

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,

McCorriston 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.

(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

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.

<p>(5) Acting as a legislative lobbyist.</p> <p>(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.</p> <p>(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.</p> <p>(8) Performing services as a law clerk to a judge, justice, or member of the bar.</p> <p>(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.</p> <p>(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.</p> <p>(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:</p> <p>(a) Preparation of real estate sales and/or purchase agreements and contracts of sale.</p> <p>(b) Preparation of real property leases or rental agreements.</p> <p>(c) Providing or</p>	<p>(5) Acting as a legislative lobbyist.</p> <p>(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.</p> <p>(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.</p> <p>(8) Performing services as a law clerk to a judge, justice, or member of the bar.</p> <p>(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p>
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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.

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

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(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.