HSBA
Hawaii State Bar Association

Testimony of the
HAWAII STATE BAR ASSOCIATION

TO: Honorable Marcus R. Oshiro, Chair
Honorable Marilyn B. Lee, Vice Chair
House Committee on Finance

FROM: Carol K. Muranaka ckm
President, Hawaii State Bar Association

RE: **House Bill 1875, House Draft 1 (Foreclosures)**

Hearing: Wednesday, February 29, 2012, at 10:00 a.m.

Mr. Chair, Vice Chair Lee, and Members of the Committee, I have been authorized by the Board of the Hawaii State Bar Association to offer these comments regarding the proposed provision relating to attorney affirmations in judicial foreclosure cases.

The HSBA takes no position on H.B. No. 1875, HD 1, as a whole, with the exception of serious concerns we have about the proposed provision relating to attorney affirmation in judicial foreclosure, the section highlighted in the attachment hereto.

A note in the draft legislation indicates the apparent legislative intent of the proposed affirmation:

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Note: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

The provision is of concern to the HSBA because:

1. Existing safeguards embedded in the Hawai`i Rules of Professional Conduct and the Hawai`i Rules of Civil Procedure (Rule 11), promulgated by the Hawai`i Supreme Court that govern the conduct of attorneys, are adequate to address the concerns of the proposed provision;

2. The proposed provision improperly affects the client's right of confidentiality by forcing the attorney to be a material witness who, under the Hawai`i Rules of Professional Conduct, may be forced to withdraw from representation on conflict of interest grounds and negatively affects the attorney/ client relationship, by forcing the litigating attorney for the creditor to potentially be some kind of an expert witness as to the ultimate factual issue in the case if an issue of the validity of the contract is involved; and

3. Does not accomplish the apparent legislative intent.

I. <u>Existing safeguards</u>

The standards for attorney conduct within the attorney-client relationship and before the courts have largely been the province of ethics rules promulgated by

the Judiciary, not the Legislature. Stepping into this area by the Legislature raises serious concerns as to separation of powers.

Existing rules prohibit an attorney from engaging in "frivolous action." Similarly, court rules expose an attorney to monetary sanctions and penalties for engaging in frivolous conduct. Haw. R. Civ. P. Rule 11 and F. R. Civ. P. Rule 11. Ethics rules define as a "frivolous action" (as to factual matters) where "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Comment [2], Haw. R. P. C. 3.1.

In representing a client before a tribunal, ethics rules dictate that,

> (a) a lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; [or]
>
> * * *
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences.

Haw. R.P.C. 3.3.

The "Scope" discussion to the Hawai`i Rules of Professional Conduct also makes clear that violation of the Rules exposes an attorney to serious sanctions:

> [5] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
>
> [6] Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.
>
> [7] Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege except insofar as those rules provide otherwise. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled

> disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The proposed requirement of an attorney affirmation appears to be based on a perception that the sanctions rules in place are insufficient to deter alleged frivolous conduct that supposedly pervades the foreclosure crisis. Yet there is no empirical or credible evidence that increasing an attorney's duty of inquiry and his/her exposure (civil, criminal and professional) will ameliorate the abuses that are the focus of the proposed new regulation. There are no other statutes or causes of action where attorneys are directly held to a standard higher than non-frivolousness – a standard not clearly or objectively defined. The danger here is that the attorney's zealous representation of the client can be dulled by the attorney's desire to protect him/herself from liability, which in turn will have a negative impact on that attorney's obligation to faithfully represent the client.

II. Violation of attorney client confidentiality and material witness/party to foreclosure litigation

More importantly, the proposed required affirmation requires the attorney to divulge the contents of communication with a representative(s) of his/her client. It

is difficult to perceive the rationale for that intrusion into the principle of confidentiality that is a cornerstone of the attorney client relationship.

A standard verification of a pleading requires the signer to swear to the accuracy of the *pleading*, but not the factual accuracy of (presumably) all "documents and records" relating to the case.

- Must the representative(s) examine the original mortgage and each check forwarded by the mortgagor and the postmark or other proof of the date of delivery (which goes to the calculation of late charges, *etc.*)? Is the representative to audit the accounts listed to attest to the accuracy of all entries, to assure that there were no typographical or other unintentional errors?
- More fundamentally, the question is how does the required affirmation cure the problem identified in the Note? If client representatives are willing to submit false documents under oath, why wouldn't they similarly lie to their attorney, when questioned about what records they reviewed and whether the contents of notarized documents are accurate?
- And if it turns out that the plaintiff's papers are somehow inaccurate, notwithstanding the client's statement of accuracy to the attorney, has the attorney been placed in a position that he/she will potentially be a witness in a perjury prosecution against his/her own client?

But, in addition to the client's statement to the lawyer that those writings were accurate and proper, the required affirmation requires more: the lawyers "own inspection and other reasonable inquiry." Apparently, when it comes to foreclosure cases, an attorney is not entitled to rely on his/her client alone; the attorney is required to inspect the client's records, and to make other inquiry reasonable under the circumstances (beyond the inquiries specifically required to be reported on in the affirmation). The required affirmation creates a level of distrust that is not healthy for the attorney-client relationship.

It would seem that micro-managing the attorney-client relationship via the required affirmation (and the underlying communications required to be reported to the court therein) injects potential adversity into the attorney-client relationship and erodes the privilege, but accomplishes little to eliminate robo-signatures, false swearing, and inadequate review on the facts by client representatives.

III. Failure to accomplish apparent legislative intent

The proposed affirmation does not accomplish the stated legislative intent. There are other steps that can be taken to curtail the abuses that led to consideration of the required affirmation.

First, without any change in law or regulation, those who misuse or corrupt the notarization process can be prosecuted or otherwise sanctioned. Next, the courts can require a more detailed submission on motions for default or summary

judgment, to clearly allege and document standing and all of the elements of a *prima facie* case. Expanding the availability of free counsel for needy foreclosure defendants and requiring notice of the right of counsel in foreclosure summonses would reduce the number of defaults. Represented defendants are more likely to raise issues such as lack of standing or other factual disputes.

Until these and other steps are taken to eliminate the reported abuses, we believe that the current draft requirement for an attorney affirmation should be deleted. Other means of attacking the problems, some of which we have suggested, should be tested before adoption of a procedure that violates the separation of powers, fundamentally impacts the attorney-client relationship, exposes the attorney to additional liabilities, and at the end of the day does not accomplish the stated legislative intent.

Thank you for considering our testimony.

4. By adding a new section to part IA, as designated in section 11 of this Act, to be appropriately designated and to read:

"§667- Attorney affirmation in judicial foreclosure. Any attorney who files on behalf of a plaintiff seeking to foreclose on a residential property under this part shall sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted, under penalty of perjury and subject to applicable rules of professional conduct. The affirmation shall be in substantially the following form:

____ CIRCUIT COURT OF THE STATE OF HAWAII

_____

Plaintiff,

AFFIRMATION

v.

Defendant(s)

Mortgaged Premises:

_____

_____

Note: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

* * *

[_____], Esq., pursuant to Hawaii Revised Statutes §667- ___ and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the state of Hawaii and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.

2. On [date], I communicated with the following representative or representatives of Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

Name	Title
_____	_____
_____	_____
_____	_____

3. Based upon my communication with [persons specified in item 2], as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law and that plaintiff has legal standing to bring this foreclosure action. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.

4. I am aware of my obligations under Hawaii Rules of Professional Conduct.

_____

DATED:

N.B.: Counsel may augment this affirmation to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose."

PART III

SECTION 4. Section 454M-10, Hawaii Revised Statutes, is amended to read as follows:

"§454M-10 Penalty. Any person who violates any provision of this chapter may be subject to an administrative fine of [~~at least $1,000 and~~] not more than $7,000 for each violation; provided that $1,000 of the aggregate fine amount shall be deposited into the mortgage foreclosure dispute resolution special fund established pursuant to section 667-86."

SECTION 5. Section 501-151, Hawaii Revised Statutes, is amended to read as follows:

"§501-151 Pending actions, judgments; recording of, notice. No writ of entry, action for partition, or any action affecting the title to real property or the use and occupation thereof or the buildings thereon, and no judgment, nor any appeal or other proceeding to vacate or reverse any judgment, shall have any effect upon registered land as against persons other than the parties thereto, unless a full memorandum thereof, containing also a reference to the number of certificate of title of the land affected is filed or recorded and registered. Except as otherwise provided, every judgment shall contain or have endorsed on it the State of Hawaii general excise taxpayer identification number, the federal employer identification number, or the last four digits only of the social security number for persons, corporations, partnerships,