

Ethics Issues For Mainland Firms Involved In Maui Fire Suits

By **Ryan Little** (August 28, 2023, 4:10 PM EDT)

The island of Maui was recently devastated by the Lahaina fire — the deadliest wildfire in modern U.S. history.

In the wake of this tragedy, mainland-based consumer-focused law firms without a presence in Hawaii are scrambling to figure out how to serve potential clients affected by the fires.

Many of these firms — especially class action firms with a history of handling wildfire cases — have the capacity to quickly and efficiently deploy resources for affected clients, but they are wary of running afoul of Hawaii's ethics regulations.



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This article briefly summarizes a few of the most important concepts of which firms should be aware.

Complying With the Applicable Rules of Professional Conduct

Mainland firms offering services in Hawaii must comply with the applicable rules of professional conduct. Mainland firms that offer their services in Hawaii will be subject to the jurisdiction of the Hawaii disciplinary authorities.

In 2022, the Hawaii Supreme Court adopted Rule 8.5(a) of the Hawaii Rules of Professional Conduct, which makes clear that lawyers who provide, or offer to provide, legal services in Hawaii are subject to the disciplinary authority of the Hawaii Supreme Court and the court's disciplinary board, regardless of whether the lawyers are actually admitted to practice in Hawaii.[1]

The upshot of HRPC Rule 8.5 is that a mainland firm's misconduct in Hawaii could lead to serious consequences in the firm's home jurisdiction. This is due to the principle of reciprocal discipline, which generally requires that a lawyer who is disciplined by one jurisdiction will be disciplined by all others in which that lawyer is licensed.

For example, if a lawyer licensed to practice in both California and Hawaii is suspended in Hawaii, they will generally be reciprocally suspended in California, and vice versa.

While this rule has yet to be used — to this writer's knowledge — to prosecute a lawyer unlicensed in Hawaii, it provides a clear nexus for doing so in cases where misconduct occurs.

Thus, any mainland firm looking to offer their services in Hawaii in connection with the Maui wildfires must scrupulously comply with their ethical obligations under the HRPC.

Importantly, this compliance is likely required whether the mainland firm files in federal or state court.

The U.S. District Court for the District of Hawaii's Local Rule 83.3 states:

Every member of the bar of this court and any attorney permitted to practice in this court pursuant to LR 83.1(c) shall be governed by and shall observe the standards of professional and ethical conduct required of members of the State Bar of Hawaii.

This very likely means that a federal court would apply the HRPC to any claims of ethical misconduct. The federal court could also simply refer the matter to the Office of Disciplinary Counsel — the lawyer regulatory agency in Hawaii — which, as discussed above, has jurisdiction over all lawyers practicing in Hawaii, regardless of licensure status.

Not a True Referral Fee State

Unlike California and many other states, Hawaii strictly prohibits the payment of a true referral fee.

Lawyers are free to share fees with other lawyers not in the same firm, provided a number of conditions are met — including that the split is proportional to the work each lawyer performs, and that each lawyer assumes joint responsibility for the representation in a written agreement with the client — but Hawaii prohibits a true fee for referral.

This means that, if Attorney A refers a client to Attorney B, and Attorney A then does zero work on that client's case, Attorney A would be entitled to little to no referral fee, depending on how much work the client's case required.

This is a major difference from California, where true referral fees are permitted by California Rule of Professional Conduct 1.5.1. Thus, California firms looking to leverage their expertise in wildfire litigation to serve victims of the Maui fire must remain cognizant that their normal client recruitment strategies may need to be reworked.

Temporary Practice

Another difference in Hawaii's rules is the lack of a temporary practice rule.

The American Bar Association's Model Rule of Professional Conduct 5.5(c) provides for the temporary practice of lawyers in a jurisdiction where the lawyer is unlicensed, provided that the unlicensed lawyer's practice is "undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter."

Hawaii has no such rule or authority allowing temporary practice.

Additionally, there is no case law directly on point for the matter. Hawaii's Office of Disciplinary Counsel issued a press release on Aug. 14, in which the chief disciplinary counsel stated:

Non-Hawaii law firms seeking to represent victims of the recent wildfires may do so in Hawaii only if they employ one or more actively licensed Hawaii lawyers in the firm or if they have associated with a Hawaii licensed attorney in a manner consistent with the HRPC and rules of court.[2]

However, the press release — which the office should be lauded for issuing, and which all lawyers interested in serving wildfire clients should read — did not explain what it means to associate with a Hawaii lawyer "in a manner consistent with the HRPC and rules of court."

Moreover, the issue of temporary practice given Hawaii's regulatory gap has never been directly litigated in Hawaii. Thus, temporary practice in Hawaii is — at best — an open question, and an issue that all non-Hawaii firms seeking to serve wildfire clients must keep top of mind.

Lawyer Advertising Regulations

Hawaii's rules around lawyer advertising are less extensive than California's, which offers both benefits and challenges. While fewer rules mean fewer black-letter hurdles for firms to clear, the lack of an established specific regulatory framework leads to gray areas that must be handled on a case-by-case basis.

Additionally, mainland firms should be mindful of the fact that, while Hawaii's rules generally mirror the ABA's Model Rules of Professional Conduct, they diverge in important ways.

For example, Hawaii's Rule 7.3(c) still requires that the words "Advertising Material" be included on every communication soliciting professional employment from anyone known to be in need of legal services in a particular matter. By contrast, the ABA Model Rules have done away with this labeling requirement.

Hawaii Ethics Law Is Open Question

Much of Hawaii ethics law is an open question. While the HRPC provides clear guidance on many issues, it remains silent on others.

Additionally, Hawaii is a small jurisdiction with a commensurately small body of published disciplinary case law.

Further, Hawaii is fortunate in that it only rarely suffers the type of mass tort events that attract the attention of larger players in the space. Because of this, there simply isn't clear guidance on many of the ethics issues mainland firms are facing with regard to entering the Hawaii market.

For example, may a single Hawaii lawyer be of counsel to multiple mainland firms? What are the outer limits of what a mass torts mobilization team can say and do without engaging in the unauthorized practice of law?

Thus, much of the calculus for mainland firms will ultimately come down to risk analysis and appetite for operating in the gray areas created by Hawaii's regulatory gaps.

Conclusion

Firms seeking to serve the victims of the Maui fires will be subject to the jurisdiction of the Hawaii

Supreme Court and disciplinary board. This means that any ethical missteps in Hawaii could have major ramifications for the firm's practice in its home jurisdiction.

As such, firms must ensure their strict compliance with the Hawaii Rules of Professional Conduct. However, there are some gray areas that mainland firms need to get comfortable with prior to entering the Hawaii market.

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[1] <https://dbhawaii.org/wp-content/uploads/SCRU-11-0001047-Dkt-33-ORD-AM-HRPC-8.5.pdf>.

[2] <https://dbhawaii.org/wp-content/uploads/230814-wildfire-press-release.pdf>.