

Hawaii State Bar Association  
Committee on Judicial Administration

## 2014 Criminal Law Forum

*Ali`iolani Hale*  
*Supreme Court Building, Room 101*

Tuesday, September 23, 2014

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## **INTRODUCTION**

As described in the Hawaii State Bar Association (“HSBA”) Board Policy Manual, the Committee on Judicial Administration (“JAC”)<sup>1</sup>

maintains a close relationship with the judiciary on matters of mutual concern to the bench and bar, monitors and formulates recommendations to the Board concerning legislation affecting the judiciary, studies and reports on subjects of judicial conduct and discipline, and coordinates activities of the HSBA relating to improvement of the judiciary and administration of justice.

In 2013, the JAC coordinated the Bench-Bar Conference. In 2014, the Committee decided that some of the suggestions or recommendations arising from the 2013 Bench-Bar Conference were determined to merit further study and evaluation prior to implementation. Accordingly, the Committee developed a forum concept to focus on particular issues in the criminal area and separately in the civil area.<sup>2</sup>

The Criminal Law Forum occurred on Tuesday, September 23, 2014 with the participation of 20 judges, eight court administrators, eight guests, and 45 attorneys.

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<sup>1</sup> The HSBA Committee on Judicial Administration in 2014 comprised the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J.T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack; Second Circuit Court Judge Joel August (ret.); Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley Kawamura; First Circuit Court Judge Karen T. Nakasone; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G.B. Valenciano; Dennis Chong Kee; Kahikino Noa Dettweiler; Vladimir Devens; Don Jeffrey Gelber; William A. Harrison; Edward C. Kemper; Carol K. Muranaka; Lester D. Oshiro; and Audrey Stanley.

<sup>2</sup> The Criminal Law Forum Subcommittee was led by Audrey Stanley and Bill Harrison with the following members of the JAC: Justice Simeon Acoba, Justice Richard Pollack, Judge Ronald Ibarra, Judge Shirley Kawamura, Judge Catherine Remigio, Judge Randal Valenciano, Vlad Devens, Carol Muranaka, and Lester Oshiro.

**OPENING REMARKS**

Justice Simeon R. Acoba (ret.) welcomed and addressed the attendees. He thanked the Judicial Administration Committee, the panelists, and attendees participating in this important event, and others who assisted in coordinating the Forum. He hoped that this Forum would promote understanding and effective communication.

Chief Justice Mark Recktenwald emphasized that every issue that was raised at the Bench-Bar Conferences in 2012 and 2013 was given due consideration by the judiciary and, in fact, many improvements were made. For example, as a result of the bench-bar conferences and the judiciary's efforts, rules were developed allowing for telephonic appearances and the use of electronic devices in courtrooms.

While the Criminal Law Forum is a different model from the Bench-Bar Conferences, it is particularly beneficial to provide information and transparency to members of the criminal justice system. Chief Justice Recktenwald noted a criminal justice reform movement is sweeping the country. He explained that in Hawai'i in 2011 a criminal justice initiative was formulated, and in 2012, legislation was enacted with a goal to reduce the prison population without compromising public safety. These reforms created pretrial release forms, increased the size of the parole board, and established a presumption that low-risk offenders would be released on parole. He hoped this Forum would address procedural issues and perhaps emerge with creative ways to address certain issues.

## **I. SENTENCING ISSUES – ADULT CLIENT SERVICES**

*(Bill Harrison, Moderator; Panelists: Sidney Nakamoto, Miki McGarvey, Jean Oshiro, Brook Mamizuka)*

The panel discussed the preparation of presentence reports and restitution studies, treatment alternatives for probationers, and the interstate compact. The panelists provided information and guidance to counsel about how to proceed in these areas.

### **Topics:**

#### **A. Presentence reports and sentencing**

The presentence report is relied upon by the judge and the parties during the sentencing hearing. The Pre-Sentence Investigation Unit will always submit the presentence reports to the court prior to the scheduled sentencing date, but the court or the respective attorneys may wish to continue sentencing due to lack of information and/or information needing further clarification. Prosecutors and defense attorneys can do their part to ensure that a complete and accurate report is submitted.

Prosecutors should submit the police reports to the Adult Client Services Branch (“ACSB”) within three weeks from the date of the Court’s referral to prepare the presentence report. The Adult Client Services Branch prefers to review the police reports before interviewing the defendant and preparing the report. Sometimes, the ACSB does not receive the police reports in a timely manner, but it eventually receives the reports before the sentencing date. Receiving the police reports in a timely fashion results in more efficient investigations. Nonetheless, even if the ACSB receives the police reports late, it will complete the presentence reports prior to the scheduled sentencing dates. Any police report submitted three weeks after a defendant’s change of plea is untimely.

Defense attorneys should explain the presentence process to the defendants. Because recent legislation requires defendants to undergo drug assessments to be eligible for certain probationary sentences,<sup>3</sup> fifty to seventy percent of Court referrals for presentence reports require the defendants to receive some sort of drug program or assessment. Mr. McGarvey explained that the assessment process takes at least a month to be completed. In many cases, the defendant is not aware of the process and misses the interview for the drug assessment or the presentence interview, which results in a delay of the sentencing hearing. Defense attorneys can play a major role by explaining the purpose of the drug assessment interview, the importance of making and attending appointments, and the presentence interview process to their clients.

The panelists then turned to the presentence interview itself. The presentence interview is an important component of the presentence report. At the interview, the probation officer meets with the defendant and discusses personal information, such as the defendant's history, drug use, physical abuse, and education. The panel considered whether defense attorneys are welcome to attend the presentence interview. In federal court, probation officers expect defense attorneys to attend the interviews; in state court, however, defense attorneys do not always feel welcome at such interviews. The panelists agree that while attorneys are not necessarily wanted or expected to be present, they may attend if necessary. Ms. Oshiro stated that in her experience, defense attorneys who attended the interview sometimes told clients not to answer the probation officer's questions, which she believed made the process difficult. In her view, it is in the best interest of

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<sup>3</sup> For example, Haw.Rev.Stat. § 706-622.5 allows first-time drug offenders to be sentenced to probation as long as they have been assessed by a certified substance abuse counselor to be in need of substance abuse treatment. This requires a substance abuse assessment to be performed prior to sentencing.

the defendants to be honest and forthcoming because the defendants need to take responsibility for their actions.

The panel next discussed whether attorneys should be given a copy of the probation officer's confidential letter that is submitted to the sentencing court. In the First Circuit, in addition to the presentence report that is provided to the parties, the probation officer also prepares a confidential letter recommending a specific sentence, which is submitted only to the Court and is not disclosed to counsel. All the state judicial circuits except the Third Circuit, which has open recommendations, treat the recommendation letter as confidential. In federal court, the confidential letter is disclosed to the attorneys. The recommendation letter informs the court of the probation officer's assessment of the particular case and is not to contain any information that is not in the presentence report.

There was no consensus regarding whether the letter should be disclosed. Some believed that there is no legitimate reason to disclose the letter, as the probation officers may be more reluctant to share information with the Court if they are required to distribute it to attorneys. Additionally, probation officers may worry about retaliation from the defendants. Others believed that a defendant's right to know all of the information against him or her outweighs those possible concerns. Furthermore, it was contended that retaliation is not really a problem, since the probation officer must supervise the defendant anyway. Mr. McGarvey stated that he will look into whether it is possible to distribute the confidential letter.

**B. Restitution/Ability to pay studies**

The restitution process begins when letters are mailed to the victims, asking them to complete a restitution request indicating the amount of money they seek. The victims are asked to provide some form of verification, such as receipts, of the value of their loss. When the victims

do not possess any verification of value, they are asked to search online or other sources, for some source of verification of the value of the item. If no source of verification is found, the victim may not receive restitution, although the Court would still be informed of the amount of restitution that the victim is seeking.

The defendants must disclose their income and expenses on a financial sheet. That information is then used to determine the restitution the defendants are required to pay on a monthly basis. The defendants are requested to submit pay stubs and expenses to verify the information on the financial sheet. Usually, the minimum amount a defendant will be required to pay is thirty dollars per month.

An independent investigation of either the victim's claims of restitution, or the defendant's claims of income and expenses, is not performed. The panelists agreed that the restitution statutes leave room for interpretation. Often the attorneys will argue to the court their respective interpretations whether restitution for certain areas is necessary or warranted.

### **C. Treatment alternatives for probationers**

Significantly, the number of defendants who need treatment exceeds the amount of contracted, approved treatment options available. The panel discussed the contracted and alternative treatment options for defendants. There are only seven contracted substance abuse treatment providers on Oahu;<sup>4</sup> these programs must submit monthly progress reports, in either oral or written form, to the probation officers addressing any behavioral or relapse issues.

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<sup>4</sup> The probation officers do not have a list of approved vendors. Ms. Oshiro mentioned that a good place to look would be Drug Free Hawai'i, or "ADAP," the Department of Health's Alcohol and Drug Abuse Division. The ADAP website is <http://health.hawaii.gov/substance-abuse/>.

A defendant may apply to other alternative treatment programs, since there may be waiting lists for the contracted treatment programs. It is within the probation officer's discretion to allow or to deny the defendant admittance into that alternative program. The probation officer may allow the defendant to enter an alternative program if the program addresses the defendant's criminal behavior, provides feedback to the probation officer, holds the defendant accountable, and the defendant is not merely seeking an easier program, but is actually seeking treatment. The probation officer may also consider whether the facility is highly structured or not. The probation officer is responsible for researching the program and determining whether the program will be a "good fit" for the defendant. A probation officer may preclude the defendant from entering the program if the program is not agreeing to communicate with the probation officer, the probation officer's experience with the program indicates that the program is not responsible or accountable, or the probation officer fears that the client poses a risk of recidivism. A probation officer will consider several key factors to determine whether a client is benefiting from a particular program, such as behavioral changes, taking responsibility for his or her actions, making restitution payments, and reports or feedback from the program.

On a slightly different note, the panel discussed the criteria for a probation officer's decision to revoke probation. There are no concrete criteria, and revocation is largely left to the probation officer's discretion. Sometimes, a probation officer will not revoke for minor violations, whereas another probation officer may file a motion to revoke based on the same conduct for a different defendant. While there are no established criteria, a member of the panel believed that revocation should be based on the risk to the community.



**D. Rule 43 Interstate Compact Issues.**

Brook Mamizuka, who is involved in the administration of the Interstate Commission for Adult Offender Supervision, explained the interstate compact process. She identified who is eligible, the requirements for the transfer packet, and the average length of the process. The purpose of the compact is to promote public safety, protect the rights of victims, and supervise, rehabilitate, and control the movement of offenders. Ms. Mamizuka is responsible for resolving issues with other states, ensuring compliance with rules, and developing and recommending in-state operating procedures.

Defendants are eligible for coverage under the interstate compact if they are under supervision for felonies, certain misdemeanors with one or more year of supervision where the victim incurred direct or threatened physical or psychological harm, the crime involved the use or possession of a firearm, the crime involved a second or subsequent offense of driving while impaired by drugs or alcohol, or the crime was a sex offense. The defendants must submit a transfer packet if they want to “relocate,” or leave the state for forty-five consecutive days or more. The transfer packet must include a permission letter, verification of residence and employment, a signed judgment, a presentence investigation/police report, a \$200 application fee, and an understanding that if a new charge arises, the defendant will be held without bail.

All transfers are in the probation officer’s discretion, meaning that if the probation officer denies the defendant’s request, then the sending state does not have to send the defendant or start the compact process. If the probation officer approves of the transfer, then the receiving state decides whether to accept or reject the transfer. There are two types of transfers: mandatory and discretionary transfers.

In mandatory transfers, the receiving state must accept supervision because the offender meets certain criteria: the defendant has more than ninety days of supervision remaining, has a valid plan of supervision, is in substantial compliance in the sending state, and is a resident of the receiving state or has a resident family member in the receiving state that is willing to assist and can obtain means of employment or support for the defendant. Discretionary transfers occur where the receiving state has the discretion to accept or reject supervision in a manner that is consistent with the purpose of the compact.

Once the transfer packet is submitted, the investigation will be completed within forty-five days of a transfer request. The complainant must be notified of any transfer or movement. If the request is accepted, the defendant relocates. If the defendant subsequently disappears, the sending state is obligated to issue a warrant of arrest. The defendant will be returned to the home state if the defendant commits three violations, a new felony, or a new violent crime.

## **II. PAROLE AND DEPARTMENT OF PUBLIC SAFETY ISSUES**

*(Judge Catherine Remigio, Moderator; Panelists: Bert Matsuoka, Chairperson, Hawaii Paroling Authority; Max Otani, Deputy Director of Corrections)*

### **Topics:**

#### **A. Criteria used for minimum sentences and parole hearings**

The Hawaii Paroling Authority is vested with the discretion to determine minimum sentences and parole. The concern is that this exercise of discretion can result in inconsistency and/or uncertainty in the setting of minimum sentences and the granting of a parole. Such a result prevents counsel from adequately preparing for hearings and is perceived as unfair to defendants.

In response, Mr. Matsuoka, the chairperson of the paroling authority, explained that the Board has flexibility and treats each case individually. However, the Board tries to remain within the sentencing guidelines, and the current board has not yet given more than 50 years for any one

charge nor has it gone outside the guideline recommendations. Every case is different and with the discretion given, the Board can approach each hearing on a case-by-case basis and issue the appropriate decision based on the circumstances of the particular case. The members of the paroling authority are diverse and have the experience and skill to issue fair and just decisions.

The Board prepares for the hearing by reading the presentence investigation report, the police reports, and letters from victims and/or survivors. Before setting the minimum term, the Board reviews everything it has, including binders submitted by defense counsel containing information about the defendant's background. The following are some of the sources the paroling authority looks at when making its decisions:

- Inmate interview
- Social worker and public safety reports
- Presentence report (if available)
- Police report
- The offense committed
- Letters for and against the inmate
- Work history
- The inmate's make-up as a whole

An Individual Perceptive Plan ("IPP") is given to the parole board and it is reviewed with the inmate. The potential programs that the inmate can participate in are discussed at that time.

The Board will either make its decision following the hearing or issue a decision at a later date. After a minimum term is set, an inmate will be classified, which gives an idea of the type of housing the inmate will be in.

Mr. Matsuoka explained that the Board tries its best to be fair, so if a defendant did not succeed in drug court, the Board will not necessarily set an extremely high minimum. If the defendant was on probation and had previous revocations, he or she may have two or three years of credit for time served.

**B. Need for updated criteria**

The current sentencing guidelines were created in July, 1989. A question that often arises is whether the guidelines need to be updated.

Mr. Matsuoka acknowledged that the minimum guidelines are basic and old, but they seem to work and much of it still applies today. The Board tries to remain within the guidelines when fashioning a minimum sentence.

Whether or not the sentencing guidelines need to be updated remains an open question.

**C. Preparation for minimum sentences and parole hearings**

At a parole hearing, the board looks at:

- Behavior
- Prison record
- Parole plan
  - Where will the inmate live?
  - How is the inmate going to make a living?
  - Family and/or community support

For terminal illness cases, a public safety physician will initiate a request to the parole authority for early release. The family can contact the health care office at the public safety department to inquire.

The minimum hearing can be scheduled once the proper paperwork is received.

If an attorney wants a hearing to be expedited, Mr. Matsuoka encourages that a letter be sent to the board asking for an early minimum sentencing hearing, and the board will do its best to accommodate the request. There are a minimum of 50-80 hearings a month, so there is only so much the Board can do. Also, a minimum hearing must be conducted within six months of the sentencing date.

Currently, the Board is also going back and correcting prior minimum sentencing rulings and granting new minimum hearing requests. The Board wants to place past rulings within the sentencing guidelines.

Consecutive sentences are viewed as separate sentences.

Advice for inmates who hope for parole in the future:

- Stay away from gangs
- Ask for help if needed
- Be motivated to change.

Mr. Matsuoka explained that in determining whether to grant parole, the Board looks at the defendant's behavior in prison, whether the defendant has a strong parole plan, family and community support, and his or her progress in programs like furlough.

**D. Availability of inmate programs**

There are three levels of substance abuse program:

2= Outpatient (Available at Halawa, Wahiawa, Arizona)

- Treated once a week. Program runs for 2 or 3 months.

2.5 = Intense Outpatient (Available at Halawa and Wahiawa)

- Treated three times a week. Program runs for 18 months to 2 years.

3= Residential setting (Available at Wahiawa and Arizona)

A level 2 substance abuse treatment program is predicted to start at Kulani Correctional Facility in January 2015 with plans to grow further. While there is no wait list for level 2 or 3 treatment programs, there is a waitlist for level 2.5. The programs are open enrollment, meaning defendants can apply at any time. A sex offender treatment program is also available at Kulani. Sex offender treatment programs are not available in Arizona.

Defendants become eligible for these programs when they have three or more years left on their sentence.

If the Board sets a minimum term and the inmate has not completed all of the programs due to backlog, the Board will consider an outside program.

Mr. Otani discussed Reception, Assessment and Diagnostic (“RAD”) recommendations. RAD will recommend certain programs but an inmate or his attorney can request an outside program. However, RAD will not change its recommendations, and it is up to the Board to determine what program the inmate will be placed in. RAD will not research alternative programs.

Finally, the furlough program is currently over capacity with 210 inmates and has a waitlist. The furlough program is used as an integration process for inmates. Inmates in this program are given 6-8 months in furlough before parole. Furlough integrates the inmates with their families, jobs, and society. The longer an inmate is incarcerated, the more important furlough becomes. One of the biggest hurdles for inmates is finding a job, and the furlough programs help inmates overcome this issue. Furlough may be the most important program because it prepares inmates to go back into the community.

There is a wait list to use the furlough program. The State is currently “tapped out” on resources and cannot currently expand the furlough program. However, efforts are being made to find a possible contractor to expand the program.

**E. Criteria for inmate program admission**

The “inmate classification” is the first indicator as to whether an inmate is eligible for a program. The classification can be found at the classification office.

Factors involved in the classification are:

- The RAD interview
- Where programs are located
- The case manager’s determination of eligibility
- The case manager’s assistance with inmate movement
- The completion of transfer packet
- The case manager’s access to the presentence report

**F. Attorney visits**

At Halawa prison, there are visiting rooms but no tables in the room. Mr. Otani will check with the warden to get a table into the room.

In response to complaints, the prison staff has been retrained on its dress code policies.

An audience member commented about difficulty in speaking with his clients at OCCC, Annex 2. The only space available is a large room with other attorneys, clients and benches throughout the room. There are concerns about the waiver of the attorney-client privilege. It would be helpful to have separate rooms available. Mr. Otani will look into it.

If attorneys want to use video equipment, they need to notify prison staff at least 48 hours in advance because the staff will need time to obtain the appropriate approvals from their supervisors. To make arrangements, attorneys should call security and should expect a call back granting approval. If attorneys do not receive a return call, they should call the warden's office.

An audience member asked if the prison can provide advance notice before inmates are transferred to Arizona. Mr. Otani explained that it is a security issue and that inmates are not told of transfers because of the possibility that inmates who do not want to be transferred will do whatever they can to avoid it. Inmates know when movements will take place but do not know who will be moved. Mr. Otani was asked whether the location of the inmate's family or support system is considered in deciding whether to transport the inmate to the mainland. Mr. Otani explained that these factors are not considered because they do not have the resources to verify the information. The only criteria used are whether the inmate is healthy and whether the inmate has a lengthy sentence (3+ years).

The Federal Detention Center is used for overflow. This facility is available for all sentenced misdemeanants and felony offenders as long as the inmate has no pending legal matters.

An audience member asked about delay in transporting inmates to court. Mr. Otani explained that there used to be a lengthy delay in transporting defendant to court, but many improvements were made, such as purchasing new vans, equipping the vans with radios, staggering trips, and enhancing procedures. The radios are used to notify the sheriffs at court when the vans leave prison, which judge the transfers are being made for, and the estimated arrival time. These improvements have helped to eliminate delays. They are currently working on a better system with the Sheriff's Office for inmate transports in Hilo.

OCCC has to transport 100 inmates each morning to different locations. The inmates are taken from their modules at 4:30 a.m. to be ready for transport by 7:15 a.m. Some inmates must be taken to their doctors. OCCC is the hub where the other facilities bring their inmates to be transported to the different locations.

Judge Ibarra asked whether inmates could appear by phone instead of being transported from Oahu to the Big Island. Mr. Otani explained that for a reconsideration hearing, videoconferencing is available. The inmate is transported to OCCC to conduct the videoconference.

### **III. SPECIALTY COURTS - DRUG COURT, MENTAL HEALTH COURT, VETERANS COURT, DWI COURT**

*(Judge Shirley Kawamura, Moderator; Panelists: Judge Edward Kubo, Judge Steven Alm, Judge Richard Perkins, Judge David Lo)*

#### **Topics:**

- Criteria for admission
- Waiting list for admission
- Statistics
- Procedure (Application to graduation)



**Courts:****A. Judge Edward Kubo: Veterans Treatment Court**

Judge Edward Kubo has presided over Veterans Court since its inception in January 2013. Veterans courts are expanding across the nation. Judge Kubo indicated that the Hawai`i Veterans Treatment Court is the “Baby” of the judiciary. The specialized court began with three defendants and has grown to ten defendants in 2014, as more attorneys submit applications for their clients to participate in the program. “Veterans Treatment Court” was born out of the need to address problems that are specific to veterans. Judge Kubo noted the judicial trend is towards rehabilitation. The Veterans Court program will begin expanding to the neighbor island courts soon. Kona Veterans Court will be open by the end of the year, followed by one opening on Maui and then on Kauai. The defendants selected to participate in Veterans Treatment Court have all served in the U.S. Armed Forces and have experienced difficulties acclimating back into society. Many have mental health issues, including post-traumatic stress disorder, and the majority struggle with substance abuse as well. There is a significant need for the Veterans Court.

Of all military returnees:

- One out of five are drug addicted
- One out of five need mental health treatment
- Of these individuals, many are self-medicating.

Veterans often tend to have a “need for speed.” They are charged with offenses such as driving under the influence, assault, and speeding, as veterans tend to receive an adrenaline rush from fighting and speeding. Recent examples in the media include: (1) a 2008 incident in which a Hawaii national guardsmen killed his significant other, family members and then himself, and (2) a bumper car incident where a veteran was shot and killed by police officers. The Veterans Courts’ aim is to address these problems and return the veteran to self-sufficiency. Hawai`i

Veterans Treatment Court is one of 160 such courts across the nation. The court formula is working.

The Hawai'i Veterans Treatment Court takes a holistic approach to help provide the resources and treatment these veterans need to get healthy, get employed, and return to being law-abiding citizens. The court has partnered with staff from U.S. Vets and Salvation Army Addiction Treatment Services so that mental health and substance abuse issues can be addressed, evaluated, and treated. In addition, the Court helps participants find housing and receive job training.

Veterans Court returns structure to a veteran's life much like the soldier's previous military existence. Judge Kubo indicated that during a veteran's first court encounter, the veteran exhibits no signs of former military countenance. This demeanor changes as the veteran's military countenance returns. The veteran begins to address the court as she did in her former military life -- "Yes Sir, No Sir" returns.

While under the Court's supervision, these veterans must undergo urine analysis on a regular basis and are required to report to Veterans Treatment Court every Friday at 2 p.m., unless otherwise directed by the judge. If the defendant violates the terms of the program or his or her probation, then he or she is subject to immediate consequences and jail time to ensure accountability. The Hawai'i court has also formed a "Vet-to-Vet" buddy program to assist with V.A. Clinic appointments and other required court and probation obligations.

Veterans Court facts:

- There is a "0" recidivism rate for graduates of the program
- The State of Hawai'i and the District of Columbia are unique as the only places in the United States that have all five branches of the services within its jurisdiction

- The first graduating class of Hawai'i's Veterans Treatment Court will participate in ceremonies next year
- District Court numbers are not accounted for
- Haw. Rev. Stat. § 363-1's definition of "service member" is broad. It includes a service member from any branch who served any length of time.
- Veterans Court will take in all high risk individuals--including prior HOPE participants

**B. Judge Steven Alm: Drug Court**

In 2004, Judge Steven Alm launched a pilot program to reduce probation violations by drug offenders and others at high risk of recidivism. This high-intensity supervision program, called HOPE Probation ("Hawaii's Opportunity Probation with Enforcement"), was the first of its kind in the nation. Probationers in HOPE Probation receive swift, predictable, and immediate sanctions -- typically resulting in several days in jail -- for each detected violation, such as detected drug use or missed appointments with a probation officer.

The program is highly successful. The Court administers immediate sanctions for violations of probation. If a defendant shows up and tests "dirty," the defendant is sanctioned immediately. The court motto is: "swift, certain, consistent and fair."

The court is presently supervising 1,850 HOPE probationers. The program has received \$1.2 million dollars from the legislature.

The court works on a "triage" model. The individual is assessed, and it is determined whether Drug Court, Veterans Court, or a long term facility is the most appropriate program/court for the individual.

The Drug Court's focus is on "high risk" individuals. There is less focus on the "low risk" individual. Drug Court does not mix the two. The Drug Court program is the most expensive

program, therefore, if the defendant fails, the defendant goes to prison. Defendants who are violent should be in the program.

Tangible markers of the success of the program can be demonstrated by the fact that the 14 recent graduates of the program: (1) paid their restitution, and (2) each saved the State incarceration costs of \$46,000.00 per year.

This program administers the “Cadillac” of treatment modalities, which goes to the most “needy” recipients.

### **C. Judge Richard Perkins: Mental Health Court**

Judge Richard Perkins currently administers the Mental Health Court. The court began in 2005. There have been three judges involved with the program since inception: Judge Marcia Waldorf, Judge Michael Wilson (currently Hawaii Supreme Court Associate Justice), and Judge Perkins.

The Mental Health Court is a specialty court that redirects offenders from jail to community-based treatment with intensive supervision to deal with public safety issues and support the recovery of defendants diagnosed with severe mental illness. The mental health program has benefited both the community and the defendant through reduced jail time and reduced recidivism. This obviously saves the community and the system money. The program coordinates interaction among dedicated prosecutors, public defenders, psychologists, psychiatrists, case managers, private services providers (e.g., Ho’omaui Ke Ola) and Department of Health, Adult Mental Health Division, who contribute clinical support to the team. The program offers a collaborative approach where community treatment providers offer specialized care for participants requiring psycho-social rehabilitation, psychiatric treatment, substance abuse recovery, and other individualized treatment.

Upon admission to the Mental Health Court program, participants redirected from incarceration to treatment are expected to receive multiple benefits including mental and medical support, reduced jail sentences and probation, or dismissal of charges, as determined on a case by case basis.

Admission factors to the program:

- Serious and persistent mental health issues
- The “most “motivating factor for the defendant’s criminal behavior is a mental health problem
- Chemical dependency cannot be the primary diagnosis
- Non-involvement in a “sex” crime or significant violence
- Fitness to proceed.

Application procedure:

- (1) Defendants are referred to Mental Health Court by their defense attorneys who must submit a request/referral;
- (2) The court reviews application for legal exclusions; and
- (3) A clinical review is undertaken by a mental health team.

Each participant is supervised by a case manager, the court coordinator, and the court case supervisor/probation officer. Additional supervision is provided through regularly scheduled court review hearings. The Mental Health Court program is organized into four phases, corresponding to individual development. The individual will move through the phases to completion.

In 2014, there were a high number of graduates. Recent applications indicate that 42% were admitted, 39% did not meet the criteria and 19% who met the criteria were rejected. Ninety-six individuals have petitioned into the program; 35 completed the program; 25 failed to complete (this included three deaths), and one transferred to Drug Court. Thirty-five individuals is the preferable/maximum population.

Presently the process is taking 67 days from petition to acceptance, 57 days from acceptance to petition hearing and 56 days from petition hearing to treatment.

Upon graduation from the Mental Health Court program, all defendants will have met required expectations and received effective treatment, indicating solid, strength-based recovery. Each graduate will demonstrate values essential for living, working, learning and participating fully in the community. Mental Health Court staff ensures public safety, by increasing supervision, reducing recidivism, and emphasizing accountability through the use of graduated sanctions.

Mental Health Court does fill a necessary need and gap in the criminal justice system.

Judge Perkins is also responsible for handling the majority of the HRS § 704-404 (penal responsibility and fitness to proceed) hearings.

**D. Judge David Lo: Driving While Impaired (“DWI”) Court<sup>5</sup>**

Judge David Lo administers the Honolulu DWI Court Program, which was founded in 2013 to address an increase in fatal vehicle crashes involving drivers under the influence of alcohol. DWI court is a collaboration between the Judiciary, John A. Burns School of Medicine, and the State of Hawaii, Mental Health Division.

The goal of the DWI Court Program is for participants to attain sobriety through a comprehensive, court-regulated, treatment plan that provides intervention support for non-violent offenders.

Entry into the DWI Court Program is voluntary, and requires each participant to undergo a screening process and enter a no contest or guilty plea before admission. Criteria for entry:

- 2 or more DUI offenses
- High blood alcohol content [“BAC”]

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<sup>5</sup> Although the court uses the term DWI, the Hawai`i statute refers to the offense as “[o]perating a vehicle under the influence of an intoxicant.” See Haw.Rev.Stat. § 291E-61.

- DUI offense with a high speed charge
- DUI offense with a concurrent suspended license
- DUI offense with a motor vehicle accident
- Alcohol addiction problems

Rehabilitation is coordinated by a DWI Court Case Manager, and includes alcohol monitoring, individual and group counseling, and regular attendance at self-help meetings. In addition to treatment, participants are required to make regular court appearances [twice monthly on Thursday mornings] before the presiding District Court Judge for evaluation. There are 8 to 15 hearings per court calendar session. All participants are required to remain throughout the proceeding to listen to the other participants and to share their respective problems.

Each participant's sentence is stayed pending compliance and successful completion of the DWI Court Program, which takes a minimum of one year.

The DWI Court program serves participants by providing them with a gateway to resources for recovery, in turn reducing recidivism and increasing public safety.

All present participants are male. There is one potential female participant to be admitted in the future.

The breakdown of the number of applications/participants/admissions:

- 162 referred
- 80 deemed eligible
- 51 declined
- 46 chose to enroll
- 20 participants in various phases
- 2 graduated
- 2 withdrew

The goal is to have 30 participants, which is the maximum capacity of the program. The program seeks to convince attorneys that it may be in the best interest for their clients to be in this program. Those who complete the program can serve jail time on weekends.

The following are some encouraging comments by participants:

- *“Like the partnership ~ getting me better”*
- *“Giving sobriety a chance.”*
- *“Went in kicking and screaming, did not believe I had a problem.”*
- *“Enjoy the interaction with other participants.”*
- *“I like to share problems and information.”*
- *“Enjoy the comradery”*
- *“Program helped me build a foundation to a better life.”*

#### **IV. SERVICE OF BENCH WARRANTS – HONOLULU POLICE DEPARTMENT AND DEPARTMENT OF PUBLIC SAFETY**

*(Vlad Devens, Moderator; Panelists: Sheriff Robin Nagamine and HPD Major Thomas Nitta)*

##### **Topics:**

In many situations, defendants are arrested, sentenced, and near the end of their sentences when they are served with outstanding bench warrants that could have been served earlier. Some feel this is unfair to the inmate, an inefficient use of resources, and the cause of unnecessary frustration. In terms of efficiently utilizing available judicial and incarceration resources, it was felt that outstanding warrants should all be served on the arrestee upon arrest so that all pending matters can be taken care of by the courts and the arrestee during one sentencing and incarceration period, if appropriate.

The panelists were asked to discuss and explain the role their respective law enforcement agencies play in terms of serving outstanding warrants and the process used to check on whether



an arrested defendant has current outstanding warrants. The panelists were also asked about how penal summons and orders pertaining to bail were served.

**A. Sheriff's Department**

Sheriff Robin Nagamine explained that when a person is arrested by the Sheriff's Department, a computer search for outstanding warrants and sex offender registration is conducted. If there are outstanding warrants, the warrants are served on the defendant shortly after arrest. A warrant search is also conducted for inmates that are about to enter the furlough program.

Currently, the delay in serving warrants has been reduced, due to the creation of electronic warrants, an updated computerized system, and the decriminalization of some traffic offenses. Previously, warrants were generated, printed, signed, and prepared, and then scanned back into the computer system. Sometimes it took six months before warrants were inputted into the computer system. Now, the warrants are electronically prepared and inputted into the warrant database system immediately after being issued. While Sheriff Nagamine did not know how many outstanding bench warrants existed, he did explain that because many old warrants were purged, and the backlog in warrants has been reduced dramatically. He also felt that the lag between the time a warrant is issued and the time it is inputted into the computer system is substantially less than what it was before the updating of the computer system. Overall, he felt the Sheriff's Department was closing the gap in the number of outstanding warrants.

Sheriff Nagamine was not sure what access and information was available to the Department of Public Safety and its ability to check on outstanding warrants for inmates in the Department's custody. However, once an inmate is arrested, the inmate can submit a form inquiring whether any case or warrant is outstanding, and within a few weeks a search will be conducted and information provided to the inmate.

An attendee asked how a client can check on whether he/she has outstanding warrants. Sheriff Nagamine explained that the person can check with his office and the office would conduct a search.

### **B. Honolulu Police Department**

Major Thomas Nitta, who is the current commander of the Honolulu Police Department's ("HPD") Records Division, explained that contrary to popular belief HPD does not have a dedicated warrants section of officers that actively look for and serve the outstanding warrants. However, police officers on patrol routinely run checks for outstanding warrants and grand jury indictments when a defendant is arrested by HPD. HPD has access to felony, HOPE, NCIC, and grand jury warrant databases. Patrol officers serve the majority of warrants for HPD. According to Major Nitta, 50,000 traffic bench warrants and 40,000 criminal bench warrants are currently outstanding per HPD's records.

With respect to penal summons, it was explained that HPD, and not the Sheriffs, handle the service of summonses. The prosecutors/investigators also handle and serve summonses.

It was unknown whether the respective correctional facilities had access to the Judiciary's warrant databases and whether checks are made by them of inmates in their custody. If the source of the problem as to why inmates are not being timely served with outstanding warrants is a gap at the correctional facilities, a check should be made with the Department of Public Safety to determine what procedures the Department follows and what warrant checks are made, if any, on inmates in custody.

### **V. FOLLOW UP TO BENCH BAR ISSUES**

*(Judge Ronald Ibarra, Moderator; Panelists: Judge Randal Valenciano, Bill Harrison, Lester Oshiro, Stanton Oshiro, Carson Tani.)*

**Issues:**

The panelists discussed issues that were raised at the 2014 Bench-Bar Conference, such as e-filing, the use of teleconferences, sentencing inclinations, plea agreements, and possible topics for the 2015 conference.

**A. Efiling**

With respect to e-filing (electronic filing), the panelists generally agreed that e-filing was efficient and beneficial. Everyone acknowledged that Ho`ohiki is not user friendly, and there is interest for e-filing for the circuit courts.

**B. Teleconferencing**

The panelists considered the use of teleconferencing on the different islands, problems with teleconferencing, whether the temporary rules allowing for teleconferences should be extended, and whether teleconferencing could be improved in any way.

Teleconferencing is allowed in some form for hearings that do not involve evidentiary or contested matters on most islands. On the Big Island, judges liberally allow teleconferences. On Kauai, Judge Valenciano requires attorneys to fax a letter to chambers requesting to appear by phone. The court approves the request, gives the attorney the phone number to call, and the attorney calls five to ten minutes before the court proceeding begins. On Maui, judges allow attorneys to teleconference, especially from the neighbor islands. However, the phone system is antiquated and needs to be upgraded because many times the person that appears by phone cannot hear the participants in court unless they are close to the microphone. On Oahu, teleconferences do not occur in district court, but some judges do allow teleconferences in juvenile court and circuit court. It appears that on all islands, the time that an attorney must wait on the phone before the case is heard is usually no more than ten to fifteen minutes.

The panel then addressed certain concerns with teleconferencing. One concern was whether background noise such as cars whizzing by, which may be heard from the attorney calling in, caused a disturbance or distraction to the other parties at the hearing. However, it seemed that no one had encountered that situation, and background noise was not a problem. Another concern raised was the situation where the teleconference hearing expanded to include complicated issues that required argument and when many people may speak at the same time. However, such a situation does not arise often, as teleconference hearings are limited to non-contested matters. If the teleconference starts to get complicated, Judge Valenciano will continue the matter, set it for either a hearing or decision-making, and inform the attorneys that he may ask questions and may not allow arguments to be made by phone. At that point, most attorneys will seek to appear by phone at the next hearing.

Another problem the panelists considered involved attorneys who had requested a teleconference but were not ready or forgot to call. While no attorney had been sanctioned for failing to call in at the required time, Judge Valenciano stated that his staff will call the attorney to attempt to get the attorney to appear by phone, as it is easier to hold the hearing than to reschedule it. Judge Ibarra issues an order to show cause as to why the individual did not call in; if it is a first violation he requests that the attorney perform volunteer pro bono work, or if it is too often, he suspends the individual's and the firm's privilege of teleconferencing for one month.

It appeared that the panel agreed that the teleconferencing rules were beneficial and should be extended. With respect to ways to improve teleconferencing, there was agreement that the first circuit court should implement teleconferencing on a usual and ordinary basis. Many courts on Oahu require attorneys to be physically present for pretrial and status conferences, and attorneys may spend one or two hours waiting for the hearing, while they could be more productive at their

office. Additionally, the technology on Maui needs to be updated to allow for teleconferencing. An attorney mentioned that teleconferencing may be improved if the court can call the attorney when it is convenient for the court to hold the hearing, as that is the practice in federal court. However, it was explained that that may be difficult because of limited staff in the state courts.

### **C. Plea Agreements**

The panelists then turned the discussion to pleas and plea agreements and whether courts should give sentencing inclinations. There was no agreement among the panelists. The judges on the panel preferred not to give sentencing inclinations, while the practicing attorneys on the panel preferred to receive inclinations from judges, as inclinations help with settlement. It was apparent that some judges routinely give inclinations, while others do not.

Judge Valenciano explained that he stopped giving inclinations at pretrial conferences because the information he based his inclination on was not always accurate, or information that was not previously disclosed was uncovered in the presentence report. If Judge Valenciano changed his inclination after receiving the report, he felt that the defendant should be allowed to withdraw his plea since the defendant changed his plea in reliance on the inclination. Since he has stopped giving inclinations, he has not noticed any difference in the settlement of cases, as there seems to be the same amount of cases where the defendants change their pleas, and where the defendants go to trial.

The practicing attorneys encouraged judges to give an inclination to both sides. In their view, sentencing inclinations are helpful especially when the judge gives a range of a sentence, which the defense attorney is then able to relay to the client. In the Third Circuit, judges routinely give inclinations, with the exception that if any additional information comes up, the “range” may change. This practice encourages a defendant to reveal more information about the past to the

defense attorney, who then provides that information to the judge in order to form the inclination. However, a panel member cautioned that if a judge does give an inclination, the judge should not change that inclination unless some new information arises.

**D. Future Bench-Bar Topics**

Before ending the session, the panel asked the audience for any issues or topics that should be raised at the 2015 Bench-Bar Conference.

There were a couple of issues with the e-filing system. After the case is finished, attorneys cannot get back into the file to look at court minutes or at the file. This may also occur in appellate inactive cases, where the cases go offline and attorneys cannot access them anymore. It was mentioned that for appellate cases, the attorney may have to subscribe to the appellate database. Another issue is that the email that is received provides notification that activity is taking place, but does not allow parties to click directly on a link to view the document. It would be preferable to have a link to the document from the email.

**CONCLUSION**

The overall evaluation of the Criminal Law Forum was high, and the majority of attendees found the Forum highly useful. Some of the comments about the Forum include the following:

- *All segments were of value--sentencing issues, corrections issues, warrants especially concerning defendants in custody, and e-filing and phone and teleconferencing with neighbor island courts. The Specialty courts were of interest as the details of their operations are not that visible to many practitioners. Corrections and Paroling Authority concerning sentencing, minimum hearings and setting minimums, program opportunities for inmates, and detainers were of interest.*

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- *Essentially I am very happy that these forums and meetings are being organized because it allows all of us to work together to improve the system and the service we provide both to our individual clients as well as to the public in general.*
  - *Conference was well run and very insightful.*
  - *The discussion regarding the workings of the interstate compact vis a vis our clients was particularly enlightening.*
  - *Thank you for addressing issues that are outstanding from the bench bar conference.*

The Judicial Administration Committee submits this report of the 2014 Criminal Law Forum for further review and consideration by the Judiciary and by the HSBA.

**FORUM PARTICIPANTS**

Justice Simeon R. Acoba, Jr. (ret.)

Keani Alapa

Judge Steven Alm

Bronson Avila

William Bagasol

Scott Bell

Bill Bento

David Bettencourt

Jason Burks

Judge Joseph Cardoza

Hayley Cheng

Brian Costa

Judge Dexter Del Rosario

Vlad Devens

Adrian Dhakhwa

Bryron Fujieda

Richard Gronna

Bill Harrison

Jeffrey Hawk

David Hayakawa

Randall Hironaka

Cliff Hunt

Judge Ronald Ibarra

Craig Jerome

Tracy Jones

Alen Kaneshiro

Megan Kau

Judge Shirley Kawamura

Richard Kawana

Judge Kelsey Kawano

Carol Kitaoka

Justin Kollar

Sandy Kozaki

Judge Edward Kubo

David Lam

Marcus Landsberg, IV

Michelle Kanani Laubach

Judge David Lo

Howard Luke

Rodney Maile

Brook Mamizuka

Bert Matsuoka

Miki McGarvey



## FORUM PARTICIPANTS (cont.)

Justice Sabrina McKenna  
Iris Murayama  
Sheriff Robin Nagamine  
Darien Nagata  
Gail K. Nakamae  
Sidney Nakamoto  
Judge Karen Nakasone  
Major Thomas Nitta  
Jean Oshiro  
Lester Oshiro  
Stanton Oshiro  
Tommy Otake  
Max Otani  
Jeen Hee Kwak Pang  
Judge Richard Perkins  
Clinton Piper  
Justice Richard Pollack  
Chief Justice Mark E. Recktenwald  
Judge Catherine Remigio  
Judge Barbara Richardson  
Joy San Venaventura  
Sherrie Seki  
Judge Trudy Senda  
David A. Sereno  
Richard H.S. Sing  
Richard Stacey  
Audrey Stanley  
Cynthia Tai  
Judge Barbara Takase  
Carson Tani  
Jack Tonaki  
Judge Randal Valenciano  
Dawn West  
Justice Michael Wilson  
Richard Wurdeman  
Melinda Yamaga  
Chris Young

Hawai'i State Bar Association  
Committee on Judicial Administration

## **2014 CIVIL LAW FORUM**

Ali'iolani Hale  
Supreme Court Building, Room 101

Tuesday, October 21, 2014

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## INTRODUCTION

As described in the Hawaii State Bar Association (“HSBA”) Board Policy Manual, the Committee on Judicial Administration (“JAC”)<sup>1</sup>

maintains a close relationship with the judiciary on matters of mutual concern to the bench and bar, monitors and formulates recommendations to the Board concerning legislation affecting the judiciary, studies and reports on subjects of judicial conduct and discipline, and coordinates activities of the HSBA relating to improvement of the judiciary and administration of justice.

Following a successful 2013 Bench Bar Conference, the JAC developed a forum concept to focus on certain issues in the criminal area<sup>2</sup> and separately in the civil area.<sup>3</sup> The Civil Law Forum occurred on Tuesday, October 21, 2014 with the participation of 19 judges, seven court administrators, eight guests, and 54 attorneys.

### **WELCOME (Associate Justice Simeon R. Acoba (ret.))**

Associate Justice Simeon R. Acoba (ret.) welcomed attendees and remarked that the interaction between the Judiciary and the bar benefits judges, lawyers, and ultimately clients and the public because the dialogue makes the judicial system more efficient and equitable. Justice Acoba thanked the members of the panels, the HSBA Committee on Judicial Administration, and the Judiciary staff. He described the Civil Law Forum as an adjunct to the bench-bar conferences and described the Judiciary’s accessible, diligent, and receptive approach to responding to the bar’s comments.

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<sup>1</sup> The HSBA Committee on Judicial Administration in 2014 comprised the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J.T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack; Second Circuit Court Judge Joel E. August (ret.); Third Circuit Court Judge Ronald Ibarra; First Circuit District Court Judge Shirley Kawamura; First Circuit Court Judge Karen T. Nakasone; First Circuit Family Court Judge Catherine H. Remigio; Fifth Circuit Court Judge Randal G.B. Valenciano; Dennis W Chong Kee; Kahikino Noa Dettweiler; Vladimir Devens; Don J. Gelber; William A. Harrison; Edward C. Kemper; Carol K. Muranaka; Lester D. Oshiro; and Audrey Stanley.

<sup>2</sup> The Criminal Law Forum took place on Tuesday, September 23, 2014.

<sup>3</sup> The Civil Law Forum Committee members included Steve J.T. Chow, Judge Karen T. Nakasone, Judge Catherine H. Remigio, Judge Joel E. August (ret.), Judge Randal G.B. Valenciano, Kahikino Noa Dettweiler, Edward C. Kemper, Dennis W. Chong Kee, Don J. Gelber, Judge Ronald Ibarra, Justice Pollack, Justice Acoba (ret.), and Carol K. Muranaka. Teri-Ann E.S. Nagata, Jeffrey Hu, and Kyleigh F.K. Nakasone served as Reporters.

**OPENING REMARKS** (Chief Justice Mark E. Recktenwald)

*Summary: The Judiciary welcomes the bar's thoughts on proposed reforms of the civil justice system.*

Chief Justice Recktenwald thanked the organizers and attendees. He noted that the earlier bench-bar conferences led to real changes, developments, and advances, including new or proposed rules regarding telephonic appearances, pro hac vice admissions, and electronic devices. Chief Justice Recktenwald has written articles for the *Hawai'i Bar Journal* explaining what was proposed at the conferences and what the Judiciary has done to respond. The Judiciary's commitment to the Civil Law Forum was reflected in the attendance of all four chief circuit judges and court administrators from across the state. The Civil Law Forum builds on the bench-bar conferences by allowing the Judiciary and bar to discuss issues in greater depth.

Chief Justice Recktenwald put the Civil Law Forum into context nationally. He described the increased focus in the last five years on reforming the civil justice system. For example, a 2009 report by the America College of Trial Lawyers, which includes several thousand attorneys from across the county, concluded that the civil justice system takes too long and costs too much. Having judges more actively involved in case management has always been raised, but the lack of resources is an issue. The 2009 report acknowledged the issue and suggested that the key may be to identify cases for which a higher level of management is appropriate. Certain jurisdictions have started pilot case management programs.

The Hawai'i Supreme Court has looked at reform in the area of electronic discovery. The Court asked the Hawai'i chapter of the American Judicature Society to look at the issue, and a committee chaired by Judge Katherine G. Leonard and William C. McCorriston proposed new rules on the subject. These rules were then considered by the Judiciary's Committee on Rules of Civil Procedure, which recommended rules that will go into effect on January 1, 2015.

Other reforms being considered and implemented include new Federal Rules of Civil Procedure that are pending before the Judicial Conference, and an expedited civil action program in Texas for cases worth less than \$100,000. Chief justices in other states have formed a task force chaired by Chief Justice Thomas A. Balmer of Oregon that is considering a civil justice reform initiative. The task force will provide its recommendations next year.

Chief Justice Recktenwald asked attendees to share their thoughts on whether these initiatives should be considered for Hawai'i. Some initiatives might be premature at this point, but others, like mandatory initial disclosures, pursuant to Federal Rules of Civil Procedure Rule 26, might be appropriate. It would be very helpful for the Judiciary to be informed of the attendees' sense of whether it is time to establish a task force.

But more important than a potential task force is having the presence of the attendees at the Forum who convened to share their thoughts on making the civil litigation process fair and efficient in every case. Chief Justice Recktenwald stated that the presence of the attendees was very important to the Judiciary.

**I. ENVIRONMENTAL COURT UPDATE (Associate Justice Michael D. Wilson)**

*Summary: The Judiciary welcomes the bar's suggestions for the new Environmental Court.*

Associate Justice Wilson provided an update on the Environmental Court, which he described as a concept on the verge of being implemented.

Justice Wilson asked attendees to ask themselves why they were in Hawai'i and what they cared about. One concern that has been engraved in the Hawai'i Constitution is the protection of the environment and, more specifically, natural beauty. This concern led to the creation of the Environmental Court. Like Vermont, the only other state with an Environmental Court, Hawai'i has turned to the Judiciary to implement its environmental values. Other values that have been implemented through federal and state judiciaries include safe working conditions, equal treatment of races and genders, and the rights of the accused.

The idea for the Environmental Court was conceived on Maui. The resulting legislation, Act 218, provides a new tool for the Judiciary, but the Environmental Court will really be a new tool for the entire bar. Court matters may include review of environmental impact statements, for example.

Act 218 stated that environmental disputes were dealt with in a variety of courts, leading to inconsistent application of the laws. To provide the necessary vigilance and stewardship, Act 218 created the Environmental Court and assigned it broad authority. Justice Wilson will present a report at the end of December regarding the number of cases that would qualify for the Court and the Court's implementation plan. He asked attendees to provide their constructive criticism and ideas.

Article XI, Section 1, of the Hawai'i Constitution requires a balance between development and the conservation of natural beauty and natural resources. Under Act 218, this balance must be specifically addressed by the Judiciary. Article XI, Section 9, protects individuals' environmental rights. Because of these provisions, the Hawai'i Environmental Court will be unique to Hawai'i as well as a model for other states.

Act 218 places responsibility for stewardship of natural resources among the Judiciary, the civil bar, and the criminal bar. Statistics show that most of the cases before the Environmental Court will be criminal cases. For example, the Environmental Court will be responsible for enforcing criminal provisions regarding clean parks, clean water, and protections for fish and coral.

Any suggestions by the Bar for the Judiciary would be gladly received.

In response to a question regarding the Environmental Court judges, Justice Wilson noted that Act 218 requires that judges be designated to the court. Designations will be made by the chief judges of each circuit, subject to approval by Chief Justice Recktenwald. Justice Wilson explained that judges will be designated on the district court and circuit court levels. The number of cases that these judges will hear is difficult to determine.

## II. DISCOVERY DISPUTES (U.S. Magistrate Judge Kevin S.C. Chang, Steven J.T. Chow)

*Summary: The U.S. District Court's Local Rule 37.1 would expedite the resolution of simple discovery disputes while minimizing the burden on trial judges and the fiscal impact on the Judiciary.*

Steven J.T. Chow, who co-chairs the HSBA's Judicial Administration Committee with Justice Acoba, provided some background on the committee, which strives for improvement of the Judiciary and the administration of justice. Chow explained that, through Justice Acoba's leadership as co-chair for the last two years, the committee has developed the bench-bar conferences, the Criminal Law Forum, and the Civil Law Forum. Discussions during the bench-bar conferences have led to the development and exploration of new rules. The Judiciary, under the leadership of Chief Justice Recktenwald, has followed up on every topic discussed to explore the feasibility of potential reforms.

One topic discussed was discovery disputes. The bench-bar conferences looked at developing a procedure that would expedite resolution of discovery disputes while minimizing the burden on trial judges and the fiscal impact on the Judiciary. One suggestion was to implement a rule like that of the U.S. District Court's Local Rule 37.1.

Judge Kevin S.C. Chang described the history of Local Rule 37.1. Local Rule 37.1 was drafted by Magistrate Judge Barry M. Kurren after attending a conference on the mainland more than twenty years ago. There is now a version of Local Rule 37.1 in every federal district court in the country.

Local Rule 37.1 is one of the few federal court rules that would translate well in state court. The rule is effective because it begins with attorney cooperation. Local Rule 37.1(a) requires counsel to confer in good faith to attempt to limit or eliminate the need for a discovery motion or expedited assistance. Counsel must certify compliance with this requirement before they can take advantage of the expedited procedure.

The expedited procedure in Judge Chang's courtroom is for counsel to call the courtroom manager, who sets the deadline for letter briefs in three to five days. Counsel provides simultaneous letter briefs, limited to five pages in length. Some lawyers will incorporate other briefing but, if too much material is provided, the Court may instruct counsel to file a motion.

Judge Chang noted that certain matters are not suitable for resolution under Local Rule 37.1. For example, for disputes regarding e-discovery or waiver of privilege, Judge Chang often prefers to have a more complete record. If the dispute involves a request for *in camera* review, the suitability of Local Rule 37.1 tends to depend on how many documents are at issue. If five to ten documents are involved, the expedited procedure may be sufficient. If 30 to 200 documents are in issue, the expedited procedure probably would be inadequate.

In response to a question regarding conferences with the Court, Judge Chang stated that the three magistrate judges tend to examine the letter briefs and issue rulings without a conference. If Judge Chang believes a discovery conference would be beneficial, he will conduct the

conference by telephone to minimize costs. But more often than not, he simply will issue a one- or two-sentence decision. Decisions are generally provided within a few days. Local Rule 37.1 provides an opportunity for an appeal to a district judge, but such appeals are rarely filed.

Judge Chang assumed that, if the state courts were to adopt a similar rule, there would be no immediate appeal of the decisions. This, along with other benefits of Local Rule 37.1, would provide real advantages to state judges. The procedure is fair, and it saves time and resources. It would eliminate the need for motions and hearings, giving state court judges more time to do other things. The initial screening and decision making is quick. From a case management perspective, the procedure offers an interesting opportunity to set the scope of discovery in a way that will have some precedential impact in other discovery disputes. From an operational perspective, the procedure involves little additional work for court staff.

There may, however, be aspects of the procedures that state court judges would dislike. Some judges may dislike having disputes popping up on short notice. In federal court, however, the number of Local Rule 37.1 disputes is very low. The Magistrate Judges estimate that they resolve Local Rule 37.1 disputes an average of two to three times a month. Some judges may dislike increased accessibility to the court, but Judge Chang noted that, even under the current rules, lawyers may request discovery or status conferences. Some judges may want more complete records or more formal hearings but, for minor discovery disputes such as the location or date of a deposition, Judge Chang thought that judges' time would be better spent on other matters.

In response to questions, Judge Chang provided additional information. He does not set aside dates or times to handle expedited discovery disputes; he takes them as they come in. Judge Chang has not noticed common or recurring disputes or issues. One major difference between state court judges and federal magistrate judges is caseload. But Judge Chang believes Local Rule 37.1 is nevertheless a good option because it gives judges a rare opportunity to create free time.

With respect to e-discovery, Judge Chang believes cases benefit from active, hands-on case management. In general, however, lawyers have come to understand that e-discovery can be a double-edged sword. Disputes over e-discovery have been an issue but not one that the magistrate judges have been unable to manage. In this area, Judge Chang tends to appoint a special master from the mainland.

Judge Chang does not set a discovery conference in every case. Scheduling conferences, however, are set in every case. Scheduling conferences tend to primarily involve scheduling, but one issue that Judge Chang tries to raise at every scheduling conference is an early settlement conference or alternative dispute resolution. He will sometimes set a further scheduling conference in thirty days to discuss alternative dispute resolution. If discovery is necessary before alternative dispute resolution, Judge Chang will attempt to limit the discovery to what is essential.

Judge Chang discussed the proposed revisions to the Federal Rules of Civil Procedure regarding discovery. It is anticipated that these revisions will be adopted by the U.S. Supreme Court and then forwarded to Congress for approval.

The proposed amendment to Rule 1 adds language requiring cooperation among lawyers. Parties—like courts—should construe and use the Federal Rules to ensure the just and efficient resolution of disputes. Effective advocacy depends on the cooperative and proportional use of procedure.

The proposed amendment to Rule 26 requires that courts include proportionality in their analysis of the proper scope of discovery. This consideration is not entirely new, but the Advisory Committee's note states that the proposed amendment restores proportionality as factor in defining the scope of discovery. It is not clear how this will be considered in Hawai'i courts because Hawai'i's Rule 26 differs. The factors enumerated under the proposed Federal Rule 26 are similar to, but broader than, the existing factors under Hawai'i Rule 26.

In response to a question, Judge Chang stated that he has not yet had a case in which he was required to consider the proportionality factors. In his experience, disputes about the scope of discovery have involved disagreements over whether discovery is relevant to a claim or defense, rather than whether discovery is proportional. One interesting issue will be dealing with the assumed disparity between the resources that parties can devote to discovery.

Judge Chang concluded by discussing sanctions and said that he rarely imposes sanctions under Local Rule 37.1. Although parties have requested sanctions, the record on a Local Rule 37.1 dispute is very limited. It is difficult for parties to address both the issue of the discovery dispute and the issue of sanctions in the same five-page letter. In addition, if sanctions are imposed, they are likely to be appealed. Discovery sanctions are better sought in a motion to compel, which is subject to rules that require the imposition of sanctions.

Chow closed by noting that Chief Justice Recktenwald may call for further study of the issue, perhaps by a newly formed committee.

### **III. DISCLOSURE OF MEDICAL RECORDS AFTER *COHAN v. AYABE* (Michael N. Tanoue, Bert S. Sakuda, Ward F.N. Fujimoto, John C. McLaren).**

*Summary: The form Health Information Privacy Agreement and Stipulated Qualified Health Information Protective Order distributed to attendees offer a starting point for parties to address the balance between constitutional protections for plaintiffs' health information and insurers' record-keeping requirements.*

John C. McLaren provided some background on the issues raised by *Cohan v. Ayabe*, 132 Haw. 408, 322 P.3d 948 (2014). McLaren explained that he drafted the petition for mandamus in *Brende v. Hara*, 113 Haw. 424, 153 P.3d 1109 (2007). In *Brende*, the Hawai'i Supreme Court prohibited collateral uses of protected health information without the plaintiff's consent. After *Brende* was decided, the courts were deluged with voluminous motions for protective orders because *Brende* did not resolve what provisions could be appropriately included in protective orders. Charles Crumpton was asked to chair a committee of lawyers that would draft a proposed protective order form to reduce or eliminate the need for motions. The committee proposed a protective order that was never formally adopted by the Judiciary but was widely used since 2008 until the decision in *Cohan*.



Michael N. Tanoue described the consequences of *Cohan* for insurance companies. Tanoue noted that Hawai'i statutes require insurance companies to maintain records for certain periods to ensure that insurance companies conduct business appropriately in this State. Property and casualty insurers are required to maintain records for a minimum of five years after the "close of a transaction," which most insurers interpret as five years after a settlement, judgment, or conversion of an arbitration award into a judgment and in which the appeal period has run. Workers' compensation insurers are required to keep records for eight years after the close of a transaction, which theoretically may be decades after a work-related injury. Insurance companies must maintain records and provide access to them for periodic reviews. The records are also needed to defend against complaints that consumers may file against insurers. These regulatory obligations affect accreditation, reviews, ratings, and solvency for insurers.

Accordingly, when *Cohan* was decided, insurers were left to decide how to comply with *Cohan* while also complying with statutory mandates. Insurers proposed revisions to the form protective order to address *Cohan* but also to explicitly acknowledge the numerous statutory obligations of insurers.

Ward F.N. Fujimoto commended McClaren and Bert S. Sakuda for working with insurance counsel after *Cohan* was decided. Fujimoto noted that many insurers are based on the mainland and must comply with requirements of other states. Aside from statutory and regulatory compliance, the insurers' primary interest is in evaluating cases and in closing files.

Fujimoto noted that the procedural history of *Cohan* was one of total involuntariness. The plaintiff's refusal to consent to the protective order and authorizations threatened to put the entire arbitration at a standstill. Fujimoto pointed out that a key feature of the current form is a signature line for plaintiffs even on the protective order. Parties have recognized the need to balance the theoretical right to medical privacy against the need to resolve cases in way that allows fair compensation to plaintiffs.

Bert S. Sakuda shared his view that *Brende* and *Cohan* hold that, notwithstanding the regulatory requirements imposed on insurers, medical information may not be used outside the relevant litigation. Plaintiffs' lawyers had agreed on forms of authorizations and protective orders that gave up some of the rights protected by *Brende* and *Cohan*. Sakuda noted that *Brende* and *Cohan* were decided on mandamus, so the insurers' record-keeping obligations were not before the Court and were not addressed. Sakuda believes that insurers' concerns regarding their obligations must be raised separately with either the Insurance Commissioner or with the courts if insurers must move to compel plaintiffs' consent.

Tanoue pointed out that *Brende* includes footnote 6, which provides that the revision to the protected order was not intended to affect the record-keeping obligations of insurers. *Brende* also discussed the need to balance the requesting party's need for the information against the harm to the plaintiff. In *Cohan*, the plaintiff did not object to the provision that was intended to track *Brende*'s footnote 6. In Tanoue's view, this leaves open the possibility for insurer's record-keeping obligations to be balanced against plaintiff's privacy interests.

Sakuda acknowledged that *Brende's* footnote 6 addresses the record-keeping obligations of insurers. But in *Cohan*, the Court struck all of the provisions of the HSBA's form authorization. Given that result, the reasonable conclusion is that private health information cannot be used for other purposes.

Tanoue described the forms being circulated as an effort by a small group of lawyers interested in reaching agreement on a stipulated protective order that allows certain limited uses beyond what *Cohan* would appear to allow. The forms are intended to be a practical solution, but they are not final forms. The forms may be used as starting points for discussions.

McLaren remarked that he probably would not recommend that his clients sign a stipulated order that was as limited as *Cohan* suggests. If insurers are involved, they must have access to medical records to evaluate the case. Insurers also must set reserves in specific case. If insurers consistently under-reserve, then they may need to liquidate assets to pay claims, which may affect their solvency. If insurers consistently over-reserve, then they may increase premiums. It would be difficult for McLaren to recommend signing a form that would hamper insurers' ability to evaluate cases and meet their record-keeping obligations.

Fujimoto remarked that lawyers want to avoid a return to the voluminous motions for protective orders that preceded *Brende*. In his view, individual plaintiffs with the advice of counsel are free to do what they want with constitutional rights. Plaintiffs may agree to a limited waiver of their privacy rights to further the ultimate goal of just compensation.

Sakuda agreed that the use of the proposed forms is a matter of expediency. Under his reading of *Cohan*, the plaintiff is in the driver's seat because statutes in contravention of constitutional provisions are void. The only question is whether there is a compelling state interest that can overcome the plaintiff's privacy rights.

McLaren noted that the constitutional right to privacy was adopted in 1978. Did the electorate intend to void the existing regulatory laws governing insurers? This apparently was not discussed and is a hard issue. The concurring opinion in *Cohan* suggests that disclosure required by law could be a compelling state interest and sets forth insurance regulations as an example.

Fujimoto noted that the discussion had been focused on state regulatory requirements, but there is also a growing body of law on Medicare secondary payor rights. What happens when the state right to privacy conflicts with obligations of liability insurers to report under Medicare requirements? Would the state right be preempted? Would state courts have jurisdiction to adjudicate whether the state right is preempted?

Tanoue suggested that the information reported to Medicare is limited to International Classification of Diseases ("ICD") 9 codes that reveal what body parts were injured, for example. Medicare does not receive voluminous medical records. In fact, much of what is reported to Medicare is publicly available because the injuries are often discussed in court.

Sakuda recalled that there was formerly little concern about medical privacy. But for many years, insurers used paper files, and there were limited opportunities for inappropriate disclosure.

Today, because most records are electronic, the possibility of inadvertent or surreptitious dissemination is increased. Because of that, plaintiffs are much more concerned about the privacy of their records.

McLaren noted that the proposed forms allow for reporting to Medicare. In his view, ICD9 codes are private information that is protected. On the subject of authorization, McLaren noted that, when authorizations are subject to an attached protective order or confidentiality agreement, re-disclosures are limited. For example, medical records cannot be re-disclosed for purposes of third-party databases. McLaren is happy to receive suggestions for improvements to the forms.

Attendee Gail Y. Cosgrove shared that the proposed forms have not percolated through the medical malpractice bar. She shared two concerns. First, *Cohan* seems to indicate that all records must be returned physically. In a recent case, the chair of the Medical Inquiry and Conciliation Panel held that it did not have the jurisdiction to order the return of medical records. At least one participant in that proceeding refused to sign the proposed forms, leaving the MICP without the medical records. Another concern is that the proposed forms include a continued enforceability provision that seems open-ended.

McLaren responded that when the HSBA committee was formed in 2008, there was no medical malpractice representative on the committee. The focus was on automobile injury and premises liability cases. This was not intentional, but the focus was on addressing the bulk of tort litigation. He repeated that the proposed forms were not final and that he was happy to have feedback from the Judiciary and bar.

McLaren also shared an anecdote about disposing of twenty bankers boxes of medical records after the conclusion of a case. *Cohan* seems to require the return of medical records. Technically, HIPAA requires return to the health care provider but, in practice, this requirement is not followed. Another concern is that *Cohan* requires immediate return. What does this mean? Parties previously agreed to return records within thirty to ninety days.

In response to a question about resistance from medical providers, the panel shared that providers typically require signed authorizations for the release of medical records. The panel typically attaches both the authorization and the protective order as exhibits to the subpoena.

#### **IV. PUBLICATION OF LEGAL NOTICES ON THE INTERNET (Edward C. Kemper, Jeffrey S. Portnoy, William J. Plum)**

*Summary: Edward C. Kemper served as moderator for the panel of William J. Plum, an advocate of internet legal publication, and Jeffrey S. Portnoy, a defender of traditional publication notice.*

William J. Plum intrigued the afternoon crowd with the 21st century concept of providing legal notice via the internet. Plum insisted this was about moving towards a long-term, practical, and more efficient method.

Currently, the Honolulu Star-Advertiser is where most legal notices are published. Plum estimated that the price to publish a foreclosure notice on the Star-Advertiser would be around \$2,000 to \$2,400. He also noted that all parties, not just big banks, need to publish. Plum pointed

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out that the entity which owns Star-Advertiser owns almost all other major local publications in the state, due to a merger several years ago. Pre-merger, the Star-Bulletin charged below \$600 per notice, and Advertiser \$800 per advertisement. After the merger, the price increased to \$1,000 per advertisement. Currently, it costs \$2,200 per advertisement.

Plum asked the members of the audience if they read the newspaper daily. How many people really do? He suggested utilizing State websites for publications instead. Certain notices could be posted on the State DCCA website for around \$300, similar to the way some foreclosure notices are posted. This could be an economical and effective alternative to newspaper publication. Plum argued for the expansion of such state publication websites.

With internet access increasing every day, an easy and cost effective way to receive notice could involve simply checking a designated website for pending cases. Plug in your name and receive notices. Plum also suggested the goal is to make the public aware of the process through a gradual phase in. When the public is made aware of the websites, people will check the sites. Plum mentioned that the HSBA Collections Section offered a bill last year to expand internet publication. Unfortunately, the endeavor was unsuccessful.

Jeffrey S. Portnoy defended the traditional publication summons. Legal notice has always been by publication in a newspaper of general circulation. Portnoy recited statistics that show seven out of ten adults in Oahu read the Star-Advertiser, in printed form or online, whereas 70% of the population may not have access to a computer. These are the very people who need notice. Portnoy believes newspaper readers will eventually flip to the notice section, whereas with the internet, people will need to make an effort to navigate to the applicable site.

The debate between traditional publication summons and internet publication is one of notice versus economy. Big banks and attorneys say that they do not want to pay more for notices. But, this may be losing focus of the bigger picture and forgetting why notices are required in the first place? Lawsuits affect people's lives. In some cases, people are losing their homes. Notices published in a newspaper may not be effective 100% of the time. But would notices published on the internet truly be more effective? If price is the primary issue, there should be other ways to address the problem. The monopoly of the Star-Advertiser should not be the reason to move away from newspaper notice. Daily readership of the newspaper is about 325,000, with online readership being a higher figure. Portnoy pointed out that Midweek is also a medium for publication, with huge readership and does not require a subscription.

Plum also proposed a compromise: The party giving notice would publish the name(s) of the person(s) being noticed or being summoned in a newspaper of general circulation, together with information of where the notice or summons would be obtained (such as a government website, the court, and/or the attorney giving notice or causing a summons to be issued). The names of all persons being noticed would be listed in alphabetical order by the newspaper, making the publication more likely to be noticed. The cost of publishing such listing should be much less than publishing notices and summons as is the current practice.

Portnoy argued that the most effective notice to the largest number of people was still newspaper publication. He also reminded everyone that the newspaper is not responsible for the

content of the notice; rather, content is controlled by the courts. Portnoy suggested that the judiciary should be lobbied to allow a change in the content of such notice.

**V. MEDIATION CONCERNS (Collaborative Divorce; Circuit Court Rule 12.2, Alternative Dispute Resolution; Timing; and Other Issues) (Justice James E. Duffy (ret.), Judge Joel E. August (ret.), James K. Hoenig, Keith W. Hunter)**

*Summary: A panel of experienced mediators shared their thoughts on a variety of topics.*

Judge Joel E. August began his presentation by expressing his concern that disputes between apartment owners and AOA Boards relating to the application, interpretation, and enforcement of declarations, by laws and house rules are placing an excessive burden on a judicial system, which is struggling with the problem of how to make the courts more available to more litigants. He indicated that his comments on the reform or interpretation of HRS § 514B-161 to 163, inclusive, were intended to curb access to the courts for the resolution of condominium disputes, without limiting access to justice for the parties involved in those disputes.

As to HRS Section 514B-161, Judge August made the following comments:

In situations where neither an AOA Board nor an owner request mediation, judges should use their inherent powers under Hawai'i Circuit Court Rule 12.2 to order an appropriate ADR process at the earliest possible opportunity and couple that with the expectation that both sides will act in good faith to reach a resolution of the dispute. HRS Sections 161(b)(2), (3), and (4) appear to lift the statutorily imposed requirement to mediate in actions to collect assessments, personal inquiry claims and actions against an AOA, its Board or agents for amounts in excess of \$2,500. However, when no insurance is available to defend or indemnify if ADR processes are employed, there is nothing to prevent the courts from using its Circuit Court Rule 12.2 powers to require mediation in those cases.

If, in fact, there are insurance policies being issued to AOAOs and their agents, which exclude coverage because alternative dispute practices are employed to resolve a dispute, such clauses in the policies would appear to be against the public policy of the State.

Even though Section 161(c) appears to lift the mandate to mediate when such a proceeding is not completed within two months from commencement, judges should use their Circuit Court Rule 12.2 powers to keep the process going when there are legitimate bases for doing so.

As to HRS § 514B-162, Judge August had the following thoughts:

On the surface, Section 162 appears to impose arbitration on disputes between owners and AOA Boards/agent when requested by one of said parties. However, he said, all that glitters is not necessarily gold.

First, the arbitration proceeding as established in this statute is non-binding, since the following section (HRS § 514-163) provides the opportunity for a trial de novo to an unhappy litigant.

Second, Section 162(b)(7) provides that arbitration is not required when a claim against an AOA, its board or its agents is in excess of \$2,500 and insurance coverage is unavailable because of an ADR exclusion in the policy.

Third, Section 162(c) appears to invite courts to use their inherent discretionary powers to determine that “the subject matter of the dispute is unsuitable for disposition by arbitration” based upon a number of criteria, including but not limited to: (1) the magnitude of the potential award; (2) issues of broad public concern; (3) the possibility that complex discovery issues may arise; and (4) when disposition by arbitration would not provide substantial justice to one of the parties in the absence of complete judicial review.

Judge August invited judges to be conservative in their granting of dispensations from the arbitration process unless they truly enjoyed presiding over month-long trials dealing with disputes that apartment owners and AOA boards frequently have. He reminded the attendees that experienced arbitrators are familiar with sizeable damages claims, discovery issues, matters of public concern and equitable principles.

The closing comments of Judge August concerned HRS § 514B-163, which guarantees a trial de novo to any party who has submitted a dispute to arbitration under Section 162. In his view, if the goal is to maximize swift and just determinations of AOA/owner disputes and at the same time reduce trial burdens placed on the judicial system, one solution is to repeal Section 163 and make arbitration binding.

If repeal is not possible, Judge August suggested that at least the statute should be amended to define which party is the prevailing party for purposes of assessing costs, expenses, and attorneys’ fees. His recommendation was the adoption of a formula similar to that found in Rule 25 of the Hawaii Arbitration rules promulgated for the Court Annexed Arbitration Program (“CAAP”).

Keith W. Hunter discussed some of the experiences he had while serving as a mediator in Hawai`i and on the mainland. In the 30 years since Hunter has moved here, Hawai`i has been in the vanguard of establishing when and where parties mediate. In Hawai`i, mandatory mediation provisions are commonly contained in standard contracts. Circuit Court Rule 12.2 allows judges to compel parties into mediation. Many times, mediation concludes in a settlement before proceeding to litigation. Hunter commented that rules similar to Rule 12.2 are still a rarity on the mainland. Hawai`i has been a leader in this regard.

Hunter listed the different ways that parties end up in mediation. Parties who all agree to participate in mediation are more likely to reach agreements on their disputes, whereas, parties who are contractually obligated or compelled to mediation sometimes have more difficulty. Hunter discussed Circuit Court Rule 12.2, which, in his opinion can be helpful or unwieldy. In particularly difficult cases, “co-mediation” is often successful. This type of mediation involves the mediator partnering up with the presiding judge to resolve the dispute. Parties stipulate to allow the trial judge to work together with the mediator to resolve the case.

Overall, Hunter believes that because Hawai'i is a small place that values relationships, mediation can and does work well. Contrary to mainland opinion where mediating might be considered a weak position, people in Hawai'i view mediation as a positive opportunity to get things done.

Justice James E. Duffy discussed Hawai'i laws mandating disclosures by arbitrators, mentioning two recent ICA decisions on appeal: *Nordic PCL Const., Inc. v. LPIHGC, LLC*, 133 Haw. 451, 330 P.3d 389 (Ct. App. 2014) cert. granted, No. SCWC-11-0000350, 2014 WL 2587689 (Haw. June 10, 2014), and *Noel Madamba Contracting, LLC v. Romero*, cert. granted, No. SCWC-12-0000778, 2014 WL 4919963 (Haw. October 1, 2014).

In *Nordic*, one of the parties complained that the arbitrator failed to give adequate disclosure of his financial and fiduciary relationship with the attorney for one of the other parties. The complaint was made after an eighteen month-long arbitration proceeding, and weeks after the arbitrator issued his award. So, in a small legal community like Hawai'i, what types of relationships require disclosure, and when should disclosure be made?

Justice Duffy discussed the governing disclosure statute, HRS § 658A-12, and addressed a few problems that it poses. Subsection (b) states that “[a]n arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.” This language often leaves arbitrators with more questions. What warrants disclosure? Serving on bar committees? Shared children’s activities? The “reasonable person” standard is supposed to be an objective one. But, in Hawai'i’s a small legal community, attorneys have contact with each other all the time. Many attorneys have relationships that span over years.

Justice Duffy pointed to *Daiichi Hawaii Real Estate Corp. v. Lichter*, 103 Hawai'i 325, 82 P.3d 411 (2003), where the Court noted, “[t]he relationship between the arbitrator and the party's principal must be so intimate—personally, socially, professionally, or financially—as to cast serious doubt on the arbitrator's impartiality. If all arbitrators' relationships came into question, finding qualified arbitrators would be a difficult, sometimes impossible, task.” *Id.* at 342, 82 P.3d at 428, (quoting *Washburn v. McManus*, 895 F.Supp. 392, 399 (D.Conn.1994)).

Justice Duffy concluded that the solution is to form guidelines with regards to disclosure. There should also be deadlines for when challenges to arbitrator’s disclosure are made. As a general rule, Justice Duffy recommended that problems should be brought up prior to the proceedings. Otherwise, parties might strategically wait until after they lose the arbitration to bring up these challenges.

In response to a comment that laws are sometimes made by people who do not understand the practicalities of law practice, particularly in the context of large firms who routinely manage hundreds of cases, Justice Duffy suggested asking the courts and the HSBA for guidance.

James K. Hoenig discussed certain trends in the field of ADR and family law. While ADR in Hawai'i has been progressive in many areas of law, family law has lagged behind in the last 25

years. Hoenig believes that mediation is a positive alternative to the court system, especially for family law cases, because mediation is geared towards maintaining relationships and encouraging parties to work together.

Hoenig discussed several different projects aimed at reducing the case load for family law judges. About ten years ago, the Volunteer Settlement Master Program was initiated in family court. Through this program, family law practitioners volunteer three (or more) hours of their time to conduct free and confidential settlement conferences for divorcing couples.

Other programs include the Paternity Mediation Program and the Collaborative Divorce Pilot Project. The Collaborative Divorce Pilot Project was launched in January 2014. It provides legal resources and information to parties who are going through a divorce without an attorney.

Hoenig informed the audience that approximately 5,000 divorce cases are filed in Hawai`i every year. If just 100 of these cases were diverted to arbitration, roughly 2,000 hours of court time would be saved. This is equivalent to the time of one full-time judge.

## **VI. TOPICS FOR THE 2015 BENCH-BAR CONFERENCE; CHANGES AFOOT IN THE CIVIL JUSTICE SYSTEM (Don J. Gelber)**

*Summary: The Civil Law Forum considered possible topics for the 2015 Bench-Bar Conference.*

Don J. Gelber began his presentation by addressing an undeniable fact of civil litigation. A vast majority of cases are just too expensive for most litigants. Driven by this fact, various pilot programs, initiated in several mainland jurisdictions, have been implemented to make litigation more cost efficient. Many of these programs surround the idea of expedited trials. These expedited trials involve strict limitations on the amount of time that an attorney has to present his/her case, limitations on discovery that are more proportional to the amount at stake, agreements to waive certain appeal rights, and statutory caps on the amount of recovery for specific claims. What would happen if trials were set three to six months from filing, instead of ten to twelve months, with a prohibition on certain pretrial motions, and automatic document production? Civil litigation would be more accessible and less costly. Are these types of expedited trials possible in Hawai`i?

Another possibility would be taking certain issues out of the courts altogether. Could more legal claims be better suited for specialized boards and agencies, similar to the way workers' compensation claims are handled? Specialized courts, for example, a business litigation court, may be another option to consider. Should Hawai`i change its pleading rules to require fact-based pleadings instead of notice pleadings?

The Forum participants did not consider the reform proposals at this time; however, they proposed the following be considered at the 2015 Bench-Bar Conference:

1. *Smaller Circuit Court Civil Cases:* It was proposed that plaintiffs in Circuit Court cases should be allowed to proceed with discovery and trial using the more streamlined district court procedures.



2. *Jury Trial Limitations*: It was proposed that the conference consider ways in which the right to a jury trial may be limited or eliminated from certain classes of cases. Practitioners should discuss whether they want to petition the legislature to raise the \$5,000 minimum for jury demands.
3. *Appellate Practice*: Some participants suggested that the award of attorneys' fees and costs in appellate cases be reviewed and considered.
4. *Insurance Coverage Mediation*: It was suggested that a proposal that disputes of insurance coverage be subject to compulsory mediation (presumably in the context of, and together with, mediation of the claims giving rise to the insurance coverage dispute) be considered.
5. *Discovery Matters*: Several participants suggested that variations between Hawai'i's discovery rules and the federal discovery rules be reviewed, with a view to modifying Hawai'i's rules if the federal rules are found to be preferable. Among the areas mentioned were rules governing initial disclosures, discovery plans, and the treatment of communications (both written and oral) with designated expert witnesses.

## VII. CONCLUSION

The overall marks for the 2014 Civil Law Forum were high. The comments below illustrate that the attendees found the program valuable:

- *The panel discussion on Cohan v Ayabe and the protective order/confidentiality agreement was helpful and balanced on both sides. The publication summons discussion was also interesting (and entertaining thanks to Mr. Portnoy).*
- *Medical records discovery was not relevant to my practice, but it was very interesting and necessary to know.*
- *I appreciate the opportunity to interact with judges outside of the courtroom. I appreciated hearing from Judge Kevin Chang and the comparisons with Federal Court.*
- *All of the topics were of interest. I was able to share with others in my firm information on topics that are not in my practice area.*
- *Seemed well organized Judges should feel free to speak up*
- *I enjoy hearing "war" stories from the lawyers and concerns and issues raised by the judges. This is helpful in evaluating how to proceed in the case and whether to bring motions or not.*
- *This is a wonderful opportunity to speak informally with the Judges; with positive results for the bench and bar.*

The Judicial Administration Committee submits this report of the 2014 Civil Law Forum for further review and consideration by the Judiciary and by the HSBA.

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**CIVIL LAW FORUM PARTICIPANTS**

Justice Simeon Acoba (ret.)  
Michelle Acosta  
Scott C. Arakaki  
Judge Joel August  
Russ Awakuni  
Bert Ayabe  
Lisa Bail  
Judge Joseph Cardoza  
Judge Jeannette Castagnetti  
Alfred Castillo, Jr.  
Judge Derrick Chan  
Judge Kevin Chang  
David Chee  
Dennis Chong Kee  
Steven Chow  
Jeffrey Crabtree  
Judge Virginia Crandall  
Charles Crumpton  
Noa Dettweiler  
James Duffy  
Rex Fujichaku  
Ward Fujimoto  
Judge Hilary Gangnes  
Don Gelber  
Gary Grimmer  
Steven Guttman  
Jill Hasegawa  
Michael Heihre  
Harvey Henderson  
Andrew Hipp  
Jim Hoenig  
Jeffrey Hu  
Keith Hunter  
Charles Hurd  
Judge Ronald Ibarra  
Steve Iwamura  
Regan Iwao  
Ed Kemper  
Janice Kim  
Robin Kishi  
Judge Blaine J. Kobayashi  
Leslie Kop  
Sandy Kozaki

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Kyleigh Nakasone  
David Lam  
Bruce Larson  
Kenneth Lau  
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Rosalyn Loomis  
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Rodney Maile  
William McKeon  
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Greg Nakamura  
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John Nishimoto  
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Gary Okuda  
Lester Oshiro  
William Plum  
Justice Richard Pollack  
Chris Porter  
Jeffrey Portnoy  
Daniel Pyun  
Matthew Pyun  
Chief Justice Mark E. Recktenwald  
Judge Catherine Remigio  
Colin Rodrigues  
Bert Sakuda  
Sherrie Seki  
Craig Shikuma  
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Judge Barbara Takase  
Mike Tanoue  
Judge Randal Valenciano  
Justice Michael Wilson  
Tracey Wiltgen  
Deborah Wright  
Calvin Young