



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

Wednesday, April 3, 2024, 10:30 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: House Bill No. 2570, H.D. 1, S.D. 1, Relating to Attorneys.

Purpose: Requires petitions or motions for a pro hac vice appearance for a court or arbitration proceeding to be supported by certain evidence to ensure that both the applicant and local counsel will pay all state income tax due for Hawai‘i business activities as well as any other information or documentation required by the Rules of the Supreme Court of the State of Hawai‘i. Effective 4/14/2112. (SD1)

Judiciary’s Position:

The Judiciary respectfully opposes this measure. 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 HB2570, HD1, SD1. A copy of the proposed rule amendment is attached.¹ The deadline for public comment on the proposed rule amendment was March 25, 2024. The court received public comments, and is in the process of evaluating these comments.

Accordingly, the Judiciary requests this measure be deferred on the basis that the concerns raised by this bill are being considered and addressed by the court through its rule

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



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 instant legislation would intrude on those delegations of authority.

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, the Judiciary respectfully requests HB2570, HD1, SD1 be deferred.

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.



HAWAII ASSOCIATION OF PUBLIC ACCOUNTANTS

Organized August 7, 1943
P.O. BOX 61043
HONOLULU, HAWAII 96839



Committee on Ways and Means

Wednesday, April 3, 2024; 10:30 a.m.
Conference Room 211
State Capitol

Re: SUPPORT OF HB 2570, HD1, SD1 – Relating to Attorneys

Chair Dela Cruz, Vice Chair Morikawa, and Committee Members:

The Hawaii Association of Public Accountants (HAPA) is the only statewide public accounting organization with active chapters on Oahu, Maui, Big Island, and Kauai. It has over 450 members, consisting primarily of small to mid-sized CPA firm owners and employees who are in the active practice of public accountancy.

My name is Marilyn M. Niwao, M.S.P.H., J.D., CPA, CGMA, and I am the immediate past State President and currently a State Director of the Hawaii Association of Public Accountants. I am a Hawaii licensed CPA and Attorney, and a principal of a well-established Maui CPA firm, Niwao & Roberts, CPAs, a P.C. for 39 years.

I am also the immediate past Vice Chair of the Hawaii Council on Revenues, a former Commissioner of the Hawaii Tax Review Commission, and a Past President of the National Society of Accountants. However, I am testifying here solely in my capacity as a State Director of the Hawaii Association of Public Accountants and Co-Chair of its legislative committee, while drawing upon my knowledge obtained while serving in the above positions.

HB 2570, HD1, SD1 requires that a *pro hac vice* appearance for a court hearing or arbitration hearing be supported by evidence of the applicant's and local counsel's Hawaii business registration and Hawaii general excise tax license numbers, and an affirmation that both the applicant and local counsel will pay all state income taxes due for Hawaii business activities.

HB 2570, HD1, SD1, a bill focused on state tax compliance by out-of-state attorneys, should be passed with an amendment to include general excise taxes as follows:

Section 605 – (3), "An affirmation that both the applicant and local counsel will pay all state income and general excise taxes due for Hawaii business activities; and"

HB 2570, HD1, SD1 with amendment, should be passed for the following reasons:



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1. After the Maui wildfires in August 2023, there were droves of out-of-state attorneys coming to Hawaii seeking to represent Maui wildfire victims in litigation. These attorneys may charge a contingent fee for these cases that may range from 30% - 45% of the lawsuit damages or settlement amount. The damages from the Maui wildfires are estimated to be significant, and in the billions of dollars.
2. Unfortunately, based upon our experience with out-of-state CPAs, HAPA found that approximately 70% of out-of-state CPA firms were not paying Hawaii taxes since Hawaii's GET is unique in the nation. The Hawaii GET tax is applied to both gross service income and gross rental income, and this is not the case in virtually all other states. Compliance with Hawaii's tax laws markedly improved for out-of-state CPA firms when the requirement was added that out-of-state CPA firms were required to provide a Hawaii GET license number in obtaining a firm permit to practice in Hawaii.
3. After checking recently whether some of the out-of-state law firms advertising to potential Maui wildfire clients had Hawaii General Excise tax license numbers, I found that only 1 out of 15 had yet obtained the Hawaii General Excise tax license number which is necessary to pay the Hawaii General Excise tax. In addition, the out-of-state law firms would be liable for any income taxes on net proceeds earned from the Maui wildfire lawsuits. Individual attorneys practicing *pro hac vice* would also be liable for their individual income taxes on their Hawaii source income.

HRS Administrative Rules Section 18-237-29.53-07 specifies that legal services provided to a party in a judicial action or proceeding, administrative proceeding, arbitration, mediation, etc. are used or consumed where the case or matter is filed.

Therefore, even though a multistate law firm performs work physically in states other than in Hawaii, all work performed on a case filed in Hawaii are subject to Hawaii taxes because the services are used or consumed in Hawaii. Further guidance is also provided in Tax Information Release No. 2018-06 (see attached).

I have not checked on whether out-of-state law firms involved in other litigation unrelated to Maui wildfires obtained the Hawaii General Excise tax license number, but I have serious doubts that the proper amount of taxes are being paid on Hawaii service income by out-of-state attorneys.

4. The Hawaii Supreme Court governs the practice of law and provides rules for attorneys. These out-of-state attorneys must associate with local Hawaii attorneys under Rule 1.9 and Rule 1.9A of the Hawaii Supreme Court when they appear in court and administrative proceedings. See attached 2024 registration form for out-of-state attorneys appearing *pro hac vice* in court and administrative hearings. (Please note that these out-of-state law firms are separate law firms from Hawaii law firms that they must associate with in court.)



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5. Due to the size of the Maui Wildfire lawsuits and other litigation, HAPA supports HB 2570, HD1, SD1 (with amendment) as a means to collect potentially hundreds of millions of tax dollars which otherwise would not be collected, and to inform out-of-state attorneys in litigation of their Hawaii tax obligations.
6. Taking proactive steps to insure state tax compliance will mean that the Hawaii State Tax Department will not have to spend as much time and money to audit out-of-state law firms with attorneys who are practicing *pro hac vice* in Hawaii.
7. For work by out-of-state attorneys where an action or proceeding is not pending (and where out-of-state attorneys are not practicing *pro hac vice*), legal services (such as consulting work) are still deemed to be sourced and subject to tax in Hawaii for work done for a Hawaii resident or for legal work done for a Hawaii business with Hawaii-related business activities. See HAR Section 18-237-29.53-11 (a)(3) and HAR Section 18-237-29.53-11(a)(1).
8. **With more proactive tax collections from out-of-state law firms and other out-of-state businesses who do business in Hawaii, there will be less need to raise taxes for Hawaii residents, who already pay some of the highest tax rates in the nation.**

Please support HB 2570, HD1,SD1 with amendment. Thank you for this opportunity to testify. Please do not hesitate to ask any questions by contacting me at niwao@mauicpa.com or at (808) 242-4600, ext. 224.

Respectfully submitted,

Marilyn M. Niwao

Marilyn M. Niwao, M.S.P.H., J.D., CPA, CGMA
Hawaii State Director and Legislative Committee Co-chairperson

Attachments



STATE OF HAWAII
DEPARTMENT OF TAXATION
830 PUNCHBOWL STREET, ROOM 221
HONOLULU, HAWAII 96813
<http://tax.hawaii.gov/>
Phone: (808) 587-1530 / Fax: (808) 587-1584
Email: Tax.Rules.Office@hawaii.gov

June 25, 2018

TAX INFORMATION RELEASE NO. 2018-06

Re: General Excise Tax Exemption for Contracting and Services Exported Outside the State;
Sourcing of Income from Contracting and Services

This Tax Information Release (TIR) discusses the sourcing and apportionment of income from contracting or services for purposes of the general excise tax (GET) and the exemption for contracting or services exported outside the State pursuant to section 237-29.53, Hawaii Revised Statutes (HRS), and sections 18-237-29.53-01 to 18-237-29.53-13, Hawaii Administrative Rules (HAR). These administrative rules were adopted and made effective on March 29, 2018.

This TIR provides general information and is not intended to replace the law or change its meaning. If any conflict exists between this TIR and the HRS and/or HAR, the HRS and/or HAR shall be controlling.

Historical Background

Prior to the enactment of the exported services exemption, section 237-29.53, HRS, the Department sourced and apportioned gross income from services based on a "place of performance" test. Under the place of performance test, a taxpayer was subject to GET if the taxpayer was physically in the State at the time the service was performed.

The sourcing of income was necessary pursuant to section 237-21, HRS, which provides:

If any person . . . is engaged in business both within and without the State . . . and if under the Constitution or laws of the United States . . . the entire gross income of such person cannot be included in the measure of this tax, there shall be apportioned to the State and included in the measure of the tax that portion of the gross income which is derived from activities within the State, to the extent that the apportionment is required by the Constitution or laws of the United States.

Because the State did not offer a credit or offset for taxes paid to another state, there was a risk that gross income would be subject to double taxation in violation of the U.S. Commerce

Clause.¹ See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (tax must be “fairly apportioned” to comport with U.S. Commerce Clause); see also Tyler Pipe Industries, Inc. v. Washington State Dep’t of Revenue, 483 U.S. 232, 248 (1987) (credit provision for tax paid to another state would cure discrimination in violation of U.S. Commerce Clause).

Act 70, Session Laws of Hawaii 1999, which became effective on January 1, 2000, created section 237-29.53, HRS, which provides a GET exemption for contracting or services used or consumed outside the State. Act 70 therefore superseded the “place of performance” test and replaced it with a “used or consumed” test. Under the used or consumed test, a taxpayer is subject to GET if the service is used or consumed in the State, and conversely, is exempt from GET if the service is used or consumed outside the State.

Exported Services Exemption

To determine where contracting or services are used or consumed for purposes of section 237-29.53, HRS, taxpayers will need to determine which one of the nine categories listed in sections 18-237-29.53-03 through 18-237-29.53-11, HAR, the contracting or services fall under and follow the corresponding sourcing rule. If contracting or services are used or consumed both in and outside of the State, the taxpayer must apportion gross income using any reasonable method, provided that it is consistently used by the taxpayer and supported by verifiable data.

1. Contracting

Contracting, as defined in section 237-6, HRS, is used or consumed where the real property to which the contracting activity pertains is located. HAR § 18-237-29.53-03.

2. Services Related to Real Property

Services related to real property, including property management, real estate sales, real estate inspections, and real estate appraisals, are used or consumed where the real property is located. HAR § 18-237-29.53-04.

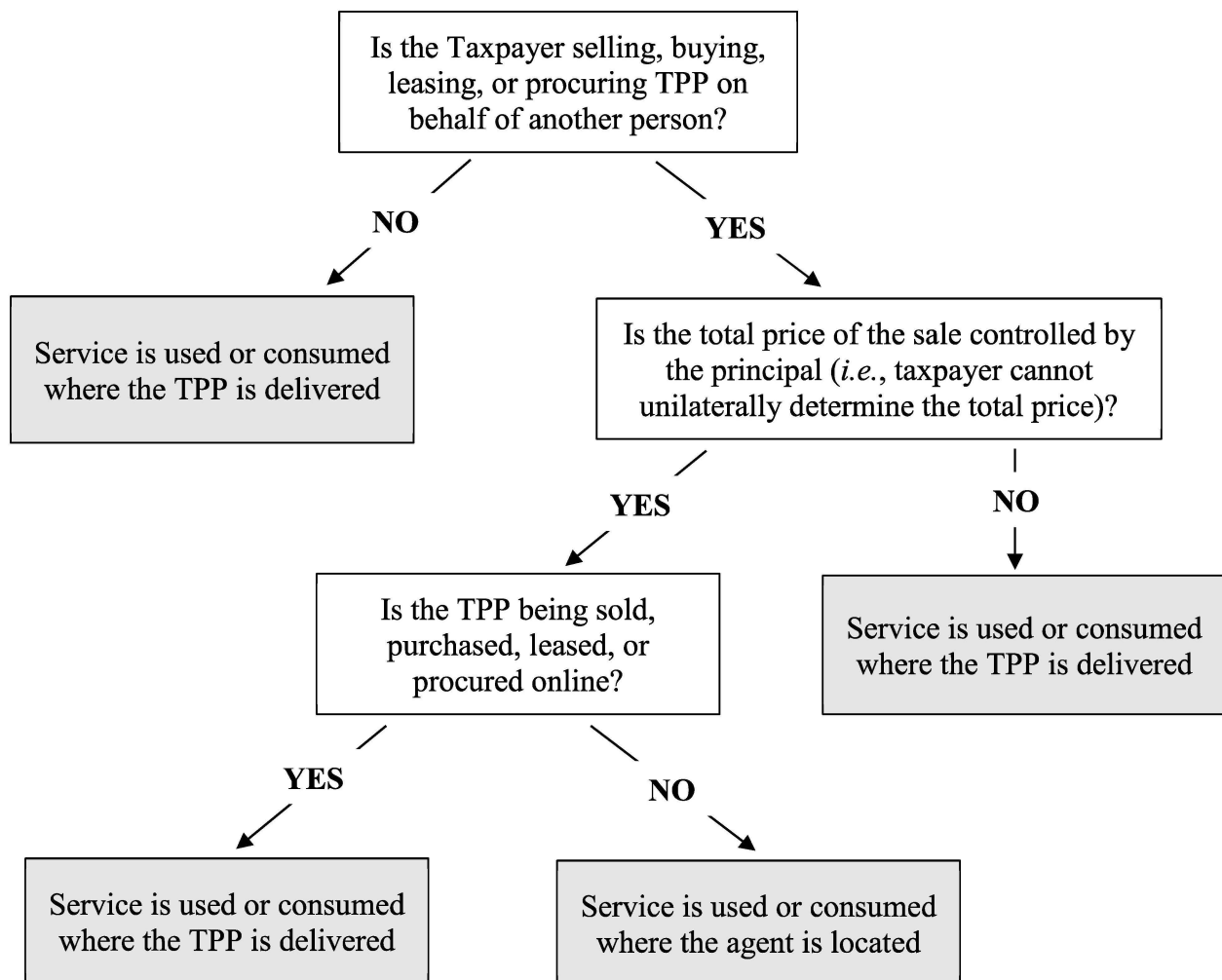
¹ Act 98, Session Laws of Hawaii 2002, amended section 237-22, HRS, by providing an offset for taxes paid to another state.

3. Services Related to Tangible Personal Property (TPP)

Services related to TPP, including inspection, appraisal, testing, and repair, are used or consumed where the TPP is delivered after the services are performed. HAR § 18-237-29.53-05.

Services performed by a commissioned agent, however, have different sourcing rules. A taxpayer is a commissioned agent, with respect to TPP, if the taxpayer sells, buys, leases, or procures TPP on behalf of a principal with the principal's assent for a predetermined fee and the total price of the sale is controlled by the principal. HAR § 18-237-29.53-01. If the commissioned agent sells, purchases, leases, or procures TPP online (exclusively through a website or app without any in-person contact), the commissioned agent's service is used or consumed where the TPP is delivered. HAR § 18-237-29.53-10(a)(1). If the TPP is not sold, purchased, leased, or procured online, the commissioned agent's service is used or consumed where the agent is located at the time the service is performed. HAR § 18-237-29.53-10(a).

The sourcing rules for services relating to TPP are illustrated in the following diagram:



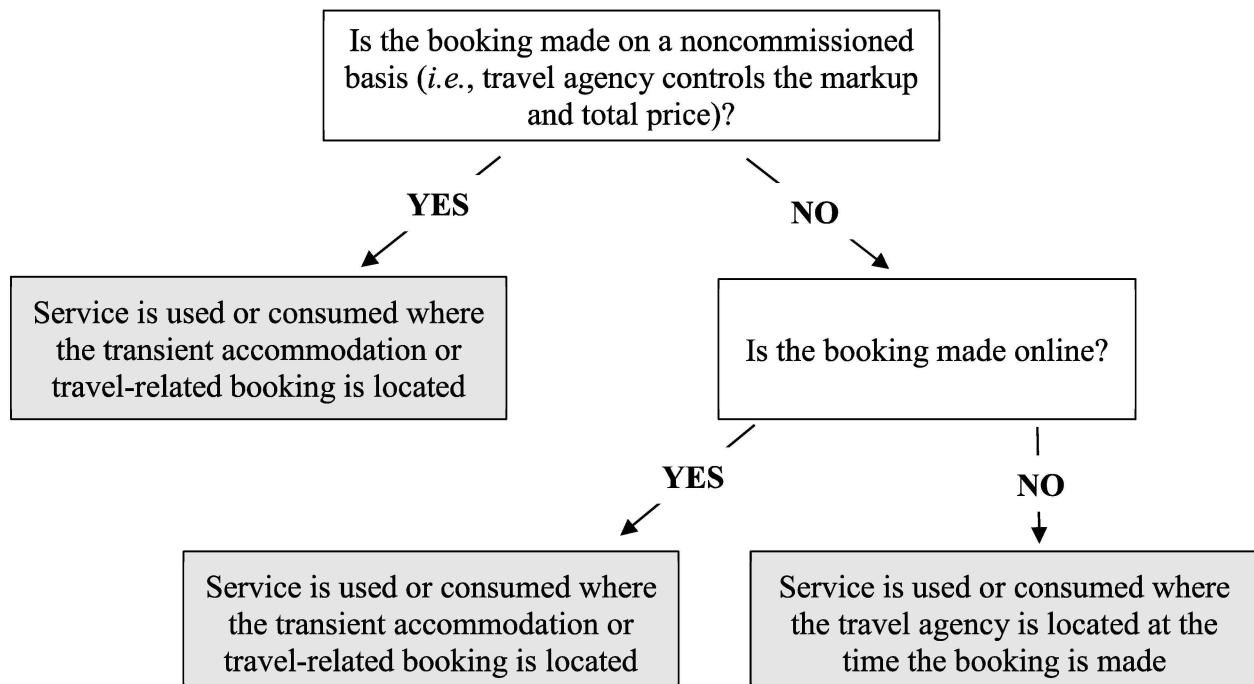
4. Booking Services by a Travel Agency or Tour Packager

Income from the sale, booking, or arrangement of transient accommodations or travel-related bookings (including tours, excursions, transportation, rental vehicles, shows, dining, spa services, and other reservations or bookings) by a travel agency or tour packager is sourced based on whether the transaction was booked on a commissioned or noncommissioned basis and whether the booking was made online.

A booking is made on a commissioned basis if the travel agency or tour packager books the transient accommodation or travel-related booking on behalf of a principal with the principal's assent for a predetermined fee and the total price of the booking is controlled by the principal. HAR § 18-237-29.53-01. A booking is made on a noncommissioned basis if the travel agency or tour packager has a contract with an operator of a transient accommodation or operator of a travel-related booking that specifies the rate the operator will receive for a booking and the travel agency or tour packager may unilaterally determine the mark-up and the total price charged to the customer. Id.

Income from bookings made on a noncommissioned basis is sourced to where the transient accommodation or travel-related booking is located. HAR § 18-237-29.53-06. Similarly, income from bookings made online (exclusively through a website or app without any in-person contact) on a commissioned basis is sourced to where the transient accommodation or travel-related booking is located. HAR § 18-237-29.53-10(a)(3). Income from bookings made on a commissioned basis that are not completed online is sourced to where the travel agency or tour packager is located at the time the booking is made. HAR § 18-237-29.53-10(a).

The sourcing rules for travel agencies and tour packagers are illustrated in the following diagram:

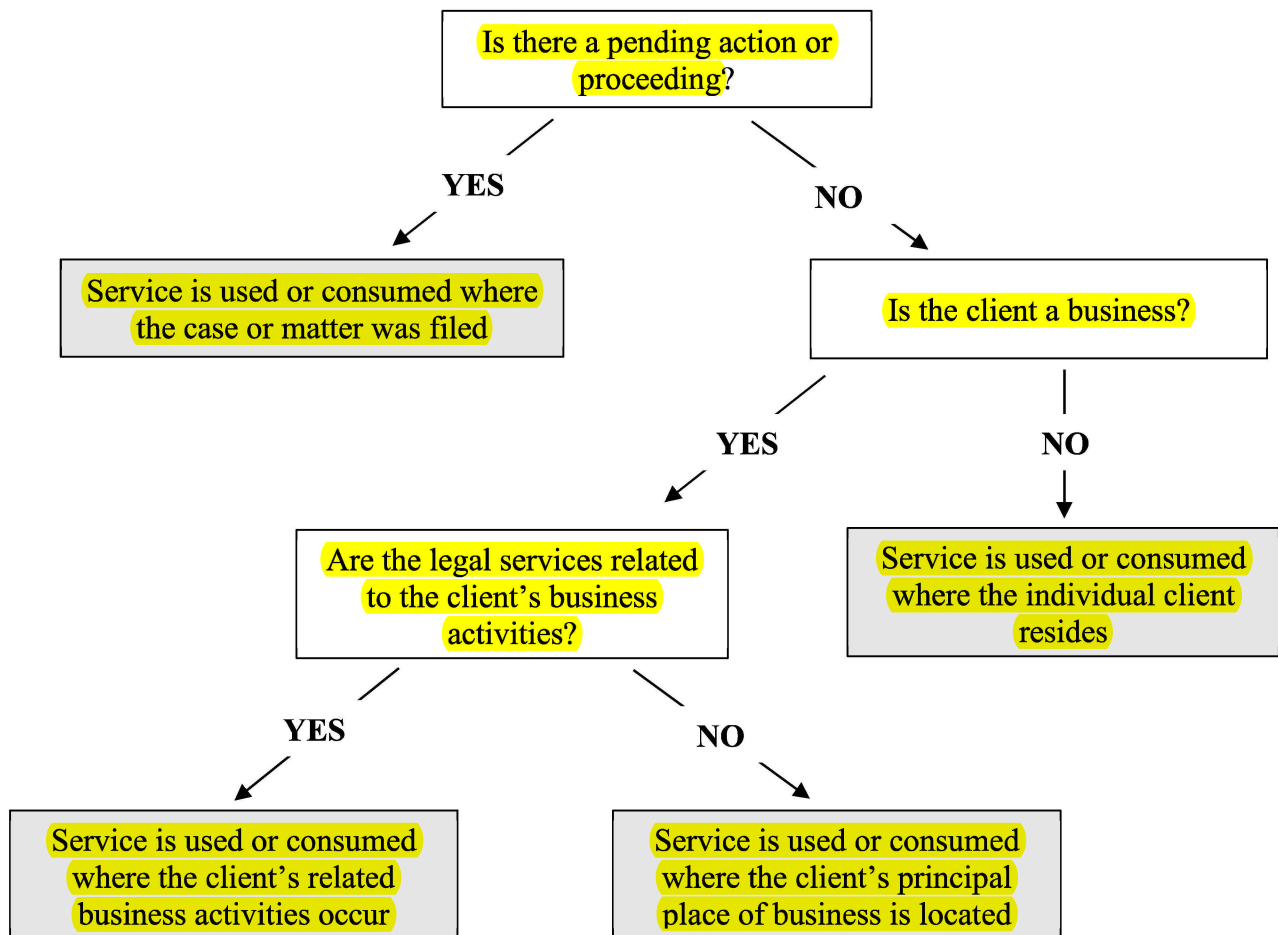


5. Legal Services

Legal services provided to a party in a judicial or administrative action or proceeding, arbitration, mediation, or other method of dispute resolution are used or consumed where the case or matter is filed. HAR § 18-237-29.53-07.

If an action or proceeding is not pending, or if the customer is not a party to the action or proceeding, income from legal services is sourced based on whether the client is an individual, business, or military or government. HAR § 18-237-29.53-11. Legal services provided to an individual are used or consumed where the individual resides. HAR § 18-237-29.53-11(a)(3). Legal services provided to the military or government are used or consumed where the benefit of the services is received. HAR § 18-237-29.53-11(a)(4). If legal services are provided to a business and the legal services relate to the client's business activities, the legal services are used or consumed where the client's related business activities occur. HAR § 18-237-29.53-11(a)(1). If legal services are provided to a business and the legal services are unrelated to the client's business activities, the legal services are used or consumed where the client's principal place of business is located. HAR § 18-237-29.53-11(a)(2).

The sourcing rules for legal services are illustrated in the following diagram:



6. Debt Collection

Debt collection services are used or consumed where the collection actions take place. HAR § 18-237-29.53-08.

7. Services Requiring the Customer to be Physically Present

Services that require the customer to be physically present at the time the services are performed are used or consumed where the services are performed. HAR § 18-237-29.53-09. This rule does not apply to contracting, services related to real property, services related to TPP, services provided by a travel agency or tour packager, legal services, and debt collection services. Id.

8. Sale, Purchase, or Procurement of Services by a Commissioned Agent

Income of a commissioned agent who sells, buys, or procures services online (exclusively through a website or app without any in-person contact) is sourced to where the transacted services are performed. HAR § 18-237-29.53-10(a)(2). If the transacted services are not sold, purchased, or procured online, the commissioned agent's services are used or consumed where the agent is located at the time the agent's services are performed. HAR § 18-237-29.53-10(a).

9. Other Services Not Covered Above

All other services that are not covered in the rules above are sourced as follows:

- Services provided to individuals are used or consumed where the individual resides;
- Services provided to the military or federal, state, or local government are used or consumed where the benefit of the services are received;
- Services provided to a business that relate to the customer's business activities are used or consumed where the customer's related business activities occur;
- Services provided to a business that are unrelated to the customer's business activities are used or consumed where the customer's principal place of business is located.

HAR § 18-237-29.53-11.

A summary of the sourcing rules discussed above may be found in the attached table. For more information, please contact the Rules Office at (808) 587-1530 or by email at Tax.Rules.Office@hawaii.gov.

LINDA CHU TAKAYAMA
Director of Taxation

Summary of GET Sourcing Rules Under Section 237-29.53, HRS

ACTIVITY	WHERE USED OR CONSUMED
1. Contracting	
All contracting, as defined in section 237-6, HRS	Location of real property
2. Services relating to real property	
All services that relate to real property	Location of real property
3. Services relating to TPP	
If taxpayer is a commissioned agent (<i>i.e.</i> , selling, buying, leasing, or procuring TPP on behalf of a principal and the total price of the sale is controlled by the principal) and	
The transaction is made online	Place of delivery of TPP
The transaction is not made online	Location of agent
All other services that relate to TPP	Place of delivery of TPP
4. Booking services by travel agency or tour packager	
If the booking is made on a noncommissioned basis (<i>i.e.</i> , travel agency controls markup and total price)	Location of transient accommodation or travel-related booking
If the booking is made on a commissioned basis (<i>i.e.</i> , travel agency does not control markup and total price) and	
The booking is made online	Location of transient accommodation or travel-related booking
The booking is not made online	Location of travel agent at the time the booking is made
5. Legal services	
If there is a pending action or proceeding	Where the case was filed
If there is no pending action or proceeding and	
The client is an individual	Client's residence
The client is the military or government	Where the benefit of the service is received
The client is a business and	
The legal services are related to the client's business activities	Where the related business activities occur/occurred
The legal services are unrelated to the client's business activities	The business' principal place of business

6. Debt collection	
If the service involves enforcement of a money judgment or collection of a debt	Location of collection action
7. Services requiring customer to be physically present	
Services that require the customer to be physically present	Where service is performed
8. Sales of services by commissioned agent	
If taxpayer is selling, purchasing, or procuring services, the total price of the sale is controlled by the principal, and	
The sale is completed online	Where the transacted service is performed
The sale is not completed online	Location of agent
9. Other services not covered above	
If the customer is an individual	Customer's residence
If the customer is the military or government entity	Where the benefit of the service was received
If the customer is a business and	
The service relates to the customer's business activities	Where the customer's related business activities occur
The service does not relate to the customer's business activities	Customer's principal place of business



PRO HAC VICE

Rules of the Supreme Court of the State of Hawaii **1.9** and **1.9A**

Appearance of Counsel in State Court & Administrative Proceedings

*N/A to Federal Court & Administrative Proceedings

As a **reminder**, the Rules of the Supreme Court of Hawaii require that “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.” RSCH 1.9C (emphasis added).

<https://www.courts.state.hi.us/wp-content/uploads/2021/02/rsch.pdf> [for pdf (print) version, and;]
https://www.courts.state.hi.us/wp-content/uploads/2021/02/rsch.htm#Rule1_9

2024 Fee Schedule

Credit card (VISA, MasterCard, Discover, American Express) OR check payment accepted.
Make check payable to the Hawaii State Bar Association.

Disciplinary Board assessment	\$600.00
Registration fee	150.00
Lawyers Fund for Client Protection assessment	50.00
Processing fee	<u>15.00</u>
TOTAL	\$815.00

Complete, sign and return the 2024 Pro Hac Vice application within **ten (10)** days after entry of Order approving appearance together with the following:

- copy of the Approved order granting petition or motion
- copy of the Petition
- payment

Upon completion of registration and payment processing an electronic confirmation message (receipt) will be transmitted. Application will be processed within 3-5 business days.

You may submit your PHV Registration forms by FAX to (808) 521-7936 or EMAIL to lcastillo@hsba.org.

For additional information contact Liberty Castillo at lcastillo@hsba.org or (808) 792-7339.



2024 PRO HAC VICE REGISTRATION
(For NEW Applicants ONLY)

Name: _____
First- no initials Full Middle – no initials Last

Social Security Number : _____ - _____ - _____ Date of Birth: _____
The Office of Disciplinary Counsel requires the HSBA to collect SSN information for its administrative and investigative purposes, if needed.

MEMBER INFORMATION

Business (Firm/Employer) Address (Published) Required

Phone: _____

Fax : _____

Email Address: _____@_____

Communication Address Preferred Mailing and E-Mail (REQUIRED HSBA use only)

Phone: _____

Fax : _____

Email Address: _____@_____

Service of Process Street Address (REQUIRED by Disc. Counsel)

Phone: _____

Fax : _____

Email Address: _____@_____

Residential Street Address (REQUIRED by Disciplinary Counsel - Confidential)
(do not list business information- respond accordingly)

Cell or landline Phone: _____

Fax : _____

Residential Email Address: _____@_____

Name of the HSBA Attorney associated with: _____ JD# _____

Email address of the HSBA Attorney associated with: _____

List Active case(s) in the State of Hawaii for which you have been admitted Pro Hac Vice: (Please attach additional sheet if necessary)

Table with 4 columns: Case Name, Case Number, Court Name, Approval Date. Includes four rows of blank lines for data entry.

HB-2570-SD-1

Submitted on: 4/2/2024 7:40:20 AM

Testimony for WAM on 4/3/2024 10:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Shannon Wibberley	Testifying for Hawaii Association of Public Accountants	Support	Written Testimony Only

Comments:

RE: Support of HB 2570 – Relating to Attorneys

As president of the Big Island Hawaii Association of Public Accounts I am in support of HB 2570. I support this bill in hopes that outside attorneys will be forced to register as a Hawaii business and pay state income tax and general excise tax. Doing so would create revenue for the state of Hawaii and also protect service type industries such as attorneys and CPAs who are already established in Hawaii.

Respectfully submitted,

Shannon Wibberley

Big Island HAPA President