

**HAWAI‘I SUPREME COURT
COMMISSION ON PROFESSIONALISM**

**NINTH REPORT TO THE
HAWAI‘I SUPREME COURT**

Present Committee Members

The Honorable Richard W. Pollack, Chair
Erika Amatore
Susan L. Arnett
The Honorable Joseph E. Cardoza
Dr. Malcom H.M. Chang
Rebecca A. Copeland
Liam Deeley
The Honorable Lisa M. Ginoza
The Honorable Leslie E. Kobayashi
Jane Kwan
The Honorable Katherine G. Leonard
Michael A. Marr
The Honorable Henry T. Nakamoto
Nathan M. Nikaido
Judith A. Pavey
Caroline R. Richelieu
The Honorable Michael K. Soong
D. Kapua‘ala Sproat
Kevin Takata
Bradley R. Tamm
The Honorable Matthew Viola
Kenneth Wong

Committee Members Whose Term Expired Since 2015

Steven B. Dixon (2011-2015)
The Honorable Daniel R. Foley (2011-2015)
Joanna Grimes (2013-2017)
David W. Hall (2011-2015)
Janet Hunt (2013-2017)

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

NINTH REPORT TO THE HAWAI'I SUPREME COURT

June 30, 2020

I. ESTABLISHMENT OF THE COMMISSION ON PROFESSIONALISM

The Commission on Professionalism (Commission) was established on March 14, 2005, by an Order of the Hawai'i Supreme Court signed by Chief Justice Ronald T.Y. Moon (APPENDIX A). Establishment of the Commission was recommended by the Hawai'i Supreme Court's Committee to Formulate Strategies for Implementing the Conference of Chief Justices' National Action Plan for Lawyer Conduct and Professionalism.

II. THE COMMISSION'S CHARGE

The Order establishing the Commission set forth its charge:

The Commission is charged with enhancing professionalism among Hawai'i's lawyers. The Commission's major responsibilities shall be to:

- (a) develop strategies and recommendations to implement the National Action Plan initiatives, including the American Bar Association's (ABA) accompanying plan, as prioritized;
- (b) identify barriers to implementation;
- (c) identify action steps to overcome barriers; and
- (d) propose a post-implementation evaluation process.

III. MEMBERS OF THE COMMISSION

- Section 2(c) would be amended as follows: "Does not ~~regularly~~ engage in the strategy of not agreeing to reasonable requests for time extensions simply to appear 'tough.'"
- Section 3(b) would be revised to read, "Serves papers by personal delivery or by ~~facsimile transmission~~ electronic means (including email or facsimile transmission) when it is likely that service by mail, even when allowed, will prejudice the opposing party."
- Section 6 would have "letter" replaced with "written communication" throughout, and Section 6(a) would be amended to read, "Does not ~~draft~~ send a letter written communication."
- Section 7(a)(10) would be amended to read as follows: "Does not engage in any conduct during a deposition that is likely to offend others ~~necessarily~~ present and that would violate prevalent standards of behavior in judicial proceedings."
- Section 7(b)(2) would be amended to read, "Does not draft requests for ~~document~~ production of documents and things so broadly that they encompass ~~documents~~ items clearly not relevant to the subject matter of the case or clearly not reasonably calculated to lead to the discovery of admissible evidence."
- Section 7(b)(4) would be amended to read, "Withholds documents and things on the grounds of privilege or confidentiality only where appropriate."
- Section 7(d) would be introduced and would read as follows:
 - (d) As to discovery conferences, a lawyer who manifests professional courtesy and civility:
 - (1) Does not request a discovery conference without first attempting to confer with opposing counsel to narrow the issues of dispute.
 - (2) Makes sparing use of discovery conferences in light of the burden of time and expense upon the parties and the court.

The Commission agreed to adopt all of the proposed revisions. On January 16, 2016, the Commission concluded that it would not be practicable to have enforceable rules governing civility issues, and thus the Guidelines would remain guidelines. The Commission voted to amend a sentence of the introduction to provide:

The Guidelines are offered for the guidance of lawyers and for the information of their clients, as well as for reference by the courts.

- Principle 13 would be amended as follows: A judge should avoid procedures that needlessly increase litigation expenses and should discourage unnecessary litigation expenses.
- Principle 14 would be amended as follows: A judge should refer to counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss), or by the professional title of attorney, counsel or counselor while in the courtroom. In any proceeding, on or off the record, a judge should refer to all counsel in a like manner.
- Principle 15 would be amended as follows: A judge should be courteous and respectful in opinions and decisions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly. A judge should endeavor to work with other judges to foster a spirit of cooperation in the mutual goal of enhancing the administration of justice.

The proposed revisions were forwarded to the Hawai'i Supreme Court and released for public comment. The court reviewed the public comments, and then it adopted the Commission's recommendations without modification. The final revisions may be found in the Principles of Professionalism for Hawai'i Judges (2017).

D. Pro Hac Vice Representation in Hawai'i

On January 15, 2016, the Commission met and discussed the issue of out-of-state counsel appearing *pro hac vice* before state agencies and in arbitration. On October 7, 2016, the Commission met and reviewed a letter that was to be sent to the executive branch, suggesting that local counsel participate meaningfully in proceedings before agencies, but declining to require local counsel to serve as lead counsel. Bernard Bays addressed the Commission and encouraged it to require *pro hac vice* admission for out-of-state counsel in any arbitration or mediation proceeding and to bar an arbitrator from admitting counsel *pro hac vice*. Several other witnesses addressed the Commission regarding establishing Hawai'i as an international arbitration center. On January 20, 2017, the Commission reviewed comments from Hawai'i attorneys and determined that it would present a rule regarding the participation of out-of-state lawyers in mediation and/or arbitration.

discrimination in the legal profession. These proposals included amendments to RSCH Rule 22, amendments to HRPC Rule 8.4, and a new section of the Guidelines (Section 15) to be adopted if proposed amendments to HRPC Rule 8.4 were not ultimately adopted by the Hawai'i Supreme Court. The drafts of these proposals, were considered and voted on by Commission members at the meeting held on October 4, 2019. Suggestions were made to RSCH Rule 22, and the Commission agreed to consider a revised version at the January 10, 2020 meeting.

At this meeting, the Commission members considered two revised options, and after discussing these proposals, one member agreed to redraft the proposal to reflect the suggestions made at the January 10, 2020 meeting. The final draft of that proposal was circulated to Commission members and unanimously approved by a majority of the members.

Final versions of the proposed amendments to RSCH Rule 22, HRPC Rule 8.4, and the Guidelines are attached as APPENDIX D.

The Commission's proposals were submitted to the Hawai'i Supreme Court on February 3, 2020. The proposals were reviewed by the court and then sent to the Communications & Community Relations Office to be released for public comment on June 26, 2020.

F. Statutory Obligations for Lawyers and Law Firms Regarding Electronic Data Breaches.

The Commission is currently considering whether to propose an amendment to the Hawai'i Rules of Professional Conduct to provide an affirmative duty for lawyers and law firms to report data breaches to clients in compliance with chapter 487N of the Hawai'i Revised Statutes. A subcommittee has been assigned to research how other states have addressed this issue and to submit recommendations to the Commission.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Establishment of
HAWAI'I SUPREME COURT'S
COMMISSION ON PROFESSIONALISM

X HAWAIIAN
CLERK OF THE SUPREME COURT
STATE OF HAWAII

2005 MAR 14 PM 1:22

FILED

ORDER ESTABLISHING THE HAWAI'I SUPREME COURT'S
COMMISSION ON PROFESSIONALISM
(By: Moon, C.J., for the court¹)

WHEREAS, in August 1996, the Conference of Chief Justices (CCJ) passed a resolution calling for a national study and action plan regarding lawyer conduct and professionalism, wherein the CCJ noted a significant decline in professionalism in the bar and a consequent drop in the public's confidence in the profession and the justice system in general and concluded that a strong coordinated effort by state supreme courts to enhance their oversight of the profession was needed; and

WHEREAS, in March 1999, the CCJ's January 1999 *National Action Plan on Lawyer Conduct and Professionalism* was published and disseminated to chief justices, lawyer disciplinary agencies, and state bar associations throughout the United States; and

WHEREAS, the National Action Plan sets forth programs, initiatives, and recommendations designed to increase the efficacy of the state supreme courts' exercise of their inherent regulatory authority over the legal profession; and

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

- (c) identify action steps to overcome barriers;
and
- (d) propose a post-implementation evaluation process.

(3) The Chair of the Commission shall be the Chief Justice or the Chief Justice's designee. Commission members shall be appointed by the chief justice, upon the concurrence of a majority of the justices of the supreme court. In addition to the Chair, the Commission shall be comprised of a total of nineteen (19) members that reflect racial, ethnic, gender, and geographic diversity and as prescribed below:

(a) Judges.

- (i) Four (4) incumbent Hawai'i trial court judges chosen from the First, Second, Third, and/or Fifth Judicial Circuits;
- (ii) Two (2) incumbent judges chosen from the Hawai'i Supreme Court or the Intermediate Court of Appeals or both;
and
- (iii) One (1) incumbent judge chosen from the United States District Court for the District of Hawai'i or the United States Court of Appeals for the Ninth Circuit.

(b) Practicing Lawyers. Four (4) practicing lawyers who are members of the Hawai'i State Bar Association, chosen from a list of ten

the Commission. A Commissioner may be appointed for additional terms.

(5) A Commissioner who no longer meets the qualifications of this rule shall be deemed to have completed the Commissioner's term and the Commissioner's office shall be deemed vacant. Any vacancy on the Commission shall be filled by the chief justice, upon the concurrence of a majority of the justices of the supreme court, for the unexpired term.

(6) The Commission shall serve in an advisory capacity only, shall give continuing consideration to the enhancement of professionalism in the practice of law, and shall make reports and/or recommendations to the supreme court, annually, regarding implementation of the National Action Plan and any other relevant information regarding the work of the Commission.

(7) Commission members shall not receive compensation for their services, but may be reimbursed for travel and other expenses that are incidental to the performance of their duties.

(8) The Commission shall have no authority to impose discipline upon any members of the Hawai'i State Bar or to amend, suspend, or modify the Hawai'i Rules of Professional Conduct (HRPC). The Commission, however, may, if appropriate, recommend amendments to the HRPC to the supreme court for consideration.

IT IS FURTHER ORDERED, pursuant to the foregoing, that the following individuals are appointed as members of the Commission on Professionalism, effective immediately upon the filing of this order and for the term as specified below:

APPENDIX B

(B) affirmation that local counsel understands he or she is the attorney of record and is ultimately responsible for all phases of the litigation;

(2) the declaration of the applicant for pro hac vice admission that provides, at minimum, the following information:

(A) the applicant's business address, the name of the law firm the attorney is associated with and the address of the law firm;

(B) every state and federal jurisdiction[s] to which the applicant has been admitted to practice law and a certificate of good standing from each listed jurisdiction in which the applicant is currently licensed in active status; [3]

(C) any and all disciplinary proceedings [that have been filed against the applicant] in which the applicant was disciplined [and the disposition of those proceedings], any pending disciplinary proceedings against the applicant, or a statement, if applicable, that the applicant has never been the subject of any disciplinary proceeding; [4]

(D) the title and case number of each case and court in this State in which the applicant has been allowed to appear pro hac vice and the present status of each case; and

(E) an affirmation that, if admitted, the applicant will comply with all applicable Hawai'i statutes, [and] laws, and [all] rules of the courts; [is familiar with] including the Hawai'i Rules of Professional Conduct and Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers.

(F) an affirmation that, if admitted, the applicant will be subject to all applicable Hawai'i statutes, laws, rules of the court, and [Understands that when admitted pro hac vice, the applicant will be subject to] the Hawai'i disciplinary process[,] with respect to any acts or omissions occurring during representation pursuant to this Rule. [5]

³ The requirement of section (b) (2) (B) has the potential to be onerous. It is recommended that it be verified that these certificates are readily available in every state and federal jurisdiction and that the good standing certificate be required only from jurisdictions in which the applicant is currently licensed in active status.

⁴ These changes would prevent an applicant who has been subject to non-meritorious disciplinary claims from having to repeatedly disclose such proceedings.

⁵ The changes to subsection (b) (2) (E) and the addition of (b) (2) (F) would clarify that pro hac vice counsel is required to comply with our law and is subject to our disciplinary process for violation of such law. See

APPENDIX C

appearances as counsel in Hawai'i during the preceding 5 years, the petition shall reflect the special circumstances that warrant the approval of the attorney's appearance in the subject arbitration.

(2) *REQUIRED DECLARATION BY OUT-OF-STATE ATTORNEY.* In addition, the out-of-state attorney shall provide a declaration that declares accurately and truthfully to the best of the attorney's knowledge, under penalty of law, that the out-of-state attorney:

(A) is in good standing before the courts where the attorney's license to practice law is active;

(B) is not currently, and has not been in the past, suspended or disbarred from the practice of law before any court or has otherwise been disciplined or, if the attorney has been disciplined or is subject to a pending disciplinary proceeding, providing material information about those proceedings;

(C) is not a resident of the State of Hawai'i, and is not regularly engaged or employed as an attorney in Hawai'i; and

(D) if given approval to represent a party in the arbitration, agrees to be subject to the jurisdiction of the courts of this state with respect to the laws of this state governing the conduct of attorneys, including the disciplinary jurisdiction of the Supreme Court of the State of Hawai'i and the Disciplinary Board of the Hawai'i Supreme Court, and will comply with applicable Hawai'i laws, arbitration rules, the Hawai'i Rules of Professional Conduct, and the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers.

(3) *REQUIRED DECLARATION BY HAWAI'I ATTORNEY.* The Hawai'i attorney submitting the petition shall provide a declaration that declares accurately and truthfully to the best of the attorney's knowledge, under penalty of law:

(A) the business address and address for service of documents for the Hawai'i attorney; and

(B) an affirmation that he or she is the attorney of record and is responsible for all phases of the subject arbitration.

(c) *Disposition of the petition.* The arbitrator(s) shall respond to the petition in writing. The arbitrator(s) may approve the petition if the requirements in subsection (b) of this Rule have been satisfied. The petition shall be disapproved for failure to submit and serve the petition as described in subsection (b). In the absence of special

who proceeds to represent a party in an arbitration proceeding, is subject to referral to appropriate authorities for potential violation of Hawai'i Revised Statutes § 605-14 (Unauthorized practice of law prohibited) and other applicable laws.

(g) **The pro hac vice attorney is subject to Hawai'i jurisdiction.** An attorney approved to appear in an arbitration proceeding under this Rule is subject to the jurisdiction of Hawai'i courts with respect to all applicable Hawai'i laws and rules to the same extent as any other attorney admitted to practice in this state. The attorney approved to appear in an arbitration proceeding under this Rule is also subject to the disciplinary jurisdiction of the Supreme Court of the State of Hawai'i and the Disciplinary Board of the Hawai'i Supreme Court.

(h) **Limits of this Rule.** Any party to an arbitration arising under a collective bargaining agreement subject to either state or federal law may be represented in the course of and in connection with those proceedings by any person, regardless of whether that person is licensed to practice law in Hawai'i, if the representation is consistent with the laws governing such proceedings. This Rule does not apply to proceedings before state or federal administrative boards or agencies that are authorized to establish their own rules governing the practice of out-of-state attorneys before those bodies. This Rule does not negate the rights of parties to be represented by a person of their choosing so long as that right is established as a matter of a specific state or federal law.

- A new subsection (b) (E) would provide: if the applicant has made repeated appearances as counsel in Hawai'i during the preceding 5 years, the special circumstances that warrant the approval of the attorney's appearance in the subject case;
- Subsection (b) (E) would be renamed to subsection (b) (F) and would be amended as follows: an affirmation that, if admitted, the applicant will comply with all applicable Hawai'i statutes, laws, and rules of the courts including the Hawai'i Rules of Professional Conduct and Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers⁺; and
- Subsection (b) (F) would be renamed to subsection (b) (G)
- Subsection (c) would be amended as follows: An attorney ~~allowed~~ approved to appear *pro hac vice* pursuant to this Rule is subject to the jurisdiction of Hawai'i courts with respect to all applicable Hawai'i statutes, laws, and rules of the courts to the same extent as any other attorney admitted to practice in the courts of this state. The attorney ~~allowed~~ approved to appear *pro hac vice* is subject to the disciplinary jurisdiction of the Supreme Court of Hawai'i. The court in which an attorney is ~~allowed~~ approved to appear *pro hac vice* or the Supreme Court of Hawai'i may, for violations of Hawai'i law, the Hawai'i Rules of Professional Conduct, or orders of the court, revoke the permission for the attorney to appear *pro hac vice*, or impose any other appropriate sanction.
- A new subsection (f) would be added, and would provide as follows: An attorney not licensed in Hawai'i who fails to obtain approval to represent a party in a court proceeding as required by this Rule, and who proceeds to represent a party in a court proceeding, is subject to referral to appropriate authorities for potential violation of Hawai'i

The proposed revisions to RSCH Rule 2.1 provided as follows:

Any attorney admitted to practice law in this state, and any attorney specially admitted by a court of this state for a particular proceeding, and any attorney specially admitted to appear in an arbitration proceeding under Rule 1.9A of these Rules is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established.

Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any voluntary bar association from censuring a member or suspending or expelling a member from membership in the association. Further, nothing herein contained shall be construed to deny to any arbitrator or arbitration panel such powers as the arbitrator or arbitration panel may have that are necessary to maintain control over a particular arbitration proceeding.

APPENDIX D

PROPOSED AMENDMENT OF THE
HAWAII RULES OF PROFESSIONAL CONDUCT

(New material proposed underlined)

Proposal to amend HRPC Rule 8.4 by inserting a new subsection regarding harassment and discrimination.

Rule 8.4. MISCONDUCT.

It is professional misconduct for a lawyer to:

(a) attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Reserved;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) fail to cooperate during the course of an ethics investigation or disciplinary proceeding.

(h) engage in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression. This paragraph shall neither limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

Comments:

[6] Definitions with respect to subsection (h) of Rule 8.4:

PROPOSED AMENDMENT TO
THE GUIDELINES OF PROFESSIONAL COURTESY
AND CIVILITY FOR HAWAI'I LAWYERS

Section 15. Harassment or Discrimination

A lawyer should refrain from engaging in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression. This paragraph shall neither limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor shall it infringe on any constitutional right of a lawyer or client.

APPENDIX E

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of January 23, 2015
2:00 p.m. – 3:15 p.m.
Supreme Court Administrative Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Susan Arnett, Associate Judge Lisa M. Ginoza, Joanne
 Grimes, David Hall, Associate Judge Katherine G. Leonard, Judith Pavey,
 D. Kapua'ala Sproat, and Kevin Takata.

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of October 10, 2014
 (3) Recommended Revisions to Rule 1.9 of the Rules of the Supreme
 Court State of Hawai'i (previously distributed and submitted to
 supreme court 11/14/14)
 (4) Documents previously distributed on Civility and Professionalism
 Guidelines

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting. Justice Pollack noted that there was not a quorum of members present at the meeting.

Justice Pollack recognized Associate Judge Daniel R. Foley's ten years of service on the Commission and noted that Judge Foley recently resigned from his position on the Commission due to a conflict of interest. Justice Pollack welcomed and introduced Associate Judge Lisa M. Ginoza of the Intermediate Court of Appeals, who was appointed to the Commission on January 21, 2015.

II. MINUTES OF MEETING OF OCTOBER 10, 2014.

Because there was not a quorum of members present, the Commission did not review the minutes of the meeting of October 10, 2014.

**III. DISCUSSION OF GUIDELINES OF PROFESSIONAL COURTESY AND
CIVILITY FOR HAWAI'I LAWYERS**

Attendees discussed whether they find the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers ("Guidelines") helpful in practice. One member stated that lawyers will sometimes remind each other of the guidelines. She noted that it may be helpful to question younger lawyers about the usefulness of the guidelines, and she suggested that younger lawyers may face civility issues more frequently. It was also noted that civility issues frequently arise with more experienced attorneys as well.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of April 17, 2015

2:30 p.m. – 4:00 p.m.

Supreme Court Administrative Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Liam Deely, Associate Judge Lisa M. Ginoza, Joanne Grimes (phone), David Hall, Grace Nihei Kido, Jane Kwan, Associate Judge Katherine G. Leonard, Michael Marr, Judith Pavey, Richard Platel, Judge Barbara Takase (phone), Calvin Young
Others: Rebecca Copeland, Pat Mau Shimizu (phone)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of October 10, 2014
 (3) Minutes of the Meeting of January 23, 2015
 (4) Responses from Judges Regarding the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers
 (5) Conference of Chief Justices, Resolution 1 Commending the American Civil Trial Bar Roundtable Policy Paper on Increasing the Professionalism of American Lawyers (White Paper Included)
 (6) Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers and Research on Civility and Professionalism Guidelines in Other Jurisdictions (previously distributed)

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting. Justice Pollack introduced the new members of the commission: Liam Deely, Richard Platel, Jane Kwan, and Michael Marr. Justice Pollack also introduced Rebecca Copeland who was appointed to the commission effective April 27, 2015, and was in attendance.

II. MINUTES OF MEETING OF OCTOBER 10, 2014 AND JANUARY 23, 2015

The Commission unanimously adopted the minutes of the meetings of October 10, 2014, and January 23, 2015.

III. DISCUSSION OF GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

Attendees first discussed the distribution of an inquiry to HSBA members regarding the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers ("Guidelines"). Pat Mau Shimizu indicated that the HSBA was willing to distribute the inquiry to bar members on behalf of the Commission. Justice Pollack noted that an ABA white paper regarding the professionalism of American lawyers was distributed for the Commission

draft proposed language. The possibility of adding to the introduction was further discussed, and Justice Pollack agreed to draft proposed language.

Judge Chang's recommendation to add a new subsection (g) to Section 2 on continuances and extensions was discussed. Judge Chang's recommended language is as follows: "(g) calls the court to notify it as soon as possible of the parties' agreement to continue or have resolved a pending matter." One member suggested that this seemed more appropriate to be included as a rule in the court rules. Another member noted that sometimes judges will require the parties to appear in court so that the agreement is placed on the record. It was noted that this recommendation was similar to one of Judge Nishimura's comments and that the issue is addressed by Section 1(e). Judge Leonard agreed to consider Judge Chang's recommendation in drafting the language she previously volunteered to consider.

The Commission next discussed Judge Chang's suggestion that the following be added to section 5: "(c) Complies with the procedural requirements of all applicable court rules and the prevailing custom and practice." There was some concern with the phrase "prevailing custom and practice." One member mentioned that this revision did not seem necessary; and another expressed concern with recommending compliance with mandatory rules in an aspirational guideline. The Members were in agreement not to adopt this suggestion.

Judge Chang's suggestion to insert the word "respectful" in Section 6, line 1 was next discussed. One member noted that civil and courteous have the same meaning. It was suggested that people may have a better sense of "courtesy" than if the word "respectful" was used. The Commission also discussed Judge Chang's recommendation with regard to avoiding incoming calls and responding in a timely manner. The members were in agreement that this issue was already adequately addressed.

Judge Chang also recommended additional language advising that counsel should avoid engaging in "gamesmanship" in conducting discovery. After some discussion on the issue, Justice Pollack agreed to take a close look at the recommendation to determine if this suggestion might be helpful. One member noted that if the recommendation were adopted, it should be phrased positively because the Guidelines are meant to be aspirational.

The Commission also considered Judge Chang's recommendation to add a subsection to Section 7(b) stating, "Does not object to a request that is proper for the purpose of delaying the production of items." It was suggested that this concept is already incorporated in Section 7(b)(6) of the Guidelines. There was some discussion with regard to Section 7(b)(6) and whether the existing language, which includes the phrase "for any other tactical reason," was appropriate. Judith Pavey volunteered to work on revisions.

Judge Chang's suggestion that a definition of "ex parte communication" be added to Section 10 was next discussed. Members discussed the differing interpretations of "ex

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of July 24, 2015

2:30 p.m. – 4:15 p.m.

Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Susan Arnett, Dr. Malcolm Chang, Rebecca Copeland, Liam Deely, Associate Judge Lisa M. Ginoza, Jane Kwan, Associate Judge Katherine G. Leonard, Michael Marr, Judge Paul Murakami, Nathan Nikaido, Judith Pavey, Judge Barbara Takase (phone), Kevin Takata
Others: Carole Richelieu, Pat Mau Shimizu

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of April 17, 2015
 (3) Proposed Revisions to the Guidelines Drafted by Judge Leonard, Judith Pavey, and Justice Pollack
 (4) Responses from HSBA Members Regarding the Guidelines
 (5) SB 1010

I. **WELCOME AND ANNOUNCEMENTS**

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. **MINUTES OF MEETING OF APRIL 17, 2015**

The Commission unanimously adopted the minutes of the meeting of April 17, 2015.

III. **DISCUSSION OF PROPOSED REVISIONS TO THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS**

The Commission first considered proposed revisions that were drafted based on the Commission's discussions at the April 17, 2015 meeting. In response to comments submitted by judges to the Commission, Judge Leonard proposed Section 1 subpart (e) be revised as follows:

Notifies opposing counsel and, if appropriate, the court or other tribunal as early as possible when scheduled meetings, hearings or depositions must be canceled or rescheduled, including due to a pending settlement, mediation, or other significant change in the status of the matter.

After discussion, there were no objections to the proposed change, and the proposed revision was approved.

A member recommended deleting the introductory language, deleting the word “even” beginning subsection (A) so that it begins with the word “Where,” and deleting the subsection headings (“(a)” and “(b)”). The members agreed to the following proposed revisions to Section 10:

- ~~A lawyer should avoid ex parte communications on the substance or merits of a pending case with a judge (or his or her law clerk) before whom such case is pending.~~
- ~~— Specifically:~~
- ~~— (a) Even w~~Where applicable laws or rules permit an ex parte...
- ~~— (b)~~ Where rules permit an ex parte application or communication ...

Justice Pollack also recommended that the Commission not revise the introduction of the Guidelines; the members agreed to this recommendation.

In response to a judge’s comment, Judith Pavey recommended that Section 7(b)(6) be revised to the following:

(b) As to document requests, a lawyer who manifests professional courtesy and civility:

(6) Timely and without unreasonable objections produces requested documents to opposing counsel to allow sufficient time for inspection prior to depositions and/or to avoid inefficient and expensive discovery conferences and motions. ~~Does not delay producing documents to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.~~

One member suggested placing a period after depositions and deleting “and/or to avoid inefficient and expensive discovery conferences and motions.” This suggestion was adopted, and the members approved a proposed revision to Section 7(b)(6) that would read,

Timely and without unreasonable objections produces requested documents to opposing counsel to allow sufficient time for inspection prior to depositions.

It was raised that the word “documents,” as used in Section 7, does not capture broader categories of discovery such as electronically stored information and things. It was suggested that the word “documents” should be changed throughout the entire section for consistency. While the members agreed the revision to Section 7(b)(6) should still be adopted, they decided to further discuss the issue of whether Section 7 should be revised to replace “documents” with “documents and things” or “discovery requests.” Judge Ginoza and Jane Kwan agreed to look further into the issue before the Commission’s next meeting.

Judith Pavey next presented her suggested revision to add a new subsection to Section 11 reading,

V. SB 1010

Justice Pollack mentioned that SB 1010 had been distributed as part of the materials for the meeting and that he may distribute other materials regarding SB 1010 for the Commission's consideration at a future time.

VI. NEXT MEETING/ADJOURNMENT

The next meeting was scheduled for 2:30 p.m. on Friday, September 25, 2015. With no new business, the meeting adjourned at 4:15 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of September 25, 2015
2:30 p.m. – 4:30 p.m.
Intermediate Court of Appeals Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Susan Arnett, Judge Joseph Cardoza (phone), Dr. Malcolm Chang, Rebecca Copeland, Liam Deeley, Associate Judge Lisa M. Ginoza, Joanne Grimes, Jane Kwan, Associate Judge Katherine G. Leonard, Michael Marr, Nathan Nikaido, Judith Pavey (phone), Richard Platel, Carole Richelieu, Judge Trudy Senda (phone), Kevin Takata

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of July 24, 2015
 (3) Proposed Revisions to Guidelines
 (4) Responses from HSBA Members Regarding the Guidelines
 (5) Principles of Professionalism for Hawai'i Judges
 (6) SB 1010
 (7) Pro Hac Vice Handout

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF JULY 24, 2015

The Commission adopted the minutes of the meeting of July 24, 2015.

III. DISCUSSION OF PROPOSED REVISIONS TO THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

The Commission discussed the memorandum written by Associate Judge Lisa Ginoza and Jane Kwan proposing further revisions to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers. Beginning with Section 2 of the Guidelines, Judge Ginoza explained her proposed revisions. As a matter of housekeeping, she recommended "extensions of" be added to Section 2(b) so that it reads: "Considers any reasonable request for extensions of time in light of the need for prompt resolution of matters" She also proposed that the word "regularly" be deleted from Section 2(c) so that it reads: "Does not ~~regularly~~ engage in the strategy of not agreeing to reasonable requests for time extensions simply to appear 'tough.'" She explained that it was never advisable to do so. One member noted that she did not think that Section 2 was applicable in the criminal setting because it would not always be appropriate to consider granting extensions when protecting a client's interest in a criminal proceeding. With no objection to the proposed revisions, the Commission adopted both revisions.

(2) makes sparing use of discovery conferences in light of the burden of time and expense upon the parties and the court.

The members agreed that the first word of the new subsections (d)(1) and (d)(2) should be capitalized.

There was also some discussion regarding the reference to withholding documents and things based on privilege in Section 7(b)(4) and whether it should be revised to include confidentiality. The members agreed that Section 7(b)(4) should be revised to read as follows: "Withholds documents and things on the grounds of privilege or confidentiality only where appropriate." The Commission also agreed to adopt all of the revisions proposed for Section 7.

Rebecca Copeland excused herself from the meeting. Judge Trudy Senda also had to leave the meeting.

Justice Pollack announced that the Bench/Bar Conference would be considering the Guidelines, and thus, the Commission could expect to receive additional comments and suggestions regarding the Guidelines. He also pointed out that the Bench/Bar Conference would be considering the Principles of Professionalism for Hawai'i Judges. There was some discussion regarding the Principles of Professionalism for Hawai'i Judges and whether the Commission should solicit comments from judges and lawyers. The Commission decided to revisit the issue after receiving comments from the Bench/Bar Conference.

IV. SB 1010

Justice Pollack discussed SB 1010, which was intended to address a perception that there are many out-of-state lawyers practicing in the state without appearing in court. There was some general discussion regarding pro hac vice and the positions that are represented in the legislation. The members discussed whether they should look at Rule 1.9 of the Rules of the Supreme Court of Hawai'i to consider whether any revisions could be made to address the concerns motivating the legislation.

The Commission next discussed the ABA Model Rule on pro hac vice admission. One member pointed out that the ABA Model Rule weighs in favor of granting pro hac vice admission as opposed to Hawaii's rule, which grants more discretion to the trial court. Another member pointed out that it would be beneficial to have a rule that specifies that there should be some sort of special reason for admission; she quoted favorably of the language from Utah's rule that states that pro hac vice counsel will be admitted after a determination that admission "will serve the interests of the parties and the efficient and just administration of the case." Another member responded that it would be beneficial to have some sort of standard or guidance to assist trial judges in exercising their discretion. Justice Pollack indicated that he would circulate examples of pro hac vice rules from other jurisdictions, and he encouraged members to look for additional models.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of January 15, 2016

2:30 p.m. – 4:20 p.m.

Supreme Court Administrative Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Susan Arnett, Rebecca Copeland, Liam Deeley, Associate Judge Lisa M. Ginoza, Joanne Grimes (phone), Associate Judge Katherine G. Leonard, Michael Marr, Judge Paul Murakami, Nathan Nikaido (phone), Judith Pavey (phone), Richard Platel, Carole Richelieu, Judge Barbara Takase (phone), Kevin Takata
Others: Frances Lum (Department of the Attorney General), Pat Mau Shimizu (HSBA)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of September 25, 2015
 (3) Selected Comments from the Bench Bar Conference Regarding the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers
 (4) Revisions to the Guidelines of Professional Courtesy and Civility Adopted by Commission
 (5) Selected Rules from the Hawaii Administrative Rules
 (6) Rule 1.9 of the Rules of the Supreme Court of the State of Hawaii: Proposed Revisions

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF SEPTEMBER 25, 2015

The Commission adopted the minutes of the meeting of September 25, 2015.

III. DISCUSSION OF THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

Justice Pollack first discussed the Bench Bar Conference comments noting that one of the general topics of the conference was the Guidelines. He emphasized that the comments that were circulated to members were not the final comments for publication. He also noted that it appeared that the Guidelines were generally viewed favorably by attendees of the conference.

The Commission discussed that the comments from the Conference indicate that there is a general concern that judges should be more proactive in promoting the Guidelines. The members in attendance were in agreement that it was most appropriate for the Guidelines

adopted the ABA model rule with additional requirements as defined by each jurisdiction; and twelve states that have not adopted the ABA model rule. Justice Pollack recommended that the Commission further discuss the various approaches that states have taken with out-of-state counsel in ADR proceedings at the Commission's next meeting.

VI. NEXT MEETING/ADJOURNMENT

The next meeting was scheduled for 2:30 p.m. on Friday, April 22, 2016. With no new business, the meeting adjourned at 4:20 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of April 22, 2016
2:30 p.m. – 4:15 p.m.
Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Susan Arnett, Rebecca Copeland, Liam Deeley, Associate
 Judge Lisa M. Ginoza, Joanne Grimes, Jane Kwan, Associate Judge
 Katherine G. Leonard, Michael Marr, Nathan Nikaido, Richard Platel,
 Carole Richelieu, Kapua'ala Sproat (phone)
 Others: Frances Lum (Department of the Attorney General)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of January 15, 2016
 (3) ADR Handout from January 15, 2016 Meeting
 (4) Sample Rules from Other States Regarding the Unauthorized
 Practice of Law
 (5) Draft Summary of Comments from the 2015 Bench Bar
 Conference Regarding the Principles of Professionalism for
 Hawai'i Judges
 (6) The Other Fifty Shades of Grey: Multijurisdictional Practice in
 Private Arbitration

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF JANUARY 15, 2016

The Commission adopted the minutes of the meeting of January 15, 2016.

III. DISCUSSION OF THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

Judge Leonard first discussed her research of guidelines concerning a lawyer's interactions with unrepresented parties. After some brief discussion, the Commission decided that it would not propose further revisions to the Guidelines at this time.

IV. PRINCIPLES OF PROFESSIONALISM FOR HAWAI'I JUDGES

The Commission first discussed the comments received from the 2015 Bench-Bar Conference and whether it was necessary to seek additional input with respect to the Principles. The Commission determined that the Bench-Bar Conference comments provided a representative sampling from the bar and thus would provide a sufficient basis for the Commission's review.

counselor while in the courtroom. In any proceeding, on or off the record, a judge should refer to all counsel in a like manner.

With regard to principle fifteen, the Commission agreed to adopt the following revision consistent with its proposed revision to principle nine:

15. A judge should be courteous and respectful in opinions and decisions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly. A judge should endeavor to work with other judges to foster a spirit of cooperation in the mutual goal or enhancing the administration of justice.

The Commission discussed the comments from the Bench-Bar Conference. One member pointed out that it is a common suggestion that judges should consider "easier" motions first as a courtesy to lawyers who are waiting for their motion to be heard by the judge. There was a general consensus amongst the members in attendance that the Principles already adequately address this time management issue. There was also some discussion concerning a lawyer's communications with the court regarding pending decisions. There was a general consensus that further revision to the Principles was not necessary to address the comments from the Bench-Bar Conference.

V. PRO HAC VICE PRACTICE IN AGENCY PROCEEDINGS

Justice Pollack next discussed pro hac vice practice in agency proceedings. He explained that the law is ambiguous as to whether the court has the authority to enact a rule related to the pro hac vice admission of lawyers in agency proceedings in order to facilitate the registration of lawyers with the HSBA. A subcommittee was formed with the goal of achieving greater consistency in the admission of out-of-state attorneys who are granted pro hac vice status by executive branch agencies. It was discussed that this may include developing a standard form to assist the HSBA and the agencies with the registration of lawyers who are admitted pro hac vice before state agencies that have rules in place for pro hac vice admission. Judge Ginoza volunteered to be a part of the subcommittee.

VI. PRIVATE ARBITRATION PROCEEDINGS

The next topic was private arbitration proceedings in Hawai'i and the potential issue of the unauthorized practice of law in such proceedings by out-of-state attorneys. Justice Pollack explained that the Commission is tasked with considering whether a rule should be proposed regarding out-of-state attorneys' participation in alternative dispute resolution proceedings. One member raised that there is a significant difference between mediation and arbitration and that there is an issue of whether the court's rule should extend to mediation in addition to arbitration. It was discussed that settlement negotiations could be considered mediation and that perhaps the rule should not extend to negotiations. It was also pointed out that mediation is frequently done electronically, raising the question of what it means to practice law in Hawai'i.

After further discussion, it was recommended that the Commission invite outside presenters to provide further information to the Commission.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of August 5, 2016
2:30 p.m. – 3:45 p.m.
Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Susan Arnett, Rebecca Copeland, Liam Deeley, Associate
 Judge Lisa M. Ginoza, Joanne Grimes (phone), Jane Kwan, Michael Marr,
 Judge Paul Murakami, Nathan Nikaido, Judith Pavey, Richard Platel,
 Carole Richelieu, Judge Trudy Senda (phone); Kapua'ala Sproat
 Others: Keith Hunter (Dispute Prevention & Resolution), Frances Lum
 (Department of the Attorney General)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of April 22, 2016
 (3) Pro Hac Vice Letter
 (4) HSBA Registration Pro Hac Vice
 (5) ADR handout from January 15, 2016 meeting
 (6) Other State Approaches from April 22, 2016 meeting

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF APRIL 22, 2016

The Commission adopted the minutes of the meeting of April 22, 2016, after correction of a typographical error on page three.

III. PRO HAC VICE PRACTICE IN AGENCY PROCEEDINGS

Judge Ginoza provided background of the work of the sub-committee that was formed at the April 22, 2016 meeting to consider pro hac vice admission in state agency proceedings. She discussed the proposed letter that was drafted by the subcommittee to be sent by the appropriate judiciary representative to the appropriate representative of the executive branch. Judge Ginoza recommended that the Commission propose that the letter be sent by the Chief Justice to the Attorney General. It was also proposed that the letter might include examples of other states that have adopted a similar approach to the one proposed by the letter. The members in attendance agreed that a letter should be sent, and Judge Ginoza agreed to prepare a final draft for further consideration by the Commission.

V. NEXT MEETING/ADJOURNMENT

The next meeting was scheduled for 2:30 p.m. on Friday, October 7, 2016. With no new business, the meeting adjourned at 3:45 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of October 7, 2016

2:30 p.m. – 4:40 p.m.

Supreme Court Administrative Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Susan Arnett, Dr. Malcolm Chang, Rebecca Copeland,
Associate Judge Lisa M. Ginoza, Joanne Grimes, Jane Kwan, Associate
Judge Katherine Leonard, Michael Marr, Judith Pavey, Richard Platel,
Carole Richelieu, Kapua'ala Sproat, Calvin Young
Others: Pat Mau-Shimizu (HSBA), Bernard Bays, Richard Mosher,
Michael Schwartz

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of August 5, 2016
 (3) Letter Regarding Rule-Making Authority
 (4) List of Authorities Related to Rule-Making Authority
 (5) Lennes N. Omura, "The Unauthorized Practice of Law in Hawaii,"
 Sept. 2016 Hawaii Bar Journal.

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF AUGUST 5, 2016

Judge Ginoza recommended an addition to the minutes of the August 5, 2016 meeting. She recommended that the following sentence be added to Part III concerning the proposed letter to be sent by the judiciary to the executive branch regarding pro hac vice practice in agency proceedings: "It was proposed that the letter reflect it was on a recommendation of this Commission and that the benefits of HSBA registration be included in the letter itself." The Commission decided to revise the minutes as suggested by Judge Ginoza and to postpone adoption of the minutes until the Commission's next meeting.

III. PRO HAC VICE PRACTICE IN AGENCY PROCEEDINGS

Judge Ginoza discussed the proposed letter that was drafted by a subcommittee of the Commission to be sent by the appropriate judiciary representative to the appropriate representative of the executive branch. She gave an overview of the revisions that were made to the letter in light of the Commission's discussion at the August 5, 2016 meeting.

The Commission discussed the letter's suggestion that local counsel participate meaningfully and whether the letter should suggest that local counsel be lead counsel. After some discussion, it was agreed to that the letter should reference the importance of

the matter would truly need to be a Hawai'i legal matter in order for the pro hac vice requirements to apply.

One member asked Mr. Bays to clarify what his proposed standard means (that the work could not be performed competently by a Hawai'i lawyer), and Mr. Bays responded that it would mean that the work is highly specialized or there is some other aspect of the case that requires the out-of-state counsel's participation, such as an established relationship with the client. He was also asked whether any other states have adopted this rule, and he indicated that California and New Jersey have adopted similar rules.

Justice Pollack next introduced Richard Mosher of Anderson Kill and Michael Schwartz, General Counsel for Hawai'i Dental Service, to present information for the Commission's consideration in addition to answering questions. Mr. Schwartz circulated a handout to the Commission Members entitled "Proposed Revision to Hawaii Rules of Professional Conduct Rule 5.5."

Mr. Schwartz discussed an ongoing effort to make Hawai'i a destination for international arbitration and mediation. He explained that the purpose of establishing an international arbitration center is to attract legal disputes for resolution in Hawai'i that otherwise would have no connection to Hawai'i. He explained that, due to the location of Hawai'i, it was ideal for the resolution of disputes concerning Trans-Pacific business. He also noted that Hawaii Revised Statutes § 658(d)(2) included a clear statement of legislative intent that the practice of international arbitration and mediation be facilitated in Hawai'i. He identified two procedural issues that prevent the establishment of an international arbitration center. First, he discussed Hawaii Rules of Professional Conduct Rule 5.5 which, unlike the American Bar Association's model rules, does not allow for any limited exceptions to the unauthorized practice of law that would allow for multi-jurisdictional practice for any reason. He further noted that the Office of Disciplinary Counsel interprets the Hawai'i Supreme Court's opinion in *Office of Disciplinary v. Gould*, to conclude that "the practice of law" includes arbitration. Second, he noted that Hawaii Revised Statutes § 658(d) would need to be updated to allow for a for-profit arbitration center.

Richard Mosher discussed the strong interest of international arbitrators to resolve claims in Hawai'i. He noted that in other states, such as Florida, Texas, California, and New York, there are international arbitration centers. He also indicated that the establishment of an international arbitration center would create work for local attorneys to facilitate the obtainment of a judgment to enforce the arbitration decision.

The possible mechanism for allowing international practitioners to arbitrate in Hawai'i was also discussed. Schwartz suggested that it would be possible to have a registration process that was parallel to the court's pro hac vice process but more informal. It was proposed that the process could involve a simple registration involving the submission of a form and fee to the judiciary. This process would only apply where the matter has no connection to Hawai'i. One member mentioned that the existing pro hac vice process required the attorney to be familiar with Hawai'i law and rules; it was recommended that it would be unnecessary to impose such a requirement on international practitioners. It

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of January 20, 2017
2:30 p.m. – 4:00 p.m.
Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Susan Arnett, Judge Joseph Cardoza (phone), Dr. Malcolm Chang, Rebecca Copeland, Associate Judge Lisa M. Ginoza, Joanne Grimes, Jane Kwan, Michael Marr, Judge Paul Murakami, Nathan Nikaido (phone), Judith Pavey, Yvonne Shinmura (for Richard Platel), Kevin Takata
 Others: Pat Mau-Shimizu (HSBA)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of August 5, 2016
 (3) Minutes of the Meeting of October 7, 2016
 (3) HSBA Suggested Revisions to Guidelines
 (4) Summary from the Subcommittee

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF AUGUST 5, 2016 AND OCTOBER 7, 2016

The Commission adopted the minutes of the meeting of August 5, 2016.

The Commission adopted the minutes of the meeting of October 7, 2016, after correction of a typographical error on page 1, correction of HRS § 658(d) to HRS § 658D on page 3, and correction of the name of Office of Disciplinary Counsel v Gould on page 3.

III. COMMENTS FROM THE HSBA REGARDING PROPOSED AMENDMENTS TO THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

Justice Pollack noted that the HSBA submitted comments regarding the proposed revisions to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers. Justice Pollack noted that the introduction to the Guidelines indicates that the HSBA was initially responsible for adopting the Guidelines and that its input accordingly merits careful consideration.

In the Commission's proposed revision, Section 11(e) would read as follows:

Specifically, a lawyer who manifests professional courtesy and civility: . . . (e) Is honest and reasonable in settlement activities.

IV. OUT-OF-STATE COUNSEL IN PRIVATE MEDIATION/ARBITRATION PROCEEDINGS: PRESENTATION BY SUBCOMMITTEE AND DISCUSSION

The Commission next heard from the subcommittee considering pro hac vice admission for out-of-state attorneys in arbitrations and mediations held in Hawai'i. The subcommittee elicited comments from all Section Chairs of the HSBA, the Attorney General's office, all County Corporation Counsel offices, as well as a number of prominent attorneys from the legal community. The comments received were from attorneys who have had experience in dealing with this issue.

Several attorneys expressed that a pro hac vice process before a court should be required in all matters where legal work is being performed, including for mediation and arbitration. One lawyer expressed that the standard should be that the out-of-state attorney is only permitted to be admitted pro hac vice if it is demonstrated that there is no local attorney capable of competently performing the work. Several lawyers expressed that it is important that out-of-state attorneys be subject to the jurisdiction of the courts and local rules through the pro hac vice admission process. Another commenter said that there should be an outright ban of out-of-state attorneys performing legal work in local, real estate transactions because of the potential for serious error. Another suggested that the policy should be focused on protecting consumers and that stricter requirements should be applied with regard to arbitration, as opposed to mediation. Another lawyer recommended that there should be an exception for in-house counsel in mediation proceedings. It was also recommended that there should be no requirement for taking depositions in Hawai'i.

It was noted that many lawyers expressed that it would be helpful if there was a definition of what it means to engage in the unauthorized practice of law. One member noted that it may not be necessary to define what it means to engage in the unauthorized practice of law if there was a rule requirement for out-of-state lawyers to obtain pro hac vice admission in order to represent clients in ADR and mediation proceedings.

After some further discussion, it was decided that the subcommittee would meet and propose procedures to be considered at the Commission's next meeting. The procedures relating to participation by out-of-state lawyers in mediation and/or arbitration would be proposed in the form of a rule.

V. NEXT MEETING/ADJOURNMENT

Justice Pollack noted that the Commission would be considering a proposal relating to ABA Rule 8.4. The next meeting was scheduled for 2:30 p.m. on Friday, April 28, 2017. With no new business, the meeting adjourned at 4:00 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of April 28, 2017

2:30 p.m. – 4:00 p.m.

Supreme Court Administrative Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Judge Henry Nakamoto (phone), Judge Michael Soong (phone), Associate Judge Lisa M. Ginoza, Associate Judge Katherine Leonard, Judith Pavey, Erika Amatore, Kenneth Wong, Kevin Takata, Kapua'ala Sproat, Carole Richelieu, Liam Deeley, Michael Marr, Bruce Kim, Dr. Malcolm Chang, Nathan Nikaido (phone)
Others: Pat Mau-Shimizu (HSBA)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of January 20, 2017
 (3) Update on HSBA Board's Suggested Revisions to Amendments to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers
 (3) Draft of Proposed Rule Regarding Out-of-State Attorneys as Arbitration Counsel
 (4) ABA Model Rule 8.4

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed and thanked the members of the Commission for attending the meeting.

II. MINUTES OF MEETING OF JANUARY 20, 2017

The Commission adopted the minutes of the meeting of January 20, 2017.

III. UPDATE ON HSBA BOARD'S SUGGESTED REVISIONS TO AMENDMENTS TO THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

Justice Pollack noted that the HSBA Board of Directors had previously submitted comments regarding the proposed revisions to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers. The Commission reviewed the Board's suggestions, modified one suggested revision, and did not adopt the Board's second suggestion. Rebecca Copeland, who is also a member of the Board, agreed to relay to the Board the reasons underlying the Commission's actions. The Board was not yet able to review the matter, but it is on the Board's agenda for its May 25, 2017 meeting. Justice Pollack noted that this topic may be placed on the next Commission meeting's agenda depending on the comments received from the Board.

For paragraph 6, it was agreed that revisions would be made by the subcommittee to address the issue of jurisdiction.

For paragraphs 7 through 9, members agreed that the subcommittee would review for any appropriate revisions.

Subcommittee members indicated that in making the agreed-upon revisions, other appropriate revisions may be suggested.

V. NEXT MEETING/ADJOURNMENT

Justice Pollack noted that, due to time constraints, the topic relating to ABA Model Rule 8.4 would be discussed at the next meeting. The next meeting was scheduled for 2:30 p.m. on Friday, July 14, 2017. The meeting adjourned at 4:00 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of July 14, 2017

2:30 p.m. – 4:25 p.m.

Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Judge Paul Murakami, Judge Henry Nakamoto (phone), Judge Michael Soong (phone), Associate Judge Lisa Ginoza, Associate Judge Katherine Leonard, Susan Arnett, Judith Pavey, Jane Kwan, Rebecca Copeland, Kenneth Wong, Michael Marr, Bruce Kim, Dr. Malcolm Chang, Nathan Nikaido
Others: Nadine Ando (HSBA), James Kawachika, Pat Mau-Shimizu (HSBA - phone)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of April 28, 2017
 (3) HSBA Board Letter – Recommended Revision to Amendments to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers
 (4) Minutes of January 20, 2017 Meeting pp 1-2
 (5) Revised Draft of Proposed Rule Regarding Out-of-State Attorneys as Arbitration Counsel – tracked changes
 (6) Revised Draft of Proposed Rule Regarding Out-of-State Attorneys as Arbitration Counsel – clean
 (7) Letter with Attachment from Bruce Kim
 (8) Background Materials for ABA Model Rule 8.4

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack welcomed the members of the Commission.

II. MINUTES OF MEETING OF APRIL 28, 2017

The Commission adopted the minutes of the meeting of April 28, 2017 with one correction: replace the apostrophe with an okina in a Commission member's name.

III. HSBA BOARD'S SUGGESTED REVISIONS TO THE INTRODUCTION TO THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAI'I LAWYERS

Nadine Ando, president of the Hawaii State Bar Association (HSBA), and James Kawachika addressed the Commission regarding the current proposed revisions to the Introduction to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers. Ms. Ando provided background to the modification suggested by the HSBA Board to the proposed revisions to the Introduction. The HSBA Board proposed the following

For paragraph 2, it was agreed that the “s” in “out-of-state’s” be removed.

For paragraphs 3 and 3A through 3B, no suggestions were made.

For paragraph 3C, it was agreed that okinas replace the apostrophes in lines 2 and 3.

For paragraph 3D, after some discussion regarding whether “or jurisdictions” or “and jurisdictions” should be added after “courts,” it was suggested that no changes be made.

For paragraph 3E, it was agreed that “of jurisdictions” be removed.

For paragraph 3F, no suggestions were made.

For paragraph 3G, it was agreed that an okina replace the apostrophe in “Hawai’i.”

For paragraph 3H, it was agreed that “attorney” replace “counsel” and an okina replace the apostrophe in “Hawai’i.”

For paragraph 3I, it was agreed that “statutes and” be deleted.

For paragraph 3J, no suggestions were made.

For paragraph 3K, it was agreed that “the arbitration proceeding” be revised as “the subject arbitration ~~proceeding~~” and that an okina replace the apostrophes in lines 1 and 6.

For paragraph 4, no suggestions were made.

For paragraph 5, it was agreed that “the arbitration proceeding” be revised as follows: “the subject arbitration ~~proceeding~~.”

For paragraph 6, a concern was raised with the following language: “pay the annual fee authorized by the supreme court to the Hawaii State Bar Association.” There was also discussion about reinserting the word “January” for payment of the annual fee. This paragraph was referred back to the subcommittee.

For paragraph 7, it was agreed that “proceeding” be deleted from both the second and third lines. There was also some discussion regarding the addition of a reference to the fact that the state in which the attorney is licensed would be notified if the attorney was noncompliant with the rules.

For paragraph 8, it was suggested that “proceeding” be deleted. After further discussion, it was decided that this matter be sent back to the subcommittee to decide whether to keep “proceeding” in “arbitration proceeding” or remove it throughout.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of October 27, 2017

2:30 p.m. – 4:00 p.m.

Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Judge Paul Murakami, Associate Judge Lisa Ginoza, Associate Judge Katherine Leonard, Judith Pavey, Rebecca Copeland, Carole Richelieu, Liam Deeley (phone), Michael Marr, Bruce Kim, Dr. Malcolm Chang, Nathan Nikaido

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of July 14, 2017
 (3) Summary of Revisions Regarding Out-of-State Attorney
 (Arbitration)
 (4) Revised Draft of Proposed Rule Regarding Out-of-State Attorneys
 as Arbitration Counsel – redline
 (5) Revised Draft of Proposed Rule Regarding Out-of-State Attorneys
 as Arbitration Counsel – clean
 (6) Background Materials for ABA Model Rule 8.4
 (7) ABA Journal Article Regarding ABA Model Rule 8.4(g)
 (8) Order Amending the Guidelines of Professional Courtesy and
 Civility for Hawai'i Lawyers

I. WELCOME AND ANNOUNCEMENTS

Justice Pollack noted that the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers have been officially approved and filed and are in effect.

II. MINUTES OF MEETING OF JULY 14, 2017

The Commission adopted the minutes of the meeting of July 14, 2017.

III. REVISED DRAFT OF PROPOSED RULE REGARDING OUT-OF-STATE ATTORNEYS AS ARBITRATION COUNSEL

The Commission next discussed the proposed rule regarding out-of-state attorneys as arbitration counsel. A subcommittee member provided background to the revisions reflected in the Revised Draft of Proposed Rule Regarding Out-of-State Attorneys as Arbitration Counsel, stating that the goal was to have this rule conform to Rule 1.9 of the Rules of the Supreme Court of the State of Hawai'i (RSCH). A suggestion was made that, if the proposed rule is adopted, it should be adopted as RSCH Rule 1.9A. A subcommittee member was asked to review RSCH Rule 1.9 to determine which provisions of this rule conformed to proposed RSCH Rule 1.9A. Any proposed revisions to RSCH Rule 1.9 would be forwarded to Commission members for comment and approval, and the revisions could then be sent to the supreme court.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of January 26, 2018
2:30 p.m. – 4:00 p.m.
Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Judge Henry Nakamoto, Judge Joseph Cardoza (phone), Judge Michael Soong (phone), Associate Judge Lisa Ginoza, Susan Arnett, Judith Pavey, Jane Kwan, Rebecca Copeland, Erika Amatore, Kenneth Wong, Kevin Takata, D. Kapua'ala Sproat, Carole Richelieu, Liam Deeley, Michael Marr, Bruce Kim, Dr. Malcolm Chang

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of October 27, 2017
 (3) Notification to Public of Proposed Change to RSCH Rule 1.9
 (4) Proposed Revisions to RSCH Rule 1.9
 (5) Proposed Revisions to Proposed RSCH Rule 1.9A
 (6) Proposed Revisions to RSCH Rule 2.1

I. WELCOME

Justice Pollack welcomed Commission members and thanked them for attending.

II. MINUTES OF MEETING OF OCTOBER 27, 2017

The Commission adopted the minutes of the meeting of October 27, 2017.

III. PROPOSED REVISIONS TO RULES OF THE SUPREME COURT (RSCH) RULES 1.9 AND 2.1 AND PROPOSED RSCH RULE 1.9A

The Commission next discussed the proposed revisions to RSCH Rule 1.9 in conjunction with the proposed revisions to RSCH Rule 2.1 and proposed RSCH Rule 1.9A. A subcommittee member provided background to the proposed revisions as reflected in the handouts that were distributed prior to the meeting. After some discussion, the Commission approved the proposed revisions to RSCH Rule 1.9. The Commission also approved the proposed revisions to proposed RSCH Rule 1.9A. As to RSCH Rule 2.1, the Commission approved the proposed revisions and additionally agreed to remove "voluntary" from "any voluntary bar association." Justice Pollack indicated that any further proposed revisions to RSCH Rules 1.9 and 2.1 and proposed RSCH Rule 1.9A would be forwarded to Commission members for comment and approval, and the revisions and proposed rule would then be sent to the supreme court.

IV. SUBCOMMITTEE: GENERAL DISCUSSION ON ABA MODEL RULE 8.4(g)

The Commission considered ABA Model Rule 8.4(g) in a discussion led by the subcommittee. A subcommittee member first provided an overview of questions and scenarios that would be discussed during the meeting. Extensive discussion then

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of April 20, 2018
2:30 p.m. – 3:55 p.m.
Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Judge Michael Soong (phone), Associate Judge Katherine Leonard, Susan Arnett, Jane Kwan, Kenneth Wong, Carole Richelieu, Liam Deeley, Michael Marr, Bruce Kim, Dr. Malcolm Chang, Nathan Nikaido

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of January 26, 2018
 (3) Notification to Public of Proposed Changes to RSCH Rules 1.9 and 2.1 and proposed RSCH Rule 1.9A
 (4) Jurisdictional Adoption of ABA Model Rule 8.4(g)
 (5) ABA Model Rule 8.4(g) Jurisdiction Status
 (6) Former Judge's Use of Judicial Title

I. WELCOME

Justice Pollack welcomed Commission members and thanked them for attending.

II. MINUTES OF MEETING OF JANUARY 26, 2018

The Commission adopted the minutes of the meeting of January 26, 2018.

III. NOTIFICATION TO PUBLIC OF PROPOSED CHANGES TO RULES OF THE SUPREME COURT (RSCH) RULES 1.9 AND 2.1 AND PROPOSED RSCH RULE 1.9A

Justice Pollack informed Commission members that the supreme court had released for public comment proposed revisions to RSCH Rules 1.9 and 2.1 and proposed RSCH Rule 1.9A. The court made no substantive changes to the revisions submitted by the Commission and set July 9, 2018 as the deadline for public comments. Justice Pollack stated that the court will then review the comments received and may forward one or more comments to the Commission for consideration.

IV. ABA MODEL RULE 8.4(g): SUBCOMMITTEE PRESENTATION AND DISCUSSION

The Commission considered ABA Model Rule 8.4(g) in a discussion led by the subcommittee. A member of the subcommittee first provided an overview of what the subcommittee had done thus far. This included seeking responses from various groups in the legal community as to whether, for example, there is a need for a guideline or rule addressing harassment or discrimination in the legal profession in Hawai'i. The subcommittee member indicated that, while most groups did not respond, the ones that

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of July 20, 2018

2:30 p.m. – 4:00 p.m.

Supreme Court Conference Room

PRESENT: **Acting Chair:** Chief Associate Judge Lisa Ginoza
Members: Judge Michael Soong (phone), Susan Arnett, Jane Kwan, Rebecca Copeland, Erika Amatore, Kenneth Wong, Kevin Takata, Kapua'ala Sproat (phone), Carole Richelieu, Liam Deeley, Michael Marr (phone), Bruce Kim, Dr. Malcolm Chang

HANDOUTS:

- (1) Agenda
- (2) Minutes of the Meeting of April 20, 2018
- (3) ABA Model Rule 8.4(g) Memo
- (4) Status of ABA Model Rule 8.4(g) by Jurisdiction
- (5) Hawaii Bar Journal Article on Sexual Harassment in the Hawaii Legal Community
- (6) Massachusetts WBA Survey of Workplace Conduct and Behaviors in Law Firms
- (7) Blog Article on When Will the MeToo Movement Reach the Judiciary

I. WELCOME

Judge Ginoza welcomed Commission members and thanked them for attending.

II. MINUTES OF MEETING OF JANUARY 26, 2018

The Commission adopted the minutes of the meeting of April 20, 2018.

III. PRESENTATION AND DISCUSSION BY MEMBERS OF HAWAII WOMEN LAWYERS ON SURVEY REGARDING SEXUAL HARASSMENT IN THE HAWAII LEGAL COMMUNITY

Members of the Hawaii Women Lawyers (HWL), Kimi Ide-Foster and Alana Peacott-Ricardos, were asked by the subcommittee on ABA Model Rule 8.4(g) to provide a background as to why the HWL decided to conduct a survey on sexual harassment in the Hawai'i legal community, as well as the details of the survey, including its results and the manner in which it was conducted. HWL members stated that the survey emerged in the wake of the #MeToo movement. Survey questions focused on sexual harassment as an issue and sought responses from members of the HWL who had experienced sexual harassment. HWL members shared that they received more than forty hits within the first fifteen minutes of distributing the survey and a total of seventy-six responses. A large number of shared stories, the members stated, were older, and the conduct reported ranged from name calling to criminal conduct. Majority of the responses, which came from individuals in the private sector, also seemed to convey that those who had

V. NEXT MEETING/ADJOURNMENT

The next meeting was scheduled for 2:30 p.m. on Friday, October 26, 2018. The meeting adjourned at 4:00 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of October 26, 2018

2:30 p.m. – 3:55 p.m.

Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Judge Lisa Ginoza, Judge Michael Soong (phone), Judge Henry Nakamoto (Phone), Judge Katherine Leonard, Susan Arnett, Rebecca Copeland, Erika Amatore, Kevin Takata, Bradley R. Tamm, Kenneth Wong, D. Kapua'ala Sproat, Dr. Malcolm Chang

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of July 20, 2018
 (3) ABA Article: "Race and Gender Bias is Rampant in Law"
 (4) ABA Article: "The Crusade Against Model Rule 8"
 (5) Memorandum re ABA Model Rule 8.4 and "Conduct Prejudicial to the Administration of Justice"
 (6) Handouts re ABA Model Rule 8.4 in other Jurisdictions
 (7) California Proposed Rule 8.4.1 (supplement)

I. WELCOME

Justice Pollack welcomed Commission members, thanked them for attending, and welcomed Mr. Bradley Tamm, Office of Disciplinary Counsel.

II. MINUTES OF MEETING OF JULY 20, 2018

The Commission adopted the minutes of the meeting of July 20, 2018.

III. DISCUSSION ON ABA MODEL RULE 8.4(d) & (g)

The subcommittee reported that the history of HRPC Rule 8.4(d) in Hawai'i was not able to be ascertained from available sources. The subcommittee discussed other jurisdictions that have language similar to amended ABA Model Rule 8.4(d). It was reported that 28 jurisdictions had included in their Rule 8.4(d) the language "engaging in conduct prejudicial to the administration of justice," with some states including comments to their rule clarifying the conduct encompassed by their respective rule. The subcommittee also discussed the previous meeting's presentation by the Hawai'i Women Lawyers division regarding a survey that it had conducted, which highlighted that the "bulk" of respondents did not feel they had an avenue to seek redress or help for harassment.

The Commission's discussion focused on what the appropriate avenue should be for addressing the issues of harassment and discrimination, e.g., educational programs, mandatory training, amending/adding to the Rules of Professional Conduct, or comments clarifying the rules. Additionally, the Commission discussed how the targeted improper conduct should be defined.

One commission member expressed the opinion that education alone would not be sufficient to deter improper conduct and suggested that some mandatory requirement

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM
Meeting of January 25, 2019
2:30 p.m. – 3:55 p.m.
Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
 Members: Judge Henry Nakamoto (Phone), Susan Arnett, Rebecca Copeland, Jane Kwan, Kevin Takata, D. Kapua'ala Sproat, Bradley R. Tamm, Michael Marr, Nathan Nikaido, Dr. Malcolm Chang
 Guest Presenter: Mandy Fernandez, Policy Director, American Civil Liberties Union (ACLU)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of October 26, 2018
 (3) ABA Formal Opinion 483--Lawyers' Obligations After an Electronic Data Breach or Cyberattack

I. WELCOME

Justice Pollack welcomed Commission members and thanked them for attending.

II. PRESENTATION ON ABA RULE 8.4(g) BY MANDY FERNANDEZ

Ms. Fernandez made a short presentation discussing free speech concerns surrounding ABA Rule 8.4(g). She stated that the ACLU agrees with the need for and purpose of ABA Rule 8.4(g), particularly in light of potential victims of harassment and discrimination not currently covered by existing rules and law. She stated that the main concerns around the rule arise from speech-based restrictions and the definition of "harassment." She suggested that one way to address the potential "chilling of speech" resulting from a rule is to make the definitions of discrimination and harassment "specific." According to Ms. Fernandez, the ACLU is currently unaware of any litigation concerning Rule 8.4(g). After her presentation, the Committee engaged in a general discussion about ABA Rule 8.4(g), which included posing questions to Ms. Fernandez.

III. COMMITTEE DISCUSSION ON ABA RULE 8.4(g)

Some members asked for clarification about how to make a proposed rule more specific. Ms. Fernandez responded that a rule that prescribed categories of conduct as well as designating an object of the harassment would be specific, but that a rule would not need to be as narrow as what is already included in existing law or so specific that it is unenforceable. Ms. Fernandez clarified that ABA Rule 8.4(g) as currently written is overbroad and may include some conduct that would infringe on free speech. One member questioned whether it was possible to craft a rule in such a way that it cannot be misused and submitted that the difficulty in doing so weighs in favor of having a guideline rather than a rule. One member suggested that the purpose of the proposed rule should be to prevent "offensive and obnoxious conduct that does not rise to the level of criminality" and offered that education alone would not address that issue. Another

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of April 5, 2019

2:30 p.m. – 3:55 p.m.

Administrative Director's Conference Room

PRESENT: **Acting Chair:** Judge Katherine Leonard
Members: Judge Matthew Viola, Judge Joseph Cardoza (phone); Judge Lisa Ginoza, Susan Arnett, Jane Kwan, Erika Amatore, Kenneth Wong, Carole Richelieu, Liam Deeley, Michael Marr, Bradley R. Tamm, Dr. Malcolm Chang, Nathan Nikaido (Phone)

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of January 25, 2019
 (3) Proposed Drafts of Various Options regarding ABA Rule 8.4(g)
 (4) Hawai'i Revised Statutes Section 378-1 Definitions
 (5) New Hampshire Proposed Rule 8.4(g) ABA Model Rule 8.4(g)

I. **WELCOME**

Judge Leonard welcomed the Commission members and thanked them for attending. She also congratulated the reappointed members of the committee and welcomed new committee member Judge Matthew Viola.

II. **MINUTES OF MEETING OF OCTOBER 26, 2018**

The Committee reviewed and adopted the minutes of the meeting of January 25, 2019.

III. **COMMITTEE DISCUSSION ON SUBCOMMITTEE PROPOSALS**

The Committee first discussed the subcommittee's proposal to amend RSCH Rule 22 ("Education Option"). A member pointed out that the Education Option as written does not seem to make education on harassment and discrimination mandatory. Another member suggested engaging avenues of education, such as writing an article in the bar journal, to make attorneys aware of the proposed amendments to RSCH Rule 22. One member suggested making education on harassment and discrimination mandatory, for example, at least once every three years. Another member thought that it might be more feasible to work with HSBA to incorporate training on harassment and discrimination into HSBA programs rather than trying to specifically make training on harassment and discrimination mandatory within Rule 22. The Committee briefly revisited the idea of creating an informal group to hear grievances, and one member cautioned that some sectors, such as the judiciary, may have mandatory reporting requirements or procedures.

The Committee agreed to change the language, "bias, harassment, or discrimination," to "bias, harassment, and discrimination," and separate the three distinct areas of education listed in section (4) of proposed RSCH Rule 22 into three sections, i.e., "(4) client trust administration," "(5) access to justice," and "(6) awareness and prevention of bias, harassment, and discrimination." The proposed rule, as amended, would read as follows:

have known” would be open to “weaponization.” One member renewed the suggestion that a finding of misconduct be based on a person being “found to have” harassed or discriminated, for example. Several members expressed support for this suggestion.

The Commission members were encouraged to come to the next meeting with comments and suggestions on the proposals to further the discussion.

IV. NEXT MEETING/ADJOURNMENT

The next meeting was scheduled for 2:30 p.m. on Friday, June 28, 2019. The meeting adjourned at 3:55 p.m.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of June 28, 2019

2:35 p.m. – 4:05 p.m.

Administrative Director's Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Judge Michael Soong (phone), Susan Arnett, Judith Pavey, Jane Kwan, Kenneth Wong, Kevin Takata, Carole Richelieu, Liam Deeley, Bradley R. Tamm, Dr. Malcolm Chang, Nathan Nikaido (Phone)

HANDOUTS:

- (1) Agenda
- (2) Minutes of the Meeting of April 5, 2019
- (3) Updated Proposed Drafts of Options regarding ABA Rule 8.4(g)
- (4) Article: Second State Adopts ABA Model Rule
- (5) Maine RPC Rule 8.4
- (6) Report: Bullying and Sexual Harassment in the Legal Profession (IBA)
- (7) Letter: Comment to HRPC 1.3

I. WELCOME

Justice Pollack welcomed the Commission members and thanked them for attending.

II. CONTINUED DISCUSSION ON SUBCOMMITTEE PROPOSALS

The Commission continued its discussion of the subcommittee's proposed amendment to Hawai'i Rules of Professional Conduct (HRPC) Rule 8.4(g).

The Commission discussed whether the terms "harassment" and "discrimination" should be defined. One member commented that there was a sufficiently broad body of law that addressed the terms such that the terms are not impermissibly vague. Another member noted that lawyers may not be aware that some forms of conduct that were previously not considered harassment might currently constitute harassment. The Commission returned to consideration of connecting a proposed rule to a violation of an existing law or rule prohibiting harassment and discrimination, which some members felt would eliminate ambiguity. The point was raised that there might be a conflict with linking a rule with a finding of liability, for example, when parties settle in civil cases. Other members felt that a rule could serve as an alternative to existing laws.

Some members expressed support for utilizing an education component prior to effectuating a rule. Several members expressed the view that a rule was needed and would be a tool for addressing issues of harassment and discrimination in the legal field and that there were checks and balances in the system to prevent abuse of the rule. A member commented that a rule could nevertheless be weaponized, leading to an investigation of the alleged conduct and other collateral repercussions such as damage to reputation, regardless of whether an attorney is ultimately disciplined or an allegation had merit. Other members observed that some existing rules may be equally vague, broadly written, and open to weaponization.

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

Minutes of Meeting of October 4, 2019

2:33 p.m. – 4:06 p.m.

Supreme Court Conference Room

PRESENT: **Chair:** Associate Justice Richard W. Pollack
Members: Judge Henry Nakamoto (phone), Judge Lisa Ginoza, Judge Katherine Leonard, Judge Matthew Viola, Susan Arnett, Judith Pavey, Jane Kwan, Kenneth Wong, Carole Richelieu, Liam Deeley, Bradley R. Tamm, Dr. Malcolm Chang, Rebecca Copeland, D. Kapua'ala Sproat

HANDOUTS: (1) Agenda
 (2) Minutes of the Meeting of April 5, 2019
 (3) Minutes of the Meeting of June 28, 2019
 (4) Proposed Amendments to RSCH Rule 22 and HRCP Rule 8.4
 (5) Proposed Amendments to Guidelines
 (6) Former Judge's Use of Judicial Title
 (7) ABA Formal Opinion 483-Lawyers' Obligation After and Electronic Data Breach or Cyberattack

I. WELCOME

Justice Pollack welcomed the Commission members and thanked them for attending.

II. MINUTES OF APRIL 5, 2019, AND JUNE 28, 2019 MEETINGS

The Commission adopted the minutes of the April 5, 2019 and June 28, 2019 meetings.

III. COMMISSION VOTING ON SUBCOMMITTEE PROPOSALS

The Commission discussed and voted on whether to submit for consideration to the Hawai'i Supreme Court three proposed amendments submitted by the subcommittee on ABA Model Rule 8.4 (subcommittee) addressing discrimination and harassment in the legal profession: (a) a proposed amendment to Rule 22 of the Rules of the Supreme Court of Hawai'i (RSCH Rule 22); (b) a proposed amendment to Rule 8.4 of the Hawai'i Rules of Professional Conduct (HRPC Rule 8.4); and (c) a proposed amendment to the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers (Guidelines). 14 voting members were present, and 4 members voted absentee.

The Commission first discussed and voted on the subcommittee proposal for RSCH Rule 22 and two additional RSCH Rule 22 proposals submitted by a member at the meeting: Option 1 and Option 2. Option 1 was presented by the member as an alternative to the subcommittee proposal.

Option 2 as proposed is set forth below:

Option 2:

It is Recommended that Rule 22 of the Rules of the Supreme Court of the State of Hawai'i be amended as follows:

Rule 22: MANDATORY CONTINUING LEGAL EDUCATION

....
(b) Ethics and Professional Responsibility Minimum. At least once every 3 years in which CLE credits are required, every active member shall complete 1 hour of approved ethics or professional responsibility education. . . . At least once every 3 years in which CLE credits are required, every active member shall complete 1 hour of approved harassment and discrimination education. This credit hour shall count toward the annual CLE requirement. "Harassment and Discrimination education" means those courses or segments of courses devoted to training on harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender.

After a discussion on Option 2, a majority of the Commission members present at the meeting voted to consider a revised version providing that 1 of the 9 CLE hours required every 3 years be in "approved awareness and prevention of bias, harassment, and discrimination education." One member agreed to draft the language of a revised Option 2 to be submitted to the subcommittee and then to be voted upon at the next meeting.

The Commission next discussed and voted on whether to propose an amendment to HRPC Rule 8.4, addressing discrimination and harassment while acting in a professional capacity and whether to include the proposed definitions of "professional capacity," "harassment," and "discrimination" within the Rule. Prior to voting, some members provided additional arguments for or against proposal of an amendment to HRPC Rule 8.4 in general and to the amendment as proposed. The proposed HRPC Rule 8.4 amendments are as follows:

Proposed Amendment to Hawai'i Rules of Professional Conduct Rule 8.4:

Proposal to amend Rule 8.4 by inserting a new subsection regarding harassment and discrimination.

Rule 8.4. MISCONDUCT.

It is professional misconduct for a lawyer to:

....
(h) engage in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression. This paragraph shall neither limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

The proposed new section to the Guidelines as amended at the meeting is shown below:

Section 15. Harassment or Discrimination

A lawyer should refrain from engaging in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression. This paragraph shall neither limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor ~~does shall~~ it infringe on any constitutional right of a lawyer or client, ~~including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.~~

The Commission members present at the meeting unanimously agreed to propose the new section to the Guidelines as amended if proposed HRPC Rule 8.4 is ultimately not adopted by the Hawai'i Supreme Court. The voting on the new section to the Guidelines as amended did not include the absentee votes.

It was noted that the four absentee members would be provided with the opportunity to vote on the following: (a) the subcommittee proposal on RSCH Rule 22 or Option 1; (b) the inclusion as a comment, rule, or exclusion of each definition to proposed HRPC Rule 8.4(g); (c) and the proposed new section to the Guidelines as amended. It was further noted that the final vote count would be presented at the next Commission meeting.

IV. NEXT MEETING/ADJOURNMENT

The next meeting was scheduled for Friday, January 10, 2020, at 2:30 p.m. The meeting adjourned at 4:06 p.m.