



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Ways and Means

Senator Donovan M. Dela Cruz, Chair

Senator Gilbert S.C. Keith-Agaran, Vice Chair

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State Capitol, Conference Room 211

by

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WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1999, H.D. 2, S.D. 1, Relating to Training.

Purpose: Requires certain government decision-makers at the state and county levels to attend a training course on native Hawaiian and Hawaiian rights. Appropriates funds for the office of Hawaiian affairs to plan and implement the training course. Takes effect on 1/1/2050. (SD1)

Judiciary's Position:

The Judiciary appreciates the opportunity to comment on this measure.

This measure requires that certain government decision-makers at the state and county levels, including judges, attend a legal training hosted by the Office of Hawaiian Affairs (OHA). While the Judiciary recognizes that these trainings have been well-received by past participants, the Judiciary agrees with OHA's testimony, which requests that judges be removed from the list of individuals who are required to attend the training. In addition to the impact that judicial presence may have on the training's learning environment as noted in OHA's testimony, the presence of state judges at the training also raises significant ethical concerns.

Under the Hawai‘i Revised Code of Judicial Conduct Rule 2.9(a), “A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter,” except in certain situations. Additionally, Rule 2.10(a) provides that “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the

fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”

Therefore, the judges who attend cannot participate in discussions about issues in cases that are before the courts, or are likely to be before the courts in the future. Given the broad range of legal topics covered in OHA’s training, this would be very difficult to accomplish without impacting the nature of the training. Because state courts hear appeals from agency decisions, the agency decision-makers who attend the training could possibly have pending or impending cases that would be decided by one of the judges in attendance. And, the judges may not even be aware that a case is impending if it is still under consideration by the agency.

Additionally, there are ethical concerns about the appropriateness of requiring judges to attend a legal training administered by OHA, which has been a party to a number of cases brought in state court and which has filed amicus briefs in cases of interest. Even if the participants avoid discussions of pending or impending matters, the appearance of a litigant having private discussions with judges on matters related to the general subject of those cases is problematic.

It is important to note that the Judiciary recognizes the importance of continuing judicial education on matters relating to native Hawaiian and Hawaiian rights. For example, judges assigned to our Environmental Courts have received training on topics related to native Hawaiian rights and environmental protections, and we expect to offer more such training in the future.

In sum, the Judiciary respectfully opposes the inclusion of judges in the list of decision-makers who are required to attend training conducted by OHA, as provided by section 3 of the bill.

Thank you for the opportunity to comment on this measure.