

REVISED Proposed Rule on Unauthorized Practice of Law

The Supreme Court of Hawai'i seeks public comment regarding a revised version of the proposed rule about the Unauthorized Practice of Law. The proposed rule defines the practice of law and would assist with regulation, by clarifying what is and is not the practice of law. The revised version of the proposed rule is attached hereto, along with the Hawai'i State Bar Association's cover letter and attachments. Please post the revised version of the proposed rule, cover letter and attachments together.

Comments about the proposed rule should be submitted, in writing, **no later than Monday, April 27, 2009** to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the online form on the Judiciary's website at www.courts.state.hi.us.

Attachments

Proposed UPL Rule (revised as of 10/23/08 HSBA Meeting)

Rule ____ . Unauthorized Practice of Law

(a) Purpose.

It is recognized that individuals have a right to represent themselves in legal matters. However, the privilege of representing others is granted and supervised by the Hawaii Supreme Court for the protection of the public from harm by persons engaged in the unauthorized practice of law in this state. Such persons generally lack the legal education, training, and experience of a licensed lawyer in this state and are not subject to Hawaii's Rules of Professional Conduct or disciplinary system established in this state for licensed lawyers. It is recognized that there are persons in this state who are licensed and/or otherwise authorized by the laws of this state to provide the public with necessary services in the fields of insurance, accounting, and real estate, among others. It is not the intent of this Rule to abridge or restrict those persons from conducting or engaging in those activities permitted or authorized by the laws of this state.

(b) Prohibition.

No person shall practice law in this state or in any manner hold themselves out as a lawyer, or being authorized or competent to practice law in this state unless the person is an active member of the state bar in good standing, except as otherwise permitted by this rule or any other supreme court rule.

(c) Definitions.

"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice, counsel, assistance, or service where there is a client relationship of trust or reliance between the party giving such advice, counsel, assistance, or service and the party to whom it is given. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person or entity about the person's or entity's legal rights and obligations or the legal rights and obligations of others where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(2) Holding oneself out in any manner as a lawyer, attorney, legal counselor or advisor entitled and able to engage in the practice of law in this state.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person or entity.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established.

(5) Negotiating legal rights or obligations with others on behalf of another person or entity.

(6) Providing oral or written legal opinions.

“Qualifying institution” is a business organization that is authorized and registered to do business as provided by law.

(d) Exceptions and exclusions.

The following activity by a non-lawyer, who is not otherwise claiming to be a lawyer, or a lawyer not licensed in this State is permitted:

(1) Appearing *pro se*.

(2) Acting as a representative when authorized by law or by a governmental agency, including the representation of a person in small claims court without compensation and upon express approval of the court or representing a legal entity as an employee representative in small claims court.

(3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (c)(1) above.

(4) Serving as in-house counsel for a single qualifying institution; provided in-house counsel

(a) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,

(b) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,

(c) makes no state court appearances on behalf of any person or entity other than him or her self, and

(d) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(10) Preparing tax returns and performing any other statutorily or legally authorized services as a certified public accountant, enrolled agent, public accountant, public bookkeeper, or tax preparer, including, but not limited to financial planning or accompanying or representing a taxpayer client in a hearing before the Board of Taxation in Hawaii.

(11) Performing or providing services authorized by statute or regulation in this state by real estate licensees who are licensed real estate brokers or salespersons under and pursuant to H.R.S. Chapter 467 and H.A.R. Chapter 99, including, but not limited to, the following:

(a) Preparation of real estate sales and/or purchase agreements and contracts of sale.

(b) Preparation of real property leases or rental agreements.

(c) Providing or completing forms related to the sale, lease, rental, and/or purchase of real estate, improvements, and personal property for their customers.

(d) Providing information or advice relating to the sale, lease, rental, and/or purchase of real estate and improvements.

(e) Negotiating for or on behalf of clients or customers relative to the sale, lease, rental, and/or purchase of real estate and improvements.

(12) Performing or providing services authorized by statute or regulation in this state by an entity or organization in the business of insurance or a self-insured entity or organization licensed in this state, and their licensed agents, affiliated licensees, and employees of such entities, including claims representatives, adjustors or handlers.

(13) Selling, soliciting or negotiating insurance and annuity products, informing customers of their options with respect to the purchase, ownership and naming of beneficiaries of such products and the performance of any other function associated

with the purchase, replacement and administration of an insurance or annuity product, and adjustment or handling of insurance claims by insurance companies and their claims representatives and/or insurance agents as well as licensed claims representatives and insurance agents not affiliated or employed by a particular insurance company.

(14) Providing information or education about law, regulations, legal procedures, and compliance issues by a person, entity or organization for the purpose of teaching, training or educating others.

(15) Performing activities that are preempted by federal law.

(16) Preparing, filling in, or explaining a form or document used in a transaction or furnishing or explaining any statement or notice provided for by state or federal law, when performed by a merchant incidental to the sale of a product or service.

(17) Performing or providing services otherwise authorized by statute or regulation in this state.

(18) Performing such other activities as the courts of Hawaii have determined do not constitute the unauthorized practice of law.

(e) Governmental Agencies.

Nothing in this rule affects the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) General Information.

Nothing in this rule affects the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(g) Document Use By A Party

Nothing contained in this rule shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

(h) No Private Cause of Action Created

Nothing in this Rule creates or may be the basis of a private cause of action or claim cognizable in any court, administrative agency or alternative dispute forum.

Attachments



December 17, 2008

James Branham, Esq.
Supreme Court, State of Hawaii
417 S. King St.
Honolulu, HI 96813

Re: UPL Rule

Dear Mr. Branham:

On behalf of the HSBA, I am submitting a revised version of the proposed Hawaii Supreme Court Rule relating to the unauthorized practice of law for the Court's consideration. At its October 18, 2008 Board of Directors meeting, the HSBA approved the enclosed revised version of the "UPL Rule." This version of the UPL Rule was the result of the HSBA's efforts over the year to work with representatives of many professional groups and organizations, individually and collectively referred to as the "UPL Coalition." A number of these groups and organizations submitted written comments to the Court and the HSBA after the Court issued its proposed UPL Rule in late 2007.

Over the course of this year, the HSBA met with the UPL Coalition representatives, including their attorneys, to discuss their concerns and suggestions relating to the Court's proposed UPL Rule; worked through several draft versions of a revised UPL Rule with them; and received additional verbal and written responses from these representatives, engaging in numerous telephone discussions and face-to-face meetings. In addition, the HSBA conducted its own research regarding UPL Rules in other jurisdictions. Inquiries were made with other State Bar Presidents about UPL Rules in their respective states, and HSBA Executive Director Lyn Flanigan and I attended a seminar on UPL rules and the Federal Trade Commission's position, which featured the FTC's Director of Policy Planning as a speaker. In the past, the Director has authored or co-authored letters from the FTC to certain state bar associations regarding the FTC's consideration and review of proposed UPL rules.

The enclosed revised version of the UPL Rule is the result of these efforts and seeks to balance a primary concern regarding the unauthorized practice of law in this state and the adverse effect it can have on consumers of legal services with the concerns of those who

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James Branham, Esq.
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December 17, 2008

engage in certain type of work or activities already permitted under Hawaii law such as statute, rule or regulation.

The HSBA provided the UPL Coalition with copies of the enclosed revised version of the UPL Rule for review and comment. Responses from some of the Coalition members were received, and I have enclosed copies of those responses and additional suggestions. Although expressed verbally, I have not yet received a written response or suggestion from the Insurers Council. It was concerned about the exception relating to "in-house" counsel and wanted to limit it to "in-house" counsel who are residents of Hawaii.

Also enclosed is a letter from Attorney General Mark Bennett regarding his review of the revised UPL Rule. Although some of the HSBA Board members are Deputies within the Attorney General's Office and have been following the HSBA's efforts to produce an acceptable, revised version of the UPL Rule, a formal request for review and comment was made to the Attorney General. Because of time and scheduling constraints, I primarily was in contact with a Deputy Attorney General for Mr. Bennett about the Office's review, and he generally was unfamiliar with this issue, the history of the development and proposed promulgation of such a rule, and the concerns voiced by the UPL Coalition. Several lengthy discussions ensued to provide and explain that background information with specific reference made to other sources of information. Mr. Bennett's position as set forth in his letter was surprising given the HSBA's inclusion of some Deputy Attorneys General within its Board, the lengthy discussions with Mr. Bennett's Office representative, and the fact that the impetus for the rule came years ago from the Attorney General's Office, which found it difficult to enforce Hawaii's UPL statute in the absence of a "practice of law" definition.

Mr. Bennett indicated a concern about the nature and scope of the exceptions to the definition of "practice of law" within the revised version of the UPL Rule. Both the original version of the UPL Rule submitted by the HSBA to the Court and the Court's proposed version of the UPL Rule were shorter with fewer exceptions. The enclosed revised version contains many more specific exceptions to better clarify that certain types of activity conducted by non-lawyers, which already are lawful under Hawaii law, would not be subject to prosecution or otherwise infringed upon. The UPL Coalition focused on the potential elimination of such lawful activity under the prior versions of the UPL Rule, and therefore, the enumerated exceptions in the enclosed revised version represents the HSBA's attempt to balance the objectives desired by having such a rule and the concerns registered by the Coalition. It was not the HSBA's intent to take away the lawful livelihood of non-lawyers or hinder the public's access to legal services.

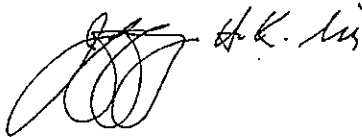
These types of exceptions are not novel. Other states with UPL rules typically provide for exceptions that relate to activities or services provided or performed by various

James Branham, Esq.
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groups and organizations. For example, Nebraska has about 12 pages of exceptions to its UPL rule. In contrast, Utah, Virginia, and Wisconsin have similar exceptions, but worded broadly so as to shorten the verbiage.

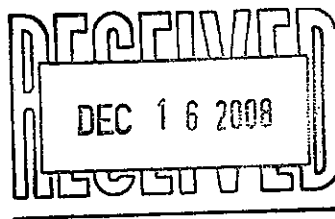
Please contact me if you have any questions regarding the revised UPL Rule; I am available to meet with you at any time. On behalf of the HSBA, thank you and the Court very much for your courtesy and patience in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "H.K. Sia", with a large, stylized flourish to the left.

Jeffrey H. K. Sia

Enclosures



December 16, 2008

Jeffrey H.K. Sia, Esq.
Hawaii State Bar Association
1132 Bishop Street, Suite 906
Honolulu, HI 96813

Dear Mr. Sia:

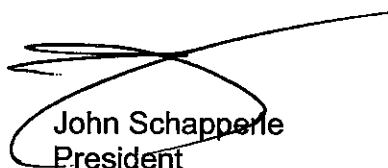
Re: Hawaii Supreme Court Rule on the Unauthorized Practice of Law

The Hawaii Insurers Council respectfully submits the enclosed proposed amendments to the revised draft relating to the unauthorized practice of law that was approved by the Hawaii State Bar Association's Board of Directors and provided to the Supreme Court on or about November 17, 2008. The changes and additions proposed by the Hawaii Insurers Council are shown in redline format on the enclosed document. In summary, the substantive changes proposed by the Hawaii Insurers Council are as follows:

- defining "in-house counsel" to require that an out-of-state licensed lawyer reside and be employed within the State of Hawaii in order to impose the registration requirement;
- clarifying that registration does not require taking the Hawaii Bar examination; and
- clarifying the definition of "qualifying institution" to mean a corporation, partnership, association, or other legal entity that is authorized and registered to do business in Hawaii and expanding the definition to include subsidiaries and organizational affiliates.

As discussed at the meeting on November 11, 2008, the Hawaii Insurers Council requests that you submit, on our behalf, the proposed changes reflected in the enclosed document to the appropriate Supreme Court personnel for possible inclusion in any proposed redraft of the rule by the Supreme Court. Your confirmation of the transmittal of our proposed changes to the Court is sincerely appreciated. If you have any questions concerning these proposed changes please do not hesitate to contact me. Thank you for your consideration and assistance in this matter.

Very truly yours,



John Schapperle
President

JS:rjy
/Enclosure

Rule _____. Unauthorized Practice of Law

(a) Purpose.

It is recognized that individuals have a right to represent themselves in legal matters. However, the privilege of representing others is granted and supervised by the Hawaii Supreme Court for the protection of the public from harm by persons engaged in the unauthorized practice of law in this state. Such persons generally lack the legal education, training, and experience of a licensed lawyer in this state and are not subject to Hawaii's Rules of Professional Conduct or disciplinary system established in this state for licensed lawyers. It is recognized that there are persons in this state who are licensed and/or otherwise authorized by the laws of this state to provide the public with necessary services in the fields of insurance, accounting, and real estate, among others. It is not the intent of this Rule to abridge or restrict those persons from conducting or engaging in those activities permitted or authorized by the laws of this state.

(b) Prohibition.

No person shall practice law in this state or in any manner hold themselves out as a lawyer, or being authorized or competent to practice law in this state unless the person is an active member of the state bar in good standing, except as otherwise permitted by this rule or any other supreme court rule.

(c) Definitions.

"In-house counsel" shall refer to a lawyer not licensed in this state, but who is currently a member in good standing of the bar of another state or the District of Columbia, or eligible to practice before the highest court in any state, territory or insular possession of the United States, and who resides and is employed within the State of Hawaii by a qualifying institution, the business of which is lawful and is other than the practice of law or the provision of legal services.

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"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice, counsel, assistance, or service where there is a client relationship of trust or reliance between the party giving such advice, counsel, assistance, or service and the party to whom it is given. The practice of law includes, but is not limited to:

- (1) Giving advice or counsel to another person or entity about the person's or entity's legal rights and obligations or the legal rights and obligations of others where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(2) Holding oneself out in any manner as a lawyer, attorney, legal counselor or advisor entitled and able to engage in the practice of law in this state.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person or entity.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established.

(5) Negotiating legal rights or obligations with others on behalf of another person or entity.

(6) Providing oral or written legal opinions.

"Qualifying institution" means a corporation, a partnership, an association, or other legal entity that is authorized and registered to do business in the State of Hawaii as provided by law, including its subsidiaries and organizational affiliates.

Deleted: is a business organization

(d) Exceptions and exclusions.

The following activity by a non-lawyer, who is not otherwise claiming to be a lawyer, or a lawyer not licensed in this State is permitted:

(1) Appearing *pro se*.

(2) Acting as a representative when authorized by law or by a governmental agency, including the representation of a person in small claims court without compensation and upon express approval of the court or representing a legal entity as an employee representative in small claims court.

(3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (c)(1) above.

(4) Serving as in-house counsel for a single qualifying institution; provided in-house counsel

(a) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17, under a classification specific to in-house counsel that does not require the registrant to take the Hawaii bar examination,

(b) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,

(c) makes no state court appearances on behalf of any person or entity other than him or her self, and

(d) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(10) Preparing tax returns and performing any other statutorily or legally authorized services as a certified public accountant, enrolled agent, public accountant, public bookkeeper, or tax preparer, including, but not limited to financial planning or accompanying or representing a taxpayer client in a hearing before the Board of Taxation in Hawaii.

(11) Performing or providing services authorized by statute or regulation in this state by real estate licensees who are licensed real estate brokers or salespersons under and pursuant to H.R.S. Chapter 467 and H.A.R. Chapter 99, including, but not limited to, the following:

(a) Preparation of real estate sales and/or purchase agreements and contracts of sale.

(b) Preparation of real property leases or rental agreements.

(c) Providing or completing forms related to the sale, lease, rental, and/or purchase of real estate, improvements, and personal property for their customers.

(d) Providing information or advice relating to the sale, lease, rental, and/or purchase of real estate and improvements.

(e) Negotiating for or on behalf of clients or customers relative to the sale, lease, rental, and/or purchase of real estate and improvements.

(12) Performing or providing services authorized by statute or regulation in this state by an entity or organization in the business of insurance or a self-insured entity or organization licensed in this state, and their licensed agents, affiliated licensees, and employees of such entities, including claims representatives, adjustors or handlers.

(13) Selling, soliciting or negotiating insurance and annuity products, informing customers of their options with respect to the purchase, ownership and naming of beneficiaries of such products and the performance of any other function associated with the purchase, replacement and administration of an insurance or annuity product, and adjustment or handling of insurance claims by insurance companies and their claims representatives and/or insurance agents as well as licensed claims representatives and insurance agents not affiliated or employed by a particular insurance company.

(14) Providing information or education about law, regulations, legal procedures, and compliance issues by a person, entity or organization for the purpose of teaching, training or educating others.

(15) Performing activities that are preempted by federal law.

(16) Preparing, filling in, or explaining a form or document used in a transaction or furnishing or explaining any statement or notice provided for by state or federal law, when performed by a merchant incidental to the sale of a product or service.

(17) Performing or providing services otherwise authorized by statute or regulation in this state.

(18) Performing such other activities as the courts of Hawaii have determined do not constitute the unauthorized practice of law.

(e) Governmental Agencies.

Nothing in this rule affects the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) General Information.

Nothing in this rule affects the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(g) Document Use By A Party

Nothing contained in this rule shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

(h) No Private Cause of Action Created

Nothing in this Rule creates or may be the basis of a private cause of action or claim cognizable in any court, administrative agency or alternative dispute forum.

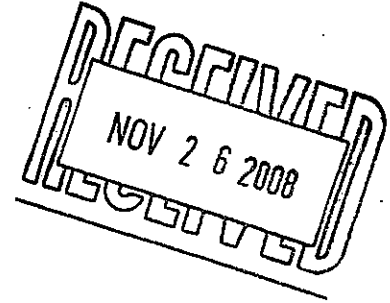
LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500



November 24, 2008

Jeffrey H. K. Sia, Esq.
President
Hawai'i State Bar Association
1132 Bishop Street, Suite 906
Honolulu, Hawai'i 96813

Dear Mr. Sia:

Thank you for providing my office with the opportunity to review the revised proposed rule regarding the unauthorized practice of law. We have reviewed the proposed rule and cannot support the HSBA's proposed revision to the rule.

Because rules adopted by the Hawai'i Supreme Court have the force and effect of law, any overly broad or ambiguous provisions of the rule would make enforcement of section 605-14, Hawai'i Revised Statutes extremely difficult. Although the primary goal of the proposed rule is to protect consumers of legal services, the rule actually is dominated by the "exceptions and exclusions" provisions which are clearly intended to protect the activities of non-lawyers from allegations of unauthorized practice of law. The unauthorized practice of law is codified in sections 605-14, *et seq.*, Hawai'i Revised Statutes, which defines the unauthorized practice of law as follows:

It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is

licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States. Nothing in sections 605-14 to 605-17 contained shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

In enacting section 605-14, the Legislature declined to further define the unauthorized practice of law, stating:

The question has been raised whether the term, "practice of law", appearing in section 1 of the bill, should be defined. A majority of the statutes in this field do not attempt to define the term "practice of law", just as statutes generally do not attempt to define certain legal terms which through the centuries have come into being Attempts to define the practice of law in terms of enumerating the specific types of services that come within the phrase are fruitless because new developments in society, whether legislative, social, or scientific in nature, continually create new concepts and new legal problems.

House Standing Committee Report No. 612 on House Bill No. 811, 28th Legislature, Territory of Hawaii (1955).

While choosing not to define the "practice of law," the Legislature also provided guidance by stating:

It is general knowledge that the practice of law is not limited to appearing before courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party, affecting the legal rights (whether concerning person or property) of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy. The question whether the one

giving such advice receives any fee therefore is immaterial.

Senate Standing Committee Report No. 700 on House Bill No. 811, 28th Legislature, Territory of Hawaii (1955).

The following are examples of some of our concerns about the overbreadth or ambiguity of some of the "exceptions and exclusions" provisions:

1. Exception 4 allows a non-lawyer to serve as in-house counsel for a qualifying institution, provided the non-lawyer meets certain requirements. Those requirements require some clarification. It is unclear who is a non-lawyer and if that person is not a lawyer, why must the person register with the State Bar and agree to submit to the jurisdiction of the supreme court and its disciplinary board?

2. Exception 5 exempts a legislative lobbyist even in situations where a lobbyist purports to provide legal interpretations of a law.

3. Exception 6 allows the making of legal forms available to the general public, whether by sale **or otherwise**, or publishing legal self-help information by print or electronic media. What does "or otherwise" mean?

4. Exception 14 appears to allow the provision of legal advice and counsel by a person not licensed as an attorney so long as it is couched as teaching, training or educating others. This exemption would make any enforcement or prosecution under Hawai'i Revised Statutes § 605-14 difficult by couching the advice and counsel as pedagogy.

5. Exception 15 does not make sense. What does "activities that are preempted by federal law" mean? Is it referring to activities that are permitted by federal law and that the federal law preempts any state prohibition?

6. Exception 16 uses the word "incidental" in reference to the sale of a product or service. The word "incidental" is

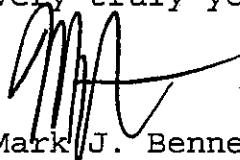
Jeffrey H.K. Sia, Esq.

November 24, 2008

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so subjective that it again will make any enforcement or prosecution difficult. Thank you for allowing us the opportunity to provide these comments.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Mark J. Bennett', written over a horizontal line.

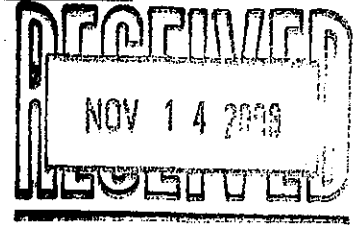
Mark J. Bennett
Attorney General

emailed to Jeff 11/17/08

MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

November 13, 2008



Mr. Jeffrey Sia, President
Hawaii State Bar Association
1132 Bishop Street, Suite 906
Honolulu, Hawaii 96813

Re: Proposed Unauthorized Practice of Law Rule

Dear Mr. Sia:

Thank you for the opportunity to comment on the suggested Unauthorized Practice of Law rule. We appreciate your hard work in creating the suggested rule and are hopeful that your advocacy will assist the Supreme Court in adopting it.

We had only one comment, and it is a detail in the drafting that would make a change for the sake of consistency.

As shown by the side-by-side comparison attached (showing the Bar's suggested rule next to the Hawaii Association of Realtors suggested rule), the section of the rule dealing with real estate agents and brokers speaks in terms of "real property" at section 11.(b), as follows: "(b) Preparation of real property leases or rental agreements." Our suggestion would change this subsection to: "(b) Preparation of real estate leases or rental agreements." in order to conform the section's language and make it consistent with the other subsections. We ask that this drafting change be made.

Our members are hopeful that the Supreme Court will look favorably on this rule proposal and we once again thank you for your leadership on this important topic.

Sincerely,

McCorrison Miller Mukai MacKinnon LLP

Robert G. Klein

Enclosure

SIDE BY SIDE (11/06/08)

Proposed UPL Rule (revised as of October 23, 2008
HSBA Meeting)

Rule _____. **Unauthorized Practice of Law**

(a) Purpose.

It is recognized that individuals have a right to represent themselves in legal matters. However, the privilege of representing others is granted and supervised by the Hawaii Supreme Court for the protection of the public from harm by persons engaged in the unauthorized practice of law in this state. Such persons generally lack the legal education, training, and experience of a licensed lawyer in this state and are not subject to Hawaii's Rules of Professional Conduct or disciplinary system established in this state for licensed lawyers. It is recognized that there are persons in this state who are licensed and/or otherwise authorized by the laws of this state to provide the public with necessary services in the fields of insurance, accounting, and real estate, among others. It is not the intent of this Rule to abridge or restrict those persons from conducting or engaging in those activities permitted or authorized by the laws of this state.

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"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice, counsel, assistance, or service where there is a client

Proposed UPL Rule (Hawaii Association of
REALTORS© as of June 9, 2008)

Rule _____. **Unauthorized Practice of Law**

(a) Purpose.

It is recognized that individuals have a right to represent themselves in legal matters. However, the privilege of representing others is granted and supervised by the Hawaii Supreme Court for the protection of the public from harm by persons engaged in the unauthorized practice of law in this state. Such persons generally lack the legal education, training, and experience of a licensed lawyer in this state and are not subject to Hawaii's Rules of Professional Conduct or disciplinary system established in this state for licensed lawyers. Nevertheless, several groups of licensed professionals provide the public with necessary and important services in the fields of insurance, accounting, real estate, automobile dealers and others. It is not the intent of this rule to draw such licensed professionals into the scope of the rule inasmuch as they are subject to their own licensing laws and rules.

(b) Prohibition.

No person shall practice law in this state or in any manner hold themselves out as a lawyer, or being authorized or competent to practice law in this state unless the person is an active member of the state bar in good standing, except as otherwise permitted by this rule or any other supreme court rule.

(c) Definitions.

"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice, counsel, assistance, or service where there is a client

relationship of trust or reliance between the party giving such advice, counsel, assistance, or service and the party to whom it is given. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person or entity about the person's or entity's legal rights and obligations or the legal rights and obligations of others where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(2) Holding oneself out in any manner as a lawyer, attorney, legal counselor or advisor entitled and able to engage in the practice of law in this state.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person or entity.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established.

(5) Negotiating legal rights or obligations with others on behalf of another person or entity.

(6) Providing oral or written legal opinions.

"Qualifying institution" is a business organization that is authorized and registered to do business as provided by law.

(d) Exceptions and exclusions.

The following activity by a non-lawyer, who is not otherwise claiming to be a lawyer, or a lawyer

relationship of trust or reliance between the party giving such advice, counsel, assistance, or service and the party to whom it is given. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person or entity about the person's or entity's legal rights and obligations or the legal rights and obligations of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(2) Holding oneself out in any manner as a lawyer, attorney, legal counselor or advisor entitled and able to engage in the practice of law in this state.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person or entity.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established.

(5) Negotiating legal rights or obligations with others on behalf of another person or entity.

(6) Providing oral or written legal opinions.

"Qualifying institution" is a business organization that is authorized and registered to do business as provided by law.

(d) Exceptions and exclusions.

The following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able

not licensed in this State is permitted:

- (1) Appearing *pro se*.
- (2) Acting as a representative when authorized by law or by a governmental agency, including the representation of a person in small claims court without compensation and upon express approval of the court or representing a legal entity as an employee representative in small claims court.
- (3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (c)(1) above.
- (4) Serving as in-house counsel for a single qualifying institution; provided in-house counsel
 - (a) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,
 - (b) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,
 - (c) makes no state court appearances on behalf of any person or entity other than him or her self, and
 - (d) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

to practice law, is permitted:

- (1) Appearing *pro se*.
- (2) Acting as a representative when authorized by law or by a governmental agency, including the representation of a person in small claims court without compensation and upon express approval of the court or representing a legal entity as an employee representative in small claims court and those in professions established, licensed, or regulated by law in Hawaii, and performing or providing services authorized by statute or regulation in this state.
- (3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (c) (1) above.
- (4) Serving as in-house counsel for a single qualifying institution; provided in-house counsel
 - (i) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,
 - (ii) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,
 - (iii) makes no state court appearances on behalf of any person or entity other than him or her self, and
 - (iv) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(10) Preparing tax returns and performing any other statutorily or legally authorized services as a certified public accountant, enrolled agent, public accountant, public bookkeeper, or tax preparer, including, but not limited to financial planning or accompanying or representing a taxpayer client in a hearing before the Board of Taxation in Hawaii.

(11) Performing or providing services authorized by statute or regulation in this state by real estate licensees who are licensed real estate brokers or salespersons under and pursuant to H.R.S. Chapter 467 and H.A.R. Chapter 99, including, but not limited to, the following:

(a) Preparation of real estate sales and/or purchase agreements and contracts of sale.

(b) Preparation of real property leases or rental agreements.

(c) Providing or

(5) Acting as a legislative lobbyist.

(6) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(10) Preparing tax returns and performing any other statutorily or legally authorized services as a certified public accountant, enrolled IRS agent, public accountant, public bookkeeper, or tax preparer, including, but not limited to financial planning or accompanying or representing a taxpayer client in a hearing before the Board of Taxation in Hawaii.

(11) Performing or providing services authorized by statute or regulation in this state by an entity or organization in the business of insurance or a self-insured entity or organization licensed in this state, and their licensed agents, affiliated licensees, and employees of such entities, including claims representatives, adjustors or handlers.

(12) Recommending insurance coverage, informing customers with respect to their options with respect to insurance or annuity contract purchase and ownership, naming of beneficiaries, and adjustment or handling of insurance claims by insurance companies and their claims representatives and/or insurance agents.

completing forms related to the sale, lease, rental, and/or purchase of real estate, improvements, and personal property for their customers.

(d) Providing information or advice relating to the sale, lease, rental, and/or purchase of real estate and improvements.

(e) Negotiating for or on behalf of clients or customers relative to the sale, lease, rental, and/or purchase of real estate and improvements.

(12) Performing or providing services authorized by statute or regulation in this state by an entity or organization in the business of insurance or a self-insured entity or organization licensed in this state, and their licensed agents, affiliated licensees, and employees of such entities, including claims representatives, adjustors or handlers.

(13) Selling, soliciting or negotiating insurance and annuity products, informing customers of their options with respect to the purchase, ownership and naming of beneficiaries of such products and the performance of any other function associated with the purchase, replacement and administration of an insurance or annuity product, and adjustment or handling of insurance claims by insurance companies and their claims representatives and/or insurance agents as well as licensed claims representatives and insurance agents not affiliated or employed by a particular insurance company.

(14) Providing information or education about law, regulations, legal procedures, and compliance issues by a person, entity or organization for the purpose of teaching, training or educating others.

(13) Performing or providing services authorized by statute or regulation in this state by real estate licensees who are licensed real estate brokers or salespersons under and pursuant to H.R.S. Chapter 467 and H.A.R. Chapter 99, including, but not limited to, the following:

(a) Preparation of real estate sales and/or purchase agreements and contracts of sale.

(b) Preparation of real estate leases or rental agreements.

(c) Providing or completing forms related to the sale, lease, rental, and/or purchase of real estate, improvements, and personal property for their customers.

(d) Providing information or advice relating to the sale, lease, rental, and/or purchase of real estate and improvements.

(e) Negotiating for or on behalf of clients or customers relative to the sale, lease, rental, and/or purchase of real estate and improvements.

(14) Providing information or education about law, regulations, legal procedures, and compliance issues by a person, entity or organization for the purpose of teaching, training or educating others.

(15) Performing activities that are preempted by federal law.

(16) Preparing, filling in, or explaining a form or document used in a transaction or furnishing or explaining any statement or notice provided for by state or federal law, when performed by a merchant incidental to the sale of a product or service.

(17) Performing or providing services otherwise authorized by statute or regulation in this state.

(18) Performing such other activities as the courts of Hawaii have determined do not constitute the unauthorized practice of law.

(e) Governmental Agencies.

Nothing in this rule affects the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) General Information.

Nothing in this rule affects the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(g) Document Use By A Party

Nothing contained in this rule shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

(h) No Private Cause of Action Created

Nothing in this Rule creates or may be the basis of a private cause of action or claim cognizable in any court, administrative agency or alternative dispute forum.

(15) Performing activities that are preempted by federal law.

(16) Performing such other activities as the courts of Hawaii have determined do not constitute the unauthorized practice of law.

(e) Governmental Agencies.

Nothing in this rule affects the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) General Information.

Nothing in this rule affects the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(g) No private cause of action created.

Nothing in this Rule creates or may be the basis of a private cause of action or claim cognizable in any court, administrative agency or alternative dispute forum.

Lyn Flanigan, Executive Director

From: Heller, Ronald I. [rheller@torkildson.com]
Sent: Thursday, November 06, 2008 11:56 AM
To: Lyn Flanigan, Executive Director
Cc: kathycastillo@hscpa.org; timlyons@cs.com; Alsop, Marty M.
Subject: FW: HSBA UPL Rule
Attachments: UPL rule October 25.doc

Lyn -

Thank you for following up on this. We would like to suggest two minor changes to subsection (d)(10). (red-lined in the attachment)

The first is to correct the reference to the Board of Review - just using the actual title. The second is to add "management consulting" in conjunction with the reference to financial planning. We feel this would help to clarify the scope of services typically performed by CPAs.

Thus, the revised (d)(10) would read:

(10) Preparing tax returns and performing any other statutorily or legally authorized services as a certified public accountant, enrolled agent, public accountant, public bookkeeper, or tax preparer, including, but not limited to management consulting, financial planning or accompanying or representing a taxpayer client in a hearing before the Board of Review in Hawaii.

I would be happy to discuss this with you, or with any of the HSBA officers or directors.

Ron Heller
rheller@torkildson.com
phone 808 523 6000 fax 808 523 6001

cc: file

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From: Lyn Flanigan, Executive Director [mailto:LFlanigan@HSBA.ORG]
Sent: Tuesday, November 04, 2008 4:31 PM
To: Alison Powers; Brad Bliss; Clayton Kamida; Craig Hirai; Cynthia Hayakawa; Gary Fujitani; Gayle Lau; Henry Beerman; J.N. Weidman; Judge Robert Klein; Kathy Castillo; Marilyn M. Niwao; Oren Chikamoto; R.J. Yahiku; Rick Brian Tsujimura; Heller, Ronald I.; Tim Lyons
Cc: Jeffrey Sia
Subject: HSBA UPL Rule