HAWAII STATE BAR ASSOCIATION

COMMITTEE ON JUDICIAL ADMINISTRATION

REPORT OF THE
2017 BENCH-BAR CONFERENCE

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REPORT OF THE HSBA COMMITTEE ON JUDICIAL ADMINISTRATION

on the

2017 BENCH-BAR CONFERENCE

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Contents

ACKNOWLEDGMENTS

The HSBA Committee on Judicial Administration was established for the purpose of maintaining a close relationship with the Judiciary on matters of mutual concern to the bench and bar. Over the years, the Bench-Bar Conferences, Criminal Law Forums, and Civil Law Forums have been positive because of the participation of Hawai‘i Supreme Court Chief Justice Mark Recktenwald, of other members and staff of the Judiciary, and of the bar. The committee is appreciative of the commitment of Chief Justice Recktenwald and the Judiciary in making these efforts a priority.

INTRODUCTION

The political commentator and columnist (and sometimes baseball authority) George F. Will said that football combines "the two worst features of American life": violence and committee meetings – the former interrupted by the latter.

If the committee, however, is enlarged by invitations to others with a common interest – and provided that the enlarged group does not meet too often – the meeting becomes a "conference." Professional conferences, according to theory, provide ideas that result in the improvement of the profession.

The Judicial Administration Committee of the Hawaii State Bar Association[1] is charged with, among other things, the responsibility of making recommendations for the "improvement of the judiciary and the administration of justice." To fulfill this responsibility, the Committee convenes a conference, usually every two years, of lawyers invited by the Committee and judges and judiciary personnel designated by the Chief Justice of the Hawai'i Supreme Court, to consider selected matters of current interest to the bench and the bar and, where appropriate, to make recommendations for consideration by the bar association and the judiciary that the conference participants believe will improve the administration of justice in Hawai'i courts.

The 2017 Bench-Bar Conference was held on October 18, 2017. The participants were members of the bench (and other judiciary personnel) and members of the bar involved in civil and criminal matters in the circuit and district courts in each

[1] The HSBA Committee on Judicial Administration in 2017 comprised the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J. T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack; Second Circuit Court Judge Joel E. August (ret.); Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley M. Kawamura; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G. B. Valenciano; Family Court District Judge Brian Costa; Hayley Y. C. Cheng; Dennis W. Chong Kee; Kahikino Noa Dettweiler-Pavia; Vladimir Devens; Kirsha Durante; Don J. Gelber; William A. Harrison; Edward C. Kemper; Carol K. Muranaka; Kyleigh F. K. Nakasone; Lester D. Oshiro; and Kevin K. Takata.

of the state's judicial circuits. In all, there were 155 participants: 125 lawyers and 30 judges and other court personnel. The Conference was divided into six sections or groups: two groups considered civil proceedings in the circuit courts and submitted a combined report; two groups considered criminal proceedings in the circuit courts and also submitted a combined report; and two district court groups, one of which considered civil proceedings and the other of which considered criminal proceedings, each of which submitted separate reports. The section reports appear below.

In addition to specific topics related to civil or criminal proceedings, a topic of common interest and importance – uniformity among the circuits – was considered by all sections at the Conference.

This introduction briefly describes the views expressed by the Conference participants on the common topic and certain of the specific topics addressed by the sections at the Conference. The reports below collectively constitute the report of the Conference.

A. Uniformity Among the Circuits

The great majority of Conference participants – both those involved in civil proceedings and those involved in criminal proceedings – agreed that the manner in which the court business is conducted can be improved if variations among (and within) the circuits are reduced and if requirements of individual judges are well-publicized. There was no consensus, however, that greater uniformity – to the extent appropriate – should be enforced through the rule-making process.

1. Civil Cases

It is often said that Hawai‘i is an "island state." This is something of a misnomer. Hawai‘i is a state of islands: eight major islands (one of which is no longer inhabited after being used for target practice by the military). The venue of Hawaii's courts of "general jurisdiction" (the circuit courts) is established along county lines. Within each circuit, there are district courts, the jurisdiction and venue of which are more limited. The living and commercial patterns of people and business, and the professional practices of lawyers, mean that litigants and lawyers will often have cases in circuits other than those where they live, engage in business, or maintain offices. The cost in

time and air travel between the circuits (and sometimes within a circuit) add a layer of additional expense that can be largely mitigated by use of telephonic appearances and other forms of telecommunication.

The circuit court civil groups, by a majority, favored the allowance of telephonic appearances – especially (*but not exclusively*) in uncontested matters. The majority agreed that telephonic appearances are efficient and that, in many cases, the cost savings (in fees and travel costs) outweigh any benefit of having counsel appear in person and that differences between circuits and among judges as to whether telephonic appearances will be permitted and the required manner for requesting leave to appear by telephone (whether in writing or by a telephone call to the court's staff) should be reduced or eliminated.

The circuit court civil groups also addressed the practice of various courts in setting trial dates and pretrial deadlines. The groups reported that the consensus of most participants, both attorneys and judges, is that the best method of setting trial dates is to make a realistic estimation for *each* case of the time needed for trial preparation for that case, and then set the trial date and pretrial deadlines accordingly. While acknowledging that "each case is different" and a "need for flexibility," the participants noted that there is a lack of uniformity as to how certain pretrial deadlines will be interpreted and enforced, and it was the consensus of the participants that the court, in each case, should make known, early in the case, any "bright-line expectations" or "standard policies" that the court has concerning the conduct of the case.

2. Criminal Cases

A consensus of the circuit court criminal law participants reported that "inconsistency in bail among the courts and throughout the circuit is and has been an issue in this jurisdiction for some time," and that "[t]his issue is especially concerning [when considering] the amount of bail charged for a first offense." Moreover, the consensus of the participants in the section was that "there is an inconsistency among courts, and especially among the different circuits, on what materials or information the court considered when setting bail." The source of this inconsistency appears to be

(or be aggravated by) the different times the courts in different circuits receive pretrial bail reports.

The lack of relative consistency (a standard far less than uniformity) means that some defendants (and their families), more than others, suffer from the delayed determination of whether the defendant can be released on bail. The criminal law sections reported that, on Oahu (which has most of the state's population), "hearings to consider bail are [sometimes] set two to six weeks after the arrest, and the defendants are forced to wait in jail until that time. This causes some defendants to lose their jobs because they cannot report to work and takes providers [of support] away from their families."

The district court criminal law group did not report on inconsistencies regarding setting bail. It did, however, note the differences between the circuits concerning the likelihood of a prosecution for contempt of court when there is a lack of a valid reason for the defendant's failure to appear in court or when a defendant has failed to comply with the terms and conditions of a sentence. Nonetheless, the district court criminal law group found that "uniformity in practice would be challenging given the varying population sizes, case load[s], and resources of the different circuits" and that "[d]istinct and differing practices between the circuits" was neither a "priority" nor a "problem" as long as the practices "were made clear to the parties."

B. Bail Reform

Beyond the problems raised by a lack of uniformity in the manner the various circuits address bail proceedings, the larger – and more vexing – question with which the court system is confronted is deciding how to treat an accused person before trial. A defendant is presumed innocent but a grand jury or a judge has determined that there is "probable cause" to believe that the defendant has committed the crime of which he or she is accused. The current system provides that the court may release the defendant pending trial if doing so will not present a danger to others and there is reasonable assurance that the defendant will appear for trial and other court proceedings. In order to increase the likelihood that the defendant will restrain his or

her behavior while awaiting trial, and will appear as ordered by the court, courts generally require that the defendant (or someone on the defendant's behalf) post bail in the form of money or other property. The initial determination of the amount of bail is generally based on the class of the crime, not the circumstances of the defendant, and adjustments in the amount of bail or the conditions of release must await a bail report and a hearing. In the meantime, the defendant remains in jail.

Any bail system that makes decisions primarily based on the defendant's ability to post cash or property in order to get out of jail favors the rich, is biased against the poor, and is inherently unfair. The current system has been widely criticized and there are efforts in several states to reform the system for pretrial release.

In 2017, the Hawai‘i State Legislature passed House Concurrent Resolution 134 (2017) requesting that the Judiciary, through the Chief Justice, establish a task force to examine and make recommendations regarding criminal pretrial practices and procedures. The task force has been established and its work is underway.

The Conference participants in the criminal law groups recommended that the task force review the federal court system, and some suggested that it be used as a model. In this regard, the participants noted that the federal courts set a detention hearing within three days of the initial hearing and that federal courts frequently permit so-called "signature bonds." The district court criminal law group reported that the District of Columbia's new bail system has eliminated monetary bail and, as a result, found that the imposition of monetary bail did not increase an individual's likelihood of appearing at court. Under the District's new bail system, "approximately 90% of pretrial detainees are released."

Several criminal law participants argued that the system of setting bail and the terms of pretrial release should be "more transparent" (meaning that the "parties and attorneys should know what factors the court considers when determining bail amounts" and other conditions of release); that the defendant should have "an [early] opportunity to present evidence for the judge's consideration" respecting bail and other conditions of release; and that the task force should "suggest rules that implement a

uniform and fair bail report procedure" that provides for the prompt preparation and early release of bail reports in all courts of all circuits.

C. Motions to Compel Discovery (The End of "Meet"; Just "Confer")

Part V of the Hawai'i Rules of Civil Procedure provides for "Depositions and Discovery" – an array of methods or tools by which each party in a lawsuit can compel the other side to divulge, in advance of trial, information concerning that party's case. A party can depose the opposing party and its potential witnesses; require the opposing party to provide written answers under oath to submitted questions; require the opposing party to produce things (and sometimes people) for examination; and request the opposing party to admit facts (or pay the cost of having those facts proven at trial). The theory is that the process of discovery will prevent each party from hiding relevant information and evidence, will allow each side to prepare for trial, will (consequently) promote the likelihood of settlements, and will (if settlement does not occur) improve the quality and speed of trials.

Whether or not the theory behind discovery is correct, the entire area is fertile ground for disputes. Motions to compel discovery are the bane of almost all trial judges. Although litigants may view a discovery dispute as important and pivotal to the outcome of the case, courts often view it as petty quibbling between lawyers and believe that such disputes occupy a disproportionate amount of the court's time.

Rule 37(a) of the Hawai'i Rules of Civil Procedure includes the specific requirement that a motion for an order compelling a discovery response by an opposing person or party "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to secure the information or material without court action." For years, lawyers and judges have wrestled with the question of whether lawyers must meet in person to satisfy the requirement that they "confer in good faith" – or whether a telephone conference will do.

The source of the uncertainty probably lies in Rule 12 of the Rules of the Circuit Courts. Rule 12 provides that no case shall be placed on the "Ready Calendar" for

trial unless a pretrial statement has been filed and served. Among the many requirements concerning a pretrial statement is in Rule 12(b)(6), which requires a statement that each party or its lead counsel has "conferred in person with each opposing party," or its lead counsel, "in a good faith effort to limit *all disputed issues*, including discovery." (Emphasis added.) The rule goes on to state: "A face-to-face meeting is required under these rules and shall not be satisfied by a telephonic conference or written correspondence."

HRCP Rule 37(a) requires that the movant confer or attempt to confer with the opposing party to see if the discovery the movant wants can be obtained without court action. It says nothing about the method of conferring and it does not appear to require a face-to-face meeting, but the question has persisted: Does the face-to-face requirement of RCC 12(b)(6), related to pretrial statements on "all disputed issues," apply to a HRCP Rule 37(a) motion to compel compliance with a then-outstanding discovery request?

It appears that a consensus in favor of simplicity has emerged. Although many participants in the civil law groups acknowledged that "face-to-face communication is an effective way to settle discovery disputes, a majority of the participants felt that telephonic communication and [other forms of] electronic communication should be permissible as well." Of greater significance, the "[j]udges in the group agreed that they would consider an exchange of positions, supported with legal arguments, sufficient to comply with Rule 37(a), even if counsel did not "look each other in the eye."

D. Additional Matters Considered by the Conference

The Conference also addressed additional selected topics applicable to civil and criminal practice in the circuit and district courts.

The circuit court civil group considered matters related to: the intended implementation of the Judicial Information Management System ("JIMS"); settlement conferences (and how to make them more productive); evidentiary hearings and procedural issues; streamlining discovery in civil cases (including the appointment,

powers, and duties of discovery masters); and the admission of counsel *pro hac vice* (and amended Supreme Court Rule 1.9).

The district court civil group considered matters related to: various procedural issues (including extension of time to serve complaints, verification of complaints, and revisions to the district court civil forms); settlement conferences and mediation in the district court (including the accessibility of mediators to assist in residential landlord-tenant matters and small claims cases); the assistance available to self-represented litigants in summary possession cases; whether the jurisdictional limits of the district courts should be increased; and whether district court litigants should be allowed the option of using the more simplified district court procedures.

In addition to the issues of uniformity among the circuits and matters related to the reform of the bail system, the circuit and district court criminal law groups considered matters related to: the Judiciary Electronic Filing and Service System ("JEFS") and various problems of the e-filing system; Chapter 704 of the Penal Code (which sets forth the substantive law and procedures for determining penal responsibility and fitness to proceed), including problems regarding the quality and timeliness of reports of appointed examiners; withdrawal of private defense attorneys prior to the hearing to determine the maximum time that a defendant must serve before being considered for parole; the need to expand visiting hours and visiting space at the Oahu and Hilo Community Correctional Centers; and warrants issued for persons on parole and probation who are alleged to have violated the terms of parole or probation (called "retake warrants"), including problems raised by the Interstate Compact Act.

The discussions, conclusions, and recommendations of the various Conference groups on these and other matters are set forth in the reports below.

REPORTS OF THE CIVIL AND CRIMINAL LAW GROUPS

Welcome

Justice Simeon R. Acoba (ret.) and Steven J. T. Chow, co-chairs of the Judicial Administration Committee, welcomed attendees and thanked them for their participation in the 2017 Bench-Bar Conference. Interaction between the judiciary and the bar benefits judges, lawyers, and the community as a whole by making the judicial system more efficient, equitable, and accessible. Every year, the Judicial Administration Committee receives helpful feedback from participants, which information assists the judiciary to continually re-access and improve the judicial system.

Opening Remarks

Hawai‘i Supreme Court Chief Justice Mark E. Recktenwald expressed his thanks to the Judicial Administration Committee and the participants of the Bench-Bar Conference and encouraged everyone to share their thoughts, comments, and concerns. Chief Justice Recktenwald noted that previous Bench-Bar Conferences have served as an effective way for the judiciary to hear and address the concerns of practicing attorneys and work towards improving the judicial system.

I. COMMON QUESTIONS DISCUSSED

A. Uniformity Among the Circuits

- Where and when should uniformity be required throughout the circuits?

1. Circuit Court – Civil Groups 1 and 2 Discussion

a. Telephonic Appearances for Uncontested Hearings

The majority of participants, and especially the attorneys, agreed that there should be uniformity regarding: (1) when telephonic appearances are allowed and (2) how to request them, especially when the hearing is in a different circuit. Currently, some judges allow attorneys to appear telephonically for uncontested hearings. Other

judges require counsel to appear in person. Further, if counsel wants to make a request to appear by phone, some courts require written letter requests while others allow the requests to be made by phone. This compels attorneys to guess as to what the court's preference is and to call the court's staff every time they are assigned to a different judge because each judge has a difference procedure. The majority of participants believed that telephonic appearances were more efficient and cost-effective, especially for uncontested hearings. Some participants felt that, even for contested hearings, the cost-savings on travel alone outweighed any benefit of a personal appearance by counsel to argue a motion. Reducing travel costs and fees can also help facilitate settlement and early resolution of cases. Some of the judges agreed that telephonic appearances were fine, but others raised concerns regarding technical difficulties they encounter, especially when there are multiple hearings scheduled at the same time, or back-to-back, or when multiple attorneys want to appear by phone.

The consensus of the group was that a rule change/implementation was not necessary, but uniformity as a matter of practice would be appreciated. Some participants felt that telephonic appearances should be automatically allowed for uncontested hearings, but, if this is not feasible for technical and/or other logistical reasons, then there should be some uniformity as to how a request can be made.

b. Trial Setting and Pretrial Deadlines

It was also mentioned that certain judges seem to set unrealistic trial dates, which trigger earlier deadlines. The consensus of most participants, both attorneys and judges, was that the best method of determining a trial date is by estimating the time for trial preparation and reviewing counsels' trial schedules. It does not make sense to schedule early trial dates when the attorneys and parties do not have enough time to conduct discovery and fully evaluate their cases.

Trial dates also determine pretrial deadlines. However, there is a lack of uniformity among the courts as to how certain pretrial deadlines will be interpreted and enforced and the format for pretrial orders. Some participants felt that this gives an advantage to the attorneys who are more familiar with the judge assigned to their case.

However, others in the group, emphasized the need for flexibility. Each case is different, and judges need flexibility to determine how to best apply the rules to accomplish a fair outcome for each case. Therefore, the consensus of the group was that early bright-line expectations should be made clear to all counsel. Additionally, if there are standard policies that a certain judge will adopt, it should be posted in an easily accessible forum such as the judiciary website. Some judges post this information on the judiciary website, but not all judges.

2. Circuit Court – Criminal Groups 1 and 2 Discussion

a. Bail Amounts

The consensus of the participants was that inconsistency of bail among the courts and throughout the circuit is and has been an issue in this jurisdiction for some time. This issue generally concerns the amount of bail charged for a first offense.

Generally, on Oahu, bail is arbitrarily set based on the class of the felony. Bail is normally between $20,000 - $25,000 for A felonies; $5,000-$10,000 for B felonies; $11,000 for C felonies; and between $50,000-$500,000 for grand jury warrants. Bail for tourists tends to be higher. For felony cases, the police detectives contact the judge directly and discuss bail amounts, at which time the judge will set bail based on the facts and circumstances of each case. The prosecutors are not involved. If the prosecutor is requesting “high bail,” a form is submitted to the judge that lists seven to eight factors for the court’s consideration. The Attorney General’s office also uses a similar bail form.

Several attorneys view the bail process as first being set by the police and prosecutors’ office, then rubber-stamped by judges, with no substantive input from the defendant or defense attorneys. However, the rules require that the judge, not the prosecutors, set bail.

Several attorneys raised the concern that the setting of cash bail is disproportionate and unfairly discriminates against the economically disadvantaged. The poor are held in custody simply because they are unable to afford bail, while those who can afford bail are released regardless of the danger they pose to the community

or their risk of non-appearance. The true purpose of bail is not being achieved, and a new bail procedure, or the elimination of bail altogether, should be considered.

To provide a historical perspective, a prosecuting attorney shared that the Honolulu prosecutors' office used to have bail schedules they used to recommend bail amounts until such schedules were deemed unconstitutional by the Hawaii Supreme Court. Some of the bail amounts from those schedules are still used today as the standard bail given for certain offenses. However, the prosecutors' office currently recommends amounts based on the dangerousness of the offender to the community, to assure his or her appearance at court, and other relevant factors.

b. Factors Considered in Determining Bail

The consensus of participants acknowledged that there is an inconsistency among the courts, and especially among the different circuits, on what materials or information the courts consider when setting bail. A significant discrepancy lies in the timing that courts receive pretrial bail reports. The neighbor island courts generally receive pretrial bail reports prior to the bail hearing. In Hilo, pretrial bail reports are completed on the day of the arrest. On Kauai, the pretrial bail report is ordered at the initial hearing and received within three days. On Oahu, the defendant, at times, does not receive the pretrial bail report until the day of the arraignment and therefore has little to no time to respond. As a result, hearings to consider bail are set two to six weeks after an arrest, and the defendants are forced to wait in jail until that time. This causes some defendants to lose their jobs because they cannot report to work and takes providers away from their families.

Several attorneys explained that they do not know with certainty what the courts consider when determining bail and would like to know if the courts review any material other than what the prosecutors ask the court to review. A prosecuting attorney pointed out that the only time the prosecutors have a unilateral conversation with the judge about bail is during a grand jury indictment, which is rare and is open to the public.

c. Raising Bail Issues

Several participants raised concerns about the prosecutor's office requesting a raise in bail after the same charges are refiled following a dismissal without

prejudice. Representatives from the prosecutor's office assured that this does not happen unless there is a dramatic change in the charges. Normally, bail companies will simply apply the prior bail to the refiled charges. However, representatives of the prosecutor's office acknowledged that this did happen once, and the offending prosecutor was counseled about his conduct.

d. Pretrial Bail Report

The consensus of participants acknowledged that defendants are not provided with a pretrial bail form. On Oahu, the pretrial bail form is electronically filed, and a downloadable copy is sent to the prosecutor's office. However, the defendant is not given notice of the electronic filing unless his/her attorney has been made a party to the case in the JEFS system. At arraignment, many attorneys have not yet been made parties to the specific cases in JEFS. Consequently, they are unaware that the pretrial bail reports are available and are unable to access the filed pretrial bail reports. The Attorney General's office also does not receive the pretrial bail report or notice of its electronic filing.

A pretrial bail report is important because the judge may release the defendant on supervised release when he receives the report.

District Courts on Oahu are not getting pretrial bail reports and instead they are produced to the court as confidential reports.

e. Bail Hearings

Several attorneys voiced that the setting and purpose of bail hearings are inconsistent and confusing. It is unclear when bail hearings can be set or what they can ask for at the hearing. At times, it feels as if the attorneys are asking the court for a favor when requesting lower bail and the court is going out of its way to entertain the request. Instead, there should be a set criterion on when it is appropriate to lower bail.

The timing of the bail hearings is also inconsistent among the courts and it can take days or weeks for a hearing to take place.

f. Rule 11

There is a lack of uniformity by the courts in adopting Rule 11 plea agreements. One or more divisions are indiscriminately refusing to follow Rule 11 plea agreements.

Courts have noted that they want to hear what a defendant has to say at sentencing. That is a factor that they consider, and courts are hesitant to bind themselves to a plea agreement prior to this allocution.

Both prosecution and defense raised the concern that Rule 11 plea agreements are an effective tool for resolving cases and should be available to the parties on a case-by-case basis.

g. Uniformity of Orders

The discussion began with the attorneys who practice in different circuits, expressing the desire for more uniformity among the circuits concerning criminal orders. A suggestion is to place form orders (statewide or circuit by circuit) on the Judiciary webpage, which can be readily retrieved and used by practitioners.

h. Prompt Release Orders

Another concern was coordination between the courts and the Department of Public Safety. Attorneys noted, for example, clients being held in custody longer than they should have been. In one case, the Department of Public Safety held the defendant for several days because they did not receive the filed order promptly. One judge indicated that attorneys need to file release orders timely. Once the order is filed, the order would be electronically available to everyone. There should not be any problem with the transmittal of the order, however, it appears that in some circuits, it still is a problem.

A new practice in the Third Circuit is that the prosecuting attorney and the defense attorney need to indicate in the order a specific release date for the defendant. It was noted that it does not necessarily resolve the issue if the defendant has multiple cases and if the defendant might have been held in custody by the police.

If the court orders credit for time served, it is up to the Department of Public Safety to properly compute the time. It appears that in some circuits, the

Department does it better than in other circuits. The consensus appears to be that a court release order needs to be filed immediately and thereafter transmitted and acknowledged by the Department of Public Safety.

3. District Court – Criminal Group Discussion

The consensus of the participants was that if practitioners understand and are familiar with the practices of each circuit, uniformity or consistency between circuits is not a priority. Distinct and differing practices between the circuits did not appear to be a problem if the practices were made clear to the parties. Practitioners seem to agree that uniformity in practices would be challenging given the varying population sizes, caseload, and resources of the different circuits.

There was a discussion regarding the varying practices of criminal contempt prosecutions. In general, the prosecutors on the neighbor islands regularly pursue contempt of court charges when there lacks a valid reason for the defendant's failure to appear in court. On Oahu, the contempt charges are not prosecuted due to the overwhelming caseload. The prosecutors on Oahu, however, do consider an individual's contempt arrest history when setting bail, as it is indicative whether the defendant will appear for future court dates. It was noted that on Maui, approximately fifty percent of a public defender's caseload may be criminal contempt charges, which includes contempt charges for citations or non-criminal offenses.

There was an additional discussion about bench warrants being issued for a defendant's failure to comply with the terms and conditions of a sentence. Sometimes contempt of court charges are initiated for the failure to comply. However, on Oahu, the prosecutors are concerned about charging contempt of court in this situation because it is a full misdemeanor, which entitles the defendant to demand a jury trial. There is a potential to overwhelm the courts with defendants demanding jury trials for contempt of court charges.

II. SPECIFIC QUESTIONS DISCUSSED

A. CIRCUIT COURT CIVIL GROUPS 1 AND 2

1. Update: Judicial Electronic Filing – Civil Practice (Presented by Judge Gary W. B. Chang)

Judge Chang informed the group that the projected date for implementation of the JIMS is fall, 2019. JIMS is a statewide information data system that requires a new/unique program design for each court. For example, the program designed for Supreme Court filings is different than those used in the district court traffic system and circuit court criminal system. Currently, a committee comprised of judiciary staff, meets twice a week to design the circuit court civil program. The first year of planning will involve substantial information gathering to ensure that JIMS is practical and efficient for users. The second year will involve programming, testing, and tweaking.

2. Settlement Conferences

- How can we ensure meaningful and productive settlement conferences?
- What are the judges' expectations regarding the exchange of bona fide offers?
- What type of sanctions, if any, should be imposed if a plaintiff does not make a demand or is unprepared with his/her evaluation of the case prior to the settlement conference?
- Should defendants be required to make an offer even when plaintiffs fail to provide a demand?
- Should a judge exercise more discretion to have mediators participate in settlement conferences?
- Are there any concerns or objections regarding the participation of a mediator in a settlement conference?
- Should there be stricter standards and requirements for participants in a settlement conference?

- Should participants be allowed to suggest the timing of the settlement conferences based on the status of completed discovery?

There was an acknowledgement that three general principles should guide settlement conferences: (1) meaningfulness; (2) accessibility; and (3) preparation. Meaningfulness is embodied in both tone and substance. A participant noted that a productive tone is struck when judges provide for an introduction of all parties, counsel, and contributors (such as a mediator) at the outset of the settlement process. Immediate segregation and grouping of participants tend to engender an adversarial mentality. At the compromise stage, it was noted that offering parties should make reasonable, bona fide offers. Several participants suggested that it is helpful when the court is able to ground the expectations of the parties in reality with respect to settlement amounts, particularly when counsel is remiss in doing so beforehand. Such "reality checks" are especially helpful when the court bases its insight on the factual and legal arguments of the case, rather than simply arriving at a mean number.

In terms of accessibility, the group largely felt that it is critical for all parties with the authority to settle to be present at the initiation of the settlement process. As a common element to civil actions, the presence of adjusters was specifically addressed. Most judges viewed the presence of an adjuster as a necessity, whether in person or immediately accessible over the phone. While a significant segment of the group felt that a mandatory settlement conference early in the proceedings is important to remove a false impression that a party requesting an early settlement conference has a weak case, the divergent view was that a delay allows the parties to conduct initial discovery and obtain a better understanding of where each party stands with respect to the claim or defense at issue. For many cases originating from an appeal of a CAAP award, this concern was largely satisfied due to the fact that the CAAP process fleshes out most, if not all, of the parties' claims or defenses and early settlement conferences were viewed as particularly successful. As an ancillary matter, by a clear showing of hands, there was agreement within one discussion group that public settlement conference statements are not useful and should be discontinued.

Discussion also focused on the appropriateness of including past case mediators in settlement negotiations. Judges noted that a mediator, if effective, is able to provide the court with unique historical knowledge and insight which, in turn, may help the court guide the parties toward a successful resolution. There was firm consensus that mediator participation in settlement conferences is only appropriate where all parties agree to such participation and that mediator disclosures to the court must be by the consent of all parties.

3. Motions to Compel (Hawaii Rules of Civil Procedure, Rule 37(a))

- Should counsel be required to meet in person, face-to-face, before filing a motion to compel discovery? Should counsel be allowed to use social media and/or other types of communication, e.g., Skype and FaceTime, to comply with the face-to-face requirement? Should these alternative means of communication only be allowed in certain cases, e.g., when opposing counsel are located on different islands?
- Is it imperative to meet in person, face-to-face, when contemplating the filing of a motion to compel?
- What if one counsel refuses, avoids or fails to respond to a request for a face-to-face meeting? How long must counsel wait before filing a motion to compel?

Although it was agreed by many participants that face-to-face communication is an effective way to settle discovery disputes, a majority of the participants felt that telephone communication and electronic communication, such as Skype and FaceTime, should be permissible as well. There was a consensus that most practitioners are able to resolve discovery disputes through a meaningful exchange of their positions and legal arguments. Most of the time, these communications are exchanged over the phone or through email correspondence. Judges in the group agreed that they would consider an exchange of positions, supported with legal arguments, sufficient for the “meet and confer” requirement, even if counsel did not technically/literally look each other in the eye.

It was also noted by many participants that there are cost savings to having the "meet and confer" over the phone, via Skype, or FaceTime, especially if opposing counsel is located on another island or in another state.

Further, most participants agreed that if an understanding cannot be reached, it is likely due to the personalities of the parties and/or counsel. In those rare cases, many participants noted that additional discussions and meetings, even if they are face-to-face, will not be helpful. There should be an interplay between the court rules, including the Hawai'i Rules of Civil Procedure, Hawai'i Rules of Professional Conduct, and the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers. Motions to compel often indicate either a lack of professionalism or a refusal to play by the rules.

4. Evidentiary Hearings and Procedural Issues

- Are practitioners knowledgeable of basic evidentiary standards, rules, and case law, sufficient to conduct an evidentiary hearing and/or trial?
- What can be done to minimize the waste of time and judicial resources implicated by the dismissal of an appeal for lack of final judgment and failure to comply with the requirements outlined in *Jenkins v. Cades Schutte Fleming & Wright,* 76 Haw. 115 (1994)?
- Is there a need for CLE or other educational courses or programs concerning evidentiary matters and trial practice?

There was broad agreement that opportunities for litigation skills advancement through training are welcome. Several veteran practitioners pointed out that while beneficial from an economic perspective, case resolution through early settlement, dispositive motions, and mediation results in fewer practical opportunities for both new and seasoned litigators. The group acknowledged the growth of formal trial practice training through initiatives such as the federal trial academy and pro bono limited representation programs. They also encouraged the bar and bench to develop other resources such as online programing and junior-senior counsel mentorships. There was a consensus that the bar's annual ethics training requirement be balanced or even replaced to a certain degree by a practical training requirement.

The participants noted that awareness and familiarity with applicable law, coupled with attention to detail, should be a cornerstone of legal practice, irrespective of experience. Judges emphasized that point by noting the increasing prevalence of dismissals of appeals for lack of final judgment. Given the practice in most instances of the prevailing party drafting the judgement and order, judges noted that it is incumbent upon the drafter to ensure compliance with the requirements set forth in *Jenkins v. Cades Schutte Fleming & Wright,* 76 Haw. 115 (1994).

Finally, practitioners should familiarize themselves with *State v. Joshua*, issued two days prior to the Bench-Bar Conference. Rather than dismissing a case entirely, the ICA will now be issuing a temporary remand, until the final judgment is filed in the underlying case and the record on appeal can be supplemented.

5. Streamlining Discovery in All Civil Cases

- Should circuit court judges adopt and/or utilize certain federal court rules to streamline discovery, e.g., expedited discovery resolution, and stipulations by the parties? Are there any other suggestions or advice that practitioners and judges can share to streamline discovery in general?

  Discovery Masters: Do they assist in streamlining discovery? When and under what circumstances should a discovery master be requested? What factors should be considered in appointing a discovery master (e.g. *pro se* litigant, costs, etc.)? Should there be a form order setting forth the appointment of a discovery master including the scope of the discovery masters' powers?

A suggestion was made by some participants, that if the courts require a face-to-face meeting, it may be helpful to follow Federal Rules of Civil Procedure, Rule 26(f), which requires a meeting twenty-one days prior to the trial setting conference. It requires the parties to discuss a number of topics designed to facilitate a prompt resolution of the case. It also requires the parties to discuss a discovery plan. If a dispute, or a potential dispute is identified, then counsel can inform the judge at the outset of the case during the trial setting conference. Many practitioners felt that early identification of potential disputes helps to avoid costly disputes later.

A majority of the participants agreed that discovery masters should only be retained or ordered by the courts in highly contentious cases where the value of the case is worth the cost of retaining a discovery master. In most instances, these types of cases are limited to complicated construction litigation cases. Many of the judges agreed that discovery masters are helpful and would provide time for the court to tend to other cases. It was noted that some courts will automatically appoint a discovery master after three discovery motions are filed.

Once a discovery master is appointed, the group consensus was that the courts should issue orders that clearly outline the discovery master's powers and duties. Some participants noted that the appointment of a discovery master is often welcomed by counsel who is forced to deal with an unreasonably litigious opponent. In those cases, it may be helpful for the discovery master to have certain sanctioning powers, or, the ability to issue suggestions or advisory opinions to the court regarding a party to be sanctioned and why. Another option is to give the discovery master discretion to determine which party should pay his/her fees and/or how those fees should be split. Although there was no consensus whether a standard form should be adopted by the courts, in part because the facts and players of each case are different, there was a consensus that court orders appointing discovery masters are more productive if they contain specific details, including clear procedures, set deadlines, and a list of the powers, duties, and limitations of the discovery master.

6. *Pro Hac Vice* (Amended Supreme Court Rule 1.9)

- Have the courts encountered any specific problems with the amended *pro hac vice* counsel rule 1.9?
    - Is Rule 1.9 as amended sufficient to address these problems?
    - What can local counsel do to assist the courts in addressing these problems?
- When is it appropriate to admit *pro hac vice* counsel?
- What are the expectations regarding the relationship between *pro hac vice* counsel and local counsel?

- How much work is *pro hac vice* counsel expected to do, especially during trial?
- Should the scope of *pro hac vice* counsel's representation be limited or restricted in any way?

- Should the clients' wishes to have *pro hac vice* counsel participate be weighed heavily by the trial court?
- Should there be a limit on the number of *pro hac vice* applications an attorney or firm is allowed to file?
  - Should a stricter standard for approval be set for *pro hac vice* admission the more an applicant applies?

The majority of participants favored a tight rein on the use of *pro hac vice* counsel. In the absence of bringing a unique skill set to the case, it was generally agreed that applications of such counsel be restricted. One judge confided that *pro hac vice* applications are generally denied. Two judges specifically limited approval of *pro hac vice* participation by an applicant to two instances. Others, however, shared their deference to a party-client's wishes in selecting non-Hawaii attorneys and a willingness to consider each application on its merits related to the circumstances of the case.

Debate remained open on the merits of *pro hac vice* counsel in matters where there is no local expertise. One judge noted that the practice of law is meant to be broad and flexible: the application of expertise in terms of justifying *pro hac vice* counsel should be extremely narrow. There was a consensus among counsel - and a general agreement by judges - that the bench should support the use of local over *pro hac vice* counsel, noting that passage of the bar exam is an open and accessible avenue to the practice of law in Hawai‘i.

B. CIRCUIT COURT CRIMINAL GROUPS 1 AND 2

1. JEFS and Efiling Issues

Efiling has been adopted statewide in both the District and Circuit criminal courts. There have been many concerns regarding the two systems, such as:

- The District Court phone help line or email is rarely answered.
- Email notices do not specify the particular document filed. The federal court electronic system indicates the title of the filed document. Email notices should also have a direct link to the filed document.
- Prior to JEFS, attorneys could search for cases by name. That was changed, and cases can only be searched by case number, which is much more difficult.
- Nothing in JEFS indicates whether an arrest by information or preliminary hearing has been charged by grand jury indictment. It would be helpful if JEFS tracked cases from the start and provided the history from District Court through Circuit Court.
- Appellate drop-down menus are good. The Circuit Court should add this feature.
- Some attorneys have had issues filing when there are co-defendants involved, especially where there are more than two codefendants. The attorneys for each defendant should also be listed. Under the current system, the only way to determine who the attorneys are and who they represent is to read the minutes.
- For motions to seal expunged records, it should be a non-hearing motion.
- Former attorneys who are no longer representing parties in the case are still getting notices. The clerks need to remove these users from the case once the representation has concluded.
- There are no standardized procedures for submitting and filing documents and exhibits (i.e. should filing be with main document or separately?)
- There are no standardized court procedures for submission of orders (i.e. proposed
  coversheets, proposed orders or filed orders?)
- Systems are not user friendly (i.e. federal Pacer system much better)
- With traffic infractions, one cannot efile continuance requests
- What are the other complaints and what suggestions do we have to address these complaints?

First, the District Court staff has no dedicated phone lines and no assigned staff to answer the phones. Staffing is limited, and there is a need to rotate and equalize job duties. The participants were told if you cannot get someone to assist, to leave a message, and a staff member will get back to you.

Second, although the JIMS staff utilizes email blasts if there are major changes, posting general answers to common questions on a website could be extremely helpful to users. In some circuits, users are encouraged to call for additional training; however, each circuit has unique staffing issues, so it depends on which circuit a user is in. The users are experiencing problems that are part of the residual "growing pains" of implementing a new system. The Judiciary is aware of the issues and will be trying to work with the attorneys to resolve the complaints.

Part of the problem with standardization is the necessity of maintaining flexibility with the requirements of individual judges as to how they schedule matters and how they process the work in their specific courtrooms. Each have different needs, which must be addressed. At this point, the Judiciary is looking at ways of standardizing other matters such as obtaining court and hearing dates. The Judiciary recognizes that further work is needed on this issue.

In terms of standardizing court procedures regarding orders, exhibits, and the like, it was acknowledged that there are no uniform procedures. The judges expect, nonetheless, that no matter how you file documents, exhibits, or attachments, attorneys must make sure the court is made aware of all submissions. One judge remarked that in each circuit there should be one established procedure for the submission of orders, and ideally, the bench and bar should gravitate to one established procedure on a statewide basis. The suggestion was to collaborate with the Judiciary and the bar to work on this issue together.

An attorney had a problem with filing large exhibits. It appears that external users are apparently limited to 10 MB while internal users have a larger limit. The Judiciary has been made aware of the matter and is considering ways to resolving the problem. There was an active discussion about fixes, including the possibility of adding

dropdown menu boxes and the need for standardized “check box” orders without the necessity of typing redundant information.

A JEFS representative thanked the participants for their concerns and suggestions and encouraged them to call the clerk’s office with complaints and suggestions so that they know how to make the system better.

Although the session ended with no call for consensus on the issue, it was discussed that perhaps the best course of action would be to have an active group from the bar and the Judiciary meet on these ongoing concerns, to collaboratively arrive at workable solutions.

2. Pretrial and Bail Reform Issues

The discussion leaders explained that the Legislature recently convened a HCR 134 “Task Force” to review Hawaii’s current pretrial system and will report its findings to the 2019 Legislature with their recommendations on to improve the system. The attorneys were asked what, if any, suggestions they have to offer the Task Force regarding:

- What if anything needs to be done to improve the system?
- What are the biggest issues involving the system?
- Are there any aspects of the current system that are functioning?
- What are the features of a fair and highly functioning pretrial system?
- What do you see as the biggest challenges to reform?
- How should we proceed with pretrial reform?

a. What needs to be done to improve the system?

The discussion was initiated by attorneys asking the question: “Why can’t we get a bail study and bail hearing at the initial appearance?” In Honolulu, sometimes a defendant might be in custody for four to five weeks before she/he can obtain a bail review hearing. By statute, the Intake Service Center has three days to complete a bail study. However, due to the volume of cases on Oahu, there seems to be no opportunity to raise the issue of bail at the earliest court appearances. In the federal courts, a “cash less” bail system is implemented, and defendants can be released at the initial appearance.

Attorneys asked why the Chief Justice cannot merely order the District or the A/P judge to immediately conduct bail hearings rather than waiting weeks later? One recommendation offered was to put the preliminary hearing judge on notice that he/she does have the authority to address bail issues. Further discussion highlighted the problem that judges would still need at least a mini-bail report before conducting a bail hearing. After additional dialogue, there was a consensus that the Chief Justice request that the Intake Service Center prepare a bail report within three days of incarceration and that the judges at the initial appearance or preliminary hearing be given authority to rule on bail issues.

b. Aspects of the current system that are functioning

It appears that cash bail works for the most part. One judge indicated that risk assessments are getting better, albeit the timing of such reports are still quite slow. Supervision also seems to be working well.

c. The features of a fair and highly functioning pretrial system

Elements identified as features of a fair and highly functioning pretrial system were transparency, speed, and diversion.

A majority of attorneys expressed that we need a more transparent bail system. The parties and attorneys should know what factors the court considers when determining bail amounts. Rules should be amended to give the defendant an opportunity to present evidence for the judge's consideration. As it stands today, the court's consideration is limited to evidence and arguments presented by the State.

One suggestion was to have a "pre-indictment" calendar where there would be a day where attorneys could appear and attempt to resolve issues prior to a person being indicted. This could be done even now without the necessity of having a calendar. In that case, the attorney could enter into discussions with the deputy prosecutor as soon as the case is identified.

d. The biggest challenges to reform

With respect to the issue of the biggest challenges to reform, Judge Ibarra thought that education as to how the system works is of paramount importance. It is essential that the public fully understand the constitutional requirements and the

purpose of bail. This is imperative in dealing with the realities of how the prosecutor approaches the case, as well as judges, who are concerned about how their actions may affect judicial retention. Another consideration is the "inertia" to have more people released, as well as the local culture of seeking more of a supervised release model, rather than moving to a cashless bail system. One judge opined that the bail system needs more evidence-based risk assessment.

e. How should we proceed with pretrial reform

One attorney suggested that Hawaii needs to standardize bail amounts. Courts in the First Circuit set bail amounts significantly higher than the other circuits. Several attorneys suggested that the Task Force study the actual bail amounts being issued. They will likely find that the bail amounts do not reflect the facts of the cases and there will be a disclosure and understanding of the problem.

The Task Force should also suggest rules that implement a uniform and fair bail report disclosure procedure. Parties on different islands are receiving bail reports at different periods of a proceeding. The Task Force needs to research and explain what the current bail procedure is. The current system is anecdotal, and the Task Force must find and recommend a best practice.

A few attorneys suggested that we look to the federal court system as a model for bail reform. At the initial hearing, the federal courts set a detention hearing within three days of the initial hearing. If the defendant needs more time, he or she can request it, but a hearing is nevertheless set in short order.

An attorney suggested that for misdemeanors and Class C felonies, consideration should be given to a signature bond. In federal court, the defendant will sign the bond and if he or she violates it, they will owe the federal government money. Signature bonds are used in all types of cases in the federal court.

A representative of the prosecutor's office cautioned that there are some situations where signature bonds would be effective, but some where it would not. Defendants who do not pose a danger to the community should be released to work and take care of their families.

Also, federal courts use electronic monitoring. Under this system, federal judges can weigh and monitor the defendant's performance with electronic monitoring. Further, federal pretrial officers closely monitor defendants. At the state level, bondsmen may supervise defendants on bond, but bondsmen are more interested in ensuring the defendants appear in court rather than supervising defendants' behavior.

3. Mental Health/704 Issues

Attorneys are experiencing significant problems with mental health clients transitioning to and from conditional release. There are also concerns regarding the quality of the H.R.S § 704-404 ("704") reports, as well as the proficiency of the report writers.

- What can we do to improve the transitioning process?
- How can we improve the quality of the panel reports?

a. Improving the transitioning process

One group first had to distinguish between "conditional release" and "release on conditions." If a defendant is placed on conditional release, she/he has been acquitted and thereafter released. Released on conditions is equivalent to supervised release in the mental health cases. In other words, the defendant is pending trial or a fitness review and is released on conditions.

The confusion appears when attorneys do not understand that the 72-hour hold is not for persons who have been released on conditions. If an individual fall into this category, then a motion to revoke conditions or a motion to modify conditions would be required. The language of the statute compounds this misunderstanding. Perhaps the 704 statute needs to be changed because the statute uses the term "release on conditions," which is completely different from conditional release, and this adds to the confusion for those released on conditions.

b. Improving the timing of completed reports and expanding the list of evaluators

There is a significant delay in the process because the same doctors continually ask for extensions. The court and Corrections Department is also to blame because they are short-staffed.

As a possible solution, an attorney suggested that if you are choosing medical examiners that are constantly asking for extensions, the court should just select someone else. However, another attorney pointed out that because the list is short, the options are limited.

In the First Circuit, the list of court-appointed evaluators is short. Each doctor on that list has about nine referrals, and the doctors are having a difficult time submitting their reports because of the workload.

The neighbor islands are not experiencing the same problems. Some neighbor island attorneys indicated that the practice in their jurisdiction was to have each party pick one doctor and then the court picks the third doctor. However, one neighbor island attorney still expressed that there should be more doctors in Kauai as delays are still common.

The Judiciary previously spearheaded an effort to work with the associations to conduct training and to get more doctors on the list but more needs to be done. The consensus of attorneys suggested that some type of committee should be formed consisting of prosecutors, defense attorneys, judges, sheriffs, and mental health providers to meet and discuss solutions to these issues.

c. Improving the quality of panel reports

Several attorneys also voiced concern with the quality of the 704 reports. Sometimes reports say that people are marginally fit, but the attorneys are unsure what that means. There are no protocols on how to write the reports, and it is unclear how much time they are supposed to spend with the subjects. These issues need to be addressed to improve the quality of the reports.

Another problem with the quality of the panel reports is that the panel doctors are sometimes asked to render an opinion on a defendant's fitness to proceed, while

being asked to refrain from rendering an opinion on penal responsibility. Unless ordered by the court, the report writer should be focused on what is being asked of him/her.

Additional concerns stated include that courts and Corrections personnel seem burned out because they are understaffed. Attorneys need to do their part to alleviate this by securing the necessary records to the examining doctors. The doctors are also reluctant to talk to attorneys, because they do not want to be sued.

Attorneys agree that the good reports are great, and bad reports are horrible. It was agreed that it would be helpful if there were standardization of the reports. There is no uniformity on the tests that are being used to determine fitness. Not all doctors use the same test. However, a participating attorney explained that such questions must be directed to the doctors' association. Perhaps a report template for the doctors to follow would be useful.

It was suggested that the report writers should undergo training and a retention process. Perhaps the Department of Health could implement a system to evaluate reports and report writers. A consensus indicated there was a need to: (1) review the fee schedule; (2) review doctors and establish a procedure for review; (3) promulgate rules for retention; (4) review the quality of reports; (5) institute educational programs for the evaluators; and (6) standardize report writing.

4. Private Attorney Withdrawals Prior to Minimum Hearings

There have been problems surrounding the withdrawal of private attorneys from cases too near to the time when "minimum" parole hearings are being set. This presents problems for the Public Defender's Office.

- Should there be rules adopted regarding withdrawals of attorneys after completion of sentencing?
- Should oral requests be approved at that time?

The consensus of attorneys agreed that when an attorney is <u>appointed</u>, he or she has an obligation to appear at the minimum hearing. The attorneys viewed the fact that these attorneys agreed to be listed on the court-appointed list as an implied agreement to at least take the case to the minimum hearings.

The consensus agreed that court-appointed attorneys should not withdraw unless withdrawal is based on Rule 40, a conflict of interest or because of an ineffective assistance claim. This is supported by the appointing order, which provides that court-appointed attorneys are required to take the case to conclusion. If court appointed-attorneys are not willing to take cases to the end, they should remove themselves from the list.

Additionally, attorneys often fail to inform the Parole Board that they have withdrawn, and it becomes a problem when no one shows up at hearings. When an attorney withdraws before the minimum hearing, the Office of the Public Defender does not have the necessary time to learn the case and to properly prepare. To make matters worse, court-appointed attorneys do not transmit the files to the Office of the Public Defender when they withdraw.

If the Public Defenders' Office is informed early, then this problem would not occur. Attorneys questioned why an oral motion to withdraw could not be made at time of sentencing. Some judges are fine with this procedure, others are not. Judge Ibarra stated that he will not release the attorneys until they file a motion, and the court conducts a hearing as to why the attorneys should not attend the minimum parole hearings. The consensus recommendation was for counsel to file a motion to withdraw as soon as reasonably practical and enter the order in the record confirming the withdrawal. If private attorneys withdraw too close to the minimum hearing dates, judges should deny the requests. There was no discussion as to whether a new rule was needed to establish such a practice.

5. Expansion of Visiting Hours and Visiting Space at OCCC

The discussion leaders explained that attorneys are having difficulty with client visits at the Oahu Community Correctional Center ("OCCC"). The problems with visitation has increased with short staffing, limited visitation hours, cramped space, and little privacy once the private visitation cubicles are filled.

The consensus of attorneys agreed that the way OCCC is running their systems and procedures is "horrible." The OCCC staff need to be reminded that the clients are

pre-trial detainees, not convicted criminals such as those housed at the Halawa Correctional Facility.

There is also a problem with the sheriffs at the Honolulu Circuit Court. When defense attorneys are meeting with their clients, sheriffs are in the same room, sometimes having lunch. The Circuit Court is aware of this issue and in the process of building more sheriff facilities.

Practically speaking, defense attorneys are only allowed to visit their client one or two days of the week between 8:00 a.m. and 1:00 p.m. This is difficult for the attorneys because most have hearings in the morning. The visiting times and dates need to be expanded.

The defense attorneys would like to bring their laptop computers or iPad to the facilities, because their case files sometimes consist of thousands of pages. The concerned parties should work together to find a middle ground to allow electronics into these facilities. One attorney noted that he was told he needed a memorandum written by the head of security/case manager to bring a computer with him to his visit. This requirement makes little sense and an easier way needs to be found. One attorney suggested having a computer set up in the OCCC visiting rooms for use by the attorneys, in lieu of having to get approval to bring in electronics.

Several attorneys also explained that visiting facilities at the OCCC are a problem. One attorney stated that at Hawaii Community Correctional Center there is only one room for attorneys to meet with their clients and if that room is already in use, the attorneys are forced to find alternate locations for their meetings. The corrections officers are doing their best to accommodate the attorneys, but there are not enough facilities. However, the attorneys can bring in laptops for the defendants to see recorded interviews.

Other concerns raised by the Hawaii island attorneys were that video conferencing is difficult to use and transport vans are old and breaking down.

There was a suggestion that perhaps the Department of Public Safety can make the effort to increase the availability of telephone access to clients. The problem is that the Department monitors all conversations. There used to be an arrangement allowing

attorney-client conversations through the prisoner's case manager, however, that practice has ceased. The consensus recommendation was to reinstitute committee meetings with representatives from the Judiciary, the prosecutors, defense attorneys, and the Department of Public Safety, where collaborative changes could be recommended. Previously, these committee meetings were a regular occurrence in First Circuit.

Justice Wilson informed the group that the Legislature formed a criminal justice task force with five subcommittees (Native Hawaiian, program, faith, design, education) to consider this issue. The purpose of the task force is to reform the system, and at a certain point, they will be asking the community of attorneys for feedback and suggestions. The attorneys should get involved and voice their concerns with the task force.

6. Parole and Probation Retake Warrants

The discussion leaders explained that there have been a significant number of recent cases, where probationers and parolees, (who have had their cases transferred under the Interstate Compact Act) are alleged to have violated conditions of probation/parole. Some of these alleged violations happened decades ago. After years have gone by, these individuals are then arrested and returned to Hawai'i, disrupting their lives, family, and occupations. Thus, the leaders presented the question, what can be done to identify these cases earlier? What kind of systemic changes can be brought to minimize these problematic occurrences?

Under the Compact Act, probationers are permitted to be supervised in another state. Often a violation occurs, and nothing is done for many years. Recently, the compact administrator has been trying to follow up on these old warrants even after the time for supervision has maxed out. There are anecdotes of cases over 20 years old where records have been lost when revocations and retakes have occurred. The time element has been detrimental to a defense of the motion.

One attorney explained that part of the problem is the Interstate Compact Act, which requires that once they pick up a defendant in another state, the state has no

choice but to send the defendant back to Hawaii. Also, if a warrant is entered into NCIC, Hawai‘i must pick up the defendant or there will be sanctions.

The suggestion is to be educated on the Interstate Compact Act and to challenge the retake at a hearing on the warrant.

7. Other suggestions/topics for future conferences

a. Circuit Court Scheduling

The issue of scheduling in Circuit Court was raised, where cases could possibly be staggered for hearings, custodies, changes of plea, and motions, so that all attorneys do not need report at 8:30 a.m. in the morning. Some judges consider scheduling to accommodate attorneys, but it is often difficult. Some law clerks are very adept at recognizing this problem, taking simple and short matters before longer hearings, to clear the courtroom as quickly as possible.

b. Online Court Calendars

There was an active discussion about getting individual court calendars online. Attorneys are also dependent on obtaining court minutes and hearing transcripts, which can take months. In federal bankruptcy court, the court minutes are available on the day of the hearing. Imbedded in the written minutes is the link to the audio minutes. The discussion then turned to the problem of obtaining transcripts either from the digital record or live court reporters. On Oahu, the delay is extraordinary.

c. Pattern Jury Instructions

Attorneys also suggested that up- to-date pattern jury instructions should be available online. At present, the jury instructions are not current or usable.

d. Court-Appointed Billing

It was discussed that court-appointed attorneys should be able to bill for travel time. The Judiciary fiscal manual provides for mileage, however, not for travel time. For attorneys living in Kona, for example, driving to and from Hilo is a four-hour roundtrip. Perhaps attorneys should raise the issue of getting a lesser amount for travel time rather than the full charges allowed for attorneys’ fees. As another alternative, Judge Ibarra said he has granted a motion for a hearing in Kona where Hilo Community Correctional Center would bring the defendant to Kona where the

attorney could meet with the defendant without the attorney incurring the non-billable travel time to Hilo.

e. Mental Health Treatment

A future proposed topic would involve a review of the state of the mental health system's case management (Adult Mental Health Division – how they are managing clients and access to services). Concerns about how limited resources are being allocated with reference to housing, services, and programs, specifically at the mental health unit at OCCC should be examined.

f. Early Release to Drug Programs

Another problem that needs to be addressed is access to drug programs for sentenced defendants. When a defendant is sentenced to probation with early release to a residential drug treatment, the defendant will often be denied the early release because they sit in the Federal Detention Center/jail unable to get an assessment. Judge Ibarra suggested that the attorney file a motion and request the defendant appear in court so that the court can render an appropriate order.

g. Bench-Bar Conference and Forum More Often

There is a suggestion to have both the Bench-Bar Conference and the Criminal Law Forum once a year instead of alternating years.

h. Newly Assigned Judges

Another suggestion concerns new judges being assigned to a new calendar. It appears that some new judges have a hard time dealing with scheduling issues. Perhaps it is a mentoring issue for new judges. Maybe having a formal bench-bar committee in each circuit might help in raising issues and trying to solve problems which are circuit-centric.

i. Uniformity in Scheduling of the First Trial Setting

Uniformity in scheduling of the first trial setting. The first trial setting in neighbor island jurisdictions can sometimes be a lengthy amount of time after arraignment. This is difficult for prosecutors as such time is charged to the State for Rule 48 purposes.

j. Scheduling Time for Trial Proceedings

Hilo is only allotted a couple of hours a day for trial matters. As a result, a simple trial could take three weeks.

k. HOPE (Hawaii's Opportunity Probation with Enforcement) Program

A few attorneys expressed concerns about the status of HOPE probation in light of the retirement of its founder the Honorable Steven S. Alm. Additionally, some attorneys expressed concerns that status violations are causing defendant to be sent back to jail.

l. Making Wireless Internet Service Available to Attorneys in the Courthouse

With the implementation of JEFS, several attorneys expressed concerns that the various courthouses do not provide Wi-Fi service for use by the attorneys. Some expressed that one potential reason for not having Wi-Fi services was that it was security issue.

m. Lack of Uniformity for Phone Status Conferences

Several attorneys expressed that there is no uniformity regarding the use of telephonic status conferences. Many attorneys appreciated those judges who allowed phone calls for status conferences. However, some attorneys noted that there were some judges who will not allow attorneys to be appear by phone for status conferences.

n. Courtroom Managers

Some attorneys expressed that the various state courts should employ the use of courtroom managers similar to those in the federal courts.

o. Addressing Problems Immediately

Finally, Judge Ibarra suggested that before an issue becomes a problem, you can and should contact the Chief Judge or at least talk to a judge who is interested in improving services. Attorneys should not wait thinking that the Judiciary will solve the problems without input from the bar.

C. DISTRICT COURT CIVIL GROUP

1. Procedural Issues

a. Extension of Time to Serve Complaints

Background

The time to serve complaints in district court was previously reduced from one year to six months to align with the time allowed in circuit court. Because district courts were then inundated with motions to extend, the time to serve was again extended to one year. Plaintiffs may move to extend the time for an additional year. Is this time sufficient?

Discussion

Collection attorneys noted that effecting service within one year is difficult if defendants move frequently or if clients delay service of complaints while attempting to negotiate a settlement. Members of the HSBA Collection Law Section informed participants that they have been seeking statutory changes to permit service by publication on the website of the Department of Commerce and Consumer Affairs.

The district court judges related that they are flexible in granting motions for extensions of time but will review a third or fourth motion more closely. If the time for service is extended too long, defendants may be prejudiced as memories fade and records are destroyed. The judges asked that attorneys provide an explanation for the delay and the extended deadline being requested. Other options include moving to set aside a dismissal if a case is dismissed for failure to serve and the defendant is later located and seeking to amend the statutes that govern service and set the service costs that may be awarded.

Consensus

The procedures for serving complaints and seeking an extension of time for service appear to be working reasonably well. There was no consensus on extending the time generally allowed.

b. Verification of Complaints

Background

In the First Circuit, district court judges have started requiring more information to support verified complaints in collection cases involving multiple assignments. Judges now require supporting information such as evidence of the assignments, a statement of the debt, a copy of the contract, and verification by a witness with personal knowledge.

Discussion

District court judges from the First Circuit discussed their requirements for participants' information. The rules have not changed, but judges have refined their interpretation of the requirements for verified complaints. District court judges from the Third Circuit noted that they have a long-standing practice of requiring similar supporting information.

2. Civil Form Revisions/Additions

Background

The judiciary website provides access to fillable court forms and to interactive interviews that assist in completing court forms. Are these forms and interviews sufficient?

Discussion

Attorneys discussed suggestions for additional forms for debtor defendants' use, including forms for an answer and an opposition to a motion for summary judgment. There may be limited need for these forms, however, because self-represented defendants usually answer by appearing on the return day and usually do not file written oppositions to motions for summary judgment.

Judges advised attorneys to use the available court forms because they help staff route documents properly. In response to questions about uniformity, judges noted that court dates and addresses differ by circuit. The rest of the court forms, however, are uniform and are approved by the Hawaii Supreme Court for statewide use. If attorneys have problems printing the forms or have other technical issues, they may contact the judiciary's webmaster.

Consensus

The group agreed that uniform court forms are useful and that additional forms may be helpful.

3. Settlement Conferences/Mediation in District Court Cases

Background

In all circuits, litigants in district court have access to settlement judges and mediators. Are these services sufficient?

Discussion

The district court judges discussed the availability of settlement conferences and mediation in their circuits. In the First Circuit, mediators are available to assist in residential landlord-tenant and small claims cases. In most cases, mediation is limited to thirty minutes; in TRO cases, mediation is limited to one hour. Judges may suggest a settlement conference, particularly in commercial cases in which both parties are represented.

In the Second Circuit, mediators are available on civil calendar days in Wailuku and Lahaina. Judges are open to having settlement conferences, but these are seldom scheduled because of the volume of cases to be heard.

In the Third Circuit, mediators are available on civil calendar days. Mediation is required in small claims cases and is encouraged in all other civil cases. One issue with settlement conferences is that there is just one judge to preside over trials and settlement conferences in each division.

Judges and attorneys discussed two other options for mediation. First, the Mediation Center of the Pacific has started a program to provide early access to mediation in residential landlord-tenant cases. Landlords may request mediation before filing a complaint.

Second, in cases involving condominium owners or associations, the parties may qualify for mediation subsidized by the Real Estate Commission. The Real Estate Commission contributes up to $3,000 to a mediation provider. Among other things, the parties may receive an evaluation of their case by a retired judge.

Consensus

Participants agreed to continue efforts to encourage mediation and settlement.

4. Access to Justice: Self-Represented Litigants in Summary Possession Cases

Background

In each circuit, there is a self-help center. In the First Circuit, the self-help center is called the Access to Justice Room where self-represented litigants may obtain limited legal advice in three areas: debt collection cases, landlord-tenant cases, and temporary restraining orders, which do not involve family members. In the Second, Third, and Fifth Circuits, these centers are identified as Self-Help Centers where self-represented litigants may obtain legal information. Is this assistance sufficient?

Discussion

The judges discussed the need for additional advice and information. In many cases, self-represented tenants appear on the return day with no real understanding of the expedited proceeding. Many self-represented tenants are unaware of the services available to them. These tenants may be referred to the Access to Justice Room or Self-Help Center, but the tenants' options may be limited after the return day.

Attorneys discussed options for providing additional assistance. These options include greater outreach by legal service providers, which attempt to reach potential clients but are severely underfunded; focusing outreach and services on tenants in government-subsidized housing; encouraging more attorneys to volunteer in an Access to Justice Room or Self-Help Center; providing information to tenants by attaching a brochure to their lease or summons; and considering whether Legal Aid's eviction clinic could be brought back to the courthouses, either outside courtrooms or in the Access to Justice Room or Self-Help Center.

Consensus

Participants agreed that self-represented parties would benefit from more information about the services available to them.

5. Jurisdictional Limits for District Court Cases

Background

The jurisdictional limit for district court cases has been increased from $20,000, to $25,000, and then to $40,000. The HSBA has also looked into raising the requirement for jury demands, which is set by the Constitution. Should the jurisdictional limit for district court cases be increased again?

Discussion

Participants discussed a proposal to raise the jurisdictional limit for district court cases to $100,000 and give defendants the option to go to circuit court in cases worth at least $50,000.

Consensus

Participants did not reach a consensus on raising the jurisdictional limit for district court cases.

6. Allowing Parties to Opt Out of Circuit Court

Background

In general, the procedures in circuit court are more rigid, time consuming, and costly than those in district court. Should parties and judges be permitted to opt out of circuit court procedures in appropriate cases?

Discussion

The judges described this practice as tiering: dividing cases based on complexity and matching them to appropriate procedures. Some tiering is already accomplished by dividing cases between circuit and district court. Tiering may be less effective because jury demands will result in cases being heard in circuit court, even if the case is simple and the amount in controversy is small.

Attorneys asked what could be done to avoid the delay of having a case transferred to circuit court based on a jury demand and then returned to district court, many months later, based on a standard jury trial waiver. The judges discussed options including filing a motion in district court before the case file is transferred or including the jury trial waiver information in the complaint. District court judges will consider whether there is a jury trial waiver before transferring the case to circuit court.

Consensus

Participants agreed that it would be beneficial for circuit court litigants to have the option to use district court procedures.

D. DISTRICT COURT CRIMINAL GROUP

1. Pretrial and Bail Reform

The legislature has convened a HCR 134 "Task Force" to review Hawaii's current pretrial system. What suggestions would this body like to offer the Task Force regarding:

- What if anything needs to be done to improve the system?
- What are the biggest issues involving the system?
- Are there any aspects of the current system that are functioning?
- What are the features of a fair and highly functioning pretrial system?
- What do you see as the biggest challenges to reform?
- How should we proceed with pretrial reform?

The discussion began with mention of Washington D.C.'s new bail system, which has eliminated monetary bail. Washington D.C. found that the imposition of monetary bail did not increase an individual's likelihood of appearing at court and considered whether monetary bail was a potential violation of the right against cruel and unusual punishment. As a result, on-line statistics indicate approximately 90% of pre-trial detainees are released.

The discussion then addressed the current situation in Hawai‘i and revealed some inconsistency among the circuits. On Oahu, there is a three- to six-week delay between submitting a motion for supervised release and the hearing on the motion. This seems to reflect the volume of cases and the lack of resources available to assist with the bail report process. The majority of the participants agreed expediting this process should be a priority. If bail reports were prepared more quickly, then the issue of a defendant's release could be addressed at a much earlier stage in the defendant's

case. In contrast, in the second circuit, a bail report is completed, and a bail hearing can occur within two days of a defendant's arraignment and plea hearing. It was also noted that on Oahu, a defendant will never be granted a bail hearing unless one is specifically requested by way of written motion.

Additionally, on Oahu, bail reports are never prepared for defendants facing misdemeanor family court charges. The only information the court will have regarding the issue of release or bail reduction comes from the attorneys. There does not appear to be an explanation why bail reports for these defendants are not done.

As an alternative to monetary bail, there was a discussion about implementing unsecured bonds or signature bonds, meaning a defendant would agree to pay a certain amount if he/she failed to appear at court. There was a lack of consensus regarding this option. Many expressed concern that most district court defendants are indigent and would be never be able to pay if they did not appear at court. There was also concern about the enforceability of this option, and which agency would be tasked with its enforcement. It was mentioned that the reason signature bonds work well in the federal system is because federal defendants are often looking at lengthy prison sentences, in contrast to the state district court defendants who are only facing petty misdemeanor or misdemeanor offenses. The participants from the prosecutor's office opined that a signature bond was the equivalent to releasing a defendant on their own recognizance. Everyone agreed that more research into this option was needed.

There was a minor discussion on changing the method for determining whether a defendant's release may be appropriate. Other jurisdictions utilize a grid system, which produces a point score. For example, one of the factors that is considered is whether a defendant has stable housing or can find housing that will then provide he/she with an opportunity to produce a bail plan with curfew hours. More resources would need to be made available in the current system in order to explore this as an option.

It was noted that there appears to be some standardized bail practices in each circuit. For example, on Oahu, bail is first determined by the Honolulu Police Department, and then Intake Service Center may recommend a certain amount. When

determining bench warrant amounts, the Oahu judges routinely consider the minimum fine amount for the alleged offense. As a general practice, bail is often set at $50.00 for petty misdemeanor offenses and at $100.00 for a misdemeanor offense. However, for the more serious misdemeanors such as Assault on a Law Enforcement Officer in the Second Degree, bail will start at $500.00. On Kaua‘i, bail is usually $50.00 for a petty misdemeanor and $100.00 for a misdemeanor. It was also mentioned that the practice of “cash-only bail” is no longer occurring on Oahu.

There was a consensus that the imposition of monetary bail should not be used as a method to persuade defendants to plead to charges to get released. There was a consensus among the private criminal defense attorneys and the public defenders that defendants often plead to charges because they will be unable to post bail. It is common for defendants to disregard the consequences of a plea (i.e. the effect of criminal convictions on their record or the impact it could have if they are on probation) to secure their release by pleading to the charge. The defense bar opined that the imposition of bail to prevent potentially dangerous defendants from being released on their own recognizance is undermined by the fact that if the defendants plead to the charge, they are often immediately released.

The necessity of dealing with defendants who have a backlog of unresolved cases was discussed. Practically speaking, if a defendant has a long history of failing to appear at court, releasing him/her to appear at a future court date only adds to the problem. Often denying a defendant’s release and setting an expedited hearing where the defendant can negotiate a plea agreement is the only effective way of resolving the cases. It was noted that in Maui, the district court calendar is comprised mainly of DUIs and contempt of court charges, because defendants charged with other crimes are released and ordered to appear at a future court date.

Maui’s current practice with regards to bail and pre-trial release for district court offenses is to issue criminal citations to defendants rather than arrest them. It was mentioned that on Oahu, there are certain offenses where criminal citations are issued, however, the practice is much more limited than on Maui. If defendants do not appear at the court date given to them on the citation, then a bench warrant is issued. The

goal is to find an alternative for the defendant who wants to have a trial but cannot afford to post bail. The current system appears to punish defendants who want to go trial because they will stay in custody longer than if they accepted a plea deal and where they are often immediately released. The issue of chronic violators was discussed and that there are certain defendants who will continuously fail to appear for their court dates. It was mentioned that policy should not be set based on this group of people, but rather on those who will follow the guidelines.

There was some discussion about creating a homeless court and mental health court to address the underlying issues for district court defendants. The Community Courts program in the Honolulu District Court was briefly discussed, and it was mentioned that the public defenders and prosecutors have worked together to assist the defendants in that program. Overall, the Community Courts program is working well, and possible expansion could be explored.

2. JEFS and Efiling Issues

Efiling has been adopted statewide in both the District and Circuit criminal courts. There have been several concerns regarding the two systems, such as:

- No one answers the District Court phone help line or email
- There are no standardized procedures for submitting and filing documents and exhibits (i.e. should filing be with main document or separately?)
- There are no standardized court procedures for submission of orders (i.e. proposed coversheets, proposed orders or filed orders?)
- Systems are not user friendly (i.e. federal Pacer system much better)
- With traffic infractions—one cannot efile continuance requests
- What are the other complaints and what suggestions do we have to address these complaints?

The discussion on this topic mainly focused on suggestions for improving the current system.

The Oahu prosecutors requested that the courts take judicial notice of electronically filed judgments. Currently, certain documents are uploaded as TIF files as opposed to PDF files, and do not show the certification language. As a result, the prosecutors are still requesting that the court clerks send a physical certified copy of the judgment. When the request is made in court to take judicial notice of an electronically filed judgment, many judges will not. The electronic filing rules state that documents in JIMS are deemed original, so the prosecutors do not understand the court's denial of their requests. Private criminal defense attorneys do not have the on-line access to view whether a judgment is certified but will receive a copy with the discovery. The consensus of the defense bar is that the courts should clarify whether judicial notice will be taken of the electronically filed judgments.

There was consensus among the practitioners that the judges should be uniform in the application of procedures for filing motions and orders. Some of the questions that the practitioners raised were: 1) Do attorneys file a proposed motion, or put the hearing date as the scheduled trial date? 2) For orders, do attorneys file it as a proposed order, or email it to the parties? Or should they have a hard copy routed to opposing counsel, signed, and then the hard copy is routed to the judge who then files it? 3) How do the attorneys ensure that the order is sent to the correct judge? (It was mentioned that sometimes writing "Attention" and the judge's name in the notes sections is helpful).

Because of the lack of uniformity, the attorneys are often unsure of the correct or preferred procedure. The practitioners agreed that it would be ideal to have a written standardized practice in place.

The practitioners also requested that they be informed as to how the judges receive notice when a motion or memorandum is filed. Often, the attorneys will go to court, and the judge indicates that he/she is unaware of the most recent filing in the case. It was mentioned that in the neighbor island district courts, the filings are set up on a work queue. It is up to the individual judges to open the queue and review what has been filed. Perhaps this system would also work on Oahu.

There was a consensus that wireless internet access should be made available in the courtrooms. It was mentioned that there are a limited number of computers with eCourt access in certain courthouses, however, these computers are open to members of the public making it difficult for the attorneys to regularly access them.

Additional suggestions were:

1) The documents submitted by the Administrative Driver's Revocation Office should be made available through JEFS;
2) There should be a hyperlink to the actual documents in JEFS, like the federal PACER system;
3) Attorneys should be allowed to modify their own profile or organization. Currently, if an attorney transitions from one job to another, efiling is not possible until the change is made, which can take a long time;
4) Navigation between fields should be possible without having to use the mouse, i.e., it should be possible to press the return button to switch fields when inputting information. The JIMS representative was willing to have any attorney request navigation changes.

3. Mental Health/704 Issues

There was a consensus that there has been delays in completing the 704 evaluations and reports. The practitioners on the neighbor islands especially have been experiencing significant delays due to the lack of available court-appointed examiners. In the second circuit, it is not uncommon for it to take six months for an examination and report to be completed. In Kona, a defendant may stay in custody for 60 days on a petty misdemeanor pending a 704 examination. As a result, the judges will try very hard to get defendants through a change of plea colloquy to avoid prolonged periods of detention. Releasing a defendant to complete the examination while out of custody is often not a good option as he/she will fail to show up for the examination.

In the second circuit, there was a recommendation to implement a court-based psychiatrist and retain a mental health coordinator. Previously, there was a psychiatrist

in mental health court, which often alleviated the need for contested hearings. That doctor left over two years ago and has not been replaced. Additionally, the program lost its mental health coordinator over four years ago and that position has yet to filled.

4. Expansion of Hours and Visiting Space at the Correctional Facilities

Overall, the defense bar agreed that it can often be difficult to visit clients who are in custody. There are limited visiting hours and inadequate visitation areas. Specifically, at the Oahu Community Correctional Center, there is no private visiting area in Annex 2. At the Maui Community Correctional Center, a visit must be arranged a week in advance, there are no private, designated visitation areas, and visits with clients are limited to one hour. It was recognized that it is unclear what role the judiciary would be able to play in this area. However, it would be helpful if there was a designated representative at the Department of Public Safety whom attorneys could contact questions or concerns.

CONFERENCE PARTICIPANTS

THE COMMITTEE ON JUDICIAL ADMINISTRATION

Committee Co-Chairs:
Honorable Simeon R. Acoba Jr.
Associate Justice, Supreme Court of Hawaii (Ret.)
Steven J. T. Chow

Members:
Honorable Richard W. Pollack
Associate Justice, Supreme Court of Hawaii
Honorable Joel August
Judge (Ret.), Second Circuit Court
Honorable Ronald Ibarra
Judge, Third Circuit Court, Big Island Drug Court – Kona (Ret.)
Honorable Shirley Kawamura
Judge, District Court, First Circuit
Honorable Brian Costa
Judge, Family District Court, First Circuit
Honorable Catherine H. Remigio
Judge, Family Court, First Circuit
Honorable Randal G. B. Valenciano
Judge, Fifth Circuit Court
Hayley Y.C. Cheng
Dennis Chong Kee
Kahikino Noa Dettweiler
Vladimir Devens
Kirsha Durante
Don Jeffrey Gelber
William A. Harrison
Edward C. Kemper
Carol K. Muranaka
Kyleigh F. K. Nakasone
Lester D. Oshiro
Audrey L. E. Stanley
Kevin T. Takata

APPELLATE JUDGES AND ADMINISTRATION

Chief Justice Mark E. Recktenwald, Hawai'i Supreme Court
Associate Justice Michael Wilson, Hawai'i Supreme Court
Chief Judge, Craig H. Nakamura, Intermediate Court of Appeals
Associate Judge Katherine G. Leonard, Intermediate Court of Appeals
Associate Judge Lisa M. Ginoza, Intermediate Court of Appeals
Associate Judge, Derrick H. Chan, Intermediate Court of Appeals
Brandon Kimura, Deputy Administrative Director of the Courts
Elizabeth Zack, Hawai'i Supreme Court staff attorney

CIRCUIT COURT – CIVIL LAW GROUPS

Participants:

Group 1

Lead Judge: Judge Randal G.B. Valenciano
Lead Attorney: Steven J.T. Chow
Reporter: Kyleigh F.K. Nakasone

Judge James H. Ashford
Judge Jeannette H. Castagnetti
Judge Gary W.B. Chang
Judge Keith K. Hiraoka
Judge Rhonda I.L. Loo (Maui)
Judge Greg K. Nakamura (Hilo)
Nadine Y. Ando
Lisa A. Bail
Wesley H.H. Ching
J. Patrick Gallagher
Marie M. Gavigan
Gary G. Grimmer
Edmund W.K. Haitsuka (Kona)
Roy F. Hughes
Archie T. Ikehara
F. Matson Kelley (Maui)
Leslie R. Kop
Corianne W. Lau
David M. Louie
John-Anderson L. Meyer
Traci Rei G. Morita
Brenda E. Morris
Jennifer D.K. Ng
Kenneth S. Robbins
Brian W. Tilker
Lynne T.T. Toyofuku
Richard Turbin

Group 2

Lead Judge: Judge Joel E. August (ret.)
Lead Attorney: Vladimir P. Devens
Reporter: Kahikino Noa Dettweiler-Pavia

Judge Bert I. Ayabe
Judge Peter T. Cahill (Maui)
Judge Jeffrey P. Crabtree
Judge Virginia L. Crandall
Judge Dean E. Ochiai
Paul S. Aoki
Roy J. Bell
Gail Y. Cosgrove
Michael R. Cruise
Marie M. Gavigan
Susan Ichinose
Curtis C. Kim
Robin M. Kishi
Dennis A. Krueger (Kona)
Sharon V. Lovejoy
April Luria
William M. McKeon (Maui)
Melvyn M. Miyagi
Zale T. Okazaki
Stefan M. Reinke
Stephanie E.W. Thompson
Mark G. Valencia
Matthew C. Winter
Reginald K.T. Yee

CIRCUIT COURT – CRIMINAL LAW GROUP

Participants:

Group 1

Lead Judge: Judge Shirley M. Kawamura
Lead Attorney: Kirsha Durante
Reporter: Keani Alapa

Judge Melvin Fujino (Kona)
Judge Glenn Kim
Kenji Akamu
Francis Alcain (Hilo)
Susan L. Arnett
Victor Bakke
Myles Breiner
Jason R. Burks
Wendy DeWeese (Kona)
Brook Hart
Randall Hironaka
Richard Kawana
Justin Kollar (Kauai)
Chad Kumagai
Clarissa Y. Malinao
Jeffrey Ng (Hilo)
Michelle Puu
Keith Shigetomi
Carson F. Tani (Maui)
Kimberly Taniyama (Kona)
Chris Van Marter
Kori Weinberger (Kona)

Group 2

Lead Judge: Judge Ronald Ibarra
Lead Attorney: William A. Harrison
Reporters: Lester D. Oshiro, Darcie Forester

Judge Joseph E. Cardoza (Maui)
Judge Karen T. Nakasone
Judge Rom A. Trader
William C. Bagasol
Scott K. Bell
Darcia Forester
Stephen L. Frye (Kona)
Jeffrey A. Hawk
David Hayakawa
Kaunoe Jackson (Kona)
Tracy Jones (Maui)
Megan K. Kau
Andrew Kennedy (Kona)
John R. Knoebber (Kona)
Neal J. Kugiya
Jason Kwiat (Kona)
Marcus Landsberg
Howard K. K. Luke
Landon Murata
Stanton Oshiro (Hilo)
Thomas M. Otake
Richard H.S. Sing
Sean Van Demark (Kauai)
Kelden B.A. Waltjen (Hilo)

DISTRICT COURT – CIVIL LAW GROUP

Participants:

Lead Judges: Judge Hilary Benson Gangnes,
Judge Michael K. Tanigawa
Lead Attorney: Dennis W. Chong Kee
Reporters: Edward C. Kemper, Teri-Ann Nagata

Judge Harry P.N. Freitas (Kona)
Judge Adrianne N. Heely (Maui)
Judge Henry T. Nakamoto (Hilo)
Scott C. Arakaki
Russ S. Awakuni
David W. H. Chee
Renee M. Furuta
Christopher Goodwin
Arlette S. Harada
Jill Hasegawa
Kenneth K.S. Lau
Sheila P. Lippolt
Allison Mizuo-Lee
Cheryl A. Nakamura
Sheryl L. Nicholson
Allan Y. Okubo
Dan O'Meara
Dan C. Oyasato
William J. Plum
Dawn Sugihara
Yuriko J. Sugimura
Robert Triantos (Kona)
Klemen Urbanc

DISTRICT COURT – CRIMINAL LAW GROUP

Participants:

Lead Judge: Judge James S. Kawashima
Lead Attorney: Hayley Y.C. Cheng
Reporter: Audrey L. Stanley

Judge Kelsey T. Kawano (Maui)
Judge Lono J. Lee
Judge Michael K. Soong (Kauai)
William Bento
Jonathan Burge
Tiffany Chang
Gilbert Doles
Chad Enoki
Richard Gronna
Matthew Kajiura
Jeen Kwak
Rick Macapiniac (Kona)
Robert Olson
John M. Tonaki
Jerry A. Villanueva