

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

**FIFTH 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  
Gayle Lau  
The Honorable Susan Oki Mollway  
The Honorable Paul Murakami  
The Honorable Paula Nakayama  
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 4, 2010

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

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

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**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 2, 2009 and March 19, 2010 are presented in Appendix “C”.

### V. STATUS REPORT ON PENDING PROJECTS REQUESTED BY THE HAWAII SUPREME COURT OR BY COMMISSION MEMBERS

#### 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. The Board has formulated and published detailed CLE Regulations, Frequently Asked Questions, and forms intended to assist both continuing legal education course providers and Bar members to meet the requirements of the new Rules (Appendix "C"; see handouts to Minutes of Commission meeting on March 19, 2010).

B. Presentation at a Judicial Education Conference of a Program Entitled "Advancing Professionalism in the Courtroom"

The Commission has been working for some time on a presentation (1) to judges at a Judicial Education Conference regarding what judges can do to encourage

professionalism in the courtroom, and (2) to HSBA members re professionalism and what judges expect of attorneys appearing in their courtrooms.

On April 30, 2010 the first piece of the project was completed when a program entitled “Advancing Professionalism in the Courtroom” (Appendix “E”) was presented to the judges. The program, organized and coordinated by Judge Trudy Senda, had an outstanding panel, and was well-received by the judges. The Commission and the HSBA are now working on the second piece of the project, the presentation to HSBA members regarding professionalism and what judges expect of attorneys appearing in their courtrooms. The HSBA has scheduled this program for August 30, 2010; several judges have agreed to serve as presenters.

C. Rejuvenation of the HSBA Minor Misconduct Program

Commission members and representatives of the HSBA, the Office of Disciplinary Counsel (ODC), and the Attorneys and Judges Assistance Program (AAP) worked together to rejuvenate the HSBA Minor Misconduct Program, which allows the ODC to refer lawyers accused of minor misconduct not warranting formal ODC disciplinary proceedings to HSBA mentors for guidance and counseling. As a result, the Commission recommended to the Supreme Court that Rules 2.7, 2.8, and 2.22 of the Rules of the Supreme Court be amended to facilitate rejuvenation of the Minor Misconduct Program by adding confidentiality and immunity provisions for mentors similar to those included in Rule 16 of the Rules of the Supreme Court regarding the Attorneys and Judges Assistance Program. On April 5, 2010 the Supreme Court filed an order amending the rules as proposed and recommended (Appendix “F”).

ODC Counsel Janet Hunt anticipates that, with the Minor Misconduct Program in place, 10% - 20% (or more) of ODC cases will be referred to HSBA members for guidance and counseling in lieu of formal disciplinary proceedings. The HSBA is soliciting volunteers to serve as mentors and the ODC, the AAP, and the HSBA are planning a training program for mentors.

D. Online Availability to Public of Whether an Attorney Has Professional Liability Insurance

At present, there are 25 United States jurisdictions which require some form of disclosure by an attorney to potential clients and/or members of the public as to whether the attorney has professional liability insurance. Following the recommendation of its committee (co-chaired by attorney Terry O'Toole and lay member Wesley Park) which has studied the issue for several years, the Commission voted to recommend that the Supreme Court rules be amended to provide that each active attorney's information regarding whether they have professional liability insurance be available online to the public. Lyn Flanigan and Jim Branham subsequently worked out language for a potential revision of RSCH Rule 17(d)(1) which would provide for the online availability to the public of whether an attorney has professional liability insurance.

The proposed amendment of RSCH Rule 17(d)(1) has been submitted for public comment.

E. Study of Whether There is a Need to Revise the Hawai'i Rules of Professional Conduct Regarding *Pro Se* Litigants and "Discrete Task Representation" (fka "Unbundling of Legal Services")

After studying this issue for some time, Judge Cardoza has concluded that a rule change is not necessary as present Rule 1.2 of the Hawai'i Rules of

Professional Conduct (entitled “Scope of Representation”) is adequate. Rather, Judge Cardoza suggests that the Commission focus on an educational program for attorneys and judges regarding the availability and need for “discrete task representation.”

Since “discrete task representation” is an important part of increasing “access to justice,” Judge Cardoza intends to work with the Access to Justice Commission and Disciplinary Counsel to set up an educational training program for attorneys and judges on this issue.

F. Revision of Disciplinary Board Formal Opinion No. 43 Regarding Use of the Title “Of Counsel”

The Commission recommended revision of Disciplinary Board Formal Opinion No. 43 regarding requirements for designation of an “Of Counsel” relationship by a law firm and attorney. The recommendation was accepted by the Disciplinary Board, and the revised Formal Opinion No. 43 was issued on April 29, 2010 (Appendix “G”).

G. History and Accomplishments of the Commission on Professionalism on the Hawai‘i Judiciary Website

At the suggestion of Justice Recktenwald, and with the assistance of the Judiciary’s Public Affairs Office, the history of the Commission on Professionalism (March 2005 - March 2010), together with its accomplishments, is now available on the Hawai‘i Judiciary Website (Appendix “H”).

Commission Chair Justice Duffy is very grateful for the hard work of the Commission Members in its first five 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 4th day of June, 2010.

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JUSTICE JAMES E. DUFFY, JR.  
Chair, Commission on Professionalism



IN THE SUPREME COURT OF THE STATE OF HAWAII

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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

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

WHEREAS, in August 1996, the Conference of Chief Justices (CCJ) passed a resolution calling for a national study and action plan regarding lawyer conduct and professionalism, wherein the CCJ noted a significant decline in professionalism in the bar and a consequent drop in the public's confidence in the profession and the justice system in general and concluded that a strong coordinated effort by state supreme courts to enhance their oversight of the profession was needed; and

WHEREAS, in March 1999, the CCJ's January 1999 *National Action Plan on Lawyer Conduct and Professionalism* was published and disseminated to chief justices, lawyer disciplinary agencies, and state bar associations throughout the United States; and

WHEREAS, the National Action Plan sets forth programs, initiatives, and recommendations designed to increase the efficacy of the state supreme courts' exercise of their inherent regulatory authority over the legal profession; and

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

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

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

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

IT IS HEREBY ORDERED that:

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

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

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

- (c) identify action steps to overcome barriers;  
and
- (d) propose a post-implementation evaluation process.

(3) The Chair of the Commission shall be the Chief Justice or the Chief Justice's designee. Commission members shall be appointed by the chief justice, upon the concurrence of a majority of the justices of the supreme court. In addition to the Chair, the Commission shall be comprised of a total of nineteen (19) members that reflect racial, ethnic, gender, and geographic diversity and as prescribed below:

(a) Judges.

- (i) Four (4) incumbent Hawai'i trial court judges chosen from the First, Second, Third, and/or Fifth Judicial Circuits;
- (ii) Two (2) incumbent judges chosen from the Hawai'i Supreme Court or the Intermediate Court of Appeals or both;  
and
- (iii) One (1) incumbent judge chosen from the United States District Court for the District of Hawai'i or the United States Court of Appeals for the Ninth Circuit.

- (b) Practicing Lawyers. Four (4) practicing lawyers who are members of the Hawai'i State Bar Association, chosen from a list of ten

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

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

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

the Commission. A Commissioner may be appointed for additional terms.

(5) A Commissioner who no longer meets the qualifications of this rule shall be deemed to have completed the Commissioner's term and the Commissioner's office shall be deemed vacant. Any vacancy on the Commission shall be filled by the chief justice, upon the concurrence of a majority of the justices of the supreme court, for the unexpired term.

(6) The Commission shall serve in an advisory capacity only, shall give continuing consideration to the enhancement of professionalism in the practice of law, and shall make reports and/or recommendations to the supreme court, annually, regarding implementation of the National Action Plan and any other relevant information regarding the work of the Commission.

(7) Commission members shall not receive compensation for their services, but may be reimbursed for travel and other expenses that are incidental to the performance of their duties.

(8) The Commission shall have no authority to impose discipline upon any members of the Hawai'i State Bar or to amend, suspend, or modify the Hawai'i Rules of Professional Conduct (HRPC). The Commission, however, may, if appropriate, recommend amendments to the HRPC to the supreme court for consideration.

IT IS FURTHER ORDERED, pursuant to the foregoing, that the following individuals are appointed as members of the Commission on Professionalism, effective immediately upon the filing of this order and for the term as specified below:

For a term expiring on March 13, 2007.

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

For a term expiring on March 13, 2009

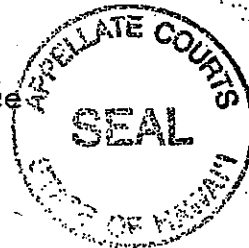
Hon. Joseph Cardoza, Second Judicial Circuit  
Hon. Trudy Senda, Fifth Judicial Circuit  
Hon. Steven Levinson, Appellate Court  
Calvin Young, HSBA  
Michael Nauyokas, HSBA  
Carol Mon Lee, Richardson School of Law  
Carole Richelieu, ODC  
Grace Nihei Kido, Board of Bar Examiners  
Petra Bray, Public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

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

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

FOR THE COURT:

  
Chief Justice



## **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.

**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.

**JUDGE SUSAN OKI MOLLWAY** was born and raised in Hawai'i. She received her bachelor's and master's degrees in English literature from the University of Hawai'i, and graduated cum laude from Harvard Law School, where she was the editor in chief of the Harvard Civil Rights-Civil Liberties Law Review. Nominated by President Clinton, Susan Oki Mollway became a United States District Judge for the District of Hawai'i in 1998. Before becoming a judge, she was a partner at the Honolulu law firm of Cades Schutte, where she concentrated in commercial litigation. One of her cases reached the United States Supreme Court, where she argued successfully. In 1998, Judge Mollway received the Trailblazer Award from the National Asian Pacific American Bar Association. She was named the Outstanding Woman Lawyer of the Year in 1987 by the Hawai'i Women Lawyers and was the 1999 Edith House Lecturer at the University of Georgia School of Law. She was recently awarded the 2004 Outstanding Judicial Achievement Award by the Hawai'i Women Lawyers.

**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.

**ASSOCIATE JUSTICE PAULA A. NAKAYAMA** is an Associate Justice of the Supreme Court in the State of Hawai'i. She has served on the Supreme Court since 1993. Prior to being appointed to the Supreme Court, she was a trial judge in the Circuit Court of the First Circuit. Justice Nakayama chairs the Committee on the Hawai'i Rules of Appellate Procedure and is the Supreme Court liaison to the Judiciary Education Committee and the CSR Board. She recently chaired the Appellate Review Task Force and has been appointed to chair the Committee on Children in Family Court. She has been cited as Jurist of the Year by Hawai'i Women Lawyers, selected as a Woman of Distinction by Soroptimists International, received the NAPABA Women's Leadership Award and has been invited to speak at the American Bar Association's Meeting of the Young Lawyers' Division and the Kyoto and Osaka Bar Associations. Justice Nakayama received her law degree from the University of California, Hastings College of Law in San Francisco and her Bachelors of Science Degree in Consumer Economics from the University of California at Davis.

**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 2, 2009**  
**2:30 p.m. - 3:15 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, Lyn Flanigan, Associate Judge Daniel Foley, David Hall, Janet Hunt, Gayle Lau, Judge Susan Mollway, Associate Justice Paula Nakayama, Michael Nauyokas, Nathan Nikaido, Terence O’Toole, Judith Pavey, Jill Ramsfield, Judge Trudy Senda (via video conference), Judge Barbara Takase (via video conference), Kevin Takata, and Calvin Young

**HANDOUTS:**

- (1) Agenda
- (2) Email from Judge Senda dated September 20, 2009 re “Advancing Professionalism in the Courtroom”
- (3) Order Amending Rule 17, and Adopting New Rule 22, of the Rules of the Supreme Court of the State of Hawai‘i, filed on July 15, 2009
- (4) Article in the U.S.Law Week entitled “New California Rule Requires Attorneys to Inform Clients About Uninsured Status”
- (5) Article in the U.S.Law Week entitled “New Mexico Rules Now Require Attorneys to Disclose Inadequate Malpractice Insurance”
- (6) Article in the U.S.Law Week entitled “Connecticut Declines to Embrace Malpractice Insurance Disclosure Rule”
- (7) Article in the Pacific Business News entitled “Proposal requires attorneys to make insurance status public”
- (8) HSBA/YLD Flyer re “Chief Justice Ronald T.Y. Moon Addresses the Bar / Retiring Judges Honored / YLD Annual Meeting and Awards

**I. WELCOME AND ANNOUNCEMENTS**

Justice Duffy announced that Commission member Gayle Lau recently won a trip for two to Las Vegas when he won the weekly Honolulu Advertiser Pigskin (football) Picks. Congratulations, Gayle!

**II. REPORT RE PRESENTATION (1) AT A JUDICIAL EDUCATION CONFERENCE RE WHAT JUDGES CAN DO TO ENCOURAGE PROFESSIONALISM AND (2) TO HSBA MEMBERS RE PROFESSIONALISM AND WHAT JUDGES EXPECT OF ATTORNEYS APPEARING IN THEIR COURTS**

Judge Senda reported on her efforts to prepare a continuing education program for all full-time state judges entitled “Advancing Professionalism in the Courtroom.” The program is scheduled for February 12, 2010. Judge Senda has assembled a distinguished panel. Please see the handout for names and details of the program. Lyn Flanigan inquired about the follow-up proposed program to HSBA members regarding what judges expect of attorneys appearing in their courts. Judge Senda and Lyn agreed to work together to prepare such a program. Justice Duffy thanked Judge Senda for all of her work on this project.

**III. REPORT RE STATUS OF IMPLEMENTATION OF THE MANDATORY CONTINUING PROFESSIONAL EDUCATION AND VOLUNTARY CONTINUING LEGAL EDUCATION REQUIREMENTS IN THE AMENDED RULES OF THE SUPREME COURT OF HAWAI‘I**

Lyn Flanigan reported that the HSBA just appointed a nine-person inaugural MCLE Board of Directors. Two Commission members are among the appointees: Susan Arnett and Judy Pavey. One lay member (from the DCCA) is another HSBA appointee. Justice Duffy (by Supreme Court appointment), Lyn Flanigan (as HSBA Executive Director), and Dale Lee (by William S. Richardson School of Law appointment) are non-voting members of the Board. Lyn related that Jodie Hagerman is doing an excellent job as MCLE Administrator, and the new Board is expected to meet shortly. Lyn emphasized that the Board is a regulatory board and will not be administering the HSBA’s CLE courses, in order to avoid any conflict of interest issues.

Lyn further related that the HSBA’s Frequently Asked Questions (FAQ’s) on the bar website have greatly reduced the number of attorney inquiries to the HSBA office concerning the MCLE requirements and how they may be satisfied.

**IV. REPORT RE HSBA MINOR MISCONDUCT PROGRAM**

Lyn Flanigan and Janet Hunt reported that they have been working with Jim Branham, Judiciary Staff Attorney, on a proposed amendment to RSCH 2.7, the minor misconduct rule, intended to add confidentiality and immunity provisions similar to those included in RSCH 16 regarding the Attorneys and Judges Assistance Program. Amendments to the proposal have been approved by the ODC Board and will be presented to the HSBA Board at their next meeting.

Janet Hunt related that many attorneys will benefit from rejuvenation of the Minor Misconduct Program, as there are many cases where referral to HSBA mentors for guidance and counseling is more appropriate than formal ODC disciplinary proceedings.

**V. REPORT RE COMMITTEE TO REVIEW POSSIBLE NEED TO REVISE HAWAI'I RULES OF PROFESSIONAL CONDUCT RE *PRO SE* LITIGANTS AND "UNBUNDLING OF LEGAL SERVICES" ISSUE**

Judge Cardoza related the background for his committee's work. His committee is awaiting a report to be issued shortly by a Disciplinary Board Committee which is studying revisions to the Rules of Professional Conduct for Hawai'i attorneys, which revisions will include "pro se" litigants and the "unbundling of legal services" issue, now more commonly known as "discrete task representation." Janet Hunt related that a draft of the report is presently with an editor and should be available for review and comment shortly. Judge Cardoza related that his committee will make a recommendation to the Commission after the members review the Disciplinary Board Committee report.

Judge Cardoza also noted that he is in contact and sharing information with Judge Simone Polak, who is chairing an Access to Justice Commission Committee studying this issue.

**VI. VOTE ON RECOMMENDATION OF COMMITTEE RE MANDATORY DISCLOSURE OF INSURANCE**

Committee Co-Chair Terry O'Toole reported that in August, 2009, the California Supreme Court adopted a new rule of professional conduct that requires lawyers without malpractice insurance in private practice to give written notice to all clients at the onset of representation whenever it is reasonably foreseeable that the legal representation of the client will exceed four hours. With California's new rule, there are now 25 United States jurisdictions that require disclosure of professional liability insurance. With the 2009 annual registration statements of Hawai'i attorneys indicating that approximately 55% of solo practitioners do not have malpractice insurance, Terry reported that his committee is recommending that a rule be adopted requiring attorneys to report to the HSBA whether they have liability insurance and that the information be available online to the public. Terry further stated that this is a compromise proposal, as the committee is not recommending that attorneys disclose directly to clients whether they have malpractice insurance.

Susan Arnett spoke in opposition to the committee's recommendation. Among other points, Susan stated that the recommendation (1) appears to be directed



mainly to solo practitioners; (2) it does not address the root cause of why a large number of practitioners are uninsured; (3) it is a “big brother” approach; (4) it is “for show” only and will not help the public; (5) the recommendation is not sufficiently defined; and (6) it will add a burden to attorneys who are already having a hard time financially, including those lawyers who do criminal defense work by court appointment and frequently have their request for attorney’s fees reduced by the court (example: \$23,000 to \$16,000).

After discussion, a vote was taken by secret written ballot. The results of the vote:

15 in favor of the committee’s recommendation (including the vote of the members attending by visual/audio technology whose votes were received after the meeting).

5 opposed

1 abstention

Justice Duffy thanked the committee for its nearly three-year work on this project, and stated that the Commission’s recommendation and vote would be reported to the Hawai‘i Supreme Court for its review and further action.

## **VII. NEW BUSINESS**

Lyn Flanigan handed out a flyer stating that Chief Justice Moon would be addressing the bar at a HSBA/YLD Annual Meeting and Awards Ceremony on October 30, 2009. Retiring Judges Karen Blondin, Reynaldo Gaulty, Victoria Marks, Corinne Watanabe, and Frances Wong will be honored.

Susan Arnett announced that on October 21, 2009 the Honolulu Chapter of the Japanese American Citizens League and other organizations will be presenting a program on the Massie case entitled “Ho’omana’o (Remember): The Massie Case and Injustice, Then and Now.”

## **VIII. NEXT MEETING**

The next meeting date was not announced; Commission members will be notified as soon as room arrangements are finalized.

Thank you for coming!

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

October 2, 2009

2:30 p.m.

Supreme Court Conference Room

**AGENDA**

- I. WELCOME AND ANNOUNCEMENTS
- II. REPORT RE PRESENTATION (1) AT A JUDICIAL EDUCATION CONFERENCE RE WHAT JUDGES CAN DO TO ENCOURAGE PROFESSIONALISM AND (2) TO HSBA MEMBERS RE PROFESSIONALISM AND WHAT JUDGES EXPECT OF ATTORNEYS APPEARING IN THEIR COURTS
- III. REPORT RE STATUS OF IMPLEMENTATION OF THE MANDATORY CONTINUING PROFESSIONAL EDUCATION AND VOLUNTARY CONTINUING LEGAL EDUCATION REQUIREMENTS IN THE AMENDED RULES OF THE SUPREME COURT OF HAWAI'I
- IV. REPORT RE HSBA MINOR MISCONDUCT PROGRAM
- V. REPORT RE COMMITTEE TO REVIEW POSSIBLE NEED TO REVISE HAWAI'I RULES OF PROFESSIONAL CONDUCT RE *PRO SE* LITIGANTS AND "UNBUNDLING OF LEGAL SERVICES" ISSUE
- VI. VOTE ON RECOMMENDATION OF COMMITTEE RE MANDATORY DISCLOSURE OF INSURANCE
- VII. NEW BUSINESS
- VIII. NEXT MEETING



Trudy K  
Senda/Users/Judiciary  
09/20/2009 09:44 AM

To James E Duffy/Users/Judiciary@Judiciary

Subject Advancing Professionalism in the Courtroom

The Hawaii Supreme Court Commission on Professionalism is sponsoring a continuing education program entitled, " Advancing Professionalism in the Courtroom ." Panelists will draw upon their experiences to discuss a judge's duty to advance professionalism in the legal field. Program details follow:

- **Date:** Friday, February 12, 2010 (2:00 PM - 4:30 PM)
- **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 John McConnell (ret.)
  - The Honorable Marcia Waldorf (ret.)
  - Janet Hunt, Esq. (Office of Disciplinary Counsel)
  - James Kawashima, Esq. (former Judicial Selection Commission member)
  - Gerald Sekiya, Esq. (Commission on Judicial Conduct)

This program is the first Judiciary-sponsored training opportunity that will qualify for CLE credit. Attendees will receive two (2) credit hours.

A program announcement will be distributed in January 2010. Judges unable to attend the program must submit a request to be excused (instructions will be distributed with the formal program announcement).

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

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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 court<sup>1</sup>)

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

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<sup>1</sup> 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

# Legal News

## Attorneys—Malpractice

### New California Rule Requires Attorneys To Inform Clients About Uninsured Status

The California Supreme Court Aug. 26 adopted a new rule of professional conduct that requires lawyers in private practice to notify clients if they lack malpractice insurance (*Order Adopting New Rule 3-410 of the California Rules of Professional Conduct*, Cal., No. S168443, 8/26/09).

California Rule of Professional Conduct 3-410, which takes effect Jan. 1, 2010, requires written notice to all clients at the outset of a representation "whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours."

**Bandwagon Effect.** According to an ABA survey, there are now 25 U.S. jurisdictions that require disclosure of professional liability insurance.

Advocates of mandatory disclosure anticipate that California's action will encourage other states to follow suit. "I hope that the new rule will give a little impetus to other states to enact similar rules," said James E. Towery, who chaired the state bar's Insurance Disclosure Task Force.

Towery, who practices with Hoge, Fenton, Jones & Appel in San Jose, Calif., said in an interview with BNA that he views the insurance disclosure mandate as a client protection issue. Whether a lawyer is insured against malpractice liability is a material fact that prospective clients have the right to know, he stated.

Opponents of the new rule are less sanguine. "I call this the California Insurance Carriers Stimulus Bill," Diane L. Karpman, of Karpman & Associates in Los An-

geles, told BNA. Karpman predicted that the court's action will force currently uninsured lawyers to buy expensive coverage, which will in turn drive up attorneys' fees that will price low-income clients out of the market for legal services.

Karpman said she agrees that the new California rule may trigger a "bandwagon effect" that could persuade other states to follow suit.

**Four-Hour Cutoff.** The new notification standard is triggered only when it is "reasonably foreseeable" to an attorney that the total amount of legal representation in a matter will exceed four hours. At one time, this was dubbed the "cocktail party" exception, to dispel concerns that lawyers would be compelled to write out a disclosure statement in social scenarios in which casual acquaintances might ask for a brief legal opinion.

Paragraph (C) of the rule indicates that lawyers employed as in-house counsel or by a government entity are exempted when they act directly in that capacity. According to the accompanying comments, the exemption was included because an entity employing a lawyer "presumably knows" whether or not the lawyer is covered by liability insurance. The comments also state, however, that the exemption does not apply to "outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured."

The rule also provides an exemption in paragraph (D) when lawyers provide legal services in an "emergency to avoid foreseeable prejudice to the rights or interests of the client." Furthermore, paragraph (E) makes clear that a lawyer need not remind returning clients of the lawyer's lack of insurance.

**Retooled Proposal.** The new standard is rooted in the Model Court Rule on Insurance Disclosure, which the ABA narrowly approved in August 2004, although in re-

### California Approves Ethics Rule Mandating Disclosure When Attorney Lacks Malpractice Insurance

"Rule 3-410. Disclosure of Professional Liability Insurance

"(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

"(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

"(C) This rule does not apply to a member who is employed as a

government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

"(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

"(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance."

quiring notification directly to clients California's rule differs from what the ABA rule recommends.

In 2005, California Supreme Court Chief Justice Ronald M. George asked the California bar to look into the matter; Towery's task force spent two years drafting proposed rules that twice were circulated for public comment.

The task force's original proposal envisioned both a rule of professional conduct requiring disclosure to clients and a regulation mandating disclosure to the bar. The proposal also would have directed the bar to lawyers' uninsured status on its website.

That proposal was rebuffed when the bar's board of governors deadlocked 8-8 and outgoing bar president Sheldon H. Sloan cast the tie-breaking vote against the measure.

A newly elected board revisited the issue under the guidance of current president Jeffrey L. Bleich, and the redrafted proposal sailed through by a vote of 16-4.

**State Survey.** Of the 25 states that have adopted some form of rule on insurance disclosure, 18 have taken a stance consistent with the ABA model rule and require annual disclosure of insurance status by lawyers on their bar registration statements: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, Virginia, Washington, and West Virginia.

Seven states—Alaska, New Hampshire, New Mexico, Ohio, Pennsylvania, South Dakota, and now California—have inserted the disclosure regulation into their professional conduct rules and require lawyers to disclose directly to their clients that they do not maintain professional liability insurance, or a minimum level of malpractice coverage.

According to a list maintained by the ABA Standing Committee on Client Protection, most states providing for disclosure also make the information available to the public, usually on the state bar's website.

Four jurisdictions—Arkansas, Connecticut, Florida, and Kentucky—have rejected a proposed mandatory insurance disclosure rule. A Texas bar task force recommended against such a rule, but the issue is still percolating in the court system.

Oregon remains the only jurisdiction that requires its lawyers to carry malpractice insurance. In 2008 the Virginia State Bar rejected a proposal that would have required lawyers in private practice to maintain professional liability insurance with specified minimum policy limits.

*The ABA survey depicting state implementation of the Model Court Rule on Insurance Disclosure is available at [http://www.abanet.org/cpr/clientpro/malprac\\_disc\\_chart.pdf](http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf) on the ABA's website.*

## Attorneys—Solicitation

### Lawyers May Not Partner With Businesses Designed to Profit From Altering Home Loans

**A**lthough attorneys directly retained by distressed homeowners may use a financial analyst to help renegotiate the clients' home loans, it is ethically improper for lawyers to work with or for companies

that aim to profit from modifying home loans, the New Jersey Supreme Court's ethics committee concluded July 6 (New Jersey Supreme Court Advisory Comm. on Professional Ethics, Op. 716, 7/6/09).

The opinion rules out any form of alliance between lawyers and entities whose purpose is to make money from revising home loans. A lawyer who receives referrals from such a business may not pay referral fees to the company and may not share fees with it, the committee declared. Nor may a lawyer work as in-house counsel to a for-profit loan modification company, formally affiliate or partner with the organization, or be retained by the company to provide legal services to the entity's customers, the opinion makes clear.

The supreme court's Committee on the Unauthorized Practice of Law joined in the opinion.

**Referral Fees and Fee-Sharing.** The ethics committee noted that in the current economic crisis, some lawyers with diminishing practices are asking about the propriety of working with for-profit loan modification services. These companies are approaching lawyers to negotiate loan or mortgage modifications on behalf of distressed homeowners, the committee said.

The panel warned lawyers not to be enticed into a seemingly lucrative business opportunity offered by a for-profit loan modification company. Most of the business models described by inquiring lawyers entail serious ethics violations, the committee said.

Describing three categories of business models, the committee said that in one scenario, a loan modification company approaches homeowners directly and indicates that it is working with a lawyer. The company and the lawyer who handles the matter each ends up with part of the money paid by the homeowner for the loan modification services.

Citing New Jersey Rule of Professional Conduct 7.3(d), the committee emphasized that lawyers are not permitted to give a referral fee or anything of value to a person who recommends the lawyer's services. Accordingly, a lawyer is prohibited from paying a for-profit loan modification company that farms out legal work to the lawyer or suggests using the lawyer, the committee said.

If a lawyer were to accept a fee for legal services from the company or if the homeowner pays separate fees to the company and the attorney, the panel added, the attorney would impermissibly be sharing fees with a non-lawyer, in violation of Rule 5.4(a).

"Paying monies to a loan modification company that refers or recommends clients to an attorney and sharing fees with the company are flatly prohibited," the opinion states.

**Employment and Partnering Arrangements.** In another scenario the committee examined, a lawyer works as in-house counsel to a loan modification company and provides legal services to the company's customers. A variation on this theme is that a lawyer or law firm officially affiliates or partners with the company, or is retained by the company to renegotiate its customers' loans. In each of these situations, the company approaches homeowners directly and solicits the work. The committee found both situations improper.

Regarding the idea of working as in-house counsel for a loan modification company, the committee noted that under a New Jersey rule and case law, corporations may use attorney-employees to provide legal services

# Legal News

## Attorneys—Confidentiality

### Lawyers Must Think Twice Before Revealing Anything Relating to Client's Representation

**T**he ethics rule on lawyer-client confidentiality constrains a lawyer from revealing any information relating to a client's representation, even if the information is generally known and not adverse to the client, and the client doesn't consider it confidential, the Nevada bar's ethics committee has advised (Nevada State Bar Standing Comm. on Ethics and Professional Responsibility, Formal Op. 41, 6/24/09).

The opinion urges lawyers to pause, and think twice before disclosing anything about a client's representation. To drive the point home, the committee listed numerous examples of common situations that potentially involve a breach of confidentiality.

**All Information Is Protected.** Nevada Rule of Professional Conduct 1.6(a) forbids a lawyer to reveal information relating to representation of a client unless the client gives informed consent, the disclosure is implicitly authorized to carry out the representation, or an exception in the rule applies.

The committee identified these three "remarkable" ways in which the language of Rule 1.6(a) differs from the historical rule of confidentiality: (1) The duty is not restricted to "confidential" or "secret" information; (2) the confidential information need not be adverse to the client; and (3) there is no exception for information already generally known or public.

"Rule 1.6(a) requires that ALL information relating to the representation of a client is confidential and protected from disclosure," the opinion declares.

The committee noted that Rule 1.6(a) operates automatically, whether or not the client has asked that the information be kept confidential or considers it confidential. Also, the rule applies even if the information is not covered by the attorney-client privilege, even if the information is not embarrassing and detrimental to the client, regardless of when the lawyer learned of the information, and whatever the source of the information, the committee said.

As authority for these points, the committee cited a variety of sources, including treatises on legal ethics, the *Restatement (Third) of the Law Governing Lawyers* (2000), cases from Nevada and other states, and ethics opinions from other states.

The committee suggested that the absolute wording of Rule 1.6(a) should not be read literally to make every innocuous disclosure a basis for discipline. "[C]ommon sense should be part of Rule 1.6 and the lawyer should not be disciplined for a harmless disclosure," the opinion states.

The rule is intended instead, the committee said, "to strongly caution the lawyer to give consideration to the rule of client confidentiality—and whether the informed

consent of the client should be obtained—whenever the lawyer makes any verbal, written or electronic communication relating to the client."

**Food for Thought.** As "food for thought" before disclosing any information about a client's representation, the committee listed 13 examples of common situations which it said raise issues under Rule 1.6(a) in the absence of client consent:

- Phoning the client and leaving a message about the representation on the answering machine or discussing the matter with the client's roommate or spouse.
- Submitting a copy of the client's billing statements to support an application for fees.
- Submitting a client list that reveals the identity of clients to a bank to support the lawyer's loan application.
- Identifying clients in a law firm brochure.
- Revealing the identity of a client by processing a credit card payment.
- Telling a story to friends about a recent trial without revealing the client's identity or any other fact not contained in the public record.
- Taking a client file or discovery documents to the local photocopy shop.
- Employing an outside computer tech support person to troubleshoot the firm's computer system.
- Providing insurance defense bills for auditing by an insurance company auditor.
- Providing a homeowner with billing statements for legal services rendered to the homeowner's association.
- Providing billing statements for representing a corporation in litigation to a disgruntled shareholder.
- Providing billing statements under an open records act for representing a public entity as outside counsel.
- Listing "best" clients in Martindale-Hubbell.

## Attorneys—Malpractice

### New Mexico Rules Now Require Attorneys To Disclose Inadequate Malpractice Insurance

**N**ew Mexico lawyers in private practice must advise clients in writing, using a prescribed form, if they carry less than \$100,000 in malpractice insurance, according to an amendment to the New Mexico rules of professional conduct rule adopted by the New Mexico Supreme Court July 24 (*In re Amendments of Rule 16-104 NMRA of the Rules of Professional Conduct*, N.M., No. 09-8300-029, 7/24/09).

Rule 104(C) of the New Mexico Rules of Professional Conduct, which takes effect Nov. 2, also provides that lawyers must disclose whether they have less than \$300,000 in aggregate coverage for multiple occurrences. (New Mexico's unique numbering system uses the same numerals as the American Bar Association's

Model Rules of Professional Conduct but without periods—e.g., Rule 104 instead of Rule 1.4.)

The new requirement makes New Mexico the sixth jurisdiction to require direct disclosure of insurance information to clients. Disclosure was previously required in New Mexico only on a lawyer's annual registration statement.

According to a list maintained by the ABA Standing Committee on Client Protection, two dozen states have adopted rules requiring lawyers to reveal their professional liability insurance status in some manner. Oregon remains the only jurisdiction that requires its lawyers to carry malpractice insurance. See Or. Rev. Stat. § 9.080.

**Two Different Approaches.** States adopting insurance disclosure rules have usually taken one of two courses. Eighteen states take a stance consistent with the ABA Model Court Rule on Insurance Disclosure and require annual disclosure of insurance status by lawyers on their bar registration statements (73 U.S.L.W. 2092). Those states include: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, Virginia, Washington, and West Virginia.

However, six states—Alaska, New Hampshire, Ohio, Pennsylvania, South Dakota, and now New Mexico—have inserted the disclosure regulation into their attorney professional conduct rules and require lawyers to disclose directly to their clients whether they maintain a minimum level of malpractice coverage.

"The New Mexico rule is based on the rules in South Dakota and Ohio," according to John A. Bannerman, who chairs the New Mexico Bar's Lawyers Professional Liability and Insurance Committee. In an interview with BNA, Bannerman explained that the committee was asked by New Mexico Supreme Court Chief Justice Edward L. Chavez 18 months ago to draft an insurance disclosure rule with an eye on the South Dakota approach as a possible model.

Bannerman, who practices with Bannerman & Williams, Albuquerque, told BNA that he isn't exactly sure why the court chose to enact the final provision as an ethics rule instead of a court rule, but he suggested that the placement makes sense. "The only time this is likely to become an issue," Bannerman said, "is when a lawyer misrepresents his or her status; that itself is a disciplinary violation."

The committee gave some consideration, Bannerman said, to adopting the approach—followed in Illinois, North Carolina, and Virginia, for example—in which a lawyer's insurance status is posted on the state bar website. But the committee was concerned, he said, that this approach doesn't work adequately where a lawyer's insurance has lapsed. The committee also voiced apprehension that much of the public simply assumes a lawyer is insured and that those who might have questions wouldn't know where to begin looking on the internet to find this information.

**Six-Year Recordkeeping Requirement.** The new rule provides that lawyers must use a specific notification form that must be signed by both the lawyer and the client. The notice requirement is not triggered, however, if a lawyer has a professional liability insurance policy of at least \$100,000 for a single occurrence and \$300,000 total coverage.

Lawyers must keep records of these disclosures for six years after the representation ceases and must notify their existing clients if their coverage drops below the minimum amounts or if the policy is terminated, the rule says.

The certificate requirement eliminates any question whether the client received notice of the lawyer's insurance status, Bannerman explained.

Subparagraph C(3) of the rule sets out exemptions for lawyers acting as full time judges, in-house corporate counsel for a single entity, or lawyers who practice exclusively as employees of a governmental agency. It also clarifies that the new rule applies to out-of-state lawyers who petition to be allowed to appear before New Mexico courts.

*The New Mexico rule is posted at [http://www.nmcompcomm.us/nmrules/NMRules/16-104\\_7-24-2009.pdf](http://www.nmcompcomm.us/nmrules/NMRules/16-104_7-24-2009.pdf) and a question and answer commentary on the new rule is posted at <http://www.nmbar.org/AboutSBNM/Committees/LPL/QAMandatoryDisclosure.pdf>, both on the State Bar of New Mexico website; the ABA survey regarding state implementation of the Model Court Rule on Insurance Disclosure may be viewed at [http://www.abanet.org/cpr/clientpro/malprac\\_disc\\_chart.pdf](http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf) on the ABA website.*

### Employment Discrimination—Age

#### **EEOC Files Age Discrimination Class Suit Challenging AT&T Inc.'s Treatment of Retirees**

**T**he Equal Employment Opportunity Commission Aug. 20 sued AT&T Inc. and several of its subsidiaries in federal district court in New York, claiming the companies are violating the Age Discrimination in Employment Act by denying a class of AT&T workers who took early retirement the opportunity for re-employment (*EEOC v. AT&T Inc.*, S.D.N.Y., No. 09 Civ. 7323, complaint filed 8/20/09).

In a suit filed in the U.S. District Court for the Southern District of New York, EEOC alleged that since at least October 2006, AT&T's policies of not rehiring former employees who retired under various programs, including its Voluntary Retirement Incentive Program (VRIP) and Enhanced Pension and Retirement Program (EPR), have adversely affected workers who are 40 and over because of their age.

In addition to AT&T Inc., EEOC named as defendants AT&T Corp., AT&T Services Inc., and Pacific Bell Telephone Co., which operates as AT&T California. EEOC sued on behalf of John Yates, a former AT&T employee who was refused rehire at age 57, and a "nationwide class of similarly situated employees" who have been affected by AT&T's policies "at all its facilities" in the United States, the complaint said.

EEOC's complaint alleged that AT&T has "no legitimate business purpose or reason" for the no-rehire policies, which "continue to result" in the defendants' refusal to rehire workers who retired under various programs, including but not limited to VRIP and EPR, regardless of their qualifications. A "disproportionate number" of those barred from rehire are age 40 or older, EEOC said.

study of how agencies are implementing the amendments. "Evidence of how well they are implementing these amendments is spotty," he said.

Another topic worthy of ACUS study is the use by agencies of scientific and technical analysis in rulemaking, including peer review and risk assessment, said Paul Noe, vice president of the American Forest and Paper Association.

Neil Eisner, an assistant general counsel at the Transportation Department, recommended ACUS look at implementing the Plain Language Act (S. 574) if it passes in the current Congress. Noting that the measure as drafted would give OMB responsibility for issuing implementation guidelines for agencies, Eisner said ACUS would be better suited to the task.

Another possible ACUS research topic is to examine the Federal Civil Penalties Inflation Adjustment Act, which as currently implemented costs the government hundreds of millions in civil penalties because it hinders agencies from adjusting civil penalties, according to Curtis Copeland, a specialist in American National Government at the Congressional Research Service.

### Attorneys—Malpractice

#### **Connecticut Declines to Embrace Malpractice Insurance Disclosure Rule**

**T**he Connecticut Superior Court Rules Committee Feb. 23 voted unanimously not to adopt a rule that would have required lawyers in that state to disclose to their clients whether they carry malpractice insurance. The committee did not indicate the reasons for its decision.

According to a list maintained by the American Bar Association Standing Committee on Client Protection, Connecticut is only the fourth jurisdiction—joining Arkansas, Florida, and Kentucky—to reject a proposed mandatory insurance disclosure rule. Twenty-four states have approved rules requiring lawyers to reveal their professional liability insurance status in some manner.

In Texas, where in July 2008 the state bar recommended against an insurance disclosure rule (77 U.S.L.W. 2052, 7/22/08), the legislature is considering a bill that would require the Texas Supreme Court to adopt a disclosure rule for lawyers. The bill, introduced March 9, has been referred to the House Judiciary & Civil Jurisprudence Committee.

The Texas initiative (H.B. 2825) would require lawyers to "display in a prominent location" a notice indicating that the lawyer is not covered by professional liability insurance or to provide notice to clients and prospective clients "in another manner." (See box.)

According to rules committee staff, the Connecticut proposal was introduced last fall by its chair, Connecticut Supreme Court Justice Peter T. Zarella.

During its deliberations, the committee reviewed the ABA Model Court Rule on Insurance Disclosure as well as rules followed in other jurisdictions, comments from the state and local bar associations, and a proposed revision to Connecticut Practice Book submitted by State-wide Bar Counsel Michael Bowler to require attorneys to certify on their annual registration form whether they carry professional liability insurance.

#### **Texas Bill Would Require Disclosure Rule**

*Texas H.B. 2825 would direct the state supreme court, no later than Dec. 1, to draw up rules that require lawyers practicing law in Texas who are not covered by professional liability insurance to:*

(1) display in a prominent location in the attorney's place of business a notice stating that the attorney is not covered by professional liability insurance; or

(2) provide notice of that information in another manner to the attorney's clients and prospective clients.

(b) In promulgating rules under this section, the supreme court shall:

(1) specify the form and content of the notice described by Subsection (a); and

(2) provide for enforcement of the rules promulgated under this section, including providing that a person may file a grievance, and the state bar may take disciplinary action for a violation; in the same manner that a grievance is filed and the state bar takes disciplinary action for conduct that constitutes professional misconduct under the Texas Disciplinary Rules of Professional Conduct.

**Two Approaches.** States adopting insurance disclosure rules have usually taken one of two courses.

Nineteen states take a stance consistent with the ABA model rule and require annual disclosure of insurance status by lawyers on their bar registration statements: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Rhode Island, Virginia, Washington, and West Virginia.

However, five states—Alaska, New Hampshire, Ohio, Pennsylvania, and South Dakota—have inserted the disclosure regulation into their attorney professional conduct rules and require lawyers to disclose directly to their clients whether they maintain a minimum level of malpractice coverage.

According to the ABA survey, most states providing for disclosure also make the information available to the public, usually on the state bar's Web site.

Oregon remains the only jurisdiction that requires its lawyers to carry malpractice insurance. See Or. Rev. Stat. § 9.080.

**Opposing Views.** The idea of compelled disclosure has fierce opponents and proponents. Indeed, the ABA's vote approving the Model Court Rule on Insurance Disclosure in 2004 was a close one: 213-202 (73 U.S.L.W. 2092).

**Arguments Against.** Those opposing disclosure rules have suggested that forced disclosure has a number of flaws, including these:

■ A disclosure rule fixes a problem that doesn't exist. There is no correlation between competence and insurance, and if coverage is a significant factor the prospective client can always ask for the information.

■ Mandatory disclosure would unfairly impact solo practitioners, newly admitted lawyers, and part-time attorneys who can least afford expensive coverage or may be viewed as uninsurable.

■ A disclosure requirement stigmatizes uninsured attorneys and puts them at an unfair disadvantage.

■ A disclosure rule will drive up fees and adversely impact the segment of the population least able to absorb that cost. If individual lawyers don't pass on the cost of the insurance, they may make up the difference by representing fewer lower-income consumers.

■ Requiring disclosure gives clients a false, and often misleading, sense of security because few clients understand "claims made" calculations or what limitations are involved.

■ No other professionals are required to volunteer whether they carry professional liability coverage.

*Arguments in Favor.* Those in favor of disclosure have offered these rationales:

■ Absence of insurance is a material fact that clients have a right to know.

■ Clients of uninsured attorneys frequently have no remedy when they have been injured by a lawyer's negligence, and they usually don't have the sophistication to ask about insurance.

■ Disclosure enhances consumer decisions, protects the public, and fulfills counsel's fiduciary duty to clients.

■ Without disclosure, the public loses respect for the justice system because they assume that attorneys are insured and become bitter when they learn that they have no recourse against an uninsured lawyer.

■ The impact on uninsured lawyers will be minimal or, at most, indirect.

*The ABA survey regarding state implementation of the Model Court Rule on Insurance Disclosure is posted at [http://www.abanet.org/cpr/clientpro/malprac\\_disc\\_chart.pdf](http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf) on the ABA Web site; the Texas initiative is available at located on the legislature's Web site at <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB028251.pdf> on the Texas legislature Web site.*

## Attorneys—Represented Persons

### **Illinois Opinion Adopts ABA View on Contact With Current Employees of Corporate Party**

In updated advice on the issue of ex parte contacts with employees of a represented entity, the Illinois bar's ethics committee has repudiated the narrow "control group test" for communications with current constituents in favor of the American Bar Association's broader three-part standard (Illinois State Bar Association Committee on Professional Ethics, Op. 09-01, 1/09).

Endorsing the commentary to ABA Model Rule 4.2, the opinion advises that three categories of current employees are off-limits for direct talks: those whose job brings them into regular contact with corporate counsel; those who have authority to obligate the entity in the matter; and those whose conduct in the matter is imputable to the company. This position modifies Illinois Ethics Op. 85-12, the committee announced.

Former employees of a represented party are fair game for informal interviews, the committee made clear, adhering to its long-held view on that issue.

**Control-Group Test Too Narrow.** According to the opinion, the inquiring lawyer represents a client adverse to a nursing home and wants to contact the nursing home's current and former staff, its employees, and other constituents to obtain statements about the client's care. The lawyer knows the nursing home is represented in the matter by counsel.

Illinois Rule of Professional Conduct 4.2 generally prohibits a lawyer who is representing a client from dealing directly with others who have their own counsel in the matter. However, the text of the rule does not indicate which employees of a corporation are considered to be represented for purposes of applying the rule, and the Illinois Rules of Professional Conduct do not have official comments that could clarify the application of the rule.

A 1984 Illinois appellate court decision held that the anti-contact rule, then codified as DR 7-104, should be construed to prevent direct communications with persons in a corporation's "control group," consisting of its top decisionmakers and top advisors. In reaching that conclusion, the appellate court noted that the Illinois Supreme Court had adopted the control-group test in the context of interpreting the corporate attorney-client privilege.

The committee pointed out, however, that the anti-contact rule serves purposes different from those protected by the attorney-client privilege. Whereas the privilege is meant to promote full and frank consultation between lawyers and clients, it said, Rule 4.2 is intended to (1) prevent lawyers from circumventing opposing counsel in hopes of obtaining careless statements from adverse parties; (2) protect the attorney-client relationship; (3) prevent the inadvertent disclosure of privileged information; and (4) facilitate settlement by channeling disputes through lawyers.

The control-group test is too narrow to serve the purposes of the anti-contact rule in some situations, the panel stated. For example, it explained, persons not in the control group may make careless statements and inadvertently disclose privileged information if not covered by the anti-contact rule.

**ABA's Advice.** In light of the policies underlying Rule 4.2, the committee joined several Illinois federal courts in concluding that the ABA's three-part test on ex parte communications delineates the proper scope of the rule regarding direct contacts with an organization's current employees.

The ABA's position, outlined in Comment [7] to Model Rule 4.2, permits direct contact with a corporation's current constituents, except those (1) who supervise, direct, or regularly consult with the entity's lawyer about the matter; (2) who have authority to bind the entity in the matter; or (3) whose act or omission in connection with the matter may be imputed to the entity for liability purposes.

Illinois bar groups reviewing the work of the ABA Ethics 2000 Commission have recommended that the Illinois Supreme Court adopt this three-part test, the committee noted.

**Ex-Employees Are Fair Game.** The committee refused to extend the protections of Rule 4.2 to former constituents of a represented organization. Op. 85-12 remains correct in that regard, it said.

The conclusion that Rule 4.2 does not cover former employees is consistent with the policies underlying the

# Proposal requires attorneys to make insurance status public

BY LINDA PHILIP  
PUBLIC BUSINESS NEWS

Hawaii attorneys would have to report publicly whether they have legal malpractice insurance under a proposal being considered by the state Supreme Court's Commission on Professionalism.

Attorneys are not required to carry malpractice insurance but, for statistical purposes, the state Supreme Court asks quite those in private practice to report to the Hawaii State Bar Association whether they have insurance. In-house attorneys and those working for the government or courts are exempt from reporting.

The 19-member commission is considering whether to make that reporting public—for example, posting it on the

bar association's Web site.

Advocates see it as a way to protect consumers, or at least keep them informed of whether their attorneys are covered, especially in areas of complex litigation or securities.

Members of most professions, such as doctors and Realtors, are often required to buy insurance, much less publicly disclose they have it, but it's considered ethical to do so.

"I think it is a very good thing that existing and prospective clients know if their attorney carries insurance," said Barry Sullivan, managing partner at Bickeron Lee Dang & Sullivan. "While no one may intend to make a mistake, knowing if your attorney has insurance if he or she does make a mistake that causes a problem, helps you make

a more informed decision."

Of the 3,297 active private-practice attorneys in Hawaii, 2,356, about 72 percent, reported having insurance in 2009, according to the bar association.

At least four companies write professional liability insurance for Hawaii attorneys including Marsh, Fireman's Fund Insurance Co. and St. Paul Travelers Insurance Co.

Insurance premiums for attorneys depend on their experience level, the areas in which they practice, the number of attorneys in their firm, and whether they have been previous claimants against them.

Sullivan said premiums can range from \$3,600 to over \$8,000 per attorney per year, which covers up to \$5 million for a firm that has between 10 and 14 lawyers. "Just having insurance does not tell you

a whole lot of things, though," he said.

For example, it can be difficult to determine whether there are unusual exceptions to what types of risks are covered and practice areas that might be excluded, he said.

"Is the coverage for \$100,000 or \$1 million, or \$5 million more?" Sullivan asked. "Is the amount per claim or in aggregate? Has the attorney kept the insurance in place? Having it in place on Jan. 1 is no guarantee that it will be in place on June 1."

The Commission on Professionalism will make its recommendation to the state Supreme Court, which will make the final decision on whether to change the current rule. Any rule change would not take effect before next year.

lphillip@hokps.net | 955-8312



## Chief Justice Ronald T.Y. Moon Addresses the Bar Retiring Judges Honored | YLD Annual Meeting and Awards | 1-hr CLE's

October 30, 2009 | Lunch: 12- 1:30 p.m. | Programs: 10:30 a.m. - 11:30 a.m.  
YWCA of Oahu | 1040 Richards St. | Honolulu, HI 96813

Join HSBA and the Young Lawyers Division for an "insider" perspective as Chief Justice Moon addresses the Bar. Also at this event the YLD will present its annual Justice and Liberty Bell Awards, conduct its annual meeting, and honor its volunteers. Judges retiring in 2009 will be also be honored.



### ➤ CHIEF JUSTICE RONALD T.Y. MOON

CJ Moon will address the membership about critical issues facing the Judiciary due to impending budget reduction measures, personnel changes, and more, including the challenges of balancing the needs of the community with the effect of the current economic downturn on the Judiciary as well as members of the Bar.

### ➤ PROGRAM TRACKS AND YLD AWARDS

#### THREE SIMULTANEOUS PROGRAM TRACKS!

10:30 a.m. - 11:30 a.m.

- » Google Research: Getting the most out of it! with Valerie Koenig  
This workshop provides a brief introduction to Google's advanced search tools, improving the quality of the information you gather.
- » Case Management with Greg Markham  
Learn how to organize, plan and monitor the work of client matters and hit the ground running. Improve service and get the best results for your client.
- » E-Communications: Business Goldmine or Quagmire? with Tamara Gerrard  
Social networking and other electronic media (Facebook, Myspace, Twitter).

#### YLD ANNUAL AWARDS

Justice Award- Naomi Hirayasu | Liberty Bell- UH Elder Law Clinic  
Best Second Year Semester Student and Constitutional Law Paper Winners  
WSRSL students Trisha Nishimoto and Shimpei Oki |  
Recognition of 2009 Volunteers

### ➤ 2009 RETIRING JUDGES HONORED

Karen Blondin | Reynaldo Grauly | Victoria Marks |  
Corinne Watanabe | Frances Wong



**Chief Justice Ronald T.Y. Moon Addresses the Bar**  
 Retiring Judges Honored | YLD Annual Meeting and Awards | 1-hr CLE's  
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**Terms and Conditions**

No Validated Parking.

Cancellation: A refund will be made if we receive written notice of cancellation five business days before the event; however, \$15 will be deducted to cover administrative costs. Twenty dollars will be charged for insufficient funds.

Questions/Special Accommodations: Contact Lisa Tsukayama at (808) 537-1868 or [Itsukayama@hsba.org](mailto:Itsukayama@hsba.org).

Mail or Fax registration: Fax: (808) 521-7936 or mail to Hawaii State Bar Association, 1132 Bishop St., Suite 906, Honolulu, HI 96813 Attention: Lisa Tsukayama.

Other Provisions: The HSBA reserves the right to cancel the event without liability, and in such a situation, will return the amounts paid to the registrant. The event may be videotaped and/or photographed, and your registration constitutes your voluntary consent to such videotaping and/or photography and the use thereof without monetary compensation.



*Neighbor Island members!*

Please use Mokulele Airlines for your travel to this event. You can book your reservation from now to October 29 to get a 15% discount for all travel between October 28- November 4. Simply book your reservation at [www.mokuleleairlines.com](http://www.mokuleleairlines.com) and enter promo code: HSBAYLD

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**REGISTRATION AND FEES:**

- \$50 LUNCH AND SEMINAR
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**I PLAN TO ATTEND THE FOLLOWING CLE SEMINAR (SELECT 1 ONLY)**

- GOOGLE RESEARCH: GETTING THE MOST OUT OF IT WITH VALERIE KOENIG
- CASE MANAGEMENT WITH GREG MARKHAM
- E-COMMUNICATIONS: BUSINESS GOLDMINE OR QUAGMIRE? WITH TAMARA GERRARD

**DISCOUNTS AVAILABLE FOR LUNCH AND SEMINAR:**

- \$40 YLD, NEIGHBOR ISLAND AND GOVERNMENT LAWYERS
- \$30 LAW STUDENTS

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 1132 Bishop St., Ste. 906 Fax: (808) 521-7936  
 Honolulu, HI 96813 Email: [Itsukayama@hsba.org](mailto:Itsukayama@hsba.org)  
[www.hsba.org](http://www.hsba.org)

# **HAWAI'I SUPREME COURT COMMISSION ON PROFESSIONALISM**

**Meeting of March 19, 2010**

**2:30 p.m. - 3:30 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, Lyn Flanigan, Associate Judge Daniel Foley, Janet Hunt, Gayle Lau, Judge Susan Mollway, Judge Paul Murakami, Associate Justice Paula Nakayama, Michael Nauyokas, Nathan Nikaido, Judith Pavey, Judge Barbara Takase (via video conference), Kevin Takata, and Calvin Young.  
Guest: Jodie Hagerman

**HANDOUTS:**

- (1) Agenda
- (2) Order of Appointment filed February 24, 2010
- (3) Biography of Judge Paul Murakami
- (4) History and Accomplishments of the Hawai'i Supreme Court Commission on Professionalism (March 2005 - March 2010)
- (5) CLE Program: "Professionalism in the Courtroom" on April 30, 2010
- (6) Proposed Draft RSCH 22 Amendment
- (7) Continuing Legal Education Regulations
- (8) MCLE Frequently Asked Questions
- (9) Letter dated October 8, 2009 from Associate Justice James E. Duffy, Jr. to Chief Justice Ronald T.Y. Moon and Associate Justices Nakayama, Acoba, and Recktenwald

### **I. WELCOME AND ANNOUNCEMENTS**

Justice Duffy welcomed and thanked the members attending, and announced that members Grace Kido and David Hall (both out of town), Wesley Park (sick), and Judge Trudy Senda (in trial) were unable to attend.

Justice Duffy gave a special welcome to new member Judge Paul Murakami, who replaced Judge Karen Radius, who has retired. Judge Duffy thanked Judge Radius for her services over the years, both as a family court judge, and as a member of the Commission.

Justice Duffy also welcomed guest Jodie Hagerman, who is the Administrator of the Mandatory Continuing Legal Education Program, and thanked her for the great job she is doing in this new program.

Finally, Justice Duffy announced that we are today celebrating the five-year anniversary of the Commission on Professionalism, which was established by Chief Justice Moon's Order in March 2010. Justice Duffy referred to the handout which shows the history and list of projects worked on during the 2005-2010 period, and thanked the members for their contribution to making the Commission a vibrant, viable, and meaningful entity. Pursuant to Justice Recktenwald's suggestion, the Commission's history and list of projects will shortly be available to the public on the Judiciary website.

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

Jodie Hagerman related the origin and history of the MCLE Board of Directors which started its work in October 2009, and met weekly until the end of December 2009 in order to have the MCLE regulations in place on January 1, 2010, when the MCLE requirements are applicable by new Supreme Court Rule 22. Among other things, Jodie reported that there are twelve members of the MCLE Board (nine appointed by the HSBA, including one lay person, and three non-voting directors, one from the Judiciary, one from the William S. Richardson School of Law, and the HSBA Executive Director); 341 HSBA members have already completed their MCLE requirements thru HSBA courses; 77 additional HSBA members are signed up to complete their MCLE requirements in April 2010 HSBA courses; Justice Acoba presented a program to government attorneys yesterday regarding pro bono work (which qualified for one hour of MCLE credit); eight providers of legal education have registered as accredited providers with the HSBA (including two federal providers: the Department of Justice and the Federal Judicial Center, and six commercial providers).

Jodie then discussed each of the MCLE Board's recommendations for revision of Rule 22 of the Rules of the Supreme Court (see handout). In addition, Jodie recommended that Rule 22(h) be further amended to include federal bankruptcy judges and court of claims judges to make it clear that all federal judiciary judges are exempt from the requirements of RSCH 22. Judge Mollway further requested that the rule refer to "magistrate judges" rather than "magistrates." Following discussion, there was a consensus (no formal vote taken) to forward the draft revisions to Rule 22 to the Supreme Court with the Commission's recommendation to adopt them. Judy Pavey, Chairperson of the MCLE Board, congratulated and thanked Jodie and Lyn Flanigan for their excellent and tireless

work in getting the MCLE Board up and running and the regulations timely in place.

**III. REPORT RE PRESENTATION (1) AT A JUDICIAL EDUCATION CONFERENCE RE WHAT JUDGES CAN DO TO ENCOURAGE PROFESSIONALISM AND (2) TO HSBA MEMBERS RE PROFESSIONALISM AND WHAT JUDGES EXPECT OF ATTORNEYS APPEARING IN THEIR COURTS**

Justice Duffy gave Judge Senda's report (as previously noted, Judge Senda was in trial): The Commission on Professionalism is sponsoring a continuing education program "Professionalism in the Courtroom" on April 30, 2010. It is a three-hour program and attendance is mandatory for all full-time judges. An outstanding panel will present the program: Honorable Barry Kurren, Honorable E. John McConnell (ret.), Honorable Marcia Waldorf (ret.), Janet Hunt, Esq. (ODC), James Kawashima, Esq. (longtime civil practitioner who previously served on the Judicial Selection Commission), and Gerald Sekiya, Esq. (representing the Commission on Judicial Conduct). After completion of this program for judges, Judge Senda and Lyn Flanigan will discuss a similar program for HSBA members.

**IV. REPORT RE HSBA MINOR MISCONDUCT PROGRAM**

Lyn Flanigan reported that the time for public comment on the proposed amendments to Rules 2.2, 2.7 and 2.8 of the Supreme Court Rules intended to rejuvenate the Minor Misconduct Program expired on March 16. No adverse comments were received, and it is anticipated that the rule amendment will be presented to the Supreme Court shortly.

Janet Hunt related that she anticipates that with the Minor Misconduct Program in place, 10% - 20% (or more) of ODC cases will be referred to HSBA mentors for guidance and counseling of the attorney who is the subject of a complaint. In the ensuing discussion, it was noted that many ODC complaints involved the attorney's lack of knowledge/training in how to operate a business and sloppiness in communications with clients, other lawyers, and the ODC. Evan Shirley's article in the most recent *Hawaii Bar News* was recommended as an excellent primer in how an attorney should respond to an ODC inquiry. Steve Dixon noted that the Attorneys and Judges Assistance Program is presently monitoring five attorneys for minor misconduct matters. It was further noted that the new "Senior Counsel Division" of the HSBA has expressed an interest in providing a pool of mentors for the Minor Misconduct Program.

**V. REPORT RE COMMITTEE TO REVIEW POSSIBLE NEED TO REVISE HAWAI'I RULES OF PROFESSIONAL CONDUCT RE *PRO SE* LITIGANTS AND "DISCRETE TASK REPRESENTATION" (FKA "UNBUNDLING OF LEGAL SERVICES") ISSUE**

Judge Cardoza related that he has been in contact with Gayle Lau regarding the "new" Rules of Professional Conduct which have been worked on for a number of years by a special committee of the HSBA on which Gayle serves. The "new" rules are now with the ODC Board for review and comment. It is Judge Cardoza's understanding that the "new" rules will not change existing rules regarding the issue of "discrete task representation" (fka "unbundling of legal services"). However, Judge Cardoza does not believe a rule change is necessary as present Rule 1.2 of the Hawai'i Rules of Professional Conduct (entitled "Scope of Representation") is adequate. Rather, Judge Cardoza suggests that the Commission focus on an educational program for attorneys and judges regarding the availability and need for "discrete task representation." Judge Cardoza suggested a committee consisting of members of the Commission on Professionalism, Access to Justice Commission, and Disciplinary Counsel.

It was noted that "discrete task representation" is an important part of increasing "access to justice," as recognized by the Access to Justice Commission, which is also studying whether there is a need to revise the Hawaii Rules of Professional Conduct to clarify the propriety of "discrete task representation." It was noted that Judge Senda has recently been asked to lead the study of this issue for the Access to Justice Commission. Judge Cardoza will work with the Access to Justice Commission to set up a training program and explore the possibility of having an article published in the *Hawaii Bar News*.

**VI. STATUS OF COMMISSION'S RECOMMENDATION TO HAWAI'I SUPREME COURT RE MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE AVAILABILITY ONLINE TO THE PUBLIC**

Lyn Flanigan reported that she and Jim Branham (Staff Attorney for the Hawai'i Supreme Court) have worked out language for a revision of Rule 17(d)(1) of the Rules of the Supreme Court which will provide for the online availability to the public of whether an attorney has professional liability insurance. The proposed language will be forwarded to the Supreme Court shortly. Justice Duffy thanked Terry O'Toole and Wesley Park for their work on this longstanding project, and Lyn for her follow-up on the HSBA software changes which will be necessary.

**VII. NEW BUSINESS**

Lyn Flanigan reported that the Young Lawyers Division of the HSBA is discussing a mentoring project. Lyn related that mentoring means different

things to different people: some relate it to an experienced attorney assisting a younger attorney on matters of professional competence, while others consider it to be networking or other assistance. Justice Duffy related that Chief Justice Moon has long wanted a mentoring program with active involvement of law students, young lawyers, and members of the HSBA. Lyn will keep us informed of the Young Lawyers Division's progress on this issue.

#### **VIII. NEXT MEETING**

The next meeting will be in the September-October time frame. We will inform you as soon as the date is set.

Justice Duffy thanked everyone for attending, and for their contributions to the Commission's body of work in its first five years.

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

March 19, 2010

2:30 p.m.

Supreme Court Conference Room

**AGENDA**

- I. WELCOME AND ANNOUNCEMENTS
- II. REPORT RE PRESENTATION (1) AT A JUDICIAL EDUCATION CONFERENCE RE WHAT JUDGES CAN DO TO ENCOURAGE PROFESSIONALISM AND (2) TO HSBA MEMBERS RE PROFESSIONALISM AND WHAT JUDGES EXPECT OF ATTORNEYS APPEARING IN THEIR COURTS
- III. REPORT ON THE STATUS OF MANDATORY CONTINUING LEGAL EDUCATION (MCLE) PROGRAM, THE WORK OF THE MCLE BOARD OF DIRECTORS, AND PROPOSED AMENDMENTS TO RULE 22 OF THE SUPREME COURT RE MCLE
- IV. REPORT RE HSBA MINOR MISCONDUCT PROGRAM
- V. REPORT RE COMMITTEE TO REVIEW POSSIBLE NEED TO REVISE HAWAI'I RULES OF PROFESSIONAL CONDUCT RE *PRO SE* LITIGANTS AND "DISCRETE TASK REPRESENTATION" (FKA "UNBUNDLING OF LEGAL SERVICES") ISSUE
- VI. STATUS OF COMMISSION'S RECOMMENDATION TO HAWAI'I SUPREME COURT RE MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE AVAILABILITY ONLINE TO THE PUBLIC
- VII. NEW BUSINESS
- VIII. NEXT MEETING



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

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K. HAMAKADO  
CLERK OF APPELLATE COURTS  
STATE OF HAWAII

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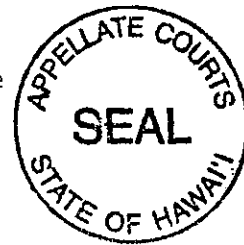
ORDER OF APPOINTMENT

(By: Moon, C.J., for the court<sup>1</sup>)

IT IS HEREBY ORDERED that the Honorable Paul T. Murakami is appointed as a member of the Commission on Professionalism, replacing the Honorable Karen M. Radius, who has retired, effective immediately upon the filing of this order and expiring on March 13, 2011.

DATED: Honolulu, Hawaii, February 24, 2010.

  
Chief Justice



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

## JUDGE PAUL MURAKAMI

**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.

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

I. ESTABLISHMENT OF THE COMMISSION ON PROFESSIONALISM

The Commission on Professionalism ("Commission") was established in 2005 by Chief Justice Ronald T.Y. Moon.

II. THE COMMISSION'S CHARGE

The Commission is charged with enhancing professionalism among Hawaii's lawyers. "Professionalism" includes competence, civility, legal ethics, integrity, and commitment to the rule of law, to justice, and to the public good.

III. MEMBERS OF THE COMMISSION

The Chair of the Commission is the Chief Justice or the Chief Justice's designee. In addition to the Chair, the Commission is comprised of nineteen members appointed by the Chief Justice, including four state trial court judges, two state appellate justices or judges, one federal judge, four practicing lawyers, one faculty member from the University of Hawai'i William S. Richardson School of Law, four representatives of attorney regulatory agencies, and three non-lawyer public members.

IV. COMMISSION PROJECTS 2005-PRESENT

1. Mandatory Continuing Professional Education

The Commission presented a recommendation to the Hawai'i Supreme Court to amend the Rules of the Supreme Court to require continuing professional

education. The Hawai'i Supreme Court accepted the Commission's recommendation, and adopted new Rule 22 of the Rules of the Supreme Court entitled "Mandatory Continuing Professional Education and Voluntary Continuing Legal Education." New Rule 22 was adopted by Order dated July 15, 2009, effective January 1, 2010.

2. Mandatory Disclosure of Professional Liability Insurance on Annual Attorney Registration Statements

The Commission recommended that the Supreme Court revise Rule 17(d) (1) of the Rules of the Supreme Court to require that attorneys disclose on their annual Hawai'i State Bar Association attorney registration statement whether they have professional liability insurance. The Supreme Court accepted the Commission's recommendation, and an Order Amending Rule 17(d) of the Rules of the Supreme Court was filed on October 10, 2007.

3. Online Availability to Public of Attorney's Disclosure Regarding Whether They Have Professional Liability Insurance

After analysis of the data revealed in response to revised Rule 17(d) (1) regarding disclosure of professional liability insurance on attorney's annual registration statements, and review of rules in other jurisdictions, the Commission recommended that the

Supreme Court adopt a rule requiring that the attorney's disclosure information regarding professional liability insurance be available online to the public. Such a rule is presently being drafted for consideration by the Supreme Court.

4. Presentation at a Judicial Education Conference Regarding What Judges Can Do to Encourage Professionalism by Lawyers in the Courtroom

A Commission member judge organized and coordinated a program entitled "Advancing Professionalism in the Courtroom" for all full-time state judges. The program (attendance is mandatory) includes a panel consisting of two retired state trial judges, a federal magistrate judge, the Disciplinary Counsel, a representative of the Commission on Judicial Conduct, and a longtime civil practicing attorney who previously served on the Judicial Selection Commission. The program will be presented on April 30, 2010.

5. Rejuvenation of the Hawai'i State Bar Association (HSBA) Minor Misconduct Program

The Commission members and representatives of the HSBA, the Office of Disciplinary Counsel (ODC), and the Attorneys and Judges Assistance Program worked together to rejuvenate the HSBA Minor Misconduct Program, which allows the ODC to refer lawyers

accused of minor misconduct not warranting formal ODC disciplinary proceedings to HSBA mentors for guidance and counseling. The Commission's recommendations to amend Rules 2.7, 2.8, and 2.2 of the Rules of the Supreme Court to facilitate implementation of the Minor Misconduct Program was submitted for public comment by the Supreme Court.

6. Revision of Disciplinary Board Formal Opinion No. 43 Regarding Use of the Title "Of Counsel"

The Commission recommended revision of Disciplinary Board Formal Opinion No. 43 regarding requirements for designation of an "Of Counsel" relationship by a law firm and attorney. The recommendation is presently pending before the Disciplinary Board.

7. Revision of Rule 2.24 of the Rules of the Supreme Court of Hawai'i Entitled "Audit of Trust Accounts"

The Commission recommended to the Supreme Court that Rule 2.24 of the RSCH be revised to shift the cost of an audit of an attorney's trust account to the attorney audited when the audit reveals that the attorney was not in substantial compliance with trust accounting requirements or when an attorney's trust account check is dishonored or the trust account balance falls below zero. The Supreme Court agreed

with the Commission's recommendation, and an Order Amending Rule 2.24 was entered on October 2, 2007.

8. American Bar Association Recommendation Adopted by the House of Delegates August 13-14, 2007 Regarding a Plan for Law Practice Contingencies in Event of Death, Disability, Disappearance, and Disbarment

After study, based upon the rationale of the HSBA expressed in its opposition to a Mandatory Plan for Law Practice Contingencies in Event of Death, Disability, Disappearance, and Disbarment, the Commission agreed not to recommend the adoption of a rule requiring mandatory designation of an inventory attorney.

9. Review of Possible Need to Revise Hawai'i Rules of Professional Conduct Regarding *Pro Se* Litigants and "Unbundling of Legal Services" Issue

The Commission is presently studying whether the Hawai'i Rules of Professional Conduct should be revised in recognition of the increasing number of "pro se" litigants and the need for clarity regarding the "Unbundling of Legal Services" issue to assist access to justice by the public.

10. Revision of Rule 2.7(b)(3) of the Rules of the Supreme Court to Broaden the Existing List of Agencies, Entities, Programs, and Individuals Authorized to Accept Referrals for Non-Disciplinary Proceedings for Minor Misconduct

The Commission recommended that the Supreme Court revise Rule 2.7(b)(3) of the Rules of the Supreme

Court to broaden the existing list of agencies, entities, programs, and individuals authorized to accept referrals for non-disciplinary proceedings for minor misconduct. The Supreme Court accepted the Commission's recommendation, and an Order Approving Referral Agencies was filed on April 11, 2006.

11. Revision of Rule 16.1 of the Rules of the Supreme Court (Entitled "Purpose; Scope" of the Attorneys and Judges Assistance Program) to Include Law Students at the William S. Richardson School of Law

The Commission recommended that Rule 16.1 of the Rules of the Supreme Court be revised to include law students at the William S. Richardson School of Law. The Supreme Court accepted the Commission's recommendation, and an Order Amending Rule 16 was filed on December 18, 2006.

12. Survey of Programs and Other Educational Vehicles Concerning Professionalism and Ethics Presently in Place at the William S. Richardson School of Law, the Hawai'i Supreme Court of Bar Examiners, the Hawai'i Professionalism Course, the Hawai'i State Bar Association, and the Office of Disciplinary Counsel

The Commission completed an extensive survey of programs and other educational vehicles concerning professionalism and ethics presently in place at the William S. Richardson School of Law, the Hawai'i Supreme Court of Bar Examiners, the Hawai'i



Professionalism Course, the Hawai'i State Bar  
Association, and the Office of Disciplinary Counsel.

V. ANNUAL REPORTS OF COMMISSION

The Commission presents an annual report of its work to  
the Supreme Court.

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.

Proposed Draft RSCH 22 Amendment

**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, magistrates 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 a 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.

**Hawaii State Board of Continuing Legal Education**

1100 Alakea Street, 10<sup>th</sup> Floor  
Honolulu, Hawaii 96813  
TEL (808) 537-1868 FAX (808) 521-7936

**CONTINUING LEGAL EDUCATION REGULATIONS**

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**Attachments**

**Continuing Legal Education Fee Schedule**

**Provider Application for Approval of Continuing Legal Education**

**Attorney Application for Approval of Continuing Legal Education**

**MCPE and VCLE Credit Tracking Worksheet**

**MCPE Certification Form**

**REGULATION 1. Definitions**

- (A) "Approved" or "Approval" means authorized for credit by the Board.
- (B) "Active Member" means any person who is licensed to practice law in the State of Hawaii and who pays "Active Member" dues to the HSBA.
- (C) "Board" means the CLE Board of Directors appointed and serving pursuant to these regulations.
- (D) "CLE" means Continuing Legal Education.
- (E) "Credit" or "Credit Hour" means one 60 minute hour dedicated to actual CLE course or activity engagement excluding rest or meal breaks.
- (F) "Directors" mean the members appointed to the CLE Board of Directors.
- (G) "Executive Director" means the Executive Director of the HSBA.
- (H) "HSBA" means the Hawaii State Bar Association.
- (I) "MCPE" means Mandatory Continuing Professional Education as defined in Rule 22.
- (J) "Provider" means an individual, group or organization presenting a course or activity.
- (K) "Report" or "Reporting" means certifying to the HSBA the number of approved credit hours completed as required by Rule 22.
- (L) "RSCH" means Rules of the Supreme Court of Hawaii.
- (M) "Rule 22" means Rule 22 of the Rules of the Supreme Court of Hawaii.
- (N) "VCLE" means Voluntary Continuing Legal Education as defined in Rule 22.

**REGULATION 2. Board of Continuing Legal Education**

CLE shall be administered by a CLE Board of Directors as provided herein.

- (A) **Composition.** The Board shall consist of twelve Directors, nine of whom shall be appointed by the HSBA. Of the nine, one shall be a lay person, and eight shall be active members of the bar from solo practices, large and small firms, state, city or county attorneys, and neighbor island practices. Additionally, there shall be three non-voting Directors, one of whom shall be from the Judiciary and appointed by the court, one from the William S. Richardson School of Law and appointed by the Dean of the law school, and the HSBA Executive Director. The HSBA Board of Directors shall designate a Chairperson who shall serve in that position at the pleasure of the HSBA Board. The Board shall designate a secretary.
- (B) **Term of Office.** Of the Directors first appointed, three shall be appointed for an initial term of one year, three for initial terms of two years, and three for initial terms of three years. Upon the expiration of the initial term of each Director, the term of each Director shall be for three years. In the event of a vacancy, appointment of a successor shall be for the unexpired portion

of the term, and shall be filled in the same manner as the original appointment. The non-voting Directors shall be replaced at-will by their respective appointing entities.

- (C) Meetings. The time, method and place of meetings shall be at the discretion of the Board. The Board has authority to act when a quorum is present. A quorum consists of five or more Directors.
- (D) Compensation. Directors shall serve without compensation, but each Director is entitled to reimbursement by the Board for actual and necessary expenses incurred in the performance of the Director's duties.
- (E) Powers and Duties of the Board. The Board shall have general supervisory authority to administer the CLE requirements for active members of the Hawaii State Bar pursuant to Rule 22.
- (F) The Board shall:
  - (1) Grant or deny approval for individual courses and activities;
  - (2) Grant or deny applications for Accredited Provider status;
  - (3) Determine the number of credit hours allowed for each approved activity or course;
  - (4) Determine whether all or portions of individual courses taken or activities engaged in by active members of the bar, qualify for approved MCPE or approved VCLE credit;
  - (5) Have authority to assess reasonable fees for administering these regulations which may be amended, deleted, or supplemented from time to time;
  - (6) Take any other action deemed necessary to administer these regulations;
  - (7) Meet at least four times per year; and
  - (8) Report annually to the HSBA Board of Directors.
- (G) Expenses of the Board shall not exceed the annual budget approved by the HSBA Board of Directors.
- (H) The Board may delegate its power to the CLE Administrator who shall be an employee of the HSBA. The CLE Administrator shall provide a report on all determinations made subsequent to the preceding Board meeting.

**REGULATION 3. Standards for Course or Activity Approval**

The Board may approve CLE courses or activities when consistent with these standards:

- (A) General CLE Standards:
  - (1) The course or activity is an organized program of learning with significant intellectual or practical content and deals with matters directly related to the practice of law.

- (2) The course or activity's primary purpose is to improve the participant's professional competence as an attorney. Areas of professional competence include substantive legal issues, legal skills or practice, improving the attorney's delivery of legal services to clients, and improving the efficiency of the practicing attorney.
- (B) Professionalism Standards. To be approved for MCPE credits, the course or activity shall be devoted to matters involving an attorney's ethical obligations, professional responsibility, bias awareness and prevention, client trust account administration, access to justice, case management, malpractice prevention and law office management.
- (C) The course being taught shall be primarily for attorneys on substantive legal subjects or subjects related to the practice of law.
- (D) Each course or activity participant is provided with appropriate, legible, substantive course or activity material at or before the time the course or activity is offered unless the absence of such materials is reasonable under the circumstances of the particular course. Material may either be in hardcopy or electronic format, and syllabi or agenda outlining the course or activity must be followed.
- (E) Courses or activities are approved for MCPE or VCLE credit if they are classified as CLE approved by:
  - (1) The HSBA;
  - (2) The American Bar Association (ABA); or
  - (3) The Board.
- (F) The number of approved MCPE or approved VCLE credits that may be earned from ABA courses shall be the same number of credits the course is advertised as approved for by the ABA.
- (G) Courses or activities for which credit will be denied include but are not limited to matters relating primarily to personal self-improvement courses, activities designed primarily to sell services, equipment or software programs, courses that are designed to enhance revenue, marketing courses or repeat courses for which the active member has already obtained CLE credit.
- (H) In order to receive CLE credit for an approved course, an attorney must be present for the first 60 minutes of a course. After the first 60 minutes, an attorney may receive credit for the time the attorney is actually present at the course rounded down to the nearest quarter hour. If an attorney is late to the start of a course, the attorney may enter the course but shall not receive CLE credit for the course.

**REGULATION 4. Credit for Approved Courses in Alternate Formats**

- (A) Credit may be claimed for viewing or listening to approved courses presented in an alternate format. Alternate formats may include but are not limited to videotape, audiotape, DVD, remote place viewing, online computer presentations, teleconferencing, computer self-study or



other formats hereafter developed. The standards set forth in Regulation 3 and procedures set forth in Regulation 10 shall apply.

- (B) An active member who completes an alternate format CLE course or activity that has been approved for credit may claim the same number of credits the course is advertised as approved for by the provider.
- (C) An alternate format course, activity or material may only be used once for credit. Updated versions may be approved for credit.
- (D) Alternate format courses, activities or materials shall be presumed outdated two years after being compiled, recorded or published unless otherwise determined by the Board.
- (E) If a complete alternate format course is divided into parts, all parts must be viewed or listened to within the same calendar year in order to earn credit for that course.

**REGULATION 5. Credit for Teaching Approved Courses**

- (A) Credit may be given for teaching and preparing written material for approved courses. The standards set forth in Regulation 3 and procedures set forth in Regulation 10 shall apply.
- (B) No more than two hours of preparation time for each one hour of teaching time may be reported. For example, up to three credits may be reported for teaching a one hour course. Credit for courses that are substantially updated from previous presentations may be approved on a similar basis.
- (C) Full time teachers and lawyers whose primary employment is teaching law school courses may not earn credit for the preparation or teaching of law school courses.
- (D) Panel speakers shall receive teaching credit for the entire time the panel is presenting.

**REGULATION 6. In-house Programs or Courses**

- (A) The Board may approve in-house courses or activities offered by law firms, corporate legal departments, government legal sections, neighbor island bars, HSBA sections or similar entities primarily for the education of their employees or active members. The standards set forth in Regulation 3, procedures set forth in Regulation 10 and Provider Requirements set forth in Regulation 11 shall apply.
- (B) Meetings held primarily for advancing a particular client's interest, including case review and evaluation, shall not be considered a course or activity that may be approved for MCPE or VCLE credit.
- (C) The course or activity may be audited free of charge by a neutral member of the Board or the Board's designee.

**REGULATION 7. Credit for Attending Live In-Person Out-of-State Courses or Activities**

- (A) An active member who attends and completes a live in-person out-of-state CLE course or activity that has been approved for credit by a jurisdiction listed on the HSBA list of approved

jurisdictions may claim the CLE credits from the course or activity without seeking prior Board approval for the course or activity.

- (B) For a live in-person course in a jurisdiction not listed on the HSBA list of approved jurisdictions, the active member or a Provider on behalf of active members must seek prior Board approval for the course pursuant to Regulation 10.
- (C) The Board shall approve or disapprove the course or activity pursuant to the standards set forth in Regulation 3.

#### **REGULATION 8. RECORDKEEPING**

- (A) Each active member is responsible for keeping an organized record of the approved MCPE and VCLE credit hours they complete each year.
- (B) Active members participating in approved CLE courses or activities should obtain a certificate of attendance from the course or activity provider at the completion of the course.
- (C) Active members should retain the certificate of attendance as well as sufficient documentation from the course or activity to establish that the course or activity was approved for MCPE or VCLE credit, or that the provisions of Regulation 7 apply.
- (D) Records should be retained by members for two calendar years.
- (E) Certificates of attendance should not be sent to the Board unless requested by the Board to do so.
- (F) Active members must certify on their annual attorney registration statement the number of MCPE and VCLE credit hours they completed for the calendar year (see RSCH 17(d)).

#### **REGULATION 9. Compliance Audits of Active Member**

- (A) The Board or its designee shall select a designated number of active members to randomly audit for compliance each year. Each active member selected for audit shall furnish to the Board all records supporting their affidavit within 30 days of being notified of the audit.
- (B) Within 30 days of completion of the audit, the auditor shall notify the active member being audited by certified mail of the auditor's determination.
- (C) If, as a result of an audit the auditor disallows all or some of the credit hours claimed and the remaining credit hours are less than the required three approved MCPE credit hours, the active member shall be deemed to be in noncompliance with Rule 22.
- (D) Within 60 days from the date the certified notice of noncompliance was mailed, evidence may be submitted to the Board that the required approved MCPE credit hours were subsequently completed, or that the notice of noncompliance was issued erroneously.

- (E) Active members who fail to prove that they have subsequently completed the required approved MCPE credit hours during those 60 days and that all fees have been paid, or that the notice of noncompliance was issued erroneously shall be automatically and immediately suspended.
- (F) If an active member disagrees with the Board's findings of noncompliance, the active member may petition the Hawaii Supreme Court for review of the Board's determination that the active member failed to prove compliance with Rule 22, or that a notice of noncompliance was issued erroneously.
- (G) The petition shall not stay the effective date of the active member's suspension.
- (H) An active member may be reinstated upon sufficient proof that the active member has:
  - (1) Completed the required three credit hours of approved MCPE for the audited year;
  - (2) Paid a reinstatement fee as determined by the HSBA Board of Directors; and
  - (3) Paid any other required fees and dues.

**REGULATION 10. Procedure for Individual Course or Activity Approval**

- (A) Providers seeking MCPE or VCLE approval for a course or activity, or active members seeking approval for a course or activity for which the provider has not already obtained approval shall submit the following to the Board:
  - (1) A completed Application for Approval of Continuing Legal Education form including the required attachments;
  - (2) The application fee pursuant to the attached fee schedule; and
  - (3) Any other information requested by the Board.
- (B) The complete application and proper fee must be received by the Board at least 45 days prior to the date on which the course or activity is scheduled. An application which is not complete or timely submitted to the Board may be rejected, or at the Board's discretion accepted for review subject to a late fee pursuant to the attached fee schedule.
- (C) After review of the complete application, the Board may:
  - (1) Approve all or a part of the course or activity for MCPE or VCLE credit;
  - (2) Disapprove the course for MCPE or VCLE credit; or
  - (3) Request more information from the applicant.
- (D) Within 30 days of receiving the complete application, the Board shall inform the applicant in writing, fax or electronic mail of the Board's determination. If the course is approved, the Board shall indicate the number of credit hours for which the course is approved.

- (E) If a course or activity is approved, the provider may state on promotional materials that the course or activity has been approved in Hawaii for the number of MCPE or VCLE credit hours determined by the Board.
- (F) Any applicant whose course or activity is disapproved for MCPE or VCLE credit may submit a written request to the Board for reconsideration within 15 days of receipt of the notice of disapproval. The request for reconsideration shall state the specific reason the applicant believes the course or activity meets the standards set forth in Regulation 3, and include any additional supporting information. The Board shall consider the matter at its next regular meeting and decide the matter by majority vote. The Board's decision is final. If the Board's decision is to uphold the course or activity's disapproval, the Board shall refund the applicant's application fee less 1/3 of the fee up to \$150.00.

#### **REGULATION 11. Provider Requirements**

Providers shall:

- (A) Monitor participant attendance throughout the course or activity and keep an attendance record for the course or activity for a minimum of 2 years. The attendance record shall be provided to the Board upon request at no cost to the Board.
- (B) Issue evaluation forms and certificates of attendance to participants at the conclusion of the course or activity; provided that government providers may issue certificates of attendance to participants upon request by a participant. The provider shall forward a copy of all course evaluations completed by active members of the Hawaii State Bar to the Board upon request at no cost to the Board.
- (C) Permit any member of the Board or its designee to attend a course or activity at no cost or without preregistration for the purpose of compliance auditing.
- (D) Submit written, electronic or presentation materials to the Board upon its request free of charge.
- (E) Submit an application and application fee pursuant to the attached fee schedule for each course for which approval is being sought.
- (F) Within 30 days of the completion date for each course or activity the provider shall send the attendance roster and corresponding attendee fee to the Board. If the roster and attendee fee are not timely received by the Board, a late fee shall be assessed in addition to the attendee fee.

#### **REGULATION 12. Accredited Providers**

- (A) At its discretion, the Board may grant Accredited Provider status to a provider.
- (B) Accreditation shall constitute prior approval of CLE courses for MCPE or VCLE credit offered by the Accredited Provider in the calendar year for which Accredited Provider status is granted.

- (C) The Accredited Provider shall comply with the course standards set forth in Regulation 3 and the Provider requirements set forth in Regulation 11 with the exception of Regulation 11(E).
- (D) An Accredited Provider may state on promotional materials that the course or activity has been approved for MCPE or VCLE credit in Hawaii based on each 60 minute segment dedicated to a MCPE or VCLE subject matter.
- (E) An Accredited Provider shall provide notice to the Board when its courses are publicly noticed, but not later than two weeks prior to a course being offered.
- (F) To be considered for Accredited Provider status, a provider shall have:
  - (1) Sponsored at least three separate courses or activities in the year immediately preceding its application that would have satisfied the course standards set forth in Regulation 3;
  - (2) Submitted an application and application fee pursuant to the attached fee schedule; and
  - (3) Submitted any additional information requested by the Board.
- (G) An Accredited Provider may apply for renewal of accredited status each year by submitting an application and fee.
- (H) If an application for Accredited Provider status is disapproved, the Board shall refund the applicant's application fee less \$150.00.

## MCLE FREQUENTLY ASKED QUESTIONS

### *Rules at a Glance*

- If you are an active member of the bar, beginning January 1, 2010 you are required to complete 3 credit hours of approved Mandatory Continuing Professional Education (MCPE) each calendar year.
- In addition to the mandatory 3 credit hours of MCPE, you are encouraged, but not required, to complete 9 or more credit hours per year of approved Voluntary Continuing Legal Education (VCLE).
- Beginning with the attorney registration statement for 2011, you are required to certify whether you have completed at least 3 credit hours of MCPE and report the number of credit hours of VCLE completed during the 2010 calendar year.
- You may carry forward and certify on your attorney registration statement a maximum of 3 excess MCPE credit hours completed during the previous calendar year.
- Members on inactive status who elect to become active members of the bar are required to complete 3 credit hours of MCPE within 3 months of achieving active status. These 3 credit hours may be used to fulfill the annual MCPE requirement.
- Newly licensed members who elect active status upon admittance to the bar are exempt from the MCPE requirement for the year in which you are admitted. However, you still are required to complete the mandatory HSBA Professionalism course prior to the end of the year following the year you are admitted to the bar.
- All credit hours earned from courses and activities sponsored by the HSBA or the American Bar Association and classified as approved MCPE may be used to fulfill your annual MCPE requirement.
- Failure to comply with the MCPE requirement may result in an administrative suspension until the credit hour deficit is cured. The "catch up" credit hours used to bring a member to compliance may not be used to fulfill the current year requirement.

### *Anticipated MCPE Questions*

1. When do the new MCLE requirements take effect?

Rule 22 of the Rules of the Supreme Court of the State of Hawaii (RSCH) takes effect on January 1, 2010. Rule 22 requires that active members of the bar complete at least 3 credit hours of MCPE, and encourages completion of at least 9 hours of VCLE during each calendar year.

2. How do I report to the bar the total number of MCPE and VCLE credits I completed during the 2010 calendar year?

Active members of the bar must certify on their attorney registration statement for 2011, that they have completed at least 3 credit hours of MCPE, and report the number of VCLE credits completed during the 2010 calendar year.

3. If I earn more than 3 MCPE credits in a calendar year can I carry the excess forward to the next year?

Yes, you may carry forward a maximum of 3 credit hours from the year immediately preceding the current reporting year.

4. I earned CLE credits during the 2009 calendar year. Do these credits carry over to satisfy all or part of my 2010 MCPE requirement?

No. Rule 22 provides that the initial reporting period will be the calendar year beginning January 1, 2010.

5. How do I report the excess credit hours that I intend to carry over into the 2011 reporting calendar year?

Part III of the attorney registration statement will have a space for certifying credit hours completed, and the number of

credits (not more than 3) you are carrying over from the prior reporting year to use toward your MCPE credit requirement for the calendar year just completed. There will also be a space for indicating the number of excess credits you will carry over to the next reporting year. For example, on part III of the 2010 registration statement there will be spaces for reporting (optional) the number of CLE hours completed during the 2009 calendar year. On the 2011 registration statement, there will be spaces for reporting the number of MCPE and VCLE credit hours completed during the 2010 calendar year. On the 2012 registration statement, there will be spaces for indicating:

- a) The number of MCPE and VCLE credit hours completed during the 2011 calendar year; and
- b) The number of carry-over MCPE credit hours from the 2010 calendar year you are using toward your 2011 reporting year MCPE credit hour requirement.

6. I am an active member of another state's bar that also has a mandatory CLE credit requirement. Can those credits be used to satisfy Hawaii's MCPE requirement?

The following credits completed out-of-state may be used to satisfy Hawaii's MCPE requirement:

- a) Credits from professionalism courses or activities sponsored by the American Bar Association.
- b) Credits from LIVE courses or activities you attended in an approved jurisdiction.
- c) Credits from other sources may be used to satisfy Hawaii's MCPE requirement if, prior to attending the course, the member seeks and obtains approval from the HSBA following HSBA review of the course information.

7. Do I need to send in the certificates of attendance I receive from attending approved courses?

No. But you should keep certificates of attendance from approved courses to help you track the credit hours you have taken during the year, and for audit purposes. Tracking forms will be available online.

8. How long must I keep MCPE records?

You are required to keep records for the two most recent reporting years. These records may be subject to audit by the HSBA.

9. What kinds of courses qualify for MCPE credit?

Qualifying professional education topics include:

- a) Hawaii Rules of Professional Conduct
- b) Legal ethics
- c) Law office management
- d) Client-trust account administration
- e) Bias awareness and prevention
- f) Access to Justice
- g) Case and client management
- h) Malpractice insurance and prevention
- i) Approved combinations of all of the above.

10. What kinds of activities qualify for MCPE credit?

Qualifying activities include:

- a) Preparing for and teaching approved MCPE courses
- b) Conducting approved presentations in-house, for Inns of Court, bar sections, professional legal organizations etc.
- c) Studying approved audio, video or other technology-delivered professional education courses.
- d) Other HSBA approved activities.

11. How much credit do I receive for teaching an approved MCPE or VCLE course?

You may count two hours of preparation time for each hour spent teaching. In other words, you may claim three credit hours for preparing and teaching a one hour course.

12. What if I have not earned 3 credit hours of MCPE during the 2010 calendar year?

You may be administratively suspended from practicing law until you fulfill your MCPE credit hour requirement for the 2010 calendar year.

13. If I will be earning MCPE "catch up" credits in 2011 to fulfill my 2010 requirement in order to be reinstated to active status, can I use these "catch up" credits toward my 2011 MCPE requirement?

No. Only the credits hours completed in excess of the amount needed to fulfill your 2010 requirement may be used to fulfill your 2011 requirement.

14. Can I continue to practice law if I don't complete 3 credit hours of MCPE by December 31, 2010?

Yes. You may practice law unless or until you have been administratively suspended. Active attorneys who certify on their attorney registration statement for 2011 that they have not completed 3 MCPE credit hours during the 2010 calendar year:

- a) Will be sent a certified notice of noncompliance within 60 days following the registration filing deadline.
- b) Within 15 days from the date the certified notice was mailed, attorneys receiving the notice may submit evidence to the bar that they have subsequently completed the required MCPE credit hours (a reporting form will be available online), or that the notice of noncompliance was issued to them erroneously.
- c) If an attorney fails to prove that he or she has subsequently completed the required MCPE credit hours during those 15 days, the attorney will be automatically suspended from practicing law.

15. What must I do to be reinstated to active status with the bar?

You will be reinstated if you:

- a) Prove that you have completed 3 credit hours of MCPE (a reporting form will be available online);
- b) Paid the reinstatement fee set by HSBA; and
- c) Paid all required fees and dues.

16. The HSBA has suspended me for not completing my MCPE requirement or reporting my MCPE/VCLE credit hours for the calendar year. Is there a review process?

Yes. You may petition the Hawaii Supreme Court for review of the HSBA's determination that you failed to complete your MCPE requirement, or that the notice of noncompliance was issued to you erroneously. However, a petition to the Supreme Court will not stay the effective date of your suspension.

17. Do MCPE requirements apply to fulltime judges?

State judges are required to participate in and report at least 3 hours of an approved Judicial Education program, or comply with their requirement by such other means approved by the Supreme Court. Federal judges are exempt from rule 22.

18. I am a newly admitted member of the bar electing active status, must I comply with the MCPE requirement this year?

No. The MCPE requirement is waived for the calendar year you are admitted to the bar. However, this waiver does not modify the requirement that you complete the HSBA course on Professionalism prior to the end of the year following the year you are admitted to the bar pursuant to RSCH Rule 1.14.

19. I am an inactive member now electing active status, what are my requirements?

You are required to complete and report to the HSBA that you have completed 3 hours of MCPE within 3 months of electing active status (a reporting form will be available online). These 3 credit hours may be used to satisfy your MCPE requirement for the year.

20. Is the HSBA doing anything to help members meet their MCPE requirement?

Yes. The HSBA is committed to ensuring that members will be able to fulfill their MCPE requirement for an annual cost of not more than \$50. Moreover, all MCPE courses will be updated semiannually ensuring that course content is current and relevant. The HSBA provides the following MCPE approved courses:

- a) A 5 credit Mandatory Professionalism course for new admittees is offered twice a year.
- b) At least once a year a 3 credit general ethics/professionalism course will be offered on Oahu, Kauai, Maui and Hawaii, and made available later online and on DVD.
- c) Various specialized ethics courses will be offered in various locations and made available later online and on DVD.

21. Can I receive MCPE credit from attending courses offered by providers other than the HSBA?

Yes. You can receive MCPE or VCLE credit by completing a course or activity that has been approved for credit by the HSBA.

*For more information, please contact MCLE Administrator Jodie Hagerman at (808) 537-1868 or [jhagerman@hsba.org](mailto:jhagerman@hsba.org).*



October 8, 2009

The Honorable Ronald T. Y. Moon  
The Honorable Paula A. Nakayama  
The Honorable Simeon R. Acoba  
The Honorable Mark E. Recktenwald  
Hawai'i Supreme Court  
417 South King Street  
Honolulu, Hawai'i 96813

Dear Members of the Hawai'i Supreme Court:

On behalf of the Hawai'i Supreme Court Commission on Professionalism, I wish to inform you that the Professionalism Commission is recommending that the Rules of the Supreme Court of the State of Hawai'i be amended to provide that:

1. attorneys be required to report to the HSBA on their annual registration statements whether they have professional liability insurance; and
2. that each attorney's information regarding whether they have professional liability insurance be available online to the public.

The following additional information is provided for your consideration:

1. the Commission's Committee (co-chaired by attorney Terence O'Toole and lay member Wesley Park) studied this issue for almost three years before making its recommendation to the Commission;
2. the Committee's recommendation was a compromise position, as it does not go as far as a new rule (August, 2009) adopted by the California Supreme Court that requires lawyers in private practice to give written notice if they lack malpractice insurance to all clients at the onset of representation whenever it is reasonably foreseeable that the legal representation will exceed four hours;

The Honorable Ronald T. Y. Moon  
The Honorable Paula A. Nakayama  
The Honorable Simeon R. Acoba  
The Honorable Mark E. Recktenwald  
October 8, 2009  
Page 2

3. there are now 25 United States jurisdictions which require some form of disclosure of professional liability insurance; and
4. the Commission accepted the Committee's recommendation in a vote (by secret ballot) in the Professionalism Commission's meeting on October 2, 2009. The vote was 15 in favor of the Committee's recommendation, 5 opposed, and 1 abstention.

Thank you for your consideration.

Very truly yours,

JAMES E. DUFFY, JR.  
Associate Justice

JED:jtm

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

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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 court<sup>1</sup>)

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

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<sup>1</sup> 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



IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

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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.

# **Advancing Professionalism in the Courtroom**

The Honorable Barry Kurren  
The Honorable E. John McConnell (ret.)  
The Honorable Marcia Waldorf (ret.)  
Janet Hunt, Esq.  
James Kawashima, Esq.  
Gerald Sekiya, Esq.

April 30, 2010

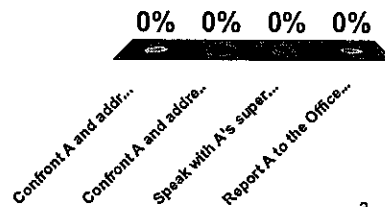
## Scenario #1

Judge has an attorney (A) that from time to time addresses the court in an irritating and arrogant tone whenever Judge speaks to A in open court. The court staff comments to Judge on several occasions that A is very disrespectful in open court every time he appears before Judge. A is at times disrespectful to opposing counsel, interrupting his argument and making arguments to him instead of the court. Judge tried to address this behavior informally but it has continued.

2

## Judge should:

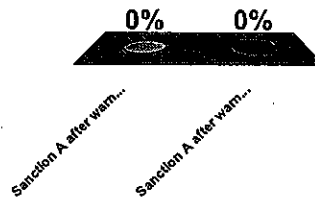
- A. Confront A and address his behavior in open court.
- B. Confront A and address his behavior in chambers.
- C. Speak with A's supervising attorney.
- D. Report A to the Office of Disciplinary Counsel.



3

A chooses to confront A and the behavior continues. **Judge should:**

- A. Sanction A after warning him in open court.
- B. Sanction A after warning him in chambers.



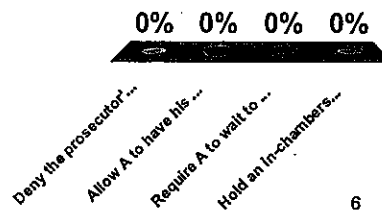
## Scenario #2

On a very busy morning, defense attorney (A) represents three defendants who are scheduled to waive or demand a jury trial. A's cases are called and he is not present, but his cases are passed because the calendar indicates that he is counsel of record. Two of A's clients are present and one is not. When A finally appears, he asks the prosecutor to take his passed cases out of order. According to other judges, A does this on a regular basis.

5

## Judge should:

- A. Deny the prosecutor's request to pass the cases, call the calendar in order, and deal with (each of) A's cases as to each defendant. Issue an OSC as to A for each of A's cases.
- B. Allow A to have his cases called out of order, but admonish A on the record regarding his tardiness.
- C. Require A to wait to end of ready cases to have cases called and admonish A regarding tardiness.
- D. Hold an in-chambers meeting with A to address the problem (with prosecutor present).



6

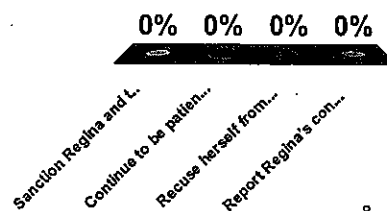
## Scenario #3

Regina is a private attorney who has been in practice for over 10 years. She is "connected" with at least two members of the Judicial Selection Commission (JSC). To call her a "zealous advocate" is an understatement; she routinely conducts herself in an aggressive and argumentative manner. Judge has cautioned her about her conduct in the courtroom, to no avail. Judge is considering sanctioning Regina with a monetary assessment the next time Regina behaves in an unprofessional and uncivil manner. However, Judge is up for retention in two years and is also being evaluated by the "Rule 19" committee within the next four months.

7

## Judge should:

- A. Sanction Regina and try to explain as best as possible to the JSC and/or Rule 19 evaluation panel that Judge does not lack judicial comportment.
- B. Continue to be patient because "Regina's behavior could be worse and she's not really breaking any rules."
- C. Recuse herself from Regina's cases because Judge's fear of reprisal is preventing her from being fair and impartial.
- D. Report Regina's conduct to the Office of Disciplinary Counsel.



8

## Scenario #4A

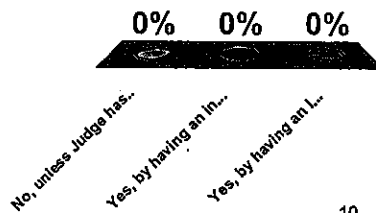
Emory, an experienced attorney, appears in court one day looking tired with bloodshot eyes. Judge conducts a chambers conference with all counsel during which Emory is articulate, alert, and has no slurred speech but Judge smells what seems like alcohol from Emory's breath. Emory then handles his in-court appearance on behalf of his (Emory's) client without incident.

A week later, Emory briefly appears before Judge on another case, but looks even more fatigued, is wearing somewhat disheveled clothing, and seems somewhat distracted but is able to handle his client's matter.

9

**Should Judge take any steps to follow up what Judge perceives to be a deterioration of Emory's physical persona?**

- A. No, unless Judge has a reasonable basis to conclude and does conclude that Emory is unable to handle his (Emory's) clients' interests in an appropriate manner.
- B. Yes, by having an in-chambers conversation with Emory alone to determine the extent to which Emory may be suffering from an impairment.
- C. Yes, by having an in-chambers conversation with Emory and opposing counsel present to determine the extent to which Emory may be suffering from an impairment.

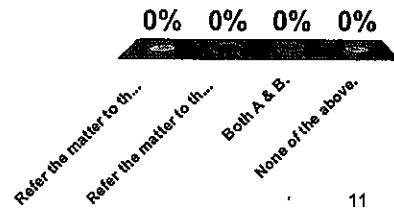


10



## In addition, Judge should:

- A. Refer the matter to the Office of Disciplinary Counsel for further investigation.
- B. Refer the matter to the Attorneys and Judges Assistance Program.
- C. Both A & B.
- D. None of the above.



## Scenario #4B

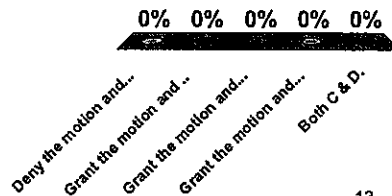
Two months later, Emory files in the first case, a motion to continue the trial date which is a month away and for leave to withdraw as counsel. His client's consent to the request accompanies the motion. The grounds for the motion are that Emory is physically and mentally unable to perform the services necessary to prepare for trial or to try the case. He attaches an M.D.'s report certifying that Emory is temporarily unfit.

Defendant opposes the motion arguing that the case is five years old, that this is already the second trial date, and that Emory could and should have filed his request earlier. Defendant asks that Emory be sanctioned with a reprimand and an award of attorney's fees.

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## Judge should:

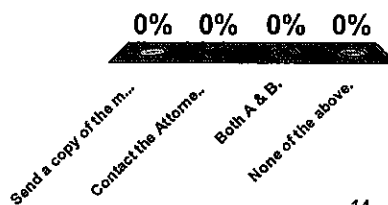
- A. Deny the motion and order Emory to try the case on schedule or be held in contempt.
- B. Grant the motion and do nothing further.
- C. Grant the motion and sanction Emory with a reprimand.
- D. Grant the motion and sanction Emory by awarding reasonable attorney's fees to the opposing party.
- E. Both C & D.



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## In addition, Judge should:

- A. Send a copy of the motion and refer the matter to the Office of Disciplinary Counsel.
- B. Contact the Attorneys and Judges Assistance Program.
- C. Both A & B.
- D. None of the above.



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## Scenario #5

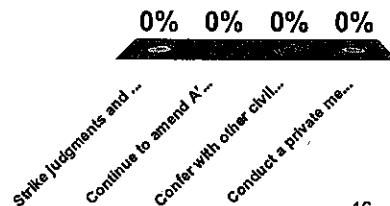
Judge notices that a frequent practitioner in collection cases, A, always files attorney fee declarations requesting the maximum assumpsit fees of 25% of a default judgment (often amounting to thousands of dollars in fees), regardless of the time she has spent on the case. Despite judges consistently reducing fees to the actual reasonable amount incurred (often \$500, for which no declaration is required), A continues to submit judgments that include fees of 25%.

It is the court's usual practice not to strike judgments and return documents to practitioners for correction when fees are reduced. This means in A's cases that the court must amend the fee amount on every default judgment (averaging 5 per week), and court staff must then conform multiple copies of each judgment.

15

## Judge should:

- A. Strike judgments and return to A to correct and resubmit with the reduced award.
- B. Continue to amend A's judgment forms.
- C. Confer with other civil judges to determine whether any course of action should be taken regarding A's practice habits.
- D. Conduct a private meeting with A to counsel her about her improper fee requests.



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## Scenario #6

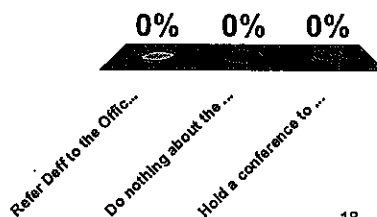
Judge reviews a summary judgment motion filed by plaintiff credit card company. Plaintiff's counsel has attached the relevant supporting documents to the motion, including credit card statements mailed to defendant at the residence address at which defendant was personally served with the complaint.

Defendant is represented by attorney Deff. Deff files a memorandum in opposition to the motion for summary judgment, which includes a declaration by defendant (drafted by Deff) that includes false statements. Judge has a hearing and rules on the motion.

17

## Judge should also:

- A. Refer Deff to the Office of Disciplinary Counsel for investigation of his role in drafting perjured testimony.
- B. Do nothing about the false statements and rule on the motion.
- C. Hold a conference to discuss Judge's concerns about the perjured testimony.



18

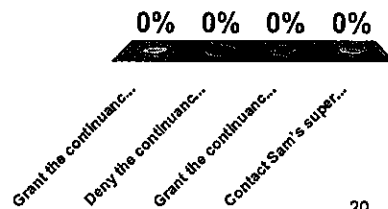
## Scenario #7

Sam is a new deputy prosecuting attorney who has been on the job for almost three months. The judge has spoken to Sam on several occasions, reminding him that he should not wait until the trial date to ask for a continuance because of witness unavailability or to dismiss on the day of trial because the State has determined that it cannot prove its case beyond a reasonable doubt. Trial is set two months hence, and a pretrial conference is held one month prior to trial date. On the day of trial, Sam asks for a continuance because his witness has not been served with a subpoena. Upon inquiry from the court, Sam admits that subpoenas were not issued until 10 days before trial. Defendant's attorney objects and asks for dismissal. This is not the first time that Sam has done this.

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## Judge should:

- A. Grant the continuance over defendant's objection but sanction Sam.
- B. Deny the continuance and dismiss the case (either with or without prejudice).
- C. Grant the continuance over defendant's objection but sanction the Office of the Prosecuting Attorney.
- D. Contact Sam's supervisor or THE Prosecuting Attorney to complain about Sam's lack of preparedness.



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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).

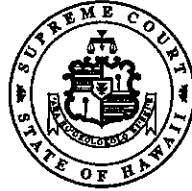
\* \* \*

**(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.

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



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Irwin J. Schatz, M.D.  
Eugene Uemura

May 14, 2010

The Honorable James E. Duffy, Jr.  
Associate Justice  
Supreme Court of Hawai'i  
417 S. King Street  
Honolulu, Hawai'i 96813

Re: Disciplinary Board Formal Opinion No. 43  
(Amended April 29, 2010)

Dear Justice Duffy:

Enclosed for your information is a copy of **Disciplinary Board Formal Opinion No. 43** (Amended April 29, 2010) regarding "of counsel."

If you have questions concerning this Opinion, please contact me at (808) 822-4500.

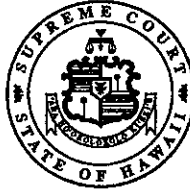
Very truly yours,

A handwritten signature in cursive script, appearing to read "Clifford L. Nakea".

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

CLN:fh  
enclosure

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Eugene Uemura

**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

# Hawaii Supreme Court Commission on Professionalism

The Commission on Professionalism (“Commission”) was established in 2005 by Chief Justice Ronald T.Y. Moon.

The Commission is charged with enhancing professionalism among Hawaii’s lawyers. “Professionalism” includes competence, civility, legal ethics, integrity, and commitment to the rule of law, to justice, and to the public good.

The Chair of the Commission is the Chief Justice or the Chief Justice’s designee. In addition to the Chair, the Commission is comprised of nineteen members appointed by the Chief Justice, including four state trial court judges, two state appellate justices or judges, one federal judge, four practicing lawyers, one faculty member from the University of Hawaiʻi William S. Richardson School of Law, four representatives of attorney regulatory agencies, and three non-lawyer public members.

## Commission Projects (2005-present)

Annual Reports (in PDF format): [2009](#), [2008](#), [2007](#), [2006](#)

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# Hawaii Supreme Court Commission on Professionalism Projects

## Commission Projects (2005 - present)

### 1. Mandatory Continuing Professional Education

The Commission presented a recommendation to the Hawai'i Supreme Court to amend the Rules of the Supreme Court to require continuing professional education. The Hawai'i Supreme Court accepted the Commission's recommendation, and adopted new Rule 22 of the Rules of the Supreme Court entitled "Mandatory Continuing Professional Education and Voluntary Continuing Legal Education." New Rule 22 was adopted by Order dated July 15, 2009, effective January 1, 2010.

### 2. Mandatory Disclosure of Professional Liability Insurance on Annual Attorney Registration Statements

The Commission recommended that the Supreme Court revise Rule 17(d)(1) of the Rules of the Supreme Court to require that attorneys disclose on their annual Hawai'i State Bar Association attorney registration statement whether they have professional liability insurance. The Supreme Court accepted the Commission's recommendation, and an Order Amending Rule 17(d) of the Rules of the Supreme Court was filed on October 10, 2007.

### 3. Online Availability to Public of Attorney's Disclosure Regarding Whether They Have Professional Liability Insurance

After analysis of the data revealed in response to revised Rule 17(d)(1) regarding disclosure of professional liability insurance on attorney's annual registration statements, and review of rules in other jurisdictions, the Commission recommended that the Supreme Court adopt a rule requiring that the attorney's disclosure information regarding professional liability insurance be available online to the public. Such a rule is presently being drafted for consideration by the Supreme Court.

### 4. Presentation at a Judicial Education Conference Regarding What Judges Can Do to Encourage Professionalism by Lawyers in the Courtroom

A Commission member judge organized and coordinated a program entitled "Advancing Professionalism in the Courtroom" for all full-time state judges. The program (attendance is mandatory) includes a panel consisting of two retired state trial judges, a federal magistrate judge, the Disciplinary Counsel, a representative of the Commission on Judicial Conduct, and a longtime civil practicing attorney who previously served on the Judicial Selection Commission. The program will be presented on April 30, 2010.

### 5. Rejuvenation of the Hawai'i State Bar Association (HSBA) Minor Misconduct Program

The Commission members and representatives of the HSBA, the Office of Disciplinary Counsel (ODC), and the Attorneys and Judges Assistance Program worked together to rejuvenate the HSBA Minor Misconduct Program, which allows the ODC to refer lawyers accused of minor misconduct not warranting formal ODC disciplinary proceedings to

HSBA mentors for guidance and counseling. The Commission's recommendations to amend Rules 2.7, 2.8, and 2.2 of the Rules of the Supreme Court to facilitate implementation of the Minor Misconduct Program was submitted for public comment by the Supreme Court.

#### **6. Revision of Disciplinary Board Formal Opinion No. 43 Regarding Use of the Title "Of Counsel"**

The Commission recommended revision of Disciplinary Board Formal Opinion No. 43 regarding requirements for designation of an "Of Counsel" relationship by a law firm and attorney. The recommendation is presently pending before the Disciplinary Board.

#### **7. Revision of Rule 2.24 of the Rules of the Supreme Court of Hawai'i Entitled "Audit of Trust Accounts"**

The Commission recommended to the Supreme Court that Rule 2.24 of the RSCH be revised to shift the cost of an audit of an attorney's trust account to the attorney audited when the audit reveals that the attorney was not in substantial compliance with trust accounting requirements or when an attorney's trust account check is dishonored or the trust account balance falls below zero. The Supreme Court agreed with the Commission's recommendation, and an Order Amending Rule 2.24 was entered on October 2, 2007.

#### **8. American Bar Association Recommendation Adopted by the House of Delegates August 13-14, 2007 Regarding a Plan for Law Practice Contingencies in Event of Death, Disability, Disappearance, and Disbarment**

After study, based upon the rationale of the HSBA expressed in its opposition to a Mandatory Plan for Law Practice Contingencies in Event of Death, Disability, Disappearance, and Disbarment, the Commission agreed not to recommend the adoption of a rule requiring mandatory designation of an inventory attorney.

#### **9. Review of Possible Need to Revise Hawai'i Rules of Professional Conduct Regarding Pro Se Litigants and "Unbundling of Legal Services" Issue**

The Commission is presently studying whether the Hawai'i Rules of Professional Conduct should be revised in recognition of the increasing number of "pro se" litigants and the need for clarity regarding the "Unbundling of Legal Services" issue to assist access to justice by the public.

#### **10. Revision of Rule 2.7(b)(3) of the Rules of the Supreme Court to Broaden the Existing List of Agencies, Entities, Programs, and Individuals Authorized to Accept Referrals for Non-Disciplinary Proceedings for Minor Misconduct**

The Commission recommended that the Supreme Court revise Rule 2.7(b)(3) of the Rules of the Supreme Court to broaden the existing list of agencies, entities, programs, and individuals authorized to accept referrals for non-disciplinary proceedings for minor misconduct. The Supreme Court accepted the Commission's recommendation, and an Order Approving Referral Agencies was filed on April 11, 2006.

#### **11. Revision of Rule 16.1 of the Rules of the Supreme Court (Entitled "Purpose; Scope" of the Attorneys and Judges Assistance Program") to Include Law Students at the William S. Richardson School of Law**

The Commission recommended that Rule 16.1 of the Rules of the Supreme Court be revised to include law students at the William S. Richardson School of Law. The Supreme Court accepted the Commission's recommendation, and an Order Amending Rule 16 was filed on December 18, 2006.

**12. Survey of Programs and Other Educational Vehicles Concerning Professionalism and Ethics Presently in Place at the William S. Richardson School of Law, the Hawai'i Supreme Court of Bar Examiners, the Hawai'i Professionalism Course, the Hawai'i State Bar Association, and the Office of Disciplinary Counsel**

The Commission completed an extensive survey of programs and other educational vehicles concerning professionalism and ethics presently in place at the William S. Richardson School of Law, the Hawai'i Supreme Court of Bar Examiners, the Hawai'i Professionalism Course, the Hawai'i State Bar Association, and the Office of Disciplinary Counsel.

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