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SCRU-11-0000068

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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In the Matter of the

RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I

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ORDER PROMULGATING A NEW RULE 2.20 OF THE  
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

IT IS HEREBY ORDERED that current Rule 2.20 of the Rules of the Supreme Court of the State of Hawai‘i is replaced with a wholly new Rule, effective January 1, 2021, as follows:

**RULE 2. DISCIPLINARY RULES.**

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**2.20. Trustee proceedings.**

**(a) Definitions.** As used in this Rule and for other purposes:

(1) “Designated Practice Administrator” means a Hawai‘i licensed attorney designated in the subject attorney’s member registration with the Hawai‘i State Bar to oversee the responsible closure of the subject attorney’s practice, including by serving 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 of these Rules, 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. The Motion shall include a declaration from the putative trustee, disclosing any conflicts or business relations with the subject attorney or the subject attorney’s clients.

(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, though this period may be shortened at the court’s discretion, for good cause.

(4) **APPOINTMENT.** When grounds exist for appointment of a trustee, the supreme court may 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 as well as third parties for whom the subject attorney was holding property as a fiduciary. If the subject attorney has a Designated Practice Administrator or if another responsible party who is a licensed Hawai‘i attorney is known to exist who is willing to conduct the subject attorney’s affairs, 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:

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

(B) promptly determine if the subject attorney has any active matters or cases and, as trustee, notify all parties and any relevant tribunals of the trusteeship.

(C) 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;

(D) publish 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 90 days of the publication date of the notice and that unclaimed items will be destroyed thereafter;

(E) 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. The trustee, however, need not send notification to a subject attorney's client where it appears after inspection of the file that the underlying legal matter has been inactive for 7 years or more and the file contains no legally operative original documents or other items of value to the client;

(F) 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; and

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

(2) A trustee appointed under this Rule may:

(A) 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;

(B) 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 of these Rules 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;

(C) after strict compliance with the rules of professional conduct relating to business transactions with a client, 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, substitute in place of the subject attorney in any given client matter;

(D) 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;

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

(F) 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 Hawai'i Revised Statutes § 523A or non-monetary property of inconsequential value or otherwise burdensome to the estate.

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

**(f) Confidentiality.** All client files in possession of a trustee are confidential in accordance with Rule 1.6 of the Hawai'i Rules of Professional Conduct. 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.** The Disciplinary Board shall appoint a specific Disciplinary Counsel to serve as Trustee Administrator.

(1) The Trustee Administrator shall be a party to all trustee proceedings under this Rule 2.20, 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. The Trustee Administrator may also be appointed as interim or successor trustee where deemed appropriate by the supreme court.

(2) The Trustee Administrator is also empowered, concurrent with the trustee appointed under this Rule 2.20, to interpose claims on behalf of the Disciplinary Board or the Fund with the subject attorney or any personal representative, trustee, probate, other trust, estate, or property of the subject attorney.

(3) Notwithstanding the foregoing, Disciplinary Counsel, including the Trustee Administrator, 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 funds not held in a bank account, promptly deposit such funds in the subject attorney's trust account and dispose of such funds as provided for in subsection (d)(1)(C) of this Rule;

(2) 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;

(3) 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;

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

(5) For unclaimed legally operative original documents or other documents of value from any unclaimed client files, the trustee shall file copies of the documents under seal in the docket of the trustee proceeding and deliver the original documents to Disciplinary Counsel. Disciplinary Counsel shall maintain the original documents for 6 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.

(6) Where the trustee determines, pursuant to subsection (d)(1)(E) of this Rule, that direct written notice to the subject attorney's client is not required, the trustee shall, after removing documents of value, destroy the file of that client in a secure manner after the time specified in the published advertisement has expired.

(7) For all remaining unclaimed property, the trustee, after culling them for legally operative original documents and other items of value,

shall destroy the files in a secure manner after the time specified in the published advertisement and, if applicable, the direct written 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 jurisdiction until the trusteeship is completed. 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 order to protect the interests of the subject attorney’s clients. 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 or an arrangement for their payment has been approved by the court, and that the subject attorney is fit to resume the practice of law. If the subject attorney remains suspended pursuant to another provision of this Rule 2, the subject attorney shall not be reinstated until the reinstatement process set forth in that other Rule is fulfilled.

**(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 fees, costs and other amounts ordered and incurred, together with interest at the Hawai‘i statutory judgment rate.

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DATED: Honolulu, Hawai‘i, December 14, 2020.

/s/ Mark E. Recktenwald  
/s/ Paula A. Nakayama  
/s/ Sabrina S. McKenna  
/s/ Michael D. Wilson  
/s/ Todd W. Eddins

