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SCRU-11-0000068

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I

ORDER AMENDING RULE 8 OF THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I
(By: Recktenwald, C.J., Nakayama, McKenna, Wilson, and Eddins, JJ.)

IT IS HEREBY ORDERED that Rule 8 of the Rules of the Supreme Court of the State of Hawai‘i is amended, effective January 1, 2023, as follows (deleted material is bracketed and stricken; new material is underscored):

RULE 8. JUDICIAL DISCIPLINE.

8.2. Jurisdiction and powers of [e]Commission.

(c) Jurisdiction of Commission.

(2) Notwithstanding any provisions to the contrary contained herein regarding the jurisdiction of the Commission:

(i) The Disciplinary Board of the Hawai‘i Supreme Court may conclude any formal disciplinary proceedings as to said conduct which occurred prior to the judicial tenure of any full-time or part-time justice or judge, and any petition to the supreme court to determine whether any justice or judge is incapacitated from continuing the practice of law by reason of physical infirmity or illness or because of the use of drugs or intoxicants, if such formal disciplinary proceedings were [~~instituted~~] initiated or such petition was filed prior to the judicial tenure of the justice or judge.

(d) Subpoena and discovery.

(1) In matters before the Commission the chairperson or, if appointed pursuant to Rule 8.7 of this Rule, special counsel in matters under investigation by special counsel, may administer oaths and affirmations, compel by subpoena the attendance and testimony of witnesses, including the judge as witness, and to provide for the inspection of documents, books, accounts, and other records.

A respondent judge may compel by subpoena the attendance of witnesses and the production of documents, books, accounts, and other records after formal disciplinary proceedings are initiated.

Writs of subpoena shall be issued in blank by the clerk of the supreme court upon application by any member of the Commission, special counsel or the respondent, subject to the demonstration of good cause required by Rule 8.2(d)(3) of this Rule.

(2) The power to enforce process may be delegated by the supreme court to any other court.

(3) There shall be no discovery proceedings except upon the order of the Commission chairperson for good cause shown.

8.4. Confidentiality.

(a) **In general.** All proceedings, records, files, and reports involving allegations of misconduct by, or disability of, a judge shall be kept confidential until and unless the judge requests such materials be made public. However, absent evidence of incapacity or disability related to the alleged misconduct, or unless otherwise directed by the supreme court, if formal disciplinary proceedings are initiated, [however, unless otherwise directed by the supreme court,] the Formal Complaint or the Statement of the Allegations, and the respondent judge's answer, if any, shall be public 90 days after the service of the Formal Complaint or the Statement of the Allegations upon [the filing of the answer by] the respondent judge[, or the expiration of the 20-day period for filing an answer under Rule 8.9(b) of this Rule], as shall any subsequent disciplinary hearings and evidence introduced therein. In such an event, however, the deliberations of the Commission and the contents of the initial investigatory file shall remain confidential. In addition, the respondent judge may apply to the Commission for a protective order based upon the assertion of private medical or other sensitive information, with denial of that order reviewable by the supreme court. [the supreme court enters an order for the imposition of public discipline or the judge requests that the matter be public.] The Commission, [and] special counsel, the supreme court, and their staffs shall conduct themselves so as to maintain the required confidentiality[-of the proceedings]. The Commission and the supreme court may, however, confirm the resignation of the respondent judge in such an event.

8.6. Complaint procedure.

(b) **Privilege.** A qualified privilege shall attach to a complaint submitted to the Commission or testimony related to the complaint, and any civil action predicated on such complaint ~~[instituted]~~initiated against any complainant or witness, or their counsel, shall be subject to said qualified privilege.

8.7. Appointment of special counsel. Upon determining that further proceedings should be had, the Commission shall request the supreme court to appoint special counsel to further investigate the matter. The supreme court, however, may also, upon receipt of the report from the Commission pursuant to Rule 8.6 of these Rules, review the record *de novo* and, in its discretion, appoint special counsel *sua sponte*. In either case, Counsel, upon further investigation, shall either report to the Commission that a formal hearing is not necessary or shall ~~[institute]~~initiate formal disciplinary proceedings as provided in Rule 8.9 of these Rules. The Office of Disciplinary Counsel may be appointed as special counsel, subject to the approval of the ~~[C]~~chairperson of the Disciplinary Board.

8.9. Formal hearing.

(a) **Formal Complaint or S[s]tatement of the Allegations.** Formal disciplinary proceedings shall be ~~[instituted]~~initiated by special counsel by filing with the Commission a detailed sworn Formal C[e]omplaint signed by the complainant. If a sworn Formal C[e]omplaint is not obtained, a clear S[s]tatement of the A[a]llegations against the judge and the alleged facts forming their basis shall be prepared by special counsel and submitted to the Commission. Where more than one act of misconduct is alleged, each shall be clearly set forth. A copy of the Formal C[e]omplaint or S[s]tatement of the A[a]llegations shall be served upon the judge by personal service unless the judge cannot be located within the State, in which case service may be accomplished by certified or registered mail to the judge's address registered with the Hawai'i State Bar.

(b) **Answer.** The judge shall serve the judge's [his or her] answer upon special counsel and file the original with the Commission within 20 days after the service of the Formal C[e]omplaint or the S[s]tatement of the A[a]llegations unless such time is extended by the chairperson. In the event the judge fails to answer, the charges shall be deemed admitted; provided, however, that a judge who fails to answer within the time provided may obtain permission of the chairperson to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect.

(c) **Termination after answer.** ~~[At any time after service of the answer, ¶]The Commission may terminate the proceeding and dismiss the [e]Formal Complaint or the Statement of the Allegations with the approval of the supreme court, and shall in that event give notice to each complainant and to the judge. [that it has found insufficient cause to proceed.]~~

(d) **Hearing officer and [N]notice of hearing.** Following service of the answer the matter may be set for hearing before a hearing officer, chosen by the Commission from the list maintained by the Disciplinary Board of the Hawai'i Supreme Court for attorney disciplinary proceedings. ~~[the Commission.]~~ A hearing officer shall refrain from taking part in any proceeding in which a judge,

similarly situated, would be required to abstain. The Commission shall serve a notice of hearing upon special counsel and the judge, or [his or her] the judge's counsel, stating the date and place of the hearing and the proposed identity of the hearing officer. Any motion for the disqualification of any proposed hearing officer shall be made within 10 days of service of the notice upon special counsel and the judge, or the judge's counsel, after which time any objection shall be deemed waived.

(e) Presentation; cross-examination; evidence. At the hearing, the judge shall be entitled to counsel of [his or her] the judge's own choice, shall be entitled to compel by subpoena the attendance and testimony of witnesses and to provide for the inspection of documents, books, accounts, and other records, and shall have a full opportunity to confront and cross-examine the complainant and other witnesses presented by special counsel and to present evidence on [his or her] the judge's own behalf. Absent good cause warranting the use of a court reporter, the hearing officer shall electronically record the disciplinary hearings, to preserve the record of the hearings for transcription at a later time, if necessary.

The [Commission] hearing officer shall not be bound by the formal rules of evidence, but shall admit only trustworthy evidence, nor shall [~~The Commission shall not rely upon~~] any evidence outside the formal record be relied upon in reaching [its] a decision. The findings of the hearing officer shall be supported by clear and convincing evidence.

The hearing officer shall, in every case, submit a report containing findings supported by citations to the record, conclusions of law, and recommendations, together with a record of the proceedings, including a transcription of the audio recordings of the hearing if requested, to the Commission within 30 days after the conclusion of the hearing, unless such time is extended by the Commission chairperson for no more than one 30-day extension, for good cause shown. A hearing is concluded when all of the evidence has been submitted or, if post-hearing pleadings have been ordered or authorized, when the last authorized pleading is filed.

(f) Findings and recommendations. Upon receipt of such a report from a hearing officer, the Commission will not entertain briefs or oral argument except:

(1) within the Commission chairperson's discretion, upon application of special counsel, the judge, or the judge's counsel, submitted within 10 days after service of the report of the hearing officer; or

(2) upon a vote of a majority of the Commission.

If such application is granted or vote occurs, the Commission chairperson shall set the dates for the timely submission of briefs and for the expeditious hearing of any oral argument before the Commission.

After a review of the report of the hearing officer, the Commission shall itself compose a report, making Findings of Fact, based upon clear and convincing evidence, entering Conclusions of Law regarding any violations found, and making a recommendation for the disposition of the matter and shall thereafter promptly file that report, [All findings of the Commission shall be supported by clear and convincing evidence. The Commission shall, in every case, submit a report containing its findings and recommendations,] together with a transcribed record of its proceedings and the proceedings before the hearing officer, to the supreme court after the conclusion of proceedings before the

Commission [its hearing] or after the submission to the Commission of the hearing officer's report if no proceedings are held at the Commission. The Commission may, at its discretion, rely upon the report of the hearing officer in the drafting of its report to the supreme court. In its report, the [The] Commission may recommend to the supreme court any of the following sanctions:

- ~~[(1)]~~ (A) Removal;
- ~~[(2)]~~ (B) Retirement;
- ~~[(3)]~~ (C) Imposition of limitations or conditions on the performance of judicial duties, including suspension with or without pay;
- ~~[(4)]~~ (D) Direct professional counseling or assistance for the judge;
- (E) Private informal admonition;
- (F) Private reprimand;
- ~~[(5)]~~ (G) Public censure;~~[-suspension from the practice of law, or disbarment; or]~~
- (H) that the matter be referred to the Office of Disciplinary Counsel and the Disciplinary Board for investigation pursuant to Rule 2 of these Rules; or
- ~~[(6)]~~ (I) Any combination of the above sanctions.

8.10. Review by [S]supreme [C]court. After the filing of the Commission's report with the supreme court a copy thereof shall be personally served on the judge, unless good cause exists for service by certified or registered mail. The judge may file exceptions to the report within 20 days from the date of service of a copy thereof or within an additional period not to exceed 20 days granted by the court for good cause shown. Within 60 days after the filing of the report and the filing of exceptions, if any, the judge shall file an opening brief pursuant to the rule governing civil appeals; and other briefs may be filed and oral argument may be had as therein provided. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order. If the supreme court imposes a private discipline the court may, at its discretion, thereafter render the record confidential.

DATED: Honolulu, Hawai'i, September 13, 2022.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

