The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary and Labor

Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

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State Capitol, Conference Room 016

By
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Bill No. and Title: House Bill No. 1059, H.D. 2, S.D. 1, Relating to Court Advisement Concerning Alien Status.

Purpose: Requires the court to advise a criminal defendant of the effects of a guilty or no contest plea on alien status in certain criminal proceedings. Effective July 1, 2013. (SD2)

Judiciary's Position:

The Judiciary supports the intent of this measure to make the alien advisement law consistent with federal law, but respectfully opposes provisions of S.D. 1 that prescribe when and how the advisement is to be administered. Further, we take no position on the accuracy or correctness, in legal terms, of the advisements themselves.

To address the unfairness inherent in a non-citizen defendant pleading guilty or nolo contendere (no contest) to a criminal offense without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization, HRS § 802E-2 currently requires the court to administer an advisement to the defendant that the defendant's conviction may result in such consequences, and requires the court, upon request, to allow the defendant additional time to consider the appropriateness of a plea in light of the advisement.

At some point,[1] federal immigration policy was understood to hold that adverse immigration consequences could result not only upon conviction, but also upon entry of a plea of guilty or nolo contendere that, as in the case of a deferral, might never result in a conviction. Further, the United States Supreme Court in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), held that a defendant's right to the effective assistance of counsel includes the right to advice on the immigration consequences of a criminal conviction. Therefore, House Bill 1059 seeks to bring section 802E-2, HRS, into conformity with federal law by requiring that the advisement inform the defendant that: (1) In addition to a conviction, a plea of guilty or no contest, whether or not deferred by the court, may result in adverse immigration consequences; and (2) The defendant has a right to advice from his or her attorney regarding the criminal case's specific impact on the defendant's immigration status. For the reasons discussed below, the Judiciary objects to the provisions in this measure that govern when and how the advisement must be administered by the court.

Timing and method of delivery of advisement

The Judiciary respectfully opposes the requirement that the court administer an advisement "on the record to all defendants present." We believe that administering a mass, group advisement to defendants prior to commencing arraignment and plea hearings is not practical, not appropriate, and will not provide defendants with the very protection that the bill was intended to provide.

S.D. 1 adopts the language proposed by the Office of the Public Defender in its March 18, 2013 testimony before the Senate Committee on Transportation and International Affairs that

[1] It was likely before December of 2006 as, by an order filed on December 7, 2006 and effective on January 1, 2007, the Hawaii Supreme Court approved the following amendment to Rule 11(c)(5) of the Hawaii Rules of Penal Procedure (deleted material is bracketed and stricken; new material is underscored), which conformed the rule to this understanding of federal law:

> (c) **Advice to Defendant.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant in open court and determining that [~~he~~] the defendant understands the following:
> * * *
> (5) that if [~~he~~] the defendant is not a citizen of the United States, [~~a conviction of the~~] entry of a plea to an offense for which [~~he~~] the defendant has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

the court advisement be made "[p]rior to the commencement of a defendant's arraignment and plea hearing," which the Public Defender contemplates as requiring the court to "read the advisement once at the arraignment and plea hearing to all of the defendants scheduled to appear on the calendar."

District Court is a high volume court that processes dozens of defendants daily through the arraignment and plea procedure. For example, on a single calendar in March 2013 in one courtroom, there were 77 arraignment and plea cases with various hearing start times. It would have been difficult, if not impossible, to have fit all of those defendants and their attorneys, if any, in the courtroom to issue the advisement at one time. Further, many defendants are late to court or may have cases in more than one courtroom at the same time, which would make it difficult for the court to know whether a defendant was present in the courtroom to hear the advisement.

At the time of their arraignment and plea hearing, many defendants have not yet retained counsel. If one of the purposes of the advisement is to impress upon defense attorneys the importance of their duty to investigate and advise their clients of the possible immigration-related consequences of their pleas or admissions of facts -- that purpose would not be served by issuing the advisement to unrepresented defendants.

Moreover, a group advisement may be insufficient notification for defendants for whom English is not their primary language. Many of the court's cases involve defendants with limited English proficiency (LEP), who would not be identified as such until their cases are called. The court would need to ascertain whether defendants with LEP understood the advisement that was given before the hearing and, if not, arrange for the advisement to be administered a second time through an interpreter.

The H.D. 2 version of this measure required the advisement to be given prior to the commencement of trial or a defendant's entry of a plea of guilty or nolo contendere. The Judiciary did not oppose that requirement as H.D. 2 further provided that, upon request, the defendant and attorney would be given additional time to consider the decision to enter a plea or commence with trial in light of the advisement, thus obviating the need for an advisement at the arraignment and plea hearing. The current version of the bill deletes the latter language allowing additional time.

Requirement of verbatim advisement

The Judiciary respectfully opposes the language in S.D. 1 that arguably requires the court to administer the advisement verbatim, and prefers the wording of the original bill and the H.D. 1 version, which required that the court's advisement "shall substantially contain the following information." The Judiciary believes that a verbatim requirement is not necessary to protect the rights of non-citizen defendants and that it is sufficient that the statute require the substance of the advisement to be communicated to those defendants.

Adopting this approach will provide the court with the flexibility to, for example, paraphrase the advisement into plain language so as to make it more comprehensible to a non-citizen who may have difficulty understanding English, and should also discourage challenges to judgments based on technical, non-substantive grounds. In the event of a challenge, judicial review will be available to ensure that the purposes of the law have been met.

Finally, the Judiciary notes that this measure does not address a cross-reference to HRS § 802E-2 (repealed in this bill) in existing § 802E-3, as this measure places the amended alien advisement law in a new statutory section.

Thank you for the opportunity to testify on this measure.