



The Judiciary, State of Hawai'i

**Testimony to the Thirty-Second Legislature
2024 Regular Session**

Senate Committee on Ways and Means
Senator Donovan M. Dela Cruz, Chair
Senator Sharon Y. Moriwaki, Vice Chair

Thursday, February 22, 2024, 10:05 a.m.
State Capitol
Conference Room 211 & Videoconference

by:
Thomas J. Berger
Staff Attorney for the Hawai'i Supreme Court

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 2514, Relating to Attorneys.

Purpose: Requires petitions or motions for a pro hac vice appearance for a court proceeding or arbitration proceeding to be supported by evidence of local counsel's Hawai'i business registration, the applicant's Hawai'i general excise tax license number, an affirmation that both the applicant and local counsel will pay all state income tax due for Hawai'i business activities, and all other information or documentation required by the Rules of the Supreme Court of the State of Hawai'i.

Judiciary's Position:

The Judiciary appreciates the intent of this bill and would like to thank Chair Dela Cruz for flagging this issue. In response, the Hawai'i Supreme Court has already published a proposed rule amendment with identical requirements on pro hac vice counsel to those set forth in SB 2514. A copy of the proposed rule amendment is enclosed.¹ The deadline for public comment on the proposed rule amendment is March 25, 2024.

¹ See https://www.courts.state.hi.us/legal_references/rules/proposed_rule_changes/proposedrulechanges.



Accordingly, the Judiciary requests this measure be deferred on the basis that the concerns raised by this bill are being considered by the court through its rule making process. Article VI, section 7 of the Hawai'i Constitution delegates to the Hawai'i Supreme Court the power to promulgate rules relating to the practice of attorneys, which have the force and effect of law. Hawai'i Revised Statutes §§ 605-1 and 605-6 similarly delegate to the Hawai'i Supreme Court the authority to establish admission requirements and rules governing attorney practice.

The Hawai'i Supreme Court has adopted rules that govern the admission of pro hac vice counsel. See Rules of the Supreme Court of the State of Hawai'i (RSCH), Rules 1.9, 1.9A. It is to the benefit of the public, litigants, the Hawai'i State Bar Association, courts, arbitrators, the Office of Disciplinary Counsel, and local and foreign counsel that all the requirements for pro hac vice counsel be addressed comprehensively in one textual location.

In conclusion, thank you to the Committee Chair for introducing this measure to thereby allow this discussion on pro hac vice counsel to take place. In light of the foregoing, the Judiciary respectfully requests SB 2514 be deferred.

MEMORANDUM

To: Communications & Community Relations Office

From: Thomas Berger

Date: February 7, 2024

Re: Proposal to Amend the Rules of the Supreme Court of the State of Hawai'i, Rule 1.9 and Rule 1.9A

*PRO HAC VICE APPEARANCES IN COURT
PROCEEDINGS AND ARBITRATION PROCEEDINGS*

The Supreme Court of Hawai'i seeks public comment regarding proposed amendments to the Rules of the Supreme Court of the State of Hawai'i, Rule 1.9, *Pro Hac Vice* Appearances of Counsel for Court Proceedings, and Rule 1.9A, *Pro Hac Vice* Appearance of Counsel for Arbitration Proceedings.

The Ramseyer version of the proposed rule amendments are attached. The proposed language to be added is underscored, and the language to be deleted is bracketed and stricken as illustrated in this [example].

Comments should be submitted in writing **no later than Monday, March 25, 2024** to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 808-539-4801, by e-mail to pao@courts.hawaii.gov, or via the [Judiciary website](#).

Attachment.

**PROPOSED AMENDMENTS TO THE
RULES OF THE SUPREME COURT OF THE STATE OF HAWAI‘I**
(Deleted material is bracketed and stricken; new material is underlined.)

1.9. *Pro hac vice* appearance of counsel for court proceedings.

(a) Any attorney actively licensed to practice law by the highest court of a state or territory of the United States or the District of Columbia may be permitted to associate with a member or members of the Hawai‘i bar (local counsel) in the presentation of a specific case at the discretion of the presiding judge or judges.

(1) The petition or motion for *pro hac vice* appearance and any subsequent documents submitted on behalf of a party must be filed by local counsel and must comply with subsection (b) of this Rule. An attorney allowed to appear *pro hac vice* in a case may continue on appeal or upon remand in the same case without filing a new petition or motion for *pro hac vice* admission so long as the attorney complies with all applicable Hawai‘i statutes, laws, and rules of the court in addition to other provisions of this Rule.

(2) An attorney allowed to appear *pro hac vice* shall, for each year the order is effective, pay to the Hawai‘i State Bar an annual Disciplinary Board fee and an annual Lawyers’ Fund for Client Protection fee authorized by the supreme court, provided that if the attorney is allowed to appear in more than one case, only one set of annual fees shall be paid. The Hawai‘i State Bar may assess a reasonable fee to register and collect these fees on an annual basis. Within 10 days after entry of an order granting a petition or motion for *pro hac vice* appearance, and also within 10 days of making subsequent fee payments in January of each year, the attorney shall file proof of payment of the required fees in the record of the court in which the case is then pending.

(3) Failure to pay the required fees within 10 days after entry of the order approving the petition or motion, and in January of each subsequent year, renders the order approving the petition or motion no longer valid, and a new petition or motion must be filed.

(b) Local counsel shall file the petition or motion for *pro hac vice* appearance in the court to which the authorization to appear is sought and provide a copy to the Office of Disciplinary Counsel. The petition or motion shall be supported by:

(1) the declaration of local counsel that ~~[provides,]~~ establishes the following under penalty of law [at minimum, the following]:

(A) local counsel’s business address and address for service of documents; ~~[and]~~

(B) affirmation that local counsel is to be the attorney of record and is responsible for all phases of the litigation;

(C) where local counsel is employed by an entity that is subject to the business registration requirements of the Department of Commerce and Consumer Affairs (DCCA), the local counsel shall include a copy of the certificate of good standing issued by the DCCA’s business

registration division for local counsel's employer that is dated within 10 days of the petition or motion, or in the alternative an affirmation that the local counsel is not subject to the DCCA's business registration requirements along with an explanation sufficient to apprise the court of the reasons for the exemption; and

(D) the local counsel's general excise tax license number issued by the Department of Taxation for the State of Hawai'i, and an affirmation that the local counsel will pay all state income tax due for all business activities in the State of Hawai'i, or in the alternative an explanation from local counsel that the requirements of this sub-section (D) do not apply.

(2) the declaration of the applicant for *pro hac vice* admission that ~~provides, at minimum,~~ establishes the following under penalty of law:

(A) the applicant's business address, e-mail address, the name of the law firm the attorney is associated with and the address of the law firm;

(B) every state and federal jurisdiction to which the applicant has been admitted to practice law and a statement attesting that the attorney is in good standing in those jurisdictions;

(C) a statement that the applicant is not currently, and has not been, suspended or disbarred from the practice of law before any court or otherwise disciplined, and if the applicant has been disciplined or is subject to a pending disciplinary proceeding, material information about those proceedings must be provided;

(D) the title and case number of each case, and the court or other forum in this state, in which the applicant has sought and/or been allowed to appear *pro hac vice* and the present status of each case;

(E) if the applicant has made more than one appearance as counsel in Hawai'i during the preceding ~~[5]~~ five years, the special circumstances that warrant the approval of the applicant's appearance in the subject case;

(F) an affirmation that, if admitted, the applicant will comply with all applicable Hawai'i statutes, laws, and rules of the courts including the Hawai'i Rules of Professional Conduct and Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers;

(G) an affirmation that, if admitted, the applicant shall be subject to all applicable Hawai'i statutes, laws, rules of the court, and the Hawai'i disciplinary process with respect to any acts or omissions occurring during representation pursuant to this Rule; ~~[and]~~

(H) where the applicant is employed by an entity that is subject to the business registration requirements of the Department of Commerce and Consumer Affairs (DCCA), the applicant shall include a copy of the certificate of good standing issued by the DCCA's business registration division for the applicant's employer that is dated within 10 days of the petition or motion, or in the alternative an affirmation that the applicant is not subject to the DCCA's business registration requirements along with an explanation sufficient to apprise the court of the reasons for the exemption;

(I) the applicant's general excise tax license number issued by the Department of Taxation for the State of Hawai'i, and an affirmation that

the applicant will pay all state income tax due for all business activities in the State of Hawai'i; and

~~(H)~~ (J) designation of local counsel as agent for service of Hawai'i disciplinary process.

(c) An attorney approved to appear *pro hac vice* pursuant to this Rule is subject to the jurisdiction of Hawai'i courts with respect to all applicable Hawai'i statutes, laws, and rules of the courts to the same extent as any other attorney admitted to practice in the courts of this state. The attorney approved to appear *pro hac vice* is subject to the disciplinary jurisdiction of the supreme court. The court in which an attorney is approved to appear *pro hac vice* or the supreme court may, for violations of Hawai'i law, the Hawai'i Rules of Professional Conduct, or orders of the court, revoke the permission for the attorney to appear *pro hac vice*, or impose any other appropriate sanction.

(d) Local counsel of record shall sign all pleadings, motions, briefs, or any other documents submitted in the case, and shall participate actively in all phases of the case and be prepared to go forward with the case as required. Service of all documents, including pleadings, shall be upon local counsel, and shall constitute service upon *pro hac vice* counsel and their client(s).

(e) Local counsel shall provide a copy of the order allowing the appearance of counsel *pro hac vice* to the Hawai'i State Bar and the Office of Disciplinary Counsel, and shall notify the Hawai'i State Bar and the Office of Disciplinary Counsel when the *pro hac vice* attorney's involvement is terminated, the case is closed, or the order granting *pro hac vice* admission is no longer valid.

(f) An attorney not licensed in Hawai'i who fails to obtain approval to represent a party in a court proceeding as required by this Rule, and who proceeds to represent a party in a court proceeding, is subject to the disciplinary jurisdiction of the supreme court and may be subject to referral to appropriate authorities for potential violation of Hawai'i Revised Statutes § 605-14 (Unauthorized practice of law prohibited) and other applicable laws.

1.9A. *Pro hac vice* appearance of counsel for arbitration proceedings.

(a) Approval to appear *pro hac vice*.

(1) An attorney not licensed in Hawai'i, but who is admitted to practice and in good standing with the highest court of a state or territory of the United States or the District of Columbia, may associate with a licensed Hawai'i attorney (Hawai'i attorney) to represent parties in the course of or in connection with an arbitration proceeding in Hawai'i that concerns a legal dispute over a Hawai'i-related matter, provided that the petition to appear, accompanied by the materials set forth in subsection (b) of this Rule, is approved in writing by the arbitrator or, if there are multiple arbitrators, a majority of the arbitrators.

(2) If the subject arbitration results in a judicial proceeding, the out-of-state attorney must comply with Rule 1.9 of these Rules to appear as counsel in the court proceeding.

(b) Contents of the application or petition. The Hawai‘i attorney to the arbitration shall submit to the arbitrator(s) in the subject arbitration a petition for *pro hac vice* appearance by the out-of-state attorney, and shall serve the petition upon all parties to the arbitration, along with the following in support of the petition:

(1) REQUIRED INFORMATION. The petition shall provide the following information:

(A) the case name and number, the name of the arbitrator(s), and the arbitral forum for the proceeding in which the out-of-state attorney seeks to appear;

(B) the out-of-state attorney’s law firm name, office address, email address, and telephone number;

(C) the courts in which the out-of-state attorney has been admitted to practice and the dates of admission; and

(D) the title of all courts and other forums in Hawai‘i in which the out-of-state attorney has sought to appear as counsel *pro hac vice* in the preceding [§]five years (including but not limited to petitions pursuant to this Rule); the name and number of each such case or proceeding; the date of each application or petition; and whether or not the application or petition was approved. If the attorney has made more than one appearance as counsel in Hawai‘i during the preceding [§]five years, the petition shall reflect the special circumstances that warrant the approval of the attorney’s appearance in the subject arbitration.

(2) REQUIRED DECLARATION BY OUT-OF-STATE ATTORNEY. In addition, the out-of-state attorney shall provide a declaration that declares accurately and truthfully to the best of the attorney’s knowledge, under penalty of law, that the out-of-state attorney:

(A) is in good standing before the courts where the attorney’s license to practice law is active;

(B) is not currently, and has not been in the past, suspended or disbarred from the practice of law before any court or has otherwise been disciplined or, if the attorney has been disciplined or is subject to a pending disciplinary proceeding, providing material information about those proceedings;

(C) is not a resident of the State of Hawai‘i, and is not regularly engaged or employed as an attorney in Hawai‘i;

(D) if given approval to represent a party in the arbitration, agrees to be subject to the jurisdiction of the courts of this state with respect to the laws of this state governing the conduct of attorneys, including the disciplinary jurisdiction of the supreme court and the Disciplinary Board of the Hawai‘i Supreme Court, and will comply with applicable Hawai‘i laws, arbitration rules, the Hawai‘i Rules of Professional Conduct, and the Guidelines of Professional Courtesy and Civility for Hawai‘i Lawyers; ~~and~~

(E) where the out-of-state attorney is employed by an entity that is subject to the business registration requirements of the Department of Commerce and Consumer Affairs (DCCA), the out-of-state attorney shall include a copy of the certificate of good standing issued by the DCCA's business registration division for the out-of-state attorney's employer that is dated within 10 days of the petition or motion, or in the alternative includes an affirmation that the out-of-state attorney is not subject to the DCCA's business registration requirements along with an explanation sufficient to apprise the court of the reasons for the exemption;

(F) has obtained a general excise tax license from the Department of Taxation for the State of Hawai'i, along with the general excise tax license number, and an affirmation that the applicant will pay all state income tax due for all business activities in the State of Hawai'i; and

~~(E)~~ (G) designates the Hawai'i attorney as agent for service of any Hawai'i disciplinary process.

(3) REQUIRED DECLARATION BY HAWAI'I ATTORNEY. The Hawai'i attorney submitting the petition shall provide a declaration ~~[that declares accurately and truthfully to the best of the attorney's knowledge,]~~ under penalty of law that establishes:

(A) the business address, e-mail address and address for service of documents for the Hawai'i attorney; ~~[and]~~

(B) ~~[an affirmation that]~~ the Hawai'i attorney is the attorney of record and is responsible for all phases of the subject arbitration~~[-];~~

(C) where local counsel is employed by an entity that is subject to the business registration requirements of the Department of Commerce and Consumer Affairs (DCCA), the local counsel shall include a copy of the certificate of good standing issued by the DCCA's business registration division for local counsel's employer that is dated within 10 days of the petition or motion, or in the alternative includes an affirmation that the local counsel is not subject to the DCCA's business registration requirements along with an explanation sufficient to apprise the court of the reasons for the exemption; and

(D) the Hawai'i attorney has obtained a general excise tax license from the Department of Taxation for the State of Hawai'i, along with the general excise tax license number, and an affirmation that the local counsel will pay all state income tax due for all business activities in the State of Hawai'i, or in the alternative an explanation from local counsel that the requirements of this sub-section (D) do not apply.

(c) Disposition of the petition.

(1) The arbitrator(s) shall respond to the petition in writing. The arbitrator(s) may approve the petition if the requirements in subsection (b) of this Rule have been satisfied. The petition shall be disapproved for failure to submit and serve the petition as described in subsection (b) of this Rule. In the absence of special circumstances, multiple appearances as counsel in Hawai'i during the preceding ~~[5]~~ five years may be grounds for disapproval of the petition and disqualification from serving as an attorney in the subject arbitration. Upon written approval of the petition by the arbitrator(s), the Hawai'i attorney shall forthwith submit a copy of

the order approving the petition, along with a copy of the petition, to the Hawai'i State Bar and the Office of Disciplinary Counsel.

(2) The arbitrator(s) in the subject arbitration or the supreme court may revoke the permission for the attorney to appear in the subject arbitration if the attorney submitted a declaration containing false information or a material omission, violated Hawai'i law, violated the Hawai'i Rules of Professional Conduct, or violated an order of the arbitrator(s).

(d) Duties of the *pro hac vice* attorney.

(1) The out-of-state attorney admitted *pro hac vice* in an arbitration shall pay to the Hawai'i State Bar the annual Disciplinary Board fee and the annual Lawyers' Fund for Client Protection fee authorized by the supreme court, provided that if the attorney is allowed to appear in more than one case, only one set of annual fees shall be paid. The Hawai'i State Bar may assess a reasonable fee to register and collect these fees on an annual basis. Proof of payment of the required fees shall be served on the arbitrator(s), the parties to the subject arbitration, the arbitral forum, and the Office of Disciplinary Counsel. For each subsequent year that the approved petition is effective, the out-of-state attorney shall pay the annual fees in January and serve proof of payment upon the arbitrator(s), the parties to the subject arbitration, the arbitral forum, and the Office of Disciplinary Counsel.

(2) Failure to pay the annual fees within 10 days after entry of the order approving the petition, and in January of each subsequent year, renders the order approving the petition no longer valid, and a new petition must be filed.

(3) The out-of-state attorney shall notify the Hawai'i attorney, the arbitrator(s), and the parties to the subject arbitration when there is any material change to the information provided under subsections (b)(1) and (b)(2) of this Rule.

(e) Duties of the Hawai'i attorney.

(1) The Hawai'i attorney shall sign all pleadings, motions, briefs, or any other documents submitted in the subject arbitration, and shall participate actively in all phases of the arbitration and be prepared to go forward with the arbitration as required. Service of all documents, including pleadings, shall be upon the Hawai'i attorney and shall constitute service upon the out-of-state attorney and their client(s).

(2) The Hawai'i attorney shall notify the Hawai'i State Bar and the Office of Disciplinary Counsel when the engagement of the out-of-state attorney is terminated, the arbitration is completed, or the order approving the petition is no longer valid.

(f) Unauthorized practice of law. An attorney not licensed in Hawai'i who fails to obtain approval to represent a party in an arbitration proceeding as required by this Rule, and who proceeds to represent a party in an arbitration proceeding, is subject to the disciplinary jurisdiction of the supreme court and may be subject to referral to appropriate authorities for potential violation of Hawaii Revised Statutes § 605-14 (Unauthorized practice of law prohibited) and other applicable laws.

(g) The *pro hac vice* attorney is subject to Hawai'i jurisdiction.

An attorney approved to appear in an arbitration proceeding under this Rule is subject to the jurisdiction of Hawai'i courts with respect to all applicable Hawai'i laws and rules to the same extent as any other attorney admitted to practice in this state. The attorney approved to appear in an arbitration proceeding under this Rule is also subject to the disciplinary jurisdiction of the supreme court and the Disciplinary Board of the Hawai'i Supreme Court.

(h) Limits of this Rule.

(1) Any party to an arbitration arising under a collective bargaining agreement subject to either state or federal law may be represented in the course of and in connection with those proceedings by any person, regardless of whether that person is licensed to practice law in Hawai'i, if the representation is consistent with the laws governing such proceedings.

(2) This Rule does not apply to proceedings before state or federal administrative boards or agencies that are authorized to establish their own rules governing the practice of out-of-state attorneys before those bodies.

(3) This Rule does not negate the rights of parties to be represented by a person of their choosing so long as that right is established as a matter of a specific state or federal law.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 305

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, INCOME, Requirements for Out-of-State Attorneys

BILL NUMBER: SB 2514 SD 1

INTRODUCED BY: Senate Committee on Judiciary

EXECUTIVE SUMMARY: Amends the process by which out-of-state attorneys are admitted to practice in Hawaii's courts by requiring petitions or motions for a pro hac vice appearance for a court proceeding or arbitration proceeding to be supported by evidence of local counsel's Hawaii business registration, the applicant's Hawaii general excise tax license number, an affirmation that both the applicant and local counsel will pay all state income tax due for Hawaii business activities, and all other information or documentation required by the Rules of the Supreme Court of the State of Hawaii.

SYNOPSIS: Adds a new section to chapter 605, HRS, requiring petitions or motions for pro hac vice appearances to include documentation of applicant's general excise tax license number and the sponsoring local counsel's Hawaii business registration. Also, both applicant and local counsel must affirm that they both will pay state income tax due for Hawaii business activities. Upon approval, the Supreme Court shall amend its rules accordingly.

EFFECTIVE DATE: April 15, 2112.

STAFF COMMENTS: This bill presents a separation of powers question. The judiciary is a coequal branch of government with the legislature, and the judiciary has constitutional authority to make rules "for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." Haw. Const. art. VI, sec. 7. This bill, if enacted, purports to order the judiciary to change its rules; however, for the above reasons the legislature might not have the authority to so order. *Kudlich v. Ciciarelli*, 48 Haw. 290, 401 P.2d 449 (1965); *State v. Hawaiian Dredging Co.*, 48 Haw. 152, 397 P.2d 593 (1964). Perhaps this issue might be solved if the proposed requirements were instead written into HRS section 605-1, which prescribes the qualifications of attorneys.

Digested: 2/20/2024

LATE

SB-2514-SD-1

Submitted on: 2/21/2024 1:51:55 PM

Testimony for WAM on 2/22/2024 10:05:00 AM

Submitted By	Organization	Testifier Position	Testify
Richard McClellan	Individual	Comments	Written Testimony Only

Comments:

This concept may potentially be more appropriately addressed by the Supreme Court (and, outside of the public sphere, by the Department of Taxation.)

Insofar as the proposed language is concerned, it is unclear whether local counsel or Pro Hac Vice counsel would **owe** any income tax, as that can turn on many factors. I also do not understand why an affirmation regarding compliance would be limited to income tax, as surely general excise (and perhaps use) would also be highly relevant.

Therefore, I suggest changing the text from "pay all state income tax" to "comply with all Hawaii tax laws":

(3) An affirmation that both the applicant and local counsel will comply with all Hawaii tax laws for Hawaii business activities;"

Thank you,

Richard McClellan