

RE: **Proposal for a New Rule 2.20 of the Rules of the Supreme Court of the State of Hawai'i**

GOVERNING TRUSTEESHIPS OVER ABANDONED LAW PRACTICES

The Supreme Court of Hawai'i seeks public comment regarding a proposal to promulgate a wholly new Rule 2.20 of the Rules of the Supreme Court of the State of Hawai'i in order to reform and amend the process by which law practices of disbarred, suspended, deceased, disappeared, or incapacitated attorneys are responsibly closed.

Comments about the proposed amendments should be submitted, in writing, **no later than Friday, October 16, 2020**, 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 NEW VERSION OF RULE 2.20 OF THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAII**

Rule 2. DISCIPLINARY RULES.

2.20. Trustee proceedings.

(a) Definitions. As used in this Rule:

(1) “Designated successor” means a Hawai‘i licensed attorney designated in the subject attorney’s member registration with the Hawai‘i State Bar to serve as trustee in the event that grounds exist to appoint a trustee for the subject attorney.

(2) “Legally operative original documents” means an original document that impacts legal rights, but is not a matter of public record (e.g., original will, unrecorded deed).

(3) “Property” means property of clients or third persons that a subject attorney holds as a fiduciary in connection with a representation within the scope of Rule 1.15 of the Hawai‘i Rules of Professional Conduct.

(4) “Subject attorney” means an attorney who is the subject or potential subject of trustee proceedings under this Rule.

(5) “Unavailable” means an attorney who has disappeared, died, been suspended or disbarred without complying with Rule 2.16, or been transferred to inactive status because of incapacity or disability.

(b) Grounds for appointment of trustee. Grounds for appointment of a trustee exist whenever: (1) a subject attorney does not have a partner as defined by Rule 1.0(g) of the Hawai‘i Rules of Professional Conduct; and (2) the subject attorney is unavailable or there is other good cause to protect the interests of the subject attorney’s clients.

(c) Procedure.

(1) Motion for appointment. When appointment of a trustee is warranted, Disciplinary Counsel shall file with the supreme court a motion for appointment of an attorney to serve as trustee with proper proof that grounds exist for the appointment.

(2) Service of motion. Disciplinary Counsel shall serve the motion on the subject attorney pursuant to section 2.11(a) of these Rules, and serve by regular mail any representative, or reasonably anticipated representative, of the subject attorney’s estate, to their last known address.

(3) Response to motion. The subject attorney or any interested person may file a response to the motion within 14 days after service of the motion.

(4) Appointment. When grounds exist for appointment of a trustee, the supreme court shall appoint a Hawai‘i licensed attorney as trustee to inventory and administer property in the possession of the subject attorney and to take such action as seems indicated to protect the interests of the subject attorney’s clients or third parties for whom the subject attorney was holding property as a fiduciary. If the subject attorney has a designated successor, or another responsible party lawfully

entitled to conduct the subject attorney's affairs is known to exist, the supreme court may appoint that person.

(5) Limited appointment. When the appointment of a trustee is warranted, upon showing of good cause to protect the interests of the subject attorney's clients, but the subject attorney is not yet unavailable, the supreme court in appointing a trustee may modify the trustee's duties consistent with the circumstances. A limited appointment shall specify whether, and from whom, the trustee is entitled to reimbursement and compensation under this Rule and whether the trustee must provide notice of the appointment to the subject attorney's clients and third parties for whom the subject attorney holds property.

(6) Partner access to client trust account. Where property is held in a trust account under the exclusive control of the subject attorney, a subject attorney's partner, or other associated attorney, who is not a signatory to the trust account may apply to the supreme court, with notice to Disciplinary Counsel, for an order allowing access to such trust account.

(d) Duties of trustees.

(1) A trustee appointed under this rule shall:

(i) promptly take custody of, and inventory, all client files and records of the subject attorney, identifying all legally operative original documents or documents of value.

(ii) promptly take legal possession, including possession by substitution of the trustee as signatory and custodian, of any trust and other bank accounts found or known to exist into which property has been deposited, and shall determine amounts therein and amounts due the clients or third persons for whom the accounts are held. The trustee shall not make any disbursements or transfers from any account without the permission of the supreme court;

(iii) publish one (1) advertisement in a newspaper of general circulation announcing that the trustee has been appointed to inventory the subject attorney's client files, that the subject attorney's clients may contact the trustee to retrieve their files within the time specified in the advertisement, and that unclaimed items will be destroyed;

(iv) send form notices by regular mail to the last known mailing address, or in the manner designated in the subject attorney's client files, to all of the subject attorney's clients, informing them of the subject attorney's status, that those clients may obtain their files by contacting the trustee at an address and telephone number specified in the notice, and that unclaimed items will be destroyed. Except that the trustee need not send notification to a subject attorney's client where it appears after inspection that the underlying legal matter has been inactive for seven years or more and the file contains no legally operative original documents or documents of value to the client;

(v) file with the supreme court periodic reports as to the status of the trustee's administration, listing issues and tasks needed for resolution, and projecting a schedule of estimated completion. Such reports shall be filed as necessary, but not less than annually.

(vi) comply with applicable rules of the Disciplinary Board concerning trustees appointed under this Rule.

(2) A trustee appointed under this rule may:

(i) employ locksmiths to open the subject attorney's present and former law offices, as well as open any safes, cabinets, closets, or other secured areas located within the subject attorney's present and former law offices and any other areas under the subject attorney's control;

(ii) where the trustee is designated by the trustees of the Lawyers' Fund for Client Protection ("Fund") to act on behalf of the trustees for the Fund, or where the trustee acts in coordination with Disciplinary Counsel, cause subpoenas to be issued pursuant to Rules 2.12 or 10.6 for the subject attorney's business and banking records to carry out the trustee's duties under these Rules or consult with and advise the Fund trustees concerning the validity and propriety of claims brought by the subject attorney's clients against the Fund;

(iii) take on a subject attorney's client matter as successor attorney after strict compliance with the rules of professional conduct relating to business transactions with a client and filing with the supreme court a notice disclosing the transfer of the client matter to the trustee and disclaiming any trustee immunity under these Rules for the transferred matter;

(iv) upon approval by the Disciplinary Board, employ assistants, accountants, or bookkeepers as necessary to determine the source and ownership of funds recovered by the trustee;

(v) upon approval by the Disciplinary Board, place any unclaimed files in storage (in the custody of the Disciplinary Board); or

(vi) take such further action as the supreme court directs, including seeking an order of abandonment of property where a client or the client's legal representative cannot be found and the property is either funds subject to escheat under HRS § 523A or non-monetary property of inconsequential value or otherwise burdensome to the estate.

(e) Reimbursement and compensation of trustee. Trustees may receive reasonable compensation for their services and may be reimbursed for traveling and other expenses incidental to the performance of their duties. Trustees compensated for their services shall apply to the supreme court for compensation not more frequently than quarterly, or less than annually.

(f) Confidentiality. A trustee shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates, except as necessary to carry out the supreme court's order appointing the trustee to make such inventory or to cooperate in investigations by Disciplinary Counsel or the Fund.

(g) Role of Disciplinary Counsel in trustee proceedings. Except where Disciplinary Counsel is appointed to serve in the capacity as a trustee under this Rule, Disciplinary Counsel shall be a party to trustee proceedings, assist trustees in the performance of their duties, monitor the progress of proceedings, review trustee reports, scrutinize applications for compensation and expense reimbursement on behalf of the Disciplinary Board, file concurring or opposing statements where appropriate on behalf of the Disciplinary Board or the Fund, and do such other acts as may aid in the advancement of proceedings. Disciplinary Counsel is also empowered, concurrent with the trustee appointed under this rule, to interpose claims on behalf of the Disciplinary Board or the Fund with any personal representative, trustee, probate, other trust, or

estate of the subject attorney. Notwithstanding the foregoing, Disciplinary Counsel shall not provide legal advice to trustees or any other person with regard to the trust estate.

(h) Disposition of property. Prior to discharge of the trustee, the trustee shall dispose of property as follows.

(1) For property released to the subject attorney's clients, express designee, or client's legal representative(s), the trustee shall obtain and maintain written records and verification of the release.

(2) For property to be released to third persons other than the client's designee or legal representative, the trustee shall obtain approval from the supreme court for release.

(3) For property that a subject attorney's client expressly declined in writing to retrieve, the trustee shall destroy the file in a secure manner.

(4) For unclaimed legally operative original documents or documents of value, the trustee shall file copies of the documents in the docket of the trustee proceeding and deliver the original documents to Disciplinary Counsel. Disciplinary Counsel shall maintain the original documents for six years, after which time Disciplinary Counsel may destroy any remaining unclaimed documents without returning to the supreme court for permission to do so. Original wills, in the alternative, may be deposited with the appropriate probate court, pursuant to Rule 74 of the Hawai'i Probate Rules.

(5) Where the trustee determines that notice to the subject attorney's client is not required, after the time specified in the published advertisement has expired the trustee shall destroy the file in a secure manner.

(6) For all remaining unclaimed property, the trustee shall destroy the files in a secure manner after the time specified in the advertisement and notice has expired.

(i) Suspension during the trusteeship. Upon appointment of a trustee, the subject attorney may, by order of the supreme court, be suspended from the practice of law in this state until the trusteeship is completed. Any subject attorney so suspended shall be entitled to apply to the supreme court for reinstatement to active status upon a showing that the grounds for commencing the trustee proceeding have been resolved, any monetary sums awarded in the trustee proceeding have been satisfied, and that the subject attorney is fit to resume the practice of law. If the subject attorney is suspended pursuant to this Rule, the Disciplinary Board or the supreme court shall promptly transmit a copy of the order of suspension to all judges of the State of Hawai'i and request such action as may be indicated in the order to protect the interests of the subject attorney's clients.

(j) Responsibility for fees and costs incurred. The subject attorney or the subject attorney's estate may be required to pay to or otherwise reimburse the Disciplinary Board and, where applicable, the Fund all trustee fees and costs ordered and incurred, together with interest at the Hawai'i statutory judgment rate.