



## *The Judiciary, State of Hawai'i*

### **Testimony to the Thirty-Second Legislature, 2023 Regular Session**

**Senate Committee on Judiciary**  
Senator Karl Rhoads, Chair  
Senator Mike Gabbard, Vice Chair

Thursday, February 16, 2023, 9:30 AM  
State Capitol, Conference Room O16 & Via Videoconference

by:

Thomas J. Berger  
Staff Attorney, Hawai'i Supreme Court

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**Bill No. and Title:** Senate Bill No. 1073, Relating to the Judiciary.

**Purpose:** Clarifies that the disqualification requirements for judges also apply to justices. Establishes a process by which a party before an appellate court in the State, who believes that the judge or justice presiding over their case may have a disqualifying conflict of interest, may move for a hearing on possible conflict of interest. Prohibits the appellate court judge or justice who is subject to the motion to hear or rule on the motion but allows them to file a response or voluntarily recuse themselves from presiding over the pending action or proceeding.

### **Judiciary's Position:**

The Judiciary respectfully opposes SB 1073 which proposes to allow a party to an appeal to file a motion that requests the appellate judge (or justice) be recused from the case based on the "party's belief that bias or prejudice exists[.]"

The Hawai'i Supreme Court has recently addressed the apparent intent of this bill through its ruling making authority. Specifically, on September 27, 2021 the court entered the Order Adopting New Rule 5 of the Hawai'i Rules of Appellate Procedure (HRAP) ("**Subject Order**"). A copy of the Subject Order is attached to this testimony.

Effective January 1, 2022, a party to an appeal “may file a motion to disqualify or recuse a judge or justice” from a pending case. See HRAP Rule 5(a).

As additional background on the Subject Order please consider the following. The Hawai‘i Supreme Court has the constitutional authority to promulgate rules for all courts, and these rules have the force of law.<sup>1</sup> With respect to the Subject Order, it was proposed by the Standing Committee to Review the Hawai‘i Rules of Appellate Procedure. This standing committee includes attorney representatives from the civil and criminal bar, the Honolulu Prosecuting Attorney, the Office of the Public Defender and the Department of the Attorney General.

After the proposed rule was formulated by the standing committee the Hawai‘i Supreme Court released the proposed new rule for 90-days of public comment. Finally, after this process was completed, the Hawai‘i Supreme Court approved the new rule as set forth in the Subject Order.

In conclusion, it would appear the concerns motivating SB 1073 were resolved by the Subject Order.

Respectfully, the Judiciary opposes this bill. Thank you for the opportunity to testify.

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<sup>1</sup> “The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.” Haw. Const. art. VI, § 7.

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IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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In the Matter of the  
HAWAI‘I RULES OF APPELLATE PROCEDURE

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ORDER ADOPTING NEW RULE 5 OF  
THE HAWAI‘I RULES OF APPELLATE PROCEDURE

(By: Recktenwald, C.J., Nakayama, McKenna, Wilson, and Eddins, JJ.)

IT IS HEREBY ORDERED that a new Rule, to be located at Reserved Rule 5 of the Hawai‘i Rules of Appellate Procedure, is adopted by entry of this order, effective January 1, 2022, as follows:

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

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

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

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

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

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

DATED: Honolulu, Hawai‘i, September 27, 2021.

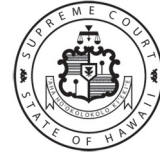
/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins



**SB-1073**

Submitted on: 2/13/2023 8:49:50 PM

Testimony for JDC on 2/16/2023 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Stand in Support