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Henry H. Shigekane

May 3, 1929 – May 4, 2019

When Henry Hideo Shigekane passed away in Honolulu on May 4, 2019, Hawaii lost a Renaissance man.

With C. Frank Damon, Jr., Henry founded Damon & Shigekane, and it was the first Hawaii law firm that had principals of different ethnicities. This may seem common today, but in 1963 it was unheard of. The firm soon became Damon, Shigekane, Key & Char, and our future was set in motion.

Ask anyone who knew him, and they'll tell you Henry was one of the smartest people they ever met—a brilliant lawyer—even if he often soft-pedaled his intelligence. He was an extraordinarily creative problem solver, and most solutions were so simple you wondered why you hadn't thought of it. He wrote splendidly, but was a man of few words. He spoke in this "on air" perfect voice—he had taught himself to sound like announcers on the radio and practiced in the back yard to downplay the pidgin he grew up speaking.

Henry's parents were both immigrants from Japan. His father, Shigezo Shigekane, came to Hawaii to work in the sugar cane fields on the Big Island of Hawaii. His mother, Fuji Akao, traveled to the Big Island to join her parents, her father also working in the cane fields.

Eventually, Henry's father left to join an importing firm in Hilo, and it was there that he settled with his wife to raise a family of nine children, of which Henry was the sixth. From this humble beginning, Henry made his way to Yale, where he met Frank Damon. He then went to Harvard Law School. At this distance, that seems outstanding. In reality, it was a spell binding achievement. People who could help a young man from Hilo get to Yale and then to Harvard recognized this was someone who could make a difference.

Continued on page 2

Continued from cover

Returning to Hawaii, after several years of government service, he went into private practice with Morio Omori, Matsuo Takabuki, and Dan Inouye, then a Congressman. His association with that firm was cut short when Wallace Fujiyama asked Henry to help him, because his partner, Walter Chuck, had become ill. It was there that Henry was exposed to a variety of private law practice cases. Chuck recovered and returned; the law group was now three and doing well. It was the early 60s, and the civil rights movement was shaking the entire nation. While there were many people of Asian ethnicities living in Hawaii, there were sharp divides between them and the haole businesspeople.

Nevertheless, a couple of men developed a dream. Frank proposed that he and Henry form a law firm.

Henry had never considered this - they were both lawyers; however, they came from vastly different backgrounds and both attending Yale hadn't ironed out those differences. Henry said "yes." He later reflected on what an adventurous person Frank was to turn his back on the "big firms" and strike out with him.

They prospered; the firm grew. Henry was the consummate business lawyer, an innovative problem solver that found ways for his clients to succeed. He always found the most expeditious way to approach an issue, which is exactly what clients want. Denis Leong recalls that "Henry was the impulsive, no nonsense, slash-and-burn and move-on type, quick as a samurai and a devastating opponent in the courtroom or at a Public Utilities Commission or other administrative contested hearing." Denis remembers that "Henry was the consummate attorney/entrepreneur, advising and working with development clients as their attorney and, in some cases, as their business partner in creating the Honolulu as we see it today, especially the Hawaii Kai and Waikiki areas.

When Henry retired from practicing law with the Firm in 1978, he went to work with his development partners, Chris Hemmeter and Diane Plotts. Together they built many hotels and resorts. One of Henry's most famous stories was "selling" what became the Hyatt Regency Waikiki. He, Diane and Chris took the model for the twin tower hotel all over the country - it barely fit in most elevators. Finally, the fishing paid off, and there were other development projects after that.

Eventually, Henry wanted more time to explore beyond the practice of law and resort development. He invested in learning—he simply couldn't get enough of language and books, and he devoted much of his time to more aesthetic endeavors, such as reading and learning languages. For much of his later life he was often cloistered with his stacks of books. Henry spent six months in Japan, learning Japanese, and then a couple years in France at the Sorbonne learning French.

And he was not just well read, but he was also "well listened." He was keenly aware of how tough others had it, and he mentored with glee, bucking traditions and established rules (like the unwritten rules of ethnic mixing) with disarmingly frank assessments, dismissing those he left behind as "fools who don't get it." By doing so, Henry remains a part of what our firm is today. We are all here because the firm's values, quality, character, and integrity—which we pursue a profession often fraught with the potential for misstep—are different, and a reflection of Henry.

As we say a final aloha to our friend, mentor, and colleague, we will also keep his legacy fresh with the words of those who knew him.

"Having a friend like Henry Shigekane meant more than I can say."

"Henry, who appeared to be low key and relaxed with his pipe in one hand and billowing smoke rising, was really a lawyer thinking all of the time and a genius in action."

Making an Impact:

Christine Kubota Honored by JCCH

A forerunner of ethnic and cultural diversity in the legal profession, Damon Key brought on a young and highly motivated attorney who would one day be recognized as a leader in the Japanese business community. Christine Kubota joined the firm in 1988 and set out to level the playing field for her Japanese-speaking clients who were vulnerable to the American legal system due to language and cultural barriers. In the decades that followed, she did just that and so much more.

Christine, a successful attorney and Damon Key Director, has shared her expertise and passion broadly to benefit the community over the years through participation in wide-ranging nonprofit organizations. In June, the Japanese Cultural Center of Hawaii (JCCH) honored Christine for promoting Hawaii Japan relations. She was recognized at the ***Sharing the Spirit of Aloha*** annual gala held in Waikiki. Other outstanding leaders honored at the event included Coach Gerald Oda and the 2018 Honolulu Little League World Series Champions, Lenn Sakata, Alan Oshima, Chef Alan Wong and Carole Hayashino.

Born and reared in Japan, Christine initially built her legal career addressing the needs of Japanese clients. Today, she practices in the areas of Immigration & Naturalization, Employment, Real Estate, Business and Commercial, and Estate Planning. She serves an impressive list of local, national and international clients. She is a past director of Meritas, a worldwide affiliation of commercial law firms.

Christine's leadership in the Japanese community includes serving as past board chair of the Honolulu Japanese Chamber of Commerce, United Japanese Society of Hawaii, and co-chair of the 150th Gannenmono, first Japanese immigrants to Hawaii. She currently serves as director of the Hiroshima Kenjikai and the Honolulu Japanese Chamber Charitable Corporation. She is a current member and past chair of JCCH.

In keeping with her dedication to promote Japanese culture, Christine just wrapped up another successful year as chair of the Pan Pacific Festival. The festival, which just celebrated its 40th year, is an annual three-day cultural celebration held in Waikiki. Scheduled each year in June, it features an array of arts, crafts, food and stage performances. Its mission is to promote international friendship and understanding through the sharing of cultures.

Originally known as Matsuri in Hawaii, the festival once celebrated the Hawaii and Japanese cultures exclusively but has since evolved to broaden its capacity to include other cultures. In 1996, the event name was changed to the Pan-Pacific Festival to reflect its expanding goals. Christine is the ideal leader to have spearheaded the effort as festival chair since 2014.

We congratulate Christine for her recent accomplishments. We can't think of a more deserving individual to be honored for a lifetime of selfless contributions.

Front row, L to R: Anjelica Barker, Megumi Honami, Akiko Ching, Christine Kubota, Anna Oshiro, back row: Michael Yoshida, Matthew Evans, Denis Leong, Doug Smith, Mark Murakami

Housing Affordability – Newly Passed Bill Rewrites Zoning Codes

By Travis T. Moon

Everyone understands that housing in Hawaii is expensive. On May 21, 2019, the Honolulu City Council enacted and effected Ordinance 19-8 which directly impacts developers and property owners in apartment, apartment mixed use and business mixed use districts. Developers and property owners in these zoning districts are now incentivized to create more affordable housing because of new financial incentives, relaxed building code standards and zoning regulations provided for in Ordinance 19-8. The ordinance will be repealed five years after its effective date in May of 2024.

Relaxed Zoning Regulations, Building Code Standards and Financial Incentives

If a lot owner qualifies based on the requirements of the Ordinance, certain financial incentives, relaxed zoning regulations and building code standards are provided. Fees for the plan review and building permits are waived for the portion of affordable housing built and rented to households earning 100 percent and below the average median income. Wastewater system facility charges will be waived for "affordable rental housing units that are rented to households earning 100 percent and below of the AMI, and rented at or below the rental rate limits established by the United States Department of Housing and Urban Development for households earning 100 percent of the AMI for the applicable household size or less, pursuant to Chapter B." Certain Real Property Tax Exemptions will be provided for a 10 year period for the portion of real property used for affordable housing units that are "rented to households earning 80 percent and below of the average median income, and rented at or below the rental rate limits established by the United States Department of Housing and Urban Development for households earning 80 percent of the AMI for the applicable household size or less."

The relaxed building code standards includes a seven story height maximum (unless VA) and no requirements for elevators, unless required by Section 1007.2.1 of the building code. The relaxed zoning requirements include a minimum front yard of 10 feet, or the minimum front yard required by the underlying zoning, whichever is less, a minimum side and rear 5 feet, or the minimum side and rear yards required yards by the underlying zoning, whichever is less, a maximum building area 80% of the zoning lot, a maximum building height of 60 feet, a maximum density of 4.0 FAR, and no height setback, off-street parking, or bicycle parking requirement.

Requirements To Qualify For Development of Land For Affordable Housing

Property owners qualify for the Ordinance's relaxed zoning regulations, building code standards and financial incentives by first owning a lot not more than 20,000 square feet in an apartment, apartment mixed use or business mixed use zoning district and agree to rent at least 80 percent of the total units to households earning 100 percent and below the area median income as determined by the United States Department of Housing and Urban Development.

These property owners must meet additional requirements that (1) renters hold a minimum six month lease, (2) do not allow more than 20 percent of the total units be occupied by family members, (3) allow lessee to early terminate the lease if "unable to access the unit by reason of an accident or medical condition", (4) execute and file a declaration of restrictive covenants with the department of planning and permitting prior to the issuance of a building permit for the affordable rental housing project, and (5) file an annual certification with the director of budget and fiscal services "affirming that at least 80 percent of the total units in the affordable rental housing are affordable rental housing units and no more than 20 percent of the total units in the affordable rental housing are occupied by the property owners or individuals who are related by blood, marriage: or adoption to the property owners."

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Attention Employers: New Hawaii Supreme Court Decision on Worker's Injury Discrimination

By Loren A. Seehase

Are you an employer? Do you know what you can and cannot do if a worker is injured on the job and isn't sure of when, if ever, they might return? Can you hire a replacement? A recent decision from the Hawaii Supreme Court has clarified an employer's responsibilities in that situation. In a worker's injury discrimination case, the Court adds further restrictions on whether and when an employer can replace a worker injured on the job while they are on disability leave without violating Hawaii's Employment Practices law. Specifically, the Court held that in order for a business necessity to constitute a valid defense to a claim for work injury discrimination, an employer must demonstrate that the employee's absence caused a business impairment that could not be reasonably alleviated by means that would not result in discrimination.

In *BCI Coca-Cola Bottling v. Dept. of Labor and Industrial Relations*, Tammy Josue was employed at Coca-Cola as a supervisor, was injured while on the job, and went on disability leave. Thirteen months after her injury Josue was cleared to return to work by her doctor. While she was on disability leave Coca-Cola utilized other supervisors to cover Josue's work as well as their own, which required each supervisor to come in two full hours earlier than normal. After ten months of absence and not knowing when Josue would be able to return to work, if at all, Coca-Cola hired a replacement supervisor. Josue returned to work the day after her doctor cleared her for work, Coca-Cola did not offer Josue her job back, but instead offered her several other positions. The offered positions were either downgrades from her pre-injury position, required experience or certifications that she did not possess, or included physical requirements that she could not meet. She rejected all the offered positions. The Court determined that Coca-Cola unlawfully discriminated against Josue when it failed to offer her the same or better position upon her return, and its defense of business impairment failed because supervisors working an extra two hours a day was not sufficient evidence to prove operational impairment and it failed to provide evidence that a permanent replacement of Josue's position was the only way to rectify the operational impairment.

Hawaii Revised Statutes ("HRS") chapter 378 pertains to employment practices and identifies discriminatory practices. The statute makes it unlawful for an employer to suspend, discharge, or discriminate an employee solely on the basis that the employee suffered a work injury that arose out of, and during, the course of their employment. Because the key term is "solely" it is not a violation to suspend, discharge, or discriminate for a legitimate reason other than the employee's work injury.

The Hawaii Supreme Court determined that the term "discriminate" was added to HRS chapter 378 to close a loophole and make unlawful specific scenarios where an employer would downgrade an employee's position, reassign them to a position with lesser pay, or add other conditions or terms to the employment after an employee returns from a work related injury. An employer may assert business impairment as a legitimate reason for replacement of the employee on work-related injury leave, but it must be justifiable in light of the purpose of the statute. This statute's purpose is to protect employees who suffer work injuries by ensuring that they are restored to their pre-injury position or placed in a commensurate position when they return from their work-related injury. Therefore, in order to prevail on a business impairment defense, an employer must prove that (1) the vacancy caused business operational impairment, and (2) there was no other feasible alternative.

The Court also made a few noteworthy practical points. One, that the discrimination did not occur when it hired a replacement, but when Josue returned to work and was not offered a position that was at least equal to her pre-injury position. Two, that if Coca-Cola had offered her a position that was at least equivalent to her pre-injury position then no discrimination would have occurred. Lastly, in criticizing a Hawaii federal district court decision the Court held that an employment policy is not a legitimate reason to excuse the discriminatory action.

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What are the chances of being audited by the IRS?

By Ross Uehara-Tilton

Have you ever wondered just how many taxpayers are audited by the Internal Revenue Service each year? Or why it is so difficult to get a live IRS agent on the phone? Or how many Americans believe that it is acceptable to cheat on their taxes? Each year, the IRS releases its annual Data Book. In May 2019, the IRS released its 2018 Data Book, covering the fiscal year from October 1, 2017 to September 30, 2018.

What are the chances of being audited?

During the year, the IRS audited almost 1 million returns, including income, estate, gift, employment, and excise tax returns. Compared to the 196 million returns that were filed in the 2017 Calendar Year, this represents just over 0.5% of the total number of returns. For the same period, the IRS audited 0.6% of all individual income tax returns, and 0.9% of all C-Corporation income tax returns filed.

Certain taxpayers were more likely to be audited. For example, individual taxpayers who filed a Schedule C to report self-employment income of $100,000–$200,000 were four times more likely to be audited than other individuals (2.4% versus 0.6%). Wealthier taxpayers with income of $1 million or more were over five times more likely to be audited than other individuals (3.2% versus 0.6%). The category of individuals most likely to face an audit? Taxpayers filing international returns (3.2% versus 0.6%).

55 million taxpayers on hold for 783 years

During the year, 54,926,704 taxpayers waited on hold for an average of 7.5 minutes each before receiving telephone assistance. That works out to almost 783 years of time wasted by taxpayers on hold. The Service's 9,583 full-time representatives and 10,226 seasonal representatives handled an average of 2,773 calls each during the year.

On the other hand, 608,776,283 taxpayers visited the IRS website to seek information. The most common type of inquiry on the IRS website? 309,174,164 taxpayers used the "Where's My Refund" tool to track the status of their tax refund.

Taxpayer attitude and tax cheats

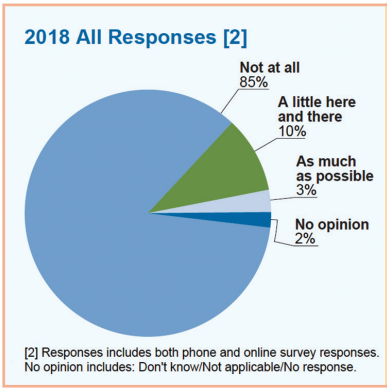
One of the most interesting sections of the Data Book is the Comprehensive Taxpayer Attitude Survey 2,008 taxpayers provided feedback in this year's survey.

The vast majority of Americans feel that it is not acceptable to cheat at all on their taxes (85%), that it is their civic duty to pay their fair share of taxes (95%), and that everyone who cheats on their taxes should be held accountable (90%). 3% of Americans feel that it is acceptable to cheat as much as possible on their taxes, 2% of Americans completely disagree that it is their civic duty to pay their fair share of taxes, and 3% completely disagree that all tax cheats should be held accountable.

The sense of civic duty to pay one's fair share of taxes increases as education level increases. 64% of high-school educated taxpayers completely agree that it is every American's civic duty to pay their fair share of taxes, compared with 73% of college-educated taxpayers.

The IRS Data Book contains a wealth of information regarding the IRS' operations and the attitudes of American taxpayers, all of which should serve to help shape federal tax policy in the coming years.

The current version of the Data Book is available in PDF format online, at www.irs.gov/pub/irs-soi/18databk.pdf.



In 2018, most taxpayers continued to agree that it is no at all acceptable to cheat on their income taxes. This attitude has remained within a four-point range since 2009.

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Insurance Companies and Climate Change

By Tred R. Eyerly

Coverage issues for climate change have been litigated sparsely since the 1990's. To a large extent, carriers have been successful in denying coverage under traditional policy language.

While not an insurance coverage case, the United States Supreme Court held in 2007 that federal courts could hear complaints against the federal government regarding climate change. The Court held that carbon dioxide was a pollutant that could be regulated by the EPA under the Clean Air Act. The Act's definition of "air pollutant" embraced all airborne compounds. Consequently, green-house gases ("GHGs") fit within the Clean Air Act's definition of "air pollutant," and the EPA had the authority to regulate the emission of such gases.

A major decision on coverage for climate change-related claims was issued by the Virginia Supreme Court in 2012, in *AES Corp. v. Steadfast Insurance Co.* The Alaskan village of Kivalina sued ExxonMobil and other oil and coal companies for releasing GHGs which contributed to global warming, which in turn melted Arctic sea ice and contributed to the erosion of the Kivalina coastline. The plaintiffs sought monetary damages under a theory of public nuisance. The federal court dismissed the case.

AES, one of the *Kivalina* defendants, sued in Virginia seeking coverage for the Kivalina suit under several CGL liability policies. The Virginia Supreme Court held that the insurer had no duty to defend because the Kivalina complaint alleged the intentional release by AES into the atmosphere of tons of carbon dioxide. If an insured knew or should have known that certain results were the natural and probable consequences of intentional acts or omissions, there was no 'occurrence' within the meaning of a CGL policy.

Another early case was *Donaldson v. Urban Land* Interests decided by the Wisconsin Supreme Court in 1997. The court addressed whether emissions of carbon dioxide fell under a CGL policy's pollution exclusion. The plaintiffs alleged the ventilation system in the insured's office building created carbon dioxide in their work area. Plaintiffs alleged various health ailments. The court concluded that the pollution exclusion did not alert a reasonable insured that coverage would be denied for harm based on human respiration. Consequently, the pollution exclusion was ambiguous because the insured could reasonably expect coverage on the facts of this case.

Therefore based upon the few decisions addressing insurance coverage under traditional policies for damage caused by climate change, coverage remains somewhat speculative.

A decade ago, UCLA professor Sean R. Hecht, chided the insurance industry for not being more active in addressing climate change. He wrote, "If insurers do not rise to the challenge of climate change, there could be a serious financial and social crisis on a global scale. Global governance institutions will have to devise other methods of managing the risks posed by climate change."

Insurance carriers need to develop new products that are properly priced if they wish to have a meaningful societal role in protecting insureds from the increasing possibility of future harm created by climate change.

For more information on this article, please call Tred at 531-8031, or email him at te@hawaiilawyer.com.

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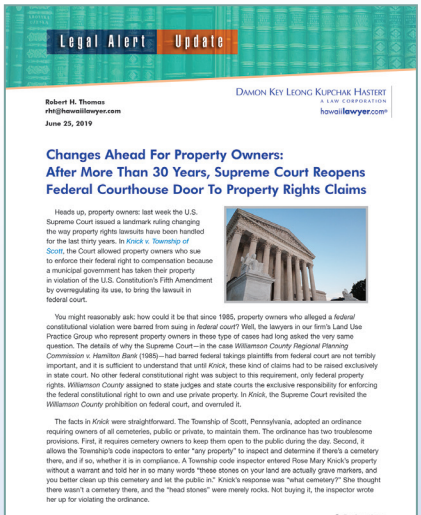
ADVERTISING MATERIAL

Attorneys in the News

To better serve our Japanese-speaking clients, our website now features Japanese capabilities. Visit http://www.hawaiilawyer.jp for information on our attorneys and the services we can provide.

Tred R. Eyerly made a presentation on Direct Physical Loss or Damage – The Developing Parameters of Coverage at the ABA's Property Insurance Conference in May in Austin, Texas.

Andrew I. Kim Damon Key alumnus and **Travis T. Moon** represented the firm at the Annual Palolo Chinese Home Golf Tournament.


Legal Alert Update

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June 25, 2019

Changes Ahead For Property Owners: After More Than 30 Years, Supreme Court Reopens Federal Courthouse Door To Property Rights Claims

Heads up, property owners: last week the U.S. Supreme Court issued a landmark ruling changing the way property rights lawsuits have been handled for the last thirty years. In *Knick v. Township of Scott*, the Court allowed property owners who sue to enforce their federal *right* to compensation because a municipal government has taken their property in violation of the U.S. Constitution's Fifth Amendment by overregulating its use, to bring the lawsuit in federal court.

You might reasonably ask: how could it be that since 1985, property owners who alleged a *federal* constitutional violation were barred from suing in *federal court*? Well, the lawyers in our firm's Land Use Practice Group who represent property owners in these type of cases had long asked the very same question. The details of why the Supreme Court—in the case *Williamson County Regional Planning Commission v. Hamilton Bank* (1985)—had barred federal takings plaintiffs from federal court are not terribly important, and it is sufficient to understand that until *Knick*, these kind of claims had to be raised exclusively in state court. No other federal constitutional right was subject to this requirement, only federal property rights. *Williamson County* assigned to state judges and state courts the exclusive responsibility for enforcing the federal constitutional right to own and use private property. In *Knick*, the Supreme Court revisited the *Williamson County* prohibition on federal court, and overruled it.

The facts in *Knick* were straightforward. The Township of Scott, Pennsylvania, adopted an ordinance requiring owners of all cemeteries, public or private, to maintain them. The ordinance has two troublesome provisions. First, it requires cemetery owners to keep them open to the public during the day. Second, it allows the Township's code inspectors to enter "any property" to inspect and determine if there's a cemetery there, and if so, whether it is in compliance. A Township code inspector entered Rose Mary Knick's property without a warrant and told her in so many words "these stones on your land are actually grave markers, and you better clean up this cemetery and let the public in." Knick's response was "what cemetery?" She thought there wasn't a cemetery there, and the "head stones" were merely rocks. Not buying it, the inspector wrote her up for violating the ordinance.

The U.S. Supreme Court recently issued an important property case. Read our analysis of why this decision is important for Hawaii property owners. Download it here: http://www.hawaiilawyer.com/publications/damon-key-legal-alert-update-2019