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SCRU-11-0000068

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

AMENDED¹

ORDER REGARDING RULES 5.1, 5.2 AND 5.3 OF THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

By order dated December 22, 2014, this court temporarily amended Rules 5.1 and 5.2 and temporarily adopted Rule 5.3 of the Rules of the Supreme Court of the State of Hawai'i, effective January 1, 2015 to December 31, 2015.

IT IS HEREBY ORDERED that Rules 5.1, 5.2, and 5.3 of the Rules of the Supreme Court of the State of Hawai'i, as amended and adopted in the December 22, 2014 order, are now permanent.

IT IS FURTHER ORDERED that Rules 5.1 and 5.2 of the Rules of the Supreme Court of the State of Hawai'i are further

¹ The original order was filed on November 16, 2015. This amended order corrects Rule 5.1(f) by inserting subsection (9) which was inadvertently not included in the original order.

amended, effective January 1, 2016, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 5.1. ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF COURT PROCEEDINGS.

(a) Reserved.

(b) Reserved.

(c) Definitions. As used in these Rules 5.1, 5.2, and 5.3, unless the context otherwise requires:

(1) "Proceeding" or "Proceedings" means any trial, hearing, motion, hearing on an order to show cause or petition, appellate argument, or any other matter held in open court which the public is entitled to attend.

(2) "Extended coverage" means any recording or broadcasting of proceedings through the use of television, radio, photographic, or recording equipment by the media or on behalf of educational institutions.

(3) "Extended audio coverage" means any recording or broadcasting of words spoken during a proceeding through the use of television, radio, or recording equipment by the media or on behalf of educational institutions.

(4) "Judge" means the justice, judge, or judicial officer presiding over the proceedings in which extended coverage is or is requested to be taking place. In courts with more than one "judge" presiding over the proceedings, any decision required to be made by the "judge" shall be made by a majority of the judges.

(5) "Administrative judge" means any judge selected to perform administrative duties in a circuit or district court with more than one judicial officer.

(6) "Coordinator" means the person designated by each administrative judge to receive requests for extended coverage of proceedings within their respective circuit or district.

(7) "Party" means a named litigant of record who has appeared in the case.

(8) "Attorney" means the attorney of record appearing for a party. A party may have only one attorney of record authorized to act on behalf of that party in the proceeding at any one time but may designate a different attorney or change attorneys at any time as permitted by law.

(9) "Trial participants" means parties, attorneys, witnesses, court personnel, and the judge or judges present during the conduct of proceedings.

(10) "Media" means any news gathering or reporting agencies and the individual persons involved, and includes newspapers, radio, television, radio and television networks, news services, magazines, trade papers, in-house publications, professional journals, or other news reporting or news gathering agencies whose function it is to inform the public or some segment thereof.

(11) "Educational institution" means any public or private school of lower or higher education, the Hawai'i Institute for Continuing Legal Education, the Hawai'i State Bar Association Committee for Legal Education for Youth, any division of the Hawai'i State Judiciary, or any nonprofit organization or

corporation whose proposal for extended coverage is approved by the Administrative Director of the Courts.

(12) "Presumption" means a rebuttable assumption of fact made from another fact or group of facts found or otherwise established in an evidentiary proceeding.

(13) "Good cause" means that, under the circumstances of the particular proceeding, or any portion thereof, extended coverage or extended audio coverage would materially interfere with the rights to a fair trial.

(14) "Pooling arrangements" means any system for media accreditation, and internal media cooperation resulting in requests for extended coverage or compliance with guidelines established for extended coverage, or any method of distributing extended coverage to all media sources seeking the type of coverage obtained.

(15) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court of this State or by any public servant authorized by law to impanel a jury, and also includes any person who has been drawn or summoned to attend as a prospective juror.

(16) "Bar" means a member of the Hawai'i State Bar Association who is licensed and in good standing.

(d) General provisions and exclusions.

(1) Nothing in this rule is intended to restrict in any way the right of the media to report on proceedings.

(2) Nothing in this rule affects the authority to permit extended coverage of investitive, ceremonial, or naturalization proceedings.

(3) Nothing in this rule is intended to alter any rules of professional or judicial conduct or canons of ethics of attorneys or judges, except as specifically provided for in this rule.

(4) Nothing in this rule is intended to limit or restrict the power of the judge to control the conduct of the proceedings.

(5) If extended coverage or extended audio coverage is permitted under this rule, such shall be impartially given to all media representatives.

(e) Request for extended coverage.

(1) All requests for extended coverage shall be made by the media or educational institution to the coordinator a reasonable time in advance of the commencement of the extended coverage. "Reasonable time" as used herein shall mean the period of time required for all parties to be notified in advance, shall consider the realities of court scheduling, and shall be the minimum time required to accomplish such notification.

(2) Requests for extended coverage shall be made in writing on a form provided by the Judiciary and shall refer to the individual case with sufficient identification to assist the coordinator in providing the required notice. Such requests may be filed with the coordinator in person, by mail, or by facsimile transmission. Requests for extended coverage shall relate to an entire case. Once application is made for extended coverage for any case, that application shall apply through the final judgment and any post-judgment motions and appeals.

(3) Upon receipt of the written request, the coordinator shall in turn expeditiously notify, in person or by telephone, counsel for all parties or the parties themselves if represented pro se and the presiding judge (or if the

presiding judge has not yet been determined, the appropriate administrative judge).

(4) Only one written request shall be necessary for any given case; once application is made, all media are considered to have applied, i.e., if a television station makes application, newspaper coverage is included and vice versa.

(5) When more than one media representative requests extended coverage or extended audio coverage, the media collectively shall designate one representative to work with the coordinator.

(f) Standard for consent to extended coverage.

(1) Prior consent of a judge shall not be required for extended coverage of any appellate proceeding. Extended coverage of all other proceedings shall not be permitted without the prior determination of the judge.

(2) The judge shall dispose, orally and on the record, of each request for extended coverage or extended audio coverage or by written order if requested by any party and, if coverage is denied, shall make written findings of fact and conclusions of law.

(3) A judge shall grant requests for extended coverage or extended audio coverage of a proceeding unless, by a preponderance of the evidence, good cause is found to prohibit such coverage. In situations where the judge has found good cause to prohibit extended coverage or extended audio coverage, the judge may permit extended coverage or extended audio coverage of only a portion or portions of the proceeding.

(4) A party may object to extended coverage at the beginning of any new stage of the case. If a party objects or if the court orders on its own motion, there shall be a hearing to determine whether extended coverage or extended audio coverage shall be allowed for that stage of the case. If no party objects, no hearing shall be necessary. At such hearing the media shall have standing to be heard and may present evidence. Any objection by a party (or a party acting pro se) to extended coverage or extended audio coverage must be made before extended coverage or extended audio coverage begins for that stage of the case.

(5) A presumption of good cause shall exist in the following circumstances:

(i) the proceeding is for the purpose of determining the admissibility of evidence; or

(ii) testimony regarding trade secrets is being received; or

(iii) testimony of child witnesses is being received; or

(iv) testimony of a complaining witness in a prosecution for any sexual offense under Part V of the Hawai'i Penal Code is being received; or

(v) a witness would be put in substantial jeopardy of serious bodily injury; or

(vi) testimony of undercover law enforcement agents who are involved in other ongoing undercover investigations is being received.

(6) At any time during the proceedings for which extended coverage has been granted, a judge acting sua sponte or on the objection of a witness may, upon establishing that good cause exists following a hearing, terminate or limit extended coverage.

(7) All objections to extended coverage shall be noted on the record of the proceedings and in the minutes of the court.

(8) The media or educational institution or any party may obtain review of an order regarding extended coverage by filing a motion for review addressed to the appropriate administrative judge, who shall have full power to vacate and modify the order[; ~~provided that where a request for extended coverage is initially referred to an administrative judge and is ruled upon, a motion for review will not lie~~]. A motion for review shall be filed no later than 5 days after the filing of the order regarding coverage. In disposing of the motion for review the administrative judge shall comply with subdivision (f)(2) of this [r]Rule. The record of the proceeding before the administrative judge shall be made part of the record of the underlying proceeding for which coverage is sought. Where a request for extended coverage is initially referred to an administrative judge and ruled upon, there shall be no further review.

(9) A party may seek appellate review of an order regarding extended coverage, including any such order issued by the administrative judge, pursuant to the procedures available for review of other interlocutory orders, but immediate appellate review of such an order shall not be available as a matter of right.

(g) Restrictions on extended coverage.

(1) There shall be no extended coverage of any proceedings which are by law closed to the public, or which may be closed to the public and have been closed by the judge. Examples of proceedings closed to the public include, but are not limited to, grand jury proceedings, juvenile cases, child abuse and neglect cases, paternity cases and adoption cases.

(2) There shall be no extended coverage of a juror or a prospective juror.

(3) There shall be no extended audio coverage of conferences between attorneys and clients, or between co-counsel and clients or parties, or between counsel and the judge held at the bench.

(4) There shall be no extended coverage of any conference or proceedings held in the chambers of a judge or any *in camera* proceeding.

(h) Procedure for extended coverage.

(1) Extended coverage shall be conducted in compliance with the guidelines in Rule 5.2 so as not to be distracting and not to interfere with the solemnity, decorum, and dignity which must attend the making of decisions that affect the life, liberty, or property of citizens.

(2) If a judge finds that the provisions of this [r]Rule or the guidelines in Rule 5.2 have been violated by those seeking extended coverage or the continuation thereof, a judge may exercise discretion to limit or terminate extended coverage as to the offending extended-coverage personnel or equipment.

(3) If pooling arrangements are necessary for compliance with this [r]Rule or with guidelines for extended coverage contained in Rule 5.2, pooling arrangements shall be instituted and shall be the sole responsibility of the media and shall not require the judge, coordinator, or other court personnel to mediate disputes.

Rule 5.2. TECHNICAL GUIDELINES TO BE FOLLOWED WHEN EXTENDED COVERAGE IS PERMITTED UNDER RULE 5.1 OR WHEN A JUDGE GRANTS A SEPARATE REQUEST.

(a) Equipment and personnel.

(1) Equipment from one television station or network - designated as the pooling station or network - shall be permitted access to a courtroom proceeding at one time. The pooling station or network shall use only portable electronic cameras which, together with any related equipment to be located in the courtroom, must be unobtrusive in both size and appearance, without distracting sound or light. One television camera, operated by one camera person, shall be admitted to record a proceeding. A second camera may be admitted for live coverage in the discretion of the judge.

(2) Not more than one audio system shall be permitted in the courtroom for extended coverage of a proceeding. Audio pickup for extended coverage shall be accomplished from any existing audio system present in the courtroom, if such pickup would be technically suitable for broadcast. Any changes in existing audio systems shall be approved by the judge or the judge's representative. No modifications of existing systems shall be made at public expense. Microphones, wiring, and recording equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the proceeding. Where possible, electronic recording equipment and any operating personnel shall be located outside of the courtroom.

Notwithstanding the provisions of this Rule [~~5.2(a)(2)~~], a judge may, in the judge's sole discretion and whether or not extended coverage has been otherwise allowed, grant a timely request by a party, a member of the public, or an individual member of the media, to make an audio recording of the proceedings by means of a small, hand-held recorder with a built-in microphone and operated from the seat of the person who made the request.

(3) A judge may also grant a timely request by a member of the public or an individual member of the media to use electronic devices, such as laptops, tablets, cell phones, smartphones, or similarly functioning devices having wireless communication capacity, subject to the following conditions set forth below [in Rule 5.3(b) of these Rules].

(A) Use of electronic devices under this Rule is restricted to law- or court-related business purposes and is subject to the requirements of subsections (i) through (iv) below. In addition, the presiding judge of a proceeding may prohibit or further restrict the use of any electronic devices prior to or during proceedings to protect the interests of security, safety, and privacy of parties, jurors, witnesses, attorneys, court personnel, or the public, or to ensure the integrity, decorum, or orderly conduct of proceedings. Failure to adhere to these requirements, prohibitions, or restrictions may result in removal of the person or device from the courtroom or courthouse or the imposition of other sanctions.

(i) Electronic devices, such as laptops, tablets, cell phones, smartphones, or similarly functioning devices having wireless communication capacity may not be used in courtrooms and during proceedings, unless otherwise authorized by the court. Electronic devices may not be used to

photograph or for audio or video recording, or for audio or video streaming, except as authorized by this Rule and Rule 5.1 of these Rules.

(ii) Within the courtroom, keyboards must be silent. Texting, e-mailing, accessing the internet, and other forms of electronic communication are acceptable uses if conducted without being audibly or visually distracting to others.

(iii) The presiding judge may designate a portion of the courtroom for the use of electronic devices.

(iv) Ring tones and other sounds produced by these devices shall be disabled or silenced. Electronic devices brought into the courtroom cannot be used to make or receive calls inside the courtroom, unless otherwise authorized by the court.

~~[(3)]~~ (4) One still photographer, using not more than 2 still cameras with not more than 2 lenses for each camera, shall be permitted in a proceeding subject to extended coverage. A second still photographer, using not more than 2 still cameras with not more than 2 lenses for each camera, may be admitted in the discretion of the judge. A still photographer also may use the permitted still camera to video record proceedings.

~~[(4)]~~ (5) No equipment or clothing of any extended coverage personnel shall bear any insignia or identification of the individual media or network involved in extended coverage.

~~[(5)]~~ (6) Sufficient video and audio tape capacities should be provided to obviate tape changes except during court recess.

(b) Sound and light criteria. Only television video and audio equipment and still camera equipment that does not produce distracting sound or light shall be employed to cover proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera or still camera.

Rule 5.3. USE OF ELECTRONIC DEVICES IN COURTROOMS BY THE BAR, JUDICIARY PERSONNEL AND SELF-REPRESENTED LITIGANTS.

(a) Application. This Rule applies to the use of electronic devices by the bar, judiciary personnel, and self-represented litigants and does not apply to the use of electronic devices by jurors. This Rule applies in all courtrooms, and in or during proceedings as defined in Rule 5.1(c) of these Rules, that are open to the public. This Rule also applies when a court holds proceedings in locations outside a courthouse, including spaces in public schools, law schools, and other locations, unless otherwise specified by the court.

Within the locations specified above, the bar, judiciary personnel, and self-represented litigants may carry and use electronic devices as set out in this Rule. Except as provided by this Rule or Rule 5.2 of these Rules, the use of electronic devices in courtrooms is prohibited.

(b) Requirements for use.

(1) Use of electronic devices under this Rule is restricted to law or court related business purposes and is subject to the requirements of subsections (2) through (5) below. In addition, the presiding judge of a proceeding may

prohibit or further restrict the use of any electronic devices prior to or during proceedings to protect the interests of security, safety, and privacy of parties, jurors, witnesses, attorneys, court personnel, or the public, or to ensure the integrity, decorum, or orderly conduct of proceedings. If prohibiting or further restricting the use of electronic devices, the judge shall state on the record the reason(s) prohibition or further restriction is deemed necessary. Failure to adhere to these requirements, prohibitions, or restrictions may result in removal of the person or device from the courtroom or courthouse or the imposition of other sanctions.

(2) Electronic devices, such as laptops, tablets, cell phones, smartphones, or similarly functioning devices having wireless communication capacity may be used in courtrooms and during proceedings by members of the bar using the member's own electronic device power source, unless otherwise authorized by the court. Members of the bar seated in the gallery must visibly display their HSBA picture identification cards to utilize electronic devices. Electronic devices may be used by self-represented litigants only with prior permission of the presiding judge and only at counsel table during a proceeding in which the self-represented litigant is participating. However, electronic devices may not be used to photograph or for audio or video recording, or for audio or video streaming, except as authorized by Rules 5.1 and 5.2 of these Rules.

(3) Within the courtroom, keyboards must be silent. Texting, e-mailing, accessing the internet, and other forms of electronic communication are acceptable uses if conducted without being audibly or visually distracting to others.

(4) The presiding judge may designate a portion of the courtroom for use of electronic devices.

(5) Electronic devices may be brought inside the courtroom, but ring tones and other sounds produced by these devices shall be disabled or silenced. Electronic devices brought into the courtroom cannot be used to make or receive calls inside the courtroom, unless otherwise authorized by the court.

DATED: Honolulu, Hawai'i, November 25, 2015.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

