



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

and

Senate Committee on Commerce and Consumer Protection

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair

Friay, February 6, 2015, 9:00 a.m.
State Capitol, Conference Room 016

by

Elizabeth Zack
Supreme Court Staff Attorney

Bill No. and Title: Senate Bill No. 1010, Relating to the Unauthorized Practice of Law.

Purpose: Clarifies that an unlicensed attorney commits the unauthorized practice of law by providing legal services and assessing a fee or being paid for those services.

Judiciary's Position:

The Judiciary respectfully takes no position on this bill, but offers the following comments.

Pursuant to HRS section 605-1 and HRS section 605-6, the Supreme Court of Hawai'i has the authority to regulate the examination, licensing, and discipline of attorneys licensed to practice law in Hawai'i. In accordance with this authority, the supreme court adopted rules of the supreme court establishing the Board of Examiners to review applications and administer the examinations for admission to the Hawai'i bar. Additionally, the supreme court adopted the Hawai'i Rules of Professional Conduct and established the Disciplinary Board and the Office of Disciplinary Counsel to oversee the conduct of attorneys in Hawai'i. Although these rules are in place to regulate attorneys licensed in Hawai'i, issues have occasionally arisen concerning the



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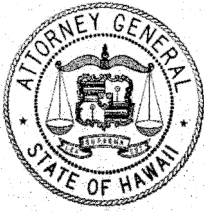
oversight of attorneys who conduct legal services in Hawai‘i, but are not licensed in this jurisdiction. Consequently, the judiciary recognizes the need to protect consumers in such situations.

We offer two comments. First, it seems the intent of the bill is to curtail the unauthorized practice of law by attorneys licensed in other jurisdictions who are not licensed in Hawai‘i. However, subsection (a) does not specifically state that. Consequently, the Committee may wish to consider amending subsection (a) to provide, “An attorney licensed to practice law in another jurisdiction who is not licensed or authorized to practice law in the State...” (new material underscored).

Next, subsection (c) may possibly be read to exempt in-house attorneys working for organizations in Hawai‘i from the Hawai‘i licensing requirements. If this is the intent of subsection (c), subsection (c) conflicts with licensing requirements already in place. As mentioned above, pursuant to HRS sections 605-1 and 605-6, the supreme court adopted rules regarding the licensing of attorneys. These rules do not exempt in-house counsel from attorney licensing requirements in the State. Requiring in-house counsel to comply with Hawai‘i licensing rules insures that the Office of Disciplinary Counsel in Hawai‘i retains authority to investigate any complaints against such attorneys.

To address the possible ambiguity in subsection (c), the Committee could either delete subsection(3) from the proposed bill or add language that acknowledges in-house counsel working in Hawai‘i are governed by the supreme court rules.

Thank you for allowing the Judiciary to submit testimony on this bill.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

S.B. NO. 1010, RELATING TO THE UNAUTHORIZED PRACTICE OF LAW.

BEFORE THE:

SENATE COMMITTEES ON JUDICIARY AND LABOR AND ON
COMMERCE AND CONSUMER PROTECTION

DATE: Friday, February 6, 2015 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Russell Suzuki, Attorney General, or
Lance M. Goto, Deputy Attorney General.

Chairs Keith-Agaran and Baker and Members of the Committees:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to clarify when an unlicensed attorney commits the unauthorized practice of law.

The Department has concerns that the bill fails to define "attorney," mixes the violation of the new offense with a violation of section 605-14, Hawaii Revised Statutes (HRS), defines "legal services" in a manner that may be difficult to prove, and creates a broad exception that appears to allow unlicensed attorneys to engage in the practice of law in this State. Section 605-14, HRS, which prohibits the unauthorized practice of law, already covers the conduct intended to be prohibited by this bill.

This bill attempts to create the new offense of unauthorized practice of law by unlicensed attorney in the following manner:

An attorney not licensed or authorized to practice law in the State violates section 605-14 when the attorney provides legal services to or for a person in the State.

The bill fails to define "attorney," but it appears to be referring to a person who is licensed to practice law in another jurisdiction, other than Hawaii. This needs to be clarified.

The bill sets out the offense by saying that an attorney violates section 605-14 when the attorney provides legal services in this State. But section 605-14 already defines the offense of unauthorized practice of law and sets out the elements of the offense. It is not clear how this bill is addressing those elements.

With respect to "legal services," this bill provides:

For purposes of this section, "legal services" include any and all acts requiring the use of any degree of legal knowledge, skill, or advocacy that a person who is licensed or authorized to practice law in the State by the supreme court, under section 605-1, has been trained and is permitted to perform, including, but not limited to, appearing in the courts of the State, giving legal advice, drafting pleadings, preparing for or conducting discovery, and evaluating and valuing claims against legal standards and precedent.

"Legal services," as defined, will be difficult to prove because it refers to acts requiring the use of legal knowledge, skill, or advocacy that a licensed Hawaii attorney has been trained or permitted to perform. This may require the prosecutor to produce testimony of an expert witness in the legal training of Hawaii attorneys. Furthermore, there appears to be an inconsistency between the definition of "legal services," and the specified acts. The definition includes specific acts, such as appearing in court and drafting pleadings. But such acts do not necessarily require any legal training. Unlicensed and untrained people appear in court and handle their cases pro se. It should also be noted that section 605-14 does not refer to "legal services," but instead prohibits the "practice of law."

The Department is also concerned that this bill creates a broad exception that appears to allow unlicensed attorneys to engage in the practice of law in this State. Section (c), on page 2 of the bill, provides:

This section shall not apply to an attorney providing legal services to an organization in another jurisdiction as in-house counsel or to an affiliated entity or employee of that organization in the State.

This provision is confusing. It may be interpreted to allow an attorney, not licensed in Hawaii, acting as in-house counsel for an "organization in another jurisdiction," to provide legal services to that organization in Hawaii. This provision also allows that attorney to provide legal services in Hawaii to an "affiliated entity" or employee of that organization. It is not clear what kind of affiliation that entity would need with that organization. This would allow someone who is not licensed in Hawaii, to provide legal services to someone in Hawaii, regardless of that person's affiliation with an organization located in another jurisdiction. This exception does not require the legal services provided to the affiliated entity or employee to have any connection with, or relevance to, the organization. The legal services for the employee could be personal in nature.

Section 605-14, HRS, which prohibits the unauthorized practice of law, already covers the conduct intended to be prohibited by this bill. 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.

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).

For the foregoing reasons, the Department respectfully requests that this measure be held.

From: A. Bernard Bays [REDACTED]

Sent: Tuesday, February 03, 2015 12:58 PM

To: Sen. Gilbert Keith-Agaran

Cc: Sen. Roz Baker; 'reprhodes@capitol.hawaii.gov'; [REDACTED]

[REDACTED] Bonnie E. Hudgin

Subject: 354948_2.docx

Senator Agaran:

I am Co Chair with Paul Alston of the Consumer Protection Committee of the Hawaii State Bar Association. I have attached a draft bill prepared by the Consumer Protection Committee which serves the same objectives as your Senate Bill 1010 which we understand is set for hearing before your Committee on Judiciary and Labor and the Committee on Commerce and Consumer Protection. We propose that Senate Bill 1010 be amended to conform to the attached draft. We have been working on various forms of this bill for two years and withdrew a bill last year in order to address concerns that had been raised. We think that the attached bill addresses those concerns and hope that it can be passed.

I apologize for not getting this bill to you sooner.

I am scheduling a meeting with you to discuss Senate Bill 1010 and this proposed amendment. Thank you for considering this proposed amendment by the Consumer Protection Committee of the Bar Association.

Respectfully,
Bernie

A BILL FOR AN ACT

RELATING TO THE UNAUTHORIZED PRACTICE OF LAW

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII

SECTION 1. The legislature finds that Hawaii has a unique heritage. It began as a monarchy, became an independent republic, and then was annexed to the United States early in the twentieth century. The Hawaiian language remained the primary language of the State well into the twentieth century. Pursuant to section 1-13, Hawaii Revised Statutes, Hawaiian and English are currently the two official languages of Hawaii.

The legislature further finds that the real property system in Hawaii is based upon a nineteenth century Hawaiian property ownership system. Real property legal practices in Hawaii continue to use Hawaiian words to describe unique real property concepts. For example, terms such as “ahupuaa” and “kuleana” and the real property concepts they describe are fundamental to real property law in Hawaii. Native Hawaiians are afforded real property rights that are not shown on title. Water rights are also determined according to a unique public trust doctrine. Hawaii also has a unique dual system of real property recordation and registration with important legal consequences.

The legislature further finds that, in addition to Hawaiians and Caucasians, large numbers of people from Asia and the Pacific, including Chinese, Japanese, Koreans, Filipinos, Polynesians, and Micronesians, have immigrated to Hawaii over the last two centuries. Each ethnic group has left its mark on the Hawaii legal system, and the various languages of these ethnic groups have been integrated into the “Pidgin English” commonly spoken in Hawaii.

The effective practice of law in this State requires the knowledge of Hawaii’s unique heritage and commonly used words and legal concepts that have evolved from that heritage. It is very difficult

for attorneys from other states to practice law effectively in Hawaii without knowledge of Hawaii's unique legal system, real property system, language, and customs. For these reasons, there are examples of clients who have been poorly served by unlicensed out-of-state attorneys attempting to practice law in Hawaii. In some cases, the clients have lost millions of dollars as a result of work performed by unlicensed out-of-state attorneys. In other cases, out-of-state attorneys who are not licensed to practice law in Hawaii have been sued for millions of dollars as a result of their lack of understanding of the Hawaii legal system. There have also been instances in which properly licensed Hawaii attorneys have had to pay millions of dollars for failing to detect mistakes made by out-of-state attorneys who are not licensed to practice law in Hawaii.

The purpose of this Act is to protect the public by specifying the acts that constitute the unauthorized practice of law in Hawaii by out-of-state attorneys who are not licensed to practice law in Hawaii.

SECTION 2. Section 605-14.1, Hawaii Revised Statutes, is enacted to read as follows:

“§605-14.1. Unauthorized practice of law by out-of-state attorneys prohibited.

(a) An attorney licensed to practice law in another state who is not authorized to practice law in the State is prohibited from practicing law in the State unless such attorney:

(1) Is first admitted pro hac vice by a judge of the circuit court of the circuit in which the attorney intends to practice law or by the United States District Court for the District of Hawaii and only:

(i) If the circuit court or the United States District Court for the District of Hawaii first finds that the legal work to be performed by the out-of-state attorney cannot be performed competently by any attorney licensed in the State; and

(ii) subject to the limitations provided in the pro hac vice order.

(b) The following acts, when performed by an attorney licensed in another state who has not been first admitted pro hac vice, constitute the unauthorized practice of law:

(1) Holding oneself out as an attorney authorized to practice law in the State.

(2) Appearing on behalf of any person or entity in any hearing or proceeding in the State before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body in a dispute resolution process with respect to a matter involving:

(A) The rights or obligations of any person or property in the State; or

(B) Any dispute to be resolved wholly or in part under the laws of the State;

(3) Preparing any document on behalf of another person that is:

(A) To be submitted to any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body in a dispute resolution process in the State; or

(B) Is in a form to be recorded in the Bureau of Conveyances or the Land Court; or

(4) Advising any person or entity located in the State regarding the laws of the State.

(c) It is a violation of this section for any person to knowingly aid or assist an attorney licensed in another state in the unauthorized practice of law in the State, including, but limited to allowing an attorney licensed in another state to participate in proceedings before a judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body in a dispute resolution process in the State.”

SECTION 3. SECTION 605-15.1, Hawaii Revised Statutes, is amended to read as follows:

“§605-15.1 Standing. The attorney general or any bar association in this State may maintain an action for violations of sections 605-14 and 605-14.1.

§605-15.2. Remedies. Remedies for the violation of sections 605-14 and 605-14.1 shall include injunctive and declaratory relief; and other existing remedies. In addition, the attorney general may maintain a criminal action against any person who violates sections 605.14 and 605-14.1, the penalties for which are set forth in section 605-17.”

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

INTRODUCED BY: _____

From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: [REDACTED]
Subject: Submitted testimony for SB1010 on Feb 6, 2015 09:00AM
Date: Thursday, February 05, 2015 7:31:47 AM

SB1010

Submitted on: 2/5/2015

Testimony for JDL/CPN on Feb 6, 2015 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Glenn Stockton	Individual	Support	No

Comments: I support SB 1010 because the number of unscrupulous individuals and organizations (including some out-of-state attorneys) that charge their "clients" an exorbitant fees and then provide little (or none) of the promised "legal services" concerning claims subject to Hawaii state court jurisdiction has increasing at an alarming rate over the past few years.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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