



Commission Update: Hawaii Judicial Pro Bono Policy

The Hawai'i Access to Justice Commission has compiled the provisions in the Hawai'i Judicial Code relating to pro bono activities by judges in a brief two-page document for easy reference by and the convenience of judges. These provisions have been organized in a sequence that is somewhat different from that presented in the Code itself to enhance clarity. The Statement was drafted by the Access to Justice Commission's Committee on Increasing Pro Bono Legal Services.¹

The provisions of the Hawai'i Judicial Code are derived essentially from the ABA model judicial code. This document is presently pending approval by the Hawai'i Supreme Court.

Hawai'i Judicial Code Pro Bono Policy Statement

Rule 3.7(b) of the Hawai'i Revised Code of Judicial Conduct ("HRCJC") specifically provides that "[a] judge may encourage lawyers to provide pro bono publico legal services." Consistent with Rule 3.7(b) and the commentary thereto, a judge may so encourage provision of delivery of pro bono publico services by:

(1) appointing lawyers to act as counsel for indigent parties in individual cases. [Comment [5] to Rule 3.7]

A judge may, without employing coercion or misusing the prestige of judicial office, promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services through many forms, including:

(1) providing lists of available pro bono publico programs to

lawyers; [Comment [5] to Rule 3.7]

(2) training lawyers to do pro bono publico legal work; [Comment [5] to Rule 3.7] and

(3) participating in events recognizing lawyers who have done pro bono publico work. [Comment [5] to Rule 3.7]

Moreover, HRCJC Rule 3.7(a) specifically provides that "a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit[.]" As specifically related to encouragement of the provision of pro bono publico services, a judge may participate in the following activities:

(1) assisting in planning of fundraising for the [pro bono publico] organization or entity and participating in the management and investment of the organization's or entity's funds; [Rule 3.7(a)(1)]

(2) soliciting contributions for such [pro bono publico] organization or entity, but only from members of the judge's family or from judges over whom the judge does not exercise supervisory or appellate authority; [Rule 3.7(a)(2)]

(3) serving as an officer, director, trustee, or nonlegal advisor of such [pro bono publico] organization or entity, unless it is likely that the organization or entity:

(A) will be engaged in proceedings that would ordinarily come before the judge; or

(B) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate

jurisdiction of the court of which the judge is a member; [Rule 3.7(a)(6)(A)-(B)]

(4) donating, without attribution of judicial title, services or goods at fundraising events; [Rule 3.7(a)(7)] and

(5) speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such [pro bono publico] organization or entity, but, if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice. [Rule 3.7(a)(4)]

To the extent that the pro bono organization or entity is concerned with the law, the legal system or the administration of justice, a judge may participate by:

(1) soliciting membership for such [pro bono publico] organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity; [Rule 3.7(a)(3)] and

(2) making recommendations to a public or private fund granting organization or entity in connection with [a pro bono publico organization's] programs and activities. [Rule 3.7(a)(5)]

¹ Moya Gray, Executive Director of Volunteer Legal Services Hawaii, is Chair of the Committee on Increasing Pro Bono Legal Services. Other members of the committee are: Judge Simone Polak, Shannon Wack, Derek Kobayashi, Tracey Wiltgen, Gilbert Doles, Clara Javier, Mihoko Ito, Colbert Matsumoto, Robin Kobayashi, and Wayne Tanna.

Chief Justice John T. Broderick, Jr.

New Hampshire Supreme Court

by Suzanne Terada

(Ed. Note: Chief Justice John T. Broderick, Jr. of the New Hampshire Supreme Court was the featured speaker at the Hawaii Access to Justice Conference on June 24, 2009.)

Chief Justice John T. Broderick, Jr. was sworn in by Governor Craig Benson during a ceremony at the New Hampshire Supreme Court on June 4, 2004. He was appointed an associate justice of the New Hampshire Supreme Court in 1995 by Governor Stephen E. Merrill after many years as a private practitioner in Manchester. His nomination as the 99th member of the state's highest court followed the retirement of Associate Justice William F. Batchelder. Chief Justice Broderick served as president of the New Hampshire Bar Association from 1990-91.

Chief Justice Broderick is a fellow of the American College of Trial Lawyers and is a past president of the New Hampshire Trial Lawyers Association. In 1993, President William Clinton appointed Chief Justice Broderick to the board of directors of the national Legal Services Corporation. He is a graduate of Holy Cross College and the University of Virginia Law School. Chief Justice Broderick is married with two children and four grandchildren.

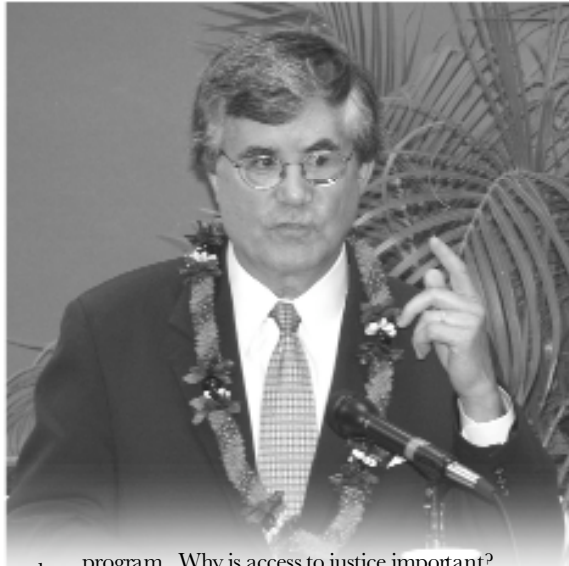
Q: What kind of law practice did you have before your appointment to the bench?

C.J.: For 22 years, I was a trial lawyer in Manchester, New Hampshire. For 17 of those years I was in a large law firm by New Hampshire standards; it had about sixty lawyers, and then in 1989, I started my own boutique trial law firm with my dear friend, Steve Merrill, former Attorney General of our state.

Q: What kind of law did that firm practice?

C.J.: We did all sorts of civil litigation, and it was pretty evenly distributed. A lot of it was commercial litigation. Many of our cases went to trial. We did very little mediation or arbitration and, at that time, they were much less common than they are today.

Q: Let's discuss the equal access to justice



program. Why is access to justice important?

C.J.: I think it is a fundamental promise in our founding documents. I am concerned that as time passes we are not keeping that commitment. People will resolve their disputes; that's a given. But it's not in society's interest that the courts be foreclosed from resolving those disputes due to the cost of litigation. I think the expense of litigation is becoming overwhelming. Not only for poor people, which has been true for decades, but middle class citizens and small businesses, as well. I think it's a concern that public forums are not used as frequently or as wisely as they once were.

Q: What does the idea of equal access to justice mean for judges?

C.J.: I think it will require change. The American state court system was ingeniously designed for parties with lawyers, a reasonable amount of money to spend, and a reasonable amount of time to wait for a final resolution. Judges, for much of America's judicial history, have been observers and referees. They have not had to participate very much or explain the process very often. They have traditionally been required to make sure that the playing field was level, but in doing so they have had the benefit of lawyers in the vast majority of cases.

Increasingly, I think change will require that judges be somewhat more proactive in the courtroom in that they will be required to explain more, to write their orders in simple

English, and be more sensitive to timeliness than ever before. The people using our courts today increasingly do not have lawyers at their side. I also think that equal access applies "up the ladder," too. For businesses, for example, I think they have come to find the court system to be too slow and too expensive, with way too much discovery which is largely unregulated by judges. I think if we are to bring the business community back in the state courts, judges need to have a more proactive role. If state courts become less and less relevant to the market place, that will not be in the public interest.

Q: What does the access to justice program mean for lawyers?

C.J.: First of all, it's not a threat to their livelihood. When I first became Chief Justice, I made a promise that I would do all in my power to make justice more accessible, affordable, and understandable for all of our citizens. Many lawyers thought they heard me say, although I didn't, that I was going to water the system down so people would not need to hire them. And so, a lot of lawyers were threatened by that notion. I think they need not be. If it works well, the folks who can never afford them, will get through the system in a more timely and efficient way. Those who can afford them will get through in a more timely and efficient way, as well. The clients will be billed less than they are now, and as I say to lawyers, what that means is, perhaps you'll be able to represent two clients and be paid 100% of your bill as opposed to representing a single client and having half of your bill be an accounts receivable. So, it's interesting that lawyers often hear the promise of improved access to justice very differently than they should. They will find it is in their interest, as well. In fact, everyone will win. I think attitudes are changing, but it's going to take awhile longer for real change to take hold.

Q: What does pro bono mean to you? For example, if pro bono work only means pro bono legal services then what about the volunteer work that lawyers do for their community, such as volunteering to be on boards of nonprofit organizations or volunteering in

any function with a nonprofit entity?

C.J.: Let me tell you my feelings about that. I think that in my state, for example, lawyers do a tremendous amount of legal work that would be traditional pro bono. They also do many other things (as I'm sure is true in Hawaii) with and for nonprofit groups. I, and my colleagues on the Supreme Court, have encouraged lawyers through our rules process to put in thirty hours of traditional pro bono a year. The service they might provide to a nonprofit, as valued as it might be, does not fulfill the promise of our Constitution. There are many people who can do wonderfully important work for nonprofits. But lawyers are essential to the court system and to meaningful access to justice. They are not essential to nonprofits.

I think traditional pro bono requires lawyers, and the New Hampshire Supreme Court has affirmatively encouraged them to do it. If they have time and interest, they obviously should continue their important efforts in the broader community, but I think that lawyers need to devote their volunteer time, in the first instance, to the unrepresented in the court system.

Q: Is it necessary to define pro bono service?

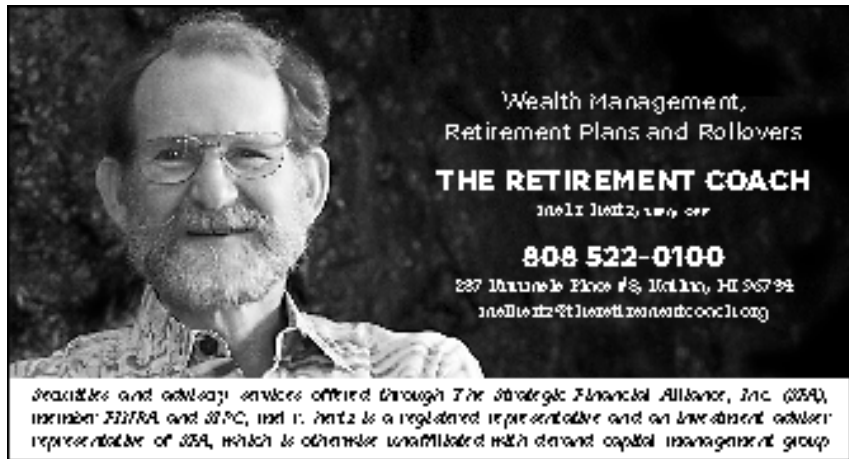
C.J.: In our Supreme Court Rules of New Hampshire, we have made it a point that the pro bono hours that we expect, which is thirty, should be directed to those in need of free legal services.

Q: What about government attorneys?

C.J.: Government attorneys are expected to do thirty hours of pro bono, too. Now they can't have clients and work for the government or a corporation, but they can pitch in over the phone or work at self-help centers where they will not establish an attorney-client relationship. In my state about 30% of the bar has traditionally had an "out" because of their government service or their work as corporate legal counsel. We don't want them to do anything unethical, but there are definite ways they can contribute without establishing a forbidden attorney-client relationship.

Q: During these tough economic times, how will a solo practitioner be able to afford the aspirational hours of pro bono legal services when he or she has to pay the bills of legal practice and living?

C.J.: It is a real challenge; I don't dispute it. Every month I ask the pro bono referral office of our state bar for a list of the lawyers who provided pro bono legal services the previous month. I write personal note cards to as many of them as I can. It is not uncommon to see a solo practitioner or a small law firm have a lawyer or two who has taken two



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or three pro bono cases that month. It's quite extraordinary. Now, I sense some of them do it because they believe it is their professional obligation. I think some of them do it because they are not that busy in this economy and they want to gain the practical experience in representing clients. But, most of our state bar is comprised of solo practitioners or small firms and they have historically done their share, if not more than their share, in both good times and bad. I know it involves sacrifice but they do it and I think it is part of being a lawyer and I think they will accept that.

Q: If attorneys are busy with their own practices, how would you motivate them to act?

C.J.: I've been doing all that I can to increase their already substantial motivation. The legal system needs to figure out a way to handle problems more effectively and efficiently for our citizens or someone else will. It's already happening. So for our legal profession to remain a profession, it can't ignore its obligation or assume that someone else will fulfill them. One of the great challenges, I think, at the beginning of this century, is to find a way to use technology more effectively to find a way in which cases might be handled administratively in the first instance, and not be in the courthouse from day one. I think lawyers have to figure out a way to make their services more affordable to more people and small businesses as well. I see a huge wave building. I do know it will crest and take a lot of unprepared people with it. I think lawyers need to be smarter about what they do. I think courts need to redesign themselves consistent with new reality outside our courthouse doors. Everyone needs to play and participate. We can't just make minor changes, in my view. We have to deal with the 21st century. To find out the consequences of unmanaged change, just ask General Motors.

Q: If judges are busy, how do you motivate the judges to act?

C.J.: I think it takes less motivation than you might think. I'll give you an example. One of our superior court judges (the superior court in New Hampshire is equivalent to your circuit court in Hawaii), a pretty experienced judge at that, called me one day and asked, "When are you getting these divorce cases off my docket? Some days it's like the Jerry Springer show." We have a family court in eight of our ten counties which handles a host of family-related cases, including divorces. The judges and masters who sit in that court sign up for that duty because they want to do it. I think judges are motivated now, more than ever before, to find the work they like because there's an increasing amount of work they would not want. I'm




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Q: How do your colleagues on the New Hampshire Supreme Court meet the access to justice challenge?

C.J.: It's somewhat difficult because we are sitting judges so we can't become lawyers. We are involved in a host of different kinds of pro bono activities. For example, one of the things I did in the last two years was to invite myself to lunch at maybe twenty law firms. I refer to it with a smile as "the pro bono world tour." I met with their lawyers, anywhere from ten to eighty, and I asked them to help. We also established an Access to Justice Commission to keep the issue front and center. We have tried to encourage lawyers to do even more, with full understanding and respect to the fact that they are all trying to make a living. I think in the long term, if we don't deal effectively with the problem of the unrepresented in our courthouses, their capacity for the average lawyer to make a living doing trial work will be affected, as will public trust and confidence in the courts.

Q: Do you have a position on whether there should be a civil right to counsel in providing access to justice for low-income clients?

C.J.: I think it's a legislative decision, and I would support it. Let me just briefly say, as you know, the ABA passed an unanimous resolution a few years ago, for which I give it great credit. When I became Chief Justice in 2004, our Supreme Court appointed a Citizen's Commission to take a look at our state courts. The Commission had 104 members, two-thirds of whom were non-lawyers and non-judges. The co-chairs of the commission were lay people. After about sixteen months, the commission issued a report. The commission suggested that the State of New Hampshire give serious consideration to a civil *Gideon*. In frugal New Hampshire where everyone squeezes the nickel three times before they spend it, these citizens recognized the legitimacy and magnitude of the problem self-representation causes. Ultimately a civil *Gideon* may be the only real answer to the problem because there will never be enough lawyers, there will never be enough volunteer lawyers, there will never be enough IOLTA money, and there will never be enough appropriated legal services money. I think we need to do something more significant than we have done. I think that's still a distance away, but I think ultimately it is the answer along with everything else we continue to do.