



Supreme Court — THE JUDICIARY • STATE OF HAWAII

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Mark E. Recktenwald
CHIEF JUSTICE

**Chief Justice Mark E. Recktenwald's Remarks
Hawai`i Justice Foundation Annual Meeting
October 27, 2010**

I'd like to thank Jim Kawachika, Bob LeClair and the board of the Hawai`i Justice Foundation for inviting me here to speak today. I'd also like to thank them for their efforts to facilitate the provision of legal services to those in our community who cannot afford them. It is a superb board, and Bob is an articulate and determined advocate. Hawai`i is a better place because of their efforts.

I work in a very isolated environment at the Supreme Court. We're housed in a beautiful building that represents the very highest ideals of our democracy--that we have a judicial system that will provide equal justice for all. Working in that environment, it can be easy to become removed from the sometimes hard realities of the world we live in.

For me, I can get a good reminder of those realities by walking just two blocks down Queen Street, on a day when Volunteer Legal Services Hawai`i is holding a walk-in clinic. People are waiting outside the building,

sometimes with papers in hand, and anxiety written on their faces. They are lining up to obtain . . . justice. They come to the clinic for the chance to spend 30 minutes with a volunteer attorney. That visit might mean the difference between their family staying in their apartment or being on the street, between being the victim of domestic abuse or obtaining a TRO that stops the abuse.

You'll find that scene playing out, in somewhat different ways, at the Legal Aid Society of Hawai`i and at other organizations across the state that are dedicated to providing legal services to those who have no other way of obtaining them.

Our judicial system exists to provide equal justice for all, but that ideal is tarnished if people can't get the help they need to meaningfully participate. Those of you who have been litigators for a while have undoubtedly seen instances in which a pro se litigant wanted to assert their rights, but either gave up and defaulted, or lost because they didn't know what to do. Each time it happens, the system loses a little bit of the integrity that is its foundation.

The Access to Justice Hui concluded in 2007 that only about one in five low to moderate income Hawai`i residents have their civil legal needs met. Things have gotten worse since then, with the downturn in our economy. There are many more people facing eviction, collections actions, foreclosure, loss of jobs or benefits . . . and

related problems as well, such as divorce or domestic violence. Indeed, there was a 35% increase statewide in civil filings in circuit court during fiscal years 2008 and 2009.

At the same time, state funding for legal service organizations has been sharply reduced. Moreover, grants based on IOLTA funds—which are dependent on interest rates—declined from \$345,000 in 2009 to \$175,000 in 2010, and are expected to decrease further this year.

I don't think it's an exaggeration to call this situation a crisis--one that we cannot afford to ignore. So the question is, how can we address the situation, and what are the keys to meeting the challenges posed by an increasing demand for legal services in a time of scarce resources?

One key is leadership and sustained focus on the issue of access to justice. As a result of the recommendations of the Hui, the Supreme Court formed the Access to Justice Commission in 2008. The Commission has had a number of significant accomplishments, including the establishment of model pro bono policies and recommendations for rule amendments and legislation that support access to justice. Perhaps equally important, the commission has significantly increased the level of interest in access to justice in the legal community. I have been to both of the Commission's annual meetings at the UH law school. Those summits were attended by hundreds of people, and generated

great enthusiasm and discussion.

There is a real sense of momentum now, which we cannot afford to lose. I'd like to thank the members of the commission for their hard work, Justice Acoba and Judge Foley for their leadership, and the HJF for its support of last year's conference at the law school. I will be meeting with the members of the commission next month to get their thoughts on the future, and look forward to working with them and supporting their efforts in the years ahead.

What are the other keys that we should pursue? There are several that stand out, including encouraging more attorneys to provide pro bono services, streamlining the civil litigation process without compromising the rights of litigants, and providing greater support to our legal service providers.

We've made some great strides in recent years in encouraging attorneys to fulfill their obligation to provide pro bono service. These strides have included the adoption of MCLE rules, which recognize access to justice as an appropriate subject for MCLE training, and which give up to 3 hours of MCLE credit each year for pro bono service. Yet another was the adoption of the model pro bono policies that I spoke about several moments ago, and the leadership of various firms, government agencies and courts in adopting those policies and supporting their attorneys who step forward to serve.

Even with those incentives, we still need to do

more to make it easier for those attorneys who want to volunteer to find the right opportunity for them. There are many people who would like to contribute more, but are concerned about whether they have the right expertise, and whether they will receive the appropriate training and support to be able to do so in a professionally reasonable way. VLSH and LASH provide numerous opportunities to serve, and have been looking for new ways to make that connection.

This weekend I visited with the participants at a seminar at the law school, where attorneys received training in how to represent victims in domestic violence cases and then had the opportunity to sign up to take on cases under the auspices of LASH. I think that one stop shop is a cost-effective model for bringing additional attorneys to the table, and I applaud LASH, the Domestic Violence Action Center and the other sponsors of the seminar for their efforts.

Another area where we should focus is in reducing the cost and complexity of litigation, so that more people will be able to afford the cost of an attorney, or be able to participate meaningfully on a pro se basis. Last year, the legislature considered a bill that would have raised the current \$3,500 jurisdictional limit in the small claims court to \$5,000. Because procedural rules are relaxed and there is no right of appeal in small claims court, it is a forum that is more comfortable for pro se litigants and where disputes can be resolved quickly and with less

expense. Raising the threshold is a sensible step, and I hope that the legislature considers it again next session.

Over the years, it has become increasingly time-consuming and expensive to litigate in circuit court, which poses an additional access barrier. In fiscal year 2009, there were nearly 5,000 new civil suits filed statewide in circuit court, but only 12 jury trials were tried to a verdict. We need to look at ways to reduce the cost of discovery, without compromising the rights of litigants. There is a committee of the American Judicature Society currently looking at the issue of electronic discovery and the possibility of implementing initial disclosure requirements similar to those used in federal courts, and I appreciate the committee's work and look forward to its recommendations.

While the infrequency of jury trials is a concern that should continue to be monitored, nevertheless the reality is that many cases are going to be resolved through settlement. To a pro se litigant with little familiarity with the system, the opportunity to participate in mediation with an experienced mediator can help to level the playing field somewhat. To minimize cost barriers to mediation, the judiciary has negotiated a contract with the community mediation centers to provide services at a reduced cost or no cost for litigants who cannot afford to pay for mediation. We also established a pilot project to mediate foreclosure cases on the big island, and have worked with

the Mediation Center of the Pacific on Oahu to provide mediation for foreclosure cases. And to ensure that our approach to alternative dispute resolution or ADR is fair and consistent, the supreme court recently proposed new draft rules to govern ADR in our courts. Those rules address subjects such as the cost of ADR and the selection of mediators, as well as conflicts of interest. We have received a number of helpful comments on those draft rules, and are awaiting comments by another AJS committee that is studying the issue as well.

And when mediation fails and there is no attorney available to help, we need to provide as much support as possible to pro se litigants. There is a natural tension for the courts in this area, since we cannot provide legal advice to litigants who are appearing before us. But we can provide general information more effectively than we have in the past, and we can facilitate the provision of information by the bar through initiatives such as self help centers. The HSBA is sponsoring a conference on that subject next month, and I look forward to hearing what opportunities exist that we could take better advantage of.

Even with all of the measures that I have been discussing, the need cannot be met without the efforts of direct providers of legal services, such as LASH and VLSH. These organizations have been hit hard by the downturn in our economy, and a strong case can be made for increasing the funding provided to them. I'm looking forward to

meeting with the access to justice commission to get their thoughts on how to proceed in obtaining that funding.

In closing, I talked earlier about the importance of leadership in focusing attention and resources on access to justice. While I singled out the access to justice commission for its role, I'd also like to thank the many individuals, firms and organizations that have stepped forward to provide their time and support. We have some great leaders in the bar in Hawaii, but those who have been working on access to justice issues really stand out. I'd like to thank them for all the contributions that they, and the organizations they are associated with, are making.

Finally, as chief justice, I have the opportunity to provide leadership as well. I spoke about the importance of access to justice in my first address to the HSBA last month, and emphasized it again in my remarks to several neighbor island bar associations. I will continue to make it a priority in the years ahead, and look forward to working with the HJF, the Access to Justice Commission and the bar to ensure that equal justice for all is a reality in Hawai'i.

Once again, thank you for inviting me today, and I look forward to answering your questions.