



**TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2009**

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ON THE FOLLOWING MEASURE:

S.B. NO. 1044, RELATING TO ATTORNEYS.

**LATE**

BEFORE THE:

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, February 11, 2009 TIME: 8:30 AM

LOCATION: State Capitol, Room 229

TESTIFIER(S): Mark J. Bennett, Attorney General  
or Lance M. Goto, Deputy Attorney General

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Chair Baker and Members of the Committee:

The Department of the Attorney General opposes this bill.

The stated purpose of this bill is to create exceptions to the unauthorized practice of law offense for certain licensed professionals who provide services within the scope of their license.

Section 1 of the bill defines the "practice of law" as follows:

(b) For the purposes of this section, "practice of law" means the provision of professional legal advice or services by a person, firm, association, or corporation. "Practice of law" does not include the provision of services by a person, firm, association, or corporation licensed or authorized under chapters 431, 453, 464, 466, or 467; provided that the person, firm, association, or corporation acts according to the terms of the license or authorization and does not provide or profess to provide professional legal advice, services based on legal competency, or standing in the law.

(Emphases added.) This definition raises several concerns. It limits the practice of law to the provision of "professional" legal advice or services, but the term "professional" is not defined. It could mean that a person practices law only if engaged in the business of providing legal advice and services and charging a fee specifically for legal advice and services. Such a definition would make the offense of unauthorized practice of law very limited in application.

Furthermore, the definition creates an exclusion for certain licensees who act according to the terms of their license and do "not provide or profess to provide professional legal advice, services based on legal competency, or standing in the law." This is overly broad and ambiguous; the "terms of a license" do not necessarily limit licensees to specific conduct. And because the term "professional" is not defined, an exclusion for licensees who do "not provide or profess to provide professional legal advice" has little meaning. The phrase "based on legal competency, or standing in the law" is equally unclear.

This definition will make it extremely difficult to enforce the offense of unauthorized practice of law.

Additionally, this bill creates unnecessary exceptions for certain professions, and by doing so it greatly reduces the effectiveness of section 605-14.

The bill provides exceptions for insurers, physicians or osteopathic physicians, professional engineers, architects, land surveyors, landscape architects, certified public accountants, public accountants, real estate brokers, and real estate salespersons. In each instance, the licensees are excluded from the unauthorized practice of law when providing services within the scope of their license. This exclusion is overly broad and ambiguous; licensing provisions do not usually identify all of the specific conduct that is authorized by the license.

The existing exception for licensed activity in the definition of the unauthorized practice of law offense is adequate. Section 605-14 defines the unauthorized practice of law as follows:

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. Nothing 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.

(Emphasis added.)

Section 605-14 currently allows licensed or authorized persons to practice within their professions, and clearly permits any party to a transaction to prepare or use any legal or business form or document.

In enacting section 605-14, the Legislature declined to further define the unauthorized practice of law, stating:

The question has been raised whether the term, "practice of law", appearing in section 1 of the bill, should be defined. A majority of the statutes in this field do not attempt to define the term "practice of law", just as statutes generally do not attempt to define certain legal terms which through the centuries have come into being . . . . Attempts 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.

House Standing Committee Report No. 612 on House Bill No. 811, 28th Legislature, Territory of Hawaii (1955).

While choosing not to define the "practice of law," the Legislature also provided guidance by stating:

It is general knowledge that the practice of law is not limited to appearing before courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party, affecting the legal rights (whether concerning person or property) of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy. The question whether the one giving such advice receives any fee therefore is immaterial.

Senate Standing Committee Report No. 700 on House Bill No. 811, 28th Legislature, Territory of Hawaii (1955).

We respectfully requests that this bill be held.

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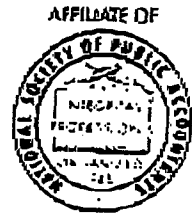


## HAWAII ASSOCIATION OF PUBLIC ACCOUNTANTS

Organized August 7, 1943

P.O. BOX 61043

HONOLULU, HAWAII 96839



**Before the Committee on Commerce and Consumer Protection**

**LATE**

**Wednesday, February 11, 2009 at 8:30 a.m.  
Conference Room 229**

**Re: Support for SB1044, with Amendment  
Relating to Attorneys**

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

**Chair Baker, Vice Chair Ige, and Members of the Committee:**

I am a CPA and attorney. I practice public accounting as a principal of Niwao & Roberts, CPAs, a P.C., a CPA firm on Maui. I am a past state president, current board member and legislative committee co-chairperson for the Hawaii Association of Public Accountants (HAPA), an association that represents local public accounting practitioners (primarily CPA firm owners and staff) throughout the State of Hawaii. I am the National Society of Accountants Governor of District XI, serving on the national governing board of this organization. I am also a member and past director of the HSCPA and a member of the AICPA.

HAPA (and I) support SB1044 which clarifies that certain licensed professionals who provide services within the scope of their licensed professions are not considered to be practicing law. SB1044 defines the "practice of law" to protect licensed professional activity at a time when the Hawaii Supreme Court is considering new proposed rules defining the "unauthorized practice of law".

With respect to certified public accountants (CPAs) and public accountants (PAs), HAPA asks that there be additional clarification that CPAs and PAs would not be considered to be practicing law if they represent clients as permitted by the Internal Revenue Service, the Hawaii State Department of Taxation, other federal, state and local authorities, and in hearings before the Board of Review in Hawaii. CPAs and PAs currently represent clients before the Internal Revenue Service, the Hawaii State Department of Taxation, other federal, state and local authorities, and the Board of Review in Hawaii, although this is not specifically provided for in the definition of public accounting practice.

Under the Hawaii Revised Statutes §466-3 definition, " 'Practice of public accountancy' means the performance or the 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 services 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."

The Hawaii Revised Statutes definition of public accounting only provides generally for 1) the preparation of tax returns or 2) the furnishing of advice on tax matters. Accordingly, HAPA asks for an amendment to SB1044 to clarify that representation before the IRS and the various federal, state and local authorities, including the Board of Review in Hawaii, does not constitute the practice of law.

**Suggested amended language is noted in bold as follows:**

"§466-5 License of certified public accountant.

- (n) A certified public accountant who possesses a valid unrevoked license and a valid unrevoked permit to actively engage in the practice of public accountancy under this chapter and applicable rules shall not be deemed to be engaged in the practice of law when providing services within the scope of the certified public accountant's license and permit. In addition, a certified public accountant with a valid license and a permit to practice shall not be deemed to be engaged in the practice of law when representing clients before the Internal Revenue Service, the Board of Review in Hawaii, and various federal, state, and local authorities with respect to tax, payroll, and financial reporting and disclosure matters."

In addition, a similar amendment should be made for public accountants as follows:

§466-6 License of public accountant.

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- (d) A public accountant who possesses a valid unrevoked license and a valid unrevoked permit to actively engage in the practice of public accountancy under this chapter and applicable rules shall not be deemed to be engaged in the practice of law when providing services within the scope of the public accountant's license and permit. In addition, a public accountant with a valid license and a permit to practice shall not be deemed to be engaged in the practice of law when representing clients before the Internal Revenue Service, the Board of Review in Hawaii, and various federal, state, and local authorities with respect to tax, payroll, and financial reporting and disclosure matters."

Thank you for this opportunity to testify. If you have any questions concerning the above, please do not hesitate to call me at (808) 242-4600, ext. 224.

Respectfully submitted,



Marilyn M. Niwao, J.D., CPA  
HAPA Legislative Co-chairperson and board member