



Commission Update: Hawaii Revised Judicial Code and Foreclosure Mediation Proposals

by Laura H. E. Kā`akua

The Access to Justice Commission (the “Commission”) recently approved two initiatives proposed by the Committee on Initiatives to Enhance Civil Justice (the “Committee”).¹ The first seeks to increase *pro bono* legal services to Hawai`i’s low-income residents and to provide another funding source through attorney sanctions.¹ The second endeavour is to assist homeowners and lenders to avoid residential foreclosure through mediation. According to Committee Chair Judge Greg K. Nakamura, both judiciary-based initiatives will create additional mechanisms to provide greatly needed legal services

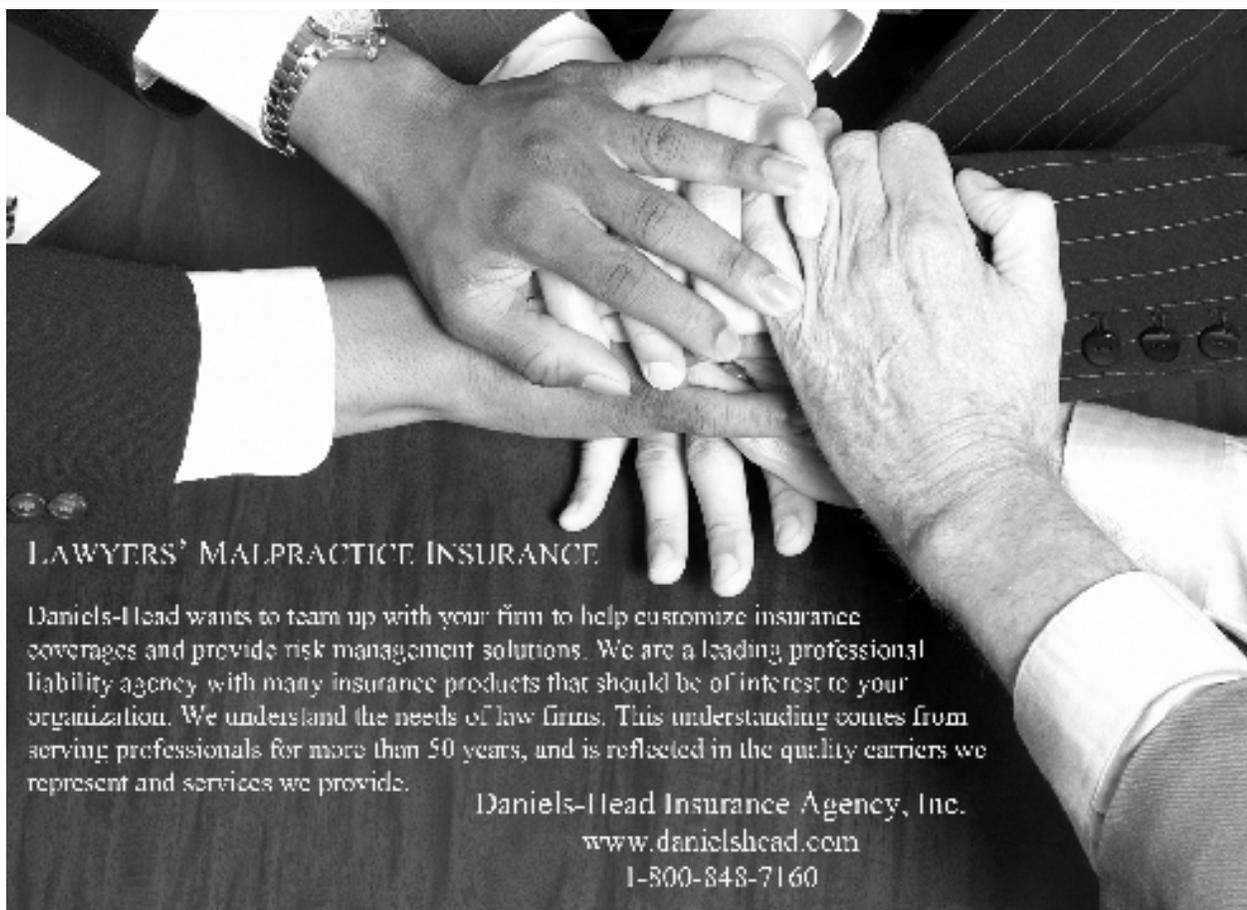
for low and moderate-income people in Hawai`i.

Clarifying the Hawai`i Revised Judicial Code to Allow Attorney Sanctions to Benefit the Underserved

Prior to June 28, 2001, when judges sanctioned lawyers formally or informally, the court routinely ordered the lawyers to make contributions to charitable organizations. The practice changed after the Commission on Judicial Conduct issued an advisory opinion stating it was improper for a judge to sanction an attorney or litigant by ordering payment of a fine either to a specific charity or to a charity or worthy cause to be selected by the person being sanctioned.² The Commission on Judicial Conduct was concerned that (i) a judge who sanctions a lawyer by having the

lawyer contribute to a particular charitable organization was susceptible of being charged with engaging in prohibited fundraising activities in order to promote the judge’s popularity, and (ii) there was no rule allowing a judge to sanction a lawyer by ordering payment of a charitable contribution.³

The Commission’s proposal seeks to allow judges, under the Hawai`i Revised Judicial Code (the “Revised Code”), to mandate, as a sanction, that lawyers provide *pro bono* legal services to low-income persons or to organizations serving low-income persons of the lawyer’s choosing, or make monetary contributions to such organizations. Specifically, the Commission proposes that Rule 2.2 of the Revised Code concerning impartiality and fairness be amended by adding the following comment: “[5] It shall not be a viola-



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tion of this rule for a judge to sanction a lawyer by ordering 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." Section 6.1(a) of the Hawai'i Rules of Professional Conduct refers to "persons of limited means" and organizations "designed primarily to address the needs of persons of limited means."

This proposal responds to the Commission on Judicial Conduct's first concern regarding prohibited fundraising by restricting the allowable *pro bono* and monetary sanctions to *pro bono* work for persons of limited means or organizations addressing the needs of persons of limited means, and/or to contributions to such organizations. This proposal should eliminate any appearance of impropriety on the part of the judge by permitting the lawyer, not the judge, to choose the person or organization to benefit under the sanction.⁴

This proposal also addresses the Commission on Judicial Conduct's second

concern regarding the lack of a rule allowing the sanction. While an additional comment to a rule, rather than a modification to a rule itself is being proposed, such comments provide decision-makers with citeable source material and guidance as to how a rule should be interpreted. Also, adding a comment to the existing rule, rather than modifying the rule itself, pays appropriate deference to the recent adoption of the Revised Code.

Presumably, the total dollar amount of court-ordered sanctions (imposed and/or recovered) in any given year is not large. To this writer's knowledge, such data is not readily available. If, however, judges order sanctioned attorneys to provide *pro bono* legal services, the impact is likely to be considerably more direct and beneficial. In 2008, only 27% of Hawai'i government attorneys, 68% of active attorneys, and 26% of inactive attorneys reported providing *pro bono* service.⁵ There are currently 7,189 inactive and active attorneys in Hawai'i,⁶ who could collectively provide 359,450 hours of legal service to the community if each fulfilled the fifty-hour *pro bono* expectation under Rule 6.1 of the

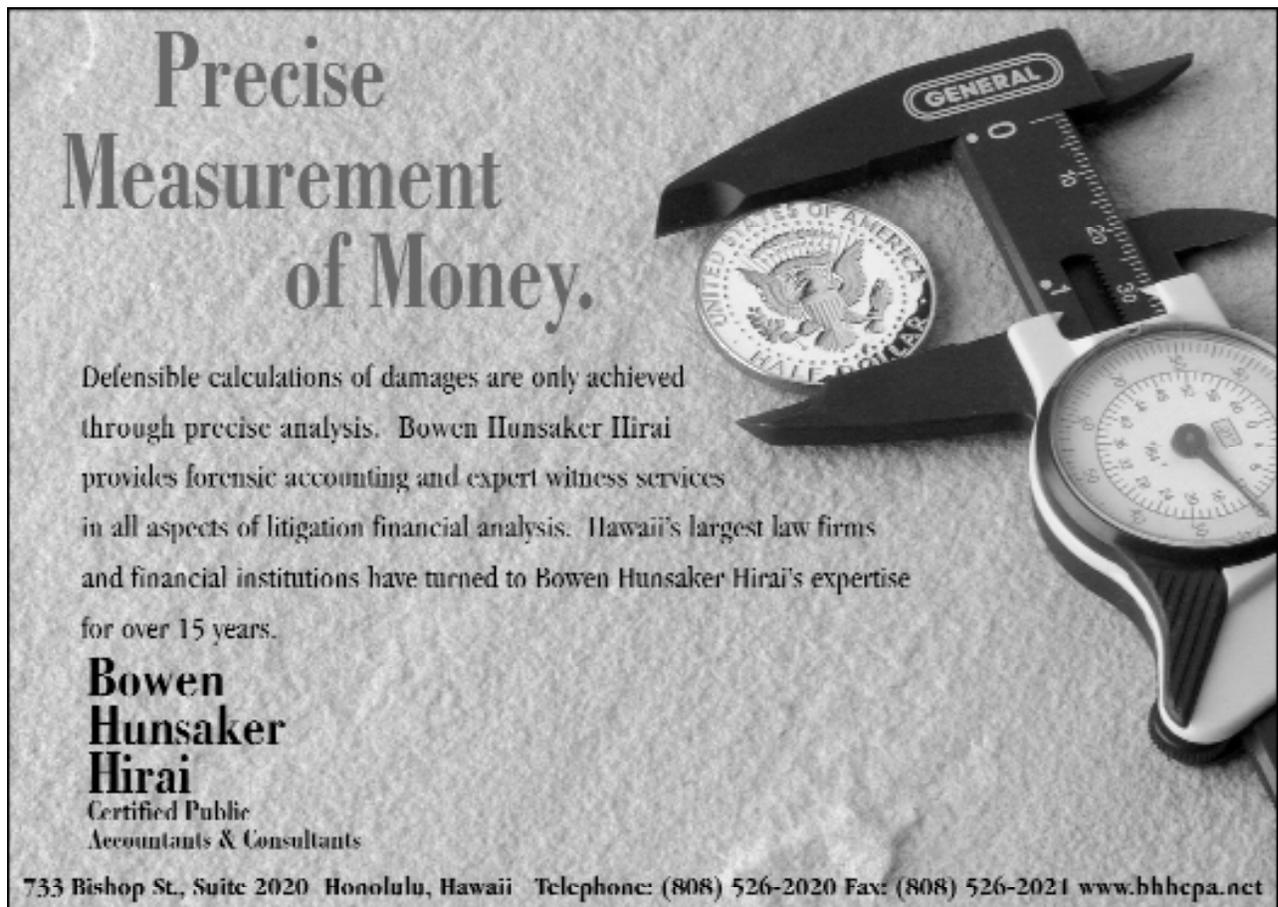
Hawai'i Rules of Professional Conduct.

The addition of Comment [5] to Rule 2.2 of the Revised Code will support the charge to judges, under Comment [4] to Rule 1.2 of the Revised Code, to participate in activities which "promote access to justice for all." Judge Nakamura stated, "I believe that judges will consider Comment [5] to be a positive change because it allows for sanctions which are more meaningful to the lawyers and which directly result in improving access to the courts for those who are limited financially."

Implementing a Foreclosure Mediation Program

The second initiative proposed by the Committee is a court-based foreclosure mediation program. The program would allow all homeowners facing residential judicial foreclosure proceedings filed in Hawai'i to request mediation with the lender.

Although residential foreclosures are increasing nationwide, Hawai'i is being hit especially hard. A study done by the Pew Charitable Trusts found that one in 29 Hawai'i homeowners is expected to face



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foreclosure by the end of 2010, and that on average a Hawai'i homeowner in foreclosure is expected to lose \$24,768 in property value.⁷ Adding to the impact, Hawai'i as a whole will suffer projected losses of \$4.16 billion from combined state and local property tax revenues.⁸ Although the majority of residential foreclosures are handled outside of the court system, the number of recent judicial foreclosures is itself distressing. By way of example, in the Third Circuit alone, 375 foreclosure cases were filed from July 2008, the beginning of the fiscal year, to May 2009, as compared to 276 cases filed from July 2007 to June 2008.

The foreclosure mediation program seeks to reduce the time, expense, and potential monetary losses in residential foreclosure cases. If implemented, it is expected that lenders and homeowners alike would benefit, and the burden on the courts would decrease.

Under the program, a summary of the process in every residential foreclosure action would be as follows: (1) the plaintiff would be required to attach to the front of the complaint and summons served upon each defendant a foreclosure mediation notice advising the defendant of the availability of mediation, to provide a foreclosure mediation request form, and to direct the defendant to notify the court within twenty days if interested in mediation; (2) upon receiving notification that a defendant is interested in mediation, the deadline for filing an answer would be suspended and the court would issue an order setting mediation deadlines; (3) the defendant requesting mediation would provide to the plaintiff and mediator information regarding his or her financial ability to make "affordable" mortgage payments based on the federal government's affordability guidelines; (4) the lender would provide to the defendant and mediator specified information about the loan; and (5) the parties would attend the scheduled mediation session.

If the mediation is successful, the mediator would document the terms agreed to by the parties, and the court would dismiss the action without preju-

dice. If the mediation is unsuccessful, the court would return the action to active status.

It is envisioned that the actual mediation would be run by existing community mediation centers in all circuits which would oversee the training and assignment of volunteer foreclosure mediators. Although it is not required that the mediators be attorneys, attorneys will be encouraged to fulfill their *pro bono* obligations by acting as foreclosure mediators, or by providing mediators with specialized foreclosure training that includes loan modification options and other ways to settle foreclosure cases. Law students and paralegals would also be encouraged to become foreclosure mediators, thereby creating a partnership among the Judiciary the Hawaii State Bar Association, the William S. Richardson School of Law, paralegal associations, and the community mediation centers.

¹ The members of the Committee on Initiatives to Enhance Civil Justice are: Judge Greg K. Nakamura, George Zweibel, Kristin Shigemura, Laura Hokunani Edmunds Ka'akua, Mihoko Ito, Lincoln Ashida, Elton Johnson, Shawn Benton, Linda Kreiger, and Edward Aquino.

¹ The Access to Justice Hui found that "Only 1 in 5 low and moderate-income Hawai'i residents have their legal needs met," and that due in large part to lack of funding, "Legal service providers are able to help only 1 in 3 of those who contact them for assistance." Access to Justice Hui, *Achieving Access to Justice For Hawai'i's People* at ii (Nov. 2007).

² Commission on Judicial Conduct, The Judiciary, State of Hawai'i, Formal Advisory Opinion #01-01, June 28, 2001.

³ *Id.*

⁴ Also, the current practice of ordering monetary sanctions paid into the state general fund is open to theoretical objection since that fund is obviously the source of judges' compensation. Although the total dollar amount of awarded sanctions paid into the general fund and later allocated to the judiciary is no doubt miniscule, there seems little point in leaving the judiciary open to such an objection.

⁵ Statistics maintained by the Hawai'i State Bar Association.

⁶ *Id.*

⁷ Pew Charitable Trusts, *Defaulting on the Dream: States Respond to America's Foreclosure Crisis*, Hawaii (December 2008).

⁸ *Id.*

Laura H. E. Ka'akua is a law clerk for Circuit Court Judge Greg K. Nakamura of the Third Circuit and a member of the Committee on Initiatives to Enhance Civil Justice.



Striving to Meet Rule 6.1

Rule 6.1 of the Hawai'i Rules of Professional Conduct embodies an aspirational goal that lawyers provide fifty hours of *pro bono* service annually, which would encompass participation in various *pro bono* activities as described in the rule. The pictured firm and government office were contacted by a member of the Access to Justice Commission, and each of these groups has expressed a willingness to strive to meet the goal outlined in Rule 6.1.

Groups interested in making a similar commitment should contact Jill Hasegawa, Vice-Chair of the Access to Justice Commission, at <jhasegawa@awlaw.com> .



(From left) Ellen Godbey Carson, Paul Alston, and Bill Tam of Alston Hunt Floyd & Ing. The Alston Hunt Floyd & Ing firm (1) makes pro bono work part of the firm's mission, (2) gives full credit for this work in calculating compensation, and (3) recognizes that these cases provide invaluable experience for new lawyers.



(From left) Rock Ley, Lily Ling, Roland Thom, Melissa Mash, and David Pendleton, all of the Labor & Industrial Relations Appeals Board.