



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

LATE TESTIMONY

January 28, 2013

The Honorable Clayton Hee, Chair
The Honorable Maile S. L. Shimabukuro, Vice Chair
Honorable Members
Senate Committee on Judiciary and Labor
Hawaii State Capitol, Room 407
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on SB 1010, Relating to Legal Services**

Hearing: January 29, 2013, 9:30 a.m.
State Capitol, Conference Room 016

Written Testimony From: Hawaii State Ethics Commission

Thank you for considering the Hawaii State Ethics Commission's comments regarding Senate Bill No. 1010, Relating to Legal Services. The Commission is concerned about what appears to be unintentional conflicts between the bill and the State Ethics Code, specifically sections 84-14(a)(2), 84-13, and 84-13(3), Hawaii Revised Statutes ("HRS").

This bill, among other things: (1) provides that a deputy attorney general, other than the attorney general's first deputy, may provide pro bono legal services in the "sole discretion" of the attorney general; and (2) declares the pro bono legal services to be for a public purpose, authorizing the use of the department of the attorney general's resources to provide the pro bono legal services.

Deputy attorneys general are state employees and thus are subject to the State Ethics Code. The conflicts of interests law in the State Ethics Code, HRS section 84-14(a)(2), prohibits a state employee from taking official action directly affecting a private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other capacity, regardless of whether the employee is paid for those services. Stated differently, if a deputy attorney general is tasked with performing official duties that affect a person for whom or organization for which he is providing pro bono legal services, the State Ethics Code prohibits the deputy attorney

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general from working on the matter in his capacity as a deputy attorney general. To avoid a conflict of interest under the State Ethics Code, he must disqualify himself from working on the matter. Given the general purpose of the State Ethics Code, i.e., to foster public confidence in state government, the Commission suggests that the attorney general, in his sole discretion, should not be allowed to waive a conflict of interest under the State Ethics Code.

To address the concern regarding a possible conflict of interest under the State Ethics Code created by a deputy attorney general's pro bono activities, the Commission suggests that bill be amended to expressly limit the types of pro bono legal services to those that do not and cannot reasonably create a conflict of interest. More specifically, the Commission suggests that subsection (a) of the bill be amended to read as follows (added language in bold):

228-10 Prohibition on private practice of law by the attorney general, first deputy, and other deputies. (a) The attorney general, the attorney general's first deputy, and other deputies shall devote their entire time and attention to the duties of their respective offices. They shall not engage in the private practice of law, ~~nor~~ or accept any fees or emoluments other than their official salaries for any legal services[-]; except that, a deputy, other than the attorney general's first deputy, may provide pro bono legal services in the sole discretion of the attorney general, provided that the pro bono activities do not create an actual or perceived conflict of interest under section 84-14, Hawaii Revised Statutes, and provided further that the activities are conducted in a manner that does not indicate or represent that the attorney is acting on behalf of the Department or in the attorney's official capacity. In exercising the discretion to allow a deputy to provide pro bono legal services, the attorney general may consider, among other things: whether the pro bono representation might create the appearance of a conflict of interest within the department of the attorney general, cast the department of the attorney general in a poor light, create undue burdens within the department of the attorney general, or otherwise interfere with or impede with the mission of the department of the attorney general. Pro bono legal services provided by a deputy shall not be construed to create any client relationship, duty, or legal obligation between the recipient of the pro bono legal services and the department of the attorney general. Pro bono legal services provided by a deputy shall not be construed to disqualify, preclude, prevent, impair, or restrict in any manner, either directly or

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indirectly, the department of the attorney general from providing legal services or from fulfilling its duties as described in section 26-7, chapter 28, or as otherwise provided or mandated by law or practice.

SB No. 1010 also declares that pro bono legal services by deputy attorneys general are “for the public purpose and may be appropriately supported with the resources of the department of the attorney general as determined by the attorney general.” The State Ethics Code, specifically HRS sections 84-13, prohibits state employees from using their official positions to secure or grant unwarranted privileges, advantages or treatment for themselves or others. The statute also prohibits state employees from using state time, equipment, or other facilities for private business purposes.¹

While the Commission believes that state resources may be used for legitimate public purposes, the extent to which state resources may be used without running afoul of HRS sections 84-13 and 84-13(3) is determined by the Commission. The Commission is concerned that a bill providing the attorney general with the “sole discretion” to determine who may receive pro bono legal services from deputy attorneys general and for whom state resources may be expended, may be inconsistent with the underlying intent of HRS sections 84-13 and 84-13(3). For instance, the bill will allow the attorney general to approve a deputy attorney general’s use of state resource to provide pro bono legal services to a political party, a family member, or a private for-profit business. The Commission’s concern is not intended to suggest that the attorney general will misuse his discretion; however, to avoid any potential issue, including issues involving preferential treatment, the Commission suggests that the bill identify specific organizations, such as Volunteer Legal Services Hawaii, or specific types of pro bono activities for which the department’s resources may be used.

We appreciate the opportunity to testify on SB No. 1010, Relating to Legal Services. We would like to thank this Committee for its consideration of our testimony.

¹ See HRS section 84-13(3). The State Ethics Code defines a “business” to include a corporation, a partnership, a sole proprietorship, a trust or foundation, or any other individual or organization carrying on a business, whether or not for profit. HRS section 84-3. For example, under the State Ethics Code, the use of state resources to perform volunteer work for a nonprofit organization constitutes a “business purpose.”



Hon. Daniel R. Foley
Associate Judge
Intermediate Court of Appeals
Chair

Jill M. Hasegawa
Vice Chair

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January 28, 2013

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

Re: Senate Committee on Judiciary and Labor
Hearing Date: Tuesday, January 29, 2013
Time: 9:30 a.m.

SB 1010 - Relating to Legal Services

Dear Chair Hee, Vice-Chair Shimabukuro and Members of the Senate Committee on Judiciary and Labor:

On behalf of the Access to Justice Commission (the "Commission"), I am writing to request your **support** for SB 1010 Relating to Legal Services. The Commission, which was created by Rule 21 of the Rules of the Supreme Court of Hawaii on May 1, 2008, was established with the purpose to substantially increase access to justice in civil legal matters for low- and moderate-income residents of Hawaii ("low income Hawaii residents").

The Commission was created in response to the 2007 Assessment of Civil Legal Needs and Barriers of Low- and Moderate-Income People of Hawaii, which found that four out of five low income Hawaii residents do not have their legal needs met and that legal service providers are only able to assist one in three persons who contact them for assistance. The Commission recognizes that in order to increase delivery of legal services to low income Hawaii residents, more involvement by attorneys with pro bono services are needed.

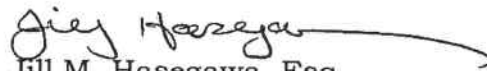
SB 1010 would amend HRS §28-10, to allow deputy attorney generals to provide pro bono legal services within the discretion of the attorney general, and would be a much needed boost to the services provided to low and moderate income residences in Hawaii. Currently government attorneys make up approximately twenty percent of Hawaii's active Bar membership, with over

900 attorneys working at the local, state and federal levels of government. If each of these attorneys were permitted to pro bono services, the impact would be enormous.

I am enclosing for your information a copy of an Access to Justice Commission article entitled Commission Update: Government Pro Bono Policy from the May 2009 Hawaii Bar Journal, discussing the need for government attorneys to do pro bono work, the positive impact that government attorneys providing pro bono services could have, and discussing pro bono activities of other county and federal government attorneys.

The Commission has been hard at work strategizing and implementing various programs to increase attorney involvement with pro bono and to assist the public. One recent successful initiative, which involved a partnership with the Hawaii State Judiciary, the Commission, the Hawaii State Bar Association, and the Legal Aid Society of Hawaii, among others, involved creating Access to Justice "self-help" centers in courthouses across the state, and having volunteer pro bono attorneys on hand to provide basic legal assistance on a variety of matters. Participation in "self-help" clinics or other such programs could greatly benefit if government attorneys were allowed to volunteer. A copy of a recent Hawaii Bar Journal article on these centers is also attached for your reference.

On behalf of the Commission, we urge you to support the passage of SB 1010, which could have an enormous benefit for the people of Hawaii. Thank you.


Jill M. Hasegawa, Esq.
Vice-Chair
Access to Justice Commission

Enclosure(s)



COMMISSION UPDATE: *Government Pro Bono Policy*

by Jill M.
Hasegawa

Government attorneys make up twenty percent of Hawaii's active Bar membership, a significant part of our legal community. A model pro bono policy could help to establish guidelines for government employers and attorneys and encourage government attorneys to engage in pro bono activities. The Big Island example led by Corporation Counsel Lincoln Ashida and Prosecutor Jay Kimura, and the Maui initiative by Corporation Counsel Brian Moto provide leadership in this area. The Hawaii Access to Justice Commission is actively working through its pro bono committee to develop and propose a model pro bono policy for government attorneys in Hawai'i.

—Justice Simeon R. Acoba, Jr.

There are over 900 government attorneys in Hawaii working at the local, state and federal levels of government. These attorneys comprise approximately 20% of the Hawaii State Bar Association's active attorneys. If each of these attorneys contributed a minimum 50 hours of pro bono service each year, the public would benefit from 45,000 hours of much needed service.

In a keynote address on June 19, 2008 to the HBSA Government Lawyers Division, Chief Justice Ronald Moon said:

ALL government attorneys should do pro bono work because...lawyers must "do good" for the poor and disadvantaged to change the public's perception of our profession.

Chief Justice Moon further opined that "the image of lawyers has been and con-

tinues to be at a low ebb based on the results of numerous surveys reported over the past several decades." Citing the ABA's 1998 *Deskbook for Government & Public Sector Lawyers*, in answer to the question "why should government and public sector attorneys have pro bono projects?," Chief Justice Moon stated: "even though government lawyers are already involved in public service broadly, they still have a specific pro bono responsibility to provide legal services to the poor, as do all other lawyers."

Moya Gray, Executive Director of Volunteer Legal Services Hawaii ("VLSH") and Chair of the Access to Justice Commission's Committee on Increasing Pro Bono Legal Services' agrees: "Justice cannot wait for someone else to do the work. We need all the leaders within our legal community — government and otherwise — to encourage

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lawyers to participate in providing pro bono services to the people of Hawaii.”

As County of Hawaii Prosecutor Jay Kimura commented:

Being an attorney is a privilege extended to only a few. Government attorneys represent a potential boost to the number of attorneys who could participate in providing pro bono legal services, and I support and encourage all government attorneys to do as much as they can for pro bono, including providing direct legal services through clinics such as VLSH, participating in educational programs, and volunteering their time with non-profit organizations.

The Access to Justice Commission is currently researching and drafting a government lawyers’ pro bono policy, which the Commission hopes will be adopted by the various levels of government in Hawaii. Two shining examples of such pro bono initiatives involve the government lawyers working for the County of Hawaii and the County of Maui.

In 2005, County of Hawaii Corporation Counsel Lincoln Ashida made an inquiry with the Hawaii County Board of Ethics concerning the use of time and resources in the fulfillment of *pro bono* requirements for deputy corporation counsels pursuant to Rule 6.1 of the Hawaii Rules of Professional Conduct (“HRPC”). Corporation Counsel Ashida proposed to have the Department of Corporation Counsel partner with VLSH to coordinate, promote, and staff neighborhood legal clinics in the County of Hawaii. Partnering with the VLSH clinics would allow members of the public in need of legal services the opportunity to meet with an attorney in order to discuss their legal dilemmas. These meetings would be “one-time consultations” with the attorneys making recommendations on other available services with VLSH as well as in the community that may assist the public in resolving their legal disputes. For those cases that the volunteer attorneys would determine need additional legal services, the attorneys would make direct referrals or rec-

ommendations to VLSH to obtain attorneys for those particular individuals. In addition, volunteer attorneys would be covered under VLSH’s liability insurance for the consultations. The clinics would regularly take place outside of the normal work hours and would be done on a volunteer basis by county attorneys.

Corporation Counsel Ashida acknowledged that there was a possibility of incidental and *de minimis* use of county time and resources, which included the possibility of using Corporation Counsel offices for the legal clinics after normal work hours. Recognizing the importance of assisting the community as well as the attorneys’ obligations under HRPC 6.1, the County of Hawaii Board of Ethics found that the Office of the Corporation Counsel of the County of Hawaii’s *de minimis* use of county property and equipment in fulfilling their professional responsibilities and of performing *pro bono* services did not violate the County of Hawaii Code of Ethics.

In a similar opinion obtained by Maui County Corporation Counsel

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Brian Moto in 2005, the Maui County Board of Ethics found that participation by Maui County Deputy Corporation Counsels in the Court Annexed Arbitration Program ("CAAP") and pro bono legal services through VLSH clinics in fulfilling their professional responsibilities outlined in Rule 6.1 of the HRPC did not violate the Maui County Code of Ethics, provided that the work was done outside of working hours and involved only *de minimis* use of county equipment and property.

In light of the opinions obtained by Corporation Counsels Ashida and Moto, both department heads have encouraged their deputies to volunteer and provide pro bono legal services through VLSH. Ashida said: "We encourage the attorneys in our office to do their part in performing and promoting pro bono. It strengthens the legal profession and strengthens our community."

Both counties have been successful in obtaining the support and participation of their attorneys with VLSH. Many of these government attorneys have been recognized with Certificates of Merit presented by the Hawaii County Council and by Mayor Tavares.

In contrast, Haw. Rev. Stat. §28-10² provides that deputy attorneys general must devote their entire time and attention to the duties of their office and shall not engage in the private practice of law. This statute, which was enacted in 1953, has been interpreted by some as imposing a limitation on deputy attorneys general in rendering pro bono legal services. In fact, Gray noted that because of this statute VLSH lost the services of a long-time committed volunteer when her office was moved from a county department to a department within the State Attorney General's office.

In 2008, House Bill 2391 was introduced to amend Haw. Rev. Stat. §28-10 to allow a deputy attorney general to provide pro bono legal services if the services did not create a conflict of interest with the duties of the deputy's office. Although House Bill 2391 was passed by the Hawaii legislature, it was vetoed by Governor Linda Lingle, who cited concerns about the process for determination of a conflict of interest.

At the federal government level, in February 1996, then President Clinton issued an executive order, which among other things, provided that "all Federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer services by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline." Following the executive order, the U.S. Department of Justice adopted an expansive written pro bono policy, which allowed attorneys with the Department of Justice to participate in pro bono legal services. Since then several other federal agencies have adopted similar policies to allow their employees to participate in providing pro bono legal services.

Across the country, federal, state, and county agencies have developed pro bono policies for their government attorneys because of the importance of the need for representation of the indigent. To date, at least 11 states have adopted pro bono policies for their government

attorneys. Issues such as conflicts of interest and use of resources may be perceived barriers, but there are opportunities that do not involve client representation. Government lawyers in Hawaii who already hold high ideals of professionalism should be allowed and encouraged to participate in pro bono projects. The Access to Justice Commission recognizes that government lawyers are committed to public service and stands ready to engage in continual development and design of pro bono policies for government lawyers.

¹ Other members of the Committee on Increasing Pro Bono Legal Services are: Judge Simone Polak, Shannon Wack, Derek Kobayashi, Tracy Wiltgen, Gilbert Doles, Clara Javier, Mihoko Ito, Colbert Matsumoto, Robin Kobayashi, and Wayne Tanna.

² Haw. Rev. Stat. §28-10 (1993) provides as follows:

Prohibition on private practice

of law by the attorney general, first deputy, and other deputies. The attorney general, the attorney general's first deputy, and other deputies shall devote their entire time and attention to the duties of their respective offices. They shall not engage in the private practice of law, nor accept any fees or emoluments other than their official salaries for any legal services. This section shall not apply to any special deputy employed on a part-time basis for a limited period.

Interestingly, section 28-5 provides that there should be assistance by the attorney general to the poor. That section provides as follows:

Aids poor. The attorney general shall give counsel and aid to poor and oppressed citizens of the State and assist them in obtaining their just rights without charge; provided that the attorney general shall not be obliged to render such aid, counsel, and assistance, unless requested so to do by the governor, or by someone of the heads of departments.

Bill M. Hasegawa is an associate at Aslyford & Wriston and serves as Vice Chair of the Hawaii Access to Justice Commission. Associate Justice Simeon R. Acoba, Jr. serves as Chair of the Commission.

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Volunteer Attorneys Provide Legal Advice to District Court Civil Litigants

by Hon. Hilary B. Gangnes and Hon. Michael K. Tanigawa

With the help of volunteer attorneys, access to legal advice in civil cases has become a reality for many district court litigants in the First Circuit who otherwise could not afford legal representation.

The "Access to Justice Room" ("AJR"), began its operations on July 23, 2012, staffed by HSBA volunteers. The AJR is a joint effort of the HSBA, the Hawaii State Judiciary, the Hawaii Access to Justice Commission, the Legal Aid Society of Hawaii, and the AmeriCorps program.

The AJR is located on the third floor of the Honolulu district court building at 1111 Alakea Street and is staffed by a volunteer attorney from 9:00 a.m. to 1:00 p.m. on Mondays and Wednesdays. Attorneys provide short-

term legal advice to self-represented parties on district court civil matters such as landlord-tenant cases, debt collection actions, and temporary restraining order and injunction against harassment petitions (that involve non-family members or parties who have not been in a dating relationship). Members of the public who seek help at the service center on the third floor and want legal advice are referred to the AJR.

The results from AJR's first few months of operation have been impressive. In its first six weeks, 16 HSBA volunteer attorneys served 65 self-represented litigants. In the month of September 2012, 11 volunteer attorneys staffed the AJR on seven days and served 41 litigants. The response from the customers of the AJR has been overwhelmingly positive, with the majority of users rating their experience as "very helpful." Customer comments include the following:

"The attorney was amazing, he made me more knowledgeable in my matters and I feel more prepared for

court!"

"Today, I was given all I need to know about my case. I'm very grateful for it. Everyone should consult the lawyer in this office before complicated cases."

"I think this is a tremendous service. I feel very good about knowing that service like this is provided for assistance."

The success of the Access to Justice Room depends on the continued volunteer efforts of HSBA members. The original group of HSBA volunteer attorneys received training on July 20, 2012. That training session was videotaped, and new volunteers can view the session at the HSBA office so that they will be ready to serve. Resource materials are also provided in the Access to Justice Room. Staffing the AJR is a rewarding way to provide direct pro bono services to the public and to be part of making "access to justice" a reality.

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