



**HAWAI`I  
ACCESS TO JUSTICE  
COMMISSION**

**Annual Report for 2011**



Hawai'i Access to Justice Commission

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## **I. HAWAI`I ACCESS TO JUSTICE COMMISSION**

This report highlights the Hawai`i Access to Justice Commission's ("Commission") activities in 2011.

### **A. New and Continuing Commissioners**

The Commission is comprised of twenty-two Commissioners. The various Commissioners are appointed as designated in Rule 21 of the Rules of the Supreme Court of the State of Hawai`i by separate appointing authorities including the Chief Justice of the Hawai`i Supreme Court, the Hawai`i State Bar Association ("HSBA"), the Hawai`i Consortium of Legal Service Providers, the Hawai`i Justice Foundation ("HJF"), the Williams S. Richardson School of Law, the Hawai`i Paralegal Association, the Governor, the Attorney General, the Senate President, and the Speaker of the House.

In 2011, the following new commissioners were added to the Commission:

- Hon. Della Au Belatti, Representative, Hawai`i State Legislature
- Hon. Clayton Hee, Senator, Hawai`i State Legislature
- L. Dew Kaneshiro, Executive Director, Volunteer Legal Services Hawai`i
- Derek Kobayashi, attorney with Schlack Ito
- Gregory Markham, attorney with Chee Markham & Feldman
- Patricia McManaman, Director, Hawai`i Department of Human Services
- Scott S. Morishige, Program Director, Helping Hands Hawai`i



The Commissioners are listed as follows:

	Name	Appointed By	Term Ends
1.	Hon. Daniel R. Foley (CHAIR as of June 30, 2010)	Chief Justice	n/a
2.	Jill M. Hasegawa (VICE-CHAIR)	Hawai`i State Bar Association	12/31/11
3.	Hon. Simeon R. Acoba, Jr. (Former Chair from May 2008 until June 29, 2010)	Chief Justice	12/31/12
4.	Hon. Greg K. Nakamura	Chief Justice	12/31/12
5.	Hon. Joseph Cardoza	Chief Justice	12/31/11
6.	Hon. Trudy Senda	Chief Justice	12/31/12
7.	Derek Kobayashi (desig. Jan. 1, 2011)	Hawai`i State Bar Association	12/31/13
8.	B. Martin Luna	Hawai`i State Bar Association	12/31/11
9.	Shannon L. Wack	Hawai`i State Bar Association	12/31/13
10.	L. Dew Kaneshiro (Volunteer Legal Services of Hawai`i)	Hawai`i Consortium of Legal Services Providers	12/31/12
11.	M. Nalani Fujimori Kaina (Legal Aid Society of Hawai`i)	Hawai`i Consortium of Legal Services Providers	12/31/12
12.	Moses Haia (Native Hawaiian Legal Corporation)	Hawai`i Consortium of Legal Services Providers	12/31/13
13.	Nanci Kreidman (Domestic Violence Action Center)	Hawai`i Consortium of Legal Services Providers	12/31/13
14.	Jean Johnson (Non-attorney public representative)	Hawai`i Consortium of Legal Services Providers in consultation with Chief Justice	12/31/12
15.	Scott S. Morishige (Non-attorney public representative)	Hawai`i Consortium of Legal Services Providers in consultation with Chief Justice	12/31/11
16.	Gregory Markham	Hawai`i Justice Foundation	12/31/12
17.	Dean Aviam Soifer	William S. Richardson School of Law	12/31/13
18.	R. Elton Johnson, III.	Hawai`i Paralegal Association	12/31/13
19.	Patricia McManaman	Governor	n/a
20.	Mary Anne Magnier	Attorney General	n/a
21.	Hon. Clayton Hee	Senate President	n/a
22.	Hon. Della Au Belatti	House Speaker	n/a



## **B. Committees**

The Commission created committees and various other ad hoc subcommittees and task force groups to carry out and facilitate its mission. Commissioners serve as chairs for the committees.

### **Administration Committee**

[Associate Justice Simeon R. Acoba, Jr. (Chair), Associate Judge Daniel R. Foley, L. Dew Kaneshiro, Jill Hasegawa, Derek Kobayashi, Carol K. Muranaka, David Reber (Vice Chair), Tracey Wiltgen]

- Assist the Chair of the Commission in developing an agenda for each Commission meeting, and assist in arranging for presenters and written or electronic materials in support of agenda items
- Assist in developing a budget for the Commission, including identifying potential sources of funding, and providing reports on the status of operations relative to budget
- Assist in providing administrative and logistical assistance to the Commission and its committees and task forces

### **Applications for Committee Memberships**

The Committee reviewed eleven applications for service on the Commission's committees and made recommendations to the Commission and other committees.

### **Summary of Actions Taken**

The Committee considered and made recommendations to the Commission and other committees regarding the following:

- (1) "Cy pres" amendment to Hawai'i Rules of Civil Procedure (HRCP) Rule 23; dissemination of amendment through articles in the Hawaii Bar Journal, a flyer, and a tool kit and communication with the Hawai'i federal district court regarding amending the local rules to match the Hawai'i amended cy pres rule.
- (2) Law student involvement in self-help centers and proposed amendment to the Hawai'i Rules of the Supreme Court (RSCH) Rule 7.



- (3) Schedule for Commission meetings and the Access to Justice Summit Conference.
- (4) Ending term dates for Commission members and beginning terms for new Commission members.
- (5) Suggestions for steps that the Commission could take to facilitate access to justice submitted to committees for further review.
- (6) Assisting veterans through veterans pro bono.
- (7) Self-Services Centers at courts and Virtual Help Centers.
- (8) Priority for comments and suggestions from the 2010 and 2011 Access to Justice Conference and allocation to the committees.
- (9) A task force for paralegal pro bono with a first focus on ways non-attorneys can become involved in pro bono work before agencies.
- (10) Act 48, Session Laws of Hawaii 2011, and non-judicial and judicial foreclosures.
- (11) Financial support for the pro bono fair.
- (12) Amendment to Hawai`i Rules of Professional Conduct (HRPC) Rule 6.1 for consideration by the Supreme Court of a \$500 payment in lieu of 50 hours of pro bono services.
- (13) Language access consideration by the Roundtable on Linguistic and Cultural Access to Justice.
- (14) Financial support for attendance at the National Meeting of State Access to Justice Chairs.
- (15) Amendment to the Indigent Legal Assistance Fund statute to increase the surcharge on court filing fees for the period from January 2012 to January 2014 to benefit legal service providers.
- (16) Amendment to RSCH Rules 1.4, 1.7, and 17 regarding military lawyers.





- (17) Mandatory continuing legal education rule change regarding the definition of access to justice.
- (18) Use of the internet and publication of articles in the Hawaii Bar Journal.
- (19) Amendment of RSCH Rule 1.16, for limited admission of attorneys employed by non-profit organizations providing civil legal services to economically disadvantaged persons.
- (20) Role of libraries in access to justice.
- (21) Legislative amendment proposal for attorney general pro bono service and small claims court jurisdiction.
- (22) Selection of vice-chairs for committees.
- (23) Approval of printing of 165 copies of the Annual Report.
- (24) Cost-benefit study.
- (25) Hawai`i Supreme Court's three-year evaluation of the Access to Justice Commission.

### **Annual Report Committee**

[Jill Hasegawa (Chair), Associate Justice Simeon R. Acoba, Jr., Carol K. Muranaka, Karen Nakasone (Vice Chair), Nichole Shimamoto]

- Assist in preparing an annual report of the activities of the Commission for filing with the Supreme Court in accordance with Rule 21(j)(1)

### Summary of Actions Taken

The Committee prepared the annual report of the Commission's activities for 2010. Over 150 copies of the annual report were distributed to commissioners, the Hawaii Supreme Court, legislators, the HSBA board and Sections, and others. The annual report was also posted on the Commission's subpage at HJF's website.



### **Committee on Education, Communications and Conference Planning**

[Dean Aviam Soifer (Chair), Rep. Della Au Belatti, Sonny Ganaden, Sen. Clayton Hee, Mihoko Ito, Elton Johnson, Robert LeClair, Carol K. Muranaka (Vice Chair), Leila Rothwell Sullivan]

- Assist in organizing an annual summit for the presentation of access to justice issue
- Make recommendations on encouraging lawyers, judges, government officials and other public and private leaders in Hawai'i to take a leadership role in expanding access to justice
- Assist in developing strategies for educating governmental leaders and the public about the importance of equal access to justice and of the problems low-income people in Hawai'i face in gaining access to the civil justice system, including through informational briefings, communication campaigns, statewide conferences, testimony at hearings and other means
- Increase awareness of low-income people's legal rights and where they can go when legal assistance is needed
- Assist in developing a communications strategy and preparing communications consistent with that strategy
- Encourage judges, lawyers and legal services providers to prepare a series of articles on access to justice topics for publication in the Hawaii Bar Journal and other media

#### Summary of Actions Taken

The Committee considered and made recommendations to the Commission regarding the following:

- (1) The definition of "access to justice" as established by the HSBA<sup>1</sup> was too narrow for the purposes of a qualifying topic under

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<sup>1</sup> The original hyperlink for Regulation 3(B) of the HSBA CLE Regulations defined "access to justice" as a qualifying course or activity under Supreme Court Rule 22 as:

To qualify for MCPE credit, access to justice course topics should cover issues related to providing pro bono work. For example, topics such as the liability exposure for providing pro bono representation, pro bono opportunities, an attorney's ethical obligation to provide pro bono



Supreme Court Rule 22.<sup>2</sup> The Committee recommended an expansion of the definition. On March 29, 2011, the HSBA CLE Board approved the following definition of “access to justice:”

To qualify for MCPE credit, “access to justice” course topics should educate attorneys about equal access to justice, including barriers arising from biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation, and should cover equal justice issues as they relate to the delivery of legal services to the low-income individuals in need. Additionally, substantive courses taught by non-profit legal service providers that require attorneys attending their course to commit to pro bono service also qualify for MCPE credit.

representation, etc. In addition, substantive courses taught by non-profit entities such as the Legal Aid Society of Hawaii that require attorneys attending their course to commit to pro bono service qualify for MCPE credit.

The Commission recommended the following definition to the HSBA MCLE Board:

To qualify for MCPE credit, access to justice course topics should educate attorneys about equal access to justice, including barriers arising from biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age, or sexual orientation, and should cover equal justice issues as they relate to the delivery of legal services to the low-income individuals in need. The annual Access to Justice Conference sponsored by the Hawaii Access to Justice Commission qualifies for MCPE credit. Additionally, substantive courses taught by non-profit entities such as the Legal Aid Society of Hawaii that require attorneys attending their course to commit to pro bono service also qualify for MCPE credit.

<sup>2</sup> Hawaii Supreme Court Rule 22 provides, in pertinent part, as follows:

(a) Mandatory Continuing Professional Education. Except as otherwise provided herein, every active member of the Bar shall complete at least 3 credit hours per year of approved Mandatory Continuing Professional Education (MCPE). Qualifying professional education topics include the Hawai'i Rules of Professional Conduct, legal ethics and related topics, law office management, client trust account administration, bias awareness and prevention, **access to justice**, case and client management, and malpractice insurance and prevention. [Emphasis added]



- (2) Requested a minimum of three MCPE credits for the 2011 Access to Justice Conference, which request was subsequently approved.
- (3) Coordinated the 2011 Access to Justice Conference (“Access to Justice: Pursuing a Noble and Necessary Purpose” on Friday, June 24, 2011.<sup>3</sup>
- (4) Prepared a report to the Commission summarizing the conference including expenses, suggestions, and action items.
- (5) Coordinated the first community briefing that was held on January 11, 2011 with the assistance of Representative Della Au Belatti, a commissioner and member of the Committee. Future community briefings were tentatively set in May and November, 2012.

### **Committee on Funding of Civil Legal Services**

[Gregory Markham (Chair), Rebecca Copeland, M. Nalani Fujimori Kaina, Robert LeClair, L. Dew Kaneshiro, Dean Aviam Soifer, Kanani M. Tamashiro, Wilfredo Tungol]

- Make recommendations and provide advocacy in support of establishing a permanent “home” for the legislative funding of providers of civil legal services to low- and moderate-income individuals so that funding for such services may be stable and secure
- Make recommendations and provide advocacy in support of increased legislative funding of civil legal services providers
- Make recommendations and provide advocacy in support of increased funding for civil legal services providers by the federal Legal Services Corporation and other federal and state agencies
- Make recommendations and provide advocacy in support of increased funding of civil legal services through the indigent legal services filing fee surcharge and other measures

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<sup>3</sup> Further discussion can be found at II. 2011 Access to Justice Conference in this report.



- Assist legal services providers in exploring additional public and private funding sources and in developing programs or projects for which funding may be sought
- Make recommendations, including in collaboration with the Judiciary and the HSBA and with law firms and other employers of lawyers, to encourage attorneys to provide substantial financial support to legal services providers, including additional amounts in years when such attorneys do not meet the aspirational pro bono goals of Rule 6.1 of the HRPC

On behalf of the Committee, the Chair recommended that the Commission send a letter of general support for federal funding of Hawai'i organizations that provide legal services to the indigent. The Committee Chair drafted a letter for consideration by the Commission.

### **Committee on Increasing Pro Bono Legal Services**

[L. Dew Kaneshiro (Chair), Rebecca Copeland, Patricia Eads (Vice Chair), Derek Kobayashi, Kanani Michelle Tamashiro, Jeanilou Torrado, Shannon Wack, Tracey Wiltgen]

- Study best practices in other jurisdictions for increasing the level of pro bono services by lawyers, paralegals and others who may assist in overcoming barriers to access to justice, including developing effective recruitment campaigns
- Make recommendations concerning ways to develop a culture of commitment to pro bono service among Hawai'i's lawyers
- Compile a list of legal services providers and others that offer opportunities for pro bono service, describe the nature of those opportunities and explore and assist providers in increasing the opportunities they provide for such service
- Make recommendations concerning ways to make providing pro bono service more attractive to attorneys, such as assisting providers in developing resources for the pre-screening of cases, training, support and recognition of service
- Make recommendations concerning ways in which the Commission, the Judiciary and the HSBA -- acting alone or in partnership with others -- can encourage attorneys to provide higher levels of pro bono service



- Make recommendations concerning ways to encourage law firms and others who employ lawyers (including governmental agencies and corporate law departments) to promote greater pro bono service among their attorneys
- Make recommendations concerning ways to encourage retired lawyers and judges to provide pro bono or staff legal services to low- and moderate-income individuals

The Committee worked on an event to celebrate National Pro Bono Week, October 23 - 29, 2011. See Section X. Celebration of National Pro Bono Day in this report.

### **Committee on Initiatives to Enhance Civil Justice**

[Judge Greg Nakamura (Chair), Earl Aquino, Lincoln Ashida, Shawn Benton, Mihoko Ito, Elton Johnson, Laura Kaakua, Michelle Moorhead, Kristin Shigemura (Vice Chair), George Zweibel]

- Develop and publish a strategic, integrated plan for statewide delivery of civil legal services to low-income Hawai'i residents
- Study best practices in other jurisdictions and develop and recommend new initiatives to expand access to justice in Hawai'i
- Make recommendations and provide advocacy in support of enhancing recruitment and retention of attorneys to work as staff members or to volunteer pro bono for nonprofit civil legal services providers in Hawai'i, which may include:
  - Establishment by the Hawai'i legislature of a student loan repayment assistance program to help full-time, nonprofit civil legal services attorneys pay back their student loans
  - Adoption by the Hawai'i Supreme Court of rules to permit attorneys actively licensed to practice law by the highest court of a state or territory of the United States or the District of Columbia or Puerto Rico and who are working on staff or volunteering pro bono for nonprofit civil legal service providers to practice in that capacity for up to one year without being admitted to practice law in Hawai'i
- Make recommendations concerning ways in which paralegals and other non-lawyers may assist in meeting specified unmet civil legal



needs, including whether ethical or procedural rules would need to be changed to accommodate such assistance

### Summary of Actions Taken

The Committee considered and made recommendations to the Commission regarding the following:

- (1) With respect to the Residential Foreclosure Mediation Initiative, recommending that the Hawai'i Supreme Court (a) enter an order fully implementing the Foreclosure Mediation protocol approved by the Commission, establishing the foreclosure mediation program in all judicial circuits; (b) add to the supreme court order provisions that will help ensure full compliance by plaintiffs' attorneys in foreclosure cases; and (c) make foreclosure mediation available upon request to owner- occupant defendants in foreclosure actions filed prior to the effective date of the expanded foreclosure mediation program and to owner-occupant plaintiffs in new and pending actions involving mortgage-related claims.
- (2) Requested support for the Hawaii Street Law Project.
- (3) Presented a Foreclosure Dispute Resolution proposal.

### **Law School Liaison Committee**

[Moses Haia (Chair), Mark Arimoto, Katie Bennett, Jean Johnson, Linda Kreiger, Angela Lovitt, Mary Anne Magnier (Vice Chair), Calvin Pang, James Pietsch, Dean Aviam Soifer]

Make recommendations concerning ways to:

- Expand efforts to create and develop law student interest in the practice of poverty law by increasing existing clinical programs and instituting new ones to serve the needs of low-income populations
- Emphasize, as part of the professional responsibilities curriculum, a lawyer's ethical duty under Rule 6.1 of the HRPC to perform pro bono legal services and the ways this obligation can be met
- Develop opportunities with legal services providers, and sources of additional funding, to support law students' efforts to meet the 60 hour pro bono graduation requirement in a manner consistent with addressing the needs of low-income populations





- Encourage and recognize the involvement of faculty members in efforts to promote equal justice by, for example, testifying in support of access to justice legislation, accepting pro bono cases, serving on boards of organizations that serve the legal needs of the poor, contributing financially to organizations that serve the legal needs of the poor and filing amicus briefs in proceedings affecting legal services to the poor
- Develop more public interest summer and academic year clerkships and obtain grants for summer internships and clerkships that serve low-income populations

Over the past year, the Law School has embarked on a strategy, parts of which are outlined below, to enhance its elder law program to assure the continuing viability of the University of Hawaii Elder Law Program (UHELP) and to engage with university and community partners to enhance elder law studies at the law school along with additional services to the community.

The Dean of the Law School, with the support of the faculty, took the initiative to seek permanent status for the director of UHELP. This will greatly help with the stability of the program and result in more ability for UHELP to work on long-term education, training and pro bono projects at the university and in the community.

The University Vice Chancellor of Research and Graduate Education appointed the Director of UHELP to the search committee for the newly approved Center on Aging. This will not only give the Law School the ability to help shape the future of the leadership of aging studies at the university but it also sends a signal that law is an integral part of the future activities of the Center on Aging.

The Department of Veterans Affairs and the City and County of Honolulu joined forces in helping UHELP establish a pilot veterans-focused Elder Law Clinic for the spring semester 2012. This pilot program seeks to address the unmet legal needs of older veterans and their caregivers. Not only are additional older persons being served but law students are learning more about this expanding area of elder law practice. UHELP is hopeful that external funding can be found to continue this initiative.

Forty-five students enrolled in the Fall 2011 semester's Law, Aging and Medicine Course, its largest student enrollment ever. Forty students were law students and five were from the schools of nursing and social





work. Practitioners were encouraged to audit the course. During the spring semester, the Elder Law Clinic reached its maximum capacity of twelve students, but exceptions were made to add one Master of Social Work student and one Master of Laws (LLM) student to see how adding such students would work within the Clinic. The preliminary results are very positive.

### **Committee on Maximizing Use of Available Resources**

[M. Nalani Fujimori Kaina (Chair), Nanci Kreidman, Marianita Lopez, David Reber, Tracey Wiltgen]

- Obtain information from all civil legal services providers and programs concerning the services they each provide, how they deliver those services and the ways in which they work with other programs to make the most efficient use of their collective resources
- Make recommendations concerning ways to ensure that:
  - There is an efficient and effective referral system of clients to the “right” program and among programs
  - Innovative methods of legal services delivery are explored and used
  - New ways to utilize technology, including a centralized access to justice website, to meet current unmet legal needs are implemented where appropriate
  - Mediation and other alternative dispute resolution methods for resolving legal problems are utilized when appropriate
  - Outreach efforts are coordinated among legal service providers as well as with social service providers, agencies and other organizations
- Explore with existing providers of legal services for low and moderate-income residents current gaps in their provision of legal services and make recommendations concerning how their services might be expanded, which may include:
  - Increasing the types of legal problems for which assistance is offered
  - Expanding office and clinic locations



- Extending office hours to include evenings and weekends
- Make recommendations concerning ways to expand outreach and publicity regarding possible legal solutions for problems and the availability of legal services to the public, which may include:
  - Locating outreach sites in areas convenient to potential clients
  - Engaging in partnerships with community groups and agencies
  - Publicizing services and programs in low- and moderate-income communities

The Committee prepared a descriptive summary of the services provided by the various legal services providers, including American Civil Liberties Union of Hawai`i, Domestic Violence Action Center, Hawai`i Appleseed Center on Law and Economic Justice (formerly known as Lawyers for Equal Justice), Hawai`i Disability Rights Center, HSBA Lawyer Referral and Information Service, HSBA YLD Legal Line, Kauai Economic Opportunity, Kauai Seniors Law Program, Kuikahi Mediation Center, Legal Aid Society of Hawai`i, Maximum Legal Services Corporation, Mediation Services of Maui, Native Hawaiian Legal Corporation, University of Hawaii Elder Law Program, the Mediation Center of the Pacific, Inc., Volunteer Legal Services Hawai`i, and West Hawai`i Mediation Center. See Appendix A.

**Committee on Overcoming Barriers to Access to Justice**

[B. Martin Luna (Chair), Russ Awakuni, Elton Johnson, Jean Johnson, L. Dew Kaneshiro, Nanci Kreidman, Mary Anne Magnier, Calvin Pang (Co-Vice Chair), Jennifer Rose (Co-Vice Chair), Kristina Toshikiyo]

- Make recommendations concerning ways to remove impediments to accessing the justice system due to language, cultural and other barriers, and make recommendations concerning what programs should be initiated to address this barrier, which may include:
  - Providing multilingual services, including increasing the number of available staff and pro bono attorneys and court personnel who are bilingual
  - Providing forms in multiple languages



- Providing translation services in court, administrative agencies, and with legal service providers
- Partnering with the University of Hawai`i and other schools offering language training to encourage multilingual volunteers to provide outreach and translation services
- Identify other barriers to obtaining legal assistance and make recommendations concerning ways to address them, such as through the provision of ancillary services, e.g., providing for child care during a court hearing or for necessary mental health services
- Seek to reduce barriers by recommending input on existing and proposed laws, court rules, regulations, procedures and policies that may affect meaningful access to justice for low-income Hawai`i residents

The Committee coordinates the Roundtable discussions with the State Judiciary Office on Equality and Access to the Courts, the Hawai`i Supreme Court Committee on Equality and Access to the Courts, the Hawai`i Supreme Court Committee on Court Interpreters and Language Access, and the HSBA Committee on Diversity, Equality, and the Law. See Section III. 2011 Roundtable Discussion on Linguistic and Cultural Barriers in this report.

### **Committee on the Right to Counsel in Certain Civil Proceedings**

[Shannon Wack (Chair), Mary Anne Magnier, Karen Nakasone]

- The American Bar Association, at its 2006 annual meeting in Hawai`i, adopted a resolution supporting “legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.” The Committee should study developments in other jurisdictions with respect to the establishment and implementation of a right to counsel in certain civil proceedings
- Make recommendations concerning the types of civil matters in which the rights or issues involved are of such fundamental importance that counsel should be provided in Hawai`i, assess to what extent attorneys are available for such matters and make recommendations on how to assure that counsel is available



The Committee reviewed 112A ABA Resolution Right to Counsel and will recommend that the Commission agree to adopt the Resolution and to recommend that the Resolution be submitted to the Hawaii Legislature for consideration.

### **Committee on Self Representation and Unbundling**

[Judge Trudy Senda (Chair), Sarah Courageous, Jerel Fonseca, M. Nalani Fujimori Kaina, Victor Geminiani, Victoria Kalman, Jo Kim, Jay Kimura, Derek Kobayashi (Vice Chair), Justin Kollar, Daniel Pollard, Kristina Toshikiyo, Shannon Wack]

Members of this Committee may also serve on a joint committee with the Supreme Court's Committee on Professionalism. Although the joint committee will need to determine its agenda, this Committee of the Commission may study and make recommendations concerning:

- The creation, staffing and funding of self-help centers connected to every courthouse in Hawai`i to provide real-time assistance
- Programs designed to make courts more "user-friendly" to low- and moderate-income individuals
- Ways to provide information to self-represented litigants on where they can receive legal assistance
- Ways to reduce barriers encountered by self-represented litigants in the court system, e.g., using plain English and translations into other languages and simplifying procedural rules
- Changes to court rules and statutes that would streamline and simplify substantive areas of the law, e.g., family, housing and landlord-tenant law
- Changes to court rules in order to permit limited representation or "unbundled" legal services, and if achieved, make recommendations concerning continuing legal education programs and other ways of promoting unbundling as a way to meet currently unmet legal needs and empowering individuals to represent themselves

The major activities of the Committee in 2011 were:



### Self Help Centers

The Committee took an active role in advocating for the establishment of self-help centers at Judiciary locations statewide. Many Committee members are also members of various committees, boards and/or Commissions, which furnish funds or services relating to increasing access to justice. With the help of these members and the cooperation of the Judiciary, a self help center was opened in the Fifth Circuit in October 2011. This center was opened in partnership with the Legal Aid Society of Hawaii, Hawaii State Bar Association, Kauai Bar Association, and Volunteer Legal Services of Hawaii. The center is open on Mondays and Fridays from 9:00 am to noon. There are plans to increase the hours of operation-- effective February 2012—to include the remaining days of the week. (See further discussion in another section of the annual report.)

### Judicial Education

Although it appears that the current rules of professional conduct permit attorneys to provide unbundled services—even in cases that are pending in court—attorneys report that judges routinely will not permit an attorney to enter a limited appearance in a case. This may be more of an educational issue for judges. Therefore, the Committee recommended that trial judges receive training, via a formal judicial education program, regarding unbundled legal services, which are permissible under the Hawaii Rules of Professional Conduct. The Judicial Education Committee supports such a presentation, but no firm date has been set as of this time. Judge Gary Chang, Judge Trudy Senda, Judge Barbara Richardson, and Janet Hunt, Disciplinary Counsel have met to discuss the possible content of such training. The training would also include a review of the proposed forms, which have been drafted by the Rule 1.2 Committee (see below).

### Rule 1.2 Committee

The Committee established a sub-committee to study proposed amendments to Rule 1.2(c) of the Hawaii Rules of Professional Conduct ("Rule 1.2 Committee). Committee members included Judge Barbara Richardson, Judge R. Mark Browning, Disciplinary Counsel Janet Hunt, Jay Kimura, Sarah Courageous, Victor Geminiani, and Victoria Kalman.

The Rule 1.2 Committee's general mission is to: (1) create guidelines to encourage attorneys to take cases involving unbundled services; (2) create standardized forms (such as a standard retainer agreement);



and (3) explore court annexed, on-site programs, which may be staffed by pro bono attorneys. Over the course of the past year, this committee has accomplished much, including the production of draft forms and proposed amendments to the Hawaii Rules of Civil Procedure, District Court Rules of Civil Procedure, and the Hawaii Rules of Professional Conduct. Proposed forms include “Agreement and Consent to Limited Representation,” “Agreement and Consent to Limited Representation for Preparation of Pleadings and Documents,” “Notice of Limited Scope Representation,” and “Stipulation for Withdrawal of Limited Appearance.” Once finalized, such forms and proposed rule amendments will be presented to the Access to Justice Commission with a request that the proposed forms and/or rules be submitted to the Supreme Court for adoption.

#### HRPC Rule 6.5

The Committee recommended to the Commission that new HRPC Rule 6.5 be passed.



## **II. 2011 ACCESS TO JUSTICE CONFERENCE**

On Friday, June 24, 2011, the Commission sponsored its third annual Access to Justice Conference with the theme: “ACCESS TO JUSTICE: Pursuing a Noble and Necessary Purpose.” Over 230 individuals attended the conference at the William S. Richardson School of Law (“Law School”), University of Hawaii. Co-sponsors of the event were the Law School and Hawaii Justice Foundation (HJF). Financial support was also provided by the Cades Foundation. Out of the total attendees, 102 attorneys sought MCPE credits for their attendance.

There were 35 speakers, panelists, and facilitators. Dean Avi Soifer and Robert LeClair served as emcees for the conference.

### **A. Opening Plenary Session**

Chief Justice Mark R. Recktenwald presented opening remarks, followed by Judge Daniel R. Foley, chair of the Commission. After mentioning the various achievements by the Commission since its creation in 2008 and collaborations with other legal-related entities, Chief Justice Recktenwald stated, “What is most intangible, but in some ways the most important achievement of the last few years, is the dramatic change in the level of awareness of access to justice issues, both in the legal community and in the community at large, and the genuine and wide-spread enthusiasm that has developed for increasing access to justice. This conference is a great example of that enthusiasm . . . .

“We cannot let that momentum dissipate, and indeed, must find ways to accelerate it further. It is clear that education and awareness are the keys to tapping into the human resources that exist in our community and that could be brought to bear to increase access to justice. The supreme court has emphasized that an understanding of access to justice is part of what it means to be a professional, competent attorney, by including access to justice among the issues that can be addressed in fulfilling the annual mandatory continuing legal education requirement.

“In summary, we have many of the pieces in place that we need to make a real difference in increasing access to justice in Hawai'i: the institutional framework, the potential for increased funding for legal services providers, policies that encourage pro bono service, and genuine and widespread enthusiasm for the task at hand. The challenge now is to keep the momentum going, to keep striving to find new and better ways to meet the need, and to set clear goals for what we want to accomplish and



for measuring whether we are getting there. Today's conference can help us chart that roadmap to a more just society," said Chief Justice Recktenwald.

Judge Foley presented Certificates of Appreciation to Gary Slovin and Mihoko Ito, both members of the Legislative Panel Committee who were instrumental in coordinating support for S.B. 1073, which bill provided for an increase in the surcharges on the filing fees that go into the Indigent Legal Assistance Fund.

Associate Justice Acoba presented a Certificate of Appreciation to the Goodsell Anderson Quinn & Stifel firm for its support of the Commission's mission.

The Funding Challenges panel featured Speaker Calvin Say, Senator Clayton Hee, and Representative Marcus Oshiro, and they were candid in discussing the fiscal concerns of the Legislature.

On the theme of "The Fight for Equal Justice: Promoting Effective Strategies," Judge Lora Livingston presented a lively and thought-provoking speech filled with humor as well as specific suggestions about the leadership of judges and possible collaborative partnerships in the pursuit for equal justice. "Judges must become architects of justice," she said. "We ought not think of ourselves nor let others think or treat us like a state agency. We are the third branch of government; we are the third leg of a very sturdy three-legged stool that holds the weight of the constitution."

Judge Livingston said, "This is important work and we need as many hands on deck as we can find. We need leaders and we need people who are willing to let others take the lead. We don't have time for turf wars. We need visionaries and we need people who know how to carry out a vision. We also need to groom tomorrow's champions because we cannot afford a leadership vacuum. Access to justice cannot just be this year's pet project, it must become a part of the culture of the community. The successful access to justice initiatives that you cultivate must become institutionalized as major components of your delivery system."

## **B. Morning Workshops**

The concurrent morning workshops led by former Judge Michael Broderick on "Pushing the Envelope of Judicial Involvement" and by David





Reber on “Creating Innovative Partnerships in the Pursuit for Equal Justice” stimulated a good deal of audience engagement. Justice Acoba and Judge Trudy Senda helped launch the Judicial Involvement workshop.

Jenny Fujinaka, the Supreme Court law librarian, provided information about resources available for self-represented litigants and discussed locating self-help centers in libraries throughout the state. Dr. Chris Derauf and Dina Shek, who established a Medical-Legal partnership for children at the Kōkua Kalihi Valley Comprehensive Family Services (KKV), a community health center, explained their collaborative process. Alex Santiago, executive director of PHOCUSED (Protecting Hawaii’s Ohana, Children, Under Served, Elderly and Disabled), and Victor Geminiani, a board member of that organization, explained how partnerships with social workers and human services agencies offer another promising partnership model.

### **C. Afternoon Workshops**

There were five concurrent workshops for the first afternoon session. Discussions of some of these workshops follow.

#### 1. Initiatives to Enhance Civil Justice Workshop

Judge Greg Nakamura, Nalani Fujimori Kaina, Michelle Moorhead, and Professor Linda Krieger participated on the panel. Their brainstorming session raised the following ideas:

- Creation of a new centralized intake system such as a "legal navigator" similar to a patient navigator. This might be accomplished in the following ways: (a) Hire a coordinator who specializes in legal referrals; (b) Expand on HSBA's current legal help line.
- Creation of an internet clearinghouse to supply direct contact information to those individuals who are seeking help. Visitors of the website could type in search information and get links to pro bono attorney matching their search terms.
- The judiciary and/or legal service providers could create advertisements in telephone books (for those who do not have access to internet or are not technologically savvy) with the



- advertisement "if you cannot afford legal services, please contact xxx-xxxx."
- Allow pro-bono attorneys to create self-advertisements on social media sites such as craigslist, Facebook, twitter, etc.
- Focus on familiarity-opportunities to establish rapport between legal service providers and pro bono attorneys.
- Educate the public to ensure greater access to justice. This might be accomplished via: self-help centers in libraries or other easily accessible locations; or judges better educating the public during court sessions.
- Improve communications by focusing on clarity between public and judiciary/attorneys (in courtroom and all documents); no legalese.
- Research additional grants to increase access to justice.
- Attorneys turn in a document each year detailing their pro bono hours worked for the previous years. This document should be used as an opportunity for attorneys to commit to service hours for the next year. An attorney could "check off" the legal service providers that they are committing to work for in the following year. The legal service providers would then know which attorneys to contact when assigning pro bono cases.
- Administrative hearings could be an opportunity for paralegals and law students to gain clinical experience. Suggested areas where help is needed are: unemployment, wage and hour, and social security cases.
- Determine whether the concept of unbundling of legal services can be used to create better access to justice.
- The creation of a "master" referral list for legal service providers and pro bono attorneys broken down by subject matter. This could be accompanied by training sessions for legal service providers (especially those who work in specialized areas because clients have multiple needs).



## 2. How to Get to Yes with Pro Bono Workshop

Facilitators: L. Dew Kaneshiro and Jeanilou Torrado were the facilitators for this workshop, which began with a discussion of HRPC Conduct Rule 6.1 and an overview of pro bono programs and opportunities available at Volunteer Legal Services Hawaii (VLSH) and Legal Aid Society of Hawaii (LASH). The workshop drew attendees who are committed to pro bono. The lively facilitated discussion included attitudes toward pro bono, barriers to volunteering, and initiatives to enhance attorney participation.

Overall, it was suggested that firms, government leaders, and peers create an environment in which a commitment to pro bono legal services is expected. Additional suggestions that emerged from the discussion included:

The Commission should:

- Set clearer standards for pro bono cases under HRPC 6.1.
- Remove “aspire” from HRPC 6.1.
- Encourage firms to report their pro bono hours and cases, and acknowledge the firms’ accomplishments.
- Encourage each attorney to have, at any one time, at least one active pro bono case or matter.
- Create a Pro Bono Clearinghouse.
- Advocate for monetary payment in lieu of pro bono hours.

Law firms should include pro bono work in billable hours, on par with fee-generating work.

The HSBA Sections should publicize pro bono opportunities among its members.

Pro bono may be more attractive if the pro bono legal service providers:

- Match the attorney’s expertise and the client’s legal issue (legal clinics).



- Screen cases for appropriateness (legal clinics).
- Continue to provide assistance after a pro bono case is placed.
- Offer subject matter training.
- Engage in causes or topics that attorneys would find interesting.
- Provide support to attorneys who do not have the required expertise, including having an experienced attorney as co-counsel; an experienced attorney as a mentor; cheat sheets; and manuals.

3. The New Paralegal Paradigm and Access to Justice Workshop

In this workshop, R. Elton Johnson, III, explored the considerable potential of, and parameters for, an evolved, qualified adjunct provider in the legal field authorized to directly address certain substantive carefully delimited, discrete, and routine basic civil legal needs that have gone unmet for most of Hawaii's low- and moderate-income people for decades.

First, a PowerPoint presentation was given, comprising seven main parts:

1. The Legal Dimension
2. The Nature of the Unmet Civil Legal Need
  - (a) "Personal Plight" Need
  - (b) Low-Income and Moderate-Income Need
3. Why Access is Important
4. The Current Delivery Structure
5. Established and New Approaches to Improving Access
6. The Adjunct Provider Approach to Improving Access
  - (a) For Low-Income People
  - (b) For Moderate-Income People
7. Exploring Parameters for the Work of the Adjunct Provider

Reasons why it is critical that low- and moderate-income people have access to justice were articulated. Established and new approaches to improving access were reviewed, and the various distinct adjunct provider approaches appropriate to improve access for low-income and moderate-income people, respectively, were examined.



#### 4. Mediation Effectiveness: When to Use and How to Make It Work Workshop

To initiate the discussion, Tracey Wiltgen as facilitator, reviewed the key areas with the greatest unmet civil legal needs that were identified in the report by the Access to Justice Hui, “Achieving Access to Justice for Hawaii’s People: The 2007 Assessment of Civil Legal Needs and Barriers to Low- and Moderate-Income People in Hawaii,” including:

- Housing (24%)
- Family (23%)
- Domestic violence (8%), and
- Consumer (7%)

To assist in the discussion regarding how mediation can be improved and what other areas might benefit from mediation, a summary of a report conducted by the Center for Analysis of Alternative Dispute Resolution Systems, Accessing Justice Through Mediation: Pathways for Poor and Low-Income Disputants, was provided. Highlights of the report were noted as follows:

- The three factors of speed, cost, and satisfaction drive the provision of mediation services. This human element can make mediation especially meaningful as an opportunity for poor and low-income disputants to take control of their lives in terms of the conflict they are experiencing.
- The use of mediation should be expanded to increase access to justice because it can be an efficient and effective way to resolve many types of legal disputes.
- Areas identified to be most amenable to mediation included: consumer; housing; family; public benefits; employment; health; education; disability; tort defense; and wills and estates.



- Factors that make a case type amenable to mediation:
  - Flexibility of negotiating positions. Is there flexibility in negotiating a resolution or does one side take a take-it-or-leave-it stance? Is flexibility in outcome possible, or is the only option an either-or situation in which one side wins and one side loses? If there is room for flexibility, chances are good that the case type is amenable to mediation because the parties have room to negotiate a resolution.
  - Multiple issues or at least multiple items to work out, such as are found in a visitation schedule, a case type is more amenable to mediation than when there is only one issue that needs to be determined, such as whether to deport an individual.
  - If those participating in the mediation have personal funds at stake or have personal responsibility for actions involved in the dispute, the case is often more amenable to mediation than if a large entity attempts to participate through a representative.
  - Interest in maintaining an ongoing relationship.
  - Special education, in which parents, teachers, and administrators need to work together to provide a positive educational environment for a disabled student, a mediation can chart a course for the future, as well as resolve a dispute.
  - Employment discrimination cases in which an employee returns to work or continues to work at the organization.

Finally, the key concepts contained in a white paper, Approaching Court Mediation Program Quality Now, prepared by Gary Weiner<sup>4</sup> for the American Bar Association's Dispute Resolution Section's Court Quality Committee, were provided. The white paper stressed the importance of

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<sup>4</sup> Gary Weiner is the Mediation Program Administrator of the California Courts of Appeal, First Appellate District.



clearly identifying outcomes and goals of a mediation program to ensure its effectiveness. More specifically, the paper noted that when creating and evaluating the success of a mediation program, it is critical to identify whether the goal of the program is “improved communication and self-determination of the parties” or settlement. The design of the process, training of the mediators, preparing of the parties, and the ultimate success of the program will depend on the identified goals.

The group then addressed the question: “What Can We Do Better and How?” The following recommendations were made:

- Making mediation understandable for indigent clients
- Strengthen cultural contexts and individual situations by modifying the mediation process to be more culturally appropriate; provide more cultural education for mediators; invite people from other cultures to participate as mediators; cultivate individuals from different communities to be mediators; provide mediation training for interpreters
- Educate the court staff and self-help desk about mediation
- Incorporate the use of technology
- Increase the number of mediators available on-site at court
- Increase public relations and marketing; TV ads
- Secure funding to develop a media plan

When asked, “Where Else Can Mediation Be Used?” the group suggested the following:

- Public policy; educating the courts; obtaining long-term financial buy-in from the public and private sector
- Provide education or outreach to different groups, including individuals with mental health issues, to help them understand that mediation is appropriate for their participation and use
- Housing issues; employment matters; healthcare; divorce;



landlord/tenant; English as a second language issues

- Co-tenancy relationships
- Condominium associations at the Board of Directors level; work with Property Manager Association
- Provide mediation on wheels to be more accessible in outlying communities
- Promote preventative mediation in the community
- Neighborhood boards

The group then offered ideas for “Next Steps” with a focus on elder issues such as property distribution, caring for elderly parents, advanced health planning, healthcare coverage disputes, and working with private and public healthcare providers to serve as mediators.

#### 5. Access to Justice for Individuals with Disabilities Workshop

John Deller and Jean Johnson facilitated this workshop, which they divided into two segments.

#### Challenges Facing Attorneys and Witnesses

An overview of the broad range of issues that confront people with disabilities in the legal system was presented. A summary of case law included a decision of the U.S. District Court for the District of Columbia that involved a blind juror who had been excluded from a jury pool. The court reviewed ways blind jurors, like blind judges, witnesses, and lawyers, compensate for their lack of sight by using other senses and found that the plaintiff could not be excluded from serving on a jury. Other cases were noted involving people with hearing and mobility impairments, chemical sensitivity, and other disabilities and accommodations that could be provided to give them full access to the justice system.

Recent articles from the *Wall Street Journal Law Blog* were mentioned, involving allegations of discrimination in the administration of the Law School Admissions Test. One plaintiff was blind and the other had Attention Deficit Hyperactivity Disorder, and the issue was what accommodations, if any, should be made in the test procedures. Testing





accommodation request forms that are used by the Hawaii Community School for Adults for the G.E.D. high school diploma examination were distributed. Separate forms are provided for physical/chronic health disability, learning and other cognitive disabilities, emotional and mental health conditions, and attention deficit/hyperactivity disorder, but the accommodations offered on the form are the same for all cases. The audience was asked to consider whether accommodations should be individually tailored.

There was discussion of Rule 1.14 of the HRPC that addresses ethical issues lawyers face when representing clients with a mental disorder or disability. Hawaii's approach was described as being more paternalistic than other states, focusing on the lawyer's view of the client's best interests rather than stressing the autonomy of the client to make decisions that might be bad ones.

Finally, reference was made to special education litigation handled by the Hawaii Disability Rights Center (HDRC) and a synopsis of administrative and judicial decisions available on HDRC's website.

### Issues Facing Parents of Children with Disabilities

A PowerPoint presentation was presented that reviewed access to justice in Hawaii as parents seek to obtain a free and appropriate education for their children under the Individuals with Disabilities Education Act (IDEA). Data were presented showing that Hawaii's rate of hearings is generally four to five times higher than the national average. Hawaii is consistently one of the three highest states in the nation for due process hearings based on the per capita number of students served under IDEA. The rate for utilization of mediation in Hawaii is consistently lower than the national average. Yet, the rate for hearing extensions is far above the national average.

Access to justice by parents is compromised by the lack of available legal services. Whereas, in the 2004-2005 school year, parents were represented by 21 different attorneys, in 2008-2009, only six attorneys represented parents, with two attorneys handling 70% of the cases.

Two recent Supreme Court decisions, *Schaffer v. Weast* and *Arlington Central School District v. Murphy* have placed a much heavier burden on parents and families as they consider exercising their rights to due process under IDEA. And, when parents decide to represent themselves *pro se*, they consistently fail to prevail.



The following recommendations arose from the spirited discussion during the workshop:

- That more attorneys in Hawaii become knowledgeable and willing to serve families with these issues.
  - That the Commission consider advocating for state legislation to address the issues resulting from *Schaffer v. Weast* and *Arlington Central School District v. Murphy*.
  - That community education occur to make policymakers such as the new Board of Education aware of these issues.
  - That parents be better informed of their rights under the IDEA.
  - That the Law School provide supportive services for families who elect to represent themselves.
  - That future conferences continue to address legal access issues faced by persons with disabilities and their families.
6. Access to Justice for the Elderly Workshop

This workshop, facilitated by Professor James Pietsch, Lenora Lee, and Scott Suzuki, explored how to identify the issues in elder law, resources in the community, and how to help. The facilitators addressed current issues and trends in elder law, including mental capacity, elder abuse, health care financing, legal issues for caregivers and end-of-life decision-making. There were approximately thirty participants who engaged in animated discussions about the increasingly large elderly population and the lack of resources to address their concerns. Many were astounded at the legal implications of growing old in America and the lack of knowledge among estate planning lawyers and family law lawyers about such basics as Medicaid eligibility, veterans benefits, and end-of-life decision-making laws. Most of the participants had not taken the elder law course or the elder law clinic at the Law School, and several indicated that they wished that they had. There was also a lively discussion about the increasing reports of suspected financial exploitation of the elderly by lawyers.



## 7. The Foreclosure Crisis: How to Help Workshop

This workshop was facilitated by United States Bankruptcy Judge Robert Faris and George Zweibel. A brief summary of the highlights of Act 48, the landmark Hawaii legislation passed in 2011 to reform the non-judicial mortgage foreclosure process, was presented. It was emphasized that, by creating a mandatory mediation (“dispute resolution”) program, the new law gave attorneys an opportunity to help unrepresented homeowners without undertaking litigation against powerful, well-funded financial institutions.

It was mentioned that the courts should also adopt a mediation program modeled on Act 48 in judicial foreclosure cases, suggesting this has major access to justice implications. The lack of such a program (except for the pilot program in the Third Circuit) now means that similarly situated homeowners receive divergent treatment depending on whether their lenders opt to commence judicial or non-judicial foreclosure proceedings. Even in the Third Circuit, mediation is discretionary and lacks provisions like those in Act 48 to increase the likelihood of successfully reaching an agreement. Leveling the playing field may result in more early resolutions in judicial foreclosure cases and at the same time eliminate any incentive loan holders and servicers may have to foreclose in court in order to avoid mandatory dispute resolution.

In a mediation context, the kinds of resolutions that homeowners might seek include:

- Loan modifications, to make mortgage payments affordable, through interest rate adjustments, extensions of the loan term, capitalization of arrearages, forgiveness of principal, or a combination of these changes;
- Short sales (a sale of the mortgaged property for less than the balance owed on the mortgage); and
- “Graceful exits” of various kinds, usually involving a deed in lieu of foreclosure and a delay of the foreclosure sale or closing to give the borrower more time to move out, a modest payment to cover the borrowers’ moving expenses, and the like.

The group discussed the benefits and shortcomings of these options, including the difficulty of communicating with lenders and mortgage



servicers; long delays and repeated requests for the same information; failure by lenders and servicers to convert trial loan modifications to permanent modifications after borrowers have made agreed trial payments; the problems posed by junior mortgages and other liens; the special issues of condominium properties; the necessity of obtaining proper documentation of any resolution; and some of the tax implications for borrowers. The importance of obtaining deficiency waivers and minimizing harm to credit histories when agreeing to a short sale or deed in lieu of foreclosure was also discussed.

Suggestions of some ways in which attorneys can help in the foreclosure crisis and perhaps satisfy their pro bono obligation at the same time, include:

- Actively support expansion and improvement of the Judiciary's foreclosure mediation project, preferably modeled on the Act 48 dispute resolution program and utilizing the infrastructure now being created to implement the latter.
- Volunteer to serve as a mediator/neutral in foreclosure mediation/dispute resolution.
- Advise homeowners in non-judicial foreclosures in choosing between dispute resolution or conversion to a judicial foreclosure (an alternative created by Act 48), based in part on whether valid defenses or claims appear to exist.
- Represent homeowners at foreclosure dispute resolution sessions conducted pursuant to Act 48 or in the courts.

#### 8. Access to the Family Court Workshop

Judge Mark Browning and Elizabeth Paek were facilitators for this workshop. During the workshop, Judge Browning suggested that interpreter services were a fundamental right and an access to justice issue. He explained that currently there are many unrepresented litigants who do not speak English. Most of them appear on the court's civil calendar. Although the courts provide interpreter services for criminal cases, there is a question as to whether the courts do so for civil cases. These civil cases include divorce, paternity, guardianship, restraining orders, and other family court matters.



Questions arise such as: Since the Family Court has the highest volume of cases that involve serious matters, shouldn't the judiciary provide interpreters free of charge in cases involving indigent pro se's? How do we know to provide interpreters prior to the parties coming to court? Does the court have the budget to provide these interpreters? Does the court have the manpower with respect to interpreters to meet the need? This is all premised by the fact that the interpreters need to be court-certified.

Other issues and comments from the audience are outlined below:

What access to justice issues are confronting the Family Court today?

- Time in court is limited (special/TRO/OSC motions)
- Gasoline/expense of the drive to the courthouse in Kapolei
- Special advocates involvement in court
- Relocation of court impacts access to justice
- High volume of cases
- Prioritizing of funds (re staffing, etc.)
- Huge number of pro se parties in Family Court
- Language: need for interpreters; consider cost; a consideration for the self-help desk; credibility of interpreters
- Parties don't understand the process in court
- Cultural issues hinder equal access

How can we improve access to justice?

- Need for more judges to address the issue; need time
- Encourage mediation and attorneys to talk before the hearing
- Utilize other decision-making resources and other resources



- Use mediation for TRO and orders to show cause
- Enforcement of court rules, for example, motions to set
- Improve effectiveness of attorneys (e.g., completing forms)
- Utilize law students or paralegals to help complete forms
- Set clear limits on time to increase efficiency of attorneys -- allows more time for pro se parties
- Unbundling legal services
- Provide more classes or education to the public regarding the family court process and the substantive law
- Allow paralegals to do more substantive work to help pro ses (possibly more cost-efficient)
- Increase pro bono practice from attorneys
- Provide pro bono attorneys training on substantive issues
- Unbundle pro bono work to add pressure and avoid abuse of free representation
- Impose requirement for pro bono service
- Link attorneys with a pro bono agency
- Raise esteem for taking on more pro bono work for attorneys; change the culture
- Raise grants to fund interpreters
- Hire or utilize bilingual workers to have on-site help
- Need to sell the need right to the legislature for interpreters and other programs
- Use video resources or technology to save costs of providing services including telephone conferencing



- Use interpreter service
  - Provide transportation for volunteers at the courthouse in Kapolei
  - Utilize technology by stipulation of the parties
9. Access to Justice for Native Hawaiians Workshop

Moses Haia facilitated this workshop to discuss access to justice for Native Hawaiians. The following concerns and recommendations on how to increase access to justice for Native Hawaiians were discussed:

a. The nature of quiet title actions (land title cases) imposes a disproportionate burden on Hawaiian families in particular. Because of the history of land title in Hawaii, it is axiomatic that when quiet title actions are filed under HRS chapter 669, together with partition actions under HRS chapter 668, plaintiffs in such actions must almost always name Hawaiian families involved in the title history of those properties.

Thus, in such instances, it is common for Hawaiian families to retain ownership, often small, in the property that is the subject of a given case. This historic association of land title forces Hawaiians to either defend their interests in court, disclaim their interest, or suffer a default if they choose, for whatever reason, not to defend.

These Hawaiian families often have to rely on a nonprofit law firm, like the Native Hawaiian Legal Corporation (NHLC), for legal representation. Representing one's interest pro se, the alternative for those who either cannot afford to hire a private attorney and/or must be turned away by NHLC due to a conflict, is a daunting task. The complexity of researching, analyzing, and presenting land title claims to a court is often far beyond the capacity of anyone not adequately versed in such proceedings. These cases typically last years and consume many attorney hours to resolve.

Workshop participants felt that the Commission might be able to assist by helping to persuade members of the bar to participate in efforts to lower this barrier to equal justice by, among other things, developing cooperative agreements to facilitate the provision of legal representation to Hawaiians and exploring creative alternatives to quieting title such as



engaging the services of land title referees and title abstractors in an effort to lower the current costs of such litigation.

One suggestion was that pro se defendants in land title cases should be allowed to choose a pro se defendant spokesperson for some or all family member defendants who either cannot afford legal representation or are unable to participate in or appear at hearings because they cannot afford the plane fare or take time off from work or because oftentimes Hawaiian families traditionally designate one person to speak for the family. In instances where the cost of travel precludes participation, it was suggested that teleconferencing or videoconferencing be allowed. It was noted that Maui is equipped with video conferencing equipment and that a pro se defendant can arrange to participate in proceedings by making arrangements with any FedEx office with video conferencing capacity.

Given the concern over allowing a family member non-attorney to speak for and represent other family members in land title cases, how might we encourage the private bar to provide pro bono assistance in these and other matters? One participant suggested that private firms would provide such representation, but often run into conflict problems based on their past and current client list. Obtaining conflict waivers from the individual/family/group where the conflict may be waived based upon competent legal advice may resolve this issue. It was suggested that the law school's Center for Excellence in Native Hawaiian Law might be a possible candidate for providing waiver advice in such instances.

b. While one seat on the Land Use Commission and one seat on the Water Commission is reserved for an individual with "substantial experience or expertise in" traditional and customary native Hawaiian practices related to the subject matter of each commission, the consensus of workshop participants was that neither seat has been or is filled by an individual with the required credentials. Hawaiians can and do suffer when decisions made by each commission fail to consider and reflect upon this unique viewpoint and voice.

c. On a related note and given the fact that the decisions of various state and county boards, commissions, and agencies may have a profound impact on the rights of Hawaiians, shouldn't each member of these boards, commissions, and agencies have a working knowledge of the laws particular to this state and Native Hawaiians? It was mentioned that the Office of Hawaiian Affairs and the State Department of Land and Natural Resources are working together to reach an agreement on an





educational training package for members of state boards, commissions, and agencies.

#### 10. Self Help Centers Workshop

Rodney Maile lead the presentation by explaining Chief Justice Recktenwald's commitment of the judiciary to collaborate with legal service providers, the HSBA, and other organizations to provide a self help center in each circuit. The contribution of each participating organization may differ with each circuit, and consequently, each self help center may differ from another based upon the demands and needs of each community. The judiciary is committed to providing the space for a self help center and together with the HSBA, LASH, and VLSH, Kauai will be the first self help center to open.

Shannon Wack provided an overview of the elements for self help centers obtained from the Equal Justice Conference on Self Represented Litigants. Self help centers require infrastructure, i.e., space, computers, internet, printers, training for pro bono attorneys, intake staffing, pro bono attorneys to dispense legal information, malpractice insurance, forms and videos on what to do in court.

Judge Randall Valenciano explained that the Fifth Circuit Court planned on opening a self help center on September 1, 2011. Judge Senda reported that Justin Kollar, head of the Kauai County Bar Association was committed to coordinating the pro bono attorneys to staff the center and that they have forms to share with the self help centers of the other circuits. Nalani Kaina of LASH announced the availability of eight Americorp positions to LASH who will provide staffing for intake and other assistance at the self help centers for the next year. Jenny Fujinaka, Chief Law Librarian of the Hawaii Supreme Court Law Library reminded the participants that she oversees a wealth of information, which is often overlooked, and is available to people referred from the self help centers.

Judge Lora Livingston also participated in the discussions by sharing her observations of the self help centers in Texas and in other states and explained that each self help center needs to be unique and responsive to the particular needs of each community.



#### **D. Summary**

The evaluations submitted for the conference were “excellent.” The 2011 Access to Justice Conference was another very successful event.



### **III. ROUNDTABLE DISCUSSION ON LINGUISTIC AND CULTURAL BARRIERS**

In 2011, the Commission’s Committee on Overcoming Barriers to Access to Justice (COBAJ) continued to convene conversations on linguistic and cultural barriers among participants from five law-related groups. As described in the Commission’s previous annual report, these gatherings, informally called the “Roundtable,” allowed COBAJ members to interact with representatives from participating groups including:

- The Hawai`i State Supreme Court Committee on Equality and Access to the Courts (CEAC);<sup>5</sup>
- The Hawai`i State Supreme Court Committee on Court Interpreters and Language Access (CILA);<sup>6</sup>

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<sup>5</sup> CEAC was established in 1989 and its co-chairs are Intermediate Court of Appeals Associate Judge Daniel R. Foley and Deputy Attorney General Frances E.H. Lum. Twenty-three voting members are appointed by the Chief Justice to serve staggered three-year terms. Seven representatives of the Judiciary sit on the Committee, including its administrative director, five judges (one Intermediate Court of Appeals (“ICA”), one circuit court, one family court, and two district court), and a Supreme Court Justice. Sixteen non-Judiciary members consist of designees from the Department of the Attorney General, the Department of the Prosecuting Attorney, the Office of the Public Defender, HSBA, the law school, and each legislative chamber. The remaining ten seats are at-large appointments. A United States District Court judge serves as an ex-officio member.

CEAC meets three times a year and receives staff support from the Office on Equality and Access to the Courts. Its mission is to:

- (1) Reduce bias to promote the fair resolution of all cases and controversies;
- (2) Promote fair treatment in the administration of justice and the provision of services; and
- (3) Facilitate and increase access to the courts, particularly for marginalized populations.

<sup>6</sup> CILA is chaired by Hawaii Supreme Court Justice Sabrina McKenna and Judge Gerald Kibe. It was formed in 1995 and consists of twenty-one at-large members appointed to staggered three-year terms by the Chief Justice. Nine of the Committee’s current members represent the Judiciary: three judges (two family court and one district court), three court/program administrators, and three fiscal officers. Twelve non-Judiciary members include two prosecutors, a public defender, two interpreter education professors in the University of Hawai`i



- The Judiciary's Office on Equality and Access to the Courts (OEAC);<sup>7</sup> and
- The HSBA Committee on Diversity, Equality, and the Law (DEAL).<sup>8</sup>

Intended to help participants stay in touch, update each other on their respective activities, identify common concerns, and coordinate and leverage the use of each other's resources to address these concerns, the Roundtable met three times in 2011. In doing so, it provided a supportive forum in a time when efforts to lower language/cultural barriers struggle to compete against more visible and politically popular needs.

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system, a professor at the William S. Richardson School of Law, four language interpreters, one sign language expert, and a private attorney. Seven members are bilingual and two sign language.

Staff support for this Committee is provided by the Office on Equality and Access to the Courts. The Committee meets four times a year.

<sup>7</sup> Under the direction of Debi Tulang-DeSilva, OEAC is the arm of the state Judiciary that addresses bias in and unequal access to the justice system. It develops, conducts, and coordinates research and educational programs to promote equality and create better access to the courts for pro se litigants, the economically disadvantaged, and the immigrant population.

OEAC is the Judiciary's designated Language Access Coordinator for compliance with Hawaii's Language Access statute. As such, it is responsible for filing a periodic Language Access Plan, monitoring and reporting on bilingual staff in public contact positions, providing interpretation and translation services throughout the Judiciary, and implementing a statewide project to collect data on encounters with LEP court users.

The Office plans and implements the day-to-day operations of the Court Interpreter Certification Program. It staffs the recruitment, training, and testing of interpreters to ensure that the most qualified interpreters are available during court proceedings. In addition, it provides the administrative support for implementation of various CEAC subcommittee projects, such as the community outreach projects.

<sup>8</sup> DEAL is the bar's standing committee to promote diversity within the profession and equal treatment within the justice system. It advances these values not only as required by the federal and state constitutions but as a matter of fairness and professional priority.



To raise the profile of language and cultural barriers when addressing access to justice, the Roundtable focused its discussions on increasing awareness within the bench, the bar, and the community-at-large. In 2011, the Roundtable also engaged in conversations on how to augment the state judiciary's efforts to meet the expectations of the U.S. Department of Justice, which has targeted the efforts of state judiciaries to make their services accessible to persons of limited English proficiency.

At its latest meeting in November, 2011, the Roundtable participants continued its conversations on these two significant areas. To provide a flavor of Roundtable discussions, below is a summary of the November 2011 meeting.

## **A. Raising Awareness**

### **1. Judicial Education**

OEAC Director Debi Tulang-DeSilva reported that on October 28, 2011, she and Melody Kubo conducted a presentation on language access and working with court interpreters to thirty-one state judges. This presentation was arranged through the Judiciary Office on Judicial Education. Although the training was voluntary, it represented a breakthrough.

Further training will be developed on working with Compact of Free Association (COFA) populations in the courts. The Office of Equality and Access will be working with the Office on Judicial Education to shape the training. There needs to be a balance of the desire for pragmatic day-to-day techniques – for example, what to say to a COFA party to ensure that he comes to court for a hearing – with a need to create a deeper, more nuanced understanding of the culture and day-to-day realities of the lives of COFA residents.

### **2. Practitioner Education**

Jean Johnson completed a draft of an article on the Pacific Islander neighbors to be published in the Hawaii Bar Journal. This was done with the intent of raising practitioner awareness of the geo-political history and culture of these communities. Her work is the introductory “chapter” of what will hopefully be a series, which may include specific pieces on Samoan, Chuukese, and Marshallese groups.



To lessen the possibility of stigmatization, the Roundtable participants thought that the articles might run in conjunction with community-based panels being formed to give presentations and create understanding in the community-at-large of these Pacific Islander groups.

Jennifer Rose of the DEAL Committee reported that the committee will create more continuing legal education presentations on cultural awareness in 2012.

### 3. Community Education

The Office of Equality and Access worked in the Palolo community, using lawyers to talk about substantive law and complemented this with OEAC's presentations on the judicial system relevant to the substantive topic.

On December 9, 2011, Jennifer Rose was involved in a statewide presentation on domestic violence and access to justice with some discussion on language and cultural access. Public health nurses and other health professionals will be in attendance.

#### **B. U.S. Department of Justice (DOJ) Investigations**

Since the summer of 2010, there has been an increase of correspondence between the U.S. Department of Justice, attorney generals, and state judiciaries. The genesis of this is the DOJ's interest in seeking state compliance with Title IV, which requires state agency compliance with federal language access mandates when that agency receives federal monies. Because many courts receive federal funds, they must comply with Title IV.

Under the current administration, the DOJ has increased both monitoring for compliance and the requirements for compliance. This has posed a challenge to state courts that lack the financial means to comply. Over twenty-five state court systems have already been subject to DOJ investigations which resulted in findings of non-compliance. This has alarmed state judiciaries and became the focus of last summer's meeting of the Consortium of State Chief Justices.

An advisory group is being formed to develop recommendations to Chief Justice Recktenwald regarding state judiciary compliance with Title IV.



#### **IV. COMMUNICATIONS ABOUT THE *CY PRES* DOCTRINE**

On January 27, 2011, the Hawaii Supreme Court adopted an amendment to Haw.R.Civ.P. 23, effective July 1, 2011, to add a new subsection (f). The new subsection provides direction to parties and the trial court regarding the distribution of residual funds in class action cases. The amended rule states that it is within the discretion of the court to approve the timing and method of distribution of residual funds to entities, as agreed to by the parties, which may include nonprofit tax exempt organizations that provide legal services to indigent persons or to HJF (for distribution to one or more such organizations).

##### 1. Definition of *Cy Pres*

*Cy pres*, meaning “as near as possible,” was originally developed as a means of distributing a trust fund whose primary purpose could not be fulfilled. The *cy pres* doctrine enables funds to be distributed to their “next best” use.

Today, the *cy pres* doctrine is commonly used in the context of providing for the distribution of residual funds from a class action settlement, where not all funds can be distributed to class claimants, or for direct awards to a “next best” class of beneficiaries where distributions to class members are not viable, such as where the cost of distribution of settlement proceeds would exceed the amount of the award to each class member. The funds may be distributed to other beneficiaries where claimants (class members) cannot be located or have failed to submit claims, where distribution is not economically feasible, or the court determines that the awards to individual class members would provide a negligible benefit to such members.

Under the *cy pres* doctrine, the court may reallocate to appropriate charitable causes the residual funds in a class action settlement or select charitable beneficiaries to receive settlement funds instead of class members where it is not economically viable to distribute the funds to class members.

##### 2. Expanding Access to Justice with *Cy Pres* Funds in State and Federal Cases

The Commission created an ad hoc subcommittee (William S. Hunt, Robert J. LeClair, Carol K. Muranaka, and David J. Reber) to work on a communications plan to educate the Hawaii legal community about the



amendment to Haw.R.Civ.P. Rule 23. The subcommittee drafted a “*cy pres* toolkit” and other information to assist Hawaii attorneys in state court class action lawsuits or other similar types of suits. Part of the charge of the subcommittee is to bring the possibility of including provisions for *cy pres* distributions in federal class action settlements to the attention of the judges of the U.S. District Court and practitioners before that court.

In the “toolkit” for state court practitioners, the following practice pointers were highlighted:

- a. Raise the issue of a *cy pres* provision early.  
Raising the issue of a *cy pres* provision relatively early in the settlement negotiations can have a positive impact on the process. Some defendants may find the prospect of paying money to settle a case more palatable when they consider that some of the money will benefit a good cause.
- b. Consider whether there are funds that can be made available.  
The parties should consider whether residual funds are likely to occur, and these funds can be made available for court-authorized awards for legal assistance to low-income individuals. The decision to make a *cy pres* award in a class action settlement most often happens during the settlement process. Class action settlements must be approved by the court and must afford absent class members the opportunity to opt out or object.
- c. Negotiating a fixed percentage of the settlement fund.  
Even where settlement funds are to be distributed to identifiable plaintiffs, *cy pres* may still be used by negotiating, from the start, to set aside a fixed percentage of the settlement fund or a certain amount. However, the most common use of *cy pres* occurs in cases where a settlement provides that unclaimed or leftover funds will be used for the *cy pres* award.
- d. Review HRCP Rule 23.  
Once the parties agree that a *cy pres* award is desirable and appropriate, the key is to fashion a remedy that will be approved by the court.





- e. Utilize Existing Expertise in Hawaii Regarding *Cy Pres*.  
Attorneys who are considering the possible distribution of funds under Rule 23 should contact the Hawaii Justice Foundation or any of the legal service providers listed in the previous section. There are attorneys in Hawaii who have experience with class actions and who would be happy to advise on how to designate one or more of these organizations as the recipient of residual funds.

### 3. *Cy Pres* Awards in Federal Class Action Settlements

While there is no provision similar to subsection 23(f) of the Hawaii Rules of Civil Procedure in Rule 23 of the Federal Rules of Civil Procedure, the applicability of the *cy pres* doctrine to permit a federal class action settlement to include appropriate distributions to charitable beneficiaries other than class members is recognized in case law. For example, this issue was recently addressed by the Court of Appeals for the Ninth Circuit in *Nachshin v. AOL, LLC*, No. 10-55129 (9th Cir. November 21, 2011). Although the Ninth Circuit reversed the U.S. District Court's approval of the particular charitable distributions in that case, the Ninth Circuit specifically recognized that *cy pres* distributions are permissible if they meet certain standards.

The *Nachshin* case was a class action lawsuit brought against America Online, LLC (AOL) on behalf of more than 66 million paid AOL subscribers who alleged that AOL wrongfully inserted footers containing promotional messages into emails sent by AOL subscribers. In connection with the class settlement, it was determined that the maximum recovery at trial would have been the unjust enrichment AOL received as a result of its footer advertisement sales of about \$2 million. Divided among more than 66 million AOL subscribers, each member of the class would receive only about 3 cents.

At the parties' request, the retired federal judge, who helped with the voluntary mediation that led to the settlement, suggested and the parties agreed that AOL would donate \$25,000 to three charitable beneficiaries: (1) the Legal Aid Foundation of Los Angeles; (2) the Federal Judicial Center Foundation; and (3) the Boys and Girls Club of America (chapters in Los Angeles and Santa Monica). It was also agreed that the class representatives would be compensated by awarding \$35,000 to four charities selected by the class representatives. The settlement also provided for prospective relief relating to requirements that AOL provide



periodic notices about the footers and the ability of AOL members to opt out of the footers.

Three objections to the charitable distributions were made by a class member and rejected by the district court: (1) the charitable award did not meet the standard for *cy pres* because the charities selected did not relate to the issue in the case and were not geographically diverse; (2) the district court judge who approved the settlement (who was different from the federal judge who assisted in the mediation) should have recused herself since her husband was a director on the board of one of the charity beneficiaries; and (3) AOL's notice to the class was defective because it did not specify that one of the class representatives worked for the charity she selected to receive a charitable donation.

The appellate court determined that the district court applied the incorrect legal standard in approving the proposed *cy pres* distribution and therefore, abused its discretion. Citing to *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), the Ninth Circuit stated that the *cy pres* distribution must be guided by: (1) the objectives of the underlying statute(s); and (2) the interests of the silent class members. In reversing the approval of the charitable distributions in *Nachshin*, the Ninth Circuit noted that:

- The *cy pres* awards failed to meet any of the guiding standards in *Six Mexican Workers* because they failed to address the objectives of the underlying statutes, target the plaintiff class, or provide reasonable certainty that any class member will be benefitted.
- Two-thirds of the donations were going to local charities in Los Angeles, whereas the class was a nationwide class.

There was no indication that the small percentage of class members who were in Los Angeles would benefit from donations to the Boys and Girls Clubs of Los Angeles and Santa Monica or Los Angeles Legal Aid.

- While the proposed donation to the Federal Judicial Center Foundation “at least conceivably benefits a national organization . . . this organization has no apparent relation to the objectives of the underlying statutes and it is not clear how this organization would benefit the plaintiff class.”



- The class shared two things in common: (1) they used the internet, and (2) their claims against AOL arose from a purportedly unlawful advertising campaign that exploited users' outgoing email messages. The Ninth Circuit concluded that the parties should have no trouble selecting appropriate beneficiaries from any number of nonprofit organizations that work to protect internet users from fraud, predations and other forms of online malfeasance.

Depending on the identity and geographical locations of class members, the purposes underlying the statutes or other theories of relief involved, and other relevant considerations to be weighed under the particular facts of the case, a settlement in federal courts could be crafted to make an appropriate *cy pres* distribution to legal aid type organizations.





## **V. LIMITED ADMISSION OF ATTORNEYS AND RULE 1.16 OF THE RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I**

On February 24, 2011, the Hawaii Supreme Court adopted the new rule proposed by the Commission: Rule 1.16 to the Rules of the Supreme Court of the State of Hawai'i. The new rule allows limited admission of attorneys employed by non-profit civil legal service providers for a period of two years, with a possible extension of an additional two years, for a maximum of four years. The rule became effective on July 1, 2011.

The comment by the Commission with respect to this proposal explained that other Hawai'i Supreme Court rules, i.e., Rule 1.7 and Rule 1.8, already permit attorneys in different circumstances (military attorneys and law school faculty members) to apply for limited admission for an initial period of up to four years and three years, respectively, and to apply for an extension of the initial limited admission period. Such rationale should apply to attorneys who are employed by non-profit civil legal service providers. The comment further provided:

To ensure that the limited admission is only for the purposes underlying the rule, the proposed rule also provides that the limited admission to the Bar will be terminated at the end of the term or extended term, when the attorney leaves employment with the legal service provider, or if the provider should cease to be eligible to receive funds from the Indigent Legal Assistance Fund (ILAF), whichever occurs earliest.

The new rule provides:

**1.16. Limited Admission of Attorneys Employed by Non-profit Organizations Providing Civil Legal Services to Economically Disadvantaged Persons.**

(a) Employees. An attorney employed by a civil legal service provider recognized by the Internal Revenue Service as a 501(c)(3) non-profit organization ("Legal Service Provider") that is eligible to receive funds from the Indigent Legal Assistance Fund, who has been admitted to practice by the highest court of another state, the District of Columbia, or a territory of the United States, and whose license to practice in that jurisdiction is active and who is a graduate of a law school approved by the American Bar Association Council on Legal Education and Admissions to the Bar may apply for limited admission and be accorded limited admission without



examination. In all other respects the application shall be made, adjudged, and conditioned as provided by Rules 1.3(a), (b), (c), (d), (e), (h), (i), 1.4 and 1.5 of this Rule 1.

(b) Term Limitation; Extensions. The term of admission under this Rule 1.16 shall be limited to a period of 2 years. The term may be extended one time for a period of 2 years at the request of the Executive Director or highest executive of the Legal Service Provider, provided the attorney has not been disciplined under Rule 2 of these rules. The license given under this Rule 1.16 shall expire at the end of the term or any extension thereof, when the attorney admitted under this Rule 1.16 ends employment with the Legal Service Provider, or when the Legal Service Provider ceases to be eligible to receive funds from the Indigent Legal Assistance Fund, whichever occurs earliest. The license admitting such employee shall be in the form provided by Rule 1.6. If an attorney admitted under this rule separates from his or her employment with the Legal Service Provider, or if the status of the Legal Service Provider changes so that it is not eligible to receive funds from the Indigent Legal Assistance Fund, then both the attorney and the Legal Service Provider shall immediately notify the Clerk of the Supreme Court and the attorney shall immediately cease and desist from the practice of law in the State of Hawai'i.

(c) Client and Compensation Limitation. Attorneys admitted pursuant to this Rule 1.16 may represent only clients of the Legal Service Provider. Attorneys admitted pursuant to this Rule 1.16 may not demand or receive any compensation from clients other than the compensation received from the Legal Service Provider.

(d) Discipline; Dues. Attorneys admitted pursuant to this Rule 1.16 shall be subject to discipline under Rule 2, and shall in all other respects be required to pay dues and fees lawfully imposed on attorneys licensed to practice law in the State of Hawai'i. The fees for application and certificate of admission shall be assessed and paid on application for admission under this Rule 1.16. The fees determined under Rule 17(d)(3) shall be assessed and paid from and after admission to the bar without limitation of time.



**VI. PRO BONO SERVICES AND RULE 6.1  
OF THE HAWAI'I RULES OF PROFESSIONAL CONDUCT**

In September 2010, the Commission recommended to the Supreme Court of Hawai'i that Rule 6.1 (Pro Bono Services) of the Hawai'i Rules of Professional Conduct (HRPC)<sup>9</sup> be amended to allow the substitution of an appropriate monetary contribution in lieu of the recommended minimum of 50 hours of pro bono service hours per year (or for a part thereof).

On December 13, 2011, the Hawai'i Supreme Court amended Rule 6.1 to allow a financial contribution in lieu of the recommended minimum of 50 hours of pro bono services:

Rule 6.1 PRO BONO SERVICES.

\* \* \* \* \*

(c) in lieu of providing 50 hours of pro bono service, a lawyer may exercise his or her desire to provide pro bono services by contributing \$500 each year to Hawai'i Justice Foundation, or an entity that provide legal services at no fee, or at a significantly reduced fee, to persons of limited means.

(d) In addition to performing pro bono services or contributing under subsection (c) each year, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means. ~~Where, in a given year, the lawyer experiences personal or employment circumstances that make it unduly difficult or impossible to provide services which qualify as pro bono activity, the lawyer may substitute such a financial contribution for direct pro bono legal services.~~

The Comment to the Rule explains the rationale for change:

[9] . . . While the personal involvement of each lawyer in the

<sup>9</sup> Rule 6.1 embodies an aspirational goal that lawyers provide 50 hours of pro bono service annually, which would encompass participation in various pro bono activities as described in the rule.



provision of pro bono services is generally preferable, such personal involvement may not always be possible. The annual contribution alternative allows a lawyer to provide financial assistance to increase and improve the delivery of pro bono services when a lawyer cannot or decides not to provide pro bono services through the contribution of time. Also, there is no prohibition against a lawyer's contributing a combination of hours and financial support.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, there are organizations, programs, and projects that have been instituted to provide those services. Paragraph (d) encourages every lawyer to financially support organizations, programs and projects that benefit persons of limited means, in addition to, and not as a substitute for, providing pro bono services, or making financial contributions annually to the Hawai'i Justice Foundation or other qualified entities when pro bono service is not feasible.





## **VII. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES AND RULE 6.5 OF THE HAWAI'I RULES OF PROFESSIONAL CONDUCT**

In September 2010, the Commission recommended to the Supreme Court of Hawai'i that Rule 6.5 (Nonprofit and Court-Annexed Limited Legal Services Programs) of the Hawai'i Rules of Professional Conduct (HRPC) be adopted to allow lawyers working with a non-profit organization or the court to provide limited legal services, such as advice over a hotline or through a clinic to a client without the expectation of the creation of an attorney-client relationship, exempt from HPRC Rules 1.7 and 1.9(a), so long as the lawyer does not know of any conflict of interest.

On December 13, 2011, the Hawai'i Supreme Court adopted Rule 6.5 as follows:

### **Rule 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS.**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
- (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

#### **COMMENT:**

[1] Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In



these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.



## VIII. THREE-YEAR EVALUATION OF THE COMMISSION

Rule 21 of the Rules of the Supreme Court of the State of Hawai'i (RSCH) established the Access to Justice Commission in 2008, requiring that "[t]hree years after the Commission holds its first meeting, the Supreme Court shall evaluate the progress made by the Commission toward the goal of substantially increasing access to justice in civil legal matters for low-income Hawai'i residents." Pursuant to RSCH Rule 21(j)(2), the Supreme Court filed its evaluation on July 21, 2011.<sup>10</sup>

The evaluation described the measurable and concrete developments toward expanding access to justice in Hawai'i, including providing ongoing leadership to improve delivery of legal services; developing and implementing initiatives to expand access to civil justice; increasing and stabilizing long-term public and private funding and delivery; improving collaboration and coordination among service providers; increasing pro bono contributions; reducing cultural and linguistic barriers to the civil justice system; encouraging community leaders to take the lead in expanding access; educating leaders and the public about the importance of access, citizens' legal rights, and the availability of assistance; increasing support for self-represented litigants; and developing initiatives to enhance recruitment of attorneys serving low-income clients.

The Supreme Court acknowledged that the Commission has made concrete strides in a difficult fiscal environment. The evaluation states:

It has approached rule amendments as an innovative tool to address practical disincentives that prevent many attorneys from committing more of their time to pro bono work. It has used that same approach to create new sources of funding for low-income legal service providers by proposing financial alternatives to pro bono work, and created a real potential for increased funding through the amendment of the class action rules. It has supported legislation to expand access to small claims court for more litigants, and has increased potential financial resources supporting low-income access by an upward adjustment to filing fees. It has engaged the legal community in a

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<sup>10</sup> A copy of the Three-Year Evaluation is attached to this report as Appendix B.



successful effort to raise the awareness of the access to justice issue at the precise moment in our state’s economic history when that access is perhaps most under threat, and it has reinvigorated the access-to-justice community through its leadership in keeping the issue in the minds of the general public, the legislature, and other stakeholders in the state. It has fostered greater cooperation and effective resource management amongst the existing service providers.

The Supreme Court recognized that there remains much to be done, but in the short time of the Commission’s existence, it has made “impressive and real progress in providing practical solutions to the ongoing challenge of improving access to the civil justice system for low-income individuals in Hawai`i.”



## **VII. SELF HELP CENTERS**

It started with the Self Help Center Conference sponsored by the HSBA Committee on the Delivery of Legal Services to the Public, LASH, VLSH, and the Commission on November 18, 2010. Since that November, 2010 conference, the collaboration of efforts brought about the opening of the Kauai Self Help Center at the Kauai courthouse on October 7, 2011.

In 2011, the Kauai Self Help Center was open two days a week with volunteer attorneys covering one day and Americorps volunteers on the other. It is intended that the days and hours will be expanded in 2012 with the continued assistance of Americorps volunteers, Legal Aid Society attorneys, and volunteer Kauai attorneys.

On Monday, December 19, 2011, Kauai Mayor Bernard P. Cravalho, Jr. honored the Kauai Self Help Center with a Mayoral Proclamation. The purpose of the proclamation was to thank the attorneys who volunteered their time at the Self Help Center and to acknowledge the efforts of the Judiciary, the HSBA, LASH, and the Kauai Bar Association in working together to make it a reality.

Meanwhile Judge Rhonda Loo on Maui, Judge Greg Nakamura on the Big Island, and Judge Barbara Richardson and Family Court Judge R. Mark Browning on Oahu are endeavoring to establish respective self-help centers on these islands. LASH is assisting with the training of the volunteer attorneys who are members of the respective bar associations on each island as well as the HSBA.





## **X. CELEBRATION OF NATIONAL PRO BONO DAY**

The Commission celebrated National Pro Bono Day on October 25 (as did many other jurisdictions) with the “Pro Bono Experiences and Ethical Considerations” workshop coordinated by the Commission’s Committee on Increasing Pro Bono Legal Services. Over 85 individuals attended the event, which offered mandatory continuing professional education credits. Six organizations participated in the Legal Services Fair after the conclusion of workshop: Domestic Violence Action Center, LASH, Mediation Center of the Pacific, NHLHC, VLSH, and the Young Lawyers Division of the HSBA.

Hawaii Supreme Court Chief Justice Mark Recktenwald opened the celebration with remarks on the importance of pro bono legal services to the underserved. Professor Calvin Pang superbly moderated the panel of individuals who described their own unique pro bono experiences: Hawaii Supreme Court Justice Sabrina McKenna; Ellen Politano, solo practitioner; Cecelia Chang, deputy prosecuting attorney; and Regan Iwao, partner at Goodsill Anderson Quinn & Stifel (“Goodsill”).

Justice McKenna said that she was taking pro bono cases from VLSH while an associate at Goodsill. She spoke with the managing partner of the firm to request that credit be given for the 50 hours of pro bono legal services as billable hours. The firm agreed to do that. She described one case that she encountered where a pawn shop customer needed help to retrieve his item from the shop. The pawn slip was not in the customer’s name. She asked what was the object being retrieved. A gun. “Why is the pawn slip in your brother’s name?” she asked. “Because I’m a convicted felon,” was the response. She did not take the case, but the moral of that story is: ask a lot of questions.

Ellen Politano began her contribution of pro bono legal services fourteen years ago. She expressed, “I wondered why I did not start earlier.” She said that VLSH is one of the significant reasons why she does pro bono work, because the staff at VLSH are extremely helpful. Her pro bono work has been in family law, an area where she believes has the greatest need. “It is an undeniable equal access right when you have a mother who took a bus from Waianae with her two little children to meet me at the VLSH office, knowing they will take that bus long after dark to get home--when my own children are in their beds, safe and sound. This is what drives me,” she stated. “I could be her and she me. My fellow family law attorneys are regulars at the VLSH clinic. We have a great need for more of these attorneys to join in the help.”



Regan Iwao described his amazing experience eleven years ago in assisting a Micronesian family, where as a young associate he argued against experienced Department of Justice attorneys in federal court. Similarly, Cecelia Chang described the satisfaction of assisting those in need with options.

Summarizing some of the salient points made by the panelists, Professor Pang noted three factors to encourage attorneys to consider pro bono work: “First, there is now a sufficient variety and number of pro bono opportunities for attorneys to consider; second, there is an institutional system of support to help an attorney undertake a pro bono task; and finally, like all of law practice, pro bono work has its challenges, but its benefits to others, as well as its reflection on our highest professional ideals and best personal selves, make it an important investment of time and effort.”

The panelists’ varied pro bono experiences were illustrative of the kinds of law-related work that would meet the aspirational goal of providing at least fifty hours of pro bono services annually under Rule 6.1 of the HRPC. For those who find that it is unduly difficult to undertake pro bono work, it was pointed out at the time of the workshop that the Hawaii Supreme Court was considering a proposed amendment to the rule that would allow attorneys to satisfy their responsibility by annually contributing \$500 to organizations that provide legal services to persons of limited means.