Hawaii State Bar Association
Appellate Section

February 12, 2018

Chair Scott Y. Nishimoto
Vice Chair Joy A. San Buenaventura
Committee on Judiciary
House of Representatives, State of Hawaii

Re: **House Bill 2191 Relating to Appellate Jurisdiction,**
House Bill 2194 Relating to the Judiciary
Testifying in STRONG OPPOSITION

Dear Chair Nishimoto, Vice Chair San Buenaventura, and members of the Judiciary Committee:

On behalf of our colleagues in the Hawaii State Bar Association's Appellate Section,[1] we write in **STRONG OPPOSITION** to both **House Bill 2191** (relating to appellate jurisdiction) and **House Bill 2194** (relating to the Judiciary).

I. HB 2191—Direct Appeal to the Supreme Court; Advisory Opinions

A. Direct Appeal to Supreme Court

By reversing the last twelve years of progress and returning the appellate process to the way it was prior to the well-received and useful changes adopted by the Legislature in 2006, House Bill 2191 would make our appellate courts much less efficient and timely by making the Supreme Court of Hawaii the first stop in Hawaii's appellate process, not the last.

HB 2191 would amend the "appellate jurisdiction of the supreme court and the intermediate appellate court to conditions as they existed prior to July 1, 2006, [and require] that most appeals be filed with the supreme court instead of the intermediate appellate court." As lawyers who practice in the appellate courts of Hawaii, we believe HB 2191 represents a step backwards that will not be helpful to the goal of prompt and fair administration of justice, and in fact will only make the appellate process more confusing and costly.

The measure would deprive the Intermediate Court of Appeals (ICA) of Hawaii of its primary jurisdiction to consider appeals from District and Circuit courts and certain agencies in the first instance, and shift that burden to the Hawaii Supreme Court. Our experience informs us that the current system—in which most cases are first appealed to the ICA as of right, and then considered by the Supreme Court on a discretionary basis by way of an application for certiorari—is the most efficient and least costly process to consider and dispose of appeals.

[1] The views and opinions expressed in this testimony are those of the HSBA's Section on Appellate Law. The HSBA Board has not reviewed or approved of the substance of the testimony submitted.

It is also the process that most likely results in the orderly development of the common law by permitting legal arguments to be analyzed and developed by the judges of the ICA and the parties' lawyers prior to the Supreme Court being presented with the case. The existing process efficiently winnows cases and arguments, and while not perfect, is certainly better and less obtuse than the pre-2006 process in which appeals would go directly to the Supreme Court from District and Circuit courts. Under the old system, the Supreme Court was required to undertake the inefficient, time-consuming process of reviewing each appeal to determine whether the Supreme Court would retain that appeal or assign it to the ICA for decision. Moreover, in cases decided by the ICA upon assignment, the losing party could still seek further review by the Supreme Court, giving those cases the opportunity for an extra level of appeal versus those retained by the Supreme Court in the first instance. Under the current system, which mirrors those of almost every other state as well as the federal court system, all appeals are subject to review by the ICA, and those warranting further discretionary review will still be heard by the Supreme Court. Moreover, the current system also already permits parties to apply to transfer cases pending in the ICA to the Supreme Court, so that the Supreme Court may decide those cases without waiting for a decision by the ICA.

In our view, the system as it is now structured works well with the ICA disposing of most of the cases on appeal, with the Supreme Court considering on secondary appellate review those cases which, in the court's discretion, are of statewide interest or public importance, or where a decision is needed to correct outdated or conflicting case law. Prior to the 2006 amendments, Hawaii's appellate system was among the few in the nation where jurisdictions with an intermediate court of appeals was not the first stop in the appellate process, and this process originated in a time when the caseload of the appellate courts was significantly lower than it is today.

Statistically, most appeals to the ICA involve family law and criminal matters. If these cases were required to be considered by the Supreme Court in the first instance, this would simply shift any delays from one court to another. If what is motivating HB 2191 is a concern about appeals taking a long time to be resolved, returning to the pre-2006 process will only make any delay worse by shifting the burden from the ICA which is able to sit in three-judge panels in most appeals, to the Supreme Court, which sits as an entire court (en banc) in practically every case.

As a whole, it appears that the primary goal of HB 2191 is to resurrect the outdated and inefficient process that existed prior to 2006, and we do not recommend that this committee pursue such a course of action. Our experience is that the appellate process is inherently more speedy under the current system.

B. Advisory Opinions

Section 51 of HB 2191 would also amend Haw. Rev. Stat. § 602-5 to grant the Supreme Court jurisdiction to issue advisory opinions. We oppose this amendment.

Currently, Hawaii's courts—including the Supreme Court of Hawaii—do not have the jurisdiction to consider a legal issue outside of the context of an actual controversy between the parties, and seek to avoid doing so, even though our courts are not bound by the Article III justiciability requirements which govern federal courts. *See Corboy v. Louie,* 128 Haw. 89, 103-

04, 283 P.3d 695, 709-10 (2011). Although not subject to this formal limitation, the jurisdiction of Hawaii courts is generally limited to "actual controversies." *Wong v. Board of Regents*, 62 Haw. 391, 394-95; 616 P.2d 201, 204 (1980); *see also State v. Hoang*, 93 Haw. 333, 336, 3 P.3d 499, 502 (2000). The jurisdiction of the courts is limited by whether the plaintiff has alleged "injury in fact" by the defendant. *Hanabusa v. Lingle*, 119 Haw. 341, 347, 198 P.3d 604, 610 (2008).

We believe this is an appropriate limitation on the power of courts, and the ability to institute a case in Hawaii's courts—including the Supreme Court—should continue to be a prudential doctrine of judicial self-restraint grounded in separation of powers, designed to insulate the courts from becoming entangled in politics. *See Kapuwai v. City & Cnty. of Honolulu*, 121 Haw. 33, 41, 211 P.3d 750, 758 (2009). The limited circumstances in which the courts are granted jurisdiction to consider legal issues without a present "case and controversy" should not be expanded. *See, e.g.*, Haw. Rev. Stat. § 37D-10.

We strongly urge your Committee and the House of Representatives to decline to adopt HB 2191.

II. HB 2194—Certified Questions to the Supreme Court from the District, Circuit, and Intermediate Appellate Courts

Similarly, HB 2194 will not help resolve cases more quickly or efficiently. Instead, it will make the process more confusing and time-consuming. That measure provides "that a court of inferior jurisdiction may certify to the Hawaii Supreme Court a question or proposition of law on which the court of inferior jurisdiction seeks instruction for the proper decision of a remanded case," and "[r]equires the Supreme Court to answer the question within 15 calendar days."

We believe that Hawaii's District, Circuit, and ICA judges are fully capable of determining what the applicable law is, and do not need instruction about how to process a remanded case, beyond the current process which already allows for interlocutory review in appropriate cases. Currently, the trial courts have the power to allow the parties to seek appellate review prior to a final judgment, either through the interlocutory appeal process, or by certifying that an issue has been resolved for or against a party and there is no reason to delay entry of final judgment. Moreover, the parties to an appeal in the ICA may seek transfer of the case to the Supreme Court if they believe that the law is not certain and that immediate resolution by the Supreme Court is necessary. Thus, the current system already gives lower courts and litigants the ability to ask for the Supreme Court's immediate instruction and guidance, and we believe there is no need for the amendment which HB 2194 would implement.

We strongly urge your Committee and the House of Representatives to decline to adopt HB 2194.

Thank you for the opportunity to provide testimony on House Bills 2191 and 2194.

Very truly yours,

Christopher J.I. Leong
Chair, Appellate Section

Ewan C. Rayner
Vice-Chair, Appellate Section

Robert T. Nakatsuji
Treasurer, Appellate Section

Benjamin E. Lowenthal
Secretary, Appellate Section

Rebecca A. Copeland
Appellate Section Liaison to the Hawaii Appellate Pro Bono Project

Robert H. Thomas
Advisor to the Appellate Section Board