

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

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

Present Committee Members

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The Honorable Daniel R. Foley (2011-2015)  
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David W. Hall (2011-2015)  
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The Honorable Trudy K. Senda (2013-2017)  
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Calvin E. Young (2013-2017)

Report Submitted By:  
The Honorable Richard W. Pollack, Chair

June 30, 2020

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

The Members of the Commission consist of judges, practicing lawyers, law school faculty, representatives of entities regulating attorneys, and non-lawyer public members.

IV. STATUS REPORTS ON COMMISSION PROJECTS (2015-2019)

A. Proposed Rule 1.9 of the Rules of the Supreme Court of Hawai'i

On November 14, 2014, the Commission submitted recommended revisions to Proposed Rule 1.9 of the Rules of the Supreme Court of the State of Hawai'i (RSCH), attached as APPENDIX B. On April 17, 2015, the Chair informed the Commission that the Supreme Court had incorporated many of the Commission's recommended changes into amended RSCH Rule 1.9.

B. Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers

The Commission met on October 10, 2014, and decided to survey judges and lawyers regarding civility problems that arise in court proceedings. On February 11, 2015, the Chair distributed a letter to the Hawai'i Legal Community requesting feedback on whether the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers (Guidelines) had been effective in improving civility and professionalism among lawyers and whether the Guidelines needed to be revisited. The Commission met on April 17, 2015, and considered proposed amendments to sections 2, 5, 6, 7, 9, 10, 12, and 14 of the Guidelines. The Commission reached out to the heads of the various Hawai'i State Bar Association (HSBA) sections as well for further comments.

On September 25, 2015, the Commission met to consider amendments to sections 2(b), 2(c), 3(b), 3(c), 6(a), 7(a)(10), 7(b)(4) and 7(d) and a proposal to add a new subsection (d) to Section 7. The proposed revisions were as follows:

- Section 2(b) would be amended to read, "Considers any reasonable request for extensions of time in light of the need for prompt resolution of matters . . . ."

- 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.

The Chair then forwarded to the Hawai'i Supreme Court all of the revisions recommended for adoption by the Commission. On January 20, 2017, the Commission discussed recommended HSBA revisions regarding the Guidelines. After considering HSBA's recommendations, the Commission voted to amend Section 11(e) to read, "~~Is honest and~~ reasonable in settlement activities."

The proposed revisions were forwarded to the Hawai'i Supreme Court and released for public comment. The court reviewed the comments submitted by the public, and then it adopted the Commission's recommendations without modification. The final revisions can be found in the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers (2018).

C. Principles of Professionalism for Hawai'i Judges

On January 15, 2016, the Commission decided, based on comments from the 2015 Bench Bar conference, that it would draft a letter to bar members and judges soliciting feedback regarding the Principles of Professionalism for Hawai'i Judges (Principles). On April 22, 2016, the Commission agreed to the revise the Principles as follows:

- Principle 7 would be amended as follows: To the extent possible, a judge should give all issues in controversy deliberate, informed, impartial and studied analysis and consideration ~~and~~; a judge should explain, when necessary, the reasons for the decisions of the court.
- Principle 9 would be amended as follows: A judge should not employ hostile, demeaning or humiliating language ~~in opinions or~~ in written or oral communications with other judges, lawyers, parties, witnesses or court personnel, including in written decisions and opinions of the court.
- Principle 10 would be amended as follows: A judge should work in cooperation with other judges in this and other jurisdictions on matters relating to the availability of lawyers, parties, witnesses or court resources. A judge should not ~~knowingly unnecessarily~~ create a scheduling conflict with another judge's judicial proceeding.

- 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 or 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.

On October 27, 2017, the Commission met to discuss proposed RSCH Rule 1.9A, a Proposed Rule Regarding Out-of-State Attorneys as Arbitration Counsel. On January 26, 2018, the Commission approved the language of proposed RSCH Rule 1.9A, as well as proposed revisions to RSCH Rules 1.9 and 2.1. The text of proposed RSCH Rule 1.9A, as well as proposed revisions to RSCH Rules 1.9 and 2.1, are attached to this Report at APPENDIX C.

On April 20, 2018, the Commission met and the Chair informed the members that the Hawai'i Supreme Court was submitting the Commission's proposed revisions to RSCH Rules 1.9 and 2.1, as well as proposed RSCH Rule 1.9A for public comment. The court reviewed the public comments and adopted RSCH Rule 1.9A and the amendments to RSCH Rules 1.9 and 2.1, with minor modifications on January 1, 2019.

E. Proposed Amendments to Rule 22 of the Rules of the Supreme Court of the State of Hawai'i, Hawai'i Rules of Professional Conduct Rule 8.4, and the Guidelines to Address Bias, Harassment, and Discrimination.

In October of 2017, the Commission began discussions on Rule 8.4(g) of the Model Rules of Professional Conduct, which was approved by the ABA in 2016. A subcommittee of the Commission was formed to review, research, and consider ABA Model Rule 8.4(g). The subcommittee conducted outreach by seeking input from community organizations regarding harassment or discrimination in the legal profession; researched rules governing harassment or discrimination by attorneys in Hawai'i and other jurisdictions; analyzed literature relevant to the topic; invited guest speakers, including Hawai'i Women Lawyers and American Civil Liberties Union Hawai'i, to discuss this topic at Commission meetings; and facilitated in-depth discussions at Commission meetings.

After nearly two years of research and discussions, the subcommittee submitted several proposals to address harassment and



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.

G. Non-Hawai'i Barred Lawyers Drafting Transactional Documents.

The Commission has been made aware of attorneys, not authorized to practice law in Hawai'i, drafting documents for transactions in Hawai'i. The Commission has created a subcommittee to research the issue and bring recommendations to the Commission.

H. Former Judge's Use of Judicial Title.

The Commission is currently reviewing former judges and justices' use of judicial titles and is considering whether revisions to the HRPC, Hawai'i Rules of Judicial Conduct, or Hawai'i's Ethic Rules would be appropriate to address this issue.

V. COMMISSION MEETINGS

The Minutes of the Commission meetings from January 23, 2015 to October 4, 2019 are presented in APPENDIX E.

VI. CONCLUSION

The Commission Chair is very grateful for the hard work of the Commission members. The Commission, now in its fifteenth year, continues its efforts to enhance professionalism among Hawai'i lawyers, as noted in this report and the earlier reports.

Respectfully submitted this 30th day of June 2020.

/s/ Richard W. Pollack  
ASSOCIATE JUSTICE RICHARD W. POLLACK  
Chair, Commission on Professionalism

# APPENDIX A



IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

KHAKAKA  
CLERK OF THE SUPREME COURT  
STATE OF HAWAI'I

2005 MAR 14 PM 1:22

FILED

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ORDER ESTABLISHING THE HAWAI'I SUPREME COURT'S  
COMMISSION ON PROFESSIONALISM  
(By: Moon, C.J., for the court<sup>1</sup>)

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

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<sup>1</sup> Considered by: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

WHEREAS, on August 2, 2001, the CCJ adopted the strategies for implementing the National Action Plan formulated by the American Bar Association in its report, entitled *The Role of the Court in Improving Lawyer Conduct and Professionalism: Initiating Action, Coordinating Efforts and Maintaining Momentum*; and

WHEREAS, the Hawai'i Supreme Court's Committee to Formulate Strategies for Implementing the Conference of Chief Justices' National Action Plan on Lawyer Conduct and Professionalism (National Action Plan Committee), charged with the task of reviewing the National Action Plan and making recommendations to the supreme court, issued its final report on May 24, 2004.

NOW, THEREFORE, upon the recommendation of the National Action Plan Committee,

IT IS HEREBY ORDERED that:

(1) The Hawai'i Supreme Court's Commission on Professionalism is hereby established.

(2) The Commission is charged with enhancing professionalism among Hawaii's lawyers. The Commission's major responsibilities shall be to:

- (a) develop strategies and recommendations to implement the National Action Plan initiatives, including the ABA's accompanying plan, as prioritized;
- (b) identify barriers to implementation;

- (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

(10) nominees recommended by the Board of Directors of the Hawai'i State Bar Association.

- (c) Law School Faculty. One (1) law school faculty member who is a full-time faculty member from the University of Hawai'i Richardson School of Law, chosen from a list of three (3) nominees recommended by the dean of the law school.
- (d) Attorney Regulatory Entities. One representative each from (i) the Disciplinary Board of the Hawai'i Supreme Court, (ii) the Lawyers' Fund for Client Protection, (iii) the Attorneys and Judges Assistance Program, and (iv) the Board of Bar Examiners, chosen from a list of three (3) nominees recommended by the board and/or trustees of each respective entity.
- (e) Public Members. Three (3) non-lawyer citizens active in public affairs.

(4) With the exception of the Chair of the Commission, the members of the Commission shall serve for a term of four (4) years provided, however, in the discretion of the chief justice, the initial appointments may be for a term of less than four (4) years so as to accomplish staggered terms for the membership of



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:

For a term expiring on March 13, 2007.

Hon. Karen Radius, First Judicial Circuit  
Hon. Terence Yoshioka, Third Judicial Circuit  
Hon. Daniel Foley, Appellate Court  
Hon. Susan Oki Mollway, Federal Court  
Susan Arnett, HSBA  
Terence O'Toole, HSBA  
Carol Muranaka, Lawyers Fund for Client Protection  
Steven Dixon, Attorneys & Judges Assistance Program  
Wesley Park, Public member

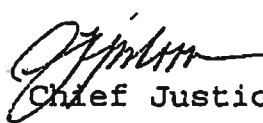
For a term expiring on March 13, 2009

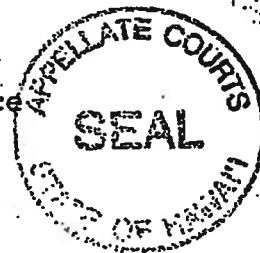
Hon. Joseph Cardoza, Second Judicial Circuit  
Hon. Trudy Senda, Fifth Judicial Circuit  
Hon. Steven Levinson, Appellate Court  
Calvin Young, HSBA  
Michael Nauyokas, HSBA  
Carol Mon Lee, Richardson School of Law  
Carole Richelieu, ODC  
Grace Nihei Kido, Board of Bar Examiners  
Petra Bray, Public member  
Nathan Nikaido, Public member

IT IS FINALLY ORDERED that the HONORABLE JAMES E. DUFFY, JR., is appointed as the Chief Justice's designee and shall serve as Chair of the Commission:

DATED: Honolulu, Hawai'i, March 14, 2005.

FOR THE COURT:

  
Chief Justice



# APPENDIX B

PROPOSED AMENDMENT OF THE  
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I  
(New material proposed underlined)

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Rule 1.                   ADMISSION TO THE BAR.

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1.9.                   Pro hac vice appearance of counsel.

(a)           Any attorney actively licensed to practice law by the highest court of a state or territory of the United States or the District of Columbia who is not a resident of Hawai'i may be permitted to associate himself or herself with a member or members of the Hawai'i bar (local counsel) in the presentation of a specific case at the discretion of the presiding judge or judges. The petition or motion for pro hac vice appearance and any subsequent documents submitted on behalf of a party must be filed by local counsel and must comply with subsection (b) of this Rule. An attorney allowed to appear pro hac vice in a case may continue on appeal in the same case without filing a new petition or motion for pro hac vice admission so long as the attorney complies with all applicable Hawai'i statutes, laws, and rules of the court<sup>[1]</sup> in addition to other provisions of this Rule.

An attorney allowed to appear pro hac vice shall, for each year the order is effective, pay to the Hawai'i State Bar an annual Disciplinary Board fee authorized by the supreme court, provided that if the attorney is allowed to appear in more than one case, only one fee shall be paid. The Hawai'i State Bar may assess a reasonable fee to register and collect this fee on an annual basis.

Failure to file proof of such payment in the record, within 10 days after entry of the order and in January of each subsequent year in which the case is pending, voids the order allowing the appearance pro hac vice, and a new petition or motion for pro hac vice appearance must be filed and approved by the presiding judge or judges.<sup>[2]</sup>

(b)           Local counsel shall file the petition or motion for pro hac vice appearance and the petition or motion shall be supported by:

(1)           the declaration of local counsel that provides, at minimum, the following information:

(A)           local counsel's business address and address for service of process as service; and

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<sup>1</sup> A pro hac vice counsel should be subject to Hawai'i statutes, laws, and rules of court. This requirement should be clear and consistent throughout the rule.

<sup>2</sup> The addition of "or judges" is consistent with the language in the fifth line of subsection (a) that refers to "presiding judge or judges."

- (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]

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<sup>3</sup> 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.

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

<sup>5</sup> 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

(c) An attorney allowed 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 [governing the conduct of attorneys] to the same extent as any other attorney admitted to practice in the courts of this state. The attorney allowed to appear pro hac vice is subject to the disciplinary jurisdiction of the Office of Disciplinary Counsel and the Disciplinary Board of the Supreme Court of Hawai'i. The court in which an attorney is allowed to appear<sup>[6]</sup> [appearing] 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 [withdraw] the permission for the attorney to appear pro hac vice.

(d) Local counsel of record shall sign all pleadings, motions, briefs, or any other documents submitted in the case, and shall participate actively in all phases of the case and be prepared to go forward with the case [at all times] as required<sup>[7]</sup>. Service of all papers and pleadings shall be upon local counsel, and shall constitute service upon pro hac vice counsel and their client(s).<sup>[8]</sup>

(e) Local counsel shall provide to the Hawai'i State Bar Association a copy of the order allowing the appearance of counsel pro hac vice and shall notify the Hawai'i State Bar Association when the case is closed or the order granting pro hac vice admission is no longer valid.

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also note 1.

<sup>6</sup> The proposal clarifies that the court may revoke the attorney's pro hac vice status before the attorney has actually appeared before the court. See also note 1.

<sup>7</sup> This revision would make the burden on local counsel, and perhaps the financial burden on the client, less severe.

<sup>8</sup> Although authority for service of papers and pleading on local counsel is implied in subsection (b)(1)(A), and is commonly included in pro hac vice orders, a specific provision should be included.

# APPENDIX C

PROPOSED AMENDMENT OF THE  
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

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(New material proposed underlined)

Rule 1.                   ADMISSION TO THE BAR.

1.9A. *Pro hac vice* appearance of counsel for arbitration proceedings.

(a) Approval to appear *pro hac vice*. An attorney not licensed in Hawai'i, but who is admitted to practice and in good standing with the highest court of a state or territory of the United States or the District of Columbia, may associate with a licensed Hawai'i attorney (Hawai'i attorney) to represent parties in the course of or in connection with an arbitration proceeding in Hawai'i that concerns a legal dispute over a Hawai'i-related matter, provided that the petition to appear, accompanied by the materials set forth in subsection (b) of this Rule, is approved in writing by the arbitrator or, if there are multiple arbitrators, a majority of the arbitrators. If the subject arbitration results in a judicial proceeding, the out-of-state attorney must comply with Rule 1.9 of these Rules to appear as counsel in the court proceeding.

(b) Contents of the application. The Hawai'i attorney to the arbitration shall submit to the arbitrator(s) in the subject arbitration a petition for *pro hac vice* appearance by the out-of-state attorney, and shall serve the petition upon all parties to the arbitration, along with the following in support of the petition:

(1) *REQUIRED INFORMATION*. The petition shall provide the following information:

(A) the case name and number, the name of the arbitrator(s), and the arbitral forum for the proceeding in which the out-of-state attorney seeks to appear;

(B) the out-of-state attorney's law firm name, office address, email address, and telephone number;

(C) the courts in which the out-of-state attorney has been admitted to practice and the dates of admission; and

(D) the title of all courts and other forums in Hawai'i in which the out-of-state attorney has sought to appear as counsel *pro hac vice* in the preceding 5 years (including but not limited to petitions pursuant to this Rule); the name and number of each such case or proceeding; the date of each application or petition; and whether or not the application or petition was approved. If the attorney has made repeated



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

circumstances, repeated appearances as counsel in Hawai'i during the preceding 5 years may be grounds for disapproval of the petition and disqualification from serving as an attorney in the subject arbitration.

Upon written approval of the petition by the arbitrator(s), the Hawai'i attorney shall forthwith submit a copy of the order approving the petition, along with a copy of the petition, to the Hawai'i State Bar Association.

The arbitrator(s) in the subject arbitration or the Supreme Court of the State of Hawai'i may revoke the permission for the attorney to appear in the subject arbitration if the attorney submitted a declaration containing false information or a material omission, violated Hawai'i law, violated the Hawai'i Rules of Professional Conduct, or violated an order of the arbitrator(s).

**(d) Duties of the pro hac vice attorney.** The out-of-state attorney admitted *pro hac vice* in an arbitration shall pay to the Hawai'i State Bar Association the annual Disciplinary Board fee and the annual Lawyers' Fund for Client Protection fee authorized by the Supreme Court of the State of Hawai'i, provided that if the attorney is allowed to appear in more than one case, only one set of annual fees shall be paid. The Hawai'i State Bar may assess a reasonable fee to register and collect these fees on an annual basis. Proof of payment of the required fees shall be served on the arbitrator(s), the parties to the subject arbitration, and the arbitral forum. For each subsequent year that the approved petition is effective, the out-of-state attorney shall pay the annual fees in January and serve proof of payment upon the arbitrator(s), the parties to the subject arbitration, and the arbitral forum.

Failure to pay the annual fees within 10 days after entry of the order approving the petition, and in January of each subsequent year, renders the order approving the petition no longer valid, and a new petition must be filed.

The out-of-state attorney shall notify the Hawai'i attorney, the arbitrator(s), and the parties to the subject arbitration when there is any material change to the information provided under subsections (b)(1) and (b)(2) of this Rule.

**(e) Duties of the Hawai'i attorney.** The Hawai'i attorney shall sign all pleadings, motions, briefs, or any other documents submitted in the subject arbitration, and shall participate actively in all phases of the arbitration and be prepared to go forward with the arbitration as required. Service of all papers and pleadings shall be upon the Hawai'i attorney and shall constitute service upon the out-of-state attorney and their client(s).

The Hawai'i attorney shall notify the Hawai'i State Bar Association when the arbitration is completed or the order approving the petition is no longer valid.

**(f) Unauthorized practice of law.** An attorney not licensed in Hawai'i who fails to obtain approval to represent a party in an arbitration proceeding as required by this Rule, and

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.

The 2019 proposed changes to RSCH Rule 1.9 provided as follows:

- The title of the Rule would be amended to provide: *Pro hac vice* appearance of counsel for court proceedings.

- Subsection (a) would be amended as follows:

An attorney allowed to appear *pro hac vice* shall, for each year the order is effective, pay to the Hawai'i State Bar an annual Disciplinary Board fee authorized by the supreme court, provided that if the attorney is allowed to appear in more than one case, only one fee shall be paid. The Hawai'i State Bar may assess a reasonable fee to register and collect this fee on an annual basis. Within 10 days after entry of an order granting a petition or motion for *pro hac vice* appearance, and also within 10 days of making subsequent fee payments in January of each year, the attorney shall file proof of payment of the required fees in the record of the court in which the case is then pending.

~~Failure to file proof of such payment in the record within 10 days after entry of the order and in January of each subsequent year in the court in which the case is then pending voids the order allowing the appearance *pro hac vice*, and a new petition or motion for *pro hac vice* appearance must be filed. Failure to pay the required fees within 10 days after entry of the order approving the petition or motion, and in January of each subsequent year, renders the order approving the petition or motion no longer valid, and a new petition or motion must be filed.~~

- Subsection (b) (D) would be amended as follows: the title and case number of each case, and the court or other forum in this State, in which the applicant has sought and/or been allowed to appear *pro hac vice* and the present status of each case; ~~and~~

- 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

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Revised Statutes § 605-14 (Unauthorized practice of law prohibited) and  
other applicable laws.

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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  
RULES OF THE SUPREME COURT OF THE STATE OF HAWAII  

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(New material proposed underlined)

Proposal to amend RSCH Rule 22 by inserting a new subsection regarding harassment and discrimination as topics of mandatory continuing legal education.

Rule 22. MANDATORY CONTINUING LEGAL EDUCATION.

(b) Ethics and Professional Responsibility Minimum. ~~At least once every 3 years in~~ Within every 3-year period in which CLE credits are required, every active member shall complete ~~12~~ 12 hours of approved ethics or professional responsibility education, with at least 1 hour from subsection (1) and the other hour from subsection (2) below. These credit hours shall count toward the annual CLE requirement. "Ethics or professional responsibility education" means those courses or segments of courses devoted to:

(1) (i) the Rules of Professional Conduct;

~~(2)(ii) the professional obligations of the lawyer to the client, the judicial system, the public and other lawyers;~~

~~(3)(iii) substance abuse and its effects on lawyers and the practice of law;~~

~~(4)(iv) client trust administration, bias awareness and prevention, and access to justice; or~~

(v) access to justice.

(2) awareness and prevention of bias, harassment, and discrimination.

PROPOSED AMENDMENT OF THE  
HAWAII RULES OF PROFESSIONAL CONDUCT

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(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:

"Professional capacity" as used in this rule includes (1) acts occurring in the course of representing clients; (2) interacting with witnesses, coworkers, court personnel, lawyers, or others, while engaged in the practice of law; (3) or operating or managing a law firm or law practice.

"Harassment" on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, gender identity and/or gender expression as used in this section means derogatory, offensive, obnoxious, or demeaning conduct or communication and includes, but is not limited to, unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content, or any conduct defined in HRS § 604-10.5 and HRS § 711-1106.

"Discrimination" on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, gender identity and/or gender expression as used in this section means conduct or communication that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

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

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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.



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# 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.

A member suggested that a central issue is how to bring the guidelines to the forefront of attorneys' minds. One member recommended a bar journal article, and another inquired whether the Guidelines are taught to students of William S. Richardson School of Law. Professor Kapua'ala Sproat offered to speak to Richardson professor, Randall Roth, about the curriculum. It was also noted that the guidelines may be taught in the mandatory course for newly admitted bar members.

The Commission next discussed whether the Commission should solicit feedback from judges and bar members about civility issues and the current effectiveness of the Guidelines. It was suggested that the Commission conduct a survey of bar members. It was discussed whether the HSBA might be able to facilitate a communication to bar members through an email or a post on the HSBA website. One member suggested that the communication could be sent to the section chairs of HSBA sections for distribution.

It was asked how the Commission would collect the responses of bar members. One member suggested that the communication to bar members could give the option of writing to the Supreme Court or the HSBA with comments. Another member recommended that an online survey or other electronic option would be easiest for members and would likely result in more responses. The members agreed that it would be appropriate to provide a two-week period for receipt of the feedback. Susan Arnett agreed to draft a message for distribution to bar members, and Judith Pavey agreed to draft a letter addressed to circuit and district court judges.

There was a consensus amongst the members that they do not refer to the guidelines with regularity. It was discussed whether the guidelines could be more "user-friendly." One member commented that the headings are very clear but that the text of the guidelines could be more accessible. Several members found that the examples provided in the guidelines were very helpful. One member noted that the tone of the guidelines is appropriate given that they are aspirational.

The Commission considered reviewing other states' recently amended civility guidelines for possible revisions. One member suggested that the Commission consider whether the guidelines should be expanded to include current issues of concern such as technology, social media, and privacy. There was a brief discussion regarding the protection of the attorney client privilege as it relates to cybercrimes.

The meeting attendees decided that it was appropriate for the Commission to first collect the results of the survey of judges and lawyers before proceeding upon other possible steps. Justice Pollack said that he would forward a letter to the judges soliciting their feedback on the guidelines.

## **V. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for April 24, 2015, at 2:30 p.m. With no new business, the meeting adjourned at 3:15 p.m.

## **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 Deeley, 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

members' reference, and he suggested that the members next discuss the comments the Commission received from judges regarding the Guidelines.

The Commission first discussed Judge Rhonda Nishimura's suggestion that Section 9 of the Guidelines should provide that reasonable and timely notice be given to non-party witnesses in the scheduling of depositions. It was noted that this matter is covered by Section 1 of the Guidelines, which one member suggested was a reason against incorporating it also in Section 9. Section 14 of the Guidelines regarding document modification was also discussed in relation to an observation of Judge Nishimura. The members agreed that Section 14 should remain in the Guidelines.

The Commission next discussed Judge Nishimura's comment that the court is often uninformed regarding whether the parties are pursuing binding arbitration or mediation. One member commented that she perceived a difference between binding arbitration and mediation, noting that the parties should always be trying to mediate the case. It was noted that the parties are typically required to provide such information in the pre-trial statement and that mediation is discussed at the first status conference. Another member suggested that Judge Nishimura's concern may already be addressed by Rule 12 of the Rules of the Circuit Court.

The Commission next turned to a comment submitted by Judge Blaine Kobayashi suggesting that the Commission consider adding language to either Section 6 or 12 to address the problem of opposing counsel openly arguing with each other while on the record rather than directing their arguments to the court. Several members noted that this behavior was problematic. One member questioned whether speaking to opposing counsel was always inappropriate. Another member shared the concern that it may not always be inappropriate to address opposing counsel and pointed out that the main issue may be in discouraging accusatory comments. It was mentioned that Section 5 of the Guidelines addresses unfair accusations in the context of writings submitted to the court but that the Guidelines do not address unfair accusations made during hearings. Judge Leonard agreed to draft language addressing Judge Kobayashi's concern. Richard Platel suggested that the California's civility guidelines might provide a useful example of how to address this conduct.

The Commission next discussed the comments submitted by Judge Gary Chang. Judge Chang recommended that a new paragraph regarding the importance of good communication between lawyers be added to the introduction. Several members thought this was a good idea. One member suggested that Judge Chang's proposed language should be rephrased so as not to assume bad behavior; she mentioned that email and telephone messages are "tools of the trade" and should not be characterized as bad behavior. It was noted that emails are a tool used by counsel to build a record and that making a telephone call instead of sending an email may require counsel to make an affidavit. Another member pointed out that Section 6 of the Guideline advises that letters intended to make a record should be used sparingly. It was suggested a revision could be made to Section 6(b) in response to Judge Chang's concerns; Judge Leonard agreed to

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

parte communication” amongst judges. The members were in agreement that there are some “practical” communications a lawyer could properly have with the court. It was mentioned that Rule 3.5 of the Hawai‘i Rules of Professional Conduct provides that a lawyer should avoid ex parte communications and gives examples of exceptions to the rule. It was suggested that a reference to this rule be included in the Guidelines. One member suggested that the revision say “as described” in the rule rather than “as defined” in the rule. Justice Pollack volunteered to work on proposed language.

With regard to Judge Chang’s recommendation to add a new subsection to Section 11 of the Guidelines regarding settlement activities, one member stated that the suggestion was already covered by the Rules of Civil Procedure. Judith Pavey volunteered to look into this suggestion. The Commission next discussed Judge Chang’s recommendation that Section 12 of the Guidelines include a section that a lawyer should comply “with all applicable procedures and deadlines and time sequences governing the procedures.” The members were in agreement that this concern was already addressed elsewhere.

#### **V. PRO HAC VICE UPDATE**

Justice Pollack indicated that many of the changes that the Commission recommended were incorporated in the amended Rule 1.9 of the Rules of the Supreme Court of Hawai‘i that was adopted by the Court.

#### **VI. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on June 26, 2015. With no new business, the meeting adjourned at 4:00 p.m.

**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.

The Commission next discussed a judge's comment that the Guidelines should include a reminder to attorneys to establish a meaningful means of contacting opposing counsel. Judge Leonard proposed the following revision to Section 6(b) to address this concern:

Makes sparing use of impersonal means of communication, such as emails, telephone messages, and letters intended only to make a record, and then only when the lawyer thinks it is necessary given all the circumstances, recognizing that excessive use of such forms of communication may promote contentiousness, rather than reconciliation.

There was extensive discussion regarding the use and misuse of emails and other forms of communications in the representation of a client and consideration of the intention of the initial drafters of the provision. After discussion of various alternatives, the Commission decided to adopt, with one dissenting vote, the following language:

Makes sparing use of communications intended only to make a record and then only when the lawyer thinks it is necessary given all the circumstances.

Judge Leonard, in response to a judge's comment, proposed a new subsection (e) be added to Section 12:

While appearing before the court, addresses all arguments, objections and requests to the court, rather than directly to opposing counsel.

The members were in agreement to adopt the proposed new subsection.

Justice Pollack recommended the following revision to Section 7 in response to a comment from a judge:

A lawyer should exercise good faith and fairness when conducting discovery and should not use any form of discovery, the scheduling of discovery, or any other part of the discovery process as a means of harassing opposing counsel or the opposing party or as a means of delaying the timely, efficient and cost effective resolution of a dispute.

Justice Pollack mentioned that this was a natural insertion into Section 7 because it is the only section in the Guidelines that begins with a negative statement. After a brief discussion, the members approved the proposed revision.

Justice Pollack also discussed a judge's comment expressing concern that the Guidelines do not include a definition of ex parte communications. The recommendation of Justice Pollack was that it was not necessary to include such a definition in the Guidelines as ex parte communications are discussed in other court rules. Members of the Commission agreed and no revisions were adopted to this provision.

It was raised that Section 10 provides that a lawyer "should avoid" ex parte communications on the substance or merits of a pending case even though such communications are prohibited under the Hawai'i Rules of Professional Conduct.



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 wWhere 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,

(e) Is honest and reasonable in settlement activities.

She explained that this revision was in response to one of the comments received from a judge. She further explained that she drafted the proposed revision in a manner that would not be inconsistent with a lawyer's duties to a client in settlement. All members agreed to adopt the proposed revision.

#### **IV. DISCUSSION OF COMMENTS RECEIVED FROM LAWYERS REGARDING THE GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY FOR HAWAII LAWYERS**

The members discussed contacting the heads of HSBA sections seeking further comments regarding the Guidelines. After a brief discussion, the members decided to send an email to the section heads soliciting comments regarding the Guidelines.

The Commission next turned to a discussion of the comments from lawyers they received in response to an email that was sent out by the HSBA to all active and inactive bar members seeking comments regarding the Guidelines. A comment that Section 5 should prohibit references to counsel instead of parties was addressed. One member commented that she did not find such behavior as inflammatory. After further discussion, the members agreed that they did not think it was necessary to include such a provision in the Guidelines.

The Commission next discussed a suggestion that the Guidelines include a section regarding a lawyer's conduct in the community. After a brief discussion, the members agreed that this was not necessary to pursue.

In discussing the comments received more generally, it was observed that there was a suggestion that the Guidelines should be mandatory. There was also a discussion of the extent of coverage of the Guidelines in CLE courses and whether there should be a course focused specifically on the Guidelines. Several comments suggested that the judges do not put enough focus on the Guidelines. One member commented that although judges are not able to enforce the Guidelines, which are not mandatory, perhaps judges could better utilize them. There was further discussion with regard to how judges could reference the Guidelines in court and make expectations clear that attorneys are to follow the Guidelines when in the courtroom. The members were in agreement that training for the judges would be beneficial. It was also recommended that discovery masters should receive training with regard to the Guidelines. The members also were in agreement that those teaching CLE courses in ethics should be encouraged to incorporate the Guidelines into their courses.

It was recommended that the Commission should thank all of those who responded to the Commission's inquiry, and Justice Pollack agreed to do so.

**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.

Jane Kwan proposed that Section 3(b) 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.” It was noted that Rule 5(b) of the Hawai‘i Rules of Civil Procedure refers to service by facsimile transmission and does not refer to email. It was discussed whether “electronic means” was sufficiently descriptive so that it would not be necessary to include the explanatory parenthetical. It was also discussed that Section 3 is recommending an additional act of courtesy rather than supplementing the rule regarding service. It was proposed that the word “also” be added to the beginning of Section 3(c). After further discussion, the Commission agreed to the following revision to Section 3(c): “Also sServes 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.”

Judge Ginoza proposed various revisions to Section 6 to conform with the Commission’s prior decision to revise “letter” to “written communication.” One member noted that it is a common practice in criminal law to send written communications for the sole purpose of creating a record; another member responded that such use of a written communication would probably be considered necessary and thus not contrary to the guideline. It was further noted that Section 6 is aimed at discouraging inaccurate communications to build a record. The Commission decided to replace “letter” with “written communication” throughout Section 6. The members also agreed to revise Section 6(a) to read: “Does not ~~draft send a letter~~ written communication . . .”

Jane Kwan next discussed her proposed revisions to Section 7 to make it consistent with the Hawai‘i Rules of Civil Procedure. Judge Ginoza also proposed that “necessarily” be deleted from Section 7(a)(10) so that it reads: “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.” It was also noted that Section 7(b)(2) would not apply in the criminal setting because defense counsel must draft discovery requests as broadly as possible because counsel often do not know what evidence the State has in its possession.

It was discussed whether language should be added to Section 7 tracking the language of Hawai‘i Rules of Civil Procedure Rule 26 requiring that discovery be “reasonably calculated to lead to the discovery of admissible evidence.” Thus, it was proposed that Section 7(b) (2) read as follows: “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.”

Jane Kwan also introduced her and Judge Ginoza’s proposal to add a new subsection (d) to Section 7:

- (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 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.

**V. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, January 15, 2016. With no new business, the meeting adjourned at 4:30 p.m.

**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



to be aspirational guidelines and that it would not be practical to have enforceable rules governing civility issues.

One member asked whether there should be a guideline advising lawyers on how to deal with unrepresented parties. It was discussed whether the Rules of Professional Conduct offer sufficient guidance with regard to interactions with unrepresented parties.

Another member proposed that the introduction of the Guidelines should include a statement regarding a judge's role in encouraging compliance with the Guidelines. It was observed that such a statement in the introduction would partially address concerns regarding the enforceability of the Guidelines. The following amendment to a sentence of the introduction was agreed to by the members in attendance:

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

Justice Pollack indicated that he would forward to the supreme court all of the revisions that the Commission had adopted with respect to the Guidelines.

#### **IV. Principles of Professionalism for Hawai'i Judges**

Justice Pollack next discussed the comments from the Bench Bar conference with regard to the Principles of Professionalism for Hawai'i Judges. He noted that the comments on this topic had not yet been forwarded to the Commission for consideration, and he indicated that the comments from the Bench Bar were more extensive than those received about the Guidelines. Judy Pavey and Susan Arnett volunteered to draft a letter to bar members soliciting feedback regarding the Principles. The members agreed that the letter would be sent to both members of the bar and judges at the same time.

#### **V. Rule 1.9 of the Rules of the Supreme Court of the State of Hawai'i – Pro hac vice appearance of counsel**

The Commission next discussed out-of-state counsel and the allowance of pro hac vice counsel before agencies. Deputy Attorney General, Frances Lum, who is assigned to the Department of Labor and Industrial Relations, was present. Ms. Lum raised the issue of whether the Judiciary had the requisite authority to enact rules regarding the admission of pro hac vice counsel in agency hearings. Ms. Lum also provided background information on pro hac vice practice in State agencies. The Commission discussed the judiciary's authority to enact a rule controlling the admission of pro hac vice counsel before State agencies. It was decided that the Commission would further consider this issue at the next meeting.

Justice Pollack next discussed out-of-state counsel practicing in private arbitration. He noted that the ABA has adopted a model rule that has not been adopted by Hawai'i but has been influential throughout the country. He explained that the ABA model rule essentially allows for out-of-state counsel to practice in arbitration or an ADR type of proceeding with very little restriction. He indicated that there are about twenty-nine jurisdictions that have adopted a rule similar to the ABA model rule; nine states that have

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.

The Commission reviewed each principle individually. With regard to the seventh principle, it was discussed whether the word “consideration” was duplicative or unnecessary. In order to improve readability, the Commission agreed to the following revision:

7. To the extent possible, a judge should give all issues in controversy deliberate, informed, impartial and studied analysis and consideration ~~and~~; a judge should explain, when necessary, the reasons for the decisions of the court.

In reviewing the ninth principle, it was discussed whether it addressed the Bench-Bar Conference attendees’ concerns with ex parte communications. One member mentioned that it seemed odd that the principle first listed opinions although this was not the primary concern of the principle, and it was noted that the wording of principle nine suggested that it only applied to appellate courts. In order to address this concern, the Commission agreed to the following revision:

9. A judge should not employ hostile, demeaning or humiliating language ~~in~~ opinions or in written or oral communications with other judges, lawyers, parties, witnesses or court personnel, including in written decisions and opinions of the court.

With regard to the tenth principle, one member suggested that the second sentence was redundant. Another member pointed out that the word “knowingly” may place an unreasonable burden on judges as it is a common and acceptable practice to schedule two trials for the same time to promote judicial efficiency in the event that one of the trials does not occur as scheduled. After some discussion, the Commission agreed to revise principle ten as follows:

10. A judge should work in cooperation with other judges in this and other jurisdictions on matters relating to the availability of lawyers, parties, witnesses or court resources. A judge should not ~~knowingly unnecessarily~~ create a scheduling conflict with another judge’s judicial proceeding.

In order to avoid an ambiguity in principle thirteen, the Commission adopted the following revision.

13. A judge should avoid procedures that needlessly increase litigation expenses and should discourage unnecessary litigation expenses.

The Commission next discussed principle fourteen. One member noted that “counsel” should be added to the list of professional titles by which a judge may refer to counsel, and the Commission agreed to the revision. It was next discussed whether the second sentence pertains to both formal proceedings and informal proceedings, such as a settlement conference. After some discussion, the Commission agreed to add the phrase “on or off the record” to the second sentence to make clear that it does not only apply to formal court proceedings; the revision is as follows:

14. 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.

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.

## **VII. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, August 5, 2016. With no new business, the meeting adjourned at 4:15 p.m.

## 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.



#### **IV. PRIVATE ARBITRATION PROCEEDINGS**

The next topic was private arbitration and mediation proceedings in Hawai'i and the potential issue of the unauthorized practice of law in such proceedings by out-of-state attorneys. Justice Pollack introduced Keith Hunter, President and CEO of Dispute Prevention & Resolution. Mr. Hunter presented information for the Commission's consideration in addition to answering questions.

Mr. Hunter explained that it is not uncommon for out-of-state and local companies to be represented by out-of-state counsel in mediation. He also explained that out-of-state counsel may advise an insurer who may or may not be a party to the mediation. He recommended that pro hac vice admission not be required for mediation. He stated that he believed it would discourage parties from participating in mediation if required.

Mr. Hunter next explained that in his view arbitration is very different from mediation as it involves an adjudication and is binding on the parties. He indicated that Hawai'i law is very unclear with respect to the participation of out-of-state attorneys in arbitration proceedings. He pointed out that a policy or rule requiring pro hac vice admission in arbitration proceedings may need to consider ways in which to provide for consistent application of the requirements. He also noted that sometimes non-attorneys may represent themselves in arbitration. Mr. Hunter stated that Michigan had adopted an approach that was very sensible. It was also noted that arbitration involves in-person representation, while mediation often happens over the phone.

The Commission discussed with Mr. Hunter whether out-of-state lawyers should be required to co-counsel with local counsel. It was also discussed whether the arbitrator should be the one to make a determination as to pro hac vice admission or whether such requests should be made to a circuit court. Commission members and Mr. Hunter also discussed the viability of an international ADR center in Hawai'i and whether foreign counsel should be permitted pro hac vice admission. Mr. Hunter noted that the requirement of local counsel being associated with foreign counsel would be beneficial and would assist foreign counsel with compliance with local rules. He indicated that New York's laws may be informative in this regard. One member noted that hiring local counsel would raise the cost of the proceedings for the parties. Another member pointed out that enforcement of an arbitration award may be sought in court, which would require properly admitted counsel. The Commission thanked Mr. Hunter for his very informative presentation.

The manner in which out-of-state attorneys may be governed in mediation and arbitration proceedings was next discussed. A subcommittee was formed to consider whether the supreme court has the authority to regulate pro hac vice admission in ADR proceedings. Judith Pavey, Justice Pollack, Joanne Grimes, Judge Ginoza, and Rebecca Copeland volunteered to serve on the subcommittee.

**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

local counsel, including that local counsel participate meaningfully, and it was also determined that the letter should not recommend that local counsel serve as lead counsel. Judge Ginoza offered to make the revisions and circulate the letter for final review.

#### **IV. OUT-OF-STATE COUNSEL IN PRIVATE MEDIATION AND ARBITRATION PROCEEDINGS**

The Commission also considered private arbitration and mediation proceedings in Hawai'i and the potential issue of the unauthorized practice of law in such proceedings by out-of-state attorneys. Justice Pollack introduced Bernard Bays of Bays Lung Rose Holma to present information for the Commission's consideration in addition to answering questions.

Mr. Bays noted that he chaired a committee of the Hawai'i State Bar Association responsible for considering the issue of the unauthorized practice of law in Hawai'i. He was involved in drafting a bill that was presented to the legislature that would prohibit the unauthorized practice of law. He explained that in his view the most serious issue associated with the unauthorized practice of law is the unauthorized practice by out-of-state attorneys. He said that the damage to the bar by the unauthorized practice of law by out-of-state attorneys is manifested in three ways: (1) it takes revenue out of the hands of Hawai'i attorneys; (2) it undermines the ongoing effort to elevate the sophistication and legal capabilities of the local bar; and (3) it imposes dangers for consumers.

To address these problems facing the Hawai'i bar, Mr. Bays proposes that pro hac vice admission to the Hawai'i bar should be required anytime an out-of-state lawyer wishes to practice law in Hawai'i concerning a Hawai'i state matter, including in-court proceedings, agency proceedings, arbitration, mediation, and transactional work. He proposed that a lawyer should not be admitted to practice pro hac vice unless it is demonstrated that there are no Hawai'i attorneys that are capable of competently performing the work. He indicated that this rule has already been enforced by some judges.

When asked whether pro hac vice requirements should apply to both mediation and arbitration, he responded in the affirmative and explained that he did not think that a distinction between mediation and arbitration should be made. He noted that mediation almost always takes place as an adjunct to a litigation or arbitration proceeding and that an attorney who would participate in the mediation should be admitted pro hac vice before a court. When asked about the possibility of the arbitrator determining the pro hac vice admission of an attorney, he responded that it should be decided by a court because a judge should determine whether the work could be competently performed by a Hawai'i attorney. He also noted that arbitration proceedings will eventually make its way to the court, and thus, it was most appropriate for a court to admit the attorney pro hac vice.

He also recommended that out-of-state attorneys appearing before an agency would need to be admitted pro hac vice by a court although he suggested that admissions would be granted more liberally for agency proceedings. When questioned about the breadth of his proposal, he clarified that there would need to be a connection to Hawai'i; in other words,

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

was also mentioned that New York simply had an exception for international practitioners such that no process was required. It was noted that there is less of a need for procedural safeguards with regard to mediation as the parties have the option of agreeing to the resolution of the matter.

**V. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, December 2, 2016. With no new business, the meeting adjourned at 4:45 p.m.

**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.



The HSBA proposed the following revision:

Specifically, a lawyer who manifests professional courtesy and civility: . . . (e) ~~is honest~~  
Does not make a false statement of material fact or law and is reasonable in settlement  
activities.

A Commission member noted that the level of specificity of the HSBA's proposed revision did not conform to the other provisions of the Guidelines. One member questioned whether the HSBA's revision would permit dishonesty in settlement activities based on differing opinions as to what constitutes a material fact. It was discussed whether withholding information, such as withholding one's settlement authorization, would be considered lying under Section 11(e). It was noted that the Hawai'i Rules of Professional Conduct already prohibits lawyers from making material misrepresentations of fact or law, and it was questioned whether Section 11(e) was necessary. The Commission considered replacing "honest" with "candid" or "forthright." After some discussion, the Commission decided to revise proposed subsection (e) as follows:

(e) ~~Is honest and~~ reasonable in settlement activities.

The Commission next discussed the HSBA's suggestion to add the following language to the preamble:

The guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, and are not to be used as an independent basis for disciplinary charges by the Office of Disciplinary Counsel of professional negligence.

It was pointed out that the proposal was inconsistent with the first sentence of the preamble, stating that the HSBA adopted the guidelines "as representing accepted norms of professional behavior upon which the successful functioning of the judicial system depends." Another member, who is also on the HSBA Board, noted that she did not believe that the Board considered the entire preamble when reviewing the revisions to the Guidelines. There was some discussion about the inherent authority of a court to reference the Guidelines when maintaining order and decorum, and it was also discussed that there is no entity that is responsible for enforcing the Guidelines because they are merely aspirational. After further discussion, it was decided that the matter should be referred back to the HSBA Board for further consideration. One member also noted that the language proposed by the Board may deter members of the public from contacting the Office of Disciplinary Counsel to inquire about questionable conduct.

Rebecca Copeland indicated that she was willing to relay comments from the Commission to the HSBA Board and report back at the next meeting with any further input from the Board.

#### **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.

#### IV. 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 member of the subcommittee that has drafted the proposed rule provided a brief summary of the proposal. The proposed rule, which follows the California model, requires an out-of-state attorney who participates in an arbitration proceeding in Hawai'i to apply for permission to do so. It was noted that international arbitration is excluded from the proposed rule, which only covers Hawai'i-related arbitration proceedings. The rule has specific requirements that the out-of-state attorney must fulfill, including that he or she must have local counsel. The arbitrator is given authority to rule on an application. The Commission had extensive discussion regarding the proposed rule and then reviewed individually each paragraph of the proposal.

For the opening paragraph, it was agreed that the following addition be made: "provided that the attorney satisfies all of the following *subject to approval as set forth in this Rule.*"

For paragraph 1, it was agreed that service requirements be included.

For paragraph 2, no revisions were made.

For paragraph 3, it was agreed that the following revision be made: "The certificate shall ~~state~~ *declare under penalty of law* all of the following."

For paragraph 3A, no revisions were made.

For paragraph 3B, it was agreed that email and phone number be added after "office address."

For paragraph 3C, it was agreed that the following addition be made: "The name, address, *email*, telephone number, and Hawaii State Bar Association registration number."

For paragraphs 3D through 3H, no revisions were made.

For paragraph 3I, no revisions were made.

For paragraph 3J, it was agreed that the following addition be made: "If the attorney has made repeated appearances in Hawai'i *during the preceding 5 years*, the certificate shall reflect."

For paragraph 4, it was agreed that revisions would be made by the subcommittee for clarity purposes.

For paragraph 5, it was agreed that the following additions and deletions be made: "and serve the *approved* certificate on the parties *and counsel* to the arbitration, the arbitrator(s), *and the arbitral forum,* ~~and all other counsel in the arbitration.~~"

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



additional text to be included at the end of the first paragraph of the Introduction to the guidelines:

The guidelines are not mandatory rules of professional conduct nor rules of practice, nor standards of care, and are not to be used as an independent basis for disciplinary charges by the Office of Disciplinary Counsel claims of professional negligence.

Mr. Kawachika then provided a more detailed explanation of the concerns regarding the current proposed revisions to the Introduction to the Guidelines. Mr. Kawachika indicated that the suggested modification is intended to clarify that the guidelines are not rules of professional conduct or practice, do not establish standards of a duty of care, and do not create an independent basis for disciplinary charges or claims of professional negligence against a lawyer.

Extensive discussion was had by Commission members regarding HSBA's proposal and other possible modifications. Following its discussion, the Commission approved the following modification to the Introduction (reflected in Ramseyer format):

The Guidelines are not mandatory rules of professional conduct, nor standards of care, and are not to be used as an independent basis for either disciplinary charges by the Office of Disciplinary Counsel or claims of professional negligence.

The Commission also approved the suggestion to have the adopted modification precede the following text of the Introduction, which would now constitute the second paragraph of the Introduction: "They are offered for the guidance of lawyers and for the information of their clients, as well as for reference by the courts."

The Commission agreed that Justice Pollack would send a letter to the HSBA Board, informing the HSBA of the Commission's approval of the modification as reflected herein.

#### **IV. 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, reviewing each paragraph of the proposed rule separately.

For the opening paragraph, it was agreed that "highest court of a state or territory of the United States or the District of Columbia" replace "bar of any other state or the District of Columbia." It was also agreed that okinas replace the apostrophes in lines 1, 2, and 4.

For paragraph 1, after some discussion regarding the deletion of "timely," no suggestions were made.

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.

For paragraph 9, there was discussion regarding the phrase “when the case is completed.” It was agreed that this paragraph be sent back to the subcommittee.

For paragraph 10, no suggestions were made.

For paragraph 11, it was agreed that an okina replace the apostrophe in line 4.

For paragraph 12, no suggestions were made.

For paragraph 13, it was agreed that “apply to” be deleted.

#### **V. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, October 27, 2017. The meeting adjourned at 4:25 p.m.

**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.

Turning to proposed Rule 1.9A, it was agreed that, as a global edit, where appropriate, apostrophes would be replaced with okinas throughout the revised draft of the proposed rule. The Commission subsequently reviewed each paragraph of the revised draft of the proposed rule separately.

For the title, the opening paragraph, and paragraphs 1, 2, 3A, 3A(1) through 3A(11), 3B, and 3B(1) through 3B(2), no suggestions were made.

For paragraph 4, after some discussion, it was agreed that the word “shall” in the last sentence be replaced with “may.”

For paragraphs 5 and 5A, no suggestions were made.

For paragraph 5B, after some discussion, it was agreed that “voids the order approving the petition” be revised as follows: “~~voids~~ renders the order approving the petition no longer valid.”

For paragraph 6, after extensive discussion regarding whether to remove the requirement that the Hawai‘i attorney “sign all pleadings, motions, briefs, or any other documents submitted in the subject arbitration,” a majority agreed to have the paragraph remain the same.

For paragraphs 7 through 9, no suggestions were made.

For paragraph 10, it was agreed that the word “allowed” in both the first sentence and the second sentence be replaced with “approved.”

For paragraphs 11 through 14, no suggestions were made.

#### **IV. ABA MODEL RULE 8.4**

The Commission generally discussed ABA Model Rule 8.4. A member commented that any proposed rule should be released for public comment. Another member stated that a rule on the subject matter could be placed in the civility rules and a more law-based statement placed in the rules. It was noted that the issue regarding misconduct was discussed at a recent ABA conference that Mr. James Kawachika attended, and perhaps he could provide some background to the ABA model rule. It was ultimately decided that forming a subcommittee on the rule would be beneficial. Justice Pollack sought volunteers for the subcommittee and indicated he would follow up by contacting members.

#### **V. NEXT MEETING/ADJOURNMENT**

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

**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

occurred regarding whether there was a need to take steps to address the conduct set forth in ABA Model Rule 8.4(g). Several members provided personal accounts of conduct encompassed by the model rule of which they were aware. Some members expressed the view that steps should be taken to address such conduct but also recognized the potentiality that adoption of the model rule created a risk of excessive regulation, including because certain conduct to be addressed by the model rule may already be covered and actionable under the current professional conduct rules. In addition, there was some discussion as to whether any measure agreed upon would be adopted as part of the Guidelines for Professional Courtesy and Civility, the Hawai'i Rules of Professional Conduct (HRPC), commentary to the HRPC, or an education program. The Commission further discussed distributing a survey to persons in the Hawai'i legal community, including law students and other identified groups, to ascertain their perception of whether such a measure is necessary. At the conclusion of the discussion, the members voted to continue discussions on the model rule. An additional member volunteered to serve on the subcommittee assigned to consideration of the model rule. The subcommittee indicated that it would be meeting in the interim to discuss a range of possible matters for presentation at the next meeting.

#### **V. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, April 20, 2018. The meeting adjourned at 4:25 p.m.

**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



did provided insightful comments. A majority of the responses received were in favor of addressing the conduct encompassed by ABA Model Rule 8.4(g). Subcommittee members also discussed ways to increase the number of responses.

Extensive discussion then occurred regarding whether it was necessary to take steps to address the conduct covered by ABA Model Rule 8.4(g) and whether there was a need to seek further information from members of the legal profession. Some Commission members expressed the view that a rule should not be adopted without first confirming whether the conduct addressed by the model rule exists in our legal profession. Several Commission members conveyed their belief that an education or training program, in lieu of a rule, guideline, or commentary to the rules of professional conduct, may be a good starting point. At the conclusion of the discussion, the subcommittee indicated that it would be meeting in the interim to examine other states' approaches to ABA Model Rule 8.4(g) for presentation at the next meeting.

#### **V. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, July 20, 2018.<sup>1</sup> The meeting adjourned at 3:55 p.m.

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<sup>1</sup> The meeting was rescheduled from Friday, July 27, 2018, to Friday, July 20, 2018, as the conference rooms were not available on the initially scheduled date.

**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

experienced sexual harassment had no avenue to have the conduct addressed and had either left the office in which the harassment occurred or left the practice of law entirely. The survey eventually resulted in a forum held by the HWL Board, at which a workplace specialist, special trainers, and Rachael Wong were brought in to discuss workplace policies and different ways to respond to experiences of sexual harassment, e.g., reporting mechanisms. Wong also distributed handouts that the HWL was willing to share with the Commission. The HWL members stated that the HWL does not have any further plans regarding this topic, but that if the Hawaii State Bar Association wants to hold a forum on sexual harassment in the Hawai'i legal community, the HWL would be willing to take part in it.

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

The Commission considered ABA Model Rule 8.4(g) and possible alternatives 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 generating three options that could be implemented to address harassment or discrimination in the legal profession in Hawai'i: (1) education, (2) some kind of rule, or (3) a policy or guideline. The subcommittee member indicated that the subcommittee had reached a preliminary consensus that ABA Model Rule 8.4(g) may not be an appropriate model to adopt at this time and that if the Commission was in favor of a rule, something akin to ABA Model Rule 8.4(d) might suffice. A Commission member pointed out that Rule 8.4(d) previously existed in Hawai'i but that the supreme court specifically deleted this provision of the rule because of due process concerns. The Commission member added that there were several unsuccessful attempts to revive Rule 8.4(d).

Extensive discussion then occurred regarding which option the subcommittee should focus its research efforts on. The subcommittee indicated that it was unrealistic to proceed on all three options given the wealth of information available. Several Commission members agreed that some form of education or training program is a good starting point; some members even stated that they would be in favor of a mandatory CLE requirement on the topic of sexual harassment or discrimination in the legal community. As to ABA Model Rule 8.4(g), some Commission members expressed disfavor in adopting this rule. One member stated that, in light of the U.S. Supreme Court's emphasis on free speech rights and a July 18, 2018 blog post seriously questioning the constitutionality of Rule 8.4(g), the Commission should not go forward with this rule, adding that ABA Model Rule 8.4(d) seemed similar to Rule 8.4(g) and should also not be considered. Conversely, another Commission member stated that the Commission should continue to consider Rule 8.4(g), as Rule 8.4(d) does not address the issues set forth in Rule 8.4(g). At the conclusion of the discussion, the Commission agreed that the subcommittee should focus its research efforts on the educational aspect, as well as the history of Rule 8.4(d) in Hawai'i.

**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

might be necessary. Many members appeared to support mandatory education in some form, with one member suggesting that mandatory education could effectuate the most meaningful and wide-reaching change. However, other members expressed doubt that education alone would be sufficient to result in change and commented that a rule would establish an enforcement mechanism to counter harassment or discrimination. One member commented that mandatory education and a rule did not have to be exclusive.

With regard to having a rule as an enforcement mechanism, various members mentioned that a rule would have to be well defined and enforceable and also commented that the language of ABA Model Rule 8.4(d) seemed overly broad and vague. A commission member asked what the purpose of creating a rule would be when harassment or discrimination may already be actionable under other laws. Another member questioned whether a rule would be the best method to dissuade a potential offender whose conduct already violates other rules. Some members raised concerns about whether a rule could be “weaponized” or used in unintended ways. One member commented that even if a rule did not eliminate the targeted improper conduct completely, it would still create a culture in the legal profession against harassment and discrimination. Some members suggested that tying a rule’s language to existing statutes might provide clarity and guidance for enforcement. For instance, California’s new Rule 8.4.1 prohibits “unlawful” discrimination and harassment, which is defined by reference to applicable state and federal statutes and decisions. Iowa’s rule 8.4(g) was also mentioned as a rule that includes the language “unlawful.” Some members expressed support for making a rule actionable based on a separate adjudication while others preferred having a rule be actionable as an independent alternative. The members also discussed possibly creating a guideline in the Guidelines of Professional Courtesy and Civility and whether such a guideline would be workable.

The subcommittee members were tasked with drafting three proposals for the next meeting: (1) a mandatory education proposal, (2) a proposed rule, (3) and a proposed guideline.

#### **IV. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, January 25, 2019. The meeting adjourned at 3:55 p.m.

**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



member expressed concern about penalizing a person for conduct that the person does not realize is no longer acceptable.

In addition, the Commission discussed the following topics: the possibility of forming a State Bar Association group similar to the Lawyer's Assistance Program aimed at addressing reports of harassment; the utility of creating a guideline or rule of civility; and the potential efficacy of an educational program aimed at addressing harassment and discrimination as an ethics requirement. Ms. Fernandez agreed to meet with the subcommittee in the future and provide examples of specific language that could be incorporated into a rule or guideline. The Committee also expressed interest in reviewing the language of New Hampshire's proposed Rule 8.4(g).

#### **IV. MINUTES OF MEETING OF OCTOBER 26, 2018**

The Commission adopted the minutes of the meeting of October 26, 2018, with a correction of the spelling of a member's name.

#### **V. PRESENTATION ON CYBER SECURITY**

Member Kevin Takata provided background on the issue of data security. Attorneys' concerns about data security should begin before a data breach occurs and start with a lawyer's obligation to prevent data breaches. A resource for finding security standards is the National Institute of Standards and Technology, but standards proposed should be fluid because technology is always evolving. Another area of discussion is the idea of a "safe harbor" that would protect practitioners who, for example, take certain minimum precautionary measures. Practitioners should be made aware that the type of notification required after a breach is dependent on the type of information taken.

Next, the Committee discussed the issue of cyber security and data breaches. One member asked whether solo practitioners would be subject to cyber security requirements. Some members related experiences with common "phishing," "spoofing," and "ransomware" schemes and expressed that there should be education in the area of cyber security and information on prevention. Various members expressed that education and information should be provided to new attorneys and solo practitioners, in particular, because they may not have the IT resources of larger firms. One member suggested an amendment to the comments of the duty of competence set forth in the professional rules as a possible course of action. A subcommittee headed by Mr. Takata was created to further address this topic.

#### **VI. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for 2:30 p.m. on Friday, April 5, 2019. The meeting adjourned at 4:00 p.m.

**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:

**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. This credit hour shall count toward the annual CLE requirement. "Ethics or professional responsibility education" means those courses or segments of courses devoted to:

- ....  
(4) client trust administration, ~~bias awareness and prevention, and~~  
(5) access to justice, or  
(6) awareness and prevention of bias, harassment, and discrimination.

(added text underlined; text removed ~~strikethrough~~)

The Committee then discussed the subcommittee's proposed amendment to Rule 8.4 of the Hawai'i Rules of Professional Conduct ("Rule Option"). A subcommittee member gave an overview of the Committee's past discussions regarding the Rule Option and some concerns that have been discussed regarding the language of ABA Model Rule 8.4(g), including issues related to "freedom of speech," an attorney's ability to advocate for clients and accept or deny clients, and overreaching into activities "related to the practice of law." The Rule Option is modeled after the ABA Model Rule and a proposed New Hampshire rule that has, modified language to address concerns raised with the model rule. The Committee then discussed the specific language used in the proposed rule.

First, the Committee discussed the phrase, "while acting as a lawyer." Currently, there appears to be no guidance on the parameters of this language from other jurisdictions, but it was suggested that the language could be clarified in a comment. One member expressed preference for this language compared to the language "engaging in the practice of law," which is already used in a statute prohibiting the unauthorized practice of law. One concern raised was that the language as written does not seem enforceable, and another member added that the language seemed vague. The alternative language "while in his or her official/professional capacity," was suggested, and several members voiced support for it or similar language. Other suggested language was "using his or her position as a lawyer."

The Commission next discussed the language "knew or reasonably should have known is harassment or discrimination." Some members stated the language was vague, due in part to the inherent vagueness of the word "harassment." One member noted that "knows" and "reasonably should know" were defined terms in HRPC Rule 1.0.

The Commission then discussed the language covering the prohibited "bases" of discrimination and harassment--e.g., race, sex, and religion--listed in the Rule Option. The subcommittee clarified that the bases listed are statutorily defined terms. The issue was raised whether the Rule Option should be more narrowly tailored to target specific conduct, for example, just "sexual harassment" or "discrimination." There was concern that a less targeted rule that also incorporates the language "knows or reasonably should

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.

Commission members also discussed the definitions of “discrimination” and “harassment” in Maine’s model rule. One member stated that definitions could be included in a comment to a proposed rule. It was also noted that the subcommittee’s proposed rule included a provision to address freedom of speech concerns.

The Commission tasked members to submit draft definitions or comments to the proposed rule to circulate in advance of the next meeting. One member expressed a desire to add language to the education option making education on harassment and discrimination mandatory within the next three years. A general timeframe to submit comments or proposals to the subcommittee was generally agreed-upon.

### **III. DISCUSSION ON OFFICIAL COMMENT TO HRPC 1.3 REGARDING SUCCESSOR DESIGNATION**

Bradley Tamm distributed a proposal to add an official comment to HRPC 1.3 addressing the issue of “successor designation,” as set forth by the American Bar Association in the Model Rules of Professional Conduct Rule 1.3, Comment [5]:

[5] To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.

Mr. Tamm noted that currently in Hawai‘i there is no enforceable formal ethical obligation or official recommendation for a lawyer to designate a successor, and often significant financial resources and personnel time are dedicated to storing files and compensating trustees when an attorney dies without designating a successor. Mr. Tamm explained that there is a focus on “solo practitioners” in the comment because a deceased attorney’s files become the responsibility of partners and firms, and the files do not become the responsibility of the Office Disciplinary Counsel. The Commission was informed that there are close to two-thousand solo practitioners, many who are over the age of 60.

Following discussion of the proposal, members expressed general agreement with the purpose and content of the proposed comment. Mr. Tamm indicated that he would like to have the proposal submitted to the Hawai‘i Supreme Court. It was noted that the proposal could either be formally approved by the Commission members and submitted to the supreme court by the Commission or Mr. Tamm could directly submit his proposal to the supreme court and note that he had discussed it with the Commission and that the Commission was in general support of the proposal. Mr. Tamm expressed a desire to submit the proposal directly to the supreme court.

### **IV. NEXT MEETING/ADJOURNMENT**

The next meeting was scheduled for Friday, October 4, 2019, at 2:30 p.m. The meeting adjourned at 4:05 p.m.

**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.



The subcommittee proposal and Option 1 are set forth below:

\*added text underlined, deleted text ~~stricken~~

**Subcommittee Proposal**

**Proposed Amendment to Rule 22 of the Rules of Supreme Court of Hawai'i:**

Proposal to amend Rule 22 by inserting a new subsection regarding harassment and discrimination as topics of mandatory continuing legal education.

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. This credit hour shall count toward the annual CLE requirement. "Ethics or professional responsibility education" means those courses or segments of courses devoted to:

- (1) the Rules of Professional Conduct;
- (2) the professional obligations of the lawyer to the client, the judicial system, the public and other lawyers;
- (3) substance abuse and its effects on lawyers and the practice of law; ~~or~~
- (4) client trust administration, ~~bias awareness and prevention, and~~
- (5) ~~access to justice; or~~
- (6) awareness and prevention of bias, harassment, and discrimination.

**Option 1**

It is recommended that Rule 22 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. This credit hour shall count toward the annual CLE requirement. "Ethics or professional responsibility education" means those courses or segments of courses devoted to:

- (1) the Rules of Professional Conduct; (2) the professional obligations of the lawyer to the client, the judicial system, the public and other lawyers; (3) substance abuse and its effects on lawyers and the practice of law; [or] (4) client trust administration, bias awareness and prevention, or (5) training on harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity.

9 members voted in favor of the subcommittee proposal to RSCH Rule 22; and 2 members voted in favor of Option 1. The voting on Option 1 did not include the absentee votes.

As to Option 2, the option was described as an "add-on" to either the subcommittee proposal or Option 1.

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.

11 members voted in favor of the proposed amendment to HRPC Rule 8.4, and 7 members voted against doing so, inclusive of absentee votes.

As for the definitions, after some discussion, the Commission decided to vote on whether to include the definitions as comments or integrate the definitions into the HRPC with respect to each proposed definition. The proposed definitions are as follows:

“Professional capacity” as used in this rule includes (1) acts occurring in the course of representing clients; (2) interacting with witnesses, coworkers, court personnel, lawyers, or others, while engaged in the practice of law; (3) or operating or managing a law firm or law practice.

8 members voted for the definition of “professional capacity” to be included as a comment, and 6 members voted to integrate the definition into the HRPC.

“Harassment” on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, gender identity and/or gender expression as used in this section means derogatory, offensive, obnoxious, or demeaning conduct or communication and includes, but is not limited to, unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content, or any conduct defined in HRS § 604-10.5 and HRS § 711-1106.

With regard to the definition of “harassment,” 6 members voted to include the definition as a comment, 1 member voted to integrate the definition into the HRPC, and 7 members voted not to include the definition as written.

“Discrimination” on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, gender identity and/or gender expression as used in this section means conduct or communication that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

As to the definition of “discrimination,” 7 members voted to include the definition as a comment, 1 member voted in favor of integration of the definition into the HRPC, and 6 members voted against inclusion of the definition. The voting on the definitions did not include the absentee votes.

Finally, the Commission discussed and voted on whether to propose an amendment to the Guidelines that would establish a new section 15 to the Guidelines. Prior to voting, the Commission discussed and made changes to the proposed new section to the Guidelines.

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.

