



HAWAI`I ACCESS TO JUSTICE COMMISSION

Annual Report for 2010



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I. HAWAI`I ACCESS TO JUSTICE COMMISSION

In 2010, the Hawai'i Access to Justice Commission ("Commission") continued its mission of substantially increasing access to justice in civil legal matters for low- and moderate-income residents of Hawai'i.

This report highlights the Commission's activities in 2010.¹

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 Hawaii 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 2010, the following new commissioners were added to the Commission:

- Moses Haia, Executive Director, Native Hawai'i Legal Corporation
- Jean Johnson, Associate Director, College of Education Center on Disability Studies
- Trudy Senda, District Court Judge, Fifth Circuit
- Debbie Shimizu, Executive Director, National Association of Social Workers, Hawai'i Chapter²

Associate Justice Simeon R. Acoba of the Hawai'i Supreme Court was Chair of the Commission until the end of June of 2010. Intermediate Court of Appeals Associate Judge Daniel R. Foley was designated as the succeeding Chair of the Commission on or about June 30, 2010.

¹ The 2009 annual report of the Commission covering matters from May, 1, 2008 to October, 2009 was completed in December 2009. The 190-page report was distributed to all interested parties, including the Governor, county mayors, legislators, newspapers, community organizations, and the various law firms and governmental entities that committed to strive to meet Rule 6.1 of the Hawai'i Rules of Professional Conduct.

² Debbie Shimizu resigned from her position in December 2010 to take a new job with the Office of the Governor.



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.	Moya Gray (Volunteer Legal Services of Hawai'i)	Hawai'i Consortium of Legal Services Providers	12/31/11
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.	* (Non-attorney public representative)	Hawai'i Consortium of Legal Services Providers in consultation with Chief Justice	12/31/11
16.	Gregory Markham (desig. Jan. 1, 2011)	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.	*	Governor	n/a
20.	Mary Anne Magnier	Attorney General	n/a
21.	Hon. Clayton Hee (desig. Jan. 1, 2011)	Senate President	n/a
22.	Hon. Della Au Belatti (desig. Jan. 1, 2011)	House Speaker	n/a

* To be appointed



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, Moya Gray, Jill Hasegawa, Derek Kobayashi, Carol K. Muranaka, David Reber, Tracey Wiltgen)

- Assist in providing administrative and logistical assistance to the Commission and its committees and task forces
- 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
- Coordinate the activities of volunteers in support of the Commission's initiatives

Annual Report Committee

(Jill Hasegawa, Chair, Associate Justice Simeon R. Acoba, Jr., Carol K. Muranaka, Karen Nakasone, 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)

Committee on Education, Communications and Conference Planning

(Dean Aviam Soifer, Chair, Sen. Mike Gabbard, Sonny Ganaden, Mihoko Ito, Elton Johnson, Jeffrey Kent, Robert LeClair, Helen Rusk Leong, Carol Muranaka, Leila Rothwell Sullivan)

- Assist in organizing an annual summit for the presentation of Access to Justice issues
- 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 *Hawai'i Bar Journal* and other media

Committee on Funding of Civil Legal Services

(Gregory Markham, Chair³, Moya Gray, M. Nalani Fujimori Kaina, Robin Kobayashi, Robert LeClair, Dean Aviam Soifer, 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

³ Chief Justice Richard Guy (retired, Washington State Supreme Court) served as Chair of this committee during the first half of 2010.



- 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 Hawai'i Rules of Professional Conduct

Committee on Increasing Pro Bono Legal Services

(Moya Gray, Chair, Gilbert Doles, Clara Javier, Derek Kobayashi, Colbert Matsumoto, Wayne Tanna, 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

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, 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

Law School Liaison Committee

(Moses Haia, Chair, Katie Bennett, Levi Hookano, Jean Johnson, Jeffrey Kent, Linda Kreiger, Angela Lovitt, Mary Anne Magnier, 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 Rules of Professional Conduct 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 to obtain grants for summer internships and clerkships that serve low-income populations

Committee on Maximizing Use of Available Resources

(M. Nalani Fujimori Kaina, Chair, Nanci Kreidman, David Reber, Bruce Sherman, 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

Committee on Overcoming Barriers to Access to Justice

(B. Martin Luna, Chair, Russ Awakuni, Shawn Benton, Elton Johnson, Dew Kaneshiro, Robin Kobayashi, Nanci Kreidman, Mary Anne Magnier, Pat McManaman, Calvin Pang, Jennifer Rose, Kristin Shigemura, 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

Committee on the Right to Counsel in Certain Civil Proceedings

(Shannon Wack, Chair, Associate Judge Daniel R. Foley, Mary Anne Magnier, Karen Nakasone, Bruce Sherman, Jack Tonaki, Wilfredo Tungol, George Zweibel)

- 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



Committee on Self Representation and Unbundling

(Judge Trudy Senda, Chair, Sarah Courageous, M. Nalani Fujimori Kaina, Victor Geminiani, Victoria Kalman, Jo Kim, Jay Kimura, Derek Kobayashi (Vice Chair), 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



II. 2010 ACCESS TO JUSTICE CONFERENCE

The 2010 Access to Justice Conference, entitled “Access to Justice: Is A Promise We Can Keep?” engaged over 270 participants in thought-provoking discussion on June 25, 2010 at the William S. Richardson School of Law. Out of the total attendees, 135 attorneys sought mandatory continuing professional education (MCPE) credits for their attendance.⁴ The conference was co-sponsored by the Hawai'i Justice Foundation, William S. Richardson School of Law, and the Hawai'i State Bar Association.

A. Opening Plenary Session

The morning session of the conference began promptly at 8:50 a.m.⁵ Dean Aviam Soifer and Robert LeClair, both members of the Commission's Committee on Education, Communications, and Conference Planning, acted as co-emcees. Chief Justice Moon took the opportunity to state that June 25 was Dean Aviam Soifer Day in the Hawai'i courts. Chief Justice Moon read a resolution by the Hawai'i State Judiciary extending to Dean Soifer its sincere appreciation for his friendship and support, for his outstanding service to the legal profession, the rule of law, and the administration of justice, and for his untiring commitment to educational excellence, public service, and the betterment of society as a whole.

Associate Justice Acoba presented the status of the work of the Commission and its continuing priorities. He presented the Certificates of Appreciation to the Cades Foundation (E. Gunner Schull, trustee) and to the

⁴ Hawai'i 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]

⁵ Registration took place from 8:15 a.m. to 8:45 a.m. A copy of the conference agenda is attached hereto as Appendix A. The forty-two panelists provided a volume of material as illustrated by the two-inch binder of documents given to each attendee. The conference materials may be obtained at <<http://www.hawaiijustice.org/hawaii-access-to-justice-commission>> by clicking on “2010 Access to Justice Conference Materials” on the left side of the page.



Hawai'i Justice Foundation (James Kawachika, president) for the grants that were approved for the Commission's objectives.

B. Morning Panels

The first morning panel with Derek Kobayashi and Nanci Kreidman⁶ was facilitated by Robert LeClair concerning the issues related to meeting the needs of the underserved with the attorneys willing to provide pro bono legal services. They interacted with the audience on the challenges encountered in rendering such legal services. One example mentioned was client responsiveness. A well-meaning pro bono client may assume that his everyday attire of a tank top and steel-toed boots are appropriate in the courtroom unless advised otherwise by his attorney. Challenges that were described included expenses of doing the pro bono cases, other issues involved besides the legal ones, a seemingly simple case evolving into a complicated one, and language barriers.

"Facing someone's suffering is not a small task," observed Ms. Kreidman. If there is insufficient training at the outset, a bigger challenge may arise. Mr. LeClair said that funding cuts are a reality. Therefore, the collaboration of the legal services providers and the attorneys is necessary to help.

The next panel with legislators, Representative Blake Oshiro,⁷ Representative Marcus Oshiro,⁸ and Senator Suzanne Chun-Oakland, facilitated by Dean Soifer, examined the challenges of funding to improve access to justice. Sen. Chun-Oakland⁹ suggested that there are several questions to be answered: (1) What are the cost drivers in Hawai'i's legal system? Have we analyzed what needs to be done up front instead of legal services? (2) As a legal community, can we partner with and support others who are advocating affordable housing? Partner with others who support early childhood system of care? (3) Have we cleaned up our own house by reducing costs so that more can be used for direct legal services? (For example, Sen. Chun-Oakland stated that the Senate began a "paperless" process in order to create major savings in their budget.) (4) Are there areas in court and in

⁶ Derek Kobayashi is a member of Schlack Ito. Tracey Wiltgen is Executive Director of The Mediation Center of the Pacific, Inc., a dispute resolution organization.

⁷ Representative Blake Oshiro represents District 33, Aiea, Halawa Valley, Halawa Heights, and Aiea Heights.

⁸ Representative Marcus Oshiro represents District 39, Wahiawa, Whitmore Village, and Launani Valley.

⁹ Senator Suzanne Chun Oakland represents District 13, Sand Island, Kalihi, Liliha, Nuuanu, Pauoa, and Puunui.



practice areas where money is being wasted? (5) Have we calculated the budget that would adequately serve the needs of the poor? When someone mentioned that only 22% of the need is being met and 78% is not, what does that equate to in terms of funding?

Representative Blake Oshiro discussed the Indigent Legal Assistance Fund (“ILAF”) bill and said that the Collection Law Section of the HSBA opposed it, and the increase in the surcharges on the court filing fees for ILAF was not successful in the 2010 legislative session. He said that the language in the small claims jurisdictional bill was problematic so that bill also did not pass.

Representative Marcus Oshiro believed that the legal services providers and the collection attorneys should work out their differences. He mentioned that there is a significant shortfall in the state budget so funding during this period is difficult. When a question was raised from audience whether the legislators would be interested in a cost benefit analysis showing how much money is saved by providing basic legal services, Representative Oshiro said that type of information would be relevant. He mentioned that the Judiciary produced that type of data for the HOPE program, and the legislators reacted in a favorable manner.

The final morning panel facilitated by Professor Calvin Pang¹⁰ consisted of the representatives of the six committees of the Commission (Increasing Pro Bono Legal Services; Initiatives to Enhance Civil Justice; Maximizing Use of Available Resources; Overcoming Barriers to Access to Justice; Right to Counsel in Certain Proceedings; and Self-Representation and Unbundling). They reported on the particular projects being accomplished by their respective committees. The committee representatives also responded to the question of what has really worked to generate momentum within the committees and the corollary question: what should be done to restore or improve momentum within the committees.

In improving momentum within the committees, Judge Greg Nakamura, Chair, of the Initiatives committee, remarked that his committee is too small to address all the issues that should be addressed and more members should be recruited. It was also suggested that the chairs of committee should be changed periodically (every two years) and the chairs need not necessarily be commissioners; subcommittees should be allowed within a committee that

¹⁰ Professor Calvin Pang joined the faculty at the William S. Richardson School of Law in 1994. He previously worked at LASH where he managed the Waianae branch office before moving to the main office in Honolulu where he worked on public entitlements and family law issues.



would not require a member of the subcommittee to be on the main committee; it would be helpful to have a project management approach where projects are prioritized by the Commission and deadlines set. It was observed that some committees are struggling with their identities. Another panelist commented that the overlapping efforts of the committees needed to be examined to avoid unnecessary duplication.

C. Afternoon Workshops

Attendees were invited to participate in a choice of workshops in the afternoon. Discussions of some of these workshops follow.

Show Me the Money Workshop

Retired Chief Justice (State of Washington) Richard Guy began the presentation by describing the funding sources for the Hawaii Justice Foundation (“HJF”). HJF distributes its funding to numerous organizations in furtherance of the objective of providing access to justice to individuals with limited economic means. Although HJF does receive money from contributions and grants, the bulk of its funding comes from interest on Lawyers Trust Accounts (“IOLTA”). This dedicated funding source is tied directly to the interest rate environment. However, there have been substantial fluctuations in the amounts generated through IOLTA. This was graphically demonstrated in charts setting forth IOLTA grants to HJF from 1986 to 2010.

In 1992, the IOLTA award totaled \$715,361; in 2003, 2004, and 2005, IOLTA generated only \$68,500, \$70,000, and \$70,000, respectively, for HJF. For 2009, the amount was \$345,000. The projected amount for 2010 is \$175,000, nearly a 50% decrease in one year.

HJF also allocates funds generated from the Indigent Legal Assistance Fund (“ILAF”), representing a surcharge on filing fees. Although these amounts fluctuate as well from year to year, this funding stream is steadier than with IOLTA, typically generating fees in the range of \$300,000 to \$350,000 annually over the last decade.

Justice Guy also noted that a charge on real estate transactions is being considered as a possible source of additional funding.



David Reber¹¹ discussed the history of funding of the Legal Aid Society of Hawaii (“LASH”), about which he was most familiar, and observed that the questions surrounding LASH’s funding sources have been complicated. LASH was formed in 1950 and was initially funded by contributions from the private bar. Funding expanded in 1966 in connection with President Lyndon B. Johnson’s “war on poverty.” Congress appropriated \$71.5 million over four years for LASH, which funding allowed the expansion of legal aid services to the neighbor islands. In 1970, however, congressional appropriations for LASH were frozen, presenting planning problems accompanying a “roller coaster” approach to funding.

In 1975, Congress created the Legal Services Corporation (“LSC”). Initially funded with \$117 million to be spread equally across the country, by 1980, the LSC appropriations grew to \$321 million. This represented the high water mark for LSC funding. Mr. Reber noted that while appropriations may have increased marginally in subsequent years, this did not necessarily translate to increased services because of the effects of inflation, etc.¹²

IOLTA originally started in California and was established in Hawaii in 1986. Every year since 1986, LASH has received grants, through HJF from funds generated through IOLTA. In 1995, large cutbacks to LSC funding were instituted, creating a need to diversify funding sources. In 1993, LSC provided (on a national basis) 56% of the funding for legal aid. In 2009, that percentage had dropped to 26%. The gap has been closed, at least in part, by increased reliance on other sources, such as state legislative appropriations (16%), IOLTA (17%), grants from foundations (7%), and other public sources (20%). Reber closed by noting that LASH has attempted to address significant cuts in funding by cutting salaries rather than cutting staff.

Senator Suzanne Chun Oakland began by noting that civil legal services has always been a top unmet need and that the legislature is interested in finding effective ways to generate special funding to fill the gaps. One concept under consideration would be the creation of “trust funds.” If established, the income would be used to fund legal services, but the corpus could not be invaded. Other ideas include an increase in the general excise tax (“GET”) for private attorneys; allowing an income tax credit to attorneys providing pro bono

¹¹ David Reber served on the Board of Directors of the LASH since 1998 and was President of Legal Aid from 2001 to 2007. He is a partner at Goodsill Anderson Quinn & Stifel, LLP.

¹² Mr. Reber prepared funding charts that showed the civil legal services funding historically. The source of these charts is Meredith McBurney, Resource Development Consultant at the ABA Resource Center for ATJ Initiatives, who kindly gave permission for the use of the charts at the 2010 Access to Justice Conference in Hawai'i. These charts are attached collectively as Appendix B.



services; and instituting a form of “IOLTA” for real estate transactions. She indicated that she was “leery” about this last idea. She stated that the interested parties need to reach a community consensus prior to approaching the legislature and that it is difficult to enact legislation when there is disagreement on how to proceed. Direct constituent contact with legislators is also effective.

Senator Oakland was not optimistic about the prospects of increased state funding. She referred to the fact that baby boomers reach 65 in 2011, resulting in increased Medicaid obligations. This, in turn, squeezes the ability of the state to provide funds for other areas. Exacerbating this problem is the fact that people in Hawaii live longer.

Margery Bronster¹³ cited a class action case that she had been involved in, in which the principles of cy pres were applied, as an example of the community coming together. The settlement of the case called for automatic refunds to customers of the defendant without any process for submitting claims by the members of the class. Many of the customers could no longer be located, resulting in a number of undelivered checks. The question was what to do with these funds, amounting to some \$100,000. There was no law covering this situation. The defendant wanted the excess funds returned to it, while counsel for the class asked the court for permission to reallocate the excess settlement funds to worthy organizations. After extensive negotiations with the defendant, it was agreed that \$75,000 of the excess funds would be reallocated to the Hawaii Food Bank and \$25,000 to LASH.

Ms. Bronster stated that this is a problem that needs to be fixed. Haw. R. Civ.Pro. Rule 23 could be amended to establish a presumption that organizations eligible to receive funds from ILAF would be appropriate beneficiaries of residual funds in class action suits. She noted that the legislature has changed the unclaimed property act to provide that unclaimed funds after one year revert to the state general fund. This change did not apply to Bronster’s case. Bronster suggested that such funds should not be treated as court funds but perhaps should be paid over to ILAF. In closing, she recommended that attorneys involved in class actions should plan on how to deal with excess funds.

The panel then engaged in a dialogue with the audience. Issues raised by the audience included the lengthy delays typically present in litigation and the accompanying financial hardship to plaintiffs’ counsel in class action cases;

¹³ Margery Bronster is a partner at Bronster Hoshibata. Prior to returning to private practice in 1999, Ms. Bronster was the Attorney General for the State of Hawai'i from 1995 until May 1999.



the possibility of attorneys paying a fee instead of putting in pro bono hours (a \$500.00 fee paid by the 3,000 lawyers who don't report any pro bono hours would generate \$1.5 million); a 1% increase in GET, which could be passed on to paying clients, could generate as much as \$7 million. Senator Oakland suggested that this was an idea that a working group of the Commission could bring to the legislature and that the monies would have to be held in a trust fund.

Self-Representation and Unbundling Workshop¹⁴

Approximately 30 attendees participated in the discussion about developing strategies to help self-represented parties, including “unbundling” legal representation by creating limits to the scope of representation and expanding court self-help centers. The discussion began with the basics: the State district courts probably see the most pro se litigants and have tried to develop forms to address almost every issue. According to Judge Barbara Richardson¹⁵, language and translation issues continue to be a large problem for their court. They are drafting a “Frequently Asked Questions” page for the Judiciary web site and instructional videos. She noted that there is a great need for live persons to assist the general public in determining what is needed from the court. With the court's limited resources (due to cut-backs and furloughs), there are fewer people and technologies available to service the great demand. They hope that the HSBA or other organizations will assist with these areas of need.

Judge Richardson stated that when members of the general public walk into the courthouse, they expect to be served and the court must be able to address their demands. She would like to create an elementary video to explain the court processes to lay persons. She noted that many available “how-to” videos or similar tools are available for comparable situations.

Judge Richardson stated that when she was in school she had difficulty in comprehending the legal process, and it must be even more difficult for the general public when entering the court system for the first time. She believes that more work needs to be done to prepare standardized forms and check-lists so that attorneys “on-site” would be able to serve all of their clients equally. She also believes that the definition of “unauthorized practice of law” should be modified. Judge Richardson noted that judges remain neutral while giving as much help as they can to pro se litigants. The judges and their staff must refrain from giving legal advice and cannot resolve some issues for the parties.

¹⁴ Jodi Kimura Yi assisted in the description of this workshop.

¹⁵ Judge Barbara Richardson is the Deputy Chief Judge for the District Court of the First Circuit.



Jay Kimura¹⁶ explained that it is often difficult for government attorneys to provide pro bono services. Because government attorneys constitute a large portion of the bar overall, by broadening the rules regarding their community service, they could provide more pro bono assistance.

Mr. Kimura also stated that attorneys may be reluctant to accept pro bono cases based on a concern that these cases may consume a large amount of time. He suggested that limited representation or unbundling would increase the amount of pro bono services by allowing attorneys to provide more limited assistance to each client. He suggested that modifying Rule 2.1 of the Hawai'i Rules of Professional Conduct, may encourage unbundling and self-representation. Unbundling would allow an attorney to address single issues, whether it is custody, child support, or other single independent issues. He noted that when services are unbundled, it is important to communicate fully, set out the scope of involvement, and listen to define the clients' issues. He warned that a clear exit policy is important so that the client understands the limits of representation.

Nalani Fujimori Kaina¹⁷ stated that at Legal Aid, they have an “upside-down triangle” so that they must “triage” the clients, by assessing those who are capable of self-representation and giving more assistance to those who need more aid. She explained that only one in three clients receive full assistance. For example, they offer clinics on divorce, which provide clients with some information, enabling the clients to represent themselves. Ms. Kaina noted that much of their efforts are directed at empowering their clients. However, they have had cutbacks; two self-help centers, one on Kauai and the other on Maui, closed due to lack of funding.

Jill Hasegawa¹⁸ mentioned that a large group of people is involved in a family proceeding, and it is not clear when particular cases will be called. Once called, the parties explain their respective positions and the judge gives a ruling. She explained that it is very confusing for a self-represented person to comprehend and suggested a potential solution of having paralegals, attorneys, or other volunteers assist the parties with drafting the court's orders.

¹⁶ Jay Kimura is the Hawai'i County Prosecuting Attorney.

¹⁷ Nalani Fujimori Kaina is the Executive Director of the Legal Aid Society of Hawai'i.

¹⁸ Jill Hasegawa is an associate with Ashford Wriston. She currently serves as Vice Chair of the Commission.



Increasing Mediation Effectiveness: When Is It Appropriate and What Makes It Work? Workshop¹⁹

Panelists John Barkai, Charles Hurd, Elizabeth Kent, and Tracey Wiltgen²⁰ led the workshop,²¹ using a hypothetical situation to illustrate the dynamics of mediation and used a one-page checklist of factors favoring the use of mediation, as follows:

1. There is a relationship worth preserving.
2. One side does not have a realistic view of the case/is not well advised by counsel.
3. If the case is sent to mediation, one or both side(s) will seriously look at the case now, instead of later.
4. One party would benefit from hearing the other's side.
5. An information exchange/discussion of options may help.
6. Earlier settlement discussions reached a stalemate.
7. The parties would benefit from talking together instead of through counsel.
8. Settlement could save time and/or money.
9. The use of outside counsel could be avoided.
10. The loss of executive/personnel time and energy could be avoided.
11. There is a need for confidentiality.
12. There is a need to avoid publicity and keep this out of the media.
13. There is a need to avoid setting unfavorable precedent.
14. The case arose because of emotional, not legal needs; these cannot be resolved by the lawsuit.
15. A fact finder might be unduly swayed by sympathies/dislike for one side.
16. Creative resolution/tradeoffs (not just money damages) may be reached.
17. Each side has something of value for negotiation.

¹⁹ Charles Fell assisted in the narrative description of this workshop.

²⁰ John Barkai is a Professor at the William S. Richardson School of Law at the University of Hawai'i where he teaches alternative dispute resolution ("ADR") as well as a litigation course. Charles Hurd was a trial lawyer for complex cases for over 35 years, closing his litigation practice in January 2006, in order to concentrate on ADR. Elizabeth Kent is the Director of the Judiciary's Center of Alternative Dispute Resolution. Tracey Wiltgen is Executive Director of the Mediation Center of the Pacific.

²¹ This workshop was conducted twice at the conference.



18. Resolution of this case could result in resolution of other cases.
19. The outcome of the case is uncertain (case is factually or technically complex, confusing, or the law is unclear).
20. It would be beneficial to limit the issues for trial.
21. The facts are sufficiently developed.
22. Neither side needs injunctive or declaratory relief.
23. Neither side needs formal vindication.
24. There are persons not directly involved in the legal action who could be included in the resolution process.

Mediation is a form of assisted negotiation in which the parties to the mediation retain the power to decide the dispute. Unlike a judge, the mediator does not decide issues, but merely assists the parties.

The panelists cautioned that mediation might be inappropriate if one or more parties do not understand what mediation is or if they are unprepared for it. It may also be inappropriate if the mediator is not qualified to mediate the type of case presented. Since there is a cultural component to mediation, mediation needs to be tailored to the cultural expectations of the parties.

A primary dynamic is rapport between the party and the mediator. Another dynamic is the improved communication and the information resulting from the safety of the process because of confidentiality and informality.

It was discussed that mediation is enhanced by the mediator's confidence, integrity, and preparation of the case (familiarity of the facts and legal issues involved). Typically, the mediator helps the parties toward a solution by: (1) developing relationships with the parties; (2) getting the parties unstuck by having them focus on their interests rather than their positions or "bottom lines"; (3) guiding the bargaining along with significant movement; and (4) closing the gap and securing agreement.

The panelists noted that it is helpful for the mediator to know the expectations of the parties with respect to the mediator's role. Some expect the mediator to simply facilitate the issue resolution, but some others expect the mediator to evaluate the respective claims and to share that evaluation.

The panelists shared two cautionary factors. The first is the difference between insight and wishful thinking. Both parties and mediators must know the difference. The second is that attorneys are typically overconfident, according to a recent study.



The panelists described that the appropriate use of mediation can increase people's access to justice in a number of ways. First, it is less expensive and faster, an attractive combination. Second, since mediation is assisted negotiation, the indigent community can gain through this assistance. Third, there are community agencies, such as the Mediation Center of the Pacific and community mediation centers located on the islands of Hawaii, Kauai, and Maui, which can, in appropriate cases, provide mediation services at either reduced rates or free of charge. Fourth, more volunteers are needed to serve as mediators. Fifth, people need to be informed of their rights so that with this knowledge, they will be aware about the probable outcome of their dispute, and be generally better participants in the mediation process.

Getting to Yes with Pro Bono Workshop²²

Panelists Associate Judge Katherine Leonard, Duane Fisher, Moya Gray,²³ and David Reber addressed strategies to increase pro bono legal services. Initially, the primary focus was whether Rule 6.1, Hawai'i Rules of Professional Conduct ("HRPC"), should be amended to allow the substitution of a monetary contribution in lieu of all or part of the aspirational minimum of fifty hours of bono service per year.

The Task Force studying the amendment to Rule 6.1 concluded that the potential benefits of the proposed amendment outweighed the potential and perceived negative consequences. It was clear, however, that the personal involvement of each lawyer in providing pro bono legal services is preferable and monetary contributions as an alternative to pro bono services are in addition to and not in lieu of an attorney's ethical obligation to voluntarily provide financial support to organizations, programs, and projects that benefit persons of limited means. The Task Force recommended that the rule specify \$500.00 as the amount of the financial contribution to the Rule 6.1 Fund in lieu of pro bono services for a given year. This amount was within the range of amounts chosen in other jurisdictions that adopted specific amounts. The Task Force rejected formulations based on annual income or other variables; and considered definitions of income unnecessarily complicated for use in this context.

The panel discussed whether associates at private law firms should receive "billable credit" for pro bono hours. There was some disagreement on

²² Charles Fell assisted with the narrative description of this workshop.

²³ Associate Judge Leonard sits on the Intermediate Court of Appeals. She chaired the Commission's Hawai'i Rules of Professional Conduct Rule 6.1 Task Force. Duane Fisher is a founding member of Starn O'Toole Marcus Fisher. Moya Gray became Executive Director of Volunteer Legal Services Hawaii at the end of December 2003.



this issue from the panelists. Some considered this an appropriate method to encourage pro bono services and in harmony with the spirit of Rule 6.1, HRPC. Another believed that it is the individual lawyer's obligation to provide services without a fee to those of limited means, thus the billable credit policy would be abrasive to the spirit of the Rule. If billable credit is being provided to the lawyer in exchange for legal services, it is arguable whether the services are "pro bono" within the spirit of the rule.

The discussion of the panel then turned to a broader issue: what draws people to volunteer their time and services to the poor, and what pushes them away? What is it that essentially motivates the volunteer of pro bono services? The answer that arose from the discussion at the workshop seemed to be the innate desire of some to simply be of help to others who are in need. It is also a way to make a contribution to the justice system. The desire to be of help appears to be the main motivator.

Why don't more lawyers provide pro bono help to the poor? What is it that pushes them away? There appears to be a perception of a lack of relevant expertise, which acts as a barrier for some. Even though most lawyers may know that many people need the help of bankruptcy lawyers or legal help in foreclosure proceedings, lawyers may be deterred by their perception that they simply don't know the substantive and procedural law necessary to help. This perception is real and understandable. However, training is the answer, and the Legal Aid Society expressed its willingness to provide the necessary training. Further, peer counseling and mentoring are available, in which a lawyer expert in a particular field may consult with a non-expert lawyer to enable that lawyer to be successful in his or her pro bono efforts. Lastly, the possibility of training by section heads of the relevant bar sections was discussed as a further source of potential training.

Overcoming Barriers to Access to Justice Workshop

Associate Judge Daniel Foley²⁴ of the Intermediate Court of Appeals, Dew Kaneshiro, a private consultant, and Jennifer Rose, Gender Equity Specialist at the University of Hawai'i at Manoa, volunteered as panelists for this workshop. Judge Foley opened the presentation, stating that its focus was the impact of language and cultural barriers on access to justice.

Jennifer Rose described the problem as how to meet the needs of a growing immigrant community. She stated that 20% of Hawaii residents are foreign-born and that 25% speak a language other than English at home.

²⁴ Associate Judge Foley is currently Chair of the Commission and at the time of the conference was a commissioner.



Hawai`i is fourth in the nation in percentage of limited English proficient (“LEP”) individuals after California, Texas, and New York. Ms. Rose stated there is also a strong correlation between LEP people and poverty. The language barriers faced by LEP immigrants are nearly insurmountable and compounded by immigrant communities’ distrust of the legal system.

Under Federal Executive Order 13166, promulgated in 2000, public and private agencies receiving federal funds must provide eligible LEP persons with “meaningful access” to their services. Hawaii’s Language Access Law, enacted in 2006, similarly requires state-funded agencies to provide meaningful access to LEP individuals. Implicit in “meaningful access” is that services be timely and effective. Furthermore, “culturally appropriate and linguistically accessible” is the new touchstone.

The panelists observed that the shortage of competent, neutral interpreters is a major problem. Cultural differences also present problems. It is not unusual for an immigrant to be in a number of different legal situations at the same time (eviction, child custody, domestic violence, etc.). LEP individuals cannot have meaningful access to justice without competent language and culturally-appropriate services in each of these settings.

Dew Kaneshiro stressed that LEP individuals must have a competent interpreter at each stage, not just when the parties get to court. Bad interpreting early on can shape the end result. To illustrate that an interpreter could “filter” messages, a short demonstration showed an LEP client and interpreter conversing for a minute or more but the interpretation was just two words. It was clear from the demonstration that the client said more than two words, but the interpreter withheld certain information.

It was pointed out that ethics is an important quality for interpreters. They must demonstrate impartiality and a commitment to confidentiality.

The panelists emphasized that the goal is to achieve direct communication. They explained that there are different levels of language competency: (1) other language only; (2) elementary; (3) conversational; and (4) narrative. Other factors such as stress, sensitive or embarrassing information, and unfamiliar circumstances can impact language competency.

Other workshops at the conference included:

Initiatives to Enhance Civil Justice with Judge Greg Nakamura, Elton Johnson, and Linda Krieger



Right to Counsel in Certain Civil Proceedings with Mary Anne Magnier, Karen Nakasone, and Shannon Wack

Elder Law Representation with Lenora Lee, James Pietsch, and Scott Suzuki

The Foreclosure Crisis: How to Help with Judge Ronald Ibarra, Judge Greg Nakamura, Alan J. Ma, and George Zweibel.

Dealing with Domestic Violence (offered twice) with Judge Michael Broderick, Nanci Kreidman, and Jan Tamura

D. Closing Plenary Session

Judge Michael Town, circuit court judge for the First Judicial Circuit, closed the plenary session after the workshops with an inspiring speech about “the least, lost, and the left out.” He explained that a long time ago in the location of Gray’s beach, which fronts the Halekulani Hotel, known as Kawehewehe, people came to heal. They would leave a seaweed lei of limu kala while asking forgiveness of any misdeeds. Judge Town described his final perspectives as “take care of the folks in the waiting room!” “love the stranger as yourself as we all were once strangers here!” and “provide free and open access to all so we can fully participate in the manner of Kawehewehe.”



III. ROUNDTABLE DISCUSSION ON LINGUISTIC AND CULTURAL BARRIERS

On January 22, 2010, representatives from five law-related groups assembled for a roundtable conversation on linguistic and cultural barriers that hinder - if not completely block - access to justice for some individuals in Hawai'i.

Participating groups included:

- The Hawai'i State Supreme Court Committee on Equality and Access to the Courts (CEAC);²⁵
- The Hawai'i State Supreme Court Committee on Court Interpreters and Language Access (CILA);²⁶
- The Judiciary's Office on Equality and Access to the Courts (OEAC);²⁷
- The HSBA Committee on Diversity, Equality, and the Law (DEAL);²⁸ and
- The Commission's Committee on Overcoming Barriers to Access to Justice (OBAJ).²⁹

Also in attendance were Associate Justice Simeon R. Acoba, then Chair of the Commission, and HSBA Vice-President Carol Muranaka.

"The meeting represented a starting point intended to bring together at least three 'pillars' within the legal community: the bar, the bench, and the Hawai'i Access to Justice Commission," said Calvin Pang, professor at the William S. Richardson School of Law and member of OBAJ, who acted as the facilitator for this Roundtable discussion.

²⁵ CEAC was represented by its Co-Chairs, Intermediate Court of Appeals Associate Judge Daniel Foley and Deputy Attorney General Frances Lum.

²⁶ CILA was represented by Committee members Christine Kubota, an attorney with Damon Key Leong Kupchak Hastert and Professor Suzanne Zeng of the University of Hawai'i's Center for Interpretation and Translation Studies.

²⁷ OEAC, which staffs CEAC and CILA, was represented by program specialist Melody Kubo.

²⁸ DEAL was represented by its Chair, attorney Jennifer Rose, and member Jan Tamura.

²⁹ OBAJ was created under the auspices of the Commission, and Committee members are appointed by the Commission. Chaired by B. Martin Luna, an attorney with Carlsmith Ball, OBAJ is comprised of attorneys and non-attorneys interested in removing impediments to access to the justice system.



OBAJ served as the host group, convening the Roundtable and setting three goals for this initial conversation: (1) to create a safe space to share information and become acquainted with one another; (2) to learn about each group's activities and goals as they relate to cultural and linguistic access to justice; and (3) to begin identifying commonalities, complementing features, and opportunities for collaboration.

A. THE ROUNDTABLE PARTICIPANTS

Hawai'i State Supreme Court Committee on Equality and Access to the Courts (CEAC)

CEAC was established in 1989.³⁰ 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 county prosecutor's office, the Office of the Public Defender, HSBA, the law school, and each legislative chamber. The remaining ten seats are at-large appointments.³¹ 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.

³⁰ In Appendix C, a brief chronology of CEAC is presented.

³¹ At-large members include the Hawai'i Civil Rights Commission; University of Hawai'i; civil rights and gender equity specialists; private attorneys; and interested citizens.



CEAC is in the process of revising its mission, in part to clarify its distinct role among other access to justice initiatives and working groups. Based on the most recent draft of its vision statement, CEAC aims to: (1)

reduce bias to promote the fair resolution of cases; (2) promote fair treatment in administering justice and providing services; and (3) facilitate and increase access to the courts, especially for marginalized populations.

CEAC's current projects are the *Judiciary Bias Awareness and Prevention Guide* and a Community Access to the Courts Project. Intended for court staff and judicial officers, the *Guide* increases awareness of personal and institutional biases that affect service to those who turn to the Judiciary for help. The Community Access Project brings aspects of the successful downtown-based "Lunch and Learn" program to underserved populations such as the immigrant community and those living in rural areas. Presenters will speak on relevant legal topics identified by community leaders and provide information on accessing the court system and increasing self-help skills. CEAC recently launched an initiative to provide educational programs on domestic violence and TROs in collaboration with Kokua Kalihi Valley's Samoan Women Health Group and Hawaii Women Lawyers. Information on the relevant domestic violence law and court services was presented in a culturally relevant and linguistically accessible manner through a three-part series that were held in March, April, and May of 2010.

Hawai'i State Supreme Court Committee on Court Interpreters and Language Access (CILA)

Chaired by Judges Sabrina McKenna and Gerald Kibe, CILA, which was formed in 1995, 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 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.

Until recently, CILA focused on policies and procedures pertaining to court interpreters in the state courts. In 2007, CILA developed and launched the Judiciary's Court Interpreter Certification Program to provide qualified



interpreters for Limited English Proficiency (LEP) court users and witnesses. CILA continues to modify and improve the program by recruiting potential interpreters, refining standards for interpreter certification, administering the certification processes, addressing interpreter performance issues, and ensuring fair payment schedules.

In the past year, the Committee expanded its purview to include language access issues, including judiciary programs and interactions outside the courtroom. This expansion was recently approved by the Hawai'i Supreme Court. Projects under this expanded mandate are pending. To avoid duplication, CILA will defer to CEAC on access issues that are not principally language or culture related.

Hawai'i State Judiciary's Office on Equality and Access to the Courts (OEAC)

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 described earlier. OEAC has also been key in implementing a follow-up to CEAC's *Judiciary Bias Awareness and Prevention Guide* by training judiciary staff on implicit bias.

HSBA Committee on Diversity, Equality and the Law (DEAL)

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 this end, DEAL's work is guided by the following Goal and Objectives of the HSBA:

Goal 3: To eliminate unfair bias, prejudice and discrimination and to create meaningful opportunities for underrepresented groups in the legal system

Objective 1: Study, educate, and motivate the bar regarding the issue of gender and ethnic fairness.

Objective 2: Educate the public regarding their legal rights when faced with discrimination.

Objective 3: Increase the meaningful participation of under-represented groups in all areas of the legal profession and system.

Objective 4: Promote Model Affirmative Action Policies.

For the last year, DEAL has been developing a survey for bar members on gender equity issues, particularly when gender intersects with race and ethnicity. The survey is being developed and implemented in partnership with Hawaii Women Lawyers.

DEAL's leadership is acutely aware that language and cultural barriers can deprive LEP court users of a just result. It also knows that many attorneys are largely unaware of the impact of these barriers. DEAL is working to develop continuing legal education programs intended to change attitudes and train attorneys on language and culture issues. DEAL identified the following CLE topics within the area of linguistic/cultural accessibility:

- Attorney responsibilities and best practices in working with immigrant clients;
- Understanding the role and function of interpreters and knowing when one is needed outside of the court setting; and
- Striving for cultural competency in interactions with immigrant and other marginalized populations.

Committee on Overcoming Barriers to Access to Justice (OBAJ)

OBAJ was created under the auspices of the Commission, and Committee members are appointed by the Commission. Chaired by B. Martin Luna, OBAJ is comprised of attorneys and non-attorneys interested in removing impediments to access to the justice system.



The Commission's charge to OBAJ covers three areas: (1) exploring and implementing new ways to remove obstacles due to language and culture; (2) reducing barriers, such as case-acceptance restrictions and inconvenient hours and locations, to legal services for low- and moderate-income residents; and (3) increasing visibility of legal services providers, as well as helping individuals recognize situations in which legal services may be needed.

Since its first meeting in September 2008, OBAJ has focused on the first charge. It developed a plan to encourage collaboration among relevant law-related entities, to promote linguistic and cultural awareness among participants in the justice system, and to encourage the Judiciary to increase its language assistance capacity.

OBAJ is conscious that the Judiciary must strive to provide language access for all groups. Title VI of the U.S. Civil Rights Act of 1964 and Hawaii's Language Access Law set forth mandates for language assistance services to LEP court users. OBAJ understands the fundamental unfairness experienced by some LEP court users and seeks to increase the capacity of all partners, itself included, to eliminate this unfairness.

B. OPPORTUNITIES FOR COLLABORATION

The presentation of each participating group's goals and activities led to the charting of the groups' interconnections. A copy of the chart (entitled *Law Related Organizations with Missions Encompassing Linguistic and Cultural Access to Justice*) follows this section.

All Roundtable participants agreed that there are obvious opportunities to work together toward a common goal and, if anything, a meshing of resources is needed to accomplish the many tasks at hand. Because most of the Roundtable participants are volunteers with primary responsibilities elsewhere, they acknowledged that it is important to plan well and keep talking with each other to find resources, avoid waste, and focus on the unifying goal of reducing language and cultural barriers.

Looking at the individuals present at the Roundtable, it was noted that many are members of at least two participating groups. On an encouraging note, this provides a concentration of commitment, interest, and skills as well as a built-in proclivity toward information sharing and collaboration. On the other hand, it may reflect that initiatives to address language and cultural barriers rest with the same few individuals. This not only narrows collective vision, but limits what can be done.



There was consensus that smaller ongoing meetings must occur, perhaps twice a year or more if needed. OBAJ will assume the job of coordinating these meetings. The topics for future conversations remain undecided, but could address the following:

- Even as we refine and expand the ongoing work of addressing bias *in* the courtroom, how do we handle bias *outside* the courtroom as it relates to obtaining justice? Who should take the lead on this?
- Who and how should we train law-related entities on language and cultural issues so consciousness can be raised and capacity built? What has been tried and what can we learn from those efforts?
- How do we effectively elicit community input so our efforts are truly responsive to on-the-ground needs?
- How do we ensure communication with other access to justice groups to avoid duplication and take advantage of synergies?
- Is the 2010 Access to Justice Conference an opportunity to raise awareness of issues relating to cultural and linguistic barriers?

C. CONTINUING CONVERSATIONS

The unanimous feedback from Roundtable participants was that the three-hour conversation in January 2010 was worth their time. Many commented that they were unaware of the activities or even the existence of the other groups. For OBAJ members, the Roundtable was a successful step toward accomplishing the first goal in its Action Plan – i.e., to increase collaboration among law-related entities. The hope is to use this collaboration to dismantle the language and cultural barriers that block many from obtaining justice through the use of Hawai'i's legal system.

The Roundtable participants met again for two more meetings in 2010 where they discussed the priority of items such as increasing language and cultural awareness among the judges, lawyers via publications, and other legal services providers, including law students, paralegals, ADR providers, and social services providers.



IV. STRIVING TO MEET RULE 6.1

Rule 6.1 of the Hawai'i Rules of Professional Conduct 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. The pictured firms and government offices were contacted by a member of the Commission, and they have expressed a willingness to meet the goal outlined in Rule 6.1.

Ashford & Wriston



From left to right are: Cuyler Shaw of Ashford & Wriston, Nalani Fujimori, a member of the Commission, and Kevin Herring of Ashford & Wriston.

Ashford & Wriston's commitment to providing pro bono services to the community stretches back to its founding in 1955. In 2009 the firm has decided to reaffirm its commitment to serving the community and the bar by pledging that each of its attorneys will devote at least 50 hours per year to pro bono services. For the firm as a whole, this commitment will result in a donation of time and effort valued in excess of \$250,000.00. Ashford & Wriston is pleased to endorse the Access to Justice Program and to make a difference in our community.

Alston Hunt Floyd & Ing

How our firm achieves its pro bono goals and, in doing so, exceeds the aspirational goals set by the Court: The answer is three-fold.

First, we give all lawyers full credit toward their annual billing goals for "partner-approved" pro bono work. This makes it easy for every associate to find some matter they are passionate about and treat it as something important, not something that distracts from their "real work."

Second, we believe that it is imperative for lawyers to recognize the "justice system" is strengthened if the poor, as well as the rich, have access to the courts and skilled advocates. So, we look for opportunities to be advocates for the voiceless. Thus, for example, in 2008 we represented homeless children in a class action against the Department of Education and obtained an injunction, and then a settlement, that gave these children better access to education. The psychic rewards of doing this work are immeasurable.



Third, we recognize that, as a law firm, it is important that we must use our skills to strengthen our community, not just profit from being in the community. Lawyers are often criticized for caring and doing too little for the well-being of the community.



From left to right are: Ellen Godbey Carson, Paul Alston, and Bill Tam.

Ayabe Chong Nishimoto Sia & Nakamura



Seated (L-R): Kenneth T. Goya and Robert A. Chong;
Standing (L-R): Richard F. Nakamura, Monica K. Suematsu, Sidney K. Ayabe, Gail M. Kang, and John S. Nishimoto.

Cades Schutte

Our firm is committed to both the letter and spirit of Rule 6.1 and the goals of the Access to Justice Commission. Providing pro bono legal services to the community is a part of our firm's mission.



From left to right are: Kawena Beaupre, Jeff Portnoy, Peter Olson, Calvert Chipchase, and Pat McHenry.



Chee & Markham



On the left is Gregory Markham and on the right is Cyd Y. Ignacio.

Carlsmith Ball, LLP

From left to right are: Nathan Nelson, Rodd Yano, Joanne Grimes, and Eric James.



Damon Key Leong Kupchak Hastert



From left to right are: Tred Eyerly, Noelle Catalan, Mark Murakami, Christi-Anne Kudo Chock, James McWhinnie, and Greg Kugle.

Goodsill Anderson Quinn & Stifel



Goodsill's long history of providing pro bono legal services includes representing indigent clients, staffing Volunteer Legal Services Hawaii's neighborhood clinics and serving as guardians ad litem through Legal Aid Society of Hawaii and as fact finders in Judge Broderick's family court program.

From left to right are: David Reber, Gary Slovin, and Regan Iwao.



Hawaii County Office of the Corporation Counsel



Back row: Justice Simeon Acoba, Gerald Takase, Craig Masuda, Molly Lugo, Renee Schoen, Joseph Kamelamela. Seated: Laureen Martin, Julie Mecklenburg, Michael Udovic, and Jill Hasegawa.

Hawaii County Office of the Prosecuting Attorney

Front row: Justice Simeon Acoba, Anson Lee, Jason Skier, Thomas Oakes, Shaunda Liu, Jack Matsukawa. Back row: Johann Smith, Darien Nagata, Shannon Kagawa, Kevin Hashizaki, Jill Hasegawa, and Carol Kitaoka.



Hawaii Disability Rights Center

The employees of the Hawaii Disability Rights Center look forward to working with private attorneys to represent people with disabilities pro bono. The need includes systemic cases involving civil rights, special education litigation, guardianship proceedings, and the creation of special needs trusts. The response we have received from members of the bar has been most gratifying, and we are pleased to be part of this effort.



From left to right standing are: John Deller, Michael Rabanal, Louis Erteschik, Howard Lesser, and Steve Walsh. Seated in the front is Jennifer Patricio.



Henderson, Gallagher & Kane



From left to right are: Harvey Henderson and Patrick Gallagher.

Honolulu Corporation Counsel

Committed to the “Striving to Meet 6.1” program by the Access to Justice Commission, Corporation Counsel Carrie K.S. Okinaga instituted a pro bono legal services policy, on July 27, 2010, that encourages the Department of the Corporation Counsel for the City and County of Honolulu to participate in pro bono activities. The Department is doing its part to encourage the improvement of access to legal services to persons in need.

The policy builds on the efforts of Deputies Corporation Counsel already providing pro bono services, addresses issues related to government attorney participation, and facilitates participation for those not currently engaged in pro bono activities. As Ms. Okinaga says, “These attorneys are dedicated public servants, and they have given and will continue to give of their time, talent and resources to serve the broader community. This policy capitalizes on past practices and legitimizes future pro bono activities within the constraints on government.” In formulating the policy, the department consulted with the City Ethics Commission, which issued an advisory opinion on pro bono activities by Deputies Corporation Counsel. The opinion concluded that the City’s ethics laws do not automatically prohibit such activities, so long as applicable standards of conduct set forth in the City Charter are followed. The policy adopted by the Corporation Counsel department is consistent with the Ethics Commission opinion.

Under the policy, Deputies are authorized to participate in pro bono activities provided that the activity (1) is officially designated and approved as having a community-wide benefit, (2) does not create an actual or potential conflict of interest, (3) does not involve the use of confidential information gained by reason of the Deputy’s employment by the Department, and (4) is conducted in a manner that does not indicate or represent that the Deputy is acting on behalf of the Department. Deputies are encouraged to seek pro bono



opportunities that can be accomplished outside a Deputy's regular work hours; however, supervisors are authorized to be flexible and to grant vacation leave or flex-time, where necessary and appropriate, for attorney pro bono work. Additionally, the policy authorizes the limited or de minimis use of certain, enumerated Department resources, office supplies, and equipment for approved pro bono activities.



Curtis Sherwood, Jesse Souki, Lis Contrades, Gary Takeuchi, Brad Saito, Kyle Chang, Carrie Okinaga, Amy Kondo, and Diane Kawauchi

Intermediate Court of Appeals



From left to right are: Judges Craig Nakamura, Katherine Leonard, Corinne Watanabe, Alexa Fujise, and Daniel Foley.

Labor & Industrial Relations Appeals Board



From left to right are: Rock Ley, Lily Ling, Roland Thom, Melissa Mash, and David Pendleton.



Maui County Department of the Corporation Counsel



Back row left: Jeffrey T. Ueoka, Edward S. Kushi, Jr., James A. Q. Giroux, Michael J. Hopper, Ryan Anderson-Teshima, Mary Blaine Johnston, Richard B. Rost. Middle row left: Madelyn S. D'Enbeau, Jane E. Lovell, Cheryl A. Tipton, Kimberly A.B. Sloper. Front row left: Traci Fujita Villarosa, Brian T. Moto, Justice Simeon Acoba, and Jill Hasegawa.

Office of the Federal Public Defender



Moya Gray, ATJ Commissioner, and Peter Wolff, Federal Public Defender.

Office of the Public Defender, State of Hawaii



On the left is Jill Hasegawa, Vice Chair of the Commission, and Jack Tonaki, State Public Defender.

Schlack Ito



From left to right standing are: Derek Kobayashi, Mark Ito, Eric Elkind, Doug Codiga, Matt Matsunaga, and Jeffrey Piper. From left to right seated are: Adrienne Shimonishi Elkind and Carol Lockwood.



Law Office of Eric A. Seitz



From left to right are: Juli Henning, Ronald Kim, Eric Seitz, Alina Baun, Lawrence Kawasaki, Della Belatti, and Hilton Lui

Starn O'Toole Marcus & Fisher

Our Directors approved a resolution officially endorsing the Access to Justice Program and encouraging each of our attorneys to dedicate a minimum of 50 hours per year to pro bono work. As part of that endorsement, our law firm will begin to show a new line on our monthly "work efforts" report for each of our attorneys and paralegals showing the time spent by each of our attorneys and paralegals on pro bono work. We will keep track of each attorney's and paralegal's pro bono work each year via this report to ensure that we are reviewing and conscious of each person's level of pro bono work.

Most of our attorneys have been very active over the years performing pro bono work. However, the Access to Justice Program will allow us the opportunity to focus on these work efforts on a more formalized and regular basis, prospectively, than we have in the past.

We look forward to continuing our commitment to be of service to the community through our pro bono work.



From left to right are Ivan Lui-Kwan, Sharon Lovejoy, Peter Starn, Justice Simeon Acoba, R. Elton Johnson, and Duane Fisher.



V. GUIDELINES FOR PRO BONO SERVICE BY JUDGES

On February 11, 2010, the Hawai'i Supreme Court entered an order amending Rule 3.7(a) of the Hawai'i Revised Code of Judicial Conduct. Pursuant to the Commission's proposal, the order amended the rule, effective July 1, 2010, adding the words "Pro Bono" to the title so as to read "Participation in educational, religious, charitable, fraternal, or civil organizations and pro bono activities" and added the following new section (a)(8) as to activities that a judge may participate in:

Rule 3.7. PARTICIPATION IN EDUCATIONAL, RELIGIOUS, CHARITABLE, FRATERNAL, OR CIVIC ORGANIZATIONS AND PRO BONO ACTIVITIES.

(a) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

* * * * *

(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.

Code Comparison

The Hawai'i Revised Code of Judicial Conduct modifies ABA Model Code Rule 3.7 by adding paragraphs (7) and (8).

(b) A judge may encourage lawyers to provide pro bono publico legal services.

The order also added a new comment (6) setting forth examples of pro bono activity:

COMMENT:

[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.



VI. CY PRES AND RULE 23 OF THE HAWAI`I RULES OF CIVIL PROCEDURE

In May 2010, the Commission recommended to the Supreme Court of Hawai`i that Rule 23 of the Hawai`i Rules of Civil Procedure (HRCP) be amended to create a presumption that unclaimed funds in class action suits be distributed to non-profit organizations eligible to receive funding from the state indigent legal assistance fund. The Supreme Court of Hawai`i sought public comment, and any comments were due to the Judiciary Public Affairs Office by September 8, 2010.

The proposed amendment, with modifications,³² was approved by the Hawai`i Supreme Court by order filed on January 27, 2011, which provides for a new subsection (f) to Rule 23 as follows:

Rule 23. CLASS ACTIONS.

* * * * *

(f) Distribution. Prior to the entry of any judgment under subdivision (c)(3) or the approval of any compromise under subdivision (e), the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to judgment. The court shall set a date when the parties shall report to the court the total amount that was actually paid to class members. After the report is

³² The amendment quoted above includes a modification by the Supreme Court of Hawai`i to the original text proposed by Commission. The following is a markup of this modification (omitted language struck through and new language underlined): “After the report is received, the court shall ~~amend the judgment to~~ direct the defendant, by order entered on the record, to distribute the sum of unpaid residue that remains after the payment of all approved class member claims, expenses, litigation costs, attorneys’ fees, and other court-approved disbursements to implement the relief granted.” Additionally, the Supreme Court did not accept the following text proposed by the Commission that would have provided a presumption that the residual funds would be distributed to the Hawai`i Justice Foundation or nonprofit legal services providers:

Unless governing law otherwise requires, it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, but there shall be a presumption that the residual funds shall be distributed to one or more nonprofit organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawai`i Justice Foundation for distribution to one or more such organizations.



received, the court shall direct the defendant, by order entered on the record, to distribute the sum of the unpaid residue that remains after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Unless otherwise required by governing law, it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawai'i Justice Foundation, for distribution to one or more of such organizations.

The rule change implements the *cy pres* doctrine by facilitating the distribution of residual funds remaining in class action suits.³³ Previously, Rule 23 was silent as to the distribution of such residual funds, leaving open the potential that those funds could be retained by the defendant. The Commission urged the Supreme Court of Hawai'i to adopt the proposed amendment in order to prevent such a windfall for the defendant, as well as to provide increased funding to organizations that promote access to justice.³⁴

The Commission explained that the distribution of residual funds to nonprofit organizations that are eligible to receive assistance from the indigent legal assistance fund is consistent with the underlying purpose of class actions and that those recipients are appropriate beneficiaries of *cy pres* awards. The Commission further explained that "providing legal assistance to individuals through non-profit legal service providers allows such individuals increased opportunities for access to justice in much the same way Rule 23 enables class members the opportunity to pursue their cause of action."

³³ The *cy pres* ("as near as possible") doctrine was originally developed as a means for a court to distribute a trust fund whose primary purpose could not be fulfilled to the "next best use." Today, the *cy pres* doctrine allows courts to reallocate the residue of unpaid funds remaining in class action suits to appropriate charitable causes, for purposes similar to the interests of the class.

³⁴ The comment by the Commission explained that the presumption may be rebutted in a particular case if the "next best" use of funds is to distribute them to another organization or purpose. In addition, this procedural rule would not override any provision of substantive law that would require a contrary disposition of such residual funds.



VII. LIMITED ADMISSION OF ATTORNEYS AND RULE 1.16 OF THE RULES OF THE SUPREME COURT OF THE STATE OF HAWAI`I

In March 2010, the Commission approved the proposal for a new rule 1.16 to the Rules of the Supreme Court of the State of Hawai`i. The new rule would allow for 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 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 Commission recommended that eligible employers be defined as section 501(c)(3) non-profit civil legal service providers that are eligible to receive funds from ILAF. The burden would be on the applicant to demonstrate employment by an eligible employer.

The Commission also recommended that the attorney admitted under this rule would be subject to disciplinary action and admission fees to the same extent as other attorneys admitted to the Hawai`i bar. The Commission further believes that an attorney admitted under this rule, as a paid employee of the legal service provider, should not demand or receive any fees from clients of the legal service provider.

On February 24, 2011, the Hawai`i Supreme Court adopted Rule 1.16, effective July 1, 2011. 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.



VIII. AMENDMENT TO COMMENTARY (COMMENT 5) TO RULE 2.2 OF HAWAI'I REVISED CODE OF JUDICIAL CONDUCT

In July, 2010, the Hawai'i Supreme Court adopted the comment [5] to Rule 2.2 of the Hawai'i Revised Code of Judicial Conduct allowing judges to impose a pro bono sanction. The rule and comment is set forth below:

Rule 2.2. IMPARTIALITY AND FAIRNESS

A judge shall uphold and apply the law* and shall perform all the duties of judicial office fairly and impartially.*

COMMENT:

[1] *To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.*

[2] *Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.*

[3] *When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.*

[4] *It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.*

[5] *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 Hawai'i Rules of Professional Conduct, or to make a monetary contribution to such organizations.*

(Amended July 15, 2010, effective July 1, 2010.) (Emphasis added)

Rule 6.1(a) of the Hawai'i Rules of Professional Conduct provides for pro bono service as follows:

A lawyer should aspire to provide at least fifty hours of pro bono services per year. In fulfilling this responsibility, the lawyer should:

(a) provide at least twenty-five hours of legal services without fee or expectation of fee to:

(1) persons of limited means or



(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means[.]



IX. HAWAI`I ACCESS TO JUSTICE COMMISSION WEBSITE

The Commission's website is a subpage of the Hawai`i Justice Foundation's website at <http://www.hawaiijustice.org>. At the subpage, there are tabs for the following categories of information:

- About the Commission
- Commissioners
- Committees
- Annual Report
- FAQs about the Commission
- Striving to Meet Rule 6.1
- Rule 21
- Model Policies
- News and Information
- 2010 Conference
- How to Help
- Contact Us

The Commission has approved a website protocol whereby all content shall be approved first by the Commission through its Administration Committee. Any material may be submitted by the chairs, committee members of the various committees, and commissioners of the Commission to the Administration Committee. A website coordinator from the Administration Committee would then communicate with the webmaster for HJF regarding the approved information to be posted at the Commission's subpage.

A listing of the legal service providers is provided under the tab "How to Help" in order for easy accessibility for volunteers.



X. EXPANSION OF DEFINITION OF “ACCESS TO JUSTICE”

The Hawai`i Supreme Court Rule lists “access to justice” as a “qualifying professional education topic,” but does not define it in the Rule. RSCH 22(a).

Rule 22 provides 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.*

The Rule provides that the HSBA would establish the procedures to administer these CLE requirements. Rule 22(g) provides that the HSBA:

is authorized to approve or disapprove:

(1) other educational courses and activities for mandatory or voluntary credit and

(2) applications by an entity for accreditation as a course or activity provider. Approved courses and activities may include, but are not limited to, courses and activities conducted in-house or sponsored by Inns of Court, bar sections or other professional legal organizations. . . . The HSBA shall establish procedures, minimum standards, and fees for approval of specific courses and activities or accreditation of providers and for revocation of such approval or accreditation.

In accordance with Rule 22, the HSBA promulgated “Continuing Legal Education Regulations” and created a “Hawaii State Board of Continuing Legal Education” to administer the CLE requirements.

The “Continuing Legal Education Regulations” define “access to justice” 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 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 approved the following definition of “access to justice” for mandatory continuing legal education purposes:

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.

In November 2010, the Commission submitted a request to the HSBA Board of Continuing Legal Education to expand the definition of “access to justice” as described above.



XI. 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)³⁵ be amended to allow the substitution of an appropriate monetary contribution in lieu of the recommended minimum of fifty (50) hours of pro bono service hours per year (or for a part thereof). The proposed amendment, which is pending before the Supreme Court of Hawai'i,³⁶ would revise Rule 6.1 as follows (omitted language struck through and new language underlined):

Rule 6.1 PRO BONO SERVICES.

* * * * *

(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. ~~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.~~

³⁵ 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. Several firms and government offices expressed a willingness to meet the goal outlined in Rule 6.1, including but not limited to: Ashford Wriston; Alston Hunt Floyd & Ing; Ayabe Chong Nishimoto Sia Nakamura; Cades Schutte; Chee Markham; Carlsmith Ball, LLP; City & County of Honolulu Corporation Counsel; Damon Key Leong Kupchak Hastert; Goodsill Anderson Quinn Stifel; Hawai'i County Office of Corporation Counsel; Hawai'i County Office of the Prosecuting Attorney; Hawai'i Disability Rights Center; Henderson, Gallagher Kane; Intermediate Court of Appeals; Labor & Industrial Relations Appeals Board; Maui County Department of the Corporation Counsel; Office of the Federal Public Defender; Office of the Public Defender, State of Hawai'i; Schlack Ito; Law Office of Eric A. Seitz; and Starn O'Toole Marcus & Fisher.

³⁶ The Supreme Court of Hawai'i is seeking public comment, and any comments are due to the Judiciary Communications and Community Relations Office by June 9, 2011.



The Commission explained that “[t]he purpose of this amendment would not be to discourage the direct provision of pro bono services, but to provide a clear alternative for lawyers and judges who are unable to satisfy the aspirational number of hours and to generate much needed funding for the direct provision of pro bono services.”³⁷ The current Rule 6.1 permits money contributions, but does not provide clear guidance as to how much should be given or to whom contributions should be given. Under the proposal, contributions would go directly to those providing legal services to the needy.

In developing its proposal, the Commission evaluated whether a proposed amendment would discourage or reduce either the direct provision of pro bono services or the financial contributions from attorneys and firms to organizations that provide legal services to persons of limited means. To address this, the Commission drafted the proposed amendment to make clear that the contribution should be in addition to, and not in lieu of other contributions. In addition, the Commission drafted the commentary to explain that each lawyer’s direct participation in providing pro bono service is preferable to monetary contributions.

The Commission also assessed how much an attorney should contribute when that attorney is unable to provide at least 50 pro bono service hours, and whether the rule should apply to all attorneys or whether some attorneys should be exempt or subject to a reduced amount. The Commission examined the range of amounts adopted in other jurisdictions, and it recommended that a \$500 financial contribution should be given in any year in which an attorney does not otherwise fulfill his or her pro bono service responsibilities. The Commission also recommended that the same dollar amount should be applicable to all attorneys.

With respect to implementation, the Commission considered who would be eligible to receive funding from the contributions, who would administer the contributions, and what reporting requirements would accompany the revised rule. The Commission determined that the Hawai'i Justice Foundation (HJF) would be best suited to administer the funds generated by the proposed rule change. The Commission recommended that HJF be named the administrator,

³⁷ The Commission’s HRPC Rule 6.1 Task Force prepared a report analyzing the various issues involved regarding the proposed amendment. The Task Force members were: Katherine Go Leonard, Associate Judge of the Intermediate Court of Appeals, Task Force Chair; Joanne L. Grimes, Managing Partner of Carlsmith Ball LLP and HJF Director; M. Nalani Fujimori Kaina, Executive Director of the Legal Aid Society of Hawai'i; Steven B. Songstad, solo practitioner and HSBA Director; Wayne M. Tanna, Chaminade University Professor, attorney, and Volunteer Legal Services of Hawai'i Director; and Milton M. Yasunaga, Partner of Cades Schutte LLP.



and that the administrator be given clear direction and authority to: (1) determine the eligibility of recipients; (2) establish the amounts that each eligible recipient might receive; and (3) implement procedures to determine eligibility and distribution.



**XII. 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. The proposed rule, which is pending before the Supreme Court of Hawai'i³⁸, is identical to the Model Rule 6.5 adopted by the American Bar Association in 2002:

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.

The Commission explained that the ABA urges that the rule be adopted to overcome problems experienced by many legal services providers who assist clients with basic advice and counsel through the use of telephone hotlines. The Commission explained that “[t]he adoption of this rule would provide welcome relief to legal service organizations who utilize hotlines to provide basic legal advice and provide self-representation assistance to pro se clients

³⁸ The Supreme Court of Hawai'i is seeking public comment, and any comments are due to the Judiciary Communications and Community Relations Office by June 9, 2011.



without becoming counsel of record.” The Commission further explained that “[p]ro bono attorneys would also be able to more easily provide assistance to self-represented litigants through legal service organizations and the court without being bound by the need to do conflict checks and without an expectation of becoming counsel of record.”



XIII. 2010 NATIONAL MEETING OF STATE ACCESS TO JUSTICE CHAIRS

A. Opening Plenary Session

The opening plenary session at the 2010 National Meeting of State Access to Justice Chairs on Saturday, May 15, 2010 at Pointe Hilton Tapatio Cliffs Resort, Phoenix, Arizona provided insight on the hot topics in the access to justice arena. The topic “Moving Justice Forward: The Money and the Message” by Meredith McBurney, ABA Resource Center for Access to Justice Initiatives, focused on communication in funding requests. She compared how funding from 1980 has changed dramatically over the years and noted that there is more diversity in 2009.³⁹ She illustrated that in 1980, civil legal services funding⁴⁰ were:

- 88% LSC
- 9% Other federal
- 1% State/local
- 0% IOLTA
- 2% Other

(LSC = \$300,000,000 + non-LSC = \$37,662,000 = \$337,662,000)

The funding sources in 2009 (\$1,345,887,000) were:

- 26% LSC
- 20% Other public
- 16% State legislature
- 17% IOLTA
- 6% Legal community
- 7% Foundations
- 2% United Way
- 6% Other

³⁹ Ms. McBurney, Resource Development Consultant for the ABA Resource Center for ATJ Initiatives, is the source of the funding charts used by the “Show Me the Money” workshop at the 2010 Access to Justice Conference. These charts are attached collectively in Appendix B.

⁴⁰ See Appendix B for charts showing the civil legal services funding for the different periods of time. The abbreviations indicated here are as follows:

LSC= Legal Services Corporation IOLTA Interest on Lawyer Trust Accounts

Other Federal = Non-LSC federal funding (e.g., HUD, IRS, etc.)

Other = Attorneys’ fees, fellowships, cy pres funds, special events, misc.

State = State legislature appropriations or court filing fees, fines, etc.



Her advice regarding the message for money was: (1) tailor the communication to the audience; (2) consider the importance of the messenger; and (3) make the message personal so that it will be more powerful.⁴¹

Bonnie Hough from the California Administrative Office of the Courts, reported that the California judiciary received a legislative appropriation of \$11 million to develop a project on the right to counsel in certain civil cases, such as housing, domestic violence, conservatorships and guardianships, elder abuse, and custody representation. She explained that they are trying to equalize the balance of power issues where one party is represented and the opposing party is not.

Judge Lora Livingston from the 261st Judicial District, Austin, Texas, and Judy Meadows from the Montana State Law Library, emphasized that collaboration with librarians is key to creating better access to justice for citizens. They explained that state public librarians need to be told how to help, and showing the public how to find the necessary information is not the unauthorized practice of law.

B. Peer State Breakout Groups

For “Peer State Breakout Groups,” Hawai'i was grouped with Wisconsin and California. Judge Lora Livingston, who was a former member of the Texas Access to Justice Commission, served as the moderator. Each state representative gave a brief report of events in the state. The Wisconsin representative stated that they did not want to put any judges on their Commission because of the funding issue, that is, judges cannot be involved in fund-raising.⁴²

⁴¹ Ms. McBurney was not able to finish her presentation because of time constraints, however, she explained that a potential grantee should not use the same message that was given in 1980 in the quest for funding, such as there are only two attorneys for every 10,000 poor people and there is a need to serve those below 125% of poverty level. The message for funding today should emphasize that legal aid makes a difference in individual lives and helps to solve problems such as homelessness, domestic violence, and the lack of health care; every person has a right to equal access to justice and should be treated fairly; and legal aid helps to project long-term solutions.

⁴² The Wisconsin Access to Justice Commission was created in June 2009 as a non-profit corporation governed by a 17-member board of directors designated by the state supreme court, the State Bar Board of Governors, the state's law schools, the Wisconsin Trust Account Foundation, the legislature, and the Governor. They will be seeking a 501(c)(3) tax exempt status. Although just formed, they have a website, which provides basic information about their Commission.



Patricia Eads, Nalani Fujimori Kaina, Robert LeClair, and Carol K. Muranaka represented the Hawai'i contingent. They provided information to the group about the foreclosure mediation pilot project on the Big Island, model pro bono policies for law firms and government lawyers, guidelines for judicial pro bono service, the annual 2010 Access to Justice Conference on June 25, and the possible amendment of rule 6.1 regarding a cash contribution as an alternative to pro bono legal services.

Since there were representatives from other states that were setting up their Commissions, the exchange of initiatives was informative. Judge Livingston stated that in Texas they create a folder of access to justice information for each legislative district, and she personally meets with the legislators. Chuck Greenfield stated that the Commissions should want judges to be involved in the legislative funding.

C. Topical Breakout Groups and Table Talks

“Promoting ‘Unbundled’ Legal Services by the Private Bar” was moderated by Will Hornsby, Staff Counsel, ABA, and Judge Fern Fisher from New York. Judge Fisher reported that her idea of unbundling started as a pilot project years ago and she has managed to have the volunteer lawyers deemed “court employees.” The New York courts train the attorneys and supervise them. Both moderators cautioned that there must be consideration of the type of case that would be good for unbundling and said that “unbundling is not only for poor people.” Judge Fisher said that many judges in New York did not know what unbundling meant and basically many attorneys perform such services and are not aware of it.

During the Table Talk discussion of “Funding Your Access to Justice Commission,” which was moderated by Jennifer Lechner, North Carolina Equal Access to Justice Commission and Jeff Brown, Wisconsin Access to Justice Commission, it was explained that the North Carolina Commission receives a small portion of every CLE dollar that is paid. Wisconsin’s Commission will be funded and staffed by the state bar for at least three years.

In the discussion on “Maintaining Momentum, Dealing with Bumps Along the Road,” Stuart Andrews, South Carolina Access to Justice Commission, and Jonathan Asher of the Colorado Access to Justice Commission, led the discussion. Mr. Andrews said that “if we don’t create ad hoc groups, it won’t get done.” They set up working groups in South Carolina and basically have three Commission committees: Pro Bono Committee, Self-Represented Litigation Committee, and Staffed Programs committee.



The Colorado Commission, which is comprised of twenty members, sets the priorities and committees and reaches out to the Commission members to help. Both the Colorado and South Carolina Commissions engage in strategic planning discussions to evaluate whether the Commission is on track, and they survey members of the Commission to solicit candid comments on whether there are any perceived problems.

D. Closing Plenary Session

In the closing plenary session, an overview of the accomplishments of the various states was presented through a “Name That State” slideshow.⁴³ Hawai'i was one of the states recognized for its model pro bono policies for law firms and government lawyers, the model policies endorsed by the state bar association, its recommendation to the Hawai'i Supreme Court and subsequent adoption of its Rules of Judicial Conduct to specify that judges may engage in pro bono service and commentary to the rule providing examples of permissible pro bono activities, and the Commission's second Access to Justice Conference with a theme “Access to Justice: A Promise We Can Keep.”

⁴³ One of the handouts from this meeting is “Access to Justice Headlines 2009-2010,” which can be found at:
<http://apps.americanbar.org/legalservices/sclaid/atjresourcecenter/downloads/ATJ_Headlines_2009-2010.pdf-2011-02-08>.