

RE: **Proposal to Amend Comments to the Hawai'i Rules of Professional Conduct**

*CLARIFYING THE ATTORNEY DUTIES REGARDING ELECTRONICALLY  
STORED CONFIDENTIAL CLIENT INFORMATION AND DATA BREACHES*

The Supreme Court of Hawai'i seeks public comment regarding a proposal to amend Comments to Rules 1.1, 1.4, 1.15, and 5.3 of the Hawai'i Rules of Professional Conduct to address duties regarding electronically stored confidential client information and data breaches. The proposals are attached hereto.

Comments about the proposed amendments should be submitted, in writing, **no later than Monday, August 9, 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 AMENDMENTS TO THE  
HAWAII RULES OF PROFESSIONAL CONDUCT**  
(Deleted material is bracketed and stricken; new material is underlined.)

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**Rule 1.1. COMPETENCE.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

**COMMENTS:**

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***Maintaining Competence***

*[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education and keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. ~~[If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.]~~ See comments [18] and [19] of Rule 1.6.*

**Rule 1.4. COMMUNICATION.**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's consent after consultation, as defined in Rule 1.0(c), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information;
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law; and
- (6) promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case which the lawyer receives.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**COMMENTS:**

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***Communicating with Client***

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*[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation, or any serious unauthorized or inadvertent disclosures of confidential information as covered by Rule 1.6.*

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**Rule 1.15. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT OR THIRD PERSON.**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, as a fiduciary. The lawyer shall not commingle such funds or property with his or her own or misappropriate such funds or property to his or her own use or benefit. Funds shall be kept in a separate account in Hawai'i in accordance with Rule 11 of the Rules of the Supreme Court of the State of Hawai'i, and Rule 4 of the Hawai'i Rules Governing Trust Accounting. Other tangible property owned by a client or third person shall be identified as such, appropriately safeguarded, and a record kept of the item's receipt and disbursement. Complete records of such account funds and other

property shall be kept by the lawyer and shall be preserved for a period of 6 years after the termination of the representation.

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**COMMENTS:**

*[1] A lawyer should hold property of others, in whatever form, with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and must comply with any recordkeeping Rules established by law or court order. See, e.g., Hawai'i Rules Governing Trust Accounting.*

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**Rule 5.3. RESPONSIBILITIES REGARDING  
NONLAWYER ASSISTANTS.**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a firm who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a

time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**COMMENTS:**

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[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. Reasonable efforts should include careful consideration of the use of technology and office resources connected to the internet, external data sources, and external vendors providing services relating to client data, and the use of client data. See Comment [2] to Rule 5.1. Paragraph (b) of these Rules applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.