

A. Elements of a Professional Liability Claim

A legal malpractice claim is one genre of negligence law. A plaintiff bringing such an action therefore must prove the basic elements of duty, breach, causation, and damages. *See Delmonte*, 975 P.2d at 1174 n.12 (1999); *First Interstate Bank v. Murphy, Weir & Butler, P.C.*, 210 F.3d 983, 986 (9th Cir. 2000), *aff'g*, 1998 U.S. Dist. LEXIS 18609 (N.D. Cal. Nov. 24, 1998). More specifically, a plaintiff must prove: "(1) [t]here was a relationship of attorney and client; (2) [d]uring that relationship, the attorney was negligent in giving advice or in failing to give advice; (3) [t]he client relied upon the advice to his detriment; and (4) [t]he loss was a proximate result of the client's reliance on the advice." Mallen, Ronald E. & Victor B. Levit, Legal Malpractice § 434 (2d. ed. 1981). All four elements must be satisfied for a plaintiff to succeed on a legal malpractice claim. The most important element for purposes of this review is the breach element, as this provides the basis for a legal claim.

B. Standard of Care—Breach Element

To establish an attorney's breach of duty, it is necessary to establish the relevant standard of care and a violation of that standard. The standard of care looks to whether the attorney exercised the "same degree of care, skill and diligence that other attorneys" would exercise in similar circumstances. *Simonson Props., Inc. v. Conway*, 1993 Conn. Super. LEXIS 1539, at *11-12 (Conn. Super. Ct. June 4, 1993). In other words, the "correct standard to which the [attorney] is held in the performance of his professional services is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law." *Cook, Flanagan & Berst v. Clausing*, 438 P.2d 865, 867 (Wash. 1968).

1. Advice

Rule 2.1 of the Rules of Professional Conduct provides that "a lawyer shall exercise independent professional judgment and render candid advice." HRPC 2.1; D.C. Rule 2.1. The commentary to Rule 2.1 explains that a "client is entitled to straightforward advice expressing the lawyer's honest assessment," and that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." HRPC 2.1, cmt. 1; D.C. Rule 2.1, cmt. 1. In giving legal advice, attorneys are required to exercise the "degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer." *Clausing*, 438 P.2d at 867. Attorneys are not held liable for mere errors in judgment, as long as the necessary degree of care, skill, prudence, and diligence is exercised. *See id.*

2. Failure to Advise

In addition to being charged with giving improper advice, an attorney can be found to violate the standard of care by failing to give advice when advice is necessary. An attorney advising a client on a particular matter has a duty to advise the client of facts and legal consequences material to the matter. Failing to give such advice constitutes professional negligence, and, accordingly, can form the basis for attorney liability.

The Rules of Professional Conduct address the failure to advise, stating:

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that the client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.

HRPC 2.1, cmt. 5; DC Rule 2.1, cmt. 5. The courts have also addressed this issue of under what circumstances an attorney can be held liable for failing to advise a client. These courts routinely hold that attorneys can be held liable in malpractice for not advising clients of facts and legal consequences pertinent to the representation. *See, e.g., FDIC v. Mmahat*, 907 F.2d 546, 554 (5th Cir. 1990) (finding the failure to advise the client of existing and applicable regulations to be a "discrete [act] of malpractice"); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & McRae*, 243 A.D.2d 168, 174-76 (N.Y. App. Div. 1998); *Williams v. Ely*, 668 N.E.2d 799, 806 (Mass. 1996) ("If . . . attorneys in the estate planning and tax field would have advised clients of the risk, the failure of [the attorney] to advise the plaintiffs of the risk was negligent."). Indeed, an attorney should "volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered." *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1684 (Cal. Ct. App. 1993).

The duty to advise is generally limited to matters falling within the scope of representation. *See* Leubsdorf at 11. In some instances, however, the attorney "may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of representation . . . . [T]he attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel." *Nichols*, 15 Cal. App. 4th at 1684. In short, the attorney has a duty to inform the client "of all material facts affecting [the client's] interest in the transaction" for which the attorney is representing the client. *Continental Cas. Co. v. Grossmann*, 648 N.E.2d 175, 178 (Ill. App. Ct. 1995).

V. STANDARDS FOR ASSERTING A CLAIM FOR DISGORGEMENT

A. Disgorgement as a Remedy

Disgorgement is a remedy whereby the attorney is required to pay back the fees a client has paid to him or her. Such a remedy is ordered when the fees are excessive, unearned, or where the attorney engages in a conflict of interest or breach of fiduciary duty in earning the fee. Disgorgement of fees "presupposes that a lawyer's clear and serious violation of a duty to the client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation." Restatement (Third) of the Law Governing Lawyers § 37, cmt. b (2000). Disgorgement of fees serves a variety of purposes: deterring attorney misconduct; preventing unjust enrichment by reimbursing plaintiffs for a lower value of representation than what was paid for; and preventing attorneys from profiting from breaches of loyalty. *See Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996).

B. Disgorgement is Appropriate Only in Limited Circumstances

Disgorgement may be ordered when fees are excessive, are for work that should not have been undertaken, or provided no benefit to the client. The attorney's work must, however, be considered in light of the principle that "it is for the client, not the lawyer, to decide what legal services the client should receive." Leubsdorf at 13. More typically, however, disgorgement is ordered when the lawyer has engaged in a clear and serious violation of the standard of care, an ethical obligation, or duties to the client. There are, in short, two scenarios in which courts order disgorgement of fees. Under the first, the lawyer's fees are unreasonable or excessive; in this case, that portion of the fee that was unreasonable or excessive is refunded to the client. Under the second scenario, disgorgement can be ordered where a lawyer receives fees for engaging in misconduct; in this situation, the lawyer must forfeit fees paid to him or her that relate to the misconduct. Hawaii state statutory law, the American Law Institute Restatement of the Law Governing Lawyers (the "ALI Restatement"), and case law all provide a basis for possible disgorgement claims.

C. Standards for Seeking Disgorgement

Hawaii's statutory code provides for the disgorgement of fees by lawyers and other outside providers employed by trustees on a trust's behalf. This provision addresses the situation in which a lawyer charges unreasonable or excessive fees:

> On petition of an interested person, after notice to all interested persons, the court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed . . . Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

Haw. Rev. Stat. § 560:7-205 (2000). Probate Rule 40(b) contains a similar provision, stating that fees paid are "subject to repayment if any interested person objects and if the court finds them excessive." Haw. Probate R. 40(b); *see also* HRPC 1.5; D.C. Rule 1.5 (requiring that a lawyer's fees be reasonable).

The ALI Restatement, on the other hand, permits disgorgement when the lawyer has engaged in misconduct. The ALI Restatement provides that a "lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." Restatement (Third) of the Law Governing Lawyers § 37. In determining whether disgorgement is appropriate and the extent of disgorgement, the ALI Restatement recommends that a number of factors be considered, namely "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." *Id.*

Professor Leubsdorf also focuses on case law in discussing two scenarios in which disgorgement is typically ordered. These two scenarios parallel the situations reflected in Hawaii statutory law and the ALI Restatement. In the first of these scenarios, the lawyer takes an unreasonably large fee. *See* Leubsdorf at 12. Claims that a fee is unreasonably large often allege, *inter alia*, that the lawyer charged "for unnecessary or inefficiently performed work." *Id* at 13. Disgorgement of fees has been ordered when such fees "are unreasonable in the sense that they are paid for lawyers' services that clearly ought never to have been rendered." *Id.* (citing *Newman v. Silver*, 553 F. Supp. 485 (S.D.N.Y. 1982) ordering disgorgement based upon, among other factors, that the fees were in part payments for making improper overtures to a judge), *aff'd in part, vacated in part,* 713 F.2d 14 (2d Cir. 1983). Finally, Professor Leubsdorf notes 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." Leubsdorf at 13 (citing HRPC 1.5(a)(4); Restatement (Third) of the Law Governing Lawyers § 39, cmt. b(ii)). In such cases, Professor Leubsdorf concludes that disgorgement 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." Leubsdorf at 13. Here, disgorgement is proper because the fees are unreasonable and provided no benefit to the client.

Professor Leubsdorf also states that disgorgement may be a remedy where a lawyer "seriously breaches professional duties to a client." Leubsdorf at 14. Actions sufficiently serious to warrant disgorgement under this second scenario include "coercing or misleading a client, failing to return important documents after the representation, and conducting a client's case despite a conflict of interest." *Id.*

In light of the factual allegations here under review, Leubsdorf contemplates two fact patterns under which disgorgement may be appropriate. In the first, a lawyer purports to represent the Trust Estate's interest, and is paid with Trust Estate funds, but in fact does work "solely for the personal benefit of one or more trustees." *Id.* An analysis of this situation, however, must include a consideration of a lawyer's prerogative to assume that the Trustees are acting within their proper powers, as discussed earlier. Because lawyers are entitled to assume that the Trustees are acting properly, "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." *Id.*

A second case for disgorgement may be made under the factual allegations at issue here where an attorney purports to represent simultaneously the Trust (*i.e.*, the Trustees in their collective fiduciary capacity) and one or more Trustees in their personal capacity, but the interests of the two are divergent. *See id.* at 14-15; *Crawford & Lewis v. Boatmen's Trust Co.*, 1 S.W.3d 417 (Ark. 1999). In the *Crawford & Lewis* case, an attorney stated that she was representing an estate, and was indeed paid by the estate. *See id.* at 420. In reality, however, the attorney was representing one of the trustees personally (who was also a beneficiary), when that trustee's interests were completely adverse to the estate's interests (*i.e.*, the trustee was defrauding the trust). *See id.* at 421. The court in that case therefore found that the estate paid for work that it should not have paid for, and, accordingly, ordered disgorgement. *See id.* at 421-

22. Professor Leubsdorf states that the *Crawford & Lewis* case "seem[s] to require a showing that the [lawyer's] services helped only the trustees personally and not the trust, to the extent that the [lawyer] should have recognized that [he or she was] representing the trustees personally." Leubsdorf at 15.

VI. TRUSTEE OBLIGATIONS

A. Trustees' Obligations to Pursue Claims

Matters of trust administration fall within the Trustees' "good faith discretion." *See* Langbein at 15; Restatement (Second) of Trusts § 187 (1959). The decision whether to pursue a legal claim or claim for disgorgement is a matter of trust administration, and, therefore, falls within the Trustees' sound discretion. *See Richards v. Midkiff*, 48 Haw. 32, 54, 396 P.2d 49, 61 (1964)

In deciding whether to pursue a claim on the Trust Estate's behalf, the Trustees must consider the likelihood of success and potential for recovery, as compared to the costs of bringing such an action. The Supreme Court of Hawaii has previously addressed this issue, in a case involving KS:

> Trustees are under a duty to the beneficiaries to take all reasonable steps to realize claims held in trust. However, they have no duty to bring an action to enforce a claim pertaining to the trust property if it appears unreasonable to do so either because the action might be unsuccessful or would involve an expense disproportionate to the possibility of success. Restatement (Second), Trusts, § 177, comment c. The best interest of the trust estate is the criteria in all cases.

Richards, 48 Haw. at 53, 396 P.2d at 61. The responsibility therefore is placed on the Trustees to evaluate whether, given all circumstances surrounding a legal claim or claim for disgorgement, that claim is worth pursuing. Because the decision of whether to pursue a legal claim is within the Trustees' sound discretion, the decision not to seek judicial relief in a particular case "is not subject to review in the absence of a showing of an abuse of discretion." *Richards*, 48 Haw. at 56, 396 P.2d at 62.

B. Trustees' Obligation to Delegate Prudently—Continued Retention of Legal Advisors

The decision to retain legal advisors is a matter of trust administration, and, therefore, falls within the Trustees' discretion. *See* Langbein at 15. Trustees have broad discretion here as elsewhere, but must exercise that discretion prudently. *See id.* On the one hand, the Trustees should take into account cost efficiencies of retaining the Trust Estate's former legal advisors. *See id.* On the other hand, the Trustees must consider the adequacy of the representation provided. *See id.* A legal advisor's past conduct must be considered when deciding whether future retention is appropriate. An advisor's lack of candor, for example, may indicate that it would not be prudent for the Trustees to use that advisor in the future. By the same token, a legal advisor's assistance in questionable transactions might argue against future retention. *See id.* at 15-16. In the end, it falls to the Trustees to balance such positive and negative factors to decide whether to retain a particular advisor in the future. That decision must be made in accordance with the Trustees' duty of prudence and exercise of sound discretion.