

Hawaii Attempts to Define the Practice of Law

Proposal could affect any nonlawyer who prepares documents for the public.

By Tommy Sangchompuphen

The Hawaii Supreme Court is reviewing public comments on a proposal it set forth in October 2007 to define the practice of law. The proposal under consideration is in the form of an addition to the Hawaii Supreme Court Rules and defines the practice of law as the “giving of legal advice or legal assistance to another person.” The definition includes, but is not limited to, “giving advice or counsel to another person about the person’s legal rights and obligations or the

legal rights and obligations of others.” Several exceptions and exclusions to the definition were included in the proposed rule, including the performance of services as a paralegal under the supervision of a judge, justice or member of the bar.

In essence, the proposal would cause businesses that provide documents for do-it-yourself court filings to close, and prevent any nonlawyer from assisting others in completing legal documents. Conviction for the unauthorized practice of law in Hawaii is a misdemeanor punishable by up to one year in jail and a \$2,000 fine.

The Hawaii State Bar Association first sent a proposed rule to the Hawaii Supreme Court in July 2007. After review, the Hawaii Supreme Court proposed its version of the rule in October 2007, posting that version on its Web site and requesting public comment through Jan. 25.

During the public comment period, more than 40 individuals and groups submitted responses, many of which criticized the proposal as overly broad. Licensed and regulated professional groups — including realtors, certified public accountants and estate

planners — expressed concern that the proposed rule, if enacted, would infringe on their professional activities as presently permitted under Hawaii law.

On Jan. 25, the HSBA asked the Hawaii Supreme Court for additional time to submit its response to the court’s



The Hawaii State Supreme Court meets at the All'i'ōlani Hale building.

proposed rule, citing numerous comments and questions it had received about the rule, and indicating that it wanted adequate time to review and possibly develop

changes to the proposed rule. The time for the HSBA to respond was extended until March 28.

Recognizing the concerns expressed by other professionals, including Hawaii’s realtors and certified public accountants, HSBA President Jeffrey Sia sent a letter to the Hawaii Supreme Court on Feb. 29, requesting another extension “for comment by the HSBA on the proposed rule” and asking

the court to share any other comments about the proposed rule that it received. In the letter, Sia reiterated the bar’s concern that bad and improper legal advice by untrained, unlicensed and unregulated individuals can result in the loss of legal rights or opportunities, which is the reason the bar association “has developed and recommended a rule to define the ‘practice of law’ as no such definition currently exists.” However, Sia also acknowledged the concerns the proposal received from various professional groups during the comment period, stating in the letter, “It was not the HSBA’s intention or goal to deprive any professional group or any person of their right to conduct and handle matters they legally are entitled to do by law. ...”

One response in particular has drawn national attention to the Hawaii proposal. On Jan. 25, the Federal Trade Commission, in consultation with the Department of Justice’s Antitrust Division, sent a joint letter to the Hawaii Supreme Court stating that “the broad, general definition in the proposal likely would force Hawaiians who would not otherwise hire a lawyer to do

so by eliminating the resources consumers can rely upon to obtain legal information. ..." Citing the duty of the FTC and the DOJ to enforce federal antitrust laws, the letter went on to state, "We believe that the definition of the practice of law proposed by the HSBA unnecessarily limits competition between lawyers and non-lawyers and likely will cause more harm to consumers than it will prevent."

The Hawaii Paralegal Association also filed a response to the proposal on Jan. 18, commenting that adoption of the current language would hamper efforts to increase access to legal services in Hawaii, banning nonlawyer practitioners who specialize in legal-related services, such as financial planners, real estate agents and tax return preparers. The association added that the proposal would place further restrictions on nonlawyers on behalf of friends and family. "If a nonlawyer helps her dad with his will, interprets a statute for a friend, or helps her mom negotiate with a credit card company, she'd be violating the law," the letter, on behalf of the board of directors and the membership of the HPA stated.

The Washington, D.C., nonprofit, nonpartisan public interest group Help Abolish Legal Tyranny weighed in on the proposal as well with its own public comment. According to HALT's program director Theresa Meehan Rudy, "The phenomenal growth of the traditional and independent paralegal profession illustrates that there's a demand for these professionals. Unfortunately, traditional paralegals are forced by unauthorized practice prohibitions to work under the supervision of an attorney rather than going into business for themselves." This arrangement, Rudy said, keeps prices artificially high and services unavailable. "A much better approach for Hawaii would be to pass legislation that acknowledges the existence and usefulness of nonlawyer legal service providers," she said.

Sia told the *Honolulu Star-Bulletin* on Jan. 21 that the bar's only motive for its original proposal was consumer protection, stating that the proposal would institute a "form of quality control" to ensure that consumers receive competent legal advice when obtaining legal services. But according to Moira Boyle, president of the California-based Alliance of Legal Document Assistant Professionals and a

freelance paralegal who works with law firms in Orange County and Los Angeles County, "Hawaii's proposal would only be effective if there were a state-funded self-help center in each court [that is] staffed by attorneys for free." She added, "There must be an alternative for those who cannot otherwise afford to pay an attorney to prepare simple legal documents."

If the Hawaii Supreme Court adopts the language in its current form, business owners such as Betty Marais would

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directly be impacted. Marais owns Legal-Ez, a legal document preparation service in Honolulu that provides affordable legal documents to about 20 to 30 customers each month. "I help people to help themselves," Marais said. "They come to me with their needs and they know what they want. I then prepare the documents based upon the information they provide to me. People save hundreds, if not thousands, of dollars utilizing my services."

Marais prepares documents for marriages, divorces, wills and incorporations at a significant savings to her customers. "If I cannot prepare these documents, where will people go to get these documents prepared?" Marais asked. "Most people — and I'm talking about the average working person — cannot afford [the] fees that an attorney charges."

Some states already have adopted legislation that regulates, rather than

prohibits, nonlawyers who perform legal-related services for the public. Boyle pointed to the California laws regarding the legal document assistant profession, California Business and Professions Code §§6400-6415, which define the scope of nonlawyer legal document preparation and set forth educational, registration and bonding requirements for legal document assistants who provide services directly to consumers. "Hawaii should at least run a pilot program similar to California," Boyle said.

Marais, who already is bonded and has 25 years of experience, agreed. "I would welcome that same regulation process here in Hawaii," she said. In the meantime,

Marais said she is prepared to do whatever it takes to keep her business open. "I have decided that being a legal document preparer is a valuable and necessary community service to the people that I help," Marais said. "I will fight to stay in business and to keep providing my services to the people of Hawaii who need [them] and want [them]."

The Hawaii Supreme Court granted the HSBA's Feb. 29 request and extended the time for the bar's response to May 30. After reviewing the public comments submitted, the court will have the option to reject the proposal, adopt it or adopt a modified version of the original language. If the court adopts the proposal, it could take effect as early as July 1. (LAT)

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