

by
R. Elton Johnson, III

For the sixth annual Hawai'i Access to Justice Conference on June 20, 2014, under the title "Meeting the Challenges to Equal Justice for All," nearly 300 people gathered to consider

REFLECTIONS on the 2014 Conference



pose mentioned in the Preamble to the United States Constitution, and "Liberty and Justice for all" are the closing words of our Pledge of Allegiance.

He quoted Judge Learned Hand regarding the importance of access for our democracy, and noted how critical a func-



the challenges to achieving access to justice for all citizens, in the sense of effective access to their justice system, and to explore how we might better meet those challenges.

"Thou shalt not ration justice"

"If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

—Judge Learned Hand

Hawai'i's Chief Justice, Mark E. Recktenwald reminded those in attendance that when President John F. Kennedy called for the passage of the Civil Rights Act fifty years ago, he cited

our founding principle that all men are created equal, and noted that the rights of every man are diminished when the rights of one man are threatened. "President Kennedy's words," said the Chief Justice, "although spoken in the context of condemning racial discrimination, resonate here today, as we contemplate the injustice that results when members of our community are denied effective access to the civil legal system because they're unable to afford an attorney to represent them."

Guest speaker James J. Sandman, President of the Legal Services Corporation ("LSC"), pointed out that "to establish justice" is the first core pur-

positional, accessible justice system is for social stability: "You won't long have a nation to defend, or worth defending, without it. It's about the rule of law." Given our professed values, President Sandman regards it a great paradox that we have failed to effectively realize access to justice.

Access remains elusive

"As a result of record-high demand for services and low funding, we are not seeing, at least on a national basis, any improvement in access to justice, despite the hard work of Access to Justice Commissions in more than thirty states."

—James J. Sandman

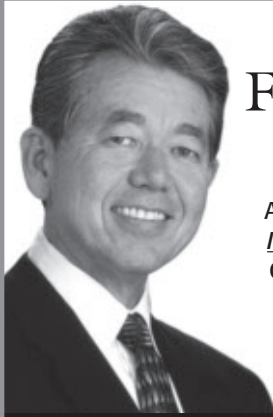


Chief Justice Recktenwald noted that every day, our courts adjudicate civil cases that affect people's most fundamental rights and interests—such as whether they'll be able to participate in raising their children after a divorce, whether they can remain in their home if they fall behind in their mortgage or rent payment, whether they'll have access to essential government services—"and every day people come into our courts who have to represent themselves in these matters because they can't afford legal counsel, and who are at sea because they don't understand the process and what is expected of them."

In his remarks, President Sandman was direct about the current status of access to civil legal assistance by low-income people nationwide. The population financially eligible for LSC-funded programs is now at sixty-five million people, or 21 percent of the U.S. population. This is an all-time high, and represents a 30 percent increase over 2007, the last year before the recession hit.

Meanwhile, funding is at best stagnant over all sources in absolute dollars, but is at an all-time low if adjusted for inflation and by funding per eligible person, due to the huge spike in the number of eligible persons. As a result, over a thousand full-time positions in LSC-funded programs have been lost since 2010, and thirty-three offices have been closed—many of these in rural areas with limited access alternatives.

An increasing number of people are on their own at court when they face life-changing legal issues. President Sandman pointed out that in New York State courts last year, for example, 98 percent of tenants in eviction cases, and 95 percent of parents in child support cases, had no lawyer. Most states do not maintain such statistics, but needs assessments in many



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states—including the latest broad civil legal needs assessment in Hawai‘i, undertaken in 2007 before the recession—have demonstrated that most low- and moderate-income people receive no help with their civil legal needs. In Hawai‘i, a new statewide needs assessment is presumably imminent, as required by Rule 21 of the *Rules of the Supreme Court*.

Approaches taken

“It’s our mandate to develop initiatives to increase access to justice by increasing public and private funding for our legal service providers, those who fight on the front lines, to work with the Bar to increase pro bono legal services, to reduce language and cultural barriers to access to justice, to educate government leaders, attorneys, and the public on access to justice.”

— Associate Judge Daniel R. Foley

Chief Justice Recktenwald, and Associate Judge Daniel R. Foley, Chair of the Hawai‘i Access to Justice Commission, each applauded the partnership enjoyed in Hawai‘i between the Hawai‘i State Judiciary, the funded legal service providers, the Hawai‘i Access to Justice Commission, the Hawai‘i Justice Foundation, the Hawai‘i State Bar Association, the William S. Richardson School of Law, the Cades Foundation, and many others. Hawai‘i’s Access to Justice Commission, they noted, serves as a model nationally, having accomplished so much with so little.

In their respective addresses, Chief Justice Recktenwald and Associate Judge Foley also mentioned many illustrative Hawai‘i efforts to improve access to justice that have been realized in recent years, or are being actively developed. These initiatives are within certain well-established approaches to improving access.

Attorney services approach:

- Amendment of court rules to clarify procedures for limited scope representation or unbundled services

Attorney pro bono services approach:

- Access To Justice Rooms established since 2011
- Ask-A-Lawyer clinics
- Amendment of *Hawai‘i Revised Code of Judicial Conduct* Rule 3.7 in 2010 to encourage pro bono by judges
- Model pro bono policies for law firms and government legal offices
- Training of attorneys for pro bono work

Attorney services via funded legal service provider approach:

- Increased surcharge on the filing of certain civil case court documents established by Senate Bill 1073 in 2011
- \$500 contribution required for attorneys in lieu of pro bono per *Hawai‘i Rules of Professional Conduct* Rule 6.1
- Amendment of *Hawai‘i Rules of Civil Procedure* Rule 23 in 2011 to facilitate distribution of unclaimed class action funds (*cy pres*)



- Grants-in-aid to support providers
- Amendment of court rules to clarify procedures for limited scope representation or unbundled services

Alternative dispute resolution approach:

- Pilot foreclosure mediation program on the island of Hawai‘i

Self-representation approach:

- Self-help centers
- Court form and document assembly workstations—and the imminent access to same through public libraries—supported by a Legal Services Corporation technology grant and a State Justice Institute grant

The importance for improving access to justice of technological enhancements generally, and of identifying and addressing language and cultural barriers, was also affirmed by these speakers.

On a legislative panel regarding increasing contributions to funded legal service providers, Senator Clayton Hee, Chair of the Senate Committee on Judiciary and Labor, and Senator Suzanne Chun Oakland, Chair of the Senate Committee on Human Services, both mentioned the Indigent Legal Assistance Fund (“ILAF”), which is based on court filing surcharges. Senator Hee said that since Senate Bill 1073 passed in 2011, ILAF funding has increased from \$330,000 to 1 million in 2014 and is expected to increase to 1.4 million in 2015. He thanked Gary Slovin and Mihoko Ito for their efforts at the Legislature and encouraged those who

seek further funding for legal services to continue to engage with legislators. Senator Chun Oakland observed that good organization and educational efforts by the legal community can be effective, and she particularly stressed the importance of quantifying the unmet need for legal services. This, she said, would also help build alliances with others outside the justice system willing to advocate for funding increases.

The work of the Judiciary Strategic Planning Committee for Access to Justice led by Associate Justice (Ret.) and former Chair of the Hawai‘i Access to Justice Commission Simeon R. Acoba, Jr. was also mentioned by Chief Justice Recktenwald. In May 2014, this committee recommended further specific efforts to increase attorney pro bono (through, *e.g.*, improvements associated with the self-help centers, and the establishment of an online Ask-a-Lawyer interface), and further efforts to facilitate self-representation (through, *e.g.*, strengthening the Ho‘okele Program that provides procedural assistance at the courts, improving and

seek further funding for legal services to continue to engage with legislators. Senator Chun Oakland observed that good organization and educational efforts by the legal community can be effective, and she particularly stressed the importance of quantifying the unmet need for legal services. This, she said, would also help build alliances with others outside the justice system willing to advocate for funding increases.

expanding operations of the self-help centers, improving the Judiciary website, producing instructional YouTube videos for the Judiciary YouTube channel, and expanding the implementation of court form and document assembly workstations).

The creative efforts being made in Hawai'i that were mentioned by Judge Foley and Chief Justice Recktenwald in the plenary session of the 2014 conference are within important well-established approaches to effecting greater access to justice, that is, attorney services, attorney pro bono services, attorney services via funded legal service provider, alternative dispute resolution, and self-representation. Though not mentioned by these speakers in the plenary session, the civil right to counsel initiative is another important effort that is also being developed in Hawai'i—if not yet on the Commission itself. Like the unbundling initiative, the civil right to counsel initiative is both an attorney services approach and a funded legal service provider approach to improving access to justice. The unbundling or limited scope representation initiative effectively encourages attorney provision of targeted—and therefore more affordable—assistance rather than strictly full representation, and the right to counsel initiative seeks the provision of counsel at public expense for indigent persons in civil cases when their basic human needs are at risk.

Systemic approaches to improving access to justice through improvement of the delivery model itself are also promising. The alternative dispute resolution (“ADR”) approach helps to improve access through mediation and related services for certain types of disputes; it has ancient roots but has been better recognized as a significant benefit in the public interest within our type of justice system for over thirty years. Judge Foley mentioned the foreclosure mediation pilot program in his conference plenary presentation, and there was a conference workshop this year that explored the implementation of the ADR approach in civil cases. The adjunct provider approach to improving access to justice, whereby an adjunct provider is author-

ized to deliver certain limited civil legal services in identified areas of chronic unmet need, was commended by President Sandman in his conference presentation. With the exception of ADR, no systemic improvement upon the longstanding thin ecology of attorney and funded legal service provider attorney has been developed, with respect to how legal services are delivered to Hawai'i's underserved.

Re-thinking access

“When we leave 80 percent of the legal needs of low-income people unmet, when we turn away half or more of those who seek out service, we have to do something differently.”

—James J. Sandman

As the head of the largest funder of United States civil legal aid programs for low-income people, supporting 134 independent legal aid programs with 799 offices serving every county in the country, President James Sandman has a unique perspective from which to diagnose our access to justice challenges. In his presentation, titled “Re-Thinking Access to Justice,” he identified two major challenges facing the access to justice movement today, namely the invisibility of the issue, and the existing service-delivery model.

With respect to the first major challenge, President Sandman noted that ignorance of the access to justice problem and its magnitude is prevalent among the public, private philanthropy, legislators, and the legal profession. Many people do not understand the difference between criminal and civil law and do not realize that there is no right to counsel in life-changing civil matters in which one may lose one's home, or have one's children taken away, for example. Private philanthropy is largely unaware of the access to justice problem, or regards funding for civil legal aid as outside their priorities, or the responsibility of the legal profession. Legislators often think of civil legal aid as just one more discretionary spending program that must be cut to meet the budg-

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Quote from Marcelo Nobrega, Esq. on why he does pro bono work:

“I always had a heart for justice and providing pro bono services for the Hawaii Immigrant Justice Center at the Legal Aid Society of Hawaii makes my life tremendously happy and fulfilling.”

Help make a difference in someone's life. Volunteer today to provide civil legal aid to the most vulnerable in our community. Attorneys needed for help with guardianships, simple wills, and immigration.

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et, rather than as a foundation of our democratic society. Members of the legal profession often do not appreciate just how severe the unmet need for civil legal services is.

To dispel this sort of ignorance, President Sandman suggests a re-thinking of our approach. Though it is not easy to get invitations, we should try to speak to people outside of the access to justice community, particularly opinion leaders, enlisting connected intermediaries in this effort. We should find people outside the legal aid world to reach new audiences, such as CEOs and foundation leaders who understand the issue. President Sandman noted the recent emergence of Chief Justices, such as Hawai'i's Chief Justice Recktenwald, as effective non-partisan advocates for access to justice.

President Sandman noted that we need to make the economic case for legal aid. He emphasized the need to customize the message for those outside our world, to illustrate with stories, and to emphasize the importance of fairness in our justice system—a focus that is known to resonate with the public. With respect to the phenomenon of the failure to self-identify one's problem as a legal problem, he mentioned an initiative by the Tennessee Access to Justice Commission whereby leaders in faith communities are trained to identify legal problems and advise regarding available resources. He noted the success of medical-legal partnerships in identifying links with other client needs, as when, for example, pervasive mold-related illness is most effectively addressed with legal measures able to eliminate the environmental exposures often at the root of such health issues. He noted the emergence earlier this year of a new initiative funded by the Public Welfare Foundation and the Kresge Foundation called Voices for Civil Justice (www.voicesforciviljustice.org), a communication hub that collects and distributes stories and information from the field, to increase media coverage and expand public awareness of the importance of civil legal aid in protecting people's livelihoods, health, and families.

The second major challenge to the access to justice movement identified by President Sandman is “a service delivery model that leaves 80 percent of the legal needs of low-income Americans unmet and turns away half or more of the people who actively seek legal aid.” He suggested that to accept this status quo as an inevitable consequence of a funding shortfall would constitute complacency.

He argued that the roles of non-lawyer professionals need to be expanded to help achieve more efficient care, as has been done in the medical profession, for example. He observed that the Washington State regulation of non-lawyers to address certain circumscribed unmet civil legal needs, which is just getting started, is “a great move in the right direction.” In Hawai'i, this important systemic approach to improvement in the delivery of legal services to the public through limited civil legal services and pro bono by regulated adjunct providers remains the uniquely neglected approach among those identified in the 2007 *Community Wide Action Plan* and the 2008 Rule 21 of the *Rules of the Supreme Court of the State of Hawai'i* that initiated our current access to justice movement.

President Sandman argued that while full representation for every client in every case is not realistic, “some assistance is better than no assistance”; he encouraged the use of technology to help provide “some form of effective assistance” to 100 percent of those unable to afford an attorney to deal with essential civil legal needs. He referred to a 2013 Legal Services Corporation summit focused especially on the use of technology to help achieve this goal, which recommended the creation of a statewide legal aid portal and automated triage system in every state (see http://www.lsc.gov/sites/lsc.gov/files/LSC_Tech%20Summit%20Rep

[ort_2013.pdf](#)). Based on historical data regarding what has been most effective, some would receive full representation, while others would receive limited representation, or be directed to court-based or online resources. He encouraged simplification of the legal system so that those who do not have a lawyer can better access the information that they need.

An information-rich conference

“I think prior to 2008, when the Commission was first established, the legal service providers and their allies worked in spheres that seemed separate from the rest of the Bar and the Judiciary. But what was important and significant in estab-



lishing the Commission was that it gave a place where people could go, established a platform that made the commitment to equal justice available to more people. The establishment of a Commission within the Judiciary thus institutionalized this commitment. And in doing that, it provided the opportunity to sustain the efforts to afford the community access to justice.”

— Associate Justice Simeon R. Acoba, Jr. (Ret.)

In the afternoon, all attending the 2014 Hawai'i Access to Justice Conference had the opportunity to choose between numerous concurrent workshops covering a rich variety of topics and drawing on the expertise of dozens of providers and others in Hawai'i's legal community with a passion for meeting the challenges of access to justice. The workshop topics covered were maximizing legal services for the underserved, the right to counsel in civil

cases, giving voice to the underserved through lobbying and political movements, mental health issues of the underserved, self-help centers, current topics in domestic violence, mediation and restorative justice, decisional capacity issues for the elderly, enhancing access to justice



with technology, and unbundled legal services. More information about these 2014 conference presentations and discussions is available at <http://www.hawaiijustice.org/hajc/access-to-justice-commission/2014-access-to-justice-conference>.¹

In one of the workshops, “Meeting Challenges to Effective Delivery of Unbundled Legal Services,” Judge Joseph Cardoza explained that for a self-represented individual, limited scope representation can mean access to relatively affordable legal services for a particularly challenging phase of their case, such as, for example, opposing a motion for summary judgment. He said that—though unbundling is not new (“Unbundling is new only when you compare it to the age of the universe,” he quipped), and has existed in the United States since its founding—more discussion and education is nevertheless needed. Judge Foley, who was in attendance at this workshop, commented that it is the hope of the Commission that explicit clarification of limited scope representation protocols in a rule will help to establish “a uniformity of practice and expectation,” and thereby address attorney reluctance to provide discrete service for fear of being required by the court to see the client’s case through to completion. Panelist Eric Seitz noted that the court typically appreciates the help provided by limited-scope representation counsel. He emphasized the need for all to have a clear understanding, up front, of what the scope of representation is.

With respect to the process of limited scope representation, Judge Cardoza referred to what he calls “the four D’s”: Define the scope of representation, document the scope, disseminate that scope to the court and to opposing parties, and

when finished with one’s work, disengage. Panelist Judge Barbara Richardson explained that a draft of a proposed court rule on limited scope representation, which was distributed to those in attendance, has been revised from mandatory to permissive based on feedback from attorneys familiar with this type of practice. Panelist Derek Kobayashi pointed out that the Access to Justice Room at the Honolulu District Court well illustrates discrete representation; there, the client begins an attorney-client relationship as he or she enters the room, and terminates that relationship upon leaving the room. This is accomplished through intake and exit documentation signed by the client. The sample forms attached to the draft limited-scope representation rule are similar in concept to those forms.

Are we making progress?

“My compliments. You have something special here. I don’t know if you know that. But your approach to access to justice issues reflects a level of integration and collaboration that I don’t see elsewhere. The involvement of your Judiciary, at all levels, is really quite remarkable. The number of judges who are here today sends a message to the entire Bar about the preeminence that they regard this issue as having in their priorities. The involvement of your bar association, of your law school, of all of your legal services providers, of your non-profit communities—it just doesn’t happen the same way elsewhere.”

—James J. Sandman

Before the sixth annual Hawai‘i Access to Justice Conference adjourned under the shared refrain of *Hawai‘i Pono‘i*, the plenary speakers responded to a few questions presented by moderator Robert J. LeClair. Asked whether he thinks we are making progress in the

efforts toward improving access to justice or rather just trying vainly to swim upstream, James Sandman cited three encouraging developments at the national level: The advent of the American Bar Association Resource Center for Access to Justice Initiatives (http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html), which serves as a clearinghouse for access to justice commissions and circumvents the need to “re-invent the wheel,” the work of the Access to Justice Initiative of the United States Department of Justice (<http://www.justice.gov/atj/>), which strives to increase funding from non-traditional federal sources (besides the LSC), and the work of the Conference of Chief Justices to bring advocacy by the judiciary to bear for the improvement of access to justice (<http://www.justice.gov/atj/>).

Chief Justice Recktenwald expressed confidence that, though “the need is huge,” we are making progress. He said that the impact of the Hawai‘i Access to Justice Commission has exceeded all expectations, and he also cited ABA grant project funding of both new commissions and innovations in many states, including Hawai‘i, as a real sign of progress. President Sandman observed that the Hawai‘i community exhibits “a depth of relationships that augurs very well for your success in meeting the challenges of access to justice.”

¹ An article about the workshop, “Right to Counsel in Civil Cases—Where Are We?” was published in the October 2014 issue of the *Hawai‘i Bar Journal*.

Elton Johnson has an abiding interest in the nature of justice, and the importance of public access to the justice system in a democratic society. He has regularly volunteered his time to help further the improvement of public access to legal services.