

From: Ember Shinn [embershinn@yahoo.com]
Sent: Thursday, February 04, 2010 10:13 AM
To: HLTtestimony
Subject: HB2572, HLT Hrg 2/5/10 at 9:30 am

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF
THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) FORMERLY KNOWN AS
CONSUMER LAWYERS OF HAWAII (CLH)
IN OPPOSITION TO H.B. NO. 2572**

February 4, 2010

HLT Hearing: February 5, 2010, 9:30 am

To: Chairman Ryan Yamane and Members of the House Committee on Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in opposition to H.B. No. 2572.

While HAJ supports the intent of the Governor's proposed legislation to keep certain aspects of mental health examinations from public disclosure, we oppose this bill for the following reasons:

1. The proposed amendment is overbroad and appears to conflict with other sections within Chapter 704. Specifically, the bill proposes to restrict public access to a report on a criminal defendant's physical or mental condition and its contents by limiting disclosure to the DOH, the prosecutor and the criminal defendant's counsel. However, under existing law, the report is ordered by the court when, among other reasons, the criminal defendant puts his/her mental/physical condition into dispute. Arguably, the criminal defendant would have waived his/her right to privacy and confidentiality upon assertion of the mental/physical condition. Yet, under this proposed bill, the report is protected from disclosure, even though its contents would be publicly disclosed in a contested fitness hearing under section 704-405 or if the report examiners are called to testify under section 704-410. It makes little sense to maintain the report as confidential after it has been publicly disclosed in a court proceeding.

2. The proposed amendment establishes a new standard for disclosure and could unfairly restrict another criminal or civil court from disclosing the report upon a showing of good cause. A criminal defendant could also be a defendant in a civil action or be an agent/employee of a civil defendant. Under this bill, an injured plaintiff in a civil action who seeks disclosure of a confidential physical/mental examination report ordered under section 704-404 would be required to show that the report is “necessary for the conduct of the proceedings before [the court] and that failure to make the disclosure would be contrary to the public interest.” Thus, while criminal cases are prosecuted in the “public interest,” not all civil actions are brought in the “public interest.” Hence, this is too harsh a standard for disclosure, particularly in a civil action where the burden of proof is less stringent than in a criminal case. Instead, the court should use a “good cause” standard to determine whether the confidential report should be disclosed.

HAJ suggests the following revisions to H.B. No. 2572, which also includes other technical changes:

“(10) Except as provided in this section, physical or mental health examination reports and supporting documents submitted to the court pursuant to this section shall be kept confidential and shall not be disclosed by any person. If the physical or mental health examination report or testimony by any of the examiners is admitted into evidence in a contested hearing held pursuant to section 704-405 and 704-410, the report shall not be deemed confidential and shall be maintained in the public record. Any criminal or civil court may direct disclosure of a confidential physical or mental health examination report submitted pursuant to this section to persons or entities other than those identified in this section upon a showing of good cause.

“(11) For purposes of this section "dispositive orders" are defined as any orders that affect the legal status of the defendant, including orders for examination, orders finding defendant fit to proceed, orders finding defendant unfit to proceed, orders acquitting defendant pursuant to section 704-411, orders concerning discharge, conditional release and modification of conditional release, after acquittal and commitment pursuant to sections 704-412, 704-413, 704-414, and 704-415, and orders of civil commitment in lieu of prosecution or sentence pursuant to section 706-607.”

HAJ recognizes that certain types of information, such as personal identifiers like social security numbers and personal information about family members, should be withheld from disclosure. However, HAJ opposes this bill as written because it goes too far. It unnecessarily restricts access to physical or mental health examination reports prepared in a criminal case, even after the contents have been publicly disclosed, and

creates a harsher standard for disclosure in another action, particularly a civil action. HAJ requests the bill be amended as suggested above. Thank you for the opportunity to testify.