

2012 BENCH-BAR CONFERENCE¹

The Judicial Administration Committee² of the Hawaii State Bar Association (“HSBA”) was established for the purpose of maintaining a “close relationship with the Judiciary on matters of mutual concern to the bench and bar” and to promote the “improvement of the Judiciary and [the] administration of justice.” To fulfill this purpose, the Judicial Administration Committee, in cooperation with the Judiciary, convened a conference of invited participants from the bar and selected participants from the bench (traditionally referred to as a “Bench-Bar Conference”) to discuss selected topics that the Committee deemed timely and that might result in suggestions or recommendations that would improve the administration of justice in the state courts.

The Conference was held on September 21, 2012 in Honolulu, Hawaii. The participants on behalf of the Judiciary were selected by the Chief Justice. Participants on behalf of the bar were selected by the Committee after considering the recommendations of various HSBA Sections whose members appear regularly before state courts. Extensive efforts were made to achieve a broad cross-section of attorneys who practice in various areas of civil law and criminal law; attorneys who practice predominantly before the circuit courts and those who practice before the various district courts; attorneys who represent the private sector, and those who represent various agencies of government, including the Office of the Attorney General, Office of the Public Defender, and the offices of the county prosecutors. The Chief Justice, 18 judges, and 93 attorneys attended the Conference.

The conference was divided into four separate groups, which respectively addressed civil practice in the circuit courts, criminal practice in the circuit courts, civil practice in the district courts, and criminal practice in the district courts. Each section considered proposed topics thought to be of common interest to practice in all courts, and proposed topics more particularly related to the court in which the participants presided or appeared. The discussion in each group was presided over by a “lead judge” and a “lead attorney,” and a report of the proceedings of each section was prepared by a “reporter.”

I. COMMON TOPICS

1. Court Appearances by Teleconference

The initial common topic for the conference was: Should a system be instituted whereby lawyers would be *permitted* (not required) to appear at non-evidentiary court proceedings by

¹ This Summary of the Proceedings was prepared by Don J. Gelber and Associate Justice Richard W. Pollack. Don J. Gelber received his bachelor's and law degrees from Stanford University in 1961 and 1963, respectively. He practices predominantly in the fields of corporate reorganizations, business bankruptcy, and federal litigation, including complex litigation involving securities fraud and multi-district litigation. Justice Pollack was sworn in as an Associate Justice of the Hawaii Supreme Court on August 6, 2012. Prior to his appointment, he served as a judge of the Circuit Court of the First Circuit from May 10, 2000.

² Members of the Committee are: Associate Justice Simeon R. Acoba, Co-Chair; James Kawashima, Co-Chair; Judge Joel August (ret.); Dennis Chong Kee, Steven Chow, Vladimir Devens, Don Gelber, William Harrison, Judge Ronald Ibarra, Edward Kemper, Carol K. Muranaka, Judge Karen Nakasone, Lester Oshiro, Justice Richard W. Pollack, Judge Catherine H. Remigio, Audrey Stanley, and Judge Randal G.B. Valenciano.

teleconference, unless the court for good cause requires an appearance in person?³ The topic also included the possibility of extending the procedure to video conference appearances as the technology for such conferences became economically available.

The overwhelming consensus of those participating in the conference was that telephonic appearances of counsel at non-evidentiary hearings in civil cases should be allowed. Moreover, the participants agreed that telephonic appearances need not be limited to certain types of non-evidentiary hearings. There was substantial agreement that in civil cases at the circuit court level, telephonic appearances should be allowed for hearings that involve both procedural and substantive matters, and dispositive as well as non-dispositive motions. In this regard, it was noted that the Family Court of the First Circuit allows, to some extent, evidentiary hearings by telephone and that, in the federal system, the bankruptcy court regularly conducts hearings that involve counsel appearing in person and counsel appearing by telephone, for both dispositive and non-dispositive matters.

It was generally agreed that the integrity and preservation of the record, although of primary importance, did not appear to be an insurmountable task; that control of the proceedings always rested with the court; and that the use of appropriate technology, coordination with court reporters, and court-imposed guidelines or rules could address the clarity and quality of the transcribed or recorded record. It was generally recognized that, even if the Judiciary adopts guidelines or rules permitting telephonic appearances for the convenience of counsel and parties, the allowance of such appearances would be in the nature of a privilege that could be limited, modified, or revoked as circumstances required.

A concern was expressed that the utility of telephonic appearances might be undermined if matters occurred “off the record,” either before or after the recorded telephonic hearing, such as scheduling a further hearing or a settlement conference (or, indeed, any discussion of any matter related to the case at a point where a telephonic participant is not available). There was agreement that, in any hearing involving telephonic participants, the court would have to limit the scope of the hearing to matters that had been noticed and briefed and not permit ancillary discussions in which telephonic participants are not fully able to participate.

The conferees also discussed whether telephonic participation should be limited to counsel who did not maintain an office on the island or in the locale where the court hearing was held. Although the impetus for permitting telephonic participation is most clearly seen, and most clearly justified, when counsel maintaining an office on one island is scheduled to appear at a hearing on another island, and seeks to avoid the expenditure of time and money in making an appearance in person on a matter that he or she feels can be adequately handled on the client’s behalf by a telephonic appearance, the consensus of the conference participants was that *no* geographic restriction should be placed on the right to participate by telephone in accordance with rules or guidelines otherwise generally applicable, and attorneys should be permitted to appear by telephone both at hearings on other islands and on the island where they regularly maintain an office.

Conference participants representing the criminal defense bar noted that there was a practical limitation on the ability to implement telephonic appearances at hearings in criminal cases because the attorney and the client need to communicate and both may not be in the same location. With respect to pretrial and status conferences, however, both prosecutors and defense attorneys prefer

³ The phrase “non-evidentiary court proceedings” is intended to refer to proceedings that do not involve live witnesses. The phrase is intended to include proceedings that involve documentary evidence that is admissible without live testimony, such as declarations, affidavits, and self-authenticating documents.

short, productive conferences by telephone, with the option of having an in-person conference if a particular case or circumstances so warrant. Telephonic status and pretrial conferences are greatly preferred to minimize attorney waiting-time and to enhance efficiency.

The conferees also considered whether it would be appropriate at this time to discuss future steps to implement participation in court hearings by video conference. It was generally agreed that telephonic court appearances represented a first step and that a discussion of appearances by video conference should be deferred and considered as cost-effective technology becomes available. In this regard, it was suggested that, depending on the ability of judges and court staff to move conveniently from one courtroom to another for a given hearing, at least one courtroom in each courthouse could be equipped for a hearing by video conference when cost-effective technology for doing so became available.

Finally, the conference participants considered whether a program for telephonic participation in hearings should be implemented by court rules or guidelines. A majority of the participants appeared to agree that uniform rules that would be equally applicable across the state in all circuits might be difficult to formulate and might deprive individual judges of flexibility in conducting hearings with telephonic participants, and that court-issued set of guidelines might be more appropriate.

Most participants appeared to agree that the presiding judge should always have the ability to require attendance in person if the judge concludes that telephonic appearances are inappropriate in a given case, whether because of the number of participants, the behavior of counsel, or other considerations. Assuming that court flexibility in dealing with telephonic appearances is desirable (or perhaps inevitable), the use of guidelines might be more appropriate than detailed rules, which may be thought by some to limit the court's discretion and flexibility. The conference participants who practice in criminal proceedings generally preferred state-wide standardization, including specified procedures and, if state-wide standardization could not be attained, preferred standardization of telephonic court appearances within each circuit.

2. Electronic Posting of Tentative Rulings

The conference also addressed whether courts should be permitted to post tentative rulings on a website and allow attorneys the opportunity to accept the tentative ruling and waive court appearances.

Although participants generally (but not unanimously) agreed that it is sometimes helpful for a court, at the commencement of a hearing, to indicate its inclination or tentative view, providing a posted tentative ruling prior to the hearing would impose an additional burden on the bench and would run the risk of creating the appearance that the court has pre-judged the matter. Moreover, it might appear to the losing litigant that, in addition to not prevailing on the legal issue (and perhaps the case), the litigant had been denied the litigant's "day in court." Those conference participants practicing before the district court civil bench also noted that the volume of cases, as well as the number of self-represented litigants, would make it impractical to post tentative rulings prior to a hearing in the district court.

Conference participants who appear regularly in criminal cases (in the circuit and district court) concluded that the practice of issuing tentative rulings was more pertinent to civil cases than to criminal cases, and that, as applied to criminal cases, there were substantial questions as to how the practice might work. Those participants who appeared in criminal cases in the district court were of the view that the practice would probably be inapplicable to district court criminal cases.

Although several conference participants believed that the proposed practice of posting tentative rulings on a website, and allowing litigants to accept the ruling for purposes of dispensing with the hearing (while not waiving the right to appeal from a final order or an interlocutory order that is appealable) might be appropriate in certain cases, there was no significant support for the practice as a general proposition. Many conference participants expressed the view that the proposal required further review or that it should not be adopted.

3. E-Filing

With the imminent expansion of e-filing to the circuit court, there was a consensus that a circuit court e-filing implementation task force be created which would include not only government stakeholders, but also members of the private bar. This would help to ensure that there would be more communication between the Judiciary and the private bar, more notice provided during the transition, and more training given to the private sector bar. Participants noted that during the district court e-filing implementation, the private sector bar, especially solo practitioners, frequently encountered technology-related difficulties.

Participants were informed that the Judiciary intends to establish a Judiciary “help center” to ensure that assistance with circuit court e-filing would be provided. It was recommended that the availability of e-filing assistance be well-publicized, so that all attorneys are aware of such assistance. Participants suggested that more outreach to the private sector bar be made through HSBA.

Other concerns with district court e-filing were noted regarding whether service of the document by email and personal delivery should both be required. There appeared to be lack of uniformity by the courts in this area.

The suggestion was that e-filing should be a streamlined and user-friendly system such as the one used in the federal courts.

4. Use of Smart Phones, iPads, and Other Electronic Devices in the Courtroom

Attorneys universally stated that cellular telephones, tablets (such as iPads), and laptop computers are very useful to have in court. Many noted that they had used such devices to make effective presentations to the jury and to store exhibits and documents conveniently in order to reference them as needed in court. The judges participating in the conference also recognized the benefit and value of these electronic devices and did not raise any objections to their use as long as they are used in a non-distracting manner and are not disruptive to the proceedings. Smart phones also have been of great assistance to attorneys by providing access to Westlaw and to Ho‘ohiki, for calendaring court dates, and for communicating with witnesses, interpreters and their offices.

Participants discussed the benefits and drawbacks of allowing use of such devices by attorneys only. Such a restriction would result in the perception by the public of disparate treatment, as most people who come to a courtroom will be in possession of a smart phone.

The major concern regarding the use of such devices is the potential to broadcast and provide extended coverage of events in the courtroom to the public, whether by photos or streaming video transmission. It is more difficult for courts to regulate non-attorneys, and the general public’s use of electronic devices in the courtroom may lead to mistrials.

While a judge may give a general instruction to the audience to refrain from taking photos or recording proceedings unless advance permission was received, practical concerns were raised regarding compliance with an oral court order as opposed to adoption of court rules regarding the

use of electronic devices. Participants acknowledged, however, that, with regard to using such devices in court, a self-represented party should be treated the same as an attorney.

Currently there is variation as to how the federal court and state courts allow use of electronics in the courtroom. The federal court allows use only by an attorney and only if related to a case on the docket. Otherwise, the phone is confiscated at the metal detector entry to federal court. Differences in the procedures of each of the circuits were noted.

Participants discussed the possible use of technology outside the courtroom, such as the televisions currently used at the Kaneohe courthouse. A television outside the courtroom would allow attorneys and litigants waiting outside to monitor the proceedings inside the courtroom.

The consensus among attorneys was that they would like courts to liberally permit non-disruptive use of electronic devices in the courtroom, as these devices assist attorneys in dealing with multiple court appearances and in making productive use of otherwise “dead” waiting time in court, especially on the criminal calendar, where long wait times for court hearings or in-chambers conferences are frequent. With the Judiciary’s shift towards e-filing on all levels, it was noted that the Judiciary is encouraging attorneys to adopt and incorporate technology; therefore, attorneys believe that judges should similarly be encouraged to adapt and allow technology into their courtrooms.

The general consensus was that smart phones and the like are the wave of the future. Participants agreed that a joint task force should be formed to investigate and develop a uniform rule, policy or guideline for use of electronic devices in the courtroom.

II. TOPICS PERTAINING TO PARTICULAR COURT PRACTICE

CIRCUIT COURT CIVIL PRACTICE

1. Miscellaneous Discovery Disputes

Attorneys felt that discovery disputes were generally able to be resolved as between attorneys who are familiar with the civility guidelines. Participants discussed whether courses regarding the civility guidelines should be permitted to satisfy the current MCPE ethics requirement. Most attendees did not seem to oppose such an idea.

Attendees invariably agreed that a discovery master could be very helpful to keep discovery on track when the matter is extremely complicated or contentious. The biggest drawback is that the fees can be expensive. A discovery master could be appointed by the court if the parties were not able to cooperate in discovery, with costs of the discovery master apportioned between the parties as deemed appropriate by the discovery master. Another suggestion was use of a “discovery plan” by order of the court, with failure to comply resulting in appropriate sanctions.

It was recognized that there is a distinction between the “mechanics of discovery,” such as deadlines, which a discovery master is qualified to handle, and the “scope of discovery,” such as questions involving privileges, which a judge should decide. It was suggested that perhaps judicial education regarding discovery issues would allow newer members of the bench to be more confident in their discovery decisions.

While attendees believe that discovery disputes are often resolvable between the parties without judicial intervention, it was recognized that there are some cases where discovery is complicated or extremely contentious and the assistance of a judge or discovery master is required. The preference, however, appeared to be for parties to resolve discovery disputes on their own to the extent possible and to turn to external assistance only if necessary.

2. Alternative Dispute Resolution (Mediation and Settlement Conferences)

Overall, mediation is considered highly effective when held at the right time, for the right type of case, and with the right mediator. There was much discussion as to when mediation would be most useful. There does not appear to be any consensus as to when and under what circumstances mediation should be used, ordered, or compelled.

A general rule of thumb was that mediation is most effective when conducted about 60 days prior to trial because, by that time, the parties have fully engaged in discovery and understand the evidence that will be presented in trial. It was also noted, however, that depending on the type and value of the particular case, mediation might be more effective earlier, before the parties have invested too much in the litigation process. Whether the mediator should be involved in the settlement conference is an individual preference of a judge. It was suggested that more judicial education should be provided as to when and how best to utilize a mediator in the settlement of a case.

CIRCUIT COURT CRIMINAL PRACTICE

1. Drug Court and Immigration Consequences

Non-citizens, immigrants and illegal aliens who plead guilty or no contest and are granted deferrals still face immigration consequences, as federal immigration courts do not recognize state court deferrals. Track II of Drug Court, which allows for dismissal of the underlying charge and does not result in an immigration consequence, is particularly important and relevant in these types of cases. A problem was also noted concerning the effect of the defendant's stipulation to a "factual basis" for the underlying charge required for entry into the Drug Court program and the consequences for the defendant's immigration status. Similarly, the HOPE (Hawaii's Opportunity Probation with Enforcement) program does not protect the defendant from deportation.

There were also concerns raised regarding proportional funding between the different circuits, i.e. higher population areas such as Oahu should have more slots funded.

Participants agreed on the need for more funding for the Drug Court. Participants felt that the Judiciary, especially in light of the new Justice Reinvestment Act, which expands the population of eligible offenders for Drug Court, should seek more Track II Drug Court funding. It was noted that usually only representatives of the prosecutor's and the public defender's offices testify in support of Drug Court funding at legislative hearings. There was consensus that having more testifiers from the private bar at upcoming legislative hearings would be helpful to demonstrate to legislators that a broader base of support exists for this vital Judiciary program.

2. Status Conferences on Oahu

Currently notification of status conferences is not standardized. Deputies in the public defender and prosecuting attorney offices in the First Circuit would like their staff to receive notice by e-mail in the same manner that notice is given to private attorneys.

There was broad consensus that pretrial conferences without judicial involvement are not productive. Attorneys believe that having a conference with the court is needed if pretrial conferences are to be useful and effective. Concerns were raised about long wait times before scheduled conferences actually commenced.

3. The Preparation and Use of Written Orders Granting Motions to Continue Trial

Some judges require written orders granting continuances of trial, while other judges simply rely on the court minutes of the proceedings (which may be referenced, if necessary, in order to

have the transcript prepared). On Maui, the courts use a fill-in form that can be completed quickly in open court; this form also includes the required waiver of the defendant as part of the form. The conference participants reached a broad consensus that creating a short form order, modeled after Maui's form order, would be beneficial. The participants would like a determination whether the Maui form order can be adopted or adapted for use in other circuits.

4. Criminal Circuit Court Judges in Separate Courthouses on Oahu

There was unanimous agreement that all circuit criminal courts in the First Circuit should be in the same building, rather than having one or two courtrooms in the District Court building. Participants urged consideration of a formation of a task force to revisit a previous proposal that was submitted to the prior court administration.

DISTRICT COURT CIVIL PRACTICE

1. Consideration of the High Civil Case Load in District Court

Approximately 13,000 new regular claims cases were filed last year in district court, but even with this volume, civil trials are set within two months in Honolulu. Due to the high volume and the fact that a mediator is available only one day per week, referrals for mediation in summary possession cases are delayed until the following Monday. Mediators are able to settle almost half of landlord-tenant cases.

The consensus was that the district court is handling the high volume of cases well. It was noted that the self-help centers at the district courts and the Access to Justice Room on Oahu, with volunteer lawyers providing legal advice, have been beneficial in this regard.

2. Should the \$25,000 Cap on Damage Claims Be Increased?

The difference between handling a case in district court and circuit court is substantial. It is faster and cheaper to proceed in district court. The conference participants were of the view that the ability to demand and obtain a jury trial for claims starting above the \$5,000 threshold seems out of step with the cost of providing and conducting the trial. One possible solution is to seek amendment of the state constitution to raise the threshold amount for a jury demand. Advantages and disadvantages of raising the threshold amount were considered.

There was also discussion concerning the advisability of raising the district court jurisdictional cap to the \$40,000 range. It was reported that attorneys have frequently advised clients to waive claim amounts over \$25,000 to fit within the district court jurisdictional limit. The conferees agreed that the amount of attorney fees and time required to handle a case in circuit court will be disproportionate to the amount at stake unless the potential recovery is in the \$40,000 to \$50,000 range.

There was a general consensus that consideration should be given to raising the district court jurisdictional limit to \$40,000 and amending the constitution to increase the amount required for a jury trial demand.

3. Accommodating Larger Summary Possession Cases

Many summary possession cases, especially those arising under commercial leases, involve complex issues and damage claims well in excess of \$25,000. Some have suggested that the district court's trial calendar and its discovery rules (which call for a 10-day response time) are not well-suited to accommodate these larger cases.

It can be unwieldy to navigate larger summary judgment cases through the district court, as district court judges frequently handle the possession portion of the case and there is often a jury demand for the damages portion of the case. Nonetheless, because commercial cases tend to settle, the larger summary possession cases have not caused scheduling problems. It was also noted that cases in rural courts can be transferred to Honolulu District Court if they are complex so that they may be scheduled for hearing on multiple days.

4. Elevator Issues

Malfunctioning elevators at the Honolulu District Court have caused significant disruption and, as a consequence, this matter was addressed. The work on the elevators will take several months per elevator, meaning that there will be at least one more year of not having all elevators in service. The reduction in operational elevators has created problems for attorneys and staff and led to many motions to set aside defaults.

Solutions to reduce waiting are being explored, including using the escalators and assigning more sheriffs to help in the movement of visitors into the building.

5. Consideration of Various Procedures that Might Aid in Conducting Cases in a Timely and Orderly Manner

A suggestion was made that, when a motion is filed in a summary possession case to set aside a default and the court stays the writ of possession pending resolution of the motion, the court not follow the usual practice of setting the hearing on the motion two weeks hence but, instead, expedite the case by automatically granting the motion to set aside the default and setting the case for a pretrial conference as soon as possible.

6. Procedures and Processes to Protect against the Disclosure of Confidential Personal Information

It was suggested that attorneys be reminded that district court does not have sufficient staff to redact or to seal numerous documents and that filed documents should include only the last 4 digits of social security numbers and other account numbers.⁴

DISTRICT COURT CRIMINAL PRACTICE

1. Case Management

Both the prosecution and the defense on Oahu were concerned with the number of continuances granted to the other side. On Maui, the court uses pretrial conferences to determine

⁴ Rule 9 of the Hawaii Court Records Rules, effective September 27, 2010, provides that personal information shall not be included in any accessible document filed in any state court. "Personal information" is defined under the Rules as follows:

2.19. Personal information means social security numbers, dates of birth (except for traffic citations), names of minor children, bank or investment account numbers, medical and health records, and social service reports. To the extent a social security or account number is required in an accessible document, the last 4 digits may be displayed, provided that no more than half of the social security or account digits are disclosed. To the extent a birthdate is required in an accessible document, the birth year may be displayed. Except as provided in Rule 9.1, to the extent the name of a minor is required in an accessible document, the initials of the minor may be displayed. To the extent a complete social security number, account number, birthdate, or name of a minor child is required for adjudication of a case, the complete number or birthdate shall be submitted in accordance with Rule 9.1 of these rules.

the cases that are actually proceeding to trial, so continuances are kept to a minimum. Kona also utilizes pretrial conferences, but requests for continuances still occur at trial.

Oahu participants noted problems with congested courtrooms, multiple continuances, witnesses appearing numerous times, Rule 48(b)⁵ issues, time constraints in rural courts, and use of per diem judges who sometimes appear reluctant about trial because they do not sit every day. Witnesses become frustrated because they are ordered to keep coming back with the consequences of missing work or being required to make child care arrangements.

Conference participants discussed having more judges, courtrooms, and staff as possible solutions. The possibility of the Judiciary opening another Oahu DUI court was discussed (which may require more prosecutors and public defenders). Holding additional pretrial conferences to screen the cases was also considered. The consensus was that the proposed solutions require additional funding beyond the participants' control.

2. Immigration Consequences

Participating judges noted that they are barred from asking about citizenship status. Charges involving domestic violence automatically trigger deportation consequences. Amendment to the charge can be considered by the parties if the defendant wants to plead guilty in this type of case. Continuances are usually granted so defendants can consult with an immigration expert or to allow prosecutors and defense attorneys to discuss a possible plea agreement. Attorneys and judges need to be aware that statements made, even during sentencing, may trigger deportation consequences (regarding *mens rea* or the status of the complaining witness). Attorneys from the public defender's office suggested that they may submit a proposal for judicial education training.

It was noted that the United States Supreme Court has observed the following:

[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.⁶

Defense counsel and the prosecutor should be given additional time to reach an agreement in an effort to craft a creative solution.

3. Order Pertaining to Bail

The section on district court criminal practice also discussed whether there should be standardization of factors that should be taken into account in setting bail. It was noted that there was a lack of consistent decisions between judges regarding the appropriate bail amount following execution of a bench warrant for non-appearance in court. Participants also expressed a concern that the bail decision was not made "face to face," with the defendant present before the judge.

⁵ Rule 48(b) of the Hawaii Rules of Penal Procedure provides under certain circumstances for dismissal of a charge by the court if trial is not timely commenced.

⁶ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

Instead, the defendant is brought to the holding cell at the courthouse where the bail decision is made. Defendants are also not represented by counsel when these bail decisions are made.

Defense counsel questioned whether, if the defendant's non-appearance was due to being in custody, the failure to appear should be used to determine future bail status; whether Rule 9 issues should be considered in setting bail; and, if the contempt charge is being dismissed, why the previous contempt bench warrant is being used to determine bail status. Some of the problems are a result of outstanding, unserved bench warrants, and lack of current information as to a defendant's status, which are administrative in nature. There was no consensus on how to solve the foregoing problems.

4. Entrance into the District Court

The possibility of attorneys being issued badges to allow them to bypass the security check was discussed. This would allow attorneys to fulfill their responsibilities more efficiently. Alternatively, establishing a special attorney line, separate and apart from the general public line, would expedite the attorney screening process.

POST-CONFERENCE

Several days following the conclusion of the 2012 Bench-Bar Conference, the Judicial Administration Committee commenced a survey of the conference participants to determine the views of the participants concerning the value of the conference, whether future conferences of the bench and the bar should be convened, and, if so, what steps might be taken to improve future conferences.⁷ Almost all who participated found that the conference was of significant value. Several expressed the view that such conferences should be held annually or at other regular intervals. Many expressed the hope that steps would be taken to implement proposed changes where the conference was able to reach a consensus on suggested improvements in the administration of the courts.

APPENDICES

1. Circuit Court Civil Report of the 2012 Bench-Bar Conference
2. Circuit Court Criminal Report of the 2012 Bench-Bar Conference
3. District Court Civil Report of the 2012 Bench-Bar Conference
4. District Court Criminal Report of the 2012 Bench-Bar Conference
5. Evaluations of the 2012 Bench-Bar Conference

⁷ Included with this report is the survey of the conference participants.

**2012 Bench-Bar Conference
Friday, September 21, 2012**

CIRCUIT COURT CIVIL GROUP REPORT

Lead Judge: Hon. Ronald Ibarra
Lead Attorney: James Kawashima
Reporter: Steven Chow

Participants:

Attending Judges: Judge Bert I. Ayabe, Judge R. Mark Browning, Judge Derrick H. Chan, Judge Greg Nakamura, Judge Joel August (ret.), and Justice Richard Pollack.

Attending Attorneys: Kathy Kuror, Al Castillo, Justin Kollar, Michael Matsukawa, Deborah Wright, Mel Akena, Lisa Bail, Louis Chang, Scott Dodd, Dennis Ferm, Rex Fujichaku, Michael Heihre, Harvey Henderson, Charles Hurd, Steve Iwamura, Janice Kim, Robin Kishi, Greg Kugle, Richard Lewallen, Mike Livingston, David Minkin, Duane Miyashiro, John Nishimoto, Ken Robbins, Paul Schraff, Craig Shikuma, Doug Smith, and John D. Thomas, Jr.

The following topics were discussed:

1. Court Appearances by Teleconference;
2. Electronic Posting of Tentative Rulings;
3. E-filing; The Use of Smart Phones, iPads, etc. in the Courtroom;
4. Resolution of Discovery Disputes; and
5. Alternative Dispute Resolution.

This report will discuss each topic in turn.

COURT APPEARANCES BY TELECONFERENCE

This topic opened the session with lively discussion by all attorneys and judges. The common consensus was that teleconferencing is a powerful and effective tool; however, there are numerous concerns that need to be addressed. An overarching question that was raised was whether these issues should be addressed by official court rules, or guidelines. Since each court hearing is unique and presents different concerns, guidelines would be preferable. Promulgating official rules may be overly burdensome and difficult to draft to meet each circumstance.

There were two areas of emphasis regarding which your committee will submit recommendations. The first will be this question of the use of rules vs. guidelines, and the second will be the manner in which rules or guidelines, whichever should be chosen, would be drafted, approved and promulgated. There was substantial discussion in both areas as will be reported below.

a. Integrity of the Record

Although the session opened with cautious concern regarding teleconferencing due to the challenges that judges and courts face to preserve the integrity of the record, the issues regarding preserving an accurate record while very important did not appear to be insurmountable with the effective use of modern-day technology and some common sense. It was contemplated, however that further discussion with court reporters would be helpful to fully understand the needs and challenges that they face when transcribing telephonic hearings.

As an initial matter, the clarity and quality of the call was a primary concern. The quality of the call however can be controlled by requiring all callers to use landlines as opposed to cell phones that are prone to dropped calls and excessive background noise. It was also suggested that callers may not put the phone on speaker mode, unless the caller put their phone on mute as speakerphones also pick up a lot of background noise that could disturb the clarity of the call. Another suggestion was made, that a teleconference could be conducted *in camera*, as opposed to in the courtroom so that the call does not have to be broadcast over speakers which affects the quality of audio; during

an *in camera* call the court reporter could be present in chambers to make the record. While the suggestion is a good one, *in camera* calls should be limited to confidential matters because matters that are decided in court should be open to the public.

Another concern regarding protecting the integrity of the record involved how to identify the speaker, and ensure that callers do not talk over each other. The identification issue however is readily resolvable by requiring parties to always state their name before speaking, whether present or on the phone. Such a practice, could also remind parties that they should patiently await their turn to speak rather than speaking over another person. Alternatively, a recommendation was made, that callers should only be allowed to listen, but not make any statements. Ultimately, the final protection of the record would always rest in the judge's hands, such that when callers get out control and do not follow the ground rules, the judge could terminate the proceeding and require all parties to appear.

b. When to Allow Teleconferencing

The next major point of discussion addressed when and under what circumstances teleconferencing is acceptable. A common understanding by all is that appearing by telephone is a privilege, and could be revoked by a judge for failure to comply with guidelines. Aside from etiquette concerns, a major discussion unfolded regarding whether teleconferencing should be limited to certain types of hearings. The judges seem to agree that teleconferencing does not have to be limited to certain types of hearings and gave examples of having used teleconferencing to resolve substantive and non-substantive matters as well as disputed ones. In addition, the Family Court allows evidentiary hearings to be held over the telephone; and the Bankruptcy Court has successfully conducted disputed dispositive hearings over the telephone as well.

The most challenging issue seems to be how to deal with complex multiparty litigation where appearance by telephone would probably be the most beneficial in terms of saving travel time and cost. Attorneys cited to examples where a motion might substantively involve only two of several parties. Attorneys expressed that in such cases, being required to appear in person when their client takes no position on the matter was burdensome and expensive. While attorneys can file a statement of nonappearance in conjunction with their statement of no position, attorneys would prefer having the option to make an appearance over the telephone to stay abreast of the matter on behalf of their clients.

With respect to complex multiparty litigation, where a telephone appearance is permitted, the point was raised that an attorney's appearance over the telephone could prejudice their client in the event that discussions occur off the record regarding the case that could affect the material interests of clients, for example scheduling a settlement conference or other court appearance. The best response to such a concern was that the judge would have to carefully control the scope of a hearing to only allow arguments on substantive matters that have been scheduled and briefed in the memoranda. Any other discussions should be prohibited. If such conversations are had, however one of the parties must be held responsible for relaying information to those who were not present.

c. Logistical Concerns

A logistical concern was raised regarding the 72-hour notice requirement provided in the current proposed guidelines for attorneys who wish to participate by phone. This requirement was ultimately deemed reasonable in light of the fact that a teleconference logistically requires parties to adhere to strict time schedules, and in some cases may require the use of a central conference call coordinating service to gather the attorneys on the line prior to the judge appearing. Some judges commented that their preference is to schedule teleconferences in the morning, and conduct live hearings in the afternoon. Attorneys also expressed a desire to know at least 72 hours in advance because the manner in which an attorney prepares for a hearing may be affected by whether he/she will be appearing by phone or in person. Moreover, teleconferencing is a privilege, and the request need not be granted by the court. Thus in the event that a teleconference is not permitted, 72 hours was deemed a reasonable time to allow attorneys to make travel arrangements or find coverage as needed.

Attorneys also questioned the current proposed guidelines to the extent that it appears to limit the use of teleconferencing to those attorneys on neighbor islands or on the mainland. While some

attorneys were concerned that their decision to appear via telephone could be construed by the court as a sign of disrespect, the common consensus was that the option to call into a hearing should not be limited to those who do not maintain an office on the island where the court is located. It was pointed out that many attorneys maintain their office quite far from the local courthouse, and driving to the courthouse is just as burdensome as traveling to another island.

There was also some discussion had about the possibility of videoconferencing. It was proposed that there be at least one room equipped with videoconferencing capability at each Circuit Court building throughout the State of Hawaii. Attorneys could gather in that room, to conduct videoconferencing with attorneys when such a conference was requested or required. As a cost-effective alternative, it was also suggested that the court take advantage of cheaper methods of videoconferencing that are currently available such as Skype. It appears that the only downfall with Skype might be the security of the connection.

d. Rules or Guidelines; Content

There was a good deal of discussion on the question of whether there ought to be Rules (as seen in the Rules of the Circuit Courts of the State of Hawaii) governing this area, or whether Guidelines would be adequate. The one point that seemed to carry a significant amount of weight was the uniqueness of the Court system in our Island-State, with the circuits being separated by a body of water, and even courts within a single circuit being separated by over 100 miles. Drafting a set of rules that would apply fairly and equally across the State would indeed be a daunting task. Utilizing guidelines would certainly allow more flexibility.

Time constraints would not allow a broad discussion of the content of the rules/guidelines promulgated by the Supreme Court and therefore either this committee or a newly-appointed one would be needed to complete the task.

Fortuitously, at the very end of this committee's work, in or about early September, we were provided with a set of Guidelines on this very subject. It turned out that a committee appointed by the Chief Justice, the Uniformity Committee, had been diligently working over at least the past year on a project very similar to the one this committee had embarked on. The Uniformity Committee had actually forwarded to the Chief Justice what appears to be a final draft of their efforts entitled: "Proposed Uniform Hawaii Civil and Family Circuit Court Guidelines & Procedures for Telephonic & Video Conference Appearances."

A careful review of the list of the Uniformity Committee members would reveal that they are a group of jurists and attorneys second to none in terms of the respect they command and the knowledge and experience they possess. A brief perusal of the fruits of their efforts revealed a thoughtful and insightful document that should be credited for its breadth and flexibility.

Conclusion and Recommendation

The consensus of the group is that telephone conferences are desirable and that a rule, policy or guideline should be adopted. Telephone video conferencing is also desirable if the technology is available. Perhaps further review of the proposed guidelines should be done in light of the observations and comments received during the conference.

The Judicial Administration Committee recommends that the Uniformity Committee's "Guidelines & Procedures" be reviewed again in light of comments raised in this conference report and ultimately finalized as the "Guidelines & Procedures" to be adopted for use henceforth.

ELECTRONIC POSTING OF TENTATIVE RULINGS

The underlying question raised with respect to this topic, was whether it would be useful for judges to post their "tentative rulings" on a website and allow litigants to accept this ruling thereby waiving their court appearances. It was agreed that tentative rulings could be beneficial because it allows the judge to highlight in advance what they would like to have addressed during oral arguments rather than having the parties recite their briefs verbatim. It seemed, however that judges and attorneys alike were both hesitant to *require* judges to post tentative rulings for numerous reasons, at least not for dispositive motions.

As an initial observation, one attorney noted that posting a written “tentative ruling” could be perceived as being too strong, but that an oral inclination given to the parties before an oral argument could be a better option to focus oral argument accordingly.

From the judge’s standpoint, drafting tentative rulings to post on a website while potentially helpful to make effective use of the hearing, would require additional preparation for hearings which could be overly burdensome to judges who could have numerous disputed motions on any given day. Moreover, a judge who issues a tentative ruling may be accused of pre-judging matters, calling into question the integrity of the judicial system. In addition, there were numerous logistical questions raised as to what should be included in a tentative ruling, and how litigants would be notified to ensure due process.

From the attorney’s standpoint, it was pointed out that tentative rulings could intrude on a client’s concept of having their “day in court” if attorneys were able to waive appearance by simply checking a box. In addition, especially with respect dispositive motions, a tentative ruling system might not “unclog” the court as hoped but rather encourage more oral argument; the attorney receiving an unfavorable tentative ruling would want to appear before the judge to sway him/her otherwise. In this respect, it was suggested that it would be helpful to establish a dichotomy as to when tentative rulings could be used, for example based on the type of motion. The simplest dichotomy would be to draw a distinction between substantive and non-substantive motions or “major” and “non-major” motions. The effectiveness of such a dichotomy however was questioned by both attorneys and judges alike noting that what an attorney deems to be a “major” motion could be a “non-major” motion from the judge’s perspective.

Based on the discussion that was had, it appears that tentative rulings may be best limited to oral inclinations that a judge may give to the parties at the judge’s discretion. At this time, there are many concerns with respect to posting “tentative rulings” online that could reflect negatively on both judges and attorneys.

Conclusion and Recommendation

Further review is required and perhaps a sub-committee formed to investigate and develop guidelines as to when and in what instance a judge should consider posting inclinations or tentative rulings. However, the consensus appeared to be that it would be a burden on the judges and may increase litigation.

E-FILING

This discussion was short and brief, due to time limitations as well as the general consensus regarding E-filing. While attorneys would like to see E-filing in the Circuit Court, there was much concern regarding how the Circuit Court’s E-filing system would work. E filing is only helpful if the system is user-friendly; attorneys who had used the ICA’s E-filing system were concerned that the Circuit Court system would be as cumbersome and difficult to use. The suggestion was that E-filing would be nice to have in the Circuit Courts, but that we should be careful to develop a streamlined and user-friendly system such as the one used in the Federal Courts.

Conclusion and Recommendation

The consensus seemed to not pursue this further at this time.

USE OF SMART PHONES, iPADS, ETC. IN THE COURTROOM

The overwhelming consensus regarding this topic was that attorneys and judges alike do not object to the presence of such devices in the courtroom so long as it is not intrusive, distracting, or disruptive to the proceedings; it is understood, that most people who come to a courtroom will be in possession of a smart phone. Thus, the issue becomes how to control the use of such a phone in the courtroom so that it does not become a distraction for the audience. The recommendation was that all smart phones brought into the courtroom must be put on silent mode. Many courtrooms, already have posted signs at the entrance requesting all persons to switch their phone to silent mode while they are in the courtroom. However, judge must ultimately enforce and monitor the nonuse of cell phones as to jurors, audience members, and attorneys at counsel table.

With respect to jurors, it was recommended that the judge could simply give an instruction to jurors to not use their cell phones during the course of the trial; and express instructions should suffice to guide jurors' cell phone use and encourage jurors to police each other's use as well. With respect to audience members, the judge could also give a general instruction to refrain from using cellphones, taking photos or recording proceedings, unless such permission was received in advance because such activity could be distracting to the participants of the trial. Aside from such verbal instructions by the judge, the question was raised whether a judge could issue an order to require persons to refrain from cell phone use or whether Rules should be implemented regarding the use of cell phones. It was noted that some courts have rules regarding the use of cell phones in a courtroom with respect to attorneys and jurors; and jurors in a federal case are required to leave their cell phones in the "jurors' lounge" for the duration of the trial. Despite the potential for disruption, all participants agreed that smart phones are useful for much more than simply scheduling meetings, etc., and would allow persons to remain in possession of their cell phones so long as they can ensure that the phones do not become a distraction. The biggest concern regarding the use of such devices was the potential to broadcast and provide extended coverage of events in the courtroom to the public, whether by photos or streaming video.

In addition to cellular phones, attorneys also commented that tablets (such as iPads) and laptop computers were very useful to bring to court. From the attorney's perspective, these devices are extremely helpful and many stated that they had used such devices to make effective presentations to the jury, carry numerous exhibits and documents conveniently in order to reference them as needed in court. It appeared that the judges also recognized the benefit and value of these electronic devices and do not raise any objections to their use, so long as they are used in a non-distracting manner. On a related note, attorneys raised the question of providing Wi-Fi service in the courthouse to further enhance the power of such devices; and there was no objection other than to note that the courthouses might not be able to support Wi-Fi.

In summary, with respect to the use of smart phones, iPads, etc. in the courtroom, attorneys and judges alike do not seem to have any objections to their presence in the courtroom so long as their presence is not distracting, invasive or disruptive to court proceedings. While federal judges have issued orders regarding the use of cell phones by attorneys and jurors, the attendees felt that it would be useful but not necessary for our courts, as judges are generally able to control and limit the use of cell phones in their courtrooms.

Conclusion and Recommendation

The general consensus was that smart phones and the like are the wave of the future. A sub-committee should be formed to investigate and develop a rule, policy or guideline for use of electronic devices in the Court.

MISCELLANEOUS DISCOVERY DISPUTES

This conversation began with a discussion of civility guidelines as being an adequate measure to ensure that attorneys engaged in discovery cooperatively. Attorneys felt that discovery disputes were generally able to be resolved as between attorneys who are familiar with the civility guidelines. It was noted however, that some attorneys seemed to use civility guidelines offensively to get their way rather than as a code of conduct. This sparked the question of whether courses regarding the civility guidelines should be permitted to satisfy the current MPC ethics requirement. Most attendees did not seem to oppose such an idea.

The discussion next moved into the pros and cons of using a Discovery Master that included some discussion about court sanctions for failure to abide by an established discovery plan. Attendees invariably agreed that a Discovery Master could be very helpful to keep discovery on track when the matter is extremely complicated or contentious; a good Discovery Master is able to assist the parties by setting frequent deadlines and meetings to resolve issues early. The biggest downside to using a Discovery Master is that the fees can be expensive. A suggestion was made, that a Discovery Master could be appointed by the court if parties were not able to cooperate in discovery, and that the court could order that the costs of the Discovery Master be apportioned between the parties as deemed appropriate by the Discovery Master. Another suggestion was made

that an attorney could make motion for a “discovery plan” as provided for in the Rules. The resulting discovery plan would be an order of the court, and failure to comply with the order could result in the appropriate sanctions, such as the preclusion of evidence.

As a final note, it was recognized that there is a distinction between the “mechanics of discovery,” such as deadlines for which a Discovery Master is qualified to handle as opposed to the “scope of discovery,” such as privileges wherein a judge should make the decision. In addition it was discussed whether it would be appropriate to have a judge participate in creating a discovery plan as opposed to simply approving one. It was also suggested that perhaps judicial education regarding discovery issues would allow newer members of the bench to be more confident in their discovery decisions.

Conclusion and Recommendation

While attendees believe that discovery disputes are often resolvable between the parties without judicial intervention, it is recognized that there are some cases where discovery is complicated or extremely contentious and the assistance of judge or a Discovery Master is required. The preference, however appeared to be for parties to resolve discovery disputes on their own to the extent possible and only turning to external assistance if necessary.

ALTERNATIVE DISPUTE RESOLUTION

The use of mediation was the primary area of discussion for this final topic. The question was posed, whether courts should order mediation and if so when would be the best time to order it. While there was no conclusion as to whether the court should order mediation, it was clear that many attorneys believe that mediation is very helpful and recommended it to their clients whenever possible prior to trial. There was some discussion about mediation being duplicative of settlement conferences, which raised the question of involving the mediator in a subsequent settlement conference. The standard rule is that substantive information regarding the mediation efforts may not be disclosed to the judge for settlement conference purposes without an agreement. However attorneys and judges understood that there could be valuable insight provided by a mediator, and it was suggested that perhaps a judge should be allowed to request that a mediator participate in the settlement conference with the permission of the parties. In addition, with respect to mediations and settlement conferences, there was some discussion about whether efforts might be redundant. This suggested that when parties utilize both, they might hold back certain arguments during one, depending on which they believe, would be more effective in settling the case.

There was also much discussion as to *when* mediation would be most useful. A general rule of thumb was that mediation would be most effective when conducted about 60 days prior to trial, because by that time parties have fully engaged in discovery and understand the evidence that will be presented on trial. It was also noted, however that depending on the type and value of the case, mediation might be more effective earlier on before parties have vested too much into the litigation process.

Overall, mediation is considered highly effective when done at the right time for the right type of case, with the right mediator. While mediation should not get in the way of the trial calendar, it is an option for parties to consider in order to avoid the much higher costs of an actual trial.

Conclusion and Recommendation

There does not appear to be any consensus as to when and under what conditions or scenarios mediation should be used, ordered or compelled. Further, under what circumstances should the mediator be involved in settlement is an individual preference of a judge. Perhaps more judicial education should be provided on when and how to utilize a mediator in settlement.

**2012 Bench-Bar Conference
Friday, September 21, 2012**

CIRCUIT COURT CRIMINAL GROUP REPORT

Lead Judge: Hon. Randal Valenciano
Lead Attorney: William Harrison
Reporter: Hon. Karen Nakasone

Participants:

Judge Joseph E. Cardoza, Second Circuit; Judge Richard K. Perkins, First Circuit;
Hilo: Charlene Iboshi, Office of the Prosecuting Attorney, Hilo; Stanton Oshiro;
Kona: Carol Kitaoka, Office of the Prosecuting Attorney, Kona; Robert Kim
Kauai: Charles Foster, Office of the Prosecuting Attorney; Justin Kollar, Kauai County Attorney; Stephanie Sato, Office of the Public Defender; Mike Soong;
Maui: Tracy Jones, Office of the Prosecuting Attorney; David Sereno; Carson Tani, Office of the Prosecuting Attorney;
Oahu: Susan Arnett, Office of the Public Defender; Adrian Dhakhwa, Office of the Prosecuting Attorney; Grant Giventer, Office of the Public Defender; Brook Hart; David Hayakawa; Howard Luke; Clarissa Malinao, Office of the Public Defender; Richard Stacey, Dept. of the Attorney General; Debbie Tanakaya, Dept of the Attorney General; Chris Young, Dept of the Attorney General

The following 11 topics were discussed, numbered 1-11, below:

1. Telephonic Court Appearances (“TCA”)

Question/Topic

Should a system be instituted whereby lawyers would be permitted (not required) to appear at non-evidentiary court proceedings via TCA, unless the court for good cause requires appearances in person?

Discussion

Participants discussed whether TCA should be allowed for convenience or limited to necessity, whether to allow inter-island, but also intra-island TCAs for Hilo/Kona. Because travel from Kona to Hilo requires a half-day trip, attorneys find it difficult to be in both places on same day; Kona and Hilo judges already allow TCAs for this reason.

Concerns were raised regarding whether TCAs should be broadened to allow defendants to also appear by TCA. Neighbor islands have allowed defendants to appear via TCA. Questions and concerns were raised as to whether the Judiciary has the infrastructure for TCA capability statewide. If an in-custody defendant participates or needs to participate in TCA, how will TCA logistically be provided for them, and when would it be provided? It was noted that whether an in-custody defendant’s presence is mandatory or not, is governed by Hawai’i Rules of Penal Procedure.

Other problems noted with TCA, by the bench participants, was with the missed non-verbal communication or cues, which are not picked up by the judge and opposing counsel, i.e. if argument presented via TCA, the judge cannot tell when someone is wanting to object.

Positions

Attorney General’s Office (“AG”) participants strongly prefer TCA, and prefer standardization by all courts statewide, since AG has statewide jurisdiction; they indicated it was very costly to fly in for short conferences.

Public Defender’s Office (“PD”) participants would like TCA to be allowed for defendants on neighbor islands in which intra-island or inter-island travel is difficult (Big Island, Maui/Lanai/Molokai).

Second Circuit participants noted concerns with technology limitations; also noted that Lanai/Maui travel costly so TCA is necessary.

First Circuit attorneys noted that when Judge Richard Pollack was on the First Circuit court that he used TCA to conduct status conferences; they felt these TCA- status-conference worked well and were efficient, and they expressed preference for this method.

Implementation/Recommendations

Broad consensus achieved, with regard to making the following recommendations:

- To allow TCA for attorneys, subject to court discretion.
- Attorneys prefer standardization statewide if possible. Otherwise attorneys will have to constantly check on each court's procedures and preferences.
- If standards can be created and implemented, such standards should cover the mechanics of how TCA will occur, i.e. who initiates or is responsible for arranging the TCA. Standards should also include who is required to participate, including when a defendant's participation is required.
- If standardization statewide cannot be attained, standardization of TCA within each circuit should be considered.

2. Electronic Posting of Tentative Rulings

Question/topic

Should the court post tentative rulings on a website and allow the attorneys the opportunity to check a box accepting the tentative ruling and waiving court appearance? This allows the attorney to avoid a trip to court for what may be a perfunctory hearing and allows the court to unclog the hearing calendar.

Discussion

Participants voiced concerns that this proposal would be problematic if the hearing concerned a substantive matter. Many questions were raised, and clarifications were sought by the attorneys, regarding if the electronic posting would be done pre-hearing or post-hearing, and with a full hearing or not. The attorneys were concerned that allowing a judge to rule by way of a simple posted ruling may, but should not, absolve the judge from explaining the basis of his/her ruling. Some participants noted that this practice is used in federal court here (Judge Mollway cited as example), also in California – where the practice consists of an inclination given by the court, posted online, after full briefing and a full hearing; such inclination includes what the ruling is and why; both attorneys could then agree on no hearing being necessary, and if they agreed, no hearing was held. It was noted that some attorneys liked the time-saving and cost-saving features, of not having to have a pro forma hearing. In the event a hearing was held, such a system would still be efficient and economical, because it would reduce the amount and scope of any further argument at the hearing.

Participants noted that this proposal may be more pertinent, or applicable to civil cases. As applied to the criminal context, the participants felt there was too much vagueness as to how e-posting would work or was envisioned to work, and to what kind of hearings it would be workable for.

Positions

The consensus of the participants was that, there was not enough information, and too many questions, as to the workability and applicability of this proposal to criminal cases.

Implementation/Recommendations

No consensus was reached on this topic. The only consensus was that there were too many questions and not enough information on this proposal.

3. E-Filing

Question/Topic

What has been the experience at the appellate and trial levels on the program for electronic filing of documents in circuit court and district court?

Discussion

Questions were raised by the attorneys as to why district court converted to e-filing before circuit court; because of district court's volume, attorneys felt it would have made more sense for circuit court to convert before district court. No one voiced problems or concerns with appellate e-filing; attorneys felt that the glitches on the appellate level were worked out, and appellate e-filing is now working well. Attorneys noted that for appellate e-filing, judiciary staff were available to take calls from attorneys having appellate e-file problems, and staff were very helpful and willing to provide step-by-step assistance. Attorneys noted that the federal e-file system also has sufficient staffing. Attorneys expressed frustration that the district court e-filing system did not have any staff to provide a similar level of assistance, as compared to the federal system or the state appellate system.

Other problems with district court e-filing were noted, regarding service via email, or paper, or both, or either; there were complaints of lack of uniformity. Attorneys did not want to have to do double-filing and service, i.e. having to do it by both paper and email.

Positions

There was consensus on the problems of past implementation and suggestions for improvement, listed *infra*; for future implementation at the circuit court level.

Implementation/Recommendations

With the imminent expansion of e-filing to circuit court, participants made the following suggestions, by consensus:

- Creation of a circuit court e-filing implementation task force, that includes members of the private criminal bar. The task force should not be limited to just government stakeholders (i.e. AG, DPA, PD). It was noted that solo criminal practitioners especially had a lot of technical difficulties with district e-filing. More communication with the private bar from the Judiciary, more notice, and more training to private sector bar is advised for the next expansion of e-filing to circuit court. Participants noted that this was lacking for the district court e-filing implementation, and hardship for private sector bar, especially for solo practitioners, was compounded as a result.
- Creation of a Judiciary help center to ensure that assistance with circuit court e-filing will be provided. The availability of e-filing assistance should also be well-publicized, so that all attorneys, not just government agency attorneys (such as PD, DPA, AG) are aware of such assistance. Participants suggested that more outreach to the private sector bar, can be done through HSBA.

4. Electronics in the Courtroom

Question/Topic

Do courts have the power to regulate the presence and use of electronic devices in the courtroom? If so, assuming the devices operate silently, should lawyers (and others in the gallery) be permitted to use smart phones and equivalent devices to send text messages?

Discussion

Attorneys want permission from courts for non-disruptive use of devices in courtroom; the devices assist attorneys deal with the volume of multiple court appearances and productive use of otherwise "dead" waiting time in court, especially on the criminal calendar. Using devices helps them communicate with their offices, and with other courts where attorneys may have concurrent appearances.

Discussion had regarding allowing non-attorneys to use devices. This becomes problematic especially during trial and may lead to mistrials; it is also harder for courts to regulate non-attorneys, and the general public's use of devices in the courtroom. Participants acknowledged, however, that a self-represented party may or should receive equal treatment as an attorney, with regard to using such devices in court.

Other courts: Participants shared that Nevada courts have wi-fi access in the courtrooms, and use of technology/devices in the courtroom is liberally allowed. Local federal court practice was

also noted and discussed. Participants noted that a local federal district court rule bans phones and other devices in the courtroom; and that more senior judges follow the rule, but the newer generations of federal judges are opting out of following the rule, and these judges are allowing attorneys to use devices in the courtroom.

Positions

The consensus of all of the attorneys was that they favored no prohibitions on the use of non-disruptive devices. Some state courts have prohibitions on reading non-court material. Attorneys would like this prohibition lifted to allow all work-related reading, even if it is done on a device. They noted that with the Judiciary's shift towards e-filing on all levels, the Judiciary is encouraging attorneys to adopt and incorporate technology; therefore, they feel the judges should similarly be encouraged to adapt and allow technology into their courtrooms.

Solo practitioners especially depend on technology to run their practice. This group especially would like existing prohibitions and limitations on devices to be lifted or relaxed; for them it is a matter of economic and financial survival, especially with the frequent, long, wait times for court hearings and conferences, on the criminal calendar.

For court-appointed attorneys, their in-court waiting time is often cut from their bills, so they feel it is particularly vital and equitable for them to be able to have access to their devices to allow them to keep working while they wait in court, given the frequent, long wait times for court hearings and conferences, on the criminal calendar.

Implementation/Recommendations

The consensus among attorneys was, that they would like courts to liberally permit use of non-disruptive use of devices in courtroom, as these devices assist attorneys deal with the volume of multiple court appearances and productive use of otherwise "dead" waiting time in court, especially on the criminal calendar, where long wait times for court hearings or in-chambers conferences are frequent.

5. Track II Drug Court and Immigration Consequences

Question/Topic

Non-citizens, immigrants and illegal aliens who plead and are granted deferrals still face immigration consequences, as federal immigration courts do not recognize state deferrals. Track II drug court is particularly important and relevant in these types of cases. Should Track II be emphasized to allow access to treatment while possibly avoiding deportation consequences?

Discussion

Problem was identified as the inability of the state courts to dictate how INS should treat DAG and DANC offenders; INS does not recognize a deferral as a non-conviction, which leads to deportation. Problems also noted with the effect of "stipulation" required for Drug Court admission, for immigration purposes. HOPE doesn't protect from deportation. There were also concerns raised regarding proportional funding between the different circuits, i.e. higher population areas such as Oahu should have more slots funded.

Positions

First Circuit – it was noted that this discussion should be limited or might appropriately be tabled, since the main Judiciary stakeholder representative, Judge Steve Alm, was not present to participate.

Implementation/Recommendation

Very limited discussion was conducted on this topic, but participants did reach consensus on the need for more funding for Drug Court. Participants felt that the Judiciary, especially with the new Justice Reinvestment Act (JRA), should make a big push for funding for more Track 2 Drug Court funding, and that the timing was good for such a push at the legislature. It was noted that usually, only the prosecutors and the public defender's office testify in support at legislative hearings. There was consensus that having more testifiers from the private bar testify at upcoming legislative hearings, would be helpful to demonstrate to legislators that a broader base of support exists, for this vital Judiciary program.

6. Status Conference Notification and Status Conference Format (mainly First Circuit)

Question/Topic

On Oahu, private attorneys are notified via email or telephone about the dates and times of status conferences, whereas public defenders receive notification via a written document which must be hand-delivered and distributed to the appropriate trial attorney.

Discussion

The method of status conference notification was not standardized across First Circuit courts -- some notify by paper, some by email; however it was noted that not all lawyers have prompt access to email. For PDs, email to secretaries is sufficient. For DPAs, the practice is to notify staff via emails, rather than notify deputies directly. For the courts, the judges noted that notification problems arise when deputies (such as PDs/DPAs) leave, or the case gets transferred to another deputy. It was noted that attorneys can check Ho'ohiki for dates also.

First Circuit lawyers clarified that the problem is less about how notification about status conference are made, but rather how the conferences are conducted. Attorneys complained that some status conferences are very inefficient. Many attorneys raised concerns about long wait times, and one even cited a two-hour wait time for a very short conference. Attorneys complained about an excessive amount of unnecessary social conversations during the conferences, causing more delay. Participants discussed and considered whether telephonic status conferences would be more efficient, and also discussed the efficacy of "paper" pretrial conferences. Attorneys questioned how useful a mere paper pretrial was, where the form is merely filled out and they leave without talking to the judge. First Circuit participants also discussed the timing of status conferences, i.e. if the conference is set too soon, before HPD investigation or discovery was completed, a status conference would be less meaningful.

Positions

For deputies in the PD and DPA offices in the First Circuit, they all want their staff to receive notice by email. Other circuits briefly noted concerns: Big Island participants voiced concern with pretrial conferences being held at very late times, i.e. 5 pm and after. Kauai participants noted concerns with a lack of privacy for conferences, as they are held in an open courtroom; telephonic status would alleviate this concern.

As to the other points of discussion, broad consensus was reached, as stated *infra*.

Implementation/Recommendations

There was broad consensus as to the following points:

- Paper pretrial conferences are a waste of time. Attorneys believe having a conference with the court is needed, if pretrial conferences are to be useful and effective.
- Maui method works well for attorneys and the court; where a pre-trial conference and status are combined; this conference is done in the courtroom, but at the bench so the participants have privacy, yet the conferences are still done quickly. Attorneys noted that the visible presence of others waiting in the courtroom for their conferences, facilitated efficiency and having conferences done quickly.
- Attorneys prefer short, productive conferences by telephone, with the option of having an in-person conference if a particular case or circumstances warrant. Telephonic status conferences preferred, to minimize attorney waiting time and to enhance efficiency by minimizing all time-wasting social conversations.

7. Preparation of Orders Granting Continuances of Trial

Question/Topic

Some judges require written orders, while other judges simply rely on the court minutes of the proceedings. Are court minutes sufficient in memorializing continued hearing and trial dates or should counsel be required to prepare written orders granting motions to continue trial?

Discussion

Some courts have fill-in forms, some courts just do minute orders, some require formal separate order. On Hawai'i, a formal order granting the continuance is required; minutes don't

work because there are usually no court minutes in that circuit. On Kauai, courts there rely on court minutes to reflect granting of continuances, and the courts conduct waiver colloquies on the record. On Maui, the courts use a fill-in form that can be done in court; this form also has the required waiver in it.

Concern raised about reliance on court minutes continuing trial, since court minutes are technically not part of the court record; in the event of an appeal, minutes would not be a proper record to rely on.

Positions

On Oahu, the separate court order requirement is viewed as cumbersome by the public defenders, given their case volume, lack of computer access at court, and long in-court wait times.

Implementation/Recommendations

The participants reached broad consensus that creating a short form order, modeled after Maui's form order that can be quickly completed in open court, was a good idea. Participants would like follow-up to see if the Maui form order, can be adopted or adapted for use in other circuits.

8. Motions Deadlines

Question/Topic

On Oahu, some judges want motions, like motions to continue, to be filed before the trial date, others routinely hear such motions orally prior to the trial date. Different judges have different deadlines and requirements for a motion in limine. Should there be standard motions filing dates on all motions for all circuits and courts?

Discussion and consensus reached

Participants did not express concerns with the timing and form of motions to continue trial. After preliminary discussion, neighbor island participants noted that motions deadlines were not an issue/concern on their islands.

In the First Circuit, consensus was that this topic may have been identified as a concern due to the practices of a single judge. Because this appears to be a one-judge issue, the attorneys were advised, and consensus was reached, that the attorneys should raise "one-judge" problems or concerns with the Administrative Judge, or alternatively, bring it to the Bench-Bar Committee, which includes attorney-members such as the lead attorney in this group, Bill Harrison.

9. Criminal Circuit Court Judges in Separate Courthouses (First Circuit only)

Question/Topic

On Oahu, attorneys who have matters at circuit court on Punchbowl Street and who at the same time have matters before circuit judges at district court on Alakea Street experience difficulties. Should there be better coordination between various circuit court calendars, or alternatively, should serious consideration be given to consolidating all criminal courts in the same venue?

Discussion/Consensus

This is a First Circuit issue only.

- Consensus was unanimous and quickly achieved. Participants noted that this was not a new concern, and that the Judiciary is already cognizant of this longstanding problem. The unanimous consensus was, to tender a request to the Bench, by the Bar, for criminal circuit court judges to all be in the same building, rather than having one or two in the District Court building.
- Participants unanimously urged consideration of a formation of a task force, to revisit, or reconsider a prior proposal submitted to previous Chief Justice Moon to consolidate all criminal courts in one building, and all civil courts in the other. This proposal was made to Chief Justice Moon but apparently was rejected.

10. True Expungement

Question/Topic

When a record is expunged after dismissal or deferral, the record must also be erased from Ho`ohiki or ecourt Kokua and JIMS, otherwise there is no effective expungement. A related issue for discussion is, the proposed Supreme Court HRPP Rule 42(g) entitled “Sealing court records,” which appears to address some of the above concerns.

Discussion

Concerns were raised that, during the period of deferral, whether the public could view the record or not. In the past, the public was not able to view case status, but now, on Ho`ohiki there is public access during the deferral period. It was also noted that, for traffic cases, there was no erasing/sealing of the record, unless the attorney actually made a motion.

Concern was also raised regarding the imposition of fees on indigent/homeless persons seeking expungement; if such persons are acquitted they should not have to pay for expungement. AGs were urged, by the PDs, to consider exception for such persons, and not require such persons to pay expungement fee.

Positions

DPA and AG position was that the sealing of the court records, should occur upon granting of order of dismissal. The criminal defense attorneys and PD position was, that it would be unfair for a defendant to be held up from having his/her records sealed, due to bureaucratic delay.

Implementation/Recommendation

There was consensus as to proposed HRPP Rule 42(g), that it was a good step. However, there was a split as to whether 42(g) was sufficient (law enforcement position), or whether 42(g) goes far enough (criminal defense position was that 42(g) does not go far enough).

11. Other concerns for neighbor islands

In the brief time that remained, the forum was opened to any other concerns neighbor islands wanted to raise.

Brief discussion was had, regarding the request for the Bench to be receptive to more polyconferencing, teleconferencing, and develop the capability and make infrastructure investments necessary to develop tech capability. Such capability is especially necessary for neighbor islands given the traveling distances between Hilo/Kona, and problems for neighbor islands having an economical way to access expert witnesses intra-island and inter-island, and facilities like Hawaii State Hospital inter-island. Attorneys and private sector all use technology heavily, but concern expressed that Bench lags behind in technological receptiveness and technological capability. HSBA has a tech committee; the Bench should have a similar group.

The unanimous consensus and recommendation of all of the participants, was for the Judiciary to form a working group, to interface with HSBA tech committee and others, to enhance the Judiciary’s high-tech conferencing capability and its overall receptiveness to technology in courtrooms statewide.

CONCLUSION

The consensus of the participants appeared to be that the discussion was productive, and they hoped to continue such discussions at future bench-bar conferences.

**2012 Bench-Bar Conference
Friday, September 21, 2012**

DISTRICT COURT CRIMINAL GROUP REPORT

Lead Judge: Judge Kelsey Kawano
Lead Attorney: Alen Kaneshiro
Reporter: Judge Catherine Remigio

Participants:

Judge Barbara Richardson, Admin. Judge, District Court, First Circuit; Judge Barbara T. Takase, District Court, Third Circuit; Judge Trudy K.T. Senda, District Court, Fifth Circuit.
 Fifth Circuit: Rosa Flores
 Third Circuit: Michelle Kanani Laubach, Darien W.L.C. Nagata, Deputy Prosecuting Attorney; Kimberly Taniyama, Deputy Prosecuting Attorney
 Second Circuit: Byron Y. Fujieda, Deputy Prosecuting Attorney
 First Circuit: Brian A. Costa; Richard Sing; Jeen H. Kwak, Deputy Prosecuting Attorney; Hayley Cheng; Jason Burks; Richard Gronna; Nietzsche L. Tolan, Deputy Public Defender; Jin Tae Kim, Deputy Public Defender; Craig Jerome, Deputy Public Defender; William Bagasol, District Court Supervisor, Office of the Public Defender.

TOPICS DISCUSSED:

1. Court Appearances by Teleconference. *Should a system be instituted whereby lawyers would be permitted (not required) to appear at non-evidentiary court proceedings by teleconference, unless the court for good cause requires appearances in person?*

a. Discussion

Kauai is fairly flexible regarding attorney appearances by telephone. No formal requests are necessary. May call first and/or fax requests to the Judge who signs and faxes it back to counsel. Parties who do not reside in Kauai need to appear in Kauai even though his/her attorney is allowed to appear by telephone. Generally, attorneys must appear in person for sentencing.

Maui is also fairly flexible. Attorneys are allowed to appear by telephone in uncontested and non-evidentiary matters.

Participants discussed proposed uniform guidelines for telephonic and video conferencing appearances in civil and family courts, as opposed to district court. In criminal matters, non-appearances by Defendants result in bench warrants. Criminal attorneys also need to communicate with their clients in a confidential manner that may not be possible if one of them is on the telephone. In Honolulu, attorneys often waive their client's presence for A & P, what happens when they do not appear for trial? What is the basis for contempt charges, if any? Need a mechanism to ensure subsequent appearances and limit the potential for non-appearances down the line. In Kauai, Defendants sign and file a "Notice to Appear" form.

Also, how to determine if the person on the telephone is actually the Defendant?

Need to ensure that calls can be efficiently transferred and recorded. Need a protocol to ensure parties identify themselves before speaking, that they speak in turn, and that they don't cut each other off.

b. Recommendation.

There was general consensus that, except for initial appearances, such as A & P, attorneys and Defendants would probably have to appear personally in District Criminal matters.

2. Electronic Posting of Tentative Rulings. *Should courts post tentative rulings on a website and allow the attorneys the opportunity to check a box accepting the tentative ruling and waiving court appearance?*

a. **Discussion.**

Participants discussed the difference between tentative rulings for civil versus criminal matters. It is unlikely that a tentative ruling would be effective in criminal matters, as evidentiary hearings would probably occur regardless of the tentative ruling. Also, how would this effect the Record on Appeal? Participants could not see how this would apply to District criminal cases.

b. **Recommendation.**

Participants agreed this was probably inapplicable to District Court Criminal Practice.

3. E-Filing. *What has been the experience at the appellate and trial levels on the program for electronic filing of documents in circuit court and district court?*

a. **Discussion.**

Regarding the effect of Rule 9 and E-Filing, it was noted that the procedure in place is not necessarily consistently applied by Judges and clerks. Prosecutors and Public Defenders or Trusted Agencies have access to the e-file record as long as they are parties to the case. If the Public Defender conflicts out, then Public Defenders should no longer have access to e-file filings. Nevertheless, the Public Defenders still receive notice of filings for cases they have conflict out of. Attorneys who agree to make “special appearances” also continue to receive notices of filings. One suggestion to solve this “end-date” issue was to modify the Order Appointing Counsel to specify that “end dating” shall occur automatically. Attorneys could also make requests to “end-date” on the record to notify/flag the court clerk. If sentencing is the end date, there could be issues regarding post-sentencing hearings, such as motions to revoke probation and proof of compliance hearing. There was general agreement that the clerks should not have to decide who receives notices.

Most judges agreed they would like courtesy copies because not everything e-filed is printed out - there is no “hard copy” file. The following circuits still have paper files:

- Kauai (Fifth Circuit) still has paper files - however, this will end January 1, 2013
- Maui (Second Circuit) eliminated paper files
- Big Island (Third Circuit) still has paper files

In addition, motions do not automatically get routed to the judges, so attorneys need to specify this option in the Judges “work queue.”

There are also form Motions (Motions to Continue, Advance, Recall Bench Warrant, Nolle Prosequi, Reconsider, Set Hearing Dates, etc.). So a separate order does not need to be submitted, if the first page of the Motion is filed, and the “order” portion is on the second page, the second page would need a caption so the Judge can print it, sign it, then e-file. For Legacy cases, need to add the Prosecutors Office as a party. If the case is initiated by the Court, then can the Court add Prosecuting Attorneys as an office?

Another issue raised involved notice of hearing dates, the timing of getting back motions, and assigned hearing dates. Specified, requested hearing dates could be placed in the “notes” section. Some court clerks read the “notes” section and some don’t – no uniformity of procedure for requesting hearing dates.

b. **Recommendation.**

There should be a meeting for the District Court, First Circuit to address the issues raised herein so that parties do not have to submit a separate proposed order, in addition to their motions.

4. Use of Smartphones, iPads, etc. in the Courtroom. *Do courts have the power to regulate the presence and use of electronic devices in the courtroom? If so, assuming that the devices operate silently, should lawyers (and others behind the bar in the public section) be permitted to use smart phones and equivalent devices to send text messages?*

a. **Discussion.**

Participants discussed the problem with have people videotape the proceedings from the gallery (most smartphones can do this quietly). Is this form of free speech or protest? How to tell if the user is doing case-related work, or social media recreation? Kauai does not allow the use of iPads unless by a person related to the case on the docket. Maui allows cell phones in the courtroom, but when an attorney or litigant receives a phone call, they are asked to step outside to take the call. On Maui, this courtesy is extended to attorneys. Persons in the gallery are asked to turn off their cell phones.

Participants discussed the benefits and drawbacks of allowing texting and smartphone use by attorneys only, and only if related to a case on the docket:

i. Benefits:

- Ease of being able to text another associate to find a case, ask if a witness is here, research a bench warrant - saves on requesting continuances and wasting court time
- Allows attorneys to finish work while waiting for their case to be called

ii. Drawbacks:

- Fairness or appearance of fairness for the self-represented person
- How to determine if it's work-related?
- Gallery vs. counsel table
- Strict with Gallery - how will the public perceive the justice system if we allow attorneys to use smartphones in the courtroom?
- What is disruptive conduct?

Should we follow the Federal Courts? Unless you are an attorney with a case, you aren't allowed a smartphone. Federal Court will confiscate the phone right at the metal detector.

b. **Recommendations.**

Participants discussed a possible solution to use technology outside the courtroom, such as the televisions used at the Kaneohe Courthouse, notifying attorneys and litigants waiting outside what case the Court is handling. Participants did agree that a joint task force should be assembled to determine a uniform policy regarding the use of technology in the courtroom.

5. Case Management – Continuances. *When and how many continuances should be granted to the State or defense?*

a. **Discussion.**

On Maui, the court uses pretrials to weed out cases that are firm set for trial, so continuances should be kept to a minimum. Kona also utilizes pretrials, but requests for continuances still happen at trial. Oahu participants noted problems with congested courtrooms, multiple continuance requests, witnesses appearing multiple times, State declaring "ready" when officers are "on call", Rule 48 issues, and time constraints in rural courts.

Participants discussed specific problems with continuances in the First Circuit. One participant described it as "game playing," when Defendants ask for continuances for the sole purpose of pushing the case towards a Rule 48/speedy trial dismissal – particularly in DUI cases in rural courts (Waianae and Wahiawa). As a result, witnesses become frustrated because they are ordered to keep coming back, missing work, or making other child care arrangements. Eventually, they are told that if they don't come back, the case will be dismissed and they won't have to appear again.

There was frustration expressed based on the perception that Rule 48 continuances are given every day. One witness reportedly had to return to court 5 times when she was a pregnant minor – meaning her mother had to come back with her each time. Also, when police officers do not show up because they have called in sick, it's automatically counted against the Prosecution as a continuance.

Other participants noted that, in some cases, the Prosecution is automatically allowed 3 continuances, even when the Defense has legitimately been ready for trial. Defense counsel could also ask for proof that an officer is actually sick and unable to attend.

Observations were made regarding the volume of cases on Oahu, the use of per diem judges unwilling or unable to go to trial. There was concern that some judges are not willing to make decisions pending appellate review.

b. Recommendations.

Participants discussed possible solutions as follows: more judges, courtrooms, and court staff. The Judiciary could also open up another Oahu DUI court (will need more prosecutors and public defenders) and have more in-chambers or pretrial conferences. Courts should also enforce pre-trial deadlines. This was a consensus, however, noting that the proposed solutions require additional funding beyond the participants' control.

6. Immigration Consequences. *Informed consideration of possible deportation in charging and sentencing. The need for creative solutions.*

a. Discussion.

Participating judges noted that they are barred from asking about citizenship status. All pleading Defendants are informed of the possible immigration consequences. Not a lot of District Court offenses trigger immigration problems, however, this is a grey area. In other words, being convicted of a deportable offense does not mean automatic deportation. Judges have limited exposure to formal judicial education training on this issue.

Problems arise with abuse of household members or DV charges, which automatically trigger deportation consequences. If the Defendant wants to plead in this type of case, he/she would first need to have the charge amended. Continuances are usually granted so Defendants can consult with an immigration expert, or so that Prosecutors and defense attorneys can discuss agreements.

One solution would be to use "creative charging" so that the Complaint does not trigger deportation. Nevertheless, participants need to be aware that statements made, even during sentencing, which could trigger deportation consequences (regarding mens rea or the status of the complaining witness).

b. Recommendation.

The Honolulu Public Defender's Office suggested they could come up with a topic/plan to propose future judicial education training for the judges.

7. Orders Pertaining to Bail ("OPB"). *Differences in bail decisions between judges, lack of consistent decisions regarding bail.*

AND

8. Issuing Bench Warrants when Defendants are in Custody. *Need to limit bench warrants when Defendant's are already in custody.*

a. Discussion.

One of the judges opined that the OPB process should not be standardized, it should fall on the individual shoulders of the judge making the decision.

Some participants expressed concern that Defendants are being arrested on old contempt bench warrants, which are used in determining bail status, even though the contempt charge is later dropped. If the contempt charge is being dropped, why is the previous contempt bench warrant being used to determine bail status?

Participants also expressed concerns that the bail decision was not made "face to face" with the Defendants present before the Judge. Does the fact that the Defendants are "in the courthouse" when the OPB Judge decides make a difference? Defendants are also not represented by counsel when these bail decisions are made.

Furthermore, if Defendant's non-appearance is due to being in custody, should his failure to appear be used to determine his future bail status? Are Rule 9 issues being considered?

Some of the problems are a result of outstanding, un-served bench warrants, and lack of current information as to Defendants' status (administrative in nature).

b. **Recommendation.**

There was no consensus on how to solve this problem.

9. **Interpreters.** *Instances when they are requested and not present.*

Discussion and Recommendation.

Participants agreed it was not a “huge” problem in district court as there are usually interpreters in the building, although they have no control over whether the interpreters are willing to “add” cases on a last minute basis. There were no recommendations.

10. **Entrance into District Court.** *Should attorneys have to wait in line or could they be issued badges allowing them to forego the line?*

a. **Discussion.**

Attorneys should probably not be allowed to bypass security.

b. **Recommendation.**

Consider the possibility of having a special attorney line that is separate and apart from the general public line that would expedite the attorney screening process. This would allow for the attorneys to get to their courtrooms quicker and easier.

CONCLUSION

The conference was well-received. Participants agreed it should be held regularly and that the discussion was productive and informative.

**2012 Bench-Bar Conference
Friday, September 21, 2012**

DISTRICT COURT CIVIL GROUP REPORT

Lead Judge: Hilary Gangnes
Lead Attorney: Dennis Chong Kee
Reporter: Edward Kemper

Participants:

Henry Nakamoto (Hilo), Emiko Meyers (Kauai), Edmund Haitzuka (Kona), Kristina Toshikiyo (Maui). Oahu attendees: Scott Arakaki, Russ Awakuni, David Chee, Marvin Dang, Renee Furuta, Steven Guttman, Blue Kaanehe, Dew Kaneshiro, Ken Lau, Delia L'Heureux, Sheila Lippolt, Cheryl Nakamura, Allan Okubo, Gary Okuda, Jason Oliver, Daniel Pyun, Matthew Pyun, Jennifer Sugita, Reggie Yee, Guy Zukeran, Judge Gerald Kibe.

A. COMMON TOPICS.

1. Court Appearances by Teleconference.

- a. Bigger issue for circuit court matters.
- b. Teleconferences permitted in family court. Kapolei courthouse has technology to facilitate; other courts do not.
- c. One issue is that the Court would almost always need a tech person to assist; if teleconferencing were permitted, it would probably need to be statewide; procedures must be consistent and fair.
- d. Group confirmed that people would be happy to use technology if it were available.
- e. Sometimes parties are sent to mediation; not sure how this would work.
- f. Another issue is that the Court could not hand parties physical reminders.
- g. Telephone appearances would not be appropriate for proceedings in which the judge is weighing credibility.
- h. Could the bar provide equipment for parties who need it?
- i. Proposed rule is for interisland or mainland attorneys; should we suggest that it be made available for intra-island?
- j. Do we have the resources?
- k. Suggest a survey of equipment before we try to make a uniform rule.
- l. Should we suggest that this be looked at on an expedited basis?
- m. Phone conferencing is pretty uniformly available; video conferencing is not.
- n. Mental health calendar on the Big Island has used video conferencing for a long time.
- o. District court is a volume court; delays to set up or fix equipment could significantly delay a calendar with 100 cases on it.
- p. Suggest we start with areas with least access: e.g., Lanai and Molokai.
- q. For settlement conferences, most judges approve of having clients and adjusters available by phone.
- r. Would like a uniform rule governing the procedure for telephone appearances.
- s. **Consensus: implement teleconferencing as far as possible and then consider video conferencing, subject to availability of technology.**

2. Electronic Posting of Tentative Rulings.

- a. Can't see this working in district court; so many unrepresented parties who might not be able to access tentative rulings; volume of cases is too high.

- b. It's possible that this could work on an ad hoc basis, but it would be hard to make uniform rules for ad hoc procedures.
- c. Unlike federal court, where tentative rulings are addressed to attorneys, the district court deals with self-presented parties; wouldn't want to give them the impression that they won't be heard.
- d. **Consensus: not a practical idea for district court.**

3. E-filing.

- a. Works wonderfully in bankruptcy, federal, and state appellate courts; makes things so much easier and saves a lot of paper.
- b. District court is getting there; now has e-filing in criminal cases.
- c. In bankruptcy court, pro se litigants can make paper filings; in state appellate court, all filings are electronic.
- d. If e-filing were required, district court staff would be required to help litigants with electronic filing, attorneys won't have a choice.
- e. E-filing in criminal cases has been hard on staff; a lot of training and a lot of work; requiring e-filing in civil cases will involve an additional layer of difficulty because there are many more self-represented parties.
- f. E-filing goes with JIMS; record keeping will be different; Ho'ohiki will be different; this requires substantial work.
- g. E-filing will go to circuit court criminal cases before district court civil cases.
- h. **Consensus: e-filing is coming; there may be staff issues with pro se litigants in particular; will be a learning curve for everyone.**

4. Use of Smart Phones, iPads, etc. in the Courtroom.

- a. Court would find it difficult to *not* allow; attorneys use smart phones all the time in district court.
- b. If the phone is not disrupting court, it may be used.
- c. Technology is infrequently used in district court trials.
- d. Smart phones have been useful in federal court for witness control, e-mailing back to office, and asking for research.
- e. In Kapolei courthouse, monitors show trial exhibits to judge and parties.
- f. In district court, smart phones are useful for access to Westlaw and to Ho'ohiki.
- f. Smart phones are also useful when setting court dates; allow parties to check their calendars, and are also useful for contacting interpreters.
- h. **Consensus: as long as the technology is not distracting, it may be used.**

B. OTHER TOPICS

5. High Case Load at District Court

- a. In Hilo, they refer cases to mediation immediately.
- b. In Honolulu, parties have to wait until following Monday for mediation; volume is too high to refer cases to mediation immediately; mediators settle almost half of landlord-tenant cases.
- c. One possible technique is to refer parties to mediation away from the courthouse; parties have a different mindset at the mediation center.
- d. Problem with sending parties to the mediation center is asking people to miss more work or school.
- e. (1) 13,000 new regular claims cases were filed last year; lots of cases fall under the \$25,000 limit; when times are bad, people will fight over smaller and smaller sums.

- (2) Even with this volume, civil trials are set within 2 months in Honolulu.
 - (3) Some of the problem is processing paperwork; district court judges have a system for handling most documents even if a judge is on vacation; district court is back to full staffing; now have 2 law clerks and a supervising clerk who review documents before they are sent to judges.
 - (4) Encourage attorneys to be mindful of page limits.
 - f. Self-help center on Kauai is helpful; may convince people that they don't have a case; can provide proper forms.
 - g. In Honolulu, have service center on third floor that helps with forms; now also have Access to Justice Room with volunteer lawyers providing legal advice.
 - h. **Consensus – district court is handling high volume of cases well.**
- 6. \$25,000 Cap on Damages.**
- a. Judges don't have a position on the limit.
 - b. When the cap was last increased, the legislature didn't consider the impact; this shouldn't be done blindly; must consider resources.
 - c. Perhaps collection law section can lead consideration.
 - d. Difference between handling case in district court and circuit court is substantial; faster and cheaper to go to district court.
 - e. Another possibility is raising the minimum for a jury demand to more than \$5,000; the ability to demand a jury seems out of step in terms of the amount of money at issue.
 - f. Cap should be in the \$40,000 range.
 - g. Attorneys have advised clients to waive amounts over \$25,000 to fit within the District Court jurisdictional limit.
 - h. Attorneys' fees and time required to handle a case in circuit court will be disproportionate to recovery unless recovery is in the \$40,000 to \$50,000 range.
 - i. Some feel ability to demand a jury even for a lower amount serves a function: makes big institutions reconsider their actions and helps citizens feel that the system works for them.
 - j. Others disagree; the ability to demand a jury for lower amounts allows people to game the system.
 - k. Minimum amount must be there because smaller money cases don't require juries.
 - l. Not sure how court would handle additional volume, but for clients, raising the \$25,000 cap would make good sense.
 - m. When the cap for small claims was raised from \$3,500 to \$5,000 the number of small claims cases increased; district court added one day to handle the increase.
 - n. **Consensus: we should consider raising the cap to \$40,000 and increasing jury demand limit.**
- 7. Difficulties in Accommodating Larger Summary Possession Cases.**
- a. Can be unwieldy to navigate larger summary judgment cases through district court.
 - b. District court judges frequently handle the possession portion of the case; there is often a jury demand for the damages piece; commercial cases tend to settle; larger summary possession cases haven't caused big scheduling problems; cases in rural courts can be transferred to town if they are complex.
 - c. Rules of civil procedure and rules of evidence should keep cases in control.
- 8. Discovery in Larger Summary Possession Cases.**
- a. Circuit court rules allow 30 days to respond to discovery requests; district court rules allow only 10 days.
 - b. Most people are pretty good about granting extensions.
 - c. Few discovery motions are filed in district court; trial can be continued until

everyone is ready; if rule were amended to allow additional days in certain cases, it would make it more difficult to follow the rules.

- d. Most lawyers will work on discovery responses 5 days before they are due whether they are allowed 30 days or 10 days to respond; hurry up now or hurry up later.
- e. Court can grant an extension for good cause.
- f. Discovery masters are very rarely used; cost would exceed benefit.

9. Elevator Issues.

- a.
 - (1) Number of things going on; contract with Otis to refurbish public, private, and custody elevators; one public elevator has been finished but must be inspected by the government department; the district court is not considered an emergency facility and so is not at the top of the list of elevators to be inspected.
 - (2) Otis couldn't start work on other elevators until the completed elevator was inspected; Otis sent its people elsewhere.
 - (3) Meeting held on September 21, 2012, on releasing the completed elevator.
 - (4) Work on elevators will take 4 months per elevator; will be at least one more year of not having all elevators in service.
 - (5) Elevator issues have created problems for attorneys and staff; has led to many motions to set aside default.
 - (6) District court has tried to accommodate attorneys and parties by, for example, passing cases to see if people will come late.
- b. Chief Justice will try to push things through as much as he can; regrets inconvenience; looking at other solutions: for example, using escalators and using more sheriffs to move people along.
- c. Chief Justice Recktenwald will look into why people are now being required to remove their belts when they go through security.
- d. Allowing attorneys to skip screening might save time but the only way for people to feel that the courthouse is safe is to have everyone go through screening.
- e. It would be difficult to reschedule returns to start later because returns are called before motions for TRO; right now, it is difficult to complete a TRO hearing before lunch. Pretrial conferences are easier to push back; unless a pretrial conference is for possession, parties can request a later time.

10. Areas for the Court and Attorneys to Work Together to Ensure That Cases Are Conducted in a Timely and Orderly Manner.

- a. Timely file papers before trial or a hearing.
- b. Judges don't always sustain objections to late filings.
- c. Judges try to be fair and to enforce the rules, but must balance this against not wanting to have people return to court on a refiled matter; in addition, want to review all of a party's submissions if intend to rule against him or her.
- d. Suggestion: rather than setting hearings on motions to set aside default that are 2 weeks away for summary possession cases, if granting a stay of the writ, automatically grant the motion and set the case for pretrial conference; time is of the essence.
- e. Suggestion: ask clerks to ensure that self-represented parties include an envelope to serve opposing counsel with their motion to set aside default.
- f. More generally, could require self-represented litigants to serve opposing counsel by certified mail and bring the return receipt or a statement of mailing to the hearing.
- g. Such rules would have to apply to attorneys too; judges attempt to ensure that motions are properly served.
- h. Suggestion: impose sanctions on tenants who frivolously file a bankruptcy petition

to stay a summary possession action.

- i. District court is bound by the federal stay.

11. Procedures and Processes to Protect Against Disclosure of Confidential Personal Information.

- a. Be mindful of what is filed; district court does not have staff to redact; leave only the last 4 digits of Social Security Number and account numbers; leave only year of birth.
- b. District court does not like to seal documents; volume of filings is too high.

12. Miscellaneous.

- a. All entities, including LLCs, must be represented by counsel; will e-mail civil judges to see how they treat LLCs.
- b. Most judges require counsel for LLCs.
- c. Because the statutory definition of landlord includes agent, a property manager can represent a landlord.
- d. Complaints regarding court staff should be directed to Judge Richardson.

EVALUATIONS OF THE 2012 BENCH-BAR CONFERENCE

Friday, September 21, 2012

1. Please mark your role in the conference:

	Response Percent	Response Count
Judge	19.0%	16
Attorney	81.0%	68
answered question		84
skipped question		0

2. Please mark the session you attended:

	Response Percent	Response Count
Circuit Court - Civil	39.3%	33
Circuit Court - Criminal	23.8%	20
District Court - Civil	21.4%	18
District Court - Criminal	15.5%	13
answered question		84
skipped question		0

3. Please rate the following:

What is your overall evaluation of the conference?

1 - Low	2	3	4	5 - High	Rating Average	Responses Count
0 % (0)	2% (1)	9.5% (8)	35.7% (30)	53.6% (45)	4.42	84

What is the overall usefulness to you of the conference?

1 - Low	2	3	4	5 - High	Rating Average	Responses Count
0% (0)	3.6% (3)	15.5% (13)	36.9% (31)	44.0% (37)	4.21	84
				answered question		84
				skipped question		0

4. Please take the time to answer the following:

	Yes	No	Responses Count
Were the topics relevant to you?	97.6% (81)	2.4% (2)	83
Was there opportunity for discussion in the sessions?	98.8% (82)	1.2% (1)	83
Did you feel comfortable asking questions or commenting during the sessions?	96.4% (80)	3.6% (3)	83
Were the hotel and accommodations adequate?	92.0% (89)	8.0% (6)	75

Were the session starting and ending times convenient?	88.0% (73)	12.0% (10)	83
Was the time of year convenient?	98.8% (82)	1.2% (1)	83
		answered question	84
		skipped question	0

5. What segments of the program were of most value to you?

(65 answered; 19 skipped)

- Comments by participants with different perspectives.
- Telephonic and video hearings and the court's consideration of issuing a preliminary ruling on a motion.
- Topic relating to telephonic court hearings and posting of tentative rulings.
- I appreciated the openness of the judiciary to discuss sensitive matters.
- The face to face frank discussions with the stakeholders. This forced us to take time out of our busy schedules to zero in on issues. While solutions were not necessarily solidified, it was a starting.
- The opportunity for open discussion with other members of the bar, as well as the courts, was valuable. It was eye opening to see what was occurring in other counties.
- JIMS CRIM, Case/calendar management.
- Status conference by telephone discussion.
- Court appearances by teleconferencing, electronic posting of tentative rulings, use of electronics in courtroom.
- Using mediation, esp. w/new Rule 12.2, Rules of Circuit Courts; technology uses changing, esp. video in some locales.
- All segments were of value.
- Feedback from attorneys on issues of greatest concern to them. Ability to discuss possible solutions and receive immediate feedback. Because of representation from various segments of the bar and all circuits, we had the ability to thoroughly discuss and consider different solutions.
- Ability to voice opinion re specified topics relevant to neighbor island practice concerns. Good to hear what is happening elsewhere and how they do things as well.
- Obtaining input from attorneys as to issues important to the practicing bar.
- The technology in the courtroom.
- The opportunity for judges and attorneys to discuss systemic issues and suggest possible solutions that will hopefully be given serious consideration or followed up with more discussion.
- All topics were interesting.
- Discussion regarding attending outer island proceedings by telephonic conference and the use of electronic equipment in the courtroom.
- Discussion on rules for calling in to hearings.
- The direct dialog with judges and various counsel from throughout the State of Hawaii to improve the system.
- Having the opportunity to have a candid and open discussion with members of judiciary.
- Discussion on topics applicable to me.

- Enjoyed the ability to speak freely with both District Court judges in a relaxed atmosphere amongst our colleagues. I felt the topics selected, i.e., of e-filing and the court elevators were very relevant. I felt clarification as to Rule 9 of the Court Record Rules and Judge Gangnes' comment not to submit sealed documents were valuable.
- Getting feedback from attorneys regarding what they liked/disliked, what was working v. not working, and their suggestions for improvement.
- Ability to have attorneys representing both sides of civil litigation present their views.
- It was good to have an opportunity to speak with Judges Gangnes and Kibe and to hear their perspective regarding issues facing the District Court. I think you should leave more time for lawyers to offer suggestions to the judiciary on how things can be improved. I think everyone brought some suggestions with them, but not everyone had a chance to have their suggestion discussed.
- I appreciated the elevator repair update and the District Court's plan to speed up repairs and improve access to the court on Monday mornings.
- Opportunity to interact with the judges outside of court.
- I only attended the bench bar portion of the program. It was very valuable for the judges and attorneys who frequently appear in district court to discuss issues.
- E-filing, use of smart phones and iPads in courtroom, and immigration consequences.
- All except e-filing.
- Good opportunity to discuss issues in each circuit in an open and professional forum.
- Not having the chance for parties to present beforehand concrete proposals. As a result, the discussion was not as focused as it could have been.
- Discussion of court appearances by phone and setting forth inclinations before hearings.
- Remote appearances by phone or VTC; electronic posting of inclinations; ADR.
- The segments discussing inclinations and telephonic hearings were valuable and it was good receiving input from bar members and other judges.
- JIMS CRIM issues; case management.
- Entire discussion was valuable.
- All were equally useful.
- Interaction with members of the bar was a positive experience.
- Discussion with judges re: practical solutions to current issues; discussion with group re: jurisdictional limits.
- The ability to give input to Judiciary re issues at Circuit Court.
- That the attorneys were allowed to bring up the issues we thought were important.
- Discussions re eFiling and problems of congestion in First Circuit.
- Discussing the guidelines re tele- and video conferencing and hearing how various judges handle this.
- Learning judges' perspective on issues.
- Discussions related to eFiling, court administration, immigration issues.
- Hearing members of the Judiciary describing their problems and concerns in the areas being discussed. We would not normally be privy to such information, but hearing them taught me to be ever watchful for the rights of others as we ALL have problems.
- The issue of publishing a tentative decision or inclination in advance.
- JIMS OVUII case management electronics in the courtroom.

- E-filing and case management.
- Allowance of counsel to participate in non-evidentiary matters over the phone (status and pretrial conferences, etc.).
- Hearing the views of the judges and other attorneys' issues of judicial administration.
- Hearing judges' thoughts on telephonic hearings, discovery, use of electronic devices.
- Immigration information for defendants; use of electronic devices in the courtroom; bail issues.
- Commentary on procedures.
- Discussions regarding telephone and video conferencing as well as the use of electronic devices in the courts.
- Having the judges there to hear both prosecution and defense side/position was helpful. The e-filing portion was valuable. Cell phone discussion was also valuable.
- Alternative dispute resolution.
- Hearing about differences among the circuit courts.
- Technology and ADR: especially mediation and judge involvement in mediation.
- Outer island input was extremely informative and helpful.
- Discovery.
- Discussion regarding inclinations and usage of electronic devices in court.

6. What segments of the program were of least value to you?

(50 answered; 34 skipped)

- Nothing comes to mind.
- All segments were valuable.
- Civility/discovery disputes.
- Some issues or concerns were specific to the First Circuit.
- Posting of advance judicial decisions (inclinations) on-line.
- Proposed findings posted online for comments.
- Immigration consequences, status conferences on Oahu.
- Telephone hearings - not in my mediation / ADR practice; tentative rulings - same.
- None.
- There was nothing that I would consider "of least value."
- Requests for procedural change that largely benefitted an individual attorney's preferences.
- Electronic filing.
- Historically, neighbor isle and Oahu attorneys have some frustration when topics deal with an issue only relevant to one of those groups but not both. That seemed less of a problem, this year, however.
- E-filing discussion.
- Commercial leases.
- Not applicable.
- Attorney concerns that were very specific to certain circuits or a certain single judge.
- The general topics vs. the ones specific to district court. They used time that could have been better spent addressing topics relevant to district court practice.
- I thought the whole program was useful.

- Most common topic issues did not seem too relevant to the District Court practice. Consequently, the conference lasted longer than it should have.
- I found the program I attended very valuable.
- Orders pertaining to bail (*OPB) - not done in our circuit.
- E-filing - except that the notifications should have a hyperlink to the documents.
- Discovery disputes; e-filing.
- Policy re attendance by telephone; posting by court of "draft decision" of court.
- None.
- Discussion on videoconferencing - since the court doesn't have the capability to do this, it was sort of a waste of time.
- Court appearances by teleconference and electronic posting of tentative rulings did not seem realistically relevant to District Court criminal session.
- E-filing.
- Questions that were not within the power of this group to change. Example: jury trial demand.
- Discussion regarding electronic posting of preliminary rulings.
- None; I can honestly say that all aspects of the conference were helpful and educational. More coverage of areas would be very probable, with more available time.
- Tentative rulings
- Electronic posting of tentative rulings.
- Technical aspects of electronic communications.
- Pretrial conference discussion (seems like it applies more to circuit court).
- Discussion regarding civility in the handling of civil cases.
- Interpreter services. Immigration issues.
- Use of electronic equipment in the courtroom.
- Oahu issue of courts setting and email versus written notices.
- Attorneys' comments about their experiences with ADR: war stories.
- Discussion of posting of electronic rulings as this "common topic" was not so common in practice for the criminal court.
- Civility

7. **Other comments**

(55 answered; 29 skipped)

- I had to forego an opportunity to obtain my MCLE to participate in the discussion. I hope in the future there is a way to obtain credit for these panel discussions.
- It was nice to meet others. The judges and moderator were prepared. Thank you.
- I gained an appreciation of the issues that are of concern to the Judges; which will enable me to provide future input that considers the issues facing the bench and bar.
- Maximizing the use of telephonic court hearings would be extremely helpful and assist greatly with productivity, especially for outer island hearings. Having judges indicate at oral argument issues which should be addressed by counsel would greatly assist focusing and directing oral argument, presumably shortening hearings and making them better directed.
- I would have liked input from young lawyers -- those that have been practicing for at least five years. Only us old guys were in our room.

- I felt we needed more time to discuss the e-filing issues and problems. I don't think we scratched the surface. We never discussed what could be done to improve e-filing. Perhaps we need to meet and continue to discuss the issues with the Judiciary in a different forum.
- We need more drug court spots on Oahu. Judiciary should advocate for more resources to be specifically allocated to drug court. Generally good experience that will hopefully bear fruit.
- Attorneys should be allowed to email the court when they have no objection to a motion instead of filing a document.
- I recommend that the Judicial Administration Committee propose that the Supreme Court encourage the use of Skype and other alternatives for video conferencing of hearings, such as arguments on dispositive motions and evidentiary hearings, which some judges seem to be leery of.
- Excellent program! Job well done!
- Well worth the time and effort necessary to attend. Will be glad to attend again in the future.
- Greatly appreciate the opportunity to participate in this free-flowing exchange with lawyers who appear frequently in our court.
- There were too many attorneys. 15-20 would have been good. There could have been a few more judges in the session too.
- Interestingly, some suggested practices to address issues in Oahu courts are already being used in neighbor isle courts. It was helpful to have people such as Judge Cardoza there to speak about what has been tried and is working in the Second Circuit.
- Overall, I thought that the majority of topics were relevant for discussion and potential implementation in the Circuit Courts.
- As the sessions all took place at the same time, it prevented various neighbor island judges from attending the session which would have applicability for them based on a dual calendar.
- Very worthwhile program.
- I think that it would be helpful to keep an open line between the judiciary and the bar. One of the concerns most attorneys have is how a particular court would rule on a certain issue and whether there is any consistency between different venues. Perhaps, this could be a topic for next year.
- I thought we had a very positive, productive discussion that was democratic and respectful. The discussion should continue at future bench-bar conventions (probably on at least an annual basis); a few attorneys inquired as to whether there would be follow-up or a response based on the group's consensus-based suggestions. The committee should ensure that the participants are informed that their feedback was considered & hopefully, follow-up done, or future discussions pursued on issues that require it.
- The only real issue with the location was the parking, which was expensive and it took us nearly 40 minutes to get out of the parking garage at the end of the day.
- The room was long and narrow and was not conducive to group discussion. There was a lot of construction noise which was distracting and made it difficult to hear. The worst, though, was the Hilton parking garage, where the exit line backed up to the 4th floor. It took me more than half an hour just to get out of the parking garage, and I missed the daycare pickup deadline for my son!
- I enjoyed the program and was glad to have been invited. I liked that a group from Legal Aid was there to balance the perspective. I think we should have more frequent interaction between the judges and the lawyers who appear before them since it promotes better understanding of the processes for all involved and can assist in making the court run more efficiently.

- Good to be able to have a forum where attorneys (and judges) can basically air out our concerns... I guess we will just have to wait and see if the forum was useful or not as measured by future actions to "correct" the concerns raised - if concerns raised are addressed, then I think this is an awesome conference and should be done at least once a year.
- Also, some of summary possession questions did not seem to be a big concern for most practitioners.
- Got lost finding tower and conference room. There were no signs and hotel personnel were not too friendly in helping with directions.
- In my opinion, the public interest in not having litigants feel "pre-judged" by tentative rulings or inclinations outweigh convenience for Bench and Bar to post those. However, the middle ground to have the parties focus on issues that concerns the court can result in robust argument on specific points without wasting the court's or party's time and money while eliminating a litigant's feeling of being "pre-judged". b. Use of iPads, smart phones, etc. should be encouraged. But counsel and parties should be provided with adequate notice of inappropriate uses by creating a distraction standard, and sanctions that may occur if the devices are distracting such as confiscation or preclusion of future use. c. I do not mind mediators speaking with the settlement judge as a general practice. My only concern is where a mediator acts as a "facilitator" (as opposed to an "evaluator") may disclose to the judge that one of the parties is not cooperating in the mediator's view because that may have nothing to do with the merits of the claims or defenses.
- Thank you for the invitation, and I hope to participate again in the future.
- I thought the breakout session was helpful. It was good to hear input from other outer island attorneys. However, it felt that there was no clear resolution to much of the issues. It was kind of just discussed and then moved on. I think it would be tremendously helpful if in the future, it was broken up between First Circuit and then all the other circuits together, and then possibly meeting as a whole for the last hour or so.
- Very Good!
- Agenda and materials distributed before conference were excellent - neither too little nor too much.
- The leaders of our section did an excellent job presiding over the discussions.
- I believe the Hawaii bar and Judiciary need to give greater consideration to the interests of our respective "clients." For the judiciary, its clients are not only the parties and attorneys, but also the general public and the legislators. The bar and the Judiciary should focus on providing the best experience and value to its clients. Obtaining a favorable decision for the client, or the legally correct decision, is not enough. Clients should feel that the civil litigation process was efficient, cost effective and fair. They should feel that the process is up to date and provides value. If we don't pay attention to our clients, we will lose them. Outsourcing has already begun in other professions including the law, e.g. tele-medicine, online legal services. This will only increase. For example, insurance companies outsourcing cases to foreign adjusters is not out of the question. We have to preserve and promote the things Hawaii lawyers and Judges provide that others cannot; e.g. local knowledge and relationships. For example, if we lose civility among Hawaii litigators, then we become like the mainland and hiring an attorney from Hawaii is no better than hiring one residing in California (or India, etc.), assuming they have a Hawaii license. If we don't embrace technology in the courtroom, then clients will see the litigation process as outdated and inefficient. If the public becomes dissatisfied with the process, it will not support taxpayer funding for the Judiciary. If this happens, the public will suffer because I do believe that a litigation process that

involves Hawaii attorneys and Hawaii judges is better than dispute resolution processes that don't involve those parties. We can avoid this by focusing on our "clients" interests. Thank you.

- I wonder if the discussions would have more energy if it were held earlier in the day. Otherwise, great job!
- I appreciated the opportunity to share my concerns with the other attorneys and judges. I am pleased that the comments and suggestions will be reviewed and hopefully implemented. I think this type of discussion is important. They should happen more often. I am willing to fly from Maui to participate.
- I enjoyed it and felt that it was useful.
- It was a great opportunity to discuss issues and problems in District Court criminal courts with judges, defense attorneys and prosecutors. I particularly appreciated that CJ and other justices joined us. We know how busy the CJ and Justices are but often wondered if they knew the reality (court congestion and the volume of cases) of District Court of the First Circuit and wished that they could come and visit the various courtrooms, especially Honolulu, Wahiawa and Waianae. The atmosphere was comfortable enough to discuss problems openly. I think we should have these sessions more regularly, more often and with more time: three hours was just not enough. I think we needed three days. If budget is a problem, could we just not meet at Circuit Court meeting rooms and/or judges' chambers in the future? Thank you very much for providing this forum it was absolutely necessary.
- Very interesting and helpful.
- Should make it an annual event.
- Because this is one of the few opportunities for attorneys and judges to interact, I would like similar meetings to occur on a regular and more frequent basis. I know that funding is always an issue but follow up meetings would be great to discuss progress in suggestions. I also don't think there was sufficient time to flesh out a lot of the discussion topics.
- I am very anxious to see what participants who will express themselves felt about our conference. I could see from 3/4 of the way through the planning process that this conference was going to be successful, and I believe it was. Again, we'll see what the written returns show, but they should be positive and may provide some help with suggestions. Not enough room here but will provide separate suggestions in two areas of attorney concern: (1) "Rules" vs. "Guidelines," and (2) Experience of Circuit Court judges.
- Good to have interchange with lawyers. Perhaps it would help to have more associate-level lawyers involved in discussions. They do most of the actual "field" work.
- Very good and robust discussion and the feeling that the court and the attorneys want to work together to make all of our jobs more efficient.
- It was great to get these interested parties together to discuss issues in the District Court, and to hear their honest feedback and suggestions for potential solutions. I think that it was very productive.
- Well done. We should have all the different circuits meet together more frequently, also to include our neighbor island judges.
- I enjoyed being a part of this.
- The room was too small for the number of participants.
- It was a pleasure to be able to discuss issues in a calm, cooperative, informative and productive manner; this is in comparison to prior years when the discussions centered on First

Circuit practices only and were essentially gripe sessions that never produced any positive or creative solutions.

- Judges seemed out of touch with electronic filing in federal court. Obviously they have no experience with that system as few were practicing when it came into existence. Too bad. It's a great system compared to what the appellate court has. It also seemed like judges hadn't done much hands on evaluation of remote appearances except for family court. Might make sense for the judiciary to reach out to the federal courts and bankruptcy court to modernize intelligently. Good program overall.
- It was valuable to have the group session to hear how other circuits handle the same issues. Thank you for doing this!
- Should be repeated every other year.
- 1) worth the time spent 2) Would like to get the summary of the breakout group 3) no need to wait on adopting good practices 4) Continue to stress need for early collaboration with all stakeholders for intense project such as JEFS 5) Recommend continuing the Bench/Bar monthly meeting, and suggest that the representatives ask for input by other local bar members 6) Mahalo.
- This program should be adopted as a yearly addition to the HSBA Conference.
- Well done.
- Excellent team leaders kept the discussions lively and interesting throughout the session.