The Judiciary, State of Hawaii

Testimony to the Twenty-Fourth State Legislature, 2008 Session
Senate Committee on Judiciary and Labor
The Honorable Brian T. Taniguchi, Chair
The Honorable Clayton Hee, Vice Chair

Tuesday, March 25, 2008, 9:45 a.m.
State Capitol, Conference Room 016

by
Thomas R. Keller
Administrative Director of the Courts

Bill No. and Title: House Bill No. 3386, H.D. 1, S.D. 1, Relating to Attorneys

Purpose: Changes the procedure for determining representation of any court or judicial or legislative office by the attorney general in cases of conflict of interest.

Judiciary's Position:

The Judiciary testifies in support of House Bill No. 3386, H.D. 1, S.D. 1.

Under current law, the attorney general, through the deputy attorneys general within the Department of the Attorney General, must provide counsel and representation to state departments, as set forth in Hawaii Revised Statutes (HRS) Section 28-1 (1993) (the attorney general shall appear for the State in all courts of record, and in all criminal or civil cases in which the State may be a party) and HRS Section 28-4 (the attorney general shall, without charge, at all times when called upon, give advice and counsel to the heads of departments . . . in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully).

Hawaii Revised Statutes Section 28-83 permits the attorney general to decline representation to state departments for reasons subjectively deemed by the attorney general to be "good and sufficient." As currently written, this option to decline is solely within the discretion of the attorney general and the "client" department has no voice in the decision. The statute fails to specify, what, if any, duties must still be fulfilled by the Department of the Attorney General if the attorney general unilaterally declines to represent in a situation where a conflict between

departments with adverse interests comes into play. This gap creates the risk of compromising department officials' actions who may fear that a mistake on their part could result in time-consuming and financially devastating legal action, with no legal counsel assigned to protect the departments' interests.

Public officials, department heads and employees are called upon to exercise discretion and critical decisions on a daily basis. These public servants must have the freedom and independence to act, within the bounds of the law, with assurance that they will be provided immediate legal counsel when needed. We simply cannot risk them becoming fearful about making and implementing decisions necessary to carry out the duties of their offices and enforcing the law, if they cannot be assured that sound advice and good representation is available to them when needed. This is consistent with the Hawaii Supreme Court ruling that:

> When the official policies of a particular state officer or instrumentality are called into question in civil litigation, that officer or instrumentality is entitled to the same access to the courts and zealous and adequate representation by counsel to vindicate the public interest, as is the private citizen to vindicate his or her personal rights. The Legislature has designated the Attorney General as the legal representative of state officers and instrumentalities sued in their official capacities. In the absence of other statutory or constitutional provision to the contrary, she is their sole legal representative in the courts and they are her clients. *Chun v. Board of Trustees of Employees' Retirement System of the State of Hawaii*, 87 Hawaii 152, 172, 952 P.2d 1215 (1998). (Citation omitted.)

There are at least three situations where conflicts may arise in the practice of law by the attorney general for which the attorney general may then determine that he will decline to represent a client agency. First, conflicts can exist between the clients' expressed interests and the attorney general's view of society's interest in the administration of justice. In such a situation, the Hawaii Supreme Court notes that, "The Attorney General is not authorized in such circumstances to place herself in the position of a litigant so as to represent her concept of the public interest, but she must defer to the decisions of the [department] whom she represents concerning the merits and the conduct of the litigation and advocate zealously those determinations in court." *Chun v. Board of Trustees of Employees' Retirement System of the State of Hawaii*, 87 Hawaii 174-75 (quotations omitted.)

Second, a conflict can exist when the interests of one client may impair the independent professional judgment of the attorney general with regard to another client. This may occur when a department takes a position adverse to another department's interests. For instance, in a water rights case, the Department of Agriculture may take a policy position contrary to that of the Department of Land and Natural Resources, or the Department of Education may take a position contrary to that of the Department of Human Services with regard to legally required services to children.

Third, a conflict can exist when an attorney general's own interests may impair his exercise of independent professional judgment on behalf of a client. An example of this might be where the attorney general advocates a particular position to the Department of Education, knowing that that position may have direct impact upon the services to be provided the attorney general's own child.

The present statute permits designated departments to retain counsel other than the attorney general but does not specify what happens if two departments develop a legal dispute involving adverse interests, and both look to the attorney general for advice and representation. Can the attorney general simply select which department it will represent and leave the abandoned department to fend as best it can to secure and pay for legal counsel?

What happens if two or more departments find themselves in a situation where they are likely to take legal action against one another? Is the attorney general required to set up ethical screens within its own offices to ensure that each department is provided adequate representation? Is the attorney general allowed to decline to represent either department without further responsibility? If independent counsel is required, who makes that determination? And, again, in such situations, should departments simply be left to their own devices to retain and fund that counsel?

One situation this bill seeks to address involves cases where the attorney general represents two or more departments who develop positions potentially adverse to one another. Under the comments to Rule 1.10, Hawaii Rules of Professional Conduct, it is noted that "Separate units of a government agency, such as the office of attorney general, may undertake concurrent representation that would otherwise offend Rule 1.10(a) so long as no prejudice is suffered by any of the clients."

In a situation where two or more departments have taken positions adverse to one another, the Department of the Attorney General could provide representation using appropriate ethical screens. The Hawaii Supreme Court has long held that separate units of a government agency, such as the Department of Attorney General, may undertake concurrent representation that would otherwise offend the provisions of the Hawaii Rules of Professional Conduct, so long as no prejudice is suffered by any of his clients. That is clearly a prerogative when two or more departments develop interests adverse to each other. *State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548 (1990).

Thus, if it is acceptable to the adverse departments, the attorney general can have one division "walled off" from another division by assigning independent legal counsel and representation to each of the parties involved. If the attorney general cannot implement effective ethical screens, however, the attorney general may determine that either one, or both, departments is free to retain independent counsel. In that situation, however, the attorney

general should be counted on to use its expertise of the process, and resources to provide independent counsel (through procurement laws) for each department it does not represent itself.

Under the present law, departments may be permitted to retain their own counsel. From a practical point of view, however, that is not necessarily feasible. For instance, the department, unlike the Department of the Attorney General, may not have any budget to retain an attorney and cover litigation expenses. Moreover, departments may not necessarily have the expertise to evaluate counsel. This responsibility is best left to the department best equipped to provide the funding and the expertise to assist in the area of providing counsel – the Department of the Attorney General.

At previous hearings, the administrative director of the courts was asked if there was a specific situation that generated this bill. Although the Judiciary is not the sponsor of this bill, we support this bill, in large part, based on a recent experience involving our futile attempt to secure counsel from the Department of the Attorney General. This experience, we believe, underscores the need for a bill to ensure that when the senate president, speaker of the house, or chief justice believe their respective departments need legal representation by the Department of the Attorney General, they should count upon being provided that representation. If there is a conflict involved, the Department of the Attorney General should ensure that informed discussion takes place and that adequate ethical screens are in place. If this is not viable, representation should be available by private counsel. Because of the potential immediacy of the need in such situations, the attorney general should be responsible for retaining and funding private counsel.

Because the attorney general has openly discussed a situation that involves precisely the concerns we expect this bill to address, we are providing, through attached testimony, a synopsis of an event that underscores the need for this bill.

Thank you for the opportunity to provide comments on House Bill No. 3386, H.D.1, S.D. 1.

Attachment to Judiciary Testimony Supporting House Bill No. 3386, H.D. 1, S.D. 1

The Judiciary supports this bill, as it would ensure that the Judiciary and the legislature do not find themselves in a situation similar to that which occurred recently.

In August 2007, the Judiciary and the Judicial Selection Commission (JSC) found themselves in a dispute concerning the hiring of an administrative assistant for the JSC. Because the JSC is administratively attached to the Judiciary by virtue of a constitutional provision, the Judiciary understood that the responsibility for the recruitment of this civil service position fell upon the Judiciary. The position of the administrative assistant does not fall under any of the categories specified by the legislature as eligible for exempt status.

By letter dated August 22, 2007, the Judiciary asked the JSC chair to nominate a member of the JSC to serve on the hiring panel for the administrative assistant. The JSC asked that an additional JSC representative be on the hiring panel. At around this time, the Judiciary was seeking advice and counsel on matters relating to the hiring of the administrative assistant from a deputy attorney general assigned to provide advice and counsel to the Judiciary.

It also became clear that the JSC was also seeking legal advice from the Department of the Attorney General on the hiring of the administrative assistant. Advised by the Department of the Attorney General, the JSC chair understood that the JSC could control the hiring process if the administrative assistant position was exempted from civil service. The Judiciary agreed with this assessment, but made clear that, in its view, only the Legislature, through appropriate statutory amendment, could provide for exemption of the administrative assistant position. (*See* Hawaii Revised Statutes Section 76-16(b), specifying which state positions are exempted from civil service.)

Acting on advice from the attorney general, the JSC adopted a new Rule of the Commission on September 29, 2007. This rule exempted the administrative assistant from collective bargaining and civil service. Based on this rule, demand was made to the Judiciary to "now cease any efforts to appoint an administrative assistant for the Commission, as it is now legally clear that that power unquestionably rests with the Commission itself." (Letter from JSC vice-chair, September 29, 2007.) The Judiciary did not agree that the JSC had the authority to promulgate a rule that essentially superseded a legislative statue, and continued with the recruitment process.

On October 2, 2007, the attorney general made clear to the Judiciary that this matter could result in litigation and that the Department of the Attorney General may be prohibited by Rule 11 from providing representation to the Judiciary. This position came as a great surprise to the Judiciary. The attorney general, asked to reconsider his position on providing representation to the Judiciary, responded:

> . . . I have concluded that the attorneys of this Department are precluded from providing [representation to the Judiciary in this matter.] As you know, I earlier concluded and advised the Judicial Selection Commission that the State Constitution authorizes the Commission to adopt rules with the force and effect of law, to establish and exempt its staff positions, including its administrative assistant position, from the civil service. I also concluded and advised the Commission that after it adopted such a rule, its staff positions would not be subject to the provisions of Haw. Rev. Stat. ch. 76 . . . .
>
> Under these circumstances, I do not believe that deputy attorneys general can properly serve as legal counsel to the Judiciary on any matters related to the Judiciary's efforts to recruit to fill the Commission's administrative assistant position. Accordingly, I must respectfully decline to assign a deputy attorney general to the Judiciary for that purpose.
>
> (Letter to Thomas R. Keller, Administrative Director of the Courts, from Mark J. Bennett, Attorney General, October 5, 2007).

On October 15, 2007, the Judiciary selected a person for the position of administrative assistant to the JSC. This person's qualifications are impeccable and the JSC was informed of her selection.

On November 2, 2007, the Department of the Attorney General issued Opinion No. 07-03, opining that the JSC's rule exempting the administrative assistant position from civil service is valid and that it forecloses the Judiciary from selecting and appointing a person to fill the administrative assistant position. Moreover, it opined that the rule "would be enforceable by a civil action brought by the Attorney General . . . in the state circuit court to enjoin the violation of the rule . . ."

On November 5, 2007, the JSC informed the Judiciary that they would not retain the person selected for the position of administrative assistant, "nor will we allow her access to any JSC files." The Judiciary was told to explain to the person selected that the "she may not begin work for the JSC on December 1, 2007 or at any other time." (Letter from JSC Chair, November 5, 2007.)

The Judiciary believed strongly that neither the attorney general's constitutional interpretation nor its JSC rule were sufficient to preempt the Legislature's authority. Because of the possibility of litigation, the attorney general was asked to provide legal counsel to the Judiciary. On November 20, 2007, the attorney general explained that the Judiciary was free to retain its own counsel pursuant to HRS 28-8.3, but that:

> Among the reasons I have declined to appoint a deputy attorney general to advise and represent the Judiciary regarding this matter are because I believe the advice we provided the JSC in Atty. Gen. Op. 07-03 is correct, because I have personally represented the Commission in this matter, and because I anticipate

> that the importance of the issues addressed and the extent of the impasse between the Judiciary and the Commission would require my personal participation in the Legislature and/or the courts if these differences cannot otherwise be ironed out. Under these circumstances, I believe all deputy attorneys general would likely be prohibited from representing the Judiciary . . .
>
> When the Attorney General believes that it is in the public interest for him or her to personally advance a particular position in a matter, all of his or her deputies are likely conflicted from representing any other state official or agency in that matter, particularly if they would or could be taking a contrary position.
>
> (Letter from Attorney General, November 20, 2007)

Because, again, legal action by the attorney general against the Judiciary was a distinct possibility and because the Judiciary wished to consult with counsel on how best to proceed with this matter, the Judiciary again asked the attorney general to continue providing legal representation through a deputy attorney or by retaining an attorney to serve by special contract and paid through the Department of the Attorney General. (Letter to Attorney General, November 27, 2007). The attorney general made clear that the Judiciary could retain its own counsel by contract, but that the Judiciary would be responsible for negotiating and paying for that contract. (Letter by Deputy Attorney General, November 29, 2007).

Thus, even though the Judiciary had received early advice on this matter from the deputy attorney general assigned to the Judiciary, the attorney general had jettisoned one client in favor of the JSC, and threatened to take adverse legal position against its former client. As a result of the Department of the Attorney General and the JSC's action, a qualified and lawfully selected civil servant has thus far been denied employment.

This bill seeks to ensure that when the heads of either the legislative or judicial branch of government seek legal counsel from the Department of the Attorney General, the attorney general must provide such legal counsel. If there is a legitimate conflict that calls into question whether the attorney general can provide such legal representation, either the attorney general can endeavor to establish adequate ethical screens within his office or, if that is not viable, ensure that private counsel is retained by assisting with the procurement process and financing that legal representation.

We would hope that this situation would not happen with any great frequency. But, if and when it does happen, it is imperative that the Legislature and the Judiciary not be placed in a position where there respective legal needs are not met.

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March 24, 2008

The Honorable Brian T. Taniguchi, Chair
The Honorable Clayton Hee, Vice-Chair
Senate Committee on Judiciary and Labor
State Capitol, Room 016
Honolulu, Hawaii 96813

RE: H.B. 3386, H.D.1, S.D.1, Relating to Attorneys
Hearing Date: March 25, 2008 @ 9:45 p.m., Room 016

Dear Chairman Taniguchi, Vice-Chair Hee, and Committee Members,

On behalf of our 10,000 members in Hawaii, the Hawaii Association of REALTORS® (HAR) submits **comments** on **H.B. 3386, H.D.1, S.D.1, Relating to Attorneys, respectfully requesting an amendment to HRS §605-14,** which currently prohibits and (pursuant to HRS §605-17) criminalizes the unauthorized practice of law, in order to clarify that HRS §605-14 does not apply to a person, firm, association, or corporation who: (a) does not provide or profess to provide professional legal advice or services based on legal competency or standing in the law; and (b) is licensed to do business in the State of Hawaii under the Insurance Code (HRS Chapter 431), the Public Accountancy Law (HRS Chapter 466), or the Real Estate Brokers and Salespersons Law (HRS Chapter 467).

In November of 2007, HAR became aware that the Hawaii Supreme Court was proposing a rule to become effective on July 1, 2008, that would define the practice of law in order to assist in enforcement measures, by clarifying what is and is not the practice of law. The proposed rule is entitled "Unauthorized Practice of Law" and defines the "practice of law" as follows:

> "Practice of law" is the giving of legal advice or legal assistance to another person. The practice of law includes, but is not limited to:
>
> (1) Giving advice or counsel to another person about the person's legal rights and obligations or the legal rights and obligations of others.
> (2) Performing legal research.
> (3) Selecting, drafting, or completing documents that affect the legal rights of another person.
> (4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established.
> (5) Negotiating legal rights or obligations with others on behalf of another person.
> (6) Providing oral or written legal opinions. [Emphasis added.]

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As set forth in the attached letter to the Judiciary Public Affairs Office dated January 23, 2008, HAR pointed out that items (1), (3) and (5) of the above proposed definition encompass many services provided by its members to their clients and thus would create the opportunity for misapplication, unnecessary expense, and possible disruption of the delivery of professional real estate services to consumers of such services. Since then, HAR has discovered that the proposed Rule has been criticized by the Federal Trade Commission and the Department of Justice as anti-competitive, inasmuch as the only beneficiaries of the proposed Rule will be attorneys. The federal agencies have requested the Bar and the Court to consider adopting a Rule like the one HAR is proposing in this testimony. A copy of the joint Federal Trade Commission and Department of Justice letter to the Hawaii Supreme Court is also attached for your information.

HAR suggests that the insurance industry and the public accounting profession also have concerns with one or more of the items contained in the above-quoted definition.

A copy of the proposed rules are attached for your reference.

The Hawaii State Bar Association sent the attached letter dated February 29, 2008 to the Hawaii Supreme Court requesting that the Court (1) extend the period for comment by the HSBA on the proposed rule, and (2) share with the HSBA any other comments about the proposed rule that were received by the Court so the HSBA could review and consider them.

The Hawaii Supreme Court replied with the attached letter dated March 7, 2008, stating that the Court would hold further consideration of the proposed rule in abeyance until such time as the HSBA makes further proposals.

As of this date, HAR has not seen any further proposals from the HSBA and is concerned with the July 1, 2008 effective date contained in the proposed rule, it would be after the adjournment of this legislative session.

HRS Chapter 605 is entitled "Attorneys", and contains the statutory provisions regulating the practice of law, including HRS §605-14 that in conjunction with HRS §605-17, prohibits and criminalizes the unauthorized practice of law.

Pending the review of any further proposals from the HSBA, upon the advice of legal counsel, HAR therefore respectfully requests that HRS §605-14 be amended to read as follows in order to assure businesses and professionals that are licensed under the Insurance Code, the Public Accountancy Law or the Real Estate Brokers and Salespersons law that they will not be engaged in the practice of law so long as they do not provide or profess to provide professional legal advice or services based on legal competency or standing in the law.

> **§605-14 Unauthorized practice of law prohibited.** (a) It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed

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or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States.

(b) For the purpose of this section, "practice of law" means the provision of professional legal advice or services by a person, firm, association, or corporation where there is a client relationship of trust and reliance, but shall not include a person, firm, association, or corporation who:

(1) Does not provide or profess to provide professional legal advice or services based on legal competency or standing in the law; and

(2) Is licensed to do business in the State of Hawaii under chapter 431, 466, or 467.

(c) Nothing contained in sections 605-14 to 605-17 [contained] shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

HAR looks forward to working with our state lawmakers in building better communities by supporting quality growth, seeking sustainable economies and housing opportunities, embracing the cultural and environmental qualities we cherish, and protecting the rights of property owners and the consumers of its professional services.

Mahalo for the opportunity to testify.

Sincerely,

Wayne "Richie" Richardson, President
Hawaii Association of REALTORS®

Attachments

The Supreme Court of Hawai'i seeks public comment regarding a proposed rule about the Unauthorized Practice of Law. The proposed rule defines the practice of law and would assist with enforcement measures, by clarifying what is and is not the practice of law. The proposed rule is attached hereto.

Comments about the proposed rules should be submitted, in writing, **no later than Friday, January 25, 2008** to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the online form on the Judiciary's website at www.courts.state.hi.us. If adopted, the proposed rules will become effective July 1, 2008.

PROPOSED ADDITION TO THE RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

Rule ___. Unauthorized Practice of Law

(a) Prohibition.

Except as provided in section (c) of this rule or other supreme court rule, no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar in good standing.

(b) Definitions.

"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice or legal assistance to another person. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person about the person's legal rights and obligations or the legal rights and obligations of others.

(2) Performing legal research.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established

(5) Negotiating legal rights or obligations with others on behalf of another person.

(6) Providing oral or written legal opinions.

"Qualifying institution" is a business organization that is authorized and registered to do business as provided by law.

(c) Exceptions and exclusions.

The following are not prohibited under section (a):

(1) Appearing *pro se*.

(2) Acting as a representative when authorized by law or by a governmental agency.

(3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (b)(1) above.

(4) Serving as in-house counsel for a single qualifying institution; provided in house counsel

(i) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,

(ii) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,

(iii) makes no state court appearances on behalf of any person or entity other than him or her self, and

(iv) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Selling legal forms.

(7) Performing services as a duly authorized negotiator for an employee organization or employer.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(d) Governmental Agencies.

Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.

HSBA
Hawaii State Bar Association

February 29, 2008

The Honorable Ronald T. Y. Moon
Chief Justice, Hawaii Supreme Court
Ali'iolani Hale
415 King Street
Honolulu, Hawaii 96813

RE: Proposed Rule Defining the Practice of Law

Dear Chief Justice Moon:

Individuals and organizations can be hurt by untrained, unlicensed, and unregulated individuals who handle their legal matters. The adverse personal and financial impact to those individuals and organizations has an added adverse impact to the community as a whole. Bad and improper legal advice by untrained, unlicensed and unregulated individuals also can result in loss of legal rights or opportunities. This has been and remains a concern to the Hawaii State Bar Association (HSBA), which is committed to protecting individuals, organizations, and the community – "consumers" of legal services -- and has developed and recommended a rule to define the "practice of law" as no such definition currently exists.

In July 2007, this proposed rule was forwarded to the Hawaii Supreme Court, and the Court, after careful review and consideration, proposed its version of such a rule in October 2007, requesting public comment before enactment. In recent years, 25 other states and the District of Columbia have adopted similar rules or statutes reflecting a nationwide concern for consumers, so the method to protect them in this regard is not unique. Licensed and regulated professional groups -- realtors, certified public accountants, estate planners -- have expressed concern that the proposed rule, if enacted and enforced, would infringe on their professional activities as presently permitted under Hawaii law.

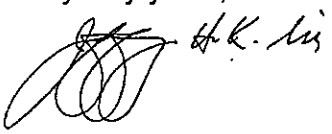
It was not the HSBA's intention or goal to deprive any professional group or any person of their right to conduct and handle matters they legally are entitled to do by law and we recognize concerns expressed by the Hawaii Association of Realtors and the Hawaii Society of Certified Public Accountants, among others. Other states have handled such concerns through exceptions within their respective rule pertaining to the practice of law definition. While the Court has included certain exceptions to the practice of law definition, the affected professional groups believe the exceptions do not go far enough to protect their otherwise lawful activities.

1132 Bishop Street, Suite 906 • Honolulu, HI 96813 • Phone: (808) 537-1868 • Fax: (808) 521-7936 •

Because the HSBA's goal is to protect consumers of legal services from the practice of law by untrained, unlicensed, and unregulated individuals, the HSBA respectfully requests that the Court (1) extend the period for comment by the HSBA on the proposed rule, and (2) share with the HSBA any other comments about the proposed rule that were received by the Court so the HSBA can review and consider them, too.

Your partnership with the HSBA on this matter is very much appreciated.

Very truly yours,



Jeffrey H. K. Sia

cc: James Branham, Esq.

Supreme Court — THE JUDICIARY • STATE OF HAWAI'I
417 SOUTH KING STREET • ALI'IOLANI HALE • HONOLULU, HAWAI'I 96813-2912 • TELEPHONE (808) 539-4735 • FAX 539-4703

Steven H. Levinson
ASSOCIATE JUSTICE

March 7, 2008

Jeffrey H.K. Sia
Hawaii State Bar Association
1132 Bishop Street, Suite 906
Honolulu, HI 96813

Re: Proposed Rule Defining the Practice of Law

Dear Mr. Sia:

I write, on behalf of the supreme court, in response to your February 29, 2008 letter to the Chief Justice.

The supreme court appreciates the need to address the consumer protection issues in light of concerns expressed by other professionals. Consequently, the supreme court agrees the HSBA should have such time as it deems necessary to consider the concerns and propose a rule or process that will protect consumers of legal services. The supreme court will hold further consideration of the proposed rule in abeyance until such time as the HSBA makes further proposals.

As requested, copies of all comments heretofore received about the subject will be forwarded by our staff to Executive Director Lynn Flanigan for the HSBA's review and consideration.

For the Court,

Steven H. Levinson
Associate Justice

SHL/JB:tsm

HSBA
Hawaii State Bar Association

February 29, 2008

The Honorable Ronald T. Y. Moon
Chief Justice, Hawaii Supreme Court
Ali'iolani Hale
415 King Street
Honolulu, Hawaii 96813

RE: Proposed Rule Defining the Practice of Law

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It was not the HSBA's intention or goal to deprive any professional group or any person of their right to conduct and handle matters they legally are entitled to do by law and we recognize concerns expressed by the Hawaii Association of Realtors and the Hawaii Society of Certified Public Accountants, among others. Other states have handled such concerns through exceptions within their respective rule pertaining to the practice of law definition. While the Court has included certain exceptions to the practice of law definition, the affected professional groups believe the exceptions do not go far enough to protect their otherwise lawful activities.

Because the HSBA's goal is to protect consumers of legal services from the practice of law by untrained, unlicensed, and unregulated individuals, the HSBA respectfully requests that the Court (1) extend the period for comment by the HSBA on the proposed rule, and (2) share with the HSBA any other comments about the proposed rule that were received by the Court so the HSBA can review and consider them, too.

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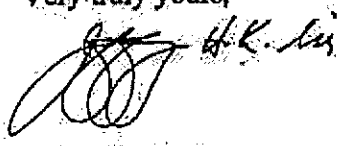

Jeffrey H. K. Sia

cc: James Branham, Esq.

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

December 16, 2004

Denise Squillante, Esquire, Co-Chair
Lee J. Gartenberg, Esquire, Co-Chair
Task Force To Define The Practice
Of Law In Massachusetts
Massachusetts Bar Association
20 West Street
Boston, Massachusetts 02111-1204

Re: Comments on Draft Proposed Definition of the Practice of Law in Massachusetts

Dear Ms. Squillante, Mr. Gartenberg, and Members of the Task Force:

We are writing about your recent proposal to define the practice of law and enumerate some exceptions. The proposed definition has been formulated by the Massachusetts Bar Association's ("MBA") Task Force to Define the Practice of Law in Massachusetts. The Department of Justice and Federal Trade Commission ("FTC") are concerned that the proposal is not in the best interest of consumers, as it would prevent non-lawyers from providing services in competition with lawyers in situations where there is no clear demonstration that non-lawyer services would actually harm consumers. For example, the definition has the potential to discourage lay activities such as real estate agents explaining certain aspects of a home purchase to consumers, accountants providing advice regarding tax filings, and the use of interactive self-help legal software to produce simple legal documents. This would likely raise costs for consumers and limit their choices. Because the proposed rule is likely to restrain competition without providing any benefits to consumers, we recommend against adopting such a definition of the practice of law. Antitrust laws and competition policy generally consider sweeping restrictions on competition harmful to consumers and justified only by a showing that the restriction is needed to prevent significant consumer injury.

The Interest and Experience of the U.S. Department of Justice and the Federal Trade Commission

The Justice Department and the FTC are entrusted with enforcing the federal antitrust laws. Both agencies work to promote free and unfettered competition in all sectors of the American economy. The United States Supreme Court has observed that "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"[1] Competition benefits consumers of both traditional manufacturing industries and professional services.[2] Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of poorer quality.

The Justice Department and the FTC are concerned about increasing efforts to prevent non-lawyers from competing with attorneys in providing certain services through the adoption of excessively broad unauthorized practice of law rules and opinions by state courts and legislatures. As Professor Catherine Lanctot has noted, "Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services."[3] In addressing these concerns, the Justice Department and the FTC encourage competition through advocacy letters such as this one and *amicus curiae* briefs filed with state supreme courts. Through these filings, the FTC and Justice Department have urged the American Bar Association and the Indiana State Bar Association, as well as the states of Virginia, Rhode Island, Kentucky, North Carolina, Georgia, West Virginia, and Ohio, to reject such restrictions on competition between lawyers and non-lawyers.[4] We recently submitted a letter in support of

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[1] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[2] *See, e.g., Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *see also United States v. American Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

[3] Professor Catherine J. Lanctot, Villanova University Law School, "Regulating the Provision of Legal Services in Cyberspace," remarks at the Federal Trade Commission Public Workshop on *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Internet Legal Services* (Oct. 9, 2002), available at http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/lanctot.pdf.

[4] Letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (October 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997), available at

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legislation permitting real estate closing services to be performed by non-lawyers in Massachusetts in response to a request by Representative Paul Kujawski of the Massachusetts House of Representatives.[5] Separately, the Department of Justice has obtained injunctions prohibiting bar associations from unreasonably restraining competition from non-lawyers, since this conduct violates the antitrust laws.[6] Our ongoing efforts in this area have led us to submit these comments.

The MBA Task Force's Proposed Rule Change

The MBA's Task Force has drafted a proposed definition of the practice of law. Section (c) states that:

> A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

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[4](...continued)
http://www.usdoj.gov/atr/public/comments/comments.htm; letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996); Brief *Amicus Curiae* of the FTC in *Cleveland Bar Association v. CompManagement, Inc.*, No. 04-0817 (filed Aug. 3, 2004), available at http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf; Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htm and http://www.ftc.gov/be/V040017.pdf; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at http://www.ftc.gov/os/2003/07/georgiabrief.pdf and http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. The letters to the American Bar Association, Indiana, Rhode Island, North Carolina, Georgia, and Virginia may be found on the FTC's web site, http://www.ftc.gov, and the Department of Justice's website, http://www.usdoj.gov/atr/public/comments/comments.htm.

[5] Letter from the Justice Department and the FTC to Representative Paul Kujawski of the Massachusetts House of Representatives (Oct. 6, 2004).

[6] In *United States v. Allen County Bar Association*, the Justice Department obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. New York County Lawyers Association*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. No. 80 Civ. 6129 (S.D.N.Y. 1981). *See also United States v. Coffee County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980). In addition, the Justice Department has obtained injunctions against other anticompetitive restrictions in professional associations' ethical codes and against other anticompetitive activities by associations of lawyers. *E.g., United States v. American Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), *modified*, 135 F. Supp. 2d 28 (D.D.C. 2001); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S 679 (1978); *United States v. American Institute of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors' Representatives*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

(1) Giving advice or counsel to a person as to his or her legal rights or responsibilities or those of others;

(2) Selecting, drafting, reviewing, recording, or completing legal documents or agreements that affect the legal rights or responsibilities of a person;

(3) Creating, conveying, evaluating, or terminating a person's legal interest in real property;

(4) Representing a person before a tribunal, including, but not limited to, preparing or filing documents or conducting discovery, or appearing before such body; or

(5) Negotiating legal rights or responsibilities on behalf of a person.

Section (d) of the draft lists certain exceptions to the presumption:

Exceptions: The following are permitted as exceptions to the requirements of Paragraph (a):

(1) Serving in a neutral non-adjudicative capacity as a mediator, conciliator or facilitator, or in an adjudicative capacity under court supervision;

(2) Affording advocacy assistance by non-lawyers through a governmental entity, a qualified legal assistance organization, or a not-for-profit entity, where no fee is charged, or as permitted by G.L.c.209A;

(3) Participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements; and

(4) Participating in a regulatory or administrative proceeding pursuant to the rules of the agency, where no fee is charged for such participation.

We understand that the Task Force originally submitted its proposal to the MBA House of Delegates last Spring and that the House referred the proposal back to the Task Force for further review and consideration. The Task Force has proposed that (1) the House of Delegates adopt the definition, and (2) the House of Delegates authorize a petition to the Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct to incorporate the proposed definition into the Massachusetts Rules of Professional Conduct.

The MBA is a private organization of lawyers and is not a state agency. This letter is addressed to the MBA's proposal to the Supreme Judicial Court to change the rules. The letter should not be construed as offering any opinion about whether the Justice Department and the FTC consider it legal under the Sherman Act, 15 U.S.C. § 1, or the Federal Trade Commission Act, 15 U.S.C. § 45, for the Task Force or the MBA to define certain activities as the practice of law for any other purpose. Nor does the letter address whether the MBA has adopted adequate safeguards to ensure that its discussions on this issue do not violate the antitrust laws.

Restrictions on Lawyer/Non-lawyer Competition Should Be Examined to Determine Whether They Are in the Public Interest

The Justice Department and the FTC recognize that there are circumstances requiring the knowledge and skill of a person trained in the law. Nonetheless, the Justice Department and the FTC believe that consumers generally benefit from lawyer-non-lawyer competition in the provision of many services.

Prohibitions on the unauthorized practice of law should serve the public interest, as the Massachusetts Supreme Judicial Court recognized in *Lowell Bar Ass'n v. Loeb*.[7] An inquiry into the public interest, however, involves not only assessing harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete.[8] More recently, the Supreme Court of New Jersey has explained,

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.
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> We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.[9]

The MBA Task Force has proposed to define broadly what constitutes the practice of law in Massachusetts. This proposed definition is not in the public interest because, by unnecessarily

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[7] *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943).

[8] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb*, 421 U.S. at 787.

[9] *In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995).

limiting competition between attorneys and non-attorneys, it will likely cause more harm to consumers than it may prevent. Indeed, one senior member of the MBA Task Force who helped introduce the proposal to the MBA's House of Delegates said, "Business and government is [sic] seeking to level the playing field on the theory that consumers will have more choice and this will drive prices down for legal services," adding that "we are going to be marginalized out of practice."[10] This statement suggests that the purpose of the definition is to protect lawyers from competition, not to serve the interests of the public.[11]

The Proposed Rule Would Likely Hurt Massachusetts Consumers by Restraining Competition Between Lawyers and Non-lawyers

The Justice Department and the FTC believe that adopting the proposed definition would harm consumers and fail to serve the public interest. The broad restrictions on lay practice found in the draft definition – and the narrow exceptions found in subsection (d) – could restrict and eliminate many forms of lawyer/non-lawyer competition. While developing an exhaustive list of all possibly affected lay activities may be difficult, some examples include:

- real estate agents explaining to consumers such things as (i) the ramifications of failing to have the home inspection done on time, (ii) the meaning of the mortgage contingency clause, (iii) the meaning of an easement, (iv) the possible need to lower the price of a home because of an unusually restrictive easement, or (v) the requirements for lead, smoke detector, and other inspections imposed by state law;

- tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of resolving a particular landlord-tenant problem;[12]

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[10] Massachusetts Bar Association, *Delegates Debate Law Practice Definition, Other Issues At May Meeting* (June 9, 2004), available at http://www.massbar.org/article.php?c_id=6650.

[11] *See Lowell*, 52 N.E.2d at 31 (excluding non-attorneys from performing certain tasks cannot be justified on the grounds of "protection of the bar from competition").

[12] This activity would be exempted under Section (d)(2) of the proposed definition only if (1) the tenant receiving advice is deemed to be "a person who has obstacles to access to justice;" and (2) the tenants' association does not charge a fee and is a government entity, a not-for-profit entity, or a "qualified legal assistance organization," defined as:

> a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe on the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

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- income tax preparers and accountants interpreting federal and state tax codes, family law code, and general partnership laws, and providing advice to their clients that incorporates this legal information;

- investment bankers and other business planners providing advice to their clients that includes information about various laws;

- lay organizations, advocates, and consumer associations that provide citizens with information about legal rights and issues in competition with attorneys and help them negotiate solutions to problems;[13]

- employees and independent contractors who advise a client or employer about what must be done to comply with local zoning laws, state labor laws, or safety regulations, and who may negotiate contracts on behalf of their employers; and

- inexpensive electronic software to complete wills, trusts, tax forms, and other legal documents, because the applications can be interactive and select certain clauses for the documents based on answers that consumers give, as well as providing some legal information and/or advice about those clauses.[14]

By Prohibiting Non-lawyer Competition for Many Services, the Proposed Rule Would Likely Hurt the Massachusetts Public by Raising Prices and Reducing Consumer Choice

When non-lawyers compete with lawyers to provide services that do not require formal legal training, Massachusetts consumers may consider all relevant factors in selecting a service provider, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. The use of lay services also can reduce costs to consumers.

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[12](...continued)
See Comment 4 to Proposed Definition of the Practice of Law in Ex. A to *Report of the Task Force to Define the Practice of Law* and Proposed Rule 9.1(i) in Ex. B to *Report of the Task Force to Define the Practice of Law*.

[13] Section d(2) of the proposed definition would exempt lay organizations, advocates, and consumer associations only if these entities provided advice to institutionalized persons, or to "a person who has obstacles to access to justice." *See* Comment 4 to Proposed Definition of the Practice of Law in Ex. A to *Report of the Task Force to Define the Practice of Law*. Further, to qualify for the exception under Section d(2), these entities cannot charge a fee and must be either a government entity, a not-for-profit entity, or a "qualified legal assistance organization."

[14] *See* Section c(2) of the proposed definition, which would define "selecting, drafting . . . or completing legal documents" as the practice of law.

By limiting the ability of lay persons to provide such services in competition with lawyers, the proposed rule would eliminate or reduce many of these benefits, potentially harming Massachusetts consumers in several ways. First, the proposal would force consumers who would not otherwise hire a lawyer to do so. Businesses and individuals that rely on accountants, bankers, advocacy organizations, or other lay people for advice and information related to the services that these professionals provide arguably would be required to hire attorneys instead. Hence, the proposal could increase costs for all consumers who might prefer the combination of price, quality, and service that a non-lawyer provider offers. For example, although accountants and tax preparers do not typically itemize the legal-related functions included in their services, it is probable that the cost of retaining an attorney for those same services would often be higher. Advice and information about the laws from tenants' associations and other individual and organizational advocates are often provided at substantially lower cost than an attorney would charge. Evidence suggests that the use of lay real estate closers in various states provides a lower cost alternative for consumers.[15] Will-writing and other legal form-fill software packages can be significantly less expensive than hiring an attorney to draft the will or other legal document.[16] Further, the proposal may hurt Massachusetts consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs. For example, consumers may choose to use legal software packages, like the will and trust-writing software, because they are relatively easy and convenient to use.

Second, by eliminating competition from non-lawyers, the proposed rule would likely increase the price of lawyers' services because the availability of alternative, lower-cost lay service providers typically restrains the fees that lawyers can charge. Consequently, even Massachusetts consumers who would otherwise choose an attorney over a lay service provider would likely pay higher prices if the proposed rule were adopted. The New Jersey Supreme Court reached this same conclusion before ultimately rejecting an opinion that would have had the effect of eliminating lay real estate closings. Evidence gathered in that proceeding indicated that, in parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid on average $350 less for closings and sellers represented by counsel paid $400 less than in parts where lay closings were not prevalent.[17] Likewise, in August 2003, the Kentucky Supreme

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[15] *See, e.g., Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003) ("before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher"). In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. Proponents of lay competition pointed to survey evidence suggesting that lay closings in Virginia cost on average more than $150 less than attorney closings. *See* letters to the Virginia Supreme Court and Virginia State Bar, *supra* n. 4.

[16] While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software that permits the consumer to draft a simple will is available for less than $100.

[17] *See In re Opinion No. 26*, 654 A.2d at 1348-49. In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. Proponents of lay competition pointed to survey evidence suggesting that lay closings in Virginia cost on average more than $150 less than attorney closings. *See* letters to the

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Court concluded that prices for real estate closings for attorneys dropped substantially as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-effectively."[18]

Finally, because the unauthorized practice of law is a crime in Massachusetts, punishable by a fine or imprisonment,[19] the Task Force should act with particular care in seeking to have the Supreme Judicial Court define activities as the practice of law. The broad definition the MBA has proposed, coupled with such stringent punishment, is likely to chill conduct even beyond that which the MBA intends to prohibit. For example, some accountants or real estate agents may be hesitant to provide clients with non-legal advice for fear of being engaged in the unauthorized practice of law. By further limiting the areas where non-attorneys are willing to practice, this over-deterrence is likely to exacerbate cost increases borne by consumers.

There Is No Indication that the Proposed Definition Is Needed to Prevent Significant Consumer Harm

Restrictions on competition generally are considered harmful to consumers. Accordingly, such restrictions are justified only by a showing that they are necessary to prevent significant consumer harm and are narrowly drawn to minimize its anticompetitive impact.[20] A showing of likely harm is particularly important when, as here, the proposed restraint could prevent consumers from using entire classes of providers. Without a showing that current practice harms consumers, a restraint on competition is likely to hurt Massachusetts consumers by raising prices and eliminating their ability to choose among competing providers, without providing any countervailing benefits. The Justice Department and FTC are unaware of any evidence that allowing non-lawyers to provide certain services has harmed consumers so as to justify a broad definition of the practice of law that effectively precludes non-lawyers from providing many services that benefit consumers and serve the public interest.

First, the agencies have not seen any factual evidence from the Task Force Report demonstrating that consumers are actually hurt by the availability of lay services. The Task Force Report asserts that

> the chief reason for defining the practice of law is to protect the public welfare and ensure that members of the public not suffer harm from the activities of persons who are

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[17](...continued)
Virginia Supreme Court and Virginia State Bar, *supra* n.4.

[18] *Countrywide Home Loans, Inc.*, 113 S.W.3d at 120.

[19] G.L.c. 221 § 41.

[20] *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

> not trained to apply the general body and philosophy of the law to fact specific matters, who may be influenced by factors other than their client's interests, or who are not subject to the direct oversight and supervision of the Court.[21]

Yet the Task Force offers no evidence that consumers have "suffer[ed] harm" under the current regime.[22] Absent such evidence, it does not appear that the proposed definition is needed to "protect the public welfare."

Further, the Task Force's proposal seeks, among other things, to declare all real estate conveyancing and closing activity to be the practice of law. But, as the Justice Department and FTC observed in our recent letter to Massachusetts Representative Paul Kujawski, those that have examined the issue have failed to find evidence that allowing non-attorneys to perform real estate settlement functions results in consumer harm. For example, opponents of allowing lay settlements have expressed a concern that buyers and sellers will have questions about the transaction and the documents that a lay settlement provider cannot or should not answer.[23] However, with regard to the Kentucky Bar's assertion that attorneys need to be present at closing to answer legal questions, the Kentucky Supreme Court found that "few, if any, significant legal questions arise at most residential closings."[24] Further, with regard to a list of questions the Kentucky Bar alleged were likely to arise at closing, the court noted that "most of the witnesses conceded that questions of the nature of those [questions] listed . . . are asked, if ever, before the closing, when there is time to resolve any problems."[25] Likewise, the New Jersey Supreme Court found that the South Jersey practice of using non-attorneys to settle real estate transactions "has been conducted without any demonstrable harm to sellers or buyers."[26]

Scholarship also supports the conclusion that consumers face no additional risk of harm from turning to lay providers to perform real estate settlement services. One study, for example, compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibit lay provision of these settlement services. The author found "[t]he only clear conclusion" to be "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision

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[21] Report at ex. A, p.1.

[22] As noted by the Justice Department and the FTC in a 1997 letter to the Virginia Supreme Court, attorneys have been responsible for fraud involving Virginia real estate settlements in the 1990s. *See* Justice Department and FTC letter to Virginia Supreme Court (Jan. 3, 1997), *supra* n.4.

[23] *See, e.g., Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow Inc*, 2001 Mass. Super. LEXIS 431, at *20-21 (Suffolk, June 5, 2001).

[24] *Countrywide Home Loans, Inc.*, 113 S.W.3d at 119.

[25] *Id.*

[26] *In re Op. No. 26*, 654 A.2d at 1359.

of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."[27]

Similarly, scholarship indicates that consumers in other areas likely to be affected by the proposed definition face little risk of harm from non-lawyer competition. According to Professor Deborah Rhode, studies of lay specialists who provide bankruptcy and administrative agency hearing representation find that they perform as well as or better than lawyers.[28] Likewise, a systematic survey found that complaints about unauthorized practice of law in most states did not come from consumers (who would be the victims of such conduct) but from lawyers, who did not allege any claims of specific injury.[29] As the Restatement (Third) of Law Governing Lawyers has explained:

> Several jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.[30]

It is also important to note that the proposed definition does not guarantee that Massachusetts consumers will have the benefit of independent or experienced counsel; it only assures that an attorney, rather than a lay person, will be involved in certain transactions. The selection, preparation, and completion of legal documents that the rule would require an attorney to do could be done by an attorney representing the other party. Real estate loan work could be done by the lender's lawyer, and the attorney who settles a real estate transaction typically will represent the lender as well. In these cases, the lawyers involved do not represent the consumer. While they might provide some legal explanations to consumers, they could not provide true

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[27] Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 520 (1999).

[28] Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 407-08 (2004). *See also* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NON LAWYERS AT WORK 50-51 (1998) (finding that in unemployment compensation appeals before the Wisconsin Labor and Industry Review Commission, "[t]he overall pattern does not show any clear differences between the success of lawyers and agents").

[29] *Id.*

[30] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

legal advice to a consumer or protect him or her.[31] Nor would their presence likely give a consumer the leverage to halt a transaction that is against his or her best interest. The same is true of a lawyer who represents both lender and buyer. Under Massachusetts law, moreover, absent such an attorney-client relationship, a party cannot assert a malpractice claim against an attorney.[32] In addition, the only requirement in the Task Force definition is that it be a lawyer who performs the service; the lawyer need not have any particular expertise or experience with the type of law or service.

Although the intent of the Task Force's proposal may be to ensure that consumers receive advice only from highly-trained individuals, consumers who receive assistance from individual advocates and advocacy organizations may be unable to hire a lawyer and may simply go without assistance altogether. A 1996 ABA task force survey, for example, concluded that low income (less than $25,000 per year) and middle-income (between $25,000 and $60,000 per year) households are severely underserved by the legal system.[33] Specifically, the ABA found that of the low- and middle-income households in the sample that had legal problems, only one-third of low-income and only 40 percent of middle-income households handled them through the legal system. Though cost was a lesser concern for middle-income households, both low- and middle-income households listed cost as a major reason for avoiding the legal system.[34] Given its very narrow exemption for advocacy programs, the proposed definition is likely to thwart attempts to provide cost-effective legal services to this underserved population.[35]

For consumers, the services of a licensed lawyer may well be desirable in certain situations. A Massachusetts consumer might choose to hire an attorney to answer legal questions, provide legal advice, research the case law, negotiate settlements, or offer various protections. Consumers who hire attorneys may get better service and representation than those who do not. This is, however, no reason to restrict the ability of non-lawyers to compete, as the proposed Task Force definition would.

Until demonstrated otherwise, accountants, bankers, individual advocates and advocacy organizations, real estate brokers, and other skilled professionals should remain able to provide advice and legal information related to their particular practices without harming the public.

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[31] *See Countrywide Home Loans, Inc.*, 113 S.W.3d at 122.

[32] *See, e.g., McCormack v. Galego*, 1996 WL 131209, at *3 (Mass. Super. Mar. 4, 1996).

[33] AM. BAR ASS'N FUND FOR JUSTICE & ED., LEGAL NEEDS & CIVIL JUSTICE: A SURVEY OF AMERICANS (1996). The most common legal needs reported by respondents were related to personal finances, consumer issues, and housing. For low- and middle-income households, the most common response to a legal problem was "handling the situation on their own." For low-income households, the second most common response was to take no action at all. The second most common response for middle-income households was to use the legal system, including contacts with lawyers, mediators, arbitrators, or official hearing bodies.

[34] *Id.*

[35] *See* notes 12-13, *supra*.

This already occurs every day in multiple jurisdictions, with little or no evidence that consumers would benefit if the same advice were provided solely by an attorney.

Less Restrictive Measures May Protect Consumers

Absent a clear demonstration not only that lay services have injured Massachusetts consumers, but also that less drastic measures cannot remedy any perceived problem, the proposed definition should not be adopted. Indeed, as a threshold matter, less restrictive alternatives to protect consumers are already in place. First, through reputation, the marketplace is likely to limit the ability of non-attorneys to provide shoddy service or otherwise take advantage of consumers. As the Kentucky Supreme Court has recognized, lay providers earn their livelihoods from providing these services; they risk those livelihoods if they commit acts that hurt consumers.[36] Consequently, they have great incentives to act ethically and professionally. Further, just as attorneys are subject to statutory, malpractice, and contract claims, lay providers are subject to similar claims if their negligence causes consumer harm.[37] For example, G.L.c. 93A provides a cause of action to consumers and businesses harmed by "unfair or deceptive acts or practices in the conduct of any trade or commerce."[38]

Although we urge the Task Force to refrain from proposing this amendment to the current Massachusetts Rules of Professional Conduct, if the Task Force considers a change in the rules necessary, any change should be narrowly tailored to address demonstrated harms and not to prohibit non-lawyer competition that is beneficial to consumers and in the public interest. Less restrictive alternatives are available to protect consumers. In real estate closings, for example, the New Jersey Supreme Court has required written notice to consumers of the risks involved in

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[36] *Countrywide Home Loans, Inc.*, 113 S.W.3d at 121.

[37] *Id.*

[38] G.L.c. 93A § 2. G.L.c. 93A § 9 provides a cause of action for consumers, and G.L.c. 93A § 11 provides a cause of action for businesses. A consumer may have additional leverage over an attorney who provides shoddy or dishonest service because the consumer can refer the attorney to the bar association for misconduct, and an attorney also may be less likely to be "judgment proof" to the extent that he or she is more likely than a non-attorney to carry malpractice insurance against negligence claims. Further, in a negligence case, an attorney likely is subject to a higher standard of care than is a lay provider. *See Fishman v. Brooks*, 487 N.E.2d 1377, 1379 (Mass. 1986) (standard of care for non-specialist in a legal malpractice suit is "the degree of care and skill of the average qualified practitioner"). Nevertheless, there is no reason to believe that the standard of care the law requires of a lay person is below what is necessary to perform correctly a legal task entrusted to him or her, especially in view of the generally simple legal tasks most often performed by non-attorneys. Further, it is likely to be more costly for a consumer to bring a legal malpractice case against an attorney than to bring a negligence case against a lay person. Under Massachusetts law, a lawyer's breach of the duty of care must be proven by expert testimony, unless "the alleged malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence." *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 515 N.E.2d 891, 894 (Mass. App. Ct. 1987) (internal quotations omitted).

proceeding with a real estate transaction without an attorney.[39] This measure permits consumers to make an informed choice about whether to use lay closing services.

Conclusion

The Task Force's proposed definition of the practice of law will likely unnecessarily and unreasonably reduce competition between attorneys and non-attorneys. Massachusetts consumers will likely pay higher prices and face a smaller range of service options with little or no offsetting benefit. The Task Force makes no showing of harm to consumers from lay service providers that would justify these reductions in competition. As the New Jersey Supreme Court has concluded:

> Not every such intrusion by laypersons into legal matters disserves the public: this Court does not wear public interest blinders when passing on unauthorized practice of law questions. We have often found, despite the clear involvement of the practice of law, that non-lawyers may participate in these activities, basing our decisions on the public interest.[40]

The Justice Department and FTC thank you for this opportunity to present our views. We would be pleased to address any questions or comments regarding this letter.

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[39] *In re Opinion No. 26*, 654 A.2d at 1363.

[40] *Id.* at 1352.

Sincerely yours,

/s/
R. Hewitt Pate
Assistant Attorney General

/s/

Jessica N. Butler-Arkow
Trial Attorney
United States Department of Justice
Antitrust Division

By direction of the
Federal Trade Commission,

/s/

Deborah Platt Majoras
Chairman

/s/
Maureen K. Ohlhausen
Acting Director
Office of Policy Planning

Hawai'i Association of REALTORS®
www.hawaiirealtors.com

The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
Neighbor Islands: (888) 737-9070
Email: har@hawaiirealtors.com

January 23, 2008

VIA FACSIMILE 539-4801 and HAND DELIVERY

Judiciary Public Affairs Office
417 S. King Street
Honolulu, Hawaii 96813

Ladies and Gentlemen:

Re: Proposed Changes to the Rules of the Supreme Court of the State of Hawaii Regarding the Unauthorized Practice of Law

In response to the publication by the Supreme Court of Hawai'i seeking public comment on a proposed rule defining the practice of law, the Hawaii Association of REALTORS® ("HAR") is pleased to submit its comments.

HAR and its Member Boards of REALTORS® (Honolulu Board of REALTORS®, REALTOR® Association of Maui, Kona Board of REALTORS®, Hawai'i Island Board of REALTORS®, Kaua'i Board of REALTORS® and Moloka'i Board of REALTORS®) have a critical interest in, and an important perspective of, the potential impact of the proposed rule change. HAR is a not-for-profit professional association of persons engaged in all phases of the real estate business in the State of Hawai'i including, but not limited to, brokerage, marketing, appraising, management, syndication, and counseling. HAR has a statewide membership of over 9, 996 real estate licensees.

SCOPE OF COMMENTS

The Hawai'i State Bar Association has proposed a change to the Rules of the Supreme Court of the State of Hawai'i, which change seeks to define the practice of law. The scope of such Rule change, although presumably inadvertent, appears to be in conflict, both with legislation regulating the practice of real estate in Hawai'i, and with the manner in which the real estate industry in Hawai'i has conducted business for decades. From the standpoint of the public, the proposed change also appears to be counter to the interests of the Hawai'i real estate consumer.

HAR takes no position with respect to the need for a definition of the practice of law. HAR is, however, very concerned about the potential for a significant unintentional negative impact of the proposed Rule on an industry which has continually provided a valuable and lawful

service to Hawai`i's consumers, without engaging in practices which are most properly performed by attorneys. It is these concerns to which these comments are addressed.

REGULATION OF PERSONS ENGAGED IN THE PRACTICE OF REAL ESTATE IN HAWAI`I

The real estate industry in Hawai`i is highly regulated by statute and by administrative regulation. Chapter 467, Hawaii Revised Statutes, establishes the educational and testing requirements for obtaining and retaining a real estate license in Hawai`i. The statute is further clarified and implemented by administrative rules adopted by the Hawai`i Real Estate Commission (Hawaii Administrative Rules, Title 16, Chapter 99).

Section 467-1, Hawaii Revised Statutes, defines a real estate broker or salesperson as "any person who, for compensation or a valuable consideration, sells or offers to sell, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or lists, or solicits for prospective purchasers, or who leases or offers to lease, or rents or offers to rent, or manages or offers to manage, any real estate, or the improvements thereon, for others, as a whole or partial vocation, or who secures, receives, takes, or accepts, and sells or offers to sell, any option on real estate without the exercise by the person of the option and for the purpose or as a means of evading the licensing requirement of this chapter."

Section 467-7, Hawaii Revised Statutes, provides that "No person within the purview of this chapter shall act as real estate broker or real estate salesperson, or shall advertise, or assume to act as real estate broker or real estate salesperson without a license previously obtained under and in compliance with this chapter and the rules and regulations of the real estate commission."

Section 16-99-29, Hawaii Administrative Rules, requires that any person desiring to practice real estate in Hawai`i, as defined by Chapter 467, Hawaii Revised Statutes, must take and successfully pass an examination prescribed by the Real Estate Commission. Section 16-99-30, Hawaii Administrative Rules, establishes the subject matter of the examination, by stating that **the license applicant must demonstrate from the examination that "they have a reasonable knowledge of general principles and practices of real estate transactions and the law and rules pertaining to or relating to real estate,** and such other subjects and matters which the commission or its designated examining agency determines to be essential to the protection of the general public in its real estate transactions [emphasis added]."

Section 16-99-90, Hawaii Administrative Rules, then provides that "In renewing an individual license on an active status, the licensee shall provide the commission evidence of completing ten hours of continuing education, including a mandatory core course if specified by the commission, which have been completed on or before the commission-prescribed deadline of an even-numbered year and within the current license biennium." The core course referenced includes a "law update" section.

Thus, the Hawai`i State Legislature and the Real Estate Commission:

(1) Require a license to engage in the practice of real estate in this State (Section 467-7, Hawaii Revised Statutes);

(2) Require that all licensees successfully pass an examination (Section 16-99-29, Hawaii Administrative Rules);

(3) Require that licensees must demonstrate in the examination "a reasonable knowledge of general principles and practices of real estate transactions and the law and rules pertaining to or relating to real estate" (Section 16-99-30, Hawaii Administrative Rules); and

(4) Require that licensees must complete courses in continuing education in such matters in order to renew their license (Section 16-99-90, Hawaii Administrative Rules).

The aggregate effect of this legislation and the related administrative rules is that real estate licensees are selected and trained to perform services for their clients, which can necessarily include explanations and discussions of the laws and rules relating to real estate and their effect on the consumer.

In addition, Section 16-99-3(d), Hawaii Administrative Rules, requires that the real estate licensee "shall recommend that title be examined, survey be conducted, or legal counsel be obtained when the interest of either party requires it."

THE PRACTICE OF REAL ESTATE IN HAWAI`I

In accordance with their mandated education, in compliance with the laws and regulations governing their licenses, and in recognition of their legal responsibilities as agents for their principals, real estate licensees in Hawai`i have assisted consumers in buying and selling residential and commercial property in the State of Hawai`i for decades.

Over this period of time, HAR and its Member REALTOR® Boards have provided tools and educational opportunities to assist licensees in their practice to ensure they maintain the requisite knowledge to properly advise their clients.

It is important to note that the practice of real estate in Hawai`i is essentially a "form based" practice. It would be impossible for real estate licensees to perform their functions without a working knowledge of forms, and the ability to explain such forms and the content of the forms to their clients. By statute, this process requires an explanation of the agency

relationship. By practice, this also includes a clear explanation of the meaning of all sections of the documents to ensure their clients understand the impact of failing to fulfill a contractual obligation or waiving a contractual right.

In that regard, Standard Forms are developed by HAR, having been reviewed and approved by legal counsel prior to implementation. Examples of the Standard Forms developed and in use are:

(1) Exclusive Right-to-Sell Listing Agreement;
(2) Buyer Representation Agreement Exclusive Right to Represent;
(3) Purchase Contract (the fundamental document for conducting the purchase and sale of residential real estate);
(4) Counter Offer;
(5) Guidelines for Counter Offer Form;
(6) Existing "As Is" Condition Addendum;
(7) Agreement of Sale Addendum to the Purchase Contract;
(8) Purchase Money Mortgage Addendum;
(9) Standard Oceanfront Property Addendum;
(10) Option Agreement Input Form;
(11) Plain Language Addendum;
(12) Agreement to Occupy Prior to Close of Escrow;
(13) Seller's Real Property Disclosure Statement;
(14) Rental Agreement;
(15) Residential Leasehold Property Addendum;
(16) Residential Leasehold Property Disclosure;
(17) Commercial Real Property Purchase and Sale Agreement;
(18) Commercial Counter Offer; and
(19) Commercial Existing "As Is" Condition Addendum

HAR and its Member Boards also provide continuing education courses, and formulate and offer special courses and develop new forms, when new laws or court cases affecting real estate arise. An example of this was the creation of a Standard Form and the revision of others, as well as education classes developed and offered to ensure compliance of sellers and their real estate licensee agents with Chapter 508D, Hawaii Revised Statutes, the Mandatory Seller Disclosures in Real Estate Transactions Act.

Real estate licensees also act as agents for their clients in the negotiation of special clauses in the documents. None of these listed activities, as they are practiced under existing license law and regulations, rise to the level of activity that has required, or should require, the intervention of an attorney. When there is any activity where the client's rights or obligations are in question vis'-a-vis' the rights or obligations of any other party, real estate licensees are obligated to refer their client to an attorney.

THE POTENTIAL IMPACT OF THE PROPOSED SUPREME COURT RULE ON THE PRACTICE OF REAL ESTATE IN HAWAI`I

The portions of the proposed definition of the practice of law, which create the opportunity for misapplication and unnecessary disruption of the conduct of real estate sales in Hawai`i, are the following:

> (1) The practice of law includes, but is not limited to:
> Giving advice or counsel to another person about the person's legal rights and obligations or the legal rights and obligations of others.

Would this clause prevent a real estate licensee from providing necessary and essential explanations of the clauses of the Standard Form Purchase Contract (an essential activity for compliance with licensing law and acting as an agent); or, for example, reminding a client that unless they provide notice of termination by the date specified under Paragraph C-51 thereof (allowing termination by a date certain after inspecting the property) , the client's right to terminate the Purchase Contract under that clause is waived?

> (2) The practice of law includes, but is not limited to:
> Selecting, drafting, or completing documents that affect the legal rights of another person.

Because this is a "form-based" industry, this clause could potentially eliminate the prime function of the real estate licensee under statute and regulation. For example, could this clause prevent a real estate licensee from properly and legally assisting a client in completing or responding to a Standard Form Purchase Contract?

> (3) The practice of law includes, but is not limited to:
> Negotiating legal rights or obligations with others on behalf of another person.

Would the effect of this clause preclude a real estate licensee from properly and appropriately representing their client as an agent in the negotiation of clauses of a Standard Form Purchase Contract?

The afore-described activities performed by real estate licensees on a daily basis for decades, are completely consistent with the education and training of real estate licensees as established by Hawai`i law and Administrative Rules, as well as by the obligations imposed by the agency relationship, and are only a few representative examples of the negative impact of an application of the language of the proposed Rule change. The proposed changes to the Supreme Court Rules would expose real estate licensees to charges of engaging in the unauthorized practice of law for practices within the parameters of their licenses, and without harm to the consumer.

HARM TO CONSUMERS

As demonstrated above, the adoption of the proposed definition has the unintended potential to throw the conduct by which real estate is sold and purchased in Hawai`i into chaos, with licensees afraid to serve their clients, consumers unable to obtain necessary assistance to complete their real estate purchase or sale, and with considerable additional expense for a lawyer's participation in each transaction. The danger is that the proposed Rule would bring confusion, rather than clarity, to the subject.

In addition, there is a larger potential impact to Hawai`i's consumers. This impact is best explained in a joint letter from the United States Department of Justice and the Federal Trade Commission, dated December 16, 2004, and addressed to the Massachusetts Bar Association, which was considering a recommendation to adopt a similar definition of the practice of law. [A copy of that letter is attached hereto.] The comprehensive and well-documented letter takes the position that such proposals are not in the best interest of consumers, as they would prevent non-lawyers from providing services in competition with lawyers in situations where there is no clear demonstration that non-lawyer services would actually harm consumers. It states, in part:

"For example, the definition has the potential to discourage law activities such as real estate agents explaining certain aspects of a home purchase to consumers, accountants providing advice regarding tax filings, and the use of interactive self-help legal software to produce simple legal documents. Because the proposed rule is likely to restrain competition without providing any benefits to consumers, we recommend against adopting such a definition of the practice of law."

CONSIDERATION OF A SOLUTION

As stated initially, HAR does not take a position with respect to the necessity for adopting any definition for the practice of law. If there is a determination that a compelling need for such a definition does, in fact, exist, HAR only asks that extreme care be taken to ensure that the potential confusion and harm to consumers does not outweigh any benefits to be derived.

Although one option would be to attempt to restrict the language to eliminate any activity properly performed by real estate agents under their licenses, that solution may be an aspiration lacking in any real practical implementation. As noted by this Court in Fought & Co., Inc. v. Steel Engineering, 87 Hawai`i 37 (1998), in drafting the statutes proscribing the unauthorized practice of law, the Hawai`i legislature "expressly declined to adopt a formal definition of the term "practice of law," noting that '[a]ttempts to define the practice of law in terms of enumerating the specific types of services that come within the phrase are fruitless because new developments in society, whether legislative, social, or scientific in nature, continually create new concepts and new legal problems.'" (87 Hawai`i at 45).

Once again, assuming that there is a compelling need to adopt any definition of practice of law, the only practical means by which to prevent the results envisioned by these comments, would be to specifically exempt licensed real estate agents from the definition to the extent that they are practicing within the laws and regulations governing their profession.

HAR and its Member Boards stand ready to assist the Court in any way possible to resolve this matter in the best interest of all concerned.

Sincerely,

Wayne M. Pitluck, General Counsel
Hawaii Association of REALTORS®

Wayne "Richie" Richardson, President
Hawaii Association of REALTORS®

N I W A O
&
R O B E R T S
Certified Public Accountants, A Professional Corporation

March 24, 2008

Senator Brian T. Taniguchi, Chair
Senator Clayton Hee, Vice-Chair
Senate Committee on Judiciary and Labor
State Capitol, Room 016
Honolulu, Hawaii 96813

RE: H.B. 3386, H.D.1, S.D.1, Relating to Attorneys
Hearing Date: March 25, 2008 at 9:45 A.M., Room 016

Dear Chairman Taniguchi, Vice-Chair Hee, and Committee Members:

I am writing in support of the intent of the amendment proposed by the Hawaii Association of REALTORS® (HAR) to H.B. 3386, H.D.1, S.D.1, Relating to Attorneys. In my opinion, however, the HAR amendment should be expanded to include enrolled agents, architects, physicians, professional engineers, professional surveyors, and other licensed and regulated professionals as well as employees working under their direct supervision.

As described in my letter to The Supreme Court of Hawaii (see attached), the proposed addition to the Rules of the Supreme Court of the State of Hawaii is overly broad. If adopted, these rules would prohibit certified public accountants and other professionals from practicing their professions to the detriment of all consumers in Hawaii.

Therefore, I urge the amendment proposed by the HAR to be redrafted to allow licensed and regulated professionals in all fields to provide their clients with advice on compliance with laws, rules, and regulations and to prepare forms within the scope of their respective professions.

Thank you for your consideration of this matter.

Very truly yours,

John W. Roberts, M.B.A., CPA
Principal

Enclosure: Letter to The Supreme Court of Hawai'i, dated January 10, 2008

2145 Wells Street, Suite 402, Wailuku, Hawaii 96793 • Telephone: (808) 242-4600 • Telefax: (808) 242-4607 • www.mauicpa.com

N I W A O
&
R O B E R T S
Certified Public Accountants, A Professional Corporation

January 10, 2008

The Supreme Court of Hawai'i
Judiciary Public Affairs Office
417 South King Street
Honolulu, HI 96813

RE: Proposed Addition to the Rules of the Supreme Court of the State of Hawai'i

Ladies and Gentlemen:

The enclosed proposed rules are overly broad. If adopted, these rules would prohibit certified public accountants, architects, physicians, professional engineers, and other licensees from practicing their respective professions.

Many professions other than attorneys advise their clients regarding compliance with laws, rules, regulations, and contract terms in the course of their licensed work. These opinions are based on expertise gained through education, experience, passing professional licensing examinations, and continuing professional education. As drafted, the proposed rules would prohibit these professions from continuing to perform these services because only attorneys would be permitted to give legal advice.

My own profession as a certified public accountant (CPA) provides an example. CPAs routinely assist their clients in complying with federal and state tax laws. By preparing tax returns and providing tax consulting services, including preparing tax opinion letters, every CPA is providing legal advice as broadly defined in the proposed rules. The United States Internal Revenue Service even permits CPAs to represent their clients in U.S. Tax Court. Moreover, in the course of performing audits of financial statements and other attestation services, CPAs are opining on auditees' compliance with applicable laws, regulations, contract provisions, etc. as part of their audit opinions. The proposed rules would prohibit CPAs from providing tax and audit services beginning July 1, 2008.

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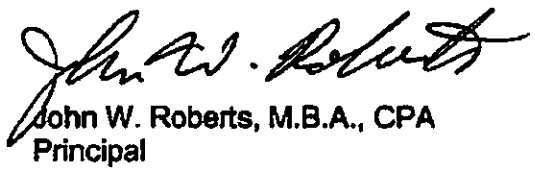
Other professions also assist their clients with interpreting and applying various laws, rules, regulations, and contract terms within their areas of expertise. For example, architects advise their clients on whether the design of an existing or proposed new structure complies with the Americans With Disabilities Act. Professional engineers and medical doctors also routinely provide advice on legal matters within the scope of their professional expertise as part of their daily work.

Unless the intent of the proposed rules is for attorneys to replace all other licensed professions in the State of Hawaii, the proposed rules need to be redrafted to allow licensed professionals in all fields to provide their clients with advice on compliance with the laws, rules, and regulations within the scope of their professions.

Thank you for your consideration of this matter.

Very truly yours,



John W. Roberts, M.B.A., CPA
Principal

Enclosure: Proposed Addition to the Rules of the Supreme Court of the State of Hawaii

The Supreme Court of Hawai'i seeks public comment regarding a proposed rule about the Unauthorized Practice of Law. The proposed rule defines the practice of law and would assist with enforcement measures, by clarifying what is and is not the practice of law. The proposed rule is attached hereto.

Comments about the proposed rules should be submitted, in writing, **no later than Friday, January 25, 2008** to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the online form on the Judiciary's website at www.courts.state.hi.us. If adopted, the proposed rules will become effective July 1, 2008.

PROPOSED ADDITION TO THE RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

Rule ___. Unauthorized Practice of Law

(a) Prohibition.

Except as provided in section (c) of this rule or other supreme court rule, no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar in good standing.

(b) Definitions.

"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice or legal assistance to another person. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person about the person's legal rights and obligations or the legal rights and obligations of others.

(2) Performing legal research.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established

(5) Negotiating legal rights or obligations with others on behalf of another person.

(6) Providing oral or written legal opinions.

"Qualifying institution" is a business organization that is authorized and registered to do business as provided by law.

(c) Exceptions and exclusions.

The following are not prohibited under section (a):

(1) Appearing *pro se*.

(2) Acting as a representative when authorized by law or by a governmental agency.

(3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (b)(1) above.

(4) Serving as in-house counsel for a single qualifying institution; provided in house counsel

(i) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,

(ii) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,

(iii) makes no state court appearances on behalf of any person or entity other than him or her self, and

(iv) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Selling legal forms.

(7) Performing services as a duly authorized negotiator for an employee organization or employer.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(d) Governmental Agencies.

Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.

SENATE COMMITTEE ON
JUDICIARY AND LABOR

March 25, 2008

HB 3386, HD 1, SD 1 Relating to Attorneys

Chair Taniguchi and members of the Senate Committee on Judiciary and Labor, I am Rick Tsujimura, representing State Farm Insurance Companies, a mutual company owned by its policyholders.

On behalf of State Farm Mutual Insurance Company and its affiliated companies, we support the amendments requested by the Hawaii Association of Realtors.

The Proposed Definition of "Practice of Law" is Too Broad

The definition of "practice of law" proffered by the Hawaii Supreme Court recently is extremely broad, so broad that the business of insurance could be impacted in Hawaii. For example, the "practice of law" includes:

> (b)(3) Selecting, drafting or completing documents that affect the legal rights of another person.

Because the choice of coverages could impact the legal rights of an individual, the work of a professional, licensed insurance agent who advises a client on the selection of policy coverages and helps a client complete an application could be considered the "practice of law." Although the broad definition would seem to prohibit these services, we doubt that this was the intent of the drafters of the rule. Otherwise, all insurance agents would need to be attorneys, and the insurance marketplace would suffer major disruptions.

The broad definition of "practice of law" could also disrupt claim settlements. Section (b)(5) includes in the definition of "practice of law":

> (b)(5) Negotiating legal rights or obligations with others on behalf of another person.

Our claims personnel, as part of the claims process, negotiate on behalf of another person, i.e. State Farm, legal rights and obligations with others. The broad definition of "practice of law" would seem to imply that the current activities of all insurance adjusters, including those in house employees of insurers, would need to be attorneys. Again, if this were the intent of the drafters of the Hawaii Supreme Court rules, major disruptions in the settlement of claims would result.

An exception in the proposed Supreme Court rule seemingly applies to the above situations:

> (c)(2) Acting as a representative when authorized by law or by a governmental agency.

Employees of an insurer who settle claims do not need to be licensed as an adjuster pursuant to the licensing exception in HRS 431:9-105(d)(3). Nonetheless, we interpret the Section (c)(2) exception to apply to our in house claims staff and to our agents, since their activities are governed by Chapter 431, the Hawaii Insurance Code, and are regulated by the Commissioner of Insurance. Having said that, to avoid any disruption in the offering of insurance and in the settlement of insurance claims, we request that the activities of individuals and entities governed or licensed pursuant to Chapter 431 be added as an exception to the definition of practice of law.

It is a fundamental notion of our representative government that the legislature is the sole repository of the ability to pass upon legislation, in this case the ability to define what is the "practice of law." In this instance the Hawaii Supreme Court is attempting to do by rule what the legislature is solely empowered by our Constitution to do. This power is non-delegable under Article III of the Hawaii Constitution[1]. The Hawaii Supreme Court may enact rules of "process, practice, procedure and appeals . . ."[2]

Although it could be argued that the "practice of law" and the ability to enact "rules of practice" enable the Hawaii Supreme Court to propose such rules, the argument lacks merit as the definition of the "practice of law" is substantive and thus legislative. The prohibitions the rule contemplates must be legislated by the legislature especially when the consequences incur criminal penalties. To do otherwise would breech the constitutional provisions. For these reasons we humbly request your consideration of these amendments.

Thank you for the opportunity to present this testimony.

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[1] "Section 1. The legislative power of the State shall be vested in a legislature . . . "

[2] Article VI, Section 7.

LATE

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:
H.B. NO. 3386, H.D. 1, S.D.1, RELATING TO ATTORNEYS.

BEFORE THE:
SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 25, 2008 **TIME:** 9:45 AM
LOCATION: State Capitol Room 016
Deliver to: Committee Clerk, Room 219, 1 copies

TESTIFIER(S): WRITTEN TESTIMONY ONLY.
(For more information, contact Charleen Aina, Deputy Attorney General, at 586-1286.)

Chair Taniguchi and Members of the Committee:

The Attorney General respectfully requests that this bill be held or amended.

This bill continues to minimize the limitations of the Code of Professional Conduct when those rules would disqualify the Attorney General from providing legal services because of a conflict of interest. The Attorney General is required to retain private counsel for the Legislature and the Judiciary, at the Attorney General's expense, even though both the Judiciary and the Legislature are authorized to secure those services directly themselves, and the conflict of interest rules that prevent the Attorney General from representing the courts or judicial or legislative offices directly, similarly limit the Attorney General's ability to negotiate the scope of work and other terms of a retention contract and supervise the delivery of those services under that contract.

While we would prefer that this bill be held, we suggest the following revisions to H.B. No. 3386, H.D. 1, S.D. 1, to assure that the Department of the Attorney General's ability to perform its statutory and common law duties to represent and defend the State and the public interest are not compromised -- first, that the

amendment to section 28-8.3(a)(2), Hawaii Revised Statutes, be revised to read as follows:

(2) By any court or judicial or legislative office of the State; provided that, if the court or office is required to retain an attorney because the attorney general has declined to provide representation on the grounds of a conflict of interest, to the extent funds appropriated for this purpose are available, the attorney general shall transfer funds appropriated to the attorney general for this purpose to the court or office to pay for the services of the attorney the court or office retains;

and second, that a new section 2 be added to the bill to include an appropriation to pay for the services of private counsel should the Attorney General be precluded by a conflict of interest from representing the Judiciary or the Legislature, and hiring private counsel to act in the Attorney General's place:

SECTION 2. There is appropriated out of the general revenues of the State of Hawaii the sum of $ or so much thereof as may be necessary for fiscal year 2008-2009 to pay for the services of attorneys retained directly by a court or office pursuant to section 28-8.3(a)(2), Hawaii Revised Statutes, in the event the attorney general declines to provide representation on the grounds of a conflict of interest.

The sum appropriated shall be expended by the department of the attorney general exclusively to implement the provisions of section 28-8.3(a)(2) and only by transferring amounts to a court or judicial or legislative office for that purpose.

LATE

HAWAII ASSOCIATION OF PUBLIC ACCOUNTANTS

Organized August 7, 1943
P.O. BOX 61043
HONOLULU, HAWAII 96839

AFFILIATE OF

Before the Senate Committee on Judiciary and Labor

Tuesday, March 25, 2008 at 9:45 a.m.
Conference Room 016

Re: H.B. 3386, H.D.1, S.D.1

Relating to Attorneys

Testimony of Marilyn M. Niwao, J.D., CPA

Chair Taniguchi, Vice-chair Hee, and committee members:

The Hawaii Association of Public Accountants (HAPA) supports the effort of the Hawaii Association of REALTORS® (HAR) to revise H.R.S. Section 605-14 to define the "practice of law" to include situations where there is a client relationship of trust and reliance, but excluding licensed certified public accountants, realtors, and insurance agents. However, as noted in our attached letter dated January 24, 2008 to the Hawaii Supreme Court, we believe other licensed professionals under the Hawaii Revised Statutes, such as the licensed professional engineers, surveyors, architects, physicians, and others, including those (such as enrolled agents) who are regulated by the Federal government, should also be excluded from the definition of practicing law to the extent they do not provide or profess to provide professional legal advice or services based on legal competency or standing in the law.

The Hawaii Association of Public Accountants (HAPA) represents approximately 500 local public accounting practitioners, primarily CPAs (and a few PAs) throughout the State of Hawaii. As the CPAs and practitioners who appear in the yellow pages offering our services to the public, our members, like other professionals, would be directly impacted if the proposed addition to the rules of the Supreme Court defining the unauthorized practice of law is adopted without amendment. If the proposed rule addition is adopted without amendment, CPA practitioners will not be able to perform their traditional work as allowed under the Hawaii Revised Statutes, as they may be unable to prepare and issue 1) tax returns, 2) written tax opinion letters, 3) audit opinions, and 4) management letters, without being considered to be "practicing law". In addition, they would not be able to provide consulting advice to clients as they have for decades.

The Hawaii Bar Association submitted a proposed addition to the Rules of the Supreme Court of Hawaii defining the "unauthorized practice of law." HAPA, however, regards this proposed rule addition as overly broad and is concerned that it would adversely impact other licensed and regulated individuals. The Hawaii Bar Association is currently

considering amending its proposed rule addition in light of comments sent to the Hawaii Supreme Court. Unfortunately, we have not seen any amendments to date, and any changes made would likely be ruled upon by the Hawaii Supreme Court after this legislative session.

For this reason, HAPA supports the intent of the amendment proposed by the HAR for the protection of consumers and to insure the continued availability of services offered by Hawaii licensed and regulated professionals. Our exceptions for consideration are noted on page 6 in our letter to the Hawaii Supreme Court (see attached).

Thank you for your consideration of this matter. If you have any questions concerning the above, please do not hesitate to contact me at (808) 242-4600, ext. 224.

Respectfully submitted,

Marilyn M. Niwao

Marilyn M. Niwao, J.D., CPA
HAPA Legislative Co-chairperson and State Director

Enclosures

HAWAII ASSOCIATION OF PUBLIC ACCOUNTANTS

Organized August 7, 1943
P.O. BOX 61043
HONOLULU, HAWAII 96839

AFFILIATE OF

COPY

January 24, 2008

Supreme Court of Hawai'i
Judiciary Public Affairs Office
417 South King Street
Honolulu, Hawaii 96813

Re: Proposed Addition to the Rules of the Supreme Court of the State of Hawai'i Regarding "Unauthorized Practice of Law"

Dear Honorable Justices of the Supreme Court of Hawai'i:

The Hawaii Association of Public Accountants (HAPA) represents local public accounting practitioners throughout the State of Hawaii. Our organization is the only statewide accounting organization with neighbor island chapters on Maui, the Big Island, and Kauai, in addition to its Oahu chapter. Our regular members are certified public accountants (CPAs) and public accountants (PAs). In addition, some of our associate members are CPA firm staff, enrolled agents (EAs) and other tax and accounting professionals.

We believe that the proposed rules regarding "unauthorized practice of law" are overly broad and impact other licensed professionals who are regulated and who have practiced for decades in areas which would be considered reserved for attorneys under the proposed new rules. We thank you for allowing comments, and respectfully submit the following with respect to the proposed addition to your rules regarding the unauthorized practice of law:

I. Proposed Rules would impact CPAs, PAs, and tax practitioners other than attorneys who are already recognized and allowed to practice before the Internal Revenue Service (IRS) and State of Hawaii Department of Taxation.

A. CPAs are licensed professionals who must meet high standards of education, experience, and examination for licensing.

The Hawaii Revised Statutes defines the practice of public accountancy under H.R.S. §466-3 as "... the performance or offering to perform, by a person or firm holding itself out to the public as a licensee, for a client or potential client of one or more kinds of service involving the use of

accounting or auditing skills, including the issuance of reports on financial statements, or of one or more kinds of management advisory or consulting services, or the preparation of tax returns, or the furnishing of advice on tax matters." H.R.S. §466-7 (a) further specifies that a license and permit are required to actively engage in the practice of public accountancy. These licenses are the certified public accountant (CPA) license and the public accountant (PA) license.

In order to obtain a license and permit to practice public accountancy, CPAs are required to meet certain education, experience, and exam requirements under H.R.S. §466-5 which are quite rigorous. The CPA exam itself tests business law and tax knowledge, in addition to accounting, auditing, statistics, and business knowledge. CPAs and PAs with permits to practice also are required to obtain continuing education (i.e., 80 continuing professional education hours every two years - see H.A.R. §16-71-33). (Note: in Hawaii, the PA license is no longer issued and there are very few PAs left who are practicing.)

Based on the above, CPAs and PAs under the Hawaii Revised Statutes are clearly allowed to prepare tax returns and furnish advice on tax matters, which may be considered to be the "unauthorized practice of law" under your proposed rules.

B. <u>CPAs and certain other tax professionals (including attorneys) are regulated and considered "practitioners" before the Internal Revenue Service (IRS)</u>.

In the tax arena, there are other tax professionals besides attorneys who are allowed to practice before the IRS. Treasury Department Circular 230, §10.2 (a) (5) specifies that the following individuals are considered "practitioners" who may practice before the IRS: 1) attorneys, 2) certified public accountants, 3) enrolled agents, 4) enrolled retirement plan agents (limited practice), and 5) enrolled actuaries (limited practice). Circular 230 regulates <u>written advice and opinions</u> from these "<u>practitioners</u>" and imposes penalties for noncompliance. In addition, tax return preparers and others under Circular 230 are allowed limited practice rights, but are not considered "practitioners" under Circular 230.

Unless the proposed rules are modified, individuals, other than attorneys, who are considered "practitioners" by the IRS under Circular 230 and who

are already regulated by the IRS will be unable to practice and give written tax advice or opinion letters as envisioned under federal tax laws.

C. Unlike certain other states (such as California), Hawaii does not regulate paid tax return preparers other than CPAs, PAs, and attorneys. Except for CPAs, PAs, and attorneys, Hawaii does not regulate paid tax return preparers by requiring examination or continuing education for paid tax preparers. Certain other states regulate paid tax preparers and require continuing education, among other requirements.

Enrolled agents (EAs) are federally-authorized tax practitioners who may represent taxpayers, and either pass an examination on taxes or have worked at the IRS for a number of years in a position which regularly interpreted and applied the tax code and its regulations (see Circular 230). EAs also are currently required to obtain 72 continuing education credits every three years.

Paid tax preparers must follow tax laws and rules of the Internal Revenue Service and the State of Hawaii. The IRS and State of Hawaii Department of Taxation periodically audit tax returns, and the IRS imposes monetary penalties on paid preparers who are negligent in their work. In addition, both federal and state laws provide for criminal sanctions for tax preparers when applicable.

If the proposed Supreme Court rule is adopted, tax preparation services performed by CPAs, PAs, EAs, and others may be construed as falling within the definition of "unauthorized practice of law" under (b) (3) - selecting, drafting, or completing documents that affect the legal rights of another person. We believe the proposed Supreme Court rule should not affect tax preparation services that are currently allowed by federal and state laws.

D. Restricting tax preparation service to attorneys only would affect the government's ability to raise tax revenues.

In Hawaii, most of the tax preparation work is performed by accountants and other tax practitioners. Based upon the complexity of tax work and the volume of returns that must be prepared each year by paid preparers, restricting this service to attorneys only would affect tax compliance and revenue generation by federal and state governments.

II. The proposed rule would impact CPAs and PAs who are already authorized under Hawaii law to issue opinions on financial statements and to perform management advisory or consulting services.

A. CPAs and PAs are the only licensees authorized under the Hawaii Revised Statutes to issue reports (opinions) on financial statements.

CPAs and PAs are authorized to issue audit, review, and compilation reports on financial statements. In conjunction with these reports and work on financial statements, CPAs and PAs are making certain legal assertions regarding the rights and obligations of the entity. In addition, CPAs oftentimes issue management letters which may mention noncompliance with certain laws or breach of certain covenants.

B. CPAs and PAs also provide management advisory or consulting services to clients, and have provided such services for decades in Hawaii.

CPAs and PAs provide management advisory and consulting services to businesses and individuals on a broad range of subjects. These services are provided based upon the education and experience obtained by CPAs and PAs, and CPAs and PAs have standards in performing these services. In addition, CPAs serve as expert witnesses or masters in court proceedings.

The proposed rule should not impact the services that already have been provided by CPAs and PAs for decades.

III. CPAS, PAs, and other tax and accounting professionals assist clients in the preparation of various government and business forms, other than tax forms.

A. CPAs, PAs, and other tax and accounting professionals oftentimes assist clients in the preparation of various government and business forms, other than tax forms, that require financial or other information. These forms include, for example, workmen's compensation and other insurance forms, and county liquor license forms.

The proposed rule should not be written so broadly so as to prohibit individuals other than attorneys from assisting clients in the preparation of these forms.

IV. Consumers would likely face higher costs and commerce would slow if the proposed rules are adopted without revision.

A. The proposed rules are written too broadly and exclude CPAs, PAs, and other licensed or regulated professionals (other than attorneys) from performing work that is currently allowed by the Hawaii Revised Statutes or the federal government.

As mentioned above, the proposed rules would prohibit CPAs and PAs from performing work already authorized under the Hawaii Revised Statutes and under federal rules. In addition, the proposed rules could conceivably impact other licensed professionals, such as architects who render opinions on ADA compliance, or licensed engineers who express opinions in the area of their expertise.

If licensed and regulated individuals are unable to perform their work within the scope of their expertise, consumers would face higher costs and commerce would slow.

B. The proposed rule should consider the impact on consumers before restricting advice and services from non-lawyers.

On December 16, 2004, the Federal Trade Commission sent comments on the Draft Proposed Definition of the Practice Of Law in Massachusetts, expressing concern that a broadly drafted definition of the practice of law may not be in the best interests of consumers as it would prevent non-lawyers from providing services in competition with lawyers in situations where there is no clear demonstration that non-lawyer services would actually harm consumers. (See attached.) This would likely raise costs for consumers and limit their choices.

If a rule is adopted regarding the "unauthorized practice of law", the rule should not be overly broad and should allow licensed professionals and others to perform work in the area of their expertise.

Based upon the above, our organization urges that if a definition for the unauthorized practice of law is adopted, that exceptions under (c) should include the following (or similar language):

1. "Except as otherwise authorized by the licensing laws of a profession or vocation regulated by the Professional and Vocational Licensing Act, HRS Chapter 436B,"

2. "Except as authorized by Treasury Department Circular 230,"

3. "Except for tax preparation services and related tax preparation advice allowed under federal and state laws,"

4. "Except for services rendered as a master or expert witness."

Realizing the complexity of this matter, our organization is willing to work with drafters of the proposed rule to arrive at a rule that would not inadvertently impact other professionals and business practices that currently exist.

Thank you for this opportunity to comment. Please call me at (808) 242-4600, ext. 224 if you have questions on the above matter.

Very truly yours,

Marilyn M. Niwao

Marilyn M. Niwao, J.D., CPA
HAPA State Director and Legislative Co-chairperson

Enclosure

The Supreme Court of Hawai'i seeks public comment regarding a proposed rule about the Unauthorized Practice of Law. The proposed rule defines the practice of law and would assist with enforcement measures, by clarifying what is and is not the practice of law. The proposed rule is attached hereto.

Comments about the proposed rules should be submitted, in writing, **no later than Friday, January 25, 2008** to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the online form on the Judiciary's website at www.courts.state.hi.us. If adopted, the proposed rules will become effective July 1, 2008.

PROPOSED ADDITION TO THE RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I

Rule ___. Unauthorized Practice of Law

(a) Prohibition.

Except as provided in section (c) of this rule or other supreme court rule, no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar in good standing.

(b) Definitions.

"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice or legal assistance to another person. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person about the person's legal rights and obligations or the legal rights and obligations of others.

(2) Performing legal research.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established

(5) Negotiating legal rights or obligations with others on behalf of another person.

(6) Providing oral or written legal opinions.

"Qualifying institution" is a business organization that is authorized and registered to do business as provided by law.

(c) Exceptions and exclusions.

The following are not prohibited under section (a):

(1) Appearing *pro se*.

(2) Acting as a representative when authorized by law or by a governmental agency.

(3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (b)(1) above.

(4) Serving as in-house counsel for a single qualifying institution; provided in house counsel

(i) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,

(ii) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,

(iii) makes no state court appearances on behalf of any person or entity other than him or her self, and

(iv) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Selling legal forms.

(7) Performing services as a duly authorized negotiator for an employee organization or employer.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(d) Governmental Agencies.

Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.

LATE

Senate Committee on Judiciary and Labor
Senator Brian Taniguchi, Chair

Hearing Date: March 25, 2008 at 9:45 AM – Room 016

RE: House Bill 3386, HD1, SD 1 – Relating to Attorneys

Chair Taniguchi and members of the Committee, NAIFA (National Association of Insurance and Financial Advisors) Hawaii, an association made up insurance agents and financial advisors across Hawaii, respectfully **requests an amendment to HB 3386, HD1, SD1. We also support the more detailed testimony provided by the Hawaii Association of Realtors on this amendment.**

We became aware in November 2007, of the Hawaii Supreme Court's proposed rule for the "Unauthorized Practice of Law" and defining the practice of law, with an effective date of July 1, 2008.

We are seeking an amendment to §605-14, HRS, currently prohibiting and criminalizing the unauthorized practice of law.

The proposed amendment to §605-14, HRS, is as follows:

> **§605-14 Unauthorized practice of law prohibited.** (a) It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States.
>
> (b) For the purpose of this section, "practice of law" means the provision of professional legal advice or services by a person, firm, association, or corporation where there is a client relationship of trust and reliance, but shall not include a person, firm, association, or corporation who:
>
> (1) Does not provide or profess to provide professional legal advice or services based on legal competency or standing in the law; and
>
> (2) Is licensed to do business in the State of Hawaii under chapter 431, 466, or 467.
>
> (c) Nothing contained in sections 605-14 to 605-17 [contained] shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

Insurance agents are regulated by state law (Chapter 431, HRS) from the time they sit for the exam for their insurance license(s). Insurance agents, as part of their service continue to be regulated when they meet with clients, review policies, offer advice on policies, explain the myriad requirements, rules and regulations regarding the various insurance policies available in the marketplace.

Rather than harming consumers, insurance agents should be explaining the policies to better inform and educate their clients on the financial and insurance products they have purchased. This service to the clients usually do not require attorneys to be involved.

If insurance agents were banned from providing these services, service fees will have to be imposed on insurance consumers and costs may become prohibitive. Insurance agents do not provide professional legal advice or services based on legal competency. We agree with the U.S. Justice Department and the Federal Trade Commission in their comments to the Hawaii Supreme Court dated Janaury 25, 2008, that they "are not aware of evidence of consumer harm arising from non attorneys providing services such as those referenced above that do not require the skill or knowledge of a lawyer but may still fall within the scope of the Rule."

We appreciate this opportunity in offering this amendment. Mahalo for your consideration.

Cynthia Hayakawa
Executive Director

LATE

HAWAII PARALEGAL ASSOCIATION
P.O. Box 674
Honolulu, Hawaii 96809

April 9, 2008

The Honorable Brian T. Taniguchi, Chair
The Honorable Clayton Hee, Vice-Chair
Senate Committee on Judiciary and Labor
State Capitol, Conference Room 016
Honolulu, HI 96813

Re: H.B. 3386 H.D. 1, S.D. 1 (March 25, 2008, 9:45 a.m.)

Chair Taniguchi, Vice-Chair Hee, and Committee members:

The Hawai'i Paralegal Association ("HPA") is a nonprofit professional association incorporated in 1978, affiliated with the National Federation of Paralegal Associations since 1988. The HPA is an active participant in the legal community and regularly takes part in educational and *pro bono* activities. The HPA promotes high standards in the paralegal profession, and its members are exhorted by its Code of Ethics and Professional Responsibility to, among other things, serve the public interest by contributing to the delivery of quality legal services and the improvement of the legal system.

We note that both the 1993 and 2007 assessments of civil legal needs in Hawaii have confirmed that most people of moderate income or below receive no help with their civil legal needs. Language considered for H.B. 3386 S.D. 1 would revise *Hawaii Revised Statutes* §605-14 to explicitly provide that the practices of realtors, accountants, and insurance professionals alone are exempt from the prohibitions of that section. We are concerned about the adverse effect, upon public access to legal services and upon the existing and potential evolution of delivery of legal services in the public interest by nonlawyers, of this amendment.

The (inadvertent) implication of this new limited exception is that the work of other nonlawyers, unlike realtors, accountants, and insurance professionals, is prohibited. This would include established nonlawyer roles (such as those of architects, title insurance companies, bank trust departments, mortgagors, human resources managers, sports agents, financial planners, credit counselors, investment brokers, debt

collection agents, and so on), and existing and potential practice by public interest organizations (such as Alternatives to Violence, Family Voices Hawai'i, Hawai'i Community Children's Council, Hawai'i Family as Allies, Learning Disabilities Association of Hawai'i, Women Helping Women, and so on), as well as the further natural evolution of paralegals in the public interest (as regulated adjunct providers of legal services, to meet certain circumscribed needs not otherwise being met, as contemplated at Action Step 6.a. of the 2007 Hawai'i *Community Wide Action Plan* formulated to address the unmet needs most recently identified by *The 2007 Assessment of Civil Legal Needs and Barriers of Low- and Moderate-Income People in Hawai'i*).

In our view, it is unacceptable to codify an overly-broad definition of prohibited nonlawyer "practice of law" based on an abstract or at best anecdotally-supported claim of harm, without actually demonstrating significant harm to consumers by nonlawyers. We trust that Hawai'i paralegals will have the opportunity to realize their potential to contribute to future efforts to improve public access to legal services in Hawai'i, as outlined in the *Community Wide Action Plan*. We believe that access to justice and unauthorized practice of law measures can be integrated so that unauthorized practice of law measures complement rather than frustrate access to justice.

Sincerely,

Cheryl A. Zuen

President
On behalf of the Board of Directors
of the Hawai'i Paralegal Association

LATE

March 25, 2008

RE: HB 3386

Terrence,

Please find below suggested language to clarify that Tax Department attorneys are authorized to practice law in certain circumstances (and thus, have the attorney-client privilege).

Thank you.

Kurt

Requested amendments to Chapters 28 and 231 for purposes of clarifying Department of Taxation attorney authority:

§28-8.3 Employment of attorneys. (a) No department of the State other than the attorney general may employ or retain any attorney, by contract or otherwise, for the purpose of representing the State or the department in any litigation, rendering legal counsel to the department, or drafting legal documents for the department; provided that the foregoing provision shall not apply to the employment or retention of attorneys:

(1) By the public utilities commission, the labor and industrial relations appeals board, and the Hawaii labor relations board;
(2) By any court or judicial or legislative office of the State;
(3) By the legislative reference bureau;
(4) By any compilation commission that may be constituted from time to time;
(5) By the real estate commission for any action involving the real estate recovery fund;
(6) By the contractors license board for any action involving the contractors recovery fund;
(7) By the trustees for any action involving the travel agency recovery fund;
(8) By the office of Hawaiian affairs;
(9) By the department of commerce and consumer affairs for the enforcement of violations of chapters 480 and 485;
(10) By the department of taxation for the administration and enforcement of title 14 pursuant to sections 231-4.5, 231-13, and 231-26;
[~~(10)~~] (11) As grand jury counsel;
[~~(11)~~] (12) By the Hawaiian home lands trust individual claims review panel;
[~~(12)~~] (13) By the Hawaii health systems corporation, or its regional system boards, or any of their facilities;
[~~(13)~~] (14) By the auditor;
[~~(14)~~] (15) By the office of ombudsman;
[~~(15)~~] (16) By the ethics commission [NOT ON THE LIST];
[~~(16)~~] (17) By the insurance division;
[~~(17)~~] (18) By the University of Hawaii;
[~~(18)~~] (19) By the Kahoolawe island reserve commission;

[~~(19)~~] (20) By the division of consumer advocacy;

[~~(20)~~] (21) By the office of elections;

[~~(21)~~] (22) By the office of information practices [NOT ON THE LIST];

[~~(22)~~] (23) By the campaign spending commission;

[~~(23)~~] (24) *[Repeal and reenactment on June 30, 2010. L 2006, c 306, §1.]* By the Hawaii tourism authority, as provided in section 201B-2.5; or

[~~(24)~~] (25) By a department, in the event the attorney general, for reasons deemed by the attorney general good and sufficient, declines, to employ or retain an attorney for a department; provided that the governor thereupon waives the provision of this section.

(b) For purposes of this section the term "department" includes any department, board, commission, agency, bureau, or officer of the State.

(c) *[Repeal and reenactment on June 30, 2010. L 2006, c 306, §1.]* Every attorney employed by any department on a full-time basis, except an attorney employed by the public utilities commission, the labor and industrial relations appeals board, the Hawaii labor relations board, the office of Hawaiian affairs, the Hawaii health systems corporation or its regional system boards, the department of commerce and consumer affairs in prosecution of consumer complaints, the department of taxation for the administration and enforcement of title 14, insurance division, the division of consumer advocacy, the University of Hawaii, the Hawaii tourism authority as provided in section 201B-2.5, the Hawaiian home lands trust individual claims review panel, or as grand jury counsel, *the ethics commission, or the office of information practices [NOT ON THE LIST]*, shall be a deputy attorney general.

(d) All attorneys retained by contract, other than employment at will, whether by the attorney general or a department, shall be retained in accordance with chapter 103D.

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§231-4.5 [~~Administrative rules officer;~~] Chief counsel; staff attorneys; specialists; appointment and duties. (a) Notwithstanding any other law to the contrary, the director of taxation may appoint a chief counsel, an assistant chief counsel, and staff attorneys as necessary to assist the chief counsel. The chief counsel, the assistant chief counsel, and the staff attorneys shall serve as legal adviser and representative for the department on matters relating to title 14, direct the adoption of rules related to taxes administered by the department, assist with the issuance of tax memoranda and tax information releases, represent the department before tribunals established under chapter 232, and perform other duties as directed by the director.

The chief counsel, the assistant chief counsel, and staff attorneys shall be authorized to represent the department before the tax appeal court, at the director's discretion, under the supervision of the attorney general.

The chief counsel, the assistant chief counsel, and staff attorneys shall be licensed to practice law in Hawaii and shall be exempt from chapters 76 and 77.

(b) The director of taxation may appoint [~~an administrative rules officer, and~~] administrative rules specialists as necessary to assist the [~~administrative rules officer~~] chief counsel [~~. The administrative rules officer chief counsel shall direct the adoption of rules related to taxes administered by the department, assist~~] with the issuance of tax memoranda and tax information releases, and perform other duties as directed by the director. The [~~administrative rules officer and the~~] administrative rules specialists shall

be exempt from chapters 76 and 77 and may be [~~legal or~~] accounting professionals[~~; provided that no individual appointed under this section shall render legal services reserved to the attorney general under chapter 28~~].

CLEAN VERSION OF HRS §231-4.5

§231-4.5 Chief counsel; staff attorneys; specialists; appointment and duties. *(a) Notwithstanding any other law to the contrary, the director of taxation may appoint a chief counsel, the assistant chief counsel, and staff attorneys to assist the chief counsel. The chief counsel, the assistant chief counsel, and staff attorneys shall serve as legal adviser and representative for the department on matters relating to title 14, direct the adoption of rules related to taxes administered by the department, assist with the issuance of tax memoranda and tax information releases, represent the department before tribunals established under chapter 232, and perform other duties as directed by the director.*

The chief counsel, the assistant chief counsel, and staff attorneys shall be authorized to represent the department before the tax appeal court, at the director's discretion, under the supervision of the attorney general.

The chief counsel and staff attorneys shall be licensed to practice law in Hawaii and shall be exempt from chapters 76 and 77.

(b) The director of taxation may appoint administrative rules specialists as necessary to assist the chief counsel with the issuance of tax memoranda and tax information releases, and perform other duties as directed by the director. The administrative rules specialists shall be exempt from chapters 76 and 77 and may be accounting professionals.

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§231-14 Attorney. [~~The~~] In cooperation with section 231-4.5, the attorney general shall assign one of the attorney general's deputies as attorney and legal advisor and representative of the director of taxation. The attorney may proceed to enforce payment of any delinquent taxes by any means provided by law. Any legal proceeding may be instituted in the name of the director or the director's deputy, the collector of the district in which the delinquency exists, or in the name of the collector of delinquent taxes.