

RE:                   **Proposal to Amend Rule 28 of the Hawai‘i Rules of Appellate Procedure**

REQUIRING THE APPELLATE COURTS TO PROVIDE AN OPPORTUNITY  
TO BRIEF DISPOSITIVE ISSUE OF PLAIN ERROR

The Supreme Court of Hawai‘i seeks public comment regarding a proposal to amend Rule 28(b)(4) of the Hawai‘i Rules of Appellate Procedure to require an appellate court, if it raises *sua sponte* an issue of plain error upon which an appeal may be decided, to provide the opportunity to all parties to the appeal to brief the issue prior to the court’s decision. The proposal is attached hereto.

Comments about the proposed amendments should be submitted, in writing, **no later than Friday, August 13, 2021**, to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the [Judiciary website](#).

Attachment

**PROPOSED AMENDMENT TO THE  
HAWAI‘I RULES OF APPELLATE PROCEDURE**  
(New material is underlined)

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**Rule 28. BRIEFS.**

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

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

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

(1) A subject index of the matter in the brief with page references and a table of authorities listing the cases, alphabetically arranged, text books, articles, statutes, treatises, regulations, and rules cited, with references to the pages in the brief where they are cited. Citation to Hawai‘i cases since statehood shall include both the state and regional reporters. Citation to foreign cases may be to only the regional reporters. Where cases are generally available only from electronic databases, citation may be made thereto, provided that the citation contains enough information to identify the database, the court, and the date of the opinion.

(2) (Reserved)

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

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error

occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;

(C) when the point involves a finding or conclusion of the court or agency, either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions;

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. If an appellate court, when acting on a case on appeal, bases the disposition of the case wholly or in part upon an issue of plain error, not raised by the parties properly through briefing, it shall not affirm, reverse, or vacate the case without allowing the parties the opportunity to brief the potential plain-error issue prior to disposition. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

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