

## VII. ACCESS TO JUSTICE CONFERENCE

Over two hundred people came together for the first annual Hawaii Access to Justice Conference on June 24, 2009, to explore how to more effectively address the unmet civil legal needs of Hawaii's low-and moderate-income people. Associate Justice Simeon R. Acoba, Jr., Chair of the Access to Justice Commission, and moderator for the event, explained that the annual conference was an opportunity to review progress made by the Commission and to consider where future efforts should be directed in order to creatively advance access to justice objectives.



During the day, a significant number of substantive issues related to Hawaii's longstanding access to justice problem were presented and discussed.

Following a review of the nature of the unmet need, and a perspective from a client victim of mortgage fraud, two panel discussions took place, one on the implications of the funding crisis for public interest legal service providers, and another on non-traditional approaches to addressing unmet civil legal needs. A significant midday speech emphasizing the importance of striving to realize the principle of justice for all was followed by audience participation and role playing events designed to give attendees a sense of

some of the linguistic, cultural, and other barriers faced by many of Hawaii's low- and moderate-income people. In four afternoon breakout groups, conference attendees had the opportunity to brainstorm and prioritize recommended goals for the Commission. Further insights on the nature of the access to justice challenges were offered in brief concluding remarks.

While there was considerable anxiety expressed at this first Hawaii Access to Justice Conference regarding the formidable challenges involved in meeting greater needs with fewer resources in difficult economic times, there was also a sense of hope expressed regarding the potential for creative responses to these challenges.



## **CHALLENGES**

### The unmet needs

Both of the statewide Hawaii legal needs assessments undertaken during the past decade and a half have demonstrated that the civil legal needs of most of Hawaii's people of moderate income or below are not met. In his opening remarks, Justice Acoba mentioned the main findings of *The 2007 Assessment of Civil Legal Needs and Barriers of Low- and Moderate-Income People in Hawaii*. These findings were further detailed by Legal Aid Society of Hawaii Executive Director Nalani Fujimori Kaina. Here are some of the key findings:

- Only 1 in 5 low- and moderate-income Hawaii residents have their civil legal needs met
- Legal service providers are able to help only 1 in 3 of those who do contact them for assistance

- Areas of significant unmet civil legal needs include housing, family, domestic violence, and consumer issues
- Significant barriers to obtaining legal assistance, include language and cultural barriers, lack of knowledge of one's legal rights, lack of knowledge of available legal services, and difficulty in accessing legal services programs
- There is one legal service attorney for every 2,291 persons living below 125% of the federal poverty level
- There is one private attorney for every 361 persons in the general population

To illustrate the severity of the need and the critical role of the legal service provider, Russ Awakuni, an attorney with the Legal Aid Society of Hawaii, presented one client who had been victimized by a mortgage rescue scam. Unlike many others less fortunate, this client and her family are still in their home, thanks to the successful defense by Legal Aid of multiple eviction efforts.

In his thoughtful mid-day address, featured speaker Chief Justice John T. Broderick, Jr. of the New Hampshire Supreme Court observed that for the past several decades the state courts have found themselves playing an expanded role in resolving society's problems. He observed that the state courts handle more than 98% of all justice needs--over 47 million cases per year--and noted that one-half or more of the courts' work relates to the family: divorce, domestic violence, guardianship, juvenile delinquency, and so on. He suggested that the growing demands on state court judges and staff are largely the result of stresses on the family, as well as the gradual decline in civic, community, and religious institutions and organizations.

#### The limitations of self-representation

In the judgment of Chief Justice Broderick, the single greatest challenge confronting America's state courts in the first decade of the 21st century is the rising number of self-represented litigants, the vast majority of whom simply cannot afford a lawyer. He asked attendees whether they think it would be appropriate to tell an uninsured individual who came into the emergency room that medical advice cannot be provided about his abdominal pain, "but there are some fabulous illustrated textbooks over there, and the instruments have been recently sterilized. Good luck."

The compelling nature of the need at the court was vividly portrayed by Oahu Family Court Judge Michael Broderick. He explained that most of the parties who appear in court on the Thursday paternity calendar, for example, are poor (earning \$2,500 per month or less--if they have a job at all), uneducated (some have a high school education, and others are

illiterate), often drug- or alcohol-addicted, often exhibiting mental health conditions, and often sharing a house with eight to twelve people, if living in a house at all.

Judge Broderick observed: "There is no way in the world that that person can represent himself. It's impossible. So when I hear people talking about giving them basic information and having them represent themselves, that simply doesn't add up. In my experience the typical family pro se party cannot even write the order that I issue." He added that only a week before the Conference, he'd learned that the court had lost, due to funding cuts, the help of lawyers from the Legal Aid Society of Hawaii, who had been drafting the orders for the parties to the 20 to 25 paternity cases that come before him each Thursday.

### Stresses on the public interest providers

During the worst economic downturn in seventy years, much of the funding for public interest legal service organizations has disappeared, requiring that hard choices be made regarding cuts to staff and programs. This has occurred at the same time that the number of low- and moderate-income people needing civil legal assistance, with not only family and housing but many other personal plight and small business matters, has significantly increased. The current state of crisis from the perspective of these nonprofit legal services organizations was clearly articulated during a panel discussion on the subject of funding moderated by Washington Chief Justice Richard Guy (retired).

Nalani Fujimori Kaina, Executive Director of the Legal Aid Society of Hawaii, noted that the loss of the general legal services funding that had been received for 35 years has changed what Legal Aid has to do and how it delivers services. It has been necessary to shift from a model focused on doing the work that clients need, to a model focused on doing the work that will be funded. Many grants require that hours be billed like any other law firm, and cases may be capped at \$2,500 to \$3,000--not enough time, at \$50 per hour, for many domestic violence, custody, and other cases. She noted that the cuts in services to the self-represented have a serious impact on the work of judges and court staff. Moya Gray, Executive Director of Volunteer Legal Services Hawaii, said that the funding cuts have meant that the mission suffers as the money is chased, in order to continue to have capability to offer services at all.

Robin Kobayashi, Executive Director of the Hawaii Immigrant Justice Center (fka Na Loio), echoed the concerns expressed by other panelists. As of June 30, 2009, she said, a critical legal services program for immigrants will be cut, part of the staff must be let go, and the organization must shift to

sustainable, for-profit projects--that is, they must begin charging for services. She explained that the vast majority of clients who need legal advice before they suffer irreparable harm such as deportation to a life-threatening situation will be excluded under this model. Panelist State Senate President Colleen Hanabusa observed that when times are difficult and resources become limited, nonprofits will be sacrificed before "core services."



### Barriers to public access

Conference attendees were given an opportunity to experience the frustration and personal risk associated with a number of other barriers to public access during audience participation and role-playing presentations by Tracey Wiltgen, Executive Director of The Mediation Center of the Pacific, Robin Kobayashi, Executive Director of the Hawai`i Immigrant Justice Center, Nanci Kreidman, CEO of the Domestic Violence Action Center, and James Pietsch, Professor, William S. Richardson School of Law and Director of the University of Hawai`i Elder Law Program.

First, attendees were asked to answer representative questions within four categories that might be encountered by individuals attempting to navigate the legal system. Then, with further help from Hawai`i Immigrant Justice Center interns Jade Wong and Jennifer Allen and Northeastern law school student Travis Agustin, some of the barriers associated with language, culture, and the interrelations between the various departments and resources within the legal system itself were illustrated within a poignant narrative (based on the ordeal suffered by one of the clients of the

Hawai'i Immigrant Justice Center) about Christina, a Cambodian picture bride, and an abusive spouse capable of manipulating the legal system.

Chief Justice Broderick mentioned another aspect of the crisis affecting the legal system. Noting the outdated tools available in many of the courts in the country, he suggested that failure to keep up technologically not only constitutes a barrier to access but may also lead to a withering of the court system itself. "Could it be that state courts are the only institution that doesn't have to change?" he asked rhetorically. "Can't be." He stressed the need for better and more efficient technology, for more public access centers and self-help centers, and effective websites. Indeed, he suggested, if state courts do not keep pace with and remain relevant to the marketplace of the 21st century, they may be virtually abandoned by the business community and within a decade become primarily a forum for self-represented parties and criminal cases--only to encounter even greater funding challenges due to a constriction of function.

## **TOWARD RESPONSES TO THE CHALLENGES**

Not all aspects of Hawaii's access to justice crisis were articulated in the five and a half hours available at the first Hawai'i Access to Justice Conference, and not all of the problems that were articulated could be effectively engaged at the conference. That is the critical responsibility of the Access to Justice Commission and its committees during the months to come. Some of the promising ideas for helping to address some of the above-mentioned aspects of the crisis were reviewed at the conference, each of which is being explored by the Hawai'i Access to Justice Commission.

### Increasing pro bono

Hawai'i Access to Justice Commission Chair Simeon Acoba has taken a leadership role in a campaign to encourage Hawaii's lawyers to commit to the goal of fifty hours per year of pro bono services set by *Hawai'i Rules of Professional Conduct* Rule 6.1. In his opening remarks, he mentioned that upon administering the oath to new lawyers, Chief Justice Ronald T. Moon emphasized that their professional duties include giving due consideration to the legal needs of those without access to justice. At the conference, Justice Acoba acknowledged a number of professional groups that have already committed to satisfying Rule 6.1.

Family Court Judge Michael Broderick reported that he had recently received calls from two young lawyers interested in helping with the paternity calendar following the loss of the assistance of Legal Aid. He also received a positive response when he contacted three of the largest law firms in Hawai'i to ask whether any associate lawyers could assist in a pro bono

fact-finder capacity for the Family Court. He expressed a belief that there are many lawyers who are interested in helping the court, and he encouraged the development of a creative way to match such volunteers with the needs.



(First row, Nalani Kaina, Moya Gray, Justice Acoba, Tracey Wiltgen; second row, Elton Johnson, Wayne Parsons, Chief Justice Guy, Robert LeClair

### Making rain

During the panel discussion of the funding aspect of the access to justice crisis, Senate President Colleen Hanabusa said that the Commission should not give up asking the Legislature for an increase in the Indigent Legal Assistance Fund (ILAF). However, she stressed the importance of locating other funding sources, given the importance of money for access to justice, and the vulnerability of funding sources that are subject to decision-makers in the legislative or the executive branch.

The Hawai`i Consortium of Legal Service providers, the Hawai`i Justice Foundation, and the Commission will continue to actively seek and develop such funding streams. Robert LeClair noted that last year's establishment of rate comparability for the Interest on Lawyers' Trust Accounts (IOLTA) will pay off once interest rates rise. He noted that interest from real estate transactions is not yet tapped to help address unmet civil legal needs.

Another funding idea mentioned was that of cash in lieu of pro bono services, from those who may not be able to fulfill Rule 6.1. The panelists

each responded favorably to this idea, although it was recognized that the amount of funds thus generated would be relatively small.

Justice Acoba noted that although the Commission is not a lobbying mechanism, it does support legal service providers by passing relevant resolutions and joining providers in visits to legislators. He mentioned that the Commission may need to consider more aggressive efforts, and even the creation of a separate foundation that would be authorized to lobby.

#### Realizing the full evolution of the adjunct provider

During the panel discussion of non-traditional approaches to meeting civil legal needs, paralegal Elton Johnson pointed out that the legal field, like most fields, includes discrete sub-areas that involve relatively routine types of services that would be most efficiently delivered by adjunct providers who specialize in them. Such an adjunct provider, he argued, would complement the primary provider, and enhance pro bono, pro se support, unbundling, and other approaches to addressing the need. He observed that many of the unmet needs fall on the relatively routine end of the spectrum of services.

Mr. Johnson mentioned the documented migration of lawyers from a personal plight sort of practice to a corporate clientele and invited those present to imagine how much less efficient the delivery of healthcare services would be without regulated, trained adjunct providers such as nurses and paramedics. He expressed hope that the Access to Justice Commission will examine the effect of the absence of the fully-evolved adjunct provider in the legal field, and consider acting on the *Community Wide Action Plan* action step 6(a), which encourages the training and regulation of paralegals and other non-lawyers to more effectively help to address certain types of unmet needs.

Robert LeClair added that he knows that expanded utilization of paralegals can work. He explained that between 1978 and 1982, during his tenure with the Legal Aid Society of Hawaii, thirty paralegals were employed under VISTA and other compensation. The number of clients served went from 4,500 to 38,500 per year under this program. He suggested that experiments could be run, as have been done in the medical field, to address some of the unmet need.

In his address, Chief Justice Broderick, too, mentioned the possibility of licensing legal practitioners, under lawyer supervision, capable of handling a narrow band of discrete legal problems at affordable rates.



### Affirming the right to universal civil representation

Also during the discussion of non-traditional approaches, Robert LeClair observed that most people are in favor of access to justice in principle. He pointed out that it is actually relatively inexpensive. He mentioned an American Bar Association study showing that only about \$20 per year, per person, is spent on legal services in the United States, and estimating that what is needed is about \$100 per year. Even if this estimate is low, he said, it is not even close to the approximately \$2,000 to \$4,200 spent on each person per year for Medicare.

Mr. LeClair stated that an affirmation of the right to counsel in civil cases, analogous to the affirmation of the right to counsel in criminal cases that was affirmed in *Gideon v. Wainwright* in 1963, would be the ultimate solution to the access to justice problem, moving the discussion from whether we have enough money in the Legislature to give to the poor or whether the providers have behaved this year, to what is necessary to meet the mandate.

In his midday address, Chief Justice Broderick observed that while every politician has a healthcare plan, none he's met has an access to justice plan. He noted, however, the American Bar Association's unanimous resolution, in 2007, in favor of a universal right to civil representation, or civil *Gideon*.

Chief Justice Broderick also mentioned that in New Hampshire a few years ago, where the Supreme Court appointed a citizen's task force with 104 members, two-thirds of whom were non-lawyers, to review and report on the court system's work, one of the recommendations was that the state should "examine the expansion of legal representation to civil litigants unable to afford counsel, and study implementation of a civil *Gideon* for the poor threatened with loss of shelter, sustenance, safety, health, and the custody of a child." He echoed Robert LeClair's view that a civil *Gideon* may prove to be the only universal solution. He stated that we cannot wait for it to happen, but must soften the beachhead by capturing the attention of citizens and the legislators who represent them, and advocating for access to justice, so that the idea of universal civil representation resonates with them. The emergence of the state access to justice commissions is a great start, he said.

### Other promising recommendations

Each of the above promising initiatives are being explored by the Access to Justice Commission and were among the recommended goals selected by the four breakout groups at the end of the conference. Further

recommended goal priorities identified during the four breakout groups, besides those that were discussed earlier in the conference, included:



#### Pro bono

- Mandatory pro bono
- Limited admission of out-of-state lawyers for pro bono
- Waiver of the pro hac vice fee for pro bono representation
- Amendment of the law student practice rule for pro bono

#### Alternative dispute resolution

- More effective use and public awareness of mediation, arbitration, and other forms of ADR



#### Facilitation/public awareness

- Make the courts more user-friendly (instructional videos and materials, language and cultural accessibility, "customer service representatives")
- More information availability (brochures, advertising on buses)

#### Other goals

- Permit more flexibility for judges to accommodate self-represented parties
- Pilot projects at the law school to better equip graduates for community-oriented practice
- Changing the focus of the Commission from being about lawyers and law firms to being about people and their needs

The Commission committees are also exploring many other initiatives that could not be substantively discussed at this year's conference and were not prioritized in its breakout groups. One major example is the concept of unbundled legal services. This promising approach to improving access to legal services was favorably mentioned by Chief Justice Broderick, but was not further explored during this year's conference.

"There is no status quo any longer," said Chief Justice Broderick. "You're either moving forward or backward in the 21st century."



In her concluding remarks, Family Court Judge Evelyn Lance (retired) observed that pro bono is admirable but can fill only a small part of the need, and money is very important but will always be far from adequate. She said that she feels that the concrete developments of the Hawaii Access to Justice Commission and its first annual conference are evidence that we may be at the beginning of a "paradigm change," noting that not only streamlining but also systemic changes are being contemplated.

Commission Chair Associate Justice Acoba, in his opening remarks at the conference, quoted United States Supreme Court Justice Lewis Powell, Jr.: "Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. It is fundamental that justice should be the same, in substance and availability, without regard to economic status." The Hawaii Access to Justice Commission will attempt to implement the bold, fundamental changes necessary to fulfill this promise.

