

RE: **Hawai'i Rules of Appellate Procedure**

*ADDITIONAL CLARIFICATIONS OF PROCEDURES*

The Supreme Court of Hawai'i seeks public comment regarding proposals to amend Rules 11, 12.1, 28(b), and 29 of the Hawai'i Rules of Appellate Procedure. The proposals clarify procedures of the appellate courts. The proposals are attached hereto.

Comments about the proposed rules should be submitted, in writing, **no later than Monday, December 14, 2015**, to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the Judiciary's website.

Attachment

**PROPOSED AMENDMENTS TO  
HAWAI‘I RULES OF APPELLATE PROCEDURE**

(Deleted material is bracketed and stricken; new material is underlined)

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**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 of these Rules and shall take any other action necessary to enable the clerk of the court or agency appealed from to assemble and transmit the record. It is the responsibility of each appellant to provide a record, as defined in Rule 10 of these Rules and the Hawai‘i Court Records Rules, that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency appealed from [~~which the appeal is taken~~] to correct any omission.

**(b) Duty of the Clerk of the Court or Agency.**

(1) Unless otherwise provided, the clerk of the court or agency appealed from shall, within 60 days after the filing of the notice of appeal, assemble, certify, and electronically file an imaged index to the record on appeal and imaged copies of each document filed in the record. The record on appeal shall include a flyleaf with a 3-inch top margin that notes, beginning at the top, the appellate court case number, the title of the appellate court and the cause in full, the case number in the trial court, ADLRO, or agency proceedings, the judgment or order on appeal, the names of all judges or hearing officers who have participated in the case or matter, the names of all parties to the case or matter since the case or matter was initiated, and any name or names, telephone numbers, physical and electronic mail addresses of unrepresented parties and the attorney or attorneys representing each party. The documents in the record on appeal shall be assembled sequentially by filing date. When all documents in the record on appeal, other than exhibits, are available in JIMS, the clerk of the court or agency appealed from need not transmit the physical or imaged documents, but shall file a notification with the appellate clerk that the documents are available in JIMS. If a complete record cannot be transmitted within such a period, the appellate court, for good cause, may extend the time upon stipulation or motion, provided that an imaged copy of any findings of fact and conclusions of law entered after the record on appeal has been transmitted to the appellate clerk shall be electronically filed by the clerk of the court or agency appealed from without further order of the 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 or agency appealed from 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) An imaged record shall provide a [~~navigation pane or frame~~] bookmark for access to each document or transcript. If any documents, exhibits, and transcripts filed in the court or agency appealed from are not mentioned in the numbered index, the clerk of the court or agency appealed from shall provide an additional bookmarked index identifying each of them with reasonable

definiteness. Physical exhibits other than documents, and such other parts of the record shall not be transmitted by the clerk of the court or agency appealed from unless he or she is directed to do so by appellate court order.

(4) If a document sealed or designated in-camera by law or order of the court or agency appealed from is part of the record on appeal, the sealed or in-camera document must remain sealed or in-camera unless the appellate court orders otherwise. An appellate court may unseal a document on application of any party, person or entity, or on its own motion with notice to the parties. Sealed or in-camera documents filed in an appellate court must be filed separate from the rest of the record on appeal and appropriately designated as sealed or in-camera. A record filed publicly in the court or agency appealed from and not ordered sealed by that court or agency must not be filed under seal or in-camera in the appellate court.

**(c) Duty of the Appellate Clerk.**

(1) Upon filing of the flyleaf and index to the record on appeal, the appellate clerk shall serve notice upon all parties to the appeal of such filing. If ~~[an]~~ a flyleaf or index is claimed to be in error, the party claiming ~~[it to be so is obligated to]~~ error shall pursue appropriate proceedings in the court or agency appealed from ~~[which the appeal is taken]~~ to correct it.

(2) When the flyleaf and index to the record on appeal is not filed within the time required, the appellate clerk shall give notice to the appellant that the matter will be called to the attention of the appellate court on a day certain for such action as the appellate court deems proper, including dismissal of the appeal.

**(d) Record for ~~[preliminary hearing]~~ motions for intermediate orders in the appellate courts.** If any party desires to make a motion for any intermediate order in the appellate courts, before the record is transmitted, the clerk of the court or agency appealed from ~~[which the appeal is taken]~~ shall electronically transmit to the appellate clerk images of such parts of the original record as any party shall request and designate in writing.

This ~~[r]~~Rule applies to all motions for intermediate orders including motions for dismissal, for release, for a stay pending appeal, for injunctive relief, or for additional security on the bond on appeal or a supersedeas bond.

**Rule 12.1. STATEMENT OF JURISDICTION.**

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**(e) Sanctions.** Failure to file a statement of jurisdiction may result in sanctions, including dismissal of the appeal following notice and a meaningful opportunity to be heard.

**Rule 28. BRIEFS.**

**(a) Format, service, and page limitation.** All briefs shall conform with Rule 32 of these Rules and, if service is by any means other than a notice of electronic filing, be accompanied by proof of service of 2 copies on each party to the appeal. Except after leave granted, an opening or answering brief shall not exceed 35 pages, and a reply brief shall not exceed 10 pages, exclusive of indexes, appendices, and statements of related cases. If a brief raises ineffective

assistance of counsel as a point of error, the appellant shall serve a copy of the brief on the attorney alleged to have been ineffective.

**(b) Opening brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

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(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. Record references shall include a description of the document referenced, the JIMS or JEFS docket number and electronic page citations, or if a JIMS or JEFS docket number is not available, the document's filing date and electronic page citations within the document~~[and the volume number, if applicable]~~. References to transcripts shall include the JIMS or JEFS docket number, the date of the transcript, and the specific electronic page or pages~~[referred to, and the volume number, if applicable]~~referenced. Lengthy quotations from the record may be reproduced in the appendix. There shall be appended to the brief a copy of the judgment, decree, findings of fact and conclusions of law, order, opinion or decision relevant to any point on appeal, unless otherwise ordered by the court.

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(10) An appendix. Anything that is not part of the record shall not be appended to the brief, except as provided in this [r]Rule.

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**(c) Answering brief.** Within 40 days after service of appellant's opening brief, or receipt as evidenced by an acknowledgment of service as provided in Rule 25 of these Rules, whichever is later, the appellee shall file an answering brief. The brief shall be of like character as that required for an opening brief except that no statement of points shall be required, and no other section is required unless the section presented in the opening brief is controverted. If, after filing the answering brief, appellee learns of a related case that has not been previously identified by any other party, appellee shall promptly file a statement of related cases that conforms with subsection (b)(11) of this [r]ule.

A nominal appellee need not file an answering brief. The appellate court may require an answering brief if one is deemed useful to its consideration.

**(d) Reply brief.** Within 14 days after service of appellee's answering brief, or receipt as evidenced by an acknowledgment of service as provided in Rule 25(e) of these Rules, whichever is later, the appellant may file a reply brief. The reply brief shall be confined to matters presented in the answering brief. If no reply brief is to be filed, the appellant shall file a notification with the appellate clerk, with service upon all parties, prior to the expiration of the time for filing the reply brief.

**(e) Briefs on reserved questions.** In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purpose of this [r]Rule, be regarded as the appellant and the party opposing the question as

the appellee. So also where there are several questions and one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some and the negative as to others, the plaintiff shall be regarded as the appellant and the defendant as the appellee, unless, upon application to the appellate court, an order specifying otherwise is issued by the appellate court. Unless otherwise ordered by the appellate court, briefs by the parties shall conform to Rule 28(a), (b), (c) and (d) of these Rules except that points of error and standards of review need not be provided.

**(f) Briefs in original cases.** Unless otherwise ordered by the appellate court, Rule 28(a), (b), (c) and (d) of these Rules shall apply to cases brought originally in the Hawai'i Supreme Court, except that points of error and standards of review need not be provided. For purposes of this [r]Rule, when a case is brought originally in the supreme court, the party who would be regarded as the plaintiff or petitioner, if the matter were instituted in a trial court, shall be regarded as the appellant, and the opposing party as the appellee.

**(g) Brief of amicus curiae.** An amicus curiae brief may be filed only by leave of the appellate court. The order granting leave shall fix the time for filing the amicus curiae brief and any response thereto. The appellate court may allow or disallow the filing of such brief with or without a hearing. All amicus curiae briefs shall comply with the applicable provisions of subsection (b) of this [r]Rule. The attorney general may file an amicus curiae brief without order of the court in all cases where the constitutionality of any statute of the State of Hawai'i is drawn into question, provided that the attorney general shall file the brief within 30 days after the filing of the answering brief, or within 30 days after notice was received pursuant to Rule 44 of these Rules, whichever period last expires.

**(h) Briefs on cross appeal.** If there is a cross appeal, separate opening and answering briefs on the cross appeal, and any reply brief relating thereto, shall be filed in addition to the briefs on the primary appeal and shall comply with the applicable requirements of Rule 28(a), (b), (c) and (d) of these Rules.

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**(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. Any response shall be made promptly and shall be similarly limited.

## **Rule 29. EXTENSIONS OF TIME FOR BRIEFS.**

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**(b) By the appellate court.** Motions for further extensions of time to file briefs shall be made at least 5 days prior to the due date and will be approved by a judge or justice only upon good cause shown.

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