

RE: **Proposal to Amend Rules of Court to Address Harassment
and Discrimination within the Practice of Law**

PROPOSALS FROM THE COMMISSION ON PROFESSIONALISM
TO AMEND RULES OF COURT TO ADDRESS
HARASSMENT AND DISCRIMINATION WITHIN THE PRACTICE OF LAW

The Hawai'i Supreme Court seeks public comment regarding proposals received from the Commission on Professionalism to amend Rule 22 of the Rules of the Supreme Court of the State of Hawai'i (RSCH); and amend Rule 8.4 of the Hawai'i Rules of Professional Conduct (HRPC) to address harassment and discrimination within the practice of law or, if this amendment is not adopted, establish a new Section 15 in the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers (Guidelines) containing language similar to the proposed amendment to HRPC Rule 8.4.

The proposal to amend RSCH Rule 22 would make education on harassment and discrimination mandatory and require at least 1 hour of continuing legal education every 3-year period devoted to awareness and prevention of bias, harassment, and discrimination.

The proposal to amend HRPC Rule 8.4 would add a new subsection providing that it is misconduct for a lawyer, while acting in a professional capacity, to engage in conduct that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of a person's protected status. The proposal also includes proposed definitions of the terms "professional capacity," "harassment," and "discrimination."

The proposed amendment to the Guidelines would set forth language providing that a lawyer should refrain from engaging in the conduct described in the proposed amendment to HRPC Rule 8.4.

Comments about the Commission's proposed amendment should be submitted, in writing, **no later than Friday, September 25, 2020**, to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the [Judiciary's website](#).

Attachments

**PROPOSED AMENDMENTS TO THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAII**
(Deleted materials are bracketed and stricken; new material is underlined.)

Rule 22. MANDATORY CONTINUING LEGAL EDUCATION.

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

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

**PROPOSED AMENDMENTS TO THE
HAWAII RULES OF PROFESSIONAL CONDUCT**

(New material is underlined.)

Rule 8.4. MISCONDUCT.

It is professional misconduct for a lawyer to:

(a) attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Reserved;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) fail to cooperate during the course of an ethics investigation or disciplinary proceeding

(h) engage in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression. This paragraph shall neither limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor does it infringe on any constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

COMMENTS:

[1] Lawyers violate Rule 8.4(a) of these Rules, and are subject to discipline, when they attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or violate the Rules through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. This is true whether or not the illegal conduct results in a criminal conviction. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics

relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) of these Rules concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional and ethical obligations of an attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[5] An attorney who is the subject of an ethics investigation or disciplinary proceeding has an ethical duty to timely cooperate with that investigation or proceeding. Examples of failure to cooperate are described in Rule 2.12A(a) of the Rules of the Supreme Court of the State of Hawai'i.

[6] Unless authorized by a court, an attorney who uses the judiciary's electronic filing or data storage system to gain access to confidential information filed in a case to which the attorney is not a party and/or an attorney of record may be subject to discipline under Rule 8.4(c) of this Rule.

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

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

[9] "Discrimination" on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, gender identity and/or

gender expression as used in this section means conduct or communication that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

**PROPOSED NEW SECTION 15 TO THE
GUIDELINES OF PROFESSIONAL COURTESY
AND CIVILITY FOR HAWAII LAWYERS**

Section 15. Harassment or Discrimination.

A lawyer should refrain from engaging in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression. This paragraph shall neither limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules, nor shall it infringe on any constitutional right of a lawyer or client.