

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Amendment
of the
HAWAII RULES APPELLATE PROCEDURE

ORDER AMENDING HAWAII RULES OF APPELLATE PROCEDURE
(By: Moon, C.J., for the court¹)

IT IS HEREBY ORDERED that Rules 1, 2.1, 3, 4, 10, 11, 12, 15, 17, 18, 21, 23, 24, 25, 28, 31, 32.1, 36, 39, 40.1, 40.2, 40.3, 41, 42, 45, 51, the attached Forms 1, 2, and 7, and Appendix A of the Hawaii Rules of Appellate Procedure are added, deleted, or amended, effective July 1, 2006, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 1. SCOPE OF RULES AND TITLE.

(a) Scope of rules. These rules govern all proceedings in the Hawaii appellate courts except as otherwise provided by statute, ~~[or]~~ Rules of the Supreme Court, or Rules of the Intermediate Court of Appeals.

* * *

(d) Interpretation and enforcement of rules. These rules shall be read and construed with reference to each other. Attorneys and pro se parties are deemed to be aware of, and are expected to comply with, all of the provisions of these rules.

Rule 2.1. APPLICABILITY OF OTHER COURT RULES; DEFINITIONS.

...

(b) Definitions. As used in the HRAP:

"agency" means every board, commission, department, council, committee, entity or officer of the State of Hawai i or its political subdivisions that is authorized by law to adjudicate contested cases or issue declaratory rulings or orders that may be appealed directly to the Hawai i appellate courts;

"appeal" includes every proceeding in the Hawai i appellate courts other than an original action;

"appellate clerk" includes any clerk, deputy, or assistant clerk of the Hawai i appellate courts;

"appellate court(s)" or "Hawai i appellate court(s)" mean(s) the Hawai i Supreme Court and the Hawai i Intermediate Court of Appeals, collectively and individually, but does not include the land or tax appeal courts;

["assignment judge or justice" means the chief justice or the chief justice's designee as provided by Rule 31];

"civil appeal" means any appeal from a civil case;

"civil case" means any proceeding in the land or tax appeal court, any proceeding before a governmental agency, and any proceeding in the family, circuit or district court other than a criminal case;

"clerk of the court" includes the clerks of each state trial court and, in appropriate cases, the official designated by an agency to prepare the record for appeals;

"docketed" means the record from a court or agency is filed in the appellate courts;

["Hawai i appellate court" or "Hawai i appellate courts" mean the Hawai i Supreme Court and the Hawai i Intermediate Court of Appeals, collectively and individually, but does not include the land or tax appeal courts;]

"intermediate court of appeals" means the Hawai i Intermediate Court of Appeals;

"nominal appellee" means a party who is designated an appellee because it is the agency or court from which appeal is taken or because the party was a party in the court or agency proceeding, but asserts no interest in the outcome of the appeal;

"papers" include pleadings, exhibits, documents and appendices;

"party" means named plaintiff, defendant, petitioner, respondent, claimant, or intervenor in the court or agency proceeding and anyone who has standing to seek review of the court or agency order or judgment; it does not include witnesses;

"supreme court" means the Hawai i Supreme Court.

Rule 3. APPEALS - HOW TAKEN.

(a) Filing the notice of appeal. An appeal permitted by law from a court or agency [~~to the Hawai i appellate courts~~] shall be taken by filing [~~of~~] a notice of appeal, together with such fees as are established by statute or these rules, with the clerk of the court within the time allowed by Rule 4. Within [~~seven~~] 7 days after the filing of the notice of appeal, the clerk of the court [~~from which the appeal is taken~~] shall transmit a copy of the notice of appeal to the

appellate clerk [~~of the supreme court~~]. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

...

(c) Content of the notice of appeal.

(1) The notice of appeal shall identify the party or parties taking the appeal either in the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "plaintiffs A, B, et al.," or "all defendants except X." In a class action, whether or not the class has been certified, it is sufficient for the notice of appeal to name one person qualified to bring the appeal as representative of the class. In cases where fictitious titles are authorized by law, the first and last initials of the party or parties shall be used. In the event that a case involves parties bearing the same initials, middle initials shall be added.

(2) The notice of appeal shall designate the judgment, order, or part thereof and the court or agency appealed from. A copy of the judgment or order shall be attached as an exhibit. Forms 1, 2, and 3 in the Appendix of Forms are suggested forms of notices of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(3) The notice of appeal shall have affixed to it proof that service of the notice was made on all parties to the appeal in the manner required by paragraph (e) of this rule. The clerk of the court shall permit a notice of appeal to be filed without the proof of service but the person who filed the notice of appeal shall file the proof of service within seven days after the filing of the notice of appeal.

* * *

Rule 4. APPEALS - WHEN TAKEN.

(a) Appeals in civil cases.

(1) TIME AND PLACE OF FILING. When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.

The notice of appeal shall be filed with the clerk of the court from which the appeal is taken. If a notice of appeal is mistakenly filed ~~in~~ with the ~~supreme court~~ appellate clerk, the appellate clerk shall note on it the date of receipt and shall transmit the notice to the clerk of the court appealed from. The date of receipt by the appellate clerk shall be deemed to be the date the notice of appeal was filed ~~in the court or agency~~ with the clerk of the court.

(2) PREMATURE FILING OF APPEAL. ~~In any case in which~~ If a notice of appeal ~~has been~~ is filed ~~prematurely~~ after announcement of a decision but before entry of the judgment or order, such notice shall be considered as filed immediately after the time the judgment or order becomes final for the purpose of appeal.

(3) TIME TO APPEAL AFFECTED BY POST- JUDGMENT MOTIONS. If ~~not later than 10 days after entry of judgment,~~ any party files a timely motion ~~that seeks~~ for judgment as a matter of law, to amend findings or make additional findings, for a new trial, to reconsider, ~~vacate, or~~ alter or amend the judgment or order, or ~~seeks~~ for attorney s fees or costs, the time for filing the notice of

separate copy of each request for each tape is provided to the supervising court reporter. The appellant shall also deliver or mail a file-marked copy of the request and its accompanying documents to counsel for all other parties, or the parties themselves, if pro se.

* * *

(H) Cancellation of request for transcripts. If, after a request to prepare a reporter's transcript has been filed but before the court reporter has begun preparation of the transcript, the requesting party decides the transcript is not necessary for the appeal, a written cancellation request, containing the same information as required by subsection (b)(1)(B) of this Rule 10, shall be filed with the court or agency from which the appeal has been taken and served on counsel for all other parties, or the parties themselves, if pro se. If, within 10 days after service of the request, counsel or a party, if pro se, deems the cancelled transcript necessary, he or she may, within the following 10 days either order the cancelled transcript or, in the case the appellant has filed the cancellation request, move in the court or agency appealed from for an order requiring the appellant to withdraw the cancellation request.

* * *

(4) NOTICE TO APPELLEE IF ~~[PARTIAL TRANSCRIPT IS]~~ FEWER THAN ALL TRANSCRIPTS ARE ORDERED. Unless ~~[the entire transcript is to be prepared]~~ transcripts of all oral proceedings have been ordered, the appellant shall, within the 10-day time provided in (b)(1)(A) of this Rule 10, file a statement of the points of error the appellant intends to present on the appeal and shall serve on the appellee a copy of the statement. If, within 10 days after service of the statement, the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall file and serve on the appellant a designation of additional parts to be prepared and included in the record on appeal. Unless within 10 days after service of such designation the appellant has ordered such parts and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the court or agency appealed from for an order requiring the appellant to do so.

Rule 11. TRANSMISSION OF THE RECORD.

(a) Duty of appellant. After the filing of the notice of appeal, the appellant, or in the event more than one appeal is taken, each appellant, shall comply with the applicable provisions of Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record. It is the responsibility of each appellant to provide a record, as defined in Rule 10(a), that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency from which the appeal is taken to correct any omission.

(b) Duty of the Clerk of the Court.

(1) Unless otherwise provided, the clerk of the court shall, within 60 days from the filing of the notice of appeal, assemble, certify, and transmit to the appellate clerk a single record on appeal, provided that when all documents in the record on appeal, other than exhibits, are available in electronic format and accessible, the clerk of the court need not transmit the physical documents, but shall notify the appellate clerk in writing that the physical documents will not be transmitted. If a complete record cannot be transmitted within such a period, the

~~[supreme court]~~ appellate court, for good cause, may extend the time upon stipulation or motion, provided that ~~[timely-ordered]~~ transcripts completed after the record has been transmitted to the appellate clerk, and ~~[timely-requested]~~ findings of fact and conclusions of law entered after the record on appeal has been transmitted to the appellate clerk, shall be transmitted by the clerk of the court as a supplemental record without further order of the ~~[supreme court]~~ appellate court.

(2) If the notice of appeal is filed without payment of the required fees and the appellant has not obtained an order allowing the appellant to proceed in forma pauperis, the clerk of the court shall not be required to prepare the record on appeal until the required fees are received or an order allowing the party to proceed in forma pauperis is obtained.

(3) In preparing the record on appeal, the clerk of the court shall consecutively number the pages of the court or agency file and shall provide in the file a numbered index of all the pages therein, provided that when an electronic or imaged record provides a navigation pane or frame for access to each document or transcript, the clerk need not separately number the pages. If any ~~[original papers]~~ documents, exhibits, and transcripts filed in the court or agency appealed from are not mentioned in the numbered index, the clerk of the court shall provide an additional index identifying each of them with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record shall not be transmitted by the clerk of the court unless he or she is directed to do so by ~~[a party or by the appellate clerk]~~ appellate court order. ~~[A party must make advance arrangements with the respective clerks for the transportation and receipt of exhibits of unusual bulk or weight.]~~

* * *

(e) Retention of the record in the court or agency appealed from by order of the appellate court. The ~~[supreme court]~~ appellate court may order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the court or agency appealed from for its use pending appeal, the court or agency may make an order to that effect, and the clerk of the court shall retain the record or parts thereof subject to the request of the ~~[supreme court]~~ appellate court and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the court or agency shall allow and copies of such parts as the parties may designate.

* * *

Rule 12. RECEIPT OF THE NOTICE OF APPEAL BY THE APPELLATE COURTS; FILING OF RECORD.

(a) Receipt of the notice of appeal by the appellate courts. Upon receipt of the notice of appeal, the appellate clerk shall thereupon assign an appellate court number to the case. Except as provided below, an appeal shall be listed with the appellate courts under the title given to the action in the court or agency appealed from with the appellant identified as such, but if such title does not contain the name of the appellant, his or her name, identified as the

appellant, shall be added to the title. In juvenile and paternity proceedings and whenever otherwise required by law, the anonymity of the persons or parties involved shall be maintained by the use of fictitious names and designations as provided by Rule 3(c)(1).

(b) Filing the record, partial record, or certificate. Upon receipt of the record or the partial record, or the clerk of the court's certificate, or the certified copy of the docket entries, the appellate clerk shall file it and shall immediately give notice to all parties of the date on which it was filed. The appeal is docketed with the Hawai i appellate courts on the date of filing of the record, partial record, clerk of the court's certificate or certified copy of the docket entries, or when the clerk of the court notifies the appellate clerk the record on appeal (other than exhibits) is available in electronic format.

Rule 15. RESERVED QUESTIONS.

(a) From what court. A circuit court ~~[, district court, family court,]~~ the land court, the tax appeal court and any other court empowered by statute, may reserve for the consideration of the ~~[Hawai i appellate courts]~~ supreme court a question of law arising in any proceedings before it. Questions may be reserved on motion of any party or on the court's own motion.

(b) Record. The court reserving the question shall transmit as much of the record as may be necessary to a full understanding of the questions reserved to the appellate clerk. Certified copies may be transmitted in lieu of the original ~~[papers]~~ documents.

(c) Disposition. The supreme court ~~[to which the assignment judge assigns the question may make such disposition of the case as it deems proper. It]~~ may, in its discretion, return any reserved question for decision in the first instance by the court reserving it.

Rule 17. ORIGINAL PROCEEDINGS.

Original actions, including applications for writs or other relief, shall conform to the requirements of any applicable statutes and to such orders as may be entered by the ~~[appellate]~~ supreme court ~~[to which the case is assigned].~~

Rule 18. AGREED FACTS; SUBMISSION ON.

(a) Submission. As authorized by law, the parties to a dispute that might be the subject of a civil action or proceeding in ~~[a Hawai i appellate court, circuit court, district court, family court, land court or tax appeal court]~~ any court or agency may, without the action of a trial court or agency, agree to submit a case directly to ~~[a Hawai i appellate court]~~ the intermediate court of appeals upon a statement containing the facts upon which the controversy depends, a statement of the question or issues, the contentions of the parties as to each issue, and the form of judgment that each party requests the ~~[appellate court]~~ intermediate court of appeals to render.

(b) Good faith. It must be shown by affidavit or declaration that the controversy is real and that the proceedings are a good faith effort to determine the rights of the parties.

(c) Disposition. The appellate court may refuse to entertain a case submitted on agreed facts. If the appellate court entertains the case, the judgment rendered thereon shall be entered and may be enforced as in other cases, subject to the right of a party to move for reconsideration or, if the case is decided in the intermediate court of appeals, apply for a writ of certiorari.

Rule 21. WRITS OF MANDAMUS OR PROHIBITION DIRECTED TO A JUDGE; WRITS OF MANDAMUS DIRECTED TO A PUBLIC OFFICER; OTHER EXTRAORDINARY WRITS.

(a) Writs of mandamus or prohibition directed to a judge.

Application for a writ directed to a judge shall be made by filing a petition with the ~~[clerk of the supreme court]~~ appellate clerk with proof of service on the respondent judge, all parties to the action in the trial court, and the attorney general. The petition shall contain: (i) a statement of facts necessary to an understanding of the issues presented; (ii) a statement of issues presented and of the relief sought; and (iii) a statement of reasons for issuing the writ.

Copies of any order or opinions or parts of the record that may be essential to an understanding of the matters set forth in the petition shall be attached to the petition.

Upon receipt of the prescribed filing fee, the appellate clerk shall docket the petition and submit it to the supreme court for determination as to whether the writ will be entertained. ~~[A petition may be assigned to the intermediate court of appeals.]~~

* * *

(c) Denial; order directing answer. If the court ~~[to which the petition is assigned]~~ is of the opinion that the writ should not be entertained, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the appellate clerk on the respondents and the attorney general or the chief legal officer of the applicable county and, in the case of a writ directed to a judge, on all other parties to the action in the trial court. All parties other than the petitioners shall be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge named respondent does not desire to appear in a proceeding, the judge may advise the appellate clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The appellate clerk shall advise the parties, the attorney general, or the chief legal officer of the applicable county of the dates on which any required briefs are to be filed and of the date of any oral argument. The proceeding shall be given preference over ordinary civil cases.

Rule 23. CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS.

(a) Transfer of custody. Pending disposition of any habeas corpus proceeding commenced pursuant to statute, before the ~~[Hawai i appellate courts]~~ supreme court or a ~~[judge or]~~ justice thereof for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing any need therefor, the ~~[appellate]~~ supreme

court or a [judge-or] justice thereof may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or release of prisoner pending disposition of application for habeas corpus. Pending a disposition of an application for habeas corpus pursuant to statute, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be released upon the prisoner's own recognizance, with or without surety, as may appear fitting to the [appellate] supreme court or the [judge-or] justice to which or to whom the application is made.

(c) Modification of initial order respecting custody. Unless modified by the [appellate] supreme court or the [judge-or] justice to which or to whom the application is made, the initial order respecting the custody or release of the prisoner and any recognizance or surety taken shall govern pending disposition of the application.

Rule 24. PROCEEDINGS IN FORMA PAUPERIS.

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(c) Motion for leave to proceed in forma pauperis before the [supreme] appellate court. If a motion for leave to proceed on appeal in forma pauperis is denied by the court or agency, or if the court or agency certifies that the appeal is not taken in good faith or finds that the party is otherwise not entitled to proceed in forma pauperis, the clerk of the court shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the [supreme] appellate court within 10 days after service of the notice of the action of the court or agency. The motion shall be accompanied by a copy of the affidavit or declaration filed in the court or agency, or by the affidavit or declaration prescribed in the first paragraph of this subsection if no affidavit or declaration has been filed in the court or agency, and by a copy of the statement of reasons given by the court or agency for its action.

(d) Effect of denial of motion for leave to proceed in forma pauperis. If the court or agency has denied a party the authority to proceed on appeal in forma pauperis, then within 10 days after the denial of such a motion filed in the [supreme] appellate court or, if no such motion is filed in the [supreme] appellate court, within 10 days after the expiration of the time to file such a motion in the [supreme] appellate court, the movant shall pay all unpaid filing fees and shall give security for costs. Failure of the unsuccessful movant to pay the unpaid filing fees or to give security for costs shall not affect the validity of the appeal, but is ground for such action as the appellate court having jurisdiction over the appeal deems appropriate, which may include dismissal of the appeal.

Rule 25. FILING AND SERVICE.

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(e) Acknowledgment of service. The party served may file, within 5 days after receiving service, an acknowledgment of service setting forth the date and manner of service where the date of [receipt] service differs from the date contained in the proof of service attached to the papers filed.

Rule 28. BRIEFS.

* * *

(j) Citation of supplemental authorities. Parties may, by letter to the appellate clerk bring to the appellate court's attention pertinent and significant authorities published after a party's brief has been filed, but before a decision. A copy of the letter, setting forth the citations, shall be served at or before the time of filing as provided by Rule 25(b) ~~[of these rules]~~. The letter shall provide references to either the page(s) of the brief or to a point argued orally to which the citations pertain. The letter shall, without argument, state the reasons for the supplemental citations. The parties shall provide 7 copies of each letter for the supreme court or 5 copies of each letter for ~~[with seven copies unless the case is assigned to]~~ the intermediate court of appeals ~~[in which case five copies shall be provided]~~, depending on the appellate court before which the appeal is pending. Any response shall be made promptly and shall be similarly limited.

Rule 31. Reserved. ~~[ASSIGNMENT OF CASES AND MATTERS ADDRESSED TO THE JURISDICTION OF THE HAWAII APPELLATE COURTS; REASSIGNMENT PROCEDURES.]~~

~~**(a) Initial assignment of cases.** The chief justice, or the chief justice's designee to be appointed by the chief justice from among the regularly appointed justices of the supreme court or from among the regularly appointed judges of the intermediate court of appeals, shall receive each case or matter. The appellate clerk shall forward the complete file of the case or matter to the assignment judge or justice no later than the close of business on the fifth working day following the filing deadline for the last document permitted to be filed in the case pursuant to court rule.~~

~~The assignment judge or justice shall file an order with the appellate clerk assigning the case or matter either to the intermediate court of appeals or to the supreme court no later than the 20th working day following the filing deadline of the last document permitted to be filed; provided, however, that, if a related case or matter on appeal and briefing of such case or matter has not been completed, the assignment judge or justice may delay assignment of the case or matter until the related case is assigned.~~

~~The appellate clerk shall serve the order of assignment on all parties.~~

~~In addition to the statutory criteria, the assignment judge or justice may consider the relative workloads of the supreme court and the intermediate court of appeals when assigning cases.~~

~~**(b) Reassignment of case or matter to Supreme Court.**~~

~~**(1) TIME OF DETERMINATION; CRITERIA FOR REASSIGNMENT.** After the assignment judge or justice has ordered a case or matter assigned to the intermediate court of appeals, the majority of the justices of the supreme court may, by order of the court, cause the case or matter to be reassigned to the supreme court.~~

~~**(2) HOW REASSIGNMENT RAISED BEFORE THE SUPREME COURT.** The supreme court may order reassignment to itself:~~

~~(A) upon its own motion;~~

~~(B) upon a certification in writing, filed with the appellate clerk by any two judges of the intermediate court of appeals that in their judgment the case or~~

~~matter concerns an issue of fundamental public importance such that the case or matter should be reassigned to the supreme court; or~~

~~(C) upon the written petition of any party to the case or matter.~~

~~(3) CONTENTS OF PETITION. A petition for reassignment shall contain, in the following order:~~

~~(A) A request for reassignment to the supreme court.~~

~~(B) A statement of prior proceedings in the case.~~

~~(C) A short statement of relevant facts.~~

~~(D) A statement of the issues of law raised by the case or matter.~~

~~(E) A statement as to how the case or matter concerns an issue of fundamental public importance such that reassignment to the supreme court is appropriate.~~

~~(F) A brief argument, not to exceed 10 pages, with supporting authorities.~~

~~(4) ORAL ARGUMENT. There shall be no oral argument on a petition for reassignment unless ordered by the supreme court.~~

~~(5) DETERMINATION. The supreme court shall accept or reject a certification of reassignment from the intermediate court of appeals, or shall grant or deny a petition for reassignment, no later than the 15th day after the filing of the certification or petition. The failure of the supreme court to accept a certification or grant a petition within the required time shall constitute a rejection or denial of the certification or petition. If the certification is accepted, or the petition is granted, the case or matter shall be deemed assigned to the supreme court as of the date of acceptance or grant.~~

~~(6) DISCRETION OF THE SUPREME COURT. The determination of reassignment to the supreme court is a matter within the discretion of the supreme court.~~

~~(7) NO MOTION FOR RECONSIDERATION AFTER DETERMINATION OF REASSIGNMENT. Neither acceptance or rejection of a certificate of reassignment nor the grant or denial of a petition for reassignment shall be subject to a motion for reconsideration by the supreme court.~~

~~(c) through (e). Deleted.~~

Rule 32.1 NUMBER OF COPIES REQUIRED TO BE FILED.

(a) Opening, answering, and reply briefs. ~~[Two copies are required when filing. After briefing is completed, the appellate clerk will notify the parties of any additional copies required.]~~ Parties shall submit 6 copies of each brief filed for the supreme court and 5 copies of each brief filed for the intermediate court of appeals. The clerk may request additional copies.

Rule 36. ENTRY OF JUDGMENT; ~~[OBLIGATION TO PREPARE NOTICE AND]~~ PREPARATION, FILING, & SERVICE OF THE JUDGMENT ON APPEAL; EFFECTIVE DATE OF JUDGMENT ON APPEAL.

(a) Entry of judgment. The filing of the ~~[notice and]~~ judgment on appeal constitutes entry of judgment~~[-on appeal]~~.

(b) ~~[Prevailing party's obligation to prepare and serve notice and] Preparation, filing, and service of the judgment on appeal.~~ ~~[In all cases, the prevailing party or, in the case of a dispute as to who is the prevailing party, the party designated by the appellate clerk, shall, within 10 days after a final decision has been filed in the case, prepare and submit a proposed notice and judgment on appeal. Form 5 in the Appendix of Forms is suggested for the notice and judgment on appeal. The proposed notice and judgment on appeal shall have affixed to it proof that a copy was served on all parties. Upon presentation to the appellate clerk, the appellate clerk shall submit the proposed notice and judgment on appeal to a judge or justice for approval and signature. The appellate clerk shall thereafter sign and enter the notice and judgment on appeal. The party who prepared the proposed notice and judgment on appeal shall, by mail or personal delivery, serve a file-marked copy of the notice and judgment on appeal on each party.]~~

(1) After a final decision, other than an order of dismissal, has been filed in an appeal, the court rendering the decision shall prepare and submit to the appellate clerk for filing the judgment on appeal, signed by a judge or justice for the court.

(2) Upon the filing of the judgment, the appellate clerk shall serve a file-marked copy of the judgment on each party and on the court or agency from which the appeal was taken. Service may be by personal delivery or mail, or, upon request, by email, facsimile, or placement in the court jacket of the party's counsel. Service on a party represented by counsel shall be made on counsel.

(c) Effective date of intermediate court of appeals judgment. The intermediate court of appeals judgment is effective upon the ninety-first day after entry or, if an application for a writ of certiorari is filed, upon entry of the supreme court's order dismissing or rejecting the application or, upon entry of supreme court's order affirming in whole the judgment of the intermediate court of appeals.

(d) Judgment after supreme court review.

(1) UPON TRANSFER. Upon disposition after transfer from the intermediate court of appeals, the supreme court shall enter judgment in accordance with section (b) of this rule.

(2) UPON ACCEPTANCE OR REJECTION OF APPLICATION FOR A WRIT OF CERTIORARI. If an application for a writ of certiorari is rejected, the judgment entered by the intermediate court of appeals shall stand. If an application for a writ of certiorari is accepted and the judgment of the intermediate court of appeals is wholly affirmed, the judgment entered by the intermediate court of appeals shall stand. If an application for a writ of certiorari is accepted and the disposition of the intermediate court of appeals is vacated or otherwise modified in whole or in part, a new judgment on appeal shall be entered by the supreme court and is effective upon entry.

COMMENT:

The judgment on appeal should not be entered until all post-decision motions for reconsideration and attorney s fees and costs or necessary expenses have been decided in the intermediate court of appeals or the supreme court. The judgment on appeal should include any attorney s fees and costs or necessary expenses awarded.

See Rule 41 and its commentary ("the intermediate court of appeals judgment cannot be effective and jurisdiction cannot revert to the court or agency from which appeal was taken until the time for filing the application has expired or, if an application is filed, the supreme court has rejected or dismissed the application or affirmed the intermediate court of appeals judgment in whole.")

Rule 39. COSTS AND ATTORNEY S FEES.

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(c) Costs defined. Costs in the appellate courts are defined as: (1) the cost of the original and one copy of the reporter's transcripts if necessary for the determination of the appeal; (2) the premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; (3) the fee for filing the appeal; (4) the cost of printing or otherwise producing necessary copies of briefs and appendices, provided that copying costs shall not exceed 20¢ per page; [and] (5) necessary postage, cost of facsimiles, interstate travel, long distance telephone charges; and (6) any other costs authorized by statute or rule.

(d) Request for Fees and Costs; Objections.

(1) A party who desires an award of attorney s fees ~~[or]~~ and costs shall request them by submitting an itemized and verified bill of fees ~~[or]~~ and costs, together with a statement of authority for each category of items and, where appropriate, copies of invoices, bills, vouchers, and receipts. Requests for indigent fees and ~~[costs]~~ necessary expenses shall be submitted in a form that substantially complies with Form 7 in the Appendix of Forms and shall be accompanied by a copy of the order appointing counsel. Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that substantially complies with Form 8 in the Appendix of Forms. A failure to provide authority for the award of attorney s fees and costs or necessary expenses will result in denial of that request.

(2) A request for fees and costs or necessary expenses must be filed with the appellate clerk, with proof of service, no later than 14 days after ~~[entry of judgment]~~ the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided. An untimely request for fees and costs or necessary expenses may be denied.

(3) Attorneys appointed to represent indigent persons may submit a request for attorney s fees and ~~[costs]~~ necessary expenses, as provided by statute, after briefing is completed. ~~[the case has been assigned to either the supreme court or the intermediate court of appeals.]~~ Requests for fees and ~~[costs]~~ necessary expenses by counsel appointed to represent indigent persons may be held in abeyance until resolution of the case on the merits. If oral argument is had or additional work is performed thereafter, the attorney may submit a request for additional fees and ~~[costs]~~ necessary expenses.

~~[(3)]~~ (4) Objections to requests for fees and costs must be filed with the appellate clerk, with proof of service, within 10 days after service on the party against whom the fees and costs are to be taxed unless the time is extended by the appellate court. A reply to the objections must be filed with the appellate clerk, with proof of service, within 7 days after service of the objections on the initiating party.

~~[(e) Judgment on Order Awarding Fees and/or Costs. Upon approval of a request for fees and/or costs the Clerk shall enter judgment thereon forthwith.]~~

RULE 40.1 APPLICATION FOR WRIT OF CERTIORARI IN THE SUPREME COURT.

(a) **Application; When Filed.** No later than ~~[30]~~ 90 days after ~~[the filing of an opinion, dispositional order, or ruling of the intermediate court of appeals or the filing of an order denying a timely motion for reconsideration by the intermediate court of appeals,]~~ filing of the intermediate court of appeals judgment on appeal or dismissal order, any party may apply in writing to the supreme court for a writ of certiorari~~[to review such opinion, dispositional order, or ruling].~~

(b) **Discretion of the supreme court.** ~~[Review by the supreme court of an opinion, dispositional order, or ruling of the intermediate court of appeals]~~ Acceptance or rejection of an application for a writ of certiorari is a matter within the discretion of the supreme court.

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(d) **Contents.** The application for a writ of certiorari shall not exceed 12 pages and shall contain, in the following order:

(1) A short and concise statement of the ~~[question or]~~ questions presented for decision, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented according to this paragraph will be disregarded. The supreme court, at its option, may notice a plain error not presented.

(2) A statement of prior proceedings in the case.

(3) A short statement of the case containing the facts material to the consideration of the questions presented.

(4) A brief argument with supporting authorities.

A copy of the challenged opinion, dispositional order, or ruling of the intermediate court of appeals shall be attached as an appendix.

(e) **Response; form.** Within ~~[5]~~ 15 days after the filing of an application for a writ of certiorari, any other party to the case may, but need not, file and serve a brief written response containing a statement of reasons why the application should not be ~~[granted]~~ accepted.

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(g) **Determination.** The supreme court shall act upon an application for a writ of certiorari no later than ~~[10]~~ 30 days after ~~[the filing of the application]~~ an objection is or could have been filed. The failure of the supreme court to ~~[issue such writ]~~ accept the application within the ~~[10]~~ 30 days shall constitute a rejection of the application.

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(i) Review by supreme court after acceptance of application for a writ for certiorari. If the supreme court accepts the application for a writ of certiorari [~~to review a decision of the intermediate court of appeals~~], the case shall be decided on the record and the briefs previously filed. The supreme court may limit the question on review, may request supplemental briefs, and may set the case for oral argument. Within 10 days after the acceptance of the application for a writ of certiorari, a party may move in the supreme court for permission to file a supplemental brief. The court may impose restrictions as to length and filing of such brief and any response thereto.

Rule 40.2. APPLICATION FOR TRANSFER TO THE SUPREME COURT

(a) Application; when filed. Any party may apply in writing to the supreme court for transfer of a case within the jurisdiction of the intermediate court of appeals to the supreme court, as allowed by law. An application

(1) for a case under Rule 18 must be submitted with the statement of agreed facts.

(2) for an appeal may be submitted no earlier than 10 days after the filing of the record on appeal and no later than 20 days after the last brief is filed or could have been filed.

(b) Denomination of the parties. The party seeking transfer shall be denominated the petitioner. The petitioner's denomination in the appeal or the agreed statement and in the trial court or agency, if from a trial court or agency, shall also be included. All other parties shall be denominated respondents and each respondent's denomination in the appeal and in the trial court or agency, if from a trial court or agency, shall also be included. Any respondent who supports the position of the petitioner shall meet the time schedule for filing responsive papers.

(c) Contents of the Application. An application for transfer shall contain, in the following order:

(1) A request for transfer to the supreme court,

(2) A statement of prior proceedings in the case, with citation to the record, if any,

(3) A short statement of relevant facts, with citation to the record, if any,

(4) A statement of the points of error to be raised and argued, with citation to the record, if any, where each point of error was preserved for appeal,

(5) An explanation, not to exceed 10 pages, concerning how the case meets statutory qualifications for transfer to the supreme court, with citation to supporting authority.

(d) Attorney subject to sanctions. Each application for transfer shall be supported by an attorney's (or party's, if *pro se*) declaration or affidavit certifying:

(1) the declarant or affiant has thoroughly reviewed the record or agreed statement of facts and relevant law;

(2) the declarant or affiant understands he or she is subject to sanctions;

(3) the declarant or affiant is not presenting the application for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(4) each point of error to be raised and argued or the legal contentions to be put forth are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law; and

(5) each assertion of fact and statement of prior proceedings is supported by the record or the agreed statement of facts.

(e) **Response to the Application.** Within the time provided for responding to a motion under Rule 27(a), any other party may file a response to the application.

(f) **Oral argument.** There shall be no oral argument on an application for transfer unless ordered by the supreme court.

(g) **Determination; no reconsideration; no extensions of time.** The supreme court shall grant a mandatory application and shall accept or reject a discretionary application for transfer no later than the thirtieth day after the filing of the response to the application or, if no response is filed, within 30 days after the time the response could have been filed. The grant, acceptance, denial, or rejection of an application for transfer shall not be subject to a motion for reconsideration. Times for submitting and responding to an application for transfer shall not be extended.

(h) **Effect of application.** Unless otherwise ordered by the supreme court while an application for transfer is pending, the submission and processing of an application for transfer shall not stay the time in which a party must act under any provision of these rules.

Rule 40.3 RECONSIDERATION, TRANSFER, OR CERTIORARI UNNECESSARY FOR EXHAUSTION OF STATE REMEDIES.

For purposes of these rules and except as otherwise provided in Rule 40 of the Hawai i Rules of Penal Procedure, a motion for reconsideration, an application for transfer, or an application for a writ of certiorari shall not be required to exhaust available state remedies regarding a claim of error. A decision or order upon an appeal in which an issue was raised shall be deemed to have exhausted available state remedies with regard to that issue.

RULE 41. STAY OF INTERMEDIATE COURT OF APPEALS JUDGMENT ON APPEAL

[The timely filing of a motion for reconsideration shall stay the finality of the decision until the disposition of the motion unless otherwise ordered by the appellate court.] The timely filing of an application for a writ of certiorari [shall] stays [the] finality of the [decision] intermediate court of appeals judgment on appeal unless otherwise ordered by the supreme court. If the application for a writ is [rejected] dismissed or rejected, the [opinion; dispositional order] intermediate court of appeals judgment on appeal [shall be final as of the date of rejection] is effective upon entry of the order dismissing or rejecting the application for writ. If the application for a writ is accepted, the [intermediate appellate court] intermediate court of appeals judgment on appeal is stayed pending final disposition of the certiorari proceeding in accordance with Rule 36.

COMMENT:

Effective July 1, 2006, a party has 90 days to file an application for a writ of certiorari. The time for filing the application is measured from the date the intermediate court of appeals judgment on appeal or order of dismissal was filed. Thus, the intermediate court of appeals judgment cannot be effective and jurisdiction cannot revert to the court or agency from which appeal was taken until the time for filing the application has expired or, if an application is filed, the supreme court has rejected or dismissed the application or affirmed the intermediate court of appeals judgment in whole. The supreme court's judgment on appeal is not subject to further state review and is effective upon entry.

RULE 42. DISMISSAL.

(a) Dismissal before the appeal is docketed. If an appeal has not been docketed, the appeal shall be dismissed by the court or agency from which appeal is taken upon the filing in that court or agency of a stipulation for dismissal signed by all the parties. Upon motion and notice by the appellant, the court or agency from which appeal is taken may dismiss the appeal upon terms fixed by the court or agency. Counsel for the appellant, or the appellant, if pro se, shall, within 72 hours after the entry of an order dismissing an appeal made by the court or agency appealed from, file a certified copy of the order with the appellate clerk [~~of the supreme court~~].

RULE 45. DUTIES OF APPELLATE CLERKS.

(a) General provisions. [~~Neither the supreme court clerk nor any deputy or assistant~~] No appellate clerk shall practice as an attorney [~~or counselor~~] in any court while he or she continues in office. [~~The office of the clerk of the Supreme Court of Hawaii shall be deemed always open for the purpose of filing any proper paper, issuing and returning process, and making motions and orders.~~] The office of the appellate clerk with [~~the~~] an appellate clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the [~~supreme court~~] Chief Justice may provide [~~by rule~~] that the office of the appellate clerk shall be open for specified hours on Saturdays, Sundays, or legal holidays.

(b) The Docket; calendar; other records required. The appellate clerk shall maintain a docket, in such form and style as may be prescribed by the Administrative Director of the Courts and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the docket. All papers filed with the appellate clerk and all process, orders, and judgments shall be entered chronologically in the docket. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The appellate clerk shall keep a suitable index of cases contained in the docket.

The appellate clerk, upon receipt of the initial paper in any appeal or original proceeding, shall assign to it a number and shall forthwith give notice thereof to the parties. The appellate clerk shall docket the record in each case

when filed in the appellate court and forthwith give notice thereof to the parties. Cross-appeals shall be docketed under the same number as the original appeal.

The appellate clerk shall prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, preference shall be given to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The appellate clerk shall keep such other books and records as may be required from time to time by the Administrative Director of the Courts or as may be required by the ~~[appellate court]~~ supreme court.

(c) Notice of non-final orders. Immediately upon the entry of a non-final order, the appellate clerk shall serve notice of entry and shall make ~~[a notice in the docket]~~ note of the service in the docket. Where a separate order is not filed, the movant shall notify all other parties of the court's ruling and shall file a copy of the notice.

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(e) Costs and fees to be collected by the appellate clerk. The appellate clerk shall collect costs and fees provided by Chapter 607 of the Hawai i Revised Statutes except that the appellate clerk shall collect the amounts specified herein as follows:

1. For copies of any document in any public record~~[-]~~
~~[a:]~~ maintained by the clerk ~~[and stored in the appellate clerk's office]:~~
 - a. in the appellate clerk's office:
 - i. \$1.00 for the first page
 - ii. \$.50 for each additional page
 - b. in an off-site storage location:
~~[Usual copying charge plus]~~ \$5.00 plus usual copying charge
 - c. on microfilm:
 - i. \$5.00 when provided by the appellate clerk~~[- \$1.00 per page]~~
plus ~~[\$5.00]~~ \$1.00 per page
 - ii. ~~[self-service:]~~ \$1.00 per page when obtained via self-service
~~[d:]~~ 2. [to be telefaxed:] For faxing of any document in any public record, the applicable charges plus:
~~[Usual copying charge plus:]~~
 - i. within Hawai i: \$2.00 first page, \$1.00 each additional page
 - ii. outside Hawai i, within the United States: \$5.00 first page, \$2.00 each additional page
 - iii. outside the United States: \$10.00 first page, \$5.00 each additional page
3. For copies of audio or video tapes, electronic copy of any document: \$10.00
- ~~[iv:]~~ 4. For any expedited or rush requests (copy(ies) provided within 4 hours if request received before noon):
\$10.00 plus all other applicable charges
 - e. ~~audio tapes, electronic copy of any document: \$10.00~~
2. ~~Parties to a pending case shall not be charged for the first copy of the appellate court's order, opinion, judgment or any other item entered in the case by the appellate court, whether provided on paper or electronically.~~
3. ~~The appellate clerk shall charge the actual cost of mailing copies of any item, provided that parties to a pending case shall not be charged for the~~

~~mailing of the first paper copy of an order, opinion, or other item entered in the case by the appellate court.~~

~~[4.]~~ 5. Certification of qualification: \$5.00

~~[5.]~~ 6. ~~[Supreme]~~ Appellate Court filing fee: \$100.00

~~[6.]~~ 7. Ex officio filing (in addition to the usual filing fee): \$10.00

8. Certification under seal of a copy of a pleading or other paper subsequent to the initial filing of the pleading or paper, except the record on appeal: \$2.00

9. Parties to a pending case shall not be charged for the first copy of the appellate court s order, opinion, judgment, or any other item entered in the case by the appellate court, whether provided on paper or electronically.

10. The appellate clerk shall charge the actual cost of mailing copies of any item, provided that parties to a pending case shall not be charged for the mailing of the first paper copy of an order, opinion, judgment, or other item entered in the case by the appellate court.

~~[7.]~~ 11. ~~[The]~~ A Hawai i appellate court, or any judge or justice thereof, may waive costs and fees for good cause shown. In lieu of copying and mailing fees, the Chief Justice may authorize the appellate clerk to provide copies of orders, opinions, or other items to publishing companies in exchange for published materials for the benefit of ~~[the]~~ a Hawai i appellate court or the judiciary.

(f) Intermediate Court of Appeals Panels.

(1) MERIT PANEL ASSIGNMENT. The appellate clerk shall assign each appeal or statement of agreed facts to a randomly selected merit panel upon receipt of the last reply brief, upon receipt of a notice the last reply brief will not be filed, or upon expiration of the time when the last reply brief could have been filed.

(2) MERIT PANEL ASSIGNMENT FOR CONSOLIDATED APPEALS. If a motion or request to consolidate related appeals is granted, the appellate clerk shall assign the consolidated appeal to the merit panel to which the oldest related appeal was assigned. If no previous merit panel assignment was made, the appellate clerk shall assign the consolidated appeal to a randomly selected merit panel upon receipt of the last reply brief, upon receipt of a notice the last reply brief will not be filed, or upon expiration of the time when the last reply brief could have been filed.

(3) NOTICE OF PANEL ASSIGNMENT. Upon assignment of a case to a merit panel, the appellate clerk shall notify the Chief Judge and the parties of the identity of the merit panel members.

(4) Judges Copies of Documents. Upon assignment of a case to a merit panel, the appellate clerk shall forward the judges copies of the record index, briefs, and other documents to the Chief Judge.

(5) DESIGNATION OF LEAD JUDGE BY CLERK; WHEN REQUIRED. If the Chief Judge does not notify the appellate clerk of the lead judge s identity within 30 days after entry of the notice of panel assignment, the appellate clerk shall randomly designate the lead judge from among the panel members. The clerk shall not disclose the identity of the lead judge except as required for internal reports approved by the Chief Justice.

(6) RECUSAL OR DISQUALIFICATION. Upon receipt of a judge s notice of recusal or disqualification in any case, the appellate clerk shall randomly select and assign to the merit panel a judge from the remaining intermediate court of

appeals judges who are not known to be recused or disqualified. If an intermediate appellate judge is not available to substitute because of vacancies, recusals, or disqualifications, the appellate clerk shall notify the Chief Justice who shall, in turn, designate a substitute from those eligible to serve as substitutes.

RULE 51. SANCTIONS

Any attorney of record or party in a case, who fails to comply with any of the provisions of ~~[these rules]~~ the Hawai i Rules of Appellate Procedure or any order of the court shall be subject to monetary or other sanctions by the appellate court before which such case is pending, such sanctions to be levied by order of the appellate court or by order of any judge or justice thereof.

DATED: Honolulu, Hawai i, June 20, 2006.

FOR THE COURT:

Chief Justice

1. Considered by: Moon, C. J., Levinson, Nakayama, Acoba, and Duffy, JJ.