

SCR 161



Democracy Under the Rule of Law is Based on Public Access

April 10, 2012

Re: SCR 161, Requesting the Judiciary to Ensure that the Access to Justice Commission's Task Force on Adjunct Providers of Legal Services Includes at Least as Many Non-Lawyers as Lawyers and Representatives of Certain Groups. (Senate Committee on Judiciary and Labor: April 11, 2012, 10:30 AM, Conference Room 016)

Dear Chair Hee, Vice-Chair Shimabukuro, and Judiciary Committee members:

Open Law Alliance supports S.C.R. 161. It makes the modest and reasonable request that the Judiciary ensure that the composition of the new Task Force on Adjunct Providers ("Task Force") be appropriately representative. The Task Force was created by the Hawai'i Access to Justice Commission ("Commission") on March 14, 2011 "to substantively examine and recommend the fundamental guiding conceptual parameters requisite for the more effective adjunct provider roles contemplated in *The Community Wide Action Plan* Action Step 6.a and Section (b)(10) of Rule 21 of the *Rules of the Supreme Court of the State of Hawai'i* . . . including the types of unmet need that may be addressed by the adjunct provider, the types of limited practice that may be most effective, and the types of education and regulation that may be required." [Option One, January 26, 2011 committee report to the Commission] S.C.R. 161 simply requests that this Task Force include at least as many non-lawyers as lawyers, and include at least one representative of consumer groups, social service providers familiar with the consequences of unmet basic human civil legal needs, evolved regulated adjunct providers such as nurses or paramedics, and offices within the Department of Commerce and Consumer Affairs familiar with the regulation of existing specialist adjunct providers of legal services. Implicit is that adjunct providers themselves, such as paralegals, will also be represented.

This is consistent with the principle of fair representation observed in the composition of any body whose recommendations will affect the public interest, and is necessary given the difficult history of the adjunct provider approach to improving access to justice since its inclusion in the 2007 *Community Wide Action Plan: Ten Action Steps to Increase Access to Justice in Hawai'i by 2010*, the fate of recommendations in 1999 for more effective roles for adjunct providers in the public interest on the Hawai'i State Bar Association Task Force on Access to Justice, and the fate of 2001 recommendations of the Task Force on Paralegal Certification, and given the attempts in 2007 to define and restrict "practice of law" in a manner that would significantly exacerbate Hawai'i's access to justice crisis.

Enclosed with the hard copy of this letter is a copy of some of the many studies and law review articles affirming the effectiveness in the public interest of a regulated adjunct provider in the legal field to fulfill a function somewhat analogous to that served by evolved regulated adjunct providers such as nurses, paramedics, and others in the medical field. Established approaches to improving access such as increased *pro bono* and *pro se* facilitation will always be very important, but are clearly far from adequate to the level of unmet need demonstrated in Hawai'i's 1993 and 2007 need assessments. The long neglected adjunct provider approach to improving access to legal services certainly merits substantive and fair examination on the Commission's Task Force on Adjunct Providers.

Encls.

R. Elton Johnson, III
Open Law Alliance



HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

Gillian K. Hadfield
Eli Goldston Visiting Professor of Law (Harvard)
Kirtland Professor of Law and Professor of
Economics (University of Southern California)

April 10, 2012

Senate Committee on Judiciary and Labor
Hawai'i State Legislature

RE: S.C.R. No. 161: *A Resolution Requesting the Judiciary to Ensure that the Access to Justice Commission's Task Force on Adjunct Providers of Legal Services Included at Least as Many Non-Lawyers as Lawyers and Representatives of Certain Groups*

Senate Committee on Judiciary and Labor: April 11, 2012, 10:30 AM
Conference Room 016

Dear Chair Hee, Vice-Chair Shimabukuro and Judiciary Committee members:

I write in strong support of S.C.R. No. 161 and urge you to pass it. The problem of access to justice in the United States is at critical levels and my research and professional work demonstrates that serious solutions to the problem **absolutely require** an expansion in the range of ways in which ordinary Americans can secure assistance with their legal problems.

I commend the State of Hawai'i in establishing this important Task Force to address the potential role for adjunct providers of legal services. To succeed, I believe it is imperative to expand the membership of this Task Force well beyond the limits of the current legal profession by appointing at least as many members who are not lawyers as those who are.

This is essential because, as a legal educator, legal scholar and advocate for a rethinking among lawyers about the structure of our profession, it has become very clear to me that lawyers are trained early on to see the problems of legal access as problems only lawyers can solve. As I will explain in this testimony, lawyers alone can never solve the problem. This is not because lawyers lack the dedication and sincere commitment necessary to address access to justice obstacles; far from it. It is because the range of options that ordinary Americans need, and to which they are entitled, covers a much broader range in terms of cost and expertise than it makes sense for uniquely-trained and expensively-educated lawyers to provide.

By including at least as many ‘non-lawyers’ on the Task Force as lawyers, the Judiciary Committee can set the stage for a deeper, more creative, and more impactful inquiry and the production of real solutions.

Consider this: we do not speak of “non-doctors” as we speak of “non-lawyers”. “Non-doctors” are nurses, nurse practitioners, physical therapists, chiropractors, homeopaths, pharmacists, radiologic technologists, and more. We could not have a healthy medical system without this range of trained and caring professionals, working together in different roles to serve patient’s medical needs. We do not think of a nurse practitioner providing immunizations in a clinic as engaged in the “unauthorized practice of medicine.” Our schools can employ nurses to care for children who become ill without the risk of being engaged in the “unauthorized practice of medicine.” But this is not true of the legal system. Because of overly rigid approaches, governed by the profession, to the “unauthorized practice of law”, *our legal system lacks entirely this range of different professionals to work on different types and elements of legal needs.* A licenses paralegal with expertise in filing for a simple divorce or bankruptcy cannot help people *who would otherwise have no help at all* to complete forms or understand the process. A community organization cannot hire lawyers to assist people with legal needs *who otherwise would have no help at all* such as those facing eviction or the elimination of child support.

By including the full-range of potential providers and perspectives on The Access to Justice Commission’s Task Force, you increase many-fold the likelihood that a person in Hawai’i who is facing eviction, having difficulty securing disability benefits, signing a complex sub-prime mortgage document, filing for bankruptcy, or seeking to protect a relationship with a child in family or dependency proceedings will receive at least some assistance in these settings. Today, the vast majority navigate these processes alone: numerous studies show that in states throughout this country as many as 90% of tenants in housing court and 85% of families in family court lack any legal assistance. The vast majority of Americans have nowhere to turn for the kind of legal advice that those with resources consider essential: help in understanding the implications of filling out a legal form or signing a legal document.

The legal profession cares about these problems but is blinkered in its view of where the solutions lie. Bringing “non-lawyers” into the conversation will help to remove those blinders.

The access to justice problem in the U.S. is largely conceptualized by the profession as a problem with ethical commitments of individual lawyers to assist the poor and the failure of federal and state bodies to provide adequate levels of funding to non-profit legal service providers.

However--although more pro bono and more funding are always needed and are very welcome--these are not the answer to the access to justice problem. Pro bono currently accounts for at most 1 to 2 percent of legal effort in the U.S.. Even if every lawyer did 100 additional hours per year of pro bono work, this would amount to about an hour per dispute-related problem per household. And the cost of even that extra hour per dispute-related problem per household would be about \$20 billion annually at \$200 per hour (the average hourly rate for solo and small-firm practitioners who serve individual clients)—which would require a 20-fold increase in relevant U.S. funding levels.

One of the causes of the access to justice problem is the restriction of available services. Economic, political, and social relationships in the U.S. are structured by the legal system, and yet we lack a robust system of legal inputs that makes that legal system a genuine basis upon which everyday lives are structured. Those concerned with access to justice, including Deborah Rhode, David Luban, and Barlow Christensen, for example, have long pointed out that the extreme approach to unauthorized practice of law in the U.S. drastically reduces the ability of ordinary people to obtain assistance with their legal needs. And were legal resources more available, they could be drawn upon to prevent or resolve problems ex ante rather than only after they have become more severe.

Marc Galanter has written eloquently of how our legal system provides ample means for protecting the interests of corporate “artificial” persons. It is critical for non-corporate, ordinary human persons to have access to services that address their legal needs, beyond pro bono and welfare funding. The vitality of a market democracy premised on the rule of law depends on more than a minimal provision for those in desperate need at poverty levels of income. It depends on the success with which law manages to serve in fact as the fundamental organizing principle of the institutions and relationships of the ordinary citizen. Is law routinely available, for example, to consult before deciding whether to sign a mortgage that creates a large risk of balloon payments, or to evaluate whether one has been treated in a legal manner by an employer? Or is law merely alive in moments of crisis?

The access to justice problem in the U.S. legal system is less an ethical problem than a market regulatory problem. It is not a matter of how to increase pro bono or legal aid (though we should do that too); those are ultimately mere drops in the bucket on the order of a few percentage points of total legal effort and resources. The policy authority of the bar and the Judiciary in the legal field implies political accountability, but we lack the necessary mechanisms for policy change because the bar and the judiciary have largely made regulatory decisions for their profession in a vacuum.

SCR 161 seeks both a more open process of decision-making and a more effective delivery system. I hope that the Senate Committee on Judiciary and Labor will affirm the potential benefits for those whose basic legal needs have long gone unmet, and sees fit to pass this resolution.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gillian K. Hadfield".

Gillian K. Hadfield
Eli Goldston Visiting Professor of Law (Harvard Law School)
Richard L. and Antoinette Schamoi Kirtland Professor of Law (USC Gould School of Law)
Professor of Economics (University of Southern California)

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: barbarapolk@hawaiiintel.net
Subject: Testimony for SCR161 on 4/11/2012 10:30:00 AM
Date: Monday, April 09, 2012 7:56:14 PM

Testimony for JDL 4/11/2012 10:30:00 AM SCR161

Conference room: 016
Testifier position: Support
Testifier will be present: No
Submitted by: Barbara Polk
Organization: Individual
E-mail: barbarapolk@hawaiiintel.net
Submitted on: 4/9/2012

Comments:

I strongly support passage of SCR 161. In our increasingly legalistic society, the opportunity for people to obtain counsel in civil cases is critical. Few low income people have counsel available to them, resulting in their loss of income and homes, and increasing debt levels. It is not fair that those with the least are the least able, in our court system, to hold onto what they have.

Although it is the prerogative of the Judiciary to decide on the composition of its task force, the legislature can help be sure that all options are considered by passing this bill to encourage expansion of the task force to include consumers and others with knowledge of the legal needs of lower income people.

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: breaking-the-silence@hotmail.com
Subject: Testimony for SCR161 on 4/11/2012 10:30:00 AM
Date: Monday, April 09, 2012 9:45:00 AM

Testimony for JDL 4/11/2012 10:30:00 AM SCR161

Conference room: 016
Testifier position: Support
Testifier will be present: No
Submitted by: Dara Carlin, M.A.
Organization: Individual
E-mail: breaking-the-silence@hotmail.com
Submitted on: 4/9/2012

Comments:



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Senate Committee on Judiciary and Labor
Hawai'i State Legislature

RE: S.C.R. No. 161: *A Resolution Requesting the Judiciary to Ensure that the Access to Justice Commission's Task Force on Adjunct Providers of Legal Services Included at Least as Many Non-Lawyers as Lawyers and Representatives of Certain Groups*

Senate Committee on Judiciary and Labor: April 11, 2012, 10:30 AM
Conference Room 016

Dear Chair Hee, Vice-Chair Shimabukuro and Judiciary Committee members:

I write in strong support of S.C.R. No. 161 and urge you to pass it. The problem of access to justice in the United States is at critical levels and my research and professional work demonstrates that serious solutions to the problem **absolutely require** an expansion in the range of ways in which ordinary Americans can secure assistance with their legal problems.

I commend the State of Hawai'i in establishing this important Task Force to address the potential role for adjunct providers of legal services. To succeed, I believe it is imperative to expand the membership of this Task Force well beyond the limits of the current legal profession by appointing at least as many members who are not lawyers as those who are.

This is essential because, as a legal educator, legal scholar and advocate for a rethinking among lawyers about the structure of our profession, it has become very clear to me that lawyers are trained early on to see the problems of legal access as problems only lawyers can solve. As I will explain in this testimony, lawyers alone can never solve the problem. This is not because lawyers lack the dedication and sincere commitment necessary to address access to justice obstacles; far from it. It is because the range of options that ordinary Americans need, and to which they are entitled, covers a much broader range in terms of cost and expertise than it makes sense for uniquely-trained and expensively-educated lawyers to provide.

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Consider this: we do not speak of “non-doctors” as we speak of “non-lawyers”. “Non-doctors” are nurses, nurse practitioners, physical therapists, chiropractors, homeopaths, pharmacists, radiologic technologists, and more. We could not have a healthy medical system without this range of trained and caring professionals, working together in different roles to serve patient’s medical needs. We do not think of a nurse practitioner providing immunizations in a clinic as engaged in the “unauthorized practice of medicine.” Our schools can employ nurses to care for children who become ill without the risk of being engaged in the “unauthorized practice of medicine.” But this is not true of the legal system. Because of overly rigid approaches, governed by the profession, to the “unauthorized practice of law”, *our legal system lacks entirely this range of different professionals to work on different types and elements of legal needs.* A licenses paralegal with expertise in filing for a simple divorce or bankruptcy cannot help people *who would otherwise have no help at all* to complete forms or understand the process. A community organization cannot hire lawyers to assist people with legal needs *who otherwise would have no help at all* such as those facing eviction or the elimination of child support.

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Gillian K. Hadfield
Eli Goldston Visiting Professor of Law (Harvard Law School)
Richard L. and Antoinette Schamoi Kirtland Professor of Law (USC Gould School of Law)
Professor of Economics (University of Southern California)

From: [Lew Andrews/Laura Warfield](#)
To: [JDLTestimony](#)
Cc: sengaluteria@capitol.hawaii.gov
Subject: Support SCR 161 (4/11/12, 10:30 a.m., Room 016)
Date: Tuesday, April 10, 2012 9:43:53 AM

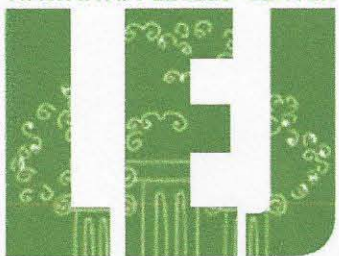
I am writing in support of SCR 161, Requesting the Judiciary to Ensure that the Access to Justice Commission's Task Force on Adjunct Providers of Legal Services Includes at Least as Many Non-Lawyers as Lawyers and Representatives of Certain Groups (Senate Committee on Judiciary and Labor: April 11, 2012, 10:30 AM / Conference Room 016).

I have tremendous respect for lawyers -- I am a paralegal, and have spent my entire adult life working for them. But lawyers alone cannot solve the tremendous problem of unmet legal needs that lower- and middle-income people face. Obviously, the task force needs to include some lawyers, but I can see no reason except turf protection for it to include only lawyers. It seems clear that the proposed categories of non-lawyer representatives can only benefit this endeavor.

Thank you for your attention to this issue.

Best regards,

Laura Warfield
55 S. Kukui Street, D-2110
Honolulu, HI 96813
landrews@lava.net
521-6733 (home)
228-3629 (cell)

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Executive Director

Victor Geminiani, Esq.

Date: April 9, 2012

To: Senator Clayton Hee, Senate Chair, Judiciary and Labor Committee

From: Victor Geminiani, Executive Director

Hawaii Appleseed Center for Law and Economic Justice

Re: Testimony in support of SCR 161

Scheduled for a hearing on Wednesday, April 11, 2012 at 10:30 am

Dear Sen. Hee and committee members;

Thank you for an opportunity to testify in support of SCR161 which would ensure that the Access to Justice Commission's Task Force on Adjunct Providers of Legal Services includes at least as many non-lawyers as lawyers.

My name is Victor Geminiani and I am the Executive Director of the Hawaii Appleseed Center for Law and Economic Justice (formerly Lawyers for Equal Justice). Hawaii's Appleseed Center for Law and Economic Justice (LEJ) is a nonprofit, 501(c)(3) law firm created to advocate on behalf of low income individuals and families in Hawaii on civil legal issues of statewide importance and to complement the assistance provided by existing legal services providers in the state. Our core mission is to help our clients gain access to the resources, services, and fair treatment that they need to realize their opportunities for self-achievement and economic security.

By good fortune, I have spent the past 43 years involved in providing legal services to the low income community, including my time as the executive director of the Legal Aid Society of Hawaii from 1994 till 2005. During my career, I have witnessed the slow erosion of funding and support for representation of poor people in most judicial proceeding regardless of the importance in their lives of the issues confronting them. The sad fact is that less funding is available per capita today than was allocated in 1980 to help those most in need of protections and representation and yet without the resources necessary to access that critical help.

In partnership with UH Richardson School of Law and Legal Aid, during the summer and fall of 2010 LEJ has observed 200 eviction proceedings in district courts in both the urban and rural parts of Oahu. Of the cases observed, 70% of the landlords were represented by counsel while only 4% of the tenants had representation. More disturbing, tenants defaulted in 70% of the eviction filings without ever contesting any of the claims. Even more disturbing but too be expected, only 3 % of the cases filed resulted in the tenant remaining in possession of their housing. This was so despite a multitude of defenses available to tenants such as the landlord's failure to maintain the services or conditions of the property, insufficient notice to vacate or process of service, proof of payment of all rent owed, no breach of material conditions of the lease etc.

There is a well documented significant level of trauma directly caused by a wrongful eviction. These include the emotional and financial costs of dislocation from a community, damage to credit ratings, the uncertainty and stress of finding replacement affordable housing, severe damage to a child's education development and the real prospect among the low income of becoming homeless.

We will have to begin experimenting with ways of providing quality based assistance other than exclusively through lawyers if we are ever going to change the current dynamic. People in crisis who have valid and strong defenses in certain civil actions should have the option of gaining that representation from trained, insured and credentialed adjunct providers. This is an issue that has been recommended repeatedly to the Hawaii State Bar Association over the past 15 years but has been ignored or deflected each time it has been considered. The current effort by the Access to Justice Commission unfortunately will likely end in the same result unless a healthy number of consumers, non lawyers and advocates for a more responsive system are included in the committee currently considering this initiative.

We strongly urge you to pass SCR161 and urge the Access to Justice Commission to undertake a transparent and objective process in considering the creation of an adjunct provider classification.

Aloha,



Victor Geminiani,
Executive Director

TESTIMONY IN SUPPORT OF S.C.R. no. 161

Dear Chair Hee, Vice-Chair Shimabukuro, and Judiciary Committee members:

I am Susan Jaworowski, attorney and director of the Kapi'olani Community College paralegal program. I am writing this testimony as a private individual, but my job is relevant to this issue, as I mention below.

The right of low-income people in Hawai'i to access civil legal services is not, and will not be, met in the foreseeable future, by attorneys alone. A 2007 assessment of the need for legal services in Hawai'i found that fewer than 1 in 4 of Hawai'i's low- and moderate-income people get help when they have a civil legal need, and fewer than 1 in 3 of those who seek help from non-profit public interest legal service providers, such as Legal Aid, can be served.

The Access to Justice Commission is creating a task force on adjunct providers to examine and develop recommendations to increase the effectiveness of adjunct providers of civil legal services, including paralegals, including the types of unmet need that may be addressed by the adjunct provider, the types of limited practice that may be most effective, and the types of education and regulation that may be required.

This Concurrent Resolution requests the Judiciary to ensure that the Commission's task force includes at least as many non-lawyers as lawyers to ensure appropriate representation in this study and make recommendations regarding the neglected adjunct provider approach to improving access to justice.

The need for non-lawyers on the task force is apparent, especially as it relates to the potential for paralegals to provide greater service to the legal community. Lawyers in general are not familiar with the scope of training of paralegals. They may understand how a specific paralegal acts in their office, but not the education of paralegals in a degree-granting program, like the two-year A.S. degree offered through the KCC paralegal program, or the various levels of rigorous professional certification offered through national paralegal organizations. Ensuring representation on the commission of a sizeable proportion of paralegals and other non-lawyers will provide a wider range of information to form the basis of the very powerful recommendations that will come from this task force.

Sincerely yours,

Susan Jaworowski