

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

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

Submitted By:

The Honorable James E. Duffy, Jr., Chair
Susan Arnett
The Honorable Joseph Cardoza
Malcom Chang
Steven Dixon
Lyn Flanigan
The Honorable Daniel Foley
David W. Hall
Janet Hunt
Grace Kido
The Honorable Leslie E. Kobayashi
Gayle Lau
The Honorable Sabrina S. McKenna
The Honorable Paul Murakami
Michael Nauyokas
Nathan Nikaido
Terence O’Toole
Wesley Park
Judith Ann Pavey
Jill Ramsfield
The Honorable Trudy Senda
The Honorable Barbara Takase
Kevin Takata
Calvin Young

June 7, 2011

HAWAI‘I SUPREME COURT COMMISSION ON PROFESSIONALISM

SIXTH REPORT TO THE HAWAI‘I SUPREME COURT

June 7, 2010

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 on 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 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.

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. Biographical information of the present Members is provided in Appendix “B”.

IV. COMMISSION MEETINGS

The Minutes of the Commission meetings on October 15, 2010 and April 29, 2011 are presented in Appendix “C”.

V. STATUS REPORTS ON COMMISSION PROJECTS

A. Mandatory Continuing Professional Education

By way of background, after many years of study and discussion, the Commission recommended to the Supreme Court that the Rules of the Supreme Court be amended to require mandatory continuing professional education. The Commission’s specific recommendation was largely based on the “Alaska rule.” The Supreme Court sent the Commission’s recommendation out for public comment.

On July 15, 2009 the Supreme Court filed an “Order Amending Rule 17, and Adopting New Rule 22 of the Rules of the Supreme Court of the State of Hawai‘i (Appendix “D”). The key elements of amended Rule 17 and new Rule 22 (collectively, the “new Rules”) are as follows:

1. The new Rules are effective January 1, 2010, with the initial reporting period being the calendar year beginning January 1, 2010.

2. Every active member of the Bar shall complete at least three credit hours per year of approved Mandatory Continuing Professional Education (MCPE).
3. In addition to MCPE, all active members of the Bar are encouraged to complete nine or more credit hours per year of approved Voluntary Continuing Legal Education (VCLE).
4. The annual registration statement filed by each Bar member must include the number of credit hours of MCPE and VCLE completed in the previous year. Failure to meet the MCPE requirements (after receipt of a written notice of noncompliance from the Bar and an opportunity to be heard or to cure) will result in administrative suspension by the Bar. The suspended Bar member may petition the Supreme Court for review.

Following adoption of the new Rules, the HSBA created a Hawai'i State Continuing Legal Education (CLE) Board to administer the process necessary to meet the requirements of the new Rules. A summary of significant Board actions and results of the Mandatory CLE program follows:

- (1) Jodie Hagerman was hired as the MCLE Administrator (half-time position) in July, 2009;
- (2) a 12 person MCLE Board was appointed in July, 2009 (9 voting members and 3 nonvoting advisory members);
- (3) Professionalism Commission member Judy Pavey has been the Board's chairperson from inception, and Professionalism

Commission members Susan Arnett (voting), Lyn Flanigan and Justice Duffy (both nonvoting advisory) are members of the Board;

- (4) the Board established CLE Regulations, Frequently Asked Questions, and website materials needed to implement the program;
- (5) 19 accredited providers were approved for 2010;
- (6) 52 providers were approved for one or more specific programs;
- (7) 17 requests by individual HSBA members for credit for a program were approved, and 2 requests were disapproved;
- (8) the HSBA entered into an agreement with the Hawai'i Supreme Court to offer a 3 credit program for no more than \$50;
- (9) the HSBA offered a total of 23 MCPE programs (18 in Honolulu) and 16 online programs;
- (10) anticipating noncompliance issues, the MCLE Board asked the Hawai'i Supreme Court to allow 30 days to cure noncompliance (instead of the previously stated 15 days) which the court granted;
- (11) all active members who said "no" or "not applicable" on their 2010 Attorney Registration Statement form for MCPE reporting were contacted and informed of (a) the deadline to cure noncompliance, and (b) scheduled approval programs in person and online;
- (12) on March 1, 2011 certified letters were sent to 62 members notifying of noncompliance and programs to cure;

- (13) on March 31, 2011 email notice was sent to 8 suspended members notifying them of their suspension and reinstatement process;
- (14) as of April 29, 2011, 3 of the 8 suspended members have been reinstated;
- (15) pursuant to the audit required by Rule 22(d)(2) and CLE Regulation 9, the MCLE Board determined that 2 percent of members who reported “yes” on compliance will be audited;
- (16) upcoming: an interface online renewal for HSBA programs database so course completion certificates can be automatically stored in the members profile (paperless certification);
- (17) Allyson Kumik is the new MCLE Administrator; and
- (18) in conclusion, out of approximately 4,500 active practicing attorneys, it is remarkable that only 8 attorneys were suspended for noncompliance with Rule 22.

B. Presentation to HSBA Members on Professionalism and What Judges Expect of Attorneys Appearing in Their Courts

By way of background, the Commission has worked for some time on two presentations regarding “Advancing Professionalism in the Courtroom.” The first presentation was presented to judges at a Judicial Education Conference on April 30, 2010 and focused on practical techniques in dealing with courtroom management when faced with disrespectful behavior, dilatory conduct, ethical violations, etc. The panelists used an interactive format using Turning Point responders, and the polling over the issues sparked vigorous discussions. In summary, the presentation was well-received.

A second presentation with several judges presenting, was made to HSBA members, and focused on what judges expect of attorneys appearing in their courtrooms, including the fields of civil, criminal, and family law. The HSBA presentation was well-attended (150 in the presentation room and 180 online) and well-received.

C. Creation of a DVD Regarding the “Do’s and Don’ts” in Appellate Court Briefs and Oral Arguments

An agreement was reached with ‘Ōlelo for the production of a DVD based on interviews with Hawai‘i Supreme Court justices, Intermediate Court of Appeals judges, and selected practicing attorneys for their thoughts, experiences, and advice regarding appellate court briefs and oral arguments “Do’s and Don’ts.” The DVD will hopefully be a video mentor for both practitioners and law students. Filming has already started, and it is hoped that the DVD will be ready for distribution sometime this fall.

D. Educational Program for Attorneys and Judges Regarding the Availability and Need for “Discrete Task Representation” (fka “Unbundling of Legal Services”)

The Commission is working with the Access to Justice Commission to organize an educational program designed to educate judges about the propriety and need for allowing attorneys to do “discrete task representation” as an “access to justice” issue, as it seems that judges are generally not allowing attorneys to limit their representation to certain issues (“once you’re in, you’re in for the entire case”).

E. Monitoring of HSBA/ODC Minor Misconduct Program, Proposed “New” Hawai‘i Rules of Professional Conduct, and a Contemplated HSBA Mentoring Project

The Commission continues to monitor the HSBA/ODC Minor Misconduct Program (the rejuvenation of which the Commission strongly urged and participated in by recommending amendments to Rule 2.7 of the Rules of the Supreme Court), the proposed “New” Hawai‘i Rules of Professional Conduct (which contain several controversial proposed rules, and also affects a recommendation by the Commission that Rule 17(d)(1)(iii) of the Rules of the Supreme Court be amended to require insurance disclosure/posting on the HSBA website) and a contemplated HSBA Mentoring Project (which the Commission supports).

VI. CONCLUSION

The Commission Chair is very grateful for the hard work of the Commission Members in its first six years, which has enabled the Commission to make significant strides in attempting to enhance professionalism among Hawai‘i lawyers, as noted in this report and the earlier annual reports.

Respectfully submitted this 7th day of June, 2011.

/s/ James E. Duffy, Jr.
JUSTICE JAMES E. DUFFY, JR.
Chair, Commission on Professionalism

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

KIHANAKAHO
CLERK OF SUPREME COURTS
STATE OF HAWAII

2005 MAR 14 PM 1:22

FILED

ORDER ESTABLISHING THE HAWAII SUPREME COURT'S
COMMISSION ON PROFESSIONALISM
(By: Moon, C.J., for the court¹)

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

¹ 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

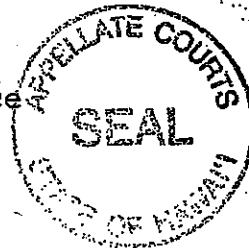
Hon. Joseph Cardoza, Second Judicial Circuit
Hon. Trudy Senda, Fifth Judicial Circuit
Hon. Steven Levinson, Appellate Court
Calvin Young, HSBA
Michael Nauyokas, HSBA
Carol Mon Lee, Richardson School of Law
Carole Richelieu, ODC
Grace Nihei Kido, Board of Bar Examiners
Petra Bray, Public member
Nathan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



MEMBERS OF THE COMMISSION ON PROFESSIONALISM

SUSAN ARNETT, ESQ. is a graduate of Kalani High School (1969), the University of Hawaii (1974) and the Catholic University of America Law School (1977). After working at the Legal Aid Society of Hawaii and five years of private practice, she joined the State Public Defender's Office in 1985. As a senior trial attorney in that office, she has done approximately 75 felony jury trials, including murder and class "A" felonies. She served as the supervisor of the Maui office from 1997 to 2001 and is now a Felony Trial Supervisor in the Honolulu office. She has supervised the planning and presentation of the annual week-long statewide Public Defender Advocacy Skills Training Program for the past 15 years. She also serves on the faculty of the Institute for Criminal Defense Advocacy program at California Western Law School. She is an adjunct professor at the William S. Richardson School of Law with the Hawai'i Innocence Project. She serves on the Hawaii Supreme Court Committee on Judicial Performance. She has served as a volunteer with the Hawaii Opera Theatre since 2002.

JUDGE JOSEPH CARDOZA is a judge of the Second Judicial Circuit Court, State of Hawai'i, and a current Vice President, Hawai'i State Trial Judge Association. He spent approximately a decade in private practice and a decade in government practice before becoming a judge. Judge Cardoza serves or has served as a continuing legal education instructor and as a volunteer with a variety of community organizations.

MALCOM H.M. CHANG, D.D.S. received his doctor of dental surgery degree from the University of Southern California in 1976 and his bachelor of science in biology degree from the University of Missouri-Kansas City in 1968. Dr. Chang started his own dental practice in 1977. He is currently serving or has served as a member, officer, or board of director of various businesses and organizations, and chaired many committees, including the American Dental Association; Hawaii Dental Association; Hawaii Dental Service; Honolulu County Dental Association; International Academy of Gnathology, American Section; the 50th State Dental Study Club; Waialae Country Club; La Confrerie des Vignerons de Saint Vincent Macon; Bulldog Club of America; Hawaiian Bulldog Club; and Hawaiian Kennel Club. Dr. Chang was also an Eagle Scout in the Boy Scouts of America.

STEVEN B. DIXON, ESQ., a 1975 graduate of the University of Hawai'i at Hilo, has practiced law in small to medium sized law partnerships, and as a solo practitioner, on the Big Island since 1978. His areas of practice included real estate, business, tax and estate planning. He has also served as Principal Broker for Kohala Ranch, and the oldest and largest vacation ownership developer in the world, Fairfield Resorts, Inc. In December 2005, he succeeded retiring Director Peter Donahoe as Director of the Hawai'i Supreme Court Attorneys and Judges Assistance Program. He serves as a

volunteer on the Hawai'i Medical Association Physician's Health Committee. An avid sailor, and author of Hawai'i sailing stories "The Hawaiian Voyages of the Ono Jimmy," he has served as Commodore of the Kona Sailing Club and is a member of the Hawai'i Yacht Club. He sailed to O'ahu and now lives on his CSY '44 cutter rigged sailing vessel in the Ala Wai Harbor.

ASSOCIATE JUSTICE JAMES E. DUFFY, JR. is an Associate Justice of the Hawai'i Supreme Court. Justice Duffy was a founding member of the firm Fujiyama, Duffy & Fujiyama, a practicing trial lawyer (representing both plaintiffs and defendants), mediator, arbitrator, and special master. Justice Duffy is a past President of the Hawai'i State Bar Association, and is a member of the American College of Trial Lawyers, the American Board of Trial Advocates, and the American Inn of Court.

LYN FLANIGAN, ESQ. After obtaining her M.A. in Asian Studies, Lyn worked in international education at the East West Center. She obtained her J.D. from the William S. Richardson School of Law (University of Hawaii) and clerked for both the U.S. Bankruptcy Court and the U.S. District Court in Hawaii. Lyn then moved to private practice in the areas of bankruptcy and workouts with Goodsell Anderson Quinn & Stifel in Honolulu. Lyn subsequently served for seven years as Senior Counsel/Corporate-Investments for the Kamehameha Schools/Bishop Estate Trust, after which she served for over five years as General Counsel and Corporate Secretary of Hawaiian Airlines. She joined the HSBA as Executive Director in September 2003. Lyn is active in community organizations in Honolulu, having served on the East West Center Board of Governors and the Manoa Dog Coalition, and is currently serving on the East West Center Alumni Board, the East West Center Foundation Board, the Board of the Red Cross of Hawaii, the Board of the YWCA of Oahu, and the Friends of the WSR Law School. Lyn spends her free time hiking with her two chocolate labs, is an aspiring yogi, swims frequently and enjoys travel, reading and movies.

ASSOCIATE JUDGE DANIEL R. FOLEY has been an Associate Judge at the Intermediate Court of Appeals, State of Hawai'i, since October 2000. He received his B.A. in 1969 and his J.D. in 1974 from the University of San Francisco. Prior to his appointment as a judge, he was a partner for eleven years in the law firm of Partington & Foley where he handled federal and state civil rights cases. He also was an Adjunct Professor of Civil Rights at the William S. Richardson School of Law. From 1984 to 1987 Judge Foley was legal director of the American Civil Liberties Union of Hawai'i, and from 1975 to 1983 he was counsel to various Micronesian governmental bodies, constitutional conventions, and organizations.

DAVID W. HALL, ESQ. has been a solo practitioner since 1993 in areas including criminal defense, civil litigation and juvenile law. He received a B.A. in political science from Yale University in 1961, served in the Naval Reserve on active duty from 1961-1966 and received his J.D from the George Washington University's National Law Center in 1971. He served as a Hawaii deputy public defender in 1971 and has been in private practice since 1971. He served on the Act 59 Task Force 2004-5 and has served as a CAAP Arbitrator since 1986 and on the Hawaii Supreme Court's Standing Committee on the Rules of Evidence since 1990.

JANET S. HUNT, ESQ. is the Executive Director of the Office of Disciplinary Counsel. She has served as an Assistant Chief Trial Counsel and as a Supervising Trial Counsel in the Office of the Chief Trial Counsel, Enforcement Division of the State Bar of California for twenty-one years prior to accepting the Executive Directorship with ODC. She practiced as a creditor's rights attorney in bankruptcy court and a general practitioner until she became staff attorney with the State Bar of California in 1987. She is the current administrator for the Lawyers' Fund for Client Protection. She is a member of the National Client Protection Organization. She has served on numerous panels for the National Organization of Bar Counsel and was a member of the Program Committee. She is a member of the American Bar Association.

GRACE NIHEI KIDO, ESQ. is a partner in the Finance and Real Estate Department of Cades Schutte, LLP. She is also the Chairperson of the firm's Recruiting Committee and a member of the Summer Program Committee. Ms. Kido obtained her B.A. with distinction from the University of Hawai'i in 1977, and her law degree from the University of Hawai'i William S. Richardson School of Law in 1985, following a five-year career in Human Resources Management in the hotel industry. While at the University of Hawai'i earning her law degree, Ms. Kido was the casenotes editor and a member of Law Review and was a finalist in the school's Moot Court competition. Ms. Kido has been a member of the Board of Examiners of the Hawai'i Supreme Court since 1994; is the current Treasurer and has been on the Board of Directors of the Real Property and Financial Services Section of the Hawai'i State Bar Association since 2000; is a Fellow of the American College of Mortgage Attorneys; and is a former director of the William S. Richardson School of Law Alumni Association and of the Young Lawyer's Division of the Hawai'i State Bar.

JUDGE LESLIE E. KOBAYASHI was confirmed as a United States District Judge in the District of Hawai'i on December 22, 2010. She was appointed as a United States Magistrate Judge for the District of Hawai'i, first in 1999 and was then reappointed in 2007. Before taking the bench, Judge Kobayashi served as a deputy prosecuting attorney for the City and County of Honolulu, and spent 17 years in private practice in the law firm of Fujiyama, Duffy & Fujiyama where she was a trial attorney and a managing partner. She handled a variety of matters while in private practice, including personal injury, business disputes, labor and employment, medical and legal

malpractice, and products liability. She received her B.A. degree from Wellesley College (1979) and her J.D. degree from Boston College School of Law (1983). Judge Kobayashi currently serves on the Ninth Circuit Alternative Dispute Resolution Committee. She has served on other committees, including the Ninth Circuit Conference Executive Planning Committee, Magistrate Judges' Executive Board for the Ninth Circuit, sub-committees for the Hawai'i Chapter for the American Judicature Society, and as a Bencher for the American Inns of Court, Aloha Inn. From 2000-2002, she was an adjunct professor at the William S. Richardson School of Law and the co-recipient of the Outstanding Adjunct Professor Award in 2002. She is the recipient of the 2011 Outstanding Judicial Achievement Award from the Hawai'i Women Lawyers.

GAYLE J. LAU, ESQ. presently serves as Regulatory Officer with the Hawaii Credit Union League. He previously served as Assistant United States Trustee with the U.S. Department of Justice, overseeing the administration of bankruptcy cases. Mr. Lau received his Bachelor's degree from the University of Southern California, his Master's of Business Administration from the University of Hawaii and his Juris Doctorate from the University of the Pacific, McGeorge School of Law. His bar activities include serving as a trustee of the Lawyers' Fund for Client Protection and a member of the committee to revise the Hawaii Rules of Professional Conduct.

ASSOCIATE JUSTICE SABRINA S. McKENNA received her B.A. in Japanese in 1978 from the University of Hawaii at Manoa, and her J.D. in 1982 from the William S. Richardson School of Law. Justice McKenna practiced at Goodsell Anderson Quinn & Stifel until 1987, then became in-house counsel to Otaka, Inc., a Japan-based international business organization, until 1990. From 1991 to 1993, she was an Assistant Professor at WSRSL. She became a state District Court judge in late 1993, then a First Circuit Court judge in 1995, where she presided over criminal, domestic violence, and civil calendars, before serving as Senior Judge of the Family Court of the First Circuit. She was sworn in as an Associate Justice of the Hawai'i Supreme Court on March 3, 2011.

Justice McKenna is currently on the Board of the AJS-Hawaii Chapter and co-chairs its Committee on Judicial Administration. She is also on the Executive Board of the Judiciary History Center and is with the Courts-Media Working Group of the Hawaii Federal and State Courts. She also previously served on various Supreme Court Committees, including as Chair of committees on Court Interpreters and Language Access, To Evaluate the Qualifications of Per Diem Judges in the First Circuit, Certification of Legal Specialists, and Probation Policy, and as a member of the committees on Children in Family Courts, Civil Pattern Jury Instructions, and Equality and Access to the Courts. She also worked with the HSBA Committee on Professionalism to author portions of the original Professionalism Manual for the Professionalism Course that became mandatory in 2001.

JUDGE PAUL MURAKAMI has been a judge in the Family Court of the First Circuit since June, 2002. He served as a per diem judge from June, 1995 until June, 2002. He has served in each of the divisions of the Family Court, both as a per diem and a full-time judge. Judge Murakami graduated from the William S. Richardson School of Law in 1983, and received his B.A. in Economics from the University of Hawaii in 1977. Prior to his appointment, he was in private practice, worked as a member of the Medical Claims Reconciliation Panel, and was a deputy Public Defender.

MICHAEL F. NAUYOKAS, ESQ. has mediated over 900 employment, labor, personal injury insurance, bad faith, Jones Act, longshore, commercial, products liability, construction, workers' compensation and other disputes in Honolulu and has been selected as an arbitrator in over 150 more. Over 99% of the cases he mediated were settled in one day. All but three subsequently settled. He has a boutique law practice specializing primarily in mediation and arbitration and employment and labor law. Mr. Nauyokas holds an "AV" rating (the highest possible) under the Martindale-Hubbell Rating System, is named in the Martindale-Hubbell Bar Register of Preeminent Lawyers, is named in The Best Lawyers Guide and The Best Lawyers in America, and has been featured in Honolulu Magazine's "Best Lawyers in Hawai'i" and Midweek's "Newsmakers." He is a Fellow of the American College of Civil Trial Mediators and member of the United States District Court Mediation Committee for the District of Hawai'i.

Mr. Nauyokas is a frequent lecturer on numerous topics in mediation, arbitration, employment and labor law areas. Mr. Nauyokas has taught numerous courses in Negotiation, and Employment & Labor Law at the University of Hawai'i and Hawai'i Pacific University. He has appeared as an expert on ADR and Employment Law on numerous television and radio shows. Among the numerous organizations he has served as a lecturer are: The U.S. Department of Labor, the EEOC, the Office of Federal Contract Compliance Programs (OFCCP), the Society for the Professionals in Dispute Resolution (now ACR), National Employment Lawyers Association ("NELA"), the American Arbitration Association, the Society for Human Resource Management, and the Hawai'i Employers Council.

NATHAN NIKAIDO, a 1978 graduate of the University of Hawai'i (B.A., Economics). 1978-1983 Masters degree program, Urban and Regional Planning. (Use of mediation in the resolution of land use disputes). 1982-present, volunteer mediator, The Mediation Center of the Pacific. Approximately 1,600 cases mediated at District Court. 1985-present, Accountant, The Mediation Center of the Pacific. 2004 Liberty Bell award recipient, Hawai'i State Bar Association.

TERENCE O'TOOLE, ESQ. is an alumni of UC Berkeley, Boalt Hall School of Law and was admitted to the California Bar in 1971, the Hawai'i Bar in 1972 and the D.C. Bar in 1989. He is a director of the law firm Starn O'Toole Marcus & Fisher and has over

twenty-five years experience in the area of commercial and complex litigation, with an emphasis in construction claims and disputes representing owners, contractors and design professionals. Mr. O'Toole co-authored an article for the Hawai'i Bar Journal that has been republished in the "Giants" of the Trial Bar V: Cross-Examination of Expert Witness. He has also organized and spoken at various professional seminars and legal conferences in California, Hawai'i and Singapore on construction claims. Mr. O'Toole was named in "Best Lawyers in America."

WESLEY T. PARK served Hawai'i Dental Service as its former President and CEO from 1995-2001. Currently, he is president of Maunawili Consulting. Mr. Park holds a bachelor's and master's of education degree from the University of Hawai'i, IMLE certificate from Harvard University, and an Honorary Doctor of Philosophy degree from Hong-ik University in Korea. He served as Captain in the U.S. Air Force and was on active duty from 1960-1965. He was Vice-President for Administration at the East-West Center, Dean Emeritus for the College of Continuing Education and Community Service at UH, and Director of the Small Business Management Program at UH. Mr. Park has also served on the boards of many businesses and organizations including the Honolulu Academy of Arts, Coalition for a Drug-Free Hawai'i, First Hawaiian Bank, Korean Chamber of Commerce, Honolulu Symphony Society, Verizon Hawai'i, and Rehabilitation Hospital of the Pacific.

JUDITH ANN PAVEY, ESQ. has been in the private practice of law since 1978. Her practice is concentrated on litigation, primarily plaintiff personal injury but with extensive criminal defense and some corporate litigation. A graduate of Purdue University (B.A.) and Indiana University (J.D.), Judy is a member of the American Board of Trial Advocates, American Inns of Court, and the Consumer Lawyers of Hawaii.

JILL J. RAMSFIELD. Ms. Ramsfield is a Professor of Law and Director of Legal Research and Writing at the William S. Richardson School of Law. Professor Ramsfield was previously a tenured faculty member at Georgetown University Law Center. Professor Ramsfield is a graduate of Wellesley College (B.A.) and the University of Wisconsin (B.S., J.D.). In addition to her law school teaching, Professor Ramsfield teaches continuing legal education courses nationally and internationally, helping lawyers to write better, faster. Her clients include law firms, government agencies, judges, and magistrates. She has developed a specialty working with individual attorneys to create techniques uniquely suited to their styles and law practices. Professor Ramsfield is the author of, among other publications, *Is Logic Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom* 47 J. LEGAL ED. 157 (1997); *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS* (West 2000); *CULTURE TO CULTURE: A GUIDE TO U.S. LEGAL WRITING* (Carolina Academic Press 2005); and co-author with Mary Ray of *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* (West 4th ed. 2005).

JUDGE TRUDY SENDA has been a judge of the District Court of the Fifth Circuit since May 2001. Prior to that, she was in private practice for 17+ years in Honolulu and Kauai. She currently serves as the acting deputy chief judge for the circuit regarding matters involving the District Court's jurisdiction over criminal, traffic and civil matters.

JUDGE BARBARA T. TAKASE has been a judge of the District Court of the Third Circuit since 2004. She served as a per diem judge of the District and Family Courts from 1999-2004. Judge Takase received her law degree from the William S. Richardson School of Law and her Bachelor of Arts in Psychology and a Teaching Certificate from the University of Hawaii - Hilo College. Prior to her appointment, she was in private practice, worked as a hearings officer for the Department of Education "Felix" cases, a deputy prosecuting attorney with the Hawaii County Office of the Prosecuting Attorney, and a social worker at various agencies.

KEVIN K. TAKATA, ESQ. graduated from Case Western University School of Law. He was an associate with Oliver, Cuskaden & Lee from 1984 to 1987, general civil practice; Honolulu Deputy Prosecuting Attorney from 1987 to present; member of the Homicide Team from 1990 to 1996; Trials Division Chief from 1997 to 2006. He handles primarily homicide cases. He lectures in various areas of criminal prosecution to other prosecutors, police and law enforcement groups. He is an instructor at the National Advocacy Center, a national training center for prosecutors and district attorneys.

CALVIN E. YOUNG, ESQ., a partner with Ayabe Chong Nishimoto Sia & Nakamura, is a 1982 graduate of the William S. Richardson School of Law. His practice concentrates on cases involving professional liability, aviation and product liability. Mr. Young was a member of the Disciplinary Board of the Hawai'i Supreme Court from 1995 to 2001 and since 2002 is the Chair of the HSBA Committee on Professional Responsibility.

HAWAI‘I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of October 15, 2010

2:30 p.m. - 3:45 p.m.

Supreme Court Conference Room

MINUTES

PRESENT: Chair: Associate Justice James E. Duffy, Jr.
Members: Judge Joseph Cardoza (via telephone), Dr. Malcom Chang, Steven Dixon, Associate Judge Daniel Foley, David Hall, Janet Hunt, Judge Susan Mollway, Judge Paul Murakami, Nathan Nikaido, Terence O’Toole, Wesley Park, Judge Barbara Takase (via video conference), Kevin Takata, and Calvin Young
Guest: Chief Justice Mark E. Recktenwald

HANDOUTS:

- (1) Agenda
- (2) ABA Journal (August 2010) Article “Video Mentors”
- (3) Report to the Commission on Professionalism re: Judicial Education and HSBA Presentations on Advancing Professionalism dated September 28, 2010
- (4) Judicial Education Conference Program on April 30, 2010 re “Advancing Professionalism in the Courtroom”
- (5) HSBA Program on August 27, 2010 re “‘How To’ Primer on Attorney Professionalism”
- (6) Order Amending Rules 2.7, 2.8, and 2.22 of the Rules of the Supreme Court of the State of Hawai‘i dated April 5, 2010
- (7) Report from Lyn Flanigan dated October 11, 2010
- (8) Order Amending Rule 22 of the Rules of the Supreme Court of the State of Hawai‘i dated April 29, 2010
- (9) Letter from HSBA (Lyn Flanigan) to James Branham (staff attorney for Hawai‘i Supreme Court) dated June 28, 2010 re Proposed Amendment to Rule 17(d)(7)(iii) Which Would Require Insurance Disclosure on the HSBA Website
- (10) “Raising the Bar in Ethics” by Janet Hunt in June, 2010 Hawaii Bar Journal with ODC Statistical Report for 2009
- (11) Formal Opinion No. 43 (Of Counsel) dated April 29, 2010 by Disciplinary Board of the Hawai‘i Supreme Court
- (12) Report of Steven B. Dixon, J.D., Executive Director of the Supreme Court of Hawai‘i Attorneys and Judges Assistance Program

I. WELCOME AND ANNOUNCEMENTS

Justice Duffy welcomed and thanked the members attending, and thanked those members who were traveling and/or otherwise unable to attend (Judge Senda, Professor Ramsfield, Lyn Flanigan, Mike Nauyokas, and Gayle Lau) for calling in and letting us know.

Justice Duffy gave a special welcome to Chief Justice Mark E. Recktenwald, who graciously agreed to have a conversation with us this afternoon.

Justice Duffy made the following announcements:

1. Judge Foley and Kevin Takata will be on a panel on October 21, 2010 at the Regal Theaters Dole Cannery for a discussion following a special premier showing of the film entitled "Conviction," which is reputed to be a compelling true story of a sister dedicating her life to overturning the wrongful murder conviction of her brother. Justice Duffy circulated an invitation to the film and panel discussion for the members to review.
2. Susan Arnett set a state record for women ages 54-60 by deadlifting 214.7 lbs. in the World Association of Bench Press and Dead Lift Tournament held in Honolulu in July.

II. A CONVERSATION WITH CHIEF JUSTICE MARK E. RECKTENWALD

C.J. Recktenwald thanked the Commission members for all of their hard work over the past five years, and said that when he reviewed the Commission's last Annual Report, he was struck by the depth and breadth of what had been accomplished. He stated that he worked with Justice Duffy on the implementation of the MCPE rules, and as someone familiar with the importance of continuing professional education from his days at DCCA, he thinks that the MCPE rules are an important and positive step for the legal profession. He further stated that the Advancing Professionalism program for the judges was a great program and could serve as a model for future judicial training as its interactive component caused the judges to discuss their own experiences and educate each other. Looking forward, C.J. Recktenwald stated that he was very supportive of the Commission's next proposed project to videotape the comments of judges and experienced attorneys regarding good appellate practice. In his opinion, the video product of this project would be extremely helpful to practitioners, and could be done at a reasonable cost.

In closing his initial remarks, C.J. Recktenwald stated that the Commission performs a very important function, and that he fully supports it. He stated that the practice of law is being changed by technology and increased globalization,

and that he looks forward to hearing the Commission members' thoughts on the challenging professionalism issues we face. He further stated that technology is changing the way the Judiciary is doing business by moving from paper to on-line, and that some difficult issues are already arising, like how to balance the increased availability of information as we move cases on-line with individual privacy interests (social security numbers, dates of birth, etc.).

Following his initial remarks, C.J. Recktenwald asked the members for questions or comments. In the ensuing discussion, the following subjects were brought up:

1. What can be done to regulate attorney electronic advertising (internet, satellite, cable TV, radio, etc.) in Hawai'i coming from out-of-state attorneys and firms, which advertising seems to be increasing? C.J. indicated that he views this as a consumer protection issue bottom-line, and was interested in how other states were dealing with the problem.
2. Our Attorneys and Judges Assistance Program (AAP) created by Rule 16 of the Rules of the Supreme Court is doing an excellent job, primarily because Rule 16 provides confidentiality and immunity. The goal of the AAP is to lift up lawyers, not persecute them. C.J. stated that he views the AAP program as "critical."
3. It would increase access to justice if the jurisdiction of the small claims division of the district court could be raised from \$3,500 to \$5,000. C.J. indicated that a legislative bill was introduced last session to so increase the jurisdiction of the small claims division, but failed for unknown reasons. The Access to Justice Commission will renew its efforts on this issue in this next legislative session.
4. A mentoring program, perhaps combined with a low-pay (or no-pay) internship program, would be of great value to both young lawyers starting to practice (particularly those going solo), and senior lawyers who have left firms and are essentially starting anew in practice. C.J. stated that he is strongly supportive of a mentoring program in Hawai'i.

In summary, C.J.'s presentation was informative and much enjoyed by the members present.

III. NEW PROJECT: VIDEOTAPING SUPREME COURT JUSTICES, ICA JUDGES, AND SELECTED PRACTICING ATTORNEYS RE APPELLATE COURT BRIEFS AND ORAL ARGUMENTS “DO’S AND DON’TS”

Justice Duffy discussed the Commission’s proposed new project to videotape the Hawai’i Supreme Court Justices, Intermediate Court of Appeals Judges, and selected practicing attorneys for their thoughts, experiences, and advice regarding appellate court briefs and oral arguments “Do’s and Don’ts.” This project, modeled after a project in the 7th U.S. Circuit Court of Appeals based in Chicago ([see Handout](#) for details) will hopefully result in a DVD available as a video mentor for both practitioners and law students. Justice Duffy asked that any member interested in helping on this project contact him.

IV. REPORT RE PRESENTATION (1) AT A JUDICIAL EDUCATION CONFERENCE ON APRIL 30, 2010 RE WHAT JUDGES CAN DO TO ENCOURAGE PROFESSIONALISM AND (2) TO HSBA MEMBERS ON AUGUST 27, 2010 RE PROFESSIONALISM AND WHAT JUDGES EXPECT OF ATTORNEYS APPEARING IN THEIR COURTS

Judge Senda prepared a written report regarding both of these programs ([see Handout](#)). Both programs had excellent panelists, who were well-prepared and discussed real-world problems and solutions. The program for judges (attendance was mandatory) focused on judicial professionalism and practical techniques in dealing with courtroom management when faced with disrespectful behavior, dilatory conduct, ethical violations, etc. The panelists used an interactive format using Turning Point responders, and the polling over the issues raised sparked vigorous discussions.

The program presented to HSBA members, entitled “‘How To’ Primer on Attorney Professionalism” discussed professional and ethical expectations of practicing attorneys in the fields of civil, criminal, and family law. A copy of the five-page outline of discussion topics is attached to Judge Senda’s report. The HSBA program was well-attended: 150 in the presentation room and 180 online.

Justice Duffy thanked Judge Senda for the great job she did in organizing both of these highly successful programs.

V. REPORT RE HSBA/ODC MINOR MISCONDUCT PROGRAM

Lyn Flanigan prepared a written report regarding the status of the HSBA/ODC Minor Misconduct Program ([see Handout](#)). Highlights of her report: with the amendments to Rule 2.7 of the Rules of the Supreme Court providing immunity and confidentiality protections, the Minor Misconduct Program is up and running. The HSBA’s role in the program is the recruitment and training of volunteer mentors and providing a roster of mentors to ODC, with the ODC (solely) making

mentor assignments to ensure confidentiality. Janet Hunt expressed her strong support of this program and belief that it will be of great benefit to both HSBA members and the ODC.

VI. REPORT ON THE STATUS OF MANDATORY CONTINUING LEGAL EDUCATION (MCLE) PROGRAM, THE WORK OF THE MCLE BOARD OF DIRECTORS, AND AMENDMENTS TO RULE 22 OF THE SUPREME COURT RE MCLE

Lyn Flanigan prepared a written report on the status of the MCLE program, the work of the MCLE Board of Directors, and amendments to Rule 22 of the Supreme Court Rules (see Handout). Justice Duffy noted that the report indicates a large number of courses provided by the HSBA that would fulfill the three credit MCLE requirement for \$50. Please review the report for details.

VII. REPORT RE POSSIBLE NEED TO REVISE HAWAII RULES OF PROFESSIONAL CONDUCT RE *PRO SE* LITIGANTS AND “DISCRETE TASK REPRESENTATION” (FKA “UNBUNDLING OF LEGAL SERVICES”) ISSUE

Judge Cardoza reported that the present Rule 1.2 of the Hawaii Rules of Professional Conduct (entitled “Scope of Representation”) appears to be adequate to provide for “discrete task representation” (fka “unbundling of legal services”). Judge Cardoza indicated, however, that a committee of the Access to Justice Commission chaired by Judge Senda was also studying this issue. In Judge Senda’s absence, Judge Foley indicated that Judge Senda’s committee is recommending that a new rule (Rule 6.5) be adopted, and that this proposed revision is presently pending before the Hawaii Supreme Court.

VIII. REPORT RE STATUS OF COMMISSION’S RECOMMENDATION TO HAWAII SUPREME COURT RE MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE AVAILABILITY ONLINE TO THE PUBLIC

Justice Duffy stated that the HSBA requested that the Supreme Court not adopt the amendment proposed by the Commission to Rule 17(d)(1)(iii) of the Rules of the Supreme Court which would require insurance disclosure/posting on the HSBA website. In support of its request, the HSBA noted that proposed changes to Rule 1.4(c) of the Hawaii Rules of Professional Conduct (contained in the proposed over-all revisions of the Hawaii Rules of Professional Conduct) would require attorneys to inform clients in writing of the absence of certain levels of insurance (see Handout, letter of Lyn Flanigan to the Supreme Court dated June 28, 2010). In response to the HSBA’s request, the Supreme Court agreed to withhold further action on Rule 17(d)(1)(iii) until all of the proposed changes to the Hawaii Rules of Professional Conduct regarding disclosure of insurance information to the public and clients can be considered together.

IX. REPORT RE MENTORING PROJECT OF HSBA YOUNG LAWYER'S DIVISION

Lyn Flanigan prepared a report which indicates that the HSBA has been exploring the possibility of offering a mentoring program for new admittees. The HSBA Strategic Planning Committee is reviewing this issue and will be making a recommendation to the HSBA Board (see Handout). Considering C.J. Recktenwald's interest expressed earlier in the meeting of having the Commission consider undertaking a mentoring program, discussion ensued about whether the Commission and the Law School should join with the HSBA to discuss a mentoring program.

X. REVIEW OF ODC 2009 COMPLAINTS

A summary of the ODC 2009 complaints was set forth in Janet Hunt's article "Raising the Bar in Ethics" published in the Hawaii Bar Journal (June 2010) (see Handout). Janet related that the largest number of complaints continue to be attorneys' failure to communicate. On a positive note, Janet indicated that Hawai'i has very few fraud or scheme to defraud client cases compared to other jurisdictions.

XI. REPORT RE STATUS OF RECOMMENDATION OF COMMISSION RE PROPOSED REVISION OF ODC FORMAL OPINION NO. 43 RE "OF COUNSEL" STATUS

Formal Opinion No. 43 (Of Counsel) amended April 29, 2010 was issued after the revision was recommended by the Commission (see Handout).

XII. NEW BUSINESS

Two additional suggestions were made concerning a possible mentoring program discussed earlier herein:

1. The mentoring program should include training in basic business management principles and practices.
2. A business organization and operation course should be offered at the Law School which would focus on the nuts and bolts of the business side of running a law office, consistent with ethical requirements.

XIII. NEXT MEETING

The next Commission meeting is scheduled for February 25, 2011.

Justice Duffy thanked everyone for attending!

HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM

October 15, 2010

2:30 p.m.

Supreme Court Conference Room

AGENDA

- I. WELCOME AND ANNOUNCEMENTS
- II. A CONVERSATION WITH CHIEF JUSTICE MARK E. RECKTENWALD
- III. NEW PROJECT: VIDEOTAPING SUPREME COURT JUSTICES, ICA JUDGES, AND SELECTED PRACTICING ATTORNEYS RE APPELLATE COURT BRIEFS AND ORAL ARGUMENTS "DO'S AND DON'TS"
- IV. REPORT RE PRESENTATION (1) AT A JUDICIAL EDUCATION CONFERENCE ON APRIL 30, 2010 RE WHAT JUDGES CAN DO TO ENCOURAGE PROFESSIONALISM AND (2) TO HSBA MEMBERS ON AUGUST 27, 2010 RE PROFESSIONALISM AND WHAT JUDGES EXPECT OF ATTORNEYS APPEARING IN THEIR COURTS
- V. REPORT RE HSBA MINOR MISCONDUCT PROGRAM
- VI. REPORT ON THE STATUS OF MANDATORY CONTINUING LEGAL EDUCATION (MCLE) PROGRAM, THE WORK OF THE MCLE BOARD OF DIRECTORS, AND AMENDMENTS TO RULE 22 OF THE SUPREME COURT RE MCLE
- VII. REPORT RE POSSIBLE NEED TO REVISE HAWAI'I RULES OF PROFESSIONAL CONDUCT RE *PRO SE* LITIGANTS AND "DISCRETE TASK REPRESENTATION" (FKA "UNBUNDLING OF LEGAL SERVICES") ISSUE
- VIII. REPORT RE STATUS OF COMMISSION'S RECOMMENDATION TO HAWAI'I SUPREME COURT RE MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE AVAILABILITY ONLINE TO THE PUBLIC
- IX. REPORT RE MENTORING PROJECT OF HSBA YOUNG LAWYER'S DIVISION
- X. REVIEW OF ODC 2009 COMPLAINTS
- XI. REPORT RE STATUS OF RECOMMENDATION OF COMMISSION RE PROPOSED REVISION OF ODC FORMAL OPINION NO. 43 RE "OF COUNSEL" STATUS

XII. NEW BUSINESS

XIII. OLD BUSINESS

XIV. NEXT MEETING

XV. ADJOURNMENT

Andrew Keyt, executive director for the Family Business Center of Loyola University Chicago. "Economically, it often makes sense to use a family member."

Keyt cautions that the success of these decisions hinges on the willingness of the family member to take on a professional role in the law practice, as well as clear job expectations and strict boundaries that keep family issues out of the workplace. He says it's also important to pre-negotiate an exit, so that if the situation proves unsuccessful, family relationships can be preserved.

To be sure, financial benefits do tip the scale in favor of bringing family into the professional fold. That is the case with Lynda L. Hinkle, a newly minted solo in Marlton, N.J. She depends on her husband, a seasonal construction worker who is completing a master's degree in social work, for two days a week of office support.

He helps with marketing her law practice and developing her website. "It's mutually beneficial," she says, joking that the two argue about traffic on the ride to work, but she is clearly the boss once they enter the office. "He provides me with those extra hours that I just don't have every day."

Many solos say work and family lives often blur anyway, as they sacrifice long hours to get their businesses off the ground. Family members entrusted roles in the practice sometimes gain important insights into the challenges of running an independent business.

Such was the case with Frank M. Nunes, a personal injury lawyer in Fresno, Calif., whose dependence on family began when his father-in-law helped him set up his office in August 2007. Since then his mother-in-law, mother and school-aged sons have also pitched in. These days, Nunes' wife functions as the bookkeeper, spending three days a week or more in the office.

"Anything that doesn't kill the marriage makes it stronger," he says. "She's more in tune with what I do." ■

LAW PRACTICE

VIDEO MENTORS

7th Circuit bar puts courts' wisdom online

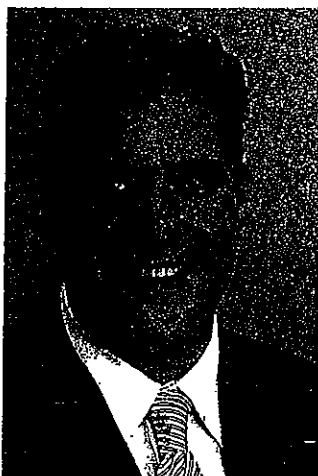
By Rachel M. Zahorsky

IMAGINE A YOUNG LITIGATOR PREPARING FOR HER FIRST ORAL ARGUMENT in the 7th U.S. Circuit Court of Appeals. Nervous, she checks with the assigned judge on the case to ask for a few last-minute pointers.

The Chicago-based 7th Circuit Bar Association is bringing that scenario closer to (virtual) reality through the launch of its e-mentoring project. The program, which features in-depth and frank video discussions with more than 45 distinguished jurists and trial lawyers across Illinois, Indiana and Wisconsin, seeks to capture and share the bar's institutional knowledge.

"There's all of this wisdom and experience in the 7th Circuit bar," says the project's co-chair, Kirkland & Ellis associate Christopher Esbrook. "However, many of the judges and lawyers only mentor the people lucky enough to be directly around them.

"The importance of the project is to broaden the concept of mentoring and make the collective wisdom and advice available—not only to young lawyers but all lawyers in the bar," he says.



Christopher Esbrook

MORE FORTHCOMING

ESBROOK AND HIS CO-CHAIRS—BETH GAUS, A staff attorney at the Federal Defender Program, and Seth Thomas, an associate in the Indianapolis office of Ice Miller—conceived the idea for the project in 2008. They plan to extend the e-law library's collection to include video interviews with all 7th

Circuit district and magistrate judges as well as prominent practitioners.

The videos, accessible only to 7th Circuit Bar Association members through a password-protected area of the bar's website, feature young lawyers engaging judges and senior lawyers. Their 30- to 75-minute question-and-answer sessions are edited into segments that range between three and 15 minutes and are categorized by judge as well as topic.

"The judges were very forthcoming," notes Esbrook, who initially worried that practical advice would be overshadowed by ephemeral, general guidance. Instead, the videos provide anecdotes and tangible examples of best trial practices that span decades of legal work, as well as specific tips for written briefs, oral arguments and courtroom etiquette.

For instance, Circuit Judge Diane Wood cautions lawyers in her courtroom to put aside apprehension and acknowledge strong arguments from opposing counsel. "A really good brief really engages in the really tough points that the other side is raising," Wood says.

In other courtrooms, it's sometimes best not to say anything at all.

"We should not be so involved with our cases and our clients that we lose our own humanity and our knowledge or belief of what's right and what's wrong," says Circuit Judge William Bauer in another video segment. "When it's appropriate, keep your mouth shut." ■

Report to the Commission on Professionalism re:
Judicial Education and HSBA presentations on Advancing Professionalism
September 28, 2010

In 2007, the Supreme Court Commission on Professionalism determined that attorneys and judges would benefit from education and training in professionalism. The Judiciary recognized that the role of a judge is more than purely adjudicative; judges have an affirmative duty to advance professionalism. A judge must help to elevate the professionalism of practitioners in our courtrooms. To that end, two programs were designed for presentation: (1) a program, to be coordinated by the Judicial Education Office and Judicial Education Committee, for judges; and, (2) a program, sponsored by the HSBA, designed for attorneys. This report summarizes the two presentations.

"ADVANCING PROFESSIONALISM IN THE COURTROOM"

On April 30, 2010, the Judicial Education Committee and the Judicial Education Office coordinated a program entitled, "ADVANCING PROFESSIONALISM IN THE COURTROOM". Attendance was mandatory for all judges. Oahu judges convened in the Supreme Court courtroom and neighbor island judges attended via web conference. Program panelists were:

Judge Barry Kurren (Magistrate Judge of the U.S. District Court for the District of Hawaii)
Judge E. John McConnell (ret.)
Judge Marcia Waldorf (ret.)
Janet Hunt, Esq. (Disciplinary Counsel)
James Kawashima, Esq. (Former Judicial Selection Commission member)
Gerald Sekiya, Esq. (Current Chair, Commission on Judicial Conduct)

The panelists represented seasoned litigators (who also have experience on judicial selection and conduct commissions), retired State court judges, a sitting federal magistrate judge and the Office of the Disciplinary Counsel.

The program focused on judicial professionalism and practical techniques judges could incorporate into their daily job duties. Panelists solicited scenarios from the judges-ahead of time- that related to courtroom management and common problems. Discussion topics included disrespectful behavior, dilatory conduct, ethics, impaired attorneys, improper fee requests, false statements and lack of preparation. In each of the seven separate topic discussions, panelists used an interactive format using TurningPoint response cards (i.e., judges would select answers from a multiple choice format and results would be tallied and

displayed almost instantaneously). The results of the polling sparked vigorous and creative discussions. Overall, attendees gave the program high marks for content and relevance. The technology did provide challenges, however, with neighbor island attendees experiencing difficulties in hearing everything that was said.

“HOW TO’ PRIMER ON ATTORNEY PROFESSIONALISM”

On August 27, 2010, the HSBA presented a program entitled, “How To’ Primer on Attorney Professionalism” at the YWCA in downtown Honolulu. Oahu attendees were offered the choice of attending in person or via web conference; neighbor island attorneys were able to attend via web conference. The program qualified for 3 mandatory continuing professional education credits. Program panelists were:

Judge Karen Ahn
Roy Bell, Esq.
Judge R. Mark Browning
Judge Gary Chang
Edward Harada, Esq. (Office of the Public Defender)
Janet Hunt, Esq. (Disciplinary Counsel)
Judge Trudy Senda
Kevin Takata, Esq., (Office of the Prosecutor, City & County of Honolulu)
Michael Tanoue, Esq.

The panel discussed professional and ethical expectations of practicing attorneys in the fields of civil, criminal and family law. There were also general discussions about the proper way to set up an office, lawyers’ accounts and the drafting of attorney-client fee agreements. The panel encouraged questions from the audience. A copy of the five-page outline of discussion topics is attached.

Interestingly, the attendees were very diverse. A significant number of very experienced attorneys registered for the program after discovering they were “shy” of required MCPE credits for 2010. There were also a significant number of newer practitioners in attendance. The diversity of the audience made it difficult for panelists to “cover all bases” for all attorneys, but the general feedback at the conclusion of the program was positive. Even longtime practitioners remarked that panel comments were insightful and helpful.

The Hawaii Supreme Court Commission on Professionalism is sponsoring a continuing education program on professionalism in the courtroom. Panelists will use their experiences to discuss a judge's duty to advance professionalism in the legal field. Program details follow:

- **Date: Friday, April 30, 2010 (9:00 AM - NOON)**
- **Location: Supreme Court Courtroom and Conference Room (Oahu)/Web Conference (Neighbor Islands)**
- **Attendees: All Full-Time Judges (attendance is mandatory)***
- **Panelists:**
 - The Honorable Barry Kurren;
 - The Honorable E. John McConnell (ret.);
 - The Honorable Marcia Waldorf (ret.);
 - Janet Hunt, Esq. (Office of Disciplinary Counsel);
 - James Kawashima, Esq. (longtime civil practitioner who previously served on the Judicial Selection Commission); and
 - Gerald Sekiya, Esq. (representing Commission on Judicial Conduct).

Attendees will earn two (2) CLE credit hours.

HAWAII STATE BAR ASSOCIATION

Continuing Legal Education

“How To” Primer on Attorney Professionalism

Course Materials

Speakers:

The Honorable Karen S.S. Ahn
The Honorable Robert M. Browning
The Honorable Gary W.B. Chang
The Honorable Trudy K.T. Senda
Roy J. Bell III, Esq.
Edward K. Harada, Esq.
Janet S. Hunt, Esq.
Kevin K. Takata, Esq.
Michael N. Tanoue, Esq.

August 27, 2010

HSRA | CLE
Hawaii State Bar Association - Continuing Legal Education

HAWAII STATE BAR ASSOCIATION PROFESSIONALISM

OVERVIEW – DIMENSIONS OF PROFESSIONALISM

1. What is "professionalism"?
 - a. High ethical standards
 - b. Professional competence – knowledge, skill, awareness, tenacity
 - c. Sense of altruism and justice
 - d. Commitment to self-improvement and education
 - e. Participation in associations, societies, and community service
 - f. Ability to think and act independently
 - g. Fostering the public perception as a professional and the enhancing the public image of the profession
 - h. Willingness to make personal sacrifices for the client, the profession and justice
2. General overview of today's discussion
 - a. Running a business-like practice
 - b. Competency (having the tools)
 - c. Prelitigation practice (outside the courtroom)
 - d. Motions practice
 - e. Trial practice
 - f. Appellate practice

RUNNING A BUSINESS-LIKE PRACTICE

1. General business considerations
 - a. Conflict checks

- b. Filing and recordkeeping systems
 - c. Purging files – HIPAA and other privacy considerations versus statutory, regulatory, other recordkeeping requirements
 - d. Supervision of associates and staff
 - e. Confidentiality
2. Managing the "client"
- a. Who is the "client"?
 - b. Intake interview of client – client expectations, assessing client control
 - c. Written retainer or other agreements
 - d. Client trust accounts (civil only)
 - e. Keeping client informed
 - f. Focus on client's goals – including costs/fees containment
 - g. Closing the matter – obligations to client after the case is settled?

COMPETENCY (HAVING THE TOOLS)

- 1. Professional responsibility and ethics
- 2. Civility and professional courtesy
- 3. Honing skills in different areas
 - a. Legal acumen
 - b. Persuasion
 - c. People skills
 - d. Oratorical skills

- e. Writing skills
- f. Effective evaluation of pros/cons, strengths/weaknesses of the case
- g. Understand the mind of the mediator, arbitrator, judge or jury
- h. Avoiding professional complacency
- i. Credibility

PRELITIGATION PRACTICE (OUTSIDE THE COURTROOM)

- 1. Requests for extensions of time – balancing civility with interests of client
- 2. Discovery disputes
 - a. Duty to confer with opposing counsel
 - b. Motions to compel and for protective order
 - c. Depositions of out of state parties and witnesses
- 3. Settlement and plea negotiations
- 4. Mediations and settlement conferences
- 5. Court Annexed Arbitration Program
- 6. Binding arbitrations

MOTIONS PRACTICE

- 1. Motions and memoranda in support
- 2. Affidavits and declarations
- 3. Exhibits
- 4. Memoranda in opposition to motions (reply memoranda)

5. Reliance upon legal authority – binding precedent versus cases cited for persuasive authority
6. Contact with the court staff
7. Hearings
 - a. Familiarity with cited authorities
 - b. Supplemental authorities
 - c. Candor
8. Preparation of orders
9. Special district court and family court considerations

TRIAL PRACTICE

1. Trial logistics
2. Accommodating witness schedules
3. Special district court and family court considerations
4. Contact with jurors after verdict

APPELLATE PRACTICE

1. Nuts and bolts and practice pointers
 - a. Jurisdiction
 - b. Know your audience
 - c. Know the facts and law of your case
 - d. Anticipate your opponent's case
 - e. Specify the points of error on appeal – HRAP 28(b)(4)
 - f. Know the standard of review that applies – HRAP 28(b)(5)

- g. Start with your strongest argument
- h. Be accurate – never overstate
- i. Yield areas where you know you will lose
- j. Develop a theme – be clear and concise, not redundant
- k. Plan the structure of your brief
- l. Ask for the specified relief sought – HRAP 28(b)(9) (opening brief); HRAP 28(c) (answering brief); HRAP 35(e) ("reverse" or "vacate and remand")
- m. Timely file your brief – HRAP 29 and 30
- n. Be early to oral argument

2. Ethical considerations

- a. Are you personally handling the appeal? Let your client know in advance
- b. Discuss your client's and your goals in advance, including appeal issues
- c. Working or consulting with appellate counsel
- d. Making your record at the trial court level for appeal
- e. Citation to Hawaii appellate decisions – HRAP 35 (unpublished dispositions, memorandum opinions, published opinions)
- f. Candor to the tribunal – HRPC 3.3(a)(3) (a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel)

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

ORDER AMENDING RULES 2.7, 2.8, AND 2.22 OF THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I
(By: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.)

IT IS HEREBY ORDERED that Rules 2.7, 2.8, and 2.22 of the Rules of the Supreme Court of the State of Hawai‘i is amended, effective July 1, 2010, as follows (deleted material is bracketed and stricken; new material is underscored):

2.7. Procedure.

* * *

(b) Minor misconduct.

(1) Notwithstanding the provisions of Rules 2.2 and 2.3, any act or omission by an attorney which, although violative of the Hawai‘i Rules of Professional Conduct, is of a minor nature may be resolved by way of non-disciplinary proceedings or dismissal.

(2) In the absence of unusual circumstances, misconduct shall not be regarded as minor if any of the following conditions exists:

(i) The misconduct involved misappropriation of a client's funds or property.

(ii) The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person.

(iii) The respondent was publicly disciplined within the past [~~three~~(3)] years.

(iv) The misconduct involved is of the same nature as misconduct for which the respondent was disciplined within the past [~~five~~(5)] years.

(v) The misconduct included dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.

(vi) The misconduct constituted the commission of a felony under applicable law.

(3) Subject to the provisions of Rule 2.7(a), Counsel shall, in Counsel's sole discretion, exclusively determine whether a matter constitutes minor misconduct. In that event, Counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, mentoring, or any other non-disciplinary proceedings authorized by the supreme court. Counsel shall then refer the matter to the agency or agencies authorized by the supreme court to conduct the proceedings.

(4) If the respondent enters into an agreement for referral to a minor misconduct program established by the Hawai'i State Bar and enters into a mentoring relationship, all records and information maintained by the mentor relating to the minor misconduct of the respondent shall be deemed confidential and shall not be disclosed to the Counsel, the Board, the supreme court or any other person and shall not be subject to discovery or subpoena unless such confidentiality is waived in writing by the respondent; provided, however, that the mentor may compile and disclose to Counsel a final report summarizing the mentoring program and the completion thereof to the satisfaction of the mentor. The mentor and the respondent have a privilege to refuse to disclose information shared or provided between the mentor and the respondent. The limitations on disclosure set forth in this section will not apply to information relating to the respondent's failure to cooperate with the mentoring program, or with a respondent's unsuccessful completion of a mentoring program.

~~[(4)]~~ (5) If Counsel shall fail to reach agreement with the respondent to submit the matter of non-disciplinary proceedings, Counsel may undertake or resume disciplinary proceedings.

~~[(5)]~~ (6) If the respondent shall fail to comply with the terms of the agreement, Counsel may undertake or resume disciplinary proceedings.

~~[(6)]~~ (7) If the respondent shall fulfill the terms of the agreement, Counsel shall dismiss the disciplinary proceedings.

* * *

2.8. Immunity.

Complaints submitted to the Board or Counsel or testimony given with respect thereto or trustee proceedings conducted pursuant to Rule 2.20 shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, hearing officers, Counsel, staff, volunteers, experts appointed pursuant to Rule 2.19, ~~and~~ trustees and assistants appointed pursuant to Rules 2.20 and 2.5, and mentors appointed pursuant to Rule 2.7(b)(4) shall be immune from suit and liability for any conduct in the course of their official duties.

COMMENT :

The purpose of extending immunity to mentors appointed pursuant to Rule 2.7(b)(3) is to enhance the ability to attract participants to participate as mentors in minor misconduct programs and to provide to these mentors

protections provided to those serving in other capacities under the auspices of the Disciplinary Board.

2.22. Confidentiality.

(a) General rule. The files, records and proceedings of the Board, the hearing committees or officers, and Counsel, and of mentors participating in minor misconduct programs pursuant to Rule 2.7(b), as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

- (1) As between Counsel, the committees or officers, the Board and the supreme court in the furtherance of their duties;
- (2) As between the Board, Counsel and an attorney admission or disciplinary authority, or judicial selection or disciplinary authority, of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice;
- (3) Upon the request of the attorney affected;
- (4) Where permitted by the supreme court;
- (5) Where required or permitted by these rules;
- (6) Where the investigation is predicated upon a conviction of the respondent for a crime;
- (7) Where 90 days have passed since the service on a respondent of a Petition for discipline, unless such time is extended by the Board Chairperson for no more than 45 days for good cause shown[-];
- (8) Where reinstatement proceedings are initiated pursuant to [RSCH] Rule 2.17(c).

* * *

(f) Except as ordered by the supreme court, or as otherwise provided by these rules, the files, records and proceedings filed with the supreme court by the Board, by Counsel or by a respondent, as well as any oral argument held before the supreme court in connection with any disciplinary proceedings, are not confidential, except that in [RSCH] Rule 2.19 proceedings, a final order transferring an attorney to inactive status shall be a matter of public record, but otherwise, the record of the proceedings shall not be publicly disclosed.

* * *

DATED: Honolulu, Hawai'i, April 5, 2010.



MEMO: Associate Justice James E. Duffy, Jr.
FROM: Lyn Flanigan
DATE: October 11, 2010
RE: Commission on Professionalism Meeting: October 15, 2010

REPORT RE: HSBA/ODC MINOR MISCONDUCT PROGRAM: On July 1, 2010, amendments to RSCH Rule 2.7 provided mentors in a minor misconduct program with immunity and confidentiality protections. Procedures and materials were developed for a rejuvenated minor misconduct program in which ODC would assign grievants. Mentors were solicited by HSBA, and a preliminary training program was organized by HSBA/ODC. Subsequently we determined that procedures should be modified to eliminate HSBA as a "middle-man" in the assignment process and to limit the HSBA role to recruitment and training of volunteers and providing a roster of mentors to ODC, thus ensuring confidentiality to the grievants. These forms have been provided to ODC for assignments.

MCLE REPORT: In mid-2009, HSBA added a part-time MCLE Administrator to coordinate implementation of RSCH Rule 22, which became effective on January 1, 2010. The HSBA Board solicited volunteers to serve on the MCLE Board created by the rule and selected 8 members and 1 non-member, along with ad-hoc members Dale Lee of WSRSL, Justice Duffy of the Supreme Court, and Lyn Flanigan, HSBA Executive Director. During the fall of 2009, the MCLE Board and Administrator developed regulations and procedures to implement Rule 22, to approve providers, programs and credits. Since October 2009, the HSBA has provided notice of the MCLE requirements in all HSBA publications, both electronic and print. Notice of the requirement was distributed with the 2010 renewal materials and will be distributed again with the 2011 materials in November 2010. During 2010, HSBA staff has provided numerous VCLE/MCPE programs on all islands and has scheduled five webcast replays available for a 2-week period each and 5 video replays at the HSBA office to enable members who have not fulfilled their requirement to do so by the end of the year. Attached is a report by the MCLE Administrator Jodie Hagerman and other materials.

MENTORING: Although 'mentoring' has not been a mandate of the Commission on Professionalism, the HSBA as part of its strategic planning process has been exploring the possibility of offering a mentoring program for new admittees. The final report/recommendation has not been submitted to the Strategic Planning Committee for review and recommendation to the Board. However, it should be noted that nominal interest in a mentoring program was expressed in a YLD survey on the topic. Attached is a summary of the survey, showing that 12.6% responded; of that 64.71% expressed an interest in a mentoring program, 81.43% preferred the program no more than quarterly or as available, and 60% would like mentoring on both "specific" and "general" career development.

Supreme Court Commission on Professionalism
MCLE Report

The HSBA began alerting attorneys about the impending effective date of RSCH Rule 22 during the fall of 2009. The Bar Journal, monthly eblasts, the Bar President's message, and the HSBA website informed attorneys of their MCLE requirements and pointed them to the HSBA website for more information. An MCLE webpage was developed for the HSBA website and FAQs were posted to help members understand the new rule and the December 31 annual deadline.

HSBA Statistics Pursuant to an MOA with the Supreme Court, the HSBA agreed to provide continuing professional education courses that would fulfill the three credit requirement for \$50.00. Courses would be provided live on Oahu and the neighbor islands and also through other course formats. To date the HSBA has:

- Held 14 live courses on Oahu, 2 on Maui, and 1 each on Kauai and in Hilo and Kona.
- Put on 4 live webcasts.
- Co-sponsored and assisted with several programs organized by the neighbor Island bars and the Access to Justice Commission.
- Offered 5 live MCPE courses at the Bar Convention and offering 4 opportunities to view video replays of 2 of the MCPE courses.

Number of attorneys who attended a live HSBA course (does not include Bar Convention):

- Oahu 1,013.
- Maui 92
- Kauai 43
- Hilo 76
- Kona 1

442 attorneys took an HSBA webinar.

MCLE Administration The MCLE Board consists of nine voting members and three nonvoting advisory members. The MCLE Administrator handles the day to day administration of the CLE Regulations. To date the MCLE Administrator has:

- Approved provider applications for 53 courses.
- Approved 17 providers for Accredited Status.
- Monitored 48 attorneys for RSCH 22(i) change of status 3 month MCPE requirement.
- Suspended 2 attorneys for noncompliance with RSCH Rule 22(i), 1 reinstated.

Poll Summary - Generated by BallotBox (www.BallotBoxOnline.com)

Name YLD Mentorship Survey
Description The YLD Board and the Senior Counsel Division Board are considering a mentorship program. First,
Online Voting 03/19/10 09:00am HST to 03/25/10 05:00pm HST

Voter Information

Eligible Voters 858 % of eligible voters
Cast Online Ballots 108 12.59%
Blank Online Ballots 8 0.93%

Report Information

Report Generated 03/30/10 03:57pm HST

Question Type	Boolean	Are you interested in being paired with a mentor?	Number of Votes	% of Respondents	% of Answers
Question Type	BOOLEAN	Yes	66	61.11%	64.71%
No. of Respondents	108	No	36	33.33%	35.29%
		Not answered	6	5.56%	
			102	94.44%	100.00%

Question Type	Single	How often would you like to meet with the mentor?	Number of Votes	% of Respondents	% of Answers
Question Type	SINGLE	Once	0	0.00%	0.00%
No. of Respondents	108	Once a month	13	12.04%	18.57%
		Once a quarter	29	26.85%	41.43%
		You would like to be available to each other on an	28	25.93%	40.00%
		Not answered	38	35.19%	
			70	64.81%	100.00%

Question Type	Single	What are your mentorship goals?	Number of Votes	% of Respondents	% of Answers
Question Type	SINGLE	Specific career development	7	6.48%	10.00%
No. of Respondents	108	General career development	19	17.59%	27.14%
		Both	42	38.89%	60.00%
		Other	2	1.85%	2.86%
		Not answered	38	35.19%	
			70	64.81%	100.00%

Legend

Question Type	Type of question (BOOLEAN, RANK, SINGLE, MULTIPLE, MEMO or TEXT)
No. of Respondents	Number of voters eligible to answer this question (based on conditional ballot page logic)
Condition	Condition required for question to be included in the poll (only for questions on conditional ballot pages)
% of Ballots	% of voters eligible to answer this question (only for questions on conditional ballot pages)
Number of Votes	Number of ballots that selected a particular answer
Number of Votes - Total	Number of selected answers - excluding 'not answered'
% of Respondents	% of voters who were eligible to answer this question and who selected a particular answer
% of Respondents - Total	% of respondents who selected an answer (excludes 'not answered')
% of Answers	% of votes for a particular answer (always totals to 100%)
Write-In response	A write-in response to a SINGLE or MULTIPLE question
Not Answered	The 'not answered' option for an optional question (actual text specified by the poll designer)

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

ORDER AMENDING RULE 22 OF THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I
(By: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.)

IT IS HEREBY ORDERED that Rule 22 of the Rules of the Supreme Court of the State of Hawai'i is amended, effective July 1, 2010, as follows (deleted material is bracketed and stricken; new material is underscored):

**Rule 22. MANDATORY CONTINUING PROFESSIONAL
EDUCATION AND VOLUNTARY CONTINUING LEGAL
EDUCATION.**

* * *

(d) Mandatory Certification, Reporting, and Record Keeping. Each active Bar member shall annually:

(1) certify the number of approved MCPE hours completed during the preceding year or carried forward, and

(2) report the number of approved VCLE hours completed during the preceding year, specifying the number of such hours, if any, satisfied by section (e)(4) of this rule. A member shall maintain records of approved MCPE credit hours and of approved VCLE credit hours for the 2 most recent reporting periods, and these records shall be subject to audit[-] by the HSBA. Any active Bar member who fails to cooperate with the HSBA when audited shall be deemed to be in noncompliance with this rule.

(e) Courses and Activities. The requirements of this rule may be met, subject to prior approval as set out in sections (f) and (g) of this rule, by:

(1) attending approved courses or activities, including but not limited to, presentations conducted in-house or for Inns of Court, bar sections, professional legal organizations, and the like;

(2) preparing for and teaching approved professional education or judicial education courses or activities. Two hours of preparation time may be

certified or reported for each hour of time spent teaching, *i.e.* 3 hours may be claimed for teaching a 1 hour course;

* * *

(h) Full-time Judges. Federal judges, magistrate judges, bankruptcy judges, U.S. Court of Federal Claims judges and administrative law judges are exempt from the requirements of this rule. Full-time state judges shall participate for at least 3 hours each year in a program of judicial education approved by the Committee on Judicial Education. Full-time state judges who are unable to attend, in person, a program approved by the Committee on Judicial Education or who are excused from that program shall comply with this requirement by such other means as the supreme court approves. Full-time state judges shall report the number of approved judicial education hours attended on the judges' annual financial disclosure form.

* * *

(k) Good Cause Exemption or Modification. An active member may apply to the HSBA for good cause exemption or modification from the MCPE requirement. Members seeking an exemption or modification shall furnish substantiation to support their application as requested by the HSBA. Good cause shall exist when a member is unable to comply with the MCPE requirement because of illness, medical disability, or other extraordinary hardship or extenuating circumstances that are not willful and are beyond the member's control.

[(k)](l) Effective Date; Reporting Period. This rule is effective January 1, 2010. The initial reporting period will be the calendar year beginning January 1, 2010, and reports for that year shall be submitted in accordance with section (d) of this rule.

DATED: Honolulu, Hawai'i, April 29, 2010.

June 28, 2010

James L. Branham, Esq.
Supreme Court of Hawaii
417 S. King St.
Honolulu, HI 96813

RE: Rule 17(d)(1)(iii) Proposed Amendment

Dear Mr. Branham:

The HSBA Board respectfully requests that the Court not implement the proposed amendment to RSCH 17(d)(1)(iii) which would require insurance disclosure/posting on the HSBA website. We note that proposed changes to HRPC 1.4(c), contained in the proposed revisions of the Hawaii Rules of Professional Conduct which have been forwarded to the Court but not yet posted for comment, would require attorneys to inform clients in writing of the absence of certain levels of insurance. (Attached)

Since both of these rules deal with the disclosure of the existence of malpractice insurance, we suggest that implementation of the currently posted amendment is premature and that issues regarding insurance disclosure to the public and to the client should be considered together.

In addition, the proposed amendment to Rule 17(d)(1)(iii) would require staff and financial resources in programming our online renewal software and the interface between the database and the website directory which may be mooted by the subsequent review and implementation of the HRPC revisions.

This request is procedural and does not include our concerns whether mere disclosure of the existence of insurance on a given date (the renewal date) without more, actually protects the client or the public.

We are attaching an analysis of a similar proposal done by the Texas Bar which addresses concerns with such disclosure.

Thank you for the opportunity to comment.

Sincerely,



Lyn Flanagan

Attachments:

HRPC Proposed Rule 1.4
Texas Bar materials

Raising the Bar in Ethics

by Janet S. Hunt, Chief Disciplinary Counsel

The Annual Statistical Summary of the Office of Disciplinary Counsel ("ODC") summarizes the number, nature, and disposition of complaints received by ODC during the calendar year of 2009.

ODC received 405 new grievances in 2009; 88 were immediately closed for a failure to allege any violation; 317 proceeded to investigation which resulted in the docketing of 111 cases; the remaining 206 matters were either closed or are still under investigation.

Communication was still the most frequent complaint by clients, followed by failure to deposit funds into the client trust account, interference with justice, conversion, commission of crime, and abandonment.

Clients file the most complaints, followed by ODC (based upon information independently coming to our attention), and lastly, attorney complaints.

A total of 293 complaints were closed in 2009, 213 of which were closed under the new system prior to docketing, and only 17 of the docketed matters actually resulted in the imposition of public discipline for three attorneys.

The annual statistical summary is presented below.

ODC STATISTICAL REPORT FOR 2009

I. COMPLAINTS DOCKETED BY SUBJECT CATEGORY

A. PERFORMANCE

1. Abandonment	5
2. Abusiveness	0
3. Communication(phone calls, letters, etc.)	28
4. Incompetence	4
5. Misrepresentations to client	1
6. Misrepresentations to others	1
7. Improper withdrawal from employment	1
8. Improper disclosure of confidential information	1
9. Conflict of Interest	3
10. Improper contact with opposing party	0
11. Other	0

B. FEES

1. Excessive fees	1
2. Failure to return unearned portion	2
3. Improper referral fees	0
4. Fee dispute, no unethical conduct	0
5. Other	0

C. FUNDS AND PROPERTY

1. Commingling	4
2. Conversion	7
3. Failure to account	4
4. Failure to deposit in trust account	16
5. Failure to maintain records	1
6. Failure to promptly pay out	2
7. Withdrawal of funds in dispute	2
8. Improper payment to client	0
9. Improper assertion of lien on client's property	0
10. Failure to deliver property promptly	2
11. Other	0

D. SOLICITATION

1. In-Person Solicitation	0
2. Direct Mail Solicitation	0
3. Other	0

E. ADVERTISING

1. False, fraudulent, deceptive, or misleading ...	0
2. Specialization	0
3. Other	1

F. INTERFERENCE WITH JUSTICE

1. Advising violation of law	0
2. Appeal in bad faith	0
3. Advising witness to hide, suppression of evidence, bribing witness	1
4. Aiding unlawful practice of law	2
5. Disobedience of court order	1
6. Disrespect of court	0
7. Gifts to officials	0
8. Harassment, claim not warranted	1
9. Misrepresentations to court	1
10. Threaten criminal prosecution	0
11. Abuse of process (sham or groundless lawsuits, etc.)	1
12. Prosecutorial misconduct	0
13. Improper contact with tribunal	0
14. Use of perjured testimony or false evidence	0
15. Improper trial publicity	0
16. Other	8

G. FRAUD

1. Scheme to defraud	1
2. Other	0

H. PERSONAL BEHAVIOR AND CRIMES

1. Commission of crime	6
2. Failure to honor agreement or stipulation	0
3. Offensive language or actions	0
4. Extortion or intimidation	0
5. Coercion to obtain payment/fee	0
6. Abusive collection practices	0
7. Failure to pay bills (court reporters, expert witnesses, etc.)	0
8. Other	3

TOTAL COMPLAINTS

DOCKETED IN 2009	111
------------------------	-----

II. COMPLAINT SOURCES

1. Clients	71
2. Attorneys	6
3. Judges	2
4. Court Reporters	0
5. Bar Association	0
6. Office of Disciplinary Counsel	9
7. Attorney General	0
8. Other Governmental Agencies	5
9. Opposing Party	4
10. Anonymous	0
11. Member of the Public	1
12. Other	13
TOTAL COMPLAINTS	111

III. NUMBER OF ATTORNEYS COMPLAINED AGAINST BY NUMBER OF YEARS IN PRACTICE

Number of Years In Practice	Number of Attorneys
Less than 1 - 5 years.....	3
6 - 10 years	2
11 - 15 years	4
16 - 20 years	6
21 - 25 years	9
26 - 31+ years.....	26
Pro-Hac Vice Admittees	0
TOTAL	50

V. NUMBER OF ATTORNEYS COMPLAINED AGAINST BY NUMBER OF COMPLAINTS PER ATTORNEY

No. of Attorneys with 1 complaint: 37
No. of Attorneys with 2 complaints: 4
No. of Attorneys with 3 complaints: 1
No. of Attorneys with 4 complaints: 2
No. of Attorneys with 5+ complaints: 6

VI. COMPLAINT DISPOSITION

	No. of Attorneys	No. of Complaints Involved
Disbarment	1	1
Resignation in Lieu of Discipline	1	15
Public Censure	1	1
Informal Admonition	11	11
Dismissed or Dismissed with Caution	29	52

COMPLAINTS CLOSED IN 2009: 80

COMPLAINTS PENDING AS OF 12/31/09 170

Disciplinary Board of the Hawai'i Supreme Court
1132 Bishop Street, Suite 300
Honolulu, Hawai'i 96813
Telephone (808) 521-4591
www.odchawaii.com



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Vice Chairperson
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FORMAL OPINION NO. 43 (Of Counsel)
(Amended April 29, 2010)


This Opinion addresses the use of the title "of counsel" on letterhead, business cards, advertisements, telephone listings, and office signs or in other circumstances where there is a representation to the public that there is some relationship between the lawyer and law firm in question.

As used herein, the term "of counsel" refers to an actively-licensed lawyer who, or a law firm which, has a continuing, close, and regular relationship with another lawyer or law firm. Any jurisdictional limitations on the practice of the "of counsel" lawyer or law firm must be stated on the affiliated firm's letterhead and other public communications in which the name of the "of counsel" lawyer or law firm is included. It should be noted that there are other variations on the "of counsel" title to which this opinion may apply as long as it refers to the type of relationship described herein. These titles may include the designations "counsel," "special counsel," "tax [or other specialty] counsel," or "senior counsel."

The use of the title "of counsel" in identifying the relationship of a lawyer or law firm with another lawyer or law firm is permissible as long as the relationship between the two is a continuing, close, and regular relationship and the use of the title is not false or misleading.

This opinion is based on the prohibition against misleading representations found in HRPC 7.1 and HRPC 7.5. HRPC 7.1 provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." HRPC 7.5 states that "[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." The prohibition against misleading representation would be violated if the "of counsel" title, or one of its variants, was used to describe a relationship other than one which is continuing, close, and regular.

DATED: Honolulu, Hawai'i, April 29, 2010.


HON. CLIFFORD L. NAKEA (RET.)
CHAIRPERSON, DISCIPLINARY BOARD
OF THE HAWAII SUPREME COURT

Supreme Court of Hawaii
Attorneys and Judges Assistance Program
Steven B. Dixon, JD, Executive Director
801 Alakea Street, Suite 209
Honolulu, Hawaii. 96813
(808) 531-2880; (800) 273-8775; fax (808) 521 7224; c: (808) 285-2307
sdixon@interpac.net; www.hawaiiiaap.com

Members of the Hawai'i Supreme Court Commission on Professionalism

October 15, 2010

RE: Agenda item V and AAP

Welcome Chief Justice Recktenwald and Commission Members:

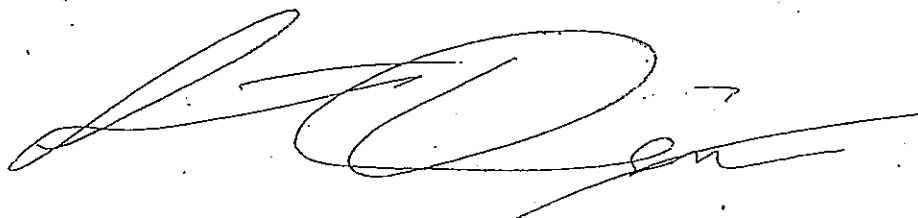
Attached to this introductory note is a copy of Hawaii Supreme Court Rule 16 which was originally adopted by the Hawaii Supreme Court in 1989 in response to concerns discussed at the 1989 National Conference of Chief Justices.

Also attached is a copy of portions of a resolution adopted by the 1996 National Conference of Chief Justices.

Also attached is the 2006 American Bar Association Commission on Lawyer Assistance Programs (ABA CoLAP) evaluation of the Hawaii Supreme Court Attorneys and Judges Assistance Program (AAP).

Hawaii's AAP is highly regarded on the national level. This is primarily because the initial draftsmen of RHSCT 16 did such a good job, our Rule 16 has been a drafting model for many other states' programs. Older studies reported in the Journal of the American Medical Association report that about 10% of the population at large is impaired by one or more of the diseases of clinical depression, stress disorders, alcoholism and/or addiction. Current medical studies adopted and accepted by the American Medical Association and the American Bar Association tell us that 15%-18% of lawyers are impaired by one or more of these diseases. We can therefore say with confidence that more than 460 practicing lawyers in Hawaii are impaired by one or more of these diseases. We know impaired lawyers injure their clients, and injure the public perception of the legal profession and system, and injure their offices, partners, families, and themselves.

RHSCT 16 makes AAP particularly useful because the Rule gives AAP the duty of confidentiality and the client lawyer, UH law student, or Hawaii judge, legal privilege against discovery. As AAP Executive Director I do about 2-4 formal interventions a year, as articulated by Rule 16. When doing a formal intervention I do inflict emotional distress and interfere with contractual relations by strongly encouraging an impaired lawyer into diagnosis, treatment, and recovery. Rule 16 provides the necessary civil immunity to allow the AAP to do our job. We are currently assisting in the protection of the public, and the recovery of impaired lawyers by receiving 14 lawyer referrals from the minor misconduct program of the ODC, and other referrals and interventions, into a formal contract of assessment and monitoring. In addition, we average well over 100 client contacts a month from lawyers, judges, and UH law students. As always, let me know how we can help.



**RULES OF THE
SUPREME COURT
OF THE
STATE OF HAWAI'I**

**Adopted and Promulgated by
the Supreme Court
of the State of Hawai'i**

**As amended April 16, 1984
Effective June 1, 1984
With Amendments as Noted**

**The Judiciary
State of Hawai'i**

**RULES OF THE SUPREME COURT
OF THE STATE OF HAWAI'I**

2.7. Procedure.

(a) **Investigation.** All investigations, whether upon complaint or otherwise, shall be conducted under the supervision of Counsel. Each investigation shall be confined to the facts of the grievance and matters reasonably related thereto that could be violations of the Hawai'i Rules of Professional Conduct or other Rules of the Supreme Court that regulate the practice of law. Upon motion, an attorney subject to an investigation may seek protective orders in the first instance from the Board and, if denied, then, within 10 days thereafter from the supreme court. Upon the conclusion of an investigation, Counsel shall recommend dismissal, informal admonition of the attorney concerned, the institution of non-disciplinary proceedings for minor misconduct, or the institution of formal disciplinary proceedings before a hearing committee or officer. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that purpose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of Counsel's recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

(b) Minor misconduct.

(1) Notwithstanding the provisions of Rules 2.2 and 2.3, any act or omission by an attorney which, although violative of the Hawai'i Rules of Professional Conduct, is of a minor nature may be resolved by way of non-disciplinary proceedings or dismissal.

(2) In the absence of unusual circumstances, misconduct shall not be regarded as minor if any of the following conditions exists:

(i) The misconduct involved misappropriation of a client's funds or property.

(ii) The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person.

(iii) The respondent was publicly disciplined within the past 3 years.

(iv) The misconduct involved is of the same nature as misconduct for which the respondent was disciplined within the past 5 years.

(v) The misconduct included dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.

(vi) The misconduct constituted the commission of a felony under applicable law.

(3) Subject to the provisions of Rule 2.7(a), Counsel shall, in Counsel's sole discretion, exclusively determine whether a matter constitutes minor misconduct. In that event, Counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, mentoring, or any other non-disciplinary proceedings authorized by the supreme court. Counsel shall then refer the matter to the agency or agencies authorized by the supreme court to conduct the proceedings.

(4) If the respondent enters into an agreement for referral to a minor misconduct program established by the Hawai'i State Bar and enters into a mentoring relationship, all records and information maintained by the mentor relating to the minor misconduct of the respondent shall be deemed confidential and shall not be disclosed to the Counsel, the Board, the supreme court or any other person and shall not be subject to discovery or subpoena unless such confidentiality is waived in writing by the respondent; provided, however, that the mentor may compile and disclose to Counsel a final report summarizing the mentoring program and the completion thereof to the satisfaction of the mentor. The mentor and the respondent have a privilege to refuse to disclose information shared or provided between the mentor and the respondent. The limitations on disclosure set forth in this section will not apply to information relating to the respondent's failure to cooperate with the mentoring program, or with a respondent's unsuccessful completion of a mentoring program.

(5) If Counsel shall fail to reach agreement with the respondent to submit the matter of non-disciplinary proceedings, Counsel may undertake or resume disciplinary proceedings.

(6) If the respondent shall fail to comply with the terms of the agreement, Counsel may undertake or resume disciplinary proceedings.

(7) If the respondent shall fulfill the terms of the agreement, Counsel shall dismiss the disciplinary proceedings.

Rule 16. ATTORNEYS AND JUDGES ASSISTANCE PROGRAM.

16.1. Purpose; scope.

(a) The purpose of the Attorneys and Judges Assistance Program ("AAP") is to provide immediate and continuing assistance to attorneys who practice law in the State of Hawai'i, judges of the courts of the State of Hawai'i, and law students of the University of Hawai'i at the Richardson School of Law (law students) who suffer from problems, disability or impairment which affect their professional performance for any reason ("impairment"), including but not limited to excessive use of alcohol or drugs ("substance abuse"), physical or mental illness, or other infirmity. Professional performance is affected when an attorney, judge, or law student is incapable of devoting the time and attention to, and providing the quality of service in, his or her law practice, judicial duties, or law studies which is necessary to protect the interest of a client, litigant, or law school career.

(b) The AAP shall consist of at least the following categories of programs.

(1) VOLUNTARY PROGRAM. A voluntary program addressing "self-referrals" entering treatment without the formal prior intervention of the AAP.

(2) INTERVENTION PROGRAM. A program primarily addressing attorneys, judges, and law students who are not "self-referrals" and who have not yet been the subject of a complaint that warrants a disciplinary petition, but whose impairment affects their professional performance and may put them at risk of disciplinary action if the impairment continues.

(c) AAP shall not provide treatment to impaired attorneys, judges, and law students but shall instead provide education and guidance concerning substance abuse, refer impaired attorneys, judges, and law students to appropriate substance abuse and/or mental health treatment providers, and provide emotional support to impaired attorneys, judges, and law students.

(Added effective July 7, 1989; amended December 12, 2006, effective January 1, 2007.)

16.2. Attorneys and Judges Assistance Program Board.

(a) The supreme court shall appoint from nominations submitted by the Nominating Committee of the Hawai'i Supreme Court a board to be known as the "Attorneys and Judges Assistance Program Board of the Hawai'i Supreme Court" ("Board") which shall consist of nine (9) members, one of whom shall be designated by the Board as chairperson. Six (6) members shall be attorneys licensed to practice in the State of Hawai'i and three (3) members shall be judges of the State of Hawai'i.

(b) All members shall be appointed to staggered three-year terms; however, to maintain a board with staggered terms, initial appointments may be for less than three years. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(c) Board members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If, in any given case, it shall become necessary for the continuation of a case, or the orderly operation of the Board, the supreme court may appoint, for that case only, one or more ad hoc members as it deems necessary. Each ad hoc member shall fulfill all the responsibilities of a Board member.

(d) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these rules, including the power and duty:

(1) To take such action as shall be appropriate to effectuate the purposes of these rules.

(2) To appoint an administrator (whether an individual or a professional assistance organization) as may from time to time be required to properly perform the functions hereinafter prescribed. The administrator is hereinafter referred to as "Director." The Director shall implement and administer all of the programs under this rule.

(3) To adopt rules of procedure governing the Board and committees which are not inconsistent with these rules.

(4) To receive from the Bar the fees collected under Rule 17(d) (3) (iv); to prepare and maintain appropriate accounting records showing the receipt and disposition of those funds, which records shall be subject to audit; and

to prepare an annual budget for the expenditure of those funds; to develop appropriate financial policies for managing all of the funds received by the Board; and to propose an annual fee as follows:

(i) submit, no later than September 15 each year, the developed budget, financial policies, and fee structure to the Hawai'i State Bar to allow an opportunity for meaningful review, analysis, input, and comment by the Hawai'i State Bar prior to submission to the supreme court;

(ii) to receive written comments, if any, from the Hawai'i State Bar regarding the budget, financial policies, and fee structure;

(iii) to reply in a timely fashion in writing to any written comments from the Hawai'i State Bar regarding section (ii), provided the comments were received no later than October 15; and

(iv) to submit, no later than November 1 of each year, the budget, financial policies, and annual fee along with any and all written comments received from the Hawai'i State Bar, and any replies thereto, to the supreme court for its review and approval.

(Added effective July 7, 1989; amended February 7, 1992, effective February 7, 1992; amended April 8, 2002, effective July 1, 2002; amended May 12, 2003, effective July 1, 2003; further amended October 16, 2007, effective December 1, 2007.)

16.3. The director.

The Director shall be a trained counselor or an attorney who is a recovering substance abuser and has not used alcohol or drugs for at least five years. A "trained counselor" shall have education, training or experience in the evaluation, counseling or management of persons who are impaired due to substance abuse or physical or mental illness. The Director shall administer the AAP and shall perform such duties as directed by the Board.

(Added effective July 7, 1989.)

16.4. Voluntary program.

(a) The Director shall administer the Voluntary Program of the AAP in accordance with policies and procedures adopted by the Board.

(b) The Director shall provide a source of evaluation and treatment for attorneys, judges, and law students who, on a strictly voluntary basis, desire to avail themselves of such services.

(c) Attorneys, judges, and law students who voluntarily seek assistance from the AAP shall be evaluated, provided education and guidance concerning substance abuse, referred to appropriate substance abuse or mental health treatment providers, and provided emotional support by attorneys and judges who are recovering substance abusers.

(Added effective July 7, 1989; amended December 12, 2006, effective January 1, 2007.)

16.5. Intervention program.

(a) The Director shall establish a Lawyer Volunteer Committee. Each person appointed to the Lawyer Volunteer Committee shall be an attorney, judge or trained counselor.

(b) Intervention is defined as the process of interrupting impairment by utilizing information, confrontation, counseling and motivation techniques to facilitate entry into diagnosis, treatment and rehabilitation.

(c) The Lawyer Volunteer Committee is established as a committee to utilize intervention exclusively with attorneys, judges, and law students who are impaired to facilitate their entry into diagnosis, treatment and rehabilitation.

(d) The Director and/or Lawyer Volunteer Committee shall review all information submitted regarding potentially impaired attorneys, judges, and law students and make a determination of the appropriateness of intervention.

(Added effective July 7, 1989; amended December 12, 2006, effective January 1, 2007.)

16.6. Confidentiality; privilege not to disclose.

(a) The identity of any person who provides information to the Director or Lawyer Volunteer Committee shall be confidential and shall not be subject to discovery or subpoena.

(b) All records and information maintained by the Director, the Lawyer Volunteer Committee or their agents, employees or members relating to matters that are being or have been reviewed and evaluated by the Director or Committee shall be confidential and shall not be revealed to the Board, the supreme court or any other person and shall not be subject to discovery or subpoena; provided, however, that the Director may compile and disclose to the Board statistical information, devoid of all identifying data, relating to the AAP.

(c) A participant in the AAP has a privilege to refuse to disclose and to prevent any other person from disclosing information provided to or maintained by the AAP. A "participant" shall include, but not be limited to, the Director, any employee or agent of the AAP, members of the Board, members of the Lawyers Volunteer Committee, and attorneys, judges, and law students seeking assistance under the AAP.

(Added effective July 7, 1989; amended December 12, 2006, effective January 1, 2007.)

16.7. Immunity.

Notwithstanding any other provision of law or rule to the contrary, there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person for providing information to the Director or Lawyer Volunteer Committee; and there shall be no monetary liability on the part of, and no cause of action for damages shall arise against any participant in the AAP for any act or proceeding undertaken or performed within the scope of Rule 16. For the purposes of this rule, the term "participant" includes employees, agents and volunteers of the AAP, and shall also be deemed to include the officers, directors and employees of the Hawai'i State Bar Association.

(Added effective July 7, 1989; amended February 7, 1992, effective February 7, 1992.)

16.8. Deleted.

Preface

This volume and its companion volume, The Lawyer Regulation Handbook, coalesced out of two separate but related endeavors. On August 1, 1996, the Conference of Chief Justices passed a resolution for a National Study and Action Plan Regarding Lawyer Conduct and Professionalism. In the resolution, the Conference acknowledged a significant decline in lawyer professionalism over the past several decades had resulted in decreased public confidence in the legal profession and in the justice system generally. The Conference—which has always maintained that state supreme courts possess plenary authority to regulate the bar and supervise state trial judges—concluded that, despite some recent efforts to improve lawyer professionalism, a much more coordinated effort by state supreme courts was urgently needed. The resolution called for the Conference to examine state court programs that encourage professionalism among lawyers and to develop a national action plan to bolster appropriate judicial oversight of and support for such programs.

In addition, with grant funds provided by the State Justice Institute, the American Bar Association Center for Professional Responsibility planned to present a conference to encourage states to study the new ABA *Model Rules for Judicial Disciplinary Enforcement*. The Model Rules, approved in 1994 by the ABA House of Delegates, express basic policies designed to enhance the effectiveness of the judicial disciplinary system while protecting the rights of judges who are the subject of complaints. Chief Justice E. Norman Veasey (Del. S. Ct), Chair of the Professionalism and Lawyer Competence Committee of the Conference of Chief Justices, and Raymond R. Trombadore, Chair of the ABA Standing Committee on Professional Discipline, met and determined that a conference covering both topics, directed at state supreme court chief justices, would be advantageous. That conference, held at Rancho Bernardo, California in March 1997, provided a unique opportunity for the chief justices to discuss [with national bar leaders] programs, recommendations and initiatives relating to their regulatory authority over the bar and their supervisory authority over the judiciary.

Because many of the conference attendees were also involved in fulfilling the mandate of the Conference of Chief Justices' resolution, the discussions that began at Rancho Bernardo flowed naturally into the deliberations about the appropriate elements of a National Action Plan on Lawyer Conduct and Professionalism. Likewise, many of the materials prepared for the Rancho Bernardo Conference provided a substantive basis for the study of existing professionalism programs or programs under consideration for adoption. Indeed, an underlying theme of both the discussions from the Rancho Bernardo Conference and the deliberations on the National Action Plan is that any appreciable improvement in the professionalism of lawyers and judges will require a sustained commitment from all segments of the bench, the bar, and the law schools under the guidance of state supreme courts. It seemed only appropriate, therefore, that the proceedings of the Rancho Bernardo Conference and the National Action Plan on Lawyer Conduct and Professionalism that was ultimately adopted by the Conference of Chief Justices should be published and disseminated as a single volume. Indeed, it is significant that this publication came about as a joint effort by the ABA Center for Professional Responsibility, the Conference of Chief Justices and the National Center for State Courts.

A National Action Plan on Lawyer Conduct and Professionalism

A Report of the Working Group on Lawyer Conduct
and Professionalism

Adopted by the Conference of Chief Justices January 21, 1999

ACKNOWLEDGEMENTS

When the CCJ Committee on Professionalism and Lawyer Competence undertook this project, it understood that the successful development of a National Action Plan on Lawyer Conduct and Professionalism would require dedication and hard work. The Committee was entirely accurate in its assessment of the magnitude of this effort. Fortunately, the State Justice Institute provided necessary financial support for the project and a great many individuals gave generously of their time, their expertise, and their institutional resources to bring this project to a successful conclusion. It is with gratitude that the Committee acknowledges these individuals, organizations, and their respective contributions.

To provide the Committee with insight and expert advice on the professionalism initiatives that have developed around the country, the Committee appointed a 30-person Working Group of judges and attorneys. These individuals were assigned to one of six subcommittees – Bar Admission, Disciplinary Enforcement, Educational Initiatives, Lawyer Support, Litigation Reform, and Public Outreach. They assisted the project staff in designing the questionnaires on state professionalism initiatives, evaluated the survey responses, and proposed the recommendations that are included in the National Action Plan. An Executive Committee consisting of Chief Justice E. Norman Veasey (Chair of the CCJ Committee on Professionalism and Lawyer Competence) and the chairs of the Working Group subcommittees – Chief Judge Judith Kaye (NY) and Chief Justices Shirley Abrahamson (WI), Ernest Finney (SC), Burley Mitchell (NC), Gerald Vandewalle (ND), Michael Zimmerman (UT), and Thomas Zlaket (AZ) – met via teleconference on several occasions to coordinate the work of their respective subcommittees.

The Committee also owes a tremendous debt to the ABA Center for Professional Responsibility. Jeanne Gray, the Center's Executive Director, graciously offered the staff and resources of the Center to support this project. Charlotte (Becky) Stretch, Special Counsel, served as the project consultant and deserves special mention for her central role in this endeavor. In addition to extensive expertise about lawyer ethics and professionalism, she brought superb organizational skills, a keen editorial eye, and unwavering enthusiasm for the project and the objectives it sought to gain. Other Center contributors were Arthur Garwin (Professionalism Counsel), Ellyn Rosen (Assistant Regulation Counsel), John Holtaway (Client Protection Counsel), and Carol Weiss (Former Director of the ABA Section of Legal Education and Admissions to the Bar) all of whom offered thoughtful commentary on the briefing papers and early drafts of the National Action Plan. Susan Campbell and Debra Taylor provided administrative assistance for the Center.

This project was staffed through the Research Division of the National Center for State Courts (NCSC). Edward O'Connell of the NCSC Government Relations Division played an important role in recruiting NCSC staff to manage the project on behalf of the Committee. Research Assistants Meredith Peterson and Charlene Daniel patiently sorted through hundreds of survey responses to provide coherent summaries of the professionalism initiatives for consideration by the Working Group. They later translated much of this material into the commentary for the National Action Plan. Program Specialist Catina Burrell provided invaluable administrative support for the project including organization of the survey responses, coordination of Working Group

teleconferences, and distribution of numerous drafts of the National Action Plan to the project's many contributors. Project Manager Paula L. Hannaford helped secure funding for the project, organized the project tasks, coordinated the activities of the project staff, and managed to keep the project on schedule. She is truly the "engine" and the "glue" of this project and deserves extraordinary praise for her highly professional work.

CCJ National Study and Action Plan
On Lawyer Conduct and Professionalism

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EXECUTIVE SUMMARY

In response to concerns about a perceived decline in lawyer professionalism and its effect on public confidence in the legal profession and the justice system, the Conference of Chief Justices (CCJ) adopted Resolution VII at its 1996 Annual Meeting. This resolution called for a study of lawyer professionalism and the development of a National Action Plan to assist state appellate courts of highest jurisdiction in providing leadership and support for professionalism initiatives. With funding by the State Justice Institute and support from the National Center for State Courts (NCSC) and the American Bar Association Center for Professional Responsibility ("Center"), the CCJ Committee on Professionalism and Lawyer Competence ("Committee") carried out the resolution.

Under the direction of the Committee, the NCSC and the Center surveyed state courts, bar associations and other legal organizations, and ABA accredited law schools concerning professionalism and legal ethics programs in each state and solicited their opinions about the support that such programs need from state supreme courts. Summaries of the responses were provided to a Working Group of 30 judges and lawyers who made recommendations about specific initiatives that should be included in the National Action Plan. In August 1998, a draft of the National Action Plan was distributed to a wide variety of legal and judicial organizations and made available from the NCSC website for public review and comment. Based on comments received, the Working Group finalized the National Action Plan for submission to the CCJ for consideration at its 1999 Midyear Meeting.

The report consists of three sections. Section I contains a detailed description of the institutional and individual responsibilities of the bench, the bar, and the law schools in promoting lawyer ethics and professionalism. In the course of conducting the study, the Working Group recognized that different components of the legal community influence lawyer professionalism in unique ways. A sustained commitment and coordinated effort by all of them is needed to effect any meaningful change in the level of professionalism demonstrated by the legal community.

Section II contains the specific recommendations of the National Action Plan. The recommendations are organized in the familiar black letter and commentary format and address seven specific topics of lawyer ethics and professionalism: (A) Professionalism, Leadership, and Coordination; (B) Improving Lawyer Competence; (C) Law School Education and Bar Admission; (D) Effective Lawyer Regulation; (E) Public Outreach Efforts; (F) Lawyer Professionalism in Court; and (G) Interstate Cooperation. The specific recommendations of the National Action Plan are:

A. Professionalism, Leadership, and Coordination

The appellate court of highest jurisdiction in each state should take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs. Specific efforts should include:

- Establishing a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction;
- Ensuring that judicial and legal education makes reference to broader social issues and their impact on professionalism and legal ethics;

- Increasing the dialogue among the law schools, the courts and the practicing bar through periodic meetings; and
- Correlating the needs of the legal profession – bench, bar, and law schools – to identify issues, assess trends and set a coherent and coordinated direction for the profession.

B. Improving Lawyer Competence

1. Continuing Legal Education (CLE)

Each state's appellate court of highest jurisdiction should encourage and support the development and implementation of a high-quality, comprehensive CLE program including substantive programs on professionalism and competence. An effective CLE program is one that:

- Requires lawyer participation in continuing legal education programs;
- Requires that a certain portion of the CLE focus on ethics and professionalism;
- Requires that all lawyers take the mandated professionalism course for new admittees;
- Monitors and enforces compliance with meaningful CLE requirements;
- Encourages innovative CLE in a variety of practice areas;
- Encourages cost-effective CLE formats;
- Encourages the integration of ethics and professionalism components in all CLE curricula;
- Encourages CLE components on legal practice and office management skills, including office management technology; and
- Teaches methods to prevent and avoid malpractice and unethical or unprofessional conduct and the consequences of failing to prevent and avoid such conduct.

2. Law Office Management

State bar programs should support efforts to improve law office efficiency. Effective support includes:

- Establishing a law office management assistance program;
- Providing assistance with daily law office routines; and
- Providing monitoring services for lawyers referred from the disciplinary system.

3. Assistance with Ethics Questions

Lawyers should be provided with programs to assist in the compliance of ethical rules of conduct. State bar programs should:

- Establish an Ethics Hotline;
- Provide access to advisory opinions on the Web or a compact disc (CD); and
- Publish annotated volumes of professional conduct.

4. Assistance to lawyers with mental health or substance abuse problems

Lawyers need a forum to confront their mental health and substance abuse problems. State bar programs should:

- Create a Lawyer Assistance Program (LAP) if one does not exist;
- Fund the LAP through mandatory registration fees;
- Provide confidentiality for LAP programs;
- Establish intervention systems for disabilities and impairments other than substance abuse or expand existing LAPs to cover non-chemical dependency impairments;
- Provide monitoring services for lawyers referred from the disciplinary system; and
- Provide career counseling for lawyers in transition.

5. Lawyers Entering Practice for the First Time – Transitional Education

Judicial leadership should support the development and implementation of programs that address the practical needs of lawyers immediately after admission to the bar. Effective programs for newly admitted lawyers:

- Mandate a course for new admittees that covers the fundamentals of law practice;
- Emphasize professionalism;
- Increase emphasis on developing post-graduation skills; and
- Ensure the availability of CLE in office skills for different office settings.

6. Mentoring

Judicial leadership should promote mentoring programs for both new and established lawyers. Effective programs:

- Establish mentoring opportunities for new admittees;
- Establish mentoring opportunities for solo and small firm practitioners;
- Provide directories of lawyers who can respond to questions in different practice areas;
- Provide networking opportunities for solo and small firm lawyers; and
- Provide technology for exchange of information.

C. Law School Education and Bar Admission

1. Law School Curriculum

In preparing law students for legal practice, law schools should provide students with the fundamental principles of professionalism and basic skills for legal practice.

2. Bar Examination

The subject areas tested on the examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers.

3. Character and Fitness Evaluation

Law schools should assist bar admissions agencies by providing complete and accurate information about the character and fitness of law students who apply for bar admission.

4. Bar Admission Procedures

Bar admissions procedures should be designed to reveal instances of poor character and fitness. If appropriate, bar applicants may be admitted on a conditional basis.

D. Effective Lawyer Regulation

1. Complaint Handling

Information about the state's system of regulation should be easily accessible and presented to lawyers and the public in an understandable format. The disciplinary agency, or central intake office if separate, should review complaints expeditiously. Matters that do not fall under the jurisdiction of the disciplinary agency or do not state facts that, if true, would constitute a violation of the rules of professional conduct should be promptly referred to a more appropriate mechanism for resolution. Complainants should be kept informed about the status of complaints at all stages of proceedings, including explanations about substantive decisions made concerning the complaint.

2. Assistance to lawyers with ethics problems or "minor" misconduct (e.g., acts of lesser misconduct that do not warrant the imposition of a disciplinary sanction)

The state's system of lawyer regulation should include procedures for referring matters involving lesser misconduct to an appropriate remedial program. Such procedures may include:

- Required participation in a law office management program;
- Required participation in a lawyer assistance program;
- Enrollment in an "ethics school" or other mandatory CLE; and
- Participation in a fee arbitration or mediation program.

3. Disciplinary Sanctions

The range of disciplinary sanctions should be sufficiently broad to address the relative severity of lawyer misconduct, including conduct unrelated to the lawyer's legal practice. Disciplinary agencies should use available national standards to ensure interstate consistency of disciplinary sanctions. All public sanction should be reported to the National Lawyer Regulatory Databank of the American Bar Association.

4. Lawyers' Funds for Client Protection

The state's system of lawyer regulation should include a Lawyers' Fund for Client Protection to shield legal consumers from economic losses resulting from an

attorney's misappropriation of law client and escrow money in the practice of law. Rules or policies of the appellate court of highest jurisdiction should:

- Provide for a statewide client protection fund;
- Require that the fund substantially reimburse losses resulting from dishonest conduct in the practice of law;
- Finance the fund through a mandatory assessment on lawyers;
- Designate the fund's assets to constitute a trust;
- Appoint a board of trustees, composed of lawyers and lay persons, to administer the fund; and
- Require the board of trustees to publicize the fund's existence and activities.

5. Other Public Protection Measures

The state's system of lawyer regulation should include other appropriate measures of public protection. Such measures that the Court should enact include:

- Mandating financial recordkeeping, trust account maintenance and overdraft notification;
- Establish a system of random audits of trust accounts;
- Requiring lawyers who seek court appointments to carry malpractice insurance;
- Collect annual information on lawyers' trust accounts;
- Studying the possibility of recertification;
- Providing for interim suspension for threat of harm; and
- Establishing a 30-day no contact rule.

6. Efficiency of the Disciplinary System

The state system of lawyer regulation should operate effectively and efficiently. The Court should enact procedures for improving the system's efficiency, including:

- Providing for discretionary rather than automatic review of hearing committee or board decisions by the Court;
- Providing for discipline on consent;
- Requiring respondents to disciplinary investigations to be reasonably cooperative with investigatory procedures;
- Establishing time standards for case processing;
- Periodically reviewing the system to increase efficiency where necessary;
- Eliminating duplicative review in the procedures for determining whether to file formal charges;
- Authorizing disciplinary counsel to dismiss complaints summarily or after investigation with limited right of complainants to seek review;
- Using professional disciplinary counsel and staff for investigation and prosecution and volunteers on boards and hearing committees;
- Providing appropriate training for all involved; and
- Incorporating disciplinary experiences in CLE curricula.

7. Public Accountability

The public should have access to information about the system of lawyer regulation including procedures, aggregate data concerning its operations, and lawyers' disciplinary records. Laypersons should be included on disciplinary hearing panels and boards. Other measures to ensure public accountability of the disciplinary agency include:

- Making written opinions available in all cases;
- Making formal disciplinary hearings open to the public;
- Collecting and making available information on lawyers' malpractice insurance; and
- Speaking about the disciplinary system at public gatherings.

E. Public Outreach Efforts

1. Public Education

Judges, lawyers and bar programs should provide more public understanding of lawyer professionalism and ethics by developing and implementing public education programs. Effective public education programs should:

- Emphasize lawyer professionalism in court communications with the public;
- Provide a "Public Liaison" office or officer to serve in a clearinghouse function;
- Distribute public education materials in places commonly accessible to the public;
- Include public speaking on the topic of professionalism on the agenda for bar association speaking bureaus;
- Encourage a more active role between educational institutions and organizations and the justice system; and
- Educate the legislative and executive branches of government about issues related to the legal profession and the justice system.

2. Public Participation

The participation of the public should be supported in all levels of court and bar institutional policy-making by judges, lawyers, and bar programs. Judges, lawyers, and bar programs should:

- Publicize the nomination and appointment process for public representatives on court and bar committees;
- Once appointed, provide lay members access to the tools necessary for effective participation; and
- Provide adequate funding on an ongoing basis.

3. Public Access to the Justice System

Judges, lawyers, and bar programs should encourage public access to the justice system through the coordination of pro bono programs. Effective coordination of pro bono programs should:

- Encourage judicial support and participation in lawyer recruitment efforts for pro bono programs;
- Provide institutional support within the court system for lawyer pro bono service;
- Establish an "Emeritus Lawyer" pro bono program;
- Provide institutional and in-kind support for the coordination of pro bono programs; and
- Explore funding alternatives to support pro bono programs.

4. Public Opinion

To gauge public opinion about the legal profession and the level of professionalism demonstrated by lawyers, the court and the bar should create regular opportunities for the public to voice complaints and make suggestions about judicial/legal institutions.

5. Practice Development, Marketing and Advertising

The judiciary, the organized bar and the law schools should work together to develop standards of professionalism in attorney marketing, practice development, solicitation and advertising. Such standards should:

- Recognize the need for lawyers to acquire clients and the benefit to the public of having truthful information about the availability of lawyers;
- Emphasize the ethical requirements for lawyer advertising and client solicitations;
- Emphasize the need to be truthful and not misleading; and
- Encourage lawyers to employ advertising and other marketing methods that enhance respect for the profession, the justice system and the participants in that system.

F. Lawyer Professionalism in Court

1. Alternative Dispute Resolution Programs

If appropriate for the resolution of a pending case, judges and lawyers should encourage clients to participate in Alternative Dispute Resolution (ADR) programs. An effective ADR program should:

- Ensure that court-annexed ADR programs provide appropriate education for lawyers about different types of ADR (e.g., mediation, arbitration);
- Establish standards of ethics and professional conduct for ADR professionals;
- Require lawyers and parties to engage the services of ADR professionals who adhere to established standards of ethics and professional conduct;
- Encourage trial judges to implement and enforce compliance with ADR orders; and
- Educate clients and the public about the availability and desirability of ADR mechanisms.

2. Abusive or Unprofessional Litigation Tactics

To prevent unprofessional or abusive litigation tactics in the courtroom, the court and judges should:

- Encourage consistent enforcement of procedural and evidentiary rules;
- Encourage procedural consistency between local jurisdictions within states;
- Adopt court rules that promote lawyer cooperation in resolving disputes over frivolous filings, discovery, and other pretrial matters;
- Encourage judicial referrals to the disciplinary system;
- Educate trial judges about the necessary relationship between judicial involvement in pretrial management and effective enforcement of pretrial orders;
- Encourage increased judicial supervision of pretrial case management activities; and
- Establish clear expectations about lawyer conduct at the very first opportunity.

3. High Profile Cases

In high profile cases, lawyers should refrain from public comment that might compromise the rights of litigants or distort public perception about the justice system.

G. Interstate Cooperation

The appellate courts of highest jurisdiction should cooperate to ensure consistency among jurisdictions concerning lawyer regulation and professionalism and to pool resources as appropriate to fulfill their responsibilities. Specific efforts of interstate cooperation include:

- Continued reporting of public sanctions to ABA National Regulatory Data Bank;
- Using the Westlaw Private File of the ABA National Regulatory Data Bank;
- Inquiring on the state's annual registration statement about licensure and public discipline in other jurisdictions;
- Providing reciprocal recognition of CLE;
- Establishing regional professionalism programs and efforts;
- Recognizing and implementing the International Standard Lawyer Numbering System created by Martindale-Hubbe and the American Bar Association to improve reciprocal disciplinary enforcement; and
- Providing information about bar admission and admission on motion (including reciprocity) on the bar's website.

Section III contains the briefing papers that were prepared for the Working Group based on the survey responses from the national study. There are eight briefing papers in all: (1) Professionalism; (2) Educational Initiatives; (3) Public Outreach; (4) Litigation Reform; (5) Bar Admission; (6) Lawyer Support; (7) Disciplinary Enforcement; and (8) Law School Education.

Appended to the report is Resolution VII adopted by the CCJ on August 1, 1996 and copies of the survey instruments that were sent to the courts, various legal organizations, and the deans of ABA accredited law schools.

INTRODUCTION

The vast majority of lawyers in this country are competent professionals. They are conscientious advocates of their clients' interests, honest in their representations to courts and to opposing counsel, civil to their legal colleagues, and generous contributors of their time and expertise to their communities. In short, they conduct themselves according to the highest dictates of the legal profession. Nevertheless, the unprofessional and unethical conduct of a small, but highly visible, proportion of lawyers taints the image of the entire legal community and fuels the perception that lawyer professionalism has declined precipitously in recent decades. The implications of this behavior for the American justice system are extremely serious in that the behavior contributes to decreased public confidence in legal and judicial institutions as well as heightened stress and decreased professional satisfaction for those lawyers who endeavor to practice in a professional manner.

In response to these concerns, the Conference of Chief Justices (CCJ) adopted a resolution at its 1996 Annual Meeting calling for a study of lawyer professionalism and the development of a National Action Plan to assist state appellate courts of highest jurisdiction to reverse this trend. With funding by the State Justice Institute, the National Center for State Courts (NCSC) in cooperation with the American Bar Association Center for Professional Responsibility undertook a national study to examine state professionalism initiatives. This report is the culmination of these coordinated efforts.

Successful efforts to improve lawyer conduct and enhance professionalism cannot be accomplished unilaterally. The objective of such efforts is a change in the very culture of the legal profession. Not only is it important to correct the behavior of lawyers who fail to live up to professional norms, it is critical that those lawyers who do conduct themselves professionally once again become the most visible members of the legal community. Success requires a sustained commitment from all segments of the bench, the bar, and the academy. Each plays a different role, both institutionally and individually, in their contributions to these efforts. Section I of this report describes these roles in detail.

Section II of this report consists of specific recommendations for state courts to improve lawyer conduct and enhance professionalism. These recommendations are based on the responses to the survey on professionalism initiatives conducted in the fall of 1997. The types of initiatives that have proven effective in the various jurisdictions cover a broad spectrum of ideas. Many of the recommendations concern programs that are not new, but were cited by a number of jurisdictions as being particularly effective in addressing lawyer conduct. These recommendations address all of the areas of professionalism that were identified by survey respondents in the national study. In addition, these recommendations recognize that judges must lead by example in demonstrating civility and other characteristics of professionalism. An effective system of lawyer regulation is a necessary base for any efforts to enhance lawyer professionalism. The obverse applies as well – enhancing lawyer professionalism should aid the goals of effective lawyer regulation. This report recognizes that each state's appellate court of highest jurisdiction has ultimate authority and responsibility for ensuring that that base is sufficient to protect the public from lawyer misconduct of every degree – major and minor.

Professionalism is a much broader concept than legal ethics. For the purposes of this report, professionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethics rules are what a lawyer must obey. Principles of professionalism are what a lawyer should live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic. The bench and the bar can create an environment in which professionalism can flourish, and these recommendations are intended to assist in that endeavor. But it is the responsibility of individual judges and lawyers to demonstrate this characteristic in the performance of their professional and personal activities.

Section III of the National Action Plan consists of a series of briefing papers that were prepared for the CCJ Working Group on Lawyer Conduct and Professionalism. These briefing papers summarize the state responses to the CCJ Survey on Lawyer Professionalism Initiatives. They are included for illustration purposes to provide additional information about various programs that states have enacted to enhance lawyer professionalism.

- **Publish annotated volumes of professional conduct.**

Comment:

The vast majority of lawyers make a good faith effort to comply with state legal ethics rules. Services should be provided for those who choose to make a good faith effort to comply with state ethical rules of conduct. A hotline serves as a forum for lawyers to direct their ethical inquiries to members of the disciplinary counsel or other qualified bar personnel. State bar programs should use the most efficient services to comply with demand. For example, Florida has a hotline staff of eight (8) lawyers with an increasing demand to hire more personnel. Hawaii uses a toll free number to better serve the outer island members. To fund this service, New Jersey uses a 900 number. Ethics assistance programs should provide lawyers with access to information on jurisdictional interpretations of rules. For advisory opinions to be more readily accessible, suggestions include Internet sources, state bar web sites, and CD-ROM materials. States also may provide lawyers with annotations to state rules of professional conduct.

4. Assistance to lawyers with mental health or substance abuse problems

Lawyers need a forum to confront their mental health and substance abuse problems. State bar programs should:

- **Create a Lawyer Assistance Program (LAP) if one does not exist;**
- **Fund LAP through mandatory registration fees;**
- **Provide confidentiality for LAP programs;**
- **Expand existing LAPs to cover non-chemical dependency impairments;**
- **Establish intervention systems for disabilities and impairments other than substance abuse;**
- **Provide monitoring services for lawyers referred from the disciplinary system; and**
- **Provide career counseling for lawyers in transition.**

Comment:

Lawyer assistance programs have been very effective in offering lawyers support for alcoholism. But lawyers also need help with chemical dependency (e.g., cocaine, marijuana, heroin) and non-chemical dependency problems (e.g., eating disorders, depression and suicide, gambling, phobias). The use of mandatory registration fees is suggested to fund LAPs. Registration fee money can be used to solicit the services of experienced professional mental health providers.

As an incentive for lawyers to take advantage of bar-related programs, they should be entitled to the same type of immunity and confidentiality privileges that exist in other dependency programs. State bars are also in a position to intervene where outside mental health professionals are not able—LAPs can offer assistance for problems commonly associated with the practice of law.

Intervention, which entails lawyer confrontation, is essential for an effective LAP. If a lawyer has chemical dependency problems, for example, volunteers or other members of the local LAP may order the lawyer to clear out his or her desk, purse, or car to search for substances. Or a lawyer who is experiencing non-chemical dependency problems can be monitored by LAP members with periodic visits to the lawyer's office or home. In addition to intervention services, monitoring can be provided for lawyers referred from the disciplinary system to ensure compliance with judicial or agency orders.

LAPs also should offer career counseling for lawyers in transition. Career counseling can be given to assist lawyers with career changes to other professions less stressful than the practice of law. For those who no longer are members of the legal profession yet remain in need of assistance, counseling services still should be provided.

5. *Lawyers Entering Practice for the First Time — Transitional Education*

Judicial leadership should support the development and implementation of programs that address the practical needs of lawyers immediately after admission to the bar. Effective programs for newly admitted lawyers:

- **Mandate a course for new admittees that covers the fundamentals of law practice;**
- **Emphasize professionalism;**
- **Increase emphasis on developing post-graduation skills; and**
- **Ensure the availability of CLE in office skills for different office settings.**

Comment

Many young lawyers enter legal practice in need of basic lawyering skills, often without the support of a large firm to assist them during those first transitional years. This lack of education and support is exacerbated by a "Rambo" approach to lawyering that, to newly admitted lawyers, may appear to be the norm rather than the exception. Many states have addressed these problems by instituting a mandatory practical skills and professionalism program for every newly admitted lawyer. These states recognize the need for practical skills training that is proactive and is provided after admission rather than in response to an already existing disciplinary problem. The most useful practical skills programs also are tailored to the individual needs of different categories of law practice. In addition to teaching basic lawyering skills, these programs should provide an opportunity for new lawyers to interact with faculty recognized for a high degree of professionalism. Making an investment in this type of educational program is essential to the success of new lawyers and to the image of the legal profession as a whole.

The vast majority of states offer "bridge-the-gap" classes for newly admitted lawyers, although the classes themselves vary extensively in the number of topics covered, the

HAWAII ATTORNEYS and JUDGES ASSISTANCE PROGRAM REVIEW

August 2 - 4, 2006

By

Richard Soden, Esq., Myer J. Cohen, Esq., and William Leary, Esq.

A SERVICE OF THE ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS

INTRODUCTION

The Evaluation Program

In 1988, the ABA Commission on Lawyer Assistance Programs (CoLAP) initiated a national project to confer with state lawyer assistance programs upon invitation by the appropriate authority. As part of that project, CoLAP undertakes evaluations of lawyer assistance programs and the issues they address. The evaluation process involves sending a team of individuals experienced in the field of peer assistance to examine the structure, operations and procedures of the state's lawyer assistance program. At the conclusion of its study, the evaluation team reports its findings and recommendations for the improvement of the system to the lawyer assistance program, state bar association, Supreme Court, or other authority that issued the invitation for the evaluation.

The team examines the lawyer assistance program in reference to criteria from the *Guiding Principles for Lawyer Assistance Programs* (Guiding Principles), adopted by the ABA in 1991, and the *Model Lawyer Assistance Program* (Model LAP), adopted by the ABA in 1995 and amended in 2004. The Principles and Model LAP reflect experience gained by CoLAP in almost twenty years of conducting program evaluations. They incorporate policies and procedures drawn from and tested by the collective experience of lawyer assistance programs throughout the United States and Canada. The consulting team also uses the report and recommendations of the *ABA Commission on the Evaluation of Disciplinary Enforcement* (McKay Commission), as adopted by the ABA House of Delegates in February 1992, and the *National Judicial Action Plan on Professionalism* created by the National Conference of Chief Justices (Chief Justices' Plan) as adopted in 1999. These recommendations reaffirm, expand, and add to many of the suggestions set forth in the Guiding Principles and Model LAP.

If the on-site evaluation team identifies areas to be addressed, the team and CoLAP members then determine whether the Principles, the Model LAP, the McKay Commission Report, and the Justices' Plan provide workable solutions, or if some other recommendation should be made. In several states where the particular ABA models are not followed, teams have discovered that because of local factors the anticipated problems do not exist. In such situations the team does not recommend that the ABA standards be followed.

The CoLAP Team and Interview Process for Hawaii

On August 2 - 4, 2006, by invitation of Hawai'i Attorneys and Judges Assistance Program (the AAP), CoLAP provided three reviewers to comment on lawyer assistance efforts in the State of Hawai'i. The CoLAP reviewers were: Richard A. Soden, Esq., Myer J. (Michael) Cohen, Esq., and William R. Leary, Esq. Mr. Soden is a partner in the Business Law Department of Goodwin Procter LLP, a fellow of the Boston and American Bar Foundations, current President of The Boston Bar Foundation, a trustee of the Social Law Library, and an overseer of the Massachusetts Supreme Judicial Court Historical Society. He is a past President of the Boston Bar Association and the Massachusetts Black Lawyers Associates. He also serves as Chairman of the Massachusetts Supreme Judicial Court Lawyers Concerned for Lawyers Oversight Committee, is the current chairman of the American Bar Association's Commission on Lawyers Assistance Programs, former chairman of the Association's Standing Committee on Bar Services and Activities, and a member of the ABA's House of Delegates. Mr. Cohen is an attorney admitted in Massachusetts and Florida, past member of the Commission on Lawyer Assistance Programs and the Commission's Advisory Committee, past Chair of the Florida Bar's Quality of Life and Career Committee, current member of the Florida Bar's Standing Committee on Professionalism, and Executive Director of Florida Lawyers Assistance, Inc. Mr. Leary is an attorney admitted in Louisiana, past member of the Commission on Lawyer Assistance Programs, current member of the Commission's Advisory Committee, and Executive Director of the Louisiana Lawyers Assistance Program.

As part of the review process, the evaluators met with the following individuals, to all of whom the evaluators are sincerely grateful:

- ! Members the Supreme Court of Hawai'i
- " Chief Justice Ronald T. Y. Moon
- " Associate Justice Steven H. Levinson
- " Associate Justice Paula A. Nakayama
- " Associate Justice Simeon R. Acoba, Jr.
- " Associate Justice James E. Duffy, Jr.
- ! The Honorable Daniel R. Foley, Intermediate Court of Appeals
- ! The Honorable Victoria S. Marks, 1st Circuit Court
- ! The Honorable Marcia Waldorf, 1st Circuit Court
- ! Gayle John Lau, Esq., Chair, Supreme Court Nominating Committee
- ! Robert A. Chong, Esq., Chair, Hawai'i Board of Bar Examiners
- ! Carole R. Richelieu, Esq., Chief Disciplinary Counsel
- ! Wayne Parsons, Esq., President, Hawai'i State Bar Association
- ! Lyn Flanigan, Esq., Executive Director, Hawai'i State Bar Association
- ! Assistant Dean Laurie Tochiki, Esq., University of Hawai'i Law School
- ! Members of the AAP Board/Members of the Lawyers Volunteer Committee (LVC)
- " B, Esq.
- " A, Esq.
- " R, Esq.
- " R, Esq.
- " S, Esq.
- " J, Esq.

" D, Esq.
" M, Esq.

Interviews were conducted at the AAP offices in Honolulu and at the Hawai'i Supreme Court. As stated, the evaluators are sincerely indebted to all of the persons interviewed for taking the time from their extremely busy schedules to meet with them, as well as for their candid and insightful comments and suggestions concerning the various aspects of attorney assistance throughout the State of Hawai'i. The participation of all concerned is especially notable in light of the fact that the evaluation was conducted during the American Bar Association's Annual Meeting in Honolulu, for which the Hawai'i State Bar Association acted as host. Needless to say, every one of the above individuals had schedules that were no doubt overwhelming, and the willingness to devote their time to the evaluation process speaks volumes about their commitment to the well-being of legal professionals in Hawai'i.

Components of the Hawai'i Lawyers Assistance Effort

The evolution of the current lawyer assistance movement in Hawai'i began in the 1970's as a voluntary organization of lawyers helping their colleagues. The efforts of these attorneys, as well as the problems associated with chemical dependency and psychological issues, were recognized by the Supreme Court through the adoption of Supreme Court Rule 16 in 1989. The mission of the program created by Rule 16 was,

to provide immediate and continuing assistance to attorneys who practice law in the State of Hawai'i and judges of the courts of the State of Hawai'i who suffer from problems, disability or impairment which affect their professional performance for any reason ("impairment"), including but not limited to excessive use of alcohol or drugs ("substance abuse"), physical or mental illness, or other infirmity. Professional performance is affected when an attorney or judge is incapable of devoting the time and attention to, and providing the quality of service in, his or her law practice or judicial duties which is necessary to protect the interest of a client or litigant.

Rule 16 directs that a nine person (six attorneys and three judges) Attorneys and Judges Assistance Program Board be created, with members nominated by the Supreme Court's Nominating Committee and appointed by the Court. The Rule further provides that funding for the program shall be derived from a per member dues setoff, which was set at, and remains, \$20.00 per active Hawai'i bar member (approximately 4,200) and \$10.00 for inactive members (approximately 2,200). The program's Director is given the authority to establish and appoint members of a Lawyer Volunteer Committee (LVC) to assist him in identifying and intervening on lawyers who may be experiencing impairment issues.

Since the adoption of Rule 16, the AAP has expanded its presence throughout the state. For approximately twelve years, until December 2005, the program was directed by Peter Donahoe, Esq., who carried the message of attorney impairment and recovery through the islands

and became well known to the Bar, the courts, and the state's law school. Upon Mr. Donahoe's retirement, its current Director, Steven Dixon, a recovering Hawai'i attorney and substance abuse counselor, was hired. By all reports received by the evaluators, Mr. Dixon has been diligent about continuing and expanding upon his predecessor's efforts.

Operation of a comprehensive lawyer assistance program in The State of Hawai'i presents logistical problems not seen by the evaluators heretofore. While many other states have their highest concentration of lawyers in one or several urban areas, both those urban areas and the more rural areas are contiguous by land, allowing LAP personnel to reach most of the lawyers in the state by car. By contrast, Hawai'i not only has its primary concentration of attorneys in one location, Honolulu, but many of its remaining lawyers practice on the outlying islands, making the task of personal contact even more difficult. Despite this, all the individuals interviewed expressed their opinion that Mr. Dixon has been doing the best he can to reach all Hawai'i attorneys with the resources available to him.

The overall impression of the evaluation team was that the AAP is a healthy, fully functioning lawyer assistance program which is strongly supported by all facets of the legal community. However, Mr. Dixon and the members of the AAP Board believe that the AAP can do an even better job of fulfilling its mission, which motivated their request for this evaluation. The evaluation team is of the opinion that the AAP's effectiveness can be increased with the implementation of some reasonably simple measures, and makes the following observations and recommendations:

***OBSERVATIONS AND RECOMMENDATIONS BASED UPON
THE ABA'S GUIDING PRINCIPLES FOR LAWYER ASSISTANCE PROGRAMS,
THE ABA MODEL LAWYER ASSISTANCE PROGRAM AND
THE MCKAY COMMISSION REPORT***

1) A Statewide Program

Guiding Principle 1 states: *A state-wide lawyer assistance program should be in place. Each state should have an active lawyers' assistance program for attorneys with substance abuse or other impairment problems. This program should include representatives from the judiciary, the bar and legal educators with a goal of guiding lawyers and law students with substance abuse or other impairment problems into successful and continuing recovery.*

As noted, Rule 16 creates a comprehensive lawyers and judges assistance program for the State of Hawai'i. In fact, the inclusion of judges in the rule's original format places Hawai'i in a very small minority of states which recognize (or are willing to acknowledge) that the members of the judiciary suffer from these impairments at the same rate as their colleagues at the bar. Rule 16.1(b) directs that the AAP shall be comprised of a voluntary and an intervention program, but does not limit the AAP to these two categories, which would allow for the inclusion of a monitoring component (as discussed below), should the Court and Board determine it to be

appropriate. The provisions of Rule 16.1 – 16.5 closely track the suggested provisions of Model LAP Rules 1 – 5.

While personal contact with attorneys on neighbor islands presents some difficulty, the AAP Director has used his best efforts to visit those areas and to include the costs of regular trips to the other islands in the program's budget. In addition, he has been moderately successful at setting up volunteer groups on the other islands that can handle matters in his absence. However, it is recommended that these efforts continue and the sufficient funding be provided to allow the Director to expand the program's presence on the other islands.

a) Confidentiality

Guiding Principle 2 states: *The confidentiality of those who seek and provide help must be maintained through a rule of court or a legislative act. Those involved in lawyer assistance programs cite confidentiality as essential to the success of any program. The fear that their problem will be reported to disciplinary authorities is so great that many in need will not seek help unless their confidentiality is assured.*

This issue has been addressed by Rule 16.6, which states:

(a) The identity of any person who provides information to the Director or Lawyer Volunteer Committee shall be confidential and shall not be subject to discovery or subpoena.

(b) All records and information maintained by the Director, the Lawyer Volunteer Committee or their agents, employees or members relating to matters that are being or have been reviewed and evaluated by the Director or Committee shall be confidential and shall not be revealed to the Board, the supreme court or any other person and shall not be subject to discovery or subpoena; provided, however, that the Director may compile and disclose to the Board statistical information, devoid of all identifying data, relating to the AAP.

(c) A participant in the AAP has a privilege to refuse to disclose and to prevent any other person from disclosing information provided to or maintained by the AAP. A "participant" shall include, but not be limited to, the Director, any employee or agent of the AAP, members of the Board, members of the Lawyers Volunteer Committee, and attorneys or judges seeking assistance under the AAP.

In some jurisdictions, statutory protection is required to maintain confidentiality outside of bar disciplinary matters. However, given the Court's prohibition against disclosure through discovery or subpoena in Rule 16.6, such statutory protection does not seem necessary in Hawai'i.

b) Immunity

Guiding Principle 3 states: *Members of the profession who serve in lawyers assistance programs should be immune from civil liability. Volunteers who give of their time and efforts to assist those with impairment problems should not be liable in damages for acts done in good faith.*

As with confidentiality, this issue has been more than adequately addressed by Rule 16.7, which states:

Notwithstanding any other provision of law or rule to the contrary, there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person for providing information to the Director or Lawyer Volunteer Committee; and there shall be no monetary liability on the part of, and no cause of action for damages shall arise against any participant in the AAP for any act or proceeding undertaken or performed within the scope of Rule 16. For the purposes of this rule, the term "participant" includes employees, agents and volunteers of the AAP, and shall also be deemed to include the officers, directors and employees of the Hawai'i State Bar Association.

2) Ties to the Recovery Community and Organized Bar

Guiding Principle 4 states: *Strong, but not exclusive, ties with the recovering community should be maintained. Those in recovery from substance abuse must make a commitment to abstain from using alcohol and other drugs. Participation in one of the twelve steps programs or their equivalent is necessary to sustain that commitment. It is essential therefore that leaders of the bar and the recovering lawyer community work together.*

It is clear that this principle has been embraced by the staff and volunteers of the AAP. Both the prior and current directors have maintained strong and cooperative ties with local Alcoholics Anonymous and Narcotics Anonymous programs, and AAP volunteers in recovery act as examples for the program's newer members. As stated in Rule 16.1(c):

(c) AAP shall not provide treatment to impaired attorneys and judges but shall instead provide education and guidance concerning substance abuse, refer impaired attorneys and judges to appropriate substance abuse and/or mental health treatment providers, and provide emotional support to impaired attorneys and judges.

The AAP staff and volunteers make it clear that participation in the AAP is not a substitute for a commitment to an abstinence program such as A.A. or N.A., but that such participation is a resource available to legal professionals in addition to their primary recovery program. The AAP Director has continued his predecessor's efforts at reaching out to the recovering legal community to enlist its assistance as AAP volunteers, without whose contributions the AAP could not operate. The contact between the AAP Director and the few treatment programs in the state is close, although the lack of treatment alternatives, especially for professionals, in Hawai'i is troubling

While the relationship between the AAP and the Hawai'i State Bar Association (HSBA) is close and cooperative, the evaluators would make certain recommendations that can increase the synergy to both agencies' benefit. The opportunity to promote outreach and educational

efforts on both sides can be expanded with minimal effort and expense. On the part of the HSBA, the assistance could include monthly inclusion of AAP ads, personal stories, and articles in bar publications at no cost to the AAP (on a space available basis). These can range from small notations of the AAP's name and telephone number to multi-page articles to theme issues dealing with attorney impairment (for an example of such a publication, see the December 1999 issue of *The Florida Bar Journal* at <http://www.flap.org/journal/index99.html>). Similar articles and ads could be placed in judicial publications and newsletters. The HSBA might also consider placing the AAP's confidential toll-free telephone number on the reverse of each member's bar card and including an AAP brochure in annual dues statements, as has been done in other jurisdictions. Taking actions such as these not only increase the AAP's visibility throughout all segments of the bar, but also sends the message that the bar association recognizes the existence and effect of impairment in the legal community and is willing to use its resources to do something about it.

On the AAP's side, responsibility must be taken by the Director to keep all arms of the Bar and the Court informed of the AAP's efforts, progress, and needs. This can be effected through regular reports (quarterly or semi-annually) in educational presentations to the HSBA, the Supreme Court, the Office of Disciplinary Counsel (ODC), and the Court Nominating Committee. In speaking with the HSBA President and Executive Director, they suggested the AAP Director make an annual report at the HSBA Board of Governors yearly retreat, which offer the evaluators strongly endorse. The evaluators would also recommend that an annual report by the AAP Director be incorporated in the Supreme Court's agenda. While such reports must obviously comport with strict confidentiality provisions, they can nonetheless provide valuable information to the AAP's funding and oversight agencies to assist those entities in carrying out their own mandates. The AAP Director also indicated he would use his efforts to have the HSBA President and/or Executive Director attend CoLAP's annual workshop in San Francisco in October 2006 as a way of learning more about lawyer assistance programs throughout the United States and Canada.

3) Centralized Responsibility for Local Efforts

Guiding Principle 5 states: Strong working relationships should be maintained between state and local programs and their sponsoring bar organizations. The state program should maintain the responsibility for assuring that local programs in the state maintain a high standard of quality and that their activities assure the confidentiality of those with problems and the immunity from civil liability of those working in the programs. Local programs should seek assistance from their state programs and assurances that the other principles embodied in this statement are provided by the state if the local association cannot fully implement them.

As stated above, implementation of this provision is difficult, given the geographical challenges of the Hawaiian Islands. Despite this, the AAP Director has used the resources available to him to develop and maintain contact with the bar associations on the other islands, to develop lawyer volunteer committees on those islands, and to provide local support through that

volunteer network and local attorney support meetings. The evaluators strongly recommend that these efforts be supported and expanded by providing sufficient funding to allow the Director's regular travel to the outer islands.

4) Monitoring and Disciplinary Referrals to LAP

Guiding Principle 6 states: *A program for monitoring attorneys who have been brought to the attention of the disciplinary system as a result of an impairment problem should be maintained with the appropriate disciplinary agency. Most states recognize that substance abuse may be a mitigating factor in a disciplinary case where the lawyer has recognized the problem and is in recovery. It is essential that a method of monitoring the lawyer's activities be in place for a program of recovery and restoration to work.*

Guiding Principle 7 states: *Impairment programs and disciplinary agencies should establish and maintain a system for the referral of lawyers with impairment problems to the assistance program. Disciplinary agencies frequently receive complaints which may be the result of impairment problems. With a proper referral mechanism in place, many lawyers may be assisted before the need for disciplinary enforcement is necessary.*

Model LAP Rule 6(C) states: *Referrals from External Agencies. Policies and procedures should be developed by the LAP, bar disciplinary agencies, the courts, and the bar admissions entity that will facilitate referrals to the LAP from these agencies.*

The many state lawyer assistance programs that incorporate a monitoring component provide ample evidence that a relationship between the LAP and the bar disciplinary agency can identify and assist impaired lawyers at earlier stages of their illness, while still maintaining a requisite degree of confidentiality in appropriate situations. While attorneys who come to the disciplinary agency's attention for misconduct clearly related to impairment, such as DUI, possession of a controlled substance, or delusional pleadings are obvious, the earlier infractions associated with impairment, such as failure to return telephone calls, lack of client contact, late or missed court or deposition appearances, or a change in appearance, may well be dismissed. A program of educating disciplinary agencies can go far towards identifying and intervening in these cases before they rise to the level of more serious misconduct so long as a mechanism is developed allowing the disciplinary agency to refer the affected lawyer to the lawyer assistance program for evaluation and, if necessary, treatment. Until recently, identification of early stage substance abuse among lawyers in Hawai'i was primarily through self-reporting and informal referrals by the ODC.

However, a framework for referring lower level cases to the AAP exists in Hawai'i, and was recently provided additional support by an order issued by the Supreme Court in April 2006. Currently, Supreme Court Rules provide:

2.3(b) Where a respondent has, with the written concurrence of the Director of the Attorneys and Judges Assistance Program, proposed a program of monitoring of the respondent's efforts toward rehabilitation from "substance abuse" (as that term is defined in Rule 16.1(a) of this court), this court or the Board may impose such a monitoring program. The monitoring program, which shall in all cases be supervised by the Director of the Attorneys and Judges Assistance Program, may be in lieu of or in addition to a disciplinary sanction. The duration and conditions of monitoring shall be stated in the final order issued by this court or Board. Violation of any conditions shall result in the imposition of disciplinary sanctions, but only to the extent set forth in the order establishing the monitoring program.

2.3(d) As a condition of reinstatement following suspension or disbarment or as a condition in connection with the imposition of any lesser discipline, the Disciplinary Board or this court may require a respondent, at the respondent's expense, to successfully complete... (ii) seminars or classes in particular subjects of the law, (iii) a program specifically designated by the Board or the court to meet some deficiency in the attorney's understanding of the law or the practice of it.... The Board may consult with the Hawai'i State Bar or others to find or develop such seminars, classes, and programs.

2.7(b)(3) Subject to the provisions of Rule 2.7(a), Counsel shall, in Counsel's sole discretion, exclusively determine whether a matter constitutes minor misconduct. In that event, Counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, or any other non-disciplinary proceedings authorized by the supreme court. Counsel shall then refer the matter to the agency or agencies authorized by the court to conduct the proceedings.

In its order of April 11, 2006 designating agencies to whom attorneys can be referred under Rule 2.7(b)(3), the Court specifically recognized the "Attorneys and Judges Assistance Program (AAP), including any agencies, entities, programs, or individuals (whether located in Hawai'i or elsewhere), with which or whom the AAP has arranged for the provision of services or referrals."

In discussions with the state's Chief Disciplinary Counsel, she expressed her strong support of the AAP and of intervention and monitoring of attorneys whose misconduct clearly resulted from a substance abuse or mental health impairment. The Disciplinary Counsel noted, however, that the Supreme Court rules made no provision for formal "probation", as that term is used in other jurisdictions, but did permit imposition of "conditions" as a requirement of reinstatement. While a reading of Rules 2.3(b) and (d) seems to suggest the possibility that in more serious disciplinary matters, probationary conditions (monitoring) might be imposed "in lieu of or in addition to a disciplinary sanction", the availability of such a procedure is clearly a matter for determination by the AAP, the ODC, and the Supreme Court. The provision of Rule 2.7(b)(3) and the Court's April 2006 order, however, clearly allow for diversion to the AAP in minor misconduct cases. The Chief Disciplinary Counsel and the AAP Director both expressed their hope that Rule 2.7(b)(3) could be used as a means to strengthen the relationship between the AAP and the ODC, without jeopardizing the necessary perception of confidentiality in non-

disciplinary cases. This will obviously require an effort by both agencies to develop practices and procedures in diversion cases, but the evaluators are convinced by the attitude of all parties that this can be achieved. In jurisdictions which have instituted a comprehensive diversion process, the results have been uniformly positive. The Chief Disciplinary Counsel did confirm to the evaluators that Hawai'i does have a procedure for placement of an attorney on inactive disability status, but explained that the requirements for involuntary assignment to disability status have not been clearly delineated, and the procedure is not often used. The evaluators suggest that as this procedure has been used with success in other jurisdictions, the Chief Disciplinary Counsel and the AAP Director may want to explore the issue further.

A question was raised during the interviews regarding whether judges have the authority to order an attorney to the AAP and, if so, what limitation exist on the AAP's ability to report back to the referring judge. Presently, no clear answer exists to this question, but other states report that judicial referrals can represent a valuable resource if the bench is educated about impairment and what resources are available if they identify it. As the ability to report an impaired attorney to AAP may, if successful, avoid disciplinary involvement, this is an area that should also be discussed by the AAP, the Court, and the ODC.

During their interviews with law school and Bar Examiners representatives, and as a result of their review of the Hawai'i Bar Application, the evaluators noted that in reference to the applicant's criminal justice history, Question 38 of the application asks for self-disclosure regarding felony or misdemeanor arrests and convictions, but a background check is not performed on every applicant to verify the answers provided. This may allow applicants who are willing to minimize criminal justice contact to avoid scrutiny. With reference to substance abuse and mental health issues, Question 33 of the application asks the applicant, "*Do you currently consume alcoholic beverages or use drugs in such quantities that your consumption affects your ability to practice law on a day-to-day basis?*" Question 45 asks, "*Do you currently have any condition(s) that would impair your ability to obey the law, to competently practice law, or to carry out fiduciary duties and ethical responsibilities to clients or as an officer of the court?*" While the evaluators understand and support the ideals of honesty and candor implicit in the application questions, with deference to the Hawai'i Board of Examiners they are constrained to point out that a process which relies on impaired applicants self-reporting their impairments is doomed to miss most, if not all, individuals suffering from these illnesses (due as much to denial as to lack of honesty). The likelihood of applicants self-disclosing their use of an illegal substance on a bar application is nil, and self-recognition of an underlying mental health issue is problematic. The evaluators recommend that consideration be given to performing criminal history background checks on applicants for licensure in Hawai'i, as well as to modification of the substance abuse/mental health questions to better determine an applicant's history regarding these issues, rather than solely their self-reported current condition. A spectrum of such questions can be found by reviewing applications from other states.

Consideration might also be given by the Supreme Court, the Bar Examiners, and the ODC to studying the possibility of conditional admission in appropriate cases. Conditional admission represents a means of allowing admission of applicants who might otherwise be denied for reasons of a history of impairment or criminal justice contact. States which have

implemented a conditional admissions process report a high degree of success in screening and monitoring candidates. The discipline, malpractice, and relapse rate among conditional admittees is actually lower than that of the general attorney population, and anecdotal, long term review of conditional admittees has found that the majority have maintained the recovery program to which they were introduced through the conditional admission process. Needless to say, the Court and affected agencies would need to decide whether such heightened scrutiny is appropriate and, if conditional admission is viewed as a possibility, how the process would be implemented. In this regard, CoLAP (which is in the process of developing a Model Conditional Admission Rule) and the National Conference of Bar Examiners' Task Force on Conditional Admission might be valuable resources. While the evaluators are well aware that concerns likely will be raised regarding such expanded probing into to the personal habits of attorneys who come to the attention of the ODC or Bar Examiners, they urge the parties involved to balance this proposed heightened level of scrutiny against the possibility of intervening on impaired attorneys at an earlier stage of their illness, with a consequent saving of lives, careers, and families and the reputation of the bar.

5) Education

Guiding Principle 8 states: *An educational element should be developed to inform the public, the judiciary, the bar, law students and the disciplinary agencies of the assistance that is available for those in need. As part of ongoing efforts at early intervention and prevention, direct efforts to educate the profession should be implemented. Ethics and professional responsibility classes in law schools should be used to inform law students about the nature and effects of substance abuse. Presentations to the membership of bar associations, law firms, civic clubs and the like are also encouraged.*

Guiding Principle 9 states: *A substance abuse lecture should be part of the continuing legal education of each bar and the curriculum of each law school. The effect of substance abuse is so devastating upon the law practice and potentially so damaging to clients' interests that all lawyers should be trained to recognize the early symptoms, to understand that the disease is treatable and how to get help for themselves and their colleagues.*

The evaluators were informed that Hawai'i does not have a system of mandatory continuing legal education, although all attorneys are required to take one professionalism seminar during their careers. As this appears to be the only mandatory CLE component for Hawai'ian attorneys, the evaluators recommend that a substance abuse and mental health awareness component be included in the seminar. In addition, substance abuse and mental health awareness segments should be included in any applicable voluntary CLE presentations developed by the HSBA. In the event Hawai'i moves to a mandatory CLE requirement in the future, consideration should be given to including substance abuse and mental health awareness to the professionalism component of that requirement. States which implemented this requirement have found that it brings about two critical changes: first, it sends the message that the state's bar and highest court recognize attorney impairment as a critical issue; and second, it places emphasis on the educational and preventive aspects of the lawyer assistance program which, in turn, raise the program's visibility and outreach efforts. The LAP's in states with such

a requirement report that requests received for CLE presentations increase three to four times after institution of mandatory substance abuse and mental health CLE's.

In their conversations with law school representatives, the evaluators were assured of strong support for the AAP, although the representatives were unaware of the existence of the law school toolkit developed by CoLAP. The evaluators recommend that a copy of the toolkit be provided to Assistant Dean Tochiki immediately. The AAP is included in the law school's orientation seminars, but it was acknowledged that allowing the AAP a forum for a more detailed presentation, perhaps in the context of a professional responsibility class, would be beneficial. Clearly, if students can be educated at an early stage regarding the issues of substance abuse, stress, and mental health disorders, the likelihood of recognizing and addressing these issues later in their careers is increased. The evaluators received assurances that the AAP would be provided with additional opportunities to address the law school students in the future.

The evaluators commend the state judiciary on including the AAP in the state judicial conference in May 2006. Judges often represent the first "outside" individuals to become aware of an impairment issue, and education regarding signs and symptoms, what resources are available, and the AAP's existence and mission can often facilitate early intervention before serious misconduct. The evaluators recommend that an annual or semi-annual presentation by the AAP be made an integral part of the judicial conference agenda.

6) Stable Funding

Model LAP Rule 1(B) states: *The state's highest court or bar association should insure stable and continual funding, either from dues or assessments of the bar generally. Appropriate accounting of all funds is essential.*

As noted above, funding for the AAP is provided through a per member setoff in the amount of \$20.00 for active members and \$10.00 for inactive members. This amount has remained unchanged since the AAP's creation in 1989. Currently, the annual budget allows staffing by a full-time director with part-time administrative assistance, rental of an office in Honolulu, and some inter-island travel and conference attendance. However, the current per member assessment will likely not permit advancement of the AAP to the "next level" of service as contemplated by this report. It appears to the evaluators that in order to permit the AAP Director to expand contact with the outer islands and increase the program's visibility and outreach activities, while fulfilling the AAP's responsibilities in Oahu, additional staffing and funding will be necessary. Presently, the AAP allotment places it in the lower tier of LAP budgets around the country as a percentage of the overall bar and disciplinary costs. Based on that and on the clear desire of AAP personnel and the other individuals interviewed to expand the program to better serve attorneys and judges in Hawai'i, the evaluators recommend consideration of an increase in the per member assessment to \$30.00 for active members and \$15.00 for inactive members, which increase would allow such expansion.

CONCLUSION

The evaluators were impressed with the reception and cooperation they received from all the individuals involved in the evaluation process and their clear desire to make the system work in the best possible manner to reach every affected lawyer in Hawai'i. The AAP Director, Board members, and LVC volunteers are dedicated and enthusiastic, and it seems clear that they are committed to addressing the tasks facing them. The support expressed for the AAP by all segments of the bench, bar, and legal educational community bodes well for its continued success and expansion.

The ABA Commission on Lawyer Assistance Programs stands ready to assist the Hawai'i Supreme Court, the Lawyer and Judges Assistance Program, the Hawai'i State Bar Association, the University of Hawai'i Law School, and the various local bar associations throughout the state in this effort. The Commission's reviewers have attempted to formulate recommendations that will be workable in Hawai'i and will fit within the current structure and financial resources.

The contents of this report are confidential and are intended for the use of the Justices of the Hawai'i Supreme Court, the staff and directors of the Hawai'i Lawyers and Judges Assistance Program, the Hawai'i State Bar Association, and the Supreme Court committees mentioned herein. The opinions and recommendations in this report are solely those of the ABA Commission on Lawyer Assistance Programs, and do not reflect the opinion or recommendations of the American Bar Association.

The ABA Commission and the members of the review team are available to answer questions, to provide further explanation of this report and its recommendations, and to be of assistance in Hawai'i's efforts.

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Dated: August 25, 2006

HAWAI‘I SUPREME COURT COMMISSION ON PROFESSIONALISM

Meeting of April 29, 2011

2:30 p.m. - 3:45 p.m.

Supreme Court Conference Room

MINUTES

PRESENT: Chair: Associate Justice James E. Duffy, Jr.
Members: Susan Arnett, Judge Joseph Cardoza (via telephone), Dr. Malcom Chang, Steven Dixon, Lyn Flanigan, Associate Judge Daniel Foley, David Hall, Janet Hunt, Judge Leslie Kobayashi, Justice Sabrina McKenna, Judge Paul Murakami, Michael Nauyokas, Nathan Nikaido, Terence O’Toole, Wesley Park, Judith Pavey, Jill Ramsfield, Judge Trudy Senda (via video conference), Judge Barbara Takase (via video conference), and Kevin Takata

HANDOUTS:

- (1) Agenda
- (2) Order of Appointment
- (3) Biography of U.S. District Court Judge Leslie E. Kobayashi
- (4) Biography of Hawai‘i Supreme Court Justice Sabrina S. McKenna
- (5) ‘Ōlelo Production Treatment Proposal
- (6) Rule 2.7 of the Hawai‘i Supreme Court Rules
- (7) Rule 2.8 of the Hawai‘i Supreme Court Rules
- (8) Rule 2.22 of the Hawai‘i Supreme Court Rules
- (9) HSBA/CLE Flyer re *“How the Newly-Proposed Hawai‘i Rules of Professional Conduct, if Adopted, Will Affect Your Practice”*
- (10) *“Raising the Bar in Ethics”* by Janet Hunt in March, 2011 Hawaii Bar Journal with ODC Statistical Report for 2010
- (11) Rule 22 of the Hawai‘i Supreme Court Rules
- (12) *Oregon Bar Issues Formal Opinion on Ethics Issues Arising in Mentoring Relationships and Use of LISTSERVs,*” dated April 21, 2011, by Hinshaw & Culberton, LLP, Lawyers for the Profession Alert
- (13) HSBA Flyer re *“Pā‘ina for the People benefiting Pro Se Self Help Centers”*

I. WELCOME AND ANNOUNCEMENTS

Justice Duffy welcomed and thanked the members attending, and thanked those members (Calvin Young and Gayle Lau) who were on the mainland for calling in and letting us know.

Justice Duffy gave a special welcome to new members U.S. District Court Judge Leslie E. Kobayashi and Hawai'i Supreme Court Justice Sabrina S. McKenna.

II. REPORT ON NEW PROJECT: VIDEOTAPING SUPREME COURT JUSTICES, ICA JUDGES, AND SELECTED PRACTICING ATTORNEYS RE APPELLATE COURT BRIEFS AND ORAL ARGUMENTS “DO’S AND DON’TS”

Justice Duffy reported that the filming project is progressing very well. An agreement has been reached with ‘Ōlelo for production of a DVD and it is anticipated that filming of the Supreme Court Justices, Intermediate Court of Appeals Judges, and selected practicing attorneys will begin in June, and hopefully be completed in July. It is further anticipated that significant editing will have to be done before the DVD is ready for distribution sometime in the fall. It is hoped that the DVD will be a video mentor helpful to practicing attorneys, pro se litigants, and law students.

III. REPORT ON EDUCATIONAL PROGRAM FOR ATTORNEYS AND JUDGES RE THE AVAILABILITY AND NEED FOR “DISCRETE TASK REPRESENTATION” (FKA “UNBUNDLING OF LEGAL SERVICES”)

Judge Cardoza (Chair of the Professionalism Commission Committee on “Discrete Task Representation”) related the background of his committee’s work and conclusion that the present Rule 1.2(c) of the Rules of Professional Conduct authorizes “discrete task representation.” He further related that he is working with Judge Senda (Chair of the Access to Justice Commission Committee studying this same issue) to organize an educational program primarily designed to educate judges about the propriety and need for allowing attorneys to do “discrete task representation,” as it seems that judges are generally not allowing attorneys to limit their representation to certain issue(s) (“once you’re in, you’re in for the entire case”). Judge Cardoza further related that he has gathered a substantial amount of information on this subject, and is in contact with a mainland proponent of “discrete task representation” who hopefully will be willing to assist in the preparation and presentation of an educational program.

Judge Senda reported that her committee will likely be proposing a revision of Rule 1.2(c) of the Rules of Professional Conduct to make it abundantly clear that “discrete task representation” is allowed and to be encouraged as an “access to justice” issue. Judge Senda further related that she is a member of the Judiciary’s Judicial Education Committee, and has asked the committee to consider an educational program for judges on “discrete task representation.” Judge Senda further related that there is an ongoing effort to re-open the Self-Help Center in the Kauai courthouse, and that it is anticipated that training regarding “discrete task representation” will be part of the re-opening.

IV. REPORT ON HSBA MINOR MISCONDUCT PROGRAM (RULES 2.7, 2.8, AND 2.22 OF THE HAWAI'I SUPREME COURT RULES)

Janet Hunt reported that the Minor Misconduct Program is up and running, and recently had a great success story, with all parties involved very pleased with the process and outcome.

Lyn Flanigan related that the HSBA is presently soliciting additional volunteer mentors, and will train the mentors and provide the names to the ODC, with the ODC (solely) making mentor assignments to ensure confidentiality.

V. REPORT ON STATUS OF PROPOSED "NEW" HAWAI'I RULES OF PROFESSIONAL CONDUCT PRESENTLY BEING CONSIDERED BY THE HAWAI'I SUPREME COURT

Lyn Flanigan reported that the HSBA has made extensive efforts to inform its members of the significant changes in the proposed "New" Hawai'i Rules of Professional Conduct presently being considered by the Hawai'i Supreme Court. The HSBA efforts have included multiple announcements, articles, and CLE programs, including a "traveling road show" presented by Evan Shirley, Jim Kawachika, and Janet Hunt. Despite the HSBA efforts, Lyn's view is that the efforts have not reached many solo practitioners, and that additional time is needed for further education and input to the Hawai'i Supreme Court before the court makes a decision on the "New" rules. Lyn anticipates that the HSBA will ask the court to extend the time for comment to the end of October, 2011 from its present deadline of June 9 (which already was an extended date.)

Substantial discussion followed regarding several of the most controversial proposed "New Rules," and what additional efforts could be done to "spread the word." Janet Hunt related that she would be willing to take her "traveling road show" to any firm or group.

Justice Duffy related that (1) the proposed "New Rules" were not drafted or prepared by the Hawai'i Supreme Court; the proposed "New Rules" were the product of a joint HSBA-ODC committee which worked for many years (6+) on this project, and (2) the Hawai'i Supreme Court reviews and considers all comments by HSBA members and the general public before deciding whether to enact new rules or revise existing rules. He further related that, despite the court's invitation to comment, generally the number of comments received by the court are minimal, even when the proposed rule is significant, as in Rule 22 of the Rules of the Supreme Court "Mandatory Continuing Professional Education."

VI. DISCIPLINARY COUNSEL'S REPORT ON 2010 STATISTICS

Janet Hunt reported that she was proud of her staff's efforts to unclog the large backlog of cases built up over the years, and significantly reduce the age of the pending cases. She noted that some of the older cases are being handled outside of the ODC because of a conflict of interest.

Janet Hunt reviewed the ODC's 2010 Statistical Summary (see Handout "Raising the Bar in Ethics"). In reviewing the categories, sources, and number of the 89 complaints docketed in 2010, she noted that (1) commission of a crime was the largest complaint area, and that most of them were for DUI, resulting in referrals made to Steve Dixon (Attorneys and Judges Assistance Program) because of the illness component; (2) the next largest complaint category was failure to deposit in a trust account, which generally results from ignorance (rather than intentional theft), in which case she tries to avoid the filing of formal disciplinary proceedings by educating the attorney; (3) clients remain the largest source of complaints; (4) during 2010, 107 docketed complaints were closed, 37 percent which resulted in imposition of public discipline; and (5) handling trusteeships for deceased, missing or disabled attorneys remains a resource allocation problem for the ODC.

VII. REPORT ON THE FIRST YEAR OF THE MANDATORY CONTINUING LEGAL EDUCATION (MCLE) PROGRAM (RULE 22 OF THE HAWAI'I SUPREME COURT RULES)

Lyn Flanigan related the history of the MCLE program from its inception in Rule 22 of the Hawai'i Supreme Court Rules in 2009 to a current report on compliance with the rule. Among the highlights cited by Lyn:

- (1) Jodie Hagerman was hired as the MCLE Administrator (half-time position) in July, 2009;
- (2) a 12 person MCLE Board was appointed in July, 2009 (9 voting members and 3 nonvoting advisory members);
- (3) Professionalism Commission member Judy Pavey has been the Board's chairperson from inception, and Professionalism Commission members Susan Arnett (voting), Lyn Flanigan and Justice Duffy (both nonvoting advisory) are members of the Board;
- (4) the Board established CLE Regulations, Frequently Asked Questions, and website materials needed to implement the program;
- (5) 19 accredited providers were approved for 2010;
- (6) 52 providers were approved for one or more specific programs;
- (7) 17 requests by individual HSBA members for credit for a program were approved, and 2 requests were disapproved;
- (8) the HSBA entered into an agreement with the Hawai'i Supreme Court to offer a 3 credit program for no more than \$50;

- (9) the HSBA offered a total of 23 MCPE programs (18 in Honolulu) and 16 online programs;
- (10) anticipating noncompliance issues, the MCLE Board asked the Hawai'i Supreme Court to allow 30 days to cure noncompliance (instead of the previously stated 15 days) which the court granted;
- (11) all active members who said "no" or "not applicable" on their 2010 Attorney Registration Statement form for MCPE reporting were contacted and informed of (a) the deadline to cure noncompliance, and (b) scheduled approval programs in person and online;
- (12) on March 1, 2011 certified letters were sent to 62 members notifying of noncompliance and programs to cure;
- (13) on March 31, 2011 email notice was sent to 8 suspended members notifying them of their suspension and reinstatement process;
- (14) as of April 29, 2011, 3 of the 8 suspended members have been reinstated;
- (15) pursuant to the audit required by Rule 22(d)(2) and CLE Regulation 9, the MCLE Board determined that 2 percent of members who reported "yes" on compliance will be audited;
- (16) upcoming: an interface online renewal for HSBA programs database so course completion certificates can be automatically stored in the members profile (paperless certification);
- (17) Allyson Kumik is the new MCLE Administrator; and
- (18) in conclusion, out of approximately 4,500 active practicing attorneys, it is remarkable that only 8 attorneys were suspended for noncompliance with Rule 22.

Discussion ensued concerning the adequacy of the 3 credits of MCPE required by Rule 22, and comparison with the continuing education requirements of other professions and other jurisdictions. It was pointed out that our requisite 3 credits apply only to MCPE courses, and that an additional 9 hours of voluntary continuing legal education is encouraged by Rule 22, and that most actively practicing attorneys report that they take more than the 12 total hours set forth in Rule 22.

Justice Duffy thanked Judy Pavey, Susan Arnett, and Lyn Flanigan, and the MCLE Board for all of their work to implement this new mandatory education program in a workable manner.

VIII. REPORT ON HSBA MENTORING PROJECT

Lyn Flanigan reported that the HBA is contemplating a voluntary mentoring program (some jurisdictions have mandatory programs). It is anticipated that the program will provide 2 hours of training for prospective mentors for which MCPE credit will be requested. It is hoped that this program will be operational by the end of 2011.

IX. NEXT MEETING

The next meeting will be scheduled in the September-October frame considering (1) availability of the Supreme Court conference room and (2) the UH football schedule of “away” games (a special request by Susan Arnett).

Justice Duffy thanked everyone for attending.

Have a great summer!

HAWAI‘I SUPREME COURT COMMISSION ON PROFESSIONALISM

April 29, 2011

2:30 p.m.

Supreme Court Conference Room

AGENDA

- I. WELCOME AND ANNOUNCEMENTS
- II. REPORT ON NEW PROJECT: VIDEOTAPING SUPREME COURT JUSTICES, ICA JUDGES, AND SELECTED PRACTICING ATTORNEYS RE APPELLATE COURT BRIEFS AND ORAL ARGUMENTS “DO’S AND DON’TS”
- III. REPORT ON EDUCATIONAL PROGRAM FOR ATTORNEYS AND JUDGES RE THE AVAILABILITY AND NEED FOR “DISCRETE TASK REPRESENTATION” (FKA “UNBUNDLING OF LEGAL SERVICES”)
- IV. REPORT ON HSBA MINOR MISCONDUCT PROGRAM (RULES 2.7, 2.8, AND 2.22 OF THE HAWAI‘I SUPREME COURT RULES)
- V. REPORT ON STATUS OF PROPOSED “NEW” HAWAI‘I RULES OF PROFESSIONAL CONDUCT PRESENTLY BEING CONSIDERED BY THE HAWAI‘I SUPREME COURT
- VI. DISCIPLINARY COUNSEL’S REPORT ON 2010 STATISTICS
- VII. REPORT ON THE FIRST YEAR OF THE MANDATORY CONTINUING LEGAL EDUCATION (MCLE) PROGRAM (RULE 22 OF THE HAWAI‘I SUPREME COURT RULES)
- VIII. REPORT ON HSBA MENTORING PROJECT
- IX. NEW BUSINESS
- X. NEXT MEETING
- XI. ADJOURNMENT

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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Appointment
of the Members of

HAWAI'I SUPREME COURT'S
COMMISSION ON PROFESSIONALISM

ORDER OF APPOINTMENT

(By: Recktenwald, C.J., for the court¹)

IT IS HEREBY ORDERED that the following individuals are reappointed as members of the Commission on Professionalism ("the Commission"), for a term of four years, effective March 14, 2011 and expiring on March 13, 2015:

Honorable Daniel R. Foley	Appellate Court
Honorable Paul T. Murakami	First Circuit Court
Honorable Barbara T. Takase	Third Circuit Court
Susan L. Arnett	HSBA
Terence J. O'Toole	HSBA
Kevin K. Takata	Attorney General
Wesley T. Park	Public Member
Steven B. Dixon	Attys and Judges Assist. Prog.
Gayle J. Lau	Lawyers' Fund for Client Prot.

¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.

IT IS FURTHER ORDERED that the following individuals are reappointed as members of the Commission, for a term of four years, effective April 27, 2011 and expiring on April 26, 2015:

Judith A. Pavey
David W. Hall

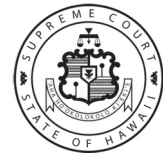
HSBA
HSBA

IT IS ALSO ORDERED that the **Honorable Leslie E. Kobayashi** is appointed to the Commission as the Federal Court Liaison, replacing the Honorable Susan Oki-Mollway, effective March 14, 2011 and expiring on March 13, 2015.

IT IS FINALLY ORDERED that the **Honorable Sabrina S. McKenna** is appointed to the Commission on behalf of the Appellate Courts, replacing the Honorable Paula A. Nakayama, effective immediately upon the filing of this order and expiring on March 13, 2013.

DATED: Honolulu, Hawai'i, March 14, 2011.

/s/ Mark E. Recktenwald
Chief Justice



Biography of United States District Court Judge Leslie E. Kobayashi

The Honorable Leslie E. Kobayashi was confirmed as a United States District Judge in the District of Hawai'i on December 22, 2010. She was appointed as a United States Magistrate Judge for the District of Hawai'i, first in 1999 and was then reappointed in 2007. Before taking the bench, Judge Kobayashi served as a deputy prosecuting attorney for the City and County of Honolulu, and spent 17 years in private practice in the law firm of Fujiyama, Duffy & Fujiyama where she was a trial attorney and a managing partner. She handled a variety of matters while in private practice, including personal injury, business disputes, labor and employment, medical and legal malpractice, and products liability. She received her B.A. degree from Wellesley College (1979) and her J.D. degree from Boston College School of Law (1983). Judge Kobayashi currently serves on the Ninth Circuit Alternative Dispute Resolution Committee. She has served on other committees, including the Ninth Circuit Conference Executive Planning Committee, Magistrate Judges' Executive Board for the Ninth Circuit, sub-committees for the Hawai'i Chapter for the American Judicature Society, and as a Bencher for the American Inns of Court, Aloha Inn. From 2000-2002, she was an adjunct professor at the William S. Richardson School of Law and the co-recipient of the Outstanding Adjunct Professor Award in 2002. She is the recipient of the 2011 Outstanding Judicial Achievement Award from the Hawai'i Women Lawyers.

Biography of Hawai'i Supreme Court Associate Justice Sabrina S. McKenna

Associate Justice Sabrina S. McKenna received her B.A. in Japanese in 1978 from the University of Hawaii at Manoa, and her J.D. in 1982 from the William S. Richardson School of Law. Justice McKenna practiced at Goodsill Anderson Quinn & Stifel until 1987, then became in-house counsel to Otaka, Inc., a Japan-based international business organization, until 1990. From 1991 to 1993, she was an Assistant Professor at WSRSL. She became a state District Court judge in late 1993, then a First Circuit Court judge in 1995, where she presided over criminal, domestic violence, and civil calendars, before serving as Senior Judge of the Family Court of the First Circuit. She was sworn in as an Associate Justice of the Hawaii Supreme Court on March 3, 2011.

Justice McKenna is currently on the Board of the AJS-Hawaii Chapter and co-chairs its Committee on Judicial Administration. She is also on the Executive Board of the Judiciary History Center and is with the Courts-Media Working Group of the Hawaii Federal and State Courts. She also previously served on various Supreme Court Committees, including as Chair of committees on Court Interpreters and Language Access, To Evaluate the Qualifications of Per Diem Judges in the First Circuit, Certification of Legal Specialists, and Probation Policy, and as a member of the committees on Children in Family Courts, Civil Pattern Jury Instructions, and Equality and Access to the Courts. She also worked with the HSBA Committee on Professionalism to author portions of the original Professionalism Manual for the Professionalism Course that became mandatory in 2001.

Production Treatment



PRODUCER: (Olelo Certified) _____ PROGRAM LENGTH: 60 Minutes _____

PROGRAM TITLE: (max 20 characters, including spaces) Case on Appeal: Tips

TARGET AUDIENCE: Attorneys and the increasing number of members of the public who represent themselves (pro se) in the appeals process in Hawaii courts, as well as law students and members of the general public who may be interested in the appellate court process.

PROGRAM DESCRIPTION: Justices of the Hawaii Supreme Court, Judges of the Intermediate Court of Appeals, and experienced attorneys will offer practical advice on the Do's and Don'ts in writing written briefs and presenting oral arguments in Hawaii appellate courts, including discussion of common mistakes made by attorneys and pro se litigants, and how to avoid them.

PROGRAM GOAL: To present educational information not presently available to attorneys, pro se litigants, and members of the general public regarding effective brief writing and oral arguments in Hawaii appellate courts.

PROPOSED TECHNICAL REQUIREMENTS: For advanced reservations there is a maximum of 2 camera sessions (24-hour period each) & 4 editing sessions, linear (4 hour session) or non-linear (6 hour session) per month.

PROPOSED PRODUCTION SITES: _____

PROPOSED CREW REQUIREMENTS: _____

Submit with Production Proposal to a CMO Staff Member on Duty for Approval- Sample on Rear

(3) To dispose, subject to review by members of the Board assigned by the Chairperson, of all matters involving alleged misconduct by dismissal, private informal admonition or the institution of formal disciplinary proceedings before a hearing committee or officer. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Counsel until the accused attorney shall have been afforded the opportunity to state his or her position with respect to the allegations against him or her.

(4) To file with the supreme court certificates of conviction of attorneys for crimes.

(5) To prosecute all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing committees or officer, the Board and the supreme court.

(6) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, to examine witnesses and to submit evidence, if any, relevant thereto.

(7) To inform complainants and attorneys complained against of the status and disposition of their respective complaint matters.

(8) To maintain permanent records of all matters processed and the disposition thereof.

(9) To assist members of the public in preparation of requests for investigation.

(10) To perform such other duties and provide such reports as the Board shall direct.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992; further amended August 17, 1993, effective August 17, 1993; further amended and effective January 9, 1996.)

2.7. Procedure.

(a) Investigation. All investigations, whether upon complaint or otherwise, shall be conducted under the supervision of Counsel. Each investigation shall be confined to the facts of the grievance and matters reasonably related thereto that could be violations of the Hawai'i Rules of Professional Conduct or other Rules of the Supreme Court that regulate the practice of law. Upon motion, an

attorney subject to an investigation may seek protective orders in the first instance from the Board and, if denied, then, within 10 days thereafter from the supreme court. Upon the conclusion of an investigation, Counsel shall recommend dismissal, informal admonition of the attorney concerned, the institution of non-disciplinary proceedings for minor misconduct, or the institution of formal disciplinary proceedings before a hearing committee or officer. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that purpose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of Counsel's recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

(b) Minor misconduct:

(1) Notwithstanding the provisions of Rules 2.2 and 2.3, any act or omission by an attorney which, although violative of the Hawai'i Rules of Professional Conduct, is of a minor nature may be resolved by way of non-disciplinary proceedings or dismissal.

(2) In the absence of unusual circumstances, misconduct shall not be regarded as minor if any of the following conditions exists:

(i) The misconduct involved misappropriation of a client's funds or property.

(ii) The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person.

(iii) The respondent was publicly disciplined within the past 3 years.

(iv) The misconduct involved is of the same nature as misconduct for which the respondent was disciplined within the past 5 years.

(v) The misconduct included dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.

(vi) The misconduct constituted the commission of a felony under applicable law.

(3) Subject to the provisions of Rule 2.7(a), Counsel shall, in Counsel's sole discretion, exclusively determine whether a matter constitutes minor misconduct. In that event, Counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, mentoring, or any other non-disciplinary proceedings authorized by the supreme court. Counsel shall then refer the matter to the agency or agencies authorized by the supreme court to conduct the proceedings.

(4) If the respondent enters into an agreement for referral to a minor misconduct program established by the Hawai'i State Bar and enters into a mentoring relationship, all records and information maintained by the mentor relating to the minor misconduct of the respondent shall be deemed confidential and shall not be disclosed to the Counsel, the Board, the supreme court or any other person and shall not be subject to discovery or subpoena unless such confidentiality is waived in writing by the respondent; provided, however, that the mentor may compile and disclose to Counsel a final report summarizing the mentoring program and the completion thereof to the satisfaction of the mentor. The mentor and the respondent have a privilege to refuse to disclose information shared or provided between the mentor and the respondent. The limitations on disclosure set forth in this section will not apply to information relating to the respondent's failure to cooperate with the mentoring program, or with a respondent's unsuccessful completion of a mentoring program.

(5) If Counsel shall fail to reach agreement with the respondent to submit the matter of non-disciplinary proceedings, Counsel may undertake or resume disciplinary proceedings.

(6) If the respondent shall fail to comply with the terms of the agreement, Counsel may undertake or resume disciplinary proceedings.

(7) If the respondent shall fulfill the terms of the agreement, Counsel shall dismiss the disciplinary proceedings.

(c) Formal hearing. Formal disciplinary proceedings shall be instituted by Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the

alleged misconduct. A copy of the petition shall be served upon the respondent in accordance with Rule 2.11(a). Notwithstanding Rule 2.22, if at the time the petition is served, the respondent is engaged in the act of the practice of law as a part of a firm, partnership, corporation or governmental entity or other group, Counsel shall provide a notice to the respondent's employer of the fact that formal disciplinary proceedings have been filed with the Board. The respondent shall serve his or her answer upon Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Board Chairperson. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent 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. Following the service of the answer or upon failure to answer, the matter shall, unless the provisions of (e) below apply, be assigned by the Chairperson to a hearing committee or officer. The hearing committee or officer receiving the assignment shall serve a notice of hearing upon Counsel and the respondent, or the respondent's counsel, stating the date, time, and place of the hearing. At every hearing wherein factual issues are to be resolved, the respondent shall have a full opportunity to confront and cross-examine such witnesses presented by Counsel and to present evidence on his or her own behalf. The hearing committee or officer shall, in every case, submit a report containing findings and recommendations, together with a record of the proceedings, to the Board within 30 days after the conclusion of the hearing unless such time is extended by the Board Chairperson for no more than 30 days for good cause shown. The findings of the hearing committee or officer shall be supported by clear and convincing evidence. The hearing committee or officer shall not be bound by the formal rules of evidence, but shall admit only trustworthy evidence. The hearing committee or officer shall not rely upon any evidence outside the formal record in reaching a decision.

(d) **Review by Board and Supreme Court.** Upon receipt of a report from a hearing committee or officer, the Board will not entertain briefs or oral argument except: (1) within the Board Chairperson's discretion upon application of Counsel or the respondent (submitted within 10 days after service of the report of the hearing committee or officer); or (2) upon a vote of a majority of the Board. If such application is granted or vote occurs, the Board Chairperson shall set the dates for submission of briefs and for any oral argument before the Board. After reviewing the report of the hearing committee or officer, the Board shall promptly either affirm or modify the report of the hearing committee or officer, remand the matter for further proceedings before the hearing committee or officer, or dismiss the petition with the consent of Counsel, provided that no such consent shall be required where the hearing committee or officer recommended dismissal of the petition. In the event the Board determines that the proceeding shall be concluded by informal admonition or private or public reprimand, such admonition or reprimand shall be imposed in accordance with procedures established by the Board.

Unless the Board dismisses the petition with any required consent of Counsel, remands the petition, or concludes the matter by informal admonition or private or public reprimand, the Board shall promptly submit a report containing its findings and recommendations, together with the entire record, to the supreme court. After the filing of such report, a copy thereof shall be served on the parties in accordance with Rule 2.11(b). The supreme court will not entertain briefs or oral argument except: (1) within its discretion upon application of the respondent or Counsel (submitted within 10 days after service of the Board's report); or (2) upon request of the supreme court. If such application is granted or request is made, the supreme court shall set the dates for submission of briefs and for any oral argument before the supreme court. In its discretion, the supreme court may in all disciplinary cases issue and publish written opinions or by per curiam order adopt and publish the findings and conclusions contained in the written report of the Board.

(e) **Elimination or suspension of hearing proceedings.** All proceedings before the hearing committee or officer shall be eliminated or

suspended (1) where the respondent has filed no answer (and the charges have thus been deemed admitted) because, after due and diligent effort by Counsel, the respondent cannot be located for personal service and does not receive registered or certified mail at any of his or her addresses last known to Counsel; or (2) where Counsel and the respondent at any time subsequent to the filing of a petition file with the Board a stipulation setting forth an admission by the respondent of the facts deemed relevant to a determination of the matter, the disciplinary violations which serve as grounds for discipline, and an agreement as to the recommended form of discipline which should be imposed upon the respondent based upon the admitted violations. The entire record in the case shall thereupon be transmitted directly to the Board for review in accordance with (c) above. The parties may request that the record be supplemented by documentary exhibits. In any event, the Board may accept a request by the parties that the submission of briefs and/or oral argument before the Board be waived. In the case of a stipulation filed by the parties, neither the Board nor the supreme court shall be bound to accept the parties' stipulated factual and legal agreements or recommended disposition, and the Board or the supreme court may either decide the matter based upon the factual admissions set forth in the parties' stipulation or may remand the matter for further proceedings before a hearing committee as outlined in (b) above.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984; further amended, March 7, 1986, effective March 7, 1986; further amended September 22, 1988, effective September 22, 1988; further amended July 3, 1989, effective July 3, 1989; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended January 11, 1991, effective January 11, 1991; further amended November 8, 1991, effective November 8, 1991; further amended February 7, 1992, effective February 7, 1992; further amended March 18, 1993, effective March 18, 1993; further amended December 6, 1993, effective January 1, 1994; further amended March 8, 1995, effective March 23, 1995; further amended and effective January 9, 1996; amended effective March 10, 1998; further amended December 10, 2003, effective January 1, 2004; further amended

November 23, 2007, effective January 1, 2008; further amended April 5, 2010, effective July 1, 2010.)

2.8. Immunity.

Complaints submitted to the Board or Counsel or testimony given with respect thereto or trustee proceedings conducted pursuant to Rule 2.20 shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, hearing officers, Counsel, staff, volunteers, experts appointed pursuant to Rule 2.19, trustees and assistants appointed pursuant to Rules 2.20 and 2.5, and mentors appointed pursuant to Rule 2.7(b)(4) shall be immune from suit and liability for any conduct in the course of their official duties.

COMMENT :

The purpose of extending immunity to mentors appointed pursuant to Rule 2.7(b)(3) is to enhance the ability to attract participants to participate as mentors in minor misconduct programs and to provide to these mentors protections provided to those serving in other capacities under the auspices of the Disciplinary Board.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended May 7, 1990, effective May 7, 1990; further amended August 17, 1993, effective August 17, 1993; further amended and effective January 9, 1996; further amended effective August 1, 1998; further amended April 5, 2010, effective July 1, 2010.)

2.9. Refusal of complainant to proceed, compromise, etc.

Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

(Renumbered September 1984.)

2.10. Matters involving related pending civil or criminal litigation.

Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.

(Renumbered September 1984.)

2.11. Service.

(a) Service upon the respondent of the petition or order to show cause in any disciplinary, disability, or trustee proceeding shall be made by personal service by any person authorized by the Board Chairperson, except that in the event the respondent cannot be found within the state or has departed therefrom, service shall be made by registered or certified mail at the respondent's address shown in his or her registration statement filed pursuant to Rule 17(d) or other last known address. Service by mail is complete on mailing.

(b) Service of any other papers or notices required by these rules may be personal or by mail. Personal service includes delivery of the copy to an attorney or a responsible person at the attorney's office. Service by mail at the respondent's address shown in his or her registration statement filed pursuant to Rule 17(d) or other last known address is complete on mailing, if mailed by postage prepaid First Class mail or other class of mail that is at least as expeditious.

(Amended July 29, 1981, effective July 29, 1981; renumbered September 1984; further amended July 3, 1989, effective July 3, 1989; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended effective May 7, 1990; further amended February 7, 1992, effective February 7, 1992; further amended November 23, 2007, effective January 1, 2008; further amended February 12, 2008, effective July 1, 2008.)

(v) upon approval by the Disciplinary Board, place any unclaimed files in storage (in the custody of the Disciplinary Board); or

(vi) take such further action as the supreme court directs.

(d) **Disposition of unclaimed files.** Following discharge of the trustee, the attorney's client files shall be stored by Counsel for a period of one (1) year. At any time thereafter, Counsel may publish a legal notice in a newspaper of general circulation announcing that the attorney's client files will be destroyed in thirty (30) days if unclaimed.

Upon expiration of the thirty (30) day period, Counsel may destroy any unclaimed files which, in the exercise of discretion, Counsel concludes do not contain original documents of value to the attorney's clients.

(e) Upon appointment of a trustee, the attorney whose files are the subject of the trusteeship may, by order of the supreme court, be suspended from the practice of law in this state until the trusteeship is completed and may be required to pay to the Board all costs ordered and incurred, together with interest at the Hawai'i statutory judgment rate.

(Renumbered September 1984; amended effective May 7, 1990; amended effective August 1, 1998; further amended June 8, 2001, effective July 1, 2001; further amended November 23, 2007, effective January 1, 2008.)

2.21. Deleted.

2.22. Confidentiality.

(a) **General rule.** The files, records and proceedings of the Board, the hearing committees or officers, and Counsel, and of mentors participating in minor misconduct programs pursuant to Rule 2.7(b), as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

(1) As between Counsel, the committees or officers, the Board and the supreme court in the furtherance of their duties;

(2) As between the Board, Counsel and an attorney admission or disciplinary authority, or judicial selection or disciplinary authority, of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice;

(3) Upon the request of the attorney affected;

(4) Where permitted by the supreme court;

(5) Where required or permitted by these rules;

(6) Where the investigation is predicated upon a conviction of the respondent for a crime;

(7) Where 90 days have passed since the service on a respondent of a Petition for discipline, unless such time is extended by the Board Chairperson for no more than 45 days for good cause shown;

(8) Where reinstatement proceedings are initiated pursuant to Rule 2.17(c).

(b) Upon receipt of trustworthy evidence that an attorney has committed a crime and to protect the interests of the public, the administration of justice, or the legal profession, the Chairperson of the Board may authorize Counsel to disclose the evidence to appropriate law enforcement or prosecuting authorities. Counsel may not disclose that an attorney voluntarily sought, received, or accepted treatment from the Attorneys and Judges Assistance Program or the record of such treatment.

(c) The Chairperson of the Board, upon the receipt of trustworthy evidence, may authorize Counsel to disclose an attorney's possible substance abuse, physical or mental illness, or other infirmity to the Director of the Attorneys and Judges Assistance Program.

(d) An affidavit resigning in lieu of discipline or consenting to disbarment submitted pursuant to Rule 2.14 shall be submitted to the hearing committee or officer, to the Board, and to the supreme court at any time that the attorney applies for reinstatement. Such affidavit shall also be supplied to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice.

(e) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the respondent, the Board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right

of the respondent to a fair hearing without prejudice, and to state that the respondent denies the allegations. The statement shall be first submitted to the respondent involved for his or her comments and criticisms prior to its release, but the Board in its discretion may release the statement as originally prepared.

(f) Except as ordered by the supreme court, or as otherwise provided by these rules, the files, records and proceedings filed with the supreme court by the Board, by Counsel or by a respondent, as well as any oral argument held before the supreme court in connection with any disciplinary proceedings, are not confidential, except that in Rule 2.19 proceedings, a final order transferring an attorney to inactive status shall be a matter of public record, but otherwise, the record of the proceedings shall not be publicly disclosed.

(g) In addition, the Board shall transmit notice of all public discipline imposed by the supreme court, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

(Amended effective July 29, 1981; renumbered September 1984; amended effective November 23, 1987; further amended November 8, 1991, effective November 8, 1991; further amended February 7, 1992, effective February 7, 1992; further amended March 18, 1993, effective March 18, 1993; further amended March 8, 1995, effective March 23, 1995; further amended and effective January 9, 1996; further amended October 21, 1999, effective January 1, 2000; further amended September 16, 2002, effective January 1, 2003; further amended October 6, 2003, effective January 1, 2004; further amended November 23, 2007, effective January 1, 2008; further amended April 5, 2010, effective July 1, 2010.)

2.23. Interim suspension.

(a) Upon receipt of sufficient evidence demonstrating that an attorney has committed a violation of the Hawai'i Rules of Professional Conduct and poses a substantial threat of serious harm to the public, Counsel may:

(i) transmit the evidence to the supreme court; and

(ii) contemporaneously make a reasonable attempt to provide the attorney with notice, which

may include notice by telephone, that a request for immediate interim suspension has been transmitted to the supreme court.

(b) Upon examination of the evidence transmitted to the supreme court by Counsel and of rebuttal evidence, if any, that the attorney has transmitted to the supreme court prior to the supreme court's ruling, the supreme court may enter an order immediately suspending the attorney, pending final disposition of the disciplinary proceedings predicated upon the conduct of causing the harm, or may order such other action as it deems appropriate.

(c) On notice to Counsel, an attorney suspended pursuant to (b) may move for dissolution or modification of the order of suspension, and in that event, the motion shall be heard and determined as expeditiously as justice requires:

(d) An order imposing an interim suspension on an attorney under this rule shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless the supreme court shall otherwise order.

(Added July 29, 1981, effective July 29, 1981; renumbered September 1984; amended February 7, 1992, effective February 7, 1992; further amended November 23, 2007, effective January 1, 2008.)

2.24. Audit of trust accounts.

(a) When audit may be ordered.

(1) The Chairperson may order an audit of any trust accounts maintained by an attorney upon:

(i) An attorney's failure to file the trust account verification required by Rule 1.15 of the Hawai'i Rules of Professional Conduct;

(ii) The filing of a petition for creditor relief on behalf of an attorney;

(iii) The filing of felony charges against an attorney;

(iv) An allegation an attorney is incapacitated under Rule 2.19 of these rules, or a judicial determination the attorney is incompetent or upon involuntary commitment on grounds of incompetency or disability;

(v) The filing of a claim against the attorney with the Lawyers' Fund for Client Protection;

(vi) Court order; or

(vii) Counsel's request for other good and sufficient reasons.

The Hawaii Supreme Court extended the deadline for comments to the new rules until June 9, 2011. Don't Snooze, Don't Lose!

HOW THE NEWLY-PROPOSED HAWAII RULES OF PROFESSIONAL CONDUCT, IF ADOPTED, WILL AFFECT YOUR PRACTICE

Tuesday, April 26, 2011 • 9:00 A.M. To 12:00 P.M.
(Registration Begins At 8:15 A.M.)
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SPEAKERS:

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See more on the proposed amendments on the HSBA website at www.hsba.org.



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Latest! Hawaii Opinions

Hawaii State Bar Association

HAWAII RULES OF PROFESSIONAL CONDUCT

The Disciplinary Board has forwarded to the Supreme Court extensive proposed amendments to the Hawaii Rules of Professional Conduct. Due to the nature of the proposed amendments a few need to educate HSBA members about these proposals, the ODC and the HSBA have, with the consent of the Court, posted the proposed amendments on their respective websites for preliminary review. Posted are the following documents:

- [Executive Summary of the Amendments & Changes](#)
- [Proposed Amendments](#)
- [Comparison of Proposed HRPAC to Current HRPAC](#)
- [Concurrence of Proposed Rule of Conduct to Counsel Site of Conduct](#)

Please review the Executive Summary and the videos to understand the extent to which these proposed amendments will affect your practice of law. Deadline to Comment is June 9, 2011!

Additional Resources from the Hawaii Bar Journal (HBJ) • November 2010 HBJ article, January 2011 HBJ article, February 2011 HBJ article.

This seminar will discuss our present ethics rules, their purpose and rationale and how they are currently interpreted and applied in real-life situations, and compare how the new proposed rules may change all of that and why.

Come and educate yourself on how the new proposed rules, if adopted, may dramatically and drastically affect how you practice law. Don't be caught with your pants down and complain after the fact about the new rules because you simply didn't know any better ahead of time. Arm yourself now with the necessary information to let your views be known before any of these rules are adopted.

- **FIND OUT** what the new rules will require you to affirmatively disclose to your client about your lack of certain minimum amounts of malpractice insurance.
- **EARN** how you can legitimately split fees with another lawyer even if you don't do any of the work.
- **CONSIDER** when it is ever okay to have sexual relations with a client and how you might cure the dilemma you find yourself in.
- **DISCOVER** what duties you still owe to a prospective client whom you interviewed but whose case you declined to take.
- **PONDER** your ethical obligations to the other lawyer when you know he has mistakenly sent you a document that was not intended to be sent to you.
- **IDENTIFY** when it is ever okay for a lawyer not licensed in Hawaii to perform legal services here.
- **REFLECT** on what you need to do to properly obtain a waiver of a conflict of interest from an existing or former client.

Raising the Bar in Ethics

Disciplinary Counsel's Report: 2010 Annual Statistical Summary

by Janet S. Hunt, Chief Disciplinary Counsel

The Office of Disciplinary Counsel ("ODC") presents its 2010 annual statistical summary.

During 2010, 347 new grievances were received, 89 of which met the current docketing standard.

Of the 89 complaints docketed in 2010, commission of a crime was the largest complaint area. The next largest complaint categories were failure to deposit in trust account, abandonment, neglect, and incompetence.

Clients are the largest source of complaints, followed by ODC and attorneys.

During 2010, 107 docketed complaints were closed, 37% of which resulted in the imposition of public discipline. In all, three Hawaii lawyers were publicly disciplined during the year, one was disbarred, and one resigned in lieu of discipline (resolving 39 complaints). In addition, 226 "undocketed" cases were closed under the new system.

ODC additionally handled 11 ongoing trusteeships as well as six reinstatement proceedings.

The 2010 annual statistical report follows:

ODC STATISTICAL REPORT FOR 2010

I. COMPLAINTS DOCKETED BY SUBJECT CATEGORY

A. PERFORMANCE	
1. Abandonment	7
2. Abusiveness	0
3. Neglect (phone calls, letters, etc.)	6
4. Incompetence	6
5. Misrepresentations to client	2
6. Misrepresentations to others	1
7. Improper withdrawal from employment	0
8. Improper disclosure of confidential information	1

9. Conflict of interest	4
10. Improper contact with opposing party	2
11. Other	3
	32

B. FEES

1. Excessive fees	1
2. Failure to return unearned portion	2
3. Improper referral fees	0
4. Fee dispute, no unethical conduct	0
5. Other	2
	5

C. FUNDS AND PROPERTY

1. Commingling	2
2. Conversion	4
3. Failure to account	4
4. Failure to deposit in trust account	8
5. Failure to maintain records	0
6. Failure to promptly pay out	4
7. Withdrawal of funds in dispute	2
8. Improper payment to client	1
9. Improper assertion of lien on client's property	0
10. Failure to promptly deliver property	1
11. Other	0
	26

D. SOLICITATION

1. In-Person Solicitation	0
2. Direct Mail Solicitation	0
3. Other	0
	0

E. ADVERTISING

1. False, fraudulent, deceptive, or misleading ..	2
2. Specialization	0
3. Other	0
	2

F. INTERFERENCE WITH JUSTICE

1. Advising violation of law	0
2. Appeal in bad faith	0
3. Advising witness to hide, suppression of evidence, bribing witness	1
4. Aiding unlawful practice of law	3
5. Disobedience of court order	0
6. Disrespect of court	0
7. Gifts to officials	0
8. Harassment, claim not warranted	0
9. Misrepresentations to court	3
10. Threaten criminal prosecution	1
11. Abuse of process (sham or groundless lawsuits, etc.)	1
12. Prosecutorial misconduct	0
13. Improper contact with tribunal	0

14. Use of perjured testimony or false evidence	0
15. Improper trial publicity	0
16. Other	1
	10

G. FRAUD

1. Scheme to defraud	3
2. Other	0
	3

H. PERSONAL BEHAVIOR AND CRIMES

1. Commission of crime	9
2. Failure to honor agreement or stipulation ..	1
3. Offensive language or actions	0
4. Extortion or intimidation	0
5. Coercion to obtain payment/fee	1
6. Abusive collection practices	0
7. Failure to pay bills (court reporters; expert witnesses, etc.)	0
8. Other	0
	11

TOTAL COMPLAINTS DOCKETED

IN 2010	89
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II. COMPLAINT SOURCES

1. Clients	47
2. Attorneys	4
3. Judges	1
4. Court Reporters	0
5. Bar Association	3
6. Office of Disciplinary Counsel	14
7. Attorney General	2
8. Other Governmental Agencies	3
9. Opposing Party	3
10. Anonymous	0
11. Member of the Public	3
12. Other	9
TOTAL COMPLAINTS	89

III. NUMBER OF ATTORNEYS COMPLAINED AGAINST BY NUMBER OF YEARS IN PRACTICE

Number of Years In Practice	Number of Attorneys
Less than 1 - 5 years	6
6 - 10 years	3
11 - 15 years	11
16 - 20 years	14
21 - 25 years	11
26 - 31+ years	26
Pro Hac Vice Admittees	0
TOTAL	71

IV. NUMBER OF ATTORNEYS
COMPLAINED AGAINST BY NUMBER OF
COMPLAINTS PER ATTORNEY

No. of Attorneys with 1 complaint:	78
No. of Attorneys with 2 complaints:	8
No. of Attorneys with 3 complaints:	1
No. of Attorneys with 4 complaints:	1
No. of Attorneys with 5+ complaints:	1
TOTAL COMPLAINTS	89

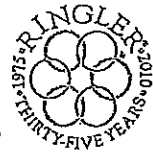
V. COMPLAINT DISPOSITION

	No. of Attorneys	No. of Complaints Involved
Disbarment	1	2
Resignation in Lieu of Discipline	1	37
Public Reprimand	1	1
Informal Admonition	11	15
Dismissed or Dismissed with Caution	26	52
COMPLAINTS CLOSED IN 2010:		107

DOCKETED COMPLAINTS PENDING AS OF 12/31/10 189

Save the Date: Friday,
June 24, 2011

The 2011 Hawaii Access to Justice Conference will be on Friday, June 24, 2011, 8:00 a.m. to 4:30 p.m., at the William S. Richardson School of Law. Please attend to be part of an exciting, provocative discussion about seeking justice for the underserved, including excellent opportunities for audience participation. The guest speaker will be Honorable Lora Livingston, 261st Judicial District Civil Court, Austin, Texas. Judge Livingston has been a frequent speaker at national access to justice events. She was appointed by the Texas Supreme Court to the inaugural board of the Texas Access to Justice Commission, and she currently serves as the Chair of the ABA National Commission on IOLTA.



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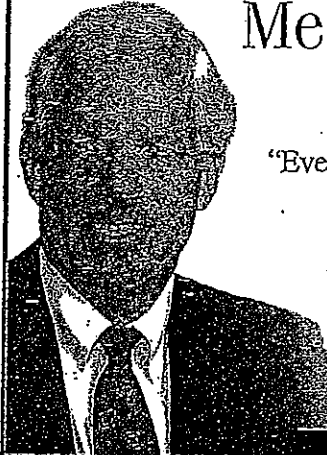
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(e) **Bylaws, Rules and Procedures.** The Commission may adopt bylaws, rules or operational procedures as it deems necessary for and consistent with Sections (c), (d) and (f) through (j) of this rule.

(f) **Committees and Task Forces.** The Commission may create such committees and task forces, and appoint such committee and task force members, as it deems necessary or desirable to facilitate the work of the Commission. The Commission shall designate a chair of the committee or task force. The Commission may appoint to the committee or task force persons who are not members of the Commission. The role of committees and task forces shall be advisory, and they shall make such recommendations to the Commission as the members of such committees and task forces deem appropriate. Meetings of committees and task forces shall be at the call of the chair or at the call of at least 20% of the members of the committee or task force. A quorum consisting of not less than one-third of the then-appointed and serving members of a committee or task force shall be necessary at a duly called meeting to adopt a recommendation to the Commission.

(g) **Meetings, Quorum, and Voting.** The Commission shall meet at least quarterly and shall have additional meetings at the call of either the chair or at least seven members upon at least ten days prior notice. A quorum consisting of not less than one-third of the members of the Commission then in office shall be necessary to transact business and make decisions at a meeting of the Commission. On any votes taken at a meeting of the Commission, the chair shall vote only in the event of a tie.

(h) **Staff and Funding Support.** It is anticipated that staff and funding support for the Commission will be provided by a combination of private and public sources of financial and in-kind support.

(i) **Recommendations.** Any recommendations by the Commission shall be made in the name of the Commission only, and not in the name of the individual members or the institutions or entities they represent.

(j) **Reports and Review.**

(1) **ANNUAL REPORTS.** The Commission shall file with the Supreme Court an annual report describing its activities during the prior 12-month period and deliver a copy of the report to the Executive Director of the HSBA.

(2) **THREE-YEAR REVIEW.** Three years after the Commission holds its first meeting, the Supreme Court shall evaluate the progress made by the Commission toward the goal of substantially increasing access to justice in civil legal matters for low-income Hawai'i residents.

(Added April 24, 2008, effective May 1, 2008.)

Rule 22. MANDATORY CONTINUING PROFESSIONAL EDUCATION AND VOLUNTARY CONTINUING LEGAL EDUCATION.

(a) **Mandatory Continuing Professional Education.** Except as otherwise provided herein, every active member of the Bar shall complete at least 3 credit hours per year of approved Mandatory Continuing Professional Education (MCPE). Qualifying professional education topics include the Hawai'i Rules of Professional Conduct, legal ethics and related topics; law office management, client trust account administration, bias awareness and prevention; access to justice, case and client management, and malpractice insurance and prevention.

(b) **Voluntary Continuing Legal Education.** In addition to MCPE, all active members of the Bar are encouraged to complete 9 or more credit hours per year of approved Voluntary Continuing Legal Education (VCLE).

(c) **Carry Forward of Credit Hours.** A member may carry forward from the previous reporting period a maximum of 3 excess MCPE credit hours. To be carried forward, the credit hours must have been earned during the calendar year immediately preceding the current reporting period.

(d) **Mandatory Certification, Reporting, and Record Keeping.** Each active Bar member shall annually:

(1) certify the number of approved MCPE hours completed during the preceding year or carried forward, and

(2) report the number of approved VCLE hours completed during the preceding year, specifying the number of such hours, if any, satisfied by section (e)(4) of this rule. A member shall maintain records of approved MCPE credit hours and of approved VCLE credit hours for the 2 most recent reporting periods, and these records shall be subject to audit by the HSBA. Any active Bar member who fails to cooperate with the HSBA when audited shall be deemed to be in noncompliance with this rule.

(e) **Courses and Activities.** The requirements of this rule may be met, subject to prior approval as set out in sections (f) and (g) of this rule, by:

(1) attending approved courses or activities, including but not limited to, presentations conducted in-house or for Inns of Court, bar sections, professional legal organizations, and the like;

(2) preparing for and teaching approved professional education or judicial education courses or activities. Two hours of preparation time may be certified or reported for each hour of time spent teaching, *i.e.* 3 hours may be claimed for teaching a 1 hour course;

(3) studying approved audio, video, or other technology-delivered professional education courses or activities; and

(4) with regard to the VCLE standard of this rule, up to 3 hours of that standard may be satisfied by providing *pro bono* service, as defined in Rule 6.1 of the Hawai'i Rules of Professional Conduct.

(f) **Approved Courses or Activities.** Courses and activities sponsored by the Hawai'i State Bar Association (HSBA) or the American Bar Association, and classified by the HSBA as MCPE or VCLE, qualify for credit under this rule.

(g) **Approval and Accreditation Authorization.** The HSBA is authorized to approve or disapprove:

(1) other educational courses and activities for mandatory or voluntary credit and

(2) applications by an entity for accreditation as a course or activity provider. Approved courses and activities may include, but are not limited to, courses and activities conducted in-house or sponsored by Inns of Court, bar sections or other professional legal organizations. Accreditation shall constitute prior approval of MCPE and VCLE courses offered by the provider, subject to amendment, suspension, or revocation of such accreditation by the HSBA. The HSBA shall establish the procedures, minimum

standards, and fees for approval of specific courses and activities or accreditation of providers and for revocation of such approval or accreditation.

(h) **Full-time Judges.** Federal judges, magistrate judges, bankruptcy judges, U.S. Court of Federal Claims judges and administrative law judges are exempt from the requirements of this rule. Full-time state judges shall participate for at least 3 hours each year in a program of judicial education approved by the Committee on Judicial Education. Full-time state judges who are unable to attend, in person, a program approved by the Committee on Judicial Education or who are excused from that program shall comply with this requirement by such other means as the supreme court approves. Full-time state judges shall report the number of approved judicial education hours attended on the judges' annual financial disclosure form.

(i) **Inactive members.** Inactive members of the Bar who subsequently elect active status shall complete and report 3 hours of MCPE within 3 months of electing active status.

(j) **Newly licensed members.** Each person licensed to practice law who elects active status in the year in which he or she is licensed shall not be required to comply with the requirements of section (a) of this rule for that year, provided that nothing herein shall modify the obligations imposed by Rule 1.14 of these rules.

(k) **Good Cause Exemption or Modification.** An active member may apply to the HSBA for good cause exemption or modification from the MCPE requirement. Members seeking an exemption or modification shall furnish substantiation to support their application as requested by the HSBA. Good cause shall exist when a member is unable to comply with the MCPE requirement because of illness, medical disability, or other extraordinary hardship or extenuating circumstances that are not willful and are beyond the member's control.

(1) **Effective Date; Reporting Period.** This rule is effective January 1, 2010. The initial reporting period will be the calendar year beginning January 1, 2010, and reports for that year shall be submitted in accordance with section (d) of this rule.

COMMENT:

Continuing professional and legal education contributes to lawyer competence and benefits the public and the legal profession by assuring that attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices. Voluntary continuing legal education is valuable to lawyers and attendance at courses is encouraged. These new rules are expected to result in a substantial increase in course attendance and participation in activities that earn MCPE and VCLE credit, with resulting enhancement of lawyer services to clients.

The state and federal judicial systems sponsor programs of judicial education for federal and state judges and, accordingly, full-time state and federal judges are excluded from the provisions applicable to active members of the Bar.

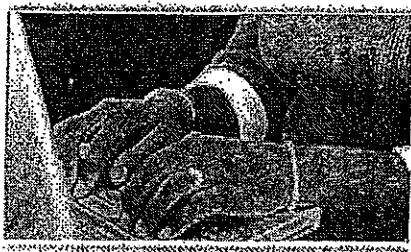
Rules 17, 22, and other Rules of the Supreme Court of the State of Hawai'i (RSCH) refer to the Bar, the Hawai'i State Bar, the Bar Administrator, the Hawai'i State Bar Association, and the Executive Director of the Bar. References to the Bar or the Hawai'i State Bar are to the unified Bar established by the Hawai'i Supreme Court upon adoption of RSCH Rule 17. Historically, the unorganized bar consisted of all attorneys admitted to the practice of law in the State of Hawai'i, and the Hawai'i State Bar Association was a voluntary organization. In 1989, the supreme court "unified" the bar by requiring all members of the bar to be part of "an organization to be known as the Hawai'i State Bar." RSCH Rule 17 also defined the unified Bar organizational structure. The supreme court ordered the Committee on Integration of the Bar to seek nominations for the "initial

officers and Board of Directors of the Hawai'i State Bar." See UNIFICATION OF THE HAWAII STATE BAR IMPLEMENTATION ORDER NO. 1. Subsequently, the Hawai'i State Bar Association amended its rules and bylaws to conform to RSCH Rule 17 "to permit [the Association] to become the administrative body of the unified bar of this State . . . if this Court should appoint it to such capacity[.]" See UNIFICATION OF THE HAWAII STATE BAR IMPLEMENTATION ORDER NO. 2. The supreme court appointed the Hawai'i State Bar Association "as the administrative entity of the Hawai'i State Bar, to carry out the purposes and to have the powers set forth in Rule 17(b) . . . and other rules of this court, according to the terms of said rules." Id. Implementation Order Number 2 rescinded Implementation Order Number 1's search for candidates. The Hawai'i State Bar Association assumed its role as administrator of the Hawai'i State Bar. By operation of Implementation Order No. 2, the Hawai'i State Bar Association is the Bar Administrator. Consequently, the Executive Director of the Hawai'i State Bar Association is the Executive Director referred to by the rules for as long as the Hawai'i State Bar Association remains the Bar Administrator.

(Added July 15, 2009, effective January 1, 2010; further amended April 29, 2010, effective July 1, 2010.)

HINSHAW

& CULBERTSON LLP



Alerts

Oregon Bar Issues Formal Opinion on Ethics Issues Arising in Mentoring Relationships and Use of LISTSERVs

April 21, 2011

Lawyers for the Profession® Alert

Professionals

Roy Pulvers

Practice Areas

Appellate
Commercial Litigation
Legal Ethics & Professional
Responsibility
Legal Malpractice
Professional Liability

Industries

Lawyers & Law Firms

Oregon Formal Opinion No. 2011-184 (March 2011)

Brief Summary

In a Formal (Ethics) Opinion regarding confidentiality of client information and conflicts of interest, the Oregon State Bar Board of Governors clarified certain duties held by lawyers who are in mentoring relationships with lawyers in different law firms. The Opinion also offered guidance to lawyers who participate on email LISTSERVs and other online venues for discussion and advice.

Complete Summary

State bars are beginning to formalize and mandate programs providing new lawyers with mentoring by more experienced members of the bar. The Oregon State Bar is launching a New Lawyer Mentorship Program that will be required for all new lawyers who pass the bar starting in the summer of 2011, Georgia and Utah have adopted similar programs, and other states appear likely to follow.

The formalization of the mentorship process highlights questions regarding what client information can be disclosed by the mentee to the mentor (and vice versa), as well issues pertaining to conflicts of interest. The same or similar questions arise in the use of LISTSERVs and other electronic discussion venues, where "consulting lawyers" frequently ask other lawyers (consulted lawyers) for advice or legal information.

The Oregon Formal Opinion clarified that the consulting lawyer seeking advice from the consulted lawyer who is not in the same law firm must abide by Rule 1.6 and safeguard information relating to the representation of a client and protect against disclosure without the client's informed consent. Following the American Bar Association's Standing Committee on Ethics and Professional Responsibility Formal Opinion 98-411, "Ethical Issues in Lawyer-to-Lawyer Consultation," the Oregon Formal Opinion recognizes that "[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client" and general hypotheticals (so long as the facts do not implicitly identify the client) do not implicate Rule 1.6.

If there is a danger of disclosing client identity or otherwise protected information, then the lawyer should obtain informed consent from the client, including apprising the client of risks of disclosure including potential waiver of attorney-client privilege. The consulting lawyer also should avoid consulting with lawyers in law firms that are likely to

represent the adverse party in the given matter, which is a risk particularly acute in the context of LISTSERVs given the broad range of potential information recipients.

The Formal Opinion states that although the consulted lawyer has certain defined responsibilities towards his/her own client, he/she would not violate any duties to the consulting lawyer's clients by using information received in the course of the mentorship, even when later representing a client adverse to the consulting lawyer's client. If, however, the consulting lawyer relies on the consulted lawyer's advice, and that results in detriment to the consulted lawyer's client, then the consulted lawyer must disclose to his/her own client about the consultation. The Formal Opinion suggests that the consulted attorney could insist on running a conflicts search prior to the discussion or perhaps even seek an agreement that the consultation would not create obligations to that client.

Significance of Opinion

This timely opinion identifies some of the potential ethical risks inherent in mentoring relationships and online discussion or advice venues. The most significant risks identified are the potential threat to protection of client information and the risk of conflicts of interest, either in the moment or arising thereafter. This Opinion provides a straightforward attempt to sort through some of the issues attendant upon the respective responsibilities of mentees and mentors as well as those who regularly use LISTSERVs and other online venues for discussion and advice.

For further information, please contact [Roy Pulvers](#).

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

Pā'ina for the People
benefiting Pro Se Self Help Centers
July 16th ♦ 5:30 p.m. - 10:00 p.m.
Hawai'i Convention Center

TICKET & TABLE RESERVATIONS

Elite - \$5,000 ___ qty. ♦ Premium - \$3,000 ___ qty.

Standard - \$1,500 ___ qty. ♦ Individual Admission - \$150 ___ qty.

Additional Wine Tasting - \$50 ___ qty.

Total Amount: \$ _____

Name: _____ JD#: _____

Firm Name: _____

Address: _____ Phone: _____

Credit Card #: _____ Exp. Date: _____

Cardholder's Signature: _____

Please email the names of who will be attending on
or before July 1, 2011 to bardinner@hsba.org.
You can also fax this form to (808) 521-7936

HSBA is a 501(c)(6) organization. Payments/donations made to HSBA are not tax deductible as charitable contributions, but may be deductible as a business expense, where appropriate.

HSBA
Hawaii State Bar Association

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Amendment
of the
Rules of the Supreme Court of the State of Hawai'i

ORDER AMENDING RULE 17, AND ADOPTING NEW RULE 22,
OF THE RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I
(By: Moon, C.J., for the court¹)

IT IS HEREBY ORDERED that Rules 17 and 22 of the Rules of the Supreme Court of the State of Hawai'i are, respectively, amended and adopted, effective January 1, 2010, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 17. THE HAWAI'I STATE BAR.

* * *

(d) Member registration, information, assessment, suspension and status.

(1) MEMBER REGISTRATION. Each member of the Hawai'i State Bar shall file an attorney registration statement and provide such information as the Board of Directors may require. A member shall notify the Hawai'i State Bar, in writing, within ~~thirty~~ (30) days of any change of such required information. At minimum, the registration statement shall require disclosure of:

(i) professional discipline or convictions in any jurisdiction, provided that convictions for offenses that are or would be classified under Hawai'i law as petty misdemeanors, violations, or infractions need not be disclosed;

(ii) hours of pro bono service for the previous year. Pro bono service hours for individual members shall be confidential, and the Hawai'i State Bar

¹ Considered by: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.

shall disclose such information only in aggregate reports of pro bono hours for the entire membership; ~~and~~

(iii) professional liability insurance, if any; provided that each active member who certifies the member is a government lawyer or in-house counsel and does not represent clients outside that capacity is exempt from providing professional liability insurance information; and

(iv) the number of credit hours of Mandatory Continuing Professional Education (MCPE) and Voluntary Continuing Legal Education (VCLE) completed in the previous year, specifying the number of VCLE hours, if any, satisfied by Rule 22(e)(4).

* * *

(4) ADMINISTRATIVE SUSPENSION.

(i) Failure to file or pay. Failure to file a properly completed attorney registration statement or nonpayment of any dues, fees, or charges required by these rules, after 15 days written notice, shall result in automatic suspension by the Hawai'i State Bar, of membership and the right to practice law until reinstatement. The Board of Directors of the Bar (1) may establish late processing fees and reinstatement charges and (2) may exempt from the registration requirements inactive attorneys who do not maintain active licenses and do not practice law in any other jurisdiction.

(ii) Failure to meet MCPE requirements; notice of noncompliance; subsequent acquisition of hours; contest; suspension. Within 60 days after the deadline for filing the disclosure required by Rule 17(d)(iv), the Executive Director of the Bar shall send a certified notice of noncompliance to each member whose disclosure shows the MCPE requirement has not been met. A member who receives a certified notice of noncompliance may, within 15 days after the notice was mailed, submit to the Executive Director of the Bar evidence the member has acquired the mandated credit hours (which hours may not be counted for the current year); that the notice of noncompliance was issued erroneously, or that the member has resigned his or her license to practice law. A member who fails to prove the member acquired the mandated credit hours or that the notice of noncompliance was issued erroneously shall be automatically and immediately suspended by the Bar.

(5) REINSTATEMENT.

(i) After failure to file or pay. Any attorney suspended [~~under the provisions of (4) above~~] for failure to file a complete registration statement or pay dues and fees shall be reinstated by the Hawai'i State Bar without further order upon:

(i)a payment to the Bar of all arrears and a late processing and reinstatement [~~charge~~] fee in such amount as shall be determined by the Board of ~~d~~ Directors of the Bar from time to time, and

(i)b satisfaction of such other requirements as may be imposed by the Board of Directors of the Bar and/or ~~this~~ the supreme court.

(ii) After failure to comply with MCPE requirements. An attorney suspended for failure to comply with MCPE requirements shall be reinstated upon sufficient proof the member has:

(a) completed 3 hours of MCPE, which hours shall not be counted for the current year;

(b) paid the reinstatement fee set by the Bar; and

(c) paid all required fees and dues.

(iii) Review by supreme court. A member may petition the supreme court for review of the Executive Director's determination the member failed to prove completion of the mandated credit hours or that a notice of noncompliance was issued erroneously. Such petition shall not stay the effective date of the suspension.

* * *

Rule 22. Mandatory Continuing Professional Education and Voluntary Continuing Legal Education.

(a) Mandatory Continuing Professional Education. Except as otherwise provided herein, every active member of the Bar shall complete at least 3 credit hours per year of approved Mandatory Continuing Professional Education (MCPE). Qualifying professional education topics include the Hawai'i Rules of Professional Conduct, legal ethics and related topics, law office management, client trust account administration, bias awareness and prevention, access to justice, case and client management, and malpractice insurance and prevention.

(b) Voluntary Continuing Legal Education. In addition to MCPE, all active members of the Bar are encouraged to complete 9 or more credit hours per year of approved Voluntary Continuing Legal Education (VCLE).

(c) Carry Forward of Credit Hours. A member may carry forward from the previous reporting period a maximum of 3 excess MCPE credit hours. To be carried forward, the credit hours must have been earned during the calendar year immediately preceding the current reporting period.

(d) Mandatory Certification, Reporting, and Record Keeping. Each active Bar member shall annually:

(1) certify the number of approved MCPE hours completed during the preceding year or carried forward, and

(2) report the number of approved VCLE hours completed during the preceding year, specifying the number of such hours, if any, satisfied by section (e)(4) of this rule. A member shall maintain records of approved MCPE credit hours and of approved VCLE credit hours for the 2 most recent reporting periods, and these records shall be subject to audit.

(e) Courses and Activities. The requirements of this rule may be met, subject to prior approval as set out in sections (f) and (g) of this rule, by:

(1) attending approved courses or activities, including but not limited to, presentations conducted in-house or for Inns of Court, bar sections, professional legal organizations, and the like;

(2) preparing for and teaching approved professional education courses or activities. Two hours of preparation time may be certified or reported for each

hour of time spent teaching, *i.e.* 3 hours may be claimed for teaching a 1 hour course;

(3) studying approved audio, video, or other technology-delivered professional education courses or activities; and

(4) with regard to the VCLE standard of this rule, up to 3 hours of that standard may be satisfied by providing *pro bono* service, as defined in Rule 6.1 of the Hawai'i Rules of Professional Conduct.

(f) Approved Courses or Activities. Courses and activities sponsored by the Hawai'i State Bar Association (HSBA) or the American Bar Association, and classified by the HSBA as MCPE or VCLE, qualify for credit under this rule.

(g) Approval and Accreditation Authorization. The HSBA is authorized to approve or disapprove:

(1) other educational courses and activities for mandatory or voluntary credit and

(2) applications by an entity for accreditation as a course or activity provider. Approved courses and activities may include, but are not limited to, courses and activities conducted in-house or sponsored by Inns of Court, bar sections or other professional legal organizations. Accreditation shall constitute prior approval of MCPE and VCLE courses offered by the provider, subject to amendment, suspension, or revocation of such accreditation by the HSBA. The HSBA shall establish the procedures, minimum standards, and fees for approval of specific courses and activities or accreditation of providers and for revocation of such approval or accreditation.

(h) Full-time Judges. Federal judges are exempt from the requirements of this rule. Full-time state judges shall participate for at least 3 hours each year in a program of judicial education approved by the Committee on Judicial Education. Full-time state judges who are unable to attend, in person, a program approved by the Committee on Judicial Education or who are excused from that program shall comply with this requirement by such other means as the supreme court approves. Full-time state judges shall report the number of approved judicial education hours attended on the judges' annual financial disclosure form.

(i) Inactive members. Inactive members of the Bar who subsequently elect active status shall complete and report 3 hours of MCPE within 3 months of electing active status.

(j) Newly licensed members. Each person licensed to practice law who elects active status in the year in which he or she is licensed shall not be required to comply with the requirements of section (a) of this rule for that year, provided that nothing herein shall modify the obligations imposed by Rule 1.14 of these rules.

(k) Effective Date; Reporting Period. This rule is effective January 1, 2010. The initial reporting period will be the calendar year beginning January 1, 2010, and reports for that year shall be submitted in accordance with section (d) of this rule.

COMMENT:

Continuing professional and legal education contributes to lawyer competence and benefits the public and the legal profession by assuring that attorneys remain current regarding the law, the obligations and standards of the profession, and the management of their practices. Voluntary continuing legal education is valuable to lawyers and attendance at courses is encouraged. These new rules are expected to result in a substantial increase in course attendance and participation in activities that earn MCPE and VCLE credit, with resulting enhancement of lawyer services to clients.

The state and federal judicial systems sponsor programs of judicial education for federal and state judges and, accordingly, full-time state and federal judges are excluded from the provisions applicable to active members of the Bar.

Rules 17, 22, and other Rules of the Supreme Court of the State of Hawai‘i (RSCH) refer to the Bar, the Hawai‘i State Bar, the Bar Administrator, the Hawai‘i State Bar Association, and the Executive Director of the Bar. References to the Bar or the Hawai‘i State Bar are to the unified Bar established by the Hawai‘i Supreme Court upon adoption of RSCH Rule 17. Historically, the unorganized bar consisted of all attorneys admitted to the practice of law in the State of Hawai‘i, and the Hawai‘i State Bar Association was a voluntary organization. In 1989, the supreme court “unified” the bar by requiring all members of the bar to be part of “an organization to be known as the Hawai‘i State Bar.” RSCH Rule 17 also defined the unified Bar organizational structure. The supreme court ordered the Committee on Integration of the Bar to seek nominations for the “initial officers and Board of Directors of the Hawai‘i State Bar.” See UNIFICATION OF THE HAWAI‘I STATE BAR IMPLEMENTATION ORDER NO. 1. Subsequently, the Hawai‘i State Bar Association amended its rules and bylaws to conform to RSCH Rule 17 “to permit [the Association] to become the administrative body of the unified bar of this State . . . if this Court should appoint it to such capacity[.]” See UNIFICATION OF THE HAWAI‘I STATE BAR IMPLEMENTATION ORDER NO. 2. The supreme court appointed the Hawai‘i State Bar Association “as the administrative entity of the Hawai‘i State Bar, to carry out the purposes and to have the powers set forth in Rule 17(b) . . . and other rules of this court, according to the terms of said rules.” Id. Implementation Order Number 2 rescinded Implementation Order Number 1’s search for candidates. The Hawai‘i State Bar Association assumed its role as administrator of the Hawai‘i State Bar. By operation of Implementation Order No. 2, the Hawai‘i State Bar Association is the Bar Administrator. Consequently, the Executive Director of the Hawai‘i State Bar Association is the Executive Director referred

*to by the rules for as long as the Hawai'i State Bar Association
remains the Bar Administrator.*

IT IS FURTHER ORDERED that Comments and Commentary are provided for interpretive assistance and are not binding on the courts.

DATED: Honolulu, Hawai'i, July 15, 2009.

FOR THE COURT:

Chief Justice