Re: Proposal to amend the Hawai‘i Rules of Appellate Procedure

- Rule 5. Disqualification or Recusal of an Appellate Judge or Justice;
- Rule 34. Oral Argument and the Use of Visual Aids at Argument;
- Rule 36. Entry of Judgment;
- Rule 39. Costs and Attorney’s Fees;
- Rule 40.1. Application for Writ of Certiorari in the Supreme Court;
- Rule 40.2. Application for Transfer to the Supreme Court;
- Rule 41. Stay of Intermediate Court of Appeals Judgment on Appeal.
- New Rule 46. Clerical Mistakes; and,
- Rule 50. Withdrawal, Substitution, Disaffiliation, or Discharge of Appellate Counsel.

The Supreme Court of Hawai‘i seeks public comment regarding proposed amendments to Rules 5, 34, 36, 39, 40.1, 40.2, 41 and 50, and to promulgate new Rule 46 of the Hawai‘i Rules of Appellate Procedure. The proposed amendments address disqualification or recusal of an appellate judge or justice; the use of demonstrative exhibits at oral argument; requiring a judgment on every appellate case; clarifying deadlines for costs and attorney’s fees and the disposition deadline for an application for transfer; increasing the page limit for applications for writ of certiorari and responses; and clerical mistakes.

The Ramseyer version of the proposed rule amendments are attached. For the rule amendments, the proposed language to be added is underscored, and the language to be deleted is bracketed and stricken as illustrated in this [example].

Comments should be submitted in writing no later than **Monday, March 9, 2026** to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 808-539-4801, by e-mail to pao@courts.hawaii.gov, or via the Judiciary website.

Attachment.

PROPOSED AMENDMENTS TO THE
HAWAIʻI RULES OF APPELLATE PROCEDURE
(Deleted material is bracketed and stricken; new material is underlined.)

Rule 5. DISQUALIFICATION OR RECUSAL OF AN APPELLATE JUDGE OR JUSTICE.

(a) Motion for disqualification or recusal. A party to any proceeding in the appellate courts may file a motion to disqualify or recuse a judge or justice before whom the case is pending.

(b) Time. The motion must be filed within 10 days after either the document initiating the proceeding in the appellate court is filed or the party discovers new information which, by due diligence, could not have been discovered earlier, that there is reason to believe that any judge or justice should not participate in deciding the case or a matter therein. Except for good cause shown, failure to file the motion by this deadline shall be deemed a waiver of the party's right to object to the judge or justice's participation.

(c) Contents. The motion shall concisely state the facts, reasons, and authority for the requested relief, and shall be supported by a declaration or affidavit, and any pertinent exhibits, establishing the asserted facts. The filing party shall, in the same or a separate declaration or affidavit, also declare or aver that the motion is made in good faith and not for purposes of delay.

(1) AUTHORITY. A party may move for recusal on the grounds that the subject judge or justice is required to recuse under the Hawaiʻi Revised Code of Judicial Conduct, Rule 2.11, "Disqualification or Recusal."

(2) INVALID GROUNDS. A motion to recuse that is grounded solely on a judge or justice having ruled a particular way in the past, such as a disagreement with the judge or justice's prior ruling on a particular issue or claim, shall be deemed to have not satisfied the content requirements of this rule.

(d) Determination of motion. Rule 27(c) of these Rules shall not apply to a motion under this Rule. [~~If the judge or justice who is the subject of the motion does not recuse from the case, the relevant appellate court shall resolve the motion. If the judge or justice does not recuse, the judge or justice may file a response to the motion within five days. A substitute judge or justice shall replace the judge or justice who is the subject of the motion, for the limited purpose of resolving the motion.~~]

(1) PROCEDURALLY DEFECTIVE MOTION. If the motion to recuse fails to comply with the requirements of subsections (b) or (c) of this rule, the appellate court as presently constituted, including the judge or justice that is the subject of the motion, may consider the motion. There is no requirement to appoint a substitute judge or justice to consider a procedurally defective motion.

(2) DISPOSITION OF MOTION. Where a motion to recuse satisfies the procedural requirements of subsections (b) and (c) of this rule, if the judge or justice who is the subject of the motion does not recuse from the case, the relevant appellate court shall resolve the motion. If the judge or justice does not recuse, the judge or justice may file a response to the motion within five days. A substitute judge or justice shall replace the judge or justice who is the subject of the motion, for the limited purpose of resolving the motion.

(e) Only one motion permitted. Only one motion for disqualification or recusal may be filed by each party at each of the appellate courts, unless the party discovers new information, which by due diligence could not have been discovered earlier, that the judge or justice should recuse or be disqualified from hearing the case or a matter therein. Any such subsequent motion or amended motion must be filed within 10 days after the discovery of the new information.

Rule 34. ORAL ARGUMENT.

(a) In general. Oral argument shall be had in all cases except those in which the appellate court before which the case is pending enters an order providing for consideration of the case without oral argument.

(b) Notice of argument; postponement; request for additional time to argue. The appellate clerk shall advise all parties whether oral argument is to be heard and, if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for the allowance of additional time to argue must be made by motion filed within 10 days of such notification. The request for additional time shall state the reasons the case cannot be presented within the time allotted.

(c) Motion for retention of oral argument. If the appellate court has ordered a case submitted on the briefs, any party may, within 10 days after the mailing of the order, file a motion for retention of oral argument, supported by a statement of reasons. The appellate court may grant or deny such motion, and such grant or denial shall not be subject to review or reconsideration.

(d) Order and content of argument. The appellant is entitled to open and conclude the argument. The opening argument may include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records, or authorities.

(e) Cross and separate appeals. A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the appellate court otherwise directs. If a case involves a cross-appeal, the plaintiff in the trial court or agency action shall be deemed to be the appellant for the purpose of this rule unless the parties otherwise agree or the appellate court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(f) Non-appearance of parties. If the appellee or counsel fails to appear to present argument, the appellate court may hear argument on behalf of the appellant. If the appellant or counsel fails to appear, the appellate court may hear argument from the appellee. If neither party nor counsel appears, the case will be decided on the briefs unless the court shall otherwise order. Sanctions may be assessed against attorneys of record or [~~pro se~~]self-represented parties who fail to appear.

(g) Submission on briefs. By agreement of the parties, a case may be submitted for decision on the briefs. In any such case, the appellate court may require oral argument.

(h) No oral argument by party failing to file brief. If the appellant or the appellee has failed to file an opening or answering brief, as the case may be, oral argument by that party's counsel, or the party, if [~~pro se~~]self-represented, will not be heard unless the appellate court directs otherwise.

(i) Use of visual aids at argument; removal. A party may utilize a visual aid at oral argument as follows:

(1) The visual aid shall be a part of the record on appeal and include a visible citation to its location in the record by displaying the docket and page number. The citation may be displayed either on the visual aid or as a separate visual aid displayed with it.

(2) At least 18 calendar days prior to oral argument the party that desires to use a visual aid shall provide a copy of the visual aid to all other appearing parties and confirm whether they have an objection to the use of the visual aid.

(3) No later than five business days prior to oral argument, the party requesting to utilize a visual aid shall file a "Notice of Intent to Use Visual Aid at Oral Argument" along with a declaration that provides: whether the requirements of subsections (i)(1)-(2) of this Rule were followed; whether an objection to its use was made by any appearing parties in the case and the identity of those objecting parties; their grounds for objection; and any reply to the objection.

The appearing parties are encouraged to address and resolve any objections in good faith without the need for court action.

By the day of oral argument, and prior to its commencement, the clerk will inform the parties whether the visual aid may be displayed at oral argument.

If visual aids are to be used at the argument, counsel or the party, if [~~pro se~~]self-represented, shall arrange with the appellate clerk to have them placed in the courtroom before the appellate court convenes on the date of the argument. After the argument, counsel or the party, if [~~pro se~~]self-represented, shall cause the visual aids to be removed from the courtroom unless the appellate court otherwise directs. If the visual aids are not reclaimed by counsel or the [~~pro se~~]self-represented party within a reasonable time, they shall be destroyed or otherwise disposed of by the appellate clerk.

Rule 36. ENTRY OF JUDGMENT; PREPARATION, FILING, & SERVICE OF THE JUDGMENT ON APPEAL; EFFECTIVE DATE OF JUDGMENT ON APPEAL; SIGNATURES.

(a) Entry of judgment. The filing of the judgment on appeal constitutes entry of judgment.

(b) Preparation, filing, and service of the judgment on appeal.

(1) PREPARATION BY THE COURT. After a final decision, other than an order of dismissal, has been filed in an appeal, the court rendering the decision shall prepare and submit to the appellate clerk for filing the judgment on appeal, signed by a judge or justice for the court.

(2) SERVICE OF THE JUDGMENT. Upon the filing of the judgment, the appellate clerk shall serve a file-marked copy of the judgment on each party and on the court or agency from which the appeal was taken.

(c) Effective date of intermediate court of appeals' judgment.

The intermediate court of appeals' judgment is effective as follows:

(1) if no application for writ of certiorari is filed,

(A) upon the thirty-first day after entry or

(B) where the time for filing an application for a writ of certiorari is extended in accordance with Rule 40.1(a) of these Rules, upon the expiration of the extension or

(2) if an application for a writ of certiorari is filed,

(A) upon entry of the supreme court's order dismissing or rejecting the application or

(B) upon entry of the supreme court's judgment entered on an order or other disposition affirming in whole the judgment of the intermediate court of appeals.

(d) Judgment after supreme court review.

(1) UPON TRANSFER. Upon disposition after transfer from the intermediate court of appeals, the supreme court shall enter judgment in accordance with section (b) of this Rule.

(2) UPON ACCEPTANCE OR REJECTION OF APPLICATION FOR A WRIT OF CERTIORARI. If an application for a writ of certiorari is rejected, the judgment entered by the intermediate court of appeals shall stand. If an application for a writ of certiorari is accepted [~~and the judgment of the intermediate court of appeals is wholly affirmed, the judgment entered by the intermediate court of appeals shall stand. If an application for a writ of certiorari is accepted and the judgment of the intermediate court of appeals is vacated or otherwise modified in whole or in part~~], a new judgment on appeal shall be entered by the supreme court and is effective upon entry. This subsection does not apply to an application for writ of certiorari of an order of dismissal entered by the intermediate court of appeals.

(e) Signatures. Any order or judgment that is filed electronically bearing a facsimile signature in lieu of an original signature of a judge or clerk has the same effect as if the judge or clerk had affixed the judge's or clerk's signature to a paper copy of the order or judgment and it had been entered on the docket in a conventional manner. For purposes of this rule and any rules of court, the facsimile signature may be either an image of a handwritten signature or the software printed name of the judge preceded by /s/.

COMMENT:

See Rule 41 and its commentary <u>of these Rules.</u>
~~[("the intermediate court of appeals' judgment cannot be effective and jurisdiction cannot revert to the court or agency from which appeal was taken until the time for filing the application has expired or, if an application is filed, the supreme court has rejected or dismissed the application or affirmed the intermediate court of appeals' judgment in whole.")]~~

Rule 39. COSTS AND ATTORNEY'S FEES.

(a) Civil costs; to whom allowed. Except in criminal cases or as otherwise provided by law, if an appeal or petition is dismissed, costs shall be taxed against the appellant or petitioner upon proper application unless otherwise agreed by the parties or ordered by the appellate court; if a judgment is affirmed or a petition denied, costs shall be taxed against the appellant or petitioner unless otherwise ordered; if a judgment is reversed or a petition granted, costs shall be taxed against the appellee or the respondent unless otherwise ordered; if a judgment is affirmed in part and reversed in part, or is vacated, or a petition granted in part and denied in part, the costs shall be allowed only as ordered by the appellate court. If the side against whom costs are assessed has multiple parties, the appellate court may apportion the assessment or impose it jointly and severally.

(b) Costs for and against the State of Hawai‘i. In cases involving the State of Hawai‘i or an agency or officer thereof, if an award of costs against the State is authorized by law, costs shall be awarded in accordance with the provisions of this Rule; otherwise costs shall not be awarded for or against the State of Hawai‘i, its agencies, or its officers acting in their official capacities.

(c) Costs defined. Costs in the appellate courts are defined as: (1) the cost of the original and one copy of the reporter's transcripts if necessary for the determination of the appeal; (2) the premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; (3) the fee for filing the appeal; (4) the cost of printing or otherwise producing necessary copies of briefs and appendices, provided that copying costs shall not exceed 20¢ per page; (5) necessary postage, cost of facsimiles, intrastate travel, long distance telephone charges; and (6) any other costs authorized by statute or rule.

(d) Request for Fees and Costs; Objections.

(1) A party who desires an award of attorney's fees and costs shall request them by submitting an itemized and verified bill of fees and costs, together with a statement of authority for each category of items and, where appropriate, copies of invoices, bills, vouchers, and receipts. Requests for indigent fees and necessary expenses shall be submitted in a form that substantially complies with Form 7 in the Appendix of Forms and shall be accompanied by a copy of the order appointing counsel. Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that substantially complies with Form 8 in the Appendix of Forms. A failure to provide authority for the award of attorney's fees and costs or necessary expenses will result in denial of that request.

(2) A request for fees and costs or necessary expenses is more appropriately filed in the court where the work was performed. A request for an appellate court to award fees and costs or necessary expenses [~~must be filed with the appellate clerk, with proof of service,~~] shall be filed no later than 14 days after entry of judgment, or the order of dismissal. [~~the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided.~~] An untimely request for fees and costs or necessary expenses may be denied.

(3) Attorneys appointed to represent indigent persons may submit a request for attorney's fees and necessary expenses, as provided by statute, after briefing is completed. Requests for fees and necessary expenses by counsel appointed to represent indigent persons may be held in abeyance until resolution of the case on the merits. If oral argument is had or additional work is performed thereafter, the attorney may submit a request for additional fees and necessary expenses.

(4) Objections to requests for fees and costs must be filed with the appellate clerk, with proof of service, within 10 days after service on the party against whom the fees and costs are to be taxed unless the time is extended by the appellate court. A reply to the objections must be filed with the appellate clerk, with proof of service, within 7 days after service of the objections on the initiating party.

Rule 40.1. APPLICATION FOR WRIT OF CERTIORARI IN THE SUPREME COURT.

(a) Application; when filed; extension of time.

(1) APPLICATION; TIME TO FILE. A party may seek review of the intermediate court of appeals' decision by filing an application for a writ of certiorari in the supreme court. The application shall be filed within 30 days after the filing of the intermediate court of appeals' judgment on appeal or dismissal order, unless the time for filing the application is extended in accordance with this Rule. However, if the application for a writ of certiorari is mailed, the application for a writ of certiorari shall be deemed timely filed if the mailing is postmarked within the time fixed for filing and is received by the clerk no later than 5 days after the postmarked date. For the purpose[~~s~~] of calculating other deadlines in these Rules, the date of filing under this Rule shall be the date the document is [~~received~~] filed by the clerk.

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(d) Contents. The application for a writ of certiorari shall not exceed [~~12~~] 20 pages and shall contain, in the following order:

(1) A short and concise statement of the questions presented for decision, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented according to this paragraph will be disregarded. The supreme court, at its option, may notice a plain error not presented.

(2) A statement of prior proceedings in the case.

(3) A short statement of the case containing the facts material to the consideration of the questions presented.

(4) A brief argument with supporting authorities.

A copy of the challenged opinion, dispositional order, or ruling of the intermediate court of appeals shall be attached as an appendix.

(e) Response; Form; Extension of Time; Reply.

(1) TIME TO FILE; FORM. Within 15 days after the filing of an application for a writ of certiorari, any other party to the case may, but need not, file and serve a brief written response, not to exceed [~~12~~] 20 pages.

(2) REQUEST EXTENDING TIME; TIME TO FILE. A party may extend the time to file a response to an application for a writ of certiorari by filing a written request for an extension. The request for extension shall be filed no later than 15 days after the filing date of the application for a writ of certiorari.

(3) TIMELY REQUEST; AUTOMATIC EXTENSION; NOTICE. Upon receipt of a timely written request, the appellate clerk shall grant a 15-day extension of time to file a response to the application for a writ of certiorari. The appellate clerk shall note on the record that the extension was granted. The clerk shall give notice the request is timely and granted.

(4) NO EXTENSION IF UNTIMELY. An untimely request shall not extend the time. The clerk shall give notice the request is untimely and denied.

(5) REPLY. Within 7 days after a response is filed any party may, but need not, file and serve a reply to the statement of reasons set forth in the response. The reply shall not exceed 5 pages.

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Rule 40.2. APPLICATION FOR TRANSFER TO THE SUPREME COURT.

(a) Application; when filed. Any party may file, in the supreme court, an application for transfer of a case within the jurisdiction of the intermediate court of appeals to the supreme court, as allowed by law. An application

(1) for a case under Rule 18 of these Rules must be submitted with the statement of agreed facts.

(2) for an appeal may be submitted no earlier than 10 days after the filing of the record on appeal and no later than 20 days after the last brief is filed or could have been filed.

(b) Denomination of the parties. The party seeking transfer shall be denominated the petitioner. The petitioner's denomination in the appeal or the agreed statement and in the trial court or agency, if from a trial court or agency, shall also be included. All other parties shall be denominated respondents and each respondent's denomination in the appeal and in the trial court or agency, if from a trial court or agency, shall also be included. Any respondent who supports the position of the petitioner shall meet the time schedule for filing responsive documents.

(c) Contents of the Application. An application for transfer shall contain, in the following order:

(1) A request for transfer to the supreme court,

(2) A statement of prior proceedings in the case, with citation to the record, if any,

(3) A short statement of relevant facts, with citation to the record, if any,

(4) A statement of the points of error to be raised and argued, with citation to the record, if any, where each point of error was preserved for appeal,

(5) An explanation, not to exceed 10 pages, concerning how the case meets statutory qualifications for transfer to the supreme court, with citation to supporting authority,

(d) Response to the Application. Within [~~the time provided for responding to a motion under Rule 27(a),~~] 10 days from the filing of an application for transfer, any other party may file a response to the application.

(e) Oral argument. There shall be no oral argument on an application for transfer unless ordered by the supreme court.

(f) Determination; no reconsideration; no extensions of time. The supreme court shall grant a mandatory application and may grant or deny a discretionary application for transfer no later than [~~the thirtieth day after the filing of the response to the application or, if no response is filed, within 30 days after the time the response could have been filed~~] 45 days after the application for transfer is filed. The grant or denial of an application for transfer shall not be subject to a motion for reconsideration. Times for submitting and responding to an application for transfer shall not be extended.

(g) Effect of application. Unless otherwise ordered by the supreme court while an application for transfer is pending, the submission and processing of an application for transfer shall not stay the time in which a party must act under any provision of these rules.

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Rule 41. STAY OF INTERMEDIATE COURT OF APPEALS JUDGMENT ON APPEAL.

The timely filing of an application for a writ of certiorari stays finality of the intermediate court of appeals' judgment on appeal unless otherwise ordered by the supreme court. If the application for a writ is dismissed or rejected, the intermediate court of appeals' judgment on appeal is

effective upon entry of the order dismissing or rejecting the application for writ. If the application for a writ is accepted, the intermediate court of appeals' judgment on appeal is stayed pending final disposition of the certiorari proceeding in accordance with Rule 36.

COMMENT:

[~~Effective for intermediate court of appeals' judgments on appeal and orders of dismissal entered on or after January 1, 2012, a party has 30 days to file an application for a writ of certiorari, which can be extended for no more than an additional 30 days upon the filing of a written request for extension in accordance with HRAP Rule 40.1(a). The time for filing the application is measured from the date the intermediate court of appeals' judgment on appeal or order of dismissal was filed. Thus, t~~]<u>T</u>he intermediate court of appeals' judgment cannot be effective and jurisdiction cannot revert to the court or agency from which appeal was taken until the time for filing the application <u>for a writ of certiorari</u> has expired or, if an application is filed, the supreme court has rejected or dismissed the application or affirmed the intermediate court of appeals' judgment in whole.

The supreme court's judgment on appeal is not subject to further state review and is effective upon entry.

<u>NEW RULE</u>

Rule 46. [~~RESERVED.~~] <u>CLERICAL MISTAKES.</u>

<u>Clerical mistakes in opinions, other dispositions, judgments, or orders, and non-substantive errors arising from oversight or omission, may be corrected by the appellate court at any time, with or without a motion, as the appellate court orders.</u>

Rule 50. WITHDRAWAL, [~~DISCHARGE, OR~~] SUBSTITUTION<u>, DISAFFILIATION, OR DISCHARGE</u> OF APPELLATE COUNSEL.

(a) Withdrawal. An attorney desiring to withdraw as counsel of record must file a motion requesting leave therefor. The motion must show that notice of the motion was given by service upon the attorney's client. The notice must provide, if available, the client's physical and electronic mail address to be used for service, and telephone number. The appellate court may, in its discretion, grant or deny such motion or, where appropriate, remand the case for filing of a motion to withdraw.

(b) Withdrawal with substitution. A substitution of counsel may be made by filing a notice of withdrawal and substitution. The notice must provide withdrawing counsel's name and substituting

counsel's name, physical and electronic mail addresses to be used for service, and telephone number. A notice of withdrawal and substitution of counsel must be signed by the client consenting thereto.

(c) Disaffiliation and withdrawal. An attorney, firm, or other public or private entity providing legal services may file a notice of disaffiliation and withdrawal as counsel upon an attorney's disaffiliation from the firm or entity providing legal services. The notice must provide the disaffiliating attorney's name and the name(s), physical and electronic mail address(es) to be used for service, and telephone number(s) of the attorney(s) at the firm or entity who will continue to represent the client in the matter. The notice must show the client was informed of the disaffiliation and withdrawal, including when the client is an agency, department, board, commission, official, officer, or employee of the State of Hawai'i or a county. However, notice to the client is not required when the client is the State of Hawai'i or a county.

[~~(c)~~](d) Discharge. A client desiring to discharge the client's counsel of record must file a motion requesting leave therefor. The motion must show service upon the attorney. The appellate court may, in its discretion, grant or deny such motion or, where appropriate, remand the case for the filing of a motion to withdraw.