

SCMF-11-0000432

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

**In the Matter of the
HAWAI`I ACCESS TO JUSTICE COMMISSION**

THREE-YEAR EVALUATION

(By: Recktenwald, C.J., for the court¹)

¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.

* The report can be found at the Hawaii State Judiciary website: http://www.courts.state.hi.us/news_and_reports/reports/reports.html; and at the Hawaii Justice Foundation website: <http://www.hawaiijustice.org/hawaii-access-to-justice-commission/three-year-evaluation-july-2011>.

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The Rules of the Supreme Court of the State of Hawai'i (RSCH) Rule 21 established the Access to Justice Commission, 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 Court hereby submits its evaluation.

I. Measurable and Concrete Developments Toward Greater Access

A. Recognizing the Need

¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.

The Commission's formation was prompted in part by a report entitled, Achieving Access to Justice for Hawaii's People: The 2007 Assessment of Civil Legal Needs and Barriers to Low- and Moderate-Income People in Hawai'i (hereinafter, "the Hui Report"), which found that only twenty percent of low-income state residents had their civil legal needs met, that service providers could assist only thirty-three percent of those seeking help, and that unmet needs included housing, family, domestic violence and consumer issues.

B. Concrete Steps to Meet the Need in a Difficult Fiscal Environment

RSCH Rule 21(b) declares that it is the purpose of the Commission "to substantially increase access to justice in civil legal matters for low- and moderate-income (together 'low-income') residents of Hawai'i" and sets forth thirteen proposed areas² in which the Commission should strive to make

² There are fourteen, but the fourteenth calls for a statewide assessment after five years, which is not germane to the present review. The thirteen areas are, in full:

(1) Provide ongoing leadership and to oversee efforts to expand and improve delivery of high quality civil legal services to low-income people in Hawai'i.

(2) Develop and implement initiatives designed to expand access to civil justice in Hawai'i.

(3) Develop and publish a strategic, integrated plan for statewide delivery of civil legal services to low-income Hawai'i residents.

(4) Increase and stabilize long-term public and private funding and resources for delivery of civil legal services to low-income Hawai'i residents.

(5) Maximize the efficient use of available resources by facilitating efforts to improve collaboration and coordination among civil legal services providers.

(6) Increase pro bono contributions by Hawai'i attorneys through such things as rule changes, recruitment campaigns,

(continued...)

progress. These areas serve as useful guideposts for assessing progress after three years.

1. Providing Ongoing Leadership to Improve Delivery of Legal Services

The Commission has proven itself an important voice since 2008 in raising awareness of the need for greater access to the civil justice system, adopting model pro bono policies for the judiciary, law firms, and government attorneys, reaching out to public and private practitioners to encourage a greater commitment to pro bono work, hosting roundtable discussions with disparate access-to-justice organizations, improving coordination amongst stakeholders in the area, and educating both the legal

²(...continued)

increased judicial involvement, and increased recognition for contributors.

(7) Reduce barriers to the civil justice system by developing resources to overcome language, cultural, and other barriers and by giving 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.

(8) Encourage lawyers, judges, government officials, and other public and private leaders in Hawai'i to take a leadership role in expanding access to civil justice.

(9) Educate 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 through informational briefings, communication campaigns, statewide conferences (including an annual summit to report on and consider the progress of efforts to increase access to justice), testimony at hearings, and other means, and increase awareness of low-income people's legal rights and where they can go when legal assistance is needed.

(10) Increase effective utilization of paralegals and other non-lawyers in the delivery of civil legal services to low-income Hawai'i residents.

(11) Increase support for self-represented litigants, such as through self-help centers at the courts.

(12) Develop initiatives designed to enhance recruitment and retention of attorneys who work for nonprofit civil legal services providers in Hawai'i and to encourage law students to consider, when licensed, the practice of poverty law in Hawai'i.

(13) Encourage the formation of a broad coalition of groups and individuals to address ways to alleviate poverty in Hawai'i.

profession and the general public on the issue through conferences and other public events. It was also instrumental in getting access-to-justice components included in the new mandatory continuing legal education rule for the Hawai'i Bar.

2. Developing and Implementing Initiatives to Expand Access to Civil Justice

Recognizing the growing foreclosure crisis facing Hawai'i homeowners in the economic downturn of 2008, the Commission launched work on a Foreclosure Mediation Protocol in March of 2009. By September, 2009, the Commission had submitted the Protocol to the supreme court, which agreed to implement it on an experimental basis in the Third Circuit from November 1, 2009 to October 31, 2010. The program allowed a party to participate if they were a borrower or a co-borrower and the party occupied the property in question as the primary residence. By filing a mediation request within fifteen days of service of notice with complaint and summons, the affected party could suspend the normal deadline to file and serve an answer. The pilot program has been extended twice and currently expires March 31, 2012.

Starting in 2009, the Commission also began work on legislation that would raise the jurisdictional amount in small claims court from \$3,500 by amending HRS § 633-27. It was believed that the change would allow pro se litigants greater access to justice at a lower cost and would lessen the case-load

burden on other courts. During the 2011 legislative session, H.B. 1333, which amended HRS § 633-27, provided the small claims court with jurisdiction over cases where the amount in dispute is less than \$5,000, exclusive of interest and costs. See Relating to Small Claims Court, H.B. 1033, 26th Legislature, §1 (2011). The bill was signed by Governor Abercrombie on June 21, 2011.

The Commission has also been examining the feasibility of a model right-to-civil-counsel statute that would address high-priority needs such as shelter, sustenance, safety, health, and child custody.

3. Developing and Publishing a Strategic Plan for Statewide Delivery of Legal Services

The first year, 2008-2009, the Commission decided to delay action on a formal strategic plan, insofar as the elements of a coherent approach to increasing access were in place and moving forward. Entering its third year now, the Commission has preferred to focus its energies on moving existing programs forward in the areas it has already identified as fruitful avenues for progress.

4. Increasing and Stabilizing Long-Term Public and Private Funding and Delivery

This has been a particularly challenging area to develop at a time when the state is suffering through a prolonged economic downturn, particularly as the downturn has so severely affected government and non-profit sector budgets and private giving. For example, in addition to budgetary pressure in the

legislature,³ private groups supporting access to justice have seen their revenues curtailed; the Hawai'i Justice Foundation (HJF), a major source of support for access-to-justice programs, derives much of its funding from the interest earned on accounts established under the Interest on Lawyers' Trust Account (IOLTA) program, funding which varies with the interest-rate environment. In a low-interest-rate environment like the present, IOLTA revenues decline - IOLTA funds for HJF have fallen as much as 50% between 2009 and 2010.

Undaunted, though, the Commission has been imaginative in its efforts to address the funding challenge. During the 2011 legislative session it joined forces with the HJF and legal service providers in a joint effort to successfully support the passage of S.B. 1073, which raises the indigent legal services surcharge on a party's initial circuit court or appellate court filing fee from \$25 to \$50, effective January 1, 2012, and to \$65 effective January 2, 2014. See Relating to Surcharge for Indigent Legal Services, S.B. 1073, 26th Legislature, §2 (2011). District court surcharges will rise from \$10 to \$25 effective January 2, 2012, and to \$35 effective January 1, 2014. Id. It is envisioned that the measure will ensure a long-term reliable

³ In the Spring of 2009 the Commission threw itself into securing legislative funding for a variety of access-to-justice programs but, due to the budget crisis, those legislative efforts never came to fruition. In September 2009, therefore, the Commission decided to focus its legislative efforts solely on securing funding for legal service providers.

source of financial support for lower-income access-to-justice programs. The measure was signed by Governor Abercrombie on July 5, 2011.

The Commission's 2010 Access to Justice Conference held June 25, 2010 at the Richardson Law School generated other alternative funding ideas - including requiring attorneys who do not complete an annual 50 hours of pro bono service to pay a fee of \$500 and a suggestion to raise the general excise tax on attorney's fees by 1%. The Commission subsequently recommended to the Hawai'i Supreme Court, in September 2010, that the court amend Hawai'i Rules of Professional Conduct (HRPC) Rule 6.1 to allow a lawyer to discharge his or her responsibility to provide pro bono services by contributing \$500 annually to a fund to be created and designated for the purpose of providing free legal services "to persons of limited means."⁴ The period of public comment has been extended to October 31, 2011. The Commission has recommended the HJF administer any funds resulting from the amendment, should it be adopted.

⁴ The proposed amendment would strike some language in the current rule and would result in the following language following Rule 6.1(b)(3):

(c) A lawyer may discharge his or her responsibility to provide pro bono services by contributing \$500 each year to the Rule 6.1 Fund created hereunder for the support of organizations that provide free legal services to persons of limited means.

(d) In addition to performing pro bono services or contributing to the Rule 6.1 Fund each year, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

In another potentially important development, the Hawai'i Supreme Court, on January 27, 2011, adopted with modifications an amendment to the Hawai'i Rules of Civil Procedure Rule 23 which was originally proposed by the Commission. The amendment will permit courts to exercise discretion in distributing any unpaid residual funds - after all victorious class-action plaintiffs who can be contacted have received the funds due them - "to nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund...or [to] the [HJF] for distribution to one or more such organizations."

5. Improving Collaboration and Coordination Among Service Providers

In 2009, the Commission took steps to establish a central statewide database cataloguing the organizations that provide legal services to low-income individuals, in order to better match needs with the appropriate service, be it mediation or litigation, and to employ improving technology to better reach those in need, including better publication of available services.

In 2010, the Commission launched a roundtable effort to bring together organizations committed to eliminating cultural and linguistic barriers preventing Hawaii's immigrant community from gaining full access to the justice system. (This effort is discussed in full, infra, in section I.B.7.) It also promoted

better coordination of service provision between the Legal Aid Society of Hawai'i and Volunteer Legal Services Hawai'i, resulting in the two groups agreeing to a Collaborative Referral System in April 2010.

6. Increasing Pro Bono Contributions

In 2009, the Commission adopted model pro bono policies for the judiciary, law firms, and for government attorneys and worked to get them endorsed by the Hawai'i State Bar Association (HSBA). For the judicial pro bono policy, the Commission worked with providers of legal services to low-income parties to inventory available pro bono opportunities, and compile the related rules and opportunities into a reference guide for judges as to what pro bono work was allowed in their official capacities. In addition, the Hawai'i Supreme Court, on February 11, 2010, amended the Hawai'i Revised Code of Judicial Conduct (RCJC) Rule 3.7(a) and added a Comment to expressly include pro bono work as an activity in which a judge may participate.⁵

⁵ The title of Rule 3.7 was amended to read "Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Pro Bono Activities" (underline text added), and a new subsection, Subsection (8) was added, which reads:

(8) participating in pro bono activities to improve the law, the legal system or the legal profession or that promote public understanding of and confidence in the justice system and that are not prohibited by this code or other law. Such pro bono activity may include activity that is related to judicial activity, but not required to fulfill the duties of judicial office.

(continued...)

Efforts were also made in 2009 to amend HRS §28-10,⁶ which contains language that appears to bar attorneys in the attorney general's office from performing pro bono service. The bill amending the statute to expressly allow such service, absent a conflict of interest determination, was passed by the legislature but vetoed by the Governor, who cited concerns surrounding the process for determining conflicts of interest.

Despite that setback, the Commission in 2009 approved a Model Policy for Government Attorneys Performing Pro Bono Work, synthesizing ideas gathered from various county policies, other states, and the United States Department of Justice. It was also integral in improving RSCH Rule 22 by successfully proposing that

⁵(...continued)

Comment 6 was also added, which reads:

[6] Examples of "pro bono activity . . . related to judicial activity, but not required to fulfill the duties of judicial office" include: (i) judging moot court for law school classes, high school mock trials or We the People competitions; (ii) giving speeches or presentations on law-related topics, such as (a) at the Judiciary's Lunch and Learn the Law events, (b) to a bar association or section, or (c) to other groups, like high school civics classes or Rotary Club groups; (iii) serving on Judiciary committees, such as the rules committees; (iv) serving on the board of a law-related organization, such as the American Judicature Society, or delivering presentations on behalf of such organizations; or (v) serving on continuing legal education committees, Bar Association committees, and committees of the Access to Justice Commission.

⁶ HRS §28-10, entitled "Prohibition on private practice of law by the attorney general, first deputy, and other deputies" states in pertinent part that "[t]he attorney general, the attorney general's first deputy, and other deputies shall devote their entire time and attention to the duties of their respective offices. They shall not engage in the private practice of law, nor accept any fees or emoluments other than their official salaries for any legal services."

up to three hours of an attorney's Voluntary Continuing Legal Education could be fulfilled through pro bono service.

In March 2010, the Commission approved a proposal for a new rule to be added to the RSCH, RSCH Rule 1.16, which the Hawai'i Supreme Court adopted on February 24, 2011 and which took effect July 1, 2011. The new rule allows for the limited admission of foreign-jurisdiction attorneys to practice in the state as long as they are employed by non-profit organizations providing civil legal services to economically disadvantaged clientele.⁷ See RSCH Rule 1.16(a). The rule provides licensed attorneys from other U.S. jurisdictions who have graduated from accredited law schools to practice for two years without having to undergo the Hawai'i bar examination, with an additional two-year extension possible at the request of the executive officer of the non-profit, provided the attorney's record remains free of disciplinary action. See RSCH Rule 1.16(b). Under the limited license, the attorney may only provide legal services to the non-profit, the license is indivisibly linked to employment by the non-profit, and the attorney may not receive any other compensation for the practice of law outside employment by the charitable organization. See RSCH Rule 1.16 (b) and (c). The attorney is subject to the same disciplinary rules and bar dues as any practicing attorney in the state. See RSCH Rule 1.16(d).

⁷ The length of the new rule makes it impractical to provide the full text of it here.

The Commission, through numerous conversations with practitioners, has also identified two obstacles to greater pro bono commitments by attorneys and has begun work to address them. The Commission identified a hesitancy among attorneys to take on pro bono work because the attorneys felt they could not control the parameters of that commitment and, in response, is weighing the merits of modifying rules and procedures to allow attorneys to undertake "unbundled" pro bono work, limited to a discrete issue or task, with clear communication with the client as to the limits of the representation.⁸ A related barrier arises from a concern among attorneys that they may not possess the requisite expertise in the substantive law needed to do effective pro bono work in a given area. The Commission hopes that hesitancy can be addressed through coordinating appropriate training from Legal Aid and, possibly, from the heads of the relevant sections of the bar association.

The Commission was also instrumental in adding Comment 5 to RCJC Rule 2.2, which reads, "It is not a violation of this Rule for a judge to sanction a lawyer by permitting the lawyer to provide pro bono legal services to persons or organizations of the lawyer's choosing that are described in Rule 6.1(a) of the [HRPC], or to make a monetary contribution to such

⁸ In a related development, the Commission submitted a proposed rule amendment to the HRPC Rule 6.1 that would allow attorneys to participate in such limited legal programs without creating an attorney-client relationship, with all the accompanying professional commitment that entails.

organizations.”

7. Reducing Cultural and Linguistic Barriers to the Civil Justice System

The need in this area is real, with 20% of Hawai‘i residents foreign born and 25% speaking a language other than English in the home.⁹ In 2009, the Commission made preliminary steps toward reaching out to minority communities in Hawai‘i who face linguistic and cultural barriers to civil justice programs. Ideas included producing forms in multiple languages and working with the University of Hawai‘i at Manoa and other schools to bring in multilingual individuals from programs at the schools as volunteers to render translation assistance.

Judge Barbara Richardson, at the 2010 Access to Justice Conference, noted that one of the greatest needs at the District Court level was individuals to assist pro se litigants in determining what they actually need from the court and how to proceed. Unfortunately, funding cuts mean both less staff and less technology to offer such assistance. The district court has, nevertheless, begun work on a series of frequently asked questions for the Judiciary website and has considered introductory videos to explain the basic workings of the court system.

The Commission has also worked with the Hawai‘i State

⁹ This according to Jennifer Rose, Gender Equity Specialist, University of Hawai‘i at Manoa, at the 2010 Access to Justice Conference.

Supreme Court Committee on Equality and Access to the Courts, the Supreme Court Committee on Court Interpreters and Language Access, the Hawai'i State Judiciary's Office on Equality and Access to the Courts, the HSBA's Committee on Diversity, Equality and the Law, and the Committee on Overcoming Barriers to Access to Justice, formed under the Commission's auspices, to identify ways to eliminate cultural and linguistic barriers to the court system. Their ongoing meetings have resulted in new coordination and support among these groups in attaining their common goal of providing unbiased, culturally sensitive access to the justice system.

8. Encouraging Community Leaders to Take the Lead in Expanding Access

In 2009 and 2010, the Commission, by sending representatives to government and private legal practitioners, secured commitments from 21 law firms and government offices to provide 50 hours of pro bono service annually. In addition, in June 2009 and June 2010, the Commission sponsored conferences on access to justice at Richardson Law School, with over 200 individuals in attendance both years.

9. Educating Leaders and the Public About the Importance of Access, Citizens' Legal Rights, and the Availability of Assistance

The Commission has submitted testimony to the legislature on a number of measures, took steps to join forces with legislators to develop further legislation, met with law

firms, government agencies and other providers, published articles in the Hawai'i Bar Journal, participated in a KHPR radio interview, appeared on Olelo TV, and increased its presence on the internet. The Commission also supported the National Pro Bono Celebration on October 28, 2009, at Tamarind Square.

10. Increasing the Effective Use of Paralegals to Increase Access

In 2009, the Commission made preliminary efforts to assess whether access to civil legal services might improve if paralegals were allowed a greater role in matters like uncontested divorces and guardian ad litem work. This could well be a fruitful area for progress in coming years in providing guidance to pro se litigants seeking access to the civil justice system.

11. Increasing Support for Self-Represented Litigants

Recognizing lessons learned regarding financial, staffing, and bureaucratic barriers pertaining to an experimental Judiciary-sponsored assistance center at the First Circuit Court, the Commission began, in 2009, by proposing similar efforts at assisting pro se litigants that would either bring in independent providers of low-income legal services or set limited hours during which court staff could be available to provide limited assistance in completing paperwork and ensuring parties make scheduled appearances. In 2011, the Commission continues to work with the HSBA and the Judiciary in creating pilot self-help

centers to address that need.

12. Developing Initiatives to Enhance Recruitment of Attorneys Serving Low-Income Clients

The Richardson Law School has a strong Advocates for Public Interest Law (APIL) student organization which the Commission has recognized could serve as an important resource for encouraging licensed attorneys to take on a greater pro bono case load by promising APIL assistance. In 2009, the Commission began work on better publicizing APIL as such a resource. It also began exploring the feasibility of establishing overarching student-professional projects that would move beyond addressing current needs to preventing future legal disputes or to providing alternate dispute resolution mechanisms.

In 2010, the Commission studied the idea of introducing a bill to the legislature creating a student loan repayment assistance program "to help full-time, nonprofit civil legal services attorneys pay back their student loans" but, understandably in the current budgetary environment, has shelved the proposal for the time-being.

13. Encouraging the Formation of a Broad Anti-Poverty Coalition

As an initial step, in 2009 the Commission began considering a study of legal proceedings governing housing issues in Hawai'i, under the theory that loss of housing often precipitates crises in other crucial areas of poverty such as safety, health, and access to education.

II. Conclusion

The Commission has made real concrete strides in a very difficult fiscal environment. 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 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.

No doubt there remains much to be done. The role of paralegals in addressing the need for guidance in navigating the civil justice system - particularly amongst newer members of the Hawai'i community who face linguistic and cultural barriers -

could be developed further. An overarching strategic plan (which would represent a significant investment of time, energy, and resources in already challenging times) could perhaps contribute a clearer and more integrated view of the problems faced by those involved in providing access to low-income individuals. With a new governor, efforts could begin anew to clarify the ability of attorneys at the Office of the Attorney General to provide pro bono service and progress could be made in providing support for self-help litigants at the district and circuit courts.

Overall, though, given the short time the Commission has been in existence and the severe economic conditions in which it has been forced to operate, 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.

DATED: Honolulu, Hawai'i, July 21, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice

